
**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2012-404-1928

UNDER THE

Judicature Amendment Act 1972

IN THE MATTER OF

**An application for judicial review and
application for order for interim relief
pursuant to section 8**

BETWEEN

KIM DOTCOM

First Plaintiff

FINN BATATO

Second Plaintiff

MATHIAS ORTMANN

Third Plaintiff

BRAM VAN DER KOLK

Fourth Plaintiff

AND

ATTORNEY-GENERAL

First Defendant

AND

**THE DISTRICT COURT AT NORTH
SHORE**

Second Defendant

**MEMORANDUM FOR DIRECTIONS HEARING
ON 26 SEPTEMBER 2012**

24 September 2012

**CROWN LAW
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Background

1. During the evidential phase of the remedies hearing Inspector Wormald, pursuant to s 70 of the Evidence Act 2006, declined to answer a question as to the identity of the entity or entities attending a planning meeting at Police National Headquarters.
2. The question of the disclosure of that entity and any further information about its role in the Police operation known as “Operation Debut” was subsequently the subject of a Ministerial Certificate issued pursuant to the Crown Proceedings Act 1950.
3. Following the evidential motions to continue the suppression sought at the hearing and in the course of ex parte proceedings it became clear that the entity subject to the s 70 application had, in part, due to mistakes of fact and law, acted without statutory authority.
4. Accordingly the application in relation to the identity of the entity could not, consistently with the rule of law, be maintained.

The entity and its role

5. In its consideration of the USA request for the execution of arrest warrants directed to the applicants, OFCANZ determined that for law enforcement reasons already heavily traversed in this proceeding there should be simultaneous arrests.
6. To assist it in determining the location, or likely location at any relevant time of the persons subject to arrest warrants it sought the assistance of the Government Communications Security Bureau.
7. Under the Government Communications Security Bureau Act 2003 the GCSB is able, in the performance of its functions, to assist a public authority by supporting it (in this case NZ Police) to prevent or detect serious crime.
8. Accordingly GCSB acquired communications involving the persons subject to arrest and forwarded any of those communications relevant to location to OFCANZ.

The unlawfulness


9. The GCSB may without warrant intercept the communications of foreign organisations or persons. Following the OFCANZ request for information relevant to location, awareness on the part of the wanted persons of law enforcement interest in them, or any information indicating risk factors in effecting any arrest, GCSB sought assurance that all the persons of interest were foreign nationals. OFCANZ gave that assurance.
10. It is accepted that the advice as to immigration status in relation to K Dotcom and B Van der Kolk and their respective families was incorrect. Those persons held residence visas under the Immigration Act 2009 and under the GCSB Act are deemed to hold the status of permanent resident. As a consequence of the determination by GCSB that it has acted unlawfully the Prime Minister, to whom the Bureau reported that finding, has referred the incident to the Inspector-General of Intelligence and Security for investigation and report.
11. Section 14 of the GCSB Act precludes the Bureau from exercising any of its interception powers or functions for the purpose of intercepting the communications of a person who is a New Zealand citizen or permanent resident of New Zealand.
12. The interception operations did not include any activity described in s 15 of the GCSB Act (Installing or Connecting Interception Devices). The GCSB activity commenced on 16 December 2011 and extended until 20 January 2012.
13. The information transferred to OFCANZ related solely to the intended movements of the persons subject to the arrest phase of the OFCANZ operation. No other class of information was provided.

The section 70 issue

14. As is evident, the reliance on s 70 as to the identity of the entity present at the Police planning meeting is discontinued.
15. However, aside from the summary of GCSB activity in this memorandum, any further information as to the Bureau's operational activities remains subject to the s 70 application as supported by the Ministerial Certificate.

16. Accordingly on Wednesday directions will be sought having regard to any applications or further applications from the applicants as to the further disclosure requirements they have made in applications to the Court.
17. If this necessitates proceedings to set aside the Minister's Certificate the nature and scope of that proceeding will require judicial directions.

Date: 24 September 2012



J C Pike
Counsel for the respondent

TO: The Registrar of the High Court of New Zealand.
AND TO: The plaintiffs.