JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
25 November 2003 *

In Case T-286/02,

Oriental Kitchen SARL, established in Choisy-le-Roi (France), represented by J.-J. Sebag, lawyer,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by B. Lory, O. Waelbroeck and O. Montalto, acting as Agents,

defendant,

the intervener before the Court being

Mou Dybfrost A/S, established in Esbjerg N (Denmark), represented by T. Steffensen, lawyer,

* Language of the case: French.

ACTION against the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 28 June 2002 (Case R 114/2001-4) in respect of the opposition of the proprietor of the national trade marks MOU to registration of the sign KIAP MOU as a Community trade mark,

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

composed of: N.J. Forwood, President, J. Pirrung and A.W.H. Meij, Judges,
Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 23 September 2003,

gives the following

Judgment

Background to the dispute

1 On 29 September 1998, the applicant filed at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('the Office'), 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, an application for registration of a Community trade mark.

2 The mark whose registration was applied for is the sign KIAP MOU.

3 The goods in relation to which registration was sought come within Classes 29 and 30 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 descriptions for each of those classes:

— Class 29: 'Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams; eggs, milk and other milk products; edible oils and fats; preserves of meat, fish, poultry and game; pickles, dried sausages; prepared or cooked dishes based on vegetables; prepared or cooked dishes based on meat; prepared or cooked dishes based on fish';

— Class 30: 'Prepared or cooked dishes based on pastry, pasta or rice'.

4 On 4 October 1999, that application was published in *Community Trade Marks Bulletin* No 78/99.

5 On 4 January 2000, Mou Dybfrost A/S ('the intervener') filed, pursuant to Article 42 of Regulation No 40/94, a notice of opposition to registration of the mark applied for, in respect of all the goods referred to in the trade mark application. The ground relied upon in support of the opposition is the likelihood

of confusion referred to in Article 8(1)(b) of Regulation No 40/94. The opposition was based on the existence of various earlier national trade marks of which the intervener is the proprietor, in particular:

— the word mark MOU, registered in the United Kingdom on 18 August 1995 under No 1524701 in relation to the goods 'Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; meat, fish, fruit and vegetable jellies; jams; egg products; milk products; yoghurt and milk powder; edible oils and fats; tinned meat and fish; soups, bouillon, soups with meat, stews; meatballs, marrow balls and vegetable balls; prepared meals consisting wholly or substantially of meat, fish, poultry, game, vegetables and/or fruit; sausage and sausage products; hamburgers', which are all included in Class 29;

— the word mark MOU, registered in the United Kingdom on 18 August 1995 under No 1524702 in relation to the goods 'Sago; flour and preparations made of cereals for consumption; bread, pastry and confectionery, ices, salt, mustard, vinegar; spices; ice; flour dumplings; toasts; prepared meals consisting wholly or substantially of noodles, rice, corn, flour and/or cereal preparations; sauces and salad dressings; hamburgers in a bun', which are all included in Class 30.

6 By decision of 11 December 2000 ('the decision of the Opposition Division'), the Opposition Division of the Office, on the basis of those two earlier marks registered in the United Kingdom, found that the marks at issue were similar and that the goods in question were identical or similar and that there was therefore a likelihood of confusion between them. That division thus upheld the opposition and refused to register the mark applied for in respect of those goods.

7 On 26 January 2001, the applicant filed notice of appeal at the Office, pursuant to Article 59 of Regulation No 40/94, against the decision of the Opposition Division.

8 That appeal was rejected by decision of the Fourth Board of Appeal of the Office of 28 June 2002 (Case R 114/2001-4, 'the contested decision'), notified to the applicant on 5 August 2002. In substance, the Board of Appeal found that there was a likelihood of confusion between the earlier marks and the mark applied for, because of the identity of the goods in question and the visual and phonetic similarities between the signs in dispute and because the average United Kingdom consumer did not have any particular knowledge of the Laotian language and was therefore able to see the word 'mou' only as an invented word.

Procedure and forms of order sought

9 By application lodged at the Court Registry on 23 September 2002, the applicant brought the present action. The Office lodged its response on 3 March 2003 and the intervener lodged its response on 4 March 2003.

10 The hearing took place on 23 September 2003 in the absence of the applicant, which was neither represented nor excused.

11 The applicant claims that the Court should:

— annul the contested decision;

— alter the decision of the Opposition Division;

— reject the intervener's opposition;

— approve the application for registration of the trade mark KIAP MOU;

— order the intervener to pay the costs.

12 The Office contends that the Court should:

— reject as inadmissible the applicant's claims that the decision of the Opposition Division should be altered, the opposition should be rejected and the disputed trade mark application should be approved;

— as to the remainder, dismiss the application as unfounded;

— order the applicant to pay the costs.

13 The intervener contends that the Court should:

— confirm the contested decision;

— order the applicant to pay the costs.

The application to annul the contested decision

14 The applicant puts forward, in substance, a single plea in law, based on infringement of Article 8(1)(b) of Regulation No 40/94.

Arguments of the parties

15 The applicant states that the food products, made up essentially of pork meat products, which it manufactures and distributes are intended exclusively for a clientele of Indochinese origin (Vietnamese, Laotian, Thai and Chinese). Those products include fried pork rind, a typical speciality of Indochina, which the applicant markets under the fanciful trade mark KIAP MOU.

16 According to an expert's report annexed to the application, in Laotian and Thai the substantive 'mou' means 'pork', whilst the adjectival expression 'kiap' means crispy or crunchy, so that the composite 'kiap mou' can be translated as 'crispy fried pork rind' or even 'crispy pork'.

17 The applicant infers that, for the clientele concerned, namely the communities of Indochinese origin living in Western Europe, the sign MOU is purely descriptive of a product which constitutes an essential ingredient of their diet. It claims that such a sign is not capable of protection under trade mark law.

18 By contrast, according to the applicant, the addition of the word 'kiap' confers on the sign KIAP MOU sufficient originality to make it registrable as a Community trade mark.

19 The applicant adds that the sign KIAP MOU is sufficiently distinctive from the sign MOU to enable the goods in question to be differentiated.

20 As a consequence, the applicant submits that the contested decision should be annulled and the trade mark application in question approved.

21 The Office and the intervener contend, in substance, that the Board of Appeal rightly decided, in correct application of the relevant Community legislation and case-law, that there exists a likelihood of confusion between the marks at issue, within the meaning of Article 8(1)(b) of Regulation No 40/94, and that the application must therefore be dismissed.

Findings of the Court

22 According to Article 8(1)(b) of Regulation No 40/94, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered if because of its identity with or similarity to the 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. The likelihood of confusion includes the likelihood of association with the earlier trade mark. Moreover, under Article 8(2)(a)(ii) of Regulation No 40/94, 'earlier trade marks' 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.

23 It is apparent from the case-law of the Court of Justice on interpretation of Articles 4(1)(b) and 5(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), the prescriptive content of which is essentially identical to that of Article 8(1)(b) of Regulation No 40/94, that the likelihood of confusion consists in 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 (Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 29, and Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 17).

24 According to the same case-law, 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 (Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 22; *Canon*, cited in paragraph 23 above, paragraph 16; *Lloyd Schuhfabrik Meyer*, cited in paragraph 23 above, paragraph 18, and Case C-425/98 *Marca Mode* [2000] ECR I-4861, paragraph 40).

25 That global assessment implies some interdependence between the relevant factors, and in particular between similarity between the trade marks and similarity between the goods or services identified. Accordingly, a lesser degree of similarity between these goods or services may be offset by a greater degree of similarity between the marks, and vice versa (*Canon*, cited in paragraph 23 above, paragraph 17; *Lloyd Schuhfabrik Meyer*, cited in paragraph 23 above, paragraph 19, and *Marca Mode*, cited in paragraph 24 above, paragraph 40). The interdependence of these factors is expressed in the seventh recital in the preamble to Regulation No 40/94, according to which an interpretation should be given of the concept of similarity in relation to the likelihood of confusion, the appreciation of which depends, in particular, on the recognition of the trade mark on the market and the degree of similarity between the trade mark and the sign and between the goods or services identified.

26 In addition, the perception of marks in the mind of the average consumer of the category of goods or services in question plays a decisive role in the global appreciation of the likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (*SABEL*, cited in paragraph 24 above, paragraph 23, and *Lloyd Schuhfabrik Meyer*, cited in paragraph 23 above, paragraph 25). For the purposes of that global appreciation, the average consumer of the goods concerned is deemed to be reasonably well informed and reasonably observant and circumspect. Moreover, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (*Lloyd Schuhfabrik Meyer*, cited in paragraph 23 above, paragraph 26).

27 In the present case, the two earlier marks are registered in the United Kingdom, which therefore constitutes the relevant territory for the purposes of applying Article 8(1)(b) of Regulation No 40/94.

28 Furthermore, both the goods covered by the earlier marks and the goods covered by the trade mark application are everyday food products falling within Classes 29 and 30.

29 In that regard, it is not necessary to take account of the applicant's assertion that it intends to use the mark applied for only in relation to some of the goods referred to in the trade mark application and, more particularly, for fried pork rind.

30 It should indeed be noted that, for the purposes of applying Article 8(1)(b) of Regulation No 40/94, the likelihood of confusion must be assessed in relation to all the goods specified in the trade mark application. In order to be taken into consideration, a restriction of the list of goods or services specified in a Community trade mark application must be made in accordance with certain detailed rules, on application for amendment of the application filed, in accordance with Article 44 of Regulation No 40/94 and Rule 13 of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1) (see, to that effect, Case T-194/01 *Unilever* v *OHIM (Ovoid tablet)* [2003] ECR II-383, paragraph 13). However, those rules have not been complied with in the present case, since the applicant has not submitted an application for amendment of the application pursuant to those provisions.

31 Nor need account be taken of the applicant's assertion that the goods referred to in the trade mark application are intended exclusively for a clientele of Chinese or Indochinese (Vietnamese, Laotian, Thai) origin living in Western Europe.

32 First, the Office has rightly pointed out that there is nothing in the wording of the contested application for registration to suggest that the goods in question are intended exclusively for such a clientele. The general terms used by the applicant suggest instead that those goods are intended for the usual, average clientele of the food products also covered by the earlier marks. Without being contradicted on that point by the applicant, the Office states that those goods are distributed through the same channels and sold at the same points of sale to the same type of purchasers.

33 Second, the Office has also rightly submitted that, without further specification in the wording of the contested application, the mere fact that the word 'mou' means something in an Indochinese language or that the expression 'kiap mou' refers, in that same language, to a characteristic of the goods is not sufficient to establish and define a particular category of consumers targeted by the contested trade mark application.

34 In any event, that assertion of the applicant does not seem to be relevant for the purposes of applying Article 8(1)(b) of Regulation No 40/94 since, as the Office and the intervener have pointed out, following the Board of Appeal, the way in which the goods are described in the trade mark application does not preclude the later use of the mark in question for a broader market, namely the market targeted by the earlier marks.

35 Accordingly, account must be taken, for the purposes of the global assessment of the likelihood of confusion, of the point of view of the relevant public made up of the end users of everyday food products in the United Kingdom.

36 In the light of the foregoing considerations, it is necessary to review the comparison made by the Board of Appeal of, first, the goods concerned and, second, the signs in dispute.

37 In the first place, the goods in question, as referred to in the trade mark application on the one hand and by the earlier trade marks on the other, are indisputably identical or, at the very least, similar. As the Office has stated, these are food products falling within Classes 29 and 30 which are presented in general terms mainly using the chapter headings of the Nice Classification. Furthermore, the applicant does not dispute that identity or similarity as such. As to the applicant's arguments to the effect, first, that use of the mark applied for will be restricted to only some of the goods referred to in the trade mark application and, second, that those goods are intended exclusively for an Indochinese clientele, they have already been rejected above.

38 In the second place, as regards the signs at issue, it should be pointed out, in general terms, 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 relevant aspects (Case T-6/01 *Matratzen Concord* v *OHIM — Hukla Germany (MATRATZEN)* [2002] ECR II-4335, paragraph 30). As the case-law of the Court of Justice indicates, the visual, aural and conceptual aspects are relevant. Furthermore, assessment of the similarity between two marks must be based on the overall impression created by them, bearing in mind, in particular, their distinctive and dominant components (*SABEL*, cited in paragraph 24 above, paragraph 23, and *Lloyd Schuhfabrik Meyer*, cited in paragraph 23 above, paragraph 25).

39 In that regard, the Court finds that it is necessary to make an initial analysis based on the premiss that, where one of the two words which alone constitute a word mark is identical, both visually and aurally, to the single word which constitutes an earlier word mark, and where those words, taken together or in isolation, have no conceptual meaning for the public concerned, the marks at issue, each considered as a whole, are normally to be regarded as similar within the meaning of Article 8(1)(b) of Regulation No 40/94.

40 In the present case, both visually and aurally, 'mou' is both the single word constituting the earlier word marks and the second of the two words (the first being 'kiap') constituting the word mark applied for.

41 Moreover, conceptually, as was found above, the relevant public is made up of end users of everyday food products in the United Kingdom. Such a public is in the very great majority anglophone. The words 'mou', 'kiap' and 'kiap mou' have no meaning in English and they bear no resemblance to the English words which have a meaning equivalent to that of these words in Laotian or Thai. Moreover, there is nothing in the case file or the applicant's arguments to suggest that a significant proportion of that public has a sufficient knowledge of the Laotian or Thai languages to understand the meaning of the words in question in those languages.

42 It also follows from those considerations that, from the point of view of the relevant public, and contrary to the applicant's submission, 'mou' is not descriptive of the goods covered by the earlier mark. It will be viewed by that public as a term which is invented and inherently distinctive.

43 As the same is true of the word 'kiap', the Court finds, as did the Office, that those two words have an equal power of attraction for the relevant public and that, coupled together in the expression 'kiap mou', they will be viewed by that public as equally dominant, without the word 'mou' losing its distinctiveness.

44 In those circumstances, the Board of Appeal was entitled to conclude that the signs constituting the word marks in issue, each considered as a whole bearing in mind, in particular, their distinctive and dominant components, are similar.

45 In the light of the foregoing, the relevant public is likely to think that the food products bearing the word mark KIAP MOU may come from the undertaking which is proprietor of the earlier word marks MOU. As a consequence, the degree of similarity between the marks at issue is sufficient for it to be considered that there exists a likelihood of confusion between them. Accordingly, the single plea in law based on infringement of Article 8(1)(b) of Regulation No 40/94 must be rejected.

46 The application must therefore be dismissed and it is not necessary to rule on the admissibility of the applicant's claims that the decision of the Opposition Division should be altered, the opposition should be rejected and the disputed trade mark application should be approved.

Costs

47 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs incurred by the Office and the intervener, in accordance with the forms of order sought by them.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber),

hereby:

1. **Dismisses the application;**

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

Forwood Pirrung Meij

Delivered in open court in Luxembourg on 25 November 2003.

H. Jung
Registrar

J. Pirrung
President