Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

10 June 2015 *

(Community trade mark — Opposition proceedings — Application for Community word mark AGRI.CAPITAL — Earlier Community word marks AgriCapital and AGRICAPITAL — Relative ground for refusal — No similarity between the services — Article 8(1)(b) of Regulation (EC) No 207/2009)

In Case T-514/13,

AgriCapital Corp., established in New York (United States), represented by P. Meyer and M. Gramsch, lawyers,

applicant,

v

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

defendant,

the other party to the proceedings before the Board of Appeal of OHIM, intervener before the General Court, being

agri.capital GmbH, established in Münster (Germany), represented by A. Nordemann-Schiffel, lawyer,

ACTION brought against the decision of the Second Board of Appeal of OHIM of 10 July 2013 (Case R 2236/2012-2), relating to opposition proceedings between AgriCapital Corp. and agri.capital GmbH,

THE GENERAL COURT (Eighth Chamber),

composed of D. Gratsias, President, M. Kancheva (Rapporteur) and C. Wetter, Judges,

Registrar: J. Weychert, Administrator,

having regard to the application lodged at the Court Registry on 23 September 2013,

having regard to the response of OHIM lodged at the Court Registry on 17 December 2013,

having regard to the response of the intervener lodged at the Court Registry on 6 January 2014,

having regard to the reply lodged at the Court Registry on 24 April 2014,

* Language of the case: English.

further to the hearing on 10 December 2014,

gives the following

Judgment

Background to the dispute

1 On 4 June 2009 the intervener, agri.capital GmbH, filed an application for registration of a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) under Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

2 The mark for which registration was sought is the word sign AGRI.CAPITAL.

3 The services in respect of which registration was sought are, following the restriction made during the proceedings before OHIM, inter alia, in Classes 36 of the Nice Agreement of 15 June 1957 concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, as revised and amended, and correspond to the following description: 'Building promoter services, namely in particular in connection with installations for generating and distributing electrical and thermal energy from renewable energy sources; development of usage concepts (facility management contracting); management of buildings; management of land; real estate management and brokerage, rental and leasing of real estate (facility management); real estate affairs; leasing of farms; The aforesaid services not in connection with publishing and/or published products.'

4 The Community trade mark application was published in *Community Trade Marks Bulletin* No 59/2009 of 14 December 2009.

5 On 12 March 2010, the applicant, AgriCapital Corporation, filed a notice of opposition, under Article 41 of Regulation No 207/2009, against registration of the trade mark applied for in respect of all the services in Class 36.

6 The opposition was based on the following earlier Community marks:

— the Community word mark AgriCapital, registered on 24 August 2007 under number 6192322;

— the Community word mark AGRICAPITAL, registered on 7 July 2006 under number 4589339.

7 The services in respect of which the earlier Community word mark AgriCapital was registered are in Class 36 and correspond to the following description: 'financial services; financial consultancy'.

8 The services in respect of which the earlier Community word mark AGRICAPITAL was registered are also in Class 36 and correspond to the following description: 'consulting and investment banking services for companies in agricultural sector'.

9 The grounds relied on in support of the opposition were those set out in Article 8(1)(b) of Regulation No 207/2009.

10 By decision of 2 October 2012, the Opposition Division of OHIM rejected the opposition on the ground that the services covered by the trade mark application and those covered by the earlier trade marks in Class 36 were different, so that one of the conditions for the application of Article 8(1)(b) of Regulation No 207/2009, namely that the services must be identical or similar, was not satisfied.

11 On 3 December 2012 the applicant filed an appeal with OHIM, under Articles 58 to 64 of Regulation No 207/2009, against the decision of the Opposition Division.

12 By decision of 10 July 2013 ('the contested decision'), the Second Board of Appeal of OHIM dismissed the appeal and ordered the applicant to pay EUR 850 by way of costs incurred by the defendant in the opposition and appeal proceedings before OHIM. In particular, it held that the relevant public was the average consumer in all Member States of the European Union. It nevertheless considered that he or she was likely to exercise a high degree of attention in view of the considerable amount of money involved in financial or real estate transactions. It then compared the services covered by the trade mark applied for, included in Class 36, with those for which the earlier trade marks were registered. After making that comparison it reached the conclusion that the services in Class 36 covered by the trade mark applied for and those covered by the earlier trade marks were dissimilar. It therefore considered that as one of the criteria for the application of Article 8(1)(b) of Regulation No 207/2009 was not satisfied there was no likelihood of confusion between the trade mark applied for and the earlier trade marks within the meaning of that provision.

Forms of order sought

13 The applicant claims that the Court should:

— annul the contested decision;

— order OHIM to pay the costs.

14 OHIM and the intervener contend that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

Admissibility of the documents produced by the applicant at the hearing

15 At the hearing the applicant requested that the Court give it leave to produce an e-mail dated 21 October 2014 that had been sent to it by a conference organiser in order to show that, in the trade mark sought, the full stop placed between the terms 'agri' and 'capital' did not suffice to remove the likelihood of confusion between the mark sought and the applicant's earlier mark, AgriCapital.

16 OHIM contended that that document was inadmissible, arguing that it had been produced too late and that, consequently, neither OHIM nor the Court had been able to take it into account.

17 The Court took note of the document at the hearing, while reserving its decision as to the admissibility thereof.

18 In that regard, it must be held that that document, produced for the first time before the Court may not be taken into consideration. The purpose of actions before the General Court is to review the legality of decisions of the Boards of Appeal of OHIM for the purposes of Article 65 of Regulation No 207/2009, so it is not the Court's function to review the facts in the light of documents produced for the first time before it. Accordingly, the abovementioned document must be excluded, without it

being necessary to assess its probative value (see, to that effect, judgment of 24 November 2005 in *Sadas* v *OHIM — LTJ Diffusion (ARTHUR ET FELICIE)*, T-346/04, ECR, EU:T:2005:420, paragraph 19 and case-law cited).

Substance

19 In support of its action, the applicant raises a single plea in law, alleging infringement of Article 8(1)(b) of Regulation No 207/2009.

20 The applicant complains, in essence, that the Board of Appeal held that there was no similarity between the services in Class 36 covered by the trade mark applied for and the services covered by the earlier trade marks. It contends in particular that, according to case-law, when assessing the similarity of services it is necessary to take into account, inter alia, whether they are in competition with each other or are complementary, and their distribution channels. In the present case, the Board of Appeal, first, disregarded the complementarity between 'building promoter services', 'real estate management and brokerage services' and 'development of usage concepts', covered by the trade mark applied for, and 'financial services' and 'consulting and investment banking services for companies in agricultural sector', covered by the earlier trade marks and, second, wrongly discounted the fact that those services may be provided through the same distribution channels. The applicant maintains, therefore, that, in view of the degree of distinctiveness of the earlier marks, and the visual similarity and phonetic identity of the trade marks at issue, the Board of Appeal infringed Article 8(1)(b) of Regulation No 207/2009 in concluding that there was no likelihood of confusion between those marks, within the meaning of that provision.

21 At the outset, it should be noted that Article 8(1)(b) of Regulation No 207/2009 provides that, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered if, because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks, there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected. The likelihood of confusion includes the likelihood of association with the earlier trade mark.

22 According to settled case-law, the risk that the public may believe that the goods or services in question come from the same undertaking or from economically-linked undertakings constitutes a likelihood of confusion. According to that same line of case-law, the likelihood of confusion must be assessed globally according to the relevant public's perception of the signs and the goods or services in question, taking into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the signs and that of the goods or services designated (see judgment of 9 July 2003 in *Laboratorios RTB* v *OHIM — Giorgio Beverley Hills (GIORGIO BEVERLEY HILLS)*, T-162/01, ECR, EU:T:2003:199, paragraphs 30 to 33 and case-law cited).

23 That global assessment implies some interdependence of the factors taken into account, in particular of the similarity of the marks and that of the goods or services covered. Accordingly, a low degree of similarity between those goods or services may be offset by a high degree of similarity between the marks, and vice versa (judgments of 13 September 2007 in *Il Ponte Finanziaria* v *OHIM*, C-234/06 P, ECR, EU:C:2007:514, paragraph 48, and *GIORGIO BEVERLY HILLS*, paragraph 22 above, EU:T:2003:199, paragraph 32).

24 For the purposes of applying Article 8(1)(b) of Regulation No 207/2009, a likelihood of confusion presupposes both that the marks at issue are identical or similar and that the goods or services which they cover are identical or similar. Those conditions are cumulative (see judgment of 22 January 2009 in *Commercy* v *OHIM — easyGroup IP Licensing (easyHotel)*, T-316/07, ECR, EU:T:2009:14, paragraph 42 and case-law cited).

25 The question whether the Board of Appeal was correct to hold that there was no likelihood of confusion between the marks at issue must be examined in the light of those considerations.

The relevant public

26 According to the case-law, in the global assessment of the likelihood of confusion, account should be taken of the average consumer of the category of goods concerned, who is reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (see judgment of 13 February 2007 in *Mundipharma* v *OHIM — Altana Pharma (RESPICUR)*, T-256/04, ECR, EU:T:2007:46, paragraph 42 and case-law cited).

27 The Board of Appeal of OHIM held in paragraph 16 of the contested decision that the services designated by the marks at issue are intended for an average consumer in all the Member States of the European Union, but that he or she was likely to exercise a higher degree of attention in view of the considerable sums of money involved in financial or real estate transactions.

28 The parties do not dispute the definition of the relevant public adopted by the Board of Appeal of OHIM in the contested decision. Furthermore, having regard to the considerations that are set out in the decision, there is no need to put that definition at issue again in the present case. In particular, as regards banking, financial and real estate services that generally involve substantial sums of money, it must be held that the public concerned will have a high level of attention (see, to that effect, judgment of 9 September 2011 in *BVR* v *OHIM — Austria Leasing (Austria Leasing Gesellschaft m.b.H. Mitglied der Raiffeisen-Bankengruppe Österreich)*, T-197/10, EU:T:2011:455, paragraph 20).

The comparison of the services at issue

29 It must be recalled that, in assessing the similarity of the goods or services concerned, all the relevant features of the relationship between them should be taken into account, including, inter alia, their nature, their intended purpose, their method of use and whether they are in competition with each other or are complementary (judgment of 29 September 1998 in *Canon*, C-39/97, ECR, EU:C:1998:442, paragraph 23). Other factors may also be taken into account, such as, for example, the distribution channels of the services concerned (see, to that effect, judgment of 21 April 2005 in *Ampafrance* v *OHIM — Johnson & Johnson (monBeBé)*, T-164/03, ECR, EU:T:2005:140, paragraph 53).

30 In that regard, it should be recalled at the outset that, for the purposes of comparing the services covered by the earlier marks with the services covered by the mark sought, the Board of Appeal of OHIM divided those services into three groups, namely, first, 'Building promoter services, in particular in connection with installations for generating and distributing electrical and thermal energy from renewable energy sources; the aforesaid services not in connection with publishing and/or published products', second, the services of 'real estate management and brokerage, rental and leasing of real estate (facility management); real estate affairs; leasing of farms; the aforesaid services not in connection with publishing and/or published products', third, services for the 'development of usage concepts (facility management contracting); management of buildings; management of land; the aforesaid services not in connection with publishing and/or published products'.

31 It must be held that that division reflects a difference in the nature, intended purpose and method of use between the services covered by the mark sought and that is not disputed by the applicant. Therefore, it is necessary to examine only whether the Board of Appeal of OHIM correctly held that there was no similarity between the services covered by the mark sought, as the Board of Appeal has grouped them, and the services covered by the earlier marks.

– The lack of similarity between ‘real estate management and brokerage services’ and ‘financial services’

32 In paragraphs 23 to 28 of the contested decision, the Board of Appeal of OHIM first defined ‘real estate affairs’ as comprising the management of real estate, real estate agency and the evaluation of real estate properties, as well as the consultancy and provision of information thereto. Those services consist, principally, according to the Board of Appeal of OHIM, of finding a property, presenting it to potential buyers and acting as an intermediary, for example, by providing assistance not only in the purchasing, selling or leasing of a property, but also in negotiating contracts between a buyer and a seller of a building or land. That also includes, according to the Board of Appeal of OHIM, the leasing of farms, as a broader category, as a lease is a contract by which property is conveyed to a person for a specified period, usually for rent. The Board of Appeal also stated that ‘real estate affairs’ might also extend to buying real estate and reselling it for a profit.

33 The Board of Appeal of OHIM then found that the ‘financial services’, which it defined in the preceding paragraph, were provided by banks and financial institutions, whilst ‘real estate affairs’ were activities typically carried out by real estate agents or real estate developers. The Board also found that those services were heavily regulated and, in many cases, had to be carried out by different entities. The Board concluded that consumers would perceive real estate agents as being clearly separate from banks, financial institutions and insurance companies, which offered different products and services, which were not substitutable.

34 The Board of Appeal of OHIM finally held that although ‘real estate affairs’ required financing, that was not enough to show that there was a close link between them and ‘financial services’, and that they had, ultimately, only a remote and indirect relationship. In that regard, the Board stated that ‘it is true that financial advice may be needed for many types of purchases (for example, when buying a property or setting up in business) and careful purchasers may seek information on insuring the purchase or venture but that does not mean that one is essential for the other or that consumers would think that responsibility for the respective services lies with the same provider’.

35 The Board of Appeal concluded that the services of ‘real estate management and brokerage, rental and leasing of real estate (facility management); real estate affairs; leasing of farms; the aforesaid services not in connection with publishing and/or published products’ covered by the mark sought were dissimilar to ‘financial services’ covered by the applicant’s earlier marks.

36 The applicant complains that the Board of Appeal of OHIM concentrated on the fact that real estate management and brokerage services and financial services cannot be substituted for one another, without examining whether they are complementary. In that regard, it argues that the Board of Appeal of OHIM’s definition of financial services is too narrow. It contends, in particular, that it is common practice for banks and financial institutions to offer real estate for sale, either themselves or via a subsidiary. Evidence of this is the joint advertising of both types of services. It follows that, contrary to what the Board of Appeal held, ‘real estate management and brokerage services’ are closely linked to ‘financial services’ and, hence, complementary.

37 OHIM contests the applicant’s arguments.

38 In that regard, first, it has already been held, as regards the nature, intended purpose and method of use of the services at issue, that financial services do not have the same nature, the same intended purpose or the same method of use as real estate services. Whereas financial services are provided by financial institutions for the purposes of the management of their clients’ funds and consist of, inter alia, the holding of deposited funds, the remittance of funds, the granting of loans or of various financial operations, real estate services are services connected with a property, namely, in particular,

the lease, the purchase, the sale or the management of a property (judgment of 11 July 2013 in *Metropolis Inmobiliarias y Restauraciones* v *OHIM — MIP Metro (METRO)*, T-197/12, EU:T:2013:375, paragraph 42).

39 It follows that, contrary to the applicant's submissions, the Board of Appeal of OHIM did not define the 'financial services' covered by the earlier mark too narrowly.

40 Second, it must be observed that, as has been held in paragraph 34 above, the Board of Appeal of OHIM did not merely examine whether the services of 'real estate affairs' and 'financial services' are substitutable for one another, but in fact proceeded to examine their complementarity.

41 Furthermore, it should be noted that, in support of its argument as to the complementarity of the services at issue, the applicant alleges merely that the sale of real estate is a service which is often offered by financial institutions.

42 However, as has also already been held, as regards the fact that the services covered might be found in the same distribution channels, it must be held that real estate services are not, in principle, provided on the same premises as financial services (judgment in *METRO*, paragraph 38 above, EU:T:2013:375, paragraph 43).

43 The documents produced by the applicant in the course of the administrative proceedings (annex A5 to the application) do not disprove that finding, since real estate services carried out by financial institutions are provided by separate branches, so that the financial services are separate from any real estate services (judgment in *METRO*, paragraph 38 above, EU:T:2013:375, paragraph 45).

44 It follows that the Board of Appeal of OHIM did not err in law in finding that the services of 'real estate management and brokerage, rental and leasing of real estate (facility management); real estate affairs; leasing of farms; the aforesaid services not in connection with publishing and/or published products' covered by the mark sought were dissimilar to the 'financial services' covered by the applicant's earlier marks.

– The lack of similarity between 'building promoter services' and 'financial services'

45 In paragraphs 19 to 21 of the contested decision, the Board of Appeal of OHIM held that building promoter services were multifaceted businesses encompassing activities ranging from the renovation of existing buildings to the purchase of 'raw' land and the sale of improved land or parcels to others. The Board also held that it was clear from the wording of the specification of the application for a Community trade mark, that the services concerned specifically installations for generating and distributing electrical and thermal energy from renewable energy sources.

46 By contrast, the Board of Appeal of OHIM held that the financial services covered by the earlier marks consisted of the provision of all those services for savings or commercial purposes concerning the receiving, lending, exchanging, investing and safeguarding of money, issuing of notes and carrying out other financial operations. The Board of Appeal of OHIM also stated that while the providers of services covered by the earlier marks might provide services related to financing and building projects and that many projects in the field of agribusiness depended on financial investments or support, it was highly unlikely that those providers would offer specific building promoter services as such services would require specialised technical expertise or particular knowledge. On that basis, the Board concluded that the services at issue were different in their nature and intended purpose.

47 The Board of Appeal of OHIM also held that the services at issue fell within two different sectors, namely, the real estate sector, on the one hand, and the financial sector, on the other hand, and that they would not be provided by the same undertaking or by related undertakings and would not share the same distribution channels.

48 The applicant submits, in essence, that there is a similarity between building promoter services covered by the mark sought and financial services covered by the applicant's earlier marks.

49 According to the applicant, the building promoter services covered by the mark sought includes marketing activity that has an overlap with financial services, such as those covered by the applicant's earlier marks. That is apparent from the practice of building promoters, whose activities involve seeking finance and frequently obtaining for their clients advice as to the financing of real estate projects.

50 The applicant submits that, in any event, the services covered by the marks at issue have, at least, a close link of complementarity, as is demonstrated both by the fact that undertakings providing financial services engage in real estate brokerage, either themselves or through their subsidiaries, and by the very wording of the explanatory note to Class 36.

51 Furthermore, the applicant maintains, contrary to OHIM's submissions, that building promoter services, such as those covered by the mark sought, are not restricted solely to the field of 'installations for generating and distributing electrical and thermal energy from renewable energy sources'. The applicant adds that, in any event, such a restriction would not have any consequence as to the existence of a similarity between the services designated by the mark sought and those covered by the earlier mark AGRICAPITAL, in so far as those services enable, in the same way, real estate to be provided on which installations for the production of energy from renewable energy sources may be built and operated.

52 OHIM and the intervener dispute the applicant's arguments.

53 In that regard, it must be observed that, as the Board of Appeal of OHIM rightly stated, building promoter services encompass many activities ranging from the renovation of existing buildings to the purchase of 'raw' land and the sale of improved land or parcels to others.

54 That activity involves, as the applicant submits, the seeking of finance by the building promoter for the purpose of the acquisition of buildings or land. However, seeking financing cannot be considered to be a financial service directly provided by the building promoter to its clients, equivalent to brokerage. The seeking of finance by the building promoter is intended only to enable that promoter to support, in the first instance, the cost of the purchase of buildings to be renovated or land to improve, before it can, at a later stage, pass on that cost to the clients to whom it will sell the real estate improved under a programme of construction or renovation.

55 Although, as the applicant asserts, it is common for building promoters to offer their clients advice regarding the financing of their purchase in the context of the marketing of building programmes, such advice cannot be assessed as being financial advice, such as that covered by the applicant's earlier marks. Such advice is akin to that which any seller of property of a certain value, such as, for example, a boat, a business or a work of art, might set out for its clients regarding the financial interest that they could have in acquiring the property in question. The seller who furnishes such advice does not, however, offer a financial service.

56 Moreover, it must be held that the evidence produced by the applicant in the course of the administrative proceedings to support the submission consists of copies of webpages of an investment company specialising in property, a property loans broker and a building society, which lack any link with the services of a building promoter (annex A4 to the application).

57 It is also necessary to reject the applicant's argument regarding the existence of a close link of complementarity between the services covered by the marks at issue.

58 In that regard, it should be borne in mind that, according to settled case-law, goods or services are complementary where there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that consumers may think that the responsibility for the production of those goods or provision of those services lies with the same undertaking (see judgment of 9 April 2014 in *Comsa* v *OHIM — COMSA (COMSA)*, T-144/12, EU:T:2014:197, paragraph 44 and case-law cited).

59 That implies that complementary goods or services can be used together, which presupposes that they are intended for the same public (see, to that effect, judgment of 12 July 2012 in *Hand Held Products* v *OHIM — Orange Brand Services (DOLPHIN)*, T-361/11, EU:T:2012:377, paragraph 48 and case-law cited).

60 In the present case, building promoter services, covered by the mark sought, and financial services, covered by the applicant's earlier marks, are both intended for the average consumer in EU territory and can be used together by that consumer.

61 Furthermore, there is no doubt that, having regard to the considerable sums generally involved in property transactions, financial services are important for the average consumer from the point of view of the use of building promoter services. Nevertheless, it must be observed that, in a market economy, a substantial portion of activities require financing or investment, with the result that financial services might, by their nature, be associated with the majority of those activities and not only with the activities of a building promoter (see, to that effect, judgement in *METRO*, paragraph 38 above, EU:T:2013:375, paragraphs 47 to 49).

62 Therefore, it must be held that the link between building promoter services and financial services is not, in itself, sufficiently close to lead the relevant public, namely, in the present case, the average consumer who might exercise a particularly high degree of attention, to think that those services are provided by the same undertaking (see, to that effect, judgment in *METRO*, paragraph 38 above, EU:T:2013:375, paragraph 50).

63 Nor can that conclusion be called into question by the applicant's argument that the services of a building promoter are provided through the same distribution channels as the financial services covered by the earlier marks. It must be held that the services provided by a building promoter are not, in principle, provided in the same premises as financial services. Furthermore, it must be observed that the documents produced by the applicant in the course of the administrative proceedings in support of that argument do not relate to the activity of a building promoter (annex A5 to the application).

64 That conclusion also cannot be called into question by the applicant's submission that the close link of complementarity between the services of a businessman in the property sector and financial services is apparent from the explanatory note to Class 36. A straightforward reading of the explanatory note to Class 36 leads to the finding that, while the services of 'property leasing' and 'services of realty administrators of buildings, i.e., services of letting or valuation or financing' fall within Class 36, they are sub-headings separate from that in respect of 'services relating to financial and monetary affairs', which includes, inter alia, 'services of all the banking establishments, or institutions connected with them', 'services of credit institutions other than banks', and 'services of brokers dealing in shares and property', with the result that the explanatory note to Class 36 is not capable of establishing a close link between the financial services covered by the earlier marks and building promoter services covered by the mark sought.

65 Moreover, it must be recalled that, under Rule 2(4) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1), 'the classification of goods and services shall serve exclusively administrative purposes' and, therefore, 'goods and services may not be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification, and goods and services may not be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification'.

66 It follows that the Board of Appeal of OHIM did not err in law in finding that the services of 'real estate management and brokerage, rental and leasing of real estate (facility management); real estate affairs; leasing of farms; the aforesaid services not in connection with publishing and/or published products' covered by the mark sought were, by their nature, dissimilar to the financial services covered by the applicant's earlier marks.

67 Having regard to that finding, it is not necessary to examine the applicant's complaint alleging the incorrect limitation of the intended purpose of the services covered by the mark sought.

– The lack of similarity between the services of 'development of usage concepts' and 'financial services'

68 The applicant maintains that the services of 'development of usage concepts' are as close to 'financial services' as they are to 'building promoter services', in so far as, according to the applicant, developing and managing real estate are two aspects of the same activity, which both require financial consultancy and financing solutions. The applicant merely refers, therefore, to the same arguments as it put forward concerning the similarity between 'building promoter services' and 'financial services'.

69 Those arguments having already been rejected in paragraphs 45 to 67 above, the Court can only find, in the absence of arguments specific to the services of 'development of usage concepts', that the applicant has failed to demonstrate that the Board of Appeal of OHIM had erred in law in finding that there was no similarity between those services and the 'financial services' covered by the applicant's earlier marks.

70 Having regard to the foregoing considerations, it must be held that the Board of Appeal of OHIM did not err in law in finding that the services covered by the applicant's earlier marks were not similar to the services in respect of which the registration of the mark AGRI.CAPITAL was sought.

The distinctive character of the applicant's earlier marks and the similarity of the signs at issue

71 In the contested decision, the Board of Appeal of OHIM held that one of the criteria for the application of Article 8(1)(b) of Regulation No 207/2009, namely the similarity between the services, was not satisfied and, consequently, there could not be a likelihood of confusion, without examining either the distinctive character of the earlier marks or the similarity between the signs at issue.

72 The applicant submits that any difference between the services covered by the mark sought and the earlier marks might be offset, in the context of a global assessment, by the high degree of visual similarity and the phonetic identity of those marks, with the result that, contrary to the Board of Appeal of OHIM's finding, there was a likelihood of confusion between the marks at issue within the meaning of Article 8(1)(b) of Regulation No 207/2009.

73 OHIM and the intervener dispute the applicant's arguments.

74 In that regard, it suffices to observe that, as has been stated at paragraph 24 above, under Article 8(1)(b) of Regulation No 207/2009 the likelihood of confusion on the part of the public in the territory on which the earlier mark is protected must be assessed having regard to cumulative circumstances, namely, the similarity or identity of the marks at issue, on the one hand, and the similarity or identity of the goods or services covered respectively by those marks, on the other.

75 Therefore, contrary to the applicant's submission, the lack of similarity between the services covered by the earlier marks and those in respect of which registration of the mark AGRI.CAPITAL is sought, found in paragraph 70 above, cannot be offset for the purposes of the assessment of the likelihood of confusion, by the similarity, even if that were of a high degree, between the marks at issue (see, to that effect, order of 9 March 2007 in *Alecansan* v *OHIM*, C-196/06 P, EU:C:2007:159, paragraphs 24 to 26).

76 In the light of all the foregoing considerations, the Board of Appeal of OHIM did not err in law in finding, having regard to the lack of similarity between the services designated by the marks at issue, that one of the criteria for the application of Article 8(1)(b) of Regulation No 207/2009 was not satisfied and, consequently, that there could not be a likelihood of confusion between those marks.

77 It follows that the applicant's single plea in law is unfounded and, therefore, the action must be dismissed.

Costs

78 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has been unsuccessful, it must be ordered to pay, in addition to its own costs, those incurred by OHIM and the intervener, in accordance with the forms of order sought by those parties.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders AgriCapital Corp. to pay the costs.

Gratsias Kancheva Wetter

Delivered in open court in Luxembourg on 10 June 2015.

[Signatures]