

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N :

THE HONOURABLE PETER THOMAS MAHON Appellant

- and -

AIR NEW ZEALAND LIMITED First Respondent

- and -

10 MORRISON RITCHIE DAVIS Second Respondent

- and -

IAN HARDING GEMMELL Third Respondent

- and -

HER MAJESTY'S ATTORNEY-GENERAL
FOR NEW ZEALAND Fourth Respondent

CASE FOR THE FOURTH RESPONDENT PURSUANT
TO RULES 60 AND 63

THE CIRCUMSTANCES OUT OF WHICH THE APPEAL ARISES

20 1. The Attorney-General apprehends that in the
Cases to be filed by the Appellant and the First,
Second and Third Respondents the circumstances out
of which this Appeal arises will be fully traversed,
and it is not, therefore, proposed to set them all
out again here.

2. The Attorney-General records, however, that he
was joined, pursuant to s.10(2) of the Judicature
Amendment Act, 1972, by order of Speight, J on
12/6/81 to represent the public interest.

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30 3. In the Court of Appeal the present Appellant
although separately represented presented no
argument, adopting a watching role by his counsel.

Part I
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He took the view that only if the deponents of affidavits filed were called upon for cross-examination (an event which ultimately did not occur) would it be appropriate for him to take an active part in the case. In those circumstances the Attorney-General for the assistance of the Court, assumed the responsibility of presenting argument in answer to the contentions of the Applicants for review. The position regarding representation in the Court of Appeal is referred to in the judgment of Cooke, J. at [1981] 1 N.Z.L.R. 618 at page 657 lines 30-41. 10

4. On this Appeal, the Appellant will, of course, by counsel present his own case. The Attorney-General as Fourth Respondent will, therefore, in these proceedings, adopt the more usual course of advancing, independently of any party and for the assistance of the Court, arguments which relate to the public interest. All contentious issues of fact and inference will be left to the other parties. 20

CONTENTIONS TO BE URGED BY THE FOURTH RESPONDENT

5. The Court of Appeal had jurisdiction to review the proceedings and Report of the Royal Commission, independently of the Judicature Amendment Act, 1972, at common law and by virtue of the Declaratory Judgments Act, 1908, and the Crown Proceedings Act, 1950 -

- (a) in the event of the terms of reference being exceeded ; 30
- (b) if the rules of natural justice were not observed ;
- (c) if there was a wrong exercise of the discretion as to costs.

6. The Court of Appeal had jurisdiction to review the proceedings and Report of the Royal Commission under the Judicature Amendment Act, 1972 and subsequent Amendments -

- (a) because the Inquiry and Report of the Royal Commissioner involved the exercise of statutory powers and statutory powers of decision ; 40
- (b) because the costs order was also the exercise of a statutory power of decision.

7. The Attorney-General does not intend to make any submissions as to whether the statements in paragraph 377 were made in excess of jurisdiction and/or contrary to the rules of natural justice. Those issues will be left to the other parties. If, however, the Board does find that the said statements in paragraph 377 were made in excess of jurisdiction and/or contrary to natural justice, then, in the public interest, the Attorney-General submits that -

- 10 (a) as a matter of justice, and having regard to modern social conditions, there ought to be a remedy ;
- (b) the remedy is available both at common law and under the Judicature Amendment Act, 1972, and subsequent amendments ;
- (c) if there is a nexus between the costs order and paragraph 377 and/or if the costs order was a penalty, then the remedy should extend to the order for costs ;
- 20 (d) in respect of (c) above the Court of Appeal's assessment of the language in the Report should be respected and only disturbed if seen to be manifestly wrong.

8. The quantum of the costs order was invalid because it exceeded the limit of \$600 prescribed by Rule III of the Scale of Costs published in the 1904 Gazette p.491.

9. The Attorney-General respectfully submits :-

- 30 (a) that if the Appeal is allowed the costs order should not be reinstated for an amount in excess of \$600 ;
- (b) the Appeal should not be allowed if the Board finds that:
- (i) paragraph 377 was made in excess of jurisdiction and/or contrary to the rules of natural justice, and
- (ii) there is a nexus between the costs order and paragraph 377 and/or the costs order was a penalty.

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CROSS-APPEAL

10. If leave to cross-appeal is applied for and granted and the Appeal is not dismissed simpliciter, then it is submitted that the Court has jurisdiction to make a declaration as to the invalidity of

paragraph 377 or an order setting it aside. Such jurisdiction is discretionary and the Attorney-General will leave it to the other parties to argue whether it would be appropriate for the Court to exercise its discretion.

RESERVATION

11. The Fourth Respondent's position is not that of an ordinary litigant and accordingly he wishes to reserve the right to file a Supplementary Case should matters be raised in the Cases of the other parties in respect of which it would be appropriate for him to make submissions.

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Robert Smellie, Q.C.

David Widdicombe, Q.C.

N.C. Anderson

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Fourth Respondent

CASE FOR THE FOURTH RESPONDENT

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