

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  
(First Respondent)

- v -

AIR NEW ZEALAND LIMITED  
and  
MORRISON RITCHIE DAVIS

First Respondent  
(First Applicant)  
Second Respondent  
(Second Applicant)

and  
IAN HARDING GEMMELL

Third Respondent  
(Third Applicant)

and  
HER MAJESTY'S ATTORNEY-GENERAL FOR  
NEW ZEALAND

Fourth Respondent  
(Sixth Respondent)

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RECORD OF PROCEEDINGS

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Messrs. Macfarlanes,  
Dowgate Hill House,  
London EC4R 2SY.

Solicitors for the Appellant.

Messrs. Linklaters & Paines,  
Barrington House,  
56-67 Gresham Street,  
London EC2V 7JA.

Solicitors for the First, Second  
and Third Respondents.

Messrs. Allen & Overy,  
9, Cheapside,  
London EC2C 6AD.

Solicitors for the Fourth Respondent.



O N    A P P E A L  
FROM THE COURT OF APPEAL OF NEW ZEALAND

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B E T W E E N

THE HONOURABLE PETER THOMAS MAHON	Appellant (First Respondent)
- v -	
AIR NEW ZEALAND LIMITED	First Respondent (First Applicant)
and	
MORRISON RITCHIE DAVIS	Second Respondent (Second Applicant)
and	
IAN HARDING GEMMELL	Third Respondent (Third Applicant)
and	
HER MAJESTY'S ATTORNEY-GENERAL FOR NEW ZEALAND	Fourth Respondent (Sixth Respondent)

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RECORD OF PROCEEDINGS  
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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  
(First Respondent)

- and -

AIR NEW ZEALAND LIMITED First Respondent  
(First Applicant)

- and -

MORRISON RITCHIE DAVIS Second Respondent  
(Second Applicant)

10

- and -

IAN HARDING GEMMELL Third Respondent  
(Third Applicant)

- and -

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

RECORD OF PROCEEDINGS

No. 1

NOTICE OF MOTION  
FOR REVIEW

In the High  
Court

No.1  
Notice of  
Motion for  
Review  
20th May 1981

IN THE HIGH COURT OF NEW ZEALAND

20

AUCKLAND REGISTRY

A No. 482/81

IN THE MATTER of Part 1 of the Judicature  
Amendment Act, 1972

BETWEEN

AIR NEW ZEALAND LIMITED a  
duly incorporated company  
having its registered  
office at Auckland and  
carrying on business there

1.

In the High Court

No.1  
Notice of  
Motion for  
Review  
20th May 1981

(continued)

and elsewhere as an  
airline operator

APPLICANT

PETER THOMAS MAHON, a  
Judge of the High Court  
of New Zealand,  
constituted as a Commission  
of Inquiry under the  
Commissions of Inquiry  
Act, 1908

10

FIRST RESPONDENT

A N D

MIRIAM MARGARET CASSIN of  
Napier, Married Woman and  
BETTY JOYCE McKNIGHT of  
Nukumaru, Waitoa, Married  
Woman as Executrices and  
Trustees of the estate of  
GREGORY MARK CASSIN,  
deceased

SECOND RESPONDENTS

20

A N D

MARIA ELIZABETH COLLINS of  
Auckland, Widow, as Execu-  
trix of the Estate of  
THOMAS JAMES COLLINS,  
deceased

THIRD RESPONDENT

A N D

THE ATTORNEY-GENERAL of  
New Zealand sued pursuant  
to Section 14 the Crown  
Proceedings Act 1950 in  
respect of the Civil  
Aviation Division, Ministry  
of Transport

30

FOURTH RESPONDENT

TAKE NOTICE that on the Wednesday the 17th day of  
June 1981 at 10 o'clock in the forenoon or so  
soon thereafter as Counsel can be heard, Counsel  
for the Applicant WILL MOVE this Honourable Court  
at Auckland FOR ORDERS BY WAY OF REVIEW pursuant  
to section 4 of the Judicature Amendment Act 1972  
in respect of certain decisions of the First  
Respondent made in the Report of the Royal  
Commission of Inquiry into the DC-10 aircraft crash  
on Mount Erebus, Antarctica :-

40

- (1) THAT such decisions be set aside.
- (2) THAT a Declaration do issue against the First Respondent declaring :
- (i) That such decisions are contrary to law, unauthorised, or otherwise invalid and/or
  - (ii) That such decisions were made in excess of jurisdiction and/or
  - (iii) That such decisions were made in circumstances involving unfairness and breaches of the rules of natural justice.
- (3) FOR further or other orders or relief as may in the circumstances be just.
- (4) QUASHING the decision of the First Respondent (being Order 6 of the Appendix to the Report) that the Applicant pay to the Department of Justice the sum of \$150,000.00 by way of contribution to the public cost of the Inquiry.
- (5) THAT the Applicant's costs of and incidental to this application be paid by such person or persons as the Court may direct

In the High  
Court

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No.1  
Notice of  
Motion for  
Review  
20th May 1981

(continued)

SUCH DECISIONS BEING the decisions recorded in paragraphs 338-363 and 373-377 that certain employees of the Applicant were guilty of serious misconduct and grave improprieties in relation to the collection and preservation of certain documents and articles relating to the Applicant's Antarctica flights and/or their conduct at the public hearings convened by the First Respondent.

UPON THE GROUNDS

- (i) Appearing in the Statement of Claim;
- (ii) That such decisions were made in excess of or without jurisdiction;
- (iii) That such decisions were made contrary to the rules of natural justice and in a manner unfair to the Applicant and certain of its employees;

In the High Court

No.1  
Notice of  
Motion for  
Review  
20th May 1981

(continued)

DATED at Auckland this 20th day of May 1981.

Sd: David Williams

SOLICITOR FOR THE APPLICANT

TO: The Registrar,  
High Court,  
Auckland.

AND TO:

The abovenamed First, Second, Third and  
Fourth Respondents

THIS NOTICE OF MOTION is filed by DAVID ARTHUR  
RHODES WILLIAMS Solicitor for the Applicant  
whose address for service is at the offices of  
Messrs. Russell McVeagh McKenzie Bartleet & Co.  
13th Floor, C.M.L. Centre, Corner Queen and  
Wyndham Streets, Auckland 1.

10

No.2  
Amended  
Statement  
of Claim  
3rd July  
1981

No. 2

AMENDED STATEMENT  
OF CLAIM

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

A. No.482/81

20

IN THE MATTER of Part 1 of the Judicature  
Amendment Act 1972

BETWEEN

AIR NEW ZEALAND LIMITED  
a duly incorporated company  
having its registered  
office at Auckland and  
carrying on business there  
and elsewhere as an air  
transport operator

FIRST APPLICANT

30

A N D

MORRISON RITCHIE DAVIS of  
Auckland, Retired Airline  
Executive

SECOND APPLICANT

A N D

PETER THOMAS MAHON, a  
Judge of the High Court  
of New Zealand,  
constituted as a  
Commission of Inquiry  
under the authority  
of the Letters Patent  
of His Late Majesty  
King George the Fifth  
dated the 11th day of  
May 1917 and under the  
Commissions of Inquiry  
Act 1908

In the High  
Court

No.2  
Amended  
Statement  
of Claim  
3rd July 1981

(continued)

10

FIRST RESPONDENT

A N D

MIRIAM MARGARET CASSIN  
of Napier, Married Woman  
and BETTY JOYCE McKNIGHT  
of Nukumaru, Waitoa,  
Married Woman as  
Executrices and Trustees  
of the estate of GREGORY  
MARK CASSIN, deceased

20

SECOND RESPONDENTS

A N D

MARIA ELIZABETH COLLINS  
of Auckland, Widow, as  
Executrix of the Estate  
of THOMAS JAMES COLLINS,  
deceased

THIRD RESPONDENT

A N D

THE ATTORNEY-GENERAL of  
New Zealand sued pursuant  
to Section 14 the Crown  
Proceedings Act 1950 in  
respect of the Civil  
Aviation Division of the  
Ministry of Transport

30

FOURTH RESPONDENT

A N D

NEW ZEALAND AIRLINE PILOTS  
ASSOCIATION INCORPORATED,  
an industrial union  
registered under the  
Industrial Relations Act  
1973 and having its  
registered office at  
Wellington

40

FIFTH RESPONDENT

Friday the 3rd day of July 1981

No.2  
Amended  
Statement  
of Claim  
3rd July  
1981

(continued)

THE APPLICANTS by their solicitor DAVID ARTHUR  
RHODES WILLIAMS say as follows :

1. THE First Applicant is a duly incorporated  
company having its registered office at Auckland.  
It carries on business in New Zealand and  
elsewhere as an air transport operator.

2. THE Second Applicant is a retired Airline  
Executive residing at Auckland. Until 31 May  
1981 he was employed by the First Applicant  
as Chief Executive. 10

3. THE First Respondent is the person appointed  
by a Commission dated the 11th day of June 1980  
("the Commission of Appointment") issued by  
the Right Honourable Sir Keith Jacka Holyoake,  
Governor-General of New Zealand by his deputy  
Ronald Davison, to be a Royal Commission of  
Inquiry to inquire into and report upon the  
matters set out in the terms of reference  
contained in the Commission of Appointment which  
related to the crash on Mt Erebus, Antarctica  
of the DC10 aircraft operated by the Applicant  
and known as Flight TE 901. 20

4. THE Second Respondents are the Executrices  
and Trustees of the estate of GREGORY MARK  
CASSIN, deceased who was the Co-Pilot of  
Flight TE 901. The Second Respondents were  
cited as parties to the Commission of Inquiry  
by the First Respondent. 30

5. THE Third Respondent is the Executrix of  
the estate of THOMAS JAMES COLLINS deceased who  
was the Pilot in Command of Flight TE 901. The  
Third Respondent was cited as a party to the  
Commission of Inquiry by the First Respondent.

6. THE Fourth Respondent is sued pursuant to  
Section 14 of the Crown Proceedings Act in  
respect of the Civil Aviation Division of the  
Ministry of Transport. The Civil Aviation  
Division of the Ministry of Transport was also  
cited as a party to the Commission of Inquiry  
by the First Respondent. 40

7. THE Fifth Respondent is an industrial union  
registered under the Industrial Relations Act  
1973 and has its registered office at Wellington.  
It was represented before the Commission of Inquiry.

8. THE Commission of Appointment contained the following preamble and terms of appointment: In the High Court

10 WHEREAS on the morning of the 28th day of November 1979, a DC10 Series 30 aircraft, operated by Air New Zealand Limited and bearing the nationality and registration marks ZK-NZP, took off from Auckland, at the beginning of a flight designated as Flight TE 901, a scenic passenger flight over the Antarctica:

No.2  
Amended  
Statement  
of Claim  
3rd July  
1981

(continued)

AND WHEREAS the next point of intended landing of the aircraft, after taking off from Auckland and flying over Antarctica, was Christchurch:

AND WHEREAS on the 28th day of November 1979, the aircraft crashed on the slopes of Mount Erebus, Antarctica, in the course of Flight TE 901:

20 AND WHEREAS the crash of the aircraft resulted in the total loss of the aircraft and in the death of all persons, believed to have numbered 257, on board:

AND WHEREAS on the 28th day of November 1979, the aircraft was a New Zealand aircraft and Air New Zealand Limited was both the registered owner and the operator of the aircraft:

AND WHEREAS it is expedient that inquiry should be made into the causes and circumstances of the crash:

30 KNOW YE that We, reposing trust and confidence in your integrity, knowledge and ability, do hereby nominate, constitute, and appoint you, the said The Honourable PETER THOMAS MAHON to be a Commission to inquire into and report upon:

- (a) The time at which the aircraft crashed:
- (b) The cause or causes of the crash and the circumstances in which it happened:
- (c) Whether the aircraft and its equipment were suitable for Flight TE 901?
- 40 (d) Whether the aircraft and its equipment were properly maintained and serviced?
- (e) Whether the crew of the aircraft held the appropriate licences and ratings and had adequate experience to make Flight TE 901?

In the High Court

No.2  
Amended  
Statement  
of Claim  
3rd July  
1981

(continued)

- (f) Whether, in the course of Flight TE 901, the aircraft was operated, flown, navigated, or manoeuvred in a manner that was unsafe or in circumstances that were unsafe?
- (g) Whether the crash of the aircraft or the death of the passengers and crew was caused or contributed to by any person (whether or not that person was on board the aircraft) by an act or omission in respect of any function in relation to the operation, maintenance, servicing, flying, navigation, manoeuvring, or air traffic control of the aircraft, being a function which that person had a duty to perform or which good aviation practice required that person to perform? 10
- (h) Whether the practice and actions of the Civil Aviation Division of the Ministry of Transport in respect of Flight TE 901 were such as might reasonably be regarded as necessary to ensure the safe operation of aircraft on flight such as TE 901? 20
- (i) The working and adequacy of the existing law and procedures relating to -
- (i) The investigation of air accidents; and
  - (ii) In particular, the making available to interested persons of information obtained during the investigation of air accidents: 30
- (j) And other facts or matters arising out of the crash that, in the interest of public safety, should be known to the authorities charged with the administration of civil aviation in order that appropriate measures may be taken for the safety of persons engaged in aviation or carried as passengers in aircraft. 40

9. THE Commission of Appointment "declared that these presents are issued under the authority of the Letters Patent of His Majesty King George the Fifth, dated the 11th day of May 1917, and under the authority of and subject to the provisions of the Commissions of Inquiry Act 1908, and with

the advice and consent of the Executive Council of New Zealand".

In the High Court

10. ON the 23rd of June 1980, the First Respondent commenced his inquiry into the Terms of Reference contained in the Commission of Appointment.

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Amended  
Statement  
of Claim  
3rd July  
1981

10

11. THE First Respondent took evidence under oath from witnesses at public hearings held in Auckland over a period of approximately 70 days such days falling between the 23rd June 1980 and the 15th December 1980. No Counsel, other than Senior Counsel assisting the Commission, was invited to make an opening address or opening submissions.

(continued)

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12. DURING the course of the public hearings evidence was given by witnesses (hereinafter called "the affected employees") employed by the First Applicant in its Flight Operations Division, Navigation Section, and Management.

13. CLOSING submissions by Counsel were presented to the First Respondent at public sittings held on the 27th, 28th, 29th and 30th January 1981 and 2nd February 1981.

14. ON the 16th day of April 1981, the First Respondent submitted his Report (hereinafter called "the Report") for the consideration of His Excellency The Governor-General.

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15. IN or about the month of April 1981 following the public release of the Report the Fourth Respondent referred the Report to the Commissioner of Police for investigation.

#### FIRST CAUSE OF ACTION

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16. IN certain parts of the Report namely paragraph 348 in a Section entitled "Post Accident Conduct of Air New Zealand" and in paragraph 377 of the Report in a Section entitled "The Stance Adopted By The Airline Before the Commission of Inquiry" the First Respondent made findings against the affected employees that they had been guilty of serious misconduct and grave improprieties in relation to their conduct at the public hearings convened by the First Respondent and referred to in paragraph 11 hereof.

#### PARTICULARS

(a) The affected employee in respect of paragraph

(continued)

- 348 is Captain D.R.A. Eden (Flight Operations Executive Captain).
- (b) The affected employees in relation to paragraph 377 are :-
- Mr. W.K.Amies (Navigation Section)
  - Mr. R. Brown (Navigation Section)
  - Mr. M.R.Davis (Chief Executive)
  - Captain D.R.A.Eden (Flight Operations Executive Captain)
  - Captain I.H.Gemmell (Flight Operations Executive Captain) 10
  - Captain P.M.Grundy (Flight Operations Executive Captain)
  - Captain M.R.Hawkins (Flight Operations Executive Captain)
  - Mr. C.B.Hewitt (Navigation Section)
  - Captain R.T.Johnson (Flight Operations Executive Captain)
  - Mr. L.A. Lawton (Navigation Section)
17. THE findings referred to in the preceding paragraph hereof are decisions deciding, prescribing or affecting the rights, duties or liabilities of the affected employees and the First Applicant. In making the findings the First Respondent was exercising a statutory power of decision within the Judicature Amendment Act 1972. 20
18. THE findings referred to in paragraph 16 hereof have affected and will gravely affect in the future the named affected employees in any one or more or a combination of the following ways :- 30
- (a) By damaging their individual and professional reputations
  - (b) By exposing them to adverse publicity.
  - (c) By exposing them to criminal inquiry and investigation.
  - (d) By causing or contributing to their early retirement.
  - (e) By adversely affecting their opportunity of obtaining suitable employment within the aviation industry otherwise than with the First Applicant. 40
  - (f) By adversely affecting their health and general wellbeing.
19. AS a further consequence of the findings

referred to in paragraph 16 hereof and their effect on the named employees as pleaded in the preceding paragraph the First Applicant has been and will continue to be adversely affected in any one or more or a combination of the following ways :

In the High Court

No.2  
Amended  
Statement  
of Claim  
3rd July  
1981

(continued)

10

(a) By exposing it to adverse publicity.  
(b) By adversely affecting its business and commercial reputation and its standing in the international aviation industry.

(c) By causing or contributing to the premature retirement of certain of its valued employees.

(d) By exposing its employees to criminal inquiry and investigation.

20

(e) By exposing its employees to criminal inquiry and investigation thus necessitating in the interests of safety the temporary removal of the employees from all or part of their duties as employees of the First Applicant.

20. THE Grounds on which the Applicants seek relief are :-

The findings referred to in paragraph 16 hereof are findings of serious misconduct or grave impropriety by the affected employees and :-

30

(i) were unlawful and beyond the jurisdiction of the First Respondent in that they contravened statutes in force in New Zealand namely 42 Edw. 3, c.3: 3 Car.1, c.1; and 16 Car.1, c.10; and/or

(ii) Such findings were beyond or without the terms of reference contained in the Commission of Appointment. The terms of reference did not give the First Respondent jurisdiction to inquire into and make findings in respect of any alleged misconduct or impropriety.

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#### SECOND CAUSE OF ACTION

AND FOR A FURTHER AND ALTERNATIVE CAUSE OF ACTION the Applicants by their said Solicitor say :-

21. THE Plaintiff repeats the allegations contained in paragraphs 1-15 (both inclusive).

(continued)

22. IN certain parts of the Report which are specified in the particulars appearing hereunder the First Respondent made findings against the affected employees that they had been guilty of serious misconduct and grave improprieties in relation to :-

- (i) Their conduct at the public hearings convened by the First Respondent and referred to in paragraph 11 hereof and/or
- (ii) The collection, retrieval, or preservation of certain articles and documents relating to the First Applicants' Antarctica flights.

10

PARTICULARS RELATING TO CONDUCT AT HEARINGS

Relevant Section of the Report

Affected Employee or Employees

A. Paragraph 255(e)

R. Brown (Navigation Section)

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

20

B. Paragraph 255(f)

W. K. Amies  
R. Brown  
C. B. Hewitt  
L. A. Lawton  
(Navigation Section)

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

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<u>Relevant Section of the Report</u>	<u>Affected Employee or Employees</u>	<u>In the High Court</u>
C. <u>Paragraph 348</u>	Captain D.R.A.Eder (Flight Operations Executive Captain)	No.2 Amended Statement of Claim 3rd July 1981
10	"Captain Eden is at present the director of flight operations for the airline. He appeared in the witness box to be a strong-minded and aggressive official. It seemed clear from this further production of First Officer Rhodes as a witness that it had been suggested to him by Captain Eden that he should either make a direct allegation	(continued)
20	against Captain Gemmell or else make no allegation at all, and that since First Officer Rhodes seemed to have no direct evidence in his possession, he was therefore <u>obliged to give the answer which Captain Eden had either suggested or directed.</u>	
30	<u>However, First Officer Rhodes was not entirely intimidated</u> because as will be observed from the evidence just quoted, he insisted on saying that Captain Gemmell had brought an envelope containing documents back to Auckland."	
40	D. <u>Paragraph 377</u>  "But in this case, the <u>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 predetermined plan of deception.</u> They were very clearly part of <u>an attempt to conceal a series of disastrous administrative blunders and so, in regard to the</u>	Mr. W.K.Amies (Navigation Section) Mr. R.Brown (Navigation Section) Mr. M.R. Davis (Chief Executive) Captain D.R.A.Eden (Flight Operations Executive) Captain I.H.Gemmell (Flight Operations Executive Captain) Captain P.M. Grundy (Flight Operations Executive Captain)
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In the High Court

No.2  
Amended  
Statement  
of Claim  
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1981

(continued)

Relevant Section of  
the Report

Affected Employee  
or Employees

D. Paragraph 377 (cont'd)

particular items of  
evidence to which I have  
referred, I am forced  
reluctantly to say  
that I have had to  
listen to an  
orchestrated litany  
of lies."  
(Underlining added)

Captain M.R.Hawkins  
(Flight Operations  
Executive Captain)  
Mr. C.B. Hewitt  
(Navigation Section)  
Captain R.T.Johnson  
(Flight Operations  
Executive Captain)  
Mr.L.A. Lawton  
(Navigation Section)

10

PARTICULARS RELATING TO COLLECTION RETRIEVAL  
OR PRESERVATION OF CERTAIN ARTICLES OR  
DOCUMENTS RELATING TO THE FIRST APPLICANT'S  
ANTARCTICA FLIGHTS

Relevant Section of  
the Report

Affected Employee or  
or Employees

E. Paragraphs 45 and 54

20

Paragraph 45:  
"Of these documents all  
those which were not  
directly relevant were  
to be destroyed."  
(Underlining added)

Mr. M.R.Davis  
(Chief Executive)

Paragraph 54:  
"This was at the time  
the fourth worst dis-  
aster 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 remark-  
able executive  
decisions ever to have  
been made in the  
corporate affairs of a  
large New Zealand  
company."  
(Underlining added)

Mr. M.R. Davis  
(Chief Executive)

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Relevant Section of  
the Report

Affected Employee  
or Employees

In the High  
Court

F. Paragraph 352

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

Captain I.H.Gemmell  
(Flight Operations  
Executive Captain)

No.2  
Amended  
Statement  
of Claim  
3rd July  
1981

(continued)

G. Paragraphs 353,354 and  
359(1)

30 Paragraph 353:  
After the evidence given  
before the Commission had  
concluded I gave some  
thought to the matters  
just mentioned. I knew  
that the responsibility  
for recovering all  
property on the crash site  
lay exclusively with the  
New Zealand Police Force,  
and that they had grid-  
searched the entire site.  
All property recovered had  
40 been placed in a large  
store at McMurdo Base,  
which was padlocked, and  
access to the shed was  
only possible through a  
senior sergeant of Police.  
I asked counsel assisting  
the Commission to make  
inquiries about the flight  
bags which had been located  
on the site but which had  
50 not been returned to Mrs.  
Collins or Mrs. Cassin.

Captain I.H.Gemmell  
(Flight Operations  
Executive Captain)



23. THE findings referred to in the preceding paragraph hereof are decisions deciding, prescribing or affecting the rights, duties or liabilities of the affected employees and the First Applicant. In making the findings the First Respondent was exercising a statutory power of decision within the Judicature Amendment Act 1972.

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10 24. THE grounds on which the Applicants seek relief are that the findings referred to in paragraph 22 hereof were made by the First Respondent contrary to the rules of natural justice and in a manner unfair to the affected employees and to the First Applicant all being persons who have been and will continue to be affected by the findings, because:

(continued)

(i) As to the findings specified in paragraph 22(A) hereof :-

- 20 (a) The affected employee was not given prior notice of the likelihood of such findings being made against him; and/or
- (b) The affected employee was not given a fair opportunity in the course of the public hearings to answer or put his case in relation to such findings; and/or
- 30 (c) Notwithstanding the provisions of Section 4A of the Commissions of Inquiry Act 1908 (as inserted by Section 4 of the Commissions of Inquiry Amendment Act 1980) the affected employee was not advised by the First Respondent that he might make such findings against him and the affected employee was not invited or advised by the First Respondent or Counsel Assisting the First Respondent to retain his own Counsel and to make submissions and call evidence in answer to likely adverse findings against him; and/or
- 40 (d) The First Respondent, having prepared the Report containing the findings, forwarded the Report to the Governor General without first giving reasonable notice to the affected employee and/or the First Applicant of the adverse findings against them and without providing the affected
- 50

employee and/or the First Applicant with the opportunity to be heard further and if necessary to call further witnesses prior to the despatch of the report to the Governor General;

(continued)

- (ii) As to the findings contained in paragraph 22(B)
- (a) The affected employees were not given prior notice of the likelihood of such findings being made against them; and/or 10
- (b) The affected employees were not given a fair opportunity in the course of the public hearings to answer or put their case in relation to such findings; and/or
- (c) Notwithstanding the provisions of Section 4A of the Commissions of Inquiry Act 1908 (as inserted by Section 4 of the Commissions of Inquiry Amendment Act 1980) the affected employees were not advised by the First Respondent that he might make such findings against them and the affected employees were not invited or advised by the First Respondent or Counsel Assisting the First Respondent to retain their own Counsel and to make submissions and call evidence in answer to likely adverse findings against them; and/or 20 30
- (d) The First Respondent, having prepared the Report containing the findings, forwarded the Report to the Governor General without first giving reasonable notice to the affected employees and/or the First Applicant of the adverse findings against them and without providing the affected employees and/or the First Applicant with the opportunity to be heard further and if necessary to call further witnesses prior to the despatch of the report to the Governor General; 40
- (iii) As to the findings contained in paragraph 22(C) hereof:
- (a) The affected employee was not given 50

prior notice of the likelihood of such a finding being made against him; and/or

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(b) The affected employee was not given a fair opportunity to answer or put his case in relation to such finding; and/or

(c) Notwithstanding the provisions of Section 4A of the Commissions of Inquiry Act 1908 (as inserted by Section 4 of the Commissions of Inquiry Amendment Act 1980) the affected employee was not advised by the First Respondent that he might make such a finding against him and the affected employee was not invited or advised by the First Respondent or Counsel Assisting the First Respondent to retain his own Counsel and to make submissions and call evidence in answer to the likely adverse finding against him; and/or

(continued)

(d) The First Respondent, having prepared the Report containing the finding, forwarded the Report to the Governor General without first giving reasonable notice to the affected employee and/or the First Applicant of the adverse finding and without providing the affected employee and/or the First Applicant with the opportunity to be heard further and if necessary to call further witnesses prior to the despatch of the report to the Governor General;

(iv) As to the findings referred to in paragraph 22(D) hereof:-

- (a) Such findings were not based on evidence of probative value; and/or
- (b) The affected employees were not given prior notice of the likelihood of such findings being made against them; and/or
- (c) The affected employees were not given a fair opportunity in the course of the public hearings to answer or put

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their case in relation to such  
findings; and/or

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(continued)

- (d) Notwithstanding the provisions of Section 4A of the Commissions of Inquiry Act 1908 (as inserted by Section 4 of the Commissions of Inquiry Amendment Act 1980) the affected employees were not advised by the First Respondent that he might make such findings against them and the affected employees were not invited or advised by the First Respondent or Counsel Assisting the First Respondent to retain their own Counsel and to make submissions and call evidence in answer to likely adverse findings against them; and/or 10
- (e) The First Respondent, having prepared the Report containing the findings, forwarded the Report to the Governor General without first giving reasonable notice to the affected employees and/or the First Applicant of the adverse findings and without providing the affected employees and/or the First Applicant with the opportunity to be heard further and if necessary to call further witnesses prior to the despatch of the report to the Governor General; 20 30
- (v) As to the findings referred to in paragraph 22(E) hereof:-
- (a) Such findings were based upon a mistake of fact by the First Respondent; and/or
- (b) Such findings were not based on evidence of probative value; and/or 40
- (c) The affected employee was not given prior notice of the likelihood of such a finding being made against him; and/or
- (d) The affected employee was not given a fair opportunity in the

course of the public hearings  
to put his case in relation to  
such findings; and/or

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(continued)

10

(e) Notwithstanding the provisions  
of Section 4A of the Commissions  
of Inquiry Act 1908 (as inserted by  
Section 4 of the Commissions of  
Inquiry Amendment Act 1980) the  
affected employee was not advised  
by the First Respondent that he  
might make such findings against  
him and the affected employee  
was not invited or advised by  
the First Respondent or Counsel  
Assisting the First Respondent to  
retain his own Counsel and to make  
submissions and call evidence in  
answer to the likely adverse  
finding against him; and/or

20

(f) The First Respondent, having  
prepared the Report containing the  
findings, forwarded the Report to  
the Governor General without first  
giving reasonable notice to the  
affected employee and/or the First  
Applicant of the adverse findings  
and without providing the affected  
employee and/or the First Applicant  
with the opportunity to be heard  
further and if necessary to call  
further witnesses prior to the  
despatch of the report to the  
Governor General;

30

(vi) As to the findings referred to in  
paragraph 22(F) hereof:-

(a) Such findings were based upon a  
mistake of fact by the First Respondent;

(b) Such findings were not based on  
evidence of probative value; and/or

40

(c) The affected employee was not  
given prior notice of the likelihood  
of such a finding being made against  
him; and/or

(d) The affected employee was not given  
a fair opportunity to answer or put  
his case in relation to such finding;  
and/or

(continued)

- (e) Notwithstanding the provisions of Section 4A of the Commissions of Inquiry Act 1908 (as inserted by Section 4 of the Commissions of Inquiry Amendment Act 1980) the affected employee was not advised by the First Respondent that he might make such findings against him and the affected employee was not invited or advised by the First Respondent or Counsel Assisting the First Respondent to retain his own Counsel and to make submissions and call evidence in answer to likely adverse findings against him, and/or 10
- (f) The First Respondent, having prepared the Report containing the findings, forwarded the Report to the Governor General without first giving reasonable notice to the affected employee and/or the First Applicant of the adverse finding and without providing the affected employee and/or the First Applicant with the opportunity to be heard further and if necessary to call further witnesses prior to the despatch of the report to the Governor General; 20
- (vii) As to the findings referred to in paragraph 22(G) hereof :- 30
- (a) Such findings were not based on evidence of probative value; and/or
- (b) The findings were based on information or evidence gathered by the First Respondent outside the public hearings conducted by the First Respondent and after those hearings had been completed. This is revealed in paragraphs 353 and 354 of the Report. Such information or evidence was not disclosed to the First Applicant or to the affected employee prior to the publication of the Report. While the Chief Inspector of Air Accidents was given an opportunity of meeting and challenging such potentially prejudicial information or evidence, as shown by paragraph 354, a similar 40 50

opportunity was not afforded to the affected employee or First Applicant.

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- (c) The affected employee was not given prior notice of the likelihood of such a finding being made against him; and/or
- (d) The affected employee was not given a fair opportunity to answer or put his case in relation to such finding; and/or

(continued)

(e) Notwithstanding the provisions of Section 4A of the Commissions of Inquiry Act 1908 (as inserted by Section 4 of the Commissions of Inquiry Amendment Act 1980) the affected employee was not advised by the First Respondent that he might make such findings against him and the affected employee was not invited or advised by the First Respondent or Counsel Assisting the First Respondent to retain his own Counsel and to make submissions and call evidence in answer to likely adverse findings against him; and/or

(f) The First Respondent, having prepared the Report containing the findings, forwarded the Report to the Governor General without first giving reasonable notice to the affected employee and/or the First Applicant of the adverse finding and without providing the affected employee and/or the First Applicant with the opportunity to be heard further and if necessary to call further witnesses prior to the despatch of the report to the Governor General;

25. THE findings referred to in paragraph 22 hereof have affected and will gravely affect in the future the named affected employees in any one or more or a combination of the following ways :-

- (a) By damaging their individual and professional reputations.
- (b) By exposing them to adverse publicity.

(continued)

- (c) By exposing them to criminal inquiry and investigation.
- (d) By causing or contributing to their early retirement.
- (e) By adversely affecting their opportunity of obtaining suitable employment within the aviation industry otherwise than with the First Applicant.
- (f) By adversely affecting their health and general wellbeing.

10

26. AS a further consequence of the findings referred to in paragraph 22 hereof and their effect on the named employees as pleaded in the preceding paragraph the First Applicant has been adversely affected in any one or more or a combination of the following ways:

- (a) By exposing it to adverse publicity.
- (b) By adversely affecting its business and commercial reputation and its standing in the international aviation industry.
- (c) By causing or contributing to the premature retirement of certain of its valued employees.
- (d) By exposing its employees to criminal inquiry and investigation.
- (e) By exposing its employees to criminal inquiry and investigation thus necessitating in the interests of safety the temporary removal of the employees from all or part of their duties as employees of the First Applicant.

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30

RELIEF SOUGHT BY THE APPLICANTS

27. THE Applicants seek the following relief:-

- (a) An order that the findings be set aside
- (b) An order that a declaration do issue against the First Respondent declaring :-
  - (i) That the findings referred to in paragraphs 16 and 22 hereof are contrary to law, unauthorised or otherwise invalid and/or
  - (ii) That the findings were made in excess of jurisdiction and/or

40

(iii) That the findings were made in circumstances involving unfairness and breaches of the rules of natural justice.

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- 10
- (c) Such further or other relief as may in the circumstances be just
  - (d) An order quashing the decision of the First Respondent (being Order 6 of the Appendix to the Report) that the First Applicant pay to the Department of Justice the sum of \$150,000.00 by way of contribution to the public cost of the Inquiry
  - (e) An order that the Applicants' costs of and incidental to this application be paid by such person or persons as the Court may direct

(continued)

20 THIS AMENDED STATEMENT OF CLAIM is filed by DAVID ARTHUR RHODES WILLIAMS, Solicitor for the Applicant whose address for service is at the offices of Messrs. Russell McVeagh McKenzie Bartleet & Co., Solicitors, 13th floor, C.M.J. Centre, Corner Queen and Wyndham Streets, Auckland, 1.

STATEMENT OF DEFENCE  
BY FIFTH RESPONDENT  
(NZALPA)

No.3  
Statement  
of Defence  
by Fifth  
Respondent  
(NZALPA)  
12th August  
1981

STATEMENT OF DEFENCE BY FIFTH  
RESPONDENT

DAY THE DAY OF 1981

The Fifth Respondent says :-

- (I) THAT this Honourable Court lacks jurisdiction to entertain the Application for Review. 10
- (II) WITHOUT prejudice to paragraph (I) hereof the Applicants lack status to pursue all or any of the claims made in the Amended Statement of Claim.
- (III) WITHOUT prejudice to the foregoing paragraphs :-
- (1) It admits each and every of the allegations contained in paragraphs 1, 2 and 3 of the Amended Statement of Claim.
- (2) It does not plead to paragraphs 4 and 5 of the Amended Statement of Claim. 20
- (3) It admits the allegations contained in paragraphs 6, 7, 8 and 9 of the Amended Statement of Claim.
- (4) As to paragraph 10 of the Amended Statement of Claim it admits that the public hearings by the First Respondent commenced on the 23rd day of June 1980.
- (5) As to paragraph 11 of the Amended Statement of Claim it admits that the First Respondent took evidence under oath from witnesses at public hearings held in Auckland over a period of approximately seventy days, such days falling between the 23rd day of June 1980 and the 15th day of December 1980. As to the allegation that no counsel other than senior counsel assisting the Commission was invited to make an opening address or opening submission, it says that prior to and at the commencement public hearings the attention of all counsel was drawn to 30 40

the practice recommended by the Report of the Commission to Review the Working of the Tribunals of Inquiry (Evidence) Act 1921 (Cmd.3121) that counsel for interested parties be afforded the opportunity to make an opening speech at the commencement of a Commission hearing. No party sought to avail itself of this procedure. It further says that counsel for the First Applicant when calling evidence, reserved to the First Applicant the right to make an opening statement or address but, in fact, the First Applicant thereafter made no opening address or opening statement or submission. It admits that no specific invitation was issued by the First Respondent to counsel in public session to make an opening address or opening submission.

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- (6) It admits the allegations contained in paragraph 12 of the Amended Statement of Claim save that it denies that the witnesses are appropriately described as "the effected employees".
- (7) It admits the allegations contained in paragraphs 13, 14 and 15 of the Amended Statement of Claim.
- (8) As to paragraph 16 of the Amended Statement of Claim it admits that within the quoted passages referred to in paragraph 16 the First Respondent commented upon the conduct of certain employees of the First Applicant. It further says :
- (a) It admits that paragraph 348 of the Report is referable to Captain Eden;
- (b) It admits that paragraph 377 of the Report is referable to the personnel mentioned in paragraph 376, namely, the executive pilots, (in regard to their assertion that they had no specific knowledge of the Antarctic flight operating under the minimum safe altitude specified by the Civil Aviation Division); the Chief Executive Mr. Davis (in regard to the same assertion); Captain Johnson (in regard to his belief that Captain Simpson had told him that the McMurdo waypoint was incorrectly situated); members of the Navigation Section (who alleged

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(continued)

that they believed that the alteration to the co-ordinates only amounted to two miles); Mr. Amies (in regard to his explanation of drawing an arrow on a meridian of longitude so as to remind himself that the meridian pointed north); Navigation Section witnesses (in regard to their assertion that the misleading flight plan radioed to McMurdo on the morning of the fatal flight was not deliberate but the result of yet another computer mistake). In addition paragraph 377 is referable to the Chief Executive, Mr. Davis, in regard to the matters referred to in paragraphs 373 and 374 of the Report.

10

It denies that such comments of the First Respondent constituted "findings". Save as is hereby expressly admitted it denies each and every of the allegations contained in the said paragraph 16.

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(9) Insofar as the allegations contained in paragraph 17 relate to matters of fact, it denies each and every of such allegations. Insofar as such allegations are matters of law, it does not plead to the same.

(10) It has no sufficient knowledge of and therefore denies each and every of the allegations contained in paragraph 18 of the Amended Statement of Claim.

30

(11) It has no sufficient knowledge of and therefore denies each and every of the allegations contained in paragraph 19 of the Amended Statement of Claim.

(12) As to paragraph 20 of the Amended Statement of Claim, it admits that the comments in paragraph 377 of the Report refers to serious misconduct or grave impropriety by certain employees of the First Applicant. It denies that such comments constituted "findings". It further denies that such comments were in excess of or without the jurisdiction of the First Respondent. It further denies that such comments were beyond or without the terms of reference contained in the Commission of Appointment. If (which is denied) the First Respondent made "findings" in respect of the matters referred to in paragraph 16 of the Amended Statement of Claim

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50

it says that, the First Respondent possessed jurisdiction to enquire into and to make findings in respect of those matters. Save as is hereby expressly admitted it denies each and every of the allegations contained in the said paragraph 20.

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10 (13) As to paragraph 21 of the Amended Statement of Claim, it repeats the foregoing paragraphs.

(14) As to paragraph 22 of the Amended Statement of Claim, it denies that the First Respondent made "findings" against the persons named in the said paragraph 22. It pleads to the particulars contained in the said paragraph 22 as follows :

(continued)

20 A. It denies that the passage quoted from paragraph 255(e) is necessarily referable to Mr. R.Brown, who stated that he probably made the relevant entry in accordance with particulars dictated to him by Mr. C.B.Hewitt. It admits that the conduct referred to appears to be that of Mr. C.B. Hewitt.

30 B. It denies that the passage quoted from paragraph 255(f) is necessarily a reference to all of Messrs. Amies, Brown, Hewitt and Lawton, and says that the First Respondent has refrained from asserting who specifically was in fact responsible for the conduct described.

C. It admits that paragraph 348 refers to Captain Eden.

40 D. It admits that paragraph 377 refers to the personnel mentioned in paragraph 376, namely, the executive pilots (in regard to their assertion that they had no specific knowledge of the Antarctic flights operating under the minimum safe altitude specified by the Civil Aviation Division); Chief Executive, Mr. Davis (in regard to the same assertion); Captain Johnson (in regard to his belief that Captain Simpson had told him that the McMurdo waypoint was incorrectly situated); members of the Navigation Section (who alleged that they believed that the alteration to the  
50 co-ordinates only amounted to two miles);

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Mr. Amies (in regard to his explanation of drawing an error on a meridian of longitude so as to remind himself that the meridian pointed north); Navigation Section witnesses (in regard to their assertion that the misleading flight plan radioed to McMurdo on the morning of the fatal flight was not deliberate but the result of yet another computer mistake). In addition paragraph 377 is referable to the Chief Executive, Mr. Davis, in regard to the matters referred to in paragraphs 373 and 374 of the Report. Save as is hereby expressly admitted it denies each and every of the allegations made. 10

E. It admits that paragraphs 45 and 54 are referable to Mr. Davis.

F. It admits that paragraph 352 of the Report contains a reference to Captain Gemmell. 20

G. It denies that paragraphs 353, 354 and 359(1) of the Report relate to Captain Gemmell.

Save as is expressly admitted it denies each and every of the allegations contained in paragraph 22 of the Amended Statement of Claim.

(15) Insofar as paragraph 23 of the Amended Statement of Claim contains allegations of fact it denies each and every of such allegations. Insofar as it contains matters of law it does not plead to the same. 30

(16) It denies each and every allegation contained in paragraph 24 to the effect that the passages of the Report referred to in paragraph 22 of the Amended Statement of Claim were made by the First Respondent contrary to the rules of natural justice and in a manner unfair to the persons referred to and to the First Applicant and in particular: 40

(i) (a) It denies each and every allegation contained therein.

(b) It denies each and every allegation contained therein and says that the employee was represented by counsel, which counsel were present during the entire course of the

public hearings and which  
counsel made final submissions  
at the conclusion of the hearings.

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(continued)

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(c) It denies each and every allegation contained therein and in particular denies that the First Respondent was by reason of Section 4(A) of the Commissions of Inquiry Act 1908 required to advise the employee as is alleged AND it further denies that adherence to the principles of natural justice required the First Respondent to adopt such a course of action.

20

(d) It denies each and every allegation contained therein and in particular it denies that the First Respondent, in order to adhere to the principles of natural justice, was required to give notice to the employee or to the First Applicant of adverse comments or findings concerning those parties AND it specifically denies that the First Respondent was obliged in order to adhere to the principles of natural justice to provide the said employee or the First Applicant with the opportunity to be heard further or to call further witnesses prior to dispatch of his Report to the Governor General.

30

(ii) (a) It denies each and every allegation contained therein.

(b) It repeats paragraph (16) (i) (b) hereof.

40

(c) It repeats paragraph (16) (i) (c) hereof as applicable to the employee referred to.

(d) It repeats paragraph (16) (i) (d) hereof as applicable to the First Applicant and employees referred.

(iii) (a) It denies each and every allegation contained therein.

(b) It repeats paragraph (16) (i) (b) hereof.

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(continued)

- (c) It repeats paragraph (16) (i)(c)  
as referable to the employee  
referred to.
- (d) It repeats paragraph (16) (i) (d)  
as referable to the First  
Applicant and the employee  
referred to.
- (iv) (a) It denies each and every allegation  
contained therein.
- (b) It repeats paragraph (16) (i) (b)  
hereof. 10
- (c) It denies each and every allegation  
contained therein.
- (d) It repeats paragraph (16) (i) (c)  
as referable to the employees  
referred to.
- (e) It repeats paragraph (16) (i) (d)  
as referable to the First Applicant  
and employees referred to.
- (v) (a) It denies each and every allegation 20  
contained therein.
- (b) It denies each and every allegation  
contained therein.
- (c) It repeats paragraph (16) (i) (b)  
hereof.
- (d) It denies each and every allegation  
contained therein.
- (e) It repeats paragraph (16) (i) (c)  
as referable to the employee referred  
to. 30
- (f) It repeats paragraph (16) (i) (d)  
as referable to the First Applicant  
and employee referred to.
- (vi) (a) It denies each and every allegation  
contained therein.
- (b) It denies each and every allegation  
contained therein.
- (c) It repeats paragraph (16) (i) (b)  
hereof.
- (d) It denies each and every allegation 40  
contained therein.

(continued)

(e) It repeats paragraph (16) (i) (c)  
as referable to the employee  
referred to.

(f) It repeats paragraph (16) (i) (d)  
as referable to the First Appli-  
cant and employee referred to.

(vii) (a) It denies each and every  
allegation contained therein.

(b) It accepts that the contents of  
paragraphs 353, 354 and 359(1)  
relate to evidence obtained by  
the First Respondent following  
the conclusion of evidence given  
before the Commission. It denies  
that the evidence so collected  
by the First Respondent was relied  
upon by the First Respondent to  
make any finding against Captain  
Gemmell and it is denied that  
the passages complained of  
specifically refer to Captain  
Gemmell and it accordingly denies  
that adherence to the principles  
of natural justice required the  
First Respondent to provide the  
First Applicant or Captain Gemmell  
with an opportunity of "meeting  
and challenging such potentially  
prejudicial information or evidence".

(c) It repeats paragraph (16) (i) (b)  
hereof.

(d) It denies each and every allegation  
contained therein.

(e) It repeats paragraph (16) (i) (c) to  
relate to the employee referred to.

(f) It repeats paragraph (16) (i) (d)  
hereof to relate to the First  
Applicant and employee referred to.

Save as is hereby expressly admitted  
it denies each and every of the allega-  
tions made in paragraph 24 of the  
Amended Statement of Claim.

(17) As regard paragraph 25 of the Amended Statement  
of Claim it denies that the passages quoted  
and referred to in paragraph 22 amount to  
"findings", and it says that it has insuffi-  
cient knowledge of and therefore denies each

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and every of the other allegations  
contained therein.

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(18) As regards paragraph 26 of the Amended  
Statement of Claim it denies that the  
passages quoted and referred to in  
paragraph 22 amount to "findings", and  
it says that it has insufficient knowledge  
of and therefore denies each and every of  
the other allegations contained therein.

(continued)

THIS STATEMENT OF DEFENCE is filed by PAUL  
JOSEPH DAVISON Solicitor for the Fifth  
Respondent whose address for service is at the  
offices of Messrs. Stacey, Smith, Holmes &  
Billington, Solicitors, Williams Parking Centre,  
Level "P", Boulcott Street, Wellington 1.

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No.4  
Notice  
requiring  
further  
particulars  
of Statement  
of Defence  
of Fifth  
Respondent  
(NZALPA)  
25th August  
1981

No. 4

NOTICE REQUIRING FURTHER  
PARTICULARS OF STATEMENT  
OF DEFENCE OF FIFTH RESPONDENT  
(NZALPA)

20

IN THE COURT OF APPEAL OF NEW ZEALAND C.A.95/81

BETWEEN

AIR NEW ZEALAND LIMITED  
FIRST APPLICANT

A N D

MORRISON RITCHIE DAVIS  
SECOND APPLICANT

A N D

IAN HARDING GEMMELL  
THIRD APPLICANT

A N D

PETER THOMAS MAHON  
FIRST RESPONDENT

A N D

THE ATTORNEY-GENERAL  
FOURTH RESPONDENT

30

A N D

NEW ZEALAND AIRLINE PILOTS  
ASSOCIATION  
FIFTH RESPONDENT

A N D

THE ATTORNEY-GENERAL  
SIXTH RESPONDENT

NOTICE REQUIRING FURTHER  
PARTICULARS OF STATEMENT  
OF DEFENCE OF FIFTH  
RESPONDENT

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of Appeal

No.4

Notice requiring  
further  
particulars  
of Statement  
of Defence  
of Fifth  
Respondent  
(NZALPA)  
25th August  
1981

TAKE NOTICE that the First and Second Applicants require further and better particulars of the following paragraphs of the Statement of Defence of the Fifth Respondent:-

1. Paragraph (5) page 2 :-

10 (a) On what date and where is it claimed that "the attention of all counsel was drawn to the practice recommended by the Report of the Commission to Review the Working of the Tribunals of Inquiry (Evidence) Act 1921 (Cmnd.3121) that counsel for interested parties be afforded the opportunity to make an opening speech at the commencement of a Commission hearing."

20 (b) By whom and in what terms is it claimed that "the attention of all counsel was drawn to the practice recommended by the Report of the Commission to Review the Working of the Tribunals of Inquiry (Evidence) Act 1921 (Cmnd.3121) that counsel for interested parties be afforded the opportunity to make an opening speech at the commencement of a Commission hearing."

2. Paragraph (16) page 7 :-

30 Paragraph (i) (b) says "that the employee was represented by counsel, which counsel were present during the entire course of the public hearings and which counsel made final submissions at the conclusion of the hearings".

The said paragraph (i) (b) is repeated in paragraphs 16(ii) (b), 16(iii) (b), 16(iv) (b), 16(v) (c), 16(vi) (c), 16(vii) (c).

40 (a) Name the employees claimed to have been so represented and provide the names of the counsel concerned.

(b) Provide a reference to and details of the "final submissions at the conclusion of the hearings" claimed to have been made for the employees named in (a) above.

3. In paragraphs 9 and 15 of the Statement of

(continued)

In the Court  
of Appeal

No.4

Notice  
requiring  
further  
particulars  
of Statement  
of Defence  
of Fifth  
Respondent  
(NZALPA)  
25th August  
1981

Defence of the Fifth Respondent it declines to plead to "the matters of law" contained in paragraphs 17 and 23 of the Amended Statement of Claim. While this might in other cases be a permissible response it is unacceptable in this case. In his Memorandum of Decisions reached at the Judicial Conference of 10 July 1981 Mr Justice Speight, at page 4, required that the Statement of Defence of the Fifth Respondent should "delineate and assist Counsel for the Applicants as to what matters will or will not be required to be proved, including questions of legal propositions; i.e. whether or not it is conceded that the Royal Commission was exercising a statutory power of decision, and similar matters."

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(continued)

Please comply with the Judge's direction by further pleading as he requires.

4. In paragraph 14B page 5 the Fifth Respondent denies that the passage quoted from paragraph 255(f) "is necessarily a reference to all of Messrs. Amies, Brown, Hewitt and Lawton". Name the employees to whom it is asserted the paragraph refers.

20

DATED at Auckland this            day of August 1981.

.....

Counsel for First and Second  
Applicants

TO: The Fifth Respondent

FURTHER PARTICULARS  
OF FIFTH RESPONDENT  
(NZALPA)

No.5  
Further  
Particulars  
of Fifth  
Respondent  
(NZALPA)  
10th September  
1981

IN THE COURT OF APPEAL OF NEW ZEALAND C.A.95/81

BETWEEN: AIR NEW ZEALAND LIMITED  
FIRST APPLICANT

A N D MORRISON RITCHIE DAVIS  
SECOND APPLICANT

10 A N D IAN HARDING GEMMELL  
THIRD APPLICANT

A N D PETER THOMAS MAHON  
FIRST RESPONDENT

A N D THE ATTORNEY-GENERAL  
FOURTH RESPONDENT

A N D NEW ZEALAND AIRLINE PILOTS  
ASSOCIATION  
FIFTH RESPONDENT

20 A N D THE ATTORNEY-GENERAL  
SIXTH RESPONDENT

FURTHER PARTICULARS BY FIFTH RESPONDENT

1. (a) and (b) By Memorandum dated 19th June 1980 Counsel Assisting the Commission drew the attention of counsel the "The Report of the Salmon Commission to Review the Working of the Tribunals of Inquiry (Evidence) Act 1921 (Cmd. 3121)".

30 At a meeting of counsel in the Royal Commissioner's Chambers on 23rd June 1980 Mr. Baragwanath referred to the question of whether parties other than Counsel assisting would wish to make an opening address in terms of the "Salmon Report".

40 Counsel for the passengers consortium when making application to the Commissioner that the consortium be granted leave to

In the Court  
of Appeal

No.5  
Further  
Particulars  
of Fifth  
Respondent  
(NZALPA)  
10th September  
1981

appear made reference to the "Salmon Report". Before calling evidence Counsel for the First Applicant (Mr. D.A.R. Williams) advised the Commissioner that the First Applicant reserved to itself the right to subsequently make an opening statement or address but in fact the First Applicant thereafter made no opening address or opening statement or submission.

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(continued)

2. (a) The employees are those named by the First Applicant in its Amended Statement of Claim in paragraphs 22A-G as "the affected employees".

The Counsel are L.W. Brown Q.C., D.A.R. Williams, R.J. McGrane, D. Henare.

- (b) The Fifth Respondent from its pleadings in 16(i)(b), 16(ii)(b), 16(iii)(b), 16(iv)(b), 16(v)(c), 16(vi)(c), 16(vii)(c), denies that the affected employees were not given a fair opportunity in the course of the public hearings to answer or put their case in relation to the "findings" and alleges that :

20

- (i) The conduct of the "employees" was the conduct of the First Applicant, they being the officers by and through whom the Company acted. 30
- (ii) That any distinction between the First Applicant and the "affected employees" is illusory.
- (iii) The interests of the employees were coincidental with those of the First Applicant.
- (iv) The First Applicant through its Counsel in protecting its own interests was also protecting the interests of the "affected employees" upon whom it called to give evidence on its behalf and upon whose evidence it relied. 40
- (v) That in briefing, calling and, re-examining the "affected employees" who gave evidence for the First Applicant, Counsel for

the First Applicant were protecting the interests of the "affected employees", and having a close knowledge of the proceedings would presumably have alerted such employees had the interests of the First Applicant diverged from those of its employees.

In the Court  
of Appeal

No.5  
Further  
Particulars  
of Fifth  
Respondent  
(NZALPA)  
10th September  
1981

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(vi) That accordingly the knowledge of the First Applicant's Counsel of the evidence and proceedings was available for the benefit and protection of the interests of the "affected employees" and further, the submissions made by such counsel relying upon the evidence by those "affected employees" were made as much for the benefit and protection of the "affected employees" as for the First Applicant.

(continued)

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3. Re paragraph 9 of the Fifth Respondent's Statement of Defence which relates to paragraph 17 of the Amended Statement of Claim :-

30

The Fifth Respondent denies that the "findings" are "decisions deciding, prescribing or effecting the rights, duties or liabilities of the affected employees and the First Applicant", and further denies that as regards the alleged "findings" the First Respondent was exercising a statutory power of decision within the Judicature Amendment Act 1972.

40

Re paragraph 15 of the Fifth Respondent's Statement of Defence which relates to paragraph 23 of the Amended Statement of Claim:-

The Fifth Respondent denies that the "findings" are "decisions deciding, prescribing or effecting the rights, duties or liabilities of the affected employees and the First Applicant", and further denies that as regards the alleged "findings" the First Respondent was exercising a statutory power of decision within the Judicature Amendment Act 1972.

50

DATED this 10th day of September 1981

(Sgd. illegible)

No.6  
Order by the  
Queen's Most  
Excellent  
Majesty in  
Council grant-  
ing Special  
Leave to Appeal  
against the  
judgment of  
the Court of  
Appeal of  
New Zealand  
22nd December  
1982

ORDER BY THE QUEEN'S MOST  
EXCELLENT MAJESTY IN COUNCIL  
GRANTING SPECIAL LEAVE TO  
APPEAL AGAINST THE JUDGMENT  
OF THE COURT OF APPEAL OF  
NEW ZEALAND

L.S.

AT THE COURT AT BUCKINGHAM PALACE

The 22nd day of December 1982

10

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY  
IN COUNCIL

WHEREAS there was this day read at the Board  
a Report from the Judicial Committee of the  
Privy Council dated the 2nd day of December 1982  
in the words following viz :-

" WHEREAS by virtue of His late Majesty  
King Edward the Seventh's Order in  
Council of the 18th day of October 1909  
there was referred unto this Committee a  
humble Petition of The Honourable Peter  
Thomas Mahon in the matter of an Appeal  
from the Court of Appeal of New Zealand  
between the Petitioner and (1) Air New  
Zealand Limited (2) Morrison Ritchie Davis  
(3) Ian Harding Gemmell and (4) Her  
Majesty's Attorney-General for New Zealand  
Respondents setting forth that the  
Petitioner prays for special leave to  
appeal from a Judgment of the Court of  
Appeal of New Zealand delivered on 22nd  
December 1981 which quashed an Order made  
by the Petitioner in his capacity as a  
Royal Commissioner that the 1st Respondent  
should pay to the Department of Justice  
\$150,000 by way of contribution to the cost  
of the Inquiry of the Royal Commission:  
And humbly praying Your Majesty in Council  
to grant the Petitioner special leave to  
appeal from the Judgment of the Court of  
Appeal of New Zealand dated 22nd December  
1981:

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30

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" THE LORDS OF THE COMMITTEE in obedience  
to His late Majesty's said Order in Council

10 have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Court of Appeal of New Zealand dated 22nd December 1981:

20 " AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said Court of Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

30 WHEREOF the Governor-General or Officer administering the Government of New Zealand and its Dependencies for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

N.E. LEIGH

A FULL SET OF DOCUMENTS IS RETAINED IN THE

PRIVY COUNCIL ARCHIVES. 31.1.84

In the Privy Council

No.6

Order by the Queen's Most Excellent Majesty in Council granting Special Leave to Appeal against the judgment of the Court of Appeal of New Zealand 22nd December 1982

(continued)