Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

4 June 2013 *

(Community trade mark — Opposition proceedings — Application for Community word mark BETWIN — Earlier Community figurative mark b'Twin — Relative ground for refusal — Likelihood of confusion — Article 8(1)(b) of Regulation (EC) No 207/2009)

In Case T-514/11,

i-content Ltd Zweigniederlassung Deutschland, established in Berlin (Germany), represented by A. Nordemann, lawyer,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by P. Bullock, acting as Agent,

defendant,

the other party to the proceedings before the Board of Appeal of OHIM being

Decathlon SA, established in Villeneuve-d'Ascq (France),

ACTION brought against the decision of the First Board of Appeal of OHIM of 30 June 2011 (Case R 1816/2010-1), relating to opposition proceedings between Decathlon SA and i-content Ltd Zweigniederlassung Deutschland,

THE GENERAL COURT (Third Chamber),

composed of O. Czúcz (Rapporteur), President, I. Labucka and D. Gratsias, Judges,

Registrar: E. Coulon,

having regard to the application lodged at the Court Registry on 28 September 2011,

having regard to the response lodged at the Court Registry on 29 November 2011,

having regard to the written questions put to OHIM by the Court and the reply to those questions, lodged at the Court Registry on 4 October 2012,

having regard to the applicant's observations on that reply, lodged at the Court Registry on 30 October 2012,

* Language of the case: English.

having regard to the fact that no application for a hearing was submitted by the parties within the period of one month from notification of closure of the written procedure, and having therefore decided, acting upon a report of the Judge-Rapporteur and pursuant to Article 135a of the Rules of Procedure of the Court, to give a ruling without an oral procedure,

gives the following

Judgment [1]

[omissis]

Forms of order sought

12 The applicant claims that the Court should:

— annul the contested decision;

— reject the opposition;

— order OHIM to pay the costs.

13 OHIM contends that the Court should:

— dismiss the action in its entirety;

— order the applicant to pay the costs.

Law

[omissis]

The application for alteration

78 With respect to the applicant's head of claim that the Court should reject the opposition, it must be borne in mind that the power of the Court to alter decisions pursuant to Article 65(3) of Regulation No 207/2009 does not have the effect of conferring on the Court the power to carry out an assessment on which the Board of Appeal concerned has not yet adopted a position. Exercise of the power to alter decisions must therefore, in principle, be limited to situations in which the Court, after reviewing the assessment made by the Board of Appeal, is in a position to determine, on the basis of the matters of fact and of law as established, what decision the Board of Appeal was required to take (Case C-263/09 P *Edwin* v *OHIM* [2011] ECR I-5853, paragraph 72).

79 In the present case, the conditions for the exercise of the Court's power to alter decisions as set out in the judgment in *Edwin* v *OHIM* are satisfied. It is apparent from the considerations set out in paragraphs 67 to 77 above that the Board of Appeal was required to find that, contrary to the view of the Opposition Division, there was no likelihood of confusion in respect of the goods in Class 28 corresponding to the following description: 'inflatable swimming pools for recreational use; jungle gyms (play equipment); stuffed plush animals; swimming pools [toys]; air pistols [toys], hand-held

1 — Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

electronic video games; toy vehicles; toy models; electronic hand-held game units; counters for games; checkers [games]; playground apparatus; mechanical action toys; playthings, except playthings for pets; electronic games; toy balloons; dice; novelties for parties, dances (party favours); hand-held electronic games; game cards; pinball-type games; cups for dice; printing toys; question sets for board games; bingo card; model aircraft; skittles; dominoes; decorative wind socks; pinball machines; skill and action games; parlour games; slot machines, automatic; pinball machines (coin or non-coin operated); scale model aeroplanes; card games; flying disks; playing balls; games; cups for dice; dolls; skittles (games); remote-control vehicles (toys); quoits; darts; clay pigeon traps; scale-model vehicles; sledges; slot machines, automatic; chess; toy masks; puzzles; stuffed toys; hand-held computer games; darts; toy aircraft; tossing disc toys; clay pigeons (targets); tappets; teddy bears; hand-held video games; electronically-operated toy motor vehicles; battery operated toys; gaming chips; targets; stuffed toy bears; inflatable toys; board games; swings; kites; model cars'. Consequently, it is necessary, by way of alteration of the contested decision, to annul the Opposition Division's decision of 21 July 2010 and to reject the opposition in relation to the abovementioned goods.

Costs

[omissis]

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Annuls the decision of the First Board of Appeal of OHIM of 30 June 2011 (Case R 1816/2010-1) so far as concerns the goods in Class 28 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, corresponding to the following description: 'inflatable swimming pools for recreational use; jungle gyms (play equipment); stuffed plush animals; swimming pools [toys]; air pistols [toys], hand-held electronic video games; toy vehicles; toy models; electronic hand-held game units; counters for games; checkers [games]; playground apparatus; mechanical action toys; playthings, except playthings for pets; electronic games; toy balloons; dice; novelties for parties, dances (party favours); hand-held electronic games; game cards; pinball-type games; cups for dice; printing toys; question sets for board games; bingo card; model aircraft; skittles; dominoes; decorative wind socks; pinball machines; skill and action games; parlour games; slot machines, automatic; pinball machines (coin or non-coin operated); scale model aeroplanes; card games; flying disks; playing balls; games; cups for dice; dolls; skittles (games); remote-control vehicles (toys); quoits; darts; clay pigeon traps; scale-model vehicles; sledges; slot machines, automatic; chess; toy masks; puzzles; stuffed toys; hand-held computer games; darts; toy aircraft; tossing disc toys; clay pigeons (targets); tappets; teddy bears; hand-held video games; electronically-operated toy motor vehicles; battery operated toys; gaming chips; targets; stuffed toy bears; inflatable toys; board games; swings; kites; model cars';**

2. **So far as concerns the goods mentioned in Article 1, annuls the Opposition Division's decision of 21 July 2010 and rejects the opposition;**

3. **Dismisses the action as to the remainder;**

4. **Orders each party to bear its own costs.**

Czúcz Labucka Gratsias

Delivered in open court in Luxembourg on 4 June 2013.

[Signatures]