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Mahon v Air New Zealand Ltd and others

PRIVY COUNCIL

LORD DIPLOCK, LORD KEITH OF KINKEL, LORD SCARMAN, LORD BRIDGE OF HARWICH AND LORD TEMPLEMAN

5, 6, 7, 11, 12, 13, 14, 18, 19, 20, 21, 25, 26, 27 JULY, 20 OCTOBER 1983

Natural justice - Royal commission - Duty to hear parties - Opportunity to rebut proposed findings - Royal commission making finding that witnesses had engaged in conspiracy to commit perjury before commission - Witnesses not given opportunity to rebut finding - Whether Royal commission finding made in breach of rules of natural justice.

Following an air disaster in which a civil aircraft owned by the defendant airline crashed in Antarctica killing the 257 passengers and crew on board, the appellant, a judge of the New Zealand High Court, was appointed to be a royal commission to inquire into the cause and circumstances of the disaster. After a lengthy inquiry the judge produced a detailed report in which he found that the single, dominant and effective cause of the crash was the act of the airline in changing the computer flight track of the aircraft to fly directly at an Antarctic volcano, Mt Erebus, without telling the aircrew, who had been briefed on a flight path that would have taken the aircraft well to the west of Mt Erebus, and that that mistake was directly attributable to incompetent administrative procedures within the airline. The judge also found that the chief executive of the airline, certain of its executive pilots and members of the airline's navigation section had engaged in 'a pre-determined plan of deception [as] part of an attempt to conceal a series of disastrous administrative blunders' and that their evidence amounted to an 'orchestrated litany of lies'. In particular, the judge found that there had been a deliberate destruction, on the orders of the airline's chief executive, of all documents disclosing the mistake in changing the aircraft's flight track and that there had been a deliberate concealment from the relevant authorities of a change in the flight path used by the airline on Antarctic flights. The judge accordingly ordered the airline to pay $NZ150,000 by way of contribution to the cost of the inquiry. The airline applied for judicial review of the costs order in the royal commission report. The application was removed into the Court of Appeal, which held that the order should be set aside because the judge had acted contrary to natural justice and in excess of his jurisdiction in finding that members of the airline's management had conspired to

commit perjury at the inquiry. The judge appealed to the Privy Council against the setting aside of the costs order.

Held - (1) A tribunal making a finding in the exercise of an investigative jurisdiction (such as a royal commission) was required to base its decision on evidence that had some probative value, in the sense that there had to be some material that tended logically to show the existence of facts consistent with the finding and that the reasoning supporting the finding, if disclosed, was not logically self-contradictory (see p 210 *b* to *d*, post);

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dictum of Diplock LJ in *R v Deputy Industrial Injuries Comr, ex p Moore* [1965] 1 All ER at 94 applied.

(2) A tribunal exercising an investigative jurisdiction was also required to listen fairly to any relevant evidence conflicting with, and any rational argument against, a proposed finding that a person represented at the inquiry whose interests (including his career and reputation) might be affected wished to place before the inquiry. Accordingly, a person represented at the inquiry who would be adversely affected by a decision to make a finding was entitled to be informed that there was a risk of the finding being made and to be given the opportunity to adduce additional material of probative value which might deter the tribunal from making that finding (see p 210 *b* to *e*, post); dictum of Diplock LJ in *R v Deputy Industrial Injuries Comr, ex p Moore* [1965] 1 All ER at 95 applied.

(3) Since the judge's findings that there had been a deliberate destruction of documents and concealment of the change in flight path had been made in the absence of any probative evidence and without giving the persons affected by those findings the opportunity to rebut them, and since those findings formed the basis of the judge's conclusion that members of the airline's management had conspired to commit perjury, which in turn was a major influence in inducing the judge to make the costs order, it followed that the costs order had been made in breach of the rules of natural justice and had rightly been set aside. The judge's appeal would accordingly be dismissed (see p 215 *h j*, p 216 *f g*, p 217 *d* to *f*, p 219 *b c*, p 220 *b* to *h*, p 221 *b* to *g*, p 222 *g* to *j* and p 224 *a b j*, post).

Notes

For the right to be heard before a tribunal reaches a decision, see 1 *Halsbury's Laws* (4th edn) paras 74-76, and for cases on the subject, see 1(1) *Digest* (Reissue) 200-201, 1172-1176.

Cases referred to in judgment

Cock v A-G (1909) 28 NZLR 405, NZ CA.

R v Deputy Industrial Injuries Comr, ex p Moore [1965] 1 All ER 81, [1965] 1 QB 456, [1965] 2 WLR 89, CA.

Royal Commission on Thomas Case, Re [1982] 1 NZLR 252, NZ CA.

Appeal

The Hon Peter Thomas Mahon (the judge) appealed by special leave granted on 22 December 1982 against the decision of the New Zealand Court of Appeal (Woodhouse P, Cooke, Richardson, McMullin and Somers JJ) on 22 December 1981 quashing an order made by the judge in his capacity as the Royal Commission appointed to inquire into the cause and circumstances of the crash on Mt Erebus, Antarctica, of a DC10 aircraft operated by the first respondent, Air New Zealand Ltd, by which the judge ordered Air New Zealand Ltd to pay the sum of $NZ150,000 by way of contribution to the public cost of the royal commission inquiry. The second and third respondents were Mr M R Davis and Captain I H Gemmell, who were respectively the chief executive and technical flight manager of Air New Zealand Ltd at the time of the crash and who joined Air New Zealand Ltd in applying for judicial review of certain parts of the report made by the judge following the royal commission inquiry. The fourth respondent was the Attorney General for New Zealand, who was joined as a respondent in the Court of Appeal to represent the public interest. The facts are set out in the judgment of the Board.

Sir Patrick Neill QC, W D Baragwanath QC (of the New Zealand Bar), Nicolas Bratza and R S Chambers (of the New Zealand Bar) for the judge.

Robert Alexander QC, L W Brown QC and R J McGrane (both of the New Zealand Bar) with him, for Air New Zealand Ltd.

D A R Williams and L L Stevens (both of the New Zealand Bar) for Mr Davis and Captain Gemmell.

Robert Smellie QC (of the New Zealand Bar), David Widdicombe QC and N C Anderson (of the New Zealand Bar) for the Attorney General of New Zealand.

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20 October 1983. The following judgment was delivered.

LORD DIPLOCK.

Introduction

This appeal to Her Majesty in Council is part of the unhappy aftermath of what in terms of loss of human life and family bereavement was the worst disaster to strike New Zealand since the end of the 1939-45 war. It happened on 28 November 1979, when, in the hours of broad daylight, a DC10 aircraft, operated by Air New Zealand Ltd (ANZ) and engaged on a sight-seeing trip to the Antarctic, flew at a height of 1,500 feet straight into the lower snow-clad slopes of a 12,500 feet high volcano, Mt Erebus, causing the instantaneous death of all the 237 passengers and 20 members of the crew who were aboard.

As soon as the news reached Auckland that the aircraft was still missing somewhere in Antarctica after the time had passed when the fuel on board would have been exhausted, a statutory investigation was set on foot. It was conducted by the Chief Inspector of Air Accidents, Mr R Chippindale. Such an investigation is held in private; it leads to a report by the inspector to the Minister of Transport in which, among other matters, he expresses such conclusion as he has been able to form as to the probable cause of the accident. The decision whether the inspector's report shall be published and, if so, when rests with the minister.

In the case of Mr Chippindale's report on the Mt Erebus disaster (the Chippindale report) the minister caused it to be published on 12 June 1980, the day after the formal appointment by the Governor-General of a royal commission to inquire into the cause and circumstances of the crash. He appointed as sole commissioner a distinguished judge of the High Court of New Zealand of some ten years' standing, Mahon J (hereafter referred to as 'the judge'), who is the appellant in the appeal to this Board. It will become necessary for their Lordships to refer to some specific provisions in his terms of reference, but this may conveniently be left until later in this judgment, which unavoidably must be lengthy.

The original warrant of appointment required the judge to report his findings and opinions to the Governor-General not later than 31 October 1980. This proved to be much too short a time for what turned out to be a highly complicated and wide-ranging investigation; and no less than four successive extensions were called for of which the last expired on 30 April 1981. The judge's report (the royal commission report) was in fact presented to the Governor-General on 16 April 1981.

It is convenient at this early stage to mention briefly three salient facts that were known both to Mr Chippindale and to the judge when they wrote their respective reports. Those salient facts, the evidence about which it will be necessary for their Lordships later to examine in some detail, were *first* that the pilot of the ill-fated aircraft, Captain Collins, and the flight officer, First Officer Cassin, had been briefed for the flight, some 18 days previously, on a flight plan which incorporated co-ordinates of latitude and longitude of its southernmost waypoint that would have taken the aircraft on a route passing over an area of ice-covered sea to the west of Mt Erebus and well clear of it. The *second* was that shortly before the departure of the flight on 28 November 1979 the

co-ordinates of the southernmost waypoint of the flight plan had been altered into one that flew directly at and over Mt Erebus and it was this latter flight plan that, at the pre-dispatch briefing on 28 November, was supplied to the aircrew to be fed into the aircraft's computer for use as the principal navigational aid. The *third* was that neither Captain Collins nor First Officer Cassin nor any other member of the aircrew was told of the change. Unfortunately, though the omission is readily explicable by the pressure of time within which the judge was required to produce his report, he overlooked para 1.17.7 of the Chippindale report, which made it crystal clear that the third of these salient facts, as well as the first and second, had been disclosed to Mr Chippindale in the course of his statutory investigation.

The Chippindale report and the royal commission report reached different conclusions

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as to the effective cause of the disaster. Mr Chippindale in the paragraph of his report which dealt with probable cause said (para 3.37):

> '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.'

In effect, although there are criticisms elsewhere in his report of management practices of ANZ in relation to Antarctic flights, Mr Chippindale ascribed the principal blame for the tragedy to pilot error.

The judge's view was very different. It is summarised in paras 393 and 394 of the royal commission report, which can helpfully be prefaced by an introductory sentence extracted from para 392:

> '392 ... The dominant cause of the disaster was the act of the airline in changing the computer track of the aircraft without telling the aircrew ...
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> 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.'

These findings, which fall fairly and squarely within the royal commission's terms of reference and for which there was ample supportive evidence at the inquiry before the judge, were not sought to

be challenged in the proceedings for judicial review of the royal commission report that were brought by ANZ in the High Court and removed into the Court of Appeal, whose judgment in that matter (see [1981] 1 NZLR 618) is the subject of the present appeal. They are not susceptible to challenge in proceedings of this kind; but their Lordships have had occasion to read and to reread with close attention before, during and since the hearing of the appeal all 167 printed pages of the royal commission report. Having done so, they would desire to place on record their tribute to the brilliant and painstaking investigative work undertaken by the judge (with the support of counsel appointed to assist him) in the course of hearings which lasted for 75 days and other investigations that he or counsel assisting him undertook in addition to the public hearings. Deserving of mention also are the patience and courtesy with which those hearings were conducted by the judge.

The judge and those counsel who were assisting him, however, laboured under a severe handicap to which, in their Lordships' view, the unfortunate sequelae of the royal commission report are in large part attributable. That handicap was pressure of time. The Chippindale report, ascribing to pilot error the principal blame for this dreadful accident from the shock of which the people of New Zealand had not yet recovered, had just been published. It is understandable that the Executive Council should want the result of the inquiry by the royal commission to be made available to the public with as little delay as possible; but the short time limit of 31 October 1980 for reporting that was set by the first royal warrant meant that by 23 June, when, by acting with the utmost expedition, the judge was able to hold the preliminary hearing to discuss procedure, he had only a little over four months to undertake all necessary inquiries and investigations in New Zealand, Antarctica and, as it turned out, in other countries too and to draft his report thereon.

The procedure followed at the hearings

The preliminary hearing was attended by counsel representing ten parties, of whom for present purposes it is necessary to list only ANZ, the Civil Aviation Division (CAD) of

the Ministry of Transport, the estates of Captain Collins and of First Officer Cassin and a consortium of estates of deceased passengers. The New Zealand Airline Pilots Association (ALPA) were not represented at that preliminary hearing but shortly afterwards were added as parties to the inquiry and through their counsel called witnesses and took a very active part. The procedure to be adopted at the inquiry was outlined by counsel assisting the judge. He proposed that apart from Mr Chippindale, who would give his evidence first, witnesses should be called by the interested parties and in an order corresponding to the chronology of the events to which they would speak, an order that was broadly followed to begin with but to which it later proved impracticable to adhere. At that stage it was contemplated that the parties represented should furnish to counsel assisting the judge written briefs of the evidence to be given by their witnesses and that this should be done well in advance of those witnesses being called, so as to enable the evidence to be collated and, if need be, elaborated. But, under pressure of time, this sensible proposal had to be abandoned, and the practice

that in fact was followed was that copies of the written brief of the evidence which each witness was intending to give were distributed to the judge, to counsel assisting him and to counsel for other parties represented, at the moment when the particular witness went into the witness box and not before. This procedure, departing as it did from that which had originally been intended, had the inevitable consequence that facts to which the judge, in his report, was ultimately going to attach the utmost significance seemed to be emerging only piecemeal as successive witnesses were called.

An investigative inquiry into facts by a tribunal of inquiry is in marked contrast to ordinary civil litigation, the conduct of which constitutes the regular task of High Court judges, in which their experience of the methodology of decision-making on factual matters has been gained. Where facts are in dispute in civil litigation conducted under the common law system of procedure, the judge has to decide where, on the balance of probabilities, he thinks that the truth lies as between the evidence which the parties to the litigation have thought it to be in their respective interests to adduce before him. He has no right to travel outside that evidence on an independent search on his own part for the truth; and, if the parties' evidence is so inconclusive as to leave him uncertain where the balance between the conflicting probabilities lies, he must decide the case by applying the rules as to the onus of proof in civil litigation. In an investigative inquiry, on the other hand, into a disaster or accident of which the commissioner who conducts it is required, as the judge was in the instant case, to inquire into and to report on 'the cause or causes of the crash', it is inevitable, particularly if there are neither survivors nor eye-witnesses of the crash, that the emergence of facts, and the realisation of what part, if any, they played in causing the disaster and of their relative importance, should be more elusive and less orderly, as one unanticipated piece of evidence suggests to the commissioner, or to particular parties represented at the inquiry, some new line of investigation that it may be worth while to explore, whether, in the result, the exploration when pursued leads only to a dead end or, as occurred in one particular instance in the present case, it leads to the discovery of other facts which throw a fresh light on what actually happened and why it happened.

The emergence of the evidence piecemeal, which was a consequence of the abandonment under pressure of time of the original proposal that counsel for the parties represented should furnish in advance the written briefs of witnesses for collation and for elaboration where necessary, was not, in the event, compensated for by affording to those counsel an opportunity of giving to the judge at the outset of the inquiry a summary, either orally or in writing, of the salient facts to which the evidence that they proposed to call would be directed. In the circumstances as they presented themselves at that early stage to all concerned in the inquiry, this too is understandable. Nevertheless, looking at it as their Lordships are able to do with the benefit of hindsight, it seems to them that, taken in conjunction with the failure to adhere to the plan for the advance furnishing of written briefs, the procedure adopted had unfortunate effects in colouring the judge's view of what he referred to as the 'stance' which the management of ANZ

had adopted as soon as the news of the crash had reached it and to which he considered it had adhered from beginning to end of the inquiry. It was what the judge said and did about that so-called 'stance' that made his report vulnerable to judicial review.

The governing statutes

There are two fields of New Zealand law that are particularly relevant to this appeal. The first is the law relating to the appointment, functions and powers of royal commissions of inquiry; the second is the law relating to judicial review.

The use of royal commissions for the purpose of conducting inquiries into matters of public importance is much more common in New Zealand than in the United Kingdom. Between 1972 and 1981 there were 15 such commissions, many of these consisting of, or presided over by, a judge of the Supreme Court. Royal commissions are appointed by the Governor-General acting on the advice of the Executive Council. The source of his authority to do so is twofold: the letters patent of 11 May 1917 and the Commissions of Inquiry Act 1908(as subsequently amended). As in the instant case, the warrant of appointment of a royal commission habitually relies on both the prerogative and the statutory source of power.

Section 2 of the Commissions of Inquiry Act 1908 empowers the Governor-General to appoint any person or persons to be a commission to inquire into and report on any question arising out of or concerning, among other things--

> '(e) Any disaster or accident (whether due to natural causes or otherwise) in which members of the public were killed or injured or were or might have been exposed to risk of death or injury.'

Where the commission consists of or includes a judge of the Supreme Court, s 13 gives to him and to any other members of the commission, for all the purposes of the inquiry--

> 'the same powers, privileges, and immunities as are possessed by a Judge of the Supreme Court in the exercise of his civil jurisdiction under the Judicature Act 1908.'

So whatever is written about anyone to his discredit in the report of a commission so constituted is the subject of absolute privilege under the law of defamation, devoid though the allegation may be of any factual foundation and notwithstanding (though this is not suggested in the instant case) that it also be inspired by malice. So he who has been traduced is deprived of any remedy by way of civil action to vindicate his reputation.

Royal commissions by the terms of their appointment have a wide discretion as to the manner in

which their inquiries are to be conducted. Having regard to the nature of their functions royal commissioners are not required to follow the rules of evidence applicable to civil litigation; but they are vested with the power to summon witnesses to give evidence on oath and to produce documents; a knowingly untrue statement made by a witness to a royal commission on oath amounts to the crime of perjury.

It lies within the discretion of the royal commission to decide in the first instance who shall be cited as parties to the inquiry; but by s 4A of the Act (inserted by amendment in 1958):

> 'Any person interested in the inquiry shall, if he 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 as if he had been cited as a party to the inquiry.'

It was pursuant to this provision that ALPA became represented at the inquiry in the instant case.

Finally as respects the statutory powers of tribunals of inquiry, attention must be drawn to the important provision contained in s 11 of the Act:

> '*Power to award costs.* The Commission, upon the hearing of an inquiry, may order that the whole or any portion of the costs of the inquiry or of any party thereto
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> *[1984] 3 All ER 201 at 207*
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> shall be paid by any of the parties to the inquiry, or by all or any of the persons who have procured the inquiry to be held.'

Their Lordships turn next to the law of judicial review as it is currently applied in New Zealand. The extension of judicial control of the administrative process has provided over the last 30 years the most striking feature of the development of the common law in those countries of whose legal systems it provides the source; and although it is a development that has already gone a long way towards providing a system of administrative law as comprehensive in its content as the droit administratif of countries of the civil law, albeit differing in procedural approach, it is a development that is still continuing. It has not yet become static either in New Zealand or in England.

Their Lordships' consideration of the reports of cases from New Zealand, England and other Commonwealth jurisdictions that have been helpfully included in the documents provided for them by the parties to this appeal does not leave them in any doubt that the principles underlying the exercise of judicial review in New Zealand and in England, at any rate, are the same. But the machinery and practices by which governmental power, central or local, is exercised to control or otherwise to affect the activities of private citizens in the two countries are not identical; and the

detailed application in New Zealand of the principles of judicial review to particular indigenous kinds of administrative action is, in their Lordships' view, best left to the New Zealand courts without obtrusion by this Board where such a course is not essential to enable an appeal to be disposed of by Her Majesty in Council. In point of fact the Judicature Amendment Act 1972, which introduced the procedure of application for review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, anticipated by five years the adoption of an analogous, though by no means identical, procedural reform in England by the remodelling of RSC Ord 53. So this is a procedure of which, in a rapidly developing field of law, the New Zealand courts have had practical working experience that is twice as long as the experience that English courts have had in operating their own reformed procedure.

The Judicature Amendment Act 1972 was itself amended in 1977. Their Lordships will refer to the Act as so amended as the Judicature Amendment Act. The only provisions of the Act that it is necessary to cite for the purposes of this appeal are s 4(1) to (3) and parts of s 3 (the interpretation section). Section 4(1) to (3) provides:

> '*Application for Review.*--(1) On an application by motion which may be called an application for review, the Supreme Court may, notwithstanding any right of appeal possessed by the applicant in relation to the subject-matter of the application, by order grant, in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power, any relief that the applicant would be entitled to, in any one or more of the proceedings for a writ or order of or in the nature of mandamus, prohibition, or certiorari or for a declaration or injunction, against that person in any such proceedings.
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> (2) Where on an application for review 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, instead of making such a declaration, set aside the decision.
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> (2A) Notwithstanding any rule of law to the contrary, it shall not be a bar to the grant of relief in proceedings for a writ or an order of or in the nature of certiorari or prohibition, or to the grant of relief on an application for review, that the person who has exercised, or is proposing to exercise, a statutory power was not under a duty to act judicially; but this subsection shall not be construed to enlarge or modify the grounds on which the Court may treat an applicant as being entitled to an order of or in the nature of certiorari or prohibition under the foregoing provisions of this section.
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> (3) Where in any of the proceedings referred to in subsection (1) of this section the Court had, before the commencement of this Part of this Act, a discretion to

> refuse to grant relief on any grounds, it shall have the like discretion, on like grounds, to refuse to grant any relief on an application for review.'

Section 3, so far as material, provides:

> '*Interpretation.* In this Part of this Act, unless the context otherwise requires,--"Decision" includes a determination or order: "Statutory power" means a power or right conferred by or under any Act ... *(b)* To exercise a statutory power of decision ... *(e)* To make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person: "Statutory power of decision" means a power or right conferred by or under any Act ... to make a decision deciding or prescribing or affecting--*(a)* The rights, powers, privileges, immunities, duties, or liabilities of any person ... '

The costs order in the royal commission report

In the instant case, in circumstances and for expressed reasons that it will be necessary for their Lordships to discuss in detail, the judge incorporated in his report an order under s 11 of the Commissions of Inquiry Act 1908 that ANZ should pay to the Department of Justice the sum of $150,000 (the costs order) by way of contribution to the public cost of the inquiry, which amounted in all to $275,000.

It is not and could not sensibly be disputed that the costs order was made in the exercise of a statutory power of decision and that to this extent, if to no other, the royal commission report was subject to review under s 4 of the Judicature Amendment Act.

The order that ANZ should pay more than half the costs of the inquiry was in the final part of the report which bore the heading 'Appendix'. It appeared at the end of the very last paragraph of that appendix which also contained directions, which ANZ did not seek to make the subject of judicial review, that the costs and disbursements of ALPA and the estates of Captain Collins and First Officer Cassin should be paid as to two-thirds by ANZ and one-third by CAD. The reasons for the judge's ordering ANZ to pay the greater part of the public cost of the inquiry were explained in the immediately proceding unnumbered paragraphs. The explanation in turn harked back to, and became intelligible only by reference to, detailed findings by the judge contained in various numbered paragraphs in earlier parts of the report and culminating in his finding in para 377, expressed in the following terms:

> '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 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 parties to the plan of deception and conspiracy to commit perjury which this paragraph charges are readily identified in the body of the report as consisting of Mr M R Davis, the chief executive of ANZ, Captain Eden, the director of flight operations, Captains Gemmell, Grundy, Hawkins and Johnson, senior officers employed in the department responsible for flight operations and sometimes referred to as 'executive pilots', since they divided their time between spells of actual flying duties and executive work at the headquarters of ANZ in the flight operations division. Another executive pilot, Captain Wilson, who was responsible for briefing pilots and navigators for Antarctic flights, was acquitted by the judge of joining in the litany of lies but his withdrawal from the predetermined plan of deception was referred to in para 289(k) of the report as seeming to have

'the hallmarks of a last-minute decision'. The report also

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identified as co-conspirators all four members of the navigation section of flight operations, namely Messrs Amies, Brown, Hewitt and Lawton.

The application for judicial review

The findings of the judge in this and certain earlier paragraphs as well as his decision mulcting ANZ in the sum of $150,000 as a contribution to the public cost of the inquiry were sought by ANZ to be made the subject of judicial review in proceedings started on 20 May 1981, to which the judge was made a respondent. However, although he was represented at the review proceedings his representatives took no active part. The Attorney General was made a respondent as representing the public interest in maintaining the costs order and it was he who in the Court of Appeal defended it and other parts of the report that came under attack.

In respect of para 377 and the other findings of which complaint was made the relief sought in the application for review was for orders that the findings should be set aside and for declarations that they had been made in excess of jurisdiction and in circumstances involving unfairness and breaches of the rules of natural justice. The relief sought in respect of the costs order was that it be set aside.

As mentioned earlier, the application for review was removed from the High Court into the Court of Appeal and heard by all five regular members of that Court presided over by Woodhouse P (see [1981] 1 NZLR 618). Although two separate judgments were delivered, one by Woodhouse P joined by McMullin J (the Woodhouse judgment), the other by Cooke, Richardson and Somers JJ (the Cooke judgment), both judgments were at one in holding that on reading the report an ordinary New Zealander, who had been exposed to the publicity that had followed on the disaster and the successive investigations by Mr Chippindale and the royal commission into its causes, would understand the reason for the costs order having been imposed on ANZ to be to punish it for organising a predetermined plan of deception, including conspiracy by members of the management of ANZ to commit perjury, with which para 337 had charged them. It was submitted to their Lordships at the hearing before the Board that there is no linkage between the costs order and any charges earlier in the report of conspiracy to deceive or to commit perjury. Their Lordships would in any event hesitate long before rejecting the unanimous opinion of the members of a New Zealand Court of Appeal how an ordinary New Zealander reading a report published for the information of New Zealanders would understand it; but their Lordships' own impressions on first and subsequent readings of the report have coincided with those of the members of the Court of Appeal.

The Court of Appeal were likewise unanimous that ANZ was entitled to have the costs order set

aside, on the ground that the judge had made it for reasons on which in law he was not entitled to rely, ie his finding in para 377 of a conspiracy by members of the management of ANZ to commit perjury at the inquiry. In both the Woodhouse judgment and the Cooke judgment it was held that in making this finding the judge had acted contrary to natural justice and in excess of jurisdiction. The only significant difference between the two judgments is that Woodhouse P and McMullin J would have been prepared to go further than the other three members of the court and, in addition to setting aside the costs order, would have dealt with the findings in para 377, together with another paragraph of the report, para 348, by either setting them aside or making declarations that these paragraphs were invalid.

For reasons to be explained later their Lordships have not found it necessary, for the purpose of disposing of this appeal, to go into the questions whether, in making his finding in para 377, the judge acted in excess of his jurisdiction as a royal commission or whether the court itself, on an application for review of a royal commission report under s 4 of the Judicature Amendment Act, had jurisdiction to set aside that paragraph or to declare it to be invalid; nor do their Lordships consider it desirable that they should make this an occasion for doing so. The appeal to this Board can, in their Lordships' view, be disposed of on the ground that in the process of arriving at the finding set out in para 377, which was the reason why he made the costs order, the judge failed by inadvertence

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to observe the rules of natural justice applicable to a decision to make a finding of this gravity that, put at its highest in the judge's favour, was collateral but not essential to his decisions on any of those matters on which his terms of reference required him to report.

The rules of natural justice that are germane to this appeal can, in their Lordships' view, be reduced to those two that were referred to by the English Court of Appeal in *R v Deputy Industrial Injuries Comr, ex p Moore* [1965] 1 All ER 81 at 94-95, [1965] 1 QB 456 at 488-490, which was dealing with the exercise of an investigative jurisdiction, though one of a different kind from that which was being undertaken by the judge inquiring into the Mt Erebus disaster. The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision on evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.

The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based on *some* material that tends logically to show the existence of facts consistent with the finding

and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.

The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, *might* have deterred him from making the finding even though it cannot be predicated that it would inevitably have had that result.

Any determination whether the judge's finding of fact in para 377 of the royal commission report was flawed by a combination of failures to observe these two rules calls for some examination by their Lordships of what evidence there was at the inquiry of the alleged conspiracy and to what extent allegations of conspiracy were put to members of the management identified in the report as being parties to it. Since this task has been undertaken in the judgments of the Court of Appeal, to which reference may be made, their Lordships will endeavour to avoid mere repetition of facts that are to be found stated in these judgments.

The fatal flight of 28 November 1979 was the fourteenth in a series of sightseeing flights to Antarctica that ANZ had undertaken. The history concerning the previous flights is set out in meticulous detail in the royal commission report and a comprehensive summary of it can be found in the Woodhouse judgment in the Court of Appeal. The findings of the judge as to the cause of the disaster, viz '... the mistake made by those airline officials who programmed the aircraft to fly directly at Mt. Erebus and omitted to tell the aircrew', and as to the occurrence of a whole series of previous inexcusable blunders and slipshod administrative practices by the management of ANZ, of which this mistake was the result, are for the most part also dealt with in one or other of the judgments of the Court of Appeal. That such blunders did occur has not been the subject of any challenge in the proceedings for judicial review of the royal commission report. Their Lordships will therefore try, so far as possible, to avoid repeating an already twice-told tale and will concentrate on the three matters which have been relied on by his counsel as entitling the judge, without any breach of either of the rules of natural justice to which their Lordships have referred, to find that the senior officials responsible for the management of the flight operations of ANZ were guilty of a predetermined plan of deception, including conspiracy to commit perjury.

The matters canvassed at the hearing of the appeal to this Board

The three matters were: (1) the deliberate destruction on the orders of Mr Davis, the chief executive, of all documents which would disclose the mistake that had been made

over the co-ordinates in the flight plan used for briefing Captain Collins and the different co-ordinates in the flight plan issued to the aircrew for use in the aircraft's computer on the actual

flight; (2) the concealment that there had been an intentional adoption by the airline management, as the southernmost waypoint for their Antarctic sightseeing flights, of the waypoint used at Captain Collins's briefing with co-ordinates that would take the aircraft over ice-covered sea to the west of Mt Erebus and well clear of it; (3) the denial by senior officials of ANZ that they knew that aircraft engaged on sightseeing flights to Antarctica, when they got there in visual meteorological conditions (VMC) with visibility at 20 km or more, flew at heights lower than 6,000 feet.

It was these matters that were canvassed in exhaustive (though not, in view of the importance of the case, excessive) detail by counsel for the appellant judge and the respondent airline during the 14 days of hearings by the Board. Their Lordships wish to express their appreciation of the helpful way in which this appeal has been conducted not only by leading counsel for the parties who addressed their Lordships orally but also by the other members of their respective legal teams, who were assiduous in supplying written notes, collating the references extracted from the mass of documents that were before the Board that bore on particular issues and summarising the submissions on those issues of the party whom they represented. By these means the burden on the Board of hearing and determining this difficult and complicated case was greatly eased.

Topography and flight plans for Antarctic flights

To put into their true perspective the three matters that were canvassed before their Lordships it is necessary to mention briefly the topography of the area in Antarctica that was visited in the course of the series of sightseeing flights. The flights in DC10 aircraft were non-stop from Auckland to a southernmost point at or adjacent to a United States military Antarctic base known as McMurdo which provided air traffic control (ATC) consisting of a tactical air navigation system (TACAN) and a non-directional beacon (NDB) situated some two miles from the TACAN. There was an ice airstrip at McMurdo known as Williams Field but it was not one at which a DC10 aircraft could land, and after sightseeing in the area the aircraft turned round and returned direct to Christchurch. This was its first and only stopping place.

McMurdo is situated on a peninsula forming the most southerly part of Ross Island, on which island there are three mountains of which the highest is the 12,500 feet Mt Erebus. To the south Ross Island adjoins and merges into the Ross ice-shelf, which forms the southern boundary of the Ross Sea. A part of the Ross Sea between 40 and 32 nautical miles in width, known as McMurdo Sound, lies to the west of Ross Island and separates it from the coast of that portion of the Antarctic continent that is called Victoria Land. The southern areas of the Ross Sea, including in particular McMurdo Sound, are ice-covered for much of the year, but the ice breaks up as the summer advances and areas of water are visible between the ice floes.

The flight plan of an aircraft undertaking an Antarctic sightseeing flight comprised a series of successive waypoints on the route, of which the co-ordinates of latitude and longitude were given,

together with the heading and distance to the next waypoint. The flight plan, when fed, together with other information, into the aircraft's computer at the beginning of the flight, enabled the aircraft to be navigated automatically and with great accuracy on a pre-determined course (referred to as 'nav track'). At the pilot's discretion, the nav track can be switched off and the aircraft navigated manually on such other course as the pilot may think preferable. This is known as changing from nav track to 'heading select'. On the nav track for the Antarctic flights the penultimate waypoint on the outward run was at Cape Hallett, a geographical feature towards the northern tip of the coast of Victoria Land at a distance from McMurdo of 337 miles. From Cape Hallett south to McMurdo it was possible to fly direct over the Ross Sea and down McMurdo Sound and during the journey to maintain contact with ATC at McMurdo. This was the route that was adopted by US military aircraft flying to and from McMurdo from the north. After reaching McMurdo and completing sightseeing the ANZ flights were programmed to return to Christchurch.

[1984] 3 All ER 201 at 212

A brief mention is also needed of what had happened on previous flights so that it may be understood what significance is properly to be attached to the practice of 'low flying' that had been adopted by pilots on previous Antarctic flights. Some of the airline officials (untruthfully as the judge found) professed to be unaware of the practice. The history of these earlier flights is set out in the Woodhouse judgment. Suffice it to say here that the two pioneer flights in February 1977 were planned with a nav track approved by CAD that took aircraft on the last stage of the outward journey on a heading from the waypoint at Cape Hallett that passed directly over Mt Erebus to McMurdo at a stipulated minimum altitude of 16,000 feet. For the October and November flights in 1977, of which there were four, the minimum authorised altitude after the aircraft had crossed Mt Erebus was reduced from 16,000 feet to 6,000 feet in an area to the south of the NDB at McMurdo Base if VMC subsisted there with visibility of 20 km or more.

Low flying

On a sightseeing flight strict adherence to the flight path from Cape Hallett over Mt Erebus to McMurdo Base rather than down McMurdo Sound, if VMC subsisted there and the assistance of ATC at McMurdo Base was available, did not make sense from the point of view of sightseeing nor was it necessary from the point of view of navigation or safety. Similarly, the maintenance of a minimum altitude in VMC was unhelpful and unnecessary. In such conditions there could be no objection to flights at altitudes as low as 1,500 feet down McMurdo Sound and in the neighbourhood of McMurdo Base. The judge so found in para 150 of his report and expressed the opinion that the formal approval of CAD and the US authorities to such practices as respects route and minimum altitude would have been automatic. It is therefore not surprising that the highly skilled and experienced pilots who were in charge of flights from October 1977 onwards treated themselves as having a discretion to diverge laterally in VMC from the original official nav track which would have taken them in a straight line from Cape Hallett to McMurdo over Mt Erebus, and to fly instead on heading select down McMurdo Sound to McMurdo on whatever track and at whatever altitude above it that information obtained from ATC at McMurdo, with whom they were

able to maintain continuous communication, indicated would best serve the purpose of sightseeing. All this occurred quite openly. Senior officials of CAD, as the judge found, knew about it; Mr Chippindale, in the course of his investigation immediately after the disaster, was made aware that the practice of low-flying deviation was not understood by pilots to be specifically forbidden by the pre-flight briefing. He refers to this in his report and, indeed, accounts for what he believed to have been the failure of pilots to discover that the co-ordinates of the southernmost waypoint on the flight plan were 2 West of the co-ordinates of McMurdo itself by the fact that in all flights subsequent to the making of the error which occurred in October 1978 the pilots had approached the area in VMC and taken routes down McMurdo Sound on heading select instead of on nav track and had relied on ATC at McMurdo to advise them as to the appropriate altitude at which to fly, having regard to the height of the cloud base (if any) below which VMC subsisted.

Under the heading 'Compliance by pilots with minimum safe altitudes' the judge devoted 21 paragraphs of his report to evidence of flying down McMurdo Sound and in the vicinity of McMurdo Base at altitudes of less than 6,000 feet. Apart from Captain Wilson, who had been pre-flight briefing officer for Antarctic flights in 1978 and 1979 and had said in evidence that in his briefings he had referred to a discretion to descend to less than 6,000 feet in VMC with visibility of not less than 20 km, the effect of the evidence given by the other executive pilots at the inquiry was that they had no 'specific' knowledge (the adjective is the judge's) of flights at below 6,000 feet. Some of them had denied all knowledge that this occurred, others conceded that they had heard rumours of flights being undertaken at lower altitudes in VMC but their notice had not been drawn to it specifically and they took no action about it.

Their Lordships accept unreservedly that the judge was entitled to take the view that, on this particular matter, the evidence given by several of the executive pilots at the inquiry was false. But, even though false, there are two reasons why it cannot have

formed part of a predetermined plan of deception adopted in 'an attempt to conceal a series of disastrous administrative blunders'. In the first place, to permit flights down McMurdo Sound and in the McMurdo area at levels ranging from 1,500 to 3,000 feet in VMC conditions with visibility not less than 20 kms was not a blunder at all. It was a method of conducting the sightseeing flights that the judge himself commended in para 223 of the royal commission report as complying with the Civil Aviation regulations and as preferable to maintaining 6,000 feet as a minimum permitted altitude. In the second place, the only stipulated minimum altitude which was of any relevance to the occurrence of the disaster was the 16,000 feet necessary to be maintained for a safe flight directly over Mt Erebus. If, in seeking to support the case put by ANZ that this minimum altitude should have been strictly maintained by the crew of the fatal flight, those witnesses whom the judge disbelieved on this issue were, as their Lordships must accept, being untruthful, they were also being singularly naive. Quite apart from the mass of evidence of flights down McMurdo Sound at

low altitudes and the publicity given to them, once it was accepted that pilots were at liberty to, and did, diverge laterally from the original flight plan over Mt Erebus, the requirement to maintain a minimum altitude of 16,000 feet on a sightseeing flight in VMC could not be justified on any rational basis. Against this background it is not conceivable that individual witnesses falsely disclaimed knowledge of low flying on previous Antarctic flights in a concerted attempt to deceive anybody as to what had happened.

That, no doubt, is why the topic of 'low flying' is not discussed in either of the judgments of the Court of Appeal, unless the sentence 'It is possible that some individual witnesses did give some false evidence during this inquiry', which appears in the Cooke judgment (see [1981] 1 NZLR 618 at 662), was meant as a passing reference to it. For the like reason, without intending any discourtesy to leading counsel for the judge, who devoted a considerable part of his argument to the marshalling of the material probative of the judge's finding that false evidence on this matter had been given by members of the management of ANZ, and to exploring the extent to which in cross-examination each of them must have been made aware that his veracity on this matter was being attacked, their Lordships do not propose to say anything more on the subject of 'low flying'.

Parenthesis on 'whiteout'

Before turning to the two other matters that were relied on as justifying the judge's finding of a predetermined plan of deception including conspiracy to commit perjury, their Lordships should spend a moment in mentioning the optical phenomenon of 'whiteout' experienced in polar regions. Of this phenomenon and the part that it is likely to have played as contributing to the causes of the Mt Erebus disaster an illuminating account is to be found in paras 165 to 201 of the royal commission report. The judge found that the existence of this phenomenon was not known to anyone concerned in the management of ANZ or to any of its pilots or navigators, including Captain Collins and First Offficer Cassin, who consequently had never been briefed about it. Nor, as the judge also found, was it known to CAD, although there were readily accessible sources from which information could have been obtained. Its effect, in meteorological conditions such as prevailed at the time of the crash in the area where it happened, would be to induce in a pilot, unaware that any such phenomenon could exist, the belief that he had unlimited visibility ahead and that he was flying over a flat terrain, since 'whiteout' prevents changes in level of the terrain over and towards which the aircraft is flying from being perceived by the pilot even though the change in level is as great as that of a precipitous mountainside such as that of Mt Erebus. The judge makes out an overwhelming case in his report that the aircraft was in a 'whiteout' when it crashed into that volcano.

Destruction of documents

It was not disputed before their Lordships that the royal commission report points the finger at Mr Davis, the chief executive, as the originator of the 'pre-determined plan of

deception', and as orchestrator of the 'litany of lies' that are referred to by the judge in para 377. It is also not disputed that the report treats Mr Davis's determination to embark on a plan of deception as having been reached on 30 November 1979 as soon as there had been reported to him what their Lordships described at the outset of this judgment as the three salient facts about the change in the co-ordinates of the southernmost waypoint in the flight plans.

The destruction or deliberate concealment of all documents which might point to there having been slipshod management of its Antarctic flights by ANZ is, in their Lordships' view, quite the most serious charge of deception contained in the royal commission report. That the judge too so regarded it is apparent from the fact that it is made a recurring theme in the report. The Woodhouse judgment refers to many of the paragraphs in which the charge that this took place on the instructions of Mr Davis is made either in direct statements or, more often, by innuendo. Its first appearance in the royal commission report is in para 45 where, after reference in the previous paragraph to the mistake about the co-ordinates, the judge says:

> '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.'

Their Lordships are in agreement with, and so do not need to repeat, Woodhouse P's analysis of the nine following paragraphs of the report dealing with the same topic. They culminate in para 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.'

The absence of documents in connection with the programming of Antarctic flights is commented on in paras 248, 250 and 254 in terms that are obviously indicative of incredulity; and the chief executive's instructions of 30 November 1979 are reverted to in paras 338 to 341 in a section of the report headed 'Post-accident conduct of Air New Zealand' where they have become a decision 'that all documents relating to the Antarctica flights and to this flight in particular were to be impounded'. However, the evidence that was before the judge was that, in accordance with routine practice, an in-house committee had been set up by ANZ on 30 November 1979 whose terms of reference were to gather documents and data relating to the Mt Erebus disaster. This committee was presided over by Mr Watson, who was not a member of the management of ANZ. A representative of ALPA attended its meetings as an observer; so did representatives of other trade unions whose members

had lost their lives in the crash. Mr Oldfield, the safety manager of ANZ, was secretary. It was he who was responsible for gathering documents. He gave evidence at the inquiry as to what he had done. He obtained the original documents from the departmental files in which they were kept and caused copies to be made for the use of members and observers at meetings of the committee and one master copy for inclusion in a single file (the committee file) on which one copy of all documents that he had collected were assembled. The committee file was made available to Mr Chippindale on 11 December 1979, when he returned from Antarctica,

[1984] 3 All ER 201 at 215

and it became an exhibit at the inquiry before the judge. After each meeting of the committee had ended the original document was returned to the departmental file from which it had come and all copies used by the members at meetings, other than the master copy that was kept in the committee file, were collected by Mr Oldfield and destroyed by him. Notwithstanding this evidence by Mr Oldfield of the procedure adopted in assembling the committee file, to which there was no challenge in cross-examination, the judge in para 341 expresses his surprise at having discovered, on his own examination of the committee file after the hearing, that the documents it contained were copies. He ends the paragraph thus: ' ... seeing that all pre-accident documents assembled on the file were copies, then where were the originals?' In the context in which it appears the innuendo that original pre-accident documents relating to Antarctic flights had been destroyed, in compliance with the chief executive's alleged instructions, is plain. Yet it was never put to Mr Oldfield when he gave evidence that he had not been assiduous in the steps he had taken to ensure that the in-house committee, on which he served as secretary, saw all original documents relating to Antarctic flights and that a master copy of each should be preserved on the committee file.

The allegations in the report about destruction and disappearance of documents on Mr Davis's instructions are not confined to the in-house committee file. Captain Gemmell, an executive pilot, had accompanied Mr Chippindale to Antarctica immediately after the accident became known. He went as representative of ANZ in a party which included, amongst others, First Officer Rhodes as representative of ALPA. The site of the crash had been first located by three mountaineers from Scott Base, a New Zealand Antarctic research station near to McMurdo. Mr Chippindale's party, because of weather conditions, were not able to reach the scene until 3 December. Then, and on the following days, the members of the party proceeded to search for and collect first the 'black box' and the cockpit voice recorder (CVR) which had been on the aircraft and, thereafter, such other material that had been brought onto the aircraft by its passengers and members of its crew as could be found, including flight bags and documents. These had been scattered by the wind over a wide, heavily-crevassed area under a covering of snow that had fallen since the date of the crash. It was unsafe to penetrate to considerable parts of this area.

Paragraphs 342 to 361 of the report, which are introduced as being 'some unfortunate repercussions' of the instructions of the chief executive for the collection of all documents, are dealt with in

considerable detail in both judgments in the Court of Appeal. The first four of these paragraphs take the form of ascribing to counsel who represented ALPA at the inquiry allegations against Captain Gemmell that he had brought back from Antarctica, from which he returned to New Zealand before Mr Chippindale, a number of documents that had been carried by Captain Collins in his flight-bag, including an atlas and a ring-binder notebook, but that, instead of disclosing them to Mr Chippindale or to the royal commission, Captain Gemmell had impounded them in compliance with Mr Davis's instructions. No such allegation had in fact been suggested by ALPA in its final submissions. It was a theory evolved by the judge himself as a result of a mistaken view of additional information which he had sought and obtained after the hearings had been concluded. The fact that he had been making these further inquiries from persons who had not been called as witnesses was never disclosed to ANZ until they read about them in paras 353 to 359 of the report; so Captain Gemmell had no opportunity of dealing with the case against him that these post-hearing inquiries are said to have disclosed. Their Lordships agree with the Court of Appeal that this was a clear breach of natural justice, and that the breach is not one that is cured by the fact that this group of paragraphs, all of which are redolent of suspicion that Captain Gemmell had taken away documents from the wreckage of the aircraft in order to conceal their existence from any official investigation, ends with these two sentences:

> '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. However, there is not sufficient evidence to justify any finding on my part that Captain
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> *[1984] 3 All ER 201 at 216*
>
> Gemmell recovered documents from Antarctica which were relevant to the fatal flight, and which he did not account for to the proper authorities.'

This grudging verdict of 'not proven' needs to be read in the light of what the judge had said in para 74 about the course that he had adopted in reaching any findings of fact:

> 'I am entitled, as part of my investigatory functions, to reach conclusions based upon the balance of probabilities. This is the course which I have adopted. And in regard to allegations in respect of which the evidence seems to me to be in even balance, or not sufficiently tilted one way or the other, then I have held the truth of any such allegation, *likely though it may be*, to have been not established.' (Their Lordships' emphasis.)

Paragraphs 347 and 348 also call for special mention, for the latter incorporates a gratuitous allegation against the director of flight operations, Captain Eden, of exerting managerial pressure on a subordinate to conceal the fact that documents had been removed by Captain Gemmell. Flight Officer Rhodes, who had on 1 October 1980 been called as a witness by ALPA, whose representative he had been on the party that had collected material from the site of the crash, was subsequently recalled in the following circumstances. On 4 December 1980 some exploratory questions had been asked of Captain Gemmell by counsel for ALPA whether he had brought back from the site of the accident any documents that had been in Captain Collins's flight-bag. Captain

Gemmell replied that he had not. A newspaper report which mentioned these questions evoked a letter from a Mr Woodford, one of the mountaineers who had been first at the site and was present at all times when Captain Gemmell was there. This letter said that the flight-bag was empty when Mr Woodford had found it some days before Captain Gemmell arrived on the site and that at all times when Captain Gemmell had been on the site he had been in the company of other members of the party. On 8 December 1980 First Officer Rhodes was recalled, this time by ANZ, to confirm, as he did, that at all times when Captain Gemmell was working on the site there had been other people adjacent to him. In para 348, however (the second paragraph of the report that Woodhouse P and McMullin J would have set aside), there is a plain allegation that Captain Eden, the director of flight operations, had intimidated First Officer Rhodes into making this exonerating statement. No suggestion had ever been put to First Officer Rhodes that Capitain Eden had directed him to give the answers that he did and not the slightest suggestion that he had done so was made to Captain Eden himself when he gave evidence three days later. The charge of intimidation in para 348 must have come like a bolt from the blue. It was not based on any probative evidence and neither Captain Eden nor ANZ was given any opportunity of dealing with it.

At para 361 the judge comments on the briefing documents of First Officer Cassin which it was thought he had left behind at his home. Of these the judge says that they had been collected the next morning after the crash by 'an employee of Air New Zealand', and he adds that they 'certainly found their way into the custody of the airline on the day following the disaster, and have not been seen since. Presumably they were destroyed'. It was conceded in the Court of Appeal that the judge must have been in error in making this allegation. In fact the evidence had been that First Officer Cassin's documents were obtained from Mrs Cassin by Captain Crosbie, a witness called by counsel representing First Officer Cassin's estate. He had obtained the documents, not in his capacity as an employee of ANZ but as welfare officer of ALPA: and in his brief and in his oral evidence at the inquiry he was positive that there were no documents at First Officer Cassin's home that had any bearing on the accident. No suggestion to the contrary was ever made to him.

Mr Davis himself was the last witness to give evidence at the inquiry. His written brief was primarily directed to matters of the general policies and organisation of ANZ since, as he said in it, as chief executive he 'did not know or require to know the actual details of the conduct of the [Antarctic] flights ie exact route, briefings, crewing etc.' In the course of his oral evidence, he was asked by counsel for ALPA a number of questions about the instructions that he had given to Mr Watson and Mr Oldfield that a complete

file incorporating a master copy of every relevant document was to be assembled by the in-house committee and any loose copies of the same document that were not required for the file were to be destroyed. It was suggested to him that his instructions may not have been sufficiently explicit, a suggestion that he rejected and added: 'Now under no circumstances and under no conditions would

I have been party to the destruction of any evidence that might come before an inquiry.' His explanation for requesting the loose copies prepared for the use of members at meetings of the in-house committee to be destroyed was to prevent there being 'leaked' to the media isolated documents which published out of context might give a sensational erroneous impression. And there the matter of Mr Davis's instructions for destruction of documents was left. It was never put to him, even by counsel for ALPA, much less by counsel assisting the judge or by the judge himself, that he had deliberately ordered that steps should be taken to ensure that documents which would disclose the extent to which administrative blunders by the airline management had been causative of the crash should never come to light. His own spontaneous outburst, which their Lordships have just quoted, made in reply to the suggestion that his instructions to Messrs Watson and Oldfield had not been sufficiently specific, after which the matter of his instructions was dropped, was the only evidence about any plan on the part of the management that any document relevant to the causes of the accident should be destroyed or otherwise prevented from being produced to Mr Chippindale in the course of his statutory investigation or to the judge at the public inquiry by the royal commission; and what this evidence amounted to was an indignant denial.

In their Lordships' view there was no material of any probative value on which to base a finding that a plan of this kind ever existed. Before their Lordships counsel for the judge have not been able to point to any such material. Experienced advocates as they are, they preferred to concentrate their fire on the second and third matters that were canvassed at the hearing, 'low flying', with which their Lordships have already dealt, and the change in the southernmost waypoint, to which they will be coming shortly.

That the linkage between the costs order and the judge's belief in the existence of a plan to destroy documents or by other means to prevent them from coming to light had a major influence in inducing him to make the costs order is, however, made apparent in some extracts from a passage in the paragraph which immediately precedes that which contains the costs order itself. Among the facts that the judge says he should have been told by ANZ at the outset are included--

> '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 ... '

The paragraph ends thus:

> '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.' (Their Lordships' emphasis.)

The intentional adoption of a new southernmost waypoint sited in McMurdo Sound

During the three years 1977, 1978 and 1979 in which sightseeing flights to Antarctica had been undertaken by ANZ, there had been four different co-ordinates for the southernmost waypoints that had been fed into the computers of aircraft used for the flights.

For the two flights in February 1977 the co-ordinates for Williams Field were used. They were 77 53' S and 166 48' E. For these flights there was a single authorised minimum altitude of 16,000 feet. When permission from CAD was obtained to descend to 6,000 feet in an area to the south of McMurdo Base it became desirable to select a navigational aid as the waypoint and the NDB at McMurdo whose co-ordinates were

77 51' S and 166 41' E was chosen, and these were used for the four flights in October 1977. At this period the flight plan was manual and was fed manually by the crew into the aircraft's computer.

In 1978 it was decided to store the flight plan for the Antarctic flights in the airline's central computer. Mr Hewitt of the navigation section was responsible for carrying out the changeover from manually prepared to computerised flight plans. He did so by first preparing what is known as an ALPHA worksheet in which he wrote down as the co-ordinates of the southernmost waypoint the co-ordinates that had been used in the February 1977 flight plan that he obtained from a storage known as the NV 90, ie 77 53' S and 166 48' E; but in typing these into the computer terminal he made a mistake and typed a figure 4 instead of a figure 6, so that the longitudinal co-ordinate of the southernmost waypoint of the flight track that went into the computerised flight plan became 164 48' E (instead of 166 48' E), which put it at a point in McMurdo Sound some 25 nautical miles to the west of the NDB where there was no physical feature by which it could be identified (the western waypoint). This is the error referred to in the Chippindale report as having remained undetected for 14 months. Cogent evidence that this happened by mistake, albeit a mistake that involved negligence and was blameworthy, was supplied by the ALPHA worksheet and by the fact that no corresponding alterations were made in the track and distance information in the flight plan. The heading from Cape Hallett remained at 188·439 and the distance 337 nautical miles, whereas for a longitudinal co-ordinate of 164 48' E they would have been 191 and 343 nautical miles respectively.

The fourth and final change in the southernmost waypoint was that made in the airline computer on the night before the fatal flight and not reported to the aircrew at their pre-dispatch briefing although it had been incorporated in the flight computerised track with which they were supplied. Notice had been given by the US authorities of their intention to cease operating the NDB, thus leaving the TACAN as the only available navigation aid at McMurdo. The co-ordinates of the TACAN were 77 52.7' S and 166 58' E, ie a difference of 10' of longitude, which represented a point some 2·431 nautical miles to the east of the NDB. The evidence of the members of the navigation section was that all that they intended and all that they believed that they were doing was

to substitute the co-ordinates of the TACAN for those of the NDB.

The judge deals with these changes of waypoint in considerable detail in paras 224 to 255 of his report. They include repeated references to absence of contemporaneous documents recording and reporting the reasons for the successive changes. Mr Davis in his evidence had explained that he preferred and had adopted in ANZ an administrative system that relied on oral communication between the executive officers concerned rather than spending time on the preparation of written reports and instructions. The adoption of such a system is not of itself probative of any sinister intentions, although it may well be indicative of inefficient management, particularly where, as in the case of the executive pilots, their time is divided between administrative and operational duties, with the result that they will not be aware of all that has been happening in the flight operations division during those periods while they have been away on actual flying duty.

A critical analysis of the reasoning of the judge in paras 224 to 255 of his report is to be found in the sections of the Woodhouse judgment that bear the sub-headings 'The western waypoint', 'Correction of co-ordinates' and 'Advice of the change'. Their Lordships are in broad agreement with this analysis. Throughout their consideration of this aspect of the inquiry the judge's findings on which were factors that led to his accusation in para 377 of conspiracy to commit perjury and have been relied on before this Board as justification for it, their Lordships have been at pains to remind themselves, as did the Court of Appeal, that in relation to findings of fact made by the judge in his report they are not exercising the functions of an appellate court in civil litigation where they would be entitled, while paying due deference to the advantages enjoyed by the trial judge of seeing and hearing the witnesses give evidence in person, to make their own assessment of the weight of the evidence and to determine for themselves whether it is sufficient to justify the findings of fact that the trial judge has made. As courts whose

[1984] 3 All ER 201 at 219

functions in the instant case have been restricted to those of judicial review, both the Court of Appeal and this Board are disentitled to disturb findings of fact by the decision-maker whose decision is the subject of review, unless (1) the procedure by which such findings were reached was unlawful (in casu by failure to observe the rule of audi alteram partem), or (2) primary facts were found that were not supported by any probative evidence, or (3) the reasoning by which the decision-maker justified inferences of fact that he had drawn is self-contradictory or otherwise based on an evident logical fallacy.

It is mainly, though not exclusively, on the first and third of these grounds that, in their Lordships' opinion, the Court of Appeal and this Board are entitled to reject the judge's findings of fact as to the intentional adoption of a new southernmost waypoint sited in McMurdo Sound, which formed in part the basis of his finding of a conspiracy to commit perjury.

The Woodhouse judgment draws attention to various inconsistencies in the reasoning by which the judge reached the conclusion that the adoption of the western waypoint was intentional. One to which their Lordships would particularly draw attention is that the judge stated that he specifically refrained from finding that the substitution of the longitudinal co-ordinates 164 48' E for 166 48' E when the Antarctic flight track was computerised in September 1978 was intentional and not due to a careless mistake by Mr Hewitt. Forgetful of the evidence of the ALPHA worksheet that Mr Hewitt had used on that occasion, the judge stated in para 255(a) that the single reason for his refraining from making a positive finding that the change to the western waypoint at the time of computerisation of the flight track was deliberate was that 'it was not accompanied by the normal realignment of the aircraft's heading so as to join up with the new waypoint'. He went on, however, to express his belief that long before November 1979 when it had been reported to flight operations by Captain Simpson, who had piloted the flight that had preceded the one on which the crash occurred, that he had discovered, to his surprise which he thought might be shared by other pilots, that the western waypoint was 27 nautical miles to the west of McMurdo Base, the navigation section had adopted it as the officially-approved southernmost waypoint.

When, and by what member of the airline management, this adoption of the western waypoint as the southernmost waypoint, with a longitudinal co-ordinate known to be 164 48' E and thus 25 miles to the west of the nearest navigational aid at McMurdo Base, was approved is not the subject of any finding by the judge; but, whenever it was, the same reason as that which of itself had made him reject deliberate selection of the western waypoint at the earlier date, viz failure to make corresponding adjustments to the heading and distance from Cape Hallett, would have been equally applicable to any officially approved adoption of the western waypoint whenever that is supposed to have occurred thereafter.

In his finding of deliberate adoption the judge was greatly influenced by a document, exhibit 164, of which there was evidence that it had been included (in circumstances that were not elucidated) among the documents contained in envelopes supplied to pilots at the time of the pre-dispatch briefings for Antarctic flights in 1978 though not, so far as any evidence goes, in 1979. (It has never been suggested that members of the unit responsible for pre-dispatch briefings and the preparation of such envelopes for handing to departing aircrews have been parties to any conspiracy.) This document is a photocopy of an original diagram which does not extend as far south as Ross Island and McMurdo. The judge refers to it as 'a track and distance diagram', incorporating a route southwards from Cape Hallett down McMurdo Sound to the west of Ross Island and another route northwards to Cape Hallett passing to the east of Ross Island along the longitude of 170 E. The lines treated by the judge as the southbound and northbound routes, from Cape Hallett and back to it, run off the southern edge of exhibit 164 without joining up. If these lines were intended to represent a continuous route of an aircraft outbound and inbound for the purposes of sightseeing in the McMurdo area, the diagram is defective in that it fails to show the most southerly part of the route or any southernmost waypoint.

Furthermore, while exhibit 164 does contain indications of headings and distances on lines joining successive waypoints to the north of and including Cape Hallett, there are no such indications on the lines which the judge held to represent a track and distance

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diagram of a route southbound from Cape Hallett down McMurdo Sound or northbound back to Cape Hallett along longitude 170 E, which is to the east of Ross Island itself. These lines form an acute-angled triangle of which the base is missing and the apex does not coincide with the position marked as Cape Hallett on the diagram. After close examination of exhibit 164 and exhaustive consideration of the evidence relating to it to which, in view of the importance that the judge had attached to this document, his counsel has devoted considerable portions of his argument before the Board both in opening and in reply, the conclusion is, in their Lordships' opinion, inescapable that there was not any material of probative value before the judge that could justify a finding that exhibit 164 incorporated a track and distance plan for a route southwards from Cape Hallett down McMurdo Sound or was intended or would be understood by any experienced pilot to be intended to be used for purposes of navigation.

The presence of exhibit 164 among the documents included in the flight envelopes provided to aircrews at the pre-dispatch briefings in 1978 appears to be the only reason given by the judge for his finding that the error made by Mr Hewitt had been discovered long before November 1979, and had been followed by the adoption by ANZ, for use as the co-ordinates of an officially approved southernmost waypoint, of the co-ordinates of the western waypoint as they had been erroneously inserted in the computerised flight plan. As pointed out in the Woodhouse judgment, however, the judge's finding to this effect was accompanied by the suggestion that the management of ANZ wanted to conceal its use of the route down McMurdo Sound from CAD, whose formal approval had been given only to a route that overflew Ross Island. This suggestion was not only never put to any of the witnesses for ANZ but also conflicts with the judge's own finding that approval from CAD for the variation of the route to one down McMurdo Sound would have been automatic. Had the suggestion ever been put to the witnesses, evidence could have been called that official approval was not even required from CAD for a lateral variation of this kind from a previously approved route.

That ANZ sightseeing aircraft were accustomed to fly to McMurdo from Cape Hallett down McMurdo Sound in VMC with visibility 20 kms or more was well known to the US authorities at McMurdo. Navigational assistance for them was regularly given by ATC from the TACAN there. That the US authorities would have objected to a direct flight track over Mt Erebus to McMurdo, if they had known that such a route had received the formal approval of CAD, was information that the judge had gathered personally on a visit to Antarctica; but there was no evidence that ANZ had ever been informed of this, nor was it put to any member of the navigation section in the course of their evidence at the hearing that they had any knowledge of, or any reason to suspect, that a flight

path which overflew Mt Erebus on a direct route from Cape Hallett would not have received US approval.

This omission was, to say the least, unfortunate, for it led to a finding by the judge that Mr Brown, a member of the navigation section, had been guilty of deliberately heinous conduct. Mr Brown's account of what he did, as having been due to an unwitting and, as he thought, harmless error, formed on important constituent of the so-called 'litany of lies'. It had been the practice of the navigation section to arrange for the transmission to ATC at McMurdo, before the departure of each Antarctic flight, of a flight plan giving co-ordinates of the waypoints on the journey to McMurdo and back. After the erroneous western waypoint was incorporated in the computerised flight track in 1978, flight plans radioed to ATC McMurdo incorporated as the co-ordinates of the southernmost waypoint the figures 77 53' S 164 48' E. The flight plan for the fatal flight on 28 November 1979 that was radioed to ATC was prepared by Mr Brown from an ALPHA sheet on which the co-ordinates of the southernmost waypoint appeared as the figures 77 53' S 166 48' E. This sheet contained a number of columns: the figure '5' entered in one of these columns would result in there being printed out in the radioed flight plan either the abbreviated name of a waypoint in letters or its co-ordinates in figures, depending on the column in which the figure '5' was entered. In the case of the southernmost waypoint Mr Brown gave evidence that he had entered the figure '5' in the column that resulted in its appearing in the radioed flight plan as the name 'McMurdo' and not as the co-ordinates of the new waypoint. Mr Brown's evidence was that this had been inadvertent.

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At para 225(e) of his report, however, the judge makes a finding in these terms:

> '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 this new flight path.'

No such suggestion was ever put to Mr Brown when he have evidence at the inquiry. He was accordingly given no opportunity of dealing with the accusation of deliberately seeking to deceive the ATC as to the direction from which to expect the aircraft that was to be made against him by the judge. This was a clear breach of the rules of natural justice which flaws the judge's finding which their Lordships have just cited, and which was specifically identified later in paras 376 and 377 of the report as being part of the 'litany of lies'.

Once the judge, by a process of reasoning that was self-contradictory, had reached the fixed conviction that there had been a deliberate adoption by the airline management of the western waypoint as the southernmost waypoint for Antarctic flights, it was inevitable that he should reject as false all evidence of primary facts that conflicted with that finding. In order to satisfy themselves that there were not any other grounds, besides those which the judge himself had stated, on which

the inference that he had drawn about deliberate but dissimulated adoption could be supported, their Lordships have examined the evidence of primary facts relevant to this matter that was given at the hearings. This they did, not for the purpose of assessing its reliability, but simply to see whether any positive evidence that supported such an inference existed; and none was to be found.

Their Lordships accept that the report contains many other findings of fact by the judge on which there had been conflicting evidence the reliability of which it was for him to assess; with his assessments a court whose functions are limited to judicial review has no jurisdiction to act otherwise than to accept them as correct. But those particular and crucial findings which their Lordships have discussed under the present heading and the previous heading 'Destruction of documents' are each of them open to rejection on judicial review for the various reasons that their Lordships have given; and, as these findings admittedly constituted a substantial part of the material on which were based the allegations contained in para 377 of a 'pre-determined plan of deception' and 'an orchestrated litany of lies', those accusations against the management of the airline must be treated as conclusions that, in the circumstances, he was not entitled to reach, and the costs order which constituted the punishment imposed on ANZ for the conduct found in that paragraph must accordingly be set aside.

The limits on the matters decided on the appeal to this Board

It may be appropriate in a case which has attracted such wide and intense interest in New Zealand that their Lordships should draw attention to the restricted nature of the matters which they have been called on to decide.

The royal commission report convincingly clears Captain Collins and First Officer Cassin of any suggestion that negligence on their part had in any way contributed to the disaster. That is unchallenged. The judge was able to displace Mr Chippindale's attribution of the accident to pilot error, for two main reasons. The most important was that at the inquiry there was evidence from Captain Collins's widow and daughters, which had not been available to Mr Chippindale at the time of his investigation and was previously unknown to the management of ANZ, that after the briefing of 9 November 1979 Captain Collins, who had made a note of the co-ordinates of the western waypoint that were on the flight plan used at that briefing, had, at his own home, plotted on an atlas and on a larger topographical chart the track from the Cape Hallett waypoint to the western waypoint. There was evidence that he had taken this atlas and chart with him on the fatal flight and the inference was plain that in the course of piloting the aircraft he and First Officer Cassin had used the lines that he had plotted to show him where the aircraft was when he switched from nav track to heading select in order to make a descent

to 2,000 feet while still to the north of Ross Island which he reported to ATC at McMurdo and to

which he received ATC's consent. That on completing this descent he switched back to nav track is incapable of being reconciled with any other explanation than that he was relying on the line he had himself plotted of the flight track on which he had been briefed. It was a combination of his own meticulous conscientiousness in taking the trouble to plot for himself on a topographical chart the flight track that had been referred to at his briefing, and the fact that he had no previous experience of 'whiteout' and had been given no warning at any time that such a deceptive phenomenon even existed, that caused the disaster.

The other principal reason why the judge felt able to displace Mr Chippindale's ascription of the cause of the accident to pilot error was that certain remarks forming part of the conversations recorded in the CVR of the crashed aircraft and attributed by Mr Chippindale to the flight engineers had suggested to him that shortly before the crash they were expressing to the pilot and navigator uncertainty about the aircraft's position. The tape from the CVR which had been recovered from the site of the crash proved difficult to interpret. The judge, with the thoroughness that characterised him throughout his investigations, went to great pains to obtain the best possible expert assistance in the interpretation of the tape. The result was that he was able to conclude that the remarks attributed by Mr Chippindale to the flight engineers could not have been made by them, and that there was nothing recorded in the CVR that was capable of throwing any doubt on the confident belief of all members of the crew that the nav track was taking the aircraft on the flight path as it had been plotted by Captain Collins on his atlas and chart, and thus down the middle of McMurdo Sound well to the west of Mt Erebus.

The judge's report contains numerous examples and criticisms of ANZ's slipshod system of administration and absence of liaison both between sections and between individual members of sections in the branch of management that was concerned with flight operations. Grave deficiencies are exposed in the briefing for Antarctic flights; and the explanation advanced by witnesses for the airline as to how it came about that Captain Collins and First Officer Cassin were briefed on a flight path that took the aircraft over the ice-covered waters of McMurdo Sound well to the west of Mt Erebus but were issued for use in the aircraft's computer as the nav track a flight path which went directly over Mt Erebus itself, without the aircrew being told of the change, involved admissions of a whole succession of inexcusable blunders by individual members of the executive staff. None of this was challenged before their Lordships. No attempt was made on behalf of ANZ to advance excuses for it.

These appalling blunders and deficiencies, the existence of which emerged piecemeal in the course of the 75 days of hearings, had caused the loss of 257 lives. Their Lordships can well understand the growing indignation of the judge when, after completing the hearings and for the purpose of preparing his report, he brought them together in his own mind and reflected on them. In relation to the three matters that were principally canvassed in this appeal and on which he based his finding that there had been a pre-determined plan to deceive the royal commission and a conspiracy to

commit perjury at its hearings, their Lordships have very reluctantly felt compelled to hold that, in the various respects to which their Lordships have referred, the judge failed to adhere to those rules of natural justice that are appropriate to an inquiry of the kind that he was conducting and that in consequence it was not open to him to make the finding that he did in para 377 of his report.

To say of a person who holds judicial office that he has failed to observe a rule of natural justice may sound to a lay ear as if it were a severe criticism of his conduct which carries with it moral overtones. But this is far from being the case. It is a criticism which may be, and in the instant case is certainly intended by their Lordships in making it to be, wholly disassociated from any moral overtones. In an earlier section of this judgment their Lordships have set out what they regard as the two rules of natural justice that apply to this appeal. It is easy enough to slip up over one or other of them in civil litigation, particularly when one is subject to pressure of time in preparing a judgment after hearing masses of evidence in a long and highly complex suit. In the case of a

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judgment in ordinary civil litigation this kind of failure to observe the rules of natural justice is simply one possible ground of appeal among many others and attracts no particular attention. All their Lordships can remember highly respected colleagues who, as trial judges, have had appeals against judgments they had delivered allowed on this ground; and no one thought any the worse of them for it. So their Lordships' recommendation that the appeal ought to be dismissed cannot have any adverse effect on the reputation of the judge among those who understand the legal position, and it should not do so with anyone else.

As respects the judge's finding that some at least of the executive pilots had given evidence as to their lack of specific knowledge that aircraft on Antarctic flights flew at altitudes lower than 6,000 feet over McMurdo Sound and in the McMurdo area which was false, their Lordships accept that there was probative material before the judge from which he was entitled to draw this inference. After the conclusion of the hearings when all the evidence had been pieced together, it became apparent, for reasons given earlier in this judgment, that official tolerance of the practice of flying lower than 6,000 feet was in no way causative of the accident. But when the executive pilots were giving evidence the causes of the crash still remained undetermined, and it is an understandable human weakness on the part of individual members of the airline management having responsibility for flight operations that they should shrink from acknowledging, even to themselves, that something that they had done or failed to do might have been a cause of so horrendous a disaster.

The jurisdiction of the judge to make findings of the kind challenged in the appeal

In both the Woodhouse and the Cooke judgments it was held by the Court of Appeal that the judge's finding in para 377 of a conspiracy to commit perjury at the inquiry was not only invalidated by its having been reached through non-observance of the rules of natural justice but also fell outside his

terms of reference and accordingly that in making it he acted in excess of jurisdiction.

The gravamen of the finding was that ten members of the airline management were guilty of the crime of conspiracy to commit perjury. It was so understood and in fact resulted in a police investigation which was pursued for some time but was ultimately dropped. The finding had been reached without the safeguards of trial by jury, or the benefit of the onus of proof applied in criminal prosecutions. In para 74 of his report the judge expressly stated: '... I am not required to insist that some particular conclusion, whether founded on direct evidence or inference, shall be established beyond reasonable doubt.'

In *Cock v A-G* (1909) 28 NZLR 405 it had been held by a New Zealand Court of Appeal that there was no jurisdiction vested in the Governor-General either under the letters patent or the Commissions of Inquiry Act 1908, as it then stood, to appoint a royal commission to inquire into a crime. At the time when the judgments of the Court of Appeal were delivered in the instant case there was pending before them an appeal in an application for judicial review entitled *Re Royal Commission on Thomas Case* which raised directly this very point and would necessitate re-examination of the 70-year-old decision in *Cock v A-G*. That appeal has now been heard by the Court of Appeal and judgment in it was delivered on 30 July 1982(see [1982] 1 NZLR 252). In that judgment it was held that an amendment made in 1970 to the Commissions of Inquiry Act 1908 did empower the Governor-General to appoint a royal commission with terms of reference that included jurisdiction to inquire into a crime if to do so is necessarily incidental to the subject matter of the inquiry.

This is a particular aspect of administrative law which is currently in the process of development by the New Zealand courts. Their Lordships can well appreciate that, where the crime concerned is one of perjury at the inquiry itself, there may well be a grey area between what is permissible comment on evidence given before the royal commissioner that he had rejected and what is a finding of criminal conduct by a witness which does not fall within the commissioner's terms of reference. The demarcation of the division of the grey area into those parts which will ultimately be held to be black and white respectively is one that can only be arrived at on a case to case basis; and the

most suitable forum in which this can be done is (for reasons that have been earlier stated) provided by the New Zealand courts themselves. Their Lordships think that it would be both premature and unwise for them to make this an occasion to formulate principles for the future guidance of the New Zealand courts on this particular matter, since the instant appeal can be decided and dismissed on the alternative ground that the finding in para 377, that was the judge's reason for making the costs order, was invalidated by its having been reached in breach of rules of natural justice.

For the like reasons their Lordships will refrain from going into the question whether on an application for judicial review of a report of a tribunal of inquiry there is jurisdiction in the reviewing court to set aside a finding of fact that is gravely defamatory of the applicant for review, or to make a declaration that such finding is invalid. This too is a matter which, in their Lordships' view, is best left to be developed by the New Zealand courts, particularly as these remedies, if they do exist, are discretionary. In the instant case all five members of the Court of Appeal were of opinion that the reputations of those who were the subject of the finding in para 377 would be sufficiently vindicated by a judgment setting aside the costs order, and that no further remedy, even if one were available, was necessary.

The quantum of the costs order

The Court of Appeal had held that the costs order was in any event invalid to the extent that it exceeded a maximum of $600 fixed by a rule made by judges in 1908 under s 12 of the Commissioners Act 1903. Brief arguments, on the one hand that this rule was ultra vires and on the other hand that it was still in force and effective, were addressed to their Lordships by counsel for the judge and counsel for the Attorney General respectively. The point of law is one that depends on a detailed examination of the legislative history of New Zealand statutes and subordinate legislation. It is not one which this Board would have regarded as a suitable subject matter for the grant of any leave to appeal from a decision of the New Zealand Court of Appeal. It has no relevance to the vindication of the reputations of the parties which were at stake in the instant appeal, and since the costs order must be set aside, irrespective of its amount, it is unnecessary for their Lordships to go into the point, and they accordingly refrain from doing so.

The costs of the appeal to the Board

Their Lordships cannot close this lengthy judgment without expressing their conviction that the time has now come for all parties to let bygones be bygones so far as the aftermath of the Mt Erebus disaster is concerned. There were what in retrospect can be recognised as having been faults or mistakes at the inquiry but which, in the circumstances in which the inquiry had to be held and the judge's report prepared, appear to their Lordships for the most part to have been manifestations of human fallibility that are easy to understand and to excuse. The time has surely come by now for them to be allowed to be forgotten.

It is in that hope and in that spirit that their Lordships propose to make no order as to the costs of the appeal to this Board. It is true that the costs of the judge are in any event being met by the New Zealand government, and that as the sole shareholder in ANZ the legal costs incurred by the airline in the appeal will also fall ultimately on the New Zealand government, so that the main financial consequences of their Lordships' decision to make no order as to costs may be limited to avoiding the expense of taxation of the parties' costs. It is nevertheless intended also to be indicative of their Lordships' view that the time for bitter feelings is over although their Lordships appreciate that

nothing can console the relatives and friends of the victims of the disaster.

Their Lordships will accordingly humbly advise Her Majesty that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors: Macfarlanes (for the judge); Linklaters & Paines (for Air New Zealand Ltd, Mr Davis and Captain Gemmell); Allen & Overy (for the Attorney General of New Zealand).

Mary Rose Plummer Barrister.