JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

24 November 2005 *

In Case T-3/04,

Simonds Farsons Cisk plc, established in Mrieħel (Malta), represented by M. Bagnall, I. Wood, Solicitor, and R. Hacon, Barrister,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by A. Folliard-Monguiral, acting as Agent,

defendant,

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

* Language of the case: English.

Spa Monopole, compagnie fermière de Spa SA/NV, established in Spa (Belgium), represented by L. de Brouwer, E. Cornu, É. De Gryse and D. Moreau, lawyers,

ACTION brought against the decision of the First Board of Appeal of OHIM of 4 November 2003 (Case R 996/2002-1) concerning opposition proceedings between Simonds Farsons Cisk plc and Spa Monopole, compagnie fermière de Spa SA/NV,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. Vilaras, President, E. Martins Ribeiro and K. Jürimäe, Judges,

Registrar: B. Pastor, Deputy Registrar,

having regard to the application lodged at the Registry of the Court of First Instance on 6 January 2004,

having regard to the response lodged at the Registry of the Court of First Instance on 15 April 2004,

having regard to the response of the intervener lodged at the Registry of the Court of First Instance on 19 April 2004,

further to the hearing on 22 February 2005,

gives the following

Judgment

Background

1 On 16 June 2000, the intervener applied to the Office for Harmonisation in the Internal Market (OHIM) for the registration of a Community trade mark pursuant to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended.

2 The trade mark for which registration was sought is the figurative sign reproduced below:



The goods in respect of which registration was sought fall within Classes 29 and 32 of the Nice Agreement concerning the Classification of Goods and Services for the

Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following descriptions for each of those classes:

— Class 29: 'Fruit pulp';

— Class 32: 'Mineral and aerated waters and other non-alcoholic drinks containing fruit juice; non-alcoholic fruit drinks; non-alcoholic fruit extracts, fruit juices, syrups and other preparations based on fruit, fruit extracts or fruit pulp for making beverages'.

3 The application was published in *Community Trade Marks Bulletin* No 6/2001 of 8 January 2001.

4 On 30 January 2001, the applicant filed a notice of opposition pursuant to Article 42 of Regulation No 40/94 against registration of the Community trade mark sought. The opposition was based on Community trade mark No 427237 consisting of the word sign KINNIE ('the earlier mark'), which was applied for on 25 November 1996 and registered on 7 April 1999. The goods covered by that mark are in Class 32 of the Nice Agreement and correspond to the following description: 'non-alcoholic drinks; preparations for making beverages'.

5 The opposition was directed against all of the goods claimed in the trade mark application. The ground relied on in support of the opposition was that referred to in Article 8(1)(b) of Regulation No 40/94.

6 By decision No 2880/2002 of 27 September 2002, the Opposition Division of OHIM upheld the opposition on the ground that there was a likelihood of confusion between the mark applied for and the earlier mark on the part of the public in the European Union because the signs are similar and because the goods concerned are identical or very similar.

7 On 27 November 2002, the intervener filed a notice of appeal at OHIM pursuant to Articles 57 to 62 of Regulation No 40/94 against the decision of the Opposition Division.

8 By decision of 4 November 2003, as corrected by corrigendum of 10 November 2003 ('the contested decision'), the First Board of Appeal annulled the decision of the Opposition Division. The Board of Appeal found, in essence, that although the goods concerned were either identical or nearly identical, the signs were visually, phonetically and conceptually dissimilar, thus excluding any likelihood of confusion.

Forms of order sought

9 The applicant claims that the Court should:

— annul the contested decision;

— uphold Decision No 2880/2002 of 27 September 2002 of the Opposition Division;

— order OHIM to reject the intervener's Community trade mark application;

— order OHIM and/or the intervener to bear the costs of the opposition proceedings, the proceedings before the Board of Appeal, and the present proceedings before the Court.

10 OHIM contends that the Court should:

— declare the applicant's fourth head of claim inadmissible to the extent that it seeks a decision from the Court ordering OHIM to bear the costs of the opposition proceedings;

— dismiss the remainder of the application;

— order the applicant to bear the costs.

11 The intervener claims that the Court should:

— dismiss the action;

— order the applicant to bear the costs.

Law

Admissibility

12 By its second and third heads of claim, the applicant requests the Court to uphold Decision No 2880/2002 of the Opposition Division and to order OHIM to reject the intervener's Community trade mark application.

13 It should be recalled that Article 63(6) of Regulation No 40/94 requires OHIM to take the measures necessary to comply with the judgment of the Community courts. Accordingly, the Court of First Instance cannot issue directions to OHIM. It is for OHIM to draw the appropriate inferences from the operative part of this judgment and the grounds on which it is based. The applicant's second and third heads of claim are therefore inadmissible (Case T-163/98 *Procter & Gamble* v *OHIM (BABY-DRY)* [1999] ECR II-2383, paragraph 53, and Case T-34/00 *Eurocool Logistik* v *OHIM (EUROCOOL)* [2002] ECR II-683, paragraph 12).

Substance

14 The applicant puts forward two pleas in law in support of its action for annulment, the first alleging infringement of Article 8(1)(b) of Regulation No 40/94, the second alleging infringement of Article 73 of that regulation.

The first plea: infringement of Article 8(1)(b) of Regulation No 40/94

— Arguments of the parties

15 First, the applicant claims that the Board of Appeal did not give sufficient weight to the phonetic and visual similarities between the signs in question. Moreover, it believes that, since the signs at issue have no meaning, no conceptual comparison between them is possible.

16 As regards the phonetic comparison, the applicant asserts that the words 'kinnie' and 'kinji' will be pronounced in a very similar way in several Community languages. In Swedish, Danish and Dutch the letter 'j' is pronounced exactly like the English letter 'y'. According to the applicant, contrary to the assertions of the Board of Appeal, the signs are therefore phonetically similar.

17 With regard to the visual comparison, the applicant claims that, where a sign consists of both verbal and figurative elements, it is the verbal element which must be considered to be dominant. It adds that the Board of Appeal erred in finding that there was no close similarity between the verbal elements of the signs apart from the first letters 'kin'. According to the applicant, the remaining letters in the two word elements 'kinji' and 'kinnie' possess similar shapes. It adds that, even as regards the visual comparison, the manner in which the words are pronounced cannot be ignored. Thus, when viewing the two signs, the average consumer, in particular one who speaks Swedish, Danish or Dutch, would recall, imperfectly, the phonetic names of the goods but not the shape of the letters used to spell their names. As such, the signs KINJI and KINNIE would therefore appear, even visually, very closely similar.

18 In addition, the applicant complains that the Board of Appeal gave too much weight to several graphic features of the mark applied for, such as the raccoon symbol and the style of writing the verbal element 'kinji' in letters shaped like bamboo sticks. In so doing the Board of Appeal acted in a manner contrary to the case-law of the Court, according to which the greatest weight should be given to the word in a figurative mark. Further, the applicant is of the opinion that the words 'by SPA' would be ignored by the majority of consumers.

19 Moreover, the applicant complains that the Board of Appeal did not take sufficient account of the fact, first, that the goods are identical or closely similar and, secondly, that the earlier mark, as a purely invented word, has a highly distinctive character.

20 So far as concerns the assessment of the likelihood of confusion, the applicant complains that the Board of Appeal wrongly based the contested decision on the premiss that the relevant consumer is likely to purchase the goods in question in supermarkets and other retail outlets in which he will be able to visually inspect the goods and their associated trade marks before purchase. According to the applicant, the goods in question will generally be sold either in retail outlets or in bars and restaurants.

21 With regard to sales occurring in bars and restaurants, the applicant claims that, contrary to the Board of Appeal's contention, consumers will generally order the goods orally, by their brand name, and the drinks may be sold without the consumer being at any time able to view the trade mark in question. Relying on Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 28, the applicant submits that it is possible that mere phonetic similarity between trade marks may create a likelihood of confusion.

22 With regard to sales in supermarkets, the applicant claims that, although the average consumer will be able to inspect the goods, the Board of Appeal failed to take into account the fact that the consumer will only rarely have the chance to make a direct comparison between the different marks and must place his trust in the imperfect picture of them he has kept in his mind.

23 OHIM does not deny that the goods at issue in the present case are either identical or virtually identical, but claims that the visual and conceptual differences between the signs preclude any likelihood of confusion.

24 With regard to the visual aspect of the signs, OHIM observes that they are different for the reasons set out in the contested decision.

25 With regard to the conceptual comparison of the signs at issue, OHIM states that the figurative component of the mark applied for and the bamboo-like font used for the word 'kinji' constitute distinguishing features which convey the idea of an exotic cartoon character, a raccoon of the same name. That association is likely to be perceived by the consumer whereas, in contrast, the earlier mark is meaningless. According to OHIM, the fact that one of the marks at issue has a semantic content whereas the other does not is sufficient to conclude that the signs are conceptually different.

26 With regard to the phonetic comparison, OHIM accepts that, contrary to the Board of Appeal's findings in the contested decision, the public in certain Member States may perceive a phonetic similarity between the conflicting marks. Nevertheless, OHIM adds that that is not sufficient to vitiate the legality of the contested decision, given that the degree of phonetic similarity between the signs is outweighed by their visual and conceptual dissimilarities in such a way that no likelihood of confusion exists, even if one assumes that the earlier mark is endowed with the highest possible degree of distinctiveness.

27 In that respect, OHIM submits that the degree of phonetic similarity between the two marks is of less importance in the case of goods which are marketed in such a way that, when making a purchase, the target public usually perceives the mark visually. That is the case for the applicant's goods.

28 OHIM contends that, even in bars and restaurants, the bottles are generally displayed on shelves behind the counter in such a way that consumers are able to examine them. Moreover, even if bars and restaurants are not negligible distribution channels for the sale of non-alcoholic drinks containing fruit juice, those channels are still negligible in terms of volume of sales in comparison with the sales made in supermarkets.

29 The intervener repeats, essentially, the arguments stated by the Board of Appeal in the contested decision. It submits that the signs are visually, phonetically and conceptually different.

30 With regard to the visual comparison, the intervener adds that, given the reputation of its mark in the Benelux countries, the words 'by SPA' attract consumers' attention and exclude any likelihood of confusion as to the origin of the goods in question.

31 With regard to the phonetic comparison, the intervener asserts that even in countries where the letter 'j' is pronounced like the English letter 'y', the word mark KINNIE is pronounced with a longer final suffix, which is sufficient to differentiate phonetically the signs at issue.

— Findings of the Court

32 Under Article 8(1)(b) of Regulation No 40/94, 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'.

33 According to settled case-law, the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion. According to the same line of case-law, the likelihood of confusion must be assessed globally, in accordance with the relevant public's perception of the signs and of the goods and services in question, and taking into account all factors relevant to the circumstances of the case. That global assessment implies some interdependence between the factors taken into account and, in particular, similarity between the trade marks and between the goods or services covered. Accordingly, a lesser degree of similarity between the goods or services covered may be offset by a greater degree of similarity between the marks, and vice versa (see Case T-162/01 *Laboratorios RTB* v *OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)* [2003] ECR II-2821, paragraphs 30 to 33, and the case-law cited therein).

34 In this case, it should be noted that, given that the earlier mark is a Community mark, the territory to be taken into account to assess the likelihood of confusion is that of the whole of the European Community.

35 Moreover, given that the goods in question are everyday consumer goods, the target public is made up of average European consumers who are reasonably well informed and reasonably observant and circumspect.

36 It is in the light of the foregoing considerations that the comparison between the goods concerned and between the signs must be made.

37 As regards the comparison between the goods, the goods covered by the mark applied for and those covered by the earlier mark are either similar or identical, which is not disputed by the parties.

38 So far as concerns the comparison of the signs, it is settled case-law that the global appreciation of the likelihood of confusion must, as regards the visual, phonetic or conceptual similarity of the marks in question, be based on the overall impression given by those marks, bearing in mind, in particular, their distinctive and dominant components (Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 23, and *Lloyd Schuhfabrik Meyer*, cited above, paragraph 25).

39 A comparison must therefore be made of the visual, phonetic and conceptual aspects of the signs.

40 In respect of the visual comparison, the Board of Appeal took the view that the strong verbal element 'kinji' and the graphic features and additional textual elements of the mark applied for serve to visually differentiate between the two marks (paragraph 18 of the contested decision).

41 It should be noted that the mark applied for is a compound sign made up of figurative and verbal elements. That compound sign contains the word 'kinji' written in bold stylised script in the form of bamboo sticks with the words 'by SPA' below in smaller characters, under the figurative element of a jumping raccoon wearing a T-shirt bearing the name 'kinji'. It is clear that the graphic characteristics of the sign applied for, namely the cartoon figure of a raccoon, the stylisation of the letters which make up the main verbal element and the words in small characters 'by SPA' are particularly eye-catching and attract the attention of the consumer and thus play a part in visually differentiating the two signs, as pertinently remarked by the Board of Appeal (paragraph 18 of the contested decision).

42 The earlier mark, by contrast, is a word mark with no particular graphic or figurative features.

43 The Board of Appeal also rightly noted, in paragraph 18 of the contested decision, that there is no close similarity between the strong verbal element of the intervener's sign and that of the applicant's sign, apart from the first three letters 'kin'. As OHIM also rightly indicates, the two verbal elements concerned have different lengths, their respective endings '-nie' and '-ji' are visually distinct and the doubling of the letter 'n' in the earlier mark is particularly striking. Moreover, the use of a compound font in the form of bamboo sticks to write the word 'kinji' and the words of the verbal element 'by SPA' in small characters add to the visual differentiation. Finally, in the

earlier mark KINNIE the syllable 'kin' is followed by the three-letter syllable 'nie'. Unlike the two-letter syllable 'ji' of the contested mark KINJI, the syllable 'nie' creates a perfectly symmetrical word in which the two central 'n's, the two 'i's and the letters 'k' and 'e' are perfectly balanced. That symmetry gives the word 'kinnie' a character which is visually different to that of the word 'kinji'.

44 It follows that the visual dissimilarity between the two signs, created by the distinct character of those two verbal elements, is increased by the presence, in the mark applied for, of the special figurative elements described in paragraph 41 above.

45 It must be stated that, contrary to what the applicant maintains, where a sign consists of both figurative and verbal elements, it does not automatically follow that it is the verbal element which must always be considered to be dominant.

46 A compound trade mark cannot be regarded as being similar to another trade mark which is identical or similar to one of the components of the compound mark unless that component forms the dominant element within the overall impression created by the compound mark. That is the case where that component is likely to dominate, by itself, the image of that mark which the relevant public keeps in mind, with the result that all the other components of the mark are negligible within the overall impression created by it (Case T-6/01 *Matratzan Concord* v *OHIM — Hukla Germany (MATRATZEN)* [2002] ECR II-4335, paragraph 33).

47 It is also apparent from the case-law of the Court of First Instance that, in a compound sign, the figurative element may occupy a position equivalent to the verbal element (see Case T-110/01 *Vedial* v *OHIM — France Distribution (HUBERT)* [2002] ECR II-5275, paragraph 53).

48 In addition, even in circumstances where two conflicting marks are composed of similar verbal elements — which is not the case here — that fact does not, by itself, support the conclusion that there is a visual similarity between the signs. The presence, in one of the signs, of figurative elements set out in a specific and original way can have the effect that the overall impression conveyed by each sign is different (see, to that effect, Case T-156/01 *Laboratorios RTB* v *OHIM — Giorgio Beverly Hills (GIORGIO AIRE)* [2003] ECR II-2789, paragraph 74).

49 In this case, it is clear that all of the figurative elements in the mark applied for are undeniably set out in a distinctive and original manner, playing an important role in the visual perception of the mark applied for and serving to differentiate the earlier mark. Consequently, the applicant's argument that the Board of Appeal wrongly gave too much weight to several graphic elements of the mark applied for and to the words 'by SPA' written in small characters, which according to the applicant are of a secondary nature in the visual perception of the signs in question, is not well founded and must be rejected.

50 It follows from all of the foregoing considerations that the Board of Appeal was right to take the view that the important differences between the verbal elements of the marks in question and the additional figurative elements of the mark applied for have the effect that the overall visual impression conveyed by each of those two marks is different.

51 As regards the conceptual comparison, the Board of Appeal took the view that, although the dominant verbal elements of the signs in question have no known meaning, the graphic elements of the mark applied for evoke various concepts which the earlier mark entirely lacks (paragraphs 20 and 21 of the contested decision).

52 In that regard it must be stated that neither the word 'kinnie' nor the word 'kinji' has any exact known meaning. Nevertheless, as the Board of Appeal pointed out and OHIM and the intervener submit, the mark for which registration is sought is, at least conceptually and visually, rich. It uses bamboo-shaped stylised letters for the graphics of the main verbal element and includes a figurative element with an anthropomorphic representation of a raccoon wearing a T-shirt with the word 'kinji'. It is therefore to be expected that those elements suggest, in the mind of the person perceiving them, that the mark and the goods in question have an association with nature or life in the wild.

53 As the Court held in its judgment in *HUBERT*, cited above, 'in order to establish conceptual similarity between the marks in question, it is sufficient to observe that the targeted public will make distinctions between the ideas evoked by each sign' (*HUBERT*, cited above, paragraph 58). Consequently, since in this case the earlier word mark does not convey the least meaning and, on the contrary, the suggestive power of the mark applied for appears sufficiently strong to be perceived by consumers, it must be held that there is no conceptual similarity between the conflicting marks.

54 So far as concerns the phonetic comparison, and as indeed OHIM expressly accepted, contrary to what the Board of Appeal found in the contested decision

(paragraph 19) it appears indisputable that the public of certain Member States is likely to perceive a phonetic similarity between the conflicting marks. In Swedish, Danish and Dutch, for example, the letter 'j' is pronounced like the English letter 'y'. The rules of pronunciation of certain European languages thus require the mark sought to be pronounced 'kinyi'. Although that similarity concerns only a small number of Member States, it is therefore clear that the conflicting marks are, at least in those Member States, phonetically similar.

55 As regards the overall assessment of the likelihood of confusion between the signs in question, it is observed that there are important visual and conceptual differences between them. In this case, it must be held that those visual and conceptual differences clearly cancel out their phonetic similarity.

56 As OHIM has wisely observed, the degree of phonetic similarity between two marks is of less importance in the case of goods which are marketed in such a way that, when making a purchase, the relevant public usually perceives visually the mark designating those goods (see, to that effect, Case T-292/01 *Phillips-Van Heusen* v *OHIM — Pash Textilvertrieb und Einzelhandel (BASS)* [2003] ECR II-4335, paragraph 55).

57 However, contrary to what the applicant maintains, that is the case here. The applicant has not furnished the slightest proof to show that its goods are generally sold in such a way that the public does not perceive the mark visually. The applicant simply claims that bars and restaurants constitute one of the traditional sales channels, where the consumer will order the goods orally by speaking to a waiter, without being at any time called on to visualise the trade mark in question.

58 In that respect, as OHIM quite rightly observes, it must be noted that, even if bars and restaurants are not negligible distribution channels for the applicant's goods, the bottles are generally displayed on shelves behind the counter in such a way that consumers are also able to inspect them visually. That is why, even if it is possible that the goods in question may also be sold by ordering them orally, that method cannot be regarded as their usual marketing channel. In addition, even though consumers can order a beverage without having examined those shelves in advance they are, in any event, in a position to make a visual inspection of the bottle which is served to them.

59 Moreover, and above all, it is not disputed that bars and restaurants are not the only sales channels for the goods concerned. They are also sold in supermarkets or other retail outlets (see paragraph 14 of the contested decision), and clearly when purchases are made there consumers can perceive the marks visually since the drinks are presented on shelves, although they may not find those marks side by side.

60 The applicant also submits that the Board of Appeal should have concluded that there was a greater likelihood of confusion between the marks because the earlier mark has a high degree of distinctiveness. In that respect, it suffices to observe that the high degree of distinctiveness of a trade mark must be established either in the light of the intrinsic qualities of the mark or owing to the reputation associated with it (Case T-99/01 *Mystery Drinks* v *OHIM — Karlsberg Brauerei (MYSTERY)* [2003] ECR II-43, paragraph 34). Although the mark KINNIE is undeniably original, the applicant has not furnished the slightest proof that the mark has a high degree of distinctiveness. It merely relied on the fact that it is a purely invented word in order to claim that account should be taken of its high degree of distinctiveness.

61 Finally, the applicant's argument that the average consumer would recognise the marks at issue as being visually similar must be rejected, because the visual perception of the letters making up the verbal element of the signs is heavily influenced by their pronunciation, in such a way that, when he sees the two signs, the average consumer will vaguely recall the sounds of the names of the goods but will not remember the shape of the letters used in their graphics. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (*SABEL*, cited above, paragraph 23). However it is clear that, in the present case, the perception which an average consumer will have of the compound sign applied for will not be determined by the comparison between just one of the elements of that sign, namely the verbal element 'kinji', and the applicant's sign.

62 In those circumstances it must be concluded that, although the goods covered by the marks in question are identical or very similar, the visual and conceptual differences between the signs provide sufficient grounds for taking the view that there is no likelihood of confusion on the part of the relevant public. It follows that the Board of Appeal rightly concluded that there is no likelihood of confusion between the mark applied for and the earlier mark.

63 In the light of the foregoing, the plea alleging infringement of Article 8(1)(b) of Regulation No 40/94 must be rejected as being unfounded.

The second plea: infringement of Article 73 of Regulation No 40/94

— Arguments of the parties

64 The applicant claims that the Board of Appeal infringed Article 73 of Regulation No 40/94 by not giving the parties the opportunity to present their comments on the grounds referred to in paragraph 14 of the contested decision relating to the Board of Appeal's view as to how drinks are ordered and sold in bars and restaurants. It accordingly complained that the Board of Appeal was in breach of essential procedural requirements.

65 OHIM contends that the reference to the 'methods of sale' and to the perception of the marks on the relevant market is not a reason in itself, in the sense used by Article 73 of Regulation No 40/94, but an argument corroborating the reasoning that the visual and conceptual differences between the marks are such as to avoid a likelihood of confusion on the specific market of the goods in question. Such a reference is not independent from the assessment of likelihood of confusion, but forms part of the reasoning of the Board of Appeal.

66 OHIM takes the view that, by not giving the applicant the opportunity to present its observations on the argument regarding 'methods of sale', the Board of Appeal did not infringe Article 73 of Regulation No 40/94, as that argument was used purely for the purposes of justifying the contested decision, on the basis of grounds and reasoning with which the applicant was already acquainted.

67 The intervener submits that it had already used the argument which the applicant challenges in the present action in the observations it submitted on 27 January 2003 in the procedure before the Board of Appeal, in which it had stated that 'the goods of both trade marks consist of non-alcoholic beverages which are sold in the same outlet and in general in supermarkets and contrary to what the Opposition Division stated in its decision (page 7, paragraph 3), the average consumer has indeed the possibility to make a direct comparison between the goods'.

68 The intervener infers from that that apparently the applicant did not judge necessary to contradict that assertion by answering in its 'observations in reply to appeal' of 21 March 2003 that that was not the case in a bar or a restaurant.

— Findings of the Court

69 Article 73 of Regulation No 40/94 provides that decisions of the Office are to be based only on reasons or evidence on which the parties concerned have had on opportunity to present their comments (Case T-173/00 *KWS Saat* v *OHIM (Shade of orange)* [2002] ECR II-3843, paragraph 57).

70 In this case, it must be observed that the Board of Appeal stated in paragraph 14 of the contested decision that 'although these goods are ... sold in bars and restaurants, the customer in these environments will not typically ask for them by brand name, unlike e.g. wines or beers'. The Board of Appeal then added that 'normally the bar or restaurant goer will request merely the generic name of these goods, e.g. "fresh orange juice"'.

71 In fact, it will be noted that what the Board of Appeal is attempting to show in paragraph 14 of the contested decision is that the typical consumer will usually be in a position to visually inspect the goods before purchasing them. That point of view is borne out by the last sentence of paragraph 14 of the contested decision, where the Board of Appeal sums up its assessment by stating that 'in other words, on the whole, the typical consumer will be able to visually inspect the goods and the trade marks associated with them before purchase (although they may not find the two trade marks side by side)'.

72 It therefore appears that the statements concerning the way in which consumers order the goods of the parties in restaurants and bars are not an independent reason for the contested decision, but form part of the Board of Appeal's reasoning with regard to the global assessment of the likelihood of confusion. The fact that the applicant has not put forward arguments on that point does not imply that it was not able to present its comments on the reasons or evidence relating to the visual or phonetic comparison of the signs in question on which the contested decision is based.

73 In those circumstances, the present plea alleging infringement of Article 73 of Regulation No 40/94 must be rejected.

74 In the light of the foregoing, the action must therefore be dismissed in its entirety.

Costs

75 The applicant requests the Court to order OHIM and/or the intervener to bear the costs relating to the opposition proceedings. It did not make any specific arguments concerning that request in its documents. However, at the oral hearing it expressed its agreement with the arguments put forward by OHIM in that connection.

76 OHIM claims that that request is inadmissible in so far as those costs are not recoverable under Articles 87 and 136 of the Rules of Procedure of the Court of First Instance.

77 In that regard, it must be recalled that Article 136(2) of the Rules of Procedure provides that:

'Costs necessarily incurred by the parties for the purposes of proceedings before the Board of Appeal ... are regarded as recoverable costs.'

78 Therefore, to the extent that the costs relating to the opposition proceedings are not recoverable costs within the meaning of Article 136(2) of the Rules of Procedure, that request must be rejected as inadmissible.

79 Under Article 87(2) of the Rules of Procedure, 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 the costs of OHIM and the intervener, in accordance with the forms of order sought by them.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Vilaras Martins Ribeiro Jürimäe

Delivered in open court in Luxembourg on 24 November 2005.

E. Coulon M. Vilaras

Registrar President