

KIM DOTCOM AND THE GOOD CHARACTER TEST Money Versus Power

- James Ayers

While Tim Vestor (or is that Kim or Jim Vestor?), aka Kim Schmitz, aka Kim Dotcom and his posse of high paid lawyers continue to taunt the US Department of Justice and make our own boys in blue look like a 21st Century version of the Keystone Cops, CAFCA took the liberty of requesting the Overseas Investment Office (OIO) file on Mr Dotcom's application to buy three upper North Island properties. One property was the "Chrisco mansion" in Coatesville, reputed to be New Zealand's largest and most expensive home, as well as an adjoining property known as "The Prom". The third, a rural lifestyle property with its own private beach, known as Vara Prasada, is located at Doubtless Bay, Northland.

It should be noted here that a number of documents and paragraphs contained within the OIO file were withheld, so our summary and conclusions are primarily based on what was provided to us. On reviewing the file it is clear that two Government departments and their respective Ministers fell under the charm (or were seduced by the money) of Dotcom. It seemed Dotcom's money was a better indicator of character than a number of past convictions or the fact he ran one of the largest porn Websites in the world. However, a third Government Minister with the "power" to veto the recommendation was not swayed, and contrary to the OIO and other Ministers' recommendations, said "no".

The OIO file released to us contains several copies of a letter in support of Dotcom's character from Fee Chung Ming Johnny, Notary Public, Hong Kong, who simply witnessed a statutory declaration by Dotcom himself that he was of good character and that he knew of no other matter (other than his German convictions*) that reflects adversely on his fitness to have the particular overseas investment. The significance of this declaration seems questionable given the revelations that eventually came to light. Another reference addressed to Immigration NZ comes from Citibank Hong Kong who describes their relationship with Mr Kim Tim Jim Vestor as "pleasant and your kind assistance to Mr Vestor is highly appreciated". Given Dotcom's (sorry, I mean Mr Vestor's) wealth, I am sure this relationship is pleasant, but why would a reference from a transnational bank have any influence over Immigration NZ? *Dotcom's German charges: in 1998 he was sentenced to two years probation for computer hacking (the incident happened in 1994); and in 2003, he got a further two years probation for breach of trust and insider trading (that incident happened in 2001).

Ten Million Bucks Will Get You In

So how did the OIO come to its initial decision to recommend approval of Dotcom's application? Dotcom applied for and received a visitor visa from Immigration New Zealand on 1 March 2010. It appears the OIO first became aware of Dotcom's intention to buy the \$30m Chrisco mansion in early 2010, having been advised so by Dotcom's solicitors Simpson Grierson. It also learnt of Mr Vestor's intention to make an application under the Investor Plus category for New Zealand residency, requiring an approved investment of at least \$10 million. In April 2010 an *Investigate* magazine article under the heading "Merry Chrischmitz or Merry Hell" described Dotcom as "a high profile German con artist and fraudster with business interests in pornography and cyber-crime" and documented in detail his dubious past, although it appears the OIO was aware of some of these claims before they were published by *Investigate*.

On 31 August 2010 the OIO received an application from Dotcom for the first two properties. The OIO stated it will work closely with Immigration New Zealand in determining whether Dotcom is of good character, and in September requested further information from Dotcom. Dotcom then submitted an application to acquire a third property adjoining the Coatesville property. Dotcom advised the OIO of his past German convictions, and an alleged deportation order from Thailand in 2002. Dotcom's application was prepared by Greg Towers, a partner at Simpson Grierson, who went a considerable length to convince the OIO of Dotcom's good character and the "significant on-going financial benefit to the economy of New Zealand, especially Auckland's North Shore" should his application be approved. However Towers also stated that if any one of Dotcom's applications (including NZ residency) was unsuccessful, Mr Dotcom would reconsider his decision to proceed with his investments in New Zealand. The application listed at least four of these; however they were blanked out in the copy of the application we received. Towers also suggested Dotcom's convictions in Germany were incurred when he was a "youth". Arguably the most serious was that of breach of trust and insider trading for which Dotcom (in his mid 20s) received a two year probationary sentence. I am not sure that someone in their mid 20s could reasonably be described as a youth.

The application included details of the properties being purchased and the proposed ownership structure via special purpose companies. The application listed details of the cars purchased here (nine late model Mercedes-Benz, two Cadillacs, two Minis and a 2008 Rolls Royce), leasing a helicopter (and pilot), 11 house keepers, five gardeners, four guards and three other managers as examples of the direct financial benefit to the New Zealand economy. Also because of Dotcom's residency application under the Investor Plus category, a further \$10 million would be invested

in the required manner; that would be in addition to the property purchases. Towers also suggested that refusal of the application would be likely to adversely affect New Zealand's image with other wealthy overseas investors.

There is clearly no doubt as to the potential economic benefits to New Zealand of Dotcom residing here. The questions were simply could his money "buy off" doubts around his good character, or would declining his application on the basis of good character put off other overseas investors? On 6 September Simpson Grierson (Greg Towers) wrote to the OIO, bringing to their attention further information (presumably in support of Dotcom's good character) by detailing Dotcom's contribution to various charitable causes in New Zealand such as the MANA project (connected to the All Blacks' Kidscan Charitable Trust), the Christchurch September 2010 Earthquake Mayoral Relief Fund and a trust fund supporting a Tongan schoolboy rugby player who broke his back during a game in New Zealand.

On 21 September in another letter to the OIO (also presumably in support of Dotcom's good character), Towers documented that Dotcom was planning a \$600,000 fireworks display on New Years Eve 2010 in Auckland Harbour to celebrate Dotcom's successful OIO and residency applications. As it turned out, it was a somewhat premature celebration. On 22 September the OIO wrote back to Greg Towers detailing the criteria that Dotcom had to meet as part of the Investor Test and, in particular, to be of good character. The OIO then listed a number of Dotcom's past convictions, alleged or real, from a variety of sources. The OIO invited detailed comment on each of the issues raised.

The OIO in its commentary concerning Dotcom's reputation refers to his "chequered criminal history" and various YouTube clips involving him driving illegally at high speed. These include driving at 240kph on urban streets in Belgium in 2004, the Gumball Rally (possibly 2004) including paying off a Moroccan police officer and deliberately colliding with a vehicle driven by the Moroccan Chief of Police, driving a Mercedes around a golf course (possibly Thailand) and numerous other videos of him driving in excess of 250kph or in a reckless manner. In reference to these videos, the OIO states: "In our view, these events give little insight into Mr Dotcom's character"!

Charges In Several Countries

On 24 September in response to the above letter from the OIO, Towers wrote to the OIO, this time refuting/clarifying media and other reports around Dotcom's past convictions. Specifically, Towers clarified why Dotcom was remanded in Germany for several months pending trial for insider trading and associated charges. Towers notes that the German translation for "embezzlement" is "breach of trust" which is the expression Dotcom's German lawyer used (see below). Towers also pointed out that Dotcom was sentenced to a prison term for two years which was suspended and placed on supervised probation for that two year period, and Towers apologised if that was not clear in the two OIO applications previously submitted. This letter included a denial from Dotcom that he has been deported from anywhere, with specific reference to allegations he had been deported from Thailand. Also in this letter, Towers elaborated on which names Dotcom uses in which countries and also explained in some detail how his companies Megapload, Megavideo and Megaporn work (and do not break any copyright or other laws).

On 30 September the OIO received a third application from Dotcom (using Megastuff Ltd) for a property adjoining the Chrisco property. As with the previous applications, Dotcom's lawyer Greg Towers of Simpson Grierson extolled the "significant on-going financial benefit to the economy of New Zealand, especially Auckland's North Shore" should the application be approved, and the "threat" of Dotcom reconsidering his investment intentions should any single application be declined. Towers also reiterated Dotcom's contributions to various charitable causes. On 3 December the OIO wrote back to Greg Towers advising that it intended to recommend to the relevant Ministers that Dotcom's three OIO applications be approved, subject to certain conditions. These conditions included aspects of properties settlement, and that the applicant continued to be of good character.

On 14 December Towers thanked the OIO for the above mentioned letter, but wished to bring a further matter to the OIO's attention. This time it was regulatory breaches* (apparently inadvertently) bought by the Hong Kong Securities and Futures Commission relating to late disclosure of four separate share purchases in the same company. Also on 14 December Towers again wrote to the OIO, requesting a change to one of the conditions specified on December 3rd regarding the date by which Dotcom must purchase the Chrisco mansion. Dotcom believed it was economically sensible to rent the Chrisco mansion for \$1m per year and to exercise an option to buy it at the end of an option period being 12 February 2013, rather than at this point in time (December 2010). *In 2011 Dotcom was fined \$HK8, 000 for late disclosure of shareholding increase (the breaches occurred in 2009).

On 22 December Towers on behalf of Dotcom advised the OIO that the agreement to purchase the Doubtful Bay property had been cancelled (I suppose it was doubtful), but Dotcom wanted the application to proceed in the event he could resurrect the deal and therefore not need to reapply. He also advised that Dotcom was in negotiations to buy another property in New Zealand for which OIO consent was not required. In January 2011 the OIO became aware that Dotcom was being prosecuted by the Hong Kong Securities and futures Commission for failing to file shareholding notices. The lawyers for Dotcom claimed this was inadvertent; the OIO sought evidence of this.

On 27 January 2011 the OIO was advised by Simpson Grierson that Dotcom was convicted and fined for the Hong Kong offences; of improvements made and contemplated to the Chrisco property; and of Dotcom's registration of another company, Megacar Ltd, through which he intended developing high-end performance cars in New Zealand. I'm starting to think Dotcom should change his name again, MegaEgo comes to mind. Around the same time the OIO was also informed that Dotcom was granted residency in late November 2010 (largely on the basis that Dotcom has and will provide fairly substantial economic benefits to New Zealand and has received "special direction" from Immigration NZ which overrides the ineligibility of a residency applicant who has previous criminal convictions). So much for the OIO working closely with Immigration NZ?

On 16 March the OIO again advised Greg Towers that it intended to recommend to the relevant Ministers that Dotcom's three OIO applications be approved, subject to certain conditions. These conditions included aspects of properties settlement, and that the applicant continued to be of good character. On 23 March Towers replied with the necessary consent agreement and statutory declarations from Dotcom. However the OIO immediately responded with questions around Dotcom's deportation from Thailand in 2002. Specifically, on 22 March 2011, a senior Thai immigration official advised the OIO that Dotcom was in fact arrested and deported from Thailand in January 2002. This was inconsistent with Dotcom's previous claim that he had never been deported. The OIO invited Dotcom to further comment on this, in detail before the OIO made a final recommendation. The OIO also asked for a diagram showing Dotcom's ultimate ownership of the nominee company (Hong Kong registered but owned by a British Virgin Island registered company) via which the NZ properties would be acquired.

On 25 March Dotcom, via Towers, denied the deportation, suggesting that his departure from Thailand appeared to have been stage managed by the German authorities with the assistance of Thai authorities, but that this amounted to neither deportation nor extradition. Apparently Dotcom was interviewed by a German television station while on holiday in Thailand and unwisely suggested he might never return to Germany. That interview immediately went to air in Germany and shortly afterwards, an arrest warrant was issued in Germany for Dotcom on charges of insider trading. Within days German Embassy officials in Thailand convinced Dotcom to give up his German passport, and "minutes" later, Thai immigration officials took him into custody for being a foreign national who did not have a valid passport. Given the choice of unspecified time in a Thai prison or a one way travel document to Germany, he chose the later and was promptly arrested on his return to Germany. This has all the makings of a movie script! Towers then explained how deportation is defined from a New Zealand perspective, and given the short passage of time with the Thailand incident, legal deportation could never have happened.

Power Trumped Williamson & OIO; Application Declined

In early April 2011 the OIO advised it had completed its review of Dotcom's applications and on 5 April submitted its report and recommendation to the relevant Ministers. The Minister for Land Information Maurice Williamson barely had time to read it, let alone give it careful consideration and gave his consent on the 7th of April. The OIO initially expected the approved application to be returned to them by 19 April. However that date soon came and went. Clearly the other Minister involved, the Associate Minister of Finance, Simon Power was giving the application much closer consideration than Maurice did. Indeed on the 17th of April, Simon Power said he was not satisfied and wants further advice.

And further advice he got. On the 26th of April the OIO expanded upon its recommendations that Dotcom was of good character, with particular reference to how good character is defined; an analysis of Dotcom's convictions in Germany and Hong Kong and Dotcom's immigration status which, of course, had already been approved by Immigration NZ. However, as time went on, more information came to the attention of the OIO. On 7 July 2011 the OIO reported to the Minister (Power) on various media reports and recently instigated proceedings in the United States District Court. The *New Zealand Herald* had reported that Dotcom was under investigation by the NZ Transport Agency for using multiple names to register motor vehicles and implied that he might be a Facebook hacker. The *Herald* subsequently published a correction and apology to Dotcom on July 3rd. The OIO also reported on Dotcom's various philanthropic activities (as being indicative of Dotcom's character?) With regard the US Court proceedings, the OIO stated that it would be unreasonable to hold the existence of these proceedings against Mr Dotcom. Eleven days later however, Simon Power made up his mind.

On the 18th of July, Power declined giving consent to the application, and five days later, Maurice Williamson changed his mind: "*After consultation and further discussion, I support the decision to decline the application for Mr Dotcom*". We'll leave it to readers to speculate as to what that consultation and discussion included. Perhaps Maurice was a little hasty in initially approving the application. Or was he just confused given the following OIO statement on page 16 of their recommendation? "*On balance, our view is that Mr Dotcom is of good character. However, our view is that the facts are also capable of supporting a conclusion that Mr Dotcom is not of good character*". With such a decisive statement, it is little wonder Maurice Williamson had no idea what to do. So it was left to Associate Finance Minister Simon Power to veto the OIO/Williamson recommendation. Clearly the Ministers work as closely together as the OIO does with Immigration New Zealand, Not!

So how does the OIO or indeed Ministers make a decision under the Overseas Investment Act 2005 as to whether an applicant is of "good character"? Good character is not defined in the Act, but it must be assessed in accordance

with section 19 of the Act, which states that the Ministers must take the following factors (without limitation) into account, in assessing whether or not a person is of good character. These factors include offences or contraventions of the law, whether convicted or not, and any other matter that reflects adversely on the person's fitness to have the particular overseas investment. Clearly Maurice was struggling to assess Dotcom's character under that brief. Simon Power on the other hand was much more decisive.

Simon Power, in declining the Dotcom application, gave some insight into how he believed the good character test should be measured. In his view, he would have to be satisfied that the applicant's character was of such value or merit that he could reasonably commend it to others. This is a positive requirement under the Act, not merely the apparent absence of unmeritorious attributes or actions. Power came to the conclusion that Dotcom's previous convictions; their repetition; and the fact that they were essentially "dishonesty offences" goes to the character of Mr Dotcom. Contrary to the view of the OIO, Power did not consider that the elapsed time since the offending in Germany had diminished the significance of the offending as it related to Mr Dotcom's character at the time of his application.

Power went on to say that other matters identified by the OIO did nothing to dispel his belief that Dotcom was of questionable character and, at worst, were consistent with an overall profile of Dotcom that would be difficult to reconcile with the expectation of Parliament that all persons investing in New Zealand are people unlikely to act inappropriately and bring this country into disrepute. This definition was actually suggested by the Finance and Expenditure Committee when they reported back on the Overseas Investment Bill in 2005. So what were these matters the OIO identified upon which Power came to a different conclusion? Take for example Dotcom's previous criminal convictions. The OIO stated: "Mr Dotcom has been convicted of a number of offences in both Germany and Hong Kong. However, despite some of these offences being serious, our view is that provide relatively little insight into Mr Dotcom's character". So criminal convictions don't provide the OIO with much insight as to a person's character? No wonder Power was starting to question what the OIO officials were recommending.

The OIO went on to state: "There are some discrepancies between the information provided by Mr Dotcom (and his German legal advisor) and certain media reports. Our view is that nothing turns on the discrepancies. The offences are serious regardless of whether Mr Dotcom's version of events or the media's version of the events is most accurate". So the OIO considered them serious regardless of who was telling the truth but this didn't reflect on Mr Dotcom's character? So what did Mr Dotcom's German legal advisor have to say? As it turns out, a rather unfortunate choice of words. In a letter to the OIO on 29 August 2010, Thomas Pfister, Attorney at Law, downplayed some of Dotcom's German offences such as computer hacking and insider trading and explained how these had been remitted by the German authorities. His final sentence however, perhaps should have been proofread by Dotcom's lawyer here in New Zealand: "*I am convicted that Mr Schmitz has changed his life completely and further mistakes are definitely not expactable*". Convicted? Mistakes? Expactable?

Just One Episode In Dotcom Soap Opera

So what can we learn from all of this. It is clear that the OIO needs some further training when it comes to making judgement calls on whether a particular overseas applicant is of good character. Its' decision making in this regard seems almost as farcical as the Police warrant used to seize a number of Dotcom's assets earlier in 2012. Dotcom clearly has a rather dodgy history; yet the OIO felt that this wasn't indicative of his character? It is in some ways comforting that the approving Ministers are free to make decisions independent of each other, as clearly Maurice Williamson was prepared to rubber stamp the OIO recommendation while Simon Power was not. However, while we must accept that Power came to his conclusion on the basis of Dotcom's past activities, one can't help having a slight suspicion that a few phone calls from the USA may have helped him make up his mind? Of course the above is but a small snippet of the on-going and quite fascinating Dotcom saga. Who knows, perhaps one day it will become a movie or reality TV show. I am sure Dotcom has already put a hefty price on the rights to it. More likely however, is that the cameras are already rolling and Dotcom is in the process of registering his next company, MegaMovie Ltd.