JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

16 December 2010 *

In Case T-281/09,

**Deutsche Steinzeug Cremer & Breuer AG,** established in Frechen (Germany), represented by J. Albrecht, lawyer,

applicant,

v

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

defendant,

* Language of the case: German.

ACTION brought against the decision of the Fourth Board of Appeal of OHIM of 8 May 2009 (Case R 1429/2008-4), relating to an application for registration as a Community trade mark of the word sign CHROMA,

THE GENERAL COURT (Fifth Chamber),

composed, at the time of the deliberation, of S. Papasavvas, President, V. Vadapalas (Rapporteur) and K. O'Higgins, Judges,

Registrar: E. Coulon,

having regard to the application lodged at the Registry of the General Court on 17 July 2009,

having regard to the response lodged at the Court Registry on 1 October 2009,

having regard to the reply lodged at the Court Registry on 21 December 2009,

having regard to the fact that no application for a hearing was submitted by the parties within the period of one month from notification of closure of the written procedure, and having therefore decided, acting upon a report of the Judge-Rapporteur, to give a ruling without an oral procedure, pursuant to Article 135a of the Rules of Procedure of the General Court,

having regard to the change in the composition of the Chambers of the General Court,

gives the following

## Judgment

### Background to the dispute

1 On 6 March 2008, the applicant, Deutsche Steinzeug Cremer & Breuer AG, filed an application for registration of a Community trade mark with the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) pursuant to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1)).

2 Registration as a mark was sought for the word sign CHROMA.

3 The goods in respect of which registration was sought are, inter alia, in Classes 11 and 19 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, for each of those classes, to the following description:

— Class 11 : 'Sinks, shower trays and bath tubs, wash basins, bidets, urinals, toilets, cisterns, all of ceramic';

— Class 19: 'Building materials, not of metal; tiles, mouldings, pipes and fittings for building, all not of metal; ceramic tiles, mosaics and shaped parts for building; Potters' clay (raw material)'.

4 By decision of 7 August 2008, the examiner rejected the application for registration in respect of the goods in question under Article 7(1)(b) and (c) of Regulation No 40/94 (now Article 7(1)(b) and (c) of Regulation No 207/2009) and Article 7(2) of Regulation No 40/94 (now Article 7(2) of Regulation No 207/2009).

5 On 30 September 2008, the applicant lodged an appeal with OHIM under Articles 57 to 62 of Regulation No 40/94 (now Articles 58 to 64 of Regulation No 207/2009) against the examiner's decision.

6 By decision of 8 May 2009 ('the contested decision'), the Fourth Board of Appeal of OHIM dismissed the appeal on the ground that the mark applied for was descriptive for the purposes of Article 7(1)(c) of Regulation No 207/2009. It found, in essence, that the sign at issue constituted the transliteration into Latin characters of the Greek word 'χρώμα' (colour) and that, since it was a descriptive indication of the characteristics of the goods concerned, there was an absolute ground for refusal in Greece and Cyprus. Furthermore, for the same reasons it found that the sign at issue was also devoid of any distinctive character within the meaning of Article 7(1)(b) of that regulation.

**Forms of order sought**

7 The applicant claims that the Court should:

— annul the contested decision;

— order OHIM to pay the costs.

8 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

**Admissibility**

9 In its response OHIM raises a plea that the action is inadmissible under the provisions of Article 44(1)(c) of the Rules of Procedure of the General Court.

10 In its reply, the applicant disputes that argument, stating that it set out, in its application, detailed arguments in support of the pleas in law on which the application is based, relating to infringement of the provisions of Article 37(1), Article 7(1)(b) and (c), and Article 76(1) of Regulation No 207/2009.

11 Under Article 21 of the Statute of the Court of Justice of the European Union and Article 44(1)(c) of the Rules of Procedure, which is applicable to intellectual property proceedings by virtue of Article 130(1) of those rules, every application must contain a summary of the pleas in law on which it is based and that information must be sufficiently clear and precise to enable the defendant to prepare its defence and the General Court to rule on the action (see the judgment of 19 November 2008 in Case T-269/06 *Rautaruukki* v *OHIM (RAUTARUUKKI)*, not published in the ECR, paragraph 33 and the case-law cited).

12 In the present case, the statement of the elements in support of the application, although succinct, is sufficient to enable the Court to identify the arguments constituting the legal and factual basis of the action. In the response, OHIM moreover admits that it understood the applicant to be alleging, in essence, infringement of Article 7(1)(b) and (c) of Regulation No 207/2009 and to be referring also to Article 37(1) and Article 76(1) of that regulation.

13 Therefore, the plea of inadmissibility raised by OHIM, based on Article 44(1)(c) of the Rules of Procedure, cannot be upheld.

**Substance**

14 In support of its action, the applicant raises, in essence, a single plea in law alleging infringement of Article 7(1)(b) and (c) of Regulation No 207/2009 and also relies on Article 37(1) and Article 76(1) of that regulation.

*Arguments of the parties*

15 The applicant submits that the sign at issue is not descriptive and is not therefore covered by the ground for refusal referred to in Article 7(1)(c) of Regulation No 207/2009 or, for the same reason, by that referred to in Article 7(1)(b) of that regulation.

16 The reasoning set out in the contested decision is based, incorrectly, on the placing of the sign CHROMA on the same footing as the Greek word 'χρώμα' (colour) and on the need to maintain its availability for the goods at issue.

17 There is no need to place the sign at issue on the same footing as the Greek word 'χρώμα' (colour). The Board of Appeal did not show that the transliteration into Latin characters was used in the same way as the word in the original language and therefore should not have based its decision on the need to avoid a monopolisation of transliterations of Greek words. The protection resulting from the registration of the sign CHROMA would not indeed enable the applicant to prohibit a third party from using the Greek word 'χρώμα' (colour).

18 Furthermore, it is not necessary to maintain the availability of the word 'χρώμα' (colour), as it is a word which designates only a type of characteristics of goods and not a characteristic of a product. It is unusual to place such an indication on a product or its packaging, and it would not be understood by a consumer as an indication of a property of the product.

19 That argument is borne out by the registration of Community trade marks consisting of the words 'dimension' (extent, size or dimension in English), 'brilliance' (lustre, splendour or sparkle in English) or 'tinta' (ink, shade or tinged in Spanish).

20 Furthermore, it is apparent from paragraph 30 of the contested decision that the reasoning of the Board of Appeal relates, in actual fact, not to the word 'colour', as such, but to the terms 'coloured', 'multi-coloured' or 'colourful', which may be used to indicate that the product is tinged or that it is not monochrome.

21 In that regard, the Board of Appeal did not take into account the goods at issue. It is inconceivable that the words 'colour' or 'coloured', no matter in which language, would be placed on the goods at issue to designate their properties. As these are goods which necessarily have a colour, even if it is only the natural colour of the materials of which they are made, such indications, which do not refer to an actual colour,

are not of the slightest relevance for the consumer. Furthermore, the colour shade of the goods at issue is always indicated on their packaging.

22 No quality of the goods at issue is thus described by the word 'colour' and even less by the sign CHROMA. A Greek-speaking consumer would not understand the sign at issue as a purely descriptive indication, but as an indication of origin.

23 That fact is borne out by the existence of the national and Community trade marks consisting of the word signs CHROMA or CROMA, which were referred to by the applicant in its written statement setting out the grounds of the appeal before OHIM.

24 Furthermore, by not taking into account those earlier registrations, the Board of Appeal failed to comply with its obligation to examine the facts of its own motion, which is referred to in Article 76(1) of Regulation No 207/2009.

25 OHIM disputes the applicant's arguments.

*Findings of the Court*

26 Under Article 7(1)(c) of Regulation No 207/2009, 'trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production

of the goods or of rendering of the service, or other characteristics of the goods or service' are not to be registered. Under Article 7(2) of Regulation No 207/2009, paragraph 1 is to apply notwithstanding that that ground of non-registrability obtains in only part of the European Union.

27 It must be borne in mind that Article 7(1)(c) of Regulation No 207/2009 pursues an aim which is in the public interest, namely that signs or indications which are descriptive of the characteristics of goods or services in respect of which registration is sought may be freely used by all. That provision accordingly prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks (see Case C-191/01 P *OHIM* v *Wrigley* [2003] ECR I-12447, paragraph 31 and the case-law cited).

28 A word sign must therefore be refused registration under that provision if at least one of its possible meanings designates a characteristic of the goods or services concerned. Furthermore, it is not necessary, in order for OHIM so to refuse to register a trade mark, that the sign in question actually be in use in a way that is descriptive, but merely that it could be used for such purposes (*OHIM* v *Wrigley*, paragraph 32).

29 Furthermore, it is irrelevant whether the characteristics of the goods or services which may be described by the sign in question are commercially essential or merely ancillary, or even whether or not there are synonyms permitting the same characteristics to be designated (see, by analogy, Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraphs 101 and 102).

30 It is also important to bear in mind that the descriptiveness of a sign may be assessed only, firstly, in relation to the understanding of the sign by the relevant public and,

secondly, in relation to the goods or services concerned (see Case T-160/07 *Lancôme* v *OHIM — CMS Hasche Sigle (COLOR EDITION)* [2008] ECR II-1733, paragraph 44 and the case-law cited).

31 In the present case, as is apparent from the findings set out in paragraphs 31 and 32 of the contested decision, which are not challenged by the applicant, the goods concerned are, first, sanitary appliances of ceramic in Class 11 and, secondly, building materials, not of metal, in Class 19, which may be purchased both by the end consumer and by construction firms.

32 Furthermore, since it is apparent from paragraph 19 of the contested decision that the absolute ground for refusal was upheld by the Board of Appeal only in relation to the Greek language, it must be held, pursuant to Article 7(2) of Regulation No 207/2009, that the relevant public for the purpose of assessing that ground for refusal is made up of the relevant consumers in Greece and Cyprus.

33 It is not disputed that the sign CHROMA is a transliteration into Latin characters of the Greek word 'χρώμα' (colour).

34 As is stated, correctly, in paragraph 22 of the contested decision, transliterations into Latin characters of Greek words must be treated in the same way, for the purpose inter alia of examining the absolute grounds for refusal set out in Article 7(1)(b) and (c) of Regulation No 207/2009, as words written in Greek characters (see, to that effect and by analogy, Case T-32/00 *Messe München* v *OHIM (electronica)* [2000] ECR II-3829, paragraph 40).

35 That finding applies particularly in the present case because the sign at issue is a faithful transcription of the Greek word meaning 'colour', in letters of the Latin alphabet which is known to the Greek-speaking consumer concerned, and its meaning is thus capable of being immediately and directly grasped by that consumer.

36 In that regard, first, it must be pointed out that the word meaning 'colour' may be used to designate a characteristic of goods, namely their ability to be presented in various shades of colours (see, to that effect, *COLOR EDITION*, paragraphs 47 and 48).

37 Although the applicant states that a colour is a type or category of characteristics and not 'a' characteristic, the fact remains that, according to the standard meanings of the word 'colour', it refers to the use of colours other than black and white or to the presence of a large range of colours.

38 Secondly, as the Board of Appeal correctly pointed out in paragraphs 31 and 32 of the contested decision, as regards sanitary appliances, the traditional colour of which is white, and building materials, not of metal, which include bathroom ceramics, the indication of the fact that they are available in various colours is a characteristic which is likely to be relevant in trade.

39 The use of the word 'colour' thus conveys a message which is capable of being grasped immediately by the consumer concerned as it indicates that there is a range of goods in various colours, in particular, as regards ceramic sanitary appliances and ceramic building materials for bathrooms, in colours other than traditional white.

Furthermore, the goods at issue are likely to be requested on the basis of the range of colours in which they come, with a view to matching them in decorative creations.

40 As that assessment is explicitly linked to the conditions under which the goods in Classes 11 and 19 at issue are marketed, the applicant is wrong to claim that the Board of Appeal failed to take those goods into account.

41 It follows from those considerations that the Board of Appeal was right to find that, from the point of view of the relevant Greek-speaking consumer, the sign CHROMA could serve to indicate that the goods concerned in Classes 11 and 19 were available in various colours and that it therefore designated a relevant characteristic in terms of the marketing of the goods in question.

42 Having regard to the case-law cited in paragraphs 28 and 29 above, that finding is not called into question by the applicant's argument relating to the existence of words capable of conveying the same message, such as 'colourful' or 'multi-coloured', or by the argument that the word at issue is not actually used for descriptive purposes. It is in addition irrelevant whether the characteristic which may be designated is commercially essential or ancillary.

43 Furthermore, the applicant cannot legitimately rely on the Community trade mark registrations consisting of words indicating a dimension, lustre or a shade, or on the Community trade marks consisting of the elements 'chroma' and 'croma' or of those elements in conjunction with other word elements.

44 Since decisions of the Boards of Appeal concerning registration of a sign as a Community trade mark are adopted in the exercise of circumscribed powers, their legality cannot generally be called into question by an argument relating to the existence of a different decision-making practice on the part of OHIM (see, to that effect, Case C-37/03 P *BioID* v *OHIM* [2005] ECR I-7975, paragraph 47).

45 In addition, the descriptiveness of a sign must be assessed, first, in relation to the goods or services in respect of which registration has been applied for and, second, in relation to the perception of it by the relevant public. In those circumstances, the applicant cannot validly refer to the similarity of the trade mark applied for in relation to another Community trade mark without putting forward the elements of fact or of law which were put forward in support of the registration of that other mark (see, to that effect and by analogy, *BioID* v *OHIM*, paragraphs 48 and 49).

46 As to the argument relating to the registration of the trade mark CROMA in Greece, it must be borne in mind that the Community trade mark regime is an autonomous system with its own set of rules and pursuing objectives peculiar to it; it applies independently of any national system. Registrations already made in Member States are not therefore a decisive factor, but may only be taken into account for the purposes of registering a Community trade mark, in particular by providing analytical support for the assessment of a Community trade mark application (see Case T-315/03 *Wilfer* v *OHIM (ROCKBASS)* [2005] ECR II-1981, paragraph 35 and the case-law cited).

47 In the present case, the applicant does not put forward any of the elements of law or of fact which resulted in the registrations of the national trade mark in question.

48 Having regard to the foregoing, the applicant is not, moreover, justified in alleging that the Board of Appeal infringed Article 76(1) of Regulation No 207/2009 by not taking into account the earlier registrations in question.

49 In the light of all of those considerations, the applicant has not challenged the Board of Appeal's finding that the sign at issue was covered by an absolute ground for refusal referred to in Article 7(1)(c) of Regulation No 207/2009.

50 Having regard to that finding, the refusal of the application for registration in respect of the goods at issue is not capable of constituting an infringement of Article 37(1) of Regulation No 207/2009.

51 Furthermore, there is no need to examine the claim of infringement of Article 7(1)(b) of Regulation No 207/2009. As is apparent from Article 7(1) of Regulation No 207/2009, it is sufficient for one of the absolute grounds for refusal listed to apply for the sign to be ineligible for registration as a Community trade mark.

52 The present action must accordingly be dismissed.

**Costs**

53 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by OHIM.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

**1. Dismisses the action;**

**2. Orders Deutsche Steinzeug Cremer & Breuer AG to pay the costs.**

Papasavvas Vadapalas O'Higgins

Delivered in open court in Luxembourg on 16 December 2010.

[Signatures]