

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV 2012-404-001928
[2012] NZHC 2000**

UNDER the Judicature Act 1972

IN THE MATTER OF an application for judicial review

BETWEEN KIM DOTCOM
First Plaintiff

AND FINN BATATO
Second Plaintiff

AND MATHIAS ORTMANN
Third Plaintiff

AND BRAM VAN DER KOLK
Fourth Plaintiff

AND ATTORNEY-GENERAL
First Defendant

AND THE DISTRICT COURT AT NORTH
SHORE
Second Defendant

Hearing: 8 August 2012

Counsel: P J Davison QC, W Akel and R Woods for First Plaintiff
GJSR Foley for Second, Third and Fourth Plaintiffs
J C Pike, A M Toohey and FRJ Sinclair for First Defendant

Judgment: 8 August 2012

Reasons: 9 August 2012

REASONS FOR RULING OF WINKELMANN J
[on (a) first defendant's application for suppression/non-publication orders, (b)
media applications for access to Court records]

*This judgment was delivered by me on 9 August 2012 at 4.30 pm pursuant to
Rule 11.5 of the High Court Rules.*

Registrar/ Deputy Registrar

[1] The plaintiffs argue that the New Zealand Police used unreasonable force in the search of the Dotcom mansion. The Police used both the Special Tactics Group (STG) and the Armed Offenders Squad (AOS) in effecting the arrest of Mr Dotcom and others and the search. For the purposes of this hearing the Police have disclosed documents, and film taken by both the Dotcom CCTV system and by a helicopter which was used by the Police to deliver part of the force involved in search, seizure and arrest at the Dotcom address. The Police sought orders suppressing parts of that evidence.

[2] The orders sought by the Police were as follows:

1. Non-publication of all details that could lead to the identity of any member of the AOS or STG.
2. Suppressing any facial features or identifying details of any AOS or STG staff which includes any in Court filming and faces shown on video recording and CCTV footage and call signs used in the helicopter video footage.
3. Non-publication of two documents identified, namely request for assistance and STG appreciation documents.

[3] At the conclusion of the hearing of this application, I made orders granting part only of the application and said that I would give my reasons today. These are my reasons.

[4] In civil proceedings, there is an onus on a party to establish a proper foundation for a confidentiality order, just as there is in criminal proceedings. This follows from the principle of open justice - the principle that justice should be administered in public, and subject to the full scrutiny of the media. This has been affirmed in many New Zealand decisions in the criminal area: *R v Liddell*,¹ and *R v*

¹ *R v Liddell* [1995] 1 NZLR 538.

B.² The principle is no less important in civil proceedings than it is in criminal proceedings³ (although different considerations may well be engaged in the civil jurisdiction than are engaged in criminal proceedings).

[5] The Court has, as part of its inherent jurisdiction, the power to suppress publication in civil proceedings. Thus in *Taylor v Attorney-General*⁴ the identity of a security agent who gave evidence was suppressed, and the names of parties have been suppressed in a number of civil cases.⁵ But it is necessary for a person who seeks confidentiality orders to point to some interest which outweighs the public interest in the open and public conduct of proceedings (such as particular circumstances relating to the privacy of a individual, or some matter of public interest in confidentiality), to justify a departure from the open justice principle.

[6] In this case, the applicant relied upon the evidence of the officer in charge of the Northern Special Tactics Group. The officer says that the overarching concern is that publication of the information and documents the subject of the application will cause increased danger to staff in future operations and inhibit both planning and operational efficiency. He said that the execution of search warrants is an inherently dangerous operation and where the STG is required, that is particularly likely to be so. Police are required to operate on unfamiliar property, usually property controlled by people the subjects of the search warrant. The behaviour of suspects is unpredictable and safety must be the paramount consideration - safety not only of the AOS and STG staff but also safety of the general public and occupants of the property. In planning the operation the AOS and STG must take many factors into account in matching the tactics they use to the particular situation. If the STG and AOS planning in this regard is published, that will give the subjects of future operation a better understanding of how the Police approach an operation and a better opportunity to take steps to negate the tactics they employ. That may eliminate or narrow some tactical objects. The Police say that the two documents

² *R v B* [2008] NZCA 130.

³ *Broadcasting Corporation of New Zealand v Attorney General* [1982] 1 NZLR 120, *Vasan v Medical Council of NZ* [1992] 1 NZLR 310 (CA) at 311, 312.

⁴ *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA).

⁵ *Re T* [1975] 2 NZLR 449 at 452; *Attorney General v Hancox* [1976] 1 NZLR 171.

contain such detail. Identification of current serving members of the AOS and STG members may endanger them.

[7] In the course of argument I heard from the plaintiffs and also representatives of the media, including Mr Fisher from the New Zealand Herald and also Mr John Campbell from TV3. There was no opposition to suppression of the identity of AOS and STG staff, but otherwise all submitted that the orders sought were unnecessarily broad in effect. All submitted that there is particular public interest in this material. At issue in this proceeding is whether the Police exercised reasonable force in executing a search warrant, an issue which inevitably entails consideration of the reasons for utilisation of the STG and AOS. For this reason these documents are at the very heart of the proceedings. They are in effect the risk assessments undertaken by the Police in deciding upon the methodology they would use. The fundamental public interest is in holding the police to account for the methods they adopt in search, seizure and arrest.

[8] Mr Fisher made a submission that the call signs are publically available. He tendered a print out from the internet which contains one of the calls signs and what it means.

[9] Mr Akel for the plaintiffs submits that the two documents contain quite unremarkable detail and analysis which most people would assume the police would go through in planning such an operation, and which has in any case been traversed in evidence in the Court by one of the officers. The Police have not sought suppression orders in respect of that evidence.

[10] Plainly there is significant public interest in the effective and safe operation of the STG and AOS, and the safety of members of those squads. If publication of the material in respect of which suppression is sought would tend to imperil either of those objectives, then grounds are made out for suppression. I deal with each of the matters in respect of which suppression is sought in turn.

[11] I accepted that the members of the AOS and STG should not be identified through publication of images of them, their names or identifying particulars.

[12] The position is less straightforward in respect of call signs. The call sign contained in the print out from a website tendered by Mr Fisher shows at least one of the call signs which we have heard during the course of the playing of the helicopter footage. However I was advised by Mr Sinclair that that is an AOS call sign. The particular concern related to the STG call signs. It was that publication of those call signs might enable sophisticated criminals to monitor radio waves and thereby gain advance warning of operations, and perhaps to identify individual members of the STG. There was no evidence before me that the STG call signs are within the public domain. I accepted that there is a public interest in that remaining the case. I was therefore satisfied that there should be suppression/non-publication orders in respect of all call signs for the STG. To clarify, those are the call signs other than the Zero Alpha call sign.

[13] The next order sought was in respect of non-publication of two documents. Initially the application was that there be non-publication and suppression of all contents of those documents – the entire documents. However after discussion with counsel, Mr Sinclair agreed to take instructions as to whether a more limited redaction of the documents would meet Police concerns. Having done so, he was able to limit the application to parts of page 106, and all of pages 107 and 108 of the document in the blue folder headed “Special Tactics Group Request for Assistance Form”. Suppression was still sought of the entirety of the document “Appreciation Operation Debut”.

[14] Addressing first the “Request for Assistance” document. Pages 106 and 107 detail particular courses of action for “high risk” deployment and “low risk” deployment. I took into account in declining this application that the options listed there were traversed, at least to a limited extent, in cross-examination of the witness referred to. It is also a matter of common knowledge that the options identified are options commonly used by Police. They are activities frequently referred to in the course of criminal proceedings in this Court. Moreover the list is by no means an exhaustive list of options, a fact which emerged from the evidence of the STG officer. For these reasons I did not consider that the public interest consideration of operational effectiveness requires suppression of those parts of the document.

[15] I therefore proceeded to consider page 108. Part of that page recites a minute by minute laying out of the planned operation. I accepted that this information tends to show how the STG organises, plans for and executes a particular operation, and for that reason, I concluded that that part should be suppressed. However, that consideration only applies down to the part of the page which commences with the heading “Legal Authority”. The remainder of that page did not in my assessment contain operationally sensitive material. Moreover, part of it had been cross-examined into the record.

[16] I then considered the document “Appreciation Operation Debut”. This document outlines in effect the risk assessment undertaken by the STG. It had been the subject of quite extensive cross-examination so that much of the material had been traversed during the course of the officer’s evidence including reference to “Trojan Horse” techniques. The analysis of the subject premises is a reasonably unremarkable analysis, and again much of it was covered in cross-examination. Moreover as Mr Fisher submitted through media coverage of past operations undertaken by the AOS, and by reason of a documentary series about the AOS, it is in the public domain that if an operation is contemplated involving the use of armed men entering a property, there will be planning to identify risks and obstacles to that operation. It follows inevitably that the STG also undertakes such analyses. This document does no more than that. Even absent such media coverage, it is surely a matter of common sense that such planning goes on. I can see nothing in the detail of the planning to suggest it would reveal techniques, operational detail or information which are of any particular sensitivity.

[17] Finally, flowing on from the particular orders sought, the Crown sought suppression of part of the STG officer’s evidence which appeared at page 113, line 22. I declined that application as no basis was made out to suggest that release of that information would compromise the operational effectiveness of the STG. Again it would be a matter of common knowledge that the STG would identify entries and exits on a subject property.

[18] I then proceeded to consider media applications and made orders without opposition that the media have access to exhibits produced at the hearing, but that

there should be non-publication orders in relation to call signs (with the exception of Zero Alpha) and any identifying particulars in respect of members of the STG and AOS. Because of logistical difficulties in allowing access to those exhibits during the course of the hearing, the plaintiffs agreed to provide copies to the media.

[19] At the conclusion of my ruling Mr Sinclair said that the first defendant wishes to take time to consider whether to appeal its effect in relation to the two documents. For that reason I made interim orders continuing the non-publication orders in respect of those two documents until further order of the Court.

Winkelmann J

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