

Hugh Hughes Green

Appellant

v.

Broadcasting Corporation of New Zealand

Respondent

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
18TH JULY 1989

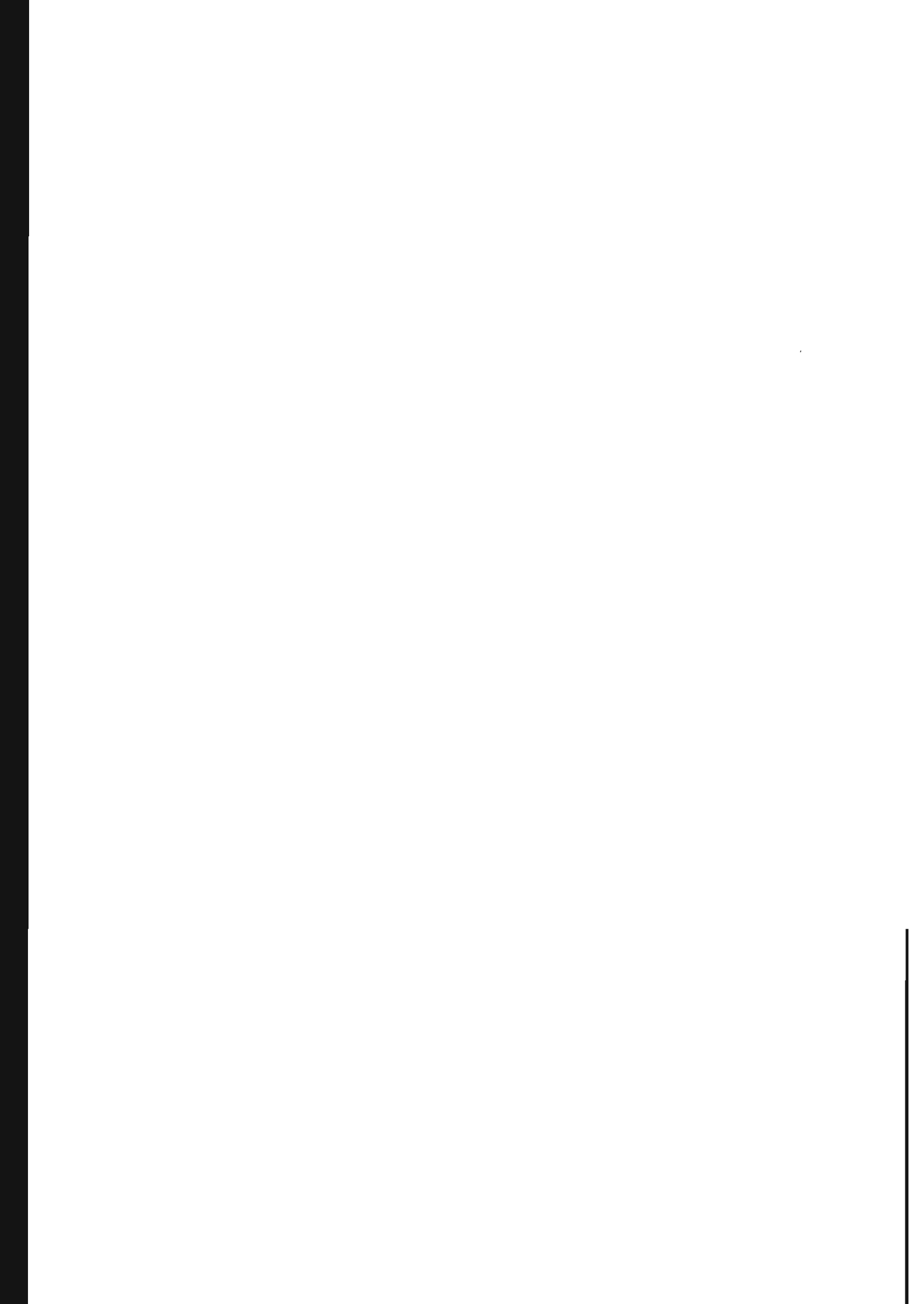
Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD ACKNER
LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

[Delivered by Lord Bridge of Harwich]

The appellant is a well known personality in the entertainment world. Between 1956 and 1978 he was the author, presenter, and compere of a television show entitled "Opportunity Knocks" in England. The show was in essence a talent contest. In 1975 and 1978 the respondent broadcast a similar television show under the same title in New Zealand. The appellant commenced proceedings in the High Court of New Zealand claiming damages for passing off and infringement of copyright. His action was dismissed by Ongley J. on 23rd December 1983. The judgment was affirmed by the Court of Appeal (Somers, Casey and Gallen J.J.) on 22nd September 1988. The appellant now appeals to Her Majesty in Council by leave of the Court of Appeal. The only issue arising in the appeal relates to the claim of copyright. The Court of Appeal decided against the appellant by a majority, Gallen J. dissenting.

The copyright alleged to have been infringed was claimed to subsist in the "scripts and dramatic format" of "Opportunity Knocks" as broadcast in England. The appellant's primary difficulty arises from the circumstance that no script was ever produced in evidence. Ongley J. concluded that:-



"There was really no evidence that any part of the show was reduced to a written text which could properly be called a script ..."

He added later:-

"No writing has been produced in evidence in this action in which, in my view, copyright could subsist."

The Court of Appeal differed from the trial judge to the extent that they accepted that the evidence established the existence of scripts. But the evidence as to the nature of the scripts and what their text contained was exiguous in the extreme. It is to be found in two short passages from the evidence given by the appellant himself. He said in the course of examination-in-chief:-

"In the year 1956, I wrote the scripts of Opportunity Knocks shows, such as they were, because we would have what we would call the introductions, our stock phrases like 'For So-and-So, Opportunity Knocks', phrases such as 'This is your show, folks, and I do mean you.' The other part of the writing dealt with interviews with the people and one could not really call it writing because you were really only finding out what the artists wanted to talk about."

He said in cross-examination:-

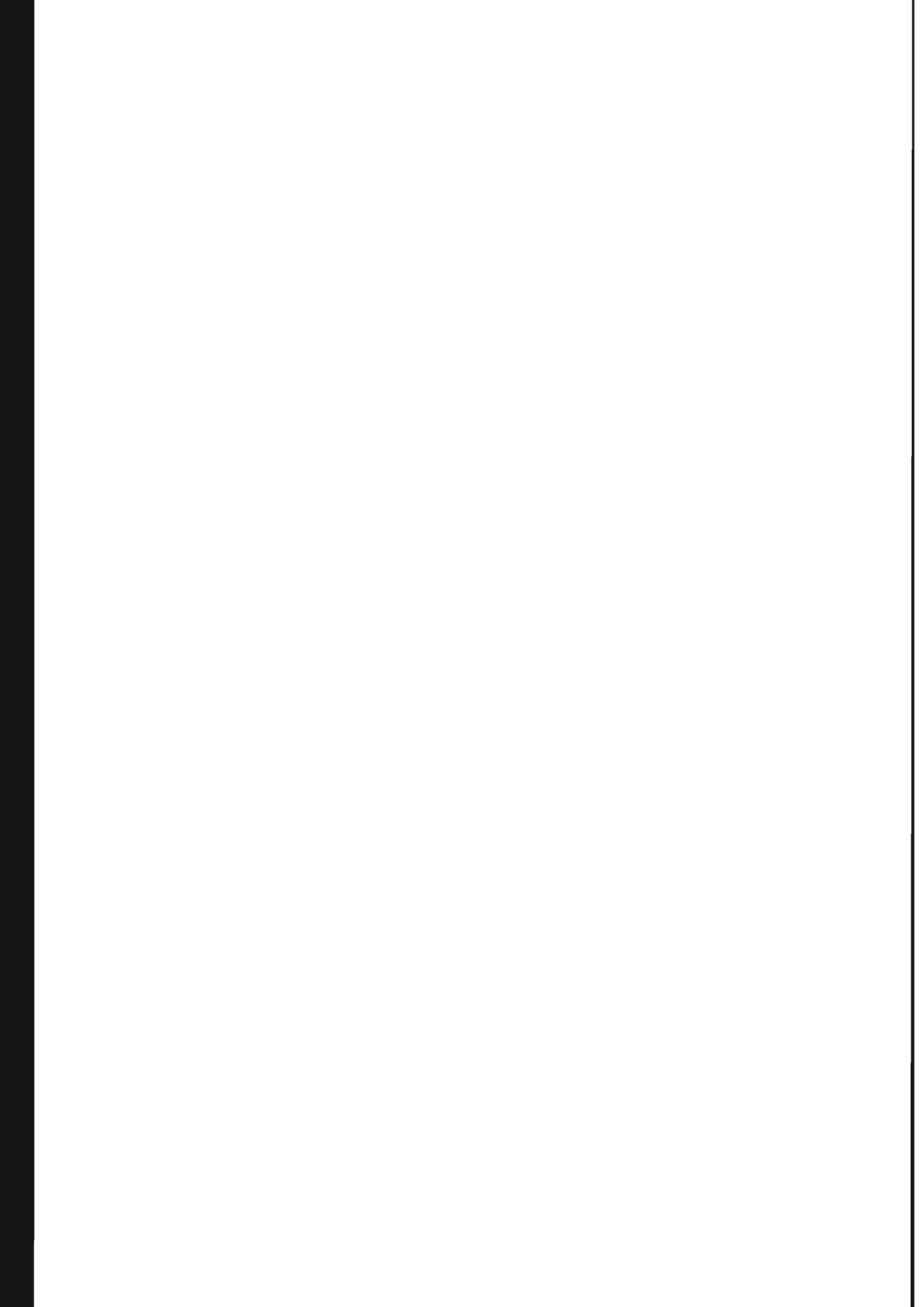
"The script of Opportunity Knocks has continuously been the same for the catch phrases, the interviews each week with the artists has differed, the script for the past 17 years and long before 1975 contained particularly the end of the show beginning with the words 'make your mind up time' using the clapometer and bringing back the five people."

On the basis of this evidence Somers J. concluded that:-

"... the scripts as they are inferred to be from the description given in evidence did not themselves do more than express a general idea or concept for a talent quest and hence were not the subject of copyright."

In the absence of precise evidence as to what the scripts contained, their Lordships are quite unable to dissent from this view.

The alternative formulation of the appellant's claim relies upon the "dramatic format" of "Opportunity Knocks", by which their Lordships understand is meant those characteristic features of the show which were repeated in each performance. These features were, in addition to the title, the use of the catch phrases "for



[name of competitor] opportunity knocks," "this is your show folks, and I do mean you," and "make up your mind time," the use of a device called a "clapometer" to measure audience reaction to competitors' performances and the use of sponsors to introduce competitors. It was this formulation which found favour with Gallen J.

It is stretching the original use of the word "format" a long way to use it metaphorically to describe the features of a television series such as a talent, quiz or game show which is presented in a particular way, with repeated but unconnected use of set phrases and with the aid of particular accessories. Alternative terms suggested in the course of argument were "structure" or "package". This difficulty in finding an appropriate term to describe the nature of the "work" in which the copyright subsists reflects the difficulty of the concept that a number of allegedly distinctive features of a television series can be isolated from the changing material presented in each separate performance (the acts of the performers in the talent show, the questions and answers in the quiz show etc.) and identified as an "original dramatic work". No case was cited to their Lordships in which copyright of the kind claimed had been established.

The protection which copyright gives creates a monopoly and "there must be certainty in the subject matter of such monopoly in order to avoid injustice to the rest of the world:" *Tate v. Fulbrook* [1908] 1 K.B. 821, per Farwell J. at page 832. The subject matter of the copyright claimed for the "dramatic format" of "Opportunity Knocks" is conspicuously lacking in certainty. Moreover, it seems to their Lordships that a dramatic work must have sufficient unity to be capable of performance and that the features claimed as constituting the "format" of a television show, being unrelated to each other except as accessories to be used in the presentation of some other dramatic or musical performance, lack that essential characteristic.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs of the appeal to the Board.

