

O-371-07

**IN THE MATTER OF AN INTERLOCUTORY HEARING
IN RELATION TO TRADE MARK APPLICATION NO. 2376138
IN THE NAME OF KATHY PAVEY AND JULIAN FIDLER (A
PARTNERSHIP), TRADING AS SYNERGY EMPLOYMENT LAW**

**AND IN THE MATTER OF OPPOSITION NO. 94119 THERETO
BY SYNERGIE (SOCIETE ANONYME)**

**AND IN THE MATTER OF AN APPEAL FROM A DECISION OF MRS J
PIKE DATED 12 JUNE 2007**

DECISION

Introduction

1. This is an appeal against an interlocutory decision of the Hearing Officer, Mrs. J. Pike, dated 12 June 2007, in which she rejected an application for an extension of time for the applicant partnership to file evidence in opposition proceedings brought by Synergie SA.

Background

2. Application No. 2376138 is for the trade mark SYNERGY for a range of legal services in Class 42. The application was made on 20 October 2004 by Kathy Pavey and Julian Fidler (a partnership), who practise as solicitors under the name Synergy Employment Law.
3. At all times, the applicant firm was represented by Be, a firm of solicitors. Be originally provided the Registry with a London address, but later moved to Brighton, a move which led to some unfortunate consequences in this case. Be had submitted a Form TM33 recording its change of address on 25 May 2006.

However, it appears that the Registry did not update its file until receipt of Be's letter of 15 January 2007 mentioned below.

4. The application was published on 4 November 2005. Notice of opposition was filed against the application on 3 February 2006 by Synergie SA. The proceedings followed the usual course, with the filing of a Form TM8 and counterstatement in defence. A preliminary indication under rule 13B(4) was issued by the Registrar on 5 June 2006. The opponent filed a Form TM53 to continue the proceedings, and filed its evidence in chief on 28 September 2006. The Registry set the statutory time period for the applicant to file its evidence, which expired on 28 December 2006.
5. On 22 December 2006, Be filed a Form TM9 to request an extension of time of 3 months for filing the applicant's evidence to 28 March 2007. The reason given was:

“Our principal client has been unavailable throughout the period for evidence preparation on maternity leave. She hopes to return to work in the New Year and we have a conference with Counsel booked for January to progress this matter.”

No fee accompanied the form, apparently because Be had misread Form TM9, despite its explanatory footnotes, and thought no fee was needed. The Registry wrote to Be on 11 January 2007 regarding the lack of a fee. It sent this letter to Be's (old) London address. On 16 January 2007, Be filed the requisite fee of £50, together with a letter in which it pointed out that its address had changed to the Brighton address. The letter also made a number of comments about the completion of the applicant's evidence.
6. The Registry in a letter of 23 January 2007 (sent to the correct address) admitted the form as a retrospective request for an extension of time under rule 68(5). However, it was not satisfied that the reasons given for the request were sufficient to grant the extra time requested and the preliminary view given was that the request would be refused. Be responded in a letter dated 6 February 2007, attaching witness statements from each of the applicants,

relating only to the application for an extension of time. The letter made several additional points about the merits of the application for an extension of time, including that the opponent's evidence was only received on or about 20 October 2006 (although the evidence had been received in the Registry on 28 September 2006) due to it originally being sent to Be's London address. The delay meant that the opponent's evidence was received only a few days before Mrs Pavey, the partner dealing with the application, went on maternity leave. Be's letter of 6 February also set out the details of the steps then being taken to prepare the applicant's evidence in answer.

7. A hearing was requested if the preliminary view was to be maintained, and was arranged to be held by video conference link on Thursday 15 March 2007. In the event, it seems that this proved rather more complicated than anticipated. The applicants were represented by Mark Engelman of counsel, with his instructing solicitor in attendance also, but from a different location. The opponent was represented by Claire Lazenby. Mrs Pike wrote to the parties on the same day to give her decision and was then asked for a full decision. That decision, dated 12 June 2007, is the subject of the appeal.
8. A final factor is that on 14 March (i.e. the day before the hearing before Mrs Pike) copies of four witness statements made on behalf of the applicant firm, dealing with the substance of the opposition, were sent by Be to the Registry and to the opponent's agent by fax. The covering letter explained that as the exhibits to the witness statements were "weighty" they were being sent out by post on the same day. The witness statements were therefore filed within the 3 month extension period requested. On the other hand, the statements were not filed with form TM54, as they should have been.

The Hearing Officer's decision

9. Mrs Pike set out the history of the case in some detail. She then referred to section 68 of the Act, and in particular sub-section 68(5) which provides:

“(5) Where the request for extension is made after the time or period has expired, the registrar may, at her discretion, extend the period or

time if she is satisfied with the explanation for the delay in requesting the extension and it appears to her to be just and equitable to do so.”

10. The Hearing Officer continued:

“25. Rule 68(5) thus has two limbs which must be satisfied for an exercise of the Registrar’s discretion:

- (i) that the reasons for the delay in requesting the extension are satisfactory;
- (ii) that the Registrar deems it to be just and equitable to extend the time period.

In the present case, the first hurdle has been overcome. I therefore had to consider the merits or otherwise of extending the time, bearing in mind current jurisprudence on extension of time requests, the facts of this case itself and the lengthy submissions of

Mr Engelman and those of Ms Lazenby at the hearing before me.

26. I heard argument as to what ‘relevant circumstances’ should be taken into account. In context, Geoffrey Hobbs Q.C., sitting as the Appointed Person, said in *LIQUID FORCE*:

“...it is for the party in default to satisfy the court that despite his default, the discretion to extend time should nevertheless be exercised in his favour, for which purposes he could rely on any relevant circumstances.”

The relevant circumstances in this case are the late receipt of evidence from the opponent; the instructing applicant’s maternity leave; and the lack of resources suffered by her colleague, managing their small firm by himself in her absence.

27. The circumstances surrounding the late receipt of the opponent’s evidence are unfortunate ... The applicant’s representative did not inform the registry of the situation and did not ask for the time for its evidence in support to be re-started. Ms Pavey then went on maternity leave. What arrangements were made to deal with the dispute whilst her planned absence took place? It seems to me that little, if any, arrangements were made and that there was a conscious decision on

the part of the applicants to leave the whole matter until March when Ms Pavey planned to return to work. This is borne out by her witness statement ... in support of the extension request where she says, at paragraph 6:

“Even if the opponent’s evidence had been received on time, I would not have been able to give it due attention, given that during that period I had numerous external meetings and was out of the office on several days ...We asked for an extension until the end of March, as I am intending to return from maternity leave at the end of February and considered that I would therefore be able to deal with this during the month of March”.

... I find it surprising that time was spent putting over seven pages of documentary evidence together to support a request for time to file different documentary evidence. It seems to me that it would have been of more benefit to the applicants to have sent in seven pages of evidence in support of their trade mark application instead; showing that progress was being made towards the collation of evidence somewhat earlier than filing it the day before the hearing the following month.

28. There is clear practice guidance on the Office’s website regarding extension of time requests and the criteria to be applied. The Law Practice Direction on “Extensions of time in Inter Partes Proceedings” quotes from the case of *Dr Ghayasuddin Siddiqui v Dr M H A Khan as a nominee of the Muslim Parliament of Great Britain* SRIS O/481/00.

In that case, Simon Thorley QC, acting as the Appointed Person said:

“1. It must always be borne in mind that any application for an extension of time is seeking an indulgence from the tribunal. The Act and the rules lay down a comprehensive code for the conduct of opposition. The code presumes for a normal case and provides for it.

2. There is a public interest which clearly underlies the rules that oppositions and applications should not be allowed unreasonably to drag on.

3. In all cases the registry must have regard to the overriding objective which is to ensure fairness to both parties. Thus, it can grant an extension when the facts of the case merit it.

4. Accordingly, it must be incumbent on the application for the extension to show that the facts do merit it. In a normal case this will require the applicant to show clearly what he has done, what he wants to do and why it is that he has not been able to do it. This does not mean that in an appropriate case where he fails to show that he has acted diligently but that special circumstances exist an extension cannot be granted. However, in the normal case it is by showing what he has done and what he wants to do and why he has not done it that the registrar can be satisfied that granting an indulgence is in accordance with the overriding objective and that the delay is not being used so as to allow the system to be abused.

Jacob J made it clear in the SAW case that any perception that the registrar would grant extensions liberally was wrong and I take this opportunity to repeat that. In principle matters should be disposed of within the time limits set out in the rules and it is an exceptional case rather than the normal case where extensions will be granted.”

29. To my mind, the assertion of Ms Pavey that she was intending to deal with the matter in March 2007, three months after the expiry of the statutory period allowed, thereby doubling the time taken to file evidence, does not satisfy me (in Mr Thorley’s words) “that granting an indulgence is in accordance with the overriding objective and that the delay is not being used so as to allow the system to be abused”. It seems to me that the system was being abused. There was no progress made in that first three months which I regard as lack of diligence on the part of the applicants and their representative, Be. They did not

show what they had done in that first three months towards compiling evidence.

30. Crucially, within that period, Julian Fidler spoke with Claire Griffiths over the telephone on 19 December 2007. However, despite my asking at the hearing for details as to the substance of that conversation, no explanation was forthcoming. It is not permissible for me to press a party to make a better case for itself; it is up to the party to do that for itself. As Matthew Clarke Q.C., sitting as the Appointed Person said in *A.J. and M.A. Levy's Trade Mark* [1999] RPC 291 said at lines 19 to 25 ...:

“It seems to me that when an extension of three months has been granted it is incumbent upon the party to whom it has been granted to ensure that, if any other extension is to be sought, strong and compelling reasons for such an extension are put forward. When the matter is opposed and there has to be a hearing, it is, in my view, essential that the applicant makes the best case for a further extension at that hearing. If that is not done and matters are left on an equivocal or uncertain basis, then it seems to me that the applicant must live with the consequences of that.”

In my view, matters were left on an uncertain basis as to the substance of that conversation which took place within the time allowed for filing evidence in support of the application. As I have said earlier, I have to conclude that the only progress made was an agreement to ask for an extension of time by way of the Form TM9, which was filed on 22 December 2007. The reason given for the request was:

“Our principal client has been unavailable throughout the period for evidence preparation on maternity leave. She hopes to return to work in the New Year and we have a conference with Counsel booked for January to progress this matter.”

This does not meet the criteria of the applicants showing what they had done, what they wanted to do and why they had not been able to do it, as per the practice direction referred to above.

31. The consequences of leaving matters on such an uncertain basis are that I considered that there had been an abuse of process in the applicants' decision deliberately to leave the filing of evidence of use until six months after the statutory period allowed for that purpose had started, and three months after it had expired. The evidence for this deliberate tactic is Ms Pavey's statement of 6 February 2007. I balanced this against the late receipt of the opponent's evidence. However, I did not consider that the overriding objective of fairness to both parties and the justice of the case (a normal one) would be best served by reversing the preliminary view to refuse the retrospective application for an extension of time. I therefore refused to admit the evidence filed on 14 March 2007 into the proceedings."

The grounds of appeal

11. The basis of the appeal is, in brief, that Mrs Pike exercised her discretion in a way that was plainly wrong, unjust or unreasonable and, in particular:
 - (a) did not take certain relevant factors into account;
 - (b) made wrong findings of fact or misdirected herself on the law; and
 - (c) took account of factors which ought not to have been taken into account or gave them undue weight. This factor - it transpired at the hearing - was said to be more or less the combined effect of (a) and (b).

Standard of review

12. This appeal is a review of the Hearing Officer's decision. That decision with regard to each of the issues in this case involved a multi-factorial assessment of the kind to which the approach set out by Robert Walker LJ in *REEF TM* [2002] EWCA Civ 763, [2003] RPC 5 at [28] applies:

"In such circumstances an appellate court should in my view show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. A decision does not contain an error of principle merely because it could have been better expressed."

This has recently been further explained by Lindsay J in *Esure Insurance Limited v Direct Line Insurance Plc* [2007] EWHC 1557, 29 June 2007 who said, at paragraph 12:

“... an error of principle such as to justify or require departure from the decision below ... includes the taking into account of that which should not have been, the omission from the account of that which should have been within it and the case (explicable only as one in which there must have been error of principle) where it is plain that no tribunal properly instructing itself could, in the circumstances, have reasonably arrived at the conclusion that it reached.”

Merits of the appeal

13. It was common ground between the parties to this appeal that the extension of time sought fell properly under sub-section 68(5) (applications made after expiry of the relevant time limit) rather than under sub-section 68(2). The result is that the applicant bears a heavier burden of justifying the need for the extension of time. This was made clear by Mr Geoffrey Hobbs QC in *Ministry of Sound Recordings Limited*, O/136/03 where he held:

“The general discretion conferred by rule 68(1) is qualified in relation to requests made after the expiry of the 28 day period by rule 68(5) which provides that ‘the registrar may, at her discretion, extend the period or time if she is satisfied with the explanation for the delay in requesting the extension and it appears to her to be just and equitable to do so.’ The burden of justification thus appears to be heavier in relation to a party who applies for an extension after expiry of the relevant time limit than in the case of a party who applies pre -expiry.”

A further point made by Mr Hobbs QC in *Ministry of Sound* is

“... applicants should not proceed to a hearing without having previously foreshadowed in writing the reasons for their request for an extension of time and that an application which is not actually based on reasons intimated in a Form TM9 filed before expiry of the relevant time limit is liable to be regarded as an application under rule 68(5)

for an extension out of time. The remedy for those concerns is to insist upon the filing of a succinct but complete statement of case in support of an application for an extension of time and treat reliance on other substantive reasons as a notional request for amendment of the statement of case rather than impose artificial limitations on the scope of the exercise of discretion under rule 68 at any ensuing hearing.”

14. The Hearing Officer was referred to a number of authorities on extensions of time in proceedings in the Registry, to which she refers in paragraph 12 of the decision. Some of these related to previous rules and so cannot be completely equated to the position under rule 68, but it is plain that the principal guidance followed by the Hearing Officer was that set out in the Registry's practice direction – see paragraph 28 of her decision.

(a) Failure to take relevant factors into account

15. The applicant's first point on the appeal was that a number of factors were not considered by the Hearing Officer. Eleven such factors are listed in the grounds of appeal, but Miss Berkeley sensibly restricted her submissions at the hearing before me to the most significant of them. In general, I note that the Hearing Officer did not restrict her consideration of the merits of the application to the very limited matters set out in Form TM 9, but did consider the broader points raised in the subsequent correspondence, as well as the arguments made by counsel who then appeared on behalf of the applicant. In that respect it seems to me that she cannot be criticised, in the light of the passage I have cited above from the *Ministry of Sound* decision.
16. On the appeal, the applicant submitted that Hearing Officer failed to take account of the fact that the applicant had completed its substantive evidence by the day before the hearing. Counsel submitted that the fact that such evidence had been supplied by the date of the hearing and well within the extended time limit sought was an important factor to be taken into account. In this respect she referred me to *Liquid Force* at pages 438-9. The relevant passages in Mr Hobbs QC's judgment are

"... the registrar is reluctant to refuse an extension of time for the filing of evidence if the evidence is available to be filed when he comes to consider whether the requested extension of time should be granted" and

"... I consider that the natural reluctance of the registrar to refuse an extension of time for filing evidence which has belatedly come to hand cannot be elevated to the status of an invariable rule. In order to leave room for justice to be done I think it is necessary to recognise that a contested application for an extension of time to filed evidence should not necessarily "follow the event" (i.e. succeed if the evidence is available at the hearing of the application and fail if it is not) ... I nevertheless agree that these are important factors to be taken into account when deciding whether an extension of time should be granted or refused. In the present case the hearing officer took them into account without regarding them as determinative *per se*. I agree with that approach"

17. It is certainly fair to say that the fact that the evidence was filed on the eve of the hearing before Mrs Pike does not play a significant part in her reasoning. On the other hand, it is perfectly clear that she was well aware that the evidence had then been filed, and that the applicant was relying upon that fact (see the factors listed at p 8 of her decision). It was a point strongly emphasised in the skeleton argument lodged on behalf of the applicant, which I have seen. It is right that the evidence filed on 14 March was substantial, but as Ms Lazenby pointed out, there was no explanation as to why much of it was only sourced after expiry of the initial time period, nor as to why it took until 14 March to compile it, when the applicant had consulted counsel in early January. In the circumstances, and as the fact would not, in any event, have been determinative of the application, this does not seem to me to indicate that the Hearing Officer was plainly in error.
18. The next complaint was that the Hearing Officer did not give sufficient credit for the fact that this was the first request for an extension of time. That does

not seem to me to be a telling criticism of the decision. The Hearing Officer plainly had in mind the fact that it was a first extension, and her concern was whether the circumstances justified the indulgence sought. The fact that it was a "first indulgence" rather than a repeated indulgence does not seem to me to alter that fact.

19. Next, it was said that the Hearing Officer failed adequately to take account of the fact that there was no evidence that prejudice was suffered by the opponent by reason of the extension of time, because the opponent was not trading in the UK. It is not clear to me that this point was emphasised or relied upon by the applicant at the hearing before Mrs Pike, albeit she did summarise the opponent's position at page 6 of her decision. In the circumstances, it does not seem to me that this was an essential point which the Hearing Officer was plainly wrong not to consider.
20. Next, the applicant complained that insufficient consideration had been given to these facts: (i) that the evidence served by the opponent was received late and was substantial, (ii) that substantial work on the applicant's evidence was done in January 2007 (within three months from receipt of the opponent's evidence), whilst Mrs Pavey was still on maternity leave and (iii) that the applicant is a small business with limited resources and (iv) that the Hearing Officer failed to take into account the differing financial positions of the parties. Similarly, the applicant complains that insufficient weight was given to the important factor that the partner dealing with the matter at the applicant firm was going on maternity leave at almost exactly the same time that the evidence was received from the opponent, leaving her sole partner to manage the small firm by himself. I do not think that any of these are fair criticisms of the Hearing Officer's decision, for the reasons given in below.
21. In addition, the applicant relied upon a passage at page 438 of *Liquid Force* where Mr Hobbs QC said

"In the interests of legal certainty it is plainly desirable that valid applications for registration should succeed and valid objections to registration should be upheld without undue delay."

It was suggested that this implies that there is some public interest in ensuring that a potentially valid mark is successfully registered, and that this was a factor ignored by Mrs Pike. I do not accept that this is what Mr Hobbs QC meant. It seems to me that Mr Hobbs was referring to the public interest in decisions as to the validity of registrations being reached without undue delay, so that the Register is a reliable indication of whether an application or a mark is valid. That is how Mr Thorley put it in *Siddiqui* (point 2 of the 4-point test mentioned above). This point does not, therefore, in my view, aid the applicant's case and certainly cannot override the other factors to be taken into account in deciding whether to grant an extension of time.

(b) Wrong findings of fact or misdirection on law

22. The applicant submitted that the Hearing Officer was wrong to find that the way in which it had dealt with compiling its evidence and its application for an extension of time amounted to an abuse of process. It is certainly right that Mrs Pike did say that her view was that there was an abuse of process because there had been a deliberate decision to leave the filing of evidence until three months after expiry of the period allowed by the rules to do so. Mrs Pike's use of the phrase "abuse of process" arises, I think, out of *Siddiqui*, where Mr Thorley said "... in the normal case it is by showing what he has done and what he wants to do and why he has not done it that the registrar can be satisfied that granting an indulgence is in accordance with the overriding objective and that the delay is not being used so as to allow the system to be abused." Similarly, the applicant objected to Mrs Pike describing its behaviour as "a deliberate tactic" and there having been "a conscious decision" to leave the evidence until Mrs Pavey returned from maternity leave. It seems to me that these points do not demonstrate any misapplication of the law by the Hearing Officer. The emphasis should fall not on the label attached to the applicant's behaviour so much as on analysing whether the applicant provides

an acceptable explanation for its behaviour, and it is that aspect of her decision that I consider below.

23. Ms Lazenby submitted on the appeal that the essential issue was whether little or no activity during the statutory period for filing evidence may be “made up for” by later extensive activity. I think the central question is a little different, bearing in mind that there is a discretion to be exercised, and it is this: did the Hearing Officer err in the weight she placed on seeking a proper explanation for the lack of initial activity? In this respect, it seems me that there is still relevance in the decision of Jacob J in *R v Registrar of Trade Marks ex parte S.A.W. Company* [1996] R.P.C. 507, even though it was decided under previous rules, which shows that the onus is on the person applying for additional time to justify the extension sought and to explain any lack of activity during the term allowed by the rules for filing the evidence. That is the underlying reasoning of *Liquid Force* and *Siddiqui* too.
24. The Hearing Officer’s decision reflects her view that whilst she did not need to find that any work had been done on the preparation of the applicant’s evidence during the initial 3 month period, she did need to be persuaded that there was an adequate explanation as to why that was the case. That seems to me a perfectly appropriate approach to take to the exercise of the Registrar’s discretion under rule 68(5) in the light of the authorities, and especially bearing in mind Mr Thorley QC’s view in *Siddiqui* that a party’s failure to show that it has acted diligently will not preclude an extension being granted, where special circumstances are shown to exist.
25. By the end of October 2006, that is to say well within the initial 3 month period, the applicant and its advisors knew that Mrs Pavey was about to go on maternity leave, that the opponent’s evidence had been served late, and that such evidence was substantial and would take a significant amount of time to answer. Obviously, it also knew of the pressures which would fall upon Mr Fidler, in running the firm in Mrs Pavey’s absence. However, nothing seems to have been done at that stage either to start work on the evidence in answer

or, more particularly, to seek the extension of time which it seems that the applicant knew (or ought to have known) it would need. I note that in paragraph 5 of Mrs Pavey's witness statement of 6 February 2007, after mentioning the late receipt of the opponent's evidence, she said, "We understood that any evidence we wanted to serve in response had to be served by the end of December, although we were able to apply for an extension of time." Mrs Pike plainly thought that this proved that the applicants had understood the position, but had not been sufficiently diligent, because they apparently decided not to do any work *at all* on the evidence in answer until after the last minute application for additional time had been made. To that extent, I consider that she was perfectly entitled to find that there was a conscious decision to delay dealing with the applicant's evidence. Furthermore, I think that Ms Lazenby was right to say that the Hearing Officer did not put a great deal of emphasis on the fact that the applicant received the opponent's evidence later than it might have done, because the applicant did not emphasise the point itself. Had it done so, it would have made an early application to the Registry for an extension of time on that basis alone or would have mentioned this as a reason in its Form TM9. Equally, for this reason, I do not attach any weight to the applicant's argument that the proper test of diligence would have been to see what was done during the 3 month period after the applicant received the opponent's evidence.

26. It was also argued that the Hearing Officer failed to take into account the fact that the opponent's evidence was received by the applicant's solicitors some 3 weeks after it was filed at the Registry, so curtailing the applicant's time for its response. It does not seem to me that this is a valid criticism of the decision, indeed, this was the first point of significance listed by the Hearing Officer at paragraph 26 of the decision.
27. And, of course, the fact that the evidence was received late, so curtailing the applicant's time to respond, was known to it in October 2006. If the applicant had made its application for additional time at that point, when all of those

relevant facts were known to it and to its legal advisors, then the result would probably have been altogether different. Had a lengthy extension been refused, at least the applicant would have known that it had to get on with the preparation of its evidence. It seems to me that the applicant is paying the price of leaving its application for an extension of time to (and beyond) the last minute, despite having on its own evidence understood the requirements of the rules, because it could not demonstrate that it had done anything at all towards preparation of its evidence in the 3 months allowed by the rules. As it was, this particular reason for needing extra time was not even mentioned in the applicant's Form TM9.

28. The applicant's counsel emphasised that the applicant is a small business, such that Mrs Pavey's absence on maternity leave put real time pressure on Mr Fidler. However, as I have said, that does not seem to me to be a significant factor to which Mrs Pike failed to give adequate weight: the applicant is after all a firm of solicitors which could be expected to understand the need to comply with rules of this kind, as Mrs Pavey's evidence suggests that it did. It was, moreover, being professionally advised. Further, there is no suggestion that Mrs Pavey's absence on maternity leave commenced earlier than had been anticipated.
29. The applicant submitted that Mrs Pike placed undue weight upon a telephone conversation which took place on 19 December 2006 between Mr Fidler and the applicant's solicitor. It was suggested to me that Mrs Pike appeared to consider that the failure to explain the content of that conversation was significant in itself, whilst the applicant itself was not particularly seeking to rely upon that conversation. However, it seems to me that the Hearing Officer's interest in that conversation arose because she wondered whether it might indicate that steps had been "taken at that point to progress the applicants' evidence-gathering"; the applicant's evidence did not disclose that anything else was done *at all* in relation to the opposition during the 3 month period allowed by the rules. Had that conversation reflected the fact that some substantial work had actually been done by that date, her view of the

applicant's diligence might have been different. As it was, she came to the (to my mind) wholly reasonable conclusion that the conversation must only have concerned the application for an extension of time which was made on 22 December.

30. The applicant criticised Mrs Pike's reliance in paragraph 30 of her decision on a passage at p 292 of *A.J. and M.A. Levy's trade mark* [1999] R.P.C. 291, although I note that the authority had been drawn to her attention as part of the "relevant law" by its then counsel at the March 2007 hearing. It is true that the *Levy* case related to a second request for an extension of time and so differed significantly from this case. On the other hand, it seems to me that Mrs Pike relied upon it only so far as it indicates that an applicant for an extension of time ought not to leave matters on an equivocal basis, which she felt was the case in relation to the conversation on 19 December 2006. Whilst she did preface her remarks about it in paragraph 30 with the word "Crucially", in my view that was not because she found the lack of explanation about the contents of the conversation to be crucial, but because she considered that it was the only evidence before her as to any activity at all in the 3 months to 28 December.
31. The applicant argued that in seeking to show that it had acted diligently, it suffices to assess diligence in the round, rather than at any particular period. Whether or not that is correct, it seems to me that the Hearing Officer's conclusion was that the applicant's failure to show that it had done anything towards the preparation of its evidence prior to making its tardy application for an extension of time was enough to outweigh any subsequent diligence. It seems to me that she was entitled to reach that conclusion as part of the exercise of her discretion.
32. As a result, in the light of *Siddiqui*, the applicant needed to convince the Hearing Officer that special circumstances existed, such that she should exercise the discretion to extend time as sought. The lack of evidence showing that the applicant had taken steps towards the preparation of its evidence in

answer during the initial 3 month period might not have been decisive, had some sufficient explanation been given for that lack of progress. For the reasons I have set out above, it seems to me that the Hearing Officer cannot be said to have erred in concluding that the factors raised as “special circumstances” were not special enough to excuse the delay, so as to justify exercising the Registrar’s discretion in the applicant’s favour. I accept that another Hearing Officer might have reached the opposite conclusion on the facts, but where a decision depends upon balancing a variety of relevant considerations, there may be more than one “right” answer.

33. For these reasons, I am not satisfied that the exercise of the discretion in this case was plainly wrong. Accordingly, I dismiss the appeal.
34. I order the applicant to pay £750 to the opponent as a contribution towards its costs of the appeal, such costs to be paid within 28 days.

Amanda Michaels
21 December 2007

Miss Iona Berkeley (instructed by Messrs Be Legal) appeared on behalf of the applicant partnership.

Ms Claire Lazenby, Trade Mark Attorney, appeared on behalf of the opponent.