IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-002168
[2017] NZHC 1621

IN THE MATTER OF	the New Zealand Bill of Rights Act 1990 and the Government Communications Security Bureau Act 2003
BETWEEN	KIM DOTCOM First Plaintiff
	MONA DOTCOM Second Plaintiff
	BRAM VAN DER KOLK Third Plaintiff (discontinued)
	JUNELYN VAN DER KOLK Fourth Plaintiff (discontinued)

cont'd: …/2

Hearing:	3, 4, and 5 April 2017
Appearances:	R M Mansfield and S L Cogan for First Plaintiff J R Hosking for Second Plaintiff K P McDonald QC and A N Isac for First Defendant D J Boldt for Second Defendant S B W Grieve QC special advocate
Judgment:	14 July 2017

JUDGMENT OF GILBERT J

This judgment is delivered by me on 14 July 2017 at 11.00 am pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Counsel/Solicitors:
R M Mansfield, Barrister, Auckland Anderson Creagh Lai Limited, Auckland - *S L Cogan*
J R Hosking, Barrister, Auckland
K P McDonald QC, Auckland, A N Isac, Barrister, Auckland
D J Boldt, Barrister, Wellington
S B W Grieve QC, Auckland
Crown Law, Wellington

FINN BATATO
Sixth Plaintiff (discontinued)

VESTOR LIMITED
Seventh Plaintiff

AND

HER MAJESTY'S ATTORNEY-GENERAL, on behalf of the New Zealand Police
First Defendant

HER MAJESTY'S ATTORNEY-GENERAL, on behalf of the Government Communications Security Bureau
Second Defendant

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Introduction

[1] The Government Communications Security Bureau (GCSB) has admitted unlawfully intercepting private communications of Kim and Mona Dotcom (the Dotcoms) and Bram van der Kolk during the period from 16 December 2011 to 22 March 2012. This occurred in the context of a police operation established to assist the United States in connection with its request for the extradition of Mr Dotcom, Mr van der Kolk and others to face trial in the United States on various charges including conspiracy to commit copyright infringement, money laundering, racketeering and wire fraud.

[2] In this proceeding, the Dotcoms seek an award of damages against GCSB for this unlawful interception of their communications.[1] They pursue other claims as well but these are not relevant to the present application. Liability having been admitted, the only issue is what relief should be given.

[3] The defendants have completed discovery but they have not discovered the raw communications, contending that these are not relevant to the question of relief. They say that the non-discoverability of the raw communications was conclusively determined by the Court of Appeal in 2013 and cannot be re-litigated now because of the doctrine of issue estoppel.[2] The Dotcoms counter that the Court of Appeal's decision was made in earlier proceedings for judicial review and is not determinative of the discovery issue in the present case.

[4] In any event, the defendants seek, on national security grounds, to withhold disclosure of the raw communications (which have not been discovered) and the redacted parts of other documents (which have been discovered). They seek an order pursuant to s 70 of the Evidence Act 2006 directing that these documents not be disclosed in this proceeding to any person other than the special advocate, his expert adviser and the Court.

[5] Section 70 of the Evidence Act provides:

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1 After the application was heard, the third to sixth plaintiffs reached a settlement with the defendants and they have now discontinued their claims.

2 *Attorney-General v Dotcom* [2013] NZCA 43, [2013] 2 NZLR 213 [Court of Appeal judgment].

> **70 Discretion as to matters of State**
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> (1) A Judge may direct that a communication or information that relates to matters of State must not be disclosed in a proceeding if the Judge considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information.
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> (2) A communication or information that relates to matters of State includes a communication or information –
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> (a) in respect of which the reason advanced in support of an application for a direction under this section is one of those set out in sections 6 and 7 of the Official Information Act 1982; or
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> (b) that is official information as defined in section 2(1) of the Official Information Act 1982 and in respect of which the reason advanced in support of the application for a direction under this section is one of those set out in section 9(2)(b) to (k) of that Act.
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> (3) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.

[6] The defendants contend that the public interest in the disclosure of the material is outweighed by the public interest in withholding it. In particular, they contend that its disclosure would be likely to prejudice: the security and defence of New Zealand and the international relations of the government of New Zealand; the entrusting of information to the government of New Zealand on a basis of confidence by the government of other countries and the agencies of other governments; and the maintenance of the law, including the prevention, investigation and detection of offences.[3]

[7] Stuart Grieve QC, a senior barrister with a high-level security clearance, was appointed by the Court in October 2012 to act as special advocate on behalf of the plaintiffs.[4] An independent expert with specialist expertise in national security issues was appointed to assist Mr Grieve in carrying out his role. One of Mr Grieve's tasks was to review the discovered documents in un-redacted form and the raw

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3 Relying on s 6(a), (b) and (c) of the Official Information Act 1982.

4 *Dotcom v Attorney-General* HC Auckland CIV-2012-404-1928, 11 October 2012 (Minute of Winkelmann J).

communications to assess on behalf of the plaintiffs whether disclosure is properly withheld on national security grounds and to advance such arguments on their behalf that can responsibly be made to contest this. Mr Grieve has successfully challenged the defendants' claims in relation to a number of the redacted documents but he is unable to challenge the defendants' claim that proper grounds exist for withholding those that remain subject to the s 70 application.

[8] The Dotcoms oppose the s 70 application arguing that disclosure would not have any significant adverse effect on New Zealand's national security interests. Although they have not seen the material, they contend that much of the information sought to be protected is already in the public domain, including the sources and methods of intelligence-gathering, the intelligence-sharing and partnership agreements with other governments and the methods GCSB employs to assist police.

[9] The Dotcoms complain that non-disclosure impedes their ability to pursue their claim and breaches their rights under the New Zealand Bill of Rights Act 1990. In particular, they submit that the measure of damages to which they are entitled will depend on the extent and nature of the unlawful intrusion into their private lives and the raw communications are needed to establish this. They contend that the appointment of the special advocate and the independent adviser to advocate their position does not overcome the disadvantage to them of not being able to confirm personally that all relevant information needed for their case has been provided.

[10] In summary, the Dotcoms argue that the public interest in disclosure outweighs any public interest in the information being withheld from them.

[11] Although the Dotcoms have not made an application under r 8.19 of the High Court Rules seeking particular discovery of the raw communications, this issue was fully argued and must be determined. The issues requiring determination are:

(a) Are the Dotcoms estopped by the Court of Appeal's judgment from seeking discovery of the raw communications in this proceeding?

(b) If not, are the raw communications discoverable?

(c) Should an order be made pursuant to s 70 of the Act?

Are the Dotcoms estopped by the Court of Appeal's judgment from seeking discovery of the raw communications in this proceeding?

The judicial review proceeding

[12] The Court of Appeal's judgment was given in the judicial review proceeding that formed the genesis of this proceeding. In order to assess whether the Court of Appeal's judgment gives rise to an issue estoppel for present purposes, it is necessary to summarise the judicial review proceeding and explain the link between that proceeding and this.

[13] In April 2012 Messrs Dotcom, van der Kolk, Ortmann and Batato commenced judicial review proceedings against the Attorney-General on behalf of the New Zealand Police and the District Court at North Shore challenging the validity of the search warrants authorising the searches of the Dotcom and van der Kolk homes.[5] On 28 June 2012 Winkelmann J determined that the search warrants were invalid but reserved the question of relief.[6] Following this judgment, the plaintiffs amended their claim to include a damages claim against the police relying on the invalidity of the search warrants and the way in which the search of the Dotcoms' house was conducted.

[14] After the unlawful involvement of GCSB came to light in August 2012, Winkelmann J gave the plaintiffs leave to add GCSB as a defendant and amend their pleadings to include a claim for damages against GCSB for unlawfully intercepting Mr Dotcom and Mr van der Kolk's communications.[7] At the same time, Winkelmann J made an order for discovery against GCSB covering:[8]

> All information collected by the GCSB in relation to the plaintiffs [including Mr van der Kolk and Mr Dotcom], their families and any associated individuals, and particularly that information which was passed on to the New Zealand Police.

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5 *Dotcom v Attorney-General* HC Auckland CIV-2012-404-1928.
6 *Dotcom v Attorney-General* [2012] NZHC 1494, [2012] 3 NZLR 115.
7 *Dotcom v Attorney-General* [2012] NZHC 3268.
8 At [26](f); see also [30] and [42](d).

[15] On 10 December 2012, in accordance with Winkelmann J's judgment, the plaintiffs filed a third amended statement of claim adding the Attorney-General on behalf of GCSB as a third defendant. The plaintiffs pleaded that GCSB had unlawfully intercepted the communications of Messrs Dotcom and van der Kolk and they sought an order requiring the police and GCSB to pay compensation for the unlawful and unreasonable interception of these communications. They claimed that the interceptions were instigated by the police.

The Court of Appeal judgment

[16] The Attorney-General successfully appealed against the order requiring GCSB to discover the raw communications, being the only documents collected by GCSB that were not passed to the police.[9] Because of its central importance to the present application, I set out in full the relevant parts of the judgment, which was delivered by O'Regan P on behalf of the Court:

> [56] Mr Boldt [for GCSB] argued that there was no basis for discovery of the information described in [[26](f)] that related to [Mr Dotcom and Mr van der Kolk]. He said that discovery must be relevant to a live and pleaded issue. We agree. He argued that in this case there was no live and pleaded issue to which the discovery could be said to relate. That is because the GCSB accepts that it acted unlawfully in undertaking surveillance of [Mr Dotcom and Mr van der Kolk], given that they were New Zealand residents, and had already indicated to the Court that it would consent to a declaration to that effect being made. That meant that the only live issue between the GCSB and the respondents is the level of *Baigent* compensation. In light of the limited nature of the inquiry required to determine the appropriate level of compensation, there was no reason why full disclosure of all of the material obtained by the unlawful interception undertaken by the GCSB would be necessary.
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> [57] Mr Boldt's submission was largely confirmed by the exchanges between the Court and Mr Akel [counsel then acting for Mr Dotcom] and Mr Foley [counsel then acting for Mr van der Kolk]. When challenged as to the need for discovery of the material obtained from the surveillance by the GCSB, Mr Akel replied that the disclosure was relevant only to the calculation of *Baigent* compensation but that it was necessary because "We don't know its relevance until we see it". Mr Foley initially argued that disclosure was required because, otherwise, there was a risk of perjured evidence from the relevant GCSB officers about the period during which the unlawful surveillance took place. He later retracted that, but argued that it remained relevant to the calculation of *Baigent* compensation. We observe that, if Mr Foley were correct and affidavit evidence from a senior public servant could not be accepted at face value, that would illustrate how

[9] Court of Appeal judgment, above n 2.

> inappropriate it would be for the issue to be resolved in a judicial review context.
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> [58] Mr Foley even suggested that the disclosure of the information obtained by the GCSB from its unlawful interceptions would have a collateral benefit of providing information relevant to the extradition hearing (if the information obtained by the unlawful surveillance had been provided to the United States). That would, of course, be an impermissible use of the disclosed information.
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> [59] Mr Foley also argued that the arrangements put in place for Mr Grieve to receive the information and make submissions to the Court meant that there was no significant problem for the GCSB in making the disclosure and there had been nothing to indicate that the volume of the information was such that disclosure would be unduly onerous for the Crown.
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> [60] In the absence of the identification of any matter in dispute before the Court to which the disclosure could relate, we do not see any proper basis for the making of a disclosure order in terms of paragraph (f), insofar as it related to [Mr Dotcom and Mr van der Kolk]. We do not accept that it is sufficient for counsel to say that he or she needs to see the information before he or she can identify whether it is relevant or not. In the present case, where there is no dispute about the illegality of the surveillance undertaken by the GCSB, and in light of the relatively limited scope of the inquiry into the level of compensation, we can see no proper basis for an order in terms of paragraph (f) even if it is limited to the information relating to [Mr Dotcom and Mr van der Kolk]. We accordingly allow the Attorney-General's appeal in relation to that issue.
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> (Footnote omitted)

The present proceeding

[17] The Court of Appeal expressed reservations about whether it was appropriate for the damages claims to be included in the judicial review proceedings.[10] This led to the current proceedings being filed as a conventional damages claim, severed from the judicial review proceeding. Three changes were made to the claim against GCSB when the present proceeding was filed: first, Mrs Dotcom and Mrs van der Kolk were added as plaintiffs in connection with it; second, invasion of privacy was pleaded as an additional cause of action; and third, the damages sought were extended to include aggravated and exemplary damages. The claim was subsequently further amended to add a third cause of action against GCSB in negligence.

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[10] At [47].

Legal principles

[18] The object of issue estoppel is twofold: it serves the public interest in finality of litigation and protects litigants from being vexed twice on the same issue.[11] In *Talyancich v Index Developments Ltd*, the Court of Appeal explained the doctrine in the following terms:[12]

> Issue estoppel arises where an earlier decision is relied upon, not as determining the existence or non-existence of the cause of action, but, as determining, as an essential and fundamental step in the logic of the judgment, without which it could not stand, some lesser issue which is necessary to establish (or demolish) the cause of action set up in the later proceedings.

[19] Issue estoppel binds not only the parties to the decision but also anyone who is a privy of a party. In *Shiels v Blakeley*, the Court of Appeal summarised what must be shown to establish that one person is the privy of another in this context:[13]

> Privity in this sense denotes a derivative interest founded on, or flowing from, blood, estate, or contract, or some other sufficient connection, bond, or mutuality of interest. No case has yet sought to define exhaustively the degree or nature of the link necessary to render a person privy in interest. That this is so is not surprising for the necessary connection may arise in a variety of ways and its existence falls to be tested in the light of the object of the rules about estoppel by res judicata and their effect in preventing the party in the subsequent proceeding from putting his case in suit. But while there is no ready definition the cases give some indication of what is necessary.
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> In *Carl Zeiss Stiftung v Rayner & Keeler Ltd*, Lord Reid said that privity of interest may arise in many ways "but it seems to me to be essential that the person now to be estopped from defending himself must have had some kind of interest in the previous litigation or its subject-matter". Lord Guest said that "Before a person can be privy to a party there must be community or privity of interest between them". The nature of the connected interest was further discussed in *Gleeson v J Wippell & Co Ltd*. There Sir Robert Megarry V-C held that there must be a sufficient degree of identity between the party to the first action and the party whom it is sought to estop in the second to make it just to hold that the first decision should be binding on a party in subsequent proceedings. …
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> We conclude that there must be shown such a union or nexus, such a community or mutuality of interest, such an identity between a party to the first proceeding and the person claimed to be estopped in the subsequent

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11 *Lockyer v Ferryman* (1877) 2 App Cas 519 (HL) at 530.

12 *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 (CA) at 37; recently confirmed and applied by the Court of Appeal in *van Heeren v Kidd* [2016] NZCA 401.

13 *Shiels v Blakeley* [1986] 2 NZLR 262 (CA) at 268.

> proceeding, that to estop the latter will produce a fair and just result having regard to the purposes of the doctrine of estoppel and its effect on the party estopped.
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> (Citations omitted)

[20] An interlocutory order, unless appealed, is as binding on the parties as a final judgment. Absent a material change in circumstances, any attempt to re-litigate an issue finally determined by an interlocutory order or judgment would constitute an impermissible collateral attack on that judgment.

[21] The Court of Appeal confirmed in *Joseph Lynch Land Co Ltd v Lynch* that the doctrine applies to interlocutory decisions, although it cautioned that it is appropriate to take a narrow view of what had been finally determined by the interlocutory judgment:[14]

> In principle a sufficiently final and certain conclusion can no doubt be found in what is effectively an interlocutory judgment so as to found a subsequent issue estoppel. We consider, however, that considerable caution is necessary before coming to such a conclusion. …
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> …
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> In our judgment the ultimate question is concerned not so much with the character of the earlier decision, ie whether it should be regarded as final or interlocutory. The question is rather whether in the circumstances it is reasonable to regard the earlier decision as a final determination of the issue which one of the parties now wishes to raise.

Submissions

[22] Mr Boldt submits that the current issue, as to whether the raw communications are discoverable as being relevant to the quantum of damages that should be awarded for the admittedly unlawful interception of Messrs Dotcom and van der Kolk's communications, is exactly the same issue as was determined by the Court of Appeal in 2013. The documents are the same and the only live and pleaded issue to which they could be relevant remains the appropriate level of damages. He submits that Mrs Dotcom is also estopped from re-litigating the issue because the issue is substantially the same and she and Mr Dotcom have a sufficiently common interest that it is fair and just to regard them as privies.

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[14] *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 42–43.

[23] Mr Mansfield accepts that if the Court of Appeal determined that the documents are irrelevant to the issues raised in the current pleadings, then Mr Dotcom cannot re-litigate this. However, he submits that this is not the case for the following four reasons:

(a) The Court of Appeal's decision was made in the context of a judicial review proceeding where *Baigent* damages were sought for the unlawful interception of communications. By contrast, Mr Mansfield contends that the current proceedings "differ greatly" in that there are now three causes of action against GCSB (unlawful and unreasonable surveillance, negligence and invasion of privacy), and different forms of relief are sought including aggravated and exemplary damages and indemnity costs.

(b) The Court of Appeal expressed its conclusion in "diffident terms":[15]

> In the absence of the identification of any matter in dispute before the Court to which the disclosure could relate, we do not see any proper basis for the making of a disclosure order in terms of paragraph (f) …

(c) The parties are not the same in that three plaintiffs have been added: Mrs Dotcom, Mrs van der Kolk and Vestor Ltd.

(d) As the Court of Appeal observed, the judicial review proceeding had become procedurally confused.[16] Mr Mansfield submits that the Court should not now deny Mr Dotcom substantive justice because of decisions made "in the midst of an interlocutory muddle".

[24] Ms Hosking supports Mr Mansfield's submissions in similarly contending that the doctrine of issue estoppel does not apply. She further submits that Mrs Dotcom is not Mr Dotcom's privy for these purposes. She argues that because she was not a party to the earlier proceeding, she could not have appreciated that her

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15 Court of Appeal judgment, above n 2, at [60].
16 At [27].

rights to discovery would be finally determined in the Court of Appeal and she did not even have standing to appeal that decision. Ms Hosking submits that it is not reasonable to expect that Mrs Dotcom should have turned her mind to the issue and taken steps to protect her position in 2013. She contends that there is no room for issue estoppel to apply to her.

Analysis

[25] I do not accept Mr Mansfield's submission that the current proceedings "differ greatly" from the earlier proceeding. That there are now three causes of action against GCSB (unlawful and unreasonable surveillance, negligence and invasion of privacy) does not alter the scope of discovery. These causes of action are all founded on the same admitted conduct, namely the unlawful interception of Mr Dotcom's communications. The only live issue remains the question of relief, particularly the quantum of damages to be awarded. If the raw communications were not relevant and discoverable in relation to the compensatory damages that should be awarded, I am unable to see how they could become relevant merely because aggravated and exemplary damages are now also claimed. There is also nothing in Mr Mansfield's submission regarding the claim for indemnity costs. Such costs were sought by the plaintiffs at the time the matter was considered by the Court of Appeal and so there is no change in that respect. Further, the raw communications are plainly not relevant to the level of costs that should be awarded for the proceeding.

[26] I also reject Mr Mansfield's submission that the Court of Appeal expressed its conclusion in "diffident terms". The Court made it clear that it did not regard the raw communications as being relevant to any live and pleaded issue and it accordingly allowed the appeal and set aside the High Court's order requiring discovery of these documents. There was no diffidence in the reasoning or the result. In any event, what matters is the result, not whether the Court expressed any reservations in reaching it.

[27] The addition of Mrs Dotcom, Mrs van der Kolk and Vestor Ltd as plaintiffs is irrelevant and cannot have any bearing on whether the raw communications are

discoverable as having relevance to the assessment of damages. The unlawfully intercepted communications are the same. No basis has been suggested for concluding that the raw communications would not be relevant to the assessment of the damages claim by Mr Dotcom but nevertheless relevant to the damages claimed by Mrs Dotcom. Plainly, that could not be so.

[28] The Court of Appeal's concern about whether it was appropriate for the damages claims to be included as part of the judicial review proceeding is immaterial to the discovery issue. Even if there had been an "interlocutory muddle", which I do not accept, this would not justify this Court disregarding the Court of Appeal's judgment on the scope of discovery.

[29] That the issue was determined in the context of an interlocutory application is of no moment. This was an interlocutory issue that could only ever be determined in this way. Because the issue was purely procedural, it could not resurface at the substantive hearing.

[30] I conclude that the Court of Appeal has finally determined, as between Mr Dotcom and the defendants, the question of whether the raw communications are relevant and discoverable in relation to the issue of the quantum of compensatory damages that should be awarded for the admittedly unlawful interception of those communications. The Court of Appeal having determined that the raw communications are not relevant or discoverable, Mr Dotcom cannot now ignore that judgment and seek a different outcome on the same issue in this Court. The doctrine of issue estoppel prevents Mr Dotcom from doing so.

[31] The Court of Appeal did not have to consider whether the raw communications were relevant and discoverable to the claims for aggravated and exemplary damages. To that limited extent, the present issue extends further than the issue that was before the Court of Appeal. However, the inclusion of these additional heads of damages cannot alter the analysis of whether the raw communications are relevant and discoverable. Even if issue estoppel does not strictly apply to that aspect of the current application, this Court would not be

justified in departing from the Court of Appeal's reasoning and conclusion which must apply with equal force to the claims for aggravated and exemplary damages.

[32] It could be said that Mrs Dotcom had a comparable interest to her husband in the subject matter of the litigation to the extent that the unlawfully intercepted communications included communications between her and her husband. Further, Winkelmann J's order specifically covered all of Mrs Dotcom's communications intercepted by GCSB; it required disclosure of all information collected by GCSB "in relation to the plaintiffs, their families and any associated individuals". However, I have reservations about whether this is sufficient for her to be considered a privy of Mr Dotcom for present purposes. Hers is not a "derivative interest" in the sense described in *Shiels v Blakeley*. Mrs Dotcom's claim arises independently from that of Mr Dotcom and any damages to which she may be entitled must be assessed by looking at her position separately from his. I doubt whether there is a "such a community or mutuality of interest, such an identity between" Mr Dotcom's claim in the judicial review proceeding and Mrs Dotcom's claim in this proceeding that it would be fair and just to regard her as his privy and estopped from pursuing her own claim for discovery.

[33] However, I do not need to finally determine the privity issue. Whether or not issue estoppel applies to Mrs Dotcom, it will not affect the result. This is because, as a matter of precedent, there could be no justification for this Court not following the analysis and conclusion reached by the Court of Appeal on what is essentially the same issue.

[34] For these reasons, I consider that the Court of Appeal's judgment is determinative of the issue as to the discoverability of the raw communications.

If not, are the raw communications discoverable?

[35] For the reasons given, this Court is bound by the Court of Appeal's determination that the raw communications are not discoverable in relation to any live and pleaded issue. However, Mr Mansfield submitted that the communications could also be relevant to "the emerging issue" as to "whether the surveillance [of

Mr Dotcom] was achieved by hacking his own devices using vulnerabilities created (whether negligently or otherwise) by the manufacturers of those devices". This is not a live and pleaded issue and it would be a contempt of court to seek to use documents discovered in this proceeding for the collateral purpose of investigating whether Mr Dotcom "may have significant claims against the manufacturers of such devices" as suggested by Mr Mansfield.

[36] Mr Mansfield also submitted that the documents could be relevant to the claims against the police for unlawful and unreasonable surveillance, unreasonable search and seizure, trespass to land and trespass to goods. I reject that submission. I am unable to see how Mr Dotcom's communications could possibly be relevant to any of these claims.

Should an order be made pursuant to s 70 of the Act?

Legal principles

[37] Section 70 of the Evidence Act codifies the law on public interest immunity. It enables a judge to protect communications or information relating to matters of state from disclosure if the public interest in disclosure is outweighed by the public interest in having the communication or information withheld. The threshold issue is whether the communication or information relates to a matter of state. If so, the judge must carry out a balancing exercise to determine how the public interest is best served in the given case. An order can only be made under the section if the judge is satisfied that the public interest in withholding the information outweighs the public interest in its disclosure.

[38] Whether the communication or information relates to a matter of state for the purposes of s 70 will usually depend on whether the reason for seeking the order matches one or more of the grounds for withholding disclosure of official information set out in ss 6, 7 and 9(2)(b) to (k) of the Official Information Act 1982.[17] The defendants rely on s 6, particularly subsections (a) to (c):

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[17] Evidence Act 2006, s 70(2).

> **6 Conclusive reasons for withholding official information**
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> Good reason for withholding official information exists, for the purpose of section 5, if the making available of that information would be likely —
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> (a) to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or
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> (b) to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by —
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> (i) the Government of any other country or any agency of such a Government; or
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> (ii) any international organisation; or
>
> (c) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial;
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> …

[39] The process of discovery has long been a central and critically important feature of ordinary civil proceedings in our courts. It is designed to ensure that no party is taken by surprise at trial and that each has a full opportunity to assess the strengths and weaknesses of its case on an informed basis. This serves the public interest in promoting opportunities for appropriate settlement at an early stage as well as better securing the just disposal of those cases that are determined following trial.

[40] There is also a strong public interest in open justice for reasons summarised by Thomas LJ in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*:[18]

> The reasons most commonly expressed as to why the courts must sit and do justice in public are as a safeguard against judicial arbitrariness, idiosyncrasy or inappropriate behaviour and the maintenance of public trust, confidence and respect for the impartial administration of justice. It has also been noted that sitting in public can make evidence become available. Furthermore the public sitting of a court enables fair and accurate reporting to a wider public and makes uninformed and inaccurate comment about the proceedings less likely.

[41] The fundamental importance of open justice and the observance of the principles of natural justice require that any claim for public interest immunity must be clear and convincing. Such a claim should be fully particularised and supported by detailed evidence demonstrating the asserted prejudice to the national interest so

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[18] *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* (*No 2)* [2009] EWHC 152 (Admin), [2009] 1 WLR 2653 at [36].

that this can be rigorously scrutinised by the court. However, where it is established that disclosure would pose a real risk to national security interests, this may well outweigh the public interest in disclosure for the purposes of a private claim. This was confirmed by the majority (Richardson P, Keith, Blanchard and Tipping JJ) in *Choudry v Attorney-General*:[19]

> Public interest immunity cases relating directly to national security are relatively rare … While the Courts have made it plain that they are the ultimate arbiters and they are not bound by the Executive's certificate in national security matters (in the absence of special legislation to the contrary) they have indicated that the secrecy of the work of an intelligence organisation is essential to national security and the public interest in national security will seldom yield to the public interest in the administration of civil justice.

[42] Although *Choudry* was decided prior to the enactment of s 70 and the Crown does not rely in this case on any Ministerial certificate under s 27(3) of the Crown Proceedings Act 1950, I consider that the observation remains apposite.

Submissions

[43] Mr Mansfield submits that it is in the public interest for all documents covered by the application to be disclosed in full. First, he contends that disclosure will help ensure that the defendants are held to public account for their intrusive and unlawful conduct. Second, he argues that disclosure will facilitate debate as to whether the defendants or other agencies have engaged in, or could engage in, mass surveillance of the New Zealand public. Third, he submits that disclosure will be consistent with Mr Dotcom's right to freedom of expression which he contends is an end in itself. Fourth, he submits that disclosure will enable Mr Dotcom to pursue his claim against the defendants with access to all relevant material, consistent with his rights to natural justice and a fair trial. Lastly, he argues that Mr Dotcom's concerns cannot be adequately addressed by any other means, including the involvement of the special advocate. Mr Mansfield elaborated on each of these points in some detail.

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19 *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA) at [19].

[44] Ms Hosking did not make separate submissions on the s 70 analysis and simply adopted Mr Mansfield's comprehensive submissions on that issue.

Analysis

[45] I do not accept Mr Mansfield's submission that disclosure will help ensure that the defendants are held to public account for their unlawful conduct. There is no contest about liability. The GCSB has already accepted full responsibility for its unlawful actions. The Prime Minister has issued a public apology for this.

[46] As noted, the only issue in this proceeding concerns the relief to be given. The proceeding is not an appropriate means to facilitate debate as to whether the defendants or other agencies could engage in mass surveillance of members of the New Zealand public or whether they have done so on other occasions. Contrary to Mr Mansfield's submission, I do not accept that this is a good reason for ordering disclosure in the present case.

[47] Nor am I persuaded by Mr Mansfield's third submission that disclosure is required to facilitate Mr Dotcom's right to freedom of expression. The discovery process is not intended for this purpose. In my view, the only point that has any merit is the last one, namely that disclosure will enable Mr Dotcom to pursue his claims against the defendants with access to all relevant material, thereby ensuring his rights to natural justice and a fair trial. I accept the indisputable importance of these rights. The question is whether the public interest in disclosure is outweighed by the public interest in withholding the information in all of the circumstances of this particular case.

[48] Although Mr Mansfield has not seen the material, he submits that disclosure could not materially prejudice national security interests for the following reasons, several of which overlap:

(a) The plaintiffs were not involved in any activities threatening the security of New Zealand.

(b) Disclosure of the documents will not reveal any techniques used by GCSB in collecting information that are not already widely known and in the public domain, particularly since the disclosures made by Edward Snowden in 2013.

(c) GCSB's *capability* to access particular communications is not secret, even if the precise detail of the technology employed is.

(d) It should make little difference whether potential surveillance targets are aware of the precise detail of the technology used by GCSB to access a particular kind of communication. What matters is their knowledge of GCSB's capability to access it.

(e) It is widely known that GCSB's partner agencies overseas have the same surveillance capability — for example, the Investigatory Powers Tribunal was established in the United Kingdom to hear claims against security and intelligence agencies for conduct breaching human rights. This Tribunal has issued a number of decisions recording acknowledgements by intelligence agencies as to their surveillance capability.

(f) GCSB no longer relies on the certificate issued by the Acting Prime Minister on 16 August 2012 pursuant to s 27(3) of the Crown Proceedings Act certifying that disclosure would be likely to prejudice the security or defence of New Zealand or the international relations of the government of New Zealand. Mr Mansfield submits that it can be inferred from the Crown's abandonment of its reliance on this certificate that GCSB recognises that disclosure of the documents would not present any genuine national security concern.

[49] I accept Mr Mansfield's submission that there is no suggestion that the plaintiffs were engaged in activities threatening the security of New Zealand. The core allegation is that Mr Dotcom, Mr van der Kolk and others were engaged in a conspiracy to commit copyright infringement on a grand scale. However, this is a

straw man argument. It is not a ground of the defendants' application and need not be considered further.

[50] Contrary to Mr Mansfield's submission, it cannot reasonably be inferred from the fact that the Crown does not rely on the certificate issued by the Acting Prime Minister under the Crown Proceedings Act that GCSB accepts that disclosure will not present any genuine national security concern. Such an inference is not available given that the defendants' application, which relies on s 70 of the Evidence Act rather than s 27(3) of the Crown Proceedings Act, is supported by an open affidavit sworn by the Deputy Director, Intelligence, at GCSB stating that disclosure of the information redacted from discovery would be likely to adversely affect past or present operational activities and the safety of GCSB personnel through disclosure of their identities, and reveal or permit deduction of sources, capacity or capability and method of collection. Updated, classified affidavits providing the detailed explanation to support these concerns were also filed shortly prior to the hearing.

[51] Mr Mansfield's other submissions, addressing whether disclosure will reveal the capability and collection methods employed by GCSB and other intelligence agencies here and overseas, are supported by three affidavits. The first is from Christopher Gibson, a solicitor employed by Mr Dotcom's solicitors. Mr Gibson identifies five websites which provide public access to considerable information about surveillance programmes employed by security agencies in various countries. One of these websites contains a searchable database consisting of over 700 documents revealed by Mr Snowden.

[52] Henry Wolfe is an associate professor of Computer Security and Forensics in the Information Science Department of the School of Business at the University of Otago. He has had extensive experience in computer security. Dr Wolfe was asked to give evidence about his knowledge of the technologies available to intelligence agencies in New Zealand and overseas to intercept common means of communication without a target's knowledge or consent, namely communications in person or by way of landline, cellular or internet. After describing the technologies of which he is aware, Dr Wolfe states that all of these have been matters of public knowledge for many years.

[53] Glenn Greenwald is a journalist based in Rio de Janeiro with particular experience of matters relating to security, surveillance and privacy. He was formerly a lawyer specialising in constitutional and civil rights law. Mr Greenwald acknowledges that, because he has not seen the communications in question, he does not know whether their disclosure would reveal how they were intercepted. However, he says that even if this were the case, it does not appear to him that disclosure would prejudice national security interests. This is because, as a result of the Snowden disclosures and other revelations, surveillance techniques and methods are now largely a matter of public record. Mr Greenwald goes on to describe a number of tools which have enabled government agencies in the United States to carry out mass surveillance.

[54] I intend no criticism of Dr Wolfe or Mr Greenwald by observing that the assistance they are able to provide is limited by the fact that neither of them has had access to the material covered by the application or to the classified affidavits that have been filed by the Crown in support of it. Mr Greenwald acknowledges this obvious handicap. However, their evidence is nevertheless helpful in assisting the Court to scrutinise the grounds of the application and the classified affidavits.

[55] All of the material has been provided to Mr Grieve and his expert adviser. As noted, one of their roles has been to examine the material and advance any arguments that could responsibly be made on behalf of the plaintiffs in opposing the application. They successfully challenged some aspects of the application and persuaded the Crown to disclose further material. They again reviewed the remaining redactions following the public disclosures made by Mr Snowden. The Crown agreed that further disclosure was appropriate as a result of this information entering the public domain.

[56] Mr Grieve, assisted by the independent expert appointed by the Court, is unable to challenge the remaining claims to confidentiality. Accordingly, the unchallenged expert evidence from all those who have had unrestricted access to the material supports the defendants' claim that disclosure should be withheld in the interests of national security.

[57] This does not mean that the Court must accept this evidence uncritically and grant the application as a rubber stamp. That would be to abdicate the Court's responsibility to make its own assessment based on all of the evidence after carrying out the mandatory balancing exercise. However, given that the expert evidence filed on behalf of the defendants is effectively unchallenged, the Court should exercise caution before rejecting it.

[58] It is not possible to traverse the classified evidence in this publicly available judgment without causing the very damage the application is designed to avoid. However, having considered this evidence, informed by the expert evidence filed on behalf of Mr Dotcom, I am satisfied that the communications and information sought to be withheld do relate to matters of state in terms of s 70. The threshold test is accordingly met.

[59] I turn now to the balancing exercise. Mr Mansfield advises that the intercepted communications will contain no evidence of the alleged conspiracy to commit copyright infringement and will therefore be useful to Mr Dotcom in opposing extradition. Mr Mansfield explained that the lack of any evidence of a conspiracy in these communications will be relevant to whether the United States breached its duty of candour. He also submitted that the documents will be useful to Mr Dotcom in defending the criminal prosecution in the United States, if it proceeds.

[60] Even if the intercepted communications provide no additional support for the alleged conspiracy, I have difficulty understanding how this could be relevant to whether the United States breached its duty of candour in seeking extradition or to the defence of the criminal prosecution. More importantly, it would be a misuse of the discovery process in the current proceeding to seek discovery, or use documents provided on discovery, for these collateral purposes. These arguments do not assist Mr Dotcom; if anything, they indicate that the true purpose for seeking disclosure is unrelated to any need for the documents to establish the appropriate relief that should be granted in the present proceeding.

[61] Given that the raw communications are not even discoverable in light of the Court of Appeal's decision, there can be little or no public interest in disclosure for

the purposes of the proceeding. Disclosure for any purpose unrelated to the proceeding would be a contempt of Court and contrary to the public interest. This is because it would tend to undermine the entrenched safeguards designed to promote compliance with discovery orders. It follows that the public interest in withholding disclosure of these communications must outweigh the public interest in disclosure of them.

[62] A number of the redactions in the discovered documents are to protect the identity or contact details of personnel who were involved in or associated with the operation or copied into email communications concerning it. It is hard to see how any of this information could be relevant to the relief that should be granted in this proceeding. Again, the public interest in withholding disclosure of this information far outweighs any public interest in its disclosure.

[63] The other redactions are sought to be justified on the basis that they are necessary to maintain secrecy of "tradecraft". I consider that this information has little, if any, relevance to the question of relief. For this reason, and also because Mr Grieve will be able to make submissions on behalf of the plaintiffs with reference to this material in closed court, the public interest in its disclosure is modest and clearly outweighed by the public interest in withholding disclosure.

[64] For these reasons, I conclude that the defendants' application should be granted in the terms sought.

Result

[65] I make an order pursuant to s 70 of the Evidence Act 2006 that those parts of the defendants' discovery which have been redacted on the grounds of national security, and the raw communications of the plaintiffs intercepted by the second defendant, are not to be disclosed in this proceeding to any person other than the special advocate, his expert adviser and the Court.

[66] The raw communications referred to are not discoverable in this proceeding.

[67] The parties all invited me to reserve the question of costs. Costs are accordingly reserved. If the issue cannot be resolved, any party seeking costs should do so by memorandum to be filed and served within 21 days of the date of this judgment. Any memorandum in response should be filed and served 14 days thereafter.

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M A Gilbert J