JUDGMENT OF THE COURT (Second Chamber)

2 October 2008 *

In Case C-144/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 11 March 2007,

K-Swiss Inc., established in West Lake Village (United States), represented by H.E. Hübner, advocate,

appellant,

the other party to the proceedings being:

Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), represented by O. Mondéjar Ortuño, acting as Agent,

defendant at first instance,

* Language of the case: English.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, K. Schiemann, J. Makarczyk (Rapporteur) and P. Kūris, Judges,

Advocate General: Y. Bot,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 10 April 2008,

after hearing the Opinion of the Advocate General at the sitting on 8 May 2008,

gives the following

Judgment

1 In this appeal, K-Swiss Inc. ('K-Swiss') asks the Court of Justice to set aside the order of the Court of First Instance of the European Communities of 14 December 2006 in Case T-14/06 *K-Swiss* v *OHIM (Parallel stripes on a shoe)* ('the order under appeal'),

by which that Court dismissed as inadmissible its action against the decision of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) of 26 September 2005 (Case R 1109/2004-1; 'the disputed decision') concerning registration of a trade mark in the form of five parallel stripes placed on the side of a representation of a shoe.

Legal context

2 Article 63(5) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) provides that actions against decisions of the Boards of Appeal of OHIM must be brought before the Court of First Instance within two months of the date of notification of the decision of the Board of Appeal.

3 In accordance with Article 102(2) of the Rules of Procedure of the Court of First Instance, the prescribed time-limits are to be extended on account of distance by a single period of 10 days.

4 Rule 61(1) and (2) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation No 40/94 (OJ 1995 L 303, p. 1), as amended by Commission Regulation (EC) No 1041/2005 of 29 June 2005 (OJ 2005 L 172, p. 4), ('Regulation No 2868/95') provides:

‘1. In proceedings before [OHIM], notifications to be made by [OHIM] shall take the form of transmitting the original document, an uncertified copy thereof or a computer print-out in accordance with Rule 55, or, as concerns documents emanating from the parties themselves, duplicates or uncertified copies.

2. Notifications shall be made:

(a) by post in accordance with Rule 62;

(b) by hand delivery in accordance with Rule 63;

(c) by deposit in a post box at [OHIM] in accordance with Rule 64;

(d) by telecopier and other technical means in accordance with Rule 65;

(e) by public notification in accordance with Rule 66.'

5 Paragraphs 1 and 3 of Rule 62 of Regulation No 2868/95 provide:

'1. Decisions subject to a time-limit for appeal, summonses and other documents as determined by the President of [OHIM] shall be notified by registered letter with advice of delivery. All other notifications shall be by ordinary mail.

...

3. Where notification is effected by registered letter, whether or not with advice of delivery, this shall be deemed to be delivered to the addressee on the 10th day following that of its posting, unless the letter has failed to reach the addressee or has reached him at a later date. In the event of any dispute, it shall be for [OHIM] to establish that the letter has reached its destination or to establish the date on which it was delivered to the addressee, as the case may be.'

6 Finally, Rule 68 of Regulation No 2868/95 provides:

'Where a document has reached the addressee, if [OHIM] is unable to prove that it has been duly notified, or if provisions relating to its notification have not been observed, the document shall be deemed to have been notified on the date established by [OHIM] as the date of receipt.'

The action before the Court of First Instance and the order under appeal

7 By application lodged at the Registry of the Court of First Instance on 16 January 2006, K-Swiss brought an action against the disputed decision.

8 By separate document lodged at the Registry of the Court of First Instance on 3 April 2006, OHIM raised an objection of inadmissibility, in accordance with Article 114(1) of the Rules of Procedure of the Court of First Instance.

9 Considering that it had sufficient information from the documents in the file, the Court of First Instance, by the order under appeal, gave a decision on that objection without taking further steps in the proceedings and dismissed the action brought by K-Swiss as inadmissible.

10 In paragraphs 22 to 30 of the order, the Court of First Instance explained its decision as follows:

'22 The Court notes that, as the applicant submits, the delivery of the [disputed] decision by an express courier service, such as DHL, is not included in the means of notification provided for in Rule 61(2) of Regulation No 2868/95. Moreover, it must be held that neither OHIM nor the applicant, which indeed expressly submits that delivery by DHL does not constitute notification by post, claims that the DHL delivery to the applicant on 28 October 2005 was sent in the form of a registered letter or, moreover, that DHL is able to send such letters in Germany or, finally, that the contested decision was notified to the applicant by one of the other means provided for in Rule 61(2) of Regulation No 2868/95 and in Rules 62 to 66 of that regulation. In that respect, it is important, moreover, to point out that the covering letter attached to the DHL delivery to the applicant does not in any way indicate that it is a registered letter, but states that that delivery is "[n]otified by DHL only".

23 It follows from the foregoing that the [disputed] decision was not notified to the applicant in accordance with the requirements of Rules 61 and 62 of Regulation No 2868/95.

24 Contrary to the applicant's assertions, however, that fact is not capable of leading to the conclusion that the present action was brought within the prescribed period.

25 It must be borne in mind that, in accordance with Rule 68 of Regulation No 2868/95, entitled "Irregularities in notification", "[w]here a document has reached the addressee, if [OHIM] is unable to prove that it has been duly notified, or if provisions relating to its notification have not been observed, the document shall be deemed to have been notified on the date established by [OHIM] as the date of receipt".

26 That provision, taken as a whole, must be construed as affording to OHIM the possibility of establishing the date on which a document reached its addressee, if it is not possible to prove due notification or the provisions relating to its notification have not been observed; OHIM must be entitled therefore to attach to that proof the legal effects of due notification (Joined Cases T-380/02 and T-128/03 *Success-Marketing* v *OHIM — Chipita* (*PAN & CO*) [2005] ECR II-1233, paragraph 64).

27 In the present case, it is common ground that the applicant received the DHL [courier] on 28 October 2005, as is attested, moreover, by the monitoring document [track report] held by the Registry of the Boards of Appeal.

28 Pursuant to Rule 68 of Regulation No 2868/95, the [disputed] decision is therefore deemed to have been notified to the applicant on 28 October 2005, with the result that the presumption laid down in Rule 62(3) of Regulation No 2868/95 does not apply in the present case. This is also in compliance with Rule 70(2) of Regulation No 2868/95, which provides "[w]here that procedural step is a notification, the event considered [to set time running] shall be the receipt of the document notified, unless otherwise provided". Similarly, according to settled case-law concerning the fifth paragraph of Article 230 EC, in the event that the contested measure has been notified to its addressee, the period within which proceedings must be brought begins to run on the day of receipt by that addressee (see, to that effect, Case T-12/90 *Bayer* v *Commission* [1991] ECR II-219, paragraph 19, confirmed on appeal in Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619).

29 Under those circumstances, and given that, in accordance with Article 63(5) of Regulation No 40/94, an action must be brought before the Court within two months of the date of notification of the decision of the Board of Appeal, extended on account of distance by a single period of 10 days, pursuant to Article 102(2) of the Rules of Procedure, the period within which proceedings against the [disputed] decision had to be brought expired on 9 January 2006.

30 The present action, which was brought on 16 January 2006, is therefore out of time and must be dismissed as inadmissible.'

Forms of order sought

11 By its appeal, the applicant claims that the Court should:

— set aside the order under appeal;

— order OHIM to pay the costs.

12 OHIM contends that the Court should:

— dismiss the appeal as unfounded;

— order K-Swiss to pay the costs.

The appeal

13 In support of its appeal, the appellant puts forward a single plea alleging infringement of Rules 61, 62 and 68 of Regulation No 2868/95.

Arguments of the parties

14 Even though K-Swiss acknowledges that the disputed decision was delivered to it by express courier dispatched by DHL on 28 October 2005, it nevertheless submits that it has to be established whether that delivery must be treated as having been effected

by registered letter with advice of delivery within the meaning of Rule 62(1) of Regulation No 2868/95.

15 In this respect, the appellant states that, in functional terms, proof of delivery furnished by an express courier service provider, such as DHL, is identical to the proof of posting provided in relation to a registered letter with advice of delivery, the only difference being that the DHL service does not provide for an advice of delivery to be returned to the sender.

16 K-Swiss also states that OHIM has changed its practice regarding notification of the decisions of its Boards of Appeal, and that it is apparent from the instructions given by the Presidium of the Boards of Appeal to the Registry of OHIM on 10 May 2006 that, where notification of such decisions is effected by post, that notification is to be made either by registered letter or by courier service. It cannot be envisaged that OHIM would have deliberately adopted a method of notification intended to bring about a form of notification that was irregular for the purposes of Rule 68 of Regulation No 2868/95.

17 Although it contends that the appeal should be dismissed, OHIM argues that the Court of First Instance could not apply Rule 68 of Regulation No 2868/95, on the ground that notification by express courier does not constitute an irregularity in notification. It submits that notification of decisions of the Boards of Appeal by express courier must be treated as notification by post, in accordance with the provisions of Rule 62 of Regulation No 2868/95.

18 By contrast, OHIM submits that the presumption which is laid down in paragraph 3 of that Rule, according to which notification by post is deemed to be delivered to the addressee on the 10th day following that of its posting, may be waived when there is evidence of the actual date of delivery of the notification. Consequently, OHIM

states that, in this case, the period within which proceedings against the disputed decision had to be brought expired on 9 January 2006. Therefore, the Court of First Instance came to the right solution by dismissing the action as inadmissible, but did so by wrongly applying the relevant provisions of Regulation No 2868/95.

Findings of the Court

19 Rule 61 of Regulation No 2868/95, headed 'General provisions on notifications', gives an exhaustive list of the means by which OHIM is to notify, inter alia, its decisions. Thus, paragraph 2 of that rule states that notifications are to be made by post, by hand delivery, by deposit in a post box at OHIM, by telecopier or other technical means or by public notification.

20 In addition, where notification is by post, Rule 62(1) of that regulation provides that decisions subject to a time-limit for appeal, such as the disputed decision, are to be notified by registered letter with advice of delivery.

21 In paragraph 22 of the order under appeal, the Court of First Instance noted that the parties did not claim that the express DHL delivery to the appellant had been sent in the form of a registered letter or that DHL was able to send registered letters in Germany, and that the covering letter attached to that delivery did not indicate that it was a registered letter, but stated that that delivery was '[n]otified by DHL only'.

22 Consequently, the Court of First Instance rightly concluded that such notification did not constitute notification 'by registered letter with advice of delivery' within the meaning of Rule 62(1) of Regulation No 2868/95.

23 However, contrary to OHIM's contention, where OHIM is unable to prove that a document has been duly notified, or if provisions relating to its notification have not been observed, but that document has reached the addressee, it follows from Rule 68 of Regulation No 2868/95, which the Court of First Instance was right to apply, that OHIM may produce proof of the date of receipt and that the document is deemed to have been notified on that date.

24 Thus, the Court of First Instance correctly held that the action brought by K-Swiss on 16 January 2006 was out of time and should be dismissed as inadmissible.

25 After observing, in paragraph 27 of the order under appeal, that it was common ground that the appellant had received the express DHL delivery on 28 October 2005, the Court of First Instance held, in paragraph 29 of that order, that, having regard to the provisions of its Rules of Procedure and Article 63(5) of Regulation No 40/94, the period within which proceedings against the disputed decision had to be brought had expired on 9 January 2006.

26 It follows from all the foregoing considerations that the appeal must be dismissed as unfounded.

Costs

27 Under Article 69(2) of the Rules of Procedure, applicable in appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since OHIM has applied for costs and the appellant has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. Dismisses the appeal;

2. Orders K-Swiss, Inc. to pay the costs.

[Signatures]