IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 103/2019
[2020] NZSC 1

BETWEEN	KIM DOTCOM Applicant
AND	HER MAJESTY'S ATTORNEY-GENERAL ON BEHALF OF THE GOVERNMENT COMMUNICATIONS SECURITY BUREAU Respondent

Court:	Glazebrook, Ellen France and Williams JJ
Counsel:	R M Mansfield and S L Cogan for Applicant D J Boldt for Respondent
Judgment:	3 February 2020

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay costs of $2,500 to the respondent.

REASONS

Introduction

[1] The applicant, Mr Dotcom, brought civil proceedings for damages against the respondent, the Government Communications Security Bureau (GCSB), in relation to the unlawful interception of Mr Dotcom's private communications by the GCSB. In the course of these proceedings, the High Court granted the GCSB's interlocutory application that certain communications and information were not to be disclosed or discovered under s 70 of the Evidence Act 2006 on the basis that the communications related to matters of State and the public interest in this information being disclosed

was outweighed by the public interest in withholding it.[1] Mr Dotcom appealed unsuccessfully to the Court of Appeal from that decision.[2] He now seeks leave to appeal to this Court.

Background

[2] The interception of Mr Dotcom's private communications took place over the period from late 2011 to early 2012. The GCSB acted at the request of the New Zealand Police, who were undertaking an operation to assist United States authorities who have sought Mr Dotcom's extradition to the United States. Mr Dotcom was arrested on 20 January 2012. In the course of judicial review proceedings subsequently brought by Mr Dotcom, challenging his arrest and search warrants authorising police actions on 20 January 2012, it became apparent that the GCSB had acted unlawfully by intercepting the communications.[3] Mr Dotcom then brought a civil claim seeking damages arising from the unlawful interception. Liability is admitted.[4] The issue outstanding is fixing the damages payable.[5] That issue has not yet been determined pending the discovery process.

[3] In the course of the discovery process, the respondent refused to discover or disclose certain information, comprising intercepted communications (the disputed information). The respondent sought an order for non-disclosure of this information on the grounds it related to matters of State and should be withheld under s 70 of the Evidence Act. Mr Dotcom maintained the disputed information was relevant to the proceeding and it was in the public interest to disclose it.

[4] Reflecting the security classification of parts of the GCSB's discovery, the High Court put in place a process designed to both safeguard legitimate national security interests and avoid any prejudice to Mr Dotcom that might otherwise arise. In particular, Stuart Grieve QC was appointed as a Special Advocate. Mr Grieve, and

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1 *Dotcom v Attorney-General* [2017] NZHC 1621 (Gilbert J).

2 *Dotcom v Attorney-General* [2019] NZCA 412, [2019] 3 NZLR 397 (Miller, Brown and Clifford JJ) [CA judgment].

3 The GCSB did not appreciate Mr Dotcom's resident-class visa precluded the surveillance.

4 In December 2016, judgment was entered in Mr Dotcom's favour.

5 The applicant says there are also issues as to the terms of declaratory relief. The respondent disputes that noting that the declarations sought are pleaded in full in the second amended statement of claim.

the independent expert appointed to assist him with technical issues, had access to the disputed information. Ultimately, Mr Grieve was unable to resist the s 70 application, also declining to cross-examine the witnesses, and recording that the GCSB's affidavits comprehensively dealt with the various issues.[6]

[5] On appeal to the Court of Appeal, Mr Dotcom argued that the Special Advocate process had miscarried (essentially arguing that there was a lack of independence in that process and that Mr Grieve had failed to cross-examine and oppose the application) and that the High Court erred in its application of s 70. In the Court of Appeal, Colin Carruthers QC was appointed as counsel assisting in lieu of a Special Advocate, with a brief to scrutinise the conduct of the Special Advocate, to the extent he thought fit, and the non-disclosure orders in the High Court.

[6] The Court of Appeal found that the Special Advocate process did not miscarry. It was sufficient that Mr Grieve had considered the material and decided there was no basis on which to resist the GCSB's application.[7]

[7] On the application of s 70, the Court of Appeal accepted the disputed information was relevant and so there was a public interest in disclosure. However, the Court did not consider that disclosure was necessary to ensure justice was done. The Court noted in this respect that the issue in the proceedings was the quantum of damages for loss of dignity. The Court also said that summaries had been prepared "with the aid of Mr Grieve" which could be used at trial and would "permit a fair trial in this case".[8]

[8] In terms of the other side of the equation, having assessed the disputed information, the Court found that the GCSB's claim that disclosure would harm national security and international relations was well-founded.[9] The Court concluded that the balancing exercise under s 70 accordingly favoured non-disclosure.

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6 The hearings in both the High Court and in the Court of Appeal were conducted on a partly-closed and partly-open basis.
7 CA judgment, above n 2, at [65] and [67].
8 At [70].
9 At [72].

The proposed appeal

[9] Broadly, Mr Dotcom wishes to argue on the proposed appeal that the Court of Appeal erred in failing to give due weight to the requirements of natural justice and open justice including the public interest in the reasons for a judgment being made available, and that the Special Advocate process miscarried. It is also said that it is important to establish the nature or extent of the unlawful infringement.

[10] We are not satisfied that it is necessary in the interests of justice to hear the proposed appeal.[10] While there may be questions arising about the scope and application of s 70 of the Evidence Act, the present case is not the appropriate case to consider those issues. No question of principle arises. Rather, the matters the applicant wishes to raise relate to whether natural justice was met in this particular case and as to the weight given to the competing public interests on these facts.

[11] Nor does anything raised by Mr Dotcom give rise to the appearance of a miscarriage of justice.[11] Mr Dotcom's arguments would reprise matters all of which have been carefully examined in the Courts below and, as the Court of Appeal noted, the "general nature of the disputed information is known to Mr Dotcom".[12] In addition, these issues would arise in a context where the respondent has been held to account having accepted liability and the central question is as to the level of damages.

[12] The application for leave to appeal is accordingly dismissed. The applicant must pay the respondent costs of $2,500.

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

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10 Senior Courts Act 2016, s 74(4).
11 *Junior Farms v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.
12 CA judgment, above n 2, at [70].