(Ortmann v The United States Of America, 2018)

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA302/2015
CA127/2017
CA128/2017
CA493/2017
CA494/2017
CA495/2017
CA511/2017
[2018] NZCA 233

BETWEEN	MATHIAS ORTMANN First Appellant
	BRAM VAN DER KOLK Second Appellant
	FINN HABIB BATATO Third Appellant
	KIM DOTCOM Fourth Appellant
AND	UNITED STATES OF AMERICA First Respondent
	DISTRICT COURT AT NORTH SHORE Second Respondent

Hearing:	12–15 and 19–23 February 2018 (further material received 20 April 2018
Court:	Kós P, French and Miller JJ
Counsel:	G M Illingworth QC, AK Hyde and PJK Spring for Messrs Ortmann and van der Kolk S S Masoud-Ansari for Mr Batato R M Mansfield and S L Cogan for Mr Dotcom K Raftery QC, M J Ruffin, FRJ Sinclair and Z A Fuhr for the United States of America No appearance for District Court at North Shore
Judgment:	5 July 2018 at 10 am

5th

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A INTRODUCTION

[1] The United States wishes to extradite the four appellants to face trial for criminal infringement of copyright in that country. Through a business known as Megaupload they are said to have breached, on a massive scale, copyright in commercially valuable property such as movies, games and music.

[2] In 2015 the United States secured in the North Shore District Court a finding that the appellants are eligible for extradition.[1] That Court has completed its inquiry but has yet to report to the Minister of Justice, whose decision it ultimately is to surrender them. The District Court also dismissed applications for a stay of proceedings, which had been brought on the ground that the United States had deprived the appellants of the capacity to fund their defence and otherwise abused the extradition process.

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[3] The appellants brought a wide-ranging appeal against the District Court decision on questions of law. They also sought judicial review. They failed before Gilbert J.[2] They now bring this second appeal on two questions of law, by leave of the Judge.[3] They also seek special leave to appeal a large number of additional

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1 *United States of America v Dotcom* DC North Shore CRI-2012-092-1647, 23 December 2015 [DC judgment].

2 *Ortmann v United States of America* [2017] NZHC 189 [HC judgment].

3 *Ortmann v United States of America* [2017] NZHC 1809 [HC leave judgment]. CA127/2017 for Messrs Ortmann, van der Kolk, and Batato CA128/2017 for Mr Dotcom.

[17] Megaupload also allowed users to embed videos directly in third-party websites if users provided those sites with URL links to the video files. This is said to have made it easier for users to watch videos on third-party websites. This practice is said to be inconsistent with the notion that Megaupload was a mere "cyberlocker" or file storage service.

The United States charges

[18] The charges are found in a superseding indictment issued by a grand jury on 6 February 2012. They are brought under federal law in the United States District Court for the Eastern District of Virginia. The indictment contains 13 charges, all brought against the four appellants and others. Each is said to have been actively involved in the business: Mr Dotcom was the CEO and chief innovation officer (through other entities he also owned 68 per cent of Megaupload and all of Megavideo), Mr Ortmann was the chief technical officer (also owning 25 per cent of Megaupload) Mr van der Kolk was the chief programmer (also owning 2.5 per cent of Megaupload), and Mr Batato was the chief marketing and sales officer, responsible for generating advertising.

[19] The charges allege:

(a) conspiracy to commit racketeering (count 1);

(b) conspiracy to infringe copyright on a commercial scale (count 2);

(c) conspiracy to commit money laundering (count 3);

(d) using the proceeds of criminal copyright infringement, wilful infringement of copyright by distributing a specified work, the movie *Taken* (count 4);

(e) wilful infringement of copyright by reproducing more than 10 copies of works worth more than $2,500 over a series of 180-day periods (counts 5–8); and

(f) wire fraud by devising a scheme to obtain money by deceiving copyright owners into believing that take-down notices had been complied with (counts 9–13), each alleging a separate instance between 23 November 2010 and 10 August 2011.

[20] Each count must be considered separately by the extradition court. Under the doctrine of specialty, which is reflected in the Extradition Act and the Treaty on extradition between New Zealand and the United States of America (the New Zealand – United States Treaty or the Treaty),[11] the United States may charge an extradited person with only those crimes for which extradition was granted.[12] However, in company with Gilbert J we begin with count 2, which best encapsulates the claim that the appellants are criminally responsible for the behaviour of Megaupload's users. Counts 4–8 allege specific instances of infringement and counts 1, 3 and 9–13 address behaviour that gave effect to the conspiracy, framing it as instances of other specific offences such as racketeering or wire fraud.

[21] We address the counts in detail below, but for present purposes it suffices to consider count 2. Count 2 charges the appellants with conspiring with one another to distribute pirated works to the public over a computer network, for money. They are accused not merely of having joined the conspiracy with a common design of committing an offence but also of having put it into effect in numerous ways which are particularised at length.[13] At its heart the conspiracy rests upon the claim that Megaupload was designed to encourage and profit from unlawful infringement while sheltering behind a pretence that it was a mere storage provider, or as one of the appellants put it, "a dumb pipe".

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[11] Section 30(5) of the Extradition Act 1999 allows the Minister to extradite only to countries that accept the doctrine of speciality. An extradition court must specify the offences for which the person is eligible (s 26) and only with their consent may they be extradited to face others (s 29). See also Treaty on extradition between New Zealand and the United States of America (signed 12 January 1970, entered into force 8 December 1970), art XIII [New Zealand – United States Treaty].

[12] M Cherif Bassiouni *International Extradition: United States Law and Practice* (6th ed, Oxford University Press, New York, 2014) at 538.

[13] Under New Zealand law it is sufficient for the conspirators to have a common design of committing an offence: *R v Gemmell* [1985] 2 NZLR 740 (CA).

relied upon. So we must survey the legislation and examine its antecedents in extradition law.

[27] We begin with the Extradition Act's provisions, so far as relevant to this case. The long title records its purpose: "to consolidate and amend the law relating to the extradition of persons to and from New Zealand". Consolidation refers to the fact that until 1999 New Zealand's extradition law was found in the Extradition Act 1965 (1965 Act) and the Fugitive Offenders Act 1870 (Imp). The 1999 Act's object, recorded in s 12, is to provide for the reciprocal extradition of accused or convicted persons and, in particular, to enable New Zealand to honour its obligations under extradition treaties. The object reflects three salient features of extradition: it is a reciprocal process between states and of mutual benefit to them, it is governed partly by treaty, and it affects citizens and non-citizens alike.

[28] A person is extraditable if accused of having committed an "extradition offence" against the law of the requesting "extradition country". Extradition countries are classified according to which of the Extradition Act's processes applies to them. The United States falls into pt 3, which covers Commonwealth states and those with which New Zealand has entered treaties that have been made the subject of an Order in Council.[18]

[29] It is necessary to set out the definition of 'extradition offence' in full:

> **4 Meaning of "extradition offence"**
>
> (1) In this Act, **extradition offence** means, subject to an extradition treaty,—
>
> (a) in relation to an extradition country, an offence punishable under the law of the extradition country for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty, and which satisfies the condition in subsection (2);
>
> (b) in relation to a request by New Zealand, an offence punishable under the law of New Zealand for which the maximum

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[18] Extradition Act 1999, s 13(b); and Extradition (United States of America) Order 1970, cl 2. The Order attaches the extradition treaty as a schedule to the order, and is conclusive evidence of the terms of that treaty: Extradition Act 1999, s 81; and Extradition (United States of America) Order, sch 1.

New Zealand agencies acting on behalf of the United States, which justifies a permanent stay.

The circumstances

[288] The misconduct relied on primarily concerns events leading up to the arrest of the appellants in 2012 including the unlawful interceptions of communications by the Government Communications Security Bureau, the failure to disclose to the District Court when applying for a provisional arrest warrant under s 20 of the Extradition Act that the information had been collected illegally, the military-style raid on Mr Dotcom's home as well as unreasonable search and seizure.[331]

[289] Mr Dotcom also alleged the prosecution was commenced against him in the United States for political reasons and that New Zealand granted him permanent residence so as to streamline his extradition.

[290] The appellants filed a joint application for a stay raising alleged misconduct on 30 October 2014. The joint application was amended on 21 August 2015. Then on 16 September 2015, Mr Dotcom filed his own separate stay application.

[291] The United States sought an order to strike out the applications. The strike-out application was heard prior to the commencement of the extradition hearing. Judge Dawson held the alleged misconduct could not have any bearing on the fairness of the extradition hearing and so was outside the scope of the stay jurisdiction of an extradition court. He therefore struck out the applications.[332] That decision was upheld by Gilbert J in the High Court.[333] As with the funding stay application, the Judge declined leave to appeal to this Court on this issue.[334]

Application for leave to appeal

[292] In seeking special leave to appeal this decision, the appellants argued:

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331 Allegations about denial of access to funding also feature in the misconduct stay application. We have already addressed these in the previous section.

332 The two stay applications were dealt with together: see below at [315]–[317].

333 HC judgment, above n 2, at [553].

334 HC leave judgment, above n 3, at [45]–[48].

L SUMMARY AND DISPOSITION

Summary of conclusions

[322] We are satisfied that New Zealand law permits extradition for copyright infringement in the circumstances of this case. That is so although we have held, contrary to previous authority, that double criminality is required in extradition between New Zealand and the United States. The appellants are accused of conduct that, if proved, would establish extradition offences in New Zealand law.

[323] Parliament has made a policy decision to protect copyright owners, conferring upon them the exclusive right to copy their works. A criminal offence is committed by anyone who knowingly possesses an infringing digital copy of a protected work in the course of business with a view to committing any act, such as online dissemination, that infringes the copyright.

[324] That Copyright Act offence qualifies for extradition between New Zealand and the United States. So do certain Crimes Act offences, such as obtaining money by dishonestly accessing a computer system, and dishonestly taking a digital file with intent to obtain money, that the appellants' conduct — if proved — would establish were they to be tried in New Zealand. All of the non-Treaty pathways to extradition relied upon by the United States are open.

[325] The ROC is both admissible and sufficient to establish the appellants' eligibility for extradition on the facts. An extradition hearing is not a trial. It is held to decide whether there is sufficient evidence to commit a person for trial on a qualifying offence. The courts below found that there was sufficient evidence for committal in this case. That conclusion was manifestly correct. The ROC discloses a clear prima facie case that the appellants conspired to, and did, breach copyright wilfully and on a large scale, for their commercial gain. We refer by way of illustration to the summaries above at [237] and at [310]–[337] of the High Court judgment. It follows that the appellants were correctly found eligible for extradition to face trial in the United States on all counts in the superseding indictment.