

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No.436 of 1998

IN THE MATTER OF AN APPLICATION BY
SOCIETE DES PRODUITS NESTLE S.A. FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A REFUSAL BY THE DEPUTY
REGISTRAR GENERAL TO ENTERTAIN AN APPLICATION
BY SOCIETE DES PRODUITS NESTLE S.A. TO EXTEND THE TIME
FOR FILING EVIDENCE IN SUPPORT OF ITS NOTICE OF
OPPOSITION
TO THE REGISTRATION OF THE TRADE MARK "TRISKIES"

October 20, 1998

Before the Hon. Justice I Archie

Appearances:

Mr. Gilkes for Applicant

Mr. Busby for Respondent

JUDGMENT

The issue for determination in this case is whether the Deputy Registrar General wrongly declined jurisdiction to reopen an application by the applicant herein for an extension of time to file evidence in opposition to the application for a registration of a trade mark by a company known as Trinidad Import and Export Company Limited ('TIECL') under the Trade Marks Act Ch.82:81.

At the material time the applicant was the registered proprietor of a trade mark comprising the word "Friskies" which was registered in Trinidad and Tobago. TIECL in 1995 applied for registration of a trade mark comprising the word "TRISKIES". Notice of that application was brought to the public by

an advertisement in a newspaper dated July 5, 1995 and the applicant in this matter sought to oppose the registration of the trade mark "Triskies" on the grounds which were set out in its notice of opposition. Before entering into a chronology of the events it is useful to set out the relevant statutory provisions governing the registration of and opposition to the registration of trade marks. Section 21 of the Trade Marks Act Ch82:81 states as follows:-

"21(1) Any person may, within three months of the advertisement of the application, give notice in duplicate to the Registrar of opposition to the registration of the trade mark. The notice shall be given in writing in the prescribed manner, and shall include a statement of the grounds of opposition. The registrar shall send a duplicate of such notice to the applicant

.....(2) Within one month after the receipt of such duplicate or such further time as the Registrar may allow, the applicant shall send to the Registrar, in the prescribed manner, a counter-statement in duplicate of the grounds on which he relies for his application, and, if he does not do so, he shall be deemed to have abandoned his application."

Section 22(1) states as follows:-

"On receipt of a counterstatement as mentioned in Sec.21(2) the Registrar shall send one copy to the person or persons giving notice of opposition and shall, after hearing the parties if so required and considering the evidence, decide whether, and

subject to what conditions or limitations, if any, registration is to be permitted. The decision of the Registrar shall be subject to appeal to a Judge in Chambers.”

The procedure for opposition is further set out in the trade marks rules and in particular Rules 43, 44 and 46 .

Rule 43 states as follows:-

“Upon receipt of the counterstatement and duplicate the Registrar will forthwith send the duplicate to the opponent and within one month from the receipt of the duplicate the opponent shall leave with the Registrar such evidence by way of statutory declaration as he may desire to adduce in support of his opposition and shall deliver to the applicant copies thereof.”

Rule 44 -

“If an opponent leaves no evidence, he shall unless the Registrar otherwise directs be deemed to have abandoned his opposition but, if he does leave evidence, then, within one month from the receipt of the copies of declarations the applicant shall leave with the Registrar such evidence by way of statutory declaration as he desires to adduce in support of his application and shall deliver to the opponent copies thereof.”

Rules 46 provides that in any proceedings before the Registrar he may at any time if he thinks fit give leave to either the applicant or the opponent to leave any evidence upon such terms as to costs or otherwise as he may think fit. It is immediately apparent therefore, that there appears to be a wide discretion vested in the Registrar which would include the power to extend the time for

filing of evidence pursuant to Rule 43. This is further supported by the provisions of Rule 92 which are in the following terms:-

“If in any particular case the Registrar is satisfied that the circumstances as such to justify an extension of the time for doing any act or taking any proceeding under these Rules, not being a time expressly provided in the Act or prescribed by Rule 66 or Rule 70, he may extend the time upon such notice to other parties, and proceedings thereon, and upon such terms that he may direct, and the extension may be granted though the time has expired for doing the act or taking the proceeding.”

Chronology of Events

The chronology of events which is not really in dispute is set out in the affidavit of Brian De Gannes which was filed here in on March 2, 1998 and the essential facts are as follows:

1. On October 2, 1995 notice of opposition was filed on behalf of the Societe des Produits Nestle S.A. (“Nestle”) at the trade marks registry opposing the registration of “Triskies”.
2. On or about November 2, 1995 Nestle’s Attorneys received a notice from the Deputy Registrar dated November 1, 1995 together with a copy of counterstatement dated October 26, 1995 filed on behalf of the TIECL. The said notice from the Deputy Registrar General advised Nestle’s attorneys that they should file evidence in support of Nestle’s notice of opposition by November 30, 1995. (It is to be observed

at this stage that both the notice of opposition and the counterstatement in support of the application for registration of the trade mark were filed within the time limits set out in the statute. It was therefore incumbent upon Nestle, within one month from receipt of the duplicate of the counterstatement, to leave with the Registrar such evidence by way of statutory declaration upon which it was intended to rely in support of its opposition to registration of the trade mark.)

3. On November 29, 1995 Attorneys for Nestle wrote to the Deputy Registrar General requesting an extension of time for the lodging of the necessary statutory declaration until the end of February 1996. The reason for the application was said to be that it was necessary to communicate with the Head Office in Switzerland through Nestle's local agents and that there would be several delays in obtaining instructions.
4. By letter dated December 21, 1995 the Deputy Registrar General responded to the request of Nestle's Attorneys advising them to seek to obtain the consent of TIECL to such extension on or before January 31, 1996. In the said letter the Deputy Registrar General indicated that if Nestle was unable to do so before that day she would set a date for an oral hearing to determine the application.

Criticism was leveled at the learned Deputy Registrar General during submissions of Counsel for Nestle with respect to that course of action. In Counsel's view it indicated a reluctance to take decisions when the parties were

outcome of the proceedings on February 16, The text of the letter is set out below in full:-

Registrar General's
Intellectual Property Registry
34 Frederick Street
Port of Spain

February 27, 1996

J. D. Sellier & Co
Attorneys-at-Law
129-131 Abercromby Street
PORT OF SPAIN

Dear Sirs,

Re: Opposition to Trade Mark Application No.21031
'TRISKIES' in Class 42 in Trinidad and Tobago

On Friday 16th February, 1996 at 10:00 a.m. an oral hearing was set for the determination of an application for an extension of time to file the statutory declaration in support of an Opposition to Trade Mark Application No.21031 'TRISKIES' in class 42. This was necessary as Messrs. J. D. Sellier & Co., was unable to get consent from the applicant to file the said statutory declaration. An oral hearing was requested by Messrs J.D. Sellier & Co, to determine the said application.

On the date of the hearing, Mr. Anthony John Arindell represented the applicant "Trinidad Import & Export Co. Ltd". The opponent "Societe des Produits Nestle S.A." was unrepresented.

By letter to the Registrar dated 29th November, 1995, Messrs J.D. Sellier & Co., acting for the opponent had indicated that extension of time was requested because Messrs J.D. Sellier & Co., had to communicate through the Nestle local company and then in turn deal with the head office Vevey Switzerland. There was no one to answer any questions at the oral hearing on behalf of the opponent.

The applicant indicated to the Registrar his difficulty in accepting J.D. Sellier's request for an extension of time on the basis of difficulties

not in agreement and that it was this predisposition which ultimately led her into error. I find that criticism to be unwarranted. The Deputy Registrar's action appears to be in accord with what in my view is a sensible practice which has arisen or was not peculiar to this case and she could not be faulted. It was clear in her letter that he was always prepared to deal with the application and was intending to do so whether or not agreement could be reached between Nestle and TIECL. In any event Nestle was unable to obtain the consent of TIECL and on January 12, 1996 Mr. De Gannes again wrote to the Deputy Registrar General advising that the applicant had refused to give consent and requesting that the Registrar General convene an oral hearing to determine the matter.

5. On January 24, 1996 the Deputy Registrar General wrote to Nestle's attorneys in the following terms -

"Please take notice that an oral hearing is set for Friday 16th February, 1996 at 10:00a.m. at the office of the Registrar, Intellectual Property Registry, No. 34 Frederick Street Port of Spain to determine an application for an extension of time to file the Statutory Declaration in support of an opposition."

That letter according to Mr. De Gannes was received on February 5, 1996

Owing to the inadvertence of Counsel Mr. De Gannes failed to attend the meeting which was called on February 16, 1996 and in his absence the application for extension of time was determined against his client Nestle.

6. On February 27, 1996 the Deputy Registrar General wrote to Nestle's Attorney informing them of the

regarding communications particularly taking into consideration the great advances in communication today, for example the use of the fax machine, etc.

In the absence of anyone to assist the Registrar on behalf of the opponent, and on the basis of the information provided, the application to extend the time to file the statutory declaration in support of the Opposition, pursuant to Rule 43 and Rule 92 was denied.

Yours faithfully,

MAZINA KADIR,
DEPUTY REGISTRAR GENERAL.

7. On March 5, 1996 Mr De Gannes made what he described in his affidavit as a "fresh application in writing" to the Deputy Registrar General for an extension of time. It would seem despite Mr. De Gannes' language that in effect what he was asking the Deputy Registrar General to do was to revisit the decision made on February 16, and Counsel has not in argument sought to deny that what in effect was being asked was a reopening of the decision of February 16. In that letter Mr. De Gannes, in urging the Deputy Registrar General to exercise her discretionary power, sought to rely on Section 53 of the Trademark Act. However, a clear reading of that Section shows that it refers only to the applicant for registration of the trademark or the registered proprietor of the trademark and has no direct application to an opponent. Section 53 was not prayed in aid of the applicant's case in argument before this court.

8. On March 19, 1996 the Deputy Registrar General responded to the request made by Mr. De Gannes on March 5 in the following terms:-

**Registrar General's
Intellectual Property Registry
34 Frederick Street
Port of Spain**

March 19, 1996

**Messrs J. D. Sellier & Co.,
Attorneys-at -Law
129-131 Abercromby Street
PORT OF SPAIN.**

Dear Sirs

**Re: Societe des Produits Nestle S.A.
Trade Mark Registration No. 14845 FRISKIES and Opposition
to Trade Mark Application No.21031 TRISKIES in Class 42
of Trinidad Import & Export Company Limited in Trinidad and Tobago**

I refer to your letter to me dated March 5, 1996. This matter is presently being addressed.

I will make a decision on your request as soon as I have received a response from the Applicant regarding a letter which I submitted for his consideration regarding this issue.

The time for him to respond was given as the 2nd April, 1996 to the letter of the Registrar referred to above.

Yours faithfully,

**MAZINA KADIR
DEPUTY REGISTRAR GENERAL**

The contents of that letter are instructive because it appears at that stage the Deputy Registrar General considered that she did have a jurisdiction to entertain Mr. De Gannes' request for a further extension of time to the extent that she invited comments from the applicant for registration TIECL. Those comments were apparently received on April 2, 1996 by the Deputy Registrar General who forwarded them to Mr. De Gannes for comment under cover of a letter dated April 15, 1996. Not surprisingly TIECL took the view that the Registrar was constrained by the time of one month expressly provided in the act or expressly provided in Rule 43. By June 11 the Deputy Registrar General appeared to have reconsidered her position and wrote to Mr. De Gannes at J.D. Sellier and Co expressing the view that she was "functus officio". She invited the parties to attend what she termed "informal discussions" on the issues raised in their respective responses. She offered to set a time for such discussions on June 18, 1996. It is difficult to see what the purpose of such discussions were or would have been if indeed she was functus officio. What is also of interest is that she described the hearing on February 16, as an "interlocutory hearing". It is clear that the proceedings of February 16 were interlocutory in this sense. - Assuming that the failure to file evidence within the specified time and the subsequent refusal of the Registrar to extend the time for filing of evidence would mean that the opponent Nestle would have been deemed to have abandoned its opposition, no final decision would yet have been taken on the registration of the Trade Mark. The Registrar would still have been obliged to have given consideration to the matters set out in Sections 12, 13 and 14 of the Trade Marks Act.

The contents of the letter are also in my view indicative of the confusion which by this time was present in the mind of the learned Deputy Registrar. In the third paragraph of the letter she indicated to Nestle that they had a right to Judicial Review, and that the exercise of this right could be procedurally addressed by an application for rectification under Section 46 of the Act.

Section 46 is a procedure entirely separate and distinct from the application for Judicial Review. Section 46 is a procedure available only after the registration of a Trade Mark. The only appropriate remedy for the wrongful exercise of a discretion at interlocutory stage would be an application for Judicial Review which has nothing to do with Section 46 of the Trademarks Act. (*See PREDATOR Trade Mark (1982) RPC 387*)

In saying this I do not mean in any way to question the motives of the Learned Deputy Registrar. On February 16th, having given Nestle an opportunity to attend and make representations, she made a decision which cannot be attacked as unreasonable. It is clear that even at this stage (i.e. in April) she was seeking the advice of the Solicitor General. That advice apparently was to the effect that she was "functus officio". That position was confirmed in her letter dated November 28, 1997 to Messrs J.D. Sellier & Co, Attorneys for Nestle.

Counsel for Nestle has very frankly admitted to this court that there was nothing wrong with the decision taken on February 16, 1996 provided (and this he could not dispute) that the Deputy Registrar General had given due consideration to all the material then before her. He was also refreshingly candid in conceding that if she had, in respect of Mr. De Gannes "fresh application" said "I have considered your application and the explanation for your absence on February 16th and can find no basis to justify a reopening of your application for an extension of time" (or words to that effect), and simply refused to reopen the hearing he would not have a legal leg upon which to stand.

The very narrow argument which he advances is that Nestle was entitled to ask for a reconsideration and The Deputy Registrar General, whatever her eventual answer, was obliged to consider that application.

Counsel for Nestle cited the case of

R v Kensington & Chelsea Rent Tribunal, Ex parte Mac Farlane

[1974] 1 WLR 1486

In that case the Rent Tribunal had dismissed a reference by the applicant when he failed to appear at the hearing. The applicant had apparently not received a notice sent by the tribunal. The Tribunal dismissed the reference on the ground that it was frivolous and vexatious. The applicant wrote the Tribunal requesting a further hearing. The Tribunal replied that having made a decision it had no power to do so. On application for an order of mandamus, the Court held that the Tribunal was not entitled to dismiss the reference on the basis that it was frivolous and vexatious once it had taken steps to entertain it by fixing an appointment to view the premises and convening for a hearing.

However, the Court did go on to consider whether the Tribunal had the power to revisit an order regularly obtained (although that was not strictly necessary the Court having disposed of the application on the ground that the original decision was flawed). Lord Widgery C.J made the following observations:

“The conclusion which I reach on the basis of what Denning L.J. said is this, that where as in the present case the tribunal has acted impeccably so far as its own duty is concerned, has in other words sent out the right notices by the right means at the right time and has had no indication that the notices have gone astray or that the applicant for any other reason cannot attend, then an order made in those circumstances is a regular order and not normally open to challenge on certiorari.

However the disappointed party has what is certainly a cheaper if not more effective remedy open to him, that he can go back to the tribunal, explain why he did not attend, and the tribunal will then have the jurisdiction if it thinks fit to reopen the matter and to reconsider its decision in the light of representations made by the absent party. It seems to me that quite independently of the frivolous and vexatious point, with which I have already dealt, that it was open to the applicant if he had wished to go to the tribunal, indeed as he did by correspondence, to ask the tribunal to accept his explanation of his absence, and give him a further opportunity of being heard. It was the tribunal's duty on receipt of that application from the applicant to consider whether they would allow the case to be re-opened, and I would stress that tribunals must be very firm in the view which they take about this kind of case. There must be no question of absent parties taking no action over a period of months, and then coming back to the tribunal with some story of having been ill or being in South America when the hearing occurred. Tribunals must be satisfied before they reopen a case that there is a good argument on the merits for giving the absent party a chance to be heard, that he has got a real and reasonable excuse, that he had to be given a further chance and that, in considering whether he ought to be given a further chance, due regard must be had to the other party to the proceedings and to any third parties who may have acted upon the tribunal's decision on the assumption that it was right and to be sustained. All these matters must be taken into account, but if the tribunal, having considered them all, is of the opinion that it would be proper to reopen the matter, it has power in my judgment to reopen it.

That will not arise in the present case because on the first ground with which I have dealt the applicant is entitled to an order of mandamus."¹

The remarks of Lord Widgery C.J were clearly not intended as an encouragement to bombard a tribunal or decision maker with repeated requests to reconsider unfavourable rulings. It is important that there be finality in the decision-making processes of public bodies or public officials exercising statutory functions such as that exercised by the Registrar General under the Trade Marks Act. Thus, the decision-maker is not required to accede to the request as a matter of course.

The power if it exists must be sparingly exercised and with a view -

- (a) to promote finality and avoid thwarting settled expectations particularly in commercial affairs;
- (b) to prevent repetitive claims which slow down administration and place undue pressure on decision makers; and
- (c) to avoid the expense and time of constant responses on the part of the decision-maker, applicants, objectors and interested parties²

However, while it should not lightly be invoked it is a power which has been recognised by the Courts.

¹ (1974) 1 WLR 1489 @ 1493

² In this regard see R v Immigration Board, ex p. Kirk Freeport Plaza Ltd & Island Companies Ltd [1996] C1LR 281 @ 313

De Verteuil v Knaggs [1918] A.C. 557 (P.C) was an appeal from the Supreme Court of Trinidad and Tobago in respect of the exercise by the Acting Governor of the power under S 203 of the Immigration Ordinance transferring indentures from one employer to another. The Acting Governor had initially exercised his discretion without hearing the appellant estate owner, but after granting a personal interview to the appellant and his manager on which occasion a fair opportunity was given to the appellant to make representations on his behalf, the Acting Governor reaffirmed his decision. In the judgment of the Privy Council delivered by Lord Parmoor it was held that there was no reason why the acting Governor could not at any time review or alter a decision previously given and that "...it may be his duty to do so in the prudent exercise of his discretion, or a further consideration of all the relevant factors after full inquiry".

Counsel for the Respondent sought to draw a distinction between the present case and *Ex parte Mac Farlane* . In that case he argued, it would have been permissible for the tribunal to re-open the matter because the original decision was flawed. In the case of *Ex parte Mac Farlane* the decision was open to attack by certiorari quite independently of any power to rehear the matter. The same argument presumably would apply to *De Verteuil v Knaggs* (which was not cited) on the basis that the Acting Governor's original decision was procedurally flawed because of the failure to afford the appellant an opportunity to be heard.

Counsel cited an authority which appears to be directly in conflict with both cases.

ADIDAS S.A.R.L's Trade Mark [1983] R PC 262

In that case, the opponent had made several requests for extensions of time to file evidence.

The Rules made under S40 of the Trade Marks Act (U.K) provided for possible extension of time.

Rule 114 was in substantially the same terms as our Rule 92. The Rules also provided that the opponent should file evidence within two (2) months of receipt of the duplicate of any counterstatement to the notice of opposition.

Rule 116 read:

“Before exercising adversely to any person any discretionary power given to the Registrar by the Act or these Rules, the Registrar shall, if so required, hear such person thereon”

The issue in the ADIDAS case was whether a request for a hearing had been made within the one month period and turned on the construction of two letters sent by the Registrar. After a number of extensions had been granted, on February 12, 1982 the Registrar wrote a letter to ADIDAS granting an extension of time until March 8, 1982 and ending with the words

“This extension is final”.

Despite this on March 8, 1982 a further application for extension was filed which drew a response on May 14, 1982 saying -

“I am instructed to say that a further extension of time as requested in your letter is refused”

Thereafter discussions took place between an officer in the Registrar's office and agents for ADIDAS and on June 14, 1982, one month after the letter of May 14, the agents wrote -

“with reference to the official letter of May 14, 1982,.....we hereby request a hearing under rule 116”

It was held that in order to give a workable construction to Rules 116 and 117 and in accordance with the practice that had developed, the letter of May 14th would be regarded as the indication that the Registrar intended to exercise a discretion adversely to ADIDAS. That construction was resisted by Counsel for the Registrar who argued that the letter of February 12th couched in final terms as it was, gave a sufficient indication. To hold otherwise, it was suggested would mean that the process could be effectively paralysed by repeated applications for extension of time.

It has been necessary to relate in some detail the background to that case in order to place in its proper context the portion of the judgment from Forbes J upon which counsel for the Respondent Registrar seeks to rely in the present case:

“Mr Paterson then suggests that this is justified when one is seeking to construe these rules in a practical way. It is justified, because otherwise, he says, there would be no end to applications for extensions of time. It would be possible for somebody to make an application for extension of time, to apply for a hearing in relation to that and then apply for a further extension and so on. I do not think that that is right, because I think Mr. Laddie is correct when he says that a refusal in a case where no hearing is requested and a refusal given after a hearing both preclude any further application just as with an application for an extension of time to file a statement of claim or defence or some other pleading in an ordinary action. I think that is right. I think the situation is, if you apply for an extension of time to do something, without the complications introduced by these rules, and that application is

refused, subject to any right of appeal, that is the end of the matter. If you do take your right of appeal and the appeal tribunal or tribunals decides that the first decision was right and that you should not have an extension of time, then you cannot subsequently go back and ask again for an extension of time for doing that for which you have been refused leave. I cannot see anything in the Trade Marks Rules themselves which alters that situation. So I feel satisfied that once a final decision to refuse an extension of time is taken, no further application for an extension of time can be made." (emphasis added)

There is, in the case of an application to extend the time for filing of evidence in opposition, no statutory right of appeal. If there is an unsuccessful appeal, the reason the tribunal or decision maker cannot reopen an inquiry would not be because there was no inherent power to do so, but because in the face of a decision by the appellate court, it would amount to a collateral attack on a finding by which it was bound and by a Court against whose findings it had no jurisdiction to entertain an appeal.

One must also look closely at the meaning of the expression '....a refusal given after a hearing'. In that context does it include a hearing at which both parties were not present and afforded an opportunity to make representations?

Consideration was given to that issue in R v Appeal Committee of County of London Quarter Sessions, Ex Parte Rossi [1956] 1 All E.R 670.

In Ex parte Rossi notice of the hearing of an appeal by the Quarter Sessions was sent to the Appellant by post but was not received by him. The decision of the Quarter Sessions was set aside upon an application for certiorari

because there was no proper service and it should be set aside. I would allow the appeal accordingly.³

The finality or irrevocability of the decision appears on Denning L.J.'s analysis to turn on whether:

- (a) there has been a hearing "on the merits"; and
- (b) both sides are present (or represented)

The former criterion includes the latter to some extent as is illustrated by the case of -

The Queen v May and others (1880) 5 OBD 382

In that case the respondent and her witnesses were absent at the hearing of an appeal to the quarter sessions against an affiliation order, having mistaken the day of hearing. Counsel applied for an adjournment which was refused, the case proceeded and the order was quashed. It was held that there had been no decision "on the merits" and that fresh proceedings might be taken before the justices.

There are obvious parallels to the present case.

The meaning of the expression "hearing on the merits" was considered in the context of a specific statutory provision in -

Martin v Abbott Australasia Property Ltd

[1981] 2 N.S.W.L.R 430

S 75A(8) of the NSW Supreme Court Act, 1970 provided that "where the appeal is from a judgment after a trial or hearing on the merits, the Court shall not receive further evidence except on special grounds".

On an appeal to a single judge from an order of the Master, Hunt, J held that that expression -

³ [1956] 1 All E.R 670 @ 675G-676D

on the basis that there was no deemed service of the notice on him as it had been returned through the post. Denning L.J. was of the view that even if the order had been regularly obtained (thus leaving no basis for certiorari) the Appellant could have applied to the quarter sessions to set aside the order made in his absence and to rehear the appeal.

“I would just add this: if the order had been regularly obtained (as the Divisional Court thought then I would agree that there would be no ground for certiorari: and Mr. Rossi’s only remedy would be by application to quarter sessions to set aside the order made in his absence and re-hear the appeal. It was suggested before us that the court of quarter sessions had no power to set aside its own order, even when made in the absence of the respondent: but, on looking into the matter, I am satisfied that it has, and that the intimation of Lord Goddard, C.J., on this point is well-founded. Suppose, for instance, that Mr. Rossi had received proper notice of the date of the hearing, but failed to attend because he was ill; and the court, not knowing of it, heard the appeal in his absence and decided against him. Or suppose that the registered letter had not been returned undelivered, so that the court were entitled to assume that it had been delivered in the ordinary course of post. In each of those cases the order of quarter sessions would be regularly obtained: but Mr. Rossi would be able to have it set aside on such terms as the court thought fit and he could be let in to defend on the merits. That was done over 250 years ago in the days of Queen Anne when Holt, C.J., was clearly of opinion that quarter sessions has just the same power as the Queen’s Bench to set aside a judgment or order made in the absence of a party. (*See St. Andrew’s Holborn (Inhabitants), v. St. Clements Danes’ (Inhabitants)*).

(1) (1704) (2 Salk.606); cf. *R.v. May* (2) (1880) (5 Q.B.D 382); and so have inferior courts generally: see *Street's Case* (3) (1722) (7 Vin. Abr.24 pl. 10), *R. v. Peters* (4) (1758) (1 Burr. 568) At one time the application to set aside had to be made during the same sessions, but that is no longer the case. Delay is a ground on which the court may in its discretion refuse relief but it is not an absolute bar. On the other hand, if the case has been heard on its merits with both sides present, quarter sessions have of course no power to set aside their own order: *Pridgeon's Case* (5) (1633) (Cro. Car. 341 @ p. 350), *R. v. Glynn* (6) 2871 (L.R. 7 Q.B. 16). I may add that, where an order has been obtained irregularly without proper service, the quarter sessions can themselves set it aside (see *Bayly v. Boorne* (7) (1720) 1 Str. 393, *Jewell v Hill* (8) (1722) 1 Str. 499); but so can the Queen's Bench by certiorari.

To sum up, when service of process is allowed by registered post, without more being said on the matter, then if the letter is not returned, it is assumed to have been delivered in the ordinary course of post and any judgment or order by default obtained on the faith of that assumption is perfectly regular. It will not as a rule be set aside except on payment of costs and showing of merits: see *T.O. Supplies (London), Ltd. v. Jerry Creighton, Ltd.* (9) ([1951] 2 All E.R. 992). If, however, the letter is returned undelivered and nevertheless, notwithstanding its return, a judgment or order by default should afterwards be obtained, it is irregular and will be set aside *ex debito justitiae*. The order of quarter sessions here was irregular

“Should be construed as meaning the hearing of any interlocutory matter in which both parties appeared and in which the issue between them in that interlocutory matter (whether of fact and/or law) was investigated by the relevant tribunal”⁴

In Reed v Nut (1890) 24 QED 669 it was held that a certificate of dismissal could only properly be issued by the magistrate where both parties had attended and there had been a proper inquiry into the facts of the case. In the absence of those preconditions there was no hearing “upon the merits” (within the meaning of 24 & 25 Vice. c. 100, S44).

The common factor in Ex parte Mac Farlane, De Verteuil v Knaggs, Ex parte Rossi, R v May and Reed v Nutt is the non appearance of a party at the original hearing. It must be remembered that the ADIDAS case was not decided on that specific ground. As a matter of public policy, there is no reason why the primary tribunal should not be allowed in appropriate cases, such as when one side was not represented and had no opportunity to put its case, to reconsider an interlocutory decision where it is just to do so.

As has been observed, it is a discretion which ought to be sparingly exercised but it nevertheless exists.

The learned Deputy Registrar General has therefore mistakenly declined jurisdiction to entertain an application to rehear Nestle’s application for extension of time.

Due consideration of that application need not have extended to the requirement of an oral hearing. A refusal in the agreed circumstances would

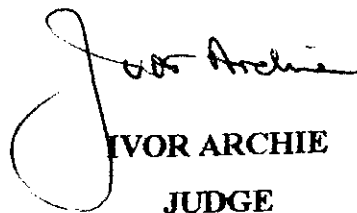
⁴ [1981] 2 N.S.W.L.R. 430 @ 435-436

not necessarily have been unreasonable but it is the reason which she has given that cannot be supported.

Accordingly, the following reliefs are granted:-

1. an order of certiorari to remove into the High Court and quash the decision of the Deputy Registrar General contained or communicated in her letter dated November 28, 1997 whereby she refused to hear an application by Societe Des Produits Nestle S.A for an extension of time for filing evidence in opposition to an application for registration of the trade mark "TRISKIES".
2. an order of mandamus directed to the Deputy Registrar General requiring her to hear and determine the said application.
3. an order that the costs of this application be taxed and paid by the Respondent to the Applicant.

Dated the ^{15th} day of January, 1999


IVOR ARCHIE
JUDGE