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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 54/2018
[2019] NZSC Trans 25

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

SC 55/2018

BETWEEN	FINN HABIB BATATO Appellant
AND	UNITED STATES OF AMERICA Respondent

SC 56/2018

BETWEEN	MATHIAS ORTMANN First Appellant
	BRAM VAN DER KOLK Second Appellant
AND	UNITED STATES OF AMERICA Respondent

SC 57/2018

BETWEEN	KIM DOTCOM Appellant
AND	UNITED STATES OF AMERICA

Respondent

SC 58/2018

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

Hearing:	10-17 June 2019
Coram:	Winkelmann CJ Glazebrook J O'Regan J Ellen France J Williams J
Appearances:	G M Illingworth QC, P J K Spring and A K Hyde for Messrs Ortmann and van der Kolk A G V Rogers and J H Kim for Mr Batato R M Mansfield and S L Cogan for Mr Dotcom K Raftery QC, D J Boldt, F R J Sinclair and Z A Fuhr for United States of America

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CIVIL AND CRIMINAL APPEALS

MR ILLINGWORTH QC:

As the Court pleases, Illingworth for Mr Ortmann and Mr van der Kolk, with me Mr Spring and Ms Hyde.

WINKELMANN CJ:

Tēnā koutou.

MR ROGERS:

May it please the Court, Rogers and Mr Kim for Mr Batato. I can indicate he is present.

WINKELMANN CJ:

Thank you, Mr Rogers.

MR MANSFIELD:

Good morning, may it please the Court, counsel's name is Mansfield. I appear together with Mr Cogan and Mrs Dotcom who doesn't appear formally but is seated at bench for Mr Dotcom, may it please the Court.

WINKELMANN CJ:

Thank you, Mr Mansfield.

MR RAFTERY QC:

E nga kaiwhakawā o Te Kōti Mana Nui, tēnā koutou. Kei kōnei mō te kaiwhakawā whakahē tuatahi te huinga Winiana, kei kōnei māua ko Boldt, Sinclair, ma Fuhr.

WINKELMANN CJ:

Tēnā koutou. Mr Raftery.

MR RAFTERY QC:

Just before we begin, could I just mention a matter. As your Honours appreciate, Mr Boldt is not with us this morning and your Honours are aware of the reason. I have been speaking with my learned friend Mr Illingworth in particular because he is dealing with the issue of *United States of America v Cullinane* [2003] 2 NZLR 1 (CA) and I've seen in a roadmap, I don't know if your Honours have had the chance to have seen my learned friend's roadmap yet –

WINKELMANN CJ:

No, we haven't.

MR RAFTERY QC:

But he's just given me the courtesy of that this morning and I see mentioned early on is a comment which you will see that the Court of Appeal was correct to overturn *Cullinane* and this is a matter that they would be dealing with when they've heard from the Crown or heard from the United States and there are two ways of dealing with this matter, it seemed to me. I am not asking for one particular one at the moment but just to put the idea out there for your Honours to think about maybe at morning tea or the lunchtime, either Mr Illingworth, not necessarily right now but during the course of his remarks, could deal with *Cullinane* in the normal course of the way because the arguments between us are quite well-known by now, we rehearsed them in the Court of Appeal, and then Mr Boldt would attempt to be here probably on Thursday, or the other way of dealing with it, because my learned friend's view is that they weren't in the Court of Appeal so it's our appeal on *Cullinane*, that Mr Boldt could either be here late Thursday afternoon or maybe even just put Friday aside for *Cullinane*, with Mr Boldt opening the argument on *Cullinane*, my learned friend responding, and then Mr Boldt replying.

WINKELMANN CJ:

Right, and that might depend on Mr Boldt's commitments?

MR RAFTERY QC:

Yes, and I haven't spoken to him since this morning but I will be speaking to him this evening and so I thought I'd put the thought out there for your Honours and then when I speak to him this evening, I have some idea of, your Honours may have thought about the matter and may give us some indication of that.

WINKELMANN CJ:

Thank you for that, Mr Raftery, and we'd like you to pass on our sympathy to Mr Boldt too, thank you.

MR RAFTERY QC:

Certainly.

WINKELMANN CJ:

Mr Illingworth.

MR ILLINGWORTH QC:

Good morning, your Honour. Just in terms of the last point, we have only just really had a brief discussion about that this morning. We will come back to you after the lunchbreak once we've had an opportunity to talk about it but the last suggestion sounds like a reasonable one on a preliminary basis. We accept that Mr Boldt will need a brief right of reply after hearing from us and somehow, we've got to fit that in.

WINKELMANN CJ:

So Mr Illingworth, we distributed our list of issues and we've received feedback from counsel. The feedback seems to be principally wordsmithing or – not wordsmithing in a derogatory sense but changing the way we've articulated the issues but I don't think there's a view that we've missed any?

MR ILLINGWORTH QC:

Not really, your Honour. We're really just trying to clarify parts of that because our view is we need to keep 24(2)(c) and 24(2)(d) quite separate. That's really the key issue that we're trying to make in our response.

WINKELMANN CJ:

Yes, all right, and it would just assist us, and this is addressed to all counsel really, if counsel can be very clear in their submissions which issues are addressed. That will assist us to follow the argument and also to make use of the transcript at a later point in time.

MR ILLINGWORTH QC:

Well, that appropriately brings us onto our roadmap because hopefully that will make that very clear as to what issues we're addressing. It doesn't have either the Court's issues or our issues stitched into it but what we can do is come back to you with a version of the roadmap that actually specifies that very clearly but I think it will be pretty obvious. I'd ask that the roadmap be

handed up. We also have another volume of correcting documents, basically, and I will just explain what that involves perhaps before I come to the roadmap. We are very clear on the fact that this Court is not engaging in the substance of the judicial review application in accordance with the minute that was issued earlier but we also expect that the Court will want to have a broad concept of what the judicial review application involves and the statement of claim was a very lengthy one so under tab 1 of the additional bundle, you've got a summary of the amended statement of claim and our application for judicial review. I'm not going to go through that at the moment but it's there just for your convenience if you need to refer to it to give you a broad overview of what we pleaded.

Under tab 2 there is a reprint of the appellants' chronology and if any of your Honours have tried to access the chronology in the printed bundles, you will have found that it's a very difficult document to negotiate because the pages are printed in such a way that you have to reverse the volume in order to follow it so we've given you a more user-friendly version of the chronology. I apologise for the length of that document but it's a complex case with a complex background and that chronology has been around for a while and has been used for various purposes.

The third document is a correct print of *Collins v Loisel* 262 US 426 (1923). Not a hugely significant case but what you got in the printed hardcopies was the wrong version of that case. It actually went to the US Supreme Court three times and we apologise for that error. This is the correct version. Justice Brandeis in full flight. And then the fourth document is a case that was included in the soft copy of the authorities but didn't make it to the hard copy bundle. A case called *United States of America v Tavormina* (1996) 112 CCC (3d) 563 (QCCA). We will come to that in due course and then the fifth document is a very short extract from the US submissions and the District Court and the relevance of that will be explained in due course.

MR RAFTERY QC:

Your Honours, just before my friend begins, I just want to mention something about the roadmap. The United States have not prepared a roadmap on the basis that they were going to follow, in essence, the points identified by your Honours of the issues in this case and just say I'm turning now to, on your list, they are numbered and you will notice that in our re-organising of your list, we put number 2, the issue of transposition later because it comes under question 2. Apart from that we were just going to follow that order that you had suggested but if you would like something more in the way of a roadmap from us, I just wanted an indication, in which case I would prepare something but basically it was just, we will deal with those topics in the order that you have suggested.

GLAZEBROOK J:

I think we will be just saying, when you were moving from topic to topic, tell us when you do and what you are dealing with.

MR RAFTERY QC:

If that is sufficient, then I won't be providing any roadmap**.**

WINKELMANN CJ:

We will discuss it over morning tea but I do not think anything extra else is required, that is a preliminary thought but we will come back to you after morning tea Mr Raftery.

MR ILLINGWORTH QC:

If we could turn to the roadmaps your Honours, I will just briefly explain that you will see that in each box, set out in a table format and each box, part A, part B, part C, links up to our primary submissions and we have set out the key points that we will be making under each of those headings and we also have the references in the right-hand column; the main references to which we will be referring in our oral presentation. The numbering on the left-hand side of the boxes does not link up and is not a cross-reference to the primary submissions. The only cross-reference to the primary submissions is the

part A, part B, part C, just to clarify that. So, we will be dealing with a brief statement of our over-arching position. We will then be dealing with the statutory scheme and the Treaty. Unless the Court directs otherwise, I will be taking you through the key provisions in the statute and the key provisions in the Treaty as quickly as I possibly can for the sake of time. We then deal with section 24(2)(c) and various issues under that heading and that of course is primarily directed to question 1. The prima facie case test is necessary because of question 2 and we will go through that in some detail. We then refer briefly to the case stated procedure. The main issues on judicial review and our part G which is the missing frame of reference and then relief. Now just so that the Court knows the position in relation to documents. This is just a housekeeping issue. Your Honours have got softcopies in electronic format of the case on appeal which includes the case on appeal for the Court of Appeal, and the case on appeal for the Court of Appeal includes the case on appeal for the High Court and all those references are hyperlinked to our electronic copy of our submissions. In the hardcopy, you've been given a much reduced set of documents. The significant documents are in the bundle entitled "Documents for hearing" so they are the key documents, if you like. There are several volumes. They are in the dark colours and you've got nine volumes of documents. The key authorities are in the light-coloured documents and there are altogether 12 bundles of hardcopy authorities and volumes 10 to 12 are Mr Mansfield's documents in relation to copyright.

So turning then to the roadmap at part A, I'll try to indicate where we are on the roadmap as we go. Our overarching submissions come down to four key points. First is that the US offences with which the appellants are charged are not extradition offences. We say they do not equate properly with any domestic New Zealand offence. Our submission is that double criminality forms the foundation of extradition law worldwide and the Court of Appeal was right to reaffirm that. The conduct with which the appellants have been charged in the United States, we submit, is not criminal here. Without criminality, the requirements of the Extradition Act can't be satisfied. So that's our submission number one.

Submission number two is that even if any particular –

WINKELMANN CJ:

Perhaps if you just slow down a little bit because I think we're all taking down your overview.

MR ILLINGWORTH QC:

Indeed, your honour.

WINKELMANN CJ:

Carry on.

MR ILLINGWORTH QC:

Even if any US count, this is point 2 –

GLAZEBROOK J:

Even if you were, sorry?

MR ILLINGWORTH QC:

Even if any US count in the superseding indictment equated to a domestic offence, and we don't accept that, but if it does, the US has failed to make out a prima facie case in respect of any such offence. Of course, that brings into play question number 2 and the question of transposition. To justify committal on any New Zealand offence identified by the United States, there would have to be sufficient evidence of subsistence, ownership, and infringement of copyright. As we will see, that raises a question which is either a question of conflict of laws or similar as to which law should apply to that topic and we'll address that in due course.

But fatally, as Justice Gilbert noted, the United States has not given any evidence that would enable that issue to be considered properly either under US law with expert evidence, as would be normal, or under New Zealand law. In an effort to fill that gap, the Courts below have distorted the prima facie case test and the law of extradition applying in this country for over a century,

and so we submit that the case fails at that point, and we say that the resulting anomaly has no precedent anywhere and renders this jurisdiction an outlier in terms of comparison with countries that have a similar extradition process. So that's point number 2.

Point number 3 is that regardless of the merits of the US case, the law was not properly applied in the District Court and that led to errors so serious that they could not be cured by the antiquated case-stated procedure. We will show that the District Court Judge misunderstood, misstated, and misapplied the law at every stage of the analysis. His Honour's judgment, we submit, was the antithesis of a meaningful judicial assessment and constituted a serious miscarriage of justice. In our submission, no higher Court could confirm a judgment of that kind however much they may have agreed with the outcome. So that's our point 3.

Our fourth point is that invalid exercises of statutory power such as those in the District Court compel the intervention of the higher Courts in their supervisory jurisdiction. Far from being an abuse of process, judicial review, we submit, was the correct procedure and in brief elaboration of that point, we say that invalidating deficiencies are the province of judicial review, especially where basic rights are at stake as they are here. The lower Courts proceeded on the basis of a wrong assumption, when I say that, of course, the High Court and the Court of Appeal proceeded on the basis of a wrong assumption that there was a total overlap between the case-stated appeals and the judicial review applications. We say that is completely wrong. As a result, judicial review was effectively excluded from consideration in relation to whether there had been a denial of fundamental justice. We will be drawing attention to a very recent case of the UK Supreme Court where this issue has been confronted in a battle between Lord Carnwath and Lord Sumption and we'll come to that in a moment.

WINKELMANN CJ:

So when you come to that, you will tell us the difference between the proceedings in terms of substance and relief?

MR ILLINGWORTH QC:

Yes, indeed, your Honour.

WINKELMANN CJ:

Because that's something the Crown's picked up and we're interested in that.

MR ILLINGWORTH QC:

Yes, essentially the Crown says it's only a technical difference because those issues were still considered. We say that's not correct and we'll explain why.

WINKELMANN CJ:

And they say you've shown no difference really in substance between the proceedings?

MR ILLINGWORTH QC:

Yes, I accept that that's the gauntlet that's been thrown down and we will accept that challenge.

So turning to part B in the roadmap and in the primary submissions, we will just quickly go through the key points in the Extradition Act to demonstrate the fundamentals of the process. This is in volume 1 of the authorities bundle starting at page 260 and I'm just going to go quite quickly through this because I'm sure the Court is already reasonably familiar with the Act but we just want to point out our key points. So at page – I'm going to use the bundle references, starting at page 261, so the definition of "extradition country", I'm not going to read it out, and the definition of "extradition offence" which refers to section 4. We then go to page 263, section 3, Meaning of extraditable person, and this is significant. "In this Act, a person is an extraditable person in relation to an extradition country if the person is accused of having committed an extradition offence against the law of that country" and what we say is that that shows that "extradition offence" is a form of classifying the foreign offence.

WINKELMANN CJ:

What shows that?

MR ILLINGWORTH QC:

That the person is accused of having committed an extradition offence against the law of the other country, the foreign country, so that means that the foreign offence has to be classified and if it falls within the definition of an extradition offence, it's the foreign offence which becomes the extradition offence. There's room for confusion about that because we've had situations where the extradition offence has been confused with the New Zealand counterpart offence and we say that's not correct. The extradition offence is the foreign offence once it's been classified as falling within the definition that we're about to look at. So the definition –

GLAZEBROOK J:

And you will get to the significance of that, will you, or is it – can you just say in a nutshell what the significance of that is?

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MR ILLINGWORTH QC:

Well, it's just to avoid confusion if the Court is measuring the prima facie case against the extradition offence, that means they're looking at the foreign offence and that's not correct. We say it should be the counterpart New Zealand offence that is the yardstick for the prima facie case and we can't get confused at that basic level. We've got to start off with the right concept. The right concept is to classify "foreign offence" and that classification occurs under section 4.

WINKELMANN CJ:

Right.

MR ILLINGWORTH QC:

So section 4, we don't need to go through the detail of that, it speaks for itself, except for the words "subject to an extradition treaty" and as we will explain

we say those words were necessary to ensure that when the Court is looking at this definition it has to take into account whether the relevant treaty with the relevant overseas country also covers that particular offence. So if we didn't have "subject to an extradition treaty", if you deleted those words then any country could come along and say, "We've got an extradition offence here," but those words ensure that the Treaty comes into play as well, and you'll see, you may have picked up already in our written submissions, that the words "subject to an extradition treaty" weren't in the original form of the Bill. They came in at the select committee stage, and the select committee obviously saw that there was a need to put those words in to ensure that the Treaty, the role of the Treaty was exactly the same as it had been under the 1965 Act.

Section 5 is important for a number of reasons in this case. It refers to the phrase "conduct constituting an offence" and that is a reference –

WINKELMANN CJ:

Can I just ask you about that section 4. People that don't have a treaty can come along and ask for extradition, they just have a different procedure.

MR ILLINGWORTH QC:

Under section 60 if there's no treaty then there's a separate procedure, I'm going to take the Court to that in a moment, but that has its own separate procedure. The primary procedure is either the Treaty procedure under Part 3, or the designated or exempted country procedure under Part 4, and then there's a separate procedure under section 60 for other countries that don't have a treaty.

But of course before we pass on from section 4, the condition in subsection (2) of section 4 is crucial, and we say it requires the same process as was always the case in the UK, dating back to 1870, the original Extradition Act in England, and the Canadian statutes going from at least 1952 onwards.

So back to section 5 the "conduct constituting an offence" is "a reference to" – now your Honours will observe immediately that that is not the usual way of

defining a meaning – it is “a reference to”, it does not say this phrase means, nor does it say this phrase includes, which are two of the common ways of defining words. “A reference to” is a looser way of associating the following words with the phrase. But it does refer to, “The acts or omissions, or both, by virtue of which the offence has, or is alleged to have, been committed.” That is simply so that the shorthand phrase can be used throughout the statute as it is.

O’REGAN J:

So is there any significance to the fact that it uses that wording? Are you saying there’s some scope for a wider definition?

MR ILLINGWORTH QC:

Yes Sir, what we say is that when the conduct constituting the offence is referred to in the Act, it’s essentially very similar to the concept of the actus reus in a criminal charge, and the actus reus in the criminal charge has never been confined to the acts and omissions only. The actus reus covers, for example, the results in a result crime and the context and the circumstances. As we will see shortly in the Canadian case of *United States v McVey* [1992] 3 SCR 375, Justice La Forest explained the concept of double criminality in a way that said that the overseas, the foreign court looks at the underlying facts to see whether it constitutes an offence under their law. We look at the conduct, the underlying facts to see whether it constitutes an offence under our law, and that has never been a blinkered approach which focuses only on acts and omissions. It takes those acts and omissions in context.

WILLIAMS J:

Why does that come from the word “a reference”. I see your argument but what does a reference say about that?

MR ILLINGWORTH QC:

Well what it’s saying Sir is that the phrase refers to that concept, but it’s not saying it is exclusively an exclusive reference. It’s not a limiting reference.

It doesn't exclude the context of the acts and omissions, just in the same way as the Court in looking at the actus reus of an offence would say, in a charge of murder, we don't just look at the fact that the person pointed a gun and pulled the trigger, we look at the results, the person was shot and died. It's not narrowed and blinkered and extradition law has never been based on a blinkered approach.

WINKELMANN CJ:

You don't really need dependence on the particular words, though, do you? You're saying this is equivalent to actus reus and actus reus is not just simple acts. Sometimes it has a mental element, sometimes it has a result component.

O'REGAN J:

But if in other sections of the Act conduct constituting an offence includes the broader context, then this word is not a reference to what –

MR ILLINGWORTH QC:

I'm sorry, I didn't hear that last bit?

O'REGAN J:

Well that means in those sections it's not a reference to what section 5(1) says it is.

MR ILLINGWORTH QC:

No it is a reference. It has to include the acts and omissions, but it's not excluding context, and it's not excluding consequences.

O'REGAN J:

Well why doesn't the statute say that if that's what it means?

MR ILLINGWORTH QC:

Well, I accept that that's a point of interpretation but adopting a purposive approach to the statute as a whole, it simply can't mean that you focus only on

an act or an omission and leave out the mental ingredient, leave out the consequences, leave out the context. That's a literalistic approach to the statute. It's not a phrase that is limited in the way that it would be if it said this phrase means X. It doesn't say that. It's simply a guide to the meaning of the words.

O'REGAN J:

Well no it's not. It's the opposite of a guide to the meaning. It's diverting you from the meaning you say it has.

MR ILLINGWORTH QC:

Well the primary phrase is the conduct constituting an offence, and one has to read that phrase together with the expansion of that phrase and read it all together, and in my submission Sir it is not a limiting phrase. It's just a guide to purpose.

So we then look at the totality principle under subsection (2). This is again a reflection of extradition law internationally. This is, as we'll see in a case called *Norris v Government of the United States of America* [2008] UKHL 16, [2008] 2 WLR 673, the Court doesn't take a narrow approach looking at the components of the foreign offence. One looks at the totality of the conduct that's been committed in the overseas jurisdiction, or that is alleged in the overseas jurisdiction, and so the totality principle helps the Court, again, to understand the purpose of the legislation.

WINKELMANN CJ:

Where do you say that is grounded?

MR ILLINGWORTH QC:

In subsection (2) of section 5 your Honour. That simply is a statement of principles that have been well worked out in various cases before that, especially in the UK and Canada.

So section 6 is fundamental to the whole statue, "An extraditable person who is in New Zealand and who is sought by an extradition country may be surrendered in accordance with either Part 3 or Part 4." I don't think I need to go into the difference. We're here under Part 3. The Part 4 procedure is simply for Australia, United Kingdom and Pitcairn I think at the moment, and that principle applies irrespective of whether New Zealand Courts have jurisdiction for obvious reasons.

We then go down to section 11, which was the subject of an important judgment in the Court of Appeal in *Yuen Kwok-Fung v Hong Kong* [2001] 3 NZLR 463 (CA). *Kwok-Fung* was affirmed by this court in at least, I think in Justice McGrath's judgment in the *Dotcom* disclosure case, and it's also the subject of consideration in a number of the *Dotcom* disclosure judgments in this Court. So there are two very different principles involved here. First is that the act must in some circumstances be construed to give effect to a treaty but under subsection (2), there is the countervailing principle that certain provisions are protected from "treaty override", as it's been called. So if we just look at subsection (1) for a moment, *Kwok-Fung* says that that principle is there because of the international law principle that a State cannot invoke its own domestic law to act in a way that is inconsistent with a treaty and that's explained by Justice Keith in the judgment of the Court in *Kwok-Fung*.

So if there's an inconsistency between the Treaty and the act then in some cases, the act has to be interpreted so as to give effect to the Treaty but subsection (2) is the exact opposite of that. The treaty gives way to the act in relation to the specified provisions and we see that in (2)(b), section 24(2)(d) and section 45(5) are protected provisions and we know, I'm sure your Honours appreciate from the submissions that what 24(2)(d) says, section 45(5) is important because under the Part 4 procedure, there is no prima facie case test. It's the opposite of the Part 3 procedure, no prima facie case test, and in fact, the respondent is not entitled to give evidence in relation to the evidential issue. Those are both protected provisions under subsection (2) and also (2)(d) is important because it protects any provision conferring a particular function or power on the Minister or the Court.

The whole of section 11 is subject to section 105 but as far as we can see, that's not relevant in the present case.

So that's Part 1. Part 2, section 12 sets out the object of the legislation.

ELLEN FRANCE J:

Sorry, just going back to section 11, you don't attach any significance to the fact that 24(2)(c) is not in the…

MR ILLINGWORTH QC:

Yes, 24(2)(c) is not a protected provision. We accept that. So that in a case of clear inconsistency between a treaty and the Act, it would be possible to read down section 4 because section 24(2)(c) cross-refers to – in effect, it requires section 4 to be applied. So to that extent, yes, it's not a protected provision and a treaty override can apply but before you get to that point, you have to find such a significant inconsistency between the Treaty and the Act that the Treaty override principle comes into play. We will also be showing that that doesn't lead anywhere because of the fact that 24(2)(d) is a protected provision and you will see as we go that there are cases going back under the 1870 legislation to the very phrasing of section 24(2)(d) which means that the double criminality principle comes into play under that protected provision. That wasn't the approach adopted in *Cullinane*, I accept that, but neither was it an argued point or a carefully considered point, it was just a preliminary view expressed by the Court at that stage.

WINKELMANN CJ:

So is your point that – do you accept that double criminality can be displaced by the words of a treaty –

MR ILLINGWORTH QC:

No, your Honour.

WINKELMANN CJ:

– but only – well, can I just finish, double criminality may be displaced by the words of a treaty but only if it explicitly does so, is that your point?

MR ILLINGWORTH QC:

No, that's not our point, I'm sorry, your Honour. The position is that the definition of an extradition offence in section 4 could in the case of clear inconsistency be reconstructed or reconsidered in accordance with the Treaty but the requesting state still has to comply with the prima facie case test under 24(2)(d) and because, as we will show, the wording of 24(2)(d) has been construed in many, many cases to include double criminality, in other words, a requirement that there must be an offence fulfilled under the local law, then the 24(2)(c) point does not eliminate double criminality.

WILLIAMS J:

This argument is predicated on the idea that the US/New Zealand extradition treaty is inconsistent with double criminality?

WINKELMANN CJ:

Yes.

MR ILLINGWORTH QC:

That was the view that was taken in *Cullinane*, yes, Sir.

WILLIAMS J:

What do you make of Article 4?

MR ILLINGWORTH QC:

Can I come back to that in a moment, Sir? We're going to go through the Treaty in just a moment. I certainly want to answer that question but if I can come back to it for the moment.

WILLIAMS J:

Right, okay, fine.

WINKELMANN CJ:

Because I suppose what I was coming – I'm possibly also raising the issue which is whether there is in fact another way for you to formulate it which is that there is nothing in the Treaty which is inconsistent with the double criminality requirement.

MR ILLINGWORTH QC:

That is our position, your Honour. That is definitely our position.

WINKELMANN CJ:

Okay, so that is your position, but your first position is that it is in fact an irremovable presumption that there is double –

MR ILLINGWORTH QC:

Yes. Under 24(2)(d), you can't get around the requirement for double criminality. Under 24(2)(c), there may be room for movement but you still don't get around 24(2)(d).

So Part 2 deals with the object of the Act and we don't need to – that speaks for itself. Part 3 is the procedure that applies to this case.

WINKELMANN CJ:

Could you just pause for a moment, thanks? I just wanted to capture that point because I think it's an important one.

MR ILLINGWORTH QC:

I'm giving you a preview of the main submissions. I shouldn't be going into the detail at this stage but I will.

WINKELMANN CJ:

That's all right. Sorry, that's our fault.

WILLIAMS J:

You just keep tempting us.

WINKELMANN CJ:

Carry on.

MR ILLINGWORTH QC:

So Part 3 deals with the countries to which this part applies in section 13 and the US comes under (b). There's no treaty required for Commonwealth countries so the US gets in under section 13, Commonwealth countries get in under section 14, and section 15 deals with Orders in Council for the application of that principle as does section 16. So that's a different issue from exempted countries under section 17 because section 17 is the record of case procedure and that's a narrower set of countries and we accept of course that the US is an exempted country under section 17 so it can rely of course on the record of case procedure in section 25.

We then come to the process. Section 18 deals with the request for surrender by the foreign state and importantly, the request under subsection (3). The request is normally transmitted to the Minister. The request has to be accompanied by duly authenticated supporting documents and we draw attention to section 18(4)(c)(ii), "in the case of any offence" – sorry, the supporting documents are dealt with under subsection (4) and one of those supporting documents, "in the case of any offence", any offence, in other words, both accusation and conviction cases are written, there must be a written deposition setting out (c)(ii), "the conduct constituting the offence". So there's an example of the key phrase being used.

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So the Minister can then request the issue of an arrest warrant but that's not what happened here. What happened here was that there was an application under section 20 for a provisional arrest warrant to be issued and you'll see that under subsection (1), a District Court Judge can do that under (1)(c) if there are reasonable grounds to believe that the person "is an extraditable person", so that brings that earlier definition into play in relation to the extradition country and the offence for which the person is sought, is an extradition offence and then there's a requirement of urgency and that means

a warrant can be issued even before the formalities have been carried out under section 18. The Court then gives a notice to the Minister under section 21 and the Minister then has the power, in effect, to veto the application but the Minister under subsection 5 must notify the Court of any action taken by the Minister in relation to that process.

Section 22 deals with the powers of the Court; this is an issue that has been dealt with at length in the *Dotcom* disclosure case. The powers of the Court, we say are protected; well the procedure of the Court is a protected provision under section 11 subsection (2) and it is important to appreciate the cross-reference in 22(1)(b) to Part 5 of the Summary Proceedings Act 1957 because that brings into play the old committal procedure at the depositions hearing and we say that that applies, although it applies with necessary modifications, there are very few necessary modifications required and that the evidence under that process must be sufficient to put the defendant on trial which is consistent with the requirements of 24(2)(d) that we will come to in a moment.

Section 23 deals with the procedure following the arrest of the person, subsection (4) deals with the process where a provisional arrest warrant has been issued and (a) is important, "The hearing of the proceedings must not proceed until the Court receives from the Minister a notice in writing stating that a request for the surrender… has been transmitted to the Minister under section 18." If the Court does not receive the notice, it must discharge the person concerned. And if you go back to section 21(2), "The applicant", that's the US, or Crown Law, "Must include in the report to the Minister a copy of the warrant issued in the extradition country and the other documentary evidence produced to the Court by the applicant." That is important because the Minister has to be properly informed about what has happened in the District Court in relation to the provisional arrest warrant. And we say that in our judicial review application that there was a false step at that point because the Court and the Minister were not notified of the involvement of the GCSB in the process and on an ex parte application we say that that was very significant. Mr Ortmann and Mr Van der Kolk have got a judgment of the

High Court confirming that the conduct of the GCSB in relation to them was unlawful and so there are proper grounds for raising that issue.

WINKELMANN CJ:

How does it come in at the section 21 stage?

MR ILLINGWORTH QC:

I am sorry, your Honour?

WINKELMANN CJ:

How does it come in at the section 21 stage on your analysis?

MR ILLINGWORTH QC:

Because the District Court has no jurisdiction to proceed unless it has got a proper notice from the Minister. If the Court and the Minister were misled at the jurisdiction stage, then that can affect the jurisdiction of the District Court to conduct the whole proceeding. That is an issue that has never been seriously considered at any stage of these proceedings, but it is an example of one of the issues that we raised in our judicial review.

WINKELMANN CJ:

So your point is the Minister's notification went back to the District Court, the proceeding was based upon…

MR ILLINGWORTH QC:

Incorrect information.

WINKELMANN CJ:

Incorrect information.

MR ILLINGWORTH QC:

Misleading information. Information that was not disclosed and should have been disclosed on an ex parte application for arrest. Section 24 is at the heart of this matter, obviously, and the steps in section 24 are all absolutely crucial.

We point to – first of all, the Court's role is to determine eligibility for surrender. Secondly, in subsection (2), eligibility depends upon all of the prerequisites set out in subsection (2), and one of those is proper supporting documents. We refer in our written submissions to the deficiency in relation to section 18(4) because there was no proper statement of the conduct constituting the offence but most significantly, (c), "extradition offence in relation to the extradition country" is a mandatory requirement and (d), the wording of which is very, very important and almost every word in that subsection can require thought but what we say most importantly is it is the evidence produced or given at the hearing which, according to the law of New Zealand, although subject to the Act, must justify the person's trial. So it's the evidence and Justice Chambers picked up on this point in a case called *United States of America v Wong* [2001] 2 NZLR 472 (HC). He said it's the evidence that must justify the trial and he emphasised that and we emphasise that too.

That evidential requirement, if looked at in accordance with the overseas jurisprudence, means that justifying the trial according to the law of New Zealand means that there has to be a counterpart offence under the law of New Zealand, the ingredients of which are fulfilled by the evidence. The reason that the conduct constituting the offence appears in that provision is jurisdictional. The Court proceeds on the basis that the conduct constituting the offence had occurred within the jurisdiction of New Zealand because then that eliminates any question of territoriality, any question of the jurisdiction of the Court not applying, but that is not the test. That is not the evidential test. The evidential test for the purposes of establishing a prima facie case is purely and simply whether the evidence produced or given at the hearing would, according to the law of New Zealand, subject to the Act, justify the person's trial. And you'll see that those words are pretty much the same as what was in the 1870 UK legislation, the Extradition Act, and have been interpreted consistently both in the UK and in New Zealand going back to an ancient New Zealand case called *R v Garvey* (1888) 6 NZLR 604 (SC). It has always been construed as a double criminality requirement and exactly the same happened in Canada.

And then subsection (3) is important, “The person is not eligible for surrender if the person satisfies the court", (b) “except in relation to a matter referred to in section 30(2)(ab), that the person’s surrender would not be in accordance with the provisions of the Treaty […]”, so that overrides even the 24(2)(d) requirement because even if the requesting state gets home under 24(2)(d), if there’s a conflict with the Treaty and the requested person satisfies the Court of that, then the requesting state does not succeed. In other words, if the Treaty is more limited than the statute then the defendant gets the benefit of that, and that was a conclusion agreed with by the Court of Appeal in *Kwok-Fung* that if the Treaty limits the act then the defendant gets the benefit of that limitation but in that case, the Court held that the particular question was for the Minister not for the Court, and that’s why there’s the reference there to section 30(2)(ab).

That brings us down to section 25, the record of case procedure. That was thoroughly analysed in the *Dotcom* disclosure case and I don’t think we need to dwell on that except to refer to subsection (5). This became a matter of confusion in the District Court. A very serious problem arose in relation to subsection (5). It says “A court to which a certificate under subsection (3)(b) is produced must take judicial notice of the signature on it […]”. The learned District Court Judge read that as if he was required to take the record of case at face value except for the question of manifest unreliability and we say that was an egregious error both in relation to section 24(2)(c) and also in relation to 24(2)(d). A really serious problem arose because his Honour thought that he had to take the whole record of case at face value, and I’ll demonstrate that his Honour cut and pasted 150 pages of his judgment straight from the US submissions and simply took it at face value in terms of inferences that could be drawn from the evidence according to the US submission. Those inferences weren’t analysed as they should have been and we will give you the authority for that in a moment.

Section 26 just deals with what –

WINKELMANN CJ:

So are you saying he accepted therefore the inferences that are set out in the ROC? Did he accept those –

MR ILLINGWORTH QC:

Yes, your Honour. We actually have available a copy of the judgment which is marked up with highlight which shows where His Honour has simply repeated the US submissions and it is a very striking document to see how much of the District Court judgment was simply a cut and paste, or in some cases very close to a cut and paste, of the US submissions. But the primary point is that His Honour did not analyse the evidence, did not analyse the inferences, and that there is a fundamental obligation on an extradition Court, best illustrated by a Canadian case called *R v Arcuri* [2001] 2 SCR 828 which was affirmed in *United States of America v Ferras* [2006] 2 SCR 77 and also in the subsequent important Canadian case of *MM v USA* [2015] 3 SCR 973 showing that the Court has to analyse the evidence to see what inferences are capable of being drawn, not –

WINKELMANN CJ:

And what's said against you is that even if you were right as to the nature of the error, Justice Gilbert did that in the High Court?

MR ILLINGWORTH QC:

Yes, but his Honour didn't do it in accordance with the correct legal principles in our submission. We'll come to that shortly. Just to answer that question, his Honour certainly redid the 24(2)(c) exercise to see whether the foreign charges were properly classified as extradition offences but he simply then said he agreed with the District Court Judge's prima facie case assessment and we say that simply cannot be right because the District Court Judge simply took the ROC at face value and then said the defendants can challenge the ROC but only if they can show that it is manifestly unreliable as a whole. He completely avoided dealing properly with the sufficiency issue and he completely avoided dealing properly with the question of whether inferences were reasonably capable of being drawn from the evidence.

He didn't do that assessment and for that reason alone, the prima facie case assessment could not be simply confirmed.

WINKELMANN CJ:

Right, so your point is that the District Court Judge didn't do the prima facie case assessment because he just took the ROC?

MR ILLINGWORTH QC:

Yes.

WINKELMANN CJ:

And Justice Gilbert just accepted the District Court Judge's assessment of the prima facie case?

MR ILLINGWORTH QC:

Yes, correct. So we can now move quite quickly through the rest of the Act. Section 30 is the Minister's role. The Minister has to make the final decision about surrender. Subsection (5) of section 30 is important because it includes the specialty principle, sometimes referred to as the speciality principle, but in the extradition law jargon, it is normally referred to as speciality and what it means is that the requesting country cannot lawfully try the person who has been extradited for an offence that has not been through the extradition process in the requested state. So what that means is that each foreign offence has to be correctly classified and separately assessed for a prima facie case because it is important at the other end of the process, the defendants are entitled to say to the US Courts, we were not extradited on this charge and therefore you cannot hear it. Now how that's dealt with in the US is for the US Courts, of course, but under our Act that is a requirement and the Minister cannot deal with that issue properly unless the Courts deal with it properly so the surrender order can be made under section 31.

There are discharge provisions under sections 35 and 36; 38 the discharge does not preclude further proceedings. That is an important point. It does not raise a res judicata or issue estoppel type situation. And then we come to part

4 which does not apply and the only thing we need to point to here is section 45, subsection 5. Chief Justice Elias referred to this point in her dissenting judgment in the *Dotcom* disclosure case pointing out that subsection 5 is a protected provision along with section 24(2)(d) and what it means is, that in these shortcut cases the person concerned is not allowed to give evidence, so you will see in (b), "Nothing in this section requires evidence to be produced or given at the hearing to establish the matters described in sub-paragraphs 1 and 2 of section 24(2)(d). So, this is the flip side of that issue.

Now that the point that your Honour the Chief Justice raised with me earlier is dealt with in Part 5, section 60 which is the special procedure for countries that are not Commonwealth countries, they are not Part 4 countries. Not Part 3 countries. There is a special process. Now that is worth considering because you can see that there is a double criminality requirement under section 60(1)(e), the offence must be an offence punishable under the law of the overseas country for at least 12 months' imprisonment, and (f) reflects the test in section 4(2). You will also see that the Minister then in subsection (3), has to consider certain mandatory issues under subsection (3) including the seriousness of the offence and the object of the Act. Those are issues that are automatically taken care of under a treaty if New Zealand has entered into a treaty. They are considered at the executive level but in the case of an ad hoc application under section 60, they have to be taken into account specifically by the Minister.

Part 6 is extradition to New Zealand so we do not need to stop there. Part 7 deals with procedural issues, nothing relevant. Part 8 deals with appeals. We have got past the jurisdiction issue but we do need to look at the powers on appeal under section 72 and 73 and we will come back to that in relation to our relevant submissions on that point.

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We just draw attention for the moment to section 73(3) which says that the Court can confirm a decision of the extradition Court on appeal. The Court can confirm the first instance decision even if there's been an error of law as

long as the Court considers that there has been no substantial wrong or miscarriage of justice. We don't need to deal with anything else until we come to section 100 which says that a treaty made after the Act commences must be in respect of an offence punishable under the law of New Zealand and the other country for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalties, so that's the double criminality principle again. We say that that is threaded through the Act and it also appears in the next stage which is section 101A and 101B. I think the Court will almost certainly be aware already that those provisions weren't in the Act when *Cullinane* was decided back in 2002. They came in, well, certainly after *Cullinane*, shortly after *Cullinane*, and so the general provision is in 101A(1), "An extradition treaty between New Zealand and an extradition country must be construed to give effect to every specified provision […]" and subsection (2) sets out the specified provisions. We go down to (g), "section 101B […] of this Act".

ELLEN FRANCE J:

Sorry, just to be clear, it's 101A and following that came in subsequently?

MR ILLINGWORTH QC:

Yes, 101A and 101B, yes, your Honour.

GLAZEBROOK J:

Sorry, I – no, I've found it. Sorry, I just lost you for a moment but I found you now. So yes, 101B.

MR ILLINGWORTH QC:

Yes, so we're on page 337 of that bundle.

GLAZEBROOK J:

I was on the same, I just couldn't find your reference to 101B.

MR ILLINGWORTH QC:

Yes, so one –

WINKELMANN CJ:

And what's the significance of this 101A and B?

MR ILLINGWORTH QC:

Yes, we now go to 101B which is the crucial one for this case. We don't need to worry about any of the other provisions in subsection (2) of 101A. So 101B requires, in our submission, careful consideration. There are New Zealand offence provisions that are deemed to be described in any extradition treaty between New Zealand and a foreign country as long as certain requirements are met. So we start off with the Order in Council under section 15, which we have, "the following offences are deemed to be offences described in any extradition treaty concluded before the commencement of section 6 of the Extradition Amendment Act 2002", so that gives us our date which is just almost immediately after the *Cullinane* decision was delivered. If we go back to *Cullinane* just for a moment, *Cullinane* referred to umbrella offences which weren't originally included in the Act. This does include some umbrella offences, particularly section 98A of the Crimes Act 1961 which is a provision that the US relies upon.

So we see that "the following offences are deemed to be offences described in any extradition treaty". So the technique being used by the legislature is to deem certain New Zealand offence provisions to be inserted into the relevant treaty and we accept that that has happened in relation to the US treaty. The deemed offences, if the requirements are met, appear in the Treaty just as if they had been put there originally.

So what are they? (a), the only relevant one of section 98A of the Crimes Act. (b) is the Passports Act and that's not relevant. So we come down to (c), "any offence against any enactment if it is punishable by imprisonment for a term of 4 years or more; and the offence for which extradition is requested is alleged to involve an organised criminal group (as defined in article 2(a) of the TOC convention)". Pause there and go to the next page. You will see that the TOC convention is defined to mean the United Nations Convention against Transnational Organised Crime done at New York on the 15th of November

2000. That brings me to a glitch in our documentation because I don't think you've got a copy of the TOC convention in the hardcopies. It must be there in the electronic copies and we will fix that as soon as we can, because the definition of serious crime is important in the TOC convention. This is, I'm sorry, a bit of a labyrinthian exercise but we have to go through it.

And then third, going back to (c), "the person whose extradition is sought is, or is suspected of being, in or on his or her way to the requested country" which is not in issue.

WINKELMANN CJ:

So is your point that since they're including New Zealand offences in treaties to do with extradition from New Zealand, that assumes double criminality?

MR ILLINGWORTH QC:

It again assumes – it's another form of double criminality but it is also substantive in this case because the US are trying to rely upon certain Crimes Act provisions which they say fall within the definition of 101B(1)(c)(i) and (ii), in other words, they are punishable by four years' or more imprisonment here and they say that they fall within the TOC definition. And so this is, if you like, a separate pathway from relying upon the Treaty only, which is the *Cullinane* approach, and so there are two broad pathways, and within pathway number 2, which we're now looking at, there are certain hurdles that have to be overcome in order to satisfy section 24(2)(c). So this is dealing with the concept of extradition offences, the classification. As we said earlier, the classification issue comes in again under 101B.

Subsection (3) is important. Subsection (2) makes it clear that this definition applies whether before or after the amendment but subsection (3) significantly says that that principle "does not apply in respect of an act that, had it occurred within the jurisdiction of New Zealand, would not, at the time that it occurred, have constituted an offence under New Zealand law." It's again a double criminality principle point very obviously.

Sections 104 and 105, as far as we're concerned, don't impact on this case and we can respond if the US says otherwise.

Just finally on the statute, you'll see that 110(1) in effect repeals the Fugitive Offenders Act 1881 and in section 112, are four repealed amendments, the '65 Extradition Act, the Amendment Act in 1969 to that Act, but then the Fugitive Offenders Amendment Act 1976 and the Extradition Amendment Act 1998. The reason why this is significant, and it may be not immediately obvious, is that the Extradition Act 1999 replaced two streams of rendition, if you like. One was the Commonwealth arrangements for extradition which were originally under the UK Fugitive Offenders Act 1881. There was a problem in the application of that Act that arose in the early 1970s in New Zealand. Some High Court ruling that had to be dealt with and so that was dealt with under the Fugitive Offenders Amendment Act 1976 and so that re-instated the Commonwealth arrangements and the Extradition Act 1965 was a separate stream for non-Commonwealth countries. So what the 1999 Act did was to combine those two streams together in one statute and that was an important reform at the time. It bought everything under the one statute and that whole process is explained in the explanatory notes to the original Bill which are earlier on in this volume.

So very quickly turning to the Treaty. This is in your hard copy volume 1 in the authorities' bundle starting at page 21. So on page 23, you have got Article II which lists all of the original offence categories. These are generic descriptions framed in a very broad way. They do not purport to be definitions. You will see that there are some provisions in there which now are more controversial than they would have been at the time. So Article II. clause 5 includes sodomy. Clause 6 deals with abortion and 8 deals with procuring sexual intercourse; all of those matters have been the subject of reform under legislation in New Zealand since the Treaty was entered into. But if you compare that original list with the schedule to the 1965 Act, which is in your volume, you will see that there is an exact match-up and the list in the schedule to the 1965 Act, contains the statutory references that demonstrate the match up so that when the Treaty was entered into, five years after the

1965 Act, so this is a 1970 Treaty. Under the 1965 Act, five years later, the New Zealand negotiators made sure that everything in this Treaty related to an offence provision under New Zealand law and in our submission that is the most powerful reason for regarding this list and this arrangement as a form of double criminality from its inception. The Treaty was matched up with the New Zealand offence provisions. The fact that some of those offence provisions have been modified by legislation later, is simply the way things work in the real world. It may mean that some provisions in the Treaty no longer match up exactly with what was originally in our 1965 Act but when the 1999 Act comes into force, it actually scoops up all of these offence provisions in the Treaty because it moves from the enumerative method which this is, to the eliminative method and the eliminative method actually created a wider set, a larger set of offences, and didn't reduce any of these provisions at the time.

So moving on, Article VI, "Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found […] to justify his committal for trial […]". We say that matches up with 24(2)(d) from a New Zealand perspective and it matched up with essentially the same requirement under the 1965 Act. It is accepted that a provision of that kind can be read differently and has been read differently in the United States under the very old *Factor v Laubenheimer* 290 US 276 (1933) case but we say that that interpretation should not be applied to this Treaty but even if it is, then it's outflanked by section 24(2)(d) in the statute which is a protected provision and there are many, many examples of this wording being treated as requiring double criminality. Even in the Australian case of *Riley v Commonwealth of Australia* (1985) 159 CLR 1. If you read Justice Deane's judgment in that case, he explains how provisions of this kind can be read as double criminality even though that didn't happen in that particular case.

Article IX, and we say this is extremely important. "The determination that extradition based upon the request therefor should or should not be granted shall be made in accordance with the laws of the requested Party and the

person whose extradition is sought shall have the right to use such remedies and recourses as are provided by such law." We say that cedes priority to the law of the requested state and it also recognises a full entitlement on the part of the requested person to rely upon local law and as we'll see shortly, that's a highly significant point.

Article X, third paragraph is significant. Again, it requires evidence that justifies arrest at committal for trial as if the offence had been committed in the requested state.

Article XI on page 29, provisional arrest warrant in case of urgency.

Article XIII is the specialty principle that we saw in section 30 of the Act and Article XVIII is significant, "This Treaty shall apply to offences specified in Article II committed before as well as after the date this Treaty enters into force, provided that no extradition shall be granted for an offence committed before the date this Treaty enters into force which was not an offence under the laws of both countries at the time of its commission."

WINKELMANN CJ:

What Article are you on, sorry?

MR ILLINGWORTH QC:

That's Article XVIII, your Honour. Again, we say that's a double criminality requirement. In our submission, that demonstrates that the purpose and intention of the negotiators was to ensure that there wasn't extradition for something that wasn't criminal in both states. And you will see, just to complete that analysis, we've given you the schedule to the '65 Act to show the match-up and I think that's at page 16 of that first bundle.

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So that deals with our Part B and the roadmap. We now come onto the classification of foreign offences. So the first question that was before the Court of Appeal we'll refer to as question 1.

WINKELMANN CJ:

So we're moving on to Part C?

MR ILLINGWORTH QC:

Part C, your Honour, yes.

WINKELMANN CJ:

Of your roadmap?

MR ILLINGWORTH QC:

Yes, your Honour. So Part C, I'll tell you where we are in the roadmap in a moment but just giving the context, the question that was before the Court of Appeal, as stated by the High Court, is "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 section 24(2)(c)?" So the Court of Appeal had that question before it because the High Court so stated and that issue is now before this Court pursuant to the leave that was granted. Our submission is that that question should have been answered in the negative.

So dealing with the roadmap at C1.1, we submit that the Court of Appeal was right to reverse *Cullinane*. The issues were not argued in *Cullinane* and we say the Court of appeal has done a full analysis of it and we say that they were right to reverse *Cullinane*. The US submissions, we submit, don't justify overruling the Court of Appeal's decision on that point. We simply reserve our right to reply to the US oral submissions and until then, we rely on the reasoning in the Court of Appeal's judgment and our written submissions and the reply submissions that we've filed and so we proceed on the basis that the Court of Appeal's decision was correct on that point which means it's not possible to rely on the Treaty alone as an extradition pathway.

So coming to C1.2…

O'REGAN J:

You probably need to address the possibility that we'll disagree with you on that.

MR ILLINGWORTH QC:

Of course, your Honour, but what we say is that the US is the appellant on that point, we've addressed the issue in our submissions, and the correct order should be Mr Boldt presents his argument, we respond to that, and he can have a right of reply.

O'REGAN J:

Except that if it affects all the other submissions you're making, that's going to be a bit difficult, isn't it?

MR ILLINGWORTH QC:

Well, I'm happy to give –

O'REGAN J:

So are you going to go through all of that again when you've dealt with *Cullinane*, go back though and say "Well, if *Cullinane* is in fact correct, this is our position"?

MR ILLINGWORTH QC:

Yes, well…

WINKELMANN CJ:

Because it may be quite hard for you to pick all of that up simply in reply is what I'm thinking, unless you – which you don't, accept that if the Court of Appeal was wrong on *Cullinane*, you have no case. You have fall-back arguments, don't you?

MR ILLINGWORTH QC:

Yes, we do.

WINKELMANN CJ:

So how are you going to deal with those? Highlight them as you go through or…

MR ILLINGWORTH QC:

Well, it's just going to make the – in our submission, your Honour, it's better if we deal first of all with the situation that applies if the Court of Appeal is right on the *Cullinane* point. We can then come back to the Court on what happens if we are wrong on that argument. We have got to keep those two arguments separate, otherwise it will become extremely messy.

WINKELMANN CJ:

What do you mean, "Come back to the Court", Mr Illingworth?

MR ILLINGWORTH QC:

We will deal with that in response to Mr Boldt's argument. The cleanest way to deal with it is to let Mr Boldt present his argument, we will respond on that, we don't expect that that will take very long, and Mr Boldt would have a brief right of reply on the *Cullinane* issue because the US are the appellants on that point.

O'REGAN J:

That's about whether *Cullinane*'s right or wrong. What I'm saying to you is what if it is right? What happens then? What happens to all of the rest of your arguments?

MR ILLINGWORTH QC:

Well, we would have to deal with that in response to Mr Boldt, Sir.

O'REGAN J:

But you don't need to hear Mr Boldt's arguments to deal with it because that's postulating a – it's either yes or no, isn't it –

MR ILLINGWORTH QC:

Yes, it is.

O'REGAN J:

You can postulate the no or the yes and then…

MR ILLINGWORTH QC:

Would your Honour mind if I come back to you after the lunchbreak on that point? I just need to think about that.

WINKELMANN CJ:

You do actually thread through your submissions, don't you, if *Cullinane* is right, *Cullinane* is wrong?

MR ILLINGWORTH QC:

Yes. Yes we've dealt with it in the written submissions, it's just a question of how I deal with it in the oral argument.

GLAZEBROOK J:

Well you can still keep it separate but deal with it –

WINKELMANN CJ:

As you go.

GLAZEBROOK J:

Well not necessarily – well it might be best, it depends how it threads in I suppose.

MR ILLINGWORTH QC:

Well I'd be grateful if I could just have the lunch break to think about that, because we've proceeded on the basis that we'll present our argument on the Court of Appeal's scenario.

WINKELMANN CJ:

Well, for instance, in overview now, can you tell us what your position is if *Cullinane* is correct, what arguments are you left with?

MR ILLINGWORTH QC:

Well we would then go back to the fact that even on a *Cullinane* analysis the District Court has not done a proper assessment of the prima facie case test and we'd have to go back to some form of rehearing in relation to the evidential assessment. The District Court Judge, even on a *Cullinane* approach got it completely wrong at the 24(2)(d) stage so that would need to be considered. We'll also have the problem that Justice Gilbert in the High Court dealt with the 24(2)(c) situation on the basis that it was not necessary for the US to do anything more than to prove, than to allege conduct and that that flowed through to the 24(2)(d) analysis. We say that even under a *Cullinane* approach that can't be right, so we would still end up in a situation where some form of rehearing would be necessary if the Court decided not to discharge the appellants. Obviously that's our primary point, but if the Court was considering some form of rehearing, then 24(2)(c) would have to be reconsidered because we say that Justice Gilbert did not apply a straight *Cullinane* approach in the High Court. The Court of Appeal changed the 24(2)(c) analysis in that Court and the prima facie case assessment was never redone by the High Court or the Court of Appeal. It was just accepted that the District Court assessment was correct when it clearly wasn't. It was affected by a number of very serious errors as we will show shortly. So in other words if –

O'REGAN J:

So it's not going to be that big a job to do your fall-back position if *Cullinane* is right?

MR ILLINGWORTH QC:

No, no, I agree with that Sir, but I just would like the opportunity to think about it.

O'REGAN J:

No that's, I mean I'm indicating that maybe you're right to just do it after reply.

WINKELMANN CJ:

Because much of your submissions is actually about the New Zealand law isn't it, about the Copyright Act…

MR ILLINGWORTH QC:

Well certainly Mr Mansfield is going to be dealing with that in detail. I'm not.

So we are now at C1.2 in the roadmap, what is the correct approach for classification purposes. The US seeks to rely on deemed offences under 101B that we've just looked at, and for classification purposes it's essential that the factual allegations underlying the foreign charge would reasonably warrant prosecution for a New Zealand offence if those same factual allegations were made in this country. Now that's obviously on the double criminality approach.

Now we need to go to the background cases and the appropriate starting point is the case of *In re Collins* (1905) 10 CCC 80 (BCSC), which is a very old Canadian case back in 1905 I think it was. That's at your authorities bundle at volume 6, page 1722. Now the reason why this case has assumed some prominence is because it's, as you will see shortly, it has been affirmed by the House of Lords in a case called *Norris*, and it has also been picked up in a Canadian Court of Appeal case called *Federal Republic of Germany v Schrieber* (2006) 206 CCC (3d) 339 (ONCA). So if we turn to page 1742 in that bundle, just brief background, the charge was a –

WINKELMANN CJ:

Actually it's morning tea time. Rather than starting you on this case I think it's time to take a break.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.46 AM

MR RAFTERY QC:

Your Honour I spoke to my learned friend and I just want to interpose at this stage. I was just a bit concerned by some of the things I was obtaining from my learned friend now because my understanding of the leave application was that leave had been given in relation to 24(2)(c) question 1, and the question 2, which is 24(2)(d) was limited solely to the issue of transposition and I have had the opportunity of looking at it in the morning break a bit more closely, at the roadmap, and this is some of the comments of my learned friend. It looked as though he was anticipating some greater exploration of the prima facie evidence under the 24(2)(d) exercise and the transposition one that I had envisaged and if that was what the Court was envisaging. You know what Mr Illingworth is doing, rather than what I am doing, I was just concerned that I need to just think accordingly slightly differently because I had looked at it as very well, 24(2)(d) is a transposition issue only. We have, regardless of the criticisms of Judge Dawson's judgment, we have had effectively a prima facie test satisfied in front of Judge Dawson, Justice Gilbert and the Court of Appeal and I thought that was an end of 24(2)(d) as far as this Court was concerned. But it did look as though, from what my learned friend was just saying before the break, that that might be a much larger exploration of prima facie test issues on an evidential level.

WINKELMANN CJ:

Is this not a judicial review point?

MR RAFTERY QC:

Well there is an element of that in the judicial review but in the judicial review, that the issues that now need to be explored, were given no attention at all in the case stated appeal so it was a more limited enquiry I considered at that stage. But if your Honour is actually envisaging it is quite a full exploration of the evidence, then I am contempt to be stand forewarned.

WINKELMANN CJ:

So what we had thought, because I think you highlighted this issue earlier in response to our list of issues, is that we would just hear from Mr Illingworth and we will perhaps come back to you before you commence because what you are saying is, you need to know before you make your submissions.

MR RAFTERY QC:

Certainly, I am grateful your Honour.

MR ILLINGWORTH QC:

So we are dealing now with roadmap C1.2 and we are looking at *In re Collins. In re Collins* is a particularly helpful case, we submit, in relation to these proceedings because it deals with a very special, fairly rare and quite tricky issue. The charge in that case was a charge of perjury in California and the question for the extradition Court in Canada was how to deal with that allegation, both at the classification stage and at the prima facie case stage. And if we go to page 1742 at the bottom paragraph. "It is contended by the application that on these authorities to which I have referred, you have to go through the conduct upon which the criminal charge is based and you have to come to the conclusion that his identical acts, if done in this country, would have constituted a crime in accordance with the law of Canada."

WINKELMANN CJ:

What page are you on, sorry?

MR ILLINGWORTH QC:

This is 1742 your Honour, volume 6 in the bundle of authorities. "Taken with new qualifications, we need not quarrel with that, but it is obvious from the outset that there must be some qualification."

GLAZEBROOK J:

I am sorry, I can't quite, oh right found you.

MR ILLINGWORTH QC:

So this is Justice Duff who later became Chief Justice of Canada and was also a Privy Councillor and this has received the approval of the House of Lords much, much later. So His Honour says, "Taken with due qualifications, we need not quarrel with that but it is obvious from the outset that there must be some qualification. In the first place the Treaty itself which after all is the controlling document in the case, speaks not of the acts of the accused but the evidence of criminality and it seems to me that the fair and natural way to apply that is this. You are to fasten your attention, not upon the adventitious circumstances", a phrase picked up by the House of Lords, "Connected with the conduct of the accused but upon the essence of his acts and their bearing upon the charge in question and if you find that his acts so regarded, furnish the component elements of the imputed offence according to the law of this country, then that requirement of the Treaty is complied with."

Now His Honour is referring to the Treaty as the primary document. Here, of course, it is the statute, then the Treaty, but in principle we submit there is no evidence. And then this further passage which is very seminal and astute. At page 1745, first main paragraph. "One may look at it in two ways. One may take it that one is to apply one's mind to the conditions existing in the demanding state or that one is to concede the accused and the acts of the accused transported to this country. In the first case one is to take the definition of the imputed crime in accordance with the law of Canada and apply that to the acts of the accused in the circumstances in which those acts took place. If, in those acts you find that the definition of the crime is satisfied, then you have the statutory and treaty requisites complied with."

So, His Honour is looking at both. "In the second case if you are to conceive the accused as pursuing the conduct in question in this country," which is our statutory approach, "Then along with him you are to transplant his environment and that environment must, I apprehend, include so far as relevant the local institutions of the demanding country, the laws effecting the legal powers and rights and fixing the legal character of the acts of the persons concerned, always excepting, of course, the law supplying the

definition of the crime which is charged." In other words, context is important. "Treating the matter in that way then what have we here? If my view of the law of California is correct, we have this. We have the fact that there was a proceeding pending in a Court of competent jurisdiction, the practice of which Court authorised a certain affidavit to be made in that proceeding. The affidavit was made and it contains a wilfully false statement of fact. In other words, in addition to all the other elements of perjury, you have an oath taken in a judicial proceeding before a Court of competent jurisdiction after a manner in which it was authorised by law. These facts make up the substance and essence of the criminality charge against the accused. If you transfer these facts to this country, you get the offence of perjury within the law of Canada."

And then on the last page, 1747, middle paragraph. "In this case, as I am satisfied that the extradition commissioner properly held that the evidence before him furnished a prima facie case that the oath was validly taken according to the law of California, it is not necessary I think to decide whether there was sufficient evidence that the ceremonial prescribed by the law of this country was punctiliously observed." And that finding was based on expert evidence of the law of California and you see that earlier in the judgment.

So, his Honour is dealing with the two stages. One on page 1745 which is the classification and then 1747, the prima facie case was established, and we say that is a template for extradition cases of a special character where the foreign law is not relevant for the purpose of assessing double criminality because we assume that the requesting state knows the law of its own country and that is a matter for the requesting state. As we'll see in a moment with the cases, the UK and Canadian cases all say that the foreign law is irrelevant in terms of that aspect of the double criminality principle. The requesting state can rely upon what is law in its own country but where the special situation arises about the context, and if that context involves a regime, industry standards, legal standards created by a foreign regime which result in industry practices, the context may be important, and what

Justice Duff is saying here is that sometimes the context is relevant and has to be brought into account along with the conduct of the person concerned.

WINKELMANN CJ:

Well, is he really saying that or is he really saying that you're really looking at the essence of what's going on?

MR ILLINGWORTH QC:

There are two points. One is you look at the essence of the criminality but the other is that if you need to look at the context in which that occurs then you bring in the overseas context with the conduct. I agreed with what your Honour said, it is the essence of the criminality, the substance of the criminality is of vital importance because that represents the comparator with the New Zealand offence.

WILLIAMS J:

What was the argument? That the oath in California was different?

MR ILLINGWORTH QC:

The argument was that the procedure for taking an oath in California was materially different from the procedure in Canada, it had to be exactly the same. Because it wasn't exactly the same –

WILLIAMS J:

What do you mean, "procedure"? Was this an affidavit or viva voce evidence?

MR ILLINGWORTH QC:

As I understand it, an affidavit, and there were all sorts –

WILLIAMS J:

Right, so it was about the formalities –

MR ILLINGWORTH QC:

Formalities, yes.

WILLIAMS J:

– of swearing an affidavit?

MR ILLINGWORTH QC:

Yes. It's all explained earlier on in the judgment and I don't profess to be able to give you – it's quite complex. I don't profess to be able to give you chapter and verse in it.

WILLIAMS J:

But not a particularly surprising result, you would have thought?

MR ILLINGWORTH QC:

No, not at all but the important point of principle is twofold, as I've just said, it's the essence and the substance of the criminality that has to be translated for classification purposes, and then when you're looking at whether the person did act in a way that was criminal for the purposes of the prima facie case test, the context needs to be brought into account.

WILLIAMS J:

So it stands for the proposition that you dispense with technicalities and look at the substance?

MR ILLINGWORTH QC:

Yes. You don't – there is a later Canadian case called *Canada (Justice) v Fischbacher* [2009] 3 SCR 170 and the *Norris* case that we'll come to, which is UK, both of those cases say you do not compare the components of the foreign offence with the components of the local offence, and so *Collins* stands for that principle as well. You're not –

WILLIAMS J:

I wasn't really talking about those technicalities. I'm really talking – this matching exercise is not a technical exercise, it's a substantive and essentialised exercise?

MR ILLINGWORTH QC:

That's exactly correct, your Honour, in our submission, with respect, yes, and we see that in the case that I am about to take you to which is *McVey* which is the leading Canadian case, 1992, Justice La Forest who was the author of an extradition textbook, Supreme Court of Canada, and in a nutshell, he says that the double criminality principle internationally works on the basis that you look at the underlying facts of the foreign charge, you transplant those into the local environment, in that case Canada, and you ask what charge would be – in fact in Canada, the charge is supplied by the Minister under an authority to proceed. You then look at the local charge and you ask whether that conduct would constitute an offence under that local charge.

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So if we go to 1748 – I'm sorry, I've just struck a glitch with my documents. I have to say that Justice La Forest's judgment is very lengthy and very detailed and it requires fairly concentrated reading to follow the detail of it through but there are some points that come through loud and clear and I'll just – so 1799, under the heading "Purpose of the hearing", "The function of the extradition hearing, then, as observed in *Argentina v Mellino* [1987] 1 SCR 536, is a modest one. That function is to determine whether there is sufficient evidence that a fugitive accused has committed an act in the requesting state that would, if committed in Canada, constitute a Canadian crime listed or described in the Treaty. In short, and I shall have more to say about this later, what the extradition judge must determine is whether the conduct of the accused would constitute a crime if it had been committed in this country. This function, if modest in scope, is critical to the liberty of the individual", and then there's reference to the case of *Canada v Schmidt* [1987] 1 SCR 500.

ELLEN FRANCE J:

Can I just check, it's quite clear in the statute there, isn't it, that double criminality is required?

MR ILLINGWORTH QC:

It's not different from our 24(2)(d), your Honour. Our 24(2)(d) is almost exactly the same wording. I can come back and show you that in the Canadian statute.

ELLEN FRANCE J:

They don't have any provisions similar to ours which has the subject to the Treaty provision?

MR ILLINGWORTH QC:

They do have that but they interpret that differently. They interpret that in a much more restrictive way than in *Cullinane* and Justice La Forest in another part of the judgment explains the history of that, that it's to do with the fact in Canada, it's treated as entirely to do with the fact that treaties were inherited from the UK and they had to make allowance for that. So…

WINKELMANN CJ:

But you're going to come back to us when you deal with the *Cullinane* thing, are you?

MR ILLINGWORTH QC:

Yes, I can do that.

WINKELMANN CJ:

I'm not directing you to, I'm saying that you're going to come back to that point when you deal with *Cullinane*?

ELLEN FRANCE J:

Yes.

MR ILLINGWORTH QC:

Yes, your Honour. So I'll just give Justice France a reference if I may. It's in volume 3 at page 824, section 18 of the legislation that was under consideration in *McVey*, I think it's in the judgment in any event.

ELLEN FRANCE J:

Yes, I've seen that.

MR ILLINGWORTH QC:

And so it is almost identical wording, in our submission, to 24(2)(d). So going back to *McVey* at 1801, and this is really a key point in the whole judgment, near the top of the page, second line, "The extradition judge in Canada, on the other hand, is concerned with whether the underlying facts of the charge would, prima facie, have constituted a crime listed in the Treaty if they had occurred in Canada. That is what is meant by saying that double criminality is conduct based. The courts of both countries deal with the offence under their own law, the law in which they are versed, but each must" –

WINKELMANN CJ:

What page, I'm sorry, I lost the thread?

MR ILLINGWORTH QC:

1801.

WINKELMANN CJ:

1801, sorry about that.

MR ILLINGWORTH QC:

So volume 6, 1801.

WINKELMANN CJ:

Got it, yes.

MR ILLINGWORTH QC:

1801 at top left-hand, "The extradition judge in Canada, on the other hand", have you got that, your Honour?

WINKELMANN CJ:

Yes.

MR ILLINGWORTH QC:

And so it's that first sentence which really encapsulates what we are submitting in this case. "The extradition Judge in Canada […] is concerned with whether the underlying facts of the charge would prima facie have constituted a crime listed in the Treaty if they had occurred in Canada." So it is a double banger, the Treaty and the law of Canada and his Honour makes it clear throughout the judgment, on numerous occasions throughout the judgment, that it has to fall within the scope of the Treaty and it has to constitute a crime under the law of Canada and that is based on the wording of section 18 under their legislation at that time. It has changed a couple of times since then, but the principle has remained the same. We have given you in the authorities' bundle, the three versions of the extradition legislation that apply in Canada with the relevant provisions set out and every time they have adopted this approach which has formed the foundation of extradition law in Canada since *McVey.* It is also important to recognise that *McVey* wasn't just a Canadian invention. Quite the opposite. It was based on a whole history of cases from the House of Lords and I think one from the Privy Council perhaps but all UK cases which we will identify and which your Honours have in the bundle in any event.

ELLEN FRANCE J:

Am I right that the main point of *McVey* was about the extent to which one needs to look at foreign law?

MR ILLINGWORTH QC:

Yes, your Honour. That is absolutely the main point of *McVey* and it is important to read *McVey* with that understanding. Justice La Forest demonstrates his expertise in extradition law at length and rightly so. It was a landmark decision and an important decision, but the key point was, does the extradition Court have to be satisfied that the matters charged were an offence in the requesting state. So, in this case that would translate into, does the District Court have to determine whether the matters charged in the superseding indictment whether they are justified in the requesting state. Is that an offence under the law of the requesting state? The answer to that is

no, definitely not and *McVey* explains that and demonstrates it. Now Justice Sopinka in his dissenting judgment takes a different view but your Honour is absolutely right with respect, that is the central feature of *McVey*, it is the reason why it went to the Supreme Court in the first place. Importantly though the principle that foreign law is irrelevant, which was established in *McVey* relates to the question of whether there is criminality in the requesting state and the Court says no it is not. But that does not deal with the *Collins* issue, the context issue.

WILLIAMS J:

So do you refer to section 3 as the construction cannon in the Canadian statute. Is that what you were referring to when you said to Justice France that the wording is the same?

MR ILLINGWORTH QC:

Oh section 18 Sir.

WILLIAMS J:

Section 18 was it?

MR ILLINGWORTH QC:

It is actually set out somewhere in *McVey*. I will get Ms Hyde to try and find that for me but the statute, the relevant excerpt from the statute is in the bundle, the reference I just gave. So coming back to our key point, his Honour is saying, this is the way extradition all works. You look at the conduct which underpins the foreign charge. You deduce that conduct and then you ask, would that conduct be an offence under the law.

WINKELMANN CJ:

So he sums it up by saying the Courts of both countries deal with the offence under their own law, the law in which they are versed, but each must ascertain whether under that law the facts support the charge.

MR ILLINGWORTH QC:

Correct.

WILLIAMS J:

But there is no subject to the Treaty in 18 is there?

MR ILLINGWORTH QC:

There is under the –

WILLIAMS J:

Section 3.

MR ILLINGWORTH QC:

Well under section 3, yes I think it is.

WILLIAMS J:

Well it does not say, it says arrangement for some interesting reason, but that is the equivalent of 11(1) is it. It is not 4(1) of our legislation.

MR ILLINGWORTH QC:

It is the equivalent – under our 1965 Act, it was made absolutely clear that the offence had to be one of the offences listed in the schedule and in the Treaty.

WILLIAMS J:

I am talking about the current…

MR ILLINGWORTH QC:

Yes, under the current section 4 we say that's the role performed by the words "subject to the Treaty". We say that –

WINKELMANN CJ:

I'm just anxious that we're moving off into *Cullinane* and Mr Boldt is not here, and also we're going to –

MR ILLINGWORTH QC:

I don't want to get into that.

WINKELMANN CJ:

Yes, well, we're going to lose a lot of time because you've still got quite a long way to go haven't you Mr Illingworth?

MR ILLINGWORTH QC:

Yes, so that's the *McVey* point. We then come to *Norris*, which is in volume 7 at page 2568. And if we go to page 2590 you'll see the heading the double criminality issue. Over the page at 65, this is a very powerful Bench in the House of Lords, including Sir Thomas Bingham, "before turning, as will be necessary, to a brief history of the English extradition law prior to the 2003 Act, particularly with regard to the so-called double criminality rule, it is useful to stand back from the detail and recognise the essential choice that the legislature makes in deciding just what the double criminality principle requires. It is possible to define the crimes for which extradition is to be sought and ordered (extradition crimes) in terms either of conduct or of the elements of the foreign offence. This is the fundamental choice. The court can be required to make the comparison and to look for the necessary correspondence either between the offence abroad (for which the accused's extradition is sought) and an offence here, or between the conduct alleged against the accused abroad and an offence here. For convenience these may be called respectively the offence test and the conduct test." And Their Lordships make it clear that they interpret their legislation in accordance with the conduct test not the offence test, and we accept that that is the appropriate approach here too.

WILLIAMS J:

What page sorry?

MR ILLINGWORTH QC:

Yes that's page 2591 of volume 7 your Honour. As we've set out in our written submissions, I won't repeat it, Their Lordships approve the *Collins*

approach and they also mention the case of *R (Al-Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69, [2002] 1 AC 556, Lord Millett's judgment in that case, which we can come to, on the concept of transposition. The important point for present purposes is that in *Norris* they agree with the *Collins* approach that you have to concentrate on the essence for classification purposes, you have to concentrate on the essence of the criminality, the substance of the criminality, translate that into the local jurisdiction and say what charge would be appropriate based on that conduct. So it's the conduct test as in *McVey* and Their Lordships approve *McVey* in relation to their jurisdiction as well.

The important point, though, about *Norris* is that it is a case that did not require a prima facie case assessment. There had been a number of changes to the extradition legislation in the UK and under the version that applied at this particular time there was no requirement for a prima facie case in relation to the United States. Only a classification assessment was all that was required.

But your Honours can consider the references to *Collins*, *Al-Fawwaz*, *Schrieber* and even the Australian case of *Riley,* they're all mentioned there and all of that is important. But for present purposes it's the conduct test and the essence of the criminality and they quote Justice Duff from *Collins* by saying you ignore the adventitious circumstances. In other words the periphery, the non-relevant periphery is ignored. That's not to exclude the totality principle, you look at the totality of the conduct, but without taking the Court through step by step in *Norris*, time just doesn't permit me to go through that in full detail.

WINKELMANN CJ:

But you rely on other material in there that you're not able to take us to, is that your point?

MR ILLINGWORTH QC:

That is the point your Honour. Then the final authority on this particular issue is the case that was included in the extra bundle that was handed up, *Tavormina*. It's under tab 4 of that bundle, and this is a Canadian case which focuses on this issue of, getting to the essence and the substance of the criminality and the foreign charge and if we turn to page 570 of that judgment, it doesn't have a bundle reference obviously, and his Honour makes this very astute obviously going down to just after "e", the full paragraph just after "e" in the margin. He says, "It is therefore proper to say that the double criminality rule is based on the fugitive's conduct, but it must be understood that the conduct in question is that conduct with which the fugitive is charged in the foreign accusation and certainly does not include all the acts of this individual which the evidence disclosed at the hearing. Otherwise, the objective pursued by the holding of an inquiry before the extradition judge is without sense and would consist of engaging in a useless exercise from the perspective of the protection of a fugitive's rights." So it's calibrating the comparison between the conduct that underpins the overseas charge, and the local charge that is used for classification purposes, which is important.

So our submission based on that is that to rely on alternative offence provisions, or to rely on domestic offence provisions, there must be a genuine equivalent between the underlying factual allegations for each charge in the US indictment and an offence provision relied upon as a counterpart provision under New Zealand law. You simply cannot push the conduct into a pigeonhole that doesn't properly relate to that conduct. You cannot force it.

So we're now down to C1.3 which is that we support Mr Mansfield's submissions concerning section 131 of the Copyright Act and his submissions on the Crimes Act and we don't need to repeat that.

At C1.4 we make the point that in this case there was no proper deposition under section 18(4). The deposition that required the conduct constituting the offence to be set out. In this case we set out in the roadmap the provisions that the US relies upon.

WINKELMANN CJ:

Can I just ask you how you say that that question about the deposition, yes, sorry, that's a prima facie case point there is it?

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MR ILLINGWORTH QC:

Well it's a point that goes to the whole evaluation of extradition offences under 24(2)(c). We've got a very broad question on 24(2)(c) as Mr Raftery has said, the question under (d) on transposition is narrower, but under 24(2)(c) the Court is required to consider what is the correct approach to classification of offences as extradition offences. If the extradition Court doesn't have a section 18(4) proper statement setting out the conduct that underpins the foreign charge, then the New Zealand Court has to ferret around in the indictment or possibly the ROC evidence to try and deduce the conduct that is supposed to underpin the foreign charge. We say that's not the way the statute is supposed to work. The requesting state has the obligation of identifying the conduct properly and clearly because it is the expert, supposedly, on its own law, so it should know what conduct underpins the foreign charge without mixing it up together with the components of the foreign offence. They are two separate things and the requesting state is supposed to do that job properly.

GLAZEBROOK J:

Can you just tell me – can we just look at the legislation again to see why you say that?

MR ILLINGWORTH QC:

Yes, your Honour. Indeed.

GLAZEBROOK J:

And then if it's not done but you can still find it, what the result is?

MR ILLINGWORTH QC:

Yes. So if we go back to volume 1 at page 270, we have the section 18 request for surrender, subsection (3), "The request must be accompanied by duly authenticated supporting documents", it's a mandatory requirement, I know that doesn't automatically mean invalidity these days but it is framed in a mandatory way, and then subsection (4) defines the supporting documents. They have to be duly authenticated supporting documents. And then we go down to (c), "in the case of any offence, a written deposition setting out", (ii) –

WINKELMANN CJ:

What section's that?

GLAZEBROOK J:

Sorry? It's here.

WINKELMANN CJ:

What section number?

GLAZEBROOK J:

Section 18(4)(c)(ii) is what you're relying on?

MR ILLINGWORTH QC:

That's correct, your Honour.

WINKELMANN CJ:

Sorry to interrupt you.

MR ILLINGWORTH QC:

So the requesting state is required to fulfil that obligation and the United States in this case has vacillated in terms of what its position is. There is no deposition that on its face complies with that requirement so at one stage, the US has relied upon the indictment and said that you can ascertain the conduct from the indictment. It's fair to acknowledge that Mr Prabhu's affidavit, he's the prosecutor, signs an affidavit and exhibits the

indictment to that affidavit so it is part of a deposition in one sense but we say that's not what section 18(4)(c) is about. It's about giving the local –

GLAZEBROOK J:

Do you say it's sort of like a summary of facts that we would have in our jurisdiction?

MR ILLINGWORTH QC:

Absolutely, yes.

GLAZEBROOK J:

So the indictment that sets out the charge, you say it has to be accompanied by a summary of facts?

MR ILLINGWORTH QC:

It should be, yes.

GLAZEBROOK J:

Sorry, translating into a New Zealand sense.

WINKELMANN CJ:

The United States refer us to cases where the Courts have gone past the indictment, don't they, to find the conduct alleged?

MR ILLINGWORTH QC:

Yes. We however have a very specific requirement in our statute and we say that simply wasn't complied with.

ELLEN FRANCE J:

You do have a description and the penalty and the conduct, it's just in a different form?

MR ILLINGWORTH QC:

Yes, but the intention of this provision, in our submission, that the requesting state is supposed to give the extradition Court on a plate a description of the conduct that underpins the offence instead of –

WINKELMANN CJ:

So Mr Illingworth, I think we'd be assisted if you could make this a little bit more concrete. So what are you saying is the deficiency in the indictment? If you take us to…

GLAZEBROOK J:

Yes, perhaps if we go to the documents, I think it would help us as well.

WINKELMANN CJ:

Because I understand this to be an important submission for you and I think you might need to put more detail around it.

MR ILLINGWORTH QC:

Can I ask for the opportunity to do that after the lunch break, please, your Honour?

WINKELMANN CJ:

Yes.

MR ILLINGWORTH QC:

Instead of messing around now –

WINKELMANN CJ:

So we'll Post-it note that as something you are coming back to?

MR ILLINGWORTH QC:

Yes.

GLAZEBROOK J:

And you will also explain when you come back to what the effect of that is?

MR ILLINGWORTH QC:

I will, your Honour.

GLAZEBROOK J:

And maybe how that relates to the ROC as well at a…

MR ILLINGWORTH QC:

Yes, I can respond to that straight away. Section 25 makes the ROC admissible for the purposes of the 24(2)(d) assessment. It doesn't make the ROC available for the purposes of section 18(4) and yet – well, if we go to – in the District –

GLAZEBROOK J:

But if you can find the conduct constituting the offence in the ROC, does it say you can't – I suppose that's what I'm saying in terms of what's the result of not doing this. So if they don't do this but at a hearing, a whole pile of information is given doing it, do you say the Court can't look at it?

MR ILLINGWORTH QC:

No, I'm saying it confuses the whole process because you don't have – the statement of facts that your Honour referred to a moment ago represents the accusation of wrongful conduct for New Zealand purposes. If –

GLAZEBROOK J:

Well, I would have thought if the indictment itself represents the assertion that an offence has been committed offshore.

MR ILLINGWORTH QC:

Yes, but if we just go back to where we were a moment ago in *McVey*, the Judge is saying that it's the underlying conduct that we need to look at. Who's –

GLAZEBROOK J:

But why don't you do that in the course of a hearing? What's wrong with doing it in the course of a hearing?

MR ILLINGWORTH QC:

Because section 18(4) –

GLAZEBROOK J:

What you seem to be saying is "If you don't do this right at the start, you can't start the process and it can't be fixed up later" –

MR ILLINGWORTH QC:

No, I'm not – no.

GLAZEBROOK J:

Maybe I've got the submission wrong.

MR ILLINGWORTH QC:

No, I'm not taking it to that extreme. What I'm saying, your Honour, is that it confuses the whole process and it has confused the process here, because in the District Court, the US submitted that Article X of the Treaty required them to provide a statement of the facts of the case, which is a very similar requirement, and that requirement was met by the superseding indictment. The facts of the case were set out in the indictment. They submitted that section 18 was complied with in this case because the US is an exempted country and the evidence of the conduct constituting the offences is in the ROC. So they relied upon the indictment and the ROC in the District Court. We say that that's not – you can say technically correct but it does – we say whether it's a technicality or not is not the issue, it's the confusion that it causes when you don't know – first of all, the Court's got to know what the conduct is that's relied upon. The requesting state shouldn't be able to duck and dive around and say "Here's some conduct here and here's some conduct there and we can find it in 100 pages or a couple of hundred pages of the ROC" –

GLAZEBROOK J:

So it's not a jurisdictional bar, it just was not best practice and in practice, in this case, it's led the District Court into error, is that…

MR ILLINGWORTH QC:

That's right. That's correct, your Honour. The effect of the original US approach, we say, was to conflate the accusation with the evidence produced to establish the accusation, and in a moment, I'll give you an example of how those two things got intermingled together or muddled up in the District Court judgment. The effect of at least a confusion of the 24(2)(c) stage, the 18(4) statement is in effect the accusation for New Zealand purposes. The ROC evidence is supposed to be the evidence tendered to support the accusation to the prima facie case standard along with any other evidence and to allow the ROC to be used as both the accusation and the evidence short-circuits the statutory scheme.

GLAZEBROOK J:

Well, again, you're saying it short-circuits the statutory scheme rather than it's a jurisdictional –

MR ILLINGWORTH QC:

Yes, that's correct..

GLAZEBROOK J:

But if it short-circuits the statutory scheme, so what, if you actually can from those documents work out what the conduct is and then do the proper exercise?

MR ILLINGWORTH QC:

That may well be right, your Honour, but in this case, we say it has caused confusion.

GLAZEBROOK J:

So it just went wrong in this case because not only was it confused in the way the US put the case, that confusion carried through to the District Court?

MR ILLINGWORTH QC:

That's correct, your Honour. In their submissions in this Court, the US now says that the superseding indictment can be used to identify the conduct and that's paragraph 45 of their submissions. The problem with that is that it forces the Court to try to distinguish between the legal components of the foreign charge and the underpinning allegations of fact. Now I've made enough of that point. I'll move on.

GLAZEBROOK J:

Yes, although to be fair if we were doing it here we'd be confusing the two as well, because we would be looking at the conduct in terms of the underlying elements of the offence, wouldn't we?

MR ILLINGWORTH QC:

Yes, that's right your Honour.

GLAZEBROOK J:

I mean we'd say this person died because of this and…

MR ILLINGWORTH QC:

Yes, yes, so we say Justice La Forest was right in *McVey* to explain how it should be done, and our statute follows that –

GLAZEBROOK J:

Well we couldn't really expect them to do that because there's an offence in the US, it has some elements, they have conduct that's required to meet those. They're not going to be saying, oh well let's pretend there isn't an offence and let's just describe the conduct that in some vacuum we think is criminal. You can't expect anybody to split that up, can you? In any realistic

sense because they can only do it by reference to what in their jurisdiction are the elements of the offence, because otherwise it wouldn't be an offence.

MR ILLINGWORTH QC:

Yes, but there is a –

GLAZEBROOK J:

You can't just say someone died.

MR ILLINGWORTH QC:

No –

GLAZEBROOK J:

For instance.

MR ILLINGWORTH QC:

And to be fair Mr Prabhu in his affidavit sets out the elements of the foreign offence. He says, this is what we're required to prove under our legislation. But in terms of this statement of facts he just says here's the ROC.

WINKELMANN CJ:

Is your point that because this wasn't done here, there has been a tendency for the District Court and the High Court and the Court of Appeal to go fishing around in the ROC to make this all fit into different provisions?

MR ILLINGWORTH QC:

Exactly your Honour. That's it.

WINKELMANN CJ:

Well do you have any cases that can help us with saying that you can't take that approach because Justice La Forest's judgment doesn't really seem to go that far.

MR ILLINGWORTH QC:

No, I agree that it doesn't. What I'm saying is that under our legislation it's been made very clear as to what is supposed to happen, it didn't happen, and as I said in response to Her Honour Justice Glazebrook, it's caused confusion in this case. I'm not taking it to the point of saying it's a jurisdictional issue.

So if we accept that the role of the Court is to identify the essence of the criminality, and to look at that under our law to see what offences would be made out, we say that copyright is at the heart of the allegations that are made against the appellants, and that infringement of copyright is at the very heart of every one of those charges, and we say that the Courts below have not done a focused analysis to consider that issue properly.

So looking at, we're now at C1.7(a), in the District Court, the District Court judgment contains an outline of the factual allegations that are made against Megaupload and this is in volume 1 of the documents bundle.

GLAZEBROOK J:

Sorry, do you mean the case on appeal?

MR ILLINGWORTH QC:

The judgments and pleadings, the purple covered one, at page 12. So going from 32 to 34, in essence his Honour Judge Dawson is setting out the fact that you have a website, you have people uploading files to the website. The system allows those files to be shared with other people and some of the files that have been uploaded are alleged to be copyright infringing and then users share the files with other people, that constitutes allegedly an infringement of copyright. Now we know that his Honour took the whole record of case at face value, including the assertions about copyright and copyright infringement. That was held to be wrong by Justice Gilbert, but if you read through 32 to 34 the methodology that was being employed by the Megaupload system shows very clearly that you've got client users who are uploading files and then sharing them with others. Now if we assume for the moment that they are primary offenders, and just assuming for a moment that

that could arguably constitute breach of copyright, even in a criminal way, how do you analyse that from the point of view of New Zealand law when what you have in count 2 is a conspiracy to commit an offence because under section 310 of the Crimes Act it has to be a conspiracy to commit an offence. So we say that reduced to its essence, based on those findings in the judgment, and looking at the substance of the underlying conduct rather than the form of the charge, the appellants are accused in count 2 of conspiring to provide or agreeing to provide machinery which enabled other people to share digital files, where to do so could infringe copyright. Now we're just making all sorts of assumptions here about, we're not dealing with the evidence, we're only dealing with the allegations. In essence, and in substance, this allegation represents a form of secondary liability under New Zealand law. It's obviously an offence to aid and abet the commission of an offence but that can only work where the prosecution can establish the commission of a specific offence by an identified principal offender. And this Court has had to deal with secondary liability in the case involving the Russian, the overseas conduct, I think it's, sorry, I've lost the reference to that at the moment, but is it *LM*…

GLAZEBROOK J:

Isn't the allegation more than that, that this was actually set up specifically to breach copyright and that a lot of money was made out of that?

MR ILLINGWORTH QC:

Yes but –

GLAZEBROOK J:

Which in that sense is a primary allegation, isn't it, that you actually set it up specifically for those people to undertake that, and that was the whole point of the setting up of the website?

MR ILLINGWORTH QC:

Well if that's the case then every ISP, Internet service provider, around the world could be said to be doing the same thing.

GLAZEBROOK J:

Well that's why you have safe harbour provisions and things, isn't it?

WINKELMANN CJ:

But in the United States cases that this ISP provider was not a dumb pipe, and that it knew about the content and it was, in fact, itself breaching copyright when it – because the system it controlled enabled a transmission, communication, copying, depending on how you view the copyright scheme.

MR ILLINGWORTH QC:

Well the point your Honour is that the evidence of an unlawful conspiracy has to be drawn from proven facts.

GLAZEBROOK J:

We're just trying to work out the conduct at the moment. You're jumping into the second part which you've told us not to do.

MR ILLINGWORTH QC:

Yes, that's true, I accept that your Honour. If the allegation is raised up to that level that Her Honour the Chief Justice has just mentioned, it's not just providing machinery for other people, it's actually creating a machine for breaching copyright.

WINKELMANN CJ:

That does breach copyright.

MR ILLINGWORTH QC:

It does breach –

GLAZEBROOK J:

And that, as I understand it, is basically the allegation, isn't it?

MR ILLINGWORTH QC:

Well the prima facie case test has to be, I'll come to that later, but the prima facie case test has to be based on that.

GLAZEBROOK J:

Yes, we're just trying to isolate the conduct at the moment, and I was just saying I think you're defining it too narrowly.

MR ILLINGWORTH QC:

Well that's a matter for the extradition court to decide, and it can be pitched at that level. The accusation can be made more pointedly but then it has to be proved and –

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WINKELMANN CJ:

So let's stay in the first classification point because why I said that to you, Mr Illingworth, following up on what Justice Glazebrook had said, was because that is how the United States has put their case. They're saying we're not saying that the appellants were secondary parties, we're saying that they are principal offenders.

MR ILLINGWORTH QC:

Yes, and – well, I'll pass on from that submission because it really comes down to that section 24(2)(d). If you're going to pitch the allegation that high then you have to prove it and you can't prove it by conclusory assertions.

So I won't try to develop that point any further. I'll simply leave it on the basis that we're dealing with the more highly-pitched allegation. If that's the case then the question becomes "How does that get classified for New Zealand purposes?" and the only way that that could be classified is if it's a conspiracy to breach section 131 of the Copyright Act. Mr Mansfield is going to address you on that and I'm –

GLAZEBROOK J:

Well, it may be, or it may be just very simply be a conspiracy to commit fraud, ie to deprive the rightful owners of the fruits of their copyright.

MR ILLINGWORTH QC:

Under?

GLAZEBROOK J:

Just under the Crimes Act.

MR ILLINGWORTH QC:

But that requires reference to a particular –

GLAZEBROOK J:

Well, you would have to reference the Copyright Act to assert that there had been copyright breached, I suppose.

MR ILLINGWORTH QC:

Yes, that's our point, that you can make that allegation and you can try and fit it into – the New Zealand offence provisions that are relied upon by the US are sections 228, 240, and 249 as the primary ones, and we say the allegations of the kind that your Honour's just mentioned don't fit properly within those allegations. They all –

WINKELMANN CJ:

Can you just remind me what those provisions are?

MR ILLINGWORTH QC:

2 –

GLAZEBROOK J:

I wasn't presupposing they did. I was just saying that it may not be just totally copyright.

MR ILLINGWORTH QC:

Well, Mr Mansfield will be arguing that –

GLAZEBROOK J:

And we're waiting for that, sorry, yes.

MR ILLINGWORTH QC:

– you can't go there but if you –

GLAZEBROOK J:

No, I understand that argument as well, I understand the code argument. Sorry, that's probably a shorthand but…

MR ILLINGWORTH QC:

Yes, specialisation argument?

GLAZEBROOK J:

Yes.

MR ILLINGWORTH QC:

Or specialist legislation argument, but we say that when you look at those provisions, they require particular types of evidence and especially when you get to the 24(2)(d) analysis, you just can't get there on the basis of conclusory assertions about copyright.

ELLEN FRANCE J:

Sorry, can I just check, the main reason why you say you can't get there is because of the proof in relation to copyright infringement, is that right?

MR ILLINGWORTH QC:

Well, two stages, your Honour. First of all, we say that it's putting the conduct into a pigeonhole that was never intended to deal with that kind of conduct. That overlaps to some extent with Mr Mansfield's argument. So you need to look at 228, 240, 249 and say "Is this a real match-up in the *Norris* sense?" And that's why we've been through all that *Norris*, *Collins* essence of the criminality point, to enable the Court to see what the test should be. We say that reaching the conclusion that the underlying conduct matches up with those offence provisions is wrong and that the Courts below shouldn't have used those provisions. But then if we're wrong on that, 24(2)(d).

WINKELMANN CJ:

Can I ask you about the shoehorning thing? Because you seem to concede that it could be accessing a computer for a dishonest purpose?

MR ILLINGWORTH QC:

No, we're not conceding that, your Honour. What we are saying is –

GLAZEBROOK J:

Where have we got those sections, just so that I'm on the same page?

WINKELMANN CJ:

They're in the first, volume 1 of the authorities.

GLAZEBROOK J:

Volume 1 of the authorities.

WINKELMANN CJ:

Page 401.

GLAZEBROOK J:

Thank you.

MR ILLINGWORTH QC:

Sorry, I just need to reorganise.

WINKELMANN CJ:

Because I did have a question in my mind as to whether this was conduct which did obviously fall within this provision even as characterised by the United States, but you don't really address your submissions to that?

MR ILLINGWORTH QC:

Yes, so in volume 1, the pink cover…

WINKELMANN CJ:

It's at page 401.

MR ILLINGWORTH QC:

Yes, but if we just go back to 393, your Honour.

WINKELMANN CJ:

Sorry?

GLAZEBROOK J:

393, 228.

MR ILLINGWORTH QC:

So we're starting with section 228. There is – we actually need to go back to 391, sorry. 391 has a definition section –

WINKELMANN CJ:

Clause 391?

MR ILLINGWORTH QC:

Page 391, section 217. "In this Part, unless the context otherwise requires", and then there's a definition of dishonesty. The Courts below have relied upon that. We then go to 228 which is dishonestly taking or using a document, a person "with intent to obtain any property, service, pecuniary advantage, or valuable consideration, dishonestly and without claim of right, takes or obtains any document; or dishonestly and without claim of right, uses or attempts to use any document", and then there are similar provisions in subsection (2). But subsection (2) wouldn't apply as a deemed offence because it's only punishable by three years' imprisonment, is that right?

GLAZEBROOK J:

Yes.

MR ILLINGWORTH QC:

So the first category is subsection (1) and we say that conspiring to infringe copyright doesn't fit appropriately within section 228(1). In other words, the conduct is being shoehorned inappropriately into that pigeonhole.

ELLEN FRANCE J:

So just explain why you say it doesn't fit?

MR ILLINGWORTH QC:

Well, an allegation that parties agreed in a conspiracy sense under New Zealand law has to be an agreement to commit an offence under section 310 of the Crimes Act. The conduct relied upon by the United States would have to be a conspiracy to act dishonestly in the legislative sense as a result of which they either took or obtained documents. It's just difficult to see how that works in relation to the underlying conduct for the US charge. That's our submission.

GLAZEBROOK J:

Well if Justice France had written a novel and has 50 copies of it on her computer and I know it's her novel and I know it's copyrighted and I take it and I print it up and I sit on the street corner and sell it for $10, haven't I dishonestly and without claim of right taken a document and used it?

MR ILLINGWORTH QC:

Yes, but the problem with that analogy is that it's not a correct analogy in relation to what happened on the –

GLAZEBROOK J:

That may or may not be but let's just get it at that level first. So if I do that, I know it's copyrighted, I also know it's definitely not mine, and I sit on the street corner and sell it for $10?

MR ILLINGWORTH QC:

And subject – I don't want to say anything to cut across Mr Mansfield's argument, he's going to say you can't do that for other reasons, but if he's wrong on that and there are some situations in which a copyright infringement might be brought within that category, I accept that, your Honour…

GLAZEBROOK J:

So if Justice Winkelmann and I decide that we'll hack into Justice France's computer to take the document…

MR ILLINGWORTH QC:

To take the document? The problem is that that's just not what happened.

GLAZEBROOK J:

You're back to secondary liability again.

WINKELMANN CJ:

Are you back to your argument – is that really your secondary liability argument?

WILLIAMS J:

No isn't the analogue –

WINKELMANN CJ:

Can I just finish. Does your argument fall apart if it is accepted that the appellants were directly infringing the copyright? So would it fall within section 228(1) in those circumstances?

MR ILLINGWORTH QC:

Well again, Mr Mansfield's argument comes first but there would have to be a wrongful taking of the document or a wrongful obtaining of the document and there has to be –

GLAZEBROOK J:

Well a computer system was set up specifically to do that, is the allegation, the broader allegation.

MR ILLINGWORTH QC:

And I appreciate that and I am addressing the argument on the basis of the agreed assumption, which is denied, but if a computer system is set up to

enable people to upload documents, irrespective of whether they are copyright compliant or not, and it's part of the agreement to milk that system, you still don't get a neat fit under section 228(1) in my submissions.

WINKELMANN CJ:

So you are saying it is not a taking or obtaining?

MR ILLINGWORTH QC:

Yes.

WINKELMANN CJ:

Your argument turns on it not being a taking or an obtaining?

O'REGAN J:

Or using presumably?

WILLIAMS J:

Well I guess the correct analogue is Justice Glazebrook prints out 10 copies and agrees with me that I will bring my wheelbarrow to the door of the Supreme Court and I will convey them to the street corner, knowing that she is going to be selling them and her and I have some sort of agreement that we will share the proceedings.

MR ILLINGWORTH QC:

And that brings into play, the client of the system. It is not a conspiracy to commit an offence. This is where we get into the secondary liability ability.

WILLIAMS J:

You are talking about the section 310 there, I am talking about 228. You are using the document for the purpose of pecuniary advantage if you have got the wheelbarrow and you are pushing it to the corner where Justice Glazebrook will sell the books.

MR ILLINGWORTH QC:

Well yes but the problem is that this is not a wheelbarrow. The wheelbarrow is not a true analogy.

WILLIAMS J:

Well it kind of is, because that is what you are saying, you have got a dumb pipe, it's not your fault.

MR ILLINGWORTH QC:

No. The dump pipe description is the US description. We are not pushing the argument that this is a dumb pipe. The Megaupload business had records of what was going on but if you read what his Honour the District Court Judge says. He describes 60 million transactions and over a billion visitors to the website. This is not a situation where you've got a wheelbarrow with the books in it and I'm –

WILLIAMS J:

No, you've got 60 million wheelbarrows.

MR ILLINGWORTH QC:

Well, no, you're dealing with a situation where the website, as his Honour recorded in the judgment, is copyright agnostic. It's a dual use technology. It's the clients who are doing the infringement. Now that's the secondary liability argument.

WINKELMANN CJ:

Yes, can I just clarify. You don't just have a secondary liability argument here, do you, which I think I got from you before. You say there is a separate argument, which is what you're trying to have us understand, and I think we might be struggling with it. Your point is that whatever is going on it is not a taking by the appellants.

MR ILLINGWORTH QC:

That's correct.

WINKELMANN CJ:

It is not a taking or obtaining?

MR ILLINGWORTH QC:

That's correct, or a using, as –

WINKELMANN CJ:

And why is it not? Why is it not, because they're just passive recipients of these things, of the copies?

MR ILLINGWORTH QC:

They are providing the photocopier. Someone else comes along and uses the photocopier. They are not saying please use our photocopier for illegal purposes.

GLAZEBROOK J:

And if they were saying please use our photocopier for illegal purposes, which I understand is the allegation, please make sure you upload as much copyrighted material as possible because then we get extra advertising revenue et cetera.

MR ILLINGWORTH QC:

Then, subject to Mr Mansfield's argument, you might be able to get into 228(1) situation, but it's still not a good fit. You're not taking a document, you're not obtaining a document in the sense that is used in that provision.

WINKELMANN CJ:

Yes well I think that might be to do with how I'm understanding your argument because every time you go to put it you actually stray off into another one. You're saying they are just passive recipients of copies.

MR ILLINGWORTH QC:

They provide, sorry your Honour?

WINKELMANN CJ:

Just passive recipients of the copies. They do not do anything active to take or obtain?

MR ILLINGWORTH QC:

Yes.

WINKELMANN CJ:

Is that really the sum total of it?

MR ILLINGWORTH QC:

Yes your Honour.

ELLEN FRANCE J:

Well then you would have to deal with things like the argument made about rewards and so on.

MR ILLINGWORTH QC:

Yes, and again –

ELLEN FRANCE J:

So which go to saying they're not just passive.

MR ILLINGWORTH QC:

They're not just passive in terms of generating traffic on their website, that's very clear. They are trying to generate as much traffic as they can because that's good for business, but they're not saying, you get rewards for breaching copyright. You get rewards for generating traffic and that's, we say it has to be looked at on the secondary liability basis because they're not actually doing anything that encourages people in any direct way to infringe copyright.

WILLIAMS J:

What if you get rewards whether you're breaching copyright or not?

MR ILLINGWORTH QC:

Well certainly under the US law that would not even begin to fly, and we say it shouldn't fly here either, because what they require is red flag knowledge of –

WILLIAMS J:

I understand that, but they say you get rewards whether you're breaching copyright or not, and we know most of you are.

MR ILLINGWORTH QC:

And in our submission Sir that is not a form of conduct that fits within section 228.

WILLIAMS J:

Okay.

MR ILLINGWORTH QC:

If we go on to obtaining by deception, or causing loss by deception under section 240, we say there's no deception. This is all being done in the open. The people who claim copyright can see exactly what's going on in this, on this website. They can see just as much as anyone else what's going on. There's no concealment, there's no deception and that doesn't fit.

O'REGAN J:

But I thought the whole idea of not in a search engine was so that they couldn't find in the website?

MR ILLINGWORTH QC:

No Sir. The way that people got to know about what was on, the URLs, if it gave them access to various items on the website, was never done by Megaupload itself. It was done, certainly there were third party websites that listed URLs that could find various items of data on the website, but there was no search engine and that is because it was never the setup of this website to make it a situation where a person from the outside could go onto the Megaupload site and search through it and find things.

GLAZEBROOK J:

Why do you say that the copyright owners could find what was on the site then? Or did I just misunderstand you?

MR ILLINGWORTH QC:

Because they could go to the third party sites that had these items listed and see exactly what was happening.

WINKELMANN CJ:

Just like everybody else could.

MR ILLINGWORTH QC:

Just like everybody else could but also Megaupload provided an abuse tool, a programme that could enable people who claimed to own copyright to go onto the website and get rid of URLs that they said, the links that they said were unlawful. I think –

GLAZEBROOK J:

But only once they'd known they were there, is my understanding. Well the abuse tool didn't allow them to go and say, I'm going to see if my film, you know, *Woodenhead* is actually on that website.

MR ILLINGWORTH QC:

That's correct.

GLAZEBROOK J:

So you had to have gone somewhere, found that *Woodenhead* was purportedly on there and then the abuse tool would work, but only as I understand it for the copies related to that particular film.

MR ILLINGWORTH QC:

Yes, but if you go onto Google and do a search for *Woodenhead* and find a third party site that gives you a URL, then you as the alleged owner of the

copyright can take that up with Megaupload, and they did, and used the abuse tool to get rid of the links.

WINKELMANN CJ:
Right.

MR ILLINGWORTH QC:
Time's up?

WINKELMANN CJ:
Yes, when you come back from lunch you're going to have reflected more on how you deal with the alternative scenario should we disagree with the Court of Appeal on *Cullinane* and you're also going to come back to us in relation to why you say Mr Prabhu's annexation of the indictment is not sufficient for the purposes of section 18(4) of the Extradition Act.

MR ILLINGWORTH QC:
Yes your Honour. I will.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.16 PM

MR ILLINGWORTH QC:
So coming back on the *Cullinane* issue, the question is whether the US can rely on first of all Article 216 which is the conspiracy to defraud provision in the Treaty for count 2, and Article 219 which the US relies upon for the money laundering allegation, and the question is whether those two pathways can be relied upon without any double criminality assessment.

WINKELMANN CJ:
So hang on, when you say you're coming back to *Cullinane*, what are you coming back to on *Cullinane*, sorry?

MR ILLINGWORTH QC:

Your Honour's question to me before lunch as to where we go with this. I'm just saying those are the two pathways that are raised. We can't fairly address those issues. It wouldn't be fair to Mr Boldt to address those issues while he's not here and so we propose, and Mr Raftery, I understand, agrees, that the first point is that Mr Boldt goes last in the US submissions. We can reply to that and our reply should include why the Court of Appeal was right and then secondly what happens if the Court of Appeal was wrong, and then Mr Boldt gets a brief right of reply on those two issues alone, and my understanding is that that's an agreed position, if the Court approves, of course.

WILLIAMS J:

That's fine.

WINKELMANN CJ:

We're content with that.

MR ILLINGWORTH QC:

Thank you, your Honour, and then the second point I needed to come back on was the section 18 point. What is the consequence of the US not complying literally with section 18(4)? So there are three points that answer to that. First is –

WINKELMANN CJ:

Sorry, hang on, was that the point you were coming back on? No, that wasn't the point you were coming back. The point we're asking you to come back on was to give some concrete…

MR ILLINGWORTH QC:

I am going to do that too. I'm just going to…

WINKELMANN CJ:

So you're having another go on the section 18 point then?

MR ILLINGWORTH QC:

No, I'm just simply showing how that was applied in relation to counts 9 to 13.

WINKELMANN CJ:

Right.

MR ILLINGWORTH QC:

The circularity can be demonstrated by the way the District Court Judge dealt with it. But if I may, your Honour, the three points are these. If the indictment is used as the statement of fact, the Court has to separate the facts from the components of the foreign offence, and that's not something that the local Judge should have to do. Second, if the ROC –

GLAZEBROOK J:

You perhaps better slow down.

WILLIAMS J:

Woo, woo.

GLAZEBROOK J:

So if the indictment is used as a –

MR ILLINGWORTH QC:

Statement of facts?

GLAZEBROOK J:

As a statement of facts or whatever the statutory wording is –

WINKELMANN CJ:

The Court has to separate the essential facts, the conduct, the essential conduct, is it?

MR ILLINGWORTH QC:

Yes, your Honour, from the components of the foreign offence, and that's not something that the local Judge should have to do. If the record of case is used –

WINKELMANN CJ:

Just pause, thanks. Yes.

MR ILLINGWORTH QC:

If the record of case is used as the accusation and the evidence, the process becomes circular and I'll demonstrate that in just a moment. But either way, there is a fairness issue because the defendant doesn't get fair notice of the conduct alleged for each individual count in the foreign indictment in order to get a fair opportunity to respond. In other words, confronted with the whole indictment, the whole ROC, and we are supposed to figure out as well as the Court the essential conduct for each count.

WILLIAMS J:

So you're saying there's a step required which is to plead the essential conduct?

MR ILLINGWORTH QC:

That's right, and that's what section 18(4) requires.

GLAZEBROOK J:

The first two seem a bit sort of contradictory to me because if you don't do it in relation to the components of the offence then you're doing it in a vacuum, and then if you say you have to say for each offence what the conduct alleged is for then I don't see how you can do it other than in relation to the elements of the offence.

MR ILLINGWORTH QC:

I agree with your Honour, with respect. If we look at Mr Prabhu's affidavit, he does the first step. He says "These are things we have to prove under our

law" but he doesn't go on to identify the conduct that constitutes the offence for the purposes of the local Judge knowing what the conduct is.

GLAZEBROOK J:

Surely you'd say if he'd done it properly, "These are the elements I have to prove: First, X and the conduct alleged under X is Y". So you wouldn't be separating out the conduct from the elements of the offence at all.

MR ILLINGWORTH QC:

Well, then that proposition undermines, with respect, the whole basis on which the conduct test has been formulated in Canada and the UK.

GLAZEBROOK J:

Well, no, it doesn't, because it says "What you say is this is what the conduct is that's alleged and this is how it relates to the offence" and then when it gets somewhere else, they say "What's the essential conduct and is that an offence under our law?" So that their expertise in their own law is being applied to the conduct that's alleged by the requesting state.

MR ILLINGWORTH QC:

I'm happy to leave my submission as it stands at the moment. It is that the statute requires the conduct to be specified and that hasn't been done and it has led to confusion. Can I take you to that proposition now?

WINKELMANN CJ:

So how many points are you making here?

GLAZEBROOK J:

I thought there were three because that's only two.

WINKELMANN CJ:

I thought so too. So you've made the point –

MR ILLINGWORTH QC:

The third point was the fairness point as Justice Williams has said.

WINKELMANN CJ:

It's circular and it's unfair?

MR ILLINGWORTH QC:

Yes, correct.

WINKELMANN CJ:

So the second point's circular and the third point's unfair?

MR ILLINGWORTH QC:

Correct, your Honour. If we go to counts 9 to 13 which is at 1.7C of the roadmap, I'll just quickly take you through what happened in the District Court. If you go to the District Court judgment…

GLAZEBROOK J:

I thought you were going to show us the indictment or is this a shortcut way of doing –

MR ILLINGWORTH QC:

This is a shortcut way. They're all charges of wire fraud and it's self-contained in the judgment. If the Court would go to page 252, if we start with paragraph 671, the Judge says that "The evidence in the ROC alleges a plan to deceive copyright owners". So he's saying the –

GLAZEBROOK J:

Sorry, I think I might be in the wrong place.

MR ILLINGWORTH QC:

Paragraph 671, page 252 of the judgment.

GLAZEBROOK J:

So you're not quoting from that?

MR ILLINGWORTH QC:

No, I'm just showing you what the judge has said, "The evidence in the ROC alleges a plan to deceive copyright owners", last line of 671. So his Honour is treating the evidence in the ROC as an allegation. The alleged conduct is then identified by reference to extracts from the evidence in the ROC, so you see that below 671. His Honour then says at 677 that "The alleged conduct in counts 9 to 13 is sufficient to establish a prima facie case against the respondents." So the allegation becomes the evidence which establishes a prima facie case. This is an example of how using the ROC as both the accusation and the evidence is circular and it short-circuits the statutory process. The accusation becomes the evidence and vice versa. And if the conduct-only test is applied under section 24(2)(d) as it was in the High Court, the prima facie case test is automatically satisfied by the accusation. That's a 24(2)(d) point but I've just tried to show that short-circuits the process.

But in any event, the allegation in each case as found by the District Court Judge was that Megaupload caused a communication to be sent from a computer server to a representative of a copyright holder. This was done in response to a takedown request. The takedown request included a leak to a so-called copyrighted film. The communication was an automated online response. The automated communications from Megaupload referred to a file or files being removed from the system, and the communication was said to be false because Megaupload only disabled the specific URL link that had been identified and failed to disable access to the underlying copyright-infringing material or remove the file from the server.

So the accusation in each case that there was a takedown request by someone who is alleged to be a copyright holder, the content of the request hasn't been disclosed so we don't know what was requested, we know that the notice identified a URL link. In response, it's common ground that Megaupload disabled the link which is exactly what had been requested, and under the US legislation, there are requirements for a valid takedown notice, we don't know if it was a valid notice, and how a URL link is disabled is not identified in the evidence. Logically, it must involve deleting or modifying data.

That could be by way of deleting a file in the system. The allegedly fraudulent communication is sent automatically by a computer –

GLAZEBROOK J:

Are you mixing up again the evidence in the prima facie case and the – because I'm just having a bit of trouble seeing where this is going.

MR ILLINGWORTH QC:

The problem, your Honour, is that that's exactly what the Judge has done. He's treated the evidence –

GLAZEBROOK J:

Well, that's a different point though, I would have thought.

MR ILLINGWORTH QC:

Well, I'm happy to move on from there. All I'm saying –

WINKELMANN CJ:

I don't actually understand the point you are making.

MR ILLINGWORTH QC:

That the result of failing to identify the conduct appropriately has caused confusion. The Judge has used the evidence as the accusation and the accusation as the evidence and he's failed to analyse it appropriately.

WINKELMANN CJ:

Because what is wrong with using the evidence as further particulars of the accusation? Because in fact, in our law, we recognise that so long as people are fully informed about what the case is against them, it doesn't matter that the indictment may not be fully particularised? They can't take that as an example of a miscarriage of justice at a later point.

MR ILLINGWORTH QC:

The problem then comes in at the prima facie case stage because the evidence and the accusation have been treated as the same thing and if the –

WINKELMANN CJ:

I can see it would be wrong to treat the accusation as evidence, I think, yes, because it's not in the ROC but what's wrong with treating the evidence as particulars of the accusation?

MR ILLINGWORTH QC:

Yes, but when we get to 24(2)(d), if the ROC is taken at face value, as it was in this case, then you've got no meaningful judicial assessment.

WINKELMANN CJ:

But that's a different point, isn't it?

1430

MR ILLINGWORTH QC:

It is, and this illustration involves two things. One is getting the accusation clear and making it a right connection between the charge and the New Zealand offence provision. We say that that hasn't been done properly here, but also when we get to (d) the importance of analysing the evidence properly, and not by taking the ROC at face value. Now that's the next point that we're going to deal with.

WILLIAMS J:

I'm not sure whether the risk is borne out here, but isn't the real risk, I think it's referred to in one of the cases that you earlier cited.

MR ILLINGWORTH QC:

I'm sorry Sir?

WILLIAMS J:

Isn't the most serious risk, if there is one, that if it's all to be found in the ROC, then it's shifting ground.

MR ILLINGWORTH QC:

That's right.

WILLIAMS J:

Because you can change your conduct and your allegations depending on what works for you or not as the trial is going on, or as the process is going on.

MR ILLINGWORTH QC:

As the process is going on, that's exactly…

WILLIAMS J:

There's a case earlier that you cited that –

MR ILLINGWORTH QC:

Tavormina?

WILLIAMS J:

Yes, it says specifically you can't do that.

MR ILLINGWORTH QC:

Well you can't do it because it's not fair to face an argument that can shift the focus on any, you can use the ROC, a global piece of evidence without any specificity for individual charges. It doesn't identify the conduct for each charge so you're always in a position where the prosecutor can change position depending upon what parts of the evidence are plucked out.

WILLIAMS J:

I guess *Tavormina* though stands for the proposition you can't change the charge.

MR ILLINGWORTH QC:

Tavormina stands for the proposition that you've got to link the relevant evidence to the relevant charge and do a proper correlation, otherwise you're just, it's not doing a double criminality analysis at all. It's a meaningless exercise.

WINKELMANN CJ:

Can I clarify again, because I've rather lost the thread, where does this all get us?

MR ILLINGWORTH QC:

It gets us to the end of section 24(2)(c) because what we have been trying to illustrate is that a proper correlation is necessary between the accusation and the charge, and that's essentially it for 24(2)(c) purposes. We say that the proper closely reasoned analysis, as in *Tavormina*, has not been done and it's just been a global approach where anything in the ROC can be used to support any particular charge, and we say that's not the right approach and it's not fair.

Now as a result of dialogue this morning I've been asked to just correct a couple of –

GLAZEBROOK J:

Well maybe you should take us to the indictment because if the argument is the indictment does that sufficiently, then we need to know why you say it doesn't, don't we?

MR ILLINGWORTH QC:

Yes, the indictment is in volume 8, the green bundle in the US supporting documents. So this is volume 8 at 3705. So we start at 3706, which has a heading "general allegations". Those general allegations run from 3706 to 3725, so there are 19 pages of general allegations which aren't linked to any particular charge. At 3726 we get count 1, which is a conspiracy to commit racketeering charge, which is reasonably brief, but that's, as I understand it, the US argues that that is paralleled by section 98A of the Crimes Act.

GLAZEBROOK J:

Sorry, I missed the page that you went to?

MR ILLINGWORTH QC:

Yes, 3276 your Honour. That's count 1. Count 1 comes last in the analysis because as an umbrella charge, it includes wire fraud, copyright infringement, and money laundering as the three predicate offences. Count 2 is conspiracy to commit copyright infringement and you'll see that as in count 1, paragraphs 1 to 45 are re-alleged and incorporated therein.

GLAZEBROOK J:

So which page are you at?

MR ILLINGWORTH QC:

So we now go to 3730, that's count 2. That's charged as a conspiracy to commit copyright infringement.

GLAZEBROOK J:

Do you say that it's not sufficient because 1 through 45, although incorporated, isn't related to specific charges or what's the issue?

MR ILLINGWORTH QC:

You've immediately got the problem that you've got these global allegations that are repeated and then the Court then has to work out, so for example under count 2, what is the underlying conduct in a *McVey* sense that underpins that charge?

ELLEN FRANCE J:

I think that just reflected the US's view of the nature of the conduct so the nature of the enterprise, if you like, that gives rise to the conduct.

MR ILLINGWORTH QC:

You mean the general allegations, your Honour?

ELLEN FRANCE J:

Yes.

MR ILLINGWORTH QC:

That's probably correct. It sets the scene, if you like.

ELLEN FRANCE J:

Yes.

MR ILLINGWORTH QC:

But we still have to have the problem that the local Judge has to work out from all of this, what is the conduct that's represented by count 1? And the same right the way through. That's all I'm pointing to.

ELLEN FRANCE J:

I understand that but on reading it – I suppose I'm not clear as to what you're saying. On one view of it, the material is there, it's just not separated out in the way it might have been, or are you saying there are things that are missing? I'm just a bit unclear.

MR ILLINGWORTH QC:

If we go back to *Norris*, the *Norris* judgment says you either have the offence test or you have the conduct test. We are clearly in the conduct test under our statute and so the Court should be given a clear statement of the conduct for, for example –

GLAZEBROOK J:

Perhaps just make sure you're speaking into the microphone.

MR ILLINGWORTH QC:

I'm sorry, yes.

GLAZEBROOK J:

It disappears for everybody, I think, otherwise.

MR ILLINGWORTH QC:

Moving over to – sorry.

GLAZEBROOK J:

I can understand why. Unfortunately, it doesn't seem to pick up the voices quite as well as it might.

MR ILLINGWORTH QC:

It's a question of what are we facing, the Judge knowing what we're facing, and having that clearly understood so that – what the US wants is the ability to go anywhere in the indictment, anywhere in the ROC, and say "This supports the local charge".

WINKELMANN CJ:

Well, can't they only go within the count? And the fact they incorporate more material in, it's not –

MR ILLINGWORTH QC:

Well, no, that's not what they've said, and that's not what they said in the District Court.

GLAZEBROOK J:

Well, what about paragraph 53 onwards then? So let's assume that 1 to 45 just goes general background.

MR ILLINGWORTH QC:

Yes, and then –

GLAZEBROOK J:

So page 3731.

MR ILLINGWORTH QC:

Well, if you follow that through, your Honour, we've got…

GLAZEBROOK J:

It's just there's quite a lot of detail there about alleged conduct, isn't there?

MR ILLINGWORTH QC:

Well, there are pages and pages of material but what is the essential conduct that would support a charge in New Zealand? Does the Judge seriously have to go through all this? So we go to page 3766 to find the next count. So we've got –

ELLEN FRANCE J:

Well, just in relation to that, looking at it, it seemed to me you had rewards, for example, and then you had what was said about the response to the takedown notice and so on. So I guess I'm just – things are there…

MR ILLINGWORTH QC:

That may well be a fair point, your Honour, but if you add to that the fact that the US can then, as well as that, go to the ROC, which is what they submitted in the District Court, then you've got this global set of material, you've got all of the material in the introductory section, you've got all of the discursive material that follows after the main count, and you've got the whole of the ROC, and you've got to search through that and figure out what's the essential conduct that is being alleged here?

WILLIAMS J:

It's really a submission that it's hard, fair enough, but –

GLAZEBROOK J:

And there's too much.

WILLIAMS J:

But you know, this is bread and butter criminal law stuff. This is the way it's done in criminal trials.

MR ILLINGWORTH QC:

Well, no, Sir, that's the point that I'm making. In a criminal trial, you have a charge and you have the evidence to support the charge.

WILLIAMS J:

Yes, well…

MR ILLINGWORTH QC:

Here, you've got a global mass of material which the local Judge has to figure out and which the defendant has to figure out. That's as far as I can take that point.

WILLIAMS J:

Yes, I mean, it's fraught and that may make it easier for you to point out how mistakes got made but it's hard to say that that's so fundamentally flawed that the whole process is invalid.

MR ILLINGWORTH QC:

Well, no, Sir, because –

WILLIAMS J:

It's just messy.

MR ILLINGWORTH QC:

No, Sir, because this Court has held in the disclosure case that the highest standards of natural justice apply in a hearing of this kind and our submission is that that's not a fair process.

GLAZEBROOK J:

Well, it's slightly difficult to say the higher standards of natural justice apply and they've been failed here because you've provided too much material rather than not enough.

MR ILLINGWORTH QC:

No, it's…

GLAZEBROOK J:

What you're saying is that what you required is to have a three-line summary of conduct.

MR ILLINGWORTH QC:

No, I'm not saying it has to be any different from the point that your Honour made to me earlier which is it's very common to have a statement of facts in criminal proceedings. I agree that's not the charge document but that's what should be done here and that's what section 18(4) requires. That's our submission.

WINKELMANN CJ:

So that was us going back in time, Mr Illingworth, so where does that take us forward to?

MR ILLINGWORTH QC:

Well, it takes us to question 2 but can I just say that I've been asked to correct some things that I perhaps misstated this morning, just four or five points. First of all, the abuse tool, which enables people who claim to own copyright to delete URLs, that is a voluntary process under the US system. It is not a requirement.

WINKELMANN CJ:

So Mega didn't need to provide it?

MR ILLINGWORTH QC:

That's correct. So these are just corrections to my submissions, in effect. Secondly, storage sites don't provide search facilities. So for example, Dropbox, the document is private unless shared by the user. The abuse tool is not an industry standard for taking down copyright material. The industry standard is a takedown notice but that has to be valid under section 512, title 17 of the US Code. Fourthly, abstract knowledge is not enough. Abstract knowledge that there are people using the website for infringing purposes, actual knowledge and deliberate infringement are required, and we say that that's the same under our law and US law. And any other approach that only required –

WINKELMANN CJ:

Actual knowledge is required where?

MR ILLINGWORTH QC:

– abstract knowledge would undermine the whole concept of Internet service provider –

WINKELMANN CJ:

So actual knowledge is required where? Where are we talking about?

MR ILLINGWORTH QC:

In any situation involving allegedly criminal copyright infringement.

GLAZEBROOK J:

What you say is there's not a due diligence requirement?

MR ILLINGWORTH QC:

Yes, exactly, your Honour. So –

GLAZEBROOK J:

Or even a suspicion requirement, it's a knowledge requirement?

MR ILLINGWORTH QC:

Certainly, the US Courts do not accept that an ISP has to go hunting for infringing material.

WINKELMANN CJ:

What about recklessness?

MR ILLINGWORTH QC:

I can't answer that in terms of US law.

WINKELMANN CJ:

But it would be enough in New Zealand?

MR ILLINGWORTH QC:

Well, you can't have a conspiracy to be reckless about committing offences. There are two High Court of Australia cases directly on that point, as I understand it. I can come back to those references but one of the Australian cases is *Ansari v R* [2010] HCA 18, (2010) CLR 299 and the other is *R v LK* [2010] HCA 17, (2010) 241 CLR 177 and our law says, section 310, if you have a conspiracy, it has to be a conspiracy to commit an offence, not to allow someone else to use your machinery to commit an offence. It's got to be a conspiracy to commit an offence and that's a crucial distinction. We have included in the submissions, I'll come to it shortly, a case called *R v Kenning* [2008] EWCA Crim 1534 which is cited with approval in *Adams on Criminal Law* which says that you can't conspire to aid and abet. That's not an offence that's known to the law and our law is the same.

So turning now to the prima facie case test. Question 2 asks "Was the High Court Judge correct to include 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", they are direct copyright infringement allegations, "and to conclude that proof of this is not required for the purposes of 24(2)(d)?" What that question requires is for the Court to correctly analyse and find the correct meaning of section 24(2)(d). So we're now at D1.1 in the roadmap. "Unless the Court determines the correct test applying under" –

WINKELMANN CJ:

Where are we in the roadmap, sorry?

O'REGAN J:

D1.

GLAZEBROOK J:

D.

MR ILLINGWORTH QC:

Unless the Court determines the correct interpretation of 24(2)(d), it can't answer question 2 and say whether proof of copyright status is required, and we say that interpretation is relevant for other reasons too, and that's our D1.2. It's also relevant to whether there has been a substantial wrong or miscarriage of justice for relief purposes under section 72, 73 of the Extradition Act, and also whether the Court of Appeal was wrong to characterise judicial review as an abuse of process because the 24(2)(d) analysis doesn't come within the scope of that question.

So in our submission, 24(2)(d) requires the ordinary prima facie case test to be applied. In paragraph 95 of the Dotcom disclosure judgment, Justice McGrath's analysis, his Honour said that 24(2)(d) requires the same standard to be met as under the old committal system. Justice William Young agreed with that at paragraph 220 and footnote 39 and your Honour Justice Glazebrook agreed with that at paragraph 283, footnote 318, and the Chief Justice was not as specific but her judgment is in general agreement with that too. So the proposition is that the prima facie case test under the old committal procedure sets the standard. If you have that standard applying, it has to be measured against some yardstick and we say that the standard yardstick has to be that set out in section 4. In other words, there has to be a local offence provision as the yardstick so that –

WINKELMANN CJ:

Does where you are tie to your written submissions at all? Because I'm just trying to link your written submissions.

MR ILLINGWORTH QC:

Yes, your Honour, I'll – this is in part D of our written submissions, so the part referenced in the roadmap links up to the written submissions, and in our main submissions, it's dealt with under D2.

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WINKELMANN CJ:

So what exactly are you addressing at the moment because I am just finding it hard to grasp. You said you were addressing the question of whether the High Court Judge was correct to conclude that proof of breach of copyright was not required.

MR ILLINGWORTH QC:

Yes and what we are saying is that you can't answer that question without understanding 24(2)(d). We say it's the standard prima facie case test and it has to be applied in the same way as under the committal procedure and you can't simply dispense with ingredients of an offence. In order to get committal you have to have evidence that establishes each ingredient of the offence and we see the effect of the High Court judgment is to dispense with that. You can assume certain things without evidence. Now there's a huge difference between the District Court judgment and the High Court judgment and the Court of Appeal judgment on this issue. The District Court judgment took the ROC at face value and accepted the copyright infringement allegations at face value. In the High Court, Justice Gilbert said no you can't do that. Conclusory assertions don't get you anywhere and that is consistent with your Honour Justice Glazebrook's observations in the Dotcom disclosure case. But Justice Gilbert, instead of following what the District Court did, said that proof of conduct to the prima facie case standard is all that is required and therefore there are some issues that can simply be assumed under the concept of transposition. We say that's wrong. We say that you can't assume important ingredients such as the existence and subsistence of copyright and you certainly can't assume the point that is essential for proof of criminality which is the deliberate wilful infringement of copyright which is the allegation that is made in the US charges and which must translate over into the conduct for the local offence.

WILLIAMS J:

You cannot assume criminality did you say?

MR ILLINGWORTH QC:

The essential criminality that is alleged underpinning all of these charges is the deliberate wilful infringement of copyright. And to say that copyright and the infringement of copyright can be assumed, is simply to derogate from the prima facie case test.

WINKELMANN CJ:

And I found the reasoning a little bit hard to follow on this. Is the reasoning of the lower Courts that because it is the conduct ownership of the copyright, it's not the conduct of the defendant and you do not need to prove it?

MR ILLINGWORTH QC:

Yes.

WINKELMANN CJ:

And you would say, that can't be right, it is no more right than if someone was charged with theft of goods. You would still have to prove theft of the goods for it to be a criminal act even though that is proof of ownership of the goods, is not proof of conduct.

MR ILLINGWORTH QC:

Exactly.

WINKELMANN CJ:

In one sense, but in another sense it is.

MR ILLINGWORTH QC:

So, for example, if you had a case, a charge of wilful damage of US government property and that has particular ramifications under the law and that person is being extradited, can you simply say well you don't have to prove ownership. You don't have to prove who owns the property because it is not a matter of conduct. Equally you shoot somebody. The fact that the person dies isn't a matter of conduct and so we submit that to adopt a conduct only approach is completely inconsistent with every tenet of the criminal law.

WINKELMANN CJ:

Do you even need to go that far because it is the essence of the conduct but it is taking someone else's thing.

WILLIAMS J:

I am not sure the "died" analogy quite works because to kill is conduct. But the status of the affected object is probably a better argument.

MR ILLINGWORTH QC:

I agree with that, with respect Sir but it just shows that you can't separate the conduct from the consequences of the conduct and in some situations the context in which a particular event occurs is crucially important and we say that's the case here.

WINKELMANN CJ:

What I'm saying to you is it isn't actually a results analysis.

MR ILLINGWORTH QC:

No, no it's not.

WINKELMANN CJ:

It's in fact, the essence of the conduct is taking someone else's things, that's the conduct.

MR ILLINGWORTH QC:

Yes, yes it is.

WILLIAMS J:

You would say, for example, if there's a, what is it, a 20–25 year gap between the copyright period in New Zealand and that in the US?

MR ILLINGWORTH QC:

Yes.

WILLIAMS J:

So if the object, let's say, was 55 years into its copyright, so that it wouldn't be a breach here, you would say what?

MR ILLINGWORTH QC:

Well we've given that issue some pretty careful thought certainly because it's a tricky question. Do you try to prove copyright status under New Zealand or does the US try to prove copyright status under New Zealand law or under the US law.

WILLIAMS J:

Well it's not copyright status under New Zealand law because it's still, you're not trying to suggest there's copyright in New Zealand because that might be an issue.

MR ILLINGWORTH QC:

No, no.

WILLIAMS J:

It's what the relevance is of the longer copyright period in the US.

MR ILLINGWORTH QC:

The position, as we see it, is that US law must apply to the existence and ownership of copyright because it's the same as if some US property was damaged, the issue of ownership would be decided under the foreign law. That's an exception to excluding the –

WILLIAMS J:

So you say the longer period applies?

MR ILLINGWORTH QC:

Well, if it was a shorter period there, or different considerations applied, that –

WILLIAMS J:

Even though the effect would be, if it was criminal –

MR ILLINGWORTH QC:

Yes, in that case –

WILLIAMS J:

– it would not be an offence here?

MR ILLINGWORTH QC:

Yes.

WILLIAMS J:

Mmm.

MR ILLINGWORTH QC:

But questions of infringement would be for our law here because that's how double criminality works. Our position is that if copyright status is claimed under US law, then that's got to be established under US law, but whether something would amount to infringement under the double criminality principle, is a matter for New Zealand law.

WINKELMANN CJ:

And what do you say to the United States rejoinder that well even if you're right there's ample evidence of copyright ownership?

MR ILLINGWORTH QC:

We say that is simply not correct. The ROC is replete with allegations, conclusory assertions that various items enjoy copyright status without saying under what law they are statements made by someone who has no apparent qualifications. It's not expert evidence, it doesn't purport to be, and it's just an assertion and Justice Gilbert held in the High Court, we say correctly, that those conclusory assertions can't establish the facts that they purport to state.

GLAZEBROOK J:

So if a film has just come out and it is in the cinemas, it is not enough to say that was on the site and there has been a breach of copyright?

MR ILLINGWORTH QC:

No it's not your Honour.

GLAZEBROOK J:

Well why not because the whole idea of that is that people know those things are copyright and they are not allowed to – I mean we expect ordinary people to know that and not to copy them.

MR ILLINGWORTH QC:

Well in a legal situation where there is an onus of proof, that has to be proved. It is not something that can just be asserted and assumed.

GLAZEBROOK J:

Well isn't it enough to say the film has just come out and here is the Copyright Act that says it is copyrighted.

MR ILLINGWORTH QC:

No, no your Honour, because the US has not given you a crucial piece of the jigsaw puzzle.

WILLIAMS J:

Which is what?

MR ILLINGWORTH QC:

Which is section 4 of title 512 of the US Code, which says that US copyright law doesn't apply to every work that has been authored by a particular individual. If, for example, the work was created by a Russian author, in Russia, then US law wouldn't necessarily apply, and so there are some essential requirements that need to be established as a matter of law. If we go, I can illustrate this without much requiring detail. There's an article, a very erudite article in volume 9 at page 3452. I don't ask your Honours to turn to it immediately, but it is an article by Paul Geller who is a recognised expert in copyright law. It is entitled *Conflict of Laws in Copyright Cases*.

WINKELMANN CJ:

What page?

GLAZEBROOK J:

Volume 9 of your authorities.

MR ILLINGWORTH QC:

Volume 9.

WINKELMANN CJ:

What page please?

MR ILLINGWORTH QC:

At page 3952 and that article demonstrates the complexity in conflict of laws cases of proving copyright and copyright infringement and it demonstrates in spades how difficult it can be for counsel to establish, in civil cases, the existence and subsistence of copyright.

WINKELMANN CJ:

And what do you make of that?

MR ILLINGWORTH QC:

I am sorry?

WINKELMANN CJ:

What do you say, what do you build on that?

MR ILLINGWORTH QC:

What we build on that your Honour is that in any case, whether it be civil or criminal, if an allegation is made that someone owns copyright, that has to be proved and that can be difficult under whatever copyright regime happens to be an issue. It is not something that can be assumed.

GLAZEBROOK J:

Why a conflict of law if they are saying this is American copyright in America?

MR ILLINGWORTH QC:

Because the work in question is not necessarily created in America.

GLAZEBROOK J:

Well I am not entirely sure but I thought that most of the works they referred to were fairly self-evidently Hollywood.

MR ILLINGWORTH QC:

No your Honour that's not necessarily the case. For example, there is one movie that is made the subject of an accusation against Mr van der Kolk, a movie called *Taken* which is actually produced in France. Now I am not saying that the US law does not apply there. All I am saying is that each work requires its own analysis to see whether US copyright law applies, if that is the law that has to apply or if the Court came to the conclusion that copyright had to be established as if we were under New Zealand law, then we look at our Copyright Act.

GLAZEBROOK J:

Well what do you say?

MR ILLINGWORTH QC:

I say US law. US law must apply to the work, certainly the work that has been created in Hollywood. If it is work that has been created outside the US, then there are other ways of bringing it in under US law. What you haven't been given and what I can get for your Honours is section 104 of the US Copyright Legislation which actually shows what the conditions are.

WILLIAMS J:

Is that the Code provision that you mentioned to me? You called it title 4? Is that the same thing?

MR ILLINGWORTH QC:

There are two separate sections that are significant for this case, probably more. But section 104 of the title 17 or 18, I will get it for you, for the Court, deals with the basic protection of copyright law in the United States and it has conditions in it. The DMCA environment for Internet service providers is dealt with under section 512 of the US title 17. And that environment is important to understand.

GLAZEBROOK J:

I suppose I am having a bit of difficulty because you say you have to have double criminality. It has to be looked at in accordance with the New Zealand law but the case you referred us to said the US can look after its own law being the requesting country and we are not supposed to go into that but now we are going into all of this because it should be done under US law. Now I can understand that argument and why you say it. It is just I cannot fit it in with your framework that you are putting in front of us.

MR ILLINGWORTH QC:

Yes I need to explain that your Honour.

WINKELMANN CJ:

So your framework is that you have to be satisfied that the essential conduct, at the second stage the essential conduct involves a breach of someone's copyright?

MR ILLINGWORTH QC:

Yes.

WINKELMANN CJ:

And then you transpose that to New Zealand?

MR ILLINGWORTH QC:

Well you, yes, you say if it's established –

WINKELMANN CJ:

If it is established the essential conduct was breaching someone's copyright and making a profit from it in circumstances which is criminal in America, would that be criminal in New Zealand?

MR ILLINGWORTH QC:

You would then say, if these things were done, the allegations that are made, the sharing of URL links and so on, if those things were done in New Zealand, and New Zealand copyright was transposed, or New Zealand copyright is assumed by transposition, then you say what would the result be here? Would it be a criminal offence under section 131?

WILLIAMS J:

And you always make that transposition?

MR ILLINGWORTH QC:

Yes. This is, that kind of transposition only comes up where there is an issue of foreign law that needs to be required under the local law that you are dealing with in double criminality.

WINKELMANN CJ:

But we shouldn't be concerned with local law, with US law, we should just be concerned with, say, someone asserting that's my copyright and it's been breached, we can't possibly be delving into whether that's a valid assertion, so it should be enough for some evidence, which is acceptable through the ROC procedure, that this is taking someone's copyright, using someone's copyrighted material. Copying.

MR ILLINGWORTH QC:

Well we submit that that cannot be the right approach, you know, because what you are doing is to assume an essential ingredient. You are assuming in the example that you put to me earlier, an example of theft and ownership is an issue, you are assuming the ownership issue.

WINKELMANN CJ:

No, not if there is proof of the ownership. So in the theft analysis, if someone from America says, say it is theft of a car, provides evidence to the Court, there evidence is summarised in the ROC that that is their car and it was stolen, that of course would fall below the threshold, but say that was the thing, that would be sufficient, wouldn't it?

MR ILLINGWORTH QC:

Yes it would, because there is a person who has given evidence of the fact that they owned that car. They bought it, they owned it and it was stolen. That is perfectly permissible –

WINKELMANN CJ:

So in this case you are not suggesting we need expert evidence about what the US law and copyright is, would you accept that if someone was to say that I assert copyright in that work and it was copied without my authority, that would be sufficient?

MR ILLINGWORTH QC:

No I don't accept that your Honour.

WINKELMANN CJ:

Why not? If we transpose – no, it is not an expression I like actually. If we then extrapolate the reasoning I applied to the car, out to copyright, why is it not sufficient?

MR ILLINGWORTH QC:

Because copyright is more complex and it requires proof of certain ingredients and a layperson cannot simply say, "I own the copyright in this," they have got to lay out the facts that underpin –

WILLIAMS J:

That's your response though, isn't it, that's a defence, so now you are wrong?

MR ILLINGWORTH QC:

No, no, no, it's not a defence Sir.

WINKELMANN CJ:

Well isn't it actually you departing from the framework which you have very carefully set up for us this morning?

MR ILLINGWORTH QC:

No.

WINKELMANN CJ:

Which is that the law, US law was for, for the US we are to apply our special knowledge here.

MR ILLINGWORTH QC:

No, no, it's a *Collins* exception. A *Collins*-type exception, so in *Collins* the issue Justice Duff was very careful to say, you don't transpose the law of California into Canada. The test for criminality is the law of Canada. But what you can do is to transpose the legal environment in which a particular, in which the conduct occurred in order to understand it, in order to understand the –

WINKELMANN CJ:

He doesn't use the word "legal environment".

MR ILLINGWORTH QC:

Well –

WINKELMANN CJ:

You're adding in the word legal –

WILLIAMS J:

He uses "adventitious".

MR ILLINGWORTH QC:

No, no, no –

GLAZEBROOK J:

So what you're really saying, that the way you take in oath in California could it have, was taking account of in seeing whether you had breached an oath here, even if the procedural requirements for taking an oath in Canada were different.

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MR ILLINGWORTH QC:

The point in *Collins* is that the extradition commissioner had evidence, expert evidence on the law of California to base the decision on. It wasn't assumed. We just don't have time to go through every paragraph of the judgment, but if your Honours go back and look at it, it is very, very clear that the decision as to what constituted US law, Californian law, was made on the basis of expert evidence. That is not the kind of situation that is being dealt with in *McVey* where the actual foreign offence, the charge in the indictment, is being looked into. The Court says, no you don't do that, and that's based on a whole line of English cases as well which says you don't do that, and we say that's one proposition. There's a second proposition that comes up in special cases. It's dealt with in *Collins*, it's dealt with in *Schreiber*, and it comes up in this case too. You cannot make a determination about the correct legal position under the foreign law without having expert evidence on that point. It doesn't infringe the *McVey* principle in our submission.

WINKELMANN CJ:

So what do you say is needed then. Can you just be particular about what is needed?

MR ILLINGWORTH QC:

Yes, what would be needed is the authorship of the work and where it was created, and the fact that it was an original work because –

WINKELMANN CJ:

Just slow down thanks. So authorship of the work.

MR ILLINGWORTH QC:

Where it was created.

WINKELMANN CJ:

Yes.

MR ILLINGWORTH QC:

And the question of whether it's an original work.

WILLIAMS J:

How do you prove that?

MR ILLINGWORTH QC:

Well, for example, the *Lord of the Rings* is based on Tolstoy's, no –

WINKELMANN CJ:

I don't think that Tolstoy would definitely disclaim any authorship of that book.

MR ILLINGWORTH QC:

I apologise.

WINKELMANN CJ:

Tolkien.

MR ILLINGWORTH QC:

It's based on Tolkien's works and so there's a question of originality. Now that might be easily passed, that test might be easily passed in that situation but there are other situations in which a movie may be a remake of another movie. You've got issues to go into which –

WILLIAMS J:

Well you would say without – you say you can't assume any of this so you'd have to get an expert to come along and say as far as I can tell this is an original work.

MR ILLINGWORTH QC:

Yes, and it wouldn't be particularly difficult to get over that evidential requirement in most cases but it's got to be done. You can't just assume it.

WINKELMANN CJ:

So are you saying an expert would say, this is an original work, surely not. The person would claim originality.

MR ILLINGWORTH QC:

Yes.

WINKELMANN CJ:

So wouldn't it simply be a question of in the ROC a summary of a person who says their copyright has been stolen, copied, breached, saying this was, I assert ownership of this work, and it was my original piece of work, and it has been copied without my consent.

MR ILLINGWORTH QC:

That would be a large part of the evidence that's required but it also would probably be necessary for an expert to give some evidence about the basics of US copyright law.

WINKELMANN CJ:

And the only authority you have for that proposition is *Collins*?

MR ILLINGWORTH QC:

No, the legal context in the foreign environment is also dealt with in the Canadian case of *Schrieber* where the issue was German income tax law and we can – the Judge in that case said that there is not much authority on when

the overseas context is relevant, but in that case the overseas environment was allowed in. But the problem with *Schrieber* is we don't know how the overseas legal environment was proved, whether it came in by consent or otherwise.

WINKELMANN CJ:

Is it possible that these cases are referring to the overseas environment simply to make the point that in some circumstances it is necessary to have more detail about that environment to make the transposition. So to understand the essential criminality involved, such as it was in *Collins*?

MR ILLINGWORTH QC:

No, it wasn't just that in *Collins*, your Honour, it was to under the equivalent of our section 24(2)(d) to establish a prima facie case. It's one thing to make an accusation. So, for example, we go to a case that the US relies upon heavily, it's an Australian case called *Griffiths v United States of America* [2005] FCAFC 34, (2005) 143 FCR 182. It's one of the rare cases that deal with –

WINKELMANN CJ:

I don't think you answered my question. My question was, is it possible that the reference in *Collins* is simply in order to understand the essential criminality in the requesting State's indictment, one needs some context for that. So, for instance, that the circumstances in which an oath is sworn, so you can understand that it's actually, an oath sworn in that way is actually comparable to an oath sworn in New Zealand or in England in a similar context, to make the transposition.

MR ILLINGWORTH QC:

Your Honour is absolutely right that that is part of it, but that is not the whole of it. That is the 24(2)(c) issue and under section 24(2)(c) we go to section 4 of the Extradition Act. Section 4 requires the transposition in the sense that the conduct has to be an offence in New Zealand according to the law of New Zealand. So that's one form of transposition. But if we go to section 24(2)(d) we see that the same transposition applies, that the conduct has to

be viewed for the prima facie case assessment, in accordance with the law in New Zealand, as if the conduct had occurred here.

GLAZEBROOK J:

I suppose then I do have difficulty seeing why we're looking at US law.

MR ILLINGWORTH QC:

Well because the question of ownership of the copyright can't sensibly – and as the Court of Appeal said, can't sensibly be right to look at that under New Zealand law. There's never been any –

GLAZEBROOK J:

Well it maybe if it's double criminality because if, in fact, it's not copyrighted at all in New Zealand, so if I'm in New Zealand and I'm using works that are 65 years old, subject to whatever else that might be related to, I can use them with impunity.

MR ILLINGWORTH QC:

Yes.

GLAZEBROOK J:

So why should I go back to the US because in fact it would be a breach of US copyright law. If there is a requirement of double criminality.

MR ILLINGWORTH QC:

That's where our team started out. We thought that the whole thing had to be viewed under a New Zealand law including the issue of copyright. As I understand it the Court of Appeal disagreed with that and said there would be no point in looking at whether the New Zealand law of copyright applied. That's never been the issue, and it's not necessary for double criminality purposes and really pointed to the fact that infringement issues needed to be considered under New Zealand law, but then they watered down the prima facie case test by saying it wasn't necessary to prove infringement of copyright. So we just go round in circles.

WILLIAMS J:

So you are accepting that the question is not as fine-grained as if the breach occurred in New Zealand would copyright be present in the work, the 65 year issue, but simply would breach of copyright be criminal in New Zealand?

MR ILLINGWORTH QC:

Would the acts of which the appellants are accused be an infringement of the law of New Zealand, that's the 24(2)(c) stage, and then have they actually done those things that would amount to criminal infringement.

WILLIAMS J:

Yes, perhaps you're not understanding my question. You said your starting point was the point that Justice Glazebrook was at.

MR ILLINGWORTH QC:

Yes.

WILLIAMS J:

And I was at frankly, which is if it was a 65-year-old copyright piece, the double criminality standard wouldn't be met. You say, no, that's incorrect. I still don't understand why you say that. But you say, no, that's incorrect, to which my next question is, so do you say you must assume infringement of copyright if proved in the US to also be proved here?

MR ILLINGWORTH QC:

No Sir.

WILLIAMS J:

Then can you just explain to me what you are saying?

MR ILLINGWORTH QC:

What we're saying is that if we start with the proposition that we're trying to establish a prima facie case, the US is.

GLAZEBROOK J:

Can we do the two-stage first?

MR ILLINGWORTH QC:

Yes. Well stage 2 is we are accused of, for example, under some of those counts deliberate wilful infringement of copyright. The copyright component can be fulfilled either by reference to New Zealand law or to US law. It must be one or other of those two laws that apply. copyright –

GLAZEBROOK J:

Well it could actually be both if double criminality.

MR ILLINGWORTH QC:

Well it could be both, yes.

WILLIAMS J:

It is in your interest that it be both, why are you arguing against it?

MR ILLINGWORTH QC:

I am just trying to get the equation right Sir and in our submission you cannot tell whether something is protected by copyright, either under US law or under New Zealand law without knowing the facts that underpin that copyright claim.

WILLIAMS J:

Of course, that is a different point.

MR ILLINGWORTH QC:

Yes, so the accusation is, in the ROC the accusation is that these works are protected by copyright, they are copyright works and the accusation is that what the appellants have done is to infringe copyright. Now how do we transpose that into the New Zealand situation, first for the purposes of 24(2)(c) and secondly for the purposes of 24(2)(d). What is the correct translation. And we say the correct translation or transposition is illustrated by *Collins* and that is the best example that we can give.

WINKELMANN CJ:

So at the classification stage, you say there is no need to enquire into the foreign law aspect of it.

MR ILLINGWORTH QC:

Correct, yes.

WINKELMANN CJ:

But at the prima facie case test, you need not only some sort of evidence in a ROC summary type way of the facts that underpin the claim.

MR ILLINGWORTH QC:

Yes.

WINKELMANN CJ:

But also, you say, which is the bit I find harder to accept, also the proof of foreign law to make out that those facts do in fact found ownership claim in copyright.

MR ILLINGWORTH QC:

Well there are two options and as Justice Duff said in the *Collins* case, you can look at it in two different ways. If the New Zealand law applies to the whole situation, then you don't need any foreign law. You would just say, they need to prove the facts that would give recognition to copyright under New Zealand law and then the facts that would establish infringement of copyright under New Zealand law. You do the whole thing under the banner of New Zealand law. We have been told at Court of Appeal level that that is wrong, that there would be no point in establishing copyright under New Zealand law so the option is to say, well if that is the case then you have got to prove it under US law. One way or the other, there has to be a law of copyright that is invoked and which applies.

GLAZEBROOK J:

Well we are not bound by whatever the Court of Appeal said.

MR ILLINGWORTH QC:

No, no I accept that.

GLAZEBROOK J:

So we need to know why that would be the case under your framework. So your framework says, number 1, you look at equivalency?

MR ILLINGWORTH QC:

Yes.

GLAZEBROOK J:

Well you have to have copyright even under equivalency at the first stage don't you?

MR ILLINGWORTH QC:

You have to have an allegation that copyright exists and that it has been infringed.

GLAZEBROOK J:

Well then you have to decide whether it is under US law or New Zealand law or under both, even at that stage don't you?

MR ILLINGWORTH QC:

Yes that is a fair point, your Honour.

GLAZEBROOK J:

So I would have thought if it is a double criminality it probably has to be both but you can assume it under US law. That is what *Collins* says.

MR ILLINGWORTH QC:

Well you transpose – at the –

GLAZEBROOK J:

So you assume they know their law and that it is an offence under US law. You then work out whether the conduct alleged would be an offence under New Zealand law.

MR ILLINGWORTH QC:

That is certainly, I agree with the second part of that your Honour. Whether the first part is –

WINKELMANN CJ:

Well it is exactly what it says.

GLAZEBROOK J:

And the phrase is that as well.

WINKELMANN CJ:

This is at the first stage, I accept it is at the first stage.

MR ILLINGWORTH QC:

We have never made a major issue out of whether it is New Zealand or US law that applies to the establishment of copyright.

WINKELMANN CJ:

I do not understand why you are saying either. Because at the classification stage you have to conceptually, you have to transpose and check that it is an offence in both, well in New Zealand, that which is an offence, claimed to be an offence in America, is also an offence in New Zealand, which does not mean that you have to show the person had copyright in New Zealand.

MR ILLINGWORTH QC:

No, I accept that.

WINKELMANN CJ:

It just means you have to show that if someone copies, copies a copyrighted work it is a criminal offence.

MR ILLINGWORTH QC:

Yes, in certain circumstances.

WINKELMANN CJ:

In those circumstances.

MR ILLINGWORTH QC:

Yes, I agree with that your Honour.

WILLIAMS J:

Take, let's deal with something else, a little more controversial and perhaps easier to grasp, I don't know. An extradition application for abortion, which because it was certified as legal here in New Zealand, would not be an offence.

MR ILLINGWORTH QC:

Yes.

WILLIAMS J:

But would be in the US because there is no certification system? I don't know.

MR ILLINGWORTH QC:

Yes.

WILLIAMS J:

What would you do with that?

MR ILLINGWORTH QC:

We would say, Sir, that the question of – it's really going to arise in the other way around if it was an offence in the requesting country but not –

WILLIAMS J:

Sorry, that's what I meant, it was an offence there but not an offence here?

MR ILLINGWORTH QC:

It couldn't be double – the double criminality principle could not be fulfilled in that situation because the conduct would not be an offence here.

WILLIAMS J:

Well, isn't that the same point as 65 year old copyright objects?

MR ILLINGWORTH QC:

Yes, it –

WILLIAMS J:

Well, why are you fighting us?

MR ILLINGWORTH QC:

Well, I'm not fighting you, Sir. The question of infringement is always judged by New Zealand law. The criminality issue is judged by New Zealand law. It has to be because otherwise, you're not carrying out double criminality. The –

WINKELMANN CJ:

But you're assuming that, you're creating a fictional world in New Zealand for these purposes?

MR ILLINGWORTH QC:

Yes, you are, and that's the whole point of transposition, that you have to transpose the material to New Zealand. I think the best answer I can give on this issue is to –

WINKELMANN CJ:

Well, what's the question you're answering? You may want to ask us that.

GLAZEBROOK J:

It came down to whether you judged copyright under US law or under New Zealand law and I suggested that at least under the first, as far as I could tell, if you had a double criminality, you'd have to have copyright established in both. You would assume that whatever you say is an offence in the US for the purposes of classification because you assume they know what they're doing, you come to New Zealand and say "Well, looking at that behaviour, would it be criminal in New Zealand?" and I would suggest that it would have to be a breach of copyright under New Zealand law because otherwise, I can't understand how you get criminality. So if I have a 65 year old work and I've done a whole pile of things with it, I'm perfectly entitled to. So it would not be an offence in New Zealand.

MR ILLINGWORTH QC:

Yes, well, that –

GLAZEBROOK J:

But if it was judged under US law, it would be?

MR ILLINGWORTH QC:

Yes. It's got to be an offence under New Zealand law, I accept that.

GLAZEBROOK J:

Well then why at the second stage do we then start judging copyright under US law, under your framework?

MR ILLINGWORTH QC:

No, we're not. All – the parallel is purely with the ownership of the car that the Chief Justice put to me earlier. The ownership issue is not part of the criminality. The ownership issue is part of the context. It's part of the background to the alleged offence. The criminality is when I steal the car and

so the ownership issue is a separate question. It's part of the context or the environment in which the offence occurred.

WILLIAMS J:

So you say that's transposable?

MR ILLINGWORTH QC:

No, I don't, I say it's transposable for the purpose of the accusation at 24(2)(c) but when it comes to the evidence, making a –

WILLIAMS J:

Got to prove it?

MR ILLINGWORTH QC:

– prima facie case, you've got to prove it.

GLAZEBROOK J:

Prove it under US law?

MR ILLINGWORTH QC:

Well, in some situations, it would just be ludicrous to say "I've got to prove the ownership of the vehicle under New Zealand law. It's mine under US law. Why do I have to prove it under New Zealand law?" I know that may be contrary –

WILLIAMS J:

But that's –

MR ILLINGWORTH QC:

– to the strongest argument that I could put forward but actually, it's more rational, in our submission.

WINKELMANN CJ:

If we take Justice Glazebrook's example that there's no copyright in 65 year old works but the request is in respect of a 65 year old work, would that simply

be a circumstance which was regarded as adventitious? So effectively, the essential criminality is the theft of a copyrighted work and so you don't transpose the age of the work, the legal elements? I raise that example because it seems it might tell us something about what needs to be proved, the prima facie case, so that's simply that there is a claimed copyright work and that's really all that needs to be proved?

MR ILLINGWORTH QC:

Well, at the 24(2)(c) stage, I accept that, your Honour. I don't accept it, we strongly resist that proposition, at the 24(2)(d) stage, because –

WINKELMANN CJ:

And that on that –

MR ILLINGWORTH QC:

– you're assuming something that goes to the very essence of the criminality.

WINKELMANN CJ:

Because on that approach then, what the defendant could do would be one of those circumstances in extradition where the defendant could say, perhaps if a claim for copyright was made in respect of works which are not copyrighted, the defendant in the extradition proceedings could say "No, there is no copyright in this". It's a complete answer. It's one of those categories of defence that is allowed in extradition proceedings.

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MR ILLINGWORTH QC:

Yes, but the problem in this case is that is beyond the reach of the Court, it's beyond the reach of the appellants, because there's only a conclusory assertion, there are no facts underpinning that assertion, and we can't get at those facts because they haven't been disclosed.

ELLEN FRANCE J:

I understand you put this in the conclusory statement box but just so I understand what more you say is required, when you get to the supplemental records of the case and they start going through the examples relating to what are called the "repeat infringers" and you have the initials of the different people involved, there there are assertions of works being subject to copyright. Just to illustrate, if you look at volume 9, part 4(2), page 4083, and so for example, towards the bottom of the page, "A preliminary view indicates that more than 96% of the files uploaded for distribution by DK are copyright-infringing" et cetera, and then you add that into, for example, page 4153, where there's reference to some of the emails and so on, and if you look at the bottom there, you had Mr van der Kolk referring to removing copyright infringing videos et cetera, and you've got the appellants' responses to the takedown notices, so when they get a takedown notice, they respond to that, what more do you say is required?

MR ILLINGWORTH QC:

We start with the proposition, your Honour, that the law in New Zealand is to, when you establish copyright and establish infringement of copyright, that is the subject of the *Henkel KGaA v Holdfast New Zealand Ltd* [2006] NZSC 102, [2007] 1 NZLR 577 case in this Court, and so there are certain ingredients that are required. Those ingredients are put beyond the reach of the Court by simply saying "A preliminary analysis indicates that these works are works of copyright". You can't get at the question of whether they are in fact copyright works or not, whether under US law or otherwise. So that's the first –

GLAZEBROOK J:

Well, if I said to my kid, "You're not supposed to be copying *Pretty Little Liars* because it's a recent thing", and he said to me "You prove I shouldn't be copying it", we do expect kids to know that and the ordinary person to know that you don't copy it, put it on the Internet, and share it with people. I'm not saying that means they don't do it, but they know they shouldn't. Every time they go to the movies, they have a copyright notice to say "The world will fall

in if you do this, you're depriving artists of their proper share of the proceeds for what they have done, it's theft".

MR ILLINGWORTH QC:

You don't lock up people for many years in jail and –

GLAZEBROOK J:

No, but we're not talking about that. You're saying they haven't proved copyright in these things and they have to but we would expect just the ordinary person to know that anything that comes up recently like these type of things would be subject to copyright. We expect them to know that.

MR ILLINGWORTH QC:

Well, it's a practical assumption but it is not a relevant thing to take into account in a criminal case, in a case where the liberty of the subject is at stake. You have to prove the copyright and you have to prove the infringement. It's just fundamental to the whole process of criminal law. You can't assume it. That's our submission. Your Honour, in the real world and in a practical sense, the advice that you would give a young person is exactly the way your Honours have put it. You assume that it would be a copy – you don't go around copying things without permission.

WINKELMANN CJ:

But that's a different point, you'd say?

MR ILLINGWORTH QC:

I say that's a different point. It's not the way a criminal case is established and it's not the way a prima facie case is established.

GLAZEBROOK J:

Well, coming back to Justice France's suggestion there, what do you say they would have to do in respect of *Pretty Little Liars*, which I understand is an American – actually, is it? Yes, I think it is an American one. Or *Grey's Anatomy* which is probably made in Canada actually but …

MR ILLINGWORTH QC:

That's the problem, your Honour. We can't attack –

GLAZEBROOK J:

You tell us what we're supposed to have I think was what Justice France was asking you.

MR ILLINGWORTH QC:

What we're supposed to have are who are the authors, who's the author or who are the authors of this particular work? Where was it made? Does that fit with – is it an original work? Has copyright expired for this work? There are a number of issues that we have to go through. We can go through our Copyright Act or the US Copyright Act and say the same thing. Our Copyright Act in sections 17 and 18, I think, protects only certain works and we have to come within those definitions to be protected under our law. The US law is similar.

WILLIAMS J:

Your point is that in *Collins*, Justice Duff did precisely that?

MR ILLINGWORTH QC:

Exactly, that's exactly it.

WILLIAMS J:

And that's the standard?

MR ILLINGWORTH QC:

That's the standard, that's the gold standard, and that gold standard has effectively been approved by the House of Lords in *Norris* although I concede that it wasn't a prima facie case situation. It was a –

WILLIAMS J:

Norris wasn't?

MR ILLINGWORTH QC:

Norris wasn't, no, and the same applies to an Australian case which Mr Raftery will hammer which is the case of *Griffiths* in Australia. So *Griffiths* is a case where it was copyright. There are not many international copyright cases in extradition law. *Griffiths* was a US extradition from Australia and the allegation was infringement of copyright. The Australian Federal Court said that copyright didn't have to be established for the purposes of the classification exercise but it would have to be proved at trial. They did not have a prima facie case test in that situation and so what we say is we're pretty much in the same boat. When you're just accusing someone, the allegation doesn't require proof of the conduct but when you get to the prima facie case stage, you've got to prove it, and that's essentially what the Australian Court said in *Griffiths*.

GLAZEBROOK J:

So it is only at the second stage?

MR ILLINGWORTH QC:

The –

GLAZEBROOK J:

And it's not essential to you that it be under US law rather than New Zealand law, it's just you say "Under whatever law, you have to have the details that would suggest there was copyright like whichever law it happens to be, where it was made, original work, has copyright expired"?

MR ILLINGWORTH QC:

Yes.

GLAZEBROOK J:

Or whatever the test has to be?

MR ILLINGWORTH QC:

Yes, well, it's for the Court to determine whether the ownership of copyright is a matter that should be determined under the foreign law or to be treated as if we were under our law for the purpose of 24(2)(d). That's a vexed issue. I accept that.

WILLIAMS J:

So where (d) says "satisfied that the evidence produced", "evidence produced", "according to the law of New Zealand" constituted an offence which occurred "within the jurisdiction of New Zealand", you say that involves an inquiry into American copyright law –

MR ILLINGWORTH QC:

That's under 24(2)(c) were you saying, Sir?

WILLIAMS J:

(d).

MR ILLINGWORTH QC:

Under (d), no, the evidence has to justify a trial in New Zealand. This is where the Courts below, we say, have –

WILLIAMS J:

You said you wanted evidence, got to prove it to the prima facie case standard at stage 2 once you've classified it?

MR ILLINGWORTH QC:

Yes. Once you've classified it, you then go –

WILLIAMS J:

Yes, so (d) says can be satisfied with the evidence given at this extradition hearing, would according to the law of New Zealand constitute an offence within our jurisdiction. You say that involves an inquiry into whether copyright exists in American law?

MR ILLINGWORTH QC:

Sir, I'm just, I need to pause. I'm not sure that that's the correct interpretation of 24(2)(d). What we say is 24(2)(d), the prima facie case test, is assessed on a jurisdictional assumption. The assumption is that if that conduct occurred in New Zealand, the New Zealand Court would have jurisdiction, but the evidence has to establish a prima facie case. Prima facie case of what? The counterpart offence in New Zealand.

WILLIAMS J:

Yes, I understand that.

MR ILLINGWORTH QC:

Under New Zealand law.

WILLIAMS J:

Under New Zealand law?

MR ILLINGWORTH QC:

Yes. The offence would have to be an offence under New Zealand law.

WILLIAMS J:

Yes.

O'REGAN J:

But with transposition though.

WINKELMANN CJ:

But transposition.

WILLIAMS J:

I am trying to get to what you transpose in that.

WINKELMANN CJ:

Justice Williams has, actually, I think summarised your case. You transpose the ownership of the copyright work in America into New Zealand, so on your case you need evidence that it is actually a copyrighted work in America.

MR ILLINGWORTH QC:
Yes.

WILLIAMS J:
Which means it is irrelevant if it is a 65 year old copyright work, you concede?

MR ILLINGWORTH QC:
Yes I concede that Sir, that under that analysis you would be looking at whether the conduct constituted an offence in New Zealand on the assumption that the person owned copyright because that has been proved and in the United States.

WILLIAMS J:
Right, so that requires quite a nuanced read according to the law of New Zealand.

MR ILLINGWORTH QC:
No Sir. It is exactly what Lord Millett –

WILLIAMS J:
I am not saying that other Judges have not read it in such a nuanced way.

MR ILLINGWORTH QC:
Yes.

WILLIAMS J:
But it is not the obvious meaning of that.

MR ILLINGWORTH QC:

Well in our submission it is Sir. The conduct is transposed into New Zealand. There is a fiction as her Honour the Chief Justice said a moment ago. The fiction or the notion, notional approach is you assume that this conduct occurred in this country because that gets rid of any territorial issues. The whole conduct occurred in this country. Now did that conduct constitute an offence under the law of New Zealand such that the evidence would justify a trial in relation to that offence.

WILLIAMS J:

Yes, yes, well all of us stated that proposition several times now but I do not find it helpful in working out whether you transpose infringement or whether you test the action by reference to New Zealand laws.

MR ILLINGWORTH QC:

You test the action by New Zealand rules.

WILLIAMS J:

Right, so that gets me back to a 65 year old object.

O'REGAN J:

But there are not any 65 year old objects here, so –

WILLIAMS J:

I know there are not but I am trying to understand them, with a practical example how this system works.

WINKELMANN CJ:

Perhaps we should reflect on the 65 year old object overnight and come back to it because I am just concerned that we move on because you have still got a way to go haven't you Mr Illingworth.

MR ILLINGWORTH QC:

Indeed your Honour. Well perhaps we can park that thought and just move on to the next point and I am getting a little bit overburdened with paper here.

WINKELMANN CJ:

And our questions too. Overburdened with our questions too Mr Illingworth.

MR ILLINGWORTH QC:

So in our submission, we are now at D1.2. Section 24(2)(d) needs to be interpreted. The appellants say that a century of case law and the Dotcom disclosure case established that the form of wording that we have in 24(2)(d) represents the well-established prima facie case committal test. The US says that the test is merely whether there is prima facie evidence of the defendant's conduct as identified at the 24(2)(c) analysis. We say that that is a misinterpretation of the statute and that is not what the statute says. Our, the interpretation that we promote is consistent with the wording of the UK legislation going back to 1870, the Canadian legislation going back to 1952 and 1985 and all of the UK case law, says that the test requires a local offence provision and the evidence is established using that as the yard stick.

So the judgment of Lord Diplock in a case called *Government of the Federal Republic of Germany v Sotiriadis* [1975] AC 1 (HL) says that the same approach was adopted again by Lord Diplock in the House of Lords in the *Neilson* case and the *Government of the United States of America v McCaffery* [1984] 1 WLR 867 (HL) case. *Sotiriadis* is 1974, *Neilson* and *McCaffery* are 1984 I think. The same issue came up again in a different form, in a case called *Government of Belgium v Postletwhaite* [1988] AC 924 (HL) –

GLAZEBROOK J:

Does this only relate to that copyright question or are there other questions?

MR ILLINGWORTH QC:

No, this relates to the interpretation of the wording in section 24(2)(d).

GLAZEBROOK J:

I understand that but the difference between you and the United States in this is that only related to that copyright issue?

MR ILLINGWORTH QC:

It relates to the whole prima facie case assessment. What is the yardstick? Is it a local offence provision or does the US only have to prove the conduct of the appellant? It underpins the whole 24(2)(d) assessment. It includes the transposition –

GLAZEBROOK J:

What I'm really asking you is what – I understand what you say went wrong with the District Court but what went wrong? What should have happened that would be different from what the US says should have happened?

MR ILLINGWORTH QC:

What should have happened is that for each count in the US indictment, there would be a local offence provision identified in accordance with the *Norris* principles. We then go to 24(2)(d) –

WINKELMANN CJ:

Identified by whom?

MR ILLINGWORTH QC:

Well, it has to be identified by the United States and then that has to be accepted after analysis by the extradition Court.

GLAZEBROOK J:

So that's the classification issue?

MR ILLINGWORTH QC:

That's a classification issue. We then get to 24(2)(d). The mistake we say that was made in the High Court and in the Court of Appeal was to say that having identified the conduct that constitutes the offence, all you have to do at

the (d) stage is establish to a prima facie standard the conduct that constitutes the offence. That's not what the Act requires, it's not what the Act says, and we have –

GLAZEBROOK J:

So what should you do – I'm just trying to just get the argument, that's all.

MR ILLINGWORTH QC:

The template?

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

Because what we're not understanding, I think it's what's the difference between that and what you say should be done and what were its implications?

MR ILLINGWORTH QC:

Yes. The conduct constituting the offence is a much narrower concept than proving all of the essential ingredients of the offence. Proving all of the essential ingredients of the offence is the traditional prima facie case test and –

GLAZEBROOK J:

Well, giving evidence that could prove, rather.

MR ILLINGWORTH QC:

Yes, evidence that could –

GLAZEBROOK J:

But is it just the copyright? That's why I was asking, is it just that copyright issue, i.e. not giving evidence to prove ownership, or are there other things they didn't do?

WINKELMANN CJ:

Where does it bite? Where does your point bite?

MR ILLINGWORTH QC:

It certainly bites on the copyright argument –

GLAZEBROOK J:

Yes, and we understand that argument and we've moved on but what I was asking was is there anything else?

MR ILLINGWORTH QC:

Yes. If I could just take a moment, your Honour. Yes, so if we use the section 228, section 240, 249 as the yardstick, we're assuming that they have passed the classification stage and we're now at the prima facie case stage. They require, for example, proof of dishonesty, proof of deception, and so on. That can possibly be justified by saying "Well, you deliberately breached someone's copyright so you've engaged in something dishonest or in the course of that, you've committed some deception", but somehow or other, you've got to establish the essential ingredients of the offence which will include deception, dishonesty, et cetera. It may be that in every crucial ingredient, the US has driven back to relying on infringement of copyright as the underpinning feature that fulfils the ingredient for the offence, but it's not completely accurate to simply say "Well, that's copyright only". The local offences can include ingredients that need to be fulfilled somehow or other.

WINKELMANN CJ:

But the lower Courts, well, High Court and Court of Appeal, did look to turn their minds to whether there was evidence of dishonesty.

MR ILLINGWORTH QC:

Yes, on the basis that copyright could be transposed, and if you assume copyright, assume copyright ownership, and then on that wrong basis, you then go ahead and say, "What is the conduct of the appellants," and then

make out a case for infringement based on that false foundation. We say that simply isn't the correct approach to the prima facie case test.

WINKELMANN CJ:

So you're saying it's a house of cards built on something?

1550

MR ILLINGWORTH QC:

It's a house of cards, yes. We can give you cases going from 1974 through to 2012. The most recent one is the Privy Council case of *Deuss v Attorney General of Bermuda* [2009] UKPC 38, [2010] 1 All ER 1059 which is volume 7, 2620 where the Privy Council applied in relation to Bermuda, which was still under the old extradition process, exactly the same line of interpretation as we are promoting for section 24(2)(d) and it's been a consistent process at least going back as far as 1974 right through to the present day. The Courts in the UK have consistently interpreted the equivalent wording of 24(2)(d) as requiring double criminality i.e. a local offence provision that matches up with the accusation. In Canada, it's exactly the same. We can go back to cases earlier than *McVey*. *McVey*'s in 1992 and there's a whole string of cases, *McVey*, *United States of America v Dynar* [1997] 2 SCR 462, *Ferras*, *MM*, which all –

WINKELMANN CJ:

Well, it's more than a double offence provision. You're on the prima facie case but you've just slipped back to classification, haven't you?

MR ILLINGWORTH QC:

No, your Honour, no. What we're saying is that the wording of 24(2)(d) has been interpreted as requiring double criminality, so that even if the Court were to take a different view of the interpretation of section 4, it still doesn't solve the problem. We still come back to double criminality in section 24(2)(d) and that requires a local offence provision to be identified and for the evidence to fulfil all the essential ingredients of that offence. A very good example of how that works is Lord Millett's judgment in the *Al-Fawwaz* case.

WILLIAMS J:

He seems to say that what's required is a duly authenticated record of allegation from the source, from the requesting country. He's not suggesting you have to provide proof?

MR ILLINGWORTH QC:

Yes, he does, Sir.

WILLIAMS J:

Where does he do that?

MR ILLINGWORTH QC:

He definitely does. I'll take you to that.

WILLIAMS J:

I mean proof from the requesting country, not the requested country.

WINKELMANN CJ:

We would like to see that.

MR ILLINGWORTH QC:

So it is volume 7 at 2481 is the start of Lord Millett's…

GLAZEBROOK J:

Can you give me a second? I seem to have buried myself.

WILLIAMS J:

Yellow.

WINKELMANN CJ:

It's yellow.

GLAZEBROOK J:

That doesn't help overly. There we go. Thank you. What page?

MR ILLINGWORTH QC:

2481, your Honour.

GLAZEBROOK J:

2481, thank you.

MR ILLINGWORTH QC:

So Lord Millett at paragraph 94 says, "My Lords, the double criminality rule lies at the heart of our law of extradition. It is a precondition of extradition that the offence for which extradition may be ordered should be within the criminal jurisdiction of both the requesting and the requested state", and His Lordship then goes on to point out that that case involved a particular issue of extraterritorial jurisdiction. "In considering this question it is important to bear the objects of the double criminality rule in mind, for its two requirements serve different purposes. The first requirement, that the offence for which extradition is ordered should be within the jurisdiction of the requesting state, serves a purely practical purpose. There is no point in extraditing a person for an offence for which the requesting state cannot try him. The second requirement, that the offence should also be within our own criminal jurisdiction, serves to protect the accused from the exercise of an exorbitant foreign jurisdiction. Views as to what constitutes an exorbitant jurisdiction naturally differ; the test adopted by our own law has been to accord to other countries the jurisdiction which we claim ourselves but no more."

And then you'll see at 97, "The magistrate's power to commit a person to prison to await extradition is contained in para 7 of Sch 1 to the 1989 Act […]". Just pausing there, we've now moved beyond the 1870 legislation into the '89 UK legislation but it's very similar to the old wording: "In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Schedule) would, according to the law of England and Wales, make a case requiring an answer by the prisoner if the proceedings were for the trial" –

WILLIAMS J:

That was the point I was making. It's enough if you provide a foreign warrant for arrest alleging breach.

MR ILLINGWORTH QC:

No, no, no Sir. Under the '89 legislation they have a different system for identifying the local offence.

WILLIAMS J:

By the local offence you mean the UK offence or the…

MR ILLINGWORTH QC:

Just one moment Sir. So under the '89 legislation the Secretary of State would provide an authority to proceed for the Court, which nominated the local offence provision, and the evidence had to be –

WILLIAMS J:

You mean the UK offence provision?

MR ILLINGWORTH QC:

The UK offence.

WILLIAMS J:

I'm not talking about the UK offence provision. Your point with respect to *Collins* was that *Collins* says you've got to prove an offence in the source country?

MR ILLINGWORTH QC:

No Sir, no. You prove the context –

WILLIAMS J:

Well you had an expert coming along proving the law that was breached.

MR ILLINGWORTH QC:

No, you're proving the law in relation to the affidavit – sorry the law as to perjury – as to the administration of the oath in the other country, and that it's a judicial proceeding. In other words the context, the actual offence can only be judged under Canadian law.

WILLIAMS J:

Paragraph 7 of schedule 1 seems to suggest that in this case all that's required, with respect to the requesting country, is a warrant alleging the offence.

MR ILLINGWORTH QC:

That's the first point.

WILLIAMS J:

Well that's not what *Collins* says, is it, it's a different system.

MR ILLINGWORTH QC:

It's a different system, yes Sir.

WILLIAMS J:

So you're not proving in both places, you're only proving in one.

MR ILLINGWORTH QC:

You're proving the –

WILLIAMS J:

You're bound to assume in the first.

MR ILLINGWORTH QC:

You're – well you assume at the classification stage that the conduct constitutes an offence in the requesting State, you don't have to prove that, but that conduct has to constitute an offence if proved under the law under the requested State.

ELLEN FRANCE J:

I hadn't read this as saying anything about proof.

GLAZEBROOK J:

Doesn't 113, it says it's really, really, really simple, you just look at it and see whether it would be sufficient if it was a British offence.

MR ILLINGWORTH QC:

That's correct your Honour. That's what I was coming to. Lord Millett is dealing with the classification stage for most of this, and then at 113 he deals with the sufficiency of the evidence.

GLAZEBROOK J:

He says it's really, really simple.

MR ILLINGWORTH QC:

Really, really simple.

GLAZEBROOK J:

But you're making it really, really hard.

MR ILLINGWORTH QC:

Well, no, because we're dealing with a more complex –

WINKELMANN CJ:

Well I think you are actually. I don't see anywhere, none of this seems to give support for your argument.

MR ILLINGWORTH QC:

Well what I'm saying is that once the charge is clarified, as to the sufficiency of the evidence, "The final matter which the magistrate is required to consider is whether the evidence is sufficient to make a case requiring an answer if the proceedings were for trial in England or Wales. This involves another hypothesis, but solely for the purpose of testing the sufficiency of the prosecution evidence. The magistrate is to consider this as if the proceedings

were a purely domestic case. No transposition of facts and no feats of imagination are called for."

So the whole case is considered under the local law, according to that approach. Now if this Court says, well that's the way we should do it here, then so be it. But if that means that you have to prove copyright according to New Zealand law that hasn't been done.

WINKELMANN CJ:

Okay, so although I hesitate to raise the zombie-like figure of a 65 year old copyrighter, that would be a problem. New Zealand's copyright law would be a problem if you had, "No transposition of facts and feats of imagination are called for."

MR ILLINGWORTH QC:

Yes, if you do the whole thing under New Zealand law then his Justice Williams' point has to be taken into account because you haven't established copyright according to New Zealand law. Our acceptance that possibly it's US law that has to be used to establish copyright, is probably more favourable to the US position than the other way of looking at it. In this way of looking at it they would have to establish facts that under New Zealand law would give the benefit of copyright, which is actually not part of the offence. That's the distinction I'm making. It's not part of the conduct that constitutes the offence. But if we made that –

GLAZEBROOK J:

Well unless you put it in the way the Chief Justice says, the offence is actually taking a copyrighted work, so it is part of the conduct because if it wasn't copyrighted then there's no offence so no relevant conduct.

MR ILLINGWORTH QC:

That's right, and if you go back over 100 years to *Collins*, Justice Duff makes exactly the same point. He says there are two ways of looking at it and that's the quote that I gave your Honours earlier. There are two ways of looking at

it. You can either look at it on the basis that it's what happened over there but you apply our law, or you transpose the whole situation into our country and apply our law to the whole thing. That's the basic choice that has to be made in terms of how these problems are resolved.

Now I see it's 4 o'clock so I'm not sure what time…

WINKELMANN CJ:
How are we going in terms – because I take it that Mr Mansfield has quite a significantly lesser amount of case than you do?

MR ILLINGWORTH QC:
Well you've got a major argument to run and I certainly don't want to cut in on him.

WINKELMANN CJ:
He's not responding at all.

MR MANSFIELD:
Well, given some of the comments made by the Court regarding the key offence we should be focusing on, I think I do have a wee bit of work to do with you. So I would anticipate we would be here for at least a day, or a good part of a day.

WINKELMANN CJ:
Okay so we should try and finish with you Mr Illingworth in the first hour tomorrow morning, do you think that's possible?

MR ILLINGWORTH QC:
Yes, I'll do my absolute best to get finished in an hour.

WILLIAMS J:
So will we.

MR ILLINGWORTH QC:

Yes, I anticipated that Sir.

MR MANSFIELD:

I wonder whether I could just address the Court before we adjourn if it's not too late for that. Just regarding an electronic copy of the casebook. You seem to be relying rather heavily on the paper volumes rather than the electronic one. Is that likely to be the practice throughout the entire hearing?

WINKELMANN CJ:

Yes, I think so. We've been using a paper copy.

GLAZEBROOK J:

The trouble is the electronic that we have is not particularly well set up.

O'REGAN J:

Which is the whole reason why we ask for the paper one.

GLAZEBROOK J:

It's not terribly satisfactory but because of that it becomes quite difficult to use.

MR MANSFIELD:

I didn't realise we wouldn't be using it at all. We can deal with that, we might just need to make some adjustment overnight. Thank you for that.

COURT ADJOURNS: 4.03 PM

COURT RESUMES ON TUESDAY 11 JUNE 2019 AT 10.06 AM

MR MANSFIELD:

Good morning. There were two matters I wonder if I could raise before we get back to my learned friend with his presentation. Firstly, I awoke in the middle of the night last night realising that I'd let the country down by failing to introduce to the Court as a matter of courtesy the two counsel from the United States who are present with us, Mr Rothken and Mr Smith who have been accommodated at the front of the Court and I am grateful to the Court for that as they are – today, we're also joined by Ms Creagh who's seated at the end. She's from the instructing solicitor and couldn't be with us yesterday so she wasn't here when I formally introduced the panel.

Secondly, and really, this is solely for my benefit, I wonder at the conclusion of my learned friend whether we might have a brief break so that I can get set up in the podium, for want of a better word, before I commence my submissions to the Court. I don't know if that is ordinary but given the amount of material, it seems necessary.

WINKELMANN CJ:

Yes, that's fine, Mr Mansfield.

MR MANSFIELD:

Thanks, Ma'am. As Your Honour pleases.

WINKELMANN CJ:

So Mr Illingworth, just before he arrives, I just want to mention a couple of things to Mr Raftery. Mr Raftery, you questioned yesterday whether the United States was going to have to respond on certain things and I thought it would be helpful if we could give you an indication now.

MR RAFTERY QC:

Certainly.

WINKELMANN CJ:

Firstly, we would be grateful if when you do address, you can articulate the case against the appellants, linking it to the indictment, and particularly clarifying whether the case is for primary or secondary liability in relation to copyright breach. So primary or secondary liability for copyright breach. Secondly, in relation to whether or not prima facie case is at issue, the approach of the Courts below does seem to have been that section 24(2)(d) did not require any proof of copyright status. So if that was wrong then there might be – well, there is a question as to whether it's within the leave question whether the prima facie case standard was met. So we haven't reached a concluded view on it but…

MR RAFTERY QC:

Certainly.

WINKELMANN CJ:

But we would want the Crown to deal with, assuming that the Courts below were wrong, that there was no requirement to prove copyright status, whether the requirement is to prove it in accordance with New Zealand or US law and what the US can point to in the materials for a prima facie case in copyright and I think that you already have done that.

MR RAFTERY QC:

We have done a certain amount of that in the submissions we have.

WINKELMANN CJ:

And as I sit here, I look to your right and I see Mr Boldt. Good morning, Mr Boldt.

MR BOLDT:

Good morning, Ma'am.

WINKELMANN CJ:

Thank you for making such great effort to return.

MR BOLDT:

Thank you, Your Honour.

WINKELMANN CJ:

Mr Illingworth. Now, before you start. We've reflected on the course of discussion yesterday and realised that at times we were struggling to work out what points you were addressing in our list of issues and that might have slowed you down. Certainly, it's slowing us down in grappling with what you were saying to us. So we'd be grateful if you could, when you move onto a new topic, make clear which of the issues you are addressing in the list of issues we distributed.

MR ILLINGWORTH QC:

Yes, Your Honour. The position yesterday is we got into quite intense questioning and answering questions and things did get a little muddled in between (c) and the (d) functions. We want to make our position clear, but we do not want to go backwards for the sake of time. We have prepared a one page note to hand up to the Court to try to clarify our bottom line position if we could have leave to hand that up your Honour.

WINKELMANN CJ:

Yes, yes.

MR ILLINGWORTH QC:

I am not going to address it. It is just to clarify our position for the Court.

WINKELMANN CJ:

Thank you Mr Illingworth. And secondly, we did wonder if you would wish to say more on the Crimes Act 1961 and also another issue which you just mentioned in passing but it just seems to be squarely at issue. The extent to which one, an offence in America can be shoehorned as you used the expression into a difference offence in New Zealand.

MR ILLINGWORTH QC:

Yes.

WINKELMANN CJ:

Whether you had finished your submissions on the Crimes Act and the shoehorning because the submissions in the Crimes Act seemed reasonably short.

MR ILLINGWORTH QC:

Well we have dealt with them in the written submissions Your Honour but if I can come back to that at the end because we have got a major issue to deal with now.

WINKELMANN CJ:

Yes.

MR ILLINGWORTH QC:

And I will come to that in just a moment.

WINKELMANN CJ:

And bearing in mind, as you address everything, can you please link it to the number of the Supreme Court issue. Your junior might have to have that to hand.

MR ILLINGWORTH QC:

Yes I will just get that handed up to me.

WILLIAMS J:

I do not suppose, this is my own selfish request, that you have got another copy of your outline because I think I have left mine up in my chambers.

MR ILLINGWORTH QC:

The roadmap, Sir, yes, we should be able to help with that. Yes, your Honour, just on that. The note that we handed up as to whether copyright status and infringement of copyright can be assumed. I just want to give you the cross-refence to our submissions. That argument is fully explained in our primary submissions at D2 page 29.

WINKELMANN CJ:

No, sorry.

MR ILLINGWORTH QC:

D2 page –

WINKELMANN CJ:

No, are you now referring to the summary of argument?

MR ILLINGWORTH QC:

The one that was just handed up, yes. So the full argument in our primary submissions is at D2, page 29, and in the reply submissions at D5, page 26. And then as to whether copyright status or infringement can be inferred, which we deny, our argument as fully explained in our primary submissions at D3, page 34.

WINKELMANN CJ:

D3?

MR ILLINGWORTH QC:

D3, page 34, yes your Honour.

MR ILLINGWORTH QC:

Now we are now – we have been dealing with the second question which is primarily based on the issue of transposition and we have submitted that that requires a proper understanding of section 24(2)(d) and that the question cannot be answered without that. 24(2)(d) is also important in relation to the

case stated procedure because we say that the question of substantial wrong or miscarriage of justice had to be confronted and how the Court has applied section 24(2)(d) to the circumstances of the case, relates to that issue. It is also relevant to whether the appellants were prejudiced by the exclusion of judicial review and so what I am –

WINKELMANN CJ:

And so, can you just say, sorry to be slow. Can you just say again why it is important?

MR ILLINGWORTH QC:

Because we say that the District Court got the law completely wrong in relation to the prima facie case assessment and applied it wrongly and that goes to the question of relief in this Court because this Court has the same powers in respect of relief as the Courts below, under the case stated appeal. It also goes to the question of whether judicial review was inappropriately excluded or in other words, were we prejudiced by not being able to raise that argument, both in the course of the judicial review application in the High Court but perhaps more particularly on appeal to the Court of Appeal as well.

GLAZEBROOK J:

Why would that argument not be part of the extradition appeal procedure?

MR ILLINGWORTH QC:

It is. I have just tried to explain your Honour that it is in relation to relief.

GLAZEBROOK J:

No I understand that. But if you could raise it in that, why would you need to raise it in judicial review, which is part of the abuse of process issue.

MR ILLINGWORTH QC:

I am not, I am simply saying either or your Honour.

GLAZEBROOK J:

Okay that is fine.

MR ILLINGWORTH QC:

I am not making a big issue out of that. So, what we need to do is to just look at the District Court judgment.

WINKELMANN CJ:

So what issue are we on at the moment?

MR ILLINGWORTH QC:

So this is, I've called it a cross over issue because it comes up under – we are now really into the question of the case stated appeal and we are saying, there was a substantial wrong and a miscarriage of justice in the case stated appeal. It flows on from the analysis of section 24(2)(d) that we were looking at under question 2.

WINKELMANN CJ:

So this is your argument, that things went so wrong in the District Court and the High Court stepped out of its proper role in a case stated appeal and effectively patching it up.

MR ILLINGWORTH QC:

And confirming a judgment that was completely wrong.

WINKELMANN CJ:

And does that correspond to an issue on the list or is it an issue that needs to be added?

MR ILLINGWORTH QC:

It is issue 9 on the list. Sorry, miscarriage of justice fits in within the Court's issue 10 and judicial review is issue 9. So this is an issue that can be characterised under one, either or both those categories. I need to move very

quickly, so if I may I will go straight to the judgment. We have a copy of the judgment that is available to the Court if you wish. One of the points we are going to be making is the Judge cut and pasted vast tracks of the US submissions and did not look at the original evidence for himself and if it is of any assistance we can hand up the marked-up copy either now or later. But what I wanted to do is to start by going to the judgment. The judgment is in three parts. Part A starts at the very beginning. Part B starts at page 173 and Part C starts at page 221. So in Part A, after recording some introductory points, his Honour addresses the standard of proof at page 7.

WINKELMANN CJ:

You had a – did you not have a version of this judgment that was highlighted, would have been cut and pasted in?

MR ILLINGWORTH QC:

We have got the copies available if Your Honour wishes to have that copy.

WINKELMANN CJ:

Yes, I think so.

MR ILLINGWORTH QC:

So you will see that when these copies arrive, there are three forms of –

GLAZEBROOK J:

And this is pasting from the submission. Oh you are going to tell us are you?

MR ILLINGWORTH QC:

I am going to tell you, your Honour what exactly it involves. So, this is a straight reproduction of the judgment. There are three mark-ups. The yellow highlight represents the cut and paste from something that has been cut and pasted literally from the US submissions and you will see that that comprises a very large part of the judgment. There are some green passages – so those

are the yellow ones. The green passages are cut and paste but with only very slight modifications.

GLAZEBROOK J:

And from –

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WILLIAMS J:

So the greens are modifications, are they?

MR ILLINGWORTH QC:

The greens are modifications, yes.

GLAZEBROOK J:

And from the US submissions again?

MR ILLINGWORTH QC:

From the US submissions again, yes.

WINKELMANN CJ:

So the green is a cut and paste but with slight modifications?

MR ILLINGWORTH QC:

That's correct, your Honour, and then in the margin, there are some cross-references. You'll see if we go, just for a random example, to page 90, you will see in the margin, there's a reference to A2183 and that's where you'll find the US submissions so that you can actually compare and those margin references are right the way through this document where appropriate.

ELLEN FRANCE J:

The High Court Judge at paragraph 55 stated that because the District Court Judge didn't engage in any meaningful way with the submissions et cetera on the essential conduct that he had to redo that exercise. So why do we need to see…

MR ILLINGWORTH QC:

Because what his Honour did was to redo the exercise for 24(2)(c). He didn't redo it for 24(2)(d). He simply said he agreed with the prima facie case assessment by the District Court Judge and I'll demonstrate that. So if we just start with paragraph 16, his Honour refers to the general principles, but then at 17, says "The duty of this Court is explained in" the *R v Governor of Pentonville Prison, ex parte Osman* [1989] 3 All ER 701 (HC) case and quotes that for the proposition that he does not need to weigh the evidence.

WINKELMANN CJ:

Sorry, what page are you at?

MR ILLINGWORTH QC:

Page 7 of the judgment, your Honour, paragraph 17. At 18, he says that he has the discretion to reject evidence that is manifestly unreliable but his Honour skips the sufficiency issue which is of course the primary issue under 24(2)(d) and doesn't mention his duty to assess sufficiency in accordance with the line of cases that the Court will be familiar with, *Ferras*, *Dotcom*, *Arcuri*, and *MM*. Three of those cases are obviously Supreme Court of Canada cases and we'll come to that in a minute.

At paragraphs 19 to 20, his Honour quotes the cases of *Ferras* and *United States v Tomlinson* [2007] 219 CCC (3d) 97 (ONCA) for the same proposition that he's just mentioned, that he can reject evidence if it's shown to be manifestly unreliable. His Honour moves in paragraph 21 to the question of –

GLAZEBROOK J:

If you were looking at it in terms of just the, which you say you do, in terms of the previous depositions-type issue, why would you be looking at foreign cases on that if we're looking at it in terms of New Zealand law?

MR ILLINGWORTH QC:

Simply because in the *Dotcom* case, the *Ferras* approach was approved certainly in the joint judgment of Justices McGrath and Blanchard. That incorporates a case called *Arcuri* which was again confirmed by the Supreme Court of Canada in *MM* and *Arcuri* makes the important point, and we say it's the same under New Zealand law anyway –

GLAZEBROOK J:

That's what I was – I'm just asking you whether there were – yes.

MR ILLINGWORTH QC:

Yes, it's the same under New Zealand law. It's not different from New Zealand law but it is an important point which is that when circumstantial evidence is in issue, the Court doesn't simply say "We accept the evidence". The Court asks the question "Is the evidence reasonably capable of carrying the inference that the requesting state seeks in relation to that evidence?" It's not a choice of available inferences but it is a question of whether an inference is reasonably available and that's an assessment that the committal Court was required to do and is required –

GLAZEBROOK J:

You're not suggesting it's any different an exercise –

MR ILLINGWORTH QC:

No.

GLAZEBROOK J:

Thank you.

MR ILLINGWORTH QC:

His Honour refers then to the need for a fair hearing, quotes for some reason the dissenting judgment of Chief Justice Elias on that point, and then at paragraphs 35 to 44 on page 13, his Honour says that "The case against the respondents as […] recorded in the ROC and supplements is to the" following

effect, and he then inserts a cut and paste of the US submissions which you will see from that judgment.

GLAZEBROOK J:
Well, that's actually reasonable, isn't it?

MR ILLINGWORTH QC:
That's reasonable. I'm not complaining about that. At page 16, paragraph 45, his Honour records what he describes as the applicant's evidence, so he's going to quote the applicant's evidence. He's not purporting to analyse it at this stage. He's simply recording it. That record goes from page 17 to page 172 and you'll see that apart from very minor exceptions, it's all cut and paste, and that's what Justice Gilbert was concerned about in his judgment. So that whole section is really a cut and pasted volume 2.

WINKELMANN CJ:
Which page?

MR ILLINGWORTH QC:
It goes to page 172, your Honour. It starts at page 17 and goes to page 172. You'll see that in relation to each of those passages, there is reference to an excerpt from the ROC with a paragraph reference and then under that excerpt, there is an italicised reference "*Inference*" and then there is thereafter set out that the inference that the US seeks from that passage. His Honour hasn't certainly at this stage purported to go through those excerpts and decide whether or not those inferences are available. He's simply recording the appellants' case. And that becomes obvious when you go to page 172 because at that lengthy section, there's a heading "Preliminary Matters to be Heard", so his Honour is now starting in effect the judgment, having recorded the case for the applicant.

There are two headings there, "Stay Applications" and the "Eligibility Hearing" so his Honour is going to deal with the stay applications first and then we see on page 173 "PART B" and the heading "Stay applications" and then

his Honour starts dealing with the three stay applications that were before him. We don't need to stop for present purposes to deal with those particular issues because they would be within the judicial review issue if we reach that point but if you could skip now to page 198, and at page 198, his Honour starts to address the onus of proof. It's a little unusual that his Honour is doing that within the section of the judgment that is on the stay applications but we're not complaining about that but what we do say is that his Honour has got this very badly wrong.

So paragraphs 526 to 529, in our submission, contain serious errors. His Honour says that "the onus is upon the applicant" to present a prima facie case. The Court must be firstly satisfied that "the offence is an extradition offence in the extradition country" which is wrong, as Justice Gilbert held. "This Court can be satisfied that an offence is an offence in the extradition country (USA)" if the appropriate officer has certified that the ROC discloses evidence sufficient to justify a prosecution in that country, and "On the face of the documents the ROC and its supplements have been so certified pursuant to s 25(5)", but that is the requirement to take judicial notice of the signature on the certificate. So this was covered in the High Court judgment. His Honour made it clear that these were wrong interpretations.

His Honour said that the respondents are entitled to challenge the ROC but once a prima facie case has been established by the ROC, the respondents need to undermine the evidence to the extent that the ROC is shown to be unreliable and not safe to go to trial. His Honour is imposing a reliability standard there and an onus really on the –

GLAZEBROOK J:

So whereabouts are you reading from there? At the end of 528, is it?

MR ILLINGWORTH QC:

Yes, that's correct, your Honour. And then similarly in 529, "The principal purpose of this eligibility hearing is as set out in s 24(2)(d), to decide if the evidence in the ROC and supplements would justify the respondent's trial",

and so his Honour is focusing on the ROC instead of the whole of the evidence which he is required to do by the relevant parts of the Summary Proceedings Act that are brought into play under section 22 of the Extradition Act.

WINKELMANN CJ:

What other evidence was there?

MR ILLINGWORTH QC:

There was other evidence, your Honour. Evidence was called from a number of defence witnesses. There was a professor named Professor Sallis. We'll come to him in a moment. Mr Rothken, who's in Court, gave evidence. There was some translation evidence. There were a number of people who gave evidence but what his Honour is saying is "I look at the ROC. If the ROC establishes a prima facie case then", and we'll see this even more clearly in a moment, "the respondents have the right to challenge the ROC but in order to challenge the ROC, they've got to show that the whole thing is manifestly unreliable". His Honour is just skipping over, because he's read some of the judgments selectively, he's skipping over the crucial issue of whether the ROC establishes sufficiency of evidence and whether the inferences are capable of being drawn from the evidence.

GLAZEBROOK J:

There's nothing particularly wrong with the statement at the end of 528 though, is there, in that because that assumes there is a prima facie case under the ROC.

MR ILLINGWORTH QC:

Well, no, your Honour, the clear principle from all the cases is that the Judge has to look at all of the evidence, including the challenges.

GLAZEBROOK J:

I see. I see what you're saying.

O'REGAN J:

Are you satisfied that the High Court Judge identified these errors correctly?

MR ILLINGWORTH QC:

No, Sir. His Honour Justice Gilbert clearly was extremely troubled by the way the judgment dealt with 24(2)(c) and you can see that from the certificate issue that we've looked at. That section was misunderstood and misapplied. Justice Gilbert approved the prima facie case assessment by the District Court and didn't appreciate that these errors flowed over into the prima facie case assessment which was just as serious an error as the 24(2)(c) issue.

WILLIAMS J:

If the only other evidence was defence evidence, is that correct?

MR ILLINGWORTH QC:

No, Sir. There were a couple of affidavits but not of great significance.

WILLIAMS J:

Yes, so the ROC –

MR ILLINGWORTH QC:

The ROC was the primary –

WILLIAMS J:

The ROC was the rock for the US. If the only other evidence was defence evidence then whether you said the Judge had to look at the whole thing or whether one said, as this Judge did, that you needed to test the ROC against the counterevidence, it's really the same intellectual process either way?

MR ILLINGWORTH QC:

Well, I can –

WILLIAMS J:

Presumably, the defence evidence is a challenge to the ROC, not in support of it, so what difference does it make?

MR ILLINGWORTH QC:

What difference it makes, Sir, is that the Judge is applying the wrong legal test.

WILLIAMS J:

Well, he's used the wrong words, but –

MR ILLINGWORTH QC:

No, no, no, Sir, no. With respect, that's –

GLAZEBROOK J:

I think you're going to show us later where you say he did do the wrong thing?

MR ILLINGWORTH QC:

He's applying a manifest unreliability standard to the defendant evidence. He's not looking at whether the defence arguments and evidence can undermine the sufficiency of the case.

WINKELMANN CJ:

So can I just ask you, because yesterday I think maybe a whole lot of hares were set running which aren't critical to your case. Here, you're very critical of what the District Court Judge said but what I want to know is really what's the gravamen of your argument?

MR ILLINGWORTH QC:

The grounding of the argument is that this is not a situation where his Honour Justice Gilbert –

WINKELMANN CJ:

No, I'm asking you to clear away things that you say got wrong but you don't say are the things which we should engage with on appeal.

MR ILLINGWORTH QC:

There are two points coming out of this. First of all, his Honour did not look at the totality of the evidence. He looked at the ROC and then said that the respondents had to overthrow it, overturn it, but the even more important point is that his Honour did not apply a sufficiency test which is the fundamental issue that has to be applied in relation to section 24(2)(d). His Honour just skipped the sufficiency. It's mentioned in a couple of places but he didn't do it. And then the third point which we will come to is that his Honour did not look at the primary evidence for himself. He simply took the US submissions and took them at face value and it is not just the evidence that the Judge had to take into account. He had to take into account the legal arguments and because he adopted this manifestly unreliable principle, he treated a large number of arguments as irrelevant with the result that we were not heard on the sufficiency argument. They were just treated as irrelevant arguments because of an error of law. We say that error of law –

WINKELMANN CJ:

So when you are saying arguments. You are talking about the arguments about the sufficiency of evidence?

MR ILLINGWORTH QC:

Yes and including the obvious one. Your Honour can't rely upon conclusory assertions for copyright. All of the conclusory assertions were taken at face value. His Honour thought that because the ROC had been certified, he had to take everything at face value in the ROC and didn't analyse it. Wasn't required to weigh the evidence. So in our submission, although it is a Canadian case, the best summary of the need to assess circumstantial evidence very carefully is in *Arcuri.* I am not going to ask your Honours to turn to it but it is in our – in the hard copy bundle at volume 6, starting at page

1986 and the relevant pages are 1945 to 1947. And that case of *Arcuri* was originally in relation to a true committal hearing but it has been confirmed as applicable to extradition cases in *Ferras* and in the more recent case of *MM*.

WILLIAMS J:
Can you give me the page number again please?

MR ILLINGWORTH QC:
Yes Sir, the starting page is 1986 in volume 6 and the reference to circumstantial evidence and how the Court should deal with it, starts at 1945 and goes to –

O'REGAN J:
It can't be.

WILLIAMS J:
Do you not mean the other way around?

O'REGAN J:
Yes if the case begins 1986.

MR ILLINGWORTH QC:
Oh look I will just get that checked. Sorry. No I can see what has happened, we have given the *Ferras* reference for *Arcuri*. I will just get that checked and come back to you on that Sir. There is an incorrect reference, but I am pretty sure that the 1945 is correct.

WILLIAMS J:
So you say that although this was about committal generally, *Ferras* and?

MR ILLINGWORTH QC:
And *MM*, transpose it.

MR ILLINGWORTH QC:

I am going to avoid that word like the plague. *MM* certainly confirms it and *Ferras* confirms it as well for extradition proceedings, but it is completely consistent with our law as I responded to her Honour Justice Glazebrook a few minutes ago, it is also referred to in the dissenting judgment of Chief Justice Elias in the *Dotcom* case. That principle, I don't know if she referred specifically to Arcuri, but she certainly refers to that principle and it is not part of the crucial issues in respect of which she was in dissent. So if we go to 535 to 537, we find that there are further errors. First, the prosecutor's certificate is conclusive unless the respondents can show that it would be unfair to conduct the eligibility hearing based on the ROC evidence covered by the certificate. That is a particularly serious issue at paragraph 535 and also 537. There is evidence to Mr Rothken's evidence and Professor Lessig, I had forgotten about him, from Harvard. He gave evidence, or he gave an affidavit. The fact that, his Honour the fact that they, "Have a different view of USA law is not sufficient for this Court to disregard the certificate produced pursuant to section 25(5)." So his Honour is treating the ROC as presumptively sufficient instead of presumptively reliable, and taking it at face value.

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GLAZEBROOK J:

Given that he was looking at whether it was a US extradition offence, that would be right, wouldn't it, because you just assume that it is an offence under US law if the requesting country says it is.

MR ILLINGWORTH QC:

Yes, that part of it is not wrong, but it is the –

GLAZEBROOK J:

So the fact someone else has a different view is actually irrelevant, you agree?

MR ILLINGWORTH QC:

That's right.

GLAZEBROOK J:

So from that point of view he was right?

MR ILLINGWORTH QC:

Yes, but it's the reliance on the certificate because it again shows that a certificate has been given a presumptive sufficiency, which is not correct. So far as the US law is concerned, the reason why that was being raised was because we were trying to assert, well certainly Mr Dotcom's witnesses were trying to assert, that there had been a lack of compliance with the duty of candour and his Honour didn't appreciate the reason why those witnesses were being called. It wasn't simply to show an alternative view of the US law, it was to try to show that Mr Prabhu hadn't made a candid disclosure about the US law situation, but that is not the point I am making for present purposes. We are talking about, at the moment, the certificate and the heavy reliance that was placed on the certificate inappropriately by his Honour.

So paragraph 549 repeats the error concerning section 25(5). His Honour says, "The respondents in their arguments are ignoring the effect of section 25(5)", and you can see that in 549. They say, it's in the second or third sentence there, and at 551 his Honour says there is no point in allowing the respondents to obtain evidence that would provide alternative inferences. His Honour overlooks the fact that the respondents are entitled to show that the inferences sought are not reasonably available. His Honour just hasn't grasped the need to deal with the inferences in the way that is set out, for example, in *Arcuri*. At 552 his Honour said –

GLAZEBROOK J:

Although this is in the context of the stay application so –

MR ILLINGWORTH QC:

Yes, it is, your Honour but it's revealing his –

GLAZEBROOK J:

You say it's repeated later.

MR ILLINGWORTH QC:

It is.

GLAZEBROOK J:

As an error, because one can understand it in the context of the stay applications, that we're not obliged to give a stay, so you can turn what's supposed to be effectively a summary hearing into the full trial.

MR ILLINGWORTH QC:

Yes, but the –

GLAZEBROOK J:

Which is what he's really saying.

MR ILLINGWORTH QC:

He's saying that but in saying it he's relying upon the certificate in a way that demonstrates the fundamental point that we are making, which is that his Honour is relying on the certificate to give prima facie sufficiency to the ROC without his having to weigh it up or analyse it. To assess it for correct inferences and so on. His Honour is simply taking the record of case at face value.

GLAZEBROOK J:

Well we need to look at whatever in Part C to illustrate that I think. But you're just setting out what he's said now, is that right?

MR ILLINGWORTH QC:

The problem is that the errors are very clear in Part B, they are not so clear in Part C and what we're trying to demonstrate here is that his Honour –

GLAZEBROOK J:

That's the foundation for the Part C analysis, is what you're saying.

MR ILLINGWORTH QC:

It is, your Honour, and we can't necessarily give the same graphic demonstration in C but we can certainly show it in spades at this part.

So, 552, unless evidence sought by the respondents is likely to undermine the evidence of the applicant so it can be seen to be manifestly unreliable, a stay or an adjournment shouldn't be granted. Now his Honour could be right or wrong about the stay, but the idea that the applicants have to undermine the evidence – sorry the respondents have to undermine the evidence of the applicants so as to show that the whole ROC is totally unreliable, is simply wrong again.

We go to 556, "A competing explanation of the applicant's evidence is not a sufficient basis for granting a stay." That is fair enough. "The respondents' challenge must go to the reliability of the ROC." So again reliability is the touchstone, not sufficiency. And there's an authority that's cited which certainly contains that statement about unreliability. But if I can just pause there for a moment and put this into context. In Canada, the only test that applied under the *United States of America v Shephard* [1977] 2 SCR 1067 case, which was the case that applied down to *Ferras*, was sufficiency of evidence and Anne Warner La Forest, the Judge's daughter who took over the writing of the extradition text in the third edition, wrote a paper which is referred to, which is actually fully reproduced in our bundle 9 – I think it is – in the authorities, and she severely criticised the new legislation that came in, bringing with it the record of case procedure. That, and another paper by another academic, triggered the *Ferras* discussion and the *Ferras* analysis and her paper is referred to in the authorities in *Ferras* and it's referred to in the judgement. What was happening there was that the submission was made that the old procedure was not compliant with the charter, with the Canadian Charter, and the Court's response was, well that's not, we're not

going to accept that because we can make the procedure under the new legislation, we can read it or interpret it in a way that's compliant with the charter, and the way that was done was to change the *Shephard* principles and to add to the *Shephard* principles an issue of reliability, and to establish that the committal court could throw out evidence that was manifestly unreliable. So that was an add-on to the sufficiency approach that had earlier existed. It was not a replacement for the sufficiency test. The fundamental question under the equivalent of our section 24(2)(d) was whether the evidence met the sufficiency standard.

WINKELMANN CJ:

So when the Court looked at the ROC, they could excise from it that which was so manifestly unreliable that it would be a miscarriage, could occasion a miscarriage of justice, or some such threshold. So it was an additional – so instead of just having to accept the ROC, and looking at it to see if there was sufficient evidence, they could excise in their minds from the ROC that which was manifestly unreliable.

MR ILLINGWORTH QC:

Yes, that's correct, your Honour. That was the principal new development that took place in *Ferras* and that was affirmed in the much more recent case of *MM*, but in *MM* the issue was can the Judge address defences, substantive defences, and the answer to that from the majority was no. But it didn't affect the development that had occurred in *Ferras* because that development was affirmed.

WILLIAMS J:

So was the law prior to *Ferras* that reliability was not a subset of sufficiency, or was it just –

MR ILLINGWORTH QC:

Reliability was not a permitted issue for the committal court.

WILLIAMS J:

Shephard said that specifically?

MR ILLINGWORTH QC:

Yes.

WILLIAMS J:

Really?

MR ILLINGWORTH QC:

Yes. It was a very narrow approach. What the Court did in *Ferras* was to say, well, although the committal process and the extradition process are similar, there are some major differences, and we need to look at those differences because this person is not simply going to go before a local court where in our situation a discharge could be granted by the local court. The person is going to be deported or sent overseas, extradited, by force if necessary, and that's a very serious issue in terms of human rights. So the Court applied a different perspective to the extradition hearing and didn't simply treat it as common or garden committal.

GLAZEBROOK J:

Well I'd be surprised if our common law garden committal would accept manifestly unreliable evidence as being part of a prima facie case.

MR ILLINGWORTH QC:

That may well be so your Honour, and hopefully our law has –

GLAZEBROOK J:

Not that we're actually have committals anymore but when we did I don't think it would've –

MR ILLINGWORTH QC:

No, under the old system I understand what your Honour means, that may well be right, but what has happened here is that his Honour Judge Dawson

has focused on the reliability and has thought that that now occupies the ground. That is not right. So, at 556, I've done that, 557, his Honour's referring to Professor Sallis' evidence, who was a defence witness who explained from a New Zealand perspective and without having expertise under the DMCA environment how the Internet worked and how cloud storage companies worked and so on and gave quite a lot of technical evidence. His Honour said that he had found that evidence very helpful but that it didn't undermine the evidence or show that it was unreliable and that's in paragraph 557. He said, "At best, it offered an alternative explanation that could be relevant at trial." So again, his Honour has missed the sufficiency point and missed the circumstantial evidence point. And just to remind the Court, in the *Dotcom* disclosure case, this case was described as a case based on circumstantial evidence which we say it certainly is.

His Honour made a serious mistake in relation to Professor Sallis, an evidential mistake at 558.

WILLIAMS J:
Can we just go back to that Sallis evidence –

MR ILLINGWORTH QC:
Yes, Sir.

WILLIAMS J:
– rejected as failing to render unreliable the ROC?

MR ILLINGWORTH QC:
He wasn't rejecting the evidence, Sir, he was saying –

WILLIAMS J:
No, rejecting it for the purpose of undermining the prima facie case. If the Judge were to set it aside on a sufficiency standard, what would he have said?

MR ILLINGWORTH QC:

Can I answer that in a slightly different way, Sir? What we say he should have done is to take that evidence into account in deciding whether or not there was a prima face case –

WILLIAMS J:

Got that.

MR ILLINGWORTH QC:

– on sufficiency grounds, and the evidence that was given showed the methodology that was being used, the technical methodology that was being used by Megaupload, the way it deduplicated files –

WILLIAMS J:

Yes, I don't want to get into the substance of it –

MR ILLINGWORTH QC:

No, I know you – all of those technical –

WILLIAMS J:

But you see, my question is really aimed at if Professor Sallis said "Well, the ROC is wrong for the following technical reasons", and the Judge then sat back and weighed the sufficiency of the applicant's case, wouldn't he have said "I have taken into account Professor Sallis' evidence and I don't think it undermines the sufficiency of the ROC"? Wouldn't it really have been in substance exactly the same comment?

MR ILLINGWORTH QC:

No, Sir, because –

WILLIAMS J:

Why not?

MR ILLINGWORTH QC:

Because the sufficiency test is the question of whether under 24(2)(d) the evidence that's been tendered at the hearing would justify the trial if the offence occurred in New Zealand or if the conduct occurred in New Zealand. Reliability is a different issue altogether. It's "this chunk of evidence goes out the window because it's manifestly unreliable".

GLAZEBROOK J:

But isn't the point about a committal hearing, and let's take it down to an allegation from a complainant that he or she has been assaulted. So there's an allegation that the person's been assaulted. There are various wounds on the person that you have a defence evidence saying "Well, those wounds are explicable by a fall". That doesn't undermine the sufficiency of the evidence of the complainant that they have been assaulted and that they have these wounds and that those two were related. Isn't that all that's being said, that an alternative explanation doesn't undermine the sufficiency and also, it is in relation to the stay application and not in relation to part C, but we've already discussed that?

MR ILLINGWORTH QC:

Well, no, your Honour, we don't agree. If I can just –

GLAZEBROOK J:

Well, you mightn't agree –

WINKELMANN CJ:

Well, is your point, Mr Illingworth, so we can move on quickly, is your point that – are you trying to argue that Professor Sallis was trying to show that there was an alternative inference available from the evidence and that therefore –

MR ILLINGWORTH QC:

That the adverse inference which the United States was seeking from parts of the evidence was not reasonably available and it should have been taken into account in that way rather than on the basis of the reliability point.

WILLIAMS J:

I wonder whether it's just infelicitous wording but essentially making the same point because wasn't he really saying "Despite Professor Sallis, a jury could rely on the ROC to found the guilty verdict"?

MR ILLINGWORTH QC:

No, Sir. What his Honour is saying is "This evidence is irrelevant because it doesn't overturn the reliability of the ROC". It's not irrelevant evidence. It is evidence that could be, should be properly weighed in the sufficiency analysis. You can't simply say –

WILLIAMS J:

Yes, all right, I get your point.

WINKELMANN CJ:

So you're going to need to show us, at least direct us to the parts of the judgment where we can be satisfied that the Judge hasn't done the sufficiency analysis because this is all peripheral, really.

MR ILLINGWORTH QC:

Well, it –

WINKELMANN CJ:

You're saying it's – yes.

MR ILLINGWORTH QC:

What I'm submitting, your Honour, is that this demonstrates a clear error of law in the judgment in relation to the application, understanding an application of section 24(2)(d). It's an error of law that goes to the very root of the

sufficiency analysis which is fundamental to committal and obviously extradition. This is not a preliminary submission. It is a submission that says "Here, you have a clear error of law. It may have been in the part of the judgment which is dealing with the stay applications but the Judge has gone wrong in principle in a fundamental way" and that is our submission.

WINKELMANN CJ:

Right, but when we get to the bit where he does come to consider the ROC, when he gets to consider the eligibility, what does he do? That's what I'm really interested to hear.

MR ILLINGWORTH QC:

Well, we now come to part C. There are further large sections, as you'll see, not so much in part C but there are fairly large sections of cut and paste. What is absent from anywhere in the judgment so far, and we submit for the rest of part C, what is absent is any evidence where his Honour has looked at the ROC for himself directly. Any evidential material, extracts from the ROC, are all taken from the US submissions and are cut and pasted in, and what that means is –

GLAZEBROOK J:

Well, there's nothing particularly wrong with that, is there?

MR ILLINGWORTH QC:

Well, yes, there is, your Honour, because it indicates –

GLAZEBROOK J:

Were there other aspects of the ROC that he's left out that totally undermined those inferences?

MR ILLINGWORTH QC:

It's the process that his Honour has followed. He's taken the US submissions –

GLAZEBROOK J:

Well, the process can be wrong, but if in fact all of the relevant aspects of the ROC were put in the submissions and there's nothing that he's left out that made it wrong then does it matter?

MR ILLINGWORTH QC:

Yes, it does, and we say it definitely does, your Honour. In the disclosure case, the point was made repeatedly that there has to be a meaningful judicial assessment and that means that the Judge has to look at the evidence for himself and weigh up the inferences that are available.

GLAZEBROOK J:

I understand that second point but just saying that he's only relied on the passages that the Crown referred him to is not – unless you can say "and therefore left out a whole pile of things that were relevant and should have been taken into account in the ROC"?

MR ILLINGWORTH QC:

Well, he's left out all of the defence evidence because –

GLAZEBROOK J:

No, I understand that point as well.

MR ILLINGWORTH QC:

I can't take it any further than that. If the Judge has done a fair analysis of the evidence and has looked at it for himself and has weighed it in the limited sense that happens at an extradition hearing, as *Ferras* says, it's a limited weighing, then fine, but what we're saying is that this is just a rubber stamp. It's just submissions that have been taken at face value, no weighing up has been done, even in a limited sense, and no assessment has been done of the inferences that are available. It just hasn't been done. The task hasn't been followed.

WINKELMANN CJ:

Right, and you say the fact he's – your best evidence of that is that when he considers the inference available on the evidence, he's simply cut and pasted the United States' inferences?

GLAZEBROOK J:

And that's from 591, is it, and 592?

MR ILLINGWORTH QC:

Yes. So we then – sorry. I think if I take the Court now to paragraph 700 –

WINKELMANN CJ:

Well, what about 588, for instance?

MR ILLINGWORTH QC:

I'm sorry, your Honour, 5?

WINKELMANN CJ:

588.

MR ILLINGWORTH QC:

588?

WINKELMANN CJ:

That is him referring to the evidence.

1100

MR ILLINGWORTH QC:

Well, it's not referring to any specific evidence. His Honour is just extrapolating from the submissions that have been made to him. He's not going back to the original evidence and saying "I've looked at the evidence for myself".

ELLEN FRANCE J:

But isn't that just a matter of semantics? If his assessment is that there's an abundance of evidence et cetera, why does he have to add on –

MR ILLINGWORTH QC:

Well, because his Honour hasn't done the analysis, your Honour. His Honour hasn't looked at the evidence – as we saw at the beginning of the judgment, we've got 150 pages of cut and paste with inferences slotted in. His Honour hasn't been through those inferences. There's no indication that his Honour has been through that material to check whether those inferences are reasonably capable. He's just taking it at face value and it's a rubber stamp exercise.

WILLIAMS J:

Do you say he had to go through each one and make a call?

MR ILLINGWORTH QC:

Yes, because this is a circumstantial evidence case and his Honour has to say what inferences can be drawn from the evidence. His Honour just hasn't carried out that task. Not only that, His Honour hasn't measured the evidence against the essential components of the counterpart New Zealand defence. He just hasn't done that adequately. The evidence and the offences haven't been matched up. And so –

WINKELMANN CJ:

So that second point, can you just repeat that again?

MR ILLINGWORTH QC:

Yes, his Honour has not measured the evidence against the essential ingredients of New Zealand defences. In part C, his Honour –

WINKELMANN CJ:

That's an additional error, is it?

GLAZEBROOK J:

Well, because he didn't think he needed to so…

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

That's the difficulty, but he was matching it to the US offences effectively.

MR ILLINGWORTH QC:

Yes, indeed.

WINKELMANN CJ:

So that's an additional –

GLAZEBROOK J:

And to a degree, against the New Zealand defences in a slightly odd manner but…

MR ILLINGWORTH QC:

Well, that's the problem in C, your Honour. It's often very difficult to know exactly what his Honour is doing.

GLAZEBROOK J:

Well, he's got headings.

MR ILLINGWORTH QC:

Yes, C –

GLAZEBROOK J:

Well, he is looking at 249 of the Crimes Act and 228.

MR ILLINGWORTH QC:

The best example was the one that I was trying to take the Court through yesterday in relation to counts 9 to 13, and you'll see that that starts on

page 254 of the judgment. So there are references to the evidence but it's all cut and paste or in the yellow highlight, and then having referred to that as both the accusation and the evidence, his Honour says that the alleged conduct in counts 9 to 13 is sufficient to establish a prima facie case. So the ROC again is taken at face value and his Honour just, in a broad way, says that's efficient to establish a prima facie case.

WINKELMANN CJ:

So can I just check that we've got your argument then? The first argument is that the Judge erred because he didn't apply a sufficiency test, he skipped that checkpoint here?

MR ILLINGWORTH QC:

Yes.

WINKELMANN CJ:

He didn't assess the evidence himself, he proceeded on the basis that because the ROC was certified, he could assume it was sufficient evidence?

MR ILLINGWORTH QC:

Yes.

WINKELMANN CJ:

Second error, he did not look at the whole of the evidence but rather siloed the evidence of the defence into relevance only to the issue of manifest unreliability?

MR ILLINGWORTH QC:

That's correct, your Honour.

WINKELMANN CJ:

He therefore treated as irrelevant all defence arguments about the sufficiency of the evidence?

MR ILLINGWORTH QC:

Correct.

WINKELMANN CJ:

And you say he didn't address them, or did he?

MR ILLINGWORTH QC:

He didn't address the –

WINKELMANN CJ:

Defence arguments?

MR ILLINGWORTH QC:

– arguments about the sufficiency of evidence and we'll show you that at the very end of the judgment.

WILLIAMS J:

Well, he treated them as reliability of evidence, of the other side's evidence?

MR ILLINGWORTH QC:

He treated them as irrelevant to the issue that he was considering which was manifest unreliability.

GLAZEBROOK J:

And are you going to take us to show us why they related to sufficiency, not reliability, in the sense I was talking to you before of alternative explanations? Because there are trial issues.

MR ILLINGWORTH QC:

Yes, your Honour.

GLAZEBROOK J:

And there always will be – in my example, in terms of "Well, those wounds were caused in a different way from the way that the Crown witness is

asserting" would not be sufficient to say there won't be a committal to trial. It would be said "That is a trial issue"?

MR ILLINGWORTH QC:

Yes, undoubtedly correct. If the Court analyses an example piece of evidence, looks at the inference that is said to be available, and says, "Well, look, it's a trial issue as to whether that inference should be drawn but it's an inference that's available on that evidence," then that's sufficient for the purposes of the extradition hearing. But if the Court, having heard all of the evidence, including, for example, the evidence of Professor Sallis says, this is innocuous – the fact that a cloud storage facility deduplicated a file so that they didn't keep 20 copies of the same digital file, is innocuous because that is the way it is done in this industry – it is completely unreasonable to treat that as a piece of circumstantial evidence that is adverse to the defendants. Now that is a sufficiency argument, that was put to the Court and there were many other arguments like that about the inferences that the US were seeking to draw but none of those arguments were heard. They were all treated as irrelevant and they were treated as irrelevant on the basis of the point that I have been illustrating, particularly in Part B.

WINKELMANN CJ:

All right, so can I go back to my list. I was going through a list with you and I have covered two grounds and the third one was, he did not measure the evidence against New Zealand offences, simply referring to the US offences which all flowed, of course, in the earlier error.

MR ILLINGWORTH QC:

Well I have to modify that slightly your Honour.

GLAZEBROOK J:

Because he did.

MR ILLINGWORTH QC:

In some cases, he was referring to New Zealand offence provisions but what we say is, he did not identify the evidence that supported that particular charge.

WINKELMANN CJ:

So, he did not measure the evidence against the New Zealand offence list.

MR ILLINGWORTH QC:

That is correct, your Honour. So, then we go to, just finally in this judgment, to paragraph 6, 7, 8. Again we see the onus issue popping up. The applicant has established –

GLAZEBROOK J:

Sorry 6, 7, 8. Sorry what paragraph are you on?

MR ILLINGWORTH QC:

Six, 7, 8 page 257. So the applicant has established a prima facie for each count in the superseding indictment. The respondents are entitled to challenge the applicant's case and do so. Those challenges are considered below but none of the challenges add up to manifest unreliability, so none of them were accepted. And then finally if we look at paragraph 699 on page 270, second to last page. This shows the general rejection point, "Given the very large volume of material presented during the hearing, not possible to issue decisions that would be less than encyclopaedic in length. No need to do this. Much of the material presented to the Court has not been relevant to an eligibility hearing and a number of the submissions were unsupported by appropriately sworn evidence. They do not come near to undermining the applicant's case."

WINKELMANN CJ:

What paragraph is that?

O'REGAN J:
699.

MR ILLINGWORTH QC:
699 page 270. "They do not come near to undermining the applicant's case or point to a breach of the duty of candour in good faith. If some aspects of the parties' submissions or evidence has not been referred to in this judgment, that is because it was not relevant to the decision." So what we say is that numerous sufficiency arguments have been thrown in the bin on the basis that they are not relevant to the manifest unreliability test which is the wrong test.

ELLEN FRANCE J:
I know the points that you make but at 688(ix) for example, the Judge does say he has reviewed the evidence and is satisfied that when inferences are required, then they are based on evidence from which it is reasonable to draw those inferences.

MR ILLINGWORTH QC:
Yes I don't doubt that his Honour has reviewed the evidence as tendered by the US. I am not suggesting for a moment that he hasn't read through that material that is included in the judgment but that's a different thing from going back to the ROC and looking at it for himself.

WINKELMANN CJ:
Sorry, what paragraph was that?

ELLEN FRANCE J:
688.

WINKELMANN CJ:
So, you say that when the Judge refers to reviewing –

MR ILLINGWORTH QC:

We say your Honour there is just no, yes if we just look at –

GLAZEBROOK J:

Well when you are looking at a judgment where you have had submissions from both parties, yes the Judge may make an error even if he or she was not referred to particular passages and they were vital, but if they were referred to all of the passages, does it matter that they have not gone back to and read the rest of the evidence that the parties are not relying on?

MR ILLINGWORTH QC:

Your Honour that I accept is the weaker of the arguments on this point. The primary argument is that his Honour has erred in law in relation to the test that he is supposed to apply. That is a very serious error of law that goes to the root of the evidential assessment.

WILLIAMS J:

He has applied *Ferras* as with a whole deal, and in fact it is an add on?

GLAZEBROOK J:

I am not actually sure about that because unless the witnesses, in my assault case, unless it was manifestly unreliable, then the fact that there is an alternative explanation and an alternative inference, is in fact irrelevant.

MR ILLINGWORTH QC:

Yes, that can be so and I need to –

GLAZEBROOK J:

Well you have to say why it is not so in this case don't you?

MR ILLINGWORTH QC:

Well for the reason that is spelled out in *Arcuri* and I need to get that judgment for you.

WINKELMANN CJ:

There seems to be a problem with your argument that he has applied the wrong test in its own terms because just before you accepted that he had reviewed the evidence as set out in the submissions but not the ROC and therefore, and turned his mind to that. Which suggests he did apply a sufficiency test.

MR ILLINGWORTH QC:

I am not suggesting that he hasn't read the material that is in the cut and paste, in the beginning part of the judgment. I presume his Honour would have read through that. What we say is, his Honour has made it clear that he is entitled to take that at face value and not do the assessment that is required in relation to the inferences which build up the circumstantial case. The best way to illustrate this is by just going to the package in *Arcuri* which is in volume 6 of the authorities' bundle.

GLAZEBROOK J:

Well does he not say that this evidence is capable of supporting these inferences? I accept that it is capable of supporting these inferences and the only way that I would say that it wasn't was if any of it was manifestly unreliable and that is not being shown by the respondents at that stage, and what is wrong with that?

MR ILLINGWORTH QC:

What is wrong with it, your Honour, is that first of all it puts the cart before the horse. It is putting the applicant's evidence on a pedestal and saying, you have got prima facie evidence, I am taking this evidence at face value. The only way you can overturn it is by showing that it is manifestly unreliable. It is the wrong legal test.

GLAZEBROOK J:

Well what is the right legal test then?

MR ILLINGWORTH QC:

The right legal test is to do exactly what every committal Court was required to do under the old system and ask whether there is evidence to establish, upon which a jury could rely, on each essential ingredient of the offence.

GLAZEBROOK J:

Well if you can rely on anything except evidence that is manifestly unreliable, what is the difference?

MR ILLINGWORTH QC:

The difference is that under the old committal approach you didn't have to show that evidence was manifestly unreliable before it was taken into account. You are simply entitled to contribute to the pool of the evidence.

WILLIAMS J:

Isn't the bare point that if – I am not going through the detailed inferences – but if on the ROC, two inferences were reasonably available. One pointing to not guilty, the other pointing to guilty, the unreliability of evidence pointing to the guilty would be irrelevant to the question of whether that was sufficient for a jury to convict. It would be sufficient that though reliable, it admitted inherently of two different verdicts?

MR ILLINGWORTH QC:

That's not the way it's put in *Arcuri*, Sir.

WILLIAMS J:

Let's not worry about *Arcuri*. Let's talk about how I put it.

MR ILLINGWORTH QC:

Well, no, I can't accept that –

WILLIAMS J:

This question is on your side, Mr Illingworth.

MR ILLINGWORTH QC:

Yes, I appreciate that, Sir. If there are two inferences available then the Court takes the one that's most favourable to the requesting state –

WILLIAMS J:

Only if that inference can be chosen –

MR ILLINGWORTH QC:

Yes.

WILLIAMS J:

– without speculation?

MR ILLINGWORTH QC:

Yes, if it's reasonably available, and that is the whole point. We're entitled to challenge the applicant's evidence on that very issue.

WILLIAMS J:

So, my point is if, taking into account the whole evidence, and a not guilty verdict was reasonably available and a guilty verdict would be chosen only on the basis of speculation rather than some other inferential or circumstantial evidence, then although manifestly reliable, it would still not meet the sufficiency test?

MR ILLINGWORTH QC:

I can't disagree with that, Sir. I believe it is an appropriate way of looking at the evidential test. Manifest unreliability and sufficiency are two different concepts.

WILLIAMS J:

Yes, but I'm trying to concretise that into –

MR ILLINGWORTH QC:

Yes, I appreciate that, yes.

WILLIAMS J:

– a particular case. Otherwise, we're just talking about scientific formulae.

MR ILLINGWORTH QC:

I'm just processing the question, Sir, but I think I can safely agree with that.

WILLIAMS J:

So the question then is whether there were such inferences argued for which on a careful combing through the ROC and the countervailing evidence would have produced or could have produced such a result. Then you've got a hard example of the wrong test being applied producing the wrong result.

WINKELMANN CJ:

Mr Illingworth took us to that example with Professor Sallis. That's your example.

WILLIAMS J:

You didn't say what Professor Sallis' points were.

MR ILLINGWORTH QC:

Professor Sallis is giving evidence about the process of deduplication which is a standard process in the cloud storage industry and he is saying "This is a stock-standard approach to save storage space. There is a process, an algorithm that's applied to a file. It produces a number called an MD5 hash value. That hash value is used by the computer system to identify whether there's more than one copy of that file on the system and if there's already a copy of that file on the system then another copy is not created".

WINKELMANN CJ:

And the United States' inference was that that process was followed to conceal from the copyright holder the fact that there were multiple entries to this one site, is that right?

MR ILLINGWORTH QC:

In essence, yes, your Honour, the deduplication process was relied upon to draw adverse inferences in circumstances where we say that was just, the evidence simply wasn't capable of drawing that conclusion once you understand the environment, the industry environment in which this process took place.

WINKELMANN CJ:

And can you at some point give us an evidence reference for Professor Sallis' evidence?

MR ILLINGWORTH QC:

Yes, we can easily do that, your Honour.

WILLIAMS J:

So let's take that example a bit further. The US says the takedown process locks one door but the governors of the organisation know there are actually 5000 other doors that are wide open and the wiretaps confirm that knowledge. Why is that not available for a jury to choose the guilty inference from that without speculating?

MR ILLINGWORTH QC:

Because the appellants are accused of deliberate and wilful infringement of copyright knowing that they are doing so and to show that they have abstract knowledge that there are items on their website or on their storage facility that may be infringing doesn't get anywhere near that standard and we say in assessing whether or not the sufficient evidence in relation to any particular charge, if the requirement is to demonstrate knowing, wilful infringement of copyright, you have to have a specific item.

WILLIAMS J:

Right, so then your sufficiency argument is more fundamental than the unreliability point?

MR ILLINGWORTH QC:

That's absolutely right, Your Honour.

WILLIAMS J:

But if that's your point, why bother with the unreliability argument?

MR ILLINGWORTH QC:

Well, no, Sir, what we're saying is the test was not carried out correctly in the District Court.

WILLIAMS J:

Of course, but actually when we drill down, your real problem is they don't grapple with concrete examples of infringement and knowing infringement and that's a pretty fundamental point that you've made several times but that's the real case.

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MR ILLINGWORTH QC:

That's the real issue. The US tries to get around that issue by drawing adverse inferences from particular passages of evidence. It's crucial to know whether those adverse inferences were reasonably capable of being drawn or not and we've given you one example. Another example is that the user, from the user's perspective, the user is able to generate a link to a particular digital file and share that with other people.

WILLIAMS J:

But on this basis, in reality, the manifest unreliability point is secondary to the fundamental point which is on the evidence that was available even from the ROC, those inferences were not available.

MR ILLINGWORTH QC:

That's what we were trying to argue but we couldn't get anywhere with that argument in the District Court because his Honour said "It's all irrelevant unless you can show manifest unreliability". His Honour wasn't listening to the sufficiency arguments. Those arguments were treated as irrelevant. We say that is wrong in law, it's a fundamental error, and you can't confirm a judgment that has been based on that kind of error.

ELLEN FRANCE J:

Your approach there though doesn't seem to be consistent with *Arcuri* where what they're saying is, as I understand it, is in the case of inferences, and I'm looking at page 1946, volume 6…

MR ILLINGWORTH QC:

Sorry, 1946?

ELLEN FRANCE J:

1946, so explaining there, as you know, the task is a little bit more complicated when you haven't got direct evidence and you're looking at inferences but if you look at the passage at the bottom, "The judge must therefore weigh the evidence in the sense of assessing whether it is reasonably capable of supporting the inferences" et cetera but the weighing "is limited. The judge does not ask whether she herself would conclude that the accused is guilty. Nor does the judge draw factual inferences or assess credibility. The judge asks only whether the evidence, if believed, could reasonably support the inference of guilt."

MR ILLINGWORTH QC:

Yes, and what we say is that you've got to go back to the preceding passage to see what that means. It's paragraph 23 from the top. What the Court says in *Arcuri* is if you've got direct evidence then it's simply a question of whether the evidence can be believed or not. When it's a circumstantial case, "The judge's task is somewhat more complicated […] The question then becomes whether the remaining elements of the offence – that is, those elements as to

which the Crown has not advanced direct evidence – may reasonably be inferred from the circumstantial evidence."

ELLEN FRANCE J:

Yes, and I don't think there's any disagreement between us in relation to that but my point is the conclusory part of that is that the Judge does not ask whether she herself would conclude that the accused is guilty so –

MR ILLINGWORTH QC:

We're agreed on that, your Honour. That's not in dispute. What the Judge must ask is whether the evidence is reasonably capable of supporting the inference. That's the crucial thing. If the Judge hasn't done that then the Judge has not carried out the task in relation to circumstantial evidence.

WINKELMANN CJ:

And your point is that when assessing that on this point in relation to the inference of dishonesty which is drawn from the deduplication process, the Judge should have been considering Professor Sallis' evidence?

MR ILLINGWORTH QC:

Yes, among other things, but that's just an example.

WINKELMANN CJ:

But that's an example?

MR ILLINGWORTH QC:

Yes.

GLAZEBROOK J:

But he did, and said it was just an alternative inference in the same way that the inference that my wounding issue was that another inference is capable of being drawn?

MR ILLINGWORTH QC:

No, because his Honour is saying it's irrelevant because it doesn't show that the evidence that we're concerned with here is manifestly unreliable. It's the wrong legal test. It's why I've been at pains to show how much he relied upon the certificate, how he took the ROC at face value, and refused to consider it any more closely than by applying a manifest unreliability standard. That's not the right standard. That's not the right test.

WILLIAMS J:

Well, you need, in order to draw that inference, a jury properly directed would need to be satisfied on the basis of other circumstantial evidence that the dishonesty inference is not a guess?

MR ILLINGWORTH QC:

Yes.

WILLIAMS J:

If there are two available, right, because that would be insufficient?

MR ILLINGWORTH QC:

Yes, but as Justice Ellen France has just pointed out to me, Sir, it's not a question of judging what would happen at a trial, it's a matter of judging the evidence that is before the extradition Court.

WILLIAMS J:

Yes, I know that, but I would have thought the purpose of this is to decide whether the inference is capable of supporting the conclusion, not whether you or I think that conclusion is correct but whether it's capable of it –

MR ILLINGWORTH QC:

That's correct, your Honour, in that respect.

WILLIAMS J:

– and it's also orthodox that if you have to speculate between them to choose, it's not capable of it.

MR ILLINGWORTH QC:

Yes, I accept that, Sir, and our submission is that by applying a manifest unreliability test, his Honour didn't engage in that process.

WINKELMANN CJ:

So Mr Illingworth, it's 25 past 11. So where are we at? We accept our responsibility for part of the delay.

MR ILLINGWORTH QC:

Thank you, your Honour. We're finished with the District Court judgment. If I can just briefly –

WINKELMANN CJ:

So if we look at your roadmap, and we just agreed at the beginning of the day, I think, that those were issues 9 and 10 on our Supreme Court list of issues. If we look at your roadmap, where are we?

MR ILLINGWORTH QC:

Well, we're at the –

WILLIAMS J:

We're not at the High Court yet?

MR ILLINGWORTH QC:

Well, we just want to finish the High Court and how the High Court and Court of Appeal dealt with 24(2)(d).

WINKELMANN CJ:

So that's D, where are we?

MR ILLINGWORTH QC:

It is in D1.6 and 1.7 but it actually takes care of most of part E because our submissions on part E have been set out in full, we don't need to repeat those orally, and much of the judicial review section doesn't need to be repeated. I have a few key points to make on that. But if we can finish with the High Court and the Court of Appeal fairly quickly then I would probably have another 10 or 15 minutes to go after that.

GLAZEBROOK J:

We've really gone through what you say was wrong with the High Court and Court of Appeal already, haven't we, or are there additional points?

MR ILLINGWORTH QC:

Well, essentially, if I could cut it very short, Your Honour, what we say is that his Honour Justice Gilbert trenchantly criticised the District Court judgment in relation to 24(2)(c) but essentially didn't see the problems with 24(2)(d) and said he confirmed the outcome, confirmed the prima facie case analysis in 24(2)(d). We say that just couldn't be done. It's so wrong that it couldn't be done. And either way, even if it was only 24(2)(c) that was done badly, it's not a judgment that could be confirmed without confronting the test in section 73(3) as to whether there was a substantial wrong or a miscarriage of justice. His Honour did not mention that point and it really isn't addressed in the Court of Appeal either and we're inviting this Court to say "If you've got a major problem with 24(2)(c) and potentially a major problem with 24(2)(d), can you possibly exercise the discretion to confirm a judgment that fails both of those fundamental tests?" Our answer to that is absolutely not. It's not a situation where the judgment can be confirmed.

So for the High Court, we say very briefly his Honour applied a different test. His Honour said "No, you can't take the ROC at face value, you can't take the conclusory assertions at face value". At pages 427 to 428, his Honour said that if the US had to prove copyright and infringement then the appellants would win and…

GLAZEBROOK J:

What – you just gave a paragraph number.

MR ILLINGWORTH QC:

Page 427 to 428 of the High Court judgment.

GLAZEBROOK J:

Page 428?

MR ILLINGWORTH QC:

Yes, it's volume 1.

WINKELMANN CJ:

Page 428 or…

MR ILLINGWORTH QC:

Page 427, paragraph 470.

WINKELMANN CJ:

Paragraph what, sorry?

MR ILLINGWORTH QC:

470.

GLAZEBROOK J:

Thank you.

MR ILLINGWORTH QC:

So, his Honour says "The appellants argue that if, contrary to their principal submission, questions of copyright ownership and infringement must be determined according to United States law applying the doctrine of transposition, then this must be proved in the usual way with evidence of the relevant foreign law. Their submission is that foreign law cannot be proved by the conclusory assertions in the record of the case and accordingly no prima

facie case has been established. I have also rejected this submission. However, even if the appellants were correct, I cannot see how they were prejudiced by any inability to have access to, or call evidence from, experts on United States law at the eligibility hearing." And then this key sentence: "If their submission was correct that the United States could not succeed without proving the relevant United States law as a question of fact, the extradition case against them would fail for lack of proof."

And similarly at the end of paragraph 472, "If those submissions had been correct and such proof was required, the appellants would have succeeded without needing access to United States experts on copyright law. Indeed, that is the result they strongly contend for."

WINKELMANN CJ:

But that doesn't seem to be the point you're making.

MR ILLINGWORTH QC:

Well the point I'm making, your Honour, is that his Honour did not accept the conclusory assertions. He said that was not the appropriate way to analyse the situation. What he focused on was, in his view, the section 24(2)(d) test could be satisfied by showing that the appellants had engaged in the conduct of which they were accused, and that copyright and infringement of copyright could be assumed under the doctrine of transposition. We say the conduct only approach is wrong. It is not just within the scope of section 24(2)(d) and the Court of Appeal didn't accept that approach.

O'REGAN J:

But this is about whether you needed experts or not, isn't it? This is in a completely different context.

WINKELMANN CJ:

Yes, you seem to be –

GLAZEBROOK J:

Well it's whether if you needed to prove copyright you haven't proved it, and whether you had an expert or not would be irrelevant. But that's on the copyright point.

WINKELMANN CJ:

You seem to be moving onto a different point. I don't understand why you're moving onto this other point.

MR ILLINGWORTH QC:

Well the point is that in the High Court his Honour applied a conduct only approach to the prima facie case assessment. His Honour did not require the US to prove copyright and said that that could be assumed because of a conduct approach to the interpretation of 24(2)(d). The Court of Appeal –

WINKELMANN CJ:

Okay, same thing as Court of Appeal, but that's a different point in relation to – well there's two things there, isn't there. Whether you've proved copyright but also whether you needed, there's a second side which is where we're snagging, where is whether you need to prove US law to prove the copyright.

MR ILLINGWORTH QC:

Yes.

WINKELMANN CJ:

And we, I think you will sense some anxiety from the Bench on that point.

MR ILLINGWORTH QC:

Indeed, but the point is what is the yardstick that is being used for the prima facie case assessment. There has to be a yardstick. There has to be a measuring rod of some description.

GLAZEBROOK J:

Well that's a quite different point from the copyright. Because the copyright is, you say, a straight error of law and a straight failure of proof.

MR ILLINGWORTH QC:

Yes.

GLAZEBROOK J:

And we understand that point.

MR ILLINGWORTH QC:

Well what I'm trying to focus on your Honour is the 24(2)(d) test and how it's been applied in the District Court, the High Court and the Court of Appeal. We say the District Court was wrong because, for the reasons that I've just been explaining at length. The High Court –

GLAZEBROOK J:

And you say it couldn't be fixed up in the High Court and the Court of Appeal and wasn't.

MR ILLINGWORTH QC:

That's right.

GLAZEBROOK J:

Is that the only point or is there a more substantive point in terms of the evidence that was missed?

MR ILLINGWORTH QC:

The point is that we weren't heard on those issues in the District Court. the problem was only partly fixed in the High Court in relation to 24(2)(c) and it wasn't fixed at all in relation to 24(2)(d) because his Honour applied a test that wasn't accepted in the Court of Appeal. It's a different test in the Court of Appeal.

ELLEN FRANCE J:

Well I must say I'm getting a bit confused now because –

WINKELMANN CJ:

Yes, can I just, sorry. We'll take morning tea but I think what's happening here is we thought we were confidently moving into the High Court to see what Justice Gilbert had done in terms of the section 24(2)(d) analysis and that he'd just simply, on your submission, picked up and endorsed what the Judge had done in the District Court, and you said the Judge hadn't done the right thing.

MR ILLINGWORTH QC:

Yes.

WINKELMANN CJ:

But somehow we've now moved into this whole issue about *Cullinane* and whether *Cullinane* has been – and also the issue of transposition. We're now suddenly in that issue and it seems to be…

MR ILLINGWORTH QC:

No, all we're trying to show at this stage is that if the conclusory assertions are set to one side, and there's no admissible evidence of copyright and copyright infringement, His Honour is saying we would win at the prima facie case assessment stage. And so his distinction is crucial in terms of the prima facie case assessment, the 24(2)(d) analysis. We say he got that wrong, with respect, and so he didn't fix up the problem on the evidential assessment in the District Court, he simply confirmed what the District Court had done.

WINKELMANN CJ:

Okay so you're saying he simply adopted the District Court and furthermore he said there was no need to prove ownership of copyright because of transposition.

MR ILLINGWORTH QC:

That's correct, your Honour.

ELLEN FRANCE J:

All I would say is that from 303 onwards he does look at whether or not there's a prima facie case. I mean I understand the point you make about copyright but apart from that he does go through that exercise. He doesn't just simply adopt what the District Court has done.

MR ILLINGWORTH QC:

No but the test he's applying is a conduct only test.

ELLEN FRANCE J:

Yes, no, I understand that.

MR ILLINGWORTH QC:

As long as your Honour has got that point I'm happy.

ELLEN FRANCE J:

I'm just saying I don't think it's correct to say he simply adopted the District Court Judge's appropriate. He has –

MR ILLINGWORTH QC:

No, your Honour is right. He reviewed the situation on the basis of a conduct only approach and, on that approach, he said the District Court Judge reached the right result. We say he applied the wrong test and we'll say the same thing about the Court of Appeal.

WINKELMANN CJ:

Which makes rather – well then on one analysis, leaving to one side the copyright issue, the Judge has fixed up the problem that occurred in the District Court with a failure to review the evidence on one analysis?

MR ILLINGWORTH QC:

No, Your Honour, because he's reviewed the evidence on the basis of an incorrect legal test. It doesn't fix up the District Court –

WINKELMANN CJ:

No, I'm saying if you leave to one side the issue of copyright ownership, the transposition issue, he has reviewed the evidence, so he has done that which the District Court did not do?

MR ILLINGWORTH QC:

He's reviewed the evidence and he's applied a test which we say has been set aside by the, or disagreed with by the Court of Appeal, so that cannot fix up the District Court evidential assessment because the evidential assessment has to be done on the basis of the correct test. It's still an error of law at that point.

WINKELMANN CJ:

And what's the wrong test he's applied?

MR ILLINGWORTH QC:

He's applied a conduct only test. We don't have to –

ELLEN FRANCE J:

See it only relates to the copyright point. You're not really pointing to any other error.

MR ILLINGWORTH QC:

If I can think about that over the break, your Honour, and come back to you, that may well be right.

WINKELMANN CJ:

Because what I want you to think about over the break is we've seen, you've said there's a huge error in the District Court Judge's judgment. Now we get

to the point where Justice Gilbert does do this review, does that fix it up apart from copyright?

MR ILLINGWORTH QC:
Yes, thank you Your Honour.

COURT ADJOURNS: 11.38 AM

COURT RESUMES: 11.51 AM

WINKELMANN CJ:
Mr Illingworth.

MR ILLINGWORTH QC:
Thank you, Your Honour. To answer her Honour Justice Ellen France's point earlier, our essential submission is that his Honour in the High Court, Justice Gilbert, did not measure the evidence against the essential ingredients of a New Zealand offence for any particular count in the indictment. Now that is an across the board proposition. We say that his Honour applied a conduct only test for everything. That certainly means that the key issue that he left out was copyright and copyright infringement, but that copyright issue underpinned essential ingredients of every offence, and his Honour acknowledged that, and so if I can take the Court briefly to the judgment I'll demonstrate what we say went wrong in the High Court.

So if we can go to page 360, this is bundle 1, the purple volume, page 360. At paragraph 266 his Honour said, "The United States' prosecution arises out of alleged copyright infringement. All counts in the indictment relate to such offending in one way or another. Despite its central importance to all counts, Mr Illingworth submits that there is insufficient evidence in the record of the case to establish any breach of copyright of any copyright protected work by any of the appellants. He says that the record of the case refers to 520 works allegedly protected by copyright but provides no proof of this at the time of the alleged offending. Further, Mr Illingworth argues that there is no evidence of a

breach of copyright in relation to any of these works," and I would add knowing and deliberate breach.

Then at the end of 267 he says, "That the record of the case contains none of this evidence," and so we've actually spelled out what a number of the ingredients that needed to be put before the Court as a matter of fact, "only conclusory assertions of copyright infringement such as 'infringing content', 'infringing copies', 'infringing copy of a copyrighted work'," et cetera. "Mr Illingworth, supported by Mr Mansfield, made the same submissions in the District Court but these are not addressed anywhere in the judgment." That's the point I was trying to make earlier.

Going to page 362 at paragraph 273, "The appellants are undoubtedly correct that their conclusory statements are of no value in proving the essential conduct constituting the alleged offence and must be disregarded. Such statements do not assist the Court in carrying out its fundamental obligation of weighing the evidence for the limited purpose of determining whether it would be sufficient to enable a properly directed jury to return a guilty verdict on each of the charges if the offence had occurred within the jurisdiction of New Zealand. Ms Gordon did not contend otherwise but argues that the United States has established a prima facie case based on properly attributed evidence" et cetera.

His Honour then has a heading "Transposition" and says "The parties made extensive submissions in the District Court about the concept of transposition and how it applies in this case but there is no mention of this topic in the judgment. Mr Illingworth assumes that the District Court must have accepted the argument advanced on behalf of the United States that issues of copyright are determined according to the law of the requesting State and must be transposed as a 'state of things' for extradition purposes without requiring proof. He argues that this proposition is incorrect and is based on a misunderstanding of the authorities. He contends that copyright ownership and whether a particular object is an infringing copy must be determined

according to New Zealand law. Alternatively, he submits that these issues must be determined by applying the law applicable in the requesting State based on evidence provided to the Court at the extradition hearing. Mr Illingworth argues that if the United States' submission was correct, these issues of mixed fact and law, which underpin the alleged copyright offending, would not be subjected to any meaningful judicial assessment by the extradition Court applying New Zealand law or United States law" and we could add because of the debate that's occurred yesterday "or possibly both".

His Honour then, on the next page at 277, says that "The concept of transposition necessarily arises in extradition cases because the extradition Court is required to proceed on the basis of the fiction that the relevant conduct constituting the offence had occurred within its jurisdiction" but then his Honour draws attention to the focus of the extradition Court being on the conduct constituting the alleged offence, not on the offence itself. We say that at this point, his Honour has started to go off-track because the conduct constituting the offence or the reference to that in section 24(2)(d) is, for jurisdictional purposes, it is not the test under the old committal process which is what we are supposed to be looking at.

There's then reference to the *Cullinane* approach. Mr Boldt's now here so I won't refrain from mentioning that. Then at 279, once satisfied under s 24(2)(c) that the request relates to an extradition offence, the Court no longer needs to be concerned about whether the conduct constituting the offence in the requesting State would also be an offence under the law of New Zealand if that conduct had occurred here. The enquiry under s 24(2)(d) is the same either way and is focused on the conduct constituting the extradition offence."

280, "The irrelevance of whether the conduct would have amounted to an offence under New Zealand law for the purposes of s 24(2)(d)(i) is reinforced by s 24(2)(d)(ii)", that's the conviction-type cases, and at 281, "For these reasons, I reject the appellants' contention that the extradition Court must

determine under s 24(2)(d)(i) whether the conduct constituting the offence would have been an offence under New Zealand law had it occurred in New Zealand at the relevant time" and his Honour says that would be contrary to *Cullinane*.

His Honour then goes on to address whether the inquiry under 24(2)(d)(i) requires proof of the applicable foreign law. His Honour then invokes *McVey* at 284 and we say that's a completely wrong approach. *McVey* was concerned with a different foreign law issue. It's not concerned with the issue that we are dealing with here which is a question of whether the offence has been made out to the prima facie standard under New Zealand law. It's a different issue and we say His Honour's gone wrong at that point. His Honour refers to *McVey*, *Norris*, and *Griffiths* and says that those authorities support his interpretation that the focus is on conduct only. The problem with that is that *McVey* was not concerned with whether the case had been made out on the prima facie basis. It does discuss that issue but it's not concerned with that.

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Norris is a case on classification only, *Griffiths* is a case on classification only, and they do not provide authority for reading down the 24(2)(d) test. *Griffiths* becomes important because it contains this reference to copyright being merely a state of things and not being part of the conduct of the defendant or respondent and that's dealt with on page 368. And then again, there's reference to *Schreiber*, I always mispronounce that name, I'm told, and *Schreiber* is used to support this interpretation as well. The problem with *Schreiber* is that it does not explain the basis upon which the German income tax legislation was taken into account as context by the Canadian Court and it certainly is instructive on the question of transposition.

It refers to *Collins*, it refers to an extract from Anne Warner La Forest's extradition text, but if we look at page 369, the second paragraph of the quote which is paragraph 43 of the quote, having quoted from *Collins*, "There is little authority on precisely what may be included in the imported legal environment

and what must be considered to be an element of the conduct alleged against the person sought. It is probably impossible to provide a precise bright line distinction that will cleanly define the boundary in all cases. However, I am satisfied that the legal definition of income falls within the category of the foreign legal environment that is properly considered as the context or background within which the alleged wrongful conduct occurred."

That very precisely articulates the point that we say is in issue here. The foreign legal environment can be relevant to the extradition hearing in a way that is quite different from the *McVey* point, but his Honour takes it that the foreign legal environment can be automatically imported without evidence. That is not what *Schreiber* says and it's certainly not what *Collins* says. The proposition upon which *Schreiber* is based is found in *Collins*, and *Collins* was a case where expert evidence from the foreign jurisdiction was brought into account and which established the foreign legal environment. And we say applying that principle, you need proof of facts that would establish entitlement to copyright and infringement of copyright under the foreign law or under New Zealand law. Either way, the US has failed to make out its case.

But his Honour takes a different view and says "I'm not required to look at that issue. That simply gets automatically included in the transposition process and it's not something I need to enquire into" and that becomes apparent in 291. His Honour relates that issue to the movie *Taken* and he says "the rights protected by the relevant copyright legislation in the United States form part of the imported legal environment and need not be enquired into." *Taken* is a European movie so that's questionable but the more fundamental principle is can you just guess on an issue of that importance? "The extradition Court is solely concerned with the alleged conduct constituting the offence, namely that the appellants wilfully infringed those rights by making the film available to members of the public on a computer network." Then there's reference to my attempt to distinguish *Schreiber* and his Honour doesn't accept that. Well, I submit that my submission was correct on that point and his Honour was wrong to reject it but…

WINKELMANN CJ:

Well, you say more than that, don't you?

MR ILLINGWORTH QC:

I do. I say that *Schreiber* was actually authority the other way when you look at it closely because it relied on *Collins*.

So at page 370, paragraph 293, his Honour said, I'm nearly finished, "I do not accept that the analysis in *Schreiber* can be disregarded on this basis. The Court arrived at its conclusion on this issue applying basic principles of extradition law, including the conduct-based approach, and without the benefit of any specific statutory direction", and that's in relation to tax issues which doesn't relate to what we're talking about. And so having distinguished *Schreiber*, his Honour says at 294, "I conclude that for the purposes of its determination under s 24(2)(d)(i) the Court must focus on the acts or omissions of the requested person, being those acts or omissions identified for the purposes of s 24(2)(c) as constituting the extradition offence." 24(2)(c) is a classification process, you will recall. It doesn't go beyond classification.

"In a case involving alleged copyright infringement by making a copyright protected work available to members of the public without licence, the question of whether or not copyright subsisted in the relevant work in the United States at the relevant time is not an act or omission of the requested person and falls outside the scope of the enquiry. The extradition Court is not required to determine this issue, which would necessitate consideration of foreign law, a task it is ill-suited to undertake." Well, the Courts do have to consider matters of foreign law from time to time and we say this is one of those examples. "The existence of copyright in the works at the time is a circumstance or "state of things" that is transposed to New Zealand as part of the relevant legal environment against which the evidence of the requested person's conduct must be assessed."

The only other paragraph that I want to refer the Court to is at paragraph 307 on page 374. It's just an example because his Honour is looking at count 2 in the indictment. "The essence of the conduct alleged in count 2 is that the appellants knowingly formed an agreement or mutual understanding to defraud copyright owners by a common plan or course of action and each obtained money by that agreement. I agree with the District Court Judge that the record of the case discloses sufficient evidence to establish a prima facie case that the appellants committed the acts or omissions by virtue of which this offence is alleged to have been committed." And his Honour doesn't at any stage take any particular count and do a full 24(2)(d) analysis as if this was a normal committal hearing. The conduct-only approach applies across the board and in our understanding, the Court of Appeal accepted our submission that that was – the Court of Appeal applied a different test.

Just finally in relation to the judgment, I need to take the Court to the answers to the case-stated questions and I'm not going to go through them all, just a few of them, that relate to the 24(2)(d) analysis. So, if the Court would turn, please, to page 485 of that bundle…

WILLIAMS J:

405?

MR ILLINGWORTH QC:

485, your Honour, near the bottom of the page in italics, "The fourth question for the Court is whether I erred in law in making determinations 45 to 54 above in particular:

Did I correctly articulate the role of the extradition Court under New Zealand law?

Answer: No.

Did I correctly set out the matters of which I was required to be satisfied under section 24 of the Act?

Answer: No.

Was I correct to find that the extradition Court is not required to undertake any weighing of the evidence before it?
Answer: No".

And so those were the answers to our case-stated questions. There was the slightly different set of questions from Mr Dotcom's legal team and if your Honours would turn to page 607 of that bundle, there's a question and answer repeated at the bottom of page 607 going over to the next page but I'll just take you to the bottom of 607. Paragraph 19.2:

"Did I correctly apply the requirements of section 25(3)(b) of the Extradition Act?
Answer: No.

Did I correctly determine the test as to the reliability of the ROC?
Answer: No".

And then the same question and answer is repeated at the top of the next page but then 19.4:

"Did I correctly state what was required of the appellants in order to challenge the evidence against them?
Answer: No.

Did I correctly apply what was required of the appellants in order to challenge the evidence against them?
Answer: No.

Did I correctly determine the test as to sufficiency of the ROC?
Answer: No.

Did I correctly apply the test as to sufficiency of the ROC?

Answer: No."

And so, in our submission, the High Court judgment actually says that the District Court got it wrong on 24(2)(c) and 24(2)(d) but his Honour nevertheless confirms the outcome in the District Court and we say that the evidential assessment, to the extent that it was done, was done on the basis of an incorrect legal test.

Finally, we turn to the Court of Appeal judgment. So we're now in volume 2, the second purple volume, at –

WINKELMANN CJ:

So, can I just ask, that case-stated procedure material you just took us to, was that a different issue under the Supreme Court list of issues or was it still…

MR ILLINGWORTH QC:

We would put it, your Honour, under the question of relief that we've raised in the case-stated process and primarily under that issue but secondly under the issue of judicial review. It also goes to the question of how transposition, the doctrine of –

WINKELMANN CJ:

So it's 9 and 10, still 9 and 10?

MR ILLINGWORTH QC:

Yes, it is. So in the Court of Appeal, as we know, in relation to 24(2)(d), the very much obiter remarks in *Cullinane*, preliminary view only, was expressed but the Court of Appeal rejected that preliminary view and applied the traditional committal test, taking into account the long list of UK cases and the long list of Canadian cases that we have relied upon, and at page 679, paragraph 103, the Court said "The New Zealand legislation expressly adopts double criminality in s 4 and further makes it clear in s 5(2)(b) that the elements of the foreign and domestic offences need not match. It is not necessary to read down s 24(2)(d) to reconcile it with the definition. The words

can be given their ordinary meaning, connoting double criminality. Accordingly, we respectfully decline to follow *Riley*."

And then at 689, paragraph 122, "[…] the test for sufficiency is whether the evidence could reasonably satisfy the trier of fact of the person's guilt. […] So the court should inquire whether the evidence, if accepted, could establish the elements of the relevant domestic offence." Then at 124, under the heading of "Transposition", the Court affirmed that an ordinary committal test applies, and we say that that's consistent with all of the judgments in the *Dotcom* disclosure case. "The court inquires whether the conduct, if proved, would make out a qualifying domestic offence and checks whether extradition for that offence is precluded or qualifies under any applicable extradition treaty. It then assesses the evidence against the elements of that offence." However, the Court nevertheless went on to formulate a new test under 24(2)(d) by saying that at 24(2)(d), the Court focuses on the essence of the criminality alleged and this involves some degree of transposition.

WINKELMANN CJ:

Where's that in the – what paragraph are you at?

MR ILLINGWORTH QC:

I'll just get that reference. Paragraph 128. And in the same paragraph, "It is unnecessary to test the evidence for sufficiency against elements of the offence that are not part of the core criminality alleged; and to do so is to abandon the principled justifications and comity concerns that animate the transposition analysis at step 2." So, having affirmed the traditional committal test, the Court is now reading that down to say "You only have to establish the core criminality" and we say so the test at 124 has apparently been refined. Only some ingredients of a domestic offence are required to be proved.

Then at paragraph 129, the Court suggests that the ingredients of a domestic offence, which may be assumed rather than proved under 24(2)(d), are identified by reference to what was transposed for the purpose of the 24(2)(c) exercise. We say that doesn't withstand analysis. Everything is transposed

under 24(2)(c). The whole case is transposed. Transposition means treating all the underlying facts as if they took place here and so we say that this test would be impossible for a District Court Judge to apply in any principled way. The benefit of the traditional prima facie case test is its familiarity.

But then having established this new refinement on the 24(2)(d) test, the Court goes on at paragraph 130 to say that they agree with Justice Gilbert that copyright status is inessential. You will recall his Honour at paragraph 266 of his judgment didn't go along with that. He accepted that infringement of copyright underpinned all of the counts in the indictment but said that he didn't need to enquire into that because it was outside the scope of the enquiry. But now the Court is saying that they agree with Justice Gilbert that copyright status is inessential, they find the copyright status is not part of the appellants' conduct and they confirm that when assessing sufficiency, the Court assumes that works enjoy copyright status in New Zealand. The Court did not consider at any stage whether overturning the leading precedent applied by the lower Courts or creating a different test than that which applied by the lower Courts invalidates those Court decisions in any way. We say that those Court decisions were based on errors of law for obvious reasons, for reasons which we have explained.

So the Court went on to hold at paragraph 265, this is page 737, "We see no reason to interfere with Gilbert J's conclusion that a prima face case has been established. 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." We again say that that prima facie case conclusion is based on error of law and we say the problem with that finding is that neither the District Court nor the High Court actually assessed whether the evidence would so justify committal in respect of any New Zealand offence. The District Court Judge thought he had to accept US assertions and didn't assess sufficiency himself in respect of any offence. The High Court expressly disavowed any requirement for criminality under New Zealand law

and focused instead on acts and omissions and for example count 2 was not measured by the High Court by reference to any New Zealand offence.

WINKELMANN CJ:

Can I just ask you to explain what you mean "expressly disavowed"?

MR ILLINGWORTH QC:

Well the High Court said we don't have to –

WINKELMANN CJ:

Was that just a copyright submission?

MR ILLINGWORTH QC:

Yes.

WINKELMANN CJ:

Right.

MR ILLINGWORTH QC:

Well it's the conduct only approach that was adopted to 24(2)(d). Now to some extent the Court of Appeal seems to have modified that approach but –

WINKELMANN CJ:

How has it modified it?

MR ILLINGWORTH QC:

Well it's extremely difficult to identify. It's a matter of going from paragraph 124 of the judgment to paragraph 130 and the reasoning in those paragraphs is just difficult to follow in our submission. They start by affirming the traditional committal test but end up by reading it down significantly, and we say that is simply unjustified.

Then finally on the Court of Appeal judgment the Court backfills the copyright issue by suggesting that inferences could be drawn about copyright status

and they say at 734, “It is safe to infer from the ROC that copyright status will be proved at trial.”

O’REGAN J:

Which paragraph is it?

1220

MR ILLINGWORTH QC:

Sorry, 252. “It is safe to infer from the ROC that copyright status will be proved at trial.” Well, that’s not the issue. The issue is, has it been established for the purposes of the prima facie case test at the committal stage? And there’s reference to thousands of takedown notices issued by copyright owners. Well, we don’t know if they’re copyright owners. The evidence, and Mr Mansfield may deal with this, but takedown notices are issued in their multiplied millions automatically by computers and many of them don’t comply with the local requirements under the DMCA. Whether or not copyright will be proved at trial is not the issue. As the Supreme Court, as this Court said in the *Dotcom* case, and as Justice La Forest held in *McVey*, the establishment of a prima facie case in New Zealand or in this country is a critical protection for requested persons. In effect the Court is trying to fill a gap in the evidence by way of judicial notice. This is not an appropriate situation in which to do so. Alternatively, copyright is not something that can be inferred merely from the name of a work. It’s actually not the name of the work, it’s the name of a file, which could be correct or may not be, or the fact that a purported takedown notice has been issued, and the complexity of the situation is revealed by the Geller article to which I referred earlier, that’s in volume 9 at 3542, and particularly at 3586 where the author refers to the relevant provisions, or one of the relevant provisions of the copyright legislation in the US. The same problems arise here that are essential ingredients that have to be established.

So, what was the yardstick that was applied in the High Court? The yardstick was merely conduct to a prima facie standard, which is very different from saying, making up a New Zealand defence to the prima facie case standard.

It's simply conduct not an offence as the yardstick. Not using an offence as a yardstick, and in the Court of Appeal the yardstick was for some elements of a domestic offence, but not all, and how does the local Court know how to distinguish between the ones that are essential and ones that aren't other than on the traditional approach.

Now that deals with the 24(2)(d) analysis. It also really deals with the case stated submissions. Obviously we rely upon the written submissions, but our point under the case stated process is that neither the High Court nor the Court of Appeal has properly addressed section 73(3) the substantial wrong and substantial miscarriage of justice point, and we know that this Court has had to deal with a miscarriage of justice recently in a different context in the *Sena* case, and if any of your Honours weren't on that panel then of course we can provide that judgment. But what we say is that that's a very recent consideration by this Court of what has to go wrong before you can say there's a miscarriage of justice, and we say this case fulfils those requirements in full. It's not a fair trial issue under the relevant provisions of the Bill of Rights, but it is a fair process issue under section 27 of the Bill of Rights, and it is also a substantial wrong, substantial miscarriage of justice issue under section 73(3) of the Extradition Act. Parliament must have intended that the power to confirm could only be used where the Court judgment being confirmed was substantially correct, and where the errors were relatively immaterial, relatively innocuous. It couldn't be used. That power could not possibly be used to revive something that was fundamentally invalid. That, so to the extent that any further submissions are necessary we rely on our written submissions and the reply submissions on that point.

That takes us to the final topic which is judicial review. We can be quite brief about that. Our submissions on *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 are full and detailed and we submit that this is nowhere near a *Tannadyce* situation. This is not exactly the same as *H (SC 52/2018) v Refugee and Protection Officer* [2019] NZSC 13 but that case provides much better guidance than *Tannadyce* does

for a situation like this. We also have referred to the recent decision of the UK Supreme Court in the privacy investigation litigation and what happened there was, that this is the sequel to a case called *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663. In the UK an appeal process has been established which has a lower tribunal and an upper tribunal and there are appeals to those tribunals. And the question was, does that exclude judicial review because the upper tribunal had a status that was very similar to the High Court. So, the Supreme Court had to grapple with the question of when judicial review should be available and when it should be unavailable, in circumstances where the upper tribunal had very extensive powers. So, in a way it is a UK parallel, a little bit like *Tannadyce,* not exactly the same.

So, we have in that privacy investigator's case what we could describe as the Battle of the Titans. Lord Carnwath one side and Lord Sumption on the other, and Lord Sumption is taking the very strict Parliamentary sovereignty approach, a very narrow legalistic approach we might say to an ouster provision and Lord Carnwath takes the more traditional *Anisminic* type approach. The fundamental principle that we submit comes out of all of the cases in this area, is that the Courts will be very, very reluctant indeed to allow Parliament to take away the supervisory jurisdiction and it was only taken away in *Tannadyce* or the judicial review was excluded in *Tannadyce*, only because the statutory power of appeal was actually broader and more effective than judicial review. It contained everything that you could do in judicial review and more and so the majority in that case said, well you just don't need judicial review in that situation. The minority said, well you can't even in that situation exclude the possibility that there might be something that could come within the scope of judicial review and obviously the Chief Justice and Justice McGrath were taking a more traditional approach to privative clauses. Either way, where does that get the US in this case?

This case does not involve an ouster provision. It doesn't involve any privative clause whatsoever. The legislation, the Extradition Act, expressly contemplates in seven different places that judicial review will be available.

It cannot be right to say that the legislation, by implication, excludes judicial review or excludes judicial review in this case. In our submission, the Court of Appeal was just plain wrong to treat the scheme of the statute as excluding judicial review in the absence of any indication whatsoever that that is what Parliament intended and indeed with every indication that the opposite intention was applicable.

O'REGAN J:

They only said it was excluded to the extent that the appeal allowed the same issue to be raised on appeal, didn't they?

MR ILLINGWORTH QC:

And we wouldn't be quibbling with that Sir if we had some appeal provision, some error of law provisions that were appropriately covered by the case stated appeal. I have done, personally done cases, I think your Honour may have been involved in one of them, where we applied for judicial review without the appeal and nobody objected to that. I think that was *Bujak v Republic of Poland* [2007] NZCA 392, [2008] 2 NZLR 604. So, it is very odd to see this very legalistic approach being adopted in this case and saying, you can't have judicial review.

WINKELMANN CJ:

So I do think we would be assisted if you could tell us, I think we started out by asking you this, about the gap you say, or why you needed – I mean I understand your submission that there is strong authority in this country and in England to the *Anisminic* effect and it's surprising to see a Court taking away from itself, let alone Parliament taking away from itself, a power of judicial review.

MR ILLINGWORTH QC:

Yes that's…

WINKELMANN CJ:

But what's the harm here?

MR ILLINGWORTH QC:

Yes, your Honour if I just find my note on that point because we have –

WINKELMANN CJ:

Appreciating it's a separate point.

MR ILLINGWORTH QC:

– taken it on board from yesterday. I'm sorry, your Honour we prepared a note exactly on that point and I've found it. No, that's not the one. I'm sorry, if I could just have a moment please. So, the note that we have from the Court is that the Court wants to know the difference between judicial review and the case stated in terms of substance and relief.

WINKELMANN CJ:

In this case.

MR ILLINGWORTH QC:

In this case. Now we just start by saying this issue is covered in our primary submissions at F7 and G5 and it is further covered in or reply submissions at E1. We've dealt with the differences in quite some detail in those submissions. But the differences in substance are that the first cause of action in the judicial review amended statement of claim identifies four different categories of statutory decisions made by the District Court. First of all, the funding stay determinations, the determinations about the funding stay that we applied for. Secondly, the determinations about the misconduct stay that we applied for. Thirdly, the eligibility determinations themselves and, fourthly, determinations that were made in respect of the case stated. So, there's a range of issues raised by that statement of claim.

It was pleaded that each of those determinations were invalid by reason of particular conventional grounds of review. First, procedural unfairness or breach of natural justice. Second, errors of law. Third, errors of fact that were made. The usual ground of unreasonableness and then a section on apparent bias or predetermination. The errors of law that were particularised

in the appendices to that statement of claim, did replicate the errors of law identified in the case stated but that excluded the case stated determinations, those errors of law occurred in the process of the cases being stated and were not included in the case stated themselves. So substantively the only identical or overlapping content as between the case stated appeal and the judicial reviews were the error of law grounds. So there was only one category that was overlapping.

The judicial review sought to place the errors of law in the context of other irregularities, which would allow the Court to view the determinations as a whole and consider their validity in light of a combination of the alleged breaches of natural justice, unreasonableness and errors of law.

GLAZEBROOK J:

Why couldn't those other context issues be dealt with under the other procedures?

MR ILLINGWORTH QC:

Because the case stated appeal is concerned with a narrow process where the District Court says, was I correct to rule in this particular way. It's error correction. It is not validity. We can take the Court to the case stated, or the main document that was stated by the Court, and the case stated as signed by his Honour Judge Dawson says, was I correct to make these rulings or these determinations? That does not deal with the matter that is the proper focus of a judicial review application, which is was this decision so affected by things that have gone wrong, including error of law, that the decision should be ruled to be invalid. Now the US have tried to portray our argument as a nullity argument. We have never said that. We avoid the word "nullity" because we've been told to do that as long ago as the 1980s by President Cooke as he then was.

GLAZEBROOK J:

But I just can't understand how the decision can be correct if it was fundamentally wrong, which is what the argument seems to be. And so I can't

understand how you can't argue that under a decision that says, was I correct to do this. Well no because you were doing it on a fundamentally wrong basis.

MR ILLINGWORTH QC:

Well that, but the problem your Honour is that judicial review brings a different perspective to the question of validity. On a case stated appeal the appellate court is simply looking at error correction. It is not properly looking at the broader question of validity. It doesn't have the perspective –

GLAZEBROOK J:

Well you say it does because it forgot to look at section 75 or whatever it was.

O'REGAN J:

Section 73.

MR ILLINGWORTH QC:

Yes, section 73. We say that the Court must decline to confirm the judgment as correct if the Court concludes that there is a substantial wrong or miscarriage of justice. So to that extent, with respect, I agree with your Honour that there is a degree of overlap between what the Court would look at on case stated appeal and what the Court would look at in judicial review. But the two procedures can run in parallel. The two procedures are not mutually inconsistent and as –

WINKELMANN CJ:

So you say your judicial review only had really overlap in terms of the errors of law as they relate to the eligibility determinations but otherwise there was this funding stay, the misconduct stay, judicial reviews brought in respect of the refusal to grant…

MR ILLINGWORTH QC:

Refusing to grant a stay.

WINKELMANN CJ:

On the basis of the funding.

MR ILLINGWORTH QC:

On the basis of the funding issue.

WINKELMANN CJ:

On the basis of…

MR ILLINGWORTH QC:

Misconduct.

WINKELMANN CJ:

Misconduct, and also the settling of the determinations about the case stated.

MR ILLINGWORTH QC:

Yes, but also the traditional ground of unreasonableness and breach of natural justice.

WINKELMANN CJ:

Well that's your grounds of review as opposed to the decisions that were being attacked.

MR ILLINGWORTH QC:

I'm sorry, your Honour, I didn't quite…

WINKELMANN CJ:

Well I was just going through the decisions that you were challenging through judicial review. You're challenging the refusal of a stay on the grounds of the funding.

MR ILLINGWORTH QC:

Yes.

WINKELMANN CJ:

You're challenging the refusal of the stay on the grounds of misconduct.

MR ILLINGWORTH QC:

Yes.

WINKELMANN CJ:

You're challenging the eligibility determinations and the determination as to the scope of the questions included within the case stated.

MR ILLINGWORTH QC:

Yes, we say that the scope of the judicial review application was significantly broader but also the grounds of review are different and the approach of the Court is to look at whether the – the fundamental issue is that in judicial review the Court is looking at the validity of the exercise of statutory powers and statutory powers of decision. It's just a different perspective. It's a perspective that applies with particular importance when basic rights are in issue, and here there can be no question about that. People are being threatened with extradition.

O'REGAN J:

But it's traditional, isn't it, where there's an appeal and a judicial review avenue available, the first focus is the appeal, and if that deals with the situation then you don't bother judicial review.

MR ILLINGWORTH QC:

Yes, I accept that Sir, and that's the approach that's adopted by the minority judgment in *Tannadyce*. But there has to be a sufficient overlap with the judicial review application and we say that simply isn't the case here. We didn't get the constitutional perspective, if you like, that judicial review brings to the case.

WINKELMANN CJ:

And you say that the point of the judicial review was attempting to place the eligibility determinations within the overall context of things going wrong?

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MR ILLINGWORTH QC:

Yes.

GLAZEBROOK J:

And the effect of that could be that the appeal says the statutory process has been followed, there is eligibility to surrender and what does the judicial review add on to that?

MR ILLINGWORTH QC:

The judicial review –

GLAZEBROOK J:

Says well it is wrong because if you put it in the whole context, there isn't eligibility.

WINKELMANN CJ:

So the relief side of things.

MR ILLINGWORTH QC:

No, the judicial review can focus on the question of whether the things that have gone wrong add up in the accumulative effective to a situation where the Court should intervene under what used to be called the innominate ground, the cumulative effect of the things that have gone wrong. That is one aspect that is unavailable.

GLAZEBROOK J:

And so, say what. That there isn't – despite the statutory procedure having been followed and met, there isn't eligibility to surrender.

MR ILLINGWORTH QC:

The process was so flawed that the determination made was invalid and the Court exercises its power to invalidate the decision. It is not something that is done.

GLAZEBROOK J:

And so they start again or what happens?

MR ILLINGWORTH QC:

Well that comes within the Court's relief jurisdiction and judicial review and it's a matter for the Court to consider in terms of what relief should be granted. Sometimes it will be sent back, sometimes the Court will say no. But you are not going to get the invalidity perspective in a case stated appeal that you would get when you have got the whole range of relief options and perspectives that judicial review provides. This case just doesn't come close to the *Tannadyce* situation and it doesn't come close to, with respect, the point made to me by your Honour Justice O'Regan because there isn't a sufficient overlap, there just isn't.

Now so far as the judicial review section is concerned. We have tried to put pretty full argument there and unless your Honours have any further questions, I can't take that point any further. Well there is one further point, I am sorry, which is that the effect of corralling the argument into the case stated appeal, is that we don't get the rights of appeal that we would get on judicial review. So that is another form of prejudice that the appellant suffered. They don't get a full scoped appeal inquiry. To get to this Court, the appeal process that is provided on the leave applications and in our submission that is a very serious deficiency that the appellant should not have to suffer.

GLAZEBROOK J:

And how is that, because most of the English jurisdiction actually says that the rights, even in a criminal case for appeals, are met by leave to appeal issues.

MR ILLINGWORTH QC:

Yes, but that would apply with a general appeal, there would be no problem. This is not a general appeal. It does not involve a rehearing de novo in the High Court or the Court of Appeal. The jurisdiction is limited to the leave grant by the High Court so in the Court of Appeal we did not get the full inquiry. We got only a narrow inquiry based on the two questions.

GLAZEBROOK J:

I am just asking you where you say you have got the right for a full inquiry right up to the Supreme Court, ignoring leave.

MR ILLINGWORTH QC:

Well we don't have a right to a full inquiry because we have to have – leave has to be granted but leave has been granted in this case to argue the judicial review issue, certainly to the extent that it shouldn't have been regarded as an abusive process. We say that the High Court was wrong to limit its focus in the way it did, and the Court of Appeal was even more wrong to treat the judicial review as an abusive process.

GLAZEBROOK J:

Sorry I just thought you said – maybe I misunderstood the submission. I thought you were saying that you should have had a proper right of appeal against all of the issues all along and that is why you had to have the judicial review.

MR ILLINGWORTH QC:

No, your Honour. What I'm saying is that to exclude judicial review is to exclude valuable rights of appeal and that if we'd been heard properly on judicial review we would certainly have had the right to take that issue to the Court of Appeal and we would have had the right to take any resulting Court of Appeal judgment to this Court, if we were able to get leave. So, we're simply saying that by narrowing it down to the case stated issue, valuable appeal rights have been lost. Now they haven't been entirely lost in

this case because we are here, and we are able to argue the question of abuse of process. But we say that the judicial review application should never ever have been excluded as an abuse of process and the Court of Appeal was wrong to invoke *Tannadyce*.

WINKELMANN CJ:

And you say also wasn't an abuse of process because the Court was proceeding upon a mistaken belief that you were motivated by creating an appeal right that you wouldn't otherwise have.

MR ILLINGWORTH QC:

Correct, your Honour, yes.

WINKELMANN CJ:

Whereas in fact you did have the appeal right on the case stated.

MR ILLINGWORTH QC:

We did have the appeal, that's right. Now there's one question dangling in the wind which is whether I need to come back to the Court on the question of shoehorning and the –

WINKELMANN CJ:

It's up to you.

MR ILLINGWORTH QC:

Well –

WINKELMANN CJ:

I mean did you have any other, you can just give us the cases that deal with it, if there are any cases that deal with the extent to which there has to be this sort of mirroring of provisions, are there any cases?

MR ILLINGWORTH QC:

Well I did deal with that your Honour. I dealt with *Norris*, which we say creates the – points the Court towards an equivalent, identifying an equivalence of criminality. So *Norris*, for example, said the US couldn't get around the fact that there was no price fixing offence under UK law at the relevant time by relying upon a more general offence of conspiracy to defraud and so the House of Lords said, "No, that's not good enough. That is not going to work because the equivalence of criminality is not sufficient, and they gave detailed reasons why that was so. The other case that we relied upon was *Tavormina*, which we handed up in that additional bundle, where the Judge in that case, Justice Proulx I think it was, and I didn't take the Court through the whole of his reasoning, but he again made it clear that there has to be an appropriate equivalence of criminality otherwise you are not assessing double criminality. You are just taking criminality in one jurisdiction, finding some criminality in the other jurisdiction, and you're not correlating those two issues appropriately.

Now I can't take that point any further than that. It's a question of whether the Court accepts that accessing a computer to engage in some form of dishonesty correlates with the offence of deliberately infringing copy. In our submission the proper matching has not been done in the courts below and if it is done properly you don't get into that pigeonhole under New Zealand law. That's really a matter of principle and it's a question of how that applies and that's really it, we're in the Court's hands on that issue.

Unless there are any further questions, those are our submissions.

WINKELMANN CJ:

Thank you, Mr Illingworth. So, you wanted us to retire for a short time Mr Mansfield? Perhaps we should just take an early lunch and then come back say at 10 to two and then you can set up and we won't lose any time.

MR MANSFIELD:

Thank you.

COURT ADJOURNS: 12.49 AM

COURT RESUMES: 1.53 PM

WINKELMANN CJ:
Mr Mansfield.

MR MANSFIELD:
May it please the Court. I don’t want to sound glib, but you can't speed date the Copyright Act, not without offending its very purpose –

GLAZEBROOK J:
You cannot what sorry?

MR MANSFIELD:
Speed date it Ma’am.

WINKELMANN CJ:
Speed date it?

MR MANSFIELD:
It’s a concept of modern times when people try to get to know each other for a few minutes before they move on to try and find another –

WINKELMANN CJ:
Yes, we know what speed dating is.

MR MANSFIELD:
I thought I'd try to keep it current, but I may have missed the mark. Not without offending its very purpose and the international jurisprudence behind it, which has existed since this Court will know the Statute of Anne in 1710. Can I submit that you need to take time to know it, you need to understand where it is from, its origin, and what its purpose is, what Parliament intended. Only then can you have a meaningful relationship, you

can apply it with the Act and allow it to achieve its desired purpose. If you do, namely if you don't get to know it, in my submission we can end up red faced here, but worst, internationally. Copyright is international and our Parliament, through the parliamentary history that I'm going to take you through, wanted to ensure that we kept up with our international treaty partners. It didn't want us to end up an outlier.

You certainly can't read section 131 in isolation. You need to read it with reference to the Act's origins and its purpose. You also can't apply crime-centric or dictionary definitions to it. They don't apply or work. The language used are terms of art with specialised meaning particular to the Act.

In the UK *Gowers Review*, which related to intellectual property, Gower, who was the author of the review put it this way. For many citizens intellectual property is an obscure and distant domain. It's laws shrouded in jargon and technical mystery. It's applications relevant only to a specialist audience. In my submission the High Court did take time to get to know the Act and let itself understand the background to it and the purpose behind it. That is why in relation to section 131 the High Court got it right. In my submission the Court of Appeal didn't. It considered 131 was it is what you see. The Court of Appeal didn't appreciate, in my submission, the scope and nature of the Act. It didn't appreciate that the words used within section 131 are terms of art, which they are, and it squeezed the essential conduct into subsection where any informed reading would lead you to know they don't belong.

Now the Court didn't engage with the legislative history or Parliament's clear intentions primarily because during the course of submissions the Court made it clear to counsel that in the High Court we were successful on that point and hence there was little need to go through the Act and the history which led to relevant amendments within the Act. But in my submission as a result of not engaging with the Court sadly the Court of Appeal has upset the very careful

balance of rights and remedies prescribed by Parliament. It couldn't be more correct that the Act is complex and engaging.

Going back to the essentials, the United States claims that the appellants are criminally liable for the acts of Megaupload's users, which are said to have infringed copyright, the infringement being the online dissemination of such works to others without the right to do so. We say an infringement of the communication right. The communication of the work. The allegation does not extend beyond allegations that are outside copyright or the reach of the Act. All of the allegations made by the US within the superseding indictment relate to allegations that involve copyright or actions directly associated with copyright. All of the allegations, in our submission, are within the reach of the Act.

The specific question of how copyright in a work is to be protected online requires a careful examination of the Copyright Act and its amendments. We're going to look at the amendment in 2008 principally, and what led to that amendment, namely New Zealand conducting a very careful review of the legislation and what was required to keep at pace with changes in technology, and that review took place between 2001 and 2008. That review closely looked at what our treaty partners, in fact what international jurisdictions were doing, and in particular looked at the treaties which are relevant, namely the WIPO Treaty.

1400

United States says that the infringement amounts to a criminal offence, not merely civil liability with the available remedies under the Act. Away from a central tenet of the Act, the US says that it, as a State, should be able to prosecute an Internet service provider for effectively allowing the acts of its users. It's a central tenet of the Act, however, that the copyright owner is required to investigate and enforce infringement. That doesn't mean there aren't criminal provisions, as we know there are, within a Copyright Act, but those criminal provisions are very limited in nature, and it's that limited nature

that we will also look at during the course of submissions. But civil liability is the usual mechanism if brought to the Court, and it's brought to the Court by the copyright owner.

The copyright issues in this case extend well beyond a case involving extradition and this can't be overlooked simply because this is an extradition hearing. The issues involving copyright are important and directly impact on any Internet service provider's responsibility and liabilities in our jurisdiction and the extent of it. For example, is their liability limited to any available offences under the Act. So section 131, which creates the only offence provisions, or is it as the United States assert, and the Court of Appeal held, does it extend to general crimes of dishonesty under the Crimes Act. The United States says that there is infringement by Megaupload as the Internet service provider. We don't agree. They say that the infringement meets the requirements for an offence under section 131, the only relevant offence provision under the Act. Again, we don't agree. Further, the United States asserts that in addition to section 131 it can rely on general dishonesty crimes under the Crimes Act, but on its theory offences need not be so limited. It could extend to offence provisions that might be asserted as applicable under other Acts. Again, we disagree that the criminal offence can be extended to crimes under the Crimes Act. We say that crimes are restricted to those which are specifically prescribed for under the Copyright Act.

A study upfront of the wealth of US law show clearly that what they seek to assert here could not be asserted at home. We should, in my submission, follow the US approach and also the Canadian approach. Our Parliament was clearly aware of what was happening internationally between 2001 and 2008 when it enacted to deal with the issue of the Internet and infringement. There is a wealth of US authority that establishes that what the United States seeks to assert here in our jurisdiction could not result in civil infringement being established for an Internet service provider at home let alone a criminal offence. What we say is that there is –

GLAZEBROOK J:

Is this, Mr Mansfield, on the basis that you said before, that they are a, I think the expression that has been used is a dumb pipe, because that's not what the US is actually asserting in this case. So do you want to just make sure you – I can understand that some of your submissions might relate to a non-dumb pipe situation but it seems to me that the US is not accepting that they are a pure Internet service provider in the sense of those cases are dealing with.

MR MANSFIELD:

In my submission the cases show, and we can look at *Viacom International Inc v YouTube Inc* 676 F 3d 19, 34 (2d Cir 2012) when we get to that point in particular, that generalised knowledge of infringement is widespread within all Internet service providers. In fact, generalised knowledge of infringement was one of the clear understandings that not only our Parliament had, but the Parliaments in Canada the US and the UK, when they enacted the safe harbour provisions which we will again look at. The very premise for a safe harbour is on the understanding that Internet service providers will know that there is infringement occurring through their service. It's a modern-day reality. So, I'm not submitting to you on the ROC Ma'am, that Megaupload could be seen to be a dumb pipe. In my submission the communications upon which the United States rely on show that there was a general understanding of infringement. The United States would say that it was welcomed and that they profited from it. But if one looks at the learned decision in the US in *YouTube*, you will see that those essential facts were all present and were insufficient for civil liability. Here we're dealing with something more stern, namely the allegation of criminal wrongdoing. So in my submission the defence proposed on behalf of the appellants does not rely on Megaupload being a dumb pipe. In fact, communications would show, like all Internet service providers, it had that generalised knowledge.

WILLIAMS J:

So there is no such thing as a dumb pipe anymore, you say?

MR MANSFIELD:

No, and there hasn't been for a long time, and all of the cases of the United States clearly show that there is a general understanding that any Internet service provider will have copyright infringement occurring every second of every day, and that is why we have the safe harbour provisions. When we go through, and look I got the feeling that the Court may have thought that Mr Illingworth QC was the cake and I might be the icing on the top. It may not take that long. The reality is to take you through the history of the review, and I'll do it as quickly as I can, but it's essential to show you that Parliament understood this, and for its own reasons here in New Zealand, because our position is quite different to say the US, which is an exporter of content, we're an importer of content in a country very much dependent on a good provider by way of Internet service providers. So we need that service. We struck our own balance, but our balance is pretty much consistent with what's happening in the US, Canada and the UK, so there isn't such a thing as a dumb pipe, and certainly I'm not making that submission.

What we say though is that there is no infringement by Megaupload. There are several reasons for this, and in opening I'm just going to touch on them. It's always been the case under our Copyright Act that only some forms of infringement have been criminalised under the Act. The breach of what was known as the broadcast right was never criminalised under section 131. If you look at section 131 you will see that only a restricted aspect of those limited acts involving infringement have been criminalised, and this is important, especially when we look at whether we can go to the Crimes Act, and that's the requirement in section 131 of in the course of business. So each of the offences under section 131, which we will deal with, require either that the possession, so the person possessing the file, was in the course of business, or in relation to distribution, which the United States also rely on and which was a limb that the learned Court of Appeal accepted was available to it, also requires this additional element that whoever is involved in the distribution be in the course of business. Now I say that's important, and

when we get to the Court of Appeal's decision you'll see why, maybe I just take you to those parts now just briefly.

I might sound really hurt but the learned Court of Appeal was rather dismissive of my submissions to it on 131, so if you turn to the documents for hearing volume 2, part 1 of 2, judgments and pleadings continued, so it may actually be 2, it is purple. Page 0705. I'm just really going to the judgment and I'm going to paragraph 163 which is just under the heading, "Conspiracy," if you have it electronically which should be SC.071. At paragraph 163, the Court talks about conspiracy. There is nothing remarkable there and I don't intend to make any submission that the Court was incorrect. We are all quite familiar with what a conspiracy is and how it is established but at paragraph 166 the Court notes, "We have concluded above that section 131(1)(c) and (d)(ii) and (d)(iii) create criminal liability where a person" and here they note –

WINKELMANN CJ:

You are at 166 are you?

MR MANSFIELD:

Yes, thank you, paragraph 166. And they note, "In the course of business knowingly is in possession of an infringing copy of a copyright work with a view to committing an act infringing the copyright, or (b) knowingly exhibits or distributes any infringing copy of a copyright work." Now I don't know if any party really places too much weight on exhibits although the Court of Appeal did. I would have thought the United States will maintain distribute as the limb of that particular provision that it would rely on together with the one above, "Possession of an infringing copy of a copyright work with a view to committing an act infringing the copyright" and that is exhibit really relates to what you might exhibit, a piece of art or a sculpture being exhibited or the like. But we will see why distributes doesn't apply.

Also, when we look at the legislative review and the relevant amendments in 2008, I suppose the irony is that in the United States they do rely on the right to distribute, as that which includes what we consider to be the communication right and then when we look at what happened in WIPO in relation to the Treaty, and we look at the discussion our Parliament had, it seems that the United States and Australia were the only two jurisdictions which wanted to stick with distribute in order to deal with the dissemination of works via the Internet. The UK, the other European countries, Canada and ourselves went with the communication right.

But turning to paragraph 167, there the Court sets out what it considers to be the elements, "Conspiracy to infringe copyright, under New Zealand law, would exist if the conspirators had knowledge of the *factual* elements of the following, (a) that a member of the conspiracy was in (or would enter into) possession of a digital file (which separately, and as a matter of law, is an infringing copy of a copyright protected work); and (b) a common purpose to either in terms of ss 131(1)(c), (d)(ii) or (d)(iii) as the case may be: (i) use or deal with that file in a way that will further infringe copyright; or (ii) exhibit or distributes the contents of that file." Then underneath, "In that respect, as we discuss later, retention of the file with a view to Internet transmission itself would amount to an act infringing the exclusive communication copyright of the owner."

Now when it comes to paragraph 167, the Court has forgotten about the need for the party who is in possession of the infringing file to be in the course of business, as it has in relation to whether the entity exhibits or distributes the contents of that file. That is important in my submission because it is clear that our Parliament never intended users – mums, dads and kids – to be criminally exposed under section 131. Section 131 was always intended to deal with commercial offending.

GLAZEBROOK J:

And this isn't commercial offending why?

MR MANSFIELD:

Because you have to look at, Ma'am, who's in possession, and we'll deal with that when we get to that point, but I'm submitting to you that Megaupload was never in possession of the infringing works and we only need look at the US authorities to reveal why, and we'll do that. Further, it was never Megaupload who distributed, even if you could rely on the distribution to include a communication so the dissemination of work via the Internet. It was always the user who did so. But in making that submission I'm not accepting, obviously, that 131(d)(ii) or (d)(iii) are available because I say what is the essence of the conduct, what is complained of, is a breach of the communication right, not the distribution right. Because we say that what is alleged is a breach of the communication right, and that's how our Act deals with the dissemination of files via the Internet, through the communication right.

GLAZEBROOK J:

So what does distribution mean in this context?

MR MANSFIELD:

Distribution relates to tangible works. Now that doesn't turn on the definition of "object" which was never our submission in the Court of Appeal.

GLAZEBROOK J:

So you can be in possession – so 131 deals with possession of a digital work but not distribution of a digital work?

MR MANSFIELD:

Well I'm going to come back to that because in relation to 131 we say possession relates to, with the view to committing the other acts which are specifically defined in 131. But even if the Court didn't accept that submission, it would definitely, and is our submission, that Megaupload was never in possession of an infringing file, as a matter of law.

GLAZEBROOK J:

What say you do have somebody who's in possession in a commercial sense, truly in possession of a digital file and distributes it. Where do they fit into your analysis?

MR MANSFIELD:

Well there will be occasions where an Internet service provider who is providing services –

GLAZEBROOK J:

No, I don't need to be an Internet service provider, I'm just somebody who in the course of my business has acquired a whole lot of digital files and I'm now selling them.

MR MANSFIELD:

We say that it relates to tangible works. When you look at section 131 –

GLAZEBROOK J:

Well it may do but I've actually been in business, I've specifically gathered all these copyrighted works, which are Internet works, and I'm selling them.

MR MANSFIELD:

How are you selling them, Ma'am, because it makes a difference.

GLAZEBROOK J:

On the Internet.

MR MANSFIELD:

Well if you're communicating them through the Internet then that is the communication right which is being infringed and in our submission you would need to look at the remedies available under the Act for that, but it's not under section 131.

GLAZEBROOK J:

Okay, it may not be, but is there any criminalising provision for that?

MR MANSFIELD:

It would depend how this Court defined possession, whether it was with the intent to commit one of the infringing acts or offences which are otherwise listed in 131 or whether, as the Court of Appeal concluded, it would include any of the rights available under section 16.

GLAZEBROOK J:

Well if you're right, and section 131 doesn't cover it at all, then I can do that with impunity can I?

MR MANSFIELD:

No, you would have civil liability under the Act Ma'am.

GLAZEBROOK J:

But not criminal liability?

MR MANSFIELD:

Correct, and that was always the intention of the legislation.

GLAZEBROOK J:

Even if I directly do it rather than merely as an Internet service provider?

MR MANSFIELD:

Yes, and if you find that offense in my submission as the Canadian authorities have done, and also in the US in *United States of America v LaMacchia* 871 F Supp 535 (D Mass 1994), the Court has identified that and if you are a direct infringer of the communication right then there are the civil remedies available. 1420

WILLIAMS J:

So your analogue is that you're the landlord of a warehouse and there's a whole lot of tenants who are breaching the Copyright Act, but you're not in possession of their material, if we use the tangible analogue.

MR MANSFIELD:

Well you could compare it, like some of the cases do, to a telephone wire provider. They provide the services for people to make the calls but they don't make the calls themselves. They might take –

WILLIAMS J:

No, mine's a slightly subtle difference because you're a landlord who knows what's going on, and hold yourself out as welcoming to that. But you say even if that's accepted, I'm not requiring you to accept it, even if that's accepted that's not enough?

MR MANSFIELD:

No.

WINKELMANN CJ:

Well it's also problematic because it's a tangible object, which is –

WILLIAMS J:

Yes, I understand that, I'm just looking for an analogue.

MR MANSFIELD:

Yes, well I say it's not enough if we're dealing with communication through the Internet.

GLAZEBROOK J:

And you go further and say that even if I'm directly infringing that's not enough? In the course of business it's not enough.

MR MANSFIELD:

If you breach the communication right then there are remedies available under the Act if you are a direct infringer.

GLAZEBROOK J:

But they're civil remedies?

MR MANSFIELD:

Correct.

GLAZEBROOK J:

And why would they make a difference, you're going to take us through that, for if I printed them off and sold them, then I'm going to be criminally liable, but if I distribute them over the Internet digitally I'm not liable.

MR MANSFIELD:

Because that's what Parliament has determined is the appropriate response after the –

WILLIAMS J:

I guess it's the same as if Sky TV sold the scripts to movies that it was showing, and the movie itself was infringing, there'd be no criminal liability for the infringing broadcast, but there might be for the infringing distribution of the paper?

MR MANSFIELD:

I'm not sure I kept up with that example.

WILLIAMS J:

Well you said that if there's no criminal liability for broadcasting, infringing broadcasting –

MR MANSFIELD:

Yes, there never was.

WILLIAMS J:

– it's only civil liability. So if a broadcaster broadcast a movie that was infringing, and sold the script, which was also infringing at the same time, it could be criminally liable for the latter but not for the former?

MR MANSFIELD:

In relation to the breach of the broadcast right they would not be liable.

WILLIAMS J:

There is no criminal…

MR MANSFIELD:

That's our submission and k—

WILLIAMS J:

What about exhibits? Is it settled law that that doesn't cover broadcasting?

MR MANSFIELD:

It was under the broadcasting right, and this is why it's important, in my submission, to understand the way in which the Act is structured, and I'm going to take you through the Act and hopefully we'll get an opportunity to see that together with legislative review, because this is one of those great examples where we have a very clear statement from our Parliament as to what was intended and, you know, I heard her Honour Justice Glazebrook talk about, well, kids know, and/or if we go to the movies we see a little preview at the start of the movie telling us that infringement is theft. Well that's actually not the law. Infringement, in my submission, is not theft, infringement is an infringement. An infringement is dealt with under the Copyright Act, and that little promo at the start of the movie is nothing more than propaganda and scare tactics to make you think that it's theft. The reality is it's infringement, it's dealt with under the Act, and as far as kids knowing, we only have to think back to our era with the cassette tape. There won't be many people in this room who hasn't put together a mix tape to give to a friend, or created a mix tape for themselves, or a mix tape for a party. That still required the individual

to record on a tape music which was otherwise copyrighted. So the reality is that there has always been infringement by mum, dad and the kids. Parliament has been aware of that and Parliament has determined that it should not be criminalised under our Copyright Act.

WINKELMANN CJ:

I think we better move on to – you're taking us to your case on this. I can see it's fundamental but we need to have it linked to the Parliamentary materials that you say make it out.

MR MANSFIELD:

Thank you. Now in addition to that submission before I conclude opening remarks, the United States has not presented within the record of case a sufficient evidential foundation to establish any criminal copyright infringement under section 131. Primarily there is no sufficient work by work analysis conducted in relation to whether there is an infringement of an offence under section 131 for a particular work. I make that submission because again the authorities to which we will turn make it clear that there must be knowledge in relation to a particular work.

WILLIAMS J:

These are US authorities?

MR MANSFIELD:

Yes Sir.

WILLIAMS J:

And you say they are applicable here, is that your…

MR MANSFIELD:

I do Sir.

WILLIAMS J:

You're not back in the US law applies argument?

MR MANSFIELD:

No, because –

WILLIAMS J:

That's fine.

MR MANSFIELD:

Copyright is international, so we can refer to international authority, in my submission, for guidance and I'm going to take you to other Supreme Courts who have found what I am submitting to you quite sensible, and in my submission should provide some assistance to this Court as to the international approach.

In addition to that we say that the Copyright Act is a clear and accepted code. Our Act has been accepted as such previously by our Courts. Further, internationally copyright acts are similarly viewed. The Act creates the special and unique property right which is copyright and protects it through specified and carefully considered civil and criminal enforcement provisions. Copyright is created by the Act and is also protected by it, and we'll see that within the wording of our own Act.

Further, the standard doctrine generalia specialibus means that if the Copyright Act is not criminalised conduct, it being a speciality piece of legislation, even if it's not accepted as a code, general dishonesty offences are then not available to create an offence out of the same conduct. Now in a nutshell that is a summary of our case. So our position is taking the record of case, or taking the US allegation at its highest, there is no available New Zealand offence. There is not an offence under section 131 and we're not permitted to go to the Crimes Act, to general dishonesty provisions.

Now I'd like to take you to the Copyright Act, and I wonder if we can just move through that. It's in the appellants' authorities bundle, volume 2, it's in part 2, page 0404. Now I've got it electronically, if anyone has it I can give you the reference.

WINKELMANN CJ:

We're going with the hard copy.

MR MANSFIELD:

There's a certain irony about that.

WINKELMANN CJ:

Or not.

MR MANSFIELD:

Let's just look at the interpretation section if we can please. Now the first definition I'd like to take you to is "communicate". "Communicate means to transmit or make available by means of a communication technology, including by means of a telecommunications system or electronic retrieval system, and communication has a corresponding meaning." Now while we're there can we just turn further forward to the definition of "telecommunications system". That was added in 2008 as well. It's on page 24, looking at the little numbering of the Act at the bottom. "Telecommunication system means a system for conveying visual images, sounds, or other information by electronic means." Now clearly the communication definition fits with the transmission of files through the Internet.

If we then turn to the definition of "copying", that means, "in relation to any description of work, reproducing, recording, or storing the work in any material form (including any digital format)," and it's that part which was added in 2008, the inclusion of "(including any digital format)" and the learned Court of Appeal considered it wasn't necessary to make that particular amendment to the definition, but nonetheless it makes it clear, which was one of the sole purposes of the 2008, "in any medium and by any means."

WINKELMANN CJ:

But you don't to resist the Court of Appeal's decision that it wasn't necessary to add it in because –

MR MANSFIELD:

Not at all because not much turns on our case on the definition of "copying". Whether it's there or not we accept that it would include in a digital format.

GLAZEBROOK J:

And is there no definition of "distribute" anywhere else other than – well, anywhere else. There isn't here I understand, as far as I can see?

MR MANSFIELD:

There's issue to the public, and when we look at section 16 that's how it's referred to, and we'll get there shortly. But "copyright work" if we can just look at that definition, "Means a work of any of the descriptions in section 14(1) in which copyright exists," and we'll go to 14(1), but not now.

"Electronic" is also defined but if we turn through to "Internet service provider" which is the next main definition I want to take you to, "Internet service provider means a person who does either or both of the following things: (a) offers the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing: (b) hosts material on websites or other electronic retrieval systems that can be accessed by a user."

So our definition of an Internet service provider is quite wide, and as I understand the United States accepts that Megaupload fell within the definition of an Internet service provider.

WILLIAMS J:

When you say it's wide do you mean it's wide by international standards or it's just wide?

MR MANSFIELD:

Well it includes, no, it's a wide definition but it's similar to our international jurisdictions.

WILLIAMS J:

Right.

O'REGAN J:

It doesn't talk about storage of files though does it? It doesn't seem to capture a cloud operator.

MR MANSFIELD:

It talks about, "Hosts material on websites or other electronic retrieval systems that can be accessed by a user," so that's –

O'REGAN J:

But that's, I mean storage is defined differently isn't it?

MR MANSFIELD:

Well storage is part of copying, and we'll get to that. If you look at the definition of –

O'REGAN J:

So copying includes storing?

MR MANSFIELD:

Correct.

O'REGAN J:

So does that mean if you're storing a file you have a copy of it?

MR MANSFIELD:

Correct.

WILLIAMS J:

By definition?

MR MANSFIELD:

Yes, and we'll look at how that's dealt with later in the Act, because that's important given the way in which the Court of Appeal dealt with this issue.

O'REGAN J:

So does that mean Megaupload was an ISP but it was also something else?

MR MANSFIELD:

No. It fits squarely within the definition. It wasn't, it didn't provide services more than the definition of Internet service provider. It fell squarely within that definition.

O'REGAN J:

Well if it was storing other people's files is that, I mean ISPs don't usually store your files.

MR MANSFIELD:

Well they do under our definition.

O'REGAN J:

And you say that's because of the word "hosts"?

MR MANSFIELD:

Correct.

O'REGAN J:

Okay.

MR MANSFIELD:

When we – well let's just, can we just move through to section 43A now. This section wasn't referred to by the learned Court of Appeal. "Transient reproduction of work. A reproduction of a work does not infringe copyright in the work if the reproduction – (a) is transient or incidental: and (b) is an integral and essential part of a technological process for – (i) making or

receiving a communication that does not infringe copyright; or (ii) enabling the lawful use of, or lawful dealing in, the work; and (c) has no independent economic significance."

O'REGAN J:

And what's the significance of that here?

MR MANSFIELD:

Because when we look at the review, that was inserted in 2008 to deal with what Internet service providers do, which is make copies of work as part of an incidental to the communication process, and Parliament intentionally carved that out so that it was not liable for that form of copying.

GLAZEBROOK J:

It's not what's happening here though is it? If they're storing the material it's not transient.

MR MANSFIELD:

They're not storing it. They provide a service where –

WINKELMANN CJ:

But you're not relying on this, this is just part of your background isn't it?

MR MANSFIELD:

I'm relying on it because of the way in which the Court of Appeal deal with the issue of copying and what the United States asserts in relation to Megaupload taking copies. When we look at the authorities it's accepted that transient copying, which is incidental to the communication process, is occurring, and that simply forms part of what is expected from an Internet service provider.

ELLEN FRANCE J:

I'm just not sure how you say that fits in then.

MR MANSFIELD:

Because the Court of Appeal when they looked at the issue of copying, and the liability for Megaupload in relation to copying, failed to refer to section 43A, which deals with the reality that copies are made as part of the communication process.

WILLIAMS J:

So when you've got your email, even that's now obsolete, your email on your screen, there's a copy of it at the ISP, and everything you type on there, which is technically copyright, is copied and stored at your ISP. Is that what this is about?

MR MANSFIELD:

Yes, well the United States assert that Megaupload infringed copyright because it was making copies as part of the service it provided as an Internet service provider, and that form of copying is protected as a permitted act under our Act. So, Parliament did not intend for an Internet service provider, who by necessity has to take or make such copies, to be liable –

WILLIAMS J:

As long as it's transient and incidental and of no economic significance.

MR MANSFIELD:

That's right.

WILLIAMS J:

Hard to understand what "of no economic significance" might mean for an ISP for example.

MR MANSFIELD:

Well, no. When we look at the cases they'll make it clear that it's accepted that an Internet service provider, through the communication process, is making copies at various different stages, and if it's simply providing the services within the definition of an Internet service provider, which

Megaupload is on the United States case, then it is protected from a claim that it has infringed copyright. Because that's the necessity. It has to be able to do so. And if it can't, and if it's liable for that form of copying, we'll get the very outcome that the New Zealand Government didn't want, which is the cost of the service for an Internet service provider being so high that citizens can't afford it or they'll leave our jurisdiction.

WINKELMANN CJ:

So why does the US say this doesn't apply to Megaupload?

MR MANSFIELD:

Well it doesn't say it doesn't apply, in my submission. It simply doesn't refer to it, neither did the Court of Appeal.

WILLIAMS J:

Did you argue it?

MR MANSFIELD:

That's my point. Before the Court of Appeal –

WILLIAMS J:

Right, you did.

MR MANSFIELD:

We made submissions about –

WINKELMANN CJ:

No, you didn't get a chance to make advanced submissions is your point?

MR MANSFIELD:

Yes, exactly. It didn't seem that section 131 was concerning them until we got the judgment, but certainly in my submission that provision applies. If we can just go back –

WINKELMANN CJ:

Well I can tell you I expect what the United States would say about it, because it's pretty plain isn't it? They'll say it is of independent, economic significance.

1440

MR MANSFIELD:

No the forms of copying that it does aren't Ma'am. If it seized control of a copy, and sought to exploit that copy itself, then that would have an economic value. But the forms of transient copying that we're talking about by necessity don't have an economic value. It's simply created through the process. What you're talking about as having economic value is the user's file that they upload, that they share the URL for, and that other parties can have access to. But the type of copying that this deals with is simply what is required for the communication to take place, and it doesn't have a considered economic value.

GLAZEBROOK J:

Well you know what the answer to that would be is that it does have an economic value to them because they were specifically getting more advertising revenue based on the number of hits and they were effectively handing rewards to people for the number of hits and that was all linked to the copy infringement. That's what they would say.

MR MANSFIELD:

What we're doing now is confusing, in my submission, with a file that infringes copyright being communicated through the service provided by the Internet service provider. Now that is the infringement of the copyright. The incidental copies of that infringing file as it moves through their system are incidental and they're covered under section 43A. Look, when we look at the parliamentary history it's as clear as day, to be frank, and that is why we need to disentangle what the user is doing versus what the Internet service provider is doing by way of providing the service, which is being utilised by the user. That distinction is very, very important in my submission. But in any event

when we look at the parliamentary history you will see why Parliament brought–

GLAZEBROOK J:

Well actually you'd say it isn't actually very significant because the user, because it's all electronic, is entitled to do this with impunity, at least from criminal, even if it's part of their business. So the distinction is actually relatively irrelevant. In terms of criminal liability on your analysis of the section as I understood you.

MR MANSFIELD:

Well, what you were asking me, Ma'am, was whether the incidental copying had value and, in my submission, the incidental copying doesn't have value, but the file that's been communicated by the user does. That is the distinction I'm drawing.

WILLIAMS J:

So, this is partly about the technology, and I need to get my head around that. The electronic material held in storage at Megaupload is a copy of the electronic material held by the user, it is not the electronic material held by the user. That copy is incidental to the storage and necessary for it.

MR MANSFIELD:

Correct.

WILLIAMS J:

Is that the point you're making?

MR MANSFIELD:

It is.

WILLIAMS J:

And, therefore, it's protected by 43A.

MR MANSFIELD:

Correct.

WILLIAMS J:

Unless it doesn't fit the description there.

MR MANSFIELD:

Well in my submission it does fit the description.

WILLIAMS J:

Well unless it's not incidental or transient.

MR MANSFIELD:

Well the copying made by the Internet service provider, including when it provides a storage facility, is incidental to the service being provided.

WILLIAMS J:

It can't provide it without it.

MR MANSFIELD:

Correct.

WINKELMANN CJ:

So in your assessment that really closes off the possibility of primary liability for breach of copyright because the copying, which is incidental in the process, is not a breach of copyright, if it on its own has no independent economic value, and you say it doesn't because it's the hosted file that has the economic value?

MR MANSFIELD:

That's right, the Internet service provider doesn't infringe copyright, the user may infringe copyright, and the Internet service provider is protected from copying that is incidental and required as part of the provision of its service.

WILLIAMS J:

There's a certain elegant circularity in that submission.

MR MANSFIELD:

Well, no, in my submission it's not circular, it's by necessity because even when – no, I won't use that analogy, but the technology that's been utilised has to and does make copies.

Now if we just move through the Act and we get to the definition of the meaning of issue to the public which your Honour asked me about earlier.

GLAZEBROOK J:

Where are you?

MR MANSFIELD:

Section 9 Ma'am. "Meaning of issue to the public. (1) References in this Act to the issue of copies of a work to the public mean the act of putting into circulation copies not previously put into circulation; and do not include the acts of – (a) subsequent distribution or sale of those copies; or (b) subject to subsections (2) and (3), subsequent hiring or loan of those copies; or (c) subsequent importation of those copies into New Zealand; or (d) distribution of imported copies that are not infringing copies within the meaning of section 12 subsequent to their importation into New Zealand."

So obviously if you receive a DVD which has the disc there but also is subject to copyright, are you able to sell the DVD yourself without infringing copyright. You're not allowed to take a copy of the DVD or create further copies of the DVD. That would be an infringement.

WINKELMANN CJ:

And the question that arises is why is the hosting and access on Megaupload not issuing of copies of a work –

MR MANSFIELD:

This is why it's actually quite difficult to understand. We've got to go back to the WIPO Treaty, which we will, which deals with –

WINKELMANN CJ:

Okay, but that is the obvious question, that's why Justice O'Regan I think asked you about this, and you're saying it's complicated.

MR MANSFIELD:

What I'd like to do is just move through the Act so we understand how the Act is structured and then look at –

GLAZEBROOK J:

Do you accept that section 9, "Issue of copies of a work to the public," includes digital works?

MR MANSFIELD:

It includes tangible items –

GLAZEBROOK J:

So it doesn't include digital works? I'm just asking the question, does it include digital copies, digital files? Because I'm not quite sure how it doesn't given the definition of "work" but –

MR MANSFIELD:

It deals with intangible items. Sorry, tangible items, yes.

GLAZEBROOK J:

Well, does that include a digital file, because work does include digital files, doesn't it?

MR MANSFIELD:

No, look, what it deals with is tangible objects to which copyright attaches, and we'll see that when we move through the parliamentary history. I thought it

was easier if we just understood how the Act was at this point and then look at the way in which we deal with the WIPO Treaty and the amendments to our legislation as a result to address that.

GLAZEBROOK J:

Well why is it tangible if work includes digital, which it certainly does as a literary work, because it includes a computer program.

MR MANSFIELD:

Well it would include a DVD.

WINKELMANN CJ:

And a computer program because –

MR MANSFIELD:

That's right, but it wouldn't include the communication of a digital file via the Internet.

GLAZEBROOK J:

So a digital file isn't a work except that copying, storing the work in any material form, including digital format…

MR MANSFIELD:

It looks at what the copyright is connected or attached to, which is a tangible item such as a CD, or a floppy disk, a book.

GLAZEBROOK J:

I read just about all of my books on Kindle. Does it not include those digital files that I read on Kindle? It's only if I make a tangible copy of it, but in fact it says if I store it copying seems to include a digital copy.

MR MANSFIELD:

Well…

WINKELMANN CJ:

Well we're having some difficulty with this Mr Mansfield. Are you saying to us that it's going to become clearer when we go through this…

O'REGAN J:

I think we should just let Mr Mansfield go through his summary.

MR MANSFIELD:

What I'm trying to do is just establish how the Act is structured and then we look at why it's structured in that way.

WINKELMANN CJ:

Let's do that. You take us along through it Mr Mansfield.

MR MANSFIELD:

Thank you. The next definition or section that I'd like to take you through to is section 14, and that relates to, "Description, ownership, and duration of copyright." The relevant part I want to take you to is, "Copyright in original works. (1) copyright is a property right that exists, in accordance with this Act, in original works of the following descriptions," and then it lists the types of works. The point I'm making at this stage is that the copyright is created by the Act. It exists through and as a result of the Act, and if we refer to section 225 at the same time, it's in the miscellaneous provisions and reads, "Rights and privileges under other enactments or common law." Then it sets out, "(1) Nothing in this Act affects – (a) any right or privilege of any person under any other enactment: (b) any right or privilege of the Crown existing otherwise than under an enactment: (c) any right or privilege of the House of Representatives," and so on.

Then subsection (2), "Subject to subsection (1), no copyright or right in the nature of copyright shall exist otherwise than under this Act or some other enactment in that behalf. (3) Nothing in this Act affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise. (4) Nothing in this Act affects any right of action or

other remedy, whether civil or criminal, available otherwise than under this Act in respect of acts infringing any of the rights conferred by Part 4." And it's important to move to Part 4, which only relates to moral rights.

So those two provisions, when read together, in my submission, provide very clear guidance to the Court that the Act is to be viewed as a code. It creates copyright and it's intended to provide for the enforcement of copyright. When we look at whether the Copyright Act is a code, then we'll come back and have a look at those two provisions in more detail.

If we move to section 16 –

WILLIAMS J:
Is your point there that subsection (4) doesn't provide the same sort of protection for rights under (3).

MR MANSFIELD:
It simply relates to moral rights only.

WILLIAMS J:
And, what, that ousts section 10 of the Crimes Act?

MR MANSFIELD:
In what respect, Sir, are you asking me?

WILLIAMS J:
Never mind, that's not your issue, is it?

MR MANSFIELD:
In my submission, Sir, what these two provisions read together tell us is that the Act is to be viewed as a code and the remedies that are available, whether they be civil or criminal, are provided within the Act, and that's the intended course, except for moral rights.

WINKELMANN CJ:

That doesn't seem to be the plain reading of that provision. It says, "Nothing in this Act affects any right or action or other remedy whether criminal or civil."

GLAZEBROOK J:

That's just in respect of Part 4 which is just in respect of moral rights I think is the point Mr Mansfield – so not in respect of Part 3 or any of the provisions, I think that was your point?

MR MANSFIELD:

Correct, that is my point.

WILLIAMS J:

So do you say this is your slam dunk with respect to section 10 of the Crimes Act?

MR MANSFIELD:

It's one of the slam dunks in relation to the Act being a code. It's a start.

WILLIAMS J:

Yes, well, all right, but section 10 of the Crimes Act says if there are offences elsewhere, and offences under this Act, then whatever's going on is described by either of them then you can choose.

MR MANSFIELD:

Well in my submission in relation to infringement of copyright you can't, it's a special piece of legislation and if an offence isn't created under –

WILLIAMS J:

Yes, that's the conclusion, I'm just asking you what you say about, is 225(4) your best shot at that proposition?

MR MANSFIELD:

No, it's 225(2), "Subject to subsection (1), no copyright or right in the nature of copyright shall exist otherwise than under this Act or some other enactment in that behalf." So it's talking about copyright with a right in the nature of copyright.

WILLIAMS J:

I don't get that.

GLAZEBROOK J:

I think your point is also though that the legislative history shows that they weren't intending to criminalise this so it's not so much the specific exclusion is it?

MR MANSFIELD:

No but –

WINKELMANN CJ:

So we need you to take us through your argument I think.

MR MANSFIELD:

Right, well let's just move to section 16 because that deals with Acts restricted by copyright. So 16(1)(a) is to copy the work. (b) is to issue copies of the work to the public, whether by sale or otherwise, distribution.

GLAZEBROOK J:

Sorry, you just said distribution, do you say (b) is distribution.

MR MANSFIELD:

That's right Ma'am.

GLAZEBROOK J:

And it has to be physical copies not digital copies, is that the submission?

MR MANSFIELD:

No, it needs to be a tangible work Ma'am.

GLAZEBROOK J:

That doesn't really answer my question I'm afraid. I mean if I've written a novel, and it's only in digital form, I've got copyright in that, and if somebody's infringing that how do they go about it?

MR MANSFIELD:

Well it depends on the right that they've infringed in that work Ma'am.

GLAZEBROOK J:

Well I suppose if they hand on the digital file to someone else, copy it and hand it on, are they coming under (b) or do you say they only come under (f) or what is the submission?

MR MANSFIELD:

No, under (b) Ma'am we say it could be a digital work, but it's recorded in a physical form. In a tangible form.

GLAZEBROOK J:

I don't understand "tangible" if it's only recorded in a series of ones and zeroes on a computer file.

MR MANSFIELD:

Well if it's on your Kindle it's in a tangible form Ma'am. So at that point if you were to distribute your Kindle, that might be –

GLAZEBROOK J:

Well if I'm reading it on the Internet, without downloading it –

MR MANSFIELD:

Well that's the distinction between a breach of the distribution right and the communication right. That's the very essence of it Ma'am.

GLAZEBROOK J:

Well I just want to know what's tangible? I'm sorry, I don't understand I think.

MR MANSFIELD:

It can be a digital work in a tangible form, like a CD.

WINKELMANN CJ:

Okay, so I think everybody is struggling with this point, and it's pretty critical to your argument Mr Mansfield, so perhaps you might at some point want to come back to it. I think we are struggling with what you're saying. The distinction between tangible and what's happening in this case. Why isn't this tangible.

MR MANSFIELD:

Because this is a, what we're talking about is a dissemination of work through the Internet. So it's in an intangible form and that is dealt with through the communication right.

WINKELMANN CJ:

Do you think it'll become plainer to us once you get us to the legislative history?

1500

MR MANSFIELD:

Oh it definitely will.

WINKELMANN CJ:

Well shall we stop there.

MR MANSFIELD:

You need to understand the structure of the Act or it's not going to make any sense in my submission. So if we look at (f), that was an amendment made in 2008. So rather than the broadcast right was amended to –

GLAZEBROOK J:

So (f) is the intangible and (b) is the tangible, just so that I've got your argument right.

MR MANSFIELD:

Thank you.

GLAZEBROOK J:

So (b) is the distribution tangible; (f) is the intangible.

MR MANSFIELD:

It's a communication through the Internet.

GLAZEBROOK J:

Okay.

MR MANSFIELD:

For the purposes of this hearing.

GLAZEBROOK J:

It's not entirely obvious that communication to the public only means that but…

MR MANSFIELD:

I know, that's why I referred you to the quote, there are terms of –

GLAZEBROOK J:

So it's legislative history that shows that is it?

MR MANSFIELD:

Correct. Now I just wonder whether we can skip through the rest of the relevant provisions because you have to understand them or otherwise none of this will make sense.

GLAZEBROOK J:

Sorry, I just did need to get that straight so I just…

MR MANSFIELD:

No, I understand that Ma'am, it's important. Part 2, deals with infringement of copyright.

GLAZEBROOK J:

What page did we get up to sorry?

MR MANSFIELD:

It's section 29, it's on page 44 of the Act, which is 0447 at the top, if you've got that numbering. So, section 29(1) says, "Copyright in a work is infringed by a person who, other than pursuant to a copyright licence, does any restricted act." I think that we can understand that, and we've just referred to the restricted act, but you need to look at subsection (3). "This Part is subject to Parts 3 and 8," and Part 3 relates to permitted acts, and Part 3 is where we find what are called the safe harbour provisions. So, if an Internet service provider is caught by the safe harbour provisions, they fall within them, then there is no infringement by the Internet service provider. Part 3 sets out a number of permitted acts, once of which I've already taken you to in relation to the transient copying.

Then at section 31 we see that there's an infringement by issue of copies to the public. Then at 33, infringement by communicating to the public. So, one being distribution, one being communication. Again, it will become clear when we move through it. Then 35 is where we see the start of the secondary infringement of copyright, and that deals with specifically importing. If we look at subsection (6), "This subsection applies to the following sound recordings, films, and computer programs: (a) a sound recording stored in a material form." I'm hoping at this point we see the distinction being drawn within the Act. "That is separate from any device or apparatus capable of playing sound recordings: (b) a film produced principally for cinematic release, or a copy of that film, or a copy of a substantial part of that film: (c) a computer

program stored in a material form that is separate from any device or apparatus capable of executing computer programs."'

Now section 36 is important because it picks up the other types of infringement that we see section 131 seeking to criminalise. Section 36 deals with possessing or dealing with infringing copy. "Copyright in a work is infringed by a person who, in New Zealand, other than pursuant to a copyright licence, – (a) possesses in the course of a business… (e) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the copyright owner – an object that is, and that the person knows or has reason to believe is, an infringing copy of the work." You'll see that there is no communication right referred to within section 36. So, for a breach of the communication right you have to be a primary infringer.

O'REGAN J:

So that depends on us accepting that communication and distribution are sort of mutually exclusive?

MR MANSFIELD:

Correct.

O'REGAN J:

If it's one, it can't be the other.

MR MANSFIELD:

That's right. Now I just want to move through Part 3 so we get an understanding about that. When we talked about what is infringement it was subject to Part 3, which are known as permitted acts. So, section 40 is important because it says, "The provisions of this Part are to be construed independently of one another so that the fact that an act is not permitted by one provision does not mean that it is not permitted by another provision." So, you may fall within one of the permitted acts, but not fall within others. Nonetheless, there's no infringement.

GLAZEBROOK J:

Sorry, I just missed that section number?

MR MANSFIELD:

It's section 40, Ma'am. We've already dealt with 43A, but that's where it fits in. It's a permitted act. So, if the copying undertaken by an Internet service provider which is transient or incidental, falls within the definition of 43A, then it's a permitted act, there's no infringement.

Now there are a number of permitted acts, and that's why it is difficult for an Internet service provider to look at a file and know whether it's infringing, because there are a number of permitted acts that would allow a user to have access to a file, which would mean that that user was not infringing copyright. And when we get to look at the evidence presented by the United States, that's something that we need to consider.

WINKELMANN CJ:

So, if we look at 43A you would say that applies whether or not the ISP knows that the thing that is being momentarily copied, transiently or incidentally copied is in breach of copyright?

MR MANSFIELD:

When we look at the law in relation to what they must know, they have to know that a specific work is infringing. So, they have to be aware of the specific work that's being claimed to be an infringing work. So generalised knowledge is not sufficient. So, knowing that your service as an Internet service provider will have infringing work moving through it and being copied incidentally is expected and that's why that provision is there.

WINKELMANN CJ:

Okay so it's unqualified, section 43A. It doesn't say you're not copying, you're not infringing unless you know it. It's just unqualified?

MR MANSFIELD:

Yes Ma'am.

WINKELMANN CJ:

I'm just wondering where the liability comes in.

MR MANSFIELD:

Well if you know a specific work is infringing on your service then you have obligations. If you receive a notice telling you that an infringing work is there, then you've got to take it down. If you don't take it –

WINKELMANN CJ:

That's under a different part?

MR MANSFIELD:

That's right.

WINKELMANN CJ:

Okay.

MR MANSFIELD:

We may as well move then now, but again I just want to show you where they are within the Act rather than discuss them in any detail because without going through the legislative history I'm sure you'll have many questions about them.

So, if we move through to section 92 and we pick it up under the heading "Internet service provider liability". So, it's within the Act that deals with permitted acts. 92A was never brought in, and has now been repealed, and that's a distinction that we have with the United States because when we look at the DMCA, safe harbours, you'll see that an Internet service provider in the United States is required to have a policy for terminating repeat infringers. Our Parliament didn't bring it in.

Then if we turn to 92B, and I just want to go through it briefly with you. Like I say, when we go through the Parliamentary history it will become clear, but it simply reads, "This section applies if a person (A) infringes the copyright in a work by using 1 or more of the Internet services of an Internet service provider to do a restricted act without the consent of the copyright owner." So, if a user uses an Internet service provider, which Megaupload was, subsection (1) applies. "(2) Merely because A uses the Internet services of the Internet service provider in infringing the copyright, the Internet service provider, without more – " so without providing a service outside the definition of an Internet service provider, "(a) does not infringe the copyright in the work: (b) must not be taken to have authorised A's infringement of copyright in the work: (c) subject to subsection (3), must not be subject to any civil remedy or criminal sanction."

Subsection (3) simply reads, "However, nothing in this section limits the rights of the copyright owner to injunctive relief in relation to A's infringement or any infringement by the Internet service provider."

So, we need not go, in my submission, any further than section 92B, because it makes it abundantly clear, and this is the clarity that Parliament sought, that Megaupload, who fits within the definition of an Internet service provider, none of the services complained of by the United States are outside that definition, fall fairly and squarely within section 92B.

Section 92C, "This section applies if – (a) an Internet service provider stores material provided by a user of the service; and (b) the material infringes copyright in a work (other than as a result of any modification by the Internet service provider)." That's important because when we look at possession, one of the parts of that definition, in accordance with US authority, is that the Internet service provider doesn't modify the work. So, doesn't alter or modify the work in any way, and we see that picked up in subsection (b).

Subsection (2) provides, “The Internet service provider does not infringe copyright in the work by storing the material unless – (a) the Internet service provider – (i) knows or has reason to believe that the material infringes copyright in the work,” and when we get to the cases you’ll see that we’re talking about specific works, but the section is clear, it talks about “in the work”. Then, “(ii) does not, as soon as possible after becoming aware of the infringing material, delete the material or prevent access to it,” and deleting the URL link would prevent access to it.

Subsection (3), “A court, in determining whether, for the purposes of subsection (2), an Internet service provider knows or has reason to believe that material infringes copyright in a work, must take account of all relevant matters, including whether the Internet service provider has received a notice of infringement in relation to the infringement.” Now we need not spend much time on 92C because as I've already submitted Megaupload falls within section 92B, and that would be sufficient, but in our submission it also falls within section 92C because even on the ROC when it receives a takedown notice, it deletes the URL link. So, it removes or prevents access to the infringing file.

Now the complaint by the United States is that the file remains but that’s as a result of deduplication which you’ve heard about already from Mr Illingworth and which I will speak to you further when I specifically get to the section.

Now section 92D sets out the requirements for notice of infringement, “A notice referred to in section 92C(3) must – (a) contain the information prescribed by regulations made under this Act; and (b) be signed by the copyright owner or the copyright owner’s duly authorised agent.” Now the US has not presented any of the takedown notices but the best we get, in my submission, in relation to counts 9 through to 13, and I'm now in documents for hearing, volume 8, part 4(1) of the United States supporting document. It’s a green volume. It’s just a point I want to make in passing. If you turn to, so it’s B-0542 electronically, but if you refer to page in red 3784, or page 80 at

the bundle of the superseding indictment. Here we see the particulars for the relevant counts 9 to 13. I'm not sure if you're all there.

WINKELMANN CJ:
I think we're all here, yes.

MR MANSFIELD:
The description for example count 9, "A communication from a computer server in the Eastern District of Virginia to a representative of a copyright holder stating one file, one video removed from our system in response to a takedown request and included a link, which is a URL, to the 210 version of the film *A Nightmare on Elm Street*." So, in relation to that count it's clear that the takedown notice, not that we have a copy of it so we don't know, for example, whether it's signed by the copyright owner or the copyright owner's duly authorised agent. We don't have any regulation specifically for a takedown notice in relation to 92C, but I'll take you to the equivalent that we do have under the regulations.
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The United States within the ROC hasn't summarised a takedown notice, and certainly hasn't asserted that a takedown notice was duly signed by the copyright owner or its agent, or met with the requirements that exist in the United States. And when we look at the authority they tell us clearly that if a DMCA notice does not meet the statutory requirements then the Internet service provider is not obliged to respond to the notice and to remove or prevent access to the file.

The point I'm making is that we have some detail here, and the response to the takedown notice, we don't know whether it was a valid one or not, it seems that it's accepted that access to the file was removed and certainly it's not asserted that it wasn't. So there's no suggestion within the description that the URL link wasn't deleted, and if we look at counts 10 to 13 we see that the United States accept that the very notices upon which they rely all refer to links, which are the URL links. That's for count 10, count 11, count 12 and

count 13, and I certainly do make the submission, which was a proposition put to Mr Illingworth QC through his submissions, that it's the indictment that sets out what the essential conduct is that the United States relies on.

Now I acknowledge that these allegations, which weren't in the original indictment, which was presented to the District Court for the arrestor warrants, which we'll come back to, the original warrant didn't include these counts 9 to 13, these counts appeared for the first time in the superseding indictment part way through the request procedure, once a superseding incidental was approved in the United States. But these allegations still relate to copyright, and I make this point as we move through, because as we can see under section 92C there's a reference to a takedown notice, and what an Internet service provider is required to do when they receive a takedown notice. We haven't adopted the DMCA requirements in the US, but we've referred to them, but in any event there is not statutory requirement for an Internet service provider to respond in correspondence or by way of a notice. But what we do know, and what we'll see when we move through the parliamentary history, is that Parliament considered making it an offence for a fraudulent or fake notice under section 92C to be issued, but decided not to enact an offence for that conduct. And in my submission, given Parliament decided not to make an offence for a copyright owner to issue the fake or fraudulent notice –

GLAZEBROOK J:

Well it would be odd for a copyright owner to do that. I would have thought it would be somebody else.

MR MANSFIELD:

It's not odd. Apparently one-third of the notices received by Internet service –

WINKELMANN CJ:

But it wouldn't be a copyright owner who issues, it'd be someone else.

MR MANSFIELD:

Variations. Either –

GLAZEBROOK J:

Well it couldn't be fraudulent if they were asserting copyright in their own work and saying there was infringement of it, could it?

MR MANSFIELD:

Well they were asserting copyright over work where they had no entitlement to, and they were –

GLAZEBROOK J:

No, exactly, so it's not a copyright owner issuing fraudulent, it's somebody who doesn't own it issuing a fraudulent one. Whether they happened to be a copyright owner of another copyright work I would have thought was perfectly irrelevant.

MR MANSFIELD:

I suppose we're at cross-purposes. I'm talking about someone purporting to be a copyright owner issuing a notice. But the point I'm making is that Parliament decided not to criminalise a party who purported to be a copyright owner and issued a fraudulent notice. It's hard to see how Parliament intended, in relation to correspondence that's not required, for an offence to come from the same. But in any event, in my submission, the takedown notice is required under the Act in relation to 92C. So it's very much within the confines of copyright. But there's no assertion that the URL link wasn't disabled so as to prevent access to the file. And if we look at various other relevant communications within the ROC, and we can do that in relation to Mr Dotcom, when they look at whether he had knowledge, it's accepted that the communications would reveal that Mr Dotcom had general knowledge of infringement occurring through the site, but the communications either don't reveal specific knowledge in relation to a work, or alternatively if they refer to a specific work, there is not an assertion within the ROC that the URL to that work was not deleted so as to prevent access. So whilst the ROC refers to

communications asserting general knowledge in the main, where it refers to information which might provide specific knowledge in relation to a work, which is what is required, there is no assertion that the URL for that work wasn't disengaged or deleted so as to prevent access.

Now still on section 92D, we talked about no regulation being created for the safe harbour in section 92C, but what happened in 2011, so the next opportunity for our Parliament to look at infringement through the Internet, it brought in the three strikes regime, different to the three strikes regime we're more accustomed to dealing with.

WINKELMANN CJ:

So the safe harbour came in in 2008 but when you say no regulation there was no consequence for failure to bring it – to comply with it, is that your point?

MR MANSFIELD:

No, in my submission there wasn't a regulation. If you look at section 92D(a), "Contain the information prescribed by regulations made under this Act," there's no specific regulation.

WINKELMANN CJ:

Yes.

MR MANSFIELD:

But what we have in 2011 is the copyright infringing file sharing regulations in 2011 so this is where they brought in another regime where if a user was infringing copyright through the Internet, there was the three strikes regime brought in to effectively bring about the infringement to the user's notice to warn them and then to take prescribed steps under the Act to remove services if required.

WILLIAMS J:

This is 122A do you, is that what triggers those regulations?

MR MANSFIELD:

Yes Sir, and if we move through, I've got the regulation here, it's not actually in the material that you've got but I'll get copies and we can circulate it tomorrow. There's a notice under those regulations called the rights owner notices and I'm just going to read it to you just as to the kind of information that is required in relation to that notice. "Every rights owner notice provided to an IPAP must include the following information about the rights owner who provides the notice: (a) the rights owner's name: (b) the right's owner's contact details, which must include an email address, telephone number, and physical address: (c) if the rights owner does not have a physical address in New Zealand, an address in New Zealand to which the IPAP can send documents for the rights owner: (d) if the rights owner is acting as an agent for a person whose copying is alleged to have been infringed, evidence of the rights owner's authority to act as agent for that person. (2) Every rights notice provided to an IPAP must – (a) identify the IP address at which the infringements are alleged to have occurred; and (b) state the date on which the infringements are alleged to have occurred at that IP address; and (c) in relation to each copyright work in which copyright is alleged to have been infringed, - (i) give the name of the owner of copyright in the work; and (ii) give the name of the work, along with any unique identifiers by which it can be identified; and (iii) describe the type of work it is (in terms of section 14(1) of the Act); and (iv) describe the restricted act or acts (in terms of section 16 (1) of the Act) by which copyright in the work is alleged to have been infringed; and (v) give the New Zealand date and time when the alleged infringement occurred or commenced, which must specify the hour, minute, and second; and (vi) identify the file sharing application or network used in the alleged infringement."

O'REGAN J:

Why do we need to know all this?

MR MANSFIELD:

My point is that is the information which is required under that process and in my submission it's akin to the information which is required under the DMCA,

and if you look at the ROC when we get to that point, none of that information is disclosed within the ROC. But more importantly, within the ROC it doesn't assert that any notice issued was signed by the copyright owner or the copyright owner's duly authorised agent.

Now in 92E –

GLAZEBROOK J:

Does it matter whether it's asserted it was signed because if it's signed and actually a false notice then there wouldn't be an infringement. So isn't the real issue whether it was an infringement of copyright?

MR MANSFIELD:

No, there still is potentially an infringement by the user, Ma'am, but the Internet service provider wouldn't be required to respond to that infringement because it hadn't received a notice. When it receives a notice advising it of the infringement of the specific work, it's then required to remove the work or disable the link.

WILLIAMS J:

So do you get to the point where for all purposes, and this may actually apply to the Crimes Act form of the offence as well, specificity is required because the Act refers to "the work", and if specificity is provided, information is required as to whether there's been compliance with the takedown regime or perhaps the three strikes regime, because if there isn't such information there's no proof of infringement, even if the work is specific.

MR MANSFIELD:

There's no infringement by the Internet service provider –

WILLIAMS J:

That's what I mean.

MR MANSFIELD:

Yes, your Honour is quite right, that is right. So, there's no infringement full stop, because it's a permitted act.

WILLIAMS J:

So, there can't be any offence anywhere on our books if that's right?

MR MANSFIELD:

There'll be no infringement so there's no basis for that Sir, yes.

WINKELMANN CJ:

Mr Mansfield, what's the relationship, I think I'm struggling here, what's the relationship between 92C and D and the file sharing provisions in the Act, because they're –

MR MANSFIELD:

No, the point, no, there's no relationship between the infringing file sharing other than in 2011 Parliament again reviewed the Copyright Act and in relation to users infringing Internet service providers and that was the mechanism it enacted to deal with that issue.

WINKELMANN CJ:

Which of the provisions apply in this case though? You're saying section 92C and D apply?

GLAZEBROOK J:

No, not D.

MR MANSFIELD:

No, no, I'm saying B applies Ma'am, and that's the end of it.

WINKELMANN CJ:

Yes, sorry, D hasn't been enacted has it, anyway. But what about 122, what's the relevance, 122A to U?

MR MANSFIELD:

I'm not, we don't need to refer to those Ma'am, other than in 2011 Parliament had the opportunity to review users infringing copyright on the Internet, and that was its response.

WINKELMANN CJ:

Okay.

WILLIAMS J:

So 122A to you is about mum and dad?

MR MANSFIELD:

About users at home.

WILLIAMS J:

And 92A, B, C, D is…

MR MANSFIELD:

Deals with where an Internet service provider is infringing copyright by being an Internet service provider, and we say that 92B is where it starts and stops because we fall clearly within 92B and there's no need to go to any of the other safe harbours.

WINKELMANN CJ:

So the basic submission is that Parliament has had a couple of looks at this issue, and has decided not to criminalise the conduct.

MR MANSFIELD:

Correct. Its response was the copyright infringing file sharing –

GLAZEBROOK J:

You say it's not even infringement under 92B, but I'm just not sure what merely because means. I mean you say without more, I'm not quite sure what that means.

MR MANSFIELD:

Well without more means –

GLAZEBROOK J:

Well if they have specific knowledge of a specific file you do – so you say even then specific knowledge of a specific file you're still protected under 92B, is that the submission?

MR MANSFIELD:

Correct.

GLAZEBROOK J:

Okay, and why would that be?

MR MANSFIELD:

Because 92B is independent, as I said when you start at the permitted acts, if you go to section 40 it reads, "Provisions to be construed independently. The provisions of this Part are to be construed independently of one another so that the fact that an act is not permitted by one provision does not mean that it is not permitted by another provision." So –

GLAZEBROOK J:

No, but it says, "Merely because without more," why is the "without more" not specific knowledge of a specific file infringing?

MR MANSFIELD:

Without more is looking at the services provided by the Internet service provider. So if you look at the definition of what an Internet service provider is, and that's why I started there, it defines the services that an Internet service provider –

GLAZEBROOK J:

Are you able to show us something in the legislative history that says even if there was specific knowledge of specific files that specifically breach

copyright, that the Internet service provider could say to that, I don't infringe copyright by continuing to store those and allow them to be made available to others?

MR MANSFIELD:

Well if you look at section 92B, and you look at the definition of Internet service –

GLAZEBROOK J:

Capital B you mean?

MR MANSFIELD:

Correct. Without more is a reference to providing a service beyond that as defined by an Internet service provider because some Internet service providers might retail content. If they retail content then that would be, without more would be outside the definition of an Internet service provider, and they would not be protected under section 92B.

WILLIAMS J:

There might be a question as to whether if the ISP's business model is predicated on copyright infringement, that might be more.

MR MANSFIELD:

Well in my submission Sir it's clear that "without more" means a service beyond the definition of Internet service provider, and the United States accepts that Megaupload in the services it was provided, all of the ones that they complain of fall within the definition of an Internet service provider, and if it was to be without more in that way one would expect it to be worded similarly to section 92C and it's not. Because that talks about them being put on notice of specific infringement in a specific work.

GLAZEBROOK J:

But if 92B lets you off, anyway, it doesn't actually matter whether you get a notice of it, you can with impunity leave it up there because you're only

providing the services of an Internet provider, so 92C is meaningless under your submission because 92B would always protect you, because all you're doing is an Internet service provider definition and storing all this material.

MR MANSFIELD:

Well that's how I submit section 92B can be read.

GLAZEBROOK J:

Well then why do you put 92C in there?

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MR MANSFIELD:

Well, I suppose the countervailing argument might be, Ma'am, that 92C relates to storage, it is a carve out of storage, or specifically in relation to storage. That's not my primary submission.

WILLIAMS J:

That put storage in the game, from your point of view. That's a dangerous position for you to be in because if you store and storage is exposed, you can be caught if you don't comply with 92C.

MR MANSFIELD:

Well that would be so if that's the way in which the two provisions are to be read. But that is contrary to section 40 which would have them being read independently.

WINKELMANN CJ:

Section 92B(3) does provide that there can be an injunction issued.

MR MANSFIELD:

That's right.

WILLIAMS J:

So just trying to get my head around 92B(2A) which says, "Even if you know," I think it says this, just read it quickly. "Even if you know you have a user who is infringing, you are not infringing, as long as you comply with all the obligations you may have under 122A to 122U." Is that right?

MR MANSFIELD:

That's right, Sir.

WILLIAMS J:

So that is predicated on the idea that you can know, specifically?

MR MANSFIELD:

That's in relation to those provisions which were bought in, in 2011 and the notice procedures under that provisions, that's right, which don't reply here. That's why I haven't referred to it, but I accept what you say.

WILLIAMS J:

I understand the 122A to U don't apply but it seems to be predicated on the idea, well it accepts that knowledge is not a disqualifying infringement.

MR MANSFIELD:

That's right and when we look at the history –

WILLIAMS J:

So if that is the case for (2A), the argument must be it is the case for the rest of the provision.

MR MANSFIELD:

For 92B, yes. That's what I am saying.

WILLIAMS J:

That specific knowledge.

MR MANSFIELD:

Yes.

WILLIAMS J:

Okay, all right, maybe I am just slow.

MR MANSFIELD:

No, no, you are not at all. The reason why we are going through the Act is because it probably strikes contrary to what you think and that is why I am trying to go through it so when we look at the parliamentary history, it starts to make sense as to what Parliament wanted to do and why and the reason why it did this is because it wanted to provide business certainty for Internet service providers in New Zealand because we are a net importer of content and we need Internet service providers, both within the community and commercially. So they are providing comprehensive protection for Internet service providers and we will see when we go through the parliamentary review, we'll see the content industry complaining about the fact that there is not an offence under 131 for a breach of the communication right. So we have the content industry making submissions to Parliament on the basis that there should be an offence under section 131.

GLAZEBROOK J:

Can I just bring you back to 92B because (2A) of 92B would seem to suggest that knowledge would be important, but knowledge that is acquired merely because of the file takedown isn't something more under (2).

MR MANSFIELD:

No "without more" was there before (2A).

GLAZEBROOK J:

Well I understand that, but if you look at it, it says "Does not infringe copyright of the work or authorise A's infringement merely because they know of the

infringement from information received" which sounds as though that if they know of it from other sources, they would actually be infringing copyright. Because they say, just because you know of it because of these takedown provisions, as long as you comply with all of those.

MR MANSFIELD:

That is standard though, to be frank, Ma'am; that is the point of the takedown notices. They don't provide notice that would make you liable for infringement if you comply with the notice.

GLAZEBROOK J:

But it still implies that if you do know that it is infringing, then you would be infringing copyright because otherwise you don't need that. If just knowledge doesn't do it, it doesn't matter what happens.

MR MANSFIELD:

Well we will come back to section 92B and C after we have done the Parliamentary review.

GLAZEBROOK J:

Because I think the content providers would be squealing even more if they thought there wasn't ever a possibility of infringement by an Internet service provider.

MR MANSFIELD:

Well Ma'am, they were squealing through the review and that's my point. They were squealing but not listened to.

GLAZEBROOK J:

But they were squealing at no criminal liability I agree but were they assuming there was no infringing liability either.

MR MANSFIELD:

Well under the infringing file sharing regime, the ISP was the intermediary so that is why they were receiving a notice on behalf of the user. And so that is why they were specifically involved in that regime. So it's the user that the content owner or the copyright owner is complaining about. Their infringement, the users' infringement but they made the complaint through the Internet service provider.

WILLIAMS J:

Well if you look at – if you think about the shape, sorry to belabour this but it feels to me like it is rather important.

MR MANSFIELD:

It is very important, Sir.

WILLIAMS J:

If you feel the shape of 92B and C, knowledge is not fatal if you are storing and it is not fatal if your knowledge comes from the infringing file sharing regime but doesn't that mean Justice Glazebrook is right, that what is not carved out is covered by without the knowledge that is not carved out, is covered by the words "without more", that is not storage.

MR MANSFIELD:

No.

WILLIAMS J:

That was your fall-back position that we started talking about.

MR MANSFIELD:

No my fall-back position was that 92B provides complete civil and criminal protection for an Internet service provider, bar for storage which could kick in under section 92C. Storage only out of all the services.

WILLIAMS J:

Yes.

MR MANSFIELD:

And for storage only, 92C might apply. So for example, the section applies, "If an Internet service provider stores material provided by a user of the service and the material infringes copyright in a work other than as a result of any modification by the Internet service provider." And then it reads on, "The Internet service provider does not infringe copyright in the work by storing material unless…" So –

WILLIAMS J:

Yes, so doesn't that mean that the knowledge sanctuaries are twofold. One in relation to storage and takedown and two, in relation to everything else an ISP does if the knowledge comes from the section 122A to U regime, otherwise knowledge can be fatal.

MR MANSFIELD:

Knowledge can be fatal under 92C, "If you obtain specific knowledge and you don't respond to it."

WILLIAMS J:

Got that.

MR MANSFIELD:

Only under 92C.

WILLIAMS J:

But knowledge is relevant under (2A).

MR MANSFIELD:

(2A).

WILLIAMS J:

There is no carve out of any other kind of knowledge under 92B except that kind of knowledge.

MR MANSFIELD:

92B without more relates to the services provided. It doesn't relate to knowledge.

WILLIAMS J:

Yes, why? Did the Parliamentary material tell us this?

MR MANSFIELD:

It will.

WINKELMANN CJ:

We are going around in circles. Perhaps we can just –

WILLIAMS J:

Well I am just trying to understand it.

MR MANSFIELD:

To embark on that.

WINKELMANN CJ:

Good. I mean I am just wondering, are you about to move on to the parliamentary materials?

MR MANSFIELD:

I am, Ma'am.

GLAZEBROOK J:

So, we are finished with the Act now?

MR MANSFIELD:

Yes, thank you. I am just getting the hard copy reference for you. So I want to start with the review which started in July 2001 and the first document I want to take you to which is electronically KD-ADT.248 which is in volume 11, page 4316.

O'REGAN J:

This seems pretty remote from the parliamentary process.

MR MANSFIELD:

Sorry, Sir?

O'REGAN J:

This seems very remote from the Parliamentary process. Departmental discussion paper 7 was before the Act was passed.

MR MANSFIELD:

Yes Sir, that's how long the discussion took with the industry and the Internet service provider industry and the content industry, that's how long the review took. 2001 is when it started and 2008 the amendment came in.

O'REGAN J:

My point is that usually we refer to parliamentary materials. This is a departmental report, seven years before Parliament was engaged with the issue.

MR MANSFIELD:

Primarily I am taking you to it because it sets out the basis upon which the review is being conducted. What are the issues that are being identified and then we see how they are addressed.

GLAZEBROOK J:

You would say it is fairly similar to a Law Commission report which directly led to legislation, i.e. it was not an internal departmental report. It was an external discussion document.

MR MANSFIELD:

Correct, thank you, Ma'am.

WINKELMANN CJ:

And we have looked at similar documents when we looked at the Companies Act 1993, I think.

GLAZEBROOK J:

That makes sense to do so if we are looking at the history of it I suppose.

MR MANSFIELD:

If it helps, what I want to move through are the documents that we have identified in the reply submissions and we have given the electronic links in the reply submissions.

GLAZEBROOK J:

Well I suppose for the record it might be, but if you are expecting us to look at them, you will have to give us the paper copy links. I mean now, look at them now.

O'REGAN J:

You go ahead.

MR MANSFIELD:

That is what I am doing, I probably won't get much further than this one.

WINKELMANN CJ:

Actually, whilst I have it in my mind, Mr Mansfield, did you hand us an index for your submissions?

MR MANSFIELD:

We filed it electronically, hopefully your registrar received that. Oh, there we go.

WINKELMANN CJ:

No that is good. It is a very good idea to include an index for submissions that are any link at all. That is just a general information for you Mr Mansfield. You will find it will assist how the Court receives your submissions.

MR MANSFIELD:

Thank you, Ma'am. Can I just get a bit of a lead for when you will be taking the break this afternoon, will it be four as usual? Because we started, I think, at 10 to two.

WINKELMANN CJ:

So we will retire for the day at four. So that is quite a long break we will take at that point.

MR MANSFIELD:

It may not feel it after last night Ma'am. So if we just deal with the foreword first which is on page 1. We see that the third paragraph from the bottom, from the signatures, we see that they are referring to the WIPO Intellectual Property Organisation which is considering many of the same issues that they are considering, and it relates, as we see here, to new advances and digital technology, creating both new opportunities for creative endeavour and new challenges.

GLAZEBROOK J:

Sorry I just missed that immediate page you are in.

MR MANSFIELD:

I am on the foreword Ma'am.

O'REGAN J:

4321.

MR MANSFIELD:

I will have both going. And if we move through the document we see, "Part One: Introduction. A. Why is the Copyright Act Being Reviewed." It relates to technological change and the development and adoption of new technologies, frequently raised issues concerning the adequacy and operation of existing laws and regulations. They acknowledge that relates to copyright and importantly, and we will pick this up later on, they refer to the English Copyright Act 1709, the Statute of Anne, and they are talking about Copyright Act involving and then further down, paragraph 3, the key issues, part way through paragraph 3, relating to the increasing use of digital technology and commerce. We see key questions are, whether the current Copyright Act, which does not include any reference to the word "digital", is capable of dealing with the use of works in the digital and online environment and whether the Act needs to be reformed to meet the demands of copyright creators, owners and users. The copyright creators and owners have concerns about their ability to control digital copying and communication of their work over the Internet. Copyright users have concerns about the effect of digital technology in restricting reasonable access to copyright material"

Then if we see in paragraph 4, we see specific reference to the nature of reproduction. If we turn to paragraph 6 under the same heading, and this is where we see the balance being struck by Parliament, "A modern and effective copyright regime is therefore an important ingredient in achieving the government's stated key goals, particularly those designed to grow an inclusive, innovative economy for the benefit of all New Zealanders, strengthen national identity and improve the skills of New Zealanders."

Then under the heading, "The Purpose of This Discussion Paper." Paragraph 10, "However it is important to bear in mind the present review is

restricted to issues raised by digital technology with particular emphasis on issues raised by the development of the Internet."

Now if we turn to Part Two, which is on page 4329, paragraph 12, we see this reference to copyright law endeavours to strike a balance between competing interest, between the interests of creators and owners of copyright material on the one hand and the interests of the users of such material on the other. Paragraph 15 –

WINKELMANN CJ:

So you can move past all the very general stuff I think Mr Mansfield.

MR MANSFIELD:

Right.

WINKELMANN CJ:

It's just motherhood and apple pie at the moment.

MR MANSFIELD:

Let's move to copyright and digital environment. We see them referring to the benefits of digital technology and the opportunities for copyright creators, owners and users. I don't want to labour that other than they were considering the importance of that and then on page 16.

GLAZEBROOK J:

Paragraph 33 might be of interest because it is talking about purely digital.

MR MANSFIELD:

Well this whole review is in relation to the communication of digital works via the Internet, so that is what the review is seeking to address.

GLAZEBROOK J:

But it is basically saying that purely digital works are already covered under the Copyright Act.

MR MANSFIELD:

What was being discussed was whether they did, or whether they were already covered under and that is why I am starting here as a matter of fairness because that is the starting premise. That they were asking that question, do the current rights provided under the Act –

GLAZEBROOK J:

Well they say probably. Did they come to a conclusion on that, is that what – 1600

MR MANSFIELD:

Yes, they came to the conclusion, Ma'am, that they would deal with it by way of a communication right, which is what I've been saying, but that's where they start with a consideration as to whether the Act as it was might be sufficient.

GLAZEBROOK J:

Right, you were going to page 16 I think.

MR MANSFIELD:

I'm going to move further through to page 17. We see them talking about communication to the public and making available copyright works. The communication of works to the public covers acts that are essentially non-copy related. That is, it covers activities by which works are transmitted to the public for immediate rather than deferred use, although copies or recordings may be made either as a result of or to facilitate this." Then, "The communication of works to the public is said to encompass a wide range of activities," and they're stated. The last sentence of that page, "The Internet also allows works to be made assessible to the public in an interactive on demand manner which is related to the concept of communication to the public."

Then over to page 18, paragraph 59, "The current Copyright Act does not grant copyright owners explicit rights to control the communication or making

available of works in this manner. Consequently, the existing broadcast cable programme service and distribution rights are unlikely to be sufficient to control the dissemination of copyright material online."

Then we talk about Internet service provider liability at paragraph 60. "Issues arise in respect of the potential liability of Internet service providers (ISPs) for copying infringement on a number of levels. ISPs may, for example, be liable for any infringement that might arise as a result of their services being used by others to infringe copyright (including unauthorised copying and distribution of copyright works). Copyright owners may wish to seek redress from ISPs, given that there can be difficulties in taking action directly against infringers. Potential ISP liability also arises in relation to transient copying. ISPs may, however, not be in a position to determine whether material infringes copyright. Concerns over potential liability could affect the availability of Internet services, and could lead to other undesirable outcomes, such as ISPs acting as de facto censors of material. The issue therefore arises as to the degree (if any) that liability in respect of copyright infringement should attach to the operation of ISPs."

So we're seeing clearly through this discussion paper what the concerns were. I think we've hit that magic time.

WINKELMANN CJ:

How much longer have you got to go on this discussion paper? Is it quite a long time.

MR MANSFIELD:

I want to spend quite some time on this paper and the next, and then it –

GLAZEBROOK J:

I don't know about the next paper. It seems to be an internal paper, unless you're not talking about that one. You're not talking about the one at 4388?

MR MANSFIELD:

I got excited by the hour Ma'am and just turned off my iPad by mistake. I can't actually tell you what the next one is but –

WINKELMANN CJ:

Well it says internal working paper for discussion only. Digital Technology and the Copyright Act 1994, that's the next one in the volume.

GLAZEBROOK J:

Unless you mean the position paper at 4467.

MR MANSFIELD:

Well I can move to the position paper, it deals with the same issues.

GLAZEBROOK J:

So we're not going to be taken to the internal paper.

MR MANSFIELD:

No, I pick up your Honour's point, I can move to the next paper.

WINKELMANN CJ:

It's now after four. How long do you think?

MR MANSFIELD:

It will take you through to at least the lunch break tomorrow.

MR RAFTERY QC:

Obviously, we're concerned about the time that is passing. The Court may well have as many questions for us as they've had for my learned friends and so I'm wondering whether in light of the indication of that we obviously don't want to lose our two days, if we could start perhaps earlier in the morning, would that…

WINKELMANN CJ:

We're just about to discuss that. Perhaps we'll just have an hour for lunch and sit until 4.30 tomorrow.

GLAZEBROOK J:

I'm probably all right at quarter to 10, so 9.45 would be fine.

WINKELMANN CJ:

So 9.45 am.

MR RAFTERY QC:

Every bit helps.

WINKELMANN CJ:

So that will gain an hour in the day. And if you can just try to be as short-winded as you can.

MR MANSFIELD:

Well I was persuaded to be short-winded in the Court of Appeal Ma'am.

WILLIAMS J:

Touché.

O'REGAN J:

Is that a refusal?

MR MANSFIELD:

No, once we get through these first couple of pages the theme is rather clear, especially when we refer to what happened in WIPO and then the UK. So it picks up pace but it becomes clear. I'm just trying to make the Act work and make sense. Hopefully I achieve that. Thank you.

COURT ADJOURNS: 4.06 PM

COURT RESUMES ON WEDNESDAY 12 JUNE 2019 AT 9.49 AM

MR MANSFIELD:

Good morning, may it please the Court.

WINKELMANN CJ:

Mōrena Mr Mansfield.

MR MANSFIELD:

Yesterday afternoon when Her Honour Justice Glazebrook talked to me about Kindle, I may have appeared more dumbfounded than I normally appear when I am in this Court. I wasn't so familiar with the Kindle, but what happened fortuitously last night is when I got back to the hotel, in the lobby was a Canadian citizen who had a Kindle and I sidled up to her and learnt what the Kindle was and how it worked.

O'REGAN J:

I hope she didn't send you the book she was reading on the Kindle.

MR MANSFIELD:

No but as a result, I think I have come up with an example that helps explain this concept that I have been talking to you about, using the Kindle and I wonder if you will just bear with me and let me get through the example and then I am happy to answer any questions that you might have about it. And it is really just using Her Honour Justice Glazebrook's example but let's say, for the premise that Her Honour received one for Christmas and she was anxious to get a few good reads. Obviously she could go to a licensed site online retailing books in a digital form. She could purchase a book in a digital form with the required licence, that it would allow her to download to copy it onto her Kindle. There is no infringement; you have made a copy but you are permitted by licence to do so. You can rest assured Ma'am, there is no infringement.

GLAZEBROOK J:

I wasn't particularly concerned.

MR MANSFIELD:

I could tell that. However, if you went to a site, say through a third party linking site, there being no connection between the third party linking site and the site you went to, but you picked up, that you could find a free copy of the book on another site and you were directed to that site via the URL, the link, to an online service that had books for download on an unlicensed basis and you downloaded it onto your computer or Kindle for free, you have made a copy and that copy of the work is infringing. While there is a civil infringement it is unlikely that that would be actioned against you because it would be uneconomic. The civil infringement is for the content owner or the copyright owner to identify and to pursue and a theme throughout copyright history is, you have these negative rights to control the rights which are protected in our Act under section 16 but primarily it is your responsibility, your duty to protect that economic right by pursuing action. If you did nothing more Ma'am, than keep it on your Kindle, you have committed no offence under section 131. So even though it is a civil infringement, the copying, if you simply keep it on your Kindle, you have committed no offence under section 131. Copying per se is not an offence and never has been.

The site that hosts the book, the unlicensed digital book which you download, has been used by whoever the user was who posted or uploaded the book to the site in the first instance as they have copied it and they have infringed the communication right. It is by their direction that the site is used and you will see reference to this phrase or this concept of direction. It is by their direction that the service or site is used. Unless the site uploaded the infringing copy of the book itself, and some sites may seek to make electronic copies of books available to the community and they may have uploaded the material themselves, then in my submission, under the Act they are a primary infringer.

GLAZEBROOK J:

I'm sorry, if they have uploaded it themselves, they are a primary infringer. You had an "unless" before that, but you meant if they have uploaded it themselves they are a primary infringer?

MR MANSFIELD:

Correct Ma'am.

GLAZEBROOK J:

But unless they do, you say unless they do that?

MR MANSFIELD:

It could only possibly be secondary liability, and as we will see, no liability for that for a site. So they need to be a primary infringer of the communication right.

GLAZEBROOK J:

So you say, just to bring it back to this, that even if they say we want you to upload infringing material on this, that they still are only secondary.

MR MANSFIELD:

No.

GLAZEBROOK J:

So we are setting up this site in order for you to upload infringing material.

MR MANSFIELD:

And I understand the reason you ask me that question but if it is at their direction.

GLAZEBROOK J:

All right so –

MR MANSFIELD:

Then they would be –

GLAZEBROOK J:

So unless they uploaded the infringing copy themselves or it was at their direction.

MR MANSFIELD:

And I can add to that Ma'am. If, once it is uploaded, they modified the content, then they would also be –

GLAZEBROOK J:

Yes, you made that point yesterday. Oh, is there anything else actually while I am writing that down?

MR MANSFIELD:

No.

GLAZEBROOK J:

All right, thank you. So if they uploaded the copy themselves, it was at their direction or they modified the content, that's primary liability, otherwise it's only accessory liability and you say that doesn't apply to these type of hosting sites.

MR MANSFIELD:

Correct, under section 36 which is the secondary liability provision. So –

GLAZEBROOK J:

Did you take us to that yesterday?

MR MANSFIELD:

Yes I did. So section 33, we can turn to that if you like now.

GLAZEBROOK J:

Sorry I didn't mean to –

WINKELMANN CJ:

So, are we going to get back to your main submission Mr Mansfield?

MR MANSFIELD:

I just wanted to take this example right through, which won't take very long Ma'am, then we will be straight back. So, if we turn to page 0448 which is in that pink volume, appellants' authorities bundle volume 2, part 2. We have the Act, we might as well keep that handy because you may want to refer to it again. Section 33 provides for direct infringement or primary infringement as we call it.

GLAZEBROOK J:

Yes I remember.

MR MANSFIELD:

And then just while we are there, 36 is secondary. So an Internet service provider can be liable for primary infringement for the reasons we have discussed but if we look at 36, it doesn't include secondary liability. Now I want to take this, and it won't take long. If once you have the licensed or unlicensed copy of the book, you upload the book, the electronic book, to say another site and make it available for other users to download. You have copied it and you have now made it available for communication and if it is downloaded, that is a breach of the communication right also.

GLAZEBROOK J:

Sorry, I copied it and made it available?

MR MANSFIELD:

Yes, so your licence wouldn't permit you to copy it and make it available to others.

GLAZEBROOK J:

So that is a breach of the communication right. I am sorry I just missed that.

MR MANSFIELD:

No that's fine. It's a breach –

GLAZEBROOK J:

It's a breach of the communication right.

MR MANSFIELD:

You have copied it, which is primary infringement.

WINKELMANN CJ:

So the uploading is an infringement and if someone downloads it, that's a further infringement.

MR MANSFIELD:

Well uploading it is making it available for the download which is a breach of the communication right, yes.

WINKELMANN CJ:

But the uploading is a copy, that in itself is an infringement.

MR MANSFIELD:

That's right.

WINKELMANN CJ:

And if someone downloads it, that's a breach of the communication right.

MR MANSFIELD:

Thank you.

GLAZEBROOK J:

No I think the downloading is the copying.

MR MANSFIELD:

Well that is also copying. So there is two stages of copying and that is why I wanted to take you through this example. So the upload is copying it and making it available. When someone seeks to download it, they are making a copy but the transmission from the two users, from user A to user B, is the communication. That is also a right which is protected. Now, however, if you purchase another Kindle, so now you have two Kindles and you put the electronic copy of the book on it also and give it to another person, you have copied the electronic book or the electronic file. It is now on another Kindle and that is a civil infringement because you have copied the work outside the licence.

GLAZEBROOK J:

Well it depends on the licence.

MR MANSFIELD:

That's right, I accept that, that is why this area is more complex and why it is difficult for an Internet service provider to be able to spot infringement in the first place but I accept that. And if you have given it to another person, you have distributed it. You have distributed it in a tangible form, so you have got an electronic –

GLAZEBROOK J:

So the distribution of the Kindle itself but what say I just send them the electronic file. You say that is for breach of the communication right but not the distribution right.

MR MANSFIELD:

That's right.

GLAZEBROOK J:

If I understand that.

MR MANSFIELD:

It's the means, it's the two rights. So that's why this is rights focussed. There are the two rights. So there is the overreaching right to copy, that the content or copyright holder owns, pursuant to the copyright but if you distribute it, the copyright, we're not worried about the Kindle, the copyright but in a tangible form, and in this case it's in the form of the Kindle, then that's distribution. If you do it through the Internet electronically that's communication.

GLAZEBROOK J:

And you're going to show us why that is under the legislative history mostly are you?

MR MANSFIELD:

Yes and the language of our own Act, but because –

GLAZEBROOK J:

I understand the language of the Act.

MR MANSFIELD:

I understand that Ma'am. I wasn't seeking to be…

GLAZEBROOK J:

You've just reminded us.

MR MANSFIELD:

Yes, thank you.

WILLIAMS J:

Why is, I struggle with the science of this, why is the Kindle or the USB, or any other form of container in which the electromagnetic impulses which form the book sit any different to a server in East Virginia or wherever that server was?

MR MANSFIELD:

Because that's the way in which they've dealt with the two rights, and if we look at WIPO and when we look at the history you'll see that that's how they've distinguished the two rights.

WILLIAMS J:

So they've distinguished containers because – the thing you're talking about is not in a tangible form at all. It's in a container which has tangible form.

MR MANSFIELD:

That's right. So if the copyright sits within an object with a tangible form, that's distribution.

WILLIAMS J:

But you see it always does, that's the problem. The server is a big thing, bigger than a USB.

MR MANSFIELD:

I understand that but what we're dealing with is the right, which is the communication right. So that's why we need to focus on the rights which are protected under section 16, and that's what makes the Copyright Act, and you might –

WILLIAMS J:

So you have to hand it over in tangible form. If it's tangible at point A, and at point B, but the connection between the two is not a handoff, but a pipe, excuse the bad analogy, it's not caught, is that what you're saying? It has to be a physical handover in a container?

MR MANSFIELD:

Section 16 just sets out what the rights are, the copyright owner has pursuant to the Copyright Act, and so in 2008 it included the communication right, so they were given, effectively, a right so as to distinguish between the two ways in which the copyright can be – I'm just trying to find a word that's more neutral.

WILLIAMS J:

Transferred.

MR MANSFIELD:

Transferred will work, thank you Sir, so transferred from person A to person B.

WILLIAMS J:

Right, transference, the form of the transference is the key.

MR MANSFIELD:

That's right Sir.

WILLIAMS J:

Not whether its destination is a container or its source is a container?

MR MANSFIELD:

It's the way in which it's transferred. So is it in a tangible form –

WILLIAMS J:

Is it transformed, transferred –

MR MANSFIELD:

Within a tangible form might be a better way to get it across.

WILLIAMS J:

Within a, right.

MR MANSFIELD:

Yes, or is it simply an electronic file communicated through the Internet, and so that's how they've distinguished the two rights. We'll come back to that, I just wanted to –

WILLIAMS J:

Okay, well for myself anyway I'm interested in the explanation as to why that apparently irrational distinction is made in the development of this law and I know you're going to take us there but I'm very interested in that.

MR MANSFIELD:

And I know that –

WINKELMANN CJ:

Mr Mansfield, isn't part of the answer that there is a special regime for those who are in the business of storing and communicating things, which is the material in relation to ISP and data storage.

MR MANSFIELD:

Yes, and I just wanted to finish this up. If you were in the course of business in relation to say you had 100 Kindles, and you were going to sell the Kindles with your electronic book in them in an electronic form, then you might commit the offence under section 131(d)(iii) because when you were selling the Kindle, the individual Kindles, you would be distributing the Kindles, although it included an electronic file, say the book. Now I also at this point just want to talk about dual use technology.

GLAZEBROOK J:

Well if it didn't have an electronic file on it then you wouldn't be infringing anything, would you, you're just selling a piece of hardware.

MR MANSFIELD:

Exactly.

WINKELMANN CJ:

Can we just move on to the next thing, but what happens if you were in the business of sending copies digital copies, that would be an offence under which provision, because that's a communication.

MR MANSFIELD:

You could only be liable for civil liability under section 33. There's no criminal liability under 131 for a breach of the communication right, whether you're in business or not. So the Internet service provider would need to be a primary infringer, and we just discussed what that would mean.

Now key to this really is this concept of dual use technology, and that's equipment or a service that's capable of being used by a user for lawful and unlawful use. Now this is a pretty basic concept. Let's take, for example, a knife. It's obviously capable of quite lawful use within a kitchen and preparing food, but it's also capable of being used to kill. So we can look at it as though it's dual use, has both lawful and unlawful capabilities. A photocopier is the same, a video recorder is the same, a DVD player or recorder is the same, and so is the Kindle. Ma'am can quite lawfully use the Kindle, as we've discussed, so the same service, the same technology, without infringing copyright, or Ma'am can use it in the way in which we've discussed and infringe copyright. So it has that dual use. That's why Internet service providers such as Megaupload have protection, because they're capable of being used by the user for infringing purposes, but they're also capable of being used for infringement.

Now Megaupload, its technology and the service it provides, would be more closely akin to Dropbox, and you're probably all familiar now with Dropbox and how it operates and so I don't need to explain that to you. But it's a mechanism, Dropbox, it's a service whereby you can store electronically your electronic files, or you can use it to transfer electronic files which are too big to email, from person A to person B. You, as the user, decide when you upload whether you're storing or simply storing the electronic file, or whether you

make it available to another. You know how you make it available to another, they have to be invited or provided with a link to the file where it's stored. Now you know that Dropbox doesn't have an index facility so you're not able to go to Drobox and search other people's files because it's a form of private communication. The user directs what files are uploaded, and also directs who has access to the files. It's, in a nutshell, Megaupload.

Now Megaupload, like Dropbox, can be used for lawful, so non-infringing, use, or for infringement, and Dropbox can be readily used for infringing. But that's why the suggestion that it's unusual that it doesn't have an index or search facility is completely implausible. In fact, if it did have a search facility, that would facilitate infringement because that would mean other users would be able to look into files of another user, identify infringing or non-infringing files and pull them down or download them. So that would be creating an opportunity for infringement. So the absence of a search facility is consistent with the service provided. It doesn't impact on its dual use and in fact if it did provide a search facility it would facilitate infringement.

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Now Megavideo, the closest comparison would be YouTube. So a user is able to put up their video, it is able to be viewed, streamed or downloaded by another user but again the user directs what goes up on the service, like on YouTube and they permit it to be publicly available. Now for both, Megaupload and Megavideo there were terms of use. For both, the terms of use provided that a user was not to upload infringing material. Now that's not to say that in reality, users breach such conditions because for example when we look at the YouTube case, you will see the high level of infringement through YouTube and that was a civil case in the US and we need to look at that because that tells us about how the US deals with allegations of civil infringement by an Internet service provider online and it is to the US – and you will see this when we go through the history, we will keep going shortly, but we will see how we refer to both what is happening in the UK and in the US.

WINKELMANN CJ:

Mr Mansfield, does YouTube have incentive payments for people whose materials are accessed at high volume?

MR MANSFIELD:

Yes YouTube does, Instagram I think does, it's common place.

GLAZEBROOK J:

I actually thought YouTube does it by virtue of advertisements that are there. I did not think it was actually a specific payment from YouTube.

MR MANSFIELD:

No, I think if you –

GLAZEBROOK J:

But maybe we can do it, rather than speculate. Look at the cases and see if you can elucidate from there.

MR MANSFIELD:

Oh well I can't elucidate – I don't think the case actually talks about that specifically from memory, but the point is that a number of Internet service providers provide incentives and we need to think about incentives because the US case, oh incentives are bad. But incentives are simply part of everyday business, encouraging general use. There is nothing about the incentives provided by Megaupload that specifically encouraged infringement. If it provided incentives directly to infringement, that would be different but you won't find any reference within the ROC to a suggestion that when they had the awards programme in place, that it was focussed on incentive, sorry it was focussed on infringement. And that is important because it is really no more than dual use and that is why I introduced the phrase, which is common. It is simply encouraging use whether it be non-infringing or infringing, it is simply

encouraging use through its site which we would expect as a matter of common sense a business would do.

WINKELMANN CJ:

And there is evidence in relation to the fact that other ISPs provide incentives.

MR MANSFIELD:

Well I don't think there is any dispute about that Ma'am, it has been referred to in the lower Court throughout without any issue being raised. As to whether we filed evidence –

GLAZEBROOK J:

Well we probably need, because as I say, I think the YouTube ones, as far as I know, that Grumpy Cat made money from advertisements on the side and then there was a percentage of advertisements going, but it might be on the terms of use of YouTube, I don't know.

MR MANSFIELD:

Well can I put it this way. A large number of Internet service providers provide incentives for general use.

GLAZEBROOK J:

There is nothing you can point to in your evidence that you put forward, or the evidence anywhere else on that?

MR MANSFIELD:

One of the complaints Ma'am is that we were prevented from calling evidence in the District Court, you might recall. There was a funding issue but beyond that, we were also denied the opportunity by the learned District Court Judge to put evidence before the Court.

GLAZEBROOK J:

To what, sorry?

MR MANSFIELD:

We were denied the opportunity by the learned District Court Judge to put evidence before the Court, so there wasn't the opportunity to put industry evidence before the Court which is one of the complaints we have had throughout the course of this proceeding, but there is, as I understand it, and if my learned friends.

GLAZEBROOK J:

Sorry I actually wasn't aware there was a specific ruling. Was there a ruling on that?

MR MANSFIELD:

Yes there were rulings.

GLAZEBROOK J:

Perhaps you could just give us the reference after the break.

MR MANSFIELD:

Okay. I am happy to go back to the review now. I just wanted to deal with that briefly.

WINKELMANN CJ:

Thank you for that Mr Mansfield.

MR MANSFIELD:

Now we were in the appellants' authorities' bundle volume 11, which has six parts and we were in part 2.

WINKELMANN CJ:

And we decided not to go through the internal document, internal working papers.

MR MANSFIELD:

That's right, so I can move through that. We were on page 4338 and look I don't propose to simply stand here and read paragraphs to you but I do want to take you to them.

GLAZEBROOK J:

That's the four, whatever?

O'REGAN J:

4338, it is the discussion paper.

GLAZEBROOK J:

We still back in that document?

WINKELMANN CJ:

We thought we had finished that Mr Mansfield.

MR MANSFIELD:

Did you? Well look we are not far from finishing it, if that provides you with some relief. I just want to take you through the passages, I see no point in us reading them together.

GLAZEBROOK J:

No that is fine, I just thought we had finished.

MR MANSFIELD:

I am sorry to disappoint you Ma'am.

GLAZEBROOK J:

No, no it's all right. I was just on the wrong page.

MR MANSFIELD:

So 4338. We see the paragraph there in relation to Internet service provider liability and it really, that paragraph simply identifies the issue which was being identified, namely in relation to the Internet service provider service as being provided there would be liability and how that should be dealt with. Towards the end of that paragraph we see, "Concerns over potential liability could affect the availability of Internet services and could lead to other undesirable outcomes such as Internet service providers acting as de facto census of material" and that's because they were being effectively so paranoid about the liability from infringement that they would be taking down material that was justifiably able to be up. "The issues therefore arise as to the degree, if any, that liability in respect of copyright infringement should attach to the operation of Internet service providers." I suppose the point I am trying to make when we go through this is that Internet service providers were identified by our Parliament as integral for New Zealand for a number of reasons and hence there was this move to identify not only their liability but how that liability might be addressed. If we turn to page 4341 we will see there is a reference to the WIPO International Treaties and at this stage I wonder if we could just turn to the hard copy we have of the WIPO.

WILLIAMS J:

Just before you go on to that. Do they, perhaps it is just the general tone of the document. Do they specifically mention, we don't want to disincentivise ISPs to site here?

MR MANSFIELD:

Yes they do that and I am going to take you to that.

WILLIAMS J:

Oh you are taking us.

MR MANSFIELD:

Yes.

WINKELMANN CJ:

Did you say 4431?

O'REGAN J:

4341.

GLAZEBROOK J:

You were going to take us to the WIPO Treaties now I think, so, where are they?

MR MANSFIELD:

That is volume 12, part 6. I think there are six parts and we are on part 3.

WINKELMANN CJ:

Of the authorities, of the authorities.

MR MANSFIELD:

Appellant authorities' bundle, volume 12. There are six parts and we are on, I think it is part 3.

GLAZEBROOK J:

And do we have a page number?

MR MANSFIELD:

I am going to go there. I am just finding it. Right, let's go to 5481. And then we are looking at Article 6. "Authors of literary and artistic works shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their works through sale or other transfer of ownership. Nothing in this Treaty shall affect the freedom of contracting parties to determine the conditions, if any, under which the exhaustion of the right in paragraph 1 applies after the first sale or transfer of ownership of the original or a copy of the work and with the authorisation of the author." And then if we go to the bottom of the page, you will see the agreed statement concerning articles 6 and 7. "As used in these Articles, the expressions 'copies' and

‘original and copies,’ being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.”

WINKELMANN CJ:

Sorry, Mr Mansfield, I've lost where you are.

MR MANSFIELD:

Sorry Ma’am. Are you on page 5483?

WINKELMANN CJ:

Yes.

MR MANSFIELD:

Right down the bottom of the page, within the footnotes it’s called, “Agreed statement concerning Articles 6 and 7.”

WINKELMANN CJ:

Got that, thanks.

MR MANSFIELD:

So it’s clear that distribution is talking about fixed copies that can be put into circulation as tangible objects.

GLAZEBROOK J:

They don’t actually explain what that means anywhere.

MR MANSFIELD:

No they don’t, well, I sought to explain that to you Ma’am.

GLAZEBROOK J:

No, I understand, but I just wondered whether there was anything in writing where they tried to explain.

MR MANSFIELD:

What we've identified in our submissions in reply are a number of articles and text which discuss the WIPO Treaty and what it means and how it's applied, so if you look at our reply submissions you will see them listed there. I was loathe to take you to them, but they discuss the WIPO Treaty and what this means and how it should be applied, but it's consistent with what I say. Article 8 deals with the right of communication to the public, and I'm not going to read that to you but if we could move down to the agreed statement concerning Article 8. "It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a contracting party from applying Article 2 too."

If we look at Article 8 now, which is the right to communicate to the public, you'll see that it relates to the, "Exclusive right of authorising any communication to the public of their works, by wire or wireless, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them." So through the Internet. Now there was discord –

WILLIAMS J:

So does that mean on demand download?

MR MANSFIELD:

That's right, online, which deals with, if someone pushes it up then someone can pull it down at a time that they choose.

WILLIAMS J:

That's specifically referring to on demand download is it?

MR MANSFIELD:

Correct. Now there was discord at WIPO because there couldn't be agreement as to how the right to disseminate or transfer a work electronically

through the Internet should be dealt with. The United States was determined that it should be dealt with through what they had as a pre-existing distribution right, because they didn't have a communication right or a broadcast right as we had it in our Act, or as the UK or other European jurisdictions had. They dealt with it always under concept of distribution and they wanted to stick with that. However, the UK and the other European countries who were negotiating the WIPO Treaty wanted to deal with distribution in relation to tangible, copyright in tangible form, and communication copyright in an intangible form or through the Internet for our purposes. So the two articles was a compromise and when you refer to the articles that we've provided within the material, you will see that the compromise was called the umbrella solution. So it was for an individual country to decide whether they adopted a communication right. As you can see we did, as the UK did, which we have throughout history mirrored in relation to amendments. In fact that's where we got our Act from. But what was important was that the member countries had to make it clear how the rights were being dealt with, so it was transparent.

WILLIAMS J:

How did the US do that?

MR MANSFIELD:

They stuck to their guns, as the US is –

WILLIAMS J:

When you said you had to make it clear, they had to make it clear to WIPO rather than make it clear in their law.

MR MANSFIELD:

No, made it clear under the Act that they dealt with it through distribution, so it was clear that they –

WILLIAMS J:

So was there a specific amendment for communications or a clarifying amendment?

MR MANSFIELD:

I might have to take you to that amendment after break, but they did make it clear and we can see that that's how they've dealt with it.

WILLIAMS J:

Right.

WINKELMANN CJ:

Where does it say that they have to make it clear?

GLAZEBROOK J:

Well you just had to comply with Article 8 and Article 11 –

WINKELMANN CJ:

No –

GLAZEBROOK J:

– however you do it, is that what you say?

WINKELMANN CJ:

Can you just answer?

MR MANSFIELD:

And that's the point, and if you refer to the academic writings on this it summarises that was the point of the agreement or the Treaty, that the member countries would make it clear.

WINKELMANN CJ:

The academics say that but is there anything here that says that they had to make it clear whether they're using –

MR MANSFIELD:

Well by agreement if they've adopted these articles they are making it clear.

GLAZEBROOK J:

When you say “making it clear” they don’t have to make the distinction though because the US didn’t make the distinction.

MR MANSFIELD:

They needed to make it clear within their domestic legislation how they were dealing with communication via their Internet. So how they were dealing with that. Whether they were dealing with it through the distribution right, which was pre-existing in the US, or whether they would deal with it through the communication right.

WINKELMANN CJ:

Yes, well this seems an important part of your submission and I'm just saying to you I don’t see where there is a requirement that they make it clear and I don’t see how adopting these articles imposes upon them an obligation to make it clear.

WILLIAMS J:

I guess the answer is did they make it clear in their copyright legislation.

WINKELMANN CJ:

Well can Mr Mansfield just answer my question please.

MR MANSFIELD:

Yes, the position Ma’am is that the countries who agreed to the WIPO Treaty agreed to make it clear that was the very purpose of the Treaty.

GLAZEBROOK J:

No, sorry, I think the question is…

MR MANSFIELD:

Where within the actual article is that specifically stated.

WINKELMANN CJ:

Because it doesn't seem to me that it flows necessarily from the differentiation that is made in the Treaty between the right of distribution and the right of communication that the party, that the member States have an obligation to make it clear which path they're pursuing.

MR MANSFIELD:

Well, if we look at, okay, Article 6(2), "Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership…"

So that in part, in my submission, confirms that the individual countries were free to decide how they would deal with the distribution.

GLAZEBROOK J:

Isn't that just saying whether it's 50, 60 or 70 years?

MR MANSFIELD:

I would agree with that also Ma'am but in my submission that assists in relation to the fact that the countries needed to make it clear. What I might do is just take you back to, at a later point, the WIPO Treaty and some of the discussion in relation to that to make that point clear, but –

WINKELMANN CJ:

Okay, well if you need to come back to this point, we can come back to it. I should say, by the way, that I thought we'd adjourn at 11.15 for morning tea, to give you a reasonably paced break.

MR MANSFIELD:

Thank you Ma'am.

WILLIAMS J:

Did you say firmly clearly and confidently that the US did, in fact, amend their legislation to make it clear?

MR MANSFIELD:

No, I just want to check the amendment and give that to you.

WILLIAMS J:

Good. I'll leave that to you then.

MR MANSFIELD:

The point I suppose of my submission is that they continue to deal with it under the distribution right which they had. They didn't have a separate right which became a communication right under their legislation, and they didn't want to deal with it in that way.

O'REGAN J:

And is New Zealand a party to this Treaty?

MR MANSFIELD:

We are now. It was in 2018, November, we ascribed to it Sir.

O'REGAN J:

So we weren't at the time we passed the legislation?

MR MANSFIELD:

Sir, we were aware of it but we didn't adopt it in a formal sense until that point.

WINKELMANN CJ:

At what point.

O'REGAN J:

2018.

MR MANSFIELD:

November, sorry, December.

WINKELMANN CJ:

But our legislation is modelled on the UK's, because it continued to be modelled on the UK's?

MR MANSFIELD:

Yes, and we'll go to the UK Act as part of our discussion.

WINKELMANN CJ:

And the UK was party to this at the time?

MR MANSFIELD:

Mhm, and the European countries were –

WINKELMANN CJ:

So when the UK was party to this, and this was being negotiated, did it already have a communication right?

MR MANSFIELD:

Mhm.

WINKELMANN CJ:

Right.

GLAZEBROOK J:

But in respect of the US, if the US did absolutely nothing, as long as that was compliant with the rights in Article 8 and Article 11, it didn't have to say anything about technology, did it, under this Treaty?

MR MANSFIELD:

No, as long as it provided for it beforehand, that would be fine. If it didn't provide for it they needed to amend it…

1030

GLAZEBROOK J:

Well obviously, but if distribution included wireless distribution under their law then they needed to do nothing whatsoever did they?

MR MANSFIELD:

That's right. And a compliant country, if it was already compliant wouldn't need to amend their legislation. I just can't –

GLAZEBROOK J:

And that is all the legislation says. They give exclusive rights in those circumstances under 6 and 11, don't they?

MR MANSFIELD:

And it is really of no relevance to us what the United States did other than they still deal with it under the distribution right, we don't.

GLAZEBROOK J:

Yes, but that takes away from your submission that this requires you to make it clear there is a distinction between tangible and intangible because I would have thought the very compromise was that you didn't need to do it. You could deal with it however you liked as long as there were the exclusive rights that were provided in 6 and 8 to the authors, subject to licences etc.

MR MANSFIELD:

Well I can't take it any further than my submission is the correct position, and if you look at the learned writings on this, it supports what I say, and other than taking you to it now which I wasn't going to do because of the concern of time, there are all of the references there.

WINKELMANN CJ:

Okay, so you can just give us the reference in your reply submissions that have those references footnoted.

MR MANSFIELD:

They are specifically set out Ma'am.

WINKELMANN CJ:

Yes, we are just asking you to pinpoint reference to your reply submissions.

GLAZEBROOK J:

Perhaps after morning tea it might be easier.

MR MANSFIELD:

Well I just don't have a hard copy.

WINKELMANN CJ:

Well your junior can give it to you shortly. Mr Mansfield you can carry on, your junior can just hand it up to you when he gets it.

MR MANSFIELD:

I can just deal with it in a short pace Ma'am, which is probably easier than coming back to it. So, if you go to the reply submissions dated 16 May 2019 and you go to a heading which is 5 which is called "Copyright" at paragraph 5.4. You will see that we have provided the complete, what we say is a complete Parliamentary history, so all of the documents and more that I am going to refer to in oral submissions together with academic commentary on WIPO and that is on page 26 and there are all of the references we could find regarding the discussion in relation to WIPO there.

GLAZEBROOK J:

And sorry, what paragraph number was it attached to?

MR MANSFIELD:

It is behind paragraph 5.4 and it just appears like a table like this Ma'am, and you should have – or we can provide the hard copy reference but also hopefully the electronic reference which is there which should take you straight to the document.

GLAZEBROOK J:

Thank you.

MR MANSFIELD:

So the point of taking you – we are back to the volume before we went to WIPO. The point of taking you to the actual treaty is that it is discussed within this document on page 4341 and then if you look at page 4342, you will see paragraph 74. "There are four main areas in which the WIPO International Treaty set new international standards in relation to the dissemination of digital digitalised material and then we have the right of communication to the public and the right of making available to the public. This new right applies to the communication of works such as cable services, therefore fills a gap in the Berne Convention which applied only to wireless broadcast communication. In effect it provides for a new right of cable transmission. The provision also includes a right to make works available in such a way that members of the public may access these works from an on demand, interactive system such as the Internet." And then if we turn over to paragraph 75, which is on page 4343. "The WIPO Internet treaties do not include provisions relating to the contentious issue of transient reproduction. Both treaties do, however, refer to agreed statements that were issued by the diplomatic conference that in relation to the question of transient copy state that the storage of a protected work in digital form in an electronic median constitutes reproduction, within the meaning of the Berne Convention. Subject to these provisions, the treatment of transient copying is effectively left to the individual member states to decide".

Now at page 4345 it deals with the issue of copying and when we went through the Act we dealt with the changes that were made to the definition of copying in 2008 and that is really not contentious. But if we move to page 4350 that deals with communication to the public and it talks about the concept of communication to the public of copyright works, refers to the transmission of works to the public through broadcasting or by inclusion in a cable programme service. It can also be used to refer to the transmission of works via the Internet through webcasting means of using the Internet to simulcast or transmit in real time audio or audio-visual material to the public usually using streaming technology."

If we turn over to page 4351, we see that they acknowledge that this concept is closely related to making available of a work on the Internet, which is what we are dealing with here, "As the essential conduct for on demand access whereby copies of works are stored on computer networks which can be accessed by persons from a place and at a time of their choosing. Digital technology also has implications for those provisions of the Act that allow the retransmission of broadcast by cable programme service providers."

Then just so that we are clear about this issue being identified, if we move down to paragraph 102. "It is not clear whether webcasting falls within the definition of broadcasting or cable programme transmission. Whether it is a combination of both or whether it is not capable of being characterised at all under the existing legislation. That is a definitional problem for copyright owners, broadcasters and cable programme service providers and the like would mean that the webcast are not covered by the existing restricted Acts and therefore fall outside the copyright control of the content owners and television organisations"

WINKELMANN CJ:

Webcasting is live broadcasting isn't it?

MR MANSFIELD:

Yes.

WINKELMANN CJ:

It is not something we are concerned with?

MR MANSFIELD:

No, we are dealing with dissemination through the Internet, and then at 103, another definitional problem is raised by the interactive nature of the Internet, Internet transmission and involved the two-way exchange of data between the webpage and the user. Then if we turn to page 4353, we see them talking about possible options and we see the three options being proposed at that point, and if we turn to page 4355, we see a further discussion regarding making a work available, the issue. And if we return to paragraph 114 it is recorded as, “Noted earlier, however, the digitalisation of sound recordings, films and typographic arrangements might not infringe a reproduction right currently provided under the Act in respect of those works. Copyright owners could therefore face difficulties in taking legal action in New Zealand in relation to unauthorised copies of sound recordings or films that had been made available on the Internet.”

Then on page 4356, and I'm just bringing the relevant parts to your attention, paragraph 118, “Copyright owners have the exclusive right to issue copies of a work to the public whether by sale or otherwise. The Copyright Act provides that issuing copies of a work to the public means putting into circulation copies that have not previously been put into circulation. It does not include subsequent distribution or sale of these copies, whether copies are first put into circulation overseas or in New Zealand. The concept of issuing copies of a work to the public has traditionally been associated with publishing a tangible work and the subsequent distribution of copies. for example in the form of books or sound recordings. The current definition in the Copyright Act is, however, somewhat wider. It provides not only that ‘publication’ means the issue of works to the public; but that it also includes making literary. dramatic, musical or artistic works available to the public by means of an electronic

retrieval system. It is possible, therefore. to interpret the right to issue copies to the public as including making those copies available in an electronic retrieval system. which would include a computer disk or a computer system or server. This would mean that the existing legislation already provides a limited right to make available in respect of literary, artistic, musical and dramatic works; but not sound recordings, films or typographical arrangements. The transmission of films and sound recordings on-demand may, however, also to some extent be covered by the existing rights granted to copyright owners."

So there was some acknowledge that in part our legislation could be interpreted to comply. But the issues that confronted Parliament, and in particular that would confront copyright owner in relation to enforcement of infringement, was identified.

Now turning quickly to page 4361 we said that they deal specifically with the liability of Internet service providers for copyright infringement. Part D, paragraph 134, "A further issue related to the copying and communication of works via the Internet issues is the potential liability of ISPs for any copyright infringement that might arise as a result of their services being used to infringe copyright. Copyright owners often face difficulties in identifying and pursuing legal action against infringers and persons who deliberately facilitate access to pirated copies of copyright works on the Internet. Of particular concern are the actions of website proprietors who may have placed unauthorised copies of copyright material on their sites, or provided unauthorised links to other websites."

So they would be direct infringes because they have placed the unauthorised copies on their service, or they have provided the link to those, or to that material.

Turning to page 4362, paragraphs 138 and 139. "Copyright owners may therefore look to ISPs and providers of services such as bulletin boards and

even telecommunications services for redress, on the basis that those providers enable users to access material placed on the Internet. The possibility of ISP liability for copyright infringement may affect investment in Internet support services. Alternatively, it may lead providers to impose unduly restrictive requirements on their customers or to seek legal indemnities from them. The desire to avoid liability may also lead ISPs to remove material from websites even where there is no conclusive proof that the material in question infringes copyright, thereby acting as de facto censors and potentially restricting freedom of expression."

Now again if we turn to page 4363 we'll see reference to the WIPO Internet Treaty. Underneath –

WINKELMANN CJ:

Just on that, because it covers potential liability under the current legislation, doesn't it, 140?

MR MANSFIELD:

Oh yes, that's what's been identified. The risk of potential liability under the current legislation. That's one of the concerns that's been identified.

4363 we see reference to the WIPO Internet Treaty. Underneath that we see possible approaches and then over on page 4364 we see the question's has been raised. Question 2, or option ii, "State that ISPs will not be liable in any circumstances for the infringing acts that relate to the activities of their subscribers." Then iii, "A middle path, under which ISPs would be liable in some circumstances for the infringing acts relating to the activities of their subscribers."

Now what's almost been discussed within this discussion paper at 4365 is technological protection measures and rights management information. So that's where a copyright owner can protect their copyright work through technology so as to make it difficult to be copied, so as to prevent infringement. That's been discussed because, and it comes back to this basic

premise that we see throughout in relation to copyright, these exclusive rights are given to the copyright owner so they can restrict the use of those rights, but the obligation on them is to protect and to enforce that economic right which they've been given. So here, within this discussion paper, is discussion around those types of measures so as to allow copyright owners to protect their copyright material online, and how that might be addressed. I don't want to spend too much time on that, if any at all, other than when we see the Bill we'll see that in relation to these types of measures offences were created within the Act. So if a user sought to get round a protection measure, they would commit an offence. So that was to incentivise copyright owners to protect their own work while they were on the Internet and the balance for the copyright owner was that Parliament would then have offences within the Act that would allow anyone who was trying to circumvent those protection measures to be prosecuted. I say that's important when we get to 131 because they didn't create a specific offence, as we'll see for a breach of the communication right.

Now we can move off that document and I'm not going to refer to the internal working paper, which is a rather large document within your bundle. It really just confirms the issues which we had discussed, but if you turn to page 4530, because what the Ministry did was issue the paper and then sought responses which were all made public. So this has been pulled off the Internet. Page 4530 is the Microsoft response.

GLAZEBROOK J:

We wouldn't normally look at individual responses either, however, much they maybe public.

MR MANSFIELD:

Yes, I'm not going to refer to them as supporting any submission I'm making, other than to make a point that the concept of whether 131 should be amended to include an offence provision was something that was submitted directly to the Ministry, and if you look at page 4530 –

1050

WINKELMANN CJ:

We'll look at it but just indicating it falls outside that to which we would normally have regard when construing a statute, so we'll look at it now, but it maybe that it's not taken into account at all.

MR MANSFIELD:

No, no, I'm not asking that it be taken into account Ma'am as far as the interpretation of the Act, I'm simply making the point that the content industry, copyright owners made submissions to Parliament in relation to these amendments and the submissions that were received from Microsoft or the MPA, which is on page 4554, both made submissions that section 131 should be amended to include an offence provision for a breach of the communication right. Now as we know, because we've already looked, that didn't happen. The submission I'm making is that it can't be suggested that this was overlooked and it can't be overlooked because the received specific submissions on it and it can't be overlooked because they looked at what the UK were doing, and the UK specifically amended their legislation to create an offence for 131.

GLAZEBROOK J:

I mean at least point us to where that's said in the submission?

MR MANSFIELD:

I'm going to do that Ma'am.

GLAZEBROOK J:

I'm really not very comfortable with looking at this material though.

WINKELMANN CJ:

I've said on the basis in which we're looking at it so let's just move on.

O'REGAN J:

I think the submission is all you need to say.

MR MANSFIELD:

I'm not going further –

O'REGAN J:

It was deliberately left out, it wasn't an oversight.

MR MANSFIELD:

That's exactly, and that material is only in there to support that contention.

WINKELMANN CJ:

Okay, well can you give us a pinpoint reference then we'll stop looking at it.

MR MANSFIELD:

What do you mean the pinpoint reference for?

WINKELMANN CJ:

To the Microsoft material that you're taking us to.

MR MANSFIELD:

I'll just give you the page numbers, I wasn't going to any further into it, because I thought –

WINKELMANN CJ:

No, I need the page number.

MR MANSFIELD:

Page 4530 is Microsoft.

GLAZEBROOK J:

No, no, that's the submission, no idea where in that –

O'REGAN J:

We don't need to know. All we've been told is it's – I don't think we need this.

MR MANSFIELD:

No, well I'm happy to move on.

GLAZEBROOK J:

Well if the submission is that Microsoft specifically brought this up, then we do need to know where in that document they specifically brought it up.

MR MANSFIELD:

Oh right.

WINKELMANN CJ:

Can I just reiterate what I said which is please give us the page reference that they make the point in, not just the page reference but the documents, unless that is 4530?

MR MANSFIELD:

It is, it's 4530.

WINKELMANN CJ:

Okay, it's on 4530, thank you, and we won't necessarily, we're just hearing this but not necessarily taking into account.

MR MANSFIELD:

No, I understand that, and the MPA is on page 4564. That's the part in the submission where they refer to the need for criminal provisions. Now the Tribunal explanatory note for the first reading of the Bill is at page 4861. I just want to take you down to the second paragraph. "Intellectual property has a major role to play in achieving – "

GLAZEBROOK J:

Sorry, were these submissions on the Act or on the document? The submissions you've referred us to, were they on the Act or on the document?

MR MANSFIELD:

I'm sorry Ma'am…

WILLIAMS J:

They were on the document.

O'REGAN J:

They were on the discussion paper.

GLAZEBROOK J:

But which had, must have had legislation attached because it's talked about the explanatory note on 4564.

MR MANSFIELD:

What is attached, or what was attached to the material was –

GLAZEBROOK J:

Was a draft though?

MR MANSFIELD:

Yes.

GLAZEBROOK J:

Yes, thank you.

MR MANSFIELD:

So I'm back to the first reading, page 4861, "Intellectual property has a major role to play in achieving an inclusive economy for the benefit of all New Zealanders and supporting research and development, while minimising regulatory harriers to innovation. Copyright is of central importance to the information and communication technology and creative industries, and to furthering growth and innovation in New Zealand. Digital technology presents significant opportunities to open new markets for creators, owners and users of copyright material, as well as potential risks."

WINKELMANN CJ:

This is in the category of motherhood and apple pie again.

MR MANSFIELD:

I know this Ma'am, but I suppose the point that I'm trying to stress, and we can get to this on page 4862, is it's not all about protecting the owner of copyright, and this is a point that I want to stress throughout. The balance struck within the Copyright Act is protecting a number of interests, on which one of the interests is the owner of the copyright, or the individuals who have licence. But there are other entities within the community to which the Copyright Act seeks to protect, and this is the point I'm picking up here, if you –

WINKELMANN CJ:

Well it's more than that, isn't it, it's but there are other interests to be furthered.

MR MANSFIELD:

That's right. "The Bill seeks to maintain the careful balance of objectives and interests reflected in the, and to clarify how the Act should apply in an increasingly digital world." Then we see this reference, "The issues involved are multi-faceted and potentially far-reaching, and the amendments are set in the context of a robust analytical framework for copyright policy. The key principle that guides copyright reform in New Zealand is the enhancement of the public interest—copyright law must benefit New Zealand as a whole and contribute to overall growth and development. In determining what policy decisions are in the public interest, the government considered a number of aspects, including economic, legal, social and cultural objectives, and these are often overlapping."

Then the next paragraph it simply acknowledges that we must take into account international development. Further down, "The Bill gives effect to the Government's decisions to provide a limited exception to the reproduction right for transient copying undertaken by computers or communication

networks as a result of an automatic or inevitable technical process. amend existing rights to broadcast or include a work in a cable programme service in order to provide a technology neutral right of communication to the public and extend copyright protection to a technology neutral category of communication works." Further down, "Limit the potential liability of Internet service providers for both primary and secondary infringement in appropriate circumstances."

If we turn to page 4863 then I pick up a point that I have made earlier in relation to technological protection measures, which are at the very bottom of page 4862, touched on. But if we turn to page 4863 we'll see that the Bill introduces offences including a fine and imprisonment of up to five years, or both, for commercial dealing in devices, services, or information designed to circumvent technology protection measures. Further down, introduce an offence, again $150,000 or five years' imprisonment or both for commercial dealings in works where the electronic rights management information has been removed or altered."

So that is the offence provisions that have been introduced into the Act for the copyright owner, because it encourages them to protect their own work and if they protect it and someone circumvents it, then they've committed an offence. It's part of the balance.

Page 4864 we see the communication right specifically addressed. Again I'm just going to read small passages, "Control over communication is necessary to encourage investment in, and provision of, the efficient online distribution methods demanded by consumers." Further down, "The Bill, therefore, amends the Act by creating a technology-neutral right of communication to the public. Consistent with the technology-neutral communication right, the Bill extends the protection currently afforded to signals that carry programme content in broadcasts and cable programmes to all 'communication works'." And why that's important is because there was no offence within 131 for a breach of the then existing communication right. So it's maintaining that position and extending it to the Internet.

WILLIAMS J:

What's the protection referring to there?

MR MANSFIELD:

They're protections under the Act as they then existed, which would be civil.

WILLIAMS J:

Oh I see.

MR MANSFIELD:

So it just maintains the position. Internet service liability is dealt with there and again really I can't but endorse the entire passage. But it simply acknowledges, "Copying is a central function of the Internet and central to the services provided by Internet service providers (ISPs). Material may be reproduced at many stages during the course of a transmission and it may be virtually impossible to identify when and where many of these copies are made. Thus, where the material being copied is subject to copyright protection, an ISP may face potential liability for both primary and secondary infringement of copyright. There is a public interest in ensuring cost-effective access to the Internet which may be affected by uncertain or increased liability for ISPs. Consistent with changes in other countries, the Bill introduces a definition of ISP and a range of provisions that limit ISP liability for copyright infringement in specific circumstances. In terms of primary liability, the Bill provides that an ISP is not liable where it is merely providing the physical facilities to enable a communication to take place. With regard to secondary liability, the Bill limits liability in respect of caching and storing of infringing material where the ISP does not know or have reason to believe that the material is infringing, and acts within a reasonable time to delete it or prevent access to it upon obtaining such knowledge. These limitations of liability will not exclude the possibility of copyright owners obtaining injunctive relief in respect of ISPs."

Now the only other reference I would like to take you to please is page 4868 where we see the proposed consequential amendments. And if we go three

quarters of the way down the page, we will see clause 65 which is proposed to amend section 131(4) only. So again, I simply make the point and it is not a significant one necessarily, that section 131 was very much in their eyesight and consideration and they only sought to amend it in that way. Turning though to page 4869 we see clause 88, new section 198(2)(b) and if you have still got the Act hopefully in front of you. It is page 636, section 198. I have already taken you to it.

WINKELMANN CJ:

What volume is it in, again?

MR MANSFIELD:

Appellant's authorities' bundle, volume 2, there is two parts, this is Part 2, New Zealand Statutes Legislative of instruments continues and if you turn to 636 you will see the consequential –

WINKELMANN CJ:

Sorry what page did you say?

MR MANSFIELD:

Sorry Ma'am, 636. At the bottom of the page you will see the amendment going in and it relates to a breach of the communication right in relation to performance rights only. So no amendment –

WINKELMANN CJ:

So you are page 4869.

MR MANSFIELD:

No sorry Ma'am, I don't know how you – which page are you on?

O'REGAN J:

4869.

MR MANSFIELD:

Page 4869 when we are looking at the Bill and when we are looking at the Act, page 636.

O'REGAN J:

Clause 88, at the list at the top of the page.

MR MANSFIELD:

So we see an offence created in relation to performance rights only and it is a breach of the communication right. So we know that if we turn over the page to 637 subsection (4) on summary conviction.

GLAZEBROOK J:

63?

MR MANSFIELD:

637.

GLAZEBROOK J:

Sorry I really don't know – on the…

MR MANSFIELD:

I am trying to work with the hard copy.

GLAZEBROOK J:

Of the Act.

O'REGAN J:

Just subsection (4) of the same section.

MR MANSFIELD:

Thank you, Sir. We see that a fine is available and three months' imprisonment on summary conviction.

ELLEN FRANCE J:

Sorry Mr Mansfield. The point that you make about the limited amendment to 131, is that dependant on there being on 131 as it was, prior to amendment.

MR MANSFIELD:

Correct.

ELLEN FRANCE J:

Not including an offence that would cover this conduct.

MR MANSFIELD:

That's right.

WINKELMANN CJ:

Is there any explicit consideration in these materials of whether an offence should be created for communicating material beyond those offences you referred us to, such as –

MR MANSFIELD:

There is nothing express – and you can imagine we have looked for it, specifically saying, we are not going to create an offence under 131. The point I am making is that it was very much in their eyesight in being considered and we know that because they were looking to the comparable UK provision.

WILLIAMS J:

It is interesting though that they thought to explicitly carve out the impact, any possible impact of communication works under subsection (3) but did not bother including a carve out in respect of (1) and (2), Why not? Given that they have taken the trouble to do it with (3)?

MR MANSFIELD:

Sorry Sir, I have to concede I didn't follow that.

O'REGAN J:

Subsection (3).

WILLIAMS J:

Sorry, so we are at section 131, this is specific carve out, subsection (4) that relates to performance, communication, sorry makes the communication of a work under subsection (3).

MR MANSFIELD:

Yes, communication work is separately defined in the Act.

WILLIAMS J:

Yes. And it is a follow-on definition from communicates isn't it?

MR MANSFIELD:

Well it has its own.

WILLIAMS J:

Yes, has its own definition.

MR MANSFIELD:

That's right.

WILLIAMS J:

But it is next to the definition of communicates or communication, I can't remember which.

MR MANSFIELD:

But it is a specific type of work and the communication right relates to the way in which any work is transmitted or disseminated. So, one is a work and one is the means by which it is disseminated.

WILLIAMS J:

All right, so what is a communication work, so I can get my head around this.

GLAZEBROOK J:

Transmission of sounds, visual images or other information or a combination of any of those for reception by members of the public and includes a broadcast for a cable programme.

MR MANSFIELD:

So my point is, one is a work and the communication right is the way in which it is disseminated.

GLAZEBROOK J:

Well it is the reception of that work, not the distribution of that work. Sorry the communication of that work.

MR MANSFIELD:

Thank you.

GLAZEBROOK J:

But which might imply that the communication of the work could otherwise be subject to subsection (3). But that is okay because it is to do with the performance of it anyway, subsection (3).

MR MANSFIELD:

The only point I am making is that they looked at 131 and what amendments, if any, were required and I suppose picking up Your Honour's comment that if they thought amendment wasn't required to include a breach of the

communication right, then we might not see an amendment to it. But my point in relation to 198 which is identically framed, is that they did see a need to amend it and they did amend it. And throughout the Parliamentary discussion, we see this intention that they want to make what they do, clear and transparent.

GLAZEBROOK J:

But then they have to amend 198 because of the whole broadcasting cable uncertainty. I will just have a look at it again, because it is a performance isn't it?

MR MANSFIELD:

No, no it is wider than that in my submission Ma'am.

GLAZEBROOK J:

No, no I understand that. But I would have thought that that was why they made that amendment because there was an uncertainty about the middle ground.

MR MANSFIELD:

In my submission it might have been New Zealand seeking to protect performance but in a different way than they were seeking to protect communications via the Internet.

GLAZEBROOK J:

That's probably true but still. Anyway, we will have to look at this.

MR MANSFIELD:

I'm just making –

GLAZEBROOK J:

You've referred us to it.

MR MANSFIELD:

Thank you, Ma'am. Now just while we are there, I wonder if we can just pull out volume 10 and its appellants' authorities' bundle, volume 10, part 6 and it is 1 of 6.

WINKELMANN CJ:

Page?

1110

MR MANSFIELD:

Page 4000. This is the UK Act and if we turn to section 107. Section 107 is the offence provision and I just firstly in relation to subsection (1) if we just look at the mirror wording to our 131. So it basically mirrors it. Our section 131 mirrors the UK 107, effectively word for word. If you turn to page 4001 you'll see the continuation of the same. "(d) in the course of a business – (i) sells or lets for hire, or (ii) offers or exposes for sale or hire, or (iii) exhibits in public or, (iv) distributes, or (e) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright."

Then we see the offence created in subsection (2) and in 2003 we see the introduction of (2A) into their equivalent of our 131. "A person who infringes copyright in a work by communicating the work to the public – (a) in the course of a business, or (b) otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright, commits an offence if he knows or has reason to believe that, by doing so, he is infringing copyright in that work."

So in all other respects the UK provision was identical to our 131, because that's how 131 came about.

WINKELMANN CJ:

And that was 2003 added in, was it?

MR MANSFIELD:

Yes, thank you Ma'am, and if you turn to page, I'm sorry about the juggling around in these volumes, but if you turn back to our Act.

WINKELMANN CJ:

It's easier than our doing it electronically as it happens because we can appear more easily.

MR MANSFIELD:

Okay, if we turn to our page 637, which is our Act.

WINKELMANN CJ:

Of volume 2?

MR MANSFIELD:

Yes, of the Act, so that's volume 2, yes thank you. At the very bottom of page 637 you'll see compare Copyright, Designs and Patents Act 1988 in the UK. So it couldn't be clearer.

WINKELMANN CJ:

But what are those sections you're referring us to in the UK Act?

MR MANSFIELD:

They refer to the UK provisions but if we turn back to 107.

GLAZEBROOK J:

107 sorry? Oh section 107.

MR MANSFIELD:

In the UK Act we see the, as I said in 2003, that amendment. Now our amendments didn't come about until 2008 and throughout the discussion papers, as we've seen, and including in the Bill, we see reference to what's happened in the UK. So my point is –

GLAZEBROOK J:

Well do they say we may be added (2A) in 2003 but we're not going to, or we don't think we do, or we for these very good reasons think that there should be a distinction.

MR MANSFIELD:

That would be ideal Ma'am, and it didn't happen.

GLAZEBROOK J:

Well one would have thought, if they're following the UK Act, it's actually essential for them to explain why they weren't following that part of the UK Act.

MR MANSFIELD:

And if my criticism, which would mirror yours Ma'am, was heard, then that would be what I would say. It would be helpful if they made it express. They don't. But it seems as plain as day when you look at what they did and didn't amend in our own Act, and that's why I've taken you to 198, which they did amend in that way, and that's why I've taken you to the UK provision, which was amended in that way in 2003 and very much in the site, so it's hard to avoid the reality that they chose not to, especially when they received submissions from the content industry, or copyright owners, to do just that.

GLAZEBROOK J:

Well we don't know, of course, whether they thought it was already included because it certainly had been suggested in some of that earlier material you showed us that it was already included.

MR MANSFIELD:

I understand Your Honour's point but then that would also be included under 198 and they wouldn't need to amend it there.

GLAZEBROOK J:

Yes, I have to look at that 198 point to see exactly why that was amended.

MR MANSFIELD:

I understand, but that's the submission.

GLAZEBROOK J:

Because they were obviously amending to get rid of that distinction they did see as being a gap being cable and fibre and electronic.

MR MANSFIELD:

Well they made the communication right, Ma'am, technology-neutral. That was the intent.

GLAZEBROOK J:

Exactly, exactly, they had to.

MR MANSFIELD:

But that didn't require an amendment to 198 anymore than it would require an amendment to 131. Now the second reading is included at 4878 in the materials, and I have to concede Ma'am I couldn't recall exactly when you wanted to take the break, was it 11.15 or 11.30?

WINKELMANN CJ:

It's 11.15, just before we go, where were you referring –

MR MANSFIELD:

I'm about to finish the Parliamentary history just with taking you very briefly to the second reading which simply supports what I say.

WINKELMANN CJ:

So you're taking us back to which volume?

MR MANSFIELD:

I'm taking you back to…

GLAZEBROOK J:

Volume 11.

MR MANSFIELD:

Yes, thank you.

GLAZEBROOK J:

Page 4878.

MR MANSFIELD:

That's where it starts.

WINKELMANN CJ:

So we'll take the morning adjournment now.

COURT ADJOURNS: 11.16 AM

COURT RESUMES: 11.31 AM

MR RAFTERY QC:

Can I mention the topic I am a bit fond of which is timing. I am getting slightly worried because my learned friend has told me that he will go until lunch time easily and maybe a bit into the afternoon and then of course Your Honours have to hear from Mr Rogers who tells me he will be obviously considerably shorter because he adopts much of what has been said. But I am concerned about our arguments having to be truncated.

WINKELMANN CJ:

Yes, well that will not happen Mr Raftery because we have time, we will just carry on into Monday if we have to.

MR RAFTERY QC:

That raises a concern, you see, as far as my learned friend Mr Boldt. He was back here thinking that his part will be completely finished this week bearing in

mind that he has other family commitments which re-awaken at the weekend and thereafter so we are anxious to finish this week if we could. So I just wanted the Court to be aware of that.

WINKELMANN CJ:

Have you got a solution then?

MR RAFTERY QC:

Well part of the solution is, you made the suggestion that maybe today we could change our sitting hours. We might have to think of them, you know, we could perhaps sit a bit longer in the afternoon, beyond 4 o'clock.

WINKELMANN CJ:

Yes. We are happy to do that and we have plans to do so. We plan to come back at two.

MR RAFTERY QC:

Certainly.

WINKELMANN CJ:

And then we were thinking to sit through to 4.30 – we could consider five, no, we cannot go through to five can we? Yes, we can go through until five.

MR RAFTERY QC:

That will certainly help I think.

WINKELMANN CJ:

And also Mr Mansfield, we will try to ask you less questions.

MR RAFTERY QC:

He will be delighted.

WINKELMANN CJ:

We will just have to see how we go Mr Raftery, we cannot eliminate the possibility we will be sitting on Monday.

MR RAFTERY QC:

I understand that. I just was concerned because of the rising at four that happens.

WINKELMANN CJ:

We are very conscious of Mr Boldt's position and we wish to do everything we can to accommodate it.

MR MANSFIELD:

So we have the second reading at page 4878 and what I would like to do is take you through to page 4883 and 4884 and just identify some relevant parts. On page 4883 if we go to the heading "Internet service provider obligations", we see, "We recommend amending the definition of Internet service provider in clause 3(2) to ensure that a person who hosts material on the websites or other electronic retrieval systems that can be accessed by a user fails within the definition." And that is quite significant because that is Parliament determining that the definition for Internet service provider should be extended, to not only to those who host rather than those who simply provide a service that might be described as a conduit. So the definition becomes wider. It includes Internet service providers who are conduits but also those who host or store.

O'REGAN J:

So host is basically store?

MR MANSFIELD:

Yes, Sir. If we turn to liability. If a user infringes copyright. "We consider the wording of the new section 92B (clause 53) is unsatisfactory because it could expose Internet service providers to liability for copyright infringement where a person had infringed the copyright concerned before using the services of the

Internet service provider to send or distribute the infringing content. We recommend that the new section 92B be amended to clarify that the section would apply only if a person infringed copyright in a work by using Internet services of the Internet service provider. We also recommend the addition of a definition of ‘‘Internet services’’ in this section." Now you will see the use of the word there "distribute" and that is distribute in lay person's terms rather than as I say, as a term of art under the Act.

Liability for storing infringing material. You will see reference there. The only part I really want to draw your attention to is the top. "In clause 53 we recommend amending new section 92C(2)(a) and inserting new section 92C(2)(b)(a) to make it clearer when Internet service providers would be required to take down material." And at the very bottom of that page –

GLAZEBROOK J:

Sorry which page are you at?

MR MANSFIELD:

Page 4884. At the very bottom of that page, "We also recommend inserting new section 92CB to set out offences in relation to notices of infringement. The maximum penalty for such offences would be a fine of $50,000 for an individual and a fine of $100,000 for a body corporate" I simply refer to that because they were contemplating doing that. That didn't make its way into the Act and that in my submission is quite important.

Now the third reading was unremarkable as far as providing any further information that might assist us to interpret the relevant provisions. And I haven't included that within the material. Now that is reflectively the review of that material, but it can be shown quite clearly in my submission that Parliament determined that the dissemination of copyright protected words via the Internet would be protected by copying and there was a carve out for transient or incidental copying through an Internet service provider, that would be a permitted act. So that an Internet service provider would not be liable for

any copying that was made by its service when it was simply being used as a service by a user. And as we have seen, that is section 43A.

GLAZEBROOK J:

Is it quite as wide as that?

MR MANSFIELD:

In my submission it is. Secondly, the communication right was added effectively as a new right to section 16 and if you were a direct infringer of that right, then there were civil remedies that could be pursued by the copyright owner. There was no secondary liability created under section 36 and no amendment to section 131 to make an offence if there was a breach of the communication right, whether it be by mum, dad and the kids or someone in the course of business and if it was to be an offence, it seems consistent with the way in which the section is drafted, that it would need to be in the course of business. Now I think I had the wrong page open when I referred to the bottom of the page. What I was intending to refer to was the end of section 131 which we see on page 556 of volume 2. I may have had section 198 open in front of me by error. The consistency between the wording of the two sections is such that it is often easy to confuse without looking at the actual section number. But if we look at section 131, the point I was trying to make which is on page 556 is the care reference to section 107 in the United Kingdom. I am sorry.

WINKELMANN CJ:

Yes it did not make any sense to me because it was referring –

MR MANSFIELD:

I started to see that look and I couldn't work out why, but I had the wrong page open, that was the reason, I am sorry.

O'REGAN J:

Sorry where is this?

MR MANSFIELD:

Page 556 at the very bottom, compare 1962, number 33, and then Copyright, Designs and Patents Act 1988, section 107. Sorry, I took you to the wrong page. Now we weren't on our own in relation to looking at our Copyright Act and what we should do. In Canada they did the same thing and what I discovered when I was preparing our oral argument for you, and what I thought might be helpful, was that one of the cases which might be relevant isn't in the hard copy volume, but it is in the electronic volume, so what I've done is I've pulled the relevant quotes from it and created a separate document but with the electronic references to the main decision. I don't know if you've received that yet, it's called quotes from the *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*.

WINKELMANN CJ:

It's about to be handed up.

MR MANSFIELD:

Thank you. We filed an electronic copy of the table of contents but I understand it wasn't added to the electronic bundle. The registry thought we were better to present a hard copy.

GLAZEBROOK J:

Does the Canadian Act have a specific offence like the UK Act or not?

WINKELMANN CJ:

I think Mr Mansfield is going to take us through it.

MR MANSFIELD:

I'll take you to the quotes and by then I should be able to answer that question. So this is obviously not the full decision but just relevant quotes to make some points that I think have been developed already. This is quotes from Justice Binnie's judgment and the second quote down really is the one I'll probably take you to first. "The Court has recently described the

Copyright Act as providing ‘a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)’”.

That really is quite an important distinction because when you were discussing relative concepts with Mr Illingworth QC, he talked about a car, and that’s quite a different property right. if someone was to take your car, which we would call theft, they would remove the car from your possession and your ability to use it. Copyright is quite distinct. You can't steal copyright because the copyright still remains with the copyright owner, and they’re still able to use it, and that’s what Justice Binnie is drawing the distinction too, and that is why the right created by the Act called copyright is quite distinct to other property rights, and that’s why I have earlier in opening said we can't use Crimes Act centric thinking when it comes to interpreting and applying the Copyright Act.

“The capacity of the Internet to disseminate ‘works of the arts and intellect’ is one of the great innovations of the information age. Its use should be facilitated rather than discouraged, but this should not be done unfairly at the expense of those who created the works of arts and intellect in the first place.”

Further down, the third quote, “I conclude that the *Copyright Act*, as a matter of legislative policy established by Parliament, does not impose liability for infringement on intermediaries who supply software and hardware to facilitate use of the Internet. The attributes of such a ‘conduit’, as found by the Board, include a lack of actual knowledge of the infringing contents, and the impracticality (both technical and economic) of monitoring the vast amount of material moving through the Internet, which is prodigious. We are told that a large on-line service provider like America Online delivers in the order of 11 million transmissions a day.”

Next quote, “Of course an Internet Service Provider in Canada can play a number of roles. In addition to its function as an intermediary, it may as well act as a content provider, or create embedded links which automatically precipitate a telecommunication of copyrighted music from another source. In such cases, copyright liability may attach to the added functions.” And that’s why I'm talking about when we look at the definition under 92(b) –

WINKELMANN CJ:

Without more.

MR MANSFIELD:

That’s right. Thank you Ma’am. “The protection provided by s. 2.4(1)(*b*) relates to a protected function, not to *all* of the activities of a particular Internet Service Provider. On the other hand, as Evans J.A. pointed out, at para. 141, Internet Service Providers who operate a host server would not lose the protection of paragraph 2.4(1)(*b*) by providing their normal facilities and services, such as housing and maintaining the servers, and monitoring ‘hits’ on particular Web pages, because these added services are merely ancillary to the provision of disk space and do not involve any act of communication.”

Then further down, just in relation to Parliament’s intent, which I say is important, “Parliament has decided that there is a public interest in encouraging intermediaries who make telecommunications possible to expand and improve their operations without the threat of copyright infringement. To impose copyright liability on intermediaries would obviously chill that expansion and development, as the history of caching demonstrates. In the early years of the Internet, as the Board found, its usefulness for the transmission of musical works was limited by ‘the relatively high bandwidth required to transmit audio files’ (p. 426). This technical limitation was addressed in part by using ‘caches’. As the Board noted, at p. 433: “Caching reduces the cost for the delivery of data by allowing the use of lower bandwidth than would otherwise be necessary.” The velocity of new technical developments in the computer industry, and the rapidly declining cost to the consumer, is legendary.”

And then there's this wonderful example cited which I'll let you read, but it just talks about the advantages in technology and how if other technology advances kept up, what that might mean. So really that just endorses the submissions which I have made regarding what was before Parliament and the balancing exercise that needed to be conducted by it, and look, it's integral to our submission that the Act is a code because Parliament has determined what's important and created the balance, and if you go outside the Copyright Act as far as allowing enforcement of those rights to be prosecuted under the Crimes Act, you throw away that balance, you absolutely discard it, because it would allow mum, dad and the kids to be prosecuted because there wouldn't be the requirement that it be in the course of a business, and the other protections which are provided, such as permitted acts might be relevant as to whether there was infringement, but would not be so relevant when it came to determining liability.

Now the other point that I just want to make before we move on, and we'll come back to this, but if I make it now you can at least think about it, is that it's going to be easier to prosecute under the Crimes Act yet the punishment under the Crimes Act is much more severe. So there's no requirement for it to be in the course of business, yet the punishment will also be more severe. So you would expose mum, dad and the kids to being prosecuted under the Crimes Act for copyright infringement via breach of the communication right, and it's very clear that that was very much in Parliament's mind, and that is the last thing that they wanted to do. That is why, in my submission, if we allow, and that is effectively what both the High Court and the Court of Appeal has done, allow the United States to allow on the Crimes Act provisions –

GLAZEBROOK J:

The conspiracy provisions, aren't they?

MR MANSFIELD:

No, because –

GLAZEBROOK J:

Were there other provisions as well?

MR MANSFIELD:

They say an available offence, they're offences under the Crimes Act, and you discussed those with Mr Illingworth. So I say 131 is the only available New Zealand offence.

GLAZEBROOK J:

Yes I understand that.

1150

MR MANSFIELD:

But they say well irrespective of whether 131 is available or not, offences under the Crimes Act are available to us. Now that has ramifications beyond this case. It doesn't simply result in these appellants being taken to the United States. It would mean anyone could be prosecuted under the Crimes Act. So that is mum, dad and the kids, whether they are in the course of business or not and the liability is significantly more than any liability that currently exists under the Copyright Act. So, you would necessarily upset that balance struck by Parliament in relation to an infringement, because that's what it is, an infringement of copyright and that particular right in breach of the communication right.

WINKELMANN CJ:

And what do you say about section 10 of the Crimes Act, or are you coming onto that?

MR MANSFIELD:

No section 10 in parties' provisions, I accept apply to all Acts but the use of concepts of conspiracy; so agreement to commit a crime or aiding and abetting a crime, doesn't upset, in my submission, the balance.

WINKELMANN CJ:

Well where do you get from if you accept the bias to all Acts?

MR MANSFIELD:

Sorry, what was that?

WINKELMANN CJ:

Where do you get to if you accept the Crimes Act applies to all Acts?

MR MANSFIELD:

Well if it applies to the Copyright Act which I accept, then it allows the United States to rely on an agreement to commit an offence under 131 or it allows an individual to be charged with aiding and abetting an offence under 131 but you are still stuck with section 131 creating the offences and it doesn't create an offence for the breach of the communication right.

GLAZEBROOK J:

And you would say, I suppose, even if you are wrong on that, that there is no primary breach here anyway.

MR MANSFIELD:

That's right. Because it is driven by the user.

GLAZEBROOK J:

That's right. That is as I understand your submission.

MR MANSFIELD:

Well you will find no evidence in the ROC Ma'am except in relation to the YouTube allegation. Sorry is it? Except in relation to the YouTube allegation, that is count 8. That is quite a different allegation to all of the other allegations. The only other one that might fit within a different category –

WINKELMANN CJ:

That is the downloading of a bulk YouTube material.

MR MANSFIELD:

Yes, and that is summarised within the ROC so it said in bulk downloaded material from YouTube and it is asserted; it is not accepted, but it is asserted within the ROC and that is what I need to deal with. That that was made available through accounts on Megaupload or Megavideo. So that is a good example, Ma'am, of where it is alleged within the ROC and again I am not making a concession that that is accepted, but based on the ROC as it is at its highest, that is a suggestion that they would be a primary infringer.

WINKELMANN CJ:

Now on your point about it being a code, you say, I suppose, that the rights created under the Act, an expectation that they will be only asserted within the carefully worked out framework?

MR MANSFIELD:

Correct.

WINKELMANN CJ:

The Act itself creates which is, as you say, a careful balancing of the rights.

MR MANSFIELD:

Correct.

WINKELMANN CJ:

And to take one aspect of that carefully created code or regime and give it force within the criminal sphere, risks disrupting the entire market place and ideas etc.

MR MANSFIELD:

That would be abandoning it altogether. Might as well have thrown it in the bin to be frank. But count 8 I accept is in a different category and what you will be interested in relation to count 8 is the limitation, period imposed under the Act which is three years in my submission because this allegation is outside that. So we'll come to that plus also in relation to proof of specific work. Where is there, within the allegation, evidence on a work by work basis and specific knowledge in relation to that work and that is why along the way I have had the discussion with you about the difficulties in identifying what work is infringing and not infringing because it is far from a straight forward exercise, which not only our Parliament has identified, Parliaments and other jurisdictions have identified. So there is a problem as far as whether the ROC actually can prove on a prima facie level this allegation.

GLAZEBROOK J:

And that is the only primary infringing one?

MR MANSFIELD:

No there is one other.

GLAZEBROOK J:

So that even if we – this is on the basis that even if we are not with you on section 131 and I am not making a comment on that one way or the other, then you would still say that most of these allegations cannot be sustained, apart from count 8 which is specific and one more.

MR MANSFIELD:

Count 4, which is an allegation in relation to a word called "taken", which Mr Illingworth referred to where it is alleged that one of the appellants themselves downloaded the work. So on that basis, if it was copyright protected and he didn't have the right to do so, that is capable of being direct infringement and civil remedies would apply.

WINKELMANN CJ:

In relation to the YouTube one, is there an assertion of copyright in that.

MR MANSFIELD:

That's the problem Ma'am. There is a general assertion of infringement of copyright.

WINKELMANN CJ:

But YouTube may not own the copyright of the materials in question, is what I am thinking.

MR MANSFIELD:

And Your Honour has identified the very point that I am trying to make. There is an absence of the required proof in relation to that aspect, so it fails for want of proof, for want of a better way of putting it. Now I don't really want to go to that submission at this point because it is a relatively brief submission.

GLAZEBROOK J:

No, no I was just wanting to make sure that I had the three levels.

MR MANSFIELD:

I thought it was helpful to identify those specific counts where it would be an allegation of direct infringement of the communication right and it would also involve copying but it wouldn't translate. They are distinct in that way, the other allegations are at best secondary, when we have discussed the distinction already in relation to that. Now there is another Supreme Court case that I really would like to take you to and it is of significance. It sounds rather arrogant, but it is a decision that I would endorse as far as reading the entire judgment, when you have time. *Dowling v United States* 473 US 207 (1985) appears in the hard copy, volume 10 at page 3676 and I do need to take you to it but I won't take you obviously through the entire judgment. So, it is appellants' authorities' bundle volume 10, there are six parts and it is volume 1 of those six parts.

WILLIAMS J:

Part 6?

O'REGAN J:

It is volume 10, 3676.

WINKELMANN CJ:

You don't need to bother about the parts.

MR MANSFIELD:

Good because I find it quite confusing to be frank. So just the page number will do, page 3676. Now that related to an appeal and if you refer to the first page which is 3676 at the bottom of that page, you will see essentially what is alleged. The defendant was convicted in the United States District Court for the Central District of California of mail fraud, interstate transportation of stolen property and conspiracy to transport stolen property interstate and he appealed. He didn't appeal the convictions under their Copyright Act or the other offence of mail fraud and the United States will say that is significant that he didn't appeal or didn't get leave to appeal, mail fraud but I will take you to that.

WINKELMANN CJ:

So, what did he appeal and what didn't he appeal?

MR MANSFIELD:

At the top you will see that he appeals the conviction, under the National Stolen Property Act. So and it related to whether the records were stolen, that being the allegation, converted or taken by fraud, and that is at the bottom of the page. So it rates the bootleg records, "that is, unauthorised copies of commercially unreleased performances."

WILLIAMS J:

Is this the *Elvis* case?

MR MANSFIELD:

Thank you, yes, I thought you might know that one Sir. It was *Elvis*. I was just double checking that just to make sure I was getting that right. And we see the records were, "Not stolen, converted or taken by fraud, except in the sense that they were manufactured and distributed without the consent of the copyright owners of the musical compositions performed on the records."

Now if we turn to page 3677, sorry, I've got it marked up electronically so I'm just trying to take you to the hard copy page at the same time. We see what was held by the Court. It's 3677. Section 2314, which is the Stolen Property Act as they call it, does not reach petitioner's conduct. "The language of § 2314 does not 'plainly and unmistakably' cover such conduct. The phonorecords in question were not 'stolen, converted or taken by fraud' for purposes of § 2314. The section's language clearly contemplates a physical identity between the items unlawfully obtained and those eventually transported, and hence some prior physical taking of the subject goods. Since the statutorily defined property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple 'goods, wares, [or] merchandise,' interference with copyright does not easily equate with theft, conversion, or fraud. The infringer of a copyright does not assume physical control over the copyright nor wholly deprive its owner of its use." Concepts we've discussed earlier as Binnie touched on. "Infringement implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud."

GLAZEBROOK J:

Can you just in a nutshell say why you're taking us to this, in just one sentence.

MR MANSFIELD:

Because it talks about the Copyright Act in the US being a code and how, and you shouldn't go to what we would call general crimes of dishonesty. It's the important balance which is struck within the Copyright Act in the US, which is the same as we've done here, same as done in Canada, and it doesn't allow

you to resort to allegations of general dishonesty that might be made in relation to other property interests, and that's why it's quite significant.

So at the top of the next column on the same page, 3677, we see (c), "The history of the criminal infringement provisions of the Copyright Act indicates that Congress had no intention to reach copyright infringement when it enacted § 2314."

Now if we move through to 3682. Perhaps just before we do, if we can stop on page 3680 just briefly. Second paragraph down with the number 213 there, "We granted," our version of leave, "to resolve an apparent conflict among the Circuits concerning the application of the statute to interstate shipments of bootleg and pirated sound recordings and motion pictures whose unauthorised distribution infringed valid copyrights." So that's just in relation to why leave was granted.

Then at the top of page 3680, second column at the very top, first paragraph indented, last line of that paragraph the Supreme Court in the United States records, "It is the legislature, not the Court, which is to define a crime, and ordain its punishment." There it's talking about both Acts, but in particular, in my submission, the Copyright Act.

WINKELMANN CJ:
What page are you on sorry?

O'REGAN J:
Page 3680.

MR MANSFIELD:
Thank you. I mean it goes without saying, I need not remind this Court of that, but it's just that the United States obviously were acknowledging that in relation to the review of copyright, and the general dishonesty provision that the United States were seeking to rely on there.

Then the next page over, 3681, the first column, about a third of the way down you'll see reference to section 2314. "The Government argues, however, that the shipments come within the reach of § 2314 because the phonorecords physically embodied performances of musical compositions that Dowling had no legal right to distribute. According to the Government, the unauthorised use of the musical compositions rendered the phonorecords 'stolen, converted or taken by fraud' within the meaning of the statute. We must determine, therefore, whether phonorecords that include the performance of copyrighted musical compositions for the use of which no authorisation has been sought nor royalties paid are consequently 'stolen, converted or taken by fraud' for purposes of § 2314. We conclude that they are not."

Then what I might describe as the key part that I'd like to take you to, which is on page 3682, starting at the second paragraph down on the first column, "In contrast, the Government's theory here would make theft, conversion, or fraud equivalent to wrongful appropriation of statutorily protected rights in copyright. The copyright owner, however, holds no ordinary chattel. A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections."

Further down, "However, this protection has never accorded the copyright owner complete control over all possible uses of his work." And at the bottom of that column, "Thus, the property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple 'goods, wares, [or] merchandise,' for the copyright holder's dominion is subjected to precisely defined limits. It follows that interference with copyright does not easily equate with theft, conversion, or fraud. The Copyright Act even employs a separate term of art to define one who misappropriates a copyright: 'Anyone who violates any of the exclusive rights of the copyright owner,' that is, anyone who trespasses into his exclusive domain by using or authorising the use of the copyrighted work in one of the five ways set forth in the statute, 'is an infringer of the copyright'. There is no dispute in this case that

Dowling's unauthorised inclusion on his bootleg albums of performances of copyrighted compositions constituted infringement of those copyrights. It is less clear, however, that the taking that occurs when an infringer arrogates the use of another's protected work comfortably fits the terms associated with physical removal employed by § 2314. The infringer invades a statutorily defined province guaranteed to the copyright holder alone. But he does not assume physical control over the copyright; nor does he wholly deprive its owner of its use.

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While one may colloquially like infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud. As a result, it fits but awkwardly with the language Congress chose–"stolen, converted or taken by fraud"–to describe the sorts of goods whose interstate shipment § 2314 makes criminal. 'And, when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable understandings.'"

GLAZEBROOK J:

Can I just say that I don't think the United States is arguing that it's theft or conversion or theft or conversion by fraud. It's saying there's a use of a document, it's saying there's a use of a computer system, all of which don't require a physical manifestation of anything. I understand your argument as to code but I'm just questioning how related this is to those points you're making, apart from the more generalist comments in there.

MR MANSFIELD:

It impacts definitely on the issue of code and the balance of rights –

GLAZEBROOK J:

I understand that.

MR MANSFIELD:

– and in my submission, when we look at *LaMacchia*, which is the next case which is significant, you'll see an application of that principle being applied to other dishonesty provisions and what I'm suggesting is that general Crimes Act dishonesty provisions are not drafted with copyright in mind. When Parliament defined offences for copyright, it did so within the Copyright Act. That's the point I'm wanting to make, Ma'am.

GLAZEBROOK J:

So it's related to the code argument, not necessarily specifically –

MR MANSFIELD:

It's related to the code but –

GLAZEBROOK J:

Thank you.

MR MANSFIELD:

– it's just saying that general dishonesty provisions, and that's what we are referring to here, what the United States rely on, don't apply or shouldn't apply to offences which are heart and soul copyright infringement.

ELLEN FRANCE J:

I just wonder if it goes quite that far given the emphasis on the physical control here in 2314.

MR MANSFIELD:

It talks more generally, Ma'am, about fraud –

ELLEN FRANCE J:

I understand in terms of the code argument but I'm…

MR MANSFIELD:

I understand Your Honour's point but it's directed at the offence provision before it and the allegation before the Court at the time but it's making general statements which have been picked up by the learned author in *Nimmer* –

WINKELMANN CJ:

Do any of the copyright texts deal with this issue?

MR MANSFIELD:

Nimmer is the one I just referred to, Ma'am, which is the –

WINKELMANN CJ:

Nimmer?

MR MANSFIELD:

– leading US – and we've got a hardcopy of the – we've got a problem with – I can distribute the full chapter which is quite lengthy but I'm just going to take you to the relevant parts of the leading US text.

O'REGAN J:

So is this in the electronic bundle?

MR MANSFIELD:

No, it's not added, Sir.

O'REGAN J:

So did you give it to the US before the hearing?

MR MANSFIELD:

No, I haven't. We just handed it out now, Sir, just because we're unsure whether we'd refer to it but as the Chief has specifically asked, I'm just going to hand…

WINKELMANN CJ:

You had a pretty good thought you would, though?

MR MANSFIELD:

Yes, we were going to and then we decided that we wouldn't so we had it. That's why we were struggling to find it again. If you go through to the page number 3 at the top, the blue numbering, page 86 on the document itself, you'll see reference to *Dowling*. "*Dowling*'s lesson is that Congress has finally calibrated the reach of criminal copyright liability and therefore have sent clear indication of Congressional intent. The criminal laws of the United States do not reach copyright-related conduct. Thus copyright prosecutions should be limited to § 506 of the Act and other incidental statutes that explicitly refer to copyright and copyrighted works".

There's quite a lot so the only other point while we've got it open is that if you turn to page 004, you'll see a reference to *United States v LaMacchia* which is a decision I'm going to take you to next which is still considered by the learned writer of this significant text, which I understand is a primary US text on copyright, to be good law. And really, it's the second paragraph on that page, "The progression of technology confounded that expectation along with countless others. *United States v LaMacchia* arose because a 21 year old MIT student, and then just to add a computer hacker as well, found irresistible the temptation to load copyrighted material, including software, onto the Internet and thereby make it available free to individuals worldwide equipped with an Internet node. The twist was that unlike in *Dowling*, the defendant derived absolutely no personal benefit from his conduct notwithstanding allegations of losses to copyright holders in excess of $1 million. The Government charged mail fraud", and why I say that's important is because you'll see that in the mail fraud convictions, *Dowling* wasn't granted leave on mail fraud, "based on *Dowling* including the interpretation of the case advanced above. The Court dismissed the indictment against *LaMacchia* alleging criminal copyright infringement under the wire fraud statute. It noted that the absence of commercial motivation precluded a direct challenge of

criminal copyright infringement and *LaMacchia*", and my learned friend and in their submissions call it the "*LaMacchia* loophole", I don't suggest it's a loophole at all but as a result of *LaMacchia*, the United States amended their Act so as to require a loss to the copyright owner of at least $1000 so a commercial loss to the copyright holder of $1000 which would therefore have allowed *LaMacchia* to have been prosecuted but given their Act as it was at the time, he wasn't able to be prosecuted under the Copyright Act and hence they tried to rely on another provision. That's why they've relied on another general dishonesty provision that was available to them.

I don't intend to go further into that text but it simply confirms that *Dowling* is considered good law for the proposition I have espoused and it provides a helpful summary of *LaMacchia* and may in fact reduce the reliance I need to place on it as far as taking you to the relevant parts of it.

Just before we leave *Dowling*, I wonder if we could just go to page 3684 of the volume you have and just picking up partway down that first column, "By virtue of the explicit constitutional grant, Congress has the unquestioned authority to penalize directly the distribution of goods that infringe copyright". We talked about the United States' reliance on distribution still, "whether or not those goods affect interstate commerce. Given that power, it is implausible to suppose that Congress intended to combat the problem of copyright infringement by the circuitous route hypothesized by the Government" so as, in that case, to allow general dishonesty provisions to apply, and then under the letter "C" on the second column, "The history of copyright infringement provisions afforded additional reason to hesitate before extending § 2314 to cover the interstate shipment in this case. Not only has Congress chiefly relied on an array of civil remedies to provide copyright holders protection against infringement, but in exercising its power to render criminal certain forms of copyright infringement, it has acted with exceeding caution."

Then we see a review of their copyright legislation, in particular the way in which offence provisions are enacted and penalised and on page 3686, and just right the bottom of that page where we see the end of the review of the way in which the copyright legislation in the areas has been amended to deal with various issues that have arisen through technology change through the time. We see the Court finding, "Accordingly, it acted to 'strengthen the laws against record, tape and film piracy' by 'increas[ing] the penalties… for copyright infringements involving such products,' thereby bring[ing] the penalties for record and film piracy… into line with the enormous profits which are being reaped from such activities. Thus, the history of the criminal infringement provisions of the Copyright Act reveals a good deal of care on Congress' part before subjecting copyright infringement to serious criminal penalties. First, Congress hesitated long before imposing felony sanctions on copyright infringers. Second, when it did so, it carefully chose those areas of infringement that required severe response – specifically, sound recordings and motion pictures."

And we know how significant they are to the US market. I mean one only needs to look at the lobbying and the donations politically made by that sector to Congress to see how important it is to the US. "This step-by-step carefully considered approach is consistent with Congress's traditional sensitivity to the special concerns implicated by the copyright laws. In stark contrast the Government's theory of this case presupposes a congressional decision to bring the felony provisions of § 2314, which make available the comparatively light fine of not more than $10,000 but the relatively harsh term of imprisonment of up to 10 years, to bear on the distribution of a sufficient quantity of any infringing goods, simply because of the presence here of a factor – interstate transportation – not otherwise thought relevant to copyright law. The Government thereby presumes congressional adoption of an indirect but blunderbuss solution to a problem treated with precision when considered directly to the contrary. The discrepancy between the two approaches convinces us that Congress had no intention to reach copyright infringement when it enacted § 2314."

And then if we turn to page 3687, second column, part way down through the first paragraph. "Thus, the rationale supporting application of the statute under the circumstances of the case will equally justify its use in wider expanses of the law which Congress has evidenced no intention to enter by way of criminal sanction," which in my view addresses the points made by Your Learned Honours earlier. Under the numeral "III", so the second paragraph but in that column, "Nevertheless the deliberation with which Congress over the last decade has addressed the problem of copyright infringement for a profit, as well as the precision with which it has chosen to apply criminal penalties in this area, demonstrates anew the wisdom of leaving it to the legislature to define crime and prescribed penalties." Now that is where I want to leave D*owling* but you will appreciate why, given its importance to my submission in relation to leading the remedies in the Copyright Act intact and not putting them in the bin by allowing any prosecuting agency to prosecute under the Crimes Act is significant and it is significant to me, given its US Supreme Court decision.

Now *LaMacchia* I have touched on already.

WINKELMANN CJ:

Now none of this actually implicates – does it have an effect on the American indictment, one assumes not.

MR MANSFIELD:

Well for the purposes of an extradition we have to assume that the US offence has stated, as such, and I can only attack, as I understand it, the translation of that offence as stated to the New Zealand reach which is our relevant provisions but this is why I talked about New Zealand not being an outlier currently, given what the learned Court of Appeal has determined in relation to the ability to reach copyright infringement outside the Copyright Act, we are on our own. We would distance ourselves from Canada and we would distance ourselves, ironically, given the nature of this hearing, from the United States.

Now my learned friend for the United States would seek to say that that case is limited to the particular section discussed and for the reason I am taking you to the additional paragraphs, I would say it has much wider reach and that is why I also referred you to the *Nimmer* text which talks about that much wider reach. But following *Dowling*, there was the decision of *LaMacchia* which had this young MIT student who was a hacker, putting up on a noticeboard what was copyrighted material and making it freely available. Now under the US Act there wasn't a requirement of gain, financial gain, which is similar to our in the course of business. Not identical and our in the course of business means something quite different to what they had but it had that commercial element to it which I have already stressed is significant. Because he was effectively giving away the material through this bulletin board, he couldn't be prosecuted under the Copyright Act, the offence provision didn't permit for that. So we see that under paragraph 5 of that judgment and I will take you to it, it is on page – same volume.

WINKELMANN CJ:

Now if this is not a judgment, do you think you can leave us to read given the extensive reference or not?

MR MANSFIELD:

I can, but can I just take you to –

WINKELMANN CJ:

Yes.

MR MANSFIELD:

Just to two parts of it.

WINKELMANN CJ:

Well you can highlight bits for us, Mr Mansfield. What volume and where?

MR MANSFIELD:

Page 3692 of the same volume which is good.

GLAZEBROOK J:

I thought you were going to paragraph 5.

MR MANSFIELD:

I am, paragraph 5. Which is on 3692.

GLAZEBROOK J:

They are different paragraph numbers, are they?

MR MANSFIELD:

I hope not.

WILLIAMS J:

It is the bold 5.

O'REGAN J:

It is the sort of head note, isn't it?

MR MANSFIELD:

Okay, everyone is quite right, it is more of a heading, heading number 5. So, the defendant's advertising of access to the computer software which infringed copyright by computer transmission did not violate wire fraud statute on grounds that the defendant's nondisclosure or concealment to copyright holders served as a basis for fraudulent scheme. No fiduciary duty existed between defendant and the copyright holders, no independent statutory duty of disclosure existed and the defendant's conduct was not criminalised under the Copyright Act." So there is that part I wanted to draw your attention to and then just in anticipation of the submission that you are going to receive from my learned friend in relation to *LaMacchia* and the suggestion to loophole and it doesn't apply, even though Nimmer's text refers to it. Still, if we turn to page 3693, second paragraph first column, "On September 30 1994 the defendant

brought a motion to dismiss" and this is in relation to *Dowling* if you turn back you will see. Oh actually –

WILLIAMS J:

No.

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MR MANSFIELD:

Sorry it's not, it's in relation to *LaMacchia*. We refer to *Dowling* through it. "The defendant brought a motion to dismiss arguing that the Government had improperly resorted to the wire fraud statute as a copyright enforcement tool in defiance of the Supreme Court's decision in *Dowling*. The government [argued] that *Dowling* is a narrower case than LaMacchia would have it, and holds only that copyright infringement does not satisfy the physical "taking" requirement of the National Stolen Property Act." And then if we move through – I'm just going to try – and then if we move through, please, to page 3697, first column, second to bottom paragraph, the argument made by the United States in this hearing that *Dowling* should be so limited is represented by the last sentence there of the *LaMacchia* judgment.

WILLIAMS J:

Is this "The concomitancy", that sentence?

MR MANSFIELD:

Yes, Sir, starting there.

WINKELMANN CJ:

Is the part you really want to take us to 3700, first column, the bottom of it?

MR MANSFIELD:

Yes, but I just wanted to make the point that in *LaMacchia*, the Government was trying to suggest that *Dowling* was limited to that one offence and what you'll see through the judgment of *LaMacchia* is saying "Well, no, it wasn't". For the reasons I have already articulated when I took you right through

Dowling, it had a much wider application. Here is the wider application to the very provision that leave wasn't granted on in *Dowling*. Here it was also found not to apply and that's really the, in a nutshell, what –

WINKELMANN CJ:

And they quote Professor Nimmer over the page.

MR MANSFIELD:

Yes.

WILLIAMS J:

So *Dowling* wasn't just about tangible objects?

MR MANSFIELD:

Correct, and it wasn't just about that provision that was being examined by the Supreme Court. It had wider application to general dishonesty provisions and here we see an application in *LaMacchia*. That's not to say, and Nimmer discusses this in his text, that other defendants, and I call them defendants because that's our reference here, haven't been prosecuted in the United States in the District Court for crimes or for offences outside the Copyright Act but they haven't, as Nimmer refers to, raised the issue of *Dowling* or challenged it on that basis and I understand that my learned friend may refer you to another District Court decision which is not referred to by Nimmer and which in my submission doesn't accord with either the Supreme Court's decision in *Dowling* or *LaMacchia*.

But if we could just turn, I suppose, to page 3700 – I'm not sure, Ma'am, if that's the page that you'd just already taken me to, the first column. It starts really at paragraph 6 on the page before. I'm not going to read it all to you but it's important, in my submission. Paragraph 6 on page 3699 I can do nothing but endorse right through to the end of the judgment and I probably will take you to this part…

WINKELMANN CJ:

Well, we can be assumed to read it, because I'm just thinking, Mr Mansfield, I want to hold you to the 1 o'clock finish. How does that look for you?

MR MANSFIELD:

Unlikely, because these concepts are important and –

WINKELMANN CJ:

Yes, but we've read them as we've sat here –

MR MANSFIELD:

Okay, that's fine. Then I'll move to *YouTube* which is a significant decision. I'm quite happy to take you to the cases but –

WINKELMANN CJ:

And just highlight the relevant parts.

MR MANSFIELD:

– these cases were referred to in the Court of Appeal and you won't find them in the judgment so that is the reason why I just want to make sure that I'm bringing to the Court's attention these judgments of significance so on page 3741, we see the *YouTube* case. I do need to spend some time with this but it's not a long judgment. The appeal – so I'm on page 3741, and the Court's just identifying what the appeal related to. "This appeal requires us to clarify the contours of the 'safe harbor' provision of the Digital Millennium Copyright Act (DMCA) that limits the liability of online service providers for copyright infringement that occurs 'by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.'" So hence the significance.

And the action related, it was a civil action to 79,000 audiovisual clips, we see that in the body of the next paragraph down, and then if we turn to page 3742, we see the Court referring to "The District Court further held that item-specific knowledge of infringing activity is required for a service provider to have the

'right and ability to control' infringing activity […] Finally, the District Court held that the replication, transmittal, and display of videos on YouTube constituted activity 'by reason of the storage at the direction of a user' within the meaning of" their provision.

Then you'll see the heading "BACKGROUND". I just want to touch on that given some of the submissions that the US will make on the ROC and we turn for that to the factual background which is on page 3743. I'm not obviously going to take you to all the facts but just those that might be considered to be parallel here. The end of that first paragraph under "Factual Background", "By March 2010, at the time of summary judgment briefing in this litigation, site traffic on YouTube had soared to more than 1 billion daily video views, with more than 24 hours of new video uploaded to the site every minute. The basic function of the YouTube website permits users to 'upload' and view video clips free of charge. Before uploading a video to YouTube, a user must register and create an account with the website. The registration process requires the user to accept YouTube's Terms of Use […]", the same as with Megaupload, "which provides, inter alia, that the user 'will not submit material that is copyrighted'", and that was the same in relation to Megaupload's.

Further down, the last paragraph of that page, "Uploading a video to the YouTube website triggers a series of automated software functions. During the upload process, YouTube makes one or more exact copies of the video in its original file format. YouTube also makes one or more additional copies of the video in 'Flash' format, a process known as 'transcoding.' The transcoding process ensures that YouTube videos are available for viewing by most users at their request. The YouTube system allows users to gain access to video content by 'streaming' the video to the user's computer" et cetera.

I'm not interested in the procedural comment other than if you turn to the next page over, you'll see the Court identifying the crucial question inset: "[T]he critical question is whether the statutory phrases 'actual knowledge that the material or an activity using the material on the system or network is

infringing,' and 'facts or circumstances from which infringing activity is apparent' […] mean a general awareness that there are infringements (here, claimed to be widespread and common), or rather mean actual or constructive knowledge of specific and identifiable infringements of individual items." When you look at…

WINKELMANN CJ:

So we don't have an actual knowledge standard in the Copyright Act, do we? We have a "reason to know" standard?

MR MANSFIELD:

We do, and 131 requires actual knowledge.

WINKELMANN CJ:

What volume is the Copyright Act in again?

O'REGAN J:

It's in volume 2.

GLAZEBROOK J:

In volume 2.

MR MANSFIELD:

Yes, you've got it.

WILLIAMS J:

555.

WINKELMANN CJ:

The data storage is the, that's a civil liability one so…

MR MANSFIELD:

Are you talking about section 92?

WINKELMANN CJ:

Yes, I think there's one that has a…

WILLIAMS J:

Yes, 92B and C.

MR MANSFIELD:

This is what I want to make clear. These aren't offence provisions –

WINKELMANN CJ:

No, these are civil –

MR MANSFIELD:

– or pseudo offence provisions, and just because you don't qualify for the safe harbour doesn't mean you've infringed copyright, it just means it's not a permitted act which prevents infringement finding at all. If there is infringement you look at whether there's liability as a primary infringer or a secondary infringer, but it's obviously acknowledged as important if you receive a notice and fail to comply with the notice. But if you look at section 131 it requires actual knowledge, "the person knows". So the very last line before subsection (2), "An object that is, and that the person knows is, an infringing copy of a copyright work," and so again it requires actual knowledge of the work in suit, and that is, in effect, what the Court concluded in *YouTube* was required, and that is consistent through many US authorities which we have given you.

So this is why I made the submission in opening, that generalised knowledge is insufficient. In fact in *YouTube*, if you look at the facts, generalised knowledge was present. If we turn through, and this is why I think it's an important decision…

WILLIAMS J:

Does it matter if our statute does?

MR MANSFIELD:

Our statute does what Sir?

WILLIAMS J:

Requires specific knowledge?

MR MANSFIELD:

No, it's consistent with the US position. Actual knowledge is required of a specific infringing work, and so it's important when you look at the allegations and the evidence that's available in the ROC, is there evidence of knowledge of infringement in a specific work. If there is, it doesn't end there because if they have knowledge of information in a specific work, as long as they remove the work, delete the link to the work, disable it, then they're not infringing.

WILLIAMS J:

Yes, well I guess those two systems knit together because the breach notice, takedown notice is the basis upon which you might infer knowledge, then you're required to respond, and if you do the system protects you.

MR MANSFIELD:

It's one of the factors you look at in New Zealand. It would be a significant one, I acknowledge that, but it's simply one of them. But if you look at the facts in relation to *YouTube*, and this is important because throughout this hearing the United States refer to the ROC and say that the knowledge was gratuitous of offending throughout the site. If you look at 3747, and I know that you'll read this judgment because it is significant, but look at the heading "Specific Knowledge or Awareness" where they talk about the facts. "The plaintiffs draw our attention to various estimates regarding the percentage of infringing content on the YouTube website. For example, Viacom cites evidence [676 F.3d 33] that YouTube employees conducted website surveys and estimated that 75-80% of all YouTube streams contained copyrighted material. The class plaintiffs similarly claim that Credit Suisse, acting as financial advisor to Google, estimated that more than 60% of YouTube's

content was 'premium' copyrighted content—and that only 10% of the premium content was authorised."

Further down. "'([A] jury could find that the defendants not only were generally aware of, but welcomed, copyright-infringing material being placed on their website.'). But such estimates are insufficient, standing alone, to create a triable issue of fact as to whether YouTube actually knew, or was aware of facts or circumstances that would indicate, the existence of particular instances of infringement." And that's my point. So –

ELLEN FRANCE J:
But it does go on to suggest that from a record there may, in fact, have been examples of –

MR MANSFIELD:
No. Your Honour is right so far as they refer to –

WINKELMANN CJ:
Can you just let Justice France finish. Sorry, examples of?

ELLEN FRANCE J:
Of where they did have specific knowledge.

MR MANSFIELD:
Yes, in communications.

ELLEN FRANCE J:
Yes.

MR MANSFIELD:
I agree with Your Honour insofar as, but it was considered to be insufficient, simple reference to the communication, because there was no evidence as to what they did in receipt of that, what they called red flag knowledge there. So when they were given knowledge in relation to a specific work, there was

no evidence placed before the Court, as there isn't here, as to what YouTube did. Did they delete the link or remove the file, and that's what the Court goes on to find, was an evidential insufficiency in YouTube, and it's the same –

GLAZEBROOK J:

Do you want to point to where they say that, seeing we're on that topic.

MR MANSFIELD:

Here we go. "We hasten to note, however, that although the foregoing emails were annexed – "

GLAZEBROOK J:

Yes, but whereabouts is that sorry?

MR MANSFIELD:

Sorry Ma'am.

ELLEN FRANCE J:

But the order is made vacating summary judgment, isn't it –

MR MANSFIELD:

But only in relation to one part that –

ELLEN FRANCE J:

Yes, yes, no, all I'm saying is there were some instances where it was accepted there was enough, at least at that preliminary stage, to indicate it might meet the test of specific knowledge, actual knowledge.

MR MANSFIELD:

Once a decision is read and complete it shows that that related to providing others with rights over the content, which doesn't exist here. It's not an allegation that we have been made that material in either Megaupload or Megavideo was provided to another outlet. So in that regard it was considered that that should go back before the lower Court again.

WILLIAMS J:

When you say outlet do you mean another ISP or another…

GLAZEBROOK J:

It doesn't say that wouldn't be sufficient though. It just says it's not sufficient for summary judgment.

MR MANSFIELD:

Well yes because –

GLAZEBROOK J:

Because if it wasn't submission at all you wouldn't send it back, would you?

MR MANSFIELD:

No, no, but it was in relation to a service being provided by YouTube as an Internet service provider that doesn't exist in Megaupload. So –

ELLEN FRANCE J:

All I'm suggesting to you is it's really just an illustration of an application of the requirement for knowledge to the particular facts of that case.

MR MANSFIELD:

That's right, and I would accept that Ma'am, and what I'm suggesting though is when you look at –

WINKELMANN CJ:

That's consistent with the law of criminal liability generally isn't it.

MR MANSFIELD:

Yes.

WILLIAMS J:

I don't think we need the 2nd Circuit to tell us that.

MR MANSFIELD:

Well the point I'm making is that you have a vast amount of material before you in the ROC and submission made by the US of generalised knowledge, and that's not sufficient, and when my learned friend stands up and takes you to that, then I just want you to appreciate that it's not sufficient. But further, when there are isolated examples of what might be considered to be red flag knowledge, that's what they call it in the United States, so correspondence between the co-conspirators, or correspondence they have received in relation to specific work, and I acknowledge what Your Honour says, because there are communications within the ROC of that kind, that might be sufficient to raise actual knowledge in relation to a specific work. But what the problem then is, is that the ROC doesn't say what Megaupload did or didn't do in relation to the receipt of that correspondence. So it doesn't go on to say, they didn't disable the link, or delete the file, and that's the problem. That's the evidential insufficiency.

GLAZEBROOK J:

And you were going to take us to somewhere in here where they say that?

MR MANSFIELD:

Yes.

GLAZEBROOK J:

Which I haven't seen so far.

MR MANSFIELD:

No, you haven't because I haven't got to that page yet.

GLAZEBROOK J:

All right.

MR MANSFIELD:

I'm going there now Ma'am, it's page 3748. We hasten to note, however, that's partway down just before the heading "Wilful Blindness."

GLAZEBROOK J:

I saw that but I didn't think that's what that was saying, so perhaps you can explain why it is saying what you say it says.

MR MANSFIELD:

Well there's other, I can say that there are other references as well.

WINKELMANN CJ:

Some of us aren't as fast as Justice Glazebrook in having absorbed the significance of that passage so can you just tell us what you say is the significance?

GLAZEBROOK J:

No, that's what I was asking him to do, I'm sorry.

WINKELMANN CJ:

I'm just not as fast as you.

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MR MANSFIELD:

The point I'm making here is that in relation to the allegation, so the correspondence, right, was put before the Court, which established general knowledge of infringement at a high level, but the problem was that the correspondence, although it referred to specific works, it didn't relate to any works which were specifically before the Court and the pleadings. The Court was unclear as to whether it did. Now for the purposes of a criminal prosecution, generalised knowledge is insufficient. If they want to rely on communications, either between the co-conspirators or correspondence that the co-conspirators receive, then they have to show that those communications relate to a specific count in the indictment, and they don't. Further, and later in the judgment –

GLAZEBROOK J:

That was just slightly different from the way you put it before though.

MR MANSFIELD:

I know.

GLAZEBROOK J:

Because I can understand that. If you say you have infringed them this way, then something that says where really that infringes, even in relation to specific things doesn't work, if you can't relate it to the count in the indictment. But I thought you were making some more broader point.

MR MANSFIELD:

No you are quite right – I was and that paragraph addresses submissions, but not the submission I was looking for support for.

GLAZEBROOK J:

That's what I thought.

MR MANSFIELD:

And you are not incorrect there Ma'am, which is probably not a surprise.

GLAZEBROOK J:

But nevertheless, I can see why you are referring to that because you may say, I think we are infringing in relation to X, but unless X is in the indictment, that is not particularly helpful.

MR MANSFIELD:

And that is a subsidiary point which is of significance but there is reference in here and I am just going to resort to the electronic copy of it. I cannot find it now but there is a point I want to make before lunch and I wonder if I can find it and come back to it but just take you to this other part of the judgment which I say is important in relation to this issue of possession. Because as you know the Court of Appeal found that an available limb under 131 involved the possession in the course of business, the Court of Appeal missed out in the

course of business but possession with a view to committing an infringing act. If you turn to page 3749 you will see the heading, “Right and ability to control infringing activity.” Now I don’t accept that Megaupload was ever in possession of the users’ files. The users were in possession of the files because they directed the use and we have seen that through the relevant authorities but you might find the discussion in relation to control and benefit and what was sufficient for that in the United States might be of some assistance when it comes to – if the Court concludes, that well an available limb of section 131 might be this suggestion that Megaupload was in possession and I think what is important is that the learned Court of Appeal failed to actually define what possession meant and/or who it was ascribing possession to. Was it the user because it couldn’t be the user? In my submission 131, would require the person in possession to be in the course of business. The only entity in the course of business would be Megaupload and Megaupload was not in possession of the file. So that is significant. But when you are looking at the right and ability to control, can I just take you through to the heading, “Control and benefit.” And underneath there you will see the heading, “Right and ability to control infringing activity” which is on page 3749. And I am just taking you to that as a marker so I can follow you. And then if you move to page 3750 and you will see at paragraph half-way down starting with “Happily.” And then you will see a quote indented. “The ability to block infringer’s access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise, alteration in original.” And then if you read, “To adopt the principle in the DMCA context, however, would render the statute internally inconsistent. Section 512(c) actually presumes that the service provider has the ability to block access to infringing material” and that refers to Shelter Capital which is in your materials. “Indeed, a service provider who has knowledge or awareness of infringing material who receives a takedown notice from a copyright holder is required to remove or disable access to the material in order to claim the benefit of the safe harbour, but in taking such action the service provider would, in the plaintiff’s analysis, be admitting the right and ability to control the infringing material thus the pre-

requisite to the safe harbour protection would at the same time be a disqualifier."

Now my point is, if we are looking at the issue of possession, the ability to disable a link can't in of itself provide a basis for an assertion the Megaupload was able to possess or did possess in infringing file because that is what the legislative scheme requires.

At the bottom of the page, "Accordingly, we conclude that the right and ability to control infringing activity under 512 requires something more than the ability to remove or block access to material posted on a service provider website." At the end of that paragraph, "The remaining and more difficult questions, how to define the something more that is required." And then further down, the second paragraph, last part, "Premises" and that is a reference to *Grokster Ltd.* "Premises liability on purposeful, culpable expression and conduct. Both of these examples involve a service provider exerting substantial influence on the activities of users without necessarily or even frequently acquiring knowledge of specific infringing activities."

Then further down, "By Reason of Storage," under that heading, "For the reasons that follow, we affirm that holding… with respect to three of the challenged software functions," and this is I suppose what sends it back, "the conversion (or 'transcoding') of video into a standard display format, the playback of videos on 'watch' pages, and the 'related videos' function. We remand for further fact-finding with respect to a fourth software function, involving the third-party syndication of videos uploaded to YouTube." So that's the basis upon which it was sent back, which is not something that's relevant here.

Then the next page please, top of the page, that's page 3752, "The relevant case law makes clear that the § 512(c) safe harbor extends to software functions performed "for the purpose of facilitating access to user-stored material."

Further down it talks about transcoding, and why that's required and why that wouldn't be sufficient, and refers to the decision of *Viacom*, which is also before you, and, "A similar analysis applies to the 'related videos' function, by which a YouTube computer algorithm identifies and displays 'thumbnails' of clips that are 'related' to the video selected by the user." Again, something that's not even present on either site that we're dealing with. So they're talking about indexing, and that's further dealt with at the end of that paragraph. As you know we don't have a repeat infringer requirement. It was considered but it wasn't something that was enacted by our Parliament.

WINKELMANN CJ:

Where to from here Mr Mansfield?

MR MANSFIELD:

That's the end of *YouTube* Ma'am.

WINKELMANN CJ:

Yes, but do you foresee a time that your submissions will draw to a close?

MR MANSFIELD:

Yes, and I understand why you're asking me that question Ma'am, I'm very much aware of that. I would've thought I will complete within an hour. I just need to refer to some other cases which I will just simply ask the Court to note but to read, because they're important and they apply, in fact I can probably give you the relevant case with the electronic references and the hard copy references. I can give you an index of that but just talk to you in a very general sense about the principles that apply there. But they're cases which we say are of primary importance and relate to comparable services being provided by those Internet service providers which were found not to be civilly liable, let alone criminally liable for infringement by users through their service. I'll get that printed and provide that to you after the break.

WINKELMANN CJ:

We're going to come back at two, but you won't be running past an hour, Mr Mansfield, really, I mean just out of consideration for other counsel, because we do have to consider Mr Boldt's situation.

MR MANSFIELD:

Yes, I thought I would require a day. I think that's taken me to a day. I'm going to be slightly over it but not significantly over it. I understand –

O'REGAN J:

You and Mr Illingworth agreed to two days and it's now three.

MR MANSFIELD:

Yes, I think we agreed a day each. I've had a day now, I acknowledge that.

MR ROGERS:

If it assists, I can indicate I'm going to be very short. I'm going to adopt the submissions of my learned friend.

WINKELMANN CJ:

Thank you.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.01 PM

WINKELMANN CJ:

You were going to say something to us?

MR RAFTERY QC:

Sorry to be bobbing up and down.

WINKELMANN CJ:

No, because we were going to suggest something to you but go ahead, Mr Raftery.

MR RAFTERY QC:

I slightly misunderstood what Mr Boldt had been telling me and his problem arises a little earlier than – he would prefer to finish slightly earlier on Friday and so he has no problem about Monday so that, and discussing with him about his family arrangements and then discussing it with Mr Illingworth and I briefly mentioned it just to my learned friend Mr Mansfield now, the suggestion that I was going to make, but I think all counsel are agreed, is that I do my bit, Mr Sinclair is also going to talk about 131 as you probably know from the earlier memo, and Mr Boldt was also going to deal with the judicial review aspect. He wants to do that still and so he's happy to do that. So my proposal, we do all of that this week and we have my learned friend's replies on all the Crown stuff on that and then the sole thing that's left for Monday morning, if that is agreeable to Your Honours, is Mr Boldt will open on the *Cullinane* argument, Mr Illingworth will respond, then Mr Boldt has a reply and then that will be the end of it so that everything bar *Cullinane*, the United States' submissions, any replies to our submissions on anything bar *Cullinane* all over this week hopefully.

WINKELMANN CJ:

Well, we had an alternative suggestion –

MR RAFTERY QC:

Certainly.

WINKELMANN CJ:

– which was that Mr Boldt addresses first on *Cullinane* and then we hear Mr Illingworth's reply on that before you commence your submissions proper.

MR RAFTERY QC:

I have a slight problem because I am due in Court elsewhere overseas. While the Court doesn't start next week, I'm due to leave next week, and I've got rather a vast amount of material and I've just seen on my email more has yet arrived for me of stuff that I need to assimilate and digest before I then travel overseas so that I would prefer to get my material out of the way this

week and I have spoken to Mr Boldt and he has said, well, he would like to rise earlier, so that's the difficulty I'm feeling. So the Court may wish to talk about it amongst themselves before deciding.

WINKELMANN CJ:

We'll go with your proposed course of action, Mr Raftery.

MR RAFTERY QC:

I'm very grateful for your thinking about it and trying to accommodate. Thank you very much.

WINKELMANN CJ:

Mr Mansfield

MR MANSFIELD:

I won't be so bold as to suggest that means I can take longer.

O'REGAN J:

You can go all day.

WINKELMANN CJ:

I was going to say –

O'REGAN J:

Don't get your hopes up.

WINKELMANN CJ:

– that I don't dispute that but that might have been too facetious so I didn't say it. There we are, you've invited the comment.

MR MANSFIELD:

What I've done is I'm going to provide you through your Registrar with a copy of references of US authorities that I'm going to refer to in brief but which I would submit to the Court are significant in relation to Internet service

providers and their potential liability through knowledge, whether it be actual or "red flag" as they call it in the United States and what their responsibilities are. So it's not in all of the cases which you have in the bundle but are what I would say are the primary cases and I think you're getting, by the looks of it, some supplementary material which is a supplementary materials folder and I'm going to refer you to that briefly. There's never enough documents in this proceeding, as you can see.

So what we've endeavoured to do with the US authorities, which we call are key authorities for you, is give you the electronic reference and if it suits you, we could file an electronic version of this which would be linked direct to the document because the case on appeal is getting quite unmanageable given that we've had an electronic version in the High Court, Court of Appeal, and now this Court. So we can give you with the links straight through but it also has a hardcopy reference where there is one. There's only one –

O'REGAN J:
I think that'd be good to get the electronic version.

MR MANSFIELD:
You've got the hardcopy reference – the links?

O'REGAN J:
If you give us one with hyperlinks, that would be helpful.

MR MANSFIELD:
Yes, I'd be more than happy to do that. There's only one other case that I'm probably going to just touch on briefly and that's *UMG Recordings Inc v Shelter Capital Partners* LLC 718 F.3d 1006 (9th Cir. 2013) but another good case is *Ventura* which is in the softcopy which has just been handed up because it talks about summarises really the US position, as does *Downs v Oath*. It deals with a number of principles –

GLAZEBROOK J:

These are new? This is truly supplementary or is this…

MR MANSFIELD:

No, they are truly new.

GLAZEBROOK J:

That's fine.

MR MANSFIELD:

And they are truly new for one reason: they are truly new because the United States filed some new cases so we had another look at it and found some further new ones.

WILLIAMS J:

This is the one where who ends up with the most cases wins.

MR MANSFIELD:

No, I don't think so, but I'm hopeful that they are persuasive in nature. I was asked a question in relation to where in the *YouTube* case was mentioned to the fact that the plaintiffs had failed to show the link between the communications and the relevant files and therefore also what had happened to the relevant files. Your Honour is actually quite right, it's not in the decision I referred you to, it's in the District Court decision which immediately follows it, hence my confusion.

If you turn to page 3756, and I'm not suggesting that the District Court decision provides you with great guidance on the law but it's there and effectively, summary judgment was granted, the action was thrown out, and if you turn to page 3757, you'll see under heading (A), "Whether, on the current record, YouTube had knowledge or awareness of any specific infringements (including any clips-in-suit not expressly noted in this opinion)". At the bottom of the page, you'll see that evidence was filed, "It has now become clear that neither side possesses the kind of evidence that would allow a clip-by-clip

assessment of actual knowledge. Defendants apparently are unable to say which clips-in-suit they knew about and which they did not (which is hardly surprising given the volume of material at issue) and apparently lack viewing or other records that could establish these facts".

And then further through the judgment, page 5 which is on page 3760 of the material you've got, it's the very bottom line which is only started "If, as plaintiffs'" over the page onto page 3761 "assert neither side can determine the presence or absence of specific infringements because of the volume of material, that merely demonstrates the wisdom of the legislative requirement that it be the owner of the copyright, or his agent, who identifies the infringement by giving the service provider notice. […] The system is entirely workable […]" and then further down, "Thus, the burden of showing YouTube knew or was aware of specific infringements of the works in suit cannot be shifted to YouTube to disprove. Congress has determined that the burden of identifying what must be taken down is to be on the copyright owner, a determination which has proven practicable in practice. The plaintiff's acknowledgement that they lack the kind of evidence that would allow a clip by clip assessment of actual knowledge, the plaintiffs lay proof that YouTube had knowledge or an awareness of any specific infringements or clips-in-suit".

So I simply draw that to your attention because it is clear that evidentially when I went back to the District Court, even where there was through the correspondence assertions, a red flag knowledge so correspondence relating to specific works, there was unable to be a link between that correspondence and the allegations or the works that were the subject of the suit and in my submission, taking that to the criminal analogy, the US would need to show that the communications, either received or between the co-conspirators related to specific works that were the subject of the counts before there could be evidence of the required specific knowledge and a specific work if that makes sense to the Court.

Finally, I was asked by Her Honour Justice Glazebrook to refer to the article where there was the requirement for the US to make it clear if they were going to stick with the distribution right. If we turn to the learned article which starts on page 526 which is just really the header page for the document but the relevant article –

GLAZEBROOK J:
Sorry, 526.

MR MANSFIELD:
I just realised what I have done. Volume 12, the appellants' authorised authorities bundle, volume 12, page 5528. Reliably informed that the author is Ficsor and if we look at the second column of text which is page 51 of the text. And really it is just the last paragraph on page 51 of the text. Starting with "First" and to the bottom of that page. Now if I can, I am just going to take you to *UMG*.

WILLIAMS J:
Just before you do. The supplementary from this was chapter 17, the US copyright legislation clarified in the way that was suggested?

MR MANSFIELD:
I have been sent through the relevant provision over the break from the US statute. I can't tell when it was amended just from what I have got and so I need further enquiries from the US counsel who are here but I wasn't able to do that once I got it. So I am not in a position to tell you the exact amendment made to their Act but I will have it and I can circulate it through your registrar if that suits. I just needed to understand it better than I have been able to.

UMG Recordings starts in the appellants' authorities' bundle volume 10 at 3780. It is a very lengthy decision and I only propose, even though it is full of gems, as far as the way in which the US approach Internet service provider liability. I am only going to take you to parts of it. And the first part is on page

3798 under the heading A. This is the Court identifying what the issue was. "We must first decide whether the functions automatically performed by Veoh's software when a user uploads a video fall within the meaning of "by reason of the storage at the direction of a user."

And then further down, towards the bottom of that page, "We agree that the phrase, 'by reason of the storage at the direction of the user' is broader causal language than UMG contends, 'clearly meant to cover than their mere electronic storage lockers. We hold that the language and structure of the statute as well as the legislative intent that motivated its enactment, clarify that § 512(c) encompasses the access-facilitating processes that automatically occur when a user uploads a video to Veoh."

So that really covers the situation where the content is not being touched but the file is being changed by way of its format to make it move through the system or to make it available to the user.

O'REGAN J:

Is Veoh similar to Megaupload?

MR MANSFIELD:

No but the general process applied so far as how files are uploaded, how they are stored, how someone would have access to them and how they are downloaded, is similar. Then later on I would take you to 3805. At the top of that page, "Finally, if Congress wanted to confine § 512(c) exclusively to web hosts rather than reach a wider range of service providers, we very much doubt it would have done so without oblique by reason of storage language."

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Then if we turn the page to 3807, and really the passages from here, 3807 to 3813 are important because it relates to knowledge. "A service provider," as you see under "B", "(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;' '(ii) in the

absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or' '(iii) upon attaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material.' UMG has never disputed that when Veoh became aware of allegedly infringing material as a result of the […] notices, it removed the files. Rather, it argues that Veoh had knowledge or awareness of other infringing videos that it did not remove."

And if we turn to page 3809, it's partway through that second paragraph, "Finally, if merely hosting material that falls within a category of content capable of copyright protection, with the general knowledge that one's services could be used to share unauthorized copies of copyrighted material, was sufficient to impute knowledge to service providers, the § 512(c) safe harbor would be rendered a dead letter: § 512(c) applies only to claims of copyright infringement, yet the fact that a service provider's website could contain copyrightable material would remove the service provider from § 512(c) eligibility."

And further down, "Cases analysing knowledge in the secondary copyright infringement context also counsel against UMG's should-have-known approach. In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the Supreme Court held that there was 'no precedent in the law of copyright for the imposition of' liability based on the theory that the defendant had 'sold equipment with constructive knowledge of the fact that their customers may use that equipment to make unauthorized copies of copyrighted material.' […] So long as the product was 'capable of substantial noninfringing uses,' the Court refused to impute knowledge of infringement. […] Applying *Sony* to the Internet context, we held in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), that 'if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement.' […] But 'absent any specific information which identifies infringing activity, a computer system operator cannot be liable for

contributory infringement merely because the structure of the system allows for the exchange of copyrighted material. […]

"Requiring specific knowledge of particular infringing activity makes good sense in the context of the DMCA, which Congress enacted to foster cooperation among copyright holders and service providers in dealing with infringement on the Internet. […] Copyright holders know precisely what materials they own, and are thus better able to efficiently identify infringing copies than service providers like Veoh, who cannot readily ascertain what material is copyrighted and what is not […]; ('[A] [service] provider could not be expected, during the course of its brief cataloguing visit, to determine whether [a] photograph was still protected by copyright or was in the public domain; if the photograph was still protected by copyright, whether the use was licensed; and if the use was not licensed, whether it was permitted under the fair use doctrine.')

These considerations are reflected in Congress' decision to enact a notice and takedown protocol encouraging copyright holders to identify specific infringing material to service providers."

Page 3812, second paragraph down starting partway through, "We therefore hold that merely hosting a category of copyrightable content, such as music videos, with the general knowledge that one's services could be used to share infringing material, is insufficient to meet the actual knowledge requirement […] We reach the same conclusion with regard to the § 512(c)(1)(A)(ii) inquiry into whether a service provider is 'aware of facts or circumstances from which infringing activity is apparent.' The district court's conception of this 'red flag test' properly followed our analysis in *CCBill*," which you have in the materials, I don't think I've given you a specific hardcopy link but you have an electronic link that's there, "which reiterated that the burden remains with the copyright holder rather than the service provider. […] The plaintiffs in *CCBill* argued that there were a number of red flags that made it apparent infringing activity was afoot, noting that the defendant hosted sites with names such as "illegal.net"

and "stolencelebritypics.com," as well as password hacking websites, which obviously infringe. […] We disagreed that these were sufficient red flags because '[w]e do not place the burden of determining whether [materials] are actually illegal on a service provider,'" and at the very bottom of that part, "[…] the DMCA recognizes that service providers who do not locate and remove infringing materials they do not specifically know of should not suffer the loss of safe harbor protection."

I just want to check that they are the only passages I specifically – and then the decision might be considered to be helpful further on. I'm sorry, I'm just trying to find it in the hardcopy. If you turn to 3822, second paragraph down, "We agree with Judge Matz that 'Congress could not have intended for courts to hold that a service provider loses immunity under the safe harbor provision of the DMCA because it engages in acts that are specifically required by the DMCA' to obtain safe harbor protection", so that's similar to what was said in *YouTube* and then on page 3828, at the top, starting with "Finally", it's probably about five lines down, and I'm just referring to this if you think possession in the course of business under 131 may be available, just the concept of control, "Finally, the Court noted that '[o]ther courts have suggested that control may
exist where the service provider is 'actively involved in the listing, bidding, sale and delivery' of items offered for sale, […] or otherwise controls vendor sales by previewing products prior to their listing, editing product descriptions, or suggesting prices […] After offering this guidance, the Second Circuit 'remand[ed] to the District Court to consider in the first instance whether the plaintiffs ha[d] adduced sufficient evidence to allow a reasonable jury to conclude that YouTube had the right and ability to control the infringing activity and received a financial benefit directly attributable to that activity.'

"We agree with the Second Circuit and hold that, in order to have the 'right and ability to control,' the service provider must 'exert[] substantial influence on the activities of users.' […] 'Substantial influence' may include, as the Second Circuit suggested, high levels of control over activities of users, as in

Cybernet. Or it may include purposeful conduct, as in *Grokster*", and you can only be referred to *Grokster*, as I understand it, by the United States. There, you will see that they would advertise to users on the basis that effectively, they were available for use as an infringing site, so they were marketing themselves to users, "Come to us, load your infringing material with us", to that extent and that express, and that was why there's reference there to *Grokster*. But there is nothing like that in the ROC. The best that the United States refer to are incentives which are dual-use, simply trying to encourage use of the site without any reference to infringement, and that's significant.

"In this case, Veoh's interactions with and conduct toward its users did not rise to such a level," and if you look at the facts they were more engaged with the infringing conduct uploaded than Megaupload or Megavideo are asserted to be within the ROC. "The allegedly infringing *material* resided on Veoh's system; (b) Veoh had the ability to remove such material; (c) Veoh could have implemented, and did implement, filtering systems," and you'll know that whilst there were no filtering systems in Megaupload, what there was, was a direct lead. So a voluntary provision provided to the copyright holder to be able to take down directly URL links to infringing material. So not something that's required under the statue. It had voluntarily engaged with the content industry to provide that service. But that has never been found to be an actual requirement that they go beyond the statutory requirement. It's just important to note that, and because there's criticism of the direct-delete system that it was completely voluntary and need not have been provided.

"Veoh could have searched for potential infringing content. Such circumstances are not equivalent to the activities found to constitute substantial influence in *Cybernet* and *Grokster*. Nor has UMG, in its initial or supplemental briefing to this court, pointed to other evidence raising a genuine issue of material fact as to whether Veoh's activities involved 'something more than the ability to remove or block access to materials posted on a service provider's website.'"

So my submission is that there was no substantial influence by Megaupload or Megavideo. Files were uploaded at the direction of the user. The user decided who received the URL, so the user would post it on third party sites, not Megaupload. Megaupload had no relationship, formal or informal, with third party sites. Received no income from them and provided no income to them. So it was the user that put the URL link up on those third party sites, so it would be the user that would dictate who would have access to their material. So there is no substantial influence at all, and Megaupload never marketed itself. It had three groups of lawyers. Lawyers in America, lawyers in Hong Kong and lawyers in Australia giving it advice in relation to compliance, and it never marketed itself as a site that you could go to, to infringe or find infringing material. That's what occurred –

O'REGAN J:

Is there evidence on this?

MR MANSFIELD:

The ROC is replete with any suggestion that that is so. So any, there's no suggestion in the ROC that it marketed itself directly to users as a site to go to for Internet – sorry, for infringement purposes, and the reason I say that is because that's what Grokster did. Grokster actively marketed itself as a site that users could go to to infringe, and it was that aspect of it in a civil capacity, not a criminal capacity, it found it liable for inducing the users to infringe, which is a civil concept that was available together with contributing liability in the United States, but that was for civil liability, in order to establish civil liability.

The best that the US do it points to are rewards and the suggestion of time limits on the video before you had to become a premium user but that didn't relate to one video, you could look at a number of videos up to that point before you were asked to become a premium member, pay a subscription, and then it was unlimited. So there is no evidence of any direct inducement or Megaupload marketing itself in the way in which Grokster did.

WILLIAMS J:

This is all premised on the idea that the legislation in the US, which requires the right and ability to control, is the US equivalent of “possess”?

MR MANSFIELD:

Yes, I'm not saying that the offence provision, which includes the word “possession” is used in the same way in the US but possession –

WILLIAMS J:

Well these cases are all about right and ability to control and you’re really focusing on that.

MR MANSFIELD:

That’s right, and surely if you are said to be in possession, because the Court of Appeal never looked at what was sufficient for possession, it has to be more, doesn’t it, then the ability to delete the link to the material because that’s what an Internet service provider is required to do.

WILLIAMS J:

Right, but it is worth underlining that these cases aren’t about what possession means, they’re about what the statute there means.

MR MANSFIELD:

No, and I accept that, but when you look at possession it’s knowledge and control, and that’s why I’ve thought it might be helpful for our courts to understand what the aspect of control and what is sufficient –

WILLIAMS J:

That’s possession in the Crimes Act.

MR MANSFIELD:

Sorry Sir. No, I’m just talking about, if you’re talking about possession, and how we might ordinarily crime-centric identify it –

WINKELMANN CJ:

Yes, but can you just remind us where it comes up in our legislative framework.

MR MANSFIELD:

It only comes up in 131.

WINKELMANN CJ:

Yes, okay.

WILLIAMS J:

When you refer to knowledge and control as your definition of "possession" that itself is a statutory definition, isn't it?

MR MANSFIELD:

Yes and I don't –

WILLIAMS J:

From the Crimes Act.

MR MANSFIELD:

I'm trying to deal with what the Court of Appeal did without them saying what they did. They identified section 131(c) as an available offence within that judgment so that requires possession in the course of a business. The Court of Appeal never defines what it considers possession in the context of 131 in the Copyright Act to be. So what I'm suggesting is even if the Crimes Act with our standard view of possession was applied, it would have to be knowledge of and the ability to control. Now I'm not accepting that because I don't accept that Megaupload was in possession, full stop. I say the user was in possession. The user in a conspiracy is insufficient because the user has to be in the course of a business and there is nothing in the ROC suggesting that any of the users had possession in the course of a business. So I'm working on the basis that perhaps, and the Court of Appeal doesn't identify this, they're suggesting Megaupload was in possession, and that they

applied what we might think is the standard Crimes Act definition of "possession" to it, even though they don't say it, and that would be knowledge and control. I don't accept that per se. I would say that the US cases are more helpful as to what is required. It requires substantial influence over the content. If you have substantial influence over the content then that would be sufficient. But Megaupload, within the ROC, had no influence over the content, nor can there be a suggestion that they had influence over the content. The content that was uploaded was at the direction of the user, and that's why I've taken you to the cases because that's of significance. It's their file, it's in their possession. They use the service but it remains in their possession throughout and in fact the terms and conditions of use actually provide for that. Now…

WINKELMANN CJ:

Have you got a reference for us for the terms and conditions of use?

MR MANSFIELD:

I have and I'm just looking for it. The electronic reference is C-0173 and it's an affidavit filed in the District Court by Mr Gibson, and at para 10 the terms and conditions for both Megaupload, Megavideo and the rewards programme, or the rewards are attached to that affidavit and they all state that infringing material is not to be uploaded and they also state that the possession of the file remains with the user. So what I'm doing is inferring from the replete discussion on possession by the Court of Appeal –

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WINKELMANN CJ:

Replete? Did you say "replete"?

MR MANSFIELD:

Well, the absence of discussion by the Court of Appeal –

WINKELMANN CJ:

Because "replete" has a different meaning, Mr Mansfield.

MR MANSFIELD:

Sorry, Ma'am.

GLAZEBROOK J:

And did you say it's C-0173 or –

MR MANSFIELD:

Yes, I did.

WINKELMANN CJ:

They all say infringing material is not to be uploaded and it stays in the possession of the file?

MR MANSFIELD:

That's right.

WINKELMANN CJ:

And what are you inferring from the absence of discussion?

MR MANSFIELD:

Well, the absence of discussion must mean, or one would infer, that the Court of Appeal has simply assumed by the fact that Megaupload, it seems, makes these transient copies although it doesn't refer to section 43A but makes transient copies and/or that it can identify a link and remove material, therefore it's in possession, and that would be quite contrary to the way in which the US deal with this issue and it's wrong in my submission.

ELLEN FRANCE J:

There would be a separate approach, do you say, for count 8?

MR MANSFIELD:

Yes. When I'm talking generally, I'm accepting that count 8 is quite a different category and that's YouTube videos, just for the rest of the bench, and the count that relates to *Taken*, because that is said to have been uploaded by an

individual who is an appellant, would also fall within that category, but it's hard to see, can I make this point in relation to that count, it's hard to see how, when you review the ROC in relation to that, that involves a conspiracy. At best, it involves the actions of one individual who has uploaded and made available that file. It doesn't involve any evidence that the other appellants knew of or participated or agreed with that approach.

So in my submission, while in relation to *Taken*, one individual might be seen to be a direct infringer if there was sufficient evidence to show that copyright was infringed, and you've heard from my learned friend on that, it goes further. It doesn't establish a conspiracy involving the other appellants. And in relation to both YouTube and *Taken*, then we say the time limitation period applies because both are outside that, which I'll come to briefly.

So I'm just going to come now, keeping away from the cases, I might give you some case references on the way through but primarily, I'm now going to deal with section 131 and that's in volume 2. Our primary submission, which I know the Court understands, is that when the communication right was added to section 16, there was no amendment to 131 like there was to section 198 and that was deliberate so as not to criminalise a breach of the communication right. It belies common sense, in my submission, that if Parliament goes to all of the effort it did, following a very careful review over seven years, identifying the distinction between the communication right and the distribution right, that when it came to section 131, it would bundle an infringement of the communication right into the offence which relates solely to the distribution right. That must be so when we look at the amendment to section 198 and it must be so when we look at the amendment to the UK provision, the identical, in effect, provision.

GLAZEBROOK J:

What would be the policy reason? Because obviously, the UK didn't see any policy reason why that should not be criminalised in the same circumstances as physical distribution.

MR MANSFIELD:

Well, ironically, Ma'am, you've brought to my attention a submission that I didn't make when we were at the UK piece of legislation because if you look closely – I'll just take you to it, I've just got to find the right book.

GLAZEBROOK J:

You might have to tell us where it is. I've lost it.

WILLIAMS J:

Are you going back to the UK statute?

MR MANSFIELD:

I am, Sir, yes. If you've got it handy, that would be great.

WILLIAMS J:

I have. Just where is the question.

WINKELMANN CJ:

He was looking to you for inspiration.

MR MANSFIELD:

Volume 10, there we go. I've got it. Sorry.

O'REGAN J:

Yes, it's page 4000 in volume 10.

MR MANSFIELD:

That's why I've got bags under my eyes. Here we go. Thank you. This is the more recent version of it. It's been actually amended since but I'll talk to you about it in any event. Section 2A, when they made it an offence, originally when they provided for the penalties, they provided for a lesser penalty than they did for other forms of infringement. Then following the *Gowers Review*, which I have up here and I can give you the reference too, there we go, it's KD-AUT.263 is the entire review, so after the initial amendment, including the

breach of the communication right being added as a specific offence, there was a complaint by copyright holders that the penalty should be increased to mirror the maximum available penalty for other forms of infringement under the same section and it was amended to 10 years and that's the version that you have before you but I can give you the actual page in the *Gowers Review*, it's on page 98 of the report, so the numbering on the actual report. It sets out a very helpful table, table 5.3 "A summary of the current penalties for online and physical copyright infringement" and so this is what they called an "online infringement" so that's (2A) and they describe the nature of the offence, "Communicating to the public by electronic transmission in the course of a business or to an extent prejudicially affecting the right holder". Initially, on summary prosecution, "Up to 3 months and/or statutory maximum fine", sentence on indictment, "Up to 2 years in prison […]".

So they amended it to create the offence. Initially, the maximum penalty on indictment was only 2 years, and then within the same table, they call "physical infringement", "Making infringing copies for sale or hire" and "Distributing infringing copies in course of business or to extent that prejudicially affects rights holder, importing infringing copy into UK other than for private or domestic purposes", so the rest of our equivalent of 131. There, the penalty was recorded "Up to 6 months in prison […]" on a summary prosecution, "Up to 10 years in prison". So that report recommended that the maximum penalty on indictment be increased for what they call "online infringement" to 10 years to mirror that of other forms of infringement in a tangible form and I'm just trying to get to the date of…

WINKELMANN CJ:

So did you have a reference for that report, the *Gowers Review*?

MR MANSFIELD:

Yes, it's KD-AUT.263.

GLAZEBROOK J:

That still doesn't really answer our question as to why, in fact, it seems to go the other way to say that there isn't a difference between physical and online because they fixed that up when they were asked to.

MR MANSFIELD:

Can I just finish? That report was in December 2006 which is important because that's before we bring in our amendment in 2008. The policy considerations are key and that's why I took you at some length through the Parliamentary history because it is perfectly clear that our Parliament was very concerned about Internet service providers being scared away and/or the cost of Internet service providers being so high.

GLAZEBROOK J:

But that's nothing to do with Internet service providers because it's not – your submission is that even if you're not an Internet service provider and you are a broadcaster, nothing to do with an Internet service provider, that you won't be criminally liable under 131?

MR MANSFIELD:

That's right.

GLAZEBROOK J:

Well, what's the policy reason for that? I can understand the policy reasons in Internet service providers but they have the same policy reasons in the UK and they have the same sort of things that they do such as the safe harbour ones that we're talking about.

MR MANSFIELD:

Our Parliament took a different approach. It struck the balance in a different way. It said –

GLAZEBROOK J:

I'm just asking you what the policy reason is for distinguishing between the two and you say "Internet service providers". Is there anything else?

MR MANSFIELD:

I'm just not understanding Your Honour's question, I'm sorry.

GLAZEBROOK J:

Well, why would you say that if I, in my example before, if I distribute via the Internet an infringing copy to somebody else, that there should be a different result if I'm doing that in the course of business than if I distribute a physical copy?

MR MANSFIELD:

Well, I can only say, Ma'am, that that's just what Parliament has determined for its own reasons.

WILLIAMS J:

Wasn't the point you were making that our position here on the bottom of the planet is a bit more precarious than a country that has London in it and so we were much more a market taker?

MR MANSFIELD:

Definitely, and I thought I'd made that submission. I had understood Her Honour to be asking me "How bad is it if you're distributing a tangible item? Why should that be any different if you're distributing an intangible item?"

GLAZEBROOK J:

That's exactly what I was asking you.

MR MANSFIELD:

And, well –

GLAZEBROOK J:

And yet, you just say, well, "One, because they were concerned about Internet providers". Is there any other reason?

MR MANSFIELD:

Because I would have thought it was more easy to do and more commonplace and it happens without people actually realising that they're doing it because every time you're on the computer, you will be looking at –

GLAZEBROOK J:

Well, no, but it has to be in the course of business in order to have a criminal offence?

MR MANSFIELD:

That's right, but it's still, in my submission, more capable of being committed than other forms of infringement with a tangible object.

GLAZEBROOK J:

Okay.

MR MANSFIELD:

But can I –

GLAZEBROOK J:

No, I'm just asking if you can point to any –

MR MANSFIELD:

No, look, I understand – I'm not suggesting – Ma'am, I hope you don't take my response as suggesting that I think it's not a question worth asking. My point is Parliament has asked itself that question and Parliament has answered it and –

WINKELMANN CJ:

And you can't take us to anything beyond what –

O'REGAN J:

But it hasn't told us the answer. That's the trouble.

MR MANSFIELD:

No, and it often doesn't, sadly, when we look at what Parliament has done and why but you could not get a more comprehensive review of what Parliament was thinking on the way through. Sadly, it hasn't given me all of the answers to give you expressly but I don't think that the –

WILLIAMS J:

You've made that point several times.

WINKELMANN CJ:

Yes, and your point is it's followed the United Kingdom so far but not so far as to criminalise the conduct?

MR MANSFIELD:

Correct.

WILLIAMS J:

Can I just ask you, when you were referring to section 107 and the, is it the *Gowers Review*, whatever it was, you said that the following complaint from copyright owners, the penalty was upgraded –

MR MANSFIELD:

Well, they were asking for it to be increased.

WILLIAMS J:

And you said that the copy we have is post-upgrade, is that correct?

MR MANSFIELD:

That's what I thought from my quick look at it.

O'REGAN J:

No, it's pre-upgrade.

WILLIAMS J:

It's pre- because the penalties are different for the two?

MR MANSFIELD:

Okay, sorry, I must have been…

O'REGAN J:

Yes, ours is the pre-upgrade.

WILLIAMS J:

So you can confirm that for (2A) breaches, it was upgraded to 10 years?

MR MANSFIELD:

Yes, I can. Sorry, I thought it was the other way around from my quick look at it. That's why in the hardcopy I thought maybe we'd put the wrong version in. Electronically, I had the right but I thought – so thank you for pointing that out, Sir. So the point I'm making is for Parliament's own reasons, and we've seen the discussion and the need for balance which it was seeking to strike, it's the communication right not the distribution right and it didn't in the 131, and it would seem to defy common sense that having gone to all that effort, it would simply bundle a breach of the communication right within the concept of distribution. It would be contrary to what all of the jurisdictions were seeking to do which was to make the position clear as to what the right was to be so the dissemination of copyright was to be the communication right as far as New Zealand was concerned and if an infringement of that right was to have consequences, what those consequences would be, whether they be civil or criminal, and that the consequences was for the nation who was imposing the legislation to determine, and that's what our Parliament has determined, whether we agree with it or not, in my submission, and there's currently a review going on of these provisions of the Copyright Act in the current review which I think started late last year.

WINKELMANN CJ:

But there's no discussion paper on that?

MR MANSFIELD:

No, there is. There's an issues paper which we have included. I kept away from that.

GLAZEBROOK J:

Yes, good idea.

MR MANSFIELD:

But it's included within the bundle just directly before we get to the first and second reading of the Bill. So it's in there setting out what the issues are to consider and undoubtedly, Parliament will have to grapple with this issue again as to whether an offence provision needs to be included within 131 and if so, what the penalties should be.

WILLIAMS J:

In the earlier review, the issues paper and the paper before that, my recollection was the passages you took us to indicated a measure of doubt about whether distribution covered this kind of offending –

MR MANSFIELD:

Yes, Sir.

WILLIAMS J:

– if it is offending. Is it not possible Parliament was content to leave it to the Courts to resolve the meaning of the statute?

MR MANSFIELD:

No, with the greatest of respect, because –

WILLIAMS J:

That might be in your favour.

MR MANSFIELD:

Sorry, Sir?

WILLIAMS J:

That might be in your favour.

MR MANSFIELD:

That might be but Parliament did make amendments. It did create the communication right.

WILLIAMS J:

But it may have decided just it didn't want to resolve this, it could be left…

MR MANSFIELD:

The Court can't, in my submission, create an offence unless it's set out within the Act and –

WILLIAMS J:

Yes, but the meaning of the offence is to the Courts.

MR MANSFIELD:

This is the point – section 131 only refers to, and it's (d)(iii) "distributes" and that's a clear reference, if we follow the material through, including WIPO – 1500

WILLIAMS J:

Yes, I understand that point, you've made it clear.

MR MANSFIELD:

But it couldn't be clearer Sir in my submission.

WILLIAMS J:

Okay, that's your argument, you can leave it at that.

MR MANSFIELD:

And if that was so why would they amend section 198.

WILLIAMS J:

I got that argument as well.

MR MANSFIELD:

Thank you. I'm sorry if that sounded repetitive. They only other aspect in relation to 131, which is possession in the course of business, we discussed along the way. In my submission still a breach of communication right is not under 131 and this is the submission made, and this might be the first time you've understood this submission, is that possession in the course of business with a view to committing any act infringing the copyright, just picking up the reference to "any act infringing the copyright". It's how should that be defined. The Court of Appeal has determined that any infringement of the right protected in section 16 would be sufficient, and on the face of it that would seem to fit with the wording, "any act infringing the copyright". However, if you were in the course of business and you possessed an infringing file, then that means that there would be an offence for an infringement of any of the rights provided for by section 16, and that would mean that simply being in possession would make it an offence in relation to all of the rights. In my submission the way in which any act infringing copyright should be defined is a wee bit like we might find within the Drugs Act, where we have actual allegations of supply or sale, but we also have possession for supply or sale, and in my submission possession, together with any act infringing copyright, is a reference to possession for the purposes of committing any of the offences as defined by section 131(a)(b)(d)(e) and (f) and it's confined to those activities.

So it's not extended to include all of the rights provided to a copyright holder under section 16, because it's never been the case that infringement of any of the rights would constitute an offence simply on the basis that you might possess an infringing file in the course of a business.

WINKELMANN CJ:

Well it would seem strange if you could be committing a criminal act simply for possessing it for a purpose which would otherwise be a civil wrong. Is that your point?

MR MANSFIELD:

That's right, and that would be extending the specific offences captured by 131. So it's limited, in my submission, to the types, possession for the purposes of committing one of those other express and completed offences, which are listed already under 131. Now in saying that you've already heard my submission in relation to whether Megaupload is in possession or could be said to be in possession and it's impossible to tell from the Court of Appeal judgment whether it concluded that a user in possession was sufficient, and there is a risk that that is what they were contemplating, and that's why when we started I took you to –

GLAZEBROOK J:

It doesn't really, we have understood your submission, so do we have to speculate as to what the Court of Appeal may or may not have been doing? Or are we better just saying well this is what we say the law is.

MR MANSFIELD:

I'm content with that.

WINKELMANN CJ:

We will do the latter.

GLAZEBROOK J:

Well it's fine if the Court of Appeal said "X" and we say "no that's not right," but to say the Court of Appeal might have been meaning this and that would be wrong if they were meaning that, is not overly helpful.

MR MANSFIELD:

I suppose I was getting ready for a question that might have come to me from the Court regarding that so I could address it, but if that question's not coming to me, I don't need to address it.

WINKELMANN CJ:

We're being careful not to beep you so far Mr Mansfield.

MR MANSFIELD:

Well on my end, Ma'am, I'm not sure that hasn't happened.

GLAZEBROOK J:

Talking of computers, I'm actually having a bit of trouble with mine, but hopefully it will come right.

WINKELMANN CJ:

Just while we're taking a break from our thinking processes I thought we would take an afternoon tea break at 3.45, because we're going to sit through to five.

MR MANSFIELD:

Thank you. So I've addressed the issue of possession. I just wonder if I can just make these submissions and just give you some references. ISP store files at the direction of users. They do not possess such files. That's our primary submission. Storage galls within the definition of "copying". Mere copying is not criminalised under section 131, a submission I've made. An ISP does not possess files uploaded at the direction of users. Again, it stores them. And the following do not amount to the right and ability to control. If the user rather than the ISP decide what to upload and what file names and tags to use, and that's *Ventura Content*, and *Motherless*, and that's in the soft copy that we've just handed up, which is labelled volume 2/373, *Ventura*. Further if ISPs have the ability to remove or block access to materials posted on a service provider's website, substantial influence on its users' activities is required. If the ability to block or remove access amounted to control the

ability to comply with section 92C, safe harbour, would mean that an ISP did not comply with the safe harbour. That's unworkable, that's *Ventura*. It's also *CoStar Group Inc v Loopnet Inc* 373 F 3d 544. I have the reference for Costa Group, it's KD-AUTISM.131. It's also *Viacom v YouTube,* which you've already looked at.

Screening user uploaded material for illegal and/or objectionable material. So, for example, child pornography or terrorism, which is easier to identify for obvious reasons than whether a file is infringing or not. that's insufficient for possession. That's *Ventura*. It's also *CoStar Group v Loopnet* which is KD-AUT.131. Also *UMG* which we have referred to and also *Downs v Oath*¸ which is in the soft copy volume which we've handed up, and which we'll provide an electronic link to.

Further, an Internet service provider who highlights most popular material and/or giving rewards to users who post the most popular material has been found to be insufficient in *Ventura Content*. Further, automated functions to enhance accessibility to user stored material do not amount to control ie converting video format, and that's *Viacom v YouTube* as an example.

Along the way we've talked about the standard of knowledge required. So actual subjective knowledge of specific instances of infringement is required. Further, where actual knowledge of specific instances of infringement is established, at least for our purposes, to a prima facie basis. there would also need to be evidence that the appellants did not delete the file or remove the URL link so that the file was not accessible, and there was an absence of a connection in the ROC where there are examples of specific knowledge given to the appellants through correspondence they've received, or correspondence between them, and the files which are cited specifically where there is specific citing within the counts.

WINKELMANN CJ:

Sorry, can you just repeat that one again? There is the absence of connection in the ROC.

MR MANSFIELD:

So where there is communications that the US rely on for either actual or red flag knowledge. There is an absence of any evidence within the ROC as to the removal of access to that file. So the deletion of the file or the removal of the URL.

WINKELMANN CJ:

You mean on a request to do so?

MR MANSFIELD:

No, of what they did do when they had knowledge in relation to a specific – so when correspondence has been presented which might raise specific knowledge in relation to a specific file, there is the absence, in my submission, of sufficient evidence within the ROC to show in relation to that work, where it is linked to account, that the URL wasn't deleted or the file removed. So what the United States has in effect done is provided you with general knowledge of infringement on the site but failed to provide your specific knowledge in relation to specific work cited within the counts but where it has provided specific knowledge in relation to correspondence it received or correspondence between the co-conspirators which is not specific to account, there is an absence of a connection in my submission to show what happened. Namely, whether Megaupload removed the link or deleted the file and deleting the URL link is all that the US cases require for compliance with a takedown notice.

GLAZEBROOK J:

That is a bit difference, this isn't a takedown notice though is it, in those circumstances?

MR MANSFIELD:

No but once an Internet service provider has what they call red flag knowledge Ma'am, if they don't act then they might lose the safe harbour as a result of that. It doesn't mean that there is infringement but the party who is claiming that they should lose the safe harbour, needs to establish that they didn't delete the URL link or remove the file, to show that they failed to comply. And I am not suggesting that failing to comply amounts to infringement, it just simply means that they can't rely on their conduct being a permitted act. Because if it is a permitted act there is no infringement. So if they don't fall within the safe harbour because once they had actual or red flag knowledge, they didn't remove or disable the link, then it still falls to be decided whether they have committed a primary or secondary infringement and obviously under our Act it is only primary infringement where civil liability applies. So I am simply saying, as in UMG and in YouTube that there is this disconnect between what is alleged in the counts as relevant files with the evidence presented.

WINKELMANN CJ:

Yes, now you have past your hour and you are repeating your submissions Mr Mansfield.

MR MANSFIELD:

Repetition is never the aim of a good advocate. I apologise if I appear I am being repetitive, I was simply answering the question, but I can move on to the main.

WINKELMANN CJ:

Can you please tell us when you anticipate finishing?

MR MANSFIELD:

This is code and we have dealt with that along the way. I just wanted to make

WINKELMANN CJ:

No I am asking you to tell me when you are going to finish, because we said an hour.

MR MANSFIELD:

15 minutes.

WINKELMANN CJ:

That will be an hour and a half. What other topics do you have to deal with?

MR MANSFIELD:

I have to deal with the code issue and the general and specific issue, but I just want to give you references. You have got our submissions on this, but I just want to –

GLAZEBROOK J:

Well there is no point just reading references out. You might as well give us references in writing.

MR MANSFIELD:

Well I can do both.

WILLIAMS J:

Or either.

MR MANSFIELD:

No sorry, I didn't mean that to say. I wasn't listening to Your Honour. I was just meaning I definitely can give you references in writing is what I mean. But I just wonder whether I can just make the general submission so you know what I say in relation to code. I am sure you picked it up along the way but –

WINKELMANN CJ:

Well at 3.30 you are going to be asked to sit down Mr Mansfield.

MR MANSFIELD:

Very good Ma'am, thank you.

WINKELMANN CJ:

Not wanting to be unduly harsh but there has to be an end at some point.

MR MANSFIELD:

I know but this is very important.

WINKELMANN CJ:

I know it is very important, that is why we haven't rushed you actually.

MR MANSFIELD:

No I am grateful for that. I can complete it within that time.

WINKELMANN CJ:

Good.

MR MANSFIELD:

So just in relation to the Copyright Act being a code. I have taken you to the specific sections within the Act which in my submission inform that it is a code. It has previously been found to be a code by our Courts in *Brooker v John Friend Ltd* which is 1936 NZLR 743. The decision that the learned Court of Appeal referred to, *World TV Ltd v Best TV Ltd* where His Honour Justice Baragwanath identified it as a code and *Viacom Global (Netherlands*) v *Scene 1 Entertainment Limited (in rec)* (HC Auckland, CIV-2009-404-4305, 18 August 2009) . The lead, or the most express statement that it is a code came from His Honour Justice Baragwanath and that was in a case where for copyright infringement, could the plaintiff pursue essentially an allegation of copyright infringement under another piece of legislation and he determined

that you could not because the Act was a code and you were confined for remedies within the Act.

WINKELMANN CJ:

This was in the civil context was it?

MR MANSFIELD:

Yes Ma'am, thank you.

O'REGAN J:

It was the Fair Trading Act wasn't it?

WINKELMANN CJ:

The Fair Trading Act.

MR MANSFIELD:

And then we have referred to the Supreme Court decision in Canada which is a society of composers, authors and music publishers. I have given you the relevant passages. We have referred to *Dowling* and *LaMacchia* in the United States and we have referred to the text of *Nimmer* on the way which confirms that both *Dowling* and *LaMacchia* are considered good law for the principle that I have espoused. In relation to the position, even if you conclude it is not a code, if it is not an offence under the Copyright Act, then that being a specific piece of legislation, it is not possible to turn to general dishonesty enactment such as the Crimes Act to find a suitable offence. And I will give you the references but for the record they are *Stewart v Grey County Council* [1978] 2 NZLR 577 (CA). It is a New Zealand authority.

WINKELMANN CJ:

Do we not have that?

MR MANSFIELD:

You do have it. It is KD-AUT .321 and the *Commissioner of Inland Revenue v Wellington Regional Stadium Trust* [2006] 1 NZLR 617 (CA), KD-AUT .326, and *Goodwin v Phillips* (1908) 7 CLR 1 (HCA).

WINKELMANN CJ:

Now just slow down a little bit.

O'REGAN J:

I think you have to give us all this in writing.

MR MANSFIELD:

Yes I am going to give it to you in writing. *Goodwin v Phillips.*

WILLIAMS J:

Give me the name of the stadium please.

O'REGAN J:

Wellington Regional Stadium.

GLAZEBROOK J:

Pretty sure we didn't say anything about copyright in that, or did we?

MR MANSFIELD:

No.

GLAZEBROOK J:

I know it is just a general and specific I think that is what you saying.

MR MANSFIELD:

But there is one that we have included. I always feel slightly weird by saying this name, it's *R v Dady* [2013] EWHC 475 (QB) and I will give you the reference for that. It is a UK decision. It appears to be in the hard copy. It is volume 10 page 4036 and that was specifically in relation to copyright, that is

why we have included it and the electronic reference is KD-AUT .335 and it is *R v Dady,* and

the decision of *Norris*, which does relate to extradition also refers to it and *R v Rimmington* [2006] UKHL 63, [2006] 2 All ER 257, which are the lead authorities. So it couldn't be clearer, in my submission, that where you have a speciality piece of legislation, as clearly the Copyright Act is, if you determine against my submission that it's not a code, if it's not an offence within the Copyright Act, can't look at general pieces of legislation such as the Crimes Act in order to prosecute an offence, and they all make the point, and especially in a case such as this, in my submission.

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The reference to in the course of business wouldn't be a requirement under the Crimes Act. So any member of the community could be prosecuted and the penalties are quite different. Are in fact significantly higher. So the liability would be higher if they were permitted to be prosecuted under the Crimes Act.

WINKELMANN CJ:

And what do you say to all those cases the Crown has referred us to in which there are clear statements to the effect that we've got specific pieces of legislation, the Crimes Act can still apply notwithstanding there are offence provisions under those specific pieces of legislation.

MR MANSFIELD:

One is the Fisheries Act, and there it was an offence under the Fisheries Act. So there is the distinction there, although I don't accept that you could compare the Fisheries Act to the Copyright Act. But it was an offence under the Fisheries Act and the Court permitted prosecution under the Crimes Act. I submit to this court that that should not have been permitted in that case, for the reasons that I have espoused through my submissions. The correct approach is that if you have a speciality piece of legislation, which I would have submitted the Fisheries Act was, the Court should not have permitted prosecution under the Crimes Act.

WINKELMANN CJ:

And in that particular case was that prosecuted under the Crimes Act to the effect of a greater penalty?

MR MANSFIELD:

Yes.

WINKELMANN CJ:

Mmm.

MR MANSFIELD:

And that is the concern which, in my submission, should run against it. The United Kingdom is slightly different because they have common law crimes, conspiracy due to fraud, which we don't have in our Crimes Act. We only have the specific dishonesty crimes set out in the Act. So the position was always different in the United Kingdom, but *Dady* is a clear example where that was not permitted.

Now the limitation period I can address the Court on briefly. If you turn to section 131A, that was inserted, yes, in 2002 through the Trademarks Act 2002, and that was when the penalties changed or were increased, and if you look at our soft copy volume that we've just given you, and you turn to grey tab 7.

WINKELMANN CJ:

This is the supplementary volume bundle, volume 2?

MR MANSFIELD:

Correct, turn to grey tab 7, and what we've set out there is the legislative history for section 131 from the Copyright Act in 1913, right through to the current day, and the various amendments and/or changes to it which have occurred. The reason we've done that is that is what the Court did in *Dowling* and *LaMacchia* just to show the very careful way in which Parliament has determined what should be offences and the way in which they should be

penalised, and you'll see if you study that, and I won't take you through it in detail, that the nature of the offence provision has changed, but also the penalty and the penalty structure has changed.

O'REGAN J:

Why does that affect limitation?

WINKELMANN CJ:

Why are you showing us this?

MR MANSFIELD:

That's a good point. The reason I took you to it was the change, so the introduction of section 131A was brought about by an increase in the maximum penalty. Sorry, and I just thought at the same time I would take you to that chart so you would have it.

Section 131 just reads simply despite section 14, and if you refer to section 14 it sets a limitation for the filing of an information in relation to a summary prosecution of six months. So despite that limitation being 14 months, an information in respect of an offence against section 131 may be laid at any time within three years of the time when the matter of the information now arose.

Now the learned Court of Appeal concluded that was only in relation to a summary information rather than a summary and indictable information. In my submission, it relates to any information laid for an offence under the Act in relation to 131 because it reads, "An information," not a summary information or an indictable information, "An information in respect of an offence against section 131 may be laid in any time within three years." It's a limitation section. So it means that whether it be summary or indictable you have three years to lay the information.

WINKELMANN CJ:

And they haven't changed that wording.

GLAZEBROOK J:

I was going to say that.

ELLEN FRANCE J:

It's been repealed now, hasn't it?

MR MANSFIELD:

Yes it has, it's been repealed now. With the Criminal Procedure Act, there's no such thing.

GLAZEBROOK J:

That's what I would have assumed.

MR MANSFIELD:

No, Your Honour's quite right. it's been repealed with the Criminal Procedure Act because we don't have summary and/or indictable. But my point is, no matter whether you wanted to pursue and individual summarily or indictably, because you would have that option, because the maximum penalty had increased to three years, it was less than that before so there was no election, then you've got three years to do it. So it increases the period of time you can lay a summary information, not within six months now within three years, but any information has to be laid within that three year period, and as this Court will know from Article 6 of our treaty, that's significant because our time limitation periods apply. So if there was an allegation that falls outside our limitation period, then it will not be an offence for which someone can be extradited for.

So that's a very straightforward argument. My learned friend runs a contrary argument simply saying that's simply increases the ability to lay a summary information within three years, sorry increasing it from six to three years, but in reality the section is very clear, and there are corresponding similar provisions in what I would call Ministerial Acts so where offence provisions are created in other forms of legislation outside the Crimes Act which lay a specific period in

which an allegation must be laid, and this is just another classic example of that.

GLAZEBROOK J:
And this point only applies to the specific counts, is that…

MR MANSFIELD:
Well the good thing, I suppose, is it applies to count 8, which is the YouTube allegation. We've discussed why that's important and it also would apply to *Taken*, which I don't accept is a conspiracy on the record of case, but it would apply to that also.

GLAZEBROOK J:
And that's all, as I've understood you before –

MR MANSFIELD:
No it's not all.

GLAZEBROOK J:
You say there's others as well?

MR MANSFIELD:
It's not all, but the importance of that, for those two counts, is that those are the only two occasions where it could be said that one of the appellants was a direct infringer of the communication right. So that's why I'm citing those two counts for you.

Now unless you have any questions, that brings me to the end of my submissions, and I think for a change I've complied with a timetable requirement from the Court.

GLAZEBROOK J:
One minute to go.

WILLIAMS J:

You're a minute early.

MR MANSFIELD:

Thank you. There's just one other point that I'd like to raise, and I perhaps shouldn't. In the initial memorandum, oh there's two points, but in the initial memorandum filed for the purposes of the arrest warrant in the District Court, under section 20, so rather than going to the Minister first the United States applied for an arrest warrant straight to the District Court, as its permitted to do, and it went to the District Court on the original indictment issued by the United States. That memorandum that accompanied that application solely referred to section 131 and money laundering and then it wasn't until 31 October 2013 that the United States expressly sought to place reliance on the Crimes Act provisions and that document setting out that notice is document D-3638. So right up until October 2013, the United States had asserted in our Court that this was all about copyright infringement. It wasn't until October 2013 that the Crimes Act provisions sought to be relied on by the United States in correspondence specifically sought by its then-counsel.

The second point I want to make is that when it went to the Minister, so after the District Court where the provision or arrest warrant was issued, on the original indictment, the superseding indictment, not the original indictment, went to the Minister and it was then the superseding indictment which was relied on for the extradition hearing and provided the jurisdiction for the Court to hear the matter. And if you look at sections 20 and 22, so 20, 21, and 22, you'll see that there is a structure within the Extradition Act which provides what must occur and in my submission, when the original arrest warrant and indictment came over and was utilised for getting the original arrest warrants in New Zealand under section 20, it was that document that should have been referred to the Minister and formed the jurisdiction of the Court at the extradition hearing.

When the superseding indictment was approved by the grand jury in the United States, when that came to New Zealand, that should have gone through the District Court pursuant to section 20 then to the Minister under 21 and 22. So it shouldn't have been able to have been included partway through the process and as a result, we say on that basis, the District Court did not have jurisdiction to determine the matter on the arrest warrant from the superseding indictment.

WINKELMANN CJ:

And where does this issue come up? Is that through your judicial review?

MR MANSFIELD:

That issue comes up, Ma'am, under the issue of jurisdiction which, in my submission, can be raised at any point through the –

O'REGAN J:

Isn't this the point you asked for leave on?

MR MANSFIELD:

Yes.

O'REGAN J:

You didn't get it.

MR MANSFIELD:

Well, we –

O'REGAN J:

So why are you arguing a point you were refused leave on?

MR MANSFIELD:

As I understood it, it could be argued under point 10 if the Court concludes –

O'REGAN J:

Well, if you ask the Court for leave and it says "No", that actually means "No".

MR MANSFIELD:

Well, that was under the separate proceeding, Sir.

O'REGAN J:

It's the same argument.

MR MANSFIELD:

Sir, I accept that. May it please the Court.

WINKELMANN CJ:

Thank you, Mr Mansfield. Mr Rogers.

MR ROGERS:

I wonder, Ma'am, whether the Court takes the adjournment if we might just adjourn a little early so that I could set myself up.

WINKELMANN CJ:

I suppose so, yes, we'll do that.

COURT ADJOURNS: 3.34 PM

COURT RESUMES: 3.48 PM

WINKELMANN CJ:

Mr Rogers.

MR ROGERS:

May it please Your Honour. I have filed a synopsis of submissions dated 5 April and a synopsis of submissions in reply dated 15 May and I trust those are before the Court.

WINKELMANN CJ:

Yes.

MR ROGERS:

And in accordance with the Court's minute of 27 May that counsel should work to avoid unnecessary repetition of oral submissions, I am simply adopting the submissions made by Mr Illingworth generally and those of Mr Mansfield on the Copyright Act issues and whether the Crimes Act provisions are available as pathways to the US.

My concern is to focus on the position of Mr Batato whose position, I suggest, has not been properly addressed in the Courts below. According to the USA itself, Mr Batato was the chief marketing and sales officer for Megaupload Limited. He was in charge of selling advertising space and supervised a sales team of approximately 10 people around the world. He was not a shareholder in Megaupload. In my submission, there's no evidence that he did anything other than what any employee in his situation might do or, alternatively phrased, that he did anything beyond acting as an ordinary employee.

In my submission, the Court of Appeal failed to properly address Mr Batato's position for three reasons. One is his position was not fully encompassed within the two questions of law in respect of which Justice Gilbert granted leave to appeal to the Court of Appeal. The second was that the Court of Appeal dismissed the appeal against the decision of Justice Gilbert to decline judicial review and Mr Batato's position was within the scope of the judicial review application. Three, despite reversing its earlier decision in *Cullinane*, the Court of Appeal wrongly, in our submission, reformulated the double criminality test.

One matter that Mr Illingworth mentioned among errors that the District Court committed was in relation to the prima facie test, and I'm not going to go through and repeat his submissions. He did mention that the Court relied on

the English case of *R v Governor of Pentonville Prison ex p. Osman* and drew your attention to *Arcuri* which was adopted in an extradition context by *Ferras* and *MM* by Canadian Supreme Court and I just reinforce the importance of that submission and perhaps the most helpful of the New Zealand authorities on the test is *R v Flyger* [2001] 2 NZLR 721 (CA) where the Court stated not in an extradition case but a case involving circumstantial evidence "Where, as here, the Crown case is dependent, in whole or in part, on inferences, the credible evidence must establish facts *capable* of supporting the inference. The Court should not decide on such an application or submission whether the relevant inference *should* be drawn."

In my primary submissions, I have set out submissions in relation to party liability and the way Mr Batato's case has been handled or not handled. I am not going to repeat all of my submission. It's succinctly set out there. I do wish to emphasise however, to supplement what I've said there, that significantly, section 66 does not appear in the judgments of the District Court, the High Court, or the Court of Appeal. It was referred to by the US in submissions in the High Court, paragraph 587, as giving some shape to the Treaty concept of participation in an extradition offence, both section 66(1)(a) as joint principals and (b) said to be aiding and abetting although of course (b) is actually aiding and (c) is abetting, and also section 66(2).

The submission the US has made in the Supreme Court in relation to counts 4 to 13 is of aiding and abetting only under section 66(1)(b) and (c). This court has not granted leave for the issue of the satisfaction of the case to be under section 24(1)(b) to be considered but what I've done in my reply submissions, in a schedule at the end, is to set out extracts from the ROC and simply how those extracts could have been considered by the District Court Judge. I'm not suggesting it's a 24(2)(d) analysis but the issues raised by those extracts did require careful analysis by the Court as required by the *Dotcom* disclosure judgment and for that reason, I have set them out there, and for the reasons given by Mr Illingworth the deficits in the District Court Judge's analysis of the

evidence in my submission are not rectified by the High Court or the Court of Appeal and those are, in fact, my submissions.

WINKELMANN CJ:

Thank you Mr Rogers. Now are you all right to set yourself up there? We'll take a three minute break, is that enough for you?

MR RAFTERY QC:

Yes.

COURT ADJOURNS: 3.56 PM

COURT RESUMES: 4.00 PM

WINKELMANN CJ:

Mr Raftery.

MR RAFTERY QC:

Your Honours, when it comes to copyright infringement the advent of the Internet has changed the landscape dramatically. If, as I imagine some of you have from the comments that you've made, had the opportunity to look at say just the introductory passages to the indictment, you'll notice that Megaupload had in the course of its six or so year history 180 million registered users. Those are the sorts of figures that would have made copyright infringers of the 19th and 20th century green with envy and the extent of the reach, not just in terms of numbers but in terms of geographic reach, is limitless as far as the Internet is concerned. And against that backdrop when you see that changes were made to the Copyright Act, maybe more than one over the last decade or two, in relation to adapting copyright and the rights that copyright holders have, and their protection, to take account of the digital age in those technology amendment acts, and the fact that the penalty for infringement under section 131 has increased 20-fold in 2002, suggest, in my submission, that Parliament takes the advent of the Internet age and the fact of copyright infringement in it, very seriously. So that it would be surprising, in my

submission, that if we were to accept the arguments, especially those put forward by my learned friend recently, Mr Mansfield, although put forward on behalf of all the appellants, that the ambit on the creation of the amendments to the Copyright Act are designed to ensure that someone in the position of the appellants are completely immune from prosecution is a result that would require very careful analysis, in my submission, before being accepted because it seems to fly completely contrary to what I would suggest is the common sense of the situation. It is, in fact, quite a staggering proposition in my suggestion.

The way I wish to approach this case is in a brief little list of issues, which I'll now ask to be handed out to Your Honours, so you can just see where we're going. It's a roadmap for you. It takes account, in effect, it's using your own points but just to show what order we're going to deal with them in, and then you'll have an idea of where I might be up to, or where my friends might be up to, and that' the sole purpose of it. There's nothing particular earth-shaking about it.

GLAZEBROOK J:

And for the record you're going to just tell us when you're moving from one to the other?

MR RAFTERY QC:

I will, absolutely.

GLAZEBROOK J:

It's for the benefit of the transcript.

MR RAFTERY QC:

Certainly, yes, I understand that. As Your Honours will see we have as it were put a little heading above the list of issues, the questions that were reserved by Justice Gilbert in which leave was given, just to show that where we saw, maybe correctly or not, the issues that we address say in counts 1 to 6, are the issues that relate to question number 1. Transposition is clearly an

issue that comes up under question 2, and hence that's going to be the seventh matter. Number 8 is now going to Monday, as I understand it, on the agreement of the Court, and that's all that's going over to Monday, so that 8, as it were, would go to the bottom of the list. But otherwise that's the order in which we intend to approach matters, and as I understand it, from the agreement is now that once the Crown is finished on one to seven, and eight and nine, my learned friends will then reply on those matters, we'll get those out of the way, everything is done hopefully by the weekend, and then all you've got to worry about on Monday is *Cullinane.*

So that's all I want to say about where I'm going. I'm going to start, therefore, with number 1. During the course of the submissions of my learned friend, and also in a remark addressed to me, Your Honour the Chief Justice made clear that you wanted to understand how it was that the counts which are, what do I call it, the Crimes Act pathway to those counts, are in fact how they work and what some of my friend's objections were to them. Now partly I suppose because they overran on other matters, they didn't really, either of them, address those except in the most general of ways. So in order to understand what their complaints were I've gone back to their written submissions in order just to remind Your Honours what they were.

Mr Mansfield's complaint essentially was that because of the protections provided by section 92B and C there was no dishonesty or no deception and could be no dishonesty and no deception on the part of an Internet service provider which, of course, obviously applies to all the appellants so that in that case, it seemed to be an argument that really was one that fell within a discussion of the safe harbour provisions rather than an issue about the Crimes Act charges except to say, if that is correct I could be charged with nothing, so it doesn't matter whether we chose the Crimes Act or any other Act, the answer would be the same. We are immune from prosecution because of the safe harbour provisions. Mr Illingworth's point was essentially, and it was addressed not so much his main submissions but in his reply submissions after we put in our submissions, and he made reference to one

case, but I don't think it was exclusively the matter that you wouldn't necessarily refer to, but the case of *Norris*. But he was saying the essential criminality match between the United States offences and the Crimes Act offences that we proposed just did not exist. So to address that issue is what I would like to deal with first and as I say, Your Honour the Chief Justice asked for some help on that but before I do that, I just want to say something about the essential match test and just going to quote something that I found useful. It may or may not appeal to any of Your Honours but something from the Supreme Court of Canada in a case called *Fischbacher*. It is a very short matter and I can read it, you don't need to get the case but if you want it I can tell you it is in volume 3 of the appellants' authorities. Sorry, in our authorities, it is our authorities, volume 3 part 2. But it is tab 50 but it is Justice Charron saying there, noting something which Mr Illingworth said, emphasised very strongly, which I accept. That this is conduct - based analysis and he says at paragraph 29 of that judgment. "Consistent with the vast majority of international practice, Canada has adopted the conduct-based approach to determining double criminality codified in section 3(2) of the Act." That is effectively our 4(2) of our Act. "As a result it is not necessary that the Canadian offence described in the ATP or the committal order match the foreign offence for which the person is sought or surrendered, in name or in terms of the constituent elements, it is the essence of the offence that is important on the conduct-based approach." And he goes on to quote *La Forest* text on that. That is I know something that probably is well ingrained in Your Honours minds by now but that is what informs the approach to this case on this analysis which I am now going to just begin with you.

In order to see where the Crimes Act offences fit in, it is necessary as my friend has emphasised and I accept, to look to see what is the allegation made in the papers that accompany the application for extradition. And a question did arise, at an earlier stage during the session I think with Mr Illingworth, about the documents that are necessary and he made a complaint, you may remember, about there was such a plethora of documents

and so difficult a task for the District Court Judge to be able to just work his way through that material in order to find out what it was and the ROC which had many supplements was so big and comprehensive, it was particularly a difficult task to understand. In my respectful submission it is nothing like as complicated as my friend has suggested and in fact the plethora of paper work that actually has gone in to challenging that matter, infinitely exceeds the actual ROC and the other accompanied papers itself. We have noted in our submissions and I think you will have seen it, that we say you need look no further than the superseding indictment in order to find the allegations. I am not saying that that should be the matter rule right across the board because there may well be cases where one needs to look at the ROC. In other cases where I have had occasion to look at American indictments, I have noticed the only ones I have looked at have been much less prolix than this one. So this has a lot of information in it but even so, there might be a case in the future where you need to look beyond just that, so I am not making a proposition that it is the indictment and indictment alone for all cases but in this particular case I think we need look no further than the indictment because what we are not talking about at the moment is evidence. We are talking about a 24(2)(c) test, so we are looking to look what is the nature and what is the essence of the criminal offending that is alleged.

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O'REGAN J:

What do you say to the complaint that the United States did not file a section 18(4) summary?

MR RAFTERY QC:

Section 18 itself mirrors the Treaty and in Article10 I think it is of the Treaty, they set out a number of things that are mentioned there. The phrase "statement of facts" appears there but it also talks about, of course, in that case because the Treaty was drafted before the section 25 ROC procedure was incorporated. It talks about all those other things that we used to require

before the ROC procedure came in. Those signed depositions of each of the witnesses and certified in particular ways and often technicalities arose about that and complaints and conforming with the actual formula required. So that's where that phrase "statement of facts" come from. But if you just think generally about what the jurisprudence on approach to treaties generally and in the context of extradition it has been said that you try to read the Treaty liberally in order to give effect to the intent of the Treaty and against the comity of nations, that we are here to try and assist the requesting state, received back into its jurisdiction someone accused of serious crime and that matter can then be tried there and we expect the same reciprocal arrangement if we make a request to another country overseas. So that in my respectful submission, the phrase "statement of facts" is not a term of art that requires a separate document. Courts have, over a large number of cases, looked at the material before them and usually with the help of counsel because the applicant is usually represented by Crown law, the respondent is represented by counsel and they fight about things and then they generate more paper work. But effectively the documents that came in February, not the first original document when the arrest warrant was made, but the bundle of material that came on 21 February was everything that you see in your documents for hearing bundles. If you go to volume 8 of that because I am going to take you to that, so I think it will be helpful if you had that before I go to it. It is one of the green covers. It is labelled volume 8 part 4(1) of United States supporting documents.

O'REGAN J:

So is your answer, you don't need a statement of facts as long as you have got the information in some other document?

MR RAFTERY QC:

Yes. These documents effectively amount to a statement of facts when put together and that is my submission and certainly that is often been the way they have been treated in other extradition applications so that is why we say, where is a good starting point. In fact, it is the starting and ending point as far

as our submissions in this particular case, as I have said, because it is quite easy, as opposed to what my learned friend has said, hard; to actually find out what the basic allegation is. Against which you then have to see whether there is some corresponding offence. So, if you go to the indictment itself and that starts at page 3705 in volume 8 and turning over the page to 3706. I just note, just a couple of things in the brief general allegations before I move on and you will see the reason why I refer to paragraphs 1 and 2 in particular. You can read on but you don't need to I think for the purpose of what I am now about to say. It mentions the nine entities there, the seven individuals and the two companies and were members of a Mega Conspiracy, a worldwide criminal organisation whose members engaged in criminal copyright infringement and money laundering on a massive scale with an estimated harm to copyright holders of $500 million and a reported income of $175 million." In that first paragraph you learn that this case has a backdrop to it; copyright infringement and then when you look at paragraph 2 it tells you that "Megaupload is a commercial website and service operated by the Mega conspiracy that reproduces and distributes copies of popular copyrighted content over the Internet without authorisation". So there, you've got another sense of what's being alleged against them. It is a commercial reproduction and distribution of copyrighted material with no authorisation to do so.

And then we come very quickly to the gravamen then of what the allegation is going to be to start with. "Since at least September 2005, Megaupload has been used by the defendants and other members and associates of the Mega conspiracy", and this is the key part now that's quite important, "to wilfully reproduce and distribute many millions of infringing copies", it doesn't worry about the numbers, millions or whatever, "of copyrighted works including motion pictures, television programs, musical recordings, electronic books, images, video games, and other computer software over more than five years of existence", so it goes on. We don't need to look on that because then it's now expanding on the story rather than what you're looking for is what's the essential conduct or what's being alleged against them.

But at the moment, you're looking at general allegations. So any Judge would want to say "Well, let's go to the counts and let's see what they allege". So if we go to count 1 – actually, I'm not going to count 1, I think it's better to start with count 2, just while we mention copyright infringement, and count 1, just to remind you, is the racketeering or the organised criminal group offence which is easier to understand and fit in once you've looked at the other charges. So if we start with count 2, which is on page 3730, we note that in paragraph 51, count 2 begins – the particulars under the count, you're told it's "1) A conspiracy to commit copyright infringement". That would be corresponding to our indictments the statement of the offence, and then what follows are the particulars.

The factual allegations contained in paragraphs 1 through 45 are re-alleged and incorporated as if set forth in their entirety. So in other words, paragraph 1 and 2 that I talked about are an important part of that exercise but in fact you'll find it covers much of the same ground and after listing the seven people and the two companies concerned, it says "Each knowingly and intentionally combined and conspired and agreed together with each other and with other persons known and unknown to the grand jury to 1) wilfully infringe for the purposes of commercial advantage and private financial gain at least 10 copies of phonorecords", then it talks about the value and so on, it's not obviously irrelevant to United States' charge but to the general allegation not particularly relevant, "and 2) wilfully infringe for purposes of commercial advantage and private financial gain a copyright by the distribution of a work being prepared for commercial distribution by making it available on a computer network accessible to members of the public when the defendants knew and should have known that the work was intended for commercial distribution in violation of title 17" et cetera.

And then there follows something under the heading "Ways, manner, and means of the conspiracy". We don't need to look through that.

GLAZEBROOK J:

I think we did ask you to just identify whether it's primary or secondary liability and exactly the basis. I presume you'll summarise that at some stage at the end. The reason I bring that up, "was intended for commercial distribution" but it doesn't sound as though the idea that it was intended for commercial distribution by – it's alleged that it was intended for commercial distribution by the Megaupload conspiracy itself?

MR RAFTERY QC:

Well, if you accept that these nine entities named are part of the Mega conspiracy, it is said that those nine people, and others, wilfully infringed for the purposes of private financial gain and they – for the purpose of commercial advantage and private financial gain a copyright by the distribution of a work being prepared for commercial distribution. In my respectful submission, the allegations are wide enough to cover the activities of this group so that forgetting –

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GLAZEBROOK J:

What I was really asking is what exactly is it, in specifics, that the United States is saying they did in order to do that, i.e. – and it's related to whether it's the users infringing copyright, whether it's the secondary distribution, whether there's distribution at all, whether it's providing the mechanism and encouraging or what exactly the allegation is.

WINKELMANN CJ:

Yes, because Mr Raftery, I think you can assume from our question that we weren't – well, I for my part found hard to relate the indictment to the practicalities of what was happening in the Megaupload business in terms of the Copyright Act and whether it was primary offending…

MR RAFTERY QC:

I may have misunderstood Your Honour's question because I had understood that you found difficult, and taking the cue from my learned friend

Mr Illingworth that he was saying it was so difficult to know what they were accused of –

WINKELMANN CJ:

Well, that's a different issue but there is a –

MR RAFTERY QC:

And that's what I – and then I thought –

WINKELMANN CJ:

Well, no, I think it's almost the same issue, actually, because the question is what is it? Is Megaupload's operation meant to be distributing them direct or are they meant to be facilitating the commercial distribution? Because they're not receiving a per-item payment.

MR RAFTERY QC:

I understand that, Your Honour, and I'll tell you – if I am, and I wasn't obviously ad idem with you, the way we had intended to approach it, because I'd understood from the question, which maybe was too succinct, that you wanted some correlation between the general allegation and the Crimes Act offences –

WINKELMANN CJ:

Yes, that too.

MR RAFTERY QC:

As you may remember, there are 228, 249, 240 as mentioned, and section 98A obviously, and what I was proposing to do at this stage was just look at that correlation. The section 131 which gives rise to the very questions you're asking about is something that we're going to deal as a – at that stage, we will come to that point because we intend to answer that for you at point 4.

WINKELMANN CJ:

But doesn't your Crimes Act offending also give rise to that question? Because you're relying upon breach of copyright, aren't you, as the essence of your Crimes Act matters?

MR RAFTERY QC:

Yes.

WINKELMANN CJ:

So who's breaching the copyright?

MR RAFTERY QC:

We're not necessarily relying on the actual breaches of copyright because this comes down to one of those questions that my friends have been addressing about needing specific evidence of specific copyright infringements. As far as the conspiracy charge is concerned, it is in my submission not necessary to actually provide evidence of any specific name-by-name violation of copyright because the allegation is that they conspire together in order to infringe copyright generally for financial gain. That is different when you come to counts 4 to 8 because you're looking at very specific things but the allegations in the first three counts which are of conspiracy is to look and see what they are alleged to have done and when it comes to 131, I accept that what we will then be doing, addressing things like primary and secondary infringement, but at this stage, it was just to see – if we ignore that, put that to one side at the moment, and then we look at saying the other counts, which you are using other pathways for, do those pathways seem to fit with the general allegation of – because you're making, for example, in this case, looking at the top line on page 3731, you're making available –

GLAZEBROOK J:

What I'm really wanting you to do is to say what the essence of the conduct is, at the moment forgetting about the Crimes Act, forgetting about everything else, just saying what is it they did is the essence of the conduct that is said to

make them criminally liable. So forget about conspiracy, forget about anything, what is the essence of the conduct?

MR RAFTERY QC:

Well, you may remember, I think one of Your Honours referred to it at a stage to my learned friend Mr Illingworth, there is a reasonably lengthy list of the sort of things that were alleged, so the conduct is things like encouraging people to upload infringing material on their website by offering reward programmes, then those who are downloading –

GLAZEBROOK J:

If you could just slow down just slightly.

MR RAFTERY QC:

Certainly.

GLAZEBROOK J:

So encouraging to upload infringing material by offering, sorry, incentives, was it?

MR RAFTERY QC:

Incentives or their rewards programme, yes.

GLAZEBROOK J:

Yes.

MR RAFTERY QC:

That's one thing, for example, but as far as then – the other thing they were encouraging is the accessing, either by livestreaming or by downloading, the material that has been uploaded by another set of users by –

GLAZEBROOK J:

And how were they doing that?

MR RAFTERY QC:

By making this material, this infringing material, available on a computer network, and –

GLAZEBROOK J:

So they were doing that by having it on their network?

MR RAFTERY QC:

Yes. So that when you type in the word "taken", for example, you're looking for that film before it's come out commercially in the United States, these, what are called "third party linking sites" will take you to places where it might be available and Megaupload, which according to the ROC at one stage had something like 4% of the Internet traffic worldwide, had a large market share of that and so that the more URLs, the more links you can get to link to that material, the more people looking for that material will be coming to your site to download it, and then what they don't do is actually download the whole film because, as the people have agreed amongst themselves, they waited for that sweet spot, normally about 20 minutes before the end of a film, when it cuts off and you have to pay. If you want to see the rest of it, become a premium user, pay a subscription, and then there are different rates of pay but that detail doesn't matter. So they're encouraging the uploading and encouraging the downloading.

So if you look at those two things, without going through the rest of the conduct at the moment, unless you want a lot more detail about that, it's quite clear that –

GLAZEBROOK J:

Well, it's really just the essence so it's encouraging to upload and encouraging to share, if I can do that in a…

MR RAFTERY QC:

In a loose way?

GLAZEBROOK J:

In a loose way, and the reason you say that conduct was there was the rewards programme and the cutting off?

MR RAFTERY QC:

Well, they're two things. There's a long list of various things that we went through –

GLAZEBROOK J:

Yes, I understand that, that's what you've given us at the moment.

MR RAFTERY QC:

Yes, as examples rather than an exclusive list.

GLAZEBROOK J:

And is that the essence of the conduct and that's all there is in essence?

MR RAFTERY QC:

The essence of the conduct that we then have to look at when we're looking at this charge, for example, the later charges –

GLAZEBROOK J:

I understand that, it's just what I was really wanting was what is the essence of the conduct?

WINKELMANN CJ:

So Mr Raftery, where do we go to get a simple list of the conduct?

MR RAFTERY QC:

I can't put my finger on it. I actually had a little list for me actually written out just to give you but I –

WINKELMANN CJ:

And was it ever produced?

MR RAFTERY QC:

There is – I think you go to the ROC preferably but the ROC I haven't got with me for the very reason that I'm saying we keep away from that because I think you can round it down but I will provide you with one in a very neat way.

WINKELMANN CJ:

And was it provided in a neat way in the District Court?

MR RAFTERY QC:

It's in the materials. It's just listed there and I can give you the reference to it. I haven't got it right there in front of me –

WINKELMANN CJ:

It's in the ROC?

MR RAFTERY QC:

But in essence, if you've got that sort of, the things that show the encouragement and to get this to happen, and then what are they doing when they've done all that, it's making it available through a computer network and they're doing in order to monetise this for themselves for the financial gain because they mention that quite there so they are earning money from this in a big way and it was the biggest source of revenue. The second biggest source of revenue was the advertising revenue that Mr Batato was in charge of.

WINKELMANN CJ:

So they monetised it in two ways, did they? They monetised it through advertising and through this premium membership?

MR RAFTERY QC:

Yes, that brings more money, the latter that you've just mentioned, and then Mr Batato was looking for people who would advertise on some of their sites so that people might go to their sites, they're willing to pay an advertising fee

in order to be able to advertise on those Megavideo sites and that was the other way that they were earning money.

ELLEN FRANCE J:

Could I just check if we're at page 3731 of the indictment in relation to count 2?

MR RAFTERY QC:

Yes.

ELLEN FRANCE J:

Paragraph 55 refers to it being a further part of the conspiracy that the content available was provided by known and unknown members et cetera including several of the defendants who uploaded infringing copies. So am I right that that's uploading infringing –

MR RAFTERY QC:

Yes.

ELLEN FRANCE J:

That that's the allegation?

MR RAFTERY QC:

Yes.

ELLEN FRANCE J:

And does that relate to – that's part of the conspiracy?

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MR RAFTERY QC:

It's – the acts are in furtherance of it because if they upload themselves, it's there available for others to – you know, with part of this group of downloaders and live streamers so they're not just relying exclusively on others. I mean

they're in the main relying on the others because they are much more proactive than members of the conspiracy itself.

ELLEN FRANCE J:

And is that then reflected in the particular counts. I am just trying to understand exactly what that relates to.

MR RAFTERY QC:

In the first three counts, it's not related specifically as a specific allegation. In respect of taken, you will see that it's a particular activity of Mr van der Kolk but in the ROC for example, there are other examples of conspirator X asking conspirator Y where do we find this on our system. So they are being sent a link. So one of them is, if they haven't got them, they are looking but then they are then downloading for the other person. They are not one of the big themes.

ELLEN FRANCE J:

No I just wanted to understand.

MR RAFTERY QC:

The full particulars, I mean if you read through all of this, you get a much better picture of it. But I was just trying to say at the very beginning, you are talking about, well they are basically, they are wilfully infringing using a computer network for financial gain to make out of infringing copyright material, so that is what the conspiracy is all about and then you can go further down and get some more particulars under the ways, means and mannered off it and then there is a section beginning on –

GLAZEBROOK J:

But they are wilfully infringing on the whole by encouraging, apart from under 55 where they are specifically uploading. Is that –

MR RAFTERY QC:

Sorry I just missed part. What did you say?

GLAZEBROOK J:

Well they are wilfully infringing from what you said by encouraging infringement by others effectively.

MR RAFTERY QC:

Well though if you say A, B and C say it together, well we need to upload this sort of material and C happens to be the one who is going out and doing the donkey work, A and B is much a part of it as that so that the unnamed conspirators whose initials you get an awful lot of that you will have seen in some of the section I have removed, some of you are referring to, they are some of those people who are either known or unknown conspirators because they are in the same game as Megaupload.

WINKELMANN CJ:

So they are actually, on your analysis, conspiring – offering a conspiracy to the world at large?

MR RAFTERY QC:

They are.

WINKELMANN CJ:

And those who join are part of the conspiracy?

MR RAFTERY QC:

Yes.

WINKELMANN CJ:

Those who upload infringing material?

MR RAFTERY QC:

Yes and some of them got quite large sums of money and rewards the volume that they did upload.

GLAZEBROOK J:

Well that doesn't come out under count 2 to me.

MR RAFTERY QC:

No. That, they're what you might call overt Acts for it but in terms of just from what I have read so far, that's not mentioned, no. But if you read through, you know, you've got all those overt Acts and you will know from all your own time, when at first instance on the bench that it was not uncommon in conspiracy charges, on fraud charges, for the –

GLAZEBROOK J:

And I always hated them as you probably know. I think we might have had a discussion on that before.

MR RAFTERY QC:

Yes and defence counsel ask for further and better particulars and so that then becomes, in law, part of the indictment and that is why you have got it in the indictment rather than just the ROC overt Acts which are. You look at the overt Acts on page 3735 for example and you will see there in 73, B and C, or D and E, counts 5, 6, 7 and 8 effects are there. Because they are mentioned as overt Acts of the conspiracy and then they are actually repeated as taken at random, not less random, but to represent separate periods, actual substantive counts as is often the way in a conspiracy indictment that you have substantive accounts.

WINKELMANN CJ:

So I hadn't appreciated that the conspiracy necessarily involves the external party because if that is so, don't you have a real difficulty with that conspiracy, since that external party joins Megaupload on the condition they accept the terms and conditions which says that they may not upload infringing material?

MR RAFTERY QC:

If that was what I might call a genuine terms of reference, that is another matter but as you will appreciate, from the nature of the material you have the opportunity to read. It is the United States case that that was a sham just as much as the front page which had the YouTube videos on it, was a sham and that it was done with a view to hiding what was their intention. I mean that terms of abuse, in terms of use, was honoured, more honoured in its breach than it ever was in its observance.

GLAZEBROOK J:

Which has to be the case in the YouTube case if the 70 or 90%, 90%, I think only 10% of premium users supposedly didn't have infringing material on them, according to the *YouTube* case.

MR RAFTERY QC:

Yes and I am not quite sure what I am supposed to follow from that.

GLAZEBROOK J:

Well I can understand – I suppose when I put right at the beginning, I think to Mr Illingworth that the United States case was that they were effectively, not only providing the mechanism but actually that was the whole purpose of the mechanism, that is in fact the US case.

MR RAFTERY QC:

Yes. Well as you appreciate –

GLAZEBROOK J:

As a principle actually gathering all of these people together and all of this material and the whole purpose of the whole thing was to infringe copyright for monetary gain.

MR RAFTERY QC:

Yes.

GLAZEBROOK J:

I am not sure you need the external parties as part of that conspiracy.

MR RAFTERY QC:

No the people who are mentioned here where it says with persons known and unknown.

GLAZEBROOK J:

Okay. It's just I thought of somebody who'd actually just downloaded it and then given an URL to someone. I can't quite see them as part of the conspiracy I suppose is the…

MR RAFTERY QC:

No, well we are talking about people like some of those TK –

GLAZEBROOK J:

Some of the big ones.

MR RAFTERY QC:

– with just phenomenal amounts of uploads and good incomes for them. A lot of them were Vietnamese as you will have seen from the papers. So there were certain countries where they are much more active in uploading than others but as I have talked about earlier, it doesn't know any geographical bounds. So I wasn't going to take you through all those overt Acts because you can read them for yourself but they –

GLAZEBROOK J:

That's all right. What I was really wanting was the essence. Are we happy we have got the essence?

WINKELMANN CJ:

Yes, a little. I think I am happy they have got the essence.

MR RAFTERY QC:

When seeking it just to correlate it to a Crimes Act offence, I was trying to make it as simple and as pared down as possible.

WINKELMANN CJ:

I must say I am struggling.

MR RAFTERY QC:

So I may have got the wrong end of the stick from what you wanted.

WINKELMANN CJ:

I am struggling with how you get beyond just creating a platform which would allow them to make money if people infringe, to actually conspiring to infringe. Because many platforms actually exist which enable the people who create platform to make more money if people put infringing material on it. That is quite a few of the models on the Internet today are like that.

MR RAFTERY QC:

Apart from its advertising revenue, this organisation only made money out of the people who are uploading onto their service.

GLAZEBROOK J:

But they would say the same of YouTube if 90% of the material was infringing, then they are only making money both from advertising and otherwise from infringing material as well. That is the point being made against you. Well I am not actually sure that it is being made against you because it may be that they are actually criminally liable for something as well.

MR RAFTERY QC:

Well you may have read the bit about YouTube in the ROC.

GLAZEBROOK J:

No sorry this was just taking from that case with the statistics at the beginning. But it was something like of the premium users, only 10% have – I might have the figures wrong, I don't think so actually.

WINKELMANN CJ:

I think you have got it a little bit high.

GLAZEBROOK J:

No, no. So the premium users it was 10%, for everything else it was 60 to 70%, from memory, i.e. so the premium users here would presumably be something in that nature as well.

MR RAFTERY QC:

As you –

GLAZEBROOK J:

Apart from Grumpy Cat or something of that nature, that might –

MR RAFTERY QC:

When you look at – I know that we were trying to keep away from the evidence because it's not a 24(2)(d) exercise, but when you look at the evidence, it's quite clear, especially all that email traffic between them, that the whole purpose of their existence is to do, to get onto their site, copyright infringing material and if you remember from that particular case, I think it was Justice France who picked up on the point that what the Judge said when he was looking at the material, he said, "But if you look at this," and there was quite a few paragraphs of it in the judgment, "what these emails between different members of the organisation were saying, it's quite clear that they knew that they were dealing in blatantly illegal material" and that, they said, is a matter for the jury, not for us. So that's why it went back in respect of those aspects and that's really what we're saying here because when you look at what the conspirators are saying amongst themselves about it, it's from a lot of that material that we get the list of things that they were doing in order to try and encourage the uploading of infringing material which they were much more interested in than any other material.

GLAZEBROOK J:

So you're basing it on a, if you look at it in the old style, on the admissions, effectively?

MR RAFTERY QC:

Well, the admissions confirm –

GLAZEBROOK J:

Through the…

MR RAFTERY QC:

Because you learn from, as you'll – in the ROC, it talks about the work that FBI computer analysts and a special agent called Michael Poston, who did a lot of the donkey work, examining those that they see from their databases which include a lot of some of those statistics that were just given and also include a lot of this email traffic which indicates that they knew that they were dealing in infringing material, they were encouraging it, and they were setting up a system, they were auditing it and saying "Well, this is now getting too much money in rewards, we need to sort of pare that back", things like that that is going on on a very regular basis throughout the years and there's a good sample of that in the ROC and it's by no means exhaustive because obviously, they talk about the volume, it's a modest volume in comparison to what you imagine must be available in the United States.

So you're looking at all that material, you're trying to get the "What are the things that they are actively doing in order to encourage others to join them and get the stuff on the Internet in return for payment.

WILLIAMS J:

So the conspiracy charge obviates the need to be specific about infringement? General statements of intention to infringe will be enough once you've got a conspiracy charge?

MR RAFTERY QC:

It depends on what you mean by "general statements of infringement". If you're meaning –

WILLIAMS J:

Well, you know where they say "That's what we're all about, 99.9% of our material is breaching" –

MR RAFTERY QC:

And that gives you plenty of mens rea and it also meets –

WILLIAMS J:

For the conspiracy charge but not for the section 131 charge?

MR RAFTERY QC:

If it's a conspiracy to commit an offence against 131 then you do not need to have, as my learned friends have suggested, specific evidence of specific infringement of known infringers because you have a general conspiracy. If I can take an example from one that you're probably familiar with from *Adams*, the textbook, my friend Mr Mansfield says, and I think it's in his written submissions where he said "Well, you can't just have these unknown variables, you have to be very specific", and quite a famous example for students at university and whatever is if you have A and B deciding that "We will rob the next person who comes round the corner", they have made a conspiracy to rob. They do not know whether that person will be male or female. They do not know the age. They do not know what they will have on them. They don't know if they're going to have any money. They don't know if they're going to have any property that might be worth stealing. But they have made that agreement to rob and those variables are irrelevant to the charge of conspiracy to rob.

And so we say here that that sort of degree of detail which they say must be provided evidentially in order to get across the threshold of a conspiracy to commit copyright infringement is not necessary. It is necessary when we

come to counts 4 to 8 to have some, because we're in this stage, some prima facie evidence suggestive of the fact that they were copyright-protected but the conspiracy is to generally attract copyright-protected material to their site for financial gain.

WINKELMANN CJ:

So is it a conspiracy to abet someone else's infringing?

MR RAFTERY QC:

A conspiracy to aid and abet is actually a conspiracy. If I'm agreed to help you do X, if it's Justice Prime that you alone are going to rob and I agree to help you, because I'll keep a look out, so I'm aiding and abetting in one sense but I'm actually conspiring with you to rob. So –

GLAZEBROOK J:

Well, you have to have the robbing in the first place and –

MR RAFTERY QC:

Not for the conspiracy you don't.

GLAZEBROOK J:

And wouldn't you need the robbing as part of the conspiracy, not outside of it?

MR RAFTERY QC:

No, it's not outside because basically, you've agreed that you will rob the person who comes around the corner.

WINKELMANN CJ:

Well, there's someone else who has to be robbing in that circumstance.

MR RAFTERY QC:

Sorry?

WINKELMANN CJ:

There might be – on this scenario, we're going to hypotheticals again, you will agree that you will support some other person should they rob the next person who comes around the corner?

MR RAFTERY QC:

No, I'm just saying if A says I'm going to rob that person and you say "I'll help", then you've agreed to rob them.

WILLIAMS J:

That's a conspiracy…

MR RAFTERY QC:

That's a conspiracy.

WILLIAMS J:

Until the robbery occurs, then it's a party and a conspiracy?

MR RAFTERY QC:

Yes, that's right.

WINKELMANN CJ:

And what would be said –

GLAZEBROOK J:

But if the robbery doesn't occur, is it still a conspiracy?

MR RAFTERY QC:

Yes.

GLAZEBROOK J:

So actually just talking about it and thinking about it unlike with an attempt is enough to get convicted of conspiracy?

MR RAFTERY QC:

As long as you have the appropriate mens rea –

GLAZEBROOK J:

I've never liked that.

MR RAFTERY QC:

– not just talking about it over a few drinks in a casual way, "Wouldn't it be fun to?" But if you say "I agree with you" –

GLAZEBROOK J:

We do start to –

MR RAFTERY QC:

– "that we will do this so that the opportunity does arose, you will do it". That's what your intention is. If you get cold feet because you go home and no one's turned up, you've waited there all night and you go home, then the conspiracy has come to an end unless you say "Well, let's try again tomorrow night" and then the second party backs out but basically, what you have done that night before is commit the offence of conspiracy.

WINKELMANN CJ:

So it's a conspiracy to aid people who you may or may not know but you do know are very likely, unnamed people who are very likely to commit an offence?

MR RAFTERY QC:

You mean in this case?

WINKELMANN CJ:

Mmm.

MR RAFTERY QC:

No, “We’re not agreeing to aid, we’re actually agreeing with them that we will infringe copyright together because you’re going to help me, I’m going to help you by paying you rewards. You’re helping me by giving me the material which I’m going to be able to monetise”.

WINKELMANN CJ:

Where’s the evidence of the agreement?

MR RAFTERY QC:

You can infer agreement from the fact that if you’re putting it out there that there’s a rewards scheme if you upload and the more stuff you upload, the more infringing stuff you upload, and the more it’s being viewed, then your income will go up.

WILLIAMS J:

So then let’s take this to the YouTube example or the Dropbox and the board of YouTube or the chief executive knows full well that a large chunk of the users are going to be doing this and you pay them rewards to upload, let’s say, I don't know whether you do but you do, is your knowledge that a good proportion of your traffic is going to be doing this and you don’t distinguish between them in your rewards system enough to make you a conspirator?

MR RAFTERY QC:

It is if your intention is that you get that. As far as the allegation in this case is, the non-infringing uploaders are a side issue, a sideline.

GLAZEBROOK J:

A what, sorry?

MR RAFTERY QC:

They’re a side issue. They’re miniscule in number.

GLAZEBROOK J:

That's fine. I just didn't hear.

WILLIAMS J:

Isn't the logic of that that once you know that a proportion of your market is criminal or at least civilly breaching the Copyright Act and you do nothing to stop it and you encourage them just as you would the non-criminal or non-breaching market, you're a conspirator?

MR RAFTERY QC:

Yes, if what you're setting out to do is to get this –

WILLIAMS J:

That's a lot of crime around the world.

MR RAFTERY QC:

It's not – there is a lot, I mean, just like the one we've just talked about there, the hypothetical –

WILLIAMS J:

So –

MR RAFTERY QC:

It's a crime that might never get caught but if you're –

WILLIAMS J:

Right, so the *YouTube* case is wrong? The *YouTube* decision and *UMG* are wrong?

MR RAFTERY QC:

No, I'm not worrying about *UMG* at the moment –

WINKELMANN CJ:

We'll come to that later.

MR RAFTERY QC:

– in case there's a general principle. What I say is you look at that passage in that case where it says "But it's different when you look at these emails or these communications where you're saying 'We know this is blatantly illegal. We had better do something about that'" and they said "Well, that's a matter on which a jury could convict. They may not. There may be another explanation for it", and we say that's the part of the *YouTube* case that is relevant to here because that's what's happening here and so it's because this isn't just about generalised knowledge which is what my learned friends are saying all they've ever got. We're saying these people had very specific knowledge about what's going on and that being the whole –

WILLIAMS J:

What do you mean by "very specific"?

1650

MR RAFTERY QC:

Well, because, I mean, it's difficult because in fact we're supposed to be doing a 24(2)(c) rather than a 24(2)(d) exercise but the fact that not just the District Court but Justice Gilbert and the Court of Appeal have all looked and said "There is good prima facie evidence in all the relevant ingredients", so they've said that, so that the – and we can go back to it if we need to, but I didn't understand this to be an exercise to say "Well, where's the evidence of it?" Because three Courts have already said there is evidence of it. They've been refused leave to appeal on the 24(2)(d) issues, except transposition and that was the only issue that we are concerned about, transposition in our submission arises at the 24(2)(c) stage.

WILLIAMS J:

Yes but my understanding was, we were here talking about what level of knowledge is required for the purpose of conspiracy and you said – at least I took you to say – to some extent a more generalised form of knowledge than the specific knowledge referred to in section 131 which is probably work by work although you might have an argument against that proposition. But let's

adopt it for now and I am really testing that. You said, well actually the knowledge is very specific, and my question to you was, what do you mean by specific in the context of conspiracy?

MR RAFTERY QC:

In the light of your reference to 131 and that might require specific case by case knowledge, I would not accept that. Because what I say, when you have a conspiracy to infringe copyright, we are talking about not one individual. What you want is, I want copyright works galore on my site to make money. I am going out to positively market for them in my own specific ways. I may get, incidentally non-infringing works but I am not going to be able to monetise those, I am out of this. So the raison d'etre of my organisation is to get that infringing material and you do not need to know, on a work by work basis and allege in the indictment that that is an infringing item.

WILLIAMS J:

So your specificity is the specificity of the conspiracy.

MR RAFTERY QC:

Yes.

WILLIAMS J:

Not the specificity of the target of the conspiracy.

MR RAFTERY QC:

No and the target has to be infringing works generally rather than I am targeting *Lord of the Rings.*

WILLIAMS J:

So the effect of that analysis is really most ISPs who know about infringement and do nothing except the takedown process, are going to be exposed in the same way?

MR RAFTERY QC:

If they have set up to operate in the way that Megaupload was set up to operate, yes they would. If they have general knowledge because they are just genuine ISPs which just accept material onto them and they know in a general way there is going to be infringing stuff up there, I don't know. But when you see these people and some of these even auditing, particularly what they have got. We have got this one, or this one is great, or he earns us good money, or this particular item, or whatever.

WILLIAMS J:

Right. I am just wanting to test how strong that distinction is in circumstances where ISPs are hauling in hundreds of millions, if not add another three zeros, knowing that half of that, or even 30 percent of that, is breaching. You are still talking about vast sums of money and vast traffic.

MR RAFTERY QC:

You are.

WILLIAMS J:

How realistic it is to say they only had generalised knowledge as opposed to the specific knowledge of breaching that this site had.

MR RAFTERY QC:

The reason why we are able to say it in this case is because, as it were, out of the mouths of babes because we have it all there in text and quite positively. But that is how we learn the whole system but if you remain completely the dumb pipe which ISPs should be and say look, I know no more than the fact that stuff is going onto my material. Some of it may well be dishonest, I don't know.

WILLIAMS J:

But they do know. A lot of it is dishonest, they know it specifically because their business model understands that, and they count it. They have known it for a decade.

MR RAFTERY QC:

You are talking about other ISPs, not this one?

WILLIAMS J:

ISPs, any ISP.

MR RAFTERY QC:

They know in a general way that there is going to be some infringing content on there but they won't have, like these people, have ordered it and say that is a goodie, that is a – like the people in the *YouTube* case.

GLAZEBROOK J:

Well YouTube did. They had had an audit in from PwC which is where the 10% came from.

MR RAFTERY QC:

But that tells them but what the – the bit that got the Judge to say, this is a jury question, not a prima facie question. Was the fact that there is acknowledgement in their behaviour and their words that this bit is blatantly legal, that bit is blatantly illegal or whatever, to use a phrase from that *Viacom* case. So that what you have got here aplenty, is material that says just that and so that from all of that material, we actually are able to learn the way they were operating their system. In other words if an ISP says I am not going out looking for anything, I am just waiting for what comes. It is a bit like leaving luggage in the left luggage office in the railway station. Now for all the person who is in charge of the locker room knows, there may be some stolen goods in some of those but I don't know, it is just luggage there and I am just holding it until they come and collect it. They have been a pure dumb pipe but that doesn't describe what was happening here. So it's for that reason that they are very different. I mean translate that into mega millions of traffic. If you still remain the dumb pipe off the locker room attendant, then you are all right. But if you go out of your way in order to try and get this material, then you are in a very different category and you set up a system that tries to attract that

material. And as I say, we are trying to discuss this in a 24(2)(c) framework but because the Courts below have said, well there is ample prima facie evidence of what I am telling you about.

WINKELMANN CJ:

Okay so if we look ahead Mr Raftery. I am just looking at the time because it is five to five. So you are starting to take us to, "Can the Crimes Act provisions apply the conduct as alleged in the superseding indictment?"

MR RAFTERY QC:

Yes and I am sorry, because I misunderstood your question. I had thought well I will just go through this.

WINKELMANN CJ:

No but it is useful to go through the Crimes Act provisions and it has also been helpful for us to have this discussion about the essential nature of the conspiracy charge.

MR RAFTERY QC:

I will have a list of those, a fuller list of those before you. It's just here on one of the pages, I just didn't want to waste time looking around in the book again.

GLAZEBROOK J:

I remember, I think, going through this in some detail at the last…

MR RAFTERY QC:

Yes it is – and we've, I know we have set it out in our submissions from time to time, so I know I can get it for you quite easily.

WINKELMANN CJ:

And then we're moving on to the code?

MR RAFTERY QC:

The code and that's obviously another important topic that will take a while. I don't think, did the Court of Appeal correctly identify the elements of conspiracy, will take long. And then Mr Sinclair, whose passion it is –

WINKELMANN CJ:

So it's not that you don't think the Court of Appeal did correctly. It's just you don't think it'll take long. And Mr Sinclair is dealing with four.

MR RAFTERY QC:

Yes, no he is dealing with four, that is his particular passion.

WINKELMANN CJ:

And Ms Fuhr is not dealing with anything?

MR RAFTERY QC:

She's not, but if she wants to volunteer I'll ask her.

WINKELMANN CJ:

Well we hope she does.

MR RAFTERY QC:

I am sure you do. She looks as though she is warming to the task.

WINKELMANN CJ:

Well is there any point in carrying on for the next three minutes?

MR RAFTERY QC:

Not for the next three minutes no.

WINKELMANN CJ:

But I think that was a helpful exchange.

MR RAFTERY QC:

Yes certainly.

COURT ADJOURNS: 4.59 PM

COURT RESUMES ON THURSDAY 13 JUNE 2019 AT 10.00 AM

MR RAFTERY QC:

Your Honours, just a preliminary point before –

WINKELMANN CJ:

Mōrena, Mr Raftery.

MR RAFTERY QC:

– we proceed, if I could just ask you to take volume 6 of the documents for hearing, the blue folder, just to assist in the light of some of the questions I was asked yesterday that if there's any further enquiry that the Court, and I was thinking more particularly of Justice Glazebrook but maybe not alone in that bringing certain matters to your attention and where they might be found if you wish to look for them rather than to take you through a document. Volume 6, if I can ask you to turn to page 269. This was what was called a supplementary material that was put in, first of all at District Court level and then at the High Court level, of a résumé, quite a full résumé of the record of case which, as you appreciate, is in eight different parts because there's an eighth supplement. Let's deal with the first seven supplements because the eighth supplement came in during the course of the hearing itself to deal with matters raised by Professor Sallis.

But this is a résumé, if you look at that, that's basically an index that goes through the ROC and its supplements, inculpatory statements, you'll see the writing's payment of the rewards system, forcing premium membership duration, viewing duration, Cogent to the servers' source traffic and so on, so you'll see various headings there. So for example, Your Honour Justice Glazebrook was saying "I want to understand rewards a bit more" but there's some material there drawn from the ROC that might help you.

GLAZEBROOK J:

So what page, sorry, was that?

MR RAFTERY QC:

I'm not drawing – this is on page 269. I'm just going through the index to make you familiar with what follows on the next 200 pages.

GLAZEBROOK J:

Okay, sorry, yes.

MR RAFTERY QC:

I don't think it's appropriate to take you through it now –

GLAZEBROOK J:

No, sorry, I thought you were –

MR RAFTERY QC:

I just want you to be aware of this material and where you can go for it if you need to because over the page then you'll see halfway down page 2691 where it talks of volume 2.2, prima facie evidence that the individual respondents were members of the conspiracy. It then addresses that issue in evidential terms and goes through all of them and being of course at the end of the thing with Mr Batato's position looking over the page on 2692 right down to the end of the volume at 200.

WILLIAMS J:

So this marries the ROC to the indictment, does it?

MR RAFTERY QC:

This is – no what this was –

WILLIAMS J:

Because it's as long as the indictment.

MR RAFTERY QC:

Yes, it's a shorter thing than the ROC by quite a considerable number of pages but what it's done is taken the themes that say – the rewards with payments because it's mentioned in different supplements from time to time

and it's all drawn together under topping so it's to make it easier for the Court, starting with the District Court, and for counsel on the other side, of how that thing could be understood topic by topic and also you will see if you just flip through, it doesn't matter what page, but I mean if you just look, say, look onwards to page 2695, if you've got it open, it's 2694, 2695, you'll see at the bottom in the footnotes, where certain statements are made in the paragraphs of the document, there is the ROC or the supplementary ROC context where that can be found if you need to cross-check it to see whether it's correct or a fair assessment of it because I appreciate this is a document created from the ROC but with what I call United States' counsel's input into it marshalling it.

And just going on and picking a page at random, page 2710, 2711, there's nothing important on the page but you'll just see it as you'll go through it, in red, little things saying, bullet points, "Inference" and then "Inference" in red and that was put in to assist the Court and some of Your Honours may remember that in the early stages of this case, Mr Davison who appeared on behalf of Mr Dotcom was saying "It's a difficult document, we don't know what inferences the United States are asking us to draw", this was to help with that purpose but hopefully the thing in red makes clear that it is a United States inference rather than – or suggestion of an inference rather than the ROC says that's the inference and we say "Put those things together, that's the inference you can draw from it". And sometimes, there's a bit of an inference in the paragraph leading into the red bullet point but that's how it's set out.

So that that's material if you need to look at it and that's why I just wanted you to be aware of that document. Some of you may have seen it but that's sort of if you did want to see special rewards or "Where was this attempt to frustrate justice?" or something, "Where's that found?", you can then look at the ROC and whatever or this would guide you to it and you may not need to look at the ROC.

WINKELMANN CJ:

Right.

MR RAFTERY QC:

So that's what I want to say about that.

WINKELMANN CJ:

Just before you carry on, Mr Raftery, can we just – some of the counsel are not tending to link their submissions to the issues list which makes it quite hard for us to follow because these issues seem to be slipping and sliding around. We would be assisted if you made an endeavour to do so.

MR RAFTERY QC:

Yes. Yesterday, I think that what happened there is that we went off that argument when I read your issues list and I misunderstood it and some of the questions that you were asking we had structured to answer but in the next section which was the one that we're actually now going to come to, because I think in light of those questions, we need to go straight to 131 because that will answer some of the questions that were going to be asked. In fact, I'm going to yield the podium now to Mr Sinclair, which is the second matter I want to mention, because I think if we address that now, some of those concerns which you thought obviously, and I wrongly, were not going to be dealt with in point number 1, will now be dealt with. So we're now moving, just so it's clear, again as you say for the transcript, to point 4 on the list of issues that I handed up yesterday, section 131 of the Copyright Act, and I'll yield the podium now to Mr Sinclair.

MR SINCLAIR:

May it please the Court, as my friend's explained, I'm going to be dealing with issue 3 on the Court's list of issues. It's issue 4 on our somewhat modified list. In the interests of structure, I have provided a mini-roadmap for that particular part of the issues list which has a few references and Your Honours may wish to have the Copyright Act handy which is found at volume 2 of the authorities.

O'REGAN J:

So where's the mini-roadmap?

MR SINCLAIR:

Sorry. Your Honours, I will come –

WINKELMANN CJ:

So this mini-roadmap feeds in your issue 4?

MR SINCLAIR:

Yes, and I will come almost directly to the Court's question about primary and secondary infringement and then to those issues about section 131 of the Copyright Act but before starting on that, I wish to spend, if I may, a few moments on some matters that were raised yesterday and they are first, the essence of the conduct for count 2, and second, some features of Megaupload that illustrate why it was involved in copyright fraud, what distinguishes it from a legitimate hosting service.

Just a word also on the wording of the conspiracy charge. The indictment alleges a conspiracy involving both the seven indicted conspirators and other unindicted co-conspirators. Examples of the latter are the flagrant repeat infringers well-known to the appellants who were lured by the offer of rewards to provide a large share of Megaupload's most popular and copyright-infringing content. The main focus of the United States' case actually lies with the executive conspiracy, how the officers of Megaupload agreed to run the business to attract, preserve, and exploit the global popularity of what they knew to be copyright-infringing material. For the conduct comparison in section 24(2(c) of the Extradition Act, the count 2 conduct is simply that the defendants conspired with the object of infringing copyrights through Megaupload and associated sites for financial gain.

WINKELMANN CJ:

Sorry can you just say that again?

MR SINCLAIR:

Yes. So the alleged conduct is simply that the defendants conspired, with the object of infringing copyrights through Megaupload and associated sites, for

financial gain. Now that is at a high level of abstraction which is appropriate for the 24(2)(c) comparison. But to flesh that out a little, the US alleges the formation of an agreement which can be inferred of course by what the defendant said and did, and it can be inferred that there was a plan to solicit infringing material to conceal the fact it was present in the site, to frustrate the owners at efforts to stop the infringements.

GLAZEBROOK J:

If you just slow down, just slightly.

WINKELMANN CJ:

Yes, you can start again.

GLAZEBROOK J:

I think you are saying there is a high level comparison appropriate for the purposes of our comparison given it is the essence of the conduct and then you allege an agreement.

WINKELMANN CJ:

Yes can we just go back to that. So in terms of the principle conduct charge is that they conspired with the object of infringing copyright through the Megaupload and associated sites for financial gain and as Justice Glazebrook has summarised, you say that for the purposes of 24(2)(d) a high level comparison is only necessary.

MR SINCLAIR:

Is the appropriate level of conduct, it is actually the 24(2)(c) exercise? For that exercise we can deal at that high level. I am simply trying to move on and flesh that out a little bit more to get a feel for –

GLAZEBROOK J:

You were just going a bit fast, that is all.

MR SINCLAIR:

I am sorry, if it is helpful to do so I can easily convert this into a note that I can provide later.

WINKELMANN CJ:

No you can give it to us now. If you just slow down a little. So you said US alleges the formation and agreement which can be inferred from?

MR SINCLAIR:

Yes so in our submission it can be inferred there was a plan and it had these components.

WINKELMANN CJ:

Well is that a plan or an agreement?

MR SINCLAIR:

An agreement to solicit infringing material.

ELLEN FRANCE J:

I thought I had noted down an agreement that one can take from what they said and did.

MR SINCLAIR:

That's right, yes.

WINKELMANN CJ:

So we are just going back to what the agreement was.

MR SINCLAIR:

Yes.

WINKELMANN CJ:

Which was to solicit infringing material.

GLAZEBROOK J:

To conceal the fact.

MR SINCLAIR:

Yes to conceal the fact it was present on the sites; to frustrate the owners' efforts to stop the infringements and to monetise the traffic, the content, that the defendants knew was copyright infringing.

WILLIAMS J:

To content or do you mean of content? In content?

WINKELMANN CJ:

To.

MR SINCLAIR:

To monetise the traffic to content.

WINKELMANN CJ:

So is the traffic travelling to the content?

GLAZEBROOK J:

Oh traffic to content, okay.

WILLIAMS J:

I see, right.

GLAZEBROOK J:

Monetise the traffic to the copyright infringing content, is that right?

MR SINCLAIR:

Yes that's right, yes. For example to take active steps to distribute that content and increase the scale of distribution.

GLAZEBROOK J:

And is that doing it directly? You will understand why I am asking that, or just encouraging?

MR SINCLAIR:

A mixture of both Your Honour. I will, in a few minutes, give illustrations of both.

GLAZEBROOK J:

That's fine. It is just I needed to know. So, it's a mixture of both directly and encouraging.

MR SINCLAIR:

Yes.

WINKELMANN CJ:

So Mr Sinclair, you are going to address our concern regarding primary and secondary and we should just –

MR SINCLAIR:

I will come to it very, very shortly Your Honour. But there is a distinction we need to keep in mind between the copyright and conspiracy in count 2 and the discreet copyright count. So for count 2, the question is, did they have a plan of the nature that I have just described but for counts 4 to 8 we do need knowledge of particular files. And if I can just take a further moment to illustrate the nature of the plan. Why did Megaupload take off? "Rewards" said Mr Dotcom "are our growth motor", but the big flaw in the rewards programme, said Mr van der Kolk, is that we are making profit off more than 90% infringing files. How would Mr van der Kolk know that? One reason is that he examined the portfolios of rewards' claimants before paying. "I checked every file/video portfolio" he said in one message and this was to find reasons to economise on payments, not to prevent infringement. As Your Honours would have seen from Mr Raftery's quick look at the index list 2 found in volume 6, there are many biographies of repeat infringes in the ROC.

The point of that evidence is that Megaupload paid rewards to individual users while at the same time dealing with thousands of takedown notices directed against that person's content. In other words, there were thousands of occasions on which the appellants were alerted to the fact they were paying money to a person who was, in response to their incentive scheme, broadcasting Megaupload URL links on the Internet to generate traffic. The most extreme example is the repeat infringer, RK, who received 40 separate payments while there were more than 300,000 takedown notices against that user's content.

WILLIAMS J:
What was the name again?

MR SINCLAIR:
It is abbreviated to RK.

WILLIAMS J:
RK, thank you.

WINKELMANN CJ:
How many takedown notices, sorry?

MR SINCLAIR:
More than 300,000.

WINKELMANN CJ:
Sorry?

MR SINCLAIR:
More than 300,000.

GLAZEBROOK J:
And the number of payments, was that 40, did I hear right?

MR SINCLAIR:

Yes, 40, Your Honour.

WINKELMANN CJ:

And is there evidence that they made that link? Is there evidence they said, oh well this is RK, we have received 300,000 takedown notices in respect of RK.

MR SINCLAIR:

Yes if Your Honour does fossick in, in that document in volume 6.

WINKELMANN CJ:

I would rather not fossick.

MR SINCLAIR:

Well, peruse.

WINKELMANN CJ:

I was hoping for some references, but that is all right.

WILLIAMS J:

That is fossicking elegantly.

MR SINCLAIR:

For references, I think it will be easier if Your Honour wishes to have references, if I perhaps hand them up afterwards rather than –

WINKELMANN CJ:

Yes, that's fine.

MR SINCLAIR:

Take the time to wade through the document.

GLAZEBROOK J:

So just to be clear, I think the Chief Justice is asking about the link that any evidence of them making that link between that particular person and the takedown notices, or possibly even generic links.

MR SINCLAIR:

What that content will reveal is that many of the takedown notices are processed manually. If Your Honours were to word-search through the combined ROC document, there's a –

1020

GLAZEBROOK J:

Because some of them were just automatic computer links, as I understand. There was a tool that did that without…

WINKELMANN CJ:

Mmm, anti-abuse tool.

MR SINCLAIR:

That is the abuse tool and that's part of the picture.

GLAZEBROOK J:

So these were actual specific takedown notices we're talking about?

MR SINCLAIR:

There could be a mixture but I think they're spoken of mainly as takedown notices that the ROC will indicate where they're received through the abuse tool. As I say, the processing of those takedown notices was often conducted manually and a simple way to get a sense of this is just to word-search the word manually and that will reveal how much of this activity, the processing of the takedown notices was done in that way. At the same time, if one compares that with the processing of the rewards payments, that's done with a high level of scrutiny. I've just mentioned the examination of portfolios.

There's a lot of discussion chiefly between Mr Ortmann and Mr van der Kolk about what they should be doing with particular rewards claimants and so the link –

WINKELMANN CJ:

What I'm interested in is is there any evidence, and I think there may be some reference in the submissions, to where there is a consciousness that rewards are being paid to infringers.

MR SINCLAIR:

Yes, there is a section entirely on this issue.

WILLIAMS J:

In volume 6?

MR SINCLAIR:

In volume 6, Your Honours, yes.

WILLIAMS J:

I guess the question is not so much the 40 payments but whether once the takedown notices were generated, what happened? Because you can't assume that payments automatically were for infringing material. You really want to know what they've done with the takedown notices.

MR SINCLAIR:

Yes, and that's a reasonably involved subject.

WILLIAMS J:

No doubt.

MR SINCLAIR:

I was proposing to deal with that when we come to look at safe harbours and their application. If it's acceptable to leave it until then I think we would be better to do so.

So as operated by the appellants, the programme in effect said to infringers, "If you give something to Megaupload that enables it to make money, we will pay you according to the extent of the benefit to us," and that, in our submission, is no different in substance from the payments for the bootleg films in the House of Lords case of *Scott v Metropolitan Police Commissioner* [1975] AC 819, [1974] 3 All ER 1032 (HL). That's a conspiracy to defraud case. It meant further that the appellants knowingly possessed the infringing copies, to come back to 131, with a view to committing acts infringing the copyright. For users to get near the threshold for payments, the currency in these transactions had to be, and manifestly was, copyright-infringing. There are examples of the somewhat personal relationships between the appellants and some of their favourite uploaders.

WINKELMANN CJ:

So is that right? Are you saying that just must follow since some of the highest content in the Internet is still quite bizarre material, on YouTube for instance, it's not copyright-infringing? It's weird films people have done of things that capture some zeitgeist?

MR SINCLAIR:

This was the appellants' own assessment of their content base, so comments made in the context of the rewards scheme, growth is mainly from infringement, "The big flaw in the scheme is that we are making profit off 90% infringing content". Such conduct, in our submission, is clearly outside the law and when Megaupload dropped the rewards programme some months before the arrest of the defendants in 2012, it was quick to accuse others who persisted with the practice of criminal activity.

WINKELMANN CJ:

And why did they drop it?

MR SINCLAIR:

The hypothesis we venture in –

WINKELMANN CJ:

So you don't know? You don't need to…

MR SINCLAIR:

There's an association in time with the takedown of the German site Kino in which arrests –

WINKELMANN CJ:

Yes, I think that's covered in your submissions.

MR SINCLAIR:

– were made, yes. The US might have sent New Zealand evidence of the rewards programme and stopped with that but there are of course many more strands to its case for extradition. So once that content base was acquired, the appellants looked for ways to squeeze more income out of it. For Megavideo, they manipulated the free viewing period to maximise the purchase of subscriptions. My friends submit that's entirely innocent. But when you are starting with a content base that is known to be infringing, by doing this to the free viewing limit, you are actively seeking to divert further revenue from the copyright owner. The limit was clearly calibrated with commercial movies in view so we find these sorts of statements, "Movies last 90 minutes, they're interesting in the last 20 minutes," or "We did" –

WILLIAMS J:

Not in my experience.

GLAZEBROOK J:

Well, you're still hoping it might become interesting.

MR SINCLAIR:

It's the hunt for the sweet spot where you get the user hooked, hopefully, on the movie and bring the free viewing to an end and the invitation to purchase the subscription to see it through to the end, clearly commercial movies. "We did some things right. We allowed fraud for a long time, fuelling our

growth," or, "Don't you think copyright holders will now get extra pissed," or "DVD rips are high quality". These are all statements made in the context of calibrating that viewing limit.

The most popular content was skimmed off to ultrafast servers better able to cope with the simultaneous demand with a well-known content base that was obviously going to be infringing content, and I'll have more to say about that when we come to look at the caching safe harbour.

Again, with such a content base, concealment was essential. The public pages were sanitised with so-called harmless content fraudulently acquired from YouTube. The lists of the most popular content were manicured to conceal what the most popular content actually was.

WILLIAMS J:

One question of detail, the content off YouTube, was that also violating on YouTube?

WINKELMANN CJ:

Perhaps.

MR SINCLAIR:

The content of YouTube was provided by users who retained their copyright in the original works –

WILLIAMS J:

So it wasn't infringing on YouTube?

MR SINCLAIR:

Not on YouTube. It was contributed by users but –

GLAZEBROOK J:

Well, it might have been but there might have been copyrighted material in it, I suppose.

MR SINCLAIR:

There's that possibility but it has gone through, and the appellants note this in some of their communications in the ROC, it's already gone through a screening process before they walk into YouTube and collect all its clips holus-bolus.

WINKELMANN CJ:

There's no allegation of breach of copyright in respect of that material, is there?

MR SINCLAIR:

Yes, there is. That's the subject matter of count 8, Your Honour.

GLAZEBROOK J:

Well, it's the breaching of the copyright of the users who have only provided a license to YouTube.

MR SINCLAIR:

Yes. They've never authorised Megaupload to make use of those files.

WILLIAMS J:

But anyway, do you or do you not say that Megaupload's breach, if it was a breach, was the second breach, or do you not know?

MR SINCLAIR:

Well, no. We're talking of course in very global terms because it is the complete siphoning off of YouTube's content or a very large part of it.

WILLIAMS J:

So there will be, given the numbers we were given in the *YouTube* decision [*Viacom International Inc v YouTube Inc* 676 F 3d 19, 34 (2d Cir 2012)] some of it will already be infringing, already have infringed?

MR SINCLAIR:

Well, the whole object of this exercise was to sanitise the appearance of Megaupload's front pages. So what will be selected for display there is going to be innocuous, the so-called "harmless" stuff.

WILLIAMS J:

Right, so the top 100 was never infringing? I thought your indictment said some of it was.

MR SINCLAIR:

On Megaupload, I think Special Agent Poston did find the odd thing that was infringing –

WILLIAMS J:

But it was exceptional?

MR SINCLAIR:

– but the point of the exercise was to make it look like…

WINKELMANN CJ:

So can we take the YouTube infringers as an example then, do you have any evidence that any of them are asserting that it's a breach? Because some of them may not wish to assert their copyright interest in those works.

MR SINCLAIR:

Yes.

WINKELMANN CJ:

Because placing a work on YouTube is not really consistent with – it's the wild west, really, in terms of being repeated and shipped here, there, and everywhere.

MR SINCLAIR:

Well, I don't know, Your Honour, but the ROC describes the evidence of users who would give evidence that they had put their original works on YouTube, these works were used by Megaupload without license…

GLAZEBROOK J:

Well, it could deprive them of income on YouTube because the hits are going to Megaupload rather than going to YouTube and if the hits are on YouTube, they could well be getting revenue from YouTube because of the advertising revenue. So they could well be annoyed about it.

MR SINCLAIR:

They could be. There is in fact –

WINKELMANN CJ:

Yes, sorry, my question is though what the evidence is. So you say the ROC covers evidence from users of YouTube whose work was carried over?

MR SINCLAIR:

Yes. There'll be a reference to that in our written submissions, Your Honour, and there is, I can recall an example of a user protesting to Megaupload that its content has appeared there without permission and asking for it to be removed. It never was.

The absence of a search function, my friends say, shows that Megaupload was like a cyber locker.

WINKELMANN CJ:

So you were going onto the search lists were sanitised or the…

GLAZEBROOK J:

That was the most popular content from YouTube was used to sanitise –

WINKELMANN CJ:

No, there was something else after that.

GLAZEBROOK J:

Was there something else after that?

MR SINCLAIR:

No, not really.

WINKELMANN CJ:

So there's nothing after the use of YouTube in terms of the concealment? I thought there was a separate point.

O'REGAN J:

The "most popular" list was not actually the most popular videos.

MR SINCLAIR:

Yes, there's grooming of the top 100, things like that. So I was just moving on to look at searchability. The defendants realised it would be fatal to reveal the known content of the sites in that direct manner, so we have statements like "Searchability is dangerous and will kill us" and "It's good to stay off the radar by making the frontend look like crap while all the piracy is going through direct links and embedded". That's the backdoor traffic, if you like, coming from the linking sites that are such a feature of this operation.

All the while, a good deal of content was directly handled by the defendants. We take as an example Mr Nomm who processed all the videos selected by Mr Ortmann and extracted thumbnail images. He examined many selected videos and saw that they were copyright works. He saw the FBI warnings on movies he personally downloaded. "Most of our content is stolen," he said to Mr Batato. "I know," was the response.

I'm not going to talk at this stage about the millions of takedown notices but I will come to that, Your Honour, when we look at safe harbours.

But there was a campaign of deception about the treatment of takedown notices. There were deceptions about what the abuse tool did. Deception about what action was actually taken in response to takedown notices. There was also, for example, the false claim that Megaupload was "One of the few online video communities that made it impossible to fraudulently host full-length featured movies due to a human-assisted automatic detection/deletion mechanism".

WINKELMANN CJ:

Sorry, can you just repeat that?

MR SINCLAIR:

Yes, there is again in that volume 6 document a section devoted to deceptions and in it will be found this quotation, a message sent to one of the film companies –

GLAZEBROOK J:

On reflection, I think it would be helpful to have something written going through what you've just said with the actual references to either the volume 6 or to the other. I think that would also be helpful presumably in reply for your friends.

MR SINCLAIR:

Yes, I fully understand that.

WINKELMANN CJ:

I know it is spread through your submissions but it's just much more concentrated.

MR SINCLAIR:

The need for that? I rather hastily put this together in light of the discussion from yesterday.

GLAZEBROOK J:

Yes, I understand that, and we're very appreciative of it but it would be – well, as I say, it will be in your submissions but in a more concentrated form, it'll be quite useful, I think.

MR SINCLAIR:

Yes, Your Honour, I'll certainly do that.

WINKELMANN CJ:

So you were just answering me in relation to my question, to repeat what you were saying about…

GLAZEBROOK J:

"One of the few online video communities" is all I got down, I'm afraid.

MR SINCLAIR:

Yes, sorry, "that made it impossible" –

WINKELMANN CJ:

What made it impossible?

MR SINCLAIR:

That comes in in the next line.

WILLIAMS J:

The computer and the human.

GLAZEBROOK J:

Did you want to just start back a sentence?

WINKELMANN CJ:

Can you start a bit further back, Mr Sinclair?

MR SINCLAIR:

Yes. So the claim was that Megaupload, and here begins the passage from the ROC, that it was "One of the few online video communities that made it impossible to fraudulently host full-length featured movies due to a human-assisted automatic detection/deletion mechanism". Megaupload had no such thing. Mr Nomm proposed it but Mr Ortmann said, "No, it would prove," and this is again a quotation, "it would prove that they had the ability to easily filter content on Megavideo".

WINKELMANN CJ:

Mr Ortmann said that?

MR SINCLAIR:

It's actually Mr Nomm paraphrasing what Mr Ortmann said to him.

WILLIAMS J:

Who was the suggester?

MR SINCLAIR:

Mr Nomm.

WILLIAMS J:

Mr Nomm suggested it?

MR SINCLAIR:

Whose evidence came in late in the sixth and seventh supplements, Your Honour.

WINKELMANN CJ:

That's not that peculiar, though, is it, Mr Ortmann saying that, because in fact, it would probably be an approach that many would take so as not to sort of inadvertently deprive themselves of the benefit of safe harbour?

MR SINCLAIR:

Yes. I think Your Honour was saying that that kind of filtering was performed by other companies –

WINKELMANN CJ:

No, I'm saying it's not that unusual for Mr Ortmann to say, "No, we've got to be careful about something like that because we might lose the benefit of safe harbour if we do that. If we are representing that we are monitoring it, we're actually taking ourselves out of that category of case where it's recognised you can set apart," – I'm not talking about the other aspect of it.

MR SINCLAIR:

Other companies in a similar position did do this kind of thing and that will be apparent even from some of the cases my friends have referred to from the United States but the –

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WINKELMANN CJ:

Yes, I'm not addressing the totality of the evidence. I'm just saying on its own, a decision not to monitor your content might be thought to be attempting to bring yourself within those authorities that say that if you're not involved in monitoring, you might not know.

MR SINCLAIR:

Yes but the difficulty is of course they did know. Mr Nomm was handling this material at the time and –

WINKELMANN CJ:

Yes which is why I was saying, quite apart from the other evidence.

MR SINCLAIR:

I don't seek to make much of this but the contrast is between the representation we have such a tool and the behind the scenes refusal to do anything about it.

WILLIAMS J:

Well it might also, mightn't it, demonstrate control, apropos of Mr Mansfield's submissions of yesterday, possession and – what was the phrase that was used in the American statute, "control" and, whatever that other word was?

MR SINCLAIR:

Yes.

WILLIAMS J:

They knew they had such control and specifically decided not to exercise it.

MR SINCLAIR:

That comes to a sharp point when we come to consider the millions of takedown notices and that is possibly the best place to look at that. My friends say, well this is general knowledge. The response to that is that it is all building up a picture. It's evidence of purpose. What was the plan? And we can deduce that plan from really quite a plethora of evidence of this kind. We spent much of yesterday looking at US law but in our submission to run this conduct through the filter of US case law, if one does that, it is impossible to conclude that the civil law safe harbour would apply. Now for some years, Megaupload did not have a designated agent to receive takedown notices so it wouldn't have got past first base on that score.

WILLIAMS J:

Are you able to say off the top of your head, which years?

MR SINCLAIR:

It had its agent appointed or notified in 2009 Your Honour. So well after the business had been operating, began operating.

WINKELMANN CJ:

But for New Zealand purposes, the safe harbour provisions came in, in what? 2008?

MR SINCLAIR:

Yes, and our safe harbour requirements are different. Well in light of the sample of evidence I have just gone through in our respectful submissions is why the Court of Appeal determined that the evidence disclosed a clear prima facie case that the appellants conspired to and did breach copyright wilfully and on a large scale for their commercial gain.

WINKELMANN CJ:

So Mr Sinclair, we are not really addressing issue 4 at the moment are we?

MR SINCLAIR:

Not quite.

WINKELMANN CJ:

We are actually addressing issue 1.

MR SINCLAIR:

I am almost through what is really a little prologue, if Your Honours will permit me to.

GLAZEBROOK J:

Yes you are just going through the evidence for us in a very brief way.

WINKELMANN CJ:

Yes I understand that but we are actually at issue1 aren't we, because in fact you were explaining to us the conspiracy count which is what Mr Raftery –

MR SINCLAIR:

I did go slightly backwards into what was discussed yesterday. I hope Your Honours will tolerate that.

WINKELMANN CJ:

No I am keen to understand what people are addressing because the avalanche of material is reasonably overwhelming if one doesn't keep a clear eye on where we are at.

MR SINCLAIR:

I have noted what Your Honour has said about that already and I will take pains to signpost where I am in relation to the –

WINKELMANN CJ:

So that is actually issue 1, the element of the conspiracy and the evidence of it.

MR SINCLAIR:

Yes and if I could just leave this little part with one thing. We have heard a lot of analogies and I am somewhat reluctant to contribute another.

WILLIAMS J:

But here goes.

MR SINCLAIR:

Because I think it condenses it nicely. In the District Court Mr Dotcom likened Megaupload to a post office, counsel for Mr Dotcom and the submission was if someone uses the mail service to deliver drugs, it is the user of the service at fault, not the mail service, even though they know that some users will use it for unlawful activity. We do not shut the post office down or impose on it the burden of investigating or prosecuting any crime, this is left to the authorities. Now Ms Gordon's response to that was that in fact one would shut down the post office if those who created it have actual knowledge that they are

repeatedly shipping drugs and do nothing to deal with that. Go to great lengths to conceal the shipments from law enforcement.

GLAZEBROOK J:

You are going to have to just slow down again.

WINKELMANN CJ:

Well isn't this really just a reformulation of your submission. I mean it is just advocacy and I think, for my part, I don't know.

MR SINCLAIR:

If it is not helpful Your Honour.

WINKELMANN CJ:

I know that is what you are doing, advocacy –

WILLIAMS J:

Yes, it is his job.

WINKELMANN CJ:

And it is your job but it is just a re-formulation of that which you have already said.

MR SINCLAIR:

Yes.

GLAZEBROOK J:

All right. Just if they did the things that you have just told us about, then they would shut it down.

WINKELMANN CJ:

I mean I don't know what power you would have to shut it down but you would prosecute them.

MR SINCLAIR:

Yes it is a metaphor, but I won't pursue it.

ELLEN FRANCE J:

In terms of the other conspiracy aspect, that is the racketeering.

MR SINCLAIR:

Yes.

ELLEN FRANCE J:

Is broadly the evidence that you have taken us through this morning, applicable to that as well? Is that broadly the case in relation to that aspect?

MR SINCLAIR:

Yes that is part of it. The racketeering count conglomerates the copyright infringement, the money laundering and the wire fraud and so this evidence is –

ELLEN FRANCE J:

So those last two aspects will be slightly different.

MR SINCLAIR:

Yes.

WINKELMANN CJ:

So, on that. Is anyone going to come back to the comparative of the Crimes Act for such a conglomeration which is effectively a recharging of the same conduct under the Crimes Act?

MR SINCLAIR:

I think Mr Raftery may, or certainly could deal with that.

WINKELMANN CJ:

Because it is a little alien to New Zealand law to conglomerate things if we can use it as a verb, in the way that this indictment has to effectively recharge the same conduct in this way?

MR SINCLAIR:

Aggravate them, I should have said. Well we say it is the equivalent of section 98A, the organised criminal group offence.

WINKELMANN CJ:

And would you charge that – it is the recharging of the same conduct is something I am interested to hear about.

MR SINCLAIR:

Yes.

WINKELMANN CJ:

Mr Raftery is going to come back to that?

MR SINCLAIR:

Yes I believe so.

WILLIAMS J:

You just told me. You said infringement, wire fraud and there was a third?

MR SINCLAIR:

Money laundering. I know Your Honours, I finally come to deal with the Court's question for us.

GLAZEBROOK J:

Now we are on your issue 1 are we?

MR SINCLAIR:

Well actually not quite.

GLAZEBROOK J:

Okay, right, that's fine.

MR SINCLAIR:

The question about primary and secondary infringement which the Court posed for us during the hearing. So primary infringement, as I understand it, is doing any of the restricted Acts in section 16 of the Copyright Act without permission. So copying for instance.

WINKELMANN CJ:

Was it section 16 or section 121?

WILLIAMS J:

Section 16.

MR SINCLAIR:

Section 16 describes the –

WINKELMANN CJ:

Yes, but the criminal side, right. Oh well that's another issue.

GLAZEBROOK J:

Can we just start, I've lost the Copyright Act again.

WILLIAMS J:

Volume 2, pink.

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

Why I ask that question is that one of Mr Mansfield's submissions is that the Court of Appeal proceeded upon the basis that you could have a charge

against her as we do in any of the section 16 prohibited acts as opposed to the criminal acts under section 131.

MR SINCLAIR:

Yes. I'll spend a little time on that point, actually, Your Honour, but if I can just –

WINKELMANN CJ:

You will come to it?

MR SINCLAIR:

I will indeed.

WINKELMANN CJ:

That's fine.

MR SINCLAIR:

Just so that we're clear about the distinction between primary and secondary. So primary infringement would be like a strict liability tort. However, because this activity is conducted in the course of a business, a knowledge requirement is added. So if we come over to section 36 which is possessing and so forth in the course of a business, that's in the part of the Act dealing with secondary liability. Section 131, the criminal offence, is located elsewhere in the Act but it's the close cousin of section 36 and for that reason, I suggest it should be regarded as a form of secondary liability.

WINKELMANN CJ:

Doesn't it criminalise –

GLAZEBROOK J:

Secondary infringement is probably the better term rather than – because otherwise we're getting confused with accessory liability, I think.

WINKELMANN CJ:

Can I just ask, I was just asking a question, doesn't it criminalise primary infringement as well? So it's not naturally seen as the close cousin, it's the criminal part of it, it's the bite part of the Act, as opposed to a secondary liability provision?

MR SINCLAIR:

The structure and the wording of sections 36 and 131 are very similar apart from the requirement of knowledge in the criminal offence.

WILLIAMS J:

Knowledge is a requirement in 36, isn't it?

MR SINCLAIR:

Reason to believe, I think.

WILLIAMS J:

Yes, I see your point, yes, lesser knowledge is enough.

WINKELMANN CJ:

Yes, so my question is doesn't section 131 criminalise both primary and secondary infringing?

GLAZEBROOK J:

But with a knowledge requirement?

MR SINCLAIR:

Well, I was going to make the submission, Your Honour, that I don't think the classification really makes any difference for the task that has to be performed and – yes.

WINKELMANN CJ:

So my question was why you were linking section 131 so exclusively to section 36 because it links to section 16 as well.

MR SINCLAIR:

I see, yes, it does.

GLAZEBROOK J:

Actually, I should have said knowledge and the course of business requirement. So 131, criminal.

MR SINCLAIR:

Yes.

GLAZEBROOK J:

Because it has to be in the course of business, 131, but it also has to be knowing, is that right?

MR SINCLAIR:

Yes, there's a mens rea requirement obviously for the criminal offence. It may be helpful to note that the explanatory note for the 2008 amendments saw section 92B as relevant to primary infringement and I think that's because it's an absence of knowledge situation, merely without more, and saw section 92C as relevant to secondary infringement because it's dealing with infringing acts potentially done with knowledge.

Your Honour the Chief Justice I think mentioned about secondary infringement and the US indictment. I simply note that the defendants' argument that Megaupload is liable only for contributory infringement under US law, that doesn't prevent a charge of criminal copyright conspiracy. There's a decision of Judge O'Grady to that effect and I do have a reference for that, Your Honours, it's US.AUT.138 at pages 6 to 7 [*United States of America v Batato* No 1:14-cv-969 (Va Dist Ct).

WINKELMANN CJ:

So this is authority for the proposition that the fact that Megaupload is only liable for secondary – there's only, on the US' case – but you don't accept this

guilty of secondary infringing does not prevent a conspiracy charge being laid?

MR SINCLAIR:

Yes, the concept I think is contributory negligence – infringement, I beg your pardon.

GLAZEBROOK J:

Sorry, I was trying to fix up my notes previously and I think I might have missed this point. Can you go back and explain what that is authority for?

WINKELMANN CJ:

So can you just re-state what the case is authority for?

MR SINCLAIR:

There was – the indictment was challenged or the potential for criminal liability was challenged in the Federal Court. The argument was Megaupload can only be liable for contributory infringement. The decision of the Court is that doesn't prevent the US succeeding on a charge of criminal copyright conspiracy.

WINKELMANN CJ:

And that's in this case, in this…

MR SINCLAIR:

In this, yes, the criminal proceeding.

GLAZEBROOK J:

I think the Chief Justice's point was more in the New Zealand context rather than in the US context.

WINKELMANN CJ:

Mmm.

MR SINCLAIR:

I'm sorry.

GLAZEBROOK J:

Although that's helpful.

WINKELMANN CJ:

That's relevant.

MR SINCLAIR:

Your Honours, I now move to –

WINKELMANN CJ:

Do you have any response on the New Zealand context?

GLAZEBROOK J:

Is Mr Raftery dealing with that later or is this a different point?

MR SINCLAIR:

Well, if the proposition is –

GLAZEBROOK J:

Sorry, I may be sort of a bit behind on this.

MR SINCLAIR:

I think the proposition from my friends is that the defendants can't be liable for the acts of users. They portray themselves as merely passive in the process of infringement. I do want to come and examine that in a little more detail quite soon.

WINKELMANN CJ:

Yes, so I think I've lost sight of who's handling what in this case because I thought that Mr Raftery had dealt with 1 and we'd moved onto 4 with you but where are we? What is the plan?

MR SINCLAIR:

Yes, Your Honour, I can tell you exactly where I now am and that is at the start of the section 131 issue.

WILLIAMS J:

You're at (a).

WINKELMANN CJ:

Mr Raftery is going to take us back to 1, is he?

MR SINCLAIR:

If there's a need to. I think there was a question about racketeering.

WINKELMANN CJ:

About, sorry? Racketeering.

ELLEN FRANCE J:

Well, for myself, I think it would be helpful for someone to go through the relevant provisions of the Crimes Act that are relied on and with some submissions as…

MR SINCLAIR:

Yes.

WINKELMANN CJ:

And that's what we have been hoping for all along, I think.

MR SINCLAIR:

Yes, that will be done by Mr Raftery. He will examine the…

WINKELMANN CJ:

And that's at 1?

MR SINCLAIR:

The shoehorning proposition that there's a mismatch between the conduct alleged by the US and the Crimes Act offences accepted as pathways in the Courts below. We'd thought that if we examined section 131 of the Copyright Act, it might actually clear up a lot of issues and so feed in better to the Crimes Act pathways. So I am now in section 131 of the Copyright Act, Your Honour. So that's –

GLAZEBROOK J:

And that is the one-page sheet you have just handed up?

MR SINCLAIR:

Yes, so that is – yes, and just to locate ourselves, it's issue 3 on the Court's original list, it's issue 4 on our modified list, and the first subheading a) was, "Does section 131 criminalise online dissemination?" and I'm just going to deal with that in a series of subheadings which I will signal as I work through them.

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So in a nutshell, we submit the issue of online dissemination can be framed as simply as this. Communication is a restricted act under section 16. Breach of the owner's exclusive right to communicate is an infringement, and that's from sections 29 and 33. In the course of a business, knowingly possessing unlicensed copies with a view to any act infringing copyright, which includes infringing the communication right, is an offence.

WILLIAMS J:

Can you run that last sentence by me again, please? "In the course of business" …

MR SINCLAIR:

So in the course of a business, knowingly possessing unlicensed copies, with a view to any act infringing the copyright, this is 131(1)(c), of course, so any

act infringing copyright, that includes infringing the communication right, that's an offence. So even focusing purely on the communication right, it's only one aspect, taking that in isolation, online dissemination can be criminalised under section 131. I realise, Your Honours, there's more to be said than that, but that's a simple way through.

O'REGAN J:
So which provision of 131 are you relying on then?

GLAZEBROOK J:
(1)(c).

WILLIAMS J:
So the soft spot in there is "with a view to". Are you going to talk to us about that?

MR SINCLAIR:
Yes.

GLAZEBROOK J:
And also with the possession point that Mr Mansfield made in terms of not being in possession?

MR SINCLAIR:
Yes, that's one of the issues to be addressed, Your Honour, but my friends –

GLAZEBROOK J:
Sorry, yes, I see, you've got that there, that's fine.

MR SINCLAIR:
My friend's proposition is that…

GLAZEBROOK J:
No, you don't need to deal with it now. I see it's on your list.

WINKELMANN CJ:

Yes, you just take us through the list, thanks, Mr Sinclair.

GLAZEBROOK J:

Let's not get further off the list. It's good to be on the list.

MR SINCLAIR:

There's no ambiguity here, we say. There's no need for –

WINKELMANN CJ:

Are you on your list or are you responding to a question?

MR SINCLAIR:

I'm still under the first issue, Your Honour, and may be for a little while. But there's no ambiguity here. There's no need for recourse to extrinsic material and the offence can be complete before any issue of safe harbour arises under section 92C.

GLAZEBROOK J:

I don't think – I think we're well past the ambiguity before we can go for extrinsic material if we're looking for a purposive approach but…

WINKELMANN CJ:

So is your submission simply the words are capacious enough to take it so therefore they do?

MR SINCLAIR:

Yes, so –

WINKELMANN CJ:

Are you going to address Mr Mansfield's careful statutory scheme-type submission?

MR SINCLAIR:

I hope to match it, Your Honour.

WILLIAMS J:

I think the other side would say that that skips over the question of whose view, and takes us back to the post office example, because they would say, I'm sure, that's with Megaupload's view to infringe and they didn't, so at some point, you're going to need to address that.

MR SINCLAIR:

Well, again –

WILLIAMS J:

You don't have to do it now but –

MR SINCLAIR:

Well, I could, I think, deal with it now. So much of the case can be seen through the issue of rewards. It's the conspiracy in microcosm. If you have –

WILLIAMS J:

Yes, but who's the – of course, but it's hard to get past the point that the actual uploading and so forth is by persons unknown to the users so that "with a view to" has to cover "with a view to facilitating others doing it" unless you say being the facilitator is infringing?

MR SINCLAIR:

No, in our submission, there are acts attributable to Megaupload in this process. It is not purely a matter of the users putting and the users taking. The reason I mentioned rewards is that if one knows that an infringing file has come onto the site, because it's been examined, because the user has 10,000 takedown notices against their content, that file is kept, and why is it kept? It's kept with a view to further infringing acts, and one of those acts, and there are others, copying for instance, if we take the flow-on act of communication, there's the offence.

WINKELMANN CJ:

So can we get back to your list then?

WILLIAMS J:

Sorry, no, can I stop? I just need to understand this. The communication is? Which communication are you talking about?

MR SINCLAIR:

There's possession with a view to communicating. That will be the outward distribution of the file, whether it's downloaded or streamed. The offence in 131(1)(c) is complete at the point you have possession, the knowledge, and then a view to committing further acts infringing the copyright.

WILLIAMS J:

Let me think about that. I'll come back to you.

WINKELMANN CJ:

Can I just ask, are you coming onto this, Mr Sinclair, in the course of – I mean, are you going to come onto the detail of the application?

MR SINCLAIR:

Yes.

WINKELMANN CJ:

So perhaps we can just address it as we go through because at the moment, you're just giving us the shape of your submission, aren't you?

MR SINCLAIR:

Yes, I'm trying to work through the headings under Court's issue 3. I just wanted to say though that the appellants submit that yes, Megaupload communicated copies online, which they say can only give rise to civil liability.

GLAZEBROOK J:

No, they say it doesn't even give rise to civil liability but…

WINKELMANN CJ:

The type of conduct could but not in this case.

GLAZEBROOK J:

Yes.

MR SINCLAIR:

Anyway, liability, we would say, can't be partitioned in that way. If you can be civilly liable under section 36, which is possessing or dealing with an infringing copy, you can be criminally liable under section 131. The knowledge requirement, as I said before, is the difference between the two.

In light of the exchanges on Tuesday, I thought actually I should come straight to sections 92B and 92C which are, as Your Honours know, dealing with safe harbours.

GLAZEBROOK J:

So what are we now on? Issue c) of your mini roadmap?

MR SINCLAIR:

I am still –

WINKELMANN CJ:

In an overview position on – yes.

ELLEN FRANCE J:

It's the second bullet point.

O'REGAN J:

Second bullet point of issue a).

WINKELMANN CJ:

Yes, so if we just let Mr Sinclair speak.

GLAZEBROOK J:

Sorry, okay, it's just you had a c) on yours that was specifically looked at so far but fine.

WINKELMANN CJ:

Yes, we'll just have to have confidence, Mr Sinclair, that you're going to have to address our vested interest.

MR SINCLAIR:

I hope it will be a logical sequence, Your Honours. I will try to deal with it as quickly as I can. But the safe harbours in those provisions simply say that an ISP is not liable if all that happens is a user infringes copyright and the ISP deletes or prevents access to infringing material as soon as it becomes aware of it and the language is looked at in some of the earlier exchanges. Importantly, in 92B(2), "Merely because A uses the Internet services of the Internet service provider", the Internet service provider "without more" (a) does not infringe copyright, and then down to (c) "must not be subject to any civil remedy or criminal sanction" and then briefly, 92C(2) –

GLAZEBROOK J:

Can I just check what you say – or are you going to do that under c) of the mini roadmap in terms of "without more" meaning?

MR SINCLAIR:

Yes, right now. So 92C, the ISP "does not infringe copyright in the work by storing the material unless" (a) the Internet service provider (i) knows or has reason to believe that the material infringes copyright, and (ii) does not, as soon as possible, and so forth. So 92C is an example of what "more" is referring to in section 92B and the "more" is knowledge. There's no safe harbour if the ISP knows it stores infringing material and does not delete it or prevent access to it as soon as possible.

Subsection (3) makes receipt of the takedown notice relevant to whether the ISP has that knowledge. Now my friend submitted that "more" is referring to non-ISP activities and he mentioned, I think, having a retail function. We submit that that reading makes the words, "without more" redundant because the business is already outside ISP protection to that extent. Section 92B is not the blanket immunity the appellants say it is. Now Justice Gilbert in my

respectful submission dealt with this very deftly in his judgment at paragraphs 124 and 125. If I simply read that Your Honours rather than take you to it?

WINKELMANN CJ:

124 and 125.

MR SINCLAIR:

He said in 124, these sections, it is 92B, 92C are not discreet regimes, they overlap. If Megaupload qualifies for the protection conferred by section 92B, even if it failed to do so under section 92C, then it would not be vulnerable to civil or criminal sanction because of the express wording of 92B subsection (2) must not be subject to any civil remedy or criminal sanction. Such an interpretation would deprive section 92C of any effect. I am now at my subheading, "Can ISPs be liable for infringement." Sections 92B and 92C describe when an ISP will not be liable; outside of those situations, they clearly can be liable. The ISP provisions were inserted to limit ISP liability but not to remove it entirely. If an ISP wanted to assess their potential criminal liability, they might go straight to the ISP provisions which is why I have started there. There it would find a description of when an ISP is not criminally and civilly liable for unwittingly hosting infringing content. That bears the clear implication that outside of that situation, that is when it knowingly infringes copyright it may be criminally and civilly liable. No one, in my submission, making this enquiry could come away with the impression that ISP cannot be criminally liable. So even the headings for sections 92B and 92C refer to ISP liability, not ISP immunity.

Safe harbour, we say, is a refuge for the innocent ISP who acts upon knowledge that it hosts infringing content. In contrast the appellants sought to optimise the occurrence of infringement on the site. As we see, they set out to attract and preserve copyright infringing content and monetise the traffic to that content and that is the antithesis of the conduct the safe harbour was intended to protect. In our submission nothing in the ISP provisions would give any comfort that this conduct was deemed to be honest and therefore outside the scope of the range of available offences. An ISP fraudulently

dealing with digital copies is liable under the Act for the same range of criminal offences as any other deliberate infringer acting in the course of the business. And any more detailed examination of the statute and its policy background would confirm that position. ISPs don't enjoy some immunity from the usual consequences of deliberating infringing copyright in the course of a business. There is no reason Parliament would privilege ISPs to engage in large scale copyright infringement and there is no evidence at all in our submission that this outcome was intended. That is notwithstanding my friend's traversal of the policy background.

I am at my next bullet point Your Honours which is the proposition, "The involvement of others does not absolve the appellants." Section 92C recognises that an ISP may be liable for storing a user's material when it knows or has reason to believe material infringes copyright. And that is apparent from the heading and subsection (1). If we go back a step and just consider what the Act said before the ISP amendments, we find that section 36 modifies that general position that infringement is a strict liability tort and knowledge element is added in section 36, person in the course of a business must know or have reason to believe they possess or deal with an infringing copy. In 2008, section 92C then added a further modification to section 36 by allowing an ISP business a period of grace in which to delete or prevent access, once it knows or has reason to believe it is storing infringing content. Importantly, the civil and criminal liability provisions, sections 36 and 131, aren't concerned with how the business came into possession. It doesn't matter if the possession came through the act of a user. Liability is defined by reference to possessing or dealing with an infringing object coupled with the state of mind. So we submit the appellants cannot deflect liability by saying that the only relevant acts are those of users. Storage is an act of the service provider. Storage accompanied by knowledge may result in infringement and criminal liability. So in section 131 it is knowing storage, i.e. possession with a view to any act infringing copyright is an offence and that includes unlicensed copying and communication which is the point I began with earlier. So that is 131(1)(c).

If we look then at distribution, the offence in 131(1)(d)(iii). This is also an act attributable to the storage provider. The good illustration is the case of *Ming v HKSAR* [2007] 2 HKLRD 489, which is found at page 305, discussion rather is found at 305 of our submissions. So it is a decision of the Court of Final Appeal in Hong Kong and it is dealing with an offence provision and is similar to ours and it has the same origin as ours, namely section 107 of the UK statute and of course this is in the same jurisdiction in which Megaupload was registered.

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Again, I won't take Your Honours to the case itself but I will just highlight really one sentence found at paragraph 54 of that judgment. The Court said, "Distribution in its ordinary meaning is clearly capable of encompassing a process in which the distributor first takes the necessary steps to make the item available and the recipient then takes steps of his own to obtain it. A simple example involves distribution of soft drinks or other consumer items by means of coin operated vending machines." And speaking of the appellant, it said, "It would be wrong to mistake his use of automated means". In that case it was the BitTorrent system software to achieve his purpose for mere passivity on his part." And an everyday example of the meaning of distribution would be if I sent an email to people on a distribution list. It would be odd to say there had been no distribution of the email.

GLAZEBROOK J:

What's said against you, and it has a specialist meaning in the copyright context. I presume you are going to deal with that?

MR SINCLAIR:

Well it is not specially defined in the Copyright Act and a point I will come to very soon. The offence is not defined by reference to those restricted acts in section 16. So it is like a standalone concept sitting in sections 36 and 131.

WILLIAMS J:

Yes, “distribute” is not a word in section 16 but you can’t ignore the big debate can you and the way in which other counties have dealt with what they think maybe or is a distinction between “distribute” and “communicate”.

WINKELMANN CJ:

So are you going to deal with that in your submissions, the stem of the legislation leads to the history argument Mr Mansfield gave.

GLAZEBROOK J:

And WIPO.

WINKELMANN CJ:

Yes, obviously that includes the WIPO.

MR SINCLAIR:

Yes I hadn’t proposed to say anything more about the treaties but I am happy to do so perhaps.

WINKELMANN CJ:

Well Mr Mansfield spent nearly a day addressing us on the legislative history, which includes WIPO, so we would, I think, like to hear from you on that.

MR SINCLAIR:

Yes we would need, in that case, to look at the relationship between WIPO and the earlier treaties, Berne, the Berne Convention and TRIPS, but yes I can certainly do that Your Honour.

WILLIAMS J:

In any event – sorry before you do that. Your primary argument is really that if you read 92C and 131(1)(c), it must follow that storage is possession.

MR SINCLAIR:

Yes.

WILLIAMS J:

And knowing storage is possession and communication is 16(1)(f) infringement, therefore knowing storage is possession with a view to a 16(1)(f) or whatever it is, infringement captured by (c).

MR SINCLAIR:

Yes.

WILLIAMS J:

So I don't need to fight about whether communication is inside "distribution" or not.

MR SINCLAIR:

No we can get home on the possession offence without that complication. It works either way.

WILLIAMS J:

Because the other side concedes that what's going on here is communication?

MR SINCLAIR:

Yes.

WILLIAMS J:

That's the whole point in their argument.

MR SINCLAIR:

Yes.

WINKELMANN CJ:

So Mr Sinclair, may I just take you back to the shape of your submissions. I do think we are interested to hear what you say in response to Mr Mansfield's point. For instance, the point he makes that the United Kingdom, that there is

a separation out of communication. The fact that the United Kingdom added in an offence for communication, but we did not do that. So we are interested in the United States' response on those points.

MR SINCLAIR:

I will endeavour to marshal my thoughts on that but I could perhaps make this point quickly now. The whole point of introducing the communication right was in favour of copyright owners. The perception was the old language, broadcasting and cable programme, would leave a gap in the coverage levy. Possibly a gap in the coverage of the Copyright Owners' Act. So this is a step that has been taken to enhance the rights of copyright owners. It is incongruous in our submission to say that somehow from that step being taken, Parliament has silently conferred this blanket immunity on ISPs.

WINKELMANN CJ:

So the point you need to address, I think, is that the thought that there is a gap that needs addressing, suggests that it is not within the existing legislative scheme so if it is put into the legislative scheme, but then not carried over into the criminal provisions, why is that?

MR SINCLAIR:

Well it was in our submission, Your Honour because as soon as you adjust the rights protected under section 16, that will be translated into the criminal offence in 131(1)(c). So as soon as you have possession with knowledge, with a view to committing any act infringing copyright. That is a reference back to section 16. The communication right is there now sitting as section 16(f). Possession in that manner, with a view to communicating, is a criminal offence. There is no need to amend section 131 to achieve that affect and if one looks at what was done in light of this amendment, there has simply been a global word change where the old language, cable programme broadcasting has been replaced by communicating, that has just gone right through the Act.

WILLIAMS J:

What did the UK do with their equivalent of 131(1)(c), do you know?

MR SINCLAIR:

Well my friend's point –

WILLIAMS J:

Because that same argument would apply there presumably.

MR SINCLAIR:

– is they made a specific offence.

WILLIAMS J:

I know but what did they do with the possession with a view to infringement clause, do you know?

MR SINCLAIR:

I don't think that's touched on, I'll just think about that.

WILLIAMS J:

Right, okay.

WINKELMANN CJ:

But you were saying you were responding to Justice Williams. You said your friend's submission is that they made a specific offence. Did you have a comment on that?

MR SINCLAIR:

Yes and *Ming* is a helpful case to look at in that respect because the same argument occurred there and I might add that Lord Millett sat on the bench for that, in that case. But the amendment, I may not be able to – I was actually going to cover this and it's not on my fingertips at the moment. That amendment, the UK Act, was seen by the Hong Kong Court as not

relevant to the construction of the closely similar Hong Kong offence in its copyright ordinance.

WINKELMANN CJ:

So when we look at section 131, how do you say that it is that it criminalises every copyright infringement under section 16 because it seems to pick up particular infringing acts.

MR SINCLAIR:

But it is (c). There are –

WINKELMANN CJ:

Right so it is (c) is it?

O'REGAN J:

Because it is a view to committing an infringement act which is broad.

WINKELMANN CJ:

So it is under section 131(1)(c).

MR SINCLAIR:

Yes, there are parts I understand. I am just noticing the time Your Honour but I will quickly deal with this and maybe come back to it.

WINKELMANN CJ:

Oh we have a few minutes.

MR SINCLAIR:

But there are two parts of relevance to us in section 131. One is the possession offence and as we submitted it is in essence the primary offence because you are going to have to possess something with the required knowledge before you can go on to deal with it, the required knowledge. So chronologically it comes first. But that picks up, for the reasons I have just described, any possession that is accompanied by a view to committing any

act infringing the copyright. So all of the protected rights in section 15. If there is possession with a view to committing any of these, for Megaupload it would be copying, communicating, an element of authorising as well, that's one criminal offence. If we come down to d), other relevant offences, and without getting into where there's an exhibition in public, distribution is the obvious one and the feature that we need to keep in mind here is that distribution is not connected, as the first offence was, to the prescribed protected rights. It's a sort of standalone descriptor of an activity. And the point of referring to *Ming* is that "distributes" has an ordinary meaning which is quite capable of encompassing an online dissemination where the copy resides with the distributor. There's an online process which results in the reproduction of another copy on the hard drive of the user. So that's the distribution even though the copy held by, let's say, Megaupload has never left its server and I think actually that –

WILLIAMS J:
So (2A) was unnecessary?

WINKELMANN CJ:
Which is what the Court of Appeal said. That's what the Court of Appeal said, that it was unnecessary, (2A).

WILLIAMS J:
107(2A) of the UK legislation.

MR SINCLAIR:
Yes, I'm sorry, yes.

WILLIAMS J:
Perhaps that's right but there's still the trouble of that debate about a lot of people who knew a lot about the subject rather thought it was but in any event, if "communicate" means "make available" then it's a wider meaning than the ordinary meaning of "communicate" so (c) is rather a firmer rock,

excuse the pun, I would have thought. "Communicate" is defined specifically to include "make available".

MR SINCLAIR:

It is.

WILLIAMS J:

"Storage" with access, that might be argued is "make available" and anyway, storage must be a subset of possession or there'd be no point in 92C?

MR SINCLAIR:

Yes, that's right, yes.

WILLIAMS J:

So that wraps it up tightly, you would've said, wouldn't you?

MR SINCLAIR:

Yes, well, we can get by with either of these offences. You could say both work but certainly, we can start and succeed on the possession offence.

WILLIAMS J:

Right, subject to the questions about whether you've got specific material that addresses – once you're outside the conspiracy, specific material that addresses your specific charges?

MR SINCLAIR:

Yes, I understand, yes. Your Honour, is that time to break?

WINKELMANN CJ:

Yes.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.46 AM

MR SINCLAIR:

Your Honours, I'm still at the third bullet point of my mini roadmap but I'm nearly finished there.

WINKELMANN CJ:

Thank you.

MR SINCLAIR:

We're just dealing with the issue of whether the involvement of users somehow absolves Megaupload and we've moved on to talk about distribution. I'd just like to note that the case of *Griffiths* [*USA v Griffiths* [2005] FCAFC 34], which will be spoken about by my colleagues, is another case where you have online dissemination and the offence is one of distribution. I do note that the Australian Copyright Act has since inserted a communication right and then defined distribution to include communication. In our submission, that's merely making explicit that which is implicit in our Act.

O'REGAN J:

So did you say "communication" is defined to include distribution or vice versa?

WINKELMANN CJ:

The other way around.

MR SINCLAIR:

"Distribution" now includes communication in the Australian statute.

WINKELMANN CJ:

So although the Act added in a right, the communication right also clarified that "distribution" includes "communicate"?

MR SINCLAIR:

Yes. My friend in his reply says at paragraph 5.29, "However the downstream act of copyright infringement may be characterised, communicating, distributing, or copying, it's out of the ISP's hands". But we say Megaupload was not a passive actor. It set up the apparatus for enabling material to be stored. It solicited infringing material, concealed it, protected it, and actively monetised it, and it controlled whether that material was disseminated or not.

GLAZEBROOK J:

Do you want to just explain – are you going to explain that last bit?

MR SINCLAIR:

Yes, I think that will become apparent very shortly, Your Honour. I'm sorry, I keep deferring these things, but…

GLAZEBROOK J:

That was just a summary? Thank you.

MR SINCLAIR:

Yes. I do need though just to expand on my nutshell. I need to grow that somewhat in light of something my friend said yesterday. If Your Honours have section 131 before you, the submission was made that the words in section 131(1)(c), possession with a view to committing any act infringing the copyright, referred to acts described in subsection (1)(a), (b), (d), and (e), so acts described within section 131 itself, that's as I understood the submission. But we say that's not how the Act works and I've covered this already but I'll just briefly remind Your Honours, so we have section 16 describing the acts restricted by copyright, section 29 defining infringement by reference to those restricted acts. So the words in section 131(1)(c) are referring back to the restricted acts in section 16 and in our submission, that must be so because a word such as "distributes" in subsection (d)(iii) is not one of the acts restricted by copyright. As I said before, it's more in the nature of a broad descriptive term. My next subheading –

WINKELMANN CJ:

I'm struggling why it follows because you could say it follows the other way, actually, that this is a self-contained code because it creates new concepts. Why is it so because "distributes" is not a word that appears in section 16?

MR SINCLAIR:

Well, because we start with the fundamentals. The acts restricted by copyright are those we find in section 16.

WINKELMANN CJ:

Isn't the point you're making that it can't be that it's just the section 131 acts because that would be illogical to add in these further hurdles when they're already criminalised without those further hurdles?

MR SINCLAIR:

The slightly odd feature is that section 131(1)(d) doesn't, as it might have done, refer back to the restricted acts. It's used different concepts and the point I was trying to make, Your Honour, was that that's why when we see the words "any act infringing the copyright", we have to go back to the restricted acts in 16 and there we find "communicating", for example. But the drafters, and they're not ours really because it's come from the UK Act, they have chosen to use broader concepts that are standalone in nature and so we have to look at the word "distributes", which is not a term used in section 16, and find what its meaning covers, and I think that's the problem with my friend's submission, that the acts infringing copyright are those described within 131.

WILLIAMS J:

They really wanted to say "an act infringing copyright where the infringement is itself in the nature of an offence"? Section 12 says "an infringing copy", for example, "is a copy that infringes copyright". Logically, that must mean something that breaches the exclusive rights in 16 so infringement is likely to mean that.

MR SINCLAIR:

Yes, section 29 will tell us that, yes.

WILLIAMS J:

Isn't the suggestion that infringement – yes, okay.

WINKELMANN CJ:

Because you could read it coherently, as Mr Mansfield suggests, which is it's doing these acts or actually possessing them to do those acts.

GLAZEBROOK J:

Sorry, what acts?

WINKELMANN CJ:

Section 131 acts.

GLAZEBROOK J:

Okay, sorry, yes.

MR SINCLAIR:

Yes, well, even on that reading, we would say you were still possessing with a view to distributing.

I'll finish then with the involvement of users and I'd be grateful for the Court's guidance on my next heading. This is the issue of whether 131 applies to infringement by digital means and in particular, the meaning of the word "object". I take it to be common ground between the parties that digital files are objects for the purposes of section 131. It's possible that the Court doesn't agree with us but in any event, my friend says that 131 only applies to tangible objects and we say there is no distinction in the Act between tangible and intangible copies or objects. So I'm not sure if it's useful to summarise our submission on that, Your Honours, or perhaps it's something that I can pass over.

WINKELMANN CJ:

I think you should summarise your submission on it.

MR SINCLAIR:

Well, our submission is the fundamental purpose of the Act is to create and protect rights of property in original works and in particular, the basic right to control copying of a work, and there is no distinction between tangible and intangible copies within the Act. And if we look at the sections that do the heavy lifting, "copying" is defined in section 2 in the widest terms to capture any form of copying and we've seen that the definition was expressly amended in 2008 to apply to reproducing copies in any material form, including digital format. So we say any kind of thing that can be a "copy" can be an infringing copy and that applies even to transient copies.

Then section 12 defines "infringing copy" by reference to whether the making of the copy infringes copyright. It's not saying that only a subset of copies, tangible objects, can be infringing copies. "Object" in this section merely refers to –

WINKELMANN CJ:

Can you just pause for a second while we get section 12 in front of us? Right.

MR SINCLAIR:

Section 12, "object" merely refers to the product of the act of copying, and then Your Honours may care to flick through to section 29. Copying in a work is infringed when an unlicensed person does any restricted act. Infringement is not tied to the kind of work or the kind of copy, so there's no tangible or intangible distinction.

WILLIAMS J:

Why did they not use the word "work" in 131? That would be the logical way to communicate that.

MR SINCLAIR:

I cannot explain that, Your Honour.

WILLIAMS J:

It doesn't make a lot of sense. It's so obvious that if you want it to be tangible or intangible then "work" is the word they've used to cover that. It doesn't make a lot of sense to use "object" which just muddies the water at least, or at the most indicates that they were talking about objects.

GLAZEBROOK J:

But the trouble is, I think, is the object that they know is an infringing copy so it can't be a work that they know is an infringing copy.

O'REGAN J:

It's a copy of the work.

GLAZEBROOK J:

Yes, it's a copy of the work.

WILLIAMS J:

I see.

MR SINCLAIR:

Then briefly looking back to sections 92B and 92C, these are predicated on ISPs having potential civil and criminal liability and that points us to sections 36 and section 131, both of which speak of possession of an object. So for these provisions to work sensibly together, that is the 92B and 92C and then the infringement in the course of a business, for those to work together, a digital file must be an object, tangible or intangible, but we don't concede that a digital file is necessarily an intangible object.

I've noted in the written submissions there are at least two other features of the Copyright Act that tell us that section 131 must apply to copies in digital form and I won't cover this in any detail but just briefly, the copyright

protection provision, which is section 226, and it's actually more helpful to consider it in its original form. In its original form, it applied specifically to electronic copies and it was designed to work in conjunction with a section 131 prosecution and that tells us that an electronic copy is therefore an "object". I've set that out in some detail in the footnote in our submissions. There's a somewhat complex path to get to that conclusion but that's the point in summary form.

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WILLIAMS J:

Which footnote? You don't need to take us to it, just tell me which one. Or you don't recall?

MR SINCLAIR:

Just if Your Honour will allow me a moment…

WINKELMANN CJ:

So that was substituted in 2008, so it's the original form of it?

MR SINCLAIR:

The original form referred expressly to electronic copies in this rather long footnote I have explained and it's –

WILLIAMS J:

84, is that the one there?

MR SINCLAIR:

349 of our written submissions on page 86.

WINKELMANN CJ:

And your point is that that proceeded from the basis that an "object "included an intangible –

MR SINCLAIR:

Yes, this is a delivery up process and it fastens onto both delivery up and civil and criminal proceedings because we're talking about copy protection mechanisms. That must follow, in my submission, that it's possible to have a conviction under 131 where the object is an electronic copy. So a somewhat complex point and I won't labour it.

A simpler point is that ISPs were seen to be potentially liable for transient copying when the 2008 amendments were inserted and section 43A was enacted as a limited exception and transient copying is seen as an aspect of communication which we see in the explanatory note and within the section. 43A was mentioned by my friend and I simply note that it wouldn't protect Megaupload. The exception only applies if the reproduction does not infringe copyright and has no independent economic significance. So if there is an infringement, it doesn't apply, and of course, there's economic significance in the harm to the copyright owner and the income for Megaupload.

GLAZEBROOK J:

Can we just have a look at that? Because it would be no protection at all and I don't think it does say that. It says it doesn't infringe copyright if it's transient or incidental. Because there would be no protection at all for the ISP who has no idea whether it infringes if you have to say it doesn't infringe copyright.

MR SINCLAIR:

Well, the starting position for the policymakers was –

GLAZEBROOK J:

Do you want to just look at the section and tell me where you get that it can't infringe copyright or you don't get the protection under the section? Because it's not the way I read it.

MR SINCLAIR:

Yes. So no infringement for reproduction that's transient subject to in (b)(i) "making or receiving a communication that does not infringe copyright" so it

has to be a transient communication that does not infringe copyright, and then coming down to subsection (c), that transient communication also has to have "no independent economic" –

GLAZEBROOK J:

So it actually doesn't help an ISP at all if unbeknownst to them somebody is communicating an infringing with them and they, through their processes, make a copy of that in order to communicate it to someone else?

MR SINCLAIR:

That's where 92B and 92C operate.

GLAZEBROOK J:

So you say this is no protection at all of anyone whatsoever unless it happens to be – in which case it seems very odd that you'd even have the section in given that if it doesn't infringe copyright, you can presumably make as many copies as you like?

MR SINCLAIR:

Well, subject to these reasonably stringent limitations. So it is transient and incidental and…

ELLEN FRANCE J:

From some of the New Zealand commentary, it's suggested it's dealing more with the situation where the way the computer operates, you end up with some copying of infringing material. I don't know enough about the technology to know how that works so you have…

WINKELMANN CJ:

There is instantaneous copying sometimes, it just passes by in the course of downloading or transmitting, communicating, to use the language of the Act.

ELLEN FRANCE J:

Yes.

MR SINCLAIR:

Yes, shunting it through the Internet.

GLAZEBROOK J:

So if you may have a communication that doesn't infringe copyright, it doesn't seem any – you're not going to infringe copyright by making a copy, are you? Maybe you are.

WINKELMANN CJ:

Mr Sinclair, can you just repeat, what is your submission in relation to this section?

O'REGAN J:

Because –

MR SINCLAIR:

Yes, Your Honour, yes.

WINKELMANN CJ:

What is your submission?

MR SINCLAIR:

Well, just beginning with the apprehension of what the problem was and that was that ISPs were thought to be at least potentially liable for transient copying.

GLAZEBROOK J:

Is this, if they make a copy of a communication, per se, they might be breaching copyright i.e. because if I'd written something that's copyrightable and I'm communicating it to somebody else, which I'm entitled to do, but the ISP makes a copy in the middle of that because of the sort of processes that Justice France was talking about, that there was a concern that that copying itself was breaching my copyright as a communicator?

MR SINCLAIR:

Yes, it's another occasion when Parliament doesn't want –

GLAZEBROOK J:

So a relatively narrow issue?

MR SINCLAIR:

A truly innocent act of copying that is –

WINKELMANN CJ:

So just taking you back to your submission in relation to it, you were saying section 43A, ISPs were thought to be potentially liable for transient copying?

MR SINCLAIR:

Yes.

WINKELMANN CJ:

And this was protecting them from it, from that line in there?

MR SINCLAIR:

Yes, it was carved out as a limited exception.

WINKELMANN CJ:

And you say however, it shows that an electronic copy is an object, does it?

MR SINCLAIR:

Yes, and I arrive at that because the ISP is otherwise potentially liable. It's the premise of the new section, and we're talking about transient communications by an ISP. That must mean you're dealing with, let's say, an intangible object, and I think the –

WINKELMANN CJ:

Well, it doesn't necessarily follow because it could be a tangible object scanned in, say, to a program and then converted into digital format.

I suppose it does assume that the digital format is something that is an "object"?

MR SINCLAIR:

Yes, well, it's treating the digital copy as an "object" if the premise is that ISPs are otherwise liable, and I'd submit also that it's indicating that transient copying such as streaming exposes an ISP potentially to liability apart from when it is protected by this section 43A.

WINKELMANN CJ:

So there is a specific provision in relation to webcasting, isn't there?

WILLIAMS J:

We talked about it the other day, I think.

MR SINCLAIR:

Yes, it's – I'm afraid it's not springing to mind.

WINKELMANN CJ:

Probably the same argument would apply then, mmm.

MR SINCLAIR:

That's really all I wanted to say about the issue of objects and tangible, intangible copies.

WINKELMANN CJ:

So that takes us to your…

MR SINCLAIR:

Yes, it takes me to another subheading of whether the activities in Megaupload were confined to communication, can it only be liable for breach of the copyright owner's communication right? Megaupload's activities covered several of the rights restricted by copyright so the creation of a file on its servers was an act of copying. The streaming or downloading of the file were further acts of copying and the restricted acts are not mutually exclusive

so the dissemination of copies from the stored copy was also an act of communicating and we can find other relevant acts the payment of rewards was authorising.

As I've already covered with Your Honours, section 131(1)(c) captures possession with a view to committing any act infringing copyright. So even if Megaupload's conduct is analysed as communicating, possession with a view to infringing the owner's communication right is an offence. We've covered that, and I've also covered this point, and that's why the offence in 131(1)(c) required no amendment when the communication right was introduced.

WINKELMANN CJ:

Can I just take you back to your submission in relation to the relationship between section 131 and section 16?

MR SINCLAIR:

Yes, Your Honour, yes.

WINKELMANN CJ:

On your submission, it would not – there might be acts under section 16 which are not criminalised but which if you possessed them for the purposes of business, possessed material in the course of business to commit those acts would be criminalised. So they might not be under section 131 – I mean, is there a gap between it, is what I'm asking you. So on your submission, if you did the express act under section 16 and if it's not in the list under section 131, it would not be criminal, but it would be if you possessed the object in the course of a business with a view to committing that infringing act, it would be criminal?

MR SINCLAIR:

Yes, possession with a view to any of the section 16 – infringing any of the section 16 rights is certainly covered by 131(1)(c).

WINKELMANN CJ:

Yes, but what I'm asking you is if you look at section 131(1), it's structured in a way where it makes certain express acts criminal, so distributing, making for sale or hire, selling, et cetera, but then it also makes possessing in the course of business with a view to committing any infringing act. So what I'm asking you is is there actually – does that expand liability? Because there are direct acts and then there are possessing. Are these some direct acts which would not otherwise be direct acts under section 16 which would not otherwise be criminal under this provision unless they fell within section 131(1)(c)? Do you understand my question?

MR SINCLAIR:

Not entirely, I have to confess, Your Honour, but I thought Your Honour was putting to me that there may be a mismatch or an incomplete coverage when we look at, say, (d) –

WINKELMANN CJ:

Yes.

MR SINCLAIR:

– and compare that with the restricted acts in section 16?

WINKELMANN CJ:

Mmm, so what I'm wondering is whether (c) brings in – because (c), on your view, is sort of a sweeper-type provision. Does (c) bring in any acts under section 16 which would not otherwise be criminalised under (a), (b), (d), (e), or (f)?

MR SINCLAIR:

Well, the way I –

WINKELMANN CJ:

I think Ms Fuhr might have a suggestion for you.

MR SINCLAIR:

The way I read it is that it directs us back to those section 16 protected acts.

WINKELMANN CJ:

Yes, and I'm asking you, are there any protected acts under section 16 that come in through section 131(1)(c) which would not otherwise be caught under (a), (b), (c), (d), (e), or (f), so the direct act is not criminalised but possession for that direct act is?

MR SINCLAIR:

So (c), because of its breadth, must pick up all of them and if the issue is "Well, what does 'distributes' cover when we compare it with section 16, what does 'exhibits' cover?", I have to confess, I haven't entirely thought my way through whether there's –

WINKELMANN CJ:

No, because my point is, I suppose, it would seem illogical that you could do the direct act in the course of business and it not be criminal but it would be criminal to possess it for that purpose. That's my thought that it might seem illogical.

WILLIAMS J:

(g) is probably one. Sorry – (g), yes.

GLAZEBROOK J:

Well, actually, even (a).

WILLIAMS J:

So if you possess a script for the purpose of adapting it, that's not covered by (d)?

GLAZEBROOK J:

Or even copying, actually.

MR SINCLAIR:

Well, if I can take Justice Glazebrook's example, copying, in our submission, would be covered by (d) for the reasons that I traversed with, let's say, the case of *Ming* that the act of copying results in another copy on the computer of the user which may be a more or less permanent copy if it's downloaded or it may be a transient copy if it's simply streamed. But that is copying and it comes under the umbrella of "distributes".

GLAZEBROOK J:

Sorry, I was saying it's not covered by anything other than (c).

WILLIAMS J:

Yes, so we get out of the computer world and you just photocopy it, yes.

GLAZEBROOK J:

And the adaptation as well.

WINKELMANN CJ:

So I don't want to interrupt your stream of thought but it just occurred to me as I was listening to these other submissions that popped into my head that it would seem illogical were there such a gap so it would not be unlawful to directly do the act in the course of business but it would be unlawful to possess the object for that purpose? It would seem illogical and that's my thought but it might be something you want to come back to. You might have a complete answer.

MR SINCLAIR:

Yes, I don't know if it's helpful to – well, two things, I didn't want to lose track of Justice Glazebrook's point –

GLAZEBROOK J:

No, it's the same point as the Chief Justice, it was just giving an example that copying doesn't come under 131 apart from under (c) if you happen to possess it and adaptation was the other example given but on your analysis, it

comes under (c) if it's possessed for that purpose but it might you just say that in fact, if you have a copy, you don't just have it for copying. If you've got a business, you're going to try and monetise it and just copying it doesn't give you the monetarisation.

WINKELMANN CJ:

That's what I'm getting at.

GLAZEBROOK J:

It's only the selling it which therefore it does come within one of the other provisions.

MR SINCLAIR:

Yes, so –

WINKELMANN CJ:

So it might be that you say that subsection 131(1)(c) picks up those things that there is no direct act other than possessing it but I'm not sure so that's why I'm asking you about the gap and that might be something you need to reflect upon, Mr Sinclair. It's a tricky question to answer on the spot.

ELLEN FRANCE J:

Am I right, I thought your submission was that copying would come under (d)?

MR SINCLAIR:

Yes, it is.

WILLIAMS J:

That kind of copying would be "distribution", you say?

GLAZEBROOK J:

Well, what you would say, just merely copying it wouldn't be in the course of a business. You'd have to be monetising it in some way and therefore, it would come under (d), is that…

WINKELMANN CJ:

Yes.

MR SINCLAIR:

Yes, so let's think of Megaupload. So the initial reception or the creation of the copy on its server is an act of copying but the offence in (1)(c) requires more. It requires the view to – it requires further acts, a view to…

WILLIAMS J:

Well, if – sorry, were you going to carry on?

MR SINCLAIR:

No.

WILLIAMS J:

The way you would use it in the course of business but merely copy and nothing more was if you had a manual or some software which you were going to use in the course of your business, you weren't distributing it or communicating it, it was for you, and you have got that by infringing the copyright of the manual maker or the software maker, you would be in possession of it for the purpose of infringing but not caught by (d)?

MR SINCLAIR:

No, there's no further distribution, is there?

WILLIAMS J:

That's right.

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MR SINCLAIR:

Yes, that's right. I don't know if it's helpful to add a point which I think I've made already that before you come to those further acts such as an exhibition in public or distributes, you probably already committed the possession

offence. It's difficult to do those downstream acts without first having possession.

WINKELMANN CJ:

Yes, that was my – yes, right, I – yes. I think that still doesn't quite match my point but –

MR SINCLAIR:

Sorry. Yes, I'm maybe not – it's my fault. I'm not getting that.

WINKELMANN CJ:

That's all right. You can come back to it if you like but otherwise we can just rest on your submissions to date. So I interrupted you on that point, I'm sorry, because of my surge of electricity in my brain on the point.

MR SINCLAIR:

Yes, I've got myself a little lost. I think I could probably move to another, and just to signpost this, this would be issue B in the Court's list and that's whether the appellants were in possession. I think the question is probably "Can a storage provider possess files?" and as I've covered already, sections 92B and C recognise that an ISP can be criminally liable, which points us to 131, and it also recognises that the ISP can be liable for storing the material of a user. If we put those things together, the obvious implication is that a hosting service, by storing the files of its users, possesses them for the purposes of criminal infringement in section 131 and it would be the same for civil infringement under section 36 which also concerns possession.

Section 92C is predicated on the hosting service having the ability to control files and delete them in situations where infringement is apparent. Megaupload's terms of service contractually armed it with powers of control over user material.

O'REGAN J:

But that was only if it was infringing, wasn't it?

MR SINCLAIR:

That's right. It could terminate the accounts of repeat infringers, the repeat infringers it paid rewards to, and I'll just look up the –

WINKELMANN CJ:

Because Mr Mansfield's point was, in reliance upon some American authority, that it's not sufficient for possession just doing that which is needed to be done to access the safe harbour provisions?

MR SINCLAIR:

Yes, that's right, but the DMCA will proceed on the same premise as our safe harbours which is on acquiring knowledge of a specific file, the obligation will be either to delete it if one wants to be within safe harbour, it's necessary to delete the file or prevent access, and so the system is based on having that ability to delete files or block access when infringement is apparent and I'm simply noting that of course, the terms of service with Megaupload entitled it to do just that. It could suspend, archive, or delete an account and all related information and data without notice for, among other things, unauthorised use of copyright material, and as I'd mentioned, had the power to suspend or terminate the user's account in situations of repeat infringement.

WINKELMANN CJ:

Yes, and Mr Mansfield's point is simply having the power to address infringing material, which is the power that's necessary for safe harbour provisions, is not enough to give an ISP control sufficient to be able to be in possession.

MR SINCLAIR:

That is his submission but –

WINKELMANN CJ:

Yes, what's your reply?

MR SINCLAIR:

Well, it's impossible to make these sections work together unless we read "storage" as meaning the same thing as "possession" in sections 36 and 131.

GLAZEBROOK J:

Sorry, unless? Okay, I think I got that, unless you read "possession" as including "storage", is that…

MR SINCLAIR:

Yes, well, amounting to the same thing. And as for control, well, the ability to delete or block access to a file is the epitome of control, in a way.

WINKELMANN CJ:

So you're just saying he's wrong on that? So your response is that he is wrong on that and that those authorities that he relies on should be put to one side in our legislative scheme or do you say that in this case, Megaupload had a higher level of control than that?

MR SINCLAIR:

Well, they're actually talking about different things, and this will become more apparent when we look at the takedown notice issue, but they're talking about different things and they certainly do not sanction the activity or the course that Megaupload followed of preserving files and continuing to allow access once knowledge is acquired. They're saying things such as it's not necessary to – if by takedown notice your attention is drawn to a particular unique file embodying *Lord of the Rings*, you have an obligation, if you wish to claim safe harbour, to delete that file or block it, and the US cases are saying you don't have to scan the rest of your site to find other versions.

WINKELMANN CJ:

Well, that's a different proposition. Mr Mansfield's proposition, which he advanced in reliance upon authority, was that it is not sufficient to constitute control for the purposes of possession simply to have the ability to take down,

to scan for, or – certainly to take down infringing material, and I just wonder what you say in relation to those authorities that he took us to.

WILLIAMS J:

It was the *UMG* case [*UMG Recordings Inc v Shelter Capital Partners LLC* 718 F 3d 1006 (9th Cir 2013)].

MR SINCLAIR:

Yes, well, I understood that to be saying that you don't lose safe harbour simply because you have that capacity to exercise control over the file but that situation changes immediately once you are put on notice that the file infringes copyright.

WINKELMANN CJ:

So is your response that all those authorities stand as authority for is that you do not lose safe harbour simply because you are put on notice, because they do seem to address explicitly whether the powers you have to address infringing material equal possession?

MR SINCLAIR:

I think what they're trying to avoid is the conclusion that you need these powers in order to come within safe harbour in a takedown situation but merely because you have those powers doesn't mean that you are controlling the file in such a way that safe harbour is ruled out of the question from the very beginning.

WILLIAMS J:

Isn't your best point that the only control that really counts is sufficient control to prevent the infringement?

MR SINCLAIR:

I would agree with that, Your Honour. I think that because the ISP – as I say, the safe harbour is predicated on this, it must have the ability to do the things necessary to acquire safe harbour.

WILLIAMS J:

Right, of course, so that would suggest that the control aspect of possession for the purpose of the Copyright Act is sufficient control to prevent the infringement?

MR SINCLAIR:

Yes.

WILLIAMS J:

You don't need any more than that?

MR SINCLAIR:

So obviously, there's no offence simply from possession. It's when the possession is coupled with knowledge that the content is infringing and it's possession coupled with the view to committing further acts.

WINKELMANN CJ:

That might be your best point but it doesn't seem to answer Mr Mansfield's reliance on those cases to date unless you say he's mischaracterising them?

MR SINCLAIR:

Well, what I can say, Your Honour, is that none of those United States cases comes anywhere close to sanctioning the course of conduct that we see with Megaupload and we'll see that –

WINKELMANN CJ:

Well, that's what I'm really interested in. So what do you say is different about Megaupload? Why is it in a greater position of control than any other ISP? Is it because it had this power and it knew about the infringing material? Is that the point?

MR SINCLAIR:

Yes, and it's something Justice France picked up on and I was going to say something about it but in the *YouTube* case, and I won't try and take

Your Honours to the exact passage, but I'll just try and describe what I'm referring to, the Court did hold that, in referring to evidence of a kind that we see in this case, on these facts, "A reasonable juror could conclude that YouTube had actual knowledge of specific" infringement in relation to a small number of clips, and it almost goes without saying, I think, as the Second Circuit Court noted, "Any service provider that has item-specific knowledge of infringing activity and thereby obtains financial benefit would already be excluded from the safe harbor under § 512(c)(1)(A) for having specific knowledge of infringing material and failing to effect expeditious removal." So there's nothing in these cases that is endorsing…

WINKELMANN CJ:

No, so formulate it in the legal terms of possession. You say it takes it outside – the fact that the appellants knew that this material was infringing and had the power to remove infringing material places them in possession of that infringing material?

MR SINCLAIR:

Yes, that's our submission, Your Honour.

GLAZEBROOK J:

Do you need to have the power to remove it to be in possession of it? Because it's actually on your server so just from that point of view, you've got the power to remove it. You could shut your server down.

MR SINCLAIR:

I think that must be so, Your Honour. The point I was trying to make is that to make any sense of the safe harbour provisions in relation to the criminal and civil liability that they envisage is possible, you have to equate storage with possession.

WINKELMANN CJ:

Well, I don't know –

GLAZEBROOK J:

Yes, but you just need to go that far, don't you, because then you say "But in order to be criminally liable, it has to be in the course of a business with a view to committing an infringing act and if you come within the safe harbour then you're not infringing", effectively?

MR SINCLAIR:

That's right, yes.

GLAZEBROOK J:

So that takes you out of it?

MR SINCLAIR:

Yes.

GLAZEBROOK J:

So it's not pure possession, you have to go through the other steps, and that necessarily means you don't fall within the safe harbour provisions? Because if you do fall within the safe harbour then you're not infringing?

MR SINCLAIR:

Yes, well, I think you could have possession and then possession in a –

GLAZEBROOK J:

You'd still have – no, exactly, possession – this doesn't criminalise possession, it only criminalises possession that is in the course of a business and with a view to committing any act infringing is I think the point you were making?

MR SINCLAIR:

Yes.

WINKELMANN CJ:

And it assumes knowledge. In the criminal law, possession normally assumes knowledge and you couldn't really be criminalised if you didn't have knowledge.

WILLIAMS J:

Unless you did, that's right.

GLAZEBROOK J:

And if you don't have knowledge, you're within safe harbour if you're an ISP, in any event.

WINKELMANN CJ:

So I think we're clear on your submission then, Mr Sinclair.

MR SINCLAIR:

Yes. That, apart from one thing, is all I wanted to say about possession. I just wanted to note, when I find it, that there is a situation in which you can – my friends say, oh well Megaupload is not in possession because it is the user who puts the material out there, it is the user who can pull it down as it were but there is one occasion in the ROC in which Megaupload appropriated thousands of files belonging to a repeat infringer. This is a person identified as TE. So entirely excluded his access to those files and treated them solely as belonging to Megaupload. So that takes the user entirely out of the equation. So 9000 videos possessed by Megaupload without any reference to the user and it is set out in our submissions at paragraph 296. Now Your Honours moving to issue (c) and that is whether the safe harbour provisions apply and if so, are they a defence and our submission is, safe harbour is a defence and for that reason it is not engaged in an extradition proceeding. And if we take section 131 as an example, the elements of the various offences in that section are set out. If these are proved, the offence is complete. If the defendant has made no reference to safe harbour they must be convicted, or in a committal must be committed. The defendant must offer enough evidence to put in play any claim to safe harbour so during this,

according to first principles, this tells us that the claim to safe harbour is a defence. The defendant has committed prima facie the elements of the offence but says they should not be convicted for another reason. There is some helpful discussion of defences in the case of *MM*, I won't take Your Honours to that but I will just read briefly from it.

GLAZEBROOK J:

Isn't it a bit difficult to see that as a defence if you are under (c) because it has to be with a view to committing any act infringing the copyright and if you are under safe harbour, then you aren't infringing the copyright. I think that was Mr Mansfield's point. That if you are going to say – well he obviously didn't accept a possession either, but his other point was you can't be infringing copyright if you are within safe harbour, so it isn't a defence. It is actually part of what has to be proved by the Crown.

MR SINCLAIR:

Part of the elements. That is his submission, I will endeavour to explain why it is incorrect.

GLAZEBROOK J:

Just so I knew we were dealing squarely with that submission.

MR SINCLAIR:

Yes, well I mentioned *MM*. I will just get through that and deal with that quickly. So at paragraph 46, "The preliminary inquiry justice," this is in in committal, "is concerned only with the elements of the offence and any other conditions on which the prosecution bears the evidential burden of proof… The justice has no role to play with respect to matters on which the accused bears an evidential persuasive burden."

Then at paragraph 95, "It was not part of the extradition Judge's role to consider whether there might be valid defences to the Canadian offences. In order to obtain a committal for trial, the prosecution does not have to negate

defences, such as the excuse set out s. 285, on which the accused bears the evidential burden."

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The position in the US civil cases appears to be similar, i.e. that raising safe harbour is something for the defendant to put in play rather than for the plaintiff to negate, at least initially and we see that in the *Capital Records, LLC v Vimeo, LLC* 826 F.3d 79 (2d Cir. 2016) case. I will give the reference to that. KD-AUT –

GLAZEBROOK J:

Can I just check what the submission is then? That the submission therefore is that if you give evidence that absence safe harbour, there would be a breach of copyright, that's a prima facie case and that's the absolute end of it. They go back to be tried on something, even if they have put up slam dunk evidence to show they're within safe harbour and there wasn't an infringement at all.

MR SINCLAIR:

Well that was the argument –

GLAZEBROOK J:

Or is it that, no they don't go back if they have put up slam dunk evidence that there was no such infringement of copyright. It's a bit of a hard sell, to me at least, to say if this was a true ISP that did absolutely nothing whatsoever, clearly came within the safe harbour, that you say well, too bad. There was infringement of copyright, so they go back no matter what and then they can raise that they were within a safe harbour once they get there.

MR SINCLAIR:

Well we would be in a situation firstly where the requesting country would have to establish the elements of an offence, so it wouldn't be a situation where the ISP is in disputably innocent.

GLAZEBROOK J:

Well no because they are only indisputably innocent because they come within safe harbour.

WINKELMANN CJ:

It does seem a rather unattractive proposition that general ISPs could be extradited who are clearly within the safe harbour provisions. It seems an unattractive submission.

MR SINCLAIR:

Well there's an issue –

WINKELMANN CJ:

Because your submission does tend to implicate – does tend to entail that.

MR SINCLAIR:

There is an issue of who safe harbour applies.

GLAZEBROOK J:

Well I understand that but really your submission is, it doesn't matter who safe harbour implies, you can still extradite them back there, even if they were undoubtedly within the safe harbour.

MR SINCLAIR:

Yes. The unattractive submission is what divided the Court in *MM* and the appellants' case was that it was a child abduction situation, removing a child or children from the custody of a parent who was entitled to that custody, and the argument for the appellant was that under Canadian law there was a defence of duress which meant that – or necessity I think it was – meant that she couldn't possibly be convicted in Canada and the argument was further that there wasn't an equivalent defence in the United States, or the State where the offending had taken place. And the Supreme Court held, as I have just mentioned, that if the elements of the corresponding Canadian offence

were proved to the prima facie standard, the Court was not to be concerned with issues of defence.

WINKELMANN CJ:

But that is a defence case. That's a clear defence case.

MR SINCLAIR:

It is.

WINKELMANN CJ:

And the question for us –

MR SINCLAIR:

I will deal with this issue on the alternative, that safe harbour is actually something that defines the offence, and therefore has to be negated but our primary submission is that if the elements are proved, it would then fall to the person sought to, or in a committal setting, the defendant, to put the safe harbour defence in play and, well, that tells you the conceptual boundaries between the elements and the defendants. It may be helpful just to refer briefly to the –

GLAZEBROOK J:

Can I just ask you why, if they definitely come within section 92B, why they would be committing an act with a view to infringing the copyright? Because it actually says in 92B(2)(a) that you don't infringe the copyright if you come within it. So I can't see how you can possibly be holding it with a view to infringing copyright if specifically it says you don't infringe it and the same applies to all of these exceptions like educational purposes et cetera. So I can't see how it can be a defence.

MR SINCLAIR:

I think the answer to this may be found in considerations of sequence. So if we start with 131 and let us suppose –

GLAZEBROOK J:
Start with what, sorry?

WILLIAMS J:
131.

MR SINCLAIR:
131 in the Copyright Act, and let's suppose that prima facie, there is a case of possessing in the course of a business with a view to committing any act infringing the copyright. As soon as that stage has been reached, you are outside of safe harbour already because you have done…

GLAZEBROOK J:
But that's accepting what I've just said to you. If you're within safe harbour, it can't be held with infringing the copyright.

WINKELMANN CJ:
It's a little bit –

O'REGAN J:
Yes, it can, if it's with a view to infringement.

GLAZEBROOK J:
No, but –

O'REGAN J:
The possession itself doesn't infringe but if you possess it for the view to infringement…

WINKELMANN CJ:
Yes, but then it sits outside the safe harbour provisions and Justice Glazebrook's point is that safe harbour provisions say it's not an infringement so if it's not an infringement then it's not an offence and it's hard to see that being separated out from the committal procedures because it's saying it's not an offence.

GLAZEBROOK J:

Well, the other way of saying it is you can't say that it's with a view to infringing the copyright if you're within the safe harbour because it says you're not infringing copyright.

MR SINCLAIR:

No, so we'd fail on that element.

GLAZEBROOK J:

But it doesn't mean that it's a defence because you can't actually be in there anyway in the first place if you're within the safe harbour.

WINKELMANN CJ:

Well, Mr Sinclair, another way of looking at it is that if the section says it's not an offence, that doesn't sound like a defence, it sounds like defining the offence. It's part of the definition of the offence.

MR SINCLAIR:

Yes, well, where it would fall down is that if an ISP receives a takedown notice, acts expeditiously to remove the file or block access to it, then you would fail at (c). It hasn't possessed with a view to committing any act infringing the copyright.

WINKELMANN CJ:

I think we've got your submission. We'll have to think about this.

MR SINCLAIR:

Yes. I may need to too, Your Honour. However, I was coming to the *Vimeo* case just to see how this operates in a civil setting which is some guidance, in my submission. So it's at KD-AUT.317, decision of the Second Circuit, and again, I won't take Your Honours to it but at page 40, I think it will be found, "A service provider's entitlement to the safe harbor is properly seen as an affirmative defense, and therefore must be raised by the defendant. The defendant undoubtedly bears the burden of raising entitlement to the safe

harbor and of demonstrating that it has the status of service provider, as defined, and has taken the steps necessary for eligibility", and I note that that initial step may be more demanding under the DMCA than it would be here and also that the Court goes on to discuss the –

GLAZEBROOK J:
Is that criminal…

WINKELMANN CJ:
It's in the civil jurisdiction.

MR SINCLAIR:
Civil.
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WINKELMANN CJ:
So it is quite distinguishable because if it's not raised by the defendant then how is it raised? How does it really help you?

MR SINCLAIR:
The point I'm seeking to make, tediously, I'm sorry –

WINKELMANN CJ:
That's all right, Mr Sinclair. We're not finding it tedious. We're just finding it difficult.

MR SINCLAIR:
I think the traditional criminal analysis would be in a committal setting that if the elements are proved prima facie then the committal threshold has been passed. If the defendant seeks to argue "Well, that may be so, but we're not guilty for another reason", then that's in the territory of defence and that would be a matter for trial and in this case, of course, the defence would be not our safe harbour but the United States' safe harbour and those are two different

things which is perhaps another reason why it's not appropriate to be drawing our safe harbour requirements into the definition of the offence.

GLAZEBROOK J:

It depends whether we've got double criminality, of course, and exactly how we're dealing with this in a New Zealand sense which we haven't really got to yet but so for obvious reasons, it's not a criticism, but I don't know that we'd – if you did have double criminality, I don't know if you could say "Well, it won't be with a view to infringing copyright in New Zealand because it says so in the Act but nevertheless, we're going to send you back". Because clearly, if there's double criminality, we couldn't do that. But if there isn't double criminality then the submission might be right. I don't want to say anything particularly more about that given we haven't heard on that yet.

WINKELMANN CJ:

So Mr Sinclair?

MR SINCLAIR:

That was my primary submission, Your Honour, but –

WINKELMANN CJ:

Yes, but you have a fall-back submission?

MR SINCLAIR:

– I am prepared to deal with it in the alternative. So if we have to negate a claim of safe harbour, what would that mean in a committal setting? I note firstly that Judge Dawson has found that the safe harbours were not available on the evidence adduced at the hearing. So whether safe harbours are characterised as a defence or as elements of the offence, that finding, in our submission, disposes of the matter. So those are his findings at paragraph 65 to 67 of the District Court judgment.

The ROC certainly contained evidence capable of negating any claim to safe harbour even if absence of safe harbour under section 92C is considered part

of the definition of the offence and that only has to be done – that's all that's needed at the committal stage, in our submission, or eligibility, as evidence capable of negating the defence if it's put in play or if we consider it as forming part of the definition of the offence. And where this bites is counts 4 to 8 where we are dealing with particular files and in short, all those files remained available on Megaupload in late 2011 despite the appellants having knowledge one way or another that those files infringed copyright and I'll briefly explain what that evidence of knowledge is.

So in count 4, Mr van der Kolk had knowledge of the infringing status of the DVD rip file of *Taken* at the point of upload and the identical file was downloaded by Special Agent Poston. That's covered in the record of case, paragraph 101, and it's discussed in some greater detail in our High Court submissions at paragraph 349. Counts 5 to 7, as discussed in the record of case at 137(c), (d), and (f), certain files were the subject of takedown notices yet still could be downloaded by Special Agent Poston –

WINKELMANN CJ:

Sorry, can you just give us that record of case again?

MR SINCLAIR:

So the record of the case, paragraphs 137(c), (d), and (f).

GLAZEBROOK J:

Sorry, what was that in relation to? Because I'd sort of lost you by that stage. You were going too fast.

WINKELMANN CJ:

Count 7, wasn't it?

ELLEN FRANCE J:

Counts 5 to 7.

MR SINCLAIR:

I see, yes, counts 5 to 7, so those are the discrete acts of…

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

And the ROC 101, was that in relation to counts 4 to 8?

WILLIAMS J:

Count 4.

GLAZEBROOK J:

Just 4, I think.

MR SINCLAIR:

Count 4. I think I said High Court submissions. I meant instead actually Justice Gilbert's decision at 349 discusses the evidence.

WINKELMANN CJ:

The High Court judgment?

GLAZEBROOK J:

Judgment.

MR SINCLAIR:

I'm sorry. The evidence of knowledge for each of these counts. So the knowledge for counts 5 to 7, again, Justice Gilbert deals with that at paragraph 359 and the Court may be assisted by our High Court submissions at pages 186 to 194.

GLAZEBROOK J:

Paragraphs or pages? Paragraphs?

MR SINCLAIR:

It should be paragraphs, I suspect, I'm sorry.

GLAZEBROOK J:

And sorry, I've missed them again, 186?

MR SINCLAIR:

186 to 194. At count 8, the YouTube clips acquired in breach of copyright were still available in January 2012 and there's a ROC reference paragraph 137(e) –

WILLIAMS J:

Did say January 2012?

MR SINCLAIR:

Yes.

GLAZEBROOK J:

Para 137(e)?

MR SINCLAIR:

(e), our High Court submissions, paragraphs 674 to 677, Justice Gilbert's decision –

WINKELMANN CJ:

Just slow down, please. High Court subs, which?

MR SINCLAIR:

Paragraphs 674 to 677 and the High Court's judgment in paragraph 364 and as I mentioned, some of the owners of the YouTube clips are to give evidence of copyright in the absence of license to Megaupload and paragraph 42 of the ROC summarises the intended evidence of representatives of copyright owners who will confirm that the files downloaded by Agent Poston infringed copyright.

WILLIAMS J:

40?

MR SINCLAIR:

42. Well, just to conclude on this point, whether Megaupload deleted the material or prevented access to it as soon as possible, which is the requirement in our statute, or "expeditiously" which is the DMCA requirement, in our submission, that would be a trial matter but there is prima facie evidence or evidence that prima facie negates any claim that this had been done.

Your Honour, I note it's nearly 1 o'clock. Would that be a time to stop?

WINKELMANN CJ:

Yes. Thank you, Mr Sinclair.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.16 PM

MR SINCLAIR:

Your Honours I am at the fourth point under (c) in my outline and can I indicate that I hope to be through all this within about half an hour.

WILLIAMS J:

Just the fourth point, or?

O'REGAN J:

No through the whole thing.

MR SINCLAIR:

The whole thing, Your Honour.

WINKELMANN CJ:

So, the fourth point at (c).

MR SINCLAIR:

So this is the infringing file sharing three strikes regime which was inserted in 2011 in place of the repeat infringer provision in section 92A which never came into force. It was an associated amendment to the safe harbour provision in section 92B (2A). This replacement regime confers remedies on copyright owners against users and that can be seen from the overview provision section 122B(1). So it explains that sections 122A to 122U provide rights' owners with a special regime for taking enforcement against people who infringe copyright through file sharing. Mr Dotcom's reply submissions argue that the three strikes regime created by these provisions gives rise to an implied limitation on the criminal exposure of ISPs, and it is our simple submission that it is illogical to suppose that a measure aimed at conferring rights on owners, impliedly shrank the liability of ISPs.

To the extent that Parliament did turn its mind to the position of ISPs in the context of the file sharing regime, it limited their liability in a very precise way and that is the addition of section 92B(2A) that I referred to. This further safe harbour did not exclude the liability which would arise if the ISP does not also come under section 92C. In other words, if the ISP knows it has an infringing file and continues to host or distribute it, it will indeed be liable because that is more than section 92C permits. The words "merely because" are significant in section 92B(2A) merely acquiring knowledge through the three strikes regime will not result in liability, but if the ISP performs the acts described in sections 36 and 131, it will be liable if it has gone beyond any immunity section 92B confers.

There is another safe harbour, Your Honours. This is my next point. The caching safe harbour. Now the reply submissions maintain that distribution from further copies on the cogent servers is a form of caching and falls within the safe harbour in section 92E of the Copyright Act. And I think Your Honours will know this but very briefly; the cogent servers were the

ultrafast servers, the most popular files were further copied onto those servers, so we're actually only looking at the part of Megaupload's activities, when we are talking about those servers. Now to qualify for this safe harbour in 92E, the ISP in subsection (1)(b) must comply with any conditions imposed by the copyright owner of the material for access to that material. Megaupload did not do so and therefore falls outside the caching safe harbour. They didn't comply with conditions imposed by copyright owners and for this reason it was known to the appellants that its most popular content, infringed copyright and most of its traffic flowed from linking sites. So it was inconsistent with genuine cyber locker activity. It must also have been apparent that cogent servers would be enhancing access to files that infringed copyright and indeed the FBI analysed two such servers and determined that more than 90% of the files infringed copyright and of 2440 files on those two servers, 2200 had multiple links. 43% of the files were already the subject of a takedown notice and 100 files had more than 50 takedown notices lodged against them and that is discussed at volume 2, paras 205 to 212.

O'REGAN J:

So volume 2 of what?

MR SINCLAIR:

Oh, it is actually, sorry. It was our volume 2 in the District Court. It is volume 6 of the materials I am sorry.

WILLIAMS J:

Is this different to the summary document?

MR SINCLAIR:

It is the document Mr Raftery briefly took the Court through this morning.

WINKELMANN CJ:

That is the summary document, isn't it?

MR SINCLAIR:

Yes and references to the ROC at paragraph 72 and 102.

GLAZEBROOK J:

205, I missed the 205 to what?

MR SINCLAIR:

At 205 to 212.

GLAZEBROOK J:

And in the ROC?

MR SINCLAIR:

In that volume 6 document.

GLAZEBROOK J:

And what was it of the ROC?

MR SINCLAIR:

For the record of the case, paragraphs 72 and 102. Now to a somewhat more involved issue. My next point, safe harbour and Megaupload's response to takedown notices. Because repeated uploads of exactly the same file, that is a file having the same MD5# did not result in multiple copies stored on Megaupload's system. This is the so called deduplication. The appellants say they could not discriminate between an upload that infringed copyright and another upload of exactly the same file that they say might not have done. Therefore files were preserved and access also preserved through other links when a takedown notice was received identifying that particular file. The appellants submit that this conduct satisfies the terms of section 92C, and in particular the requirement as soon as possible after becoming aware of the infringing material, delete the material or prevent access to it. This is actually, in our submission, an excuse for not taking the action required by the safe harbour provisions in both countries. It's said in the submissions, it's a defence on top of a defence. I say that acknowledging the issue we

discussed before lunch about whether safe harbour is properly regarded as a defence. But in any event the material was not deleted, nor was access prevented. For the appellants construction to be right, one would need to insert in section 92C words so that it read, "Delete the material or at least partially prevent access to it." That, in our submission, frustrates the purpose of the section. It's likely to mean that the limited response is doing almost nothing to curb the infringement and a perusal of the ROC will give many, many illustrations of why that's so.

I just note, somewhat as an aside, that there is an indication in the associated regulation for content of takedown notices, and that is, what I'm referring to, I don't think it is in the materials Your Honours, but I'll explain what it is. It's the Copyright (General Matters) Regulations 1995 and focusing on Regulation 5B. it says, "A notice to an Internet service provider under section 92C(3) of the Act must be in the form of a notice that – (a) contains the following information," and I'll just omit some words, but "(iv) a description of the specific material that is alleged to be infringing," and "(vi) the online location where the allegedly infringing material is found." That appears to draw a distinction between the online location, I think it's referring to the URL link as opposed to the material itself. But moreover the DMCA –

WINKELMANN CJ:

Sorry, what's your point about that?

MR SINCLAIR:

That the legislature recognises a distinction between material and the online location, or let's say the URL providing that location, so in 92C when it talks of "material" it's not talking about removing a link.

WINKELMANN CJ:

And they say that because they deduplicated copies, some of those copies might have been legitimate and some not.

MR SINCLAIR:

That is the excuse but I have a little more to say about that, because the DMCA does provide a process for resolving any assertion that a file the subject of a takedown notice does not infringe copyright. Megaupload did not offer users that opportunity because it did not tell them a takedown notice had been received and there are examples of this in the ROC relating to the infringer TH who says that his noticed that his links were no longer operative. Was never told that they had been deleted in response to takedown notices. That's at the record of the case, paragraph 603B, that seems high, I might need to check that, I'm sorry Your Honour. And this was also the experience of Special Agent Poston when he was experimenting with the operation of the site, had links deleted but never notified by Megaupload that that had happened, and that's found at the ROC, paragraph 40 f. So there was no interest in sifting infringing from non-infringing uploads of exactly the same file, and I'd add to that that deduplication was an economy measure. If it created problems of separation it was a problem the appellants made for themselves, and although the appellants say it can't be assumed a takedown notice was valid, they treated them as valid by deleting the identified links, but of course that's all.

ELLEN FRANCE J:

And where's the best place in the ROC to see a description of what was in the takedown notices?

MR SINCLAIR:

As I think my friends have noted, there isn't a sample of a takedown notice that I can recall. I don't think that's an omission of any consequence because, as I said, Megaupload seems to have treated, I think this is common ground, that they invariably responded to takedown notices, but the only response was to remove a link, and as Justice Gilbert noted, that is an indication that the validity of the notices is accepted.

WINKELMANN CJ:

Well, is there evidence that there were takedown notices delivered though?

MR SINCLAIR:

Delivered?

WINKELMANN CJ:

To the appellants or Megaupload?

MR SINCLAIR:

Millions.

WINKELMANN CJ:

And the evidence is summarised in the ROC.

MR SINCLAIR:

That will be found in the ROC. It would only be necessary to read some of the repeat infringer biographies to appreciate the magnitude of the takedown notices being accumulated against the content of known individuals being paid for their activities.

This is a too quick illustrations of this issue of validity and how it was regarded. One is the Mexican takedown notices, which were initially processed, Mr Dotcom ordered them to be, the links to be undeleted. That's the ROC at paragraph 133 c.4, and here's a little excerpt, "Later that day Mr Ortmann told Mr Benko the takedown notices were legitimate for sure. However, calculated risk could work here." And another quick example at 31 d. of the ROC, this is Warner Bros using the abuse tool, "Seeking an increase in their daily removal limit," and Mr Ortmann says here, "They are currently removing 2500 files per day. A cursory check indicates it's legit takedowns of content they own appearing in public forums."

WINKELMANN CJ:

What's the significance of that?

MR SINCLAIR:

Well my friends raised an issue about takedown notices and the significance and they say, well they may not have been valid, may not have been in the required form under the DMCA, and the broader point is simply they received these in vast numbers and treated them all as if they were valid, but only to the extent of removing the –

WINKELMANN CJ:

So their point is really that there hasn't been an attempt, and I'm interested in your response to this, there's been no attempt. He might point to instances of a narrative of takedown notices and instances of people referring to them as legitimate, but there's no evidential ink that links to the counts that says, this takedown notice was delivered in respect of this infringing material and this was not responded to and this relates, links to this count.

MR SINCLAIR:

I was coming actually to where this really matters in the case, and I can explain it in this way. For count 2 it's just one strand of evidence supporting the existence of a conspiracy. The conspiracy can be demonstrated without that evidence. There's no reason not to rely on it, and what it means is that on millions of occasions Megaupload had particular knowledge that a file infringed copyright and chose to continue distributing that content. So that's it significance for count 2. I just add by way of aside that they're relevant to the payment of rewards to repeat infringers because quite apart from how the identified file should have been treated, there's no justification for paying rewards to individuals with thousands of takedown notices against their content.

WINKELMANN CJ:

So what's your submission to us in relation to count 2?

MR SINCLAIR:

To count 2, well, if necessary you could ignore this whole subject and there would be ample evidence to establish the conspiracy.

WINKELMANN CJ:

The whole subject of takedowns?

MR SINCLAIR:

Yes. For counts 5 to 7 takedown notices are relied on for the inferences that the appellants knew they possessed certain infringing copies. As I say, acknowledged the validity of the copyright owner's claim, though only to the extent of removing the URL link specified in the notices. Now if evidence to rebut a claim of safe harbour is needed, it exists, despite these notices. Megaupload retained the files and preserved access to them. They were all found in 2011 when Agent Poston conducted his Internet searches.

Now just a moment or two I'll spend responding to some of the appellants' submissions on the issue of notice and takedown. So Mr Dotcom's reply at paragraph 3.20 says, "Disabling the identified URL prevents access to the file." Well the file in counts 5 to 7 remained accessible through other links, and the ROC has many other illustrations of how files remained accessible after takedown notices were received and responded to.

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The same reply submissions at paragraph 3.30 say, "Disabling the URL is synonymous with deleting the user's file/material. If the URL in a takedown notice is disabled then the file is effectively deleted - for that user. They have no further access and, if they have provided that URL to others, nor do those others have access."

In our submission that is not true, even for the user whose link has been deleted. A record of the case has 13 examples where a user's access remained even though they were the only person to have uploaded the file and that is the ROC at paragraph 167. Also illuminating is the –

GLAZEBROOK J:

So how was that – so they didn't disable the link or they had access through other means?

MR SINCLAIR:

It is a situation where one user has repeatedly uploaded the same file and so multiplied the links to that file but there is no other user in the picture. The takedown notice has resulted in the removal of one of those links.

GLAZEBROOK J:

Right, so they had access through other means.

WILLIAMS J:

Well presumably the uploader had the offending material so just did it again. Is that what is going on through a different link?

MR SINCLAIR:

That was indeed a technique that the repeat infringers needed to employ to defeat the takedown process against them. But if you keep uploading exactly the same file, you multiply the number of links and therefore that is a precaution against losing your internet exposure through takedown notices and again the repeat infringer biographies will show you examples of users doing exactly that. The repeat infringer BM is an interesting case study and that is found at the ROC, paragraph 49. And also with some commentary in that volume 6 document I have been referring to, paragraph 186. So here BM has created more and more links to the same software file which has been accessed 114,300 times, despite the manual processing of takedown notices. So BM's content was the subject of 1500 takedown notices but he was never terminated.

Now Mr Dotcom's reply, paragraph 3.31 says in this context, "File and link can be used interchangeably without misleading. The copyright owners knew this and were incapable of being misled. This was the extent of industry practice at the time." This is the argument that Megaupload's takedown policy was standard practice in the industry; something well understood and accepted by copyright owners. Now I submit that it is well outside the scope of the extradition inquiry, but in any case it is refuted by some of the authorities and

other material on which the appellants seek to rely and I will just give two examples of that. One is the *UMG recordings v Shelter Capital* case. It is about Veoh and it is found at KD-AUT .296. I simply read –

O'REGAN J:

Have you got the volume reference for it? Do you want to take us to it or not?

MR SINCLAIR:

No I wasn't proposing to. I thought it would be swifter if I just read Your Honours the paragraph –

WINKELMANN CJ:

So you are saying it wasn't common industry practice to pursue deduplication but it does seem logical, doesn't it, not to hold multiple copies of the same thing because it would take up a lot of space?

MR SINCLAIR:

It may be common practice, it is the response that matters, in our submission.

WINKELMANN CJ:

So, what's not the common practice then. The common practice is, it is not common practice to deduplicate or it's not common practice, when you get a takedown notice just to proceed and remove one URL as opposed to proceed and delete all of the links. Where's the no common practice bit?

MR SINCLAIR:

A point about deduplication, and it may be common, is that you can't use it as an excuse for continuing to possess and distribute a file and I have not seen in any of the United States authorities my friend relies on any case sanctioning that practice.

GLAZEBROOK J:

Is the *UMG* case the one that we've already been taken to?

MR SINCLAIR:

It is.

GLAZEBROOK J:

In which case it would be better if we went to it because then we can mark what you're going to tell us about.

MR SINCLAIR:

Yes, well at volume 10, Ms Fuhr has passed me the reference.

GLAZEBROOK J:

Volume 10 of the appellants' submissions?

MR SINCLAIR:

Yes. Page 3780.

WILLIAMS J:

I think that's the start of the decision but I'm not sure what passage you're referring to.

MR SINCLAIR:

I'm sorry Your Honours. So page 3791 at the first full paragraph. "Veoh employs various technologies to automatically prevent copyright infringement on its system. In 2006, Veoh adopted "hash filtering" software. Whenever Veoh disables access to an infringing video, the hash filter also automatically disables access to any identical videos and blocks any subsequently submitted duplicates."

So all access will be removed to content having the same hash. It's possible, looking at that, that Veoh is not deduplicating but the effect is, of its action, is that there's no longer any access to the unique file identified by the takedown notice.

O'REGAN J:

Is there any actual evidence about what industry practice was?

MR SINCLAIR:

Well…

WINKELMANN CJ:

Was it the professor from the AUT's evidence?

MR SINCLAIR:

Yes. I was going to say the cases are more helpful and, indeed, if we carry on looking at this one, and there's no question that Veoh removed files so if Your Honours were to turn to page 3807, midway down the paragraph under the heading "B". "UMG has never disputed that when Veoh became aware of allegedly infringing material as a result of the RIAA's DMCA notices, it removed the files," and there's more along these lines at 3183.

GLAZEBROOK J:

Sorry, I didn't catch the number.

WILLIAMS J:

It might be 3813.

MR SINCLAIR:

I'm sorry, page 3813, the first full paragraph there. "Of course, a service provider cannot willfully bury its head in the sand to avoid obtaining such specific knowledge" and reading down then, "there is no evidence that Veoh acted in such a manner. Rather, the evidence demonstrates that Veoh promptly removed infringing material when it became aware of specific instances of infringement." It might be a partial answer to Justice O'Regan's point about industry practice. The appellants support their claim about standard industry responses by references to material that's not been admitted in the Courts below and in general, the inadmissible evidence did not

refer to analogous takedown issues so they have to be read with a degree of care even if one does read them.

But the one exception where exactly Megaupload's practice is discussed directly contradicts the submission made in this Court and I will simply read it to Your Honours and provide a reference and spend no more time on it if that's acceptable. So "Certain music industry groups responded to the United States Copyright Office notice and request for public comment by saying 'The process has gotten so out of hand that at least one service provider that claims safe harbour protection has told the RIAA that receiving a notice about one link to an infringing file it hosts will not lead to a takedown of any other links it provides to exactly the same file. That service provider reasons that while it can condense user uploads of the same content into one file so that it can conserve server space", that's deduplication, "it's inappropriate for the site to be obligated to remove all links its service created to that file upon a DMCA notice that specifies only one of those links because the uploaders might have authorisation to upload that file.'" That is exactly the deduplication defence but the submitter carries on to say "This is contrary to the express provisions of the DMCA". So I simply refer to that example to illustrate that this industry consensus, which the copyright owners went along with, was an acceptable practice is controversial and while I've been referring to the reference – Ms Fuhr is reminding me it's in the handout, yes, at the bottom of the page.

So I've dived into evidence that is not properly before the Court and I apologise for that but I simply do make that point.

WINKELMANN CJ:

So what is the status of the supplementary materials?

MR SINCLAIR:

Excuse me, Your Honour. I think we're looking at a reference to the electronic case on appeal that…

WINKELMANN CJ:

So you just said they're not properly before us so…

MR SINCLAIR:

They are before the Court in a fashion – they're in volume 7, a document subject to fresh evidence applications and it's subject to our objection because –

WINKELMANN CJ:

But now you're referring to it?

MR SINCLAIR:

I have referred to it, indeed I have –

ELLEN FRANCE J:

But the position is it's not been ruled admissible to date?

WINKELMANN CJ:

No.

MR SINCLAIR:

No, I'm simply trying to meet the assertion against me that there's industry consensus about this kind of thing and this is one way of indicating to the Court that it's not.

O'REGAN J:

When I said "Is there any evidence?", I thought it would be implicit in that it was evidence that's actually properly before the Court.

MR SINCLAIR:

Yes, well, it's a little unorthodox, I'm sorry. A more significant point, perhaps, is that the justification now offered in this Court was never exposed by the appellants before this proceeding, at least there's no evidence that it was. There's no evidence that Megaupload admitted that it preserved files and access after takedown notices and that deduplication was the justification for

that. Instead, Megaupload consistently represented that it was removing content or files or videos. That will be found in that volume 6 document again. It is a section on deceptions at paragraph 109 and following.

The deceptive statements made to the United States trade representative in January 2012, that's on the eve of the arrests, is a good example. These included deceptions about the removal of content and files, the removal of 15 million uploads, deceptive statements about rewards, the determination of the accounts of 120,000 repeat infringers. But the record of the case at paragraph 164(l) has this statement from Mr Ortmann's letter to the United States trade representative and he said "US law requires removal of infringing files from servers within the US but Mega removes infringing files from all of its servers worldwide, not just in the United States". This uses language that the USTR would expect to hear, namely the removal of files, but this statement can't be reconciled with the idea that everyone understood "removing a file" meant only removing a link. It can't refer to the mere removal of a link. It was clearly meant to convey the impression that Megaupload removed content from its servers not just in the United States but from all its servers. There would be no point in saying this if "file" means only a link to a file because a deleted link is dead wherever a file may be located.

O'REGAN J:
Sorry, could you just give me the page reference to that again?

WILLIAMS J:
164(l) of the ROC.

MR SINCLAIR:
Yes, it is in the outline –

O'REGAN J:
Sorry, just the paragraph number's fine.

MR SINCLAIR:

164 of the ROC, Your Honour. Then my friend in his reply says at paragraph 5.16 "The takedown obligation under section 92C is clearly limited to specified material of a specified user. Section 92C(1) provides that the section applies if an ISP stores material provided by a user of the service and the material infringes copyright […] It can therefore be seen that the takedown obligation is confined to the material of the user specified, not that of any other user."

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"There is no basis to read section 92C's requiring cross site takedown as the US contends. Whereas here deduplication has occurred preventing access to the material by disabling the URL is as good as deleting it as far as the user is concerned." And our response is that there is no safe harbour if the ISP knows or has reason to believe that the material infringes copyright, does not as soon as possible, after becoming aware of the infringing material, delete the material, prevent access to it. In respect of the number of uploaders of an exactly identical file, the harbour is lost if the material continues to be accessible.

WINKELMANN CJ:

So your point is, whether or not and you don't accept it is, it is a good response to a takedown notice to delete that user's URL, it nevertheless lands the appellants with knowledge that the copies are infringing?

MR SINCLAIR:

Yes, Your Honour.

WINKELMANN CJ:

Copy is infringing.

MR SINCLAIR:

Yes. I can move now to the issue D which is the knowledge, or standard of knowledge and my inclination Your Honours is to pass over that. I am going

to be supplying a few references and I can perhaps list there some of the examples of the kinds of knowledge that the appellants acquired and how it was acquired.

WINKELMANN CJ:

And you say it's actual knowledge or recklessness, is that your submission, or what is your submission on D?

MR SINCLAIR:

Well again I think we have to be careful about the context. In the context of count 2, it is not necessary to have knowledge of particular files. The evidence we are looking at is relevant to purpose and what the plan was. But that changes when we come to counts 4 to 8 and we do have to have actual knowledge prima facie of the particular files, the subject of those counts.

The dual use submission that my friend has made is not something that we have covered in our written outlines so I will just deal with that very briefly but we say there is no comparison between Megaupload and the *Sony Corp of America v Universal City Studios Inc* 2 IPR 225 (1984) case, it is the one about the VCR recorders. The *Sony* case involved a product, that VCR recorder that could be used to infringe copyright but also substantially used for legitimate purposes and was so used on the facts. In the later case of *Grokster*, the Supreme Court of the United States explained that the *Sony* decision does not require a Court to overlook other evidence that a device can be used to infringe. Said, "Where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses and shows statements or actions directed to promoting infringement, *Sony's* staple article will not preclude liability." And the remand decision in *Grokster* established in the facts that the defendant knew its business model depended on massive infringing use and acted to grow its business accordingly. So contrary to the impression given at paragraph 5, at point 30 of Mr Dotcom's reply, *Grokster* was a case where the dual use technology principle did not apply.

Now we submit that Megaupload stands outside the dual use principle because it was directly involved in infringements and the operation of the reward scheme is a sufficient illustration of that. Moreover, it had a continuing relationship with the users who infringed and the significance of that – I will simply give the Court a reference, *Capital Records Inc v MP3Tunes LLC* No. 07 Civ 9931 WHP (S.D.N.Y. August 22, 2011) that is at KD-AUT.294, page 25.

Moving on again, I was going to say something about rewards because –

WILLIAMS J:

Just before you go to rewards. You referred to the remand decision in *Grokster.* Do we have that in the materials?

MR SINCLAIR:

Yes on our sheet Your Honours.

WILLIAMS J:

Tab 35. That's not the *Grokster.*

O'REGAN J:

I think Mr Mansfield took us to it yesterday.

MR SINCLAIR:

We do have it I am sorry.

O'REGAN J:

You really need to give us the references in these. It doesn't help us, we haven't got the electronic files here.

WINKELMANN CJ:

This says US tab 35, though.

WILLIAMS J:

But is that the appellate decision or the – when you said the remand decision. Do you mean the remand back to trial? Do we have that first instance decision?

MR SINCLAIR:

Yes I think we do.

WINKELMANN CJ:

That is in volume 2 is it or 3?

MR SINCLAIR:

Volume 3, tab 35.

WILLIAMS J:

Whose volume 3?

WINKELMANN CJ:

US volume 3, the respondent. And what page?

MR SINCLAIR:

I have no particular reference. It was a general.

WINKELMANN CJ:

But you say it stands, the proposition that supports your position, Megaupload cannot, or the appellants cannot have the benefit of the jury use principle since the Megaupload model was designed, to use this technology for an illegitimate purpose.

MR SINCLAIR:

Yes.

WILLIAMS J:

Okay let me just get my head around that. Designed – that the system was designed for this purpose?

GLAZEBROOK J:

To use the technology for illegitimate purposes.

WILLIAMS J:

Yes, that's right. Neutral technology being utilised for the –

MR SINCLAIR:

The differences is, as one can imagine, that the VCR recorder is sold and goes out the door. What the user then does is entirely at their control. The difference with Megaupload is that it was in the position to control how the files it stored were used and in particular it could prevent dissemination had it chosen to do so and that is an example of the kind of continuing relationship that is referred to in the *MP3Tunes* that I just mentioned.

WILLIAMS J:

Right, okay.

MR SINCLAIR:

So rewards – I thought it called for a response because as we submit Your Honours, you can see the conspiracy in microcosm and so I didn't want to leave any scope for misconception about what this subject involves but in view of the time.

WINKELMANN CJ:

Yes well you have gone past the half hour you anticipated.

MR SINCLAIR:

I am very close to finishing Your Honour. In fact I think any issue my friends raise can be answered from the volume 6 discussion of the subject. I'll pass over that now. Your Honour wished me, I think, to talk about the international treaties and their –

WINKELMANN CJ:

I just wanted to know, at least an outline, what your response is to the very carefully advanced alternative view of the Copyright Act based upon the link with WIPO and the legislative history.

MR SINCLAIR:

Yes. Well, I shall try and cover that in a very short time but to frame the issue somewhat, the appellants, I would submit, have to say that New Zealand's response to those international instruments, and in particular, to the WCT, was to confer a free pass on hosting services to engage in knowing infringement and my friend took Your Honours through the various background documents where the WCT –

WINKELMANN CJ:

He actually said it was just to impose civil liability, I think.

GLAZEBROOK J:

Not for ISPs.

O'REGAN J:

No, I think he said there was no liability.

WINKELMANN CJ:

Okay, carry on.

MR SINCLAIR:

– is discussed and in my submission, nowhere is that intention apparent. The response to the WIPO Copyright Treaty was limited and it was to enhance the rights of copyright owners by replacing the existing section 16(f), which was thought to be relatively broad but technology-specific, with technology-neutral language, and that's where the communication right comes in. So it's the measure to improve the position of owners.

The WCT is subject to TRIPS and of course, the Copyright Act 1999 was enacted in part to give effect to TRIPS obligations and New Zealand must, under TRIPS, provide for criminal penalties for wilful copyright piracy on a commercial scale. So my friend's interpretation immediately puts us in breach of TRIPS.

WILLIAMS J:

Give me that sentence again.

MR SINCLAIR:

So the WCT is subject to TRIPS.

WILLIAMS J:

I got that bit, and then you said "TRIPS creates an obligation to"…

MR SINCLAIR:

An obligation to provide for criminal penalties for wilful copyright piracy on a commercial scale. This is set out in our submissions, Your Honour. And my comment on that was that the appellants' submission would put us in breach of that TRIPS obligation.

WILLIAMS J:

Insofar as Internet is concerned?

MR SINCLAIR:

Yes, it would leave –

WILLIAMS J:

Because it does it for everything else.

MR SINCLAIR:

– the territory wide open for massive Internet piracy. The WCT commentary on articles 6 and 7 links the right of distribution to tangible copies, and this is a point my friend emphasised. However, we say it doesn't stand in the way of countries treating the concept of distribution more broadly, and it was seen as

irrelevant to the interpretation of “distribute” in the Hong Kong ordinance, and that’s in the case of *Ming*.

WINKELMANN CJ:

You’ve taken us to that already.

MR SINCLAIR:

I have taken Your Honours to that.

WINKELMANN CJ:

What were you saying was irrelevant in the case of *Ming*? Are you saying they directly addressed their WCT commentary?

MR SINCLAIR:

Yes. So the Court regarded the WCT as an agreement as to minimum levels of copyright protection to be implemented and the Court thought it did not follow that the scope of the ordinance offence should be similarly constrained if, as a matter of proper construction, it provides more extensive protection. This is especially so where, as in the present case, the Court is not concerned with ascertaining the scope of a right holder’s distribution right, nor with conduct permissible after exhaustion of that right which was the relevant focus of the Treaty but with the unlicensed dissemination of multiple infringing copies via the Internet.

So the Court referred to a view expressed in a textbook that the distribution right did not apply to transmission over the Internet and said in disagreement with that that this position reflected the applicable European directive which echoes the level of protection agreed to by the contracting parties to the WIPO treaty. The learned authors were postulating a construction of UK legislation which would reflect the limited level of protections stipulated by the directive which was a measure aimed at harmonising copyright law in the European community. Those concerns do not engage the Hong Kong Courts.

Justice Gilbert saw the creation of a new offence in section 107(2A) of the UK statute as marking a significant contrast with the 2008 amendments in New Zealand but as we see from the English text *Copinger*, and again, this is all set out in our submissions, section 107(2A) was enacted because the British Government, quoting the text, "decided that in order properly to implement the directive, it was necessary to create a new criminal offence", and so we submit that the taking of that step in 2003 in response to a European directive doesn't illuminate the meaning of section 131 either before or after the 2008 amendments.

WINKELMANN CJ:

Why not? Because Justice Gilbert proceeded on the basis that these effectively are the same Acts, very similar Acts?

MR SINCLAIR:

Yes.

WINKELMANN CJ:

And if the UK Government thought it necessary to create this offence, on Mr Mansfield's submission, by implication, they thought it wasn't already in a criminal offence and that seems to be the submission that Justice Gilbert accepted. So I'm just asking what your –

MR SINCLAIR:

Yes, well, the interpretation provided by the Hong Kong Court is that this was done in an EU context in response to an EU directive and that's –

GLAZEBROOK J:

Have we got that case? Because we've been referring to it much more extensively than just a sentence or two so can you tell us where it is so we can actually mark it?

WINKELMANN CJ:

Ming.

MR SINCLAIR:

Yes, I can, Your Honour, it's…

WINKELMANN CJ:

I think your junior's giving you the…

MR SINCLAIR:

US-AUT –

GLAZEBROOK J:

No, that's no use to us.

MR SINCLAIR:

Sorry, US tab 61 in volume 3.

O'REGAN J:

The US volume 3, did you say?

WILLIAMS J:

Last on the second volume 3.

GLAZEBROOK J:

Volume 3 or volume 2?

WINKELMANN CJ:

Volume 3, part 2, so it's the last one.

WILLIAMS J:

Volume 3, part 2, last case. So your argument is given TRIPS –

GLAZEBROOK J:

And where are we in that *Ming* case?

MR SINCLAIR:

Paragraph 47, Your Honour.

WILLIAMS J:

Your argument is given TRIPS, the obligation is either to read it in or expressly enact it, it doesn't matter which one, that's the obligation?

MR SINCLAIR:

Well, to be compliant with TRIPS, we need to ensure that our Act is interpreted not to confer this free pass on ISPs.

WILLIAMS J:

I think that's the same as what I just said.

MR SINCLAIR:

It probably was, Your Honour, probably less lucid. Sorry, I don't know if Your Honours –

WINKELMANN CJ:

Yes, we've got it.

1520

MR SINCLAIR:

– had any more to say to me about *Ming*? I was just proposing to move on.

WINKELMANN CJ:

Well, we wanted to know, you said that the UK response is to be understood in its EU context and we understood you to be saying that was the approach that the Hong Kong Court had taken or is that not so?

MR SINCLAIR:

Yes, that is my submission on *Ming*.

GLAZEBROOK J:

Can you tell us where it is?

WINKELMANN CJ:

So where did they say that?

MR SINCLAIR:

I'll just take a moment, Your Honours.

O'REGAN J:

I think it's paragraph 50.

MR SINCLAIR:

52.

GLAZEBROOK J:

Paragraph 52, is it?

MR SINCLAIR:

Yes, 51 and 52, so they're setting out there the text for view that the distributional right does not apply to transmission over the Internet and then in paragraph 52, disagreeing with that, at least in the exercise of construing the Hong Kong ordinance offence which is, as I've said before, very similar to our own.

WILLIAMS J:

I don't suppose you've got the Article number of TRIPS on the tip of your tongue, have you?

MR SINCLAIR:

Yes.

WINKELMANN CJ:

TRIPping off his tongue.

MR SINCLAIR:

Ms Fuhr was telling me that TRIPS itself is at volume 1, tab 10 but the…

WINKELMANN CJ:

Of yours or of the – of the United States.

MR SINCLAIR:

Article 61, Your Honour, of TRIPS.

GLAZEBROOK J:

United States what, sorry?

WINKELMANN CJ:

US tab 10, volume 1 of the US authorities.

GLAZEBROOK J:

Tab 10, thank you.

WINKELMANN CJ:

Is it Article9?

WILLIAMS J:

61.

WINKELMANN CJ:

Yes, we've got that.

MR SINCLAIR:

Before I move on and forget the point, Your Honour, our submissions are somewhat out of date at paragraph 314. We said there it was true at one stage that New Zealand was not party to the WCT but things have moved on and –

WINKELMANN CJ:

These are your principal submissions?

MR SINCLAIR:

Yes.

WINKELMANN CJ:

And what paragraph so we can just go there?

MR SINCLAIR:

Paragraph 314.

WINKELMANN CJ:

314?

MR SINCLAIR:

314.

WINKELMANN CJ:

Yes, you do have that many paragraphs. So they are now a party to the…

MR SINCLAIR:

Yes, that first sentence is incorrect but it doesn't affect our argument.

WINKELMANN CJ:

As of when?

O'REGAN J:

November last year.

ELLEN FRANCE J:

It's in Mr Mansfield's submissions.

WINKELMANN CJ:

As of 2018 anyway. I think it's 2018.

MR SINCLAIR:

November 2018.

GLAZEBROOK J:

November.

MR SINCLAIR:

Not critical but…

WINKELMANN CJ:

No, good not to have a misdirection.

MR SINCLAIR:

And finally under this heading, you'll note that WCT is subject to the Berne Convention, New Zealand is a signatory.

WINKELMANN CJ:

And what's the significance of that?

MR SINCLAIR:

Well, if we look at the agreed statement concerning Article1(4) of the WCT, it says this, and it's set out in our written submissions if Your Honour still has that –

WINKELMANN CJ:

Yes, where?

MR SINCLAIR:

And really, I was just going to repeat the submission made there –

WINKELMANN CJ:

Where is it set out in your submissions? Where in your submissions?

MR SINCLAIR:

Page 104. So paragraph 322 sets out the agreed statement in the WCT and it affirms that the reproduction right under the Berne Convention fully applies in the digital environment, in particular, the use of works in a digital form. It's understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article9 of the Berne Convention. Our submission follows on from that that if storage in digital form is a reproduction, the Copyright Act ought to be interpreted consistently with Berne to mean that the creation of a copy or reproduction at the ISP and user's end is an act of copying or an act of distribution.

At any rate, moving onto 324, reading the Copyright Act as giving ISPs a free pass because they communicate digital material would be consistent with Article9 of the Berne Convention.

WINKELMANN CJ:

I must say, have I got the wrong end of the stick on this? I thought that Mr Mansfield's submission was that there was limited civil liability but very generous safe harbour provisions but no criminal liability for ISPs?

MR SINCLAIR:

Well, I must say, I have understood him to say, and I'm sure I'm wrong, but that there can be civil liability for communicating but not criminal –

WINKELMANN CJ:

Yes, that's what I had understood too.

MR SINCLAIR:

– and that, as I endeavoured to submit this morning, is an illogical distinction because if you can be civilly liable, that will be under section 36 and section 131 is almost identical apart from the more onerous knowledge requirement. So you can't –

GLAZEBROOK J:

I think he said that 92B mostly takes that out unless it's direct infringement but I don't think we need to worry too much about that.

MR SINCLAIR:

No, and that was the submission rejected by Justice Gilbert. One last thing, we touched upon inadmissible evidence and I do note, without wishing to be critical, that my friends have built their argument about takedown matters and such on evidence that is in that contested zone, so the Bao affidavit, the Timmins affidavit, the affidavit of Mr Ortmann which was not the subject of an oral evidence order in the District Court. I can simply provide a few

references to that later on if that's helpful. I could cover this discontent with the eighth supplement which was in response to Professor Sallis' evidence. I can explain the context of all of that but I suspect we're getting towards the tail end of things.

1530

WINKELMANN CJ:

So which evidence did you say has not been admitted in the committal proceedings, can we just be clear about that? Mr Ortmann's –

MR SINCLAIR:

Well I mean the clearest thing for me to do and the quickest thing I think would be to provide references but very quickly the Timmins affidavit, the Bao affidavit, there's an affidavit referred to from Mr Ortmann, which was filed in the District Court, I think in relation to an adjournment application, but it was no the subject to an oral evidence order. Mr Ortmann did give evidence but not on the contents being relied on.

GLAZEBROOK J:

Have we got all this stuff in front of us?

MR SINCLAIR:

Well it is identified as subject to the fresh evidence application.

WINKELMANN CJ:

So it is clearly – we've got material that is thread through elsewhere, but we might not understand, it's clearly, it's all in the yellow folder?

MR SINCLAIR:

It is there. It's not really identified –

WINKELMANN CJ:

Through the course of the submissions?

MR SINCLAIR:

As being in that, having that status. Unless Your Honours have further questions that completes all I wish to…

GLAZEBROOK J:

Do you just want to briefly, Mr Mansfield put some stress on the fact that section 198 was amended but not section 131. Do you want to make any comment on that?

MR SINCLAIR:

Yes, I think we did cover that in the written submissions as well, but that's simply a result of that global wording change that's – wherever there was broadcasting or cable programme in the Act, it's all been taken out and simply replaced with communication wording. May it please the Court.

WINKELMANN CJ:

Mr Raftery?

MR RAFTERY QC:

I wonder if you might just retire now while I just get set up.

COURT ADJOURNS: 3.32 PM

COURT RESUMES: 3.38 PM

WINKELMANN CJ:

Mr Raftery.

MR RAFTERY QC:

Your Honour, I just wondered whether I could come back a question that you asked Mr Sinclair about, and it seemed to be something that was concerning at least two of Your Honours, but what is the position that this is an honest ISP, are they suddenly open to this sort of indictment.

WINKELMANN CJ:

This is the question about whether the safe harbour provisions are defences or whether they define primary liability.

MR RAFTERY QC:

That's right. What I was just going to pose the position that the question seemed to take as a given that there had been an indictment laid against a completely innocent ISP, and all I wanted to say about that was if we assume that such a thing happened, and it's hard to imagine, but if we did, when the extradition Court is required to do the 24(2)(c) exercise, it is looking at the conduct which constitutes the offence, it looks at the indictment and it looks at what's alleged, and it finds the elements and the strands that are to go to the next stage, which is the 24(2)(d) exercise, and it's at that stage that the issue of 92B and C comes into play, and if you imagine the sort of thing that you've been talking about, it wouldn't be, it's nothing to do with being a defence, it is at the end of the examination by the District Court of the material put before it. If there is no evidence other than that entirely consistent with the honest ISP, the case would fail and would not –

1540

WINKELMANN CJ:

So it fails at the (d) point. So it doesn't really matter how you characterise it, effectively, roughly speaking –

MR RAFTERY QC:

But that's when it comes in. In, at the 24(2)(d) exercise it certainly has come into play in this case because it's been very much an active part of the defence put forward by the appellants, and it's been the constant theme of their submissions. But the reason why it's a reality as an argument in this case is because this United States case is, when you look at the phrasing "without more" there was heaps more in this case. Much more than if the only evidence that the United States could put before the Court was that there were a huge volume of takedown notices, but that they responded to them within a reasonable time as provided for by 92C, a District Court Judge would

say, no extradition offence evidence. Nothing established. It would be kicked out.

WILLIAMS J:

Not if it's not – you're calling, Mr Sinclair was correct in saying that's not for us, that's for the American court?

MR RAFTERY QC:

No, what is for the American court is if the District Court found that there was evidence over and above the purely innocent ISP, it either complied with 92B or 92C. There's not a scintilla of evidence beyond that. It wouldn't survive the extradition Court's process, it would never – the Court would say not extraditable.

GLAZEBROOK J:

I think that was the only point we were making, because Mr Sinclair's submission at its highest was that anything to do with that was the defence and we were just reacting against a – so you're now saying well –

MR RAFTERY QC:

I understand that. All I'm saying it's not quite a defence, you just say, there's no evidence.

GLAZEBROOK J:

Well, yes.

MR RAFTERY QC:

If it's the case, like it is here, just taking the rewards programme or the fact that they kept things on file even after they got notices, then there is more, and if there's evidence on that within the ROC on a prima facie basis, and there is as all the Courts below have found, then it would go – and at trial I accept, in the United States, these things would need to be proved, not just on a prima facie basis, but to a beyond reasonable doubt standard, which is the same in the States as in here, and that's a question for trial. What we are just

concerned with is some prima facie evidence so that the way it comes into play is submission of no case because there's no evidence in the extradition Court, or it goes to trial, and that's why we say it's a defence in the realities of this case. So that's all I wanted to say about that.

GLAZEBROOK J:

I don't think that was quite what Mr Sinclair was saying, but we'll take your – and I think maybe he was saying that by the end of the discussion.

MR RAFTERY QC:

Yes. So that's all I wanted to say and I'm now going to go back to topic number 1 on the list, which I think is where we were yesterday when we interposed Mr Sinclair. Now I just want to be sure that I don't do anything more – at the moment what I was proposing to do was, as I started yesterday, just to look at the indictment because there had been a question raised while Mr Illingworth was on his feet, and then Your Honour addressed me saying, "Well I hope someone's going to take us to the indictment at some stage and try and relate it to the Crimes Act pathways." So that's what I was going to do now.

WINKELMANN CJ:

Just before you do Mr Raftery, just a timetabling check. Where are we at?

MR RAFTERY QC:

Well, the way I saw it, but in the light of the experience of my learned friends I'm loathe to give you how long I'll be on any topic. It depends on your contributions to the exchanges as well. I don't mean that disrespectfully. But the –

WINKELMANN CJ:

Well to some extent although –

MR RAFTERY QC:

I understand, but it's a necessary part of the process we're going through, but in terms of looking at the list, which I think will take more than others, the code issue, which is topic 2. I'm going from the numbering in my list that we gave you yesterday. I don't think topic 3 will take long. The topic 5 is, because that's as I understood yesterday, bearing in mind it was I think the point made by Mr Mansfield, that's the 92B, C, if I can call it "defence" in inverted commas, because he was saying their conduct was not dishonest because they're an honest ISP. So then it was the limitation period, which I think is a very short point. Then the transposition is the only one that might take a little bit longer. But I don't think it will take as long as it took with my learned friends. Can I just say this in anticipation for your night's work. Taking up the invitation of the Chief Justice yesterday, Ms Fuhr has prepared something for Your Honours. She's off the school that believes speech is silver but silence is golden, so will not be speaking to the topic, because her document speaks for itself, and is what I might call a transposition exercise that you will be able to look at overnight so that when we come back tomorrow to discuss it, because I suspect I'll still be on my feet tomorrow –

WINKELMANN CJ:

Can she respond to the questions on it?

MR RAFTERY QC:

Well as I said she believes that silence is golden.

WINKELMANN CJ:

I'm sure she'll respond to the questions if we need her to.

MR RAFTERY QC:

Well if she's pressed I'm sure she might feel forced.

WINKELMANN CJ:

Yes, and you're making her mortified, I can see.

MR RAFTERY QC:

Sorry, but I just wanted to let you know that it wasn't, as you may have gathered, she has not sat idle in this case, she's been a large part of the work that's been involved. So that just this document has been prepared in order to assist, and overnight you have the opportunity of looking at it, rather than my labouring it column by column tomorrow. But I won't give it to you now because it is the transposition point.

WINKELMANN CJ:

Thank you.

MR RAFTERY QC:

Unless you want it now, but I just thought at the end of the day it can just be given to you.

WINKELMANN CJ:

Yes, that's fine.

MR RAFTERY QC:

And then number 8 goes to Monday and 9 and 10 will be tomorrow, with Mr Boldt, and again as always counsel obviously say I won't be very long but I suspect they will, just because these issues need teasing out, so I would hope that we would finish by lunchtime tomorrow, if not before and the my learned friend will be replying to everything bar topic 8, and then that should be the end. Just while I'm on housekeeping matters, I will need to leave at lunchtime on Monday when we won't be finished and I hope, therefore, that the Court would be happy with my doing so and leaving the matters with my learned friends.

WINKELMANN CJ:

Yes, I think that's fine Mr Raftery.

MR RAFTERY QC:

I'm grateful.

WILLIAMS J:

You could upload anything else you want to say.

MR RAFTERY QC:

I hope I've run out by then. So if we come back to the indictment.

WINKELMANN CJ:

Can you remind me where we find that?

MR RAFTERY QC:

The indictment is in the documents for hearing, volume 8, it's a green volume. Now I started yesterday with count 2, which is the conspiracy to infringe copyright, and I think that's been well thrashed around with my learned friend as far as section 131 is concerned. So I can just go back to count 1 and just go through the indictment in the order of the counts because perhaps now the Court has a better handle on it. Count 1 is basically charging that they are, it's called a racketeering offence, and what the United States allegation is that they, looking down after that list of names on page 3726, that they constituted an enterprise, that is a group of individuals and entities associated in fact. Skipping a few lines, "The Enterprise constituted an ongoing organisation whose members functioned as a continuing unit for the common purpose of achieving the objectives of the Enterprise. This Enterprise was engaged in, and its activities affected, interstate and foreign commerce."

Then looking at the objectives of the enterprise you see under the heading, "B. The Racketeering Violation." After, again, the list, "Being persons employed by and associated with the Enterprise, which Enterprise engaged in, and the activities of which affected interstate and foreign commerce, did knowingly, wilfully, and intentionally combine, conspire," skipping a few lines, "to conduct and participate, directly and indirectly, in the conduct of the affairs of that Enterprise through a pattern of racketeering activity."

1550

Over the page, the purposes, "C". "Enriching the members… through, among things, copyright infringing and money laundering," and wire fraud. So in effect, for 24(2)(c) purposes, they formed an organised group, they participated in it by conspiring knowingly to commit multiple acts of serious crime, copyright infringement, money laundering and wire fraud, and I will come to wire fraud when we come to the 9 to 13 counts. The correspondence, says the United States is with section 98A of the Crimes Act, and that comes into the Treaty in effect by virtue of section 101B of the Extradition Act and section 101A provides that treaties are deemed to incorporate certain crimes and subsection (2) of 101A says basically the crimes listed in section 101B of the Act. And section 101B calls certain crimes with transnational aspects deemed to be included in extradition treaties and it says, "The following offences are deemed to be offences described in the extradition treaty concluded before the commencement of section 6 of the Amendment Act. And (a) every offence against the number of sections including 98A and then – we don't need to worry about B. But (c) says, "Any offence against any enactment if it punishable for a term of four years or more, all the Crimes Act pathways which we say are available, are all Crimes Act pathways that have a maximum sentence that is above that four year period and even the 121 you will remember the maximum sentence is five years, since 2002. So, it must be an offence punishable by a term of four years or more and an offence alleged to involve an organised criminal group and the organised criminal group is required to be three or more persons.

Now if I can just turn back to the indictment. So that was the correspondence in terms of the section in the local New Zealand legislation which we say corresponds there and in terms of what we are alleging, which is fleshed out in the document that I referred the Court to this morning. I am not going to take you through it and go through chapter and verse but just talk about some things in general. That the knowledge of the group's activities and that their participation in it, contributed to the enterprise that they all performed; and what we know from the ROC is they all performed corporate roles within Megaupload. They were in regular contact with each other. Their purpose

was to deceive copyright holders, to enable them to continue in business. The objectives of the group, of course, in terms of the local offences are those which we have used as pathway section, 228 and 249 and 240 which comes into play later at the wire fraud stage, as well, of course, as section 131 but we don't need to mention that.

WINKELMANN CJ:

Sorry what did you just say Mr Raftery.

MR RAFTERY QC:

There is also section 131 as another pathway, but that one has already been dealt with. I am just talking about pure Crimes Act pathways is what we suggest.

WINKELMANN CJ:

So at the moment we have had section 98A.

MR RAFTERY QC:

And section 98A is the immediate correspondence. They want to obtain the material benefits from the commission of offences. The offences envisaged are section 228, 240, 249, that is under the Crimes Act. I leave out section 131. So that if it assists, in the back of the United States submissions in this appeal, the last page – page 110 onwards, is actually an appendix which has done the exercise that I have just been describing and if you are able to turn that up in the United States submissions, it may assist and it may assist the ability to move with a bit more speed because you have yet again another chart. So, it is the very back, it is the last few pages of the United States submissions. You will see there, 110 is count 1, conspiracy to commit racketeering. On the left-hand column is the conduct alleged for the indictment in count 1. This is looking at the indictment, extrapolating that. What are the essential allegation against the accused in this case. How does that correlate to section 98A. Just in the back, it says, "Deemed in treaty by Extradition Act 101(b)(1), that is why I read that out but we don't need to refer to that again unless Your Honours want to, and that these five elements there

are the elements, leaving aside conspiring which is something that I am just – from the evidence in general. I think Your Honours are well enough aware of what the United States case is. There is no need to amplify that more, but these are the five elements involved in the Crown submission of what is involved in section 98A. Now I am not sure that in fact the materials before you have every section of the Crimes Act. There are certain selected sections put in but I think section 98A might be missing because I couldn't find that one. The first one I found was section 228 in volume 1 of the materials.

WINKELMANN CJ:

So Mr Raftery I did ask. There was one question and we might deal with it tomorrow. This is the same criminal conduct that is charged here as is charged in other offences?

MR RAFTERY QC:

I can address that right now because I remember you raised that question, and it seemed to be, and correct me if I am wrong, but the tenor of the remark, rather than I remember the actual words of it were, well go to a lot of these counts in the indictments all cover the same ground which is not an invalid point. But if you think back to your days in the High Court, Your Honour might well have done, for example, presided over a drug trial involving a number of offenders and it was not uncommon to find in indictments of that sort, section 98A and an equivalent of count 2, conspiring to deal in drugs.

GLAZEBROOK J:

I think what the Chief Justice is saying is yes, you can but only in circumstances one would have thought, usually where it is dealing with different conduct, rather than absolutely duplicative charges with exactly the same conduct.

MR RAFTERY QC:

If I finish just what I am saying and then I am going to make, I hope, answer that point and then money laundering will be quite often included and they would all be inter-related because the organised criminal group exists to deal

in drugs. The dealing in drugs is what is going on in count 2 and count 3 is the money laundering. Now as far as an indictment properly presented, it is entirely proper but all those three should remain there. At the end of the Crown case, a Judge might say, I might not let this count go to the jury because it just duplicates but that is a sort of trial decision, rather than any decision that affects the exercise of the extradition Court. They need to look just at the counts in the indictment, is there material in the ROC that supports the allegation when translated to New Zealand. If there is, then I have to decide whether he or she is extraditable or not. That is all I do, then it goes to the Minister. They have done their exercise. So that while it is not an improper question in the context of a trial, at the stage of the equivalent of a committal hearing, it is just something to say, well is there evidence to support each of the charges. This will be a task for the trial Judge to decide when the time comes, how far it goes and the fact that there might be repetition or overlay between, does not in fact mean that there is something wrong with the indictment.

1600

GLAZEBROOK J:

Well, my understanding is that once you add racketeering charges, it has a major effect on penalty and if it has a major effect on penalty merely for exactly the same conduct as the other then I'm not entirely sure that it is something that you could say is double criminality, effectively, because effectively, what you're actually saying is it's an extra – because we would say "Well, if it's the same conduct, it just gets the same" – whether it's in the – it might be a slightly aggravating factor if it's an organised criminal group but not to the extent of ratcheting up from 10 years to 80.

MR RAFTERY QC:

But the exercise for the extradition Court is to say "Is the maximum level for the offence, in the case of a section 98A charge, four years or more?"

GLAZEBROOK J:

So you say we ignore the fact that somebody in New Zealand might get two years and in the States get 80 years by adding a racketeering – and I might be totally wrong on that but I don't think I am, by adding – because say, in the *Cullinane* case, I think he would have had about 18 months there and was looking at about 50 in the US because of the racketeering charges.

MR RAFTERY QC:

For the extradition Judge, that is not a question. It may come into play at a later stage because –

WINKELMANN CJ:

The section 30 –

MR RAFTERY QC:

– remember the actual decision to extradite is not the Court's.

WINKELMANN CJ:

The section 30 stage?

MR RAFTERY QC:

Yes. So I'm not saying it's an improper thing for the Court to be thinking about but we are here doing the extradition Judge's exercise on appeal, as it were, rather than looking beyond the extradition Court. And so while it's an important exercise and there are important safeguards built into it for people who are requested, it's still a limited exercise in the sense that there are two questions: is it an extradition offence? Is there prima facie evidence of that offence? And then –

GLAZEBROOK J:

So this is for the later judicial review then, is it?

MR RAFTERY QC:

It'll be coming your way if you agree with the United States on this, I feel sure, if the Minister makes a decision to extradite. But that's way beyond our worries at this stage. We're just up here doing the task of saying "Well, how do we look at the correspondence between the New Zealand statutory offences?", which the United States says are the other pathways. In respect of count 4 to 8 and 9 to 13, and I'm going to – I'm leaving count 3 to one side and count 2 has been well flashed by my learned friend and I'll come back to it in a minute but count 3 is something that is really brought into focus by the discussion that you'll be having next week on *Cullinane* because it very much centres around the 219 in particular, to a certain extent 216, but 219 provision of the schedule and it's not really something for now so I'm leaving that count 3 to one side.

But counts 4 to 8 and count 2 as pathways involve consideration of, as I've said, two particular sections of the Crimes Act, namely section 228 and 249, and we see that in the chart that I have given you which starts at page 111 and you will see for the conspiracy to commit copyright infringement, the central conduct is still that the defendants conspired with the object of infringing copyright through Megaupload and associated sites for financial gain and we look across to the correspondence which is said there under 249. I'm going to leave out 310 each time, but the defendants conspired to directly or indirectly access a computer system, they thereby obtained any property. Don't worry about the pecuniary advantage or anything like that, just "obtained property" is enough. This was done dishonestly and without claim of right.

WINKELMANN CJ:

So we have a great – well, for myself, I find it hard to understand how this could be accessing a computer system because that's really an offence which is directed at the unauthorised accessing of someone's computer.

MR RAFTERY QC:

Well, I don't – I'm not sure that I would agree with Your Honour about that. "Access" is defined in section 248 and I'm not sure if we do have the whole Crimes Act –

WINKELMANN CJ:

So I'm just looking at the time, it's five past four, so we probably should break and take up that point in the morning.

MR RAFTERY QC:

Certainly, Your Honour, and I will ensure that if they aren't in the bundle, there are a couple of sections of the Crimes Act that are important that we may have for you then that aren't, I think, recopied by my learned friends into the bundle.

GLAZEBROOK J:

And I think we were going to have the paper handed up, were we?

MR RAFTERY QC:

You are, yes, Your Honour. My learned friends look as though they're champing at the bit to have their own copies but they will be coming their way.

MR MANSFIELD:

Just full of excitement.

WILLIAMS J:

I think we are going to have lots of questions on this.

MR RAFTERY QC:

Well, maybe we'll be here on Monday anyway.

WINKELMANN CJ:

Thank you, Mr Raftery.

COURT ADJOURNS: 4.06 PM

COURT RESUMES ON FRIDAY 14 JUNE 2019 AT 10.02 AM

WINKELMANN CJ:

Mōrena.

MR RAFTERY QC:

Mōrena. Your Honours, I'm just going to hand out more paper to you. Can I just explain what's there. There are some references I made to the Crimes Act yesterday, which on checking the volumes I saw something that said the Crimes Act, and I thought it was there, but it had only put certain selected sections in it, there are a couple I referred to, or was going to refer to, that aren't there. So that's just supplementing that. I know you can look up the Crimes Act on your laptops but just so that you've got them there in a documentary form if you need them.

The second document is one that we've prepared overnight, which is about the pathways issue, and I'll tell you what I was proposing is just to give it to you, not to talk to it, and actually to bring the pathways topic to an end now because it sets out in each way the way the Crown, or the way the United States says the pathways apply, and I do it for two reasons. In other words give it to you and don't talk to it is just for this reason. One, we have a lot to get through today, and the general tenor of the United States approach I think we've covered that yesterday, and it's perhaps important to remember that in the Court of Appeal some of the comments which you may or may not have noticed was that there wasn't any real challenge to the pathways under the Crimes Act.

I'll just quote you a couple of passages of Justice Gilbert when he was looking at the other pathways like 228 and 249. He said at 185, for example, "No substantial challenge to the Judge's finding other than based on 131 was made by the appellants in this respect. But for the same reasons as the case at 249, dishonest use of a document for the purposes of 228, is not predicated

upon the criminal offence", that's of copyright offending, "having been committed under section 131".

That really was the tenor of the challenge throughout on the pathways. It wasn't against the Crimes Act pathways, it was the 131 usage. He did the same at other paragraphs. I don't need to go through them all, but at 200 when talking about counts 4 to 8: "There was no substantial on appeal to these findings except using the pathway under section 131." And likewise for 9 to 13, again the appellants mounted no meaningful attack on Justice Gilbert's findings that 228 was an available pathway. We see no error in Justice Gilbert analysis, and there a couple more, but I don't need to refer you to that. That was the general tenor of the Court of Appeal hearing. So what I was proposing was to leave that pathway document to you, it may be at a later time you want to come back to me on that, but I was proposing, bearing in mind we have to deal with the code, the transposition, two smaller points, or less time consuming points of Mr Mansfield, Mr Batato's appeal and then the judicial review and the nullity thing, to try and get through today with my friends' replies –

WINKELMANN CJ:

So do you have a hand up on pathways?

MR RAFTERY QC:

I have, it's there, sorry, I was just explaining what was coming to you. Now there is a third document, which is the one that Mr Sinclair promised you yesterday when he said I'll put in writing some of those references when he was talking to the ROC, but again that's something, so just to give you that bit of paperwork now so you've got it, and you'll see that it's named "Some rewards issues and references".

So my proposal then was to move to the question raised by my learned friend that the Copyright Act is a code, and if that was agreeable to Your Honours, that's what I propose to do now.

WILLIAMS J:

I wonder if I could get a copy of the transposition handout, do you have…

MR RAFTERY QC:

The one that was handed out last night?

WILLIAMS J:

The one that came out at the end of yesterday, it's just that I've mislaid mine.

MR RAFTERY QC:

Certainly, I'll have it when transposition comes.

WILLIAMS J:

Yes. Let's do it, if I can get one by then.

MR RAFTERY QC:

Yes, certainly. So my learned friend says it's not a code, and I think just as a simple starting point it's important to remember that the Copyright Act itself does not describe itself as a code. Now I know that that is not the end of the matter. We look at, as my learned friend asked you to do so, look at *Stewart v Grey County Council* where again the Mining Act didn't call itself a code, but when looking at it under the specialibus rule, the Court found it to be a code for the purposes of, when looking at it in comparison to the Town and Country Planning Act. So the absence of the phrase is not fatal, but it's interesting to note that in an Act that predates the Copyright Act, the Property (Relationships) Act 1976, section 4 described it as a code, and in an Act that post-dates, just to take two examples, the Care of Children Act 2004, section 13, again described that Act as a code. So that's just a starting point but by no means a finishing point, I accept.

So what I would now like to look at is some of the case law in New Zealand before looking at some of the overseas case law and some of the case law and some of the cases that my learned friend, Mr Mansfield, relied on. The first important case that I want to take you to is in our bundle 2, that's the

bundle of authorities of the United States, an orange cover. Before I go through the cases that I'm going to take you to, the point of the submission is this. That our law has recognised that, notwithstanding the nature of, in this case, the Copyright Act, it is possible to prosecute outside that Act in serious cases for the conspiracy to defraud, and I think it was Justice Williams who raised with my learned friend the question of section 10 of the Crimes Act, which permits prosecution under the Act or any other Act. So that the first case I want to take you to, which is not a –

WILLIAMS J:

Can I just ask you, you're starting phrase in that sentence, our law is recognised and notwithstanding, and I can't remember whether you said code or…

MR RAFTERY QC:

No.

WILLIAMS J:

What did you say, notwithstanding…?

MR RAFTERY QC:

I said notwithstanding the Copyright Act.

WILLIAMS J:

I see.

MR RAFTERY QC:

Or other Acts which may be under consideration might have a statutory scheme of offences listed in the code.

WILLIAMS J:

Right.

MR RAFTERY QC:

Listed in the Act, code or not, does not necessarily preclude prosecutions using the Crimes Act, and that was why I made the reference to section 10. The issue in *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 (CA) which is the first case which is at tab 15 in the bundle 2. It was a civil action against the operators of video clubs alleging breaches of copyright in certain cinematograph films and I will just read from the head note just to position you. So, it is tab 15 and if we just look at the head note to just give you a brief idea of the background. On 23 February 1982, the plaintiffs commenced action against the operators of two video clubs alleging breaches of copyright in certain cinematograph films. The same day, on an ex parte application by the plaintiffs, Anton Piller orders were granted. So just closing that. That was a civil case and it was a question of Anton Piller orders being made. These were challenged and the issue that arose was, were they required to produce documents or answer questions, because the Anton Piller orders were quite wide, which might incriminate them. And so that was the issue that was confronting. That is the only issue from this case that I want to deal with in these submissions. The issue that arose because there were possible avenues of prosecution under the Copyright Act and although this was under the old Act, I suppose this is a 1984 case, it is the same principle that applies and prosecution under the more serious consequences of the Crimes Act. And all three Judges came to the same conclusion. Justice Cooke –

WINKELMANN CJ:

So can you just explain to me how the issue arose as to whether the prosecution would be under one Act or the other. Why was it an issue?

MR RAFTERY QC:

Because the issue of self-incrimination arose when the question of producing certain documents or answering certain questions and they were resisting those Anton Piller orders saying that they would make themselves liable to prosecution if they were to answer those questions or to produce those documents, just to simplify. So that was the issue that the Court had to

address and so it came into focus because what were the prosecutions that they could face? The prosecutions were for offences under the Copyright Act or were there other offences with which they could be charged. If my learned friend is correct, that the New Zealand Courts were viewing the Copyright Act as a code, here was a case that might have called that question right up to the forefront. And so there were –

GLAZEBROOK J:

Sorry I didn't understand that. If it was a code, what?

MR RAFTERY QC:

No if – my learned friend's submission that the Copyright Act was a code, it might have informed the approach of the Court in this case as to whether they face prosecution just for copyright or for something else.

WINKELMANN CJ:

But how did that have an impact on their obligation to answer the Anton Pillar orders because on either analysis, they would have been reading them, there was a risk of self-incrimination.

MR RAFTERY QC:

Yes, absolutely and that was why they raised it and at that time, if you remember from the limitation point being argued by my learned friend, the maximum penalty for offences under section 131 was three months, and so you had, on the one hand, endangering crimination for an offence under section 131 or danger of self-incrimination in respect of something more serious but only if the Act was not a code. Because if the Act was a code you couldn't go outside it to anywhere else and so that was the issue that arose, and it was addressed by all three Judges. Justice Cooke dealt with the part that I want to draw to your attention – really it's from page 469. And if I take you to, first of all, the first paragraph that actually begins on that page, at line 8. It just says, "In New Zealand the availability of the privilege against self-incrimination when discovery of interrogatories are sought, is established by the following decisions." And I don't need to take you through that.

On line 19, the next paragraph, “The leading English cases on the test are now *Rank* and a case in the House of Lords a few years earlier, *Re Westinghouse Uranium Contract* [1978] AC 547. Reading the speeches in those cases as a whole, I think that they accept that the test of a sufficient tendency to incriminate is not a rigorous one; a mere improbability that criminal proceedings will be taken is not enough to exclude the privilege; the risk must be real and not fanciful. As to what can be taken into account, two passages from *Rank Film Distributors Ltd and others v Video Information Centre and others* [1981] 2 All ER 76 (HL) should be quoted …”, and I read those to you because I am not going to take you to *Rank*, it saves having to do that and jump around the volumes.

Lord Wilberforce said, “However it is only too clear (and I deliberately use the language of reluctance) that supply of the information and production of the documents sought would tend to expose the respondents to a charge of conspiracy to defraud. In the very nature of this activity, a number of persons are certain to be involved in it – in printing the master tapes, copying from the master tapes, seeking and accepting orders, and distributing illicit copies. A charge of conspiracy to defraud, so far from being, as it sometimes is, a contrived addition to other charges, is here an appropriate and exact description of what is being done. So far from it being contrived, fanciful, or imagined, it is the charge on which Mr Dawson, who appears on the existing evidence to be closely connected with Mr Lee and Ms Gomberg, is to stand trial. It cannot be said that charges under this head would be nothing more than charges under section 21 of 1956,” that is the 1956 Copyright Act “under another name. An essential ingredient in them is dishonesty, which may exist in cases brought under section 21, but which may not. The much heavier penalties also make it more likely that the charges would be brought of conspiracy to defraud.”

And Lord Fraser to the same effect said, “But conspiracy to defraud is a different matter. It is a serious offence. The risk of those who deal in or manufacture illicit films being prosecuted for it is by no means remote or

fanciful. Indeed the sixth respondent is now facing prosecution on that ground for the matters with which this appeal is concerned."

So what we take from *Rank* is that while the offences under section 21 of the 1956 Act in the United Kingdom which were summary at that stage too, was relatively trivial. There was a real risk of being prosecuted for conspiracy to defraud, which as you can see it is another copyright type case, was a real and not a fanciful reality. Just to make that point, over the page, this is Justice Cooke dealing with the instant appeal in front of him. He said at about line 25, 26, this is page 470: "And he may well have been entitled to ignore the possibility of summary prosecution under s 28 of the Copyright Act." That's our New Zealand Act, not the present one but the former one. "Not simply because offences thereunder are on first conviction comparatively trivial, because the smallest of the penalties compared with the potential profits and the fact that the prosecution may provide in essence merely ancillary remedies for copyright owners, mean the possibilities of such prosecutions could reasonably be dismissed."

Then over the page at page 471, taking it up from line 15, "The statement of claim," this is because you remember we are talking about a civil case here, "The statements of claim make only incidental references to conspiracy, but the very nature of the defendants' operation means that a number of other persons must be involved. There seems to be every possibility in each case of a common purpose of extending to defrauding, not the public, but 'any person ascertained or unascertained' (that is to say the copyright owners) within the meaning of s 257 of the Crimes Act 1961."

That is the old conspiracy to defraud section. "Experience suggests that neither the police nor any other person are likely to prosecute but mere improbability has never been treated as tantamount to no real risk."

And to like effect, Justice Somers at page 480 where he said at the top of that page, that first paragraph, "I am of opinion that the facts so far disclosed in the instant cases suggest that each defendant may have been involved in criminal

conspiracy to defraud the plaintiff copyright owners. To require them to produce the documents mentioned in the orders and to answer the questions which they authorise would tend to expose them to prosecution. The risk of such a prosecution is real and not fanciful."

And again, to like effect, from Justice Bisson, who again commented at page 485 on the relative triviality of section 21 of the Act, and this was quoting from the *Rank Films* case, 21 of the Act and our comparative offence at that stage was section 28 of our Copyright Act, and then he quotes those passages of Lord Wilberforce that we referred to before, and then he comments over the page at page 486, about line 46, "Although there may not yet have been any case in New Zealand of conspiracy to defraud based on copyright infringement, the fact that video piracy has led to such a prosecution in England must cause one to regard the possibility of such a prosecution arising in New Zealand, when Anton Piller orders have become necessary, as more than a remote possibility. The respondents may decide that a criminal sanction with a maximum term of imprisonment of five years would be a more satisfactory means of combating 'pirates' of intellectual property than pursuing civil remedies."

WINKELMANN CJ:

So is this the rather unusual situation where the alleged infringers were arguing that they might be exposed to criminal liability under the Crimes Act?

MR RAFTERY QC:

Yes.

WINKELMANN CJ:

So they were arguing –

MR RAFTERY QC:

Liability to prosecution under either Act, Copyright Act or the other, the Court said "Look, Copyright Act, the penalty's so trivial, and the likelihood of being prosecuted slight". If that was the only prosecution that you faced, which it

would be if my learned friend's argument about a code is correct, then that would not have called into question the self-incrimination rule and they would have had to provide the documents and answer the interrogatories. But because in fact on the circumstances of copyright infringement, they were facing the possibility, because of the nature and extent of criminal prosecution for conspiracy defraud then the Anton Piller orders – well, the Judges came to different routes. One Judge would strike them down completely. The other two Judges said what they could do is ask the questions but they would never be allowed to use them in any criminal prosecution but the principle is exactly the same whatever the course each individual Judge thought was appropriate to deal with the orders.

WILLIAMS J:

You do get a sense that at least Justice Bisson, perhaps Justice Somers, took the view that conspiracy to defraud, because of its higher penalty, captured the culpability more effectively and so it shouldn't be excluded, but of course now the penalty under the Copyright Act is five years. What do you make of that?

MR RAFTERY QC:

I don't make much of that, with respect, Your Honour. What I say is the reality is that what they were saying is behind all this, is it a code or not? If it's a code, it doesn't matter whether they're three months or three years or 53 years. That's the thing they base prosecution under. They might well have said "No, you don't have to answer the interrogatories" if the penalty was higher. But what they're saying is you actually don't just face prosecution for offences under the Copyright Act, you face prosecution for offences under the Crimes Act. The two are not mutually exclusive.

WILLIAMS J:

Yes, but underlying that is the sense that "And that's a very good idea" because the penalties under the Copyright Act are so trivial. That's one of the reasons in the weighing process that took them to that conclusion. That reason's now gone.

MR RAFTERY QC:

It was one of the reasons. The reason may have been gone but if you had a five year penalty, they might have said "No, you face prosecution under both Acts. Therefore, you don't have to answer them". But they say "If all you faced was a penalty of three months maximum, that would never have been prosecuted in New Zealand", that's too remote to worry about. But here, you face prosecution under two separate regimes.

WINKELMANN CJ:

Mr Raftery, is it possible to say that under the Copyright Act, you're only liable to criminal penalty if you are in fact dishonest because you must know when you're making a profit? I'm just interested if there's a different additional level of criminality under the Crimes Act.

MR RAFTERY QC:

I'm not sure there's a different level of criminality in the sense that in order to be guilty of conspiracy to defraud, apart from the agreement, there are two real elements about that, there must be dishonesty and someone must be, depending on the forum, deceived or something of that sort but those are the sort of things you're looking at in a conspiracy to defraud and it results in maybe dishonesty resulting in some form of deprivation because someone's going to lose out, the copyright holders are going to lose out, or depending on what type of fraud, maybe shareholders lose out or whatever it might be.

WINKELMANN CJ:

Because it just occurs to me that you might think it's unusual to have two offences for exactly the same – that there should be two offences for exactly the same essential conduct. So carrying on how a business is normally done – I suppose it is possible to do it with one person but often it's done with more than one so that people who come together, and they know that they are infringing copyright to make a profit, one might say that that's no different to the conduct that would be charged under conspiracy.

MR RAFTERY QC:

You mean conspiracy…

WINKELMANN CJ:

To breach…

MR RAFTERY QC:

Breach the Copyright Act?

WINKELMANN CJ:

Yes.

MR RAFTERY QC:

There are many instances where the same conduct can give rise to different charges and sometimes indictments are laid for charges – look at 249 and 240, the ones we've been looking at. A bundle of sections together with some others that were put in to replace the repeal of section 257, the old conspiracy to defraud, and sometimes the conduct will fit under one or the other and maybe it will fit under both. I accept that sometimes you might charge both on the basis that you will say "Well, a Court or a jury might have difficulty with the concept of 'access' in this case" or "Did this amount to using a computer?" or those sorts of issues.

So you might have them in there as alternatives but it wouldn't be wrong to prosecute for both if there was those possibilities, so you're facing the possibility of an alternative charge. But if, and this may be more significant when I come to look at some of the English cases because of the regime there in relation to the conspiracy to defraud and conspiracy generally, and it may bring into focus some of the questions that Your Honour wants to be answered because we don't quite face the same situation that they have in England which has led to some interesting cases which my learned friend relied on and I say can be distinguished for the sort of reasons that you're talking about.

WINKELMANN CJ:

I suppose I'm not concerned with prosecutorial discretion but really rather Parliamentary intent. Could Parliament intend that a person should be exposed to very different penalties for the same conduct depending upon how they're charged?

MR RAFTERY QC:

Yes, I think they could because what section 10 of the Crimes Act says, you're open to prosecution under this Act for any offence under this Act that's appropriate, or under any other Act that might be appropriate. There'll be very few cases where you have identical penalties for all those possible options. If you think of someone who drives and kills someone, they can be prosecuted under the Land Transport Act for reckless driving causing death, or they could be prosecuted under the Crimes Act for manslaughter.

WINKELMANN CJ:

But there are different elements to the offence.

MR RAFTERY QC:

There may be different elements but in the light of authorities of the Court of Appeal in relation to sentencing in respect of manslaughter and Land Transport Act offences, reckless driving causing death rather than some of the others, they have suggested that the penalties should be – not the maximum potential but the actual penalties imposed should be similar and then you look at the gravamen of the case and you might want to capture something in the manslaughter charge that you don't in reckless driving causing death. So you might capture something in a conspiracy to defraud that you might not capture in a conspiracy for some of the offences under the Copyright Act.

And in the case of conspiracy to defraud, as I hope to demonstrate a little later, looking at more English authorities here but we have our own Attorney-General's guidelines in this country that govern the conduct of prosecutors that the English Courts have said "Well, it is appropriate to charge

serious offending that might be copyright offending as conspiracy to defraud where the volume of what you're doing or the extensiveness or the fact that it may involve several elements of criminality, it's justifiable to prosecute under the conspiracy to defraud heading rather than under the statutory offence".

GLAZEBROOK J:

Can I just check you said the New Zealand Courts or were you referring to the guidelines or both?

MR RAFTERY QC:

Well, I was talking about the UK guidelines –

GLAZEBROOK J:

That's what I understand. It's just you said "the English Courts have said" that it's appropriate but did you mean the English guidelines?

MR RAFTERY QC:

And I was referring to the English guidelines –

GLAZEBROOK J:

That's what I thought.

MR RAFTERY QC:

– but I said we don't have to address in our guidelines quite the same issue that they have to in England because there are statutory conspiracies and common law –

GLAZEBROOK J:

I understand.

MR RAFTERY QC:

The guidance they've been given as to how they are to approach those and one of the things about any common law offence, of course, it has no maximum penalty because it's just a common law offence. It may have a limit in practice of how far you'll go because they'll look at the comparative

criminality but the Courts have said there are times when you may prosecute for one or when you ought not to be prosecuting for one and prosecute under the statutory offence. And so I'll come to those a little later and take you through them but I thought at the moment, I'm just going through some of the indicia from decisions of the Courts in this country as to whether they approach the Copyright Act as a code and *Busby* is, in my submission, certainly consistent with the submission of the United States that the Copyright Act is not a code and if it had been a code and the Court had been of the view that it was a code and it accepted the type of argument that my learned friend put forward, there is no way that the plaintiffs in the appeal could have been liable to the maximum penalties which the conspiracy to defraud under 257 would have exposed them to because they could have only been exposed to three months' imprisonment.

So if I leave that perhaps and go to the next case which is in the same booklet, if you go to tab 21. This has got nothing to do with copyright but it's a case called *R v Cann* [1989] 1 NZLR 210 (CA) and it's just to make the point, rather than to go through it in any length, is that Mr Cann was charged with offences in relation to tax matters and he was charged also in relation to an offence under section 229A(b) of the Crimes Act 1961 and if I just go to the, leave the headnote and go straight to where it says what the Court held, and again this is our Court of Appeal in 1988, "The prosecution could proceed under the Crimes Act. There was nothing to suggest that the three taxing statutes, individually or collectively, comprised a code in the sense that all prosecutions for infractions of the tax law must be laid under their provisions. Section 10 of the Crimes Act indicated to the contrary and there was no reason in principle why an act or omission which might be prosecuted as an offence under s 62 of the" –

GLAZEBROOK J:

Sorry, did you give a page number where you were reading from?

MR RAFTERY QC:

Sorry, page 211. It's part of the headnote so I was just reading from –

GLAZEBROOK J:

You were reading from the headnote?

MR RAFTERY QC:

Just to give you that summary to know why that case is in here. It's more, obviously, fully expanded on but so you know that what – basically, the issue was those two charges, section 229A of the Crimes Act and section 62 of the Goods and Services Tax Act and so they say, reading again from the headnote, "Section 10 of the Crimes Act indicated to the contrary and there was no reason in principle why an act or omission which might be prosecuted as an offence under s 62 of the Goods and Services Tax Act should not be prosecuted under the provisions of the Crimes Act if the circumstances in which it had been committed brought it fairly within the provisions of a particular section of the Crimes Act". The rest of the findings don't matter because they concern an entirely different matter.

And the very issue of whether it was a code or not, in other words whether the various tax statutes put together were a code, was dealt with by Justice McMullin over the page at page 213 and line 27 it is, the paragraph that begins "A statute is sometimes said to be a code in that it effectively replaces the common law and rules of equity affecting a particular branch of the law. For example in *Stewart v Grey County Council* [1978] 2 NZLR 577", which I'll come to later, "this Court said that the Mining Act 1971 was a code which operated to the exclusion of all other statutes. However, there is nothing to suggest that the Income Tax Act, the Goods and Services Tax Act, and the Inland Revenue Department Act, individually or collectively, comprise a code in the sense that all prosecutions for infractions of the tax law must be laid under their provisions" and he goes on to refer to section 10 of the Crimes Act.

It's not a question of having to go through the tax Acts but one might have imagined if an area of law might be considered appropriate codified into a code is something like the area of tax because it's a very separate, self-contained, special area of the law, but what the Court was saying here

was that where there's tax offending, it does not have to be prosecuted solely under the tax regimes, whatever Act you're applying, because they don't create a code together, they can be prosecuted also under the Crimes Act. And then the example that I gave to Your Honour about the reckless driving is dealt with here at line 50 on the same page 213: "It is plain enough from the provision just cited that an act or omission which is an offence against one Act may be prosecuted under the provisions of another. It may be prosecuted under either Act and frequently is. For instance, cases of dangerous driving or reckless driving causing death may be prosecuted under provisions of the Transport Act 1962 or as manslaughter under the Crimes Act. There is no reason in principle why an act or omission which may be prosecuted as an offence under s 62 of the Goods and Services Tax Act should not be prosecuted under the provisions of the Crimes Act if the circumstances in which it has been committed bring it fairly within the provisions of a particular section".

So that the, obviously, the principle that I seek the Court to draw from that is that unless the Act can be said to be a code, they can be prosecuted under other acts, mainly the Crimes Act we're talking here, and it's entirely consistent with the *Busby* case that we just looked at, in appropriate cases. That might be a way of prosecuting someone who has actually seriously offended in copyright terms, more seriously than the relative provisions or whatever they might be, as to sentence under that, or because they don't reflect the real criminality or the extensiveness of it or the volume of it.

If we can just look at another –

WILLIAMS J:

Just before you do –

MR RAFTERY QC:

Certainly.

WILLIAMS J:

– I didn't get a sense from skimming through the decision that they engage with whether in the GST Act there are equivalents, for example, of the safe harbour provisions which are lost by prosecution outside the GST Act. Do you know anything about that?

MR RAFTERY QC:

I have to confess that the area of tax law is something that passed me by –

WILLIAMS J:

Well, that's both of us.

MR RAFTERY QC:

– and I'm quite willing to keep it like that. So I don't know although Justice Glazebrook might have a better idea than me but…

GLAZEBROOK J:

I would have thought it's difficult to – that it'll be the same as the argument made under the Copyright Act that if it isn't an infringement then you couldn't prosecute it under the Crimes Act because you haven't got anything to prosecute. So if there was no GST owing because of something in the GST Act then it's difficult to see how you could have a conspiracy to defraud the GST system.

MR RAFTERY QC:

That's a slightly different question, really, isn't it?

GLAZEBROOK J:

It is, yes, but I think that's probably the answer.

WINKELMANN CJ:

Well, it answers the question, I suppose, that Justice Williams raised, because if it's not an offence under the Copyright Act then it wouldn't be an offence under the Crimes Act?

MR RAFTERY QC:

I accept that, of course.

WILLIAMS J:

Well, you would say, wouldn't you, that if you sat around in a room to conspire to evade GST, you don't actually have to have committed the actus reus –

MR RAFTERY QC:

No, in that case, that's slightly different because if you're wanting to do a dishonest act that might not be a criminal act but a civil wrong and you're doing it dishonestly then you could be caught by the conspiracy to defraud and I'll come to a couple of cases on that later because I was going to mention those in this context too but I think I'd like to do that at a later stage if that suits.

GLAZEBROOK J:

And the issue as to whether that should be allowed probably comes down to whether what they're doing as a breach would be criminalised under the Copyright Act or was merely a civil wrong?

MR RAFTERY QC:

If – as we're on it, let me take – my learned friend Mr Mansfield says the most they could have been exposed to was civil action for the breach of the communication right but communication has never been criminalised. But just the interference with the proprietary right of copyright owners might expose them to prosecution for conspiracy to do just that. The cases that I was thinking of was something like the Equiticorp case of *Adams v R* (1994) 12 CRNZ 379 (PC) in the Privy Council where he hadn't committed a criminal wrong and he'd been acquitted of those counts which had suggested dishonesty in relation to that but Adams had a duty as a director to the company that he was going to involve himself in a scheme that was for private benefit. He was failing in his breach of fiduciary duty to the company, and the Privy Council upheld his conviction for an offence in relation to that, although he had been convicted of a number of what I call substantive offences. So

that was a case that recognises, and there are other cases that recognise, that you can be charged criminally for conspiracy to commit a civil wrong. So that's why, I hope that answers your question, Justice Williams, because that was what I was…

WILLIAMS J:
Thank you.

GLAZEBROOK J:
The question will be whether we should follow those cases unless there's a case of this Court that says that.

MR RAFTERY QC:
Well, obviously, there's nothing to fetter you at this case but the Privy Council authorities, and bearing in mind it was a New Zealand case, you're not bound by cases on the same level, you can overturn your own cases as the Court of Appeal did in relation to *Cullinane*, but in my respectful submission, there's nothing in the Privy Council decision in *Adams* that suggests it's time now to completely overhaul that area of law to come to a different decision. The ability to prosecute for conspiracy to commit a civil wrong, which has been a long strand in the common law, is not something that this Court should readily undertake when, if we go back to what we're actually talking about in this particular case, and this is where that would be what you might call an obiter issue that arises whereas in this particular case, we are looking very much at if correct, criminal offending rather than some civil wrong.

GLAZEBROOK J:
Well, that's right, we may never get to it, but I was just noting that we're not necessarily bound to follow those decisions.

MR RAFTERY QC:
No.

WINKELMANN CJ:

Because – yes –

MR RAFTERY QC:

The reason why I mentioned –

WINKELMANN CJ:

It is a fall-back position for you, isn't it?

MR RAFTERY QC:

Yes, *Adams* being Privy Council from New Zealand. It's what I call a New Zealand case. There's House of Lords authority, nothing to do with New Zealand to the same effect, but I'll touch on that again unless you'd like me to just finish off now but I think it's –

WILLIAMS J:

Mr Sinclair would say it doesn't matter anyway because of section 131(1)(c) so you don't need to fiddle with that issue.

MR RAFTERY QC:

Yes, it depends obviously how you resolve that issue because I don't think Mr Mansfield agrees with Mr Sinclair.

WILLIAMS J:

Of course.

MR RAFTERY QC:

I'm sorry, Your Honour?

GLAZEBROOK J:

Or (d), I was going to say.

MR RAFTERY QC:

Yes, 131 just generally. The next case I was going to take you to, unless you want anything more on that, was *R v Walters* [1993] 1 NZLR 533 (CA) which

is at tab 23 in the same booklet. This was a prosecution in relation to fishing matters. If I just take you straight to the bottom of the headnote at the last paragraph, it says "On appeal against conviction and sentence, two questions of law arose in respect of the conviction. First, whether a charge could properly lie under s 257 of the Crimes Act 1961 for an offence under s 97 of the Fisheries Act 1983 which makes it an offence to buy, sell or possess fish taken in New Zealand fisheries waters." So that was the issue and that's where its relevance is to our discussion in this particular case.

And again, it was the then-President Justice Cooke gave a judgment of the Court and at the bottom of page 536, he states the question there, and it is something that may again tie into what Your Honour Justice Williams was saying a moment ago to me, "Two issues of law arise. The first is whether the charge under s 257 properly lies. Section 97 of the Fisheries Act makes it an offence to buy, sell or have in possession fish taken in New Zealand fisheries waters in contravention of the Act. At the period specified in the charges the maximum penalty under that Act, s 107, was a fine of $10,000; that amount has now been increased to $250,000. There are also fines for continuing offences. It is conceded for the accused that a charge of conspiring to commit an offence against the Fisheries Act could have been made under s 310 of the Crimes Act but under the latter section the maximum penalty is the same as if the offence under the Fisheries Act had been committed" (if charged in that way), I add. "The argument is that the fraud charges cannot be brought under s 257 or s 299A of the Crimes Act when an ingredient of the charge is an offence under the Fisheries Act and nothing more. As to conspiracy, s 257 and 310 of the Crimes Act are submitted to be mutually exclusive."

"We are unable to accept this argument." Skipping about three or four lines, the sentence beginning "The circumstances that the obtaining amounted to a series of offences against s 97 of the Fisheries Act does not prevent its being fraudulent means within s 257. There is no sound reason for limiting the words of s 257 in that way. Nor does the circumstance that the same conspiracy could be charged under s 310 affect the scope of s 257. So too

there is nothing in s 97 of the Fisheries Act to exclude the applicability of s 229A of the Crimes Act."

If I just pause there, coming back to a question asked by Justice Williams, about the penalties when you see that a penalty of $10,000 increased to $250,000 and you note there that there were a series of offences against section 97. The maximum potential penalty that someone could have faced under the Fisheries Act wasn't very substantial indeed if the maximum, subject to totality principles and things of that sort that might be available. So it's not an exact comparator case with three months, five years but it's clear that they were conscious of the fact that there were different sentencing regimes available under different Acts and that didn't in any way deter the Court and deter the President from suggesting that therefore, one should even look hard at whether a prosecution under section 257 was appropriate.

If I can just carry on, because it deals with a case that we may look at a bit later, "The United Kingdom legislation which caused difficulties in *R v Ayres* [1984] AC 447 and *R v Cooke* [1986] AC 909 has had no counterpart in New Zealand, and the problem of mutual exclusiveness which arose under that legislation (see per Lord Mackay of Clashfern in the latter case at p 926) does not arise here." Just to say what that refers to, it is something we'll look at later when we come to look at the English cases is the problem that arose in *Ayres* was that Lord Mackay came to the conclusion that the fact that there was a statutory conspiracy and the fact there was a common law conspiracy in relation to defrauding were mutually exclusive. That was regarded later to be an error on Lord Mackay's part and we'll come to some of those English cases when we look at them.

Then he goes on in line 15, "With regard to the other elements of the first count, while the charge of defrauding the public by unlawfully depriving the public of economic benefit of a resource and depleting the resource may be a somewhat novel use of s 257, it falls squarely within the concept and purpose of the section. A large-scale depletion of the resource could threaten its continued existence, deprive the State of resource rentals and possibly

revenue from taxation, and jeopardise the economic welfare of those legitimately engaged in the fishing industry and their employees. The extent and likely consequences of the conspiracy would be a matter for consideration on penalty, but there is nothing to suggest that in enacting monetary penalties for breaches of the Fisheries Act Parliament meant to exclude any possibility of heavier penalties, including imprisonment, for a conspiracy to subvert the purpose of the Act."

So that while we've got this volume in front, I think there's one more case that I'd like to draw to your attention in that. Actually, no, maybe there's two probably. If you look at tab 20, the case of *Power Beat International Ltd v Attorney-General* [2000] 2 NZLR 288 (CA), again just looking at the headnote because it summarises the factual background, "In 1998, police applied for the issue of a warrant to search the premises of Power Beat International Ltd, alleging the commission of offences under the Copyright Act 1994 and the Crimes Act 1961. The affidavit filed in support of the application alleged that Power Beat had made copies of a computer program, which had been purchased on a CD-ROM in the United States. As a result of that application, a search warrant was issued […]" and it was a challenge to that search warrant that was the subject matter of this case and the decision of the Court of Appeal was delivered by Justice Salmon.

If I can take you to the case now, the Crimes Act provision that was being considered there was 266A, and we see that from paragraph 22 of the decision on page 295. Now they had, in the search warrant, they had, that's the Crimes Act provision, they had explained that there was offending under the Copyright Act, possible offending under the Copyright Act, which is section 131, and they also said possible offending under 266A, and if we look over the page on page 296, after a quote there from a passage in an authority, at line 21 it says, "Mr Henry," who was then counsel, "placed particular emphasis on the reference to a narrow meaning. By reference to the context of the section in the Act counsel submitted that the legislature must never have intended to impose this criminal sanction in relation to

breaches of copyright and in that regard he referred to the decision of this Court in *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461."

There's then some further discussion and going down to paragraph 27, at the very bottom of the page, "In this case the police have thought it appropriate to bring a criminal prosecution and the question for the Court is whether the copying of the CD-ROM onto other computers was a reproduction in the sense described in s 266A(I)(b). We have no doubt that it was." Again that case is –

WINKELMANN CJ:

They don't address the issue squarely, but they allow the –

MR RAFTERY QC:

No, they don't address the issue squarely, but it caused no concern to the Court, and it's certainly consistent, in my respectful submission, with all those cases that we've been looking at thus far. There is, therefore in my respectful submission, nothing in New Zealand law that suggests that anything in the course adopted by the United States – sorry the submission adopted by the – I apologise, I got confused there. There's nothing in the indictment presented by the United States that would make itself amenable to the argument of my learned friend Mr Mansfield that because the Crimes Act has no reach into the area of copyright offending, because it's entirely confined to section 131.

ELLEN FRANCE J:

Because they didn't address it squarely in the Court of Appeal decision I did go back and have a look at the first instance decision, which is that of Justice Hammond, which does have quite, I think, quite a useful discussion of the concerns that might arise with extension, but also talks about increasing reliance in other countries on the criminal law for these types of instances.

MR RAFTERY QC:

Yes.

ELLEN FRANCE J:

And I just refer to that because it is a more explicit discussion of the underlying policy, if you like.

MR RAFTERY QC:

Well I'm certainly grateful for that, Your Honour, because I hadn't gone back to Justice Hammond, but the point that he there makes is actually reflective of some of the points I'm going to make when looking at some of the authorities from overseas to the same effect, so I'm grateful for that.

WILLIAMS J:

This is a case where he downloads software relevant to Power Beat's business and uses it to operate the business?

MR RAFTERY QC:

Yes.

WILLIAMS J:

So it's a 131(1)(c) offence? It's possession –

MR RAFTERY QC:

Yes.

WILLIAMS J:

– rather than a (d) offence, is that correct?

GLAZEBROOK J:

That's assuming that merely copying is caught by (c), which is –

ELLEN FRANCE J:

It is possession. Initially I think they sought to rely on (1)(b) as well as (c) but it ends up being simply (c).

WILLIAMS J:

Right.

MR RAFTERY QC:

Yes, but they did start with (b) as well, you're right Your Honour. I apologise, maybe I should have made the comment about the *Walters* case. I mean when you think of fisheries and there's fisheries legislation which is, you know, designed I think, I haven't got it here in front of me, but you know it's designed for the management and conservation of fisheries and the fisheries resources of New Zealand, you might think of that as being fairly much, in inverted commas, "a code", that that's the area, that's a special sort of area that's hived off and yet certainly the reach of the criminal law went beyond those offences in the Act itself.

WILLIAMS J:

Did the, in that case, the fishery, the section 97 offence was fine only or it was prison to?

MR RAFTERY QC:

No, it was fine only, $10,000 –

WILLIAMS J:

So that's the choice that was wanted to be preserved, five years versus 250K. One basically an economic penalty, the other –

MR RAFTERY QC:

Yes but as far as the, that's the reason why I – there were a number of offences –

WILLIAMS J:

Yes.

MR RAFTERY QC:

– that could be charged under that, so the economic penalty might not be as limited as it would for just one offence. Obviously the totality principle comes into it but you're correct about that. As far as the – I'll come back to that.

I'll leave the New Zealand cases then. It's volume 3 of our authorities. All I was going to draw your attention to at this stage was at tab 47 of that has the *Rank* film case, which was the English Anton Piller case that the Court were referring to in *Busby v Thorn EMI*.

WINKELMANN CJ:

Sorry, volume 3…

MR RAFTERY QC:

Volume 3 of the United States authorities and at tab 47. Again, you may remember that this was the Anton Piller case, but just to remind you it's also a copyright case. We see that from the headnote "The plaintiffs were the owners of copyright in certain cinematograph films. On the basis of that evidence that, in breach of that copyright, the defendants were making and selling video cassettes of the films" and as you'll see just from the nature of the heading of the case, it was a civil action and there were Anton Piller orders and Lord Wilberforce, addressing the issue that comes into focus in this particular case, starting at letter (d) –

O'REGAN J:

Which page?

MR RAFTERY QC:

I was going to say off page 441 where Lord Wilberforce –

WINKELMANN CJ:

So is this just going to be the material that's already set out earlier?

MR RAFTERY QC:

Well, yes –

WINKELMANN CJ:

I mean –

MR RAFTERY QC:

– and all I was doing was drawing to your attention that's that page there and Lord Fraser says much to the same event on page 445 and that was just to show you where, if you wanted the full text of that particular Act. Again, we've had reference to *Scott* which is at tab 49 in that same bundle and here, you get Copyright Act offending which did not exclude prosecution for conspiracy to defraud and again, Lord Dilhorne's judgment begins on page 834 and again –

WINKELMANN CJ:

And in all these authorities, is there some point at which the conflicting line that Mr Mansfield has referred us to is addressed?

MR RAFTERY QC:

Which conflicting line was that you're thinking of, Your Honour?

WINKELMANN CJ:

Well, I can't recall any cases but I think they're American cases.

MR RAFTERY QC:

I'm coming to those. I'm going to deal with the American cases as well but maybe if I come to actually Mr Mansfield's arguments –

WINKELMANN CJ:

Don't let me take you out of order.

MR RAFTERY QC:

No, I'm quite happy to deal with those now.

O'REGAN J:

Just before you do, just tell us where we should be looking in *Scott*?

MR RAFTERY QC:

In *Scott*, sorry, I had put it away. I lost my marker, I'm sorry, because I took it off.

O'REGAN J:

Don't worry.

MR RAFTERY QC:

I will find that and come back to that, Your Honour, rather than waste time. If I can now just turn to deal with some of Mr Mansfield's arguments, there's a preliminary point, I suppose, which is you may remember that in respect of the act itself, he pointed to section 225(4) as, in his submission, indicating or providing support for his argument that this act was a code. All I would seek to just draw to your attention is that the, I think forget the date of the English Act but the English Copyright Act upon which ours is modelled has wording to the similar provision. It may not be exact wording in 171(4) of their Act, I think it's their Copyright Act of 1988. 1969, is it?

GLAZEBROOK J:

Sorry, could you just repeat the section number?

MR RAFTERY QC:

171(4) and when we come to look at the English authorities, they have not approached the matter in the way in which my learned friend has suggested the interpretation of 224 should be put. I'm not saying that these are cases that actually address 171(4) and say "It means this" or "It means that" but if it was to provide a break on going outside the Copyright Act, as my learned friend has suggested, it's not a view that seems to be shared by the English Courts.

If I can just deal perhaps with, just let me get the volume, just give me one moment. If I go to the English case of *Dady* is the one I'm going to go to now, which is in volume 10 of the appellants' authorities.

WILLIAMS J:

Which part?

MR RAFTERY QC:

Volume 10 of the appellants' authorities and if you turn to page 4036, what Mr Dady and his family were engaged in was filming English Premier League football matches in breach of copyright and they were charged with conspiracy which you'll see the indictment set out on page 4038 and you'll see there that count 1 of what's called the voluntary bill, if I just set the background there that the prosecution were presenting a voluntary bill of indictment because they had had the original charges knocked out and they then re-presented an indictment and then it came up for consideration as to whether it was appropriate. Looking at the statement of the offence, which is the important thing I want to draw to your attention, is that the conspiracy was said to be to defraud contrary to the common law, and the issue effectively was, was it appropriate to prosecute for the conspiracy to defraud?

I take you then back to the case there, it says at paragraph 3 on page 4036, "The Crown now applies to" – the indictment was dismissed by the Crown Court Judge and it went on appeal to the High Court, "The Crown now applies to prefer a voluntary bill of indictment, repeating the same three counts. In essence, they say that Judge Armstrong was wrong to dismiss the charges" and over at page 4039, it may assist in understanding what this is about, at topic 4, "The Complications", and this is the Crown counsel, "I accept Mr Mitchell's broad division of the statutory provisions, namely that s.107(2A) is concerned with copyright," and that was the copyright effect, "while s.297 is concerned with encryption. The authorities demonstrate three potential problems with any claim against Marc Dady" and then they mention those cases there.

Going over to the case based on section 297, "Mr Mitchell maintained that, in other circumstances, Marc Dady could either have been charged under s 297 of the Act or, rather more plausibly, with an offence of conspiracy to commit offences under s 297" and "However, it is common ground that, if Mr Dady had been charged with an offence of conspiracy to commit offences in breach of s 297, a number of things would have been different. Section 4 of the Criminal Law Act 1977 imposes restrictions on the institution of proceedings

for conspiracy to commit statutory offences. Any conspiracy proceedings would have had to have been started within six months of the offence, and the permission of the DPP would have been required. The offence would have been summary only and therefore the maximum prison sentence available would have been a term of six months. Indeed as Mr Mitchell said, the normal operation of s 297 would have led, in all probability, to the imposition of a fine."

"For these reasons, Mr Mitchell said that, in the present case, given the scale of Mr Dady's offending, s.297 'simply did not do the job'. It was as a result of the practical difficulties, created by section 3 of the 1977 Act". Just skipping down to paragraph 22, "In addition, of course, to allow the Crown to prefer this voluntary bill would be contrary to Lord Bingham's guidance in *R v Rimmington*, because it would be depriving the defendant of the protection", the ones he just referred to, DPP consent and so on, "of being charged with an offence which was summary only", and this is the point that exercised the Judge in *Rock v Overton*. Going on to section 6, paragraph 24, "It is unnecessary for me to spend too long on s 107(2A) of the Act. In one sense this is slightly surprising, given that, at the time that Mr Dady was arrested and charged, it was the copyright element of the case, and not the encryption element, which was at the forefront of the Crown's investigation. It was also a matter to which Judge Armstrong devoted a good deal of his judgment. However, it now seems to me to be largely immaterial, because Mr Mitchell has made it plain, for the reasons set out at paragraphs 14 and 15 above, that he no longer pursues the argument that this conspiracy to defraud can rely, or reflect, s 107."

WINKELMANN CJ:

Mr Raftery, what's the relevance of this?

MR RAFTERY QC:

What I was going to say was what you see here is tension between different sections of different Acts and the concept of conspiracy to defraud at common law and I was going to say I'm going to bring you now to the case that sets out

why there was this tension and difficulty. That's what I'm going to say. That is an illustration of some difficulty that was caused by –

WINKELMANN CJ:

Well, it's a gap in the Act whether or not a football game can be a work for the purposes of section 107 and an apparent endorsement. There is no apparent differing with Lord Bingham and *R v Rimmington* of this point.

MR RAFTERY QC:

If I take you now to *Rimmington*, which is at 4003 of the same volume, these were two appeals joined together concerning a conspiracy at common law to effect public nuisance and the public nuisance involving, in one case, the sending of white powder through the post and –

WINKELMANN CJ:

Could you give us that page reference?

MR RAFTERY QC:

Sorry, 4003, we're on the same volume 10, and the other case concerned sending racially offensive material through the mail, and just really dealing briefly with that, in effect, the Court said this wasn't a conspiracy to commit a public nuisance because public nuisance requires offending against the community as a whole rather than against individuals but I want to draw your attention to Lord Bingham at paragraph 30 which is on page 4021. He says "There is in my opinion considerable force in the appellants' second contention under this head. Where Parliament has defined the ingredients of an offence, perhaps stipulating what shall and shall not be a defence, and has prescribed a mode of trial and a maximum penalty, it must ordinarily be proper that conduct falling within that definition should be prosecuted for the statutory offence and not for a common law offence which may or may not provide the same defences and for which the potential penalty is unlimited" and that's the passage, you may remember, that my learned friend relied on.

But I think it's important that we see what else Lord Bingham said in that paragraph because left bare, it might suggest there was some force in my learned friend's argument but if we go to the end of the paragraph at letter h, "I would not go to the length of holding that conduct may never be lawfully prosecuted as a generally expressed common law crime where it falls within the terms of a specific statutory provision, but good practice and respect for the primacy of statute do in my judgment require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise."

And this is a case where with that in mind, I will draw your attention to later on the Attorney-General's guidelines in relation to choosing between offences for prosecutors but basically, the tenor of the English Courts' approach has been to say "Where you have these two types of crime, statutory conspiracy and common law conspiracy, because the common law conspiracy is wider and it has no maximum, there should be preference to go down the statutory route unless there is good reason to do otherwise" and it's clear that what Lord Bingham was saying, "I'm not ruling out that possibility, I'm just saying good practice suggests…" and so in my respectful submission, the cases that my learned friend has been putting before you as establishing support for his proposition need to be seen against that background that there are two choices rather than there's just the one choice but our two choices are to charge conspiracy and that there are, you reserve, as it were, the more general common law conspiracy for more serious offences where volume, variety of them, criminality and so forth might be appropriate to the extensive nature of an operation but where –

WINKELMANN CJ:

There might be different considerations at play, mightn't there, in New Zealand where it's not an issue of the common law being displaced, it's the issue of two different statutory provisions. So you might say that that puts your case in a slightly better footing than has been addressed here.

MR RAFTERY QC:

Yes. What I'm saying is these don't quite provide the support to my learned friend that he suggests. They're not authority for his proposition full stop. It's because they're looking at the tension between two different ways of charging conspiracy and there's a –

WINKELMANN CJ:

Yes, but I'm asking you, so this is one, it's a conflict between common law and statute, and the common law can be displaced by express statutory provision. Here, we've got two statutory provisions.

MR RAFTERY QC:

Yes. Just give me one moment.

WINKELMANN CJ:

So *Rank* is not referred to in this case?

MR RAFTERY QC:

No, I don't think *Rank* was. I'll just check what cases…

WINKELMANN CJ:

I couldn't see it in the list of cases we have.

MR RAFTERY QC:

It mightn't have been readily resorted to only because of the Anton Piller nature but no, I don't see that. Sorry, Your Honour, I've just got the wrong tab 41. Sorry, that's my fault. Just give me one moment.

WINKELMANN CJ:

Is it volume 3, part 1 or volume 3, part 2?

MR RAFTERY QC:

Sorry, it was volume 3, part 1, sorry.

GLAZEBROOK J:

Sorry, I think I've missed what we're doing.

WINKELMANN CJ:

Volume 3, part 1.

MR RAFTERY QC:

Volume 3. It was my fault that we're just there because I was trying to find the volume I was…

WINKELMANN CJ:

USA authorities.

MR RAFTERY QC:

Yes. Does Your Honour have it? Again, this is one of the cases that you –

WILLIAMS J:

Tab?

MR RAFTERY QC:

Sorry, tab 41, Your Honour, I apologise. This was an insurance fraud case and you'll see that in the headnote at letter F, "The defendant was charged upon indictment with the common law offence of conspiracy to defraud, the particulars of the offence being that he had conspired with his co-defendant and other persons to obtain money from an insurance company by falsely claiming that a lorry" – we don't need that sort of detail. "He was convicted and appealed on the ground, inter alia, that he was improperly charged with common law conspiracy to defraud when the charge should have been conspiracy to obtain property by deception contrary to section 1(1) of the Criminal Law Act 1977. The Court of Appeal held, dismissing the appeal, that on the wording of section 5(2) of the Act the defendant was properly charged with conspiracy to defraud", and it was held "that upon the true construction of the Act of 1977 common law conspiracy to defraud and statutory conspiracy contrary to section 1 were mutually exclusive offences; that "conspiracy to

defraud" within the meaning of section 5(2) was limited to those exceptional fraudulent agreements" and so on which you don't need to know the details.

That's the only point I want to draw to your attention that *R v Ayres* [1984] AC 447 (HL), you may remember, was said by President Cooke in that passage that I read to you earlier, when he said the difficulties that were reflected in the case of *Ayres* that have come to a head there don't apply in New Zealand, the *Ayres* problem was – well, the decision of Lord Bridge in *Ayres* where he said the two sections are mutually exclusive and in fact since then, that position has been corrected by a number of decisions so that although my friend relied on *Ayres* quite heavily to say it supported him, there has since that time…

WINKELMANN CJ:

When you say "corrected", subsequent decisions have taken a different approach, are you saying?

MR RAFTERY QC:

Well, two things. There was a statutory change and the cases themselves, I'm just trying to find that in my notes, but I'll come back to that in a minute. It was section 12 of the Criminal Justice Act 1987.

WINKELMANN CJ:

I think your junior has the note of your paragraph there.

MR RAFTERY QC:

The next case I was going to take you to is *Evans* which is tab 42 in our…

O'REGAN J:

The same volume?

MR RAFTERY QC:

Same volume, yes, I'm just…

WILLIAMS J:

Next tab.

MR RAFTERY QC:

Yes. Again, just reading from the headnote to give you a background, "The defendants, the directors of a coal mining company and four lawyers who had advised them, were charged on indictment with conspiracy to defraud contrary to common law" and going over to the page saying what the Court held, "That a common law conspiracy to defraud had to involve unlawfulness, either in its object or in its means, and so could not be constituted by an agreement to obtain a lawful end by lawful means; that, further, an agreement dishonestly to cause economic injury to the object victim could not constitute a common law conspiracy to defraud unless a proprietary right or interest of the victim were actually or potentially injured" and if I take you then to the paragraph 30, Justice Hickinbottom said "Following consideration by the Law Commission (*Report on Conspiracy and Criminal Law Reform* (1976) (Law Com No 76)), the Criminal Law Act 1977 generally abolished common law conspiracy (section 5(1)) in favour of a new statutory offence of conspiracy, defined in terms of an agreement to commit any offence: section 1(1). However, the common law offence of conspiracy to defraud was expressly preserved: section 5(2). Reversing *R v Ayres* [1984] AC447, section 12 of the Criminal Justice Act 1987 provides that a charge of conspiracy to defraud can be brought even where the course of conduct agreed to be pursued will or may itself amount to the commission of a statutory offence. However, unless there is good reason for doing otherwise, the courts have emphasised that, where conduct falls within the terms of a statutory offence, then that offence should be charged, and not a common law offence, such as conspiracy to defraud, that might also be committed on the facts".

WINKELMANN CJ:

Can you give us the page reference again, sorry? It's my fault I missed it.

MR RAFTERY QC:

Sorry, no, it was paragraph 30, page – at the top, it's 0830.

WILLIAMS J:

So they basically went back to *Rimmington*?

MR RAFTERY QC:

Yes, they gave support to *Rimmington*. In other words, you had this short period of time where mutual exclusivity appeared as a result of Lord Bridge in *Ayers* but we are back to the position where we were before with *Rimmington*, the way you've got a tension between the two. The common law conspiracy to defraud is not ruled out by the fact that there is a statutory offence. You can still charge the statutory offence, it'd still be preferred, where certain criteria arise, but there's always this other alternative so that, in other words, you can prosecute within statute law or within another area of law, namely the common law and what –

WILLIAMS J:

So when you say there's always this common law alternative, is your point there that Lord Bingham just gave a practice note but not a ruling about good reason to do otherwise? Do you see –

MR RAFTERY QC:

Yes, and they're obiter comments from the bench giving guidance as to how the prosecutors might approach this but what it's –

WILLIAMS J:

So do you say *Rimmington* makes no attempt to say "If there is good reason, you can't prosecute under the common law offence"?

GLAZEBROOK J:

If there is not good reason, you can't.

MR RAFTERY QC:

If there's not good reason to use the common law offences, yes. The whole tenor of the approach in the English Courts is to say you use the statutory offence if you're going to say conspiracy to commit statutory crimes or to commit summary crimes but there will be occasions where, even if you're conspiring to a statutory crime, there is the common law offence of conspiracy to defraud if like it is so big and so extensive or a variety of criminality and things of that sort. But the point that I'm trying to make about this is that the cases which my learned friend relies on say, well, this establishes support for his proposition that the Copyright Act is a code. The cases in England are really illustrating not that but the fact there are these difficulties and tensions between the two sections and, not tensions, but there are two options and the Courts are trying to address, because you will have noticed for example in *Dady*, they did conspiracy to defraud at common law. They're saying "No, you're using the wrong section" rather than "You're prosecuting for a crime that you can't because it's all tied down to the Copyright Act".

WINKELMANN CJ:

I can't help thinking that there are different considerations at play in England where it's a conflict between a statute and common law.

MR RAFTERY QC:

I accept there are different considerations but the point that I'm making is that –

WINKELMANN CJ:

Well, it's a point –

MR RAFTERY QC:

– you need to look at those, the cases that my learned friend says are authority for his proposition, they actually need to be looked at in a different light because they're actually examples of how the Courts in England are saying "In case X, no, you shouldn't use that conspiracy to defraud", "Yes, you

can in that", so that they're not the forceful authorities which my learned friend contends.

If we look perhaps at his – it may be useful now to look actually at the Attorney-General guidelines just so that I've mentioned them a few times and they are in our volume 4, tab 74.

GLAZEBROOK J:
Tab what, sorry?

MR RAFTERY QC:
Sorry?

GLAZEBROOK J:
I thought you said tab 72 but I don't think that's right.

MR RAFTERY QC:
74, and it's really guidance given to prosecutors in the United Kingdom how to use – it's not the full guidelines, obviously, you will appreciate, it's in relation to the use of the common law offence of conspiracy to defraud, talking about the common law offence.

WINKELMANN CJ:
So it's morning tea time, Mr Raftery. Were you going to be long with this document or shall we just finish up with this document?

MR RAFTERY QC:
We could finish off with the document. If you look at A on the third page of the document, "Conduct that can more effectively be prosecuted as conspiracy to defraud", and you'll see that "There may be cases where the interests of justice can only be served by presenting to a court an overall picture which cannot be achieved by charging a series of substantive offences or statutory conspiracies. Typically, such cases will involve some, but not necessarily all of the following: evidence of several significant but different kinds of

criminality, several jurisdictions, different types of victims, eg individuals, banks, website administrators, credit card companies, organised crime networks. The proper presentation of such cases as statutory conspiracies could lead to: large numbers of separate counts to reflect the different conspiracies, severed trials for single or discrete groups of conspiracies, evidence in one severed trial being deemed inadmissible in another." And the other, that's a reason not to use the statutory conspiracy.

Looking at B, "Conduct that can only be prosecuted as conspiracy to defraud". "Examples of such conduct might include but are not restricted to agreements to the following courses of action: the dishonest obtaining of land and other property which cannot be stolen such as intellectual property not protected by the Copyright, Designs and Patents Act 1988 and the Trademarks Act 1994, and other confidential information – the Fraud Act will bite where there is intent to make a gain or cause a loss through false representation, failure to disclose information where there is a legal obligation to do so, or the abuse of position dishonestly infringing another's right; for example the dishonest exploitation of another's patent in the absence of a legal duty to disclose information about its existence," and so on.

So I draw those to your attention that those are the types of areas where those crimes, according to the guidelines, could be properly charged under the common law conspiracy and so that when one looks at some of the cases we've been looking at where the reluctance of the Courts to allow some prosecutors to use the common law conspiracy count are not saying what my learned friend says but they're just saying it's an example of putting those types of principles and practice into account. So I'm happy to stop there for morning tea and come back afterwards.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.46 AM

WINKELMANN CJ:

Now Mr Raftery, we've got some anxiety. We think you're taking us through these cases at great length and that we're going to run out of time.

MR RAFTERY QC:

I appreciate that, I was going to move straight now to the United States and not go through any more of those, because I was aware of the time too. My learned friend relies on a case called *Dowling*, as you know, but what you'll remember was that *Dowling* the tension between line of decisions going either way in the Courts below led to certiorari being granted and the issue of whether it came under the Stolen Property Act, and of course that was moving goods wares and merchandise. They said no it didn't because these were his own bootlegged copies of the Elvis material but it had copyright material on them, and that's what, it was the moving of the phonorecords across boundaries or whatever, that was the gravamen there, and so they couldn't be prosecuted for an offence under that section and the convictions were quashed and following that LaMacchia's convictions were quashed as well. But LaMacchia's convictions for wire fraud were also quashed and that was interesting because Dowling had been convicted of wire fraud as well in relation to the same matters, but certiorari wasn't granted on that, it was only on the issue under the Stolen Property Act. So that the, whether *LaMacchia* was right, or *LaMacchia* was being looked at in the context of there was no actual economic factor in LaMacchia's behaviour. He was remember a student hacker or whatever and they said whatever, however reprehensible you think his conduct, it doesn't come within the Stolen Property Act because of the *Dowling* case and even though *Dowling* didn't talk about wire fraud convictions, because that wasn't before them, they quashed the wire fraud convictions, and the, in fact *LaMacchia*, although my learned friend pooh-poohed the phrase *LaMacchia* loophole, which is what some of the writers on the topic said, it was, in fact, plumbed by then a new Act, the No Electronic

Theft Act of 1977, so that that was removed, but what I want to draw your attention to is the fact that looking at cases post-*Dowling*, apart from *LaMacchia*, I'm just going to bring two to your attention which followed *Dowling* in one way but not another, because you'll notice that my learned friend relied on a statement of Professor Nimmer, in an article which was referred to in *LaMacchia* when he said, "I like what Professor Nimmer says," and Professor Nimmer, the quote that my learned friend gave you was to the effect that basically copyright, his argument was copyright was a code and that's what *Dowling* really confirms. You prosecute copyright under the copyright code. Now first of all the fact that *Dowling* wire fraud counts never went to the Supreme Court would seem to suggest that at first blush was that right or not, but *LaMacchia* might seem to confirm it because his wire fraud counts were quashed.

But I just want to draw your attention to two cases which are in our volume 3, part 1. Both of them are in the same volume fortunately. The first is at tab 28, it's a case called *Cooper v United States* 639 F.Supp. 176 (M.D.FLA. 1986), which is from 1986 so it's post-*Dowling*, and in fact *Dowling* was considered in it, and again just for the sake of keeping it going to the headnote on that very first page behind tab 28 to the right-hand column heading, "2. Courts. Holding of the United States Supreme Court in *Dowling v. United States,* that criminal penalties could not be imposed under National Stolen Property Act." That's fair enough. Then going on to, "3. Receiving Stolen Goods. Decision of United States Supreme Court that criminal penalties could not be imposed under National Stolen Property Act for interstate transportation of pirated records or tapes did not affect defendants' conviction for wire fraud which were based upon scheme to fraudulently deprive copyright owners," and so on and so forth, which is why I want to draw that to your attention, and then I ask you also to turn to tab 37.

WINKELMANN CJ:

That's taking a different approach to *Dowling* than *LaMacchia* did?

MR RAFTERY QC:

Yes. But *LaMacchia*, you remember, was not dealing with commercial matters. There was no commercial element in it.

WINKELMANN CJ:

But you concede that it's a free-standing reason in *LaMacchia*?

MR RAFTERY QC:

Yes. Then looking at the other case I'm going to bring your attention to is *Wang* at tab 37 in the same volume and the defendants were, looking again just at the headnote without taking you through it just to show why you've got it there, I'm conscious of time, "Defendants charged with wire fraud filed motion to dismiss indictment. Held that: (1) defendants' alleged unauthorised transmission by wire of copyrighted computer files containing confidential source would, allegedly to gain for defendant's rights and benefits lawfully reserved to owner of the confidential information, could be prosecuted under wire fraud statute."

The point that I make really about these cases is that I'm not sure that the United States cases help as much as my learned friend suggests, they just don't throw light on our situation here. There is every suggestion that Professor Nimmer's drawing of a conclusion from *Dowling* and *LaMacchia* that the United States Supreme Court was saying, these cases of copyright infringement, using whatever statute you want to, are confined to the copyright acts, although sections of the criminal code that deal with copyright alone is not quite correct because it's clear that wire fraud still seems a very real and obvious pathway for copyright infringement by wire, which in the Internet age is really what we're talking about, so much more.

WILLIAMS J:

What do you say to Mr Mansfield's argument, if I think I remember it correctly, that these are all lower court and if they say that they're wrong.

MR RAFTERY QC:

Well, it doesn't look as though anyone sought to go any further up the appellate chain to say, no, we'd like not to be convicted. They aren't Supreme Court, I accept that, but what you do have is, bearing in mind going back to *Dowling*, at the Supreme Court level certiorari was only granted for the Stolen Property Act. His convictions, confirmed by the Court of Appeal, had been upheld so that the – it would seem to suggest, looking at that theme, looking at *LaMacchia* as a separate decision on its own, you've got saying well, you know, you're not confined to the copyrights acts, you've got wire fraud acts or wire fraud statute you can use as well to capture this copyright infringement. So that the, wherever they come from in the United States there hasn't been any cases that have said you can't use the wire fraud statute, they're the ones that seem to be being used. I think we do mention a couple more in our footnotes, but there's just a, we don't want to bog you down with too many of them. That's two good illustrations in my respectful submission.

WINKELMANN CJ:

What level of court was *LaMacchia*?

MR RAFTERY QC:

It was a District Court too I think, yes, because they followed *Dowling* because it had just come out, and *LaMacchia* had, in fact, been convicted before *Dowling*, and it was his lawyers bringing it back to the Court saying, actually his conviction should be quashed because look what *Dowling* said.

WINKELMANN CJ:

So your argument is that there is nothing in the, I assume, because you're not just taking a kind of a weighing up one case against the other approach, are you arguing that there was nothing in the reasoning of the Court in *Dowling* which leads, which goes beyond the particular facts of the case –

MR RAFTERY QC:

That's right.

WINKELMANN CJ:

– because that's certainly not what Mr Mansfield's submission was.

MR RAFTERY QC:

No, but if you remember the passage he read out to you saying, look, there'd been two conflicting lines of authority basically saying you can use the Stolen Property Act, or you can't, we're now going to resolve that for you, and if you're transferring in that case phonorecords, they don't amount to stolen goods, wares or merchandise, the phonorecords themselves might but they were his, what he put on them was copyright infringing material. So it didn't actually attach onto the copyright itself, because copyright is not goods, wares and merchandise, but you use the wire fraud statute for that, it would seem, and that's what seems to be being used since. So if I was going to leave that and come to the final one of my learned friend's points, unless any of Your Honours want anything more on that.

I'm just going to go to really what he calls his high watermark of Justice Baragwanath in *World TV*. Justice Baragwanath did describe the Copyright Act as a code but if you remember what his exercise that he was doing in that case was the generalia specialibus principle being applied, that you there had two statutes, the Mining Act in *Stewart* and the Town and Country Planning Act and how they gelled together, and in the *World* case it was the Fair Trading Act and the Copyright Act, so that he was looking at the standard way of approaching when you've got two statutes conflicting, and as was said in *Stewart v Grey* the starting point is always to look and see if there is an inconsistency. If there is, then you have to try and resolve it, if there isn't, you don't, and because he saw a tension between the Fair Trading Act provisions and the copyright provisions, Justice Baragwanath said, "Well one of the reasons why I say that the Fair Trading Act provisions don't apply is because we look at the Copyright Act, it's obviously a carefully constructed code." Bearing in mind these were civil proceedings in *World TV*, not a criminal prosecution, and it was a licensee of a copyright but not an exclusive licensee seeking to enforce that copyright as against another, and the Court said no you can't because you have to join the copyright holder or our

exclusive licensee, but he wasn't an exclusive licensee, so that in that case what you've got is that type of exercise. So I accept instantly that the Copyright Act creates copyright and creates the rights of the copyright holder, but that's a very far cry from saying that it therefore excludes any possible sanction by the criminal law beyond section 131, and with all due respect to Justice Baragwanath, it's a reasoned judgment, but he wasn't being asked to look at the tension between the Crimes Act and the Copyright Act. What he was trying to do was say resolve the tension between the Fair Trading Act and the Copyright Act and saying, well, there is an inconsistency that I need to try and resolve. There is, in our submission, absolutely no inconsistency between the Crimes Act and the Copyright Act. In fact section 10 of the Crimes Act emphasises that in clear statutory form.

So that's all I would wish to say on that topic. I did mention section 171(4) of the English Copyright Act and I couldn't remember the reference, it's not in the volumes, but it's actually spelled out in Justice Gilbert's judgment at paragraph 100, which is the documents for hearing volume 1 at page 309.

But that's if you want that actual chapter and verse, but I don't want to say any more about that, and I would now propose, unless there's anything more you want to ask me about a code, to move on to transposition. If I could just ask for assistance, Justice Williams was missing a copy of this.

GLAZEBROOK J:

Actually, I'm sorry, I meant to go and get mine at morning tea so if you have another one that would be great. Thank you very much.

MR RAFTERY QC:

Now I know that my learned friend, Mr Illingworth, has taken you through the Extradition Act, so I don't want to take you to it, but just as a starting point if we remind ourselves where transposition arises, and he agrees that it arises under 24(2)(c) when the Court has to determine whether it is an extradition offence, and the meaning of extradition offence is in section 4(2) and section 5(2), which are the two sections that are important, and just to remind you that

4(2) says, “If the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had occurred within the jurisdiction of New Zealand at the relevant time it would, if proved, have constituted an offence punishable under the law of New Zealand for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty.”

And in section 5(2) it says, “In making a determination for the purposes of section 4(2), the totality of the acts or omissions alleged to have been committed by the person must be taken into account and it does not matter whether under the law of the extradition country and New Zealand – (a) the acts or omissions are categorised or named differently; or (b) the constituent elements of the offence differ.”

So that’s the exercise that’s being done under 24(2)(c), and in one sense, as I said, there’s very little to talk about on that topic because my friend agrees that transposition applies there. But where he says, and where we differ, is that when it comes to the 24(2)(d) exercise you are required then to have prima facie evidence of that thing that does not amount to conduct, namely the proof of copyright. Now before I say anything in general terms let me just remind you that this only applies to five counts in the indictment, counts 4 to 8, and it only applies to one of the pathways to those, for those charges, namely the pathway under the actual Copyright Act itself. Because they are specific examples of overt acts of the conspiracy to infringe copyright. So the –

GLAZEBROOK J:
I'm not sure that your friends agree with that but I'm not sure –

MR RAFTERY QC:
I was going to make a comment about they say –

GLAZEBROOK J:
That’s all right.

MR RAFTERY QC:

They say but I think we've dealt with that. I wasn't going to repeat Mr Sinclair's submissions yesterday that copyright needs to be shown specific case-by-case, author-by-author, film-by-film, or whatever, in respect of all the other counts, and particularly my learned friend Mr Mansfield's arguments about the short failings of the Court of Appeal's definition of what is a conspiracy is not that they got it wrong in what they said. What they did get wrong was not adding into it the element of actually breaching copyright in specific itemised, specified, particulars. Now we, as you know, and as you know from Mr Sinclair's discussions yesterday, we don't accept that. We say that all those other charges, those conspiracy charges, you say they're conspiring to infringe copyright, but you're not required to say and prove at this stage this particular copyright, this particular material, this was the name of the holder, this was the name of the dates of breach and whatever, that will come out in part of the, no doubt in the evidence in any event, because there'll be a lot of evidence about that, but where it does come into focus in doing your 24(2)(c) exercise is in respect of those counts where they are not conspiracy charges, they are substantive offences which are said to be just representative overt acts across the course of the period of the conspiracy.

So what the Act shows is, and what the case law confirms, and it's the case law across the common law world really, that the whole inquiry at both levels really is conduct. This is conduct-based extradition, and when you find in the 24(2)(c) exercise some correspondence between the conduct that you identified as a result of the analysis and either the Treaty offences, if you're going down the *Cullinane* path, or the New Zealand offences if you're going down the double criminality path, then you have discovered your conduct for the purposes of the next stage of the exercise, which is 24(2)(d). So while in one sense my learned friend's argument is I suppose academic because the lower Courts, District Court, High Court and Court of Appeal, have all said there is good prima facie evidence of the existence of copyright in relation to these, from which either (inaudible) or from the inferences that can be drawn from the ROC that copyright existed in these works, and this is not a, no leave has been given on evidential matters, but because my learned friend has

made this point and that's why we broke down our argument into two. One we say he's wrong about that in law anyway, but even if he's right there was, in fact, evidence and I can give you some references to that later.

WINKELMANN CJ:

Mr Raftery, are you saying it only arises under counts 4 to 8 which are the specifically charged instances, and only under the Copyright Act. Why wouldn't it arise under the criminal Crimes Act pathways that you say exists for those counts?

MR RAFTERY QC:

Because if you're being accused of dishonestly accessing a computer to get a benefit let's say, or using a document or whatever it might be, that's the conduct that is alleged. It doesn't depend on proof of who owned the copyright in X, it's that you are trying to make, you're dishonestly trying to use a computer to make a benefit out of using this material, whatever that material might be.

WINKELMANN CJ:

Isn't there a flaw in that argument though that the dishonesty consists in using somebody else's thing?

MR RAFTERY QC:

Yes, but you don't need to prove that this is X's thing, he got a copyright on that date that he, all those variables that my learned friend Mr Mansfield was saying are just not there and not dealt with. All you have to show in respect of each of those charges under the pathways are the, as long as they're constituent elements of let us say, that he's accessed, somebody has accessed a computer system and he's done so dishonestly, and you look at say –

GLAZEBROOK J:

Well wasn't what the Chief Justice was going to say is it can't be dishonest, it was their computer system for a start, and it can't be dishonest unless you are

wanting to take someone else's stuff, because it's not a case where they're going onto someone else's computer system where it probably, the dishonestly is probably just going on there, whatever you're doing it for, because it's not your computer system. But here it's their computer system, well for a start I have difficulty in the computer system charge anyway but leaving that aside, let's assume it works, you're going onto their own computer system, which they're perfectly entitled to do, unless they're dishonest in it, and the only dishonestly is taking someone else's stuff. But then you would say, which makes it all totally irrelevant, that you've put forward a lot of evidence already to say that they knew they were breaching copyright, and you pointed to the cases, and especially the, actually I've forgotten the name of it, but the *Veoh* case where that was allowed to go back to see whether it was a sufficiency of evidence, and we've been through that ad nauseum yesterday.

MR RAFTERY QC:
Yes.

WINKELMANN CJ:
But is that just a sufficiency of evidence point or what is it? Is there dishonestly other than the fact that they're using the, accessing somebody else's copyright?

MR RAFTERY QC:
Dishonestly in section 217 of the Act means in relation to an act or omission done or omitted without a belief that there was an express or implied consent or authority for the act or omission from a person entitled to give such authority, but what they are doing is accessing the material on the website, on the computer system which is not theirs, and which they don't have the authority to use, and if you, I know you may or may not have been through it, but if you go through all those, the material, the six pages of stuff there, you'll see how we've set it out in relation to each of those counts and so it may be that you want to come back to that later, but I thought just in terms of time, we're just saying there's the –

GLAZEBROOK J:

No, but you're saying copyright, the ownership of copyright is irrelevant but it can't be in those circumstances, is what's being put to you. Whether there's a sufficiency of evidence to show that they were being dishonest because they knew about the copyright is a different matter, isn't it, but you can't say it's irrelevant.

MR RAFTERY QC:

It's part of a factual matrix, I accept, but the, in terms of, let's just take it away from that and just go to say the section 98A, count 1 argument, yes, we don't have to have any actual copyright infringing material as part of the elements of the offence. What you have to have is the organised criminal group with a view to committing serious criminal offences, a name and number of them, with a view to obtaining benefits and to do so dishonestly, and you don't need, in those circumstances to have, it's not an essential element of section 98A to say that they have been breached X's copyright in respect of this and that's something you've got to prove in relation to that count to get home on that. You don't because it's, the gravamen of the criminality is that they have formed together with a group to do something dishonest with a view to –

GLAZEBROOK J:

But we still come back to why is it dishonest, don't we, and you have to come back to because they were infringing copyright, don't you? You can't say they're dishonest because they just have got together.

MR RAFTERY QC:

Yes, but –

GLAZEBROOK J:

You have to have got together to do something. Now I accept that they don't actually have to have done it, and you don't have to have proved that, but what they were conspiring to do has to at least get to the stage of being illegal.

MR RAFTERY QC:

Yes, I agree with that, but what you have to do when you're looking at the transposition argument, which is what we're talking about, is say is it a necessary part of their conduct to prove case by case, item by item, copyright holder by copyright holder, no it's not. Where it does come into –

WINKELMANN CJ:

Well can I just –

MR RAFTERY QC:

Sorry Ma'am.

WINKELMANN CJ:

You finish.

MR RAFTERY QC:

So where it does come into focus is in the count where you are saying, this is copyrighted and they did something in relation to it.

WINKELMANN CJ:

I was just going to ask, so if we, I know analogies are invidious in this particular area, but if we were to take a situation which is theft, if extradition was sought in respect of theft, you would have to say that proof that the goods were someone else's was part of the conduct so why – when they're dealing in someone else's things, thing is the offence being charged in substance, leaving to one side count 1, why isn't the fact that someone else's copyright part of the essential conduct. It's inextricable in it.

MR RAFTERY QC:

There's a big difference between copyright and stealing someone else's property in the context of transposition, and maybe if I come to that a little later in terms of the illustrations I'm going to give. If we first examine some of the case law on the principles, which I say are applicable, and then come to

why it is, what you need to do in any particular case, and the case that Your Honour cites it's very different to the case that we're talking about here.

GLAZEBROOK J:

Can I just – because I think there is a difference, I accept, between saying for those counts of conspiracy, do you have to go through every single thing and say "Well, it was owned by someone else" and saying the conspiracy was to steal or infringe other people's copyright? Because whether the conspiracy is to infringe other people's copyright can be inferred, you say, from the sort of things that were actually done rather than having to prove case by case. That's actually very different, however, from saying you don't actually have to infer any of that, you can just assume it to be the case which is your transposition argument.

MR RAFTERY QC:

Well, I'm not sure that's quite my transposition argument but I accept in general what you're saying in terms of – let's take count 2, the obvious one, which involves infringing copyright. We have to produce some evidence of that but we don't –

GLAZEBROOK J:

Some evidence of?

MR RAFTERY QC:

Some evidence of, for prima facie purposes for the 24(2) stage, that because we're concerned with infringing copyright, that we have to do so and we have to produce some evidence of that and when we're alleging a conspiracy to participate in an organised criminal group, we have to say it is for the purpose of committing a number of criminal offences, one or more –

WINKELMANN CJ:

Sorry, can you just slow down? What was the first thing you accepted? Were you accepting that for the specific charges, you need to produce some evidence of copyright ownership?

MR RAFTERY QC:

No.

ELLEN FRANCE J:

So –

MR RAFTERY QC:

Maybe it would be – if you are willing to forgive me, and I am being a bit clumsy about this, if I just went back to what I was going to present and say it might be easier to follow what I'm saying, because I'm not making it clear now, if I just do that and then say – because what I hoped to say at the beginning, I agree with my learned friend that we do an exercise of transposition to 24(2)(c) but we do not do it at 24(2)(d). We do it at 24(2)(c) level when we're discovering an extradition offence only to the extent that it might be necessary to do so. And so if we look at, let's start with the case of *Griffiths* which is an Australian case which is in the appellants' volume 8, and this is at page 3180, and you will see that, if we just look at page 3180 then looking at the headnote, that Mr Griffiths "was charged under United States law with conspiracy to commit an offence relating to copyright infringement and with actual copyright infringement and was indicted by a grand jury" and so on. So it's in exactly the same area or territory that we're concerned with in this case. The issue in this case was again looking for what is the conduct in question? A 24(2)(c) exercise, and my learned friend wants to emphasise that this wasn't a 24(2)(d) case because they don't have similar provisions in Australian law in relation to that in respect of a United States extradition anyway.

So if I could just go to the part of the case that I can just say to you what the appellants' case and argument was and that's at 3195 and paragraph 79 is where I'd like to begin: "The appellants' case is in substance that for the double criminality requirement to be satisfied", to skip a few lines, "it must be shown that that conduct would have constituted an offence under s 132(2)(b) of the Copyright Act. For this to be demonstrated it has to be shown that, under Australian law: (i) copyright would have subsisted in the works in

question: s 32 of the Copyright Act; (ii) the owners of the relevant works were identified: s 35". So if we just come over the page then to 3196, and if I just ask you to look at paragraph 85.

"The requirement of s 19(3)(c)(ii) is to provide a statement of the 'conduct constituting the offence'. That conduct, as s 10(2) indicates, is a reference to the acts or omissions by virtue of which the offence has been, or is alleged to have been, committed. Whether or not the pirated material is a matter of copyright in either the US or Australia is not of itself a matter of conduct. It is more in the nature of 'a state of things rather than an act' (*Riley v Commonwealth* (1985) 159 CLR 1 at 8; 62 ALR 497 at 501) which, as the US acknowledges, it will be required to prove in any trial of the charges. The evidence of it was not required to be included in the supporting materials for the purposes of describing the conduct constituting the offence."

That latter part is less relevant. It's that first part where what they're saying, and you'll see the statutory provisions in relation to extradition are similar to ours in this country, the conduct constituting an offence, the acts or omissions. "Whether or not the pirated material is a matter of copyright in either the US or Australia is not of itself a matter of conduct. It is more in the nature of 'a state of things […]'" and that's really what we're saying, is that when you do the exercise, you have to, in some cases, not in every one, transpose some factors to make sense of the task of finding out what the conduct is. Something like murder, you don't, but something like this, you might have to do, something like exchange control laws which we'll come to in due course.

WINKELMANN CJ:

For myself, I find that quite a hard and difficult proposition to understand or accept because how can it not be part of the conduct that you are using someone else's intellectual property?

GLAZEBROOK J:

I think if you look at the last sentence of that paragraph, that probably explains it.

WINKELMANN CJ:

So that's Mr Mansfield's point.

GLAZEBROOK J:

Yes.

MR RAFTERY QC:

But the evidence is referring to the 24(2)(d) stage which we have here. They don't. But the exploration that the Judge in Australia is doing is just the same as the Judge in this country is doing, is trying to discover, what is the extradition offence?

WINKELMANN CJ:

Yes, I understand the point –

MR RAFTERY QC:

So that the –

WINKELMANN CJ:

– but I'm just wondering if you can take us to any authority which actually gives some sort of reasoned response to the point I made – well, not a response, but explains it. Because how can you excise the fact of copyright from the conduct?

MR RAFTERY QC:

You're not excising anything. What you're saying is when you look at that, what copyright are you talking about, under Australian law or United States law? It must be the copyright under the United States law.

GLAZEBROOK J:

Actually, that's not exactly what's said at the end of paragraph 86.

MR RAFTERY QC:

I was going to come onto 86 but –

GLAZEBROOK J:

Because what they're actually saying is that all you have to be satisfied is that the type of work could be subject to copyright, you just don't have to go into whether it is copyrighted, and this is presumably for both (c) and (d) if you have that. You don't have to go into the specific work but it has to – you still have to say "Well, this is the type of work" –

MR RAFTERY QC:

That's right.

GLAZEBROOK J:

– and then we don't have to worry about whether it is actually subject to copyright protection. So coming down to the only thing you need to say prima facie which I think is the United States' point is that they are dishonest because they were conscious of the fact that there were copyrighted material, and there's ample evidence to show that, without having to go and say "and X, X, X, and X were copyrighted".

MR RAFTERY QC:

Yes, because – and I said I was going to go on because that's quite an important passage, I think, because that is the issue. You're saying "How do we discover the corresponding offence that we have to enquire into for a 24(2)(d) stage?" It's alleged to be offending against the copyright laws of the United States. It's not a question of whether it's offending against Australian or New Zealand laws, so that's not conduct you transfer back to here but it's copyrighted in the United States. So for the conduct exercise –

GLAZEBROOK J:

I'm not sure what this is saying but…

MR RAFTERY QC:

Well, I'll tell you why I suggested yes and just, I know Your Honour might disagree with me, but we transposed that part in order to make sense, just trying it out, "Is it the type of work?" So if copyright existed here in this work,

as opposed to in the United States, if copyright did exist in *Taken* here, is the type of thing that they did, the type of conduct in which they engaged, bearing in mind that the work is copyrighted notionally in New Zealand, would it be infringing conduct that would bring appropriate criminal sanction? If you do that exercise then the answer is yes, but you don't ask yourselves "Is this actually copyrighted in New Zealand?" because you're actually transposing the whole thing, the conduct and everything else, over to this country and you're saying "Well, what is the element?" You see, it's not a state of things as it says there. I say "Well, that's United States law. This is an offence against" –

GLAZEBROOK J:

Do you want to just look at the last sentence of paragraph 86? Because I don't think that's what they're saying you do at all.

MR RAFTERY QC:

"This would have required that the magistrate be satisfied that the type of work pirated, that is, software, was itself a type of work capable of attracting protection under the Australian Copyright Act." What I say is you've got the type of work. It's a Hollywood movie.

GLAZEBROOK J:

So you're saying you –

MR RAFTERY QC:

I'm just saying you translate that for computer software.

GLAZEBROOK J:

I don't think you're transposing anything. You just say "If this conduct occurred in New Zealand, if they infringe the copyright of something that's capable of being copyrighted in New Zealand like a New Zealand film, would it be criminal?" The answer is yes.

MR RAFTERY QC:

Yes, and –

GLAZEBROOK J:

It doesn't matter whether it was or wasn't copyrighted or whether there was some exception or licence or whatever would be the United States' position and in accordance with what's being said here. It's just is it a type of work, in a very generic sense, capable of being subject to copyright protection here or in Australia, in that case?

MR RAFTERY QC:

Your Honour is right and you've just done the exercise in transposition for me.

GLAZEBROOK J:

But I don't see that as transposition.

WINKELMANN CJ:

No.

ELLEN FRANCE J:

No. Well, it is transposition to the extent that as in cases like *Schreiber*, you don't go into the detail of whether or not Mr Schreiber actually would have had to pay the tax in the New Zealand context. You just look at whether evading payment of tax is an offence.

MR RAFTERY QC:

That's right, but what you –

GLAZEBROOK J:

Well, it's the essence argument, isn't it?

MR RAFTERY QC:

Yes, it is, and I agree with that. I think we're actually on the same page but maybe it's just the language you don't know, "transposition" is just the buzzword of extradition writers.

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

It's confusing.

MR RAFTERY QC:

So you may prefer another word for it but we actually are all making the same point together, we're on the same page, because – and *Schreiber* is perhaps the better example because you've got this – I don't need to go into the difficulties of it, "Was this income or not?" It is under the German law, it isn't under New Zealand law, but you have to notionally transpose the fact that it is an offence against Germany also. So is it an offence to try and evade paying income tax? Yes it is. So you look at what was the conduct. That's when you then go to 24(2)(d). What's the evidence of the conduct of trying to evade tax? You don't ask yourselves anything about New Zealand tax law. So that's why you're notionally transposed into the 24(2)(c) exercise. Forget whether it's income or not under New Zealand law, you say "Well, it is in German law if he engaged in this type of conduct, namely, an attempt to evade paying tax. Is that the type of conduct upon which the New Zealand criminal law would impinge?" And yes, it is, in our submission, but that's the exercise.

So you've done a type of transposition argument, whatever phrase you use. Would it help, rather than go through the cases, although *Schreiber*, *Dutton v O'Shane* [2003] FCAFC 195, *Norris*, they all speak volumes about this and explain it and I can take you through them, but would it help to go straight to that little chart that you were given last night?

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

I suppose from my point of view, I see it as looking at the essence of the conduct and then bringing it to New Zealand and saying "In essence is this the type?" and in some cases, that – but not going down to the actual elements of whatever the New Zealand offence might be, and then being in this terrible – in fact, copyright is probably one of the easiest ones to worry about because it is effectively universal throughout the world unlike tax law where there will be quirks of bits and pieces all taking oaths and declarations as in *Norris*.

MR RAFTERY QC:

Yes.

GLAZEBROOK J:

Copyright is probably one of the easiest ones to actually not worry too much about in detail.

WINKELMANN CJ:

There's a difference between you and Mr Mansfield that, and I don't think he brings it in at this point, but Mr Mansfield was suggesting to us that it was necessary for the United States to prove American law in relation to this.

MR RAFTERY QC:

It was actually Mr Illingworth's point.

WINKELMANN CJ:

Mr Illingworth, sorry.

MR RAFTERY QC:

He didn't get off the fence on that one because that's where his problem arises, when you look at 24(2)(d), because he says you accept that transposition has to take place, in other words you accept it's an offence against the law of that country, and if you did this sort of conduct, even though it wouldn't be tax evasion in this country, but against the tax law, is it, yes it is, then you find out what is the conduct I now have to examine for the prima

facie stage, 24(2)(d). So I don't need to worry about Australian, German, whatever law. I say it's tax evasion, what's the evidence of doing that and that's what transposition is all about. I mean it's a fancy term for a very simple concept.

So if it does help if we just look at the chart and if we look at number 3 on the chart, which is Mr Griffiths. So the alleged conduct, you see the column ahead at the top, is that Mr Griffiths conspired to engage in Internet software piracy in the United States. The transposed element, the status of the computer program is an unlicensed copy. But the particular one we're talking about in the allegations, as an unlicensed copy protected by the copyright under the foreign US law. The next heading is the extent of the enquiry that will be required under New Zealand law of double criminality is required, because I'm looking through this lens before Mr Boldt deals with *Cullinane* next week, and you're determining whether it's an offence under New Zealand law to conspire to engage in Internet software piracy, and whether a computer program is capable of being protected under New Zealand law, and the answer to that question if the evidence is there is yes, because that's the next stage. But what we have to do at the 24(2)(d) stage is establish that Mr Griffiths copied an identified computer program and so on and so forth.

So that is the exercise, and I said where – but at the 24(2)(c) stage I think Mr Illingworth and I are aligning on that because that's what he says has to be, and where I think he falls down, in my respectful submission, is where he says you now need to prove, when you come to the 24(2)(d) stage, the fact that you've transposed for the purposes of your argument. In other words you need to prove and then you can't say when questioned by the Court, well is it German law, or is it New Zealand law, is it Australian law, and there must be no enquiry in this Court about what is the New Zealand law of copyright to establish the status. You say this thing is a copyrighted object, and you just look at the evidence that says, what have I done. What evidence is there that he's actually tried to infringe copyright. It might not be protected in our country but it is in the requesting state.

WINKELMANN CJ:

Yes, but do you go so far to say that at the section 24(2)(d) stage it is not necessary to show a prima facie case that there is copyright, which might be no more than the copyright holder's assertion of copyright?

MR RAFTERY QC:

What we say is that if you've done your exercise, 24(2)(c) correctly, and have incorporated only as much or as little as you need to make sense of the foreign allegation, in other words you bring over the fact that it is copyright protected in the States, even if it's not here, then that helps you discover, right, this is what he's done. He's tried to infringe copyright. When it comes to the 24(2)(d) exercise you have to say, well, is this conduct copyright infringing and because the transposition has already been done you find that that's what you're actually looking for evidence of. Now is accepting that this is the type of object that is capable of being protected by the New Zealand copyright laws, has it done acts in relation to that, or has, prima facie evidence, has he done acts that show that he's infringing or attempting to infringe or conspiring to infringe copyright, and if I could just take you to a passage in *Norris* which –

GLAZEBROOK J:

So what you're saying is the only thing that needs to be proved is that he copied a computer program. You don't have to show prima facie evidence that that was copyrighted, you just assume it.

MR RAFTERY QC:

According to the laws of –

GLAZEBROOK J:

No, no, not according to any laws, you don't even go into it, you just say it's capable of being copyrighted in New Zealand, that satisfies (c). All that needs to be proved at a prima facie stage is that he copied a computer program, and it's totally irrelevant whether the computer program was, in fact, subject to copyright or not.

WILLIAMS J:

Well it's not even that it's capable of being copyrighted in New Zealand, because you say it doesn't need to be capable of being copyrighted in New Zealand?

MR RAFTERY QC:

No, because you don't look –

WILLIAMS J:

That's *Schrieber*.

MR RAFTERY QC:

It's a lot of cases, it's not just *Schrieber*. You don't, at the 24(2)(d) exercise you're looking at the conduct. Now I'll come to your point about theft Your Honour.

WINKELMANN CJ:

I'm really finding it very difficult to accept – I mean because you're saying there doesn't need to be a prima facie case if there's anything unlawful because the unlawful, the illegality consists in it being somebody else's copyright. It doesn't consist of it being copyrighted, it's subsists in it being somebody else's.

MR RAFTERY QC:

The conduct, the unlawful conduct is doing infringement activities in relation to copyright. The status of the thing is that it is copyright protected. At the 24(2)(d) stage you do not have to enquire as to the status of the thing in the foreign country. You just, that is something you've already determined for the purposes of section 24(2)(c) and then –

WINKELMANN CJ:

Yes, so if we're talking about theft, you would not have to have, say, a German lawyer giving evidence as to the ownership. Law of ownership in

relation to, say, funds or something like that, but you would need to show at the 24(2)(d) stage that it was somebody else's funds.

MR RAFTERY QC:

You would have to show that he was doing dishonest activities in relation to trying to evade income tax. He was doing dishonest activities in relation to trying to infringe copyright. You have to show those things on a prima facie basis, but you don't examine, as my learned friend says, you have to have evidence, in New Zealand you don't need evidence because it's New Zealand law, or you have to have evidence of the German law, or of the American law.

WINKELMANN CJ:

Well I'm not testing you on that Mr Raftery, I'm testing you on whether you need to have just the most basic evidence that it's somebody's copyright, which is not a question of law, it is a question of assertion of ownership.

MR RAFTERY QC:

Yes, and as I have said when it comes to counts 4, 7 and 8 you've got it in the ROC.

WINKELMANN CJ:

I asked you quite some time ago did you accept that on counts 4, 7 and 8, the specific charges, whether there had to be some sort of evidence of assertion of ownership, you do accept that?

MR RAFTERY QC:

Yes, some, yes, because you've got some prima facie evidence there which you've mutually got in the ROC, but you're not, the difficulty with, or my difficulty with Mr Illingworth's suggestion is that you have to prove as a matter of law the foreign law in relation to copyright.

WINKELMANN CJ:

Yes.

MR RAFTERY QC:

Or if I'm wrong about that then you have to use the New Zealand law.'

WINKELMANN CJ:

I'm sorry, I must have been very unclear in my questioning, because I wasn't asking you about that. I was asking you, I thought quite clearly, obviously not clearly enough, about just whether there was a need for a basic assertion of ownership in the copyright?

WILLIAMS J:

Yes, I thought you were, because you have, my sense, listening to this exchange and some other exchanges about the same discussion, was you've answered differently at different times, in some cases it seems to me very clear you've said you do not have to prove ownership.

MR RAFTERY QC:

I may have –

WILLIAMS J:

Let me just finish. So you said copyright status is assumed.

MR RAFTERY QC:

Yes.

WILLIAMS J:

And then you I think on a number of occasions took it a step further and seemed to say to me that that included who owned the copyright.

MR RAFTERY QC:

Yes.

WILLIAMS J:

And then on other occasions you've said no.

MR RAFTERY QC:

That's my fault. I've obviously – all I'm saying is that it is the legal status that is the only thing that will be transposed in this case for the purpose of the 24(2)(c) exercise –

WILLIAMS J:

Not who owns that status.

WINKELMANN CJ:

Well it's the legal context, isn't it, really is a better way of saying it?

MR RAFTERY QC:

Yes, the legal context maybe.

WINKELMANN CJ:

Yes.

MR RAFTERY QC:

You've got that and then you say, right, what are you alleging against this man in relation to that, that he did all these things to infringe that copyright. You now say, right, we take over to the 24(2)(d) exercise, is there evidence of all that conduct that is of infringing character, and youv'e got the status of it as a thing, protected thing in the United States is a given. Let me give an example that might be a better –

WILLIAMS J:

Can I just, sorry, when you say "status", do you mean merely as a protected thing in the United States or do you mean a protected thing in the title of A?

MR RAFTERY QC:

A protected thing in the United States. Let me give you an example, say, from drugs. You are importing in trafficking in narcotics, it's one of the examples in my learned friend's submissions. Let us suppose that you've got cocaine and for some reason, it's not illegal to traffic in cocaine in New Zealand but it is in

the United States. The allegation is that he has imported the cocaine which is a prohibited narcotic in the United States. The bit that you are transposing and do not need to prove at 24(2)(d) as a matter of evidence is that the cocaine is a prohibited narcotic in the United States but you have to show that in relation to the thing itself that this man did XYZ in relation to it and there is some evidence that it was cocaine. Because if it's just purely white powder and you –

WILLIAMS J:

Yes, that's lovely and clear, I appreciate that.

MR RAFTERY QC:

Yes, and it's much easier, I think, in that –

WILLIAMS J:

But does that mean that in this case, you are or are not required to prove that the copyright in *Taken* belonged to whoever it was?

WINKELMANN CJ:

Not as a matter of the law.

MR RAFTERY QC:

No. It's simply you're saying "*Taken* is in the category of protected material under the copyright laws of New Zealand and then what did he do in relation to it?" And we've got some prima facie evidence of the copyright holder asserting ownership of copyright. Come trial, we will need to prove that.

WILLIAMS J:

Right, okay, good.

MR RAFTERY QC:

But as a prima facie case, that's all we do, but the status that it's copyright protected under United States law, we don't – that's the – I hope that's made it a bit clearer, Your Honour, or maybe I'm – I'm sorry if I've –

WINKELMANN CJ:

I must say I thought it was quite simple but the submissions of counsel have made me think it's very complex and now I think it's simple again.

MR RAFTERY QC:

Then I better stop there. Your Honour, I could go through the rest of this chart but I think it helps saying the same thing. You'll notice that, just to deal with Your Honour's question in relation to the last page number 10, "Ms X received a stolen painting". There's no question of transposition there and so –

WINKELMANN CJ:

No, but you would have to have someone give evidence at a ROC standard "That was their picture".

MR RAFTERY QC:

"That's my painting and they stole it", yes, that's right, so transposition just doesn't arise in the example that you gave.

GLAZEBROOK J:

So what does the United States have to show here, do you say?

MR RAFTERY QC:

We have to show that they did infringing acts in relation to copyrighted works.

WINKELMANN CJ:

Works capable of copyright?

MR RAFTERY QC:

Yes. In against New Zealand law, it's works that are capable of being – their title can be copyright-protected and that they, if you look at number 6 on the list, for example, applications of the transposition principle in relation to count 4.

GLAZEBROOK J:

Can you perhaps just finish answering the question? So how would you do that? So what would you have to put forward to do that?

MR RAFTERY QC:

You have evidence that this organisation or these people did acts which prima facie infringed the copyright of some other person that we have some evidence that –

GLAZEBROOK J:

That doesn't really help me.

MR RAFTERY QC:

No, and that we have evidence from that other person that they are claiming copyright in it and that's the bit you prove. The fact that the item is capable of being protected by the laws of copyright is all that we need – it's of a type of work that could be protected by copyright in New Zealand.

GLAZEBROOK J:

Can I just say that that's what I understood the appellants to say was missing, evidence from the person to say "You infringed my copyright".

MR RAFTERY QC:

As we've said quite clearly, there is evidence of that but he spent a lot of time saying "Well, how do we measure that this thing really is copyright-protected? Do we use New Zealand law or Australian law or United States law or German law?" And I say to discover its status, perhaps the status it has in the requesting country, if you take that over here and say they did all these acts that they did in terms of infringing copyright, would it amount to an offence in New Zealand? Because they did actions in relation to a type of work that was capable of being copyright-protected in New Zealand.

GLAZEBROOK J:

I'm fine on that. I'm just trying to work out what you say that means in terms of what has to be proved here. I understand that you don't have to prove it was actually copyrighted either in the United States or in New Zealand under any technical aspect of it but do you or do you not have to have evidence saying "This was my copyright" whether right, wrong, or – because as I understood it, that's what the argument of the appellants was.

MR RAFTERY QC:

It was a twofold argument, I think.

GLAZEBROOK J:

Yes, I think so, but let's leave the more complicated one aside.

MR RAFTERY QC:

We accepted that when it came to specific items of infringement in respect of specific counts like 4 to 8 then all that we have to transpose is that the work in question, by transposing it, we learn that that's the type of work that's capable of being protected by New Zealand law. Have they done acts that will be infringing? And we look at what they did in relation to an item there's some prima facie evidence that that was protected by the United States' copyright law, you've got, looking at *Taken*, you've got the evidence of someone's asking to download a DVD rip, for example, which is a slang word for the – so there's some prima facie evidence of it being copyright-protected. When Agent Poston, who is giving evidence and it's in the ROC, said "I looked at the same thing that Mr van der Kolk looked at and that was this film *Taken* and it was a copyright-protected one and it was still up on the website in 2012 when the business was closed down and the Motion Picture Association of America are going to come along and say they claim copyright on all this material that was on their website". From that, you could infer that there is good prima facie evidence that he was actually attempting to infringe the copyright on *Taken*.

WILLIAMS J:

So do you accept from that comment that you have to apply the essence of the safe harbour provisions too?

MR RAFTERY QC:

No. Safe harbour doesn't come into it.

WILLIAMS J:

Why not?

MR RAFTERY QC:

Because it's nothing to do with – in this case, it goes back to the example we were talking about yesterday, there is ample evidence that they did more than merely be a locker.

WILLIAMS J:

I understand that. I'm not talking about the facts here. I'm talking about the way we construct our approach.

MR RAFTERY QC:

So where that comes in can only be for the appellants to say "No, we are pure cyber locker because we didn't do this, we didn't do that, we didn't do the other, we came exactly" – and that is why we say it's a defence because that's your trial issue, not here, because you can only have the cyber locker protection if you've done nothing other than play the dumb pipe. So in this case, what you're just saying is, because that's the nature of the allegation, that's why it's so difficult to sort of translate what Your Honour's asking me into the realities of the evidence.

WILLIAMS J:

Well, it's because "infringement", of course, in both sets of laws, in part involves a question of whether the safe harbour provisions render it non-infringing, whatever – it would be infringing but for the safe harbour provisions because the technology requires you to make multiple copies just

to do your job. So the question then is do you ignore the safe harbour provisions for the purpose of applying your 24(2)(d) analysis?

MR RAFTERY QC:

The 24(2)(d) analysis, yes, it would only come in if, as it were, being a pure cyber locker was an evidential reality on the material before you. I mean, it would require –

WILLIAMS J:

Can we just, let's for the present discussion assume that that's debatable. Then what?

MR RAFTERY QC:

Well, then if it's debatable, it's –

WINKELMANN CJ:

Perhaps, can we take the example of *Taken* which might – can we take the example of *Taken*?

MR RAFTERY QC:

Yes.

WINKELMANN CJ:

So would you accept that in relation to the specific charge, which is *Taken*, you would have to show that Agent Poston looked at the file up through one of the URLs and saw it was copyrighted, that someone was claiming copyright, he looked later and it had not been taken down. Would you also have to prove evidence of a takedown notice to show knowledge of *Taken* or something that shows knowledge that *Taken* was a copyrighted work? Or do you have that evidence?

MR RAFTERY QC:

There really is no safe harbour issue in *Taken*.

WINKELMANN CJ:

I'm just asking you what you accept you'd have to show for those specific charges because Mr Mansfield says, and Mr Illingworth, I think, that you don't string all of these elements together, that someone's claiming copyright, that someone has done a takedown notice, that it remains there.

MR RAFTERY QC:

Yes. Taking the takedown notice, which is what I take your question's more directed towards, if it was merely, and this is what our evidence amounted to, merely a takedown notice was issued in relation to *Taken* and they took it down in the short period thereafter even though they looked at it in between or before the takedown notice, then we would fail evidentially.

WILLIAMS J:

Right, so that means that the safe harbour provisions are relevant to the analysis? Because you were telling me they weren't.

MR RAFTERY QC:

Well, in the example Her Honour the Chief Justice gave –

WINKELMANN CJ:

Yes, so can we just play that example through?

MR RAFTERY QC:

Yes, certainly. So you're talking about one isolated issue. The whole point about the takedown notices, they come so much later in the chain of evidence. But it was exclusively as Her Honour posed, in other words, we have no other evidence but this, a takedown notice, one takedown notice came for the film *Taken*, and we were trying to, on that shimmer, we were trying to create a big trial, if they took it down within the period covered by 92C and they were able to – that's it.

WILLIAMS J:

Can I –

WINKELMANN CJ:

No, can we let Mr – I think we might go faster if –

WILLIAMS J:

My question just relates to that point and I think it's the essence of my question anyway and it is the appellants really say "But you didn't show they didn't take it down".

MR RAFTERY QC:

Well, we do, because Agent Poston said it's there in 2012 still.

WILLIAMS J:

I know that, I know there's a fight over the facts, but I'm trying to get to what you have to prove.

WINKELMANN CJ:

I think it would be more efficient if we just let Mr Raftery finish his example and then you can…

MR RAFTERY QC:

Well, just going back to the example as I understood Your Honour put it. We've got this single offence, no other case in this indictment, and we're relying on the takedown notice, then the fact that if they responded to it within the days, when it comes to the 24(2)(d) exercise, we would fail completely because they would say "We are just doing what the dumb locker does and once we had notice" –

GLAZEBROOK J:

Sorry, I didn't catch, just doing what?

MR RAFTERY QC:

"We are doing exactly what the dumb pipe does, cyber locker", and we're bound to fail evidentially on that basis. But in a 24(2)(c) analysis, all that's happened there is you've identified the conduct that you're looking for and

he's done no infringing content. He has responded to the takedown notice within the reasonable period. End of story. It would never get to the Minister. So in that example, I agree with Your Honour, but because we're actually in an entirely different ballgame in this case, just so that you understand where takedown notices come in, as it were, it's at the end of the chain, because you've got a system set up to – I won't go through all that has been gone through yesterday, but to upload onto that as much infringing material as they could to get as many people as possible to download and pay Megaupload and so once you've got that system up and going, you're in full knowledge that you're dealing with an infringing territory and then a takedown notice arrives and in the case of the film *Taken*, it wasn't taken down because it was still there.

WILLIAMS J:

For myself, I understand all of that, that's perfectly clear. My question is a different question. It's who has to prove what. And you say if the appellants prove that they took it down, they walk away, of course, that's obvious. My question is do you have to prove they didn't?

MR RAFTERY QC:

Yes, we'd have to prove they didn't take it down.

WILLIAMS J:

Right, so that means that the safe harbour provisions are a matter of prima facie proof for the US? Because I thought you were saying they weren't.

MR RAFTERY QC:

Well, if in the example given by the Chief Justice, they would be, because 92C is there, the whole thing hangs on that, did they take it down or didn't they? If they didn't – but in the case that we're talking about here, their response to them is in fact part of the evidence of the conspiracy, not in evidence for the compliance with the Act if – and on a prima facie basis, we've got the evidence of all these other things going on from which the inferences can be drawn that it was a corrupt copyright-infringing organisation. At trial, we will

need to prove that and go further than we do in the prima facie case, so that that's why in this particular case, 92B or C or the DMCA equivalents will arise. I have no doubt in the light of what's been going on here, as parts of the argument for the defence in the United States but if this case remains as intact as it appears on prima facie level, then they would not succeed on those. But it is pure defence there. That's where you're just going to go in and really attack it and say, and presumably explain away X and explain away Y and explain away Z why they offered a rewards scheme, all those other things, and there was nothing dishonest and all those emails were just banter and so on and so forth. But that's really for trial. It's just not an issue at this stage in the context of this case but in the example given by Her Honour the Chief Justice, then it brings it really into focus that yes, it would come into play there because that's all you've got. I don't know whether that helps or not, Your Honour. You look puzzled.

WILLIAMS J:

Yes. It seems to me my question is really a simple one, I think, at least I thought it was –

MR RAFTERY QC:

Well, it's –

WILLIAMS J:

And that is whether you have to show that the takedown sanctuary was not availed of?

MR RAFTERY QC:

Yes, and the evidence shows that.

WILLIAMS J:

In prima facie in New Zealand?

MR RAFTERY QC:

In the prima facie evidence, yes.

WILLIAMS J:

I know you say the evidence shows that.

MR RAFTERY QC:

Yes, so that we do have to show that. The Chief Justice's example, we couldn't. In this one, we can with bells on.

WILLIAMS J:

Of course.

MR RAFTERY QC:

So I accept it comes into play but in the reality of the case we're talking about in the instant case, it doesn't –

WILLIAMS J:

I get that.

MR RAFTERY QC:

– but in a pure example that the Chief Justice has given, I accept it would.

WINKELMANN CJ:

Right. Mr Raftery, I know we've tested you with some of this. For my part, it was necessary so I could understand your submissions. I'm sorry about that.

MR RAFTERY QC:

Not at all.

WINKELMANN CJ:

But where are we at with the…

MR RAFTERY QC:

Well, could I just draw to your attention, I think it's quite important because of one of the limbs of Mr Illingworth's argument about it's necessary to prove this as a matter of law and he said you have to go further, you have to prove as a matter of law that it had this status in the United States, and I thought it was

just useful if Your Honours just were aware of, I'll just take you to the case of *Norris* which is in the appellants' volume 7, page 2568. I'm sorry, I haven't got the appellants' volume 7 in front of me but – I may have actually, but I'm using just my own copy of it and I just want to go to –

GLAZEBROOK J:

I'm sorry, do I have the wrong volume or the wrong…

WINKELMANN CJ:

The appellants' volume 7.

MR RAFTERY QC:

It's volume 7 of the appellants, page 2568. Ms Fuhr will give me the page reference because I'm using it, as I say, for my own copy of the case but paragraph 89, page 2598, and this is just to meet my learned friend's argument about it needs to be proved as a matter of law about what the status is in the United States, paragraph 89 says, he's been going through some cases before this looking at different constructions, "The wider construction furthermore avoids the need always to investigate the legal ingredients of the foreign offence, a problem long since identified as complicating and delaying the extradition process: see, for example, besides the passages cited above from *Cando Armas* and *Dabas* , La Forest J's judgment in *McVey*'s case (at 528). To require evidence of foreign law beyond the documents now supplied with the requisition could cripple the operation of the extradition proceedings. Flying witnesses in to engage in abstruse debates about legal issues arising in a legal system with which the judge is unfamiliar is a certain recipe for delay and confusion to no useful purpose, particularly if one contemplates the joys of translation and the entirely different structure of foreign systems of law. In addition, the wider construction would place the United Kingdom's extradition law on the same footing as the law in most of the rest of the common law world. The broad conduct approach – the examination of all the conduct on which the requesting state relies – is that almost universally followed."

And that's in answer to my learned friends when he said because you couldn't say you didn't have to be New Zealand law or United States law. The legal status of the thing must be the legal status that it enjoys in the country of the requesting state and there's a very clear indication from the House of Lords and from the Supreme Court of Canada, and I don't need to take you back to *McVey*, just saying "Look, enquiring into foreign laws are not part of modern extradition law".

And in the cases that – I won't take you through all of them now but the ones that my learned friends referred you to, which cited a decision of Justice Duff in *Collins* with approval, are those passages in fact where he cites what I would call, with the risk of upsetting Your Honour, transposition, their incorporation of the adventitious circumstances or whatever into the local context for the purposes of the 24(2)(c) exercise. In that case, he did hear evidence about what Californian law was. That appears to have been a practice that must have been available or prevailing 115 years ago but in modern extradition practice, the statements of the House of Lords in *Norris* and of the Supreme Court of Canada in *McVey* reflect, in my submission, the correct approach to that, that legal status is not something that requires proof, legal status in the requesting country that requires proof in evidential terms at the 24(2)(d) stage and those cases, in my respectful submission, make that quite clear.

WINKELMANN CJ:

Yes, well, it's lunchtime. Does that mean you are finished?

MR RAFTERY QC:

Your Honour, I can finish transposition unless there's anything, you may think of nuggets over your lunch break, but I was going to stop there. I think you've got the point that I'm making. If there's anything that's not clear, I'd prefer we cleared it up now. There are a couple of things that I – there are some more things I want to say after lunch just because we have a few little tidy-up points but then it'll be over to Mr Boldt.

WINKELMANN CJ:

So –

MR RAFTERY QC:

Well, I've got to deal with the limitation point.

WINKELMANN CJ:

So Mr Boldt's got to deal with the judicial review?

MR RAFTERY QC:

Yes.

WINKELMANN CJ:

So we're really behind time, aren't we?

MR RAFTERY QC:

We're not going as fast – that's why I gave you that chart this morning just to sort of jump ahead.

WINKELMANN CJ:

How are we looking then? Because when do you think…

MR RAFTERY QC:

I'm not sure how long Mr Boldt thought he was going to be but –

WINKELMANN CJ:

Mr Boldt might be able to tell us.

MR RAFTERY QC:

Yes, that's right.

MR BOLDT:

I'm tempted to say, Your Honour, I'll be about 15 minutes if Your Honours don't ask me any questions but…

WILLIAMS J:

So three hours?

MR BOLDT:

Possibly. No, Sir, I have only a relatively small number of hopefully quite narrow points to make on the judicial review topic. So we'll see how we go. I'm hoping to be brief.

GLAZEBROOK J:

So was that you'll be 15 minutes on judicial review?

MR BOLDT:

No, Ma'am, if I spoke uninterrupted, I would be 15 minutes. I suspect Your Honours may have some questions.

GLAZEBROOK J:

Sorry, I just wasn't sure whether that included – that was uninterrupted on judicial review or whether there were other matters.

MR BOLDT:

I'm only going to deal with judicial review today.

WINKELMANN CJ:

And that's it, once Mr Boldt has dealt with judicial review?

MR RAFTERY QC:

That's it, we're all finished. So I'm optimistic that we will, depending again on whether Your Honours have many questions for me, finish in relatively short order in the afternoon and give my friends their opportunity that they're waiting for.

WINKELMANN CJ:

For reply?

MR RAFTERY QC:

Yes.

WINKELMANN CJ:

And when we look ahead to reply, I just want to make it clear that we're going to hear strictly in reply to oral submissions, really, because I anticipate that counsel addressed their written submissions as they went through. I think that's the case both for Mr Mansfield and Mr Illingworth. And Mr Illingworth, as we look ahead, how long do you think you would be in reply?

MR ILLINGWORTH QC:

Could I respond to that after the break, Ma'am? I need to just have – we've gone into some areas on transposition that need to be thought through quite carefully and there's a lengthy debate that's been – we need to deal with that issue in some detail and we have the problem that we then have to have Mr Boldt on *Cullinane* and Ms Hyde is going to deal with the reply on *Cullinane*.

GLAZEBROOK J:

That's Monday though.

MR ILLINGWORTH QC:

Well, that would be Monday. I'm just not sure whether I could finish my reply today depending on what time we finish this afternoon and what time we're arising. It may well be that I'd go a little bit into Monday morning and of course, Mr Mansfield and Mr Rogers both need to reply as well.

WINKELMANN CJ:

Well, is it possible counsel, when we adjourn, just to have a quick discussion regarding timing? Because I don't think *Cullinane* will take – it's one…

MR ILLINGWORTH QC:

Cullinane is something like 30 pages in the US submissions and a similar response from the others, Ma'am. It's not going to be short.

WINKELMANN CJ:

Right. Well, if counsel could have a discussion regarding timing, we'd be assisted.

MR RAFTERY QC:

And for my part, depending on Your Honours, I would be willing to foreshorten my lunch break and sit a bit later this afternoon. On Friday afternoon, I'm obviously exiting but you could think about that but I'm quite happy to…

WINKELMANN CJ:

We'll come back at 2.00, Mr Raftery.

MR RAFTERY QC:

I'm grateful.

WINKELMANN CJ:

We'll have a discussion as we retire regarding spending longer but it's quite a lot for us to take in and I know it's also demanding for counsel. I'm not suggesting otherwise. Thank you.

COURT ADJOURNS: 1.06 PM

COURT RESUMES: 2.00 PM

WINKELMANN CJ:

So we had a discussion regarding the rest of the day and this is how it's going to go. You're going to finish Mr Raftery. In a few minutes Mr Boldt will then address. We will then adjourn for a few moments to allow Mr Illingworth to move his papers over, but we're going to have, reply submissions are going to be finished by 5 o'clock today, we'll sit through until five. That will give each of the defendants, as to how you divide it up, but that is a very adequate period of reply, given that reply is not an opportunity to repeat submissions but simply to address points which have arisen in oral argument, and I do appreciate that, at least from our perception, some of the Crown's points may

have been revealed in their true, well, they may not have been exactly obvious in their written submissions, so there is a need to reply on those, but it's not an opportunity to reformulate and re-present the same arguments. So we're confident that the reply can be dealt with this afternoon, that just leaves us with *Cullinane* on Monday.

MR RAFTERY QC:

Your Honour can I just merely address my remarks to the Court obviously, but just to Justice Williams in terms of the safe harbour matter, just say one thing in case it helps, and then I will finish on transposition. Copyright status of a film, say like *Taken*, is assumed because of transposition. The US then doesn't need to prove or show at a prima facie level that it was, in fact, copyright protected. Only that it was of the type of work that could attract that sort of protection in New Zealand. I think they were all ad idem on that I think.

So what about safe harbour? If there is evidence that a takedown notice had been served on the defendant in respect of the same film, *Taken*, the defendant would have responded in one of three ways. He would have contested the assertion of copyright, which he's entitled to do. He would have taken the file down, the material down, or he would have ignored the notice. Whichever option he chooses is the conduct which is then examined at 24(2)(d). If that negates a prima facie case, then the United States fails in its request. But if, for example, he ignored the notice or pretended to take it down when in fact he hadn't, then safe harbour won't help him. So I just hope that helps Your Honour. If it doesn't I'm going to move on quickly.

WILLIAMS J:

If on the evidence he ignored…

MR RAFTERY QC:

He ignored it or pretended he'd taken it down.

WILLIAMS J:

Right, but you don't deny that there is evidence required about safe harbour matters, that's my question.

MR RAFTERY QC:

Yes, we have to address, because I said if we look at what did he do in response to it. What he did tells us what is the content we need to require into. If he took it down, that's 92C, then we fail.

WILLIAMS J:

My question is really do you need to prove a notice was given.

MR RAFTERY QC:

Yes.

WILLIAMS J:

And not responded to –

MR RAFTERY QC:

Yes.

WILLIAMS J:

– to a prima facie level at this stage, that's all I needed to know.

MR RAFTERY QC:

Yes.

WILLIAMS J:

Good, thank you.

GLAZEBROOK J:

And just because you did say they could dispute copyright you would say, well, that's the trial, whether –

MR RAFTERY QC:

Oh the copyright, yes, but in terms of the responses to how they did respond to it, if our evidence was they took the response they're entitled to take, namely contesting copyright, then that's…

I'm now going to move to limitation. In moving to limitation I can say there's another, before we got to limitation, the question of dishonesty. I've looked at the issue there and gone back to the submissions of my learned friends. Basically I think we've already dealt with it because it's this sort of, this argument about needing to prove actual knowledge, and as Mr Mansfield put it in one of his written submissions, if you by failing to mention actual knowledge the Court of Appeal have excised the safe harbour protection basically, and that issue has been thrashed out and that seemed to be what his dishonesty – no, not dishonesty, his complaint about the Court of Appeal, the way they summed up the way of conspiracy because it had excised effectively actual knowledge on the part of the ISP, actual knowledge of infringement, and therefore they'd excised the element which, of the defence, or the lawful action on the part of an ISP, but we've already thrashed that around quite a lot and I don't think I need to do it again.

So I'm just going to deal finally with the limitation point, which only arises in respect of three counts anyway, 4, 7 and 8 I think it is. As Your Honours will be aware in general from your own past experience in the pre-Criminal Procedure Act days, we had either summary offences or indictable offences. It was very common to have limitation periods for summary offences. Generally it was a six month period within which the charge had to be laid. Indictable offences had no such limitation at all. There have been the occasional statute which has created a specific limitation period in respect of a specific offence. For example, under the anti-money laundering legislation there is a six year limitation period for all offending, but we don't need to worry about that. Just the general proposition is the one that I have mentioned. The Summary Proceedings Act carried over that regime and created under part 2 a regime for summary offences, and under part 5 a regime for when indictable offences were being dealt with in the Magistrates Court or later the

District Court and someone could either plead guilty at that level, or the matter was committed for trial to a jury jurisdiction.

Under the Copyright Act, as originally drafted as we know, the maximum sentence was three months' imprisonment for any offence under 131. Therefore, it was caught by the Summary Proceedings Act which said, a charge for any offence for three months or less needs to be laid within six months of the offending. But that changed in 2002 when the maximum sentence was raised to five years' imprisonment. So when section 131A was introduced, in the Trademarks Act at the same time, in other words if the sentence was increased, so it was to take account of the fact that it was ceasing to be a purely summary offence, but was now an indictable offence, it introduced at the same time the limitation period of 131A. Effectively the regime of how to lay a charge on the part of a prosecuting authority remained the same. They could choose to lay a charge summarily under part 2 of the Summary Proceedings Act, or they could elect, and it was entirely at the election of the prosecution, to lay it indictably, in which case part 5 but not part 2 of the Summary Proceedings Act kicked into play.

If a charge was laid summarily, for the five year maximum offence, could still be laid summarily and the person could plead guilty at the first instance in the District Court and the matter could be dealt with there, but he could elect, because it's over three months, trial on indictment if he wished. If he made that election then part 5 of the Act kicked into play and the procedures for committal, with which we're concerned in this case, because parts of part 5 were incorporated into the Extradition Act for the purposes of carrying out the procedures, especially the 24(2)(d) exercise. The section of the Act which prescribed the limitation period of six months for a summary offence, was set out in section 14 of the Summary Proceedings Act. Section 14 is one of the early sections in part 2, the purely summaries, and it therefore applied. Once they decided to increase the penalty to five years, it then became an indictable charge, and that's when they brought in 131A which reads, to remind Your Honours, "Despite section 14 of the Summary Proceedings Act," section 14 being the six month for summary offences, "an information in

respect of an offence against section 131 may be laid at any time within three years of the time when the matter of the information arose." In my submission that does not alter the standard position of indictable charges now having a limitation period, because if they were bringing in a limitation period for a charge under 131 laid indictably, there would be no need to make any reference to despite section 14, because section 14 only relates to purely summary offences, and this could never be a purely summary offence because it's got the five year maximum. Also when they go on to say in the section, "An information in respect of an offence may be laid," if it was to be a limitation period on all indictable matters, the word should have been "must" because you're trying to say no indictable offence can be laid, if that's what they were trying to achieve.

WINKELMANN CJ:

Can you just repeat that last point?

MR RAFTERY QC:

Certainly. In respect of section 131A there are two passages. The first one I presume Your Honour understands when I say there would be no need to refer to section 14. The second one is they said, "An information in respect of a matter, may be laid at any time within three years." And I'm saying that if it was intended to capture all indictable charges under 131 it would have said, "Any information for an offence against section 131 must be laid within three years," because that way you're making clear that it relates both to summary and indictable, and the very fact that you begin the section with reference to section 14 is saying notwithstanding that summary offences have a six month time limit, now under this Act they have a three year time limit, because we've increased the penalty and we've increased the potential of jeopardy for those charged with it and therefore, and bearing in mind that a lot of these sections to amendments to the Copyright Act over a period of time, were bringing – taking account of the realities of the digital era. That there may have been good reason for increasing the six-month period to three years for summary offences because of the nature of taking time to discover just exactly what's going on on the internet. But that's speculation. I mean I've not got any

chapter and verse for that. But I say when you look at the wording, the reference to section 14, saying notwithstanding that for summary offences you now are able actually to, the six-month period for summary offences, in respect of 131 you're now given an extended time of three years.

Now that's my point, I've got nothing more to say unless Your Honours want to ask me any questions?

GLAZEBROOK J:

And if we're not with you on that, because obviously we have to crawl through that legislation ourselves.

MR RAFTERY QC:

Certainly, yes. If you're not with me I still say a couple of things about that because there is a section in the Treaty, I think it's Article VI, subparagraph 3, where there is a, I forget the phraseology now, but basically if it's asserted that matter is time-barred, then those factors are taken into account by either jurisdiction. But that really is, usually what that's aimed to getting at is really whether it's stale offending. Effectively, in other words, if it's all over it's so long ago, whatever the so long might be.

GLAZEBROOK J:

I'm sorry, I'm losing what you're saying there.

MR RAFTERY QC:

Sorry, the suggestion in the Treaty, what is it trying to address, it's stale offending basically. But here when you're looking at the actual charges that are laid that are potentially affected by 131A, they are in respect of matters that are all overt acts of the conspiracy and the conspiracy continues right up until 2012. The material in question in those counts was actually still on the servers of the Megaupload when the matter was closed down in January 2012, and so if you think of this as really like any conspiracy sort of continuing on a continuing period, those are inessential details, they may reflect

something trying to capture evidence at the beginning, the middle and the end of the conspiracy.

WILLIAMS J:

Which treaty are you talking about?

MR RAFTERY QC:

The United States-New Zealand Extradition Treaty.

WILLIAMS J:

Oh I see.

MR RAFTERY QC:

It's Article VI 3. I think.

WILLIAMS J:

Yes, thank you.

MR RAFTERY QC:

I may be wrong about that, but that's what my memory tells me. So the way to look at it is they are continuing offences, those, if we're in a New Zealand context, you might apply to amend the indictment to change the dates, because the essential conduct is the same, you're infringing in relation – bearing in mind there's nothing stale about the matter because the infringement material is still on your servers in 2012 when the matter is closed down. So that's why I say that that prevents no bar, leaving aside the 131A argument as well. So just to answer Justice Glazebrook's point, that's all I'd wish to say on that unless there's anything more you wish to tease out with me.

WINKELMANN CJ:

No thanks.

MR RAFTERY QC:

I could say, with no disrespect to my learned friend Mr Rogers, we have said and given our answer to Mr Batato's position at the end of our submissions in writing and there's nothing I'd wish to add to that and in that case that's all I would wish to say to Your Honours.

WINKELMANN CJ:

Thank you Mr Raftery. Mr Boldt?

MR BOLDT:

May it please Your Honours. Your Honours, thank you for your consideration and kind words this week in a difficult week that really has meant a great deal. Your Honours, I'm going to take you as quickly as I can through the points I want to make. I don't believe there is any significant difference between my learned friend and me regarding the law that applies in terms of the relationship between judicial review proceedings in a statutory appeal procedure. I handed to the registrar just before we came back a couple of additional cases. I don't think they need to be distributed to Your Honours now, I'll just speak to them very briefly, they're both well-known and recognised decisions of the Court of Appeal. The first is the *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd* [1985] 2 NZLR 94 (CA), which is a decision of the Court of Appeal from 1985, and it mentioned the relationship between section 4 of the Judicature Amendment Act and the statutory appeal process. The Court just noted by the Judicature Amendment Act 1972, "The existence of a right of appeal does not exclude the jurisdiction in review proceedings; but that does not prevent the withholding of the discretionary remedy of review when an appeal is pending." The Court went on to say, "If the judicial review proceedings ever served a useful purpose, they no longer do so. On that discretionary ground we dismiss the appeal." That's at page 103 of the reported judgment.

There's another case called *Fraser v Robertson* [1991] 3 NZLR 257, also a decision of the Court of Appeal from 1991, a reported decision, which cited *Auckland Acclimatisation Society* and simply said, "Although section 4(1)

extends review to cases where the applicant has a right of appeal, relief will be refused if the remedy of appeal is more appropriate." And those cases lay a foundation for a line of authority that culminated in this Court's decision in *Tannadyce*, and they are entirely consistent with the comments in *Tannadyce*. In effect what the authorities have held from the very first occasions when this problem has arisen, is if the appeal is able to do the job, then the appeal is the procedure that ought to be employed. And that indeed is also consistent with a decision of the UK Supreme Court, the *Cart* case on which my learned friend relied. In that case there was no appeal and judicial review was held to lie because of that.

However, where there is an appeal and the appeal can handle the situation then the appeal should. The only area where we may disagree in terms of the legal position is on a point that is probably not material in this case and that is whether a stricter approach is appropriate in criminal cases. Your Honours will have seen the language the Court of Appeal adopted in the 1996 decision in *C v Wellington District Court* [1996] 2 NZLR 395 (CA) which is in the materials, it's volume 4 of the appellants' authorities at page 1208 and again, Your Honours may not need to go to that now but I will just make the point that in a criminal case –

WILLIAMS J:

What's the name of the decision again?

MR BOLDT:

The case is called *C v Wellington District Court*, Sir, and that was an attempt to judicially review a committal for trial.

WINKELMANN CJ:

What's the page, sorry?

MR BOLDT:

The passage that I'm going to read Your Honour from is at page 1213 of the bundle.

GLAZEBROOK J:

Let's get it. What volume?

MR BOLDT:

It's volume 4, Ma'am. The case begins at page 1208 and the passage that is relevant to our discussion, which is also reproduced in our submissions, is at page 1213. In a criminal context, what the Court said was "As a matter of general principle truly exceptional circumstances will be required for the Court to entertain an application for judicial review of a decision to commit for trial under s 168 of the Summary Proceedings Act 1957 where the sole ground is a challenge to the sufficiency of the evidence. That principle should apply even if an identifiable question of law (other than sufficiency of evidence) is said to arise." The next part is the most important: "The Crimes Act 1961 provides a person committed for trial with an alternative, adequate, and convenient procedure to obtain the same remedy. There is a comprehensive statutory procedure included in Part XII of the Crimes Act 1961 governing indictable trials which is directed to their just and expeditious disposal, and in a situation such as the present there is no cause for the Court's wider review process to be brought into play and thereby to interfere with that process."

I make that point because this is a criminal case and of course, the rights of appeal in extradition matters are now contained within the Criminal Procedure Act. The Criminal Procedure Act itself contains, and I did the maths this morning, I think 141 discrete provisions that deal with appeal rights. They have been very carefully set out and calibrated to deal with all manner of different situations that might arise throughout the criminal process. Of course, they don't just apply in extradition cases, they apply across the board, but my learned friend says they don't apply at all in extradition cases but of course now, under the Extradition Act as it is today, the appeal process goes through the Criminal Procedure Act.

WINKELMANN CJ:

But did it –

O'REGAN J:

It didn't at the time?

MR BOLDT:

It didn't, but I'm talking about a general principle for the future because, in my respectful submission, it would drive a horse and cart through that whole procedure if, given that most criminal cases begin in the District Court, someone were to say "You know, I think I would like a more holistic perspective brought to my challenge to this pre-trial ruling. I think I would like it observed through a broader and different lens employing different procedures". If the simple fact that a case has begun in an inferior Court automatically gives rise to a right of appeal regardless of the parallel existence of an appeal right then you can really imagine the disruption which would be injected.

The reason I say this may not be an important factor in the present case is because the way both the High Court and the Court of Appeal dealt with the interaction of this statutory appeal with the judicial review is very much along the lines of the way it was handled in those two cases I cited at the beginning and very much the way it was handled by this Court in *Tannadyce*. Both the High Court, first through Justice Asher and then through Justice Gilbert, said "Look, I'll deal with everything but if these points can be handled in the context of the case-stated procedure, through the statutory appeal procedure, then they should be and they will be and then at the end, we will see what, if anything, is left over for the judicial review".

Your Honours might like to have a look at Justice Asher's decision on that point because he encapsulated this approach that I have outlined to Your Honours quite clearly. His decision on this can be found in volume 5 of the case materials rather than the authorities, so volume 5 of the case on appeal and it's at page 2572, Your Honours. This was a pre-trial argument held before Justice Asher when he had carriage of the High Court appeal and ironically, it was an application brought by the United States to have the review and the case-stated issues separated out more clearly. The

United States made an application to have all the procedural matters, the stays and the various procedural rulings they wished to challenge, confined to the judicial review and for the case-stated to be concerned only with the substantive matters of law that had arisen in the District Court, and the appellants opposed that, and you can see their submission recorded, it's the very last half a sentence on page 2574, it's paragraph 5 of the judgment. His Honour Justice Asher says "The appellants argue however that despite this, the procedural issues relating to the stay applications are properly raised in the case on appeal", and then at 9, the appellants are recorded there "The appellants submit that the United States' interpretation is too narrow and that when section 68 is seen in the context of the whole Act, the right of appeal relates to any question of law arising from the judgment and includes issues relating to the Court's process and fairness of the hearing as well as the substantive determination of the extradition appeal".

And then His Honour went on to rule, and the key parts of His Honour's ruling can be found at paragraphs 22 and 23 of the judgment, His Honour determined "Thus it seems to me that not only the determination itself but all matters of process involved in reaching that determination can be included in the case stated on appeal. The only limitation is that the points must be questions of law only." And then the last sentence of the following paragraph, paragraph 23, is highly relevant. "The appeal procedure set out in section 68 of the Act is the primary appeal procedure and if matters can properly be included in those proceedings, they should be. The complications in relation to other proceedings will have to be worked through in due course." So that was the way in which the parties approached the exercise in the High Court.

We can also then see that in the way Justice Gilbert approached the question in paragraph 8 of the High Court judgment. Justice Gilbert noted the directions given by Justice Asher and he noted, and this was obviously after having sat through many weeks of the appeal hearing in the High Court and considering all issues both under the statutory heading and also the judicial review, he concluded that the only issue raised in the applications for judicial

review that is not also dealt with in the case-stated is the allegation of bias and predetermination which His Honour then dealt with separately at the end.

My learned friends nonetheless say that there is some additional substance or value to pursuing these matters by way of judicial review rather than through the case-stated appeals process. And the obvious question that arises is, well, why? What exactly are you missing out on with respect to this statutory appeal process that you would have access to in the course of judicial review?

My learned friend has sought to explain that in a number of ways. He says things like "Well, it raises fundamental issues about the validity of the whole process". He says there's different methodology and focus. Judicial review allows things to be considered holistically. He says the Court will look at the matter through a different lens. All of which is characteristically eloquent but it comes back, raises still the question "Well, where does it take us in terms of what is missing in terms of what the Court actually did?"

Your Honours put exactly that question to my learned friend just before lunch on Tuesday, "What exactly are you missing out on here?" I took a careful note of his response and I have to confess, I'm still not a great deal the wiser. He noted that there were a number of things that were covered in the judicial review, the funding stay, the misconduct stay, the eligibility, the case stated, all of which is true, but they of course were also all the things covered in the course of the case stated, and he noted that there were a number of mechanisms by which what the District Court did was said to have been wrong or invalid. These included procedural unfairness, errors of law, errors of fact, unreasonableness, and apparent bias. But, and I say it again, all of those matters were dealt with by Justice Gilbert.

And really, I can sum my submission here up in a single sentence, and that is that if you ask the same question in a completely different way, you are still asking the same question. What we have not seen, what has not been offered to us on behalf of the appellants, is a single example of a point or a question that they say is critical to the determination of this case which was

not addressed fully and on its merits in the course of the case-stated appeal. What we actually – and in fact, the challenge in the Court of Appeal, at least according to the judgment at paragraph 307, was that Justice Gilbert was wrong to limit the judicial reviews to matters not covered in the judicial review but when we think through what that means, what it means is the appellants are saying "Well, I have determined that the matters raised in the course of the funding stay, for example, made no difference whatsoever to the fairness of the proceeding in the District Court" and that none of the matters the appellants wish to put before the Court could possibly have affected the District Court's judgment.

I have found this in the course of the case stated but I must now take off my case stated but I must now take off my case-stated hat, put on my judicial review hat, and ask myself the same question again. And it is only if we can find any example anywhere in this whole analysis where the Court, having done that, and put in its judicial review lens, is suddenly going to say "You know what, that hearing I thought was completely fair a moment ago I now think looks unfair". Unless we have some example of something along those lines, there is simply nothing at all to be gained by these concurrent judicial review proceedings.

What I could do, Your Honours, and it's over to Your Honours, really, whether this kind of exercise is necessary, is to look for an example that the claims of unreasonableness that are enumerated in the first amended statement of claim, say, on behalf of Messrs Ortmann and Batato, and look at the actual complaints they make there. Because what I can say to Your Honours, and I'm perfectly happy to take Your Honours right through this but I'm conscious of the time, is that whenever you do that, you see that all they are in fact doing is recasting questions that arose fairly and squarely in the course of the case-stated appeals and were dealt with in that context.

Most importantly, Justice Gilbert made a number of affirmative findings in his judgment that the District Court procedure was completely fair, and I can just give Your Honours perhaps a few examples of that. At paragraph 552 of the

High Court decision, the "The extradition Court's power to ensure a fair hearing is beyond doubt and was confirmed by the Supreme Court in *Dotcom*. That was the yardstick against which the District Court assessed each of the grounds of the application," this is one of the stays. "None of the matters complained of has any bearing on whether the eligibility hearing could be conducted fairly, save to the extent of the overlap with the July funding stay application. Nor did they have any bearing on the extradition Court's limited enquiry in determining eligibility for surrender." His Honour made a number of other similar observations, paragraph 584, for example, "I reject the appellants' claim that they were denied a fair hearing before an unbiased judge."

His Honour did all of the things a Judge hearing a judicial review would do and considered not only the merits of the legal questions that were before him but was acutely concerned with whether there had been any element of unfairness at any point in the process. That is exactly what a JR Judge would do.

Your Honour Justice Williams and my learned friend had a discussion shortly before lunch yesterday about "Well, what about the findings of fact you were complaining about in the judicial review? What exactly do you say went wrong there?" And in the end, my learned friend came back to say "Well, we think *Arcuri* and *Ferras* were misapplied in the District Court and the Court used a slightly incorrect formulation in terms of what you should do with allegedly exculpatory evidence". But that too is a question of law. If the Judge applied the wrong test then clearly, that's an error of law and it can be challenged as part of the case-stated process.

There are a number of errors of law alleged in the statement of claim but they are all allegations that there was no evidence capable of supporting the particular finding, also therefore a question of law and amply capable of being dealt with in the case-stated appeal.

So that, in a nutshell, is my submission. I cannot find any example of anything that wasn't looked at on its merits. What I will also say is that the fact that has happened, that all of these matters have been considered in detail and on their merits and, shall I say, that leave has been granted to come to this Court on the two most important questions and that all of the other questions have reached final resolution through the leave process, all of that is the hallmark of an appeals process that is successful and functioning exactly as it should. So there can be no suggestion, in my respectful submission, that the case-stated appeals process in this case was not up to the task or didn't do the job. The only issue that was outside that was this issue of bias and predetermination which is no longer pursued. Everything else was there. It was done.

Your Honours, I think, as I said I would, if I was uninterrupted, be 15 minutes. I think I've been 20 and I haven't been interrupted –

WINKELMANN CJ:

25.

MR BOLDT:

Unless Your Honours have any questions?

ELLEN FRANCE J:

Just one question, Mr Boldt, just to be clear about your position, the Court of Appeal's finding in relation to this was that judicial review wasn't available. Are you saying it was available but would have been dismissed or are you seeking to uphold that finding?

MR BOLDT:

I think the Court of Appeal went further, Ma'am, didn't it –

ELLEN FRANCE J:

Yes.

MR BOLDT:

– and said in fact, it's an abuse of process here. Justice Gilbert didn't go that far. He just said "Well, look, the same answer applies because I've asked myself all of these questions". We are obviously content either way. Where the abuse of process arose though, and it is an abuse of process, is simply to ask the same question a second time in the hope of getting a different answer.

WINKELMANN CJ:

Is that really an abuse of process? Because often, the law, we do that in many ways in the law. Parties do that, and it's in the same proceedings, it's not as if they were doing it seriatim so they weren't having one go and then having another go later.

MR BOLDT:

In effect, Your Honour, though, that's what they're seeking to do in this Court is to say "Well, all right, with the case-stated lens in, you might have found this was a fair hearing but putting in your judicial review lens, you might find it's slightly different".

WINKELMANN CJ:

At the same time though, this is being done at the same time, so it's not violating that principle of abuse of process that you prolong litigation by not dealing with all your points at the same time.

MR BOLDT:

Well, I think where the Court of Appeal was coming from was to say you've got an appeals process which is perfectly up to the task. There is no reason to run the entire thing through a second time using judicial review. Whether that's appropriate characterised as an abuse of process or whether you prefer the approach of Justice Gilbert, which is simply to say, it's res judicata, these questions that you are now putting to me under the judicial review have been asked and answered, it doesn't matter particularly from our perspective.

If the appellants had been doing this to secure themselves an appeal right to which they would not otherwise be entitled then that also would be an abuse of process, in my respectful submission. All of these cases tell us that if there is an appeals process that can handle it then that's what should be employed and of course, that comes with all the checks and balances and limitations of that appeals process itself. My friends assure us that wasn't the reason they brought the judicial review and that being the case, I don't say that makes it an abuse of process, but the outcome in any event is going to be the same regardless of whether you put that particular label on it or not.

Unless I can assist Your Honours further, those are my submissions.

WINKELMANN CJ:

No, thank you, Mr Boldt. Mr Illingworth – we were going to retire for a short time.

MR ILLINGWORTH QC:

I don't think you need to Your Honour. I think I can…

WINKELMANN CJ:

Yes, but have you reached agreement with Mr Mansfield about how you're going to split the time?

MR ILLINGWORTH QC:

No, Your Honour, I will just go through my points as quickly as I can.

WINKELMANN CJ:

Would it be prudent for you and Mr Mansfield to have a quick chat?

MR ILLINGWORTH QC:

Yes, if the Court's able to take a quick break, that would be helpful.

WINKELMANN CJ:

Yes, we'll take a break.

COURT ADJOURNS: 2.44 PM

COURT RESUMES: 2.47 PM

WINKELMANN CJ:

Just to assist you Mr Illingworth, we will break at 3.30 pm for 15 minutes.

MR ILLINGWORTH QC:

The indication between counsel is, Your Honour, that we are in serious difficulty in terms of being able to present our reply submissions in the time available and my estimate is that I would need an hour and a half to reply and that is not going to leave Mr Mansfield and Mr Rogers enough time to reply Your Honour.

WINKELMANN CJ:

I am finding that hard to understand Mr Illingworth, because it is a matter of reply, it is not a matter of reiterating submissions and not that much which is new has come up from the Crown. We have been taken in quite a lot of detail through things that are in the written submissions.

MR ILLINGWORTH QC:

Your Honour I will do my best to get through this as quickly as I can, that is all I can say.

WINKELMANN CJ:

Well if you were to divide the time equally between you, you would finish at what time?

MR ILLINGWORTH QC:

Well if we are sitting till five Your Honour, that is an hour each.

WINKELMANN CJ:

Two hours 15 with afternoon tea, so it is an hour each, yes.

MR ILLINGWORTH QC:

Mr Rogers also has to be fitted in but he said he will be very brief.

WINKELMANN CJ:

Well I imagine he would be brief since he really hasn't advanced a great deal in the way of his principal submissions. Mr Mansfield is just rising to his feet.

MR MANSFIELD:

Yes sorry Ma'am. I was also hoping for slightly longer than an hour. I would have thought economically I can address the Court in an hour and a half, like my learned friend. There is actually quite a bit of material to go through with you if we are to leave you best informed to make this decision and there are a number of important decisions to make in this hearing for our respective clients.

WINKELMANN CJ:

Yes and that is why we have heard you at great length in your principal submissions.

MR MANSFIELD:

And I understand that Ma'am and I am grateful but the position is that the Crown have presented a number of facts that they say are represented in the ROC which in my submission are not represented in the ROC and it is necessary, given the length of the ROC, to take you through that and show you exactly what it does establish in relation to the evidence they rely on in the prima facie case.

WINKELMANN CJ:

Well you see there you are Mr Mansfield. That is really a case of repeating your submissions, your principal submissions which were that that was not covered adequately. One way through would be to allow you to address for an hour each and then you can each hand in say a three or four page outline with bullet points and the particular things you want to refer us to.

MR MANSFIELD:

I don't want to appear impertinent Ma'am, I just wonder if I could make a suggestion to see whether it met with approval or at least consideration which would be my learned friend address you today. Perhaps we could start early on Monday. I complete in an hour and a half and you have got the rest of the day in effect for *Cullinane* and both counsel can still provide you with written references which is what I think we are endeavouring to do, to make sure that you have the material at hand when you consider the issue.

WINKELMANN CJ:

Well then we will have a difficulty with *Cullinane* won't we, which won't be able to be dealt with in time on Monday.

MR MANSFIELD:

I think it would only eat in, only to a small degree on Monday Ma'am, not significantly and I would have thought we can have reduced breaks if that is the concern and complete on Monday. I think all are intent on completing on Monday.

WINKELMANN CJ:

My preference is that you will be finished the replies today and you can hand in a short synopsis of the points you want covered and us to pay attention to and Mr Mansfield, that should suit you very well because what you want us to do is note the absence of evidence in the ROC and instead of us sitting here with you as you go through that, you could take time over the weekend or whenever and hand us in something that is synthesised and that will be better and that will be a better and more effective act of advocacy, I think, than doing it here and now.

MR MANSFIELD:

I understand Your Honour's point, may it please Your Honour.

MR ILLINGWORTH QC:

So, if the Court pleases. Our written submissions, both primary and reply were carefully directed at the issues that are before the Court and our roadmap was structured to match the written submissions. At the 11th hour we received an issues list that proceeded in a different order from our own structure and by that stage it was too late to change the whole structure of our primary argument. But now, because we are replying to the US submissions, we will follow the amended US order of issues in order to try to avoid any further confusion. We don't necessarily accept that all their issues are appropriate, we will explain why as we go but before addressing those arguments, we need to respond to a small set of submissions made by counsel for the US, to which the appellants object and which they say are misleading.

So the first US submission to which we want to respond is the suggestion it was misleading or dishonest for Megaupload to refer to removal of files when they disabled links. The US invites this Court to draw inferences of dishonesty from the practice of taking down links in response to takedown notices which requested the takedown of links. The US says that the abuse tool response confirming the number of files and videos that have been removed and correspondence referring to files, videos, content, material and uploads was deceiving rights-holders and others. The US has placed an unreasonable interpretation, we say, on the abuse tool response messages. It is undisputed that by uploading files and videos, users added files and videos to their accounts, in other words, user files. The data portion of the files and videos were stored in what the US calls a content file, it has received various descriptions. In paragraph 162(b) of supplementary ROC 5 – that is where the US called it a content file.

WINKELMANN CJ:

Paragraph what of the supplementary ROC?

MR ILLINGWORTH QC:

162(b) of supplementary ROC 5. So that is what the US has called it at that point. The content file was subject to deduplication. This was not visible from a user's perspective. They still saw their user file. In paragraph 32(b) of the ROC the US describes how user files were stored.

GLAZEBROOK J:

Paragraph what, sorry 32(b)?

MR ILLINGWORTH QC:

32(b), Your Honour.

WILLIAMS J:

Big B?

MR ILLINGWORTH QC:

32 little b. That's in the first stage of the original ROC. The US describes how user files were stored. Importantly, they have their own – this is in 32(b), they have their own filename, exactly one associated URL link which is also the download number, a timestamp, a deletion status, and a reference to the content file containing the user file's data. For a more detailed description of how deduplication works in general, including that a content file can be used by multiple user files with different filenames, you can find that in paragraphs 81 to 95 of Professor Sallis' affidavit, particularly at paragraph 95, and the bundle reference is in the key documents, volume 5, 2502, and I think that was a reference that was requested by Your Honours earlier.

WILLIAMS J:

20…

MR ILLINGWORTH QC:

2502 of volume 5 of the documents bundle, Your Honour. In communications referred to by the US as misleading or fraudulent, references to the words "file", "video", "content", "material", or "upload" are in fact merely shorthand for

the user file, the user video, the user content, the user material, and the user upload. There is no evidence in the ROC or elsewhere that Megaupload intended it to mean anything else. There is no evidence to suggest that language was deliberately adopted to mislead or deceive. So that's the first response. The second US submission –

GLAZEBROOK J:

Sorry, can I just check, that's a factual response to their submission?

MR ILLINGWORTH QC:

It's – their –

GLAZEBROOK J:

The reason I ask is I thought you said something at the beginning that they weren't entitled to make that submission –

MR ILLINGWORTH QC:

No.

GLAZEBROOK J:

But this is just a factual response to it?

MR ILLINGWORTH QC:

Yes. We say those allegations are misleading, they're overegged, and the appellants take strong objection to those representations being made on evidential issues which are certainly not founded.

WINKELMANN CJ:

Okay, so it would be helpful if you could formulate your reply submissions with the main proposition and then simply your evidence references because…

MR ILLINGWORTH QC:

Yes, I'm going to do that, Your Honour, when I get onto the issues list, but there are four –

WINKELMANN CJ:

No, I mean your main proposition. I'm not referring to the link to the issues list because it was just difficult to follow. Your point in relation to that is then that it was overegging it for them to say that there was something misleading about the response to the takedown notices and the use of the anti-abuse tool?

MR ILLINGWORTH QC:

That's correct, Your Honour.

The second US submission is that Megaupload disabling links was insufficient to comply with the safe harbour requirements. The US invites this Court to draw an inference of systematic non-compliance with takedown notices, alleging that in response to a request to take down a link, only the link was taken down. Our Parliament, and Congress in the United States, recognise that the rights holder is in the best position to assess the infringement based on the context in which the link appears. The US submissions, however, seek to shift the burden of investigating circumstances from which infringement could be apparent to the ISP, in other words, shifting the burden to the ISP. Parliament did not burden ISPs with taking down all other user files with the same MD5 hash, in other words, the content, in response to a takedown notice for a specific user file.

O'REGAN J:

You've already told us all this, Mr Illingworth. We know this.

MR ILLINGWORTH QC:

Well, Sir –

WINKELMANN CJ:

This is what I was just saying, Mr Illingworth. I know that a lot of it, you have the responses to their submissions, but you've actually made them in your own principal submissions.

MR ILLINGWORTH QC:

Well, if I can simply move on to – there are four points which I have been specifically asked to address and I am endeavouring to do that very quickly, Your Honour.

The third submission is that the user access remained for sole uploaders after a link was disabled, one user has taken the same file and created multiple links to that file. That was a submission that was made that we haven't had a chance to reply to and was made by Mr Sinclair. The US purports to provide examples of a small number of users having multiple copies of the same file in their account. None of these examples claims that two or more such copies were active at the same time. The ROC acknowledges that links were disabled but does not give a date when this was done. There is no reason to believe that links were not disabled, that is, user files deleted before the user reuploaded the same file. There is no evidence that users were able to have multiple active files of the same file in their account. Indeed, the appellants deny that.

There is no requirement under the US DMCA or the New Zealand Copyright Act to implement a policy of notice and stay-down, that is, there is no requirement to block a user from uploading a file again after it has been removed from their account once. The implementation of such a regime is a discussion point in the material contained in the Timmins affidavit and we submit that that affidavit material should have been admitted and should be admitted in these proceedings.

The fourth and final submission is that it's common ground that Megaupload invariably responded to takedown notices and did so by disabling the requested link. Mr Sinclair submitted that this is an indication that Megaupload accepted the validity of the notices. The US alleges that by acting on takedown notices that were not complying with the requirements set out in the US DMCA or the New Zealand Act, Megaupload expressly accepted them as valid but the US has failed to provide any evidence as to what percentage of the takedown notices were complying with the notice

requirements or otherwise but they invite this Court to draw inferences of a conspiracy with users through so-called "repeat infringer biographies" based on takedown notices that do not differentiate between valid and invalid notices. Relying on such statistics, which could well be skewed by Megaupload's overcompliance, in other words, through the abuse tool and otherwise, is unreliable.

To draw any inference as to the validity of takedowns that the US would have had to include at least summarised evidence as to the nature of the notices processed in the ROC evidence, how the abuse tool worked, whether abuse tool takedowns complied with the notice requirements, what fraction of the notices received by other means approximately complied with the notice requirements, in all of that, there is just a very minor task compared against the resources that the US have put into building the case against the appellants.

I now want to turn to the issues in the order set out in the amended US issues list. I'm going to do this one step at a time so we make it absolutely clear what our response is. So issue 1 is section 131 of the Copyright Act, does section 131 criminalise online dissemination? We say no for the reasons given by Mr Mansfield and in particular, we strongly concur with Mr Mansfield's submission that the US interpretation of 131(1)(c) creates such indeterminate criminal liability that it cannot represent the intention and purpose of the legislature. That's the provision that has the "with a view to" infringing.

The next issue is what is the meaning of "possesses" in section 131(1)(c) and did the appellants possess the relevant protected works for the purposes of that paragraph? So on that issue, we concur with, and adopt, Mr Mansfield's argument and in particular, we say that Megaupload did not generally exert any form of control over uploaded digital files of the kind that would be necessary to constitute possession of those files within the meaning of the Copyright Act.

WILLIAMS J:

Megaupload never, sorry?

MR ILLINGWORTH QC:

Exerted any form of control over uploaded digital files of the kind that would be necessary to constitute possession of those files within the meaning of the Act.

The third point on this issue, are the safe harbour provisions in section 92B et cetera defences or are they elements of the offence to be negated to a prima facie standard and if so, were they? I think in the end, Mr Raftery conceded that they are elements of the offence to be negated where appropriate. We say that where they apply, the safe harbour provisions exclude essential ingredients of legal liability. It follows that where the safe harbour provisions are met, there is no infringement of the relevant copyright. It may be that we're on common ground now on that issue.

WINKELMANN CJ:

So this is an example – I don't want to take up time pointing this out, but you really aren't dealing with matters that are strictly in reply. You're actually repeating submissions that were advanced on your behalf by Mr Mansfield.

MR ILLINGWORTH QC:

Well, I'll endeavour not to do that, Your Honour.

WINKELMANN CJ:

Because you can assume that we understand the positions maintained.

MR ILLINGWORTH QC:

Yes, and we're certainly relying upon all of the written submissions that we've made. So I'll move on to the next question. The question was whether it's within the scope of question 1 to determine whether the appellants knew that they were dealing with infringing copies and if so, did the evidence establish prima facie that they had the required knowledge? We say that –

WINKELMANN CJ:

Sorry, what's the issue you're addressing now?

MR ILLINGWORTH QC:

It's issue 1D on the US list, Your Honour.

WINKELMANN CJ:

4D?

WILLIAMS J:

1D.

MR ILLINGWORTH QC:

1D, Your Honour. I'm just going to –

WINKELMANN CJ:

Mine says 4D.

MR ILLINGWORTH QC:

I'm trying to go quickly through the US list and just –

WINKELMANN CJ:

There's no 1D on my USA list.

WILLIAMS J:

Sorry, 4D, yes, you're right, issue 1, number 4D.

MR ILLINGWORTH QC:

4D, yes, sorry.

WINKELMANN CJ:

Thank you.

MR ILLINGWORTH QC:

I don't know how that happened. So question 1 deals solely with the classification of offences and so we say that the task of the extradition Court is to determine whether the foreign charge should be classified as an extradition offence. The two questions posed in 4D are both inappropriate in relation to the classification of offences under 24(2)(c). Whether the appellants knew they were dealing with infringing copies is an evidential issue and whether the evidence established that the appellants had the required knowledge is the same. Those two evidential issues do arise in the appeal but they're not classification issues.

The next point is whether the Copyright Act is the only source of criminal liability, is it a code? And we don't need to address that point. Mr Mansfield's covered it and will cover that again. The same applies to the limitation period argument. We rely on the submissions that he made and will make.

The fourth point, did the Court of Appeal correctly identify the elements of conspiracy? The answer is that the Court of Appeal did not adequately consider the difference between primary and secondary liability under New Zealand law and we say that the US hasn't properly responded on that argument.

WINKELMANN CJ:

You've really got nothing to say in reply since they didn't even deal with it, really.

MR ILLINGWORTH QC:

Well, indeed, Your Honour, so I can pass on from that.

Then in relation to individual counts, can the Crimes Act provisions apply to the conduct as alleged in the superseding indictment? We have a problem here because the US has handed up a new document which is quite lengthy, in fact two new documents. We haven't had a chance to look at that properly but what I can say is the contents of a charge in the foreign indictment don't

equate to the underlying facts of the foreign charge. Mr Raftery relied on *Fischbacher*. If the Court, and I'm not going to take you there, but if you look at the analysis in *Fischbacher*, we say that is very accurate and very correct in terms of the need to analyse the essential criminality but the underlying facts need to be separated from the foreign charge. They need to be identified separately from the components of the foreign offence. Now the US has had seven years to get its story straight on this issue but when asked –

GLAZEBROOK J:

Is this in reply or just repeating what you were saying before?

MR ILLINGWORTH QC:

No, Your Honour, I'm just going to respond to Mr Raftery's submissions and Mr Sinclair's submissions on that point.

WINKELMANN CJ:

I think there is something in what you say about the US handing up this material because it was not handed to you in advance.

MR ILLINGWORTH QC:

Well, Your Honour, if we could have the opportunity to respond on this point by memorandum –

WINKELMANN CJ:

So which point?

MR ILLINGWORTH QC:

To the Crimes Act pathways document which was given to us this morning, we're listening to submissions being made in Court, this is a new pleading, in effect, on a crucial issue which is the conduct constituting the offence. You will recall that Mr Raftery was asked to identify the conduct. He appeared to have some confusion about that. He came up with a couple of different theories. One theory was based on the notion that Megaupload had

encouraged other people to infringe copyright. That's clearly an allegation of secondary liability and we say that can't work.

Then he moved on to a second theory, it appeared, which was that Megaupload was expressly created as an instrument for copyright, in other words, a milking machine for monetising copyright. In fact, he said that that was Megaupload's raison d'être. The problem with that theory is there's simply no evidence to back it up. Allegations of fraud on a massive scale are easy to make but difficult to substantiate. The more extreme the allegation, the more cogency is required to establish the allegation evidentially. The US case does not come even close to establishing that Megaupload was established as a kind of copyright infringement milking machine and so that, we say, doesn't work either.

When we think about the conduct constituting the offence, these submissions from the US are being made in response to our argument that this is something that should have been done right at the very outset under section 18(4). It's a bit rich to come along now and reformulate the theory or reformulate the conduct when we're in the Supreme Court seven years later. In any event, Mr Sinclair then comes in and he is supposed to be dealing with the copyright issues but he starts off by trying to restructure the conduct argument. He began by referring to the indictment again, like Mr Raftery is, as if that told the whole story concerning conduct, but he then very quickly moves to selective examples of allegations in the ROC. In other words, on this view, we still end up fishing around in the ROC to try to find the essential conduct which forms the conduct allegation and that's not the way the process should work. The essential conduct should have been notified from the outset and it wasn't. The US has had, as I said, seven years to think about it. It's astonishing that we have got to the Supreme Court without any clear statement from the US of the essential conduct constituting each foreign charge.

WINKELMANN CJ:

Now we've got that point, I think.

MR ILLINGWORTH QC:

Now we've got this new document, if we can have an opportunity to respond in memo –

WILLIAMS J:

Are you talking about the pathways document?

ELLEN FRANCE J:

The Crimes Act pathways.

MR ILLINGWORTH QC:

The Crimes Act pathways document, yes, Sir.

WINKELMANN CJ:

Because I think Mr Illingworth says he's only seen it this morning and hasn't had a chance to respond and is your position that it's new material, that it's not simply a summary of what's already in the submissions?

MR ILLINGWORTH QC:

Yes. This is, in effect, a new submission and we need a chance to respond to it.

WILLIAMS J:

Are you saying that this is not an essentialisation of the –

WINKELMANN CJ:

No, that's –

MR ILLINGWORTH QC:

No, I'm not saying that, Sir. We had Mr Raftery's efforts, we had Mr Sinclair's efforts, we had Mr Raftery referring to the schedule at the back of their submissions, and then we get this today and what we say is we just need an opportunity to respond to that.

WILLIAMS J:

I took you to be saying that this represented a shifting of the ground?

MR ILLINGWORTH QC:

Well, I don't want to say that at the moment, Sir. I want a chance to think about it.

WILLIAMS J:

You haven't read it, that's your point?

MR ILLINGWORTH QC:

I haven't had a chance to look at it properly, Sir, no.

MR RAFTERY QC:

Can I just provide you with some reassurance, it's exactly what we were saying from us in the High Court that was dealt with by Justice Gilbert and it's extracted from that material and nothing more, so there are no new surprises for him. He can just rest assured. And it's also in the electronic case on appeal as well. So –

WINKELMANN CJ:

This document is?

MR RAFTERY QC:

No, not the document, it's a summary of that material so I just wanted to give my friend some assurance that he doesn't need to be quite so panicked by this document because it is material that's actually all in the electronic casebook truncated into this schedule.

MR ILLINGWORTH QC:

We just need an opportunity to check that and come back to the Court on it. That's all I was saying.

WINKELMANN CJ:

Fair enough, Mr Illingworth, and you were free to raise it at the time but I don't think there's any harm that you didn't raise it.

MR ILLINGWORTH QC:

No, well, we didn't want to slow the process down. A fundamental problem is that the US has proceeded on the basis of a blunderbuss approach and we just draw to your attention that this is mentioned by the Federal Court of Australia in a case called *Dutton v O'Shane*. That's in the US volume 3, part 2, tab 57, starting at page 1314.

WINKELMANN CJ:

Sorry, I've missed that reference.

MR ILLINGWORTH QC:

Dutton and O'Shane, it is US volume 3/2 tab 57 and it starts at page 1314. That volume isn't numbered, I don't think, and it runs from paragraphs 47 to 48 and 55 to 59 and the Court deals with the question, I think they call it the grape shot approach that had caused problems there. The Court then goes on to discuss transposition at the classification stage in a way that is extremely helpful, but we come back to that in relation to question 2. Then the next issue was whether the Court of Appeal was wrong to find, that as a matter of law, the appellants conduct was dishonest for the purposes of the Crimes Act provisions. We say the Court of Appeal fell into error on that point and its conclusions about dishonesty are wrong primarily because it has accepted that it can assume a copyright infringement. As His Honour Justice Gilbert rightly concluded, the conclusory assertions in the ROC are of no evidential value and the numerous repetitions of that assertion about copyright and copyright and infringement in the ROC do not make the US case any stronger. Once the numerous conclusory assertions are removed from consideration, there is no evidential basis for a conclusion that the appellants acted dishonestly or deceptively and we say that those matters of dishonesty and deceptive conduct are matters that are always regarded as very serious in the criminal process and require clear substantiation, even at the prima

facie stage. If dishonesty and deception are viewed as merely arising from an absence of authority, which is one argument that has been put, copyright status and infringement still have to be established. But even if a different approach could be taken, the appellants have not had a fair opportunity to defend themselves in relation to the approach that was adopted by the Court of Appeal.

WINKELMANN CJ:

So when we look at the United States list of issues, where are we at now?

MR ILLINGWORTH QC:

We are down to the heading, "Treaty-only pathways".

WILLIAMS J:

There are treaty pathways, that is under *Cullinane.*

MR ILLINGWORTH QC:

Treaty pathways, *Cullinane,* so we are going to skip that because that is for Monday. And then that brings us down to – for some reason my questions on my screen seem to have got a little bit into a different order. But we now come down to question 2 which was, "Was the High Court Judge correct to find that copyright in a particular work does not form part of the accused person's conduct." And this is supposedly limited to counts 4 to 8 which we say must be wrong. And so this is question 2, the question of whether it was necessary to show copyright status and the question of transposition. My friends have relied upon the paper on that point, which was handed up today. This paper has some real problems we submit.

WINKELMANN CJ:

Which paper?

MR ILLINGWORTH QC:

This is the landscape document here, the transposition.

O'REGAN J:

It is the one that was handed in last night, is that right?

WINKELMANN CJ:

Yes it is the one, that the transposition landscape is styled off.

O'REGAN J:

That one.

MR ILLINGWORTH QC:

That's correct Your Honour. If you look down the left-hand column, you will see *Norris, Schrieber, Griffiths, Dutton* and *Collins.* We then have a heading, "Transposed element" and then the extent of their inquiry that would be required under New Zealand law if double criminality is required. And then in the fourth column, "Establish on a prima facie basis section 24(2)(d)." Well the most obvious problem with that is that *Norris* is not a 24(2)(d) case. *Schrieber*, difficult to say whether the Court was dealing with a 24(2)(d) analysis at that point, it was certainly dealing with a classification. *Griffiths* is definitely not a 24(2)(d) case. *Dutton v O'Shane* was not a 24(2)(d) case.

WINKELMANN CJ:

Can you just slow down thanks Mr Illingworth. So *Dutton*?

MR ILLINGWORTH QC:

Dutton v O'Shane.

WINKELMANN CJ:

Schrieber hard to know. *Schrieber* isn't.

MR ILLINGWORTH QC:

Yes and –

WINKELMANN CJ:

Sorry, *Norris* isn't, *Schrieber* hard to know.

MR ILLINGWORTH QC:

Schrieber hard to know. *Griffiths* is not. *Dutton* is not and *Collins* is, and we'll come back to that. There is no authority that my friends for the US can rely upon to substantiate the theory of transposition that they promote for section 24(2)(d) purposes. This is a novel theory. It is out of line with every case on 24(2)(d) or –

WINKELMANN CJ:

Well what aspect of it, Mr Illingworth, what aspect of the theory?

MR ILLINGWORTH QC:

The aspect that you can assume ingredients of an offence. You can assume, for example, the status of a file as a copyrighted item or it's infringement.

ELLEN FRANCE J:

Can I just check, sorry, what do you say is the best case for your view on this?

MR ILLINGWORTH QC:

Collins Your Honour.

ELLEN FRANCE J:

Collins, right.

WILLIAMS J:

Is that the one you did say was a 24(2)(d)?

MR ILLINGWORTH QC:

It's the Canadian case, the very old Canadian case.

WILLIAMS J:

Right, that's the oath taking case?

MR ILLINGWORTH QC:

Yes Your Honour. Because what we say is that in that case the extradition commissioner took evidence about the foreign legal environment. Now there

is a very helpful analysis in *Dutton v O'Shane* which tends to put the *Griffiths* case into proper context. It was the predecessor to *Griffiths*, but the important point for present purposes is that all of these cases, including *Collins*, obviously have to deal first with the classification stage, what we would call the 24(2)(c) stage, which incorporated under the non-*Cullinane* approach section 4 in its vanilla, unadulterated form. For classifying at that stage it is clearly correct to take the allegations at face value. It's just a form of pleading. We take the pleading at face value and you say, if this set of conduct allegations were transplanted into New Zealand, and if those allegations were proved, would it amount to an offence under New Zealand law, and those cases all say the same thing. That's fine, we don't argue about that, and that is why Mr Raftery said we were ad idem in relation to the (c) analysis. We are. But when we get to (d), we couldn't be further apart. My friend says, and the Court of Appeal accepted this argument, we say wrongly, that once you got to (c) you can make the same assumptions at (c) as you make at (d).

WINKELMANN CJ:

(d), make the same assumptions at (d)?

MR ILLINGWORTH QC:

Sorry, at (d) as you made at (c), sorry, yes, Your Honour is right, and we say, no, that is never the way the prima facie case test has ever been accepted in any court, and our prima facie case test is not just something that can be interpreted in a vacuum in New Zealand in 2019, it has a history. It has a genealogy if you like. The genealogy goes back to the UK and the modern case law starts in 1974 with *Sotiriadis* and runs right the way through to the Privy Council's decision in *Deuss* in 2010. It has always been accepted, and Lord Millett's judgment in *Al-Fawwaz* is an excellent example of how this works. It's always been accepted that once you've got the classification matter sorted out, you then judge the evidence against the yardstick. What is the yardstick? The yardstick is a local offence provision and you measure the evidence against that yardstick in the usual way, and I think it was paragraph 113 that we got to the other day of Lord Millett's judgment and he says, "There

are no feats of imagination called for at that point in time, you're simply treating the evidence in exactly the same way as you would for any normal committal process."

WINKELMANN CJ:

I don't think that you're different to Mr Raftery on that then. Where he takes issue with you is whether it's necessary to prove foreign law.

MR ILLINGWORTH QC:

Yes, and this is where we get into a real mixer. He portrays me as saying that I'm on the fence, that I don't know whether it's US law or New Zealand law and I'm sort of having a bob both ways. I'm not doing that. What I'm saying is it has to be one or the other, and that whole issue is explained very well by His Honour Justice Duff in the Canadian *Collins* case. He says there are two ways of looking at it but the better way of looking at it is that you transplant the whole situation into this jurisdiction and you look at it in that way, and that's pretty much what Lord Millett says.

WINKELMANN CJ:

This is at the (d) stage?

MR ILLINGWORTH QC:

At the (d) stage. You transplant the whole of the underlying facts into New Zealand. The problem arises when there are issues of context. Now this is context and circumstances. Sometimes the conduct is so entangled with the local context that you have to take that into account. Now that is not the *McVey* point. It is not the point about whether foreign law should be taken into account when you're working out double criminality. It's an evidential point. It's an issue about what inferences you can draw from the facts. Now ironically I think it was Mr Raftery said that there was no evidence of, there was no expert evidence about the foreign environment. We were prevented from getting expert evidence about the foreign environment because of the funding stay. We wanted that. We pleaded with the US to give us the ability to spend some of the funds that had been released for defence purposes to

engage US experts to help us on A, technological issues, and B, legal issues about the local environment under the DMCA, because we wanted to be able to show that some of the things that Megaupload was accused of doing which were said to be wrongful or dishonest, could not properly be used as a basis for drawing adverse inferences. We were blocked, and that stay application was rejected in the District Court as irrelevant to the District Court proceeding on the basis that the District Court couldn't look at foreign law. Well it can't look at foreign law under the *McVey* concept to determine whether the foreign offence is an offence in the foreign country, but it definitely can look at foreign law issues when they relate to the very function of the extradition court, which is in issue in the proceedings, and that's a *Collins* issue.

It's also well considered in *Dutton v O'Shane* and it's well worth reading that, that judgment of the Federal Court of Australia. They go into that issue and *Schrieber* actually says that there are, although there's not a lot of case law on this issue, there are situations in which the local context in which the conduct actually took place needs to be considered. Now we simply say that if you look at the history of our section 24(2)(d) in context, in its historical context, there is no way in the world that you can assume essential points at that evidential stage. It's a different concept and this idea that you can assume something at 24(2)(c) and then carry it over into 24(2)(d) we say is heresy. We say it is wrong. There is no precedent for it anywhere in the world and our Court of Appeal is the only Court that has adopted that approach. To some extent Justice Gilbert did too, but he was working on a modified version of *Cullinane*, whereas our Court of Appeal said no, we're looking at double criminality, but they still read down the requirements of 24(2)(d) and we say that is something you simply cannot do. It is unprincipled. It conflicts with all of the prior case law, both in the UK and especially Canada where the normal prima facie case test applies.

WINKELMANN CJ:

I think it would be fair to say, well, I won't speak for the others in the Court, but I have felt that all parties' positions have shifted around on these points. It has been confusing, at least for me, to follow what the parties' position is.

I understood Mr Raftery to end by accepting that under section 24(2)(d) it was necessary for the Crown to meet the relevant prima facie evidential threshold in relation to, at least the specifically charged counts, that there was a claim to copyright, that someone was claiming copyright in the materials. So if you take those specific counts, what is the difference between you on those counts then? On the 24(2)(d) point.

MR ILLINGWORTH QC:

Yes, Your Honour is absolutely right. The US position has shifted considerably on that issue and we now have a modified theory that has been advanced in this Court, which is not the theory that was advanced in the Courts below. It's now I think said that as long as we have someone who claims copyright and that the work is the type of work that is capable of being protected by copyright, then that's enough. Well we don't accept that. We say it's necessary to prove the basic facts from which a conclusion can be drawn that copyright exists and has been infringed. It's a simple, straightforward application of normal legal principles.

GLAZEBROOK J:

So what do you say needs to be proved in – well it's only a prima facie case so perhaps you can say what needs to be done to show the prima facie case on your analysis?

MR ILLINGWORTH QC:

The prima facie case would be established on the basis of – we still need to determine whether it's US law or New Zealand law but let's say –

GLAZEBROOK J:

Just tell me what you say.

MR ILLINGWORTH QC:

The facts would be this is an original work. It was where it was created, because where it's created can affect whether copyright law applies. That it is a work that is not an infringing copy itself, and there are probably a number of

other ingredients, but it is a work that fits within the requirements of the relevant law such as the US copyright law, or the New Zealand Copyright Act. It's got to fulfil those basic ingredients. It's not a hard thing to do. Someone just has to set out the facts for a particular work and say this is a work that would comply with the copyright law for that country, and because –

GLAZEBROOK J:

Well if somebody's claiming copyright, aren't they saying that? That will be their evidence?

MR ILLINGWORTH QC:

Yes, it could be done that way, or it could possibly be done by an expert witness Your Honour.

WINKELMANN CJ:

I mean if it's New Zealand law would it really be necessary to do that because you can look at a movie and see that that's obviously the kind of work that would normally…

MR ILLINGWORTH QC:

It isn't necessarily that simple Your Honour. In many cases it may be but *Henkel* is the authority that tells us the basic points that are – the New Zealand Supreme Court judgment in *Henkel* tells us the basic points that are required to establish copyright. It is not particularly difficult and if those facts are established then we would say under our law that that work deserves to be regarded, at least prima facie, as a work that is protected by the law of copyright. We then go on to say what was done in relation to that work and was that conduct an infringing conduct. We don't simply say, well we're going to make some assumptions here. We're going to assume it's a work of copyright because it's a work that well, this kind of work would be a work protected by copyright. We just don't accept that analysis. It's not the legal analysis and we say that's completely wrong.

WINKELMANN CJ:

We'll just take a short break. You seem to be going quite well time wise Mr Illingworth.

MR ILLINGWORTH QC:

I'm trying Your Honour.

WINKELMANN CJ:

So how many issues have we got to go?

MR ILLINGWORTH QC:

I think we will be able to finish probably within about 20 minutes Your Honour.

COURT ADJOURNS: 3.35 PM

COURT RESUMES: 3.48 PM

MR ILLINGWORTH QC:

Thank you, Your Honour. I think I've figured out why we were not on the same page in terms of the issues. We've got a couple of different issues lists and I think I'm working off the US amended issues list.

WINKELMANN CJ:

We were working off the roadmap.

O'REGAN J:

Anyway, they're the same issues. They're just in a different order.

MR ILLINGWORTH QC:

Yes, I'm just saying that that seems to be the reason why we got confused but the questions are the same, as Justice O'Regan has just said, so we're now onto the heading "Are the judicial review proceedings an abuse of process?" and under that heading, the first question is "Was the Court of Appeal right to dismiss the application for judicial review?" We have already explained in detail in our written submissions that the judicial review was not an abuse of

process. Mr Boldt's two new cases don't assist with this present case. One of those cases was about a very old issue that had been brought up several years after the decision in question and the JR was regarded as an abuse of process for that reason. The other one was –

WILLIAMS J:
Which case was that?

MR ILLINGWORTH QC:
That was the…

O'REGAN J:
Acclimatisation Society.

WILLIAMS J:
The *Auckland Acclimatisation Society v Sutton*, was it?

O'REGAN J:
No, *Fraser*.

MR ILLINGWORTH QC:
So we've got two. We've got *Fraser v Robertson* which is 1991, and the earlier one is *Auckland Acclimatisation Society v Sutton Holdings Limited*. I'm not sure if they've been handed up but my friend has offered them to you but the 1985 case, the Court said very simply –

WINKELMANN CJ:
Which is the 1985 case? Is that *Acclimatisation*, isn't it?

O'REGAN J:
Yes.

MR ILLINGWORTH QC:
Auckland Acclimatisation Society. "The appeal in the judicial review proceedings served no useful purpose because it covered the same questions

as in the appeal by way of case stated." It's a complete overlap case and we say that's not the situation here. In *Fraser v Robertson*, the judicial review had been filed I think four years after the decision in question. It's a case on a completely different point, it's that delay in judicial review can be fatal. That's a well-established principle and not an issue.

Mr Boldt also cites *C v Wellington District Court*. However, there is a major difference between judicial review in relation to the old-fashioned committal proceedings and extradition proceedings. The reason is that in the old-fashioned committal proceedings, section 347 of the Crimes Act was available and virtually anything could be argued under section 347 to show that there was no case to answer so the local Court system had control over the whole process. Here, the local Court system loses control of the process and that is one of the major reasons why *Ferras* reconsidered the approach to extradition. Section 347, I think it's now section 151 of the…

O'REGAN J:
It's 147.

MR ILLINGWORTH QC:
So 147 of the Criminal Procedure Act, saying basically the same kind of provision, gave a very broad power for the Court to dismiss. So there was a comprehensive alternative and fully adequate procedure that could be invoked and so judicial review, of course, was not going to fly.

My friend referred to the Criminal Procedure Act. Well, we're not under that regime. He said it would drive a horse and cart through the new procedure. Well, this Court is not dealing with the new procedure and anything you say about the old procedure is not automatically going to apply.

My friend then referred to Justice Asher's decision on the question of the scope of the case-stated appeal. It's very important to understand that we were including errors of law, obviously as many errors of law as we could identify, in the case-stated appeal. Absolutely nothing wrong with that. That's

what we're supposed to do as representatives of the party who's been affected by it. The United States came along and said "You shouldn't be including procedural errors in the case-stated appeal process". Our response to Justice Asher was "If there's an error of law in the procedure that's been followed by the Court then it falls within the case-stated procedure because the case-stated procedure is about errors of law". His Honour accepted that and he said "You can bring procedural issues into the case-stated procedure so long as it involves an error of law". Whether that's right or wrong, His Honour did say "And we're going to have to consider the implications of that for judicial review further down the track". But His Honour was not purporting to say "That means that everything that you can argue about in this case falls within the case-stated procedure". Whether Justice –

WILLIAMS J:

Wouldn't a procedural error be an error of law by definition?

MR ILLINGWORTH QC:

Yes, that's what we were saying, Sir, that –

WILLIAMS J:

Well, then my question is really what's left over?

MR ILLINGWORTH QC:

Well, because broader concepts such as breach of natural justice and so on, yes, they can perhaps be portrayed as error of law but that was not the focus of that ruling by Justice Asher. He was simply looking at the question of whether the case-stated appeal was as limited as the US were trying to say.

WILLIAMS J:

I see.

MR ILLINGWORTH QC:

Now, of course, after that ruling has been obtained, the US argues that the case-stated procedure is fully capable of embracing all sorts of things and we

say no, that's not true either. That's going to the other extreme. It is a circumscribed procedure. It is limited to questions of law. When you're dealing with fundamental issues like the validity of the judgment or a breach of natural justice or unreasonableness or the exercise of the supervisory powers of the High Court, including what's known as the Bennett jurisdiction under *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138 (HL), a very famous landmark decision in the House of Lords. That's an exercise of the original inherent power of the High Court. It is not supervisory in the normal sense. The cumulative effect of decisions under what is sometimes called the innominate ground, these are all issues that can only properly be run under a judicial review application and we say there was no reason whatsoever to deprive us, the appellants in this case, of the opportunity to bring parallel review proceedings.

The US says "Well, there's an overlap. You've got errors of law and you're bringing up those same errors of law in the judicial review". Yes, we are, of course we are, because the Court in the judicial review proceedings might just want to say "Let's look at these errors of law in combination with the other things that have gone wrong in this case and the cumulative effect might be such to invalidate the proceedings even though one issue on its own might not".

There's plenty of authority for that cumulative effect approach. We've given the authorities such as Justice Tipping's judgment in *Madlener v Lester & Anor* (31 July 1996, High Court, Christchurch, CP263/91), there's a judgment of Justice Wild that we've referred to, there's a whole string of cases, Justice McGechan has considered it, and this is a case where the cumulative effect of the errors and the things that have gone wrong well justified judicial review. This is not a case like *Fraser v Robertson* and it's not a case like the *Auckland Acclimatisation Society*. There were big issues involved, there were human rights involved, because these people sitting behind me are threatened with being taken offshore to face potentially very lengthy prison sentences. If this is not a case for anxious scrutiny, I don't know what would be, and that kind of perspective cannot be brought to bear via the case-stated

process. This is classic judicial review and in our submission, it is completely wrong for the US to contend otherwise.

We've set out at length in our written submissions why *Tannadyce* doesn't apply, why this is –

WINKELMANN CJ:

Yes, and we have those submissions and we do understand your point.

MR ILLINGWORTH QC:

– and I'm not going to repeat those. So Mr Boldt's submissions were very powerful and he has presented an argument which does credit to him and to his client but in our submission, he is simply wrong to suggest that the case-stated appeal covered the same ground as judicial review and that therefore, we were out the door. In our submission, that simply fails to understand –

WINKELMANN CJ:

Yes, so I think the thing you might want to reply on is whether there is any issue that was not addressed which was raised.

MR ILLINGWORTH QC:

Yes, Your Honour. For example, we say Justice Gilbert limited the judicial review application to bias and predetermination. He mentioned other issues but certainly did not look at the other issues in accordance with the amended statement of claim in the judicial review proceedings, there's no reference to the affidavits that were filed in those proceedings –

WINKELMANN CJ:

Yes, but what are the issues which were not addressed?

MR ILLINGWORTH QC:

Well, His Honour did not, for example, even mention the *Bennett* jurisdiction as to whether or not the evidence in the judicial review would warrant a stay

granted by the High Court as a form of original application. That was pleaded. That was supported by evidence. It was not considered. There was no consideration of whether the cumulative effect of the errors might be able to invoke the innominate ground or the residual discretion.

In our submission, the idea of focusing on the stay applications, there was a major issue about the funding stay, there was a major issue about the misconduct stay. His Honour in his leave application said we didn't need leave for those issues because we had a right of appeal in relation to judicial review which seemed to go completely against what he had said in his primary judgment on those issues. We then get to the Court of Appeal and the Court of Appeal only looks at questions 1 and question 2, excludes judicial review as an abuse of process and so we miss out on our normal appeal right for the judicial review proceeding. We have been short changed in relation to judicial review, not by a few cents, not by a few dollars but by a very long chalk. In our submission that was a denial of justice. It was a denial of the rights that we have under section 27 of the Bill of Rights and at common law.

GLAZEBROOK J:

And just to answer Mr Boldt. What were the things – are these the same things that were not dealt with that you say couldn't have been dealt with under the case stated procedure?

MR ILLINGWORTH QC:

There are some things that were dealt with in a relatively cursory way. The funding stay was one of them and the misconduct stay was another. We say that the learned District Court Judge made very serious errors of fact in law in relation to both stay applications. Now it is certainly true that Justice Gilbert looked at those and referred to them in his judgment, but he did not consider them with the full range of powers and abilities that he had in the judicial review proceedings. There are other issues that were not dealt with at all as I have just mentioned.

GLAZEBROOK J:

And do you say they couldn't have been dealt with under the case stated procedure or just weren't?

MR ILLINGWORTH QC:

They could be dealt with to the extent that an error of law arose but no further than that. The other point is –

WINKELMANN CJ:

And the main ones you identify are the *Bennett* ground and the innominate ground which we might call it the cumulative wrongs, justifying the stay. Those are the two things?

MR ILLINGWORTH QC:

That's correct Your Honour but also simply not looking at those fundamental validity issues in accordance with the pleadings and the evidence in the JR.

WINKELMANN CJ:

Can I just ask you to tell me what you mean by looking at the fundamental validity issues?

MR ILLINGWORTH QC:

Well yes, well that brings me on to the next point so perhaps I can deal with it under what I have as point 10. The question is, is the "nullity resulting from fundamental error" question properly before the Court. Now where that nullity point has come from, I am not sure because it has never been the argument for the appellants that we had to demonstrate absolute nullity in order to be able to succeed, either under the case stated appeal or the judicial review. I need to deal with those two things separately.

Under the case stated appeal, we go back to section 72 and 73 which incorporate the powers of the Court. Section 73(3) of the Extradition Act says that the Court can confirm a judgment in the Court below if there is no substantial wrong and no miscarriage of justice.

WINKELMANN CJ:

I think we have submissions on this point.

MR ILLINGWORTH QC:

You do Your Honour but what I am pointing to is that a finding that there was substantial wrong or substantial miscarriage of justice, does not mean we have got to show that the whole thing was a nullity. It is a different issue. Nullity is a very extreme concept. We have never relied upon that concept. The US has accused us of evoking that concept but it is not correct and somehow that has got into the issues list in a way that is extremely unfavourable to the appellants and which is completely wrong. So that is one point in relation to invalidity. The traditional approach in judicial review is to look at all of the things that have gone wrong in the case and to decide whether the decision is legally valid in accordance with the ordinary principles of administrative and constitutional law and I suppose the rule of law.

If the Court decides that the decision is so seriously affected by error and procedural error and so on, the Court then has the discretion in public law to declare that decision to be invalid and to set it aside or quash it. That is just administrative law 101. The Court doesn't have to go to the extreme of saying, this is a nullity. It becomes a nullity when the Court says so. It comes void ab initio. Professor Wade's theories have permeated our administrative law for decades and his principle that unless a decision is completely outside the jurisdiction of the decision maker, the decision stands unless and until it is set aside by a Court of competent jurisdiction.

O'REGAN J:

We didn't have any oral submissions on this did we? I just don't know what you are replying to here because Mr Boldt didn't address us on this.

WINKELMANN CJ:

Mr Illingworth, we really do have the point and I appreciate your point. I don't know where the word nullity crept in. Maybe it crept in from us. I am not sure.

GLAZEBROOK J:

I think it was a discussion of *IH* wasn't it.

WINKELMANN CJ:

In any case, we take the point that you make about nullity.

MR ILLINGWORTH QC:

So what we say and just to finish on that point. Under the case stated appeal, a substantial wrong or miscarriage of justice. Under the judicial review, the Court looks at the validity of the decision. The case stated appeal as signed by the learned District Court Judge simply asks the High Court to say whether I erred in law. It does not ask the High Court to say was my decision invalid and nor would it be in any way usual for that to happen and we say that there are two different processes. Two completely different perspectives and although Mr Boldt said, well change of perspectives doesn't mean anything, we don't accept that. We say that the perspective that is brought to bear by judicial review is crucial.

WINKELMANN CJ:

And your point is that the High Court Judge didn't address that question because he wasn't addressing your judicial review.

MR ILLINGWORTH QC:

Correct Your Honour and the Court of Appeal didn't do so because in their view, our judicial review was an abuse of process. And then I had it as paragraph 11 and I think it is the last one. It builds on the previous point and says, if so, in other words, is that question before the Court and we say it is. "If so, was the District Court decision a nullity and could the case stated appeal as dealt with by Justice Gilbert remedy any problem." Again, we say that's the wrong question. The question is, under the case stated appeal, was there a substantial wrong or miscarriage of justice and if there was then the power to confirm was not available and they say that is a question of relief. And this Court has the same powers in relation to relief as the High Court had on appeal and in judicial review, as I have just said, the question is, was that

decision valid or invalid. We say that it was invalid. Now my friend Mr Boldt says that in effect the situation was cured because the High Court judgment was fair, the High Court Judge found that the District Court process was fair. That is not correct.

WINKELMANN CJ:

I think we understand. You are saying it was beyond the statutory powers in the entire concept of the case stated.

MR ILLINGWORTH QC:

Yes but I am also saying that His Honour Justice Gilbert did not say that the process below was fair. In fact he ruled out bias and pre-determination and that aspect of fairness was not accepted. But what he did say was that the District Court Judge had misread the statute, had failed to apply section 24(2)(c) and as a result of that our submissions were not heard. That is a breach of natural justice. That is not a finding of fairness, that is a finding of unfairness. So we say he was wrong – well Mr Boldt's submission was incorrect. We also say that the High Court judgment was flawed in any event and that comes back to *Cullinane* and the question of transposition. If the Court pleases, those are my submissions.

WINKELMANN CJ:

Thank you, Mr Illingworth. Mr Mansfield, are you wanting us to adjourn shortly whilst you sort yourself out or are you in a good position as to –

MR MANSFIELD:

I don't want to freak you out but I've got a bundle of your hardcopies to take up to the podium but that won't take me that long. I don't mind if you stay there, Ma'am. Just while I just get the material just there, I have prepared just an additional bundle for the Court. I wonder whether your Registrar could just hand that out.

WINKELMANN CJ:

Well, what is that Mr Mansfield?

MR MANSFIELD:

It's just some materials that we've referred to but we're giving it to you in a hardcopy.

WINKELMANN CJ:

What kind of materials?

MR MANSFIELD:

It's exhibits that were attached to an affidavit which was properly before the extradition court in the District Court, Ma'am, but it's just a hardcopy so that I can refer my submission to it without having to take you to the electronic.

WINKELMANN CJ:

And how are you labelling it, as supplementary bundle 3 or how's it labelled?

MR MANSFIELD:

Well, here it comes. It's just called "Screenshots", Ma'am. I'll explain it when it comes. It's not cases. It's not new documents.

May it please the Court, Justice Binnie in *SOCAN* said "Don't shoot the messenger!" and if we look at the amendments which were made to the 2008 Act, that simple message was really right behind it, don't shoot the messenger. It is only if, in my submission, an Internet service provider becomes a direct infringer that they have an issue under our Act.

I want to deal with, if I can, just a few brief points in relation to the code issue and I simply want to give you a reference in *Dowling* because my learned friend Mr Raftery QC, when he made submissions to you, suggested that it could be quite confined, the judgment. I have already taken you to the learned author of the most significant US text on copyright but really, you need go no further than the judgment itself and if you look at page 3137 of the judgment, you will see that the Supreme Court in the United States always intended its decision to have wider application than the simple case that was before it and the Court might recall in *Dowling*, the Supreme Court went right

through the history of the particular offence provision it was concerned with which was just a general dishonesty provision and also went right through the Copyright Act defence provisions and then at the very end, summarised the position. But certainly if this Court looks at *Dowling*, it's perfectly clear the wider –

WINKELMANN CJ:

You can assume we have that because I actually put that, that was your submission, I put that to Mr Raftery.

MR MANSFIELD:

Yes, you did, Ma'am. I just wanted to give you the page number. That was it.

WINKELMANN CJ:

And that page was?

MR MANSFIELD:

3137 of the actual judgment. In relation to the issue as to where safe harbours fit, I have already submitted to you that they're a permitted act and an assessment as to whether an entity falls within the safe harbour is required before there can be a determination as to whether there is an infringement which is a step prior to considering an issue as to whether there is an offence under section 131. The decision of *Lenz v Universal Music Corp* (Nos. 13-16106, 13-16107; 9th Cir, 17 March 2016) will provide assistance to the Court in that regard. *Lenz* makes it perfectly clear, although it deals with the –

WINKELMANN CJ:

Which case is that, *Lenz*?

MR MANSFIELD:

Lenz, L-E-N-Z, and we've already provided that to you and we gave you – actually, I'll give you the electronic reference just in case it's not there for you.

WILLIAMS J:
Did you hand it up?

MR MANSFIELD:
No, it's in the bundle.

WINKELMANN CJ:
We'll find it, Mr Mansfield.

MR MANSFIELD:
Right, thank you. It's a decision that deals with a sound clip of Prince in a video which was uploaded and the mother who had filmed her child dancing to the music claimed that she was entitled to upload and keep the video up. The company that was behind Prince tried to pull it down through a takedown notice and there was a dispute, she contested their right to do so and the Court in the United States found that fair use, which is also a very important permitted use, which we also have within our Act, meant that if the work fell within a permitted use then it was authorised by law and there was no infringement.

I also want to refer the Court to *CoStar Group Inc v Loopnet Inc*. *Loopnet* is also before you in the electronic materials but it is also an important decision in relation to what the position is in the United States. It provides quite clearly that "Where the infringing subscriber is clearly directly liable for the same act, it does not make sense to adopt a rule that would lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet. The court does not find workable a theory of infringement that would hold the entire internet liable for activities that cannot reasonable be deterred. Billions of bits of data flow through the Internet and are necessarily stored on servers throughout the network and it is thus practically impossible to screen out infringing bits from noninfringing bits. Because the court cannot see any meaningful distinction (without regard to knowledge) between what Netcom

did and what every other Usenet server does, the court finds that Netcom cannot be held liable for direct infringement."

WINKELMANN CJ:

So just in reply, Mr Mansfield, this seems to be a repetition of your submissions.

MR MANSFIELD:

I really just want to pick up a point that Justice O'Regan made, Ma'am, when he was asking my learned friend Mr Sinclair a question regarding "Well, do we have evidence of industry practice before us?" and in my submission, and I'll come onto this, given what the United States claim regarding a conspiracy to defraud, if the United States is going to claim that Megaupload has set up its service in a way that the Court can infer a fraudulent intent then it would be necessary, would it not, for the United States to provide itself industry evidence which shows that the way in which Megaupload and/or operated was distinctly different to that of the entire industry or in such a way that would allow the kind of inference that the United States asks do we draw possible.

When one reviews all of the authorities which have been provided, it's perfectly clear, in my submission, that Megaupload simply operated as a standard internet service provider and the focus must be on the fact that it provides a service. It provides a service as a conduit and it also provides a service as storage and/or hosting like many of the internet service providers which have been similarly pursued. There is nothing in the ROC which established that Megaupload was operating differently than any other internet service provider or had been set up differently.

There was a suggestion that *Grokster* provided the United States with some assistance. The difference there with *Grokster* and with one other entity that has been found to have assumed control or had sufficient control in relation to user data was in *Grokster*, not only was there general discussion between senior members of that organisation in relation to an intention to encourage infringement specifically, so to encourage infringement specifically by the way

in which they operated the service, but they were also presenting to the world outwardly through their advertising that that is what they were doing. So the *Grokster* decision is informative so far as it is clear that the Court, in *Grokster*, noted and considered it significant the way in which it was conducting itself with the rest of the world, conducting itself with users, and that is one of the reasons why, although it's in the material before the District Court that I provided you with the supplementary material, because the United States in the ROC presented no evidence as to how outwardly Megaupload presented to the outside world or how it marketed itself except to the extent that it talked about the rewards programme and time viewing limitations.

What was required after the United States had effectively shut down the entire operation of the company was that on behalf of Mr Dotcom, we went back through a website called the Wayback Machine which takes snapshots of various different Internet sites and was able to print off how in fact Megaupload was presenting itself to the rest of the world, and the document I've handed up shows you screenshots which are in the material from its website. At no point in any of that material will you see Megaupload presenting itself to the outside world as a site solely for the purposes of infringement. At the very bottom, you'll see a reference to the Megaupload promotional video which was played in part in the extradition hearing in the District Court but it was stopped by the learned District Court Judge. Again, if you were to view that video, the way in which Megaupload presented itself to the outside world, it was not as a company that was encouraging or seeking to induce infringement.

So when my learned friend makes that submission rather broadly, there is an absence of any evidence within the ROC that Megaupload was created with that intent. There is an absence of any evidence within the ROC that it had marketed itself as an infringement site or a site that you could go to to infringe and that is why, in my submission, that material is important. But beyond that material, as I've said, there is an absence of any evidence in that regard. What you do have is evidence, as I have already submitted, of general knowledge of infringement, much like in *YouTube*, the similar types of email

communications as you will see being referred to by the Court in *YouTube*. In addition, you have a high percent, on the US case, of infringing material through the website, again, comparative to *YouTube*, and you know from *YouTube*, that in and of itself is insufficient. So where is the evidence within the ROC, despite these bald assertions in this Court, that show that Megaupload or any of the particular appellants were presenting themselves to the outside world as a site you would go to to infringe, because that is what is required for this theory of inducement which is discussed in a civil capacity in *Grokster*. There is an absence of it.

In my submission, when it comes to conspiracy to defraud in relation to copyright, it's necessary for the United States to allege a conspiracy to infringe a particular work. It's not appropriate for them to assert a conspiracy that does not relate to specific work because as in *Henkel*, a work-by-work analysis is required and if one looks at the US authorities which have been placed before the Court, that is the way in which all Courts approach the issue in relation to copyright infringement, so it relates to specific and identifiable works which are established as having copyright or being pursuant to a license that none of the permitted acts apply to the work.

WINKELMANN CJ:

So *Henkel* is, sorry, it's not a conspiracy case, is it?

MR MANSFIELD:

No, it's not, but there is a need for specific knowledge in relation to specific works and in my submission, simply asserting, which is effectively what the United States are asserting here, namely a generalised knowledge and a continuation operating an Internet service provider with that generalised knowledge is sufficient, all of the United States cases, which is where relevant authority of this kind comes from, tells us that's not enough. Even if they're quite prepared to profit from the reality of infringement through their site, not enough, and in reality, the communications which the United States rely on are in that category.

My learned friend in his submissions referred to a joint submission made by a number of copyright owners, including complainants in this proceeding, as part of the United States' review, and that document came from the US Copyright Office, Library of Congress, and he's quite right that that material was sought to be admitted in the High Court as fresh evidence through the Timmins affidavit but it was material that was simply pulled off the US Copyright Office, Library of Congress, and although it relates to a submission by copyright owners, what it does in effect is set out their complaints regarding determinations in the United States by their Courts, including all of the decisions which have been presented on behalf of the appellants to this Court, so that you could be informed in relation to the law as it applies in the United States at least, internet service providers, which is similar to the position here, and that is why when I opened to you, I made the point that the United States, in this extradition hearing, is simply making the complaint to this Court which is the complaint it's making in the US to try and get amendments to their legislation because it's their position that it does not work and if you don't have the reference, it's KD-AUT.307 and in my submission –

O'REGAN J:

But it's not in evidence.

MR MANSFIELD:

I am just about to address that Sir. In my submission, despite the fact it was sought to be produced, as fresh evidence in the High Court on appeal, it was determined that it could not be and that is because an appeal, in relation to an extradition hearing, can only proceed on the basis of evidence which was received by the Court in the District Court and it wasn't available at that point. So for that reason it wasn't admitted in the High Court but nonetheless in my submission it could be received by the Court as an authority and certainly all of the matters raised in that document, are in fact raised by the US copyright office. In its notice of inquiry document, which is held at the library of congress, which is KD-AUT.134 which must in my submission be an authority that this Court can receive. And that simply sets out the complaints by the copyright owners regarding this whack-a-mole issue which they acknowledge.

They acknowledge that internet service providers on receipt of a takedown notice which identifies a URL simply delete the URL, rather than the underlying file because of the issue of deduplication. And in fact if you look at most of the authorities which had been presented, you will see that's the URL which is being discussed as being part of the takedown which is provided to the internet service provider for action and as we discussed earlier, when we looked at the indictment, for the counts in the indictment where there is any reference to a takedown notice, there is only reference to a URL and they describe the whack-a-mole issue, that you take one URL down and another one pops up on a third party hosting site and hence their issue. But the law in the United States is simply that that all an internet service provider is required to do, is to remove access to the underlying URL and if that is what they do, they have complied with the requirement and there cannot be an inference that they have knowledge.

GLAZEBROOK J:

Even if they do?

MR MANSFIELD:

Well they gain knowledge through that process of a particular file and all they are required to do in relation to that URL is to delete it. And the point I want to make Ma'am is this. That if you look at our own Copyright Act and it is in this purple volume here, it is volume 2.

GLAZEBROOK J:

Where are you referring us to?

MR MANSFIELD:

Page 500 thank you Ma'am.

GLAZEBROOK J:

Of your authorities, is it?

O'REGAN J:

This is the legislation volume?

MR MANSFIELD:

Yes, 92C. Page 500. You will see that our legislation is very similar to what is required in the US. It simply requires deleting material to prevent access to it so if you comply with that, that is sufficient. And then if we turn, regarding the issues with deduplication as to why you can't simply delete the entire file, there are two issues which I don't know if they've been made clear. In the United States the DMCA requirement, as you can see in *Lenz*, the person who has uploaded the file who is told that it has been removed pursuant to a takedown notice can dispute that and the file has to be reinstated. So if the file is deleted, it is no longer held by the internet service provider then the entire dispute process in the United States would effectively come to an end. So simply deleting the URL or removing the URL is sufficient and if we look at page 485, we will see section 80, and section 80 talks about how a user can make a backup of a computer program.

WILLIAMS J:

Can you give me the page number again?

MR MANSFIELD:

Sorry Sir, 485, so you can make a backup of your own computer program and store it. Now that just makes my point. One user's computer program may be infringing but a different URL, pointing to the same file, may be non-infringing because it may be illegitimate backup of the user, that is why you can't delete the file; you just delete the URL. And that is standard known practice in the United States and even though the United States didn't seek to call that kind of evidence as part of its ROC. Now you have heard from my learned friend Mr Illingworth QC, that the appellants sought to and after we managed to secure funding, after stern opposition, we received correspondence from the US telling us that if we briefed that kind of evidence in the United States the witness would be liable for a civil or criminal liability. And that is document before you, D5.

O'REGAN J:

What is this replying to?

MR ILLINGWORTH QC:

This is the point regarding Your Honour's question that there is no –

O'REGAN J:

Nobody said anything about this, so just stick to reply otherwise we will never get to the end of it.

MR MANSFIELD:

Well Your Honour asked why there wasn't any industry evidence.

O'REGAN J:

No I asked if there was any. I didn't say why there wasn't any.

MR MANSFIELD:

Well there isn't Sir.

O'REGAN J:

I know and that is the answer, there isn't any.

MR MANSFIELD:

Let's turn to page 488. There we see that under section 81A, someone can make a recording or keep a copy of recording for personal use. So the same point I make in relation to a computer program would apply. In New Zealand there is no permitted use to make a backup of a film or a TV series but in Canada there is. So, under the Copyright Act 1985 of Canada, section 29.2.4.1 any user is entitled to make a backup of any work. So each jurisdiction has entirely different permitted acts under their legislation which makes it all but impossible for an internet service provider to know whether a file on their service is infringing or not without significantly more information. That is why the obligation is on the copyright owner to take action to enforce their property because as the authorities will make it very clear, it is the

copyright owner who knows who should have or who should not have their material. And if they get it wrong, then there is a dispute process and the file may be required to put back up and put back into the user's possession.

Now in addition to that there is the fair use provision, that is section 42, where anyone can have a file for criticism review and news reporting. So, anyone doing a review on a work, if they were provided access to it or had access to it for that purpose, would be entitled to store that work. So just the fact that they had that work would not mean that it wasn't printing. Now the point I am trying to make is that you can't therefore simply delete the file because a number of URLs might point to it. Some of the URLs might be pointing to a user's possession of that file, which would amount to infringement, but another user might have possession of the same file and it would not be infringing, for the various different reasons which are set out under the permitted acts.

That is why the United States consider it important to consider such issues as fair use, or other permitted acts, because they protect other principles which are considered important in the United States, and our Parliament considered important here, and we see that balancing exercise go on through the Parliamentary review. So this suggestion made in our jurisdiction that can't be made in the United States because it's unsustainable there through their own authority, doesn't bear scrutiny at all.

Now you'll need to be patient with me for a moment because I am going to refer to something I have referred to already in my submissions, but the point is a brief one but it needs to be made, in my submission. Can I just take you to this volume please. It's appellants' authorities bundle, volume 11. I can just give you the reference, if it's easier, if you don't want to pick it up, I can read the passage to you.

WINKELMANN CJ:

Well you can just point it to us and we can highlight it because we've probably read most…

MR MANSFIELD:

That's all I'm going to do. So page 4883, there's a heading, "Internet service provider obligations." And you'll see they recommend –

WINKELMANN CJ:

What document are we in?

MR MANSFIELD:

We're in the second reading of the Bill Ma'am. Part of the Parliamentary review we undertook.

O'REGAN J:

This is in 2008 or 2011?

MR MANSFIELD:

The 2008 one Sir, second reading, 4883. All I want you to do is just underline, or highlight what you see under the heading, "Internet service provider obligations". But what you see is the deliberate extension of the definition of "internet service provider" at that stage in the process. That means that Parliament was including internet service providers who host to the definition. Now before that, if you look at the definition it would just include those internet service providers who provide conduit services rather than hosting services. And when you look at section 92B it's now clear, given that Parliament expressly at that stage at the second reading wanted to include "internet service providers who host" into the definition of "internet service providers" rather than simply providing storage that they would be covered under section 92B. Now when you also take into account section 40, which says that each of the sections that relate to permitted works are to be read independently, that means section 92B and 92C are read independently. If you fall within one of the permitted acts then it's non-infringement, and when they deliberately amended the definition of "internet service provider" they included sites such as Megaupload within the protection of 92B, and it's clearly, expressly a safe harbour against civil and criminal liability.

Now I just want to ask this question. What would be the point in providing either a criminal or civil safe harbour if you would only qualify if you had no civil or criminal liability in the first place. So if there was no potential civil or criminal liability, what would be the point. It's a nullity. It would be a waste of time. But it couldn't be clearer that Parliament intended a hosting site to be included under section 92B rather than just internet service providers such as Vodafone or Spark or the like. So that was a deliberate step taken by Parliament, and if you were to read section 92B in the way in which my learned friend promotes then that deliberate decision made by Parliament is also not enforced.

WINKELMANN CJ:

I'm sorry, I've lost the thread on this point. How does he read section 96(2)(b) in a way which you're taking exception to?

MR MANSFIELD:

He says that 92B "without more", "without more" is a reference to 92C, so he connects the two.

GLAZEBROOK J:

That's not how I udnerstood. He said just "without more" means without actual knowledge –

WINKELMANN CJ:

Yes.

MR MANSFIELD:

And that's my point. If you had to be without liability. So if you had to be without knowledge then you wouldn't need a safe harbour in the first place. You wouldn't need a civil or criminal safe harbour. So…

GLAZEBROOK J:

Well they thought you did, didn't they, because they thought otherwise they could say well there is this infringing material on your site, you're making copies of it –

MR MANSFIELD:

But if you didn't know then you wouldn't be liable for it.

GLAZEBROOK J:

Well you would if you were making direct copies, wouldn't you, because that's a direct infringement.

MR MANSFIELD:

But you wouldn't, well in my submission the very fact that you get both civil and criminal immunity is a suggestion that 92B stands alone and the inclusion of hosting sites such as Megaupload means it was a deliberate decision to give it that protection or that immunity, and the Court needs to be cautious before removing what was intended to be a comprehensive safe harbour for Internet –

GLAZEBROOK J:

If you've got complete immunity, why do you need 92C? The same point could be made against you, couldn't it, that you're trying to make against the Crown.

MR MANSFIELD:

Well the Court might think that when Parliament extended the definition of "internet service provider" so when it extended it beyond simple sites that provide access with user A and user B, it didn't appreciate that it would be providing protection under 92B, but that's what it's done.

GLAZEBROOK J:

So section 92C was just a mistake and it means it's not necessary, because in any event you don't have any liability under 92B because you have a complete immunity.

MR MANSFIELD:

Well 92C –

GLAZEBROOK J:

Unless you do something other than B, come within the definition of "internet provider".

MR MANSFIELD:

92C was already going to be there in relation to storage, so it was always going to apply to a site that was hosting, but when they included hosting sites into the definition they also included them within 92B.

WINKELMANN CJ:

So your position is that there is a complete immunity for civil and criminal for ISPs if, irrespective of whether they know about the presence of infringing material, if they respond to takedown notices appropriately?

MR MANSFIELD:

That's the primary submission made on the basis I've just presented. The fall-back submission which I've also made is that under 92B an internet service provider has civil and criminal liability for all of the services as defined for an internet service provider, but wouldn't have protection for a service provided outside that and then in relation to 92C it's a carve out in relation to storage. But "without more" doesn't relate to knowledge and the US cases make that clear. "Without more" relates to providing a service outside the definition, which includes and specifically identifies the services that are captured.

GLAZEBROOK J:

So 92B has nothing to do with takedown notices, it's just a blanket immunity?

MR MANSFIELD:

In relation to all services as defined for an internet service provider.

GLAZEBROOK J:

Which you say includes storage.

MR MANSFIELD:

Yes, but Ma'am how I would say it's then worded in relation to storage 92C applies so this section applies if an internet service provider, so with the same definition, "stores material provided by a user of the service," which a hosting site would, and in relation only to storage 92C would apply.

So just in relation to storage. You would lose the immunity just in relation to storage which is really only where you're exposed or where they intend for you to be exposed so when you're hosting it if you don't comply once you get actual knowledge or objective knowledge. So it's just in relation to storage. So it's just carving out storage for special treatment.

WILLIAMS J:

If that analysis is right then the "without more", the "more" would necessarily take you outside being an ISP and so you wouldn't have protection anyway? You wouldn't need the "without more" because to the extent that you're doing something outside the definition of ISP, you're not protected anyway?

MR MANSFIELD:

No, because storage is not outside –

WILLIAMS J:

I'm not talking about storage, I'm talking about 92B.

MR MANSFIELD:

Yes.

WILLIAMS J:

So it says just because you use the services of an ISP, doesn't make the service provider liable without more. So we're trying to work out what "without more" means. You say "without more" must mean "without services other than those defined within the definition of 'ISP'"?

MR MANSFIELD:

A service outside the definition.

WILLIAMS J:

That's right, yes, so the problem with that is if you're providing a service outside the definition of an ISP, these provisions don't apply anyway so the 92B is irrelevant?

MR MANSFIELD:

They only would not apply in relation to those additional services, Sir.

WILLIAMS J:

But they're the only services that count on your analysis?

MR MANSFIELD:

No, because an internet service provider is also likely to be providing services within the definition.

WILLIAMS J:

Yes, but to the extent that it's not, it's not.

MR MANSFIELD:

Yes, but –

WILLIAMS J:

You can be more than one thing.

MR MANSFIELD:

You can but you only would not have protection for the service that's not within the definition. "Without more" has been discussed in United States cases to mean just that, looking at the services provided, and we took –

WILLIAMS J:

Which case?

MR MANSFIELD:

The case I took you through in the primary submission.

WILLIAMS J:

Yes, what was it?

WINKELMANN CJ:

Was that *UMG*?

MR MANSFIELD:

UMG is one and on Monday, I'll give you the other cases that make that clear.

GLAZEBROOK J:

But you do accept that if you don't respond to a takedown notice, immunity is lost?

MR MANSFIELD:

In relation to storage, Ma'am, yes.

GLAZEBROOK J:

Yes.

MR MANSFIELD:

And can I just be clear, that doesn't mean you have liability as an infringer, it just means that you would then have to consider the primary and secondary infringement provisions. So it doesn't equate to "You have civil liability or you have criminal liability if you don't comply with a takedown notice".

GLAZEBROOK J:

What does it mean if you don't have immunity? So is what you're saying "If you don't come within that then you just have to go back and see whether you're an infringer"?

MR MANSFIELD:

That's right.

GLAZEBROOK J:

I think I understand now.

MR MANSFIELD:

But can I just be also clear about this: it's on a work-by-work basis. So if you have one work and you receive a notice and you don't take that down then you have liability in relation to that work. You don't lose protection in relation to all of the other works that might be going through your site or on your site. It only relates to the specific work that you have actual knowledge of and all of the cases are also clear about that. I'm slightly concerned by the way in which my learned friend was pointing at it as though "Well, if there's one file and you've got a notice and you don't comply with that, you lose the safe harbour". You don't. You only would lose the safe harbour in relation to that work and that can be seen from the wording itself because it's work-focused and it can also be seen by reference to the US authorities and that is why a work-by-work analysis is essential. Ironically, if you look at the Hong Kong case of *Ming*, you will see the evidence that's presented by the prosecution in *Ming* which is ideal as far as establishing liability under these provisions.

WINKELMANN CJ:

Well, you're certainly making quite a good argument as to why you should be able to step outside the Copyright Act if it is so ridiculously restrictive.

MR MANSFIELD:

No, Ma'am, it's what's called the careful balance, and that's why I took you through the Parliamentary history and I referred you to *Dowling* and

LaMacchia and *SOCAN*. That's the whole point of the Act. That's why it is a code. It is so carefully-balanced. But it's perfectly clear from the US authorities that you just don't lose safe harbour holus-bolus just because you've got one work, you receive a notice, and you don't comply with it. So it only relates to that work.

WINKELMANN CJ:

We've got that submission, thanks, Mr Mansfield.

MR MANSFIELD:

Thanks, Ma'am. Section 131, an Internet service provider such as Megaupload provides a storage service, so it's an electronic storage locker and you would have heard my learned friends refer to that but the authorities also refer to that. So that is the facility or service they provide. They don't take possession of the item stored within the facility.

WINKELMANN CJ:

So you're addressing possession now?

MR MANSFIELD:

That's right.

WINKELMANN CJ:

So there is no need to repeat your submissions.

MR MANSFIELD:

I'm not going to. I'm going to give you an analogy. So a –

WINKELMANN CJ:

Is that by way of repeating your submissions?

WILLIAMS J:

Oh, goodie.

MR MANSFIELD:

I hope not, Ma'am.

WINKELMANN CJ:

Well, what are you replying to? Because it would be helpful if we know what you're replying to.

MR MANSFIELD:

Because there's a suggestion that Megaupload takes possession. They don't –

WINKELMANN CJ:

Well, yes, but you've addressed that in your submissions so what point are you replying to?

MR MANSFIELD:

Well, if a storage facility, Ma'am, provides a unit and gives the key to the unit to someone who's renting it then what they put in the storage facility is theirs and even though they leave the storage facility, it's still in their possession, we don't have a difficulty with that, even though the storage facility owner can allow the police access to it if there is an allegation that's what's in the storage facility is unlawful. So my point is that what you have here is the service being provided but the user dictating what they upload and when they upload and there's no evidence within the ROC at all of any influence over the users.

WINKELMANN CJ:

Right, so this is definitely a repeat of what you've said. You took us through all those cases which showed where if it's just simply the only evidence is their ability to respond to the need to take down and remove infringing material, that is not sufficient for control?

MR MANSFIELD:

Correct, but the only other point I want to make, Ma'am, is that if –

GLAZEBROOK J:

But why do you need control for possession? Your submission is you do need control for possession and the Crown says you don't. Is there anything more you want to say on that point?

MR MANSFIELD:

Well, there's no other basis upon which the United States can assert that Megaupload had possession other than its services were being utilised as a conduit or for storage of these files moving through them.

GLAZEBROOK J:

It's just your analogy of a storage facility, you would at that stage, or the person holding the storage facility and owning the storage facility, would be in possession of those goods. It may not have control over them but it would certainly be seen as being in possession, wouldn't it?

MR MANSFIELD:

In my submission, no. Without knowledge as to what is –

GLAZEBROOK J:

So possession means control?

MR MANSFIELD:

Knowledge and control –

GLAZEBROOK J:

Knowledge and control, all right, that's fine.

MR MANSFIELD:

– so they would have to have specific knowledge of what was in the storage facility and the ability and/or to exercise some influence over it and that's what the US authorities support. The point I wanted to make, which was an additional point in reply, was that the user can delete the file at any point

themselves. In the material that I've handed up from the affidavit, you will see the terms of service there and that's why I provided them. They –

O'REGAN J:

That's in this thing you've just handed up?

MR MANSFIELD:

Yes, and there's two terms of service. There's the terms of service in relation to using Megaupload which clearly states that the items remain in the possession of the user and that they're not to infringe, and in relation to the rewards programme, there is also a limitation on the file size of 100 megabytes, which is about three to six minutes watching a video. By comparison, a movie that was uploaded would be approximately one gigabyte per hour. So there was a size limit imposed in the terms and conditions which the United States acknowledge which was small which was in effect 100 megabytes or three to six minutes which again would deter people or in fact prevent people from uploading movies or series or things such as that in order to engage the rewards programme.

So it can't be said, when you have a look at the rewards programme which are not offered to the world as come here and offend and we will pay you, we'll share in the rewards, which I think is a way in which Mr Raftery loosely put it, or Mr Sinclair or both. The communication with the world is, don't infringe and then there is the imposition of a very small size per file, which would discourage or prevent rewards being paid for movies or series.

WINKELMANN CJ:

So how does it work, if there's a file limit of eight minutes that the premium notification regarding premium membership comes 20 minutes from the end of a…

MR MANSFIELD:

No, that's the viewing time through the Megavideo. So it doesn't matter how many videos, if you are watching whatever through the site, through the

services provided at the site, once you got to 72 minutes you either couldn't watch or you needed to become a premium member, and the point of that is rather straightforward. It's simply commercial because they're paying for storage, and they're paying for the facilities or the service they're providing to the user. So it's just the imposition of an incentive to become a premium member, so they derive income. But it's not, and there is nothing in the material focusing on infringement.

GLAZEBROOK J:

It's not worth asking the obvious question because they obviously did have videos of full length movies on their site.

MR MANSFIELD:

That's the reality. All Internet service providers can't prevent users, despite their terms and conditions, uploading infringement material of that ilk. You see that in *YouTube.* You see that in all of the cases. That doesn't make the internet service provider liable. What you would need before the internet service provider is liable, and that's civilly, is inducement, and that's offering to the world, offering to the users, come here to infringe because that's what we do, and there's nothing in the material, and there's nothing in the ROC of that kind.

WILLIAMS J:

If we take your warehouse analogy, if the landlord knows that one big tenant is running a knockdown shop and selling illicit car parts, and charges people coming onto the site a fee to come on, and this guy is generating a pile of car parts purchase traffic, and these people say, well, this guy is running a, the landlord group says, this guy is running a knock shop and we should probably stop him, and they say no because he's generating a lot of traffic, in fact we will pay him some rewards or reduce his rent because we're making a pile of money out of the fees from coming onto the site, that's caught, isn't it?

MR MANSFIELD:

Well Sir what you're talking about is if they get actual knowledge.

WILLIAMS J:

That's right, once you get to actual knowledge, game over.

MR MANSFIELD:

Actual knowledge in relation to specific works?

WILLIAMS J:

Yes.

MR MANSFIELD:

I mean it's not game over, it just means you don't have safe harbour. It's no longer a permitted act.

WILLIAMS J:

All right.

MR MANSFIELD:

So then it has to be, as we've said, primary or secondary, but that's what I'm talking about. It's in relation to a specific work. So here you have a specific criminal group within the storage facilities. Once you know about that on your website you are required to take steps in relation to storage. If you don't, you lose the safe harbour. You've made my point Sir.

WILLIAMS J:

That's right.

MR MANSFIELD:

But if you don't know, you're not liable.

WILLIAMS J:

That's right.

WINKELMANN CJ:

I'm looking at the time Mr Mansfield, it's five past five, you've been going for an hour and 20 minutes so far. How far are we from you finishing?

MR MANSFIELD:

I want to take you to the ROC because my learned friend has made a number of submissions.

GLAZEBROOK J:

I thought you were going to do that in writing?

WINKELMANN CJ:

Yes.

MR MANSFIELD:

I can do it in writing, Ma'am, I'm just trying to –

GLAZEBROOK J:

It's just that I thought that's what we discussed.

WINKELMANN CJ:

Yes, it's what I said to you Mr Mansfield.

MR MANSFIELD:

I'm quite happy to use my weekend for that purpose.

WINKELMANN CJ:

It would be better for you and us if you proceed in that fashion because I think it's –

MR MANSFIELD:

I'm happy to do that Ma'am. Can I just check my notes to make sure that there's nothing else specific that I want to refer you to, although I can just provide references in the additional material.

There's one other thing I do need to address, and that's in relation to 92B. We talked about how the IPAP provisions don't apply to Megaupload but I just want to make sure that we understand why they don't apply to Megaupload because –

GLAZEBROOK J:

The what, sorry?

MR MANSFIELD:

The IPAP. We talked about that.

WINKELMANN CJ:

What are the IPAP? Can you remind us of that acronym?

WILLIAMS J:

122A.

WINKELMANN CJ:

That's section 122A.

MR MANSFIELD:

So the definition for an IPAP is within the Act at section 122A. I don't need to take you to it now but it only includes specific types of internet service providers such as, for example, Spark or Vodafone. It would not include Megaupload. So those provisions don't apply to Megaupload, and I just wanted to make sure you understood why they didn't apply, because Megaupload doesn't fit within the definition of an IPAP. Otherwise I'm quite happy to include the references in relation to the ROC to you in writing.

WINKELMANN CJ:

All right. Now when would you have that to us?

MR MANSFIELD:

How does Monday morning sound?

WINKELMANN CJ:

By the end of Monday I think is fine.

MR MANSFIELD:

Okay.

WINKELMANN CJ:

And Mr Illingworth, I don't know what Mr Illingworth's intention regarding…

MS HYDE:

We can deal with it Monday as well, file an additional written reply Your Honour.

WINKELMANN CJ:

Can we limit those in length because it will just be the references under headings won't it Mr Mansfield?

MR MANSFIELD:

It certainly will Ma'am, if that's what you direct.

WINKELMANN CJ:

So will five pages for each be adequate?

MR MANSFIELD:

Well it's hard to know Ma'am until we sit down and do it, but if you direct that then we'll comply as we have done this afternoon.

WINKELMANN CJ:

Yes, I direct that, because it seems reasonable, because they're references. So now we've just got to deal with Mr Rogers I think by way of reply.

GLAZEBROOK J:

In terms of just the headings, obviously the headings are going to say what it particularly relates to.

WINKELMANN CJ:

Yes, because the material is quite confusing, bits of paper coming here, there and everywhere, so…

MR MANSFIELD:

Well what we had intended to do, and I thought what the Court wanted after our initial presentation, was the references and with them linked electronically to the material, so you can go away just with your iPads or your laptop.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

That would certainly be helpful.

MR MANSFIELD:

So we were doing that. We've already spent quite some time on doing that hence why –

WINKELMANN CJ:

So you'd be wanting to respond to Mr Sinclair's, some rewards issues and references?

MR MANSFIELD:

Loving to, and that's what I wanted to talk to you about –

WINKELMANN CJ:

Well when I look at it, to be fair to you, it's about…

MR MANSFIELD:

There's a text in there too which we haven't had before.

WINKELMANN CJ:

Yes, so we'll limit you to 10 pages, that seems reasonable, because it's longer than Mr Sinclair.

MR MANSFIELD:

Thank you. As Your Honour pleases.

WINKELMANN CJ:

And we'll make yours 10 pages too, just for simplicity. Mr Rogers are you able just to –

MR ROGERS:

I wonder if I might address you Monday morning, Your Honour, it's been a long day.

WINKELMANN CJ:

How long will you be?

MR ROGERS:

15 minutes.

WINKELMANN CJ:

We'll start at quarter to 10 then on Monday.

COURT ADJOURNS: 5.10 PM

COURT RESUMES ON MONDAY 17 JUNE 2019 AT 9.45 AM

WINKELMANN CJ:

Mōrena Mr Rogers.

MR ROGERS:

I've taken the opportunity to reduce my submissions to writing to ensure I kept within the 15 minutes. I have copies for your Honours.

WINKELMANN CJ:

I just express a bit of frustration. These seem to be your principal submissions Mr Rogers rather than matters in reply, but we didn't hear them in your principal submissions.

MR ROGERS:

Well I am responding to what Mr Raftery said in his oral submissions your Honour.

WINKELMANN CJ:

So what do you say he said in his oral submissions which was different to what you had understood then?

MR ROGERS:

Well he said specifically what I have set out in paragraph 2, "Let's infringe copyright together" but only C, you going out and doing the donkey work." He said in this situation C would be the user. He submitted, "The appellants have wilfully encouraged infringement by others on the whole and accepted the proposition that Megaupload was offering conspiracy to the world at large and that those who uploaded copyright infringing material were part of the conspiracy." And that is consistent with the appendix to the US submissions but inconsistently, in their submissions state, "As far as Mr Batato is concerned, the counts 4 to 13 allege that Mr Batato aided and abetted Megaupload and the named defendants in the commission of these offences. On that basis the other

appellants are alleged to be principal parties and Mr Batato is alleged to be a secondary party only." And of course if all the appellants are secondary parties, there must be prima facie evidence of the commission of offences by users, of which there is none.

WINKELMANN CJ:

So are you saying that the United States case against Mr Batato is that only he is an aider and only that he aided and abetted.

MR ROGERS:

That appears to be the case although I submit that the position is unclear and that is really the gravamen of my complaint. That, at this stage, his position remains unclear. Those are my submissions.

WINKELMANN CJ:

Thank you, Mr Rogers. Mr Illingworth?

MR ILLINGWORTH:

We are going to hear from Mr Boldt first.

MR BOLDT:

Mōrena. Now your Honours we do have a small number of additional handouts, some of which are already in the electronic record but are not in the hard copy bundles. And I will refer your Honours to those new materials as we go along. Now at this part of the United States submissions we invite the Court to examine the Court of Appeal's decision in this case to depart from its 2003 decision in *United States of America v Cullinane* [2003] 2 NZLR 1 (CA). And as part of that I will also discuss with your Honours how the Court of Appeal applied the double criminality standard because it is our submission that even if *Cullinane* was correctly overruled, and we say, of course, it was in fact correctly decided, but even if *Cullinane* was correctly overruled we will submit that the Court of Appeal misapplied the double criminality standard in this case. Then finally I will discuss count 3 because it is the only part of the indictment where it is at least

arguable that the presence or absence of the double criminality standard might actually make a difference between eligibility and no eligibility.

So, I propose to address the *Cullinane* argument this morning in four stages. First, I will take your Honours through the Extradition Act. Now my learned friends have suggested that we have focussed in our submissions on the terms of the Treaty without first examining whether the Act incorporates the Treaty into domestic law. So, I will take your Honours to those provisions in the Act which make it clear that where there is a treaty, it is the treaty which defines and governs the extradition relationship. Next, I will take your Honours through the Treaty itself which is a fairly typical example of an American treaty from around that time and in fact as you may have seen from the materials, I think our treaty may even have been the very last American treaty that employed that enumerative method. But it was certainly the last of a long line of American treaties where double criminality was regarded as the exception rather than the rule. Then I will examine the Court of Appeal's decision in light of that analysis and will submit that, in fact, on all of these critical points the Court in *Cullinane* was correct. I will also submit as part of that that even if double criminality is required it was clearly satisfied here, even without having to look to those offence provisions which are imported via section 101B of the Extradition Act, but of course it's our main submission there's no double criminality required at all.

So in a nutshell this morning it is our submission that the Treaty provides a simple and direct pathway to extradition for the appellants and it's a pathway to extradition which will not require your Honours to worry, for example, about the exact scope of section 131 of the Copyright Act, or whether that Act is a code, or the exact relationship between the appellants' conduct and any of those provisions in the Crimes Act we've been debating over the last few days. And that's because, as Justice Keith writing in the Court of Appeal recognised in the case of *Edwards v United States of America* [2002] 3 NZLR 222 (CA), which is one of the cases I'll be referring your Honours to quite a bit in the course of the morning, and it's at page 1310 of the bundle, which is in volume 4. Justice Keith recognised in *Edwards* that the items in Article II of the Treaty

between clauses 12 and 20, were designed to provide broad coverage in the field of property offending, and as we've already heard the general prohibition on obtaining money by fraud and on conspiracy to defraud was always regarded as a catchall provision, which treated fraud involving intellectual property in the same way as crimes involving any other kinds of property rights.

It's our submission that the Court was wrong in the way it characterised the relationship between the Act and the Treaty. As you'll have seen from the written submissions, a concise encapsulation of the proper relationship between an extradition treaty and its empowering Act, is to be found in the Supreme Court of Canada's decision in *United States McVey* [1992] 3 SCR 475. That is another decision I'll be referring your Honours to quite a bit this morning, it's in volume 6 of the appellants' authorities. You don't need to go to it now but the key quote which is at page 1718 is Canada's international obligations, then, are to be found in the Treaty. The purpose of the Act is to ensure that the law of the land conforms to the Treaty, and that, with respect your Honours, is exactly the role that our Extradition Act plays. We can see that most clearly in section 12, which lists as the first of the objects of the Extradition Act, "To enable New Zealand to carry out its obligations under extradition treaties." But as we will see it's abundantly clear from a number of other provisions in the Act as well, which I'll take your Honour through in a moment, that that is just one small indication in a broad overall legislative scheme, which subordinates the Act to any treaty whenever the two are not exactly the same.

Now in this case the Court of Appeal effectively held that Articles I and II of the Treaty have to be read subject to section 4 of the Act. Section 4, of course, being the provision that ordinarily requires double criminality. So in this case the Court said, well, you must read Articles I and II of the Treaty subject to section 4 whereas of course the Court in *Cullinane* said, no, it's the other way around, and that where you have a treaty the definition of "your extradition obligation" is to be found in the Treaty itself. So that is the issue in this part of the case. Given the Treaty commits New Zealand to extradite people who might not be eligible for extradition under the Act, what should the Court do. Do we read the Act subject to the Treaty, or do we do what the Court of Appeal

said we must, and apply what we can call a double barrel test where you have to satisfy both the Act and the Treaty before extradition is possible? Of course, your Honour, it's our case that the Court had it right in *Cullinane* when it held that whenever there is an inconsistency the Treaty will prevail over the Act, subject of course to that small number of provisions where the Act cannot be overridden.

[10:00]

The alternative, and this is an important theme, which I may return to more than once this morning, the alternative is New Zealand having to go to its extradition partner and saying, look, sorry, we know you have forwarded us an extradition request, which is in compliance with the Treaty, and for an offence which is mentioned in the Treaty, but we cannot honour that request because our domestic law does not let us, and as I will come to in a minute, that would place New Zealand in breach of its international obligations and in breach of international law.

GLAZEBROOK J:

Well it always will be, won't it, as a dualist state when it's not been incorporated into law. So, if it's not incorporated into law as a dualist state then New Zealand will be in breach of its obligations, that's just a function of being a dualist state.

MR BOLDT:

It is Ma'am but of course it's our submission that the Act actually sets out to do exactly that.

GLAZEBROOK J:

But then that's what you need to show us, not say we'll be in breach of obligations, because unless it's incorporated that's the result.

MR BOLDT:

Of course. Well my first –

GLAZEBROOK J:

You can say that Parliament is assumed to legislate in accordance with our international obligations, that is a perfectly reasonable submission, but not the broad statement that we're in breach, because that's the problem of the executive entering into treaties if they haven't secured them being incorporated into New Zealand law.

MR BOLDT:

Indeed Ma'am and it is, of course, my learned friend's submission that that's what's happened here. We've got Treaty obligations which on some basis they say the Act doesn't permit us to fulfil them, but your Honour is quite right to note that even without the provisions I'm going to take your Honours too in a minute, there is a presumption that we will read our statutes consistently with our international law obligations particularly where, as we have here, we have a statute which expressly says one of its principal purposes is to enable New Zealand to comply with its international law obligations.

This was something Justice Keith in another case, the *Yuen Kwok-Fung v Hong King Special Administrative Region of the People's Republic of China* [2001] 3 NZLR 463 (CA) case, which is also in volume 4 and which I'll also take your Honours to later, noted. He, in that case, with reference to New Zealand's extradition obligations, observed that a State does breach international law if it points to its domestic law and says it's prevented from complying. In fact, and my learned friends acknowledge this in their submissions, B9.7 of their reply, they say the wrongful denial of a legitimate request for extradition could constitute the basis for an international dispute, and we say, yes, exactly.

Anyway, I think your Honour is right that the place to look and the place to start is the Extradition Act and so at the risk of further torturing an already very bad metaphor, let's go for a gentle stroll with the Extradition Act and I'll take your Honours to the provisions that we say establishes exactly the point the United States is seeking to make. So the first provision, your Honours, I would like to take you to is the one I've mentioned already, and that is section 12. It sets out the five obligations, or five objects of the Act, and as I've noted the

first is, “To enable New Zealand to carry out its obligations under extradition treaties.” But that use of that word “obligations” is an important one. It provides us with a clear indication, albeit among many, that Parliament recognised when it enacted this legislation that New Zealand is already bound by a number of existing obligations, and it might sound like a statement of the obvious, but clearly the Act was designed to facilitate compliance rather than to get in the way of compliance.

Now what were those obligations? Justice Keith in the *Edwards v United States of America* [2002] 3 NZLR 222 (CA) case set out what our basic obligations under the United States extradition treaty were. That’s in paragraph 2 of his decision in *Edwards*, which is at page 1302, and it’s in volume 4 of the appellants’ bundle. His Honour says there in paragraph 2, “The basic obligation under the Treaty is set out in art I,” and his Honour sets out Article I in full, but note we are agreeing to extradite, “Persons found in its territory who have been charged with or convicted of any of the offences mentioned in Article II of this Treaty committed within the territory of the other.”

As his Honour notes in the following paragraph, “That obligation reflects the desire of New Zealand and the United States of America, as stated in the preamble of the Treaty, to ‘make more effective the cooperation of the two countries for the reciprocal extradition of offenders.’”

Now the next provision I'd like to take your Honours to is section 11. Section 11(1) provides that the Act, “Must be construed to give effect to the Treaty.” And subsection (2) then sets out a number of provisions which can’t be, and I'm using the Act’s words here, overridden. So again that language, in my submission, is important. Section 11(2) confirms that with the exceptions of those sections referred to there, the Treaty will override the Act. And it’s important in this context to remind ourselves again what Justice Keith said about section 11. In the *Kwok-Fung* case, which is also volume 4, and this is page 1295 of the bundle, Justice Keith in *Kwok-Fung* said, “Section 11(1) is a very strong direction. The ‘construction’ it directs is more than the mere interpretation of the Act. It uses much stronger wording than the interpretation

directions in the Interpretation Act 1999, s 4 and the New Zealand Bill of Rights Act 1990, s 6 which is also to be read with ss 4 and 5. To use the wording of subs (2) of the Extradition Act, the Act is 'overridden' by inconsistent treaty provisions or, as the equivalent provision in s 3(4) of the Extradition Act 1965 put it, the Act must be read 'subject to' the terms of the Treaty and construed to give effect to it."

Then at paragraph 16 he said, "The process which s 11 of the New Zealand Act requires can perhaps be better thought of as reconstruction of the Act, to the extent it is inconsistent with the Treaty, to make it consistent." And that description of section 11 was endorsed in this Court by Justice McGrath writing for himself and Justice Blanchard in the *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 disclosure case in 2014. Your Honours need not go to that now but it's there, it's at paragraph 165 of the judgment, which is page 1618 of the bundle. So that's section 11.

The next provisions I'd like to direct your Honours' attention to are sections 24(2)(c) and 24(2)(d). Those provisions we've heard a great deal about already in the course of this hearing but in my submission, they are also very important in the consideration for this interpretation exercise. Sections 24(2)(c) and 24(2)(d) represent between them what are often regarded as two pillars of protection for the individual in international extradition law. Section 24(2)(d) deals with the requirement that a prima facie case be shown and that is a provision which cannot be overridden by treaty. Section 24(2)(c) represents another of the fundamental safeguards. It's often used as a shorthand for saying "double criminality" but actually what section 24(2)(c) and what this second safeguard actually protects is someone from being extradited to face a criminal charge that is unfamiliar, that is something that we in our system do not recognise as criminal.

By far the most – so we could give it a different name. I've been using names like the "rule of familiarity" or the "rule of recognition" and that's most often achieved these days by requiring double criminality because that's easy, at least in principle. You are protecting someone from political offences or from

unfamiliar, alien offences by requiring that the conduct be criminal in both jurisdictions.

But double criminality in this context is really just a means to an end. It is a means of ensuring people are not subjected to these alien forms of criminal sanction and it is sometimes, but less commonly these days I acknowledge, achieved by other means. The United States in its treaty-making practice, certainly between its 1933 decision in *Factor v Laubenheimer* 290 US 276 (1993) and the 1970s, commonly entered into treaties where instead of requiring double criminality, they simply set out a long list of offences for which extradition would be available, and it's very interesting that in Europe now, and in the United Kingdom in particular, they've gone down that track again, and your Honours will have seen from the material in the submissions about the European arrest warrant framework that there has been at least a partial replacement of the requirement of double criminality for the most serious European extraditions with a list of generic kinds of criminal offending which are not tied to specific provisions and for which double criminality is not required, and your Honours will have seen from the material in the submissions the acknowledgement by the Home Office in the United Kingdom in 2003 that for the first time in Britain's history as an extradition country, double criminality would not anymore in fact be required.

There was another note in the same Home Office report which said, "Our attitude here is that if the conduct is a crime in one of our European partner countries then that should be good enough for us". My friends are right, that only applies to offences with a maximum penalty of three years or more, and that where the conduct involves maximum penalties of between one year and three years, double criminality is still required and similarly, if there is extraterritorial conduct, double criminality is still required, but for the most serious offending, schedule 2, that generic list of offences in schedule 2 provides the touchstone. So in that respect, it is very similar to the sorts of lists that were around prior to the 1970s. So this is an alternative mechanism for securing what I call, say, the rule of familiarity or the rule of recognition.

WINKELMANN CJ:

Double criminality?

MR BOLDT:

Well –

WINKELMANN CJ:

You don't change it by changing the label, Mr Boldt, it's a statutory provision.

MR BOLDT:

Well, there is a statutory provision for double criminality, Ma'am, but the next point I'm going to make is that in our Act, section 24(2)(c) can be overridden by treaty whereas 24(2)(d) cannot.

WINKELMANN CJ:

Yes.

MR BOLDT:

And that's the important distinction. So ordinarily, our default provision in New Zealand, I readily acknowledged, is double criminality. However, as I have just taken your Honours to, that is –

GLAZEBROOK J:

Well, it doesn't really matter what they do overseas, does it? What's important is what we've done here.

MR BOLDT:

I agree entirely, Ma'am, and –

GLAZEBROOK J:

Well, why take us to overseas if it doesn't matter at all?

MR BOLDT:

Well, for two reasons –

GLAZEBROOK J:

You've made your point that it's done differently elsewhere but we have proof of that in respect of the actual Treaty that we've got in front of us so…

MR BOLDT:

Well, I'm…

GLAZEBROOK J:

Repeating it doesn't make it a better point.

MR BOLDT:

Well, I have a new point which is –

WINKELMANN CJ:

We'll move on with that then.

MR BOLDT:

– with respect to section 24(2)(c) and 24(2)(d). My point is 24(2)(c) can be overridden by treaty. 24(2)(d) cannot. What that means is when section 24(2)(c) refers to an extradition offence, it means an extradition offence as defined by the Act or alternatively, another form of extradition offence which may be defined by treaty. If, as my learned friends suggest, that section 4 always prevails and that the definition of "extradition offence" in section 4 is always the correct definition and can't be overridden, the immediate question arises, why is section 24(2)(c) capable of being overridden while section 24(2)(d) is not? What section 24(2)(d) secures is recognition that whatever the actual offence turns out to be under 24(2)(c), it must be established to a prima facie level, but 24(2)(c) provides that what you must show will either be an extradition offence as defined in section 4 or perhaps another extradition offence as defined by treaty.

GLAZEBROOK J:

One of the slight difficulties with that, and I think this is your friend's point, is that it's actually difficult to work out, if you don't go to US law in this case, what

exactly the offence is and what exactly might have to be established because if you don't go to the elements of the US offence, how on Earth do you know what has to be established under 24(2)(d), so do you have a solution for that?

MR BOLDT:

I do.

GLAZEBROOK J:

Because you have the essence of the offence but that's not very – it's helpful for working out under the essence of the offence whether there is an equivalent in New Zealand but not so helpful for working out what the elements of that offence might be and therefore whether you have a prima facie case.

MR BOLDT:

Ma'am, and I'm planning to deal with that –

GLAZEBROOK J:

If you're coming to it, that's fine.

MR BOLDT:

– in a bit of detail later but yes, *Edwards*, *McVey*, and *Re Nielsen* [1984] AC 606 (HL) all give us a great deal of help in terms of answering that question, Ma'am.

GLAZEBROOK J:

Come to it when you come to it.

MR BOLDT:

But I will come to it.

WINKELMANN CJ:

And also – well, and it may be the same point that Justice Glazebrook is making but it's differently put but section 24(2)(d) requires us to undertake the analysis according to the law of New Zealand et cetera, et cetera. If you haven't done

the kind of classification act that's required under section 24(2)(c), which you say is displaceable, how do you do the exercise on 24(2)(d)?

MR BOLDT:

Well, it's the same point, Ma'am. Section 24(2)(c) will tell you what you have to show to a prima facie level. The point about 24(2)(d) is that whatever that is, it must always be shown to a prima facie level.

[10:20]

WINKELMANN CJ:

As if it had occurred in New Zealand, though, is the additional bit, isn't it? So it couldn't just be transposing the entire US law into New Zealand and applying that. It is as if that occurred within the jurisdiction of New Zealand which is the language, double criminality isn't it.

MR BOLDT:

Well that provision has been the subject of argument in exactly this context, both in Australia and in the United States and in both of the authorities, which I can refer your Honours to and will refer your Honours to and that is the *Riley v Commonwealth of Australia* [1985] HCA 82, (1985) 159 CLR 1 case in Australia and *Factor* in the United States. The Courts have said no, that provision which refers to the local laws and to the appropriate standard for committal, are not part of the definition of the extradition offence. All they are doing is outlining the level to which, in New Zealand, at which a committal would occur. So in other words, it is the New Zealand law of committal for trial which applies here. It shows us the evidential standard.

GLAZEBROOK J:

Which we don't have, of course.

MR BOLDT:

Well we don't anymore, no but we had to imagine we did. We have to imagine we do.

GLAZEBROOK J:

It becomes a bit difficult doesn't it, where there is a number of feats of imagination.

MR BOLDT:

Yes, we do. We have to imagine we have a committal standard and we have to remember back to how we did it, back when we did. And in *Riley* and I will take your Honours to the passage in a bit but in *Riley* the Court said yes, there is already a provision which defines extradition offence. This isn't it. This is simply the provision that tells us the evidential standard that has to be met and exactly the same argument was made and rejected on exactly the same basis in *Factor* as well and I can take your Honours to those passages. And really the juxtaposition of (c) and (d) makes that clear as well; (c) is telling you what you need to establish. (c) would be entirely redundant if (d) always incorporated the definition of offence from section 4.

WILLIAMS J:

Or it could be they are just being consistent.

MR BOLDT:

They could be just being consistent Sir but given you have one provision that can't be overridden and one provision that can, it indicates that those two provisions are intended to work together but actually have quite different functions.

Now the next section I would like to take your Honours to and it is just a quick stop at section 60 is to note – and this is the backup provision that came into our law in 1999. And it provides that if we have a treaty relationship with a country, but the offence is not – and this is the word from section 60(1)(a)(ii). This can be applied if there is a treaty, but the offence concerned is not an extradition offence under the Treaty. So we see there that the Act is recognising there is a second kind of extradition offence which is relevant to its analysis. There is the extradition offence as described in section 4 but there is also

another sort of extradition offence and that is an extradition offence under the Treaty.

Now the next provision and it is quite an important one in my respectful submission is section 100. Section 100 effectively provides that all future treaties New Zealand enters into must include a requirement of double criminality. Now that raises two questions. The first question is why is it necessary at all if double criminality is already to be interpreted or read into all New Zealand's extradition treaties and the second question is, why does it only apply to future treaties. Now in my respectful submission –

GLAZEBROOK J:
How does this relate to *Cullinane*, just in terms of date?

MR BOLDT:
Cullinane postdates this by about four years Ma'am. So, this was 1999, *Cullinane* was 2003.

GLAZEBROOK J:
I think *Cullinane* though, because I don't think there was major argument on this. It was just an assertion, so I think *Cullinane* indicated the understanding at the time, so in fact this may just indicate an understanding at the time that double criminality was not required under the US treaty.

MR BOLDT:
I was going to offer a slightly broader explanation for the two questions. The first question is why is this provision necessary at all if all treaties have already got double criminality read into them and the simple answer is because they don't.

GLAZEBROOK J:
Well it might have been a misunderstanding of the law and that is what your friends would suggest.

MR BOLDT:

Perhaps but the second question, which is why this only applies to future treaties and my submission is also quite telling. It only applies to future treaties in my respectful submission because Parliament here is not seeking to cut across existing treaty obligations New Zealand has already undertaken. Once again, we see Parliament in my respectful submission respecting New Zealand's international obligations, our existing international obligations; saying, you need to do things this way for the future but that will not affect the interpretation of existing treaties where double criminality may not be a part of them. New Zealand by the way, as your Honours will have seen from the material, made three treaties under the 1965 legislation. The United States Treaty in 1970 and the Fiji Treaty in 1992, neither of which were double criminality treaties and then in 1998 it made the Hong Kong Treaty which was a double criminality treaty. And so in the same vein, we have section 105 which I will invite your Honours to have a quick look at. And this also is a very clear recognition of New Zealand's existing treaty obligations and Parliament ensuring that nothing in this new Act will cut across them. We have already noted what section 11 says and it sets out a series of provisions that can't be overridden by treaty but section 11(3) also says that section is subject to section 105. And what 105 says in cases where there is an existing treaty, for example, none of the mandatory restrictions on surrender in sections 7 and 8 apply and instead the old treaty continues to be subject to the far more limited range of mandatory restrictions to which it was subject when it was struck via the 1965 Act.

So once again what section 105 is achieving is ensuring that New Zealand's existing treaty obligations can't be narrowed by the 1999 Act rather than the statutory restrictions of those that were in force when the Treaty was entered into. Now the Court of Appeal referred to section 105 along these lines, in both the *Kwok-Fung* decision and the *Bujak v Republic of Poland* [2007] NZCA 392, [2008] 2 NZLR 604 decision and in both cases, the Court noted section 105 was designed to preserve existing treaty obligations and it actually expanded the protection of the Treaty from being overridden by the Act. It reduced the number of provisions that could be overridden by Treaty.

So it is against that general background and what I say is a strong and consistent theme in the Act of ensuring that nothing the statute does cut in any way across the obligations under the Treaty. It's against that background that I would invite your Honours to have a look at section 4 which, of course, is the provision the Court of Appeal said effectively overrides Articles I and II of the Treaty. It is the general default definition of extradition offences under the Act. First of all, section 4 is not one of those provisions referred to in section 11 which are immune from treaty override and as if to underline that point, in section 4(1), the definition of "extradition offence" in section 4(1) is expressly subject to an extradition treaty. And when we look at all the other statutory indications throughout the Act that Parliament was concerned not to cut across New Zealand's existing Treaty obligations, it's my respectful submission that the meaning of that provision is very clear. This will be the definition of "extradition offences" for non-treaty extraditions but where there is a treaty extradition, the Treaty will prevail.

The Court of Appeal, admittedly, when it was discussing the equivalent provision in the 1965 Act, said "Well, we read the words 'subject to' differently". The Court came up with, I say with the greatest respect to the Court, was a decision, at least one I hadn't seen before, of "subject to" where it said "Well, that can just mean 'might be influenced by'" but in my respectful submission, "subject to" is a very well-known and very clear statutory phrase. We've included a reference to a nice encapsulation of the definition of the phrase "subject to" in our written submissions from Justice Megarry in the *C & J Clark Ltd v Inland Revenue Commissioners* [1973] 2 All ER 513 case, "subject to" means nothing where there is no clash between two provisions but where there is, it shows which is to prevail, and your Honours might have noted Justice Megarry's comment that the alternative construction "would strike terror into the hearts of Parliamentary counsel" if suddenly "subject to" were simply to mean anything else and certainly if it were to be interpreted to mean "might be influenced by".

So it's respectfully submitted that all of those provisions, but particularly sections 11 and 105, confirm what the Court said in *Edwards* and also in *Cullinane*, namely that if the Act and the Treaty deal with the same question in different ways, then it is the Act which gives way and not the Treaty.

WILLIAMS J:

If that's right, it would have been better if Parliamentary counsel had made that very clear because of course, this is constitutional heresy. The starting proposition that the Treaty overrides the statute is inconsistent with the duality that Justice Glazebrook was talking about so it would have been good if this was nice and clear so it's possible to read this as if "subject to the extradition treaty" simply means "unless the Treaty gives a subset of offences which is smaller than that set out in paragraph (a)". It makes perfect sense that way. It's in fact a restricting provision, not an expanding one.

MR BOLDT:

Well, two responses to that, Sir. First of all, in my submission, it isn't constitutional heresy to incorporate the provisions of a treaty into statute –

WILLIAMS J:

No, but to allow one to override a statute is.

MR BOLDT:

Well, again, I would respectfully disagree, Sir. In my submission, when New Zealand undertakes international obligations, it acquires an obligation to adapt its domestic law to ensure those obligations can be met.

WILLIAMS J:

Well, the Crown does.

MR BOLDT:

The country does, and –

WILLIAMS J:

Well, the Crown does. Parliament doesn't.

GLAZEBROOK J:

It's the executive. It can't bind Parliament.

MR BOLDT:

Well, no, Ma'am, but very often, and indeed exactly as has happened here, the mechanism by which that's given effect to is by Act of Parliament which incorporates the Treaty into domestic law.

WILLIAMS J:

Right, so that gets us back down to "subject to" and what it might mean and an alternative reading of that is exactly what the US extradition treaty does which is provide a list because that 4(1)(a) is inconsistent with the list. The list is potentially smaller than 4(1)(a) and so "subject to" is a reading down provision.

MR BOLDT:

It is – of course, and Sir, I do submit that "subject to" there is just icing on the cake because of course, the main provision is section 11. It's what Justice Keith described as that very strong direction to reconstruct the Act to give effect to the Treaty.

WILLIAMS J:

That's your best argument, yes.

MR BOLDT:

That's the best point and of course, "subject to" is simply consistent with that, and it's a little bit different here. These treaties are a little bit different from other international obligations New Zealand undertakes where we subscribe to conventions, for example, and undertake to adapt our domestic law accordingly. We can do that in a statute and it will apply in the same way at all times but of course, where New Zealand has multiple extradition treaties, as we

do, there needs to be a mechanism to make sure each and every one of them is given effect to and that's what section 11 sets out to do and does do.

WINKELMANN CJ:

But you have yourself accepted "subject to" only does work when there is a clash?

MR BOLDT:

Correct.

WINKELMANN CJ:

And I suppose you're coming onto why you say there's a clash?

MR BOLDT:

Yes.

WINKELMANN CJ:

Because there's nothing in the Treaty which removes the need for double criminality, is there, expressly?

MR BOLDT:

Well, I'm going to submit there is, Ma'am.

WINKELMANN CJ:

You're coming onto that? I don't want to take you out of order.

MR BOLDT:

I'm coming onto that in about one minute, so we are at that and in fact, perhaps the next place to look is the Treaty itself. I've already directed your Honours to –

GLAZEBROOK J:

Can you remind me where that is?

MR BOLDT:

Yes, Ma'am, I think it's 23 of the bundle.

GLAZEBROOK J:

Yes, I actually didn't have it marked so…

MR BOLDT:

It's volume 1, Ma'am, and it starts at 21.

WILLIAMS J:

Volume 1 of?

MR BOLDT:

Of the appellants' bundle.

O'REGAN J:

It's at the same one we're in now, right at the front.

GLAZEBROOK J:

Volume 1/1.

WILLIAMS J:

Is that where it was, at the front?

MR BOLDT:

I've already directed your Honour to what Justice Keith described in paragraph 2 of *Edwards* as the basic obligation New Zealand had undertaken pursuant to this Treaty and that is the obligations set out in Article I. It's our submission that where we have a treaty like this which is incorporated into domestic law in the manner I've described, it is designed to operate, and does operate, effectively as a self-contained instrument, and Article I here does the job, in my respectful submission, that section 4 does in the Treaty.

GLAZEBROOK J:

That can't be right. There are Acts that say "we incorporate" – well, it comes down to the Law Commission's thing on how you incorporate treaties and I think probably Justice Keith would say this is one of the worst ways of incorporating treaties, where you don't quite incorporate it, you incorporate some bits but not others but this isn't one where they just say "this Act creates these obligations under the Treaty and therefore, you then go to the Treaty to look at what they mean", and it's not one that's tried to reconstitute the terms of the Treaty in the Act which I think he hates even more than this way of doing it but – because a lot of the provisions of the Extradition Act, which has to be the case, actually do apply –

[10:40]

MR BOLDT:

Of course.

GLAZEBROOK J:

– and you don't go to the Treaty.

MR BOLDT:

No, and I'm not talking, Ma'am, about procedural provisions, for example. The Treaty doesn't even make provisions about who is the final decision-maker, it doesn't say "It has to be the Minister" and in fact, that is the correct role of Article IX in the Treaty which says that matters of that sort, how you comply with your Treaty obligations is always going to be a matter for domestic law, which is also something that very same Treaty provision as discussed in *McVey* and also a couple of American cases which are in the material, your Honours probably don't need to look at those, but it is certainly true that procedural provisions, the "how", is a matter for domestic law but New Zealand's basic obligation, as described by Justice Keith, is plainly set out there in Article I and that is to –

GLAZEBROOK J:

So it is in the Extradition Act, isn't it, and wouldn't you go to that rather than the Treaty? The basic obligation is set out in the Extradition Act itself and it's a generic obligation.

MR BOLDT:

Well, in terms of the particular obligation, Ma'am, it's our submission that if the question is "Who can you extradite from New Zealand to the United States?", if we did not have a treaty with the United States, the answer would be easy, it would be exactly those people described in section 4 of the Act but –

GLAZEBROOK J:

This is the obligation that says we agree to extradite. That obligation is the generic obligation in the Act in terms of – so yes, I can understand the submission, it says who you can extradite what they're charged with comes from the Treaty, but the actual obligation to extradite does not come from the Treaty, it comes from the Act?

MR BOLDT:

Yes, I understand that, Ma'am, and I don't –

GLAZEBROOK J:

Again, on a dualist system, it can't come from the Treaty.

MR BOLDT:

I don't think we disagree about that at all. All of those –

GLAZEBROOK J:

You're just putting your submissions a bit high, I think, is what I'm suggesting to you.

MR BOLDT:

Okay, well, and I take that point, Ma'am. However, bringing it down then to the much more narrow question which is "Who can be extradited from New Zealand

to the United States?" Without a treaty, that's easy. We look at section 4 of the Act and it's whoever meets the test in section 4. Who can be extradited from New Zealand to the United States under this Treaty? The answer is not the same as in section 4. The answer is persons charged with, or convicted of, any of the offences mentioned in Article II. So in other words, it is a very different test and standard.

Your Honour the Chief Justice asked "Well, there's nothing in the Treaty that says double criminality doesn't apply" and there are a number of responses to this. The first is that the Treaty does talk about double criminality. It talks about it in a number of places. For example, in Article II, point 7, the Treaty refers to "Unlawful sexual acts with or upon children under the age specified by the laws of both the requesting and requested parties." Similarly, number 30, "Offences against the bankruptcy laws which are punishable by more than three months' imprisonment." But the clearest, by far, indication –

WINKELMANN CJ:

You mean 29, don't you?

GLAZEBROOK J:

Why do you say 30? Is that because you say it's the bankruptcy laws of the particular state?

MR BOLDT:

Yes, that's right, and –

GLAZEBROOK J:

Where does the double criminality come in?

WINKELMANN CJ:

I think you meant 29.

MR BOLDT:

I may have meant 29. 29 is certainly an important indication there where it is expressing New Zealand law that is to be applied.

GLAZEBROOK J:

I don't see 30 as having anything to do with it.

MR BOLDT:

No, and I think your Honour may be right and I'm unsure why I highlighted 30 now I look at it but perhaps the very best answer, the very best indication about how the Treaty was designed to deal with the question of double criminality can be found in Article XVIII and it's the commencement of the Treaty and its application to offences committed before it came into force: "This Treaty shall apply to offences specified in Article II committed before as well as after the date this Treaty enters into force, provided that no extradition shall be granted for an offence committed before the date this Treaty enters into force which was not an offence under the laws of both countries at the time of its commission." And so we have there the very essence of that old phrase "The exception which proves the rule". The fact the Treaty partners saw the need to make an exception for pre-Treaty offences indicates there was no general contemplation that double criminality would apply for offending which occurred after the Treaty came into force and that was one of the provisions the Court of Appeal was most heavily influenced by in *Cullinane*.

WINKELMANN CJ:

I was just going to ask what did the Court of Appeal say in this case about it?

MR BOLDT:

It didn't say a lot, in fact, Ma'am. The Court did not confront directly the exception which proves the rule analysis that I've offered.

GLAZEBROOK J:

Is it an exception that proves the rule, though, or is it just –

ELLEN FRANCE J:

Sorry, was there anything else the Court of Appeal said about it, Mr Boldt?

MR BOLDT:

Well, I'll take Your Honours to what the Court of Appeal said. I must say, your Honours, I didn't see a clear confrontation of this issue in the Court of Appeal. The way the Court of Appeal approached this question…

GLAZEBROOK J:

Did you want to just give us a page reference? Because I just have lost it for the moment, the Court of Appeal decision which is…

MR BOLDT:

I'm trying to find the best place to start. Perhaps paragraph –

O'REGAN J:

Just give us the volume first so we can find the case.

MR BOLDT:

It's volume 2, your Honours, this is the –

WINKELMANN CJ:

Isn't it volume 1 of documents for hearing or is it volume 2?

WILLIAMS J:

Volume 2.

MR BOLDT:

Volume 2, and it's the decision, obviously, under appeal.

GLAZEBROOK J:

It wasn't in the most logical volume, I remember now.

MR BOLDT:

The Court approached it at an even higher level, if I might say, your Honours. It began from the immutable starting point that double criminality is always required in extradition law and also that it was required in New Zealand under the 1965 Extradition Act and so accordingly, there was simply no possibility that the negotiators who entered into the Treaty could have intended to depart from it.

WILLIAMS J:

It's – have you got more to say about that?

MR BOLDT:

No, Sir.

WILLIAMS J:

Isn't it possible to read Article XVIII consistently with double criminality? It's not stating an exception at all. It's stating a consistency that when they entered into the Treaty, there was an audit done, everyone was satisfied that double criminality was covered by the list, no one had the time to go back in history and check whether 30 years ago that was the position, so to make it clear, they said so. So double criminality was always required, it's just that pre-1970, no one could have been sure that it could be met, so it was better to say it?

MR BOLDT:

The difference, Sir, is that prior to 1965, double criminality was always required in New Zealand. That is, as my learned friends have noted in their statutory history, New Zealand until 1965 was subject to the 1870 Extradition Act which was an imperial statute, and that was a very, very different kind of Extradition Act to the one we passed in 1965 and the one we re-enacted in 1999 and it did require that all offences listed in the schedule – first of all, it provided that only offences listed in the schedule to the Act could go into treaties, and that all of those offences had to be read in accordance with the law of the UK or whichever other part of the Empire at time was seeking to invoke it, and that all treaties therefore needed to be consistent with that.

WILLIAMS J:

This is the intra-Empire?

MR BOLDT:

This is the –

WILLIAMS J:

Was this the intra-Empire fugitive offenders one or the true extradition?

MR BOLDT:

No, Sir, it was the Extradition Act – no, so not the intra-Empire statute, Sir, the actual Extradition Act of 1870. That Act was a very different kind of Act to the 1965 Act and the 1999 Act. Perhaps the best way of, if your Honours don't mind me talking a bit about the history of that statute because it did form part of the background here, is to take you to the article written by Professor Hudson which is in the material in the bundle of authorities at volume 9 and that's –

GLAZEBROOK J:

Can you just, if it's right at the moment, but just say what was the difference you're saying it was? Really just because you say the 1965 Act didn't require double criminality?

MR BOLDT:

Correct. Well, that is correct, your Honour. Reading, and this is at page 3403 of the bundle and Your Honours perhaps don't need to have it in front of you, but Professor Hudson wrote a very interesting –

WINKELMANN CJ:

Sorry, what page?

MR BOLDT:

3403, Ma'am.

WINKELMANN CJ:

3403 and what volume?

MR BOLDT:

And it's volume 9.

GLAZEBROOK J:

Of theirs or yours?

MR BOLDT:

Of the appellants' bundle. This is an article by Professor Hudson in the United States which was written very shortly after the *Factor* decision came out and Professor Hudson was critical of the *Factor* decision but at 3403, there's a very interesting –

GLAZEBROOK J:

I'm still trying to find this.

WINKELMANN CJ:

Volume 9, page 3403.

MR BOLDT:

It's a pink volume.

WILLIAMS J:

Part 5, other authorities.

O'REGAN J:

3403.

MR BOLDT:

Number 90 in the index as well, if that's any help, Your Honour.

GLAZEBROOK J:

It's not 3403 in my volume though. 3399, is it?

ELLEN FRANCE J:

That's the start. Mr Boldt's taking us to 3403.

GLAZEBROOK J:

Okay, I see.

MR BOLDT:

The quote came from 1876 and the person who made the quote was a chap by the name of Hamilton Fish, he was Ulysses S Grant's secretary of state during the Reconstruction period, but this was his comment on the 1870 Act which applied in New Zealand right up until 1965, he said "At the outset, it was apparent that the Act of 1870" –

GLAZEBROOK J:

I still don't think I've got this.

ELLEN FRANCE J:

We're looking at the piece in quotes towards the bottom there.

MR BOLDT:

Yes. It's the first footnote, your Honour, on there, yes.

GLAZEBROOK J:

Okay.

MR BOLDT:

"At the outset it was apparent that the Act of 1870 was not an act to carry into effect treaties and conventions for extradition, as is the United States Act of 1848, but one providing a system to which all subsequent treaties of extradition must be adapted, and which could be applied to enforce treaties or arrangements made subject to its provisions." And so we see there are two kinds of treaties and in fact, British extradition law right up until the 2003 Act, which reduces almost to nothing the effect of treaties, has always set out to prescribe the way future treaties should be written and so there was rarely, if ever, any inconsistency between Act and treaty but the treaties there were then expressly subject to the Act and in fact, one of the criticisms in *Factor* that your Honours might have seen, *Factor* being the case that in the US said

"There's no double criminality unless it's express in a treaty", part of what the dissenting judgment said was "Well, this wouldn't work the other way round because the British do require double criminality", to which the majority said "Well, just because Britain might be going to breach its international obligations, doesn't mean that we have to". But that was because of that English statute which was part of the law of New Zealand until 1965.

But we changed in 1965 and section 3 of our 1965 Act was much more akin to the American practice. It became an Act that was designed to give effect to treaties just as Justice Keith noted in that passage from *Kwok-Fung* that I referred Your Honours to earlier. I can take Your Honours to the 1965 Act.

GLAZEBROOK J:

You were actually telling us what the Court of Appeal said, had you finished saying what they had said, which was they had just started at a broader level and you couldn't really find any specific thing looking at Article18, was that right. You don't need to go back to the Court of Appeal judgment, I was just reminding you that we hadn't necessarily finished your submission on that?

MR BOLDT:

No your Honour I would perhaps like to come back to that in a moment and when we have talked a bit more about the 1965 Act. Because it was that historical perspective that caused the Court of Appeal to say, look this just can't be right.

WINKELMANN CJ:

So can I just clarify because I did ask you if they had dealt with this provision, Article18 and is the answer no. They really just dealt with it on this historical analysis and the particular view they took of it?

MR BOLDT:

Yes, and there were other explanations for the sporadic references to double criminality and the Treaty and that they were perhaps designed to underline the

need for double criminality other than to indicate that this was the exception that proves the rule, if you like.

WINKELMANN CJ:

Which was Justice Williams' question to you, so you might need to deal with that as well later.

WILLIAMS J:

So you are at section 3 of the 1965 Act?

MR BOLDT:

Yes and if your Honours have got the 1965 legislation which is in the same volume. And if I can just hand up to your Honours. This is something which was referred to by the Court of Appeal in its judgment but it didn't find its way into our materials. But this is a copy of the 1965 Extradition Bill and it sets out there what the 1965 Act was setting out to do and where it set out to change.

[11:00]

The passages I would like to direct your Honour to can be found on the second page, page (ii). And the Court noted that it was largely adapting the United Kingdom legislation to New Zealand but you can see there right at the very top of the page the Court says, "Apart from the changes mentioned in the notes below, there are no substantial changes in the law as set out in the present statutes and cases." So the Court is noting, where we are making changes we are setting those out below. And then under the first italicised heading, the explanatory note and it goes on to say in the last sentence of that paragraph, "Except as provided in subclause (3), the new Act is to be read subject to the terms of the treaty and to be so construed as to give effect to it." So, we see there for the first time –

WINKELMANN CJ:

Sorry what clause is that?

MR BOLDT:

It is clause 3, it became section 3 without any substantive alteration at all. So we can see there and as enacted section 3(4) of the 1965 Act, provided, "Except as provided in subsection (3) of this section," and that was a provision that dealt with those mandatory restrictions on surrender. "… this Act shall be read subject to the terms of the treaty and shall be so construed as to give effect to the treaty." So that was a reversal of the position that had formed part of New Zealand law prior to 1965 and we can see in the explanatory note, that was actually signalled as one of the things which were to change in the new legislation.

So we moved from – if we have those two classes of statute referred to by Secretary of State Fish way back in 1876, an Act that is simply prescriptive for future treaties, versus an Act designed to give effect to treaties. New Zealand had moved from that first type of statute to that second type of statute. Now that wasn't mentioned by the Court of Appeal and I suspect it was moved by the submission by my learned friends that nothing substantive in terms of the relationship between acts and treaties was even meant to change between the various Extradition Acts in force in New Zealand. Because treaties had to be read subject to the old 1870 Act, they submitted there was never to be any change in 1965 so treaties made under that statute, therefore also couldn't override the Act and that there was then also not meant to be any substantive change in this area in 1999, therefore in effect the 1870 Acts regime and the immovable presumption in favour of double criminality will always apply. That was, as I understand it, the Court of Appeal's approach to this and in my submission that's wrong and what it overlooked is that there was actually a change. We have subsection (3), or section 3(4) set out in the 1965 Act and that really was different, and we can see from the note that it was meant to be a change.

The other point and your Honours have asked me questions about how are we to read this Treaty, why are we to presume there is no double criminality just operating as an overarching interpretative presumption with respect to the statute. It's worth also taking a moment to consider the historical background

against which this Treaty was being negotiated. This was our first treaty in New Zealand. This was the first treaty New Zealand entered into in its own right after gaining the authority to do so but the United States was a party to lots of extradition treaties. In the United States extradition only occurs by treaty and in the United States they have a very simple set of questions they ask when there is an extradition request. They ask three questions. First, is there a treaty. Secondly, is the offence concerned in the Treaty and thirdly, is there a prima facie, or as the Americas call it, is there probable cause and that's it, that is the entire eligibility exercise and they are bound, at all stages, by the four corners of the treaties into which they have entered, hence the, perhaps you can say surprise and frustration on the part of Secretary Fish all those years ago when he was saying, this is not what an Extradition Act looks like to us, and of course in America, by virtue of Article 6 of the Constitution, treaties are accorded the status of supreme law and will override any act of congress that might get in the way of their operation. They have the same status of supreme law as the United States Constitution.

So it's very much a treaty-bound culture in the United States and they were immensely experienced at drawing up extradition treaties and in 1933 the Supreme Court in the *Factor* case established the rule that double criminality is not a presumption, either rebuttable or non-rebuttable. It is simply something to be found or left out of extradition treaties on their terms. What had happened in *Factor* was that a British man named John Factor had been engaged in a very productive conspiracy to defraud in London and he fled with a huge sum of money to Illinois and he was charged with receiving property knowing it to have been unlawfully obtained, which was not a crime in Illinois at the time.

WILLIAMS J:

What was the charge sorry?

MR BOLDT:

It was receiving property knowing it to have been unlawfully obtained. Receiving money and transporting money knowing it to have been unlawfully obtained. As I say not a crime in Illinois at the time though a crime in a lot of

the United States. John Factor, incidentally, is the brother of Max Factor who became the makeup tycoon, but again that's of no relevance. He then resisted extradition on the basis of no double criminality and said, look, I'm in Illinois, there's no such crime, you can't extradite me. The Supreme Court said, that doesn't matter. Double criminality is referred to in some places in the extradition treaty. Some of the offences listed in the Treaty expressly require double criminality. This offence does not and therefore on exactly the approach I've been discussing with your Honours of an exception that proves the rule, the Court said, there is no overall rule in favour of double criminality. It's there when it's there, it's not when it's not, and with respect to this offence, it's not required.

Now my friend's say, well *Factor* was wrongly decided and it was the subject of a strong dissenting judgment by three other members of the Court and it's certainly true that it has been criticised a bit in recent, ever since, in fact, it was decided, but it remains good law in the United States. In fact I've got a case I could hand out to your Honours from just 2016 which your Honours may not need to refer to, but one of the Circuit Courts debated *Factor* at length. They divided, they were sitting en banc, they divided by 13 Judges to three over a particular point in terms of the application of *Factor*. It is good law in the United States and there are decisions in your Honours' materials, the *Gallina v Fraser*, 278 F 2d 77 (2d Cir 1960) decision and the *Matter of Assarsson* 687 F 2d 1157 (7th Cir 1982), a decision from Sweden, which make it clear that in the United States, it is possible to extradite even if the conduct concerned is not an offence in the United States.

WINKELMANN CJ:

What case was that, sorry?

GLAZEBROOK J:

You're going to hand it to us, are you?

MR BOLDT:

I can hand your Honours this case, it's a case called *Martinez v United States*, 828 F3.d 451 (6th Cir 2016), which is a recent decision. The double criminality point isn't discussed in the case but it certainly shows that *Factor*, even as recently as 2016, remains good law and in terms of the presumptions it contains, those also remain good law. But I was going to refer your Honours to what is the ratio in *Factor*. The ratio in *Factor* can actually be found at the beginning of the –

GLAZEBROOK J:

You better tell us where it is because I'm not sure –

MR BOLDT:

Factor is in volume 8, your Honour, and it begins at page 3286. The best place to look for the ratio of the case is at page 199 of the judgment which is page 3294 of the bundle, and I'm reading from the bottom of the page, this is from Justice Butler's dissenting decision: "The decision just announced holds that the United States is bound by treaty to surrender its citizens and others to England there to be prosecuted criminally and punished for that which if committed here would transgress no law; federal or state. And it is so held despite the established rule that England is not by the Treaty bound to grant any extradition upon the demand of this country unless the crime charged against the fugitive is also a crime under English law." So that is the rule and that was because the Court said "Look, the Treaty governs the terms of this extradition arrangement and for the particular offence in question, no double criminality is required so we are not going to insist on it and Factor may be extradited".

WINKELMANN CJ:

It's normally regarded as being risky to rely upon the dissenting Judge to summarise the ratio of the case. Do you say it's reliable in this case?

MR BOLDT:

Well, true, your Honour, but first of all, my learned friends rely strongly on the dissenting judgment but what I can –

GLAZEBROOK J:

That's because they say we should follow it.

MR BOLDT:

Yes, but what I'm going to come to, your Honour, is to say that saying *Factor* was wrong rather misses the point because *Factor* stated the law of the United States and that was the law that then governed its treaty-making practices from that point on. So what that meant was that those negotiating treaties on behalf of the United States after 1933 understood exactly how provisions requiring or not requiring double criminality were going to be interpreted and they then drew up large numbers of treaties that expressly picked and chose between double criminality offences and offences that would not require double criminality and your Honours will have seen in our written submissions we included an extract from a treaty the United States entered into in 1961 with Israel where something like the first 25 or 26 offences did not require double criminality but the following six or seven did.

And so we saw it was very much a standard part of United States treaty-making practices back in those days not to insist on double criminality unless the Treaty partner wanted double criminality. It certainly entered into some treaties back in those days that did require double criminality as well. But if there was no general requirement for double criminality, the US picked and chose and would require double criminality in some cases and not in others and that was part of what the Court of Appeal said in *Cullinane*; the Treaty was drafted by people who must be presumed to have been familiar with the United States decision in *Factor.* So, that also provides, I think, at least a partial answer to your Honour Justice Williams' question about well, how do we know they were really intending to pick and choose here among the offences that required double criminality. The answer is, that's what the United States did all the time back in those days when it was writing enumerative treaties of this sort. It also knew

from *Factor* that double criminality would not be presumed or implied when it came to reading an offence for which nothing was said about double criminality. So, in other words if a particular provision was silent on the question of double criminality, the Americans understood, pursuant to their law, that double criminality would not be read in. And what we see with this Treaty is a very typical American treaty. I have now read a lot of them and provisions that appear in our treaty are there in a lot of other American treaties. Your Honours have probably already noticed some of them because you will have seen the provisions in force in the Canadian treaty when reading *McVey* and there are a number of provisions that look just like ours, except, of course, the Canadian treaty was an express double criminality treaty.

So that is the point. *Factor* provides us with the jurisprudential background against which post-war treaties were written and as I say, there were cases in the materials, *Gallina* and *Assarsson,* both of Sweden, which say as a result of this, the conduct need not even be criminal in the United States. Now my learned friends have referred to some other lower Court cases in the United States which have instead asked whether the crime is a crime in the preponderance of states and suggests that some of the lower Courts have been seeking to reintroduce double criminality by saying, look you could have come to the same result in *Factor* if you had just asked, would this have been a crime in most parts of the United States. But there are two responses to that. Firstly, that is not what *Factor* held. But secondly that kind of analysis in the US about how many jurisdictions in the States does something need to be a crime in before you have double criminality, properly arises over there where you have a *Factor* type situation, but you do have double criminality in the Treaty. For example, let's assume *Factor* arose in a situation where the Treaty expressly did require double criminality. Could he get away with it simply because Illinois was an outlier and didn't criminalise the conduct, whereas every other state did. Or in that situation, do you look at the preponderance of the jurisdictions and make a decision on that basis. That's the legitimate use of that preponderance of the states' technique. It has occasionally and I think my friends will take you to one case called *Shapiro v Ferrandina* 355 F Supp 563 (SD NY 1973) being confusingly applied to a treaty that doesn't apply

double criminality. But the appropriate role for that kind of analysis over in the US is what happens when the *Factor* problem arises, but you still have to find double criminality. And in any event, none of that detracts from the real relevance of *Factor* to our case which is that it provided the jurisprudential background to our Treaty and it tells us how these selective references to double criminality in the Treaty were likely to be interpreted at the time.

[11:20]

That then brings us to the provisions in the Treaty and what provisions do we say are relevant in this case. I know my friends and I perhaps should pre-empt this submission now or note that I was slightly surprised to see in their submission the suggestion that if double criminality is not read into this Treaty, New Zealand might be required to extradite for sodomy or for abortion on the basis that both of those old crimes appear in the Treaty. The simple answer to pre-empt their submission on that point is consensual sexual conduct of any sort is not a crime in the United States.

GLAZEBROOK J:

Well it may not be but that's the point about it, isn't it? That if – and one doesn't have to be too imaginative to say that it could well be made so in the future.

MR BOLDT:

Well Your Honour *Lawrence v Texas* 2003 539 US 558 which is in our materials is a decision of the United States Supreme Court which indicates that the right to privacy indicates that provisions which purported to regulate consensual sexual conduct among adults, were unconstitutional and had always been unconstitutional. The Court in *Lawrence v Texas* expressly referred back to a decision of its own from 1985 called *Bowers v Hardwick* 478 US186 (1986) and said that decision was wrongly decided then and it's wrong now. There is no constitutional basis on which this kind of conduct can or should be criminalised and of course it is absolutely right to do that. So what the US has done is really what New Zealand did recently as well –

GLAZEBROOK J:

Well they said they can overrule themselves on those matters, haven't they?

MR BOLDT:

Well they can overrule themselves, I hope such a thing never happens.

WINKELMANN CJ:

But that's not really your answer is it though. You can't be answering in terms of specific offences. What your answer is, one assumes, is that we, before we reach this Treaty, formed a view that our criminal justice systems were suitably aligned.

MR BOLDT:

And they are still suitably aligned on that issue. And in fact in terms of abortion, the United States' position is far more liberal than the New Zealand position. And if things changed, if things do change, just as perhaps an extra layer of reassurance, our case really is that only another international commitment can override the international commitment we have made pursuant to this Treaty and since 1970 New Zealand has signed up to a number of conventions.

GLAZEBROOK J:

Well that can't be right because if you say New Zealand law says the Treaty applies, it really doesn't matter how many other international conventions we have signed; you could possibly say it can't be contrary to the Bill of Rights but the Bill of Rights says it can be.

MR BOLDT:

Your Honour the Minister retains discretion throughout this process.

GLAZEBROOK J:

But would still be in breach of international obligations on your view of this.

MR BOLDT:

No they would not. Our submission is that the Minister must –

GLAZEBROOK J:

So the Minister can actually say, I don't actually care. I am just not extraditing someone because I don't feel like it even though there is a prima facie case. Even though it comes within the enumerated offences, without being in breach of international law?

MR BOLDT:

The Minister would be in breach of international law if there was no competing international law obligation that required a different outcome. That's my submission and your Honour for example, the Law Commission late last year brought out a paper which dealt with law reform in the abortion area and it cited a number of international provisions which New Zealand is already actually receiving criticism under because our abortion provisions potentially place us outside them. They provide a basis, according to the Law Commission, both for a change to our existing law, and would provide a solid basis for the Minister when exercising his or her discretion under sections 19 and 21 of the Act to even allow an extradition to kick off for saying, no, this one, I can't comply with your request without breaching another international obligation. That's the short point. It's not a risk, it's not a risk that because never mind double criminality with respect to these crimes, we don't even have single criminality and my learned friend, it's simply wrong and unrealistic to suggest that that is a risk if double criminality is regarded as excluded from the Treaty.

WINKELMANN CJ:

We're five minutes from the morning tea break. It's probably a good time to check about timing.

MR BOLDT:

Well your Honour I think I am close, subject to any further questions from your Honours, to concluding the submissions I want to make about treaty and statute, and will then come on shortly after the break to discuss how, in my submission, the correct approach applied in this case would affect the outcome

and what correct approach might be for your Honours in considering the extradition pathways.

WINKELMANN CJ:

And how long will that take do you think Mr Boldt?

MR BOLDT:

I hope, your Honour, to be seated by quarter past 12.

WINKELMANN CJ:

Have you had a discussion with your colleagues about how that goes timing wise?

MR BOLDT:

I haven't, Ma'am, but what I have hoped, I know Ms Hyde is going to be carrying this argument on behalf of the appellants, and I hope if I sit down at that time that will leave ample time in the remainder of the day for her to respond.

WINKELMANN CJ:

And she is nodding that it will.

MR BOLDT:

Okay. The last point I wanted to make perhaps before I leave this topic and before morning tea, is simply to note what our Law Commission has said on this very issue quite recently. The Law Commission concluded a comprehensive review of the Extradition Act in 2016 and I have set out some of the most important parts of the Law Commission's report in my written submissions, and what the Law Commission effectively held was that the approach the Court applied in *Cullinane* is the correct and appropriate approach should be made clearer that there should, that the provisions in a treaty may override the general definition of "extradition offence" and it proposed the repeal of section 100 so that would mean there would no longer be a restriction on future treaties dispensing with double criminality if the Treaty partners wished

to go that way and I should take a moment to respond to my learned friend's submission. They're a bit stuck with the Law Commission's report because –

WINKELMANN CJ:

Well not really because it's just the Law Commission's report.

MR BOLDT:

Well it is Ma'am but it's a Law Commission report which was undertaken after many years of extensive consultation and work and it surveyed –

WINKELMANN CJ:

Yes, but it doesn't tell us what the law is Mr Boldt.

MR BOLDT:

It doesn't, however, it tells us what at least in the Law Commission's view the law should be, having regard to the competing policies in play and also –

WINKELMANN CJ:

Into the future because it's a law reform.

GLAZEBROOK J:

And that aspect has been criticised by a number of people, and they, well…

MR BOLDT:

Well, look, of course I'm not suggesting that your Honours are in any way bound by what the Law Commission says. However, it is a useful response to my learned friends saying, first of all that the *Cullinane* Court had the relationship between Act and Treaty badly wrong. That was not the Law Commission's view after doing a great deal of work on it.

WINKELMANN CJ:

Well then you are using the Law Commission then as an authority, and it isn't an authority on what the law is. It might be a useful summary for counsel, but it's not an authority on what the law is.

MR BOLDT:

No Ma'am, nor do I suggest that it is an authority in terms of what the law is, but what I'm addressing is the suggestion there is something wrong from a policy perspective, a human rights perspective and an international law perspective, with the way the Court in *Cullinane* approached this issue of the relationship between Act and Treaty.

GLAZEBROOK J:

There might be something wrong with the section 100 repeal because you're then giving carte blanche to the executive to enter into something that is actually contrary to the will of Parliament and the Extradition Act, because you're saying in future you can put whatever you like in this and it overrides the Act, and that may not be something that is actually appropriate for Parliament to do, but that is for Parliament and nothing to do with us.

MR BOLDT:

True, but can I say quickly in response to that point, Ma'am, I noted the contention by my learned friends that this is effectively a Henry VIII clause in that the executive is being given carte blanche to re-write New Zealand's law in any way it might choose, but that is simply incorrect. Every extradition treaty has to be laid before Parliament, this is section 15 of the Extradition Act, an Order in Council has to be laid before the House and it is a disallowable instrument for the purposes of the Legislation Act 2013, which means if Parliament doesn't like an Extradition Treaty, doesn't like what the Extradition Treaty does, then it is entitled to override it and say, this is not going to be the law. That is the approach the Act provides. It definitely does not give carte blanche to the executive. Effectively there is a ratification process on a treaty by treaty basis for the House.

GLAZEBROOK J:

Does that mean the Treaty isn't entered into or it has been entered into but just doesn't come into effect?

MR BOLDT:

It's quashed for all purposes. So the Treaty ceases – so New Zealand would sign it but of course, as with every treaty, there's then a ratification process which this forms in the context of New Zealand law. So Parliament very much keeps its finger on the pulse with respect to what actually occurs in this area. So this isn't a Henry VIII clause at all. It's a provision that retains close Parliamentary scrutiny and it does mean that if double criminality was done away with in a way that Parliament thought inappropriate, it could simply ensure the Treaty was quashed and had to be renegotiated.

Your Honours, if that's a convenient time.

WINKELMANN CJ:

Yes it is.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.46 AM

MR BOLDT:

Your Honours, I checked during the break as to whether the Court of Appeal had said anything about Article XVIII. I didn't think it had and having reviewed the relevant parts of the judgment, no, it did not. The only one of those specific double criminality provisions the Court did refer to was the provision we were discussing regarding age of consent with respect to minors and at footnote 109, the Court noted that there were different ages in consent throughout the United States so that probably explained that point although of course it would have been an unnecessary stipulation if double criminality was read into the Treaty in any event.

But the Court didn't confront Article XVIII and Article XVIII was in fact one of the provisions the Court of Appeal found most influential in *Cullinane* itself and so the Court allowed that, what in my submission was a very good and strong

contextual pointer, regarding the role of double criminality in the Treaty. It allowed that strong point to go unanswered in my respectful submission.

WINKELMANN CJ:

So which footnote is it that deals with the sexual offending against children?

MR BOLDT:

Footnote 109 of the Court's decision. The sentence that gives rise to the footnote begins, it's in paragraph 91 of the judgment, the Court says viewed in light of, the Court suggests the history of double criminality, "the language simply reinforces the need for double criminality. In this instance, the Treaty presumably speaks in this way because the age of consent may differ between New Zealand and some United States jurisdictions." So that's paragraph 91 of the judgment and then there's a footnote to the differing ages of consent in different parts of the United States, that's footnote 109.

I also remember now why I highlighted the bankruptcy provision because that was the part of the Treaty which is dealt with in the following paragraph of the Court of Appeal's decision at paragraph 92 and the bankruptcy provisions were important because in the Treaty, that expressly provided for extradition for offences against bankruptcy laws which are punishable by more than three months' imprisonment. So that clearly contrasts with what section 4 provides where the maximum penalty for extradition is just one year. And so the question then is well, what applies? If we have a bankruptcy offence where the maximum penalty is six months, do we apply the bankruptcy provision in the Treaty which expressly provides for three months, or do we again default back to what the statute says and say "This is not an extradition offence because the minimum penalty level is not satisfied in this case".

Our submission of course would be that in light of the way the Treaty is quite clearly expressed, a three month offence provision under our bankruptcy laws would, pursuant to this Treaty, be an extradition offence, notwithstanding the conflict with the general definition of "extradition offence" in section 4.

WINKELMANN CJ:

But why does that bring in double criminality?

MR BOLDT:

It doesn't but it's an example of a situation where if the Court of Appeal is right, an express provision in the Treaty would have to be put to one side, namely that an offence provision with only a three month maximum is an extradition offence. The Treaty provides for that but the Act only allows extradition for offences where the minimum penalty is 12 months or more. In the Court's decision, it said again it would apply the Act in that situation, and so a three month offence against bankruptcy laws would, on the Court of Appeal's analysis, not be an extradition offence and we say again that was a mistake on the part of the Court. This is one of those provisions where the Treaty clearly prevails over an inconsistent provision in the statute.

So your Honours, I may not need to say a great deal more unless your Honours have further questions for me about this issue of double criminality. I do agree with what your Honours said to me at the beginning about the important thing being this Act and this Treaty. It is true a number of overseas authorities have been called in aid and I'm about to do that again, albeit on the different issue of how we apply the generic types of offence provisions listed in the Treaty. But in the end, interpreting New Zealand's extradition obligations, we don't, I entirely agree, need to look beyond what the 1999 Act says and what the New Zealand-United States Extradition Treaty says. It is all there.

Perhaps one final point before I leave this, and it's just to highlight again what, in my respectful submission, would be the absurdity of outcome generated by the Court of Appeal's test. What the Court of Appeal has held is that you must first satisfy the normal statutory test under section 4 before you'd have somebody who can even be considered for extradition. But then you must also satisfy the test under the Treaty. That's what I called earlier the double-barrel test. So this is a case where the existence of this Treaty would make it harder for the United States to extradite someone from New Zealand than another Part 3 country which does not have an extradition treaty, because that country

would need only to comply with the provisions of the statute, and given, as we say, this Treaty was plainly designed to facilitate and make easier extradition between the United States and New Zealand, that simply can't be right.

But let's consider the consequence of what would happen if that was right, and you have a situation where you have an offence that fails this double-barrel test because the Treaty doesn't apply. The answer, according to the Court of Appeal, is that you can then go straight to the Act anyway by virtue of an ad hoc request under section 60. So you either have Act plus Treaty or just Act, in my respectful submission, given that the consequence is that you then just go back to the same position as any normal country.

WILLIAMS J:

There is some truth in what they say though because the extradition treaty does restrict the US to some extent. That list is not a list of every offence in New Zealand that carries imprisonment of a year so it is tougher.

MR BOLDT:

Well, it provides a set of offences, and most of the really serious offences are there, Sir. It provides a list of offences where the normal difficulties associated with, for example, the double criminality test, don't apply. So it provides you with a simpler and easier procedure for a treaty country which it is entitled to by virtue of its status as a treaty country. That is what we say the appropriate role of the Treaty is, and then if you've got an offence that falls outside that then you're in the territory of the Act.

WILLIAMS J:

Yes, so your argument was that this, did you call it double-barrel, I can't remember what you…

MR BOLDT:

The double-barrel test from the Court of Appeal.

WILLIAMS J:

The double-barrel test made it harder for the US. Can you give me a practical example of where that might be so?

MR BOLDT:

I can, Sir, and there was a practical example in this very case. On the Court of Appeal's approach, at least, to its interpretation of the Treaty. Let's assume for a minute, Sir, that we didn't have an organised criminal group at work here and so the imported provisions into the – all those provisions from the Crimes Act and the Copyright Act which are imported into the Treaty by virtue of section 101B weren't imported. Let's assume you've got a single person acting alone and that person is charged with a fraud-type offence, an offence that would fall within Article II.16 of the Treaty, that's obtaining money or valuable securities by false pretences. On the Court of Appeal's analysis, you could have no problem establishing double criminality but the Court held that because 16 is no longer reflected in those terms in our Crimes Act, the Treaty component of the offence falls over and that's why –

GLAZEBROOK J:

They'd have to be wrong on that on the "essence of the crime" approach, wouldn't they?

MR BOLDT:

Well, that's certainly our submission, your Honour.

GLAZEBROOK J:

I would have thought it was actually even accepted by your friends, effectively.

MR BOLDT:

Well, I hope so, in which case we'll be able to save a bit of time –

WILLIAMS J:

Give me a better one.

MR BOLDT:

Certainly, Sir, if the Court's right, that is a good example, because then the Treaty – but you see then, let's follow that through. So the Treaty component of the offence fails, so that means you don't have a Treaty extradition, but then what happens? You just go back and apply again under the Act as though the Treaty's not there.

WINKELMANN CJ:

Can I just ask about that? Because why do you say the Act kicks in to give you more? Because Article I says that there's an agreement, "These are the people who can be extradited"?

MR BOLDT:

Yes. Well, that's right, Ma'am, and it's our position that if you have someone who has committed a Treaty offence but which is not necessarily a double criminality offence then we still have an obligation to extradite that person.

GLAZEBROOK J:

No, but you have a double criminality provision under the Act so I don't understand the point.

MR BOLDT:

What do you mean, Ma'am? Which provision? Let's assume –

WINKELMANN CJ:

Well, I don't know, you might be answering a different question than I've asked. I'm just saying that perhaps the list provided in the Treaty is the entirety of the right to extradition for the United States?

[12:00]

MR BOLDT:

Pursuant to the Treaty, yes.

WINKELMANN CJ:

Full stop. Because if the Act is subject to the Treaty, so the Act's subject to the Treaty and you say section 4 is subject to the Treaty, you say, section 4 says "These are extradition offences, but the Treaty says oh no, actually these are extradition offences between us." So why does the Act come into supplement. That is my question to you.

MR BOLDT:

Because of section 60(1)(a).

GLAZEBROOK J:

But isn't that subject to 24(2)(c)?

MR BOLDT:

Well the way section 60 works is that it provides an alternative pathway to extradition for cases where the Treaty itself is not able to be satisfied. So if you have –

GLAZEBROOK J:

It would still have to comply with 24(2)(c) wouldn't it?

MR BOLDT:

Yes, it would.

GLAZEBROOK J:

So you can't say, I want you to be extradited on abortion or sodomy charges without satisfying 24(2)(c).

MR BOLDT:

I understand that your Honour. Now let's imagine it. Let's say we have a request from the United States to extradite for sodomy. Now if that happens, the person concerned will be either a paedophile; will be accused either of acting with respect to a child or there will be an absence of consent. Because that is the only situation in which that conduct is criminalised in the

United States. However, if that is the request, our treaty process ought to say, well is this an offence which is referred to in the Treaty? Answer, yes. That then is read in as a section 24(2)(c) extradition offence and then the 24(2)(d) question is, is there a prima facie case with respect to that allegation. That is the way this would work under the Treaty if you had simply a generic offence request under that provision. If, on the other hand, it was an entirely new provision, an entirely new crime – money laundering perhaps might not be a bad example. Let's assume that's an example that we can't jam into the Treaty because it wasn't around in 1970 and let's assume none of these other provisions are flexible enough to accommodate it. The correct approach then would be for the United States to say, okay we want this person, they are in New Zealand, they have committed an offence, but it is not a treaty offence. They would then make a request to the Minister under section 60 and assuming the Minister didn't have some good reason for turning it down, the extradition request would go forward in the normal way, as it would from any other country.

GLAZEBROOK J:

And would require double criminality under section 24(2)(c).

MR BOLDT:

That would require double criminality.

GLAZEBROOK J:

I just don't know what your point is because that seems to work perfectly reasonably to me.

MR BOLDT:

Well that is the position we say is correct as well.

GLAZEBROOK J:

Well no, I thought you were saying it shows – this would be absurd to require double criminality under the statute because they could just come back under section 60, but they could only come back under section 60 if they had double criminality so it doesn't show an absurdity.

MR BOLDT:

No.

GLAZEBROOK J:

Was there a different point that I haven't quite understood?

MR BOLDT:

Well the absurdity arises Ma'am – let's compare New Zealand with another part 3 country, a Commonwealth country. They only ever have to satisfy the requirements of the statute. Under the Court of Appeal's approach in this case, the United States has an extra hurdle. It has an extra hoop to go through before there can be a treaty-based extradition. If it is one of these crimes where we have an approach via the Treaty, there needs to be a second tier of analysis and you can fail at either point.

GLAZEBROOK J:

But surely there has to be because that's what happened in *Cullinane.* Now they can go under section 60 but before they couldn't.

MR BOLDT:

Well they could in *Cullinane* as well.

GLAZEBROOK J:

Well they could have done, but they didn't.

MR BOLDT:

That's what the Court in *Cullinane* held. It held in effect that you have two alternative and mutually complimentary pathways to extradition for countries that have treaties. So where you have an offence that's listed in the Treaty.

GLAZEBROOK J:

I just can't understand how the current Court of Appeal's decision creates absurdity.

WINKELMANN CJ:

Mr Boldt is your submission that, well this might be a different submission. But if you read section 4 as Justice Williams had suggested was a possibility, just to address the situation where you come up with a lesser list, that seems illogical. Because if you have got the lesser list, you can still go to section 60 and apply double criminality so what is section 4 doing at all? It suggests that the section 4, the ones that are in the lesser list are in a different category to double criminality ones.

MR BOLDT:

Yes I am not sure what you mean by the lesser ones.

WINKELMANN CJ:

The list that qualifies section 4.

MR BOLDT:

Absolutely yes. So yes I agree with that point.

WILLIAMS J:

Can I just test that? I've just been looking at section 60 and you see that requirement in subsection (1)(f). So 60(1)(a)(ii) says it applies if it is not an extradition offence under the Treaty. Then (f) has a double criminality requirement on my quick read of it. Well if that were the case, why would 4(1) only apply in its fulness if there were no extradition treaty. Sorry 4(2) because it is exactly the same requirement.

MR BOLDT:

Yes well that's right Sir.

WILLIAMS J:

No, this is against you, not with you. It is the exception that proves the rule.

MR BOLDT:

Well Sir, most countries, the great majority New Zealand does not have extradition treaties with and all Commonwealth countries, for example, are automatically deemed to be part 3 countries so they can just make an application without needing to make an ad hoc request here under section 60. Those countries, when they come to New Zealand and ask for someone's extradition, they must satisfy the test in section 4. Now it is our case that if you have an extradition offence that is listed in a treaty, then you don't have to worry about that last bit. You don't have to worry about satisfying section 4.

WILLIAMS J:

Yes, I thoroughly understand. We have spent some days on that very question. But if I am right in reading (f) as if it essentially says the same as 4(2), what is the point in 4(2) only applying to non-extradition offences because 60(1)(f) does the same job for it?

MR BOLDT:

Because 60(1)(f) only applies where you don't have an offence under the Treaty.

WILLIAMS J:

No it applies if you don't have a treaty too.

MR BOLDT:

Sure and that is for countries where ad hoc requests are always required and your Honours were dealing with that in the *Kim* case for example, that always requires an ad hoc request.

WILLIAMS J:

Right but the subject to the Treaty wouldn't kick in, if you are not on the list in an extradition treaty country, because the Treaty doesn't speak to it, right. So 4(2) would kick in, even if there were a treaty because the Treaty doesn't speak to the situation.

MR BOLDT:

I think I understand the point Sir. No, certainly our case is that what the Treaty provides and certainly this is how it would be interpreted in the United States because they only have the Treaty. The treaty provides that this is a list of crimes for which extradition may be granted. So if you have a crime which is not on that list, you are out of luck and that was the position in New Zealand until 1999 as well. So if we did have a new offence –

WILLIAMS J:

Who is out of luck? The United States is out of luck?

MR BOLDT:

The requesting state is out of luck, yes.

WILLIAMS J:

Why?

MR BOLDT:

Because the extradition relationship was defined in the terms of the Treaty and under the 1965 Act, the Treaty is all there was. So if you came within the terms of the Treaty –

WILLIAMS J:

There was no equivalent of section 60 under the 1965 Act, but there is now so presumably it is not the end of the game now.

MR BOLDT:

That's right and so what this has done, is it has provided a supplementary pathway to extradition in those cases where you would otherwise have missed out because your offence wasn't on the list in the Treaty.

WILLIAMS J:

So my question is, what is the point in (f) for non-extradition treaty offences with an extradition treaty country, if 4(2) does that job?

MR BOLDT:

Because in the absence of section 60, you would not be able to make the extradition request at all as a treaty country.

WILLIAMS J:

Well previously, but now you can.

MR BOLDT:

That's right Sir, and that's there for the role.

WILLIAMS J:

Sorry, doesn't your answer not answer my question?

MR BOLDT:

Well I'm not sure Sir.

WILLIAMS J:

Am I misunderstanding?

MR BOLDT:

I'm doing my best to answer the question. Your Honour, if we begin, if our starting point is pre-section 60 the Treaty is all there was.

WILLIAMS J:

Yes.

MR BOLDT:

If you're outside the Treaty, no extradition.

WILLIAMS J:

Got that.

MR BOLDT:

Now in the absence of section 60 that would still be the position for a treaty country.

WILLIAMS J:

Yes, got that too.

MR BOLDT:

You'd be out of luck completely because the extradition relationship is defined by the Treaty, extradition offence is defined by the Treaty.

WILLIAMS J:

Yes, I understand that.

MR BOLDT:

So what we have now, though, is an alternative mechanism which says, all right, if you're outside the Treaty you can – but you can still satisfy all the normal other tests.

WILLIAMS J:

Yes.

MR BOLDT:

Then you can make an application and you can simply be considered in the normal way like a non-treaty country would.

WILLIAMS J:

Yes.

MR BOLDT:

So when your Honour says, section 4(2) does the same job, section 4(2) does not do the same job in the case of a treaty country because the way the Court of Appeal put it in *Cullinane* was section 4 is replaced by the alternative definition of "extradition offence" that is found in the Treaty. So section 4 in the case of a treaty country is no help to you at all. You need another way of securing extradition and in this case that is section 60.

GLAZEBROOK J:

What I didn't understand was your absurdity argument.

MR BOLDT:

I think my absurdity –

GLAZEBROOK J:

It might be that it's just not…

MR BOLDT:

I think my absurdity argument may have been self-defining.

GLAZEBROOK J:

I think it didn't work.

MR BOLDT:

It may not have worked, so why don't we move on because I said I'd sit down –

GLAZEBROOK J:

Okay, well that's fine, as long as I haven't missed something that is sort of particularly necessary to your argument, but as far as I can see I don't think it does make sense.

MR BOLDT:

No, it made sense to me at the time but…

WINKELMANN CJ:

But it's not really absurdity, it's just it doesn't make sense, the statutory scheme.

MR BOLDT:

No, and in my submission it doesn't make sense that a treaty country has more hoops to go through to secure extradition than a non-treaty country. Now in a nutshell –

GLAZEBROOK J:

Well they wouldn't have more hoops to go through, in terms of double criminality, because a non-treaty country has to have double criminality.

O'REGAN J:

But on the Court of Appeal's decision so does the United States.

GLAZEBROOK J:

No, no, that's right, but he's saying that –

O'REGAN J:

That's what he's addressing.

GLAZEBROOK J:

No, no, I don't think so because I think he did say, well if it's the same argument and just couched differently, I can understand that argument.

MR BOLDT:

It is, and it's just that there is an additional separate process, the Court of Appeal said, that has to be gone through. You must satisfy the Act and the Treaty, not just the Act, which is what everyone else has got to satisfy. But I don't think too much is going to turn on this point Your Honours. I'm either right or I'm wrong about the relationship between the Treaty and the Act.

WINKELMANN CJ:

Yes, so you want to take us to some cases?

MR BOLDT:

I would like to take you to some cases. The most important cases under this heading are the *Edwards* decision, which your Honours have looked at already, which I think is in volume 4, and *McVey* which is in volume 6. *McVey* quotes from the British decision in *Nielsen*. So your Honours have already, I think, grasped my first point, and that is that the Court of Appeal was wrong to say that because section 257 of the old Crimes Act as it was, which was our old conspiracy to defraud provision was repealed in 2003, that means that Article II.16 no longer applies to the appellants' conduct. So if I'm wrong about double criminality the test for your Honours is, assuming your Honours are satisfied that double criminality has been established, well that's the end of the

case anyway, but in terms of the Treaty the question would be does the conduct in which the appellants engaged come in a broad and generic way within the provisions of the Treaty.

WINKELMANN CJ:

What issue are we addressing now?

MR BOLDT:

We're now addressing the application to this case of a conclusion that double criminality doesn't apply. My first submission is even if double criminality does apply the Court of Appeal's approach was incorrect.

So the next question though is well what happens if your Honours conclude that double criminality does not apply in this case. Now it's our submission that Article II.16 of the Extradition Treaty is broad enough to encompass all of the appellants' conduct. Article II.16, "Obtaining property, money or valuable securities by false pretences or by conspiracy to defraud the public or any person by deceit or falsehood or other fraudulent means," and for the reasons that were discussed with your Honours during the course of last week we say that in a broad and generic sense that is exactly what the appellants set out to do when they embarked on what's been called the Mega conspiracy. There is a very large body of evidence that they set out with dishonest intent to commit copyright fraud.

Now your Honour Justice Glazebrook asked me much earlier in the day, well how are we to read these broad generic provisions, and the way to approach those has been addressed. It was addressed by the Supreme Court of Canada in the *McVey* case, but it was also addressed by Justice Keith in *Edwards*, and perhaps *Edwards* would be the first place to turn to for this discussion. *Edwards* is in volume 4 and the relevant part begins I think at page 1309. In effect what the Court held in this case is that these words are to be read in their normal sense. Perhaps the best place to start is paragraph 27 your Honour. The Court had just referred to the need to read treaties in good faith and in accordance with the ordinary meaning to be given to the terms. The Court then

goes on to discuss the way the Article II offences should be interpreted in light of that. The Court said, look, we don't have to limit the terms of Article II by tying them exclusively to the detail of national definitions. And they note the fact that, "Over the life of an extradition treaty (and they tend to have long lives) national definitions will alter." The Court suggested there's no need to – that this was designed to provide a straightforward and accessible way of interpreting these provisions.

GLAZEBROOK J:

Can I just check. Are they here talking about looking at the essence or about how you work out a prima facie case or both?

MR BOLDT:

Well they're looking at first of all how do you define the question for the purposes of the prima facie test, and over the page the Court referred simply to the generally understood meanings of "larceny" and "embezzlement." And what the Court notes in there is that we're looking at just the general, ordinary meaning of these words, interpreted in a legal sense.

GLAZEBROOK J:

What about bankruptcy offences? Do we look at the generic – what do we do there?

[12:20]

MR BOLDT:

Well those ones are expressly provided for because it talks about the bankruptcy laws and so obviously they are going to be much more technically defined offences with reference to specific national definitions. But that, again, is very much the exception rather than the rule, and at paragraph 28, "But to repeat, our task is not to reach a decision solely under the law of one particular jurisdiction. Rather, it is to determine whether the counts as charged do fall within the ordinary meaning of items 14, 15, 16 and 20 in their context and in the light of the treaty's purpose and object. A primary purpose, emphasised for

us by s 12(a) of the Act, must be to fulfil New Zealand's obligations under the treaty."

They go on to say, "It is not however a matter of using dictionary definitions …. Part of the critical context is that the terms are commonly used for legal purposes, they have legal meanings, even if again those meanings may vary in detail, and the members of the delegations of the two countries who in 1970 prepared the list of property offences included in items 12–20 of art II would have been fully aware of that general legal usage," of the terms.

So that is what the Court defines, how the Court says generic provisions of this sort need to be approached, and a very similar analysis can be found in the decision of the Canadian Supreme Court in *McVey*, and we're looking at, that's volume 6 your Honours, at page 1824.

WINKELMANN CJ:

Page 1824?

MR BOLDT:

Page 1824 Ma'am. This is in the majority judgment. The passage I'm going to direct your Honours to is in the last paragraph of that page, and it goes on over the page. "The issue is not whether the crime charged is called forgery or not in either country, but whether the conduct charged can fairly be said to fall within the expressions 'forgery' and 'conspiracy' in the treaty. In considering this issue, it must be remembered that the crimes listed in the treaty are not to be interpreted according to the niceties of the applicable legislation of either country. Rather they are described in compendious terms to catch broad categories of conduct."

GLAZEBROOK J:

Am I right to say this wasn't a prima facie case question?

MR BOLDT:

No Ma'am, no. It was a –

GLAZEBROOK J:

So it's actually irrelevant?

MR BOLDT:

Well no it's not irrelevant Ma'am because –

GLAZEBROOK J:

Well it doesn't help me in how I then work out what the elements of the offence are that has to be shown in terms of a prima facie case to be honest.

MR BOLDT:

Well the way I read those provisions, and indeed what Justice Keith said in *Edwards*, is that, and in fact Justice La Forest goes on to say, "The frequently repeated principle that the fine or nice distinctions of criminal law are out of place in the law of extradition." Now –

WINKELMANN CJ:

It's a bit of a peculiar thing though really because sitting as a New Zealand Court we're not applying double criminality, but we can only make sense of it if we have no American law by reference to New Zealand law.

MR BOLDT:

Certainly, well, New Zealand law will be relevant as part of the context and background but what I think the Courts are getting at in both cases is that we don't have to be concerned with the detail and the technicality of local provisions. What we have seen with respect over the course of the last week is an attempt on the part of the appellants to approach their situation with reference very much to the vast technicality of New Zealand law. the argument about the Copyright Act and in particular the argument about say the safe harbours and whether they fit in, is very much in that context of trying very hard to apply a stringent local regime to a crime none of which actually occurred here. The issue about New Zealand's relationship with this offending is that we just happen to be holding the parcel when the music's stopped and so it's unusual for our law and the detail and technicality of our law to be the thing that

determines extradition. Of course, that's appropriate in the case of a non-treaty country because that's what the Act tells us we must do, but with respect to these general categories contained in a treaty, that's the antithesis of what those who wrote the Treaty were seeking to achieve. They were simply seeking to say "Well, in general terms, does this conduct fall within these categories?", in which case you've got a treaty offence –

GLAZEBROOK J:

But what it might have been saying was "Did this fall within this particular offence under the law of the requesting country?" And that actually makes a lot more sense to me than "Does this generically fall into some generic sort of goodness knows what?"

MR BOLDT:

Well –

GLAZEBROOK J:

So I wonder whether you're arguing against yourself.

MR BOLDT:

Your Honour, I'm having enough trouble as it is without taking myself on as well. So –

GLAZEBROOK J:

Because what it might mean is just what it says, "If you come within the bankruptcy laws of this country, you can go. If you come within whatever this is in accordance with the law of the requesting country, in this case, the United States, and there's a prima facie case in accordance with that law, then you're…" – which is worked out on the basis, as you say, of New Zealand law as to what would be a prima facie case, assuming those were the elements of the offence in New Zealand, that's what you say section 24(2)(d) means?

MR BOLDT:

That's right, and the way it was put by the High Court of Australia in *Riley* was to say assuming this was an offence in Australia, would, applying Australian standards of committal, a prima facie case be established? So they were prepared in that case to assume the conduct was criminal and then to say "All right, assuming this is criminal, does the evidence get you over the bar?" I have no difficulty, on the other hand –

WINKELMANN CJ:

Can I just ask you to clarify what you were saying then? Because I think I may have lost the thread. Are you accepting that there is a reference to New Zealand law or not?

MR BOLDT:

I'm not accepting, your Honour, that strict compliance with New Zealand law is required, no. What I am saying is that in each case, we've been given a series of broad headings and that provides the boundaries of our consideration of the appellants' conduct. In this case, actually as it turned out, that was very easy to do. Justice Gilbert in his decision in the High Court, which I'm going to take your Honours to in a minute, said "Look, yes, we are dealing with broad, generic categories and there may be some instances where that might create interpretive difficulties", but he said "This is absolutely not such a case. It is abundantly clear what Article II.16 means in the context of this Treaty", and perhaps the best thing I can do, your Honours, to illustrate this is just to take you to what Justice Gilbert said.

WINKELMANN CJ:

It occurs to me you could make an argument that we just proceed from the indictment and the elements are there and we just apply the standard to it –

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

– but you seem to be doing something more kind of liminal.

MR BOLDT:

Well, I would be very happy with that approach, your Honour. There is no reason –

WINKELMANN CJ:

No, it's not a matter about your personal hand in this, Mr Boldt, it's a matter about what the law is.

MR BOLDT:

I agree, Ma'am, but your Honour, that approach would work and it would provide your Honours with a yardstick by which to operate. What I have sought to do with these submissions though is to illustrate what other Courts have said when faced with similar questions. For example –

GLAZEBROOK J:

McVey was looking at double criminality and in that case, the essence makes total sense because you don't have an enumeration but it doesn't make total sense to look at an essence when you're looking at elements of an offence. It makes much more sense to me the submission that you look at what the US law is. You assume the US knows its own laws so when it sets out the elements of the offence, you assume that it knows what they are, and then you apply the New Zealand standard as to whether there's a prima facie case in relation to those elements.

MR BOLDT:

Yes, provided those elements fall within the –

GLAZEBROOK J:

You'd have to look and see whether it was an enumerated offence but then if it wasn't then you'd have section 60 anyway, but then you would need double criminality.

WINKELMANN CJ:

And isn't that consistent with the *Factor* questions? Was it in *Factor* where there were three questions you addressed?

MR BOLDT:

Yes. Well, your Honour, I can say the position in the United States is simply "Is there a treaty? Is this in the treaty, in broad terms? Is there probable cause?" What I don't want to do, and I do continue to adopt what Justice Keith said in *Edwards*, is to imply that in any sense, we need to be looking at United States law in order to interpret our extradition treaty. The Treaty is expressed in general and broad and neutral terms. It is meant to cover, in an umbrella fashion, conduct that is generally regarded as criminal in both countries. It may be that there will be cases where technical issues arise but what this regime is seeking to achieve is to sweep aside those technicalities and simply ask in a broad, generic sense, looking at the ordinary meaning of the word in a legal context, does this conduct fall within it, and then if so, has it been established to a prima facie level?

ELLEN FRANCE J:

My question is, when you're looking at that second question, does it fall within a prima facie level, does it meet the prima facie test, what law are you applying? If you identify elements of the offence that have to be proved to the prima facie standard, are those elements of the equivalent provision in New Zealand law or the foreign law?

MR BOLDT:

My reading of *Edwards*, and I may be wrong about this, but my reading of *Edwards* is that it took a broad and neutral position between the two. So for example, assault. There is a general, broadly-recognised definition of assault, the intentional application of force to another. That's contained in our Crimes Act but it also reflects decades of common law. So using that word in its ordinary sense, you would simply need to establish that to a prima facie case. Justice Keith interpreted the word "larceny" in *Edwards* and said that in New Zealand it is theft, pure and simple, and we know what "theft" means.

There might, I submit, for example, your Honours, that if the crime, say, were rape, we wouldn't necessarily be tying ourselves to the strict detailed technicalities of needing to show, for example, belief on reasonable grounds, because that's very much an idiosyncratic feature of New Zealand law.

WINKELMANN CJ:

So why isn't this double criminality, what you're describing?

MR BOLDT:

Because the particular offence need not anymore be an offence in the requested State. That, in my submission, is the position, and also, your Honours, you don't need to get into – and so for example, under conspiracy to defraud which is Article II.16 –

GLAZEBROOK J:

Can I just say to the rape example, let's assume the United States' definition of "rape" is exactly the same as ours, the indictment says "This man raped this woman without her consent and without reasonable belief in consent". When you do the generic thing, do you just have to see whether there's a prima facie case for lack of consent? Because it's idiosyncratic, as you put it, for it to have a non-reasonable belief in consent when in fact in the United States, it is not idiosyncratic at all, it's an element of the offence. So do you have to not have a prima facie case for what is actually an element of the offence for which they are actually asking for extradition?

MR BOLDT:

Where the offence provisions are exactly the same, Ma'am, that's easy.

GLAZEBROOK J:

Does it matter – you say we don't worry about the New Zealand offence at all. So the United States say "Well, I want to extradite for fraud. In America, there are these four elements of fraud". The normal view of fraud, you say, you look at the normal view of fraud and say "Well, there are only two elements that have to be proved to a prima facie case, so we can send them back even though

there are four elements that have to be proved in the United States and the United States hasn't managed to prove two of them"? Because the United States, in that case, would be – if we just took the four elements that the United States said there are and we assume that they are criminal in the United States and then we see if there's a prima facie case in relation to those four elements, that seems fine and easy for New Zealand to do, we just assume that those four elements would constitute a crime in New Zealand even if they would or they wouldn't, because we don't have to prove criminality, and then we look at the prima facie case in relation to those.

MR BOLDT:

Well, again, I fear arguing against myself, your Honour, but that is the argument that was rejected in the *Fischbacher* decision. We're not confining ourselves to the law of either jurisdiction. In situations where the law of the two parties is the same, it's a straightforward exercise and usually with respect to generic offences of this sort, you're going to be there or you're going to be very close, so in my submission, it's unlikely to cause practical difficulties very often, but the test Justice Keith suggested is that if it's not, then you have regard to the ordinary meaning of the words in a legal context and it may be, for example, that there is a request to extradite somebody to the United States and belief on reasonable grounds is not an element of the offence. That's not an element of the offence at common law and it wasn't an element of the offence when the Treaty was struck. So in that situation, in my submission, you could look more generally at perhaps not the dictionary definition but the way the word is generally understood and was generally understood when the Treaty was struck. As his Honour Justice Keith noted, you're looking at the general meaning of the terms in light of the purpose of the Treaty.

GLAZEBROOK J:

So you don't have an ambulatory view of the Treaty? Because I'm not sure that fits within the Vienna Convention but…

MR BOLDT:

Well, there are some words in this Treaty where we now have a far better understanding of their meaning than we did when the Treaty was struck. Sodomy is a good example of that. It was thought in 1970 that it could encapsulate consensual conduct. We now know it cannot and that that is outside the proper scope of the criminal law.

WINKELMANN CJ:

So you do have an ambulatory view of the meaning of the Treaty?

WILLIAMS J:

Well, it's more a revelatory view, isn't it?

MR BOLDT:

Absolutely, Sir, it is a revelatory view. That word in particular is one which we now know the meaning of better than we did in 1970. Other areas, the common law will be amended by statute. The way these provisions were intended at the time will be amended by statute. They are though broad, general words and they should continue to be applied in that sort of situation in the broad terms in which they would have been understood by those who were striking the Treaty.

WILLIAMS J:

It does seem that this all comes down to "This is messy, folks, try and do your best". So let's talk about this particular case.

MR BOLDT:

Yes, thank you, Sir.

WILLIAMS J:

Both sides of the Pacific have safe harbour provisions. Mr Raftery said they were relevant and had to be taken into account at prima facie level. I got the impression you were saying they aren't anymore.

MR BOLDT:

Well, your Honour, the only offence – and I can say across this entire indictment, in my respectful submission, Article II.16 is the only provision your Honours need to refer to. What my learned friend was saying is that a party strenuously trying to keep itself within safe harbour provisions is not going to have mens rea for any of the Crimes Act provisions. A party strenuously trying to keep itself within safe harbour may also have a defence under the Copyright Act but the Crimes Act provisions all require dishonest intent, and a party that is conscious of its safe harbour obligations and is doing everything it possibly can to remain within it, is never going to have a dishonest intent so the Crimes Act provisions would cease to be relevant as well. But of course, that is the antithesis of this case. In this case we say there was a concerted act of deception at all levels. Justice Gilbert with respect to Article II.16 and if I can take your Honours to –

[12:40]

WINKELMANN CJ:

Well can you just answer Justice Williams' question.

WILLIAMS J:

Because I am interested in the in principle approach that should be taken. Whether on the facts you are right, or the other side is right, is another question. I just want to know what the correct approach is.

MR BOLDT:

The answer is Sir, if it is a fraud provision we are looking at, and it is. Then yes, safe harbour is relevant to the extent it tells us something about the intent or otherwise of those who are facing extradition.

WINKELMANN CJ:

Well on a Crimes Act analysis though, it is quite hard to make it relevant isn't it, because it is sort of a defence but under the Copyright Act it is not a defence.

MR BOLDT:

Well I am not sure even that it is a defence with respect to a fraud charge, because you either have dishonest intent in which case a multiple of these fraud charges come into play or you have no dishonest intent.

WINKELMANN CJ:

But if your client, that's this case, that's not really so, is it? You might have some emails saying one thing but if you have people assiduously complying with the safe harbour provisions, it becomes more blurred.

MR BOLDT:

My answer is, it is a matter of evidence which may go to fraudulent intent.

WILLIAMS J:

So is it 24(2)(d) matter of evidence?

MR BOLDT:

Yes, yes it is because even at the most generic level of a fraud provision like Article II.16, dishonest intent is a critical element.

ELLEN FRANCE J:

Well you are dealing with it more in terms of Article II.16 rather than the alternative Crimes Act pathways.

MR BOLDT:

Today I am yes, because of course last week the Crimes Act pathways were being dealt with. But if I can take your Honours just quickly, and I know I have gone over time – to where this was dealt with by the Judges below. So you can see that actually in practical terms, there was nothing difficult about the application of this generic provision in this case.

GLAZEBROOK J:

Well yes except that doesn't mean that because there wasn't anything difficult in this case, it is the right way to go, that is the problem. But anyway, do you want to take us to it?

MR BOLDT:

Well we can start perhaps at paragraph 83 of Justice Gilbert's decision.

GLAZEBROOK J:

And can you just remind me where that is. Volume 1, part 1 or 2.

MR BOLDT:

That is volume 1. Documents for hearing, yes.

WINKELMANN CJ:

The judgment starts at 277 and in fact it is at 301.

MR BOLDT:

So paragraph 83 of Justice Gilbert's decision.

WINKELMANN CJ:

302 in red.

MR BOLDT:

302, yes Ma'am. And so his Honour then notes, "I now consider whether this alleged conduct corresponds to the offence described in the treaty even though it doesn't specifically refer to copyright infringement." At 84 his Honour notes that, "Unlike the descriptions of the offences of larceny and embezzlement" and referred to in *Edwards,* there is no difficulty interpreting Article II.16. It closely followed the wording of section 257 of our old Crimes Act and noted also that it reflected the common law offence of conspiracy to defraud.

GLAZEBROOK J:

He is looking at New Zealand law at that stage ironically but defined the other ones.

MR BOLDT:

He is Ma'am, albeit as part as within a context of a well understood concept of conspiracy to defraud which of course was a common law offence that we have seen referred to.

WINKELMANN CJ:

Don't we know these provisions actually were taken from the schedule to the 1965 Act in any case?

MR BOLDT:

We do, yes. And so there is no challenge, as I understand it, to the formulation of the scope of Article II.16 in this Court which you can see at the top of the next page, "A potential limitless variety of circumstances encompassing the entire spectrum of dishonest means. The object of the conspiracy need not be criminal. A conspiracy to commit a civil wrong would suffice." And so even if the conduct here were only civil rather than criminal, the fact this was a group of people who had conspired together to make money by defrauding copyright holders would be sufficient. And his Honour then goes on in a fairly detailed analysis to talk about how, at the time the Treaty was struck, conspiracy to defraud was the well-recognised mechanism by which copyright offending tended to be prosecuted. So his Honour was saying there that when you look at the *Scott v Metropolitan Police Commissioner* [1975] AC 819 (HL) case. If you even look at the New Zealand, at *Adams* as it stood at the time the Treaty was struck, it expressly referred to copyright offending as a species of conspiracy to defraud and the various other cases we have heard where arguments that the various copyright statutes were a code, were, to use his Honour's words, "given short shrift."

It is also worth in my respectful submission your Honours having a look at – I know we haven't referred to his decision very much in this case – but when we

look at what Judge Dawson said. Because although Judge Dawson has attracted a degree of criticism for the way he confused the elements of the article of section 24(2)(c). He did do a thorough 24(2)(d) analysis and that, your Honours, can be found in his decision which is the very first decision in the same purple bundle. If I can ask your Honours to have a look at paragraph 588 which is page 223 of the bundle. And indeed I know there has been a temptation to go down rabbit holes with respect to the evidence and it is worth noting that although there were some aspects of his decision that he got wrong, Judge Dawson did sit through nine weeks of the evidence and this is a distillation of his findings, with respect, to the elements of dishonesty under Article II.16. He noted the reward system, noted a prima facie case that they shared a common intention to obtain popular conduct knowing much of it was infringing, encouraged wide spread access, maintaining availability of copyright infringing conduct and then over the page at 224, we see his Honour's findings and there are 13 of them. All of which are very clear encapsulation of what the evidence shows and why it shows a fraudulent intent on the part of the conspirators in each case. So what his Honour noted was again correctly stating the elements of a conspiracy to defraud. He found an absolute abundance of evidence that that was present in this case and your Honours have asked me about the safe harbour provisions. What you can see in these findings is active steps to subvert the safe harbour provisions and in my respectful submission, therefore first of all, you can put them to one side for the purposes of your section 131 analysis, but secondly, they show this was not an honest group where you can't infer mens rea because they were taking steps at all stages to comply with their obligations. Actually, what they were doing was seeking to subvert those obligations and to conceal what they were doing.

[12:50]

ELLEN FRANCE J:

This part, the 591 is the part that's highlighted in yellow, isn't it, on the version Mr Illingworth gave us?

MR BOLDT:

It may be, Ma'am. My friend says this was cut and pasted but with respect, it was plainly adopted by his Honour as his findings and furthermore, it has then been the subject of concurrent findings at every level from here up. Justice Gilbert accepted those findings and of course, your Honours are familiar with the passage from the Court of Appeal in which they said the evidence, there was a very strong prima facie case that they conspired to, and did, infringe copyright on a large scale for their own commercial gain. But for the purposes of this part of the case, this pathway, it is their agreement to act dishonestly - that is the important thing. Ironically enough, it wouldn't matter, having formed that agreement, if by some sheer fluke, every file that went through their system turned out not to be copyright-protected because as my learned friend Mr Raftery noted in his submissions, the offence is complete at the stage of agreement. Even if they thought there was only 10% that they were doing whatever they could to make the most of that, that would be the same. Here we see clear evidence of a dishonest agreement which comfortably satisfies that Article II.16 test and therefore that pathway.

Your Honours, I'm just about finished. There has been – count 3 caused a little bit of difficulty in the Court of Appeal because prior to the Court declining to follow *Cullinane*, the pathway for that offence had always been regarded as Article II.19 of the Treaty which was the receiving and transporting. Count 3 is the one that deals with the movement of the money both within the Megaupload conspiracy and also into the pockets of the conspirators. It was framed as a United States money laundering offence but it would not qualify as money laundering under our law. The Judges of the first two Courts said "Well, Article II.19 applies". The Court of Appeal quashed the Treaty pathway and said "But we can get in under section 246 of the Crimes Act" which is the receiving provision, and my friend's right, he criticised that conclusion on the basis they would be receiving from themselves and you have to receive something obtained from a crime committed by another.

In our respectful submission, the correct Treaty pathway for count 3 is simply Article II.16 again because the movement of the money within the conspiracy

was part of the broad overall conspiracy. It included the payment of the service, for example, the payment of the leases on their premises, the payment of staff, the payment of rewards to infringing uploaders, it was all just part of that same broad –

WINKELMANN CJ:

But that's the same offence then, so why is it being allowed to be charged separately? Wouldn't this be the sort of situation where in New Zealand, it's not recognised as criminal conduct outside of that which you've already got another charge?

MR BOLDT:

Well, the United States' superseding indictment notes that under United States law, any act done in furtherance of the conspiracy can be charged and what they are doing, of course, is constructing an American indictment based on American criminality. All we are asked to say is does this come within this provision of the Treaty? Looking at the count 3 conduct by itself, these were simply more isolated instances of people acting pursuant to this conspiracy. Exactly the same point can be made with respect to counts 4 to 8 in the indictment which were the individual acts of uploading et cetera. They were all designed to further the conspiracy, they were all part of this overall regime of dishonesty, and so in my submission, Article II.16 applies to that as well, and as long as your Honours see no reason to depart from the concurrent findings of the three Courts below, that, in my respectful submission, is simply all you need in order to hold these appellants eligible for surrender.

WINKELMANN CJ:

You mean Article II.16 is simply all we need?

MR BOLDT:

Article II.16 is all you need because it shows a very clear course of dishonesty, as that term has been defined both in the old New Zealand statute but also at common law and would definitely have been understood by the framers of the Treaty in 1970. Your Honours, on this analysis, everything else is a bonus,

section 131, the various provisions within the Crimes Act. In *Cullinane*, the Court of Appeal noted that the approach where you simply need to look within the Treaty and don't need to apply the detail of double criminality represents a significant simplification of the process and in my submission, we see a very good example of that here. You're simply asked "Are we within the Treaty?" Plainly, we are. There is no specific requirement for double criminality. So as long as we can safely infer to a prima facie level dishonesty then we actually have all we need in order to say we've satisfied what's necessary to extradite, or right, should I say, for the matter then to go to the Minister which then raises a host of other issues.

So this is a simple, straightforward treaty analysis of a relatively straightforward provision and in my submission, both the District Court and the High Court were exactly right in terms of the way they applied that in the present case and in that the findings they made, there is absolutely no basis for disturbing them, especially as they were also then confirmed by the Court of Appeal, albeit in the context of the Crimes Act offences because the Court didn't look at the Treaty offences, but the Court accepted all those findings of dishonesty which are amply sufficient to say there is a prima facie case for Article II.16.

I see we've come right up to 1 o'clock but I am now finished, your Honours, unless you have any other questions for me.

WINKELMANN CJ:
No thank you, Mr Boldt.

MR BOLDT:
Thank you, Ma'am.

WINKELMANN CJ:
So Ms Hyde, how do you think you're going to go for timing? Do we need to come back at 2.00?

MS HYDE:

I think that might assist, your Honour. I was expecting to be at least an hour and a half, probably up to two hours in total. There are a few things I need to fix up along the way and apparently a whole new case on II.16 so there's a bit to do.

WINKELMANN CJ:

All right, we'll come back at 2 o'clock then.

COURT ADJOURNS: 12.58 PM

COURT RESUMES: 2.00 PM

MS HYDE:

Thank you. If the Court pleases, I thought I'd begin by giving you a brief overview of what I'm going to cover. There are really three issues of interpretation that the Court needs to determine. The first is what is the meaning of "subject to a treaty" in section 4. The second is in the case of –

WINKELMANN CJ:

You might just go a little bit slower because I want to take this down, because as you say it's framing up your whole argument. So the meaning of "subject to a treaty".

MS HYDE:

Yes your Honour. Meaning of "subject to a treaty" in section 4. The second issue is: in the case of inconsistency with a treaty, can section 4 be overridden by a treaty?. The third issue is that if so, is the New Zealand-United States Treaty inconsistent with section 4?. So I'm going to address each of those three issues following which a couple of other considerations as to why we say the Court of Appeal is correct to overturn *Cullinane* and then finally I'll address the position if we're wrong and if *Cullinane* is reinstated, what does that mean.

I thought I'd begin though just by observing in response to my learned friend's submissions this morning that everything this morning has really shown just how confusing and difficult extradition is if your yardstick is unclear. The US is really trying to remove any cogent or clear yardstick from this process and that's where things get difficult. I'm going to endeavour to show you that Parliament had a very clear intention that domestic New Zealand offences would be the yardstick and that's all the Court has to worry about.

So beginning on the first issue, the meaning of "subject to a treaty" in section 4. Mr Boldt has taken your Honours on a speed-date with the Extradition Act. I'm going to suggest you need to meet the parents. We need to go back to the 1965 Act, because to understand section 4 you really need to understand where it's come from. So I'll just take you to the Act, it's in the appellants' authorities bundle, volume 1, a kind of purple coloured one, and if we start at page 4. Appellants' authorities, volume 1, it's pale purple in colour, and it's page number 4.

WINKELMANN CJ:

It's pink.

MS HYDE:

That's the one. Sorry, Your Honour, I see that as purple, because there's another one that's more pink. This is the one. So I'm looking at the definition of "extradition offence" in the 1965 Act, definition of "extradition offence" begins about half way down the page. "Extradition offence, in relation to any foreign country, means any act or omission which, if it occurred in New Zealand," first, "would be one of the crimes described in the First Schedule to this Act." Second, "And which amounts to one of the offences described in the extradition treaty with that country." Then third, "And is punishable in that country."

That's your three stage test. Is it a crime described in the schedule. Is it a crime described in the Treaty, and is it criminal in the requesting State. Then it says that the definition, "Also has the extended meaning given by subsection (2)," so that begins at the bottom of the page, "For the purposes of

this Act, the expression 'extradition offence' in relation to any foreign country, shall also include any act or omission which, if it occurred in New Zealand, would be one of the crimes of…" basically conspiracy, attempts and accessories after the fact.

WINKELMANN CJ:

Sorry, where are you?

MS HYDE:

Over on page 5. So it's saying that it includes conspiracies, attempts, counselling or attempting to procure and being an accessory after the fact, and then it says, "And which amounts to one of the offences described in the extradition treaty with that country." So that's a further affirmation of double criminality. What Parliament is saying is we have a general proposition, we have a general baseline of offences for which Parliament has agreed there will be extradition, and those are the ones listed in the schedule. New Zealand will only extradite for those offences. However, there's no obligation to extradite anywhere without a treaty, so what the Treaty does, is it further refines the schedule by saying which specific categories of offence that particular country can request extradition for. So you can see the schedule in that same volume beginning at page 16.

GLAZEBROOK J:

Is the submission that the Treaty would be limiting rather than expanding?

MS HYDE:

That's exactly right your Honour. This is why the offence has to be, one, in the schedule, because that's what Parliament has said, yes, we will extradite for these offences, and it has to be one in the Treaty because that's where the executive has created a reciprocal arrangement with another country. So you kind of have two prerequisites. You need seriousness and reciprocity. Seriousness is Parliament saying these are the offences serious enough that we think we can extradite for them. Reciprocity is your treaty. So that's up to

the executive. They negotiate that with another country. What offences are the ones that we will reciprocally extradite for.

If you look at the schedule to the 1965 Act, which is the one at page 16, they're not just descriptions like you see in the enumerative list in the Treaty, they're actual offences, you've got actual provisions there under New Zealand law. Domestic offences identified. The version of the Act that you have in the bundle here is the 1965 Act as enacted, but that schedule was subject to change. It was amended as the criminal law changed in New Zealand. We've covered that in our written submissions. There are references to that.

WILLIAMS J:

They were steadily amended over the years, is that what you're saying?

MS HYDE:

That's right your Honour. There seemed to be a bit of a lag with some offences and they were caught up with in 1998 by way of a Statutes Amendment Bill, and that's a legislative instrument that I think the Cabinet Manuel says it's for uncontroversial changes to legislation, so it was very much viewed as just tidying up.

The other important context is that as at 1965 all of our treaties were actually UK treaties that also applied to New Zealand. These treaties, I think for the most part, still apply, and they're listed in one of the schedules to the current 1999 Act, and you don't need to go there but if you want to later it's at page 345.

WILLIAMS J:

Which schedule?

MS HYDE:

The schedule to the 1999 Act is schedule 1 to the 1999 Act at page 345 of the same volume, United Kingdom Orders in Council relating to extradition having effect in New Zealand. If you run an eye over it, they're very old, they're from the late-1800s, early-1900s, and they're still applying today.

So because in 1965 our treaties had been negotiated by the United Kingdom and primarily under UK law there is a possibility for inconsistency between UK treaties and the New Zealand law that now applied under our Crimes Act and in our Extradition Act, and so the way that they dealt with that was by section 3(4), which is on page 5 of the bundle, and that's where you see for the first time this provision that "Except as provided in subsection (3) of this section, this Act shall be read subject to the terms of the Treaty and shall be so construed as to give effect to the Treaty."

WINKELMANN CJ:

Section 3, subsection?

MS HYDE:

4. The reason why I say that relates to the issue about UK treaties is because that was actually addressed by Justice La Forest in *McVey*. I'd like to show you that but first, we should have a look at the equivalent Canadian provision in the 1985 Canadian Act and that's in volume 3 of the appellants' authorities which is a pale blue colour, I think. If you turn to page 821, you'll see there section 3, "In the case of any foreign state with which there is an extradition arrangement, this part applies during the continuance of the arrangement but no provision of this part that is inconsistent with any of the terms of the arrangement has effect to contravene the arrangement and this part shall be so read and construed as to provide for the execution of the arrangement." And that's explained by Justice La Forest in *McVey* which is in volume 6 of the authorities, it's a yellow one, at page 1783. His Honour said "A second, but related, difference flowing from Canada's" –

GLAZEBROOK J:

Sorry, I missed the page number.

MS HYDE:

1783, Your Honour.

GLAZEBROOK J:

Thank you.

MS HYDE:

"A second but related difference flowing from Canada's incapacity to negotiate treaties at the inception of our present scheme of extradition is found in s 4 of *The Extradition Act, 1877* (now s 3)". Section 3 is the one I just took you to. And then they go on, "In Great Britain, a treaty only came into effect when it was applied by Order in Council. In Canada, it was provided that the treaties would apply during their continuance. But given the fact that Great Britain, not Canada, negotiated the treaties, provisions could be inserted in treaties that might not precisely square with the procedure set forth in the Canadian Act. 'For the avoidance of doubts', therefore, s. 4(2) added that any provision of the Act that might be deemed to be inconsistent with a term of the treaty would not have effect to contravene the treaty; the Act was to be construed to provide for the execution of the treaty. This provision should not be read as incorporating into the Act every provision of the treaty."

And then he goes on and again picking up towards the bottom, "Section 4 of *The Extradition Act, 1877* (now s 3) simply was intended to ensure that the Canadian provisions confirmed to treaty provisions that were negotiated against the background of the law of Great Britain. It does not provide for the broad incorporation of treaty provisions into judicial extradition proceedings; it was simply intended to avoid possible inconsistencies. Any other approach would defeat the basic purpose of the Act. Such inconsistencies were, in any event, hardly likely. Our Act was largely modelled on the British Act."

ELLEN FRANCE J:

Do you agree with what's said in *Cullinane* which is that section 3(4) equated to section 11 of the current Act?

MS HYDE:

I think section 11 is the updated modern version of section 3(4). It has been read stronger in *Kwok-Fung* than it is by La Forest in *McVey* and I'm not here

to overturn *Kwok-Fung* but it's just to show the origins of this, where this all came from. It was not about bringing the whole treaty into the Act. It was just about ensuring there's consistency in a situation where you've got treaties negotiated by another country.

GLAZEBROOK J:

And he makes the point on the next page that there is that reciprocity requirement in any event, punishable by at least one year's imprisonment in both states.

MS HYDE:

Yes, and I'm glad your Honour picked up on that because I was going to come back to that passage later as well. I think the key wording there is that Justice La Forest says, "Many of the treaties contain provisions such as those in the treaty in this case that speak of 'reciprocal extradition' or require that crimes be punishable by at least one year's imprisonment in both states." When we look at the Treaty, you're going to see that the New Zealand-US Treaty uses the word "reciprocal". It doesn't define by reference to a period of imprisonment, no, but it's very clearly based on double criminality, reciprocity, and the use of the word "reciprocal" means double criminality and that's what Justice La Forest is pointing out here.

But turning back, that's all I wanted to show you about the 1965 Act by way of background but what we say is that the 1999 Act, and section 4's definition of "extradition offence", all that did was replace the enumerative list in the schedule to the Act with an eliminative test. That was the change being made. It was a modernisation but it was not intended to otherwise change the test, and you can see this in the explanatory note to the 1998 Bill and that's also in that first volume of appellants' authorities. If you turn to page – it begins at 37 and we'll pick up at page 38. I just draw your attention on page 38 to the heading "Basis of modern extradition law". "The modern law of extradition is founded on a number of principles: It is in the interests of all states that crimes acknowledged to be such do not go unpunished", comity of nations, and then "It is also necessary to ensure that the basic human rights of the person sought

are adequately protected. There is considerable hardship if an innocent person is sent to stand trial in another state, particularly when the requesting state is not that person's usual state of residence." I'd add that that's the position the appellants are in here.

WINKELMANN CJ:

Sorry, I've lost where you are.

MS HYDE:

I'm on page 38, your Honour, under the heading "Basis of modern extradition law," the third bullet point I just read. So immediately following that, "Extradition law therefore attempts to strike an appropriate balance between the aspirations of the international community in wanting to limit havens for law breakers and the legitimate expectations of persons accused or convicted of crimes that they will be dealt with humanely and in accordance with law."

So what the explanatory note goes on to do is record towards the bottom of that page that there's a trend towards more uniform extradition laws, so we're wanting to be in line with that trend, and then over the page, on page 39, you see a bolded heading "Key features of the Bill". "Extradition is increasingly seen as an important law enforcement tool and it is likely that, as transnational crime becomes more common, so too will requests for extradition. The main aim in reforming New Zealand extradition law at this time has therefore been to put in place a more modern extradition regime that allows extradition for a wider range of offences and can be used in respect of requests from any state. While the Bill aims to ensure that alleged offenders can be surrendered expeditiously, it also sets a 'bottom line' as to the circumstances in which extradition may occur. This helps to protect the alleged offender's basic human rights, given that the person is threatened with removal from the safety of a state where he or she has committed no offence."

And then the key features in heading number (1), "Extradition is possible for a wider range of offences", and what they explain there is that the 1965 Act with its schedule is very restrictive because it limits the offences to those listed in

the schedule and what Parliament says is that's outdated and we'd prefer now to use the eliminative approach which is where you have the broad test based on how many years of imprisonment setting a minimum standard. So what we see is that Parliament is changing its bottom line. It's saying "Our bottom line is not now that we'll allow extradition for the offences listed in the schedule to the Act. Parliament's bottom is line is now we'll allow extradition for offences that satisfy the section 4 test". What we don't see here is any indication of any intention that a treaty can replace that test. We don't see any indication or intention that you don't also still have to satisfy a treaty because although you have Parliament's bottom line in the section 4 test, you still need that treaty reciprocity that's defined by the Treaty and the offences in the Treaty to get home. So the three stage test's still very much applying.

ELLEN FRANCE J:

At that point, there's no "subject to" in the meaning, is there?

[14:20]

MS HYDE:

That's correct, your Honour, it was left out of the Bill as introduced. The wording was put back in by the Select Committee and there's no comment on that in the Select Committee report which I think, to me, speaks to an error correction rather than a policy change. So moving towards the bottom of page 39. They talk about the main regime in part 3 and I just want to draw your attention to the very final sentence of that page beginning, "The." Then it goes over to page 40.

GLAZEBROOK J:

Sorry just what page are we?

MS HYDE:

Page 40.

O'REGAN J:

It is at the bottom of page 39.

MS HYDE:

There is a "The" on page 39, and then on page 40. "The second stage is for the Court to determine whether a prima facie case exists against the person. That is whether such evidence exists that if not contradicted at the trial would be sufficient for a reasonably minded jury to convict. This essentially involves the same process as for a preliminary hearing of criminal proceedings commenced in New Zealand." Parliament is not saying there, you only need evidence of conduct. So what we say is that the wording you end up with in section 4 and the words, "Subject to a treaty" are just the updated version of the definition in the 1965 Act. Parliament's bottom line is the section 4 test and then you get the reciprocity from the Treaty and that is why you need to satisfy both. If there had been a more substantive change, then you would expect to see a note of it in what is quite a detailed explanatory note. The point that follows from that as well about section 4 is that the words "Subject to a treaty" in section 4 are not related to section 11. Section 11 is a separate requirement for the statute to be read consistently with treaties. And in fact, the US interpretation of "Subject to a treaty" as meaning the Treaty can replace section 4, would really be rather redundant in light of section 11 because if you already have to give effect to the Treaty by section 11, why would Parliament say that twice in section 4? The approach of having to satisfy a domestic standard, identify a domestic offence and also the Treaty, is an ordinary approach in extradition law. Authorities that have been canvassed by the Court of Appeal in this proceeding just don't appear to have been put before the *Cullinane* Court, so I don't think the Court was directed to the historical origins of section 4 or to the United Kingdom and Canadian case law in relation to legislation that is very similar to what we have here and that shows that this three stage test is quite ordinary.

In *McVey* the definition was slightly different. For something to be an extradition crime, it could be either listed in the Act or it could be described in a treaty and they did that because sometimes there would be updates in the UK and to not require them to have to fix it up, in Canada they could just negotiate their own

treaties and not have to update the Act necessarily but what Justice La Forest said is, that that makes no difference. Although it refers to only having to be described in the Treaty, you still identify the equivalent Canadian crime. And so Justice La Forest says on page 1789, back in volume 6. You don't need to turn to it, I can read it. He just says, "Shortly put then, under the Act an extradition crime is one that if committed in Canada, would be one described in the schedule or treaty as construed according to the law of Canada."

GLAZEBROOK J:

What was that page reference, sorry?

MS HYDE:

Page 1789, volume 6. I think that's the conclusion, so the reasoning kind of leads up to that point. So the next point is that this three stage test in section 4 is consistent with the entire scheme of the Extradition Act. So I'd like to go back to the section 60 process that Mr Boldt addressed you on this morning, and that's in volume 1 of the authorities again, at page 311. So in section 60, as your Honour Justice Williams picked up on this morning, the subsections (e) and (f) replicate the section 4 test and so what this is showing, again. Is Parliament's bottom line. The same bottom line in section 4 we have appearing in section 60 for an ad hoc request for extradition. What Mr Boldt didn't address is subsection (3) which is also critical to understanding this section because a request is made to the Minister and there are certain mandatory relevant considerations in subsection (3) that the Minister has to take into account, and under (a) you see, "Any undertakings given by the country making the request," basically that there will be reciprocity. So if New Zealand is seeking extradition for this kind of offence, will this requesting State reciprocate?. And then in (b) the seriousness of the offence.

So section 60 is mimicking section 4. You have Parliament's bottom line in terms of the double criminality, and then you need reciprocity as determined by the executive. Normally that's done by a treaty but on the ad hoc basis that can be determined by the Minister. It is not easier to go by section 60 than section 4. When you have a treaty and you go via section 4 there's already a reciprocal

arrangement, there's already agreement at that executive level that of the offences for which Parliament is prepared to extradite, they can apply for extradition in respect of these offences. If it's not included in the Treaty, they still need to clear that reciprocity hurdle but they do it a different way via the Minister. So my submission is that that's completely consistent with the three stages in section 4.

The other part of the Act that's consistent with the three stage test is section 101B, and that's on page 338 of the bundle, and it's the wording of the section that I submit is important, because it talks about offences being deemed to be offences described in an extradition treaty.

WINKELMANN CJ:

What section is that?

MS HYDE:

Section 101B on page 338. This is the deemed offences provision. 101 capital B, section 101B, subsection (1) on page 338. So what it says here is that offences will be deemed to be described in a treaty, because that's what treaties do, they describe offences, they don't contain offences in and of themselves. If you didn't need the provisions that satisfy this 101B test to be described in a treaty, there'd be no need for this section. What it's saying is there are offences that will satisfy the section 4 bottom line test, that Parliament in accordance with obligations under UNTOC and given the seriousness, you know we're talking four years plus imprisonment, and given that it's an international treaty, we can be pretty sure there's a bit of reciprocity there because everyone has the same obligations. So Parliament is saying, okay, well you'll satisfy that subject to a treaty part of the test because these ones have been deemed to be described in the Treaty.

That basically concludes my interpretation of section 4 so I'll move right along to the question of whether section 4 can be overridden by a treaty. So as I say I think section 11 –

WINKELMANN CJ:

Can you just, I'm sorry to ask you this question and take you right back to the beginning. Can you just close this off by explaining what you say "subject to an extradition treaty" means in section 4?

MS HYDE:

What it means is that you have to satisfy the three stage test. It means that you have to satisfy the bottom line in section 4, which is imprisonable in both countries by at least 12 months, and subject to a treaty limits section 4 to say, once you've satisfied Parliament's bottom line it also needs to be an offence described in the Treaty.

WINKELMANN CJ:

Does that mean then an extradition offence has to be an extradition offence – well, the existence of a treaty is an element of an extradition offence?

MS HYDE:

If there is a treaty, yes your Honour. So moving on to whether that three stage test in section 4 can be overridden by a treaty. As I say, section 11 is the updated version of section 3(4) in the 1965 Act. It has origins in dealing with treaties that have been negotiated by the UK, but it was interpreted by the Court of Appeal in *Kwok-Fung* in a stronger way than *McVey*, to say that if a provision is not protected under subsection (2) of section 11 it may be overridden by an inconsistent treaty.

I just want to clarify because my learned friend suggested that you'd go to the Treaty if it was asking the same question but in different ways. I submit that that's not an inconsistency. That's taking too broad an approach to section 11. So in theory an inconsistent treaty could override section 4 in light of *Kwok-Fung*. Realistically though, this is not going to become an issue because all of New Zealand's existing extradition treaties are based on double criminality, and I'm going to show you that in the United States Treaty shortly. Then –

GLAZEBROOK J:

Sorry, can you just repeat that last bit, I'm not sure I quite caught it.

MS HYDE:

The issue of override with section 4 actually in reality is not an issue because there are not treaties that are inconsistent with section 4 because all of our treaties are based on double criminality. Also, as you saw this morning, section 100 of the Act has put in place a requirement that that will continue going forward. All treaties, it's a direction to the negotiators, all treaties must have double criminality. I don't read that provision as changing the position. I submit that it is Parliament saying, well, we've had double criminality up until this point and we're satisfied with that, but we're going to be sure that moving forward that position continues. There's no evidence in the explanatory note in the select committee report that Parliament had any concerns that there were any treaties in existence, not based on double criminality, that might override section 4. Even if you could override section 4 in theory by a treaty, this would not dispense with double criminality and that's because section 24(2)(d) is a protected provision and it requires the committal standard to be met in respect of a domestic criminal offence.

GLAZEBROOK J:

What do you say to the submission that it's just meaning the standard of proof?

MS HYDE:

I say, your Honour, that that's inconsistent with a very long line of UK and Canadian authorities. The wording of this provision is a variation on wording that's been in place since the Extradition Act of 1870. It has been consistently interpreted in the UK and in Canada as requiring a committal test in respect of a domestic offence. There has never been a suggestion that it's a conduct yardstick.

GLAZEBROOK J:

There was one case I think we were taken to or was that just *Edwards*. Just *Edwards*, I think, maybe.

MS HYDE:

And I wanted to clarify *Edwards* your Honour because –

WINKELMANN CJ:

I thought it was *Riley*.

MS HYDE:

That's true, I should walk back my statement with a tiny exception. The exceptions are *Factor* and *Riley* only. I'm going to explain why *Factor* was so controversial and is not followed in the United States. I can still say that in light of that case Mr Boldt handed up and I'll explain that to you in a minute as well. The other exception is *Riley*, which followed *Factor*, and had a different statutory regime that didn't require double criminality. Its equivalent of our 24(2)(d) was not a protected provision.

WINKELMANN CJ:

Sorry, can you just state that again? What was different about *Riley*?

MS HYDE:

Riley's statute didn't, it was interpreted, the Australian statute was interpreted as not requiring double criminality as the primary position and so in light of that the Court was saying you couldn't use that other provision to get double criminality. It wasn't a protected provision. It was a different statutory context and the Court of Appeal in this case has outlined all of that in its judgment.

GLAZEBROOK J:

Just so I can perhaps put it another way which always annoys people but what you're saying is that because there wasn't a general double criminality, section 24(2)(d) couldn't fill in the gap, whereas if there is a double criminality then a section 24(2)(d)-type provision would have to be interpreted in accordance with double criminality. Is that sort of the submission?

MS HYDE:

Yes, yes your Honour, that's it, and again in *Riley* and *Factor* they also haven't considered all of this UK and Canadian authority that makes it very clear. Our statutory regime is much closer, it completely derives from the UK, very similar to Canada, and so I submit that those are definitely by far the better authorities for us to be using to assist to interpret our statute.

GLAZEBROOK J:

And Mr Boldt's point was, though, that the US negotiators would have been negotiating in terms of *Factor*, or one of his points sorry.

MS HYDE:

I want to talk to you about what would have been known to the Treaty negotiators because that's important. As at 1970 my submission is that they would have been thinking double criminality. *Factor* was a controversial decision not followed and in fact *Factor* itself recognises that although the US didn't have double criminality, the UK did. So certainly, from our negotiator's point of view if they looked at *Factor* they would have thought, well we can still have double criminality, even if the US isn't going to interpret it that way.

WINKELMANN CJ:

Okay so *Riley* you say is distinguishable because of the Act they were interpreting, and the Courts didn't have all the UK and Canadian authority before them, and *Factor* you say, what's your overall submission about *Factor*?

MS HYDE:

Controversial to get rid of double criminality the way they did and has been labelled that way in the US. The text of Bassiouni, which is from 2014, and that's on United States extradition. It's in volume 9 beginning at 3479. You don't need to look at it now but –

GLAZEBROOK J:

It might be as well for us – do you want to give us the volume number?

MS HYDE:

Volume 9, it's the one that I call pink. So Bassiouni begins at 3479 but I pick up at 3492. In the middle of the page the majority position, just talking about double criminality there, remained firm in US jurisprudence until it was expanded in a controversial manner in *Factor*, so describing it as controversial, and in footnote 82 the author cites –

GLAZEBROOK J:

So what's the majority provision that you're specifically referring to?

MS HYDE:

I think it must be the paragraph above your Honour.

GLAZEBROOK J:

It's a quote by Brandeis over the page.

MS HYDE:

Brandeis in*Collins v Loisel* 259 US 304 (1920) on page 3491.

WINKELMANN CJ:

And it's the sentence at the end of the first paragraph I think that is the lead in, two sentences.

[14:40]

MS HYDE:

Yes. So this is a textbook in 2014 describing *Factor* as controversial and citing for that proposition at footnote 82, the Hudson article that you saw briefly this morning and that I rely on as well. And if you turn over the page, at the bottom of 3493, it says "The *Factor* decision was precedent to the question of treaty interpretation and only in dicta addressed the substance of the application and interpretation of the dual criminality requirement".

So the case my learned friend handed up this morning was on treaty interpretation. Yes, *Factor* remains good law on treaty interpretation, but it is not considered good law on dual criminality. The Hudson article suggests that it should be constrained to its facts but as an alternative, it can be treated as an authority to say that if you're in one particular state of the United States and something's not criminal in that state but it is generally regarded as criminal in a number of states, that might satisfy the double criminality requirement and that's how *Factor* has been applied.

And as I say, in *Factor*, there was acknowledgment that the United Kingdom would apply double criminality on the other side of that treaty. I suspect it's also partially because of the different way treaties are given effect to in the United States. They're self-executing, I think it is, and so if in the United States, the substance of what you're looking at is in the Treaty, then it makes sense that other provisions are just referring to the procedure of the requested country, because they don't have substantive matters in their domestic law. Whereas in the United Kingdom and New Zealand, treaties only have effect as far as the domestic law allows them and our Extradition Act contains a lot more content.

So I want to return to 24(2)(d) and its interpretation. It was intended as a committal test in respect of a domestic offence and we see that in the explanatory note to the Bill.

WINKELMANN CJ:

So where are we back to now?

MS HYDE:

Back at section 24(2)(d) but really, it's a general point that doesn't require looking at the section. It's on page 275 if you need it. But I took you to the explanatory note to the Bill which showed what's intended is an ordinary committal test. Subsection (2) of section 11 provides that this is a protected provision and so I submit that to interpret it, you need to take the Treaty out of the equation to find the true meaning of 24(2)(d), because if you've undertaken

a section 4 analysis in the absence of a treaty, what you've ended up identifying is your domestic offence that will be your yardstick for 24(2)(d).

WINKELMANN CJ:

Can you just restate that?

MS HYDE:

To understand the true meaning of section 24(2)(d), you need to take the Treaty out of the equation because a treaty can't override 24(2)(d). If you're applying the test under section 4 without a treaty, what you end up with inevitably, I say with a treaty as well but even without, you end up with a domestic offence at 24(2)(c). You then use that domestic offence as your yardstick at 24(2)(d) and you apply just an ordinary committal prima facie case test.

WINKELMANN CJ:

So on your analysis, even if 24(2)(c) was overridden, you would get double criminality, so section 24(2)(d) would bring in –

MS HYDE:

That's correct, Your Honour, because to interpret 24(2)(d) otherwise is to let the Treaty infect 24(2)(d) and section 11(2) says you can't do that, it's protected.

WILLIAMS J:

Unless 24(2)(d)'s about something else. Conduct.

MS HYDE:

The wording of the provision does not say that.

WILLIAMS J:

I agree.

MS HYDE:

This conduct test is surprising. It has no authority anywhere. It is brand new in this proceeding from counsel for the United States.

ELLEN FRANCE J:

Well, the word "conduct" is used.

MS HYDE:

The word "conduct" is used for a jurisdictional assumption. It's the evidence that must justify the person's trial.

WINKELMANN CJ:

There is a case that talks about conduct, isn't there?

MS HYDE:

Many cases talk about conduct, your Honour, because we do look to conduct at the classification stage. No issue with the conduct test there, that's absolutely correct. You need to find the conduct by virtue of which the foreign offence has been committed and you see whether that conduct would also make out an offence here.

WINKELMANN CJ:

It is Lord Justice Millett, I think talks about it.

MS HYDE:

But when you get to (d) that conduct you identified is treated as occurring here but it is not your yardstick, that's not the test.

GLAZEBROOK J:

So do you want to say exactly why you say that under the wording?

MS HYDE:

At subsection (d) on page 275, the Court must be satisfied that the evidence produced or given at the hearing would justify the person's trial. If the conduct constituting the offence had occurred within the jurisdiction of New Zealand, the evidence, according to the law of New Zealand, has to justify a trial. We have to treat the conduct as occurring here because that's that assumption we have to make because otherwise you would have a requested person saying, well

my trial could never be justified here because there was no offence here, I didn't do it here.

WINKELMANN CJ:

Mr Boldt says, *Riley* expressly says that's not what it is meaning, it is just setting up an evidential threshold, an evidential test.

MS HYDE:

I think Justice Deane acknowledged that it could also mean the ordinary committal standard and as I say the better authorities are the UK and Canadian ones because that is how those words have been interpreted in every case in the United Kingdom and Canada.

ELLEN FRANCE J:

And how does that work for (d)(ii).

MS HYDE:

In (d)(ii) it is a requirement of proof that someone has been convicted in the requesting state. That is where someone has been convicted and absconded and they are trying to get them back. They don't have to prove the trial would be justified because they have already been convicted. They just have to prove the fact of the conviction.

WILLIAMS J:

So on that basis, the override of (c) is about what?

MS HYDE:

The override of (c) that is suggested by counsel for the United States is that at that stage all they have to prove is that the conduct by virtue of which the US offence has been committed, falls within the scope of the Treaty description.

WILLIAMS J:

Yes, I know what the US is saying. What do you say it means then?

MS HYDE:

I say that 24(2)(c) refers to extradition offence that is defined in section 4. Section 4 is a three stage test. There is no override.

ELLEN FRANCE J:

Well what is section 11 envisaging then?

MS HYDE:

The question comes down to and this is actually my next point, is whether there is an inconsistency with the Treaty because I do accept, on the basis of *Kwok-Fung* that if there is an inconsistency, there might be an override. What I say is no inconsistency.

ELLEN FRANCE J:

Can I just be clear then? You accept that 24(2)(c) can be overridden by a treaty.

MS HYDE:

Yes I think that's the necessary conclusion from *Kwok-Fung* and the fact that – because in section 11 subsection (2) it does talk about any section conferring a power on the Court or a Minister and I might have thought section 24 as a whole could fall within that but given the express identification of 24(2)(d), you have to accept that 24(2)(c), in theory, could be overridden by treaty if it's inconsistent.

WINKELMANN CJ:

And how might it be overridden. I am just trying to imagine what it might look like?

MS HYDE:

I am trying to imagine as well your Honour. My submission is that you have to interpret treaties against the background of standard international practice which is actually that there is double criminality unless you have got an express disavowal. If you have a treaty that makes it extremely clear that the State parties are saying, we will extradite for conduct irrespective of whether it is

criminal in the requested State. That would put you in conflict with section 4. The proposition that if a treaty is silent, double criminality should govern, actually appears in the Hudson text which is in volume 9 at page 3411 and you don't need to take it up, I can just read it. And the author says, "Certainly, however, one must lean toward finding that the principal of double criminality has not been departed from and if a treaty is silent as to the law applicable, that principal should govern." It is also consistent with Shearer and Bassiouni and other texts on extradition.

In *Cullinane* an inconsistency was found between the Treaty and the Act because the Treaty uses the enumerative approach and the Act uses the eliminative approach and my submission is that is not inconsistent. Both are just different means of giving effect to double criminality. If you look in the pink volume 9 at the Shearer text, this is a text book from 1971, so right at the time of the Treaty. Page 3496 volume 9 is where it begins, 1971. Indicative I submit of what the negotiators would have thought. If you turn to page 3503, the heading, "The principle of double criminality. The basic rule observed by the enumerative and no list treaties alike is the rule of double criminality. This rule requires that an act shall not be extraditable unless it constitutes a crime according to the laws of both the requesting and requested States. The validity of the double criminality rule has never seriously been contested, resting as it does in part on the basic principle of reciprocity." So, turning over the page, 3504, about half-way through the second paragraph, "Although the double criminality rule often appears expressis verbis in the treaties employing the enumerative method, its use is superfluous, not only because it has a sure basis in custom but also because it is implicit in the precise specification of offences. In the case of those treaties which require the establishment of a prima facie case of guilt according to the laws of the requested State, a further indirect importation of the rule is to be seen." The enumerative and the eliminative tests are different ways of identifying domestic offences. The enumerative approach is to give overarching descriptions, the eliminative approach is to apply a test based on the period of imprisonment. They are not inconsistent, one with the other. And in fact in most cases, both will reach the same result, because if you have the description murder in the Treaty, you will also find an offence in

the Crimes Act satisfying the section 4 test. So, to have the three stage test under section 4, it is not creating any inconsistency.

Where that really leave us is that the only possible inconsistency here is that the Treaty describes an offence of conspiracy to defraud which has been repealed under New Zealand law and would not meet the section 4 test. That's the potential inconsistency we are talking about in this case. It is no broader than that. My submission is that for that to create a true inconsistency requiring override there would have to be some sort of requirement or agreement in the New Zealand-United States Treaty to extradite for conduct that's not criminal in the requested State. But when you read the Treaty as a whole that is not what it provides.

GLAZEBROOK J:

What about the view that at the classification stage you're not looking at whether something's been repealed or not, you're looking at conduct?

MS HYDE:

The conduct is used by reference to the foreign offence. What you're not looking at is whether the foreign State is correct to categorise it as criminal, whether they're correct to bring those charges, but what you have to do is take that foreign offence and identify, in accordance with the section 5 definition, what is the conduct by virtue of which that foreign offence has been committed, and then you take that conduct and you use it for the section 4 test to see whether it would make out a qualifying New Zealand offence.

GLAZEBROOK J:

But I'd understood you to say that because the actual offence or equivalent offence in Article II.16 is no longer a New Zealand offence, that that's the end of it.

MS HYDE:

That's not the end of it your Honour –

GLAZEBROOK J:

Because if you're looking at conduct then the conduct could come, depending upon whether we accept the other argument, but let's just assume it does for the moment, could be another offence under New Zealand law of a similar nature.

MS HYDE:

It could well be another offence under New Zealand law. The offence of conspiracy to defraud though as an offence in and of itself, formerly section 257 of the Crimes Act has been repealed.

GLAZEBROOK J:

Yes, I understand that, I'm just trying to get your submission on the effect of that under your theory of the…

MS HYDE:

The effect of the repeal of section 257, on my interpretation is that at section 4 you start with the test you have to identify a New Zealand offence. You stop at that point because section 257 is not available. Now it may be that the conduct you've identified as relating to the foreign offence could make another offence. You can look for any offence in New Zealand that qualifies under section 4, but given that section 257 isn't a crime here, that one is not available.

GLAZEBROOK J:

I can understand the view that that is not available, so all you're saying is if – so we have to identify an offence, let's say it is an offence under 131, that would be sufficient.

MS HYDE:

Yes your Honour.

GLAZEBROOK J:

For section – okay, thank you.

MS HYDE:

And because section 131 is deemed to have been described in the Treaty by section 101B that satisfies the "subject to a treaty" requirement. All I'm saying is that conspiracy to defraud is not something that's available to the United States. But if that, that's also not a problem, that doesn't create an inconsistency with the Treaty because the Treaty is founded on double criminality.

So I just want to go through the Treaty briefly to show you that, and that's in volume 1 of our authorities, beginning on page 22. Actually 23 sorry. So we've got the Treaty beginning on page 23 and that –

WINKELMANN CJ:

Can I just ask you to stop for a moment. How much longer do you think, because I think we should take an afternoon break at about 3.15.

MS HYDE:

I'd be happy with that your Honour. I'll still be going at that point.

WINKELMANN CJ:

I thought you might be.

MS HYDE:

So the introductory wording in the Treaty, "New Zealand and the United States of America, desiring to make more effective the cooperation of the two countries for the reciprocal extradition of offenders…" And as in the passage Justice Glazebrook identified "reciprocal" is double criminality.

O'REGAN J:

It's reading a fair bit into that word, isn't it? All it's saying is if you do it we'll do it too.

MS HYDE:

I think, your Honour, when you read it in the context of the whole treaty it's consistent with the double criminality that comes through, as I'll show you. If that were the only indication I might be in trouble but there's much more than that.

WINKELMANN CJ:

You also rely upon Shearer, don't you, his analysis, or her analysis.

[15:00]

MS HYDE:

I believe it's a his, and yes I do.

WINKELMANN CJ:

Saying it's almost customary between States, this notion.

MS HYDE:

That's right your Honour. It's not so far as a rule of international law, but it's so fundamental throughout extradition that it's at least an assumption. So then in Article I, "Each Contracting Party agrees to extradite to the other, in the circumstances and subject to the conditions described in this Treaty, persons found in its territory who have been charged with or convicted of any of the offences mentioned in Article II of this Treaty," so Article II is mentioning offences, "…committed within the territory of the other." So you can only commit an offence if it's actually an offence under domestic law. Article II mentions those offences by way of description. They're just labels.

So then you have the offence descriptions listed in Article II. If you come over to Article IV on page 26, "Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, either to justify his committal for trial if the offence of which he is accused had been committed in that place or to prove that he is the person convicted…" but the point of that is again we're seeing it's deferring to the

domestic law. The evidence has to be sufficient according to the laws of the place where the person is found.

ELLEN FRANCE J:
The same argument is made against you in relation to that.

MS HYDE:
It is your Honour.

ELLEN FRANCE J:
I think that that's relating to procedural type matters.

MS HYDE:
It is and my answer is the same. Turning over, Article VI begins at the bottom of page 26, but over to clause 3. "When the prosecution or the enforcement of the penalty for the offence has become barred by lapse of time according to the laws of the requesting Party or would be barred by lapse of time according to the laws of the requested Party had the offence been committed in its territory." So again, the law of the requested party if there's a limitation issue.

Article VII talks about the death penalty, and if the laws of the requested party do not permit punishment for that offence they can refuse extradition, or they can get a guarantee that the death penalty won't be applied, and again we're deferring to the law of the requested party.

Then another very important provision is Article IX, which is on page 28, "The determination that extradition based upon the request therefore should or should not be granted shall be made in accordance with the laws of the requested Party and the person whose extradition is sought shall have the right to use such remedies and recourses as are provided by such law." The United States submits that this is just a procedural provision, it just applies procedural laws, but they haven't pointed to an authority that limits it that way. They've identified in their written submissions some authorities that use it for that. It does encompass procedural law but it doesn't limit it to that. And my

submission is just on the face of it the question of whether the determination – the determination of whether the extradition request should or should not be granted, is made in accordance with the law of the requested party.

What I say that shows, is that the Treaty itself defers to domestic law, so in a situation like we have here, where the US wants to rely on conspiracy to defraud, there's no inconsistency arising from the fact that that offence has been repealed in the Crimes Act because the determination has to be made in accordance with our law.

I'd add that the schedule of offences to the 1965 Act, that was actually amended in 1970 by I think a Narcotics Amendment Act, and we've given the references in our written submissions, so the Treaty negotiators would have been absolutely aware of the fact that the offences for which Parliament would extradite might change. It's unrealistic to suggest that they wouldn't have considered that possibility and built it into the Treaty, and I submit that that's what Article IX is doing.

So then back to the Treaty and Article X, the third –

WINKELMANN CJ:

So in other words you're saying it's double criminality.

MS HYDE:

Yes your Honour, all the way. Article X again we have a reference to evidence according to the laws of the requested party would justify arrest and committal. Deferring to the requested State's law.

O'REGAN J:

That's pretty clearly only applying to the way in which the committal hearing is undertaken, isn't it, and what the rules are that apply to it? It's got nothing to do with how you define the offences.

MS HYDE:

The point that I'm endeavouring to make, your Honour, is that there isn't an inconsistency. If it appears that an offence has been described in the Treaty, but it wouldn't satisfy section 4, that does not create an inconsistency for the purposes of section 11 because the Treaty as a whole requires double criminality and defers to the law of the requested party.

WILLIAMS J:

The short point is there are too many echoes of section 4(2) in the Treaty.

MS HYDE:

Yes your Honour, and in fact it brings me to Article XVIII which the Court looked at this morning and, as your Honour Justice Williams identified, my submission is exactly as you suggested. As at 1970 when this Treaty was entered into all of the offences described in it were criminal in both countries. What they're saying in Article XVIII is that we'll allow retrospective effect but it may not have been the case previously that all of these cases were criminal in both of our countries, so to cover that off we're just going to make sure that there has to be double criminality if there's going to be a retrospective effect. So this is not an exception to double criminality, this is an affirmation of double criminality.

WINKELMANN CJ:

Can you say what it is again sorry? I don't think I followed you.

MS HYDE:

As at 1970 all of the offences described in Article II were criminal in both countries. What the Treaty says is that there can be extradition for offences committed prior to the Treaty being entered into. But it isn't necessarily clear that those offences in Article II were all offences in both countries prior to 1970. So what they're covering off here is the possibility that that might not be the case. So they're saying, all right, we'll have retrospective effect but only if there is still double criminality.

WINKELMANN CJ:

So it's a reassertion of it?

MS HYDE:

Yes your Honour, an affirmation. So where that gets us too –

WILLIAMS J:

That's really section 60(f) isn't it, (1)(f), whatever it is?

MS HYDE:

Section 60(f) repeats the test in section 4. I'm not sure if it's retrospective.

WILLIAMS J:

No, no, but it's that point. If it's not covered in the Treaty, double criminality applies, right?

MS HYDE:

Yes. So my overall submission from all of that is that there is no inconsistency between the US-New Zealand Treaty and section 4 of the Act, so there's no need for an override. So I support the Court of Appeal's finding, they also said no inconsistency.

That's the end of my three interpretive points so I was just going to move now into other reasons that we have, other submissions we have in support of overturning *Cullinane*, and I've already really made the first of those, which is that it is contrary to long-standing UK and Canadian authority, but it clearly wasn't put before the Court but our law is based on the UK law, it's very similar to the Canadian law.

ELLEN FRANCE J:

Could I just check in relation to the UK law. If you're looking at the 1989 Act, is the only definition of "extradition crime" that you see at page 902, volume 3 of the appellants' bundle, part 2?

MS HYDE:

I believe it is your Honour.

ELLEN FRANCE J:

That's right, you can come back to that if –

MS HYDE:

There's a slight difference in that statute, I believe, in the UK because they had a process where the request was made to the Minister and the Minister undertook our equivalent of 24(2)(c) so they identified a domestic UK offence. All the Court had to do was measure whether there was a prima facie case in respect of that domestic offence. That's the procedure that now also applies in Canada under their 1999 Act. It did not apply when *McVey* was decided under the 1985 Act in Canada.

WINKELMANN CJ:

So who identified the domestic offence?

MS HYDE:

A Minister. I cannot recall which one. It would be the equivalent of the Minister of Justice here but…

WINKELMANN CJ:

So the Minister did the section 24(2)(c) exercise?

MS HYDE:

Yes your Honour.

WINKELMANN CJ:

And that came in when?

MS HYDE:

That appears in the UK 1989 Act. It's also now in the Canadian 1999 Act. They're both in volume 3 of our authorities bundle.

WINKELMANN CJ:

And *McVey* if we go to that.

MS HYDE:

Yes your Honour, *McVey* was determined under the 1985 Canadian Act, which is similar to what we have here, the Judge would determine whether it was an extradition crime and then go on to measure a prima facie case against a domestic offence.

WINKELMANN CJ:

So when you say our law is very similar to the UK and Canada, you mean prior to 1989-1999? Or still similar. It's just different people are doing it?

MS HYDE:

Yes, the latter your Honour. The principles are still the same but the roles have changed somewhat.

ELLEN FRANCE J:

But there wasn't there in that definition the interaction with the Treaty, is that right?

MS HYDE:

Is this in the…

ELLEN FRANCE J:

In the 1989 version.

MS HYDE:

It's rather a large definition your Honour. I wonder if I could have a look.

ELLEN FRANCE J:

Yes, that's why I was asking you about it.

WINKELMANN CJ:

Perhaps we'll take the afternoon tea break now and you can spend your afternoon tea reading that.

MS HYDE:

I look forward to it, thank you.

COURT ADJOURNS: 3.14 PM

COURT RESUMES: 3.28 PM

MS HYDE:

I've been looking at the definition of "extradition crime" in the UK Act over the adjournment but I don't know that I've quite grasped it in the time available. I wondered if it might be useful to refer to *Nielsen* which is the decision quoted by Justice La Forest so I'll just go to the quote in *McVey*. So that's in volume 6 of the authorities bundle, the yellow one, at page 1806, and this is about the 1870 Act so it's not interpreting the '85 one. So on page 1806 of *McVey*, about halfway down, Justice La Forest says "As Lord Diplock, speaking for all the Law Lords in *Nielsen*, put it, at pp. 624-25: . . . at the conclusion of the evidence the magistrate must decide whether such evidence would, according to the law of England, justify the committal for trial of the accused for an offence that is described in the 1870 list (as added to or amended by subsequent Extradition Acts) provided that such offence is also included in the extraditable crimes listed in the English language version of the extradition treaty. In making this decision it is English law alone that is relevant", and so that's the point about not questioning the decision of the foreign authority to prosecute. I also have some references in our written submissions –

GLAZEBROOK J:

I'm sorry, can you just give me that page number again?

MS HYDE:

Page number 1806, volume 6. I keep referring to all these UK and Canadian authorities without saying exactly what they are. They are listed in our written submissions so I could just give you the references to those briefly. In our primary submissions, it's in paragraph C2.7, and in particular, the authorities listed in footnote 111, and then in our reply submissions at B1.2. I've also been handed at the break a document that my learned friend is going to hand up and rely on in his reply. It's an extract from Anne Warner La Forest's textbook on extradition. So your Honours don't have it before you but I thought I'd just point out that it jumped out to me on page 1851, "It is of course also possible for states to do away with the requirement of double criminality by treaty but it is doubtful if the Courts would read in such an intent in the absence of clear words". So that's just another authority supporting my earlier point.

ELLEN FRANCE J:

Is that a later version of the passage that we've already got? Because we do have that passage, I think.

MS HYDE:

This is from 1991, it looks like, your Honour. I'm not sure. I'll leave it to Mr Boldt to explain. There are a number of other criticisms made of the *Factor* decision in the Hudson article and in volume 9 of the authorities, the pink volume, that's where the Hudson article is, and I just refer you to page 3404.

WILLIAMS J:

Can you give the volume number again, please?

MS HYDE:

Volume 9, your Honour, the pink one.

WINKELMANN CJ:

Volume 9, page?

MS HYDE:

3404, and under the heading "General purposes of the treaties", Professor Hudson says "What then is meant by 'murder' in the treaty of 1842 or by 'receiving money known to have been fraudulently obtained' in the convention of 1889? This would seem to involve preliminarily an inquiry into the purposes which the treaties are intended to serve and into the fundamental principles underlying the law of extradition", and the point that I'm making here before I go further is that these labels in the Treaty, it's not clear necessarily what they mean. There does need to be an interpretive exercise to figure out what are the ingredients of these offences and it can be a complex exercise even for something like murder. So if you turn over to page – and that's what the –

WINKELMANN CJ:

You mean there needs to be a yardstick?

MS HYDE:

That's right, your Honour. A label, a description is not sufficient to give clarity. And so over on page – this is the point also being made by Professor Hudson, and so over on page 3405, towards the bottom, he says "The United States/British treaty of 1842 might have provided for the surrender of an accused person charged with killing another under certain circumstances. It did not do this. Instead, it listed the crime of murder and other crimes", and now I'm over the page on 3406, "Whatever be the crime listed in the treaty, it is clearly necessary therefore to refer to some system of criminal law for its definition. The terms employed in the treaties to describe the crimes for which extradition is to be granted are not employed in a popular sense, nor does international law afford any definition for their content. There is no international law to which resort may be had for determining what is the meaning of 'murder' as that term was employed in the treaty of 1842, hence 'murder' must mean 'causing the death of a human being in such a way that the act is made punishable by the law of one or more states'".

In the same way, the Treaty must be related to the law of one or of both of the parties to the treaties and it's what you kind of see in Justice Gilbert's decision when he's looking at Article II.16 and he goes straight to section 257 of the Crimes Act because how else do you interpret these things? Rather than creating a complex treaty interpretation exercise, Parliament was intending to simplify. Look at the New Zealand law, look at the offences we have here. We know what the elements of those offences are. That's the yardstick.

WINKELMANN CJ:

And you would say, I suppose, which supports your interpretation, the fact they chose New Zealand offences for the list supports your argument of double criminality?

MS HYDE:

Yes, your Honour. All of the offences that are described in the New Zealand-United States Treaty align with the offences that were in the schedule to the 1965 Act.

WILLIAMS J:

What then do you say about cases like *Schreiber*?

MS HYDE:

In what regard, your Honour?

WILLIAMS J:

If I've got the name right, it's the German extradition for taxation –

MS HYDE:

Yes, that's the one.

WILLIAMS J:

– where the Canadian Supreme Court, if I recall correctly, says "We're not interested in the detail of Canadian law on these matters. We're looking to the essence as best we can in a regime that's different in quite significant ways".

MS HYDE:

So I think the first point to be really clear on is that that's talking about a 24(2)(c) exercise, it's talking about classifying the offence, and this is where you can bring in some assumptions for the purposes of satisfying the 24(2)(c) test. So what they were saying, I understand, in *Schreiber* is that "Although certain matters are taxable in Germany, perhaps are not taxable in Canada, we're categorising the offence as not paying your taxes and we bring in those taxes from Germany because it wouldn't make sense to say that there would be a crime of not paying a tax that's not a tax in Canada".

WILLIAMS J:

Yes.

MS HYDE:

I assume that makes sense.

WILLIAMS J:

Yes. What happens when you get to the equivalent of 24(2)(d)?

MS HYDE:

When you get to 24(2)(d), it's a different enquiry. You have a domestic offence as your yardstick and you are determining whether there is evidence that could justify trial in respect of that domestic offence. The question we've got in this case is whether some of that prima facie case can be met with evidence of US law like the United States is trying to do. They are saying that because you can transpose in the US law, you can also assume it. We are saying "You might be able to transpose it in, you might be able to use US law for the establishment of copyright, but you must still prove it, because 24(2)(d) is still about proof and it's still about proof of every element of a domestic offence".

WINKELMANN CJ:

I notice you have not used the word "transposition" until this point in time.

MS HYDE:

I think, your Honour, that there can be a little confusion in the expression because transposition, depending on what you're doing, it doesn't mean "assume", it just means "treat as occurring here". When you're at 24(2)(c), everything is an assumption because you're looking at allegations and you're saying "If they're made out, would they be an offence?" When you're looking at 24(2)(d), as the House of Lords said in *R (Al-Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69, there are "no feats of imagination" there. You're proving. So although you might be treating things as happening in New Zealand, you're still proving them.

WINKELMANN CJ:

You're transposing the offending to New Zealand notionally?

MS HYDE:

Yes, the transposition means "treat as happened in New Zealand". It does not mean "assume and let them off the hook for proving a prima facie case".

WINKELMANN CJ:

Well, on that, I think we rather got to the point that Mr Raftery accepted there was a need to prove an assertion of copyright ownership to a prima facie level and breach, that it was the type of work which attracted copyright, an assertion of ownership by an owner, and breach to a prima facie level.

MS HYDE:

It's a bit of a difficulty, your Honour, because the US theory of the case is changing on us at every level. This is a new one and I still don't accept, even if that were the standard, that they have proved that on their evidence but…

[15:40]

WINKELMANN CJ:

Right. That's the evidence…

MS HYDE:

On the ROC, they still haven't. But it wouldn't be hard to give evidence of facts from which copyright could be established. All you need to do is have a witness who is going to identify the work, they are going to identify where it was created, when it was created, who was the author. If the author is not the owner of the copyright because ordinarily the author is the first owner of the copyright, if it is not the author, then who is it?. So there can be evidence from someone saying why they own it. Was the author their employee? Is there some sort of other agreement that changes the ownership? Originality, you know potentially from evidence from the author saying I didn't copy anyone. Maybe an expert could deal with that –

WILLIAMS J:

Really you want to debate originality at a committal stage?

MS HYDE:

The test is, is there evidence of every essential ingredient such that a reasonable jury could convict.

WILLIAMS J:

Well it's a prima facie case.

MS HYDE:

It is your Honour and so if it has to be proved at trial, doesn't there have to be evidence of it at the committal stage?

WILLIAMS J:

Well someone has to say, I did this.

MS HYDE:

And that is what I am saying your Honour. It's a simple list of facts that had to be made. It does have to be in respect of an identified work.

GLAZEBROOK J:

What about the argument about conspiracy that's made against you, that's not necessary for conspiracy as long as there was the intention and – let's assume there are steps done to implement it because that would have to be the allegation here.

MS HYDE:

I'm strayin from *Cullinane* but my understanding is that it is quite ordinary to expect a conspiracy to be proved by showing that it was put into effect and they refer to that in *Griffiths v United States of America* [2005] FCAFC 34. I don't have the exact reference with me. There is also an authority in our bundle called *Tarling v Government of the Republic of Singapore* (1980) 70 Cr App R 77 (HL). It is either a House of Lords or Privy Council decision where they make the same point, but you need to see it put into effect to kind of backfill the conspiracy.

GLAZEBROOK J:

But what they would say here, it was put into effect because they set up this honey trap if you like to attract all of this copyright material and it's not necessary to prove, at that stage, having put it into effect that the honey trap worked although they say there is a lot of material. Nevertheless, that from which it could be inferred; I use honey trap in that sense in this structure that was designed to encourage others to breach copyright.

MS HYDE:

I understand that that is the US submission. I think the difficulty they have is evidential as well. The appellants were still running a business and so a lot of this correspondence is them running a business and identifying ordinary business risk. When you have a company and you are trying to categorise it as a conspiracy, I submit that the best way of showing that is to show that they actually committed the offences.

WILLIAMS J:

Not the only way, that's pretty orthodox isn't it?

MS HYDE:

That may be your Honour. That's my argument, that's the best way.

WILLIAMS J:

You don't have to show a completed offence. Not your bag.

MS HYDE:

Actually, I have a couple more points to make about why we say *Cullinane* should have been overturned and then I am actually going to get to II.16 so I might have a little bit more to say about that point then, if I can just carry on to make my last couple of points. Which I just wanted to refer back to. The very careful balance of rights that we saw identified in the explanatory note to the 1998 bill and that double criminality is a bottom line protection for requested persons and it forms the basis of the whole Extradition Act. *Cullinane* upsets that balance because it allows for the possibility of there not being double criminality and the comments as well about 24(2)(d) but probably obiter in *Cullinane*, they would also do away with double criminality. I think that's probably been dealt with by this Court in the *Dotcom* disclosure case when it came back to prima facie case. And also in terms of interpreting the Act, just to bring in the Bill of Rights Act in section 18, people aren't supposed to be removed from this country except on grounds prescribed by law. My submission is that an interpretation which allows for extradition for conduct that is not criminal in New Zealand would be inconsistent with that right.

Then finally there's a need for obviously certainty in the law and the effect of allowing the US to resort back to New Zealand's criminal law as at 1970 is that you've got some archaic criminal provisions that are just appearing in obscure treaties that I submit shouldn't form the basis for punishment because people are expected to govern their behaviour in accordance with current law, and that's another reason for not following the *Cullinane* approach.

WINKELMANN CJ:

So you're saying that that approach tends to make, lock those provisions in the permafrost whereas applying a double criminality constantly brings them up-to-date, naturally makes it ambulatory.

MS HYDE:

Exactly right your Honour and relying on the United States to tell us, "oh no, we'd never ask to extradite someone for sodomy", or "we'd never ask to extradite someone for abortion:, seems like a much less principled way of doing things than just keeping double criminality.

So just turning then to the question of if *Cullinane* is reinstated and what happens in this case. What it means is that the US would be able to attempt to satisfy section 24(2)(c) by reference only to those treaty descriptions. What that means is that the conduct by virtue of which the US offences have been committed, would have to fall within those treaty descriptions, but nothing more is required. My learned friend has taken you to the *Edwards* case to see a treaty interpretation exercise. I just wanted to make it very clear what the Court in *Edwards* was considering. It was considering that third stage of the three stage test, that is whether the conduct is also provided for in the Treaty. The Court expressly said that it was making no comment on section 4 and the *Edwards* case had nothing to do with section 24(2)(d). It was only at the 24(2)(c) stage. So what you end up with, if you take a *Cullinane* approach, is that it's a treaty interpretation exercise rather than just the simple application of domestic law to the conduct and apparently I've heard this morning that you also need to do an investigation of all of New Zealand's other international law obligations to see if you'd be in breach of those if you extradited.

Our response really is that even if you're going to look at the Treaty you still need to take a *Norris* approach. There still needs to be a clear and principled identification of the conduct by virtue of which the US offences are said to have been committed, and that if you undertake that exercise there's not sufficient equivalence with the Treaty descriptions.

WINKELMANN CJ:

Sorry, can you just repeat that submission? Only because I did something to my computer screen and I was trying to fix that.

MS HYDE:

We make the same point about *Norris* that there has to be a principled and clear identification of the conduct by virtue of which the foreign offence has been committed, and that if that's done properly in this case there's no sufficient equivalence between that conduct and any treaty description.

WINKELMANN CJ:

Sorry, that last one was, and if that's done properly?

[15:50]

MS HYDE:

There's no sufficient equivalence between that conduct and any treaty description. If your Honours would turn to Article II.16 in the Treaty, which is in the first volume of authorities at page 24. The offence there is, "Obtaining property, money or valuable securities by false pretences or by conspiracy to defraud the public…" So actually the essence of that Article II.16 is that you've obtained something by the conspiracy. So returning to the point about whether the conspiracy has to be put into effect, it does for II.16. Under this Treaty offence the conspiracy alone would not be enough. It must be put into effect and something must be obtained by it.

GLAZEBROOK J:

I presume the Crown would say all of the fees and the money that came in through the conspiracy…

MS HYDE:

I recalled in my learned friend's submission this morning he said that the Treaty offence was complete at the stage of agreement.

O'REGAN J:

But the US argument is that it's a conspiracy to do this, isn't it? You're reading out the underlying offence but the charge is conspiracy to do this, which is a different thing.

MS HYDE:

In my submission your Honour the –

GLAZEBROOK J:

It comes right at the end, because conspiracy to commit is granted by the wording after paragraph 32 is, I think, the argument.

MS HYDE:

A conspiracy to conspire. A conspiracy to obtain by a conspiracy?

WINKELMANN CJ:

No, a conspiracy to obtain property, money or valuable securities by false pretences, it's simply what you read in it. A conspiracy to do that.

MS HYDE:

The way I've understood the US –

WINKELMANN CJ:

So you could read out – or you could read out that, or by conspiracy to defraud, you read out conspiracy to defraud and you read in conspiracy to obtain property, money or valuable securities by false pretences…

MS HYDE:

I see that. I hadn't understood the US to ever argue that. It's been, since the District Court it's been conspiracy to defraud.

GLAZEBROOK J:

But you might be right, I'm not sure they have.

O'REGAN J:

No I think they did.

ELLEN FRANCE J:

Well that's what I understood.

GLAZEBROOK J:

Well, no, because the conspiracy included in II.16, I'm not sure that Mr Boldt was relying on the wording at the end of the Article but…

MS HYDE:

It's kind of shifting sands a little bit. We've now got II.16 apparently applying to all counts. It's not something that's been considered, it hasn't been considered by the lower Courts on that basis. We've had, I'd understood that –

ELLEN FRANCE J:

Well the Court of Appeal rejected the…

O'REGAN J:

Cullinane so they wouldn't have done it.

MS HYDE:

Yes, correct. His Honour Justice Gilbert only considered II.16 in respect of count 2. That was what I understood the US case to be. Counts 4 to 8 certainly aren't charged as conspiracy charges so I don't understand that one. It's a surprise to hear, as well, the submission from my learned friends on a number of occasions that all of the lower Courts have found a prima facie case. They haven't. The District Court analysis is flawed for the reasons Mr Illingworth has gone through. The High Court did not consider committal in respect of domestic offences. His Honour's yardstick was conduct, acts, omissions. We get –

WINKELMANN CJ:

Sorry, he didn't consider what?

MS HYDE:

He did not consider the evidence against domestic offences to ask the question of whether a reasonable jury could convict. It's very clear that his yardstick was acts, omissions, conduct, and that everything else need not be enquired into. In the Court of Appeal a different test again. It is a domestic offence but only some elements of it. Somehow refined by reference to 24(2)(c). And despite this new test the appellants lose anyway. We find out what the new test is in the judgment, we don't get to argue about their application. In fact *Cullinane*, if we're talking about 24(2)(d), *Cullinane* did not actually create this conduct only test. *Cullinane* just said, :it's not a double criminality provision:, which I submit is wrong for various reasons, but *Cullinane* did not go on to say, "and the yardstick is conduct only". In fact in *Cullinane* ingredients of the Treaty offences were distilled and identified so one potential option is that a prima facie case was going to be measured against some identified ingredients of a treaty offence, but I would say that's a breach of subsection (2) of section 11 because that's altering 24(2)(d) by treaty.

So unless your Honours have any further questions that's about me.

WINKELMANN CJ:

Thank you.

MR ILLINGWORTH QC:

Your Honour, can I just answer Justice Ellen France's question about the Anne Warner La Forest article. Your Honour, in volume 9 of our authorities bundle at 3317 we've given you an article by Anne Warner La Forest which was significant in the *USA v Ferras* [2006] 2 SCR 77 case. There are no references to her textbook, which is the third edition of the text written by her and her father, which Mr Boldt has handed to us today.

ELLEN FRANCE J:

Yes, I just thought I had read it in the respondent's bundle, that was all, and I was just wanting to know whether what we were getting now was something new or…

MR ILLINGWORTH QC:

I'm just told that it's in the electronic bundle. It hadn't been handed up.

ELLEN FRANCE J:

Right, that'll be, I must have just read it online, thanks.

MR ILLINGWORTH QC:

Could I just add that on the point that conspiracies are often proved by acts and events that actually happen, we've dealt with that in our primary submissions at D8.5.

WINKELMANN CJ:

Mr Boldt. Sorry, what paragraph was that Mr Illingworth?

MR ILLINGWORTH QC:

It's 8.5. It's mentioned in *Griffiths* and *Tarling*, those two authorities that Ms Hyde mentioned. The fact that you can infer the nature of the conspiracy from the acts and events which actually are carried out, so in other words the actual substantial offence, and we've referred to that in our D8.5.

MR BOLDT:

May it please your Honours. I hope not to detain you long. My learned friend began by posing three questions for your Honours. What is the meaning of "subject to" in section 4, can section 4 be overridden and is the Treaty inconsistent with section 4. Now after my learned friend engaged in a detailed traverse of the history, the meeting the parents as she described it, and ultimately though came back to addressing your Honours on her second question which, in my submission, is by far the most important question in this analysis, and that is in the case of an inconsistency between Act and Treaty can section 4 be overridden, and after discussion with your Honours the answer that came back was, all right, yes, it can. Section 4 is capable of being overridden by treaty.

[16:00]

That, in my submission, is the first domino from which all others fall. It tells us, in my respectful submission, what the correct relationship between sections 24(2)(c) and 24(2)(d) is because, as your Honour Justice Williams noted in your discussion with my learned friend, allowing section 24(2)(c) to be overridden would make little sense and have little point underpinning it section 24(2)(d) automatically incorporated the section 4 definition in any event. In my submission, sections 24(2)(c) and 24(2)(d) are, as I say, addressed to these two pillars of extradition law that I described this morning, the first being the principle that is often achieved by double criminality, namely that we are not going to extradite for strange, alien offences, things that have to be familiar to us in our law, and the second is the standard to which the conduct needs to be proved. As I say, section 24(2)(c) would ordinarily be achieved by double criminality but not necessarily always where there is a treaty. The treaty provides you with the standard you need to meet.

So that is the first point in that having conceded that 24(2)(c) also can be overridden, in my submission, the logic tells us therefore that section 24(2)(d) must be addressed to something other than the definition of the extradition offence.

WINKELMANN CJ:

So can't there be aspects of 24(2)(c) that are overridden which do not have an impact upon double criminality?

MR BOLDT:

Well, Ma'am, my learned friend's submission was that section 24(2)(d) automatically incorporates the double criminality standard anyway and in my submission, Ma'am, that submission is incorrect because double criminality, or whatever you might want to substitute for double criminality, is imported into section 24(2)(c). Section 24(2)(d) is about something else entirely.

WINKELMANN CJ:

No, but you didn't answer my question. You can make sense of the fact that section 24(2)(c) can be overridden and there still being a requirement of double criminality if an aspect of section 24(2)(c) which doesn't impact upon double criminality is the part that's overridden, so for instance, the maximum penalty.

MR BOLDT:

Well, that is another aspect of section 4 that can be overridden by treaty, in my respectful submission. There's no reason to confine that, to confine what can be overridden to double criminality, and we've seen an example in our discussion already and that's the bankruptcy –

WINKELMANN CJ:

Yes, so my comments, which I might not be making plain, I rather addressed whether or not it follows from the fact that section 24(2)(c) was left as a provision that could be overridden that it contemplated that double criminality would be overridden but it doesn't necessarily, does it?

MR BOLDT:

Well, I think it does, with respect, your Honour. Given that section 4 in totality can be overridden by treaty, there is no reason to pick and choose between the different requirements of section 4. If the entire section 4 definition is subject to treaty, in other words, can be overridden by treaty or to use the words of the Court of Appeal in *Cullinane* "is replaced by" the treaty, then we simply look to the treaty instead for our extradition offence and we then use section 24(2)(d) to determine whether the evidence has been tendered sufficient to warrant a committal, and that was exactly the approach the High Court of Australia took in the *Riley* case and *Riley* is an important decision in that respect, your Honours. It can be found, I believe it's volume 6, your Honours, and it's at page 3159. I'll just take your Honours to the relevant passage from *Riley* because it really does address this directly. I'm sorry, it's volume 8. There was a reason I couldn't see it and yes, here it is.

WILLIAMS J:

3159?

MR BOLDT:

It begins at 3159, Sir, but the critical passage I want to take your Honours to is at 3167. Interestingly, this case took place against the backdrop of a statute that generally requires double criminality and a treaty that generally requires double criminality, and the High Court of Australia was happy to say that…

GLAZEBROOK J:

I thought the submission against you was that it didn't but maybe I misunderstood that submission.

MR BOLDT:

Well, the Australian-US Extradition Treaty is a double criminality treaty. What the High Court majority found in this case was that there were sufficient exceptions both in the statutory and treaty definitions to that general requirement of double criminality that in the present case, even though this crime of continuing criminal enterprise, which is what Riley was charged with, even though that's not an offence in Australia, it could nonetheless comprise an extradition offence for the purposes of their statute. So they actually construed every presumption away from double criminality in that case and the Court allowed that it could and should be assumed that the conduct was criminal in Australia.

WINKELMANN CJ:

You're making it sound quite an unattractive authority.

MR BOLDT:

Well, your Honour, if we have a look at the top of 3167, first of all, the Court explained why it was going to find, this is at the previous page 3166, why it was going to find that "continuing criminal enterprise" fell within the definition of an extradition offence in Australia notwithstanding the absence of double criminality. The crime was a little bit, say, like racketeering or organised criminal

group so there was some underlying criminal offending at its core but then a number of overlaid elements that aggravated the offending significantly and so the Court said "Well, we're going to say that because there were two or more elements, some of which were criminal in Australia, that'll be good enough".

The Court then goes on to say that "Section 17(6)(b)(i)", this is the bottom of page 3166, which is their evidential standard provision, "is in no way inconsistent with that view. That provision does not indicate that an extradition crime must be a crime according to the law of the State or Territory in which a magistrate is exercising jurisdiction. Section 4(lA) alone defines what is an extradition crime," so that's the effective equivalent of our section 4, "s. 17(6)(b)(i) is purely evidentiary and its provisions do not provide any justification for departing from the ordinary and natural meaning of the words of s. 4(1A)." And so what –

WINKELMANN CJ:

But the case is about a situation where the offence came within Australian law but it didn't come within the Treaty . That's quite an unusual circumstance, isn't it?

MR BOLDT:

Well, they managed to find, your Honour, albeit by giving a liberal construction to both, that it did squeeze within the Treaty , and even though it wasn't a crime under Australian law.

WINKELMANN CJ:

It seems to say it isn't a crime under Australian law?

MR BOLDT:

Well, the core conduct would have been criminal under Australian law. They just had no equivalent of the aggravated overlay, if you like, your Honour, the equivalent of the organised criminal group. As I say, this one is called "continuing criminal enterprise". So the way the Court framed it was the question was whether such evidence had been produced before the Magistrate

"as would, in his opinion, according to the law in force in New South Wales, justify the trial of an accused person if the acts or omissions constituting the crime of continuing criminal enterprise had taken place in or within the jurisdiction of New South Wales and on the assumption that those acts or omissions would constitute a crime according to the law of New South Wales, whether or not in truth they would constitute a crime in New South Wales." So that is the way, according to the High Court of Australia, you apply the prima facie standard in circumstances where the underlying offence is not criminal in the jurisdiction.

[16:10]

WINKELMANN CJ:

So what are you showing us this is authority for?

MR BOLDT:

Well, this is good authority that section 24(2)(d) is an evidential provision. It performs the same function in the Australian legislation as section 24(2)(d) performs in ours. It's saying what is an extradition offence is defined elsewhere in the statute. This type of provision is concerned only with whether the second pillar of safeguard, namely the need for a prima facie case, has been established. When we talk about the law of Australia there, we're talking about the standard of committal required in Australia.

WINKELMANN CJ:

I think though that Ms Hyde's submission was rather not that section 24(2) defines "extradition offence" but that it is the engine room of this part of the legislation and it proceeds upon the assumption of double criminality which weighs against your interpretation.

MR BOLDT:

That section 24(2)(d) proceeds on the assumption of double criminality?

WINKELMANN CJ:

So it proceeds on the assumption that double criminality can't be done away with in a treaty unless, and she did accept, I think, unless it explicitly does say so.

MR BOLDT:

Well, and I think that in the end, your Honour, is perhaps where we can cut to the chase. My friend also submitted, in effect, that it would have been impossible under the Canadian legislation in force in 1985 which she described as the closest analogue with our legislation for double criminality to be excluded over there as well and her submission was the Treaty override provision in the Canadian legislation of 1985, which is to be found in section 3, nonetheless could not override the definition of "extradition offence" and again, with respect, your Honours, that's incorrect.

If we look at *McVey*, for example, which I'm always losing, it's volume 6, and the particular passage is 1781, Justice La Forest in his decision there said "International writers" –

GLAZEBROOK J:

So where are you?

MR BOLDT:

This is Justice La Forest writing in *McVey*, Ma'am.

GLAZEBROOK J:

I just want a page if that's all right.

MR BOLDT:

1781, Ma'am.

WINKELMANN CJ:

And that's in volume 9?

MR BOLDT:

No, Ma'am, this is volume 6. 1781 and the passage is "Of course, some assistance may be found in the practices followed by other states and there is considerable similarity in the practices of different states. In discussing these practices, international writers" –

GLAZEBROOK J:

You do need to tell us exactly where you are.

MR BOLDT:

1781 and it's the first complete paragraph around about the middle.

GLAZEBROOK J:

Okay, thank you.

MR BOLDT:

"International writers have for convenience identified certain principles or 'rules' such as double criminality and so on. These are convenient labels, and this international practice, as noted in Allard (at p. 865), 'may no doubt have a certain value in interpreting the law', but in the end the international duty must be found in the terms of the appropriate treaty", and in the passage from the La Forest textbook which I handed to your Honours but which is also in the electronic record, the critical passage is the one –

WINKELMANN CJ:

I'm sorry, Mr Boldt, but I didn't follow where you were. I'm sorry about that.

MR BOLDT:

No, Ma'am, my fault, it's 1781 is the page and the quotation I'm relying on begins around about the middle of the first complete paragraph.

MR BOLDT:

Perhaps beginning with "Of course".

WINKELMANN CJ:

This is on page 1781?

MR BOLDT:

Page 1781, Ma'am.

WINKELMANN CJ:

Halfway down. I see, right, got it. Sorry about that.

MR BOLDT:

And so Justice La Forest there is saying "Look, we talk about these things and for convenience, sometimes we call them rules, but in the end, it comes down to what the treaty says". And even in the Canadian environment, despite their long history of double criminality based on the English model, section 3 of the 1985 Act provided that any inconsistent provision in an arrangement, a treaty, I use the word "arrangement", has to be read subject to the Treaty and that also included the definition of "extradition offence" in that Act.

WINKELMANN CJ:

The very next paragraph seems to say quite the opposite.

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

Rather peculiar, really.

MR BOLDT:

Well, no. What the Court is noting there is treaties don't have independent legal force, they need to be brought into domestic law by statute, and that's why that leads into the passage in the final paragraph which is to say "Our international obligations are found in the treaty and the purpose of the Act is to ensure the law of the land conforms to the treaty", and that's what section 3 in that 1985 Act does and that is why Professor La Forest, in her text, which remains, I agree

with my friends, the leading text on Canadian extradition, writing in 1992 and referring to that 1985 Act, concluded of course it is possible for states to do away with double criminality by treaty and the only area where perhaps there might be some difference between the law as she states and the law as I say applies in New Zealand is that she goes on to say it would be doubtful if the Courts would read in such an intent in the absence of clear words. But what we see is that –

WINKELMANN CJ:

Why is that not the case in New Zealand?

MR BOLDT:

It's not the case in New Zealand because – well, it depends what you mean by "express words". In my submission, our treaty does, in express words, say "no double criminality is required as a rule", and I say that because it makes certain express references to double criminality in certain particular situations. Article XVIII is the clearest example, the provision dealing with the age of consent is also an example, and as I put it to your Honours this morning, the treaty was drafted against a background of American practice where selective references to double criminality were extremely common, and I do invite your Honours, if you doubt that, to have a look at the extracts from the Israeli treaty of 1962 that are in our submissions, and it's also in volume 1, the Israeli treaty, which talks about the first 25 offences say nothing about double criminality and the final six or seven mention double criminality.

And *Factor*, which was the guide to interpretation underpinning American treaty practice, also said "Where the treaty is silent, we're not going to read anything in. We are simply going to look at the holistic intention of the parties and if the treaty parties refer to double criminality in some places but not others, that is a pretty clear indication that in some places, but not others, double criminality is required".

GLAZEBROOK J:

1785 and 1786 suggest that what has to happen is that the Judge has to identify the equivalent Canadian crime and it would be better practice if the extradition request identified it themselves to avoid confusion which doesn't sound to me like you just ignore it and look at the Treaty.

MR BOLDT:

Well, no, Ma'am, but the reason for that is that all of Canada's post-imperial treaties require double criminality and I can say that now because I've read all of them –

GLAZEBROOK J:

Including the US one? Because I think at that stage, it was an enumerative one and they said it doesn't cause a problem because the law is the same, somewhere?

MR BOLDT:

Yes, that's right.

GLAZEBROOK J:

No, but what's right? Does the US/Canadian one include double criminality or doesn't it or is it just enumerative that's being looked at here or referred to?

MR BOLDT:

The treaty was entered into, I think, in the mid-1970s, around about the same time as the Australian one. I think that was dated around 1976 and it required express double criminality.

WINKELMANN CJ:

It expressly required double criminality?

[16:20]

MR BOLDT:

Yes, the Canadian, the US-Canadian Treaty expressly required double criminality. My learned friend is looking for it because it is in the materials, and I can take your Honours to the passage. It is in volume 3, part 2 of the appellants' authorities bundle, and Article 2, and it's at page 785 your Honours if you'd like to have a look, it was…

WILLIAMS J:

Sorry, can you give me the volume again?

MR BOLDT:

Yes Sir, it's volume 3, part 2 of the appellants' – sorry, it's just volume 3 Sir. It begins at 781. It's a blue volume Ma'am. It's volume 3. It begins at 781. If we go over the page, 782, we note that the Treaty was signed in 1971. Notifications exchanged 1976 and then over the page at 785, "Article 2 (1): persons shall be delivered up according to the provisions of this Treaty for any of the offences listed in the Schedule annexed to this Treaty, which is an integral part of this Treaty provided these offences are punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year."

GLAZEBROOK J:

So where are you sorry?

MR BOLDT:

I'm reading from Article 2, Ma'am, at page 785. It's Article 2, clause (1), and it's the last two lines of that clause.

GLAZEBROOK J:

Well no, they've got to be punishable by the laws of both countries by a term of imprisonment exceeding one year.

O'REGAN J:

That's double criminality, that's what he's saying.

GLAZEBROOK J:

It's more related to the amount of time but…

MR BOLDT:

Yes, but you've got to be able to get it in both places, which would rather assume – and yes, and my learned friend notes that it's also an enumerative Treaty, but what this Treaty expressly does is, it says here is the schedule and it must be criminal in both jurisdictions, and that's the formula that Canada has followed in all of its treaties, which is why, when in 1999 it moved to a slightly different model and double criminality couldn't be overridden by treaty anymore, that wasn't going to create a problem because they didn't have any non-double criminality treaties to be inconsistent with. Canada has always done that as a matter of practice, but as we can see from Professor La Forest that's not a question of law, and actually we see it also from Justice La Forest and those comments in *McVey*, the key point is what does the Treaty say.

GLAZEBROOK J:

I'm not sure that's right because he seems to be just assuming that's what happens under Canadian extradition law, no matter what the Treaty says. As you look at 1785 to 1786.

MR BOLDT:

And I – well if we need –

GLAZEBROOK J:

He's not saying you ferret around in the Treaty to see whether there's a double criminality, he just assumes that that's what you do when you're looking – in any event it was a classification, I suppose, but nevertheless.

MR BOLDT:

Well your Honour as I say the Canadian cases they do talk at length about double criminality but that is against the background of a universal treaty practice requiring it. The Canadians, as far as I'm aware, have never been confronted with a treaty where the issue is, does double criminality apply here?

GLAZEBROOK J:

Well of course the enumerated offences in the New Zealand-US did have double criminality at the time they were entered into. That was the whole point about them.

MR BOLDT:

In 19…

GLAZEBROOK J:

When it was entered into they went through and said to these offences they were ones that were identified in the schedule to the 1965 Act with specific provisions in New Zealand that corresponded to them.

MR BOLDT:

Well –

GLAZEBROOK J:

So in fact there was double criminality in practice in the US-New Zealand Treaty, even if the wording didn't say so, and Ms Hyde would say the wording does say so but…

MR BOLDT:

Well your Honour that, we perhaps then do need to have a brief discussion about the 1965 Act. What the 1965 Act did was it effectively set out a menu. The schedule to the statute set out the offences that could be then included in extradition treaties and their selection in New Zealand extradition treaties depended on there being crimes according to the laws of New Zealand which are listed in the schedule. But once the Treaty was struck, section 3 provided that the Act had to be read subject to the Treaty. Now that's not going to create a problem or an inconsistency because all the offences in the Treaty are going to have been derived from the statute. But it does matter when the criminal law changes, and what's interesting about this, about what happened to this schedule, is that Parliament seemed acutely conscious of the need to ensure that it didn't accidentally place New Zealand in breach of the Treaty, or make

extradition more difficult by taking out of the schedule a crime that was in the Treaty, even when that crime had been repealed under the law of New Zealand.

The best example of that is that when homosexual law reform happened in New Zealand in the mid-1980s, new offences were created, namely indecency I think upon a young person which was section 140A of the Crimes Act. That found its way into the schedule. There was an offence in the schedule called having a place of resort for homosexual acts. That was section 146. That had never been included in any treaty. That was removed from the schedule. But the crime, despite all of this activity around homosexual law reform that was never touched, was sodomy, section 142, and in my submission the reason for that was because sodomy was in the Treaty, and Parliament would, in revising the list of crime enumerated in the schedule, had been concerned to ensure it didn't accidentally render that part of the Treaty unenforceable by taking it out of the schedule. So in other words once a crime was in the Treaty, the definition of "extradition act" in the Act had to be read subject to the Treaty, and the ambulatory –

GLAZEBROOK J:

You're actually digging yourself more of a hole actually, I must say, at least as far as I'm concerned.

WINKELMANN CJ:

Yes, I'm not really following you either.

GLAZEBROOK J:

What you're saying is that they thought specifically that despite the homosexual law reform that they should actually still extradite people for sodomy, to be imprisoned somewhere else for sodomy, and I think what your argument before was, well actually it was perfectly fine because in the US there is no such crime as sodomy so it was fine, but you can't have it both ways.

MR BOLDT:

No, what you see with what Parliament was doing was the same thing it did throughout the enactment of the 1999 Act, which is to make sure that if something was in a treaty then it can continue to be enforced. That's the important point.

GLAZEBROOK J:

But your point before was: don't worry about it because they're never going to be extradited for sodomy because it's not an offence in the US, in fact there's not even offences – well I don't believe there are a lot offences in respect of young people but…

MR BOLDT:

Look, your Honour, there are offences of sodomy in the US and we could easily get an extradition request for it, it's just that we would interpret that through what we now understand sodomy to be in both jurisdictions.

WINKELMANN CJ:

Double criminality, we'd interpret it through double criminality.

MR BOLDT:

What's that Ma'am?

WINKELMANN CJ:

We'd interpret it through double criminality.

MR BOLDT:

Only because in respect of that offence there is double criminality now, and look, your Honour, I don't shrink from the fact that it is possible. It is possible in the 1990s that there could have been a request that we would have had to meet even in the absence of double criminality. There never was. That would have been an outrage if it had happened, but nothing actually compared to the outrage of the original offence provision having existed in our statute for all that time. The two laws aligned from 2003 on and they remain aligned.

WILLIAMS J:

What do you say to the argument Ms Riley made that if you read –

WINKELMANN CJ:

Hyde.

[16:30]

WILLIAMS J:

Hyde, yes, that's right, *Riley* is a case. Justice La Forest explains the "subject to" in section 3(4) in the 1965 Act as being in relation to pre-existing imperial treaties and the risk of inconsistency.

MR BOLDT:

Well, your Honour, all I can do is take your Honour back to the way our extradition Bill was framed in 1965, which was to say previously the presumption has been the other way around. Treaties are going to be written to be consistent with the Act and to the extent they are not consistent with the Act, then the Treaty will yield. The Act in 1965 reversed that. The Court said, now section 3 is going to provide that the Treaty will prevail over any inconsistency in the statute.

WILLIAMS J:

So do you say Justice La Forest is wrong?

MR BOLDT:

No Sir because –

WILLIAMS J:

Wrong in New Zealand?

MR BOLDT:

I submit that that point doesn't apply in New Zealand. That may have been what underpinned the "subject to" provision, and in fact the provision

Justice La Forest was talking about, which was the one which began, "For the avoidance of doubt," was in the previous legislation. Section 3 of the 1985 Act, which is the one my learned friend characterises as the closest analogue with our statute, simply says, just as our statute does, that to the extent of an inconsistency it is the Treaty that will prevail, around part 1 of the statute, which also includes the definition of "extradition offence". It's just that in Canada they never tried to strike a non-double criminality treaty so that issue just never really arose in New Zealand.

In any event, your Honours, it's my submission that really as your Honour's taxed with me first thing this morning, and really as Justice La Forest says in *McVey*, it's perhaps useful and helpful to look at what happens in other countries. It's useful and perhaps helpful to see how significant the rule of double criminality is in different jurisdictions. But the fact is we have to interpret our Treaty and our Act, and our Treaty does not expressly provide for double criminality, as US treaties back then were well capable of doing, and often did when they wanted to strike a double criminality, when they wanted a double criminality arrangement. Instead it went the other way. It went the way, say, of the Israel Treaty, where there is selective reference to double criminality indicating it is not the rule. *Factor* made it clear, as the Court of Appeal observed in *Cullinane*, that we're not going to read things in there that aren't there. There is no presumption in favour of double criminality. It's simply a case of interpreting the Treaty as best we can in accordance with the way it has been written.

So your Honours my learned friend put it in the end, she said you need an express disavowal –

WINKELMANN CJ:

I mean *Cullinane* must be wrong on that point, mustn't it, because there is effectively a presumption in favour of double criminality and you need to look at the Treaty to see if it displaces it because we need, as you said, subject to must mean where there's an inconsistency.

MR BOLDT:

Yes, that's right Ma'am, there needs to be an inconsistency, but the question then is well what's an inconsistency for the purposes of this argument. For example, if the Treaty is silent on a topic and the Act speaks of a topic, are they consistent or are they inconsistent, and the best articulation of the answer to that question can be found in the *Kwok-Fung* case decision, as I referred your Honours to this morning, Justice Keith writing in the Court of Appeal, and this is volume 4, page 1296, and it's paragraph 17 of the judgment. His Honour has just spoken about the need for a reconstruction of the statute, to make sure we're not put in breach, and his Honour said at paragraph 17 of the judgment, "The discretionary grounds provisions…" this is section 8 of the Act, "…help illustrate the operation of s 11(1). If a treaty had no discretionary ground, New Zealand, as the requested State, would not under the treaty be able to refuse surrender on a discretionary ground. To do so would be to breach its basic obligation to surrender the accused person. In such a situation s 11(1) would require s 8 not to be applied or in effect require it to be read out of the Act."

WINKELMANN CJ:

Well I don't think we'd take that approach anymore. You're saying that section 30 discretionary grounds would not be allowed in this case.

MR BOLDT:

Well certainly not all of them would be ruled out Ma'am, and there are a number of grounds which would survive, but what his Honour said in –

WINKELMANN CJ:

Well, why, on your analysis since section, the Treaty doesn't allow those so on your analysis you reconstruct the Act to exclude them.

MR BOLDT:

Well to fair Ma'am it's not my approach, it was the approach of the Court of Appeal.

WINKELMANN CJ:

Yes, sorry.

MR BOLDT:

It was the approach of the Court of Appeal in *Kwok-Fung*.

WINKELMANN CJ:

Yes, quite so Mr Boldt.

GLAZEBROOK J:

But you need to persuade us why that is the correct approach because we are not bound by what the Court of Appeal said in this case.

MR BOLDT:

No Ma'am but the other decision which talks about this in some detail is the Court of Appeal's decision in *Bujak* which of course also doesn't bind your Honours, but the way the Court approached it in that case was to say –

GLAZEBROOK J:

So where are you now?

MR BOLDT:

I'm paraphrasing but I can take your Honour to *Bujak* in a moment if you like, but if I may articulate the rule as I understand it. Of course section 11 expressly provides that no power that's reserved for the Minister can be overruled by Treaty, and the way the Court of Appeal applied that in *Bujak* was by saying that when considering the section 30 exercise, let me just find the provision for your Honours. In section 11(2) the Act says that subsection (2)(b) or (3)(a) of section 30 cannot be overridden by a treaty and then in section 30 itself there are a number of provisions in that section, including for any other reason the Minister considers the person should not be surrendered, which may confer a broad discretion on the Minister. What the Court said in *Bujak* was that where there are express grounds that are inconsistent with the Treaty they may not be applied, but that the Minister's general ground in paragraph (3)(e) could still

be applied, the general discretion provided it's not inconsistent with the provisions that are overridden. I'm sorry, your Honours, that probably sounds a convoluted way of doing it, but what that means is that the section 8 factors are taken out, so the individual specific factors in section 8 aren't able to be considered. The catchall ground though in (e) will apply provided it's not inconsistent with the grounds that had been overridden. I'm sorry that sounds confusing.

GLAZEBROOK J:

No, what you're saying is, there's a residual discretion, but it's a residual discretion that doesn't include any of the section 8 ground.

MR BOLDT:

Correct. That's it. So in other words you couldn't use the residual discretion to reinsert a section 8 ground that had been overridden and the particular ground in issue in that case was the, well there was a complaint about Mr Bujak's health, which he said would be badly affected if he were extradited, and the Court said, well, you can't use the residual ground to reinsert that.

[16:40]

So anyway that is the approach which has been applied. If you're faced with silence in one instrument, versus something being said in another instrument, you actually have got an inconsistency and it's what's said in the Treaty which is going to prevail, or not said, and that also applies, of course, to the question –

GLAZEBROOK J:

That's actually a bit odd, isn't it, to say what's not said in the Treaty means that it's inconsistent and you apply the Treaty and therefore nothing that's, not everything that's not said in the Treaty, because why doesn't that apply to all of the procedural grounds in the procedure in the Act?

MR BOLDT:

Because the procedure is provided for in effect by Article 9. The way you do discharge your obligations, and who does it –

GLAZEBROOK J:

I don't think you need to take it this far, and frankly once you start taking it this far you really do get yourself into a situation where one is driven to say that can't possibly be the case.

MR BOLDT:

I better stop talking in that case your Honour.

WINKELMANN CJ:

It does sound rather inconsistent with the notion of Parliamentary supremacy but you have an answer to that, don't you, about legislative instruments that are disallowable.

MR BOLDT:

Indeed, everything that goes through, every treaty that goes through has to be placed before Parliament. So Parliament can't be overridden in that sense. It's not a Henry VIII clause in the way it's been characterised.

WINKELMANN CJ:

It's not very consistent with the notion of the rule of law and certainty in the law, is it, though that there can be this major act of Parliament, everyone thinks this is the law but there's all these instruments which are not particularly accessible.

GLAZEBROOK J:

Which not only their express provisions could override the Act, but things they don't say can override the Act.

MR BOLDT:

Well, your Honours discussed the question of reciprocity earlier, and that perhaps segues nicely into that. As far as the United States is concerned our

Treaty partner, which will also be applying this exact Treaty in the event of a request from us, it will look to the terms of the Treaty, and that means the grounds on which surrender might be refused are those enumerated in the Treaty. It will apply it within its four corners, and the fact that in the United States treaties are effectively self-executing, and are self-contained instruments, gives us an indication of the way this Treaty was intended to be applied. It was also intended to provide a self-contained instrument within New Zealand to be applied in that way here as well. That's…

GLAZEBROOK J:

But doesn't it apply just to the US, does it, the argument must apply to everybody, so I don't think that we can say, well, in this case the US would have been negotiating on this basis because of its own internal things, therefore we interpret the Act as overriding everything, even if we're dealing with a country that doesn't have that imperative and might have been negotiating on a totally different basis.

MR BOLDT:

Well –

GLAZEBROOK J:

Like Canada for example.

MR BOLDT:

Of course, but –

WILLIAMS J:

And the US is negotiating double criminality treaties at the same time.

MR BOLDT:

It is.

WILLIAMS J:

So why would they do that if they didn't have double criminality themselves and their treaties are self-executory?

MR BOLDT:

Well it's because, Sir, they took a case by case approach, for whatever reason –

WILLIAMS J:

What's the point from their point of view in double criminality, from their self-interest point of view, because the Treaty is their statute.

MR BOLDT:

Well because a treaty negotiation is a discrete exercise from place to place, from country to country. There was a decision – and all that really emphasises Sir is that there's no one rule. That the parties are free to do one thing in one case, do something different in another case, and that they actually did that regularly.

WILLIAMS J:

And you said the Australian one was also double criminality?

MR BOLDT:

The Australian Treaty, yes. Yes Sir.

WILLIAMS J:

What's the date for that one?

MR BOLDT:

That's around about the same date as the Canadian Treaty, so early 1970s.

WILLIAMS J:

Right, so is it just a leverage question? We didn't have enough –

MR BOLDT:

I don't think so Sir. The speculation in *Abell*, which is the text that your Honours have, is that the United States had previously preferred the list method because it's easy to apply, or it should be easy to apply. We don't have to engage in the kinds of technical arguments we've been enmeshed in, in the last week. If you only have to look to see if the crime is in the Treaty it actually becomes a lot easier to apply. The trouble is they are expensive. They are harder to negotiate because you've got to dream up every crime you want to put in them, and they require a degree of maintenance as well.

WINKELMANN CJ:

Well not according to you. You don't need to dream up every crime to put in them because then you have access to the general provisions in the Act in any case.

MR BOLDT:

Yes, although you see they didn't at the time this Treaty was struck. There wasn't a section 60 equivalent at the time, there is now, and I suspect that's their way of getting around not having to maintain the Treaty, it's because of new crimes come along, people can go the section 60 way rather than having to go through the Treaty.

WINKELMANN CJ:

In *Factor* they said it didn't matter that the Treaty partner required double criminality.

MR BOLDT:

Correct. The way the United States puts it is this is an international obligation. The US, under its Constitution, takes treaties and international obligations very seriously because of the status of treaties as supreme law in the United States, and it says, so just because our Treaty partner would, by our standards, be in breach, is no reason for us to be in breach as well. We have a treaty which we are reading on its face. It is clear from the selective references to double criminality in the crimes here that this was not intended as a general rule, so

we will only require double criminality in those cases where it's expressed. As I say that, these enumerative treaties are harder to write but they're easier to apply. Double criminality treaties are easy to draft, and New Zealand has entered into a few in recent times, but they give rise to the same levels of technicality we've been subjected – I shouldn't say subjected to – but which the Court has had to grapple with over the course of the last week. The Court in *Cullinane* was quite right to say this is a simplified procedure, it just requires identification of the generic offence, and the Court in *Cullinane* adopted the approach taken by its earlier decision in *Edwards* as to what needed to be shown, and also reaffirmed that 24(2)(d) was just an evidential standard applying *Riley*. So all of that has been articulated before and I submit reading the Treaty in the context of the way the US was writing treaties at the time, that was absolutely the correct approach.

WINKELMANN CJ:

Mr Boldt, strictly reply.

MR BOLDT:

I'm going to simply ask your Honours whether I need to reply on Article 9. Article 9 is the provision relied on by my friend as effectively importing double criminality into the Treaty. That's the – that identical provision is referred to by the Supreme Court in the *McVey* case, by Justice La Forest, and I can take your Honours very quickly to the passage that discusses that.

WINKELMANN CJ:

If you just give us the page reference, that will be fine.

MR BOLDT:

That's 1794 your Honour. It's at the top. You can see there, Article 8, which is a bit further down, is the same as our Article 9. It was a very standard provision in American extradition treaties, and the Court says there, "Like most treaties… only speaks in general terms about the procedures to be employed by the requested State in implementing its treaty obligations." So in effect it's noting there that this is all about –

GLAZEBROOK J:

Noting where?

MR BOLDT:

It's at the top of the page. It says, "It leaves the details to the law of the requested State … Only speaks in general terms about the procedures to be employed by the requested State in implementing its treaty obligations."

WINKELMANN CJ:

So you say this is about procedure?

MR BOLDT:

It leaves the details to the law of the requested State, and your Honours for a really detailed discussion of this, of a very similar provision to this, can I ask your Honours to have a look at a case called *In re Commissioner's Subpoenas* 325 F 3d 1287 (11th Cir 2003). That's in volume 3, part 1, this is of the United States bundle, volume 3, part 1, tab 31 of the United States authorities. That was actually a mutual assistance treaty but it used a very similar term and the exact issue for the, this is the 11th Circuit Court of Appeals in the United States, the exact issue for it in this case was does this import the laws of the requested State, or is it simply concerned with procedure, and the Court concluded in that case that it was entirely procedural.

[16:50]

GLAZEBROOK J:

It is in a different context, though, isn't it, without a background of a double criminality?

MR BOLDT:

Well that's true your Honour –

GLAZEBROOK J:

Or do you think it is against a background of double criminality?

MR BOLDT:

In fact there is a very important double criminality aspect of that case, and it's at page 1299 of the judgment. I'm not sure what the reference is in the large numbers, but page 1299 of the judgment. As you can see there under heading, "C" there's the –

GLAZEBROOK J:

Let me just get it. What volume is it of yours?

MR BOLDT:

It's at volume 3, part 1 of the United States authorities. Tab 31. I can now tell your Honours it's page 633 of the bundle that I'm most interested in. This is after the Court has held that this is only a procedural provision. There's this heading, "Rejection of 'Dual Criminality'" and it noted that there had been a decision made in this Treaty not to include double criminality and the Court in this section simply makes the point that if it's to be regarded as a substantive provision, rather than one simply dealing with matters of procedure, then you will have double criminality imported into the Treaty by the back door.

WINKELMANN CJ:

So the absence of double criminality favours their interpretation so it's rather not – doesn't help us one way or the other.

MR BOLDT:

It's exactly the same argument I make in this case.

WINKELMANN CJ:

No but there the – there's an explicit provision then if there's not a requirement of double criminality.

MR BOLDT:

Well, yes, or they expressly decided not to include double criminality in that Treaty.

WINKELMANN CJ:

"Article II, 3 explicitly provides that ''[a]ssistance shall be provided without regard to whether the conduct…"" et cetera.

MR BOLDT:

And the Court goes on, and it's at the top of the page in the second column, "Therefore, if Article VII… is read as the appellants contend, a dual criminality provision will be brought into the Treaty through the back door." And that is the exact submission I make with respect to the contention my friends are advancing with respect to Article 9.

WINKELMANN CJ:

Okay.

GLAZEBROOK J:

But without having an express provision rejecting double criminality, as in this Treaty.

MR BOLDT:

Well, correct Ma'am, although as I say I don't accept that the statute is silent on double criminality. It's our submission that the way this – sorry, the Treaty is silent. The way the Treaty handles the question of double criminality, in my submission, makes it clear it is the exception and not the rule and that, as I say, is clear both on the face of the Treaty. It's clear in terms of the interpretation in *Factor*. It's also clear in the way the United States drafted other enumerative treaties from around that time. So there was nothing foreign, noting alien or different about the New Zealand Treaty and in fact it's exactly the same formula but even clearer that New Zealand applied in its 1992 Treaty with Fiji, which contains even more in the way of contextual references to double criminality on some occasions but not otherwise. So in that Treaty the extraterritoriality provision is engaged if there is double criminality but not otherwise, for example.

So it was always understood, in my respectful submission, that double criminality where it's referred to, needs to be shown, especially in that kind of context, where it's referred to selectively, it is not required generally.

WINKELMANN CJ:

All right. So are those your reply submissions Mr Boldt?

MR BOLDT:

They are Ma'am.

MR ILLINGWORTH QC:

Your Honour can I just raise two very small points just to ensure –

WINKELMANN CJ:

I take it they're not reply to reply submissions are they?

MR ILLINGWORTH QC:

No, just to correct some points that my friend made, well two points that my friend made.

WINKELMANN CJ:

Well is this a reply Mr Illingworth?

MR ILLINGWORTH QC:

It's just to correct two things which could be misleading.

WINKELMANN CJ:

Can you just discuss with Mr Boldt because we don't normally hear replies to replies.

MR BOLDT:

Well my learned friend invites me to invite your Honours to read from the La Forest textbook beginning at page 1847, and that's page 68 of the textbook.

GLAZEBROOK J:

1847?

MR BOLDT:

1847 and the second point I think, my learned friend suggested that the repeal of sodomy did not need to be reflected in a change to the schedule because a new offence of anal intercourse had been created in the statute – sorry, had been created in the Crimes Act. So even though the schedule to the 1965 Act continued to refer to "sodomy", my friend says that because there was a new section 142 covering similar conduct, sodomy would be read down to match the conduct in the new offence of anal intercourse. I won't comment on that. I will just sit down, thank you Ma'am.

WINKELMANN CJ:

Now just Mr Mansfield, do you want to file additional submissions, when were you to do that by?

MR MANSFIELD:

I think your Honour said 5 o'clock today. Mr Cogan's out the back just trying to get it finalised Ma'am, but I think we're having some difficulty with the connection through to the electronic record, getting all of those entries in to make it…

WINKELMANN CJ:

Do you need slightly more time?

MR MANSFIELD:

I was going to ask for that Ma'am, and we've also, the plan was –

WINKELMANN CJ:

Midday tomorrow?

MR MANSFIELD:

That would be fine, thank you Ma'am. We were just wanting to raise one other matter Ma'am. Your Honour set a 10 page limit for the reply document but what we would prefer to do is combine the speaking notes we had for the main oral submissions and the reply into the one document, which makes it slightly longer but just one document rather than two.

WINKELMANN CJ:

Are you saying you want to take your notes for your oral presentation…

MR MANSFIELD:

To be combined with the reply into the one doc, rather than two.

WINKELMANN CJ:

Will that still be limited to 10 for this material?

MR MANSFIELD:

No, it'd be slightly longer, that's why I'm on my feet asking Ma'am, whether we can –

WINKELMANN CJ:

No, I understand, but if you add in the notes it'll be more than 10, but are you proposing to add in more than 10 pages?

MR MANSFIELD:

No, in combination I think it comes to 18, with all the references. In total. So combining the two documents into one, otherwise it's longer than that. I just thought it was easier getting one document rather than two.

WINKELMANN CJ:

You're still complying with the 10 page limit for this additional material though?

MR MANSFIELD:

Yes.

MR ILLINGWORTH QC:

And your Honour just moments ago we filed our 10 page document, which you'll have in electronic format. I was just going to enquire whether you want that in hard copy as well?

WINKELMANN CJ:

We can print it.

MR ILLINGWORTH QC:

Thank you.

WINKELMANN CJ:

Is there anything else before we retire? All right, counsel. We will take time to consider our decision and let you have it in the usual way. Thank you very much for your submissions. Most of the time they've been very helpful. We've got some very difficult thinking to do, so thank you.

COURT ADJOURNS: 4.59 PM