IN THE COURT OF APPEAL OF NEW ZEALAND

CA451/2014
[2014] NZCA 509

BETWEEN	KIM DOTCOM Appellant
AND	TWENTIETH CENTURY FOX FILM CORPORATION, DISNEY ENTERPRISES, INC, PARAMOUNT PICTURES CORPORATION, UNIVERSAL CITY STUDIOS PRODUCTIONS LLP, WARNER BROS. ENTERTAINMENT, INC Respondent

Hearing:	9 October 2014
Court:	Harrison, Wild and French JJ
Counsel:	T J Walker and J S Caen for Appellant M C Sumpter and L L Fraser for Respondents
Judgment:	20 October 2014 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The 20 August 2014 order of the High Court dealing with confidentiality and the 29 August 2014 order of this Court dealing with confidentiality are set aside.

C The confidentiality orders set out in [45] are substituted.

D The appellant is to pay the respondents' costs as for a standard appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] Mr Dotcom appeals against a judgment delivered by Courtney J in the High Court at Auckland on 30 July 2014.[1] The Judge made this ancillary order:[2]

> By 20 August 2014 Mr Dotcom is to file and serve an affidavit setting out the nature, extent and value of his assets wherever they are located and identifying the nature of his interest in them.

[2] In appealing against that order Mr Dotcom takes four points. We state them as questions:

(a) *Jurisdiction*: Did the High Court have jurisdiction to make the ancillary order?

(b) *Requirements*: Was the High Court wrong to conclude the respondents have a good arguable case and a sufficient prospect the United States Court will give judgment for a sum exceeding the value of assets currently restrained?

(c) *Submission to jurisdiction*: Did the High Court err in concluding there is a sufficient prospect of enforcement in New Zealand of any United States judgment, because Mr Dotcom had submitted to the United States jurisdiction?

(d) *Inconsistency*: Is the ancillary order inconsistent with the stay order made by the United States Court?

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1 *Twentieth Century Fox Film Corporation v Dotcom* [2014] NZHC 1789 [High Court judgment].
2 At [75].

Background

Criminal proceedings

[3] Mr Dotcom, Megaupload Ltd, Vestor Ltd and six other individual defendants face criminal charges in the United States of America. The charges are before the United States District Court for the Eastern District of Virginia (the Virginia Court). The charges include criminal copyright infringement.

[4] Mr Dotcom is resident in New Zealand. The United States is seeking extradition of Mr Dotcom to face trial in the United States. The extradition application is scheduled to be heard by the Auckland District Court in February 2015.

[5] In January 2012 the United States Government obtained orders from the Virginia Court restraining Mr Dotcom's use of his assets in various countries including Australia, Germany, Hong Kong, the Netherlands, New Zealand, the Philippines, the United Kingdom and of course in the United States. On 18 April 2012 the High Court ordered that those restraining orders be registered in New Zealand.[3] Registration was for an initial period of two years. In a judgment this Court delivered on 21 August 2014, it ordered that registration be extended for one further year, to 18 April 2015.[4]

[6] It is agreed that the value of Mr Dotcom's New Zealand assets secured by those criminal restraining orders is NZD11.8 million.

Civil proceedings

[7] On 7 April 2014 the respondents filed a civil proceeding against Mr Dotcom and some of the other defendants in the criminal proceeding, also in the Virginia Court. The allegation is breach of copyright, earning the defendants some USD175 million before Megaupload was closed by the United States authorities in January 2012.

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3 *Commissioner of Police v Dotcom* [2012] NZHC 634.

4 *Commissioner of Police v Dotcom* [2014] NZCA 408. That judgment reversed a decision Thomas J had given in the High Court on 16 April 2014, declining to extend registration: *Commissioner of Police v Dotcom* [2014] NZHC 821.

[8] On 27 May, in light of the High Court's refusal on 16 April to extend the criminal restraining orders,[5] the respondents applied under r 32.2 of the High Court Rules for a freezing order. The aim was to prevent Mr Dotcom disposing of his New Zealand assets so that they would remain available to satisfy any judgment the respondents obtained in their United States proceeding.

[9] Early in June, Mr Dotcom publicly announced:

(a) he was personally funding the Internet Party in the New Zealand general election to the extent of about NZD3.7 million; and

(b) he would pay a USD5 million "bounty" for "information that proves unlawful or corrupt conduct by the US Government, the New Zealand Government, spy agencies, law enforcement and Hollywood".

[10] The respondents believed Mr Dotcom's assets in New Zealand and in the other countries listed in [5] above were frozen. Understandably, the respondents were concerned as to the source of the approximately NZD9 million mentioned by Mr Dotcom in his public announcements. Mr Dotcom refused to answer an inquiry made by the respondents through their solicitors. It was Mr Dotcom's public pronouncements indicating he had millions of dollars of available cash, coupled with his refusal to cooperate with the respondents' inquiry as to the source of these monies, that prompted the respondents to apply to the High Court for the ancillary order against which Mr Dotcom appeals.

[11] After that ancillary order was made on 30 July Mr Dotcom applied for a stay of it. Courtney J refused that in a judgment she delivered on 20 August.[6]

[12] Having also applied unsuccessfully to this Court for a stay of the ancillary order,[7] Mr Dotcom complied with the ancillary order by swearing two disclosure of assets affidavits, on 5 and 17 September.

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5 This is the judgment of Thomas J referred to in n 4 above.
6 *Dotcom v Twentieth Century Fox Film Corp* [2014] NZHC 1980 [High Court stay decision].
7 *Dotcom v Twentieth Century Fox Film Corp* [2014] NZCA 426 [Court of Appeal stay decision].

Issue 1: *Jurisdiction*: Did the High Court have jurisdiction to make the ancillary order?

[13] Rule 32.3 of the High Court Rules provides:

> **32.3 Ancillary order**
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> (1) The court may make an order (an **ancillary order**) ancillary to a freezing order or prospective freezing order if the court considers it just.
>
> (2) Without limiting the generality of subclause (1), an ancillary order may be made for any of the following purposes:
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> (a) eliciting information relating to assets relevant to the freezing order or prospective freezing order:
>
> (b) determining whether the freezing order should be made:
>
> (c) appointing a receiver of the assets that are the subject of the freezing order.
>
> …

[14] No freezing order has been made. The order under appeal therefore needed to be ancillary to a "prospective freezing order". Because freezing and ancillary orders interfere with property rights, Ms Walker argued the appropriately cautionary approach required an extant application for a freezing order. When the Court pointed out such an application had been made, on 27 May, Ms Walker submitted that application was only to preserve the status quo, against the event the criminal restraining orders would not be renewed. Ms Walker argued that a fresh application, seeking more than preservation of the status quo, was required. She sought support for this submission in the decision of the English High Court in *Parker v C S Structured Credit Fund Ltd*.[8]

[15] We reject Ms Walker's submission. We do not accept that r 32.3(1) requires an extant application for a freezing order. It requires just what it says; a "prospective freezing order". That is, the prospect a freezing order will be made. But even if an extant application is a requirement, the respondents' 27 May application for a freezing order remains before the High Court, undetermined. Mr Sumpter assured us the respondents intend to pursue it

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[8] *Parker v C S Structured Credit Fund Ltd* [2003] EWHC 391 (Ch), [2003] 1 WLR 1680 at [22].

[16] *Parker*, if it has any relevance, supports the existence of jurisdiction, rather than the converse. The English Court interpreted the differently worded English equivalent of r 32.3(1) as "dealing with a situation where there is either an application for a freezing injunction on foot or one where it is at least likely that there will be such an application".[9] The judgment in *Parker* records that counsel for the applicant "candidly admits that he does not have the material with which to apply for a freezing injunction".[10] That is not the situation in this case.

[17] The submission we have just disposed of appears not to have been put to Courtney J, or at least not in the same way. The Judge recorded merely that Ms Walker "was critical of the applicants' attempt to obtain an ancillary order other than in conjunction with a freezing order".[11] The Judge went on to reject that criticism, pointing out that r 32.3(3) "clearly contemplates an ancillary order being made before a freezing order and even without any freezing order ultimately following".[12] We obviously agree with those observations.

Issue 2: *Requirements*: Was the High Court wrong to conclude the respondents have a good arguable case and a sufficient prospect the United States Court will give judgment for a sum exceeding the value of assets currently restrained?

Good arguable case

[18] Ms Walker accepts Courtney J correctly set out the threshold requirement in r 32.5(1)(b) that the respondents have "a good arguable case" in their United States civil proceeding. She accepts also that the Judge correctly identified this Court's decisions in *Hannay v Mount* and *Wing Hung Printing Ltd v Saito Offshore Pty Ltd* as the guiding authorities.[13] Both cases emphasise that the sufficiency of evidence required of an applicant must reflect the early stage of the proceeding. Courtney J referred to this Court's stipulation in *Hannay v Mount* that "the allegations in the proposed claim [be] capable of tenable argument and [be] supported by sufficient evidence".[14]

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9 At [23].
10 At [23].
11 High Court judgment, above n 1, at [12].
12 At [12].
13 *Hannay v Mount* [2011] NZCA 530; *Wing Hung Printing Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754.
14 At [22].

[19] The respondents' supporting evidence came in the form of an Introduction and Summary of Evidence (Summary) in the criminal proceeding against Mr Dotcom and the other defendants disclosed by the United States Government. The respondents obtained this pursuant to an order of 22 November 2013 by Judge O'Grady of the Virginia Court authorising the United States Government publicly to notify the potential victims in the criminal case of the evidence held by it. That Summary, some 190 pages, detailed the FBI investigation into Megaupload, the operation of Megaupload, and summarised the evidence that is expected to be given by various FBI witnesses.

[20] Courtney J concluded:[15]

> [44] The evidence described in the summary of evidence is arguably capable of proving the allegations that Megaupload committed substantial infringements of the [respondents'] copyright interests and that Mr Dotcom controlled Megaupload, was aware of the copyright infringements and benefited from them. …

[21] Courtney J had earlier held the Summary is not hearsay evidence.[16] While we disagree with the Judge on that point, we agree with her conclusion that the Summary and the supporting expert evidence of Mr Rotstein demonstrated the respondents have a good arguable case. Though the Summary is hearsay, it is admissible under ss 18 and 20 of the Evidence Act 2006, and r 7.30(1)(c) of the High Court Rules.

[22] Given her criticisms of the adequacy of the Summary, the Court asked Ms Walker what she submitted could or should have been provided. First, she suggested the Summary ought to have been annexed to an affidavit sworn by an appropriate United States Government official. Secondly, she suggested the Summary should have been pruned of material that did not relate to events within the three year limitation period Ms Walker advised us applied to civil copyright infringement in the United States. Thirdly she suggested there should have been more direct evidence.

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15 High Court judgment, above n 1.
16 At [37]–[38].

[23] The first of these suggestions would not improve the quality of the Summary as evidence. As it was, the Summary was annexed to an affidavit sworn by Ms Karen Thorland, the Senior Vice President and Global Content Protection Counsel of the Motion Picture Association of America Inc. Ms Thorland explained the provenance of the Summary, just as we have done in [19] above. In our view, having regard to that provenance and the fact that this is an interlocutory proceeding none of those suggestions demonstrate error in the Judge's conclusion as set out in [20] above.

[24] Next, Ms Walker argued Courtney J erred in holding there is sufficient prospect that the Virginia Court will give judgment in favour of the respondents in a sum exceeding the NZD11.8 million value of the assets already under the criminal restraint order. This submission addresses the requirement in r 32.5(3)(a) that "there is sufficient prospect that the other court will give judgment in favour of the applicant". Ms Walker accepted, for the purposes of this appeal, that Mr Dotcom is potentially liable for copyright infringement. That was not the position in the High Court. A significant section of Courtney J's judgment summarises the opposing views of the parties' experts about liability.[17]

[25] In this Court, Ms Walker restricted her argument to the quantum of any judgment that may be given against Mr Dotcom. Ms Walker's submission invited us to prefer the evidence of Professor Jaszi for Mr Dotcom over that of Mr Rotstein for the respondents. Both men are experts in United States copyright law. In affidavits, and affidavits in reply, they advanced differing views about the likely quantum of any judgment that might be given by the Virginia Court. Having read these affidavits, we see no basis to disagree with Courtney J's view that the respondents had met the r 32.5(3)(a) requirement.

[26] Ms Walker based her invitation to prefer Professor Jaszi's evidence on two points. First, Professor Jaszi was an independent expert, whereas Mr Rotstein was not. Secondly, Mr Rotstein's evidence about the likelihood of a judgment and its quantum was "too speculative". We do not accept either of these criticisms. We

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[17] High Court judgment, above n 1, at [42]–[49].

consider Ms Walker is incorrect in submitting Mr Rotstein was not independent. Mr Rotstein deposed:[18]

> I confirm that I have no personal or professional interest in either this application or in the motion picture studios' or record companies' United States civil claims against the respondents. As I have said, I have read New Zealand's Code of Conduct for expert witnesses, and my evidence complies with it.

[27] Ms Walker's criticism that Mr Rotstein's evidence was too speculative echoes a comment by Professor Jaszi. The complaint for copyright infringement (our equivalent is a statement of claim) filed by the respondents in the Virginia Court on 7 April 2014 includes this allegation:

> 49. Without authorization from any plaintiff, or right under law, defendants Megaupload Limited, Vestor Limited, Dotcom, Ortmann, and van der Kolk, through their operation of Megaupload and associated websites, have directly infringed thousands of plaintiffs' copyrighted works, including those listed in Exhibit A hereto, by providing unauthorized copies of those works to users in violation of the Copyright Act, 17 U.S.C § 106.

Exhibit A lists 30 copyright works.

[28] In his first affidavit Mr Rotstein deposed it is commonplace in an action such as the respondents have brought in the Virginia Court "for plaintiffs to later amend the Complaint with evidence of additional infringements, including those that come to light in the course of the litigation. Leave so to amend is freely granted in such cases."[19]

[29] Given the very substantial scale of the Megaupload service, Mr Rotstein expressed the view: "it is reasonable to expect that the applicants will be able to seek and obtain a judgment in an amount exceeding USD $100 million".[20]

[30] In the affidavit he swore on 20 July 2014 in response, Professor Jaszi expressed the view that Mr Rotstein "clings to his speculation regarding numerous additional allegations of infringement".[21] He concluded:[22]

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18 Affidavit of Robert Henry Rotstein, sworn 23 May 2014 at [9].
19 At [32].
20 At [33].

> In sum, it remains my conclusion that any attempt to estimate with specificity the monetary relief that might ultimately be awarded against respondents is premature on the record presented.

[31] Professor Jaszi's view that it is "premature" to attempt any precise estimate of the likely amount of monetary relief prompts us to reiterate the point this Court made in *Hannay* and *Wing Hung* that the sufficiency of the evidence must reflect the early stage of the proceedings. In the absence of an obvious factual error or lack of expertise, a court dealing with an application for an ancillary order can but assume an expert's opinion is tenable. We add that Ms Walker accepted what Mr Rotstein stated: that in the United States it is standard practice to amend a complaint for copyright infringement (statement of claim) to add additional allegations of infringement.

[32] Ms Walker also argued that the "sufficient prospect" requirement in r 32.5(3)(a) is a more stringent test than the "good arguable case" test in r 32.5(1)(b). That is not a submission she put to the High Court and we reject it. A reading of r 32.5(1) and (3), indeed of the whole of r 32.5, demonstrates the "good arguable case" and "sufficient prospect" requirements are complementary, the first referring to the tenability of the respondents' case, the second to the prospects of the – in this case – Virginia Court giving judgment in favour of the respondents.

Issue 3: *Submission to jurisdiction*: Did the High Court err in concluding there is a sufficient prospect of enforcement in New Zealand of any United States judgment, on the basis Mr Dotcom had submitted to the United States jurisdiction?

[33] This issue hinges on the r 32.5(3)(b) requirement that "there is a sufficient prospect that the judgment [of the Virginia Court] will be registered in or enforced by the [New Zealand High] Court". As the Reciprocal Enforcement of Judgments Act 1934 does not apply to the United States, the common law will apply and enforcement will depend on whether Mr Dotcom has submitted to the jurisdiction of the Virginia Court by voluntarily appearing in the proceeding: *Von Wyl v Engeler*.[23]

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21 Affidavit of Peter Jaszi, sworn 20 July 2014 at [25].
22 At [26].
23 *Von Wyl v Engeler* [1998] 2 NZLR 416 (CA).

[34] The stay application referred to in [2](d) above was nominally made by Megaupload. But the ground of the application was the risk of infringement of the individual defendants' Fifth Amendment rights if the civil proceeding went ahead before the parallel criminal proceeding was determined. This ground clearly emerges from Megaupload's "Brief in Support of Motion … for a Stay Pending a Parallel Criminal Prosecution". After an introductory section the brief (which in New Zealand we would call a submission or synopsis of argument) continues:

> ARGUMENT
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> Defendant Megaupload now moves the Court to enter an order, staying this case until (at least) August 1, 2014, on the same terms and conditions as in the *Microhits Action*. A stay is warranted here to avoid burdening the Fifth Amendment rights of the individual defendants.

[35] The Fifth Amendment to the Constitution of the United States of America includes "no person … shall be compelled in any criminal case to be a witness against himself". In short, it affords protection against self-incrimination. Megaupload, as a "collective entity", did not have a Fifth Amendment right to assert: *Bellis v United States*.[24] So the stay application was advanced – and successfully – based on the Fifth Amendment rights of Mr Dotcom and the other individual defendants. Consistent with that, the Court papers relating to the application refer in a number of places to "the defendants" plural. In the defendants' reply brief supporting their motion for a stay, there is also extensive reference to the proceedings in New Zealand, first in relation to registration here of the criminal ("conviction-based") restraining orders, and then latterly to the 27 May 2014 application "for a civil pre-judgment 'freezing order' under [r 32.5]". All the proceedings in New Zealand, whether criminal or civil based, are against Mr Dotcom. There is none against Megaupload. That further demonstrates that the stay was for the benefit of the individual defendants.

[36] Thus, not only has Mr Dotcom not protested the Virginia Court's jurisdiction, but he presently has the benefit of an order staying the proceeding against him founded on his own Fifth Amendment rights, along with those of the other individual defendants. We consider the r 32.5(3)(b) "sufficient prospect" of enforcement in

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[24] *Bellis v United States* 417 US 85 (1974) at 88.

New Zealand requirement is met. Indeed, the conclusion that Mr Dotcom has submitted to the jurisdiction of the Virginia Court is irresistible.

[37] Nevertheless, Ms Walker sought to avoid that conclusion, by reiterating that Megaupload was the applicant for the stay, and it necessarily acted through individuals such as Mr Dotcom, who had Fifth Amendment rights. This was exactly the argument put to the Virginia Court by Megaupload. Having looked through the Court documents, we are well satisfied that the Virginia Court would not have granted a stay to protect Fifth Amendment rights were Megaupload the sole defendant.

Issue 4: *Inconsistency*: Is the ancillary order inconsistent with the stay order made by the United States Court?

[38] This last issue is directed to the r 32.5(3)(d) requirement that "the order sought would not be inconsistent with interim relief granted by the other court".

[39] We consider this argument fails at the threshold. Rule 32.5(3)(d) has the obvious aim of avoiding the High Court making freezing or ancillary orders which are inconsistent with any interim relief granted by – in this case – the Virginia Court. The Virginia Court has not made any orders akin to a freezing order or an ancillary order.

[40] But Ms Walker submitted to us – as she had to Courtney J – that the stay order made by the Virginia Court is "interim relief" in terms of r 32.5(3)(d). We very much doubt the correctness of that submission. But, assuming the submission is correct, there is no inconsistency. The Virginia Court has stayed the civil proceeding before it for the reasons explained in [35]–[36] above. It is not inconsistent with that for the High Court to make the ancillary order. Indeed, the need to preserve Mr Dotcom's assets against the event of a judgment from the Virginia Court is, if anything, more pressing given the stay. Further, the stay order made by the Virginia Court is subject to three conditions. The last of them is:[25]

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[25] *Twentieth Century Fox Film Corporation v Megaupload Ltd* No 1:14-CV-00362 (ED Va June 10, 2014) (order granting stay pending criminal prosecution).

> Plaintiffs may institute and pursue any action in the United States or a foreign jurisdiction to preserve Defendants' assets in the event that such action becomes necessary.

[41] We do not accept Ms Walker's argument that this condition only contemplated attempts to protect the status quo, by which we understand her to mean protect the assets covered by the criminal restraining orders, should those orders lapse and civil restraining orders become "necessary". There is no basis in the wording of the condition nor anywhere else so to restrict the condition.

[42] Ms Walker's other argument was based on Professor Jaszi's evidence that no freezing order or order equivalent to the ancillary order could be made by the Virginia Court. Again, Mr Rotstein took issue with this and the two experts debated the point in their affidavits. The condition we have set out in [40] above, which the Virginia Court attached to its stay order, rather suggests the Court had jurisdiction to make an order "preserving" Mr Dotcom's assets. However, we need not resolve the issue of the Virginia Court's jurisdiction. Assuming, for the purposes of dealing with this argument, that Professor Jaszi is right, it seems to us to undermine rather than support Ms Walker's argument that there is inconsistency. In *Credit Suisse Fides Trust SA v Cuoghi* Millett LJ rejected the suggestion that interim relief under s 25 of the English Civil Jurisdiction and Judgments Act 1982 should be limited to that which would be available in the court trying the substantive dispute, or that by going further the English Court would be seeking to remedy defects in the laws of other countries.[26] Potter LJ and Lord Bingham CJ concurred. The English Court of Appeal endorsed that approach in *Motorola Credit Corp v Uzan*.[27] Of the position where the foreign court simply lacks the jurisdiction to make an ancillary order, the Court commented:[28]

> In the latter event, the English court may judge it "not inexpedient", and indeed is likely to regard it as desirable in cases of international fraud, to be supportive of the processes of the primary court.

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26 *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 (CA) at 827. In England all forms of interim relief may be granted in aid of foreign courts under s 25 of the Civil Jurisdiction and Judgments Act 1982 (UK) unless "in the opinion of the court, the fact that the court has no jurisdiction apart from this [s 25] in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it."

27 *Motorola Credit Corp v Uzan (No 2)* [2003] EWCA Civ 752, [2004] 1 WLR 113.

28 At [119].

[43] To summarise, where the Virginia Court has stayed the primary proceeding, but on terms contemplating a court in another jurisdiction such as New Zealand making an order "preserving" Mr Dotcom's assets, we see no scope for an argument that the ancillary order is inconsistent with, or other than supportive of, the process in the Virginia Court.

Confidentiality

[44] In her judgment of 20 August declining to stay the ancillary order under appeal, Courtney J ordered the respondents' solicitors not to disclose the contents of Mr Dotcom's affidavits without the Court's leave.[29] Substantially the same order was made in this Court's judgment declining to stay the ancillary order.[30] Ms Walker sought a continuation of that order. Mr Sumpter opposed that, submitting that it was put in place to deal with interim confidentiality concerns.

[45] We set aside the orders of the High Court and this Court dealing with confidentiality and substitute the following orders:

(a) Save with the prior leave of a Judge of the High Court, the respondents may not use Mr Dotcom's affidavits made in compliance with the ancillary order except for the purposes of any application to the High Court or to a court of law in any other jurisdiction in respect of the restraining or freezing of the assets disclosed in the affidavits.

(b) No member of the public, nor any representative of the media, may have access to the affidavits without the prior leave of a Judge of the High Court.

Result

[46] The appeal is dismissed. The ancillary order made by the High Court on 30 July 2014 stands.

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29 High Court stay decision, above n 6, at [27(b)].
30 Court of Appeal stay decision, above n 7, at [33(b)].

Costs

[47] Ms Walker submitted that a settlement offer made by Mr Dotcom means costs should not follow the event. We have considered the letter dated 29 September sent by Mr Dotcom's solicitors to the respondents' solicitors. The disclosure and confidentiality terms offered in that letter differ from the orders we have substituted in [45] above.

[48] The position is that Mr Dotcom has unsuccessfully run an appeal which he himself regarded as rendered nugatory by his failure to obtain a stay of the ancillary order, with the result that he has in the interim complied with that order. He did not have to run that appeal. He could have restricted the contest to an application for orders restricting the use of and access to the two disclosure of assets affidavits he has sworn.

[49] In those circumstances, Mr Dotcom is to pay the respondents' costs as for a standard appeal on a band A basis with usual disbursements.

Solicitors:
Simpson Grierson, Auckland for Appellant
Chapman Tripp, Auckland for Respondent