IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA512/2017
[2018] NZCA 220

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

Hearing:	28 March 2018
Court:	Cooper, Asher and Clifford JJ
Counsel:	R M Mansfield and S L Cogan for Appellant D J Boldt and S L Graham for Respondent
Judgment:	27 June 2018 at 11 am

JUDGMENT OF THE COURT

A Mr Dotcom's appeal against the High Court's issue estoppel ruling is allowed.

B The parties are to liaise with the Registry to organise the hearing of the balance of the appeal.

C Costs are reserved and are to be dealt with at the end of that hearing.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] In 2013 the appellant, Kim Dotcom, commenced these proceedings against the Government Communications Security Bureau (the GCSB) and the police for damages for admittedly illegal surveillance and search activities those agencies had carried out. Issues as to discovery arose. The respondent discovered material obtained by the GCSB pursuant to unlawful surveillance activities which had been passed on to the police. The GCSB declined to discover the other material which had been obtained pursuant to unlawful intercepts but not provided to the police (the raw intercept material). It did so on the basis that previously this Court had, in a decision involving a similar application in related proceedings, determined the issue against Mr Dotcom.[1] The GCSB agreed Mr Dotcom was therefore estopped from arguing that issue in these proceedings.

[2] That issue came before Gilbert J in the High Court. There, the GCSB argued that if an issue estoppel did not apply, then the raw intercept material was not discoverable in any event as it was not relevant. Furthermore, the GCSB relied on s 70 of the Evidence Act 2006 to oppose discovery if the Court ruled that the raw intercept material was discoverable as relevant.[2]

[3] Gilbert J determined that an issue estoppel did arise.[3] Even if that had not been the case, the Judge determined that the raw intercept material was not discoverable as it was irrelevant. Furthermore, the Judge granted the GCSB's s 70 application as regards the raw intercept material and certain parts of the otherwise discoverable material (that is, the material provided to the police, which had been redacted by the police and the GCSB in the discovery process up to that point).

[4] Mr Dotcom appealed to this Court. That appeal was divided into two parts. First, Mr Dotcom's challenge to the High Court's issue estoppel decision was to be

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1 *Attorney-General v Dotcom* [2013] NZCA 43, [2013] 2 NZLR 213 [*Court of Appeal decision*].

2 Section 70 of the Evidence Act 2006 provides for a judge to direct otherwise discoverable material not be disclosed in the public interest.

3 *Dotcom v Attorney-General* [2017] NZHC 1621 [*High Court decision*]. The police were initially included as a respondent to this appeal. After a settlement was reached, Mr Dotcom abandoned this aspect of the appeal.

heard first. Then, and depending on the outcome of that appeal, the question of the appeals on the relevance and s 70 issues would be considered, if necessary.

[5] This judgment concerns the first of those matters: Mr Dotcom's appeal against the decision of Gilbert J that he faced an issue estoppel on his application for discovery of the redacted source material.

[6] In arguing that aspect of his appeal, Mr Dotcom says his application for discovery against the GCSB in these proceedings raises different issues from those previously ruled on by this Court. Hence no issue estoppel arises.

Background

[7] On 20 January 2012, and in circumstances which have now received considerable publicity, the police executed search warrants at Mr Dotcom's home. Mr Dotcom, and others affected, challenged the legality of those police actions in judicial review proceedings (the 2012 proceedings).

[8] In the 2012 proceedings, and as relevant, Mr Dotcom initially sought declarations that the search warrants were invalid. At that point, the GCSB was not a respondent. As the 2012 proceedings progressed, however, the matters in issue expanded considerably. The High Court found that the warrants were invalid.[4] In doing so, it commented negatively on the way the warrants had been executed. Mr Dotcom's attention then turned to the reasonableness of the searches. He sought leave to amend his statement of claim to include that issue, and to add a claim for public law damages (*Baigent* damages). The Crown consented to the enlargement of the judicial review proceedings to include the reasonableness of the searches, but opposed the application for leave to add a claim for *Baigent* damages.

[9] That application was heard at what became known as "the remedies hearing". During that hearing it emerged for the first time that the GCSB had been monitoring Mr Dotcom. Thereafter Mr Dotcom applied to join the GCSB and include in the 2012

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4 *Dotcom v Attorney-General* [2012] NZHC 1494, [2012] 3 NZLR 115 at [144(a)].

proceedings a claim for *Baigent* damages for the breach of rights the GCSB's illegal actions caused.

[10] From the outset, the Crown acknowledged the illegality of the GCSB's actions: as Mr Dotcom was a permanent resident of New Zealand, the GCSB was not entitled to monitor his activities as it had. But, as the police had done, the GCSB opposed the inclusion of a *Baigent* damages claim in the 2012 proceedings. The Crown also accepted that the information the GCSB had, as a result of it monitoring activities, provided to the police should be discovered. That material, it was agreed, could be provided to the Court appointed special counsel, Mr Grieve QC, for consideration in Mr Dotcom's interests. But discovery of the raw intercept material, the source of the material provided to the police, could not be agreed. The GCSB's opposition to Mr Dotcom's applications to expand the 2012 proceedings to include a claim for *Baigent* damages against the GCSB, and for discovery in those proceedings of the raw intercept material, came before Winkelmann J. Winkelmann J joined the GCSB and granted both those applications.[5]

[11] The Crown appealed. It did so on the basis that s 10 of the Judicature Amendment Act 1972 reflected a procedural bar to the inclusion of claims for *Baigent* damages in judicial review proceedings. On the discovery issue, all that was relevant for the *Baigent* damages claim was the information the GCSB had provided to the police. As that had already been discovered, there was nothing further for the GCSB to discover.

[12] On appeal, this Court acknowledged that generally it would not be appropriate to include claims for *Baigent* damages in judicial review proceedings.[6] And the practice was not to be encouraged. But that proposition was not one of universal applicability.

[13] For various reasons, the circumstances applying as regards the 2012 proceedings did make that appropriate.[7] In particular, the Judge had already

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5 *Dotcom v Attorney-General* [2012] NZHC 3268.
6 *Court of Appeal decision*, above n 1, at [50].
7 At [50].

heard extensive evidence, including cross-examination, relating to factual events. Pragmatically, it made sense for the *Baigent* damages claim against the GCSB to proceed in the 2012 proceedings alongside Mr Dotcom's judicial review application. The Crown's appeal was dismissed to that extent. But its appeal against the discovery order was allowed (this Court's discovery decision). As this Court put it, given the limited nature of the inquiry required in a claim for *Baigent* damages, and the GCSB's admission of illegality, discovery of the raw intercept material was not required for a determination of the quantum of public law damages payable in the 2012 proceedings by the GCSB.[8]

[14] Mr Dotcom did not challenge that decision. Rather he then commenced these proceedings (which we now refer to as the 2013 proceedings). In these proceedings, and in response we infer to reservations expressed by this Court in its *Baigent* discovery decision, Mr Dotcom made a *Baigent* damages claim against the GCSB and the police based on, but severed from the judicial review proceedings. The 2013 proceedings focus on the illegality of the surveillance and searches involved.

[15] Importantly on this appeal, in addition Mr Dotcom alleges breach of privacy and negligence, and seeks common law damages (including aggravated and exemplary damages) for both those civil wrongs.

[16] The question of discovery by GCSB in the 2013 proceedings then came before Gilbert J in the High Court. The Judge ruled that this Court's discovery decision created an issue estoppel on the point.[9] Referring to the 2012 proceedings as they involve the GSCB, the Judge reasoned:

> [25] I do not accept Mr Mansfield's submission that the current proceedings "differ greatly" from the earlier proceeding. That there are now three causes of action against GCSB (unlawful and unreasonable surveillance, negligence and invasion of privacy) does not alter the scope of discovery. These causes of action are all founded on the same admitted conduct, namely the unlawful interception of Mr Dotcom's communications. The only live issue remains the question of relief, particularly the quantum of damages to be awarded. If the raw communications were not relevant and discoverable in relation to the compensatory damages that should be awarded, I am unable to see how they could become relevant merely because aggravated and exemplary damages are now also claimed …

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8 At [56].

9 *High Court decision*, above n 3.

[17] Notwithstanding that determination, the Judge went on to consider the very detailed questions of relevance as argued by the Crown and the Crown's s 70 application. Those issues were, in fact, the basis of by far the larger part of his judgment.

Appeal

[18] As originally filed, Mr Dotcom's appeal against Gilbert J's decision would first have had us reconsidering this Court's discovery decision. We could not see any reason to do so. Responsibly, Mr Mansfield of his own initiative did not pursue that argument before us. Rather he focussed his argument on Mr Dotcom's alternative, and much narrower, point: the inquiry into common law damages for breach of privacy and negligence required in the 2013 proceedings is a different and broader inquiry than the inquiry required into *Baigent* damages in the 2012 proceedings. This Court's discovery decision only addressed the question of discovery in that narrower context. The ratio of that decision was limited to that context. Hence that decision did not give rise to an issue estoppel here.

[19] For the Crown, Mr Boldt argued that the two inquiries were essentially coextensive. Accordingly, and as Gilbert J had decided, this Court's discovery decision had indeed created an issue estoppel in the 2013 proceedings.

Analysis

[20] The core of the reasoning in this Court's discovery decision is best seen at two points in that judgment.

[21] First, with reference to the Crown's submissions, the Court said:

> [56] Mr Boldt argued that there was no basis for discovery of the information described in paragraph (f) that related to the first and fourth respondents. He said that discovery must be relevant to a live and pleaded issue. We agree. He argued that in this case there was no live and pleaded issue to which the discovery could be said to relate. That is because the GCSB accepts that it acted unlawfully in undertaking surveillance of the first and fourth respondents, given that they were New Zealand residents, and had already indicated to the Court that it would consent to a declaration to that effect being made. That meant that the only live issue between the GCSB and the respondents is the level of *Baigent* compensation. In light of the limited

> nature of the inquiry required to determine the appropriate level of compensation there was no reason why full disclosure of all of the material obtained by the unlawful interception undertaken by the GCSB would be necessary.

[22] Secondly, and having noted that none of the reasons said by Mr Dotcom to justify discovery challenged Mr Boldt's argument as to the absence of a material dispute between the parties, it concluded:

> [60] In the absence of the identification of any matter in dispute before the Court to which the disclosure could relate, we do not see any proper basis for the making of [the] disclosure order [sought]. We do not accept that it is sufficient for counsel to say that he or she needs to see the information before he or she can identify whether it is relevant or not. In the present case, where there is no dispute about the illegality of the surveillance undertaken by the GCSB, and in light of the relatively limited scope of the inquiry into the level of compensation, we can see no proper basis for an order … We accordingly allow … the appeal.

[23] Notwithstanding this apparent acceptance of the Crown's submissions as to the limited nature of the inquiry required to assess *Baigent* damages, before us Mr Boldt argued that the Supreme Court's decision in *Taunoa v Attorney-General* showed the inquiry into *Baigent* damages was in fact a broad one, which was not materially different from that into common law damages of the sort Mr Dotcom was now claiming from the GCSB.[10] In doing so, Mr Boldt placed particular reliance on the following comments made by Tipping J in the course of his judgment:[11]

> The other principal ingredient of an effective remedy is compensation. Everything relevant to compensating for what the plaintiff has suffered as a result of the breach is potentially available here. Economic loss clearly qualifies, as does compensation for non-economic or intangible damage or detriment. Nothing should be allowed under any head which is covered by the accident compensation legislation, but otherwise compensation for all loss or damage, direct or indirect, is potentially capable of playing a part in the remedial package.

[24] Mr Boldt also drew our attention to Tipping J's view that there should be consistency between the scope of the Court's powers to award damages for New Zealand Bill of Rights Act 1990 (NZBORA) breaches and those of the Human Rights

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10 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [322] (footnote omitted).
11 At [322].

Tribunal under s 92M of the Human Rights Act 1993.[12] Given the broad scope of the s 92M power, that view was significant here.

[25] The breadth of the approach Tipping J favoured was, Mr Boldt submitted, reinforced by this observation:[13]

> It is often said that the purpose of compensation is to restore the plaintiff, as far as the court can do so, to the position that he or she would have been in had the breach not occurred.

[26] Mr Boldt also drew our attention to remarks made by the Chief Justice and McGrath J in the course of their judgments, favouring a broad approach to the inquiry.[14]

[27] We acknowledge those aspects of the decisions in *Taunoa*. But, as ever, context is important. In *Taunoa*, the Crown challenged the decision to award *Baigent* damages made by the High Court and, if unsuccessful as to that, the quantum of those awards. The Crown's general argument was that *Baigent* damages served an entirely different purpose from common law damages. The latter were primarily compensatory, whereas the former were vindicatory and declaratory. The emphasis with *Baigent* damages — the Crown argued — was on identifying and fixing the issue, rather than compensating those who had suffered a breach of the NZBORA. As to quantum, the Crown argued that, in *Dunlea v Attorney-General*[15] and *Wilding v Attorney–General*,[16] the courts had wrongly approached the question on the basis that public law compensation and damages for tort should be assessed according to the same scales. That approach, followed by the High Court in the *Taunoa* claims, failed to take account of the nature of a public law claim for breach of the NZBORA and the purpose of relief. Thus, as regards both purpose and calculations, the approaches to be taken to *Baigent* and common law damages were dichotomous.

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12 Section 92M of the Human Rights Act 1993 empowers the Human Rights Tribunal to award damages in respect of the loss (pecuniary or otherwise), humiliation, or injury suffered by the complainant.

13 At [323].

14 At [109] per Elias CJ and [370] per McGrath J.

15 *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA).

16 *Wilding v Attorney–General* [2003] 3 NZLR 787 (CA).

[28] The Supreme Court unanimously held that awards of *Baigent* damages were called for. But the Crown's argument that the amounts awarded were in some cases excessive succeeded: only the Chief Justice would have dismissed that aspect of the Crown's appeal.

[29] On the present appeal, Mr Boldt argued that, in reaching those conclusions, the Supreme Court had rejected the Crown's "dichotomy" argument and held the approaches to *Baigent* and common law damages were alike. Indeed, Mr Boldt argued, that they were identical. Thus, the inquiry involved in determining quantum was no different and outcomes would be broadly equivalent (if not identical).

[30] We are satisfied that is not an accurate reading of *Taunoa*. Delivering the leading judgment for the majority, Blanchard J summarised the correct approach to the question of appropriate remedy in claims for breaches of NZBORA rights:

(a) The Court must provide an effective remedy: taken overall, the remedy or remedies must be sufficient to deter and also to vindicate.[17]

(b) The purpose of a monetary award was not to punish the State or its officials: monetary awards would be made to ensure sufficient vindication of, and solace to, the victim.[18]

(c) If those outcomes were achieved by damages awarded under other available private causes of action, *Baigent* damages may be "entirely unnecessary or inappropriate".[19]

(d) Where *Baigent* damages were considered necessary, the Court should not proceed on the basis of any equivalence with the quantum of awards available in tort.[20] Nor did *Baigent* damages perform the same economic or legal function as common law damages or equitable compensation.[21] Fixing of levels of *Baigent* damages was far from an

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17 *Taunoa v Attorney-General*, above n 10, at [253]–[254].
18 At [255].
19 At [256].
20 At [258].
21 At [259].

exact science. The figure to be chosen had to be one which responsible members of New Zealand society would feel comfortable with. Breaches involving systemic failures would call for a greater response than individual misconduct by an official.[22]

(e) Fixing the level of monetary sanction for an individual plaintiff was the most difficult issue.[23] Amounts should not be so small as to seem derisory. That might trivialise the breach. On the other hand, internationally awards of damages in this area do not generally approach the level of damages in tort and can best be described as moderate in amount. That was, Blanchard J considered, the right approach in New Zealand — although what was "moderate" had to be judged according to New Zealand conditions.[24]

[31] In our view, the remarks of the Chief Justice and Tipping J that Mr Boldt referred to do not alter that analysis. Tipping J broadly adopted Blanchard J's approach, as did the other members of the majority. The Chief Justice differed principally on the question of quantum. The comments of Tipping J quoted earlier were general observations about the function of damages, and not directed to the distinction between *Baigent* damages, and common law damages or equitable compensation. The statements of Blanchard J were directed to that issue. There is no inconsistency.

[32] We accept, as Mr Boldt fairly submitted, that in *Taunoa* all the Judges rejected the minimalist approach the Crown argued as to both the availability and quantum of *Baigent* damages. But, as we think is clear, in doing so none of Judges adopted the approach advanced by Mr Boldt in this appeal. That is, when the Supreme Court rejected the Crown's "dichotomous" argument it did not go to the other extreme and find that when considering claims for *Baigent* and common law damages the approaches to availability and quantum were alike.

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22 At [263].
23 At [264].
24 At [265].

[33] Rather, the Court affirmed the by then well-understood position that different principles determine the availability and quantum of *Baigent* damages as distinguished from common law damages generally even where the claims for both arise out of the same set of facts and circumstances.

[34] This Court's reference in its *Baigent* discovery decision to an inquiry of "limited scope" reflects that analysis. What *Taunoa* makes very clear is that there remain important differences between *Baigent* damages and common law damages. Nor, in that analysis, can it be said that the inquiry into, nor the outcome as to, quantum involve the same considerations.

[35] We accordingly agree with the submission made by Mr Mansfield that the ratio of this Court's discovery decision is limited to a discovery application made for the purposes of pursuing a claim for *Baigent* damages, where liability is admitted. Therefore, that decision does not create an issue estoppel for Mr Dotcom's application for discovery by the GCSB in the 2013 proceedings. The issue that was dealt with there was different from that which now arises.

[36] In reaching that conclusion we emphasise that estoppel is a substantive doctrine, and not one of form. The inquiry turns on the substance of the issue in dispute, and not the form of the proceeding or the manner in which those issues are presented. Having said that, the purpose of estoppel is specific: it is to preclude a party from repeated argument of the same substantive issue.[25] In our view, and as Mr Mansfield argued, the substantive issues as to quantum raised by the 2013 proceedings are — as our analysis demonstrates — different from those raised by the 2012 proceedings. It is for that substantive reason that an issue estoppel does not arise. We also note that the rationale behind the principle of issue estoppel is less powerful in an interlocutory context, as here.[26]

[37] As a result, Mr Dotcom may now pursue the second part of this appeal. The parties are to liaise with the Registry to organise this.

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[25] *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 42.

[26] *Greymouth Petroleum Holdings Ltd v Empresa Nacional Del Petróleo* [2017] NZCA 490, [2017] NZAR 1617 at [51].

Result

[38] Mr Dotcom's appeal against the High Court's issue estoppel ruling is allowed.

[39] The parties are to liaise with the Registry to organise the hearing of the balance of the appeal.

[40] Costs are reserved and are to be dealt with at the end of that hearing.

Solicitors:
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