IN THE HIGH COURT OF NEW ZEALAND
I TE KŌTI MATUA O AOTEAROA
AUCKLAND REGISTRY
TĀMAKI MAKAURAU ROHE

CIV-2017-404-

UNDER	the Crown Proceedings Act 1950
BETWEEN	**KIM DOTCOM**, of Apartment 64, 143 Quay Street, Auckland, businessman
	First plaintiff
AND	**MEGAUPLOAD LIMITED**, a company duly incorporated under the law of Hong Kong SAR and having its registered office at 11/F AXA Centre, 151 Gloucester Road, Wanchai, Hong Kong
	Second plaintiff
AND	**THE ATTORNEY-GENERAL (ON BEHALF OF THE CROWN IN RIGHT OF NEW ZEALAND)**, Crown Law Office, Level 3, Justice Centre, 19 Aitken Street, Wellington
	First defendant
	THE ATTORNEY-GENERAL, Crown Law Office, Level 3, Justice Centre, 19 Aitken Street, Wellington
	Second defendant

STATEMENT OF CLAIM
DATED 22 DECEMBER 2017

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AND	**THE ATTORNEY-GENERAL (ON BEHALF OF CROWN LAW OFFICE)** , Crown Law Office, Level 3, Justice Centre, 19 Aitken Street, Wellington
	Third defendant
AND	**THE UNITED STATES OF AMERICA**
	Fourth defendant
AND	**THE ATTORNEY-GENERAL (ON BEHALF OF NEW ZEALAND POLICE)**, Crown Law Office, Level 3, Justice Centre, 19 Aitken Street, Wellington
	Fifth defendant

THE PLAINTIFFS BY THEIR SOLICITOR SAY:

PARTIES

1. The first plaintiff is Kim Dotcom, businessman, of Auckland. Amongst other proceedings, the first plaintiff is a respondent in the extradition proceeding commenced by the United States of America (**United States**) in the District Court at North Shore (**District Court**) under file number CRI-2012-092-1647 and currently on appeal to the Court of Appeal (**Extradition Proceeding**).

2. The second plaintiff is Megaupload Limited, a company founded by the first plaintiff and duly incorporated under the laws of Hong Kong, which, until 20 January 2012, carried on business as an internet service provider, in particular of cloud storage services.

3. The first plaintiff is the beneficial owner of 100 per cent of the shares in Vestor Limited, a Hong Kong registered company. Vestor owns 34,001 out of 50,000 shares (approximately 68 per cent) of the shares in the second plaintiff.

4. The first defendant is named for and on behalf of the Crown in right of New Zealand, which is the requested state in the Extradition Proceeding and a party to the Treaty on Extradition between New Zealand and the United States (**US-NZ Treaty**).

5. The second defendant is named in these proceedings in his capacity as chief law officer of New Zealand, central authority under the Mutual Assistance in Criminal Matters Act 1992 (**MACMA**) and in his capacity as the party alleged to be responsible for advancing the Extradition Proceeding through the New Zealand judicial system and performing New Zealand's obligations under the US-NZ Treaty.

6. The third defendant is named for and on behalf of the Crown Law Office (**Crown Law**) as the central authority under the Extradition Act 1999, and counsel for the United States in the Extradition Proceeding and other proceedings.

7. The fourth defendant is the United States of America, the requesting state in the Extradition Proceeding and a party to the US-NZ Treaty.

8. The fifth defendant is named in these proceedings for and on behalf of the New Zealand Police (**Police**), which assisted the United States with the application for and execution of the arrest warrant in respect of the first plaintiff at issue in this proceeding.

FACTUAL BACKGROUND

United States' investigation into Megaupload

9. At all material times, the United States has been seeking, or intending to seek, the extradition of the first plaintiff from New Zealand to the United States to face trial on criminal charges.

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

11. The investigation was triggered by a complaint lodged by the Motion Picture Association of America, the members of which include the following Hollywood studios:

    (a) Twentieth Century Fox Film Corporation;

    (b) Paramount Pictures Corporation;

    (c) Sony Pictures Entertainment;

    (d) Universal Studios Productions LLP;

    (e) Walt Disney Studios; and

    (f) Warner Bros. Entertainment (together **Studios**).

12. In April 2014, the Studios commenced civil proceedings in the United States against the first and second plaintiffs (amongst others) seeking damages for over USD$100 million for alleged copyright infringement based on substantially the same allegations

as are at issue in the Extradition Proceeding (**US Civil Proceeding**).

New Zealand's interactions with the Studios and the United States

13. Since not later than March 2010, New Zealand, the United States, and the Studios (and associated persons and entities) have discussed and sought to co-operate in their mutual best interests on matters including (but not limited to):

    (a) Film productions and related commercial and legislative incentives to attract such productions to New Zealand;

    (b) Copyright infringement; and

    (c) The plaintiffs.

14. In or around February 2010, the first plaintiff, via an immigration consultancy, Malcolm Pacific, expressed an interest in migrating to New Zealand.

15. On or about 10 March 2010, the then Minister of Justice, the Honourable Simon Power, met with:

    (a) Michael Ellis of the Motion Picture Association of Asia, a former law enforcement officer and extradition expert; and

    (b) Tony Eaton of the New Zealand Federation Against Copyright Theft.

16. Also in March 2010, the Studios lodged a formal complaint with the DOJ in respect of the second plaintiff.

17. In or about October 2010, the FBI contacted the New Zealand Security Intelligence Service (**NZSIS**) to seek its assistance with the FBI's investigation into the first and second plaintiffs, amongst others.

18. On or about 26 and 27 October 2010, the Prime Minister and other senior ministers (including the Minister for Arts, Culture and Heritage) met with a Hollywood delegation, led by Mr Kevin

Tsujihara, then President of Warner Bros Home Entertainment. Following this meeting:

(a) The Prime Minister agreed to give the content industry significant tax incentives to ensure the filming of *The Hobbit* trilogy would take place in New Zealand.

(b) The employment law of New Zealand was changed at the behest and to the advantage of the content industry.

19. The Minister for Arts, Culture and Heritage was at all relevant times the Hon Christopher Finlayson, who was also the Attorney-General at all relevant times.

First plaintiff's immigration to New Zealand

20. Immigration New Zealand (**INZ**) processed and approved the first plaintiff's residence application on or about 1 November 2010 following "political pressure".

21. An internal NZSIS email dated 22 October 2010 states:

> *INZ [blank] has phoned me to advise that the INZ CEO (Nigel BICKLE) is questioning why this case is on hold. Apparently there is some 'political pressure' to process this case.*

22. Residence was granted to the first plaintiff despite:

(a) His known and disclosed criminal convictions.

(b) The fact that he was known to be the subject of an active and ongoing FBI investigation.

23. On or about 13 October 2010, the NZSIS put the first plaintiff's application for residence on hold following being alerted to the FBI investigation.

24. On or about 14 October 2010, the NZSIS wrote to the Police informing them of the FBI's interest in the first plaintiff.

25. On or about 22 October 2010, NZSIS confirmed that the first plaintiff was not a security concern.

26. As pleaded above, on or about 26-27 October 2010, the Prime Minister met with senior members of the content industry.

27. The NZSIS removed its objection to the first plaintiff being granted residence on or around 28 October 2010:

    (a) On or around 29 October 2010, INZ official Chris Biggs noted:

> *Advice has been received that the FBI has an interest in pursuing an investigation into the applicant [Dotcom] because of his ownership of the company Megaupload Ltd. It would appear that interest relates to the alleged provision of pirated digital content by Megaupload Ltd.*

    (b) Mr Biggs further noted that there was no indication of actual charges, and then determined:

> *It is therefore my opinion that the policy relating to the deferral of an application does not apply in this case as there is no evidence to indicate that the applicant falls within any of the deferring provisions of the policy.*

    (c) On or about 29 October 2010, Mr Biggs signed a Special Direction in relation to the first plaintiff's application. This Special Direction is required under section 7(1)(b) of the Immigration Act 1987 (then in force) due to the first plaintiff's criminal conviction history. However, the Special Direction notes:

> *... we have no evidence to indicate that any law enforcement agency currently has an investigation underway into the applicant [Dotcom] or his business.*

28. On or about 1 November 2010, the first plaintiff was granted residence.

29. Despite having been granted residence, and the Overseas Investment Office having approved his application to buy

approximately 45 hectares of land, the relevant ministers declined the application.

New Zealand assistance with United States' investigation into the plaintiffs

30. On or about 14 October 2010, the NZSIS sent a letter to the Police advising of the FBI's desire for a joint investigation into the first plaintiff.

31. During 2011, Police and the FBI liaised on an ongoing basis in respect of the FBI's investigation into the first plaintiff.

32. New Zealand's involvement was part of a global operation co-ordinated by the United States which was intended to culminate in the simultaneous execution in multiple jurisdictions (including New Zealand and Hong Kong) of arrest warrants, search warrants, and/or restraining orders with a view to extraditing the first plaintiff (amongst others) to the United States to face criminal charges.

33. On or about 31 January 2011, the FBI provided to Police an intelligence memorandum regarding the first and second plaintiffs, amongst others.

34. Police viewed PowerPoint presentations prepared by the FBI on or about:

    (a) 22 March 2011;

    (b) 19 April 2011; and

    (c) 21 June 2011.

35. A teleconference took place between Special Agent Poston of the FBI, Detective Inspector G S Cramer (of Waitematā Police District) and Detective Inspector J Ferguson (of the Organised and Financial Crime Agency of New Zealand (**OFCANZ**)) on 21 April 2011.

36. On or about 21 April 2011, Detective Inspector Ferguson prepared a report in which he identified that the FBI had specifically asked for, amongst other matters:

> *Assistance with extradition, initial explanation and assessment whether the USA offending would meet the thresholds for New Zealand law and later actual assistance in conducting the process.*

37. On or about 29 April 2011, Detective Inspector Cramer prepared a report on the request by the FBI for assistance (**Cramer report**), in which he noted:

(a) That the FBI had requested assistance with ascertaining whether certain United States offences would be extraditable offences in respect of New Zealand;

(b) The FBI's intention to terminate its operation whilst all persons of interest were in New Zealand, likely to be on or around the first plaintiff's birthday on 21 January 2012;

(c) Various other matters for which the FBI requested Police assistance, including information as to property and financial records.

(d) That the potential benefits to Police from assisting the FBI included:

(i) Police being seen on the world stage as contributing to the battle against international crime;

(ii) Sending a clear message to international criminals that New Zealand is not a soft touch or haven for co-ordinating trans-national crime; and

(iii) Development of capacity and capability in the area of cyber crime.

38. OFCANZ reported to Assistant Commissioner of Police, Malcolm Burgess, (**Assistant Commissioner**) in a memorandum dated 29 April 2011. In that memorandum, OFCANZ noted:

(a) That the first plaintiff held New Zealand residency;

(b) The FBI was in a position to terminate its operation, and viewed January 2012 as the ideal time to do so; and

(c) That the FBI investigation was ongoing, and the FBI requested Police assistance.

39. The Assistant Commissioner was also provided a copy of the Cramer report.

40. On 7 July 2011, the Assistant Commissioner wrote to the FBI regarding, among other things, the next steps to be taken by Police to assist the FBI with its intention to take law enforcement action in New Zealand against the first plaintiff and his business associates in January 2012, in concert with New Zealand authorities.

41. In a letter dated 31 August 2011, the FBI formally requested:

(a) Police's involvement in a joint case investigation between the FBI and Police into the New Zealand activities of the plaintiffs; and

(b) A co-ordination meeting with Police in New Zealand in late October or early November 2011 in order to prepare an investigative and operation plan for the anticipated formal charges being brought against those the United States sought to extradite and others.

42. 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 first plaintiff (amongst others associated with the second plaintiff) in New Zealand.

43. Operation Debut was established and undertaken by Police for the benefit of the United States.

44. In or about September 2011, for the purposes of Operation Debut, Sergeant Nigel McMorran of OFCANZ conducted various background checks as to the whereabouts of those individuals the United States sought to extradite and the nature of their connection

with New Zealand, including residency, property ownership, vehicle registration and travel records.

45. On or about 16 September 2011, prior to any formal request by the United States for assistance from New Zealand, the then manager of the New Zealand Customs Service's Integrated Targeting Operations Centre email Immigration New Zealand intelligence staff as follows:

> *During email discussions over night with our Washington DC CLO around another target – he stated that the FBI would be interested in anything we have on Kim DOTCOM so any information we can proactively feed to them on him will buy you many brownie points.*

46. On or about 21 September 2011, a meeting regarding Operation Debut took place in New Zealand between representatives of some or all of the FBI, OFCANZ, Crown Law, and other New Zealand government agencies.

47. On or about 27 October 2011, a meeting regarding Operation Debut took place at Crown Law between representatives of some or all of the FBI, OFCANZ, Crown Law, and other New Zealand government agencies.

48. On or about 31 October 2011, a meeting regarding Operation Debut took place in New Zealand. The Assistant Commissioner, who was also the head of OFCANZ, chaired the meeting. Also present were Detective Inspector Wormald, Detective Sergeant McMorran, Mr Fergus Sinclair of Crown Law, Mr Jay Prabhu (United States Prosecutor) and at least three FBI officers.

49. The agenda at the 31 October 2011 meeting included:

> ***EXTRADITION TOPICS***
>
> - *FBI: Anticipated actions and aims*
> - *Timing required/available to accomplish by 21st January 2012*
> - *Number of subjects to be extradited*

- *Logistics of removing 9 persons from NZ to America under extradition*
- *Request from FBI to Justice Dept*
- *Draft/Final version availability for Crown Law*

Administrative procedures

NZ Procedures/lessons learnt/pit falls

Staff required/available

Long term involvement by NZ Crown/Police/OFCANZ

…

OTHER IDENTIFIED ISSUES

- *The Way Forward:*
  - *Priorities*
  - *Deadlines and obstacles (Statutory holidays, court availability)*
  - *FBI requirements*
  - *Crown law requirements*
  - *NZ Police requirements*

50. On or about 4 November 2011, a meeting regarding Operation Debut took place in New Zealand between representatives of the FBI, OFCANZ, Crown Law, and other New Zealand government agencies.

51. On or about 10 November 2011, a meeting regarding Operation Debut took place in New Zealand between representatives of the FBI, OFCANZ, Crown Law, and other New Zealand government agencies.

52. On or about 15 November 2011, a telephone conference regarding Operation Debut took place between Police, Crown Law and the FBI during which the United States' progress in obtaining indictments and producing a formal request for mutual legal assistance was discussed, amongst other matters.

53. A further teleconference regarding Operation Debut took place on or about 7 December 2011, between Police, Crown Law and the FBI.

UNITED STATES' APPLICATION FOR PROVISIONAL ARREST WARRANT

Indictment

54. On 5 January 2012, the United States District Court for the Eastern District of Virginia issued an indictment dated 5 January 2012 (**Indictment**) charging the plaintiffs (amongst others) with:

(a) Count 1: Conspiracy to commit racketeering;

(b) Count 2: Conspiracy to commit copyright infringement;

(c) Count 3: Conspiracy to commit money laundering;

(d) Count 4: Criminal copyright infringement; and

(e) Count 5: Criminal Copyright Amendment and Aiding and abetting criminal copyright infringement.

55. The Indictment alleged that:

(a) For the purposes of count one (racketeering), the activities of the enterprise were criminal copyright infringement and money laundering; and

(b) For the purposes count three (money laundering), the unlawful activity from which the property involved in the transactions was derived was criminal copyright infringement.

56. On 5 January 2012, the United States District Court for the Eastern District of Virginia issued an arrest warrant for the first plaintiff on charges contained in the Indictment (**US Arrest Warrant**).

57. On 13 January 2012, the Ministry of Foreign Affairs and Trade received a diplomatic note from the United States' embassy

requesting the provisional arrest of the first plaintiff for the purposes of extradition.

Provisional arrest warrant

58. Article 11 of the US-NZ Treaty relevantly provides:

> *Article XI*
>
> *In case of urgency a Contracting Party may apply for the provisional arrest of the person sought pending the presentation of the request for extradition through the diplomatic channel. The application shall contain a description of the person sought, an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a judgment of conviction against that person, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offence been committed, or the person sought been convicted, in the territory of the requested Party.*

59. Section 20 of the Extradition Act 1999 provided:

> ***20 Provisional arrest warrant may be issued***
>
> *(1) A District Court Judge may issue a provisional warrant in the prescribed form for the arrest of a person if the Judge is satisfied on the basis of the information presented to him or her that—*
>
> > *(a) a warrant for the arrest of a person has been issued in an extradition country by a court or a Judge or other person having authority under the law of the extradition country to issue it; and*
> >
> > *(b) the person is, or is suspected of being, in New Zealand or on his or her way to New Zealand; and*
> >
> > *(c) there are reasonable grounds to believe that the person is an extraditable person in relation to the extradition country and the offence for which the person is sought is an extradition offence; and*

> *(d) it is necessary or desirable for an arrest warrant to be issued urgently.*
>
> *(2) A warrant may be issued under this section even though no request for surrender has been made.*

60. Pursuant to s 101B of the Extradition Act 1999, s 131 of the Copyright Act 1994 is deemed to be included in the US-NZ Treaty.

Arrest Warrant Application

61. On 17 January 2012, by its counsel, Crown Law, the United States filed at the District Court a without notice application for a provisional arrest warrant for the arrest of the first plaintiff under s 20 of the Extradition Act 1999 (**Arrest Warrant Application**).

62. In the context of a without notice Arrest Warrant (an *ex parte* application), each of:

(a) The United States;

(b) The Police; and

(c) Crown Law;

owed a duty of candour to the Extradition Court, including a duty to make full disclosure of all matters that could reasonably affect the exercise the discretion of the Court in relation to the merits of the application.

63. The Arrest Warrant Application relevantly stated:

> *(c) There are reasonable grounds to believe that the said KIM DOTCOM [and others] are extraditable persons in relation to the extradition country and the offences for which they are sought are extradition offences; …*

The first plaintiff relies on the Arrest Warrant Application as if pleaded in full.

64. The Arrest Warrant Application was supported by:

(a) An affidavit sworn by Detective Sergeant McMorran on 18 January 2012 (**First McMorran Affidavit**); and

(b) A memorandum of counsel in support of the Arrest Warrant Application dated 18 January 2012 (**Arrest Warrant Memorandum**).

65. No other documents were before the District Court in support of the Arrest Warrant Application besides the Arrest Warrant Application itself, the First McMorran Affidavit and the Arrest Warrant Memorandum (together **Arrest Warrant Documents**).

66. The First McMorran Affidavit did not set out any basis for the allegation that the offences for which the first plaintiff was sought in the United States were extradition offences.

67. The predicate offence relied upon by the United States for the offences in the Indictment was criminal copyright infringement.

68. The Arrest Warrant Memorandum stated:

> *34. The US copyright charges have a New Zealand equivalent in section 131 of the Copyright Act 1994 – dealing with infringing objects – which has a maximum penalty of five years' imprisonment. This offence is deemed to be an extradition offence punishable in both countries by more than four years' imprisonment, and the offence is alleged to involve an organised criminal group as defined in article 2(a) of the TOC convention.*
>
> (emphasis added)

The first plaintiff relies on the Arrest Warrant Memorandum as if pleaded in full.

69. Under s 20(1)(c) of the Extradition Act 1999 the District Court Judge was required to be satisfied that (amongst other criteria) there were reasonable grounds to believe that the offence for which the first plaintiff was sought was an extradition offence.

70. None of the Arrest Warrant Documents:

(a) Identified the offence under section 131 of the Copyright Act 1994 that was alleged to be the New Zealand equivalent of the United States copyright offences;

(b) Addressed whether files were objects for the purposes of section 131 of the Copyright Act 1994; or

(c) Referred to any cases decided under section 131 of the Copyright Act 1994.

71. On 18 January 2012, the District Court issued a provisional arrest warrant in respect of the first plaintiff (**Arrest Warrant**). The Arrest Warrant relevantly stated:

> *(a) Kim DOTCOM is accused of the following offences related to criminal copyright and money laundering:*
>
> *Count One: Conspiracy to commit racketeering, in violation of Title 18, United States Code, section 1962(d), which carries a maximum penalty of twenty years of imprisonment.*
>
> *Count Two: Conspiracy to commit copyright infringement, in violation of Title 18, United States Code, Section 371, which carries a maximum penalty of five years of imprisonment.*
>
> *Count Three: Conspiracy to commit money laundering, in violation of Title 18, United States Code, Section 1956(h), which carries a maximum penalty of twenty years of imprisonment.*
>
> *Count Four: Criminal copyright infringement by distributing a work on a computer network, and aiding and abetting of criminal copyright infringement, in violation of Title 18, United States Code, Sections 2 and 2319, and Title 17, United States Code, Section 506, which carries a maximum penalty of five years of imprisonment.*
>
> *Count Five: Criminal copyright infringement by electronic means, and aiding and abetting of criminal copyright infringement, in violation of Title 18, United States Code, Sections 2 and 2319, and Title 17, United States Code, Section 506, which carries a maximum penalty of five years of imprisonment.*
>
> *…*
>
> *I am satisfied that –*
>
> *…*
>
> *(c) There are reasonable grounds to believe that –*
>
> *…*
>
> *(ii) The offences for which Kim DOTCOM is sought are extradition offences within the meaning of section 4 of the Extradition Act 1999;*

The first plaintiff relies on the Arrest Warrant as if pleaded in full.

72. The Arrest Warrant did not identify any offence, whether under section 131 of the Copyright Act 1994 or otherwise, that was alleged to be the New Zealand equivalent of the United States copyright offences.

73. On 20 January 2012, Police entered onto the first plaintiff's residences at Mahoenui Valley Property and 5H The Prom in order to execute the Arrest Warrant, amongst others.

74. During their presence on the Mahoenui Valley Property, Police purported to arrest the first plaintiff pursuant to the Arrest Warrant.

75. On 20 January 2012, while the first plaintiff was in custody and unable to respond, the Police issued three press releases regarding the execution of the Arrest Warrants.

76. The press releases were misleading and intended to, and did, create a narrative that cast the plaintiffs in an unfavourable light, and the United States and Police in a favourable light, in the eyes of the public, not only in New Zealand but also internationally.

77. The first plaintiff was then detained in a remand facility until 22 February 2012.

78. On 22 February 2012, the District Court ordered that the first plaintiff be remanded on bail subject to a range of conditions.

ARREST WARRANT INVALID

***Ortmann v United States of America* [2017] NZHC 189**

79. In *Ortmann v United States of America* (DC North Shore CRI-2012-092-1647), the District Court held that the first plaintiff was eligible for surrender to the United States, including on the basis of material contained in the supplemental record of case that had been obtained from the devices seized pursuant to the Search Warrant.

80. In *Ortmann v United States of America* [2017] NZHC 189, on appeal and judicial review from the decision of the District Court,

the High Court held that the first plaintiff was eligible for surrender to the United States.

81. On appeal, in *Ortmann v United States of America* [2017] NZHC 189, the High Court made the following findings in respect of the counts in the 5 January 2012 indictment:

(a) Count 1 (racketeering) and count three (money laundering) depend on the predicate offending of criminal copyright infringement (paragraph [56]).

(b) Count 1 (racketeering) is an umbrella charge alleging a criminal enterprise formed for the purpose of committing criminal copyright infringement (covered by counts 2 and 4 to 8) and money laundering (count 3) (paragraph [56]).

(c) The conduct alleged in count 2 would not, if carried out in New Zealand, amount to an offence under section 131 of the Copyright Act 1994 (paragraph [192]).

(d) Counts 4 and 5 relate to specific instances of alleged copyright infringement (paragraphs [195] and [200]).

(e) The conduct alleged in counts 4 and 5 would not, if carried out in New Zealand, amount to an offence under section 131 of the Copyright Act 1994 (paragraphs [196] and [201]).

Material non-disclosure by and/or on behalf of United States in arrest warrant application

82. Article IX of the US-NZ Treaty provides:

Article IX

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

83. As pleaded at paragraph 61 hereof, the Arrest Warrant Application was made without notice.

84. In addition, as the requesting state in the Extradition Proceeding, was under a separate duty of candour.

85. Crown Law was acting on behalf of the United States in a solicitor-client relationship and as central authority under the Extradition Act.[1]

86. The Police were acting on behalf of the United States in preparing, seeking and executing the Arrest Warrant.

87. Accordingly, in making and pursuing the Arrest Warrant Application, each of the United States, the Attorney-General, Crown Law and the Police owed an ongoing duty of candour to the District Court to disclose any evidence that would render worthless, undermine or seriously detract from the evidence upon which they relied.

88. Each of the Attorney-General, Crown Law and the Police owed an ongoing correlative duty to the extradition court to use their best endeavours to ensure that the United States complied with its duty of candour.

89. In the context of the Arrest Warrant Application, the duty of candour required the United States, the Attorney-General, Crown Law and the Police to disclose to the District Court:

    (a) All facts that could reasonably have been regarded as relevant to the District Court in determining the Arrest Warrant Application, including (without limitation) any information relevant to whether the District Court Judge could be satisfied that there were reasonable grounds to believe:

        (i) The US Arrest Warrant had been validly issued; and

        (ii) The offence for which the first plaintiff was sought was an extradition offence under the Extradition Act 1999.

[1] *Dotcom v United States of America* [2014] 1 NZLR 355, at [101].

(b) Any defence that might have been available to the first plaintiff.

90. This duty applied not only at the time the Arrest Warrant Application was made and heard but also continued to apply after the Arrest Warrant was issued.

91. In making the Arrest Warrant Application, the United States, the Attorney-General, Crown Law and the Police:

(a) Were recklessly indifferent as to whether there was any reasonable basis on which to believe that the offences for which the first plaintiff was sought were extradition offences by virtue of s 131 of the Copyright Act 1994, despite having had since 2010 to consider this issue.

(b) Failed, in breach of Article XI of the US-NZ Treaty and the duty of candour, to disclose that there was no reasonable basis on which to believe that the offences for which the first plaintiff was sought were extradition offences by virtue of s 131 of the Copyright Act 1994, including:

(i) At the relevant time, there had never been a case in New Zealand in which online infringement of copyright had been found to be an offence under s 131 of the Copyright Act 1994;

(ii) That s 92B of the Copyright Act 1994 provides internet service providers with a “safe harbour” from criminal liability for the conduct of their users in certain circumstances; and

(iii) That, if criminal copyright infringement was not an extradition offence, none of the other offences in the US Arrest Warrant (i.e. racketeering and money laundering) were extradition offences because they depended on the predicate offence of criminal copyright infringement.

92. The information pleaded at paragraph 90 was:

(a) Information relevant to the role of the District Court under s 20 of the Extradition Act and should have been disclosed to the District Court; but

(b) Was not disclosed by any of the United States, the Attorney-General, Crown Law and the Police.

93. The Arrest Warrant was therefore issued on the basis of material non-disclosure by Crown Law.

94. As a result of the material non-disclosure, the process by which the District Court and High Court found the first plaintiff eligible for surrender was in breach of Article IX of the US-NZ Treaty because:

(a) The process by which the first plaintiff was brought before the extradition court, and the resulting Extradition Proceeding, was not in accordance with New Zealand law; and

(b) As a result, the first plaintiff was deprived of his right under section 27 of the New Zealand Bill of Rights Act 1990 to a fair hearing of the Arrest Warrant Application in light of all relevant facts.

95. Accordingly, the Arrest Warrant, and all steps taken pursuant to it, are therefore unlawful and invalid.

No reasonable grounds on which to believe offences for which plaintiff was sought were extradition offences

96. The Arrest Warrant was invalid because there were no reasonable grounds on which the District Court could have been satisfied for the purposes of s 20(1)(c) of the Extradition Act 1999 that there were reasonable grounds to believe that the offence for which the first plaintiff was sought was an extradition offence.

97. At the time the Arrest Warrant Application was made:

(a) The warrant on which the United States relied for the purposes of s 20(1)(a) of the Extradition Act 1999 was the US Arrest Warrant.

(b) The offences for which the first plaintiff was sought, and on which the United States relied for the purposes of s 20(1)(c) of the Extradition Act 1999, were those in the Indictment.

(c) The Superseding Indictment had not been issued.

(d) The Superseding US Arrest Warrant had not been issued.

Count two – conspiracy to commit copyright infringement is not an extradition offence

98. For the purposes of s 20(1)(c) of the Extradition Act 1999, the Arrest Warrant Memorandum alleged that the conduct alleged to comprise the predicate offence of criminal copyright infringement under count two would, had it occurred in New Zealand, amount to an offence under s 131 of the Copyright Act 1994.

99. In *Ortmann v United States of America* [2017] NZHC 189, the High Court held that:

> *[192] I conclude, in respectful disagreement with the District Court, that the conduct alleged in count 2 is not an offence against s 131(1)(c), (d)(ii) or (iii) of the Copyright Act. For the reasons given, I consider that these offences, which all relate to "an object", do not apply to online infringement as is alleged here. It follows that s 131 of the Copyright Act does not provide an available extradition pathway.*

100. None of the Arrest Warrant Application, Arrest Warrant Memorandum or the First McMorran Affidavit alleged that such conduct would amount to any other offence under New Zealand law besides s131 of the Copyright Act 1994.

101. Accordingly, on the information before the District Court at the relevant time, there were no reasonable grounds on which to believe for the purposes of s 20(1)(c) of the Extradition Act 1999 that the offence for which the first plaintiff was sought under count two was an extradition offence.

Count four – Criminal copyright infringement by distributing a work on a computer network is not an extradition offence

102. For the purposes of s 20(1)(c) of the Extradition Act 1999, the Arrest Warrant Memorandum alleged that the conduct alleged to comprise the criminal copyright infringement under count four would, had it occurred in New Zealand, amount to an offence under s 131 of the Copyright Act 1994.

103. In *Ortmann v United States of America* [2017] NZHC 189, the High Court held that, for the same reasons as in relation to count two, the alleged copyright infringement under count four would not, had it occurred in New Zealand, amount to an offence under s 131 of the Copyright Act 1994 (paragraph [196]).

104. None of the Arrest Warrant Application, Arrest Warrant Memorandum or the First McMorran Affidavit alleged that the conduct under count four would amount to any other offence under New Zealand law besides s 131 of the Copyright Act 1994.

105. Accordingly, on the information before the District Court at the relevant time, there were no reasonable grounds on which to believe for the purposes of s 20(1)(c) of the Extradition Act 1999 that the offence for which the first plaintiff was sought under count four was an extradition offence.

Count five – Criminal copyright infringement by electronic means is not a copyright offence

106. For the purposes of s 20(1)(c) of the Extradition Act 1999, the Arrest Warrant Memorandum alleged that the conduct alleged to comprise the criminal copyright infringement under count five would, had it occurred in New Zealand, amount to an offence under s 131 of the Copyright Act 1994.

107. In *Ortmann v United States of America* [2017] NZHC 189, the High Court held that, for the same reasons as in relation to count two, the alleged copyright infringement under count five would not, had it occurred in New Zealand, amount to an offence under s 131 of the Copyright Act 1994 (paragraph [201]).

108. None of the Arrest Warrant Application, Arrest Warrant Memorandum or the First McMorran Affidavit alleged that such conduct would amount to any other offence under New Zealand law besides s 131 of the Copyright Act 1994.

109. Accordingly, on the information before the District Court at the relevant time, there were no reasonable grounds on which to believe for the purposes of s 20(1)(c) of the Extradition Act 1999 that the offence for which the first plaintiff was sought under count five was an extradition offence.

Count one – Conspiracy to commit racketeering is not an extradition offence

110. For the purposes of s 20(1)(c) of the Extradition Act 1999, the Arrest Warrant Memorandum alleged that the conduct alleged to comprise the racketeering offence under count one would, had it occurred in New Zealand, amount to an offence under s 98A of the Crimes Act 1961 (paragraph 33).

111. Section 98A(2) of the Crimes Act 1961 provided:

> ***98A Participation in organised criminal group***
>
> *(1) Every person commits an offence and is liable to imprisonment for a term not exceeding 10 years who participates in an organised criminal group—*
>
> > *(a) knowing that 3 or more people share any 1 or more of the objectives (the **particular objective or particular objectives**) described in paragraphs (a) to (d) of subsection (2) (whether or not the person himself or herself shares the particular objective or particular objectives); and*
> >
> > *(b) either knowing that his or her conduct contributes, or being reckless as to whether his or her conduct may contribute, to the occurrence of any criminal activity; and*
> >
> > *(c) either knowing that the criminal activity contributes, or being reckless as to whether the criminal activity may contribute, to achieving the particular objective or particular objectives of the organised criminal group.*

> *(2) For the purposes of this Act, a group is an organised criminal group if it is a group of 3 or more people who have as their objective or one of their objectives—*
>
> > *(a) obtaining material benefits from the commission of offences that are punishable by imprisonment for a term of 4 years or more; or*
> >
> > *(b) obtaining material benefits from conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of offences that are punishable by imprisonment for a term of 4 years or more; or*
> >
> > *(c) the commission of serious violent offences (within the meaning of section 312A(1)); or*
> >
> > *(d) conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of serious violent offences (within the meaning of section 312A(1)).*
>
> *(3) A group of people is capable of being an organised criminal group for the purposes of this Act whether or not—*
>
> > *(a) some of them are subordinates or employees of others; or*
> >
> > *(b) only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or*
> >
> > *(c) its membership changes from time to time.*

112. In *Ortmann v United States of America* [2017] NZHC 189, the High Court held that:

(a) Racketeering (count one) depended on the predicate offence of criminal copyright infringement (paragraph [56]); and

(b) The alleged predicate offence did not amount to an offence under s 131 of the Copyright Act 1994.

113. None of the Arrest Warrant Application, Arrest Warrant Memorandum or the First McMorran Affidavit alleged any other predicate offence for the purposes of s 98A(2) of the Crimes Act 1961 besides s 131 of the Copyright Act 1994.

114. Accordingly, had the alleged conduct occurred in New Zealand, there was no predicate offence under New Zealand law for the purposes of s 98A of the Crimes Act 1961 alleged in the Arrest Warrant Documents.

115. Accordingly, on the information before the District Court at the relevant time, there were no reasonable grounds to believe for the purposes of s 20(1)(c) of the Extradition Act 1999 that the offence for which the first plaintiff was sought under count one was an extradition offence.

Count three – Conspiracy to commit money laundering is not an extradition offence

116. For the purposes of s 20(1)(c) of the Extradition Act 1999, the Arrest Warrant Memorandum alleged that the conduct alleged to comprise the money laundering offence under count three amounted to an offence under:

(a) Article II item 19 of the US-NZ Treaty (paragraph 33); and

(b) Had it occurred in New Zealand, s 243 of the Crimes Act 1961.

117. In *Ortmann v United States of America* [2017] NZHC 189, the High Court held that:

(a) Money laundering (count three) depended on the predicate offence of criminal copyright infringement (paragraph [56]); and

(b) The alleged predicate offence did not amount to an offence under s 131 of the Copyright Act 1994.

118. None of the Arrest Warrant Application, Arrest Warrant Memorandum or First McMorran Affidavit alleged any other predicate offence besides criminal copyright infringement.

119. Accordingly, on the information before the District Court at the relevant time, there were no reasonable grounds to believe for the purposes of s 20(1)(c) of the Extradition Act 1999 that the offence

for which the first plaintiff was sought under count three was an extradition offence because there was no predicate offence which also amounted to an extradition offence.

120. As a result of the breaches pleaded at paragraphs 96 to 119 hereof, the Arrest Warrant was invalid.

No reasonable grounds on which to believe US Arrest Warrant for the first plaintiff had been issued in the United States

Superseding indictment

121. On 16 February 2012, apprehending that the United States copyright infringement offences were not extradition offences by virtue of s 131 of the Copyright Act 1994, the United States procured the United States District Court for the Eastern District of Virginia to issue a superseding indictment (**Superseding Indictment**).

122. Under United States law, the effect of the Superseding Indictment was to dismiss the Indictment.

123. The Superseding Indictment charged the first plaintiff (amongst others) with:

(a) Count 1: Conspiracy to commit racketeering;

(b) Count 2: Conspiracy to commit copyright infringement;

(c) Count 3: Conspiracy to commit money laundering;

(d) Count 4: Criminal copyright infringement;

(e) Counts 5-8: Criminal copyright infringement by electronic means and aiding and abetting criminal copyright infringement;

(f) Counts 9-13: Fraud by wire and aiding and abetting fraud by wire.

124. The Superseding Indictment differed from the Indictment in that (without limitation):

(a) Counts 1-5 of the Superseding Indictment, and in particular count 2 (conspiracy to commit copyright infringement), were pleaded differently to counts 1-5 of the Indictment.

(b) Counts 6-13 were added.

(c) Additional "General Allegations" were pleaded.

125. On 16 February 2012, based on the Superseding Indictment, the United States District Court for the Eastern District of Virginia issued a new arrest warrant in respect of the offences alleged under counts 1-13 of the Superseding Indictment (**Superseding US Arrest Warrant**).

Superseding US Arrest Warrant

126. The US Arrest Warrant on the basis of which the District Court issued the Arrest Warrant was superseded and therefore ceased to be of legal effect on 16 February 2012.

127. At no time subsequently has any arrest warrant under the Extradition Act 1999 been sought or issued in respect of the first plaintiff on the basis of the US Superseding Arrest Warrant.

128. Even if it was valid at the point it was issued (which is denied), the Arrest Warrant pursuant to which the first plaintiff was brought before the Extradition Court and the Extradition Proceeding was commenced has been invalid at all times since 16 February 2012.

129. Despite this, none of the United States, Attorney-General, Crown Law or the Police disclosed to the first plaintiff or the District Court that, under United States law, the effect of the Superseding Indictment was to render invalid the Indictment and the US Arrest Warrant.

Request for surrender

130. On 27 February 2012, the United States purported to issue a request for the surrender of the first plaintiff under s 18 of the Extradition Act 1999 (**Request for Surrender**).

131. The Request for Surrender was expressly made on the basis of:

(a) The Superseding Indictment; and

(b) The Superseding US Arrest Warrant.

132. At the relevant time, s 23 of the Extradition Act 1999 provided:

> ***23 Procedure following arrest***
>
> *…*
>
> *(4) If the person has been arrested on a provisional arrest warrant issued under section 20, the following provisions apply:*
>
> > *(a) the hearing of the proceedings must not proceed until the court receives from the Minister a notice in writing stating that a request for the surrender of the person has been transmitted to the Minister under section 18:*
> >
> > *(b) pending the receipt of the notice from the Minister, the proceedings may from time to time be adjourned:*
> >
> > *(c) if the court does not receive the notice—*
> >
> > > *(i) within the time prescribed in an extradition treaty that is in force between the extradition country and New Zealand; or*
> > >
> > > *(ii) if no time is prescribed in a treaty, or no treaty is in force, within such reasonable time as the court may fix,—*
> >
> > *the court must discharge the person:*
> >
> > *(d) the court may from time to time, in its discretion, extend any time fixed by it under paragraph (c)(ii).*

133. At the relevant time, s 18 of the Extradition Act 1999 provided:

> ***18 Request for surrender***
>
> *(1) A request by an extradition country for the surrender of a person who—*

> *(a) is an extraditable person in relation to that country; and*
>
> *(b) is, or is suspected of being, in New Zealand or on his or her way to New Zealand,—*
>
> *must be transmitted to the Minister of Justice.*
>
> *(2) The request must be made—*
>
> *(a) by a diplomatic or consular representative, or a Minister, of the country that seeks the person's surrender; or*
>
> *(b) by such other means as is prescribed in a treaty (if any) in force between New Zealand and the extradition country or in any undertakings between New Zealand and the extradition country.*
>
> *(3) The request must be accompanied by duly authenticated supporting documents.*
>
> *(4) In this section,* ***supporting documents****, in relation to an extradition offence, means,—*
>
> *(a) if the offence is an offence of which the person is accused,—*
>
> *(i) a warrant for the arrest of the person for the offence issued in the extradition country by a court or a Judge or other person having authority under the law of the extradition country to issue it; or*
>
> *(ii) a copy of such a warrant:*
>
> *…*
>
> (emphasis added)

134. Under s 18 of the Extradition Act 1999 the arrest warrant to be included in the supporting documents must be the same arrest warrant as provided in support of the application for the arrest warrant.

135. The US Request for Surrender was made on the basis of the Superseding US Arrest Warrant.

136. The US Request for Surrender therefore did not comply with s 18 of the Extradition Act 1999 and was invalid.

Minister's notice invalid

137. On 1 March 2012, the third defendant purported to issue a notice under ss 18(1) and 23(4) of the Extradition Act 1999 (**Minister's Notice**).

138. The Minister's Notice provided:

> ***NOTICE UNDER SECTIONS 18(1) AND 23(4) OF THE EXTRADITION ACT 1999***
>
> ***Whereas***
>
> *1 On 1 September 1999 the Extradition Act 1999 (the Act) came into force;*
>
> *2 Part 3 of the Act applies to the **UNITED STATES OF AMERICA** by virtue of it being party to the Treaty on Extradition between New Zealand and the United States of America 1970 (the Treaty);*
>
> *3 On 18 January 2012 the North Shore District Court issued a provisional warrant for the arrest of **KIM DOTCOM** pursuant to section 20 of the Act and Article XI of the Treaty;*
>
> *4 On 1 March 2012 a formal request from the **UNITED STATES OF AMERICA** for the surrender of **KIM DOTCOM** was transmitted to the Minister of Justice in accordance with section 18 of the Act;*
>
> *5 Section 23(4)(a) of the Act provides that the hearing of the proceedings must not proceed until the court receives from the Minister of Justice a notice in writing stating that a request for the surrender of the person has been transmitted to the Minister under section 18.*
>
> ***NOW THEREFORE**, pursuant to section 18(1) and section 23(4) of the Extradition Act 1999,1 hereby notify the North Shore District Court that a request for the surrender of KIM **DOTCOM** to the **UNITED STATES OF AMERICA** has been transmitted to me by the authorities of the **UNITED STATES OF AMERICA** in accordance with the provisions of the Act.*

139. The Request for Surrender was made, and the Minister's Notice under s 23(4) of the Extradition Act 1999, was given on the basis of:

(a) The invalid Arrest Warrant; and/or

(b) Contrary to the Extradition Act 1999, a different indictment and different foreign arrest warrant from the arrest warrant pursuant to which the first plaintiff was brought before the Extradition Court.

140. The Minister's Notice was therefore invalid for the purposes of s 23(4)(a) of the Extradition Act 1999 because it stated that a request for surrender of the first plaintiff had been transmitted to the third defendant under s 18 of the Extradition Act 1999 when, in fact, the US Request for Surrender did not comply with s 18 of the Extradition Act 1999.

141. At no time has the United States:

(a) Sought an arrest warrant based on the Superseding Indictment and/or the Superseding US Arrest Warrant; and/or

(b) Disclosed to the District Court that, under United States law, the effect of the Superseding Indictment was to dismiss the Indictment such that the Indictment was of no legal effect.

142. No valid notice under s 23(4)(a) of Extradition Act 1999 has ever been submitted.

143. Accordingly, pursuant to s 23(4)(a) of the Extradition Act 1999, the Extradition Proceeding could not lawfully have proceeded and is ultra vires and a nullity.

Failure to discharge first plaintiff in breach of US-NZ Treaty

144. Article XI of the US-NZ Treaty provides:

Article XI

> *In case of urgency a Contracting Party may apply for the provisional arrest of the person sought pending the presentation of the request for extradition through the diplomatic channel. The application shall contain a description of the person sought, an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a judgment of conviction against that person, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offence been committed, or the person sought been convicted, in the territory of the requested Party.*
>
> *On receipt of such an application the requested Party shall take the necessary steps to secure the arrest of the person claimed.*
>
> *A person arrested upon such an application shall be set at liberty upon the expiration of 45 days from the date of his arrest if a request for his extradition accompanied by the documents specified in Article X shall not have been received. However, this stipulation shall not prevent the institution of proceedings with a view to extraditing the person sought if the request is subsequently received.*
>
> (emphasis added)

145. No valid request for surrender having been received from the United States before the expiration of 45 days from the date of the first plaintiff's arrest, the first plaintiff should have been set at liberty but was not.

146. In breach of Article XI of the US-NZ Treaty and the duty of candour, the United States, the Attorney-General, Crown Law and the Police failed to disclose that the United States' extradition request was based on a different indictment from the one on the basis of which the Arrest Warrant had been issued.

147. As a result of this breach of the duty of candour, the first plaintiff has not been set at liberty, and the Extradition Proceeding has proceeded for approximately six years, and continues to proceed, despite the fact that:

(a) No valid request for the first plaintiff's extradition accompanied by the documents specified in Article X of the US-NZ Treaty had been received; and

(b) 45 days have passed from the date of the first plaintiff's arrest.

148. Accordingly, even if the Arrest Warrant was valid when issued (which is denied), the Extradition Proceeding has been invalid and ultra vires since the expiry of 45 days from 20 January 2017.

Defendants knew or were recklessly indifferent to whether alleged conduct was not an offence under s 131 of Copyright Act 1994

149. Despite being requested to do so by the first plaintiff, the United States declined to advise the first plaintiff of the offences under the US-NZ Treaty on the basis of which it asserted the United States offences were extradition offences.

150. By minute dated 18 September 2013, the District Court ordered that the United States provide such information to the first plaintiff and his co-respondents.

151. By letter dated 31 October 2013, on behalf of the United States, Meredith Connell advised counsel for the first plaintiff of the offences on which it intended to rely.

152. The 31 October 2013 letter raised for the first time predicate offences under the Crimes Act 1961.

153. Accordingly, by not later than 31 October 2013, the United States, the Attorney-General, and Crown Law knew that the alleged conduct would not constitute an offence under s 131 of the Copyright Act 1994 had it been carried out in New Zealand.

154. On or about 19 December 2017, the former Solicitor-General, who was the Solicitor-General at the time of the Arrest Warrant Application, publicly acknowledged in relation to the Extradition Proceeding that "we could have had better legal advice earlier on

in the piece", which is understood to be a reference to Crown Law, the Attorney-General and/or the United States.

RESTRAINING ORDERS

155. As part of the United States' global, co-ordinated strategy for prosecuting the plaintiffs, the United States sought restraining orders over all of the plaintiffs' assets worldwide.

156. All of the plaintiffs' material assets worldwide have been restrained on behalf of the United States since not later than 18 January 2012.

Foreign restraining orders

157. On 10 January 2012, on the application of the United States, the United States District Court for the Eastern District of Virginia issued a post-indictment restraining order in respect of assets of the plaintiffs (**First Foreign Restraining Order**).

158. The First Foreign Restraining Order purported to restrain all of the plaintiffs' material assets in New Zealand and Hong Kong.

159. On 25 January 2012, the United States District Court made or purported to make a supplemental post-indictment restraining order (**Second Foreign Restraining Order**).

160. The Second Foreign Restraining Order purported to restrain all of the plaintiffs' material assets in New Zealand and Hong Kong.

New Zealand restraining orders

161. On 13 January 2012, pursuant to the MACMA, the United States requested assistance from the Attorney-General in relation to the First Foreign Restraining Order.

162. On 17 January 2012, the Attorney-General authorised the Commissioner to apply to register the First Foreign Restraining Order in New Zealand.

163. On 17 January 2012, the Commissioner applied *ex parte* in CIV-2012-404-33 *Commissioner of Police v Dotcom & Ors* to the High

Court at Auckland to register the First Foreign Restraining Order (**First Registration Application**).

164. On 18 January 2012, the High Court made orders purportedly granting the without notice registration of the First Foreign Restraining Order.

165. On 25 January 2012, the United States Central Authority made a further request under the MACMA to the Attorney-General for assistance in relation to the Second Foreign Restraining Order.

166. On 30 January 2012, having concluded that the application on 17 January 2012 to register the First Foreign Restraining Order was "procedurally premature", the Commissioner applied without notice for an interim foreign restraining order.

167. On 30 January 2012, the High Court granted the interim foreign restraining order over the first plaintiff's assets.

168. On 30 January 2012, the Attorney-General purported to authorise the Commissioner to apply to register the Second Foreign Restraining Order.

169. On 30 January 2012, the Commissioner applied to the High Court at Auckland to register the First and Second Foreign Restraining Orders (**Second Registration Application**).

170. On 16 March 2012, the High Court ordered the registration orders made on 18 January 2012 were null and void and of no legal effect.

171. On 20 March 2012, the Commissioner discontinued the Second Application for Registration of the First and Second Foreign Restraining Orders because the purported authorisation dated 30 January 2012 was invalid.

172. On 20 March 2012, the Commissioner made a third registration application, for registration of the First and Second Foreign Restraining Orders (**Third Registration Application**).

173. The Third Registration Application was made pursuant to a purported authorisation dated 16 March 2012 by the Deputy

Solicitor-General, Cameron Mander, pursuant to a delegation from the Attorney-General under sections 9A and 9C of the Constitution Act 1986 (**16 March 2012 Authorisation**).

174. The 16 March 2012 Authorisation relevantly stated:

> *…in my opinion nothing in the Mutual Assistance in Criminal Matters Act 1992 precludes the granting of this request.*

175. On 18 April 2012, the High Court granted the Third Registration Application for registration of the First and Second Foreign Restraining Orders.

176. On 21 March 2014, the Commissioner applied to the High Court for an extension of the duration of the 18 April 2012 restraining orders.

177. On 21 August 2014, the Court of Appeal granted the extension, thereby extending the expiry of the 18 April 2012 restraining orders until 18 April 2015.

178. Subject to variations ordered by the High Court, the first plaintiff's assets remained restrained under the 18 April 2012 restraining orders until their expiry three years later on 18 April 2015.

179. From 18 April 2015, the first plaintiff's New Zealand assets have been frozen pursuant to freezing orders granted in favour of the Studios under Part 32 of the High Court Rules in CIV-2014-404-1272 *Twentieth Century Fox Film Corporation & Ors v Dotcom & Ors*.

Hong Kong restraint order

180. On a date unknown but prior to 17 January 2012, the United States made a request for assistance from Hong Kong under Hong Kong's Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (**MLAO**) (**Hong Kong request**).

181. Despite request by the plaintiffs' solicitors, the Secretary for Justice of Hong Kong has declined to provide a copy of the Hong Kong request on grounds including that the United States requested that it be kept confidential.

182. On 17 January 2012 (Hong Kong time) the Secretary for Justice of Hong Kong filed an ex parte originating summons in the High Court of the Hong Kong Special Administrative Region Court of First Instance in HCMP 116/2012 seeking a restraint order over the plaintiffs' Hong Kong assets as set out in the draft order exhibited to the affirmation of Yu Yat-Ming Sunny dated 17 January 2012 (**Sunny affirmation**) filed in support of the summons (**Restraint Order**).

External confiscation order required

183. The application for the Restraint Order was made under s 27 of the MLAO. Section 27 provides:

> ***27. Requests to Hong Kong for enforcement of external confiscation order***
>
> *(1) Where a place outside Hong Kong requests the Secretary for Justice to make arrangements—*
>
> *(a) for the enforcement of an external confiscation order; or*
>
> *(b) where an external confiscation order may be made in a proceeding which has been or is to be instituted in that place, to restrain dealing in any property against which the order may be enforced or which may be available to satisfy the order,*
>
> *then the Secretary for Justice may, in relation to that request, act for that place under the provisions of Schedule 2.*
>
> *(2) A request under subsection (1) shall, unless the contrary is shown, be deemed to constitute the authority of the place outside Hong Kong concerned for the Secretary for Justice to act on its behalf in any proceedings in the Court of First Instance under section 28 or under any provision of Schedule 2.*

184. Schedule 2, s 7 of the MLAO provides:

> ***7. Restraint orders***
>
> *(1) The Court of First Instance may by order (in this Schedule referred to as a restraint order (限制令)) prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order.*
>
> *(2) A restraint order may apply to any realisable property, including property transferred to a person after the making of the order.*
>
> *(3) This section shall not have effect in relation to any property for the time being subject to a charge under section 8.*
>
> *(4) A restraint order—*
>
> > *(a) may be made only on an application by the Secretary for Justice or, in a case where an external confiscation order has been registered under section 28 of this Ordinance, by a receiver appointed under section 9 or the Secretary for Justice; (Amended L.N. 362 of 1997)*
> >
> > *(b) may be made on an ex parte application to a judge in chambers; and*
> >
> > *(c) may, notwithstanding anything in Order 11 of the Rules of the High Court (Cap. 4 sub. leg. A), provide for service on, or the provision of notice to, persons affected by the order in such manner as the Court of First Instance may direct.*

185. Schedule 2, s 6 of the MLAO provides:

> ***6. Cases in which restraint orders and charging orders may be made***
>
> *(1) The powers conferred on the Court of First Instance by sections 7(1) and 8(1) are exercisable where—*
>
> > *(a) proceedings have been instituted in a place outside Hong Kong;*

> *(b) the proceedings have not been concluded; and*
>
> *(c) either an external confiscation order has been made in the proceedings or it appears to the Court of First Instance that there are reasonable grounds for believing that an external confiscation order may be made in them.*
>
> *(2) Those powers are also exercisable where the Court of First Instance is satisfied that proceedings are to be instituted in a place outside Hong Kong and it appears to the court that an external confiscation order may be made in them.*
>
> *(3) Where the Court of First Instance has made an order under section 7(1) or 8(2) by virtue of subsection (2), it shall discharge the order if the proposed proceedings are not instituted within such time as the Court of First Instance considers reasonable.*

186. Pursuant to s 2 of the MLAO:

> *"external confiscation order" (外地沒收令) means an order, made under the law of a place outside Hong Kong, for the purpose of—*
>
> *(a) recovering (including forfeiting and confiscating)—*
>
> *(i) payments or other rewards received in connection with an external serious offence or their value;*
>
> *(ii) property derived or realised, directly or indirectly, from payments or other rewards received in connection with an external serious offence or the value of such property; or*
>
> *(iii) property used or intended to be used in connection with an external serious offence or the value of such property; or*
>
> *(b) depriving a person of a pecuniary advantage obtained in connection with an external serious offence, and whether the*

> *proceedings which gave rise to that order are criminal or civil in nature, and whether those proceedings are in the form of proceedings against a person or property;*

187. The "external confiscation order" contemplated in the Indictment and Superseding Indictment was a post-conviction forfeiture order.

188. Accordingly, the contemplated external confiscation order could not be made unless the first plaintiff was convicted in the United States. The first plaintiff could not be convicted in the United States if he was not first arrested, then found eligible for surrender, then in fact surrendered to the United States to face trial.

Double criminality required

189. Section 5(1)(g) of the MLAO provides:

> ***5. Refusal of assistance***
>
> *(1) A request by a place outside Hong Kong for assistance under this Ordinance shall be refused if, in the opinion of the Secretary for Justice—*
>
> *…*
>
> *(g) the request relates to an act or omission that, if it had occurred in Hong Kong, would not have constituted a Hong Kong offence.*

190. Accordingly, before seeking the Restraint Order, the Secretary for Justice was required to be reasonably of the opinion that the conduct alleged to constitute the criminal offence would have constituted a criminal offence if it had taken place within Hong Kong.

191. The High Court of Hong Kong was required to be satisfied that there were reasonable grounds for believing that an external confiscation order may be made in the United States. A post-conviction forfeiture order as contemplated by the Indictment and Superseding Indictment could not be obtained without the first plaintiff first being:

(a) Arrested;

(b) Surrendered to the United States; and

(c) Convicted.

Duty of candour

192. The application having been made on an ex parte basis, the Secretary for Justice was under a duty to disclose all material information to the Court.

193. Information material to the Restraint Order application included (without limitation):

(a) information relevant to the validity or otherwise of the Arrest Warrant; and/or

(b) information as to the grounds for alleging double criminality.

Restraint Order hearing

194. At 9:45 a.m. on 18 January 2012 (Hong Kong time), the Restraint Order application was heard before the Honourable Mrs Justice V Bokhary in chambers.

195. The Restraint Order application was expressly made pursuant to s 27 of the MLAO, and ss 6 and 7 of Schedule 2 to the same ordinance.

196. The transcript of the hearing records the following exchange between the court and counsel for the Secretary for Justice:

> *COURT: They've already -- anybody been charged yet?*
>
> *MS LAM: Yes, seven individuals and two corporate entities as set out in paragraph 17 of the affirmation.*
>
> *COURT: 17. So, has he been arrested already, the first...*
>
> *MS LAM: They are charged, and an indictment has been filed in court under seal. And, in fact, because this case involved several jurisdictions. The targets are expected to hold a birthday party in New*

Zealand on 20 January, which is this Friday. So...

COURT: That's where the 1st defendant is now?

MS LAM: Correct, correct. Because about $350 million of their assets are in Hong Kong, and a few of their...

COURT: So, when -- you say that US defendants and charges; they are charged with the following offences.

MS LAM: Correct, by view of the filing of the indictment.

COURT: They have not been arrested and charged yet?

MS LAM: No. They have been charged but not arrested.

COURT: They've been charged.

MS LAM: But not arrested. They've...

COURT: You mean a charge has been -- I mean, they will be charged, or they haven't been charged yet, have they?

MS LAM: The indictment is the US terminology of "charge sheets".

COURT: Oh, I see.

MS LAM: Yes. Indictment is -- Hong Kong is a charge.

COURT: Because there has -- you know, in Hong Kong you say that they have been charged, you know...

MS LAM: Correct, correct, we use "charge".

COURT: But they haven't been arrested yet.

MS LAM: They haven't been arrested. They have been charged by the US court by the filing of the indictment...

COURT: Yes.

MS LAM: ...in the United States District Court for the Western District of Virginia. And, in fact, the same court -- the indictment was...

> *COURT: So, they will be charged upon arrest. You can't charge somebody before they're arrested.*
>
> *MS LAM: Right, right, yes.*
>
> *COURT: You can prepare an indictment to charge them?*
>
> *MS LAM: Right, in that sense, yes. And in fact, as set out at paragraph 19 of the affirmation on 10 January, the same court made a restraint order restraining their assets, including their assets in Hong Kong. The arrest action and the restraint action need to go together at the same pace. They can't be arrested -- we need to obtain the restraint order today to tie in with the arrest action to take place in New Zealand and that's why we need to make the application today.*
>
> *COURT: All right.*

The plaintiffs rely on the transcript as if pleaded in full.

197. The Restraint Order was granted by the High Court of Hong Kong on the terms sought by the Secretary for Justice after a 13 minute hearing.

198. In granting the Restraint Order, the High Court of Hong Kong attached significant weight to the submission that, although the first plaintiff had not yet been arrested, he soon would be.

199. The only evidence filed by the Secretary for Justice in support of the Restraint Order application was the Sunny affirmation.

200. The only reference in the Sunny affirmation to the arrest of the first plaintiff is at paragraph 30:

> *30. The request has further sought restraint of an artwork and 3 expensive televisions which are believed to be located at the 1st Defendant's residence at Suite number 3608 of Grand Hyatt Hong Kong, 1 Harbour Road, Wanchai, Hong Kong. The items will be seized by customs officers when they execute a search warrant on the premises at the same time as the arrests of the defendants scheduled to take place in the coming few days in New Zealand.*

201. At the time the Sunny affirmation was made, the Arrest Warrant had not been issued.

202. In determining the Restraint Orders Application, the High Court of Hong Kong was unaware that:

(a) There were no reasonable grounds to believe that the offence for which the first plaintiff was sought was an extradition offence for the purposes of s 20(1)(c) of the Extradition Act 1999; and

(b) Accordingly, that there were no reasonable grounds for believing that an external confiscation order may be made in the United States.

203. The matters at paragraph 201 hereof constitute information material to:

(a) The Secretary for Justice's decision on whether or not to grant the Hong Kong request; and/or

(b) The High Court of Hong Kong's decision on the Restraint Order application.

204. If the absence of any reasonable grounds to believe that the offence for which the first plaintiff was sought was an extradition offence had been disclosed to the Secretary for Justice, the Secretary for Justice would have:

(a) Had regard to s 5(1)(g) of the MLAO;

(b) Concluded that the request related to an act or omission that, if it had occurred in Hong Kong, would not have constituted a Hong Kong offence; and

(c) Been required under s 5(1)(g) of the MLAO to refuse to assist the United States with the Restraint Order application.

205. If the absence of any reasonable grounds to believe that the offence for which the first plaintiff was sought was an extradition offence had been disclosed to the United States and/or the

Secretary for Justice then, pursuant to their duty of candour as the applicants in an ex parte application, they would have been required to disclose, and would in fact have disclosed, this information to the High Court of Hong Kong.

206. Had this information been disclosed to the Secretary for Justice and/or the United States, there would have been no valid basis for the opinion expressed at paragraph 32 of the Sunny affirmation that:

> *32. In view of the information contained in the preceding paragraphs, I believe that:*
>
> *…*
>
> *(c) there are reasonable grounds for believing that an external confiscation order may be made in the proceedings in respect of property held by or under the control of the Defendants, including but not limited to the property subject to the proposed restraint order; …*

207. Had this information been disclosed to the High Court of Hong Kong at or before the hearing on 18 January 2017, it would have concluded that there were no reasonable grounds for believing that an external confiscation order may be made in the United States proceeding because there were no reasonable prospects of the first plaintiff being arrested in New Zealand.

208. But for the non-disclosure of this information the High Court of Hong Kong prior to issuing the Restraint Order, it would not have granted the Restraint Order.

209. Had the invalidity of the Arrest Warrant and Extradition Proceeding been disclosed to the High Court of Hong Kong after the Restraint Order was granted, it would have rescinded the Restraint Order.

Superseding indictment

210. The duty of candour to which the Secretary for Justice was subject was an ongoing duty.

211. Accordingly, had the impact of the Superseding Indictment on the Arrest Warrant been disclosed to them after the Restraint Order had been granted, the Secretary for Justice and/or the United States would have been required to disclose, and would in fact have disclosed, to the High Court of Hong Kong that:

(a) There was no longer a foreign arrest warrant for the purposes of s 20(1)(a) of the Extradition Act 1999;

(b) The Arrest Warrant was therefore no longer valid (if it ever was); and

(c) There were therefore no longer reasonable grounds for believing that an external confiscation order may be made in the United States.

212. In these circumstances, the High Court of Hong Kong would have discharged the Restraint Order.

FIRST CAUSE OF ACTION – ATTORNEY-GENERAL, CROWN LAW AND POLICE – NEGLIGENCE (ARREST WARRANT)

The plaintiffs repeat paragraphs 1-212.

213. Each of the Attorney-General, Crown Law and the Police owed the first plaintiff a duty of care in seeking and maintaining the Arrest Warrant.

214. In breach of their respective duties, the Attorney-General, Crown Law and the Police failed to exercise reasonable care by:

(a) Seeking the Arrest Warrant notwithstanding that they knew or ought reasonably to have known that there was no information on the basis on which a District Court Judge could reasonably be satisfied that the offence for which the first plaintiff was sought was an extradition offence.

(b) Failing to disclose to the District Court that there was no information on the basis of which a District Court Judge

could reasonably be satisfied that the offence for which the first plaintiff was sought was an extradition offence.

(c) Failing, on learning of the issuing of the Superseding Indictment and consequent invalidity of the US Arrest Warrant, to notify the District Court that there was no basis on which a District Court Judge could reasonably be satisfied that a warrant for the first plaintiff's arrest had been issued in the United States for the purposes of s 20(1)(c) of the Extradition Act 1999.

(d) Failing to discharge their duty to ensure that the United States understood and discharged its duty of candour.

Loss suffered by plaintiffs

215. The plaintiffs have suffered loss as a result of the Arrest Warrant being unlawfully issued.

Loss of liberty, business opportunities and reputation

216. As a result of the Arrest Warrant, as at the date of filing this statement of claim, the first plaintiff has been on bail for almost six years.

217. Amongst other restrictions, the first plaintiff's bail conditions prevent him from leaving New Zealand.

218. As a result of being on bail for approximately six years, and the ongoing threat of extradition and imprisonment, the first plaintiff has suffered loss of:

(a) Opportunities to develop further business ventures as an internet entrepreneur; and

(b) Reputation.

Legal costs

219. As a result of the Arrest Warrant, Extradition Proceeding and Restraint Orders, the first plaintiff has incurred legal costs in New Zealand and Hong Kong in proceedings.

Destruction of Megaupload group of companies

220. As a result of the Restraint Order, all of the second plaintiff's material assets were restrained.

221. As a result of the second plaintiff's material assets having been restrained, the second plaintiff, and the companies in the Megaupload group of companies, were unable to meet their ordinary business expenses as and when they fell due, including (amongst other expenses):

(a) The cost of leasing servers on which to store customer data;

(b) Bandwidth; and

(c) Staff salaries.

222. At the same time, the second plaintiff's officers (including the first plaintiff) were in custody and their assets were restrained such that they were unable to either fund the business in the short term or take legal action to challenge the Restraint Orders.

223. As a result, the second plaintiff was unable to continue trading and ceased to do so.

224. At the time the Restraint Orders were granted, second plaintiff was preparing to list on the Stock Exchange of Hong Kong at a conservative valuation of not less than US$2.6 billion based on:

(a) 66 million registered users valued at US$40 per user;

(b) 50 million daily unique visitors;

(c) US$100 million revenue per annum; and

(d) US$45 million profit per annum.

225. But for the Restraint Order, the second plaintiff would have continued to increase its registered user base and increase in value

such that it would now be valued at approximately US$10 billion based on:

(a) The number of registered users of Megaupload doubling each year such that it would have had 500 million registered users by 2017;

(b) Advertising revenue and premium sales having increased proportionately;

(c) Costs having decreased significantly as a result of the price of bandwidth having been approximately three times more expensive in 2012 than it is now;

(d) Revenue of US$300-500 million per annum; and

(e) A profit margin of 50 per cent.

226. As a result of the Restraint Orders:

(a) The second plaintiff has lost profits from Megaupload, and all companies within the Megaupload group of companies, since January 2012.

(b) The first plaintiff has lost:

(i) the value of his beneficial ownership of 68 per cent of the second plaintiff; and

(ii) the value of his right to participate in the future profits of the second plaintiff.

Option to purchase mansion

227. At the relevant time, the first plaintiff had an option to purchase the property that he was then leasing at 186 Mahoenui Valley Road, Coatesville (**Property**) on the expiration of the lease in February 2013.

228. On or about 27 September 2012, the first plaintiff became "ordinarily resident" in New Zealand for the purposes of the Overseas Investment Act and would therefore, but for the New

Restraint Orders, have been in a position to purchase, and would in fact have purchased, the Property.

229. In anticipation of exercising the option, the first plaintiff had made improvements to the Property at a cost of approximately NZ$9.5 million.

230. The purchase price for the Property under the option was US$18 million or approximately NZD$21.6 million as at February 2013.

231. As a result of the restraining order, the first plaintiff was unable to exercise the option to purchase the Property.

232. In or about June 2016, the Property was purchased for approximately NZ$32.5 million.

WHEREFORE THE PLAINTIFFS CLAIM:

(a) The second plaintiff seeks damages in an amount to be particularised prior to trial for lost profits from Megaupload, and all companies within the Megaupload group of companies, since January 2012.

(b) The first plaintiff seeks damages in an amount to be particularised prior to trial comprising:

(i) The estimated value of his beneficial ownership of 68 per cent of the Megaupload group of companies;

(ii) Lost business opportunities whilst on bail in New Zealand since 22 February 2012;

(iii) Legal costs since January 2012 on a solicitor-client basis in proceedings in Hong Kong and New Zealand relating directly or indirectly to the Arrest Warrant and/or Restraint Order;

(iv) Loss of his investment in improvements to the Property;

(v) Lost profit as a result of being unable to purchase the property in an amount to be particularised prior to trail

but estimated to be approximately NZ$11 million (based on a purchase price under the option of approximately NZ$21.6 million as at February 2013 and the value of the Property as at 2016 being NZ$32.5 million).

(vi) Loss of reputation.

(c) Exemplary damages;

(d) General damages;

(e) Interest; and

(f) Costs.

SECOND CAUSE OF ACTION – ATTORNEY-GENERAL AND CROWN LAW – NEGLIGENCE (REQUEST FOR SURRENDER AND MINISTER'S NOTICE UNDER S 23 OF THE EXTRADITION ACT 1999)

The plaintiffs repeat paragraphs 1-212.

233. The Attorney-General and Crown Law owed the plaintiff a duty of care in the exercise of their role as Central Authority under the Extradition Act 1999 and US-NZ Treaty.

234. In breach of their duty, the Attorney-General and Crown Law failed to identify that, contrary to the Extradition Act 1999, the Request for Surrender was made in reliance on the Superseding US Arrest Warrant, rather than the US Arrest Warrant on which the Arrest Warrant was based and was therefore invalid.

Loss suffered by plaintiffs

235. As a result of the Minister's Notice under s 23 of the Extradition Act 1999 being invalid, and the Extradition Proceeding therefore being ultra vires, the plaintiffs have suffered the loss pleaded at paragraphs 215-232 hereof.

WHEREFORE THE PLAINTIFFS CLAIM:

(a) The second plaintiff seeks damages in an amount to be particularised prior to trial for lost profits from Megaupload, and all companies within the Megaupload group of companies, since January 2012.

(b) The first plaintiff seeks damages in an amount to be particularised prior to trial comprising:

(i) The estimated value of his beneficial ownership of 68 per cent of the Megaupload group of companies;

(ii) Lost business opportunities whilst on bail in New Zealand since 22 February 2012;

(iii) Legal costs since January 2012 on a solicitor-client basis in proceedings in Hong Kong and New Zealand relating directly or indirectly to the Arrest Warrant and/or Restraint Order;

(iv) loss of his investment in improvements to the Property;

(v) Lost profit as a result of being unable to purchase the Property in an amount to be particularised prior to trail but estimated to be approximately NZ$11 million (based on a purchase price under the option of approximately NZ$21.6 million as at February 2013 and the value of the Property as at 2016 being NZ$32.5 million);

(vi) Loss of reputation;

(c) Exemplary damages;

(d) General damages;

(e) Interest; and

(f) Costs.

THIRD CAUSE OF ACTION – ATTORNEY-GENERAL, CROWN LAW AND POLICE – MISFEASANCE IN PUBLIC OFFICE (PROVISIONAL ARREST WARRANT)

The plaintiffs repeat paragraphs 1-212.

Public office

236. In preparing and pursuing the Arrest Warrant Application and resulting Extradition Proceeding, the then Attorney-General, the New Zealand Police, Crown Law, and their respective delegates, employees, agents, officers and representatives, were acting as public officers and exercising, or purporting to exercise, public powers, including under the Extradition Act 1999, the US-NZ Extradition Treaty, and the Mutual Assistance in Criminal Matters Act 1992.

Unlawful exercise or purported exercise of office

237. The Attorney-General, the Police, Crown Law, and their respective delegates, employees, agents, officers and representatives, were acting as public officers and exercising, or purporting to exercise, public powers, including under the Extradition Act 1999 and the US-NZ Extradition Treaty in:

(a) Preparing and pursuing the Arrest Warrant Application;

(b) Procuring the Minister's notice under s 23 of the Extradition Act 1999; and

(c) Pursuing the resulting Extradition Proceeding.

Malice

238. The Attorney-General, Crown Law and the Police knew or were recklessly indifferent to the fact that the Arrest Warrant was unlawful and would, if issued, cause harm to the plaintiffs because:

(a) The Arrest Warrant was essential to commence the Extradition Proceeding.

(b) The Extradition Proceeding was essential to the first plaintiff being surrendered to the United States to face trial in that jurisdiction.

(c) The Arrest Warrant was therefore essential to the restraint orders to be sought on behalf of the United States over the assets of the plaintiffs in Hong Kong. As pleaded in more detail below, for the intended restraint order to be granted, it was necessary for the High Court of Hong Kong to be satisfied that there was a reasonable prospect of an external confiscation order being granted in the United States.

(d) The majority of the second plaintiff's assets were in Hong Kong. Accordingly, if the restraint order was granted in Hong Kong, Megaupload would be unable to carry on business and would be destroyed.

239. In preparing and pursuing the unlawful Arrest Warrant Application, the Attorney-General, Crown Law and/or the Police acted:

(a) For the improper motive of making an example of the plaintiffs to appease and or earn favour with the United States and Hollywood interests.

(b) Knowing the Arrest Warrant Application was unlawful and therefore outside the scope of their respective offices because they knew or were recklessly indifferent to:

(i) The fact that:

(aa) There were no reasonable grounds to believe that the offences for which the first plaintiff was sought were extradition offences for the purposes of s 20(1)(c) of the Extradition Act 1999;

(bb) They had not in fact considered whether there were reasonable grounds to believe that the offences for which the first plaintiff was sought

were extradition offences for the purposes of s 20(1)(c) of the Extradition Act 1999; and/or

(cc) They were required to, but did not, disclose to the District Court the matters pleaded at paragraphs 96 to 119 hereof; or

(ii) The consequences for the plaintiffs if, notwithstanding that, the Provisional Arrest Warrant nevertheless issued.

240. In failing to disclose to the District Court that, the Superseding Indictment having been issued, and the Indictment having therefore been rendered invalid, Crown Law and/or the Police acted unlawfully either:

(a) For the improper motive of making an example of the plaintiffs to appease and or earn favour with the United States and Hollywood interests.

(b) Knowing that, or being recklessly indifferent as to whether:

(i) There were no longer reasonable grounds for a District Court Judge to believe that a warrant for the arrest of the first plaintiff had been issued in the United States (s 20(1)(a)); and

(ii) They were required to disclose the Superseding Indictment, and its impact, to the District Court.

Loss suffered by plaintiffs

241. As a result of the Arrest Warrant being unlawfully issued, the plaintiffs have suffered the loss pleaded at paragraphs 215-232 hereof.

WHEREFORE THE PLAINTIFFS CLAIM:

(a) The second plaintiff seeks damages in an amount to be particularised prior to trial for lost profits from Megaupload, and all companies within the Megaupload group of companies, since January 2012.

(b) The first plaintiff seeks damages in an amount to be particularised prior to trial comprising:

(i) The estimated value of his beneficial ownership of 68 per cent of the Megaupload group of companies;

(ii) Lost business opportunities whilst on bail in New Zealand since 22 February 2012;

(iii) Legal costs since January 2012 on a solicitor-client basis in proceedings in Hong Kong and New Zealand relating directly or indirectly to the Arrest Warrant and/or Restraint Order;

(iv) Loss of his investment in improvements to the Property;

(v) Lost profit as a result of being unable to purchase the Property in an amount to be particularised prior to trail but estimated to be approximately NZ$11 million (based on a purchase price under the option of approximately NZ$21.6 million as at February 2013 and the value of the Property as at 2016 being NZ$32.5 million).

(vi) Loss of reputation.

(c) Exemplary damages;

(d) General damages;

(e) Interest; and

(f) Costs.

FOURTH CAUSE OF ACTION – MALICIOUSLY PROCURING AN ARREST WARRANT

The plaintiffs repeat paragraphs 1-212.

242. The United States, the Attorney-General, Crown Law and/or the Police procured the Provisional Arrest Warrant.

No reasonable and probable cause to procure warrant

243. The United States, the Attorney-General, Crown Law and/or the Police did not have reasonable and probable cause to apply for the Arrest Warrant because:

(a) There was no reasonable basis on which they could have held such a belief and none was disclosed in the Arrest Warrant Application or Arrest Warrant Memorandum. In particular, there was no authority for the proposition that online dissemination of copyright infringing works was an offence under s 131 of the Copyright Act 1994.

(b) They lacked any bona fide subjective belief that they were placing before the District Court Judge material sufficient to meet the requirements of s 20 of the Extradition Act 1999. In particular, they knew or were recklessly indifferent to whether on the basis of the information presented to him the District Court Judge could reasonably be satisfied that there were reasonable grounds to believe that the offence for which the person was sought is an extradition offence for the purposes of s 20(1)(c).

244. Even if the United States, the Attorney-General, Crown Law and/or the Police had reasonable and probable cause to apply for the Arrest Warrant at the time the Arrest Warrant Application was made (which is denied), they ceased to have any reasonable and probable cause to sustain the Arrest Warrant once the Superseding Indictment was issued because:

(a) There was no reasonable basis on which they could have held such a belief because the Indictment, and the US Arrest Warrant obtained in reliance on the indictment, was invalid and of no effect.

(b) They lacked any bona fide subjective belief that the District Court Judge had had material before him sufficient to believe that a warrant for the first plaintiff's arrest had been validly issued in the United States for the purposes of s 20(1)(a) of the Extradition Act 1999.

245. Despite this, the defendants breached their respective duties of candour to the District Court by failing to disclose the absence of grounds under ss 20(1)(a) and 20(1)(c) of the Extradition Act 1999.

Malice

246. By nevertheless pursuing and maintaining (by material non-disclosure) the Arrest Warrant, the defendants acted with malice towards the plaintiffs because:

(a) The defendants were motivated by the improper purpose of:

(i) Making an example of the plaintiffs;

(ii) Winning favour with the United States and/or the United States authorities; and/or

(iii) Winning favour with the Studios for the New Zealand Government.

(b) The defendants knew, or were recklessly indifferent as to whether, pursuing and/or sustaining the Arrest Warrant in the absence of any reasonable and probable cause to procure the Arrest Warrant would cause harm to the plaintiffs.

Loss suffered by Plaintiff

247. As a result of the United States, the Attorney-General, Crown Law and/or the Police procuring the Arrest Warrant, the plaintiffs have suffered the losses pleaded at paragraphs 215-232 hereof.

WHEREFORE THE PLAINTIFFS CLAIM:

(a) The second plaintiff seeks damages in an amount to be particularised prior to trial for lost profits from Megaupload, and all companies within the Megaupload group of companies, since January 2012.

(b) The first plaintiff seeks damages in an amount to be particularised prior to trial comprising:

(i) The estimated value of his beneficial ownership of 68 per cent of the Megaupload group of companies;

(ii) Lost business opportunities whilst on bail in New Zealand since 22 February 2012;

(iii) Legal costs since January 2012 on a solicitor-client basis in proceedings in Hong Kong and New Zealand relating directly or indirectly to the Arrest Warrant and/or Restraint Order;

(iv) Loss of his investment in improvements to the Property;

(v) Lost profit as a result of being unable to purchase the Property in an amount to be particularised prior to trail but estimated to be approximately NZ$11 million (based on a purchase price under the option of approximately NZ$21.6 million as at February 2013 and the value of the Property as at 2016 being NZ$32.5 million).

(vi) Loss of reputation.

(c) Exemplary damages;

(d) General damages;

(e) Interest; and

(f) Costs.

This document is filed by **PHILIP CHARLES CREAGH** solicitor for the plaintiff of the firm Anderson Creagh Lai Limited. The address for service of the plaintiff is Level 1, 110 Customs Street West, Auckland.

Documents for service on the plaintiff may be left at the address for service or may be:

(a) Posted to the solicitor at PO Box 106-740, Auckland; or

(b) Transmitted to the solicitor by facsimile on (09) 300 3197; or

(c) Emailed to phil.creagh@acllaw.co.nz.