

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2009-404-4965

UNDER Trade Marks Act 2002

IN THE MATTER OF an appeal from the decision of the Assistant
Commissioner of Trade Marks dated 15
July 2009

BETWEEN THE MUIR ELECTRICAL COMPANY
PTY LIMITED
Appellant

AND THE GOOD GUYS GROUP LIMITED
Respondent

Hearing: 24 November and 1 December 2009

Appearances: Mr A Brown QC and Mr G Hall for appellant
Mr I Finch for respondent

Judgment: 18 December 2009 at 11.30 am

JUDGMENT OF LANG J
[on appeal against a decision of the Assistant Commissioner of Trade Marks]

*This judgment was delivered by me on 18 December 2009 at 11.30 am , pursuant to
Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date.....

Solicitors:
Buddle Findlay, Auckland
Counsel:
Mr A Brown QC, Auckland
James & Wells, Takapuna, Auckland

[1] The Trade Marks Act 2002 permits a variety of applications to be filed with the Commissioner of Trade Marks. It also permits affected parties to oppose those applications. The procedural provisions that apply to such proceedings are prescribed in the Act and the Trade Mark Regulations 2003.

[2] The Commissioner has numerous powers and duties under the Act and the regulations. One of these is the power to grant an extension of time for a party to comply with the procedural requirements imposed by both. Assistant Commissioners appointed under the Act are also able to exercise that power.

[3] One of the procedural requirements that applies to all applicants or opponents is an obligation to file evidence with the Commissioner within a prescribed period. The consequences of failing to comply with that requirement are potentially serious. This is because the regulations provide that a party who fails to file its evidence within the prescribed period thereby “discontinues” its application or opposition.

[4] This appeal arises out of the fact that the respondent, who had applied for the revocation of several trade marks owned by the appellant, failed to file its evidence within the prescribed period. After a contested hearing an Assistant Commissioner determined that she had the power to grant an extension of time for that to occur. She reached that conclusion notwithstanding the fact that the time for filing the evidence had expired before the extension was sought. The Assistant Commissioner also considered that the circumstances of the case justified the granting of the extension. The appellant challenges both determinations on appeal.

[5] The first issue to be determined is whether the Commissioner had the power to grant the respondent an extension of time to file its evidence in the circumstances that I have described above.

[6] If the Commissioner had that power, the second issue relates to the adequacy of the grounds upon which the Commissioner purported to grant the extension. The regulations provide that the Commissioner may only grant an extension of time where “genuine and exceptional circumstances” exist so as to justify the extension being granted. The appellant contends that such circumstances did not exist in the

present case. It therefore argues that, even if she had the power to grant an extension, the Assistant Commissioner should not have exercised that power in favour of the respondent in the circumstances of the present case.

[7] Before considering these two issues it is necessary to explain in greater detail the legislative framework, the events that have given rise to the appeal and the power of the Commissioner to grant extensions of time for the taking of specified steps in proceedings under the Act.

The legislative framework

[8] The Act and regulations govern all aspects of the process by which a party may seek to register, support or challenge a trade mark. For the most part the procedural requirements are contained within the regulations. These specify the steps that parties to a proceeding under the Act are required to take. They also prescribe the time within which those steps must be taken. In some cases they also prescribe the consequences that will follow if a party fails to comply with a specified step within the prescribed period.

[9] The Act and regulations prescribe a comprehensive suite of procedures that must be followed in relation to the following proceedings:

- (a) An application to register a trade mark: ss 47 - 49; Regs 73 - 85;
- (b) An application to revoke a registered trade mark: ss 65 –68; Regs 94 – 105;
- (c) An application to declare a registered trade mark invalid; ss 73 – 74; Regs 106 – 112;
- (d) An application for rectification of the Register to correct an error or omission: s 76; Regs 86 – 93;
- (e) An application to cancel or alter a registered trade mark: ss 62 – 64; Regs 113 –121;

[10] The procedures prescribed in respect of (b) to (e) above are identical. They all require the following steps to be taken:

- (a) The party seeking to challenge or alter a trade mark must file an application containing prescribed information, including the grounds upon which it advances the application;
- (b) The owner of the trade mark must oppose the application by filing a counter-statement within two months after receiving a copy of the application. If it does not do so, the Commissioner must determine the application on the basis of the documents filed by the applicant;
- (c) The applicant must, within two months after receiving the counter-statement, file evidence in support of the application. Alternatively, it may advise the Commissioner either that it withdraws the application or that it does not intend to file evidence. If it does neither, the regulations provide that it discontinues the application;
- (d) The owner of the trade mark then files its evidence. It must do so within two months after it receives a copy of the applicant's evidence or the applicant's notice that it does not propose to file evidence;
- (e) The applicant may then, within one month after it receives a copy of the owner's evidence, file evidence strictly in reply to the owner's evidence.

[11] The procedure to be followed in an application to register a trade mark is slightly different. Once the Commissioner receives such an application he or she must determine whether it is registrable. Once that determination has been made, the acceptance of the application for registration must be advertised in the Trade Marks Journal.

[12] Regulation 75 requires a party who wishes to oppose the registration of a trade mark to file a notice of opposition within three months after the date upon which the acceptance is first advertised. It also provides:

75 Time for filing notice of opposition

...

- (2) The Commissioner may, if requested, extend the deadline for filing a notice of opposition—
 - (a) by up to 1 month, without the applicant's consent; and
 - (b) by up to 2 months, with the applicant's consent.
- (3) The Commissioner must not extend the deadline after the deadline has expired.

[13] Section 48(1) of the Act and Regulation 79 of the Regulations require the applicant for registration to file a counter-statement within two months after the applicant receives a copy of the notice of opposition. If the applicant fails to do so, s 48(2) prescribes the consequences as follows:

- (2) If the applicant does not send a counter-statement to the Commissioner within the prescribed time, the applicant is deemed to have abandoned the application.

[14] Thereafter the procedure to be followed mirrors the procedure prescribed in relation to the other four types of proceeding listed above. The person opposing the application must file its evidence within two months of receiving a copy of the counter-statement. Alternatively, the opponent must advise the Commissioner that it withdraws its opposition or that it does not intend to file evidence in support of its opposition. Again, however, Regulation 83 provides that the opponent “discontinues” its opposition if it fails to take any of those steps.

[15] The applicant for registration may then file evidence in support of the application provided it does so within two months after receiving the opponent’s evidence. The opponent is entitled to file reply evidence within one month after receiving the applicant’s evidence.

The events that have led to the appeal

[16] The Muir Electrical Company Pty Limited (“Muir Electrical”) is the owner of 12 registered trade marks in New Zealand for the word mark THE GOOD GUYS and for a logo using the same name.

[17] In December 2007 the respondent, The Good Guys Group Limited (“The Good Guys”) filed an application with the Commissioner of Trade Marks seeking the revocation of Muir Electrical’s trade marks. It alleged that Muir Electrical had not used the trade marks during the three year period leading up to 29 October 2007, and that the Commissioner should revoke the trade marks for that reason. Muir Electrical opposed that application.

[18] Muir Electrical filed its counter-statement on 7 April 2008. It also filed its evidence in opposition to the application on 28 April 2008.

[19] Regulation 98 prescribed the time within which The Good Guys was required to file evidence in support of its application. It provides as follows:

98 Applicant for revocation for non-use must file evidence

- (1) Within 2 months after receiving a copy of the counter-statement and the evidence, if any, of use of the trade mark or special circumstances of the kind referred to in section 66(2) of the Act, the applicant (A) must—
 - (a) file evidence in support of the application; or
 - (b) notify the Commissioner that A does not intend to file evidence; or
 - (c) notify the Commissioner that A withdraws the application.
- (2) The Commissioner must notify the owner or licensee opposing the application as soon as practicable after A has taken one of the steps under subclause (1)(b) or (c).
- (3) A discontinues the application if—
 - (a) A does not within the applicable deadline file evidence or notify the Commissioner that A does not intend to file evidence; or
 - (b) A notifies the Commissioner that A withdraws the application.

[20] The Good Guys was therefore required to file its evidence no later than 7 June 2008. Thereafter, however, the proceeding stalled for various reasons. This required The Good Guys to seek several extensions of time for the filing of its evidence. It sought those extensions by writing to the Commissioner before the expiration of each date by which it was due to file its evidence. On each occasion the Assistant Commissioner granted an extension of time for The Good Guys to file its evidence.

[21] On 30 January 2009 the Commissioner granted yet another extension and set 28 February 2009 as the date by which The Good Guys was required to file its evidence. Once again The Good Guys failed to file its evidence before the nominated deadline. On this occasion, however, it had not sought a further extension prior to the expiry of the deadline. For that reason the Commissioner wrote to both parties on 19 March 2009 advising them that the applications for revocation were “considered discontinued” and that the trade marks would remain on the register.

[22] On the same date the solicitors acting for The Good Guys wrote to the Commissioner seeking a retrospective extension of time within which to file their client’s evidence. They advised the Commissioner that they had drafted a letter on 27 February 2008 seeking a further extension of time within which to file the evidence. By oversight, however, they had failed to send the letter to the Commissioner.

[23] Muir Electrical opposed The Good Guys’ application for retrospective extension of time, and on 25 May 2009 the parties presented their submissions in relation to that application to the Assistant Commissioner.

[24] On or about 15 July 2009 the Assistant Commissioner released a written decision in which she determined that she had the jurisdiction to grant the retrospective extension of time that The Good Guys sought. She also concluded that The Good Guys had established the existence of genuine and exceptional circumstances so as to justify the granting of the extension.

The Commissioner's power to grant extensions of time

[25] The Commissioner has a general power to extend time for taking steps in proceedings by virtue of Regulation 32, which provides as follows:

32 Commissioner may extend time

- (1) The Commissioner may, if satisfied in a particular case that there are genuine and exceptional circumstances that justify an extension of time, extend the time specified by these regulations for a step to be taken, except where these regulations stipulate that time must not be extended.
- (2) In extending the time for a step to be taken, the Commissioner may stipulate the terms and conditions on which the extension is granted.

[26] This regulation is significantly different to its predecessor, Regulation 93 of the Trade Marks Regulations 1954. It provided as follows:

If in any particular case the Commissioner is satisfied that the circumstances are such as to justify an extension of the time for doing any act or taking any proceeding under these regulations, not being a time expressly provided in the Act, he may, upon application in writing, extend the time upon such notice to other parties and upon such terms as he may direct, and the extension may be granted though the time has expired for doing the act or taking the proceeding.

[27] I consider that the 2003 Act and Regulations contain a significant shift in emphasis so far as the power to grant extensions of time is concerned. First, Regulation 32 does not carry forward the express power, previously contained in Regulation 93 of the old regulations, to grant an extension “though the time has expired for doing the act or taking the proceeding”. The omission of this power from the 2003 regulations clearly signals Parliament’s intention that the Commissioner should have no power to grant an extension of time where the extension is sought after the time for performing an act or taking a step has already passed.

[28] Secondly, the grounds upon which the Commissioner may exercise the general power to grant an extension of time under Regulation 32 are now quite different. The Commissioner could grant an extension under the old Regulation 93 if he or she was “satisfied that the circumstances are such as to justify an extension”. The current grounds are much more restrictive. Regulation 32 only permits the

Commissioner to grant an extension “if satisfied in a particular case that there are genuine and exceptional circumstances that justify an extension of time”.

[29] Thirdly, the 2003 regulations have introduced three concepts that are of significance. The first of these is the use of the word “deadline” to describe the latest point in time by which a party is to comply with a step prescribed by the regulations. That word did not appear in either the earlier Act or regulations. I consider that, by using the specific and unambiguous word “deadline” in several regulations (including Regulation 98, with which this proceeding is concerned), Parliament intended to emphasise the importance of complying with procedural steps within prescribed periods. The word “deadline” generally conveys the notion that the time for taking a step will finally run out if that step is not taken by the prescribed date. In the present context it creates the expectation that significant consequences will follow if a party does not take a required step within the prescribed time limits.

[30] Secondly, some regulations now have self-contained powers of extension that must be interpreted as overriding the general power in Regulation 32. An example is Regulation 75 (set out at [12]), which prescribes the time within which any notice of opposition to an application to register a trade mark must be filed. Regulation 75 provides the Commissioner with an unfettered discretion to grant a request for an extension of up to one month for the notice of opposition to be filed regardless of the applicant’s attitude. The Commissioner may also grant an extension of up to two months with the consent of both parties.

[31] Importantly, however, Regulation 75(3) prohibits the Commissioner from extending the deadline after the deadline has expired. I take the effect of this to be that the Commissioner has no power to extend the date for filing a notice of opposition unless the extension is both requested and granted before the expiry of the three month deadline contained within Regulation 75(1). That prohibition clearly overrides the general power conferred by Regulation 32, because that power may not be exercised “where [the] regulations stipulate that time must not be extended”.

[32] The third new concept is that of “discontinuance”. That consequence follows where an applicant or opponent fails to file its evidence within the prescribed period. Under the 1954 regulations a party was “deemed to have abandoned” its opposition if it failed to take that step.

[33] The term “discontinue” is a technical term that is most often encountered in the codes of civil procedure used in the courts. Parliament no doubt chose the term advisedly and must, in my view, have intended that it should be given the same meaning in the regulations as it has within the High Court Rules. Under the High Court Rules a discontinuance is the method by which the plaintiff in a civil proceeding ends the proceeding. Rule 15.21 provides for the effect of a discontinuance as follows:

15.21 Effect of discontinuance

- (1) A proceeding ends against a defendant or defendants on—
 - (a) the filing and service of a notice of discontinuance under rule 15.19(1)(a); or
 - (b) the giving of oral advice of the discontinuance at the hearing under rule 15.19(1)(b); or
 - (c) the making of an order under rule 15.20.
- (2) The discontinuance of a proceeding does not affect the determination of costs.
- (3) Rule 15.22 overrides this rule.

[34] Once a proceeding has been discontinued, there is no means by which the plaintiff may revive it. The only way in which a discontinuance may be set aside is under r 15.22. That rule permits the Court to set a discontinuance aside on the application of the defendant if the Court considers the discontinuance is an abuse of the process of the Court. Subject to that rule, the proceeding is at an end once it has been discontinued.

[35] I take the word “discontinue” to have the same meaning in the present context. It is one of the methods by which the applicant or opponent in proceedings under the Act may bring its application or opposition to an end. It does so by failing

to file its evidence, or failing to advise the Commissioner that it does not propose to file any evidence, within the prescribed time.

[36] Counsel for The Good Guys endeavoured to argue that there is a material difference in the meaning of the term “discontinue” and the phrase “deemed to have abandoned”. He submitted that the word “discontinue” meant to “cease”, and that this was a less final end result than a deeming provision that created a statutory form of abandonment. I accept that the word “cease” also captures the flavour of the word “discontinue”, but I do not see how it conveys the notion that the outcome is less final than the word “end”.

[37] Counsel for The Good Guys also placed some emphasis on the fact that s 48 of the Act retains the “deemed to have abandoned” consequence. It provides that an applicant for a trade mark is deemed to have abandoned the application if it fails within the prescribed time to send a counter-statement to the Commissioner setting out the grounds on which the applicant relies for its application. Counsel submitted that Parliament clearly viewed the two concepts as being different. If it did not, it would not have retained the phrase “deemed to have abandoned” in s 48.

[38] I do not place any weight on this submission. The 2003 Regulations were promulgated a year after the Act was passed. Section 48 is the only provision in either the Act or the regulations to use the phrase “deemed to have abandoned”. I consider that a likely explanation for the use of different terminology in the Act and regulations is that the person who drafted the regulations elected to use the word “discontinue” as a more modern form of terminology than the deeming provision previously used in the 1954 Regulations. By that stage, however, the 2002 Act had already been passed.

[39] I consider that a deemed abandonment and a discontinuance under the 2003 Regulations share one very significant feature. In failing to file its evidence within the prescribed time the party in default will often not intend to abandon or bring its application or opposition to an end. The default may be caused solely through oversight on the part of that party or (more usually) its advisors. The discontinuance or deemed abandonment follows inevitably, however, as a consequence of the failure

of the party to comply with the requirements imposed by the regulations. It occurs in both cases through the operation of the regulatory provisions and regardless of the wishes and intentions of the party in default. Those provisions force that party to discontinue its application or opposition in exactly the same way as a deeming provision operates to deprive the party in default of the ability to continue with its application or opposition.

[40] This leads me to conclude that a regulation that provides for the discontinuance of a proceeding has the same practical effect as a provision that deems a party to have abandoned its application or opposition. If there is any distinction between the two terms it amounts, in my view, to a distinction without a difference.

[41] With that background in mind it is now appropriate to determine whether the Assistant Commissioner had the power in the present case to grant the retrospective extension that The Good Guys sought.

Did the Assistant Commissioner have the power to grant the retrospective extension that The Good Guys sought?

[42] I propose to determine this issue by having regard to the authorities, the conclusions that are to be drawn from the wording of the current regulations and the arguments that The Good Guys raises in opposition to the appeal.

The authorities

[43] No cases have been decided by this Court or the Court of Appeal in relation to the legislative provisions that lie at the heart of the appeal.

[44] My conclusion at [40] that there is no material difference in this context between a discontinuance and a deemed abandonment means, however, that earlier authorities relating to the effect of Regulation 93 of the 1954 Regulations remain relevant.

[45] The leading Court of Appeal authority in this context is *Natural Selection Clothing Limited v Commissioner of Trade Marks* [1996] 2 NZLR 148. That case involved an application for the registration of a trade mark. A party who wished to oppose the application had not filed its notice of opposition within the three month period prescribed for the filing of such notices under the 1954 Regulations. It then applied to the Commissioner for a retrospective extension of time within which to do so. One of the issues that the Court of Appeal was required to determine was whether the Commissioner had the power to grant an extension of time when the extension was not sought until after the time for filing the notice of opposition had expired.

[46] The Court determined this issue in favour of the party seeking the extension. In doing so it said:

As a preliminary point, and one not argued before Heron J, Mr Hodder submitted that Regulation 93, at least so far as it permits the grant of extensions of time on applications made after the expiry of the 3-month opposition term, is inconsistent with s28(1) which provides that if no opposition is filed and the time for opposing has expired the Commissioner shall register the trade mark. He said this creates an entitlement to registration of the trade mark enjoyed by the applicant and that there is no jurisdiction to extend the time beyond 3 months. We do not accept that argument. Section 28 must be read in light of s27(2) which leaves the period within which notice of opposition is to be lodged to be prescribed. It is prescribed in Registrar 36 which in turn must be read with Registrar 93 as constituting the prescription of the opposition period. That is 3 months plus any extended time the Commissioner may grant pursuant to Registrar 93. The entitlement to registration therefore must be considered in that light. There is no inconsistency.

[47] At first sight the *Natural Selection* case might be thought to support the argument for The Good Guys in the present case. Upon closer examination, however, I do not consider that the reasoning that the Court used in *Natural Selection* provides any assistance in determining the issue that this appeal raises. First, that case was concerned with an application for registration of a trade mark. Not surprisingly, the regulation with which the Court was dealing in that case did not contain a provision to the effect that the opposition was deemed to be abandoned if the notice of opposition was not filed within the prescribed time. Until such time as the intended opponent obtained an extension of time to file its notice of opposition, there was nothing in existence that a deeming provision could apply to. The

regulation that the Court considered in *Natural Selection* was therefore entirely different to Regulation 98 of the 2003 Regulations.

[48] Secondly, I accept the submission of counsel for Muir Electrical that s 75 of the 2002 Act (set out at [12]) has been drafted so as to prevent any recurrence of the outcome in the *Natural Selection* case. Unlike its predecessor, s 75(2) provides the Commissioner with an unfettered discretion to extend the deadline for filing a notice of opposition to an application for registration of a trade mark for one month and, with the applicant's consent, for up to two months. Thereafter, however, Regulation 75(3) prohibits the Commissioner from extending the deadline further. This means that the Commissioner cannot now use the general power under Regulation 32 to extend the time for filing a notice of opposition beyond the two month period permitted by Regulation 75(2).

[49] The case that is most similar, in my view, to the present case is *Societe des Produits Nestle SA v Commissioner of Trade Marks* (1999) 9 TCLR 135. In that case this Court considered whether it was possible for the Commissioner to grant an extension of time for filing evidence in opposition to an application for a trade mark after the prescribed time for filing the evidence had expired. The opponent had not sought the extension until well after the prescribed time for filing the evidence had expired. As a result, Regulation 39(3) of the 1954 regulations deemed the applicant to have abandoned its opposition to the application.

[50] The applicant contended that the Commissioner still had power under Regulation 93 of the 1954 Regulations to extend the time for filing evidence notwithstanding the operation of Regulation 39. Ellis J disagreed, and held that the Commissioner had been correct to conclude that he had no power to grant a further extension after the expiration of the prescribed period for filing evidence. His Honour took the view that the deeming provision in Regulation 39(3) was analogous to provisions in the Court of Appeal Rules that deemed an appellant to have abandoned an appeal if it did not take certain steps within a prescribed period. In *Hermans v Hermans* [1961] NZLR 390 and *Airwork (New Zealand) Limited v Vertical Flight Management* [1999] 1 NZLR 29 the Court of Appeal had held that the Court had no power to extend the time for complying with those requirements if

the appellant did not seek the extension before the expiration of the time prescribed for those steps to be taken. Ellis J said at 139:

Consistent with the *Hermans* and *Airwork* cases, is the view that where a provision provides a cut-off point with deemed abandonment, that provision cannot be circumvented by a general power to extend time. To hold otherwise would be to negative the presumption.

In my view therefore, the Commission was right to hold that he had no jurisdiction to entertain the application for extension of time filed on 7 March 1998. In so holding I expressly state I am not holding that an application for extension of time filed before the expiry of time cannot be determined after the expiry of that time and validly extend the time. I have not been asked to determine that.

[51] In *Nestle* Ellis J distinguished the *Natural Selection* case, rightly in my view, because of the absence of any deeming provision in that case. He said at 139:

In my view the decision in the *Natural Selection Clothing* case is a straightforward application of R93 in a situation where there was no provision for a deemed abandonment.

[52] The approach that Ellis J took in the *Nestle* case therefore supports the argument for Muir Electrical in the present case.

Conclusions to be drawn from the wording used in the current regulations

[53] I consider that the wording used in the current regulations, discussed above at [25] to [40], permits several conclusions to be drawn. First, Parliament clearly intended to tighten up the requirement that parties take prescribed steps in a timely manner. One of the methods by which it has sought to achieve that objective is by significantly limiting the power of the Commissioner to grant extensions of time. The Commissioner no longer has an express power, as it formerly did, to grant an extension of time under Regulation 32 where the time for taking a step has expired. The Commissioner is also prohibited from exercising the general power under Regulation 32 where the Act or regulations prohibit the Commissioner from granting an extension beyond a prescribed period. Finally, the Commissioner can only grant an extension where there are genuine and exceptional circumstances that justify the extension being granted.

[54] I consider that the use of the word “deadline”, coupled with the introduction of the concept of discontinuance, continues this theme. Moreover, when it introduced the latter concept to the 2003 Regulations Parliament must have been aware of the existence and effect of the *Nestle* case. It therefore knew that this Court had determined that it was not possible for the Commissioner to grant an extension of time where the extension was sought after the then current regulations had deemed the application or opposition to have been abandoned. Notwithstanding that knowledge Parliament elected to replace the phrase “deemed to have been abandoned” with a term that I have held has exactly the same meaning. Parliament must therefore, in my view, be taken to accept the appropriateness of the outcome in *Nestle*. Otherwise it would surely have amended the 2003 Regulations to limit or negate the effect of the *Nestle* decision in the same way that it promulgated Regulation 75 to limit the effect of the decision of the Court of Appeal in *Natural Selection*.

[55] I consider that the consequence of abandonment or discontinuance recognises that in most contested applications there should be a point at which the applicant or opponent is required to positively demonstrate that it has evidence to support its application or opposition. Put colloquially, it must “put up or shut up”. Parliament has nominated that point as being the stage in the proceeding immediately after one party has provided the other with a counter-statement. Once that point is reached, the other party is taken to understand the case that it is facing. It is not unreasonable to require that party to justify its stance either by filing its evidence within a prescribed period or advising the Commissioner that it does not propose to file any evidence. Alternatively it can abandon its application or opposition. It can achieve the latter result or in one of two ways. It can advise the Commissioner of its intention to withdraw its application or opposition or it can do nothing, thereby permitting the discontinuance provisions of the regulations to come into play. This allows the other party to know where it stands. That would obviously not be the case if the Commissioner had the power to grant an extension that was not sought until after the prescribed time for taking the step had expired.

The arguments for The Good Guys

[56] Perhaps the strongest argument for The Good Guys is the fact that Regulation 32(1) does not expressly prohibit the Commissioner from granting an extension in circumstances where the time for a taking a step has expired. Neither does it expressly prohibit the Commissioner from granting an extension where the party seeking the extension is taken to have discontinued its application or opposition by failing to file its evidence within the prescribed time.

[57] By way of contrast, Regulation 32(1) expressly prohibits the Commissioner from granting an extension under Regulation 32(1) where the regulations stipulate that time must not be extended. It can be argued that, if Parliament had wanted to prevent the Commissioner from granting extensions in the present situation, it could easily have included an express provision to that effect within Regulation 32(1). It can also be argued that the absence of such a prohibition confirms that the general power to grant an extension is available in circumstances such as the present.

[58] I consider that the answer to this issue lies in the fact that, unlike the regulations that contain an express limit or prohibition on the power to grant an extension, regulations such as Regulation 98 provide their own consequences for any failure to comply with a procedural step within the prescribed period. Parliament has determined that, if a party does not comply with the obligations that those regulations impose, that party's application or opposition is discontinued and is at an end. It is therefore not surprising that Parliament did not feel the need to cater for this type of situation by making it a further exception under Regulation 32(1).

[59] The same reasoning also applies to the argument that, if the Commissioner did not have the power to grant an extension retrospectively, there would be no need for provisions such as Regulation 62(3) and 75(3). Those regulations prohibit the Commissioner from extending a deadline or allowing an extension "after the deadline has expired". Neither of those regulations contains a provision to the same effect as the discontinuance provisions in Regulation 98(3). It can be argued, in fact, that both regulations are also narrower than Regulation 98 because of the fact that they expressly prohibit the Commissioner from granting any extension of time after

the deadline has expired. In the present case counsel for Muir Electrical accepts (although I am not required to decide the issue) that the Commissioner may use the general power under Regulation 32(1) to grant extensions to the time prescribed by Regulation 98 even after the expiry of that time. The critical factor is whether the extension is sought before the expiry of the current deadline.

[60] Next, counsel for The Good Guys submitted that the Assistant Commissioner was correct to conclude that the use of the term “applicable deadline” in the discontinuance provisions of Regulation 98(3)(a) is of significance. Counsel submitted that those words mean “the deadline that applies at the time the relevant step is required to be taken, which may be extended prospectively or retrospectively”. Counsel contended that, if that was not the case, there was no need for Parliament to have used the word “applicable” because the original deadline would be the only deadline that was relevant.

[61] I agree with this submission as far as it goes. In the absence of any express provision to the contrary, Regulation 32(1) permits the Commissioner to grant more than one extension. Once the Commissioner extends a deadline, the new deadline becomes the “applicable deadline” for the purposes of the discontinuance provisions of the regulations. That is precisely what occurred in the present case. After the Commissioner granted the extension on 30 January 2009, the “applicable date” for the purposes of Regulation 98(3)(a) became 28 February 2009. I do not, however, consider that any wider meaning can be attributed to the phrase than that.

[62] In particular, I do not consider that the phrase can be taken to imply that the Commissioner has any power to extend a deadline retrospectively. An extension of a deadline can only be valid if the Commissioner has the necessary power to grant it in the first place.

[63] In concluding that discontinuance under Regulation 98(3)(a) did not prevent her from granting an extension retrospectively, the Assistant Commissioner said:

... if, in this case, the former applicable deadline of 28 February 2009 is extended retrospectively and is replaced with the new applicable deadline of 19 March 2009, the application was effectively never discontinued.

I agree with counsel for Muir Electrical that this amounts to circular reasoning, because the conclusion proceeds on the assumption that the power to grant a retrospective extension existed. That is a matter that cannot be assumed. The issue at the heart of this case is whether the discontinuance on 28 February 2009 deprived the Commissioner of the power to grant any further extensions.

[64] Finally, counsel for The Good Guys also argued that the Commissioner has a range of broad discretionary powers under the Act. He submitted that these are designed “to permit the Commissioner to deal flexibly with the difficult matters arriving for his consideration”. He contended that this Court should therefore be slow to interfere with what is in essence a discretionary process.

[65] This submission may be correct to the extent that it relates to some of the powers vested in the Commissioner pursuant to the Act and regulations. I do not, however, consider that the power to grant extensions of time under regulation 32 can properly be described as broad. The Commissioner can only exercise that particular power in relation to an existing application or opposition. The Commissioner must also be satisfied that the applicant has established that genuine and exceptional circumstances exist so as to justify the granting of the extension sought. As I discuss at [83] to [85], that is a relatively high threshold. The Commissioner has no discretionary power until that threshold has been attained.

Conclusion

[66] The factors to which I have referred persuade me that the Assistant Commissioner erred when she concluded that she had power under regulation 32(1) to extend the time within which The Good Guys was to be able to file its evidence. In failing to apply for a further extension of time before the deadline expired on 28 February 2009 The Good Guys permitted the discontinuance provisions of Regulation 98(3) to come into play. Thereafter it was not possible to turn the clock back. The Good Guys’ applications were at an end and neither The Good Guys nor the Commissioner could take any further step to revive them. There were no applications in existence and, as a consequence, the Commissioner had no power to

grant any further extension of time within which The Good Guys could file its evidence.

[67] These conclusions mean that the appeal must succeed.

Did genuine and exceptional circumstances exist in the present case?

[68] The conclusion that I have reached in relation to the first issue makes it unnecessary for me to consider this issue. In case I am wrong regarding that issue, however, I propose to briefly consider whether the grounds that The Good Guys advanced were sufficient to justify the Assistant Commissioner granting the extension. This requires me to consider whether genuine and exceptional circumstances existed so as to justify the extension being granted.

[69] The Assistant Commissioner decided this issue in favour of The Good Guys on the basis of the potential prejudice to the parties if the application was not granted, coupled with the public interest in having the revocation proceedings continue. She did not, however, articulate how both parties would be prejudiced if the application was not granted or why the continuation of the proceeding was in the public interest. More importantly, she did not explain why the circumstances of the present case were exceptional so as to justify the extension that The Good Guys sought.

[70] I am not sure, with respect, that the two reasons that the Assistant Commissioner gave for deciding this issue in favour of The Good Guys withstand scrutiny. The only party who will be prejudiced if the extension is not granted will be The Good Guys. It will thereby lose the opportunity to file evidence and submissions in support of its opposition to Muir Electrical's application. Muir Electrical, on the other hand, will clearly not be prejudiced because the Good Guys' application will no longer exist.

[71] It also seems to me, for the reasons that I have already given, that the public interest will usually favour the party opposing an application for an extension. This is because Parliament has restricted the Commissioner's power to grant an extension

to cases involving exceptional circumstances. In doing so it must have determined that in unexceptional cases the consequences prescribed by the Act, including abandonment of an application and discontinuance of an opposition, are in the public interest.

[72] This is, in any event, an area in which this Court must reach its own decision based on the information that was before the Assistant Commissioner. In this context the now well-known passage from *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC) at [16] is apposite:

Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[73] The statutory test comprises two separate components, both of which an applicant must satisfy before an extension can be granted. The first is that the circumstances that the applicant relies upon are genuine. That issue must obviously be considered first. If the Commissioner is not satisfied that the grounds upon which the applicant seeks an extension are genuine, the application cannot succeed and it will not be necessary to consider the second component.

[74] The relevant circumstances will generally include the reasons why the extension is sought and the consequences for the applicant if it is not granted. In the case of an application for an extension that is made after the time for taking a step in the proceeding has expired, the circumstances will also include an explanation for the failure to take that step within the prescribed time.

[75] Muir Electrical points out that The Good Guys did not file any evidence, in the form of an affidavit or affirmation, prior to the hearing that the Assistant Commissioner conducted on 25 May 2009. It argues that it was not sufficient for the Assistant Commissioner to rely on unsworn and unsubstantiated assertions by The Good Guys regarding the reasons for its failure to file evidence in time and the effect

that the discontinuance of the proceeding would have on it. As a result, it contends that neither the Assistant Commissioner nor the Court can reasonably be satisfied that the grounds upon which The Good Guys relies are genuine.

[76] I agree with counsel for Muir Electrical that, in a contested case, it will generally be necessary for the applicant to place assertions of fact before the Commissioner formally by way of affidavit or statutory declaration. That is particularly the case where the facts are disputed and are of real relevance to the outcome of the issue that the Commissioner is required to determine. It is also important where the facts are known to the party rather than to counsel. A requirement that such evidence be formally adduced ensures that the party who makes assertions is prepared to stand behind them. He or she does so in the knowledge that serious consequences are likely to follow in the event that the assertions are found to be false or misleading in a material way. It is also consistent with s 160 of the Act, which provides as follows:

160 Mode of giving evidence in proceedings before Commissioner

- (1) Subject to any regulations, in any proceeding under this Act before the Commissioner, the evidence must be given by affidavit or statutory declaration in the absence of directions to the contrary.

[77] Failure to adduce evidence formally in an application such as the present may not, however, necessarily be fatal to an applicant's cause. In some cases the essential facts may be able to be gleaned from the material held on the Commissioner's file. Where those facts are not seriously contested and the application is of an interlocutory nature, there may be little point in requiring the applicant to file further evidence setting out information that is already apparent from the material held on the Commissioner's file.

[78] In the present case The Good Guys maintained that the failure to comply with the requirements of Regulation 98 arose because, through oversight, its counsel failed to seek a further extension of time within which to file evidence. The Commissioner's file contained the letter dated 19 March 2008 in which counsel for The Good Guys advised the Commissioner that he had prepared a letter on 27 February 2008 seeking a further extension of time for his client to file its

evidence. He attached a copy of that letter in draft form. This was dated 27 February 2008. Counsel for The Good Guys advised the Commissioner that, due to oversight on his part, he had never sent the letter to the Commissioner.

[79] I do not consider that the failure to advance this explanation in a more formal way was necessarily fatal to The Good Guys' application. The material was already on the Commissioner's file. The Commissioner must also be entitled to rely on factual statements made by counsel for an applicant regarding matters in respect of which counsel has personal knowledge. In advancing an application under the Act counsel will be bound by the same ethical restrictions as they are subject to in their capacities as officers of the Court. Counsel are also bound by their own ethical rules, and serious consequences will follow if they are found to have misled a decision maker in a material way.

[80] In the present case this aspect of the case for The Good Guys was uniquely within the knowledge of its counsel. There is nothing to suggest that the information contained in the letter dated 19 March 2008 was false or misleading in any way. The draft letter dated 27 February 2008 also supported counsel's explanation for his client's failure to file its evidence in time. The information contained in the letter dated 19 March 2008 is therefore sufficient, in my view, to establish a genuine explanation for the failure of The Good Guys to seek an extension of time before the expiration of the deadline.

[81] The effect on The Good Guys if the application was not granted is that it will no longer be able to continue with its application. That much is clear from the wording of the Act and can be viewed as a genuine consequence of any refusal to grant an extension. Thereafter, in the absence of any affidavit or statutory declaration from a representative of The Good Guys, the Court has been left to rely on submissions on that topic from its counsel. I do not consider that the Court should be required to proceed on that basis in the case of a seriously contested issue. I therefore proceed on the basis that the consequences for The Good Guys if the application is not granted are those provided by the statute.

[82] The real issue, however, is whether those factors can properly be described as exceptional in terms of Regulation 32.

[83] In this context I draw assistance from the judgment of the Supreme Court in *R v Rajamani* [2008] 1 NZLR 723. In that case the Court said at [4] that the issue of whether exceptional circumstances exist is not a matter of judicial discretion. Rather, it is a matter of fact requiring judicial assessment. Any residual discretion may not be exercised until such time as exceptional circumstances have been found to exist.

[84] The precise meaning to be applied to the term “exceptional circumstances” can often present difficulty. In this context counsel for Muir Electrical referred me to the following passage from the judgment of Hammond J in *Awa v Independent News Auckland Limited* [1996] 2 NZLR 184 at 186:

As to such, the term ‘exceptional circumstances’ when used in a statute is never free from difficulty. As a matter of general approach it is usually construed as meaning something like ‘quite out of the ordinary’. And obviously the onus must be on the applicant to establish entitlement in face of the statutory language.

[85] Although the *Awa* case was decided in a different statutory context, I consider that the phrase “quite out of the ordinary” aptly captures the flavour that Parliament intended the phrase to convey in Regulation 32. The Commissioner will therefore be entitled to grant an extension in circumstances that are quite out of the ordinary. That threshold may be reached by virtue of a single factor or by the combined weight of all relevant factors. In the final analysis, however, the extension cannot be granted unless the circumstances of the case are exceptional.

[86] It is difficult to see how the reason for the failure to take the prescribed step in the present case can be regarded as exceptional. Counsel for The Good Guys does not seek to explain his failure to send the letter to the Commissioner as being caused by anything other than simple oversight on his part. Regrettably, however, that cannot be regarded as being unusual or out of the ordinary. Oversight is a common cause of deadlines being missed. That is not to say that oversight will never amount to an exceptional reason. An unusual combination of events may cause a deadline to

be missed and that may amount to exceptional circumstances. Counsel for The Good Guys does not, however, suggest that that is the case here.

[87] Similarly, the only effect that the failure will have, based on the material available to me, is the statutory consequence of discontinuance. That will occur as a result of any failure to comply with the requirements of Regulation 98. It cannot be regarded as being out of the ordinary, let alone quite out of the ordinary.

[88] For these reasons, even if I had held that the Commissioner had the necessary power to grant the extension, I would nevertheless have concluded that genuine and exceptional circumstances did not exist to justify the Assistant Commissioner exercising that power in favour of The Good Guys.

Result

[89] The appeal is allowed. The order granting an extension of time within which The Good Guys is to file its evidence is quashed.

Costs

[90] There is no reason why costs should not follow the event.

[91] I make an award of costs and disbursements in favour of the appellant. Costs are to be calculated on a category 2B basis.

Lang J