

**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, A K 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

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**JUDGMENT OF THE COURT**

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- A** Mr Dotcom's, and Messrs Ortmann and van der Kolk's, applications for leave to adduce further evidence on appeal are declined.
- B** Leave to file the submissions referred to in the memorandum of Mr Illingworth QC dated 24 April 2018 is declined.
- C** The questions of law on which Gilbert J granted leave are answered as follows:
- (a)** Question 1: Was the High Court Judge correct to find that the essential conduct with which the appellants are charged in each count constitutes an extradition offence for the purposes of s 24(2)(c) of the Extradition Act 1999?
- Answer: Yes, though for somewhat different reasons.
- (b)** Question 2: Was the High Court Judge correct to conclude that copyright in a particular work does not form part of the accused person's conduct constituting the extradition offences correlating to counts 4 to 8; and to conclude that proof of this is not required for the purposes of s 24(2)(d) of the Extradition Act 1999?
- Answer: Yes. Copyright in a particular work was not part of the appellants' conduct constituting the extradition offences alleged in counts 4–8 of the superseding indictment and it need not be proved for the purposes of s 24(2)(d) of the Extradition Act. Rather, it is a circumstance transposed when determining whether the offence is an extradition offence.
- D** The remaining applications for leave to appeal on the questions of law raised by the appellants are declined.
- E** The application for leave to appeal on the questions of law raised by the United States is declined.
- F** The eligibility determination made by the District Court is confirmed. The District Court should now proceed without further delay to complete

its duties under s 26 of the Extradition Act in accordance with the determination.

- G** The appeal against Gilbert J’s decision to decline judicial review is dismissed.
- H** The appeal in CA302/2015 is dismissed.
- I** The parties are granted leave to file memoranda of no more than two pages in length, excluding the cover page, in relation to costs within 10 working days of the delivery of this judgment. The appellants are encouraged to file a joint memorandum.

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## REASONS OF THE COURT

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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.<sup>1</sup> 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.

[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.<sup>2</sup> They now bring this second appeal on two questions of law, by leave of the Judge.<sup>3</sup> They also seek special leave to appeal a large number of additional

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

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

<sup>3</sup> *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.

questions of law,<sup>4</sup> and they appeal the refusal of judicial review.<sup>5</sup> The United States also seeks special leave to appeal.<sup>6</sup> For completeness we record CA302/2015 is an appeal filed by Messrs Ortmann, van der Kolk, Dotcom and Batato against a judicial review decision of Katz J issued on 1 May 2015.<sup>7</sup> Before us the parties did not pursue this appeal and we are satisfied the concerns are similar to those in the other appeals and applications. We therefore dismiss that appeal.

[4] The two questions of law on which Gilbert J granted leave are:<sup>8</sup>

- (a) Was the High Court Judge correct to find that the essential conduct with which the appellants are charged in each count constitutes an extradition offence for the purposes of s 24(2)(c) of the Extradition Act 1999?
- (b) Was the High Court Judge correct to conclude that copyright in a particular work does not form part of the accused person's conduct constituting the extradition offences correlating to counts 4 to 8; and to conclude that proof of this is not required for the purposes of s 24(2)(d) of the Extradition Act 1999?

[5] These questions raise some issues of general importance: whether double criminality is required in extradition between New Zealand and the United States, whether copyright infringement by disseminating infringing copies online can found an extradition offence, and how eligibility is determined under the record of case procedure in the Extradition Act 1999 (Extradition Act or 1999 Act).

## **B THE ALLEGATIONS**

### **The Megaupload business model**

[6] We here explain, by reference to the record of case (ROC), how Megaupload is said to have worked. Except where otherwise noted, we use "Megaupload" to include all the websites and businesses that the ROC describes. Besides Megaupload

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<sup>4</sup> CA493/2017 for Mr Dotcom, CA494/2017 for Messrs Ortmann and van der Kolk, and CA495/2017 for Mr Batato.

<sup>5</sup> The judicial review appeal is also under CA127/2017 and CA128/2017. The District Court at North Shore is named as respondent in these file numbers, but it has been excused from appearances: *Ortmann v District Court at North Shore* CA302/2015, 28 September 2017 (Minute of Miller J).

<sup>6</sup> CA511/2017.

<sup>7</sup> *Ortmann v District Court at North Shore* [2015] NZHC 901 [decision of Katz J].

<sup>8</sup> HC leave judgment, above n 3, at [49].

itself and Megavideo, which we discuss below, the enterprise included Megaporn, Megaclick, Megapix and several other sites.<sup>9</sup>

[7] Megaupload provided file storage for its customers via its website. Its terms of service provided that users must not upload any files that infringed copyright, that they were responsible for anyone else who accessed their files, and that they indemnified Megaupload against liability. Uploaded files included movies, games, music, and other types of files such as computer software.

[8] The United States' case focuses on movies and we will use them to illustrate how files were uploaded and shared. A Megaupload user could upload a movie which had been 'ripped' from a DVD or otherwise illicitly obtained. (The United States' case is that a DVD owner's licence does not extend to copying, and certainly not to sharing the file with the public.) Megaupload would convert it and store it as a flash video (.flv) file. A file in that format can be played directly or streamed in an internet browser without needing to be downloaded. Copies were stored on multiple servers around the world, including a set located in the state of Virginia.

[9] When the file was uploaded it would be given a unique identifier known as a MD5 hash. The user would be provided with a URL (uniform resource locator) link permitting the user to access that file. The user could share the link with anyone, but could not do so on a Megaupload site.

[10] A movie stored on Megaupload could be viewed via Megavideo, a separate website that shared Megaupload's database. Anyone who had the uploading user's Megaupload link could view it via their browser, but they could not search directly for infringing movies on Megaupload or Megavideo, whose websites featured a "front end" of user-generated content, much of it allegedly taken from YouTube, as well as trailers and demos freely available elsewhere on the Internet. Megaupload had search capability but it was for internal use only. Viewers accessed files stored on Megaupload via third-party or 'linking' websites that Megaupload did not control. So, for example, a member of the public who wanted to watch a given movie would

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<sup>9</sup> Megaporn was named Sexuploader from June 2005, Megarotic from October 2006 and Megaporn from November 2008.

search for it on an internet browser and be presented with a number of third-party websites that offered URL links, shared by Megaupload's users, to copies of that movie stored on Megaupload's servers.

[11] Upon clicking on a link, the viewer would be taken to Megavideo and there presented with advertising, from which Megaupload earned revenue. The viewer could watch 72 minutes of the movie for free. To watch the balance — movies are usually longer than 72 minutes — the viewer would have to purchase a premium subscription from Megavideo. The United States says that more than 90 per cent of registered users made use of their account exclusively to view and download content.

[12] Until June 2011 Megaupload ran a rewards programme that paid users, in cash or premium subscriptions, for uploading files that were much in demand for downloading. The United States says many of these files were popular because they were copyrighted and not otherwise freely available for online viewing or download. A small proportion of users uploaded many files in exchange for rewards. Some of these users were located in countries with a reputedly lax attitude toward copyright. For example, a person known as TH uploaded many infringing files between 2006 and 2011. He received reward payments of more than USD 50,000 and was the subject of 1200 take-down requests. In one six-month period links created by TH generated more than 10 million downloads.

[13] Megaupload experienced enormous growth from 2008. It is said that the business earned revenues of more than USD 175 million and accounted at one point for four per cent of global internet traffic. The United States attributes this to the systematic infringement of copyright and says that copyright owners lost more than USD 500 million.

[14] To save storage space on the servers, Megaupload engaged in a practice called deduplication. When a user uploaded a file which Megaupload identified as a copy of a file already held on its servers (because it had the same MD5 hash as an existing file), Megaupload would not store the file but would send the user a new link to the existing file. The United States case on this point, much disputed in this proceeding, is that files were treated as identical only when uploaded from the same source file.

If another copy of the same movie was uploaded from a different DVD or computer, or even if a different rip of the DVD was created at a different time on the same computer, it would be given its own MD5 hash and stored as a separate file, because the time of its creation and other aspects of the algorithm used to generate the MD5 hash would vary from the earlier rip.

[15] So, according to the United States, files that MegaUpload treated as duplicates were usually uploaded by the same user and would be based off the same rip. Some users uploaded the same file many times in anticipation of take-down requests from copyright owners. Each upload would receive a new link which could be offered to the public on linking websites. The United States argued that this process explains how multiple copies of the same copyrighted work were present on Megaupload's servers, and also how a single user could receive multiple links (for sharing on third-party websites) to the same file. The appellants said, in contrast, that even if many users uploaded many different rips from different DVDs (for example) Megaupload would only assign one MD5 hash. This is why the appellants said the approach they took to take-down requests was appropriate.

[16] Copyright owners in the United States very frequently asked Megaupload to take down infringing files. A take-down notice would identify the copyright owner and their protected files, assert that they in good faith believed they had not authorised the recipient's use of those files, specify that the notice was given pursuant to the relevant provisions of the Digital Millennium Copyright Act (DMCA),<sup>10</sup> and require the recipient to expeditiously remove or disable access to the files. The United States maintains that Megaupload did not respond by deleting or disabling access to infringing files. Rather, it would simply delete the link nominated in the take-down notice, leaving the file accessible via other links. The United States characterises this practice as deceptive, while the appellants maintain that it was standard industry practice, well known to copyright owners. This issue too has been the subject of much argument before us.

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<sup>10</sup> Digital Millennium Copyright Act 17 USC §§ 101, 104, 104A, 108, 112, 114, 117, 512, 701, 1201–1205, 1301–1332, 28 USC § 4001 (1998).

[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),<sup>11</sup> the United States may charge an extradited person with only those crimes for which extradition was granted.<sup>12</sup> 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.<sup>13</sup> 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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<sup>11</sup> 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].

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

<sup>13</sup> 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).

## Illustrations from the ROC

[22] The appellants stand accused for their active participation and intimate knowledge of this scheme. By way of illustration, the ROC summarises evidence, much of it in the form of communications among them, that:<sup>14</sup>

- (a) They directly monitored traffic from linking sites to Megavideo:

On or about April 15, 2008, via Skype:

[van der Kolk]: almost 18,000,000 video views on MRV per day, and also a whopping 6,000,000 on MV now.

[Ortmann]: amazing ... wow.

[van der Kolk]: MV had nice growth during the past 2 months, probably piracy in embedded players...

- (b) They monitored uploads by and provided reward payments to serial infringers:

On or about November 18, 2007, via Skype:

[van der Kolk explained] ... that a particular repeat infringer and unindicted conspirator [VF] ... “created a second account ... and within 19 days a 1500 USD redemption.”

[Ortmann]: amazing. We are very, very lucky to have him as an uploader ... Those 1500 USD are multiplied by a factor of 10 at least ...

- (c) They were aware that Megaupload’s revenue was substantially attributable to infringing content:

On or about October 7, 2007, via Skype:

[van der Kolk]: maybe we should automatically delete videos on Megavideo that are longer than 30 minutes and have more than XXX views or something because I still see so much piracy that is being embedded ... What kind of videos are legit and longer than 30 minutes and views more than XXX times.

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<sup>14</sup> A fuller list of examples is found in the HC judgment, above n 2, at [312]–[333]. We have modified the formatting and typography of these conversations from the record of the case to make them easier to read, but the substance is the same.

[Ortmann]: what we can indeed do is put them into 'temporarily not available' state and priority-audit them. Anything that's legit will then be unblocked permanently, the rest will go to deleted.

[van der Kolk]: yeah but 99.999% will be deleted then.

...

On or about January 25, 2008, via Skype ...

[Ortmann]: he [an uploader] probably has 100% fraudulent files in his account.

[van der Kolk]: most likely, that's the big flaw in the rewards program — we are making profit of more than 90% infringing files. So either we should just lower the points a bit and pay everybody, or stop paying rewards... I assume with this rewards payment Kim wants to be very generous?

[Ortmann]: yes, but only for those users that brought premium sales :)

...

On or about March 7, 2009, via Skype:

[van der Kolk]: if copyright holders would really know how big our business is they would surely try to do something against it, they have no idea that we're making millions in profit every month.

[Ortmann]: indeed.

- (d) They monitored the quality of infringing files and tried to ensure that high-definition copies were available for viewing:

On or about March 3, 2009, via Skype:

[van der Kolk] sent [Ortmann] the results of a search for the term "1080p" in the Mega database. The term "1080p" refers to high-definition video, which typically contains 1080 lines of progressively vertical resolution. The search showed that the term appeared in more than 41,000 separate files ...

[Ortmann]: yes :) but with HD video, we'll easily need 50 gigs more already, but we'll also be MUCH more popular/valuable ... I just wonder what warner bros. will say when they see crystal clear BD rips instead of the usual blurry video :)

[van der Kolk]: yeah will be even more pissed off :)

- (e) They sought to conceal the presence of infringing material by ensuring that Megavideo was not searchable and making its “front end” appear innocuous:

On or about October 10, 2009, via Skype:

[van der Kolk]: theoretically we could make MV just like MU, remove all the video listing stuff.

[Ortmann]: yep, but even better than that, we list only really harmless stuff.

[van der Kolk]: yes, but problem is almost no harmless stuff is being uploaded to MV :) ... We should actively add youtube videos again perhaps

[Ortmann]: yes, we could do that indeed ... Kim's [Mr Dotcom's] idea of leaving the semi-harmful stuff online for 23 hours is also pretty good.

[van der Kolk]: yes also not bad, but then there will always still be harmful content on the site always ... I would say we should not even make it public at all ... we make money from direct links & embedded, no need to risk anything.

[Ortmann]: harmful content isn't bad per se as long as we process takedowns and don't upload it ourselves.

[van der Kolk]: that we already do now even :)

[Ortmann]: it has a positive effect in that it allows content owners to search our site and send takedown requests.

[van der Kolk]: but it's good to stay off the radar by making the front end look like crap while all the piracy is going through direct links & embedded.

[Ortmann]: the important thing is that nobody must know that we have auditors letting this stuff through.

[van der Kolk]: yes that's very true also.

[Ortmann]: if we had no auditors — full DMCA [Digital Millennium Copyright Act] protection, but with tolerant auditors, that would go away.

[van der Kolk]: yes true.

- (f) They responded selectively to take-down notices depending on their perception of legal risk:

On or about April 23, 2009:

[Dotcom] sent an email message to [Messrs van der Kolk, Ortmann, and Bencko, another member of the alleged conspiracy] in which he complained about the deletion of URL links deleted in response to infringement notices from the copyright holders.

[Dotcom]: I told you many times not to delete links that are reported in batches of thousands from insignificant sources. I would say that those infringement reports from Mexico of '14,000' links would fall into that category. And the fact that we lost significant revenue because of it justifies my reaction.

...

On or about April 23, 2009, via Skype:

[Ortmann]: maybe try undeleting them :)

[van der Kolk]: you want to risk that? I mean MX [this is said to mean Mexico] is just MX, we could ignore them

[Ortmann]: it's not like Mexico is going to sue us in Hong Kong ... just for testing, we should undelete those files, for one day, we can excuse it as a tech glitch.

[van der Kolk]: I often ignore reports from certain countries, such as VN [this is said to mean Vietnam].

## **C OUR APPROACH TO THE APPEALS**

[23] We will answer the questions on which leave was granted as follows:

- (a) Because Gilbert J's answer to the first question rested in part on the proposition that double criminality is not required in extradition between New Zealand and the United States, we survey the legislation and decide whether *United States of America v Cullinane*, in which this Court held that it was not, was correctly decided.<sup>15</sup>
- (b) We examine the task of determining eligibility under the ROC procedure, which allows us to answer the second question.

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<sup>15</sup> *United States of America v Cullinane* [2003] 2 NZLR 1 (CA).

- (c) We then answer the first question, deciding as we do so whether copyright infringement by digital dissemination may found an extradition offence.
- (d) We respond to the special leave applications, which concern whether the evidence was admissible and sufficient in law and whether the stay applications ought to have been granted.
- (e) We decide the judicial review appeal.

[24] We are indebted to Gilbert J for his careful analysis and for isolating what we agree are the relevant questions of law. We approach the case differently because he was obliged to follow *Cullinane* and, as will be seen, we have decided to overrule it. We largely agree with his view of the case, with the exception of the narrow copyright pathway to extradition. That being so, we need not discuss his reasons in detail.

[25] On 24 April 2018 Mr Illingworth QC for Messrs Ortmann, van der Kolk and Batato sought leave to file submissions in these extradition appeals addressing matters raised in CA12/2018.<sup>16</sup> Messrs Ortmann, van der Kolk and Batato are not parties in CA12/2018. The United States urged us to decline to receive the submissions. We are satisfied CA12/2018 will sufficiently deal with matters raised by Mr Illingworth, and it would be inconsistent with this Court's previous directions to deal with those issues here.<sup>17</sup> We decline leave to file these submissions.

## **D THE EXTRADITION ACT**

### **The statutory scheme**

[26] As just noted, the appeal requires that we consider whether *Cullinane* was wrongly decided. It also requires that we examine, for the first time so far as this Court is concerned, how eligibility is determined under the Extradition Act when a ROC is

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<sup>16</sup> An appeal against a decision striking out seven of eight causes of action brought by Mr Dotcom seeking judicial review of, largely, the search and arrest warrants that led to the police raid of his home on 20 January 2012, together with further related challenges to these extradition proceedings initiated in the District Court: *Dotcom v District Court at North Shore* [2017] NZHC 3158.

<sup>17</sup> *Ortmann v United States of America* CA127/2017, 29 January 2018 (Minute of the Court).

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.<sup>18</sup>

[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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<sup>18</sup> 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.

penalty is imprisonment for not less than 12 months or any more severe penalty.

- (2) The condition referred to in subsection (1)(a) is that if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had occurred within the jurisdiction of New Zealand at the relevant time it would, if proved, have constituted an offence punishable under the law of New Zealand for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty.

[30] The Extradition Act expressly adopts the principle of double criminality, meaning that the conduct of the person constituting the offence in the extradition country must also have been, at the time of the conduct, an offence punishable by a minimum of 12 months' imprisonment in New Zealand. As will be seen, the Extradition Act also provides that in any given case double criminality is to be judicially determined.

[31] We observe that double criminality is a central feature of international extradition law.<sup>19</sup> It rests on two central concepts: reciprocity between states and protection of the citizen's liberty from detention for conduct which the requested state does not consider criminal.<sup>20</sup> It justifies, by reference to the substantive and evidential standards of domestic law, a state's entry into arrangements authorising the detention of its citizens and their removal to face trial elsewhere.<sup>21</sup>

[32] The Extradition Act also adopts the 'eliminative' approach to classification of extradition offences,<sup>22</sup> meaning that it includes all offences attracting the qualifying maximum penalty. The alternative 'enumerative' approach, which was adopted in the 1965 Act,<sup>23</sup> lists a series of specific offences.<sup>24</sup> As will be seen, the New Zealand – United States Treaty, which was entered in 1970, also adopts an enumerative approach.

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<sup>19</sup> Bassiouni, above n 12, at 500–502; and I A Shearer *Extradition in International Law* (Manchester University Press, Manchester, 1971) at 137–138. We express no view as to whether double criminality is a principle of customary international law.

<sup>20</sup> *Knowles v Government of United States of America* [2006] UKPC 38, [2007] 1 WLR 47 at [12]; and Bassiouni, above n 12, at 496–498.

<sup>21</sup> *United States of America v McVey* [1992] 3 SCR 475 at 518–519 per La Forest J; and *United States of America v Dynar* [1997] 2 SCR 462 at [121].

<sup>22</sup> Extradition Act 1999, s 4(2).

<sup>23</sup> Extradition Act 1965, s 2, definition of “extradition offence” and sch 1.

<sup>24</sup> The difference between the eliminative and enumerative approach is helpfully explained in Shearer, above n 19, at 133–137.

[33] The definition is expressed to be “subject to an extradition treaty”. The question this raises is whether, as the Court held in *Cullinane*, a treaty’s classification of extradition offences may replace s 4, including the express requirement for double criminality, or whether, as English law traditionally held, a treaty may reduce but not enlarge upon the offences for which the statute would permit extradition. We return to this point at [61]–[62] below.

[34] The term “conduct constituting the offence”, which is used in s 4(2), receives a definition in s 5:

#### **5 Interpretation provisions relating to offences**

- (1) A reference in this Act to **conduct constituting an offence** is a reference to the acts or omissions, or both, by virtue of which the offence has, or is alleged to have, been committed.
- (2) In making a determination for the purposes of section 4(2), the totality of the acts or omissions alleged to have been committed by the person must be taken into account and it does not matter whether under the law of the extradition country and New Zealand—
  - (a) the acts or omissions are categorised or named differently; or
  - (b) the constituent elements of the offence differ.

[35] It will be seen that the Extradition Act focuses on the totality of the person’s acts or omissions and specifies that there need not be a match between the requesting state’s offence and a New Zealand offence. This conduct-centred approach ensures that the extradition process is practical and not overly technical, and avoids difficulties that might arise if the relevant offences under domestic and foreign law are not perfectly identical.<sup>25</sup>

[36] Part 3 of the Extradition Act may be applied to treaty countries by Order in Council.<sup>26</sup> It may also be extended to non-treaty countries by Order in Council, and in that case the order may be made subject to “limitations, conditions, exceptions, or qualifications” specified in the order.<sup>27</sup>

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<sup>25</sup> *Edwards v United States of America* [2002] 3 NZLR 222 (CA) at [27]; and *Riley v Commonwealth of Australia* [1985] 159 CLR 1 at 17 per Deane J.

<sup>26</sup> Extradition Act 1999, s 15.

<sup>27</sup> Section 16.

[37] Section 11 deals with construction of treaties, enjoining those administering the Extradition Act, including the courts, to interpret the Act to give effect to a treaty in force between New Zealand and the extradition country:

**11 Construction of extradition treaties**

- (1) If there is an extradition treaty in force between New Zealand and an extradition country, the provisions of this Act must be construed to give effect to the treaty.

[38] However, no treaty may be construed to “override” certain provisions, including importantly s 24(2)(d), which provides that an extradition court must be satisfied that a prima facie case would be made out on the evidence “if the conduct constituting the offence had occurred” in New Zealand, and any provision conferring a particular function or power on the Minister or a court:<sup>28</sup>

- (2) Despite subsection (1), no treaty may be construed to override—
- (a) section 7; or
  - (b) section 24(2)(d) or section 45(5); or
  - (c) subsection (2)(b) or subsection (3)(a) of section 30 (including where those provisions are applied under section 49); or
  - (d) any provision conferring a particular function or power on the Minister or a court.

[39] A request for extradition under pt 3 is transmitted by diplomatic means to the Minister. It must be accompanied by duly authenticated supporting documents, being an arrest warrant and a written deposition describing the offence (and its penalty) and the conduct constituting the offence.<sup>29</sup> In this case the Treaty also provides that the request shall be accompanied by a description of the person sought, a statement of the facts of the case, the text of the applicable requesting state laws defining the offence and prescribing the punishment and fixing any limitation of the legal proceedings, an arrest warrant issued by a judicial officer, and such evidence as according to the laws of the requesting state would justify the person’s arrest and committal for trial.<sup>30</sup> It is for the Minister to be satisfied that these obligations have

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<sup>28</sup> Section 11(2).

<sup>29</sup> Section 18.

<sup>30</sup> New Zealand – United States Treaty, art X.

been met.<sup>31</sup> The Minister may then ask a District Court judge to issue an arrest warrant here and the judge may do so if there are reasonable grounds to believe the person is extraditable and the offence is an extradition offence.<sup>32</sup>

[40] The Extradition Act provides that the District Court must then decide whether the person is eligible for surrender for extradition.<sup>33</sup> The Court goes about it by conducting a committal hearing under the Summary Proceedings Act 1957, which survives its repeal for this purpose.<sup>34</sup>

## 22 Powers of court

- (1) In proceedings under this Part, except as expressly provided in this Act or in regulations made under section 102,—
  - (a) the court has the same jurisdiction and powers, and must conduct the proceedings in the same manner, as if the proceedings were a committal hearing of an information for an indictable offence alleged to have been committed within the jurisdiction of New Zealand; and
  - (b) the following provisions apply to the proceedings, so far as applicable and with the necessary modifications:
    - (i) Parts 5 and 5A and sections 203, 204, and 206 of the Summary Proceedings Act 1957:
    - (ii) Parts 1 (except sections 9 to 12), 2, and 4 of the Bail Act 2000:
    - (iii) the Criminal Procedure (Mentally Impaired Persons) Act 2003.

...

[41] The appellants have sought a stay of the extradition proceeding for abuse of process by the United States. In *Siemer v Solicitor-General* the Supreme Court held that a court has such implied powers as it needs to act effectively and uphold the

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<sup>31</sup> *R v Governor of Pentonville Prison, Ex parte Sinclair* [1991] 2 AC 64 (HL) at 91–92 [*Sinclair*]; and *McVey*, above n 21, at 518–519 per La Forest J.

<sup>32</sup> We record that a challenge to the adequacy of grounds for issuing the warrants in this case has been struck out in the High Court and an appeal has been heard separately in this Court. See *Dotcom v District Court at North Shore*, above n 16.

<sup>33</sup> Extradition Act 1999, s 24(1).

<sup>34</sup> These provisions survive for extradition purposes although the domestic committal regime has been abolished under the Criminal Procedure Act 2011: Extradition Act 1999, s 22(4). At the time this proceeding was commenced the Extradition Act 1999 had not been amended to reflect these changes however.

administration of justice within its jurisdiction, and this extends to dismissing or staying proceedings that abuse the court’s processes.<sup>35</sup> We accept that such implied powers may be found in s 22 of the Extradition Act. In *Bujak v Republic of Poland* this Court found that the District Court may exercise in extradition proceedings the “very limited” jurisdiction described in *Police v D* to refuse to conduct a hearing that would plainly be an abuse of the District Court’s own processes.<sup>36</sup> The Court rejected a submission that the jurisdiction extends to considering the fairness of the trial to be held overseas.<sup>37</sup> And in *Dotcom v United States of America (Dotcom (SC))* the Supreme Court recognised that extradition courts possessed any implied powers that were necessary to protect their processes from abuse or to ensure a fair hearing, albeit the majority concluded that the particular power at issue in that case (an implied power to order disclosure) was not necessary.<sup>38</sup>

[42] Eligibility is determined by a four-step process:

(a) Step 1: the supporting documents submitted with the diplomatic request for extradition must be produced to the extradition court. It will be recalled that these describe the conduct and identify the requesting state offence:<sup>39</sup>

(a) the supporting documents (as described in section 18(4)) in relation to the offence have been produced to the court; and

The Court must also receive any other document that a treaty requires be produced to it. The Treaty envisages that the documents referred to above at [39] will be produced, since they inform the eligibility determination.<sup>40</sup>

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<sup>35</sup> *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [114].

<sup>36</sup> *Bujak v Republic of Poland* [2007] NZCA 392, [2008] 2 NZLR 604 at [65]; citing *Police v D* [1993] 2 NZLR 526 (CA).

<sup>37</sup> At [66].

<sup>38</sup> *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [160] per McGrath and Blanchard JJ and [227] per William Young J [*Dotcom (SC)*].

<sup>39</sup> Extradition Act 1999, s 24(2)(a).

<sup>40</sup> New Zealand – United States Treaty, art X.

- (b) Step 2: the extradition court must decide that the offence is an extradition offence:<sup>41</sup>
    - (c) the court is satisfied that the offence is an extradition offence in relation to the extradition country ...
  - (c) Step 3: the extradition court must decide that the evidence meets the committal standard:<sup>42</sup>
    - (d) the court is satisfied that the evidence produced or given at the hearing would, according to the law of New Zealand, but subject to this Act,—
      - (i) in the case of a person accused of an extradition offence, justify the person's trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand;
- ...
- (d) Step 4: the extradition court assesses whether any mandatory or discretionary restrictions on surrender apply.<sup>43</sup>

[43] We observe that at step 1 the requesting state documents that were submitted to the Minister must be produced but the court is not required to make a decision about them. The court uses the documents when making the decisions required of it at steps 2–4.

[44] We have noted that an extradition offence is defined as a qualifying offence under the laws of both countries. At step 2, however, the court does not ordinarily inquire into the requesting state offence. As Lord Millett explained in *R (Al-Fawwaz) v Governor of Brixton Prison*, the requirement that the conduct be an offence in the requesting state serves a “purely practical purpose”; there is no point in extraditing a person who cannot be tried in the requesting state.<sup>44</sup> Responsibility for satisfying that requirement rests with the Minister, who must consider the requesting state documents before asking the District Court to issue an arrest warrant. At the extradition hearing

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<sup>41</sup> Extradition Act 1999, s 24(2)(c).

<sup>42</sup> Section 24(2)(d).

<sup>43</sup> Sections 24(3) and 24(4).

<sup>44</sup> *R (Al-Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69, [2002] 1 AC 556 at [95].

the court examines the second limb of the definition: whether the conduct of which the person is accused would be an offence in New Zealand. This requirement protects the person from what Lord Millett described as “the exercise of an exorbitant foreign jurisdiction”.<sup>45</sup> We return to this topic below at [124], when dealing with transposition.

[45] At step 2 the court also considers any applicable extradition treaty. It does so because, as we explain in subsequent sections of this judgment, an extradition treaty may preclude or qualify extradition for conduct that would make out a given domestic offence.

[46] At step 3, the committal standard in New Zealand is whether the admissible evidence, if accepted, could reasonably satisfy a properly directed trier of fact of the defendant’s guilt.<sup>46</sup> This is a question of judicial judgement. When answering it a court must recognise that in all but the most unusual or extreme circumstances it is for the trier of fact — here, the requesting state’s court — to decide whether evidence is credible or reliable and to determine the defendant’s guilt or innocence.<sup>47</sup> We return to this topic below at [112], when dealing with the determination of eligibility under the ROC procedure.

[47] Step 4 concerns restrictions on surrender. The person is ineligible for surrender if he or she satisfies the court that s 7 (mandatory restrictions on surrender) or s 8 (discretionary restrictions) applies.<sup>48</sup> Section 7 lists important restrictions such as the political character of the requesting state offence and s 8 provides that it may be unjust or oppressive to surrender the person where the case is trivial, or the accusation has been made in bad faith, or too much time has passed since the offence was allegedly committed. These provisions establish an express judicial power to address an alleged abuse of extradition process by the requesting state. It is now common ground that s 7 does not apply in this case. In the District Court Mr Dotcom invoked s 8, alleging that it would be unjust to surrender him because of the fugitive disentitlement doctrine applied to him in the United States,<sup>49</sup> but that claim was not pursued on appeal,

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<sup>45</sup> At [95].

<sup>46</sup> *Police v D*, above n 36, at 529.

<sup>47</sup> *Parris v Attorney-General* [2004] 1 NZLR 519 (CA) at [14].

<sup>48</sup> Extradition Act 1999, ss 24(3) and 24(4).

<sup>49</sup> The fugitive disentitlement doctrine is helpfully explained by Ellis J in *Dotcom v Deputy Solicitor-General* [2015] NZHC 1197, [2016] NZAR 229 at [12]–[16] and [74]–[79].

the appellants all preferring to invoke the implied power to stay for abuse. We return to this point below at [286], when dealing with the stay applications. For completeness, we note that under s 24(3)(b) a person is also ineligible if he or she can satisfy the court that surrender would not be in accordance with an extradition treaty, but that provision is subject to s 30(2)(ab), under which the Minister decides whether a mandatory restriction on surrender that is imposed by treaty applies to the person.<sup>50</sup> The appellants did not invoke s 24(3)(b).

[48] The United States has been designated an exempted country under s 17, meaning that it may rely on s 25, which permits the extradition country to rely on a ROC for purposes of committal, though it need not do so and may also adduce evidence in addition to the ROC. We observe in passing that reciprocity of this more expedient process is one of the criteria for exemption.<sup>51</sup>

[49] The ROC must contain a “summary of the evidence acquired to support” the surrender request and “other relevant documents”, and it must be prepared by a person having the status of a prosecutor or investigating authority in the requesting country:

**25 Record of case may be submitted by exempted country at hearing**

...

- (2) A record of the case must be prepared by an investigating authority or a prosecutor in an exempted country and must contain—
- (a) a summary of the evidence acquired to support the request for the surrender of the person; and
  - (b) other relevant documents, including photographs and copies of documents;

[50] The ROC is admissible if it was prepared by or under the authority of a prosecutor, the evidence has been preserved for use at the trial, and in the opinion of a person having control over the decision to prosecute,<sup>52</sup> the ROC discloses

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<sup>50</sup> Extradition Act 1999, ss 24(3)(b) and 30(2)(ab).

<sup>51</sup> Section 17(2).

<sup>52</sup> Section 25(3A). The person may be the principal law officer of the requesting state, or their delegate, or a person having lawful control over the decision to prosecute. Judicial notice must be taken of the signature: s 25(5).

“the existence of evidence” that suffices under the exempted country’s law to put the person on trial.<sup>53</sup>

- (3) The record of the case is admissible as evidence if it is accompanied by—
  - (a) an affidavit of an officer of the investigating authority, or of the prosecutor, as the case may be, stating that the record of the case was prepared by, or under the direction of, that officer or that prosecutor and that the evidence has been preserved for use in the person’s trial; and
  - (b) a certificate by a person described in subsection (3A) stating that, in his or her opinion, the record of the case discloses the existence of evidence that is sufficient under the law of the exempted country to justify a prosecution in that country.

[51] Part 9 of the Extradition Act contains other provisions relating to evidence. Notably:

- (a) s 74 allows an extradition court to receive evidence from the person to show that ss 7 or 8 apply, if the court considers the evidence reliable;
- (b) s 75 deems depositions taken overseas and official certificates of conviction or other facts to be admissible if duly authenticated;
- (c) s 76 provides that without limiting s 25, a hearsay statement made and contained in a deposition taken outside New Zealand is admissible as evidence of a fact or opinion that it tends to establish; and
- (d) s 78 provides that courts must take judicial notice of signatures or judicial seals on certain requesting state documents requiring authentication.

[52] If it finds the person eligible for surrender, the extradition court records the extradition offence or offences for which eligibility has been established and sends its advice to the Minister along with the evidence and other material. The court may provide the Minister with such report as it thinks fit. It also issues a warrant for the

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<sup>53</sup> Section 25(3).

person's detention.<sup>54</sup> The District Court has not yet taken these steps in this case, pending this appeal.

[53] It is then the task of the Minister to decide under s 30 whether the person is to be surrendered. Available grounds for denying extradition include compelling personal circumstances and the existence of discretionary grounds under s 8.

[54] It is necessary to outline the appellate jurisdiction because the appellants maintain that the High Court could not address the substantive merits or remedy deficiencies in the District Court process. The Extradition Act confers limited appeal rights, consistent with the status of an extradition hearing as a committal proceeding only. An appeal lies to the High Court on a question of law by way of case stated.<sup>55</sup> Appeals may not be brought on the ground of improper admission or exclusion of evidence.<sup>56</sup> The High Court's powers jurisdiction and powers are found in s 72, which allows the Court to reverse, confirm or amend the determination and make any other order affecting it that the Court thinks fit:

## **72 Powers of court on appeal**

- (1) The High Court must hear and determine the question or questions of law arising on any case transmitted to it, and do 1 or more of the following things:
  - (a) reverse, confirm, or amend the determination in respect of which the case has been stated;
  - (b) remit the determination to the District Court for reconsideration together with the opinion of the High Court on the determination;
  - (c) remit the determination to the District Court with a direction that the proceedings to determine whether the person is eligible for surrender be reheard;
  - (d) make any other order in relation to the determination that it thinks fit.
- (2) In hearing and determining the question or questions of law arising on any case transmitted to it, the court—

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<sup>54</sup> Section 26.

<sup>55</sup> Section 68.

<sup>56</sup> Section 69(1)(b).

- (a) must not have regard to any evidence of a fact or opinion that was not before the District Court when it made the determination appealed against; and
- (b) may in the same proceeding hear and determine any application for a writ of habeas corpus made in respect of the detention of the person whose surrender is sought.

We draw attention to the legislation's limits upon appeals founded on new evidence or evidence that was improperly included or excluded.<sup>57</sup>

[55] Under s 73(3) the High Court need not reverse or amend a determination made in error if it considers that no substantial wrong or miscarriage of justice has been done and the determination ought to be upheld:

- (3) Despite subsections (1) and (2), if an appeal is against a determination that a person is eligible for surrender, and the court determines that there has been an error of law, it may nevertheless decline to reverse or amend the determination in respect of which the case has been stated if it considers that no substantial wrong or miscarriage of justice has occurred and that the determination ought to be upheld.

[56] This short survey of the appellate jurisdiction establishes plainly that the High Court may have regard to the substantive merits of the case for extradition and its powers are wide enough to remedy any deficiency in the lower court process.

[57] This Court's powers on further appeal are found in s 144 of the Summary Proceedings Act. Appeal on a question of law is by leave of the High Court or, if leave is refused, this Court. The criterion for leave is whether the question ought, by reason of general or public importance or for any other reason, to be submitted to this Court for decision. This Court has the same power to adjudicate on the proceeding that the High Court had.

[58] We conclude this survey by noting pt 4, which applies to Australia and other designated countries but does not presently include the United States. Under that part the extradition court must decide that the offence is an extradition offence but the person may not adduce evidence to contradict an allegation that he or she has engaged in conduct constituting the offence for which surrender is sought. We are not presently

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<sup>57</sup> Sections 69(1)(b) and 72(2)(a).

concerned with the interpretation of these provisions, but it is relevant to note that the legislature has created a statutory process that further simplifies extradition for designated countries but retains double criminality by requiring that the court identify an extradition offence under s 4.

### **Interpretation principles**

[59] We pause to note some relevant principles of interpretation that inform our analysis of the Extradition Act and the Treaty:

- (a) It is a principle of extradition law that a substantive, purposive approach is needed to ensure the extradition process is practical and workable. The Extradition Act itself expressly confirms this.<sup>58</sup>
- (b) Interpretation must be cognisant of the New Zealand Bill of Rights Act 1990 (BORA). Extradition does not engage the BORA right to a fair trial, because the trial is a matter for the foreign state and comity demands that the domestic court focus on the committal process.<sup>59</sup> However, it does engage the liberty of the subject, an interest which underpins a number of specific BORA rights, such as the right to freedom of movement, the right not to be arbitrarily arrested or detained and the right to natural justice.<sup>60</sup>
- (c) The Extradition Act states that it must be interpreted consistently with any relevant extradition treaty, as already noted,<sup>61</sup> and the Treaty must also be given a generous and purposive effect.<sup>62</sup>

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<sup>58</sup> Section 5.

<sup>59</sup> *Dotcom* (SC), above n 38, at [115] per McGrath and Blanchard JJ and [211] per William Young J.

<sup>60</sup> New Zealand Bill of Rights Act 1990, ss 18, 22, 23 and 27. See also *Dotcom* (SC), above n 38, at [118] per McGrath and Blanchard JJ, [212] per William Young J and [281] per Glazebrook J; *Ferras v United States of America* 2006 SCC 33, [2006] 2 SCR 77 at [14]; and Claudia Geiringer and Paul Rishworth “Magna Carta’s Legacy? Ideas of Liberty and Due Process in the New Zealand Bill of Rights” (2017) NZ L Rev 597.

<sup>61</sup> Extradition Act 1999, s 11.

<sup>62</sup> *Edwards*, above n 25, at [25]–[28].

## The Extradition Act's legislative antecedents

[60] In our opinion the Extradition Act's interpretation is significantly informed by an understanding of its predecessors. New Zealand's extradition law can be traced directly to two Acts of the Westminster Parliament:

- (a) the Extradition Act 1870 (Imp) (1870 Act), which dealt with extradition requests from countries outside the British Empire and its dominions,<sup>63</sup> and
- (b) the Fugitive Offenders Act 1881 (Imp), which dealt with extradition requests from British colonies or dominions, the rationale being that they formed part of a single state for extradition purposes.<sup>64</sup>

The first of these statutes applied in New Zealand until the 1965 Act was passed,<sup>65</sup> and the second until the 1999 Act was passed.<sup>66</sup>

[61] The 1870 Act contained an express double criminality requirement from its inception. An offender could only be extradited for an offence which could be mapped to one of a set list of English offences in a schedule to the Act and assuming that the conduct alleged had occurred within the jurisdiction of the English courts.<sup>67</sup> The Act delegated to the executive the power to extend it to treaty countries by Order in Council. Reflecting the principle that delegated legislation may not without antecedent legislative authority interfere with the operation of the statute, the legislation expressly authorised additional limits; its application to any given treaty country might be "subject to such conditions, exceptions, and qualifications as may be deemed expedient".<sup>68</sup> Lord Diplock explained in *Government of the Federal Republic of Germany v Sotiriadis* that:<sup>69</sup>

Since effect may not be given under the Act to treaties which are not in conformity with its provisions, one finds the main provisions of the Act

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<sup>63</sup> Extradition Act 1870 (Imp) 33 & 34 Vic c 52.

<sup>64</sup> Fugitive Offenders Act 1881 (Imp) 44 & 45 Vic c 69.

<sup>65</sup> Extradition Act 1908, s 2; and Extradition Act 1965, s 20(1).

<sup>66</sup> Extradition Act 1999, s 112(2).

<sup>67</sup> Extradition Act 1870, s 26, definition of "extradition crime".

<sup>68</sup> Section 4(2). Section 12 of the Fugitive Offenders Act 1881 was in materially identical terms.

<sup>69</sup> *Government of the Federal Republic of Germany v Sotiriadis* [1975] AC 1 (HL) at 24.

reflected in the extradition treaties; though ... the language in which they are expressed may not follow the precise wording of the Act itself and the treaty may also contain restrictions additional to those provided in the Act itself.

[62] In *Re Neilsen*, Lord Diplock returned to the topic, observing that a treaty could not expand upon the 1870 Act's list of crimes for which extradition might be granted but could impose additional limits upon the extradition of fugitives from the state concerned.<sup>70</sup> We note in passing that s 16 of the 1999 Act, dealing with extension to non-treaty countries, is in similar terms.

[63] New Zealand enacted its own extradition regime with the 1965 Act (although the Fugitive Offenders Act continued to apply to Commonwealth countries).<sup>71</sup> The 1965 Act authorised its extension to treaty countries by Order in Council but specified that any treaty was to be read subject to certain provisions of the Act.<sup>72</sup> Section 2 defined an "extradition offence" as:

In relation to any foreign country, means any act or omission which, if it occurred in New Zealand, would be one of the crimes described in the First Schedule to this Act, and which amounts to one of the offences described in the extradition treaty with that country and is punishable in that country and also includes conspiring, attempting or being an accessory after the fact to such an offence.

[64] It will be seen that the 1965 Act incorporated double criminality using the enumerative approach, listing in a schedule the New Zealand offences against which the alleged act or omission was to be gauged as if the conduct had occurred here. The definition also provided that an extradition offence must also be described in the relevant state's extradition treaty. Thus a treaty might curtail but not enlarge upon the offences for which extradition was available under the statute.

[65] The definition colours the meaning of s 3(4), which provided that where a treaty existed and the Act had been applied to the relevant state by Order in Council:

Except as provided in subsection (3) of this section [restrictions on surrender], this Act shall be read subject to the terms of the treaty and shall be so construed as to give effect to its terms.

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<sup>70</sup> *Re Neilsen* [1984] 1 AC 606 (HL) at 616.

<sup>71</sup> *R v Riley* [1985] 2 NZLR 242 (CA).

<sup>72</sup> Extradition Act 1965, s 3(3).

It will be seen that this language is essentially identical to s 11(1) of the 1999 Act.

[66] The direction that the 1965 Act should be read subject to the terms of the treaty cannot be taken to override the definition of ‘extradition offence’. That is so because the definition expressly established how a treaty might bear on the classification of extradition offences. When applied to the definition, “subject to the treaty” accordingly recognises that the treaty may qualify the definition. In ordinary usage “subject to” need not connote that one thing is subordinate to another. It may mean, in context, that the one may be affected by the other.<sup>73</sup> To interpret it in the latter way in this example is to avoid what would otherwise be a conflict with the definition and to restrict the statutory injunction to a statement of principle, consistent with what we take to have been Parliament’s intention. We find support for that conclusion in the balance of s 3(4), in which legislative expression was given to the principle that a purposive approach is required in extradition practice. Further support is found in the explanatory note to the Extradition Bill, which stated that the intention was to replicate the 1870 Act but address certain difficulties (such as the need to translate English offences into their New Zealand equivalents) that complicated extradition practice.<sup>74</sup>

### **The New Zealand – United States treaty**

[67] The New Zealand – United States Treaty was given effect under the 1965 Act by an Order in Council that took effect on 8 December 1970.<sup>75</sup> It recites that the parties desire to make more effective their co-operation for the reciprocal extradition of offenders and records in art I that:

Each Contracting Party agrees to extradite to the other, in the circumstances and subject to the conditions described in this Treaty, persons found in its territory who have been charged with or convicted of any of the offences mentioned in Article II of this Treaty committed within the territory of the other.

[68] Article II comprises a list of extradition offences corresponding to those in the 1965 Act. Like the 1965 Act, it describes offences in what Lord Diplock called

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<sup>73</sup> Bryan A Gardner (ed) *Black’s Law Dictionary* (10th ed, Thomson Reuters, St Paul, 2014), definition of “subject”.

<sup>74</sup> Extradition Bill 1965 (75–1) (explanatory note) at i–ii.

<sup>75</sup> Extradition (United States of America) Order.

“generic” terms, using “general terms and popular language” rather than specific definitions.<sup>76</sup>

[69] Article IV provides that extradition shall be granted only if the evidence be found sufficient to justify committal for trial under the requested state’s law:

Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, either to justify his committal for trial if the offence of which he is accused had been committed in that place or to prove that he is the person convicted by the courts of the requesting Party.

[70] Article VI sets out mandatory restrictions on surrender which broadly align with those found in the Extradition Act.<sup>77</sup> We draw attention to art VI.3 however, which deals with limitation periods for prosecutions (and which we return to below at [157]–[162]):

Extradition shall not be granted in any of the following circumstances:

...

3. When the prosecution or the enforcement of the penalty for the offence has become barred by lapse of time according to the laws of the requesting Party or would be barred by lapse of time according to the laws of the requested Party had the offence been committed in its territory.

...

[71] Article IX further states that the extradition decision, which in New Zealand is that of the Minister, is to be made in accordance with the laws of the requested party:

The determination that extradition based upon the request therefor should or should not be granted shall be made in accordance with the laws of the requested Party and the person whose extradition is sought shall have the right to use such remedies and resources as are provided by such law.

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<sup>76</sup> *Re Neilsen*, above n 70, at 615. The list in the Extradition Act 1965 has since been eliminated by statute. However, under s 101B of the Extradition Act 1999 certain “transnational” crimes are now deemed to be included in the New Zealand – United States Treaty. We discuss those applicable to this case at [190]–[194] and [227]–[230] below.

<sup>77</sup> Compare Extradition Act 1999, s 7; and New Zealand – United States Treaty, art VI.1 and VI.4.

## Extradition in practice under the 1965 Act and the Treaty

[72] Such authority as there is under the 1965 Act mostly reflects an assumption that double criminality was required in cases involving the United States. For example, in *Re Translateur*, where the United States sought the extradition of a Colombian woman for drug offences,<sup>78</sup> this Court noted in 1982 that:<sup>79</sup>

It is not in dispute that at least some of the offences are extradition offences as defined in the New Zealand Act and if committed in New Zealand would be drug dealing offences as defined in s 10 of the Misuse of Drugs Amendment Act 1978.

[73] In *Mewes v Attorney-General*, a 1979 case in which it was held that s 3(4) did not dictate that authentication requirements under the Treaty prevailed over those in the Act, Chilwell J held:<sup>80</sup>

It would surprise me if the constitutional law of this country is that the Treaty of 1970 somehow amended the 1965 Act of the New Zealand Parliament. All that s 3(4) does is to enact a rule of construction which encourages the fulfilment of international obligations rather than the reverse.

[74] In *D’Cunha v United States*, a 1997 High Court decision dealing with the different definitions of sodomy under United States law and New Zealand law (both before and after homosexual law reform), Giles J held that s 5(2) of the 1965 Act protected double criminality.<sup>81</sup> Section 5(2), which was not subject to a treaty, provided that an accused could not be extradited to be charged in the requesting state with offences that were not extradition offences. Giles J reasoned that because it used the term “extradition offence”, s 5(2) mandated that (as much as possible domestically) a person could only be extradited to the requested country based on offences that can be mapped to New Zealand offences.<sup>82</sup>

[75] In *Yuen Kwok-Fun v Hong Kong Special Administrative Region of the People’s Republic of China*, a 2001 decision, a Full Court of this Court considered whether discretion to refuse extradition on humanitarian grounds under the 1965 Act lay with

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<sup>78</sup> *Re Translateur* [1982] 1 NZLR 700 (CA).

<sup>79</sup> At 700–701.

<sup>80</sup> *Mewes v Attorney-General* [1979] 1 NZLR 648 (HC) at 665–666.

<sup>81</sup> *D’Cunha v United States of America* HC New Plymouth M24/97, 24 June 1997.

<sup>82</sup> At 12–13.

the District Court or the Minister.<sup>83</sup> For the Court, Keith J observed that s 3(4) (now s 11 of the 1999 Act) contemplates that a treaty may override the legislation, explaining that:<sup>84</sup>

The process which s 11 of the [1965 Act] requires can perhaps be better thought of as reconstruction of the Act, to the extent it is inconsistent with the treaty, to make it consistent. The strength of the direction recognises the basic principles of international law that treaties must be complied with and that a state cannot invoke its internal law to justify its failure to perform a treaty...

[76] However, the Court was not there concerned with the definition of extradition offence and its relationship to treaties. It was addressing the statutory allocation of functions between the court and the Minister. Speaking of what is now s 11(2)(d), which preserves from override any provision conferring a particular function or power on the Minister or a court, Keith J simply observed that conflict is unlikely since treaties seldom address such matters.<sup>85</sup>

[77] It is convenient to note here that in the following year the Court decided *Edwards v United States* under the 1999 Act and expressly refrained from commenting on the question whether s 4(2) and its rule of double criminality applied to the New Zealand – United States Treaty.<sup>86</sup> The question in that case was whether the United States charges — essentially, theft — sufficiently corresponded to the now-archaic treaty offences of larceny or embezzlement. The Court held that they did, emphasising that treaties must be interpreted in a liberal manner and with the purpose of bringing serious offenders to justice in mind, explaining that this rule applies to extradition treaties partly because they have long lives during which national offence definitions may alter, and adding that because the United States is a federation, treaties must incorporate the law of more than 50 jurisdictions.<sup>87</sup>

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<sup>83</sup> *Yuen Kwok-Fung v Hong Kong Special Administrative Region of the People's Republic of China* [2001] 3 NZLR 463 (CA).

<sup>84</sup> At [16].

<sup>85</sup> At [18]. We do not need to decide whether this Court's decision on the way s 11 of the Extradition Act 1999 operates should be revisited in light of the Canadian and English authorities discussed in this judgment, but we observe that those authorities do not appear to have been cited to the Court.

<sup>86</sup> *Edwards v United States of America*, above n 25, at [14].

<sup>87</sup> At [25]–[29].

## Parliamentary history of the Extradition Act

[78] As we have already noted, the Extradition Act uses the eliminative approach to define extradition offences. The explanatory note to the Extradition Bill indicates that this was done so the legislation need not be updated as new offences were created.<sup>88</sup>

This list or “enumerative” approach is now regarded internationally as being outdated. The preferred approach, known as the “eliminative” approach, is instead to describe the offences for which extradition can be granted by reference to a minimum penalty. The main advantages of this approach are to reduce the risk of offences being inadvertently excluded from the Act and to allow any new offences that are created and have the requisite penalty to be automatically regarded as extraditable offences.

[79] The note also explained (when outlining the characteristics of extradition offences) that double criminality is required.<sup>89</sup> It contains nothing to suggest that the Bill was intended to detract from this principle; and specifically, nothing to suggest that the executive branch might override double criminality by treaty. On the contrary, it reinforced the need for a “bottomline”:<sup>90</sup>

While the Bill aims to ensure that alleged offenders can be surrendered expeditiously, it also sets a “bottomline” as to the circumstances in which extradition may occur. This helps to protect the alleged offender’s basic human rights, given that the person is threatened with removal from the safety of a state where he or she has committed no offence.

[80] The clauses that became ss 4(1) and 11(1) were amended at the Select Committee stage. The Report of the Foreign Affairs, Defence and Trade Committee explains that this was done to clarify the relationship between treaties and the statute.<sup>91</sup> The Regulations Review Committee had prompted this change, seeking to limit any power to amend the statute by subordinate legislation.<sup>92</sup> The resulting provisions were designed, the Select Committee explained, to establish a “general principle” that the Extradition Act was to be construed to give effect to a treaty and to

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<sup>88</sup> Extradition Bill 1999 (146–1) (explanatory note) at iii.

<sup>89</sup> At iii and v.

<sup>90</sup> At iii.

<sup>91</sup> Extradition Bill (146–1) (select committee report) at iii.

<sup>92</sup> Letter from Arthur Anae (Deputy Chairperson, Regulations Review Committee) to Derek Quigley (Chairperson, Foreign Affairs, Defence and Trade Committee) regarding the Report of the Regulations Review Committee: Extradition Bill (31 August 1998) at 2.

deal more comprehensively with the ways in which a treaty could not override the Act.<sup>93</sup>

[81] We conclude that nothing in the legislative record suggests an intention to change existing law regarding double criminality. To do so by leaving it to treaty negotiators rather than the courts would be a very significant step even if they were thought unlikely to compromise the principle that domestic law should protect the liberty of the subject. The change to the definition of extradition offence is explicable by the adoption of an eliminative approach. Broadly consistent with that, the legislation adds further protection from treaty override. The 1965 Act provided that treaties must be read subject to subss (1) to (5) of s 5, which dealt with what are now mandatory restrictions on surrender. The 1999 Act retains those but also protects from treaty “override” judicial and ministerial functions and powers and, as already noted, s 24(2)(d). This brings us to *Cullinane*.

## **E DOUBLE CRIMINALITY IN EXTRADITION BETWEEN NEW ZEALAND AND THE UNITED STATES**

### ***Cullinane***

[82] In *Cullinane* the United States sought extradition for visa fraud, racketeering, alien smuggling and harbouring, all offences arising from a scheme to have Australasian truck drivers enter the United States to work there contrary to immigration law. The question was whether these were extradition offences.<sup>94</sup> The District Court held the appellant ineligible on some charges, and the High Court on others. The United States’ appeal to this Court was dismissed.

[83] The High Court had followed the Extradition Act’s three-part test (conduct said to establish a) requesting state offence mapped to b) qualifying domestic offence and c) treaty offence). During argument, this Court inquired whether the New Zealand – United States Treaty classification replaces s 4, so eliminating b), the double criminality requirement. Further submissions were called for. As it turned out, counsel for both parties agreed that the Treaty prevailed.<sup>95</sup> In the result, the Court did

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<sup>93</sup> Extradition Bill (146–1) (select committee report) at iii.

<sup>94</sup> *Cullinane*, above n 15, at [4].

<sup>95</sup> At [49].

not have the benefit of the thorough argument for which we are indebted to counsel, and particularly Mr Illingworth, in this case. We turn to the Court's reasons.

### *Interpretation*

[84] The Court's principal reason was that the definition of extradition offence in s 4 of the Extradition Act is subject to the Treaty under the definition itself and s 11. It followed that if the conduct is an offence under the Treaty no further inquiry is required.<sup>96</sup> With the benefit of full argument, we have reached the conclusion that under the 1965 Act, which contained materially similar language, double criminality was required and treaties were incorporated into the definition because they might further restrict extradition, and we do not find in the 1999 Act any intention to depart from that policy.<sup>97</sup>

[85] We find support for our conclusion in s 24(2)(d), which is protected under s 11 and requires that the prima facie case be assessed against the extradition offence as if the conduct had taken place in New Zealand. The interpretation adopted in *Cullinane*, in which sufficiency of evidence was not in issue, required that these words be read down, confining them to an affirmation that domestic rules of procedure and evidence apply.<sup>98</sup> But to confine the paragraph in that way is to make surplus the words "if the conduct constituting the conduct had occurred ... [in] New Zealand", since the paragraph provides separately that the evidence is to be assessed according to the law of New Zealand.

### *Simplicity of extradition process*

[86] The Court observed that it is unlikely that any conduct made an extradition offence under the Treaty is not also an offence under the laws of both nations. It followed that the principal consequence of holding that the treaty prevails is that the extradition process is made considerably simpler.<sup>99</sup>

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<sup>96</sup> At [53], [55] and [63].

<sup>97</sup> See above at [66] and [81].

<sup>98</sup> *Cullinane*, above n 15, at [65].

<sup>99</sup> At [64].

[87] There is force in these propositions, but as noted above it is a significant step to delegate authority over the definition to negotiators. And the treaty-only approach need not simplify the inquiry, as this case regrettably demonstrates. Under the usual four-step test the extradition court's task is in principle simple and squarely within its expertise: it decides whether the conduct alleged, if proved at trial, would make out the elements of a qualifying domestic offence. The treaty definition must also be satisfied, but it is usually expressed in general terms and serves as a filter, screening out any offences that the treaty excludes.<sup>100</sup>

[88] By contrast, the treaty-only approach focuses the attention of the extradition court upon the task of interpreting the treaty to ascertain whether it should prevail over the s 4 definition, and then upon a treaty offence which is likely to be listed without explanation or definition, which may not correspond exactly to a domestic offence, and which may be archaic. Because it must measure conduct against offence elements the court needs some frame of reference to decide what the treaty means by (for example) the single word "murder". So the court will tend to fix the elements of treaty offences by reference to domestic law in any event.<sup>101</sup> The treaty-only approach may also lead, as it has in this case, to attempts to invoke the requesting state's law when defining treaty offences.<sup>102</sup>

*The Treaty's enumerative approach and double criminality*

[89] The Court reasoned that while treaties and statutes employing the eliminative approach almost invariably adopt double criminality expressly, as the Extradition Act does, those using the enumerative approach may or may not do so.<sup>103</sup> We agree that statutes and treaties employing double criminality normally adopt it expressly, as the Extradition Act does, but it is normally express or implicit in those using the enumerative approach too, for the reasons given above at [61]–[66]. As Ivan

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<sup>100</sup> *Edwards*, above n 25, at [27]; *Re Neilsen*, above n 70, at 624–625; *McVey*, above n 21, at 549; and *G V La Forest Extradition to and from Canada* (2nd ed, Canada Law Book, Toronto, 1977) at 42 and 56–58.

<sup>101</sup> *Re Neilsen*, above n 70, at 614–615; and Manley O Hudson "The Factor Case and Double Criminality in Extradition" (1934) 28 AJIL 274 at 280–281.

<sup>102</sup> This practice has been criticised in both England and Canada, and is not permissible in either jurisdiction: *Sinclair*, above n 31, at 91–92; and *McVey*, above n 21, at 518–520.

<sup>103</sup> *Cullinane*, above n 15, at [50]–[52].

Shearer puts it, “[t]he basic rule observed by the enumerative and ‘no list’ treaties alike is the rule of double criminality”.<sup>104</sup>

*The Treaty language and double criminality*

[90] The Court reasoned that the Treaty expressly employs double criminality in connection with only one specified offence, that of unlawful sexual connection with children under the age specified by the law of both parties, and so indicates that double criminality is not otherwise required. The Court cited the 1933 United States Supreme Court decision in *Factor v Laubenheimer* for the proposition that double criminality is not required in a treaty that employs the enumerative approach and speaks expressly of double criminality in connection with only some of the listed offences.<sup>105</sup> *Factor* is notable for dissents by Butler, Brandeis and Roberts JJ, and it was and remains controversial in the United States,<sup>106</sup> but the judgment remains law and we were told that the Supreme Court has often refused to revisit it.

[91] The list of extradition offences in art II corresponds generally to offences that were or are recognised by New Zealand law. Those relevant to this appeal are arts II.16 and II.19, which we examine later and the concluding words of art II, which extend extradition to conspiracy to commit any of the listed offences. We are presently concerned, however, with the question of whether the Treaty generally excludes double criminality. Two articles are relevant to that question. Article II.7, which was discussed in *Cullinane*, lists sexual offences upon children under the age of consent according to the law of both parties.<sup>107</sup> In his article on *Factor*, Professor Hudson reviewed the history of treaty provisions specifying that behaviour must be an offence by the law of both countries and concluded persuasively that such language merely recognises that certain behaviour may not always be punishable by the laws of both states.<sup>108</sup> Viewed in that light, the language simply reinforces the need for double

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<sup>104</sup> Shearer, above n 19, at 137.

<sup>105</sup> *Factor v Laubenheimer* 290 US 276 (1933).

<sup>106</sup> Hudson, above n 101, at 301–306; and Shearer, above n 19, at 144: in “*Factor v Laubenheimer* the United States Supreme Court seems ... to have misconceived the true application of the double criminality rule”.

<sup>107</sup> *Cullinane*, above n 15, at [61].

<sup>108</sup> Hudson, above n 101, at 292–295.

criminality. In this instance, the Treaty presumably speaks in this way because the age of consent may differ between New Zealand and some United States jurisdictions.<sup>109</sup>

[92] Article II.30, which was not discussed in *Cullinane*, comprised offences against the bankruptcy laws which are punishable by more than three months' imprisonment. Because that penalty is less than 12 months, this provision appears to admit offences which would be excluded by the Extradition Act's definition. But it does not follow that the Treaty was intended to expand upon the legislation. The Treaty predates the Extradition Act and the 1965 Act took enumerative form. We record that Mr Raftery QC, for the United States, also submitted that the relevant offence under the Bankruptcy Act 1967 was punishable by two years' imprisonment if charged indictably and suggested that the maximum specified in the treaty was presumably adopted because the offence was punishable by three months' imprisonment if charged summarily.

[93] We conclude that nothing in the Treaty conflicts with s 4. It follows, as a matter of construction of s 4, that no question arises of the Treaty displacing the statutory definition.

#### *Reciprocity of New Zealand – United States extradition practice*

[94] Reciprocity is a central principle of extradition law, so it is relevant to inquire whether United States courts would insist on double criminality when considering extradition to New Zealand. In *Factor* the United States Supreme Court held that double criminality did not apply under the treaty then in force between the United States and Great Britain,<sup>110</sup> but the decision is treaty-specific.<sup>111</sup> Our attention was drawn to no decision in which a United States court has interpreted the Treaty to exclude double criminality.

[95] Broadly to the contrary, some United States courts and commentators have drawn from *Factor* support for the proposition that double criminality is a central

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<sup>109</sup> At 296. We note that the age of consent in California for example is 18: CA Penal Code § 261.5(a).

<sup>110</sup> *Factor*, above n 105, referring to The Webster – Ashburton Treaty, Great Britain – United States of America (signed 9 August 1842, entered into force 15 October 1842).

<sup>111</sup> Shearer states that, “the decision was ... expressly limited to the question of treaty construction”. Shearer, above n 19, at 145.

principle of extradition law against which treaties ought to be interpreted. Briefly, Mr Factor happened to have been detained in the state of Illinois, which did not recognise the requesting state offence of receiving money knowing it to have been fraudulently obtained. The Supreme Court majority noted that this offence was generally recognised by the laws of both nations and found it undesirable that a person might find refuge in a United States domestic jurisdiction, the laws of which were relevantly idiosyncratic.<sup>112</sup> In *Shapiro v Ferrandina* the Court of Appeals for the Second Circuit highlighted these observations when treating *Factor* as treaty and offence-specific.<sup>113</sup> The Court added that “at least the broad elements of double criminality ... ordinarily remain a prerequisite for extradition.”<sup>114</sup>

#### *The position in other jurisdictions*

[96] Mr Illingworth drew our attention to authorities in which English courts interpreted language similar to that of s 24(2)(d) of the 1999 Act to mean that double criminality was required under the 1870 Act. We have already mentioned *Sotiriadis* and *Neilsen*.<sup>115</sup> One further example may be given. In *R v Governor of Pentonville Prison, ex parte Sinclair* the House of Lords reiterated that the task of the extradition judge is to determine whether the conduct alleged is an offence at English law.<sup>116</sup>

[97] Significantly, the Canadian authorities do not appear to have been cited in *Cullinane*. The leading case is *United States of America v McVey*.<sup>117</sup> The legislation, modelled on the 1870 Act, defined an extradition crime as any crime that, if committed in Canada, would be a crime under Canadian law and would be one of the crimes listed in the Act or in the relevant treaty (the latter being designed not to supplant the legislative list but to ensure that new offences could be added without amending it).<sup>118</sup> The treaty in issue stated that people would be extradited for any of a list of crimes,

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<sup>112</sup> *Factor*, above n 105, at 298–301. Shearer suggests that the case could have been resolved by reasoning that the conduct concerned would if proved amount to obtaining money by false pretences, which was a crime in Illinois: Shearer, above n 19, at 145. This possibility was also mentioned in the dissenting judgment: *Factor*, above n 105, at 308. If so, the difficulty that concerned the majority would be addressed in New Zealand by s 5 of the Extradition Act 1999.

<sup>113</sup> *Shapiro v Ferrandina* 478 F 2d 894 (2nd Cir 1973).

<sup>114</sup> At 911.

<sup>115</sup> *Sotiriadis*, above n 69; and *Re Neilsen*, above n 70.

<sup>116</sup> *Sinclair*, above n 31.

<sup>117</sup> *McVey*, above n 21.

<sup>118</sup> Extradition Act RSC 1970, s 2, definition of “extradition crime”.

provided those crimes were punishable by the laws of both countries.<sup>119</sup> The Court stated that the task of the extradition judge was that of identifying the equivalent Canadian crime and deciding whether the conduct established that crime according to Canadian law. A majority held that it was not for the judge to decide whether the conduct was also an offence under United States law; that is a treaty obligation and treaties are administered by the executive.<sup>120</sup> When identifying the equivalent Canadian crime the court should not interpret treaty expressions, such as “forgery” or “conspiracy”, according to the laws of either country but rather should recognise that these terms are used in a generic and comprehensive sense.<sup>121</sup> Speaking generally of extradition, La Forest J, for the majority, said:<sup>122</sup>

Some perspective may be gained through reflection on what an extradition treaty is. It is an agreement between two sovereign states whereby each agrees to surrender on request persons alleged to have committed crimes in the state requesting the surrender. To this general obligation, states frequently attach terms and conditions. When a request is made, the political authorities in the requested state will examine the material to see that the request complies with these terms and conditions. The treaties also make provision for the requesting state to supply certain material whereby the requested state can determine the validity of the request and its compliance with the terms and conditions of the treaty ... and it is reasonable that these are the materials to be looked at in determining the issue. In essence, the treaty obligations are a political character to be dealt with in the absence of statute by the political authorities. However, ... the liberty of the individual has not been forgotten in these rather special proceedings. The treaties, sensitive to the liberty of the individual, contain provisions for their protection. Most important is the requirement that there be *prima facie* evidence that the act charged would constitute a crime in Canada. This specific matter, about which judges are most competent, is the task assigned to a judge by the Extradition Act.

[98] Citing *McVey*, the Supreme Court later held in *United States of America v Dynar* that:<sup>123</sup>

One of the most important functions of the extradition hearing is the protection of the liberty of the individual. It ensures that an individual will not be surrendered for trial in a foreign jurisdiction unless, as previously mentioned, the Requesting State presents evidence that demonstrates on a *prima facie* basis that the individual has committed acts in the foreign jurisdiction that would constitute criminal conduct in Canada.

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<sup>119</sup> Extradition Treaty between Canada and the United States of America CTS 1976 No 3 (signed 3 December 1971, entered into force 22 March 1976), art 2.1.

<sup>120</sup> *McVey*, above n 21, at 510–511 and 518–519.

<sup>121</sup> At 551–552.

<sup>122</sup> At 518–519 (citations omitted).

<sup>123</sup> *Dynar*, above n 21, at [121].

[99] The position in Australia appears to be different. In *Riley v Commonwealth of Australia*, which this Court followed in *Cullinane*,<sup>124</sup> the High Court of Australia held that language corresponding to that found in s 24(2)(d) was purely evidentiary.<sup>125</sup> The Extradition (Foreign States) Act 1966 (Cth) permitted extradition where the conduct, were it to happen in Australia, would constitute one of the offences against Australian law listed in a schedule. The definition provided that a foreign state offence was an extradition crime:<sup>126</sup>

... if, and only if the act or omission constituting the offence or the equivalent act or omission, or, where the offence is constituted by two or more acts or omissions, any of those acts or omissions or any equivalent act or omission, would, if it took place in ... the part of Australia where the person ... is found, constitute an offence against the law in force in that part of Australia [that is listed in a Schedule to the Act] ...

The schedule listed “an offence against the law relating to dangerous drugs, narcotics or psychotropic substances.”<sup>127</sup>

[100] The appellant was actually charged with a continuing criminal enterprise in connection with narcotics, an offence under the United States Criminal Code that was not known to Australian law. The High Court held that it was nonetheless an extradition crime. This conclusion is unremarkable, but the majority reached it by holding that the statutory definition did not require that the conduct also be an offence in Australia. They reasoned that a single act was an extradition crime even if it formed only one of a number of acts needed for a composite offence that was an offence in the requesting state only, and accepted a submission for the Commonwealth of Australia that this entailed rejection of double criminality.<sup>128</sup> The legislation required that the extradition judge must assess whether the evidence would justify trial for the *foreign* offence — continuing criminal enterprise — had the conduct occurred in the domestic jurisdiction and whether or not those acts would constitute a domestic crime.<sup>129</sup>

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<sup>124</sup> *Cullinane*, above n 15, at [60] and [65].

<sup>125</sup> *Riley v Commonwealth of Australia*, above n 25.

<sup>126</sup> Extradition (Foreign States) Act 1966 (Cth), s 4(1A).

<sup>127</sup> Schedule 1, cl 34.

<sup>128</sup> *Riley v Commonwealth of Australia*, above n 25, at 4–5, and 8.

<sup>129</sup> At 8–9.

[101] It may have been thought necessary to interpret the legislation in this way because the appellants argued that the treaty did not extend to continuing criminal enterprise either. They contended that to apply the relevant treaty offence would be to depart from the principle of double criminality. The majority responded by noting that domestic statutes and international treaties may be so framed as to permit extradition for conduct which is an offence only in the requesting state, citing *Factor*.<sup>130</sup> Having concluded by reference to the definition that double criminality was excluded, the Court further reasoned that the provision requiring that evidence be adduced that would justify trial had the conduct happened in Australia — s 17(6)(b)(i) — did not affect the definition and accordingly was limited to matters of evidence.<sup>131</sup>

[102] Writing separately, Deane J held that the principle of double criminality is one of substance rather than technical form and it is satisfied if the conduct concerned is criminal under both systems even if the offences have different names and elements. This being so, the statutory definition did not exclude double criminality. To the contrary, it gave statutory effect to the principle, when properly understood to mean that the acts and omissions would necessarily involve an offence against Australian law if they had happened there.<sup>132</sup> He agreed, however, that s 17(6)(b)(i) was purely evidentiary.<sup>133</sup>

[103] The New Zealand legislation expressly adopts double criminality in s 4 and further makes it clear in s 5(2)(b) that the elements of the foreign and domestic offences need not match. It is not necessary to read down s 24(2)(d) to reconcile it with the definition. The words can be given their ordinary meaning, connoting double criminality. Accordingly, we respectfully decline to follow *Riley*.

**Conclusion: double criminality is required under the Extradition Act and the Treaty**

[104] Recognising value in legal certainty, this Court departs only for good reason from its previous decisions.<sup>134</sup> There are two reasons for doing so in this case:

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<sup>130</sup> At 12, citing *Factor*, above n 105.

<sup>131</sup> At 9.

<sup>132</sup> At 17–20.

<sup>133</sup> At 21.

<sup>134</sup> *R v Chilton* [2006] 2 NZLR 341 (CA) at [84].

first, with benefit of full argument, we are satisfied that as a matter of interpretation double criminality is required under the Extradition Act and the New Zealand – United States Treaty; and second, its omission is undesirable for both reasons of both policy, since it supplies the policy justification for the person’s arrest and extradition, and practicality, since it also supplies a familiar and relatively straightforward test of eligibility for extradition courts. *Cullinane* is accordingly overruled. If it thinks fit, the legislature may exclude double criminality for the United States by amending the Extradition Act. Alternatively, the United States may be added by Order in Council to those countries to which pt 4 applies, which would not eliminate double criminality but would simplify the eligibility determination.

## **F DETERMINING ELIGIBILITY UNDER THE ROC PROCEDURE**

[105] We introduce this topic by summarising what was said about it in *Dotcom (SC)*, in which the Supreme Court adopted the concept of a “meaningful judicial process” in extradition.<sup>135</sup> We then discuss Canadian authority on what such a process requires when a ROC is used, before applying the concept to the Extradition Act and briefly addressing the issue of transposition.

### **The Supreme Court decision in *Dotcom***

[106] In *Dotcom (SC)* the Supreme Court rejected a claim that Mr Dotcom was entitled to general disclosure in this extradition proceeding, but it took the opportunity to discuss the task of the extradition court generally. For our purposes, the following propositions emerge from the majority judgments:

- (a) Care is needed when applying statutory provisions that the drafter has incorporated into other legislation; in this case, those parts of the Summary Proceedings Act that were incorporated into the Extradition Act. Delivering the principal judgment,<sup>136</sup> McGrath and Blanchard JJ observed that the drafter finds incorporation convenient but it may force courts to work out adjustments to meet the

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<sup>135</sup> *Dotcom (SC)*, above n 38, at [184].

<sup>136</sup> The judgment was that of McGrath and Blanchard JJ. William Young J agreed generally with it (at [202]).

legislative purpose.<sup>137</sup> The extradition context, including considerations of comity and reciprocity, requires that some features of an extradition hearing differ from those for a domestic law committal.<sup>138</sup> Making substantially the same point, William Young J observed that the question was whether disclosure, which was arguably available under the Summary Proceedings Act, was “necessary to the proper performance of the function of an extradition court.”<sup>139</sup>

- (b) The extradition hearing is to be a “meaningful judicial process” in which the subject of the application has a fair opportunity to contest the requesting state’s claim that the evidence makes out a prima facie case.<sup>140</sup>
- (c) The ROC procedure does not alter the test of eligibility under s 24. It allows the requesting state to rely on a summary of the evidence, rather than its detail, as the basis for a prima facie case.<sup>141</sup> It was negotiated between states on a reciprocal basis,<sup>142</sup> and is intended to accommodate differences in legal systems that can give rise to difficulties in extradition proceedings.<sup>143</sup> Specifically, it excludes domestic admissibility rules.<sup>144</sup> Reliance is placed on certification, which requires that a degree of trust be placed in a requesting state’s prosecutors.<sup>145</sup>
- (d) The ROC must include a summary of the material relied on but need not summarise all evidential material that the requesting state may rely upon at trial. Nor, subject to its duty of candour, need the requesting state copy or summarise all exculpatory material.<sup>146</sup>

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<sup>137</sup> At [163].

<sup>138</sup> At [192].

<sup>139</sup> At [228].

<sup>140</sup> At [181] per McGrath and Blanchard JJ, [229] per William Young J and [284] per Glazebrook J.

<sup>141</sup> At [25] per Elias CJ, [133] per McGrath and Blanchard JJ and [256] per Glazebrook J.

<sup>142</sup> At [139]–[141] per McGrath and Blanchard JJ.

<sup>143</sup> At [25] per Elias CJ and [133] per McGrath and Blanchard JJ.

<sup>144</sup> At [244] per William Young J.

<sup>145</sup> At [142] per McGrath and Blanchard JJ.

<sup>146</sup> At [195] per McGrath and Blanchard JJ and [270] per Glazebrook J.

## A meaningful judicial process

[107] The phrase “a meaningful judicial process” is drawn from the 2006 Supreme Court of Canada judgment in *Ferras v United States of America*, in which the appellants mounted a constitutional challenge to the ROC procedure.<sup>147</sup> The Court held that a meaningful process requires: a judicial phase that is independent of the executive and its functions under the legislation, providing real protection against extradition where a prima facie case is not made out; an impartial judge; and a hearing that is fair and meaningful in the sense that the judge may refuse to declare the person eligible if the evidence is insufficient to make out the elements of the domestic offence.<sup>148</sup> The last of these requirements corresponds to the concept, adopted in *Dotcom (SC)*,<sup>149</sup> of a fair opportunity to contest the requesting state’s claim that the evidence makes out a prima facie case.

[108] When considering what a meaningful judicial process requires in practice, we find the Canadian authorities directly relevant. The relevant provisions of Canada’s Extradition Act SC 1999 are similar to those of New Zealand’s Extradition Act; unsurprisingly so since the ROC process was adopted on a reciprocal basis by agreement among participating states.<sup>150</sup> In both jurisdictions the ROC is to be *admissible* in evidence.<sup>151</sup> Both statutes also require that the extradition court assess the admissible evidence for *sufficiency* against a committal standard, measured against the elements of a qualifying domestic offence.<sup>152</sup> Both recognise that courts must adapt committal processes for extradition; the Canadian legislation provides that committal process applies “with any modifications that the circumstances require”, while the New Zealand legislation provides that committal process applies “so far as applicable and with the necessary modifications”.<sup>153</sup>

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<sup>147</sup> *Ferras*, above n 60.

<sup>148</sup> At [22]–[26].

<sup>149</sup> *Dotcom (SC)*, above n 38.

<sup>150</sup> The background is discussed in Anne Warner La Forest “The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings” (2002) 28 Queen’s LJ 95 at 136.

<sup>151</sup> Extradition Act 1999, s 25(3); and Extradition Act SC 1999, ss 32(1)(a) and 33(3).

<sup>152</sup> Extradition Act 1999, s 24(2)(d); and Extradition Act SC 1999, s 29(1)(a).

<sup>153</sup> Extradition Act 1999, s 43(1)(b); and Extradition Act SC 1999, s 24(2).

[109] There are material differences affecting evidence. Notably, the Canadian legislation expressly makes admissible evidence gathered from the person that is directed to the extradition decision, provided the evidence is reliable,<sup>154</sup> while the New Zealand legislation leaves the admissibility of such evidence to the incorporated Summary Proceedings Act provisions.<sup>155</sup> We discuss those provisions below at [116]–[123].

### **The Canadian cases on the ROC procedure**

[110] In *Ferras* the ROC procedure was found consistent with a meaningful judicial process in extradition, “which has historically proceeded flexibly and in a spirit of respect and comity for extradition partners.”<sup>156</sup> This was so notwithstanding that evidence in the ROC may lack the threshold guarantees of reliability that Canadian evidence law would provide and the legislation effectively removed much of the extradition court’s discretion not to admit evidence. If properly certified, the ROC is admissible and a presumption of reliability attaches to it.<sup>157</sup> Unless rebutted it will suffice for committal.<sup>158</sup> The extradition judge must still evaluate the evidence for sufficiency and decide that it justifies committing the person for trial. To that end the judge may engage in a limited weighing of evidence to decide whether there is a plausible case. This extends to the existence of evidence and its preservation for trial, matters which the requesting state must certify to establish a prima facie case.<sup>159</sup> If the evidence is so defective or appears so unreliable that the judge concludes it would be dangerous or unsafe to convict, then the test has not been met. Otherwise the ultimate assessment of reliability must be left for trial. The person may challenge the evidence for sufficiency, and under the Canadian legislation may adduce evidence to that end, but such evidence is admissible only if it exhibits sufficient indicia of reliability to make it worth considering at the extradition hearing.<sup>160</sup>

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<sup>154</sup> Extradition Act SC 1999, s 32(1)(c). The Act is explicit that this evidence is admissible even if it would not normally be admissible under Canadian law.

<sup>155</sup> The Extradition Act 1999 also provides in s 74 that the subject may adduce evidence gathered from outside New Zealand, whether admissible or not, directed to the mandatory and discretionary restrictions on surrender in ss 7 and 8.

<sup>156</sup> *Ferras*, above n 60, at [33].

<sup>157</sup> At [52].

<sup>158</sup> At [66].

<sup>159</sup> At [57].

<sup>160</sup> At [53].

[111] The Supreme Court of Canada returned to the topic in *MM v United States of America*, which post-dates the decision in *Dotcom (SC)*.<sup>161</sup> It appears that appellate courts had adopted divergent practices following *Ferras*, so the Court took the opportunity to clarify and develop the law.<sup>162</sup> In *MM* the United States wanted to extradite a woman to Alabama to face trial for removing her children from the jurisdiction contrary to a custody order. She sought to show that the children had fled of their own volition from an abusive father and she had acted from necessity, which if true would make out defences in Canadian law. The majority held that the extradition judge had erred in law by weighing evidence, defences and exculpatory circumstances, some of which ought not be considered in the committal process or were the preserve of the Minister when making the subsequent surrender decision.<sup>163</sup> (The minority considered that extradition required a higher evidential standard than committal, allowing a judge to rule the person ineligible where a properly directed jury could not return a guilty verdict after considering an affirmative defence available in Canadian law.<sup>164</sup>)

[112] The majority set the extradition process in context, in language equally applicable in New Zealand:

[15] Extradition serves pressing and substantial Canadian objectives: protecting the public against crime through its investigation; bringing fugitives to justice for the proper determination of their criminal liability; and ensuring, through international cooperation, that national boundaries do not serve as a means of escape from the rule of law. To achieve these pressing and substantial objectives, our extradition process is founded on the principles of “reciprocity, comity and respect for differences in other jurisdictions”. These principles “are foundational to the effective operation of the extradition process” and mandate the prompt execution of Canada’s international obligations.

(Citations omitted.)

The committal phase plays an important but carefully circumscribed role in protecting the rights of the person sought. The statutory question — whether there is evidence justifying committal for trial had the conduct happened in Canada — exhaustively

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<sup>161</sup> *MM v United States of America* 2015 SCC 62, [2015] 3 SCR 973.

<sup>162</sup> At [10].

<sup>163</sup> At [41] and [44]–[48].

<sup>164</sup> At [214].

defines the extradition judge's role.<sup>165</sup> The meaningful judicial assessment required under *Ferras* does not extend to assessing the likelihood of conviction and deciding, as the extradition judge had done, that no reasonable jury could conclude the mother intended to deprive the father of possession of the children. The extradition judge "is concerned only with the essential elements of the offence and any other conditions on which the prosecution bears the evidential burden of proof",<sup>166</sup> and the test is "whether there is any admissible evidence that would, if believed, result in a conviction".<sup>167</sup> Nor is the extradition judge to assess the "quality, credibility or reliability" of the evidence, beyond a limited weighing to determine whether there is a plausible case.<sup>168</sup> The evidence in the ROC is presumptively reliable and there is a high threshold for refusing committal on the ground that the supporting evidence is unreliable; the evidence must be so defective or apparently unreliable that it would be dangerous or unsafe to act on it.<sup>169</sup> It does not suffice that the case appears to the extradition judge to be weak or unlikely to succeed at trial.

[113] The majority also examined the threshold for admissibility of evidence from the person sought, noting that the legislation envisaged such evidence must be both reliable and relevant.<sup>170</sup> The assessment must be made by reference to the test for committal, which permits only a limited weighing of the evidence. It followed that before hearing evidence from the person requested "the judge may, and I would suggest generally should, require an initial showing that the evidence is capable of satisfying the high standard that must be met in order to justify refusing committal on the basis of unreliability of the requesting state's evidence."<sup>171</sup> The proposed evidence will not do so unless, considered in light of the entire record, it could support the conclusion that the evidence essential to committal is so unreliable or defective that it should be disregarded.<sup>172</sup>

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<sup>165</sup> At [22]–[24]. This observation must be qualified in New Zealand: see ss 22, 24(3) and 24(4) of the Extradition Act 1999, and particularly the implied power to stay proceedings for abuse in s 22. In *MM*, above n 161, the Court also recognised (at [79]) that the court may, exceptionally, admit evidence that is not strictly relevant to committal but which may inform the Minister, and we note that the District Court may report to the Minister under s 26(1)(c) of the Act.

<sup>166</sup> At [46].

<sup>167</sup> At [45].

<sup>168</sup> At [47].

<sup>169</sup> At [63].

<sup>170</sup> At [74].

<sup>171</sup> At [77].

<sup>172</sup> At [78].

[114] We pause here to note that we adopt the approach of the majority in *MM* to the question of whether affirmative defences can be considered by the extradition judge. As in Canada, the role of an extradition judge in this country is essentially limited to considering whether there is a prima facie case on the evidence. As noted above, we do not consider that the Extradition Act permits of a broader role for the judge than that; to engage in considering affirmative defences requires the judge to enter into the space properly reserved for the requesting state's court.

### **The New Zealand committal process**

[115] The question whether *MM* ought to be followed in New Zealand was not controversial before us. Mr Illingworth, who led the argument on this part of the case for the appellants, accepted that the Canadian principles are sensibly adopted here. We agree generally, but it is necessary to say more because the extradition process is of course a question of construction of the New Zealand legislation, informed by the dual purposes of protecting personal liberty and facilitating the reciprocal process of extradition. As noted above, the New Zealand committal process differs from the Canadian committal process.

[116] The committal regime changed after the Extradition Act was enacted. In 1999 committal involved a hearing in the defendant's presence, and only with his or her consent might the court commit without considering the evidence. Absent such agreement the witnesses gave evidence orally and might be cross-examined. In 2009 a standard domestic committal under the Summary Proceedings Act became an automatic process, with no hearing and no judicial consideration of the evidence.<sup>173</sup> If the prosecutor filed formal written statements and the defendant did not seek a hearing the court was required to commit the defendant for trial.<sup>174</sup> It is these provisions that are now incorporated into the Extradition Act.

[117] Extradition necessitates some adaptation of these provisions. In our opinion, the Extradition Act continues to envisage that a hearing will be held. Sufficiency of evidence is only one component of an eligibility decision — the court must also

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<sup>173</sup> Under the Summary Proceedings Amendment Act (No 2) 2008.

<sup>174</sup> Summary Proceedings Act, ss 177 and 184M.

identify an extradition offence and satisfy itself that the evidence is admissible — and the Act does not envisage that eligibility will be decided automatically, without a hearing. We have also drawn attention to the extradition court’s jurisdiction to find a person ineligible if mandatory or discretionary restrictions on surrender apply.

[118] A committal proceeds on formal written statements, which are signed witness statements that comply with certain requirements of form and are deemed admissible.<sup>175</sup> Using this procedure, a requesting state may tender formal written statements and any exhibits referred to in them,<sup>176</sup> whether or not it also relies on a ROC.<sup>177</sup> A ROC does not comply with formal requirements for written statements, and as the Supreme Court noted in *Dotcom (SC)* it allows the requesting state to rely on a summary of the evidence rather than the evidence itself, but it is expressly admissible under s 25 of the Extradition Act. And without limiting s 25, documentary hearsay is admissible to prove any fact or opinion in the requesting state’s depositions, official certificates or judicial documents where direct oral evidence of that fact or opinion would be admissible in New Zealand.<sup>178</sup>

[119] The Extradition Act provides that the ROC must be certified by a person having legal control over the decision to prosecute in the requesting state.<sup>179</sup> It also requires an affidavit from an officer of the investigating authority deposing that the ROC was prepared by or under that person’s authority and has been preserved for use at trial. This latter requirement is intended to establish that evidence actually exists sufficient to put the person on trial. As it was put in *Ferras*, the point of extradition is to send the person to be tried, not to languish in prison without trial.<sup>180</sup> The verification and certification requirements justify a presumption of reliability for committal purposes, so that the ROC will likely suffice for committal. As noted above, a similar

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<sup>175</sup> Sections 162, 178 and 180.

<sup>176</sup> Sections 168 and 184A.

<sup>177</sup> Extradition Act 1999, s 25(4).

<sup>178</sup> Section 76.

<sup>179</sup> Section 25(3).

<sup>180</sup> *Ferras*, above n 60, at [55].

presumption was adopted in *Ferras* and *MM*, although under the Canadian legislation it suffices if these matters are certified by a judicial or prosecuting authority.<sup>181</sup>

[120] At the extradition hearing the court inquires, as noted, whether any extradition offence exists and whether the evidence is admissible and sufficient. It considers any challenge to these matters. In the ordinary case the court makes its decision by reference to the ROC and any formal written statements or exhibits already filed by the requesting state. Oral evidence is permissible, but the requesting state must obtain an order before it may call a witness to give oral evidence,<sup>182</sup> and the person must obtain such an order before providing evidence, oral or otherwise, at the hearing.<sup>183</sup>

[121] Before making an oral evidence order, the judge must be satisfied:<sup>184</sup>

...

- (a) if the proposed order is for the oral examination of a witness who has provided a formal written statement, that—
  - (i) it is necessary to hear the witness in order to determine whether there is sufficient evidence to commit the defendant for trial; or
  - (ii) it is otherwise in the interests of justice to hear the witness; or
- (b) if the proposed order is for the oral examination of a person who has not provided a formal written statement,—
  - (i) that the anticipated evidence of that person is relevant to the charge specified in the information; and
  - (ii) either—
    - (A) that the person has been requested to give evidence in the form of a formal written statement but has failed or refused to do so; or

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<sup>181</sup> Extradition Act SC 1999, s 33(3). We note for completeness that the certification under Canadian law appears to require either that the evidence is sufficient to commit for trial in the requesting state or that it was gathered according to the requesting state's law, a difference from the Extradition Act 1999.

<sup>182</sup> Summary Proceedings Act, ss 176 and 178. If notice was not given the court might exclude the evidence or adjourn the hearing: s 184H. Where oral evidence is permitted, witnesses may give evidence by audio-visual link: Courts (Remote Participation) Act 2010, ss 5, 6 and 9.

<sup>183</sup> Summary Proceedings Act, s 176. Only if any oral evidence order was made would there be a hearing for a domestic committal: s 183. See also *Carroll v District Court at Nelson* HC Nelson CIV-2009-442-509, 22 December 2009 at [13]; and *Pandey-Johnson v District Court at New Plymouth* HC New Plymouth CIV-2010-443-508, 30 November 2010 at [59].

<sup>184</sup> Summary Proceedings Act, s 180(1).

- (B) that it is otherwise in the interests of justice to hear the witness; or

...

[122] It will be seen that where sufficiency is in dispute the court must be satisfied that it is “necessary to hear the witness” to decide the point. As noted earlier, the test for sufficiency is whether the evidence could reasonably satisfy the trier of fact of the person’s guilt. This is an important but deliberately modest standard. When applying it the court must bear in mind that in all but the most unusual or exceptional circumstances the assessment of quality, reliability and credibility is a matter for the trial court, whose law and processes must be respected. So the court should inquire whether the evidence, if accepted, could establish the elements of the relevant domestic offence. The court may go further and assess the evidence for quality, credibility and reliability where the evidence appears to be so defective or apparently unreliable that the court could not safely act upon it, but any weighing of the evidence to that end should be limited to ensure that an extradition hearing does not become a trial on the merits.

[123] It follows that a high admissibility threshold applies to evidence that a person seeks to adduce to challenge the requesting state’s evidence on sufficiency grounds.<sup>185</sup> The court should assess the proposed evidence and inquire whether it might plausibly cause the court to form the opinion that the ROC as a whole does not make out a sufficient case for committal purposes.<sup>186</sup> Only if the answer be affirmative should it be necessary to hear the relevant witness.

### **Transposition**

[124] As we explained above at [44], the extradition court does not inquire whether the alleged conduct sufficiently makes out the requesting state offence. That is both a question of requesting state law and practice, which it is not the court’s task to answer, and a question of treaty compliance, which is the responsibility of the executive.

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<sup>185</sup> Where the proposed evidence does not go to sufficiency, the court may admit it under s 180(1)(a)(ii) of the Summary Proceedings Act.

<sup>186</sup> We note that, though s 184F of the Summary Proceedings Act speaks of the sufficiency of the prosecution’s evidence, this Court has emphasised the judge’s assessment at the committal stage does nonetheless consider *all* the evidence: *W v Attorney-General* [1993] 1 NZLR 1 (CA) at 8.

If differences between institutions and legal circumstances of the two states are egregiously offensive to domestic standards of justice, then that is a matter for the Minister under his or her discretion to refuse surrender after the Court has determined whether the person is eligible.<sup>187</sup> The court inquires whether the conduct, if proved, would make out a qualifying domestic offence and checks whether extradition for that offence is precluded or qualifies under any applicable extradition treaty. It then assesses the evidence against the elements of that offence.

[125] Of course, the conduct actually happened outside the jurisdiction. The question is whether the conduct would constitute a qualifying domestic offence had it happened here. To answer it, the court must undertake what Lord Millet described as “some degree of transposition”,<sup>188</sup> making assumptions that lend a hypothetical dimension to the inquiry.<sup>189</sup> The court must obviously assume at step 3 (sufficiency) that the conduct happened in New Zealand. It must also adopt “the circumstances of the case” by substituting New Zealand for the requesting state in the indictment and otherwise adopting, so far as appropriate, the circumstances of the requesting state.<sup>190</sup> In an oft-cited passage in *Re Collins (No 3)*, Duff J explained that:<sup>191</sup>

... if you are to conceive the accused as pursuing the conduct in question in this country, then along with him you are to transplant his environment; and that environment must, I apprehend, include, so far as relevant, the local institutions of the demanding country, the laws effecting the legal powers and rights, and fixing the legal character of the acts of the person concerned, always excepting, of course, the law supplying the definition of the crime which is charged.

[126] Transposition of circumstances is undertaken when identifying an extradition offence at step 2 but it also applies to step 3. Several illustrations help to explain it:

- (a) In *Germany (Federal Republic) v Schreiber* the defendant’s extradition was sought for, among other things, tax evasion. The appellant argued

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<sup>187</sup> *Germany (Federal Republic) v Schreiber* (2006) 264 DLR (4th) 211 (ONCA) at [46].

<sup>188</sup> *Al-Fawwaz*, above n 44, at [107].

<sup>189</sup> We are not concerned with the case where, as in *Al-Fawwaz*, extradition is sought for an offence that had not been committed in that country.

<sup>190</sup> *Al-Fawwaz*, above n 44, at [109] per Lord Millet; and *Tarling v Government of the Republic of Singapore* (1980) 70 Cr App R 77 (HL) at 136 per Lord Keith.

<sup>191</sup> *Re Collins (No 3)* (1905) 10 CCC 80 (BCSC) at 103.

that differences in definitions of income meant the German and Canadian offences did not correspond. The Ontario Court of Appeal said, in obiter, that the German definition of income formed part of the circumstances of the case that might be transposed because it identified the nature and extent of the obligation to pay taxes. By doing so the extradition court had correctly focused on the essence of the conduct — the wrong of tax evasion — and the question whether that was an offence at Canadian law.<sup>192</sup>

- (b) In *Griffiths v United States of America* extradition was sought for software piracy.<sup>193</sup> At step 2 of the corresponding Australian process, the Full Federal Court held that copyright status was not part of the person's conduct but rather was transposed as a state of affairs that need not be proved in an extradition hearing.<sup>194</sup>
- (c) In *Re Collins*, extradition was sought for the offence of perjury committed in California. Duff J transposed the circumstances that an oath had been taken in a judicial proceeding before a court of competent jurisdiction after a manner authorised by law.<sup>195</sup> When added to the allegation that a wilfully false statement of fact had been made in evidence, these facts made out the offence of perjury in Canada, so justifying extradition.<sup>196</sup>

[127] Mr Illingworth argued that transposition is strictly confined to step 2, and that facts or circumstances assumed there must be proved at step 3. He contended that the appellants are entitled to adduce evidence of fact and United States law at step 3, and further, that the United States failed to prove that the works enjoyed copyright status in that jurisdiction. This submission must fail. When defining the domestic offence

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<sup>192</sup> *Schreiber*, above n 187, at [38]–[43].

<sup>193</sup> *Griffiths v United States of America* [2005] FCAFC 34, (2005) 143 FCR 182.

<sup>194</sup> At [86].

<sup>195</sup> *Re Collins (No 3)*, above n 191. The case was decided under the Extradition Act 1870 (Imp). The Court heard evidence of Californian law before reaching this conclusion. It would not have been necessary to hear such evidence in modern practice, which, as we have explained, does not require that the court consider whether the conduct makes out the requesting state offence.

<sup>196</sup> At 103.

at step two, the court focuses on the essence of the criminality alleged.<sup>197</sup> This is because states do not have to extradite individuals for conduct they do not consider criminal; states do not have “an obligation to extradite a person who would not, according to [their] own standards, be guilty of acts deserving of punishment”.<sup>198</sup> As the Court noted in *Schreiber*, that justification is lost sight of if states instead focus on policy differences that are disconnected from the core criminality at issue.<sup>199</sup> So it follows that the transposition process must import circumstances that are not connected to that core criminality.

[128] This analysis must continue through from step 2, when defining the domestic offences, to step 3, when assessing the evidence for sufficiency against the offence just defined. It is unnecessary to test the evidence for sufficiency against elements of the offence that are not part of the core criminality alleged; and to do so is to abandon the principled justifications and comity concerns that animate the transposition analysis at step 2. This approach is reflected in s 5(2) of the Extradition Act, which focuses on the essence of the wrong alleged in the double criminality inquiry. And we emphasise that to refuse to surrender a person in reliance on non-essential features of an offence, or evidence related to those features, is inconsistent with the fundamental principles at play in the extradition process.

[129] The extent to which the court must engage in transposition of conduct and circumstances may vary with the case and the offence.<sup>200</sup> The guiding principle is that the exercise is undertaken only so far as necessary to decide whether the person’s conduct would make out a qualifying domestic offence and whether the evidence is sufficient for committal.<sup>201</sup> We emphasise that, as the Court noted in *Schreiber*, it is difficult and unhelpful to define in the abstract what elements of offences will relate to the essence of criminality in any given case.<sup>202</sup> The analysis must necessarily be case and offence specific. Judges should take care when defining the relevant

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<sup>197</sup> *Schreiber*, above n 187, at [42]; and La Forest, above n 100, at 53–54.

<sup>198</sup> Shearer, above n 19, at 137–138.

<sup>199</sup> *Schreiber*, above n 187, at [45].

<sup>200</sup> At [43].

<sup>201</sup> *Al-Fawwaz*, above n 44, at [109] per Lord Millett.

<sup>202</sup> *Schreiber*, above n 187, at [43].

domestic offences at step 2 that they do not transpose any more than necessary. To do so risks tacitly weakening the effectiveness of the double criminality principle.

[130] In this case, we agree with Gilbert J that copyright status is inessential. It is not part of the appellants' conduct.<sup>203</sup> Rather, when assessing sufficiency, the court assumes that the works enjoy copyright status in New Zealand law.<sup>204</sup> There would be no point in requiring proof of copyright status in United States law when assessing the evidence against the elements of a domestic New Zealand offence.<sup>205</sup>

[131] To say this is not to deny that there may be cases in which a court finds it necessary to consider the requesting state's law, which must be proved by evidence where it is not common ground. That may happen where a treaty provides for it,<sup>206</sup> or when it is necessary to consider whether the requesting state offence is of a political character.<sup>207</sup> That is not the case here. The leading authorities establish that in other circumstances the court does not consider whether the conduct is an offence under requesting state law:

- (a) We have mentioned *McVey* above at [97]. The appellant was charged with using a telephone in connection with a scheme to defraud a named corporation. This was an offence in the United States, but the relevant treaty offence was confined to schemes intended to defraud the public. Sopinka J delivered a dissenting judgment for this reason.<sup>208</sup> The majority, however, held that treaty offences are defined in general terms and, as we have noted above, it was not the task of the extradition court to decide whether the conduct made out the requesting state offence.

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<sup>203</sup> *Griffiths*, above n 193, at [86]. We express no view on the proposition, made in the same paragraph, that the extradition judge must be satisfied that the *type* of work pirated be capable of copyright protection in Australia.

<sup>204</sup> At [85].

<sup>205</sup> In case we should be wrong, we are also satisfied that this is not a case in which the record could possibly be considered so deficient as to merit closer examination of the evidence to be called at trial. See below at [252].

<sup>206</sup> *Re Neilsen*, above n 70, at 621.

<sup>207</sup> At 625. Under the Extradition Act 1999 the political character of the offence may be considered at step 4 of the eligibility determination.

<sup>208</sup> *McVey*, above n 21, at 502–505.

- (b) In *Sinclair*,<sup>209</sup> the House of Lords reviewed the leading authorities, including the judgment of Robert Goff LJ, as he then was, in *Re Neilsen*,<sup>210</sup> and the speech of Lord Diplock on appeal in the same case.<sup>211</sup> Lord Ackner emphasised that an extradition court need not consider foreign law at all, except in the circumstances mentioned above. Its task was simply to inquire whether the conduct in the foreign warrant would constitute a qualifying crime had it been committed in England.<sup>212</sup>

[132] We conclude, answering question two, that copyright in a particular work is not part of the appellants' conduct constituting the extradition offences in counts 4–8, and the United States need not prove copyright for purposes of s 24(2)(d) of the Extradition Act.

## **G ARE THE ALLEGED OFFENCES “EXTRADITION OFFENCES”?**

### **Analytical approach**

[133] We first consider three of the organising submissions made by the appellants. These concern the extent to which copyright infringement is criminalised in New Zealand, whether counts 4, 7 and 8 would be time-barred in New Zealand and the availability of conspiracy charging in the context of alleged offending based on copyright infringement.

[134] We then turn to consider the pathways for prosecution under New Zealand law. We will consider the counts in the superseding indictment returned by the United States Grand Jury in the most logical order and grouping, starting with count 2. We first define the essential conduct. We then consider whether that essential conduct would constitute an offence if committed in New Zealand. We examine the Judge's conclusions, the submissions thereon, and whether those conclusions were correct. After that we consider the New Zealand – United States Treaty, and whether the pathways asserted are provided for in that instrument. As we have noted, if it is

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<sup>209</sup> *Sinclair*, above n 31.

<sup>210</sup> *Re Neilsen* (1983) 79 Cr App R 1 (CA).

<sup>211</sup> *Re Neilsen*, above n 70.

<sup>212</sup> *Sinclair*, above n 31, at 91–92.

not, then the charge will not constitute an “extradition offence”.<sup>213</sup> We record that it is not suggested that any of the pathways asserted by the United States fail to meet the maximum imprisonment threshold for qualifying New Zealand extradition offences.

## **Copyright**

[135] The United States alleges that the appellants, together with other known and unknown associates, conspired to use the Megaupload commercial website and service (in the course of a business), to reproduce and distribute infringing copies of copyright works. And that they did so without authorisation (for example, a copyright licence) but with knowledge that they possessed or were dealing with infringing copies.

[136] The United States relies upon a pathway under s 131 of the Copyright Act 1994 (the 1994 Act or the Copyright Act). This raises a fundamental issue as to the extent to which that provision criminalises online dissemination of copyright works. In particular, there is a question as to whether it applies to online dissemination of digital copies of copyright works.

[137] Section 131 relevantly provides:

### **131 Criminal liability for making or dealing with infringing objects**

(1) Every person commits an offence against this section who, other than pursuant to a copyright licence,—

...

(c) possesses in the course of a business with a view to committing any act infringing the copyright; or

(d) in the course of a business,—

...

(ii) exhibits in public; or

(iii) distributes; ...

...

an object that is, and that the person knows is, an infringing copy of a copyright work.

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<sup>213</sup> See above at [45].

Section 131(1) provides several other ways in which an offence may be committed (for example by selling or hiring an object known to be an infringing copy under s 131(1)(a)) but they do not arise on this appeal and we therefore confine ourselves to those set out above.

*Judgment below*

[138] Gilbert J concluded that the s 131 offences “relate to physical infringement in the sense that the breach involves tangible copies of infringing works (‘an object’)”.<sup>214</sup> Online dissemination of infringing works did not therefore attract criminal sanction under the Copyright Act.

[139] The Judge noted that in 2008 Parliament amended s 16 of the Copyright Act, via the Copyright (New Technologies) Amendment Act 2008 (the 2008 Amendment Act), to enlarge the scope of restricted acts. The exclusive right to “communicate the work to the public” was added.<sup>215</sup> The Judge noted:<sup>216</sup>

Prior to the amendment, the communication right applied only to transmission of protected works by cable or broadcast. Infringement gave rise to civil remedies but was not a criminal offence.

He went on to note that s 131 was not materially amended and that while infringement of the communication right gave rise to civil remedies, “no new offence was created for infringement of the communication right through the online transmission or dissemination of copyright works”.<sup>217</sup> That was a deliberate choice by Parliament, despite submissions made to it by, among others, the Motion Picture Assoc.<sup>218</sup> The Judge contrasted the position in the United Kingdom, where s 107(2A) of the Copyright, Designs and Patents Act 1988 (UK) was amended in 2003 to provide that knowing infringement by communicating a copyright work to the public in the course of a business commits an offence.<sup>219</sup> No such amendment was made in New Zealand. But s 198 of the Copyright Act was amended in 2008. It is found within pt 9, dealing with performers’ rights. It is an offence provision paralleling s 131, but dealing with

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<sup>214</sup> HC judgment, above n 2, at [191].

<sup>215</sup> Copyright Act 1994, s 16(1)(f).

<sup>216</sup> HC judgment, above n 2, at [181].

<sup>217</sup> At [182].

<sup>218</sup> At [183]–[184].

<sup>219</sup> At [185].

sound or film recordings made directly of a performance. It now provides that an offence is committed by communicating to the public a known illicit recording. Section 131 was not similarly amended. Likewise in 2011, when the Copyright (Infringing File Sharing) Amendment Act 2011 was passed. That amendment introduced ss 122A to 122U of the Copyright Act. Those provisions dealt with the uploading or downloading of copyright work on the internet. The remedies provided were civil only, and s 131 was not amended.

[140] The Judge concluded:<sup>220</sup>

In summary, Parliament addressed online dissemination of copyright-protected works to the public in the Copyright (New Technologies) Amendment Act as follows:

- (a) the copyright owner has the exclusive right to communicate its works to the public by whatever means under s 16(1)(f) of the Copyright Act;
- (b) communicating a copyright-protected work to the public is a restricted act under s 33 of the Act;
- (c) infringement of this right is actionable at the suit of the copyright holder under s 29(1) of the Act; and
- (d) Parliament chose not to follow the approach taken in the United Kingdom of making infringement of the communication right a criminal offence in relation to copyright works, despite being urged to do so by industry participants.

### *Submissions*

[141] Mr Mansfield (who presented submissions on this subject for all appellants) supported Gilbert J’s reasoning that no criminal liability existed under the 1994 Act for online dissemination of copyright-protected works. Mr Mansfield relied in particular on the 2008 Amendment Act, noting that distribution rights “apply exclusively to fixed copies that can be put into circulation as tangible objects”.<sup>221</sup> Communication rights, however, were technology-neutral and encompassed online transmission. The effect of the 2008 Amendment Act, he said, was that “a copyright holder’s protection against unauthorised online dissemination of protected works exists exclusively in the capacity conferred by s 16(1)(f) — the ‘communication

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<sup>220</sup> At [191].

<sup>221</sup> It should be noted, however, that “distribution” does not feature as an exclusive right in s 16, and nor did it in s 7 of the Copyright Act 1962.

right”. Breach of that right, Mr Mansfield submitted, was deliberately not added to s 131.

[142] In addition, Mr Mansfield placed some weight on the “safe harbour” provisions for internet service providers (ISPs) in ss 92B–92E of the 1994 Act. These were introduced by the 2008 Amendment Act. Section 92B provides “blanket certainty” that ISP-*user* infringement would not create either civil or criminal liability for an ISP unless the ISP was providing more than “ISP services”. An ISP that is a mere conduit will not be liable. The provision was included to encourage growth in New Zealand of a technology-based knowledge economy.

### *Analysis*

[143] The question before us is whether s 131 imposes a criminal sanction in respect of the online dissemination of digital copies of copyright protected works (such as digital copies of films). The mechanism by which works were disseminated through Megaupload has been described earlier in this judgment.<sup>222</sup> At the heart of that question is another: whether “object” in ss 12 and 131 is limited to physical tangible copies or extends to digital files.

[144] The most fundamental copyright right is the owner’s exclusive right to make a *copy* of a protected work. That is the essential starting point of copyright, and therefore of this Court’s analysis. That right is found in s 16(1)(a) of the 1994 Act: “[t]he owner of the copyright in a work has the exclusive right to do, in accordance with sections 30 to 34, the following acts in New Zealand: (a) to copy the work”. Similarly, s 7(3)(a) of the Copyright Act 1962 (the 1962 Act), provided that “[t]he acts restricted by the copyright in a literary, dramatic, or musical work are — (a) Reproducing the work in any material form”. The focus of the first copyright statute, the Statute of Anne 1710 (GB) 8 Ann c 19, was upon printers.<sup>223</sup> The expression “copying” in the 1994 Act as originally enacted meant “in relation to any description of work, reproducing or recording the work in any material form”.<sup>224</sup>

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<sup>222</sup> See above at [6]–[17].

<sup>223</sup> See Gillian Davies, Nicholas Caddick and Gwilym Harbottle (eds) *Copinger and Skone James on Copyright* (17th ed, Sweet & Maxwell, London, 2016) vol 1 at [2-39]–[2-40].

<sup>224</sup> Copyright Act 1994, s 2(1).

From 2008 the words “(including any digital format), in any medium and by any means” were added to that definition.<sup>225</sup>

[145] Under s 29 of the 1994 Act a person who does any “restricted act” other than where licensed, infringes copyright in a work. Pursuant to s 30, “copying” a work is a restricted act. These provisions fall under the subheading of “[p]rimary infringement of copyright”. Section 36 provides:

Copyright in a work is infringed by a person who, in New Zealand, other than pursuant to a copyright licence,—

(a) possesses in the course of a business; or

...

(d) in the course of a business, exhibits in public or distributes; ...

...

an object that is, and that the person knows or has reason to believe is, an infringing copy of the work.

[146] It may be observed these provisions substantially overlap with the particular offences under s 131(1) that we are presently seized of. Notably, ss 131(1)(c), and (d)(ii) and (d)(iii), set out above at [137]. Reproduction of a copyright protected work in any material form amounts to primary infringement unless authorised by the copyright owner.<sup>226</sup> Secondary infringement under s 36 is criminalised in s 131(1) where the defendant knowingly deals with an “object” that is an “infringing copy” which is in the person’s possession. Section 12(2) in turn provides that “[a]n object is an infringing copy if its making constitutes an infringement of the copyright in the work in question”. The question then becomes whether the word “object” as it appears in s 12(2) is limited to physical tangible copies or whether it includes digital files.

[147] We see no warrant to infer that Parliament intended “object” to be read down, thus limiting both secondary infringement and criminal responsibility under s 131. The word “object” in the 1994 Act replaced “article” in the 1962 Act. Section 28 of the 1962 Act criminalised knowingly making for sale or hire an “infringing copy”,

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<sup>225</sup> At the same time, the extended definition of “copying” in s 2 of the Copyright Act which included “storing” any “literary, dramatic, musical, or artistic work ... by any means” was repealed.

<sup>226</sup> Copyright Act, ss 2(1), 29 and 30.

being “an article the making of which constituted an infringement of the copyright in the work”.<sup>227</sup> The change from “article” to “object” cannot have been intended to be limiting, particularly given the broader range of technologies with which the 1994 Act had to deal, including the copyright status of computer programmes. It is relevant that the 1994 Act was in part a response to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which, as the explanatory note to the Copyright Bill 1994 explained, required “criminal procedures and penalties sufficient to provide a deterrent in cases of copyright piracy on a commercial scale”.<sup>228</sup>

[148] We do not think Parliament can have intended to limit infringing copies to tangible, physical articles, as Gilbert J thought. We do not construe “object” to mean anything other than the output or product of the act of copying a copyright protected work, the infringement of the most fundamental copyright. In many instances that product will be a tangible, physical article. But it need not be so in the increasingly digital age with which the 1994 Act is concerned. In this sense the meaning of “object” under the 1994 Act has many similarities with the definition of “document” in s 217 of the Crimes Act 1961 discussed by the Supreme Court in *Dixon v R*.<sup>229</sup> There the Supreme Court held that digital CCTV footage extracted from an employer’s computer by a security guard was both a “document” for the purposes of s 217 and “property” for the purposes of s 249(1)(a) of the Crimes Act. This was because the digital files involved could be identified, had a physical presence and value, and were capable of being transferred to others. Similarly, digital copyright works are identifiable, can be possessed exclusively and are capable of transmission. These qualities are at the heart of what copyright protects.

[149] Section 6 of the Interpretation Act 1999 provides that “[a]n enactment applies to circumstances as they arise”, embodying the so-called “ambulatory approach” to legislative interpretation. That approach, broadly, reflects the courts’ anxiety to “give statutes ... an interpretation that keeps them up to date in the modern world”.<sup>230</sup>

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<sup>227</sup> Copyright Act 1962, s 2.

<sup>228</sup> Copyright Bill 1994 (32-1) (explanatory note) at i.

<sup>229</sup> *Dixon v R* [2015] NZSC 147, [2016] 1 NZLR 678.

<sup>230</sup> Ross Carter *Burrows and Carter: Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 413.

[150] Approaching the construction of s 131 then in a chronological fashion, we see rather less significance in the 2008 Amendment Act than Gilbert J did. Fundamentally those amendments added an exclusive right of communication, or transmission by any means and in digital form, of copyright protected works. But what matters here is that it added that right on top of the fundamental right already identified, which was the exclusive right to copy that work, and to control or prevent its copying by others. The means by which that copying occurred was not of critical concern, so long as there had been copying. In our view, this is reinforced by the language of s 12(2) which provides that an “object” is an “infringing copy” if its “making” constitutes copyright infringement. The focus is on the making of the copy and whether that infringes the copyright in the work. That meaning of “infringing copy” is entirely neutral of whether the output from that “making” is tangible or not. Prior to 2008 “copying” simply meant “reproducing or recording the work in any material form”. After 2008, it explicitly included reproduction in digital format. But in our view, it already did.

[151] In 2002, the Ministry of Economic Development considered whether the existing definition of copying was broad enough to allow copyright owners to control copying of material in digital form and the conversion of print or analogue works to digital form. It concluded that the existing definition of “copying” in the 1994 Act was broad enough.<sup>231</sup> It considered that digital copying and digitisation was already covered by the existing technology-neutral definition of copying (“reproducing or recording a work in any material form”). It noted also that s 34 of the Electronic Transactions Act 2002 provided that the copyright in a work was “not infringed by the generation of an electronic form of a document or the production of information by means of an electronic communication if these acts are carried out for the purposes of meeting a legal requirement”.<sup>232</sup> In those circumstances, the Ministry considered the existing definition sufficient, although noting that greater clarity at least could be given by stating that any “material form” included digital formats.<sup>233</sup>

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<sup>231</sup> Ministry of Economic Development *Digital Technology and the Copyright Act 1994: Position Paper* (December 2002) at [37]–[38].

<sup>232</sup> At [37], n 7.

<sup>233</sup> At [39].

[152] We agree that the existing 1994 definition of copying was broad enough before the 2008 Amendment Act to prohibit unauthorised copying of material in digital form. That perspective is reinforced by two other considerations.

[153] The first is this Court's 2000 decision in *Power Beat International Ltd v Attorney-General*.<sup>234</sup> The appeal concerned the validity of a search warrant based on alleged offences under s 131 of the 1994 Act and s 266A of the Crimes Act 1961. The application referred to the downloading of a copyright computer programme from a CD-ROM to Power Beat's computers. This Court considered the definition of "infringing copy" in s 12(2) of the 1994 Act. It held that "the affidavit did provide the Registrar with reasonable grounds for thinking that an offence against s 131(1)(c) had been, or would be, committed".<sup>235</sup> Although not discussed directly, this Court made no distinction between tangible and intangible copies. It expressed no concern that the digital files stored on the computers were not "objects" for the purposes of s 131.

[154] The second is the content of the explanatory note to the Bill that became the 2008 Amendment Act. It noted that:<sup>236</sup>

Under the Act, liability for unauthorised copying can currently arise in relation to such transient or incidental copies that are a necessary part of the computer or communications processes, for example, when browsing websites on the Internet.

That is, transient digital reproduction could, as the Ministry considered in 2002, already constitute "copying" for the purposes of the 1994 Act.

[155] Finally, we note also the implicit recognition in the 2008 Amendment Act that digital dissemination might give rise to potential criminal liability. That is found in s 92B(2)(c) which provides that, "without more" the ISP "must not be subject to any civil remedy *or criminal sanction*" merely because a user has used the ISP's services in infringing the copyright.

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<sup>234</sup> *Power Beat International Ltd v Attorney-General* [2000] 2 NZLR 288 (CA).

<sup>235</sup> At [13].

<sup>236</sup> Copyright (New Technologies and Performers' Rights) Amendment Bill 2006 (102-1) (explanatory note) at 3.

[156] That provision is consistent with the conclusion we have reached that the 1994 Act did create criminal liability, in the case of s 131(1)(c), where a person (including an ISP) was, in the course of business and with a view to committing any act infringing the copyright, knowingly in possession of an infringing copy of a copyright work, whether that copy was tangible or digital.<sup>237</sup> And likewise, in relation to ss 131(1)(d)(ii) and (iii) respectively, where a person who knowingly possess an infringing copy of a copyright work a) exhibits in public or b) distributes the object in the course of a business. For the purposes of both ss 36 and, more importantly, 131 the “object” that is an “infringing copy” of the copyright work can take any “material form”, whether tangible or digital.

### **Limitation**

[157] Mr Mansfield submitted that the appellants were ineligible for surrender on counts 4, 7 and 8 because, at the time the superseding indictment was issued, those counts were time-barred in New Zealand. At the relevant time s 131A of the Copyright Act provided that:<sup>238</sup>

Despite section 14 of the Summary Proceedings Act 1957, an information in respect of an offence against s 131 may be laid at any time within 3 years of the time when the matter of the information arose.

[158] The indictment was laid more than three years after the infringement alleged in counts 4, 7 and 8. Therefore, the appellants argued, the proxy offence of copyright infringement is statute barred and accordingly there is no extradition offence. Further, it is improper and an abuse of process to attempt to circumvent the limitation period by relying on Crimes Act offences when copyright infringement is at the centre of all the alleged offending.

[159] In the High Court, Gilbert J regarded this an issue for determination by the Minister at the surrender stage under s 30, rather than for the extradition court to determine when deciding eligibility.<sup>239</sup> That was because of art VI of the Treaty, which the Judge construed as a mandatory restriction on surrender.<sup>240</sup> Contrary to

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<sup>237</sup> Copyright Act, s 131(1)(c).

<sup>238</sup> Repealed by s 413 of the Criminal Procedure Act, with effect from 1 July 2013.

<sup>239</sup> HC judgment, above n 2, at [299]–[300].

<sup>240</sup> At [301]. See above at [69].

the High Court, we consider that an extradition court can decide whether a domestic limitation period applies; not because the court is assuming the Minister's responsibility under s 30(2) but because it is necessary to decide the prior question whether by reason of limitation the conduct fails to make out an extradition offence. In this case, having heard full argument on the issue, we are satisfied that limitation does not apply.

[160] We may state our reasons briefly. The offences created by s 131 of the Copyright Act are listed as indictable offences triable summarily in pt 2 of sch 1 to the Summary Proceedings Act. The prosecution would have had a choice whether to proceed on such offences summarily or by indictment.<sup>241</sup> Part 2 of the Summary Proceedings Act prescribes the procedure where a defendant is proceeded against summarily; pt 5 where it is by way of indictment. Section 14, which is the provision referred to in s 131A of the Copyright Act, was contained in pt 2. It prescribed a six-month time limit, but plainly only for summary proceedings. Certain provisions within pt 5 (proceedings by way of indictment) list particular pt 2 provisions which also apply in pt 5. But s 14 was not one of these. There were no time limits where the prosecution was by way of indictment, other than that stated in s 10B of the Crimes Act (which is inapplicable here).<sup>242</sup>

[161] Section 131A may be read either expansively or more narrowly. The expansive reading is that s 131A imposed a general three-month time limit for any s 131 prosecution, whether brought summarily or indictably. The narrower reading is that it simply operated as a dispensation from the six-month limit for summary proceedings in s 14 of the Summary Proceedings Act, extending it to three years, but did not affect a prosecution brought indictably. The narrower reading is the more obvious one available on the words employed by Parliament. There is no indication in the legislative history that in enacting s 131A, Parliament intended to introduce a time

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<sup>241</sup> See *Radish v Police* HC Auckland CP11089/90, 30 July 1990. Different forms of information for summary proceeding and indictment are specified in sch 2 to the Summary Proceedings Act.

<sup>242</sup> Section 10B(2) prescribes a 10-year limitation period for fine-only offences less than \$2,000, or those with a maximum imprisonment term less than three years. Section 131 of the Copyright Act prescribes a maximum penalty of five years' imprisonment.

limit for a copyright infringement prosecution brought indictably.<sup>243</sup> It is not at all apparent to us why Parliament would have had such a constraint in mind. Nor why it would have done this via the curious mechanism of an apparent dispensation from the six-month limit for *summary* proceedings in s 14 of the Summary Proceedings Act — to which s 131A alone refers. We conclude that when s 131A talks about an information being laid within three years, it addresses only the circumstance with which the premise — the application otherwise of s 14 of the Summary Proceedings Act — is concerned. That is, where the charge under s 131 of the Copyright Act is being tried summarily only. The provision does not therefore render the appellants ineligible to extradition on those three counts.

[162] In any event, it is doubtful whether limitation alone would eliminate s 131 as an extradition offence. New Zealand courts normally regard the offence date specified in an indictment as a mere particular, capable of amendment at trial and proof by evidence led there. The ROC alleges that the conduct here continued over a period, part of which would be within time. We did not receive argument on this last point and it is unnecessary for us to resolve it here.

### **Conspiracy**

[163] We turn now to the extent to which conspiracy may be charged in the context of alleged offending based on copyright infringement.

[164] In *R v Gemmell* this Court said:<sup>244</sup>

It is of the essence of a conspiratorial agreement that there must be not only an intention to agree but also a common design to commit some offence, that is, to put the design into effect.

What is necessary is an agreement to do something which on the facts known to the defendants would amount to an unlawful act if carried out. As the House of Lords has observed, defendants “cannot excuse themselves by saying that, owing to their

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<sup>243</sup> There was only brief reference in the Parliamentary debates to s 131A. The speaker (who was not the Minister responsible) referred to the amendment extending the time for laying an information summarily. He said nothing about whether the three-year time limit in that provision was also to apply to charges laid by indictment: (19 November 2002) 604 NZPD 2343–2345.

<sup>244</sup> *Gemmell*, above n 13, at 743.

ignorance of the law, they did not realise that such an act was a crime”.<sup>245</sup>  
The commentary in *Adams on Criminal Law* on s 310 of the Crimes Act (the provision criminalising conspiracy) observes:<sup>246</sup>

Provided the essential elements of the offence are known and agreed, it does not matter that legally immaterial aspects have not yet been determined or cannot yet be known. If A and B agree to attack the first man to pass by and to rob him of whatever items that he may have in his possession, there is a conspiracy to rob despite the uncertainty as to the time of the robbery, the victim’s identity, and the articles to be stolen ... The conspirators need not know that the agreed conduct amounts to an offence: *Churchill [v Walton]*.

[165] Applying that approach, the question here becomes whether there is evidence of an agreement to infringe copyright. The exact works to be infringed need not be known or identifiable for the conspiracy to exist. Nor need their legal status as copyright protected works be first appreciated by the conspirators.

[166] We have concluded above that ss 131(1)(c), and (d)(ii) and (d)(iii) create criminal liability where a person, in the course of business:<sup>247</sup>

- (a) knowingly is in possession of an infringing copy of a copyright work with a view to committing any act infringing the copyright; or
- (b) knowingly exhibits or distributes an infringing copy of a copyright work:

regardless of the form that copy takes. For those purposes, digital file copies of copyright protected works can constitute infringing copies for the purposes of the Copyright Act.

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<sup>245</sup> *Churchill v Walton* [1967] 2 AC 224 (HL) at 237.

<sup>246</sup> Simon France (ed) *Adams on Criminal Law* (looseleaf ed, Thomson Reuters) at [CA310.07] (citations omitted).

<sup>247</sup> See above at [156].

[167] Conspiracy to infringe copyright, under New Zealand law, would exist if the conspirators had knowledge of the *factual* elements of the following:

- (a) that a member of the conspiracy was in (or would enter into) possession of a digital file (which, separately and as a matter of law, is an infringing copy of a copyright protected work); and
- (b) a common purpose to either, in terms of ss 131(1)(c), or (d)(ii) or (d)(iii) as the case may be:
  - (i) use or deal with that file in a way that will further infringe copyright; or
  - (ii) exhibit or distribute the contents of that file.

In that respect, as we discuss later, retention of the file with a view to internet transmission itself would amount to an act infringing the exclusive communication copyright of the owner.<sup>248</sup>

[168] We need deal only briefly with an argument advanced by Mr Mansfield that the Copyright Act is a “code” and thereby excludes additional criminalisation under s 310 of the Crimes Act for conspiracy.

[169] The issue was addressed comprehensively by Gilbert J in his judgment and we need add little to his analysis, with which we agree.<sup>249</sup> The appellants’ argument relies on (but misapplies) terminology employed by Baragwanath J in the High Court decision *World TV Ltd v Best TV Ltd*.<sup>250</sup> That decision concerned the borders between the Copyright Act and the Fair Trading Act 1986, an entirely distinct context. We agree with Gilbert J that the case is not authority for the proposition that a case of conspiracy to commit copyright infringement could not be prosecuted under the

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<sup>248</sup> See below at [187].

<sup>249</sup> HC judgment, above n 2, at [83]–[111].

<sup>250</sup> *World TV Ltd v Best TV Ltd* HC Auckland CIV-2005-404-1239, 13 July 2005.

Crimes Act. Nor is it a case that calls into question a long line of contrary authority.<sup>251</sup>

As Gilbert J said:<sup>252</sup>

The Copyright Act is but one of many statutes containing offence provisions where it can equally be said that Parliament has carefully calibrated the consequences of infringement. Another example is the Fisheries legislation. A Full Court of the Court of Appeal in *R v Walters* had no difficulty rejecting the argument for the appellants that a conspiracy to obtain paua for the purposes of sale contrary to the Fisheries Act 1983 could not be prosecuted as a conspiracy to defraud. Cooke P, who delivered the judgment of the Court, stated that there was nothing in the Fisheries Act to exclude the applicability of ss 257, 229A [the predecessor of s 228 discussed below], or 310 of the Crimes Act:

To conspire to evade the Fisheries Act by obtaining ordinary paua for the purposes of a sale otherwise than in accordance with the Fisheries Act may amount to a conspiracy to act by fraudulent means and clearly did so on the facts found in this case. The circumstance that the obtaining amounted to a series of offences against s 97 of the Fisheries Act does not prevent its being fraudulent means within s 257. There is no sound reason for limiting the words of s 257 in that way. Nor does the circumstance that the same conspiracy could be charged under s 310 affect the scope of s 257. So too there is nothing in s 97 of the Fisheries Act to exclude the applicability of s 229A of the Crimes Act.

We agree and need say no more.

## Count 2

### *The essential conduct*

[170] Count 2 in the indictment charges the appellants jointly with conspiring to commit copyright infringement through Megaupload and associated sites for financial gain. That is the essence of the conduct charged.

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<sup>251</sup> See for example *Scott v Metropolitan Police Commissioner* [1975] AC 819 (HL); *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 350 (HL); and in obiter *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 (CA).

<sup>252</sup> HC judgment, above n 2, at [111] citing *R v Walters* [1993] 1 NZLR 533 (CA) at 537.

[171] The particulars of count 2 are that the appellants conspired to:

- (a) wilfully infringe, for purposes of commercial advantage and private financial gain, various copyrighted works; and
- (b) wilfully infringe, for purposes of commercial advantage and private financial gain, a copyright by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, when the appellants knew and should have known that the work was intended for commercial distribution.

[172] The United States asserts three pathways: ss 228 and 249 of the Crimes Act and s 131 of the Copyright Act.<sup>253</sup>

*First pathway — Crimes Act, s 249*

[173] Section 249 of the Crimes Act provides:

- (1) Every one is liable to imprisonment for a term not exceeding 7 years who, directly or indirectly, accesses any computer system and thereby, dishonestly or by deception, and without claim of right,—
  - (a) obtains any property, privilege, service, pecuniary advantage, benefit, or valuable consideration; or
  - (b) causes loss to any other person.
- (2) Every one is liable to imprisonment for a term not exceeding 5 years who, directly or indirectly, accesses any computer system with intent, dishonestly or by deception, and without claim of right,—
  - (a) to obtain any property, privilege, service, pecuniary advantage, benefit, or valuable consideration; or
  - (b) to cause loss to any other person.

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<sup>253</sup> A fourth pathway, art II.16 of the New Zealand – United States Treaty, has since fallen away owing to our reversal of the decision in *Cullinane*, above n 15. We therefore deal with it no further here. Similarly, the United States’ reliance on art II.19 as providing a pathway for count 3, and on art II.16 for counts 4–13, is no longer live. We therefore say nothing further about those pathways.

(3) In this section, **deception** has the same meaning as in section 240(2).

[174] Two definitions need to be referred to. First, “access” is defined in s 248:

in relation to any computer system, means instruct, communicate with, store data in, receive data from, or otherwise make use of any of the resources of the computer system

Secondly, “dishonestly” is defined in s 217:

in relation to an act or omission, means done or omitted without a belief that there was express or implied consent to, or authority for, the act or omission from a person entitled to give such consent or authority

[175] Gilbert J concluded that s 249 provided an available extradition pathway for the conspiracy charged in count 2.<sup>254</sup> He held the conspiracy there alleged involved “accessing” a computer system and concluded the conduct alleged “fits comfortably within this definition”.<sup>255</sup> As the Judge put it:<sup>256</sup>

It involved accessing a computer system in that the data (the copyright infringing file) was *received* from the uploader onto Megaupload’s computer system, *stored* in that system and made available to others to access using the link provided by Megaupload *using* the computer system. All of this involved making use of the resources of the Megaupload computer system.

[176] In terms of the “dishonesty” element, which had also been contested in the High Court, Gilbert J concluded that the essential conduct charged in count 2 involved an allegation of dishonesty, namely wilful infringement of copyright.<sup>257</sup> As the Judge put it:<sup>258</sup>

If proved, this would be an act done without a belief that there was express or implied consent to, or authority for, the act from a person entitled to give such consent or authority (the copyright owner).

[177] On appeal the appellants repeated arguments made in the High Court. Mr Illingworth further submitted that the dishonesty element found by the Judge depended on wilful infringement of copyright (if proved). The appellants’

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<sup>254</sup> HC judgment, above n 2, at [168].

<sup>255</sup> At [166].

<sup>256</sup> At [166] (emphasis in original).

<sup>257</sup> At [165].

<sup>258</sup> At [141].

fundamental argument was that if conduct was not a criminal infringement under the Copyright Act, it could not be criminalised under the Crimes Act.

[178] Gilbert J found that s 131 of the Copyright Act did not provide an available extradition pathway in relation to alleged online infringement of the kind asserted in count 2.<sup>259</sup> We have departed from the Judge in our analysis of s 131.<sup>260</sup> But the Judge's conclusions on ss 249 and 228 (the latter of which we will turn to shortly) were not affected by his conclusion on s 131. Each of the ss 249 and 228 pathways depended on dishonesty, as defined, and the other elements of the actus rei of those offences. Inherent in the Judge's finding was that dishonesty for the purpose of s 249 (and s 228) did not require proof of criminal conduct under s 131. With that conclusion we agree. It is plainly sufficient that for the purposes of s 217 that the relevant acts are done without belief in the existence of consent or authority from the copyright owner. It does not need to amount to criminal conduct independently of s 249. Put another way, "dishonestly" as defined in s 217 is not contingent on having committed another offence, but is instead simply an element of the offence.

[179] In particular, the conduct charged, to the extent it is based on copyright infringement, did not need independently to amount to infringement to such a degree that it is separately criminalised by s 131 of the Copyright Act before it could also be characterised as contravening s 249 of the Crimes Act (or indeed s 228 to which we will turn). It is not necessary to sustain a charge under s 249, where the underlying purpose of access was to affect an alleged infringement of copyright, to also prove that a charge under s 131 of the Copyright Act would succeed. The New Zealand offence does not have to match the conduct alleged; rather the conduct alleged simply has to fulfil the requirements of that offence had the conduct occurred in New Zealand. The issue is whether the alleged conduct would have fitted within a qualifying New Zealand offence had it been committed in this jurisdiction. That is the approach adopted by the House of Lords in *Norris v Government of United States of America*:<sup>261</sup>

[T]he conduct test should be applied consistently throughout the [Extradition Act 2003], the conduct relevant ... being that described in the documents

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<sup>259</sup> At [192].

<sup>260</sup> See above at [143]–[156].

<sup>261</sup> *Norris v Government of the United States of America* [2008] UKHL 16, [2008] AC 920 at [91] (emphasis added).

constituting the request ... ignoring in both cases mere narrative background but taking account of such allegations *as are relevant to the description of the corresponding United Kingdom offence*.

[180] Accordingly, although much effort was expended by the appellants in attempting to sustain Gilbert J's conclusion that a s 131 charge could not succeed on these facts, in our view the effort was largely beside the point in analysing the s 249 pathway. In the context of that pathway the attention to s 131 involved setting up a false premise.

[181] We therefore conclude that s 249 provides an available extradition pathway for count 2, subject of course to: a) meeting the s 4(1) requirement for inclusion in the Treaty (which we deal with at the end of our analysis of count 2); and b) the separate sufficiency analysis required by s 24(2)(d).

*Second pathway — Crimes Act, s 228*

[182] Section 228(1) of the Crimes Act provides:

Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to obtain any property, service, pecuniary advantage, or valuable consideration,—

- (a) dishonestly and without claim of right, takes or obtains any document; or
- (b) dishonestly and without claim of right, uses or attempts to use any document.

[183] Reference needs also to be made to the definition of “document” in s 217:

**document** means a document, or part of a document, in any form; and includes, without limitation,—

- (a) any paper or other material used for writing or printing that is marked with matter capable of being read; or
- (b) any photograph, or any photographic negative, plate, slide, film, or microfilm, or any photostatic negative; or
- (c) any disc, tape, wire, sound track, card, or other material or device in or on which information, sounds, or other data are recorded, stored (whether temporarily or permanently), or embodied so as to be capable, with or without the aid of some other equipment, of being reproduced; or

- (d) any material by means of which information is supplied, whether directly or by means of any equipment, to any device used for recording or storing or processing information; or
- (e) any material derived, whether directly or by means of any equipment, from information recorded or stored or processed by any device used for recording or storing or processing information

[184] We agree with Gilbert J that material held in electronic form in a computer system will fall within the s 217 definition of “document”. As we address above,<sup>262</sup> the Supreme Court in *Dixon v R* held that digital CCTV footage constituted “property” for the purposes of s 249(1)(a) of the Crimes Act.<sup>263</sup> In addition to those qualities we have already set out, the files were “documents” in the sense they constituted a record of data for the purposes of s 217.<sup>264</sup> In the present appeal, Gilbert J concluded:<sup>265</sup>

The digital files recording films and other copyright protected works alleged to have been used by the appellants (by hosting and distributing them to members of the public) are ... documents for the purposes of s 228 of the Crimes Act.

[185] We agree with that analysis. No substantial challenge to the Judge’s finding, other than that based on s 131, was made by the appellants in this respect. But, for the same reason as in the case of s 249, dishonest use of a document for the purpose of s 228 is not predicated upon another criminal offence having been committed, such as under s 131 of the Copyright Act. To that extent, the s 131 challenge, which dominated this aspect of the appeal, was beside the point.

*Third pathway — Copyright Act, s 131*

[186] We have set out above from [135]–[156] and [163]–[169] our analysis of s 131 of the Copyright Act, and the circumstances in which conspiracy to commit an offence against ss 131(1)(c), or (d)(ii) or (d)(iii) might be established. For those purposes possession and use (or intended use) of a digital file copy of a copyright protected work is sufficient.

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<sup>262</sup> See above at [148].

<sup>263</sup> *Dixon*, above n 229.

<sup>264</sup> At [25] and [31].

<sup>265</sup> HC judgment, above n 2, at [138].

[187] Here the essential conduct alleged is that the appellants would receive a digital file from users of Megaupload, convert and store the file on servers leased for that purpose and, via a URL link, enable user access to that file which they could then share with other users (albeit not on a Megaupload site) for the purpose of enabling others to access that content. The appellants contended s 131 does not criminalise digital dissemination. We have reached a different view, holding that digital copies of copyright protected works amount to infringing copies for the purposes of the Copyright Act.<sup>266</sup> We consider that a common purpose conspiracy to make infringing copies of copyright protected works available on a computer network accessible to members of the public is likely to constitute conspiracy to commit an offence against s 131. Whether or not it amounts to exhibition in public or distribution (in terms of ss 131(1)(d)(ii) and (iii)), possession of the infringing copies was retained with a view to internet transmission which itself would amount to an act infringing the exclusive communication copyright of the owner contrary to s 131(1)(c). That exclusive right was introduced by the 2008 Amendment Act with effect from 31 October 2008. The alleged conspiracy is asserted to have run between September 2005 and January 2012.

[188] Differing therefore from Gilbert J, we conclude that s 131 of the Copyright Act provides an available extradition pathway for the conspiracy charged in count 2, subject to: a) meeting the s 4(1) requirement for inclusion in the Treaty; and b) the separate sufficiency analysis required by s 24(2)(d).

[189] The “safe harbour” provisions at ss 92B–92E of the Copyright Act, on which Mr Mansfield sought to rely, are of very limited significance given the conclusion we reach at [187] that a common purpose conspiracy to make infringing copies of copyright protected works available on a computer network accessible to members of the public is likely to amount to a conspiracy to commit an offence against s 131. Sections 92B–92E state exceptions to potential ISP liability under s 131. They are therefore more in the nature of defences than elements of offences punishable within the penumbra of s 131. The primary potential liability of the appellants on a transposed basis remains, for present purposes, under s 131 alone. The evidential case presented that the appellants might nonetheless fall within

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<sup>266</sup> See above at [143]–[156].

one of the exceptions provided in ss 92B, 92C and 92E was, as we see it, manifestly weak. For the reasons given at [114] and [128]–[130], it does not fall for the extradition court to scrutinise further that defensive potentiality.

### *The Treaty*

[190] Section 101B of the Extradition Act provides that certain offences are deemed described in any extradition treaty, including the New Zealand – United States Treaty. The United States relies on a deemed offence contained in s 101B(1)(c), being:

any offence against any enactment if—

- (i) it is punishable by imprisonment for a term of 4 years or more; and
- (ii) the offence for which extradition is requested is alleged to involve an organised criminal group (as defined in article 2(a) of the TOC convention); and
- (iii) the person whose extradition is sought is, or is suspected of being, in or on his or her way to the requested country.

[191] Each of the domestic offences that we have dealt with in relation to count 2 — ss 249 and 228 of the Crimes Act, and s 131 of the Copyright Act — need to satisfy these requirements to be so deemed. We deal with them all together. No issue arises as to ss 101B(1)(c)(i) and (iii) being met, so the focus here is on s 101B(1)(c)(ii). An “organised criminal group” is defined in the United Nations Convention against Transnational Organised Crime (the TOC convention) to mean:<sup>267</sup>

a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit[.]

“Serious crime” is then defined as:<sup>268</sup>

conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty[.]

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<sup>267</sup> United Nations Convention against Transnational Organised Crime (opened for signature 15 November 2000, entered into force 29 September 2003), art 2(a).

<sup>268</sup> Article 2(b).

[192] As Gilbert J noted, six elements were thus essential for deemed inclusion in the treaty:<sup>269</sup>

- (a) a structured group;
- (b) of three or more persons;
- (c) existing for a period of time;
- (d) acting in concert;
- (e) with the aim of committing;
  - (i) offences established in accordance with the TOC convention;  
or
  - (ii) a serious crime, being conduct constituting an offence punishable by imprisonment of four years or more;
- (f) in order to obtain a financial or material benefit (directly or indirectly).

[193] Of these six elements, Gilbert J held all but (e) were clearly satisfied.<sup>270</sup> In relation to element (e)(ii), he accepted the appellants' submission that to qualify it must be alleged that the group had the aim of committing an offence punishable by at least four years' imprisonment *in the United States*.<sup>271</sup> Argument on this issue was not renewed before us, the United States not challenging Gilbert J's interpretation. We do not therefore express a view ourselves on the correctness of this interpretation. We note s 4(1)(a) of the Extradition Act already requires the United States to establish that the offence charged was punishable in the United States by more than 12 months' imprisonment. The effect of Gilbert J's interpretation of s 101B(1)(c)(ii) is effectively to enlarge that requirement, for the deeming provision to apply, to four years' imprisonment. Here the Judge was satisfied the requirement was met: the United States' affidavit evidence was that the offence charged in count 2 carried a maximum penalty of five years' imprisonment in the United States.<sup>272</sup>

[194] In the absence of material challenge to the Judge's conclusion on this element, we conclude that the Extradition Act's s 4(1) requirement concerning the Treaty is met in relation to count 2.

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<sup>269</sup> HC judgment, above n 2, at [150].

<sup>270</sup> At [151].

<sup>271</sup> At [153]–[159].

<sup>272</sup> At [160].

### *Conclusion*

[195] We conclude that count 2 is an extradition offence for the purposes of the Extradition Act.

### **Counts 4–8**

[196] Count 4 alleges that on or about 25 October 2008, the appellants wilfully and for the purposes of commercial advantage and private financial gain, infringed copyright by distributing a work being prepared for commercial distribution in the United States (the motion picture *Taken* — which would not be commercially distributed until on or about 30 January 2009) by making it available on a computer network accessible to members of the public when they knew, and should have known, that the work was intended for commercial distribution. Counts 5–8 allege wilful reproduction and distribution of various copyright works on the internet. It is convenient to deal with them in conjunction with count 4.

[197] The United States here asserts three pathways: ss 228 and 249 of the Crimes Act and s 131 of the Copyright Act.

[198] Gilbert J found that count 4 qualified as an extradition offence for the same reasons as count 2.<sup>273</sup> The allegation of wilful infringement for purposes of a commercial or financial gain satisfied the requirement in ss 228 and 249 that the relevant acts were committed with intent to obtain pecuniary advantage or valuable consideration. The allegation that the appellants wilfully infringed copyright by making the film available to members of the public satisfied the requirement they obtained and or used a document (that is, a digital file) dishonestly without claim of right. And the alleged conduct also involved “accessing” a computer, satisfying that requirement of s 249.<sup>274</sup> The Judge reached the same conclusions for counts 5–8.<sup>275</sup>

[199] The Judge rejected a submission made in the High Court by the appellants that count 4 stood alone and could not satisfy s 101B(1)(c)(ii), in particular, because it did

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<sup>273</sup> At [196].

<sup>274</sup> At [196].

<sup>275</sup> At [201].

not contain an allegation that the appellants acted in concert with the aim of committing the offence.<sup>276</sup> The Judge rejected that submission on the basis that the indictment alleged a conspiracy by the appellants including the acts underpinning count 4.<sup>277</sup> Finally, for the purpose of s 101B(1)(c)(ii) count 4 was punishable by a maximum penalty of five years' imprisonment, thus meeting the tertiary treaty qualification.<sup>278</sup> The Judge appears to have reached the same conclusions for counts 5–8.<sup>279</sup>

[200] There was no substantial challenge on appeal to these findings beyond the s 131 copyright challenge and, in the case of Messrs Ortmann and van der Kolk, a nominal challenge to the appropriate terms of imprisonment under United States law repeated from their High Court submissions. That challenge is answered by Mr Prabhu's affidavit evidence for the United States and the exhibited superseding indictment thereto. In the absence of other seriously advanced error, we see no good reason to depart from the conclusions reached by Gilbert J on counts 4–8.

[201] Having concluded that count 2 is an extradition offence for the purposes of the Extradition Act, we conclude that counts 4–8 likewise qualify.

### **Count 3**

#### *The essential conduct*

[202] Quoting from the superseding indictment, the essential conduct alleged in count 3 is that the appellants conspired to commit the following money laundering offences:

- (a) to knowingly conduct and attempt to conduct a financial transaction affecting interstate and foreign commerce, which in fact involved the proceeds of the specified unlawful activities of criminal copyright infringement and wire fraud with the intent to promote the carrying on of the specified unlawful activities of criminal copyright infringement and wire fraud, and that while conducting and attempting to conduct such financial transaction knew that the property involved in the financial transaction represented the proceeds

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<sup>276</sup> At [197].

<sup>277</sup> At [198].

<sup>278</sup> At [198].

<sup>279</sup> At [200]–[201].

of some form of unlawful activity in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i);

- (b) to transport, transmit, and transfer and attempt to transport, transmit, and transfer a monetary instrument and funds from a place in the United States to and through a place outside the United States, and to a place in the United States from or through a place outside the United States, with the intent to promote the carrying on of the specified unlawful activities of criminal copyright infringement and wire fraud, in violation of Title 18, United States Code, Section 1956(a)(2)(A); and
- (c) to knowingly engage and attempt to engage in monetary transactions in criminally derived property of a value greater than \$10,000 that is derived from the specified unlawful activities of criminal copyright infringement and wire fraud, in violation of Title 18, United States Code, Section 1957.

[203] The essence of the alleged conduct is the transfer of funds which were the proceeds of criminal activity at various times between August 2005 and July 2011.

*Pathways available*

[204] The United States acknowledged that this Court's reversal of *Cullinane* would present it with a problem in relation to finding count 3 an extradition offence. The United States was hitherto reliant on art II.19 of the New Zealand – United States Treaty. Absent the Treaty as a primary source of the counterpart offence, the United States was driven to ss 246 and 310 of the Crimes Act (receiving and conspiracy). Only brief argument was addressed to s 246 by any party.

[205] Section 246(1) of the Crimes Act provides:

Every one is guilty of receiving who receives any property stolen *or obtained by any other imprisonable offence*, knowing that property to have been stolen or so obtained, or being reckless as to whether or not the property had been stolen or so obtained.

(Emphasis added.)

[206] Section 246 requires a predicate offence. It is capable of capturing knowing or reckless receipt of the proceeds of crime.<sup>280</sup> To that extent it supplements the money laundering provisions that appear immediately before it in the Crimes Act, but

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<sup>280</sup> See *R v Nichols* [1998] 1 NZLR 608 (HC).

which are more focused on concealment or conversion of proceeds of crime than their mere receipt.<sup>281</sup> Where the proceeds exceed a value of \$1,000, the maximum penalty is seven years' imprisonment.<sup>282</sup>

[207] A person cannot be convicted of both the predicate offence *and* receiving under s 246.<sup>283</sup> In other words, a person cannot receive from him or herself. The charges must be laid in the alternative. We are satisfied that a charge under s 246 could have been so laid in New Zealand. The essential allegation is that the appellants obtained money payments as a result of criminal copyright infringement and other dishonest acts. It would be entirely permissible for a further, alternative charge to be laid that even if the appellants did not receive those money payments as a direct result of that offending, they each received that money knowingly or recklessly as to whether that money had been obtained by the commission of a different imprisonable offence by another.

[208] Therefore, although s 246 was not addressed in the High Court, we are satisfied that it is an available pathway for the essential conduct alleged in count 3. We heard no material argument to the contrary from the appellants.

### *The Treaty*

[209] The United States, as noted, relied on art II.19 of the New Zealand – United States Treaty to satisfy the treaty qualification requirement. Article II.19 reads:

Receiving and transporting any money, valuable securities or other property knowing the same to have been unlawfully obtained.

[210] Gilbert J held that the essential conduct alleged in count 3 correlated to the offence described in art II.19.<sup>284</sup> The appellants “reserved their position” on that finding but focused on both copyright infringement and the submission that there was no evidential foundation that they had transported funds that were the proceeds of criminal copyright infringement. In any event, s 101B having provided a pathway in

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<sup>281</sup> Crimes Act 1961, ss 243–245.

<sup>282</sup> Section 247(a).

<sup>283</sup> *The Queen v Keenan* [1967] NZLR 608 (CA) at 609; and *Regina v Seymour* [1954] 1 WLR 678 (Crim App).

<sup>284</sup> HC judgment, above n 2, at [209]–[212].

relation to counts 4–8, would also apply here in the case of count 3. Absent persuasive challenge to Gilbert J’s conclusion on this question, we see no reason to differ from it.

### *Conclusion*

[211] We conclude that count 3 presents an extradition offence for the purposes of the Extradition Act.

### **Counts 9–13**

#### *The essential conduct*

[212] The essential conduct alleged in counts 9–13 is the use of Megaupload email accounts by the appellants to send deceptive messages to copyright owners calculated to cause those copyright owners to believe that the appellants were taking more effective steps to curb copyright infringement by users than was in fact the case. While copyright infringement will need to be proved at trial, the copyright status of the relevant works must be transposed for the purposes of the present analysis.<sup>285</sup>

[213] It is sufficient for present purposes to adopt the description of the essential conduct in counts 9–13 given by Gilbert J in his judgment.<sup>286</sup>

[213] Counts 9 to 13 allege that the appellants devised a scheme to defraud copyright owners and obtain money by means of false and fraudulent pretences, representations and promises, including:

- (a) misleading copyright holders into believing that the notifications of infringing copies of copyright works would result in the removal of the file or access to the file being disabled when, in fact, only the link identified by the copyright holder was disabled;
- (b) falsely representing to copyright holders that repeat infringers would have their access terminated pursuant to Megaupload’s terms of service whereas they were allowed to continue their infringement and sometimes even rewarded financially for it; and
- (c) misrepresenting to copyright holders [Megaupload’s] “Abuse Tool” and “notice-and-takedown” procedure.

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<sup>285</sup> See below at [252].

<sup>286</sup> HC judgment, above n 2.

[214] The United States alleges in the superseding indictment that the scheme allowed infringing copies of copyrighted works to remain on the servers controlled by [Megaupload] thereby allowing it to obtain advertising revenue:

101. The scheme allowed infringing copies of copyrighted works to remain on the servers controlled by the [Megaupload] and accessible to members of the public ...

...

103 It was further part of the scheme that [Megaupload] obtained advertising revenue as a result of the continued availability of files known to be infringing ...

[215] Each count relates to a specific wire communication in furtherance of the allegedly fraudulent scheme.

[214] The United States relies on three pathways under the Crimes Act: ss 249, 228 and 240.

*First pathway — Crimes Act, s 249*

[215] We have considered s 249 already.<sup>287</sup> In the context of counts 9–13, the essential conduct is the sending of the emails described earlier to copyright holders in response to take-down requests. Gilbert J rejected a submission that the sending of the email would not amount to “access” of “a computer system”.<sup>288</sup> He considered the definitions of those words in s 248 were broad and that sending an email plainly came within the scope of the definition.<sup>289</sup> The Judge concluded:<sup>290</sup>

Counts 9 to 13 correlate to the offending in s 249 because it is alleged that, in furtherance of the conspiracy, the appellants caused knowingly false responses to be sent to copyright holders in response to take down notices. This was achieved by accessing the Megaupload computer system (instructing, communicating with and using a computer system). As a result of accessing the computer system in this way, it is alleged that the appellants “thereby” dishonestly or by deception, and without claim of right, obtained a benefit. The alleged benefit achieved by this dishonest and deceptive response was that it enabled Megaupload to retain the copyright infringing file on its computer system and continue to profit from it. There can be no doubt that the necessary casual connection between the relevant access of a computer system and the obtaining of the benefit is met. This is the allegedly operative cause of Megaupload being able to retain these files despite the efforts of the copyright holders to have them removed.

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<sup>287</sup> See above at [173]–[181].

<sup>288</sup> HC judgment, above n 2, at [229].

<sup>289</sup> At [229].

<sup>290</sup> At [230].

[216] The appellants very briefly resisted the Judge’s conclusion in their written submissions — again largely by reference to their High Court submissions — but offered no argument other than that concerning the criminality of copyright offending to sustain any assertion of error.

[217] We see no error in the Judge’s reasoning in this respect, where the essential allegation concerns the use of emails to dishonestly “obtain” (which is defined to include “retain”)<sup>291</sup> a pecuniary advantage or valuable consideration.

[218] We consider, therefore, that s 249 of the Crimes Act provides an available extradition pathway for counts 9–13, subject to meeting the Treaty requirement under s 4(1) of the Extradition Act and the separate sufficiency analysis required by s 24(2)(d).

*Second pathway — Crimes Act, s 228*

[219] The second pathway relied on by the United States was s 228. That provision we have also considered earlier.<sup>292</sup> It is clear that the use of emails involves the use of documents, and that the essential conduct alleged in counts 9–13 falls within the scope of s 228 as the dishonest use of a document with intent to obtain pecuniary advantage or valuable consideration. Again the appellants mounted no meaningful attack on Gilbert J’s finding that s 228 provided an available pathway for counts 9–13. We see no error in Gilbert J’s analysis under this heading.<sup>293</sup>

[220] We conclude that s 228 provides an available extradition pathway for counts 9–13, subject also to meeting the Treaty criteria under s 4(1) of the Extradition Act and the evidential-sufficiency analysis under s 24(2)(d).

*Third pathway — Crimes Act, s 240*

[221] Section 240 of the Crimes Act reads:

- (1) Every one is guilty of obtaining by deception or causing loss by deception who, by any deception and without claim of right,—

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<sup>291</sup> Crimes Act, s 217.

<sup>292</sup> See above at [182]–[185].

<sup>293</sup> HC judgment, above n 2, at [220]–[222].

- (a) obtains ownership or possession of, or control over, any property, or any privilege, service, pecuniary advantage, benefit, or valuable consideration, directly or indirectly; or
  - (b) in incurring any debt or liability, obtains credit; or
  - (c) induces or causes any other person to deliver over, execute, make, accept, endorse, destroy, or alter any document or thing capable of being used to derive a pecuniary advantage; or
  - (d) causes loss to any other person.
- (1A) Every person is liable to imprisonment for a term not exceeding 3 years who, without reasonable excuse, sells, transfers, or otherwise makes available any document or thing capable of being used to derive a pecuniary advantage knowing that, by deception and without claim of right, the document or thing was, or was caused to be, delivered, executed, made, accepted, endorsed, or altered.
- (2) In this section, deception means—
- (a) a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and—
    - (i) knows that it is false in a material particular; or
    - (ii) is reckless as to whether it is false in a material particular; or
  - (b) an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it; or
  - (c) a fraudulent device, trick, or stratagem used with intent to deceive any person.

[222] In the High Court it was accepted by the appellants that the essential conduct alleged (emails allegedly containing false representations) could fall within the scope of s 240.<sup>294</sup> No meaningful challenge to that conclusion was advanced before us.

[223] We conclude that s 240 is also available as an extradition pathway for counts 9–13 subject to meeting the requirements of ss 4(1) and 24(2)(d) of the Extradition Act.

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<sup>294</sup> At [224].

### *The Treaty*

[224] Given our conclusions on this question in relation to count 2, it follows also that the s 4(1) requirement concerning the Treaty must also be met in relation to counts 9–13.

### *Conclusion*

[225] We conclude that counts 9–13 constitute extradition offences for the purposes of the Extradition Act.

## **Count 1**

### *The essential conduct*

[226] Count 1 alleges an enterprise, which included the appellants, which was engaged in interstate and foreign commerce. The core allegation is that the members of the enterprise knowingly conspired to conduct and participate in the affairs of the enterprise, through a “pattern of racketeering activity” as defined in 18 United States Code §§ 1961(1) and (5), for the purpose of enriching the members of the enterprise through copyright infringement, money laundering and wire fraud.

### *Pathways available*

[227] The United States relies on s 98A of the Crimes Act (participation in an organised criminal group) in combination with s 101B(1)(a) of the Extradition Act. Section 101B(1)(a) of that Act provides “every offence against any of sections 98A ... of the Crimes Act”, among others, are deemed offences in “any extradition treaty”. The United States says that the appellants were an “organised criminal group” for the purpose of s 98A(2). The essence of the conduct alleged by the United States is the existence of a group that had, as one of its objectives, obtaining material benefits from the commission of serious offences.

[228] Gilbert J concluded:<sup>295</sup>

I have already concluded that the conduct constituting the alleged criminal copyright infringement and wire fraud charges correlates to New Zealand offences punishable by at least four years' imprisonment. The other elements of s 98A of the Crimes Act are satisfied by the conduct alleged in count 1 because it alleges that each of the appellants had a common purpose of achieving the group's objective of enriching its members from the commission of these offences and knowingly participated in the commission of these offences to help achieve this objective. In these circumstances, I am satisfied that the conduct relied on by the United States for count 1 would amount to an offence against s 98A of the Crimes Act if it had occurred in New Zealand and is accordingly an extradition offence.

[229] There was no substantial challenge to that conclusion other than the s 131 argument. We see no reason to differ from the conclusion reached by Gilbert J, which is plainly correct.

#### *The Treaty*

[230] We are satisfied that, by operation of s 101B(1)(a) of the Extradition Act, s 98A of the Crimes Act is incorporated in the Treaty.

#### *Conclusion*

[231] We conclude that count 1 constitutes an extradition offence for the purposes of the Extradition Act.

#### **Conclusion: the offences are “extradition offences”**

[232] We conclude, answering question one, that the essential conduct with which the appellants are charged in each count is an extradition offence for the purposes of s 24(2)(c) of the Extradition Act. We summarise the counts and pathways in the following table.

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<sup>295</sup> At [237].

<b>Count</b>	<b>Pathway offence asserted</b>	<b>Available?</b>
<b>Count 1</b>	Crimes Act, s 98A and Extradition Act, s 101B(1)(a).	Yes
<b>Count 2</b>	Treaty, art II.16.	No
	Crimes Act, s 249.	Yes
	Crimes Act, s 228.	Yes
	Copyright Act, s 131.	Yes
<b>Count 3</b>	Treaty, art II.19.	No
	Crimes Act, ss 246 and 310.	Yes
<b>Counts 4–8</b>	Treaty, art II.16.	No
	Crimes Act, s 249.	Yes
	Crimes Act, s 228.	Yes
	Copyright Act, s 131.	Yes
<b>Counts 9–13</b>	Treaty, art II.16.	No
	Crimes Act, s 249.	Yes
	Crimes Act, s 228.	Yes
	Copyright Act, s 131.	Yes

## **H APPLICATIONS FOR SPECIAL LEAVE TO APPEAL**

[233] Before Gilbert J, the appellants sought leave to appeal on no fewer than 130 questions, and the United States on 69. In a numerical sense this was an improvement on the 300 questions raised in the District Court, but Gilbert J found the questions were still unfocused and unhelpful.<sup>296</sup> He reduced them to the two we have answered.<sup>297</sup>

[234] Mr Dotcom posed 12 questions, Messrs Ortmann and van der Kolk posed 17, and Mr Batato posed the same 17.<sup>298</sup> Some were plainly incorporated into questions

<sup>296</sup> HC leave judgment, above n 3, at [30].

<sup>297</sup> See above at [132] and [232].

<sup>298</sup> There was some degree of overlap due to the different phrasing of the questions by Mr Dotcom and Messrs Ortmann and van der Kolk.

one and two. We set aside those that have already been answered fully and group the remainder as follows.<sup>299</sup>

- (a) whether the ROC failed to comply with s 25(2), including whether the evidence summarised within it was sufficient for committal, and was inadmissible under s 25(3);
- (b) whether Gilbert J was wrong to find that the United States had not breached its duty of good faith and candour;
- (c) whether Gilbert J was wrong to refuse to admit further evidence on appeal;
- (d) whether Gilbert J was wrong to find, in connection with the funding stay application, that there was no breach of natural justice as a result of the appellants being prevented from instructing overseas expert witnesses; and
- (e) whether Gilbert J was wrong to conclude that the District Court correctly struck out the misconduct stay application.

[235] The United States also sought special leave to appeal, putting in issue the High Court's conclusion that the appellants' copyright infringement was not an extradition offence under the Act and the Treaty. We have answered this question.<sup>300</sup>

[236] As noted, the criterion for special leave is that the question ought to be submitted to this Court for decision, by reason of general or public importance or for any other reason.<sup>301</sup> We turn to consider the proposed questions we have framed below at [234]. We deal with the first three together, under admissibility and sufficiency of the ROC.

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<sup>299</sup> Another question posed by the appellants was whether Gilbert J was wrong to determine he had authority to confirm as correct the judgment of the court below on grounds that were substantially inconsistent with the grounds that had been relied on by the lower court. This was dealt with from [54] above.

<sup>300</sup> See above at [143]–[156].

<sup>301</sup> See above at [57].

## **I Admissibility and sufficiency of the ROC**

[237] The evidence summarised in the ROC broadly falls into the following categories:

- (a) Evidence of the design and structural features of the Megaupload business, including forensic analysis of its database, traffic sources, user behaviour, rewards programme and sampled server contents. Inferences are sought to be drawn from this evidence as to the existence of widespread copyright infringement, the existence of a conspiracy and the requisite mental elements for each of the extradition offences. For example, there is evidence that over 90 per cent of content on the two sampled servers infringed copyright and that Megaupload paid rewards to individual users with tens of thousands of take-down notices.
- (b) Evidence of FBI undercover activities involving the Megaupload sites. These include identifying, viewing and downloading copyright-infringing materials. Evidence of an FBI review of the financial transactions between the appellants is also included.
- (c) Evidence of numerous incriminating statements made by the appellants in communications with each other which are said to show an appreciation that Megaupload was a pirate operation reliant on systemic infringement of copyright. The alleged admissions are relied upon as among other things providing an evidential foundation for the existence of the conspiracy, the fact that longer content was overwhelmingly copyright infringing and the relevant mental elements of the various offences including dishonesty and intent to defraud. Examples of the admissions relied on include statements by the appellants describing themselves as being “not 100% legit”, modern day pirates, making a living from piracy, providing shipping services to pirates, and describing examination of files as dangerous because it would reveal Megaupload was “not the dumb pipe we claim to be.”

Another statement attributed to Mr van der Kolk was that if copyright holders “really [knew] how big our business is they would surely try to do something against it ... they have no idea that we’re making millions in profit every month”. Another conversation involved discussion about preparing for law suits and this statement: “[p]romise some kind of technical filtering crap and then never implement it.”<sup>302</sup>

- (d) Evidence of one of the alleged co-conspirators Andrus Nomm who following a guilty plea has been convicted in the United States of the charge of conspiracy to commit copyright infringement. He is to testify about the operation of the business including the knowledge of the co-conspirators, their opposition to making any serious attempts to screen for copyright, steps taken to make the sites look more legitimate than they actually were, as well as a request made to him by Mr Dotcom to provide an invoice representing that funds of EUR 10,000 were payment for consulting services when Mr Nomm had not provided any such services.
- (e) Evidence of some repeat infringers.
- (f) Evidence of affected copyright owners that particular works were protected by copyright and Megaupload sites were not authorised to distribute them.

[238] The appellants wish to challenge Gilbert J’s finding that the summarised evidence in the ROC was sufficient to establish a prima facie case for the purposes of s 24 (2)(d) of the Extradition Act. The challenge is made on grounds of inadmissibility, unreliability (resulting from breach of the duty of candour) and insufficiency. As noted, Gilbert J refused to grant leave on any matters raised under that rubric other than that relating to transposition. He considered transposition was the only issue that was of general significance. Everything else was case-specific.<sup>303</sup>

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<sup>302</sup> See also the examples given above at [22].

<sup>303</sup> HC leave judgment, above n 3, at [39].

## **Was the ROC admissible?**

[239] Under this head, the appellants argued that: the ROC was inadmissible because it was not properly certified, and that it was otherwise inadmissible in part because some of it took the form of commentary and opinion and did not permit a meaningful judicial assessment.

### *Alleged non-compliance with s 25(3): admissibility*

[240] Section 25(3) sets out certain prerequisites to admissibility of the ROC:

#### **25 Record of case may be submitted by exempted country at hearing**

...

(3) The record of the case is admissible as evidence if it is accompanied by—

(a) an affidavit of an officer of the investigating authority, or of the prosecutor, as the case may be, stating that the record of the case was prepared by, or under the direction of, that officer or that prosecutor and that the evidence has been preserved for use in the person's trial; and

(b) a certificate by a person described in subsection (3A) stating that, in his or her opinion, the record of the case discloses the existence of evidence that is sufficient under the law of the exempted country to justify a prosecution in that country.

(3A) A person referred to in subsection (3)(b) is—

(a) the Attorney-General or principal law officer of the exempted country, or his or her deputy or delegate; or

(b) any other person who has, under the law of the exempted country, control over the decision to prosecute.

[241] In this case, the required affidavit and certificate were provided by the United States prosecutor Mr Prabhu in respect of the ROC and each of the supplementary ROCs. In total he has sworn 13 affidavits. He certified that he had:

... thoroughly reviewed the government's evidence against these individuals, which has been preserved for trial, and believe that this evidence is sufficient to prove beyond a reasonable doubt that they are guilty of all the offenses charged in the Superseding Indictment.

[242] The appellants contended the certification is false because Mr Prabhu is well aware that Megaupload data seized by the United States has been destroyed and/or is deteriorating. This data includes a large number of Megaupload servers. Some of these contain files which are the subject of the alleged copyright infringements, and take-down notices.

[243] In our view, these are issues properly reserved for trial in the United States. Indeed we understand that the United States courts are already seized of issues about the future of the servers and have been for some time. What the Extradition Act requires the requesting state to certify is that the ROC evidence is available for trial, and that is precisely what has been certified. The ROC is not based upon the contents of the servers at issue. We are not persuaded that there has been a breach of s 25(3).

*Alleged non-compliance with s 25(2): prescribed content*

[244] The contents of the ROC are regulated by s 25(2). It states among other things that the ROC must contain a “summary of the evidence acquired to support the request for the surrender of the person” sought to be extradited.

[245] The appellants contended that the ROC as a whole does not comply with this basic requirement because it is in a form that does not allow for any meaningful judicial assessment. It was said to be replete with commentary, legal submissions and conclusory assertions, all of which must be excluded. It was also a theme of the argument that the United States case hinges entirely on the drawing of inferences, which the appellants say undermines the ROC.

[246] In particular, the appellants complained that although there are numerous references to allegedly copyrighted works there is no actual evidence of copyright protection. According to the appellants, it is merely asserted. There is also no evidence of whether an uploader had a licence or was undertaking a permitted act. Also, there is no evidence of the creation of files making it difficult to ascertain whether there is infringement because of the deduplication process.<sup>304</sup>

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<sup>304</sup> See above at [14].

[247] A related complaint is that in breach of s 25 the ROC fails to provide proper particulars of the witnesses and the evidence they have provided. According to the appellants, there must be a detailed summary of the actual evidence in support of each of the alleged offences. This should include the identification of each witness briefed and a summary of their statement. With two exceptions, the ROC does not even identify the witnesses and in the case of the two who are identified only minimal evidence is attributed to them.

[248] It is said that at best the ROC refers to a type of witness and their organisation and what they are expected to say, which is demonstrably inadequate. The extradition court cannot safely assume that evidence which is only expected is in fact available.

[249] We do not accept these arguments. First, in our view, nothing turns on the use of the phrase “expects ... to testify to the following facts”. That wording is standard and simply reflects the fact the witness has not yet given formal evidence in accordance with their brief. Secondly and more importantly, the complaints are based on a misconception about the task of an extradition court and the nature of a ROC. If accepted the arguments would significantly undermine the whole purpose of a ROC as discussed at [106]. To some extent, the arguments also appear to represent a back-door attempt to gain the disclosure which the Supreme Court has confirmed the United States is not required to provide.<sup>305</sup>

[250] All that s 25(2) requires is a summary of the evidence. It does not require the briefs of evidence to be provided. Nor does it require a detailed account of how the witnesses are able to give that evidence. Nor is the nature of the evidence to be given by unnamed but described witnesses such as to trigger concerns that the non-disclosure of their identity warrants further inquiry or somehow renders their evidence inadmissible or insufficient. Inferences are permissible.<sup>306</sup>

[251] The complaint about the absence of evidence of copyright protection and infringement overlooks that, for the purpose of the conspiracy counts,<sup>307</sup> what is

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<sup>305</sup> *Dotcom (SC)*, above n 38.

<sup>306</sup> *United States of America v Chavez* (2013) ABQB 347, (2013) 107 WCB (2d) 259 at [18]–[20].

<sup>307</sup> Counts 1–3.

essential is evidence of an agreement to infringe copyright. The exact works to be infringed need not be known or identifiable for the conspiracy to exist.<sup>308</sup>

[252] The position is different in relation to the proxy offences for counts 4–8 and 9–13: ss 249 and 228 of the Crimes Act and s 131 of the Copyright Act. In the case of those offences, it would be necessary to prove copyright infringement at trial. But as we have explained above, for the purposes of eligibility, copyright status is a circumstance that must be transposed.<sup>309</sup> That being so, it is not necessary to prove the works are subject to copyright in the United States. In any event, we do not accept that the ROC fails to make out a plausible case that copyright exists in each of the works concerned.<sup>310</sup> On the contrary, it is safe to infer from the ROC that copyright status will be proved at trial. It is unrealistic to suggest that copyright did not attach to major films such as the Lord of the Rings trilogy, or to ignore the tens of thousands of take-down notices issued by copyright owners, or to overlook evidence that the appellants themselves admitted to being pirates.

[253] As to the inclusion of non-evidential material, we agree with the United States that the ROC would cease to be a coherent and usable document if it consisted solely of disconnected snippets of evidence devoid of any overall narrative or explanation of relevance. The ROC must be read in a practical way.

*Reliability and duty of candour*

[254] The appellants contended that in breach of its duty of candour,<sup>311</sup> the United States:

- (a) failed to disclose the relevant legal context and inconsistent statements made by its own witnesses;
- (b) failed to include evidence that some people saw Megaupload as complying with its DMCA obligations; and

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<sup>308</sup> See above at [165].

<sup>309</sup> See above at [132].

<sup>310</sup> See above at [108].

<sup>311</sup> See *Dotcom (SC)*, above n 38, at [152].

- (c) misrepresented the communications by the appellants that are relied on as admissions by (i) incorrectly translating them from the original German and (ii) using selective quotes.

[255] The Supreme Court has held the duty of candour does not require a requesting state to include all potentially exculpatory evidence in the ROC,<sup>312</sup> only “evidence that would render worthless, undermine or seriously detract from the evidence.”<sup>313</sup> It follows we do not accept the duty of candour requires the inclusion of competing expert views. We note too that the only example given of an alleged mistranslation does not, when viewed objectively, remove all incriminating sting from the statement in question.

[256] We reiterate that it is the task of the extradition court to inquire whether the evidence in the ROC *if accepted* could establish the elements of the domestic offence. It is only in exceptional circumstances — where it appears the evidence may be so defective or apparently unreliable that the court should not safely act upon it — that an extradition court may go further and assess the evidence for quality, credibility, and reliability.<sup>314</sup> In our view, that is plainly not warranted in this case. None of the matters relied upon demonstrates a manifest unreliability in the ROC. At best for the appellants, the material they say should have been included in the ROC creates a conflict of evidence which can only be properly resolved at trial.

### **Sufficiency of the evidence for committal**

#### *Submissions*

[257] The appellants argued that Gilbert J was required to determine whether a prima facie case had been made out that a) copyright subsisted in the relevant works and had been infringed and b) whether the inferences sought to be drawn as to dishonesty, deception and/or fraudulent conduct were available and reasonable. In their submission, the Judge failed to do this.

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<sup>312</sup> At [195] per McGrath and Blanchard JJ and [262]–[265] per Glazebrook J.

<sup>313</sup> At [152] per McGrath and Blanchard JJ, and [265] per Glazebrook J.

<sup>314</sup> See above at [122].

[258] The United States sought to draw inferences of dishonest conduct and intent from Megaupload's conduct in responding to take-down notices it received from copyright holders by deleting only the URL link specified in the notice. The United States claimed that copyright holders were misled into believing their take-down notices would result in the deletion of the infringing file itself.

[259] The appellants contended that any adverse inference is not reasonably capable of being drawn and therefore there is a fatal gap in the evidence. They argued that under both New Zealand and United States law, an ISP is not required to delete the file, only to disable access to it by deleting the link identified in the notice.

### *Analysis*

[260] The assertion that this is fatal to establishing a prima facie case assumes that this is the only item of evidence in the ROC of dishonest conduct or intention. It is not. Indeed, as will be readily apparent from the preceding paragraphs, there is ample other evidence. But in any event an inference of dishonesty from the responses to the take-down notices is potentially available. A plausible analysis as submitted by the United States is that the take-down notice put Megaupload on notice that an infringing file which it was hosting had been discovered by the copyright owner. Despite this knowledge, it deliberately chose to preserve access to that file. On its face, the continued possession or distribution of the file thus amounted to infringing acts by Megaupload of which the appellants had knowledge. This is supported by other evidence, for example an alleged admission attributed to Mr van der Kolk describing the multiplication of links to the same file as a "feature that would make it harder to control for copyright holders".

[261] There is also evidence of allegedly false statements Mr Ortmann made to a United States' government agency about the operation of Megaupload, evidence which suggests he knew the appellants were not following standard industry practice.

[262] In saying this, we have not overlooked that the appellants seek to justify their practices, rely on the provision of direct delete access for certain verified copyright

owners,<sup>315</sup> rely on arguments about deduplication and claim that not complying with take-down notices is not evidence of knowledge of infringement. But these are all plainly trial points. As already mentioned it is not the role of an extradition court to consider affirmative defences.<sup>316</sup>

*Application for leave to adduce further evidence*

[263] Mr Dotcom and Messrs Ortmann and van der Kolk sought leave to adduce further evidence in this Court. They also contended that Gilbert J wrongly refused to admit further evidence in the High Court.

[264] The evidence before us took the form of affidavits intended to show that organisations representing copyright owners had acknowledged, in the context of a review of United States legislation, that a take-down notice applies only to a particular link and not to the underlying file; and further, that a safe harbour applies if the link is taken down. The evidence before Gilbert J concerned an earlier stage of the same review. The evidence went to the merits of the eligibility determination. As explained above,<sup>317</sup> s 72(2) provides that the High Court must not have regard to evidence that was not before the District Court. The same must apply here. So the evidence was and is inadmissible. Evidence might be admissible in support of the stay applications, to show prejudice to the appellants' case, but that is not the point of this evidence. In any event, we would not admit it for that purpose. At best, it raises a potential issue for trial. It does not detract from the sufficiency for committal purposes of the evidence contained in the ROC. Similarly, we would not admit it for the judicial review, which we address below from [304].

*Conclusion on sufficiency*

[265] We see no reason to interfere with Gilbert J's conclusion that a prima facie case has been established. The evidence contained in the ROC amounts to a strong prima facie case which would justify the committal of the appellants on each of the available New Zealand offences.

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<sup>315</sup> A procedure where copyright owners could themselves disable URL links they considered provided access to infringing content.

<sup>316</sup> See above at [114].

<sup>317</sup> See above at [54]–[56].

[266] Finally for completeness we address Mr Batato's position. His counsel submitted that his personal circumstances were different to the other alleged conspirators because of a) his "unique situation" as an employee following instructions and because b) he did not become involved in Megaupload until 2007 which was well after the business had been established by the others and so well after any conspiracy had been formed. It was submitted that these critical differences had been overlooked by both the District and High Courts.

[267] As a matter of law, it is possible to join a conspiracy after it has been formed.<sup>318</sup> And in so far as the arguments appear to be based on the view that an employee can never be a conspirator they are misconceived. There is evidence that Mr Batato was aware of the copyright infringement and directly advanced the conspiracy.

[268] In our view all of the arguments about the sufficiency of the ROC lack merit and we do not therefore grant leave.

## **J THE STAY APPLICATIONS**

[269] There were two distinct stay applications — the funding stay application and the general or misconduct stay application.

### **The funding stay application**

[270] Gilbert J refused leave on the question whether he was correct to find there was no breach of natural justice as a result of the appellants being prevented from instructing overseas expert witnesses by the United States' conduct, reasoning that the appeal had no prospects of success and in any event did not strictly concern eligibility but rather went to judicial review.<sup>319</sup>

#### *The circumstances*

[271] After the grand jury had returned indictments against the appellants in January 2012, a United States Court issued worldwide restraining orders over all

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<sup>318</sup> See *R v Harris* CA121/06, 27 September 2006 at [66]–[68].

<sup>319</sup> HC leave judgment, above n 3, at [46]–[48].

property belonging to the appellants. This included real and personal property situated in New Zealand, Hong Kong, and Australia. The orders were issued on the grounds there was probable cause to believe the property constituted proceeds of alleged offending. None of the appellants had any property in the United States itself.

[272] The restraining orders were duly registered in Hong Kong and New Zealand by order of their respective High Courts.<sup>320</sup> Of the four appellants, only Messrs Dotcom and van der Kolk have property in New Zealand.

[273] In April 2012, the High Court in New Zealand allowed the release of some of the restrained money for living expenses.<sup>321</sup> In August 2012, Potter J amended the order by allowing the release of further monies for ongoing legal and living expenses. The Judge appointed Mr Galbraith QC to review all legal expenses against stated criteria.<sup>322</sup> In July 2013, the Hong Kong High Court followed suit, allowing the release of restrained monies to Messrs van der Kolk and Ortmann for living and legal expenses. Further funds were released to Mr Dotcom by Courtney J in this country in March 2015 and again in April 2015.<sup>323</sup>

[274] On 27 March 2015, the United States obtained civil forfeiture orders in a United States Court forfeiting the foreign assets of the appellants to the United States under a doctrine known as the fugitive disentitlement doctrine.<sup>324</sup> At that time, the extradition hearing was due to commence in June 2015, although it was later adjourned to September 2015.<sup>325</sup>

[275] The appellants contended that the forfeiture order prevented sums released from restraint in New Zealand and Hong Kong being spent on obtaining expert evidence for the purposes of the extradition hearing. Under United States law, it is an offence for a United States citizen or resident to deal with forfeited property. This rendered payment of expert witnesses from forfeited funds highly problematic.

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<sup>320</sup> *Commissioner of Police v Dotcom* [2012] NZHC 634.

<sup>321</sup> *Commissioner of Police v Dotcom*, above n 320.

<sup>322</sup> *Commissioner of Police v Dotcom* [2012] NZHC 2190.

<sup>323</sup> *Commissioner of Police v Dotcom* [2015] NZHC 458; *Commissioner of Police v Dotcom* [2015] NZHC 761 (results only); and *Commissioner of Police v Dotcom* [2015] NZHC 820 (reasons).

<sup>324</sup> *United States of America v All Assets Listed in Attachment A* 89 F Supp 3d 813 (ED Va 2015).

<sup>325</sup> See decision of Katz J, above n 7, at [118].

The United States refused to undertake not to prosecute any person engaged by the appellants using impugned funds.

[276] On 14 July 2015, the appellants applied to the District Court for a permanent stay of the extradition hearing on the grounds that the conduct of the United States in restricting their access to funds for the hearing amounted to an abuse of process.

[277] Judge Dawson declined the application.<sup>326</sup> On appeal in the High Court, the appellants argued Judge Dawson had breached their right to natural justice, made multiple errors of law and acted unreasonably. Justice Gilbert rejected those complaints and concluded there was no substance to the appellant's contention that they were denied a fair extradition hearing as a result of being unable to instruct experts in the United States in the few months prior to the commencement of the hearing.<sup>327</sup> The Judge subsequently declined leave to appeal to this Court on this issue.<sup>328</sup>

#### *Application for leave to appeal*

[278] In seeking special leave to appeal, counsel for the appellants characterised the issue as a natural justice argument. They pointed to passages in *Dotcom (SC)* which confirmed the right of a defendant to investigate the evidence in the ROC and to call his or her own evidence at the extradition hearing challenging the ROC.<sup>329</sup> The appellants argued that the United States had effectively thwarted those rights as well as the orders of the Hong Kong and New Zealand courts allowing monies to be used to pay legal expenses. The appellants say that as a result, the extradition hearing that took place in the District Court was unfair and the appellants were prevented from participating in it in a meaningful way.

#### *Analysis*

[279] The evidence the appellants say they wanted to call in the District Court but were unfairly prevented from doing so falls into three main categories a) expert

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<sup>326</sup> We explain the relevant facts more fully below at [315]–[317].

<sup>327</sup> HC judgment, above n 2, at [521].

<sup>328</sup> HC leave judgment, above n 3, at [45]–[48].

<sup>329</sup> For example: *Dotcom (SC)*, above n 38, at [184] per McGrath and Blanchard JJ.

evidence on United States law, especially the legal context of the alleged conduct  
b) expert evidence on technical issues regarding the operation of Megaupload  
c) evidence about industry practice, in particular evidence regarding standard responses to take-down notices and the expectations of those who issue take-down notices. Of the three categories, it was the inability to obtain access to industry expertise, not legal expertise that was the most important.

[280] Initially, Mr Mansfield submitted that the United States was preventing any expert in the world from giving evidence for the appellants. However, he subsequently acknowledged that was an overstatement and that the restriction applied only to witnesses who were United States citizens or persons resident in the United States. He also acknowledged it was possible the relevant expertise might be able to be located elsewhere, including in Europe. Ultimately, Mr Mansfield's complaint distilled to being denied the right to call witnesses of the appellants' choice.

[281] For its part, the United States contends it was not doing anything improper but simply enforcing its own law. It characterises the funding stay applications as gamesmanship and a delaying tactic.

[282] There is reason to be sceptical about some of the appellant's claims of prejudice. For example, between May 2013 and November 2014, Mr Dotcom had access to very substantial funds which were not subject to any restraint. He therefore did have ample opportunity to engage experts including experts in the United States at a time when the extradition hearing was pending. Mr Dotcom has been represented throughout by United States lawyers and so must also have been well aware of the potential implications of the United States restraining orders from the time they were first made in 2012. That is to say, he must have appreciated how important his unrestrained funds would be to the case.

[283] Be that as it may, there is a more fundamental obstacle in the path of granting a stay. We are satisfied that even if the appellants had called all the evidence they wanted to call, it would not have made any difference to the outcome of the extradition hearing. To suggest otherwise is to confuse an extradition hearing with trial. At best for the appellants, all the proposed evidence would have achieved would have been to

create conflicts in the evidence, the resolution of which was not the function of the extradition judge. To put it another way, correctly analysed, none of the evidence was the slam dunk necessary to preclude the finding of a prima facie case.

[284] We need only demonstrate that by reference to the strongest example given by the appellants. They wanted to call evidence of industry practice regarding the expectations of copyright owners and the operations of other comparable ISPs, a key point being that those who issued the take-down notices could not have been misled into thinking the appellants were doing anything more than what the appellants told them they had done. That would show the appellants were not dishonest. However, the ROC contains evidence from industry representatives who clearly dispute that. Further, as already stated, it contains evidence of allegedly false statements Mr Ortmann made to a government agency about the operation of Megaupload, which suggests he knew he was not following standard industry practice. Otherwise, why would he deliberately lie? There is also evidence of several conversations between the appellants themselves which on the face of it constitute evidence of guilty knowledge and dishonesty.

[285] It follows that this is not an issue on which special leave should be granted.

### **The misconduct stay applications**

[286] In *Wilson v R*, the New Zealand Supreme Court confirmed that a permanent stay of criminal proceedings may be granted where there is state misconduct that will:<sup>330</sup>

- (a) prejudice the fairness of a defendant's trial (the first category); or
- (b) undermine public confidence in the integrity of the judicial process if a trial is permitted to proceed (the second category).

[287] The appellants said these principles apply to committal and hence extradition proceedings and that there has been conduct by the United States, and the

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<sup>330</sup> *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705 at [40].

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.<sup>331</sup>

[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.<sup>332</sup> That decision was upheld by Gilbert J in the High Court.<sup>333</sup> As with the funding stay application, the Judge declined leave to appeal to this Court on this issue.<sup>334</sup>

*Application for leave to appeal*

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

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

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

<sup>333</sup> HC judgment, above n 2, at [553].

<sup>334</sup> HC leave judgment, above n 3, at [45]–[48].

- (a) Judge Dawson mistakenly treated Mr Dotcom's September stay application as a joint application. As a result, in breach of the rules of natural justice, the Judge completely failed to address the separate August application of Messrs Ortmann and van der Kolk.
- (b) Both Judge Dawson and Gilbert J took an excessively narrow approach to the stay jurisdiction of an extradition court, effectively precluding an extradition defendant from ever being able to rely on the second category in *Wilson*.
- (c) The two cases relied on by Gilbert J to support his narrow approach to jurisdiction,<sup>335</sup> namely *Police v D* and *Bujak*,<sup>336</sup> have been superseded by the Supreme Court decisions of *Siemer*, *Dotcom (SC)*, and the English decision of *Regina (Government of the United States of America) v Bow Street Magistrates' Court* which support an enlarged stay jurisdiction.<sup>337</sup>
- (d) Because the application was wrongly struck out, the appellants have never had the opportunity to put before the extradition court the substantive evidence on which they would rely or make submissions about that evidence.

### *Analysis*

[293] We accept that Judge Dawson did erroneously treat Mr Dotcom's September application as a joint application and overlooked the separate August application. However, the point is of no significance. That is because there is nothing of any substance in the August application that is not contained in the September application and therefore nothing of substance which Judge Dawson failed to address. When pressed, Mr Illingworth was unable to identify any significant difference.

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<sup>335</sup> HC judgment, above n 2, at [548]–[552].

<sup>336</sup> *Police v D*, above n 36; and *Bujak*, above n 36.

<sup>337</sup> *Siemer*, above n 35; *Dotcom (SC)*, above n 38; and *Regina (Government of the United States of America) v Bow Street Magistrates' Court* [2006] EWHC 2256 (Admin), [2007] 1 WLR 1157.

In those circumstances, the error made by the District Court Judge does not of itself merit a second appeal.

[294] As for the scope of an extradition judge's jurisdiction to permanently stay an extradition hearing on the grounds of abuse of process, in our view the starting point must be s 8 of the Extradition Act, which states that a discretionary restriction on surrender exists if, among other things, the accusation "was not made in good faith in the interests of justice" and in all the circumstances "it would be unjust or oppressive to surrender the person". The extradition court may decline to find the person eligible where a discretionary restriction exists.<sup>338</sup>

[295] Based on the way the Act is structured, there is a strong argument for saying that s 8 delineates the scope of the jurisdiction to stay for abuse of process in the context of extradition. In the absence of exceptional circumstances, conduct outside the terms of s 8 should not generally be considered grounds for a stay. Exceptional circumstances might also exist where, as was the case in *Bujak*, s 8 is excluded by the terms of the relevant extradition treaty. That was not seen as in itself reason to deprive the Court of its residual jurisdiction to stay for abuse for reasons of delay.<sup>339</sup>

[296] Section 8 was raised in this case in the District Court. However, it was not argued before Gilbert J, nor did it form any part of the argument before us. We therefore do not decide the issue on that basis. The argument before us centred on whether the general law relating to abuse of process at a committal stage applied to extradition hearings and whether there was a conflict between *Bujak* and later Supreme Court decisions.

[297] It is not clear to us that there is any necessary inconsistency between *Bujak* and later Supreme Court decisions. There is a passage quoted with approval in *Bujak* which expressly contemplates staying an extradition proceeding, even in

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<sup>338</sup> Extradition Act 1999, s 24(4).

<sup>339</sup> *Bujak*, above n 36, at [30]–[33].

circumstances where the informant's evidence is sufficient to justify committal, if to embark on the committal function would be "an affront".<sup>340</sup>

[298] In any event, we are prepared to accept for present purposes that in principle the second category of abuse of process in *Wilson* can apply at the committal stage including extradition. It will be recalled that the second category is where the state misconduct will undermine public confidence in the integrity of the judicial process if a trial is permitted to proceed.

[299] The difficulty for the appellants is that, as *Wilson* makes clear, the threshold for staying a proceeding in a category two case is particularly high. A stay for a second category reason was described as "an extreme remedy which should be given only in the clearest of cases".<sup>341</sup> It generally requires a causal connection between the misconduct and the prejudice to the defendants,<sup>342</sup> which is lacking in this case. Mr Dotcom's permanent residency has not for example in any way impeded him from vigorously resisting extradition and the incontrovertible fact is that a complaint was made to the United States prosecuting authorities by third parties with a genuine interest in protecting copyright.

[300] The availability of an alternative remedy is also highly relevant.<sup>343</sup> In this case there have been other proceedings in relation to the raid,<sup>344</sup> and the Government Communications Security Bureau has admitted it unlawfully intercepted Mr Dotcom's and Mr van der Kolk's private communications (though the quantum of damages has not yet been resolved).<sup>345</sup> Further, there is nothing to prevent the appellants from raising these issues at trial which, in the circumstances of this case, is in our view where they properly belong.

[301] We are satisfied that even if the allegations pleaded in support of the stay applications relating to procedural misconduct are true, they do not come close to

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<sup>340</sup> At [27]; quoting the High Court decision in the same case *Bujak v Republic of Poland* [2007] NZAR 513 (HC) at [44].

<sup>341</sup> *Wilson*, above n 330, at [92(e)] and similarly at [60].

<sup>342</sup> At [78]–[80].

<sup>343</sup> *Wilson*, above n 330, at [92(e)].

<sup>344</sup> See *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745.

<sup>345</sup> See *Dotcom v Attorney-General* [2017] NZHC 1621 at [1] and [2]; and *Dotcom v Attorney-General* [2018] NZCA 220 at [10].

satisfying the high threshold for staying the extradition proceeding. It would be wrong to grant leave in relation to an argument that would not affect the outcome and we therefore do not grant it.

[302] For completeness, we record that after the hearing before us, the Human Rights Review Tribunal (the Tribunal) awarded Mr Dotcom \$90,000 in damages against the Attorney-General for breaches of the Privacy Act 1993.<sup>346</sup> This related to information privacy requests made by Mr Dotcom in 2015 to every Minister of the Crown and almost every government department. Mr Dotcom was seeking all personal information held about him and requested urgency because of a then-pending extradition hearing. Nearly all the requests were transferred to the Attorney-General. On his behalf, the Solicitor-General declined the requests on the grounds they were vexatious and included information which was trivial. The Tribunal held the transfer of the requests to the Attorney-General was not authorised by the Privacy Act and in any event there was no proper basis for the decision to decline.<sup>347</sup>

[303] The appellants submitted, by way of material filed post hearing, the Tribunal's decision is relevant to the extradition issues because it confirms an abuse of process that would undermine public confidence in the judicial system. We disagree. The conduct at issue does not come close to establishing the high threshold required under *Wilson* and to attempt to rely on it for the purposes of staying an extradition is misconceived.

## **K JUDICIAL REVIEW**

[304] As mentioned, there were two proceedings before Gilbert J:<sup>348</sup>

- (a) The appeal from Judge Dawson's decision under the case-stated appeal provisions of the Extradition Act. This is the only appeal pathway under the Act. It is restricted to questions of law settled by the District Court.

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<sup>346</sup> *Dotcom v Crown Law Office* [2018] NZHRRT 7.

<sup>347</sup> At [204].

<sup>348</sup> See above at [3]; and see HC judgment, above n 2, at [6]–[7].

- (b) Judicial review proceedings relating to Judge Dawson’s eligibility determination and his decision dismissing the stay applications.

[305] There was significant overlap between the two proceedings, to the point that every alleged error of law (bar one) in the judicial review proceedings was replicated in the case-stated appeal. The one exception was a pleaded ground of review alleging apparent bias and predetermination on the part of Judge Dawson.<sup>349</sup>

[306] In light of this, Gilbert J limited his consideration of the judicial review proceeding to apparent bias and predetermination. He addressed that issue at the end of the judgment and found that a fair-minded lay observer would have been satisfied that all parties had been given a fair hearing.<sup>350</sup>

[307] The appellants appeal the Judge’s decision to limit the scope of the judicial review proceeding to matters not dealt with in the case-stated appeal. They said they were entitled to pursue judicial review. They also appealed the specific findings rejecting their allegations of apparent bias and predetermination.

[308] Counsel for the appellants argued Gilbert J was wrong to rely on an earlier decision of Asher J as “directing” that all aspects of the District Court judgment including the procedural rulings that led to it should be dealt with in the context of the appeals rather than separately by way of judicial review.<sup>351</sup> Rather, Asher J had simply ruled contrary to a submission made by the United States that procedural aspects could be included in the case-stated appeal so long as they involved questions of law. According to the appellants, Asher J did not purport to limit the scope of the judicial review proceedings, although he acknowledged this could be an issue later.

[309] This précis of Asher J’s decision however overlooks his description of the appeal procedure under s 68 as “the primary appeal procedure” and his ruling that if matters could be properly included in those proceedings they should be.<sup>352</sup>

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<sup>349</sup> HC judgment, above n 2, at [8].

<sup>350</sup> At [554]–[584]; applying the test in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3].

<sup>351</sup> At [8]; referring to *Ortmann v United States of America* [2016] NZHC 522.

<sup>352</sup> At [23].

[310] We accept as a general principle that the existence of a right of appeal is not automatically fatal to the right to apply for judicial review. We also acknowledge the Extradition Act does not contain a privative clause. However, in our view, having regard to the nature of an extradition hearing and the comprehensive legislative scheme governing extraditions, the principles articulated in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* are engaged.<sup>353</sup>

[311] In our view, if a ground of judicial review can be raised and adequately determined through the case-stated appeal process under s 68 — as, in our assessment, it has been in this case — judicial review is not available. Parliament cannot have intended it would be possible to bring duplicate sets of proceedings covering identical grounds. In effect, what the appellants are attempting to do by bringing judicial proceedings replicating the same grounds is to circumvent the carefully circumscribed appeal rights under the Extradition Act. That in our view is an abuse of process and should not be permitted.

[312] It is therefore arguable that at least some aspects of the claim alleging apparent bias and predetermination could have been encompassed in the case-stated appeal. However, because of the way the case was argued in the High Court, we proceed to address those on the basis of an appeal as of right to this Court.

[313] As noted by Mr Mansfield, the allegation of predetermination is based on Judge Dawson's approach to the two stay applications. It was said the Judge predetermined the applications and lacked impartiality. The alleged unequal treatment was said to be evident from:

- (a) Judge Dawson's refusal to hear both applications before the eligibility hearing;
- (b) the Judge's refusal to determine the funding stay application until after the eligibility hearing, thereby causing the appellants the very prejudice they sought to avoid by the application;

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<sup>353</sup> *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [56]–[61].

- (c) determining the United States' request to strike out the stay applications during the eligibility hearing;
- (d) providing no reasons in purporting to uphold the preliminary objection of the United States; and
- (e) purporting to determine the misconduct stay application substantively despite refusing to allow the appellants to call evidence and present submissions.

[314] We do not accept that an informed and fair-minded lay observer would regard any of these matters, whether viewed individually or collectively, as suggesting bias or predetermination on the part of Judge Dawson.

[315] What happened was that the funding stay application was filed in July 2015. The appellants sought an urgent hearing of the application. Judge Dawson issued a minute on 21 July 2015 advising that the application would be heard at the commencement of the extradition hearing scheduled for 21 September 2015.<sup>354</sup>

[316] The appellants sought urgent judicial review of this scheduling decision. The High Court declined to grant a priority fixture directing that the judicial review application could be heard at the time of any substantive appeal from an extradition decision.<sup>355</sup> The appellants appealed to this Court. The appeals were heard in this Court on 8 September 2015 and dismissed on 14 September 2015. This Court concluded there was insufficient time to enable it to resolve the argument. This Court was satisfied the appellants would not be prejudiced by leaving scheduling to be resolved by the District Court because the decision could always be challenged later.<sup>356</sup>

[317] The hearing of the funding stay application duly proceeded in the District Court. There were numerous affidavits, some cross-examination and lengthy submissions. It did not conclude until late October 2015. The Judge reserved

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<sup>354</sup> *United States of America v Dotcom* DC North Shore CRI-2012-092-1647, 21 July 2015.

<sup>355</sup> *Ortmann v United States of America* HC Auckland CIV-2015-404-1733, 6 August 2015; and *Dotcom v United States of America* HC Auckland CIV-2015-404-1770, 13 August 2015.

<sup>356</sup> *Ortmann v District Court at North Shore* [2015] NZCA 443 at [15], [21] and [23].

his decision and then invited the appellants to proceed immediately with their misconduct stay applications. He confirmed he intended to proceed with the extradition hearing before determining the outcome of the funding stay.<sup>357</sup>

[318] The Judge adopted this approach reasoning that the United States' case for eligibility would provide context for considering the funding stay application. We agree with Gilbert J that the Judge took the best course available to him in difficult circumstances.<sup>358</sup> If he had concluded the appellants had been denied their right to a fair eligibility hearing he would have granted the stay.

[319] As regards the sequence adopted for determining the misconduct stay applications, we do not consider this is capable of giving rise to any concerns about the Judge's impartiality. In particular, we do not accept that a lay observer would have expected the Judge to reserve his decision on the strike-out application and proceed to hear the substance of the stay applications. On the contrary, having decided there was no jurisdiction for him to entertain the stay applications, it would have been wrong for him to have embarked on a further lengthy hearing inquiring into them.

[320] Finally, like Gilbert J,<sup>359</sup> we reject the complaint that Judge Dawson did not give reasons for striking out the applications. The Judge did give reasons.<sup>360</sup>

[321] We conclude there is no merit in the appeal against the High Court's decision on judicial review and it is accordingly dismissed.

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<sup>357</sup> See HC judgment, above n 2, at [451]. Judge Dawson released a results decision in *United States of America v Dotcom* DC North Shore CRI-2012-092-1647, 29 October 2015; with reasons in DC judgment, above n 1, at [437]–[571].

<sup>358</sup> HC judgment, above n 2, at [567].

<sup>359</sup> HC judgment, above n 2, at [537] and [543].

<sup>360</sup> Judge Dawson gave his reasons by inserting the grounds of the application into the judgment and responding point by point: DC judgment, above n 1, at [578]. See similarly *Crinion v IG Markets Ltd* [2013] EWCA Civ 587 at [16]–[18] where the Court held a similar practice, though not laudable, did not found judicial review.

## **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.

[326] The High Court rejected the claim that the United States so misconducted itself, with the assistance of New Zealand authorities, as to warrant a stay of extradition. That conclusion does not raise a question of law meriting appeal to this Court in this proceeding, which is brought under the Extradition Act and strictly concerned with eligibility.<sup>361</sup> In particular, the evidence the appellants say they would have called but for the intervention of United States courts and prosecutors may raise an issue for trial but it is inadmissible in the appeals and anyway does not detract from the case for extradition.

[327] Lastly, judicial review was correctly refused in the High Court.

### **Disposition**

[328] We decline Mr Dotcom's and Messrs Ortmann and van der Kolk's applications for leave to adduce further evidence on appeal.

[329] We decline leave to file the submissions referred to in the memorandum of Mr Illingworth QC dated 24 April 2018.

[330] We answer the questions of law on which Gilbert J granted leave as follows:

- (a) Question 1: Was the High Court Judge correct to find that the essential conduct with which the appellants are charged in each count constitutes an extradition offence for the purposes of s 24(2)(c) of the Extradition Act 1999?

Answer: Yes, though for somewhat different reasons.

- (b) Question 2: Was the High Court Judge correct to conclude that copyright in a particular work does not form part of the accused person's conduct constituting the extradition offences correlating to counts 4 to 8; and to conclude that proof of this is not required for the purposes of s 24(2)(d) of the Extradition Act 1999?

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<sup>361</sup> We express no view about other proceedings brought by the appellants against those involved in the alleged misconduct.

Answer: Yes. Copyright in a particular work was not part of the appellants' conduct constituting the extradition offences alleged in counts 4–8 of the superseding indictment and it need not be proved for the purposes of s 24(2)(d) of the Extradition Act. Rather, it is a circumstance transposed when determining whether the offence is an extradition offence.

[331] We decline leave to appeal on all the remaining questions of law raised by the appellants. Because of our conclusion in relation to the Copyright Act pathway,<sup>362</sup> we decline leave to appeal on the questions of law raised by the United States.

[332] We accordingly confirm the eligibility determination made by the District Court. We direct that the District Court should now proceed without further delay to complete its duties under s 26 of the Extradition Act in accordance with the determination.<sup>363</sup>

[333] We dismiss the appeal against Gilbert J's decision to decline judicial review.

[334] We dismiss the appeal in CA302/2015.

[335] Ordinarily we would order the appellants are jointly and severally liable to pay the United States of America one set of costs for a complex appeal on a band B basis and usual disbursements, with an allowance for second counsel. However, the parties have not been heard on costs. We grant leave for the parties to file memoranda of no more than two pages in length, excluding the cover page, in relation to costs within 10 working days of the delivery of this judgment. The appellants are encouraged to file a joint memorandum.

Solicitors:

Keegan Alexander, Auckland for Messrs Ortmann and van der Kolk  
Anderson Creagh Lai, Auckland for Mr Dotcom  
Crown Law Office, Wellington for the United States of America

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<sup>362</sup> See above at [188].

<sup>363</sup> Extradition Act 1999, s 72(1).