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Judicial Review, Competitors, and the Court's Discretion to Withhold a Remedy

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Introduction

> I cannot see that the tactics of the applicant are other than that of the spoiler hoping by the operation of the legal process of forfeiture to obtain some sort of windfall from what has occurred.[1]

With increasing frequency judicial review proceedings are being used by competitors as a means of commercial warfare. Plaintiffs may seek to challenge the validity of an administrative decision made in favour of a third party trade rival. Typically the decision confers a benefit on the third party, such as a licence, quota, planning consent, or other authorisation, which poses a threat to the plaintiff's own business interests by increasing competition. Often the plaintiff will not have been a party to the relevant application; its only interest is that of the competitor. In other instances, the plaintiff may have been an unsuccessful competing applicant for the benefit of the decision, as in the case of competing tenderers.

Although the plaintiff's purported object may be to "protect the public interest" by exposing some irregularity in the decision-making, the reality is that such proceedings are usually inspired by collateral commercial motives. There is, perhaps, nothing novel about that. However, the use of judicial review in this way does have some important practical consequences. In the first place, because the object is to thwart the decision at all costs, the decision-making process tends to be carefully scrutinised for any irregularity, however slight. The result is often a challenge based on insubstantial or unmeritorious grounds.[2] Certainly the success rate of such proceedings is low.

In the second place, the impugned decision is always a decision that has been made in favour of a third party. This means that such proceedings, even if ultimately unsuccessful, have the potential to cause enormous commercial disruption to the third party who may have begun to take steps in reliance upon the decision. For example, the third party may have commenced a construction project[3] or other undertaking, entered contracts,[4] incurred expenditure, or made other commitments.

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1 Heron J, at first instance, in *Southern Ocean Trawlers v Director-General of Agriculture* (HC Wellington, CP 350/92, 6 August 1992), p 25.

2 For that reason the emphasis in this paper will be on the public interest in the withholding of a remedy in appropriate circumstances, rather than the acknowledged public interest in the exposing and remedying of administration wrongdoing.

3 *Pacer Kerridge Cinemas Ltd v The Hutt City Council* (HC, Auckland, M 896/92, 18 December 1992, Williams J); *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA). The writer appeared as one of the counsel for the second respondent in the latter case.

4 *Travis Holdings Ltd v Christchurch City Council* [1993] 3 NZLR 32 (Tipping J).

An illustration of the potential commercial upheaval inherent in such proceedings is provided by *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries*.[5] A question had arisen as to whether fishing quota owned by the second respondent, Sealord Products Ltd, had become forfeited by reason of Sealord's inadvertent infringement of the foreign control provisions in the Fisheries Act 1985. The Director-General made a decision under the 1985 Act allowing Sealord to continue to hold the quota. A competing fishing company brought a judicial review proceeding challenging the validity of the decision and seeking a declaration that Sealord had in fact forfeited its quota. The challenge led to a delay in the then proposed Sealord float, which had been publicly announced; and, later, it threatened to jeopardize the proposed Brierley/Maori joint venture bid for Sealord.

In such circumstances, the third party is faced with a difficult choice whether to continue to act upon the decision (and risk a later adverse finding) or whether to put everything on hold until the matter has been determined by the court. Usually an interim injunction is not sought by the plaintiff because of the huge potential liability which an undertaking as to damages would entail. A third party who elects to suspend implementation of the decision will therefore almost certainly be doing so on an uncompensatable basis.

What safeguards exist to protect the position of the third party in such a situation? Increasing liberalization of the law of locus standi means that a threshold challenge to the plaintiff's standing is unlikely to succeed. Except in special circumstances, it now appears to be accepted that a competitor has standing to bring review proceedings.[6] However, against this the courts are becoming increasingly willing, in appropriate cases, to exercise their discretion to refuse to grant a remedy, even though a ground of review may have been established. This trend has been especially marked in cases involving competitors, where a very pragmatic and utilitarian approach to the remedial discretion is now apparent. The following factors, some of which overlap, are being accorded increasing weight:

- The interests of innocent third parties and others who have taken steps, such as expenditure of money, entry into contracts, and so on, in reliance upon the validity of the decision.

- Undue delay in issuing a proceeding. In situations where a competitor is seeking to challenge a decision in favour of a third party, who can normally be expected to implement the benefit of it immediately, delay takes on a new significance. The plaintiff must act with the utmost promptitude. Even a very short delay can be fatal.

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5 [1993] 2 NZLR 53 (CA). The writer appeared as one of the counsel for the second respondent in this case.

6 In an extreme case of misuse of the litigation process, amounting to an anti-competitive use of market dominance, s 36(2) of the Commerce Act 1986 may provide a means of stopping such proceedings: see *Electricity Corp Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641 (CA); *Telecom Corp of NZ Ltd v Clear Communications Ltd* [1992] 3 NZLR 247 (Smellie J). In other situations, the striking out jurisdiction of the High Court may be invoked. In *Southern Ocean Trawlers Ltd*, above, note 5, the second respondent succeeded in striking out the proceeding as a whole. However, most judicial review claims by competitors will fall short of these extremes.

- The interests of the wider public who may be seriously prejudiced by the setting aside of the decision. Administrative inconvenience also features under this head.

- The status and motives of the plaintiff as a competitor. Even if the courts are prepared to accord a competitor initial standing, this factor may be taken into account, and weighed along with other circumstances, at the remedial stage.

The purpose of this paper is to examine the courts' approach to the remedial discretion in cases involving competitors. Each of the above factors will be discussed after a brief preliminary consideration of the issue of standing.

Competitors and standing

A plaintiff who is in the category of an unsuccessful competing applicant, such as a competing tenderer, clearly has a sufficient interest to confer standing to challenge the decision-making process. The plaintiff has been a party to that process; it will have incurred expenditure in preparing the tender or application; and if the decision is declared invalid it is likely to be a party to any reconsideration or re-hearing. The standing of a plaintiff in this situation is not usually questioned.[7] In *Hunter Brothers v Brisbane City Council,*[8] the Court expressly held that four unsuccessful tenderers for contracts for refuse collection had standing to challenge the validity of the contract awarded to the successful tenderer.

The position of a plaintiff who is merely a trade competitor and who has not been a party to the relevant decision-making process, is not quite as straightforward. Currently, the weight of authority is that such competitors do have standing. This is perhaps not surprising given the liberalization of the law of standing that has occurred since the decision of the House of Lords in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd.*[9]

In *Blencraft Manufacturing Co Ltd v Fletcher Development Co Ltd*[10] the question was whether a competitor had a right to be heard as an objector on an application for a change of use under s 38A of the Town and Country Planning Act 1953. Cooke J held that a competitor who was "likely to suffer significant economic consequences differentiating him from the general public"[11] had a right to be heard. Subsequently, in *Foodstuffs (Auckland) Ltd v Planning Tribunal (Number One Division)*,[12] Holland J

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7 Wade & Forsyth, *Administrative Law* (7th ed, 1994) p 717.

8 [1984] 1 Qd R 328, 336-337, per Connolly J.

9 [1982] AC 617 (HL). See also Cane, "Standing, Legality and the Limits of Public Law – The Fleet Street Casuals Case" [1981] PL 322; *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 (CA). More recently, in England, a narrower approach to standing was taken in *R v Secretary of State for the Environment, Ex parte Rose Theatre Trust Co* [1990] 1 QB 504 (Schiemann J). However that decision was not followed in *R v Inspectorate of Pollution, ex p Greenpeace Ltd (No 2)* [1994] 4 All ER 329 (Otton J), and it seems likely that the expansionist view will dominate in the future: see the comments of Beloff, "Judicial Review-2001; A Prophetic Odyssey" (1995) 58 MLR 143, 145. See also Gordon, "The Law Commission and Judicial Review" [1995] PL 11, 17-19.

10 [1974] 1 NZLR 295 (Cooke J).

11 Ibid, p 314.

12 [1982] 2 NZLR 315 (Holland J).

expressly held that a competitor whose business interests were "directly affected" by an application under the Town and Country Planning Act 1977 not only had a right to be heard under the Act but also had standing to bring a judicial review proceeding.[13]

The question was considered by the Court of Appeal in *Consumers Co-Operative Society (Manawatu) Ltd v Palmerston North City Council*.[14] The Council proposed to sell surplus land to Foodtown Supermarkets Ltd. The plaintiff, who was also a supermarket operator, claimed that the Council had not complied with the disposal provisions in ss 40 and 42 of the Public Works Act 1981, and sought an interim injunction restraining the sale. The Court of Appeal held that the plaintiff "while admittedly using these proceedings for its own business advantage" had a sufficient interest to support the injunction application.[15] The plaintiff's interest was twofold. First, there was a likelihood of prejudice to its business through the introduction of a new competitor; secondly, the plaintiff, as the owner of adjacent land, might itself be entitled to an opportunity to purchase the Council's land under ss 40 and 42.

The Court of appeal further emphasised that, except in very simple cases where it is obvious a plaintiff has no sufficient interest, questions of standing should not be considered as a preliminary isolated point. Rather, it was a matter to be determined during the substantive hearing, along with the legal and factual context.[16]

The issue has since arisen in three very recent decisions of the High Court. In one a competitor was held to have standing; in the others, the competitor was not. The first case is *Talley's Fisheries Ltd v Minister of Immigration*.[17] The plaintiff was a commercial fisher and it had competitors who brought into New Zealand cheap foreign crew for their boats. This gave the competitors a trade advantage over the plaintiff. The plaintiff therefore sought to review a decision of the Minister granting immigration permits for foreign crews. The defendant alleged that an interest as a competitor did not suffice to give standing. McGechan J stated that he was willing to recognise competition as according standing, provided there is some real economic prejudice, rather than a merely speculative disadvantage.[18] He considered that the need to demonstrate real prejudice would avoid a "flood gates" problem. He held that the plaintiff would in fact be significantly affected in its relative commercial position by the allegedly erroneous issue of permits to foreign crew, and therefore had standing.

The requirement of "significant economic prejudice" accords with the approach of the courts in the earlier decisions in the *Blencraft*[19] and *Foodstuffs* cases.[20] Mere status as a competitor is not enough. That is, it is insufficient for a person claiming standing simply to say that he is engaged in the same business.[21] There must be direct

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13 Ibid, pp 322-323.
14 [1984] 1 NZLR 1 (CA).
15 Ibid, p 5, per McMullin J. Somers J considered that an interest as a mere ratepayer arguably afforded a sufficient standing (p 7).
16 This of course accords with the approach of the House of Lords in the *Self-Employed and Small Businesses* case, above, note 9.
17 (HC Wellington, CP 201/93, 12 October 1993, McGechan J).
18 Ibid, p 5.
19 Above, note 10.
20 Above, note 12.
21 *Sutherland Service Station v Paparua County Council* (1986) 12 NZTPA 333, 336.

competition between the plaintiff and the third party adverse to the plaintiff's business operation. The plaintiff does not need to establish positively that he will suffer significant economic prejudice, but he must demonstrate a real likelihood of that occurring.[22] In some cases, direct evidence of this may be necessary. In others the likely prejudicial effect will be obvious.[23]

The second decision is *Quarantine Waste (NZ) Ltd v Waste Resources Ltd*.[24] There the plaintiff sought an order invalidating decisions of the Manukau City Council under the Resource Management Act 1991 permitting an application by a competitor, Waste Resources, for a land use consent to proceed on a non-notified basis, and granting the application.

In considering whether the plaintiff had standing, Blanchard J noted that the plaintiff had neither given evidence, nor asserted, that its business had been injured. However, his Honour then went on to hold that even if the question of competition had been raised, it was likely he would have found that it could not be put forward as a means of differentiating the plaintiff from the general public because under s 104 of the 1991 Act, harm to a competitor's trading prospects was not a factor which the Council was entitled to take into account if there were a hearing. Therefore it could not be said that denial of a hearing gave rise to an adverse effect in that respect.[25]

The *Quarantine Waste* case can be best reconciled with the earlier authorities as a case where, having regard to the particular statutory context, an interest as a competitor was insufficient to give rise to standing.

In deciding that the plaintiff had no standing, the court in *Quarantine Waste* also appears to have been influenced by two further factors: the plaintiff, although purporting to be concerned about the environment, was clearly using the judicial review proceeding for purely commercial purposes; and the grounds of review were unmeritorious. Blanchard J stated:[26]

> As will be seen, the present case is not one requiring a champion, particularly a plaintiff who is concealing a business or economic motivation within the cloak of environmental concern and seeking to do battle on behalf of those who appear not to wish any combat to occur. I refer here to the suggestion made by counsel for Quarantine that Maori may have concerns about the activities of the incinerator.

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22 Ibid, p 336. Taylor, *Judicial Review: A New Zealand Perspective* (1991) para 4.24, suggests that it would be appropriate to apply the competition law concept of a "market". I doubt that such a refinement is necessary.

23 As was the case in *Foodstuffs,* above, note 12, p 323, per Holland J. See also *Christian Broadcasting Association Ltd v The Broadcasting Tribunal* [1990] NZAR 97 (Tompkins J). One of the plaintiffs had applied unsuccessfully for an FM warrant, and one was an existing FM warrant holder. The Court considered that they had a sufficient interest to challenge decisions of the Tribunal granting AM warrants to two of the respondents. Tompkins J observed, p 111, that "every warrant holder is concerned with the total pool of listeners so that the addition of a further radio station must have at least some effect on existing stations".

24 [1994] NZRMA 529 (Blanchard J).

25 Ibid, p 536. Contrast the provisions under earlier planning legislation considered in the *Blencraft* and *Foodstuff* cases, above, notes 10 and 12. Note that if a competitor is accorded standing, the grounds on which he may challenge a decision are not then limited to factors relating to his status as a competitor: *Blencraft*, above, note 10, p 300, per Cooke J.

26 Idem.

> As will appear, it seems to me there I no basis for these suggestions by the applicant. Quarantine poses as a champion of the environment. Though Quarantine does not admit to it, it is in reality merely a business which seeks to minimise economic detriment from competition. I regard this as one of Lord Wilberforce's "simple cases" in which it can immediately be seen that there is insufficient interest to support the application for judicial review. But, if that be wrong, I am content to find that after an examination of the legal and factual context, to which I now turn, there is no demonstration of a sufficient interest for Quarantine to bring these proceedings.

The third decision is *Elderslie Park Ltd v The Timaru District Council.*[27] This case also involved an application to review a decision under the Resource Management Act 1991 not to notify an application for a resource consent. The decision of the Council had the effect of permitting the relocation of a supermarket. The plaintiffs claimed to act as champions for the broader public interest, but were in fact front persons for retail trade competitors. Williamson J followed the decision in *Quarantine Waste* in holding that the plaintiffs did not have standing.

In England the courts have also recognised that, subject to any countervailing statutory intent, competitors generally have standing. For example, in *R v Attorney-General, ex parte Imperial Chemical Industries plc,*[28] the plaintiff was permitted to seek judicial review of the basis on which petroleum revenue tax was assessed in ethane used by competitor companies. It was acknowledged that the tax regime adopted would have a considerable impact on the plaintiff's commercial interests.[29]

A more recent example is *R v Department of Transport, ex parte Presvac Engineering Ltd.*[30] The plaintiff, a manufacturer and supplier of valves to the shipbuilding industry, sought to quash a decision of the Department certifying a rival's valves as acceptable pursuant to certain regulations, on the grounds that the necessary tests had not been properly carried out. There was evidence that the new valve would threaten sales of the plaintiff's valves. The Court of Appeal considered that the plaintiff's commercial interest as a trade competitor conferred standing, stating that there is no reason why a person "who is directly and financially affected by the unlawful or erroneous performance by a public authority of its statutory functions cannot, as a general rule, be said to qualify as having a sufficient interest".

In summary, the present position on standing in respect of competitors who, unlike competing tenderers, have not been a party to the decision-making process, can be stated as follows:

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27 (HC Timaru, CP 10/94, 24 February 1995, Williamson J).

28 [1987] 1 CMLR 72 (CA).

29 Ibid, pp 106-108, per Lord Oliver.

30 Court of Appeal, England, 25 June 1991, (Purchas, Butler-Sloss and McCowan LJJ); (1992) 4 Admin LR 121; *The Times* 10 July 1991. See also Wade & Forsyth, above, note 7, pp 715-716. In *Patmor Ltd v City of Edinburgh District Licensing Board* 1987 SLT 492 (Lord Jauncy) it was held that the holder of a gaming licence having a statutory right to object to applications for licences had standing to seek judicial review of a decision granting a licence to another company; contrast *Matchett v Dunfermine District Council* 1993 5 LT 357 (Lord Kirkwood). For a discussion of the similar Australian position, see Baker "The Availability of Judicial Review in the Nineties" in Harris & Waye (ed) *Administrative Law* (1991) 2, pp 13-14.

1. A trade competitor will normally be accorded standing if there is evidence before the court of a likelihood of significant economic prejudice, or if the circumstances are such that prejudice can be assumed.

2. A competitor will be denied standing only where, (a) the particular statutory context indicates that an interest as a competitor is not to be treated as an interest greater than that of the public at large, as was the case in the *Quarantine Waste* and *Elderslie Park Ltd* decisions,[31] or (b) the possibility of economic prejudice to the competitor is merely speculative. However, because of the liberal approach to standing, and the growing "fusion" of standing and the merits,[32] even in those circumstances a plaintiff is unlikely to be denied standing if its complaint is a genuine and substantial one.[33]

3. The courts prefer issues of standing to be resolved at the substantive hearing, assessed together with the legal and factual context, rather than as a preliminary and isolated issue. Except in very simple cases, where it is clear a plaintiff has an insufficient interest to support the proceeding and where the grounds of review are plainly hopeless, a threshold challenge to standing is unlikely to be successful.[34]

In short, in the majority of cases, competitors are likely to be accorded standing. However, as will be discussed later in this paper, a plaintiff's motives and status as a competitor are matters that the court can certainly take into account in exercising its ultimate discretion whether to grant a remedy.

To revisit the plaintiff's status at the remedial stage does not undercut the finding that the plaintiff has sufficient standing.[35] Standing is concerned with the court's jurisdiction to consider a claim at all.[36] The courts' readiness to let competitors "in" is consistent with the move away from the private right conception of standing towards a more liberal and public-oriented approach.[37] The rationale of this trend towards liberalisation is that overly refined and technical rules of standing should not preclude people from bringing administrative wrongdoing to the court's attention. If particular categories of plaintiffs, such as competitors, were barred in principle, there would be a risk that potentially serious violations might go unchecked.

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[31] Above, notes 24 and 27; see the *Self-Employed and Small Businesses* case, above, note 9, where some of their Lordships relied heavily on the statutory framework and background to reach the conclusion that the applicant in that case (a taxpayer) possessed no sufficient interest: pp 632-633, per Lord Wilberforce, p 646 per Lord Fraser, and pp 662-663 per Lord Roskill. Cf *Subritzky Shipping Line Ltd v Auckland Harbour Ferry Service District Licensing Authority* (HC Auckland, CP 748/88, 1 September 1989, Henry J).

[32] Craig, *Administrative Law*(3rd ed, 1994) pp 502-504

[33] In the *Self-Employed and Small Businesses* case, above, note 9, for example, all the judgments contained statements to the effect that if serious or grave illegality existed, standing would be accorded.

[34] For example, in *Carter v North Shore City Council* (HC Auckland. M 1112/93, 10 May 1994) Anderson J declined to determine the issue of standing in the context of a strike out application.

[35] Beatson, "The Discretionary Nature of Public Law Remedies" [1991] NZ Recent Law Review 81, 89, argues that substantive considerations such as the plaintiff's motives should not be taken into account at the remedial stage.

[36] I agree with Taylor that standing still exists as a distinct concept (see Taylor, above, note 22, para 4.27), but only just.

[37] Above, note 9.

It is in my view quite appropriate for the court to take into account the plaintiff's status and motives as a competitor in exercising its remedial discretion. Approached in this way the plaintiff's status is not a decisive factor (as it would be if it precluded standing) but is rather one factor which the court may weigh, along with other relevant matters such as the gravity of the alleged wrongdoing, in deciding whether to grant or withhold relief.

The court's remedial discretion

Public law remedies are, or course, discretionary. A decision which is tainted by some irregularity stands, and remains fully effective, unless and until it is set aside or declared invalid by the court;[38] and the court may, in its discretion, refuse to do so.

A plaintiff competitor who has succeeded in establishing both standing and a ground of review can often find itself facing a formidable obstacle at the remedial stage. In cases of this kind, where the interests of third parties are invariably in issue, the court's discretion to refuse a remedy assumes real significance. Frequently the focus of the plaintiff's case is the alleged irregularity in the decision-making, and the importance of the remedial discretion is overlooked or underestimated.

The grounds upon which the court may exercise its discretion to withhold relief are not circumscribed.[39] I have earlier identified four factors which have particular relevance in cases involving competitors. These will now be considered.

1. *First discretionary factor - the interests of third parties*

Because the decision under attack is always a decision made in favour of a third party, who will usually have taken some steps in reliance upon it, the prejudice likely to be suffered by the third party if the decision is invalidated can be great. This is a factor upon which the courts are placing increasing weight in exercising their discretion. In the UK it us an express statutory criterion for the refusal of relief.[40]

A striking example is the recent case of *Auckland Casino Ltd v Casino Control Authority.*[41] The plaintiff, one of the unsuccessful competing applicants for a casino premises licence in Auckland, challenged the validity of a decision by the Casino Control Authority to award the licence to the second respondent, Sky Tower Casino

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[38] *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA), p 4, per Cooke J; *Hill v Wellington District Licensing Authority* [1984] 2 NZLR 314 (CA), p 315, per McMullin J; *R v Panel on Takeovers & Mergers, ex p Datafin* [1987] 1 QB 815 (CA), p 840, per Sir John Donaldson MR; *Martin v Ryan* [1990] 2 NZLR 209, 236-238, per Fisher J; *M v Kendall* [1992] NZFLR 63, 68, per Smellie J. See also Taggart, "Rival Theories of Invalidity in Administrative Law: Some Practical and Theoretical Consequences" in *Judicial Review* of *Administrative Action in the 1980s* (Auckland: Oxford University Press & Legal Research Foundation, 1986) 70, 90-98.

[39] It was suggested by Peiris, "Natural Justice and Degrees of Invalidity in Administrative Action" [1983] PL 634, 649, that the grounds on which relief may be withheld were "well-defined" and reducible to the core elements of fault in the plaintiff, or futility and impracticability of judicial intervention. He considered that these grounds insufficiently recognised third party interests. This narrow view was criticised by Taggart, above, note 38, pp 99-100, who argued that the remedial discretion was not so circumscribed. Current authority clearly supports the wider approach.

[40] Section 31(6), Supreme Court Act 1981.

[41] Above, note 3.

Ltd. By the time the plaintiff filed its proceeding Sky Tower has spent $2.375m on the project, and was committed to proceeding with it. By the time the matter reached the Court of Appeal (after two unsuccessful challenges in the High Court) total expenditure incurred was $38m. The project was forecast to involve an ultimate investment of $320m. The plaintiff's complaint was one of presumptive and apparent bias. The Court of Appeal described it as a "borderline case" of presumptive or apparent bias, but found that the plaintiff had waived any bias. The Court of Appeal went on to hold that even if there had been no waiver, it would have exercised its discretion to decline relief.[42] The continually accruing prejudice to Sky Tower and to the public interest was "obvious".[43]

A similar situation arose in *Pacer Kerridge Cinemas Ltd v The Hutt City Council.*[44] The Council wished to redevelop a building which it owned as a multiplex cinema and called for tenders for the redevelopment. A multiplex operator, Endeavour Entertainment Ltd, was the successful tenderer. The plaintiff, who had previously been a tenant of the building, and was one of the unsuccessful tenderers, challenged the validity of the tendering process. It plainly sought itself to secure the right to redevelop.

The Court held that even if the alleged grounds of review had been established (which was not the case) it would not have exercised its discretion to grant relief because, inter alia, the interests of third parties were involved. Prior to the issue of the proceeding Endeavour had entered into an agreement to lease with the Council. The Council had contracted with Fletcher Construction for the refurbishment. In addition, Endeavour had contracted with Fletcher for a substantial refit of the premises. In anticipation of the refit Endeavour had committed itself to orders for fittings and equipment. A deferral of the possession date, and of operation of the complex, would have resulted in losses to Endeavour for which the Council would be liable under its contract with Endeavour.

In *Travis Holdings Ltd v The Christchurch City Council,*[45] the plaintiff challenged the validity of certain resolutions of the Council to sell surplus land to the second respondent, a Dr Beulink. Numerous grounds of review were advanced, none of which succeeded. Tipping J considered that a material reason why the plaintiff had commenced the proceeding was to try and stop Dr Beulink from setting up a competing medical centre on the land in question. The plaintiff had an existing medical practice close by. Having disposed of the plaintiff's complaints, Tipping J

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42 The Court of Appeal took a similar approach in *West Coast Province of Federated Farmers of New Zealand (Inc) v Birch & Kanieri Gold Dredging Ltd* (CA 25/82, 16 December 1983, Cooke, Somers and Casey JJ), although the case did not involve competitors. The plaintiff challenged a decision granting a gold mining licence to the second respondent. The Court of Appeal declined relief (notwithstanding a failure to comply with the Mining Act 1974) on the grounds that between the grant of the licence and the commencement of the proceeding the second respondent had done certain physical work (excavation and erection of temporary buildings) and had committed itself to expenditure of $1.5m for steel. See also *Turner v Allison* [1971] NZLR 833 (CA), where by the time of the judicial review hearing, the developer of the supermarket had almost competed building work in reliance upon the planning consent given.

43 Above, note 3, p 153, Cooke P. An application by the plaintiff for leave to appeal to the Privy Council has been declined by the Court of Appeal: CA 181/94, 7 March 1995 (Cooke P, Hardie Boys and McKay JJ).

44 HC Auckland, M 896/92, 18 December 1992, Williams J.

45 [1993] 3 NZLR 32 (Tipping J).

went on to state that even if the plaintiff had demonstrated a prima facie entitlement to relief, he would have declined a remedy as a matter of discretion. The Council had already entered into a contract with Dr Beulink to sell the land to him, and Dr Beulink was an innocent third party who had "expended a considerable amount of time, effort and money getting himself into his present position".[46] It would in his Honour's view, be quite unfair if Dr Beulink had to face the setting aside of the relevant resolution and thus the loss of his contract to purchase.

The English courts have also given increasing emphasis to the interests of third parties, in cases brought by competitors and public interest groups alike. For example, in *R v Swale Borough Council and Medway Ports Authority, ex p Royal Society for the Protection of Birds*[47] a conservation body challenged the granting of planning permission to a port authority to reclaim mud flats. In reliance on the permission the port authority had entered into a dredging contract with another company. The evidence established that the benefit of that contract would be lost, costs would increase, and the overall development would be delayed if the decision were invalidated, resulting in very substantial financial loss to the port authority and other third parties. Relief was refused.

The recent decision of the English Court of Appeal in *R v Secretary of State for Health; ex parte Furneaux*[48] is interesting in that it involved the reverse situation to that discussed in the above cases. The plaintiffs, who were three doctors, sought to review a decision of the Secretary of State declining an application to allow them to provide pharmaceutical services at their surgery. The second respondent, a company who had purchased the only pharmacy in the area in reliance on the Secretary's decision to refuse the plaintiffs' application, contended that the Court should exercise its discretion to dismiss the review proceeding on the grounds that it would suffer a financial loss due to increased competition. The Court of Appeal declined relief because of the plaintiffs' six months' delay in seeking review and demonstrable prejudice (in the form of financial detriment) to the second respondent.

The third party in whose favour the impugned decision has been made will almost always be joined as a respondent, and will be in a position to put its case fully before the Court.[49] It may also be in the third party's interests to encourage other persons who may be directly affected, such as contractors, to seek intervenor status. This may

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[46] Ibid, p 51. See also *Mirelle Pty Ltd v Attorney-General* (HC Wellington, CP 969/91, 27 November 1992, Heron J). The plaintiff challenged the Minister of Commerce's rejection of its tender bids for licences to radio frequencies. Licences had been provisionally awarded to the other respondents. Heron J declared the decision invalid, other than in respect of two of the successful bidders who had established a change of position and sufficient prejudice. An appeal in respect of the invalidated licenses was allowed by consent in *Attorney-General v Mirelle Pty Ltd* (CA 391/92, 13 October 1993).

[47] [1991] JPL 39 (Simon Brown J). See also *Re Friends of the Earth* [1998] JPL 93 (CA). This involved an application for leave to apply for judicial review of a consent to the construction of the Sizewell nuclear generating plant. The CEGB had committed £300m to the project following the giving of consent. Leave was refused.

[48] [1994] 2 All ER 652 (CA). Unlike in the other cases discussed, the plaintiffs' challenge related to a decision in respect of their own application, not a decision made in favour of the third party. The effect of the Court's decision was to protect the third party from competition.

[49] See *Talley's Fisheries Ltd v Minister of Immigration* (1994) 7 PRNZ 469 where the plaintiff sought judicial review of the Minister's decisions to grant work permits to foreign seamen as crew on ships of its competitors. McGechan J ordered that the competitors be added as respondents.

have more impact than the mere filing of affidavits from those persons. In the *Auckland Casino Ltd* case, for example, the head contractor for the second respondent's casino project, Fletcher Construction Ltd, sought and obtained intervenor status.

In the cases discussed above the third parties were "innocent", in that they had not themselves committed any wrongdoing, or contributed to or colluded in the allegedly unlawful decision-making. However, where a third party is not blameless, that is no doubt a matter the courts will weigh, along with all other circumstances, in exercising their discretion.[50]

2 *Second discretionary factor – undue delay*

Closely interrelated with the question of prejudice is that of delay. In New Zealand there is no fixed statutory time limit on the issue of judicial review proceedings. Nevertheless, delay has always been recognised as an important discretionary ground for withholding substantive relief.[51] This is especially so if it is coupled with prejudice to third parties.

Usually the notion of undue delay in this context means an excessive period of inaction of a year or more. There are any number of examples of that.[52] But, in cases where challenges are made to decisions granting licences, planning permissions and other authorisations to third parties, the concept of delay has assumed new significance. Undue delay can mean anything from a few months to only a few weeks. This reflects the commercial reality that the recipient of the decision can be expected to act on it almost immediately. If competitors (or anyone else) wish to challenge such decisions, they must act with like promptitude in issuing a proceeding. In some circumstances even a very short delay can be fatal.

In the *Auckland Casino Ltd* case,[53] the Authority issued an interim decision on 17 December 1993, and a final decision on 21 January 1994. The plaintiff's judicial review proceeding was filed a week later, on 28 January 1994. In normal circumstances such a delay would not be unreasonable. At first instance the Court was not satisfied that there had been undue delay.[54] However, the Court of Appeal was of the view that, in the circumstances of the case (especially the continually accruing prejudice to the second respondent who had commenced work on the casino project before the proceeding was issued) the plaintiff was bound to show "the utmost expedition" in issuing and prosecuting a court proceeding. In finding that there had been undue delay, the Court of Appeal also had regard to the fact that the plaintiff had knowledge of the grounds of review (ie, apparent and presumptive bias) before the

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50 See the comments of Temm J in *Ngati Whatua O Orakei Maori Trust Board v Attorney General* (HC Auckland, M1501/92, 18 November 1992), p 28.

51 *Turner v Allison*, above, note 42, p 850, per Turner J.

52 For example, *Turner v Allison,* ibid, (one year); *Hill v Wellington District Licensing Authority,* above, note 38 (three years); *Stininato v Auckland Boxing Association (Inc)* [1978] 1 NZLR 1 (CA) (four and a half years); *Manson v New Zealand Meat Workers Union* [1990] 3 NZLR 615 (Master Hansen) (five years). See also Caldwell "Discretionary Remedies in Administrative Law" (1986) 6 Otago Law Rev 245, 252-253.

53 Above, note 3.

54 HC Auckland, M81/94, 13 July 1994, Robertson J, p 59.

interim decision was announced. The plaintiff could therefore be expected to move speedily after the interim decision.[55]

This increasing emphasis on the need to proceed with urgency has been particularly noticeable in England. In that jurisdiction, there is a prima facie statutory period of three months for applying for judicial review, coupled with an overall obligation to apply "promptly".[56] It has been held that an application will not necessarily be prompt simply because it is made within three months.[57] There have been a number of instances where, although proceedings were brought within three months, there was nevertheless held to be inexcusable delay. The view of the English courts is that in situations where a licence or other benefit is conferred, there should be early finality; people should be allowed to implement the benefits of favourable administrative decisions with reasonable promptness, and not have to fear that their expenditure or other commitments will be wasted because of a belated challenge to the validity of the decision.[58]

This approach is best exemplified in the recent decision of the English Court of Appeal in *R v Independent Television Commission, ex p TVN1 Ltd.*[59] The appellants applied for leave to review the decision of the Commission refusing to grant them regional television licences, and granting such licences to two other companies. On 16 October 1991, the Commission made an interim announcement of the names of the companies to whom it proposed to grant licences, and the licences were formally granted on 4 December 1991. The appellants filed their proceeding after 4 December (the exact date is unspecified in the report). The Court of Appeal declined leave in a judgment delivered on 19 December, on the grounds of undue delay, even though the delay was clearly very short, because the recipients of the licence had already acted in reliance on the decision, and would suffer prejudice. Lord Donaldson MR stressed the need for promptness in such cases, stating:[60]

> I saw it reported in the press that all the applicants had until 16 January, that is to say three months from 16 October, in which to apply for judicial review. That just is not correct. In these matters people must act with the utmost promptitude because so many third parties are affected by the decision and are entitled to act on it unless they have clear and prompt notice that the decision is challenged.

In a number of other recent English decisions, intervals of seven weeks,[61] a little more than a month,[62] and two and a half months[63] have been held to constitute undue

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55 Above, note 3, p 153, Cooke P. The Court of Appeal referred to, inter alia, *Malayan Breweries Ltd v Lion Corporation* (1988) 4 NZCLC 64,344 (Barker J). There an interim injunction was sought to "unscramble" a proposed merger. Barker J was of the view that a delay of more than a few days would not be justified, stating (p 64,373) that "… the commercial realities of this situation demanded urgent measures".

56 RSC Ord O 53, r4(1).

57 *Caswell v Dairy Produce Quota Tribunal for England & Wales* [1990] 2 AC 738, 746-747 (per Lord Goff of Chieveley).

58 *R v South Northamptonshire District Council, ex parte Crest Homes plc* [1993] 3 PLR 75, Brooke J.

59 CA, England, 19 December 1991 (Lord Donaldson MR, Staughton and Nolan LJJ); *The Times,* 30 December 1991.

60 Ibid, p 6.

61 *R v Secretary of State for Education, ex parte London Borough of Lambeth* (Queen's Bench Division, Crown Office List, CO 2736, 22 December 1992, Owen J).

delay.[64] In *R v Exeter City Council, ex parte J L Thomas & Co* (where the delay was just under three months)[65] Simon Brown J stated that he could "not sufficiently stress the crucial need in cases of this kind for applicants to proceed with the greatest possible urgency, giving moreover to those affected, the earliest warning of an intention to proceed".

In addition to the overall requirement of promptness per se, there are two further factors which should be borne in mind for the purposes of assessing the period of delay. The first is that in some circumstances, time may start running from a date earlier than the formal decision under challenge. For example, time may run from an earlier interim decision, if that decision is a sufficiently clear and firm indication of the decision maker's intention. This was the case in *Turner v Allison*.[66] As mentioned above, in both the *Auckland Casino Ltd* and *Independent Television* cases, time ran from the date of the interim decisions.

The second is that the question whether a plaintiff has acted sufficiently promptly is affected by prior knowledge of the grounds of review. That is, in judging promptitude, account may be taken of the longer period during which the plaintiff was aware of the alleged irregularity. The plaintiff is then expected to be ready for foreseeable urgent proceedings. As mentioned above, the Court of Appeal in the *Auckland Casino Ltd* case took into account the fact that the plaintiff had knowledge of the alleged bias well prior to the announcement of the interim decision.[67]

The decision in *R v Secretary of State for the Home Department, ex parte Prison Officers' Association & Goodman*,[68] although not a "competitor" case, illustrates the point well. The plaintiffs sought to review a decision of the Secretary, contained in a letter dated 9 November 1992, to implement a proposal relating to remand prisoners. The applicant had had knowledge of the proposal long before 9 November. The review proceeding was commenced just over one month after the decision. Otton J held that the application was too late. He considered that there was ample opportunity

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62 *R v Secretary of State for the Home Department, ex parte Prison Officers' Association & Goodman* (Queen's Bench Division, 11 December 1992, Otton J).

63 *R v South Northamptonshire District Council, ex parte Crest Homes plc,* above, note 58.

64 See also Beloff, "Judicial Review – 2001: A Prophetic Odyssey", above, note 9, pp 156-158 where the author comments on the increasing awareness in England of the need for extreme expedition. Beloff refers to several additional cases including *R v DTI, ex parte Virgin,* unreported, 4 December 1992, (concerning the approval given by the Department to the takeover by British Airways of Dan-Air) where apparently a delay of a week was held to be too long.

65 [1991] I QB 471, 484. In the *Furneaux* case, above, note 48, a delay of six months was held fatal, as in the meantime a rival pharmacy had been established. The obligation to proceed promptly was described as "of particular importance where third parties are concerned", per Mann LJ, p 658.

66 Above, note 42, pp 852-854 per Turner J. There a firm indication had been given that the supermarket would be authorised by the Council. Conditions had still to be settled, but that was a mere formality.

67 Above, note 3, p 153; see also *Re Friends of the Earth*, above, note 47, p 95 per Sir John Donaldson MR; *R v Exeter City Council, ex parte J L Thomas & Co*, above, note 65, p 483 per Simon Brown J. In *West Coast Regional Council v Attorney-General* (HC Wellington, CP 376/94, 20 December 1994, Heron J), a case of a challenge by an unsuccessful competing tenderer, Heron J declined to exercise his discretion to grant an interim order because although the delay in issuing the proceeding was quite short, the plaintiff had known of the alleged irregularity well prior to the completion of the tender process. The delay therefore disqualified the plaintiff from any relief.

68 Above, note 62.

for the plaintiffs "to have their block and tackle in order" well before 9 November so they could move promptly on receipt of the letter.

3 *Who bears the "litigation risk" when a third party elects to proceed to implement a decision in the face of a challenge by a competitor?*

It is only fair and just that in exercising its discretion the court should place considerable weight on the interests of third parties who have, in good faith, taken steps in reliance on a favourable administrative decision. In the cases discussed above, the challenge simply came too late. But what of the third party who, knowing that the validity of the decision is challenged, presses on regardless? What should the court's approach be then?

This issue arose in the *Auckland Casino Ltd* case. The plaintiff contended that by continuing with construction of the casino after receiving notice of the judicial review proceeding, the second respondent had, in effect, proceeded at its own risk; the additional work done by the time of the hearing should therefore be disregarded by the Court. At first instance, Robertson J, having found that there had been no undue delay in the commencing of the proceeding, did express the view that the second respondent had proceeded at its peril. His Honour stated:[69]

> The second respondent went ahead in the full knowledge that there was a serious and determined attack on the validity of the licence granting process… A party which chooses to proceed in the hope that it can point either to a building (or in this case an enormous hole in the ground) and suggest that precludes the Court from granting relief which is otherwise deserved, takes a risk. An alternative approach does not accord with justice… The danger in holding to the contrary is that a party, by proceeding full steam and making various arrangements, could be seen as having the ability to thwart an otherwise aggrieved (and worthy) litigant of receiving full justice.

The Court of Appeal did not expressly address this point in its judgment. But, given the Court's finding that the plaintiff had delayed unduly, and that this, taken together with prejudice to the second respondent, disentitled relief, it can be argued that the Court implicitly accepted that the second respondent was justified in continuing work.[70]

The issue of whether and to what extent the court, in the exercise of its discretion, should have regard to the interests of a third party who has deliberately proceeded in the face of a challenge is a difficult one, and one which the courts have yet to grapple with fully. It will turn on questions of timing, notice, the nature and extent of the third party's commitment to proceed, and whether the plaintiff has sought an interim order supported by an undertaking as to damages. I have summarised below the approach I consider to be appropriate.

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[69] Above, note 54, p 60.

[70] The matter was fully argued before the Court of Appeal. The Court of Appeal presumably would not have been so concerned about the "continually accruing prejudice" to the second respondent if it considered that the second respondent had proceeded without justification and was therefore the author of its own misfortune.

1. If a third party, anticipating a favourable decision, incurs expenditure or takes other steps before the decision is actually announced, then those steps should be disregarded by the court. The action has not been taken in reliance upon the decision. In *Re Friends of the Earth*[71] the second respondent, the Central Electricity Generating Board, was so concerned with considerations of urgency, that it committed itself to spending the sum of £300m to build the nuclear generating station before consent was granted. The English Court of Appeal accepted that that could not be held against the plaintiffs. However, the further £300m which had been committed following the giving of consent, on the footing that the consent was sound, was another matter.[72]

2. If, after the decision is announced and before the third party has taken any action or entered into commitments of any significance in reliance upon it, the plaintiff gives formal and unequivocal notice that it intends to review the decision, then the third party will be proceeding at its own risk if it subsequently implements the decision and goes on to incur expenditure, enter into contracts and so on. In such circumstances the Court would be justified in disregarding or downplaying any resulting prejudice suffered by the third party.

   In a number of the decisions discussed above, the Court placed emphasis on the lack of any early notice from the plaintiff that it intended to challenge the decision.[73] In *Re Friends of the Earth* Sir John Donaldson MR stated, in relation to the £300m expenditure committed after the giving of consent:[74]

   > That again might not have mattered quite so much if the Friends of the Earth had given any audible warning of approach following the giving of consent either to the effect that they were going to apply or that they were giving urgent consideration to applying. In fact they had given no warning at all. They suddenly popped up, more or less at the last minute, with this application.

   It is to be emphasized that what is contemplated is a situation where the third party has taken no steps of any significance, and where implementation of the decision can be put on hold without any real prejudice being caused, other than the inconvenience of delay and further uncertainty. The plaintiff, for its part, would need to move with the utmost urgency in filing and prosecuting its proceeding.

3. If, by the time the plaintiff gives notice that it is challenging the decision, the third party has already taken steps in reliance on the decision, and is committed

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71 Above, note 47.

72 Ibid, p 95.

73 See for example, the *Independent Television case*, above, note 59, p 6; *R v Exeter City Council, ex parte J L Thomas & Co,* above, note 65, p 484; *Mirelle Pty Ltd v Attorney-General*, above, note 46, p 26, per Heron J. See also *King Turner v The Minister of Agriculture and Fisheries* (HC Blenheim, A4/83, 31 July 1989, McGechan J) where the plaintiff, a competing applicant for a mussel farming licence, unsuccessfully sought judicial review of MAF's grant of a licence to the second respondent. McGechan J observed, p 27, that the third respondent who had purchased the licence in the knowledge that a challenge existed, had proceeded on an "at risk basis".

74 Above, note 47, p 95.

to proceeding, the situation is, in my view, quite different. The "litigation risk" should then shift to the plaintiff.

The third party may be committed to proceeding in a number of different ways. For example:

- The third party may have made contractual commitments – as in *Pacer Kerridge,*[75] where contracts had been entered into for the refurbishment and fitout of the cinema complex;

- The third party may be under some other legal obligation to proceed, as in the *Auckland Casino Ltd* case,[76] where the second respondent was under a statutory obligation to complete the casino within two years from the grant of the licence. A failure to comply with the two year deadline would result in the automatic lapse of the licence under s 26(1) of the Casino Control Act 1990.

- There may be compelling commercial reasons why the third party is bound to proceed. An obvious example is the situation where a third party has commenced a large construction project. Even if a suspension of work is legally possible, it is unlikely to be commercially realistic. Once a major development has begun, it cannot simply be put on hold for an open ended period. The developer will be faced with demobilisation costs, escalating constructions costs, loss of experienced personnel and general disruption to the project.

In any of these circumstances the third party will be prejudiced if implementation of the decision is simply suspended, on an uncompensatable basis. The third party should not be expected to do this. Rather, the onus should be on the plaintiff to seek and obtain an interim restraining order under s 8 of the Judicature Amendment Act 1972.

In practice, it is uncommon in such cases for the plaintiff to seek an interim order, because of the potential liability of an undertaking as to damages. Although, under s 8 of the 1972 Act, the filing of an undertaking is a matter of discretion,[77] it is clear that in cases where third parties are likely to suffer damage the court will rarely, and only in very exceptional circumstances, dispense with an undertaking.[78] In addition, the Court has power to require an

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[75] Above, note 44.

[76] Above, note 3.

[77] If a judicial review proceeding is brought under Part VII of the High Court Rules then an undertaking is a mandatory requirement of any interim order: R630(1).

[78] See *Pfizer Inc v Director-General of Health*(1989) 3 TCLR 30. This was a dispute between rival drug companies. The plaintiff sought an interim order, but disputed the need to give an undertaking. In the event the Court declined to grant an order, but made it clear that if it had decided to do so, the plaintiff would have been directed to furnish an undertaking. In *Area 1 Consortium Ltd v Treaty of Waitangi Fisheries Commission* (CA 224/93, 29 September 1993) the Court of Appeal declined to grant an interim order under s 8 for a stay pending an appeal, partly on the basis that no undertaking was given. In *R v Secretary of State for the Environment, ex parte Rose Theatre Trust Company* [1990] COD 47, the Court refused an injunction requiring developers to preserve the Rose Theatre pending the outcome of the judicial review. Schiemann J stated the Court would be "extremely slow" to grant an injunction without any undertaking in damages.

undertaking to extend to protect innocent third parties who are not parties to the proceeding.[79]

It would undermine the principles and safeguards relating to interim orders if a third party who was already committed (legally and/or commercially) to implementing a decision were expected to suspend all action without being do directed by the court, and without the benefit of an undertaking as to damages. In the absence of an interim order, the third party should be entitled to proceed, in the expectation that in exercising its discretion the court will have regard to the full extent of work done at the time of the hearing.

Of course, it may not be necessary to argue this far. At the very least, the court will have regard to the steps taken by the third party at the time when the belated notice of challenge is given. If by then the steps taken are significant, the accrued prejudice to the third party at that point may well be sufficient, in itself, to warrant the refusal of relief.

4. If a third party, knowing of the plaintiff's challenge, deliberately accelerates the pace of work, or enters commitments which it is not required to make, then the additional work or commitments should properly be disregarded by the court. This occurred in *Cheyne Developments Ltd v Auckland City Council.*[80] The Court held that a developer who continued to erect a high rise apartment building, pending the hearing of a judicial review proceeding challenging the validity of the planning consent, had proceeded entirely at his own risk. The court, on being told that the building would not exceed the permitted height by the date allocated for the substantive hearing, decided it was unnecessary to deal with the matter on an interim basis even though the plaintiff had filed an application for an interim order supported by an undertaking. The developer then deliberately accelerated the pace of the work to the extent where by the time of the hearing he had exceeded the permitted building height.

It is important to emphasise that the above analysis is concerned only with the implications of the third party proceeding after receiving notice of a challenge; that is, whether prejudice suffered by that third party should be taken into account by the court in the exercise of its discretion, or whether it should be disregarded. The court's overall evaluation will also include other factors, notably the seriousness of the alleged unlawfulness. Conceivably a situation could occur where, notwithstanding undue and substantial prejudice, the wrongdoing is so "flagrant" as to warrant the granting of a remedy.[81] In deciding whether to proceed the third party will therefore need to evaluate carefully all relevant circumstances, including the gravity of the alleged error.

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[79] *Z Ltd v AZ & AA-LL* [1982] QB 558 (CA); *Clipper Maritime Co Ltd v Mineralimportexport* [1981] 3 All ER 664 (Goff J). In *Auckland Casino Ltd,* above, note 3, the plaintiff sought an interim injunction, but without offering an undertaking as to damages. During the hearing an application was made by the intervenor, Fletcher Construction, that any undertaking extend to it. In the event the injunction application was declined on the grounds that it was not "necessary" under s 8: (HC Auckland, M81/94, 21 March 1994, Temm J).

[80] (HC Auckland, A 936/85, 13 May 1986, Chilwell J).

[81] Although, as will be discussed in the conclusion to this paper, such instances have been uncommon in cases brought by competitors. More often the matter complained of has been insubstantial.

4 *Third discretionary factor – the interests of the wider public*

In assessing the question of prejudice, the courts have regard not only to the interests of the recipient of the decision, and other third parties who may be directly affected, but also the interests of the wider public. Several recent decisions of the Court of Appeal illustrate this principle.

The first is *Ritchies Transport Holdings Ltd v Otago Regional Council.*[82] That case concerned competing tenders for passenger service routes in Dunedin City, pursuant to the Transit New Zealand Act 1989. The proceeding was commenced by the Otago City Council and its transport company, Citibus Ltd (who had received only 11 of the 23 possible routes), challenging the validity of the tender process which had been adopted by the Otago Regional Council. Soon after the filing of the proceeding, the Otago Regional Council re-evaluated the tenders and awarded Citibus 17 routes. This led to a complete about-face in the litigation. At first instance Holland J described the situation as follows:[83]

> As a result of this indication, the proceedings all went into reverse. The city council, which had been so anxious to set aside the whole process, became equally firmly resolved to uphold it. Ritchies, who were originally very anxious to uphold the process, became equally anxious to set it all aside.

On appeal, Gault J described it as a case of parties "blowing hot and cold", their allegations of invalidity depending on commercial gains and losses. The Court of Appeal held that notwithstanding "significant defects" in the tendering process, it could not exercise its discretion to grant relief (except in respect of one route) because to do so would lead to further disruption from changes of operator, likely public inconvenience from timetable changes, and inevitable commercial uncertainty.[84]

The second is *Southern Ocean Trawlers v Director-General of Agriculture and Fisheries*.[85] As mentioned above, the validity of a decision by the Director-General allowing Sealord to continue to hold its fishing quota was in issue. The Court of Appeal struck out the plaintiff's claim on the basis that none of the grounds of review pleaded had any prospect of success. In addition, Gault J accepted a submission that if the case went to trial the Court would inevitably exercise is discretion to withhold a remedy, having regard to the interests of Sealord, the people of Nelson, the New Zealand fishing industry, and the need for certainty in any public dealings with the securities involved.

In the *Auckland Casino* decision one of the factors taken into account by the Court of Appeal was the perceived general public interest, in terms of the impact on the economy, in the early establishment of a casino.[86]

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82 CA 152/91, 16 August 1991 (Casey, Hardie Boys and Gault JJ).

83 *Dunedin City Council v Otago Regional Council* (HC Dunedin, CP 41/91, 31 May 1991, Holland J), p 6.

84 Above, note 82, p 47. Gault J did indicate, however, that if the whole tendering process had been "seriously flawed", the Court may have intervened (p 42).

85 Above, note 5.

86 Above, note 3, pp 145 and 153, Cooke P.

A related factor, in considering the public interest, is the impact on administration. This factor is particularly important in cases where the setting aside of a decision will result in the need for a re-hearing, with the further delay, expense, uncertainty and inconvenience that that necessarily entails.

Formerly the courts placed little weight on the question of administrative inconvenience in exercising their discretion.[87] However, its importance was emphasised by the English Court of Appeal in *R v Monopolies and Mergers Commission; ex parte Argyll Group plc.*[88] There the Court of Appeal held that the Chairman of the Commission acted without jurisdiction in deciding alone, without the other members of the Commission, that a takeover bid had been abandoned, leaving the bidder free to make a fresh bid. The applicant was a commercial rival seeking to prevent the making of a new bid. The Court of Appeal refused to exercise its discretion to grant relief. One of the factors taken into account was the need for good public administration, including speed of decision, particularly in the financial markets, decisiveness and finality.[89]

This approach was followed by Tompkins J in *Christian Broadcasting Association Ltd v The Broadcasting Tribunal*[90] where the plaintiff sought to challenge certain decisions of the Tribunal granting broadcasting warrants to the respondents. Subsequent to announcement of the decisions a completely new statutory regime had been introduced. Tompkins J refused to declare the decisions invalid. A great deal of time, energy and cost had been expended by the respondents bringing the applications to a hearing. The process had commenced three and a half years earlier. To require the whole process to be gone through again, particularly under a totally different regime, would impose a considerable burden on the respondents, and would not be in accordance with good administration.[91]

5 *Fourth discretionary factor – the plaintiff's motives as a competitor*

I have stated above that in cases involving competitors often the plaintiff's primary object is to advance its own private commercial interests. Judicial review is perceived as a useful means to that end. However, even though a competitor will usually be accorded standing the courts regard the plaintiff's collateral motives as a factor relevant to the exercise of their discretion.[92] This is particularly so where the plaintiff has not been a party to the decision-making process as a competing applicant and its interest is solely as a competitor. This will seldom be a decisive ground but may well

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87 Lewis, *Judicial Remedies in Public Law* (1992), 294.

88 [1986] 1 WLR 763 (CA).

89 Ibid, p 774, Sir John Donaldson MR. The English Court of Appeal again emphasised the need for certainty in market dealings refusing to set aside a decision awarding a regional television licence in the *Independent Television* case, above, note 59.

90 Above, note 23. See also *Destounis v Minister of Fisheries* (HC Wellington, CP 1/87, 11 February 1993) where McGechan J, in declining relief, agreed that invalidation of the Minister's decision setting fixed prices for surrender of ITQ in a tender round would cause serious administrative problems and undesirable industry disturbance.

91 Ibid, p 152, In *Auckland Casino Ltd* Robertson J, at first instance, thought there was force in an argument about the consequences of a re-hearing if the Authority's decision were to be declared invalid (p 60).

92 Supperstone & Goudie, *Judicial Review* (1992) p 351; Sir Thomas Bingham, "Should Public Law Remedies be Discretionary?" [1991] PL 64, 71, 74-75.

incline the court towards withholding relief in cases where the grounds of review are insubstantial or unmeritorious.

In *R v Monopolies and Mergers Commission, ex parte Argyll Group plc*[93] the English Court of Appeal declined to grant relief, primarily on the grounds of administrative inconvenience, But the Court also took into account the fact that the plaintiff Argyll, was a commercial rival seeking to prevent the making of a fresh bid by Guinness. Sir John Donaldson MR stated:[94]

> … regard has to be had to the purpose of the administrative process concerned. Argyll has a strong and legitimate interest in putting Guinness in baulk, but this is not the purpose of the administrative process under the [Fair Trading Act] 1973. To that extent their interest is not therefore of any great, or possibly any, weight.

In several recent New Zealand decisions the courts have had regard to the plaintiff's ulterior purpose as a competitor. For example, in *Waiheke Shipping Co Ltd v Auckland Regional Council & Seaflight Cruises (1990) Ltd*[95] the applicant unsuccessfully challenged a decision by the ARC to grant registration to its competitor, Seaflight, to operate a passenger ferry service between Auckland and Waihake Island. One of the grounds of review alleged was that the ARC had paid insufficient regard to environmental factors. Wylie J was prompted to state:[96]

> I hope I am not being too cynical in thinking that in the present context Waiheke is not in the least concerned over environmental factors of the kind mentioned, and that is not the real reason for its opposition. For it to seize upon that consideration as a ground for seeking review has no merit whatsoever.

By analogy, the courts have also taken into account the plaintiff's motives as a competitor in exercising their discretion to decline interim relief under s 8 of the Judicature Amendment Act 1972. In *Air New Zealand Ltd v Overseas Investment Commission*[97] the plaintiff sought an interim order preventing the Commission from further considering an application by a consortium (including a competitor) which might have an adverse impact on its own domestic air services. Davison CJ stated:[98]

> In my opinion the proper status of Air New Zealand in this matter is simply that of a competitor to the consortium in the airline business and the steps which Air New Zealand is taking are designed to prevent as far as possible such competition.

Similarly, in *Compass Tax and Duty Free Shopping Ltd v Miles DFS Ltd*[99] Wylie J stated that because the applicant was "seeking to use the review procedure to gain a

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93 Above, note 88.

94 Ibid, p 774. See also *R v South Northhamptonshire District Council, ex parte Crest Homes Plc,* above, note 58, where, in exercising his discretion Brooke J took into account, inter alia, the fact that the application was being made by a competitor. In *R v Commissioners of Customs and Excise, ex parte Cook* [1970] 1 WLR 450, Lord Parker CJ declined to grant relief because of the plaintiff's ulterior motive of putting a competitor out of business (p 456).

95 (HC Auckland, M 687/91, 14 October 1991, Wylie J).

96 Ibid, p 25; see also *Travis Holdings Ltd v Christchurch City Council,* above, note 45, p 51, Tipping J; see the comments of Heron J in *Southern Ocean Trawlers,* above, note 1, p 25.

97 [1986] 2 NZLR 470 (Davison CJ).

98 Ibid, p 478.

99 (1987) 2 TCLR 32.

private commercial advantage", he would exercise his discretion against an order even if the other requirements of s 8 were met.

This growing focus on the plaintiff's motives perhaps indicates an increasing concern about the use of the court procedure for ulterior commercial purposes. It is reflected in areas other than judicial review. In several cases under the Fair Trading Act 1986, involving complaints of misleading comparative advertising, the courts have had regard to the plaintiff's motives as a competitor in deciding whether to exercise their discretion to grant interim injunctions. For example, in *E R Squibb & Sons (NZ) Ltd v ICI New Zealand Ltd*[100] McGechan J cautioned against the use of the court process as "a tool for marketing gamesmanship".

Conclusion

A third party faced with a judicial review challenge by a competitor will only very occasionally be able to achieve an early knockout on the grounds of standing. However, in such cases the various discretionary factors discussed above will sometimes provide compelling grounds for the ultimate withholding of a remedy.

The court, in exercising its discretion, must, of course, weigh these factors against the seriousness of the proven unlawfulness. In cases of "flagrant" invalidity, where the decision-making process is fundamentally flawed, the court may have no option but to set aside the decision, notwithstanding the consequences.[101] But experience indicates that such "flagrant" instances of administrative wrongdoing have been uncommon in cases brought by competitors. More often the complaint has been insubstantial, or at least not serious enough to justify relief in all the circumstances.

It has been said that "judicial review is more likely to command public acceptance if it is seen as a precision instrument and not a juggernaut".[102] The courts' growing willingness to exercise their discretion to refuse a remedy in appropriate cases, particularly those involving competitors, is a welcome development. While there is a public interest in the exposure and correction of administrative error, there is also a public interest in ensuring that the courts' processes are not used as a mere vehicle for commercial advantage, resulting in disruption, uncertainty, and prejudice to blameless third parties. The discretionary nature of judicial review remedies provides the means by which the court can achieve a proper balance, as the cases discussed above illustrate.

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[100] (1988) 3 TCLR 296 (McGechan J), p 324; see also *Telecom Directories Ltd v Ad Viser (NZ) Ltd* (1992) 5 TCLR 60, pp 62-63 and 73 (Williams J).

[101] See the comments of Cooke P in *West Coast Province of Federated Farmers of New Zealand Inc,* above, note 42, pp 6 and 8; and see the comments of Robertson J at first instance in the *Auckland Casino Ltd* case, above, note 54, p 62.

[102] Sir Thomas Bingham, "Should Public Law Remedies be Discretionary?" above, note 92, p75.