

1988 September 29

[CHRYSOSTOMIS, AG. J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

TOMS FOODS LIMITED,

*Applicants,*

THE REPUBLIC OF CYPRUS, THROUGH  
THE REGISTRAR OF THE TRADE MARKS,

*Respondent.*

*(Case No. 73174).*

*Trade marks—The Trade Marks Law, Cap. 268—Registrability—Judicial control—Principles applicable—"FIZZA" for beverages—Refusal on ground that it has a direct reference to the quality of the goods and that it may cause confusion—Reasonably open to the respondent.*

5 *Recourse for annulment—Facts relied upon by Administration—No complaint concerning them made by applicant—Presumption that they were correctly ascertained—Court will not raise ex proprio motu an issue concerning their correctness.*

The facts of this case need not be summarised.

10

*Recourse dismissed.*

*No order as to costs.*

*Cases referred to:*

*Easiman Photographic Materials Co. v. Comptroller-General of Patents, Designs and Trade Marks [1898] A.C. 571 H.L.;*

15

*HjiMichael and Others v. The Republic (1972) 3 C.L.R. 246;*

*Iacovides Enterprises v. The Republic* (1986) 3 C.L.R. 2101;

*Merck v. The Republic and another* (1972) 3 C.L.R. 548;

*White Horse Distillers Ltd. v. El Greco Distillers Ltd.* (1987) 3 C.L.R. 531.

## Recourse.

5

Recourse against the refusal of the respondent to register in Class 32 of Part A of the Register of Trade Marks of the trade mark "FIZZA" in respect of beverages.

*L. Christodoulides (Miss), for L. Papaphilippou*, for the applicants.

10

*S. Georghiades*, Senior Counsel of the Republic, for the respondent.

*Cur. adv. vult.*

CHRYSOSTOMIS Ag. J. read the following judgment. The Applicants are a company of limited liability registered in Cyprus and they are in the industry of dried nuts, vegetables and preparations of same.

15

On 17/11/73 the Applicants applied to the Respondent Registrar of Trade Marks for the registration in class 32 of part A of the Register of the trade mark "FIZZA" in respect of beverages (σιρόπια).

20

The Respondent Registrar acting through the Assistant Registrar of Trade Marks by his letter dated 17/12/73 informed the Applicants of his objections, to wit, that on the basis of the provisions of paragraph (d) of s. 11(1) of the Trade Marks Law, Cap. 268, the application could not be entertained because the proposed trade mark has direct reference to the character or quality of the goods and that it is not distinctive under s.11(1)(e). There

25

was also objection on the basis of s.13 of the Law. Furthermore, in the said letter it is stated that the word "FIZZA" is a minor variation of the word "FIZZ" which is defined in Webster's Dictionary as "an effervescent beverage, specifically a drink variously  
5 made of spirituous liquor carbonated water and lemon juice".

On 31/12/73 the Applicants through their advocate filed a considered reply pursuant to the provisions of Rule 32 of the Trade Marks Rules 1951. By their reply the Applicant submitted that the word "FIZZA" has no direct reference to the character or quality  
10 of the goods and they exclusively referred to Halsbury's Laws of England, 3rd Edn., Vol. 38, p. 521, paras. 864 and 865. Para. 864 reads as follows:

"Words having no direct reference. The introduction of the word 'direct' in the description of registrable words shows  
15 that the mere fact of words having some reference to the goods does not render them incapable of registration, and was intended to correct the tendency to find some commendatory or descriptive reference in any word that might be proposed, and to make it clear that a descriptive word may at the same time be  
20 distinctive. It allows the registration of a number of words really fitted to form the name of goods although they may suggest some object or quality of such goods. Whether a word has such a direct reference is largely a question of fact in each case. In deciding this question the tribunal has to examine the  
25 mark not in its strict grammatical significance but as it would represent itself to the public at large who are to look at it and to form a view as to what it connotes. A mark having an indirect reference to a quality of the goods is not necessarily deceptive because the owner might apply it to goods not having such  
30 quality."

Para. 865 refers to examples of words held to have no direct reference to the character and quality of the goods. From these examples, learned counsel for the Applicants referred to the words "Dustic" for adhesives, "Buster" for animal food, "Moto-  
35 rine" for lubricating oils and "Rosette" for face powder, and said

that these words were found not to have "direct" reference to the character and quality of the goods in spite of the facts that they had "some" reference to the goods, if the last syllable was omitted from those words.

As regards the issue of "distinctiveness", the Applicants referred to another extract from Halsbury's Laws of England, 3rd Edn., Vol. 38, para. 861, p. 520, to the effect that the telescoping of two dictionary words which are descriptive can produce an invented word, and for this purpose they referred to the word "Whiskeur" which is referred to at footnote "c" of that page. 5  
10

The Respondent Registrar through his Assistant by his letter dated 11/1/74, informed the Applicants that he reconsidered the application on the basis of the matters referred to in the considered reply, but it was not made possible for the application to be entertained and, consequently, his objection still stands. 15

The Respondent was not required by the Applicants to state in writing the grounds of his decision and the material used by him in arriving thereat. Instead, as a result of the Respondent's reply, the Applicants filed the present Recourse.

The grounds on which the Recourse is based are as follows: 20

- (1) The Respondent was wrong and/or acted under a misconception as regards the construction of the Trade Marks Law, Cap. 268, and, in particular, as regards the meaning of the phrase "...direct reference to the character or quality of the goods..." referred to in s.11(1)(d). 25
- (2) The Respondent was wrong in finding that the proposed trade mark had direct reference to the character or quality of the goods.
- (3) The Respondent wrongly decided that the proposed trade mark lacks distinctiveness. 30

(4) The Respondent wrongly decided that the proposed trade mark is not an invented word.

5 By his written address learned counsel for the Applicants relied on his considered reply and he submitted that the contents thereof correctly sum up the law applicable to this case. He also said that the "article, the subject of these proceedings, is a powder known in the island as 'FIZZA' which, with the addition of water, becomes effervescent, and is drank as a refreshment".

10 Learned counsel for the Respondent referred to the discretion the Registrar has got and cited Halsbury's Laws of England, 3rd Edn., Vol. 38, p.518, para. 859. He also submitted that the proposed trade mark is not an invented word and he cited *Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs and Trade Marks* [1898] A.C. 571 H.L. He further stated that the proposed trade mark has direct reference to the character of the goods, that it is likely to deceive or cause confusion and that it is not distinctive. As regards the use of the word "FIZZA" in Cyprus, he said that this word is widely used here, to denote a refreshment in the form of an effervescent powder also known as "Afroza".

25 Although both Counsel referred to the use and the understanding of the proposed trade mark in Cyprus, nevertheless the Respondent in his letter dated 17/12/73 (Exh. 1) did not refer to such use but he only confined himself to the meaning of the word as defined in Webster's Dictionary. Of course, the Court was not afforded the opportunity to see a statement of the grounds of the sub judice decision, as the Applicants did not invoke the procedure under s. 19(4).

30 Be that as it may, the Applicants do not complain that the Respondent failed to take this factor into consideration in taking the sub judice decision or that it was not open to him to reach his sub judice decision as he had not carried out a due inquiry. In the circumstances, the Court cannot consider this aspect on its own motion, as the Applicants never raised it, and thus it must be pre-

sumed that the administrative Authority made a correct ascertainment of the facts about which there is no complaint and evaluated same correctly. Such a presumption, of course, is rebuttable but as I said, in this case this issue was not raised. (Vide *Koumis Hji Michael and others v. The Republic* (1972) 3 C.L.R. 246 at p. 252). Also, useful reference may be made to Michael Dendias on Administrative Law 1965, Vol. 3, at p. 329 where the following is to be found:

"Β' Απόδειξις της περί τα πράγματα πλάνης. Η περί τα πράγματα πλάνη δεν ελέγχεται υπό του δικαστού αυτεπαγγέλτως, αλλά μόνο εφ' όσον επικαλείται την ύπαρξιν αυτής ο προσφεύγων· κατά τεκμήριον δηλ. το ενηργήσαν διοικητικόν όργανον θεωρείται, ότι εξηκρίβωσε τα πραγματικά περιστατικά και εξετίμησεν αυτά ορθώς. Ούτω ο δικαστής δεν εισέρχεται εις έρευναν τυχόν υφισταμένης πλάνης περί τα πράγματα, εάν ο προσφεύγων δεν προβάλλει ταύτην, ότε ούτος μεν βαρείται διά της αποδείξεως αυτής, ο δε δικαστής ελέγχει εις εκάστην συγκεκριμένην περίπτωση την 'υλικότητα' (matérialité) των επικαλουμένων υπό του προσφεύγονος προς κατάδειξιν της πλάνης γεγονότων ή καταστάσεων."

(Also, vide M. Stasinopoulos on the Law of Administrative Acts 1951, p.306).

As regards the issue of administrative discretion, a useful reference may be made to the case of *Iacovides Enterprises v. The Republic* (1986) 3 C.L.R. 2101, where Stylianides, J. said, at p. 2106:

"The evaluation of the facts is within the discretionary power of the administrative Authority. An administrative Court can only interfere if there exists an improper use of the discretionary power or a misconception concerning the factual situation or the non-taking into account of material factors."

Also, in the case of *Merck v. The Republic and another* (1972)

3 C.L.R. 548, A. Loizou, J. (as he then was ) referred to the discretion of the Registrar of Trade Marks and said at p. 564 the following:

5 "To my mind, the Registrar in exercising his discretion, is not limited to any particular type of consideration. He must exercise it judicially on reasonable grounds which are capable of being clearly stated. He has to examine the possible confusions or difficulties which might arise in consequence of the registration of the trade mark or the possible impairment of the rights of other traders to do that which, apart from the registration, might be their ordinary mode of carrying on their business.

10

The point, therefore, that arises for consideration, is the extent to which this Court will interfere with the exercise of administrative discretion. This matter has been the subject of judicial pronouncement in a number of cases (See, inter alia, *Jacovos Jacovides v. The Republic* (1969) 3 C.L.R. page 212, *Impalex Agencies Ltd. v. The Republic* (1970) 3 C.L.R. 361, and *Psaras v. The Ministry of Commerce and Industry* (1971) 3 C.L.R. 151). This Court will not interfere with such a discretion if due weight has been given to all material facts, it has not been based on a misconception of law or fact and it was not exercised in excess or abuse of power."

15

20

In the case of *White Horse Distillers Ltd. v. El Greco Distillers Ltd.* (1987) 3 C.L.R. 531, the approach of our Supreme Court as to when the Court should interfere with an administrative decision regarding registrability of a trade mark, was reviewed by the Full Bench and Triantafyllides, P. had this to say at p. 534:

25

"It is the well established approach of our Supreme Court, on the basis of the principles governing the exercise of its jurisdiction as an administrative Court in the first instance and on appeal, that it does not interfere with an administrative decision regarding the registrability of a trade mark if such decision was reasonably open to the Registrar of Trade Marks and does not

30

substitute its own evaluation in the place of that of the Registrar."

The burden of proving the aforementioned grounds on which this Recourse is based, lies on the Applicants. I have considered the material before me, the grounds of objection of the Respondent, the arguments advanced and the aforementioned legal position. The Applicants have failed to persuade me that the sub judice decision was erroneous and I hold the view that all the objections of the Respondent were reasonably open to him and that he exercised his discretion properly in the circumstances. The word "FIZZA" is not distinctive nor an invented word, and it has direct reference to the character of the goods and is likely to lead to deception or confusion.

In the result, this Recourse fails and is hereby dismissed with no order as to costs.

*Recourse dismissed.  
No order as to costs.*