JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

20 September 2011 *

In Case T-232/10,

Couture Tech Ltd, established in Tortola (British Virgin Islands), represented by B. Whyatt, Barrister,

applicant,

v

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

defendant,

ACTION brought against the decision of the Second Board of Appeal of OHIM of 5 March 2010 (Case R 1509/2008-2), concerning an application for registration of a figurative sign representing the Soviet coat of arms as a Community trade mark,

* Language of the case: English.

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and M. van der Woude, Judges,

Registrar: E. Coulon,

having regard to the application lodged at the Registry of the Court on 21 May 2010,

having regard to the response lodged at the Court Registry on 7 September 2010,

having regard to the decision by the President of the Court of 9 December 2010 dismissing the application made by the applicant for the removal of a judge,

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 Court,

gives the following

Judgment

Background to the dispute

1 On 22 December 2006 the applicant Couture Tech Ltd filed an application for registration of a Community trade mark with the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), in accordance with Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (now replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

2 The trade mark in respect of which registration was sought is the figurative sign reproduced below:



3 The goods and services in respect of which registration was sought are in Classes 3, 14, 18, 23, 26 and 43 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.

4 By decision of 27 August 2008, the examiner rejected the application for registration on the ground that the mark applied for was contrary to public policy or to accepted principles of morality within the meaning of Article 7(1)(f) of Regulation No 40/94 (now Article 7(1)(f) of Regulation No 207/2009), read with Article 7(2) of Regulation No 40/94 (now Article 7(2) of Regulation No 207/2009).

5 On 20 October 2008 the applicant appealed against the examiner's decision.

6 By decision of 5 March 2010 ('the contested decision'), the Second Board of Appeal of OHIM dismissed the appeal. The Board of Appeal found, first, that the mark applied for consisted of an exact representation of the coat of arms of the former Union of Soviet Socialist Republics (USSR). Relying on legislation and administrative practice in Hungary, Latvia and the Czech Republic, the Board of Appeal held that symbols connected with the former USSR would be seen as contrary to public policy and to accepted principles of morality by a substantial section of the relevant public, namely the general public living in the part of the European Union which had been subject to the Soviet regime. The Board of Appeal inferred from this that the mark applied for was contrary to Article 7(1)(f) of Regulation No 207/2009, at least as far as Hungary and Latvia were concerned. According to the Board of Appeal, it is apparent from Article 7(2) of Regulation No 207/2009 that, for a sign to be refused registration, it is sufficient that that sign is found to be contrary to public policy or to accepted principles of morality in only one Member State. Under those circumstances, the Board of Appeal concluded that the mark should be refused registration pursuant to Article 7(1)(f) and (2) of Regulation No 207/2009.

Forms of order sought

7 The applicant claims that the Court should:

— declare the action admissible;

— 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.

Law

9 The applicant invokes two pleas in law, the first alleging infringement of Article 7(1)(f) and (2) of Regulation No 207/2009, and the second alleging a breach of the principles of the protection of legitimate expectations and legal certainty.

First plea : Infringement of Article 7(1)(f) and (2) of Regulation No 207/2009

10 The first plea is in two parts. The first part is based on an error of law made by the Board of Appeal when interpreting Article 7(1)(f) and (2) of Regulation No 207/2009. The second part is based on an error of appraisal made by the Board of Appeal when applying those provisions to the mark applied for.

First part: Error of law when interpreting Article 7(1)(f) and (2) of Regulation No 207/2009

— Arguments of the parties

11 First, the applicant submits that, contrary to the Board of Appeal's finding, it is not apparent from Article 7(2) of Regulation No 207/2009 that a sign must be refused registration if it is covered by one of the absolute grounds for refusal laid down in Article 7(1) of that regulation only in part of the European Union.

12 According to the applicant, Article 7(2) of Regulation No 207/2009 has another purpose. That provision is to apply when the laws of certain Member States either do not lay down provisions which correspond to each of the absolute grounds for refusal laid down in Article 7(1) of Regulation No 207/2009 or lay down further absolute grounds

for refusal in addition to those laid down in that provision. Applying Article 7(2) has the effect that, whatever the absolute grounds for refusal laid down by the various Member States, the only relevant grounds in proceedings for registration of a Community trade mark are those listed in Article 7(1) of Regulation No 207/2009.

13 The applicant submits that its position is borne out by the use of the words 'notwithstanding that' in Article 7(2) of Regulation No 207/2009. The interpretation of that provision favoured by the Board of Appeal assumes that those words are to be understood as meaning 'where', 'if' or 'it being sufficient if', and is thus based on a misreading.

14 The applicant adds that, although Article 7(2) of Regulation No 207/2009 covers all the absolute grounds for refusal laid down in Article 7(1) of that regulation, the Board of Appeal's interpretation of the former provision cannot apply to each of those grounds and, in particular, to that laid down in Article 7(1)(b) of that regulation.

15 Second, relying on its interpretation of Article 7(2) of Regulation No 207/2009, the applicant claims that, contrary to the position taken by the Board of Appeal, the concepts of 'public policy' and 'accepted principles of morality' set out in Article 7(1)(f) of that regulation must be interpreted as referring to the public policy and accepted principles of morality of the European Union. The substantive content of those concepts must therefore be analysed with reference to European Union law ('EU law'), to the fundamental aims and principles on which it is based and in which all Member States participate, and to international conventions such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'). On the other hand, the legislation, public policy and accepted principles of morality of various Member States, which may differ from those at EU level, are irrelevant.

16 In that regard, the applicant claims that, unlike national trade marks, the role of the Community trade mark is to participate in the development of economic activity within the common market. Consequently, pursuant to, inter alia, recitals 2 to 4 in the preamble to Regulation No 207/2009, the Community trade mark is regulated by a unitary EU law, is given uniform protection and produces its effects throughout the entire area of the European Union.

17 In the same way, according to recital 12 in the preamble to Regulation No 207/2009, OHIM is an independent body operating within the framework of EU law. Under those circumstances, the applicant submits that both OHIM and the Courts of the European Union are required to implement that regulation on the basis of a policy which is independent of that of each individual Member State.

18 Moreover, an approach which consists of taking into account the public policy and accepted principles of morality of various Member States makes the procedure for registering a Community trade mark excessively cumbersome, to the detriment of the applicant for that trade mark. It also obliges the applicant for a trade mark which is contrary to public policy or to accepted principles of morality in only one of the 27 European Union Member States to obtain and maintain 26 national registrations. That fact is all the more significant given that, under Article 110(2) of Regulation No 207/2009, the use of a Community trade mark may be prohibited in a Member State, under, for example, the criminal law of that State, but that fact does not justify that Community trade mark's proprietor being deprived of his rights.

19 The applicant submits that its position is borne out by case-law, according to which the Community trade mark regime is an autonomous system which applies independently of any national system. That case-law implies that no account should be taken of evidence from Member States, or the compatibility of the use of the Community trade mark with the criminal law of those States.

20 In the alternative, assuming that the Court holds that account should be taken of the public policy and accepted principles of morality of the individual Member States, the applicant claims that the examination carried out by OHIM must then have regard to all of the Member States or certain groups of those States, and not just those that it chooses to mention. In particular, it is necessary to conduct a 'balancing exercise', since the point of view of one Member State or one group of Member States should not prevail over the whole of the European Union.

21 OHIM disputes the validity of the applicant's arguments.

— Findings of the Court

22 First, according to case-law, Article 7(2) of Regulation No 207/2009 must be interpreted as meaning that a mark must be refused registration if it is covered by one of the grounds for refusal laid down in Article 7(1) of that regulation in part of the European Union. Such a part may comprise a single Member State (see, to that effect, Case C-25/05 P *Storck* v *OHIM* [2006] ECR I-5719, paragraphs 81 and 83).

23 Concerning the applicant's arguments challenging that interpretation, it must be observed, first, that that interpretation is not contrary to the wording of Article 7(2) of Regulation No 207/2009. The use of the words 'notwithstanding that' in that provision implies that, if a sign is covered by an absolute ground for refusal in only part of the European Union, that is no impediment to applying Article 7(1) of Regulation No 207/2009. Thus, when Article 7(1) and (2) of that regulation are read together, a mark must be refused registration when it is covered by an absolute ground for refusal throughout the European Union or, as the case may be, only in part of the Union.

24 Next, although Article 7(2) of Regulation No 207/2009 is expressed in general terms, it is nonetheless not apparent from its wording that the rule it prescribes must necessarily apply to each of the grounds for refusal listed in Article 7(1) of that regulation. Furthermore, concerning the absolute ground for refusal laid down in Article 7(1)(b) of Regulation No 207/2009, specifically highlighted by the applicant, it is perfectly possible for a sign to be devoid of any distinctive character in only part of the European Union, inter alia because it has a semantic content only in certain languages or because of divergent practices connected with the marketing of the goods or services in question.

25 Lastly, it must be noted that, while the absolute grounds for refusal laid down in Article 7(1) of Regulation No 207/2009 are the only relevant grounds in proceedings for registration of a Community trade mark, irrespective of the absolute grounds for refusal laid down in the law of the Member States, that follows from the nature of the regulation as a measure which is binding in its entirety and directly applicable in all Member States. In that regard, the wording of that provision lays down an exhaustive list of absolute grounds for refusal which does not refer to those laid down in the laws of the Member States. In the same way, Article 1(1) of Regulation No 207/2009 states that Community trade marks are registered in accordance with the conditions contained in that regulation and in the manner provided therein. Consequently, the interpretation of Article 7(2) of Regulation No 207/2009 proposed by the applicant cannot be accepted in so far as it would render that paragraph redundant.

26 Under those circumstances, it must be concluded that, as held by the Board of Appeal, it is apparent from Article 7(1)(f) and (2) of Regulation No 207/2009 that a mark must be refused registration if it is contrary to public policy or to accepted principles of morality in part of the European Union, and that part may, in some circumstances, be comprised of a single Member State.

27 Second, concerning whether the concepts of 'public policy' and 'accepted principles of morality' must be interpreted only with reference to the circumstances common to all Member States or whether the particular circumstances of individual Member

States should also be taken into account, it must be noted that, according to case-law, the essential function of a trade mark is identifying the commercial origin of goods or services, thus enabling the consumer who acquired them to repeat the experience if it proves to be positive, or to avoid it if it proves to be negative, on the occasion of a subsequent acquisition (Case T-34/00 *Eurocool Logistik* v *OHIM* (*EUROCOOL*) [2002] ECR II-683, paragraph 37).

28 Thus, a mark is intended for use by a public composed of consumers of the goods and services which it designates.

29 The public interest underlying the absolute ground for refusal laid down in Article 7(1)(f) of Regulation No 207/2009 is to ensure that signs which, when used in the European Union, would be contrary to public policy or to accepted principles of morality are not registered.

30 Under those circumstances, the existence of the absolute ground for refusal laid down in Article 7(1)(f) of Regulation No 207/2009 must be assessed with reference to the perception of the average consumer, within the European Union, of the goods and services in respect of which registration is sought.

31 First, consumers who are within the European Union are, by definition, within a Member State.

32 Second, signs likely to be perceived by the relevant public as being contrary to public policy or to accepted principles of morality are not the same in all Member States, inter alia for linguistic, historic, social and cultural reasons.

33 Accordingly, the perception of whether or not a mark is contrary to public policy or to accepted principles of morality is influenced by the circumstances of the specific Member State in which the consumers who form part of the relevant public are found.

34 Consequently, it must be held that, in order to apply the absolute ground for refusal laid down in Article 7(1)(f) of Regulation No 207/2009, it is necessary to take account not only of the circumstances common to all Member States of the European Union, but also of the particular circumstances of individual Member States which are likely to influence the perception of the relevant public within those States.

35 That conclusion is not called into question by the applicant's arguments.

36 First, the Community trade mark regime is an autonomous system which applies independently of any national system (see Case T-140/02 *Sportwetten* v *OHIM - Intertops Sportwetten (INTERTOPS)* [2005] ECR II-3247, paragraph 31 and case-law cited). That fact implies, inter alia, that the existence of the absolute ground for refusal laid down in Article 7(1)(f) of Regulation No 207/2009 must be assessed, in all cases, according to the criterion laid down in that provision, interpreted with reference to the perception of the relevant public within the European Union or part of the Union. On the other hand, the autonomous character of the Community trade mark regime does not preclude taking into account particular circumstances of Member States which are likely to influence that perception.

37 In that context, concerning the legislation and administrative practice of certain Member States invoked by the Board of Appeal in the contested decision, it must be noted that those factors were taken into account not because of their normative value, but as evidence of facts which enabled it to assess the perception of symbols connected with the former USSR by the relevant public within those Member States. Under those circumstances, the criticism cannot be made of the Board of Appeal that

it disregarded the autonomous character of the Community trade mark regime in that regard.

38 Second, the aim of developing the common market does not justify infringing public policy or accepted principles of morality in part of that market.

39 Third, in so far as it is apparent from Article 76(1) of Regulation No 207/2009 that OHIM is to examine the facts of its own motion, it cannot be considered that the interpretation set out in paragraph 34 above makes the registration procedure excessively cumbersome, to the detriment of the applicant for a trade mark. It is for OHIM to examine the existence of absolute grounds for refusal in all parts of the European Union. Subsequently, it is for the applicant for the trade mark to present its observations on the objections actually raised by the examiner at the end of his examination.

40 Fourth, the need to obtain and maintain national registrations where a mark is covered by one of the absolute grounds for refusal laid down in Article 7(1) of Regulation No 207/2009 only in part of the European Union is a direct consequence of the unitary character of the Community trade mark, established in recital 3 in the preamble to Regulation No 207/2009 and in Article 1(2) thereof. That circumstance is therefore inherent in the structure of that regulation.

41 Fifth, Article 110(2) of Regulation No 207/2009 concerns the prohibition of the use of a Community trade mark which has been registered. Therefore, that provision cannot be invoked when examining the existence of the absolute ground for refusal laid down in Article 7(1)(f) of Regulation No 207/2009, which precedes registration of the mark.

42 In the light of all the foregoing, it must be concluded that the Board of Appeal did not commit an error of law in holding, first, that under Article 7(2) of Regulation No 207/2009 a sign should be refused registration if it was covered by the absolute ground for refusal laid down in Article 7(1)(f) of that regulation only in part of the European Union, including, in some circumstances, in a single Member State and, second, that in order to interpret the concepts of 'public policy' and 'accepted principles of morality' it was necessary to take account of particular factors in individual Member States.

43 Consequently, the first part of the first plea must be rejected as unfounded.

Second part: Error of appraisal when applying Article 7(1)(f) and (2) of Regulation No 207/2009 to the mark applied for

— Arguments of the parties

44 Relying on its interpretation of Article 7(1)(f) and (2) of Regulation No 207/2009 as set out in the first part, the applicant claims that the mark applied for is not contrary to the public policy or accepted principles of morality of the European Union and that it should not, therefore, have been refused registration.

45 In that regard, the applicant claims that, unlike the swastika, the political connotation of the coat of arms of the former USSR has been diffused and transformed into a provocative one, connected with the concept of the avant-garde, so that the mark applied for has acquired 'a new distinctiveness'.

46 The applicant adds that the device constituting the mark applied for has not been banned in any European Union Member State, the Commission having moreover rejected, in 2005, a demand for a general ban on communist symbols. The fact that certain uses of those symbols may possibly be prohibited in Hungary and Latvia is irrelevant to the registration procedure.

47 Lastly, the applicant claims that it is not inconceivable that the bans on the use of symbols such as the mark applied for, laid down in Hungarian and Latvian law, may be contrary to the ECHR.

48 OHIM disputes the validity of the applicant's arguments.

— Findings of the Court

49 According to Article 7(1)(f) of Regulation No 207/2009, trade marks which are contrary to public policy or to accepted principles of morality are not to be registered.

50 It is apparent from what has been said in connection with the first part of this plea that the assessment of whether a sign is contrary to public policy or to accepted principles of morality must be carried out with reference to the perception of that sign, when being used as a trade mark, by the relevant public within the European Union or part of the Union. That part may, in some circumstances, be comprised of a single Member State.

51 In the present case, first, it is not disputed that the relevant public is the general public. Consequently, as the Board of Appeal correctly noted in paragraph 37 of the contested decision, it is necessary to take into account the perception of the average consumer from the general public, with normal sensitivity and tolerance thresholds.

52 The Board of Appeal's finding that the mark applied for was contrary to public policy or to accepted principles of morality is based, inter alia, on the examination of factors connected with the situation in Hungary, due to the decisive influence exercised over that Member State in recent history by the former USSR.

53 First, the Board of Appeal referred to Article 269/B of the *1978. évi IV. törvény a Büntetö Törvénykönyvröl* (Law No IV of 1978 on the Criminal Code; 'the Hungarian Criminal Code'), headed 'Use of symbols of despotism'. That provision reads as follows:

'(1) Any person who:

(a) distributes

(b) uses in public

(c) publicly exhibits,

the swastika, the insignia of the SS, the arrow cross, the hammer and sickle, the five-point red star or any other symbol representing one of those signs commits — where the conduct does not amount to a more serious criminal offence — a minor offence, punishable by a fine.

(2) The acts set out in paragraph 1 are not punishable if performed for the purpose of disseminating knowledge, education, science, art or information on historical or contemporary events.

(3) The provisions of paragraphs 1 and 2 do not apply to current official State symbols.'

54 The Board of Appeal explained that, according to the Commentary on the Hungarian Criminal Code, a symbol designated an idea, person or event with an insignia or an image which was designed to connect that sign with the designated idea, person or event. Moreover, use in public includes the possibility of a sign being shown on a product as a trade mark when that product is distributed on the market.

55 Second, the Board of Appeal referred to the Guidelines of the Magyar Szabadalmi Hivatal (Hungarian Patent Office), now, as from 1 January 2011, the Szellemi Tulajdon Nemzeti Hivatala (Hungarian Intellectual Property Office), according to which those signs including 'symbols of despotism' were regarded as contrary to public policy.

56 In the light of those factors, the Board of Appeal held that the mark applied for would be perceived as being contrary to public policy or to accepted principles of morality by the relevant public situated in Hungary because it symbolises the former USSR.

57 Concerning the validity of that finding, it must first be noted that, in assessing the existence of the absolute ground for refusal laid down in Article 7(1)(f) of Regulation No 207/2009, factors arising from national law, such as those examined by the Board of Appeal in the present case, are not applicable by reason of their normative value

and are not, therefore, rules by which OHIM is bound. As was stated in paragraph 36 above, the Community trade mark regime is an autonomous system which applies independently of any national system.

58 None the less, those factors are evidence of facts which make possible an assessment of how certain categories of signs are perceived by the relevant public in that Member State.

59 Thus, in the present case, it is apparent from Article 269/B of the Hungarian Criminal Code, as interpreted by legal writers and set out in administrative practice, that the Hungarian legislature considered it necessary to ban certain uses of 'symbols of despotism', including the hammer and sickle and the five-point red star. That ban, which also covers the use of those signs as trade marks, is accompanied by criminal penalties.

60 The applicant does not dispute the Board of Appeal's finding that the ban on the use of 'symbols of despotism' as a trade mark implies that such symbols are perceived as being contrary to public policy or to accepted principles of morality in Hungary.

61 Nor is it disputed that the mark applied for is a reproduction of the coat of arms of the former USSR and that it includes, inter alia, a hammer and sickle and a five-point red star.

62 Under those circumstances, it must be considered that the Board of Appeal did not commit an error of assessment in finding that the use of the mark applied for as a trade mark would be perceived by a substantial section of the relevant public in Hungary as being contrary to public policy or to accepted principles of morality within the meaning of Article 7(1)(f) of Regulation No 207/2009.

63 The applicant's arguments cannot invalidate that finding.

64 Thus, it is apparent from the foregoing that, concerning Hungary, the semantic content of the coat of arms of the former USSR has not been diffused or transformed to the point where it would no longer be perceived as a political symbol. As the Board of Appeal recalled, a substantial section of the relevant public in Hungary has experienced the period when the former USSR had a decisive influence.

65 Added to this is the fact that the mark applied for merely reproduces the coat of arms of the former USSR and does not, therefore, include any additional elements likely to diffuse or transform the semantic content of that symbol.

66 The fact that certain uses of 'symbols of despotism' are not prohibited by Hungarian law is irrelevant in the present case. It is apparent from paragraphs 27 to 29 and paragraph 50 above that the examination of the existence of the absolute ground for refusal laid down in Article 7(1)(f) of Regulation No 207/2009 must be carried out with reference to the way in which that sign will be perceived when being used as a trade mark.

67 Lastly, the Court does not have jurisdiction to assess the compatibility of Article 269/B of the Hungarian Criminal Code with the ECHR. In any event, that fact is not relevant in the present case in so far as it is apparent from paragraphs 57 and 58 above that that provision must be taken into account not by reason of its normative value but as evidence of fact which makes possible an assessment of the perception of the relevant public in Hungary.

68 On the other hand, according to Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are to constitute general principles of EU law. Consequently, respect for those fundamental rights is a condition of the lawfulness of European Union measures, such as the contested decision, and the Courts of the European Union must ensure that respect.

69 In that regard, according to Article 10(1) of the ECHR, everyone has the right to freedom of expression, which includes, inter alia, the freedom to impart information and ideas without interference by public authorities.

70 According to Article 10(2) of the ECHR, the exercise of freedom of expression may be subject to certain restrictions prescribed by law which are necessary in a democratic society, inter alia in the interests of national security, territorial integrity or public safety, and for the prevention of disorder or crime, or for the protection of morals.

71 The applicant puts forward no arguments to show that the refusal to register the mark applied for constitutes an interference with the exercise of the freedom guaranteed by Article 10(1) of the ECHR which does not satisfy the requirements of Article 10(2). Therefore, in any event, there is no basis for the applicant to rely on the ECHR in this case.

72 In the light of all the foregoing, it must be concluded that the Board of Appeal did not commit an error of assessment in finding that the mark applied for was contrary to public policy or to accepted principles of morality in the perception of the relevant public in Hungary and, consequently, that it should be refused registration pursuant to Article 7(1)(f) and (2) of Regulation No 207/2009.

73 Accordingly, the second part of the first plea must be rejected as unfounded, and there is no need to analyse the other elements examined by the Board of Appeal relating to the perception of the relevant public in Latvia and the Czech Republic.

74 As both parts of the first plea have been rejected, that plea must be rejected.

Second plea: Breach of the principles of the protection of legitimate expectations and legal certainty

Arguments of the parties

75 The applicant submits that the Board of Appeal breached the principles of the protection of legitimate expectations and legal certainty in so far as it refused to register the mark applied for although OHIM had accepted the registration of the applicant's mark No 3958154, which related to the same sign and which was examined under the same conditions as the mark applied for. By registering mark No 3958154, OHIM gave the applicant precise and unconditional implied assurances regarding the registrability of that sign.

76 In that context, the applicant contests the Board of Appeal's argument that the registration of mark No 3958154 was the result of a mistake. It is not for the applicant for a trade mark to determine whether the result of the examination is reliable. Rather, it is for OHIM to carry out a full and adequate analysis and to apply Regulation No 207/2009 in a clear and certain manner.

77 The applicant adds that, as far as it is aware, the examination procedure for mark No 3958154 is not vitiated by any error.

78 OHIM disputes the validity of the applicant's arguments.

Findings of the Court

79 According to case-law, the legality of the decisions of Boards of Appeal must be assessed solely on the basis of Regulation No 207/2009, as interpreted by the Courts of the European Union, and not on the basis of OHIM's previous decision-making practice (see, to that effect, Case T-106/00 *Streamserve* v *OHIM* (*STREAMSERVE*) [2002] ECR II-723, paragraph 66).

80 Consequently, the applicant cannot legitimately claim that, by registering mark No 3958154, OHIM gave it assurances regarding the registrability of the mark applied for. *A fortiori*, the applicant may not legitimately rely on a breach of the principle of legal certainty in that regard.

81 Furthermore, irrespective of whether the registration of mark No 3958154 is the result of a mistake, examination of the first plea has not shown that the contested decision, which is the only decision referred to in this action, is vitiated by any infringement of Regulation No 207/2009.

82 Under those circumstances, the second plea must be rejected and, consequently, the action must be dismissed in its entirety.

Costs

83 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party must 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 (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders Couture Tech Ltd to pay the costs.

Pelikánová Jürimäe Van der Woude

Delivered in open court in Luxembourg on 20 September 2011.

[Signatures]