IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-003103
[2018] NZHC 495

BETWEEN	KIM DOTCOM First Plaintiff
	MEGAUPLOAD LIMITED Second Plaintiff
AND	THE ATTORNEY-GENERAL (on behalf of the Crown in right of New Zealand) First Defendant
	THE ATTORNEY-GENERAL Second Defendant
	THE ATTORNEY-GENERAL (on behalf of Crown Law Office) third Defendant
	THE UNITED STATES OF AMERICA Fourth Defendant
	THE ATTORNEY-GENERAL (on behalf of New Zealand Police) Fifth Defendant

Hearing: 21 March 2018 (by teleconference)

Counsel: R M Mansfield and S L Cogan for Plaintiffs
M J Lillico, F R J Sinclair and Z Fuhr for Defendants

Judgment: 21 March 2018

JUDGMENT OF VENNING J

This judgment was delivered by me on 21 March 2018 at 2.15 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors: Anderson Creagh Lai, Auckland
Crown Law, Wellington
Counsel: R M Mansfield/S L Cogan, Auckland

Introduction

[1] The former President of the United States of America, Barack Obama, is in New Zealand for three days. The plaintiffs have filed an application for an order for his examination before a Judge while he is in New Zealand or, in the alternative for an order sending a letter of request to the judicial authorities of the United States to take his evidence in the United States.

[2] The plaintiffs also seek a further order that any order that may be made be served by way of substituted service. The application has been supported by affidavits from Mr Dotcom and Ms Ingram, a solicitor employed by Mr Dotcom's advisers.

[3] The applications were filed late on 19 March 2018. According to press reports Mr Obama is only in New Zealand between 21 and 23 March. The application was referred to me yesterday. I convened a telephone conference this morning to deal with the application as a matter of urgency.

[4] In the limited time available Crown Law, who have represented the defendants in this proceeding, have filed a brief affidavit by Ms Regan annexing various tweets by Mr Dotcom. On behalf of the defendants Mr Lillico addressed oral submissions in opposition to the application.

Application for examination

[5] Rule 9.17 provides:

> **9.17 Order for examination of witness or for letters of request**
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> (1) When, in a proceeding or on an interlocutory application, a party desires to have the evidence of a person or persons taken otherwise than at the trial or the hearing of that interlocutory application, the court may, on application by that party, make orders on any terms the court thinks just—
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> (a) for the examination of a person on oath before a Judge, Registrar, or Deputy Registrar or before a person that the court appoints (in rules 9.18 to 9.23 referred to as the examiner) at any place whether in or out of New Zealand; or

(b) for the sending of a letter of request to the judicial authorities of another country, to take, or cause to be taken, the evidence of a person.

…

[6] An order under r 9.17 is discretionary.

[7] In these proceedings the plaintiffs raise four causes of action directed at the validity of the provisional arrest warrant issued by the District Court in respect of Mr Dotcom on 18 January 2012.

First cause of action

(a) It is alleged the Attorney-General, Crown Law, and the Police owed Mr Dotcom a duty of care in applying for the arrest warrant and that they breached that duty.

Second cause of action

(b) It is alleged the Attorney-General and Crown Law owed Mr Dotcom a duty of care in the exercise of their role as Central Authority under the Extradition Act 1999 and the Treaty on Extradition between New Zealand and the United States. In breach of that duty they failed to identify the request for Mr Dotcom's surrender was made in reliance on a superseding US arrest warrant, rather than the US arrest warrant on which the 18 January 2012 arrest warrant was based.

Third cause of action

(c) The plaintiffs allege the Attorney-General, Crown Law and the Police knew or were recklessly indifferent to the fact the arrest warrant was unlawful, and failed to disclose to the District Court a superseding indictment had been issued and did so for an improper motive to make an example of the first plaintiff and to appease or earn favour with the United States and Hollywood Studios.

Fourth cause of action

(d) It is alleged the United States, the Attorney-General, Crown Law and Police maliciously procured the arrest warrant because they did not have reasonable and probable cause to apply for the warrant. They were motivated by an improper purpose to make an example of the plaintiff to win favour with the United States or Hollywood Studios.

[8] The plaintiffs argue:

(a) Mr Obama can give evidence directly material to the pleaded issues in the proceeding, and the defendants' strike out application, particularly directed at the purpose of the United States' prosecution of the plaintiffs and the United States' dealings with the New Zealand authorities.

(b) In the absence of a Court order it is unlikely Mr Obama will give evidence.

(c) It is not practical to obtain a subpoena order as no trial date has been allocated, and by the time a trial date is allocated it will not be practicable to serve Mr Obama in the United States.

(d) In the absence of an order compelling his attendance Mr Obama is unlikely to be called as a witness.

(e) There is no other witness competent to give evidence on the same matter, who is present in New Zealand and/or better able to be served with the order.

[9] Although the application as filed seeks an order for the examination of Mr Obama between 21 and 23 March 2018, Mr Mansfield accepted during the course of the conference that it was unrealistic and unreasonable to suggest any examination would take place over that limited period. He argued that the order for examination

should nevertheless be made so that it could be served while Mr Obama was in New Zealand, even if the examination was to be at a later date.

[10] Despite Mr Mansfield's concession, I consider the application is still premature. The current civil proceedings were only filed on 22 December 2017. The defendants have applied for an order deferring the filing of a statement of defence pending the determination of the hearing of two appeals currently before the Court of Appeal. That application is yet to be determined. Further, the defendants have applied to strike out the plaintiffs' causes of action as an abuse of process on the basis they are collateral challenges to decisions of the Court. In large part the outcome of that application will be informed by the Court of Appeal decisions.

[11] There is a further point about timing. It is suggested that the evidence of Mr Obama would be relevant to the strike out application as well as the substantive claim. Evidence is only very rarely permitted on strike out applications and then generally is restricted to uncontested evidence. The strike out application is made on the basis the proceedings are a collateral challenge to judgments of this Court. Any evidence Mr Obama could give would not be relevant or admissible on such an application.

[12] Next, even if it could be said Mr Obama held relevant information and was compellable as a witness, it would be necessary for him to prepare for any such examination given that it relates to matters that occurred five to six years ago. He would need to review relevant documents and materials from the time in preparation for any examination. That confirms the current application is premature.

[13] I also accept Mr Lillico's point that the urgency of this application has been created by the plaintiffs. Mr Dotcom has been aware of Mr Obama's visit for some time. It is apparent from Mr Dotcom's tweets that at least by 21 February 2018 he was aware Mr Obama was to visit New Zealand. Despite that this application was not filed until late in the day on 19 March 2018.

[14] Next, on the material presently before the Court I am not satisfied that the evidence Mr Obama could give would be of relevance. It is based on Mr Dotcom's construct that Hollywood was a major benefactor of the Democratic Party in the

United States and that, in his opinion, the action against Megaupload and him met the United States' need to appease the Hollywood lobby. He also says that the United States and New Zealand's interests were perfectly aligned. Essentially Mr Dotcom's argument that Mr Obama should be required to give evidence is based on the fact that the relevant actions were taken against him during the Obama administration.

[15] The high point of the evidence that Mr Obama may have any particular knowledge about the relevant background is based on hearsay evidence from a Mr Hart, a lawyer and lobbyist in Wellington who has told Mr Dotcom that "President Obama was dissatisfied with the way it had been handled. He indicated an awareness that it had not gone well, that it was more complicated than he thought, that he will turn his attention to it more prominently after November". Further, Mr Dotcom relies on public records which apparently confirm Mr Obama had a private lunch with the Chairman and Chief Executive of the Motion Picture Association of America. Mr Dotcom's opinion that Mr Obama's evidence will be relevant to the present claims appears at best speculative.

[16] Mr Lillico also referred to s 74 of the Evidence Act 2006. That section provides that a Head of State of a foreign country is not compellable to give evidence.[1]

[17] Mr Mansfield argued that that only applied to current Heads of State contrasting it with s 74(d) which provides that a Judge is not compellable but only in respect of the Judge's conduct as a Judge. However, without deciding the point as counsel were not prepared to argue it fully, it seems to me there is a strong argument that the section applies to a former Head of State when the evidence in issue concerns actions taken when they were Head of State. The immunity applies to the position rather than the person. The whole purpose of the present application is to obtain an order requiring Mr Obama to give evidence about his actions when he was Head of State.

[18] For the above reasons I decline to exercise the discretion to issue a subpoena or to make a request. The application for the issue of a subpoena or letters of request

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1 Evidence Act 2006, s 74(c).

is dismissed. The application for substituted service is, in the circumstances, otiose. It is also dismissed.

[19] The plaintiffs are to pay costs to the defendants on a 2B basis for this morning's conference.

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Venning J