IN THE COURT OF APPEAL OF NEW ZEALAND

CA420/2013
[2014] NZCA 19

BETWEEN	HER MAJESTY'S ATTORNEY-GENERAL Appellant
AND	KIM DOTCOM First Respondent
AND	FINN BATATO Second Respondent
AND	MATHIAS ORTMANN Third Respondent
AND	BRAM VAN DER KOLK Fourth Respondent

Hearing:	28 November 2013
Court:	Ellen France, Randerson and White JJ
Counsel:	D J Boldt, F Sinclair and M J Cooke for Appellant P J Davison QC, W Akel and H D L Steele for First Respondent G J Foley and L Stringer for Second, Third and Fourth Respondents
Judgment:	19 February 2014 at 10.00 am

JUDGMENT OF THE COURT

A The appeal is allowed in respect of the declaration as to the invalidity of the search warrants, but dismissed in respect of the declaration as to the unauthorised removal of the clones from New Zealand.

B The order made in the sealed judgment of the High Court at 1 declaring the search warrants invalid is set aside.

C **The orders made in the sealed judgment of the High Court at 3.1 and 3.2.1 are confirmed.**

D **Leave is reserved to any of the parties to apply to this Court for any further relief that may be necessary in respect of the remaining orders in the sealed judgment of the High Court.**

E **The respondents are to pay 60 per cent of the costs of the appellant for a standard appeal on a band A basis. We certify for two (not three) counsel. The liability of the respondents for costs is joint and several.**

F **Leave is reserved for the parties to apply to the High Court for costs in that Court in light of this judgment.**

REASONS OF THE COURT

(Given by White J)

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Introduction

[1] On 20 January 2012 the police executed search warrants at the properties of the first and fourth respondents, Messrs Kim Dotcom and Bram van der Kolk. Acting under the warrants, which had been obtained the previous day from a District Court Judge, the police seized more than 135 electronic items, including laptops, computers, portable hard drives, flash storage devices and servers, containing an estimated 150 terabytes of data.

[2] The search warrants were obtained under the Mutual Assistance in Criminal Matters Act 1992 (the MACMA) at the request of the Department of Justice of the United States of America which is seeking the extradition of the four respondents to face charges in the United States District Court for the Eastern District of Virginia of criminal copyright offending and money laundering involving substantial sums of money.

[3] The police also obtained warrants for the arrest of the four respondents and they were arrested at the same time. The second and third respondents were guests of Mr Dotcom when they were arrested.

[4] Following the seizure of the items under the search warrants, the Solicitor-General, acting on behalf of the Attorney-General, directed under s 49 of MACMA that the items "remain in the custody and control of the Commissioner of Police until further direction from [the Crown Law] Office".

[5] Without further direction from the Crown Law Office, the Commissioner of Police permitted the United States Federal Bureau of Investigation (the FBI) to make forensic copies (clones) of some of the electronic items seized during the searches and to remove one set of the clones to the United States.

[6] In High Court judicial review proceedings, the four respondents successfully challenged the validity of the search warrants and the removal of the clones from

New Zealand.[1] Consequential orders were also made in respect of items not yet cloned as well as the items already cloned.[2]

[7] The respondents did not challenge the validity of the decision of the Commissioner of Police to permit the FBI to make the clones of the items seized.

[8] The Attorney-General appeals against the declarations of invalidity in respect of the search warrants and the unauthorised removal of the clones from New Zealand as well as two aspects of the consequential orders.

[9] This appeal is concerned only with these issues.[3]

The validity of the search warrants

The search warrants

[10] The search warrants issued by the District Court under s 44 of the MACMA are set out in full in the first High Court judgment.[4] In authorising any constable to enter and search the properties of Messrs Dotcom and van der Kolk, District Court Judge McNaughton stated in the warrants that he was satisfied that there was reasonable ground for believing that things in "Appendix A" to the warrants were there:

> (upon or in respect of which an offence of Breach of Copy Right and Money Laundering has been or is suspected of having been committed)
>
> (or which there is reasonable ground to believe will be evidence as to the commission of an offence of Breach of Copy Right and Money Laundering)

[11] Appendix A to the warrants read:

> All evidence, fruits, and instrumentalities of the crimes being investigated including, but not limited to, the following:

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1 *Dotcom v Attorney-General* [2012] NZHC 1494, [2012] 3 NZLR 115 [first High Court judgment] and *Dotcom v Attorney-General* [2013] NZHC 1269 [second High Court judgment].

2 Second High Court judgment, above n 1, at [65].

3 Compare *Attorney-General v Dotcom* [2013] NZCA 43, [2013] 2 NZLR 213 at [10]–[21]. The reserved decision of the Supreme Court on appeal from this decision is currently awaited.

4 First High Court judgment, above n 1, at [18]–[19].

- Indicia of occupancy or residence in, and/or ownership of, the property;

- All documents and things in whatever form relating to the reproduction and distribution of copyrighted works, including, but not limited to, motion pictures, television programs, musical recordings, electronic books, images, video games, and other computer software;

- All records and things in whatever form, including communications, relating to the activities of the Mega Conspiracy, including, but not limited to, Megaupload, Megavideo, and Megastuff Limited;

- All bank records, deposit slips, withdrawal slips, cheques, money orders, wire transfer records, invoices, purchase orders, ledgers, and receipts;

- All documents that reference shipments, imports, exports, customs or seizures;

- All digital devices, including electronic devices capable of storing and/or processing data in digital form, including, but not limited to;
    - Central processing units;
    - Rack-mounted, desktop, laptop, or notebook computers;
    - Web servers;
    - Personal digital assistants;
    - Wireless communication devices, such as telephone paging devices;
    - Beepers;
    - Mobile telephones;
    - Peripheral input/output devices, such as keyboards, printers, scanners, plotters, monitors, and drives intended for removable media;
    - Related communication devices, such as modems, routers, cables, and connections;
    - Storage media, including external hard drives, universal serial bus ("USB") drives, and compact discs;
    - Security devices.

The High Court judgments

[12] In the first High Court judgment, the Chief High Court Judge, Winkelmann J, accepted the submissions for the four respondents that the search warrants were invalid because:[5]

(a) they were general warrants that did not adequately describe the offences to which they related; and

(b) they authorised the seizure of such very broad categories of items that unauthorised irrelevant material would inevitably be captured.

[13] Winkelmann J was also critical of the District Court Judge for issuing the warrants without conditions. She said:

> [82] To achieve an appropriate balance between the investigative needs of the FBI and the right of the plaintiffs to be free from unreasonable search and seizure of their property and correspondence, it may well have been appropriate to impose conditions. The failure to do so meant that the subjects of the warrants were left unsure of their rights in relation to the material taken offsite, and also risked irrelevant material being released to the FBI, beyond the jurisdiction of the New Zealand Courts to order its return.

[14] In the absence of any evidence of significant volumes of privileged material, the Judge considered that the conditions did not need to be as onerous as those suggested by this Court in *A Firm of Solicitors v District Court at Auckland*.[6] Nor did she consider that conditions were needed to keep the content of the hard drives from the FBI.[7] Instead she expressed the views that:[8]

> The conditions should have provided for the cloning exercise and extraction of relevant material, what was to be done with irrelevant material, and whether the plaintiffs were to have returned to them the original hard drives returned, [sic] or clones ....
>
> ... if the warrants had been adequately specific as to offence and scope of search, it may still have been appropriate for the issuing Judge to impose conditions to address the offsite sorting process that

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5 At [144(a)] and [144(b)].

6 At [84]. See *A Firm of Solicitors v District Court at Auckland* [2006] 1 NZLR 586 (CA) at [108].

7 At [85].

8 At [84] and [86].

> was inevitable in this case. The conditions could have provided for the cloning of hard drives, the extraction of relevant material and the return to the plaintiffs of the original hard drives, or their clones.

[15] In the second High Court judgment, Winkelmann J rejected the new submission for the Attorney-General that the warrants should be saved by s 204 of the Summary Proceedings Act 1957 which provided at the relevant time:[9]

> **204 Proceedings not to be questioned for want of form**
>
> No information, complaint, summons, conviction, sentence, order, bond, warrant, or other document, and no process or proceeding shall be quashed, set aside, or held invalid by any District Court or by any other Court by reason only of any defect, irregularity, omission, or want of form unless the Court is satisfied that there has been a miscarriage of justice.

[16] The Judge noted that ss 44 and 46 of the MACMA linked the power to search and seize by a warrant issued under the MACMA to the particular offence or offences described in the warrant.[10]

[17] Affirming her first judgment as to the first ground of invalidity, Winkelmann J identified three key deficiencies in the warrants:[11]

> (a) The warrants were defective in form as they did not stipulate the country under whose laws the offence is alleged to have been committed.
>
> (b) The warrants did not identify an offence as required by the MACMA; they merely referred to the nebulous concept of "Breach of Copy Right." Nor could the offence or offences to which they related reasonably be inferred from a reading of the warrant as a whole.
>
> (c) The warrants were not issued in respect of a particular offence or offences as the MACMA requires.

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9 The validity of search warrants issued under the Mutual Assistance in Criminal Matters Act 1992 [MACMA] is governed now by s 107 of the Search and Surveillance Act 2012, and s 204 of the Summary Proceedings Act 1957 now relates only to warrants and other documents issued under that Act: Summary Proceedings Amendment Act (No 2) 2011, s 7(2), which took effect from 1 July 2013: Summary Proceedings Amendment Act (No 2) 2011 Commencement Order 2013.

10 Second High Court judgment, above n 1, at [34].

11 At [35].

[18] In respect of the second ground of invalidity, the Judge identified two aspects of deficiency:[12]

(a) the District Court Judge could not have had reasonable grounds to believe that all of the items listed in Appendix A were relevant to the offence or offences; and

(b) the MACMA only authorises the issue of warrants where the authority to search and seize is limited to the particular offence or offences.

[19] The Judge held that, apart from the defect in the form of the warrant in failing to stipulate that the alleged offences had been committed in the United States of America, the other defects went to the heart of the warrants and could not be properly categorised as minor, as technical, or mere defects in expression.[13] She pointed out that:[14]

> A warrant is an important document. It determines the precise parameters and scope of the Police's authority to intrude upon the privacy and property rights of individuals. It is axiomatic that it should contain a simple statement of the extent of the search and seizure authorised.

[20] The Judge distinguished the decision of this Court in *Rural Timber Ltd v Hughes*,[15] relied on by the Crown, and concluded:[16]

> If I am incorrect in the foregoing analysis and s 204 is capable of curing the relevant deficiencies, I am nevertheless of the view that a miscarriage of justice did result. A miscarriage will arise if the defect has caused significant prejudice to the person affected. In this case, while the material contained in the arrest warrants clarified the nature of the "Breach of Copy Right" offending by linking it to specific offences and making clear that it involved the distribution of works on a computer network, the arrest warrants also potentially added to confusion. The arrest warrants stipulated offences that the search warrants were not sought or issued for, namely conspiracy to commit racketeering and conspiracy to commit copyright infringement. More fundamentally this additional information could not cure the defect that the warrants authorised the seizure of items unlimited by the notion of relevance to each offence. As a consequence, the Police regarded themselves as authorised to carry away and keep a wide category of items without undertaking analysis of whether the items were "things" falling within

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12 At [36].
13 At [37].
14 At [38].
15 *Rural Timber Ltd v Hughes* [1989] 3 NZLR 178 (CA).
16 Second High Court judgment, above n 1, at [43] (footnote omitted).

s 44(1). They continue to assert that they are so authorised. This has given rise to a miscarriage of justice.

Submissions

[21] For the Attorney-General, Mr Boldt acknowledges that the search warrants were far from perfect, but submits that they are saved by s 204 of the Summary Proceedings Act when interpreted and applied in accordance with the leading authorities which require the Court to adopt a common sense approach taking into account the particular circumstances of the case.[17] When that is done here, especially taking into account the contents of the arrest warrants and the evidence relating to the circumstances of the execution of the search warrants, including the arrest of the four respondents, it is clear that there was no miscarriage of justice.

[22] For Mr Dotcom, Mr Davison QC supports the High Court judgments. He submits that the search warrants were invalid and not able to be saved by s 204 of the Summary Proceedings Act. In evaluating the warrants, the Court should not overlook the nature of the police raid on Mr Dotcom's property which involved "an overwhelming force of armed police officers transported by helicopters and vehicles ... in the early hours of the morning". Mr Davison also submits that when issuing the warrants the District Court Judge ought to have imposed conditions addressing where and when the items seized would be assessed for relevance and making provision for the return of copies of the information and items taken. This was particularly important when an invasion of the right to privacy in computer searches was involved.[18]

[23] For the other respondents, Mr Foley adopts Mr Davison's submissions.

Principles

[24] The starting point is to recognise that issues relating to the validity of search warrants arise in the context of the exercise of statutory powers designed to achieve a balance between well-established rights of privacy, personal integrity, private

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[17] *Rural Timber Ltd v Hughes*, above n 15, at 184–185; *R v Sanders* [1994] 3 NZLR 450 (CA) at 454 and 467–468; *Andrews v R* [2010] NZCA 467 at [38]–[48] and *Gill v Attorney-General* [2010] NZCA 468, [2011] 1 NZLR 433.

[18] *R v Vu* 2013 SCC 60.

property, the rule of law and law enforcement values.[19] In New Zealand the rights of the individual are protected by s 21 of the New Zealand Bill of Rights Act 1990 (NZBORA) which provides:

> **21 Unreasonable search and seizure**
>
> Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

[25] Reflecting the focus on the protection from "unreasonable search and seizure" and the ability to impose justified limits on the protection,[20] Parliament, for law enforcement purposes, has enacted over the years a wide range of statutory provisions conferring powers relating to search and seizure, including those in the Summary Proceedings Act, the Crimes Act 1961, the Misuse of Drugs Act 1975, the Arms Act 1983 and the MACMA. These provisions have now been substantially replaced by the new Search and Surveillance Act 2012 which is designed to facilitate the monitoring of compliance with the law and the investigation and prosecution of offences in a manner that is consistent with human rights values.[21]

[26] The rights of the individual are protected from "unreasonable search or seizure" not only by the need for law enforcement agencies to comply with the requirements of the relevant statutory powers but also by the involvement of the Courts in considering issues relating to the validity of search warrants in challenges to the admissibility of evidence obtained under them and, on occasion, in judicial review proceedings.[22] Both the Supreme Court and this Court have addressed the question of the application of s 21 of NZBORA and s 30 of the Evidence Act 2006 in the context of the exercise of powers of search and surveillance.[23]

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19 Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at ch 2.

20 New Zealand Bill of Rights Act 1990, s 5 and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at ch 18.

21 Search and Surveillance Act 2012, s 5 and Warren Young, Neville Trendle and Richard Mahoney *Search and Surveillance Act and Analysis* (Thomson Reuters, Wellington 2012) at [SS5.01].

22 Evidence Act 2006, s 30; *Gill v Attorney-General*, above n 17, at [21]–[29] and Young, Trendle and Mahoney, above n 21, at [SS 107.03]–[SS 107.04].

23 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 and *Lorigan v R* [2012] NZCA 264.

[27] Most of the relevant statutes, including the MACMA, required search warrants to be obtained on application to an independent officer acting judicially.[24] The officer had to be satisfied that there were reasonable grounds for authorising the issue of the warrant. Warrants were to be issued in a prescribed form which had to identify what might be searched and seized and the relevant offences. At the same time, in terms of s 204 of the Summary Proceedings Act,[25] courts were precluded from quashing, setting aside or holding invalid warrants "by reason only of any defect, irregularity, omission, or want of form" unless satisfied that there had been "a miscarriage of justice".

[28] Appellate decisions interpreting and applying these statutory provisions have established that:

(a) an application for a search warrant should make proper disclosure;[26]

(b) a warrant must be issued in respect of a particular offence and should be as specific as the circumstances allow and may be invalid for lack of specificity;[27]

(c) a warrant containing a misdescription of the offence, but which is not otherwise misleading, may be saved by s 204 of the Summary Proceedings Act;[28]

(d) a warrant that is in such general terms that it fails to identify with sufficient particularity the offence to which the search relates will be a nullity and not able to be saved by s 204;[29]

(e) a warrant with defects that cannot be regarded as so radical as to

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24 Summary Proceedings Act, s 198, Misuse of Drugs Act 1975, s 18; MACMA, s 44; and Law Commission, above n 19, at 22.

25 Above at [15].

26 *Solicitor-General v Schroder* (1996) 3 HRNZ 157 (CA); *Tranz Rail Ltd v District Court at Wellington* [2002] 3 NZLR 780 (CA); and *A Firm of Solicitors v District Court at Auckland*, above n 6.

27 *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728 (CA); *R v Sanders*, above n 17; *Trans Rail Ltd v District Court at Wellington*, above n 26, at [41]; and *A Firm of Solicitors v District Court at Auckland*, above n 6, at [75]–[76].

28 *Auckland Medical Aid Trust v Taylor*, above n 27.

29 Ibid.

require the warrant to be treated as a nullity may, in the absence of a miscarriage of justice, be saved by s 204;[30]

(f) the court's approach should not be overly technical or "nit-picking";[31] and

(g) a question of degree is involved, "answerable only by trying to apply a commonsense judgment" against the statutory background and with reference to the particular facts.[32]

[29] The question whether a warrant is saved by s 204 requires a careful examination of the terms of the particular warrant in the context of the facts of the particular case. This is shown by contrasting the decisions of this Court in *Medical Aid Trust v Taylor*[33] and *Gill v Attorney-General*.[34]

[30] In *Medical Aid Trust*, where there was evidence of only one specific case of abortion, the warrant referred to "an offence of abortion" and authorised the seizure of "anything which there is reasonable ground to believe will be evidence as to the commission of the offence". In other words, the warrant authorised a search of all patient records regardless of whether there was any evidence of offending beyond the particular case identified. This Court held that the warrant was not saved by s 204 because the insufficiently specific descriptions of the offence and what might be seized led to a miscarriage of justice.[35]

[31] In *Gill*, on the other hand, where there was evidence of fraudulent claims for public health funding by Dr Gill in respect of over 9,000 patients, a broad description of the offences against ss 228(b) and 240(1)(a) of the Crimes Act 1961 and reference in the search warrant to "patient consultation records, enrolment forms, computer hard drives and other business records of the medical practice" was held to be unobjectionable.

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30 *Rural Timber Ltd v Hughes*, above n 15, at 184.
31 *R v T* [2008] NZCA 99; *R v Kissling* [2008] NZCA 559, [2009] 1 NZLR 641 at [36]; and *Gill v Attorney-General*, above n 17, at [32]–[36].
32 *Rural Timber Ltd v Hughes*, above n 15, at 184.
33 *Auckland Medical Aid Trust v Taylor*, above n 27.
34 *Gill v Attorney-General*, above n 17.
35 At 737–738 per McCarthy P, at 742 per Richmond J and at 748 per McMullin J.

[32] In *A Firm of Solicitors v District Court at Auckland*[36] the warrant issued under the Serious Fraud Office (Prescribed Forms) Regulations 1990 authorised a search for:

> any document or other thing that you believe on reasonable grounds may be relevant to the investigation or may be evidence of any offence involving serious or complex fraud.

This Court held that the warrant was invalid for lack of specificity because the Serious Fraud Office could have narrowed the ambit of the search. Delivering the judgment of the Court, O'Regan J said:

> [78] We are satisfied that, in the circumstances of this case, there was no reason not to be specific about the documents which were sought pursuant to the search. The SFO knew the details of the purported transaction and the names of the parties to it, already had a copy of the letter written by a partner in the firm and already had a copy of the allegedly fraudulent agreement for sale and purchase which was suspected to have been prepared on the firm's computer system. It was therefore in a position to exclude from the ambit of the search the vast bulk of the documents and electronic data held by the firm for its own purposes or on behalf of its other clients.

[33] Again the Court emphasises that the focus is on the circumstances of the particular case. When an applicant for a search warrant already has detailed knowledge of the relevant documents, there may be no justification for a warrant which authorises a search for just "any document".

[34] The decision of this Court in *Rural Timber Ltd v Hughes*,[37] however, confirms that an inadequate description of the target offending may be adequately explained by the content of the remainder of the search warrant assessed in a commonsense way in the particular factual circumstances of the case. In *Rural Timber* the warrant described the suspected offence as "conspiring to defraud the Commissioner of Works (Crimes Act 1961, s 257)" and authorised the search for and seizure of 15 items listed in a schedule, namely: hubodometers, waybills, consignment notes/manifests, instructions for delivery, driver's log books or time-sheets, financial records, road user charges application forms, distance licences, driver hours records, vehicle running receipts, vehicle mileage records,

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[36] *A Firm of Solicitors v District Court at Auckland*, above n 6.
[37] *Rural Timber Ltd v Hughes*, above n 15.

tools/implements for tampering with hubodometers, sales records, contracts for cartage, and hire purchase agreements.

[35] In applying s 204, this Court in a judgment delivered by Cooke P said:[38]

> None of the defects can be regarded as so radical as to require the warrant to be treated as a nullity: compare *New Zealand Institute of Agricultural Science Inc v Ellesmere County* [1976] 1 NZLR 630, 636. That is a question of degree, answerable only by trying to apply a commonsense judgment against the statutory background; in a case like the present, one can hardly elaborate further, apart from referring to the particular facts.
>
> The facts which seem to us especially material are these. The suspected offence was described somewhat inadequately in the warrant, in that the precise nature of the alleged conspiracy was not specified and no dates were given. Reading the warrant together with the schedule, however, a reasonable reader would gather that hubodometers, instruments for tampering therewith, road user charges, and distances were involved. A reasonable reader would have little difficulty in gathering that the alleged conspiracy must involve misrepresentation of the distances travelled by the company's vehicles. Moreover, there is evidence, relevant to the question of miscarriage of justice, that the nature of the alleged conspiracy and the general object of the searches was explained both in the briefing of the police and traffic officers who participated in the searches and at the commencement of the searches at Ohingaiti to the company personnel then present.

[36] Adopting a similar approach in the present case, we propose to consider first whether the defects in the search warrants were so radical as to require them to be treated as nullities. The cases demonstrate that this is a question of degree involving a range of considerations. These include the relevant provisions of the authorising statute, the terms of the search warrants and how those terms would be understood by a reasonable reader in the position of the recipients; the nature of the offending alleged; the items authorised to be seized; and the factual context of the case. In this case, an important part of the factual context is the terms of the arrest warrants given to the respondents immediately before the search warrants were executed. This was at least an unusual, if not unique, feature of the case and cannot in our view be sensibly ignored when considering the validity of the warrants in their factual context.

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[38] At 184.

The application of the MACMA

[37] The object of the MACMA is to facilitate the provision and obtaining, by New Zealand, of international assistance in criminal matters.[39] Implementing this object, s 43(1) provides that a foreign country may request the Attorney-General to assist in obtaining an article or thing by search and seizure.[40]

[38] There is no dispute in the present case that in terms of this provision the United States was entitled to request the Attorney-General to assist in the search and seizure of the electronic items in the possession of the respondents.

[39] Under s 43(2) the Attorney-General was then entitled to authorise an application to be made to a District Court Judge for a search warrant in accordance with s 44 if satisfied –

> (a) that the request relates to a criminal matter in that foreign country in respect of an offence punishable by imprisonment for a term of 2 years or more; and
>
> (b) that there are reasonable grounds for believing that an article or thing relevant to the proceedings is located in New Zealand ...

[40] There is no dispute in the present case that the request from the United States Department of Justice to the Attorney-General provided sufficient information to enable the Attorney-General to be satisfied that the requirements of s 43(2) were met. The request from the United States was comprehensive and provided all the necessary background information relating to the criminal offences in the United States, including their maximum penalties, a detailed description of the alleged offending by the respondents through their various companies, including Megaupload, Megavideo and Megastuff Ltd (described generically as the Mega Conspiracy), the substantial sums of money alleged to be involved, the presence in New Zealand of the respondents and the relevant electronic equipment in their possession. The decision of the Solicitor-General, acting on behalf of the Attorney-

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39 MACMA, s 4.

40 The international history of the enactment of the MACMA is referred to in *Bujak v Solicitor-General* [2009] NZSC 42, [2009] 3 NZLR 179 at [13].

General, to authorise the application to the District Court Judge for the search warrants in this case is not challenged in this proceeding.

[41] Under s 44 of the MACMA a District Court Judge who receives an appropriate application for a search warrant may issue a search warrant if satisfied that there are reasonable grounds for believing that there is in or on any place or thing –

> (a) any thing upon or in respect of which any offence under the law of a foreign country punishable by imprisonment for a term of 2 years or more has been, or is suspected of having been, committed; or
>
> (b) any thing which there are reasonable grounds for believing will be evidence as to the commission of any such offence; or
>
> (c) any thing which there are reasonable grounds for believing is intended to be used for the purpose of committing any such offence ...

[42] There is now no dispute in the present case that the application for the search warrants provided Judge McNaughton with reasonable grounds to be satisfied that the search warrants should be issued.[41] The application for the warrants included a copy of the request from the United States Justice Department to the Attorney-General and included four pages outlining the sophisticated nature of fraud alleged by the United States' authorities and identifying Mr Dotcom's property as one of the principal sites from which Megaupload was run. Reference was made to the significant electronic infrastructure associated with the company and housed at Mr Dotcom's property. There is no suggestion on appeal that Judge McNaughton was given inadequate or misleading information.[42] As Mr Boldt submits, the Judge was entitled to conclude from the information provided in the application that computers, servers, wireless communication devices, modems, routers cables and the like would be present and relevant to the alleged offending.[43]

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41 Compare second High Court judgment, above n 1, at [35].

42 In *Attorney-General v Dotcom* [2013] NZCA 488 we rejected a late attempt by the respondents to support the judgment on grounds neither pleaded nor argued in the High Court, namely the alleged non disclosure to the District Court Judge of the manner in which it was intended to execute the warrants, the prior involvement of the Government Communications Security Bureau and the fact that there had been prior surveillance of the subject property.

43 *R v Sanders*, above n 17, at 461 and *Re Church of Scientology and The Queen (No. 6)* (1987) 31 CCC (3d) 449 (ONCA) at 515.

[43] The first specific question in this case is whether the search warrants issued by Judge McNaughton complied with s 45 of the MACMA which provided:

> **45 Form and content of search warrant**
>
> (1) Every warrant issued under section 44 shall be in the prescribed form.
>
> (2) Every warrant issued under section 44 shall be directed to any constable by name, or to any class of constables specified in the warrant, or generally to every constable.
>
> (3) Every warrant issued under section 44 shall be subject to such special conditions (if any) as the District Court Judge may specify in the warrant.
>
> (4) Every warrant issued under section 44 shall contain the following particulars:
>
> (a) the place or thing that may be searched pursuant to the warrant:
>
> (b) the offence or offences in respect of which the warrant is issued:
>
> (c) a description of the articles or things that are authorised to be seized:
>
> (d) the period during which the warrant may be executed, being a period not exceeding 14 days from the date of issue:
>
> (e) any conditions specified by the Judge pursuant to subsection (3).

[44] The relevant "prescribed form" was Form 5 in the Schedule to the Mutual Assistance in Criminal Matters Regulations 1993 which provided:

> Form 5
> Warrant to search and seize article or thing
> relevant to foreign offence
> *Section 44(1), Mutual Assistance in Criminal Matters Act 1992*
>
> No: [*number/date*]
> **To** every constable
> (or **To** [*insert class of constables*])
> (or **To** [*full name*], constable)
> I am satisfied on application in writing made on oath by [*full name*], a constable authorised by the Attorney-General under section 43 of the Mutual Assistance in Criminal Matters Act 1992 to make that application, that there are reasonable grounds for believing that there is in (*or* on) [*describe place or thing that may be searched pursuant to the warrant*] the following article

(*or* thing) [*insert description of the article or thing to be searched for and seized*], being an article or thing—

Upon or in respect of which the offence of [*specify offence*], being an offence under the law of [*country*], and being an offence punishable by imprisonment for a term of 2 years or more, has been (*or* is suspected of having been) committed.

or

Which there are reasonable grounds for believing will be evidence of the commission of the offence of [*specify offence*], being an offence under the law of [*country*], and being an offence punishable by imprisonment for a term of 2 years or more.

or

Which there are reasonable grounds for believing is intended to be used for the purpose of committing the offence of [*specify offence*], being an offence under the law of [*country*], and being an offence punishable by imprisonment for a term of 2 years or more.

This warrant authorises you, at any time by day or night within [*specify the period during which the warrant may be executed, which may not exceed 14 days from the date of issue*] days of the date of the issue of this warrant to enter and search the said [*specify*].

In exercising the authority conferred by this warrant, you may—

(a) use such assistants as may be reasonable in the circumstances for the purpose of the entry and search; and

(b) use such force as is reasonable in the circumstances for the purposes of effecting entry, and for breaking open anything in or on the place searched; and

(c) search for and seize the article (*or* thing) described in this warrant.

This warrant is subject to the following special conditions: [*specify*]

When executing this warrant you are required to comply with section 47 of the Mutual Assistance in Criminal Matters Act 1992.

If you seize any article or thing pursuant to this warrant, you are required to comply with section 48 of the Mutual Assistance in Criminal Matters Act 1992.

Dated at: [*place, date*]

District Court Judge:

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[45] Also relevant is reg 3 which provided:

3 Forms

(1) The forms set out in the Schedule are the forms to be used in respect of the proceedings or matters under the Act to which those forms relate.

(2) Such variations may be made in any prescribed form as the circumstances of any particular case may require.

> (3) Strict compliance with the prescribed forms is not necessary, and substantial compliance, or such compliance as the particular circumstances of the case allow, is sufficient.

[46] There is no dispute in this case that the search warrants issued by Judge McNaughton were not in the prescribed form. The criminal offences in respect of which they were issued were described only in general terms and did not include any reference to the United States of America as required by s 45(4)(b) and the prescribed form. We also agree with Winkelmann J that the descriptions in Appendix A of the categories of items to be seized under the warrants were, on their face, broad.

[47] While we accept that the search warrants were defective in these respects, we do not agree that they were also defective on the ground that Judge McNaughton failed to impose conditions as to the scope of the items that might be seized and the need to return items that were not relevant. The power under s 45(3) to impose "special conditions" is discretionary. It may be exercised for example to specify in detail documents or things to be sought under the warrant, especially when issues of legal professional privilege are likely to arise,[44] but it was not necessary for the Judge to do so in this case. Appendix A to the search warrant was as specific as could reasonably be expected in the circumstances, and no issues of legal professional privilege were contemplated.[45] Neither Winkelmann J nor Mr Davison suggested that the Judge ought to have imposed conditions preventing the FBI from having access to the contents of the computer hard drives. And, as we later find, issues relating to the disposition of items seized was a matter for the Attorney-General under the MACMA.

[48] Winkelmann J did suggest that there "should" or "could" have been conditions relating to the cloning exercise, but we do not consider that the absence of

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[44] *A Firm of Solicitors v District Court at Auckland*, above n 6, at [77]–[79]. The equivalent provision in the Canadian legislation refers expressly to conditions "relating to the time or manner of [the warrant's] execution": Mutual Legal Assistance in Criminal Matters Act RSC 1985 c 30 (4th Supp), s 12(2).

[45] First High Court judgment, above n 1, at [84] and *Gill v Attorney-General*, above n 17, at [68]–[75].

such conditions invalidates the search warrants in this case, especially as s 49 of the MACMA covered subsequent dealings with the things seized.[46]

[49] Furthermore, in our view Judge McNaughton was entitled to rely on the police to execute the warrants lawfully and not to seize anything that was clearly irrelevant. The Judge was also entitled to rely on the police to comply with the provisions in the MACMA requiring a notice to be given to the owner or occupier of the place or thing searched identifying anything seized under the warrant and requiring everything seized to be delivered into the custody of the Commissioner of Police.[47] There is no suggestion in this case that the police failed to comply with these requirements.

[50] In this case Mr Boldt does not rely on the substantial compliance provisions of reg 3(3). At the same time this provision can be treated as a statutory indicator that strict compliance with the prescribed form is not required and that substantial compliance (or such compliance as the particular circumstances of the case allow) is sufficient. To support his submission that s 204 applied, Mr Boldt relies instead on the full terms of the search warrants, the terms of the arrest warrants and the particular circumstances of the execution of the search warrants to establish that the respondents could not have been in any doubt as to the precise nature of the relevant criminal offences in the United States and the nature of the items to be seized under the warrants.

The terms of the search warrants

[51] We have already set out the terms of the search warrants.[48] While they omitted any reference to the United States of America, they did refer to "an offence of Breach of Copy Right and Money Laundering". There is no criminal offence of breach of copyright in New Zealand, but there is such an offence in the United States.

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46 Compare Summary Proceedings Act, s 199, Law Commission Report, above n 19, at [7.23]–[7.28], [7.39]–[7.44] and discussion below at [99]–[111].

47 MACMA, ss 48 and 49.

48 Above at [10]–[11].

[52] Appendix A to the warrants, while in broad terms, does refer expressly to documents and things relating to "the reproduction and distribution of copyrighted works, including, but not limited to, motion pictures, television programs, musical recordings, electronic books, images, video games and other computer software" and to "records and things ... relating to the activities of the Mega Conspiracy, including, but not limited to, Megaupload, Megavideo, and Megastuff Limited". The final bullet point in the Appendix makes it clear that a wide range of "electronic devices" and computer related equipment was included.

[53] In our view a reasonable reader in the position of the recipients of the search warrants would have understood what they related to. This view is reinforced by the fact that Mr Dotcom was a computer expert who would have understood without any difficulty the references in the search warrant to his companies (Megaupload, Megavideo and Megastuff Ltd) and the description of the various categories of electronic items in Appendix A. As Mr Davison submits, Mr Dotcom's "life and soul is on his computer".

[54] The defects in these warrants were therefore not so radical as to require them to be treated as nullities. Unlike the position in *Auckland Medical Aid Trust v Taylor*, here there was no disconnect between what there were reasonable grounds to believe might be at the properties and what the warrant authorised the police to take. In other words, this really was a case of error of expression. The defects were defects in form not in substance.

The terms of the arrest warrants

[55] The arrest warrant for Mr Dotcom issued by District Court Judge McNaughton at the same time as the search warrants read:

> **PROVISIONAL WARRANT FOR ARREST**
> **UNDER EXTRADITION ACT 1999**
> (Sections 20(1), 42, Extradition Act 1999)
>
> **TO**: Every member of the police
>
> On 18 January 2012 the United States of America applied for a provisional warrant under section 20 of the Extradition Act 1999 for the arrest of Kim

DOTCOM, also known as Kim SCHMITZ and Kim VESTOR, currently residing in Auckland.

The information provided in support of the application states that –

(a) Kim DOTCOM is accused of the following offences related to criminal copyright and money laundering:

Count One: Conspiracy to commit racketeering, in violation of Title 18, United States Code, Section 1962(d), which carries a maximum penalty of twenty years of imprisonment.

Count Two: Conspiracy to commit copyright infringement, in violation of Title 18, United States Code, Section 371, which carries a maximum penalty of five years of imprisonment.

Count Three: Conspiracy to commit money laundering, in violation of Title 18, United States Code, Section 1956(h), which carries a maximum penalty of twenty years of imprisonment.

Count Four: Criminal copyright infringement by distributing a work on a computer network, and aiding and abetting of criminal copyright infringement, in violation of Title 18, United States Code, Sections 2 and 2319, and Title 17, United States Code, Section 506, which carries a maximum penalty of five years of imprisonment.

Count Five: Criminal copyright infringement by electronic means, and aiding and abetting of criminal copyright infringement, in violation of Title 18, United States Code, Sections 2 and 2319, and Title 17, United States Code, Section 506, which carries a maximum penalty of five years of imprisonment.

(b) On 5 January 2012 a warrant for the arrest of Kim DOTCOM in relation to these offences was issued by Julie Correa, Deputy Clerk of the United States District Court for the Eastern District of Virginia, pursuant to the authorisation of Magistrate Judge Theresa Buchanan, in accordance with the practice of the Court.

I am satisfied that –

(a) The warrant for the arrest of Kim DOTCOM has been issued in the United States of America by a judicial authority having lawful authority to issue the warrant; and

(b) Kim DOTCOM is in New Zealand; and

(c) There are reasonable grounds to believe that –

(i) Kim DOTCOM is an extraditable person within the meaning of section 3 of the Extradition Act 1999;

(ii) The offences for which Kim DOTCOM is sought are extradition offences within the meaning of section 4 of the Extradition Act 1999;

(c) It is necessary or desirable that a warrant for the arrest of Kim DOTCOM be issued urgently.

I DIRECT YOU TO ARREST Kim DOTCOM and bring him before a District Court as soon as possible to be further dealt with in accordance with the Act.

[56] Similar arrest warrants were issued for the other respondents.

[57] There is no doubt that the arrest warrants did particularise the criminal offences in the United States in respect of which the extradition of the respondents was sought. There is express reference in the warrants to the offences relating to criminal copyright and money laundering, together with the relevant provisions of the United States Code and the maximum penalties for the offences. There are also express references to criminal copyright infringement by distributing work on a computer network (Count Four) and by electronic means (Count Five).

[58] In the second High Court judgment, Winkelmann J rejected the submission for the Attorney-General that the information in the search warrants could be bolstered or clarified by the information in the arrest warrants.[49] She considered that it would be highly undesirable to take "a patch and mend approach" to the significant defects in the search warrants in this case, especially when the District Court Judge did not limit the authority.

[59] We do not agree with Winkelmann J. Following the approach of this Court in *Rural Timber Ltd v Hughes*,[50] we are satisfied that, when reading the arrest and search warrants together, a reasonable reader would have little difficulty in gathering that the offences in the search warrants were those specified in the arrest warrants and that the electronic items in Appendix A related to those offences. Mr Davison also acknowledged in the course of argument that if Mr Dotcom had looked at both warrants he would have understood the nature and scope of the search warrant in which case its defects would have been overcome. Our view is reinforced in this case by the circumstances of the execution of the search warrants.

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49 Second High Court judgment, above n 1, at [21] and [37]–[38] and [43].

50 *Rural Timber Ltd v Hughes*, above n 15, at 184.

The execution of the search warrants

[60] The unchallenged police evidence establishes that when the police raided Mr Dotcom's property on 20 January 2012 he was shown the original arrest warrant and given a copy before being shown the original search warrant and being given a copy of that also. Mr Dotcom read both warrants. The police officer, who gave them to him, explained that the arrest warrant was issued under the Extradition Act 1999 in relation to "a variety of charges including Conspiracy to Commit Racketeering, Money Laundering, and Copyright Infringement, following an investigation by the FBI".

[61] After Mr Dotcom had read the second warrant, the police officer explained to him that it authorised the seizure of evidence relating to "Breach of Copyright and Money Laundering, such as computers, cellphones, electronic storage devices and documents".

[62] It is clear that Mr Dotcom understood from the warrants and the police explanations that allegations of copyright infringement were involved. Mr Dotcom deposed in one of his affidavits filed in support of his application for judicial review that shortly after his arrest:

> As I passed Mona [his wife] and Mathias Ortmann [the third respondent], I expressed my surprise that this operation related to alleged copyright infringement, particularly as I believed we had endeavoured to be fully compliant with all of our obligations.

[63] Mr Dotcom's evidence was confirmed by Mr Ortmann who deposed in his affidavit that after Mr Dotcom had been arrested:

> I believe he said to me something like "it's about copyright infringement, nothing to worry about".

[64] The police evidence establishes that the other respondents were also shown the original arrest and search warrants when they were arrested. Mr Foley referred us to the relevant evidence and confirmed that: Mr Batato was shown a warrant and given an idea of what it contained; Mr Ortmann saw both warrants; and Mr van der Kolk was able to read and understand both documents.

[65] In light of this evidence we have no doubt that Mr Dotcom and the other respondents would have understood that:

(a) The offences referred to in non-specific terms in the search warrants were in fact the five United States offences specified in the arrest warrants; and

(b) The items referred to in general terms in Appendix A in the search warrants were the items relating to those offences, in particular the electronic items referred to in Counts Four and Five.

[66] For these further reasons we are satisfied that in the circumstances of this case the defects in the search warrants were not so radical as to require the warrants to be treated as nullities. Rather, they were defects in form, not substance. It is therefore necessary to consider whether in terms of s 204 of the Summary Proceedings Act the defects in the warrants led to a miscarriage of justice, there being no dispute that s 204, as it was at the relevant time, applied to warrants issued under the MACMA.[51]

A miscarriage of justice?

[67] As already noted,[52] Winkelmann J decided in her second judgment that if s 204 of the Summary Proceedings Act was capable of curing the defects in the search warrants, then there was a miscarriage of justice because:

(a) While the material contained in the arrest warrants clarified the nature of the "Breach of Copy Right" offending by linking it to specific offences and making clear that it involved the distribution of works on a computer network, the arrest warrants also potentially added to the confusion. The arrest warrants stipulated offences that the search warrants were not sought or issued for, namely conspiracy to commit racketeering and conspiracy to commit copyright infringement.

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[51] See above n 9.
[52] Above at [20].

(b) More fundamentally this additional information could not cure the defect that the warrants authorised the seizure of items unlimited by the notion of relevance to each offence.

(c) As a consequence, the Police regarded themselves as authorised to carry away and keep a wide category of items without undertaking analysis of whether the items were "things" falling within s 44(1). They continue to assert that they are so authorised. This has given rise to a miscarriage of justice.

[68] As Mr Boldt submits, however, the Judge has focussed principally on the nature of the defects themselves rather than on the practical consequences for the person whose property or possessions were being searched, which is the correct approach.

[69] As this Court explained in *R v Sanders*:[53]

> If there is a legal defect, but not one which nullifies the application, the final question under s 204 is whether the Court is satisfied that there has been a miscarriage of justice. Three points arise here. First, the onus of proving a miscarriage of justice lies upon its proponent, albeit merely upon the balance of probabilities. Secondly, it must have been the defect in the application which caused the miscarriage of justice. Thirdly, whether it did so could be determined only by examining the events which had actually occurred since the application. In a case like the present one there could be a miscarriage of justice only if the defect had caused significant prejudice to the accused. With respect to the Judge, it could not be enough to say in the abstract that even if the problems in this case could fairly be described as defects, irregularities, omissions or wants of form, as distinct from features which nullified the applications, there had nevertheless been a miscarriage of justice in that the detective unjustifiably obtained search warrants on the basis of the applications made. This is to confuse the defects themselves with the specific consequences to the accused.

[70] Adopting that approach in this case, we are satisfied that the defects in the search warrants have not caused any significant prejudice to the respondents beyond the prejudice caused inevitably by the execution of a search warrant. In this case the practical consequences for the respondents must be assessed in light of the nature of

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53 *R v Sanders*, above n 17, at 462 per Fisher J.

the electronic items that were seized when the warrants were executed. Assessed in this way it is clear that:

(a) No more items were seized than would have been without the defects in the search warrants. Winkelmann J did not find that any specific items were seized that ought not to have been, for instance because they were irrelevant or outside the scope of the warrants.[54] A number of electronic items, which the police considered did not contain relevant evidence, were not seized.

(b) For practical reasons, particularly bearing in mind the estimated 150 terabytes of data,[55] the contents of many of the 135 electronic items seized had to be examined off site at a later time.[56]

(c) Any question of any subsequent prejudice caused by alleged excessive seizure, retention of irrelevant evidence or alleged breach of s 49 of the MACMA were separate downstream matters not caused by the defects in the search warrants.

[71] We do not overlook Mr Davison's submissions based on the recent decision of the Supreme Court of Canada in *R v Vu*[57] where it was held that a search warrant authorising the search of a residence did not authorise the search of a computer found in the residence. A further search warrant would be required in respect of the computer and the data on it. In reaching this conclusion the Supreme Court accepted that "unique privacy interests" were at stake in relation to the search and seizure of computers because of their ability to:[58]

> ... store immense amounts of information, some of which, in the case of personal computers, will touch at the "biographical core of personal information".

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54 There was evidence that items belonging to others and jewellery belonging to Mr Dotcom's wife were returned. Winkelmann J also ordered that personal photographs and videos be excised.

55 A single terabyte can apparently hold roughly 1,000,000 books of 500 pages each, 1,000 hours of video or 250,000 four-minute songs: *R v Vu*, above n 18, at [41].

56 *A Firm of Solicitors v District Court at Auckland*, above n 6, at [114] and *Gill v Attorney-General*, above n 17, at [115].

57 *R v Vu*, above n 18.

58 At [46].

[72] We agree that the search and seizure of personal computers may give rise to particular difficulties when accessing relevant and irrelevant information, but we do not consider that the decision in *R v Vu* assists the respondents on this aspect of the appeal because the warrants in this case did authorise the police to seize the respondents' computers. There is also no real dispute in this case that the computers had to be examined off site before it would be possible to differentiate between relevant and irrelevant information.

[73] We therefore allow the appeal in respect of the validity of the search warrants. These warrants are consequently valid.

The validity of the removal of the clones

Background

[74] The issue of the validity of the removal of the clones from New Zealand to the United States arises in the context of s 49 of the MACMA and the Solicitor-General's direction issued under that provision.

[75] In summary, s 49 provides for "things seized" under a s 44 warrant to be delivered into the custody of the Commissioner of Police. The Commissioner is to arrange to keep the thing seized for up to a month pending a direction from the Attorney-General as to how the thing is to be dealt with. Section 49(2) states that the direction may include a direction "that the thing be sent to an appropriate authority of a foreign country". If no direction is given by the Attorney-General within the one month period, the Commissioner is to arrange for the thing to be returned to the person from whom it was seized.

The Solicitor-General's direction

[76] In the present case, after the search of the properties of Messrs Dotcom and van der Kolk and the seizure of the electronic items on 20 January 2012, the Solicitor-General, acting on behalf of the Attorney-General under s 9A of the Constitution Act 1986, wrote to the Commissioner of Police by letter dated 16 February 2012 referring to the relevant search warrants and stating:

> Pursuant to s 49 of the Mutual Assistance in Criminal Matters Act 1992 I direct that any items seized pursuant to those warrants remain in the custody and control of the Commissioner of Police until further direction from [the Crown Law] Office.

[77] There was evidence before the High Court that the Solicitor General had two reasons for not directing that the items seized be sent offshore immediately:[59]

(a) The police and Crown Law were concerned that there should be a register which clearly identified every single item and every document that had been seized.

(b) There had been notification of the proposed filing of judicial review proceedings by Mr Dotcom to challenge the search warrant and prevent the computer items leaving the country before arrangements had been made which were satisfactory to preserve his ability to access data.

[78] Notwithstanding the Solicitor-General's direction, forensic clones of some of the electronic items seized during the searches were made by the FBI and taken by the FBI back to the United States in March 2012. No further direction permitting the removal of the clones to the United States was sought by the Commissioner of Police or given by the Solicitor-General before the clones were sent to the United States. It seems that the Crown position is that it was sufficient to retain the originals in New Zealand. In this sense, the Crown now appears to be arguing that the direction was not necessary or does not mean what it says.

Mr Dotcom's claim

[79] It is clear from the third amended statement of claim in this judicial review proceeding that Mr Dotcom had two concerns relating to the removal of the clones from New Zealand, namely:

(a) The effect of the removal of the clones on his ability to access the material to pursue litigation in New Zealand. Mr Dotcom complained

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[59] First High Court judgment, above n 1, at [95].

that no agreement had been reached as to the manner in which the items seized should be dealt with so as to provide him with access to his property to enable him to prepare for the extradition proceedings in New Zealand and the prosecution he faces in the United States if he is extradited.

(b) The need to ensure that the process for the delivery of the clones to the United States preserved his ownership interests and his access to the material.

[80] Mr Dotcom pleads that the removal of the data and information from New Zealand contravened the Solicitor-General's direction. The provision of the data and information to the representatives of the United States and its removal from New Zealand was unlawful because it was not specifically authorised as required under s 49 of the MACMA and was in contravention of the exiting direction under s 49.

[81] Mr Dotcom sought orders as follows:

(a) An order by way of declaration that the removal of the clones from New Zealand was contrary to the Solicitor-General's direction, was not authorised in accordance with s 49 and was accordingly unlawful.

(b) An order that none of the items seized, or clones or copies thereof, remaining in New Zealand be permitted to leave New Zealand or be accessed in any way other than in accordance with the process set out, subject to any further order of the Court.

The High Court judgments

[82] In her first judgment, Winkelmann J accepted the submissions for the four respondents that the release of the cloned hard drives to the FBI for shipping to the United States was contrary to the Solicitor-General's direction given under s 49(2) of the MACMA that the items seized were to remain in the custody and control of the

Commissioner of Police until further direction.[60] This dealing with the cloned hard drives was therefore in breach of s 49(3) of the MACMA.

[83] In reaching this decision, Winkelmann J rejected the submission for the Attorney-General that s 49 regulates only physical custody of an item seized. Her reasons were:

> [93] Mr Pike's essential submission for the Central Authority is that neither the language nor the context of s 49 support the argument that all dealings with seized items held by the Commissioner, even those that do not affect legal custody of the original items seized, must be supported by a s 49 "direction". Things seized are kept by the Commissioner pending a written direction. Once a written direction (of the sort dated 16 February 2012) is issued, the things are no longer kept pending direction but rather kept pursuant to the direction issued. That in itself, Mr Pike submits, tells against the construction that access to or other actions relating to the seized things not affecting their physical custody, or their status as items seized pursuant to the MACMA, requires a s 49 "direction".
>
> [94] An interpretation of s 49 that required a direction to authorise each and every dealing with an exhibit whilst it is in the custody of the Commissioner of Police would be inconsistent with the purpose of the MACMA legislation. In executing a search warrant obtained pursuant to a MACMA request, the Police are likely to have to allow foreign law enforcement agencies access to items seized. Consequently, custody is to be given a broad and liberal meaning: if an item seized remains under the control of the Police, it is within their custody. Whether a s 49 direction is required when it is proposed to send to law enforcement agencies overseas an exact replica of the items is a rather more difficult question. The original physical item seized remains in the possession of the Police. However, once a clone of a hard drive is sent offshore, the Police have lost the ability to control what is done with information stored on that hard drive. The same may also be true of copies of the documents involved. The wording of the legislation does not address how replicas (effectively identical twins of the item) fit within this regime.

[84] In her second judgment, Winkelmann J confirmed her declaration that the shipment of the clones to the United States was unlawful.[61]

Submissions

[85] Mr Boldt submits that s 49 has no application to forensic copies of items seized. He relies on the purpose of the provision in light of its legislative background, the authority of the Attorney-General under s 49 to exercise all relevant

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60 First High Court judgment, above n 1, at [90]–[97] and [144(f)].

61 Second High Court judgment, above n 1, at [65(c)(ii)(1)].

incidents of ownership in respect of the "things seized", decisions of this Court relating to copying of things seized,[62] and the definition of "thing seized" in s 3 of the new Search and Surveillance Act.

[86] In supporting Winkelmann J's decision on this issue, Mr Davison submits that the physical items seized in this case must include the data stored within them because it is that data which is the evidence that the United States' authorities wish to rely on. Mr Davison refers to the decision in *R v Vu*, the scheme of the relevant provisions of the MACMA, the role of the Attorney-General under the MACMA, the provisions of s 49 itself, the terms of the Attorney-General's direction in this case and s 21 of the NZBORA.

[87] For the other respondents, Mr Foley again adopts Mr Davison's submissions.

The issues

[88] The issues on this aspect of the appeal are therefore:

(a) Did the New Zealand police need to obtain approval from the Solicitor-General before permitting the FBI to remove the clones to the United States?

(b) Did the Solicitor-General's direction of 16 February 2012 prevent the New Zealand police from permitting the FBI to remove the clones to the United States without a further direction?

[89] These issues require us to interpret and apply s 49 of the MACMA and the Solicitor-General's direction.

Interpretation of s 49

[90] Section 49 provides:

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[62] *MA v Attorney-General* [2009] NZCA 490 at [32] (leave to appeal to Supreme Court refused: *MA v Attorney-General* [2010] NZSC 33) and *Chief Executive of the Ministry of Fisheries v United Fisheries Ltd* [2010] NZCA 356, [2011] NZAR 54 at [78] per Glazebrook and Ellen France JJ.

> **49 Custody and disposal of things seized**
>
> (1) Where any constable seizes any thing pursuant to a warrant issued under section 44, that constable shall deliver the thing into the custody of the Commissioner of Police.
>
> (2) Where a thing is delivered into the custody of the Commissioner of Police under subsection (1), the Commissioner of Police shall arrange for the thing to be kept for a period not exceeding 1 month from the day on which the thing was seized pending a direction in writing from the Attorney-General as to the manner in which the thing is to be dealt with (which may include a direction that the thing be sent to an appropriate authority of a foreign country).
>
> (3) Where, before the expiry of the period referred to in subsection (2), the Attorney-General gives a direction in respect of the thing, the thing shall be dealt with in accordance with the direction.
>
> (4) If no direction is given by the Attorney-General before the expiry of the period referred to in subsection (2), the Commissioner of Police shall arrange for the thing to be returned to the person from whose possession it was seized as soon as practicable after that period has expired

[91] Section 49 is not a unique provision. There are similar provisions in the International War Crimes Tribunals Act 1995 (s 55) and the International Crimes and International Criminal Court Act 2000 (s 108) under which the Attorney-General has responsibility for directing how things seized are to be dealt with. None of these provisions has previously been considered by a court in New Zealand.

[92] There is no dispute that the meaning of s 49 is to be determined from its text and in the light of its purpose in the context of the MACMA and that its legislative history may also be relevant.[63]

[93] We note first the following features of the text of s 49:

(a) As its heading indicates,[64] it relates to the "custody" and "disposal" of "things" seized. None of these expressions is defined in the MACMA.

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63 Interpretation Act 1999, s 5(1); *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] and *Fonterra Co-operative Group Ltd v The Grate Kiwi Cheese Co Ltd* [2012] NZSC 15, [2012] 2 NZLR 184 at [13].

64 Interpretation Act, s 5(3).

(b) It imposes a sequence of mandatory obligations on the police and the Commissioner of Police.

(c) It gives the Attorney-General a discretionary power to exercise.

(d) While reference is made to "a direction" in the singular, on the basis of established rules of statutory interpretation, the Attorney-General will in this context also be empowered to make further directions.[65]

[94] Reflecting the subject-matter of the section, the sequence of mandatory obligations is clear:

(a) The constable who seizes "any thing" under a s 44 warrant must ("shall") deliver it into the "custody" of the Commissioner: s 49(1).

(b) In terms of s 49(2) the Commissioner must ("shall") then arrange for the "thing" to be kept for the prescribed one month period:

> pending a direction in writing from the Attorney-General as to the manner in which the things is to be dealt with (which may include a direction that the thing be sent to an appropriate authority of a foreign country).

(c) If the Attorney-General gives a direction before the expiry of the prescribed period the thing must ("shall") be "dealt with" in accordance with the direction: s 49(3).

(d) If no direction is given by the Attorney-General before the expiry of the prescribed period, the Commissioner must ("shall") arrange for the thing to be returned as soon as practicable: s 49(4).

[95] Based on this analysis of s 49, it is apparent that the specific purpose of the provision is to provide a carefully prescribed process for things seized to be "kept" in the custody of the Commissioner for a short period pending a decision by the

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[65] Ibid, ss 16 and 33, and JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 428–429.

Attorney-General as to how the thing is to be "dealt with". If there is no direction, then the thing seized must be returned.

[96] It is the Attorney-General, or the Solicitor-General acting on his behalf,[66] who has responsibility for giving the direction. It is the Attorney-General who will decide how the "thing" seized is to be "dealt with" and whether the "thing" is to be sent to an appropriate authority of a foreign country in terms of the request which will have been received from the country under s 43(1) of the MACMA and which will have led to the application for, and issue of, a search warrant under s 43(2) and s 44. Clearly, once the thing has been seized and has been delivered to the Commissioner, responsibility for the implementation of the MACMA rests with the Attorney-General and not with the Commissioner or the police.

[97] The role of the Commissioner at this stage is a limited and essentially passive role. That reflects the underlying purpose of s 49, namely to provide for "a breathing space" ensuring that things seized are protected in a custodial sense while the Attorney-General or Solicitor-General decides whether or not to permit the things to be sent overseas in accordance with the request received from the foreign country.

[98] Our view that this is the underlying purpose of s 49 is consistent not only with the evidence as to the Solicitor-General's reasons for his direction in this case[67] but also with the approach of the Canadian Courts to the interpretation of the equivalent provision under the Mutual Legal Assistance in Criminal Matters Act RSC 1985 c 30 (4th Supp), s 15, which requires an application for a court order before things seized in execution of a search warrant may be sent to the requesting state. In *United States v Schneider*[68] the Supreme Court of British Columbia declined to make an order partly because copies of documents seized had been sent to the United States prior to the hearing of the application. In *Canada (United States of America) v Equinix Inc*[69] the Ontario Superior Court of Justice refused to make an order sending mirror-imaged copies of 32 computer servers seized from Megaupload

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66 Constitution Act 1986, s 9A.
67 Above at [77].
68 *United States v Schneider* 2002 BCSC 1014.
69 *Canada (United States of America) v Equinix Inc* 2013 ONSC 193.

Ltd to authorities in the United States. Instead the Court adjourned the hearing so that steps could be taken to refine what would be sent.

[99] When the text and purpose of s 49 are analysed in this way, we have little doubt that the "thing" that must be "kept" in the "custody" of the Commissioner pending a direction from the Attorney-General as to the manner in which it is to be "dealt with" must include not only the physical "thing" but also its contents or in the case of an electronic item, the data contained in or on it. It does not make sense of the provision to suggest that the "thing" does not include its contents or computer data.[70] Such an interpretation would give the Commissioner power to "deal with" the "thing" by accessing and disposing of the contents or the data and would deprive the Attorney-General of the power to give a direction as to the manner in which the "thing", including its contents and the data, were to be "dealt with". Neither of these consequences could have been intended in the context of s 49 where responsibility for deciding how a "thing" seized is to be "dealt with" is vested in the Attorney-General and not in the Commissioner of Police.

[100] Once it is accepted that the "thing" includes its contents and the data in or on it and that sole responsibility for deciding how they are to be "dealt with" rests with the Attorney-General, then it is equally apparent that it is the Attorney-General and not the Commissioner of Police who must decide whether any copies or clones of the "thing" or its contents or data may be removed from New Zealand. In our view the removal of such copies is clearly within the expression "dealt with". That view is supported by s 49(2) which gives as an example of the types of directions that may be made under the section, a direction as to removal of the thing seized to the foreign country. Again to interpret s 49 in any other way would in our view be contrary to the purpose of the provision and would have the effect of undermining the primary responsibility of the Attorney-General.

[101] There are in our view a number of interrelated reasons why, in the context of the MACMA, the Commissioner of Police should be restrained from permitting

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[70] *A Firm of Solicitors v District Court at Auckland*, above n 7, at [114] and *Gill v Attorney-General*, above n 18, at [115], and compare *R v Vu*, above n 18, at [44]–[45]. See [71]–[72] above.

clones of computer data to be taken out of the jurisdiction without the authority of the Attorney-General. The reasons are:

(a) Once clones are taken out of the jurisdiction, New Zealand loses control over them. Neither the executive government nor the courts here have any power to require the foreign country to return them. The responsibility of the Attorney-General to decide how the clones are to be dealt with is pre-empted. In particular, the Attorney-General is deprived of the opportunity of considering whether the data should be examined further in New Zealand for the purpose of establishing a register of all the data seized, removing irrelevant material and providing the person whose property has been seized with an opportunity to access it.

(b) Any opportunity for the person from whom the property was seized to raise any concerns with the Attorney-General or to challenge in New Zealand in accordance with s 21 of NZBORA the validity of a search and seizure under the MACMA and a decision by the Attorney-General permitting clones to be taken from this country is lost.

(c) The choice of the Attorney-General, or the Solicitor-General, as the person with the responsibility for giving the necessary directions under s 49, reflects their constitutional role as independent law officers of the Crown with special responsibility to act in the public interest and to exercise independent judgment impartially.[71]

[102] For these reasons we therefore agree with the approach of Winkelmann J to the interpretation of s 49 and do not accept Mr Boldt's submissions to the contrary. First, there is nothing in the legislative background to MACMA that requires a different interpretation.

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[71] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at [8.5.4 (3)] and [26.7.2].

[103] Second, while under s 49 the Attorney-General may be able to exercise all relevant incidents of ownership of the "things seized", the Commissioner of Police does not have that power. As indicated in our analysis of s 49, the Commissioner's role of custodian is a much more restricted one.

[104] Third, the decisions of this Court relating to the copying of "things" seized were reached in different contexts and therefore do not determine the issue in this case which relates to the propriety of the removal of the clones of things seized from New Zealand.

[105] *MA v Attorney-General*[72] concerned the provision by the police of copies of documents seized under search warrants from the home of an applicant for refugee status to the New Zealand Immigration Service. The Court decided that provision of the documents to the Immigration Service was permitted because s 199 of the Summary Proceedings Act did "not deal with copies of what had been seized".[73] As the Court pointed out:[74]

> The section [s 199] provides what is to happen to the things seized. With certain exceptions irrelevant to the present case, things seized are to be retained by a constable except while being used in evidence or in the custody of a court until either returned to the person from whom they were seized or disposed of by court order.

[106] Unlike s 49 of the MACMA, s 199 contained no reference to, or restriction on, "the manner in which the thing is to be dealt with" while it is retained in the custody of the police or a court. As the heading to s 199 made clear, the focus was on the "disposal" of things seized by court order within New Zealand, the court being empowered to order their forfeiture, destruction or disposal in such manner as the court thought fit or delivery to the person claiming to be entitled to the thing. The issue which arises in the present case, namely whether the Commissioner of Police was authorised to release cloned hard drives to the FBI notwithstanding the terms of the Solicitor-General's direction, would not arise in the context of s 199 of the Summary Proceedings Act. The decision in *MA v Attorney-General* may therefore be distinguished.

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72 *MA v Attorney-General*, above n 62.
73 At [32].
74 At [31].

[107] *Chief Executive, Ministry of Fisheries v United Fisheries Ltd*[75] concerned, amongst other issues, the question whether, in exercising a search power under s 199 of the Fisheries Act 1996, a fisheries officer had power to clone a computer when s 206 of the Act provided express power to make or take copies of documents seized. Baragwanath J considered that the officer did not have the necessary power, but Glazebrook and Ellen France JJ held that the officer did because even though a computer may contain both relevant and irrelevant material it was a "thing" in itself, not just a container and, noting the power to make or take copies under s 206 of the Fisheries Act, there was, in order to make the Act work, power to clone.[76]

[108] In reaching this conclusion Glazebrook and Ellen France JJ applied the approach of the United Kingdom Court of Appeal in *R (Faisaltex Ltd) v Preston Crown Court*[77] that, like a diary, a computer was a single thing that might contain both relevant and irrelevant material. This approach has also been followed subsequently in *R (Glenn & Co (Essex) Ltd) v Revenue and Customs Commissioners*[78] where Lloyd Jones J said:[79]

> ... the discussion of the nature of records stored on a computer is of general application and it is an analysis with which I respectfully agree. Analogies, whether with filing cabinets or leather bound ledgers, are necessarily imprecise and may not be of particular assistance. However, *it is clear that a hard disk is not simply a container of files but is properly regarded as a single object containing a variety of materials* ...

[109] While the decision in *Chief Executive, Ministry of Fisheries v United Fisheries Ltd* was reached in a different statutory context and was not concerned with the question of the removal of clones of things from New Zealand, the view of the majority, that the data on a computer is part of the "thing", is consistent with our interpretation of the word "thing" in s 49 of the MACMA.

[110] Fourth, while the definition of "thing seized" in s 3 of the new Search and Surveillance Act now expressly excludes anything made or generated by a person

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75 *Chief Executive, Ministry of Fisheries v United Fisheries Ltd*, above n 75.

76 At [77]–[78].

77 *R (Faisaltex Ltd) v Crown Court at Preston* [2008] EWHC 2832 (Admin), [2009] 1 WLR 1687 at [76]–[79].

78 *R (Glenn & Co (Essex) Ltd) v Revenue and Customs Commissioners* [2010] EWHC 1469 (Admin), [2011] 1 WLR 1964 at [31]–[32].

79 At [32] (emphasis added).

exercising a search or surveillance power (for example "a forensic copy of a computer hard drive"), that Act was not in force at the relevant time and would not therefore retrospectively override our interpretation of the specific terms of s 49. Furthermore, the need for the new definition in s 3 tends to reinforce our interpretation of s 49, especially as s 49 is one of the provisions in the MACMA which has been retained following the enactment of the Search and Surveillance Act.[80]

[111] Our view that the definition of "thing seized" in s 3 of the Search and Surveillance Act does not apply retrospectively to s 49 is supported by an examination of the purposes of the definition. The first purpose of the definition is to overcome the doubt whether under s 198 of the Summary Proceedings Act the police were authorised to copy or convert computer data into tangible form for removal.[81] The second purpose of the definition is to enable the police to retain forensic copies of things seized.[82] Neither of these purposes is applicable here where s 49 prohibits any dealing with things seized in the absence of a direction from the Attorney-General.

Did the Solicitor-General's direction prevent removal?

[112] In our view the words of the Solicitor-General's direction in the present case plainly did not authorise removal of the clones to the United States. Once it is accepted that s 49 is not limited to custody of the original thing seized, but encompasses removal of the clones, the wording of the direction applied to require the Commissioner to retain "custody and control" of the clones here in New Zealand "until further direction" from the Solicitor-General.

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80 Compare Burrows Carter, above n 65, at 250 and 644.

81 Law Commission, above n 19, at [7.26].

82 At [7.147]–[7.149]. This position rejects the condition proposed by this Court in *A Firm of Solicitors v District Court at Auckland*, above n 6, at [107] that the police should be required to separate and delete irrelevant material, as it would be impractical for only relevant evidential material to be retained.

Application of s 49

[113] Applying our interpretation of s 49 to the facts of this case means that we agree with Winkelmann J that:

(a) The Solicitor-General had power under s 49(2) to give a direction that related to the items seized from the respondents in the terms in which he did.

(b) The direction related to all the electronic items, including the computer data.

(c) The direction required the Commissioner to retain "custody and control" of all the items, including the computer data, until further direction.

(d) While the Solicitor-General was empowered to give a further direction permitting clones of the computer data to be taken to the United States by the FBI, he did not do so.

(e) In the absence of any further direction, the Commissioner therefore had no power to "deal with" the items, including the computer data, by permitting clones of some of them to be removed by the FBI to the United States.

[114] We therefore uphold the declaration made by Winkelmann J in respect of the unlawful removal of the clones contrary to the Solicitor-General's direction.

Consequential orders

[115] The formal sealed judgment of the High Court entered after the second High Court judgment reads as follows:

1. An order by way of declaration that the Mutual Assistance search warrants were unlawful;

2. In respect of items that have not yet been cloned:

2.1 An order that none of the items seized, nor copies or clones thereof, remaining in New Zealand be permitted to leave New Zealand or be accessed in any way other than in accordance with the processes set out in paragraph 2.2 below, subject to any further order of the Court;

2.2 An order providing for the following process to be undertaken at the cost of the Police:

2.2.1 The review of all items seized, including the contents of digital storage devices, for the purpose of identifying irrelevant material;

2.2.2 Items containing only irrelevant material are to be returned to the plaintiffs;

2.2.3 In respect of items identified as mixed content devices, two different clones must be prepared – one complete clone to be provided to the plaintiffs and one "disclosable" clone, with any personal photographs or film deleted, to be provided to United States authorities after the plaintiffs have received their clone;

2.2.4 In respect of items containing only relevant material, clones must be provided to the plaintiffs before a clone is provided to the United States;

3. In respect of items which have already been cloned:

3.1 An order that those clones created by the FBI and currently held by the Police (the existing clones) will be provided to the plaintiffs upon receipt of encryption passwords;

3.2 In respect of clones that have already been sent to the United States and the original devices that were cloned:

3.2.1 An order by way of declaration that the removal of clones from New Zealand was contrary to the Solicitor-General's direction to the Commissioner of Police dated 16 February 2012, was not authorised in accordance with s 49 of the MACMA, and was accordingly unlawful;

3.2.2 An order requiring the Police to provide confirmation in writing to the plaintiffs identifying those items the clones of which have been removed from New Zealand, and confirming whether or not the existing

clones are effectively duplicates of the clones removed from New Zealand;

3.2.3 An order requiring the examination of the original devices that were cloned. If any of these devices are found to contain no relevant material, they are to be returned to the plaintiffs and the Police are to request the United States authorities to destroy clones of that device, and all material derived from that clone. The Police are to provide a copy of this judgment to the FBI so that they are aware of this possibility.

[116] For the reasons we have given, order 1 by way of declaration, that the search warrants were unlawful, will be set aside, while the order by way of declaration in 3.2.1, that the removal of the clones from New Zealand was not authorised and was accordingly unlawful, will be confirmed.

[117] While we were told that difficulties had been encountered over the disclosure by the respondents of their encryption passwords, there is no dispute that order 3.1 should be retained. Counsel for the respondents appeared to accept that it is now in the respondents' hands to disclose the passwords and obtain copies of the clones currently held by the police in New Zealand.

[118] In respect of the orders in 2.1, 2.2, 3.2.2 and 3.2.3, which are also challenged by the Attorney-General, we propose to reserve leave to the parties to apply for further relief in light of our decision on the principal issues. In view of the further steps that have apparently been taken since these proceedings were issued some of the orders may now be unnecessary or inappropriate.

[119] On the question of costs, taking into account the significance of the issue relating to the validity of the search warrants and the measure of success achieved by the parties overall, we consider that the respondents should pay 60 per cent of the costs of the Attorney-General.

Result

[120] Accordingly:

(a) The appeal is allowed in respect of the declaration as to the invalidity of the search warrants, but dismissed in respect of the declaration as to the unauthorised removal of the clones from New Zealand.

(b) The order made in the sealed judgment of the High Court at 1 declaring the search warrants invalid is set aside.

(c) The orders made in the sealed judgment of the High Court at 3.1 and 3.2.1 are confirmed.

(d) Leave is reserved to any of the parties to apply to this Court for any further relief that may be necessary in respect of the remaining orders in the sealed judgment of the High Court.

(e) The respondents are to pay 60 per cent of the costs of the appellant for a standard appeal on a band A basis. We certify for two (not three) counsel. The liability of the respondents for costs is joint and several.

(f) Leave is reserved for the parties to apply to the High Court for costs in that Court in light of this judgment.

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