COMALCO NEW ZEALAND LTD v BROADCASTING STANDARDS AUTHORITY

Court of Appeal (CA148/95) 9 November; 14 December 1995
Richardson, Gault, McKay JJ

Discovery — Particular discovery — Application for judicial review — Whether documents not before Authority discoverable — High Court Rules, r 301.

Discovery — Appeal — Whether discovery available in appeal proceedings — High Court Rules, r 300.

Appeal — Nature of appeal — Whether "civil proceeding" — Whether "proceeding" for purpose of r 300 — High Court Rules, r 300.

The respondent Authority refused to uphold a complaint against a television programme made by the second respondent. The appellant applied for judicial review and sought discovery of documents relating to the Authority's deliberations and also discovery of material by the second respondent which had not been before the respondent when it made its decision. Both applications were refused and the appellant appealed against both decisions. The appellant also appealed to the High Court against the Authority's decision and applied for particular discovery in that proceeding. That application was removed into the Court of Appeal to be heard with the appeals.

Held, (1) the application for judicial review was based on the ground that the Authority had failed to have regard to all relevant considerations and/or had had regard to irrelevant considerations. Whether that was so could only be decided by reference to the material before the Authority at the time it made its decision unless it was intended to allege a duty on the Authority to obtain more material than the parties placed before it. No such allegation was pleaded and so the material in the hands of the second respondent was irrelevant and not liable to discovery. (p 157, line 30)

Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55 (CA) applied

(2) Likewise, in the absence of an application by the appellant for the Authority to hold a hearing or to consider the second respondent's material, it could not be said that there had been any failure of natural justice to which the documents were relevant. Discovery would not be ordered on this ground. (p 158, line 20)

(3) A proceeding which is not criminal is civil; there is no middle ground of proceedings which are neither civil nor criminal. A statutory appeal against the

decision of a statutory body is therefore a "civil proceeding" and hence a "proceeding" for the purpose of r 2. (p 159, line 34)
Pallin v DSW [1983] NZLR 266; (1983) 1 FRNZ 117 (CA) considered

(4) The question on appeal was whether the Authority had acted on a wrong principle. If the Court were to find that it did, then it could substitute its own decision. In considering that question it could not be said that the only relevant documents were those originally before the Authority. (p 160, line 9)

(5) The Court clearly had power, if it believed it appropriate, to order production of the second respondent's material, by virtue of its powers under the Broadcasting Act 1989. (p 160, line 38)

(6) The Authority was limited to considering whether broadcast material breached its standards, but in doing so it was entitled to consider any evidence which in its opinion might assist with the inquiry. This might well include considering whether the programme had been prepared in a fair and balanced way and that might require consideration of the material from which the broadcast material was selected. (p 160, line 21)

(7) A legitimate question on appeal was whether the Authority had given insufficient weight to some factor. Possibly relevant material had not been before the Authority and so it was appropriate that the Court had the material before it to determine the appeal. (p 161, line 46)
Fitzgerald v Beattie [1976] 1 NZLR 265 (CA)
Havelock-Green v Westhaven Cabaret Ltd [1976] 1 NZLR 728 (CA) applied

Obiter, it would be surprising if the new r 300, which allows particular discovery at any stage of the proceedings, was intended to introduce discovery into classes of proceedings where it had never previously been allowed. It was not necessary to decide for the purpose of this case, however, whether an appeal was a "proceeding" in the context of r 300. (p 160, line 29)

Statutes and regulations referred to
Broadcasting Act 1989, ss 4, 5, 7, 8, 10, 12, 13, 18, 19
Commissions of Inquiry Act 1908, ss 4B, 4C
Evidence Amendment Act (No 2) 1980, s 32
Judicature Act 1908, ss 51, 64
High Court Rules, rr 3, 106, 234, 293, 297-310, 312, 425, 426, 718, 718A
Rules of the Supreme Court (UK), O 24 r 7

Cases referred to
Auckland Building Removals Ltd v Utting (1992) 6 PRNZ 8
Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55 (CA)
Fitzgerald v Beattie [1976] 1 NZLR 265 (CA)
Havelock-Green v Westhaven Cabaret Ltd [1976] 1 NZLR 728 (CA)
Jones v Monte Video Gas Co (1880) 5 QBD 556
Martin v A-G unreported Cook J, 6 August 1984, HC Christchurch A370/83
Pallin v DSW [1983] NZLR 266; (1993) 1 FRNZ 117 (CA)

Reference
McGechan on Procedure para HR293.08

Appeal

This was an appeal against refusal of orders for discovery and an application for discovery.

J E Hodder and *P A Cashmore* for appellant
L J Taylor and *A Howman* for respondent
H B Rennie QC and *P J Ryder-Lewis* for second respondent

The judgment of the Court was delivered by

McKAY J (reserved): These various motions arise out of related proceedings and were heard together. They are all concerned with questions of discovery which have arisen in respect of an application by Comalco New Zealand Ltd ("Comalco") for the review of a decision of the Broadcasting Standards Authority ("the Authority"), and in respect of an appeal from the decision of the Authority. The Authority's decision was in respect of a complaint by Comalco against a *Frontline* programme broadcast by Television New Zealand Ltd ("TVNZ") on 12 September 1993.

Background

The programme dealt, among other things, with the supply of electricity to Comalco and the pricing of that electricity. Comalco complained that the programme was unbalanced, misleading and outrageous. It complained initially under s 6 of the Broadcasting Act 1989 to TVNZ, and being dissatisfied with the result, it referred the complaint to the Authority under s 8. Being dissatisfied with the Authority's decision, it issued the proceedings for judicial review, and at the same time lodged an appeal to the High Court under s 18 of the Act against various aspects of the decision. In the review proceedings Comalco served an order for general discovery on TVNZ, as a result of which TVNZ disclosed the documentation it had already placed before the Authority. Comalco then applied for particular discovery of eight categories of pre-programme documents which had not been disclosed by TVNZ. TVNZ filed an application to limit discovery to the documents placed before the Authority on the ground that those documents were sufficient for the disposal of the proceeding. It claimed that discovery of other documents would serve no useful purpose, and would be oppressive and unnecessary and involve the parties in needless expense or delay.

The application was duly heard by the Master, who found in favour of Comalco and ordered particulars of discovery in accordance with its application. TVNZ appealed, and the Judge took a different view. Doogue J referred to the classic formula in the judgment of Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 63:

> "It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* — not which *must* — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary."

The central issue between the parties, said Doogue J, was whether the documents which had been held by the Master to be discoverable might be relevant to the plaintiff's causes of action for review of the decision of the first defendant. Those causes of action were, first, that the Authority had failed to have regard to all relevant considerations, or had regard to irrelevant considerations in reaching its decision, and secondly, that in refusing to hold a formal hearing it had denied Comalco a fair opportunity to put its case. He pointed out that the application for discovery was not made in the context of Comalco's appeal under s 18, but in the context of the application for review. He failed to see how any of the materials for which discovery had been ordered could be relevant in any manner, even in the wider sense of the classic formula of Brett LJ, given the causes of action and the nature of the documents for which discovery had been ordered.

Doogue J pointed out that none of those documents were before the Authority at the time of its decision. They could not be relevant in any way to a consideration of whether or not the Authority took into account irrelevant considerations, or failed to take into account relevant considerations, when these documents were not before the Authority. Nor could they be relevant in any way to the consideration of whether the Authority acted in accordance with the rules of natural justice or otherwise in exercising its power to have an informal hearing rather than a formal hearing of Comalco's complaint. He accordingly reversed the decision of the Master, and held that the only discovery to which Comalco was entitled was a limited discovery in accordance with TVNZ's application. He made an order for discovery in accordance with that application and quashed the order made by the Master.

Comalco appeals from that decision pursuant to leave granted by the High Court. At the same time as it granted leave, the High Court made an order for the removal into this Court under s 64 of the Judicature Act 1908 of an application by Comalco in its appeal under s 18 for particular discovery of specified classes of document. In this application Comalco sought in the appeal proceedings discovery of the documents which the High Court had refused to order in the judicial review proceedings. The order for removal was made with a view to the joint disposition of both matters.

At the same time as it applied for leave to appeal from the decision of the Judge limiting discovery against TVNZ, Comalco applied for an order for particular discovery against the Authority. This order was sought in the judicial review proceedings. The application was heard by McGechan J, and was refused. Comalco appeals from that judgment also.

The Broadcasting Act 1989

The Long Title to the Act states as the first of its objectives "the maintenance of programme standards in broadcasting in New Zealand". Section 4 makes every broadcaster responsible for maintaining certain standards, including those in any approved code of practice. Any complaints are by s 5 to be made promptly to the broadcaster, in writing, and are to be given their first consideration promptly and without undue formality. If a formal complaint is found not to be justified, the complainant is to be notified in writing under s 7, and by s 8 has the right to refer the complaint to the Broadcasting Standards Authority. Section 10 empowers the Authority, if it thinks fit, to consider and determine the complaint without a formal

hearing, but in such case it must receive submissions and have regard to them. Section 12 confers on the Authority various of the powers of a Commission of Inquiry. Section 13 empowers the Authority to require the broadcaster to publish an appropriate statement, and to direct payment to compensation. There is a right of appeal to the High Court under s 18, and by s 19 the decision of the High Court is to be final.

There is an approved Code of Broadcasting Practice which sets out general programme standards. It requires broadcasters, in the preparation and presentation of programmes, to be truthful and accurate on points of fact, and to deal justly and fairly with persons taking part or referred to in the programme. They must show balance, impartiality and fairness in dealing with questions of a controversial nature.

The first appeal in the judicial review proceedings

The appeal seeks to restore the Master's order for further discovery against TVNZ. Doogue J reversed that order on the ground that the further documents sought were not relevant to the issues. The essential question is therefore that of relevance. The documents sought are all documents which came into existence in the hands of TVNZ prior to the broadcast. They include research notes, story lines and draft scripts for the programme, notes and recordings of interviews made for the programme, file notes, minutes and instructions in connection with it and all footage that was shot. Comalco says that this material is obviously relevant to the matter which was before the Authority, namely the complaint that the programme lacked balance. Mr Hodder submitted that balance and objectivity could not be assessed merely by looking at what was broadcast. It was necessary to consider what was broadcast against the background of the total material available. Lack of balance and objectivity might be shown in the selection process, in the editing out of certain material and the inclusion of other material. Unless the Authority was able to consider all the material that was available to the producer, it would not be in a position to assess properly the balance or lack of balance of the programme.

One can readily appreciate the argument that this material might have been of assistance to the Authority in deciding whether the programme was balanced. The issues in the judicial review proceedings are different. The statement of claim alleged that the Authority "failed to have regard to all relevant considerations and/or had regard to irrelevant considerations". That raises a question which can only be judged on the basis of the materials before the Authority, unless it was intended to allege a duty on the Authority to obtain more information than the parties chose to place before it. As Mr Hodder conceded, the claim was not so pleaded.

The second cause of action pleaded was a breach of natural justice by the Authority's decision to determine the complaint on the written and other material submitted to it by the parties, and not to hold a formal hearing. A formal hearing would have permitted Comalco to have canvassed the question of pre-broadcast materials and of lack of balance in the editing process. Comalco had supplied to the Authority all the material it had provided to TVNZ, so that the Authority would know what had been used and what had been discarded of that material. TVNZ had not supplied the Authority with the other material which it had obtained but had not included in the programme. Mr Hodder submitted that this additional pre-broadcast material was relevant to establishing this second cause of action.

The Authority has express power under s 10 of the Act to consider and determine any complaint without a formal hearing. That is a matter left to the Authority's discretion, and we were informed that its normal practice is not to conduct a formal hearing. In such case it is required by s 10 to give the complainant and the broadcaster a reasonable opportunity to make submissions to it in writing, and to have regard to all relevant submissions made to it in writing in relation to the complaint. This course was followed. Comalco complained, inter alia, of the failure to use in the programme of some of the material it had provided. It did not, apparently, request the Authority to obtain and consider all other material which had been obtained by TVNZ but had not been used in the programme. It did, however, request that there be a hearing.

Mr Hodder referred to the Authority's letter of 16 December 1993, in which it advised the parties that "on the basis of the comprehensive submissions received, the Authority considers at this state that it is likely the issues will be able to be resolved without such a hearing". He said this was a "signal"; that it did not want to go into a detailed examination. It would have been open to Comalco, however, to have then asked the Authority to obtain and consider the additional material available to TVNZ, and to consider the process by which the broadcast material had been selected. This was not done.

In the absence of any such request being made by Comalco, it would be difficult to argue that the Authority denied natural justice by failing on its own initiative to direct TVNZ to provide to it the additional pre-broadcast material now in issue. Nor was it so pleaded. The pleading was that the range, seriousness and complexity of the issues and the nature of the material relied upon by Comalco and TVNZ was such that the refusal to hold a formal hearing was a breach of natural justice. That is an issue which must be judged on the material placed before the Authority, including any requests from either party to obtain additional material. The decision on that issue cannot be assisted by material which was not before the Authority. We respectfully agree with Doogue J that further discovery must be refused as being irrelevant to the issues raised in the proceeding, and unnecessary in terms of r 312.

An amended statement of claim was filed subsequent to the judgment of the High Court. It added an allegation that the Authority acted "unreasonably" and added particulars referring to the material available to TVNZ and to the Authority's failure to censure TVNZ's use of certain editing techniques. The additional matters now pleaded are not such as would persuade us that discovery should be ordered.

Discovery in the Broadcasting Act appeal

Mr Hodder sought an order for discovery of the disputed documents in the appeal under s 18 from the decision of the Authority. The first question is whether discovery is available in such an appeal.

Mr Hodder referred to s 12 of the Broadcasting Act 1989, which gives the Authority the powers of a Commission of Inquiry. Sections 4B and 4C of the Commissions of Inquiry Act 1908 empower a commission to receive any evidence which may assist it, whether or not it would be inadmissible in a Court of law, and to require any person to produce papers, documents, records or things for examination. He then referred to s 18(5) of the Broadcasting Act, under which the

High Court in determining an appeal from the Authority may exercise any of the powers of the Authority. The High Court thus has the power to require the pre-broadcast records and documents in question to be produced to it. The application which has been removed into this Court is not, however, an application for the exercise of these powers. It is an application for an order for particular discovery in the form of an affidavit of documents, made in reliance on rr 234, 300 and 718. Rule 234 deals only with the model of application, and r 718 with the hearing of appeals. Rules 718(4) and (6), to which Mr Hodder referred, give the Court a wide discretion to receive further evidence, and to receive any evidence that the tribunal of first instance could have received. Rule 300 is the substantive provision under which the Court can make an order for particular discovery.

The rule commences with the words "Where at any stage of the proceeding . . .". "Proceeding" is defined in r 3 as "any application to the Court for the exercise of the civil jurisdiction of the Court other than an interlocutory application". Mr Rennie, for TVNZ, argued that an appeal is not an application for the exercise of civil jurisdiction. It is an appeal under a separate statutory provision. Such an appeal is therefore not a proceeding, and r 300 has no application. He acknowledged that r 106 appeared to suggest otherwise, as it prescribes the filing of a statement of claim as the means of commencement of "every proceeding (other than . . . an appeal from a determination of a District Court or a statutory tribunal)". It would be unnecessary to create an exception in the case of an appeal from a statutory tribunal unless such an appeal was a "proceeding". But he submitted that r 106 was not effective to make such an appeal a "proceeding" because of the clear wording of r 3 and because of the special procedure for such appeals provided in Part X of the High Court Rules.

Rule 106 is not the only rule which suggest that the term "proceeding" includes an appeal to the High Court. Rule 425 shows that it includes appeals under the Summary Proceedings Act 1957, and r 426 that it includes appeals under Part V of the District Courts Act 1947. There is a brief discussion of the matter in *Auckland Building Removals Ltd v Utting* (1992) 6 PRNZ 8, 11.

Rule 703, which is in Part X, provides that any appeal to which Part X applies is to be commenced by filing a notice of appeal in the appropriate registry. The notice of appeal thus asks the Court to exercise its jurisdiction to determine the appeal. That jurisdiction is a statutory one, but in our view it is still a civil jurisdiction. In the context of civil procedural law, "civil" is used in contradistinction to "criminal": *37 Halsbury's Laws of England* (4th ed), para 2. Thus s 51(1) of the Judicature Act 1908 provides that the practice and procedure of the Court "in all civil proceedings" is to be regulated by the High Court Rules. Section 2 defines "civil proceedings". This wide meaning of the word "civil" is also inherent in its use in s 32 of the Evidence Amendment Act (No 2) 1980: *Pallin v DSW* [1983] NZLR 266 (CA) at pp 269, 275 and 278. There is no middle ground of proceedings which are neither civil nor criminal. It follows that an appeal under the Broadcasting Act is within the definition of "proceeding" in r 2, subject to the opening words of that rule "unless the context otherwise requires".

Mr Rennie further argued that r 300 referred to a document or class of document "relating to any matter in question in the proceeding". The matter in question, he said, is the decision of the Authority. To relate to that decision, the document must have an actual connection with the questioned decision.

That appears to overlook r 718, which provides that every appeal is to be by way of rehearing, the Court may rehear the whole or any part of the evidence and the Court may hear further evidence. By r 718A the Court may not only set aside the decision but may substitute any decision which ought to be given. In the case of an appeal under the Broadcasting Act, s 18(4) requires the appeal to be heard and determined as if the decision or order appealed against had been made in the exercise of a discretion. The first question, therefore, is whether the Authority has acted on some wrong principle, and it is difficult to see how documents which were not before the Authority could be relevant to that question. If the Court finds that the Authority has acted on some wrong principle, the Court has the power to substitute its own decision, although in the ordinary case it would be more likely to remit the case to the Authority under r 718A(3). Having regard to the wide powers of the Court, it cannot be said that the only documents which could be relevant are those relating to the Authority's decision, as distinct from those relating to the complaint before the Authority.

There remains the question whether, in the particular context of r 300, "proceeding" includes an appeal, and if so then the further question whether specific discovery should be ordered in the present case. General discovery is clearly not available on an appeal. It is only available, under r 293, "after a statement of defence has been filed". No such document is filed in a proceeding commenced by notice of appeal. Rule 300 enables particular discovery to be ordered "at any stage of the proceedings". This rule is new, and had no counterpart in the old Code of Civil Procedure which was replaced by the present High Court Rules on 1 January 1986. It appears to be based on RSC O 24 r 7, first introduced in 1962, and to have been intended to relax the previous law as to the conclusive nature of an affidavit of documents: see *Jones v Monte Video Gas Co* (1880) 5 QBD 556. *McGechan on Procedure* notes that the rule also enables specific documents to be obtained where necessary to enable a party to plead.

It would be surprising if the rule were intended, as by a side wind, to expand the availability of discovery to classes of proceeding where it had never previously been available and where there was no apparent need for it. So far as appeals are concerned, the proper time for discovery is while the case is before the lower Court. If discovery is appropriate in relation to matters before a tribunal, one would expect to find provision for it in the legislation setting up the tribunal. The Broadcasting Act does not provide for discovery as such, but the Authority is given power to require documents to be produced, and the parties can ask it to exercise those powers.

It is unnecessary in this case to decide whether r 300 has any application in proceedings by way of appeal, as it is clear that the material in question can be required by the Court in the exercise of its powers under ss 18(5) and 12 of the Broadcasting Act 1989 and s 4C of the Commissions of Inquiry Act 1908. These provisions were not referred to in Comalco's application, but they were canvassed in argument before us and we are prepared to treat the application as if it had been an application for the exercise of those powers. The question before the Authority was whether the programme lacked balance and objectivity. That question is now the issue on the appeal. As Mr Hodder submitted, lack of balance and objectivity may be present in the material broadcast, or they may be present in the selection process by which certain material was included in the programme and other material edited out. That is the issue Comalco seeks to have resolved, and the

Court clearly has the power, if it considers it appropriate, to order the further documents to be placed before it.

Mr Rennie, for TVNZ, submitted that any such order would have further implications. He pointed out that access to such pre-broadcast materials would not be available to Comalco in defamation proceedings. No doubt this would ordinarily be so, because such proceedings are based on the matter published, not on matter which has not been published. If such documents were relevant in defamation proceedings to issues such as malice or damages, they would be discoverable unless covered by some recognised ground of privilege. The issues in the present case before the Broadcasting Standards Authority, and before the High Court on appeal, are in any event different.

Mr Rennie said that if Comalco's argument were accepted, then it would be open to TVNZ to produce this pre-broadcast material to the High Court in support of its contention that the Authority had reached a correct decision. We agree it would be entitled to do so to answer the suggestion that there was a lack of balance in the selection and editing process. This, said Mr Rennie, would go beyond the jurisdiction of the Authority, which is limited to dealing with complaints relating to broadcasts. It did not extend to material not used in a programme, or to programmes not transmitted. We agree that the Authority's jurisdiction is to deal with complaints as to what is broadcast, but it is entitled to consider any evidence that "in its opinion may assist it to deal effectively with the subject of the inquiry": Commissions of Inquiry Act 1908, s 4C. To determine whether broadcast material is balanced and objective may well call for consideration of the way in which it was selected and in which other material was excluded. The Authority is not thereby extending its jurisdiction by making a decision on the material not in the actual broadcast. It is using that material in order to decide whether the complaint as to what was broadcast is justified, and whether the broadcast failed to comply with the standards required by the Act. Mr Rennie accepted that his original submission went too far, and that provided the decision was concerned with the programme which is the focus of the complaint, the Authority may consider other material which assists it in judging the programme.

Comalco was remiss in not asking the Authority to obtain the pre-broadcast material, possibly because it saw a formal hearing as providing the appropriate answer. The Authority elected to proceed without a formal hearing, and while it had power to do this, it did not obtain all the material required to make a proper assessment of balance in the selection and editing process. Comalco made its written submissions, but failed to ask the Authority to exercise its powers to obtain the documents now in issue. The failure of the Authority to require the production of the pre-broadcast records and documents was not put forward in the review proceedings as being a denial of natural justice such that its decision should be set aside. It nevertheless meant that the Authority reached its decision without having access to all the possibly relevant material. Its decision is now the subject of an appeal, and the issues have been clarified in the course of the argument in this Court. If those issues are to be properly determined on the appeal, the High Court will need to have the additional material before it.

Section 18(4) of the Broadcasting Act requires the Court to hear and determine an appeal "as if the decision or order appealed against had been made in the exercise of a discretion". This means that the appeal should only be allowed if

the Authority has proceeded on a wrong principle, given undue weight to some factor or insufficient weight to another, or is plainly wrong: *Fitzgerald v Beattie* [1976] 1 NZLR 265, 268 (CA); *Havelock-Green v Westhaven Cabaret Ltd* [1976] 1 NZLR 728, 730 (CA). In the present case the Authority did not have possibly relevant material before it, and so could not consider the issue of balance in the selection and editing process. It is appropriate that the Court should have this material in order to determine the appeal.

We therefore make an order, pursuant to the powers conferred by ss 18(5) and 12 of the Broadcasting Act 1989 and s 4C of the Commissions of Inquiry Act 1908, requiring TVNZ to produce for examination the papers, documents, records and things listed in the schedule to Comalco's motion dated 4 July 1995 in the appeal proceeding AP117/94. This material should be produced in the first instance to Comalco and its advisers, and so much of it as either party considers material and so desire should then be put before the Court for the purpose of the appeal.

Discovery against the Authority

Comalco appeals also against the judgment of McGechan J in the judicial review proceedings, refusing an application for particular discovery against the Authority. The documents in question were defined as being draft versions of the Authority's decision, annotations to or comments on those drafts by members of the Authority, and supporting documents relating to the decision such as internal correspondence, memoranda and file notes. McGechan J rejected a submission by the Authority that such documents were not relevant. He referred to the public policy rule which would generally preclude a plaintiff from leading evidence as to the deliberative process by which the Authority reached its decision, and which therefore made discovery pointless. He accordingly refused the application on the ground that discovery was not "necessary" within the terms of r 312.

Mr Hodder submitted that the Judge had fallen into the error of merging discoverability with admissibility, but we do not find this to be the case. He clearly distinguished the two concepts, and criticised the judgment in *Martin v A-G* unreported, Cook J, 6 August 1984, HC Christchurch A370/83 for merging them. He pointed out:

> "Material may be inadmissible, but nevertheless be discoverable, and subject to production. The utility or otherwise of ordering production of material in itself inadmissible is a factor which may go to discretion, a point which I consider shortly, but it is not an absolute barrier."

He then dealt with the question of admissibility, and proceeded:

> "Discoverability is not the same as admissibility; but discovery of the inadmissible can sometimes be pointless."

Mr Hodder said the Judge did not have the benefit of submissions on the issue of necessity, but r 312 expressly applies to every application for an order under rr 297 to 310, and the Judge was required to refuse an order unless satisfied that it was necessary. We are not persuaded that his conclusion was other than correct.

Conclusion

For the reasons given, we dismiss the appeals from the judgments of Doogue J and of McGechan J refusing further or particular discovery against TVNZ and against the Authority in the judicial review proceedings. In the appeal proceedings under s 18 of the Broadcasting Act, we treat the application for particular discovery as an application for the exercise of the powers under s 4C of the Commissions of Inquiry Act, and we make an order in the terms set out earlier in this judgment.

Comalco having failed on its appeals in the review proceedings, the respondents are entitled to costs, which are allowed in the sum of $3,500 to TVNZ and in the sum of $3,000 to the Authority. There will be no costs allowed on Comalco's application in the appeal under the Broadcasting Act, where it has succeeded on a different basis from that relied on in the application, and had failed to raise the matter before the Authority.

Appeals in judicial review proceedings dismissed; production of documents ordered in appeal proceeding

Reported by Bernard Robertson