JUDGMENT OF THE COURT (First Chamber)

2 September 2010 *

In Case C-254/09 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 9 July 2009,

Calvin Klein Trademark Trust, established in Wilmington (United States), represented by T. Andrade Boué, abogado,

appellant,

the other parties to the proceedings being:

Office for Harmonisation 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: Spanish.

Zafra Marroquineros SL, established in Caravaca de la Cruz (Spain), represented by J.E. Martín Álvarez, abogado,

intervener at first instance,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, M. Ilešič, M. Safjan (Rapporteur) and M. Berger, Judges,

Advocate General: J. Mazák,
Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its appeal, Calvin Klein Trademark Trust ('Calvin Klein') seeks to have set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') of 7 May 2009 in Case T-185/07 *Klein Trademark Trust* v *OHIM - Zafra Marroquineros (CK CREACIONES KENNYA)* [2009] ECR II-1323 ('the judgment under appeal'), dismissing its action brought against the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 29 March 2007 (Case R 314/2006-2) ('the contested decision'). By that decision, the Second Board of Appeal had upheld the decision of the Opposition Division of OHIM of 22 December 2005 rejecting Calvin Klein's opposition to the application lodged by Zafra Marroquineros SL ('Zafra Marroquineros') for registration of the word mark CK CREACIONES KENNYA as a Community trade mark.

Legal context

2 Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) was repealed by Council Regulation (EC) No 207/2009 of 26 February 2009 (OJ 2009 L 78, p. 1), which entered into force on 13 April 2009. Having regard to the date of the facts, however, the case continues to be governed by Regulation No 40/94.

3 Article 8(1)(b) of Regulation No 4/94 provided as follows:

'1. Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered:

…

(b) 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.'

4 Article 8(5) of Regulation No 40/94 provided that 'upon opposition by the proprietor of an earlier trade mark within the meaning of paragraph 2, the trade mark applied for shall not be registered where it is identical with or similar to the earlier trade mark and is to be registered for goods or services which are not similar to those for which

the earlier trade mark is registered, where in the case of an earlier Community trade mark the trade mark has a reputation in the Community and, in the case of an earlier national trade mark, the trade mark has a reputation in the Member State concerned and where the use without due cause of the trade mark applied for would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.'

5 Article 51(1)(b) of Regulation No 40/94 provided as follows:

'1. A Community trade mark shall be declared invalid on application to the Office or on the basis of a counterclaim in infringement proceedings,

…

(b) where the applicant was acting in bad faith when he filed the application for the trade mark.'

Facts of the dispute

6 On 7 October 2003, Zafra Marroquineros filed an application with OHIM for registration of the word sign 'CK CREACIONES KENNYA' as a Community trade mark.

7 The goods in relation to which registration of the trade mark was sought belong to Classes 18 and 25 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 ('the Nice Agreement'), and correspond to the following description:

— Class 18: 'Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery';

— Class 25: 'Clothing, footwear, headgear'.

8 The application was published in *Community Trade Marks Bulletin* No 23/2004 of 7 June 2004.

9 On 6 September 2004, Calvin Klein filed a notice of opposition to registration of the mark applied for pursuant to Article 8(1)(b), (2)(c) and (5) of Regulation No 40/94.

10 The opposition was based on the following earlier marks:

— Community trade mark No 66172, registered for goods and services in Classes 3, 4, 8, 9, 14, 16, 18, 20, 21, 24 to 27, 35 and 42 of the Nice Agreement, and represented below:



— Spanish trade mark No 2023213, registered for goods in Class 18 of the Nice Agreement, and represented below:



— Spanish trade mark No 2028104, registered for goods in Class 25 of the Nice Agreement, and represented below:



11 The opposition was based on all the goods and services covered by the earlier marks and was directed against all the goods covered by the trade mark application.

12 By decision of 22 December 2005, the Opposition Division of OHIM rejected the opposition in its entirety. It found that there was no likelihood of confusion between the marks at issue for the relevant consumer.

13 On 22 February 2006, the appellant filed a notice of appeal at OHIM against the Opposition Division's decision.

14 By decision of 29 March 2007, the Second Board of Appeal dismissed the appeal. It found that the signs at issue were not sufficiently similar for it to be concluded that there was a likelihood of confusion on the part of the public concerned.

Procedure before the General Court and the judgment under appeal

15 By application lodged at the Registry of the General Court on 29 May 2007, Calvin Klein brought an action for annulment of the contested decision and an order that OHIM should refuse registration of the trade mark applied for. In support of its application, it relied on a single plea, alleging infringement of Article 8(1) and (5) of Regulation No 40/94.

16 The General Court dismissed the action in the judgment under appeal.

17 First, it recalled, at paragraph 32 of the judgment under appeal, that, according to settled case-law, the likelihood of confusion must be assessed globally, according to the perception by the relevant public of the signs and the goods or services in question, and taking into account all factors relevant to the circumstances of the case, in particular the interdependence between similarity of the signs and similarity of the goods or services designated.

18 Second, it pointed out, at paragraph 33 of that judgment, that the more distinctive the earlier mark, the greater will be the likelihood of confusion. Therefore, marks with a highly distinctive character, either per se or because of the recognition they possess on the market, enjoy broader protection than marks with a less distinctive character.

19 It also pointed out, at paragraph 35 of the judgment under appeal, that the parties did not dispute that the goods at issue are identical.

20 As regards the similarity of the conflicting signs, the General Court stated, at paragraph 38 of the judgment under appeal, that the global assessment of the likelihood of confusion must be based on the overall impression given by them, bearing in mind, inter alia, their distinctive and dominant components. At paragraph 39 of that judgment, it pointed out that 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. It observed, at paragraph 40 of that judgment, that the comparison must be made by examining the marks in question, each considered as a whole.

21 The General Court found, at paragraph 42 of the judgment under appeal, that the words 'creaciones kennya' occupy, because of their size, a much more significant position than the group of letters 'ck' and form a syntactical and conceptual unit which dominates that whole mark. In fact, as that court stated, at paragraph 43 of that judgment, the element 'creaciones kennya' has a certain distinctive character in respect of the items of clothing and fashion accessories in Classes 18 and 25 of the Nice Agreement. Furthermore, that distinctive character is not called into question by the connection which the relevant public makes between the word 'kennya' and the country of Kenya, having regard to the different spelling of the two words. The General Court went on to observe, at paragraph 44 of that judgment, that the element 'ck', which corresponds to the initial letters of the words 'creaciones' and 'kennya', occupies an ancillary position in relation to the element 'creaciones kennya'.

22 According to paragraph 45 of the judgment under appeal, the relevant consumer will above all remember the words 'creaciones kennya', on which he will to a very great extent focus his attention. In the present case, the mere position of the group of letters

'ck' at the beginning of the trade mark applied for is not sufficient to make it the dominant element in the overall impression created by that mark.

23 As regards the visual similarity between the signs, the General Court found, at paragraphs 46 to 48 of the judgment under appeal, that the earlier marks consist of the sole or dominant element 'ck', represented with a specific graphic design which confers on those marks inherent distinctive character. Nevertheless, the mere visual resemblance of the sole or dominant figurative element 'ck' in the earlier marks and the element 'ck' in the mark applied for does not, in the view of the General Court, serve to create a visual similarity between the marks at issue, in the light of the overall impression created by the mark CK CREACIONES KENNYA and the specific graphic representation which characterises the earlier marks, namely the smaller size and centring of the letter 'c' in relation to the letter 'k'. The General Court considered that the protection which results from registration of a word mark concerns the word mentioned in the application for registration and not the specific graphic or stylistic elements accompanying that mark.

24 From the phonetic point of view, the General Court also found, at paragraphs 49 and 50 of the judgment under appeal, that the marks at issue were not similar. The trade mark applied for will be referred to by using the words 'creaciones kennya' alone or the whole of the expression 'ck creaciones kennya'. It is very unlikely that the trade mark applied for will be referred to merely by using the group of letters 'ck'.

25 From a conceptual standpoint, according to paragraph 51 of the judgment under appeal, the Board of Appeal did not err in finding that the words 'creaciones kennya', from which the group of letters 'ck' is derived, create a conceptual difference

compared with the earlier marks. The group of letters 'ck' in the mark applied for derives from the words 'creaciones kennya', whereas the group of letters 'ck' of which the earlier marks consist constitutes a reference to the well-known manufacturer and designer of fashion items Calvin Klein.

26 Accordingly, the General Court found, at paragraph 52 of the judgment under appeal, that the lack of similarity between the signs at issue stems from the visual, phonetic and conceptual differences between the signs.

27 As regards the likelihood of confusion, the General Court considered, at paragraphs 53 to 55 of the judgment under appeal, that it was inappropriate to conclude that there was a likelihood of confusion in the absence of any similarity between the marks at issue. The fact that the goods covered by the conflicting marks are identical does not alter that assessment. Next, although marks with a highly distinctive character on account of their reputation enjoy broader protection, the recognition, in the present case, of the reputation of the earlier marks cannot call into question the finding that the marks at issue create overall impressions which are too different for it to be found that there is a likelihood of confusion.

28 As regards the appellant's argument to the effect that the target public may perceive the trade mark applied for as one of the sub-brands of Calvin Klein, the General Court considered, at paragraph 56 of the judgment under appeal, that the marks at issue do not share a common dominant element.

Procedure before the Court of Justice

29 By its appeal, the appellant claims that the Court should set aside the judgment under appeal and order OHIM and Zafra Marroquineros to pay the costs.

30 OHIM and Zafra Marroquineros contend that the Court should dismiss the appeal and order the appellant to pay the costs.

The appeal

31 In support of its appeal, the appellant relies on two grounds, alleging, first, infringement of Article 8(1) of Regulation No 40/94 and, second, infringement of Article 8(5) of that regulation.

The first ground of appel

Arguments of the parties

32 By its first ground of appeal, which essentially comprises three parts, the appellant claims that the General Court disregarded the case-law on the interpretation of Article 8(1) of Regulation No 40/94 as regards the need to take account of all the factors relevant to the circumstances of the case.

33 By the first part of the first ground of appeal, the appellant criticises the General Court for disregarding the fact that Zafra Marroquineros used the letters 'CK' in isolation in large highlighted letters together with the words 'CREACIONES KENNYA' in very small letters to copy the well-known marks cK of Calvin Klein. Such conduct on the part of Zafra Marroquineros therefore shows that the letters 'CK' constitute the most distinctive part of the trade mark applied for. In the appellant's view, Zarfa Marroquineros' conduct is at variance with its legal argument. According to a general principle of law, no person can bring proceedings that are in conflict with his own acts.

34 Disregarding the case-law of the Court of Justice, the General Court failed to take account of Zafra Marroquineros'conduct in determining which element in the Community trade mark applied for is the most important and the most noticeable. Appropriate legal weight was not therefore given to that conduct in the judgment under appeal in the light of the case-law to the effect that it is necessary to take account of all factors relevant to the circumstances of the case. According to the appellant, in the light of Zafar Marroquineros' conduct, the letters 'CK' must be regarded as the most distinctive in the trade mark applied for.

35 By the second part of the first ground of appeal, the appellant criticises the General Court for distorting the facts by considering, without taking account of Zafra Marroquineros'conduct, that the words 'CREACIONES KENNYA' constitute the most noticeable part of the mark applied for.

36 By the third part of the first ground of appeal, the appellant complains that the General Court failed to take account of the importance of the letters 'CK' and, as a result, to carry out an analysis as to whether there was a likelihood of confusion due to the presence of those letters in the marks at issue. In the present case, there is a heightened risk of confusion due to the reputation of the earlier marks and the fact that the goods covered by the marks at issue are exactly the same.

37 In the fashion sector, it is common for clothing manufacturers to be identified by the letters forming the acronym of their name so that, where trade marks acquire a reputation in that sector, they are identified by those two letters both visually and phonetically. From a legal viewpoint, there is therefore a likelihood of confusion between the marks at issue, since the letters 'CK' in the mark applied for represent a very distinctive element for the consumer in so far as, in the fashion sector, the letters 'CK' are identified with Calvin Klein.

38 OHIM raises an objection that the first ground of appeal is inadmissible since it seeks to require the Court to substitute its own assessment of the facts for that of the General Court. Since an appeal before the Court lies on points of law only, the appraisal of the facts does not, save where the evidence submitted to it is distorted, constitute a point of law which is subject, as such, to review by the Court.

39 In OHIM's view, the argument put forward by the appellant in connection with the first ground of appeal is in fact predicated on an amendment of the subject-mater of the action. Since the contested mark is the word sign 'CK CREACIONES KENNYA', the appellant is referring to distinct signs, namely a specific graphic representation of the word sign referred to above. Moreover, the General Court did not distort the evidence in the present case, since the appraisal of the evidence could not be extended to cover the examples relied on by the appellant.

40 The appellant's arguments concerning 'obvious' facts relating to copying is also inadmissible in the present case, the purpose of which is to determine whether there is a likelihood of confusion between earlier rights and a sign that is specific and precise, in respect of which registration as a Community trade mark is sought. Submissions of that kind should be made in proceedings alleging possible infringement of a trade mark or unfair competition.

41 Zafra Marroquineros submits that the judgment under appeal did not disregard the case-law on the interpretation of Article 8(1) of Regulation No 40/94.

42 When examining the similarity between the marks at issue, it is necessary to take into consideration the trade marks as a whole, as registered or applied for, any hypothetical use which may be made of them being irrelevant. Moreover, any hypothetical intention on the part of Zafra Marroquineros to copy the appellant's earlier marks, which, in any event, it did not have, is irrelevant for the purpose of examining the likelihood of confusion between two marks.

Findings of the Court

43 As regards the first part of the first ground of appeal, Article 8(1)(b) of Regulation No 40/94 provides that, upon opposition by the proprietor of an earlier trade mark, the 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. According to that provision, such a likelihood of confusion includes the likelihood of association with the earlier trade mark.

44 According to the settled case-law of the Court, the existence of a likelihood of confusion on the part of the public must be appreciated globally, taking into account all factors relevant to the circumstances of the case (see, inter alia, Case C-251/*95 SABEL* [1997] ECR I-6191, paragraph 22; Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 18; Case C-120/04 *Medion* [2005] ECR I-8551, paragraph 27; Case

C-334/05 P *OHIM* v *Shaker* [2007] ECR I-4529, paragraph 34; and Case C-498/07 P *Aceites del Sur-Coosur* v *Koipe* [2009] ECR I-7371, paragraph 46).

45 It is also apparent from settled case-law that the global assessment of the likelihood of confusion, in relation to the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components. The perception of the marks by the average consumer of the goods or services in question plays a decisive role in the global appreciation of that likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (see, inter alia, *SABEL*, paragraph 23; *Lloyd Schuhfabrik Meyer*, paragraph 25; *Medion*, paragraph 28; *OHIM* v *Shaker*, paragraph 35; and Case C-206/04 P *Mülhens* v *OHIM* [2006] ECR I-2717, paragraph 19).

46 It should be noted in that connection that the similarity of the marks at issue must be assessed from the point of view of the average consumer by referring to the intrinsic qualities of the marks and not to circumstances relating to the conduct of the person applying for a Community trade mark.

47 It must therefore be held that, contrary to the appellant's submissions in the first part of its first ground of appeal, the General Court's analysis is not vitiated by an error of law due to the fact that it failed to take account of alleged wrongful conduct on the part of the trade mark applicant. While such conduct is a particularly significant factor in proceedings brought under Article 51(1)(b) of Regulation No 40/94 – which is not at issue in the present appeal – it is not, on the other hand, a factor that must be taken into account in opposition proceedings brought under Article 8 of that regulation.

48 It follows that the first part of the first ground of appeal must be dismissed as unfounded.

49 As regards the second part of that ground of appeal, alleging distortion of the facts, it should be noted at the outset that, under Article 225(1) EC and the first subparagraph of Article 58 of the Statute of the Court of Justice, an appeal lies on a point of law only. The General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus does not, save where they distort the evidence, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see, inter alia, Case C-104/00 P *DKV* v *OHIM* [2002] ECR I-7561, paragraph 22; Case C-173/04 P *Deutsche SiSi-Werke* v *OHIM* [2006] ECR I-551, paragraph 35; and the judgment of 26 March 2009 in Case C-21/08 P *Sunplus Technology* v *OHIM*, paragraph 31).

50 The assessment of the similarities between the signs at issue is of a factual nature and, save where the evidence and facts are distorted, is not subject to review by the Court of Justice. Such distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence (see Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175, paragraph 72; Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 54; Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 108; and the judgment of 7 May 2009 in Case C-398/07 P *Waterford Wedgwood* v *Assembled Investments (Proprietary) and OHIM*, paragraph 41).

51 The appellant has failed to produce any evidence which would make it possible to consider that the General Court distorted the facts by finding, at paragraph 52 of the judgment under appeal, that the lack of any similarity between the signs at issue stems from the visual, phonetic and conceptual differences between the signs. The appellant's argument that the distortion derives from the fact that the General Court

failed to take account of Zafra Marroquineros' conduct must be disregarded since, as is apparent from paragraphs 43 to 47 above, that court was not required to take such conduct into account when carrying out its assessment.

52 Accordingly, the second part of the first ground of appeal must be rejected as unfounded.

53 As regards the third part of the first ground of appeal, it should be noted, first, that, where there is no similarity between the earlier mark and the mark applied for, the reputation of or the well-known nature attaching to the earlier mark and the fact that the goods or services concerned are identical or similar are not sufficient for it to be found that there is a likelihood of confusion between the marks at issue (see, to that effect, Case C-106/03 P *Vedial* v *OHIM* [2004] ECR I-9573, paragraph 54; Case C-234/06 P *Il Ponte Finanziaria* v *OHIM* [2007] ECR I-7333, paragraphs 50 and 51; and the judgment of 11 December 2008 in Case C-57/08 P *Gateway* v *OHIM*, paragraphs 55 and 56).

54 In the judgment under appeal, the General Court found that there was no similarity between the marks at issue. It stated, at paragraph 52 of that judgment, that the visual, phonetic and conceptual examination of the marks shows that the overall impression created by the earlier marks is dominated by the element 'ck' whereas that created by the trade mark applied for is dominated by the element 'creaciones kennya', concluding that the lack of similarity between the signs at issue thus stems from their visual, phonetic and conceptual differences.

55 In order to reach that conclusion, the General Court carried out, at paragraphs 41 to 51 of the judgment under appeal, an analysis forming part of the process the purpose of which is to determine the overall impression created by the marks at issue and to carry out a global assessment of the similarity of the marks. Thus, at paragraphs 42 to 45 of that judgment, it conducted a detailed analysis of the mark applied for, taken as a whole, taking into account in particular how the average consumer perceives

the mark. That analysis was followed, at paragraphs 46 to 51 of that judgment, by an examination of the visual, phonetic and conceptual similarity of the marks at issue.

56 It must be observed in that connection that, contrary to what appears to be stated at paragraph 39 of the judgment under appeal, the existence of a similarity between two marks does not presuppose that their common component forms the dominant element within the overall impression created by the mark applied for. According to established case-law, in order to assess the similarity of two marks, it is necessary to consider each of the marks as a whole, although that does not rule out the possibility that the overall impression created in the mind of the relevant public by a complex trade mark may, in certain circumstances, be dominated by one or more of its components. However, it is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element (see *OHIM* v *Shaker*, paragraphs 41 and 42; the judgment of 20 September 2007 in Case C-193/06 P *Nestlé* v *OHIM*, paragraphs 42 and 43; and *Aceites del Sur-Coosur* v *Koipe*, pargraph 62). In that connection, it is sufficient for the common component not to be negligible.

57 However, it is clear that the General Court found, first, that the overall impression created by the mark applied for is dominated by the element 'creaciones kennya', on which the consumer concerned will to a very great extent focus his attention and, second, in particular at paragraph 44 of the judgment under appeal, that the element 'ck' occupies only an ancillary position in relation to that element, which, in essence, amounts to a conclusion that the element 'ck' in the mark applied for is negligible.

58 Thus, having ruled out, on the basis of a properly conducted analysis, any similarity between the marks at issue, the General Court correctly concluded, at paragraphs 53 to 57 of the judgment under appeal, that, notwithstanding the reputation of the earlier marks and the fact that the goods covered by the marks at issue are identical, there is no likelihood of confusion between the marks.

59 The third part of the first ground of appeal must therefore be declared unfounded.

60 In those circumstance, the first ground of appeal must be rejected.

The second ground of appeal

Arguments of the parties

61 By its second ground of appeal, the appellant criticises the General Court for failing to have regard to Article 8(5) of Regulation No 40/94 by failing to examine the reputation of the earlier marks in the context of that provision.

62 The General Court erred by stating, at paragraph 15 of the judgment under appeal, that the appellant relies on a single plea in law, alleging infringement of Article 8(1)(b) of Regulation No 40/94, whereas the application was also expressly based on infringement of Article 8(5) of that regulation.

63 By stating that, since the marks at issue are not similar, there was no need to consider the reputation of the earlier marks, the General Court erred in law. In the appellant's view, account should have been taken of the fact that Calvin Klein's earlier mark cK

is well known in determining whether it should be afforded greater protection. The reputation of an earlier mark should be considered in the course of the assessment of the similarity between the marks at issue and not after similarity has been established.

64 In that connection, the appellant submits that if the well-known cK marks were protected only when the letters 'cK' were used by third parties with the same mode of graphic representation, that would be tantamount to conferring on the well-known mark CK a lower level of protection in practice than it would enjoy if it was not widely known. The fact that the cK trade marks, along with other distinct graphic representations of those letters, are well known protects them against the use of the letters 'CK' in the fashion sector, since, in that sector, those letters are identified with Calvin Klein, so that the use of those letters by a third party would lead to confusion by association.

65 OHIM contends that, in the judgment under appeal, the General Court gave a correct ruling on the question of the reputation of the earlier mark. Since the signs at issue cannot be regarded as similar, Article 8(5) of Regulation No 40/94 is not applicable.

66 Zafra Marroquineros submits that the judgement under appeal refers to the reputation of the earlier marks. Recognising the reputation of the figurative element 'CK' in the earlier mark, the judgment under appeal then goes on to state that that reputation does not alter the fact that there is no likelihood of confusion between the marks at issue.

Findings of the Court

67 By its second ground of appeal, the appellant complains, in essence, that the General Court incorrectly confined its assessment to an analysis of Article 8(1) of Regulation No 40/94, without examining the appellant's arguments in the light of Article 8(5), and failed to take account of the reputation and well-known nature which attaches to the earlier marks in carrying out the assessment required under Article 8(5) of Regulation No 40/94.

68 It should be noted that, in order for Article 8(5) of Regulation No 40/94 to be applicable, the marks at issue must be identical or similar. Consequently, that provision is manifestly inapplicable where, as in the present case, the General Court ruled out any similarity between the marks at issue.

69 Accordingly, the second ground of appeal must be rejected as unfounded.

Costs

70 Under Article 69(2) of the Rules of Procedure, which applies to 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 and Zafra Marroquineros have applied for costs and Calvin Klein has been unsuccessful, the latter must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders Calvin Klein Trademark Trust to pay the costs.

[Signatures]