ORDER OF THE COURT (Fifth Chamber)

28 June 2004 *

In Case C-445/02 P,

**Glaverbel SA**, established in Brussels (Belgium), represented by S. Möbus, Rechtsanwältin, with an address for service in Luxembourg,

applicant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber) of 9 October 2002 in Case T-36/01 *Glaverbel* v *OHIM(glass-sheet surface)* [2002] ECR II-3887, seeking to have that judgment set aside in so far as the Court of First Instance held that the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) did not infringe Article 7(1)(b) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) by adopting its decision of 30 November 2000 refusing to register a design applied to the surface of glass products as a Community trade mark (Case R 137/2000-1),

* Language of the case: English

the other party to the proceedings being:

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

defendant at first instance,

THE COURT (Fifth Chamber),

composed of: C. Gulmann (Rapporteur), President of the Chamber, R. Silva de Lapuerta and J. Makarczyk, Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

after hearing the Advocate General,

makes the following

## Order

1 By application lodged at the Court Registry on 9 December 2002, Glaverbel SA ('Glaverbel') brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 9 October 2002 in Case T-36/01 *Glaverbel* v *OHIM(glass-sheet surface)* [2002] ECR II-3887 ('the judgment under appeal'), seeking to have that judgment set aside in so far as the Court of First Instance held that the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('OHIM') did not infringe Article 7(1)(b) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) by adopting its decision of 30 November 2000 refusing to register a design applied to the surface of glass products as a Community trade mark (Case R 137/2000-1) ('the contested decision').

## Legal background

2 Article 4 of Regulation No 40/94 provides:

'A Community trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.'

3 Article 7(1) and (3) of Regulation No 40/94 provides:

'1. The following shall not be registered:

...

(b) trade marks which are devoid of any distinctive character;

...

3. Paragraph 1(b) ... shall not apply if the trade mark has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it.'

**Facts**

4 On 24 April 1998, Glaverbel filed with OHIM an application for registration as a Community trade mark of a sign described as 'a design applied to the surface of the goods' in respect of goods in Classes 11, 19 and 21 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, which are, primarily, glass products for building and for the manufacture of sanitary installations.

5 The sign in respect of which registration was sought was an abstract design for application to the surface of glass products.

6 By decision of 24 January 2000, the examiner refused the application for registration on the ground, inter alia, that the mark applied for was not distinctive within the meaning of Article 7(1)(b) of Regulation No 40/94.

7 On 4 February 2000, the applicant filed an appeal against that decision.

8 The contested decision dismissed the appeal on the ground, inter alia, that the sign in question was devoid of distinctive character because it is incapable of indicating the trade origin of the goods concerned.

**The judgment under appeal**

9 By application lodged at the Registry of the Court of First Instance on 19 February 2001, Glaverbel brought an action for annulment of the contested decision.

10 The judgment under appeal upheld that action.

11 Whilst rejecting the applicant's plea alleging infringement of Article 7(1)(b) of Regulation No 40/94, the Court of First Instance upheld its plea alleging infringement of the right to be heard as regards the further plea raised by it on the basis of Article 7(3) of Regulation No 40/94. The contested decision was therefore annulled by the judgment under appeal.

**Forms of order sought by the parties**

12 Glaverbel claims that the Court should:

— annul the judgment under appeal in so far as the Court of First Instance held that the First Board of Appeal of OHIM did not infringe Article 7(1)(b) of Regulation No 40/94;

— annul the contested decision in so far as registration of the sign in question was refused under Article 7(1)(b);

— order OHIM to pay the costs of the proceedings before the Court of First Instance and those of the present appeal.

13 OHIM contends that the Court should dismiss the appeal and order Glaverbel to pay the costs.

## The appeal

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

15 Glaverbel complains that the finding by the Court of First Instance that the glass design which Glaverbel sought to register as a Community trade mark was devoid of distinctive character was based on a misinterpretation of Article 7(1)(b) of Regulation No 40/94.

16 Its plea can be divided into four parts.

*The first part*

Arguments of the parties

17 Glaverbel submits that no distinction may be drawn between the various signs capable of being represented graphically within the meaning of Article 4 of Regulation No 40/94. In particular, the condition 'that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings' must be applied to each of them in an identical manner. That means that the same conditions, tests and interpretations are to be applied to them.

18 Glaverbel complains that, in paragraph 23 of the judgment under appeal, the Court of First Instance held that the perception by the target public is not necessarily the same in the case of a sign composed of a design applied to the surface of goods as it is in the case of a word or figurative mark. That finding is incorrect. More specifically, it is wrong to hold that such a finding leads to a different assessment of distinctiveness. The Court of First Instance wrongly stated that the public is accustomed to perceiving word or figurative marks instantly as identifying the trade origin of the goods. That finding draws a distinction between word or figurative marks and other types of mark such as that in question in the present case. The result is that the degree of distinctiveness of word or figurative marks is generally greater than that of other types of mark. That interpretation has no basis in law.

19 OHIM takes the view that this part of the plea is inadmissible since it challenges the Court of First Instance's assessment of the facts.

Findings of the Court

20 In paragraph 22 of the judgment under appeal, the Court of First Instance, when interpreting Article 7(1)(b) of Regulation No 40/94, rightly pointed out that a sign's distinctiveness must be assessed by reference to the goods or services for which registration is claimed and by reference to the perception of the sign on the target market (see, with respect to the identical provision in Article 3(1)(b) 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), Case C-299/99 *Philips* [2002] ECR I-5475, paragraphs 59 and 63, and Case C-218/01 *Henkel* [2004] ECR I-1725, paragraph 50).

21 It also rightly observed, in paragraph 23 of the judgment under appeal, that Article 7 (1)(b) of Regulation No 40/94 does not draw a distinction between different types of sign (see, likewise with respect to Article 3(1)(b) of Directive 89/104, Joined Cases C-53/01 to C-55/01 *Linde and Others* [2003] ECR I-3161, paragraph 42).

22 It went on to state, in the same paragraph of the judgment under appeal, that the perception amongst the target market is not necessarily the same in the case of a sign composed of a design applied to the surface of goods as it is in the case of a word or figurative mark comprising a sign that bears no relation to the appearance of the goods it identifies. It observed that, whilst the public is accustomed to perceiving word or figurative marks instantly as identifying the trade origin of the goods, the same is not necessarily true where the sign forms part of the appearance of the goods for which it is claimed.

23 First of all, the Court of Justice has held in its case-law that, whilst the criteria for assessing distinctiveness are the same for the various categories of trade mark, it may become apparent, when applying those criteria, that the relevant public's perception is not necessarily the same in relation to each of those categories and that, therefore, it may prove more difficult to establish the distinctiveness of the marks in certain categories than of those in other categories (see *Henkel*, cited above, paragraph 52; Joined Cases C-456/01 P and C-457/01 P *Henkel* v *OHIM* [2004] ECR I-5089, paragraph 38; Joined Cases C-468/01 P to C-472/01 P *Procter & Gamble* v *OHIM* [2004] ECR I-5141, paragraph 36; and Joined Cases C-473/01 P and C-474/01 P *Procter & Gamble* v *OHIM* [2004] ECR I-5173, paragraph 36).

24 The criticised findings in the judgment under appeal are consistent with that case-law.

25 Consequently, the complaint is manifestly unfounded.

26 The first part of the plea must therefore be rejected.

*The second part*

Arguments of the parties

27 Glaverbel complains that, in paragraphs 26 to 30 of the judgment under appeal, the Court of First Instance stated that the design applied to the surface of the goods:

— is perceived primarily as a technical means of rendering the glass opaque;

— cannot be easily and instantly recalled by the target market as a distinctive sign as a result of its complexity and fancifulness, which are attributable in greater measure to the ornamental and decorative nature of the design's finish;

— does not convey a fixed impression.

28 Glaverbel argues that there are thousands of possible patterns, each of which renders a glass sheet opaque. The consumer will chose a glass sheet on the basis of the design which he likes most. Thus, the consumer will not perceive the design primarily as a technical means of rendering the glass opaque. The fact that a sign is complex and fanciful usually leads to the assumption that it is distinctive. The average well-informed consumer buying a glass sheet with the design in question applied to its surface will immediately recognise that glass sheet upon seeing it elsewhere and will believe it to originate from the same undertaking, even if the details of the design are complex.

29 According to Glaverbel, the design applied to the surface of the glass is clearly perceived primarily as an indicator of origin and not as a technical or decorative feature. In any event, many marks are perceived not only as an indicator of origin but also as a decorative element because consumers wish it so and because producers must prevent the trade mark, whether it be a word, figurative or any other type of mark, from rendering the product unattractive. Finally, there is no requirement that the impression be fixed. Word and figurative marks can themselves be interpreted in many different ways and this does not mean that it can be concluded that they lack distinctive character.

30 OHIM contends that the complaint relating, in particular, to the finding that the sign is perceived primarily as a technical means of rendering the glass opaque and that its complexity makes it more difficult to remember it is inadmissible since it challenges findings of fact.

Findings of the Court

31 Under Article 225 EC and Article 58 of the Statute of the Court of Justice, an appeal lies on a point of law only. Therefore, the appraisal of the facts does not constitute,

save where the clear sense of the evidence produced before the Court of First Instance is distorted, a question of law which is subject, as such, to review by the Court of Justice (see, inter alia, Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraph 78, and Case C-104/00 P *DKV* v *OHIM* [2002] ECR I-7561, paragraph 22).

32 In paragraphs 26 to 30 of the judgment under appeal, the Court of First Instance examined the specific glass products in question.

33 It found that the design, which consists of countless tiny strokes applied to the surface of the sheet, no matter what its area, forms part of the appearance of the product itself and embodies obvious characteristics of the product, with the result that it is perceived primarily as a technical means of rendering the glass opaque. Moreover, it stated that the complexity and fancifulness of the design in respect of which registration was sought is attributable rather to the ornamental and decorative nature of the design's finish. The overall complexity of the design and the fact that it is applied to the external surface of the product do not allow the design's individual details to be committed to memory or the design to be apprehended without the product's inherent qualities being perceived simultaneously. Finally, it took the view that the impression conveyed by the sign is not fixed and varies according to the angle from which the goods are viewed, the brightness of the light and the quality of the glass.

34 The Court of First Instance concluded that the sign does not serve as an indication of origin for the target public, which is composed of both professionals in the construction field and the public in general.

35 Glaverbel's complaints seek a finding that the design in question is immediately and clearly perceived by the consumer as an indication of the origin of the goods.

36 They are thus intended solely to call into question the Court of First Instance's assessment of the facts and are not accompanied by arguments establishing that the clear sense of the evidence was distorted.

37 The second part of the plea is therefore manifestly inadmissible.

38 Accordingly, it must be rejected.

*The third part*

Arguments of the parties

39 Glaverbel submits that account must be taken of the fact that many registered marks consist of the shape of the goods themselves. It points out, for example, that packaging of goods or bottles may be protected as trade marks and registered even though their primary purpose is to contain or present the goods. The shape of a product consists of the product's appearance, as in the present case. Consequently, if the shape of goods may be registered, even if there are no additional features, that must also be the case for marks such as that in question in the present case, particularly since the various types of marks must be treated in an identical manner.

40 OHIM contends that this part of the plea is manifestly unfounded since at no time did the Court of First Instance deny generally that a sign consisting of an ornamental design applied to the surface of a product may be registered.

Findings of the Court

41 Under Article 4 of Regulation No 40/94, a Community trade mark may indeed consist of the shape of goods or of their packaging, in the same way as it may consist of a design or any other sign capable of being represented graphically. However, Article 4 states that such a sign can constitute a trade mark only if it is capable of distinguishing the goods or services of one undertaking from those of another.

42 In paragraph 19 of the judgment under appeal, the Court of First Instance rightly ruled that a design applied to the surface of goods is capable of constituting a Community trade mark in so far as it is capable of distinguishing the goods or services of one undertaking from those of another.

43 It did not, therefore, hold that a design applied to the surface of goods cannot be registered.

44 Accordingly, the argument that, if a shape may be registered, it must be possible to register a mark such as the one in question in the present case is likewise based on an erroneous premiss. On that ground alone, it is manifestly unfounded.

45 The third part of the plea must therefore be rejected.

*The fourth part*

Arguments of the parties

46 Glaverbel complains that, in paragraph 32 of the judgment under appeal, the Court of First Instance disregarded consumer declarations containing statements such as 'when I see glass with the design in question, I know that this glass comes from one particular manufacturer', because they were related to the test for distinctiveness acquired through use. It argues that, even though those declarations were lodged with OHIM in connection with its application under Article 7(3) of Regulation No 40/94, with a view to showing that the sign had acquired distinctive character as a result of considerable use, that does not mean that they could be rejected by the Court of First Instance when examining its application under Article 7(1)(b) of that regulation. The argument based on the above statement was raised in support of the application under Article 7(1)(b). There was nothing in that statement from which the conclusion could be drawn that the person making it was aware of the widespread use of the glass sheets in question. On the contrary, it merely reflected the consumer's opinion that the glass sheets were distinctive.

47 OHIM contends that:

— although it has not examined or compared in detail the declarations relied on by Glaverbel, those documents, which were submitted together with Glaverbel's

application for registration, are inadmissible in the appeal procedure because they were not produced at an earlier stage of the proceedings;

— in any event, the Court of First Instance took account of the declarations of specialists included in those documents and concluded that, since specialists cannot be regarded as the only persons making up the target market, those declarations could not alter its assessment of the consumer's general perception of the design on the glass.

Findings of the Court

48 Contrary to OHIM's submissions, the declarations relied on by Glaverbel, which are attached to its appeal as Annex A 12, were produced before the Court of First Instance. They were produced as Annex A 7 to the application. Therefore, the plea of inadmissibility raised against the production of the documents in question cannot be upheld.

49 Those documents include a statement made by an employee of Glaverbel and 15 other declarations made by professionals in the glass sector and specialist journalists. All the declarations contain a statement that, in essence, the person making the declaration, upon seeing the design in question, immediately recognises a specific glass product originating from Glaverbel. All of the persons making a declaration make clear that their knowledge of the goods was acquired in the course of their trade. The majority state that they have lengthy practical experience and that the goods identified by the design in question have been marketed for some time.

50 It was in the light of those documents that the Court of First Instance, in paragraph 32 of the judgment under appeal:

— held that its finding that the sign lacked distinctive character was not affected by Glaverbel's argument that the consumer is able to identify that sign because its goods have been on the market for a long time and that specialists cannot but recognise that goods bearing that sign originate from the applicant;

— and, moreover, stated that the argument in question was based on a test of distinctive character acquired through use and not the inherent distinctiveness of the design and that specialists, members of the building trade or glass industry, cannot be regarded as the only persons making up the target market for the goods in question.

51 In view of that reasoning, the content of the declarations and the status of those making them, it is apparent that, contrary to what Glaverbel claims, the Court of First Instance rejected the documents in question after examining them and not on the sole formal ground that they had been produced in support of an application for registration based on the acquisition of distinctiveness through use under Article 7 (3) of Regulation No 40/94.

52 Accordingly, the complaint raised by Glaverbel is manifestly unfounded.

53 Even assuming that the part of the plea examined also comprises a complaint that the Court of First Instance wrongly failed to conclude from the content of the declarations produced that the persons making them confirmed that the design in question is inherently distinctive within the meaning of Article 7(1)(b) of Regulation No 40/94, it is sufficient to point out that such a complaint essentially calls into question an assessment of the facts and that, therefore, in the absence of any arguments showing that the clear sense of the evidence was distorted, it is manifestly inadmissible in an appeal procedure.

54 Accordingly, the fourth part of the plea must likewise be rejected.

55 In conclusion, since none of the four parts of the plea have been upheld, the appeal must be dismissed.

## Costs

56 Under Article 69(2) of the Rules of Procedure, which applies to the procedure on appeal by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Glaverbel has been unsuccessful in its plea, it must be ordered to pay the costs of the present proceedings in accordance with the form of order sought by OHIM.

On those grounds,

THE COURT (Fifth Chamber)

hereby orders:

1. **The appeal is dismissed.**

2. **Glaverbel SA shall pay the costs.**

Luxembourg, 28 June 2004.

Registrar

R. Grass

President of the Fifth Chamber

C. Gulmann