

(Ortmann v The United States
Of America, 2017)

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CRI-2015-404-000429
[2017] NZHC 189**

UNDER the Extradition Act 1999

IN THE MATTER of an appeal on questions of law by way of
case stated under s 68 of the Extradition
Act 1999

BETWEEN MATHIAS ORTMANN
First Appellant

KIM DOTCOM
Second Appellant

BRAM VAN DER KOLK
Third Appellant

FINN HABIB BATATO
Fourth Appellant

AND THE UNITED STATES OF AMERICA
Respondent
cont .../2

Hearing: 29 August to 28 September, 12 October 2016

Appearances: G M Illingworth QC, PJK Spring and A K Hyde for First and
Third Appellants
R M Mansfield and S L Cogan for Second Appellant
J Bioletti for Fourth Appellant
J C Gordon QC, M Ruffin, F Sinclair and F Biggs for
Respondent

Judgment: 20 February 2017

JUDGMENT OF GILBERT J

*This judgment is delivered by me on 20 February 2017 at 11 am
pursuant to r 11.5 of the High Court Rules.*

.....
Registrar / Deputy Registrar

CIV-2015-404-001733

UNDER the Judicature Amendment Act 1972, Part
30 of the High Court Rules and s 27(2) of
the New Zealand Bill of Rights Act 1990

BETWEEN MATHIAS ORTMANN
First Plaintiff

BRAM VAN DER KOLK
Second Plaintiff

FINN HABIB BATATO
Third Plaintiff

AND THE UNITED STATES OF AMERICA
First Defendant

THE DISTRICT COURT AT NORTH
SHORE
Second Defendant

CIV-2015-404-001770

UNDER the Judicature Amendment Act 1972, Part
30 of the High Court Rules and s 27(2) of
the New Zealand Bill of Rights Act 1990

BETWEEN KIM DOTCOM
Plaintiff

AND THE UNITED STATES OF AMERICA
First Defendant

THE DISTRICT COURT AT NORTH
SHORE
Second Defendant

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Introduction

[1] The United States of America claims that Mathias Ortmann, Bram van der Kolk, Kim Dotcom, Finn Batato (the appellants) and others were members of a worldwide criminal organisation that engaged in criminal copyright infringement and money laundering on a massive scale with estimated loss to copyright holders well in excess of USD 500 million. The United States terms this the “Mega Conspiracy”. The case has been touted as one of the largest criminal copyright cases ever brought by the United States.

P

[2] The United States seeks the extradition of the appellants to face trial on 13 counts set out in a superseding indictment that was filed in the United States District Court for the Eastern District of Virginia on 16 February 2012.¹ These counts allege conspiracy to commit racketeering (count 1); conspiracy to commit copyright infringement (count 2); conspiracy to commit money laundering (count 3); criminal copyright infringement by distributing a copyright work being prepared for commercial distribution on a computer network and aiding and abetting of criminal copyright infringement (count 4); criminal copyright infringement by electronic means and aiding and abetting of criminal copyright infringement (counts 5 to 8); and fraud by wire and aiding and abetting fraud by wire (counts 9 to 13).

[3] The appellants have mounted a comprehensive and determined defence to extradition and this has been met with an equally determined response from the United States. The appellants filed a number of interlocutory applications in the District Court leading to appeals and applications for judicial review in the High Court and further appeals to the Court of Appeal and the Supreme Court. By the time the eligibility hearing commenced, nine judgments had been delivered by this Court on issues arising out of the extradition proceedings,² seven by the Court of Appeal³ and

¹ This indictment superseded the original indictment returned by the Federal Grand Jury on 5 January 2012.

² *Dotcom v United States of America* [2012] NZHC 75; *United States of America v Dotcom* [2012] NZHC 328; *Dotcom v Attorney-General* [2012] NZHC 1494; *United States of America v Dotcom* [2012] NZHC 2076; *Dotcom v Attorney-General* [2012] NZHC 3268; *Dotcom v Attorney-General* [2013] NZHC 1269; *Dotcom v Attorney-General* [2014] NZHC 1505; *Dotcom v United States of America* [2014] NZHC 2550; *Ortmann v District Court North Shore* [2015] NZHC 901.

³ *United States of America v Dotcom* [2013] NZCA 38, [2013] 2 NZLR 139; *Attorney-General v Dotcom* [2013] NZCA 43, [2013] 2 NZLR 213; *Attorney-General v Dotcom* [2013] NZCA 488; *Attorney-General v Dotcom* [2014] NZCA 19, [2014] 2 NZLR 629; *Attorney-General v Dotcom*

two by the Supreme Court.⁴ This does not take into account numerous judgments issued in related proceedings concerning the restraint and forfeiture of the appellants' assets. As a result of these interlocutory processes, the eligibility hearing in the District Court had to be rescheduled nine times before it finally commenced on 21 September 2015. That hearing took three months.

P [4] In a judgment delivered on 23 December 2015 in the North Shore District Court, Judge Dawson found that the appellants were eligible for extradition pursuant to s 24 of the Extradition Act 1999 on all counts in the superseding indictment.⁵ The appellants appeal against this judgment claiming that the Judge made errors of law in virtually every aspect of his eligibility finding. The United States also appeals against several aspects of the judgment.

[5] The appellants also appeal against the District Court's decision to dismiss three applications which they brought seeking a permanent stay of the extradition proceedings for alleged abuse of process.

[6] These are not general appeals. The appeals are brought pursuant to the former s 68 of the Extradition Act, prior to its amendment by s 413 of the Criminal Procedure Act 2011, and are restricted to questions of law. These questions of law are settled by the District Court.

[7] Additionally, the appellants apply for judicial review of the eligibility determinations and the District Court's decisions dismissing the stay applications. The appellants contend that each of these decisions was the product of procedural unfairness, breaches of natural justice, errors of law and unreasonableness. The appellants also argue that the decisions were tainted by bias and pre-determination.

[8] There is significant overlap between the case stated appeals brought by the appellants and their applications for judicial review. Every error of law relied on for

[2014] NZCA 444; *Attorney-General v Dotcom* [2015] NZCA 309; *Ortmann v the District Court at North Shore* [2015] NZCA 443.

⁴ *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 [Disclosure]; *Dotcom v Attorney-General* [2014] NZSC 199, [2014] 1 NZLR 745 [Warrants].

⁵ *Ortmann v the United States of America* DC North Shore CRI-2015-092-001647, 23 December 2015.

the purposes of the judicial review proceeding is replicated in the case stated appeals. This is in accordance with a judgment given by Asher J in this proceeding on 24 March 2016 directing that all aspects of the District Court judgment, including the procedural rulings that led to it, should be dealt with in the context of the appeals, rather than separately by way of judicial review.⁶ The only issue raised in the applications for judicial review that is not also dealt with in the case stated appeals is the allegation of bias and pre-determination. I will therefore deal with that issue separately, at the end.

[9] This judgment is unavoidably lengthy and has taken some time to prepare because the Court has been required to answer hundreds of questions of law that have been stated in the various appeals as well as consider the applications for judicial review.⁷ The Court has received some 20,000 documents and hundreds of authorities and has had to consider over 3,000 pages of submissions.

[10] Because almost every aspect of the District Court judgment and the procedural steps that led to it are challenged, a basic understanding of the relevant procedural and factual history is needed to comprehend the many issues requiring determination. It is therefore necessary to start by briefly setting out some of the history.

Background

The Mega companies

[11] In 2005, Mr Dotcom developed a business under the name “Megaupload”. This business enabled users to upload files for storage in the cloud on one of the many servers leased by Megaupload. The user would be provided with a unique link to the file, known as a uniform resource locator. The user could then provide the link to others enabling them to access the file.

[12] The business grew rapidly. By January 2012, Megaupload claimed to have over 60 million registered users. It was said to be the thirteenth most frequently visited site on the Internet attracting an average of 50 million visits daily and more than one billion

⁶ *Ortman v Ors v United States of America* [2016] NZHC 522.

⁷ Over questions of law are raised in the case stated appeals.