JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
17 September 2003 *

In Case T-71/02,

Classen Holding KG, established in Essen (Germany), represented by S. von Petersdorff-Campen, lawyer, with an address for service in Luxembourg,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by S. Laitinen, acting as Agent,

defendant,

* Language of the case: English.

the intervener before the Court of First Instance being

International Paper Co., established in New York, New York (United States of America), represented by E. Armijo Chávarri, lawyer,

ACTION brought against the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 14 December 2001 (Case R 810/1999-2) declaring inadmissible, following rejection of the application for *restitutio in integrum*, the appeal brought against the decision of the Opposition Division in opposition proceedings between Classen Holding KG and International Paper Co.,

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

composed of: V. Tiili, President, P. Mengozzi and M. Vilaras, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 30 April 2003,

gives the following

Judgment

Legal background

1 Article 59 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended, provides as follows:

'Time-limit and form of appeal

Notice of appeal must be filed in writing at the Office within two months after the date of notification of the decision appealed from. The notice shall be deemed to have been filed only when the fee for appeal has been paid. Within four months after the date of notification of the decision, a written statement setting out the grounds of appeal must be filed.'

2 Article 78(1) to (3) of Regulation No 40/94 provides:

'*Restitutio in integrum*

1. The applicant for or proprietor of a Community trade mark or any other party to proceedings before the Office who, in spite of all due care required by the circumstances having been taken, was unable to observe a time-limit vis-à-vis the

Office shall, upon application, have his rights re-established if the non-observance in question has the direct consequence, by virtue of the provisions of this Regulation, of causing the loss of any right or means of redress.

2. The application must be filed in writing within two months from the removal of the cause of non-compliance with the time limit. The omitted act must be completed within this period....

3. The application must state the grounds on which it is based and must set out the facts on which it relies. It shall not be deemed to be filed until the fee for re-establishment of rights has been paid.'

3 Rule 49(1) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1) provides:

'Rejection of the appeal as inadmissible

1. If the appeal does not comply with Articles 57, 58 and 59 of the Regulation and Rule 48(1)(c) and (2), the Board of Appeal shall reject it as inadmissible, unless each deficiency has been remedied before the relevant time-limit laid down in Article 59 of the Regulation has expired.'

Facts

4 On 1 April 1996 International Paper Co. (hereinafter 'the intervener') filed an application for a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) under Regulation No 40/94.

5 The trade mark in respect of which registration was sought is the word mark BECKETT EXPRESSION.

6 The goods in respect of which registration of the trade mark was sought are in Class 16 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, and correspond to the following description: 'Paper, cardboard and goods made from these materials, not included in other classes; printed matter; bookbinding material; photographs; stationery; adhesives for stationery or household purposes; artists' materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging (not included in other classes); playing cards; printers' type; printing blocks.'

7 The trade mark application was published in *Community Trade Marks Bulletin* No 22/97 of 6 October 1997.

8 On 23 December 1997 the applicant, acting under its previous name, 'Classen-Papier KG', filed a notice of opposition under Article 42(1) of Regulation No 40/94. The opposition was based on the registration in Germany of the word mark Expression for goods in Class 16 of the Nice Agreement corresponding to the following description: 'Paper, millboard, cardboard, articles of paper and millboard'.

9 By decision of 8 October 1999, which was served on the applicant on the same day by fax, the Opposition Division rejected the opposition on the ground that, by reason of the difference between the signs, the identity of the goods was not sufficient to demonstrate a likelihood of confusion between them, for the purposes of Article 8(1)(b) of Regulation No 40/94, in the relevant territory of the Community, namely Germany.

10 On 30 November 1999 the applicant filed a notice of appeal under Article 59 of Regulation No 40/94 seeking the annulment of the decision of the Opposition Division. A written statement setting out the grounds of appeal was filed on 10 February 2000.

11 By electronic mail of 26 April 2000, the Registry of the Boards of Appeal at OHIM informed the applicant that, under the provisions of Article 59 of Regulation No 40/94, the written statement setting out the grounds of appeal should have been filed within four months of the date of notification to the opponent of the decision of the Opposition Division, that is to say, by 8 February 2000. It added that the written statement setting out the grounds of appeal had been filed on 10 February 2000, and that therefore 'the appeal [was] likely to be deemed inadmissible'. The applicant was invited to file any comments it might have on that point, together with supporting evidence, by not later than 26 June 2000.

12 By letter of 29 May 2000, received at OHIM on 30 May 2000, the applicant filed an application for *restitutio in integrum* under Article 78 of Regulation No 40/94. The applicant submitted therein that the reason why the time-limit prescribed for the filing of the written statement setting out the grounds of appeal had not been observed was that its representative had been ill. An affidavit to that effect was supplied.

13 By decision of 14 December 2001 (hereinafter 'the contested decision'), the Second Board of Appeal of OHIM declared the appeal inadmissible and rejected the application for *restitutio in integrum*. Paragraph 16 of the contested decision reads as follows:

'In the present case the "cause of non-compliance", within the meaning of Article 78(2), is stated to be the illness of the opponent's representative. That cause was removed when the opponent's representative returned to work on 10 February 2000 and signed the statement of grounds. The application for *restitutio in integrum* thus had to be filed within two months from that date, i.e. by 10 April 2000. Since the application was not filed until 30 May 2000, it must be rejected, without its being necessary to rule on the sufficiency of the alleged cause of non-compliance.'

Procedure and forms of order sought

14 By an application drawn up in English and lodged at the Registry of the Court on 14 March 2002, the applicant brought this action.

15 The intervener did not object, within the time-limit set for that purpose by the Registry of the Court, to English becoming the language of the case.

16 OHIM lodged its response at the Registry of the Court on 18 July 2002. The intervener lodged its response at the Registry of the Court on 24 July 2002.

17 On the basis of the Report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure.

18 The applicant and the intervener informed the Court respectively on 25 and 28 April 2003 that they would not appear at the hearing.

19 OHIM presented oral argument and replied to the oral questions put by the Court at the hearing on 30 April 2003.

20 The applicant claims that the Court should:

— annul the contested decision;

— order OHIM to pay the costs.

21 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

22 The intervener contends that the Court of First Instance should:

— dismiss the action;

— order the applicant to pay the costs.

Law

First plea: infringement of Article 78 of Regulation No 40/94

Arguments of the parties

23 The applicant maintains that its non-observance of the time-limit laid down in Article 59 of Regulation No 40/94 for filing the written statement setting out the grounds of appeal was due to a heavy workload and to the simultaneous absence

of the director in charge of the matter. On 3 February 2000 a first draft statement was dictated by one of the patent attorneys, Mr D. That draft was typed the following day and put in the outgoing post by Mr D.'s secretary, Ms S., together with all correspondence to be posted on Monday 7 February 2000.

24 The applicant adds that Ms S. is the person in charge of this file and responsible for dealing with trade marks in general, and that she is also responsible for checking and monitoring deadlines. The deadlines are noted in special books, calendars and computer tables, which are checked continually. The internal time-limit for completing the statement and posting it to OHIM was 7 February 2000. This had been noted in the special books and in Ms S.'s diary.

25 However, on that day Mr D. was prevented from coming to the office by illness. As soon as Ms S. learned that Mr D. would not be able to return to work before 10 February 2000, she checked the outgoing post in his office but overlooked the statement which was due to be posted on the following day and was ready for signing. Thus, the statement setting out the grounds of appeal was not signed by any of the partners and remained in the post folder.

26 On Mr D.'s return, on 10 February 2000, the statement setting out the grounds of appeal was amended slightly, signed and then faxed to OHIM. However, due to the absence of Mr D. and a heavy workload, the fact that the time-limit had been missed by two days was not noticed by either Mr D. or Ms S.

27 The applicant submits that it was as a result of the illness of Mr D. and the workload of Mr D. and Ms S. that the time-limit for filing the statement setting out the grounds of appeal could not be complied with. That amounts to a cause of

non-compliance within the meaning of Article 78 of Regulation No 40/94. The non-observance can be deemed to have been ended only by OHIM's notification, which is to say on 26 April 2000. Consequently, the applicant submits that its application for *restitutio in integrum*, filed on 30 May 2000, was submitted within the two-month period laid down in Article 78 of Regulation No 40/94.

28 In the alternative, the applicant states that even if the application of 29 May 2000 were to be deemed to have been lodged after the expiry of the time-limit laid down in Article 78 of Regulation No 40/94, an application for *restitutio in integrum* is impliedly incorporated in the statement setting out the grounds of appeal filed on 10 February 2000.

29 OHIM, on the other hand, supported by the intervener, contends that it is common ground in this case that the cause of non-compliance coincided with the end of Mr D.'s illness and not, contrary to what the applicant claims, with the notification by OHIM that it had failed to observe the time-limit for filing the statement setting out the grounds of appeal.

30 By its letter of 26 April 2000, OHIM merely gave the applicant an opportunity to show that OHIM's preliminary impression regarding the late submission of the statement setting out the grounds of appeal was in fact erroneous. OHIM adds that that letter did not, contrary to what the applicant suggests, imply that a new time-limit for bringing an application for *restitutio in integrum* began to run from when it was sent. The letter had no bearing on the time-limit which ran from the removal of the cause of non-compliance in question.

31 OHIM concludes that the Board of Appeal correctly held that the cause of non-compliance, in this case absence due to illness, was undoubtedly removed on 10 February 2000, when Mr D. returned to work and signed the statement setting

out the grounds of appeal. OHIM contends that from that moment in time, the representative should, exercising due diligence and on his own initiative, have filed an application for *restitutio in integrum* within two months, that is by 10 April 2000. Since the application was not filed until 30 May 2000, some three-and-a-half months after the 'removal of the cause', the Board was right to reject it.

32 OHIM also points out that the time-limits in question are not at its discretion.

33 The intervener also draws attention to the fact that the time-limits granted cannot be interpreted flexibly, to protect the interests of the other parties.

34 It adds that the requirements of Article 78 of Regulation No 40/94 are not at all fulfilled in this case. The fact that Mr D. did not notice the delay in filing the statement setting out the grounds of appeal when he returned to work does not constitute a cause of non-compliance within the meaning of Article 78 of Regulation No 40/94, but on the contrary shows that the applicant failed to exercise all due care required by the circumstances.

Findings of the Court

35 It must be recalled that under Article 78(2) of Regulation No 40/94 '[t]he application [for *restitutio in integrum*] must be filed in writing within two months from the removal of the cause of non-compliance with the time-limit' and that 'the omitted act must be completed within this period'.

36 However, the applicant essentially maintains that the alleged cause of non-compliance only ended on the date on which OHIM's letter of 26 April 2000 drawing its attention to the fact that the statement setting out the grounds of appeal had been filed late was notified. It therefore submits that the two-month period provided for by Article 78 of Regulation No 40/94 only began to run as from that date.

37 It is therefore necessary to determine at what point in time the alleged cause of non-compliance was removed.

38 In that connection, it is common ground that Mr D. returned to work after his illness on 10 February 2000, the date on which the statement setting out the grounds of appeal was signed by him and sent to OHIM. Thus, even if the circumstances surrounding the late filing of the statement setting out the grounds of appeal, namely Mr D.'s illness and his and Ms S.'s workload, amount to a cause of non-compliance within the meaning of Article 78 of Regulation No 40/94, which OHIM does not deny, that cause of non-compliance was naturally removed as soon as Mr D. returned to work. On 10 February 2000, when Mr D. signed the statement setting out the grounds of appeal, the cause of non-compliance had ended. Furthermore, it was at that point in time that he could have discovered that the statement was late.

39 Furthermore, Ms S. should have noticed that it was late at the time when the statement was sent to OHIM. It is clear from the description of her system for checking time-limits, described at paragraph 24 above and in the application for *restitutio in integrum*, that the applicant gave his staff general instructions to monitor compliance with time-limits. According to the applicant's own submissions, Ms S. was the person in charge of the file in question and of dealing with trade marks in general, and was also responsible for monitoring and checking deadlines. According to the applicant, the deadlines are noted in special books, calendars and computerised tables, which are checked continually. The internal time-limit for settling the statement and sending it to OHIM would have been 7 February 2000. That would have been noted in the special books as well as in Ms S.'s diary.

40 Therefore, even if Mr D.'s illness, together with Ms S.'s alleged error, constitute a cause of non-compliance within the meaning of Article 78 of Regulation No 40/94, it cannot be accepted that the failure to notice that the deadline for filing the statement setting out the grounds of appeal had not been complied with was purely the result, as the applicant claims, of an oversight on the part of Ms S. in not noticing the statement in the outgoing post in Mr D.'s office. The system for checking current deadlines within the applicant's office ought normally to have led to that error being detected promptly, given that the special books, calendars and computerised tables are, according to the applicant's own assertions, checked continually (see to that effect Case T-146/00 *Ruf and Stier* v *OHIM* ('*DAKOTA*' image) [2001] ECR II-1797, paragraphs 56 to 61).

41 Those findings cannot be called in question by the applicant's argument that the period laid down in Article 78 of Regulation No 40/94 only begins to run when OHIM serves notice that a statement setting out the grounds of appeal is late. Firstly, it must be observed that that letter forms part of a practice followed by OHIM which the relevant provisions of Regulation No 40/94 in no way require of it, and cannot in any event affect the point in time when the period granted for bringing an application for *restitutio in integrum* begins to run. Secondly, it must be pointed out that such an interpretation would be manifestly contrary to the wording of Article 78(2) of Regulation No 40/94. That argument cannot therefore be upheld.

42 Accordingly, the application for *restitutio in integrum* should have been filed by 10 April 2000. The Board of Appeal was therefore correct to find that the application for *restitutio in integrum* had been filed outside the two-month period provided for in Article 78 of Regulation No 40/94.

43 Nor can the argument put forward by the applicant in the alternative, to the effect that the statement setting out the grounds of appeal filed on 10 February 2000 impliedly incorporated an application for *restitutio in integrum* be upheld.

44 In that connection, it must be observed that there is nothing in the statement of grounds of appeal from which it may be inferred that an application for *restitutio in integrum* is being made. In any event, it is clear from Article 78(1) and (3) of Regulation No 40/94 that an application for *restitutio in integrum* must be submitted in an application with a statement of grounds setting out the facts and substantiation relied on in support thereof. Accordingly, an application for *restitutio in integrum* must be made by a separate act, distinct from the act by which the appeal is brought.

45 Furthermore, under Article 78(3) of Regulation No 40/94, an application for *restitutio in integrum* is deemed to be filed only once the fee for re-establishment of rights has been paid. However, as is clear in this case from the application for *restitutio in integrum*, the applicant did not pay that fee until 29 May 2000, when the application was filed. It cannot therefore be considered that the statement setting out the grounds of appeal impliedly incorporated an application for *restitutio in integrum*.

46 The first plea in law must therefore be rejected as unfounded.

Second plea in law: infringement of Article 59 of Regulation No 40/94

Arguments of the parties

47 The applicant submits that filing a statement setting out the grounds of appeal is not a precondition for the admissibility of the appeal. Even if the statement

setting out the grounds of appeal is lodged out of time, the appeal is still admissible. According to the applicant, the Board of Appeal had available to it sufficient facts for it to rule on the appeal since the appeal was filed and the appeal fee paid within the two-month period prescribed by Article 59 of Regulation No 40/94.

48 The applicant concludes that OHIM, by dismissing the appeal on the ground that the statement setting out the grounds of appeal was filed out of time, infringed its right to due process of law and thus its fundamental rights.

49 OHIM, on the other hand, supported by the intervener on this point, contends that, under Article 59 of Regulation No 40/94, filing the statement setting out the grounds of appeal is obligatory and if it is not submitted, the appeal is not admissible under Rule 49(1) of Regulation No 2868/95. The fact that the appeal was filed and the relevant fee paid within the prescribed period cannot in any event remedy the fact that the appeal is inadmissible if no statement setting out the grounds of appeal is filed within the prescribed period. OHIM maintains that Rule 49(1) of Regulation No 2868/95 sets out three separate conditions which must be satisfied cumulatively within their respective time-limits.

Findings of the Court

50 Under Rule 49 of Regulation No 2868/95, an appeal is only admissible if it complies with the cumulative conditions set out in Articles 57 to 59 of Regulation No 40/94.

51 The last sentence of Article 59 of Regulation No 40/94 provides: 'Within four months after the date of notification of the decision, a written statement setting out the grounds of appeal must be filed'.

52 It is common ground in this case that the applicant filed an appeal on 30 November 1999 without setting out the grounds for its appeal and that it also paid the appeal fee. It is also common ground that it did not file the statement setting out the grounds of appeal until 10 February 2000, even though it had been notified of the decision of the Opposition Division on 8 October 1999. Furthermore, as is clear from OHIM's file, at the time of notification of the registration of the appeal, that is to say, 19 December 1999, OHIM drew its attention to the fact that a statement setting out the grounds of appeal had to be filed within four months of notification of the decision of the Opposition Division.

53 However, the appeal of 30 November 1999 does not contain a statement of the grounds of appeal. They were not set out, even briefly, in the body of that document; there was simply a reference to the fact that they would be sent later. The appeal is merely an OHIM form which simply contains the basic details of the applicant and the contested decision. It must also be observed that the form expressly provides that the statement of the grounds of appeal must be attached or provided later. Since the statement of the grounds of appeal was sent outside the period provided for in Article 59 of Regulation No 40/94, the applicant's appeal must be regarded as having been filed without a statement of grounds of appeal, such statement being a precondition for the appeal's admissibility.

54 Having regard to the wording of Article 59 of Regulation No 40/94, the applicant's argument that the statement of the grounds of appeal is not a condition of the appeal's admissibility cannot therefore be upheld.

55 The second plea must therefore also be rejected, and the action thus dismissed in its entirety.

The offer to provide a witness

56 In light of all the foregoing considerations, it is not necessary to call Ms S. as a witness, since the Court has been able to give judgment effectively on the basis of the arguments, pleas in law and submissions made during the course of the written procedure and in the light of the documents produced.

Costs

57 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful parties' pleadings. Since the applicant has been unsuccessful and OHIM and the intervener have asked for costs, it must be ordered to pay their costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Tiili Mengozzi Vilaras

Delivered in open court in Luxembourg on 17 September 2003.

H. Jung
Registrar

V. Tiili
President