DISCRETIONARY REMEDIES IN ADMINISTRATIVE LAW

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Perhaps the realistic starting point of any discussion of modern administrative law should be with a referral to a simple but revealing dictum of Cooke J in *Burr* v *Mayor of Blenheim.*[1] In discussing whether a court would set aside a decision of a statutory authority which had been affected by some defect or irregularity, Cooke J stated that the current tendency in the courts was to avoid terms such as "ultra vires" and that:[2]

> [t]he determination by the court whether to set aside the decision or not is acknowledged to depend less on clear and absolute rules than on an overall evaluation; the discretionary nature of the remedies is taken into account.

His Honour derived support for this emphasis on the judicial discretion in administrative law from the significant judgment of Lord Hailsham LC in *London and Clydeside Estates Ltd* v *Aberdeen District Council.*[3] In that case Lord Hailsham had given a useful discussion on the difficulties of categorisation of errors made by statutory authorities and noted that the jurisdiction of the court on judicial review is "inherently discretionary".[4]

More recently the New Zealand Court of Appeal has taken the opportunity of reaffirming the existence of this discretion to withhold remedies[5] and it is clear that the discretion remains even where there has been a breach of a so-called "mandatory" provision.[6] Of course, such statements as those made by various members of the Court of Appeal and Lord Hailsham do not set out new propositions of law; relief in administrative law has always been essentially discretionary. However, one intuitively feels that the discretionary element in administrative law has become more prominent over the last fifteen years and this article seeks to survey some of the cases over that period in an endeavour to elicit any trends.

I THE EXPANDING SUBSTANTIVE GROUNDS

Before examining the role of discretion in the granting or withholding of remedies it is important to consider by way of background how the jurisdiction of the courts to grant remedies has increased with the great expansion of the substantive grounds of review. It can be said that the courts

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1 [1980] 2 NZLR 1.
2 Ibid at 4.
3 [1980] 1 WLR 182.
4 Ibid at 190.
5 See *Hill* v *Wellington Transport District Licensing Authority* [1984] 2 NZLR 314, 319 and *Fraser* v *State Services Commission* [1984] 1 NZLR 116, 123.
6 *Hill* v *Wellington Transport District Licensing Authority,* ibid at 319.

have a discretion, in the more general sense of the word, to set the limits of judicial review and that in recent years they have been extending those limits. But as the courts make this choice of expanding the potential scope of judicial review it may well be that they will become particularly conscious of their residual discretion to refuse remedies.[7] For obviously the courts seek to ensure that the law of judicial review develops in a predictable and reasonable way and without this check of the discretion to withhold remedies the dramatic movements in administrative law could result in considerable instability and uncertainty. As Cooke J put it in *Stininato* v *Auckland Boxing Association (Inc)*:[8]

> Concern for the development of administrative law as an effective and realistic branch of justice must imply that the discretionary remedies should not be granted lightly. After all, progress is not synonymous with giving judgment for plaintiffs.

We therefore turn to consider the judicial approach to the substantive grounds of review.

It is still, of course, a cardinal theoretic principle that the courts are not concerned with the merits of an administrative body's decision but only with legality and procedure.[9] Thus warnings still emanate from the House of Lords on the dangers of the usurpation of power by the courts on an application for judicial review.[10] And in the important case of *R* v *Inland Revenue Commissioners, ex p National Federation of Self Employed and Small Businesses Ltd*[11] Lord Roskill seemed to perceive that the abandonment of the old restrictions on judicial review taken together with the present emphasis on the discretionary nature of the jurisdiction could bring such dangers to pass.

Yet the inexorable thrust of the cases over the last decade has been to blur, if not to actually traverse, the boundary line between concern with the legality and concern with the merits of a decision. For instance in *Daganayasi* v *Minister of Immigration*[12] Cooke J explicitly propounded the view that "[f]airness need not be treated as confined to procedural matters". Indeed on the facts of that case Cooke J held that in order to determine if the applicant had been "fairly" treated by the respondent the court had to consider ". . . the whole case in perspective – the merits . . . the procedure . . . the grounds of the Minister's decision . . .".[13]

7 For example see *R* v *Diggines, ex p Rahmani* [1985] All ER 1073, 1084 per Purchas LJ, citing Greene MR in *R* v *Stafford Justices, ex p Stafford Corporation* [1940] 2 KB 33, 43,

8 [1978] 1 NZLR 1, 29. See also *R* v *Aston University Senate, ex p Roffey* [1969] 2 QB 538, 559 per Blain J; but compare the dictum of Pennycuick V-C in *Glynn* v *Keele University* [1971] 1 WLR 487, 496 in which it was stated that the discretion not to grant the remedy sought should be "very sparingly exercised" where a breach of natural justice has been found.

9 For an example of the restatement of the theory see *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374, 414.

10 See *Chief Constable of the North Wales Police* v *Evans* [1982] 1 WLR 1155, 1173 per Lord Brightman.

11 [1982] AC 617, 662.

12 [1980] 2 NZLR 130, 149.

13 Idem. A similar broad view of "fairness" is apparent in the judgment of Lord Roskill in *Wheeler* v *Leicester City Council* [1985] 2 All ER 1106, 1111-1112.

In fact the notion of "fairness", once regarded as being synonymous with the concept of natural justice, has been responsible for major shifts in administrative law. For instance in *HTV Ltd* v *Price Commission*[14] Scarman LJ suggested that the duty to act fairly incorporated the duty to act consistently. This somewhat original suggestion was developed by the House of Lords in *Preston* v *Inland Revenue Commissioners*[15] and adopted by Eichelbaum J in *Lemmington Holdings Ltd* v *Commissioner of Inland Revenue.*[16] It thus seems that a doctrine akin to estoppel has been introduced into administrative law under the aegis of the doctrine of "fairness".

The House of Lords has always been careful to leave the grounds of review open for further expansion. Thus in *Anisminic Ltd* v *Foreign Compensation Commission*[17] Lord Reid concluded his list of possible jurisdictional errors by stating that he did not intend the list to be exhaustive. Again in *Council of Civil Service Unions* v *Minister for the Civil Service*[18] Lord Diplock, in attempting to synthesise the grounds of review, noted that further grounds may have to be added. This was confirmed by Lord Roskill in *Wheeler* v *Leicester City Council.*[19]

One of the more recently established grounds of review is that of mistake of fact.[20] Judicial recognition of this ground means that the courts now have the task of determining the accuracy of fact-finding by decision-makers. At the same time the courts have chosen to expand radically the concept of the jurisdictional/reviewable error of law, so that there is now a strong presumption that an error of law made by a statutory authority will be reviewable.[21] Thus, whether the question be one of fact or law, it is difficult to argue convincingly that the courts are concerned solely with issues of legality and not with the merits.

Moreover in recent years the courts have elected to inject the principles of judicial review into areas of decision-making once thought to be immune. Thus in recent English cases the exercise of the Crown prerogative,[22] the

14 [1976] ICR 170, 192.

15 [1985] 2 All ER 327 per Lord Templeton at 339-341 and Lord Scarman at 330.

16 [1984] 2 NZLR 214, 221.

17 [1969] 2 AC 147, 171.

18 [1985] AC 374, 410.

19 [1985] 2 All ER 1106, 1111.

20 The impetus for this ground of review was derived from the judgments of Scarman LJ and Lord Wilberforce in *Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council* [1977] AC 1014, 1030 and 1047. The judgments were adopted by Cooke J in *Daganayasi* v *Minister of Immigration* [1980] 2 NZLR 130, 145-149. For the current judicial approach in New Zealand towards factual review see also *CREEDNZ* v *Governor-General* [1981] 1 NZLR 172, 200 per Richardson J, *Lemmington Holdings Ltd* v *Commissioner of Inland Revenue* [1984] 2 NZLR 214, 222-223 per Eichelbaum J and *Re Erebus Royal Commission* [1983] NZLR 662, 671 per Lord Diplock, delivering the opinion of the Privy Council.

21 See the important dicta of Cooke J in *Bulk Users Group* v *Attorney-General* [1983] NZLR 129, 133-136 affirming the views of Lord Diplock in *Re Racal Communications Ltd* [1981] AC 374, 382-383. The judgment of Cooke J has been followed in *Mobil Oil New Zealand Ltd* v *Motor Spirits Licensing Authority* (1983) 4 NZAR 128 per Roper J (confirmed (1985) 5 NZAR 412 (CA)).

22 *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374.

decision of the registrar of companies to register a charge[23] and the decision by the Inland Revenue Commissioners to initiate an investigation[24] have all been held to be potentially reviewable. In New Zealand the universities which were once thought to be in a protected position because of the existence of the visitatorial jurisdiction have also been held to be subject to judicial supervision.[25]

So in various ways the courts have chosen to extend the substantive base of judicial review. Of course there are still occasions when the courts will choose not to review the exercise of a particular administrative power because the nature of the power is unsuitable for curial analysis. In New Zealand the courts have evinced a reluctance to review various powers such as that of the Stock Exchange to suspend the listing of a company,[26] that of a hospital board to appoint a replacement member on the death of a sitting member[27] and that of certifying consultants under the Contraception, Sterilisation and Abortion Act 1977 to form a medical opinion.[38] In England the courts have declined to review the exercise of powers where the dispute raised questions of national security,[29] or of disruption to vital local authority services,[30] or where it simply had political overtones.[31] In Australia there is a recent line of cases where the courts have expressed a great reluctance to review decisions made in the course of committal proceedings of a criminal trial.[32] But all such powers and decisions have obvious special characteristics. There are few statutory powers which the courts will feel unable to review; there are fewer and fewer restrictions on the substantive grounds of review. This may well mean that if the court is to deny redress to an applicant it will rely on the discretionary nature of the remedies — for the present wide scope of the grounds of review makes it less likely that the applicant will fail to establish some substantive basis for a claim. In the very nature of a discretion it would be impossible to draw up a list of all relevant factors which may persuade the court to withhold a remedy, but three factors seem of particular importance and these will be dealt with at some length.

II THE EFFECT OF ALTERNATIVE REMEDIES

The existence of remedies alternative to that of judicial review is of considerable significance in the exercise of the court's discretion. Thus in *R*

23 *R* v *Registrar of Companies, ex p Esal (Commodities) Ltd (in liquidation)* [1985] 2 All ER 79.

24 *Preston* v *Inland Revenue Commissioners* [1985] 2 All ER 327. (Also of interest is the Court of Appeal judgment *R* v *Commissioner for the Special Purposes of the Income Tax Acts, ex p Stipplechoice Ltd* [1985] 2 All ER 465.)

25 *Norrie* v *Senate of the University of Auckland* [1984] 1 NZLR 129.

26 *New Zealand Stock Exchange* v *Listed Companies Association Inc* [1984] 1 NZLR 699.

27 *Paterson* v *Dunedin City Council* [1981] 2 NZLR 619.

28 *Wall* v *Livingston* [1982] 1 NZLR 734.

29 *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374.

30 *Pickwell* v *Camden London Borough Council* [1983] 2 WLR 583.

31 *Gouriet* v *Union of Post Office Workers* [1978] AC 435, 482 per Lord Wilberforce. For similar New Zealand comment see *Ashby* v *Minister of Immigration* [1981] 1 NZLR 222, 230-231 per Richardson J.

32 See, for example, *Murphy* v *Director of Public Prosecutions* (1985) 60 ALR 299, and *Foord* v *Whiddett* (1985) 60 ALR 269; but contrast *Shepherd* v *Griffiths* (1985) 60 ALR 176.

v *Epping and Harlow General Commissioners, ex p Goldstraw* Donaldson MR firmly stated:[33]

> . . . it is a cardinal principle that, save in the most exceptional circumstances, that jurisdiction [of judicial review] will not be exercised where other remedies were available and have not been used.

However, it is an equally fundamental principle that the jurisdiction to review is not ousted by the existence of unused alternative remedies.[34] It is only a matter of discretion and it can be noted that even Donaldson MR himself allowed for the possibility of review in "the most exceptional circumstances".[35] In New Zealand section 4(1) of the Judicature Amendment Act 1972 expressly provides that the court may grant relief on an application for review "notwithstanding any right of appeal possessed by the applicant in relation to the subject-matter of the application".[36]

Whether an applicant will succeed in the application for review will depend on the nature and context of the alternative remedy provided. In the clearest case there may be a specific statutory provision such as that of section 166 of the Town and Country Planning Act 1977 which states, in essence, that where there is provided a right of appeal against a decision of a council to the Planning Tribunal, the High Court shall not entertain an application for review in relation to that decision until the applicant has exercised the right of appeal.[37] But given the history of the courts' approach in severely confining the effects of more general privative clauses, it may need a legislative direction as specific as that of section 166 for the courts to accept without question that an application for review is premature until the alternative remedy has been pursued. As Viscount Simonds declared in the much cited case *Pyx Granite Co Ltd* v *Ministry of Housing and Local Government*:[38]

> It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words.

The courts may, however, be more likely to insist upon the alternative remedy being pursued where the statute has created an entirely new right

33 [1983] 3 All ER 257, 262.

34 See *Norrie* v *Auckland University Senate* [1984] 1 NZLR 129, *Murdoch* v *New Zealand Milk Board* [1982] 2 NZLR 108, 115 and *Wislang* v *Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29, 43. It must also be true that the substantive grounds for intervention do not become narrower because of the existence of the alternative remedy — though, to the contrary, see *R* v *Surrey Coroner, ex p Campbell* [1982] QB 661.

35 Supra n 33. Also see *Preston* v *Inland Revenue Commissioners* [1985] 2 All ER 327, 330 per Lord Scarman.

36 Noted by Cooke J in *Tauhara Properties Ltd* v *Mercantile Developments Ltd* [1974] 1 NZLR 584, 591. Conversely, Cooke J has observed that the mere filing of an application for review does not prevent the continuation of appeal proceedings: *Slipper Island Resort Ltd* v *Number One Town and Country Planning Appeal Board* [1981] 1 NZLR 143.

37 This statutory provision was discussed by the New Zealand Court of Appeal in *Love* v *Porirua City Council* [1984] 2 NZLR 308.

38 [1960] AC 260, 286.

and *uno flatu* provided the remedy for enforcing that right. The House of Lords judgments in *Barraclough* v *Brown*[39] may no longer represent the law to the extent that they suggest the jurisdiction of the court to review is ousted in such circumstances, but certainly the courts will tread more warily before granting a discretionary remedy.[40]

In *Anderson* v *Valuer-General*[41] Roper J distinguished *Barraclough* v *Brown* and also firmly rejected the argument of counsel that the Valuation of Land Act 1951 and the Land Valuation Proceedings Act 1948 constituted a complete and exhaustive code of the means of attacking valuations so that judicial review was thereby excluded.[42] Nevertheless the exclusive code idea may well provide a good test of predicting whether the court will in its discretion decline to review. As Viscount Simonds pithily said in the *Pyx Granite* case, the question is whether it is ". . . an alternative or an exclusive remedy".[43]

But the legislative intention may not be the most important consideration for the court. Perhaps more important will be whether the alternative remedy is as effective and convenient for the applicant.[44] Thus in *R* v *Hillingdon London Borough Council, ex p Royco Homes Ltd*[45] the right of appeal to the Secretary of State for the Environment was held to be a more useful remedy for the applicant because the Secretary of State could dispose of all issues of fact, law and opinion at the one hearing, whereas the court of review was, of course, limited to matters of law. In *R* v *East Berkshire Health Authority, ex p Walsh*[46] it was held that an application to an industrial tribunal would achieve the applicant's aim of clearing his name more quickly and cheaply than judicial review. And in *Wislang* v *Medical Practitioners Disciplinary Committee*[47] Speight J noted how the procedures of the prerogative writs could be described as "strained" and "artificial" if some other full remedy such as a right of general appeal existed. Thus the question may simply be which is the more "obvious" means of challenge.[48] And if the applicant fails to pursue an alternative remedy which provides a more obvious and appropriate means of redress,

39 [1897] AC 615.

40 See, for example, *R* v *East Berkshire Health Authority, ex p Walsh* [1985] QB 152, 167-168 per May LJ and *North Sydney Municipal Council* v *Comfytex Pty Ltd* [1975] 1 NSWLR 447, 450 per Street CJ.

41 [1974] 1 NZLR 603.

42 Ibid 611-614.

43 Supra n 38.

44 In the context of relief in the nature of mandamus see *Daemar* v *Gilliand* [1981] 1 NZLR 61, 64; in the context of relief by way of certiorari see *R* v *Huntingdon District Council, ex p Cowan* [1984] 1 WLR 501, 507, *R* v *Hillingdon London Borough Council, ex p Royco Homes* [1974] QB 720, 729, and *Wislang* v *Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29, 44 where Speight J suggested the test is simply "how good is the alternative remedy?" More recently see *R* v *Hallstrom, ex p W* [1985] 3 All ER 775, 789-790 per Glidewell LJ.

45 [1974] QB 720, 728-729.

46 [1985] QB 152, 168 per May LJ.

47 [1974] 1 NZLR 29, 44.

48 See *Fraser* v *State Services Commission* [1984] 1 NZLR 116, 123 per Cooke J.

then he runs the real risk of being perceived by the court of review as a busybody or vexatious litigant.[49]

Conversely, there will be situations where the alternative remedy seems less satisfactory than that of judicial review. For instance if the applicant seeks to challenge an alleged error of law it may be that an application for review is the most suitable and expeditious way of doing so.[50] Similarly judicial review may seem more appropriate if the applicant alleges "fragrant unfairness"[51] or bias.[52] On occasions the alternative remedy might not really provide the special type of redress sought and it cannot therefore be categorised as truly "alternative".[53] Moreover in all public law cases the public interest is of considerable importance and so the question of whether an alternative remedy is as convenient and effective must be answered with regard not only to the applicant but with regard also to the public interest. For example, in *R* v *Huntingdon District Council, ex p Cowan*[54] Glidewell J noted that the decision as to whether the respondent council had adopted the proper procedure in refusing the application for an entertainment licence would affect the future conduct of other local authorities and so the factor of the public interest meant that the applicant's right of appeal to the Magistrate's Court could not be regarded as effective and convenient as an application for review.

Finally in this context it is worth noting briefly a converse situation where the applicant has exercised, without success, a right of appeal from the original decision and then seeks to review the original decision on the ground of a breach of natural justice. The overly conceptual approach of *Denton* v *Auckland City Council*[55] has recently been confirmed to be bad law[56] and the approach followed by the New Zealand courts in these circumstances will be that propounded by the Court of Appeal in *Reid* v *Rowley*.[57] Thus when an applicant has exercised a right of appeal, the principle is that the jurisdiction of the court to review for a breach of natural justice is not thereby ousted but that the court will take the exercise of the right of appeal into account (along with other factors) in its decision to grant or withhold a discretionary remedy. The emphasis therefore remains on the discretion rather than on the jurisdiction of the court.

49 Consider *Hill* v *Wellington Transport District Licensing Authority* [1984] 2 NZLR 314, 321 and *Anderson* v *Valuer-General* [1974] 1 NZLR 603, 619.

50 *Pyx Granite Co Ltd* v *Ministry of Housing and Local Government* [1960] AC 260, 287, *Kelly* v *Coats* (1981) 35 ALR 93, 95, *Lemmington Holdings* v *Commissioner of Inland Revenue* [1984] 2 NZLR 214, 223, *Norrie* v *Auckland University Senate* [1984] 1 NZLR 129, 141 per Cooke J.

51 *Norrie* v *Auckland University Senate* ibid; see also *Lemmington Holdings* v *Commissioner of Inland Revenue* ibid.

52 *Anderton* v *Auckland City Council* [1978] 1 NZLR 657, 700 per Mahon J.

53 *R* v *Secretary of State for the Environment, ex p Ward* [1984] 2 All ER 556, 566.

54 [1984] 1 WLR 501.

55 [1969] NZLR 256.

56 The New Zealand Court of Appeal overruled *Denton's* case in *Love* v *Porirua City Council* [1984] 2 NZLR 308. The Privy Council had previously expressed disapproval of its reasoning in *Calvin* v *Carr* [1980] AC 574.

57 [1977] 2 NZLR 472. The approach of the Court of Appeal was approved, with minor reservations as to emphasis, by the Privy Council in *Calvin* v *Carr* ibid.

III DELAY

Delay could be described as a "typical" reason[58] leading the court to decline relief in its discretion and it is said the onus is on the applicant to "get over" the delay by offering an acceptable explanation.[59] Conversely, diligence on the part of the applicant in pursuing the application for review may well favourably impress the court.[60] Excessive delay could lead the court to hold that there has been acquiescence or waiver on the part of the applicant but it is more likely the court will treat delay as being relevant to the exercise of discretion without actually holding that the applicant has waived his right to challenge.[61]

The real problem lies in determining what period of time constitutes unwarrantable delay. In the United Kingdom Order 53 r4 of the Rules of the Supreme Court, as amended in 1980, provides that an application for review must be made within three months from the date when the grounds for the application first arose — unless the court considers there is good reason for extending the period. In New Zealand there is no such limitation and so guidance must be derived from the cases. In *R* v *Stafford Justices, ex p Stafford Corporation*[62] a period of five months was held to amount to unwarrantable delay. Citing that case, the New Zealand Court of Appeal in *Turner* v *Allison*[63]held that a period of one year was too long. In both cases, however, parties had relied to their prejudice on the applicant's inactivity. Not surprisingly delays of four and a half years in the case of *Stininato* v *Auckland Boxing Association*[64] and three years in the case of *Hill* v *Wellington Transport District Licensing Authority*[65] were both held by the Court of Appeal to count against the applicant. But again in both cases the delay was not the only relevant factor in the exercise of the court's discretionary decision.

Indeed it may be rare for the court to refuse relief on the ground of delay alone. There are dicta in the decision of the House of Lords in *R* v *Herrod, ex p Leeds City Council*[66] which suggest delay by itself might not suffice as a ground for refusing the writ of certiorari in the court's discretion. Certainly as Turner J stated in *Turner* v *Allison*:[67]

58 It was so described by Cooke J in *Fraser* v *State Services Commission* [1984] 1 NZLR 116, 123. See also *R* v *Aston University Senate, ex p Roffey* [1969] 2 QB 538, 559 per Blain J.

59 *Attorney-General, ex rel Benfield* v *Wellington City Council* [1979] 2 NZLR 385, 427-429 per Davison CJ. Opting to pursue an inappropriate remedy during the relevant period is not an acceptable justification for delay: *Anderson* v *Valuer-General* [1974] 1 NZLR 603, 617 per Roper J.

60 *Hanson* v *Church Commissioners for England* [1978] QB 823, 834.

61 *Hill* v *Wellington Transport District Licensing Authority* [1984] 2 NZLR 314, 321.

62 [1940] 2 KB 33.

63 [1971] NZLR 833, 850, 842-854 per Turner J.

64 [1978] 1 NZLR 1.

65 Supra n 61.

66 [1978] AC 403, 419-420, 422, 425. In *Attorney-General, ex rel Benfield* v *Wellington City Council,* supra n 59, Davison CJ relied on the judgments of the Court of Appeal.

67 Supra n 63.

> There are not many reported cases in which mere delay, without other complicating factors, has been enough to persuade the Court in its discretion to refuse a writ of certiorari.

Adopting that test Moller J could find no "other complicating factors" in *Whitford Residents and Ratepayers Association (Inc)* v *Manukau City Corporation*[68] and his Honour therefore declined to exercise his discretion against the applicant even though there had been a delay of a year in filing proceedings.

Perhaps the factor which is most fatal to the applicant who has delayed is reliance by and consequent prejudice to the respondent or some third party.[69] Other "complicating factors" which could compound the delay would include those discussed in this article — for example, the existence of alternative remedies which have not been pursued and the feeling that the decision being challenged was an inevitable one.[70] Sometimes delay may be but one of a long list of factors leading the court to decline a discretionary remedy.[71] Thus whilst delay may be cited as a "typical" ground for refusing discretionary relief it might not, by itself, be the most important.

IV If the Outcome of the Decision was Inevitable

When an applicant alleges that a decision against him was made in breach of the rules of natural justice, the courts are increasingly looking at the effect of the breach on the outcome of the decision. If the court concludes that the outcome of the decision would have been the same even if the rules of natural justice had been complied with, it may well withhold discretionary relief on that ground. The test for the grant of relief seems to be that there must be a real likelihood of prejudice to the applicant.[72] Although inevitability of outcome can be regarded as a somewhat controversial ground for withholding discretionary relief, it has twice in recent years been accepted as a relevant factor by the New Zealand Court of Appeal.[73] Similarly the House of Lords and the English Court of Appeal have also

68 [1974] 2 NZLR 340, 351-352.

69 *Anderson* v *Valuer-General* [1974] 1 NZLR 603, 617-618; *Coney* v *Choyce* [1975] 1 WLR 422, 436.

70 See *Coney* v *Choyce,* ibid, where both additional factors were perceived to be present; also the judgments of the Court of Appeal in *Stininato* v *Auckland Boxing Association (Inc)* [1978] 1 NZLR 1 and *Hill* v *Wellington Transport Licensing Appeal Authority* [1984] 2 NZLR 314 which held that not only had the respective applicants delayed but that the decisions in any event were "inevitable".

71 Eg *Attorney-General, ex rel Benfield* v *Wellington City Council* [1979] 2 NZLR 385, 429-431.

72 This test, propounded by T A Gresson J in *McCarthy* v *Grant* [1959] NZLR 1014, 1020, was adopted by Speight J in *Wislang* v *Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29, 42 and by Hardie Boys J in *Evans* v *Bradford* [1982] 1 NZLR 638, 642.

73 *Stininato* v *Auckland Boxing Association (Inc),* Woodhouse J dissenting, and *Hill* v *Wellington Transport Licensing Appeal Authority,* supra n 70.

confirmed in two recent cases that the refusal of discretionary relief on this ground was perfectly proper.[74]

Although this ground for refusing relief has traditionally been adopted when the applicant has been seeking redress for breach of the audi alteram partem rule, there has never been any theoretical reason for it to be so confined. Indeed in two cases in 1985 relief was refused on this ground when the respective substantive grounds for review were bias[75] and the taking account of irrelevant cosiderations.[76]

Patently there are considerable dangers with the adoption of this ground under any circumstances, and New Zealand judges have expressed some caution. Delivering judgments in the Court of Appeal, Richardson J in *Birss* v *Secretary of Justice*[77] stated that the exercise of discretion on this ground was only appropriate in "rare" cases, and Cooke J in *Reid* v *Rowley*[78] made the point that the merits of the charge and of the defence were not of "primary importance". Again in *Wislang* v *Medical Practitioners Disciplinary Committee*[79] Speight J noted that a decision-maker's failure to consider defences which the court considered would be unsuccessful ". . . alone, of course, would not be sufficient to refuse to exercise the discretion . . .".[80] Nevertheless in both *Reid* v *Rowley* and *Wislang* v *Medical Practitioners Disciplinary Committee* the learned judges went on to say that the merits of the decision were "not irrelevant".[81]

Of course there can still be found the occasional judgment which adopts the contrary view and which holds that the merits of a decision are entirely irrelevant when redress is sought for a breach of natural justice.[82] And it is respectfully submitted that this once orthodox approach is to be preferred. As Megarry J so convincingly argued in *John* v *Rees*:[83]

74 *Cheall* v *Association of Professional Executive Clerical and Computer Staff* [1983] 2 AC 180, 190 per Lord Diplock and *R* v *Crown Court, ex p Marcrest Ltd* [1983] 1 WLR 300, 313 (CA). Some sympathy for this approach had been expressed in the earlier House of Lords judgment *Malloch* v *Aberdeen Corporation* [1971] 1 WLR 1578 at 1595 (per Lord Wilberforce), and at 1600 (per Lord Simon), but it had been rejected in *Ridge* v *Baldwin* [1964] AC 40, Lord Evershed dissenting. The English Court of Appeal had adopted a similar approach in their earlier judgment *Cinnamond* v *British Airports Authority* [1980] 1 WLR 582.

75 *Loveridge and Henry* v *Eltham County Council* (1985) 5 NZAR 257, 265 per Gallen J; cf dictum of Mahon J in *Anderton* v *Auckland City Council* [1978] 1 NZLR 657, 700: ". . . I am not persuaded that any decision vitiated by actual bias should as a matter of discretion be allowed to stand."

76 *R* v *Broadcasting Complaints Commission, ex p Owen* [1985] 2 All ER 522, 533 per May LJ.

77 [1984] 1 NZLR 513, 521.

78 [1977] 2 NZLR 472, 484.

79 [1974] 1 NZLR 29.

80 Ibid 42.

81 Idem; supra n 78.

82 Eg *R* v *Wear Valley District Council, ex p Binks* [1985] 2 All ER 699, 704 per Taylor J. Sometimes it is by implication that the court treats the matter as irrelevant. For instance in *Pratt* v *Wanganui Education Board* [1977] 1 NZLR 476 Somers J made no reference to the penalty of dismissal being "inevitable" (though on the facts one may have suspected it was).

83 [1970] Ch 345, 402.

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.

Applying that reasoning to collective decision-making Mahon J similarly surmised in *Meadowvale Stud Farm* v *Stratford County Council*[84] that "[t]he well-springs of collective thought are far too mysterious, I fear, to justify any speculation of the kind proposed". Thus if, for example, a decision-maker makes laudatory reference to an undisclosed report in giving the decision it would be very difficult for the court to hold with confidence that the report had no effect on the outcome of the decision.[85] If the decision-maker gives no reasons, the task of ascertaining the impact which compliance with natural justice may have had on the outcome of the decision becomes doubly difficult.[86] Moreover there are frequently several courses of action open to a decision-maker once basic findings have been made. For instance, at a prison disciplinary hearing there may be a variety of penalties available once a finding of guilt has been made. In such a case it must always be arguable that had the applicant been able to present his case fairly he may have persuaded the decision-maker to take a lesser course of action than the one adopted.[87] For this reason one feels particularly uneasy when judges state that even though there may have been some defect in the decision-making, its outcome and the penalty imposed were "proper".[88]

But even if it is assumed that nothing the applicant could say would have affected the outcome of the decision, it is still mistaken to hold that the applicant is not prejudiced by a breach of natural justice. In *Annamunthodo* v *Oilfield Workers Trade Union*[89] the Privy Council rejected the argument that a person could not complain of a breach of natural justice unless he could show prejudice by it. As Lord Denning pointedly said:[90]

84 [1979] 1 NZLR 342, 350.

85 *James Aviation Ltd* v *Air Services Licensing Appeal Authority* [1979] 1 NZLR 481, 497.

86 *Mohu* v *Attorney-General* (1983) 4 NZAR 168, 173.

87 Consider, for instance, the facts of *R* v *Board of Visitors of Hull Prison, ex p St Germain* [1979] 1 QB 425. See also *Malloch* v *Aberdeen Corporation* [1971] 1 WLR 1578, 1600 per Lord Simon. Cf *Evans* v *Bradford* [1982] 1 NZLR 638 where the applicant had actually sought the conclusion reached by the decision-maker.

88 Eg *Glynn* v *Keele University* [1971] 1 WLR 487, 496 per Pennycuick V-C, *Baker* v *Public Service Appeal Board* [1982] 2 NZLR 437, 447 per Bisson J. Also see the judgments of Lord Denning MR in *Cinnamond* v *British Airports Authority* [1980] 1 WLR 582 and *Ward* v *Bradford Corporation* (1971) 70 LGR 27. (Note conversely that the imposition of an excessive penalty may now provide a ground of review: *R* v *Barnsley Metropolitan Borough Council, ex p Hook* [1976] 1 WLR 1052, 1057-1058 per Lord Denning MR.)

89 [1961] AC 945.

90 Ibid at 956.

> If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts. It is a prejudice to any man to be denied justice.

Similarly if a statute provides a person with a right to a hearing and the person is denied that right ". . . compelling argument would be needed to show that no injustice has occurred . . ." (*Foodstuffs (Auckland) Ltd* v *Planning Tribunal* per Holland J).[91] But even in the absence of a statutory requirement the courts freely imply the rules of natural justice when the nature and consequences of a decision-making power demand procedural fairness. Thus if a decision has such serious consequences for the applicant that the court will hold it can only be taken after compliance with the rules of natural justice, it would be strange if the court could then decline relief on the basis that failure to comply with the rules of natural justice had not resulted in any prejudice to the applicant.

Moreover in all public law issues the public interest must be considered. Thus in *R* v *Thames Magistrates Court, ex p Polemis*[92] Lord Widgery argued:

> It is again absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, as on the afternoon in question here, it seems to me that it is no answer to the applicant to say: "Well, even if the case had been properly conducted, the result would have been the same." That is mixing up doing justice with seeing that justice is done, so I reject that argument.

In response to the argument that insistence upon a hearing would be insistence upon a useless formality it is tempting to cite the aphorism of Lord Atkin in *General Medical Council* v *Spackman*[93] that "[c]onvenience and justice are often not on speaking terms". Or, to use the words of Lord Morris in *Ridge* v *Baldwin,*[94] ". . . the importance of upholding [the rules of natural justice] far transcends the significance of any particular case".

Finally it can be noted that if an applicant seeking a remedy for a breach of natural justice can be denied relief because the decision was "inevitable" there are significant practical consequences. Firstly, it means it will be necessary for the legal adviser to make an assessment of the merits of the decision before deciding to initiate proceedings for judicial review on the grounds of breach of natural justice. It also means that if the application for judicial review does proceed the legal counsel for both the applicant and the respondent must prepare, and possibly make, full argument on the merits. The application for review is thus effectively transformed into an appeal. This blurring of the boundaries between appeal and review may, as discussed earlier, be consistent with the general trend of administrative law but conceptually issues of fair procedure do seem more clearly

91 [1982] 2 NZLR 315, 323.
92 [1974] 1 WLR 1371, 1375-1376.
93 [1943] AC 627, 638.
94 [1964] AC 40, 114. See also *R* v *Environment Secretary, ex p Brent London Borough Council* [1982] 1 QB 593, 646 and *R* v *Board of Visitors of Hull Prison, ex p St Germain (No 2)* [1979] 1 WLR 1401, 1406.

demarcated from the merits than do issues of ultra vires; and the adoption of unfair procedure by a decision-maker does seem a sufficiently serious matter in itself to warrant invalidation of the decision.

V Other Relevant Factors

There is, of course, no limit on the factors which may be relevant to the exercise of the court's discretion and an exhaustive list of relevant factors could not be drawn up.[95] But to conclude this survey it may be useful to allude briefly to some of the other more important grounds which are influential in the courts' approach.

(1) The question of standing is no longer viewed as being a preliminary, jurisdictional matter but rather as a matter of judicial discretion which is to be determined once the substantive arguments have been made.[96] The court will thus determine the seriousness of the breach of the law before determining locus standi;[97] but overall there is now a more liberal approach to all questions of locus standi in administrative law.[98]

(2) The choice of the appropriate remedy is an inevitable part of the judicial discretion and this is, of course, the very essence of the Judicature Amendment Act 1972. Frequently the court of review will conclude that the particular remedy sought by the applicant is inappropriate and therefore grant some other form of relief.[99]

(3) The seriousness of the error is of considerable significance in the exercise of the discretion — particularly on an issue of natural justice.[1] Speaking generally, Somers J opined in *Hill* v *Wellington Transport District Licensing Authority*:[2]

95 In *Reid* v *Rowley* [1977] 2 NZLR 472, 483 Cooke J observed that the compilation of an exhaustive list of all relevant factors would be "undesirable".

96 See *R* v *Inland Revenue Commissioners, ex p National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617. The approach at the House of Lords in that case has been adopted by the New Zealand Court of Appeal in *Environmental Defence Society Inc* v *South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 and *Consumers Co-operative Society (Manawatu) Ltd* v *Palmerston North City Council* [1984] 1 NZLR 1. Also see *Van Duyn* v *Helensville Borough Council* (1984) 5 NZAR 55 and *Nicholson* v *Waimairi District Council* (1985) 5 NZAR 142. In *Finnigan and Recordon* v *New Zealand Rugby (No 3)* [1985] NZLR 190, 203 McMullin J explained that locus standi had been treated as a preliminary matter in that case only on the invitation of the respondent and because of the special circumstances.

97 See, for example, *Van Duyn* v *Helensville Borough Council* ibid at 60 per Barker J.

98 Noted by Holland J in *Nicholson* v *Waimairi District Council* supra n 96 at 145. Perhaps an indication of the increasing liberalisation is apparent in the decision of the English Court of Appeal in *R* v *HM Treasury, ex p Smedley* [1985] 1 All ER 589 to accord locus standi to a taxpayer — although standing to taxpayers was denied, albeit in a different context, in the *Inland Revenue Commissioner's* case itself, supra n 96.

99 Eg *Mohu* v *Attorney-General* (1983) 4 NZAR 168, 174, *Barton* v *Licensing Control Commission* [1982] 1 NZLR 31, 39, *Fiordland Venison Ltd* v *Minister of Agriculture and Fisheries* [1978] 2 NZLR 341, 350-353. Also see *Chief Constable of the North Wales Police* v *Evans* [1982] 1 WLR 1155, 1176.

1 In the context of natural justice see *Reid* v *Rowley* [1977] 2 NZLR 472, 484; cf *Stininato* v *Auckland Boxing Association (Inc)* [1978] 1 NZLR 1, 30. In other contexts see, for example, *CREEDNZ* v *Governor-General* [1981] 1 NZLR 172, 175 and *R* v *Sheffield Supplementary Benefits Appeal Tribunal, ex p Shine* [1975] 1 WLR 624, 631.

2 [1984] 2 NZLR 314, 324.

> . . . it does not follow that to establish some want of legality on the part of the tribunal or authority will ipso facto lead to the setting aside of its order or decision. Such result will depend on the gravity of the error in the context and circumstances of the case.

With respect to statutory powers of decision, section 5 of the Judicature Amendment Act 1972 is of relevance. It provides:

> On an application for review in relation to a statutory power of decision, where the sole ground of relief established is a defect in form or a technical irregularity, if the Court finds that no substantial wrong or miscarriage of justice has occurred, it may refuse relief and, where the decision has already been made, may make an order validating the decision, notwithstanding the defect or irregularity, to have effect from such time and on such terms as the Court thinks fit.

(4) As seen in the discussion on the effect of delay, the conduct of the applicant may be taken into account by the court when it exercises its discretion to grant or withhold relief. And if, for example, the court considers that the conduct of the applicant contributed to the defect complained of it may well deny relief on this ground.[3]

(5) The consequences of the award of a remedy are often considered by the court when it makes its discretionary decision. As has been discussed, relief may be declined if the court feels the decision was an "inevitable" one. The consequences of a remedy can also be taken into account in other ways. Thus it is a well-established principle that the court would not issue a declaration which at the time of making would be devoid of practical value or consequence;[4] there is a similar reluctance to grant a remedy if an applicant would thereby gain only a trivial advantage.[5]

It has been held that the court would not grant a remedy if that would perpetuate a situation contrary to the intention of Parliament,[6] or if it would give the appearance the court countenanced some unlawful action,[7] or if a coercive order of the court would be impossible to obey.[8]

Likewise the court would be reluctant to grant a remedy which could result in administrative or organisational chaos[9] — although in *Anderson* v *Valuer-General*[10] Roper J did suggest that administrative chaos by itself might not suffice as a ground for refusing a remedy ". . . because the administration could always obtain relief from Parliament if the chaos

3 *Wisland* v *Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29, 42-43, *R* v *Diggines, ex p Rahmani* [1985] 1 All ER 1073 (though Stephenson LJ did note at 1082 that the court was able to review and quash a decision reached as a result of the applicant's own fault).

4 *Lemmington Holdings* v *Commissioner of Inland Revenue* [1984] 2 NZLR 214, 239-240, *Turner* v *Pickering* [1976] 1 NZLR 129, 141, *Williams* v *Home Office (No 2)* [1981] 1 All ER 1211, 1248.

5 *Attorney-General and Robb* v *Mount Roskill Borough* [1971] 1 NZLR 1030, 1044; cf *Daemar* v *Hall* [1978] 2 NZLR 594, 604 where a forfeiture of four days remission on a prison sentence of eighteen months was held not to be a trifle.

6 *Johnston* v *Manukau City Council* [1975] 2 NZLR 469 per Wilson J (though reversed on the facts by the Court of Appeal: [1978] 1 NZLR 68).

7 *Harold Stephen & Co Ltd* v *Post Office* [1977] 1 WLR 1172.

8 Eg *R* v *Bristol Corporation, ex p Hendy* [1974] 1 WLR 498, 502-503.

9 *Lewis* v *Heffer* [1978] 1 WLR 1061.

10 [1974] 1 NZLR 603.

created was too great".[11] In response to an argument concerning possible administrative difficulties if a remedy were to be granted, the New Zealand Court of Appeal also warned in *Lower Hutt City Council* v *Bank*[12] that ". . . expedience cannot be promoted to the stage of denying citizens fundamental rights . . .".

VI Conclusion

When considering the judicial discretion to make interim orders under section 8 of the Judicature Amendment Act 1972, as amended in 1977, Hardie Boys J in *Fitzgerald* v *Commission of Inquiry into Marginal Lands Board*[13] stressed the necessity to preserve flexibility in its exercise and the undesirability of laying down criteria or guidelines. In another case concerning the exercise of discretion under the same section, *Nair* v *Minister of Immigration,*[14] Davison CJ reached his decision by simply asking ". . . what does the justice of the case require?"[15] This emphasis on the flexibility inherent in the court's discretion and on the quest for the "just" solution has typified judicial thinking not only in cases on section 8 of the Judicature Amendment Act 1972 but in all the case-law examined on the withholding of remedies and the expansion of the substantive grounds of review. In truth the success of an application for review increasingly hinges on the individual judge's sense of the merits and in practice, if not in theory, an application for review has become little different from an appeal.

11 Ibid at 618.
12 [1974] 1 NZLR 545, 551.
13 [1980] 2 NZLR 368, 374. The judgment was applied by Cook J in *Attorney-General* v *Waitaki Catchment Commission* (1983) 4 NZAR 175.
14 [1982] 2 NZLR 571.
15 Ibid at 576.