IN THE COURT OF APPEAL OF NEW ZEALAND

CA222/2014
[2014] NZCA 408

BETWEEN	COMMISSIONER OF POLICE Appellant
AND	KIM DOTCOM First Respondent
	BRAM VAN DER KOLK Second Respondent
	MEGASTUFF LIMITED Third Respondent
	MONA DOTCOM Interested Party

Hearing:	30 July 2014
Court:	O'Regan P, Wild and French JJ
Counsel:	D J Boldt and B F Fenton for Appellant R M Gapes and S J W Devoy for First Respondent No appearances for Second and Third Respondents A J Lloyd and R W Harris for Interested Party
Judgment:	21 August 2014 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The decision of the High Court is set aside.

C An order is made extending the duration of the registration of the restraining orders issued by the United States District Court for the Eastern District of Virginia on 10 and 25 January 2012 and registered in New Zealand on 18 April 2012 for one year from 18 April 2014.

D **The application by the interested party for exclusion of her property from the restraining orders is declined.**

E **We make no order for costs in this Court.**

F **Any award of costs in favour of the respondents or the interested party in the High Court is quashed. Costs in that Court should, in the absence of agreement, be re-determined in that Court in light of this judgment.**

REASONS OF THE COURT

(Given by O'Regan P)

[1] This is an appeal against a decision of Thomas J, in which she dismissed an application by the appellant, the Commissioner of Police, for an order extending the duration of the registration in New Zealand of restraining orders over the assets of the respondents made by a United States Court.[1] The Judge proceeded on the basis that the Court had jurisdiction to extend the duration of the registration of the US restraining orders, but determined that it would be inappropriate to do so. The Commissioner contests the latter finding. The Judge did, however, extend the order pending the outcome of the present appeal.

[2] The first respondent, Mr Dotcom, resists the appeal by supporting the reasoning of the Judge and also on the basis of other points not relied on in the High Court judgment. He cross-appeals against the finding that there was jurisdiction to extend the order. The jurisdiction to extend the order pending the outcome of this appeal is also contested in the cross-appeal.

[3] Mr Dotcom's estranged wife, Mona Dotcom, was represented at the appeal as an interested party. She supports Mr Dotcom's position on the appeal and the cross-appeal, and in addition seeks orders excluding items of her own property from the ambit of the registration order if its duration is extended.

---

1 *Commissioner of Police v Dotcom* [2014] NZHC 821.

[4] The second and third respondents were not represented on the appeal.

Issues

[5] The issues raised in the cross-appeal are logically prior to those raised in the appeal, and we will deal with them first. The issues to be resolved are, therefore:

(a) Did the High Court have jurisdiction to extend the duration of the registration of the US restraining orders for an additional year, as sought by the Commissioner? This is the first cross-appeal issue.

(b) Did the High Court have jurisdiction to extend the registration of the US restraining orders pending appeal and, if so, was it correct to grant such an extension in this case? This is the second cross-appeal issue.

(c) If the answer to issue (a) is "yes", was the High Court Judge correct to refuse to exercise her discretion to extend the duration of the registration of the US restraining orders for an additional year? This is the issue raised by the appeal.

(d) If the answer to issue (c) is "no", should the property of Mrs Dotcom be excluded from the US restraining orders?

[6] Before addressing these issues, we will briefly traverse the factual background.

Facts

[7] On 10 January 2012, a Judge of the United States District Court issued a post-indictment restraining order as to certain assets located in New Zealand associated with the defendants in a criminal proceeding in that court. The defendants included the respondents to the present appeal, but not Mrs Dotcom.

[8] On 25 January 2012, the United States District Court Judge issued a supplemental restraining order, also relating to property of the defendants located in New Zealand.

[9] These are the US restraining orders to which we have made reference earlier. We will use that term to describe them in this judgment.

[10] On 18 April 2012, Potter J ordered that the US restraining orders be registered in New Zealand, subject to certain conditions.[2] That order was made under s 56 of the Mutual Assistance in Criminal Matters Act 1992 (MACMA).

[11] The registration of the US restraining orders in New Zealand would have expired on 18 April 2014 (two years after the date of the registration order) under s 136(1)(b) of the Criminal Proceeds (Recovery) Act 2009 (CPRA). However, s 137 of the CPRA provides that the High Court may extend the registration of the foreign restraining order for a period of up to one year.

[12] The Commissioner applied to the High Court for an order extending the duration of the registration of the US restraining orders in New Zealand under s 137 of the CPRA. Thomas J declined to order an extension, and it is against that judgment that the present appeal is brought.

[13] The US restraining orders recite that the respondents and the other defendants to the criminal proceeding in the United States have been indicted for the following offences:

(a) conspiracy to commit racketeering;

(b) conspiracy to commit copyright infringement;

(c) conspiracy to commit money laundering;

(d) criminal copyright infringement by distribution of copyrighted work being prepared for commercial distribution on a computer network and aiding and abetting of copyright infringement; and

---

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

(e) criminal copyright infringement by electronic means and aiding and abetting of copyright infringement.

[14] The order made by the United States District Court Judge records that all of the offences with which the respondents are charged are punishable by maximum term of imprisonment of at least five years and all carry a penalty of forfeiture. The US restraining orders were made on the basis that the United States Government alleges that the property subject to the restraining orders:

(a) constitutes the proceeds of those criminal offences;

(b) has been acquired as a result of the criminal offences;

(c) is property of a person who has, or may have, unlawfully benefitted from criminal activity; or

(d) has been directly or indirectly derived from the criminal offences.

[15] The order recites that this means the property subject to the US restraining orders is subject to civil or criminal forfeiture under a number of United States federal statutory provisions.

[16] It was common ground that the US restraining orders remain in force.[3]

Issue one: jurisdiction

[17] Counsel for Mr Dotcom, Mr Gapes, argued that the High Court Judge did not have jurisdiction to extend the registration of the US restraining orders.

[3] The United States has undertaken to notify the Attorney-General promptly if the US restraining orders are vacated or otherwise altered.

[18] The application for extension was made under s 137 of the CPRA, which provides:

> **137 Extension of duration of registration of foreign restraining order**
>
> (1) If the High Court has registered a foreign restraining order in New Zealand, the applicant for that order may, before the registration of the restraining order expires, apply to the High Court for an extension of the duration of the registration of the foreign restraining order in New Zealand.
>
> (2) If an application is made under subsection (1), the High Court may order that the registration of a foreign restraining order be extended for a further period not exceeding 1 year.
>
> (3) If an application is granted under this section, the registration of the foreign restraining order in New Zealand ceases at the time specified in the Court's order.

[19] On the face of it, an argument that a provision that says "the High Court may order that the registration of a foreign restraining order be extended" does not give the Court jurisdiction to extend a foreign restraining order is a difficult argument to sustain. In order to understand the basis on which it is made in this case, it is necessary to traverse more of the factual background.

[20] The application to register the US restraining orders in New Zealand was made by the Commissioner after the then Deputy Solicitor-General, acting as delegate of the Attorney-General, authorised the Commissioner to make the application.[4]

[21] The Attorney-General's authorisation was made after receipt of a request for assistance from the United States Government under s 54 of the MACMA. That section provides that a foreign country may request the Attorney-General to assist in enforcing a foreign restraining order that relates to property believed to be located in New Zealand.[5] The Attorney-General then has a discretion to authorise the Commissioner to apply to the High Court to register the foreign restraining order in New Zealand.[6]

---

4 For simplicity, we will refer to the Attorney-General from now on, since the then Deputy Solicitor-General, Mr Mander, was acting as the Attorney-General's delegate.

5 Subsection (1).

6 Subsection (2).

[22] Once that authorisation was given in the present case, the Commissioner made the application to the High Court under s 56 of the MACMA. Section 56(1) provides that the High Court must make an order registering a foreign restraining order in respect of which an application for registration is being made by the Commissioner if the Court is satisfied that a foreign restraining order is in force in a foreign country. As Potter J noted in her judgment granting the registration order, s 56(1) "provides both the source and the sole guidance for the exercise of the Court's power in registering the foreign order".[7]

[23] The process therefore provides for:

(a) a request to be made by a foreign government to the Attorney-General;

(b) an authorisation by the Attorney-General to the Commissioner to make an application for registration;

(c) a decision by the Commissioner, once such authorisation is given, to actually make the application; and

(d) a decision by the High Court to register the foreign restraining order. As noted above, the High Court is obliged to make that decision if satisfied that the foreign restraining order is in force: there is no discretionary aspect to the decision.

[24] In the present case, the requests to the Attorney-General for assistance stated that the purpose of seeking registration of the US restraining orders in New Zealand was "to ensure that [the restrained assets] are available for forfeiture to the United States". There was no mention of the process by which forfeiture would be pursued. However, the requests and the subsequent application by the Commissioner to the High Court for registration of the US restraining orders were supported by an affidavit executed by Mr J V Prabhu, an assistant United States attorney involved in the prosecution of the respondents and others in the United States.

---

7 *Commissioner of Police v Dotcom*, above n 2, at [86].

[25] In that affidavit, Mr Prabhu explained that the United States has both a conviction-based forfeiture regime as well as an in rem non-conviction-based system. This broadly equates with the criminal forfeiture and civil forfeiture regimes in the CPRA. He deposed that both the criminal and civil forfeiture systems (and the preceding restraining order process) were available to the United States in the present case. However, in a passage heavily relied on by Mr Gapes, Mr Prabhu added:

> 4. … at this time, the [United States] government is only asking New Zealand to temporarily restrain assets in connection with the [United States] government's conviction-based forfeiture case, that is, the criminal forfeiture case. The United States anticipates that such assets will be forfeited in the event of a conviction in the criminal case.

[26] Two points about this statement should be noted:

(a) it is not consistent with the broad language of the request for assistance itself, which does not mention the forfeiture procedure to be followed in the United States; and

(b) it is a statement made as to the United States' intention "at this time".

[27] The essential hallmark of the criminal-based forfeiture system is that forfeiture would occur only in the event of a conviction. In the case of the respondents who are located in New Zealand, such conviction could occur only if the United States is successful in extraditing those respondents to the United States, and then obtaining a conviction at trial.

[28] The attempt by the United States to extradite the first and second respondents has been subject to a number of delays. As a result of this, it is no longer realistic to expect that the criminal-based forfeiture process could be completed before 18 April 2015, the date on which the registration of the US restraining orders in New Zealand will lapse, even if the present appeal succeeds and the application for extension of the duration of the US restraining orders is granted.

[29] For that reason, the United States is now pursuing civil forfeiture (or "in rem" forfeiture, to use Mr Prabhu's term) which may be progressed separately from any

criminal proceedings and does not therefore depend on the extradition of the first and second respondents to the United States.

[30] The application for extension was supported by an affidavit from another assistant US attorney involved in the case against the respondents, Mr G W Grant. He deposed as follows:

> 3. Given the delays in the extradition process in New Zealand, the United States is preparing to file a civil (non-conviction based) forfeiture action involving, at a minimum, the restrained property in New Zealand. Such an action would be legally independent of the criminal case, and, as such, would not be conditional on the successful extradition or criminal conviction of any individual, including those currently involved in the extradition process in New Zealand.
>
> 4. Given our analysis of the legal regime, the United States believes that the civil forfeiture process is likely to be completed before April 1, 2015.

[31] As Thomas J noted in the judgment under appeal, Mr Grant did not say when the civil forfeiture proceedings would be filed.[8] We were told that this had happened only a day or two before the hearing of the present appeal. We do not know the reason for the delay but it hardly exhibits a concerted effort by the United States to complete the proceedings before 18 April 2015.

[32] Thomas J dealt with the case on the assumption that there was jurisdiction to make the extension order. Her conclusion that the order should not be made meant she did not need to deal with the respondents' argument to the contrary.

[33] Mr Gapes' essential argument is that the United States authorities' change in approach from criminal (post-conviction) forfeiture to civil forfeiture meant the Commissioner was seeking the extension of the registration of the US restraining orders for "an entirely different and impermissible purpose" than the purpose identified by Mr Prabhu when the original restraining order was obtained. The purpose of the extension sought was to permit civil forfeiture proceedings to proceed in the United States, whereas Potter J made the original registration order for the purpose of criminal forfeiture proceedings in the United States. Mr Lloyd for Mrs Dotcom supported the position taken by Mr Gapes.

---

[8] At [46].

[34] Mr Gapes argued that s 137 of the CPRA should be interpreted as authorising an extension only for a purpose precisely the same as the purpose of the original registration order. His reasons, and our analysis of them, follow.

[35] Mr Gapes said s 137 had to be interpreted in a way which best protected the rights of the respondents under the New Zealand Bill of Rights Act 1990 (Bill of Rights). He relied in particular on s 6 of the Bill of Rights, which requires that an enactment be given a meaning that is most consistent with the rights and freedoms contained in the Bill of Rights where more than one meaning is possible; and s 21 dealing with the right to be secure against unreasonable seizure of property.

[36] We do not see this as an issue going to the jurisdiction to extend an order though it may affect the decision as to whether an extension should be given. The wording of s 137 is clear and it can be interpreted to conform with the Bill of Rights without any straining of its language. If, after the safeguards provided for in the CPRA and the MACMA have been met, a properly registered foreign restraining order is subject to an order for extension of the registration, we do not consider that that could be categorised as unreasonable seizure for the purposes of s 21 of the Bill of Rights. Mr Gapes was effectively asking us to read s 137 as if it had the words "on the same basis as the application for the registration of the foreign restraining order in New Zealand" in it. We do not think there is any reason to do that.

[37] Mr Gapes also referred to the detailed requirements of the CPRA and the MACMA in relation to the registration of foreign restraining orders. He argued that given the safeguards provided for in relation to the original registration, it must be assumed that no extension can be granted unless the basis for the extended restraining order is exactly the same as the basis for the original restraining order. Again, we see that as an issue of merits rather than of jurisdiction.

[38] Mr Gapes said that the Commissioner was effectively trying to use the extension process under s 137 to achieve the registration of a new foreign restraining order to be used for a different purpose from that disclosed when the US restraining orders were originally registered. We disagree. There is no dispute that the US restraining orders in the present case allow for the possibility of both civil and

criminal forfeiture. The fact that the United States Government determined at the outset to pursue criminal forfeiture did not inhibit its ability to pursue civil forfeiture later. The fact that it represented in the request for assistance that it intended "at this time" to pursue criminal forfeiture did not amount to an undertaking not to pursue civil forfeiture if that became necessary.

[39] If the United States authorities had obtained a civil forfeiture order during the two year period of the registration of the US restraining orders in New Zealand, there would have been no basis for complaint on the part of the respondents. That would have been expressly within the ambit of s 14 of the CPRA. If the United States authorities had obtained such a forfeiture order under the civil process and had sought to register it in New Zealand, s 14 would have applied. That provision says that if proceedings to register a foreign forfeiture order involve restrained property that was subject to a foreign restraining order registered in New Zealand, the registration of a foreign forfeiture order may be sought on grounds that differ from those on which the foreign restraining order was registered.

[40] It seems to us that a logical extension of the principle outlined in s 14 is that a Court should treat as unexceptional a decision by a foreign government that has the benefit of a foreign restraining order to change from one forfeiture process to another, in circumstances where the foreign restraining order provides for either to be pursued. Mr Gapes said that s 14 should be confined to the specific situation it provides for, and not seen as an indication that a change of approach in the forfeiture process from the time of registration of a foreign restraining order to the time of extension of the duration of the registration is unexceptional. He said if the legislature had intended this, one would have expected that s 14 would have expressly said so.

[41] We do not accept that submission. Section 14 provides an indication that a change in the forfeiture process from that initially envisaged to another process also provided for under the law of the relevant jurisdiction and contemplated by the foreign restraining order is not considered to be exceptional. In the High Court, the then counsel for the Commissioner described the regime contained in the MACMA and the CPRA as "agnostic" as to the process adopted to obtain a forfeiture order. In

this Court, the Commissioner's counsel, Mr Boldt, described it as "catholic" in the sense that it encompasses all available methods of achieving a forfeiture order.

[42] We are satisfied that the fact a foreign government intends to pursue a different process for achieving a forfeiture order during the proposed period of extended duration of the registration of the order from that which was anticipated at the time of its registration is not a factor which limits or excludes the jurisdiction to grant an extension under s 137.

[43] We conclude, therefore, that the High Court Judge was correct to proceed on the basis that s 137 gave her the power to extend the registration of the US restraining orders in this case. This ground of the cross-appeal therefore fails.

Issue 2: extension pending appeal

[44] Mr Dotcom also cross-appeals against the decision of the High Court Judge to extend the registration of the US restraining orders pending the outcome of this appeal. As counsel, Mr Gapes argued that extending the orders to preserve appeal rights is inconsistent with the statutory regime and thwarts the purpose and effect of the applicable statutory time restraints. He argued that if the Commissioner was concerned at the need to preserve appeal rights, he should have applied for the extension order earlier, to allow for time to appeal within the initial two year period of registration.

[45] As we have found there is jurisdiction to extend the duration of the registration for a period up to one year under s 137, it follows that there must be jurisdiction to extend the duration of the registration for a shorter period, whether to allow for appeal rights or otherwise.

[46] In any event, given that the extension was to allow for the present appeal and the argument is being made in the context of that appeal, there is a certain futility in the argument. Mr Gapes accepted this was so. He argued that, if the Judge had not granted the extension pending appeal, the registration of the US restraining orders would have lapsed on 18 April 2014. But after discussion he accepted that, even if we were to find that the Judge had been incorrect to extend the duration of the

registration pending appeal, that would not change the fact that she did so and that her order, until set aside, was valid. It seems to us that therefore makes this aspect of the appeal essentially moot.

[47] The second ground of the cross-appeal therefore fails.

Third issue: should the extension have been granted?

[48] We now turn to the issue on appeal, namely whether the Judge erred in refusing to extend the duration of the registration of the US restraining orders for a further year under s 137 of the CPRA.

[49] Thomas J accepted the argument made on behalf of the respondents and Mrs Dotcom that the High Court could not properly extend the duration of the registration of the US restraining orders on a basis that was different from that which was before the Attorney-General when he decided to authorise the Commissioner to apply for registration of the US restraining orders in New Zealand.[9]

[50] Thomas J placed considerable weight on the statement in Mr Prabhu's affidavit that, at the relevant time, the United States was asking for assistance from New Zealand in connection with the conviction-based forfeiture case. She accepted that the authorisation of the Attorney-General to the Commissioner to apply to register the US restraining orders in New Zealand did not refer to the conviction-based forfeiture process. But she said it did refer to the request from the United States under s 54 of MACMA and Mr Prabhu's affidavit was submitted in support of that request.[10] She considered that, as Mr Prabhu's affidavit was in front of the Attorney-General when determining whether to give the authorisation, it would not be right for the Court to extend the duration or registration of the US restraining orders on a different basis from that which was in the material before the Attorney-General.

---

9 At [65].

10 At [57]. Section 26 of the Mutual Assistance in Criminal Matters Act 1992 requires any request by a foreign country for assistance under that Act to specify the purpose of the request.

[51] Thomas J pointed out that the Attorney-General did not have to accede to the request for assistance from the United States. She said she did not know whether the Attorney-General would have done so on the basis of a civil forfeiture action. She noted that, while the Court making a registration order under s 56 of the MACMA has no ability to look beyond the face of the Attorney-General's authorisation and the Commissioner's application, s 137 of the CPRA gave the Court a discretion whether to grant an extension.[11]

[52] Thomas J said that once a foreign government requested assistance from the New Zealand Government solely on the basis of conviction-based forfeiture proceedings, it could not effectively "short circuit the registration process" by applying to the Court for an extension of the registration order, rather than making a new request under s 54 of the MACMA, when the basis for it had changed.[12] She rejected the Commissioner's argument based on s 14[13] and also ss 11 and 15 of the CPRA.

[53] Thomas J noted that Mr Grant's affidavit did not say when the civil forfeiture action had been filed and how and to what extent it might be relevant to the conviction-based forfeiture proceedings.

[54] In assessing the Judge's conclusion, we traverse much of the ground already covered in relation to the jurisdictional argument raised on the cross-appeal. We can, therefore, set out our analysis relatively briefly.

[55] We do not see the reference in Mr Prabhu's affidavit to the United States Government's intentions at the relevant time to seek a conviction-based forfeiture order as precluding the United States from seeking a civil forfeiture order during the term of the initial registration. As noted earlier, the request for assistance did not mention the forfeiture process that would be adopted in the United States. And, in any event, we think s 14 of the CPRA Act is a clear indicator that a switch from criminal to civil forfeiture is not significant. That being the case, we see nothing exceptional in a request by the United States for a renewal of the registration of the

---

11 At [59]–[60].
12 At [62].
13 Referred to above at [39]–[41].

order on the basis that the civil forfeiture process is to be invoked rather than the criminal forfeiture process. Since the order contemplates both, and remains in force in the United States, we do not see why the High Court should regard the decision to pursue the civil regime as somehow exceptional.

[56] All that the registration of the US restraining orders in New Zealand does is extend their ambit to the assets within the New Zealand jurisdiction. The jurisdiction to order forfeiture remains throughout with the United States Court and it is for that Court to determine whether a civil forfeiture order should be granted. If such an order is granted, it will itself need to be registered in New Zealand and a New Zealand Court could decline to do this if some abuse of process was involved in obtaining it. But, given the clear terms of s 14, it seems unlikely that the change from one process to the other would provide any basis for a refusal to register a forfeiture order obtained under the civil regime in New Zealand.

[57] Taking the analogy with domestic proceedings, a restraining order obtained in anticipation of criminal proceedings may also facilitate civil forfeiture proceedings if that becomes the preferred option of the Commissioner for pragmatic or other reasons. We do not see why that should not also apply in relation to the registration of the foreign restraining orders.

[58] Thomas J said that if the request to register the foreign restraining order under s 54 had been on the basis that the United States intended to take forfeiture proceedings in either the civil or criminal jurisdiction, then an extension of the order's duration would have been straightforward.[14] We agree. But given that the US restraining orders authorised both criminal and civil proceedings, we do not see that the choice of the United States to pursue criminal forfeiture at the relevant time should be seen as somehow precluding the way in which the United States Court could deal with the proceedings before it. We are cognisant of the fact that the authorisation given to the Commissioner to seek the registration of the US restraining orders said nothing about civil or criminal forfeiture orders.

---

[14] At [61].

[59] Mr Gapes and Mr Lloyd argued that the discretion granted by s 137(2) must be exercised in a reasonable manner having regard to the purposes of the MACMA and the CPRA and the nature and purpose of orders registering foreign restraining orders in New Zealand.[15] We agree. But we do not see anything in the scheme of the MACMA or the CPRA that attaches particular significance to the foreign country's process for obtaining orders forfeiting the property subject to the foreign restraining order. Given the different processes applying in different countries, it would be surprising if it did. So we do not see the application of the test stated in *Commissioner of Police v Reed* to the present facts as assisting the respondents' case or that of Mrs Dotcom.

[60] Mr Gapes suggested that Mr Dotcom may have sought judicial review of the decisions of the Attorney-General or the Commissioner of Police in relation to the registration of the US restraining orders in 2012 if he had known the use of civil forfeiture proceedings was countenanced. He said the knowledge that, under the criminal forfeiture process, assets would not be forfeited until conviction, meant that possible review points were not pursued.

[61] We do not find that convincing. The consequences for Mr Dotcom of the registration of the US restraining orders in New Zealand were sufficiently serious for us to deduce that if grounds for judicial review had presented themselves, he would have pursued them. And if he was relying on the United States eschewing its right to pursue civil forfeiture under the US restraining orders, he could have asked for greater assurance than Mr Prabhu's assertion of the intention to pursue criminal forfeiture "at this time". We can see no reason why either the Attorney-General or the Commissioner would have done anything differently in 2012 if Mr Prabhu's affidavit had said the United States planned to pursue civil rather than criminal forfeiture.

[62] Mr Gapes adopted the Judge's characterisation of the extension in circumstances where civil forfeiture was to be pursued as "short-circuiting the

---

[15] By analogy with s 41 of the Criminal Proceeds (Recovery) Act 2009, dealing with extensions of domestic restraining orders: *Commissioner of Police v Reed* [2013] NZHC 802 at [34].

registration process".[16] He submitted that such a change of course should not be permitted.[17] But there would be a "short-circuiting" of the registration process only if the MACMA and CPRA regime required or even allowed for a new registration of an already registered foreign restraining order in the event of a change in forfeiture process in the foreign jurisdiction. Mr Gapes did not identify any provision to that effect.

[63] The reality is that the US restraining orders now under consideration are the same US restraining orders that were registered by Potter J in 2012. There is no reason to think that the legislation contemplates, or even permits, their de-registration and then re-registration on a different basis from their registration in 2012. That would not be consistent with the legislative scheme of the MACMA and the CPRA. As we have mentioned already there was nothing to stop the United States initiating the civil forfeiture process in the United States during the initial two year registration period in New Zealand. There was no available process to involve the New Zealand courts in that event; and not even a requirement to notify the High Court.

[64] There is nothing in the MACMA or the CPRA to indicate that the basis of registration in New Zealand of foreign restraining orders fetters the options available to the foreign government or the foreign court in relation to the forfeiture proceedings in the foreign country. Nor in s 137 is there any indication that the New Zealand court, when considering the application for extension, should review the method by which the foreign government is seeking forfeiture orders in the foreign court.

[65] Mr Gapes also supported the High Court judgment on a number of grounds that did not feature in the decision of Thomas J.

[66] Mr Gapes said the Commissioner was not acting as a model litigant, as the Crown is required to do. He went even further, and suggested the Commissioner's

---

16 At [62]; see above at [52].

17 Citing *Commissioner of Inland Revenue v V H Farnsworth Ltd* [1984] 1 NZLR 428 (CA). The facts and statutory context in that case differ so markedly from those of the present case that we did not find it helpful.

application was an abuse of process. He said the Commissioner was misusing the s 137 process in a way that was not fair or honest and for an ulterior or improper process.

[67] These rather extreme submissions were based on the assertion that a s 137 application could not properly be made if the forfeiture process to be followed had changed since registration. We have found that assertion to be incorrect. So we reject the "model litigant" and abuse of process arguments. They added nothing to the case for Mr Dotcom and should not have been made.

[68] Drawing these threads together, we conclude the Judge erred in her key conclusion that the High Court could not properly extend the duration of the US restraining orders on a basis that was different from that which was before the Attorney-General when he decided to authorise the Commissioner to apply for their registration in New Zealand. In our view, the manner in which the United States seeks forfeiture in the United States courts is not a material issue for a New Zealand court exercising the s 137 discretion, given that the civil and criminal processes in the United States are consistent with the forfeiture processes available in New Zealand. It may be significant if it is clear that a forfeiture order could not be obtained during the period of extension of the registration. Perhaps ironically, it is the delay in the criminal process that has led to the switch to the civil forfeiture process by the United States. The evidence before this Court is that civil forfeiture proceedings can be completed before 18 April 2015. That evidence has not been challenged.

[69] We have to say, however, that the evidence in support of the application for extension was sparse in the extreme. We agree with the criticism in that regard made by Thomas J, and echoed in this Court by Mr Gapes. The affidavit from the responsible United States attorney should have explained clearly how the switch from criminal to civil forfeiture would occur, whether the United States District Court had been (or needed to be) notified of this, what time period is normally required for a civil forfeiture proceeding to be concluded and so on.

[70] In our view the Judge made an error of principle in the exercise of her discretion under s 137 by effectively adding into s 137 a requirement that an extension must be on the same basis as the original registration of a foreign restraining order. She wrongly viewed, as a relevant consideration for the New Zealand court, the process to be followed in the foreign court to obtain a forfeiture order. In effect she held that the United States was committed to seeking only criminal forfeiture, when under United States law no such restriction applies. The logical corollary of her decision was that a foreign government would lose its opportunity to extend the duration of the registration if it changed the process by which it was to seek forfeiture at the end of the two year registration period even if it had good prospects of obtaining forfeiture orders during the intended third year of registration.

[71] In view of that error in principle, we have considered for ourselves whether an extension should be granted. Once the method of obtaining forfeiture is removed as an obstacle to an extension, the decision becomes straightforward. The US restraining orders remain in force. The United States still seeks forfeiture. The evidence before the Court is that forfeiture proceedings of a kind contemplated by the US restraining orders can be completed before April 2015. In those circumstances, we consider an extension should be granted.

[72] We therefore allow the appeal and make the order sought by the Commissioner.

Issue four: Mrs Dotcom's application for exclusion

[73] Counsel for Mrs Dotcom, Mr Lloyd, submitted that, if the Court considered an extension of the duration of the US restraining orders should be granted, it should grant the extension subject to a condition excluding Mrs Dotcom's property from the US restraining orders. We have some reservations about the procedural correctness of what is effectively an application by a non-party to the proceedings for the exercise of a discretion said to exist under s 137. But we will deal with it on its merits in any event.

[74] Mr Lloyd said there was no dispute that Mrs Dotcom has interests in property subject to the US restraining orders. Some is her personal and separate property and she has a relationship property interest in some of the other restrained property. He criticised the Commissioner for not advancing evidence that Mrs Dotcom knew the property concerned was the proceeds of significant criminal activity.

[75] Mr Lloyd said Mrs Dotcom has not been charged with any offence and there is no application to extradite her to the United States.

[76] Mr Lloyd acknowledged that Mrs Dotcom could apply under s 139 of the CPRA to have her property interests excluded from the order registering the US restraining orders in New Zealand. Mr Boldt pointed out that she has made, but not proceeded with, such applications in the past. Mr Lloyd argued that s 139 puts a burden on Mrs Dotcom to prove lack of knowledge but, in contrast to trial, the burden rests on the Commissioner to justify an extension of the duration of the registration of the US restraining orders over Mrs Dotcom's property under s 137. He said, given Mrs Dotcom's denial of knowledge, the Commissioner has a burden to prove her knowledge in the present proceeding.

[77] Mr Lloyd said if the Court allowed any extension without excluding her property it would be condoning the continued restraint of her property which would be a continued breach of her rights under s 21 of the Bill of Rights.

[78] Mr Boldt argued that Mrs Dotcom's remedy lay under s 139 and she should not be permitted to obtain that remedy by a sidewind under s 137. We agree. If Mrs Dotcom's evidence of lack of knowledge is correct, it is puzzling that she has not proceeded with her earlier applications for exclusion. The CPRA provides different procedures for extension (s 137) and exclusion (s 139). We can see no good reason to go behind this legislative regime.

[79] We therefore reject Mrs Dotcom's submission that her property be excluded from the property restrained under the US restraining orders as a condition of the extension of the duration of their registration in New Zealand.

Result

[80] We allow the appeal, quash the decision of the High Court and make the extension order sought by the Commissioner. We dismiss the cross-appeal and Mrs Dotcom's application.

Costs

[81] The Commissioner did not seek costs in his notice of appeal or his counsel's submissions. We therefore make no award of costs in this Court.

[82] We quash any award of costs made in favour of any respondent or Mrs Dotcom in the High Court and direct that costs in that court be redetermined in light of this judgment unless the parties are able to settle costs among themselves.

Solicitors:
Crown Law Office, Wellington for Appellant
Simpson Grierson, Auckland for First Respondent
Minter Ellison Rudd Watts, Auckland for Interested Party