COURT OF APPEAL

June 25, 1991

(Purchas, Butler-Sloss and McCowan L.JJ)

R. v. Secretary of State for Transport, ex parte Presvac Engineering Ltd. and Another

Judicial review - when time starts to run for the purposes of calculating delay - relationships between locus standi and the exercise of the court's discretion to grant relief - O. 53, Rules of the Supreme Court.

The appellant and the second respondent were commercial competitors. The first respondent certified that certain valves which were manufactured by the second respondent and which were used in ship-building were acceptable for the purposes of the Merchant Shipping (Cargo Construction and Survey) Regulations 1984. The appellant sought judicial review of the decision to approve the valves.

Having failed in the High Court, the appellant pursued arguments in the Court of Appeal alleging non-compliance with the 1984 Regulations and concerning issues of *locus standi* and delay. The Court of Appeal, being uncertain of the precise nature of the proceedings in the High Court, decided to treat the instant proceedings as an appeal against a refusal to grant judicial review.

Held (*dismissing the appeal*): (1) On the facts there had been no unfair discrimination against the appellant.

(2) For the purposes of the provisions as to delay contained in O.53(4) of the Rules of the Supreme Court, (a) it was impossible to uphold an argument that time did not start to run against a potential applicant until he was in a position to formulate his application with reasonable confidence, based upon admissible and sensible evidence, because this would involve re-writing the rule; and (b) when seeking an extension of time for making an application on the basis that the public interest required the matter to be heard despite the expiry of the time normally allowed for the making of an application, the onus of proof is on the

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applicant who is seeking the indulgence of the court. (3) Applying the normal principle in the context of an application for leave to apply for judicial review, that the court should approach the issue of *locus standi* by placing the emphasis on the subject-matter of the alleged misfeasance rather than on the possible differential effects of that misfeasance upon various people, there was no doubt that leave had been properly granted in the present case, even though, when the case had progressed to the ultimate stage, after an *inter partes* investigation in depth, the court decided that, in all the circumstances of the case, relief should not be granted. (4) When an application for judicial review has progressed to the ultimate stage, after an *inter partes* investigation in depth, and the court is reviewing the question of sufficiency of interest, it is probably a semantic distinction without a difference to seek to separate the issue of *locus standi* from the exercise of the court's discretion to grant or withold relief.

Note: The case of *R. v. Dairy Produce Quota Tribunal for England and Wales ex parte Caswell and Caswell,* to which reference is made in the judgment, is reported at ((1990) 2 Admin. L.R. 55 and 765 (Court of Appeal and House of Lords respectively).

Appeal against a decision of the Queen's Bench Division of the High Court.

T. Cullen and *L. Persey,* for the appellant.
J. Flaux, for the first respondent.
D. Holgate, for the second respondent.

JUDGMENT

Purchas L.J.

Lord Justice Purchas: This appeal or renewal of application for leave to move for Judicial Review is brought before the court by Presvac Engineering Limited A/S ("Presvac"). The precise procedural form is not important. The single Judge Henry J. gave leave to move "subject specifically to the question of delay". It is not clear whether the Divisional Court dealt with the matter as a renewed application for leave to move or the application itself. In any event the matter was fully investigated on an *inter partes* hearing.

The respondents are the Department of Transport (Marine Directorate) ("the Department") and Wilson-Walton International (UK) Limited ("Wilson-Walton"). Presvac seek an order of certiorari to quash a decision of the Department to issue a certificate dated February 3, 1987, stating that Martin Hi-jet Velocity Series II Pressure-Vacuum Valves ("Martin Valves") Numbers WSM0104, WSM0105 and WSM0106, were acceptable for the purposes

of reg.12(7) of the Merchant Shipping (Cargo Construction and Survey) Regulations 1984. Hereafter in this judgment I shall refer to the valves just listed as the 4", the 7" and the 10" Martin Valves. The matter comes before the court as a result of the dismissal of Presvac's application by the Divisional Court on March 22, 1989. Presvac manufacture valves serving a similar purpose to the Martin Valves. I shall refer to these as "Presvac Valves". It was as manufacturer and supplier of Presvac Valves to the ship building industry that Presvac claimed to have a sufficient interest under Order 53 r.3(7) to entitle them to apply for relief. I shall hereafter treat the present proceedings as an appeal rather than as a renewed application.

The appeal first came before this court on January 11, 1990 (Slade, Neill and Glidewell L.JJ). By an affidavit sworn on January 8, 1990 Ian Alastair Ramsay, who is a principal engineer and surveyor in the Department, deposed to the issue of a further certificate on December 18, 1989, as a result of tests carried out on behalf of the Department on all three sizes of Martin Valves which might have an important effect on the conduct of the appeal. The court decided to adjourn the appeal, granting leave for the filing of further affidavit evidence by the parties in the hope that the matter might either be disposed of or substantially shortened. Unfortunately, as events transpired, neither was it possible to bring the adjourned appeal before the same constitution of the court, nor has the matter been in any material way shortened. In pursuance of the leave granted by the court, Presvac and Wilson-Walton agreed upon the instruction of an independent expert Mr. Van der Laar by whose report they agreed to be bound. The Department did not enter into this agreement but maintained their position was disclosed in the evidence already filed in the affidavit of Mr. Ramsay and the other evidence already on file. Although we have seen the contents of this report *de bene esse* it was not admitted in evidence, nor have the conclusions which might be said to have challenged the validity of the latest series of test as being relevant to the issue in the appeal been taken into consideration in our determination of the matter.

The Merchant Shipping (Cargo Construction and Survey) Regulations ("the Regulations") came into existence as a result of the United Kingdom being a party to the protocol of 1978 relating to the International Covention for the Safety of Life at Sea 1974 ("the 1974 SOLAS Convention"). Under the Protocol effect is to be given to standards of design and testing of safety equipment adopted by the International Maritime Organisation ("IMO"). In 1984 the Maritime Safety Committee of the IMO published a circular setting standards for the design, testing and locating of devices to prevent the passage of flame into

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cargo tanks in oil tankers. This will be referred to as "MSC Circular 373".

The Martin Valves with which this appeal is concerned are designed to form part of the venting system to be incorporated in the construction of oil tankers. Their function is critical during the loading and discharge of cargo. For example during the loading process inflammable vapours are exhausted from the space in the tank by the injection of the cargo. It is essential that any random source of ignition of the emitted inflammable gases should not cause a "flashback" into the body of the tank itself. Thus the valve must only open when the pressure in the tank is great enough to cause a jet of gases sufficient to clear the superstructure of the vessel, and the valve itself must also be fitted with anti-flashback valves etc. Similar dangers exist during the discharge of the cargo during which process air is drawn into the tank and the dangers of an external source of ignition being drawn into the space of the tank which is occupied by inflammable gases is obvious. The regulations which were passed under the provisions of s.11 of the Merchant Shipping Act 1964 provide standards in accordance with MSC Circular 373 in reg.12(7):

> "Cargo Tank Ventilation (7). The venting system shall be provided with devices to prevent the passage of flame into the cargo tanks. The design, construction, location and testing of these devices shall be in accordance with sch.1 of the Regulations. The devices for cargo tanks in which the atmosphere is flammable shall be flame arresters or high velocity vents."

The schedule provides in detail a large number of tests and specifications which are designed to comply with MSC Circular 373, although they are not drafted in precisely the same terms. For the purposes of this appeal I can summarize the effect of the schedule under certain headings:

1. A design adequate to prevent "flashback" by means of flame arresters and high velocity vents.
2. Anti-corrosion characteristics of the material used in construction of the valves protecting the equipment from the effect of both sea water and of the cargo itself.
3. A capacity to operate in "freezing conditions" with protection by the provision of heating arrangements where necessary.
4. The valves must be so constructed that they lift easily without remaining in the open position.
5. Only one prototype device should be submitted for each test. The device tested should have the same dimensions with the most unfavourable tolerances

allowed as the design of the production model.

The equipment therefore had to satisfy the standards defined in the schedule both as to design and to performance. Moreover, although only one prototype was necessary, the test only applied to production models with the same critical dimensions.

The grounds upon which Presvac claimed relief asserted seven different aspects in which it was said that the department failed to comply with the Regulations in testing the prototypes of the three Martin Valves in respect of which they had issued the certificate. It is not necessary to detail these alleged failures more than to say that they covered allegations that the tests failed to ensure the valves operated in freezing conditions, failed to test properly their capability to prevent flash back, they failed to ensure that the valves were fitted or were designed so that they could lift easily without remaining in the open position, failed to ensure that the valves were tested by a single approved laboratory and that one prototype device underwent all of the tests required in the schedule. In respect of all but one of these, Presvac either lost in the Divisional Court and have not challenged the finding on appeal or have abandoned or failed to pursue the particular allegations. The only allegation which remains alive for the purposes of this appeal is:

> "(c) Contrary to regs.4(1) and 4(6) of the said schedule, they failed to require that one prototype of each size and type of device destined for production was submitted for each test, and wrongfully gave approval for three different valves in circumstances where only one type had been submitted for testing and had in fact been tested."

Presvac further contended that their application was not made out of time or alternatively if it was then grounds existed upon which the court ought to grant an extension of time (see RSC Order 53, r.4).

It is now necessary shortly to summarize the circumstances in which the application came to be made. Presvac are one of a select number of manufacturers worldwide producing the highly technical equipment with which this appeal is concerned and which is in due course to be incorporated in the construction of, *inter alia*, oil tankers. One of the other manufacturers involved are Wilson-Walton. Presvac are a company incorporated in Denmark whose chairman at all material times was a Mr. Sorensen. The Presvac valves were developed in the early 1970s and were protected by a U.S. patent issued on December 28, 1976. The safety control of design of cargo ships including their equipment is ultimately in the hands of various

A classification societies which assume responsibility for the seaworthiness of ships flying their respective flags. This appeal is not directly concerned with these societies. Various national bodies such as the Department and the Danish Government Ships Inspection Service undertake, or cause to be undertaken and supervised, the testing of various pieces of equipment and the issue of certificates B certifying that the equipment concerned would pass the requirements of MSC Circular 373 and in the case of the U.K. the Regulations. Amongst the leading classifications societies are included Lloyds Register of Shipping, the Bureau Veritas of France, Det Norske Veritas of Norway, the American Bureau of Shipping, and Nippon Kaiji Kyokai (Japan)).

C When the Presvac valves were first put on the market there were few international requirements controlling the design and manufacture of such equipment. The 1980s heralded a much stricter control of design and manufacture of safety equipment including valves like the Presvac valves. In about 1983 Mr. Sorensen appreciated that the Presvac valves would sooner or later have to be tested and D approved, although this was looking ahead. MSC Circular 373 was not finally published until the following year. In spite of widespread inquiries of suitable institutions, including the Danish Government Ships Inspection Services (DGSIS) and the Department, Mr. Sorensen was unable to find anyone with an existing capability to test the valves. Mr. Sorensen was particularly concerned because the E Presvac valves were intended to be included in a tanker then under construction at the Hyundai yard in Korea. It was a term of the contract that all equipment fitted should be approved by the Department. The Department were planning to establish a testing facility in conjunction with the Health and Safety Executive at Buxton in Derbyshire; but it did not appear that this was likely to be available in time.

F In these circumstances Presvac decided to establish their own testing facility. This took about a year to complete and was ready in the early part of 1985. Mr. Sorensen then invited DGSIS to conduct a series of tests upon the Presvac valves in accordance with MSC Circular 373. The Department declined to attend on the grounds that they would be testing themselves. DGSIS issued their certificate on May 8, 1985, covering Presvac Vacuum Valves HS2 to G HS8 (inclusive) and HS10D. Presvac applied to the Department for their approval on the basis of the Danish tests, but this was refused on the basis that the tests were going to be carried out at the Health and Safety Executive. This became subject to delays and the lack of approval exposed Presvac to liability for penalty payments resulting in respect of which Presvac said they would claim indemnity H from the Department.

In the latter part of 1985, the Department's facility not yet having tested the Presvac valves, Mr. Ramsey was instructed to proceed to Presvac's institution in Denmark and there to carry out the necessary tests.

As a result of an exchange of letters and telex messages during the early part of 1986 a selected number of tests were carried out on a selected number of valves at Presvac's premises between April 8 and 10, 1986, in the presence of representatives from the Department. In view of the report of the extensive tests carried out by DGSIS, leading to the certificate dated May 8, 1985, the Department were content to issue their own certificate after a limited programme of tests suggested by Presvac and agreed to by the Department.

It is common ground that if Presvac's assertions as to the strict requirements of the Regulations in the schedule are correct, the certificates which were then issued covering the Presvac valves would not have complied with the Regulations. It is not necessary at this stage for me to consider this aspect of the case in detail. The Divisional Court recorded this common ground and relied upon it in coming to their conclusion that in issuing the Wilson-Walton certificate the Department "had not unfairly discriminated" in favour of them or against Presvac.

The Wilson-Walton valves were tested between August 1985 and October 1986. Corrosion and hydraulic tests were carried out on a valve of a larger dimension but this is not important. Flash back and flow-rate tests were carried out on the 10" Martin valve between September 1985 and March 1986. Other tests were carried out between April and October 1986. In October 1986 endurance burning tests were carried out by the Health and Safety Executive on the 6" Martin valve. No physical tests were carried out on the 4" Martin valve. This valve was only available for study in the proceedings and certainly not until after the Department had granted the certificate for all three Martin valves on February 3, 1987. A certificate was also granted for a 10" Martin valve which had been manufactured in Spain.

In December 1986 Lloyds List carried an article announcing the Wilson-Walton valve. This was the first intimation which reached Mr. Sorensen that Wilson-Walton were producing a competing high performance valve which would threaten the Presvac valve. In considering the question of delay it will be necessary to have regard in some detail to the information available to Mr. Sorensen and his agent Mr. Noad and the steps that they took. I shall however defer this for the time being. Between January and October 1987 Presvac were studying such information as was available to them about the Martin valves. As a result a letter was written to the Department. The Department

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however, were not prepared to enter into detailed correspondence with a rival manufacturer relating to the certification of another manufacturer's valves. During the early part of 1988 Presvac had reason to believe that they had lost an order for a supply of valves for a new ship being built in a Dutch shipyard, because the Martin valves which were cheaper had been preferred. Their representative who was in the yard investigating the situation was allowed to have a look at the competing valve and seized the opportunity of taking photographs unobserved by others. This was the first hard evidence available to Mr. Sorensen of the characteristics of the Martin valves, which supported what he was alleging in the form of deficiencies of the rival equipment.

Det Norske Veritas had approved the Wilson-Walton valves at the first instance. This however, appeared to be a provisional approval and it was subsequently withdrawn. On March 19, 1988 Lloyds Register approved the valves.

The remaining history of testing and certification can be shortly stated. Although when the certificates were granted in February 1987 it is common ground that no prototype of the 4" valve was available for testing, this valve was fully tested in November 1987. There had been minor modifications from the drawing as originally presented in 1987 but these were not considered to be such as to call for further testing before certification or recertification. Mr. Cullen emphasized that although there were substantial further tests in November and December 1987, and that these had been mentioned to the Divisional Court, the issue by the Department of certificates, that is fresh certificates, on March 29, 1988 was never disclosed. Mr. Cullen suggested to the court that this indicated that there were major modifications to the 6" and 10" valves, otherwise he submitted there would not have been the necessity for further certification in March 1988. This matter has been fully ventilated before us and it appears that the tests which had been carried out in November 1987 culminating in the full testing of the 4" valve and tests to the other valves, had been requested by one of the certification societies. As a result of the satisfactory testing, the Department were invited by Wilson-Walton to issue fresh certificates based upon the new tests. This the Department were pleased to do. This struck at the heart of the submission made by Mr. Cullen that there had been something less than frankness in the case presented to the Divisional Court and that had they known that significant modifications had necessitated retesting in November and December 1987, and recertification in March 1988, it would have caused them to form a different view as regards the efficiency of the valves which were tested and certified in February 1987. Mr. Cullen submitted that it would not be open to the

Department to retest and issue new certificates as indicated in the judgment of the Divisional Court since the new valves would incorporate significant modifications with the result that the new tests would not be relevant to the validity of the certificates issued in February 1987.

It is at this point of the testing history that the further evidence of Mr. de Laar, to which I have referred earlier in this judgment, might have become relevant. As regards the Department it could not be admissible and certainly was not accepted by them. As regards Wilson-Walton, they found themselves in a more complicated position to which it may be necessary to return subsequently.

The judgment of the Divisional Court which was delivered by Phillips J. dealt with a wide range of issues including the allegations made that the tests e.g. flashback and velocity flow tests, were inadequate or that the Wilson-Walton valves should not have been certified as complying with those tests. Happily, as I have already indicated, many of these matters are no longer in issue and it is not necessary for this court to consider the judgment on these aspects. The findings which have fallen for consideration before us may be summarized as follows:

1. On the one remaining allegation that the tests were not properly conducted the Divisional Court found in favour of Presvac. Presvac submitted firstly that the Regulations required each size of valve to be subjected to all the tests; secondly that in the event of any modification a valve must be resubmitted to the entire sequence of tests; and, thirdly, that the certificate issued by the Department falsely represented that each size of valve had been tested in accordance with the Regulations. Having recited reg.4(6) the judgment reads:

> "This makes it clear beyond peradventure that tests on a prototype cannot apply to a production model that has different dimensions".

These findings were challenged by both respondents in pursuance of notice served by each of them, the Department attacking only the finding that in relation to the 10" valve there had been a significant modification which called for retesting. Wilson-Walton asserted that on the true construction of the 1984 Regulations there was no requirement that each size of valve should be subjected physically for all of the relevant tests, alternatively they adopted a stance similar to that being adopted by the Department.

2. On the question of delay, the Divisional Court having concluded that the application was made out of time, i.e. outside the three month period provided by RSC Order 53, r.4(1), deferred the consideration of the question whether

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there was good reason for extending the period within which the application should be made until after the consideration of the merits. Presvac have challenged both findings.

3. On the issue of *locus standi* having again deferred their decision until after the merits had been considered the court came to the conclusion that Presvac had not demonstrated that they had a *locus standi*. This again Presvac have challenged on the appeal.

It is now convenient to cite the relevant parts of the judgment of Phillips J:

As to finding 1:

"As for the meaning of the certificate, it states expressly that specimens of the valves described in the schedule, that is all three valves, have been tested and are acceptable for the purpose of reg.12(7). We find the submission that this accurately described the position, where one of the three valves exists only on the drawing board, as astonishing - the more so where, as we have found, the regulations in question require each size of valve to be fully tested.

Thus, we find that the Department on February 3, 1987 issued a certificate indicating that each of the three valves had been tested in accordance with the regulations and complied with those regulations which tests had not been carried out in accordance with the regulations. The 10" valve had not been resubmitted to the full series of tests after modification. The 6" valve had only had one test and the 4" valve did not even exist in prototype".

As to findings 2 and 3:

"The questions now arise of whether we should hold that, having regard to the facts that we have found, there is good reason for permitting Presvac to apply so long out of time for judicial review, whether we should recognize that Presvac has *locus standi* and whether we should grant the relief that they seek or some alternative order. Having carefully considered the matter, we have reached the conclusion that the answer to each of these questions is no. Presvac have demonstrated that the Department has certified as acceptable for the purposes of the regulations valves which have not been tested in accordance with the strict requirements of these regulations. They have not, however, demonstrated that by so doing the Department has unfairly discriminated in favour of Wilson-Walton or against Presvac. Indeed, the evidence has established that the Department has issued a similar certificate in respect of Presvac's own valves when they also have undergone testing that does not accord strictly with the regulations. Presvac have not

demonstrated that the Department has approved valves that fail to satisfy the requirements of the SOLAS Regulations and which, accordingly, should not be permitted to compete with Presvac's valves. In these circumstances, we do not find that Presvac have demonstrated sufficient interest in relation to the Department's actions to give them *locus standi* in this court. As to the delay that has occurred in seeking relief, on the facts that we have found we do not consider that good reason has been demonstrated for entertaining an application which has been brought so far out of time. For these reasons, Presvac have not made out their claim to relief and their application must be dismissed."

Notwithstanding the attractive argument of Mr. Flaux to the effect that the issue of certificates in relation to individual component parts or apparatus finds no part in the SOLAS Regulations or that whether there had or had not been either the necessity to retest in the case of the 10" valve or the necessity to test each size of valve separately under the regulations was a matter of engineering judgment, I regret that I am unable to accede to this submission. Regrettably I am forced to the conclusion that although there was no obligation on the Department either to test or to certify at all, having undertaken a task of importance of this kind they were, in my judgment, obliged faithfully to follow the letter of the regulations including the tests provided in the schedule. Purely as a question of construction, whether this be engineering or legal, matters not; the phrasing of reg.28 leaves no doubt that the production model must conform within certain limits to the prototype under test. It cannot be logically argued that whereas a significant but minor divergence of measurement would invalidate the certificate, a major divergence in the form of a totally different dimension or capacity, either greater or smaller, would not. The discretion to relieve the Department from rigid adherence to the regulations in the schedule lies in the formal dispensation which is open to the Secretary of State under the relevant legislation.

Order 53, r.4(1), provides that an application must "in any event be made within three months", otherwise it is necessary for an extension of time to be granted on the terms in the order. Mr. Cullen argued vigorously that the three months' period did not run until Mr. Sorensen was in a position to formulate his application for judicial review with reasonable confidence based upon admissible and sensible evidence. This he submitted, was not available to him until April or May 1988.

Presvac's case as presented by Mr. Cullen depended largely upon the facts disclosed in paras. 39 - 50 of the first affidavit sworn by Mr. Sorensen on June 9, 1988. In these

paragraphs Mr. Sorensen described the increasing ground which he had for suspicion over the efficiency of the Martin valves in relation to the requirements of MSC Circular 373. Mr. Sorensen referred to his receiving a letter from a company called Waukesha Bearings in America. This enclosed copies of the Wilson-Walton catalogue covering the Martin valves which led him to produce a document headed "Evaluation and Analysis of the Martin Hi-jet Series II" dated September 25, 1987. By November 5, 1987 Mr. Sorensen felt in a position to write to the Department referring to his suspicions that the Martin valves could not pass the IMO tests. In a closely reasoned letter of some length and detail Mr. Sorensen criticized the tests which had apparently been carried out and the performance of the Martin valves, finishing with this paragraph:

> "Our concern is, that if the above four items or just one of them are understood correct by us, it is a question whether the certificates should have been issued, and in the affirmative, we are subjected to unfair competition and the safety aspects intended by MSC Circular 373 are being neglected."

Mr. Sorensen's hope that his letter would be met with a positive and co-operative reaction from the Department was misplaced. Nevertheless, at that stage Mr. Sorensen deposed to his wish to continue to maintain "a low key and informal approach to the Department" in order to obtain their co-operation. Their letter in reply of November 24, 1987, made it clear that there was to be no positive reaction or co-operation by way of retesting of the Martin valves at the hands of the Department. The Department emphasized that they were not prepared to enter into discussion with competitors of applicants for certificates. In his letter of December 3, 1987, Mr. Sorensen repeated his conviction that the Martin valves were substandard and that the certificate should not have been issued and concluded in his penultimate paragraph:

> "If we are able to obtain further evidence regarding our opinion that the above devices are substandard in accordance with MSC Circular 373, we reserve the right to revert to the matter."

It was at this stage that Presvac came into possession of photographs taken surreptitiously by an agent at the Dutch shipyard of which I have already made mention. These were forwarded by Mr. Sorensen to the Department under the cover of a letter dated March 18, in which Mr. Sorensen repeated his demands that the certificates of the Martin valve should be amended.

Shortly after this Mr. Sorensen learnt that the Det Norske Veritas had withdrawn its provisional approval of the Martin valves and in view of the lack of co-operation he was receiving from the Department he decided to consult English solicitors. During the latter part of May 1988 Mr. Sorensen was to attend a sub-committee meeting of IMO in London and hoped that this visit would prove to be an opportunity for discussion with Mr. Ramsay or others in the Department. However, this was not to be. During this meeting however, on May 24, in conversation with Mr. Ricou, who was a French delegate to the IMO meeting and an employee of Bureau Veritas, Mr. Sorensen learnt that Bureau Veritas had rejected an application for the approval of the Martin valves for three reasons which related to the lack of proper testing within the requirements of MSC Circular 393. This he considered provided him with firm grounds for proceeding for relief in the English courts. Unfortunately this information was unreliable.

Mr. Cullen submitted that it was not sufficient for "a cause of action to arise" under Order 53 r.4, for there to be suspicion in the mind of the intended applicant that there had been misconduct within the terms of the order. He submitted that the cause of action did not arise and therefore the time limit under Order 53 r.4 did not begin to run until the proposed applicant had sufficient evidence reasonably to mount an application under Order 53 which would have reasonable prospects of success. Therefore, he submitted that the true date from which the three month period provided in Order 53 r.4, was May 23, when the hard information, apparently reliable but in fact untrue from Mr. Ricou, came to hand. Alternatively Mr. Cullen submitted that it was not until April 1988 that Mr. Sorensen had sufficient "ammunition" upon which he could reliably make an application to the court under Order 53.

I regret that I am unable to accept these submissions which amount to importing into the terms of Order 53 r.4 qualifying words so that it should read:

> "An application for judicial review shall be made promptly and in any event within three months from the date when the grounds for the application first became known to the proposed applicant unless ...."

In my judgment the words of the order are perfectly clear and do not admit of any implication of the kind which would be necessary to support Mr. Cullen's submission. In my judgment Order 53 r.4 provides that (a) the application must be made promptly, (b) that in any event it should be made within three months from the date when the grounds for the application first arose. Therefore, the subjective experience and state of knowledge of Mr. Sorensen upon

which Mr. Cullen relied for his submission that time did not run until mid-April or May 1988 are not relevant. They may however be relevant when the court comes to consider the proviso contained in the second part of order 53 r.4, namely:

> "...unless the court considers that there is good reason for extending the period within which the application shall be made".

It is now necessary to turn to consider Mr. Cullen's alternative submission that there were in this case good reasons for extending the time in which the application should be made. In this area both the provisions of Order 53 r.4(1) and the provisions of s.1(6) of the Supreme Court Act 1981, come into play. There is clear authority for the manner in which this problem should be approached in the case of *R. v. Stratford-on-Avon District Council ex parte Jackson* [1985] 1 WLR 1319 as summarized in paras 53/1-14/34 of the Supreme Court Practice 1991. Reference is also made to a subsequent case, *R. v. Dairy Produce Quota Tribunal for England and Wales ex parte Caswell* in the Court of Appeal. The subsequent report of the speeches in the House of Lords [1990] 2 AC 738 was not available to the editors of the Supreme Court Practice when they prepared the current edition. In the leading speech with which the other learned and noble Lords agreed, Lord Goff of Chieveley summarized the position at p.747:

> "It follows that, when an application for leave to apply is not made promptly and in any event within three months, the court may refuse leave on the ground of delay unless it considers that there is good reason for extending the period; but, even if it considers that there is such good reason, it may still refuse leave (or, where leave has been granted, substantive relief) if in its opinion the granting of the relief sought would be likely to cause hardship or prejudice (as specified in s.31(6)) or would be detrimental to good administration. I imagine that, on an *ex parte* application for leave to apply before a single Judge, the question most likely to be considered by him, if there has been delay, is whether there is good reason for extending the period under r.4(1). Questions of hardship or prejudice, or detriment, under s.31(6) are, I imagine, unlikely to arise on an *ex parte* application, when the necessary material would in all probability not be available to the Judge. Such questions could arise on a contested application for leave to apply, as indeed they did in *R. v. Stratford-on-Avon District Council, ex parte Jackson;* but even then, as in that case, it may be thought better to grant leave where there is considered to be good reason to extend the period under r.4(1), leaving

the questions arising under s.31(6) to be explored in depth on the hearing of the substantive application.

In this way, I believe, sensible effect can be given to these two provisions, without doing violence to the language of either. Unlike the Court of Appeal, I do not consider that r.4(3) and s.31(7) lead to a *circulus inextricabilis,* because 31(6) does not limit 'the time within which an application for judicial review may be made' (the words used in r.4(3)). Section 31(6) simply contains particular grounds for refusing leave or substantive relief, not referred to in r.4(1), to which the court is bound to give effect, independently of any rule of court".

On behalf of the Department Mr. Flaux submitted that Mr. Sorensen had not made out any case for extending the period of three months for which provision was made under Order 53, r.4. He relied upon evidence emanating from Presvac itself which demonstrated that as early as December 12, 1986 Presvac were alleging *in specie* aspects in which the Martin valves fell short of the requirements of MSC Circular 373 in their letter to the Department of that date. This letter was written as a result of Mr. Sorensen seeing the publicity in Lloyds Register and was before the date when the certificate under challenge was issued. Furthermore, Mr. Flaux submitted that a study of the contents of the evaluation and analysis memorandum of September 25, 1987 demonstrated that there were full details available to Mr. Sorensen of the alleged shortcomings of the Martin valves. This document contains firm statements of opinion on this topic. Even allowing for the comment made by Mr. Sorensen in his affidavit that the purpose of this memorandum was in part to boost the morale of his own workforce, nevertheless, it contains such a wealth of specific criticism which subsequently formed the basis of the complaint on form 86A that the document cannot be lightly dismissed. It is quite clear that by September 1987 Presvac were in possession of all the detailed information on the basis of which they could have made an application under Order 53 had they been minded to do so. On November 5, 1987, Presvac wrote to the Department a letter which can only be described as being in the form of a letter before action. The reply from the Department dated November 24, 1987 refuted this letter in the following paragraph:

"With reference to your comments made in paras.(a), (b) and (c) of your letter you will no doubt appreciate that it would be improper to discuss your competitors' products. In general, all devices which have been submitted to this Department for approval have been carefully considered

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> against the requirements of Schedule 1 to the Merchant Shipping (Cargo Ship Construction and Survey) Regulations 1984 (MSC Circular 373) and all testing has been carried out in the presence of competent personnel. Since however, you have raised a number of issues we have looked particularly at all testing which has so far been carried out and are satisfied that devices concerned have been correctly tested."

From this point onwards it was quite clear, or should have been, to Mr. Sorensen that if he wished to seek relief against the Department he would have to do this formally and not by way of informal approach. In light of this position, I am unable to accept that Mr. Sorensen's motives for withholding from resort to the courts under Order 53 could amount to a good reason to extend the period, except in the most exceptional circumstances which do not exist in this case. By this I have in mind that had the Department encouraged a co-operative approach and further delay on the part of Mr. Sorensen, then different considerations might possibly apply. On the contrary, between the letter of November 24, 1987 and March 18, 1988, no further correspondence took place between Presvac and the Department.

On March 18, 1988 Mr. Sorensen wrote to Mr. Ramsay repeating a point which he had previously made, namely that the Martin valve could not operate "in freezing conditions". His letter contained the following paragraph:

> "Therefore, for the sake of safety at sea, we trust you appreciate that the photos substantiate our opinion, that the DOT certificate should include a clause about provision for heating arrangement, otherwise we feel that the department assumes greater responsibilities with respect to safety at sea and by subjecting other suppliers of certified equipment to unfair competition."

It is relevant to note in this context that one of the complaints being made by Presvac was that the unfair competition arose because the Martin valves were cheaper since they had not the appropriate safety device incorporated in them. On April 25, the Department answered this specific allegation relating to the freezing conditions and the manner in which this requirement included in MSC Circular 373 should be interpreted. Suffice it to say that this point has now been abandoned by Presvac.

Finally on April 21, 1988 solicitors instructed by Presvac wrote the formal letter before action. It is to this date that Mr. Cullen, unsuccessfully in my judgment, attempted to relate the time from which the limitation under Order 53 r.4

should run.

The only remaining question arising under the issue of delay is whether in the circumstances, regardless of the conduct of Presvac in not expeditiously pursuing their right to apply, there are good reasons for extending the time based upon public policy. The basis of this submission is that where there is a serious public safety element in the relief claimed then the court will be more ready to extend time under its general discretion under Order 53 r.4. Mr. Cullen referred the court to the judgment of Taylor J. (as he then was) in *R. v. Secretary of State for the Home Department, ex parte Ruddock* [1987] 1 WLR 1482 at p.1485 G:

> "However, proceedings were not brought until July 29, 1985, so the further delay is in itself well over the three months maximum prescribed in RSC, Ord.53, r.4. It is said to be due to Miss Massiter's involvement in retraining as a gardener and her anxiety to be cautious in the drafting of her affidavit, which was not sworn until July 12, 1985. I have seriously considered what effect I should give to this further delay. I am unimpressed by the reasons for it. But I have concluded that since the matters raised are of general importance, it would be a wrong exercise of my discretion to reject the application on grounds of delay, thereby leaving the substantive issues unresolved. I therefore extend time to allow the applicant to proceed."

And to the judgment of Ackner L.J., (as he then was) in *R. v. Stratford-on-Avon District Council, ex parte Jackson* [1985] 1 WLR 1319 at p.1325 G:

> "We have considered with care a number of submissions made to us on behalf of the respective respondents to the effect that substantial hardship, etc., would be suffered if the leave sought or substantive relief were to be granted. However, as the wording of s.31(6) itself shows, the court, in considering whether or not to exercise the discretion conferred on it by the subsection, may have to consider the interest of sections of the public wider than the immediate parties to the relevant dispute. We think that on the facts of the present case such consideration may well necessitate (*inter alia*) some assessment of the substantial merits or otherwise of the applicant's complaints and that this assessment can be made far more appropriately and satisfactorily on the hearing of the substantive application."

In the circumstances of this case the argument runs as follows. The whole concept of IMO the 1974 SOLAS

Convention and the Regulations is safety of life at sea. Reiterating suggestions made more than once in the correspondence by Presvac, Mr. Cullen submits that a breach of the regulations carries with it the presumption of risk to life at sea. With respect to his argument, I find this too broad a proposition in the present context. I have not overlooked Mr. Cullen's submission that as a result of the manner in which evidence was presented to the Divisional Court they were erroneously of the view that the position was that contemporaneously repeated tests would retrospectively substantiate the previous inadequate testing. They were, therefore unaware of what he alleged were significant modifications which rendered the 1989 tests irrelevant and struck at the validity of the tests carried out in November 1987. Nevertheless, I respectfully agree with the view of the Divisional Court that there was not at any point in the evidence, either as laid before them or as presented before this court, anything which established that the Martin valves either as tested prior to February 1987, or subsequently in fact constituted a threat to life at sea. We are here in the field of technical breach and let it be remembered no longer seven but only one breach. In my judgment the failure properly to test all sizes of valves fell short of establishing any degree of public interest which would justify the court in extending the time under Ord.53, r.4. The failure fully to test each valve has not been shown to constitute a threat to safety at sea. The onus to establish that the Martin valves were potentially dangerous must lie on the applicant who seek the indulgence of the court. I feel able to dismiss this submission made by Mr. Cullen as shortly as this and without further reference to authority.

I now come to the second ground disclosed in the judgment of the Divisional Court on which they based their decision not to extend time under Ord.53 r.4, namely that compendiously referred to as *locus standi*. I have here with regret to say at once that I have considerable anxiety about the approach adopted by the Divisional Court. The question whether the applicant qualified under RSC Ord.53, r.3(7) must certainly depend on the general context of the case but this must relate to his relationship to the subject-matter of the complaint on which the application is based. The rule provides:

> "(7) The court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

Ex hypothesi this issue will normally arise at the *ex parte* application stage. Bearing in mind what was said by Lord Goff in *ex parte Caswell* the determination of this matter should not involve a detailed investigation in depth of the

circumstances of the application. I would gratefully adopt the expression contained in the notes to the order in the Supreme Court Practice after the reference to *R. v. Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617 per Lord Roskill at p.659, that the term "interest" should perhaps not be given a narrow construction, but should be regarded as including any connexion, association or interrelation between the applicant and the matter to which the application relates.

Mr. Cullen's submissions were based on a number of cases which he submitted established that the commercial interest of a trade competitor is sufficient to confer *locus standi* under Ord.53 r.3(7). These were *R. v. Groom and others, ex parte Cobbold and others* [1901] 2 KB 157, *R. v. Richmond Confirming Authority, ex parte Howitt* [1921] 1 KB 248 and *R. v. Patent Appeal Tribunal, ex parte J. R. Geigy S.A.* [1963] 2 Q.B. 723. The Divisional Court distinguished these three authorities in these terms:

> "We do not consider that the cases cited establish this broad proposition. The subject matter of the first two was the grant of liquor licences and of the third, the grant of patent right. In each of those cases, the applicant had been party to the proceedings in respect of which the application arose. In each case, the applicant plainly had sufficient interest to challenge the decision made. In *Inland Revenue Commissioners v. National Federation of Self Employed and Small Businesses Limited* [1982] A.C. 617, the House of Lords considered at length the nature of the interest necessary to entitle an applicant to seek judicial review. Unhappily, it is not possible to derive from the speeches any uniform principle. At one extreme, Lord Diplock suggested that the court was left with '... an unfettered discretion to decide what in its own good judgment if considered to be "a sufficient interest" on the part of an applicant in the particular circumstances of the case before it'. - p.642.
>
> At the other extreme, Lord Fraser expressed the view that: 'The correct approach in such a case is, in my opinion, to look at the statute under which the duty arises, and to see whether it gives any express or implied right to persons in the position of the applicant to complain of the alleged unlawful act or omission.' - p.646.
>
> What does emerge clearly from the majority of the speeches is that the question of sufficiency of interest should normally be considered in the context of the facts of the particular case. We think that this is certainly true in the present case. The SOLAS regulations are, as their name implies, designed primarily to protect the interests

of those who go to sea in ships. The Regulations have, nonetheless, important commercial implications for shipowners, shipbuilders and for manufacturers of marine equipment. In performing their statutory duties in relation to certification, the Marine Directorate of the Department ought to treat all manufacturers fairly and on an equal basis. Our conclusion is that a manufacturer will normally be able to demonstrate a sufficient interest to justify an application for judicial review if, by conduct susceptible to such review, the Department has unfairly discriminated to a significant degree in favour of another manufacturer or against the applicant. Thus, just as in the case of delay, our decision on *locus standi* must await consideration of the merits of the application itself."

It is at this point that I regretfully find that I am unable to follow the Divisional Court judgment to this limit. In considering the particular context of the problem Phillips J. considered not the relationship between the proposed applicant and the subject-matter of the decision under attack but the subjective effect upon the proposed applicant of that decision. I have no doubt that to consider whether or not there has been unfair discrimination against the applicant is a relevant if not important aspect when it comes to the question of exercising the court's discretion whether or not to grant relief. However, I cannot myself follow the argument that it also touches upon the status of the applicant as a person having a sufficient interest to have the merits of the alleged wrongful exercise of power examined by review. I find it difficult to conceive of a trade competitor who has not a sufficient interest in the subject matter of the order under attack if it is for the benefit of another competitor regardless of whether there has been unfair discrimination or not. Bearing in mind that this decision must normally be taken at the *ex parte* application stage without detailed examination in depth, it seems inconsistent that the question of bias or unfair discrimination should be a relevant topic for consideration at this early stage. I therefore find myself differing from the Divisional Court on the basis of whether or not Presvac qualified as a party having sufficient interest.

I believe I am supported in this view by certain passages from the speeches of their Lordships in the *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617. This case concerned an application by groups of self-employed and persons involved with small businesses under R.S.C. Ord.53 for an order of *mandamus* directed to the Inland Revenue to collect income tax due from a group of casual workers in the printing industry in respect of which the Inland Revenue had granted an amnesty. The appeal related solely to the

question whether a group of taxpayers *could* have "a sufficient interest" in the general collection of tax by the Inland Revenue within the terms of RSC 53 r.3(7). Although their Lordships were not wholly unanimous in their approach, three decided the appeal directly on the *locus standi* point (Lord Wilberforce, Lord Fraser of Tullybelton and Lord Roskill). Having stated that an individual taxpayer would not be excluded from seeking judicial review if he could show that the revenue failed in its statutory duty towards him, Lord Wilferforce then turned to the position of "third party taxpayers" distinguishing them from the local ratepayers (p.632):

> "The position of other taxpayers - other than the taxpayers whose assessment is in question - and their right to challenge the revenue's assessment or non-assessment of that taxpayer, must be judged according to whether, consistently with the legislation, they can be considered as having sufficient interest to complain of what has been done or omitted. I proceed thereto to examine the revenue's duties in that light.
>
> These duties are expressed in very general terms and it is necessary to take account also of the framework of the income tax legislation. This establishes that the commissioners must assess each individual taxpayer in relation to his circumstances. Such assessments and all information regarding taxpayers' affairs are strictly confidential. There is no list or record of assessments which can be inspected by other taxpayers. Nor is there any common fund of the produce of income tax in which income taxpayers as a whole can be said to have any interest. The produce of income tax, together with that of other inland revenue taxes, is paid into the consolidated fund which is at the disposal of Parliament for any purposes that Parliament thinks fit.
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> The position of taxpayers is therefore very different from that of ratepayers. As explained in *Arsenal Football Club Ltd. v. Ende* [1979] AC 1, the amount of rates assessed upon ratepayers is ascertainable by the public through the valuation list. The produce of rates goes into a common fund applicable for the benefit of the ratepayers. Thus any ratepayer has an interest, direct and sufficient, in the rates levied upon other ratepayers; for this reason, his right as a 'person aggrieved' to challenge assessments upon them has long been recognized and is so now in s.69 of the General Rate Act 1967. This right was given effect to in the *Arsenal* case.
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> As a matter of general principle I would hold that one taxpayer has no sufficient interest in asking the court to investigate the tax affairs of another taxpayer or to complain that the latter has been under-assessed or over

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assessed: indeed, there is a strong public interest that he should not. And this principle applies equally to groups of taxpayers: an aggregate of individuals each of whom has no interest cannot of itself have an interest."

And Lord Fraser at p.646 A-B;

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"On what principle, then, is the sufficiency of interest to be judged? All are agreed that a direct financial or legal interest is not now required, and that the requirement of a legal specific interest laid down in *R. v. Lewisham Union Guardians* [1897] 1 QB 488 is no longer applicable. There is also general agreement that a mere C busybody does not have a sufficient interest. *The difficulty is, in between those extremes, to distinguish between the desire of the busybody to interfere in other people's affairs and the interest of the person affected by or having a reasonable concern with the matter to which the application relates. In the present that matter is an alleged failure by the appellants to perform the duty imposed upon* D *them by statute.* (Emphasis provided.)

The correct approach in such a case is, in my opinion, to look at the statute under which the duty arises, and to see whether it gives any express or implied right to persons in the position of the applicant to complain of the alleged unlawful act or omission. On that approach it is easy to see that a ratepayer would have a sufficient interest to E complain of unlawfulness by the authorities responsible for collecting the rates."

In my judgment applying the *ratio decidendi* upon which both Lords Wilberforce and Fraser distinguished between the general taxpayer and the ratepayer and the words they used in doing this, had their Lordships been considering the position of Presvac they would have held that Presvac had a F sufficient interest in the issue of certificates under the Regulations.

Lord Roskill, when considering the question of "sufficient interest", restricted his observations to the field of "other taxpayers" in the general income tax field and did not consider the case of ratepayers or those with a more directly indentifiable connexion with the performance of the G statutory duty. Certainly he did not say anything to indicate that he would have held that Presvac did not have an interest.

Although he preferred to decide the appeal on the ground that no breach had been established against the Inland Revenue, Lord Diplock considered the question of "sufficient interest" in the context of RSC Ord.53 r.3 at p.637 H G:

"It would be very much to be regretted if, in consequence of the unfortunate form in which the instant appeal came before this House, anything that is said by your Lordships today were to be understood as suggesting that the new Ord.53 r.3(5) has the effect of reviving any of those technical rules of *locus standi* to obtain the various forms of prerogative writs that were applied by the Judges up to and during the first half of the present century, but which have been so greatly liberalized by judicial decision over the last 30 years. It is for this reason that I venture to state how, in my view, Ord.53 would have applied to the federation's application if, instead of their *locus standi* being considered in isolation, the proper course had been followed at the hearing of the application in the Divisional Court."

After reviewing the development of judicial review under Ord.53 at p.642F:

"The procedure under the new Ord.53 involves two stages: (1) the application for leave to apply for judicial review, and (2) if leave is granted, the hearing of the application itself. The former, or 'threshold', stage is regulated by r.3. The application for leave to apply for judicial review is made initially *ex parte* but may be adjourned for the persons or bodies against whom relief is sought to be represented. This did not happen in the instant case. Rule 3(5) specifically requires the court to consider at this stage whether 'it considers that the applicant has a sufficient interest in the matter to which the application relates'. So this is a 'threshold' question in the sense that the court must direct its mind to it and form a *prima facie* view about it upon the material that is available at the first stage. The *prima facie* view so formed, if favourable to the applicant, may alter on further consideration in the light of further evidence that may be before the court at the second stage, the hearing of the application for judicial review itself.

The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."

And at p.643G:

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"My Lords, at the threshold stage, for the federation to make out a *prima facie* case of reasonable suspicion that the board in showing a discriminatory leniency to a substantial class of taxpayers had done so for ulterior reasons extraneous to good management, and thereby deprived the national exchequer of considerable sums of money, constituted what was in my view reason enough for the Divisional Court to consider that the federation or, for that matter, any taxpayer, had a sufficient interest to apply to have the question whether the board was acting *ultra vires* reviewed by the court. The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.

The analyses to which, on the invitation of the Lord Advocate, the relevant legislation has been subjected by some of your Lordships, and particularly the requirements of confidentiality which would be broken if one taxpayer could complain that another taxpayer was being treated by the revenue more favourably than himself, mean that occasions will be very rare on which an individual taxpayer (or pressure group of taxpayers) will be able to show a sufficient interest to justify an application for judicial review of the way in which the revenue has dealt with the tax affairs of any taxpayer other than the applicant himself.

Rare though they may be, however, if in the instant case, what at the threshold stage was suspicion only had been proved at the hearing of the application for judicial review to have been true in fact (instead of being utterly destroyed), I would have held that this was a matter in which the federation had a sufficient interest in obtaining an appropriate order, whether by way of declaration or *mandamus*, to require performance by the board of statutory duties which for reasons shown to be *ultra vires* it was failing to perform."

Thus it appears that on the pure question of capacity to have "sufficient interest", Lord Diplock was prepared to envisage exceptional circumstances wholly absent from the

facts of the case he was considering, in which even a general taxpayer or group of payers would qualify under Ord.53 r.3(7). On this aspect Lord Scarman was in general agreement with Lord Diplock (see p.653F):

> "The one legal principle, which is implicit in the case law and accurately reflected in the rule of court, is that in determining the sufficiency of an applicant's interest it is necessary to consider the matter to which the application relates. It is wrong in law, as I understand the cases, for the court to attempt as assessment of the sufficiency of the applicant's interest without regard to the matter of his complaint. If he fails to show, when he applies for leave, a *prima facie* case, or reasonable grounds for believing that there has been failure of public duty, the court would be in error if it granted leave. The curb represented by the need for an applicant to show, when he seeks leave to apply that he has such a case is an essential protection against abuse of legal process. It enables the court to prevent abuse by busybodies, cranks, and other mischief-makers. I do not see further purpose served by the requirement for leave.
> But, that being said, the discretion belongs to the court: and, as my noble and learned friend, Lord Diplock, has already made clear, it is the function of the Judges to determine the way in which it is to be exercised. Accordingly I think that the Divisional Court was right to grant leave *ex parte*."

I see nothing in these speeches to indicate that 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. The emphasis is on the subject matter of the alleged misfeasance, not upon the possible differential effects upon various people affected by the misfeasance. This would accord with the distinction between income tax payers and the payers of general rates. At the *ex parte* stage, Henry J. was justified in granting leave. Such an action would be wholly in accord with Lord Diplock's approach at the "threshold stage". At the ultimate stage after an *inter partes* investigation in depth, whether this be an *inter partes* hearing of the application, (a probability envisaged by Lord Diplock) or whether this be on the hearing of the motion itself does not much matter. The court must however review at this stage the question of sufficiency of interest and exercise its discretion accordingly. Whether this is properly called an investigation of *locus standi* or the exercise of discretion whether to grant relief is probably a semantic distinction without a difference.

Personally I would prefer to restrict the use of the

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expression *locus standi* to the threshold exercise and to describe the decision at the ultimate stage as an exercise of discretion not to grant relief because the applicant has not established that he had been or was sufficiently affected. With respect to the Divisional Court this is what in effect they did when they deferred their determination of *locus standi* until after they had considered the whole of the merits.

For my part I agree with the approach of the Divisional Court to the question whether the Department had unfairly discriminated against Presvac as set out in the passage from the judgment already cited; but I feel that this was a question which was more properly considered in the exercise of discretion whether to grant relief rather than a question of *locus standi*.

To summarize, I would dismiss this appeal both on the ground that no good reason has been demonstrated for extending the three months' time limit under R.S.C. Ord.53, r.4(1) and that had it been necessary to consider the application on its merits, in all the circumstances of the case it would have been wrong in my judgment to exercise the court's discretion in favour of the applicant and grant relief. I would therefore dismiss this appeal.

Butler-Sloss L.J.

Lord Justice Butler-Sloss: I agree.

McCowan L.J.

Lord Justice McCowan: I also agree.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Messrs. Stephenson Harwood,* London, for the appellant

Messrs. Robert Muckle, Newcastle-upon-Tyne, for the second respondent.

Reported by: Ian McLeod, Esq., LL.B., B.A., *Solicitor.*