IN THE SUPREME COURT OF NEW ZEALAND

SC 25/2014
[2014] NZSC 199

BETWEEN	KIM DOTCOM First Appellant
	FINN BATATO Second Appellant
	MATHIAS ORTMANN Third Appellant
	BRAM VAN DER KOLK Fourth Appellant
AND	HER MAJESTY'S ATTORNEY-GENERAL Respondent

Hearing:	25 and 26 August 2014
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	P J Davison QC, W Akel and H D L Steele for First Appellant F Pilditch for Second Appellant G J S R Foley and L F Stringer for Third and Fourth Appellants D J Boldt, F R J Sinclair and M H Cooke for Respondent
Judgment:	23 December 2014

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants are jointly and severally liable to pay costs of $35,000 to the respondent.

REASONS

	Para No
Elias CJ	[1]
McGrath, William Young, Glazebrook and Arnold JJ	[68]

ELIAS CJ

[1] In issue in the appeal is the validity of search warrants granted by the District Court at Auckland on 19 January 2012 under the provisions of the Mutual Assistance in Criminal Matters Act 1992. The Police had been authorised to apply for the warrants by the Attorney-General following a request by the United States of America.

[2] Before authorising the Police to seek warrants, the Attorney-General was required by the legislation to be satisfied that there were reasonable grounds for believing that in the premises identified in the warrant application there would be evidence in respect of offences alleged to have been committed in the United States punishable by imprisonment for a term of 2 years or more.[1] No issue arises as to whether this condition was met.

[3] Rather, it is claimed that the warrants as issued by the District Court were invalid because substantively defective. The defects in the particularity with which the offences and the material authorised to be seized were identified are said to make the warrants general warrants which are bad in law. They authorised search and seizure of material likely to include that which was irrelevant and private. No conditions such as might have permitted the court to supervise sorting for relevance were imposed.

[4] The Attorney-General acknowledges deficiencies in the warrants but says they are not such as to make the warrants general and invalid. He maintains that the deficiencies are technical ones giving rise to no miscarriage of justice in the circumstances (including the other information available to the appellants at the time the warrants were executed).

[5] On that basis, the Attorney-General says that the Court is obliged by s 204 of the Summary Proceedings Act 1957 to treat the warrants as valid. Section 204 is a

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1 Mutual Assistance in Criminal Matters Act 1992, s 43.

provision of general application to criminal processes. The section, as then applicable,[2] provided:

> **204 Proceedings not to be questioned for want of form**
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> No information, complaint, summons, conviction, sentence, order, bond, warrant, or other document, and no process or proceeding shall be quashed, set aside, or held invalid by any District Court or by any other Court by reason only of any defect, irregularity, omission, or want of form unless the Court is satisfied that there has been a miscarriage of justice.

[6] The appellants were successful in the High Court, where Winkelmann J held that the warrants were substantively defective and amounted to general warrants.[3] She deferred the question of relief to be argued at a second hearing. At it, the Crown raised the application of s 204 of the Summary Proceedings Act, which had not been raised at the initial hearing to determine the validity of the warrants. Winkelmann J pointed out that reliance on s 204 went to validity and dealt with the submission on s 204 on that basis.[4] In the second judgment, she held that the substantive deficiencies in the warrants she identified were not susceptible to the saving provided by s 204.[5] In case wrong in that conclusion, she concluded further that, in any event, the deficiencies gave rise to a miscarriage of justice.[6] Winkelmann J made orders for the sorting of irrelevant material from material relevant to the charges and the return of irrelevant material to the appellants. She also made orders that the appellants were to be provided with copies of relevant material which was retained, on their provision of the encryption passwords.[7]

[7] The judgment of the High Court was overturned on the appeal of the Attorney-General to the Court of Appeal.[8] The Court of Appeal accepted that the warrants were, "on their face", too broad and were defective in a number of respects.[9] It considered however that the defects in the warrants were not "so radical

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2 Section 204 has since been amended by s 7(2) of the Summary Proceedings Amendment Act (No 2) 2011.
3 *Dotcom v Attorney-General* [2012] NZHC 1494, [2012] 3 NZLR 115 at [49].
4 *Dotcom v Attorney-General* [2013] NZHC 1269 at [22].
5 At [31]–[42].
6 At [43] and [45].
7 At [65].
8 *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629 (Ellen France, Randerson and White JJ).
9 At [46] and [47].

as to require them to be treated as nullities".[10] The validity of the warrants fell to be considered in the "factual context" provided by their execution, in which the appellants had also been served with arrest warrants which provided further information than was contained in the search warrants.[11] The Court emphasised that the imposition of conditions on the warrants was a matter of discretion and considered that it was unnecessary to impose conditions in circumstances where there was no suggestion that the material authorised to be searched and seized was the subject of privilege. Because it held that the defects did not in themselves render the warrants nullities, the Court of Appeal took the view that they fell within the saving provision of s 204.

[8] As appears in the reasons given below, I have come to the conclusion that the High Court was correct to hold the warrants to be general warrants which are invalid. Failure to specify the offences and the materials authorised to be seized with sufficient particularity to ensure that what is seized is properly connected to the offending and does not include material which is irrelevant and private cannot be characterised as no more than "want of form", the subject with which s 204 and similar statutory slip provisions are concerned. That was also the conclusion of the Law Commission in its recent report on search and seizure.[12] It took the view that s 204 and comparable provisions do not excuse deficiencies in warrants which are not properly characterised as "minor non-compliance with technical aspects of the warrant requirements":[13] "substantial compliance with the statutory requirements is absolutely essential in any search regime that aims to effectively control the exercise of law enforcement powers".[14]

Search warrants are judicial process

[9] Search warrants are judicial authority to do something otherwise against the law. It is part of the rule of law and fundamental rights protections under the New Zealand Bill of Rights Act and the common law that such intrusions are authorised in advance, rather than being justified afterwards. Such warrants must show the nexus

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10 At [54].
11 At [36].
12 Law Commission *Search and Surveillance Powers* (NZLC R97, 2007).
13 At [2.56].
14 At [2.56].

between what may and may not be searched or seized and the specific offence. The issuing officer must ensure that their scope intrudes upon the protected right no more than is necessary to achieve the legitimate social interest in obtaining evidence linked to an identified offence.

[10] Some of the acknowledged defects in the warrant were defects in form. They include the use of the Summary Proceedings Act search warrant prescribed form rather than the form prescribed under the Mutual Assistance in Criminal Matters Regulations 1993. Provided that the authorisation is sufficiently particularised to offences and evidence connected with them, such defects in form may be immaterial and precisely the want of form s 204 permits to be overlooked unless giving rise to a miscarriage of justice. I am not concerned with these technical deficiencies and regard them as something of a red herring. They were not relied on by Winkelmann J and were not pressed in argument on appeal to this Court. The appeal is concerned, rather, with the deficiencies of substance which undermine the validity of the authorisation contained in the warrant.

[11] The appeal raises questions of how electronic data is properly to be treated when search and seizure is authorised. This is a topic that is exercising courts in a number of jurisdictions as reliance on electronic media has swamped case law developed for paper-based record-keeping and communications. As it has transpired, the search in the present case obtained something like 150 terabytes of data, accessed through more than 135 computers and electronic devices seized in reliance on the terms of the warrant. It is now acknowledged that a substantial amount of this data, perhaps as much as 40 per cent, was irrelevant to the offences charged. Some of it was personal and private. A direction by the Solicitor-General that any items seized were to remain in the custody and control of the Commissioner of Police until further direction, did not prevent the earlier removal of a number of cloned hard drives to the United States (an issue in additional proceedings not presently before the Court). More generally, and of direct relevance to cases involving domestic warrants where electronic data is seized with computers, however, the case raises questions about how the sorting of relevant and irrelevant information obtained under warrants is properly authorised by the court granting the warrant.

[12] The New Zealand Law Commission in a 2007 report described, in terms with which I am in complete agreement, a "number of compelling reasons" why search warrants are not left in the hands of the party conducting a search but require the authority of a judicial officer:[15]

> - It is an essential component of the checks and balances that should exist in a system operating according to the rule of law. While the state through its agents may be expected to act in good faith when exercising coercive powers against individual citizens, that cannot be guaranteed and should not be assumed; it is fundamental to the protection of individual liberty that the need for the exercise of the power should be demonstrated to the satisfaction of an independent officer and authorised by that officer before the exercise of the power rather than justified afterwards with the benefit of hindsight.
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> - It introduces its own disciplines and constraints into the routine procedures and activities of law enforcement agencies. Even if applications for warrants and orders are almost always approved, the fact that they have to be justified to an independent person is likely to mitigate any risk of abuses or excesses of power.
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> - It acts as some protection for the agencies themselves against claims of civil or criminal liability. It gives their actions the imprimatur of a judicial order and may to some degree pre-empt the filing of court proceedings by those under investigation who would otherwise seek either to prevent the exercise of the power or to obtain damages for that exercise. In other words, the requirement for a court order acts as a protection not only to the suspect, but also to the agency.
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> - It promotes the protective objective of section 21 of the Bill of Rights Act.

[13] To fulfil these purposes, the Law Commission said that "it is not sufficient that there be a piece of paper": "[r]ather the warrant must have been properly issued, in accordance with the relevant law".[16] It recognised as "essential"[17] the requirement that "the items to be located and seized are stated with sufficient particularity" to ensure that:[18]

> … both the person executing the warrant, and the person whose premises are being searched, know with a fair degree of certainty if and why the enforcement officers are allowed onto the premises and what it is that they are allowed to do and to seize (and, conversely what they are *not* allowed to do or seize).

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15 Law Commission, above n 12, at [2.55].
16 At [2.56].
17 At [2.56].
18 At [2.61].

[14] The requirement for a warrant was seen by the Law Commission as "essential to the checks and balances that are necessary in a system that operates according to the rule of law":[19]

> It is fundamental to the protection of individual privacy and liberty that the exercise of such a power is authorised by an independent person who has been satisfied by the enforcement officer that it is necessary to do so in the circumstances.
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> Moreover, the requirement for particularity and an individualised focus is consistent with a human rights perspective which insists that before any coercive state power is exercised against a citizen, the state turns its mind to whether the power truly needs to be exercised. On this, the Human Rights Committee has observed, in respect of Article 17 of the International Covenant on Civil and Political Rights that:
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> … relevant legislation must specify in detail the precise circumstances in which … interferences [with privacy] may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis.

[15] In its proposals for new legislation concerning search and seizure (now enacted in the Search and Surveillance Act 2012), the Law Commission was concerned to ensure that the legislation should not authorise anything approaching a general warrant by "relaxing the nexus between the material to be seized and the specific offence".[20]

[16] It is because they do not sufficiently identify what may be done that the common law has treated general warrants as invalid and entry under them as trespass. These principles have been established since *Entick v Carrington* in 1765[21] and were confirmed in New Zealand by the Court of Appeal in *Auckland Medical Aid Trust v Taylor*.[22]

The legislation

[17] The warrants were issued under Part 3 of the Mutual Assistance Act. Section 45, as then in force, prescribed the content of search warrants granted under the Act:

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19 At [2.64]–[2.65].
20 At [3.24].
21 *Entick v Carrington* (1765) 19 How St Tri 1030, 95 ER 807 (KB).
22 *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728 (CA).

> **45 Form and content of search warrant**
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> (1) Every warrant issued under section 44 shall be in the prescribed form.
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> (2) Every warrant issued under section 44 shall be directed to any constable by name, or to any class of constables specified in the warrant, or generally to every constable.
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> (3) Every warrant issued under section 44 shall be subject to such special conditions (if any) as the District Court Judge may specify in the warrant.
>
> (4) Every warrant issued under section 44 shall contain the following particulars:
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> (a) the place or thing that may be searched pursuant to the warrant:
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> (b) the offence or offences in respect of which the warrant is issued:
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> (c) a description of the articles or things that are authorised to be seized:
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> (d) the period during which the warrant may be executed, being a period not exceeding 14 days from the date of issue:
>
> (e) any conditions specified by the Judge pursuant to subsection (3).

[18] It has been common ground throughout that although the warrants submitted in draft by the New Zealand Police and authorised by the District Court Judge referred in their heading to "[s]ection 43 and 44 [of the] Mutual Assistance in Criminal Matters Act 1992", they were not in the form prescribed by the Mutual Assistance Regulations,[23] as required by s 45(1) of the Act. Rather, they were in the form prescribed for warrants under the Summary Proceedings Act.[24] The form prescribed in the Mutual Assistance Regulations required, in addition to the information required by s 45, that the warrant identify the country under whose laws the offence is alleged to have been committed and a statement that the offence was one punishable by a term of two or more years imprisonment.

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[23] Mutual Assistance in Criminal Matters Regulations 1993.

[24] Except for the reference in the heading to ss 43 and 44 of the Mutual Assistance Act and the reference to the 14-day time limit for execution of the warrants, required by s 45(4)(d).

[19] Section 26 of the Interpretation Act 1999 makes it clear that failure to use a prescribed form does not render a process invalid if the differences are minor "as long as the form still has the same effect and is not misleading". If the warrant had contained the information required to be shown in the warrant by s 45 of the Mutual Assistance Act and Form 5 in the Schedule to the Mutual Assistance Regulations, s 26 would have prevented invalidity of the warrants, as long as their form was not itself misleading. The appellants contend that the defects here were not limited to the form used but extended to the substance of what had to be communicated in the warrant.

The warrants issued

[20] The warrants as issued authorised search of three properties in Auckland occupied by or connected with the appellants, by force if necessary, and seizure of items which were "all evidence, fruits, and instrumentalities of the crimes being investigated". The "things" believed to be on the properties and in respect of which the warrants were granted were identified in an attached "Appendix A" and were "things":

> (upon or in respect of which an offence of Breach of Copy Right and Money Laundering has been or is suspected of having been committed)
>
> (*or* which there is reasonable ground to believe will be evidence as to the commission of an offence of Breach of Copy Right and Money Laundering)

[21] "Appendix A" identified the "things" in respect of which the search and seizure was authorised as:

> All evidence, fruits, and instrumentalities of the crimes being investigated including, but not limited to, the following:
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> - Indicia of occupancy or residence in, and/or ownership of, the property;
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> - All documents and things in whatever form relating to the reproduction and distribution of copyrighted works, including, but not limited to, motion pictures, television programs, musical recordings, electronic books, images, video games, and other computer software;
>
> - All records and things in whatever form, including communications, relating to the activities of the Mega Conspiracy, including, but not limited to, Megaupload, Megavideo, and Megastuff Limited;

- All bank records, deposit slips, withdrawal slips, cheques, money orders, wire transfer records, invoices, purchase orders, ledgers, and receipts;

- All documents that reference shipments, imports, exports, customs or seizures;

- All digital devices, including electronic devices capable of storing and/or processing data in digital form, including, but not limited to;

    - Central processing units;

    - Rack-mounted, desktop, laptop, or notebook computers;

    - Web servers;

    - Personal digital assistants;

    - Wireless communication devices, such as telephone paging devices;

    - Beepers;

    - Mobile telephones;

    - Peripheral input/output devices, such as keyboards, printers, scanners, plotters, monitors, and drives intended for removable media;

    - Related communication devices, such as modems, routers, cables, and connections;

    - Storage media, including external hard drives, universal serial bus ("USB") drives, and compact discs;

    - Security devices

[22] The offences in respect of which the warrants were obtained were not further described in the warrants other than as "an offence of Breach of Copy Right and Money Laundering" although the terms of Appendix A indicated a connection with what is named as "the Mega Conspiracy," not itself further explained in the warrant or Appendix A. It appears from Appendix A that it may relate to, but not be limited to, activities of companies called Megaupload, Megavideo, and Megastuff Ltd. And it may be inferred from the specific mention of electronic devices and electronic "storage media" that the offences of breach of copyright and money laundering on which the warrants were based were at least in part conducted through electronic means.

The deficiencies

[23] There is overlap between the information required to be included in warrants under the Mutual Assistance Act and the information that must be included in a warrant under the Summary Proceedings Act. The deficiencies claimed here include failure to provide adequate particulars of the "things" or articles authorised to be searched and seized and failure to identify "the offence or offences in respect of which the warrant is issued", which would equally be deficiencies under the requirements of the Summary Proceedings Act or the Mutual Assistance Act. As has been mentioned, the appellants contend that the warrants were so broad as to constitute "general warrants", which are not authorised under either Act. To that extent, then, the points raised by the appeal are of equal application to purely domestic criminal investigations authorised under the Summary Proceedings Act.

[24] The use of the wrong form may however have led to two additional informational requirements in relation to Mutual Assistance Act warrants being overlooked: the identification of the country under the laws of which the offence is alleged to have been committed and a statement that the offence is punishable by imprisonment for a term of two or more years, both required by form 5 of the Mutual Assistance Regulations.

[25] Under the Mutual Assistance Act,[25] the issuing judicial officer is empowered to set conditions. Similar ability to impose conditions has been recognised in respect of warrants granted under the Summary Proceedings Act[26] and is now explicitly conferred by s 103(3)(b) of the Search and Surveillance Act. If conditions are imposed they must be specified in the warrant. There are however different consequences in relation to the product of any search and seizure in respect of mutual assistance requests by foreign States and domestic investigations. Where a warrant is executed under the Mutual Assistance Act, "any thing" seized under it is required to be delivered "into the custody of the Commissioner of Police" to hold pending a direction by the Attorney-General as to how it is to be dealt with, including a direction that it "be sent to an appropriate authority of a foreign

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25 Mutual Assistance in Criminal Matters Act, s 45(3).

26 *Television New Zealand Ltd v Attorney-General* [1995] 2 NZLR 641 (CA) at 648.

country".[27] If, within one month, no such direction is given, the Commissioner is required to return anything seized to the person from whom it was taken.[28]

[26] The consequence of execution under a warrant granted under the Mutual Assistance Act is therefore that, in the absence of any conditions set by the court in granting the warrant, further dealings with the product of search and seizure are matters for the Attorney-General and outside the operation of the domestic criminal justice system in New Zealand, supervised by the domestic courts. The fact that remittal of the information beyond the jurisdiction is the end of the mutual assistance process is important to the argument of the appellants that the breadth of the search and seizure authorised, which inevitably entailed things irrelevant to the underlying offences, should have been subjected to conditions to protect their privacy and to ensure that only information and material relevant to the offences was obtained, observing the law.

[27] The search warrants did not identify the country in which the offences alleged were crimes. In addition, the items listed in Appendix A were not limited to those relevant to the offences and did not impose conditions to ensure that irrelevant material, which was inevitably within scope, would be sorted from material relevant to the offending. The failure to identify the underlying offence with sufficient particularity overlaps with the failure to confine the search to exclude irrelevant material or instead to impose conditions to ensure only those things which were relevant were searched and retained. The imprecision in the description of the offences exacerbated the overreach of the warrants which, especially in relation to the electronic devices authorised to be seized from domestic premises, was likely to include personal and irrelevant information.

The arrest warrants and the circumstances of execution of the search warrants

[28] In addition to the request for assistance in the matter of obtaining evidence under the Mutual Assistance Act, the respondents are also the subject of extradition proceedings on behalf of the United States. Warrants for their arrest have been issued in the United States on a Grand Jury indictment charging them with

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27 Mutual Assistance in Criminal Matters Act, s 49(1) and (2).

28 Section 49(4).

conspiracy to commit racketeering, copyright infringement and money laundering (the money laundering and racketeering charges being apparently linked to the underlying offence of conspiracy to commit copyright infringement), as well as charges of criminal copyright infringement. As a result of the request for extradition, provisional warrants for the arrest of the appellants in New Zealand were issued under the Extradition Act 1999 and were executed at the same time as the execution of the search warrants at the premises in Auckland.

[29] This circumstance is of importance in the present appeal because it was accepted by the Court of Appeal, and is maintained by the Attorney-General in the appeal to this Court, that the acknowledged inadequacies in the description of the offences, the failure to identify the country of the offences, and the over-inclusive scope of the search authorised, were all cured by the information contained in the arrest warrants and the evidence that at the time of the execution of both warrants the appellants seemed to appreciate that they related to breaches of copyright. On that basis, the Court of Appeal held that the defects were ones of form, able to be overlooked in application of s 204 of the Summary Proceedings Act because they gave rise to no miscarriage of justice.

[30] The provisional warrants for arrest under the Extradition Act, served on the appellants at the time the search warrants were also executed, recite that each "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.
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> 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.
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> 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.
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> 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.

[31] The provisional arrest warrant also recited that a warrant for the arrest of the appellants had been issued by the United States District Court for the Eastern District of Virginia and that the issuing Judge in the District Court was satisfied that the appellants were "extraditable" and that the offences were "extradition offences" within the meaning of the Extradition Act. The United States arrest warrant was annexed. In it, the offences in respect of which the warrant was issued were "briefly described" as "Conspiracy to Commit Racketeering, Conspiracy to Commit Money Laundering, Conspiracy to Commit Copyright Infringement, Criminal Copyright Infringement".

The search warrants were invalid as general warrants

[32] In *Auckland Medical Aid Trust v Taylor*[29] and in *Tranz Rail Ltd v Wellington District Court*,[30] the Court of Appeal affirmed longstanding authority that general search warrants are invalid. The Court acknowledged in addition that general warrants breach s 21 of the New Zealand Bill of Rights Act.[31] They purport to authorise trespass and interference with property and privacy which is wider than the circumstances require. A general warrant, as was explained in *Tranz Rail*, is one which "does not describe the parameters of the warrant, either as to subject-matter or location, with enough specificity".[32] The Law Commission, as described above at [15], was concerned that there should not be relaxation of "the nexus between the material to be seized and the specific offence", which would be to "raise the spectre of a general warrant".[33]

[33] Although what is "enough specificity" is ultimately a matter of degree for assessment, minimum requirements in the context of the statutory purpose include both identification of the offence as a matter of positive law and indication of the

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29 *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728 (CA) at 733.
30 *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA) at [38].
31 At [41].
32 At [38].
33 Law Commission, above n 12, at [3.24].

basis on which it is said to be transgressed in the particular case, without which information search cannot be confined to what is relevant. So, in *Tranz Rail*, the Court said that a warrant issued under an Act which described the underlying offence as "conduct that constitutes or may constitute a contravention of this Act" would be "hopelessly general and thus invalid".[34] In that case, the warrant was said to be "only slightly more specific" in referring to "conduct that does or may constitute contraventions of sections 27 and/or 36 of the Commerce Act 1986".[35] The invocation of provisions of the Act in this way did not save the warrant in *Tranz Rail* from invalidity.

[34] Tipping J, who delivered the judgment of the Court of Appeal in *Tranz Rail*, explained the principles which make a general warrant bad in law and justified the granting of a declaration of invalidity and other relief:

> [41] A search warrant is a document evidencing judicial authority to search. That authority must be as specific as the circumstances allow. Anything less would be inconsistent with the privacy considerations inherent in s 21 of the Bill of Rights. Both the person executing the warrant, and those whose premises are the subject of the search, need to know, with the same reasonable specificity, the metes and bounds of the Judge's authority as evidenced by the warrant: see McMullin J in *Auckland Medical Aid Trust* at 749; and also McCarthy P at 736. The point is reinforced by s 98C of the Act which requires production of the warrant on execution [as s 47 of the Mutual Assistance Act also requires].
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> [42] Judges who issue warrants which are not as specific as reasonably possible are not balancing the competing interests appropriately. …

[35] In the present case, the specific offences relied on were not identified in the search warrants. Nor was the manner of their transgression explained. The Court of Appeal did not effectively disagree with the conclusion of Winkelmann J that the search warrants, taken by themselves, were significantly deficient in these respects. It considered however that the context provided by reading the arrest warrants, served on the appellants at the same time the search warrants were executed, was "an unusual, if not unique, feature of the case" which could not "be sensibly ignored when considering the validity of the warrants in their factual context".[36] It pointed to the evidence that, at the time, the appellants appeared to understand that the arrest

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34 *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA) at [39].
35 At [39].
36 *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629 at [36].

and the searches were related to "copyright infringement".[37] Indeed, the Court thought that a "reasonable reader" in the position of the appellants would have understood without any difficulties the references in the search warrants.[38] Its view was "reinforced" by the fact that Mr Dotcom was a "computer expert" (as the Court thought was shown by counsel's acknowledgment that Mr Dotcom's "life and soul is on his computer").[39]

[36] Although it accepted that off-site sorting of relevant and irrelevant information was necessary[40] (as Winkelmann J in the High Court had also accepted[41]), the Court of Appeal took the view that the judge was not obliged to impose conditions. The power to impose conditions was "discretionary" and Appendix A to the search warrant "was as specific as could reasonably be expected in the circumstances, and no issues of legal professional privilege were contemplated".[42] The Court considered the Judge "was entitled to rely on the police to execute the warrants lawfully and not to seize anything that was clearly irrelevant".[43]

[37] Greater specificity was readily available. As the Court of Appeal pointed out, the request from the United States "was comprehensive and provided all the necessary background information relating to the criminal offences in the United States".[44] Such "necessary background information" included:[45]

> … maximum penalties, a detailed description of the alleged offending by the respondents through their various companies, including Megaupload, Megavideo and Megastuff Ltd (described generically as the Mega Conspiracy), the substantial sums of money alleged to be involved, the presence in New Zealand of the respondents and the relevant electronic equipment in their possession.

[38] In concluding that the deficiencies in the warrants were sufficiently overcome by the additional information provided in the arrest warrants, the Court of Appeal

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37 At [62].
38 At [53].
39 At [53].
40 At [70] and [72].
41 *Dotcom v Attorney-General* [2012] NZHC 1494, [2012] 3 NZLR 115 at [86].
42 *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629 at [47].
43 At [49].
44 At [40].
45 At [40].

said it applied the approach taken in *Rural Timber Ltd v Hughes.*[46] There, a warrant to search the premises of a road transport company, subject to road user charges, described the suspected offence as "conspiring to defraud the Commissioner of Works (Crimes Act 1961, s 257)".[47] Although the Court was of the view that the offence was described "somewhat inadequately in the warrant, in that the precise nature of the alleged conspiracy was not specified and no dates were given", the detailed descriptions in the schedule attached to the warrant of the items to be seized made it clear that "hubodometers, instruments for tampering therewith, road user charges, and distances were involved".[48] In those circumstances, the Court considered that "[a] reasonable reader would have little difficulty in gathering that the alleged conspiracy must involve misrepresentation of the distances travelled by the company's vehicles".[49] The warrants were accordingly not treated as bad for generality because they sufficiently described the offences.

[39] The substantive deficiency in *Rural Timber* concerned the description of the offence.[50] The Court held that it was reduced to one of form only (amenable to the curative effect of s 204) because the description of the items authorised to be seized in the warrant itself made the nature of the conspiracy evident.

[40] *Rural Timber* demonstrates the interconnection between the description of the scope of the search and the description of the offence when considering whether a warrant is sufficiently particular to enable what is authorised to be understood. In the present case, the deficiencies went to both the description of the offence and the description of what was within the scope of the search authorised by the warrant. The inadequacies in both here meant that there was no limitation on the scope of the offence, as in *Rural Timber*, which enabled relevance to be understood. No limits were set by the warrants, as was found by the Court of Appeal to be the effect of the warrants in *Rural Timber*. As a result, as Winkelmann J pointed out, in my view correctly, whereas in *Rural Timber* the scope of the authority granted in the warrant

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46 *Rural Timber Ltd v Hughes* [1989] 3 NZLR 178 (CA).
47 At 181.
48 At 184.
49 At 184.
50 There were other defects of a technical nature: see at 184.

was sufficiently clear from reading the warrants as a whole, in the present case what they were able to search and seize was in large part left to the police to define.[51]

[41] Nor do I think the Court of Appeal was right to say that the Judge granting the warrant was "entitled to rely on the police to execute the warrants lawfully and not to seize anything that was clearly irrelevant".[52] As the Law Commission said, it is not appropriate to proceed on such assumption.[53] Lawfulness and relevance have to be tied to the terms of the warrants themselves. They cannot be left to be justified after the exercise of power "with the benefit of hindsight".[54] The warrants should have established what could and could not be seized or should have set up conditions to enable sorting under the supervision of the Court. Simply leaving the matter to the police executing the warrant is not consistent with the legislative scheme. It directs those executing the warrant as to what is relevant. It is important to the rule of law, for the reasons given by the Law Commission and referred to above at [12], that those exercising powers under search warrants know what is authorised and what is not.

[42] The "disconnect"[55] here was between what the police were authorised to take and what was material relevant to the commission of the crimes in respect of which the warrants were obtained. This was not an inadequacy properly described as an "error of expression".[56] Winkelmann J referred to the fact that the police indeed acknowledged that they had no basis upon which to assess relevance, including any basis they might have obtained in the instructions provided to them.[57] Unlike the warrant in *Rural Timber*, the warrants in issue here were general and invalid.

[43] In addition, I consider that the Court of Appeal extracted a broader proposition from *Rural Timber* than was warranted. It treated that case as permitting the scope of a warrant and its generality to be determined from material and circumstances extraneous and in part subsequent to its grant. That is not the effect of

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51 *Dotcom v Attorney-General* [2013] NZHC 1269 at [42].
52 *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629 at [49].
53 See above at [12].
54 Law Commission, above n 12, at [2.55].
55 *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629 at [54].
56 As the Court of Appeal held at [54].
57 *Dotcom v Attorney-General* [2013] NZHC 1269 at [42].

Rural Timber, where the acknowledged deficiency in the description of the offence (a description not dissimilar in generality to the one provided here) was overcome by the specificity of the items for which search was authorised annexed to the warrant itself.

[44] In light of the reliance placed by the Court of Appeal on the circumstances surrounding the execution of the warrants, including explanations given by the officers executing them, it should be noted that in *Rural Timber* the Court treated such context as bearing not on whether the warrants were invalid because they were too general, but rather whether, in application of s 204, defects which were not such as to require the warrants to be treated as nullities had caused a miscarriage of justice. It is one thing to look at the surrounding circumstances when deciding whether deficiencies in a warrant not so defective as to be beyond saving under s 204 have caused a miscarriage of justice. It is quite another to treat as valid a fundamentally flawed warrant (as a general warrant is) on the basis that, in the event, it has not been shown to have caused a miscarriage of justice.

[45] It should be noted that the consequences of invalidity are a subsequent issue and may involve comparable consideration of prejudice to the inquiry of miscarriage of justice in application of s 204. A determination of invalidity does not for example preclude admission of the product of an unlawful search under s 30 of the Evidence Act 2006 and questions of actual prejudice may be highly relevant to the form of relief granted as a consequence of a determination of invalidity. But such consequences are not relevant to the determination of invalidity except where the defect is not fundamental and properly falls within the scope of s 204.

[46] Conversely, the emphasis placed by the Court of Appeal on s 49 of the Mutual Assistance Act, which makes the disposition of items seized a matter for the Attorney-General, seems to me to be misconceived. The role of the issuing Judge was to ensure that the search warrant authorised seizure that was lawful and reasonable. Subsequent dealing with the material seized is distinct from the question of justification for the search and seizure in the warrant. Indeed, as has already been

suggested,[58] the fact that under the Mutual Assistance Act subsequent use passes beyond the New Zealand criminal justice system may be seen as a pointer to a need for more, rather than less, care in the warrants themselves.

[47] The extent to which the approach adopted in *Rural Timber* should be built on requires care, post enactment of the New Zealand Bill of Rights Act. The New Zealand Bill of Rights Act not only provides that protection against unreasonable search and seizure is a human right but adds further emphasis to the common law's preference for prior authorisation of law before rights of property and privacy are limited.[59] More importantly, nothing in *Rural Timber* suggests that a reviewing court may treat a warrant that is fundamentally flawed as valid, as the discussion about nullity makes clear. And, as has been explained, a warrant bad for generality is fundamentally flawed and rightly outside the protection of s 204.

[48] Nor is *Rural Timber* authority for treating the context in which validity is to be assessed as extending beyond the terms of the warrant. There may be cases in which cross-reference to other process may make it appropriate to look to a wider context. But there was no such cross-reference here. Like Winkelmann J, I have considerable doubts about whether it is appropriate for a court to take what she described as a "patch and mend approach" to significant defects in warrants.[60] Search warrants are judicial authority to take action that would otherwise be in breach of the law. It is critical that they are clear as to what is authorised and are tied to the offences properly identified which provide the justification for such action. In this case, as Winkelmann J rightly identified, the warrants authorised the seizure of items "unlimited by the notion of relevance to each offence".[61] It was not surprising then that "the Police regarded themselves as authorised to carry away and keep a wide category of items without undertaking analysis of whether the items were 'things' falling within s 44(1)".[62] (The basis on which Winkelmann J concluded that, in any event, there had been a miscarriage of justice.)

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58 See above at [26].
59 Discussed by me in *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [44]–[45].
60 *Dotcom v Attorney-General* [2013] NZHC 1269 at [38].
61 At [43].
62 At [43].

[49] The Court of Appeal accepted the criticism made by counsel for the Attorney-General that the High Court Judge had:[63]

> focussed principally on the nature of the defects themselves rather than on the practical consequences for the person whose property or possessions were being searched, which is the correct approach.

As has already been indicated,[64] I do not accept that the "practical consequences" for the person searched is sufficient assessment for a process that is substantively and seriously flawed and I do not think *Rural Timber* supports such reasoning.

[50] Moreover, in the present case, the arrest warrants potentially added to the confusion, for the reasons given by Winkelmann J. They stipulated offending not referred to in the search warrants or mentioned in the application for them.

[51] It is suggested that the scale of the offending made greater specificity in the warrants impossible. But, as has been mentioned above at [37], the High Court and the Court of Appeal were in agreement that the application to the Attorney-General provided ample information which could have been drawn on. To the extent that sorting for relevance on-site was impractical, conditions should have been imposed, as is further discussed below, particularly in relation to search and seizure of electronic devices. It was not good enough to characterise any excessive seizure, along with claimed breaches of s 49, as "separate downstream matters not caused by the defects in the search warrants"[65] when the excessive seizure was a result of the generality of the warrants.

[52] General warrants are not deficient in any technical or minor way. They are fundamentally objectionable. Winkelmann J considered that the warrants in the present case were properly characterised as general and invalid. In addition to the failure to identify the country in which the offences applied, more significantly, the description of the offences was inadequate and their nature could not be reasonably inferred from reading the warrant as a whole. The search warrants were not issued in respect of particular offences, as the Act required, but rather indicated the category

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63 *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629 at [68].
64 See above at [43]–[44].
65 *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629 at [70].

of offence. Such general indication is inadequate, as the *Auckland Medical Aid Trust* case determined and as *Tranz Rail* has more recently confirmed. While there was reference to the "Mega Conspiracy" in Appendix A, that reference, as Winkelmann J pointed out, "adds to, rather than removes the confusion", since the conspiracy was not described or defined.[66] Nor, given the breadth of the warrants, could the Judge granting them have had reasonable grounds to believe that all the items listed were relevant to the offence or offences. In their terms, the search warrants were "unlimited by the notion of relevance to each offence"[67] and the evidence of the police made it clear that their intention was "to seek warrants that authorised the seizure of anything that might possibly be relevant, in the knowledge that irrelevant material would be caught up in the net that was cast" for subsequent sorting by the authorities in the United States.[68] Winkelmann J considered that the defects went "to the heart of the warrants" because they "did not limit the authority conferred as the statutory scheme required".[69] They could not be characterised as "minor, as technical, or mere defects in expression".[70] I agree. I would allow the appeal on this point.

[53] In what follows I expand briefly, because of its practical importance, on the question of conditions to permit sorting, particularly in relation to the data held or accessed through seized electronic devices. I also deal briefly with miscarriage of justice in application of s 204. Although on the view I take, s 204 has no application, I do not accept the approach taken by the Court of Appeal to it and express reservations about reliance on the judgment of Fisher J in *R v Sanders*.[71]

Conditions

[54] In both Courts below it was accepted that, for practical reasons, the material seized (including the data obtained through the more than 135 electronic items obtained) could be sorted for relevance only off-site. That was acknowledged to be a process that would require some time and inevitably and reasonably required the

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66 *Dotcom v Attorney-General* [2012] NZHC 1494, [2012] 3 NZLR 115 at [48].
67 *Dotcom v Attorney-General* [2013] NZHC 1269 at [43].
68 *Dotcom v Attorney-General* [2012] NZHC 1494, [2012] 3 NZLR 115 at [60].
69 *Dotcom v Attorney-General* [2013] NZHC 1269 at [37].
70 At [37].
71 *R v Sanders* [1994] 3 NZLR 450 (CA).

assistance of the United States authorities because beyond the capacity of the New Zealand Police. For that reason, Winkelmann J envisaged that it would be necessary to create clones of the hard drives and set up a system for release of irrelevant material on sorting.[72]

[55] Such off-site sorting, where the seizure is not indiscriminate and the executing officer has reasonable grounds to believe the material is evidence of the crime under which the warrant is justified, is permitted in New Zealand in accordance with the principles discussed by the Court of Appeal in *A Firm of Solicitors v District Court at Auckland*.[73] This latitude does not permit wholesale seizure for later examination of documents or material not reasonably thought to contain evidence. Off-site sorting may be the only practicable way to separate out relevant from irrelevant data contained on or accessed by electronic devices.

[56] In the United Kingdom, s 50 of the Criminal Justice and Police Act 2001, which applies to mutual assistance warrants,[74] specifically empowers the police executing a search warrant to seize something which contains material that is both relevant and irrelevant if there is no practicable way to separate the two. That is subject to prompt sorting off-site,[75] notice and opportunity for judicial review,[76] and subsequent orders as to how the material is to be treated before it is sent to the requesting country.[77] In Canada, too, the mutual assistance legislation provides for judicial oversight of material seized before it is delivered to the requesting country.[78]

[57] Beyond the context of mutual assistance warrants, the Supreme Court of Canada held in *R v Vu* that, before a warrant authorises seizure or search of computers, there must be prior consideration by the judge and specific authorisation to ensure that privacy interests are sufficiently protected.[79] This protection is necessary to give effect to rights under the Canadian Charter of Rights and Freedoms

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72 *Dotcom v Attorney-General* [2013] NZHC 1269 at [70].
73 *A Firm of Solicitors v District Court at Auckland* [2006] 1 NZLR 586 (CA).
74 The Crime (International Cooperation) Act 2003 (UK) adopts provisions of the Police and Criminal Evidence Act 1984 (UK) and the Criminal Justice and Police Act 2001 (UK).
75 Criminal Justice and Police Act 2001, s 53.
76 Sections 52 and 59.
77 Sections 60 and 61.
78 Mutual Legal Assistance in Criminal Matters Act RSC 1985 c 30 (4th Supp), s 15.
79 *R v Vu* 2013 SCC 60, [2013] 3 SCR 657 at [46]–[48].

because of the likelihood that electronic devices contain much information that is private and personal, giving rise to "unique privacy interests".[80] The Court held that while a computer reasonably thought to contain relevant material might be seized under a search warrant, search of the computer required specific warrant.[81] I am of the view that the same approach should be followed in New Zealand. It is simplistic and insufficiently protective of the right not to be subjected to unreasonable search and seizure to take the view that sorting of data held on a device is not the responsibility of the court in issuing a warrant authorising seizure of the device itself.

[58] Although New Zealand does not have as elaborate legislative safeguards as exist in the United Kingdom and Canada for dealing with material obtained under the Mutual Assistance Act, the power of the issuing Judge to impose conditions on the warrant enables protection of the values underlying the right to be free from unreasonable search and seizure. The use of such power, wherever reasonable seizure includes material unable to be immediately extracted but which is not within the scope of the warrant, is also consistent with the procedure under the Search and Surveillance Act for sorting items of "uncertain status".[82]

[59] The Court of Appeal considered that the failure to impose conditions in the present case could not be said to be an error because the power to impose special conditions under s 45(3) is discretionary and its exercise was not necessary, as it might have been if issues of legal or professional privilege were likely to arise.[83] It thought that the decision of the Supreme Court of Canada in *Vu* did not advance the case for the appellants because "the warrants in this case did authorise the police to seize [their] computers" and:[84]

> There is also no real dispute in this case that the computers had to be examined off site before it would be possible to differentiate between relevant and irrelevant information.

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80 At [1] and [41].
81 At [47].
82 Section 112.
83 *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629 at [47].
84 *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629 at [72].

[60] I do not find this reasoning to be convincing. It is not sufficient to say that the power to impose conditions is "discretionary". Such powers are conferred to be exercised where the circumstances indicate the need. Those applying for the warrants cannot have it both ways. If it was reasonably necessary to seize material likely to be irrelevant (as *Vu* recognised will very often be the case with personal computers) or if it was reasonably necessary because of the scale of the offending for the warrants to be so broad in scope that they were likely to cover irrelevant as well as relevant material (as is suggested here), then the discretion must be exercised to meet the circumstances.

[61] I agree with the views expressed by Winkelmann J that the issuing Judge could not have been satisfied that there were reasonable grounds for suspecting that all the things listed in Appendix A were evidence of breach of copyright or money laundering when "those categories were so broadly drawn".[85] Had the issuing Judge turned his mind to it (as *A Firm of Solicitors* and *Vu* suggest he was obliged to do), he would have identified that the digital devices would "most likely store some irrelevant material, probably a large volume of irrelevant material, since the warrants were to be executed at domestic properties".[86] He might also have "identified the real possibility that not all of the accounting material or shipping documents would be relevant".[87]

[62] Without definition of the "Mega Conspiracy", it was impossible to know what properly fell within the category referred to in Appendix A, as Winkelmann J pointed out.[88] That was borne out by the evidence of Detective Inspector Wormald, which Winkelmann J accepted showed that the intention of the police was to seek anything that might be relevant "in the knowledge that irrelevant material would be caught up in the net".[89] The police acknowledged they were not able to assess relevance and that such sorting would be carried out when the material was passed over to the United States.[90] All these circumstances indicated that the power to

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85 *Dotcom v Attorney-General* [2012] NZHC 1494, [2012] 3 NZLR 115 at [52].
86 At [56].
87 At [56].
88 At [58].
89 At [60].
90 At [60].

impose conditions on the warrant was one the Judge should have exercised if the warrant was to authorise a search that was reasonable and lawful.

[63] It is not an answer to the concern for the protection of privacy expressed in *Vu* to say that the warrant here explicitly authorised the search and seizure of electronic devices so that *Vu* (where such devices were not identified) is distinguishable. The question is whether the warrant should have done so without imposing conditions to ensure that irrelevant material was properly excluded by sorting under judicial supervision and before the material was passed to the Attorney-General. This was the approach indicated in *A Firm of Solicitors*, which accepted that computers which could reasonably be expected to contain irrelevant as well as relevant information could be seized for forensic examination and extraction of the relevant information. There it was accepted such removal and extraction would be pursuant to conditions included in the warrant which would ensure that irrelevant material would be deleted from any clone of the original hard drive.[91] Although that case was concerned with legal professional privilege, I do not think the general approach was dictated by that dimension. It is one of general application in protection of rights of privacy and property where electronic capture means that irrelevant material needs to be excluded from what is appropriately passed under judicial authority to investigating authorities for use in criminal cases.

Miscarriage of Justice

[64] Because I take the view that the warrants were seriously flawed, I consider s 204 has no application for the reasons already given. It is therefore unnecessary for me to deal with the conclusion of the Court of Appeal that there was no miscarriage of justice, because that issue arises only if there is defect in form. Other members of the Court however consider that the warrants were not general warrants and that their broad scope, although defective, is not sufficient to cause them to be treated as invalid under s 204 unless they amounted to a miscarriage of justice. It is therefore necessary for me to indicate disagreement with the approach taken in the Court of Appeal to the application of s 204, which is approved by the majority in this

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91 *A Firm of Solicitors v District Court at Auckland* [2006] 1 NZLR 586 (CA) at [107].

Court. I indicate my views briefly because they overlap with the reasons why I consider the defects here were too substantive to be covered by s 204.

[65] The Court of Appeal was satisfied that the defects in the search warrants "have not caused any significant prejudice to the respondents beyond the prejudice caused inevitably by the execution of a search warrant".[92] That conclusion is I think based on a mistaken view of what constitutes a miscarriage of justice in this context. The Court of Appeal adopted the view taken by Fisher J in his judgment in *R v Sanders*, a judgment that the two other members of the Court of Appeal, Cooke P and Casey J, were not prepared to join in full. Fisher J there said that miscarriage could be determined only by examining the events which had actually occurred "since the application", so that the defect could be said to have caused "significant prejudice to the accused".[93] I think this is to focus wrongly on the criminal process to follow, rather than the warrant itself and what it authorises.

[66] A search warrant properly issued would not have authorised the seizure of irrelevant material, at least not without setting up conditions to ensure secure and expeditious sorting under the supervision of the court. Where, as here, a search warrant was overbroad and no protective conditions were imposed, the relevant miscarriage of justice is complete. If treated as valid, the warrant is authority for any trespass or breach of privacy entailed. Section 204 is not concerned with matters "downstream" of that.[94] As has already been indicated, the treatment of evidence obtained under an invalid warrant is a different matter.

Conclusion and Result

[67] For the reasons given, I would allow the appeal. I would reinstate the orders made in the High Court. The majority being of the contrary view, the appeal is dismissed with costs of $35,000 for which the appellants are jointly and severally liable to the respondent, together with reasonable disbursements.

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92 *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629 at [70].
93 *R v Sanders* [1994] 3 NZLR 450 (CA) at 462.
94 Compare *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629 at [70].

McGRATH, WILLIAM YOUNG, GLAZEBROOK AND ARNOLD JJ

(Given by McGrath and Arnold JJ)

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Introduction

[68] The United States of America seeks to extradite Mr Dotcom and the remaining appellants to face trial on counts relating to racketeering,[95] copyright infringement and money laundering. Warrants for their arrest have been issued in the United States. On the United States' application, a District Court Judge issued provisional warrants for their arrest in New Zealand under s 20(1) of the Extradition Act 1999. In addition, the United States requested New Zealand's assistance under

[95] "Racketeering" involves a criminal enterprise that is focused on committing or furthering (among other things) money laundering and criminal breach of copyright.

the Mutual Assistance in Criminal Matters Act 1992 (Mutual Assistance Act), the purpose of which is "to facilitate the provision and obtaining, by New Zealand, of international assistance in criminal matters".[96] The request was granted and the New Zealand police sought and obtained search warrants in respect of three addresses occupied by, or associated with, Mr Dotcom and Mr van der Kolk.[97] On 20 January 2012, the police searched those addresses, arrested the appellants, and seized items belonging to them.

[69] The appellants issued judicial review proceedings challenging the validity of the mutual assistance search warrants. They alleged that they were, in effect, general warrants, against which the law has long set its face.[98] They were successful before the High Court,[99] but that Court's decision was overturned on appeal.[100] This Court granted leave on the question:[101]

> …whether the Court of Appeal was correct to allow the appeal from the High Court on the basis that the search warrants issued by the District Court under s 44 of the Mutual Assistance in Criminal Matters Act 1992 were valid.

[70] It is common ground that the District Court Judge who issued the search warrants had a proper basis for issuing them. The evidence before him established reasonable grounds to believe that items related to the offending alleged by the United States were on the premises identified. What is at issue is the form of the warrants. They were not in accordance with the prescribed form, as required by the Mutual Assistance Act and provided for in regulations made under it. More importantly, the appellants also argue that the warrants were deficient in two critical respects – first, they did not sufficiently identify the alleged offences and, second,

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96 Mutual Assistance in Criminal Matters Act 1992, s 4.

97 On 18 January 2012, the District Court at North Shore issued interim arrest and search warrants. The Court also granted an application for an order for registration of a foreign restraining order under the Criminal Proceeds (Recovery) Act 2009, requested by the United States Government. This order was later declared to be a nullity because the application was sought under the wrong statutory provision: see *The Commissioner of Police v Dotcom* HC Auckland CIV-2012-404-33, 16 March 2012. The order has since been superseded by an interim foreign restraining order made by the High Court on 1 February 2012, and foreign restraining orders made on 18 April 2012: *Commissioner of Police v Dotcom* [2012] NZHC 634.

98 See, for example, *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA) at [38].

99 *Dotcom v Attorney-General* [2012] NZHC 1494, [2012] 3 NZLR 115 [first High Court judgment] and *Dotcom v Attorney-General* [2013] NZHC 1269 [second High Court judgment].

100 *Attorney-General v Dotcom [Search Warrants]* [2014] NZCA 19, [2014] 2 NZLR 629 [Court of Appeal judgment].

101 *Dotcom v Attorney-General* [2014] NZSC 52.

they contained an overbroad description of the items that could be seized without specifying conditions to ensure that only relevant items were seized – and were, accordingly, unlawful general warrants.

[71] Under s 21 of the New Zealand Bill of Rights Act 1990, everyone in New Zealand has the right not to be subjected to unreasonable search or seizure.[102] This statutory prohibition has its origins in the common law, in particular the great English case of *Entick v Carrington*[103] and also reflects New Zealand's international obligations.[104] While there are circumstances where warrantless searches are lawful,[105] in general searches must be carried out under warrant, thus interposing the decision of an independent judicial officer between the investigators seeking to conduct a search and the suspect. Besides providing the authority for a search and delineating its scope, a search warrant serves the important function of informing both the searchers and the searched of the legitimate scope of the search.[106]

[72] At the time these warrants were issued, a search warrant that was defective in form could be saved by s 204 of the Summary Proceedings Act 1957.[107] An issue in the present case concerns the application of s 204, which depends on the nature of any deficiencies in the warrants.

Factual background

[73] Mr Dotcom and Mr van der Kolk are resident in New Zealand. Like the other appellants, they have various interests in the Megaupload group of companies,

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102 Searches can be lawful but still unreasonable and unlawful but still reasonable: see *R v Grayson & Taylor* [1997] 1 NZLR 399 (CA) at 407.

103 *Entick v Carrington* (1765) 19 How St Tri 1030, 95 ER 807 (KB).

104 International Covenant on Civil and Political Rights, 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 17.

105 For example, searches incidental to arrest under the Search and Surveillance Act 2012, s 11 and Part 3, Subpart 4. See also searches incidental to a detention warrant under the Misuse of Drugs Amendment Act 1978, s 13EA.

106 See, for example, *Tranz Rail*, above n 98, at [41].

107 The searches at issue took place before the Criminal Procedure Act 2011 and the Search and Surveillance Act 2012 came in to force. This means that the legal position discussed is that which prevailed before the passage of those Acts. Search warrants issued under the Mutual Assistance Act are now governed by s 107 of the Search and Surveillance Act 2012. While s 204 is still in force, it now only relates to warrants and other documents issued under the Summary Proceedings Act (per Summary Proceedings Amendment Act (No 2) 2011, s 7(2) which took effect from 1 July 2013: Summary Proceedings Amendment Act (No 2) 2011 Commencement Order 2013).

which includes Megaupload Ltd, a company incorporated in Hong Kong, and Megastuff Ltd, a company incorporated in New Zealand. Megaupload Ltd operated a website, Megaupload.com, that offered file and content hosting (ie, storage) services. The United States alleges that this website was used by the Megaupload group to facilitate reproduction and distribution of infringing copies of a variety of copyrighted works, including movies, television programmes, music, software and e-books. In addition, the United States alleges that the Megaupload group conducted monetary transactions with the proceeds of these unlawful activities.

[74] On 5 January 2012, a Grand Jury in Virginia handed down an indictment which charged the appellants and associated companies with offences relating to breach of copyright, money laundering and racketeering. Specifically, Mr Dotcom and the other appellants face charges on counts of conspiracy to commit racketeering, conspiracy to commit copyright infringement, conspiracy to commit money laundering, criminal copyright infringement and criminal copyright infringement by electronic means. The maximum penalties for these offences range from five to 20 years' imprisonment.

[75] On 11 January 2012, the United States Department of Justice (as the United States Central Authority)[108] requested the assistance of the Attorney-General (as the New Zealand Central Authority) in obtaining items of evidence. A Deputy Solicitor-General, acting under delegated authority, authorised Detective Sergeant Nigel McMorran to seek a search warrant under s 44 of the Mutual Assistance Act.

[76] Detective Sergeant McMorran swore the affidavit which was the basis for the issue of the warrants. In all, five warrants were granted, three for addresses associated with Mr Dotcom and Mr van der Kolk and two in respect of telecommunications companies. At least two of the addresses associated with Messrs Dotcom and van der Kolk were residential properties, albeit ones from which the United States alleged that the appellants conducted their business activities. The properties had multiple internet connections, including a dedicated fibre optic link, a microwave link and multiple ADSL connections.

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[108] Mutual Assistance Act, s 2.

[77] Before we set out the next steps in the background, we should address the relevant provisions in the Mutual Assistance Act and set out the wording of the warrant issued under it.

The Mutual Assistance Act

[78] The Mutual Assistance Act was enacted to give effect to the Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters, which was adopted at the Commonwealth Ministers meeting in Harare in 1986. The Act makes provision in Part 3 for requests by foreign countries to New Zealand for assistance in criminal matters. Such requests must be made to the Attorney-General, or a person authorised by the Attorney-General in writing to receive such requests.[109] Requirements as to the form of a request for assistance, and what must accompany it, are specified by the Mutual Assistance Act.[110] Assistance may be provided to a requesting country under Part 3 of the Mutual Assistance Act, subject to such conditions as the Attorney-General determines in any particular case or classes of case.[111]

[79] The United States' request for assistance was made under s 43, which makes specific provision for assistance to obtain an article or thing by search and seizure:

> **43 Assistance in obtaining article or thing by search and seizure**
>
> (1) A foreign country may request the Attorney-General to assist in obtaining an article or thing by search and seizure.
>
> (2) Where, on receipt of a request made under subsection (1) by a foreign country, the Attorney-General is satisfied—
>
> (a) that the request relates to a criminal matter in that foreign country in respect of an offence punishable by imprisonment for a term of 2 years or more; and
>
> (b) that there are reasonable grounds for believing that an article or thing relevant to the proceedings is located in New Zealand,—
>
> the Attorney-General may authorise a constable, in writing, to apply to a District Court Judge for a search warrant in accordance with section 44.

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109 Sections 24 and 25.
110 Section 26.
111 Section 29.

As we have said, the United States' application for assistance was granted by a Deputy Solicitor-General. Under s 9A of the Constitution Act 1986 the Solicitor-General may "perform a function or duty imposed, or exercise a power conferred, on the Attorney-General". Under s 9C, the Solicitor-General may delegate any of these matters to a Deputy Solicitor-General, with the written consent of the Attorney-General. There is no suggestion that the Deputy Solicitor-General was not authorised to act.

[80] The police applied for the search warrants under s 44, which provides:

> **44 Search warrants**
>
> (1) Any District Court Judge who, on an application in writing made on oath, is satisfied that there are reasonable grounds for believing that there is in or on any place or thing—
>
> (a) any thing upon or in respect of which any offence under the law of a foreign country punishable by imprisonment for a term of 2 years or more has been, or is suspected of having been, committed; or
>
> (b) any thing which there are reasonable grounds for believing will be evidence as to the commission of any such offence; or
>
> (c) any thing which there are reasonable grounds for believing is intended to be used for the purpose of committing any such offence—
>
> may issue a search warrant in respect of that thing.
>
> (2) An application for a warrant under subsection (1) of this section may be made only by a constable authorised under section 43(2).

As previously noted, it is not disputed that the District Court Judge had a proper basis for issuing the search warrants.

[81] The form and content of the warrants was governed by s 45.[112] It provided:

> **45 Form and content of search warrant**
>
> (1) Every warrant issued under section 44 shall be in the prescribed form.

[112] This section is now repealed: see s 335(5) of the Search and Surveillance Act 2012.

(2) Every warrant issued under section 44 shall be directed to any constable by name, or to any class of constables specified in the warrant, or generally to every constable.

(3) Every warrant issued under section 44 shall be subject to such special conditions (if any) as the District Court Judge may specify in the warrant.

(4) Every warrant issued under section 44 shall contain the following particulars:

(a) the place or thing that may be searched pursuant to the warrant:

(b) the offence or offences in respect of which the warrant is issued:

(c) a description of the articles or things that are authorised to be seized:

(d) the period during which the warrant may be executed, being a period not exceeding 14 days from the date of issue:

(e) any conditions specified by the Judge pursuant to subsection (3).

[82] Two features of this provision are of particular importance for present purposes. First, the form of warrant required by s 45(1) to be prescribed was form 5 in the Schedule to the Mutual Assistance in Criminal Matters Regulations 1993 (Mutual Assistance Regulations).[113] Regulation 3(1) requires that that the forms set out in the schedule be used "in respect of the proceedings or matters under the Act to which those forms relate". Besides requiring reference to the matters referred to in s 45(4), form 5 required that the warrant:

(a) identify the country under whose laws the offence is alleged to have been committed; and

(b) contain a statement that the offence specified is punishable by a term of imprisonment of two or more years.

[113] Form 5 was revoked by reg 4(2) of the Mutual Assistance in Criminal Matters Amendment Regulations 2012 as from 1 October 2012.

Second, under s 45(3), the District Court Judge has the power to set "special conditions". Section 45(4)(e) requires that any such conditions be specified in the warrant, and form 5 makes provision for that.

[83] Section 46 sets out what the constable executing the warrant is authorised to do. It gives authority "subject to any special conditions specified in the warrant pursuant to s 45(3)" to enter and search the place or thing specified in the warrant at any time during its currency, using such assistants as may be reasonable in the circumstances. It also confers power "to search and seize any thing referred to in section 44(1)".

[84] Following execution of the warrant, the Mutual Assistance Act provides for what is to happen to things that are seized:

> **49 Custody and disposal of things seized**
>
> (1) Where any constable seizes any thing pursuant to a warrant issued under section 44, that constable shall deliver the thing into the custody of the Commissioner of Police.
>
> (2) Where a thing is delivered into the custody of the Commissioner of Police under subsection (1), the Commissioner of Police shall arrange for the thing to be kept for a period not exceeding 1 month from the day on which the thing was seized pending a direction in writing from the Attorney-General as to the manner in which the thing is to be dealt with (which may include a direction that the thing be sent to an appropriate authority of a foreign country).
>
> (3) Where, before the expiry of the period referred to in subsection (2), the Attorney-General gives a direction in respect of the thing, the thing shall be dealt with in accordance with the direction.
>
> (4) If no direction is given by the Attorney-General before the expiry of the period referred to in subsection (2), the Commissioner of Police shall arrange for the thing to be returned to the person from whose possession it was seized as soon as practicable after that period has expired.

[85] The statutory scheme accordingly provides that a constable seizing anything under the warrant must deliver it into the custody of the Commissioner of Police. The Attorney-General then has one month in which to give directions as to how what has been seized is to be dealt with and may direct that it be sent to the appropriate authority of the requesting country. If a direction is given, the thing seized is dealt

with accordingly. If not, the Commissioner must return the thing seized to the person from whose possession it was seized. In effect, the custody and disposal of what is seized under mutual assistance search warrants comes under the control of the executive government.

The warrants

[86] We turn now to the search warrants issued in respect of the three addresses associated with Mr Dotcom and Mr van der Kolk. All were in essentially the same form, as follows:

> **SEARCH WARRANT**
>
> **Section 43 and 44**
>
> **The Mutual Assistance in Criminal Matters Act 1992**
>
> To: Every Constable
>
> (or to , constable)
>
> **I am satisfied** on an application
>
> (in writing made on oath/affirmation)
>
> …
>
> **THAT** there is reasonable ground for believing that there is (are) in any building, aircraft, carriage, vehicle, box, receptacle, premises or place situated at [the address], the following thing(s), namely:
>
> As per Appendix "A"
>
> (upon or in respect of which an offence of Breach of Copy Right and Money Laundering has been or is suspected of having been committed)
>
> (*or* which there is reasonable ground to believe will be evidence as to the commission of an offence of Breach of Copy Right and Money Laundering)
>
> …
>
> **THIS IS TO AUTHORISE YOU** at any time or times within 14 days from the date of this warrant to enter and search the said building, aircraft, carriage, vehicle, box, receptacle, premises or place situated at [address], with such assistants as may be necessary, and if necessary to use force for making entry, whether by breaking open doors or otherwise, and also to break open the box (receptacle) (any box or receptacle therein or thereon) by force if necessary; and also to seize:

(any thing upon or in respect of which the offence has been or is suspected of having been committed)

(*or* any thing which there is reasonable ground to believe will be evidence as to the commission of the offence)

…

DATED at Auckland this 19th day of January 2012.

[87] The warrant states that the items to be searched for are "as per Appendix A". Appendix A was attached to each of the warrants and read as follows:

All evidence, fruits, and instrumentalities of the crimes being investigated including, but not limited to, the following:

- Indicia of occupancy or residence in, and/or ownership of, the property;
- All documents and things in whatever form relating to the reproduction and distribution of copyrighted works, including, but not limited to, motion pictures, television programs, musical recordings, electronic books, images, video games, and other computer software;
- All records and things in whatever form, including communications, relating to the activities of the Mega Conspiracy, including, but not limited to, Megaupload, Megavideo, and Megastuff Limited;
- All bank records, deposit slips, withdrawal slips, cheques, money orders, wire transfer records, invoices, purchase orders, ledgers, and receipts;
- All documents that reference shipments, imports, exports, customs or seizures;
- All digital devices, including electronic devices capable of storing and/or processing data in digital form, including, but not limited to;
    - Central processing units;
    - Rack-mounted, desktop, laptop, or notebook computers;
    - Web servers;
    - Personal digital assistants;
    - Wireless communication devices, such as telephone paging devices;
    - Beepers;
    - Mobile telephones;

- Peripheral input/output devices, such as keyboards, printers, scanners, plotters, monitors, and drives intended for removable media;
- Related communication devices, such as modems, routers, cables, and connections;
- Storage media, including external hard drives, universal serial bus ("USB") drives, and compact discs;
- Security devices.

[88] The warrants were not in the form prescribed by the Mutual Assistance Regulations. Except for specific references in the heading to ss 43 and 44 of the Mutual Assistance Act and the 14-day time limit for execution of the warrants (which is required by s 45(4)(d)), the warrants were in the form prescribed for search warrants authorised by the Summary Proceedings Act and under the Summary Proceedings Regulations 1958.[114]

Alleged deficiencies in warrants

[89] The appellants submitted that the warrants were invalid as they were not in the required form. As well they were fatally flawed because of the inadequate specification of the offences and the breadth of the description of the things to be seized. This was exacerbated by the absence of conditions.

[90] In relation to the offences, Mr Davison QC for Mr Dotcom submitted that the warrants were defective because, contrary to requirements of the prescribed form:

(a) they did not identify an offence, nor could an offence or offences be inferred from a reading of the warrants as a whole;

(b) they were not issued in respect of a particular offence or offences; and

(c) they did not stipulate the country whose laws had allegedly been breached.

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[114] Refer to Summary Proceedings Regulations 1958, sch 1, form 50.

[91] In relation to the items authorised to be seized, Mr Davison submitted that the warrants were defective because:

(a) the issuing Judge could not have had reasonable grounds to believe that all of the items listed in the warrants were relevant to the offence or offences because of the broad wording of the warrants;

(b) the authority to search conferred by the warrants was not limited to the particular offence or offences referred to, but was broad-based; and

(c) the warrants did not contain conditions as to the offsite sorting of material and the return of seized items (or copies) to the appellants.

[92] In short, Mr Davison submitted that the search warrants "lacked specificity, were invalid and a nullity".

[93] We will discuss these alleged deficiencies under two headings – description of offences and absence of conditions. Before we do so, however, we need to note the statutory provisions relevant to deficiencies in the form of the warrants and to outline, briefly, the essential principles raised by the issues in the appeal.

Statutory provisions relating to defects in form

[94] First, as indicated, s 45 of the Mutual Assistance Act required that the search warrants be issued by in the prescribed form and reg 3(1) of the Mutual Assistance Regulations prescribed and required the use of form 5. Regulation 3(2), however, provides that variations may be made to a prescribed form to fit the circumstances of the particular case. Then, reg 3(3) provides:

> Strict compliance with the prescribed forms is not necessary, and substantial compliance, or such compliance as the particular circumstances of the case allow, is sufficient.

[95] At the relevant time, s 204 of the Summary Proceedings Act applied to search warrants. That section read as follows:[115]

> **204 Proceedings not to be questioned for want of form**
>
> No information, complaint, summons, conviction, sentence, order, bond, warrant, or other document, and no process or proceeding shall be quashed, set aside, or held invalid by any District Court or by any other Court by reason only of any defect, irregularity, omission, or want of form *unless the Court is satisfied that there has been a miscarriage of justice*.

Unlike reg 3(3), s 204 makes express reference to a miscarriage of justice test.

[96] Next, we mention s 5 of the Judicature Amendment Act 1972, which applies to applications for judicial review such as the present. That section provides:

> **5 Defects in form, or technical irregularities**
>
> On an application for review in relation to a statutory power of decision, where the sole ground of relief established is a defect in form or a technical irregularity, if the Court finds that no substantial wrong or miscarriage of justice has occurred, it may refuse relief and, where the decision has already been made, may make an order validating the decision, notwithstanding the defect or irregularity, to have effect from such time and on such terms as the Court thinks fit.

[97] Finally, s 26 of the Interpretation Act 1999 provides:

> **26 Use of prescribed forms**
>
> A form is not invalid just because it contains minor differences from a prescribed form as long as the form still has the same effect and is not misleading.

[98] In the discussion which follows, we will focus on s 204 as that, potentially at least, appears to offer the widest protection and was the provision that was the focus of argument.

Overview of underlying principles

[99] A search warrant must be as specific as reasonably possible, as the Court of Appeal emphasised in *Tranz Rail Ltd v Wellington District Court* when it said:[116]

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[115] (Emphasis added).

> A search warrant is a document evidencing judicial authority to search. That authority must be as specific as the circumstances allow. Anything less would be inconsistent with the privacy considerations inherent in s 21 of [the Bill of Rights Act 1990]. Both the person executing the warrant, and those whose premises are subject of the search, need to know, with the same reasonable specificity, the metes and bounds of the Judge's authority as evidenced by the warrant: … .

[100] The Bill of Rights Act plays an important role in the interpretation of the scope of powers affecting protected rights that are expressed in broad or general terms. Legislative provisions conferring discretions and powers are, like all statutory provisions, to be read in accordance with s 6 of the Bill of Rights Act,[117] which states:

> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

The powers to issue a search warrant under s 44 of the Mutual Assistance Act must be exercised in a manner consistent with the Bill of Rights Act, and the rights and freedoms it protects.[118] Of these, s 21 is of direct importance in the present case:

> **21 Unreasonable search and seizure**
>
> Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

[101] That said, it is important to recognise that s 21 values are, to a large extent, built in expressly to the Mutual Assistance Act. In particular:

(a) The Attorney-General may only authorise an application for a search warrant where satisfied that the request relates to a criminal matter of some gravity,[119] and there are reasonable grounds for believing that an item relevant to that criminal matter is in New Zealand.[120]

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116 *Tranz Rail*, above n 98, at [41].

117 See *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [68].

118 This is, of course, subject to s 5, which allows for "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

119 It must be an offence punishable by a term of 2 years or more.

120 Mutual Assistance Act, s 43.

(b) Applications for search warrants must be made on oath and provide reasonable grounds to believe that items specified will be in the place that is to be searched.[121] A warrant can only be issued where a District Court Judge is satisfied that there are reasonable grounds to believe that there is in the relevant place anything that may be evidence of the commission of an offence, or in respect of which an offence has or may be committed; search warrants may only be issued in relation to things of that character.[122] The requirement of judicial consideration of whether or not there is a basis for issuing a warrant ensures that there is no intrusion into or on an individual's property and privacy unless there is a legitimate objective of providing mutual assistance to overseas law enforcement authorities that makes the intrusion reasonable.

(c) The prescribed form also reflects s 21 values. First, the particulars referred to in s 45(4) are identified in the form, so that following the form ensures compliance with the law in these respects.[123] In addition, form 5 requires details of the country whose laws are alleged to have been breached and a statement that the offence specified is punishable by two or more years imprisonment,[124] the latter being important as it goes to legality, the Attorney-General being authorised to grant a request for mutual assistance only where such an offence is alleged.[125] So the statutory requirement that a mutual assistance search warrant be issued in a prescribed form reinforces human rights protections by helping to ensure that warrants include information that will enable those executing them,[126] and those whose premises or things are to be searched, to understand the suspected offending overseas that gives rise to it and the authorised scope of the search and what may be taken. The requirement helps ensure that a search does

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121 Section 44.
122 Section 44(1).
123 See above at [81].
124 See above at [82].
125 See s 43.
126 Mr Davison submitted that this was particularly important in relation to a search warrant under the Mutual Assistance Act, given that those executing the warrant will not be those responsible for investigating or prosecuting the alleged criminal conduct.

not exceed the reasonable boundaries of what is required to meet the law enforcement objectives. Those subject to a search are then able to seek meaningful advice concerning the warrant if they wish to do so.

(d) Section 45(3) enables an issuing judge to impose conditions when granting a warrant. As we discuss later in this judgment, conditions are not always necessary; but where imposed, they may assist in protecting against unreasonable search and seizure.

[102] Despite these explicit Bill of Rights-compliant protections, there are aspects of the mutual assistance process where no Bill of Rights protections are specifically identified but will nevertheless be relevant. For example, where items are seized under a warrant, s 49 requires the police constable to deliver them into the custody of the Commissioner of Police, who must hold them until the Attorney-General gives a direction as to how the items are to be dealt with. Bill of Rights considerations may well be relevant to decision-making in this context.

[103] Section 21 is also relevant to the interpretation and application of s 204 of the Summary Proceedings Act in the search warrant context. Butler and Butler express the view that a search or seizure under a search warrant is "unreasonable" for s 21 purposes if the warrant was not "properly issued in accordance with the relevant law".[127] However, they go on to point out that various statutory provisions excuse minor non-compliance with technical aspects of warrant requirements and say that this is not inconsistent with s 21.

[104] We will return to these issues later in this judgment, in particular the question of remedies. We turn now to the first area of particular complaint, the description of the offences.

Description of offences

[105] The warrants did not follow form 5, as required by reg 3(1) of the Mutual Assistance Regulations. Standing alone, that does not mean the warrants were

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[127] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2005) at [18.16.5].

invalid, given the protections provided by the provisions identified earlier. It is the alleged substantive deficiencies that must be considered.[128]

The Courts below

[106] Winkelmann J held that the alleged deficiencies were of such a nature that the warrants were general warrants and accordingly unlawful. In relation to the description of the offences, Winkelmann J held:[129]

> [35] To draw these threads together, there are three key deficiencies in the warrants identified in the first ground of invalidity:
>
> (a) The warrants were defective in form as they did not stipulate the country under whose laws the offence is alleged to have been committed.
>
> (b) The warrants did not identify an offence as required by the [Mutual Assistance Act]; they merely referred to the nebulous concept of "Breach of Copy Right." Nor could the offence or offences to which they related reasonably be inferred from a reading of the warrant as a whole.
>
> (c) The warrants were not issued in respect of a *particular* offence or offences as the [Mutual Assistance Act] requires.

[107] The Court of Appeal took a different view. They considered that a reasonable reader in the position of the recipients of the search warrants would have understood what they related to.[130] This was reinforced by the fact that Mr Dotcom was a computer expert "who would have understood without any difficulty the references in the search warrant to his companies (Megaupload, Megavideo and Megastuff Ltd) and the description of the various categories of electronic items in Appendix A".[131] The Court did not consider that the defects were so radical as to require the warrants to be treated as nullities, describing the defects as "defects in form not in substance".[132] Moreover, the Court was satisfied that when the search warrants were read in the light of the information conveyed contemporaneously by the arrest warrants, a reasonable reader would have understood the nature of the offences

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128 See above at [91].
129 Second High Court judgment, above n 99, footnotes omitted.
130 Court of Appeal judgment, above n 100, at [53].
131 At [53].
132 At [54].

alleged and that the electronic items referred to in Appendix A related to those offences.[133]

New Zealand authorities

[108] In *Tranz Rail*, the Court of Appeal relied on its earlier decision in *Auckland Medical Aid Trust v Taylor*, a decision that preceded the enactment of the Bill of Rights Act.[134] In that case, a warrant was challenged on the basis that the description of the offence was insufficiently precise and the items to be searched for were over-broadly described. The warrant was issued under s 198 of the Summary Proceedings Act 1957. That section authorised the granting of a warrant in respect of "any offence punishable by imprisonment". The warrant referred simply to "an offence of abortion". But there was no such offence: the word "abortion" covers both the legal and illegal termination of pregnancies. In the (then) Supreme Court, Wilson J had held that the misdescription of the offence did not give rise to any miscarriage of justice as no one involved was misled by it. Accordingly, in this respect, the warrant was protected by s 204.

[109] On this point, all three Judges in the Court of Appeal agreed with Wilson J. Having set out Wilson J's finding, McCarthy P said:[135]

> I agree with this. As I have indicated I do not believe for a moment that anyone was misled, and it seems to me that the mandatory provisions of s 204 therefore took effect. Moreover these present proceedings are, in form of an application for review, brought pursuant to the Judicature Amendment Act 1972. Section 5 of that Act also justified our refusing relief on this particular ground.

[110] McCarthy P went on to say, however, that even though the loose description of the offence would be insufficient on a standalone basis to declare the warrant invalid, it could be considered in support of the Auckland Medical Aid Trust's principal submission that the warrant, read as a whole, was unreasonably vague and general.[136] The items authorised to be seized were generally stated – essentially

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133 At [59].
134 *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728 (CA).
135 At 735.
136 See also Richmond J at 742 and McMullin J at 747–748.

records relating to women seeking abortions. The police had seized between 450 and 475 files when executing the warrant.[137]

[111] The Court held that, although the affidavit supporting the search warrant application referred only to one specific suspected incident of illegal termination, what the police officer involved had sought and what he thought he had obtained was a warrant to search all the records at the Auckland Medical Aid Trust to see how many, if any, illegal terminations had been carried out. In other words, he had sought and obtained a general warrant. That defect could not be cured by resort to s 204, as those in charge of the Trust's premises were deprived of the opportunity they should have had to resist the wholesale seizure of their records and to insist on the police making a selective search,[138] particularly given confidentiality concerns.[139] The warrant was quashed accordingly.

[112] In *Tranz Rail*, the Court of Appeal considered the validity of a search warrant obtained by the Commerce Commission in respect of Tranz Rail's offices at the Wellington Railway Station. Under s 98A(2) of the Commerce Act 1986, specified judicial officers were empowered to issue a search warrant if there were reasonable grounds for believing that it was "necessary" for the purpose of ascertaining whether or not a person had engaged, or was engaging, in conduct that constituted, or might constitute, a breach of the Commerce Act. The warrant was described as being for the purpose of "ascertaining whether or not Tranz Rail Limited or any of its related entities or any employee of theirs have engaged in or are engaging in conduct that does or may constitute contraventions of sections 27 and/or 36 of the Commerce Act 1986".

[113] Tranz Rail argued that the issue of a warrant was not "necessary" and that the description of the warrant's purpose was overbroad, so that the warrant was a general one. The Court of Appeal found for Tranz Rail on both points. The Court described a general warrant in this context as "a warrant which does not describe the parameters of the warrant, either as to subject-matter or location, with enough

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137 At 749 per McMullin J.
138 At 737–738 per McCarthy P. See also McMullin J at 747–750.
139 At 742–743 per Richmond J.

specificity".[140] The reference in the warrant to "engaging in conduct that does or may constitute contraventions of sections 27 and/or 36 of the Commerce Act 1986" was overbroad, being little more illuminating than a reference simply to contravening the Commerce Act.[141] Greater specificity could and should have been given.[142]

[114] In the present case, the warrants were deficient in that, while they referred to offences of breach of copyright and money laundering, they did not specify that these were offences against United States law, nor did they specify that they were punishable by two or more years' imprisonment. Before we address these deficiencies more specifically, however, we should address the issue of miscarriage of justice under s 204 and the relevance of context or surrounding circumstances in the analysis.

Miscarriage and relevance of surrounding circumstances

[115] As we have said, at the relevant time, s 204 had the effect that a search warrant issued under the Mutual Assistance Act should not be set aside or held to be invalid "by reason only of any defect, irregularity, omission, or want of form unless the Court is satisfied that there has been a miscarriage of justice". In a series of cases, the Court of Appeal held that the test for miscarriage under s 204 is whether there has been prejudice to the person affected and that it is relevant to an assessment of prejudice in a search warrant context, at least where the alleged defects are on the face of the warrant, to take a contextual approach and consider the circumstances surrounding the execution of the warrant. This is subject to the overriding point that some defects may be of such a nature as to render a document or process a nullity, incapable of being saved by s 204, as was the case in *Auckland Medical Aid Trust*.

[116] In *R v Kestle*, a Magistrate committed an accused facing a charge of murder for trial without reading him a statutorily required statement or giving him the opportunity to plead.[143] The accused was brought before the same Magistrate about three weeks later, when the Magistrate did read the required statement and gave the

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140 At [38].
141 At [39].
142 At [42].
143 *R v Kestle* [1973] 2 NZLR 606 (CA).

accused the opportunity to plead, before committing him for trial a second time. The accused argued that the original committal for trial was a nullity and the (then) Supreme Court was without jurisdiction to deal with the case. The Crown invoked s 204.

[117] The Court of Appeal noted that s 204 was "entirely new" and that the former sections protecting want of form, ss 79 and 373 of the Justices of the Peace Act 1927 and s 11 of the Summary Jurisdiction Act 1952, did not contain the words "unless the court is satisfied that there has been a miscarriage of justice". The Court said that it could see "no reason why full effect should not be given to the ordinary and natural meaning of the language of s 204", particularly because of the protection to an accused that the miscarriage proviso gave.[144] The Court concluded:[145]

> In our view, s 204 in its plain meaning prevents this Court from holding the order of committal to be invalid by reason of [the omission to address the accused in the statutorily required manner] unless the Court is satisfied that there has been a miscarriage of justice. In the circumstances of the present case we feel able to say with certainty that the failure so to address the appellant did not operate to his disadvantage, as it is clear from the facts that he had no wish or intention to plead guilty to the charge of murder.

[118] Subsequently, the Court of Appeal has confirmed this approach in a number of cases and has applied s 204 in situations where there have been substantive deficiencies, on the basis that there was no suggestion of prejudice. We give two examples.

[119] First, in *Police v Thomas* the Court considered the application of s 204 to defects in respect of notices of prosecution for minor offences.[146] Although Richmond P left open the question how far s 204 might apply to a "grave defect" in an information,[147] he considered that s 204 applied to the defects alleged in the particular case.[148] The President emphasised that there was no suggestion of a miscarriage of justice in the particular case, and thought it unlikely that there could

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144 At 609.
145 At 609.
146 *Police v Thomas* [1977] 1 NZLR 109 (CA).
147 At 115.
148 At 116.

be a miscarriage in other similar cases given the nature of the defects alleged, but left that to be determined in the context of individual cases.[149]

[120] Woodhouse J did not express a concluded view on the application of s 204[150] but the third Judge, Cooke J, observed:[151]

> If a notice considered as a whole is defective, s 204 will apply unless there has been a miscarriage of justice. No doubt s 204 is unavailable if a defect is so serious as to result in what should be stigmatised as a nullity. But nullity or otherwise is apt to be a question of degree: … In practice the questions of miscarriage of justice and nullity will often tend to merge.

Later, Cooke J said:[152]

> After hearing his counsel there can be no doubt that in fact none of the technical points raised have involved any prejudice to the defendant. They are all at worst in the category of defects, irregularities, omissions or want of form. Section 204 applies to the notional information and the conviction unless the court is satisfied that there has been a miscarriage of justice. Not being so satisfied, one cannot hold the proceedings invalid. It may be added that, although we do not have the particular facts of any other case before us. I think that the great majority of cases in which similar notices have been used in the past will almost certainly likewise be valid because protected by s 204.

In this passage, Cooke J, like Richmond P, appears to accept that s 204 requires a consideration of whether there has there been a miscarriage of justice in the particular circumstances of individual cases, that is, a contextual approach is contemplated. As a consequence, there may be prejudice in one case but not another, even though the defect in each case is identical. Cooke J also emphasised that if what occurred must be characterised as a nullity, s 204 has no application and the question of miscarriage does not arise.

[121] Second, in *Hall v Ministry of Transport*, the Court of Appeal was required to consider the effect of deficiencies in infringement notices.[153] While the infringement notices followed the form in the relevant regulations, that form was not consistent with the requirements of the relevant legislation. The main deficiency with the form

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149 At 116.
150 At 119.
151 At 121.
152 At 122.
153 *Hall v Ministry of Transport* [1991] 2 NZLR 53 (CA).

in the regulations was that it could mislead a reasonable reader by giving the impression that unless the stipulated fee was paid within 28 days, enforcement proceedings could be commenced. In fact, the legislation provided that a reminder notice was to be issued after 28 days, after which the recipient had a further 28 days to make payment.

[122] Delivering the judgment of the Court, Cooke P noted first that the recipient of the notice in the particular case did not allege that he had been in any way misled by the error.[154] Cooke P referred to the Court's observation in *Kestle* that full effect should be given to the natural and ordinary meaning of the section and said that it was "settled that this is the correct approach".[155] Cooke P went on to state that nullity is a question of degree. He accepted that a document might be "so gravely defective" that it should be treated as non-existent, so that s 204 could not apply, but said that the court should be slow to reach such a conclusion, even where there are substantial deficiencies.[156] In the particular case, there was no injustice and s 204 applied. It is implicit in the Court's approach that if a recipient of the notice could show that he or she had been misled by it, and thereby prejudiced, the Crown could not rely on the curative effect of s 204, which again indicates that the approach is a contextual one.

[123] The Court of Appeal has also considered s 204 in the context of search warrants. In *Rural Timber Ltd v Hughes* a search warrant was alleged to be defective as a result of the way in which the offence was described and the breadth of the description of things that could be seized.[157] The police were investigating the appellants (a trucking company and its principals) for avoiding road user charges by fraudulent means. They conducted a search under a search warrant that described the offence as "conspiring to defraud the Commissioner of Works (Crimes Act 1961, s 257)" and attached a schedule identifying, in general terms, 15 categories of items that could be seized (for example, hubodometers, tools or implements for tampering with hubodometers, driver's log books or time sheets, vehicle running receipts and mileage records and so on).

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154 At 56.
155 At 56.
156 At 57.
157 *Rural Timber Ltd v Hughes* [1989] 3 NZLR 178 (CA).

[124] The Court accepted that there was a proper basis for the issue of the warrant.[158] Although the statement of the offence in the warrant lacked precision, the schedule was broadly stated and there was a further defect,[159] the Court held that the warrant was protected by s 204. This was because it was not satisfied that there had been a miscarriage of justice.[160] The Court held that a reasonable reader would have understood from reading the warrant as a whole (including the schedule) that the conspiracy alleged against the appellants concerned misrepresentation of distances covered by the company's vehicles. The Court also referred to evidence that those who carried out the search had been briefed as to the nature of the alleged conspiracy and the general object of the searches and that the company had also been briefed as to these matters before the search began: this was, the Court said, relevant to the question of miscarriage of justice.[161] The Court appears to have accepted that the nature of the alleged conspiracy meant that the items to be seized had to be stated widely, and said that if any obviously irrelevant material was taken, that could be addressed in a civil suit.[162]

[125] For present purposes, the relevance of the case is that the Court was prepared to consider the surrounding circumstances (the briefing of the searchers and explanations to the searched) in assessing the applicability of s 204 to the search warrant, specifically the question of miscarriage. Cooke P said:[163]

> Because of the evidence about the briefing and what was explained on the arrival of the search party at the [company's] premises, the case has to be seen as one in which all concerned, the searchers and those in control of the premises and vehicles searched, knew that the search was intended to be for evidence of a duplicate hubodometer conspiracy.

[126] The Court of Appeal also considered s 204 and its application to search warrants in *R v Sanders*, a case in which Fisher J gave a lengthy judgment examining the relevant principles.[164] In a joint judgment of himself and Casey J, Cooke P said:[165]

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158 At 183.
159 The third defect is not presently relevant, but is discussed at 185–186.
160 At 184.
161 At 184.
162 At 185 and 186.
163 At 185–186.
164 *R v Sanders* [1994] 3 NZLR 450 (CA).
165 At 454.

> Fisher J has provided a valuable general discussion of ss 198 and 204. We have no doubt that it will be helpful in the resolution of cases arising under those sections. Shortcomings in procedure and documentation are so various, however, that we have reservations as to how far any formula could be evolved that would provide anything in the nature of an automatic analytical answer to issues under the two sections. In the end it is always a question of the relative seriousness or otherwise of an error. If the error is so serious as to attract the description "nullity", s 204 will not assist. Inevitably questions of degree and judgment arise.

[127] In *R v McColl*, Tipping J, delivering the judgment of the Court of Appeal in another case involving s 204 and a search warrant, cited this extract from the judgment of Cooke P and Casey J before going on to approve aspects of Fisher J's judgment.[166] The Court said that if a defect is such as to nullify an application for a warrant, s 204 will not save the warrant; but if the defect falls short of nullification, the question will be whether there has been a miscarriage of justice, the onus being on the proponent to establish that.[167] The Court said that a miscarriage would arise "if the defect has caused significant prejudice to the person affected".[168]

[128] Subsequent cases have confirmed this approach in the context of search warrants,[169] and in other contexts.[170] In one of these cases, *Andrews v R*, the Court of Appeal concluded that "the courts have shown a willingness to use s 204 robustly, even in relation to serious defects".[171] It is noteworthy that the text of s 204 has been carried over into s 379 of the Criminal Procedure Act 2011, with no relevant change, suggesting that Parliament did not consider it necessary to alter or amend the approach which the courts had hitherto taken to s 204, although it no longer applies in respect of search warrants under the Mutual Assistance Act.[172]

[129] In summary, the authorities to date have held that full effect should be given to the ordinary and natural meaning of the language of s 204. The authorities accept that some defects are so serious that the document or process concerned must be

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166 *R v McColl* (1999) 17 CRNZ 136 (CA) at [18].
167 At [21].
168 At [22].
169 See, for example, *R v Green* [2008] NZCA 352 and *Andrews v R* [2010] NZCA 467, where a number of the relevant authorities are discussed at [42]–[44].
170 See, for example, *Abraham v District Court at Auckland* [2007] NZCA 598, [2008] 2 NZLR 352, especially at [41] and following and *Wallace v Waikato Regional Council* [2011] NZCA 119, [2011] 2 NZLR 573, especially at [62] and following.
171 *Andrews*, above n 169, at [42].
172 See n 107 above.

treated as a nullity and outside the scope of s 204, this conclusion is one which courts should be slow to reach. The court's approach should not be a technical or mechanical one, and even relatively serious defects may receive the protection of s 204. Where a court concludes that the relevant document or process is not a nullity on account of the particular defect(s), the question whether s 204's protective effect is available depends on whether that will involve a miscarriage of justice. That will be determined by whether or not the particular defect has caused significant prejudice to the person affected. In considering whether there is such prejudice, where defects on the face of a search warrant are alleged, the court is entitled to have regard to the context or surrounding circumstances to see whether they alleviate the potential effect of any such deficiencies or whether prejudice remains.

[130] Clearly there is room for dispute about how far the concept of miscarriage of justice should be taken in the context of s 204. However, it is not necessary for present purposes that we consider the extent to which we should accept the principles that emerge from the line of cases just discussed and resolve definitively the question of how expansive the concept is. Whatever else it does, we think it is clear that the concept goes far enough to enable a court to take relevant surrounding circumstances into account when considering whether the subject of a search warrant has suffered any prejudice for the purposes of s 204 as a result of defects on the face of the warrant of the type alleged in this case (assuming they do not reach the nullity threshold). We see this approach as being consistent with s 21 of the Bill of Rights.

Additional factual context

[131] Detective Inspector Wormald led the investigation into Mr Dotcom and his associates and companies in New Zealand. He gave evidence that the police who attended and held primary roles in managing the searches had been involved in planning for the execution of the warrants for periods ranging from weeks to months. He deposed that all had received significant briefings as to the nature of the case and understood what was evidence and what was likely to contain evidence relevant to the United States proceedings. Additional staff were briefed in the days before, or on the morning of, the searches.

[132] The officer in charge at Mr Dotcom's residence on 20 January 2012 when the search took place was Detective Sergeant Humphries. The initial entry onto the property was made by the Special Tactics Group (STG) and the Armed Offenders Squad (AOS) at around 6.45 am. We understand that the manner of entry is the subject of separate litigation, so we will not comment on it.

[133] Initially, Mr Dotcom could not be found as he had gone to what was described as the "Red Room". He was discovered there around 7 am. The commander of the STG/AOS group advised DS Humphries shortly after that three of those for whom there were arrest warrants were in custody. Then, at 7.40 am, the commander advised DS Humphries that the property was secure and that it was safe for him to enter. DS Humphries then went into the property and, at 7.45 am, went to the dining room, where Mr Dotcom was sitting. DS Humphries identified himself, and said that he was in charge of the police operation at the house and that the police were there because of the activities of Megaupload. He advised Mr Dotcom that he had a warrant for his arrest and asked him if he understood that he was under arrest. Mr Dotcom confirmed that he did understand, and that he had been given his rights.

[134] DS Humphries provided Mr Dotcom with a copy of the arrest warrant, which Mr Dotcom read. DS Humphries explained that the warrant was issued under the Extradition Act and that it related to a variety of charges including conspiracy to commit racketeering, money laundering and copyright infringement, following an investigation by the Federal Bureau of Investigation. Mr Dotcom asked what was meant by the term "racketeering". DS Humphries said that he understood the equivalent offence in New Zealand was participation in an organised criminal group. In response to Mr Dotcom's question whether the case would be heard in New Zealand or whether he would be extradited to the United States, DS Humphries said that the United States would be applying for his extradition.

[135] Following some further discussion, DS Humphries showed Mr Dotcom the original search warrant and gave him a copy of it. Mr Dotcom read it. DS Humphries explained that it authorised the seizure of evidence relating to breach of copyright and money laundering, such as computers, cell phones, electronic storage

devices and documents. Then, at 7.50 am, DS Humphries served the restraining order on Mr Dotcom, and they had some discussion about that.

[136] DS Humphries went through a similar process in relation to Messrs Ortmann and Batato. It appears that the full scale search of the property started shortly after.

[137] The arrest warrant issued in respect of Mr Dotcom read as follows:

> **PROVISIONAL WARRANT FOR ARREST UNDER**
>
> **EXTRADITION ACT 1999**
>
> *(Sections 20(1), 42, Extradition Act 1999)*
>
> **TO**: Every member of the police
>
> On 18 January 2012 the United States of America applied for a provisional warrant under section 20 of the Extradition Act 1999 for the arrest of Kim DOTCOM, also known as Kim SCHMITZ and Kim VESTOR, currently residing in Auckland.
>
> The information provided in support of the application states that –
>
> (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.

(b) On 5 January 2012 a warrant for the arrest of Kim DOTCOM in relation to these offences was issued by Julie Correa, Deputy Clerk of the United States District Court for the Eastern District of Virginia, pursuant to the authorisation of Magistrate Judge Theresa Buchanan, in accordance with the practice of the Court.

I am satisfied that –

(a) The warrant for the arrest of Kim DOTCOM has been issued in the United States of America by a judicial authority having lawful authority to issue the warrant; and

(b) Kim DOTCOM is in New Zealand; and

(c) There are reasonable grounds to believe that –

(i) Kim DOTCOM is an extraditable person within the meaning of section 3 of the Extradition Act 1999;

(ii) The offences for which Kim DOTCOM is sought are extradition offences within the meaning of section 4 of the Extradition Act 1999;

(d) It is necessary or desirable that a warrant for the arrest of Kim DOTCOM be issued urgently.

I DIRECT YOU TO ARREST Kim DOTCOM and bring him before a District Court as soon as possible to be further dealt with in accordance with the Act.

[138] As can be seen, the warrant spelt out that Mr Dotcom was being arrested under the Extradition Act at the request of the United States, specified the counts with which he had been charged in the United States and noted that a warrant for his arrest had been issued in the United States.

[139] Against this background, we turn to the validity of the search warrants in light of their description of the relevant offences. The ultimate question is whether or not the deficiencies in the warrants resulted in a miscarriage in terms of s 204.

Evaluation

[140] We will begin by looking at the search warrants on their face, ignoring any relevant surrounding circumstances. We will then consider the position when the surrounding circumstances are taken into account.

[141] Before we do so, however, we should say that it is difficult to understand how it came about that the Crown sought search warrants in the form that it did. When the application for the warrants was made, Crown counsel filed a supporting memorandum in which counsel said:

> The form and content of the warrant is set out in ss 45 and 46 of [the Mutual Assistance Act]. The form of the warrant provided to the Court complies with these sections. Of particular note, the warrant can only be in force for 14 days.

Counsel's memorandum then set out the full text of ss 45 and 46. In fact, the warrants submitted did not comply with s 45. No reference was made to the Mutual Assistance Regulations and the prescribed form was seemingly overlooked. Obviously, it is most unsatisfactory that this error was made.

[142] Beginning with the warrants, standing alone, they described the offences as breach of copyright and money laundering. Appendix A gives some greater specificity to this by indicating that the charges relate to the distribution of electronic materials. They also provide some detail by referring to Megaupload, Megavideo and Megastuff as being elements of the "Mega Conspiracy". These references identify the means by which the alleged offences were carried out – through the companies – and that in turn provides information as to the type of activity alleged to be illegal as it relates to the business activities of the companies, which were internet-based. Moreover, the references place the alleged offending within something of a time frame, as the evidence was that Megaupload Ltd was incorporated in the Hong Kong in September 2005 and Megastuff Ltd in New Zealand in 2010.

[143] However, although some detail can be obtained from a reading of the warrants in light of the appendix, it is not obvious on the face of the warrants that the alleged offending is against United States law (although that may be a deduction that could be made from the nature of Megaupload's website), nor is it clear that the maximum penalty for the offending exceeds two years, both of which were requirements of the prescribed form.

[144] Potentially, missing details of this type could be important and their absence could cause prejudice. For example, a person subject to a search may seek legal assistance. It will be difficult for a lawyer to advise if the warrant does not contain basic information of the type that was omitted.

[145] However, we are satisfied there was no significant prejudice in this case when the surrounding circumstances are taken into account. The relevant surrounding circumstances include in particular:

(a) the explanations given by DS Humphries to Mr Dotcom when he was given a copy of, first, the arrest warrant and, second, the search warrant; and

(b) the contents of the arrest warrant, which Mr Dotcom read and understood (apart from the meaning of racketeering) before he was given the search warrant.

When the surrounding circumstances are taken into account, it is clear that Mr Dotcom was given the relevant detail about the offences which were the subject of the search warrant. There is no indication that he did not understand what the search warrant related to. Further, the evidence does not suggest that Mr Dotcom's lawyers faced any difficulty in giving advice as a result of lack of detail in the warrants. Equally, it is clear that police personnel were given the relevant information about the specific offences at issue in their briefings prior to the searches being conducted.

[146] Accordingly, we consider that, viewed in isolation from the other alleged shortcomings, the deficiencies in the warrants in relation to the description of the offences did not result in a miscarriage of justice. The deficiencies were defects in form, not substance, and are protected by s 204, so that the warrants are not invalid on that account. As we have already indicated, applied in this way, s 204 does not raise concerns under s 21 of the Bill of Rights.

[147] The more significant issue is the breadth of the description in Appendix A of the items to be seized and the lack of conditions, to which we now turn.

Overbroad description and absence of conditions

[148] The appellants' complaint concerning the breadth of the search warrants is directed at the generality of the description in Appendix A. Appendix A listed the categories of items police believed to be at the places to be searched which they were authorised to seize if the police believed them to be evidence of the commission of the stipulated offences or things in respect of which offending had taken place. The focus of the appellants' submission is particularly, but not exclusively, on the reference in Appendix A to:

> - All digital devices, including electronic devices capable of storing and/or processing data in digital form, including, but not limited to;
>
> - Central processing units;
> - Rack-mounted, desktop, laptop, or notebook computers;
> - Web servers;
> - Personal digital assistants;
> - Wireless communication devices, such as telephone paging devices;
> - Beepers;
> - Mobile telephones;
> - Peripheral input/output devices, such as keyboards, printers, scanners, plotters, monitors, and drives intended for removable media;
> - Related communication devices, such as modems, routers, cables, and connections;
> - Storage media, including external hard drives, universal serial bus ("USB") drives, and compact discs;
> - Security devices.

[149] The appellants submitted that Appendix A was so broad that it did not meaningfully limit the scope of the search to be undertaken. The list of items was expressed in an inclusive rather than exhaustive manner. On their terms, the search

warrants enabled seizure of a huge amount of data, much of which was irrelevant. Given that the searched properties were used for domestic as well as business purposes, it was inevitable that items seized under the warrant would include highly personal information. The effect of the broad terms of the warrants was said by the appellants to be a massive invasion of their privacy.

[150] In addition to the general expression of authority in the warrant, the appellants submitted that the failure to include conditions as to offsite sorting of material and return of seized items, or at least cloned copies of them, was a defect that made the warrants invalid. In addition to the personal information, a large amount of the seized data would have been relevant to the preparation of the appellants' defence to the substantive charges and to their extradition. Given that the seizure of such material was foreseeable, the Judge issuing the warrants ought to have imposed conditions sufficient to protect the appellants' rights to privacy, to access the seized material to prepare their defence, and to a fair extradition hearing.

The Courts below

[151] Winkelmann J held that the terms of the warrants, which were to be executed on residential properties, were likely to be read as authorising seizure of all data and items in the very broad categories set out in Appendix A.[173] The breadth of the description of those categories meant they would include irrelevant information. Some of the digital devices would also store irrelevant and personal material. There was also a reasonable possibility that some of the accounting material and shipping documents covered by the warrants would also be irrelevant.[174] The reference in the warrants, without definition, to the "Mega conspiracy" was unacceptably vague. Overall the warrants, in the Judge's view, authorised search and seizure of items beyond what the issuing Judge could reasonably be satisfied was evidence of breach of copyright or money laundering.[175]

[152] Winkelmann J accepted that there would be operational difficulties in sorting what material was relevant to the alleged offending but decided that these could not

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173 First High Court judgment, above n 99, at [55].
174 At [56]: see also at [62] in relation to personal information on the computers.
175 At [56].

expand the scope of authority to search and seize under the Act.[176] While the police practice of taking material, for the purpose of separating the relevant from irrelevant offsite, made it inevitable that some irrelevant material would be taken, this practice had limits.[177] Police officers were required to undertake a preliminary sorting exercise on the searched premises, after which they could take offsite the things which they reasonably believed contained relevant material. Further necessary offsite sorting should have taken place promptly, with irrelevant material or items then being returned to the owner.[178] Due to the limited ability to search computer drives onsite, however, it would have been reasonable for the police officers to take them offsite and clone them. Either the original or the cloned devices could then have been returned.[179] Given that the New Zealand police officers had limited knowledge of the operation, it would have been proper for them to involve officers from the FBI in the sorting exercise.[180]

[153] This approach was necessary because there was no legal basis for the officers to retain material that did not fall within the categories in s 44(1) of the Mutual Assistance Act.[181] Winkelmann J's conclusion was that, because the warrants authorised the seizure of irrelevant material, they were invalid.[182]

[154] Her Honour did accept that, had the warrants been adequately specific as to the offence and scope of items that might be seized, and therefore valid, conditions could have been imposed, when the warrant was issued, to address the sorting process. They could have enabled it to take place offsite and provided for how it should be undertaken.[183] Conditions addressing the offsite sorting process in this case might have achieved "an appropriate balance between the investigative needs of the FBI and the right of the plaintiffs to be free from unreasonable search and seizure".[184] The conditions could have appropriately provided for cloning of hard

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176 At [61].
177 At [63].
178 At [69].
179 At [70].
180 At [68], [70] and [75].
181 At [70].
182 At [77].
183 At [81]–[86].
184 At [82].

drives, extraction of relevant material, and in due course return to the appellants of hard drives or clones.[185]

[155] The Court of Appeal saw the lawfulness of the search warrants differently, concluding that the warrants were valid. The Court accepted that the descriptions in Appendix A of the categories of items that could be seized were on their face broad, and that in this respect the warrants were defective.[186] But despite this and the failure to use the prescribed form for the warrants, the Court was satisfied that "a reasonable reader in the position of the recipients of the search warrants would have understood what they related to".[187] Mr Dotcom, in particular, as a computer expert, would have understood all of the references to the Megaupload companies and the description of various electronic items.[188] As well, reading the search and arrest warrants together, it was apparent that the offences in the search warrants were those stated in the arrest warrants, and that the items in Appendix A related to those offences.[189]

[156] The Court of Appeal also decided that the absence of conditions imposed under s 45(3) did not make the warrants defective.[190] The Mutual Assistance Act gave the issuing Judge a discretion as to whether to impose special conditions in a warrant. It was not necessary for the Judge to do so in this case, particularly as there were no issues of legal professional privilege.[191] Appendix A was as specific as could reasonably be expected in the circumstances and it was not necessary to prevent the FBI having access to the contents of the seized material.[192] Under the Mutual Assistance Act, any issues relating to disposition of the seized items were matters for the Attorney-General to decide.[193]

[157] Finally, the Court of Appeal saw the question of whether any subsequent prejudice was caused by alleged excessive seizure or retention of irrelevant evidence

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185 At [86].
186 Court of Appeal judgment, above n 100, at [46]–[47].
187 At [53].
188 At [53]
189 At [59].
190 At [47].
191 At [47].
192 At [47].
193 At [47].

as "separate downstream matters not caused by the defects in the search warrants".[194] The Court acknowledged that search and seizure of personal computers might give rise to difficulties in relation to assessing what is relevant and irrelevant. In the present case, however, the warrants had explicitly authorised seizure of computers and there was no real dispute that in order to differentiate between relevant and irrelevant information they would have to be examined offsite.[195]

The position of the parties

[158] In this Court, the appellants contended that the broad description of the categories of items listed in Appendix A, coupled with the absence of conditions, meant that the search warrants took effect as "general warrants". They submitted that, in practical terms, the over-broad description authorised the "wholesale seizure of virtually every electronic device located at the properties". It was readily foreseeable that thus framed, the warrants would result in "a massive invasion of the appellants' privacy, and seizure of a huge amount of data, much of which would be irrelevant and, further, highly personal".

[159] The argument for the Attorney-General was that the practicalities of a search that covered information on computers required that the sorting out of relevant information take place following an examination of the devices offsite. It was not necessary that conditions be imposed on the warrant to authorise or achieve this. It was argued that under the Mutual Assistance Act post-search handling of seized items was a matter for the Attorney-General and noted that mutual assistance warrants had been excluded from the provisions of the Search and Surveillance Act that ordinarily govern the handling of seized items.

[160] These competing contentions raise interrelated issues of whether the scope of the mutual assistance warrant that was issued should have been confined and whether conditions should have been imposed in the warrant concerning the sorting of information that was to be available to be sent to the requesting country.

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194 At [70](c).
195 At [71]–[73].

Interpretation of the Mutual Assistance Act

[161] While the terms of s 44 apparently confer broad and unfettered powers of search and seizure, to give effect to such a meaning would constitute an unreasonable and unjustifiable limit on the s 21 right to be free from unreasonable search and seizure. In accordance with s 6 of the Bill of Rights Act, s 44 should, so far as possible, be given a meaning consistent with that right. The general terms of s 44 can be read consistently with s 21 as a restraint on governmental action.[196] So read, the power given is to issue a mutual assistance search warrant that will authorise search and seizure that in the circumstances is consistent with the Bill of Rights Act restraint.[197] In this respect, legitimate state interests under the Mutual Assistance Act must accommodate reasonable expectation of privacy of individuals in their property and homes.

[162] As we have said, there are Bill of Rights-compliant protections built into the relevant provisions of the Mutual Assistance Act.[198] Other constraints under settled common law principles applicable to the Mutual Assistance Act also contribute to protection of the right to be free from unreasonable search and seizure. Case law and approaches followed in other jurisdictions provide guidance as to how s 21 interests can be recognised in relation to mutual assistance search warrants and, in particular, those authorising search and seizure of computer information.

New Zealand authorities

[163] A number of decisions of New Zealand courts, in different statutory contexts, have recently addressed the scope of police authority to search, seize and make copies of computers and hard drives and to sort offsite seized material in both physical or electronic form.

[164] In these cases, the 1985 decision of the Court of Appeal of England and Wales in *Reynolds v Commissioner of Police of the Metropolis* has often been discussed and relied on.[199] It was one of the first cases to consider the issue of

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196 *R v Grayson and Taylor*, above n 102, at 407.
197 The Bill of Rights Act does permit justified limits on the rights that it contains: s 5.
198 See above at [101].
199 *Reynolds v Commissioner of Police of the Metropolis* [1985] QB 881 (CA).

offsite sorting of material seized under a search warrant. *Reynolds* did not involve the search and seizure of computers and the information on them, but of physical documents. In execution of a search warrant issued as a result of a forgery investigation, police officers seized thousands of documents and took them to the station. Officers did not take documents that they thought could not possibly have any evidential value, and the documents that were seized were returned two days later. No prosecution followed, and the plaintiff brought a claim for trespass to goods, amongst other things. At first instance, the jury found that the police had not taken any documents they were not entitled to take. On appeal, the plaintiff challenged the Judge's summing up on this point.

[165] The judgment of Slade LJ contains a helpful statement of the principles on which the members of the Court were agreed:[200]

> (1) No matter how convenient this course may seem to be, a police officer acting under a search warrant … is not entitled, without the consent of the owner, indiscriminately to remove from the premises each and every file, book, bundle or document he can lay his hands on, even if only for the purpose of temporary sorting. Before doing so, he must have regard to the nature and contents of the item in question.
>
> (2) However, provided that he acts reasonably in so doing, he is entitled to remove from the premises files, books, bundles or documents which at the time of removal he reasonably believes contain (i) forged material, or (ii) material which might be of evidential value, as showing that the owner is implicated in some other crime.
>
> (3) Any necessary sorting process in relation to all items removed (e.g., those contained in files and bundles) should be carried out with reasonable expedition and those of them which are not found to fall within either of the two relevant categories should then be returned reasonably promptly to the owner.

[166] The plaintiff's appeal succeeded on the basis that the Judge had not directed the jury to consider whether each document seized by the police was one that they reasonably believed to be forged or otherwise relevant as evidence.

[167] In a subsequent judgment in *R v Chesterfield Justices ex p Bramley*,[201] the English Court of Appeal took a more restrictive approach, under different legislation,

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200 At 896.

201 *R v Chesterfield Justices, ex p Bramley* [2000] QB 576 (CA).

holding that while sifting through a mountain of material prior to taking it away to sort elsewhere might be a common sense answer to a situation where officers executing a warrant are faced with vast amounts of material, this approach was not authorised by the statutory provision which only permitted seizure of items reasonably believed to be evidence of an offence under investigation.

[168] The New Zealand Court of Appeal considered these two English cases in *A Firm of Solicitors v District Court at Auckland*.[202] The Court perceived a difficulty with applying the approach in *Bramley* to a search warrant under the Serious Fraud Office Act 1990. The likely effect would be that an officer executing a warrant could never remove from searched premises a computer hard drive containing data other than that relevant to an investigation. Nor would cloning such a hard drive onsite be permitted. In the Court's view, such outcomes were neither appropriate nor required under the legislation being applied.[203] The approach taken in *Reynolds*, which was to be preferred to that in *Bramley*, provided for a "reasonable balance between the competing interests of respect for privacy rights and effective law enforcement in cases involving large amounts of documentary material or computer data".[204]

[169] Although the warrant in that case was held invalid because it was not framed as specifically as the circumstances allowed, the Court in *A Firm of Solicitors* expressed a view of the position where a warrant was appropriately limited in its scope:

> [106] We believe that there may be situations in which it can be said that the computer hard drive is a thing which is relevant to an investigation (and could therefore be removed under a … warrant) if the circumstances are such that:
>
> (a) there are reasonable grounds to believe that there is data stored on the hard drive which is, or may be, relevant to the investigation;
>
> (b) this evidence cannot be extracted from the hard drive without the use of forensic investigative techniques;
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> (c) it is not practicable to carry out those extraction measures on-site without the risk of destruction of the evidence or the risk that relevant evidence will not be successfully extracted; and

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202 *A Firm of Solicitors v District Court at Auckland* [2006] 1 NZLR 586 (CA) at [91]–[97].
203 At [96].
204 At [97].

(d) there is no practicable alternative to removing the hard drive itself for the purpose of undertaking the extraction measures off-site.

[170] Where an issuing judge was satisfied as to all of these matters, a warrant could be issued which empowered removal of the hard drive for subsequent cloning and extraction of relevant information. The warrant would need to include conditions precluding the accessing of irrelevant material and requiring its deletion from the clone.[205] Similar conditions would apply to the cloning of a computer drive at the site of a search, and subsequent removal of the clone.[206] The removal of a hard drive holding irrelevant as well as evidential material would be justified on the basis outlined by Slade LJ in *Reynolds*.

[171] Underpinning the Court of Appeal's approach was its view that computer hard drives reasonably believed to contain both relevant and irrelevant material could themselves be a "thing" relevant to an investigation and able to be searched and removed. A similar view was taken by the Court of Appeal in the subsequent cases of *Chief Executive, Ministry of Fisheries v United Fisheries Ltd*[207] and *Gill v Attorney-General*.[208]

United Kingdom authorities

[172] The Human Rights Act 1998 (UK) incorporates into United Kingdom law the rights set out in the European Convention on Human Rights, including the right to respect for private and family life, home and correspondence under art 8. In the United Kingdom, mutual assistance legislation adopts and applies provisions in domestic legislation governing searches, including s 50 of the Criminal Justice and Police Act 2001 (UK).[209]

[173] Section 50 gives additional powers of seizure to the police in circumstances where it is not reasonably practicable to determine at the time of the search whether or not a thing found on searched premises falls within the scope of the search

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205 At [107]–[108].
206 At [109].
207 *Chief Executive, Ministry of Fisheries v United Fisheries Ltd* [2010] NZCA 356, [2011] NZAR 54 at [77]–[78].
208 *Gill v Attorney-General* [2010] NZCA 468, [2011] 1 NZLR 433 at [115]–[117].
209 The Crime (International Cooperation) Act 2003 adopts provisions of the Police and Criminal Evidence Act 1984 (UK) and the Criminal Justice and Police Act 2001 (UK).

warrant. Officers executing a warrant are entitled to seize whatever is necessary to remove such a thing from the searched premises to enable it to be ascertained whether it is something that can be properly seized under the warrant.[210] Similarly, if a thing is found that the police are entitled to seize, but it is contained in, or is part of, something else which there is no power to seize, the officer can seize that from which what is relevant cannot practicably be separated.[211] These powers enable police executing a warrant to seize computers and other electronic storage devices.[212]

[174] The legislation also requires those who have taken possession of seized property promptly to make arrangements for the examination, as soon as reasonably practicable, of whether any of it is legally privileged, or excluded material that cannot be sent to overseas authorities, or material that cannot reasonably be viewed as evidence of criminal offending. If so, the privileged, excluded, or irrelevant items or material must be returned to the owner as soon as reasonably practicable after the sorting process is complete.[213]

[175] Where any items or material are seized under s 50 of the Criminal Justice and Police Act, the police must give to the person from whom the property has been seized a notice which records what they have taken.[214] That person then has the right to apply to a judicial authority for the return of seized property on grounds such as that it is privileged or otherwise excluded material, or that the police had no power to make the seizure or to retain a particular item.[215]

[176] If an application is made to the judicial authority for return of any property, the person having possession of it must ensure that it is not examined or copied other than with the consent of the applicant or on the direction of the judicial authority.[216] The judicial authority determining the application may give directions as to the examination, retention, separation or return of whole or part of the seized property.[217]

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210 Criminal Justice and Police Act, s 50(1).
211 Section 50(2).
212 United Kingdom Home Office *Requests for Mutual Legal Assistance in Criminal Matters: Guidelines for Authorities Outside of the United Kingdom – 2014* (11th ed, 2014) at 24.
213 Criminal Justice and Police Act, s 53.
214 Section 52.
215 Section 59.
216 Sections 60 and 61.
217 Section 59.

[177] In this way, the United Kingdom legislation governing mutual assistance searches provides for an examination and sorting process to follow the search and seizure of information, together with an opportunity to apply to a court to ensure seizures were lawful and that nothing is retained which should be returned. This process must be completed prior to any material going to a requesting country. Of particular interest for present purposes is that the effect of this scheme is that computer data seized pursuant to a mutual assistance search warrant must be examined and sorted before it can be sent overseas.

Canadian authorities

[178] The Canadian Charter of Rights and Freedoms, like New Zealand's Bill of Rights Act, guarantees "the right to be secure against unreasonable search and seizure".[218]

[179] Mutual assistance legislation in Canada, as in New Zealand, provides in general terms that a judge who issues a search warrant may impose conditions when doing so.[219] As well, the judge who issues the warrant must fix a time and place for a hearing to consider a report from the officer involved concerning its execution.[220] At the hearing, any person from whom property has been seized has a right to be heard.[221] The judge may order that seized property be sent to the requesting state and impose any conditions necessary to give effect to the request, to secure the return of the property to Canada, or protect the interests of third parties. Alternatively, if the judge is not satisfied that the warrant was executed according to its terms and conditions or that the seized thing should be sent overseas, the judge may order its return.[222]

[180] In this way, Canadian law ensures that there is a measure of judicial oversight of the mutual assistance search warrant process, before seized material is sent overseas.

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218 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982 (Can), s 8.
219 Mutual Legal Assistance in Criminal Matters Act RSC 1985 (Can), s 12.
220 Section 12(3).
221 Sections 12 and 15.
222 Section 15(1).

[181] Outside of the mutual assistance context, Canadian case law provides guidance as to the approach required in order to give effect to the right to be free from unreasonable search and seizure in the context of computer searches. The Supreme Court of Canada considered this issue in *R v Vu*.[223]

[182] The central question in *Vu* was whether it was necessary that a search warrant specifically confer authority to search a computer, or whether the rule that a warrant authorising search of a place also authorised search of all receptacles found on that place and enabled search of any computers found there. The Supreme Court of Canada unanimously decided that, before computers can be searched, a judge asked to issue a warrant must specifically address whether there are reasonable grounds to believe that a computer will contain relevant material, and whether the particular privacy interests that may be affected by a computer search are outweighed by state law enforcement interests.[224] The Court treated a computer as "a separate place of search necessitating distinct prior authorisation".[225] The right to be free from unreasonable search and seizure requires such prior consideration and specific authorisation.[226]

[183] In *Vu*, the Court was not so concerned about the implications of the seizure of the computers as it was with the search of their contents. The Court decided that it would be permissible for police officers to seize a computer without specific prior authorisation to do so, but they must not search that computer without first obtaining a warrant.[227]

[184] Importantly, the Court did not require that, wherever search of a computer was authorised, the warrant should incorporate a detailed "search protocol" specifying the manner and limits of the search.[228] To require this as a general rule would, the Court decided, add significant complexity and practical difficulty to the issue of warrants and, ultimately, might lead to blind spots in an investigation,

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223 *R v Vu* 2013 SCC 60, [2013] 3 SCR 657.
224 At [47]–[49].
225 At [54].
226 At [50]–[51].
227 At [49].
228 At [53]–[54].

undermining the legitimate law enforcement goals.[229] Rather, the Court considered that the police were entitled to search the computer for relevant material. If they acted unreasonably in that searching process, affected persons would have the same remedies as are available to those who have been subjected to a search under warrant which has been conducted unreasonably. The Court found support for its approach in a number of United States authorities.[230]

[185] The Court did acknowledge, however, that there might be cases where it would be necessary to impose conditions in advance. Although the Court did not specify what these might be, obvious examples are where the police seek to search a solicitor's computer system or that of a doctor to obtain information about a particular client or patient. In the former case, issues of legal professional privilege are likely to arise in relation to both the suspect and other clients; in the latter, issues of confidentiality in relation to other patients are likely to arise.

[186] Finally, we mention a very recent decision of the Supreme Court of Canada, *R v Fearon*.[231] That case addressed the question of the application of the common law power to search incident to a lawful arrest to cell phones. The majority concluded that the power permitted the seizure and search of cell phones, although some modification of the common law framework was necessary to recognise the privacy interests associated with cell phones.[232] The majority considered that, to be lawful, the search had to be truly incidental to a lawful arrest, the search had to be tailored to its purpose and the police must keep a detailed record of what they did.[233] The majority specifically rejected the more restrictive approach adopted by the United States Supreme Court in the case we are about to mention.[234] By contrast, the minority considered that while the police could seize a cell phone as an incident to a lawful arrest, they were required to seek a warrant to search it, except where there were exigent circumstances.[235] Consistently with *Vu*, the minority accepted that a

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229 At [57].
230 At [58].
231 *R v Fearon* 2014 SCC 77.
232 At [15] and [27]–[58].
233 At [83].
234 At [60]–[64].
235 At [105].

judge issuing a warrant to search a cell phone did not need to establish a protocol for the search.[236]

United States authorities

[187] As noted, the Supreme Court in *Vu* found support for its approach in United States authorities. We will not reiterate that discussion. Rather, we mention only one United States authority, the recent decision of the United States Supreme Court in *Riley v California*, a case involving a warrantless search incidental to an arrest.[237]

[188] Mr Riley was stopped by the Californian police for driving an unregistered car. He was also unlicensed. The police impounded the car in accordance with their departmental policy. An inventory search of the car revealed two loaded handguns and Mr Riley was arrested for possession of concealed and loaded firearms. As an incident of the arrest, the police searched Mr Riley and found his smart phone. The police then examined its contents and found evidence linking Mr Riley to an unrelated shooting some weeks earlier. When he was charged in relation to that shooting, an issue arose as to the admissibility of the material found on his smart phone linking him to the shooting. The Supreme Court was required to consider how the "search incident to arrest" doctrine applied to mobile phones, that doctrine being an exception to the warrant requirement enshrined in the Fourth Amendment. The Court was unanimous in finding that the mobile phone had been searched unlawfully, so that the evidence had been obtained unlawfully.

[189] Two points of particular relevance emerge from the case. The first is that the Court considered that the police were entitled to seize and secure the phone when they discovered it during the search incident to arrest and take steps to minimise the risk of remote wiping or to disable a phone's automatic locking feature (to prevent the phone from automatically locking and encrypting data). The second is that the Court concluded that, once secured, the police were required to obtain a warrant to search a mobile phone (subject to an "exigent circumstances" exception). In reaching this view, the Court emphasised the "immense storage capacity" of modern

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236 At [157].

237 *Riley v California* 573 US _, _ (2014) (slip op). The Court also addressed another similar case at the same time.

cell phones – in reality, they are mini-computers. The Court noted that cell phones are pervasive in the population, collect and store many different types of current and historical information and enable the reconstruction of the owner's private life, particularly given the widespread use of software applications (apps) and cloud-based storage facilities.

Evaluation

[190] The overseas and New Zealand authorities accept the need, in relation to computers,[238] for limits upon what is searched and seized in order to respect the right to be free from unreasonable search and seizure, and also for judicial oversight of decisions to issue search warrants.

[191] As *Vu*, *Fearon* and *Riley* illustrate, searches of computers (including smart phones) raise special privacy concerns, because of the nature and extent of information that they hold, and which searchers must examine, if a search is to be effective. This may include information that users believe has been deleted from their files or information which they may be unaware was ever created. The potential for invasion of privacy in searches of computers is high, particularly with searches of computers located in private homes, because information of a personal nature may be stored on them even if they are also used for business purposes. These are interests of the kind that s 21 of the Bill of Rights Act was intended to protect from unreasonable intrusion.

[192] Accordingly, for a search of any computer to be reasonable, a mutual assistance warrant must give specific authorisation for the computer to be searched in order to identify and seize the data that it is believed is evidence of commission of an offence. For a warrant to include such authority there must have been sufficient sworn grounds in the application to support its issue in that form. This is consistent with the conclusion of the Canadian Supreme Court in *Vu* and with the decision of the United States Supreme Court in *Riley*.

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[238] Because this case involves the search of information contained on computer drives and other hardware, we address the issue in those terms without considering whether and, if so, to what extent, the principles may be applicable to searches involving other physical items or documents.

[193] Where the search involves large amounts of material stored on computer hard drives, particular problems may arise. The sorting out of relevant material onsite may be impracticable and highly intrusive. Moreover, as the United Supreme Court recognised in *Riley*, particular difficulties in relation to both securing and accessing the contents of computers arise from protective mechanisms such as passwords, encryption and remote deletion. In view of these factors, the appropriate balance of the interests underlying s 21 will best be achieved, at least in most cases, by the removal of the computer to an offsite location for searching, as the Canadian Supreme Court accepted in *Vu* and the New Zealand Court of Appeal has accepted in the decisions to which we have referred.

[194] In some situations, the issuing judge will need to establish conditions (either directly or through identifying some appropriate process) to deal with obvious constraints on the extent of the search, as where a solicitor's or doctor's business computer is being searched; but, as the Court said in *Vu*, that will not be necessary as a general rule.[239] Rather, the police will be entitled to search the computer in order to identify any relevant material, generally offsite. If relevant material is identified, downstream issues of some difficulty may arise, for example, as to how relevant material is to be preserved, what steps should be taken in relation to irrelevant material and how material is to be returned/made available to the suspect. We are not in a position to provide specific guidance on these matters in the abstract as much will depend on the circumstances of particular cases and the particular characteristics of the technology involved. We can say, however, that if the police act unreasonably in conducting the search (by, for example, not dealing appropriately with irrelevant material), those affected will be able to pursue the same remedies as are available in relation to any other unreasonably conducted search under a valid search warrant.

[195] Where search and seizure takes place for the purpose of criminal proceedings to be conducted in New Zealand, the opportunity exists for judicial oversight of the lawfulness and execution of the search warrant in the context of the trial process.

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[239] Despite this, judges issuing mutual assistance search warrants should always consider whether conditions are necessary, or could be helpful in protecting rights. Moreover, the police may wish to develop protocols themselves.

The primary mechanism by which this occurs is the application of the rules of evidence and, where there has been an unreasonable search and seizure, an available remedy will be exclusion of evidence on the basis that it is improperly obtained. In that respect, as *The Laws of New Zealand* "Police" observes:[240]

> Judicial oversight of police practices and procedures frequently occurs in the course of criminal proceedings, and it has been held to be part of the judicial function to exercise a general supervisory role with respect to police compliance with rules governing the exercise of their powers. The sanction of excluding the evidence may result from a successful challenge based on the alleged unlawfulness or unreasonableness of police practices, or investigative techniques, and a grave and unjustified departure from statutory requirements may result in the discharge of the defendant.

[196] A person who is the subject of an unreasonable search and seizure may be able to pursue a public law claim against the Crown for damages for breach of that right. That remedy is of particular value where criminal proceedings in New Zealand do not follow the search, whether because no charges are laid or because proceedings are to take place overseas, so that the exclusion of evidence in a New Zealand court is not an applicable remedy.

[197] In *Simpson v Attorney-General* (*Baigent's case*),[241] the plaintiff had been subjected to an unreasonable search arising because of an error in the warrant as to the address of the premises that were to be searched. She was not facing any criminal charges. Casey J said:[242]

> I am satisfied that the purpose and intention of the Bill of Rights Act is that there be an adequate public law remedy for infringement obtainable through the courts which … are already according it in the sphere of criminal law. What is adequate will be for the courts to determine in the circumstances of each case. In some it may be that already obtainable under existing legislation or at common law: in others, where such remedies are unavailable or inadequate, the Court may award compensation for infringement, or settle on some non-monetary option as appropriate. In this way the rights affirmed by the Bill can be protected and promoted as an integral part of our legal framework. Selection of the remedy which will best vindicate the right infringed will be a matter best left to a Judge rather than a jury.

In *Baigent's case*, the Court of Appeal held that the appropriate and effective remedy for the unreasonable search at issue in *Baigent's case* was an award of damages.

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240 *Laws of New Zealand* Police (Reissue 1) at [46].
241 *Simpson v Attorney-General [Baigent's case]* [1994] 3 NZLR 667 (CA).
242 At 692.

There is presently a claim for such damages before the High Court arising from the circumstances of the present appeal.[243]

[198] Finally, the common law also enables judicial supervision of the search warrant process outside of the criminal justice process, by application for judicial review of the decision to issue the search warrant. A court that finds a search or seizure to be unreasonable may make orders including requiring the return of the unlawfully seized property.[244] This process is available for mutual assistance search warrants and is the procedural context of the present case.

[199] Given that (a) New Zealand does not have a comprehensive legislative scheme as provided in Canada and England and (b) some remedies may be ineffective if seized material has been sent overseas, those who wish to challenge the legality of searches conducted under mutual assistance search warrants need timely access to the High Court to challenge by judicial review what was done *before* what is seized is sent overseas to the authorities of the requesting country. In proceedings to challenge the issue or execution of a search warrant (including the conduct of any offsite sorting process), an available remedy may include return of material wrongly seized rather than allowing it to be available to be sent overseas at the direction of the Attorney-General. In some cases, the return of wrongly seized material before it can be sent overseas will be the most effective redress for an unreasonable search and seizure in the mutual assistance context.

[200] But in other cases, where the High Court is satisfied that it is not practicable for information to be sorted or extracted in New Zealand, it will be open for the Court to conclude that it is reasonable for the relevant computer hard drives to be sent overseas to the requesting authority, if the Attorney-General so directs.

[201] Two things follow from this discussion. First, in exercising his or her powers to give directions about seized material, including whether it will be sent overseas, the Attorney-General must take Bill of Rights considerations into account. Second, the Attorney-General should advise any affected party of his or her intention to order

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243 We do not make any comment on the merits of this claim.

244 Butler and Butler, above n 127, at [18.4.11].

that material be sent offshore in advance, so as to permit an affected person who alleges illegality in the process to mount an effective challenge.

This case

[202] How do the principles discussed above apply in the present case? In *Vu* the search warrant did not refer specifically to a computer. Despite that, the Canadian Supreme Court accepted that the police could, if they reasonably thought a computer discovered while executing the warrant might contain relevant material, seize the computer and do what was necessary to preserve the integrity of its data.[245] However, if the police wanted to search the computer in those circumstances, they needed specific judicial authorisation, which in that case required obtaining another search warrant. Prior judicial authorisation to search the computer was required because of the particular privacy issues computers raise.[246]

[203] In the present case, the material put before the District Court Judge in the application for the warrants set out the basis for the belief of the police that the computers and other electronic items in respect of which warrants were sought would contain material relevant to the alleged offending, which was, of course, internet-based offending. As a consequence, unlike *Vu*, the warrant made specific reference to computers and other electronic devices. It was not disputed that the warrants authorised (subject to the general warrant argument) the search of the computers and, in any event, it was implicit that search would follow seizure. The police took the computers offsite in order to be cloned and searched. It is difficult to see that any other course was practically open to them, particularly given security concerns arising from the fact that the contents of the computers were protected by way of passwords and encryption, so that without Mr Dotcom's co-operation, access would be difficult or impossible.[247] Indeed, there was no challenge to the need to take the computers offsite.

[204] Despite the need to take the computers offsite to search their contents, we do not consider that this was the type of case where the issuing Judge was required to

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245 *R v Vu*, above n 223, at [49].

246 At [46] and following.

247 We understand that, as at the date of the hearing in this Court, Mr Dotcom had not provided passwords to enable access to some of the computers' contents.

set conditions as part of the process of issuing the warrants. The warrants authorised searches of the computers' contents for material relevant to the alleged offending, and the seizure of any relevant material. If the police acted unlawfully in carrying out the search, that would be addressed in the normal way, after the search was completed. In the particular circumstances of this case, sending clones of the seized computers overseas may have been the only practical way of effecting the search, but that is not something on which we should express any view as it is the subject of separate proceedings.

An overall view

[205] In *Auckland Medical Aid Trust*, the Court of Appeal held that, although the misdescription of the offence as "abortion" would not, of itself, invalidate the warrant, it could be considered in support of the Trust's submission that the warrant, read as a whole, was unreasonably vague and general.[248] We have addressed separately the two principal areas of deficiency alleged in relation to the search warrants in this case, namely, the lack of precision in the description of the offences and the overbroad description of the things to be seized. We should, however, stand back and look at the matter overall – were the warrants, read as a whole, unreasonably vague and general?

[206] We have concluded that they were not. Undoubtedly they could have been drafted rather more precisely. But they do not share the deficiencies that the warrant in the *Auckland Medical Aid Trust* case suffered. There the police officer seeking the warrant had reasonable grounds to suspect one illegal termination. However, what he sought and what he obtained was a warrant that would have enabled him to search all the medical records held by the Trust to see whether there were other illegal terminations as well. On any view, that was a general warrant. Here, however, the United States authorities have charged Mr Dotcom and others with particular offences, including money laundering and criminal breach of copyright. The criminal activity alleged is extensive and is alleged to have been carried out through what, outwardly, resembled a legitimate large-scale cloud storage facility. Through the New Zealand Police, the United States authorities sought and obtained warrants

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[248] *Auckland Medical Aid Trust v Taylor*; above n 134; see above at [110].

to search for and seize material, including computers, relevant to that alleged offending. The warrants did not, as the warrant in *Auckland Medical Aid Trust* did, purport to authorise the seizure of things that were not relevant to the suspected offences. The computers were plainly relevant to the offending alleged, although some of their contents were undoubtedly irrelevant. As a practical matter, the computers would have to be taken offsite to enable cloning and search for relevant material. As we have said, this is consistent with the position adopted by the Supreme Court of Canada.

[207] The warrants recorded the police belief that there was evidence on the sites to be searched that related to reproduction and distribution of copyrighted works "including but not limited to motion pictures, television programmes, musical recordings, electronic books, images, video games and other computer software". Communications related to the activities of the "Mega Conspiracy" were also specified, naming "Megaupload, Megavideo and Megastuff Limited", albeit inclusively. There was also reference to banking and shipping records along with a list of devices capable of storing and processing data. Moreover, the search warrants were served and executed immediately following the arrests of the appellants, who were given copies of their arrest warrants. These detailed the offences for which the appellants were being arrested (and to which the searches related) and were discussed with the appellants. While the warrants were directed at residential properties, there appears to be no dispute that the appellants ran their business activities from the properties, which had multiple, sophisticated internet connections. Finally, those conducting the searches were briefed on what they were searching for.

[208] Accordingly, we agree with the Court of Appeal that the appellants were reasonably able to understand what the warrants related to and that the police were adequately informed of what they should be looking for. Any issues relating to matters such as the way the search of the computers was conducted or the handling of irrelevant material should be addressed through other processes.

Decision

[209] We would dismiss the appeal, with the consequences identified by the Chief Justice at [67] above.

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