

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA12/2018
[2018] NZCA 442**

BETWEEN	KIM DOTCOM Appellant
AND	DISTRICT COURT AT NORTH SHORE First Respondent
	DEPUTY SOLICITOR-GENERAL (CRIMINAL) Second Respondent
	MINISTER OF JUSTICE Third Respondent
	UNITED STATES OF AMERICA Fourth Respondent
	DEPUTY SOLICITOR-GENERAL (CROWN LEGAL RISK) Fifth Respondent
	ATTORNEY-GENERAL Sixth Respondent

Hearing: 23 and 24 April 2018

Court: Kós P, French and Miller JJ

Counsel: R M Mansfield and S L Cogan for Appellant
Appearances excused for First, Second, Third, Fifth and
Sixth Respondents
K Raftery QC, M J Ruffin, F R J Sinclair and Z A Fuhr for Fourth
Respondent

Judgment: 18 October 2018 at 2.30 pm

Reissued: 13 November 2018

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the fourth respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Kós P)

[1] The United States of America seeks Mr Dotcom's extradition to face charges in that country for alleged conspiracy and commission of criminal copyright infringement, racketeering, money laundering and wire fraud. This Court recently confirmed Mr Dotcom's eligibility for extradition.¹

[2] In this distinct proceeding Mr Dotcom appeals against a decision of Brewer J striking out seven of eight causes of action for judicial review brought by Mr Dotcom. These focus on the legitimacy of search and arrest warrants preceding a police raid of Mr Dotcom's house on 20 January 2012. They also advance other challenges to preliminary stages of the extradition process.²

[3] Counsel for other parties to the extradition proceeding and the earlier appeal on their eligibility sought leave orally to intervene and be heard in this appeal. Those persons are not parties in this proceeding. Leave was declined.

Background

[4] On 5 January 2012 the United States District Court for the Eastern District of Virginia issued an arrest warrant for, among others, Mr Dotcom on five counts: conspiracy to commit racketeering; conspiracy to commit copyright infringement; conspiracy to commit money laundering; and two counts of criminal copyright

¹ *Ortmann v United States of America* [2018] NZCA 233 [CA eligibility judgment].

² *Dotcom v District Court at North Shore* [2017] NZHC 3158 [Brewer J's judgment].

infringement. That Court also issued restraining orders over Mr Dotcom's property worldwide, including real and personal property in Hong Kong, New Zealand, Germany, the Netherlands, the Philippines the United Kingdom and Australia.

[5] The United States then requested assistance of the New Zealand Government in extraditing Mr Dotcom. On 18 January 2012 Judge McNaughton issued a provisional arrest warrant under s 20 of the Extradition Act 1999. The following day the Judge issued search warrants for three properties, including Mr Dotcom's house in Auckland, under ss 43 and 44 of the Mutual Assistance in Criminal Matters Act 1992.³ Mr Dotcom's house was raided the following day. He was arrested. On 16 February 2012, after the arrest and search warrants had been issued and executed in New Zealand, a further arrest warrant was issued in the United States. It was based on a superseding indictment, issued by a grand jury on the same day, which added a further eight counts to the original five. In April 2012, the New Zealand High Court registered the United States restraining orders against the Mr Dotcom's assets in this country under the MACMA.⁴

[6] Mr Dotcom challenged the validity of the search warrants in judicial review proceedings. That challenge was heard in the High Court on 22 and 23 May 2012. Conventional judicial review grounds of excess breadth and inadequate specificity were advanced. A particular point taken was that the warrants did not adequately describe the offences in respect of which the warrant was issued, and that therefore they were non-compliant with s 45(4)(b) of the MACMA. More bespoke arguments concerning process, including copying and transport of the seized items, were also advanced. In a judgment delivered on 28 June 2012 Winkelmann J issued declarations that the warrants were invalid and that the search actions by the police had exceeded the terms of the warrants in any event.⁵ Supplementary orders were made by the Judge in May 2013 regarding possession and copying of seized items.⁶ An appeal was taken to this Court by the Crown, heard in November 2013. In a judgment delivered in February 2014 we held the search warrants were valid, but otherwise confirmed certain

³ Referred to hereafter as the MACMA.

⁴ *Commissioner of Police v Dotcom* [2012] NZHC 634.

⁵ *Dotcom v Attorney-General* [2012] NZHC 1494, [2012] 3 NZLR 115 at [145]–[146].

⁶ *Dotcom v Attorney-General* [2013] NZHC 1269.

of the property process directions made in the High Court.⁷ A further appeal was mounted, by Mr Dotcom, to the Supreme Court. It was heard in August 2014 and judgment was delivered in December of that year.⁸ By a majority the Supreme Court dismissed the appeal, confirming the validity of the search warrants.

[7] The registration of the United States restraining orders in New Zealand would have expired after two years, that is, in April 2014, pursuant to s 136(1)(b) of the Criminal Proceeds (Recovery) Act 2009. Section 137 of that Act provides that the High Court may extend the registration of the foreign restraining order for a period of up to one year. The police applied to the High Court for such an extension. The High Court declined the application,⁹ but an appeal to this Court was allowed and the extension was ordered.¹⁰ The restraining orders expired in April 2015.

[8] Separately, it was for the District Court to determine whether Mr Dotcom was eligible for extradition. Judge Dawson held that he was eligible.¹¹ On appeal to the High Court Gilbert J agreed with that conclusion.¹² On further appeal to this Court, on two questions of law, we agreed with Gilbert J's conclusion that Mr Dotcom is eligible for extradition, though our reasoning differed in some important respects.¹³

[9] After Gilbert J's judgment was delivered, but before Mr Dotcom's appeal in the extradition-eligibility proceeding was heard by this Court, Mr Dotcom filed a new claim for judicial review in the High Court. As we noted earlier, it advanced eight causes of action. They may be summarised thus:

- (a) First cause of action: the arrest warrant brought to Mr Dotcom's home on 20 January 2012 was invalid — as were all steps taken in reliance upon it.

⁷ *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629.

⁸ *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 [SC search warrant decision].

⁹ *Commissioner of Police v Dotcom* [2014] NZHC 821.

¹⁰ *Commissioner of Police v Dotcom* [2014] NZCA 408.

¹¹ *United States of America v Dotcom* DC North Shore CRI-2012-092-1647, 23 December 2015.

¹² *Ortmann v United States of America* [2017] NZHC 189 [Gilbert J's judgment].

¹³ CA eligibility judgment, above n 1.

- (b) Second cause of action: the Minister of Justice's notice under s 23(4)(a) of the Extradition Act — a necessary step before extradition proceedings can take place — did not comply with s 18 of that Extradition Act.
- (c) Third cause of action: if the arrest warrant is invalid, so too were the search warrants.
- (d) Fourth cause of action: the search warrants were invalid because no extraditable offence was made known to the relevant authorities and therefore police should not have been authorised to apply for the search warrants.
- (e) Fifth cause of action: the Attorney-General should not have authorised the Commissioner of Police to apply to register orders of an American Court following a request from the United States because no extradition offence was identified.
- (f) Sixth cause of action: the Minister wrongly exercised her discretion under ss 21(3) and (4) of the Extradition Act not to cancel the arrest warrant, discontinue the extradition proceedings and discharge Mr Dotcom.
- (g) Seventh cause of action: because the Minister should not have exercised her discretion under s 21(3) and (4) of the Extradition Act, she therefore erred in law by issuing the s 23(4)(a) notice.
- (h) Eighth cause of action: the Deputy Solicitor-General wrongly issuing a decision under s 49 of the MACMA directing that cloned copies of electronic devices seized from Mr Dotcom's home be made and sent to the United States was unlawful.

[10] The claim sought that the warrants and extradition proceeding be quashed, seized property be returned to Mr Dotcom, evidence obtained in reliance upon the

search warrants be ordered inadmissible, Mr Dotcom be discharged and that various other declarations be made.

[11] The United States applied to strike out the first seven causes of action. It did not seek strike out of the eighth. It said those seven were either not reasonably arguable or were an abuse of process in mounting collateral challenges on earlier judicial decisions or the still-extant eligibility proceedings.

Judgment appealed

[12] Brewer J allowed the United States' application and struck out seven of Mr Dotcom's eight causes of action. While he held the first two causes of action were reasonably arguable, the others were not. And all seven were abuses of process. Essentially because they were either a collateral attack on the Supreme Court's decision declaring the search warrants valid,¹⁴ or an attempt to subvert the extradition eligibility proceeding by attacking aspects previously ruled on and (at the time of the judgment) still on an appeal to this Court.

[13] We discuss the content of the judgment in more detail below as we review each of the causes of action struck out.

Strike-out principles

[14] Where a pleading discloses no reasonably arguable cause of action or is otherwise an abuse of process, an order striking out that part of the pleading may be appropriate.¹⁵

[15] A strike-out application proceeds on the assumption that the facts pleaded in the statement of claim are true, whether admitted or not, unless entirely speculative and without foundation.¹⁶ Before striking out a proceeding the court must be satisfied the cause of action is so untenable that it cannot possibly succeed.¹⁷

¹⁴ SC search warrant decision, above n 8.

¹⁵ High Court Rules 2016, rr 15.1(1)(a) and (d).

¹⁶ *Attorney-General v Price* [1998] 1 NZLR 262 (CA) at 267 and 277.

¹⁷ *R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289 (CA) at 294–295.

[16] The jurisdiction to strike out should be exercised sparingly.¹⁸ In *Reid v New Zealand Trotting Conference* we observed that the purpose of the strike-out power is fundamentally to avoid the misuse of judicial processes which tend to undermine confidence in the administration of justice.¹⁹ The re-litigation of matters already determined may constitute an abuse of process for precisely that reason.²⁰

[17] The principles applicable to an application to strike out an application for judicial review are the same as for other civil proceedings.²¹

First cause of action: validity of the arrest warrant

[18] The first cause of action alleges that the arrest warrant brought to Mr Dotcom's house on 20 January 2012 was invalid (along with all actions taken in reliance upon it). The District Court Judge who issued the provisional arrest warrant had to be satisfied in terms of s 20(1) of the Extradition Act that there were reasonable grounds to believe s 131 of the Copyright Act 1994 constituted an "extradition offence" in relation to the online dissemination of copyright infringing works. After issue of the arrest warrant Gilbert J held that s 131 did not constitute an extradition offence. The claim pleads that the brief reference in the arrest-warrant application to s 131 was insufficient, among other things because there was no reference to which subsection of s 131 was relied upon, whether any of the offences under s 131 apply to online communication of copyright infringing works or to the "safe harbour" provisions of the Copyright Act.²²

[19] Given the conclusion reached by Gilbert J (that s 131 did not constitute an extradition offence) and the limited content of the arrest warrant application, Brewer J found this cause of action arguable.²³

¹⁸ *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [31].

¹⁹ *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8 (CA) at 9.

²⁰ *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 541; and *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) at 482.

²¹ *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53 (CA) at 63.

²² Copyright Act 1994, ss 92B–92E.

²³ Brewer J's judgment, above n 2, at [43]–[45].

[20] However, Brewer J was satisfied the first cause of action was “clearly” an abuse of process.²⁴ The Supreme Court had determined that the related search warrants were valid and the High Court had confirmed Mr Dotcom’s eligibility for extradition. Mr Dotcom could have challenged the validity of the arrest warrant earlier. He was now attempting to return to the beginning of the process and allege a further procedural ambiguity. That was an abuse of process.²⁵

Submissions

[21] Mr Mansfield on behalf of Mr Dotcom submitted Brewer J was wrong to conclude the first cause of action was an abuse of process. There was no barrier to challenging an earlier stage in the extradition process where matters have since proceeded. In *Kim v Prison Manager, Mt Eden Corrections Facility* the extradition process there had advanced to the second stage, bail, but the Supreme Court still granted leave to challenge the first step, the issuing of an arrest warrant.²⁶ A compartmentalised approach was inconsistent with a Law Commission Issues Paper that recognised the possibility of a multiplicity of appeals and judicial reviews.²⁷ It could not be said the issue had already been dealt with in Gilbert J’s judgment. The provisional arrest warrant was challenged there only in relation to whether the United States breached its duty of candour. The challenge now made could not have been made before the High Court. The District Court did not assess whether there was an extradition offence under s 24(2)(c) of the Extradition Act.

Analysis

[22] Section 131 of the Copyright Act is at the heart of the first cause of action. The Judge issuing the arrest warrant had to have an objective and credible basis to believe s 131 constituted an extradition offence. It was a central plank of the argument for Mr Dotcom that Gilbert J had held s 131 of the Copyright Act did not provide an extradition offence pathway. It may be noted that Mr Mansfield accepted that if the

²⁴ At [46].

²⁵ At [47]–[49].

²⁶ *Kim v Prisoner Manager, Mt Eden Corrections Facility* [2012] NZSC 121, [2013] 2 NZLR 589 at [18].

²⁷ Citing Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) at [9.62].

law were that s 131 *did* provide an available pathway, his argument essentially fell away. At the time this appeal was heard we had heard but not delivered judgment in the extradition eligibility appeal.

[23] Our judgment delivered on 5 July 2018 disagreed with Gilbert J’s conclusion in this respect. It held that s 131 of the Copyright Act did give rise to criminal liability and provided an extradition pathway in Mr Dotcom’s eligibility proceeding.²⁸ Furthermore the “safe harbour” provisions did not avail the appellants.²⁹ Given those findings the District Court Judge’s conclusion that there were reasonable grounds to believe the offences were extradition offences cannot sensibly be assailed. The Judge’s assessment of the matter may have been brief, but it was correct in law.

[24] The whole of this cause of action relies on a finding that s 131 creates no criminal liability. Other aspects of the first cause of action are that the United States failed to discharge a duty of candour by failing to disclose certain information concerning s 131 and the safe harbour provisions. But they too ultimately rely on s 131 not providing a proper pathway, and now fall away.³⁰

[25] The first cause of action is not reasonably arguable and was rightly struck out. It is unnecessary for us to consider the issue of abuse of process in the case of this particular pleading. We will address that in the context of the second cause of action. But the reasoning there applies equally here.

Second cause of action: Extradition Act, s 23(4)(a) notice validity

[26] Brewer J summarised the second cause of action in this way: under s 23(4)(a) of the Extradition Act, the District Court must not proceed with the extradition process where the person has been arrested pursuant to a provisional arrest warrant until the extradition court receives written notice from the Minister stating that a request for

²⁸ CA eligibility judgment, above n 1, at [156]. In particular via ss 131(1)(c) and (d) of the Copyright Act.

²⁹ At [189].

³⁰ The first cause of action also alleges the arrest warrant was invalid because it was issued based on the original indictment. No arrest was issued in this country once the superseding indictment was issued and so Mr Dotcom says the arrest warrant lapsed from the date the latter indictment was issued. This limited challenge is dealt with by implication by our analysis in relation to the second cause of action below.

surrender has been transmitted to the Minister under s 18 of the Act. Section 18(3) in turn states the request must be accompanied by certain “authenticated supporting documents”. As Brewer J put it, “[t]his issue comes down to the question: which arrest warrant should have been attached to the request, the original warrant or the superseding warrant?”³¹

[27] Brewer J held the cause to be arguable, but struck it out as an abuse of process. He held the cause of action could (and should) have been put before Gilbert J in the extradition-eligibility proceeding. Raising it now within judicial review amounted to a collateral attack on Gilbert J’s decision.³²

Submissions

[28] Mr Mansfield submitted Brewer J failed correctly to identify that the second cause of action turns on whether the extradition request could validly be made based on the superseding indictment when the provisional arrest warrant was obtained based on the earlier indictment. Furthermore, those matters could not have been raised before Gilbert J in terms of s 24(2)(a) because the extradition court was concerned with whether the “supporting documents” had been produced, not whether they were valid. Therefore those issues could be raised only by way of judicial review. Once the superseding indictment was issued the process ought to have been started afresh.

[29] He submitted that the provisional arrest warrant issued under s 20 frames the extradition court’s jurisdiction. For example, if the warrant was issued in relation only to three of the five original charges, the remaining two could not be brought into the s 24 assessment once the process proceeded to the question of whether Mr Dotcom was eligible for extradition. In short, if a superseding indictment is issued the process must begin anew. Mr Mansfield also submitted this was not a collateral attack on the eligibility proceedings because it does not target a finding of eligibility, but instead a step preliminary to it.

³¹ Brewer J’s judgment, above n 2, at [55].

³² At [58].

Analysis

[30] We doubt very much that the argument advanced by Mr Mansfield can be correct. Article X of the Treaty on extradition between New Zealand and the United States,³³ and s 18(4) of the Extradition Act each stipulate that a warrant for the arrest of the person sought must accompany the request. We agree with Mr Raftery QC on behalf of the United States that the purpose of that requirement is to demonstrate to the extradition court that the criminal process is formally engaged in the requesting country for the offences for which extradition is sought. We also agree that, as he put it, that purpose is not served “by attaching a redundant warrant that does not reflect the complete set of charges Mr Doctom faces in the United States at the time the request is made”. The argument Mr Dotcom raises was rejected by the Federal Court of Australia in *Matson v United States of America* and by the Ontario Court of Appeal in *United States of America v Adams*.³⁴ Ultimately however it is unnecessary for us to form a final view on the point. Instead we rest our conclusion on the alternative ground for strike out, that is, abuse of process.

[31] In *New Zealand Social Credit Political League Inc v O’Brien* this Court observed:³⁵

Estoppel per rem judicatam, issue estoppel, and abuse of process in at least one of its manifestations, may be seen as exemplifying similar concepts — that a matter once determined may not be again litigated, that a matter which could and should have been raised in proceedings which have been determined should not be allowed to be raised subsequently, and that a collateral attack upon a final decision in other proceedings will not be permitted. The dual objects are finality of litigation and fair use of curial procedures.

[32] These new proceedings seek to engage judicial review collateral to a statutory right of appeal. That is impermissible where the basis of the review claim is capable of being advanced on appeal instead and that form of recourse is more appropriate.³⁶ In our view that was clearly so in the case of the second cause of action. Contrary to

³³ Treaty on extradition between New Zealand and the United States of America (signed 12 January 1970, entered into force 89 December 1970).

³⁴ *Matson v United States of America* [2016] FCA 1245 at [48]–[53]; and *United States of America v Adams* [2001] OJ 4156 (ONCA) at [13].

³⁵ *New Zealand Social Credit Political League Inc v O’Brien* [1984] 1 NZLR 84 (CA) at 95.

³⁶ *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [61]; *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 136; and *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA) at [31].

the submission made to us, the validity of the s 23(4)(a) notice was capable of being advanced in the eligibility proceeding and appeals therefrom. The argument made relies in part on what is required under s 18. Arguments were advanced before Gilbert J concerning compliance with s 18, and not accepted.³⁷ Though the argument advanced now takes a different tack, that is no answer to the question of abuse of process. The new points could and should have been raised at that time. We do not accept the submission that s 24(2)(a) is only concerned with the production of the s 18 documents and not their validity. Or that the point advanced now could only be advanced in a judicial review application. As Mr Raftery submitted, validity of the request plainly can be attacked within the extradition proceeding through either s 18 or s 24(2)(a).³⁸ Here, in the eligibility proceeding Mr Dotcom had submitted that non-compliance with s 18 would deprive the extradition court of jurisdiction. However, as Gilbert J noted, “[a]s far as I can ascertain, no one suggested that the appellants were not eligible for surrender because the formalities under s 24(2)(a) and (b) had not been met.”³⁹

[33] In any event it may also be observed that Gilbert J was also seized of an application for judicial review relating to Judge Dawson’s eligibility determination and his decision dismissing stay applications. As we noted in our judgment in the eligibility proceeding,⁴⁰ there was significant overlap between the two proceedings before Gilbert J, with each alleged error of law (bar one) in the judicial review proceeding replicated in the eligibility appeal. The sole exception was a ground of review alleging apparent bias and predetermination on the part of Judge Dawson, to which Gilbert J confined himself. The procedure adopted enabled Mr Dotcom in either proceeding there to raise the argument that the s 23(4)(a) notice was invalid. If judicial review was needed, that vehicle was running before Gilbert J. Mr Dotcom’s failure to fully fuel that vehicle does not permit him to go back to square one and restart the journey. That is because a litigant, including a person challenging extradition eligibility, cannot mount that challenge by instalments. Mr Dotcom’s attempt to do so now is abusive. As Brewer J observed, a substantive determination has been made on the validity of the search warrants and “Mr Dotcom

³⁷ Gilbert J’s judgment, above n 12, at [420]–[425].

³⁸ *Kim v Prisoner Manager, Mt Eden Corrections Facility* [2012] NZHC 2417, [2012] NZAR 990 at [49]; and *Kim v Prisoner Manager, Mt Eden Corrections Facility*, above n 26, at [67].

³⁹ Gilbert J’s judgment, above n 12, at [425].

⁴⁰ CA eligibility judgment, above n 1, at [305].

cannot now start again and make another challenge because he has found another argument.”⁴¹

[34] The principle in *Henderson v Henderson*,⁴² proscribing proceedings by instalment as an abuse of process, and collateral attack on res judicata where the points could have been made in the initial proceeding, is as applicable to judicial review as it is to general proceedings.⁴³ In *Bradbury v Judicial Conduct Commissioner* the judicial review there was “part of an extended course of conduct directed at reopening the earlier litigation”.⁴⁴ Such litigation by instalment was there held to be an abuse of process by this Court. Similarly here, the raising of further grounds as an afterthought — particularly in circumstances where parallel statutory rights of appeal have been pursued — renders the current applications for review an attempt to reopen the earlier litigation.

Third cause of action: validity of search warrants based on validity of arrest warrant

[35] The third cause of action — that if the arrest warrant was invalid so too were the search warrants — was struck out as disclosing no reasonably arguable cause of action, the Supreme Court having already ruled the search warrants valid.⁴⁵ Alternatively, Brewer J would have struck it out as an abuse of process as a collateral attack on the Supreme Court’s decision.⁴⁶

Submissions

[36] Mr Mansfield submitted that it is difficult to reconcile Brewer J’s finding that the first cause of action was reasonably arguable but that the third was not. An invalid arrest warrant could not be used in the way the Supreme Court did in its search-warrant judgment to bolster the otherwise deficient search warrant.

⁴¹ Brewer J’s judgment, above n 2, at [63].

⁴² *Henderson v Henderson* (1843) 67 ER 313 (Ch).

⁴³ *Bradbury v Judicial Conduct Commissioner* [2014] NZCA 441, [2015] NZAR 1.

⁴⁴ At [108].

⁴⁵ Brewer J’s judgment, above n 2, at [62] citing SC search warrant decision, above n 8.

⁴⁶ At [63].

Analysis

[37] The third cause of action relies substantially on finding the first cause of action is made out — that is, that it relies on a finding the arrest warrant was invalid. We have concluded that the first cause of action is not reasonably arguable.⁴⁷ It follows by extension that the third cause of action is not reasonably arguable either.

[38] In any event we agree also with Brewer J that this cause of action constitutes an abuse of process by way of a further collateral attack on the Supreme Court's search-warrant judgment. The reasoning at [31]–[34] above applies equally here.

Fourth cause of action: validity of search warrants based on s 26(2) of the MACMA

[39] The fourth cause of action pleads that the search warrants were invalid because they were not duly authorised under MACMA. It is said that the Attorney-General's delegate failed to comply with ss 27(2)(a) and (h) of the Act. These provide that a request by a foreign country for assistance may be refused respectively if the request relates to the prosecution of a person for conduct that, if it had occurred in New Zealand, would not have consisted an offence against New Zealand law, or if the request does not comply with the requirements of s 26.

[40] Brewer J held that under s 27(2)(a) the enquiry is not whether there was an extradition offence but whether there was a request relating to the prosecution of a person in respect of conduct that would have consisted an offence against New Zealand law if committed in this country.⁴⁸ Section 131 of the Copyright Act creates an offence. That was sufficient. In relation to s 27(2)(h) the Judge held that s 27(5) provides that the Attorney-General may grant a request even though it does not comply with s 26.⁴⁹ He therefore struck out the claim as disclosing no reasonably arguable cause of action. In any event he regarded the pleading as another improper collateral attack on the Supreme Court's search warrant decision.⁵⁰

⁴⁷ See above at [22]–[25] of this judgment.

⁴⁸ Brewer J's judgment, above n 2, at [73].

⁴⁹ At [72].

⁵⁰ At [74]–[75].

Submissions

[41] Mr Mansfield submitted there was an inconsistency between Brewer J's finding the first cause of action was reasonably arguable but that the validity of the search warrant was not. For the purposes of s 27(2)(a) of MACMA the alleged conduct could not have constituted an offence if carried out in New Zealand given Gilbert J's s 131 conclusion that provision created no criminal liability of the sought alleged in respect of Mr Dotcom.

Analysis

[42] This pleading is also impaired very substantially by the view this Court later took of s 131. But there is a more fundamental objection. We have set out in some detail the lengthy earlier judicial review proceedings concerning validity of the search warrants.⁵¹ Those proceedings gave close attention to validity challenges based on alleged non-compliance with provisions of the MACMA. The present pleading attempts to advance additional alleged non-compliances with the MACMA. It concerns the same search warrants, the same timeframe and the same legislation. To attempt to advance these parallel afterthought challenges to the validity of the search warrants, the subject already of lengthy examination and appeals through to the Supreme Court, is plainly an abuse of process. Although the focus here is the distinct search warrant proceedings, rather than the eligibility proceedings, the observations we have already made in relation to the second cause of action apply with equal force here.⁵²

Fifth cause of action: validity of restraining orders

[43] Brewer J stuck out the fifth cause of action as an abuse of process because it was a collateral attack on this Court's decision extending the restraining orders.⁵³

[44] We are bound to agree with that conclusion, although the abuse lies in relation to this ground being pursued in a third course of proceedings — this time in neither

⁵¹ See above at [5]–[6].

⁵² See above at [31]–[34].

⁵³ Brewer J's judgment, above n 2, at [79]. See above at [7].

the search warrant proceedings or the eligibility proceedings. This challenge to the lawfulness of the restraining orders — long since lapsed — was required to be taken in the challenge to their extension. It cannot be advanced now.

Sixth cause of action: failure to cancel arrest warrant

[45] The sixth cause of action — that the Minister “rubberstamped” a recommendation to not discontinue the proceeding or cancel the arrest warrant and order Mr Dotcom’s discharge under ss 21(3) and (4) of the Extradition Act — was struck out as disclosing no reasonably arguable cause of action.⁵⁴ That was partly on the basis that Mr Dotcom intended to rely on a statement made by the Minister in Parliament, which statement could not be relied upon owing to s 11 of the Parliamentary Privilege Act 2014.⁵⁵ Alternatively Brewer J would have concluded the pleading was an abuse of process as a collateral attack on Gilbert J’s determination that Mr Dotcom was eligible for extradition.⁵⁶

Submissions

[46] Mr Mansfield submitted Brewer J erred by finding there was no evidence the Minister failed properly to exercise her discretion under s 21 of the Extradition Act because she received and acted upon advice in the form of a report from the Ministry of Justice. He submitted it is precisely her reliance on that advice that means the cause of action is arguable having rubberstamped that “entirely circular” advice.

Analysis

[47] This is another forensic afterthought by the appellant. It is sufficient for present purposes to observe that, just as we concluded in relation to the first and second causes of action,⁵⁷ the sixth seeks to collaterally attack the eligibility proceeding. We therefore also conclude this cause of action constitutes an abuse of process.

⁵⁴ At [86].

⁵⁵ At [87]–[88].

⁵⁶ At [89]–[90].

⁵⁷ See above at [22]–[25] and [30]–[34] of this judgment.

Seventh cause of action: cancellation of proceeding and arrest warrant

[48] The seventh cause of action, which Brewer J stated was pleaded on the same basis as the sixth, claims the Minister erred in issuing her notice under s 23(4)(a). The Judge struck it out for the same reasons given in relation to the sixth cause of action.⁵⁸

Submissions

[49] Mr Mansfield submitted Brewer J was wrong to strike out his seventh cause of action for the same reasons as the sixth. He said the sixth cause of action relies on s 21 of the Extradition Act, and the seventh on s 23. The Minister's discretion under each is separate and required to be exercised separately.

Analysis

[50] For the same reasons we concluded the sixth cause of action is an abuse of process, we conclude the seventh is also an abuse of process.

Result

[51] The appeal is dismissed.

[52] The appellant must pay the fourth respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

Solicitors:
Anderson Creagh Lai Ltd, Auckland for Appellant
Crown Law Office, Wellington for Fourth Respondent

⁵⁸ Brewer J's judgment, above n 2, at [91].