KIM DOTCOM CASES TEST BOUNDARIES OF INTERNATIONAL MUTUAL ASSISTANCE REGIME

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Introduction

Since 2012 a series of cases have rolled through New Zealand courts regarding US restraining orders over the assets of alleged copyright infringer/abettor Kim Dotcom. The multiple procedural challenges and appeals in this high-profile legal saga have provided a rare opportunity to test uncharted legal aspects of the regime for mutual assistance in criminal matters. Interesting problems arise as to local implementation of foreign asset restraining orders, discovery and disclosure and extradition processes.

In August 2014 the Court of Appeal overturned an earlier decision not to extend the registration of the US restraining orders (based on criminal copyright offences) regarding Dotcom, his associate Bram Van der Kolk and their company Megastuff Limited. Further, the court rejected an application by Dotcom's estranged wife to have her assets separated or excluded from the restraining order.

This follows a Supreme Court decision earlier in 2014 dealing with extradition procedures and the 'record of the case' discovery process, as Dotcom continues to resist attempts to extradite him to the United States to face substantive charges.

Background

In January 2012 armed police carried out a major asset seizure operation at a location north of Auckland involving German internet tycoon Dotcom. Assets worth approximately NZ$20 million were seized in the raid, including large sums of cash, firearms, artwork, electronic equipment and a dozen luxury motor vehicles. US agencies accused Dotcom's website Megaupload.com of internet piracy on a scale not seen since Napster. The seized property in New Zealand is said to represent the proceeds of the criminal copyright offences, or to have been directly or indirectly derived from criminal activity.

Previously, a lengthy investigation by the Federal Bureau of Investigation (FBI) and other US agencies had led to a grand jury indictment issued by the US District Court for the Eastern District of Virginia, laying criminal charges of:

- conspiracy to commit racketeering;
- conspiracy to commit copyright infringement;
- conspiracy to commit money laundering;
- criminal copyright infringement by distributing copyrighted work being prepared for commercial distribution on a computer network, and aiding and abetting criminal copyright infringement; and
- criminal copyright infringement by electronic means and aiding and abetting such infringement.

The indictment contains 72 pages of background detail to support the FBI allegations, including details that the FBI argues show that the defendants had knowledge of the misuse of the websites by customers to host files with copyright-infringing film or sound recordings. The copyright charges in the United States carry a maximum penalty of five years' imprisonment, but the addition of racketeering and money laundering charges takes the maximum up to 20 years.

In the interests of international comity, the New Zealand attorney general has discretion to receive and apply requests for mutual assistance in criminal enforcement matters from an appropriate and legally competent foreign body, such as the US court. If accepted and registered, local asset restraining powers under the New Zealand Criminal Proceeds (Recovery) Act 2009 can be engaged.

On April 18 2012 the High Court ordered that the US restraining order be registered under the Mutual Assistance in Criminal Matters Act 1992. This registration would have expired on April 18 2014 but, under Section 137 of the Criminal Proceeds (Recovery) Act, can be extended by the court for up to one year. After various delays made it clear that the defendants were unlikely to reach a hearing in the United States before the expiry of the original registration, an extension was sought. The High Court denied the extension, but allowed the orders to remain in place pending an urgent appeal.

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Issues on Appeal

At the time of the appeals, some NZ$12 million in assets remained restrained (plus potentially NZ$22 million in Hong Kong and other countries). The US restraining orders are still in force and the New Zealand Police appealed against the court's refusal to extend their Mutual Assistance in Criminal Matters Act registration. The defendants cross-appealed on the basis that the High Court did not have jurisdiction to extend the order. Mona Dotcom, Dotcom's estranged wife who was not a defendant in the US proceedings, also applied to have her assets excluded if the restraining order registration was extended.

Jurisdiction exists regardless of forfeiture process

The Court of Appeal dealt with the cross-appeal issues first, finding that the High Court did have jurisdiction to extend the registration for one year under the Criminal Proceeds (Recovery) Act.

The process leading to the original registration order was that, once a request for assistance was received from the US government under Section 54 of the Mutual Assistance in Criminal Matters Act, the attorney general exercised his discretion to authorise the New Zealand Police to apply to the High Court for registration in New Zealand. In dealing with that application, the High Court must register the foreign restraining order if it is satisfied that the foreign restraining order is in force. It has no additional discretion.

The US government's stated purpose of the request was to ensure that the restrained assets remain available for forfeiture to the United States. It did not refer to a particular forfeiture procedure to be followed. However, an affidavit supporting the request referred to the two forfeiture procedures available in the United States: a conviction-based regime and an *in rem* non-conviction-based regime. Both were available in the circumstances, but the affidavit stated that the United States was at that time asking New Zealand only to restrain assets under the conviction-based regime. This meant the assets would be forfeited only if there was a subsequent criminal conviction.

The delays experienced in attempting to extradite the defendants to the United States meant that it was no longer realistic to expect to achieve a conviction at trial by April 18 2015 (the latest date the order could remain registered in New Zealand, even with the one-year extension). For that reason, the United States began pursuing civil forfeiture and filed evidence that it expected this type of procedure could be completed by April 2015.

Dotcom argued that the United States could not obtain an extension of the registration for an entirely different purpose (to permit civil forfeiture to be pursued) than the conviction-based forfeiture relied on for the original registration. The Court of Appeal rejected this argument. It held that the registration of the US order could allow either of the two forfeiture processes to be pursued; it was unexceptional to change tack from the process originally envisaged. The High Court therefore had jurisdiction to extend the registration for one year or a shorter period, including pending appeal.

Extension granted

The High Court had refused to grant an extension, on the basis that the order could not be extended for a different purpose. Since the US government had applied for registration based on a criminal forfeiture approach, it could not circumvent the process of applying for a new civil forfeiture registration by extending the existing order.

The Court of Appeal disagreed with this analysis ([2014] NZCA 408). It noted that the original US application did not mention which forfeiture regime would be used, and the affidavit referred only to its intentions "at the time" to use the conviction-based process. It held that there was nothing to prevent the US government pursuing a different process. Further, it held that Section 14 of the Criminal Proceeds (Recovery) Act made it clear that if proceedings were brought to register a final foreign forfeiture order over property that was subject to an earlier temporary restraining order in New Zealand, the registration of the forfeiture order could be sought on grounds that differed from those on which the restraining order was previously registered. This indicated that a change in process (at least, from the basis for an initial restraining order to the basis for a forfeiture order) was not intended to be treated as significant. There was no reason to deny extending the registration period.

Separately, the Supreme Court at an earlier hearing had dismissed challenges to the extradition process based on what needed to be disclosed by the US govt

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This decision appears to represent a sensible and purposive approach to ensuring that the policy of the Mutual Assistance in Criminal Matters Act regime is achieved and that overseas assets of suspected criminals are not prematurely released from restraint on technical grounds. Had the extension been refused, the defendants' delaying tactics would have been effective in putting their assets beyond the reach of the US government, for both criminal and civil forfeiture. The United States will now have a further period in which to obtain civil forfeiture orders.

Exclusion of spousal asset denial

Mona Dotcom applied as a non-party for her assets to be excluded from the extension order. She had not been charged with an offence. Some assets covered by the order were her personal, separate property, and she had a relationship property interest in other assets. However, the Court of Appeal refused to exclude her property from the extension, because she had a different remedy available under Section 139 of the Criminal Proceeds (Recovery) Act if she could prove she did not know that the property was the proceeds of criminal activity. The court would not permit her to achieve that remedy "by a sidewind", particularly without proof of the necessary lack of knowledge.

Supreme Court limits what must be disclosed in extradition proceedings

There have also been various challenges to the 2012 search warrants, including applications for judicial review of the original grant of the warrants, alleging that they were unlawful.

Dotcom and his co-accused had sought, before a hearing on their eligibility for extradition, disclosure of the documents on which the US case against them was based. Several appeals later, in *Dotcom v United States of America* ([2014] NZSC 24), the Supreme Court held, by a majority, that the US government is not required to disclose to the appellants before their extradition hearing the documents, records and information on which their criminal case relies.

In its extradition application, the United States is able to make use of a procedure for submitting evidence called the 'record of the case'. This comprises a summary of the evidence that the requesting state says implicates those facing extradition, and is relied on to establish a *prima facie* case against them. It is not available to every country that applies to New Zealand for extradition and is designed to provide a streamlined procedure for certain preferred nations. In Dotcom's case, the record contained extracts from emails, data stored on computer servers, an analysis of how Megaupload's websites operated and proposed evidence of investigators and experts.

The Supreme Court held that the record of case procedure does not require disclosure of all the documents summarised, and there is no general obligation of disclosure upon a foreign state requesting extradition. Further, it held that the lower courts have no power to make disclosure orders in extradition cases, as the statutory powers in the Criminal Disclosure Act are not incorporated into the Extradition Act. However, the majority also noted that the requesting state has a strong duty of good faith to disclose any information that would seriously undermine the evidence on which it relies.

To discuss any aspect of this article, please contact the authors:

Gary Hughes
gary.hughes@wilsonharle.com
DDI: +64-9-915 9726
Mob: +64-21 477780

Felicity Monteiro
felicity.monteiro@wilsonharle.com
DDI: +64-9-915 9715
Mob: +64-21 558327