

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV2013-404-2168

IN THE MATTER OF

the New Zealand Bill of Rights Act 1990 and the
Government Communications Security Bureau
Act 2003

BETWEEN

KIM DOTCOM of Auckland, Businessman

First Plaintiff

MONA DOTCOM of Auckland, Married Woman

Second Plaintiff

BRAM VAN DER KOLK of Auckland,
Businessman

Third Plaintiff

JUNELYN VAN DER KOLK of Auckland,
Married Woman

Fourth Plaintiff

MATHIAS ORTMANN of Auckland,
Businessman

Fifth Plaintiff

FINN BATATO of Auckland, Businessman

Sixth Plaintiff

CONT...

STATEMENT OF DEFENCE

14 May 2013

Judicial Officer: Winkelmann J
Next event date:

CROWN LAW
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HIGH COURT
15 MAY 2013
AUCKLAND

WP

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AND

HER MAJESTY'S ATTORNEY-GENERAL
sued on behalf of the New Zealand Police

First Defendant

AND

HER MAJESTY'S ATTORNEY-GENERAL
sued on behalf of the Government Communications
Security Bureau

Second Defendant

The defendants refer to the statement of claim dated 30 April 2013 and say:

Parties

1. They admit paragraph 1.
2. They admit paragraph 2.
3. They admit paragraph 3.
4. They admit paragraph 4.
5. They admit paragraph 5.
6. They admit paragraph 6.
7. They admit paragraph 7.
8. They admit paragraph 8.

Background

9. They admit the United States Government has formally asked the New Zealand Government to extradite the first, third, fifth and sixth plaintiffs to the United States, where they have been indicted on charges arising from the operation of the Megaupload business, and that the extradition application has been prosecuted on behalf of the Government by Crown Law. Save as is expressly admitted herein they deny paragraph 9.
10. They have no direct knowledge of, and therefore deny, the allegations in paragraph 10.
11. They admit the Police National Intelligence Centre profiled the first plaintiff in late 2010 and collected other information about him during 2011. They admit some of this information concerned the first plaintiff's residency status. Save as is expressly admitted herein, they deny paragraph 11.
12. They admit paragraph 12.
13. They admit paragraph 13, save that the request was made in October 2010, not July 2011.
14. They admit paragraph 14.

15. They admit paragraph 15.
16. They admit paragraph 16.
17. They admit that various planning meetings were held in Wellington and Auckland, including on the dates nominated in paragraph 17, but deny that the organisations referred to in that paragraph were present at all of these meetings.
18. They admit paragraph 18, save that three members of the FBI attended.
19. They admit paragraph 19.

GCSB

20. They admit paragraph 20.
21. They admit paragraph 21, but say this discussion occurred after other attendees at that meeting had left.
22. They admit paragraph 22.
23. They admit the GCSB provided the Police with nine written reports and up to five oral reports over the period specified in paragraph 23. Save as is expressly admitted herein, they deny paragraph 23, and refer to the written reports (and the unclassified summaries thereof) for their contents. They say the oral reports conveyed no material information which was not included in existing or subsequent written reports.

Covert camera surveillance

24. They admit paragraph 24, and say the meeting occurred on 9 January 2012.
25. They admit paragraph 25.
26. They admit paragraph 26.
27. They admit the property owner agreed to the installation of camera equipment to monitor movements in the vicinity of the first plaintiff's property, and say the cameras were installed on 16 January 2012.
28. They admit the cameras were on the nearby property between 16 and 20 January 2012, and recorded footage which was manually collected by members

of the Police from time to time. Save as is expressly admitted herein, they deny paragraph 28.

Senior Constable Homan hidden microphone and camera

29. They deny paragraph 29.
30. They admit Senior Constable Homan visited the first and second plaintiffs' property on 19 January 2012, and that he carried with him a covert recording device. They do not plead to that part of paragraph 30 which contains a statement of law.
31. They admit the footage was passed to members of the Police involved in planning the termination of Operation Debut, but otherwise deny paragraph 31.

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

32. They admit paragraph 32.
33. They deny paragraph 33.
34. They deny paragraph 34.

Arrest warrants

35. They admit that on 18 January 2012 the District Court issued provisional arrest warrants, pursuant to the Extradition Act 1999, for the first, third, fifth and sixth plaintiffs, but otherwise deny paragraph 35.

MACMA search warrants

36. They admit paragraph 36, save that the applicant for the warrants was Detective Sergeant N McMorran.
37. They admit paragraph 37.
38. They admit paragraph 38, but refer to the whole of the document for its contents.
39. They admit paragraph 39, but refer to the whole of the document for its contents.

Execution of the search warrant

40. They admit that on 20 January 2012, the New Zealand Police executed the search and arrest warrants. Save as is expressly admitted herein, they deny paragraph 40.
41. They admit paragraph 41, save that the termination operation at Mahoenui Valley Road was scheduled to commence between 6:30 and 7:00 am.
42. They admit paragraph 42.
43. They admit paragraph 43.
44. They admit paragraph 44.
45. They admit paragraph 45, and say special precautions were taken during the execution of the warrants because of the second plaintiff's pregnancy.
46. They admit the execution of the warrants at the Mahoenui Valley Road property included the involvement of members of the Special Tactics Group (STG), and say that the role of the STG was to ensure Police were able to secure the property quickly and safely, and with the lowest possible risk of relevant evidence being lost. Save as is expressly admitted herein, they deny paragraph 46.
47. They admit paragraph 47.
48. They admit paragraph 48.
49. They admit some officers were armed, that two Police dogs and their handlers were present, and that while some members were in Police uniform, other members of the Police were dressed in civilian clothing with the word POLICE displayed in prominent letters on their vests. Save as is expressly admitted herein, they deny paragraph 49.
50. They admit STG officers entered the residential buildings without knocking and dispersed to secure the property for CIB staff who undertook the search. Save as is expressly admitted herein, they deny paragraph 50.
51. They deny paragraph 51.

52. They deny paragraph 52.
53. They admit paragraph 53, and say that Police located two loaded and illegal firearms during their initial deployment.
54. They deny paragraph 54.
55. They deny paragraph 55.
56. They admit the occupants' legal advisors, who arrived after 11 am, were excluded from the property during the search, but say Police offered to facilitate consultations between the legal advisors and occupants away from the area being searched.
57. They deny paragraph 57, and say the first plaintiff hid from Police for approximately ten minutes after realising Police were searching for him, and that when located he was forced to the ground, from a sitting position, after refusing to comply with Police instructions to show his hands.
58. They admit paragraph 58, and rely on the schedule of items seized for the array of electronic equipment seized during the search.
59. They deny paragraph 59.
60. They admit some doors and other property was damaged during the search, but say this was necessary in light of the operational requirements associated with the execution of the warrant. Save as is expressly admitted herein, they deny paragraph 60, and say Police did not damage any part of the CCTV system when executing the warrant.
61. They deny paragraph 61, and say Police did not damage the CCTV device referred to.
62. They deny paragraph 62.

Seizure of items by the Police

63. They admit Police seized a large number of electronic items during the search. Save as is expressly admitted herein, they deny paragraph 63.
64. They deny paragraph 64.

65. They deny paragraph 65.

66. They deny paragraph 66.

67. They deny paragraph 67.

Dealing with property seized after 20 January 2012

68. They admit paragraph 68.

69. They do not plead to paragraph 69, which contains a statement of law.

70. They admit forensic clones of some electronic items seized on 20 January 2012 were sent to the United States in late March 2012. Save as is expressly admitted herein, they deny paragraph 70.

71. They admit paragraph 71.

72. They deny paragraph 72.

MACMA search warrants, and transfer of the clones declared unlawful

73. They admit paragraph 73.

74. They deny paragraph 74, and say the reasons for the challenge to the search warrants were set out in the plaintiffs' statement of claim.

75. They deny paragraph 75.

76. They deny paragraph 76.

77. They admit paragraph 77, but rely on the whole of the judgment for its terms.

78. They admit paragraph 78.

79. They admit paragraph 79.

FIRST CAUSE OF ACTION AGAINST NEW ZEALAND POLICE

First *Baigent* claim – unlawful and/or unreasonable search and seizure under s 21 New Zealand Bill of Rights Act 1990 and s 46 MACMA

80. They do not plead to paragraph 80, which contains a statement of law.

81. They do not plead to paragraph 81, which contains a statement of law.

82. They deny paragraph 82. They do not plead to those parts of paragraph 82, which contain statements of law.
83. They deny paragraph 83. They do not plead to those parts of paragraph 83 which contain statements of law.
84. They deny paragraph 84. They do not plead to those parts of paragraph 84 which contain statements of law.

Damages

85. They deny paragraph 85.
86. They do not plead to paragraph 86, which contains a statement of law and submission.
87. They deny paragraph 87.
88. They deny paragraph 88.

SECOND CAUSE OF ACTION AGAINST NEW ZEALAND POLICE

Trespass to land

89. They do not plead to paragraph 89, which contains a statement of law.
90. They do not plead to paragraph 90, which contains a statement of law.
91. They do not plead to paragraph 91, which contains a statement of law.
92. They deny paragraph 92.

As a further and/or alternative defence, the first defendant says he was at all material times acting in obedience to a court process and/or in connection with the execution (or purported execution) of judicial process and is protected from liability by s 44 of the Policing Act 2008, and sections 6(4) and 6(5) of the Crown Proceedings Act 1950.

THIRD CAUSE OF ACTION AGAINST NEW ZEALAND POLICE

Trespass to goods

93. They do not plead to paragraph 93, which contains a statement of law.
94. They do not plead to paragraph 94, which contains a statement of law.
95. They do not plead to paragraph 95, which contains a statement of law.

96. They deny paragraph 96.

As a further and/or alternative defence, the first defendant says he was at all material times acting in obedience to a court process and/or in connection with the execution (or purported execution) of judicial process and is protected from liability by s 44 of the Policing Act 2008, and sections 6(4) and 6(5) of the Crown Proceedings Act 1950.

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 s 14 GCSB Act 2003, and unreasonable search under s 21 NZBORA 1990

Background to specific claim arising out of illegal GCSB interceptions

97. They repeat the admissions and denials set out above.

98. They deny paragraph 98, and say the first and second plaintiffs held residence class visas at the material time.

99. They admit newspaper articles were published in 2011 which referred to the first plaintiff seeking New Zealand residency, and refer to the whole of the articles for their terms. Save as is expressly admitted herein, they deny paragraph 99.

100. They admit paragraph 100.

Background Immigration enquiries by New Zealand Police

101. They admit paragraph 101.

102. They admit paragraph 102.

103. They admit paragraph 103.

104. They admit paragraph 104.

New Zealand Police involve GCSB

105. They admit that on 13 December 2011, Detective Inspector Wormald invited a representative from the GCSB to a meeting with the intention of inquiring whether it was able to assist the Police in relation to Operation Debut.

106. They admit paragraph 106.
107. They admit paragraph 107, which pleads evidence, but rely on the whole of that affidavit for its terms.
108. They admit paragraph 108 and say, having ascertained the first, second and third plaintiffs were not New Zealand citizens or permanent residents, that GCSB representatives did not seek further information regarding the plaintiffs' immigration status.
109. They admit paragraph 109.
110. They admit paragraph 110.
111. They admit paragraph 111, and say the RFI was drafted by GCSB in conjunction with Police, and signed by Detective Sergeant McMorran.

Interception of communications and gathering of information by GCSB

112. They admit paragraph 112, save that the meeting occurred on 15 December 2011.
113. They admit that interception of communications relevant to Operation Debut commenced on 16 December 2011, and that the interceptions included private communications of the first, second and third plaintiffs. They deny intercepting the communications of the fourth plaintiff (apart from any captured incidentally as part of the interception of the third plaintiff's communications).
114. They admit paragraph 114.
115. They admit paragraph 115, and say this information was not transmitted to GCSB.
116. They admit that on 23 December the Police received immigration files for the third plaintiff. Save as is expressly admitted herein, they deny paragraph 116, and say they received immigration files for the first plaintiff on 11 January 2012, and say this information was not transmitted to GCSB.

117. They admit paragraph 117, and say this information formed part of the files referred to in paragraph 116. This information was not transmitted to GCSB until February 2012.
118. They admit paragraph 118, and say this information was not transmitted to GCSB.
119. They admit paragraph 119.
120. They admit paragraph 120, but say the oral reports conveyed no material information which was not included in existing or subsequent written reports.
121. They admit that on 20 January 2012, the New Zealand Police executed the search and arrest warrants. Save as is expressly admitted herein, they deny paragraph 121.

Post-termination Operation Debut

122. They deny paragraph 122, and say that for technical reasons limited interception of the communications of the first plaintiff continued until 30 January 2012, but that these communications were not accessed or viewed until after the plaintiffs commenced legal proceedings, and that no communications of the second or third plaintiffs were intercepted after 20 January 2012.
123. They admit paragraph 123.
124. They admit paragraph 124.
125. They admit paragraph 125, save they deny Mr Wolfensohn was present.
126. They admit paragraph 126.
127. They admit paragraph 127, and say that following the 16 February meeting, a representative of GCSB sought definitive confirmation of the relevant plaintiffs' immigration status through Police, so that if a mistake had occurred this could be identified and appropriate action taken.
128. They deny paragraph 128, and say only the first, second, third and fourth plaintiffs held residence class visas.
129. They admit paragraph 129.

130. They admit paragraph 130, and say the conclusion there had been no illegality (communicated to Police by GCSB staff) was erroneous, but had been confirmed, prior to being passed to Police, by the GCSB's internal legal advisor, Mr Wolfensohn.

Disclosure of GCSB involvement and unlawful interception

131. They admit paragraph 131, which pleads evidence, but refer to the whole of the transcript for context and content.
132. They admit paragraph 132, but refer to the whole of the transcript context and content.
133. They admit paragraph 133.
134. They admit paragraph 134.
135. They admit paragraph 135.
136. They admit paragraph 136.
137. They admit representatives of Crown Law and GCSB approached the Acting Prime Minister seeking the issue of a Ministerial certificate, but say that this occurred before GCSB became aware of the illegality in the interceptions of the first, second and third plaintiffs' communications. Save as is expressly admitted herein, they deny paragraph 137.
138. They admit paragraph 138.
139. They admit paragraph 139.
140. They admit paragraph 140.
141. They admit paragraph 141, and say the GCSB's appreciation it had acted unlawfully began when it received the first plaintiff's affidavit dated 7 September 2012.
142. They admit paragraph 142.
143. They admit paragraph 143.
144. They admit paragraph 144.

145. They admit paragraph 145.
146. They admit paragraph 146, but rely on the whole of the memorandum – which was subsequently withdrawn in part – for its terms.
147. They admit paragraph 147.
148. They admit paragraph 148.
149. They admit affidavits were sworn on behalf of GCSB and the Police on the dates alleged but otherwise deny paragraph 149, and rely on the whole of those affidavits, together with the second GCSB affidavit sworn 22 October 2012, for their terms.
150. They admit paragraph 150, but rely on the whole of the relevant letter for its terms.

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

151. They do not plead to paragraph 151, which contains a statement of law.
152. They do not plead to paragraph 152, which contains a statement of law.

Storage, access and disclosure of communications by GCSB

153. They deny paragraph 153.
154. They deny paragraph 154.
155. They deny paragraph 155.

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

156. They do not plead to paragraph 156, which contains a statement of law.

Damages

157. They deny paragraph 157.
158. They do not plead to paragraph 158, which contains a statement of law and submission.
159. They deny paragraph 159.

As to the declarations sought by the plaintiffs, the second defendant accepts, with respect to the interception of communications of the first, second and third plaintiffs, that declarations of illegality, in terms to be determined, are appropriate. They do not plead to the remaining declarations sought, but deny any person sought or conspired to conceal unlawful conduct on the part of the GCSB.

FIFTH CAUSE OF ACTION AGAINST FIRST AND SECOND DEFENDANTS

Invasion of privacy

160. They repeat the admissions and denials set out above.
161. They do not plead to paragraph 161, which contains a statement of law.
162. They do not plead to paragraph 162, which contains a statement of law.
163. They do not plead to paragraph 163, which contains a statement of law, but deny any illegally obtained information was disclosed to any third party, including United States authorities.
164. They deny paragraph 164.

As to the declarations sought by the plaintiffs, the second defendant accepts, with respect to the interception of communications of the first, second and third plaintiffs, that declarations of illegality, in terms to be determined, are appropriate. They do not plead to the remaining declarations sought, but deny any person sought or conspired to conceal unlawful conduct on the part of the GCSB.

This document is filed by David Jonathan Boldt, Crown Counsel, solicitor for the first respondent, of Crown Law.

The address for service of the first respondent is Crown Law, Unisys House, 56 The Terrace, Wellington 6011. Documents for service on the first respondent may be left at this address for service or may be:

- (a) posted to the solicitor at PO Box 2858, Wellington 6140; or
- (b) left for the solicitor at a document exchange for direction to DX SP20208, Wellington Central; or
- (c) transmitted to the solicitor by facsimile to 04 473 3482; or
- (d) emailed to the solicitor at david.boldt@crownlaw.govt.nz