Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 3 May 2018 [1]

Case C-139/17 P

QuaMa Quality Management GmbH
v

European Union Intellectual Property Office (EUIPO)

(Appeal — EU trade mark — Regulation (EC) No 207/2009 — Regulation (EC) No 2868/95 — Notice of opposition filed by the proprietor of the earlier mark — Entitlement to file a notice of opposition — Registration procedure for the transfer of the earlier mark to a new proprietor — Appeal inadmissible in part and unfounded in part)

I. Introduction

1. The present case concerns an appeal lodged by the company QuaMa Quality Management GmbH ('the appellant') against the judgment of the General Court of the European Union of 17 January 2017, *QuaMa Quality Management* v *EUIPO — Microchip Technology (medialbo)* (T-225/15, not published, 'the judgment under appeal', EU:T:2017:10), by which the General Court dismissed the action it had brought against the decision of the Fourth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 19 February 2015 [2] relating to opposition proceedings between Microchip Technology, Inc. ('the intervener') and Mr Alexander Bopp.

2. The appellant raises two grounds of appeal, alleging, first, infringement of Article 41(1) of Regulation (EC) No 207/2009, [3] governing the filing of a notice of opposition to the registration of a mark and, secondly, infringement of Article 8(1)(b) of that regulation, laying down the conditions under which there is a likelihood of confusion between the marks at issue.

3. As requested by the Court, I will restrict my analysis in this Opinion to the first ground of appeal.

4. Whereas, on a preliminary analysis of the file, that ground of appeal appeared to raise a point of law concerning the intervener's entitlement to file a notice of opposition (Article 41 of Regulation No 207/2009 and Rules 15 to 19 of Regulation (EC) No 2868/95 [4]) in the context of a transfer of the earlier mark to a new proprietor (Article 17 of Regulation No 207/2009 and Rule 31 of Regulation No 2868/95), it is apparent from a more detailed examination of that ground of appeal that the appellant has failed to demonstrate either that the facts and evidence submitted to the General Court were in any way distorted or that that court made an error of law vitiating the judgment under appeal.

1 Original language: French.

2 Joined Cases R 1809/2014-4 and R 1680/2014-4.

3 Council Regulation of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1).

4 Commission Regulation of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1).

5. In this Opinion, I therefore propose that the Court reject the first ground of appeal, alleging infringement of Article 41(1) of Regulation No 207/2009, as inadmissible in part and unfounded in part.

II. Background to the dispute and the procedure before the General Court

6. The background to the present dispute is described in detail in the judgment under appeal, to which I would refer.[5] The facts essential to and necessary for an understanding of this Opinion may be summarised as follows.

7. In its action before the General Court, the appellant put forward two pleas in law.

8. In support of its first plea, the appellant argued that the opposition should be rejected as it was submitted after the period laid down in Article 41(1) of Regulation No 207/2009 had expired. At the time the notice of opposition was filed, SMSC Europe GmbH, not the intervener, was registered as the proprietor of the earlier mark. According to the appellant, given that the intervener, by the date of expiry of the opposition period, had submitted a request for a change of name and address only and not an application for registration of a transfer, it was not, therefore, entitled to file a notice of opposition pursuant to Article 17(7) and Article 41(1) of Regulation No 207/2009. In addition, the appellant asserted that EUIPO could not reclassify the request for a change of name and address as an application for registration of a transfer, as shown by the Opposition Division's initial rejection of the first application and the submission of a second application by the intervener.

9. The General Court rejected that plea.

10. The General Court recalled, in paragraphs 18 to 27 of the judgment under appeal, the principles on which opposition proceedings are based, as well as the conditions that must be met in order to submit an application for registration of a transfer. It concluded, in paragraph 29 of that judgment, by reference to Article 17(7) and Article 41(1) of Regulation No 207/2009, that successors in title who are not yet registered as proprietors but to whom the earlier mark has been transferred are entitled to file a notice of opposition, provided that EUIPO has received their application for registration of a transfer.

11. Taking the view that the intervener had indeed remedied the deficiencies in the application for transfer, submitted as a request for a change of name and address, and had submitted proof of its entitlement to file a notice of opposition within the period allowed by EUIPO, the General Court found, in paragraph 35 of the judgment under appeal, that the notice of opposition filed at the same time as the request for a change of name and address of the proprietor of the earlier mark had been submitted within the period prescribed in Article 41(1) of Regulation No 207/2009, in the light of the combined provisions of Article 17(7) of that regulation and Rule 31(1) and (6) of Regulation No 2868/95.

12. The General Court rejected the appellant's argument that the request for a change of name and address should not have been reclassified as an application for registration of a transfer, taking the view, in paragraph 37 of the judgment under appeal, that EUIPO cannot attach importance only to the formal title of a request without taking its content into account. In that regard, the General Court, first of all observed, in paragraph 38 of the judgment under appeal, that it does not follow from any provision of Regulations No 207/2009 or No 2868/95 that the use of the correct form is an essential pre-condition for an application to be valid. Next, it stated, in paragraph 39 of the judgment under appeal, that it was clear from the intervener's request for a change of name and address that the request related to a change of ownership of the earlier mark. Finally, the General Court considered, in

5 See paragraphs 1 to 12 of the judgment under appeal.

paragraph 40 of the judgment under appeal, that the fact that the Opposition Division had registered the two applications under two different numbers had no bearing whatsoever on the finding that EUIPO was entitled to regard the request for a change of name and address, in the light of its clear content, as an application for registration of a transfer.

13. In the light of those findings, the General Court considered, in paragraph 41 of the judgment under appeal, that EUIPO had not erred in interpreting the request for a change of name and address as an application for registration of a transfer for the purpose of Article 17(7) of Regulation No 207/2009.

14. In paragraph 42 of the judgment under appeal, the General Court therefore held that the Board of Appeal had been fully entitled to find that Article 41(1) of Regulation No 207/2009 had not been infringed in the case in the main proceedings, as the intervener was entitled to file a notice of opposition on 9 April 2013 and had done so within the prescribed period.

15. In support of its second plea, the appellant argued that the Board of Appeal of EUIPO infringed Article 8(1)(b) of Regulation No 207/2009 by failing to carry out a proper assessment of the likelihood of confusion between the marks at issue.

16. The General Court rejected that plea after examining each of the appellant's claims concerning the definition of the relevant public, the comparison of the signs in question and the assessment of the likelihood of confusion between the marks at issue.

III. Procedure before the Court and forms of order sought

17. By application lodged at the Court Registry on 17 March 2017, the appellant brought an appeal asking the Court to set aside the judgment under appeal, and, in disposing of the case, to annul the decision of the Fourth Board of Appeal of EUIPO of 19 February 2015. The appeal is based on two grounds, alleging infringement, first, of Article 41(1) of Regulation No 207/2009 and, secondly, of Article 8(1)(b) of that regulation.

18. EUIPO claims that the Court should dismiss the appeal, on the ground that it is unfounded in its entirety, and order the appellant to pay the costs.

19. The intervener also claims that the Court should dismiss the appeal, on the ground that it is inadmissible in its entirety, and order the appellant to pay the costs.

IV. Analysis of the first ground of appeal, alleging infringement by the General Court of Article 41(1) of Regulation No 207/2009

20. By its first ground of appeal, the appellant criticises the General Court, in essence, for having considered that, in the light of the conditions established in Article 41(1) of Regulation No 207/2009, the intervener was in fact entitled to file a notice of opposition on 9 April 2013. More specifically, the appellant claims that the Court erred in proceeding on the basis of the premiss that the intervener had, on that date, submitted the correct application for registration of change of ownership of the mark and had merely used an incorrect form on that occasion.

21. That ground of appeal can be interpreted as being based on two heads of complaint.

22. In support of its first head of complaint, the appellant alleges that the General Court distorted the facts and evidence submitted to it, the request for a change of name and address submitted by the intervener on 9 April 2013 and EUIPO's request in its letter to the intervener of 15 April 2013 in particular.

23. In support of its second head of complaint, the appellant considers, in addition, that the General Court erred in stating that the submission of the form headed 'Recordal application' (application for registration) was sufficient proof that ownership of the earlier mark had been transferred to a new proprietor.

A. The first head of complaint: distortion of the facts and evidence submitted to the General Court

1. Arguments of the parties

24. The appellant alleges that the General Court distorted the facts and evidence submitted to it, the request for a change of name and address submitted by the intervener on 9 April 2013 and EUIPO's request in its letter to the intervener of 15 April 2013 in particular.

25. As regards the request for a change of name and address submitted by the intervener on 9 April 2013, the appellant maintains that it could not be reclassified as an application for registration of a transfer as it was treated as a new application. EUIPO, according to the appellant, rejected the request for a change of name and address on 9 July 2013, which, moreover, concerned all 14 of SMSC Europe's trade marks, and granted the later application for registration of a transfer only after the period for filing a notice of opposition had expired, as is apparent from the content of EUIPO's letter to the intervener of 19 June 2013, in which EUIPO states that the application for registration of the transfer is dated 14 June 2013.

26. As regards EUIPO's letter to the intervener of 15 April 2013,[6] the appellant maintains that the General Court distorted that letter by considering that EUIPO had, in that context, asked the intervener to 'fill in the correct form for an application for registration of a transfer'.[7] The appellant therefore complains that the General Court incorrectly presented the facts of the main proceedings by asserting that EUIPO set a time limit by which the intervener was required to 'submit evidence of its entitlement to file a notice of opposition, and to remedy the deficiencies of its application for registration of a transfer'.[8] According to the appellant, EUIPO had, in fact, merely indicated to the intervener that it 'appeared' that the intent was to transfer ownership, not to change the name and address of the registered proprietor, and requested the intervener to submit 'observations' in that regard. The appellant maintains that EUIPO was therefore uncertain as to how the request for a change of name and address should be processed.

27. According to the appellant, the General Court therefore acted unlawfully by interpreting the requests made by EUIPO too broadly.

28. EUIPO and the intervener dispute those arguments in their entirety.

2. My assessment

29. I consider that the first ground of appeal is inadmissible, in view of the nature and extent of the Court of Justice's powers of judicial review in an appeal.

6 The appellant refers to the letter of 14 April 2013. It appears from the facts in the main proceedings that that letter was sent on 15 April 2013.

7 The words used in paragraph 31 of the judgment under appeal.

8 The words used in paragraph 32 of the judgment under appeal.

30. It has consistently been held that, under Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal must be limited to points of law and may be based on grounds of lack of competence of the General Court, a breach of procedure before it and infringement of EU law by the General Court. Therefore, the General Court has, in principle, sole jurisdiction to find and appraise the facts, save where the substantive inaccuracy of its findings is apparent from the documents submitted to it. In that case, the Court of Justice has jurisdiction under Article 256 TFEU solely to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them. [9]

31. Thus, the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. The appraisal of the facts does not therefore, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review on appeal by the Court of Justice. [10]

32. When an appellant alleges that the General Court has distorted facts and evidence submitted to it, the Court can carry out a judicial review.

33. Distortion has occurred where the assessment of the facts and evidence appears to be manifestly incorrect and where the General Court has, according to the Court's case-law, 'manifestly exceed[ed] the limits of a reasonable assessment'. [11] In order to show that such distortion has occurred, the appellant must not therefore merely suggest a reading of the evidence different from that adopted by the General Court, but must specify the points allegedly distorted by the General Court and must show the errors of reasoning which, in its assessment, led the Court to distort those points. Lastly, such distortion must be obvious from the documents in the Court's file, without there being any need to carry out a new assessment of the facts and the evidence or obtain fresh evidence.

34. On the basis of those principles and that case-law, the first head of complaint is not, in my view, admissible.

35. Admittedly, the appellant specifies the points that, in its view, were distorted by the General Court, namely, the request for a change of name and address submitted by the intervener on 9 April 2013 and EUIPO's request in its letter to the intervener of 15 April 2013. Nonetheless, the appellant has failed to establish that that evidence was distorted, as the arguments it raises are not, in my view, sufficient to show that the General Court manifestly exceeded the limits of a reasonable assessment, as required by the Court's case-law.

36. As regards the appellant's arguments relating to an alleged distortion of the request for a change of name and address submitted by the intervener on 9 April 2013, it is clear that the appellant is in fact seeking a re-examination of its arguments before the General Court. The appellant merely repeats the arguments it made before the General Court with a view to obtaining a fresh assessment of the facts, which, as indicated above, falls outside the Court's jurisdiction. [12]

9 Judgment of 19 April 2012, *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraph 25 and the case-law cited).

10 Judgment of 19 April 2012, *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221, paragraph 26 and the case-law cited).

11 Judgment of 19 December 2013, *Siemens and Others* v *Commission* (C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraph 44).

12 See, inter alia, judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 51 and the case-law cited).

37. As regards the appellant's arguments relating to an alleged distortion of EUIPO's letter to the intervener of 15 April 2013, the appellant, in fact, focuses its criticism on the manner in which the General Court assessed the content of that letter and suggests a different reading to that adopted by the General Court. It thereby provides its own assessment of the facts and evidence before the General Court, but fails to show, to my mind, that that court's analysis is manifestly incorrect.

B. The second head of complaint: incorrect assessment of the evidence of the intervener's entitlement to file a notice of opposition

1. Arguments of the parties

38. In support of its second head of complaint, it is my understanding that the appellant disputes the General Court's analysis in paragraph 30 of the judgment under appeal.

39. In that paragraph, the General Court stated as follows:

'30. In the present case, it is not disputed that the intervener submitted its request [for a change of name and address] of 9 April 2013 to EUIPO along with its notice of opposition, which was filed within the period prescribed for that purpose. The information listed in Rule 31(1)(a) to (d) of Regulation No 2868/95, which must be included in an application for transfer, was contained in the notice of opposition and the request [for a change of name and address] of 9 April 2013. *Only sufficient proof of transfer*, in accordance with Rule 31(5) of Regulation No 2868/95 and Point 3.5 of Chapter 1 in Section 3 of Part E of the guidelines [concerning proceedings before EUIPO],[13] *was lacking*.'[14]

40. The appellant considers that it was incorrect to assert that the submission of the form headed 'Recordal application' (application for registration) was sufficient proof of transfer of the earlier mark to a new proprietor. In its view, the rules governing evidence required the intervener to show that the transfer had in fact been completed within the prescribed opposition period, not after that period had expired. By contrast, according to the application, neither the form headed 'Recordal application' (application for registration) nor any other evidence in the case file provides proof of that transfer having been completed.

41. EUIPO and the intervener dispute those arguments in their entirety.

2. My assessment

42. In my view, the second head of complaint must be rejected as unfounded.

43. The head of complaint is based on a misreading of paragraph 30 of the judgment under appeal. In that paragraph, the General Court merely noted the facts which, as shown by the use of the expression 'it is not disputed' at the beginning of that paragraph, were established between the parties and not disputed by either party. When it observed that 'only sufficient proof of transfer, in accordance with Rule 31(5) of Regulation No 2868/95 and Point 3.5 of Chapter 1 in Section 3 of Part E of the EUIPO Guidelines, was lacking', the General Court merely took note of the content of Rule 31(1) and (5) of Regulation No 2868/95 and the EUIPO Guidelines and in no way asserted that, by submitting the

13 'The EUIPO Guidelines'.

14 Emphasis added.

form headed 'Recordal application' (application for registration), the intervener had provided sufficient proof of transfer allegedly required by EUIPO. The question of whether the submission of such a form was sufficient proof of the intervener's entitlement to file a notice of opposition, for the purposes of those provisions, was not raised or discussed before the General Court.

44. Even if that point were to have been raised expressly before the General Court, I observe that the appellant does not dispute the fact that the information listed in Rule 31(a) to (d) of Regulation No 2868/95, which must be contained in an application for transfer, was already apparent from the notice of opposition and the request for a change of name and address submitted on 9 April 2013, as observed by the General Court in paragraph 30 of the judgment under appeal. Although, in its arguments, the appellant refers, in addition, to 'the taking of evidence', I note that nor does the appellant dispute the General Court's interpretation or application of Rule 31(1) and (5) of Regulation No 2868/95 and Point 3.5 of Chapter 1 in Section 3 of Part E of the EUIPO Guidelines, in particular Rule 31(5) of that regulation, which clearly states that the signing of the application for registration of a transfer by the registered proprietor of the earlier mark and by the successor in title constitutes sufficient proof of transfer for the purposes of Article 17 of Regulation No 207/2009. While the appellant thus attempts to explain the reasons for which the proof of transfer was, in its view, insufficient to demonstrate that the intervener was entitled to file a notice of opposition, it fails to identify any error of law that might vitiate the judgment under appeal.

45. In the light of the above, I therefore consider that the second head of complaint is unfounded.

46. In the light of all those considerations, I am of the view that the first ground of appeal, alleging infringement of Article 41(1) of Regulation No 207/2009, is therefore inadmissible in part and unfounded in part.

V. Conclusion

47. In the light of the foregoing considerations, I propose that the Court rule as follows:

The first ground of appeal is inadmissible in part and unfounded in part.