

The good thing is he is operationally dependant on us . . . he cannot sneak away with the money.

[69] Van der Kolk then asks:

But what if the shit really hits the fan . . . would he grab the last little bit of money and take off . . . he's good at that.

[70] Ortmann then states:

True but with his spending now days he will attempt to get the shit off the fan and that's what he needs us for.

[71] Ms Toohey submitted that the scenario discussed between the applicant's close associates in 2007 was now a reality and that the mistrust expressed by the applicant's close associates was well founded and a reliable indicator of his likely response if released on bail.

[72] Mr Davison emphasised the date of the discussion some four and a half years ago. He urged that these conversations not be taken out of context or elevated into a firm conclusion that the applicant has a propensity to avoid his lawful obligation.

[73] Finally it was submitted that in addition to the passports found in the applicant's possession he was also holding 16 credit cards in one wallet and nine in another. Mr Davison submitted that most of those cards were out of date and that the applicant was a "collector" of credit cards and that there was nothing significant in the location of either the credit cards or the passports.

Findings

[74] The starting point is s 8 of the Bail Act. It is for the prosecution to establish that there is just cause for continued detention. Flight risk and the risk of reoffending on bail are mandatory considerations.

[75] In relation to the offences charged in the indictment whilst the maximum penalties for the money laundering and racketeering offences are 20 years imprisonment the copyright charges are relatively less serious carrying maximum penalties of five years imprisonment.

[76] I am mindful of the scale of the offending described in the indictment and that this is the biggest case of its kind ever prosecuted in the United States. I cannot be sure as to the ultimate penalty if the applicant were convicted and Counsel were not able to assist me with any relevant sentencing decisions relating to breach of copyright from the United States but taking into account the nature and duration of the alleged offending and the profits generated from it, it is safe to assume that substantial terms of imprisonment would be imposed although whether those sentences would be anywhere close to the maximum available penalties of 20 years I simply cannot say at this point.

[77] As to the strength of the prosecution case I am in no position to assess that as the evidence has not yet been filed. I am asked to determine that issue on the basis of the indictment, the summary of facts and counsel submissions regarding the respective merits. It is simply impossible for me to determine at this very early stage whether the US Government has a strong case or whether the applicant has a good defence to any or all of the offenses charged. All I can say is that there appears to be an arguable defence at least in respect of the breach of copyright charges and no doubt very considerable resources will be brought to bear both for the prosecution and the defence should the matter proceed to trial.

[78] As to the applicant's ability to flee the jurisdiction I am sure that he has the financial resources to obtain forged identity or travel documents and to arrange transport out of the country by covert means should he chose to do so. I very much doubt the form of transport would be chartered jet or helicopter and previous use by the applicant of either chartered jets or helicopters is essentially irrelevant. Mr Davison acknowledged in his submissions that the applicant holds another account in New Zealand unknown to the FBI with a balance of NZ\$300,000. The applicant disclosed the account and the funds it contained as a sign of good faith in advancing his bail application. I cannot exclude the possibility that there are other bank accounts and other sources of cash available to him at short notice.

[79] The real question though on the bail application is whether there is any incentive to flee the jurisdiction. If the applicant were able to leave the country undetected and travel to Germany he would be safe from extradition to the United

States. The US Government submits the risk of flight is extreme. The applicant submits the risk is non-existent. Given the nature of the business of Mega Upload.com and the profits it generated and the discussions some years earlier regarding shifting the domain to Canada or Hong Kong I would be surprised if the applicant and his close associates had not already discussed the possibility of legal action either in the Civil Courts by copyright holders or criminal prosecution. I would expect that there are already contingency plans in place should Mega Upload.com be closed down in the United States involving back up storage of data and transfer of data to another website outside the jurisdiction and that remains a real possibility whether or not the applicant is released on bail because there are still some 30 staff employed worldwide and two of the seven named defendants are still at large.

[80] The alleged risk of reoffending then is a neutral factor on this bail application. Restarting the business from another site outside the jurisdiction is a factor completely outside the Courts control, and remains an open question irrespective of any decision regarding bail.

[81] The value of the restrained assets is massive and there must be strong financial incentive to defend the criminal charges and undermine any claims for confiscation based on money laundering or racketeering. The applicant and his associates have been operating in plain sight for some years. Prosecution for breach of copyright must have been an ever present possibility and if that is the applicant's view of the matter I can accept that there is absolutely no incentive to leave New Zealand pending hearing of the extradition.

[82] Mr Davison may well be correct when he submits that Mr Dotcom wishes to let the legal process take its course and has no desire to live as a fugitive.

[83] On the other hand I cannot discount the scenario advanced by the Crown that with the applicant's business effectively shut down in the United States and his bank accounts and assets frozen and facing prosecution on serious charges with the full weight of the United States Government behind it that the applicant may take whatever money is still available to him and run to safe haven in Germany.

[84] In making that assessment I place no weight on the so called deportation from Thailand in 2002. If the US Government had been able to satisfy me that is in fact what occurred then my decision in relation to bail would have been straightforward and I could accept the submission that the risk of flight is very significant.

[85] Similarly I place no weight on the proposed trip to Hong Kong for medical reasons relating to the pregnancy or the retention of an apartment there.

[86] While the US Government's argument on flight risk in general is not as strong as initially suggested nonetheless I am left in the position that there is a risk and it is a significant risk. The applicant has explained his possession of three passports in three different names and the reason for changing his names but the fact remains that he has no qualms about changing his identity and had up to the time of his arrest been operating at least one bank account under another name.

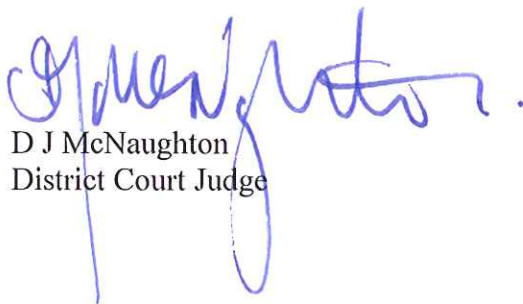
[87] The applicant's unlawful possession of the firearm is another factor which weighs in the balance. It suggests a level of criminality which to my mind could easily extend to exploiting criminal connections to obtain false travel documents and leave the country undetected.

[88] While there will be a delay of some months until the request for surrender can be heard that is not a factor of any real weight at this point, taking into account the nature of the charges and the potential penalties. I am mindful of the impact of custodial remand on the applicant's family, particularly his pregnant wife and the many staff he employs. I do not ignore either the medical issues or the difficulties in meeting counsel and mounting an effective defence. In the end flight risk remains a serious concern and must be taken into account in consideration of just cause for continued detention.

[89] The final issue is whether there are bail conditions which could meet that risk. The applicant offers electronic monitoring funded privately. He could be required to report to the police on a daily basis, subject to 24 hour curfew which the police could check at any time, not to apply for travel documents, and not to possess or operate any computer, cell phone or internet connection. Bail conditions

permitting search of his residence to ensure that neither the applicant, any family members or staff were in possession of computers, cell phones or able to access the internet could be imposed.

[90] Whilst those conditions would restrict the applicant's movements and inhibit his ability to plan any escape, with sufficient determination and financial resources flight risk remains a real and significant possibility which I cannot discount and bail is declined.



D J McNaughton
District Court Judge