IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-001928
[2012] NZHC 3268

UNDER	the Judicature Act 1972
IN THE MATTER OF	an application for judicial review
BETWEEN	KIM DOTCOM First Plaintiff
AND	FINN BATATO Second Plaintiff
AND	MATHIAS ORTMANN Third Plaintiff
AND	BRAM VAN DER KOLK Fourth Plaintiff
AND	ATTORNEY-GENERAL First Defendant
AND	THE DISTRICT COURT AT NORTH SHORE Second Defendant

Hearing: 14 November 2012

Counsel: P J Davison QC, W Akel and R Woods for First Plaintiff
GJ Foley for Second, Third and Fourth Plaintiffs
J C Pike and FRJ Sinclair for First Defendant
DPH Jones QC, Amicus
SBW Grieve QC, Special Advocate

Judgment: 5 December 2012

JUDGMENT OF WINKELMANN J

This judgment was delivered by me on 5 December 2012 at 2.15 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

[1] The plaintiffs apply to join an additional defendant, amend the statement of claim, and for additional discovery. The background to these applications is as follows. I have previously determined that aspects of a Police search and seizure in January 2012, in connection with the plaintiffs, were illegal. Following on from that finding, there was a hearing in August 2012 to consider the plaintiffs' allegations that the Police search and seizure of the Dotcom mansion was unreasonable because it was illegal, and because the force used was excessive in all the circumstances. I refer to this hearing as the remedies hearing.

[2] Following the conclusion of the remedies hearing, material came to light which showed that the Government Communications Security Bureau (GCSB) had been intercepting the communications of the first and fourth plaintiffs, Mr Dotcom and Mr van der Kolk. The first defendant concedes that those interceptions were unlawful.

[3] The revelation that the Police had access to intercepted communications gathered by the GCSB created difficulty in the conduct of this litigation. This is material which is likely relevant, at least in part, to an assessment of the circumstances as the Police understood them to be, when they planned the search of the Dotcom property. If so, it is material which should have been available for the remedies hearing. There is further difficulty, however, because the GCSB claims that disclosure of those communications will prejudice New Zealand's national security interests as it will tend to reveal intelligence gathering and sharing methods. The first defendant also challenges the relevance of the documents, and says, even if they are relevant, I should direct, pursuant to s 70 of the Evidence Act 2006, that they should not be disclosed in the proceeding.

[4] Mr Grieve QC has been appointed by me as amicus to advocate for the plaintiffs' point of view in relation to these documents, on the issues of relevance, and the s 70 issue.

[5] The late revelation of the involvement of the GCSB has therefore slowed the progress of the proceeding. A further development is that the plaintiffs now seek leave to amend the statement of claim to add the Attorney-General as a third

defendant, sued in his capacity as representative of the GCSB (the Attorney-General is already joined in respect of the New Zealand Police). That application is opposed and is dealt with in this judgment along with various other issues which have arisen in relation to discovery.

1. Application for joinder

[6] The plaintiffs seek leave to join the GCSB (through the Attorney-General) and to add to the claim allegations that the New Zealand Police requested interception of Mr Dotcom and Mr van der Kolk's communications at a time when they knew, or ought to have known, that the two men's immigration status meant that such interceptions were unlawful. The plaintiffs also intend to allege that it was unreasonable for the GCSB to fail to make its own inquiries to satisfy itself it was proceeding lawfully. These failures, it is said, aggravate the illegality involved in the interceptions so that the interceptions were both unlawful and unreasonable. The plaintiffs seek orders by way of declaration that the interception by the GCSB of Mr Dotcom's and Mr van der Kolk's communications was unlawful, and an order requiring the New Zealand Police and GCSB to pay compensation to the plaintiffs:

> In such an amount as this court deems just and appropriate having regard to the nature, extent and consequences of the breaches of rights under the New Zealand Bill of Rights Act 1990, by reason of the unlawful and unreasonable interception of the first and fourth plaintiffs' communications by the third defendant at the instigation of the first defendant.

[7] The Attorney-General opposes joinder of the GCSB as a further defendant. I understand the Attorney's opposition to be on behalf of both the GCSB and the New Zealand Police. The principal ground of opposition is that joinder and consequential amendment will further deflect the Court from resolution of what was the core issue in the proceeding; whether, having regard to the unlawfulness of the 20 January search and the consequent breach of s 21 of the New Zealand Bill of Rights Act, the remedies sought should be granted. Because the resolution of this core issue may have some bearing on the extradition proceeding,[1] the addition of the GCSB as a further respondent may well also delay the extradition proceeding. There is little

[1] One aspect of the relief sought for the illegal search and seizure is the delivery up of the data seized, or at least a copy of it. The plaintiffs need this data to prepare for the extradition proceedings.

nexus, it is argued, between the search and seizure issues of January and the GCSB actions. The addition of GCSB will simply be a distraction.

[8] Significance is also attached to the fact that the remedies sought in relation to the actions of the GCSB are declarations as to the unlawfulness and unreasonableness of the interceptions and compensation for breach of the plaintiffs' rights under the New Zealand Bill of Rights Act 1990. Yet the Crown has accepted the GCSB actions in relation to Messrs Dotcom and van der Kolk and their families were unlawful. For that reason the pleading in relation to relief from GCSB is in substance and effect purely a claim for constitutional "Baigent" style damages.[2] Such a claim has no place in judicial review proceedings.

Relevant Principles

[9] Rule 4.56 of the High Court Rules regulates joinder of parties and provides that:

> **4.56 Striking out and adding parties**
>
> (1) A Judge may, at any stage of a proceeding, order that—
>
> (a) the name of a party be struck out as a plaintiff or defendant because the party was improperly or mistakenly joined; or
>
> (b) the name of a person be added as a plaintiff or defendant because—
>
> (i) the person ought to have been joined; or
>
> (ii) the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding.
>
> (2) An order does not require an application and may be made on terms the court considers just.
>
> (3) Despite subclause (1)(b), no person may be added as a plaintiff without that person's consent.

[10] In determining whether a person ought to have been joined under r 4.56(1)(b)(i), r 4.3 is also relevant:

---

[2] *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA).

4.3 Defendants

(1) Persons may be joined jointly, individually, or in the alternative as defendants against whom it is alleged there is a right to relief in respect of, or arising out of, the same transaction, matter, event, instrument, document, series of documents, enactment, or bylaw.

(2) It is not necessary for every defendant to be interested in all relief claimed or every cause of action.

(3) The court may make an order preventing a defendant from being embarrassed or put to expense by being required to attend part of a proceeding in which the defendant has no interest.

(4) A plaintiff who is in doubt as to the person or persons against whom the plaintiff is entitled to relief may join 2 or more persons as defendants with a view to the proceeding determining—

(a) which (if any) of the defendants is liable; and

(b) to what extent.

[11] Finally, also relevant is s 10 of the Judicature Amendment Act 1972 which provides:

10 Powers of Judge to call conference and give directions

(1) For the purpose of ensuring that any application or intended application for review may be determined in a convenient and expeditious manner, and that all matters in dispute may be effectively and completely determined, a Judge may at any time, either on the application of any party or intended party or without any such application, and on such terms as he thinks fit, direct the holding of a conference of parties or intended parties or their counsel presided over by a Judge.

(2) At any such conference the Judge presiding may—

(a) Settle the issues to be determined:

(b) Direct what persons shall be cited, or need not be cited, as respondents to the application for review, or direct that the name of any party be added or struck out:

(c) Direct what parties shall be served:

(d) Direct by whom and within what time any statement of defence shall be filed:

(e) Require any party to make admissions in respect of questions of fact; and, if that party refuses to make an admission in respect of any such question, that party shall be liable to bear the costs of proving that question, unless the Judge by whom the application for review is finally

> determined is satisfied that the party's refusal was reasonable in all the circumstances, and accordingly orders otherwise in respect of those costs:
>
> (f) Fix a time by which any affidavits or other documents shall be filed:
>
> (g) Fix a time and place for the hearing of the application for review:
>
> (h) Require further or better particulars of any facts, or of the grounds for relief, or of the relief sought, or of the grounds of defence, or of any other circumstances connected with the application for review:
>
> (i) Require any party to make discovery of documents, or permit any party to administer interrogatories:
>
> (j) In the case of an application for review of a decision made in the exercise of a statutory power of decision, determine whether the whole or any part of the record of the proceedings in which the decision was made should be filed in Court, and give such directions as he thinks fit as to its filing:
>
> (k) Exercise any powers of direction or appointment vested in the Court or a Judge by its rules of Court in respect of originating applications:
>
> (l) Give such consequential directions as may be necessary.
>
> (3) Notwithstanding any of the foregoing provisions of this section, a Judge may, at any time before the hearing of an application for review has been commenced, exercise any of the powers specified in subsection (2) of this section without holding a conference under subsection (1) of this section.

[12] The claim that is sought to be added in this proceeding includes a claim for damages. There is no procedural bar to including claims for damages in judicial review proceedings. In terms of s 10(1) the issue is whether it is convenient and expeditious for the claim to be included. In assessing this issue, the public interest in the expeditious disposal of judicial review proceedings needs to be weighed.[3]

---

[3] *Orlov v New Zealand Law Society* [2012] NZCA 12; *Deliu v New Zealand Law Society* [2012] NZCA 359.

Analysis

[13] The GCSB's concession that it was intercepting communications unlawfully does not weigh against the grant of the applications. Mr Dotcom and Mr van der Kolk are entitled to this Court's determination as to the extent of any illegality regardless of the GCSB's position. Mr Dotcom has filed an affidavit (sworn 7 September 2012) in which he states his belief that his communications were intercepted from early November 2011. I understand that the GCSB does not concede that they were intercepting communications as early as November 2011. Messrs Dotcom and van der Kolk are also entitled to seek a declaration as to the reasonableness of the search entailed in those interceptions.

[14] There is more force in Mr Pike's point that the cause of action against the GCSB contains an allegation of illegality in respect of a search other than the search previously at the core of these proceedings. The addition of these allegations will therefore require additional factual and legal inquiries. My assessment, however, is that, while this amendment will increase the scope of the further hearing required, that increase in scope will not be great. This is because the new search is part of the same factual narrative as the search which was previously the focus of proceedings.

[15] There were two issues in the August 2012 hearing. The first was whether the search pursuant to invalid warrants was unreasonable in all the circumstances. The second was whether the method of search used was unreasonable, because it employed disproportionate force, particularly when alternative courses of action were available to the Police. Part of the focus for that hearing was the information which was available to the Police which informed their decision not to follow the normal "knock and announce" approach to search, but instead to land helicopters, armed men and dogs on to the Dotcom property. It was in the course of consideration of this issue that the involvement of the GCSB came to light.

[16] Because the GCSB has claimed confidentiality for much of the information it provided to the Police, it has been necessary to appoint Mr Grieve amicus. His role is to assist with consideration of the relevance of that information to the proceeding and if the information is relevant, to assist the Court with assessing the claim to

confidentiality, and finally, if confidentiality claims are upheld, to advance such arguments on behalf of the plaintiffs as can be advanced in reliance upon that material. Inevitably therefore, whether or not the GCSB is joined as a party, and whether or not the statement of claim is amended as proposed, at least some of the material gathered by GCSB through the interceptions will be the subject of consideration in the proceeding, in one form or another. Indeed, such is the connection between these events that were the plaintiffs to be required to issue separate proceedings against the GCSB, my assessment is that they would have a very strong argument in support of an application for the new proceedings to be heard together with this proceeding.

[17] Also to be weighed in assessing this issue, is the public interest in the expeditious determination of judicial proceedings. There is a risk that the addition of the GCSB to this proceeding will delay the extradition proceeding, but in reality I think that is not a likely outcome. As I have held, the additional issues added by the amendment are not broad in scope. Moreover, the delay in these proceedings to date has been caused by the fact that not all relevant information was before the Court at the time of the remedies hearing. We are still working through the processes that were necessitated by that late disclosure. This will take time, and will eventually require a further hearing.

[18] There is also, I am told, near certainty that my earlier disclosure decision (in a different proceeding) will be subject to further appeal and that my July 2012 judgment in this proceeding will be appealed.[4] All of this will take time.

[19] In this case I have no doubt that the most convenient and expeditious way of enabling the court to determine all matters in dispute is to join the GCSB in the proceedings and give leave to amend the claim.

2. Redactions to the blue folder

[20] During the August hearing the documents discovered by the Police were produced to the Court as an exhibit in the blue folder. They came to be referred to as

---

[4] The Court of Appeal judgment on the appeal of the disclosure judgment is currently awaited.

"the blue folder documents". The documents in the folder had extensive redactions. The Police have now agreed that most of those redactions should be withdrawn. Mr Sinclair is to organise for a copy free of those redactions to be provided to the plaintiffs and to the Court.

[21] There are three outstanding issues with regard to redactions in the blue folder that have not been resolved. The plaintiff seeks an order that the redactions in the following pages of the blue folder should be removed:

(a) Page 172 of the blue folder. Reference is made to an in depth FBI presentation/overview; and also to a presentation in regard to NZ financial institutions related to the subject of the investigation (McMorran/Milne). Mr Davison says that Crown Law have been asked if there are any documents relating to these two presentations and if so to make full disclosure.

(b) Pages 175 and 176 of the blue folder. Redactions have been made on the basis of a claim for legal privilege. Mr Davison says that despite requests Crown Law has not advised the basis of this claim for legal privilege.

(c) Page 76 of the blue folder contains reference to a briefing of Ms Anne Toohey (Crown Law) and other key players to be arranged for Thursday 10 November 2011. It also contains reference to a video conference to be arranged for 15 & 16 November at OFCANZ office, once the FBI returns to the United States. Mr Davison says that Crown Law has been asked for any documentation which relates to these briefings but no response has been received.

[22] Accordingly the plaintiffs seek orders directing the first defendant discover any materials, documents or information described in paragraph [21](a), (b) and (c) above. In relation to (a) and (c), Mr Pike says there is no basis made out by the plaintiffs that these materials will be relevant and he says further, in respect of (b), that no more detail need be provided to support the claim for legal privilege.

[23] The issue to be determined in connection with this aspect of the plaintiffs' application is whether there are grounds for believing that the first defendant has not disclosed documents that should have been discovered[5] Addressing [21](a), any documents or notes of the FBI presentation could well be relevant to one issue in this proceeding; what was the window of opportunity for the search, and what considerations determined the time of entry onto the property? Since this briefing was preparatory to the January termination operation, there are good grounds to believe that documents that relate to the briefing will be relevant. This is also true of any record or documents associated with the briefings in [21](c). Against this, I note that there is no evidence offered on behalf of the first defendant to suggest that any such documents are irrelevant. The simplest way to resolve this issue is for me to inspect the documents that fall within this category to determine if they are relevant. I will discuss with counsel the procedure to be adopted in connection with that inspection at the next telephone conference.

[24] In contrast, the presentation by Messrs McMorran and Milne in relation to New Zealand financial institutions does not appear relevant to the issues in this proceeding. There are no grounds to believe documents in connection with this presentation should have been discovered.

[25] As to [21](b) (the redactions made to support a claim to legal privilege), no basis for going behind that claim to privilege is made out.

3. Discovery in relation to the GCSB

[26] The plaintiffs seek further disclosure in the following terms:

(a) The date and time the GCSB first received the signed request for information from the New Zealand Police in relation to this matter.

(b) Confirmation of the existence of an information sharing agreement between Immigration New Zealand and the GCSB between 1

---

5 High Court Rules, r 8.19.

September 2011 and 1 September 2012 and if such an agreement was in place, a copy of that agreement.

(c) Any further documents held by the GCSB in relation to the residency status of Mr Dotcom and Mr van der Kolk and their respective families.

(d) Confirmation as to whether the GCSB carried out any interception or surveillance of any kind on either Mrs Dotcom or Mrs van der Kolk. If such a surveillance was undertaken, confirmation of the date and time of any such interceptions.

(e) Confirmation of all entities to whom the GCSB provided information in relation to this matter. In particular, confirmation is sought of whether any such information was shared with other members of Echelon/"Five Eyes", including any United States authority.

(f) All information collected by the GCSB in relation to the plaintiffs, their families and any associated individuals, and particularly that information which was passed on to the New Zealand Police.

[27] Mr Pike initially opposed the disclosure on the same grounds as he opposed joinder of GCSB. He accepted that if the GCSB is joined, as I have ordered that it should be, then some of the information should be disclosed, but said that some will raise secrecy issues. In relation to (d) he sought the opportunity to take further instructions. I am content to provide him with the opportunity to do so since Mrs Dotcom and Mrs van der Kolk are not parties to the proceeding. In relation to (e) he queries the relevance of the disclosure sought and says that the disclosure would compromise New Zealand's national security interests, as it would reveal information sharing protocols and practices with intelligence allies. Finally in relation to (f) he says that although some of this material would be relevant, it would also incorporate disclosure of lawful interceptions (relating to those plaintiffs who were not New Zealand residents). Some also could engage the same confidentiality considerations identified earlier.

[28] Plainly most of what is sought by the plaintiffs is relevant. The plaintiffs are entitled to discovery of the items identified in paragraphs [26](a), (b) and (c). This ruling does not however preclude the GCSB from claiming public interest confidentiality in respect of that material. If it is to do so, it should properly identify those documents or portions of documents which are not disclosed on this basis so that the procedure which has been set in place in respect of the existing claims to confidentiality, utilising the assistance of Mr Grieve, can be followed in resolving those claims.

[29] The category of documents listed at paragraph (e) may be relevant to the proceeding. The use made of illegally obtained information is something which bears upon both the extent of illegality and the question of damages. To the extent that there are confidentiality issues, the process utilising Mr Grieve is to be followed.

[30] Finally, in relation to paragraph (f), Mr Pike is correct in that the request, as framed, would extend to information lawfully gathered. There should however be disclosure in relation to the information obtained in respect of Mr van der Kolk and Mr Dotcom. Some of this material will already have been included in the material provided to Mr Grieve. Material already disclosed need not be duplicated

4. Issue arising from Ten One New Zealand Police magazine February 2012

[31] In the "Ten One New Zealand" online Police magazine issue of February 2012 Detective Superintendant Mike Pannett, New Zealand Police Liaison Officer in Washington reports having monitored termination activities around the world in connection with the Mega Upload operation, from the FBI's multi agency command centre. Crown Law has been requested to provide an affidavit from Detective Superintendent Pannett setting out full details of the monitoring he was a party to including:

(a) the date that he monitored the termination activity;

(b) the time of such monitoring;

(c) the physical location where he carried out such monitoring;

(d) who else was present at the time of the monitoring;

(e) precisely what form the monitoring was, in particular whether this was by way of live feed or broadcast via satellite or otherwise, and

(f) full details of the information obtained from the monitoring and in particular, whether it was of the New Zealand Police raid on Mr Dotcom's property.

[32] Mr Pike says that the information sought is too broad. It requires disclosure that would create serious difficulty for the Police in terms of their relations with the FBI. More fundamentally, the information requested is beyond anything which is necessary for this proceeding. I think these points are well made. The critical issue is whether there was live footage of events unfolding in New Zealand on termination. This is a critical issue because Detective Inspector Wormald stated in an affidavit provided following the remedies hearing, that there was no live coverage of the operations going on at the Dotcom mansion. This affidavit contradicted earlier evidence he had given at the hearing. Footage of the events, if it exists, would be relevant to assessing the nature of Police actions on site at the Dotcom mansion. However, it is sufficient for these purposes if Detective Superintendent Pannett provides an affidavit in which he addresses whether he viewed a live feed of any aspect of the New Zealand termination operations, and if so, provides details which enable identification of the source of that feed, and the locations and events being filmed. The time at which he viewed that material should also be particularised.

5. Affidavits from Detective Inspectors Jones and Wormald

[33] In my minute of 19 October 2012 I noted Crown Law's confirmation that Detective Inspector Wormald had no material which recorded his dealings in relation to the undertakings connected with what have come to be referred to as "the stationary cameras". I also recorded that Crown Law had identified a gap in the

factual narrative available to me from the evidence provided so far in connection with the stationary cameras. Leave was granted to file further affidavits from Detective Inspectors Wormald and Jones. The plaintiffs supported the grant of leave.

[34] Subsequently Crown Law advised the plaintiffs that it no longer considered the proposed affidavits were necessary. The plaintiffs now seek orders requiring the Police to file further affidavits from Detective Inspectors Wormald and Jones explaining the circumstances in which the stationary cameras were set up and discussions and dealings with third parties in connection with that.

[35] To assist Crown Law in understanding the issues I am concerned with, I have directed that a copy of Mr Jones' memorandum (as amicus) be provided to the Crown. It is apparent from paragraphs [48] to [53] of that memorandum that Mr Jones identifies a gap in the factual narrative. In the light of that, the Crown has agreed that Detective Inspectors Jones and Wormald are to file affidavits which set out all their dealings in respect of those stationary cameras and attach any relevant documentation.

6. Continued interceptions or surveillance

[36] The final matter that the plaintiffs raised in the conference was in connection with a concern that while proceedings are in train against them both in New Zealand and the United States, they remain the subject of on-going surveillance or interceptions by a government agency. Crown Law has confirmed that there has been a cessation of activity by the GCSB in relation to Mr van der Kolk and Mr Dotcom. There has been no such confirmation with regard to interception or surveillance by other government agencies either in New Zealand or the United States, or with regard to Mr Batato or Ortmann.

[37] The plaintiffs express concern that not only are the plaintiffs communications being intercepted, but also communications between the plaintiffs, and between the plaintiffs and their solicitors and counsel. Communications with legal advisors are protected by legal professional privilege. So too, the plaintiffs say, are

communications between the plaintiffs relating to proceedings, and any other "common interest" privileged communications.

[38] At the conference, the plaintiffs sought orders directing Crown Law on behalf of New Zealand Police and on behalf of the United States government, to advise and inform both the Court and the plaintiffs as to whether, since 20 January 2012, there has been any surveillance of the plaintiffs and/or any interception of communications between the plaintiffs, and their solicitors and counsel of any kind by any government agency, whether in New Zealand or on behalf of the United States. Confirmation was also sought as to whether the product of any such interceptions or surveillance has been or is being reported to either the New Zealand or the United States authorities involved in the proceedings.

[39] Mr Pike submitted that the Court has no jurisdiction to make the orders sought. Mr Davison accepts that he can not point me to any jurisdiction that I have to make such a direction. I also observe that the concerns Mr Davison expresses on the plaintiffs' behalf are concerned predominantly with communications in the extradition proceedings and not in these proceedings.

[40] I did, however, ask Mr Pike whether he was aware of any ongoing interception and surveillance of the plaintiffs. He confirmed that he is not. I have suggested to Mr Davison that he write to formally request confirmation from the Crown in relation to this issue, and that if he wishes to pursue the issue he can do so through the Inspector-General of Security.

Conclusion

[41] It will be necessary to attend to further timetabling of these matters once arrangements are in place for Mr Grieve to perform the tasks with which he has been charged. In the meantime, the plaintiffs should attend to filing and serving the third amended statement of claim and the New Zealand Police and the GCSB should attend to the disclosure directed.

[42] A summary of my rulings is as follows:

(a) The GCSB is joined as a defendant to these proceedings.

(b) Leave is granted to the plaintiffs to amend their claim, in accordance with the draft pleading filed, to seek declarations about the legality of the GCSB's actions and to seek damages against the Police and the GCSB.

(c) I will inspect any documents relating to the topics identified at pages 76 and 172 of the blue folder (other than those relating to the financial institutions briefing) in order to determine relevance.

(d) The GCSB is to provide discovery of documents in accordance with paragraphs [27] – [30].

(e) Detective Superintendent Pannett is to provide an affidavit in which he deposes whether he viewed a live feed of any aspect of the New Zealand termination operations and, if he did, provides details particularising the timing and enabling identification of the source of that feed and the locations and events being filmed.

(f) Detective Inspectors Jones and Wormald are to file affidavits setting out all their dealings in respect of "the stationary cameras" (attaching any relevant documentation).

[43] There will be a further conference in this proceeding in the second week of December 2012, to resolve any outstanding matters in terms of the judgment, and to address any necessary timetabling in connection with the judgment.