IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA720/2023
[2024] NZCA 260

BETWEEN	KIM DOTCOM Applicant
AND	CROWN LAW OFFICE First Respondent
AND	ATTORNEY-GENERAL Second Respondent
AND	DEPARTMENT OF PRIME MINISTER AND CABINET Third Respondent
AND	IMMIGRATION NEW ZEALAND Fourth Respondent
AND	MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Fifth Respondent
AND	MINISTRY OF FOREIGN AFFAIRS AND TRADE Sixth Respondent
AND	MINISTRY OF JUSTICE Seventh Respondent
AND	NEW ZEALAND POLICE Eighth Respondent

Court:	Cooke and Wylie JJ
Counsel:	R M Mansfield KC, S L Cogan and T P Refoy-Butler for Applicant V E Casey KC and A P Lawson for Respondents
Judgment: (On the papers)	21 June 2024 at 3 pm

JUDGMENT OF THE COURT

A The application for special leave to appeal is declined.

B The applicant must pay costs for a standard application on a band A basis to the respondents jointly, together with usual disbursements.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] The applicant, Kim Dotcom, applies for special leave to appeal a decision of the High Court (High Court damages judgment)[1] dismissing his appeal against a decision of the Human Rights Review Tribunal (the Tribunal).[2]

[2] The application arises out of 52 information requests Mr Dotcom made in 2015, pursuant to s 37 of the Privacy Act 1993 (the 1993 Act).[3] Most of the requests were transferred to the Attorney-General's office (Crown Law) by the various Ministers (and government agencies) to whom they were sent. The transfers were challenged by Mr Dotcom. After differing findings in the Tribunal[4] and the High Court,[5] this Court found that the transfers of the information requests breached Mr Dotcom's privacy.[6] The question of damages was remitted to the Tribunal.[7]

[3] The Tribunal subsequently declined to award damages to Mr Dotcom.[8] Mr Dotcom appealed to the High Court and it also declined to award him damages.[9]

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1 *Dotcom v Crown Law Office* [2023] NZHC 1122, [2023] 3 NZLR 1 [High Court damages judgment].
2 *Dotcom v Crown Law Office* [2022] NZHRRT 7 [Tribunal damages decision].
3 The Privacy Act 1993 was repealed by the Privacy Act 2020, s 216(1) from 1 December 2020.
4 *Dotcom v Crown Law Office* [2018] NZHRRT 7 [Tribunal complaint decision].
5 *Attorney-General v Dotcom* [2018] NZHC 2564 [High Court complaint judgment].
6 *Dotcom v Attorney-General* [2020] NZCA 551 [Court of Appeal complaint judgment] at [107].
7 At [113].
8 Tribunal damages decision, above n 2, at [48].
9 High Court damages judgment, above n 1, at [175].

[4] Mr Dotcom applied for leave to appeal to this Court. That application was declined by the High Court.[10]

[5] The application is brought pursuant to s 124 of the Human Rights Act 1993.[11] It provides that a second appeal from a decision of the Tribunal can only be brought on questions of law with the leave of the High Court or, if the High Court declines leave, with special leave from this Court. We discuss this provision further below.

Factual background

[6] The background to this matter is convoluted. There are two threads to the various proceedings — first the extradition proceedings and secondly, the privacy proceedings under the 1993 Act. At various points, the two threads intersect.

[7] There was no dispute as to the background as it was recited by the High Court in the High Court damages judgment and we gratefully adopt much of that analysis:[12]

> *United States extradition requests*
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> [5] In January 2012, the Government of the United States of America requested the Government of New Zealand to extradite Mr Dotcom and three other persons to the United States …
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> [6] As stated by the High Court in one of the decisions dealing with the United States' extradition requests:[13]
>
> > The United States of America claims that … [Mr] Dotcom … and others were members of a worldwide criminal organisation that engaged in criminal copyright infringement and money laundering on a massive scale with estimated loss to copyright holders well in excess of USD 500 million. …
>
> [7] Extensive litigation ensued in which, among other things, Mr Dotcom and his associates challenged the validity of the actions taken by the New Zealand authorities in relation to the United States extradition request. …

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10 *Dotcom v Crown Law Office* [2023] NZHC 3105 [High Court leave judgment].

11 Under sch 1 cl 9(1) of the Privacy Act 2020, a proceeding commenced before the Tribunal under pt 8 of the 1993 Act before 1 December 2020 is to be continued and completed under the Privacy Act 2020. Mr Dotcom's proceeding was commenced under pt 8 of the 1993 Act. Pursuant to s 111 of the Privacy Act 2020, pt 4 of the Human Rights Act 1993 (which includes s 124) applies to various proceedings commenced under the Privacy Act 2020, including proceedings of the kind commenced by Mr Dotcom.

12 High Court damages judgment, above n 1.

13 *Ortmann v United States of America* [2017] NZHC 189 [High Court extradition judgment] at [1].

…

> [9] Eventually, in May 2015, the hearing of the eligibility of Mr Dotcom and his associates for surrender in accordance with the Extradition Act 1999 was set down to commence in the District Court on 21 September 2015.

[8] Mr Dotcom had earlier sought disclosure in the extradition proceedings under the Criminal Disclosure Act 2008. He was successful in the District Court[14] and the High Court,[15] but unsuccessful in this Court.[16] On appeal, the Supreme Court found that there is no right to disclosure under the Criminal Disclosure Act 2008 in extradition proceedings.[17] However, the Court observed that a person whose extradition is sought can seek pre-hearing disclosure against any New Zealand agencies involved in the extradition process, including the Minister of Justice. It noted that such disclosure is available by reason of the Official Information Act 1982.[18]

[9] It has since been accepted that the Supreme Court's observations extend to recognise the right to obtain personal information under the 1993 Act.[19]

[10] The High Court damages judgment goes on as follows:[20]

> *Information privacy requests*
>
> [10] In July 2015, Mr Dotcom made information privacy requests of 52 Government Ministers and agencies under s 37 of the [1993] Act. He asked that the requests be treated as urgent because the information was required for "pending legal action".
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> [11] At the instigation of the Crown Law Office, most of the information privacy requests were transferred by the Government agencies to the Crown Law Office, purportedly in accordance with s 39(b)(ii) of the [1993] Act.[21] …

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14 *Dotcom v United States of America* [2012] DCR 661.
15 *United States of America v Dotcom* [2012] NZHC 2076.
16 *United States of America v Dotcom* [2013] NZCA 38, [2013] 2 NZLR 139.
17 *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [190] per McGrath and Blanchard JJ, [224] per William Young J and [315] per Glazebrook J.
18 At [122] per McGrath and Blanchard JJ, [231] per William Young J and [274] per Glazebrook J.
19 Tribunal complaint decision, above n 4, at [31]; and *Dotcom v United States of America* [2014] NZHC 2550 at [49] and [56].
20 High Court damages judgment, above n 1.
21 Although letters from some government agencies referred to s 39(a)(ii) of the 1993 Act, it was common ground in the earlier proceedings that the references should have been to s 39(b)(ii).

Solicitor-General responses

[12] On 5 August 2015, the Solicitor-General wrote to Mr Dotcom's counsel in response to the information privacy request to the Crown Law Office. … The letter advised that the Attorney-General considered that the information sought, to the extent it was held by other agencies, was more closely connected with his functions as Attorney-General and observed that most recipient agencies had transferred the requests to the Attorney-General's office. The letter advised that the Solicitor-General considered Mr Dotcom had not complied with the requirements of s 37 of the [1993] Act to give reasons why the request should be treated as urgent. It stated that, as currently expressed, the request must be declined under s 29(1)(j) on the grounds it was vexatious and, due to its extremely broad scope, included information that was trivial.

[13] In a response dated 17 August 2015, solicitors acting for Mr Dotcom advised they had taken over responsibility for the requests, challenged the transfer of the requests and the right of the Attorney-General to respond to the requests and purported to require the requests to be returned to the targeted agencies. The letter did not accept that the requests could reasonably be considered to be vexatious or only seeking trivial information. …

[14] On 31 August 2015, the Solicitor-General responded to Mr Dotcom's solicitors stating that Crown Law did not accept that the letters were unlawfully transferred or that it was inappropriate for Crown Law to decline the requests. The Solicitor-General included with his letter a copy of a letter, also dated 31 August 2015, sent to the Privacy Commissioner requesting the Commissioner's advice on the Crown Law Office's response … to Mr Dotcom's requests …

…

Extradition hearing commences

[17] On 21 September 2015, the hearing of the application for Mr Dotcom's surrender for extradition to the United States commenced in the District Court. The hearing concluded on 24 November 2015.

Complaint to Privacy Commissioner

[18] On 28 October 2015, Mr Dotcom's solicitors made a complaint to the Privacy Commissioner about the transfer and refusal of the information privacy requests.

District Court finds Mr Dotcom and associates eligible for surrender

[19] On 23 December 2015, the District Court issued its judgment finding that Mr Dotcom and his associates were eligible for surrender to the United States on all 13 charges that formed the basis of the United States application for surrender.[22] …

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[22] *United States of America v Dotcom* DC North Shore CRI-2012-092-001647, 23 December 2015 [District Court extradition judgment]. …

[20] Mr Dotcom and his associates filed an application for judicial review of the [District Court] [e]xtradition [j]udgment and for a stay of the extradition proceedings and an appeal by way of case stated of the [District Court] [e]xtradition [j]udgment. The appeal raised over 300 questions of law. The United States also appealed aspects of the [District Court] [e]xtradition [j]udgment.

Privacy Commissioner's final views on Dotcom complaint

[21] In June 2016, the Privacy Commissioner provided final views on Mr Dotcom's complaint. In relation to the transfer of the information privacy requests, the Privacy Commissioner's letter to Mr Dotcom's counsel stated that the Commissioner had determined that Crown Law had acted lawfully as legal adviser to the Government agencies. The letter also stated that the Commissioner had not concluded that all personal information held by the Crown about Mr Dotcom was trivial but, because of the breadth of the requests, they included trivial information. The letter also said the overall volume and extent of the information privacy requests indicated that the requests were designed to frustrate or vex the respondents. The letter concluded that, while the Commissioner could not take the issue further, Mr Dotcom was free to take a case to the Tribunal.

Complaint to Tribunal

[22] In August 2016, Mr Dotcom made a complaint to the Tribunal (the Privacy Complaint). … Mr Dotcom alleged interference with his privacy by the wrongful transfer of the information privacy requests in breach of s 39 of the [1993] Act, the wrongful refusal of the requests in breach of s 40 of the [1993] Act and the unlawful refusal to deal with the requests urgently.

High Court dismisses challenges to [District Court] [e]xtradition [j]udgment, but grants leave to appeal on limited grounds

[23] On 20 February 2017, the High Court answered the questions of law in the appeal brought by Mr Dotcom and his associates and by the United States against the [District Court] [e]xtradition [j]udgment and dismissed the judicial review of that judgment.[23] The High Court confirmed the District Court's determination that Mr Dotcom and his associates were eligible for surrender on all counts in the United States indictment.[24] …

[24] On 2 August 2017, the High Court refused to grant leave to Mr Dotcom and his associates to appeal the [High Court] [e]xtradition [j]udgment on the basis of approximately 130 questions of law but granted leave to appeal on two specific questions of law.[25] The High Court also dismissed an application by the United States for leave to appeal.

Tribunal upholds Privacy Complaint

[25] In March 2018, the Tribunal upheld the Privacy Complaint.[26] The Tribunal declared that there had been an interference with Mr Dotcom's

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23 High Court extradition judgment, above n 13.
24 At [599].
25 *Ortmann v United States of America* [2017] NZHC 1809. …
26 Tribunal complaint decision, above n 4.

privacy by the unlawful transfer of the information privacy requests to the Attorney-General, and that the Attorney-General had no lawful authority to refuse the requests on the grounds that they were vexatious. In the alternative, the Tribunal declared that, if the transfers were lawful, there was no proper basis for refusing the information privacy requests on the grounds they were vexatious.

[26] The Tribunal awarded Mr Dotcom damages against the Attorney-General of $30,000 for the loss of a benefit Mr Dotcom might reasonably have been expected to obtain but for the interference and $60,000 for loss of dignity and injury to feelings.[27] …

…

Government agencies start to respond to information privacy requests

[30] The Attorney-General filed an appeal against the [Tribunal] [c]omplaint [j]udgment. In addition, from 30 April 2018, Government agencies began to respond to the information privacy requests that Mr Dotcom had filed previously. …

[31] From 15 June 2018, tranches of information were released by Government agencies to Mr Dotcom. All requests were eventually responded to, subject to the withholding of some information under s 27 of the [1993] Act.

Court of Appeal dismisses challenges to [High Court] [e]xtradition [j]udgment.

[32] After hearings in February 2018, on 5 July 2018, the Court of Appeal dismissed Mr Dotcom's appeal against the High Court [e]xtradition [j]udgment.[28] …

[33] The Court of Appeal also dismissed applications to stay the extradition proceedings on various grounds, including the Attorney-General's handling of the information privacy requests. …

[34] [Mr Dotcom and his associates] subsequently obtained leave from the Supreme Court to appeal the Court of Appeal's decisions dismissing their appeals against the [High Court] [e]xtradition [j]udgment … .[29]

High Court upholds appeal against [Tribunal's] [c]omplaint [j]udgment

[35] In October 2018, the High Court allowed the Attorney-General's appeal against the [Tribunal] [c]omplaint [j]udgment.[30] The High Court held that there was a proper and lawful purpose for the transfer of the requests and that, because the requests were required to be responded to urgently on the ground that the information sought was relevant to the eligibility proceedings, the requests were vexatious.[31]

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27 At [204] and [255].

28 *Ortmann v United States of America* [2018] NZCA 233, [2018] 3 NZLR 475 [Court of Appeal extradition judgment].

29 *Ortmann v United States of America* [2018] NZSC 126. …

30 High Court complaint judgment, above n 5.

31 At [239].

[36] The High Court observed that, given its findings, it was not necessary to address the question of remedies. However, it expressed its views on the Tribunal's award of damages in case it was wrong on its findings.[32]

Leave to appeal granted on two questions of law

[37] In April 2019, the High Court granted Mr Dotcom leave to appeal the [High Court complaint judgment] with respect to a single question of law:[33]

> Can a request for personal information under the [1993 Act] be transferred by the recipient to another agency where the request seeks urgency and the basis for the urgency request is not a matter that the recipient is able to sensibly assess but the agency to which the request is transferred is the only agency able to properly evaluate the claimed basis for the urgency request?
>
> (Question 1)

[38] In October 2019, the Court of Appeal granted Mr Dotcom special leave to appeal the [High Court complaint judgment] with respect to the following further question:[34]

> Is a request for urgency under s 37 of the [1993 Act] a relevant factor for an agency in determining whether to refuse a request for personal information under s 29(1)(j) of that Act?
>
> (Question 2)

Supreme Court decision on appeals against [Court of Appeal] [e]xtradition [j]udgment

[39] On 4 November 2020, the Supreme Court dismissed most aspects of the appeals against the [Court of Appeal] [e]xtradition [j]udgment.[35] The Supreme Court also held that the Court of Appeal was in error in concluding that the judicial review proceedings were an abuse of process and allowed the judicial review appeals.[36] The Supreme Court subsequently remitted the matter to the Court of Appeal for the purpose of identifying any outstanding issues in relation to the judicial review appeals that had not been addressed as part of the Extradition Act appeals and resolving those issues.[37]

Court of Appeal allows Mr Dotcom's appeal against [High Court complaint judgment]

[40] On 10 November 2020, the Court of Appeal allowed Mr Dotcom's appeal against the [High Court complaint judgment] to the extent reflected in its answers to the approved questions.[38] The Court of Appeal said the fact urgency was sought did not comprise a part of the information that was the subject of a request and did not provide a proper basis for a transfer of the

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32 At [189]. …
33 *Dotcom v Attorney-General* [2019] NZHC 740.
34 *Dotcom v Attorney-General* [2019] NZCA 509.
35 *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 …
36 At [588]–[590].
37 *Ortmann v United States of America* [2021] NZSC 9 at [8].
38 Court of Appeal complaint judgment, above n 6, at [112].

> request to another agency. Accordingly, it answered Question 1 in the negative. In response to Question 2, the Court of Appeal said a request for urgency could be a relevant factor in a decision to refuse a request.[39] …

[11] Counsel for Mr Dotcom had submitted to this Court that the appropriate course was for the Tribunal complaint decision to be reinstated and for the question of damages to be remitted to the High Court for determination. This Court observed that the Tribunal complaint decision on the transfer issue was based on a different argument than had been advanced before it. It considered that the appropriate course was to allow the appeal from the High Court complaint judgment to the extent reflected in its answers to the two approved questions. It ordered accordingly. The issue of damages was remitted to the Tribunal for reconsideration in light of this Court's judgment.[40]

[12] Finally, in the High Court damages judgment, it was noted as follows:

> *Court of Appeal dismisses judicial review appeals*
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> [41] On 12 July 2021, the Court of Appeal held that there were no issues raised in the judicial review appeals that were not addressed in the [Court of Appeal] [e]xtradition [j]udgment and dismissed the judicial review appeals that had been remitted to it by the Supreme Court.[41] In reaching that decision, the Court rejected arguments of alleged breaches of natural justice, including alleged misconduct on the part of the authorities. This included Mr Dotcom's complaint about the Attorney-General's handling of the information privacy requests.[42]
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> [42] The Supreme Court subsequently declined an application for leave to appeal the Court of Appeal's decision.[[43]]
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> …
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> *Tribunal declines to award damages to Mr Dotcom*
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> [44] On 15 February 2022, the Tribunal issued its decision on the referral of the [Court of Appeal complaint judgment].[44] The Tribunal declined to award any damages to Mr Dotcom.

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39 At [111].
40 At [109]–[113].
41 *Ortmann v United States of America* [2021] NZCA 310 [second Court of Appeal extradition judgment].
42 At [71].
43 *Ortmann v United States of America* [2021] NZSC 187.
44 Tribunal damages decision, above n 2.

[13] As noted above at [1], Mr Dotcom appealed the Tribunal damages decision to the High Court, which also declined to award any damages to Mr Dotcom.[45]

The damages hearings in the Tribunal and in the High Court

[14] The focus of the damages hearings before both the Tribunal and the High Court was s 88(1)(b) of the 1993 Act (now repealed).

[15] Relevantly, s 88 provided as follows:

> **88 Damages**
>
> (1) In any proceedings under section 82 or section 83, the Tribunal may award damages against the defendant for an interference with the privacy of an individual in respect of any 1 or more of the following:
>
> …
>
> (b) loss of any benefit, whether or not of a monetary kind, which the aggrieved individual might reasonably have been expected to obtain but for the interference:

Tribunal damages decision

[16] The Tribunal considered that, given the terms of the Court of Appeal complaint judgment, the issue of damages was not "at large".[46] It also recorded that no party had filed further briefs of evidence, despite being given the opportunity to do so.[47] The Tribunal said that, as a result, it was subject to the following constraints:[48]

(a) This Court had remitted back to the Tribunal the consideration of damages relating to the transfers of the information privacy requests (and not the refusal of those requests).

(b) The fact that the transfers did not meet the requirements of the 1993 Act did not make them void. This Court had not set aside the transfer decisions; rather it had determined that they were wrongful.

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45 High Court damages judgment, above n 1.
46 Tribunal damages decision, above n 2, at [14].
47 At [15].
48 At [16].

(c) Because the parties had not produced any further evidence, the Tribunal's consideration of damages was confined to the evidence adduced at the original hearing (which had resulted in the Tribunal complaint decision).

(d) The Tribunal was bound by the finding in the High Court complaint judgment, that there was a proper basis to refuse the information privacy requests — namely that the requests were vexatious.

[17] The Tribunal held that any loss of benefit had to be causally linked to the wrongful transfers of the information requests. Mr Dotcom had submitted that the loss of benefit that he had suffered was the loss of the opportunity to use the information in the extradition eligibility hearing and subsequent appeals. The Tribunal considered that it was no longer necessary to speculate whether this claimed loss of benefit might reasonably have been expected to accrue. In the intervening years, the various Ministers and government agencies the subject of the information requests had provided the information sought. Mr Dotcom failed to identify any specific document that might potentially have made a difference to his extradition hearings. The Tribunal observed that, while s 88(1)(b) of the 1993 Act might a set a low threshold of proof, a plaintiff nevertheless has to cross that threshold by establishing that the claimed loss of benefit was one he or she might reasonably have been expected to obtain but for the interference.[49]

[18] Mr Dotcom had also submitted that potential relevance was not required to be established beyond the fact that the information was personal to him and was held by the agencies involved in the extradition process. He had argued that relevance to the extradition hearing could be inferred from the primary grounds on which significant amounts of the information had been withheld — namely that disclosure of the information would be likely to prejudice the security of New Zealand or to prejudice the entrusting of information to the Government of New Zealand.[50] The Tribunal

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49 At [25]–[28].
50 At [29].

rejected this submission; it considered that it was framed "in terms so wide that no such inference [could] be reasonably drawn".[51]

[19] Accordingly, it held that the loss of benefit claim failed because of the absence of evidence.[52]

[20] The Tribunal went on to consider Mr Dotcom's claim for loss of dignity and injury to feelings.[53] These findings are not the subject of the application for special leave so we do not deal with them.

High Court damages judgment

[21] The High Court considered that the appeal from the Tribunal damages decision gave rise to the following questions:[54]

(a) Was the Tribunal required by the Court of Appeal complaint judgment to restrict its consideration to damages arising from harm caused by the transfer of the information privacy request?

(b) Was the Tribunal bound by the finding in the High Court complaint judgment that there was a proper basis to refuse the information privacy request — namely that they were vexatious?

(c) Was the Tribunal correct in holding that no damages for loss of benefit should be awarded?

(d) Was the Tribunal correct in holding that no damages for loss of dignity or injury to feelings should be awarded?

(e) If the Tribunal was not correct in its decisions on the award of damages, what damages should be awarded to Mr Dotcom?

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51 At [30].
52 At [32].
53 At [33]–[41].
54 High Court damages judgment, above n 1, at [75].

[22] At issue in the application for special leave is the High Court's approach to question (c). This approach is however dictated by the High Court's conclusions in relation to the first two questions. Accordingly, we briefly summarise those conclusions.

[23] The High Court considered that the Tribunal had misdirected itself when it held that it was unable to consider damages for the refusal of the requests because, in the Tribunal's view, this Court had only remitted back to the Tribunal the consideration of damages arising from the transfers. The High Court was satisfied that this Court's direction that the issue of damages should be remitted to the Tribunal for reconsideration in light of its judgment, included consideration of damages in relation to the refusal of the requests.[55]

[24] Further, the High Court was satisfied that the Tribunal erred when it held that it (the Tribunal) was bound by the finding in the High Court complaint judgment that there was a proper basis to refuse the information privacy requests because they were vexatious.[56]

[25] The High Court considered that it followed that the Tribunal erred in excluding from consideration any loss of benefit that Mr Dotcom might have been expected to obtain from the refusal of the information requests and in limiting its consideration to such loss of benefit that Mr Dotcom might have been expected to obtain from the transfer of the information requests.[57]

[26] The Court found that the loss of benefit could include "the loss of being able to use the information in the extradition proceedings". It did not consider that this strained the language of s 88(1) or raised the risk of establishing some new category of damages. The Court did not accept the submission made for Mr Dotcom that all that was required was a causal connection between the breach and the pleaded loss. The Court observed that such an approach would leave it open to an aggrieved claimant to plead any loss he or she might choose, however fanciful.[58]

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55 At [123].
56 At [128].
57 At [129].
58 At [131].

[27] The Court accepted that Mr Dotcom did not have to establish that the requested information was likely to have actually affected the outcome of the extradition hearing. It considered that this would put the bar too high, having regard to the language of s 88(1)(b). The Court held that it was enough to show that the information could have been put to some use, such as in cross-examination or in submissions.[59]

[28] The Court considered that the difficulty with the case advanced for Mr Dotcom was that it presumed relevance but provided no information for the Court to be satisfied on that point.[60] The Court observed as follows:

> [147] Given this history of specific judicial rejection of Mr Dotcom's allegations of prejudice or of a lack of fairness in relation to the earlier requests for disclosure of personal information and in relation to the lack of a response to the information privacy requests, it is not sufficient for Mr Dotcom simply to assert the possibility of a benefit from having access to the information requested at the extradition proceedings. That is particularly so where, as here, Mr Dotcom has had access to that information, albeit after the event. In order to demonstrate he might reasonably have been expected to obtain a benefit from having such access, Mr Dotcom must show that there was something in the documents that might have had some relevance to and [been] put to some use at the extradition hearing. Beyond making the general and vague assertion that there might be something relevant behind the black lines of redacted information withheld in accordance with s 27 of the [1993] Act, Mr Cogan has provided nothing at all.
>
> [148] For these reasons, we agree with the Tribunal that Mr Dotcom has not established that there was any benefit that he might reasonably have been expected to obtain but for the interference with his privacy, whether by the transfer of the information privacy requests or the refusal of the requests.
>
> [149] Accordingly, we consider the Tribunal was correct in finding that no damages should be awarded for loss of benefit.

High Court leave judgment

[29] As noted, the High Court declined leave for a second appeal to this Court.

[30] Before the High Court, Mr Dotcom was seeking leave to raise the following questions before this Court:[61]

> (a) Where an agency has interfered with the privacy of an individual by refusing to grant access to personal information in response to a

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59 At [132]–[133].
60 At [134].
61 High Court leave judgment, above n 10, at [2].

request under Information Privacy Principle 6 (IPP6) as provided for in s 6 of the [1993] Act … is it necessary, for the purposes of assessing damages for loss of a benefit under s 88(1)(b) of the [1993] Act, for the individual to show more than a causal connection between the breach and the pleaded loss?

(b) Where an agency has interfered with the privacy of an individual by refusing to grant access to personal information in response to a request under IPP6 made in the context of actual or apprehended litigation by or against that individual, is it necessary, for the purposes of assessing damages for loss of a benefit under s 88(1)(b) of the [1993] Act, for the individual to show that:

(i) There was an objective basis for concluding that some of the requested information would have been relevant to the proceedings; and/or

(ii) The requested information could have been put to some use in the proceedings.

[31] The High Court declined leave for the following reasons:

(a) The first question did not reflect the findings in the High Court complaint judgment.[62]

(b) The second question was not seriously arguable and it did not raise a matter of public importance.[63]

The leave provision

[32] Relevantly, s 124 of the Human Rights Act 1993 provides as follows:

124 Appeal to Court of Appeal on a question of law

(1) Any party to any proceedings before the High Court under this Act may, with the leave of the High Court, appeal to the Court of Appeal against any determination of the High Court on a question of law arising in those proceedings:
provided that, if the High Court refuses to grant leave to appeal to the Court of Appeal, the Court of Appeal may grant special leave to appeal.

…

(3) Where the High Court refuses leave to any party to appeal to the Court of Appeal under this section, that party may, within

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62 At [17]–[22].
63 At [27]–[29].

> 15 working days after the refusal of the High Court or within such further time as the Court of Appeal may allow, apply to the Court of Appeal, in such manner as may be directed by the rules of that court, for special leave to appeal to that court, and the Court of Appeal may grant leave accordingly if, in the opinion of that court, the question of law involved in the appeal is one which, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.
>
> …
>
> (6) The decision of the Court of Appeal on any application to that court for leave to appeal shall be final.

Submissions

[33] Mr Dotcom seeks special leave to appeal in respect of the following questions:

> For the purposes of assessing damages for loss of a benefit under s 88(1)(b) of the [1993 Act]:
>
> (a) Was it necessary for [Mr Dotcom] to show a loss of benefit over and above the unlawful withholding of information requested under [IPP6] by the [r]espondents?
>
> (b) Was it necessary for [Mr Dotcom] to show that there was an objective basis for concluding that some of the information withheld by the [r]espondents would have been relevant to, or able to have been put to some use in, the eligibility proceeding concerning the United States of America's request for [Mr Dotcom's] surrender under the Extradition Act 1999?

For Mr Dotcom

[34] It was submitted for Mr Dotcom that:

(a) The proposed questions of law are seriously arguable, would be dispositive of the appeal and are not simply in the nature of an advisory opinion. If the High Court erred in its formulation of what amounts to loss of a benefit where a request under IPP6 is made in the context of extent proceedings, then its finding that Mr Dotcom did not suffer any loss of a benefit for the purposes of s 88(1)(b) is in error. If loss of a benefit requires an individual to show that unlawfully withheld information would have been relevant, or otherwise able to be "put to some use" in the proceeding in relation to which it was sought, many

individuals will be left with without an effective remedy for beach of IPP6.

(b) It is unclear from the High Court judgment what "put to some use" means in practice and how this is to be assessed by the Tribunal. It would appear that the High Court contemplated that something more than merely referring to the withheld information in submissions or cross-examination (irrespective of the utility of doing so) is required, yet something less is required than showing that the information would have affected the outcome. It is inappropriate to require the Tribunal to engage, retrospectively or prospectively, in speculation as to the extent to which unlawfully withheld information could have been put to use in a different forum.

(c) The questions are of general and/or public importance. If the High Court's interpretation is correct, damages will rarely be available for interferences with privacy under IPP6 where the information was sought in relation to extant or anticipated proceedings. This in turn could encourage the strategic withholding of information by agencies that are, or apprehend that they may become, parties to proceedings, which cannot have been intended.

(d) Although the 1993 Act has been repealed and replaced by the Privacy Act 2020, s 103 of the Privacy Act 2020 is in substantially similar terms to s 88(1)(b) of the 1993 Act. Accordingly, the outcome of any appeal will be relevant to interpretation of s 103.

For the respondents

[35] The respondents supported the reasons given by the High Court in declining the application for leave to appeal.[64] They advanced further reasons on each question.

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64 High Court leave judgment, above n 10.

[36] The respondents submitted that special leave should not be granted for the first proposed question for three reasons:

(a) Mr Dotcom did not seek leave to bring an appeal on this question from the High Court.

(b) The proposed question is a new argument that Mr Dotcom has not made in any of the previous stages of this proceeding. Throughout, he has argued that the benefit he lost was the ability to use the requested material in the extradition proceedings. He now seeks to argue that the benefit he lost was simply the benefit of having the requested material. He also now suggests that any higher test would leave aggrieved claimants without a remedy, a new argument which the High Court made no findings on.

(c) The proposed question is not seriously arguable. It is not a tenable reading of s 88(1)(b) that the mere failure to provide requested information, when this amounts to an interference with privacy, in and of itself amounts to a loss of benefit for which damages can be awarded. Plaintiffs who do not meet the criteria in s 88(1)(b) are not without a remedy; it is simply that they are not entitled to a monetary award under that subsection.

[37] The respondents also argued that special leave should not be granted for the second question for three reasons.

(a) The proposed question is not a question of law capable of serious argument. The High Court's description of what Mr Dotcom needed to show aligns with s 88(1)(b). The Court was identifying what evidence it was looking for in assessing the factual question — did Mr Dotcom meet the requirements of s 88(1)(b)?

(b) The proposed question does not raise any issue of general or public importance warranting a second appeal. The High Court's discussion

of its approach to whether Mr Dotcom had established his claim for damages, was specific to his claim, the way he chose to frame his case and the evidence he brought (or failed to bring) to support it. Mr Dotcom is seeking to re-argue the merits of the resulting conclusion, rather than arguing a point of law. What amounts to "put to some use" needs to be determined on the facts of each case.

(c) Even if there is an arguable error of law:[65]

> It is not every alleged error of law that is of such importance, either generally or to the parties, as to justify further pursuit of litigation which has already been considered on a number of occasions.

Analysis

Relevant law

[38] We have set out above s 124 of the Human Rights Act. This Court can only grant special leave to appeal if the question of law involved in the appeal is one which, by reason of its general or public importance or for any other reason, ought to be submitted to this Court for decision.

[39] This formula is not unique to the Human Rights Act. It is used in a number of different statutory contexts. The applicable principles were set out by this Court in *Cook v Housing New Zealand Corp*, in relation to a proposed appeal pursuant to similar provisions in the Residential Tenancies Act 1986. The Court noted as follows:[66]

> [3] Section 120(3) provides that leave for a further appeal to this Court may only be granted if, in the opinion of the Court, the appeal involves a question of law that, because of its general or public importance or for any other reason, ought to be submitted to this Court for decision. This is a high threshold. It has been emphasised on many occasions that on a second appeal (or in this instance a third appeal) this Court is not engaged in the general correction of errors. Its primary function is to clarify the law. It is not every alleged error of law that is of such importance, either generally or to the

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65 Referring to *Cook v Housing New Zealand Corp* [2018] NZCA 270 at [3], which cited *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413.

66 Footnote omitted.

> parties, as to justify further pursuit of litigation which has already been considered on a number of occasions.

[40] This approach was recently affirmed in *Sharma v Foster-Bohm*, where this Court noted, in relation to the rather more open provisions in s 60 of the Senior Courts Act 2016, the approach adopted in *Butch Pet Foods Ltd v Mac Motors Ltd*:[67]

> The proposed appeal must raise some question of law or fact capable of bona fide and serious argument, in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal. On a second appeal this Court is not engaged in the general correction of error. Its primary function is to clarify the law and to determine whether it has been properly construed and applied by the Court below. It is not every alleged error of law that is of such importance, either generally or to the parties, as to justify further pursuit of litigation which has already been twice considered and ruled upon by a court.

[41] Care has to be taken in determining whether a question of law arises in any proposed appeal. As the Supreme Court observed in *Bryson v Three Foot Six Ltd*, in relation to a similar provision in the Employment Relations Act 2000:[68]

> [25] An appeal cannot, however, be said to be on a question of law where the fact-finding court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.

To establish that the fact-finding Court's conclusion was so clearly insupportable as to amount to an error of law, an applicant must show that there was no evidence to support the determination, or that the true and only reasonable conclusion contradicts the determination. This is a very high hurdle.[69]

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67 *Sharma v Foster-Bohm* [2023] NZCA 509 at [3], citing *Butch Pet Foods Ltd v Mac Motors Ltd* [2018] NZCA 276, (2018) 24 PRNZ 500 at [4] (footnotes omitted), which cited *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343 (CA) at 346–347, and *Waller v Hider*, above n 65, at 413.

68 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 271.

69 At [26]–[27].

The first proposed question of law

[42] There is a difference between the proposed question of law which was the subject of the application for leave considered by the High Court and the question which is the subject of the application for special leave from this Court.

[43] Section 124 provides that leave to bring a second appeal on a question of law must be sought first from the High Court and then, if leave is declined, from this Court. Mr Dotcom has not sought leave from the High Court to bring an appeal on the first proposed question of law. We do not however consider that this is a jurisdictional bar. Not infrequently this Court will amend a proposed question of law, to better reflect the findings of the Court below, or to ensure that what is put before this Court is a question of law. This approach has been taken, notwithstanding that the amended question has not been first referred to the High Court.

[44] In our view, the respondents are on stronger ground when they assert that Mr Dotcom is endeavouring to raise a new argument that has not previously been raised in the course of the 1993 Act proceedings.

[45] Sections 85 and 88 of the 1993 Act set out the remedies the Tribunal could award where there had been an interference with privacy. Those remedies were wide ranging and included, but were not limited to, damages. The Tribunal could award damages in three circumstances, which were set out in s 88(1)(a)–(c).

[46] Throughout, Mr Dotcom's focus has been on an award of damages for the loss of a claimed benefit under s 88(1)(b). He has argued that the information requests were made so that he could use the information obtained in the extradition proceedings. The benefit he claimed he had lost through the interference with his privacy was the ability to use the requested material in these proceedings. This claim was successful in the Tribunal complaint decision but has been dismissed at every stage since. It now appears that Mr Dotcom is seeking to argue that the benefit he lost was simply the benefit of having the information requested. It appears to be his argument that the loss of this benefit entitles him to damages. He suggests that the test would be too high if anything beyond this had to be established, as it would leave aggrieved litigants without an effective remedy.

[47] This is a new argument, not raised in any of the Courts below.

[48] It is clear from the various judgments given in the extradition proceedings that there would have been no benefit to Mr Dotcom if he had received the information requested at the time the extradition proceedings were underway. The Courts consistently held that the peripheral matters raised by Mr Dotcom were irrelevant to the extradition process, given the Court's limited role in determining a person's eligibility for surrender.[70] Following the Tribunal complaint decision, Mr Dotcom sought to raise before this Court the fact that the Tribunal had found that there had been an interference with his privacy and had awarded him $90,000 in damages for breach of the 1993 Act. Mr Dotcom argued that the Tribunal complaint decision was relevant to the extradition hearing, because it confirmed an abuse of process that would undermine public confidence in the judicial system. This Court disagreed. It noted that the conduct at issue did not come close to establishing the high threshold required to stay extradition proceedings and that the attempt to rely on it for this purpose was misconceived.[71]

[49] If leave were to be granted, this Court would effectively be required to deal with an argument which has not previously been advanced. In our view that is inappropriate.

[50] We also agree with the respondents that the proposed argument in relation to the first question of law is not seriously arguable. Mr Dotcom is effectively inviting the Court to conclude that any interference with privacy would, of itself, amount to a loss of a benefit, for which damages could be awarded. We agree with the respondents that this does not align with the wording or purpose of s 88. That section identifies three separate categories of damage that can be recovered by an applicant if he or she has suffered any of the harms set out in the section as a result of an interference with privacy. If a claimant has not suffered any of the harms specified in the section, he or she cannot be entitled to damages for these harms, although the claimant may still be entitled to other non-monetary remedies to vindicate the interference.

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70 District Court extradition judgment, above n 22; and High Court extradition judgment, above n 13, at [552]–[553].

71 Court of Appeal extradition judgment, above n 28, at [301]–[303]; and second Court of Appeal extradition judgment, above n 41, at [32].

Second proposed question

[51] We agree with the respondents that the question proposed does not raise a seriously arguable question of law.

[52] The question appears to relate to [130]–[133] of the High Court damages judgment. The Court was there identifying the sort of evidence necessary to show that Mr Dotcom had suffered a loss of benefit. The Court essentially concluded that, while Mr Dotcom did not need to show that the requested information would have made a difference in the extradition proceedings, he did have to show that it could have been put to some use. The Court considered that Mr Dotcom was required to show that there was an objective basis on which it could be concluded that the requested information was relevant and material.

[53] Again, we agree with the respondents that the Court's approach aligns with s 88(1)(b). There does not seem to us to be any tenable argument to the contrary.

General or public importance? Any other reason?

[54] Further, and in any event, we do not consider that either question raises an issue of general or public importance such as to warrant a second appeal. The way in which the High Court approached Mr Dotcom's claim for damages was specific to Mr Dotcom's circumstances, the way he chose to frame his case and the evidence he brought (or failed to bring) to support it. We do not consider that the High Court damages judgment creates the uncertainty Mr Dotcom claims it does. As was noted in the High Court leave judgment, what amounts to "put to some use" will need to be determined on the facts of each case.[72]

[55] This Court's primary function is to clarify the law. It is not every alleged error of law that is of such importance, either generally or to the parties, as to justify the further pursuit of issues which have already been considered on multiple occasions. That is very much the case with the present application.

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72 High Court leave judgment, above n 10, at [29].

[56] Nor is there any other reason which suggest that it would be appropriate to grant Mr Dotcom special leave to appeal.

Conclusion

[57] We do not consider that either question which Mr Dotcom seeks to put before this Court for decision meets the threshold for leave.

Result

[58] The application for special leave to appeal is declined.

[59] The applicant must pay costs for a standard application on a band A basis to the respondents jointly, together with usual disbursements.

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