ORDER OF THE COURT (Fourth Chamber)

18 January 2005 *

In Case C-325/03 P,

APPEAL pursuant to Article 56 of the Statute of the Court of Justice brought on 21 July 2003,

José Luis Zuazaga Meabe, residing in Bilbao (Spain), represented by J.A. Calderón Chavero and N. Moya Fernández, abogados,

appellant,

the other parties to the proceedings being:

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by O. Montalto and I. de Medrano Caballero, acting as Agents,

defendant at first instance,

* Language of the case: Spanish.

Banco Bilbao Vizcaya Argentaria SA (BBVA), established in Madrid (Spain), represented by J. de Rivera Lamo de Espinosa, abogado,

party to the proceedings before the Board of Appeal of OHIM,

intervener on appeal,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, J.N. Cunha Rodrigues and M. Ilešič (Rapporteur), Judges,

Advocate General: M. Poiares Maduro,
Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By his appeal, Mr Zuazaga Meabe seeks to have set aside the order of the Court of First Instance of the European Communities of 28 April 2003 in Case T-15/03 *Zuazaga Meabe* v *OHIM — BBVA (BLUE)*, not published in the ECR ('the order under appeal'), dismissing his action for annulment of the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade

Marks and Designs) ('OHIM') of 24 October 2002 (Case R 918/2001-2) ('the contested decision'), rejecting Mr Zuazaga Meabe's opposition to the registration of the word mark BLUE applied for by Banco Bilbao Vizcaya Argentaria SA ('BBVA').

Background to the dispute, procedure before the Court of First Instance and the order under appeal

2 BBVA filed an application at OHIM to register as a Community trade mark the word mark BLUE and Mr Zuazaga Meabe gave notice of opposition under Article 42 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), invoking a likelihood of confusion with the national word mark BILBAO BLUE, which he owns.

3 At first upheld by the Opposition Division of OHIM, that opposition was then dismissed by the contested decision, which was notified to Mr Zuazaga Meabe by registered recorded-delivery letter received on 4 November 2002.

4 Mr Zuazaga Meabe brought an action before the Court of First Instance seeking annulment of the contested decision. A copy of the application was received by the Registry of the Court of First Instance by fax on 3 January 2003, whilst the original was received on 15 January 2003.

5 The Court of First Instance first of all found, in paragraphs 8 to 11 of the order under appeal, that the period within which the appellant was entitled to commence proceedings under Article 63(5) of Regulation No 40/94 and Article 102(2) of the Rules of Procedure of the Court of First Instance had expired on 14 January 2003.

6 Next it pointed out in paragraph 12 of the order under appeal that, whilst the application had indeed been lodged at the Registry of the Court of First Instance by fax on 3 January 2003, before the expiry of the time allowed for commencing proceedings, the original of the application, by contrast, was not received at the Registry until 15 January 2003, that is outside the 10-day time-limit referred to in Article 43(6) of the Rules of Procedure of the Court of First Instance, so that only the date of lodgement of the original was to be taken into account and the application had therefore been lodged out of time.

7 Lastly, in paragraph 13 of the order under appeal, it pointed out that the appellant had not demonstrated, or even alleged, the existence of unforeseeable circumstances or force majeure so as to permit a derogation from the time-limit in question on the basis of the second paragraph of Article 45 of the Statute of the Court of Justice.

8 Accordingly, it dismissed the action as manifestly inadmissible.

The appeal

9 In his appeal, in support of which he puts forward five pleas in law, the appellant claims that the Court should set aside the order under appeal and refer the case back to the Court of First Instance.

10 OHIM decided not to lodge a response.

11 BBVA contends that the Court should dismiss the appeal and order the appellant to pay the costs.

12 According to Article 119 of the Rules of Procedure of the Court of Justice, where the appeal is, in whole or in part, clearly inadmissible or clearly unfounded, the Court may at any time, acting on a report from the Judge-Rapporteur and after hearing the Advocate General, by reasoned order dismiss the appeal in whole or in part.

The second, third, fourth and fifth pleas in law

13 By his second, third, fourth and fifth pleas in law, which should be examined together, the appellant criticises the Court of First Instance for having infringed, respectively, Article 102 of the Rules of Procedure of the Court of First Instance and Article 81(2) of the Rules of Procedure of the Court of Justice, Article 103 of the Rules of Procedure of the Court of First Instance and Article 82 of the Rules of Procedure of the Court of Justice, and Article 43(3) and (6) of the Rules of Procedure of the Court of First Instance.

14 He submits essentially that those provisions are the expression of the principle of proportionality and of 'legal tolerance' in respect of extending procedural time-limits, so that the time-limit of 10 days within which the original of the application must be lodged, under Article 43(6) of the Rules of Procedure of the Court of First Instance, begins to run not on the date the fax is received but on the expiry of the period of two months and 10 days resulting from the provisions of Article 63(5) of Regulation No 40/94 in conjunction with Article 102(2) of those Rules of Procedure.

15 Thus, in the present case, the time-limit laid down for lodging the original of the application did not expire on 14 January 2003 but on 24 January 2003 and, therefore, his application should not have been held to be inadmissible.

16 In this respect, according to settled case-law, no derogation from the application of the Community rules on procedural time-limits may be made save where the circumstances are quite exceptional, in the sense of being unforeseeable or amounting to force majeure, in accordance with the second paragraph of Article 45 of the Statute of the Court of Justice, since the strict application of those rules serves the requirements of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (see, in particular, the orders in Case C-239/97 *Ireland* v *Commission* [1998] ECR I-2655, paragraph 7, and of 19 February 2004 in Case C-369/03 P *Forum des migrants* v *Commission* [2004] ECR I-1981, paragraph 16).

17 Pursuant to Article 43(6) of the Rules of Procedure of the Court of First Instance, the date on which a copy of the signed original of a pleading is received at the Registry of the Court of First Instance by fax is taken into consideration, for the purposes of compliance with the procedural time-limits, only if the signed original of the pleading is lodged at the Registry no later than 10 days thereafter.

18 Accordingly, the interpretation to the effect that that time-limit begins to run from the date of expiry of the period of two months and 10 days arising from the provisions of Article 63(5) of Regulation No 40/94 in conjunction with Article 102 (2) of the Rules of Procedure of the Court of First Instance, irrespective of the date of receipt of the fax, cannot be upheld. In particular, it should be noted that where, as in the present case, the fax is received more than 10 days before the expiry of the time-limit fixed for bringing an action before the Court of First Instance, the provisions of Article 43(6) of the Rules of Procedure of the Court of First Instance do not extend that time-limit.

19 In the present case, since the appellant sent his application by fax received on 3 January 2003, the original of the application should have been lodged at the Registry of the Court of First Instance by 13 January 2003 at the latest in order that account be taken of that fax. Since the original of the application did not arrive until 15 January 2003, the Court of First Instance rightly held that that date alone was to be taken into account in assessing whether the time-limits for bringing proceedings had been complied with.

20 The second, third, fourth and fifth pleas in law must therefore be rejected as clearly unfounded.

The first plea in law

21 By his first plea in law the appellant submits that the Court of First Instance infringed Article 45 of the Statute of the Court of Justice by not finding that there was force majeure within the meaning of that article.

22 The appellant states that he entrusted the original of his application to Cibeles Mailing SA ('Cibeles Mailing') on 7 January 2003, that is seven days before the expiry of the time-limit within which to commence proceedings, for its consignment to the Spanish postal service. Accordingly, the delay in the arrival of that letter at the Registry of the Court of First Instance was unforeseeable. He submits that he cannot be criticised for not having recourse to a faster method of despatch (private courier service) as the postal service is the safest and most efficient method in Spain.

23 He adds that where a party has done everything in its power to entrust to an ordinary administrative service the letter of confirmation, the principle of proportionality requires the Court of First Instance to relax its time-limits.

24 As a preliminary point, it should be noted that the Court of First Instance, which gave its decision by order on the basis of Article 111 of its Rules of Procedure, did not inform Mr Zuazaga Meabe of its intention to dismiss the action as being out of time and did not give him an opportunity to justify the delay in the arrival at the

Registry of the original of the application. Accordingly, the appellant cannot be criticised for pleading force majeure for the first time on appeal.

25 The concept of 'force majeure' within the meaning of Article 45 of the Statute of the Court, contains both an objective element relating to abnormal circumstances unconnected with the person in question and a subjective element involving the obligation, on that person's part, to guard against the consequences of the abnormal event by taking appropriate steps without making unreasonable sacrifices. In particular, the person concerned must pay close attention to the course of the procedure set in motion and, in particular, demonstrate diligence in order to comply with the prescribed time-limits (Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619, paragraph 32). Thus, the concept of force majeure does not apply to a situation in which, objectively, a diligent and prudent person would have been able to take the necessary steps before the expiry of the period prescribed for instituting proceedings (Case 209/83 *Ferriera Valsabbia* v *Commission* [1984] ECR 3089, paragraph 22).

26 In the present case it is clear from the notice of appeal that Mr Zuazaga Meabe allowed four days to elapse after sending the fax before entrusting — just seven days before the expiry of the time-limit for commencing proceedings — the original of the application, not directly to the postal service, but to Cibeles Mailing, which itself waited two days before sending that document by registered letter to the Registry of the Court of First Instance. It follows that, by his conduct, Mr Zuazaga Meabe increased the likelihood that his application would arrive out of time at the Court of First Instance and thus did not display the diligence expected of an ordinarily prudent appellant in order to comply with the time-limits.

27 Such a failure of diligence precludes the existence of force majeure and consequently the first plea in law must be rejected as clearly unfounded.

28 Accordingly, the appeal must be dismissed as clearly unfounded.

Costs

29 Article 69(1) and (2) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings pursuant to Article 118 of those Rules, provides that a decision as to costs is to be given in the final judgment or in the order which closes the proceedings and the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since BBVA applied for costs against the appellant and he has been unsuccessful, he must be ordered to bear his own costs and to pay those incurred by the intervener. However, as OHIM did not apply for costs against the appellant, it must bear its own costs.

On those grounds, the Court (Fourth Chamber) hereby orders:

1. **The appeal is dismissed.**

2. **Mr Zuazaga Meabe shall bear his own costs and pay those incurred by Banco Bilbao Vizcaya Argentaria SA.**

3. **The Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) shall bear its own costs.**

[Signatures]