**IN THE HIGH COURT OF NEW ZEALAND**
**AT AUCKLAND**

**CIV 2013-404-** 2168

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| **IN THE MATTER** | the New Zealand Bill of Rights Act 1990 and the Government Communications Security Bureau Act 2003 |
| **BETWEEN** | **KIM DOTCOM** of Auckland, Businessman<br>**First Plaintiff** |
| | **MONA DOTCOM** of Auckland, Married Woman<br>**Second Plaintiff** |
| | **BRAM VAN DER KOLK** of Auckland, Businessman<br>**Third Plaintiff** |
| | **JUNELYN VAN DER KOLK** of Auckland, Married Woman<br>**Fourth Plaintiff** |
| | **MATHIAS ORTMANN** of Auckland, Businessman<br>**Fifth Plaintiff** |
| | **FINN BATATO** of Auckland, Businessman<br>**Sixth Plaintiff** |
| **AND** | **ATTORNEY-GENERAL** in respect of the New Zealand Police<br>**First Defendant** |
| **AND** | **ATTORNEY-GENERAL** in respect of the Government Communications Security Bureau<br>**Second Defendant** |

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**STATEMENT OF CLAIM**
Dated 30 April 2013

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Judicial Officer Winkelmann J

HIGH COURT
30 APR 2013
10:30am
AUCKLAND


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**THE PLAINTIFFS** by their solicitor say:

**Parties**

1. The first plaintiff is a businessman who resides at 186 Mahoenui Valley Road, Coatesville, Auckland.

2. The second plaintiff is the wife of the first plaintiff, and resides at 186 Mahoenui Valley Road, Coatesville, Auckland.

3. The third plaintiff is a businessman who resides at 37 Ngaiwi Road, Orakei, Auckland.

4. The fourth plaintiff is the wife of the third plaintiff and resides at 37 Ngaiwi Road, Orakei, Auckland.

5. The fifth plaintiff is a businessman who at the time of the events on 20 January 2012 referred to below, was a guest of the first plaintiff at his home at 186 Mahoenui Valley Road, Coatesville, Auckland.

6. The sixth plaintiff is a businessman who at the time of the events on 20 January 2012 referred to below, was a guest of the first plaintiff at his home at 186 Mahoenui Valley Road, Coatesville, Auckland.

7. The first defendant is named in these proceedings for and on behalf of the New Zealand Police.

8. The second defendant is named in these proceedings for and on behalf of the Government Communications Security Bureau (**GCSB**).

**Background**

9. The United States Government represented by Crown Law in New Zealand is seeking the extradition of the first, third, fifth and sixth plaintiffs in relation to allegations arising from their operation of the Megaupload business.

10. In or about March 2010 the Federal Bureau of Investigation (**FBI**) and the United States Department of Justice commenced investigations into Megaupload.

11. In or about November 2010 to September 2011, the Police National Intelligence Centre gathered intelligence on the first plaintiff, including in relation to his residency status and that of his wife, and concluded that he and his wife and children had applied for and been granted New Zealand residency status and would be issued with the appropriate permits in their passports upon their return to New Zealand.

12. In or about March 2011 the FBI first contacted the Organised and Financial Crime Agency of New Zealand (**OFCANZ**) requesting assistance with its investigation into Megaupload and associated persons as related to New Zealand.

13. In or about July 2011 the FBI requested the assistance of the New Zealand Security Intelligence Service (**NZSIS**) in its investigations into Megaupload and associated persons in New Zealand.

14. Shortly thereafter the NZSIS passed on this request to the New Zealand Police.

15. In or about September 2011 Sergeant Nigel McMorran of OFCANZ conducted various background checks as to the whereabouts of the first and second plaintiffs and other suspects, and the nature of their connection with New Zealand, including residency, property ownership, vehicle registration and travel records.

16. In or about September 2011 OFCANZ set up Task Force Debut (**Operation Debut**) led by Detective Inspector Grant Wormald to assist in the arrest and investigation of the plaintiffs and others associated with Megaupload in New Zealand.

17. Following that, various meetings were held in Wellington and Auckland (in particular on 21 September 2011, 27 October 2011, 31 October 2011, and 4 and 10 November 2011) involving representatives of OFCANZ,

Crown Law, the FBI, and other New Zealand government departments with regard to Operation Debut.

18. Assistant Commissioner Malcolm Burgess, the head of OFCANZ, chaired the meeting on 31 October 2011. Others in attendance included Detective Inspector Wormald, Detective Sergeant McMorran of OFCANZ and four FBI members.

19. Topics discussed at the meeting included:

(a) procedure/plan for searching telecommunications (if required);

(b) procedure/plan for searching servers/phones/computers.

**GCSB**

20. On 14 December 2011 a further meeting was held in Wellington which included representatives of OFCANZ, Crown Law, the Ministry of Justice, the Police Legal Section, and the GCSB.

21. At that meeting Detective Inspector Wormald discussed certain aspects of Operation Debut with the representatives of GCSB either together with, or separately from the other representatives attending the meeting.

22. On or about 16 December 2011, the GCSB commenced the interception of the communications of some or all of the plaintiffs at the request of OFCANZ.

23. Between the 16 December 2011 and 20 January 2012 the GCSB provided the New Zealand Police with nine written reports, and five reports by secure voice updates as to the plaintiffs' respective locations, together with other information derived from the interception and collection of the plaintiffs' communications and data relating to the appreciation by those under surveillance of being the subject of any investigation or official interest, and other such information reflecting what Detective Inspector Wormald has described as the "atmospherics" of those under surveillance.

**Covert camera surveillance**

24. In about late 2011 or early 2012 on a date unknown to the plaintiffs, Detective Inspector Jones of the New Zealand Police met a person who lived in the vicinity of the first and second plaintiffs' home at 186 Mahoenui Valley Road, Coatesville.

25. At the meeting Detective Inspector Jones told the person that there was an individual or individuals who the Police believed were driving a vehicle of interest to an investigation on Mahoenui Valley Road.

26. Detective Inspector Jones explained to the person that Police would like to gain access to that person's property to place equipment there to capture images that would help identify the drivers of some vehicles, and that the images would not be used for evidential purposes and therefore would not be linked back to his or her address, nor identify the person.

27. As a result the owner of the property agreed to a covert camera being installed on the person's property to observe the first and second plaintiffs' property, and the movements on the part of the first plaintiff from the date of installation of the camera and in particular in the days preceding the execution of a search warrant as referred to below.

28. The covert camera recorded or filmed the first and second plaintiffs' property which was provided to the NZ Police and the FBI for a period unknown to the plaintiffs.

**Senior Constable Homan hidden microphone and camera**

29. On or about 18 January 2012, Detective Inspector Wormald requested that Senior Constable Jason Homan of the NZ Police carry out an illegal search of the first and second plaintiffs' property by using a hidden microphone and camera (pencam) on a pre-arranged visit to the property on 19 January 2012.

30. On 19 January 2012 Senior Constable Homan visited the first and second plaintiffs' property with the hidden pencam recording the visit without a search warrant being obtained to lawfully enable him to do so.

31. On the same day, Senior Constable Homan reported, and provided to Detective Inspector Wormald what was recorded by the hidden pencam so that it could be used in preparation for the raid on the first and second plaintiffs' property that was to take place on 20 January 2012.

**Application under MACMA the Criminal Proceeds (Recovery) Act 2009**

32. On or about 10 January 2012 United States authorities requested Crown Law to obtain an order temporarily restraining the various accounts and assets of the first and third plaintiffs' property in New Zealand.

33. During the morning of the raid on the first and second plaintiffs' property, and the third and fourth plaintiffs' property on 20 January 2012, Crown Law and the NZ Police knew that the order obtained on 18 January 2012 was unlawful, or was likely to be unlawful and of no effect for the reasons to be subsequently referred to in a High Court judgment of 16 March 2012 in CIV-202-404-33.

34. Despite such knowledge, the NZ Police and Crown Law proceeded with the seizure of the first and second plaintiffs' accounts and assets and that of the third and fourth plaintiffs, pursuant to the said order of 18 January 2012, and the Criminal Proceeds (Recovery) Act 2009.

**Arrest warrants**

35. On 18 January 2012 the District Court at North Shore issued interim arrest warrants in relation to the first, third, fifth and sixth plaintiffs under the Extradition Act at the request of OFCANZ on behalf of the United States authorities.

**MACMA search warrants**

36. On 19 January 2012 the District Court at North Shore, on the application of OFCANZ, issued search warrants under MACMA authorising the search of:

    (a) The first and second plaintiffs' home at 186 Mahoenui Valley Road, Coatesville, Auckland (**the Mahoenui Valley property**);

(b) The first and second plaintiffs' property at 5H The Prom, Coatesville, Auckland; and

(c) The third and fourth plaintiffs' home at 37 Ngaiwi Road, Orakei, Auckland.

37. An affidavit of Detective Sergeant Nigel McMorran of OFCANZ dated 19 January 2012 (**the McMorran affidavit**) was filed in support of the application.

38. The McMorran affidavit made no reference to:

(a) GCSB intercepting the plaintiffs' communications since at least 16 December 2011.

(b) The first and second plaintiff's property being under surveillance by way of a camera installed by OFCANZ on an adjacent or nearby property.

(c) A hidden pencam being used or was about to be used by Senior Constable Homan when he visited the Mahoenui Valley property on 19 January 2012, and that no search warrant had been obtained for this search.

(d) The first defendant's intention to deploy the STG and use other aggressive tactics at the Mahoenui Valley Property.

39. The McMorran affidavit also made no reference to the results of the surveillance conducted, as set out hereunder.

**Execution of the search warrant**

40. On 20 January 2012, the New Zealand Police raided the properties named in the search warrants, and in the course of those raids arrested the first, third, fifth and sixth plaintiffs pursuant to the interim arrest warrants, and purported to execute the search warrants relating to the properties.

41. The execution of the search warrants at the three properties was coordinated to take place at 7.00am on 20 January 2012.

42. The execution of these warrants was coordinated to coincide with an international operation conducted at the behest of the United States authorities to secure and restrain the assets and information held by the Megaupload group of companies and individuals associated therewith.

43. The international operation included the securing of the Megaupload servers located in Virginia, USA, and the seizure of records and information held by the Megaupload and other related companies in Hong Kong, in order to obtain and preserve relevant evidence.

44. The three properties to be searched, pursuant to the warrants, were residential properties, with the properties at 186 Mahoenui Valley Road, Coatesville, and 37 Ngaiwi Road, Orakei being home to children, including, in both cases, children of pre-school age.

45. In addition, the second plaintiff was, to the knowledge of the first defendant, heavily pregnant with twins at the time of the raids.

46. At the Mahoenui Valley Road property, the Police employed Special Tactics Group (**STG**) and Armed Offenders Squad (**AOS**) personnel and tactics to spearhead the execution of the search warrants.

47. Officers were deployed in two helicopters, one of which landed in the courtyard immediately outside the house. This helicopter landed briefly while armed officers alighted and then took off again.

48. Additional officers gained access to the property in vans. These officers arrived at the house very shortly after the helicopter which had landed in the courtyard had taken off again.

49. The officers deployed were armed, and Police dogs and their handlers were also in attendance. Some of the officers were dressed in STG/AOS uniforms with flak jackets, carrying firearms. Not all officers wore flak jackets with the word "Police" visible. Other officers who were also

armed, wore civilian dress, without any visible Police insignia or identification.

50. AOS and STG Officers entered the main house without knocking and dispersed rapidly through the property. Armed officers also entered and searched the staff and children's quarters located across the courtyard from the main house.

51. In both buildings, where the officers encountered doors that were locked, the doors were forcibly broken down.

52. Occupants of the main building were removed from the house and made to congregate, under the supervision of armed officers, in the courtyard outside the main house. The occupants were detained in that location under the supervision of armed Police for approximately 45 minutes to an hour.

53. Members of the household security staff were handcuffed by Police. None of the security staff were found to be carrying weapons, and none of the security staff or any other member of the household offered any resistance to the Police.

54. The nannies and children were required to remain in the staff and children's quarters, and were not permitted to see or speak to the second plaintiff nor any of the other members of the household.

55. While some of the occupants were informed of their rights under the New Zealand Bill of Rights Act 1990, the occupants were effectively precluded from contacting their legal advisors as their phones had been confiscated by Police and the land line connection to the house had been disabled.

56. Despite requesting access to the property, the occupants' legal advisors were excluded from the property and were denied any ability to observe the Police operation.

57. When located, the first plaintiff was forced to the ground and had force applied to him in such a way that left him with bruises and abrasions.

This was not precipitated by any resistance from the first plaintiff to the Police.

58. In the course of the execution of the search warrants a wide array of items, and particularly of electronic equipment, was seized and removed by the Police.

59. The manner in which the equipment was seized by the Police and their assistants was such as to render the reinstatement of the equipment to the household needlessly expensive, time-consuming and complex.

60. The Police damaged property in the course of the search, including by knocking down doors, removing electronic equipment in a manner which rendered reinstatement unnecessarily difficult, knocking a hole in a wall in the first plaintiff's bedroom and also in relation to certain other equipment, including a CCTV camera located at the "trade gate" entrance to the property which was smashed in the course of the raid.

61. There was no legitimate or justifiable operational utility in the destruction of the CCTV device or for the method of the removal of electronic equipment.

62. Throughout the operation the Police paid little or no effective regard to the rights or needs of the occupants of the properties, and dealt with them in a highly aggressive, oppressive and intimidatory fashion, such as to cause significant unnecessary distress and anxiety and fear.

**Seizure of items by the Police**

63. In the course of the search of the properties, the Police seized many and wide-ranging items of all the plaintiffs including a large number of electronic devices on the basis that they could potentially "store data", regardless of whether the data stored could be in any way relevant in relation to the alleged offending.

64. This concentration on the capability of the equipment rather than the nature of the information actually stored on the devices and the specific purpose thereof resulted in the Police seizing an overly broad range of

electronic equipment, much of which is entirely irrelevant to the allegations made by the United States authorities.

65. The Police also seized items which did not come within the scope of the search warrants including electronic household infrastructure, such as switches, routers, and power supply units, and jewellery belonging to the second and fourth plaintiffs.

66. The failure to properly distinguish between relevant and irrelevant items of property of all the plaintiffs was compounded by the inability of the Police to discern what was relevant by reason of their unfamiliarity with the subject matter of the investigation.

67. The Police had made no plan to further assess the electronic items seized for relevance or to provide copies thereof to the owners of the property, prior to handing possession of the property over to the FBI.

**Dealings with property seized after 20 January 2012**

68. On 16 February 2012, the Solicitor-General for and on behalf of the first defendant, issued a written direction under s 49(2) of MACMA in relation to the items seized on 20 January 2012, directing that :

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

69. Pending further written direction, the Commissioner of Police was required to maintain custody and control of the seized items, and not to otherwise or inconsistently deal with them.

70. Unbeknown to the plaintiffs, on or about 23 and 28 March 2012, the New Zealand Police approved and/or allowed representatives of the United States Government to send images/clones of seven seized items out of New Zealand. These images/clones contained certain data and information seized by the New Zealand Police on 20 January 2012.

71. The total number of images/clones removed by representatives of the US Government is reported to have been 19.

72. The New Zealand Police approved and/or allowed the images/clones to be removed from New Zealand by the representatives of the United States Government despite:

(a) A hearing date of 2 and 3 April 2012 being allocated in the North Shore District Court for resolution of issues in relation to the status of the items seized and clones of which the NZ Police and the United States authorities were aware, or should have been aware.

(b) Crown Law filing on 23 March 2012 a memorandum in the District Court and serving it on the plaintiffs' counsel in which Crown Law recorded that the issues for resolution were the duties and entitlements for New Zealand parties in respect of digital/computer items seized under MACMA warrants for transfer to, and examination by the United States authorities.

(c) Crown Law, confirming on 23 March 2012 to one of the plaintiffs' counsel that no items of evidence had left New Zealand and setting out an email from Detective Sergeant McMorran which indicated that the seized material would be held by OFCANZ for storage pending the outcome of the hearing in the District Court on 2 or 3 April, or as directed otherwise by the Crown.

**MACMA search warrants, and transfer of the clones declared unlawful**

73. On or about 11 April 2012 the first, third, fifth and sixth plaintiffs commenced judicial review proceedings in the High Court at Auckland [CIV-2012-404-1928] challenging the lawfulness of the search warrants issued by the North Shore District Court, and executed by the NZ Police on 20 January 2012 at the addresses referred to, and at which assets of all those plaintiffs were seized by the New Zealand Police.

74. The reasons for the challenge to the search warrants are set out in a judgment of the High Court subsequently delivered on 28 June 2012 as [2012] NZHC 1494.

75. During the course of the first hearing of the judicial review proceeding on 23 May 2012, Crown Law disclosed for the first time to the Court and the plaintiffs, that hard drives had been imaged and shipped by the FBI to the United States.

76. Crown Law conceded, on behalf of the New Zealand Police, and the United States of America for which it acted, that there was no document directing the release of images, signed by the Attorney-General, the Solicitor-General or the Solicitor-General's delegate, and that at the time the images were sent to the United States, the s49(2) direction which applied was that of 16 February 2012.

77. In its judgment delivered on 28 June 2012 the High Court found for the reasons set out in the judgment, that:

(a) the search warrants were invalid;

(b) the Police relied on invalid warrants when they searched the properties and seized the various items;

(c) the search and seizure was therefore illegal;

(d) even if the warrants were not invalid, the Police in executing the warrants exceeded what they could lawfully be authorised to do because they continued to hold, along with the relevant, irrelevant material;

(e) the release of the cloned hard drives to the FBI for shipping to the United States was contrary to the 16 February 2012 direction given under s49(2) of MACMA;

(f) the shipping was therefore in contravention of s49(3) of MACMA.

78. As a result, the High Court was satisfied that directions should issue in relation to the validity of the warrants, and the transfer of the clones.

79. Remedies Hearings were held in the High Court in the weeks commencing 6 August 2012 and 15 April 2013 to consider what orders should be made as a result of the High Court's determinations of 28 June 2012. As at the date of filing of this statement of claim, the High Court has not delivered its decision.

**FIRST CAUSE OF ACTION AGAINST NEW ZEALAND POLICE**

**First Baigent Claim – Unlawful and/or unreasonable search and seizure under s21 New Zealand Bill of Rights Act 1990, and s46 MACMA**

80. This claim proceeds on the following bases:

(a) the first and second plaintiffs' - unlawful and/or unreasonable search and seizure at the Mahoenui Valley Road property;

(b) the third and fourth plaintiffs – unlawful and/or unreasonable seizure at 37 Ngaiwi Road, Orakei, Auckland;

(c) the fifth and sixth plaintiffs – unlawful and/or unreasonable search and seizure as guests at Mahoenui Valley Road.

81. The search of the properties was unreasonable by reason of the unlawfulness of the search warrants pursuant to the High Court judgment of 28 June 2012.

82. Further, and/or in the alternative, the manner in which the Police executed the search warrant at the Mahoenui Valley Road property was such that the search itself was unreasonable in that:

(a) It involved a use of unnecessary force and aggressive intimidatory tactics, which was unprecedented for a search and seizure in New Zealand having regard to the residential nature of the properties, the nature of the alleged offending and the

information held by Police as to the individuals residing at the property.

(b) It adopted an excessively aggressive and invasive approach, which was unnecessary, and indeed inapt, to achieve the Police objectives and which paid scant regard to the nature of the property or the presence of vulnerable individuals, including a heavily pregnant woman and young children.

(c) It was not the least intrusive and disruptive approach capable of meeting the Police operational objectives.

(d) Having embarked on their pre-determined operational plan, the Police failed to adjust their course of action to recognise the circumstances that presented themselves, which did not justify the continued use of such an intrusive and aggressive approach.

83. More particularly the execution of the search was unreasonable in the following respects:

(a) The use of helicopters was such as was likely to intimidate and frighten the occupants and could not be justified by reference to the operational objectives of the operation and was in fact counterproductive in relation thereto.

(b) The use of the helicopter in close proximity to the house and staff quarters, in an essentially enclosed courtyard was dangerous and created an unnecessary risk of damage to property and injury to individuals.

(c) The use of armed police was intimidatory and could not be justified by reference to the information available to Police or the operational objectives of the raid.

(d) The unannounced entry of both the main house and the staff and children's accommodation was an invasion of privacy and was such as to cause unnecessary distress and anxiety and

could not be justified by reference to the operational objectives of the raid.

(e) The breaking down of doors within the house was unnecessary and unjustifiable, was apt to create needless distress and fear and was intimidatory.

(f) The deployment of the STG and AOS was intimidatory and could not be justified by reference to the operational objectives of the raid or by the information available to the Police. These impacts were in no way ameliorated by the wearing of civilian clothing by the armed officers involved.

(g) The deployment of Police dogs and their handlers was unnecessary and unjustifiable, and was such as was likely to create fear and anxiety among those residing at the property.

(h) The forced division implemented between the second plaintiff and her children was without any operational purpose, was entirely unjustifiable and served only to amplify the likely distress and anxiety experienced by all concerned.

(i) The forced detention of members of the household with no ability to contact legal advisors was unreasonable and failed to give meaningful effect to the BORA rights to which the individuals affected by, and detained in the course of the raid were entitled.

(j) The exclusion of occupants' legal advisors was unjustifiable and unreasonable and prevented the occupants from effectively receiving legal advice on the actions of the Police in the course of the raid.

(k) The application of force to the first plaintiff could not be justified by reference to his behaviour towards Police and was a gratuitous assault and interference with his physical integrity.

(l) The destruction of and damage to property occasioned in the course of the search was unnecessary and unjustifiable. Further the damage of the CCTV camera at the "trade gate" demonstrates an attitude to the observation and recording of the actions of Police that is wholly improper and without justification.

(m) The exclusion of members of the household from their home was liable to create further distress and inconvenience and could not be justified by reference to the operational objectives of the operation.

(n) The refusal to render assistance to the second plaintiff later in the day when the Police raid had left the occupants without transport and without an ability to use a telephone was unreasonable and indefensible.

(o) The refusal demonstrated a failure on the part of the Police involved to recognise the very severe impact that the raid would have on the occupants of the property and to respond appropriately thereto.

84. Further, or in the alternative, the seizures conducted by the Police on 20 January 2012, and which have continued thereafter were and are unreasonable on the following grounds:

(a) The seizures were pursuant to invalid warrants so as to be unjustifiable and unreasonable.

(b) The seizures were overly broad and could not be justified having regard to the powers conferred either under the search warrants specifically or the MACMA more generally.

(c) Even if the seizure of some items might have been reasonable at the date of the raids, which is denied, the continued withholding of the seized items is such as to render the manner of seizure of all items unreasonable. This unreasonableness flows from the following circumstances:

(i) The refusal to provide clones of the computer equipment and consequent deprivation of the plaintiffs of access thereto was not required by and cannot be justified by reference to, the purposes of MACMA or other legitimate policing purposes.

(ii) The items seized contain information likely to be central to the plaintiffs' participation in the extradition hearing and any subsequent US proceedings. By depriving the plaintiffs of the information stored on the items seized, the New Zealand Police have rendered nugatory the plaintiffs' right to adequate time and facilities to prepare a defence and their right to instruct counsel in a meaningful and effective way.

(iii) The items seized contain a broad range of information including information, which is relevant to and necessary for the plaintiffs' day-to-day arrangements. The plaintiffs have effectively been deprived of access to their property, including to a wide array of their personal information.

(iv) The items seized contain a wide array of information some of which may be relevant to the alleged offending, but much of which is wholly irrelevant thereto and ought to have been identified as such and returned.

(v) The length of time over which the Police have held the items (some fifteen months) has been more than adequate to provide clones/images of the electronic items to the plaintiffs and to discern those items which

are entirely irrelevant and return those hardware items.

(d) The failure to maintain appropriate control and custody of the information contained on the computer equipment was an act which rendered the seizure by Police of those items unreasonable in that it was an action taken without authority, and indeed in contravention of a specific direction from the Solicitor General.

(e) The release of personal information to a third party in the absence of specific authority to do so is contrary to the plaintiffs' legitimate interests of privacy in that information, which should only be interfered with or abrogated to the limited extent permitted by law, and not at the unauthorised instigation of the New Zealand Police.

**Damages**

85. As a result of the unlawful and/or unreasonable search and/or seizure by the New Zealand Police as referred to above, the plaintiffs, and in particular the first and second plaintiffs, have been very greatly distressed by the invasion of their family and private life, the privacy and sanctity of their homes, and have suffered loss of dignity, anxiety, humiliation, and embarrassment, and accordingly claim general damages.

86. In aggravation of damages the plaintiffs, and in particular the first and second plaintiffs, will rely on:

(a) The failure by the New Zealand Police, and in particular Assistant Commissioner Malcolm Burgess, and Detective Inspector Grant Wormald, to consider, or properly consider the standard procedure of "knock and announce" to the arrest of the first, fifth and sixth plaintiffs, and the search and seizure in relation to the first and second plaintiffs and the fifth and sixth plaintiffs.

(b) The engagement and involvement of the STG and/or the AOS in the search and seizure of the first and second plaintiffs' property on 20 January 2012 when such was not necessary.

(c) The failure to appreciate that the use of the STG and/or the AOS was not necessary in carrying out the appreciation and risk analysis as to whether to involve the STG and/or the AOS in the raid, and in the request for assistance of the STG.

(d) In particular in that assessment and request for assistance describing the first plaintiff in a misleading way as having access to weapons, being currently armed, threatening to kill or injure, having a prior history of violence, currently exhibiting violence, having fortified premises, and that there was a potential that policing action by members other than STG, would reasonably be expected to result in injury or death to police, suspects or members of the community.

(e) In failing to have the involvement of the STG given meaningful approval by an appropriately independent assistant commissioner of police, or another, more senior authorised approving officer.

(f) In having the approval to deploy the STG given by Assistant Commissioner Malcolm Burgess, who at the time was the overall officer in charge of OFCANZ, and whose approval was given without any meaningful consideration.

(g) The authorisation of STG and/or AOS to shoot an offender, and in particular to prevent the escape of an offender by such action.

(h) The use of helicopters, armed police generally, and police dogs to effect the search and seizure.

(i) The unlawful search carried out by Senior Constable Homan of the first and second plaintiffs' home on 19 January 2012 at the

request of OFCANZ, and in particular Detective Inspector Wormald.

(j) The unlawful interception of the first and second and third and fourth plaintiffs' communications by GCSB (as referred to below).

(k) The surveillance of the first and second plaintiffs' property by the surveillance camera instigated at an adjacent property at the instigation of OFCANZ, and in particular Detective Inspector Wormald.

(l) The failure of the New Zealand Police to consider, or properly consider that the reports provided to them by GCSB did not disclose any reason to deploy the STG and/or the AOS in the raid on the first and second plaintiffs' property, or were inconsistent with any need for the deployment of such an armed force.

(m) The failure of the New Zealand Police to consider or properly consider that the information provided by the covert camera surveillance did not give any reason for the need for the STG and/or the AOS to be deployed in the raid.

(n) The failure of the NZ Police to consider or properly consider that the material obtained from Senior Constable Homan's pencam did not support the STG and/or the AOS being deployed on the raid, or was inconsistent with any need for the deployment of such an armed force.

(o) The known vulnerability of the second plaintiff by reason of her physical condition at the time of the raid and the unnecessary separation of the second plaintiff from her infant children.

(p) The deliberate failure to disclose in the McMorran affidavit that:

(i) GCSB had been intercepting the plaintiffs' communications since at least 16 December 2011;

(ii) the first and second plaintiffs' property had been under surveillance by way of a camera installed by OFCANZ on an adjacent or nearby property.

(iii) a hidden pencam had been used, or was about to be used, by Senior Constable Homan when he visited the Mahoenui Valley property on 19 January 2012, and that no search warrant had been obtained for this search.

(iv) The intention to use the aggressive tactics detailed above.

(q) The refusal to allow the plaintiffs' legal advisers on to the Mahoenui Valley Road property, and the denial of legal advice to those persons held at the property during the search and seizure carried out during the day of 20 January 2012.

(r) The issue by the NZ Police of a press statement after the raid which was intended to convey the impression that the force used by the Police was justified as the first plaintiff on the Police identifying themselves had retreated into the house and activated a number of electronic locking mechanisms, had barricaded himself into a safe room within the house, and the Police had to cut their way into the safe room, and once they gained entry into the room, the first plaintiff was near a firearm which had the appearance of a shortened shotgun, and the impression that the first plaintiff was a violent and dangerous person. These statements and impressions were deliberately conveyed by the NZ Police, and in particular Detective Inspector Wormald, so as to portray the first plaintiff in particular in the worst possible light so as to justify the tactics used in the raid, as the Police knew that the raid would be the subject of a large amount of media attention, both within New Zealand and internationally.

(s) Generally, the Police carried out the search and seizure of the first and second plaintiffs' property in such a way which was calculated to ensure that it was well-publicised internationally so as to create the utmost harm and damage and humiliation to the plaintiffs, and in particular the first plaintiff.

(t) The NZ Police approving and/or allowing representatives of the United States Government to send images/clones of 19 seized items out of New Zealand contrary to the 16 February 2012 direction of the Solicitor-General under s49(2) of MACMA.

(u) The failure of the New Zealand Police and/or Crown Law to disclose that hard drives had been imaged and shipped by the FBI to the United States prior to 23 May 2012, when they knew or must have known that such shipping had taken place, and there was no authorisation to do so.

(v) The unlawful involvement of the GCSB in intercepting the communications and collecting the information of the plaintiffs, as referred to below.

(w) Detective Inspector Wormald giving misleading evidence to the Court at the Remedies Hearing in the week commencing 6 August 2012 with regard to the interceptions of the plaintiffs' communications by GCSB and other surveillance of the plaintiffs, as referred to below.

87. The actions of the New Zealand Police as referred to above were a high-handed and oppressive abuse of the power of the State and in contumelious disregard of the rights of the plaintiffs, and in particular the first and second plaintiffs, and accordingly exemplary damages are claimed.

88. As a result of the Police actions as referred to above, the first and second plaintiffs also suffered special damages being the cost of repairs for damage to the residence at 185 Mahoenui Valley Road, and the electronic equipment, the estimated cost of which is approximately $800,000.

**WHEREFORE THE PLAINTIFFS OR EACH OF THEM CLAIM JUDGMENT AGAINST THE FIRST DEFENDANT FOR:**

(a) A declaration that the search and/or seizure of the first and second plaintiffs' property at 186 Mahoenui Valley Road, and 5H the Prom, Coatesville, Auckland, was unreasonable under s21 of the New Zealand Bill of Rights Act 1990 and/or s46 of MACMA.

(b) A declaration that the search and/or seizure of the third and fourth plaintiffs' property as effected at 37 Ngaiwi Road, Orakei, Auckland was unreasonable under s21 of the New Zealand Bill of Rights Act 1990 and s46 of MACMA.

(c) A declaration that the seizure of the fifth and sixth plaintiffs' property as effected at the first and second plaintiffs' property was unreasonable under s21 of the New Zealand Bill of Rights Act 1990 and s46 of MACMA.

(d) The sum of $650,000 for the first plaintiff by way of damages, including aggravated and exemplary damages.

(e) The sum of $350,000 for the second plaintiff by way of damages, including aggravated and exemplary damages.

(f) The sum of $100,000 for the third plaintiff including aggravated and exemplary damages.

(g) The sum of $100,000 for the fourth plaintiff including aggravated and exemplary damages.

(h) The sum of $250,000 for the fifth plaintiff including aggravated and exemplary damages.

(i) The sum of $250,000 for the sixth plaintiff including aggravated and exemplary damages.

(j) An order requiring the first defendant to pay:

(i) the cost of reinstating the electronic componentry of the household removed from the Mahoenui Valley Road property, such reinstatement to be undertaken by the contracted party which was previously responsible for the development, and maintenance of that componentry, Liquid Automation Ltd.;

(ii) the cost of repairing all and any damage caused during the first defendant raid of the properties named in the search warrants; and

(iii) the costs incurred by the plaintiffs in relation to attempts to obtain access to the information stored on the electronic items seized, prior to these proceedings.

(k) An order that the first defendant pays, on an indemnity basis, the plaintiffs' costs of and incidental to this proceeding and any order thereon.

(l) Such further and other relief as the Court deems just.

**SECOND CAUSE OF ACTION AGAINST NEW ZEALAND POLICE**

**Trespass to land**

89. The plaintiffs repeat the foregoing, and further say this claim is made on behalf of the first and second plaintiffs as being entitled to possession of the Mahoenui Valley Road property, and the third and fourth plaintiffs as the persons entitled to possession of the property at 37 Ngaiwi Road, Orakei, Auckland.

90. As a result of the search warrants being held unlawful, the acts of the NZ Police on 20 January 2012 at the Mahoenui Valley Road property and at 37 Ngaiwi Road, Orakei, Auckland amounted to a trespass by the NZ Police.

91. Further, and in the alternative, the unreasonableness of the NZ Police actions at the Mahoenui Valley Road amounted to a trespass by the NZ Police.

92. As a result, the first and second plaintiffs, and third and fourth plaintiffs have suffered the loss and damage as referred to in the first cause of action as relates to them.

**WHEREFORE THE FIRST, SECOND, THIRD AND FOURTH PLAINTIFFS CLAIM THE FOLLOWING**

(a) A declaration that the search and/or seizure of the first and second plaintiffs' property at 186 Mahoenui Valley Road, Coatesville, Auckland, was a trespass by the NZ Police.

(b) A declaration that the search of the third and fourth plaintiffs' property as effected at 37 Ngaiwi Road, Orakei, Auckland was a trespass by the NZ Police.

(c) The sum of $650,000 for the first plaintiff by way of damages, including aggravated and exemplary damages.

(d) The sum of $350,000 for the second plaintiff by way of damages, including aggravated and exemplary damages.

(e) The sum of $50,000 for the third plaintiff including aggravated and exemplary damages.

(f) The sum of $50,000 for the fourth plaintiff including aggravated and exemplary damages.

(g) An order requiring the first defendant to pay:

(i) the cost of reinstating the electronic componentry of the household removed from the Mahoenui Valley Road property, such reinstatement to be undertaken by the contracted party which was previously responsible for the development, and maintenance of that componentry, Liquid Automation Ltd;

(ii) the cost of repairing all and any damage caused during the first defendant raid of the properties named in the search warrants; and

(iii) the costs incurred by the plaintiffs in relation to attempts to obtain access to the information stored on the electronic items seized, prior to these proceedings.

(h) An order that the first defendant pays, on an indemnity basis, the plaintiffs' costs of and incidental to this proceeding and any order thereon.

(i) Such further and other relief as the Court deems just.

**THIRD CAUSE OF ACTION AGAINST NEW ZEALAND POLICE**

**Trespass to goods**

93. The plaintiffs repeat the foregoing and further say that this claim is made on behalf of the first, third, fifth and sixth plaintiffs as a result of the unlawful seizure of their property as referred to above.

94. As a result of the High Court finding that the search warrants were unlawful, the seizure of the property of the first, third, fifth and sixth plaintiffs by the NZ Police amounted to a trespass to their goods.

95. The trespass to the goods of the first, third, fifth and sixth plaintiffs was particularly aggravated by:

(a) the refusal of the NZ Police to return the goods or clones/images thereof to those plaintiffs;

(b) the unlawful release of the clones to the United States authorities.

96. By reason of the trespass to their goods the first, third, fifth and sixth plaintiffs have suffered the loss and damage as referred to above.

**WHEREFORE THE FIRST, THIRD, FIFTH AND SIXTH PLAINTIFFS' CLAIM AGAINST THE FIRST DEFENDANT FOR:**

(a) A declaration that seizure of the first, third, fifth and sixth plaintiffs' property at 186 Mahoenui Valley Road, Coatesville, Auckland, and at 37 Ngaiwi Road, Orakei, Auckland was a trespass to their property as seized by the NZ Police.

(b) The sum of $650,000 for the first plaintiff by way of damages, including aggravated and exemplary damages.

(c) The sum of $200,000 for the third plaintiff including aggravated and exemplary damages.

(d) The sum of $200,000 for the fifth plaintiff including aggravated and exemplary damages.

(e) The sum of $200,000 for the sixth plaintiff including aggravated and exemplary damages.

(f) An order that the first defendant pays, on an indemnity basis, the plaintiffs' costs of and incidental to this proceeding and any order thereon.

(g) Such further and other relief as the Court deems just.

**FOURTH CAUSE OF ACTION AGAINST FIRST AND/OR SECOND DEFENDANTS**

**Second Baigent Claim - unlawful interception, storage, access and disclosure of, and/or enabling access to information under s14 GCSB Act 2003, and unreasonable search under s21 NZBORA 1990**

**Background specific to claim arising out of illegal GCSB interceptions**

97. This claim is made by the first and second, and third and fourth plaintiffs who repeat the foregoing and further say.

98. The first and second plaintiffs were granted residency on 23 November 2010, and were permanent residents as from 26 September 2011.

99. The first plaintiff's residency status was in the public domain:

(a) The first plaintiff funded a public fireworks display in Auckland to celebrate receiving resident's status on 31 December 2010.

(b) Articles were published in relation to the grant of residency to the first plaintiff in the New Zealand Herald on 12 and 19 June 2011 and 11 September 2011.

100. The third and fourth plaintiffs were granted residency on 2 December 2011.

**Background Immigration Inquiries by New Zealand Police**

101. Prior to 21 September 2011, the NZ Police conducted various background inquiries of the plaintiffs, including establishing their citizenship and the nature of their connection with New Zealand, such as residency, property ownership, vehicle registration and travel records.

102. Information available to Detective Inspector Wormald from on or before 21 September 2011 identified that the first and second plaintiffs had been granted residency in New Zealand.

103. The Police inquiries also revealed that the third plaintiff had bank accounts in New Zealand.

104. On or about 9 December 2011, the New Zealand Police sought from the Department of Immigration the immigration files relating to the first and second plaintiffs.

**New Zealand Police involve GCSB**

105. On a date unknown to the plaintiff, but prior to 14 December 2011, Detective Inspector Wormald contacted GCSB to inquire whether it was able to assist the NZ Police in relation to Operation Debut.

106. At the meeting on 14 December 2011 Detective Inspector Wormald asked GCSB to assist the Police in Operation Debut.

107. Detective Inspector Wormald has sworn an affidavit dated 19 October 2012, in the proceedings CIV-2012-404-1928, stating that at the meeting he informed the two GCSB representatives that:

(a) he did not think that it was possible for the GCSB to intercept either Mr Dotcom or Mr van der Kolk on the basis that they were living in New Zealand;

(b) the Police were sure that Mr Dotcom and Mr van der Kolk were not citizens, but could not advise with any certainty what type of residency they held;

(c) that both Mr Dotcom and Mr van der Kolk were residing in New Zealand, and were able to come and go, so they must have a form of residency;

(d) if required he would act as a go-between for GCSB for inquiries with New Zealand Immigration for the purpose of clarifying residency.

108. At the meeting the GCSB representatives advised Detective Inspector Wormald that it was not necessary to clarify the issue of residency with New Zealand Immigration.

109. On the same day, information was provided to the GCSB by the NZ Police including a briefing document and a draft of the search warrant.

110. On or about 16 December 2011, a Request for Information (**RFI**) was signed by Detective Sergeant McMorran on behalf of Detective Inspector Wormald, and provided to GCSB.

111. The RFI was either prepared by GCSB, or GCSB assisted Detective Sergeant McMorran in completing the RFI at GCSB Headquarters in Wellington.

**Interception of Communications and Gathering of Information by GCSB**

112. On or about 16 December 2011, an internal meeting was held at the GCSB in relation to the interception and information gathering to be conducted in relation to Operation Debut.

113. On or about 16 December 2011, the GCSB commenced the unlawful interception of the communications of some or all of the plaintiffs. Pending further discovery, the plaintiffs do not know if interception of their communications commenced at an earlier date and reserve their rights in this respect.

114. At no time prior to commencing the interception of the plaintiffs' communications did the GCSB take steps to satisfy itself as to the residency status of the plaintiffs, independent of information obtained from OFCANZ.

115. On 16 December 2011, OFCANZ received information from Immigration New Zealand in relation to the travel movements of Messrs Dotcom and van der Kolk, which identified Mr Dotcom as a New Zealand "resident". The plaintiffs do not know if or how this information was provided to GCSB by OFCANZ.

116. On 22 December and 23 December 2011 OFCANZ received the Immigration New Zealand files relating to the first and third plaintiffs which confirmed they had NZ residency. The plaintiffs do not know if or how these files were provided to GCSB by OFCANZ.

117. Between 1 and 10 January 2012 OFCANZ received copies of letters sent by Immigration NZ to the first and third plaintiffs also confirming their

residency status. The plaintiffs do not know if or how this information was provided to GCSB by OFCANZ.

118. In the Request for Assistance to the STG of 9 January 2012 by OFCANZ, the first and second plaintiffs were both described as having New Zealand residency (the third and fourth plaintiffs were not referred to as STG were not requested to assist at their home at 37 Ngaiwi Road, Orakei, Auckland). The plaintiffs do not know if or how this information was provided to GCSB by OFCANZ.

119. During the period of the interception to 20 January 2012, reports were provided by the GCSB to OFCANZ on 20 December 2011; 5 January 2012; 12 January 2012; 16 January 2012 (two reports); 18 January 2012 (two reports); 19 January 2012; and 20 January 2012.

120. During that period of interception, five reports were also provided by GCSB to OFCANZ by way of secure voice update.

121. As referred to above, on 20 January 2012, the New Zealand Police, including members of the STG and the AOS, raided the residence of the first and second plaintiffs and members of the New Zealand Police also searched the residence of the third and fourth plaintiffs, and the first and third plaintiffs were arrested.

**Post-termination Operation Debut**

122. The GCSB continued its interception of the communications and collection of information of and concerning the plaintiffs until 30 January 2012, despite the termination of Operation Debut on 20 January 2012.

123. In and around late January 2012, following the raid of the plaintiffs' residences, various news stories appeared in the media referring in particular to the first plaintiff's residency status.

124. On or about 16 February 2012, a meeting was held between the GCSB, OFCANZ and representatives from the Department of the Prime Minister and Cabinet (**DPMC**), in the course of which a debrief of the Operation

Debut GCSB involvement was conducted, including the issue of the "Citizenship vs. residency of targets".

125. The meeting on 16 February 2012 was attended by, amongst others, the Director of the GCSB, Mr Ian Fletcher, the Deputy Director of Mission Enablement, Mr Hugh Wolfensohn, and Detective Inspector Wormald.

126. The plaintiffs do not know who attended the 16 February meeting on behalf of the DPMC but in an affidavit of disclosure for GCSB sworn on 20 December 2012, the deponent refers to DPMC:

> The only information related to Operation DEBUT otherwise circulated by GCSB beyond the department or the Responsible Minister were the emails and End Products Reports supplied to OFCANZ and attached to the affidavit of Detective Inspector Grant Wormald, as well as the February debriefing with OFCANZ and DPMC.

127. At or following the meeting on 16 February 2012, a representative of GCSB advised Detective Inspector Wormald that the interception of Mr Dotcom and Mr van der Kolk may not have been lawful because of their residency status.

128. On or about 22 February 2012, a representative of the GCSB received confirmation from OFCANZ that all of the plaintiffs held residency throughout the period of interception.

129. Following discussions and emails between OFCANZ and GCSB with regard to residency status, on 22 February 2012 GCSB sent an email to OFCANZ as follows:

> I'm aware that you've spoken to my manager *[GCSB Redactions]* about this issue. I just wanted to follow up and make sure that there wasn't an impression at the OFCANZ end that there has been a major inquiry or witch hunt here at GCSB about Dotcom & co's residency status.
>
> *[GCSB Redactions]* providing a summary document to our legal advisor about the TF DEBUT case and the compliance issues encountered. This document will likely then be stored on file (in case it is needed for future reference), but we do not expect it will lead to any further action or questions asked. None of us are of the opinion that there needs to be any follow on discussions – certainly at a Deputy Director level.
>
> GCSB staff and managers are still viewing TF DEBUT as a very successful collaboration with OFCANZ and we would not want this issue to take the shine off things.

> Certainly, we are all looking forward to any further opportunities to work together. Hope that puts your mind at ease, *[GCSB Redactions].*

130. On or about 27 February 2012, GCSB advised OFCANZ that there had been no illegality in the interceptions conducted. GCSB say that this advice was given by Mr Wolfensohn who was also the Deputy Director of Mission Enablement.

**Disclosure of GCSB Involvement and Unlawful Interception**

131. At the Remedies Hearing in the week commencing 6 August 2012, Detective Inspector Wormald gave evidence as to a group of unidentified people represented at the meeting on 14 December 2011, but declined to identify the people because of the nature of the organisation they were involved in.

132. Detective Inspector Wormald also gave evidence as follows:

> Q So apart from the surveillance which they [the Auckland Police Surveillance Team] might have been going to undertake on your behalf, was there any other surveillance being undertaken here in New Zealand to your knowledge?
>
> A No there wasn't.
>
> ...
>
> ...
>
> Q We've been provided with some – the plaintiffs have been provided with some surveillance notes that related to surveillance being undertaken of Mr Dotcom on the night of the – well on the day of the 19th of January of this year and at paragraph – I can't just put my finger on the paragraph at present but I think you've said in your affidavit that you had Mr Dotcom under surveillance from the 19th?
>
> A Yes.
>
> Q So can we take it from that that there was no surveillance whatsoever of him prior to the 19th?
>
> A Yes, that's correct.
>
> Q Either by the surveillance team or any other government organisation here in New Zealand?
>
> A Not that I'm aware of.
>
> ...

133. On or about 15 August 2012, the plaintiffs' solicitors wrote to the Director of the GCSB seeking any information held by the GCSB under the Official Information Act.

134. On the same date, a letter was sent by counsel for the plaintiffs to Crown Law referring to the involvement of the GCSB in the Police operation.

135. On or about 16 August 2012, a letter from the Director of the GCSB was sent to the plaintiffs' solicitors refusing to provide the information sought in the plaintiffs' solicitor's letter of 15 August 2012 on the grounds that the disclosure of the information in question would be likely to prejudice either:

(a) the security or defence of New Zealand or the international relations of the Government of New Zealand;

(b) the entrusting of information to the Government of New Zealand on the basis of confidence by the government of any other country or any agency of such a government;

(c) the maintenance of the law, including the prevention, investigation, and detection of offences.

136. On 17 August 2012, the solicitors for the plaintiffs sent a request to the Ombudsman for a review of the decision made by the Director of the GCSB.

137. Sometime after 15 August 2012 the Director of the GCSB advised the Honourable Bill English as acting Prime Minister and Responsible Minister for GCSB, along the lines as set out in paragraphs 2.1 and 2.2 of the Ministerial Certificate referred to in the following paragraph.

138. On 17 August 2012, the Honourable Bill English, as Acting Prime Minister and responsible Minister for the GCSB, signed a Ministerial Certificate prepared by Crown Law, dated 16 August 2012, suppressing all details of the GCSB's involvement in Operation Debut on the basis set out in paragraph 2 of the Certificate:

> 2. I have sought advice on the implications of this request from the Director of the GCSB. Having considered that advice and having read the relevant documents held by that agency I am satisfied that:
>
> 2.1 [Disclosing] the information requested would likely prejudice the security of New Zealand, both as referred to in Section 8(2)(c) of the Government Communications Security Bureau Act 2003, and generally by compromising the future supply of information and intelligence from law enforcement agencies and the intelligence services of foreign states with which New Zealand has long-established partnership arrangements.
>
> 2.2 [Disclosing] the information requested would likely prejudice the security of New Zealand in relation to the detective or prevention of serious crime by inhibiting the free and candid flow of information to and from the Bureau to an extent that would compromise the Bureau's functions in terms of Section 8(2)(c) of the Government Communications Security Bureau Act 2003.

139. The Ministerial Certificate was addressed to Inspector Grant Wormald, the Commissioner of Police, and the Director of GCSB and directed that neither of them nor any other person

> subject to this direction shall provide any information or answer any question ... [in the Court proceedings CIV-2012-404-1928] or otherwise that may tend to disclose any such information as requested in the 15 August letter unless any Court with the necessary jurisdiction holds that my objection has not been taken in accordance with law, or for any other sufficient reason.

140. On 7 September 2012, the first plaintiff filed an affidavit in proceedings CIV-2012-404-1928 raising concerns as to the involvement of the GCSB in Operation Debut and noting that any such involvement would have been illegal on account of his residency status.

141. On a date unknown but not later than 12 September 2012, members of the GCSB acknowledged the illegality of the interception of the plaintiffs' communications.

142. On or about 12 September 2012, the Ministerial Certificate signed by the Honourable Bill English was provided to the plaintiffs in proceedings CIV-2012-404-1928.

143. On a date unknown, but not later than 17 September 2012, the Honourable John Key, Prime Minister, Minister responsible for the GCSB, was informed of the illegal actions of the GCSB.

144. On or about that date, the Prime Minister initiated an inquiry by the Inspector-General of Intelligence and Security.

145. In a Memorandum dated 24 September 2012 in proceedings CIV 2012-404-1928 Crown counsel confirmed that GCSB had acted without statutory authority, and that reliance on the Ministerial Certificate was discontinued as to the identity of GCSB (but not as to operational planning).

146. That Memorandum also stated at paragraph 9:

> ... Following the OFCANZ request for information relevant to location, awareness on the part of the wanted persons of law enforcement interest in them, or any information indicating risk factors in effecting any arrest, GCSB sought assurance that all the persons of interest were foreign nationals. OFCANZ gave that assurance.

147. On or about 24 September 2012, the Prime Minister issued a press release acknowledging the illegality of GCSB's actions.

148. On or about 27 September 2012, the Inspector General of Intelligence and Security issued his report to the Prime Minister confirming the illegality of GCSB's actions.

149. Since then inconsistent affidavits have been filed by GCSB (Affidavit of "X", sworn 17 September 2012) and OFCANZ (affidavit of Detective Inspector Wormald, sworn 19 October 2012) in proceedings CIV 2012-404-1928 as to the advice and instructions given and received between OFCANZ and GCSB.

150. By letter dated 11 March 2013 Crown Law advised the plaintiffs' solicitors that:

(a) GCSB's interceptions had continued to 30 January 2012;

(b) that the communications and information intercepted and collected between 20 January 2012 and 30 January 2012 had been accessed and viewed by GCSB following the discovery of the unlawfulness of the GCSB's activities and in the course of legal proceedings.

**Interceptions unlawful under section 14 of the GCSB Act 2003 and unreasonable search under section 21 NZBORA 1990**

151. The interception of the first, second, third and fourth plaintiffs' communications was unlawful in that it breached section 14 of the Government Communications Security Bureau Act 2003, and was therefore an unreasonable search and seizure under section 21 New Zealand Bill of Rights Act 1990.

152. Further, the interceptions were also an unreasonable search and seizure under section 21 of NZBORA due to the following factors:

(a) GCSB decided to proceed with the interception notwithstanding the first, second, third and fourth plaintiffs' residency status.

(b) The interceptions were commenced at a time or times when the GCSB knew or ought to have known the residency status of the first, second, third and fourth plaintiffs.

(c) The GCSB failed to make appropriate enquiries to satisfy itself that it had jurisdiction to intercept the communications of the first, second, third and fourth plaintiffs. It was unreasonable for the GCSB to either:

(i) rely on the inaccurate and/or incomplete information provided by the New Zealand Police without making its own conclusive and independent checks as to the

residency status of these plaintiffs; or in the alternative; or

(ii) to receive accurate information from the New Zealand Police and nevertheless persist in carrying out the interception.

(d) The interception continued for a further 10 days after the purported justification for the interception (the termination of Operation Debut on 20 January 2012) had ceased to apply.

**Storage, access and disclosure of communications by GCSB**

153. GCSB continued to store and/or access or enable access to the information obtained from the unlawful interceptions of the first, second, third and fourth plaintiffs' communications, and concealed such storage and/or access after it had become apparent or should have been apparent to GCSB that the interceptions were unlawful.

154. Further, GCSB disclosed the information, whether in its original form or in some derivative form, to the Department and responsible Minister for GCSB, and may have made disclosure to other entities including United States authorities and Five Eye partners of GCSB. The plaintiffs cannot state the full extent of the disclosure of the information obtained from the unlawful interceptions until discovery has been made by GCSB in this respect.

155. The continued storage and/or accessing of the information, and the extent of the disclosure of the same, impacts upon the damages claimed in this cause of action and that based on breach of privacy.

**New Zealand Police jointly and severally liable for GCSB's unlawful acts**

156. The New Zealand Police are also liable for the unlawful acts of GCSB and the unreasonable search by way of interception of the first, second, third and fourth plaintiffs' communications in that OFCANZ:

(a) Failed to clearly and unequivocally advise GCSB that their enquiries had already established that the first and second plaintiffs had been granted residency status within New Zealand;

(b) requested GCSB to carry out the interception and were a party to the unlawful interceptions;

(c) received the fruits of the unlawful interceptions;

(d) was involved in the concealment of the unlawful interceptions once it become apparent, or should have been apparent, that the interceptions were unlawful; and

(e) were otherwise directly or indirectly involved in the unlawful interceptions.

**Damages**

157. As a result of the unlawful interceptions and unreasonable search, the first, second, third and fourth plaintiffs have been very greatly distressed by the invasion of their family and private life, the privacy and sanctity of their communications, and have suffered loss of dignity, anxiety, humiliation, and embarrassment and accordingly claim general damages.

158. In aggravation of damages the plaintiffs will rely on:

(a) The instruction of the GCSB by the New Zealand Police to conduct the interception of communications and collection of information in circumstances in which they knew or ought to have known that such activity would be unlawful.

(b) GCSB failing to carry out any proper checks as to the residency status of the plaintiffs prior to commencing the interception, particularly as it is incumbent upon GCSB to fully understand the nature of its powers and its role in a free and democratic society;

(c) GCSB failing to give effect and proper recognition to the rights of privacy of citizens and residents against intrusive interceptions into their private lives;

(d) GCSB failing to recognise or to acknowledge the illegality of the interception despite the residency status of the plaintiffs being raised with the GCSB by OFCANZ in February 2012;

(e) GCSB failing to seek effective legal advice or independent legal advice at the time that the issue of illegality was raised by OFCANZ in February 2012;

(f) Detective Inspector Wormald, either alone or in conjunction with others, concealing the involvement of GCSB from the plaintiffs and the Court including giving misleading evidence at the Remedies hearing in August 2012 when Detective Inspector Wormald knew, or should have known, that GCSB's involvement was, or would likely be relevant in any investigation into and assessment of the NZ Police's actions on 20 January 2012 at the Mahoenui Valley Road property and in particular, the deployment of the STG and AOS;

(g) the NZ Police and GCSB failing to advise the plaintiffs and the Court that the said evidence given by Detective Inspector Wormald was or would likely be misleading even though it

would or should have been apparent that such was the case, and that the involvement of GCSB would have informed the issue as to the deployment of the STG and AOG on 20 January 2012;

(h) GCSB continuing the interceptions until 30 January 2012, after Operation Debut had terminated on 20 January 2012;

(i) the failure of New Zealand Police and GCSB to disclose that unlawful interceptions had continued to 30 January 2012 until 11 March 2012 contrary to what was stated in an affidavit on behalf of GCSB that interceptions were conducted between 16 December 2011 and 20 January 2012;

(j) wrongly claiming legal privilege until 25 March 2013 for certain records in relation to the GCSB's involvement in Operation Debut, so as to conceal the true nature of the information available to the GCSB prior to the commencement of the interception;

(k) wrongly refusing to provide information to the plaintiffs' solicitors when requested, on the basis that the disclosure would prejudice:

- the security or defence of New Zealand or the international relations of the Government of New Zealand;
- the entrusting of information to the Government of New Zealand on the basis of confidence by the government of any other country or any agency of such a government;
- the maintenance of the law, including the prevention, investigation, and detection of offences;

(l) GCSB and the NZ Police unlawfully obtaining and relying upon the Ministerial Certificate to suppress and conceal information

about the interception at a time when the GCSB appreciated, or should have appreciated, the illegality of its actions; and

(m) the signing of the Ministerial Certificate by the Responsible Minister to suppress and conceal the involvement of GCSB from the plaintiffs.

159. The actions of the New Zealand Police and GCSB as referred to above were a high handed and oppressive abuse of the power of the State and in contumelious disregard of the plaintiffs' rights in carrying out, storing, accessing, and disclosing the illegal interceptions, and concealing the same, and in particular until inquiry was made on behalf of the plaintiffs, and when it had become apparent that the interceptions would be exposed in the Court proceedings in CIV-2012-404-1928.

**WHEREFORE THE FIRST, SECOND, THIRD AND FOURTH PLAINTIFFS AND EACH OF THEM** seek judgment against the first and/or second defendants for the following orders:

(a) Orders by way of declarations that:

(i) the interception, collection, storage, and disclosure of and enabling of access to the plaintiffs' communications and information, whether in its original form or in some derivative form, were illegal and contrary to the Government Communications Security Bureau Act 2003;

(ii) Both the Police and/or the GCSB knew or ought to have known at all relevant times that GCSB's interception was unlawful

(iii) the Director of GCSB, acted unlawfully in refusing to provide the information requested by the plaintiffs' solicitors in their letter of 15 August 2012 on the basis that to disclose the information would be likely to prejudice either:

- the security or defence of New Zealand or the international relations of the Government of New Zealand;

- the entrusting of information to the Government of New Zealand on the basis of confidence by the government of any other country or any agency of such a government;

- the maintenance of the law, including the prevention, investigation, and detection of offences;

In doing so, the Director acted without proper or legitimate justification and for an improper purpose, namely to obstruct and prevent the plaintiffs from becoming informed as to the true nature and extent of the GCSB's involvement

(iv) the Director of GCSB, Ian Fletcher, acted unlawfully in causing information to be provided to the Acting Minister, the Honourable Bill English, that was incomplete and/or misleading in order to secure the execution of the Ministerial Certificate, suppressing all details of GCSB's involvement in Operation Debut. Alternatively, the Minister failed to consider or properly consider information from the GCSB when assessing whether to sign the Ministerial Certificate;

(v) the Honourable Bill English acted unlawfully in signing the Ministerial Certificate suppressing all details of GCSB's involvement in Operation Debut, and in particular on the basis set out in paragraph 2 of the Certificate;

(vi) the Honourable Bill English acted unlawfully in directing the parties to whom the Ministerial Certificate was addressed, and any other person subject to the direction not to provide any information or answer any questions that may tend to disclose the information requested in the 15 August 2012 letter from counsel for the plaintiffs;

(vii) the New Zealand Police, either alone or together with the GCSB acted unlawfully in withholding until 24 September 2012 GCSB's involvement in Operation Debut, and in particular its

illegal interception and collection of the first, second, third and fourth plaintiffs' communications and information;

(viii) that the New Zealand Police and the GCSB unreasonably adopted an approach whereby they deliberately withheld information regarding the GCSB's involvement so as to obscure any such involvement from the public, plaintiffs and the Court; and pursuant to such approach, Detective Inspector Wormald, when giving evidence, declined to provide information or gave evidence which was misleading or liable to mislead the Court.

(ix) that the New Zealand Police either alone or together with the GCSB acted unlawfully in withholding information which would disclose and demonstrate that the explanation and evidence given by Detective Inspector Wormald to the Court was such as was likely to the prevent the Court from being informed as to the role and involvement of the GCSB in Operation Debut and consequently mislead on an issue directly relevant to whether the STG and/or AOS should have been deployed at the search and seizure of the first and second plaintiffs' property at 186 Mahoenui Valley Road, Coatesville, Auckland on 20 January 2012.

(x) that the New Zealand Police and GCSB took active steps to conceal GCSB's role and failed to take any steps to correct the misinformation given to the Court and to the plaintiffs.

(b) Damages including aggravated and exemplary damages for the first plaintiff of $1 million.

(c) Damages including aggravated and exemplary damages for the second plaintiff of $500,000.

(d) Damages including aggravated and exemplary damages for the third plaintiff of $350,000.

(e) Damages including aggravated and exemplary damages for the fourth plaintiff of $350,000.

(f) The plaintiffs' costs of and incidental to these proceedings on an indemnity basis.

(g) Such further and other relief as the Court deems just.

**FIFTH CAUSE OF ACTION AGAINST FIRST AND SECOND DEFENDANTS**

**Invasion of Privacy**

160. The first, second, third and fourth plaintiffs repeat the foregoing and further say:

161. These plaintiffs and each of them had a reasonable expectation in the privacy of their communications, whether electronic or otherwise.

162. The unlawful and unreasonable interception of these plaintiffs' communications by the GCSB was an unlawful invasion of and interference with their privacy, and the privacy of each of them.

163. Further, the disclosure of such information to the New Zealand Police and to any third parties including United States authorities would be considered highly offensive to the reasonable person.

164. As a result of the unlawful invasion of, and interference with the plaintiffs' privacy, they have suffered the loss and damage as aforesaid, including aggravated and exemplary damages as referred to above.

**WHEREFORE THE FIRST, SECOND, THIRD AND FOURTH PLAINTIFFS AND EACH OF THEM** seek judgment against the first and/or second defendants for the following orders:

(a) Orders by way of declarations that:

(i) the interception, collection, storage, and disclosure of and enabling of access to the plaintiffs' communications and information, whether in its original form or in some derivative

form, were illegal and contrary to the Government Communications Security Bureau Act 2003;

(ii) Both the Police and/or the GCSB knew or ought to have known at all relevant times that GCSB's interception was unlawful

(iii) the Director of GCSB, acted unlawfully in refusing to provide the information requested by the plaintiffs' solicitors in their letter of 15 August 2012 on the basis that to disclose the information would be likely to prejudice either:

- the security or defence of New Zealand or the international relations of the Government of New Zealand;
- the entrusting of information to the Government of New Zealand on the basis of confidence by the government of any other country or any agency of such a government;
- the maintenance of the law, including the prevention, investigation, and detection of offences;

In doing so, the Director acted without proper or legitimate justification and for an improper purpose, namely to obstruct and prevent the plaintiffs from becoming informed as to the true nature and extent of the GCSB's involvement

(iv) the Director of GCSB, Ian Fletcher, acted unlawfully in causing information to be provided to the Acting Minister, the Honourable Bill English, that was incomplete and/or misleading in order to secure the execution of the ministerial certificate, suppressing all details of GCSB's involvement in Operation Debut. Alternatively, the minister failed to consider or properly consider information from the GCSB when assessing whether to sign the ministerial certificate.;

(v) the Honourable Bill English acted unlawfully in signing the Ministerial Certificate suppressing all details of GCSB's involvement in Operation Debut, and in particular on the basis set out in paragraph 2 of the Certificate;

(vi) the Honourable Bill English acted unlawfully in directing the parties to whom the Ministerial Certificate was addressed, and any other person subject to the direction not to provide any information or answer any questions that may tend to disclose the information requested in the 15 August 2012 letter from counsel for the plaintiffs;

(vii) the New Zealand Police, either alone or together with the GCSB acted unlawfully and without reasonable cause in withholding until 24 September 2012 GCSB's its involvement in Operation Debut, and in particular its illegal interception and collection of the first, second, third and fourth plaintiffs' communications and information;

(viii) that the New Zealand Police and the GCSB unreasonably adopted an approach whereby they deliberately withheld information regarding the GCSB's involvement so as to obscure any such involvement from the public, plaintiffs and the Court; and pursuant to such approach, Detective Inspector Wormald, when giving evidence, declined to provide information or gave evidence which was misleading or liable to mislead the Court.

(ix) that the New Zealand Police either alone or together with the GCSB acted unlawfully in withholding information which would disclose and demonstrate that the explanation and evidence given by Detective Inspector Wormald to the Court was such as was likely to the prevent the Court from being informed as to the role and involvement of the GCSB in Operation Debut and consequently mislead on an issue directly relevant to whether the STG and/or AOS should have been deployed at the search and seizure of the first and second plaintiffs' property at 186 Mahoenui Valley Road, Coatesville, Auckland on 20 January 2012.

(x) that the New Zealand Police and GCSB took active steps to conceal GCSB's role and failed to take any steps to correct the misinformation given to the Court and to the plaintiffs.

(b) Damages including aggravated and exemplary damages for the first plaintiff of $1 million.

(c) Damages including aggravated and exemplary damages for the second plaintiff of $500,000.

(d) Damages including aggravated and exemplary damages for the third plaintiff of $350,000.

(e) Damages including aggravated and exemplary damages for the fourth plaintiff of $350,000.

(f) The plaintiffs' costs of and incidental to these proceedings on an indemnity basis.

(g) Such further and other relief as the Court deems just.

This document is filed by WILLIAM AKEL solicitor for the plaintiffs of the firm of Simpson Grierson.

The address for service of the Plaintiffs is at the offices of Simpson Grierson, Level 27, 88 Shortland Street, Auckland.

Documents for service on the Plaintiffs may be left at that address for service or may be -

(a) posted to the solicitor at Private Bag 92518, Auckland; or

(b) left for the solicitor at a document exchange for direction to DX CX10092; or

(c) transmitted to the solicitor by facsimile to+64-9-977 5028; or

(d) emailed to the solicitor at william.akel@simpsongrierson.com