IN THE COURT OF APPEAL OF NEW ZEALAND

CA11/2013
[2013] NZCA 43

BETWEEN	ATTORNEY-GENERAL IN RESPECT OF THE GOVERNMENT COMMUNICATIONS SECURITY BUREAU Appellant
AND	KIM DOTCOM First Respondent
AND	FINN BATATO Second Respondent
AND	MATHIAS ORTMANN Third Respondent
AND	BRAM VAN DER KOLK Fourth Respondent

Hearing: 14 February 2013

Court: O'Regan P, Arnold and Harrison JJ

Counsel: D J Boldt and F R J Sinclair for Appellant
W Akel and L Stringer for First Respondent
G J Foley for Second, Third and Fourth Respondents

Judgment: 7 March 2013 at 10 am

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B The orders set out at [42](a) and (b) of the judgment under appeal are confirmed.

C The order requiring discovery of documents is amended by deleting the requirement to discover all information collected by the Government

Communications Security Bureau in relation to the first and fourth respondents, their families and any associated individuals, but which the GCSB did not pass on to the New Zealand police.

D **We make no award of costs.**

REASONS OF THE COURT

(Given by O'Regan P)

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Introduction

[1] In this appeal, the Attorney-General challenges two interlocutory rulings made by Winkelmann J, the Chief High Court Judge, in proceedings in which the respondents challenge the legality of searches of properties of the first and fourth respondents undertaken at the request of the United States of America under the Mutual Assistance in Criminal Matters Act 1992 (MACMA).

[2] The Attorney-General (sued on behalf of the New Zealand Police) was the original defendant in those proceedings.

[3] The rulings to which this appeal relates are:

(a) the Chief Judge's decision to join as a defendant to the proceedings the Attorney-General (sued on behalf of the Government Communications Security Bureau (GCSB)) and to grant leave to the respondents to amend their claim to seek declarations about the legality of actions taken by the GCSB and to seek damages against the Police and the GCSB;

(b) the Chief Judge's decision to order that the GCSB provide discovery of certain documents. This order is challenged in part only.

[4] For ease of reference we will refer to the police and the GCSB as if they were parties sued directly, rather than repetitively referring to the Attorney-General on behalf of each agency. Where the reference to the Attorney-General does not specify the party on behalf of which he is named as party, we will refer to the Crown.

Background

[5] We will first set out the relevant background. We do this because the High Court proceedings have evolved and expanded over time as new information has come to light. The advancing of this appeal before other matters relevant to its resolution have been determined in the High Court has provided some difficulty for

us, and this procedural background explains that context and the reason for the difficulty.

Extradition

[6] The respondents were involved with a group of companies known under the name "Megaupload". In early 2012, prosecuting authorities in the United States of America obtained an indictment charging the respondents and others with offences involving breach of copyright, racketeering and money laundering. The United States has applied to extradite the respondents to face those charges in the United States. Both the first respondent and the fourth respondent are resident in New Zealand.

[7] The New Zealand police assisted the United States Federal Bureau of Investigation (FBI) in the FBI's investigation of the respondents and the Megaupload companies. The United States sought the assistance of the New Zealand authorities under the MACMA. As part of that assistance the police applied for search warrants under the MACMA to search the properties of the first and fourth respondents. The warrants were granted and were executed on 20 January 2012. Both the validity of the search warrants and the manner in which they were executed are at issue in the High Court proceedings.

[8] Much greater detail about this factual background is contained in the judgment of Winkelmann J of 28 June 2012 and reference should be made to that judgment for the detail.[1]

[9] The extradition eligibility hearing was originally scheduled for August 2012, but there have been two sets of intervening proceedings that have led to the deferral of the eligibility hearing. The first concerns the extent to which a country seeking extradition must make disclosure prior to eligibility being determined; this Court has recently delivered its judgment in that proceeding.[2] The second proceeding is the present judicial review.

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1 *Dotcom v Attorney-General* [2012] NZHC 1494, [2012] 3 NZLR 115.
2 *United States of America v Dotcom* [2013] NZCA 38.

The present judicial review proceedings: the procedural history

[10] The original statement of claim in the judicial review proceeding sought against the police a declaration that the search warrants were invalid and an order for clones of all computer equipment seized be provided to the respondents. It claimed that the warrants were unreasonably broad because they failed to address that some items located during the search would belong to people resident at the addresses other than the respondents, and because the seizure of the electronic devices by the police would result in the police obtaining material irrelevant to the alleged offending.

[11] The judicial review application was heard on 22 and 23 May 2012. During the hearing, it became apparent that cloned copies of the seized electronic material had been provided to United States investigators in the United States.

[12] As a result of that revelation, the respondents filed an amended pleading asserting that the removal of the clones from New Zealand breached a direction given by the Solicitor-General under s 49 of the MACMA that the police retain the seized material in their custody and control until further order. On 6 June 2012, there was a further hearing regarding the removal of the clones.

[13] In a judgment delivered on 28 June 2012, Winkelmann J found that the warrants were invalid. She held that the warrants did not accurately describe the offences to which they were directed.[3] In addition, she held that the warrants unlawfully authorised the seizure of irrelevant material[4] and that the police should have put in place mechanisms to identify irrelevant material and to return irrelevant material promptly.[5] Winkelmann J also held that the release of the clones to the United States breached the Solicitor-General's s 49 direction, and was therefore unlawful.[6] She indicated that she was satisfied that declarations should issue in relation to the validity of the warrants and the transfer of the clones, but she declined to grant other forms of relief, preferring to schedule a further hearing on the matter

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3 *Dotcom v Attorney-General*, above n 1, at [49].
4 At [77].
5 At [88].
6 At [97].

of remedies. This has subsequently been referred to as the "remedies hearing" and we will use the same description.

[14] In her judgment of 28 June 2012, Winkelmann J noted that the issue of whether the police conduct amounted to an unreasonable search and seizure for the purposes of s 21 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights) had not been raised by the parties.[7] She expressed a provisional view that the searches were unreasonable and said that, if the issue needed to be dealt with, that could occur when she heard the parties on relief.

[15] Following release of the judgment of 28 June 2012, the respondents indicated that they would expand their claim to argue that the search was unreasonable not just because it was made without a valid warrant, but also because of the way in which it was executed. In essence the argument was that the force used was not "reasonable" force in all the circumstances for the purposes of the MACMA. There is nothing in the record to indicate that they had told the Court that they would be claiming compensation for breaches of s 21 of the Bill of Rights.

[16] Counsel for the Crown indicated at a telephone conference on 17 July 2012 that he had no objection to the statement of claim being amended to plead that additional ground, and also asked that it properly particularised all grounds on which the respondents contended that the search was unreasonable in terms of s 21 of the Bill of Rights. The s 21 allegations had not been pleaded but the respondents had indicated they would wish to pursue those allegations in light of the Judge's indication of her willingness to deal with them and her expression of her provisional view that the searches were, in fact, unreasonable in terms of s 21. Winkelmann J gave leave by consent for an amended statement of claim reflecting these matters to be filed. Again, there was no mention in the Judge's minute of a compensation claim, and it could be expected there would have been if such a claim had been foreshadowed. Accordingly, the leave that was given by consent did not encompass a pleading seeking compensation for breaches of the Bill of Rights.

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[7] At [89] and [144](d).

[17] A second amended statement of claim was filed on 18 July 2012, setting out claims making allegations about the alleged unreasonableness of the manner in which the search warrants were executed and pleading a breach of s 21 of the Bill of Rights. The s 21 claim was based not only on the fact that the searches were made pursuant to warrants which were invalid but also on the manner in which the searches were carried out. The respondents sought, in addition to the remedies already pleaded in relation to their judicial review claim, an order requiring the police to pay compensation to the respondents "having regard to the nature, extent and consequences of the breaches of rights under the New Zealand Bill of Rights Act", apparently relying on *Baigent's case*.[8] The claim for compensation included compensation for emotional harm, the cost of reinstating electronic componentry at one of the properties searched, the cost of repairing damage to the properties and the costs incurred by the respondents in attempting to obtain access to the information stored on the computer equipment that had been seized.

[18] Upon receipt of the second amended statement of claim, the counsel then acting for the Crown filed two memoranda. In a memorandum filed on 20 July 2012 he characterised the *Baigent* claim as a new cause of action and submitted that it be severed from the judicial review. He submitted that the complexities of *Baigent* claims are antithetical to the purposes of judicial review and are generally severed from judicial review claims. In a second memorandum of 27 July 2012, the Crown submitted that the respondents required leave to change the character of the judicial review proceedings in that way (framing the *Baigent* claim as in essence a fresh proceeding), and indicated that leave was opposed.

[19] At a teleconference of 31 July 2012, Winkelmann J noted the Crown's objections in relation to the prayer for relief seeking *Baigent* compensation and ruled that the question of leave to add a claim for *Baigent* compensation, together with the question of whether the compensation claim should be severed, could be argued at the remedies hearing which was set down for 7–9 August 2012. The outcome appears therefore to be that the second amended statement of claim was allowed to be filed (and was filed) but that this was essentially a provisional ruling pending

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8 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*].

argument about the *Baigent* relief sought. Before us, counsel for the respondents, Mr Akel and Mr Foley, agreed that this issue remained at large.

[20] While the remedies hearing was set down for three days, four days of evidence was heard. At least some of this evidence was directed to the allegation of a breach of s 21 of the Bill of Rights and indirectly also to the *Baigent* claim against the police, even though that aspect remained at large. Counsel for the Crown in this court, Mr Boldt, explained to us that, given the time pressures of hearing all the evidence, argument about combining the judicial review and *Baigent* claim against the police did not take place as had been foreshadowed. At the remedies hearing it emerged for the first time that the GCSB had been involved in monitoring the first and fourth respondents who both hold residence class visas. Mr Boldt confirmed that the Crown accepts such monitoring was unlawful.

[21] In light of the disclosure of the GCSB's monitoring of the first and fourth respondents, the respondents filed an application on 21 November 2012 to join the GSCB as a defendant in the judicial review proceeding. This was accompanied by a draft pleading (that became the third amended statement of claim) seeking to expand the proceeding to seek *Baigent* compensation separately for the unlawful monitoring by the GCSB. The Crown opposed this expansion of the proceeding as the new allegations went beyond the conduct of the police and opened up a new front in which the GCSB's conduct was in issue. Unfortunately, the draft third amended statement of claim was drafted as an amendment to the second amended statement of claim even though the permissibility of including the prayer for *Baigent* compensation against the police in the second amended statement of claim had not been resolved. Faced with this, it would have been preferable for the Crown to formalise its objection to the *Baigent* claim in the second amended statement of claim by applying to strike it out, so that there was a proper procedural footing for its objection. This did not occur.

Judgment under appeal

[22] The judgment under appeal was delivered by Winkelmann J on 5 December 2012. The Judge ordered the joinder of the Attorney-General on behalf of the GCSB

as an additional defendant and gave leave to the respondents to amend their claim in accordance with the draft third amended statement of claim.[9] Paragraph [42](b) of her judgment refers to the respondents seeking damages "against the Police and GCSB" in accordance with the draft pleading submitted to the Court. It is clear from the context that the reference to the police was only because the *Baigent* claim against the GCSB sought compensation from both the police and the GCSB in relation to unlawful actions by the GCSB. It did not resolve the substantive point raised in the second amended statement of claim about the proposed *Baigent* claim against the police in relation to the actions of the police itself.

[23] The Chief Judge held that there was no procedural bar to including claims for damages in judicial review proceedings.[10] She determined that the addition of the GCSB allegations to those already pleaded against the police would require additional factual and legal inquiries, but that the increase in the scope of the proceedings would not be great. This was because the GCSB search was part of the same factual narrative as the police search that was the original focus of the proceedings. She noted that the connection between the police search and the GCSB search was such that, if the respondents were required to issue separate proceedings against the GCSB, "they would have a very strong argument in support of an application for the new proceedings to be heard together with this proceeding."[11] The Judge considered the risk of delay to the extradition proceeding and the public interest in expeditious determination of judicial proceedings, but did not see the risk of extra delay as great. She noted that the delay in the proceedings to date was caused by the fact that not all relevant information was before the Court at the time of the remedies hearing.

Procedural difficulty

[24] We were told that the counsel then representing the Crown in the High Court proceedings did not ask the Judge to determine the outstanding issue as to the permissibility of the inclusion of respondents' *Baigent* claims against the police in

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9 *Dotcom v Attorney-General* [2012] NZHC 3268 at [42](a) and [42](b).
10 At [12].
11 At [16].

the second amended statement of claim before or at the same time as she dealt with the application to include an additional *Baigent* claim against the GCSB. Nor did anyone remind the Judge at the hearing that led to the 5 December judgment that the matter relating to the *Baigent* claim against the police remained at large. This difficulty is amplified now that the Crown has appealed against the decision permitting the inclusion of the GCSB *Baigent* claim and brought the appeal on for hearing before us at a time when the High Court has still yet to rule on the inclusion of a *Baigent* claim against the police.

[25] This leaves us in the position of having to decide the correctness of the Chief Judge's decision in relation to the GCSB *Baigent* claim without knowing what ruling she will make in relation to the police *Baigent* claim. There is a significant difference between permitting the expansion of a judicial review claim to include a Bill of Rights claim for *Baigent* compensation and adding one *Baigent* claim to an already existing *Baigent* claim against another Government agency involved in the same factual narrative.

[26] The *Baigent* claim against the police will obviously be the primary compensation claim for determination by the High Court. Mr Boldt confirmed the Crown's willingness to have the declaration sought by the first and fourth respondents as to the illegality of the GCSB's surveillance made by consent and its acceptance of liability to pay compensation on the GCSB *Baigent* claim. He said the only issue is one of quantum, which he believes to be capable of resolution between counsel.

[27] The dilemma that this Court now faces should not have been allowed to develop. The Crown should have ensured that the issues brought to this Court were in a proper procedural form for us to deal with the issue of principle (whether a civil action ought to be allowed to be joined to a judicial review claim), especially as the police *Baigent* claim is the principal area of contention. In short, the Crown should have asked the Chief Judge to determine the position in relation to the police *Baigent* claim before this appeal came on for hearing. If the Crown did not accept her decision in relation to the police *Baigent* claim, it should have appealed that and asked this Court to determine the appeals relating to the two *Baigent* claims together.

Should we defer a decision?

[28] We have considered whether we should defer a decision on the issue in the present appeal relating to the GCSB *Baigent* claim until the fate of the *Baigent* claim against the police is resolved in the High Court. We have decided that, having heard argument on the present appeal, we should give our ruling on it as promptly as we can, and allow the Chief Judge to continue to progress matters in the High Court and bring all the outstanding issues to a conclusion.

[29] We record that Mr Akel suggested that the appeal was premature because the Chief Judge had not ruled on the addition of the claim against the GCSB for *Baigent* compensation. We do not accept that is the case: the summary of the Judge's rulings clearly states that the GCSB is joined to the proceedings and leave is granted to amend the claim to seek declarations about the legality of the GCSB's actions and to seek damages against the GCSB and the police.[12]

Issues

[30] We now turn to the issues raised by the appeal.

[31] In relation to the ruling relating to the joinder of the GCSB to the proceedings and the inclusion of a *Baigent* compensation claim against the GCSB, the issues which arise are:

(a) Can claims for damages ever be attached to judicial review proceedings?

(b) If such claims can be attached to judicial review proceedings, in what circumstances should this be permitted?

(c) Applying those principles, should the Chief Judge have allowed the joinder of the GCSB and the expansion of the claim to include a claim for *Baigent* compensation in the present case?

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[12] At [42](a) and (b).

[32] In relation to the discovery issue, the issue is whether the discovery order, insofar as it required discovery of full details of the information obtained from the monitoring of the first and fourth respondents by the GCSB, ought to have been made.

[33] Counsel for the Crown also argued that, if a claim against the GCSB were to be permitted, it was inappropriate for the Attorney-General in respect of the GCSB to be added to the proceeding in which the Attorney-General in respect of the police was already a party. He argued that the more appropriate course would have been to permit the extension of the claim so that the Attorney-General was sued in two different capacities. While nothing substantive turns on this point, we will comment briefly on it at the end of this judgment.

[34] We now deal with the issues raised in the order in which they are set out above.

Can claims for damages be attached to judicial review proceedings?

[35] Counsel for the Crown, Mr Boldt, argued that this Court should make a definitive ruling that a claim for damages can never be added to a judicial review proceeding. Before evaluating that contention, we set out the relevant law.

[36] The relevant provisions that govern joinder of parties are rr 4.56 and 4.3 of the High Court Rules and, in the context of judicial review proceedings, s 10 of the Judicature Amendment Act 1972 (JAA).

[37] The High Court Rules give judges a wide discretion to add parties to a proceeding, either because "the person ought to have been joined" or that is "necessary to adjudicate on and settle all questions involved in the proceeding":

> **4.56 Striking out and adding parties**
>
> (1) A Judge may, at any stage of a proceeding, order that—
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> (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.

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.

[38] The JAA further provides that in the context of judicial review proceedings brought under that Act the touchstone for whether a respondent should be joined is whether that will allow "the application for review" to be "determined in a convenient and expeditious manner" and allow "all matters in dispute ... [to be] effectively and completely determined":

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 issue 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:

...

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

...

[39] Relevant to the application of these provisions is the well established principle that judicial review proceedings should be "simple, untechnical and prompt".[13] This Court has also commented on the topic of the intersection of review proceedings and claims for compensation. In *L v Chief Executive of the Ministry of Social Development*[14] this Court doubted whether it was advisable for *Baigent* claims to be combined with review proceedings:

> [34] It is debatable whether a claim for compensation under the Bill of Rights should be brought in a judicial review proceeding. But we heard no argument on that, and so put it to one side.

[40] Similarly in *Orlov v New Zealand Law Society* one of the issues considered by this Court was whether the High Court was correct to sever Mr Orlov's judicial review application and his claim for relief for breaches of the Bill of Rights. This Court agreed that the severance order was proper, noting that:[15]

> [21] We consider the starting point in considering the Judge's severance order is the need "to fulfil the purposes of judicial review as a relatively simple, untechnical and prompt procedure". This Court reiterated the importance of that aspiration in 2006 in *Commerce Commission v Powerco Ltd*. ...
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> [22] If there is any justification for combining another claim or claims with an application for judicial review, it can only be that that course will be

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13 *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA) at 353; *Commerce Commission v Powerco* Ltd CA123/06, 9 November 2006 at [40]. Matthew Smith *New Zealand Judicial Review Handbook* (Brookers, Wellington, 2011) at 379.

14 *L v Chief Executive of the Ministry of Social Development* [2009] NZCA 596.

15 *Orlov v New Zealand Law Society* [2012] NZCA 12.

> the most "convenient and expeditious" way of enabling the Court to determine "all matters in dispute ... effectively and completely". Those are the words in s 10(1) of the Judicature Amendment Act.

[41] So, this Court has emphasised the importance of keeping judicial review proceedings simple and prompt, and indicated that it will not usually be appropriate for review proceedings to expand to include claims for compensation. Leave to cross-examine in judicial review proceedings is usually refused for the same reason.[16] However, there has been no decision creating an absolute rule to that effect.

[42] Mr Boldt was critical of the Judge's conclusion that there was no procedural bar on including claims for damages in judicial review proceedings, particularly her observation that the issue was whether, in terms of s 10(1) of the JAA, it was convenient and expeditious for the damages claim to be included with the judicial review claim. Mr Boldt argued that this was an error of law on the Judge's part, because s 10(1) stated the purpose of any orders made under s 10(2) to be the purpose of ensuring that the *judicial review application* be determined in a convenient and expeditious manner, not the overall litigation including matters extraneous to the judicial review application.

[43] The Judge's interpretation of s 10 appears consistent with that of this Court in *Orlov v New Zealand Law Society*.[17] But we think there is force in Mr Boldt's argument that s 10's focus is on the issues in dispute in the judicial review proceedings, not all matters of any kind that may be in dispute between the parties. So we consider that the correct approach to a joinder application involving the addition of a damages claim to a judicial review claim is to apply the relevant rule in a manner that is consistent with s 10.

[44] Mr Boldt said that the adding of a damages claim to a judicial review claim is inimicable to the determination of the judicial review application in a convenient and expeditious manner, and therefore could not be permitted under s 10. He argued that the powers given under the High Court Rules for joinder of parties and the granting

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16 *Wilson v White* [2005] 1 NZLR 189 (CA) at [25]–[26].
17 See [40] above.

of leave to add additional causes of action to a statement of claim must be read subject to s 10 and are effectively supplanted by s 10.

[45] There is nothing in the language of s 10 which indicates an intention to restrict the powers of a High Court Judge to manage proceedings before him or her in accordance with the High Court Rules. We do not therefore accept Mr Boldt's submission that s 10 operates as an exclusive code, preventing the application of the rules to claims under the JAA. Rather, we consider that s 10 reflects the intention stated in a number of earlier decisions of this Court that judicial review proceedings should be simple and expeditious. As noted earlier, we consider that, in exercising any powers under the High Court Rules including the powers for joinder of new parties and leave to add additional causes of action, judges ought to do so in a way which is consistent with the objectives of s 10.

[46] Accordingly, we reject the submission by Mr Boldt that the addition of a damages claim to a judicial review claim is barred by s 10 of the JAA.

In what circumstances can an additional claim be added to a judicial review claim?

[47] The analysis of the first issue provides an indication of our position in relation to this issue. In essence, we consider that the objective of dealing with judicial review proceedings in the way that is most convenient and expeditious will provide reason for a High Court Judge to be cautious about allowing the expansion of a judicial review claim by the addition of a claim for damages. We endorse what this Court said in *Orlov v New Zealand Law Society* in that regard, and stress that it is the expedition of the application for *judicial review* that must be the focus.[18]

[48] We do not think there is any point in our setting out particular guidelines or specifications for circumstances in which non-judicial review claims can be added to judicial review claims. Ours is not a legislative role. However, we accept the general thrust of Mr Boldt's submission that the objective of maintaining the

[18] See [40] above.

simplicity of the judicial review procedure should not be lost sight of when applications to extend a claim beyond the initial judicial review claim are made.

Should the Judge have allowed the joinder of the GCSB in this case?

[49] Applying that analysis to the present case, we record our concern that the present proceedings have expanded to a point where there is a degree of complexity and a level of factual dispute that is undesirable in relation to a judicial review claim. The expansion seems to have been triggered initially by the Chief Judge's observations about the unreasonableness of the search. Given that the parties themselves had not raised the issue and it was not relevant to the judicial review proceedings as substantively determined by the Judge, it might have been better had the matter not been raised in this context. But that, of course, is the wisdom of hindsight, and it should not be forgotten that the subsequent uncompleted remedies hearing identified further illegality.

[50] If we were considering the present application on a blank canvass, that is the addition of a *Baigent* claim to an orthodox judicial review claim that was proceeding in the orthodox way, we would take the cautious view and require the *Baigent* claim against the GCSB to be commenced as a separate claim. But we are also conscious of the unusual context of the decisions made in the present case. In particular:

(a) Counsel for the Attorney-General consented to the expansion of the original judicial review claim to include a claim under the Bill of Rights for a breach of s 21, unreasonable search and seizure. Although, as we have noted earlier, this did not involve consenting to a *Baigent* claim, it did involve an expansion of the original judicial review claim which focussed on the validity of the search warrants to a broader inquiry relating to the manner in which the searches were undertaken.

(b) The present case has been characterised by unforeseen disclosures of information, which have prompted an expansion of the focus of the parties and the Judge on to matters which were not earlier known

about. The Chief Judge referred in her judgment to the fact that the revelation during the course of the August 2012 hearing that the police had had access to intercepted communications gathered by the GCSB "created difficulty in the conduct of this litigation". It was, she said, material that should have been available for the remedies hearing.[19] Later, she observed that the late revelation of the involvement of the GCSB "has therefore slowed the progress of the proceeding".[20]

(c) The Judge has already heard four days of oral evidence involving cross-examination relating to the circumstances of the search. That evidence is directed at the reasonableness of the search, a matter which is before the Court by consent. Much of the evidence is also likely to be relevant to the *Baigent* claims against both the police and the GCSB. The Crown did not object to the requirement that witnesses be cross-examined.

(d) The fact that there has been evidence relevant to the police *Baigent* claim, even though it is not yet resolved whether that claim will be permitted, indicates that it is likely that such claim will be permitted, so that the *Baigent* claims against both agencies will be dealt with together if we dismiss the appeal.

(e) There has already been another hearing in the High Court since we heard this appeal. We understand there will be a further hearing in April in which the proceedings should be able to be completed, at least insofar as the final resolution of the judicial review claim and the granting of remedies in relation to that claim is concerned.

[51] In light of all these factors we conclude that it would not now be appropriate for us to intervene in the Chief Judge's management of the High Court proceeding.

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19 At [3].
20 At [5].

We do not, therefore, propose to allow the Attorney-General's appeal against the joinder of the GCSB and the inclusion of the *Baigent* claim against the GCSB.

[52] However, we do accept Mr Boldt's submission that there is urgency in concluding the judicial review remedies hearing so that a final decision can be made on the judicial review claim relating to the validity of the warrants, allowing the Attorney-General to appeal to this Court against that finding, which Mr Boldt has indicated the Attorney-General has wanted to do since June 2012. It has been open to the Crown since then to apply to the High Court under r 10.15 of the High Court Rules to formally determine the issue of the validity of the search warrants. It is hard to see how the respondents could object, given Winkelmann J's earlier findings**.** That is a course of action she should consider if the alternative is a delay in the conclusion of the judicial review proceedings and the making of declarations relating to the validity of the search warrants.

Discovery order

[53] The Judge recorded the respondents' request for further disclosure in her judgment of 5 December 2012 as follows:

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

[54] Although there was some debate about a number of the categories of disclosure outlined in that paragraph, the only element of the disclosure order that is now in contention is that contained in paragraph (f) above. It is not disputed that discovery of the information passed on by the GCSB to the police is warranted. So the appeal relates to the requirement to discover the information collected by the GCSB that was not passed on to the police.

[55] The Judge noted in relation to paragraph (f) that counsel then acting for the Crown argued that, although some of the material within that category would be relevant, it would also incorporate disclosure of lawful interceptions relating to those of the respondents who were not New Zealand residents. He also said the requirement to disclose this information would exacerbate the difficulties caused by the fact that a specific regime is required to preserve the security of the disclosed information, involving the appointment of counsel to receive the disclosure and advance arguments on the respondents' behalf, as appropriate. The Judge accepted that some lawfully gathered information would be within the scope of paragraph (f) and her discovery order excluded that material. However, disclosure was required of all information obtained in respect of the first and fourth respondents.

[56] Mr Boldt argued that there was no basis for discovery of the information described in paragraph (f) that related to the first and fourth respondents. He said that discovery must be relevant to a live and pleaded issue. We agree. He argued that in this case there was no live and pleaded issue to which the discovery could be said to relate. That is because the GCSB accepts that it acted unlawfully in undertaking surveillance of the first and fourth respondents, given that they were New Zealand residents, and had already indicated to the Court that it would consent to a declaration to that effect being made. That meant that the only live issue

between the GCSB and the respondents is the level of *Baigent* compensation. In light of the limited nature of the inquiry required to determine the appropriate level of compensation, there was no reason why full disclosure of all of the material obtained by the unlawful interception undertaken by the GCSB would be necessary.[21]

[57] Mr Boldt's submission was largely confirmed by the exchanges between the Court and Mr Akel and Mr Foley. When challenged as to the need for discovery of the material obtained from the surveillance by the GCSB, Mr Akel replied that the disclosure was relevant only to the calculation of *Baigent* compensation but that it was necessary because "We don't know its relevance until we see it". Mr Foley initially argued that disclosure was required because, otherwise, there was a risk of perjured evidence from the relevant GCSB officers about the period during which the unlawful surveillance took place. He later retracted that, but argued that it remained relevant to the calculation of *Baigent* compensation. We observe that, if Mr Foley were correct and affidavit evidence from a senior public servant could not be accepted at face value, that would illustrate how inappropriate it would be for the issue to be resolved in a judicial review context.

[58] Mr Foley even suggested that the disclosure of the information obtained by the GCSB from its unlawful interceptions would have a collateral benefit of providing information relevant to the extradition hearing (if the information obtained by the unlawful surveillance had been provided to the United States). That would, of course, be an impermissible use of the disclosed information.

[59] Mr Foley also argued that the arrangements put in place for Mr Grieve to receive the information and make submissions to the Court meant that there was no significant problem for the GCSB in making the disclosure and there had been nothing to indicate that the volume of the information was such that disclosure would be unduly onerous for the Crown.

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[21] *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429. Damages for Bill of Rights breaches will generally be awarded only where there is no other effective and appropriate remedy available. The principal objective for an award of *Baigent* damages is vindication, along with the purposes of compensation and denunciation.

[60] In the absence of the identification of any matter in dispute before the Court to which the disclosure could relate, we do not see any proper basis for the making of a disclosure order in terms of paragraph (f), insofar as it related to the first and fourth respondents. We do not accept that it is sufficient for counsel to say that he or she needs to see the information before he or she can identify whether it is relevant or not. In the present case, where there is no dispute about the illegality of the surveillance undertaken by the GCSB, and in light of the relatively limited scope of the inquiry into the level of compensation, we can see no proper basis for an order in terms of paragraph (f) even if it is limited to the information relating to the first and fourth respondents. We accordingly allow the Attorney-General's appeal in relation to that issue.

Should the Attorney-General on behalf of the GCSB have been named as a separate defendant?

[61] The defendant in the judicial review application was the Attorney-General in respect of the New Zealand police. When the respondents wished to expand their claim to encompass the GCSB, they applied to join the Attorney-General on behalf of the GCSB. Mr Boldt argued that this was inappropriate, because the Attorney-General represented the Crown as an indivisible whole and should not be named twice as a party. He said the Court should have simply treated the application as an application to expand the claim against the Attorney-General, rather than as an application for a joinder of a new party. Mr Boldt accepted, however, that, in practical terms, nothing had turned on this technical point. This point does not appear to have been raised in the High Court.

[62] The answer turns on the correct interpretation of s 14 of the Crown Proceedings Act 1950. Under s 14(2)(c), civil proceedings against the Crown are required to be instituted against the Attorney-General if there is no appropriate Government department or officer of the Crown that may be sued apart from s 14 itself. Section 14(4)(b) applies a similar rule to the joinder of the Crown as a defendant or third party to civil proceedings.

[63] There is conflicting High Court authority on the point. In *Mihaka v Attorney-General*, the Attorney-General was joined to a proceeding to which the Attorney-General in another capacity was already a party.[22] In *Hill v Attorney-General*, the Attorney-General filed statements of defence in two separate capacities.[23] On the other hand, in *Rahiman v Attorney-General*, the Court found that adding the Attorney-General to a proceeding in which he or she was already sued in another capacity was inappropriate, because the Attorney-General was capable of being sued in respect of any Government department which could not be separately sued.[24] The interpretation adopted in *Rahiman* is supported in *Sim's Court Practice*.[25]

[64] We do not see this issue as of great moment. Either the Attorney-General is cited as two separate parties, each in respect of a specific Government department, or cited as one party but in respect of two different Government departments. The practical effect is the same. In the absence of any clear indication in s 14 of the Crown Proceedings Act either way, we think that it is preferable to require the addition of the Attorney-General as a separate party in respect of each Government entity in respect of which he or she is sued. This best replicates the situation that would apply where the Government departments concerned were capable of being sued in their own name, and were therefore named in the proceedings as separate parties. That is what has occurred in this case. The lack of clarity about this is a matter which Parliament may wish to address.

[65] On that approach, the Attorney-General in respect of the police should have been a party to the appeal. Although the intituling does not state this, the reality was that Mr Boldt represented the Attorney-General in both capacities before us.

Result and costs

[66] For these reasons, we allow the appeal in part and make the orders set out in the Judgment of the Court. Our decision to make no award of costs reflects the fact that each party has had a measure of success in this Court.

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22 *Mihaka v Attorney-General* HC Wellington CP 370/86, 16 September 1987.
23 *Hill v Attorney-General* HC Wellington CP288/91, 29 April 1993.
24 *Rahiman v Attorney-General* HC Auckland A900/82, 9 November 1983.
25 *Sim's Court Practice* (looseleaf ed, LexisNexis) at [CPA14.5].

Final comment

[67] We urge the parties to co-operate to ensure that the pleadings are brought into proper order and that the issues before the High Court are determined as expeditiously as possible.

Solicitors:
Crown Law Office, Wellington for Appellant
Simpson Grierson, Auckland for First Respondent