IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-856
[2015] NZHC 1197

UNDER	the Judicature Amendment Act 1972
IN THE MATTER	of an application for Judicial Review
BETWEEN	KIM DOTCOM First Plaintiff
	BRAM VAN DER KOLK Second Plaintiff
AND	THE DEPUTY SOLICITOR-GENERAL First Defendant
	THE COMMISSIONER OF POLICE Second Defendant

Hearing:	8 May 2015
Appearances:	R Mansfield and S L Cogan for the First Plantiff G M Illingworth QC and A K Hyde for the Second Plaintiff D J Boldt and B Fenton for the Defendants
Judgment:	3 June 2015

JUDGMENT OF ELLIS J

This judgment was delivered by me on Wednesday 3 June 2015 at 11.00 am pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……..

Counsel/Solicitors:
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[1] As is tolerably well known, the United States government is presently seeking to extradite Kim Dotcom and Bram Van der Kolk, in order that they can be tried on a number of criminal charges in that country. The charges relate to their involvement in the allegedly unlawful activities of a number of companies, which are commonly and collectively referred to as the "Megaupload" group.

[2] Following the laying of charges against Messrs Dotcom and Van der Kolk in the United States, the United States government obtained restraining orders there over residential properties and personal assets owned by them in New Zealand. Pursuant to the Mutual Assistance in Criminal Matters Act 1992 (the MACMA) and the Criminal Proceeds (Recovery) Act 2009 (the CPRA), those restraining orders were registered in New Zealand in 2012, which meant they could be enforced here.[1]

[3] More recently, the United States has, in America, applied for, and been granted, civil forfeiture orders over those same assets (the US Forfeiture Order). Following a further request for mutual assistance the New Zealand Commissioner of Police (the Commissioner) has taken steps to have those orders, too, registered in this country. The effect of registration here would be that the assets would, within a relatively short space of time, vest absolutely in the Crown.[2]

[4] The Commissioner is required to obtain the authorisation of the Attorney-General (or his delegate, in this case, the Deputy Solicitor-General (Criminal)) before applying to the Court for registration of the forfeiture orders. That authorisation was obtained on 9 April 2015 and the application for registration was then filed.

[5] By these present proceedings, Messrs Dotcom and Van der Kolk (the plaintiffs) seek judicial review of the Deputy Solicitor-General (Criminal)'s authorisation decision. They also seek interim orders to prevent the Commissioner from taking further steps to progress the registration application, pending resolution of the substantive review. In turn, the Commissioner has applied to strike out the judicial review proceedings.

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1 Criminal Proceeds (Recovery) Act 2009, s 135.
2 Section 144.

[6] It is those two competing applications to which this judgment relates. Because interim orders would, self-evidently, not be available if the claim is struck out, it is the strike out application that will be addressed first.

Background

[7] The post-indictment restraining orders to which I have already referred were obtained on 10 and 25 January 2012. As I have said, following requests for mutual assistance made by the United States, the orders were registered in New Zealand on 18 April 2012.[3]

[8] On a number of occasions since then, orders varying the terms of the restraining orders have been made to enable the plaintiffs to pay their debts, meet reasonable living expenses, and to pay their legal expenses both here and in America. The legal costs involved in defending the extradition proceedings and related matters have been, and continue to be, extensive.

[9] Section 136(1)(b) of the CPRA provides that restraining orders may continue in force for two years. On 16 April 2014 this Court declined the Commissioner's application to extend the restraining orders for a further year pursuant to s 137.[4] But on 21 August 2014 the Court of Appeal overturned that decision and extended the orders to 18 April 2015.[5]

[10] In the meantime, Twentieth Century Fox Film Corporation, Disney Enterprises Inc, Paramount Pictures Corporation, Universal City Studios Productions LLP and Warner Bros Entertainment Inc (the Studios) had filed a copyright infringement claim in the United States against the plaintiffs and others. Megaupload sought a stay of those proceedings in May 2014.

[11] On 27 May 2014, the Studios sought freezing orders against assets of the plaintiffs and others in this Court. In June 2014 the application for a stay was granted, on conditions. As a result of those conditions, an agreement was reached

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3 *Commissioner of Police v Dotcom* [2012] NZHC 634.
4 *Commissioner of Police v Dotcom* [2014] NZHC 821.
5 *Commissioner of Police v Dotcom* [2014] NZCA 408.

between the plaintiffs and the Studios that, in the event the restraining orders obtained by the United States lapsed, an interim asset freeze arrangement would come into effect, thereby protecting the Studios' (and the United States') interests.[6]

[12] On 29 July 2014 the United States government filed a claim in America for civil forfeiture against the plaintiffs' overseas assets.[7] The plaintiffs filed claims to the assets the following month and, in October, applied to stay the forfeiture proceedings. In November, the United States moved to strike out the plaintiffs' claims, relying upon the doctrine of "fugitive disentitlement". That doctrine gives the Court a discretion to proceed on essentially a default judgment basis in a civil forfeiture action against a "fugitive" defendant. More specifically, 28 USC § 2466 provides:

> (a) a judicial officer may disallow a person from using the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action … upon a finding that such a person -
>
> (1) after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution –
>
> (A) purposely leaves the jurisdiction of the Unites States;
>
> (B) declines to enter or re-enter the United States to submit to its jurisdiction; or
>
> (C) otherwise evades the jurisdiction of the court in which a criminal case is pending against the person; and
>
> (2) is not confined or held in custody in any other jurisdiction for commission of criminal conduct in that jurisdiction.
>
> …

[13] The application of the fugitive disentitlement doctrine in this case was opposed by the plaintiffs, whose lawyers were heard on that issue. I am unsure whether their submissions included the point made by counsel before me, namely that to apply the fugitive disentitlement doctrine to a person who is defending extradition proceedings pursuant to a right conferred upon him by the relevant

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6 In accordance with the Court of Appeal's decision, the restraining orders did lapse on 18 April 2015. The interim freezing arrangement has therefore now come into play.

7 Civil forfeiture is an *in rem* procedure. The application had been foreshadowed at the time the extension of the restraining orders was sought.

extradition treaty appears, at least to the uninitiated, to involve something of a paradox.[8]

[14] Be all that as it may, on 27 February 2015 Judge Liam O'Grady determined that they were disentitled to litigate the civil forfeiture complaint and struck out and dismissed their claims to the assets. In doing so he said:

> The claimants urge the court to consider in its discretionary analysis the fact that New Zealand courts continue to litigate important issues related to forfeiture of the assets. The court certainly considers as relevant the significant oversight by the New Zealand courts over the assets located in that country. … It is the court's understanding that the New Zealand assets restrained in connection with the criminal action will remain under restraints pursuant to orders issued in [the Studios'] civil actions. It appears therefore that the assets held in New Zealand are subject to significant oversight by the New Zealand courts due to the civil litigation occurring there.
>
> This court accords great respect to courts in New Zealand and Hong Kong and does not wish to interfere with litigation occurring in either country. Importantly, the court does not believe that an order of disentitlement will unduly interfere with the litigation in New Zealand. After the claimants are disentitled, the government may seek default judgment in this action. If the court grants a default judgment and orders forfeiture, that would not be the end of the matter. Because the assets are located in New Zealand, the government would have to present that order to the New Zealand courts, which may or may not choose to register an order of forfeiture issued by this court.

[15] Significantly, the Judge then quoted from the relief provisions contained in the CPRA (NZ) (ss 148 and 143(2)) and went on to say:

> If this court after disentitling the claimants were to ultimately order a default judgment of forfeiture, the New Zealand courts may continue to litigate the issue of whether the assets will be forfeited. Thus, this court believes that disentitlement of the claimants in the United States will not unduly interfere with litigation occurring in New Zealand.

[16] As a result of the fugitive disentitlement decision, the forfeiture application proceeded essentially unopposed. All "well pled" allegations of fact made by the United States were taken as proven. On that basis, Judge O'Grady made the civil

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[8] Mr Mansfield pointed out that Article IX of the Extradition (United States of America) Order 1970 provides: "[t]he determination that extradition based upon the request therefor should or should not be made shall be made in accordance with the laws of the requested Party and the person whose extradition is sought shall have the *right* to use such remedies and recourses as are provided by such law" (emphasis added).

forfeiture orders on 27 March 2015. It is these orders that the Commissioner now seeks to have registered in New Zealand.

[17] An appeal by the plaintiffs from the fugitive disentitlement decision was filed on 3 April 2015 and is pending. I am advised that there is a further right of appeal to the United States Supreme Court.

[18] On 12 March 2015 (after Judge O'Grady's disentitlement decision but shortly before his forfeiture order decision) Courtney J granted Mr Dotcom's application to vary the restraining orders insofar as they related to New Zealand government bonds. Mr Dotcom was initially given access to the bonds (which were to mature in April 2015) for legal and living expenses of up to $700,000.[9] Subsequently, access was granted to the remainder of the bonds for legal fees and reasonable monthly living expenses.[10] The application for variation had arisen from Mr Dotcom's urgent need to pay for the legal work required to defend his approaching extradition hearing.[11] The Judge accepted that, for reasons that are not presently material, these expenses could not be met from unrestrained property.[12] She held that the New Zealand Bill of Rights Act 1990 (NZBORA) and International Covenant on Civil and Political Rights and, in particular, Mr Dotcom's rights under the NZBORA to natural justice and to prepare a defence, outweighed the State's contingent (and punitive) interest in the restrained property.[13]

[19] Before turning to consider the specific matters presently in issue it is necessary to outline the key features of the statutory regime governing mutual assistance requests in relation to the registration of foreign forfeiture orders. This involves consideration of both the MACMA and the CPRA, and the interplay between them. The MACMA was significantly amended when the CPRA was enacted, and the two statutes are clearly intended to work in tandem in relation to

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9 *Commissioner of Police v Dotcom* [2015] NZHC 458.

10 *Commissioner of Police v Dotcom (No 2)* [2015] NZHC 761; *Commissioner of Police v Dotcom* [2015] NZHC 820. Mr Dotcom sought access to the remaining $4.6 million of $10 million bonds purchased in connection with his immigration to New Zealand.

11 Under the CPRA, a restraining order can be made subject to conditions; in respect of a foreign restraining order, legal expenses were held to fall within s 28(1)(d).

12 [2015] NZHC 820 at [14].

13 [2015] NZHC 458 at [28] and [23], citing Potter J in [2012] NZHC 634 at [43], [45], and [47].

foreign forfeiture orders. For reasons that will become evident, however, I consider that the relevant parts of the legislation are, in key respects, poorly drafted.

The MACMA

[20] The long title to the MACMA states that it is "[a]n Act to facilitate the provision and obtaining of international assistance in criminal matters". It has been described as "gateway" legislation, because it offers foreign states a route through which they can access the tools New Zealand uses when investigating and prosecuting criminal activity.[14]

[21] In terms of the wider international context, in *Solicitor-General v Bujak* the Court of Appeal noted:[15]

> [23] The international background to the the MACMA is twofold. One is the Harare Scheme. The other is the United Nations Model Treaty on Mutual Assistance in Criminal Matters (adopted by General Assembly Resolution 45/117 of 14 December 1990) to which the the MACMA is New Zealand's response. Like the OECD Model Tax Convention on Income and on Capital and s BH1 of the Income Tax Act 2004, which facilitate the negotiation of double tax agreements between states, the UN Model Treaty and the MACMA respond to the outmoded rule of international law that one state will not assist another to enforce tax and penal measures.

[22] I shall return to the significance of the Harare Scheme and the Model Treaty later in this judgment.

[23] The MACMA provisions relevant to the present application are found in Part 3 of the Act, which governs requests made by foreign countries to New Zealand.

[24] The process for making and dealing with "requests for assistance" (which include requests for registration of foreign orders) is governed by the MACMA ss 25 to 29.

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[14] Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) at [1.21].

[15] *Solicitor-General v Bujak* [2008] NZCA 334, [2009] 1 NZLR 185 (citations omitted).

[25] Section 25 provides:

> **25 Requests to be made to Attorney-General**
>
> (1) Every request by a foreign country for assistance in a criminal matter pursuant to this Part of this Act shall be made—
>
> (a) To the Attorney-General; or
>
> (b) To a person authorised by the Attorney-General, in writing, to receive requests by foreign countries under this part of this Act.
>
> (2) Where a request by a foreign country is made to a person authorised under subsection (1)(b) of this section, the request shall be taken, for the purposes of this Act, to have been made to the Attorney-General.

[26] In the present case the Attorney-General has delegated his authority under s 25 to the Solicitor-General who has, in turn, delegated to the Deputy Solicitor-General (Criminal) pursuant to s 9C(1) of the Constitution Act 1986.[16]

[27] Section 26 specifies the form that a request must take and the documentation that must accompany it. Section 27 sets out both mandatory (subsection (1)) and discretionary (subsection (2)) grounds upon which the Attorney-General (or his delegate) can refuse a request for assistance. In broad terms, the grounds are intended to operate as a check by which the Attorney-General can ensure that providing the assistance sought is not constitutionally objectionable or contrary to the basic tenets of New Zealand's legal system.

[28] By way of example only, requests must be refused under s 27 where they:

> (a) relate to prosecution or punishment of a person for:
>
> (i) political offences;
>
> (ii) discriminatory offences;
>
> (iii) offences that engage the double jeopardy rule; or

[16] The issue of delegation was considered at length in the restraining order context by Potter J in [2012] NZHC 634.

(iv) military offences; or

(b) prejudice New Zealand's sovereignty, security or national interests.

[29] I shall refer to the specific grounds at issue in the present case later in this judgment.

[30] Section 28 provides that if a request for assistance is refused, notice and reasons must be given to the Central Authority of the requesting country and s 29 provides that a request can be granted on conditions.

[31] The provisions of the MACMA that deal specifically with assistance requests relating to foreign forfeiture orders are ss 55–58.[17] Section 55 provides:

> **55 Request to enforce foreign forfeiture order**
>
> (1) A foreign country may request the Attorney-General to assist in enforcing a foreign forfeiture order that relates to property that is believed to be located in New Zealand.
>
> (2) The Attorney-General may authorise the Commissioner to apply to the High Court to register a foreign forfeiture order in New Zealand if satisfied -
>
> (a) that the request from the foreign country relates to property that may be forfeited under the foreign forfeiture order and is specific property that -
>
> (i) tainted property (as defined in relation to Part 3); or
>
> (ii) property of a person who has unlawfully benefited from significant foreign criminal activity; or
>
> (iii) an instrument of crime (as defined in relation to Part 3); or
>
> (iv) property that will satisfy some or all of a foreign pecuniary penalty order; and

[17] "Foreign forfeiture order" is defined in s 2(1) of the MACMA as meaning a foreign pecuniary penalty order, or an order made under the law of a foreign country by a court or other judicial authority for the forfeiture of property that is either tainted property, property of a person who has unlawfully benefited from significant foreign criminal activity, or an instrument of crime.

(b) that there are reasonable grounds to believe some or all of the property to which the property to which the order relates is located in New Zealand.

(3) An authority issued under subsection (2) must be in writing.

[32] Section 56 provides:

> **56 Method for registering foreign orders in New Zealand**
>
> (1) If the High Court is satisfied that a foreign order that the Commissioner has applied to register under section 54 or 55 is in force in a foreign country, the High Court must make an order that it be registered in New Zealand.
>
> …

[33] Section 56(3) provides the manner in which the foreign order may be registered in the High Court. Section 56(5) provides that a foreign order does not have effect under the MACMA or the CPRA until registered.

[34] Section 57(3) provides that a foreign forfeiture order registered in New Zealand under s 56 has effect, and may be enforced, as if it is a forfeiture order made under the CPRA. Section 58 provides that at any time, such as when the forfeiture order has ceased to have effect in the requesting country, the Attorney-General can apply to the Court to have the registration of the foreign order cancelled.

The CPRA

[35] The registration process itself, and its consequences, are governed by the CPRA, which also governs New Zealand's domestic civil forfeiture regime. Sections 140 and 141 merely confirm that the Commissioner may apply for registration if authorised by the Attorney-General under s 55 of the MACMA and that such an application is to be made to the High Court. Notice of any such application must be given to any person known to have an interest in the relevant property under s 142.

[36] The effect of registration of a foreign forfeiture order is dealt with in s 144, which provides that the property that is the subject of the order vests in the Crown absolutely and is placed in the custody and control of the Official Assignee. And

s 86 provides that, once a foreign forfeiture order is registered in New Zealand, the Assignee must, as soon as practicable after the expiry of the "specified period" dispose of the forfeited property by:

(a) paying the costs recoverable under s 87; and

(b) paying the remaining money to the Attorney-General for disposal at his or her discretion.

[37] The "specified period" is defined in s 86(2) as one which is:

(a) on the date that is 6 months after the expiry of the time for bringing any appeal against the registration of the foreign forfeiture order, if no appeal has been filed; or

(b) on the date that is 6 months after all appeals in respect of the registration of the order have been withdrawn or finally determined, if an appeal or any appeals have been filed.

[38] It may be noted at this point that notwithstanding s 86, neither the CPRA itself (nor the MACMA) contain any express right of appeal against a decision to register a foreign forfeiture order. Mr Boldt said that, in those circumstances, the general right of appeal contained in s 66 of the Judicature Act 1908 applies.

[39] Sections 143, 148 and 149 are interlinked provisions which deal with relief from forfeiture. Section 148 states that:

> **148 Relief from foreign forfeiture order registered in New Zealand**
>
> A person who claims an interest in property sought to be forfeited under a foreign forfeiture order registered in New Zealand may, before the date that is 6 months from the date on which the foreign forfeiture order is registered, apply to the High Court for an order if the person is a person to whom section 143(2)(a), (b), or (c) applies.

[40] In turn, s 143(2) makes it clear that the only persons who may apply for relief under s 148 is a person who:

(a) in a case where the foreign forfeiture order was made without a hearing in a court in the foreign country where it was made, was given no opportunity to make representations to the person or body that made the foreign forfeiture order:

(b) in a case where the foreign forfeiture order was made at a hearing of a court in the foreign country where it was made, was not served with any notice of, and did not appear at, the hearing held in the court:

(c) in any other case, obtains the leave of the court to make the application.

[41] Section 143(3) is concerned with natural justice rights. It is confusingly drafted. It provides:

(3) Sections 46 and 64 apply, in relation to an application to register a foreign forfeiture order or in relation to an application for relief in respect of a foreign forfeiture order, but confer a right of appearance on the person who is subject to the order or the applicant for relief only if that person,—

(a) in a case where the foreign forfeiture order was made without a hearing in a court in the foreign country where it was made, was given no opportunity to make representations to the person or body that made the foreign forfeiture order:

(b) in a case where the foreign forfeiture order was made at a hearing of a court in the foreign country where it was made, was not served with any notice of, and did not appear at, the hearing held in the court:

(c) in any other case, obtains the leave of the court to appear at the hearing of the application.

[42] Section 46 relevantly provides that:

(a) any person on whom the application is served (including, if applicable, the respondent); and

(b) any other person who claims an interest in the property to which the application relates;

are entitled to appear and to adduce evidence at the hearing of an application for a domestic civil forfeiture order. Section 64 specifies those persons to whom an applicant for relief (who, by virtue of s 61, may not be the subject of the forfeiture

order) must serve with notice of the application for relief from a domestic civil forfeiture order. Similarly, s 143(3) is concerned with appearance rights both in respect of the registration application itself and in relation to applications for relief.

[43] In terms of the leave that may be sought under both s 143(2)(c) and s 143(3)(c) subsection (4) provides that the court may grant leave if:

> (a) the applicant for relief or the person who is the subject of the foreign forfeiture order had good reasons—
>
> (i) for failing to make representations to the decision-making person or body who made the order in the foreign country; or
>
> (ii) in a case where the order was made by a court in the foreign country, for failing to attend the hearing at which the foreign forfeiture order was made; or
>
> (b) the evidence proposed to be adduced by the applicant for relief or other person who is subject to the foreign forfeiture order was not reasonably available to the applicant for relief or other person at the time when the applicant or other person—
>
> (i) was required to make submissions to the person or body that made the foreign forfeiture order in a foreign country; or
>
> (ii) at the time of the hearing at which the foreign forfeiture order was made by the court in a foreign country.

[44] Sections 143 and 148 will be discussed in more detail later in this judgment.

[45] Finally, s 149 sets out the parameters for the grant of relief by the High Court from foreign forfeiture orders registered in New Zealand. Subsection (2) makes it clear that relief can take the form of an order either:

> (a) directing the Crown to transfer the interest to the applicant; or
>
> (b) that the Crown pay to the applicant an amount equal to the value of the interest declared by the Court.

[46] And subs (1) says that the Court may make such an order if it is satisfied:

> (a) of the matters in s 148; and

(b) that the applicant has an interest in the property to which the order relates.

[47] Subsection (3) authorises the Court to refuse to make an order for relief if it is satisfied that:

(a) the applicant was involved in the significant foreign criminal activity to which the foreign forfeiture order relates; or

(b) the applicant did not acquire the interest in the property in good faith or for value (without knowing or having reason to believe that the property was tainted property) in circumstances where the applicant acquired the interest at the time of, or after, the commission of the offence or serious criminal activity; or

(c) the applicant has unlawfully benefited from the significant foreign criminal activity to which the foreign forfeiture order relates.

[48] Subsection (4) provides that nothing in subsection (3) requires the Court to refuse making an order.

The authorisation decision

[49] It appears that on 10 April 2015 the Deputy Solicitor-General (Criminal) served the application for registration of the US Forfeiture Order on the plaintiffs' counsel. Mr Mansfield responded the same day asking (inter alia) for a full copy of the authorisation decision, together with the reasons for it. Mr Horsley's reply effectively denied that there was any obligation to give reasons and referred to paragraphs [31](f), [83], [86] and [88] of Potter J's 2012 decision relating to the restraining orders.[18]

[50] The present application for review was filed 10 days later.

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[18] [2012] NZHC 634.

The claim for judicial review

First cause of action – error of law

[51] The first cause of action relies on s 27(1)(f) and (h) of the MACMA, which require the Attorney-General (or his or her delegate) to refuse a request for assistance if, in his opinion:

> (f) the granting of the request would prejudice the sovereignty, security, or national interests of New Zealand; or
>
> …
>
> (h) the request is for assistance of a kind that cannot be given under this Act, or would require steps to be taken for its implementation that could not be lawfully taken;

[52] More specifically, the pleading is that the Deputy Solicitor-General (Criminal) knew or ought reasonably to have known:

(a) that the US Forfeiture Order was granted without the plaintiffs having been heard, as a consequence of the application of the fugitive disentitlement doctrine, which is:

(i) not recognised in New Zealand; and

(ii) contrary to the principles of natural justice to which the plaintiffs are entitled under s 27 of the New Zealand Bill of Rights Act 1990; and

(b) that as a consequence of the application of the fugitive disentitlement doctrine, the US Forfeiture Order was entered by default, without the United States being put to formal proof of its case.

[53] The plaintiffs then say that, in these circumstances, the authorisation decision was made unlawfully because the Deputy Solicitor-General (Criminal) wrongly either:

(a) concluded that s 27(f) and (h) of the MACMA did not apply;

(b) concluded that they did apply but granted the request anyway; or

(c) failed to have regard at all to whether s 27(f) and (h) applied in this case.

Second cause of action – failure to have regard to relevant considerations

[54] The second cause of action relies on s 27(2) of the MACMA which provides that a request by a foreign country for assistance *may* be refused if, in the opinion of the Attorney-General:

> (a) the request relates to the prosecution or punishment of a person in respect of conduct that, if it had occurred in New Zealand, would not have constituted an offence against New Zealand law; or
>
> …
>
> (b) the request relates to the prosecution or punishment of a person in respect of conduct that occurred, or is alleged to have occurred, outside the foreign country and similar conduct occurring outside New Zealand in similar circumstances would not have constituted an offence against New Zealand law; or
>
> …
>
> (c) the request relates to the prosecution or punishment of a person in respect of conduct where, if it had occurred in New Zealand at the same time and had constituted an offence against New Zealand law, the person responsible could no longer be prosecuted by reason of lapse of time or for any other reason;
>
> …
>
> (e) the provision of the assistance requested could prejudice —
>
> (i) a criminal investigation or criminal proceeding in New Zealand; or
>
> (ii) a proceeding of any kind under the Criminal Proceeds (Recovery) Act 2009 or ss 142A to 142Q of the Sentencing Act 2002; …

[55] The plaintiffs plead that the Deputy Solicitor-General (Criminal) knew, or ought reasonably to have known, that:

(a) the plaintiffs' eligibility hearing was (at the time of filing) scheduled for a four week hearing commencing 2 June 2015;

(b) the extradition proceeding is a criminal proceeding in New Zealand;

(c) as part of the eligibility hearing, the Court will be required to determine whether there is an extradition offence (as defined in s 4 of the Extradition Act 1999) which involves consideration of whether the plaintiffs' conduct constitutes an offence in the United States and New Zealand, as to which there is a genuine dispute;

(d) there is also dispute as to whether the alleged equivalent New Zealand offences would be statute barred under s 131A of the Copyright Act 1994 (as it then was); and

(e) Mr Dotcom had a pending application to vary the restraining orders, which was "a proceeding of any kind under the Criminal Proceeds (Recovery) Act 2009".

[56] The plaintiffs then say that because the eligibility hearing has not yet taken place, the Deputy Solicitor-General (Criminal) could not properly or reasonably have formed a view as to whether:

(a) the request related to the prosecution or punishment of a person in respect of conduct that, if it had occurred in New Zealand, would not have constituted an offence against New Zealand law; or

(b) the request related to the prosecution or punishment of a person in respect of conduct where, if it had occurred in New Zealand at the same time and had constituted an offence against New Zealand law, the person responsible could no longer be prosecuted by reason of lapse of time or for any other reason.

[57] It is further pleaded that, at the time the request was made, the Deputy Solicitor-General (Criminal) should have known and did not take into account the fact that the provision of the assistance requested would prejudice:

(a) the fair disposition of the extradition proceeding by cutting off Mr Dotcom's only current source of funding, being the proceeds of the Government bonds released by the High Court on 18 April 2015;[19] and/or

(b) Mr Dotcom's application for release of funds for legal and living expenses under the Criminal Proceeds (Recovery) Act 2009.

Third cause of action – breach of natural justice

[58] This cause of action pleads that because the US Forfeiture Order was obtained by default under the doctrine of fugitive disentitlement and in breach of natural justice the Deputy Solicitor-General (Criminal) could not be satisfied that the request for registration related to "tainted property" under s 55(2)(a)(i) of the MACMA.

Fourth cause of action – procedural unfairness (bias)

[59] This cause of action relates to the identity of the decision-maker and the role of Crown Law and the Criminal Group within it (of which Mr Horsley is the leader) in other litigation involving the plaintiffs. More particularly, it is pleaded that Crown Law represents:

(a) the United States in the extradition proceedings and in related High Court proceedings;

(b) the Commissioner in the restraint of property proceedings, in which the Commissioner is said to be effectively representing the interests of the United States in respect of:

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19 [2015] NZHC 761.

(i) the two post-indictment restraining orders obtained by the United States, which were registered in New Zealand on 18 April 2012 and expired on 18 April 2015; and

(ii) the application dated 9 April 2015 for registration in New Zealand of the US Forfeiture Order; and

(c) the Attorney-General, on behalf of the New Zealand Police in the GCSB proceeding (CIV-2013-404-2168).

[60] The plaintiffs contend that by delegating his decision-making power under s 55 to the Deputy Solicitor-General (Criminal), the Attorney-General put Mr Horsley in a position of conflict between, on the one hand, his duties under the MACMA and, on the other, the interests of and duties owed to Crown Law's clients, the United States and the Commissioner of Police. They say that this conflict creates "at the very least" a perception of bias in relation to the s 55 decision making process in this case.

Fifth cause of action (second defendant) – illegality

[61] This cause of action pleads illegality and, it is accepted by the plaintiffs, stands or falls with the others.

Sixth cause of action – unreasonable seizure

[62] This cause of action alleges that the authorisation decision constitutes or facilitates an unreasonable seizure in terms of s 21 of NZBORA because registration would result in the forfeiture of the plaintiffs' property (and deprive them of the only means by which their legal and living expenses can be met) without them having been heard on any of the following:

(a) the foreign forfeiture order itself (due to the operation of the fugitive disentitlement doctrine);

(b) the application to extradite them from New Zealand;

(c) the substantive criminal allegations on indictment in the US; or

(d) the authorisation decision.

Relief

[63] Various orders for relief are sought pursuant to each cause of action, including orders:

(a) setting aside the authorisation;

(b) striking out the application for registration;

(c) prohibiting the defendants from taking further action to enforce the US Forfeiture Order in New Zealand until the request for assistance has been lawfully determined; and

(d) remitting the decision on the United States' request to register the US Forfeiture Order to an impartial decision-maker.

Strike out principles

[64] The principles applicable to an application to strike out are well understood. In essence, the claim or the ground of relief sought must be so clearly untenable that it is suitable for peremptory determination.

[65] Importantly, because no reasons for the impugned authorisation decision have, as yet, been disclosed, the court must assume for present (strike out and interim orders) purposes that any factual allegations made in relation to the decision-making process are true. By way of example only, it must be assumed that Mr Horsley either did not consider s 27(1)(f) and (h) or concluded that those provisions did not apply.

[66] I also record that Mr Illingworth QC said that the statement of claim had necessarily been prepared in some haste because, by the time the plaintiffs became

aware of it, the registration application had already been filed in this Court. He understandably acknowledged that further amendment and refinement to the pleadings might therefore be required. Accordingly he relied (if necessary) on the admonition that a claim must be beyond repair before it can properly be struck out.[20]

[67] I proceed on the above bases.

Justiciability

[68] It is important to record at the outset that Mr Boldt did not seek to contend that the authorisation decision was not amenable to judicial review at all. That is unsurprising given earlier judicial comments about the availability of review in that regard. For example, in Potter J's 2012 decision in relation to the restraining orders her Honour said:[21]

> [91] The respondents' concern that the restriction of the Court's role to ensuring that the Commissioner has followed the correct procedure undermines the safeguards in the process is misplaced. The respondents have potential rights of review against the three entities that exercise discretion: the original decision may be challenged in the substantive proceedings in the United States or through related proceedings; *and, as noted by the applicant, the decisions made by the Attorney-General (and probably the Commissioner) may be the subject of judicial review in New Zealand. In particular, the absence of reasons for Mr Mander's decision and his consideration of the Bill of Rights Act may properly be the subject of judicial review.* Registration of an order that has no error on its face does not deprive the respondents of a right to review these matters.

[69] The availability of judicial oversight of the authorisation stage is, arguably, particularly important given the Court's limited ability to engage with the issues at the registration stage (a matter to which I shall revert, later).

My approach

[70] Notwithstanding the division of the application for review into six causes of action I do not propose to analyse them at any length separately. That is because I have formed the view that the claim overall has two important and viable strands,

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[20] As Tipping J (speaking for the majority) said in *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [123], "[i]t is a commonplace of the strike-out jurisdiction that the Court will consider not only the basis upon which the claim is presently pleaded but also any other basis upon which the claim might be pleaded".

[21] [2012] NZHC 634 (emphasis added).

each of which leads to the conclusion that the application for review should not be struck out.

[71] The first strand relates to the relevance to the authorisation decision of the part played by the fugitive disentitlement doctrine in the granting of the forfeiture orders in the United States against the plaintiffs' assets. The second strand relates to the alleged conflict within the Crown agencies dealing with the mutual assistance requests, extradition matters and the other proceedings involving Messrs Dotcom and Van der Kolk.

[72] I attempt to unravel the strands in turn.

Fugitive disentitlement

[73] Before addressing the significance of the fugitive disentitlement doctrine in terms of the claims for review and the basis for the Commissioner's application to strike out those claims it is necessary to say a little more about the doctrine itself.

The fugitive disentitlement doctrine

[74] As noted in passing at [12] above, in the United States the doctrine of fugitive disentitlement in the civil forfeiture context is a creature of statute. Although the doctrine had originally developed under the common law relating to fugitive criminal defendants who sought to pursue appeal rights *in absentia*, its subsequent extension into the civil forfeiture sphere was refused by the United States Supreme Court in *Degen v United States*.[22] In that case the Court said:

> … the sanction of disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked. The dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits.
>
> There would be a measure of rough justice in saying Degen must take the bitter with the sweet, and participate in the District Court either for all purposes or none. But the justice would be too rough. A court's inherent power is limited by the necessity giving rise to its exercise. There was no necessity to justify the rule of disentitlement in this case; to strike Degen's

[22] *Degen v United States* 517 US 820 (1996).

> filings and grant judgment against him would be an excessive response to the concerns here advanced.

[75] As I understand it, it was the decision in *Degen* that led to the statutory codification of the fugitive disentitlement doctrine in 28 USC § 2466.

[76] The courts in both the United Kingdom and in New Zealand have similarly held that the doctrine forms no part of the common law in those countries. Thus, in *Polanski v Conde Nast Publications Ltd* the House of Lords stated at [25] and [26]:[23]

> … a fugitive from justice is not as such precluded from enforcing his rights through the courts of this country. This is so whether the fugitive is claimant or defendant. Mr Polanski's status as a fugitive offender does not deprive him of any rights he would otherwise possess in respect of the subject matter of this action. His flight from California in 1978, and the steps he has taken ever since to remain beyond the reach of the Californian court, do not preclude him from bringing proceedings in England in respect of damage to his reputation flowing from publication of defamatory material in this country.
>
> At first sight this may seem unattractive. It may seem unattractive that a person can, at one and the same time, evade justice in respect of his criminal conduct and yet seek the assistance of the courts in protection of his own civil rights. But the contrary approach, adopted in the name of the public interest, would lead to wholly unacceptable results in practice. It would mean that for so long as a fugitive remained 'on the run' from the criminal law, his property and other rights could be breached with impunity. That could not be right. Such harshness has no place in our law. Mr Polanski is not a present-day outlaw. Our law knows no principle of fugitive disentitlement.

[77] Although Mr Boldt suggested that s 57 of CPRA suggests that at least a limited form of fugitive disentitlement is alive and well in New Zealand, I would not go that far. Section 57 stipulates that:

> **57 Profit forfeiture order if respondent has absconded**
>
> (1) The High Court may make a profit forfeiture order even if the respondent has absconded.
>
> (2) In subsection (1), a respondent has absconded if the respondent—
>
> (a) is unable to be found; or
>
> (b) by reason of being outside New Zealand, is not amenable to justice.

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[23] *Polanski v Conde Nast Publications Ltd* [2005] UKHL 10, [2005] 1 WLR 637.

[78] While I accept that s 57 would permit the court to make a forfeiture order in the absence of a respondent, it does not expressly authorise the court to proceed on an ex parte basis or to decline to receive submissions made on behalf of an absent respondent who wished to be heard.[24] Moreover, whether or not a person who is exercising his right to resist extradition to New Zealand could properly be said to be "not amenable to justice" is not clear cut.

[79] I therefore proceed on the basis that, as Venning J accepted in *Erceg v Erceg*, in this country, "the law knows no principle of fugitive disentitlement".[25]

The plaintiffs' claim and the defendants' response

[80] Put simply, the plaintiffs say that the undisputed fact that the forfeiture orders were made in the United States on a default judgment basis (as a result of Judge O'Grady's application of the fugitive disentitlement doctrine) is a matter which should have been taken into account by the Deputy Solicitor-General (Criminal) when making his authorisation decision. The same contention is advanced in different ways in the pleadings, including in particular that:

(a) the threshold for authorisation contained in the MACMA s 55 is not met because a judgment given in breach of natural justice could not be capable of satisfying the Deputy Solicitor-General (Criminal) that the property concerned was tainted;

(b) authorisation was prohibited by the MACMA s 27(1)(f) or (h) because acceding to a request for assistance in enforcing a judgment that had been given in breach of natural justice;

(i) would prejudice the national interests of New Zealand; or

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[24] Nor, in light of s 27 of NZBORA and the dicta noted above, could it be said that s 57 impliedly permits such a course.

[25] *Erceg v Erceg* [2014] NZHC 2601 at [22].

(ii) would require unlawful steps to be taken;[26] and

(c) because authorisation under s 55 almost inevitably results in the forfeiture of assets, an authorisation that is based on (and would give effect to) a decision made in breach of natural justice, amounts to an unreasonable seizure in terms of NZBORA s 21.

[81] In relation to (a), the plaintiffs say that it can be no answer that the Deputy Solicitor-General (Criminal) could nonetheless be "satisfied" that the property was tainted because the property has already been restrained. That must, I think, be so because the evidentiary threshold for making a restraining order is lower than the threshold for making a forfeiture order.[27] Relatedly, and notwithstanding Potter J's comments to the effect that the "satisfaction" threshold in relation to the almost identically worded s 54 was a low one, I tend to accept Mr Mansfield's submission that the bar must be raised when forfeiture is at issue.[28]

[82] In terms of (b)(i), they submitted that, if acceding to the request for assistance involved decisions or acts that were contrary to public policy then New Zealand's "national interests" would necessarily be prejudiced. And similarly, in terms of (b)(ii), they said that authorising the registration and enforcement of orders made in what New Zealand would regard as a breach of natural justice would (necessarily) involve unlawful steps. At this point I merely observe that those submissions do not appear to be inconsistent with the thrust of much of s 27 of the MACMA, which is aimed at ensuring that a request for assistance does not require the Central Authority to ride roughshod over New Zealand's own laws or legal norms.

[83] And in terms of (c), there is the amplification of the point noted at [13] above. The application of the fugitive disentitlement doctrine to a person who is exercising a bi-laterally recognised right to defend an eligibility hearing, with the result that he is deprived of the financial means to mount that defence, is to put that

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[26] It might be thought that the most obvious basis for review would simply be that the decision-maker failed to take account of a relevant consideration, namely that the swingeing foreign orders sought to be enforced were made in breach of natural justice. However the narrow ambit of s 55 and the apparent exclusivity of the matters listed in s 27 perhaps makes it difficult to argue that the authorisation discretion is fettered in this more straightforward way.

[27] *Bujak v Solicitor-General* [2009] NZSC 42, [2009] 3 NZLR 179 at [12].

[28] [2012] NZHC 634 at [83].

person on the horns of a most uncomfortable and (the plaintiffs would say) unconstitutional dilemma.

[84] Mr Boldt, however, contended that any breach of natural justice by the requesting state in obtaining the orders sought to be enforced could never be relevant, let alone fatal, to an authorisation decision because the subject of the orders can apply for relief from forfeiture under the CPRA. He said s 143 of that Act was the New Zealand Parliament's "elegant solution" to the possibility that foreign forfeiture orders might be made in what indigenous courts and decision-makers might consider to be a procedurally unfair manner.[29] Moreover, he noted that when determining to apply the fugitive disentitlement doctrine in this case, Judge O'Grady had specifically taken into account the protection offered in New Zealand by the CPRA relief provisions.[30]

[85] Significantly, Mr Boldt was also prepared to put some money where his mouth was, and to undertake that, subject to any appeal that might yet be filed against Courtney J's recent decision (see [18] above), the Crown would not oppose relief being granted to the plaintiffs under s 143(2)(c) to the extent of the monies required to meet their ongoing legal expenses. He acknowledged that this might give rise to something of a conundrum in the event that a portion of those funds were sent to the United States to meet the costs of the plaintiffs' lawyers there, because the US Forfeiture Order would remain wholly in force notwithstanding any "relief" that might be granted here.[31] But he said that that was a matter that could be worked through with the United States' authorities.

Discussion

[86] In my view there are several potential difficulties with the Commissioner's position which is, as I have said, almost wholly predicated on the availability of

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29 Although Mr Boldt did not put it in quite this way, the effect of his submission was that, insofar as any application for judicial review based on a breach of natural justice by the requesting foreign authority is concerned, s 143 operates as a privative clause.

30 See [15] above.

31 In other words, he foresaw the possibility of the United States authorities seizing any such funds transferred because they remained subject to the forfeiture orders in that country.

relief for the plaintiffs under s 143, the content of which I have set out at [40]-[43] above.

[87] First, it appears to me to be seriously arguable that s 143 is intended only to permit the grant of relief to third parties and would not be available to the plaintiffs at all. As far as I am aware there is no authority either way on the issue.

[88] The interpretation I presently favour appears to be consistent not only with the operation of the relief provisions in the CPRA relating to domestic civil forfeiture,[32] but also with the distinction drawn throughout s 143 between an applicant for relief and the person who is the subject of the forfeiture order.

[89] Secondly, the separate references in s 143 to an applicant for relief and to the person who is the subject of the forfeiture order are explicable when it is recognised that s 143 deals not only with applications for relief but also with the right to be heard on the application to register the foreign forfeiture order. In that respect it is my provisional view that ss 143 and 148 collectively provide that:

(a) A third party who has an interest in the forfeited property has a right to apply for relief under s 148 only in the circumstances set out in s 143(2), namely where:

(i) the foreign forfeiture order was made in the requesting country without a hearing in a court and the third party was given no opportunity to be heard by person or body making the order; or

(ii) the foreign forfeiture order was made at a hearing of a court in the requesting country but the third party was given no notice of and did not appear at the forfeiture hearing in the requesting country, or

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[32] The CPRA s 61 makes it clear that relief in domestic civil forfeiture matters is only available to third parties. And as the Court of Appeal said in *R v Bujak* [2007] NZCA 347, in relation to different provisions in the MACMA, "… in a general way the New Zealand Parliament elected to give as much assistance in New Zealand to overseas law enforcement agencies as it would to New Zealand authorities, but no more" (at [47]).

(iii) otherwise with leave.

(b) A third party may be *heard* on an application for registration or on an application for relief in the circumstances set out in s 143(3), namely where:

(i) the foreign forfeiture order was made in the requesting country without a hearing in a court and the subject was given no opportunity to be heard by person or body making the order; or

(ii) the foreign forfeiture order was made at a hearing of a court in the requesting country but the subject was given no notice of and did not appear at the forfeiture hearing in the requesting country, or

(iii) otherwise with leave.

(c) The person who is the subject of the foreign forfeiture order may only be heard *on the application for registration* in the circumstances set out in s 143(3), namely where:

(i) the foreign forfeiture order was made in the requesting country without a hearing in a court and the person who is the subject of the order was given no opportunity to be heard by the person or body making the order; or

(ii) the foreign forfeiture order was made at a hearing of a court in the requesting country but the person who is the subject of the order was given no notice of and did not appear at the forfeiture hearing in the requesting country, or

(iii) otherwise with leave.

[90] Thirdly, the contention that the subject of a foreign forfeiture order might be able to argue for relief in New Zealand begs the question as to what possible basis for relief could be advanced by him. To suggest that the person who is the subject of the order could apply for relief based on his (self-evident) interest in the property concerned is facile. Similarly, an argument that relief was warranted because the order would cause the subject of it financial hardship would also appear to cut across the whole point of a final forfeiture order. And to the extent that the subject might wish to invite a New Zealand court to second-guess the merits of (basis for) the foreign forfeiture order, that would appear to run counter not only to the principle of comity which underlies the mutual assistance regime but also to the practical realities of the matter.

[91] And lastly, all the reservations I have expressed above are fortified when regard is had to the key international instruments in relation to mutual assistance in criminal matters which underlie or inform the operation of the MACMA. All of these suggest that the availability of relief from forfeiture is limited to third parties. For example:

(a) Art 29(6) of the Harare Scheme 2005 provides:

> (6) The law of the requested country may provide for the protection of the interests of bona fide third parties in property restrained or confiscated as a result of a request made pursuant to this Scheme, by providing:
>
> > (a) for the giving of notice of the making of orders restraining or confiscating property; and
> >
> > (b) that any third party claiming an interest in property so restrained or confiscated may make an application to a court of competent jurisdiction for an order
> >
> > > (i) declaring that the interest of the applicant in the property or part thereof was acquired bona fide; and
> > >
> > > (ii) restoring such property or the value of the interest therein to the applicant.

(b) Similarly, cl 25 of the UN Model Law on Mutual Legal Assistance (Criminal Matters) provides:

25. Rights of bona fide third parties

(1) Notice of the [registration/filing] of an order under section 24 shall be given to all persons appearing to have an interest in property against which the order may be executed, prior to any execution action.

(2) Subject to subsection (4), any person with an interest in the property against which an order [registered/filed] under section 24 may be executed, may, within 30 days of receiving notice of the [registration/filing], make an application for an order excluding his or her interest in the property from execution of the order. The time for bringing the application may be extended by order of the [court/prosecutor/other authority].

(3) The provisions of the [proceeds of crime/anti-money laundering/terrorist financing laws of **(name of state)**] relating to the rights of bona fide third parties shall apply, mutatis mutandis, to any application brought under subsection (2).

(4) Unless a court/prosecutor/other authority in the interest of justice orders otherwise, any person who received notice in advance of the confiscation proceedings in the foreign State, whether participated in those proceedings or not, is precluded from bringing an application under subsection (2).

(c) And the relevant clauses of art 18 of the UN Model Treaty on Mutual Assistance in Criminal Matters provide:

5. The requested State shall, to the extent permitted by its law, give effect to or permit enforcement of a final order forfeiting or confiscating the proceeds of crime made by a court of the requesting State or take other appropriate action to secure the proceeds following a request by the requesting State.

6. The Parties shall ensure that the rights of *bona fide* third parties shall be respected in the application of the present **article**.

[92] Similarly, the equivalent relief provision in the Australian mutual assistance legislation is limited to third parties.[33]

[93] Accordingly, as a matter of both literal and purposive interpretation, it seems to me that it is strongly arguable that the purpose and meaning of s 143 is to permit:

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[33] Mutual Assistance in Criminal Matters Act 1987 (Cth), s 34C.

(a) third parties who have an interest in the property that is the subject of a foreign forfeiture order that was not brought to the attention of the foreign court or body making the forfeiture order to be heard and have their claims adjudicated in New Zealand either:

(i) by affording them the right to be heard at the time the application for registration is determined; or

(ii) by affording them the opportunity to apply subsequently for relief; and

(b) the subject of the foreign forfeiture orders to be heard in relation to the registration application if they were deprived of that opportunity by the foreign court or body that made the forfeiture order.

[94] I nonetheless acknowledge that there is limited support for Mr Boldt's position in the recent observations of the Law Commission in its 37th Issues Paper *Extradition and Mutual Assistance in Criminal Matters*, although there is no authority cited for that proposition and it is preceded by the observation that the assistance provided by New Zealand at the forfeiture stage has not yet been the subject of any controversy.[34] The explanatory note to the Supplementary Order Paper that resulted in the enactment of s 143 in its present form also arguably supports a wider application, although it is poorly written. And given that the Bill as originally drafted and reported back clearly limited relief to third parties, and given that that position is consistent with the relevant international instruments, one might expect a complete reversal of that position effected by way of a Supplementary Order Paper would have been the subject of some comment at the time.

[95] Perhaps the best argument in favour of a more expansive approach is that any right to be heard possessed by the subject of a foreign forfeiture order in relation to the registration application itself is potentially empty if the Court itself has no discretion to refuse registration. If that is so, then there may be a sound policy argument that the subject of the foreign forfeiture order should be able to apply for

[34] Law Commission, above n 14, at [16.51] and [16.53].

relief, in circumstances where he has been denied a hearing when the order was made in the foreign jurisdiction.

[96] But even putting to one side the points already made above (such as that permitting the subject to make an application for relief would be out of sync internationally) I am not convinced that the ability to be heard on registration is quite such a Clayton's right. Notwithstanding the apparently narrow ambit of the registration decision, s 86 of the CPRA quite clearly contemplates that such a decision can be appealed. The existence of an appeal right under s 66 of the Judicature Act 1908 tends to suggest that s 56 decisions are not necessarily merely rubber-stamping exercises.

[97] As well, in *Commissioner of Police v Dotcom*, the Court of Appeal noted that when the High Court is asked to make a registration order it could decline to do so "if some abuse of process was involved in obtaining it".[35] That approach is broadly consistent with (for example) the express statutory discretion contained in the equivalent statutes in both the United Kingdom and Australia, where the domestic court can decline to register a foreign forfeiture order if enforcing the order domestically would be "contrary to the interests of justice".[36]

[98] Accordingly my present view is that s 143 does not afford the plaintiffs with a right to apply for relief once the registration order is made. If that proves to be correct, registration would not only have the effect of more or less irreversibly vesting their assets in the Crown[37] but it would potentially deprive them of the means to defend the pending extradition proceedings and to pursue their appeal from the fugitive disentitlement decision in the United States. As Courtney J's recent judgment indicates, it seems that they will only have the necessary funds to pay their legal advisers if they have continue to have recourse to a portion of their presently restrained/frozen assets.[38]

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35 *Commissioner of Police v Dotcom*, above n 5, at [56].

36 Mutual Assistance in Criminal Matters Act 1987 (Cth), s 34A(1); Criminal Justice Act 1988 (UK), s 97(1).

37 Pursuant to s 144(a) of the CPRA. I say "more or less" because there remains the slight possibility that the registration order could later be cancelled under s 58 of the MACMA, if, for whatever reason, foreign forfeiture order ceased to have effect in the United States.

38 [2015] NZHC 458.

[99] Accordingly, it seems to me that the consequences of registration for the plaintiffs in this case may well be more permanent and more serious than:

(a) they were understood to be by Judge O'Grady;

(b) they were submitted to be by Mr Boldt; and

(c) they were (presumably) understood to be by the Deputy Solicitor-General (Criminal).[39]

[100] Even if (contrary to the preliminary view I have expressed above) s 143 does potentially afford some (after the fact) protection to the plaintiffs, there remain other concerns. In particular, the *right* to claim relief under subsection (2)(a) and (b) are limited to the circumstances there stipulated. And while those paragraphs are clearly concerned with breaches of natural justice during the making of the foreign forfeiture order I am of the view that neither would apply in the plaintiffs' case. Mr Boldt did not really seek to contend otherwise. In particular:

(a) paragraph (a) appears to be concerned with circumstances in which the foreign forfeiture order is made by a person or body *other than* a court; and

(b) paragraph (b) is concerned with circumstances in which the foreign forfeiture order is made by a court, but the person applying for relief does not receive notice and did not appear at the hearing.

[101] Here, the forfeiture order *was* made by a court, the plaintiffs *did* have notice and the plaintiffs *did* appear at the hearing.

[102] If s 143(2)(a) and (b) do not apply then it is only paragraph (c) that might yield the plaintiffs an opportunity for relief and, as that provision makes clear, leave of the Court is first required. The requirement for leave immediately invites an

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[39] I say that because, presumably, Mr Boldt's submissions reflect the Deputy Solicitor-General (Criminal)'s position.

unfavourable comparison with an application for judicial review, which may be brought as of right.[40]

[103] Accordingly it seems to me that the possibility of relief under section 143 (if it exists at all) is but an impoverished cousin of this court's supervisory function. Much clearer words would, in my view, be required, before s 143 could properly be read as ousting the court's jurisdiction in that regard.

Conclusions

[104] In summary, my view of the operation of the relevant statutory provisions is as follows:

(a) Section 143 of the CPRA does not afford the subject of a foreign forfeiture order a right to apply for relief from the operation of that order once it is registered in New Zealand;

(b) Section 143 does afford the subject of a foreign forfeiture order a right to be heard on an application to register that order in New Zealand where:

(i) the foreign forfeiture order has been made by a body that is not a court, without affording the subject an opportunity to be heard; or

(ii) by a court, without notice to, or an appearance by, the subject; or

(iii) the leave is the Court obtained;

(c) in the present case, the plaintiffs would require leave in order to be heard on the registration application:

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[40] As confirmed by s 27(2) of the NZBORA.

(d) a purposive interpretation of s 143 would suggest that leave might be granted if the foreign forfeiture order has been obtained in circumstances that the New Zealand courts would consider would amount to a breach of natural justice;

(e) I leave for another day whether the content of a right to be heard would be limited to persuading the Court that the foreign forfeiture order should not be registered for procedural reasons (for example because it was obtained in breach of natural justice) or whether it might extend to the factual and legal merits of the foreign forfeiture order. An argument in favour of the latter approach is the incorporation by Parliament of the right to "appear and *adduce evidence*" from s 46 into s 143(3). However my present view tends towards the former, principally because of the difficulties inherent in engaging with the merits on the basis of foreign law;

(f) the seemingly mandatory requirement placed on the Court under s 56 of the MACMA to grant an application to register a foreign forfeiture order should therefore be read as being subject to:

(i) the subject's right to be heard under s 143 of the CPRA; and

(ii) the Court's inherent power to control abuses of its own processes;

(g) the manner in which a foreign forfeiture order has been obtained is arguably relevant to the exercise of the Attorney-General's authorisation power either in terms of either s 55 (whether he can be "satisfied") or s 27 (where there is something about the process that might be offensive to New Zealand law);

(h) the contention that the Attorney-General has a crucial gate-keeping role in relation to natural justice issues is, of course, less strong if my conclusions about ss 56 and 143 are correct. Equally, however, there

> are diplomatic avenues open to the Attorney in cases of concern that are not open to the Court; it would, I think, be wrong therefore to suggest that the Court (at the registration stage) has a monopoly on such matters. Moreover whether or not the plaintiffs will be afforded the opportunity to be heard at all on the registration application is contingent on the grant of leave.

[105] It therefore cannot be said that the claim for review of the authorisation decision on the grounds that due process (in New Zealand terms) has not been followed by the requesting State is untenable and should be struck out.

The Montgomery case

[106] Before leaving the subject of fugitive disentitlement entirely, I record that Mr Boldt also referred me to the decision in *Government of the United States of America v Montgomery (No 2).*[41] That case was concerned with similar matters to those presently at issue, albeit in the context of the Court's discretion to register a foreign forfeiture order, rather than the Central Authority's discretion to authorise a registration application to be made.[42]

[107] In brief, Mrs Montgomery (whose ex-husband had been convicted of a significant fraud on the US Government) sought to oppose the registration of a foreign confiscation order on the grounds that the fugitive disentitlement doctrine had been applied in the context of the determination of her appeal against the making of the order in the United States. The confiscation order related to the (indirect) proceeds of her husband's fraud which had been transferred to her. Prior to the making of the confiscation order, Mrs Montgomery and her husband had been held to be in contempt of other orders of the Court.

[108] On the application by the United States to register the confiscation order in the United Kingdom the first instance judge held that it would not be contrary to the interests of justice to register the order, even though the application of the fugitive

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41 *United States v Montgomery (No 2)* [2004] UKHL 37, [2004] 1 WLR 2241.

42 I have noted the express statutory discretion conferred on the Court in the UK legislation at [97] above.

disentitlement doctrine would mean that the order would be in breach the requirements of art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998 (UK).[43] That decision was upheld by the Court of Appeal. Mrs Montgomery appealed to the House of Lords.

[109] The House's decision was delivered by Lord Carswell who disagreed with the Court of Appeal's view that it was unnecessary for the court asked to register the order to question whether registration of a foreign order could have the "indirect effect" of breaching art 6.[44] Noting that the relevant case-law emphasised that any breach by the foreign state must be "flagrant" in order to engage indirect responsibility for that breach on the part of the domestic authority, His Lordship then concluded:

> 29 When one comes to apply these principles to the present case, the conclusion is in my opinion quite clear. The fugitive entitlement doctrine is not an arbitrary deprivation of a party's right to a hearing, but is intended to be a means of securing proper obedience to the orders of the court. As Lord Woolf CJ said:
>
> > Where a party is guilty of contempt there may be no other sanction available if he is outside the jurisdiction of the court. The reason for the doctrine being applied by the United States Court of Appeals in Mrs Montgomery's case was not to vindicate the dignity of the court, but because the court thought that it was the only available sanction which could achieve obedience to the order of the court.
>
> Although the application of the fugitive entitlement doctrine may be regarded as failing to secure all of the protection required by article 6 of the Convention, it is a rational approach which has commended itself to the Federal jurisdiction in the United States. As such it could not in my opinion be described by any stretch as a flagrant denial of the appellant's article 6 rights or a fundamental breach of the requirements of that article. It follows that the appellant's argument based on the indirect engagement of the responsibility of the United Kingdom must fail.
>
> 30 The same reasons are relevant in considering the issue whether it was contrary to the interests of justice to enforce the confiscation order by registering the judgment of the US district court. As Stanley Burnton J and the Court of Appeal have pointed out in their judgments, the appellant was by no means shut out from taking part in the proceedings. The merits of her contentions had been fully considered at first instance and on appeal she filed a brief and was represented by counsel. When the issue of fugitive

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43 Article 6 essentially guarantees due process rights in both civil and criminal proceedings.

44 *United States v Montgomery (No 2)*, above n 44, at [15]. Lord Carswell nonetheless agreed with the outcome of the Court of Appeal's decision.

> disentitlement was raised by the court she was able to file a brief relating to this issue. Moreover, it seems to me a material consideration that the US Court of Appeals found that she had been taking active steps to hide assets and transfer funds in an effort to evade the forfeiture judgment. I accordingly agree with the conclusion of Stanley Burnton J and the Court of Appeal that it would not be contrary to the interests of justice to register the judgment. (citation omitted)

[110] As Mr Mansfield submitted, however, there are some arguably significant differences between that case and the present. In particular:

(a) Mrs Montgomery had been held to be in contempt of court in the United States;

(b) Mrs Montgomery had fled the United States in order to avoid enforcement action and was taking steps to evade the forfeiture judgment. Here, the plaintiffs are New Zealand residents who are exercising their right to resist extradition;

(c) registration of the foreign confiscation order would not have deprived Mrs Montgomery of the means to:

(i) pursue an appeal in the United States against the confiscation order (because her appeal had already been heard); and

(ii) defend extradition proceedings (the relevant convictions in the United States had already been entered); and

(d) Mrs Montgomery was in fact heard in relation to the making of the confiscation order in the United States both at first instance and on appeal.

[111] For those, and possibly other, reasons it cannot be concluded at this early stage that a New Zealand court would feel obliged to follow *Montgomery (No 2)* in the present case. If anything, the decision indicates that there are serious issues raised here that are worthy of something more than summary determination.

[112] There is, therefore, nothing in the *Montgomery* decision that would cause me to alter the conclusion I reached at [105] above. It cannot be said that the various causes of action that are based on the application of the fugitive disentitlement doctrine are so clearly untenable that they should be struck out.

Alleged bias

[113] The starting point, which is not in dispute, is that the Attorney-General's decision-making role under the MACMA is a constitutionally important and independent one, "with special responsibility to act in the public interest and to exercise independent judgment impartially".[45] In the recent words of the New Zealand Law Commission:[46]

> 12.30 Underlying the gateway and gatekeeping roles of the MACMA is the need to strike an appropriate balance between law enforcement and the protection of human rights. While mutual legal assistance does not involve the direct and far-reaching intrusion into the personal liberty of the individual that occurs in extradition, with the surrendering of a person to a foreign country for trial, it still has important human rights implications. …
>
> 12.31 International criminal cooperation presents the challenge of balancing the protection of the individual with the larger, international societal interest in combating crime.

[114] For all present intents and purposes the Deputy Solicitor-General (Criminal) is the relevant embodiment of the Attorney-General by virtue of a sub-delegation made pursuant to s 9C of the Constitution Act 1986.

[115] The plaintiffs say, however, that because of the Deputy Solicitor-General (Criminal)'s other roles and operational responsibilities within Crown Law, he was in a position of conflict, which meant that he could not fulfil his Attorney-General role independently, or gave rise to an appearance of bias. Because that conflict and/or appearance was (they say) inevitable, the delegation of the Attorney-General's functions to him was inappropriate and, perhaps, invalid. [47]

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45 *Attorney-General v Dotcom* [2014] NZCA 19, [2014] 2 NZLR 629 at [101](c).

46 Law Commission, above n 14.

47 This appears to involve a somewhat different argument from the challenge to the validity of the delegation to the Deputy Solicitor-General (Criminal) in relation to the restraining orders matter and which was thoroughly ventilated before Potter J in [2012] NZHC 634.

[116] It is agreed that the appropriate test for apparent bias is whether a fair minded lay observer would reasonably apprehend that the decision-maker might not bring an impartial mind to the decision he is required to make.[48]

[117] The first step in the bias inquiry, however, is to identify the actual circumstances that are said to give rise to the allegation that the decision-maker was conflicted.[49] In the present case, the relevant circumstances might be said to be that:

(a) the Deputy Solicitor-General (Criminal) is an employee of Crown Law and the leader of the Criminal Group within that office;

(b) the Criminal Group comprises two teams, namely the Criminal Teams[50] and the Public Prosecutions Unit;

(c) the Criminal Teams' work includes:

(i) representing the United States in the extradition proceeding and related High Court matters;

(ii) advising the Minister of Justice in relation to extradition matters;

(iii) representing the Commissioner of Police, who in turn is said to represent the interests of the United States, in relation to the post-indictment restraining orders matter and the present matter relating to the registration of the forfeiture order;

(iv) representing the Attorney-General in relation to the 2013 proceedings related to the legality of the search of Mr Dotcom's home;

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48 *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 at [61]; *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3].

49 *Muir v Commissioner of Inland Revenue*, above n 48, at [61].

50 The use of the plural here comes from the Crown Law website.

(v) advising the Deputy Solicitor-General (Criminal) in relation to the exercise of his Attorney-General powers under the MACMA.

[118] To the above list of relevant "circumstances" I would be inclined to add that the *Dotcom* litigation in all its manifestations has, undoubtedly, proved vexing and costly for the Crown and, in all likelihood, difficult in terms of the New Zealand government's mutual assistance relationship with the government of the United States.

[119] The issue therefore is whether some or all of these circumstances could, arguably, give rise to a reasonable apprehension of bias or conflict on the part of the Deputy Solicitor-General (Criminal) when making his authorisation decision.

[120] I fear I would do Mr Boldt's submissions on the issue a disservice by attempting to summarise them. I therefore set them out more or less in full. He said:[51]

> The Central Authority's role is a law officer function. For good reason MACMA entrusts decisions under the Act to officers of the Crown, despite the Crown's inevitable concurrent role as advocates for the foreign country. The role is formally assigned to the Attorney-General but, for the reasons articulated by Potter J, must in practice be performed by the Solicitor-General or a deputy. The present decision was taken by the incumbent deputy with particular (and ongoing) responsibility for considering and assessing requests under the Act. Far from perceiving bias, a *well-informed* layperson would understand that law officers are from time to time called upon to make independent statutory decisions which affect proceedings involving the Crown, and that the law officer's obligations of impartiality in that role override all other considerations.
>
> Exercises of law officer power are rarely challenged and, given the special constitutional role law officers perform it is almost unheard of for law officer decisions to be successfully reviewed. Far from giving rise to a conflict, a law officer's status as an officer of the Crown is what imbues it with its authority.
>
> Examples of law office functions which impact upon judicial proceedings are too numerous to list. On the plaintiffs' analysis, the Solicitor-General and criminal deputy, who also supervise public prosecutions in New Zealand, could never stay a prosecution or issue a witness immunity. The Solicitor-General could not consider requests for second or subsequent inquests in cases involving Government agencies. It is simply part of the job

[51] The quotation is from Mr Boldt's written submissions; he also elaborated orally upon them.

> that the Solicitor-General acts both as the Crown's chief advocate and as its non-political law officer. Holders of that office, and their deputies, are accustomed to wearing multiple hats.
>
> As noted above, all those eligible to exercise power under the MACMA would, on the plaintiffs' analysis, be disqualified. A good test of whether a proposed rule of disqualification is too broad is whether it would leave anyone to exercise the power. It is a recognised principle that a rule which would disqualify everyone disqualifies no-one.[52]

[121] The first difficulty with accepting those submissions without question at the strike out stage is that the very history of the litigation involving Mr Dotcom and his associates demonstrates how the Attorney-General's role as the Central Authority under the MACMA and his Law Officer function strictly so-called can have separate and potentially conflicting interests. The point was writ large in the 2013 search warrant proceedings where the Attorney-General was, eventually, named as first defendant in two distinct capacities and was separately represented in relation to each. Winkelmann J explained the reasons for this as follows:[53]

> [5] The first defendant was originally joined in the proceedings for, and on behalf of the Police. During the course of the initial hearing of the application for review, I was told by counsel for the first defendant that the Police had allowed the FBI to ship to the United States images of the content stored on the digital storage devices, that is to say, clones of the hard drives of those devices. The Police sought leave to file further evidence explaining the circumstances in which this occurred. That leave was granted and the initial hearing came to an end.
>
> [6] Following the receipt of the additional information, the plaintiffs sought leave to amend their pleadings to add to the relief sought a declaration that removal from New Zealand of clones of the hard drives was unlawful. That leave was granted unopposed. At the request of the first defendant, there was then a further day's hearing in respect of this new aspect to the proceeding. I gave leave to Mr Pike and Ms Toohey to appear as counsel for the first defendant, but appearing for the Attorney-General in the Attorney's capacity as the Central Authority for New Zealand. "Central Authority" is defined in the MACMA as "the person or authority for the time being designated by that country for the purposes of transmitting or receiving requests made under or pursuant to" MACMA.

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52 See, for example, *United States v Mattison* 731 F. Supp. 831 (M.D. Tenn. 1990) at 833: "a rule which would disqualify everybody must be held to disqualify nobody". To similar effect is the observation of Lord Denning MR in *Bromley London Borough Council v Greater London Council and another* [1982] 1 All ER 129 (HL) at 131-132 that a suggestion of disqualifying judicial interest in a case before the Court was untenable in circumstances where any configuration of the Court would be in the same position.

53 *Dotcom v Attorney-General* [2012] NZHC 1494, [2012] 3 NZLR 115 (citation omitted).

[122] A second, and related, difficulty arises from the present state of confusion around the roles and responsibilities of the various players in the extradition process. The Law Commission has very recently commented on the matter in its Issues Paper (referred to above) as follows:[54]

> 4.5 The way that roles and responsibilities are divided under the current extradition system is complex and compartmentalised. Some of this is inevitable. Extradition is a complicated process that involves diplomacy with foreign countries, their comprehension of our extradition process, the need to provide adequate protection to the person sought, judicial processes, and ministerial decision making.
>
> 4.6 However, a number of different actors are involved in different parts of the process. This can lead to a lack of clarity regarding who is responsible for what and can make the extradition process more difficult for foreign countries. *The current division of responsibilities can give rise to concerns about conflicts of interest and the suitability of certain actors being in certain roles.* The Extradition Act itself is also unclear regarding who carries out some roles.

[123] After noting that it is presently the Minister of Justice who receives extradition requests and determines whether to initiate court proceedings (but on advice from Crown Law) the Commission then goes on to state:

> 4.28 The Act is silent on who should be the applicant in extradition proceedings. Normally, a foreign government initiates the extradition process. It does not necessarily follow, however, that the foreign government should be the formal applicant in the court proceedings.
>
> 4.29 The current ambiguity has been an issue before the courts in recent cases. The different approaches taken by different courts and judges illustrate that the issue is far from clear.
>
> 4.30 *This is, in some senses, a technical issue, but it may have substantive implications, particularly for the New Zealand agencies acting as counsel in the case before the court. There is a risk that considering the foreign government to be the applicant gives it too great a standing and creates confusion about the degree to which Crown Law can be instructed by the foreign government.* There are also issues about who can withdraw from proceedings, the rules of discovery, and privilege between counsel and the foreign government. The issue of privilege between the foreign country and counsel is discussed below. Another area where the issue of who the applicant is has been problematic is in relation to disclosure.
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> (footnotes omitted, emphasis added)

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[54] Law Commission, above n 14 (emphasis added).

[124] The Commission concludes that the "present uncertainty" needs to be clarified in legislation.[55]

[125] The New Zealand Law Society has also recently expressed the view (in its submission on the above Issues Paper) that, ideally, the Central Authority for extradition purposes would be an independent standalone agency *separate from* Crown Law, the Police, Ministry of Foreign Affairs and Trade, and the Ministry of Justice. The Law Society nonetheless recognises that the desirability of aligning the extradition and mutual assistance regimes along with the volume of requests means that the establishment of a separate agency is an unlikely outcome. But, it says, if the Attorney-General is to be designated the Central Authority for extradition purposes, then:[56]

> [a]t an administrative level Crown Law would need to implement procedures to ensure its objectivity is not compromised when it is required to provide advice and act in proceedings but is also the agency whose decisions and procedures are being challenged.

[126] I acknowledge that, as a matter of constitutional principle, there is conceptually only one, indivisible, "Crown" in New Zealand. Accordingly the Crown position in relation to domestic legal issues involving it should be consistent across all of government. There is thus no room for legally meaningful conflict between its core agencies. That principle is reflected in the Law Officers' role and functions and it is made manifest (for example) in the *Cabinet Directions for the Conduct of Crown Legal Business 2012*.

[127] But the difficulty in the present case arises (or potentially does so) because giving effect to the Crown's international obligations on occasion may require it to act at the behest, or in the interests, of another State. It is then that a conflict with its domestic interests might, theoretically, arise.

[128] In any event, it seems to me from the matters to which I have referred above that the plaintiffs have a modicum of high level support for their concerns about

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55 At 4.31.

56 Email from Chris Moore (President of the New Zealand Law Society) to the EMA Review (Law Commission) regarding Extradition and Mutual Assistance in Criminal Matters, IP37 (11 March 2015) at [8].

"conflicts of interest", and "confusion" about the extent to which a requesting state is Crown Law's "client" and the consequences of any such relationship. It is, in my view, conceivable that a platform for the fourth cause of action does exist.

[129] I appreciate Mr Boldt's disquiet that this aspect of the plaintiffs' claim gives rise to the prospect that all three of those persons who are eligible to exercise the Attorney-General's decision-making power under the MACMA would be disqualified.[57] But I am not certain however that that is the necessary consequence of the argument. There are two other Deputies who, presumably, are unconnected with the Dotcom matters. Alternatively, it may simply be that a better understood, clearer and more transparent process around mutual assistance and extradition matters might suffice to dispel such concerns. It may well be that the necessary measures to ensure objectivity are, indeed, in place. But that is potentially a matter for evidence at the substantive hearing.

[130] And it may of course be that even without such evidence the judge who hears the substantive application for review will ultimately be unpersuaded by the plaintiffs' arguments. But for the present, and notwithstanding that I have some sympathy for Mr Boldt's arguments I am unable to conclude that the "bias" claim is so untenable that it cannot succeed.

Other matters: second and fifth causes of action

[131] I am conscious that I have not separately addressed the matters raised by the second cause of action. In light of my general conclusions above I do not propose to do so. Because of those conclusions the ambit of s 27 remains squarely on the table. Nor am I attracted by the suggestion that I should rule now on the "dual criminality" point (namely whether the offences with which the plaintiffs have been charged in the United States have indigenous equivalents). And even had I been prepared to do so, there would remain question-marks over the applicability of s 27(2)(c) and (e), which were not separately addressed by Mr Boldt. And although the Deputy Solicitor-General (Criminal) would not be *required* to refuse to authorise the making of the registration application in the circumstances set out in those paragraphs, it

[57] Namely the Attorney-General, the Solicitor-General (for the reasons given by Potter J) and the Deputy Solicitor-General (Criminal).

seems to me that he was obliged to turn his mind to whether those circumstances existed.

[132] As far as the fifth cause of action is concerned, my present view is that it adds nothing to the others and I would be inclined to strike it out for that reason. But in light of my conclusions that the other five should remain there is little to be gained by doing so. I therefore leave it to Mr Illingworth and Mr Mansfield to consider whether they wish separately to pursue it in due course.

Conclusion: strike out

[133] For all the reasons I have given I am unable to conclude that the any of the first, second, third, fourth and sixth causes of action are clearly untenable. The defendant's application to strike out those claims is declined accordingly. The fifth cause of action I propose to leave for further consideration by the plaintiffs for the reasons I have just given.

Interim orders

[134] It is, I think, self evident from the above discussion that the plaintiffs have a substantial position to preserve and there will be very real consequences if it is not protected, pending final determination of the claim for review. If the provisional view I have formed about the unavailability of post-registration relief is correct, authorising the registration application to proceed now might deprive the plaintiffs of any ability to defend the extradition or to pursue their appeals against the forfeiture order in the United States.[58]

[135] I have little hesitation in concluding that interim relief should therefore be granted. Accordingly there will be a declaration that the Commissioner of Police is to take no further action that is consequent upon the decision by the Deputy Solicitor-General (Criminal) to authorise him to apply to register the foreign forfeiture orders made by Judge O'Grady in the District Court in Virginia on 27 March 2015 until further order of this Court.

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[58] I say "might" in recognition of the contingent right to be heard on the registration application itself.

[136] I can presently see no reason why the plaintiffs should not be entitled to their costs on both applications, on a 2B basis in the usual way. I would certify for second counsel. Memoranda may be submitted if agreement cannot be reached.

Postscript

[137] In writing this judgment I have (literally) not read the plaintiffs' further memorandum and Mr Van Der Kolk's updating affidavit dated 25 May 2015, to which objection was taken by the defendants. This judgment was essentially complete by the time they were received. My understanding is that they would, in any event, have made no difference to the result.

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Rebecca Ellis J