Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)

Court of Appeal Wellington
5, 6, 7, 8, 9, 12 October; 22 December 1981
Woodhouse P, Cooke, Richardson, McMullin and Somers JJ

Administrative law — Judicial review — Airline and airline officials challenged certain findings of the Royal Commission on the Mount Erebus aircraft disaster — Whether the Commissioner had implied powers to make assertions in his report amounting to charges of conspiracy to perjure at the inquiry itself — Whether the Commissioner had acted in excess of jurisdiction or in breach of natural justice.

On 28 November 1979 an Air New Zealand DC10 aircraft on a scenic flight to the Antarctic crashed on Mount Erebus killing all 257 people on board. Two investigations were held into the causes of the crash. In a report dated 31 May 1980 the Chief Inspector of Air Accidents concluded that the probable cause of the accident was pilot error. On 11 June 1980 a Royal Commission was appointed to inquire into "the causes and circumstances of the crash", and Mr Justice Mahon, a Judge of the High Court, was appointed sole Commissioner. In his report dated 16 April 1981 the Commissioner, disagreeing with the Inspector on this point, found that ". . . the single dominant and effective cause of the disaster was the mistake made by those airline officials who programmed the aircraft to fly directly at Mt Erebus and omitted to tell the aircrew". The Commissioner exonerated the crew from any error contributing to the disaster.

The Commissioner also made findings of misconduct against certain airline officials. He referred critically to "the stance" of the airline at the inquiry before him and in para 377 of the report stated that there had been "a pre-determined plan of deception" and "an orchestrated litany of lies". The Commissioner awarded costs against the airline, ordering that it pay, inter alia, $150,000 to the Justice Department by way of contribution to the public cost of the inquiry.

The airline, its chief executive, and the airline's technical flight manager brought judicial review proceedings seeking orders quashing the Commissioner's decisions recorded in specified paragraphs that certain employees were guilty of serious misconduct and grave improprieties in relation to the collection and preservation of certain documents and articles relating to the flights and/or their conduct at the public hearings convened by the Commissioner. An order was also sought to quash the $150,000 costs order. The proceedings were removed into the Court of Appeal by order of that Court. The issues before the Court of Appeal included whether the Commissioner had powers, implied as being reasonably incidental to his legitimate functions of inquiry into the causes and circumstances of the crash, to make assertions amounting to charges of conspiracy to perjure at the inquiry itself; and whether he had given the employees affected a proper opportunity of answering the allegations made against them.

Held: In making the allegations stated in para 377 of the report of "a pre-determined plan of deception" and "an orchestrated litany of lies" the Commissioner had acted in excess of jurisdiction and contrary to natural justice. The conspiracy postulated in para 377 was evidently intended to include as participants the chief executive of the airline, the executive pilots and members of the navigation section. The order for costs reflected the same thinking as para 377 and was not realistically severable from that part of the report. In order to do substantial justice to the company and those individuals, the order for $150,000 costs was quashed on the ground that the statements as to a pre-determined plan of deception and an orchestrated litany of lies were made without jurisdiction and contrary to natural justice, as well as on the ground that the costs order was invalid because the amount awarded exceeded the maximum allowable under the still extant scale prescribed in 1903 (see p 650 line 44, p 666 line 33).

Re Royal Commission on Licensing [1945] NZLR 665, *Re Royal Commission on State Services* [1962] NZLR 96 and *Pilkington v Platts* [1925] NZLR 864 applied.

Cock v Attorney-General (1909) 28 NZLR 405 and *Reynolds v Attorney-General* (1909) 29 NZLR 24 referred to.

Held further as to the other paragraphs complained of:

Per Cooke, Richardson and Somers JJ: If the Court had jurisdiction to quash particular passages in the report, as to which no opinion was necessary, it must be discretionary; and the applicants had not made out a sufficiently strong case to justify the Court in interfering (see p 667 line 11).

Per Woodhouse P and McMullin J: The other complaints of the applicants were also justified. The expressed complaints turned on the absence of warning that the affected officers were at risk and that the critical decisions taken against them were unsupported by any evidence of probative value (see p 651 line 30, p 620 line 48).

Other cases mentioned in judgments

Anderson, Re (1978) 82 DLR (3d) 706.
Attorney-General for the Commonwealth of Australia v Colonial Sugar Refining Co Ltd (1912) 15 CLR 182 (HC), (1913) 17 CLR 644; [1914] AC 237 (PC).
Daemar v Gilliand [1981] 1 NZLR 61.
De Verteuil v Knaggs [1918] AC 557.
Environmental Defence Society Inc v South Pacific Aluminium Ltd [1981] 1 NZLR 146.
Fairmount Investments Ltd v Secretary of State for the Environment [1976] 1 WLR 1255; [1976] 2 All ER 865.
Hughes v Hanna (1909) 29 NZLR 16.
John v Rees [1970] Ch 345; [1969] 2 All ER 274.
Landreville v The Queen (1973) 41 DLR (3d) 574.
Landreville v The Queen (No 2) (1977) 75 DLR (3d) 380.
McGuinness v Attorney-General (1940) 63 CLR 73.
Ng v Minister of Immigration [1981] 1 NZLR 235.
Ontario Crime Commission, Re (1962) 133 CCC 116.
Pyx Granite Co Ltd v Ministry of Housing and Local Government [1960] AC 260; [1959] 3 All ER 1.
R v Collins (1976) 8 ALR 691.
Ridge v Baldwin [1964] AC 40; [1963] 2 All ER 66.
Royal Commission on Thomas Case, Re [1980] 1 NZLR 602.
Sedlmayr, Re (1978) 82 DLR (3d) 161.
Sheldon v Bromfield Justices [1964] 2 QB 573; [1964] 2 All ER 131.
Testro Bros Pty Ltd v Tait (1963) 109 CLR 353.
Whangarei Co-operative Bacon-Curing and Meat Company v Whangarei Meat-Supply Company (1912) 31 NZLR 1223.

Note
Refer 1 Abridgement 82; 2 Abridgement 254, 257.

Application for review
This was an application for review which was removed as a whole into the Court of Appeal by order of the Court of Appeal under s 64 of the Judicature Act 1908: see ante p 614.

L W Brown QC and *R J McGrane* for the first and second applicants (Air New Zealand Ltd and M R Davis).
D A R Williams and *L L Stevens* for the third applicant (I H Gemmell).
G P Barton and *R S Chambers* for the first respondent (Hon P T Mahon).
C J McGuire for the fourth respondent (the Attorney-General representing the Civil Aviation Division) (given leave to withdraw).
A F Macalister and *P J Davison* for the fifth respondent (New Zealand Airline Pilots Association).
W D Baragwanath and *G M Harrison* for the sixth respondent (the Attorney-General).

Cur adv vult

The judgment of Woodhouse P and McMullin J was delivered by

WOODHOUSE P. On 28 November 1979 a DC10-30 aircraft owned and operated by Air New Zealand Ltd crashed during daylight hours at a point 1465 feet above mean sea level on the ice-covered slopes of Mount Erebus in the Antarctic. It was a tragedy in which 257 lives were lost. The magnitude of the disaster resulted in two separate investigations into the causes of and circumstances surrounding the accident. The second inquiry took the form of a Royal Commission appointed by Letters Patent and also pursuant to the provisions of the Commissions of Inquiry Act 1908. Mr Justice Mahon, a Judge of the High Court at Auckland, was appointed sole Commissioner on 11 June 1980. He prepared the Commission's Report and presented it on 16 April 1981.

The case now before this Court is entirely concerned with that Report. But lest there be any misunderstanding it is necessary to emphasise at the outset that no attack can be or indeed has been made upon the conclusions it reaches as to the cause of the crash. Instead the proceedings are brought by way of judicial review under the Judicature Amendment Act 1972 in order to challenge statements in the Report about the conduct of certain officers of Air New Zealand.

Senior officers of the airline are severely criticised in the Report and in one paragraph on the basis of "a pre-determined plan of deception . . . to conceal a series of disastrous administrative blunders . . . an orchestrated litany of lies". These findings are challenged on grounds that they were made unfairly, in disregard of basic principles of natural justice and without jurisdiction. We are satisfied that those complaints of the applicants are justified and that the statements should never have been made. It was done without authority of the terms of reference of the Commission and without any warning to the officers affected. Thus they were given no opportunity at all to answer and deny as they claim in affidavits now before this Court they were in a position to do.

Because of the view we take of some aspects of the facts and of the law we would be prepared to go further than the other members of the Court in regard to the formal order to be made in this case. We also find it necessary to go further in our conclusions in regard to a number of matters of fact. We feel sure, however, that reputation can be vindicated and the interests of justice met by the formal decision of this Court which will have the effect of quashing a penal order of the Commissioner requiring Air New Zealand to pay the large sum of $150,000 as costs in the Royal Commission Inquiry.

The two inquiries

Before the Royal Commission was appointed and began its work a statutory investigation had already been carried out in terms of the Civil Aviation (Accident Investigation) Regulations 1978. Immediately it was known that the aircraft had crashed on Mount Erebus the standard procedures for aircraft accident investigation were invoked by the Chief Inspector of Air Accidents, Mr R Chippindale. And he arrived in the Antarctic with a small team of experts on the day following the disaster. They included mountaineers, police, surveyors, the chief pilot of Air New Zealand (Captain Gemmell), and a representative of the Airline Pilots Association, named in the present proceedings as the fifth respondent (First Officer Rhodes).

Mr Chippindale conducted intensive inquiries at the site of the crash and instructed that all reasonable steps were to be taken to recover equipment that would bear upon the cause of the accident and any documents which were still accessible before they were blown away into crevasses or covered with snow. Two important items were soon discovered: the cockpit voice recorder was found at once and after a period of systematic digging into the snow the digital flight data recorder was recovered as well. The first piece of equipment provided a tape recording of much that was said on the flight deck during a period of 30 minutes preceding the time of the collision with the ice slope. The second, often described as the "black box", provided conclusive information concerning course, altitude, and other data relating to the flight and functioning of the aircraft at the relevant period of time.

Mr Chippindale continued his investigation in New Zealand where he inspected records gathered from the airline. He also interviewed pilots and other officers with relevant information. In addition he travelled overseas. At that point he prepared an interim report so that he could give notice of his tentative findings to all those whom he felt might have some degree of responsibility for the accident. Thus the airline and representatives of the deceased pilots and others were given an opportunity to provide any appropriate answer to the chief inspector before he completed his final report. All this was attended to and his report, which is dated 31 May 1980, was made available to the Minister of Transport on 3 June 1980. The Minister then approved the report for release as a public document on 12 June 1980. As mentioned, the Royal Commission was appointed for the purpose of conducting a public inquiry at that same time.

There is a difference in the two reports upon the cause of the accident. Mr Chippindale considered the probable cause to have been pilot error. On the other hand the Royal Commission exonerated the pilots completely and spoke instead of "incompetent administrative airline procedures". Since this case is concerned with allegations by the Commissioner that the affected officers of Air New Zealand had engaged "in a pre-determined plan of deception . . . to conceal a series of disastrous administrative blunders" (administrative mistakes which he himself had found to be the real cause of the disaster) it is not unimportant to ask what relevant information the airline had actually been able to provide which was not supplied to Mr Chippindale. For that last reason the material made available for consideration by Mr Chippindale deserves some examination. An example concerns the change made to the final stage of the computer flight track to the Antarctic which the Commissioner regarded as a central reason for the accident. During a period of fourteen months prior to the fatal flight Air New Zealand's ground computer had contained an incorrect geographical reference to the southern waypoint of the journey at McMurdo. Accordingly, in that period it was shown incorrectly on any computer print-outs of the flight plan. But a few hours before departure of the DC10 an amendment was made and the flight crew was not informed that amended co-ordinates (since their briefing 19 days earlier) had thus been fed into the aircraft's computer.

In para 44 the Report explains that the chief executive of the airline was told of this matter on 30 November. Then in para 45 it is said that the chief executive "determined that no word of this incredible blunder was to become publicly known". There follows a statement that a direction was thereupon given "that all documents relating to antarctic flights, and to this flight in particular, were to be collected and impounded. They were all to be put on one single file which would remain in strict custody. Of these documents all those which were not directly relevant were to be destroyed". The reference in this context to the amendment to the co-ordinates invites the question as to whether Mr Chippindale had been given that particular information by the airline during his own investigation. It is made plain in his own report that this had been done immediately.

He himself was not uncritical of the administrative work of the airline as it touched upon the fatal flight and concerning this matter he said:

> "3.5 The flight planned route entered in the company's base computer was varied after the crew's briefing in that the position for McMurdo on the computer printout used at the briefing, was incorrect by over 2 degrees of longitude and was subsequently corrected prior to this flight."

The variation in the computer *after the crew of the DC10 had been briefed* (as Mr Chippindale realised) is the matter which is mentioned by the Commissioner in para 44 and which in para 45 is offered as the motive for what is there described as an immediate decision by the chief executive that no word of the matter was to become publicly known, with documents to be impounded and others destroyed. This information was given into Mr Chippindale's hands by Air New Zealand in a written statement on the day following his return from the crash site in Antarctica.

The Chippindale report then states in para 3.6 that the computer error had remained in the flight plans for some fourteen months. Then it is said:

> "3.7 Some diagrams and maps issued at the route qualification briefing could have been misleading in that they depicted a track which passed to the true west of Ross Island over a sea level ice shelf, whereas the flight planned track passed to the east over high ground reaching to 12450 feet AMSL.
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> "3.8 The briefing conducted by Air New Zealand Limited contained omissions and inaccuracies which had not been detected by either earlier participating aircrews or the supervising Airline Inspectors."

So these various matters (also mentioned by the Commissioner) were well within Mr Chippindale's knowledge. However he came to a final conclusion that pilot error had been involved as a probable cause of the accident while the Commissioner (who decided this was an incorrect finding) was satisfied instead that the cause of the accident was not pilot error at all. He said:

> "393. In my opinion therefore, the single dominant and effective cause of the disaster was the mistake made by those airline officials who programmed the aircraft to fly directly at Mt Erebus and omitted to tell the aircrew. That mistake is directly attributable, not so much to the persons who made it, but to the incompetent administrative airline procedures which made the mistake possible.
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> "394. In my opinion, neither Captain Collins nor First Officer Cassin nor the flight engineers made any error which contributed to the disaster, and were not responsible for its occurrence."

Jurisdiction to review

Several important questions arise in this case. Is there jurisdiction in the Courts to review in such a context as this taking into account the ambit of ss 3 and 4 of the Judicature Amendment Act 1972? And if there is such power is it by reason of the award of costs in this case? Or on grounds relating to excess of jurisdiction on the part of the Commissioner? Or considerations of natural justice? Or by reference to all three of those matters? For the reasons that follow we are satisfied that the findings are reviewable and that each one of those three matters is properly within the scope of the Court's jurisdiction.

As already mentioned, the proceedings are by way of application for review under the Judicature Amendment Act 1972 and are directed against certain findings in the Report, to which we have referred. The applicants claim that those findings are invalid, in excess of jurisdiction or made in circumstances involving unfairness or breach of natural justice. They seek declarations to that effect and orders setting aside the findings and quashing the order that Air New Zealand pay $150,000 as a contribution to the public cost of the inquiry. It is necessary to consider whether under the Act the Court has jurisdiction to grant such relief in this case.

By ss 3 and 4 of the Act relief may be granted only where a "statutory power" is involved. That term includes a "statutory power of decision". Since liberalising amendments made in 1977, "statutory power" includes power conferred by or under any Act "To make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person" and "statutory power of decision" includes power conferred by or under any Act "to make a decision . . . affecting" any such rights, powers, privileges, duties or liabilities. Generally the relief available is confined by s 4 to that which the applicant would have been entitled to in any one or more of the proceedings for mandamus, prohibition, certiorari, declaration or injunction; but there is a relevant exception in s 4(2) whereby if the applicant is entitled to an order declaring that a decision made in the exercise of a statutory power of decision is unauthorised or otherwise invalid the Court may set aside the decision instead.

The first question as to jurisdiction is therefore whether, apart from the 1972 Act, the applicants could have obtained relief by any of the proceedings mentioned. The Commission having ceased to exist, it would be too late to apply for prohibition or an injunction against the first respondent and mandamus would also be inappropriate. The decision of this Court in *Reynolds v Attorney-General* (1909) 29 NZLR 24, 37-38, suggests that once the report has been forwarded to the Governor-General it may be permanently beyond the reach of certiorari; this is perhaps a corollary of the view, to which we referred in the judgment concerning discovery in *Environmental Defence Society Inc v South Pacific Aluminium Ltd* [1981] 1 NZLR 146, that a prerogative remedy may not lie against the Sovereign's representative.

But we need not go further into the rather technical question of the scope of certiorari in this kind of case. As has been said in the *Environmental Defence Society* case and *Ng v Minister of Immigration* [1981] 1 NZLR 235, a declaration may be granted in the discretion of the Court whether or not certiorari would have lain. That a declaration may be an appropriate remedy for both jurisdictional errors and closely analogous defects such as unfairness or breaches of natural justice is shown by such Privy Council and House of Lords decisions as *De Verteuil v Knaggs* [1918] AC 557, *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260; [1959] 3 All ER 1, and *Ridge v Baldwin* [1964] AC 40; [1963] 2 All ER 66. The statement apparently to the contrary at the end of the *Reynolds* judgment at p 40 is obsolete. And if a declaration could have been granted that a decision made under a statutory power is invalid the Court has power under the 1972 Act to set the decision aside.

The order for costs

In argument in the present case it was common ground that if the order for $150,000 costs is invalid the Court can set it aside. That is clearly so. The order was made in reliance on s 11 of the Commissions of Inquiry Act 1908 which (notwithstanding an argument to the contrary by Mr Harrison) is in our opinion

undoubtedly the only source of any authority for a Royal Commission or a Commission of Inquiry to award costs. If valid it is enforceable by virtue of s 12 of that Act as a final judgment of the High Court in its civil jurisdiction. Plainly it is the exercise of a statutory power of decision. The jurisdiction of the New Zealand Courts to determine the validity of orders for costs by Commissions is well established: *Hughes v Hanna* (1909) 29 NZLR 16; *Whangarei Co-operative Bacon-Curing and Meat Company v Whangarei Meat-Supply Company* (1912) 31 NZLR 1223; *Pilkington v Platts* [1925] NZLR 864.

What was in dispute in the argument in this connection was principally whether the order is so linked with the challenged findings in the Report that if those findings are invalid for excess of jurisdiction or breach of natural justice the order will fall with them. There was a subsidiary argument about whether the order was in any event invalid because the amount may greatly exceed the maximum allowed by the long out-of-date but still apparently extant scale prescribed in 1903 (1904 *Gazette* 491). We propose to consider the main argument, however, and in doing so to confine attention to whether there is a sufficient link between the order and the main findings complained of in the Report, those in para 377.

At the beginning of his reasons for ordering costs the Commissioner expressed the opinion that the power should be exercised whenever the conduct of a party at the hearing has materially and unnecessarily extended the duration of the hearing. His following reasons include criticisms of the management of the airline for prolonging the hearing, and it was contended before us by Mr Baragwanath that they go no further. We are unable to accept that contention. In reciting the circumstances leading to the orders for costs the Commissioner expressly includes the chief executive's order for documents to be destroyed and says, "The cards were produced reluctantly, and at long intervals, and I have little doubt that there are one or two which still lie hidden in the pack". We think that such language would naturally be understood by a reasonable reader to refer back to the matters more fully developed in the section of the Report headed "The stance adopted by the airline before the Commission of Inquiry", a section culminating in para 377 with its references to "a pre-determined plan of deception . . . an attempt to conceal a series of disastrous administrative blunders . . . an orchestrated litany of lies". The impression almost inevitably created is that, to adapt words used by Williams J delivering the judgment of this Court in *Cock v Attorney-General* (1909) 28 NZLR 405, 421, the judgment for costs was in fact, though not in name, a punishment. The reasons given for the costs orders have definite echoes of para 377 and the immediately preceding paragraphs. The airline was being required to pay costs, and not for delaying tactics simply. A significant part of the reasons was that in the view of the Commissioner its chief witnesses had been organised to conceal the truth.

It is true that, on purely verbal grounds, refined distinctions can be drawn between the sections of the Report dealing with the airline's stance at the inquiry and with costs; but we have no doubt that their overall effect is that most readers would understand them as closely associated. It follows, we think, that if the findings in para 377 are invalid for excess of jurisdiction or breach of natural justice they should be seen as playing a material part in the order for $150,000 costs and as requiring the Court to set aside that order. Irrespective of the order for costs, we think that there are strong arguments to support the view that there is jurisdiction to review the findings in challenged paragraphs on grounds relating to jurisdiction and natural justice. There is a good deal of support in the authorities for excluding or strictly limiting judicial review of Commission findings and Mr Baragwanath carefully put the arguments forward. But, as we say, there are reasons why the Court ought not to adopt the facile approach of saying that the function of the Commission was merely to inquire and report and that as the Commission's findings bind no one they can be disregarded entirely as having no legal effect.

Scope of Royal Commission

As has been the practice in New Zealand when a Commission of Inquiry consists only of or is chaired by a High Court Judge, the Erebus Commission was a Royal Commission in that the warrant was expressed to be issued under the authority of the Letters Patent of 1917 constituting the office of Governor-General. One of the powers delegated by the Letters Patent to the Governor-General is to "constitute and appoint, in Our name and on Our behalf, all such . . . Commissioners . . . as may be lawfully constituted or appointed by Us". The warrant was also expressed to be issued under the authority of and subject to the provisions of the Commissions of Inquiry Act 1908, and s 15 of that Act extends and applies not only to inquiries under statutory Commissions appointed by the Governor-General or Governor-General in Council but also to inquiries under the Letters Patent. This means inter alia that statutory powers of summoning witnesses and requiring the production of documents apply, that a Judge of the High Court acting as Commissioner has the ordinary judicial immunity, and that interested persons have statutory rights to be heard under s 4A, inserted by an amendment made in 1980 shortly before the inquiry now in question began. Section 2 of the 1908 Act empowers the Governor-General by Order in Council to appoint any person or persons to be a Commission to inquire into and report upon any question arising out of or concerning a range of matters. The relevant one is "(e) Any disaster or accident (whether due to natural causes or otherwise) in which members of the public were killed or injured . . .". In giving statutory power to appoint Commissions and listing permissible subjects the Act differs from the Evidence Acts considered in Australian cases. The Australian Acts presuppose the existence of Commissions appointed under prerogative or inherent executive powers and merely confer ancillary powers of compelling evidence and the like. Under Acts of that type the validity of the Commission depends on the common law and the division of powers in the Australian Constitution. Under the New Zealand Act a Commission can be given a statutory source for its basic authority even if it is a Royal Commission and has a prerogative source as well.

The Erebus Commission was appointed to inquire into the causes and circumstances of the crash. Among the particular questions referred to it was:

> "(g) Whether the crash of the aircraft or the death of the passengers and crew was caused or contributed to by any person (whether or not that person was on board the aircraft) by an act or omission in respect of any function in relation to the operation, maintenance, servicing, flying, navigation, manoeuvring, or air traffic control of the aircraft, being a function which that person had a duty to perform or which good aviation practice required that person to perform?"

All the terms of reference fall well within s 2 (e). The Commission was not appointed to inquire into allegations of crime so we are not now called upon to go into the question whether a Royal Commission can be appointed for such a purpose, on which New Zealand and Australian authorities diverge (see *Re Royal Commission on Licensing* [1945] NZLR 665, 679; and D R Mummery, "Due Process and Inquisitions", 97 *LQR* 287). Nevertheless para 377 of the Royal Commission Report contains findings of organised perjury. The judgment in the leading New Zealand case, *Cock v Attorney-General,* while denying that the prerogative can authorise a Commission with the main object of inquiring into alleged crimes, recognises at p 425 that a Commissioner may investigate an alleged crime if to do so would be "merely incidental to a legitimate inquiry and necessary for the purpose of that inquiry". We think that the test must be what is reasonably incidental to valid terms of reference. In relation to para 377 the allegation of excess of jurisdiction turns accordingly on whether the findings are reasonably incidental to an inquiry into the causes and circumstances of the crash.

It is difficult to find reasons why the Court should refuse to entertain that question. While Commissions of mere inquiry and report are largely free from judicial control, there is strong authority indicating that the Courts have at least a duty to see that they keep within their terms of reference. We agree with the opinion of Myers CJ in the *Royal Commission on Licensing* case at p 680 that it is implicit in all the judgments in the Privy Council and the High Court in *Attorney-General for the Commonwealth of Australia v Colonial Sugar Refining Co Ltd* [1914] AC 237; (1913) 17 CLR 644 (PC), (1912) 15 CLR 182 (HC), that if it can be said in advance that proposed questions are clearly outside the scope of the inquiry they are irrelevant and cannot be permitted. In the *Royal Commission on Licensing* case that very principle was applied in this Court, it being held that certain matters were not within the ambit of the Commission's inquiry. That decision was given on a case stated by the Royal Commission under ss 10 and 13 of the 1908 Act, but the *Sugar Company* case was an action for declaration and injunctions and the procedure was expressly approved in the judgment of their Lordships delivered by Viscount Haldane LC ([1914] AC 237, 249-250; (1913) 17 CLR 644, 648-649). Similarly in *McGuinness v Attorney-General* (1940) 63 CLR 73 the High Court, on an appeal from a conviction for refusing to answer a question touching the subject-matter of an inquiry by a Commissioner, accepted without any apparent difficulty that the Court had authority to determine whether the question was relevant.

We do not overlook that the cases just cited were concerned with the scope of questions that might be put to witnesses under compulsory powers given by statute. They were not directly concerned with the scope of findings in reports. But if the Court has jurisdiction to determine the true scope of a Commission's inquiry and require the Commission to keep within that scope there are obvious arguments that it should have a corresponding jurisdiction in the matter of findings. A vital part of the constitutional role of the Courts is to ensure that all public authorities, whether they derive their powers from statute or the prerogative, act within the limits of those powers.

A different view was taken by Stephen J sitting at first instance in chambers in *R v Collins* (1976) 8 ALR 691, but we note the opinion expressed in several Canadian cases that the Court will intervene where a Commissioner has inquired or seeks to inquire into matters outside his terms of reference: *Re Sedlmayr* (1978) 82 DLR (3d) 161; *Re Anderson* (1978) 82 DLR (3d) 706; *Landreville v The Queen* (1973) 41 DLR (3d) 574; *Landreville v The Queen (No 2)* (1977) 75 DLR (3d) 380, 400-402.

In *Re Royal Commission on Thomas Case* [1980] 1 NZLR 602 a Full Court (Moller, Holland and Thorp JJ) held inter alia that the Court may prohibit a Commission from acting in excess of its jurisdiction and that the creation of a Commission pursuant to the Letters Patent does not exempt it from the supervisory role of the Court. However part of the Full Court's decision in that case is the subject of a pending appeal to this Court and other proceedings relating to the Thomas Commission have been moved into this Court. So we refrain from expressing any final view upon it.

For the foregoing reasons we think that if the applicants make out their claim that the findings of the Erebus Commission in para 377 are outside the Commissioner's terms of reference, they could be granted a declaration to that effect at common law. To obtain a setting aside of the findings under s 4(2) of the Judicature Amendment Act 1972 they have to show in addition that the findings were made in the exercise of a statutory power of decision. We think this requirement should not present final difficulty if regard is had to the evident intent and spirit of the 1972 Act and particularly the amendments made by Parliament in 1977.

Judicature Amendment Act 1972

Was the statutory power one of *decision*? The 1977 Amendment Act brought statutory investigations or inquiries into rights or liabilities within the definition of "statutory power". An inquiry into whether any person caused or contributed to the crash by an act or omission in respect of his duties is an inquiry into liabilities. But that is less important for present purposes than the fact that the Amendment Act also extended the concept of statutory powers of decision to those "affecting" the rights of any person. The purpose was manifestly to make the ambit of review under the Act at least as wide as at common law. This point is dealt with in *Daemar v Gilliand* [1981] 1 NZLR 61.

We think it would be very difficult to justify an argument that findings likely to affect individuals in their personal civil rights or to expose them to prosecution under the criminal law are not decisions "affecting" their rights within the meaning of the Act. In the present case, for example, it was virtually certain that the findings of the Erebus Commission would be published by the Government. The effect on the reputation of persons found guilty of the misconduct described in the Report was likely to be devastating. At common law every citizen has a right not to be defamed without justification. Severe criticism by a public officer made after a public inquiry and inevitably accompanied by the widest publicity affects that right especially when the officer has judicial status and none the less because he has judicial immunity.

The present case is in many ways unique and, if the findings in para 377 were made without jurisdiction or contrary to natural justice, it affords a striking instance of how contrary to the public interest it would be if the Courts were not prepared to protect the right to reputation. The magnitude of the disaster, bringing tragedy to many homes in New Zealand and overseas, and the fact that the national airline was involved meant that the national attention was focused on the inquiry. There are imputations of collective bad faith which had started from a high place in the company and all this was likely to receive the widest publicity. Further, the findings in para 377 amounted to public and official disclosures of alleged criminal conduct and led to investigation by the police to determine whether charges should be laid. In the event it was announced shortly before the hearing of the present case that there would be no such charges, but clearly the individuals concerned were in fact exposed to the hazard of prosecution as a natural consequence of the Report.

In interpreting the 1977 legislation we think that a narrow conception of rights and of what affects rights would not be in accord with the general purposes of the Act. A broad, realistic and somewhat flexible approach would enable the Act to work most effectively as an aid to achieving justice in the modern community.

Natural justice

This Court has had to examine and apply the principles concerning natural justice and fairness quite often in recent years. In translating the ideals of natural justice and fairness into current operation in New Zealand we have been influenced as to general principles mainly by decisions of the Privy Council and the House of Lords but, of course, we have had New Zealand conditions and practicalities very much in mind. The result has been a pragmatic approach.

Some overseas Courts have held that if all that occurs is inquiry and report and the report is not in law a condition precedent to some further step the rules of natural justice are automatically excluded. That was the premise, for instance, of the High Court of Australia in *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353. A contrary approach is to be found in the judgment of Schroeder JA representing the view of the majority of the Ontario Court of Appeal in *Re Ontario Crime Commission* (1962) 133 CCC 116, although that case depends partly on Ontario statute law. There is little attraction in the idea of automatic exclusion. Commissions of Inquiry have compulsory statutory powers of insisting on evidence and their findings can affect rights in the ways already outlined. It seems to us highly unlikely that the New

Zealand Parliament intended them to be wholly free of the elementary obligation to give persons whom they have in mind condemning a fair opportunity for correcting or contradicting any relevant allegation.

Some reinforcement for the view that they are under that obligation is to be found in some added considerations. Section 4A of the Commissions of Inquiry Act, enacted in 1980 in place of briefer provisions and in time for the Erebus inquiry, provides:

> "**4A. Persons entitled to be heard** — (1) Any person shall, if he is a party to the inquiry or satisfies the Commission that he has an interest in the inquiry apart from any interest in common with the public, be entitled to appear and be heard at the inquiry.
>
> "(2) Any person who satisfies the Commission that any evidence given before it may adversely affect his interests shall be given an opportunity during the inquiry to be heard in respect of the matter to which the evidence relates.
>
> "(3) Every person entitled, or given an opportunity, to be heard under this section may appear in person or by his counsel or agent."

The section may be seen as a recognition by Parliament that natural justice should apply. It does not purport to enact a complete code of procedure or to cover the whole field of natural justice, which would not be easy in a statute of this general kind. The statute specifically requires an opportunity to be heard to be given to any person who shows that evidence may adversely affect his interests. In the parallel situation of the statutory investigation which must be undertaken following any aircraft accident considerations of fairness are carefully spelled out in reg 15(1) of the Civil Aviation (Accident Investigation) Regulations 1978. There it is provided that "where it appears to an Inspector that any degree of responsibility for an accident may be attributable to any person, that person or, if he is dead, his legal personal representatives, shall, if practicable, be given notice that blame may be attributed to him, and that he or they may make a statement or give evidence, and produce witnesses, and examine any witnesses from whose evidence it appears that he may be blameworthy". In the case of the earlier investigation by Mr Chippindale into the Erebus disaster that very step was taken.

In his judgment in this Court in *Re Royal Commission on State Services* [1962] NZLR 96, 117, Cleary J while stressing the wide discretion of Commissions to regulate their own procedure said plainly that the one limitation is that parties cited and persons interested must be afforded a fair opportunity of presenting their representations, adducing their evidence, and meeting prejudicial matter. That judgment was given with reference to the old s 4A, now replaced by the section already quoted. What Cleary J said, particularly about the general absence of a right to be represented by counsel, must now be read subject to the new provisions. But his expression "prejudicial matter" was a general one. It ought not, we think, to be read down in some way so as to exclude suggestions of conspiracy which may have evolved in the mind of a Commission without being specifically raised in evidence or submissions.

A suggestion of an organised conspiracy to perjure is different from the possibility commonly faced by individual witnesses that their evidence may be disbelieved. Grave findings of concerted misconduct in connection with the inquiry ought not to be made without being specifically raised at the inquiry. Once the thesis of such a conspiracy had emerged in the Commissioner's thinking as something upon which he might report, he would have had power, if that question were indeed reasonably incidental to his terms of reference, to reconvene the hearing if necessary so that the alleged conspirators could be fairly confronted with the allegation. See the speech of Lord Russell of Killowen in *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 2 All ER 865; [1976] 1 WLR 1255, and the judgment of Lord Parker CJ in *Sheldon v Bromfield Justices* [1964] 2 QB 573, 578; [1964] 2 All ER 131, 133-134. In fact in the present case but for a far less significant reason the Commissioner himself actually considered the possible need to reconvene the hearing after certain enquiries had been made on his instructions following the taking of evidence in public. The matter is mentioned in para 358 of the Report.

Landreville v The Queen (No 2) (1977) 75 DLR (3d) 380, 402-405, was decided in the end on just such a ground. It was held that a Commissioner, who happened to be a distinguished Judge, had failed to put to the person whose conduct was expressly subjected to investigation by the terms of reference of the Commission a very serious allegation upon which a finding was made in the report; and that the Commission should have been reconvened for that purpose. There the relevant rule of natural justice was fully embodied in a statutory provision. We think that the position is the same under the New Zealand Commissions of Inquiry Act supplemented by the common law.

All these considerations suggest that the Commission was bound by the broad requirements of natural justice. These included a reasonable opportunity of meeting the unformulated allegation of organised deception and concealment that was apparently passing through the Commission's mind. Some of the reasons why experience has shown the importance of this sort of opportunity were well put by Megarry J in *John v Rees* [1970] Ch 345, 402; [1969] 2 All ER 274, 309:

> "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious,' they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

As to the general possibility of a result being obvious from the start, in this particular case something more should be said. The applicants contend that this is not simply a case where the conspiracy suggestion could not have been rebutted. They plead in their statement of claim that the Commissioner's findings to that effect are not based on evidence of probative value. Elsewhere in the present judgment we deal with aspects of these arguments. Here, dealing with principles, we add that fairness is not necessarily confined to procedural matters. It can have wider range. Remedies in this field are discretionary and the law not inflexible. If a party seeks to show not only that he did not have an adequate hearing but also that the evidence on which he was condemned was insubstantial, the Court is not compelled to shut its eyes to the state of the evidence in deciding whether, looking at the whole case in perspective, he has been treated fairly.

Factual background

In a written synopsis of argument presented before this Court by counsel for Air New Zealand it was said that background matters had to be understood as they were entirely relevant to the complaints made by the applicants in the present proceedings. But that "the Applicants do not propose to canvass any factual matters which fall outside the range of their specific allegations". In regard to that last matter we emphasise again that this case (as counsel well realised) cannot be used to attack the Royal Commission findings as to the cause of the crash. On behalf of the

applicants it was made clear nonetheless that their acceptance of the jurisdictional bar to such a challenge in the Courts did not mean and should not be used to draw any inference that they accepted the causation findings themselves (at least in the unqualified form in which they are set down in the Report). It is simply that they do all readily accept as they must that in no sense can these proceedings become an appeal against those findings. It is right to add that throughout the hearing in this Court that attitude has very properly been reflected in the submissions we heard. Thus the conclusions as to the cause of the crash must and do stand.

Late in 1976 Air New Zealand decided to commence a series of non-scheduled sightseeing journeys from New Zealand to the Ross Dependency region and return to this country without a touch-down at any intermediate point. They began with two flights in February 1977. There were four further journeys in October and November 1977, four in November 1978, and three more in November 1979 — on 7th, 14th and 21st. The accident flight was to be the fourteenth of the series. In 1977 the designated route was one which used Cape Hallett on the north-eastern point of Victoria Land as the first southern waypoint on the continent itself en route further south either to a point adjacent to the Williams ice landing field (near Scott and McMurdo bases) or alternatively the south magnetic pole. One or other became the southernmost waypoint, the magnetic pole destination being used at the discretion of the pilot if weather conditions made the McMurdo area unsuitable for sightseeing.

Scott and McMurdo bases are located close together at the south-western tip of Ross Island which forms the eastern coast of McMurdo Sound. On the island there are four volcanic mountains including Mt Erebus, the highest, at 12,450 feet. The Sound itself, which is about 40 miles long by 32 miles wide at the narrowest point, lies between mainland Antarctica and Ross Island and for most of the year it is covered with flat sea ice.

The first two flights in February 1977 took place with the necessary approval of the Civil Aviation Division of the Ministry of Transport and after clearance with the United States naval authorities who control the air space in the vicinity of McMurdo Station. Those flights followed a computer-controlled flight track to Cape Hallett thence directly over Ross Island and Mt Erebus at the stipulated minimum height of 16,000 feet to the McMurdo waypoint. The co-ordinates of that waypoint had been written correctly into the flight plan as 77° 53′ South latitude and 166° 48′ East longitude. Three of the pilots who flew to the Antarctic in November 1977 were available to give evidence and, like the two earlier pilots, they agreed that at that time the flight plan followed a track from Cape Hallett to the McMurdo area which passed virtually overhead Mt Erebus. However then and on subsequent occasions the sightseeing aircraft to the McMurdo area arrived in the general vicinity of Cape Hallett to find clear air further on and took the opportunity of visual meteorological conditions to veer laterally from the direct computer flight track from Cape Hallett by tracking to the west along the coast of Victoria Land and eventually down McMurdo Sound over the flat sea ice. Ross Island was thus left to the east while near the head of the Sound the aircraft would turn left in order to fly over Scott and McMurdo bases and in the vicinity of Ross Island so that a view would be obtained of Mt Erebus and the other three mountains there.

When the decision was made to operate the series of flights to take place at the end of 1977 a change was made with the approval of the Civil Aviation Division to permit flights below 16,000 feet down to 6000 feet in a specified sector south of Ross Island and subject to such criteria as a cloud base no lower than 7000 feet, clear visibility for at least 20 miles and descent under ground radar guidance. It has been mentioned that similar criteria applied, officially at least, until the time of the fatal crash. But the written directions were interpreted by some pilots as leaving them with a degree of discretion to go lower in ideal weather conditions.

Then in September 1978 steps were taken to print a flight plan for each Antarctic

journey from a record stored in the Air New Zealand ground based planning computer. And it is at this stage that the longitude co-ordinate for the southernmost waypoint was fed into the ground computer as 164° 48′E.

The flight track

The navigation system used by DC10 aircraft is a computerised device known as the area inertial navigation system (AINS). It enables the aircraft to be flown from one position to another with great accuracy. Prior to departure of a flight the AINS aboard the aircraft is programmed by inserting into its computers the co-ordinates of the departure and destination points (in degrees of latitude and longitude) together with those of specified waypoints en route. In the case of the Antarctic flights (which were engaged on what may be described as a return trip without touch-down) the southernmost waypoint, like each of the intermediate positions, was really a reference point to which the pilot knew the aircraft would be committed if it were left to follow the computer-directed flight track. And as mentioned the southern point for the preferred route to the McMurdo area was a ground installation at Williams Field.

During 1977 the co-ordinates for each waypoint which comprised the Antarctic routes had not been stored on magnetic tape for automatic retrieval and insertion into the navigation computer units of the aircraft. Instead the flight plan was dealt with manually and upon issue to the aircrew at the time of departure was manually typed by the pilot concerned into the aircraft computer units. When the Air New Zealand ground based computer was used in 1978 to produce computerised Antarctic flight plans they followed the same format as those that had been produced earlier. But before the ground computer could be programmed it had been necessary for an officer of the navigation section to prepare a written worksheet containing all the waypoints and their respective latitude and longitude co-ordinates which then were transcribed from the worksheet. And by reference to the original flight plan used in February 1977 this was done by Mr Hewitt, one of the four members of the navigation section at airline headquarters. He said in evidence before the Royal Commission that when he went on to take from his written worksheet the longitude co-ordinates of the McMurdo waypoint he mistakenly transcribed the correct figures of 166° 48′ as 164° 48′ by inadvertently typing the figure "4" twice. This had the effect of moving the McMurdo waypoint 25 nautical miles to the west and once in the aircraft's system the navigation track which then it would follow from Cape Hallett when under automatic control would be over the Sound rather than directly to Williams Field.

At this point it should be mentioned that the print-out of a flight plan shows not merely the co-ordinate waypoints but also a finely calculated statement of the direction and distance between them. This last information is obtained independently from what is called the NV90 programme of the computer which is able automatically to calculate the rhumb line track and distance between each of the respective waypoints once the co-ordinates have been fed into it. This information forms the basis for the data required to produce the computerised flight plan. So that finally when a print-out of the plan is obtained it will disclose not merely the geographical co-ordinates for each waypoint but the true track direction and the distance in nautical miles from one to the next. That last information is needed prior to a flight departure in order to calculate tonnages of fuel during the prospective journey and accordingly as a flight proceeds it enables the quantity of fuel already consumed to be checked against the anticipated consumption in the flight plan print-out. Thus the precise track and distance is used for purposes of fuel calculations and has importance as a check in navigation.

All this information is disclosed on page 96 of the Royal Commission Report where the print-out is shown for the flight plan with the co-ordinates for McMurdo showing the longitude as 164° 48′ East. In the next column the track direction is

given as 188.9° (grid) and the distance between Cape Hallett and McMurdo as 337 miles. On the facing page 97 there is a print-out of the flight plan actually used on the fatal flight which shows the correction made to the longitude, 166° 58′ East. It will shortly be mentioned that when that correction was made the navigation section say it was thought to involve a minor movement of only 2.1 miles or 10 minutes of longitude. Despite the very small change that this could make to the track and distance between the two points a re-calculation was made and entered into the computer programme as 188.5° (grid) and the distance 336 miles. Compared with the other figures the difference seems minimal but it was still thought necessary to assess it and it was done.

The western waypoint

The circumstances surrounding the use of the 164° 48′E figures were in issue before the Royal Commission. It was suggested against the airline they had not been introduced accidentally: that the movement of the position 25 miles to the west had been deliberate. If that were so it would seem that a re-calculation of track and distance would have been needed and made both for the fuel plan and also as a check for purposes of navigation. However, no re-calculation of track and distance was made and entered with the 164° 48′ co-ordinate. The figures which actually appear for track and distance to that point remain precisely the track and distance figures which were shown in the flight plan to the 166° 48′ point for the first flight in February 1977. For purposes of comparison a calculation to the "false" waypoint was prepared and put before the Royal Commission. It showed that a direct track from Cape Hallett to that point is actually 191° and the distance 343 miles. The point is referred to in para 230 of the Report within a section headed "The creation of the false McMurdo waypoint and how it came to be changed without the knowledge of Captain Collins".

In para 229 it is said that submissions had been put to the Commissioner that "the shifting of the McMurdo waypoint was done deliberately so as to conform" with a track used by military aircraft proceeding to Williams Field. Then in para 230 there is a summary of contrary arguments advanced by members of the navigation section to support their claim of accident. They include:

> "(c) It was pointed out that if the McMurdo waypoint had been intentionally moved 25 miles to the west, then the flight plan would have a corresponding change to the track and distance information which it previously contained. Instead of a true heading from Cape Hallett to the NDB of 188.9° and a distance of 337 nautical miles, there would have been required, in respect of the changed McMurdo waypoint, a true heading of 191° and 343 nautical miles. Similar alterations would have had to be made in respect of a return journey to the true north."

That is the matter already outlined. Concerning it the Commissioner said in para 234 that there was "considerable validity in this point" although then he added:

> ". . . the Navigation Section may have thought it not necessary to alter the track and distance criteria from Cape Hallett to McMurdo for the reason that the pilots were accustomed to flying on Heading Select down this sector and not by reference to the fixed heading programmed into the AINS."

There is a further argument of the navigation section which is summarised in para 230 (e):

> "It was submitted that an alteration to the McMurdo waypoint to facilitate better sightseeing was not valid because flight captains had a discretion to deviate horizontally from the flight plan track."

The Commissioner accepted that point as "a valid objection" in answer to the suggestion that the move had been deliberate (para 236).

However when he came in para 255 (a) to express his final conclusion upon this general question he initially said this:

> "The first question is whether the programming of the McMurdo waypoint into the 'false' position before the commencement of the 1978 flights was the result of accident or design. On balance, it seems likely that this transposition of the McMurdo waypoint was deliberate."

There is reference at that point to a track and distance diagram indicating a track down McMurdo Sound, and the subparagraph then continues:

> "So as I say, I think it likely that the change of the McMurdo destination point was intended and was designed by the Navigation Section to give aircraft a nav track for the final leg of the journey which would keep the aircraft well clear of high ground."

Then the final portion of para 255 (a) leaves the matter in the following half-way situation:

> "However, I propose to make no positive finding on this point. I must pay regard to the circumstance strongly urged upon me by counsel for the airline in their closing submissions, namely, that if the alteration was intentional then it was not accompanied by the normal realignment of the aircraft's heading so as to join up with the new waypoint. As I say, I think this latter omission is capable of explanation but it is a material fact in favour of the Navigation Section which I cannot disregard, and it is the single reason why I refrain from making a positive finding that the alteration of the waypoint was intentional."

It may be that in speaking of a single reason in the last sentence of the extract the Commissioner put aside his earlier unqualified conclusion that the matter set out in para 230 (e) was also "a valid objection" to the suggestion that the waypoint had been moved deliberately. In any event the eventual and significant finding concerning the matter is contained in the following subpara 255 (b):

> "I believe, however, that the error made by Mr Hewitt was ascertained long before Captain Simpson reported the cross-track distance of 27 miles between the TACAN and the McMurdo waypoint, and I am satisfied that because of the operational utility and logic of the altered waypoint it was thereafter maintained by the Navigation Section as an approved position."

At this point it is necessary to explain the reference in that subparagraph to Captain Simpson; and then, if it be assumed that "the altered waypoint . . . was thereafter maintained . . . as an approved position", it is necessary to understand the reasons given by the Commissioner for the change back to Williams Field. If the altered waypoint had been adopted as a better position why was it then thought that it had to be discarded?

Correction of co-ordinates

It was not until 14 November 1979 that any question arose about the McMurdo waypoint. On that day Captain Simpson had taken the second November 1979 sightseeing flight to the Antarctic and something persuaded him to raise the matter of the southern waypoint with Captain Johnson, the Flight Manager Line Operations. There is a difference of opinion as to precisely what was said by Captain Simpson to Captain Johnson but according to the evidence of those in the navigation section they thought that when they checked up-to-date records of the co-ordinates at McMurdo Station against the original NV90 flight plan what had been brought forward for notice was the small difference of 10 minutes of longitude to which

reference has been made. They said this represented the recent relocation of the tactical air navigation system (the TACAN) at Williams Field. Accordingly Mr Brown of the navigation section wrote into his worksheet a corrected position of 77° 52.7′S and 166° 58′E and entered those figures into the system on 16 November. But the amendment was not made in the live flight planning system until the early hours of 28 November. According to the members of the navigation section all this was done without knowledge that the effect of introducing the amended figures would be to override "164° 48′" and so alter the co-ordinate by 2° 10′ rather than 10′.

The Commissioner rejected the explanations he had heard to the effect that Captain Simpson's information seemed to point to quite a minor movement to the up-dated position of the TACAN. He stated that there appeared to have been clear advice by Captain Simpson that the "false" waypoint was 27 miles west of it. In addition he rejected the possible explanation that the advice had been misinterpreted by Captain Johnson to whom it had been given, and he adopted instead what in para 245 he described as "the second explanation":

> "(b) The second explanation is that both Captain Johnson and the Navigation Section knew quite well that the McMurdo waypoint lay 27 miles to the west of the TACAN and that since his track had not officially been approved by the Civil Aviation Division it should therefore be realigned with the TACAN and then someone forgot to ensure that Captain Collins was told of the change. Such an interpretation means that the evidence as to the alleged belief of a displacement of only 2.1 miles is untrue."

Then in para 255 (d) he said this:

> "If, as I have held, the Navigation Section knew the actual position of the McMurdo waypoint as being 27 miles to the west of the TACAN, then why did they not submit to Captain Johnson, or to Flight Operations Division, that the waypoint should remain where it was? One view is that the Flight Operations Division expected, in terms of Captain Johnson's letter to the Director of Civil Aviation dated 17 October 1979, that the next edition of the Ross Sea chart NZ-RNC4 would contain the official Air New Zealand flight path to McMurdo, and that the safest course would be to put the destination point back to the approximate location at which Civil Aviation Division had thought it had always been."

That last suggestion was not put to any of the navigation witnesses at the Inquiry. It implies that although those in the navigation section believed the airline had been using a computer track to the west of Ross Island for the past year because it was the better route they nevertheless suddenly became uneasy lest knowledge of the matter would now reach the Civil Aviation Division which had not given its official blessing to the change. The idea apparently is that because the airline might receive an official rebuke the officers in the section made their own independent decision that the route must once again be directed back over Mt Erebus.

There was no evidence at all before the Royal Commission that the approval of the Civil Aviation Division was needed for a change from the direct Cape Hallett/McMurdo route. An affidavit in support of the present application for review indicates that if the matter had been raised at the Inquiry members of the navigation section would have wished to present evidence from the Civil Aviation Division that "a change of route from the direct route to the McMurdo Sound route would not have required CAD approval and therefore could have been lawfully accomplished by the airline without reference to CAD". That situation may have been anticipated by the Commissioner himself for by reference to the false waypoint and the earlier consequential movement of the computer flight track down McMurdo Sound to the west he said that although approval of the route by the Civil Aviation Division should have been obtained it "would have been automatic" (para 150).

In para 255 (f) of the Report the explanation from all four members of the navigation section is described in the following way:

> "In my opinion this explanation that the change in the waypoint was thought to be minimal in terms of distance is a concocted story designed to explain away the fundamental mistake, made by someone, in failing to ensure that Captain Collins was notified that his aircraft was now programmed to fly on a collision course with Mt Erebus."

That finding is one of those directly challenged in the present proceedings.

Advice of the change

A different matter was considered by the Commissioner in relation to the change made in November 1979 to move the waypoint back to the TACAN at Williams Field. As usual a signal was sent to the United States base at McMurdo with advice that the aircraft was to fly to the Antarctic on 28 November and the flight plan for the journey. And in the list of waypoints appears the word "McMurdo" in lieu of the geographical co-ordinates which had appeared in the equivalent signal for the flight three weeks earlier. The message had been prepared by Mr Brown, one of the four officers in the navigation section.

The use of the word "McMurdo" was the subject of an idea put by the Commissioner to Mr Hewitt, who was the second of the witnesses from the navigation section. The Commissioner asked:

> "I know you have explained to me how that happened but someone may suggest to me before the inquiry is over that the object was to thats [sic] not to reveal there had been this long standing error in the coordinates and that is why the word McMurdo was relayed to them. I take you would not agree with that".

Mr Hewitt said:

> "Certainly not sir."

The suggestion had not been raised earlier at the Inquiry and it was not mentioned by anybody subsequently. In particular it was not put to Mr Brown himself when the latter was called to give evidence three months later. However the Commissioner expressed his view upon the matter in the following way. In para 255 (e) he said this:

> "In my opinion, the introduction of the word 'McMurdo' into the Air Traffic Control flight plan for the fatal flight was deliberately designed to conceal from the United States authorities that the flight path had been changed, and probably because it was known that the United States Air Traffic Control would lodge an objection to the new flight path."

It will be observed that the last few words are qualified by "probably". It appears that the Commissioner was told during a visit to Antarctica that the United States authorities would not have approved a flight path over Ross Island. But there was no evidence that Air New Zealand had ever received an intimation from the United States authorities to that effect or that the navigation section had reason to think they would so object. The qualification seems to reflect that position. In the result, when the findings in the two subparagraphs 255 (e) and (f) are put together they reveal the theory that at one and the same time the navigation section felt obliged to conceal from officials in Wellington the use of a flight track down McMurdo Sound that was regarded favourably by officials at McMurdo Station and from officials at McMurdo Station a flight track over Ross Island that was regarded favourably by officials in Wellington.

Whiteout

In relation to the cover-up allegations that have been made against the executive officers some reference should be made to their knowledge or otherwise of the freak meteorological condition known as "the whiteout phenomenon". Did they know or suspect that such a condition must have been an explanation for what happened and yet still be determined, as the Commissioner found, to promote pilot error as the cause of the crash?

It is something that can be mentioned quite briefly. The Royal Commission Report has made it clear the phenomenon can result in a loss of horizon definition and depth perception and is a great hazard for those who fly in arctic or antarctic conditions. The Commissioner found that at the critical time "the air crew had been deceived into believing that the rising white terrain ahead was in fact quite flat and that it extended on for many miles under the solid overcast". This danger is something well known to those who fly regularly in those areas. Unfortunately it is not so well known by others, and as the Commissioner stated in para 165 it was not understood by any of those involved in this case. He said:

> "So far as I understand the evidence, I do not believe that either the airline or Civil Aviation Division ever understood the term 'whiteout' to mean anything else than a snowstorm. I do not believe that they were ever aware, until they read the chief inspector's report, of the type of 'whiteout' which occurs in clear air, in calm conditions, and which creates this visual illusion which I have previously described and which is, without doubt, the most dangerous of all polar weather phenomena."

It would seem that if those at airline headquarters were unaware of the deceptive dangers of the whiteout phenomenon they could not have deliberately ignored it as a factor that should be taken into account in favour of the aircrew.

Instructions of the Chief Executive

In para 41 and following paragraphs there is reference to "what happened at the airline headquarters at Auckland when the occurrence of the disaster became first suspected and then known". It is explained that the navigation section became aware of the fact that when the McMurdo waypoint co-ordinates were corrected in November 1979 the movement was not one of 2.1 miles within the vicinity of Williams Field but a distance of 27 miles from longitude 164° 48'E; and that "by 30 November the occurrence of this mistake over the co-ordinates was known not only to the Flight Operations Division but also to the management of the airline, and in particular, had been reported to the Chief Executive of Air New Zealand, Mr M R Davis". At that point there follows the serious allegation in para 45 already cited:

> "The reaction of the chief executive was immediate. He determined that no word of this incredible blunder was to become publicly known."

On the face of it the unqualified idea expressed in that sentence is that Mr Davis had decided to suppress from everybody outside the airline all information about the changed flight track. But if that meaning were intended it has been greatly modified in para 48. There it is said:

> "It was inevitable that these facts would become known. Perhaps the chief executive had only decided to prevent adverse publicity in the meantime, knowing that the mistake over the co-ordinates must in the end be discovered."

Of course if the decision were merely "to prevent adverse publicity in the meantime" then such an attitude could not in any way be consistent with an attempt "orchestrated" by Mr Davis to hide from official scrutiny what finally was held by the Commissioner in para 393 to be "the single dominant and effective cause of the disaster". Despite that, para 48 goes on to say this:

> "This silence over the changing of the co-ordinates and the failure to tell the air crew was a strategy which succeeded to a very considerable degree. The chief inspector discovered these facts after he had returned from Antarctica on or about 11 December 1979. In his report, which was published in June 1980, the chief inspector referred to what he termed the 'error' in the McMurdo destination point, and the fact that it had been corrected a matter of hours before the flight left Auckland."

It is difficult to understand why the Commissioner considered "this silence over the changing of the co-ordinates and the failure to tell the air crew" had been "a strategy which succeeded to a very considerable degree". The information had been given to the chief inspector immediately on his return from Antarctica. That much is acknowledged in the two sentences that follow. It becomes apparent, however, that this was criticised not because the information had been kept away from those to whom it most certainly had to be given, those charged with the important responsibility of inquiring into the causes of the disaster. Mr Davis was criticised for nothing more than his failure to release the material to the outside world. That is made plain by a subsequent statement towards the end of the Report which leads on to the very severe pronouncement in para 377 that the Commissioner had been obliged to listen to "a pre-determined plan of deception . . . an orchestrated litany of lies". The relevant passage is in para 374:

> "The fact that the navigation course of the aircraft had been altered in the computer had been disclosed by the chief inspector in his report dated 31 May 1980, 6 months after the disaster. But it was not until the Commission of Inquiry began sitting that the airline publicly admitted that this had occurred."

The effect of the absence of general publicity that the information was given rather than its ready provision by the airline to Mr Chippindale on the day after his return from the crash site is described in the remaining portion of para 48 which continues in the following way:

> "Then the chief inspector went on to say in his report (paragraph 2.5):
>
> > 'The error had been discovered two flights earlier but neither crew of the previous flight or that of the accident flight were advised of the error by the flight despatcher prior to their departure.'
>
> The chief inspector did not make it clear, however, that the computer flight path of TE 901 had been altered before the flight, and that the alteration had not been notified to the air crew. Had that fact been disclosed in the chief inspector's report then the publicity attending the report would undoubtedly have been differently aligned. . . . the news blackout imposed by the chief executive was very successful. It was not until the hearings of this Commission that the real magnitude of the mistake made by Flight Operations was publicly revealed."

Concerning that last part of para 48 it seems that the Commissioner's remark immediately following the extract from paragraph 2.5 is inaccurate. It appears to suggest either that the chief inspector was unaware of the fact that the alteration to the co-ordinates "had not been notified to the air crew"; or that if he had been made aware of that fact then he had failed to bring it to public attention in his report as the next sentence suggests. But Mr Chippindale was both aware of all this and he said so. In para 1.17.7 he explicitly stated:

> "This error was not corrected in the computer until the day before the flight. Although it was intended that it be drawn to the attention of the previous crew, immediately prior to their departure this was not done, *nor was it mentioned during the pre-flight dispatch planning for the crew of the accident flight.*" (Emphasis added.)

The "pre-flight dispatch planning" mentioned in those last words was the occasion of final briefing of the aircrew immediately before the aircraft left Auckland on the morning of 28 November 1979.

A different comment upon para 48 is central in this part of the case. It is very hard to understand why the chief executive officer of this airline should have had any duty to pass on for debate and public prejudgment the same material that in accord with his responsibility had been properly and immediately placed before the appointed official required and well equipped to assess it.

"Irrelevant" documents

At the beginning of this judgment a different aspect of para 45 is explained by contrast with the following para 46 which correctly summarises instructions given by Mr Davis for the disposal of surplus copies of documents lest they be leaked to the news media. In para 46 it is explained by the Commissioner that "his instructions were that *only copies of existing documents were to be destroyed.* He said that he did not want any surplus document to remain at large in case its contents were released to the news media by some employee of the airline. The chief executive insisted that his instructions were that all documents of relevance were to be retained on the single file" (emphasis added). There was no evidence before the Royal Commission to any contrary effect. But in the preceding paragraph a different impression is given. The relevant part of para 45 reads:

> "He directed that all documents relating to antarctic flights, and to this flight in particular, were to be collected and impounded. They were all to be put on one single file which would remain in strict custody. Of these documents" —

that is, *all* documents relating to the Antarctic flights — the sentence continues:

> " all those which were not directly relevant were to be destroyed. They were to be put forthwith through the company's shredder."

Then in para 54 the actual instruction is taken into a further dimension where it is described as "this direction on the part of the chief executive for the destruction of 'irrelevant documents'". And one serious complaint made by the applicants about the Royal Commission Report is that what could be an understandable direction for the *retention* of one copy on a master file *of all relevant documents* has become an unacceptable instruction that *irrelevant documents* (related to the Antarctic flights nonetheless) *should be destroyed.* We think the complaint is justified.

At the same early stage of the Report the Commissioner gave his attention to the question as to what if anything was done about the suppression of documentary evidence. He said in para 52:

> "As will be explained later, there was at least one group of documents which certainly were in the possession of the airline as from the day following the disaster, and which have never been seen since. I am referring here to the flight briefing documents of First Officer Cassin. . . . [He] had left his briefing documents at home. They were recovered from his home on the day after the disaster by an employee of the airline. As I say, they have never been seen since."

In the following para 53 he observed — "If the explanation of the chief executive is to be accepted, then in the opinion of someone the briefing documents of First Officer Cassin, the co-pilot, were thought to be irrelevant to the disaster"; and in para 54 — "it follows that this direction on the part of the chief executive for the destruction of 'irrelevant documents' was one of the most remarkable executive decisions ever to have been made in the corporate affairs of a large New Zealand company".

Those remarks require some brief comment. It must be explained that the "employee of the airline" mentioned at the end of para 52 was Captain Crosbie. It is true that he was "an employee of the airline" but he did not go to the home of First Officer Cassin in that capacity. He had been asked by the Airline Pilots Association, the group which throughout the inquiry had very properly been concerned to protect the interests of the two deceased pilots, to act on their behalf for the purpose of bringing immediate aid and comfort to the two widows. His evidence was to the effect that he had gone to each of the homes for that purpose; that sometime later a member of Mrs Cassin's family had invited him to take away a box containing such items as flight manuals; and he said he had done no more than that. He flatly denied taking any flight documents. But even if he had, the alleged conspiracy has always been limited in the Royal Commission Report to the executive pilots and other officers in the management area. It has never been suggested that it had extended as well to the airline pilots. As may be expected, throughout both investigations they have done their conscientious best to protect the valued reputations of their deceased colleagues.

There was documentary evidence before the Inquiry to the effect that on 30 November 1979 an in-house committee of Air New Zealand met on the instruction of Mr Davis for the purpose of deciding how to collect together all available information relevant to the accident. It seems that it began its practical work on Monday 3 December. In that regard and as an example of the way in which the applicants say the cover-up allegation could have been answered by those affected they placed material before this Court which would suggest that the formation of such a committee is a conventional step taken by an airline when confronted with any serious disaster, that it was required by this company's Accident Investigation Procedures Manual, and that this committee was appointed accordingly. If it had been before the Inquiry it would have supported the view that Mr Davis had decided the chairman should not be associated with the flight operations side of Air New Zealand and for that reason he appointed Mr Watson who had charge of certain related companies. There is also an affidavit sworn by Captain Priest who was appointed by the Airline Pilots Association to sit as its representative on the committee. Taken at its face value it is to the effect that he took part in the committee's work from the meeting on 3 December. In the affidavit he has explained: "My position on that Committee was an ALPA watchdog — there were two other independent members"; that as the inquiry progressed "it became apparent that the committee was amassing a large amount of papers"; and that Mr Watson then announced that he had been directed by the chief executive to get all the information onto one file and any surplus disposed of to avoid information getting into the wrong hands. The affidavit indicates that it was then agreed by the committee itself that this should be done on the basis that the master file was to be available to the committee members at any time and it appears that Captain Priest joined in that decision. It is not for us to decide what would have been the effect or significance of all this material if it had been placed before the Royal Commission but since the conspiracy to deceive theory that is developed in the Royal Commission Report apparently stems from the instruction given by Mr Davis clearly the officers so gravely affected were entitled to be warned in advance and so be given the opportunity to have such information fairly and properly considered.

Search at Mt Erebus

The issue of documentary evidence is given extended attention in a section of the Report headed, "Post-accident conduct of Air New Zealand" which is exclusively concerned with suggestions of possible items that might have been withheld from the Inquiry. The discussion is introduced at para 342 by a statement that "This instruction by the chief executive for the collection of all Antarctica documents had some unfortunate repercussions". The observation is then

developed by reference in particular to the work of Captain Gemmell, the technical flight manager for Air New Zealand, while assisting Mr Chippindale at the crash site.

Captain Gemmell had received instructions in the early hours of the morning of 29 November 1979 to travel to McMurdo in order to assist Mr Chippindale's investigation into the cause of the accident at the scene. However, by reason of weather conditions it was not possible for him to be taken by helicopter to the ice slope until 3 pm on 2 December. Then, clad in protective clothing and roped to mountaineers, he assisted in a search for the in-flight recording equipment (consisting of the cockpit voice recorder and the "black box") and the recovery of any other equipment or documents which might indicate how the accident had happened.

Three days earlier, at about 8.30 am on the very morning after the accident, three mountaineer staff members at Scott Base had managed to get there in order to search for survivors. And Mr Woodford, who was one of them, has described the scene in a letter received by the Royal Commissioner during the public hearings. The letter, which is amplified in an affidavit put before this Court, is set out later in this judgment. Mr Woodford explained that when he got to the scene he found a black flight bag with Captain Collins' name printed on it. It was lying open on the snow and it was empty. Already material in the form of books and papers that had not been destroyed when the aircraft disintegrated on impact had been blown by winds over the ice-slope or into crevasses or covered by drifting snow. He pointed out that although the cockpit voice recorder had been located quite quickly when he was back at the crash site with the party from New Zealand on 2 December the "black box" could not be found until later that evening after it had been decided to begin digging systematically for it. It was found buried under snow at a depth, he said, of 20 to 30 cms.

But although the bag was empty it was suggested at the hearing that while at McMurdo Captain Gemmell might have "collected a quantity of documents from the crash site and brought them back to Auckland"; that only three of the flight documents carried on the aircraft had been produced to the Royal Commission; that it was "curious" to find that each favoured the case "which the airline was now attempting to advance"; and all this against counsel's theory that before Captain Gemmell had left Auckland on 29 November he was aware of possible problems associated with the amendment to the destination point co-ordinates. Captain Gemmell flatly denied having that knowledge while in the Antarctic; and he rejected totally any suggestion that he had recovered anything from the site which had not been passed across in terms of Mr Chippindale's instructions. In that regard he answered two propositions put to him by the Commissioner (at p 1834 of the transcript) in the following way:

> "Well the suggestion may be made to me in due course that because of the discovery that Capt Collins did not know of the alteration in the nav track consequently someone in the co. would have been instructed to locate whatever documents there were on the crash site and elsewhere that might throw light on that question. You say that no such instruction was given to you . . . Certainly not.
>
> "But it would have been a reasonable instruction would it not . . . No it would not have."

Intimidation of a witness

At this point it is necessary to mention a different suggestion which was also rejected by Captain Gemmell. It was put to him during cross-examination that he had carried back from McMurdo a blue plastic envelope containing personal property recovered from the accident site. In evidence given later by First Officer Rhodes the envelope was supposed to have been entrusted to Captain Gemmell by Mr Chippindale for delivery in New Zealand since Captain Gemmell was about to depart from the base several days before the others. First Officer Rhodes had himself been in Antarctica as a member of Mr Chippindale's investigation team, representing there the Airline Pilots Association. He appeared as a witness before the Royal Commission on two occasions. During his first appearance he was called by the Association. He did not refer then to a blue envelope; but because it was thought that the material may have been mentioned by him to the Association's counsel he was recalled to give evidence, this time by counsel for the airline.

Before turning to the evidence given by First Officer Rhodes during his second appearance it is worthwhile making a preliminary comment. No complaint has ever been made by Mr Chippindale about a missing blue envelope or papers within it. If Captain Gemmell had been entrusted with such a mission which he had failed to discharge Mr Chippindale would seem to be the first person who would want to know why. He himself gave evidence before the Royal Commission for a period of ten days and during all that time he was never asked about this matter. Nor was he recalled to deal with it after it had been raised with Captain Gemmell or after First Officer Rhodes gave his further evidence. That fact alone might be thought sufficient to dispose of the matter. And in the end the Commissioner himself decided that neither this nor other evidence could justify a finding against Captain Gemmell that he "recovered documents from Antarctica which were relevant to the fatal flight, and which he did not account for to the proper authorities".

It is necessary to describe all this because the second appearance of First Officer Rhodes resulted in a finding in para 348 of the Royal Commission Report which reflects seriously upon the conduct of another executive officer of the airline, Captain Eden. The paragraph is another of those challenged in the present proceedings.

It seems that First Officer Rhodes agreed to give evidence on the second occasion in order to remove any false impression that he himself doubted the integrity of Captain Gemmell. The following extract from the transcript explains the position (a condensed version appears in para 347 of the Report):

> "Youve already given evidence and stated your qualification. I think you have offered to give some supplementary evidence relating to activity at the Erebus crash site . . . Our discussion with Capt Eden last Friday indicated this would be appreciated.
>
> "I think just as Capt Gemmell was there representing the co. you were there as a rep. of ALPA . . . Thats correct.
>
> "May we take it that you worked in conjunction with Capt Gemmell and other members of the team involved . . . Correct.
>
> "And in so doing you were present at the crash site with Capt Gemmell . . . No we had different tasks I was in the area with Capt Gemmell at some stages.
>
> "So far as your observations are concerned what would you have to say regarding Capt Gemmells conduct and behaviour in the course of his duties there . . . I have no reason to doubt Capt Gemmell in any way shape or form.
>
> "Have you ever suggested otherwise to anybody . . . I have not."

Then he was cross-examined by counsel for the Association whose witness he had been earlier. He was asked about Captain Gemmell's work at the actual scene of the disaster and his explanation about that matter is reflected in the following question and answer:

> "Did you see Capt Gemmell at any time in the cockpit area or thereabouts working on his own . . . I qualified that before. Working on your own is a relative term. At all stages there would be somebody adjacent for your own safety and

well-being. I did not at any stage see Ian Gemmell Capt Gemmell or Ian Wood or David Graham in total isolation in any part of the wreckage."

Then there is mention of material that may have been returned by Captain Gemmell to New Zealand:

"You heard question the other day concerning Capt Gemmell returning from McMurdo with an envelope containing property can you tell us about that . . . At the stage that Capt Gemmell ws returning to NZ he was asked by the Chief Inspector of Accidents if he would return to NZ with one or more envelopes I cannot recall how many containing photos and perhaps other information to be used in the conduct of the inquiry at a later date but specifically at that early dte the intention was for Capt Gemmell to brief the Minister and the Dir. of CAD and senior execs. of Air NZ as to what had transpired at tht early date in the investigation. As Mr Chippindale would be staying in the Ant. and the remainder of his team would be with him or else in the US.

"What about private property . . . The envelopes which Capt Gemmell return [sic] to NZ with may have contined [sic] some documentation from the crash site which was beginning to return in significant quantities from the various people on the crash site including the police."

The following portion of the cross-examination then refers to documents described as "the technical crews flying records, the collection of log books, licences and other relevant documentation". He said that at first there was reluctance on the part of Air New Zealand to release this material "as it was not clear at that stage in many peoples minds what my duties were". It was not immediately appreciated that he was acting on Mr Chippindale's behalf. He was then asked:

"And Air NZ and Capt Gemmell released to you the material which you'd previously sought . . . Correct".

Concerning all this evidence the Commissioner expressed the following conclusions in para 348:

"Captain Eden is at present the director of flight operations for the airline. He appeared in the witness box to be a strong-minded and aggressive official. It seemed clear from this further production of First Officer Rhodes as a witness that it had been suggested to him by Captain Eden that he should either make a direct allegation against Captain Gemmell or else make no allegation at all, and that since First Officer Rhodes seemed to have no direct evidence in his possession, he was therefore obliged to give the answer which Captain Eden had either suggested or directed. However, First Officer Rhodes was not entirely intimidated because as will be observed from the evidence just quoted, he insisted on saying that Captain Gemmell had brought an envelope containing documents back to Auckland."

Those statements are in no way related to the assessment of Captain Eden's evidence or as Captain Eden as a witness. They are observations that Captain Eden had attempted to influence or direct the evidence to be given by First Officer Rhodes by a process of intimidation. Counsel for First Officer Rhodes' own association had made no suggestion to that effect. Nor is there any hint by First Officer Rhodes himself that he was present as anything but a voluntary witness. The answer he gave to the opening question would not seem to support suspicions of intimidation. And that answer is itself followed by quite a generous tribute to Captain Gemmell. But the reputation of Captain Eden and the support given Captain Gemmell is dismissed by a finding of intimidation. It should be said as well that although Captain Eden himself appeared to give evidence three days later not a word was said to him by anybody to suggest that earlier he had been guilty of attempting to intimidate a witness.

Specific documents

To the extent that the Royal Commission Report has pointed to any particular classes of documentary material that did not reach the Inquiry the list is not a long one. It comprises:

1. Unidentified papers within the blue envelope.
   No complaint about this was ever made by Mr Chippindale as we have mentioned.
2. Papers given to First Officer Cassin as briefing material.
   It has been explained that if any complaint could be made about this matter it would affect Captain Crosbie, the unnamed "employee of the airline" referred to in para 52. It was he who went to the Cassin home for compassionate reasons as the spokesman for the Airline Pilots Association. He denies ever receiving the material. Even if he had, the Report has not challenged the conduct of any of the line pilots. This matter would seem to be irrelevant.
3. Documents or papers that may have been shredded by Mr Oldfield following the decision of the in-house committee which met during the week beginning 3 December 1979.
   This matter requires no further discussion.
4. Pages within the cover of a ring-binder notebook of Captain Collins.
   This matter too was handled by Captain Crosbie. However, it requires some specific mention because in para 352 it has been associated with Captain Gemmell and as all counsel now acknowledge this has been done in error. The paragraph is one of the specific paragraphs challenged by these proceedings.
5. Briefing or other flight documents (including a New Zealand Atlas) taken onto the aircraft within Captain Collins' flight bag; and similar papers within a flight bag owned by First Officer Cassin.
   This matter also requires discussion.

The ring-binder notebook

The Commissioner found that Captain Collins carried with him on the fatal flight a small pocket diary usually kept in his breast pocket; and a ring-binder loose-leaf notebook carried in his flight bag. It is said in para 351 "that the chief inspector had obtained possession of the small pocket diary, but it did not contain any particulars relating to Antarctica flights". At the hearing Mrs Collins described the diary and said that on 12 December 1979 Captain Crosbie had returned it to her together with certain other items of personal property belonging to her husband. She explained that there were no pages in the ring-binder when she received it "other than some loose papers which are still folded inside the front cover". The question arose as to what had happened to the balance of the contents of the notebook. Captain Crosbie himself was called by counsel for the Airline Pilots Association to give evidence before the Commission. He explained that his involvement in all post-accident matters was as a welfare officer for the association; and in that capacity he had been given by the police personal property for distribution to next-of-kin. When asked about pages which normally would have been within the ring-binder covers he said that most of the recovered items had been damaged considerably by water and kerosene, and in answer to the Commissioner, who had asked "How could the ring-binder cover itself be intact and yet the pad of writing paper disappear?", he said, "I suggest the cover survived the water and kerosene but the paper contents didn't". He added in answer to questions by counsel:

"If papers were removed from the ring-binder who wd have done that . . . I wd have myself I presume.

"Do you recall doing that . . . No not specifically. I was involved in destroying a lot of papers that were damaged and wd have caused distress some because of that and some because it was the obvious thing to do."

As a further sample of the kind of material that might have been provided by the criticised officers had they been given the opportunity we were referred to a signed statement by Captain Crosbie forwarded to the police (who by then were investigating the allegations of conspiracy) on 5 May 1981. In the statement he has said after he had given evidence before the Inquiry he recalled that because of the poor condition of the notebook and severely damaged paper inside it and "rather than present this to Mrs Collins" he had disposed of the pages himself. Then having cleaned the cover he dried it in the sun and returned it to Mrs Collins. It would seem to be an understandable reaction although once again the effect this kind of material might have had if it had been put forward is not for us to assess. In any event, concerning this matter the Commissioner said in para 352:

"As to the ring-binder notebook, it had been returned to Mrs Collins by an employee of the airline, but all the pages of the notebook were missing. *Captain Gemmell* was asked about this in evidence. He suggested that the pages might have been removed because they had been damaged by kerosene. However, the ring-binder notebook itself, which was produced at the hearing, was entirely undamaged." (Emphasis added.)

It is clear that the Commissioner has wrongly attributed the explanation given by Captain Crosbie concerning the removal of missing pages to Captain Gemmell. The latter was never questioned at all about possible reasons for the missing pages. The fifth and sixth respondents have formally acknowledged that the reference to Captain Gemmell in that paragraph is wrong.

Contents of flight bags

It has been explained that the Commissioner was satisfied that Captain Collins had used the New Zealand Atlas to plot the last leg of the flight path from Cape Hallett to McMurdo and may have used a chart of his own for the same purpose. In addition there were his briefing documents and those received by First Officer Cassin. Those received by the latter have been discussed. The Commissioner held that they had not been taken aboard the aircraft. But he was concerned with whatever else may have been carried onto the DC10 by First Officer Cassin in his flight bag; and about the contents of Captain Collins' flight bag which he believed would include the atlas and briefing documents. In fact the only evidence concerning the possible survival of the first officer's flight bag, let alone its contents, was a name-tag which finally reached Mrs Cassin through Captain Crosbie, the welfare representative. Since there is no description of the contents and it has been held that the briefing material was left behind anyway, the fate of the bag itself would seem to be immaterial.

On the other hand it is known that after the accident Captain Collins' bag was seen on Mt Erebus. The matter has been mentioned. The bag did not reach his widow as it would normally have done if it had been received and returned to New Zealand and this fact is the focus of attention in the Royal Commission Report.

In order to examine the matter it will be remembered that the mountaineer, Mr Woodford, arrived by helicopter searching for survivors on the morning of 29 November. In the letter he sent to the Royal Commission he said he found the bag then and: "My recollection is that it was empty when I first inspected it. It certainly contained no diaries or briefing material." Apparently the bag had been thrown from the disintegrating aircraft at the time of impact and its contents lost in the snow or scattered by winds before the arrival of the mountaineers. But whatever the reason for their absence from the bag it is the contents that matter in this case — not the

flight bag itself. And according to the letter they had already disappeared from the bag three days before the New Zealand party arrived there. So like the bag of First Officer Cassin it might be thought that this item too was immaterial. However, it is discussed by the Commissioner in the following way.

First there is listed a series of documents "which clearly had been carried in the flight bag of Captain Collins" and which had not been recovered. The items comprise the New Zealand Atlas and a chart; the briefing documents; and the ring-binder notebook. Those three items have been mentioned. And finally a topographical map issued on the morning of the flight. The suggested significance of these various documents is explained by reference to the view of counsel for the Airline Pilots Association that they "would have tended to support the proposition that Captain Collins had relied upon the incorrect co-ordinates" (para 344).

There follows reference to the blue envelope and the matter of Captain Eden after which para 349 speaks of the flight bag:

"Then, as the Inquiry proceeded, there were other queries raised. It seemed that Captain Collins' flight bag had been discovered on the crash site. It was a bag in which he was known to have carried all his flight documents. It was said to have been empty when found, a fact which was incidentally confirmed by a mountaineer who had seen the flight bag before Captain Gemmell arrived at the crash site. The flight bag was rectangular and constructed of either hard plastic or leather, and had the name of Captain Collins stamped on it in gold letters. It was evidently undamaged."

There is mention as well of First Officer Cassin's flight bag and the ring-binder notebook (both of which matters have now been discussed) and then it is said in para 353 that after the taking of evidence the Commissioner asked counsel assisting the Commission to make inquiries about the two flight bags "which had been located on the site but which had not been returned to Mrs Collins or Mrs Cassin".

It appears from the following para 354 that among others interviewed by counsel or asked for comment upon this matter were Mr Chippindale (the chief inspector of air accidents), and the senior sergeant of police who had been in charge of the property collected from the crash site when it was brought to McMurdo. It is said in that paragraph that the police officer —

". . . recollected either one or two flight bags among other property awaiting packing for return to New Zealand. He said that personnel from Air New Zealand had access to the store, as well as the chief inspector, and the senior sergeant said that he thought that he had given the flight bags to the chief inspector and that the chief inspector was the sole person to whom he had released any property. The chief inspector was then interviewed on 11 December 1980 by telephone, being at that time in Australia, but he said that no flight bags were ever handed to him."

Thus the inquiries that were made in this fashion were inconclusive. However, the Commissioner was satisfied that:

"The two flight bags were lodged in the Police store at McMurdo and would have been returned in due course to Mrs Collins and Mrs Cassin by the Police. But they were taken away from the store by someone and have not since been seen" (para 359(1)).

Then in the same context he said in subpara 359(4):

"Captain Gemmell had brought back some quantity of documents with him from Antarctica, and certain documents had been recovered from him by First Officer Rhodes on behalf of the chief inspector."

And then — "It therefore appears that there were sundry articles and perhaps

documents which had been in the possession of the aircrew which came back to New Zealand otherwise than in the custody of the Police or the chief inspector" (para 360).

In evidence Captain Gemmell had denied knowledge of the change that had been made to the McMurdo waypoint but the Commissioner did not accept that answer; and he is linked with the matters mentioned in para 360 on the basis that he had known "about the changed co-ordinates before he went to Antarctica" and that because he —

> "... plainly kept this significant fact to himself, [he] was to be the arbiter of which documents were relevant. The opportunity was plainly open for Captain Gemmell to comply with the chief executive's instructions to collect all documents relevant to this flight, wherever they might be found, and to hand them over to the airline management."

The next sentence of that paragraph contains the finding already mentioned:

> "However, there is not sufficient evidence to justify any finding on my part that Captain Gemmell recovered documents from Antarctica which were relevant to the fatal flight, and which he did not account for to the proper authorities."

At the conclusion of this section of the Report the Commissioner said that he could "quite understand the difficulty in recovering loose documents from this desolate mountain side, although the heavy atlas", he said, "was not in this category". But he stated that an opportunity had been "created for people in the airline to get rid of documents which might seem to implicate airline officials as being responsible for the disaster". And he spoke of all these matters in terms of "justifiable suspicion".

The condition of Captain Collins' flight bag when it was first seen by Mr Woodford has already been mentioned. His letter dated 5 December 1980 was written immediately after some cross-examination of Captain Gemmell had been given widespread publicity and on Monday 8 December 1980 Captain Gemmell was still giving evidence. By then he was under cross-examination by counsel assisting the Commission and the latter proceeded to read into the record the text of the letter (Exhibit 266) which reads:

> "Dear Sir,
>
> "At the time of the DC10 crash I was employed in Antarctica by DSIR as a survival instructor/mountaineer assistant. I was one of the three mountaineers who made the initial inspection of the site for survivors. I was also one of the three mountaineers who accompanied Messrs David Graham (Investigator) Ian Gemmell & Ian Wood (Air NZ) during their initial inspection of the aircraft. During the first six days after the accident I was at the crash site at all times when the site was occupied.
>
> "In regard to evidence reported in the Christchurch Press today, 5 Dec 1980, I can state unequivocally that:
>
> "1) Captain Gemmell did not spend any time inspecting the aircraft without other people being present.
>
> "2) Captain Collins flight bag was found by me the day after the crash, this being three days before any Air NZ personnel or crash investigators reached the site. My recollection is that it was empty when I first inspected it. It certainly contained no diaries or briefing material.
>
> "3) Captain Gemmell did not remove any items from the persons of deceased lying in the area. . . ."

Counsel proceeded to read from the letter which goes on to refer to instructions concerning the crevassed area of the ice-slope.

No challenge was made to the views expressed by Mr Woodford nor was he called to give evidence. And no evidence to any contrary effect was given by anybody. Yet apart from the passing reference to the matter in para 349 of the Report the point of view Mr Woodford expressed seems to have been given no attention. The extent of the evidence which could have been given by Mr Woodford if he had been called as a witness is indicated by his affidavit now put before this Court. The importance of the letter seems obvious. The bag being empty when it was seen only 18 hours after the aircraft had crashed it is difficult to understand how it could have any significance when found in that same condition three days later. Yet in this part of the Report it is left as a central issue. Mr Woodford's own concern about all this is indicated in the lengthy affidavit which he prepared for the purpose of exonerating Captain Gemmell. It was sworn by him on 21 May 1981 not very long after the Report of the Royal Commission had been made public.

A final comment should be made about Captain Gemmell's position. It concerns a submission made on his behalf to this Court that "In view of the 'not proven' verdict against Captain Gemmell and the various critical statements made about him it is a remarkable thing that he was given no opportunity for further comment when the Commissioner decided to make further enquiries of the police sergeant and Mr Chippindale at the conclusion of the hearing of evidence". If Captain Gemmell was to be left enveloped in "justifiable suspicion" this is something that certainly should have been done. Indeed if the post-hearing investigation had been sufficiently developed the Commissioner might have been satisfied (as now appears from the affidavit of Mr Stanton) that the police officer who gave information to counsel assisting the Commission about one or two flight bags was not even in Antarctica while Captain Gemmell was there. The affidavit indicates that the police officer arrived to take charge of the police store only on the evening of 6 December and by then Captain Gemmell had been back in New Zealand for two days.

Airline's attitude at Inquiry

This matter requires brief comment. It involves the issue as to whether Air New Zealand adopted an uncompromising approach to the matters under consideration by the Royal Commission so that the proceedings were unnecessarily prolonged. Concerning the matter the Commissioner said this in the Appendix to the Report dealing with the awards of costs, which must be mentioned later:

> "In an inquiry of this kind, an airline can either place all its cards on the table at the outset, or it can adopt an adversary stance. In the present case, the latter course was decided upon. The management of the airline instructed its counsel to deny every allegation of fault, and to counter-attack by ascribing total culpability to the air crew, against whom there were alleged no less than 13 separate varieties of pilot error. All those allegations, in my opinion, were without foundation."

The general complaint that Air New Zealand had adopted an adversary approach and withheld evidence until a late stage needs to be assessed against the control exercised by counsel assisting the Commission concerning the order in which witnesses were to be called and the way in which the Inquiry progressed. Before the initial hearing to settle questions of procedure he supplied the airline with a "Memorandum as to areas to be covered by Air New Zealand evidence". It is dated 13 June 1980 and specifies 21 topics. Then on 19 June he circulated a "Memorandum to counsel engaged in DC10 Inquiry" advising that the parties were to prepare initial briefs which he would then put in sequence. And at the preliminary hearing on 23 June it was arranged that a basically chronological order should be followed after Mr Chippindale had been called as the first witness. On the following day counsel for the Civil Aviation Division took issue with the requirement that its brief of evidence should be handed in before Mr Chippindale had appeared and the

Commissioner ruled that briefs of evidence would be withheld until shortly before the witness was to be called. Mr Chippindale's evidence occupied the first fortnight of the inquiry and thereafter the actual order in which the witnesses were to be called was arranged by counsel assisting the Commission who stated in advance the days and times at which those concerned should come forward. Thus the first Air New Zealand witness to give evidence was the chief engineer who appeared before the Inquiry on 22 July.

It was said that the airline had not been invited through its counsel to make its position known by means of an opening address at the commencement of the public hearing. No doubt the Commissioner would have permitted such an address but the occasion for it did not seem to arise and he himself did not require the matter to be dealt with on this basis by any of the parties. And in the result witnesses were called from among the personnel of the airline in order to deal with various questions in an ordered fashion. Thus it was not until all evidence had been called that counsel for the various parties made submissions to the Commissioner.

At the conclusion of the evidence counsel for the airline invited counsel assisting the Commission to inform him what were the main issues upon which closing submissions were requested. However the extended written answer to that enquiry includes no suggestion whatever that the conduct of airline witnesses or the post-accident conduct of the employees was in issue. And the Commissioner himself said this in para 375 about the airline's submissions:

> ". . . counsel for the airline adopted, in the course of their detailed and exemplary final submissions, the very proper course of not attributing blame to any specific quarter but leaving it to me to assemble such contributing causes as I thought the evidence had revealed."

In that regard some of the statements which were made on behalf of the airline are not unimportant. At one point counsel said:

> "By now it should be apparent to the smallest mind that the Company has not espoused, and does not espouse, a proposition that the accident can be contributed to a sole cause, let alone a sole cause of pilot error. If, from the evidence adduced, there emerges or is implicit a criticism of the Company's flight crew, that criticism has been moderate, informed and responsible."

And in the same context:

> "I would, with respect, also remind Your Honour that in the very nature of these proceedings there has not been an opportunity for a formal opening where one might have expected just that. But I would further suggest, Sir, that the evidence advanced by the Company, which has been in an attempt to bring every witness who can contribute something towards the causal factors and everything else has been done, not selectively, and there have been witnesses who have plainly, unequivocally, acknowledged their fault, their error. There has not in any way been a parade of witnesses all seeking to criticise the flight crew and thus, as it were, exonerate themselves. There has been an endeavour, without selection, to reveal all the evidence to reveal all the documents . . .".

This statement by senior counsel for the airline as to the manner in which he had attempted to handle his responsibilities should be enough to answer the complaint in the Appendix that "The management of the airline *instructed its counsel* to deny every allegation of fault, and to counter-attack by ascribing total culpability to the air crew". The tribute the Commissioner paid counsel in para 375 (the same counsel appeared in this Court for the applicants) is not altogether consistent with those last remarks. In any event the Appendix continues:

> "Apart from that, there were material elements of information in the possession of the airline which were originally not disclosed, omissions for which counsel for the airline were in no way responsible, and which successively came to light at different stages of the Inquiry when the hearings had been going on for weeks, in some cases for months."

A final comment should be made about the criticisms of the airline concerning the position it adopted concerning pilot error as a cause of the accident.

In the course of his evidence (at p 272) Mr Chippindale was asked by the Commissioner: "Was not the position Capt Collins must have clearly have thought he was flying toward McMurdo over McMurdo Sound?" He said, "It is my belief that this could be the only possible reason for him to continue". That is an important answer. It means that in this respect Mr Chippindale had reached the same conclusion as the Commissioner but for general reasons of logic whereas the latter was influenced by his finding that Captain Collins had made use of the New Zealand Atlas or a chart in order to plot the position of the waypoint and the route to be taken by the aircraft.

But although this general conclusion about McMurdo Sound was shared it is at this point that the two investigations diverged in terms of pilot responsibility for the accident. The Commissioner was of the opinion that until the last moment the pilots believed they were flying in clear air; that they were deceived by a whiteout situation; and that it was understandable that they flew on at 2000 and then 1500 feet. Mr Chippindale was aware of and spoke in his report about the whiteout phenomenon, but after giving evidence before the Royal Commission for eight days he still adhered to his conclusion of pilot error for reasons he expressed (at p 274) in the following way:

> "I believe that the cause as it stands [in the Chief Inspector's report] is reasonable. As I attempted to clarify last time the pilot has descended to 2000 ft and evidently is unable to see anything ahead. I say 'evidently' because there is a snow slope leading to a mountain rising to 12450 feet and that was directly in front of him. He 'popped down', to use his own words, another 500 feet and continued to progress towards an ice cliff which is 300 feet high, the lower 50 per cent of which is solid and bare rock. And still he didnt perceive anything to persuade him to divert from his track. To me this indicates it was an area of poor definition and as such he would not be able to discern what he could expect to see had he been, as various people suppose, believing that he was proceeding down the McMurdo Sound. The sea ice is by no means uniform in texture and during his descent he would have seen the nature of the sea ice — in fact the photos from the passengers indicate that it had large breaks in its surface and was quite easily discerned so therefore I believe at the end of his descent to 2000 ft he was confronted with a very vague area in front of him which he may or may not have believed was cloud, and when descending a further 500 feet the view ahead of him would have been of equally poor definition. Despite this, he continued to the point of 26 miles from destination as indicated presumably on the AINS . . .".

Mr Chippindale's opinion has some background relevance in the present case. It is in no way relevant because it differs from that of the Commissioner upon the issue of causation. Already we have emphasised and we do so once again that what was said in the Royal Commission Report about the cause or causes of the accident must stand entirely unaffected by these proceedings. But the opinion has some relevance because although it was wrong, as the Royal Commission Report decided, the Commissioner certainly did not consider it to be anything other than a completely conscientious and honest attempt by Mr Chippindale to analyse and draw a rational conclusion from all the available facts. He described Mr Chippindale as a model witness. In the circumstances it is difficult to understand why the same point of view Mr Chippindale expressed in his evidence could not be genuinely shared by other educated observers.

We turn now to the relief sought by these various officers and the airline itself.

The claim for relief

The applicants seek relief in the form of an order that the findings be set aside or for a declaration that the various findings are invalid or made in excess of jurisdiction; or were made in circumstances involving unfairness and breaches of the rules of natural justice. In addition we are asked to make an order quashing the decision of the Commissioner that the airline should pay to the Department of Justice the sum of $150,000 by way of costs.

Earlier in this judgment we have said that if the challenged findings were made without jurisdiction or contrary to natural justice then it would be possible for the Court to take steps by way of declaration to offer at least some form of redress. And we went on to explain why we think the Royal Commission was bound by the broad requirements of natural justice. As an example of what would be required to meet obligations of fairness we then referred to the need for a reasonable opportunity of meeting unformulated suspicions of deception and concealment that had been in the Commissioner's mind. However, before we turn to the natural justice part of the case it is convenient to consider the claim of excess jurisdiction, and that by confining our attention to the terms of reference.

The submission of counsel for the sixth respondent is that the statements contained in each of the two paragraphs 348 and 377 are relevant to and justified by the following items of the terms of reference:

> "(g) Whether the crash of the aircraft or the death of the passengers and crew was caused or contributed to by any person (whether or not that person was on board the aircraft) by an act or omission in respect of any function in relation to the operation, maintenance, servicing, flying, navigation, manoeuvring, or air traffic control of the aircraft, being a function which that person had a duty to perform or which good aviation practice required that person to perform?
>
> "(j) And other facts or matters arising out of the crash that, in the interests of public safety, should be known to the authorities charged with the administration of civil aviation in order that appropriate measures may be taken for the safety of persons engaged in aviation or carried as passengers in aircraft:"

In its essentials the argument is that in order to answer the questions posed by para (g) the Commissioner found it necessary or was entitled to explain the process by which he reached his final conclusions; that in doing so he was entitled to comment upon the quality of the evidence that was given in the course of the Royal Commission Inquiry; that the assessment of witnesses was a necessary part of the findings he reached as to the cause of the accident; that the assessment was not a part of the substantive findings of the Commission; and "whether, having reached his conclusion, he expresses himself vehemently or refrains from pungent comment is entirely a matter for him". Similar submissions were made in relation to the second cause of action and natural justice.

In certain circumstances it is obvious enough that reasons for rejecting evidence would not merely be relevant but often a necessary part of a decision. But considerations of that kind are far removed from the conclusions expressed in para 377. There it is said that the ten senior members of this airline had been involved in organised deception. "Palpably false sections of evidence ... a pre-determined plan of deception ... an attempt to conceal a series of disastrous administrative blunders ... an orchestrated litany of lies". These are unlikely phrases to associate with a mere assessment of the credibility of witnesses.

In the Courts it is constantly necessary to indicate a preference for the evidence of one witness or to make a decision to put evidence completely to one side; sometimes it even seems necessary to describe evidence in terms of perjury. But in the Courts Judges always attempt to be most circumspect in handling issues of this kind, particularly if misconduct seems apparent which is not immediately associated with the central issues in the case. There can be no less reason for circumspection in the case of a Royal Commission at least where the terms of reference do not directly give rise to inquiries into criminal dealing. In *Re Royal Commission on Licensing* [1945] NZLR 665 Sir Michael Myers CJ dealt with the point in the following way (at p 680):

> "A Commission of Inquiry under the statute and a Royal Commission under the Letters Patent are alike in this respect — each of them is an inquiry, not an inquisition. By that I mean that the Commission is not a roving Commission of a general character authorizing investigation into any matter that the members of the Commission may think fit to inquire into and that the ambit of the Inquiry is limited by the terms of the instrument of appointment of the Commission."

It must always be sensible for any Commission of Inquiry or other tribunal to keep those words in mind.

We are satisfied that the findings contained in each of paragraphs 348 and 377 are collateral assessments of conduct made outside of and were not needed to answer any part of the terms of reference. The Commissioner had no authority or jurisdiction to deal with the affected officers in such a fashion and the findings themselves are a regrettable addition to the Report.

Fairness

The concept of natural justice does not rest upon carefully defined rules or standards that must always be applied in the same fixed way. Nor is it possible to find answers to issues which really depend on fairness and commonsense by legalistic or theoretical approaches. What is needed is a broad and balanced assessment of what has happened and been done in the general environment of the case under consideration.

In the present case the expressed complaints turn upon the absence of warning that the affected officers were at risk and that the critical decisions taken against them were unsupported by any evidence of probative value. But in estimating the significance of these complaints it would be unreal to ignore the fact that the findings are not only very serious in themselves: they are made more potent by the way they have been so closely associated with one another. Furthermore, each of them is advanced in this Report as an overt manifestation of one general conspiracy. That last matter has special importance because for the reasons just explained we have held the conspiracy findings to be unjustified. They should never have been made. In saying that we do not overlook the fact that this Court is making an assessment in isolation from the viva voce evidence given at open hearings of the Inquiry. But the present issue is simply whether the affected officers were or were not deprived of the advantage of answering unformulated charges. In such a situation the advantage of actually hearing and seeing a witness is hardly a relevant consideration.

In the course of the survey that has been made up to this point we have commented upon the nature and significance of the various challenged paragraphs in the Report. It is unnecessary to traverse the same subject-matter once again and we simply remark that the applicants have justified their complaints concerning the way in which the findings have been reached.

Award of costs

We have explained earlier in this judgment that an order for costs was made against Air New Zealand in favour of parties other than the Civil Aviation Division. As a matter of company policy the airline decided that it would comply with that order although in doing so it has made no admission that the order was validly made. In addition, however, the airline was ordered to pay to the Department of

Justice the large sum of $150,000 by way of contribution to the public cost of the inquiry. It is that last order which is challenged in the present proceedings on two grounds. The first is that the award involved a wrong exercise of the discretion provided by s 11 of the Commissions of Inquiry Act 1908. The second ground is that in any event no award greater than $600 could be made by reason of Rule III of rules made in terms of the statute and gazetted on 11 February 1904.

The reasons given by the Commissioner for making the respective orders against Air New Zealand are set out in a passage from the Appendix to the Report which is mentioned in this judgment under the heading "Airline's attitude at Inquiry". And on behalf of the Attorney-General it is said that the discretion was properly exercised for reasons expressed to be related to "conduct . . . at the hearing [which] materially and unnecessarily extended the duration of the hearing". However, the reasons given by the Commissioner do not stop there. The Appendix goes on:

> "The management of the airline instructed its counsel to deny every allegation of fault, and to counter-attack by ascribing total culpability to the air crew . . . Apart from that, there were material elements of information in the possession of the airline which were originally not disclosed . . . it was not a question of the airline putting all its cards on the table. The cards were produced reluctantly, and at long intervals, and I have little doubt that there are one or two which still lie hidden in the pack."

When discussing the legal implications of the order for costs under that particular heading earlier in the judgment we stated that on purely verbal grounds it might be possible to draw refined distinctions between parts of the Report which are highly critical of the position taken up by the airline at the inquiry on the one hand and the effect this had on the duration of the hearing on the other. But there can be no doubt that in the context of this Report and the conclusions reached by the Commissioner concerning conspiracy and otherwise any ordinary reader would feel satisfied that the imposition of an order for costs in the sum of $150,000 was nothing less than the exaction of a penalty. In those circumstances and by reason of the conclusions we have reached concerning the invalidity of the challenged paragraphs we are satisfied that the order must be set aside.

Concerning the second ground advanced on behalf of the airline it is sufficient to say that even if it had been appropriate to make an award of costs in this case the amount was limited to the modest sum of $600.

At the beginning of this judgment we said that we had felt it necessary to go at some length into the facts. This we have done both in order to analyse the important questions raised in the areas of natural justice and excess of jurisdiction and also because we have thought it to be in the public interest to attempt to explain the factual issues that are involved in the proceedings. We now express our conclusion that for the reasons already given we are satisfied that the complaints of the applicants are justified. Against that finding we return to the beginning of this judgment where we said that we felt sure that reputation can be vindicated and the interests of justice met by a formal decision of this Court that will have the effect of quashing the order of the Commissioner requiring Air New Zealand to pay costs in the large sum of $150,000. We would make an order accordingly.

The Court being unanimous as to the result there will be an order quashing the order of the Royal Commissioner that Air New Zealand pay to the Department of Justice the sum of $150,000 by way of contribution to the public cost of the Inquiry. There have been no submissions concerning the costs of the present proceedings and that matter is reserved.

COOKE, RICHARDSON and **SOMERS JJ.** On 5 August 1981, for reasons then given, this Court ordered that these proceedings be removed as a whole from the High Court to this Court for hearing and determination. They are proceedings,

brought by way of application for judicial review, in which certain parts of the report of the Royal Commission on the Mount Erebus aircraft disaster are attacked. In summary the applicants claim that these parts are contrary to law, in excess of jurisdiction and in breach of natural justice.

One of the reasons for ordering the removal was that it was important that the complaints be finally adjudicated on as soon as reasonably practicable. We had in mind that the magnitude of the disaster — 257 lives were lost — made it a national and indeed international tragedy, so the early resolution of any doubts as to the validity of the report was a matter of great public concern. Also the report contained very severe criticism of certain senior officers of Air New Zealand. Naturally this criticism must have been having damaging and continuing effects, as evidenced for instance by the resignation of the chief executive, so it was right that the airline and the individuals should have at a reasonably early date a definite decision, one way or the other, on whether their complaints were justified.

In the event the hearing in this Court was completed in less than six days. We had envisaged that some further days might be required for cross-examination, as there were applications for leave to cross-examine the airline personnel and the Royal Commissioner himself on affidavits that they had made in the proceedings. But ultimately the parties elected to have no cross-examination — and it should be made clear that this was by agreement reached between the parties, not by decision of the Court. With the benefit of the very full written and oral arguments submitted by counsel, the Court is now in a position to give judgment before the end of the year.

We must begin by removing any possible misconception about the scope of these proceedings. They are not proceedings in which this Court can adjudicate on the causes of the disaster. The question of causation is obviously a difficult one, as shown by the fact that the Commissioner and the Chief Inspector of Air Accidents in his report came to different conclusions on it. But it is not this Court's concern now. This is not an appeal. Parties to hearings by Commissions of Inquiry have no rights of appeal against the reports. The reason is partly that the reports are, in a sense, inevitably inconclusive. Findings made by Commissioners are in the end only expressions of opinion. They would not even be admissible in evidence in legal proceedings as to the cause of a disaster. In themselves they do not alter the legal rights of the persons to whom they refer. Nevertheless they may greatly influence public and Government opinion and have a devastating effect on personal reputations; and in our judgment these are the major reasons why in appropriate proceedings the Courts must be ready if necessary, in relation to Commissions of Inquiry just as to other public bodies and officials, to ensure that they keep within the limits of their lawful powers and comply with any applicable rules of natural justice.

Although this is not an appeal on causation or on any other aspect of the Commission's report, the issues with which this Court is properly concerned — the extent of the Commissioner's powers in this inquiry, and natural justice — cannot be considered without reference to the issues and evidence at the inquiry. We are very conscious that we have not had the advantage of seeing and hearing the witnesses. It can be very real, as all lawyers know. It is true that the kind of analytical argument we heard from counsel, with concentration focused on the passages of major importance in the report and the transcript of evidence, can bring matters into better perspective than long immersion in the details of a case. Necessarily this Court is more detached from the whole matter than was the Commissioner. And several different judicial minds may combine to produce a more balanced view than one can. But as against those advantages, which we have had, there is the advantage of months of direct exposure to the oral evidence, which he had. So we have to be very cautious in forming opinions on fact where there is any room for different interpretations of the evidence.

Having stressed those limitations on the role of this Court, we think it best to state immediately in general terms the conclusion that we have reached in this case. Then we will go on to explain the background, the issues and our reasoning in more detail. Our general conclusion is that the paragraph in the report (377) in which the Commissioner purported to find that there had been "a pre-determined plan of deception" and "an orchestrated litany of lies" was outside his jurisdiction and contained findings made contrary to natural justice. For these reasons we hold that there is substance in the complaints made by the airline and the individuals. Because of those two basic defects, an injustice has been done, and to an extent that is obviously serious. It follows that the Court must quash the penal order for costs made by the Commissioner against Air New Zealand reflecting the same thinking as para 377.

The disaster

In 1977 Air New Zealand began a series of non-scheduled sightseeing flights to the Antarctic with DC10 aircraft. The flights left and returned to New Zealand within the day and without touching down en route. The southernmost point of the route, at which the aircraft turned round, was to be at about the latitude of the two scientific bases, Scott Base (New Zealand) and McMurdo Station (United States), which lie about two miles apart, south of Ross Island. On Ross Island there are four volcanic mountains, the highest being Mount Erebus, about 12,450 feet. To the west of Ross Island is McMurdo Sound, about 40 miles long by 32 miles wide at the widest point and covered by ice for most of the year.

It was originally intended that the flight route south would be over Ross Island at a minimum height of 16,000 feet. From October 1977, with the approval of the Civil Aviation Division, descent was permitted south of the Island to not lower than 6000 feet, subject to certain conditions concerning weather and other matters. However, the evidence is that the pilots were in practice left with a discretion to diverge from these route and height limitations in visual meteorological conditions; and they commonly did so, flying down McMurdo Sound and at times at levels lower than even 6000 feet. This had advantages both for sightseeing and also for radio and radar contact with McMurdo Station. Moreover from 1978 the flight plan, recording the various waypoints, stored in the Air New Zealand ground computer at Auckland actually showed the longitude of the southernmost waypoint as 164° 48′ East, a point in the Sound approximately 25 miles to the west of McMurdo Station.

The evidence of the member of the airline's navigation section who typed the figures into the computer was that he must have mistakenly typed 164° 48′ instead of 166° 48′ and failed to notice the error. Shortly before the fatal flight the navigation section became aware that there was some error, although their evidence was that they understood it to be only a matter of 10 minutes of longitude. In the ground computer the entry was altered to 166° 58′ East, and this entry was among the many in the flight plan handed over to the crew for that flight for typing into the computerised device (AINS) on board the aircraft. The change was not expressly drawn to the attention of the crew. The AINS enables the pilot to fly automatically on the computer course ("nav" track) at such times as he wishes.

The crash occurred at 12.50 pm on 28 November 1979. The aircraft struck the northern slopes of Mount Erebus, only about 1500 feet above sea level. There were no survivors. The evidence indicates that the weather was fine but overcast and that the plane had descended below the cloud base and was flying in clear air. The pilot, Captain Collins, had not been to the Antarctic before, and of the other four members of the flight crew only one, a flight engineer, had done so. The plane was on nav track.

The Chief Inspector of Air Accidents, Mr R Chippindale, carried out an investigation and made a report to the Minister, dated 31 May 1980, under reg 16 of the Civil Aviation (Accident Investigation) Regulations 1978. It was approved by

the Minister for release as a public document. The Chief Inspector concluded that "The probable cause of this accident was the decision of the captain to continue the flight at low level toward an area of poor surface and horizon definition when the crew was not certain of their position and the subsequent inability to detect the rising terrain which intercepted the aircraft's flight path". He adhered to this in evidence before the subsequent Royal Commission.

The Royal Commission was appointed on 11 June 1980 to inquire into "the causes and circumstances of the crash", an expression which was elaborated in terms of reference consisting of paragraphs (a) to (j). Mr Justice Mahon was appointed sole Commissioner. In his report, transmitted to the Governor-General by letter dated 16 April 1981 and subsequently presented to the House of Representatives by Command of His Excellency and later printed for public sale, the Commissioner found that ". . . the single dominant and effective cause of the disaster was the mistake made by those airline officials who programmed the aircraft to fly directly at Mt Erebus and omitted to tell the aircrew". He exonerated the crew from any error contributing to the disaster.

The Commissioner and the Chief Inspector were at one in concluding that the crash had occurred in a whiteout. The Commissioner gave this vivid reconstruction in the course of para 40 of his report:

> "I have already made it clear that the aircraft struck the lower slopes of Mt Erebus whilst flying in clear air. The DC10 was at the time flying under a total cloud cover which extended forward until it met the mountain-side at an altitude of somewhere between 2000 and 2500 feet. The position of the sun at the time of impact was directly behind the aircraft, being in a position approximately to the true north of the mountain and shining at an inclination of 34°. The co-existence of these factors produced without doubt the classic 'whiteout' phenomenon which occurs from time to time in polar regions, or in any terrain totally covered by snow. Very extensive evidence was received by the Commission as to the occurrence and the consequences of this weather phenomenon. So long as the view ahead from the flight deck of an aircraft flying over snow under a solid overcast does not exhibit any rock, or tree, or other landmark which can offer a guide as to sloping or uneven ground, then the snow-covered terrain ahead of the aircraft will invariably appear to be flat. Slopes and ridges will disappear. The line of vision from the flight deck towards the horizon (if there is one) will actually portray a white even expanse which is uniformly level.
>
> "What this air crew saw ahead of them as the aircraft levelled out at 3000 feet and then later at 1500 feet was a long vista of flat snow-covered terrain, extending ahead for miles. Similarly, the roof of the solid overcast extended forward for miles. In the far distance the flat white terrain would either have appeared to have reached the horizon many miles away or, more probably, merged imperceptibly with the overhead cloud thus producing no horizon at all. What the crew could see, therefore, was what appeared to be the distant stretch of flat white ground representing the flat long corridor of McMurdo Sound. In reality the flat ground ahead proceeded for only about 6 miles before it intercepted the low ice cliff which marked the commencement of the icy slope leading upwards to the mountain, and at that point the uniform white surface of the mountain slope proceeded upwards, first at an angle of 13°, and then with a gradually increasing upward angle as it merged with the ceiling of the cloud overhead. The only feature of the forward terrain which was not totally white consisted of two small and shallow strips of black rock at the very bottom of the ice cliff, and these could probably not be seen from the flight deck seats owing to the nose-up attitude of 5° at which the aircraft was travelling, or they were mistaken for thin strips of sea previously observed by the crew as separating blocks of pack ice.

"The aircraft had thus encountered, at a fateful coincidence in time, the insidious and unidentifiable terrain deception of a classic whiteout situation. They had encountered that type of visual illusion which makes rising white plateaux appear perfectly flat. This freak of polar weather is known and feared by every polar flier. In some Arctic regions in the Canadian and in the north European winter, it is responsible for numbers of light aircraft crashes every year. Aircraft fly, in clear air, directly into hills and mountains. But neither Captain Collins nor First Officer Cassin had ever flown at low altitude in polar regions before. Even Mr Mulgrew [the commentator for the passengers], with his antarctic experience, was completely deceived. The fact that not one of the five persons on the flight deck ever identified the rising terrain confirms the totality of this weird and dangerous ocular illusion as it existed on the approach to Mt Erebus at 12.50 pm on 28 November 1979."

Paragraph 165 of the Commissioner's report also merits quotation. We have italicised some of it, indicating that in this particular part of his report the Commissioner seems to accept that when they first heard of the crash the management of the airline must have been unaware of the true nature and danger of a whiteout. If so, they would have had no reason to suppose that the pilot would have elected to fly at such a low level without real visibility. That is an aspect which could well have been strongly relied on if, when giving evidence before the Commissioner, they had realised that they were being accused of trying to cover up the cause of the crash from an early stage:

"The term 'whiteout' has more than one meaning as being descriptive of weather conditions in snow-covered terrain. For aviation purposes it is often described as the cause of the visual difficulty which occurs when an aircraft is attempting to land during a snowstorm. As already stated, the United States Navy maintains a special whiteout landing area situated to the south of its normal landing strips near McMurdo Station. This area is used when an aircraft, which is committed to a landing, is required to land when visibility is obscured by a snowstorm. The snow in Antarctica is perfectly dry, and a wind of only 20 kilometres can sweep loose snow off the surface and fill the air with these fine white particles. A landing on the special whiteout landing field can be accomplished only by an aircraft equipped with skis or, in the case of an aircraft without skis, then it must make a belly-up landing on this snow-covered emergency airfield. Flying in a 'whiteout' of that description is no different from flying in thick cloud. The pilot cannot know where he is and must land in accordance with strict radio and radar directions. *So far as I understand the evidence, I do not believe that either the airline or Civil Aviation Division ever understood the term 'whiteout' to mean anything else than a snowstorm. I do not believe that they were ever aware, until they read the chief inspector's report, of the type of 'whiteout' which occurs in clear air, in calm conditions, and which creates this visual illusion which I have previously described and which is, without doubt, the most dangerous of all polar weather phenomena.*"

While largely agreed about the whiteout conditions, the Commissioner and the Chief Inspector took quite different views as to whether the crew had been uncertain of their position and visibility. This disagreement is associated with a major difference as to the interpretation of the tape recovered from the cockpit voice recorder covering the conversation on the flight deck during the 30 minutes before the crash.

Both the Commissioner and the Chief Inspector found difficulty in arriving at an opinion about what was said and by whom. Whereas the Chief Inspector thought that the two flight engineers had voiced mounting alarm at proceeding at a low level towards a cloud-covered area, the Commissioner thought that Captain Collins and

First Officer Cassin had never expressed the slightest doubt as to where the aircraft was and that "not one word" was ever addressed by either of the flight engineers to the pilots indicating any doubt. This is not a question on which the present proceedings call for any opinion from this Court, nor are we in any position to give one.

A major point in the Commissioner's reasoning, and one that helps to explain the difference between the two reports, is that on the basis of evidence from the wife and two daughters of Captain Collins he accepted that, at home the night before the flight, the Captain had plotted on an atlas and two maps a route of the flight; and he drew the inference that Captain Collins must then have had with him a computer print-out. Any such print-out would have been made before the alteration and consequently would have shown the longitude of the southernmost waypoint as 164° 48'E. The Commissioner accordingly concluded that Captain Collins had plotted a route down the Sound. No doubt this tended to reinforce his view that the Captain, flying on nav track, had never doubted that he was in fact over the Sound.

The challenged paragraphs

The background already given is needed for an understanding of the case. But we repeat that the case is not an appeal from the Commissioner's findings on causation or other matters. The applicants acknowledge that they have no rights of appeal. What they attack are certain paragraphs in the Commission report which deal very largely, not with the causes and circumstances of the crash, but with what the Commissioner calls "the stance" of the airline at the inquiry before him. The applicants say that in these paragraphs the Commissioner exceeded his powers or acted in breach of natural justice; and further that some of his conclusions were not supported by any evidence whatever of probative value. Their counsel submit that a finding made wholly without evidence capable of supporting it is contrary to natural justice.

The arguments on the other side were presented chiefly by Mr Baragwanath and Mr Harrison, who had been counsel assisting the Commission and appeared in this Court for the Attorney-General, not to advance any view on behalf of the Government but to ensure that nothing that could possibly be said in answer to the contentions of Mr Brown and Mr Williams for the applicants was left unsaid before the Court. This was done because it has not been usual for a person in the position of the Commissioner to take an active part in litigation concerning his report. Mr Barton, who appeared for the Commissioner, did not present any argument, adopting a watching role. He indicated that he would only have played an active role if the Commissioner had been required for cross-examination. As already mentioned, it was agreed otherwise. At that stage the Commissioner, by his counsel, very properly stated that he would abide the decision of the Court.

Mr Baragwanath's submissions were to the general effect that the Court had no jurisdiction to interfere with the opinions expressed in the Commission's report, which were not "findings" and bound no one; and that in any event they were conclusions within the Commissioner's powers, open to him on the evidence and arrived at without any breach of natural justice.

We now set out the various paragraphs under attack, bearing in mind that they cannot properly be considered in isolation from the context in the report. The paragraphs vary in importance, but it is convenient to take them in the numerical order of the report. We will indicate as regards each paragraph or set of paragraphs the essence of the complaint. After doing this we will state how we propose to deal with the complaints.

Destruction of documents

Paragraphs 45 and 54, which affect particularly the chief executive at the time of the crash, Morrison Ritchie Davis, are as follows:

"45. The reaction of the chief executive was immediate. He determined that no word of this incredible blunder was to become publicly known. He directed that all documents relating to antarctic flights, and to this flight in particular, were to be collected and impounded. They were all to be put on one single file which would remain in strict custody. Of these documents all those which were not directly relevant were to be destroyed. They were to be put forthwith through the company's shredder.

"54. This was at the time the fourth worst disaster in aviation history, and it follows that this direction on the part of the chief executive for the destruction of 'irrelevant documents' was one of the most remarkable executive decisions ever to have been made in the corporate affairs of a large New Zealand company. There were personnel in the Flight Operations Division and in the Navigation Section who anxiously desired to be acquitted of any responsibility for the disaster. And yet, in consequence of the chief executive's instructions, it seems to have been left to these very same officials to determine what documents they would hand over to the Investigating Committee."

These paragraphs occur in the context of a discussion of the change in the computer waypoint shortly before the flight and the failure to draw it to the attention of the flight crew. The reference to the chief executive having "determined that no word of this incredible blunder was to become publicly known" is, taken by itself, at least an overstatement, because in para 48 the Commissioner in effect qualifies it. He says there that it was inevitable that the facts would become known and "perhaps" the chief executive had only decided to prevent adverse publicity in the meantime. Clearly the airline disclosed to the Chief Inspector that the change of more than two degrees of longitude had been made in the computer early on the day of the flight and not mentioned to the crew; these matters are referred to in paras 1.17.7 and 2.5 of the Chief Inspector's report. They were matters which the Chief Inspector did not highlight; evidently he did not regard them as of major importance. For his part the Commissioner (in para 48 of his report) states that the Chief Inspector did not make it clear that the computer flight path had been altered before the flight and the alteration not notified to the crew.

We are not concerned with whether or not the Commissioner's implied criticism of the Chief Inspector's report is correct. The complaint made by the applicants is that the criticisms of Mr Davis in the two paragraphs that we have set out are based on mistake of fact, not on evidence of probative value. It is also said that he was not given a fair opportunity to put his case in relation to such findings, but what the applicants most stress is the way in which the Commissioner dealt with the evidence.

In particular they point out that the evidence of Mr Davis, not contradicted by any other evidence and correctly summarised in para 45 of the Commissioner's report, was that only copies of existing documents were to be destroyed; that he did not want any surplus document to remain at large in case its contents were released to the news media by some employee of the airline; and that his instructions were that all documents of relevance were to be retained on the single file. Their counsel submit in effect that in converting this direction for the preservation of all relevant documents into a direction for the destruction of "irrelevant" documents — a word used by the Commissioner as if it were a quotation from Mr Davis — the Commissioner distorted the evidence. And it is said that the description "one of the most remarkable executive decisions ever to have been made in the corporate affairs of a large New Zealand company" is, to say the least, far-fetched.

Counsel for the applicants point also to the fact that there is no evidence that any document of importance to the inquiry was destroyed in consequence of the instructions given by Mr Davis. The gist of the contrary argument presented by Mr Baragwanath was that Mr Davis was fully cross-examined about his instructions;

and that "it was open to the Royal Commissioner to find that there were in existence documents which never found their way to that file and that the procedures were tailor made for destruction of compromising documents".

Alteration of flight plan

Paragraph 255 (e) and (f), in numerical order the next passages complained of, refer to the fact that when the co-ordinates in the Auckland computer were altered a symbol was used which had the effect of including in the information to be sent to the United States air traffic controller at McMurdo Station the word "McMurdo" instead of the actual co-ordinates (latitude and longitude) of the southernmost waypoint. The Commissioner said:

"(e) When the TACAN position [a navigational aid at McMurdo Station enabling aircraft to ascertain their distance from it] was typed into the airline's ground computer in the early morning of 28 November 1979, there was also made the additional entry to which I have referred, which would result in the new co-ordinates not being transmitted to McMurdo with the Air Traffic Control flight plan for that day. It was urged upon me, on behalf of the airline, that McMurdo Air Traffic Control would consider the word 'McMurdo' as indicating a different position from that appearing on Air Traffic Control flight plans despatched from Auckland during 1978 and 1979. I cannot for a moment accept that suggestion. First Officer Rhodes made a specific inquiry at McMurdo within a few days of the disaster and ascertained that the destination waypoint of the first Air Traffic Control flight plan for 1979 had been plotted by the United States Air Traffic Control personnel, and there was evidence from the United States witnesses that this would be normal practice. In my view the word 'McMurdo' would merely be regarded, and was indeed regarded, by McMurdo Air Traffic Control as referring to the same McMurdo waypoint which had always existed. In my opinion, the introduction of the word 'McMurdo' into the Air Traffic Control flight plan for the fatal flight was deliberately designed to conceal from the United States authorities that the flight path had been changed, and probably because it was known that the United States Air Traffic Control would lodge an objection to the new flight path.

"(f) I have reviewed the evidence in support of the allegation that the Navigation Section believed, by reason of a mistaken verbal communication, that the altered McMurdo waypoint only involved a change of 2.1 nautical miles. I am obliged to say that I do not accept that explanation. There were certainly grave deficiencies in communication within the Navigation Section, but the high professional skills of the Navigation Section's staff entirely preclude the possibility of such an error. In my opinion this explanation that the change in the waypoint was thought to be minimal in terms of distance is a concocted story designed to explain away the fundamental mistake, made by someone, in failing to ensure that Captain Collins was notified that his aircraft was now programmed to fly on a collision course with Mt Erebus."

These paragraphs are attacked on the grounds, in short, that the members of the navigation section said to be adversely affected by them — according to the applicants, Mr R Brown as regards (e) and Messrs Amies, Brown, Hewitt and Lawton as regards (f) — were not given a fair opportunity of answering the findings or allegations.

To understand this complaint one needs a clear picture of what it was that the Commission found or alleged against the navigation section. When studying the report as a whole we have encountered difficulties in this regard, difficulties not

altogether removed when we explored them during the argument with Mr Baragwanath. But our understanding is that in essence the Commissioner suggests that the original change of the southernmost point to one in the Sound, 25 miles west of McMurdo Station, was probably deliberate on the part of the navigation section (although he refrained from a definite finding) and that in November 1979 they deliberately made a major change back to the vicinity of McMurdo Station but deliberately set out to conceal the change from the American personnel there. The motive for the 1979 change ascribed by the Commissioner to the navigation section appears to be that they considered that the New Zealand Civil Aviation Division had only approved a route over Mount Erebus, yet at the same time that the American "authorities" would object to that route, regarding the route down the Sound as safer. In short the theory (if we understand it correctly) is that the navigation section were in a dilemma as there was no route approved by all concerned.

Beyond argument, it would seem, there was slipshod work within the airline in the making of the change and the failure to expressly notify flight crews. But the allegations of deliberate concealment and a concocted story are another matter. The complaint is that they were never put squarely to the members of the navigation section. The Commissioner himself did put to the chief navigator, Mr Hewitt, that "someone may suggest to me before the inquiry is over" that the word "McMurdo" was relayed to McMurdo to conceal a long-standing error in the co-ordinates. Mr Hewitt replied "Certainly not, sir" and there, the applicants point out, the matter was left, without further questions to witnesses by anyone or any reference in counsel's final submissions.

On the other hand Mr Baragwanath urged in substance that the witnesses from the navigation section must have understood that their evidence was under suspicion; that they had ample opportunities to explain how and why any mistakes occurred; and that it was for the Commissioner to assess their explanations, taking into account any impressions they made on him individually as witnesses.

Captain Eden

First Officer Rhodes, an accident inspector, had been one of the party who went to Antarctica very shortly after the crash. He was representing the Airline Pilots Association as well as working with others in the party. When he first gave evidence at the inquiry he was called by counsel for the association. Apparently concern was felt by the airline that some of his evidence might be taken to reflect on Captain Gemmell (the Flight Manager, Technical, and former Chief Pilot) so First Officer Rhodes was recalled as a witness by counsel for the airline. He said that he had "no reason to doubt Captain Gemmell in any way shape or form". There was some cross-examination by counsel for the association but no reference was made to Captain Eden in any of the questions. The Commissioner said in para 348 of his report:

> "348. Captain Eden is at present the director of flight operations for the airline. He appeared in the witness box to be a strong-minded and aggressive official. It seemed clear from this further production of First Officer Rhodes as a witness that it had been suggested to him by Captain Eden that he should either make a direct allegation against Captain Gemmell or else make no allegation at all, and that since First Officer Rhodes seemed to have no direct evidence in his possession, he was therefore obliged to give the answer which Captain Eden had either suggested or directed. However, First Officer Rhodes was not entirely intimidated because as will be observed from the evidence just quoted, he insisted on saying that Captain Gemmell had brought an envelope containing documents back to Auckland."

Exception is taken to that paragraph as making findings of intimidation against Captain Eden without any such allegation ever having been put to him. Captain Eden gave evidence later in the inquiry than First Officer Rhodes and the transcript shows that he was asked nothing by anyone about their discussion.

Captain Gemmell

The following paragraphs of the report are attacked for their references to this senior officer:

> "352. As to the ring-binder notebook, it had been returned to Mrs Collins by an employee of the airline, but all the pages of the notebook were missing. Captain Gemmell was asked about this in evidence. He suggested that the pages might have been removed because they had been damaged by kerosene. However, the ring-binder notebook itself, which was produced at the hearing, was entirely undamaged.
>
> "353. After the evidence given before the Commission had concluded, I gave some thought to the matters just mentioned. I knew that the responsibility for recovering all property on the crash site lay exclusively with the New Zealand Police Force, and that they had grid-searched the entire site. All property recovered had been placed in a large store at McMurdo Base, which was padlocked, and access to the shed was only possible through a senior sergeant of Police. I asked counsel assisting the Commission to make inquiries about the flight bags which had been located on the site but which had not been returned to Mrs Collins or Mrs Cassin.
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> "354. The Royal New Zealand Air Force helicopter pilot who flew the property from the crash site to McMurdo remembered either one or two crew flight bags being placed aboard his helicopter, and he said that they were then flown by him to McMurdo. This was independently confirmed by the loadmaster of the helicopter, who recollected seeing the flight bags. The senior sergeant of Police in charge of the McMurdo store was spoken to, and he recollected either one or two flight bags among other property awaiting packing for return to New Zealand. He said that personnel from Air New Zaland had access to the store, as well as the chief inspector, and the senior sergeant said that he thought that he had given the flight bags to the chief inspector and that the chief inspector was the sole person to whom he had released any property. The chief inspector was then interviewed on 11 December 1980 by telephone, being at that time in Australia, but he said that no flight bags were ever handed to him.
>
> . . .
>
> "359. The following facts seemed to emerge:
>
> "(1) The two flight bags were lodged in the Police store at McMurdo and would have been returned in due course to Mrs Collins and Mrs Cassin by the Police. But they were taken away from the store by someone and have not since been seen.
>
> . . ."

These paragraphs followed a discussion by the Commissioner of a submission by counsel for the Pilots Association that a number of documents which would have tended to support the proposition that Captain Collins had relied upon the incorrect co-ordinates had not been located; and in that context the Commissioner recorded Captain Gemmell's denial that he had recovered any documents relevant to the flight which had not been handed over to the Chief Inspector. There was also a reference shortly afterwards in the report to Captain Gemmell having brought back some quantity of documents with him from Antarctica. On its own this would be innocuous, but it is part of a context which could lead to inferences adverse to Captain Gemmell being drawn from the paragraphs complained of.

The applicants say that there was a mistake of fact, no evidence of probative value and no fair opportunity to answer the criticisms or findings which they claim to be implicit in these paragraphs. The last point, the natural justice one, has a special

feature in the case of Captain Gemmell. The applicants say that the findings, apart from one made under mistake (para 352), were based on information or evidence gathered by the Commissioner after the public hearings; and that, while an opportunity of meeting the new matter was given to the Chief Inspector of Air Accidents, none was given to Air New Zealand or Captain Gemmell.

Another special feature is that the Commissioner himself ultimately concluded (para 360) "However, there is not sufficient evidence to justify any finding on my part that Captain Gemmell recovered documents from Antarctica which were relevant to the fatal flight, and which he did not account for to the proper authorities".

Alleged 'orchestration'

We now come to the most serious complaint. It concerns para 377 of the report, a paragraph building up to a quotable phrase that has become well known in New Zealand and abroad:

> "377. No judicial officer ever wishes to be compelled to say that he has listened to evidence which is false. He always prefers to say, as I hope the hundreds of judgments which I have written will illustrate, that he cannot accept the relevant explanation, or that he prefers a contrary version set out in the evidence.
>
> "But in this case, the palpably false sections of evidence which I heard could not have been the result of mistake, or faulty recollection. They originated, I am compelled to say, in a pre-determined plan of deception. They were very clearly part of an attempt to conceal a series of disastrous administrative blunders and so, in regard to the particular items of evidence to which I have referred, I am forced reluctantly to say that I had to listen to an orchestrated litany of lies."

The applicants claim that these findings were not based on evidence of probative value and that the affected employees were not given a fair opportunity of answering such charges. The general allegation in the statement of claim that the findings attacked were made in excess of jurisdiction has in our view a special bearing on this paragraph. The applicants say that the paragraph affects a considerable number of employees — namely Mr Amies, Mr R Brown, Mr Davis, Captain Eden, Captain Gemmell, Captain Grundy, Captain Hawkins, Mr Hewitt, Captain Johnson and Mr Lawton. These include all the employees affected by the other paragraphs under challenge.

We accept that reasonable readers of the report would take from it that the conspiracy which the Commissioner appears to postulate in his references to "a pre-determined plan of deception" and "an orchestrated litany of lies" was seen by him as so wide as to cover all those persons. Paragraph 377 is the culmination of a series of paragraphs beginning with para 373 and separately headed by the Commissioner "The Stance adopted by the Airline before the Commission of Inquiry". They include specific references to the chief executive, described as "very able but evidently autocratic" in the context of an allusion to what "controlled the ultimate course adopted by the witnesses called on behalf of the airline". There are also specific references to the executive pilots and members of the navigation section.

It is possible that some individual witnesses did give some false evidence during this inquiry. The applicants accept that this was for the Commissioner to consider and that it is not for us to interfere with his assessment of witnesses. But the complaint goes much further than that. It is that there is simply no evidence on which he could find a wholesale conspiracy to commit perjury, organised by the chief executive, which is what this part of the report appears to suggest. Our conclusion that here the Commissioner went beyond his jurisdiction and did not comply with natural justice — a conclusion to be explained more fully later in this judgment — makes it unnecessary for us to decide whether there was any evidence that could conceivably warrant such an extreme finding. It is only right to say, however, that if forced to decide the question we would find it at least difficult to see in the transcript any evidence of that kind.

The language of para 377 has evidently been carefully selected for maximum colour and bite, and the Commissioner has sought to reinforce its impact by bringing in his status and experience as a judicial officer. While unfortunate, it is no doubt the result of a search for sharp and striking expression in a report that would be widely read. He cannot have overstated the evidence deliberately. Similarly at senior management level in Air New Zealand there would have been a natural tendency to try to have the company's case put in as favourable a light as possible before the Commission; but it was adding a further and sinister dimension to their conduct to assert that they went as far as organised perjury.

Costs

The applicants ask for an order quashing one of the Commissioner's decisions as to costs. The decision in question and the reasons for it are stated in an appendix to the report:

> ". . . I asked the airline for its submissions on the question of costs. The general tenor of the submissions is that the establishment of this Royal Commission was directed by the New Zealand Government and that the airline should not be ordered to meet any part of the public expenditure so incurred. As a statement of general principle, this is correct. But there is specific statutory power to order that a party to the inquiry either pay or contribute towards the cost of the inquiry, and that power should be exercised, in my opinion, whenever the conduct of that party at the hearing has materially and unnecessarily extended the duration of the hearing. This clearly occurred at the hearings which took place before me.
>
> "In an inquiry of this kind, an airline can either place all its cards on the table at the outset, or it can adopt an adversary stance. In the present case, the latter course was decided upon. The management of the airline instructed its counsel to deny every allegation of fault, and to counter-attack by ascribing total culpability to the air crew, against whom there were alleged no less than 13 separate varieties of pilot error. All those allegations, in my opinion, were without foundation. Apart from that, there were material elements of information in the possession of the airline which were originally not disclosed, omissions for which counsel for the airline were in no way responsible, and which successively came to light at different stages of the Inquiry when the hearings had been going on for weeks, in some cases for months. I am not going to burden this recital with detailed particulars, but I should have been told at the outset that the flight path from Hallett to McMurdo was not binding on pilots, that Captain Wilson briefed pilots to maintain whatever altitudes were authorised by McMurdo Air Traffic Control, that documents were ordered by the chief executive to be destroyed, that an investigation committee had been set up by the airline in respect of which a file was held, and that one million copies of the Brizindine article had been printed, a fact never revealed by the airline at all. So it was not a question of the airline putting all its cards on the table. The cards were produced reluctantly, and at long intervals, and I have little doubt that there are one or two which still lie hidden in the pack. In such circumstances the airline must make a contribution towards the public cost of the Inquiry.
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> . . .
>
> "6. The costs incurred by the Government in respect of this Inquiry have been calculated by the Tribunals Division of the Department of Justice at $275,000. A substantial liability for the burden of such costs must lie upon the State but in my opinion the State ought to be in part reimbursed in

respect of the cost to the public of the Inquiry, and I accordingly direct that Air New Zealand Limited pay to the Department of Justice the sum of $150,000 by way of contribution to the public cost of the Inquiry."

The order is in any event invalid because the amount is far greater than the maximum allowed by the long out-of-date but apparently still extant scale prescribed in 1903 (1904 *Gazette* 491). It is only fair to the Commissioner to say that the scale seems never to have been drawn to his attention by any counsel, although he gave an opportunity to make submissions on costs. But there is a deeper objection to the validity of the order, to which we will come shortly.

Conclusions

Having set out the various complaints we now state our conclusions more specifically than in the earlier part of this judgment.

As to the jurisdiction of the Court in the present proceedings, the application is made solely under the Judicature Amendment Act 1972. Under that Act a decision cannot be set aside unless it was made in exercise of a statutory power and *either* it could have been quashed in certiorari proceedings at common law — that is the effect of s 4(1) — *or* the applicant is entitled to a declaration that it was unauthorised or invalid, in which case s 4(2) empowers the Court to set aside the decision instead.

The Erebus Commission, like others in the past in New Zealand when a Supreme Court Judge has been the Chairman or the sole Commissioner, was expressed to be appointed both under the Letters Patent delegating the relevant Royal Prerogative to the Governor-General and under the authority of and subject to the provisions of the Commissions of Inquiry Act 1908. Some of us have reservations on various legal questions — whether the Commission had statutory authority for its inquiry as well as Prerogative authority; whether the findings in the body of the report amounted to "decisions", whether complete absence of evidence is relevant in considering natural justice or can be redressed in proceedings of this kind. These questions may be of more importance in cases concerning the Thomas Commission which are to come before this Court next year. Moreover, though most important in principle, they are highly technical. It seems to us preferable that the Court should not determine them now unless it is essential to do so. And we do not think it is essential, because we are agreed on what now follows and it enables substantial justice to be done in the present case.

It is established in New Zealand that in appropriate proceedings the Courts may prevent a Commission of Inquiry — whether a Royal Commission, a statutory Commission or perhaps a combination of the two — from exceeding its powers by going outside the proper scope of its inquiry. That basic principle was clearly accepted by this Court in *Re Royal Commission on Licensing* [1945] NZLR 665. See especially the judgment of Myers CJ at pp 678 to 680. As he indicated, the principle is implicit in the judgment of the Privy Council in *Attorney-General for the Commonwealth of Australia v Colonial Sugar Refining Co Ltd* [1914] AC 237; (1913) 17 CLR 644. It is also clear that in a broad sense the principles of natural justice apply to Commissions of Inquiry, although what those principles require varies with the subject-matter of the inquiry. The leading authority is the decision of this Court in *Re Royal Commission on State Services* [1962] NZLR 96.

In recent times Parliament has shown an increasing concern that natural justice should be observed by Commissions. In 1958 s 4A was inserted in the Commissions of Inquiry Act 1908, expressly giving any person interested in the inquiry, if he satisfied the Commission that he had an interest apart from any interest in common with the public, a right to appear and be heard as if he had been cited as a party. Then in 1980, just as the Erebus Commission was about to start, the section was replaced and strengthened. The main changes made are that any person who satisfies the Commission that any evidence given before it may adversely affect his interests

must be given an opportunity to be heard in respect of the matter to which the evidence relates; and every person entitled to be heard may appear in person or by his counsel or agent. In giving this right to representation by counsel the legislature has gone further than observations made in this Court in the *State Services* case at pp 105, 111 and 117.

Some statements in the judgments in that case are very relevant to the present case. They are also entirely consistent with the spirit of the changes made by Parliament in 1980. Gresson P at p 105 and North J at p 111 both gave an inquiry into a disaster as an example of the kind of inquiry where the requirements of natural justice would be more extensive than in inquiries into a general field. Cleary J stressed at p 117 that, while Commissions have wide powers of regulating their own procedure, there is the one limitation that persons interested (ie apart from any interest in common with the public) must be afforded a fair opportunity of presenting their representations, adducing evidence, *and meeting prejudicial matter.*

In both the *Licensing* and the *State Services* cases the Commissions were presided over by Supreme Court Judges. It is implicit in the judgments that this status on the part of the Chairman does not emancipate a Commission from judicial review on jurisdictional or natural justice grounds. We hold that the position can be no different when a High Court Judge is sole Commissioner. He will, however, have the powers, privileges and immunities mentioned in s 13(1) of the Commissions of Inquiry Act. For instance he will have immunity from defamation actions.

A further important point, clear beyond argument, is that an order for costs made by a Commission under s 11 of the Commissions of Inquiry Act is the exercise of a statutory power of decision within the meaning of the Judicature Amendment Act 1972. Accordingly it is subject to judicial review. The judgments in this Court in *Pilkington v Platts* [1925] NZLR 864 confirm that if an order for costs has been made by a Commission acting without jurisdiction or failing to comply with procedural requirements the Court will by writ of prohibition or other appropriate remedy prevent its enforcement. We add that, notwithstanding an argument by Mr Harrison to the contrary, we are satisfied that s 11 was the only possible source of the Commissioner's power to award costs and s 13 was not and could not have been invoked.

The order for costs under challenge in the present case is the Commissioner's order that Air New Zealand pay $150,000 by way of contribution to the public cost of the inquiry. In our view there can be no doubt that this order is and was intended to be, in the words of Williams J delivering the judgment of this Court in *Cock v Attorney-General* (1909) 28 NZLR 405, 421, ". . . in fact, though not in name, a punishment". What is more important, although Mr Baragwanath argued otherwise we have no doubt that reasonable readers of the report would understand that this order is linked with and consequential upon the adverse conclusions stated by the Commissioner in the section of the report headed by him "The Stance adopted by the Airline before the Commission of Inquiry". It is true that the reasons for the costs order open with a proposition about unnecessarily extending the hearing. But the passage develops and the later reasons go further. The words chosen convey that the punishment was not simply for prolonging the hearing. In particular the statements about cards in the pack are a reversion to the theme of the "Stance" section, with its exceedingly strong allegations in para 377 of "a pre-determined plan of deception" and "an orchestrated litany of lies".

Applying the well-settled principles already mentioned, we think that if in making those statements the Commissioner exceeded his terms of reference or acted in violation of natural justice, the costs order is not realistically severable from that part of the report and should be quashed. For the purposes of the present case that is sufficient to dispose of the argument based on *Reynolds v Attorney-General* (1909) 29 NZLR 24 that after a Commission has reported it is functus officio and beyond the reach of certiorari or prohibition.

Naturally the stance of the airline at the inquiry directed by the terms of reference was not included expressly in those terms. The argument presented in effect for the Commissioner on the question of jurisdiction is that comments, however severe, on the veracity and motives of witnesses were incidental to the carrying out of the express terms. We accept unhesitatingly that what is reasonably incidental is authorised (as was recognised in *Cock's* case at p 425) and also that to some degree any Commission of Inquiry has the right to express its opinion of the witnesses, much as a Court or statutory tribunal has that right.

But we think that it is a matter of degree. For present purposes it is not necessary to decide whether the law of New Zealand is still, as held in *Cock's* case, that a Commission of Inquiry cannot lawfully be constituted to inquire into allegations of crime. That issue may be raised more directly by the litigation regarding the Thomas Commission. The issue now to be decided is whether the Commissioner had powers, implied as being reasonably incidental to his legitimate functions of inquiry into the causes and circumstances of the crash, to make assertions amounting to charges of conspiracy to perjure at the inquiry itself.

In considering that issue the importance of not unreasonably shackling a Commission of Inquiry has to be weighed. It is also material, however, that such a charge is calculated to attract the widest publicity, both national and international. It is scarcely distinguishable in the public mind from condemnation by a Court of law. Yet it is completely without the safeguards of rights to trial by jury and appeal. In other words, by mere implication any Commission of Inquiry, whatever its membership, would have authority publicly to condemn a group of citizens of a major crime without the safeguards that invariably go with express powers of condemnation.

We are not prepared to hold that the Commissioner's implied powers went so far. We hold that he exceeded his jurisdiction in para 377.

If, contrary to the view just expressed, the Commissioner did have jurisdiction to consider allegations of organised perjury, natural justice would certainly have required that the allegations be stated plainly and put plainly to those accused. That was not done. If it had been done, what we have said earlier is enough to show that they could well have made effective answers.

So we conclude that in making the findings or allegations stated in para 377 of the report the Commission acted in excess of jurisdiction and contrary to natural justice. As previously mentioned, the conspiracy postulated in para 377 is evidently intended to include as participants the chief executive of the airline, the executive pilots and members of the navigation section. If the order for $150,000 costs is quashed on the ground that the statements about a pre-determined plan of deception and an orchestrated litany of lies were made without jurisdiction and contrary to natural justice, we think that substantial justice will be done to the company and those individuals. In our opinion that costs order must be quashed on those grounds as well as on the ground that it was invalid as to amount.

Further, during the proceedings in this Court there occurred developments which in themselves threw a different light on matters dealt with in the paragraphs under attack affecting Captain Gemmell particularly. These should be publicly recorded.

It was acknowledged by all parties, including the Commissioner, that the reference to Captain Gemmell in para 352, concerning a notebook belonging to Captain Collins, was a mistake. The Commissioner evidently had in mind some evidence given by Captain Crosbie, the welfare officer of the Airline Pilots Association. This disposes of any inference against Captain Gemmell that might be taken from that paragraph.

Much the same applies to the other paragraphs affecting him which are complained of. We have set them out in full and it will be seen that they all relate to two flight bags. It had seemed that para 359(1), in its context, might have conveyed

the impression that Captain Gemmell had removed these bags from the McMurdo store and brought them or their contents back from Antarctica. At our hearing, however, Mr Davison, who was one of the counsel for the Pilots Association both before the Commission and in this Court, made it clear responsibly and fairly that this is not suggested.

As to Captain Eden, it has already been stated that the transcript shows that the allegation expressed or implied in para 348 was never put to him. Having said so plainly, we need only add as regards this particular complaint that the allegation, although it would naturally have caused concern to Captain Eden and Air New Zealand, was not as serious as the others that are complained of.

Whether the Court has jurisdiction to quash particular passages in the report in addition to the costs order is a difficult and technical question. We prefer not to lengthen this judgment with an unnecessary discussion of it.

In modern administrative law, as a result of developments in both case and statute law, the power of the Courts to grant declarations and quash decisions is wider than was thought in the *Reynolds* case in 1909 (29 NZLR at 40). It may be that in a sufficiently clear-cut case the jurisdiction, either under the Act or at common law, will be found to extend to parts of Commission reports even when they are not linked with costs orders.

But in the end that jurisdictional question does not have to be decided in this case, and we reserve our opinion on it. If the jurisdiction does go so far, it must be discretionary, as the grant of declarations always is. The Court would have to be satisfied that grounds so strong as to require it to act in that unusual way had been made out. In our opinion they would be made out clearly enough as regards para 377, which stands out from the general body of the report. But the quashing of the costs order because of its association with that paragraph is enough to do justice there.

The position is less clear as regards the other paragraphs complained of. For various reasons they are all in a marginal category. What has been said in this judgment may help to enable them to be seen in perspective. On balance we would not be prepared to hold that as to these other paragraphs the applicants have made out a sufficiently strong case to justify this Court in interfering, assuming that there is jurisdiction to do so.

In the result, the application for review having succeeded on the main issue, we see no need to and are not prepared to go further in granting relief. Our decision is simply that the $150,000 costs order be quashed on the grounds already stated.

As to the costs of the present proceedings, they should be reserved, as there has been no argument on the matter.

Order quashing the Commission's $150,000 costs order.

Solicitors for the first and second applicants: *Russell, McVeagh, McKenzie, Bartleet & Co* (Auckland).

Solicitors for the third applicant: *Sheffield, Young & Ellis* (Auckland).

Solicitors for the first, fourth and sixth respondents: *Crown Law Office* (Wellington).

Solicitors for the fifth respondent: *Keegan, Alexander, Tedcastle & Friedlander* (Auckland).