JUDGMENT OF THE COURT (First Chamber)

11 May 2006 *

In Case C-416/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice brought on 27 September 2004,

The Sunrider Corp., established in Torrance, California (United States), represented by A. Kockläuner, Rechtsanwalt,

appellant,

the other party to the proceedings being:

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

defendant at first instance,

* Language of the case: English

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, K. Lenaerts, E. Juhász and M. Ilešič (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 17 November 2005,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2005,

gives the following

Judgment

1 By its appeal, The Sunrider Corp. seeks to have set aside the judgment of the Court of First Instance of the European Communities of 8 July 2004 in Case T-203/02 *Sunrider* v *OHIM — Espadafor Caba (VITAFRUIT)* [2004] ECR II-2811 ('the judgment under appeal') dismissing its action for annulment of the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 8 April 2002 (Case R 1046/2000-1) rejecting the application for registration of the word mark VITAFRUIT ('the contested decision').

Legal framework

2 Article 8 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), entitled 'Relative grounds for refusal', provides 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.

2. For the purposes of paragraph 1, "earlier trade marks" means:

(a) trade marks of the following kinds with a date of application for registration which is earlier than the date of application for registration of the Community trade mark, taking account, where appropriate, of the priorities claimed in respect of those trade marks:

...

(ii) trade marks registered in a Member State ...'

3 According to Article 15 of Regulation No 40/94, entitled 'Use of Community trade marks':

'1. If, within a period of five years following registration, the proprietor has not put the Community trade mark to genuine use in the Community in connection with the goods or services in respect of which it is registered, or if such use has been suspended during an uninterrupted period of five years, the Community trade mark shall be subject to the sanctions provided for in this Regulation, unless there are proper reasons for non-use.

...

3. Use of the Community trade mark with the consent of the proprietor shall be deemed to constitute use by the proprietor.'

4 Article 43 of Regulation No 40/94, entitled 'Examination of opposition', provides in paragraphs 2 and 3:

'2. If the applicant so requests, the proprietor of an earlier Community trade mark who has given notice of opposition shall furnish proof that, during the period of five years preceding the date of publication of the Community trade mark application,

the earlier Community trade mark has been put to genuine use in the Community in connection with the goods or services in respect of which it is registered and which he cites as justification for his opposition ..., provided the earlier Community trade mark has at that date been registered for not less than five years. In the absence of proof to this effect, the opposition shall be rejected. If the earlier Community trade mark has been used in relation to part only of the goods or services for which it is registered it shall, for the purposes of the examination of the opposition, be deemed to be registered in respect only of that part of the goods or services.

3. Paragraph 2 shall apply to earlier national trade marks referred to in Article 8(2)(a), by substituting use in the Member State in which the earlier national trade mark is protected for use in the Community.'

5 Rule 22(2) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1) provides: '[t]he indications and evidence for the furnishing of proof of use shall consist of indications concerning the place, time, extent and nature of use of the opposing trade mark for the goods and services in respect of which it is registered and on which the opposition is based ...'.

Background to the dispute

6 On 1 April 1996, the appellant applied to OHIM for registration of the word mark VITAFRUIT as a Community trade mark, pursuant to Regulation No 40/94.

7 The goods in respect of which registration was sought are in Classes 5, 29 and 32 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. Class 32 covers '[b]eers; mineral and aerated waters and other non-alcoholic drinks; fruit and vegetable drinks, fruit juices; syrups and other preparations for making beverages; herbal and vitamin beverages'.

8 On 1 April 1998, Mr Espadafor Caba filed notice of opposition to registration of the trade mark for all the goods covered by the application, pursuant to Article 42(1) of Regulation No 40/94.

9 The earlier trade mark of which Mr Espadafor Caba is the proprietor is the national word mark VITAFRUT, registered in Spain for '[n]on-alcoholic and non-therapeutic carbonic drinks, non-therapeutical cold beverages of all kind[s], gaseous, granulated effervescent; fruit and vegetable juices without fermentation (except must), lemonades, orangeades, cold beverages (except orgeat), soda water, Seidlitz water and artificial ice', falling within Classes 30 and 32.

10 At the request of the appellant and pursuant to Article 43(2) and (3) of Regulation No 40/94, the Opposition Division of OHIM asked Mr Espadafor Caba to furnish proof that the earlier trade mark had been put to genuine use in Spain in the five years preceding the publication of the Community trade mark application.

11 Mr Espadafor Caba provided OHIM with six bottle labels on which the earlier trade mark was displayed and 14 invoices and orders, 10 of which dated from before that publication.

12 By decision of 23 August 2000, the Opposition Division rejected the application for a Community trade mark in respect of goods falling within Class 32 other than beers, referred to in the trade mark application. It held, first, that the evidence produced by Mr Espadafor Caba showed that the earlier trade mark had been put to genuine use within the meaning of Article 43(2) and (3) of Regulation No 40/94 in respect of 'fruit and vegetable juices without fermentation, lemonades, orangeades'. It held, second, that those goods and the goods falling within Class 32 other than beer, referred to in the Community trade mark application, were in part similar and in part identical, and that there was a likelihood of confusion within the meaning of Article 8(1)(b) of that same regulation between the earlier trade mark and the mark in respect of which registration was sought.

13 The appeal brought by the appellant against that decision was dismissed by the contested decision. The OHIM First Board of Appeal essentially upheld the findings contained in the Opposition Division's decision, pointing out, however, that use of the earlier trade mark had been proven only for goods identified as 'juice concentrates'.

The procedure before the Court of First Instance and the judgment under appeal

14 By application lodged at the Registry of the Court of First Instance on 2 July 2002, the appellant brought an action for annulment of the contested decision on grounds of infringement, first, of Article 43(2) of Regulation No 40/94 and, second, of Article 8(1)(b) of the same regulation.

15 By the first part of its first plea in law, it argued that the Board of Appeal had wrongly taken into account the use of the trade mark by a third party. It maintained essentially that the opposing party had not demonstrated that the alleged use of the earlier trade mark had been with its consent.

16 In paragraph 23 of the judgment under appeal, the Court of First Instance found that the alleged use of the earlier trade mark had been by the company Industrias Espadafor SA and not by Mr Espadafor Caba, the proprietor of that trade mark, although his name also featured in the name of the company in question. It nevertheless found, in paragraphs 24 to 28 of the same judgment, that the Board of Appeal had been entitled to rely on the presumption that the use of the earlier trade mark had taken place with the consent of the proprietor, and that the appellant had not disputed this point before it.

17 Accordingly, the Court of First Instance rejected the first part of the first plea in law.

18 By the second part of the first plea, the appellant alleged that the Board of Appeal had interpreted the concept of 'genuine use' incorrectly. It maintained, in essence, that the evidence adduced by Mr Espadafor Caba did not establish the time, place, nature or even sufficiency of the alleged use of the trade mark in order to qualify it as genuine.

19 After referring, in paragraphs 36 to 42 of the judgment under appeal, to the case-law of the Court of Justice (Case C-40/01 *Ansul* [2003] ECR I-2439) and to its own case-law and having examined, in paragraphs 43 to 53 of the same judgment, the evidence adduced by the opposing party, the Court of First Instance, in paragraph 54 of that judgment, concluded its analysis as follows:

'It follows that the other party to the proceedings before the Board of Appeal furnished proof that sales were made, with its consent, to a Spanish customer during the period from May 1996 to May 1997 of around 300 [cases] of 12 items each of concentrated juices of various fruits, representing sales of approximately EUR 4 800. Although the scale of the use to which the earlier trade mark was put is limited and although it might be preferable to have more evidence relating to the nature of the

use during the relevant period, the facts and evidence put forward by the other party to the proceedings are sufficient for a finding of genuine use. Consequently, OHIM was right to find, in the contested decision, that the earlier trade mark was put to genuine use in respect of some of the products for which it was registered, namely for fruit juices.'

20 Accordingly, the Court of First Instance dismissed the second part of the first plea.

21 By its second plea, the appellant stated that the Board of Appeal had infringed Article 8(1)(b) of Regulation No 40/94 in finding that the goods 'herbal and vitamin beverages' referred to in the Community trade mark application and the goods 'juice concentrates', in respect of which the earlier trade mark had been put to genuine use, were similar. In its view, there was, at best, only a remote similarity between the goods.

22 In paragraph 66 of the judgment under appeal, the Court of First Instance found that the earlier trade mark had been used for various concentrated fruit juices, intended for end-consumers, and not for juice concentrates, intended for manufacturers producing fruit juices. It therefore rejected the appellant's argument that herbal and vitamin beverages and the goods in respect of which the earlier trade mark had been put to genuine use were intended for different purchasers.

23 In paragraph 67 of the same judgment, the Court of First Instance found that herbal and vitamin beverages and concentrated fruit juices shared the same purpose, that of quenching thirst, that in both cases the goods concerned were non-alcoholic beverages normally drunk cold and that to a large extent they were in competition. It found that the fact that their ingredients differed did not, however, affect the finding that they are interchangeable because they are intended to meet an identical need.

24 The Court of First Instance thus dismissed the second plea and the appellant's action in its entirety.

The appeal

25 The appellant advances three grounds of appeal and claims that the Court of Justice should:

— set aside the judgment under appeal;

— in the alternative, set aside the judgment under appeal in so far as it upheld the refusal to register the mark in respect of which registration was sought for the goods 'herbal and vitamin beverages';

— annul the contested decision;

— order OHIM to pay the costs, including those incurred before the OHIM adjudicating bodies and before the Court of First Instance.

26 OHIM requests the Court to dismiss the appeal and order the appellant to pay the costs.

The admissibility of OHIM's response

27 In its reply, the appellant submits that OHIM's response is inadmissible on the ground that the latter did not seek the same form of order, in whole or in part, as that sought at first instance, as required by Article 116 of the Rules of Procedure of the Court of Justice.

28 Article 116(1) provides:

'A response may seek:

— to dismiss, in whole or in part, the appeal or to set aside, in whole or in part, the decision of the Court of First Instance;

— the same form of order, in whole or in part, as that sought at first instance and shall not seek a different form of order.'

29 That provision states for which purposes the parties to the proceedings other than the appellant may lodge a response.

30 For the response to serve a purpose, those other parties must, in principle, state therein their position as to the appeal, and request that it be dismissed in whole or in part, or express total or partial support for it, or even lodge a cross-appeal, all of which are forms of order provided for in the first indent of Article 116(1) of the Rules of Procedure.

31 The other parties to the proceedings cannot, however, be required, in order for their responses to be valid, to seek the form of order provided for in the second indent of that provision. Each party is free to make before a court the claims which it considers appropriate. Thus, when the Court of First Instance does not grant the form of order sought by a party, or grants it only in part, the party may choose not to seek that form of order from the Court of Justice when the latter hears an appeal against the judgment of the Court of First Instance.

32 A fortiori, when, as in the present case, a party has obtained full satisfaction before the Court of First Instance and, in its response before the Court of Justice, seeks to have the appeal dismissed in its entirety, it is not necessary for it to seek the same form of order as that sought at first instance. Moreover, if the Court of Justice allows the appeal and, exercising the option open to it under Article 61 of the Statute of the Court of Justice, decides to give final judgment in the matter itself, it will be required to take account of that form of order, either to grant it again, in whole or in part, or to dismiss it, but cannot justify that dismissal on the ground that the party concerned did not seek the same form of order before it.

33 Accordingly, the objection of inadmissibility raised against OHIM's response must be rejected.

The first ground of appeal

Arguments of the parties

34 By its first ground of appeal, the appellant claims that the Court of First Instance infringed Article 43(2) and (3) of Regulation No 40/94, read together with Article 15(1) and (3) of the same regulation, by taking account of a third party's use of the earlier trade mark.

35 By the first part of this ground of appeal, the appellant criticises the Court of First Instance for having misinterpreted the apportionment of the burden of proof, having taken into account inconclusive evidence provided by the opposing party and having relied on presumptions rather than firm evidence.

36 According to the appellant, it is settled case-law of the Court of First Instance that genuine use of a trade mark cannot be proved by means of probabilities or presumptions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned.

37 In the present case, it was for the opposing party to prove that the use of the earlier trade mark by the company Industrias Espadafor SA had taken place with its consent. The opposing party has, however, adduced no evidence that it consented to that use. In order to find that the opposing party had consented to that use, the Board of Appeal and the Court of First Instance therefore incorrectly relied on probabilities and presumptions.

38 By the second part of the first ground of appeal, the appellant alleges that the Court of First Instance committed an error of law by failing to consider, in the course of the examination of the first part of the first plea at first instance, whether, at the time it gave its ruling, it could lawfully adopt a new decision with the same operative part as the contested decision, as required by its own case-law (Case T-308/01 *Henkel* v *OHIM — LHS (UK) (KLEENCARE)* [2003] ECR II-3253, paragraph 29).

39 Paragraphs 25 and 26 of the judgment under appeal indicate that the Court of First Instance in fact confined itself to examining the issue of whether the Board of Appeal could, at the time it adopted the contested decision, rely on the presumption that the opposing party had consented to the use of the earlier trade mark by Industrias Espadafor SA.

40 Regarding the first part of the first ground of appeal, OHIM states that, in the present case, the presumption that the opposing party had consented to the use of the earlier trade mark by Industrias Espadafor SA, a presumption which the Court of First Instance accepted, is completely justified for the reasons set out in paragraphs 24 to 29 of the judgment under appeal. Accordingly, the assessment of the facts by the Court of First Instance, on completion of which it acknowledged that the opposing party had consented to the use of the earlier trade mark, does not contain any error of assessment or any distortions which would justify the Court of Justice's interfering in the findings made by the Court of First Instance.

41 As to the second part of the first ground of appeal, OHIM states that, according to settled case-law, the purpose of the action before the Court of First Instance is to ensure judicial review of the Board of Appeal's decision for the purposes of Article 63 of Regulation No 40/94, so that the Court of First Instance was in no way required to consider whether or not a new decision with the same operative part as the contested decision could lawfully be adopted at the time it gave its ruling.

Findings of the Court

42 First of all, under Article 43(2) and (3) of Regulation No 40/94, at the request of the applicant for a Community trade mark, the proprietor of an earlier trade mark who has given notice of opposition must furnish proof that his trade mark has been put to genuine use.

43 Moreover, Article 15(3) of Regulation No 40/94 provides that the genuine use of a trade mark is the use made of that mark by the proprietor or with his consent.

44 It follows that it is for the proprietor of the earlier trade mark who has given notice of opposition to furnish proof that he consented to the alleged use of that trade mark by a third party.

45 In the present case, first, in so far as it complains that the Court of First Instance misinterpreted the apportionment of the burden of proof, the first part of the first ground of appeal is unfounded.

46 After noting, in paragraph 23 of the judgment under appeal, that the name of the company Industrias Espadafor SA, which made use of the earlier trade mark, reproduced part of the name of the proprietor of that trade mark and having held, in paragraphs 24 and 25 of the judgment, that it was unlikely that Mr Espadafor Caba would have been in a position to submit the proof of use of the trade mark which he did produce before the Opposition Division and the OHIM Board of Appeal if that use had taken place against his wishes, the Court of First Instance found that OHIM had correctly relied on the presumption that the opposing party had consented to the alleged use of the earlier trade mark.

47 In so doing, the Court of First Instance did not require the appellant to prove the lack of consent, but relied on the material adduced by the opposing party and found that his consent to the alleged use had been proved. It did not, therefore, reverse the burden of proof.

48 Second, in so far as it complains that the Court of First Instance held that the evidence adduced by the opposing party proved his consent to the alleged use, that part of the argument essentially asks the Court of Justice to substitute its own assessment of the facts for that of the Court of First Instance and is, accordingly, inadmissible.

49 In addition, under Article 225(1) EC and the first paragraph of Article 58 of the Statute of the Court of Justice, an appeal lies on a point of law only. The Court of First Instance thus 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 do not, save where the facts and evidence are distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see, inter alia, Case C-37/03 P *BioID* v *OHIM* [2005] ECR I-7975, paragraph 43 and case-law cited).

50 Moreover, it does not appear that, in paragraphs 23 to 25 of the judgment under appeal, the Court of First Instance distorted the facts and evidence submitted to it.

51 For the sake of completeness, the Court of First Instance, in paragraphs 26 and 27 of the judgment under appeal, found that '[t]here was all the more reason for OHIM to rely on [the] presumption [that the opposing party had consented to the alleged use] given that the applicant did not dispute that the earlier trade mark had been put to use by Industrias Espadafor SA'.

52 The first part of the first ground of appeal must therefore be rejected as being partly unfounded and partly inadmissible.

53 Second, contrary to the appellant's assertions, it does not follow from the Court of First Instance's case-law that it is required to ascertain whether, at the time it rules on an action against a decision of the OHIM Board of Appeal, it may lawfully adopt a new decision with the same operative part as the decision appealed against. In paragraphs 25 and 26 of its judgment in *Henkel* v *OHIM — LHS (UK) (KLEENCARE)*, the Court of First Instance merely stated that that obligation applies to the OHIM Boards of Appeal because of the principle of continuity, in

terms of their functions, as between the OHIM adjudicating bodies deciding on the application at first instance — such as the examiners, the Opposition Division and the Cancellation Division — and those boards.

54 Under Article 63 of Regulation No 40/94, the Court of First Instance may annul or alter a decision of an OHIM Board of Appeal only 'on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of Regulation [No 40/94] or of any rule of law relating to [its] application or misuse of power'.

55 It follows that the Court of First Instance may annul or alter a decision against which an action has been brought only if, at the time the decision was adopted, it was vitiated by one of those grounds for annulment or alteration. The Court of First Instance may not, however, annul or alter that decision on grounds which come into existence subsequent to its adoption.

56 The second part of the first ground of appeal is thus unfounded and this ground of appeal must accordingly be rejected in its entirety.

The second ground of appeal

Arguments of the parties

57 By the first part of its second ground of appeal, the appellant states that the labels produced by the opposing party do not bear dates and therefore do not amount to proof of use of the earlier trade mark during the relevant period; nor do they support the other evidence adduced during the procedure.

58 By the second part of the same ground of appeal, the appellant maintains that the Court of First Instance infringed Article 43(2) of Regulation No 40/94 by misinterpreting the concept of 'genuine use' within the meaning of that provision: inter alia it applied incorrectly the conditions according to which the use of a trade mark may be held to be genuine.

59 According to the appellant, it follows from the Opinion of Advocate General Ruiz-Jarabo Colomer and the judgment of the Court of Justice in *Ansul*, as well as from the Court of First Instance's case-law, that genuine use does not include use that is not merely token, serving solely to preserve the rights conferred by the trade mark, that the point beyond which commercial use of the trade mark may be held to be appropriate and genuine is directly related to the nature of the product or the type of service, that, regardless of the volume of transactions carried out under the trade mark and their frequency, the use must be continuous and in no way sporadic or occasional, and genuine use requires that the trade mark be present in a substantial part of the territory in which it is protected.

60 The appellant states that, in the present case, the goods sold are everyday manufacturing and consumption goods, intended for daily use by the end-consumer at low cost and, therefore, easy to sell. In the light of the nature of those goods, sales volumes such as have been established in this case cannot be considered to be sufficient for the purposes of Article 43(2) of Regulation No 40/94. Moreover, the opposing party, who provided evidence of a mere five transactions over a period of 11 months, established at most only sporadic and occasional use of the earlier trade mark. In any event, such use cannot be regarded as being continuous, actual and stable. Furthermore, since the invoices produced were all addressed to the same customer, it has not been proven that the earlier trade mark was present in a substantial part of the territory in which it is protected.

61 It adds that its submission that the Court of First Instance misinterpreted the concept of 'genuine use' for the purposes of Article 43(2) of Regulation No 40/94 is

supported by the fact that the Bundesgerichtshof (Federal Court of Justice, Germany) held, in another case, that monthly sales of EUR 4 400 indicate merely token use.

62 According to the appellant, it does not in any way call into question the findings of fact and assessment of the evidence carried out by the Court of First Instance, but complains that it disregarded the concept of 'genuine use'. This is a point of law which may be raised on appeal.

63 OHIM states that, in paragraphs 32 to 42 of the judgment under appeal, the Court of First Instance correctly set out the principles developed by it and the Court of Justice regarding the concept of 'genuine use' and notes that the appellant does not contest those principles but considers that the facts of this case do not provide proof of such use.

64 It infers from that that the second ground of appeal seeks a re-examination by the Court of Justice of the facts and evidence; this ground of appeal is therefore inadmissible.

65 OHIM submits, in the alternative, that the Court of First Instance was right in holding that genuine use of the earlier trade mark was established, which means that this ground of appeal is unfounded. It admits that the use proven is on a rather small scale and appears to relate to a single customer, but states that the overall amount of the transactions was achieved over a fairly brief period. It adds that, in accordance with the Court of Justice's case-law, there is no de minimis rule and that the Court of First Instance was correct in holding that small-scale use may be compatible with actual market presence.

66 Regarding the appellant's assertion that a trade mark must be present in a substantial part of the territory in which it is protected in order for its use to be found to be genuine, OHIM submits that that requirement is not valid in the light of *Ansul* and the order in Case C-259/02 *La Mer Technology* [2004] ECR I-1159, and that the extent of the territorial coverage is only one of the factors to be taken into account in the determination of whether or not the use is genuine.

67 As to the argument drawn from the Bundesgerichtshof's judgment, OHIM contends that judgments of national courts are not binding in these proceedings and that, in addition, since the assessment of whether use has been genuine must be on a case-by-case basis, it is practically impossible to draw general conclusions from other cases.

Findings of the Court

68 The Court notes, first, that the appellant does not call into question the finding made by the Court of First Instance, in paragraphs 46 to 48 of the judgment under appeal, on the basis of invoices produced by the opposing party, that the value of the goods sold under the earlier trade mark between May 1996 and May 1997 to a single customer in Spain amounted to no more than EUR 4 800, corresponding to the sale of 293 cases of 12 items each.

69 In those circumstances, the first part of the second ground of appeal, alleging that the labels produced by the opposing party cannot in themselves prove use of the earlier trade mark during the relevant period nor support the other evidence, is not such as to justify setting aside the judgment under appeal and must therefore be rejected as ineffective.

70 Second, as is apparent from the case-law of the Court of Justice, there is genuine use of a trade mark where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark. When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark in the course of trade is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark (see, regarding Article 10(1) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), a provision which is identical to Article 15(1) of Regulation No 40/94, *Ansul*, paragraph 43, and order in *La Mer Technology*, paragraph 27).

71 The question whether use is sufficient to maintain or create market share for the goods or services protected by the mark thus depends on several factors and on a case-by-case assessment. The characteristics of those goods and services, the frequency or regularity of the use of the trade mark, whether the mark is used for the purpose of marketing all the identical goods or services of the proprietor or merely some of them, or evidence of use which the proprietor is able to provide, are among the factors which may be taken into account (see, to that effect, order in *La Mer Technology*, paragraph 22).

72 It follows that it is not possible to determine a priori, and in the abstract, what quantitative threshold should be chosen in order to determine whether use is genuine or not. A de minimis rule, which would not allow OHIM or, on appeal, the Court of First Instance, to appraise all the circumstances of the dispute before it, cannot therefore be laid down (see, to that effect, order in *La Mer Technology*, paragraph 25). Thus, when it serves a real commercial purpose, in the circumstances

referred to in paragraph 70 of this judgment, even minimal use of the trade mark can be sufficient to establish genuine use (order in *La Mer Technology*, paragraph 27).

73 In the present case, the Court of First Instance did not commit any error of law in its assessment of the genuine use of the earlier trade mark.

74 First, under Rule 22(2) of Regulation No 2868/95, it analysed, in paragraphs 46 to 54 of the judgment under appeal, the place, time, extent and nature of that use.

75 Second, in accordance with the case-law referred to in paragraphs 70 to 72 of this judgment, it sought to determine whether the earlier trade mark had been used in order to create or preserve an outlet for the goods 'concentrated fruit juices', for which the alleged use was established, or whether, on the contrary, that use had been for the sole purpose of preserving the rights conferred by the mark and had to be regarded as token.

76 Third, contrary to the appellant's assertions, the fact that in the present case the proof of use of the earlier trade mark was established only for the sale of products intended for a single customer does not a priori preclude the use being genuine (see, to that effect, order in *La Mer Technology*, paragraph 24), even though it follows from that situation that the mark was not present in a substantial part of the territory of Spain, in which it is protected. As OHIM has maintained, the territorial scope of the use is only one of several factors to be taken into account in the determination of whether it is genuine or not.

77 Lastly and fourthly, regarding the appellant's argument that a judgment delivered by the Bundesgerichtshof in a case concerning a trade mark other than the trade mark VITAFRUT, it is clear from the case-law referred to in paragraphs 70 to 72 of this judgment that, when assessing whether use of the mark is genuine, regard must be had to all the circumstances of the case and it is not possible to determine a priori, and in the abstract, what quantitative threshold should be chosen in order to determine whether use is genuine or not. It follows that courts ruling in two different cases may assess differently the genuine nature of the use alleged before them, even when instances of that use may have generated comparable sales volumes.

78 Moreover, the appellant's line of argument that, in the light of inter alia the nature of the goods marketed under the earlier trade mark, the quantitative scope of the use of that mark was insufficient for it to be found to be genuine within the meaning of Article 43(2) of Regulation No 40/94, essentially asks the Court of Justice to substitute its own assessment of the facts and evidence for that of the Court of First Instance. Unless the facts or evidence have been distorted, which has not been alleged here, such a line of argument does not constitute a point of law which is subject, as such, to review by the Court of Justice, for the reasons given in paragraph 49 of this judgment.

79 Accordingly, the second part of the second ground of appeal, alleging misinterpretation of the concept of 'genuine use' within the meaning of Article 43(2) of Regulation No 40/94, is partly inadmissible and partly unfounded and this ground of appeal must therefore be rejected in its entirety.

The third ground of appeal

Arguments of the parties

80 By its third ground of appeal, relied on in support of its alternative claim for the judgment under appeal to be set aside in part, the appellant maintains that the Court

of First Instance infringed Article 8(1)(b) of Regulation No 40/94 in finding that 'herbal and vitamin beverages' for which registration is sought, and the goods 'concentrated fruit juices', for which genuine use of the earlier trade mark has been established, are goods bearing a similarity within the meaning of that provision.

81 First, the appellant alleges that the Court of First Instance did not take account of the nature of the respective goods, which, according to the case-law of the Court of Justice, is a relevant factor which must be taken into account for determining whether goods or services are similar.

82 Second, it states that those goods are very different in terms of how they are manufactured, the manner in which they are used, their intended purpose and the places where they are marketed, and that those differences, taken as a whole, are more important than the one feature they have in common, namely that they are aimed at the same potential consumers.

83 The appellant maintains that, by this ground of appeal, it does not call into question the findings of fact and the assessment of the evidence carried out by the Court of First Instance, but complains that it disregarded the concept of 'similarity of the goods'. It is, in its view, a point of law which may be raised on appeal.

84 OHIM submits, by way of principal argument, that the third ground of appeal is inadmissible because the appellant merely criticises the assessment of the facts carried out by the Court of First Instance. It submits, in the alternative, that the goods in question are similar.

Findings of the Court

85 As the Court of First Instance rightly held, in paragraph 65 of the judgment under appeal, in order to assess the similarity of the products or services concerned, all the relevant features of the relationship between those products or services should be taken into account. Those factors include, in particular, their nature, their intended purpose, their method of use and whether they are in competition with each other or are complementary (see, regarding Article 4(1)(b) of Directive 89/104, a provision which is substantively identical to Article 8(1)(b) of Regulation No 40/94, Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 23).

86 In accordance with that case-law, the Court of First Instance found, in paragraph 66 of the judgment under appeal, that the goods 'herbal and vitamin beverages', for which registration is sought, and the goods 'concentrated fruit juices', for which genuine use of the earlier trade mark has been established, are intended for end-consumers. Likewise, it held, in paragraph 67 of the judgment under appeal, that those goods share the same purpose, that of quenching thirst, are to a large extent in competition, have the same nature and method of use — both are non-alcoholic beverages normally drunk cold — and that the fact that their ingredients differ does not affect the finding that they are interchangeable because they are intended to meet an identical need.

87 In complaining that the Court of First Instance did not take into account the nature of the goods in question in order to assess the similarities between them, the appellant relies on an incorrect interpretation of the judgment under appeal. In paragraph 67 of the judgment under appeal, the Court of First Instance indeed considered whether or not the goods were similar, examining, inter alia, their respective natures.

88 In complaining that the Court of First Instance did not hold that the differences between the goods in question were more important than the one characteristic they shared, namely that they are aimed at the same potential end-consumers, the appellant is, in reality, asking the Court of Justice to substitute its own assessment of the facts for that of the Court of First Instance, contained in paragraphs 66 and 67 of

the judgment under appeal (see, by analogy, regarding the assessment of the similarities between two trade marks, Case C-361/04 P *Ruiz-Picasso and Others* v *OHIM* [2006] ECR I-643, paragraph 23, and Case C-206/04 P *Muelhens* v *OHIM* [2006] ECR I-2712, paragraph 41). Unless there has been distortion, which has not been alleged here, such an argument is not a point of law which is subject, as such, to review by the Court of Justice, for the reasons given in paragraph 49 of this judgment.

89 The third ground of appeal must accordingly be rejected as being partly unfounded and partly inadmissible and, therefore, the appeal in its entirety must be dismissed.

Costs

90 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 has applied for costs and the appellant 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 The Sunrider Corp. to pay the costs.

[Signatures]