JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

7 September 2006 *

In Case T-133/05,

Gérard Meric, residing in Paris (France), represented by P. Murzeau, lawyer,

applicant,

v

Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), represented by A. Rassat, acting as Agent,

defendant,

the other party to the proceedings before the Board of Appeal of OHIM having been

Arbora & Ausonia, SL, established in Barcelona (Spain),

* Language of the case: French.

ACTION brought against the decision of the First Board of Appeal of OHIM of 17 January 2005 in Case R 250/2004-1, regarding the opposition of the proprietor of the national word and figurative marks PAM-PAM to the registration of the word mark PAM-PIM'S BABY-PROP (opposition proceedings No B 505 067),

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

composed of M. Vilaras, President, F. Dehousse and M. Šváby, Judges,

Registrar: B. Pastor, Deputy Registrar,

having regard to the application lodged at the Court Registry on 17 March 2005,

having regard to the response lodged at the Court Registry on 15 July 2005,

further to the hearing on 8 December 2005,

gives the following

Judgment

Background to the case

1 On 9 July 2001, the applicant filed a Community trade mark application at the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) under Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended.

2 The trade mark for which registration was sought is the word mark PAM-PIM'S BABY-PROP.

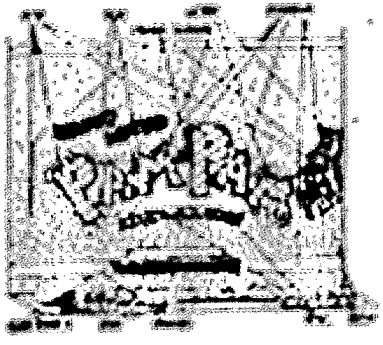
3 The goods in respect of which registration of the mark was sought fall within Class 16 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following description: 'napkin-pants made out of paper or cellulose (disposable)'.

4 On 21 January 2002, the trade mark application was published in *Community Trade Marks Bulletin* No 7/02.

5 On 19 April 2002, the company Arbora & Ausonia, SL ('Arbora & Ausonia') filed a notice of opposition to registration of the trade mark applied for, based on three earlier Spanish trade marks, reproduced below:

— the word mark PAM-PAM No 855 391, registered on 7 October 1981 for the following goods in Class 25 of the Nice Agreement: 'any ready-made clothing, in particular napkin-pants, footwear';

— the figurative mark PAM-PAM No 1 146 300, registered on 7 May 1991 for 'napkin-pants made out of paper and cellulose (disposable)', in Class 16 of the Nice Agreement:



— the word mark PAM-PAM Servicio de Merchandising, SA No 1 153 492, registered on 20 April 1988 for the following goods, in Class 5 of the Nice Agreement: 'sanitary pants, sanitary towels, absorbent wadding, sanitary tampons and towels, sterilising preparations, cotton wool for medical purposes'.

6 The opposition, based on Article 8(1)(b) of Regulation No 40/94, was directed at all of the goods designated in the Community trade mark application.

7 On 9 February 2004, by Decision No 289/2004, the Opposition Division upheld the opposition brought by Arbora & Ausonia, rejected the Community trade mark application and ordered the applicant to bear the costs.

8 As justification for its decision, based solely on the earlier figurative mark PAM-PAM, the Opposition Division held, essentially, that the goods in question were identical and that there was a phonetic similarity between the signs concerned. The Opposition Division concluded that there was a likelihood of confusion on the part of the relevant public as defined in Article 8(1)(b) of Regulation No 40/94.

9 On 6 April 2004, the applicant filed a notice of appeal at OHIM against the decision of the Opposition Division.

10 On 19 November 2004, the rapporteur informed the parties that he was intending to propose to the Board of Appeal to take into account not only the earlier figurative mark PAM-PAM, which alone was examined by the Opposition Division, but also the two other earlier marks referred to in the notice of opposition. OHIM pointed out at the hearing that the parties had not put forward observations on that subject before the Board of Appeal.

11 By decision of 17 January 2005 ('the contested decision'), notified to the applicant on 20 January 2005, the Board of Appeal dismissed the appeal. Essentially, it held that,

in view of, inter alia, the important elements of similarity between the mark applied for and the earlier word mark PAM-PAM, the very strong similarity between the goods and the intrinsic distinctive nature of the earlier word mark PAM-PAM, the visual and phonetic differences highlighted were not such as to avoid a likelihood of confusion (paragraph 28 of the contested decision). Having reached that conclusion, the Board of Appeal considered that it was not necessary to examine further the two other marks cited in the opposition proceedings.

Arguments of the parties

12 The applicant claims that the Court of First Instance should:

— 'purely and simply' alter the contested decision;

— reject the opposition entered by the company Arbora & Ausonia to registration of the trade mark PAM-PIM'S BABY-PROP;

— order Arbora & Ausonia to pay the costs.

13 OHIM claims that the Court of First Instance should:

— dismiss the action;

— order the applicant to pay the costs.

In law

Preliminary observations

14 At the outset, it should be pointed out that the applicant did not attend the hearing of 8 December 2005. By a first facsimile dated 7 December 2005, he informed the Court that 'a last minute difficulty would not allow him to be present'. He stated that he 'sought to advise it immediately in order that [the Court of First Instance] can organise [its] hearing' and requested to be 'informed of the date on which [the] decision is given'. By a second facsimile of 7 December 2005, the applicant stated that he wished the hearing, 'if possible', to be postponed to the following month of January or February, citing 'a difficulty of a purely personal and last-minute nature'. In view of the contradiction of the messages, the imminence of the hearing and, in any event, the inadequacy of the reasons for the applicant's request, the Fifth Chamber decided not to allow the request for the postponement of the hearing.

15 Next, the view must be taken that, although the arguments of the applicant formally relate to the alteration of the contested decision, it is clear from the content of the application that, by the present action, the applicant seeks, essentially, annulment of the contested decision on the ground that the Board of Appeal wrongly held that there was a likelihood of confusion between the opposing marks, within the meaning of Article 8(1)(b) of Regulation No 40/94.

Substance

16 The applicant puts forward a single plea, alleging infringement of Article 8(1)(b) of Regulation No 40/94. Between the mark applied for and the earlier marks, he argues, there is no similarity in the signs nor similarity in the goods concerned. According to the applicant, there cannot be, on the part of the average consumer in Spain, a likelihood of confusion between the trade marks in question.

17 OHIM argues, on the contrary, that the decision of the Board of Appeal is not vitiated by irregularities.

18 Under Article 8(1)(b) of Regulation No 40/94, a mark is not to be registered if, because of its identity with or similarity to an earlier trade mark and the identity or similarity of the goods or services covered by the trade marks, there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected. Further, under Article 8(2)(a)(ii) of Regulation No 40/94, 'earlier trademarks' means trade marks registered in a Member State with a date of application for registration which is earlier than the date of application for registration of the Community trade mark (Case T-85/02 *Díaz* v *OHIM — Granjas Castelló (CASTILLO)* [2003] ECR II-4835, paragraph 27).

19 Under the continuity, in terms of their functions, between the Opposition Division and the Boards of Appeal of OHIM (Case T-308/01 *Henkel* v *OHIM — LHS (UK) (KLEENCARE)* [2003] ECR II-3253, paragraph 25, and Case T-107/02 *GE Betz* v *OHIM — Atofina Chemicals (BIOMATE)* [2004] ECR II-1845, paragraph 33), the Board of Appeal re-examines all the relevant matters of law and of fact to determine

if a new decision with the same operative part as the decision under appeal may be lawfully adopted at the time of the appeal ruling (*KLEENCARE*, paragraph 29, and Case T-16/02 *Audi* v *OHIM (TDI)* [2003] ECR II-5167, paragraphs 81 and 82).

20 In the present case, it is common ground that the opposition of Arbora & Ausonia was based on the three earlier national marks referred to at paragraph 5 above. The Opposition Division found that there was a likelihood of confusion between the mark applied for and only the earlier figurative mark.

21 By contrast, after having informed the parties of its intention also to take into account the two other earlier marks referred to in the statement of opposition, the Board of Appeal first compared the mark applied for and the earlier mark PAM-PAM No 855 391, the latter also being a word mark and, therefore, closer to the mark applied for (paragraph 22 of the contested decision). It was only after finding that there was a likelihood of confusion between those two marks that the Board of Appeal held that it was not necessary to examine the possibility that there was a likelihood of confusion between the mark applied for and the two other earlier marks (paragraph 30 of the contested decision).

22 It must be borne in mind that the purpose of the action before the Court of First Instance is to obtain a review of the legality of the decision of the Board of Appeal (see, in this connection, Case T-237/01 *Alcon* v *OHIM — Dr. Robert Winzer Pharma (BSS)* [2003] ECR II-411, paragraph 61; Case T-128/01 *DaimlerChrysler* v *OHIM (Grille)* [2003] ECR II-701, paragraph 18; Case T-129/01 *Alejandro* v *Anheuser-Busch (BUDMEN)* [2003] ECR II-2251, paragraph 67; and Case T-311/01 *Éditions Albert René* v *OHIM — TRUCCO (Starix)* [2003] ECR II-4625, paragraph 70). Under Article 63 of Regulation No 40/94, the Court of First Instance has power to annul the contested decision 'on grounds of lack of competence, infringement of an

essential procedural requirement, infringement of the Treaty, of this Regulation or of any rule of law relating to their application or misuse of power' in the context of Articles 229 EC and 230 EC. The Court of First Instance's review of the legality of a decision by a Board of Appeal must therefore be carried out with regard to the issues of law raised before the Board of Appeal (see Case T-373/03 *Solo Italia* v *OHIM — Nuovo Sala (PARMITALIA)* [2005] ECR II-1881, paragraph 25).

23 It is therefore appropriate to examine whether the Board of Appeal acted correctly in holding that there was a likelihood of confusion between the mark applied for and the earlier word mark PAM-PAM ('the earlier mark in question').

The comparison of the goods

— Arguments of the parties

24 The applicant argues that, contrary to the view taken by the Board of Appeal, there is no identity or similarity in the designated goods. He contends that the goods covered by the trade mark application are nappies made out of paper or cellulose, disposable, intended for babies, whereas the goods covered by the earlier mark in question are '"napkin-pants for children" not made out of paper or cellulose, but made with another material (tissue, polyester, nylon, etc.)', washable and reuseable.

25 In that respect, the applicant points out that 'the mark PAM-PAM only distributes nappies for adults'. Arbora & Ausonia has never marketed nappies for babies. That factor is established since Arbora & Ausonia has not furnished proof that it has marketed that type of products before.

26 OHIM argues that the Board of Appeal was correct in holding that the goods covered by the mark applied for and the earlier mark in question were 'at least very similar'.

— Findings of the Court

27 At the outset, it should be observed that, in the present case, the Board of Appeal held that the goods were identical or at least very similar.

28 In assessing the similarity between the goods or services concerned, all the relevant factors which characterise the relationship between them should be taken into account. Those factors include, in particular, their nature, their end users and their method of use and whether they are in competition with each other or are complementary (*CASTILLO*, cited in paragraph 18 above, paragraph 32, and Case T-346/04 *Sadas* v *OHIM — LTJ Diffusion (ARTHUR ET FELICIE)* [2005] ECR II-4891, paragraph 33).

29 In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme* v *OHIM — Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser* v *OHIM — Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial* v *OHIM — France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi* v *OHIM — Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).

30 It should be noted that the comparison of the goods must concern the description of the goods covered by the marks in issue and not the goods for which the trade marks are actually used, unless, following an application in accordance with Article 43(2) and (3) of Regulation No 40/94, the proof of use of the earlier mark is only in respect of some of the goods or services for which it is registered. In such a case, the earlier mark is, for the purposes of the assessment of the opposition, deemed to be registered only in respect of those goods and services (*ELS*, cited in paragraph 29 above, paragraph 50, and *ARTHUR ET FELICIE*, cited in paragraph 28 above, paragraph 35).

31 In the present case, the Board of Appeal correctly held that the proof of use of the earlier marks had not been sought and it therefore took into consideration the description of the goods in question.

32 The Board of Appeal stated in the contested decision, at paragraph 27, that the goods designated by the application were 'napkin-pants made out of paper and cellulose (disposable)' both for adults and for babies. It compared them to certain goods designated by the earlier mark in question which are, according to the Board of Appeal, 'children's napkin-pants'.

33 The applicant's argument regarding the absence of marketing of babies' nappies by Arbora & Ausonia cannot succeed. The applicant thus contends that there is a lack of proof of genuine use of the earlier mark. Such a lack of proof can be penalised by rejecting the opposition only where the applicant has expressly and timeously requested such proof before OHIM (Joined Cases T-183/02 and T-184/02 *El Corte Inglés* v *OHIM — González Cabello and Iberia Líneas Aéreas de España (MUNDICOR)* [2004] ECR II-965, paragraph 38, and Case T-303/03 *Lidl Stiftung* v *OHIM — REWE-Zentral (Salvita)* [2005] ECR II-1917, paragraph 77).

34 It is noteworthy that the earlier mark in question was registered for 'any ready-made clothing, in particular napkin-pants, footwear'. As regards the napkin-pants, the original text in Spanish indicates 'braga-pañal infantil' (children's napkin-pants).

35 The trade mark application concerns 'napkin-pants made out of paper and cellulose (disposable)'. As the applicant has not put forward any factors which would allow the application for registration to be considered as being limited to pants for adults or for babies, the Board of Appeal was right to find that that wording covered both pants for adults and those intended for babies.

36 It is therefore significant that, as the goods designated by the earlier mark in question were, in particular, babies' nappies, they are included in the more general category covered by the trade mark application which covers both babies' nappies and adults' nappies.

37 It should be added that the goods thus referred to are of the same kind (hygiene products), have the same function or purpose (protection of clothes in the event of incontinence) and are marketed in the same points of sale (generally, supermarkets or pharmacies). Finally, the goods have a potentially complementary nature, in so far as, when they are intended for young children, the disposable napkin-pants can be placed inside the nappies made of reusable tissue. There is therefore no doubt that they can be made or marketed by the same economic agents.

38 The applicant's argument that the goods are not identical or at least similar because of the differences in composition and use must be rejected. In the present case, those differences cannot outweigh the common nature and purpose of the two goods concerned. Whether he is faced with nappies made out of cellulose or tissue,

disposable or not, the consumer will be able to take the view that the goods are similar (for a similar approach, see Case T-164/03 *Ampafrance* v *OHIM — Johnson & Johnson (monBéBé)* [2005] ECR II-1401, paragraph 53), belonging to the same general range of napkin-pants, capable of having a common commercial origin (*CASTILLO*, cited in paragraph 18 above, paragraphs 33 to 38).

39 Consequently, the Board of Appeal did not err in finding that the goods designated by the opposing marks were identical or at least very similar.

The comparison of the signs

40 The Court first points out that two marks are similar when, from the point of view of the relevant public, they are at least partially identical as regards one or more visual, aural and conceptual aspects (Case T-6/01 *Matratzen Concord* v *OHIM — Hukla Germany (MATRATZEN)* [2002] ECR II-4335, paragraph 30, and Case T-34/04 *Plus* v *OHIM — Bälz and Hiller (Turkish Power)* [2005] ECR II-2401, paragraph 43).

— Arguments of the parties

41 The applicant submits that, contrary to the opinion of the Board of Appeal, there is no identity between the signs PAM-PAM and PAM-PIM'S BABY-PROP. There are, as between the earlier mark in question and the mark applied for, visual, aural and conceptual differences which are much greater than those accepted by the Board of Appeal.

42 In that regard, the applicant disputes the approach taken by the Board of Appeal, according to which the attention of the consumer is necessarily focussed on the first part of a mark, in the present case the words 'pam-pim's', without paying attention to the second part 'baby-prop'. According to the applicant, the consumer is, on the contrary, drawn visually to the original or particular aspect of a mark.

43 Firstly, as the mark applied for and the earlier mark in question contain a number of different words, they are not visually similar. The applicant also puts forward a graphic and visual difference which is even greater between the mark applied for (PAM-PIM'S BABY-PROP) and the earlier figurative mark (PAM-PAM), the only earlier mark which corresponded to goods also in Class 16.

44 Secondly, the applicant finds that there is a phonetic difference in which the syllable 'pim's' conferred an aspect of smoothness to the mark applied for, intended for babies, in contrast to the earlier mark in question, PAM-PAM, which resonates in the manner of a drum.

45 Furthermore, the applicant accuses the Board of Appeal of having assessed the alleged visual and aural similarities in a subjective manner. That subjective character resulted from the fact that the territory of the earlier marks considered (Spain) and that where the decision was taken is the same.

46 Thirdly, from a conceptual point of view, the applicant submits that there is no similarity between the signs concerned. The mark applied for would immediately allow the product concerned to be determined, namely babies' nappies, whereas the earlier mark in question has no particular meaning. In addition, it has not been shown that the average Spanish consumer necessarily associates that mark with babies' nappies.

47 OHIM maintains that the Board of Appeal was correct to confirm the view of the Opposition Division that there is a similarity between the signs concerned.

— Findings of the Court of First Instance

48 According to the case-law, the global assessment of the likelihood of confusion, so far as concerns the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, inter alia, their distinctive and dominant components (Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 23; Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 25; Case T-423/04 *Bunker & BKR* v *OHIM — Marine Stock (B.K.R.)* [2005] ECR II-4035, paragraph 57).

49 Whilst the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details, in general it is the dominant and distinctive features of a sign which are more easily remembered (*Fifties*, cited in paragraph 29 above, paragraphs 47 and 48, and Joined Cases T-117/03 to T-119/03 and T-171/03 *New Look* v *OHIM — Naulover* (*NLSPORT, NLJEANS, NLACTIVE and NLCollection*) [2004] ECR II-3471, paragraph 39).

50 In the present case, the Board of Appeal held that, in the mark applied for, the words 'pam-pim's' were distinct from the goods designated and dominant in relation to the words 'baby-prop' (paragraph 21 of the contested decision).

51 It is noteworthy that, as the Board of Appeal correctly pointed out, the reference consumer will more easily remember the words 'pam-pim's', which, on the one hand, have no particular meaning in Spanish except as an expression of infant language, and, on the other hand, are situated at the beginning of the mark applied for (PAM-PIM'S BABY-PROP). The consumer generally pays greater attention to the beginning of a mark than to the end (*BUDMEN*, cited in paragraph 22 above, paragraph 47, and *ARTHUR ET FELICIE*, cited in paragraph 28 above, paragraph 46). The word combination 'pam-pim's' therefore plays an important role in the visual and aural assessment of the earlier mark, given its position at the beginning, that is to say, in the most visible place (Case T-312/03 *Wassen International* v *OHIM — Stroschein Gesundkost (SELINIUM-ACE)* [2005] ECR II-2897, paragraph 41).

52 As for the word combination 'baby-prop' contained in the mark applied for, it does not allow attention to be drawn from the element 'pam-pim's' to the point of sufficiently amending the way in which the public will perceive that mark. In that regard, the parties correctly agree that the Board of Appeal did not make an error in holding that the Spanish reference consumer will understand the word 'baby' as meaning 'baby'. That word may be part of the expressions used in everyday speech to designate the function of babies' nappies (Case C-383/99 P *Procter & Gamble* v *OHIM* [2001] ECR I-6251, paragraph 43). In that context, the association of the words 'baby' and 'prop', placed at the end of the mark applied for, occupy only a secondary position within the sign as a whole (see, for a similar assessment, *HUBERT*, cited in paragraph 29 above, paragraph 53).

53 It follows from those considerations that the word combination 'pam-pim's' is the dominant element of the mark applied for.

54 It is in the light of that assessment that it is necessary to examine whether the signs in question display similarities.

55 It is noteworthy, first, that, although the Board of Appeal held in the contested decision that a visual and aural similarity existed (paragraphs 23 and 24 of the contested decision) and that there was a slight conceptual similarity between the earlier trade mark in question and the mark applied for, whilst in particular taking account of its distinctive and dominant elements (paragraph 25 of the contested decision), it did not, contrary to the applicant's argument, hold that those signs were identical.

56 First, from a visual point of view, the dominant element of the mark applied for, 'pam-pim's', and the earlier trade mark in question, PAM-PAM, are both made up of two words linked by a hyphen. Those words contain three letters each, of which two are identical, placed in the same order and in the same position.

57 The difference pointed out in the contested decision between the vowels 'a' and 'i' and the addition of a 's' preceded by an apostrophe are not sufficiently significant to challenge the visual similarity which exists between the earlier trade mark in question and the dominant element of the mark applied for (*ELS*, cited in paragraph 29 above, paragraph 66).

58 In the same manner, the addition of the words 'baby-prop' in the trade mark application is not such as to amend that assessment, in so far as those words occupy a secondary position within the sign as a whole.

59 The Board of Appeal therefore acted correctly in law in holding that there was a visual similarity between the mark applied for and the earlier mark in question.

60 So far as concerns the applicant's argument relating to the difference between the trade mark applied for and the earlier figurative mark, this is irrelevant, as the Court has stated at paragraph 21 above that the Board of Appeal validly based its decision only on the earlier word mark in question, without it being necessary to examine the other earlier trade marks put forward.

61 Secondly, from the phonetic point of view, the dominant element of the trade mark applied for, 'pam-pim's', and the earlier trade mark in question (PAM-PAM) are made up of two monosyllabic words which start with the same consonant 'p' and finish with the same consonant 'm'. They also have in common the contested syllable 'pam'. The only difference in pronunciation for the Spanish public concerns the central vowel of the second syllable 'a' in the earlier mark in question and 'i' in the mark applied for. That minor difference cannot under any circumstances bring into question the aural similarity which exists between the trade marks concerned.

62 As regards the words 'baby-prop' contained in the mark applied for, the Court has already stated that they occupy a secondary position within the sign as a whole. They cannot therefore bring into question the extensive aural similarity between the dominant element of the mark applied for and the earlier mark in question (see, to that effect, Case T-31/03 *Grupo Sada* v *OHIM — Sadia (GRUPO SADA)* [2005] ECR II-1667, paragraph 62).

63 The applicant's assertion that the earlier trade mark in question resonates in the manner of a drum, as opposed to the trade mark applied for which relates to an aspect of softness, is not substantiated. In any event, it would not be sufficient to preclude all aural similarity between the mark applied for and the earlier mark in question, as the smoothness of the sound 'pam-pim's' has not been established.

64 Therefore the Board of Appeal correctly held that there was an aural similarity between the trade mark applied for and the earlier trade mark in question, taken together, as their similarities override their differences (see, for a similar approach, *SELENIUM-ACE*, cited in paragraph 51 above, paragraph 44).

65 Furthermore, the Court finds that the applicant's assertion as regards the subjectivity of the assessment by the Board of Appeal of the visual and aural similarity is not substantiated.

66 Thirdly, from the conceptual point of view, the sign PAM-PAM and the dominant element 'pam-pim's' of the trade mark applied for do not have, for the relevant public, a clear and specified semantic content. As the Board of Appeal rightly held, they do not have a meaning in Spanish, except a babbling specific to babies. As regards the words 'baby-prop' featuring in the trade mark applied for, it should be observed that they occupy a secondary position within the sign as a whole. In addition, while the word 'baby' can be understood as meaning 'baby' by the relevant public, it should be pointed out that the word 'prop' does not have any particular meaning in Spanish. Taken as a whole, the trade mark applied for (PAM-PIM'S BABY-PROP) does not therefore have a clear and specific meaning. Contrary to the applicant's argument, it does not allow the relevant public to identify the product considered.

67 Consequently, there are no conceptual differences capable of neutralising the visual and phonetic differences which exist between the signs concerned.

68 It follows that the Board of Appeal correctly established that the marks concerned are similar.

The likelihood of confusion

— Arguments of the parties

69 According to the applicant, there is no likelihood of confusion between the marks concerned, as the relevant public targeted by the trade marks is radically different. The consumer targeted by the trade mark applied for is a public consisting of young parents, whereas the public concerned by the adults' nappies distributed under the trade mark PAM-PAM is made up of older or even very old persons.

70 For OHIM, the global assessment of the likelihood of confusion indicates the existence of a likelihood of confusion. In view of the similarity of the goods and marks in question, the Spanish reference consumer will tend to attribute the same commercial origin to the goods covered by the trade mark PAM-PIM'S BABY-PROP as to the goods sold under the trade mark PAM-PAM.

— Findings of the Court

71 The risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically linked undertakings constitutes a likelihood of confusion (Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 29; *Lloyd Schuhfabrik Meyer*, cited in paragraph 48 above, paragraph 17; and *ARTHUR ET FELICIE*, cited in paragraph 28 above, paragraph 26).

72 The likelihood of confusion on the part of the public must be appreciated globally, taking into account all factors relevant to the circumstances of the case (*SABEL*, cited in paragraph 48 above, paragraph 22; *Canon*, cited in paragraph 71 above, paragraph 16; and *Lloyd Schuhfabrik Meyer*, cited in paragraph 48 above, paragraph 18).

73 For the purposes of that global assessment, the average consumer of the products concerned is deemed to be reasonably well informed and reasonably observant and circumspect. His level of attention is likely to vary according to the category of goods or services in question (*ELS*, cited in paragraph 29 above, paragraph 47).

74 In the present case, in the light of the observations set out above, it must be concluded that the existence of a similarity between the mark applied for and the earlier mark in question is established. In addition, it should be borne in mind, as has been done in the contested decision, that the goods covered by the opposing trade marks are identical. The corollary of that identity is that the scope of any differences between the signs in question is reduced (see in that regard *BUDMEN*, cited in paragraph 22 above, paragraph 59).

75 As regards the relevant public, it has already been established above that both the earlier mark in question and the mark applied for designate, in particular, nappies intended for babies. The public targeted is therefore the same, at least in part, for the two opposing trade marks.

76 The Court notes that, in the clothing sector, it is common for the same mark to be configured in various different ways according to the type of product which it designates. It is also common for the same clothing manufacturer to use sub-brands, that is to say, signs that derive from a principal mark and which share with it a common dominant element, in order to distinguish his various lines from one another (*Fifties*, cited in paragraph 29 above, paragraph 49; *BUDMEN*, cited in paragraph 22 above, paragraph 57; and *NLSPORT, NLJEANS, NLACTIVE, and*

NLCollection, cited in paragraph 49 above, paragraph 51). In such circumstances, it is conceivable that the targeted public may regard the goods designated by the opposing marks as belonging, admittedly, to two distinct ranges of products but as coming, none the less, from the same manufacturer (*Fifties*, cited in paragraph 29 above, paragraph 49, and *ARTHUR ET FELICIE*, cited in paragraph 28 above, paragraph 68).

77 In view of all of those elements, the average Spanish consumer may believe that the goods covered by the trade mark PAM-PIM'S BABY-PROP and those sold under the trade mark PAM-PAM come from the same manufacturer or, as the case may be, from manufacturers that are economically linked.

78 The Board of Appeal was therefore correct in law in holding that there was a likelihood of confusion between the marks in question.

79 Consequently, the single plea alleging infringement of Article 8(1)(b) of Regulation No 40/94 is rejected.

Costs

80 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful, it must, having regard to the forms of order sought by OHIM, be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the action;**

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

Vilaras Dehousse Šváby

Delivered in open court in Luxembourg on 7 September 2006.

E. Coulon M. Vilaras

Registrar President