

[23] Four of the alleged conspirators were arrested and detained in New Zealand. A fifth defendant named Nomm in the indictment was arrested in the Netherlands on a provisional arrest warrant. A sixth defendant named Echternach was in the Philippines at the time the warrant to arrest was executed but has since travelled to Germany which has no extradition treaty with the United States and Ms Toohey advised that Germany will not extradite German nationals to the United States.

[24] It was submitted that if Mr Dotcom were granted bail he would assist the remaining two defendants still at large who may be trying to reinstate the business in some modified form from overseas jurisdictions. Various domain names have been registered in other countries outside the United States from which that business could be operated. The seventh defendant, a Mr Bencko who is still at large, attempted to contact Mr van der Kolk by telephone as the police were executing the warrant at Mr van der Kolk's address on the morning of 20 January 2012.

[25] There is a huge demand for the business given the volume of internet traffic and the number of visits to the site per day, estimated at 50 million. It is submitted that the vast profits generated are a further incentive to restart the business from another location. In response to the taking down of websites in the United States various hacker groups have attacked government sites in response and it is submitted this also is an indicator of strong demand.

Section 8(2) Discretionary Factors

[26] It is submitted that this is the largest prosecution to date for infringement of copyright in the United States. The offending is described as unprecedented and most serious. The conspiracy to commit racketeering and money laundering charges carry maximum penalties of 20 years imprisonment and Ms Toohey is instructed that prosecutors in the United States will press for the maximum penalty if the defendants are convicted.

[27] It is acknowledged that no assessment of the strength of the evidence can be made at this point. Supporting evidence will be filed along with the request for surrender.

[28] Under the heading of character and past conduct or behaviour I was asked to take into account that in 2006 Mr Dotcom participated in a gumball rally event in which he was driving at speeds of 250 kph and refused to stop at a police check point when motioned by an officer to pull over to the side of the road. For the purposes of this bail application I place no weight on that whatsoever. Further, any suggestion that Mr Dotcom was actively avoiding or resisting arrest by sitting on the floor cross legged when the police entered the inner panic room, and failed to immediately stand and show himself, I dismiss also.

[29] In relation to delay the request for surrender for extradition must be made within 45 days of the arrest. Once the request is received extradition proceedings will be filed and a hearing date set. Ms Toohey indicated that that hearing might take a day given the pro forma nature of the evidence in a summary form. At this point I am unable to determine precisely how long the hearing would take but even if it were a full day this Court could not accommodate such a hearing for some months.

Defence Submissions

[30] Mr Dotcom in his affidavit emphatically denies any criminal misconduct. He denies the existence of the so-called Mega Conspiracy and denies that there was any criminal enterprise relating to reproduction and distribution of infringing copies of copyrighted works via the internet. He deposes that Mega Upload is essentially a file storage facility available to internet users to upload their own digital files and users are provided with a link which enables other users access to those digital files. The terms and conditions of access to the storage facility stipulate the prohibition on any uploading of any digital material or files in which the user is not the legal and authorised owner of the copyright. It is noted that privacy laws prevent searching of the digital files by Mega Upload but it is recognised that some users have and will upload films, videos and other copyrighted material in order to share those files with other internet users.

[31] Mega Upload has negotiated with major rights holders including The Recording Industry Association of America, The Motion Picture Association of America, Disney, Warner Bros and Universal Pictures and others a facility enabling

these organisations to take down or remove files breaching their copyright directly and without prior reference to Mega Upload. In accordance with the US Digital Millenium Copyright Act Mega Upload has met requirements to remove any offending items uploaded to the site within 24 hours notice received from the relevant copyright holder. This does not apply to internet users outside the jurisdiction of the United States.

[32] Mr Dotcom states that there have been some 15 million take downs either conducted by Mega Upload pursuant to take down notices or files taken down directly by the copyright holders.

[33] It is noted that there are some 12 billion files stored and that the proportion of digital material infringing copyright is relatively small. He states that the vast majority of Mega Upload users use the storage facility for entirely legitimate storage of personal and business related files.

[34] Whilst the alleged gross revenue of \$175 million over the past five years is not disputed business expenses account for 50% of the gross revenue.

[35] Mega Upload has employed sophisticated and expensive systems that prevent search engines such as Google "crawling" over its database and indexing its file both to protect the privacy of its users and to prevent other internet users accessing material that breaches copyright.

[36] In answer to the US Government submission that a user rewards programme was introduced to increase the illegal downloading of files breaching copyright. Mr Dotcom states that the rewards programme had been in place at an early stage and only paying members were entitled to receive rewards and paying members were required to provide identification details. He states that the provision of identification details was a disincentive for users to share files in breach of copyright and in any event the rewards programme was discontinued in 2011 and notwithstanding that withdrawal usage of the site has continued to increase.

[37] Mr Davison submitted that the nature of the offending had been amplified beyond reality and that there was a complete misapprehension on the part of the US Government regarding the true nature of the applicant's business and that there is no concession regarding the cogency of the government's case.

Flight Risk

[38] Contrary to the US Government's submission that the applicant is an extreme flight risk Mr Davison submitted he presented no flight risk whatsoever. He submitted that the operations of Mega Upload had been effectively terminated by seizure of the requisite servers in the United States and data storage equipment and restraint of assets and business accounts held by Mega Upload and the applicant personally.

[39] Mr Davison submitted there was no ability, let alone financial incentive, to start the business again and that the applicant has no interest in restarting the business until these charges are resolved. He submitted that millions of dollars had been spent on legal advice to ensure that Mega Upload was operating within the law.

[40] The applicant in his affidavit disputed any suggestion that he was attempting to evade the police or avoid arrest. He states that there were concerns for the personal safety of himself and his family and that "security protocols" were in place. In closed Court Mr Davison explained the position regarding possession of the firearm submitting that the applicant's wife is from the Philippines where kidnapping of wealthy individuals or the children of wealthy individuals is a common place occurrence and that the applicant's retention of a bodyguard and acquisition of two firearms were a precautionary measure to meet that threat.

[41] The security system in place in the applicant's bedroom and the inner panic room were installed by the previous owner of the property. In his affidavit Mr Dotcom describes the inner panic room as large, about 20 metres long, and that the gun safe containing the shot gun was some distance away from where he was seated. The stock was disconnected and it was his instruction to his security advisor

that the shotgun be loaded with a rubber cartridge. The applicant acknowledges that he was not a licensed firearms holder but was intending to apply for a license.

[42] It was emphasised in the affidavit and submissions that he made no move to use the firearm and he did not resist arrest although some physical force was used to restrain him.

[43] Mr Davison described the execution of the arrest warrants by the police as unnecessarily aggressive and irresponsible and he submitted there was no basis to anticipate any physical resistance or lack of co-operation.

[44] Taking into account the nature of the charges and the applicant's limited criminal history it is difficult to disagree with that submission but the finding of this loaded unlicensed firearm in close proximity to a certain extent justifies the scale and strength of the police operation, after the event.

[45] Preliminary inspection by the police armourer suggests that the firearm had been modified in some way to reduce the length of the barrel to 300 mm and it was submitted that the firearm could not have been legally purchased in New Zealand. At a total length of 760 mm it meets the definition of a pistol.

[46] Mr Davison during the course of argument offered to call Wayne Tempero the security advisor as a witness or alternatively file an affidavit to the effect that he purchased the firearm from a firearms dealer or broker and that Mr Tempero was in the process of applying for the appropriate pistol license. In the limited time available I have been unable to resolve that issue, but in any event whether the firearm was modified or not, it was loaded, unlicensed and available and that is a significant concern.

[47] As to the use of private transport including chartered jets that is acknowledged but it is noted that charter companies and pilots are required to ensure that customs formalities are met and in any event restraint of the applicant's bank accounts in effect means that he no longer has the wherewithal to obtain private air travel.