JUDGMENT OF THE GENERAL COURT (fifth chamber)

4 March 2010 *

In Case T-24/08,

Weldebräu GmbH & Co. KG, established in Plankstadt (Germany), represented by W. Göpfert, lawyer,

applicant,

v

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

defendant,

* Language of the case: English.

the other party to the proceedings before the Board of Appeal of OHIM, intervener before the Court, being

Kofola Holding a.s., established in Ostrava (Czech Republic), represented by S. Hejdová and R. Charvát, lawyers,

ACTION brought against the decision of the Fourth Board of Appeal of OHIM of 15 November 2007 (Case R 1096/2006-4), relating to opposition proceedings between Weldebräu GmbH & Co. KG and Kofola Holding a.s.,

THE GENERAL COURT (Fifth Chamber),

composed of M. Vilaras, President, M. Prek (Rapporteur) and V.M. Ciucă, Judges,

Registrar: N. Rosner, Administrator,

having regard to the application lodged at the Registry of the Court on 16 January 2008,

having regard to the response of OHIM lodged at the Registry of the Court on 13 May 2008,

having regard to the response of the intervener lodged at the Registry of the Court on 14 May 2008,

further to the hearing on 29 October 2009,

gives the following

Judgment

Background to the dispute

1 On 23 September 2003, the intervener, Kofola Holding a.s., filed an application for registration of a Community trade mark at the Office for Harmonisation 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 (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 mark in respect of which registration was sought is the three-dimensional sign corresponding to the following description: 'a bottle of cylindrical form has a narrowed, helically formed neck and its cylindrical part is labelled "snipp"', and reproduced below:



3 The goods in respect of which registration was sought are in Classes 30, 32 and 33 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, in respect of each of those classes, to the following description:

— Class 30: 'Coffee, tea, cocoa, artificial coffee, sauces, vegetable sauces, confectionery, chocolate based beverages, cocoa based beverages, coffee based beverages, tea based beverages, flavourings for beverages other than essential oils, golden syrup';

— Class 32: 'Non alcoholic beverages, non alcoholic fruit beverages, fruit extracts (non alcoholic), fruit nectars, fruit juice, mineral water, effervescing beverages, essences for making beverages, syrups, beers';

— Class 33: 'Alcoholic beverages'.

4 The Community trade mark application was published in *Community Trade Marks Bulletin* No 2004/033 of 16 August 2004.

5 On 16 November 2004, the applicant, Weldebräu GmbH & Co. KG, filed a notice of opposition under Article 42 of Regulation No 40/94 (now Article 41 of Regulation No 207/2009) to registration of that trade mark for the goods referred to in paragraph 3 above.

6 The opposition was based on the earlier three-dimensional Community trade mark consisting in the shape of a bottle, registered under Number 690 016 on 16 November 2000, and reproduced below.



7 The goods covered by the earlier mark fall within Classes 21, 32 and 33 and correspond, in respect of each of those classes, to the following description:

— Class 21: 'Boxes of glass, bottles, jugs (not of precious metal)';

— Class 32: 'Beers, mineral and aerated waters, fruit drinks and fruit juices, syrups and other preparations for making beverages, ale, porter';

— Class 33: 'Alcoholic beverages (except beer), liqueurs, spirits, wine'.

8 The ground relied on in support of the opposition was that referred to in Article 8(1)(b) of Regulation No 40/94 (now Article 8(1)(b) of Regulation No 207/2009).

9 On 26 June 2006, the Opposition Division rejected the opposition.

10 On 14 August 2006, the applicant filed an appeal with OHIM, pursuant to Articles 57 to 62 of Regulation No 40/94 (now Articles 58 to 64 of Regulation No 207/2009), against the decision of the Opposition Division.

11 By decision of 15 November 2007 ('the contested decision'), the Fourth Board of Appeal of OHIM dismissed the appeal, in essence holding that, having regard to the average degree of distinctiveness of the earlier mark and the significant differences between the signs at issue, there was no likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94, read in conjunction with Article 8(2)(a)(i) of Regulation No 40/94 (now Article 8(2)(a)(i) of Regulation No 207/2009), between the marks at issue on the part of the average consumer within the European Union.

Forms of order sought

12 The applicant claims that the Court should:

— annul the contested decision;

— order OHIM to pay the costs.

13 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

14 The intervener contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

15 In support of its action, the applicant relies on a single plea, alleging breach of Article 8(1)(b) of Regulation No 40/94. It submits that the Board of Appeal was wrong to reject the existence of a likelihood of confusion, within the meaning of that provision, between the marks at issue. OHIM and the intervener contend that the Board of Appeal correctly concluded that there was no such likelihood.

16 Under 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 where, 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.

17 According to established case-law, the risk that the public might believe that the goods or services in question come from the same undertaking or from economically-linked undertakings constitutes a likelihood of confusion. According to that same line of case-law, the likelihood of confusion must be assessed globally according to the relevant public's perception of the signs and the goods or services in question, taking into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the signs and that of the goods or services designated (see Case T-162/01 *Laboratorios RTB* v *OHIM - Giorgio Beverley Hills (GIORGIO BEVERLEY HILLS)* [2003] ECR II-2821, paragraphs 30 to 33 and the case-law cited).

18 The question whether the Board of Appeal was correct to hold that there was no likelihood of confusion between the earlier mark and the trade mark applied for must be examined in the light of those considerations.

19 In the present case, it is common ground that the relevant public is composed of average consumers in the European Union who are reasonably well informed and reasonably observant and circumspect.

20 It is also common ground, as the Board of Appeal correctly observed in paragraph 26 of the contested decision, that the goods designated by the trade mark applied for in Classes 32 and 33 are identical to those of the earlier trade mark in the same classes, and that the goods in Class 30 covered by the trade mark applied for are very similar to the goods in Classes 32 and 33 covered by the earlier mark.

The comparison of the signs at issue

21 It is settled case-law that the global assessment of the likelihood of confusion must, as regards the visual, phonetic or conceptual similarity of the marks in question, be based on the overall impression which they create, bearing in mind, in particular, their distinctive and dominant components. The perception of marks by the average consumer of the goods or services in question plays a decisive role in the global assessment of that likelihood. In that respect, the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (see Case C-334/05 P *OHIM* v *Shaker* [2007] ECR I-4529, paragraph 35 and the case-law cited; judgment of 20 September 2007 in Case C-193/06 P *Nestlé* v *OHIM*, not published in the ECR, paragraph 34; Case T-186/02 *BMI Bertollo* v *OHIM - Diesel (DIESELIT)* [2004] ECR II-1887, paragraph 38).

22 In the present case, two three-dimensional signs are at issue, consisting of a body of a bottle of cylindrical form and a helically formed neck. In addition, the sign applied for includes the word element 'snipp' engraved on the lower part of the body of the bottle in small-sized letters of the same colour as the bottle.

23 As is apparent from the findings made in paragraph 28 of the contested decision, which are not disputed by the parties, no phonetic comparison can be made since the earlier mark does not contain any word element and the word element 'snipp', minor in size and engraved on the bottom part of the sign applied for, is not liable to affect the overall impression produced by the mark. A conceptual comparison is also impossible since the marks at issue do not convey any meaning. Accordingly, the marks at issue may only be compared visually.

24 The Board of Appeal held, in paragraph 31 of the contested decision, that the overall visual comparison of the two signs shows several significant differences, taking into account, inter alia, the fact that the proportions between the length and width of the bottles are different, that the sign applied for has a word element which is not contained in the earlier sign and that the shapes of the necks of the bottles are very different.

25 In this connection, although it is true that the word element, 'snipp', of the trade mark applied for, engraved in the same colour as the glass, is difficult to see and, consequently, is not likely to have an effect on the overall impression produced by the trade mark, and although it is evident that the necks of the bottles of the signs at issue are both helically formed and, consequently, can be distinguished from traditional necks, the fact remains that the overall visual impression is of various significant differences between the signs at issue, as the Board of Appeal rightly concluded.

26 First, the earlier sign appears, from the perspective of average consumers who are reasonably well informed and reasonably observant and circumspect, to be longer, slimmer and therefore more delicate than the sign applied for, which has a smaller, thicker and more corpulent silhouette which gives a more bulky impression. In addition, in the case of the sign applied for the shape of the body of the bottle is irregular because of its curvy form, whereas that of the earlier sign is straight. Secondly, the necks, although both helical, have different spirals. Whereas the neck of the earlier sign is thinner and consists of only two helical turns, that of the sign applied for is wider and consists of at least four helical turns.

27 Consequently, the Board of Appeal did not err when it found, in paragraph 31 of the contested decision, that the fact that the neck of both bottles can be described as 'helical-shaped' is of very little relevance, as the shape of each neck is very different.

28 That assessment is not affected by the applicant's arguments derived from the case-law of certain national courts and the practice of OHIM. First, the case-law of the courts of the Member States is a factor which may merely be taken into consideration, without being given decisive weight, for the purposes of registering a Community trade mark (Case T-194/01 *Unilever* v *OHIM (Ovoid tablet)* [2003] ECR II-383, paragraph 68). Secondly, concerning the practice of OHIM, decisions concerning registration of a sign as a Community trade mark which the Boards of Appeal are called on to take under Regulation No 40/94 are adopted in the exercise of circumscribed powers and are not a matter of discretion. Accordingly, the legality of those decisions must be assessed solely on the basis of that regulation, and not on the basis of a previous practice (Case C-412/05 P *Alcon* v *OHIM* [2007] ECR I-3569, paragraph 65, and Case T-346/04 *Sadas* v *OHIM - LTJ Diffusion (ARTHUR ET FELICIE)* [2005] ECR II-4891, paragraph 71).

29 Having regard to the foregoing considerations, the Board of Appeal was fully entitled to observe that there were significant differences between the signs. Consequently, it must be concluded that there is only a low degree of visual similarity between the signs at issue.

The likelihood of confusion

30 A global assessment of the likelihood of confusion implies some interdependence between the factors taken into account, and in particular between the similarity of the trade marks and the similarity of the goods or services concerned. Accordingly, a low degree of similarity between these goods or services may be offset by a high degree of similarity between the marks, and vice versa (Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 17, and Joined Cases T-81/03, T-82/03 and T-103/03 *Mast-Jägermeister* v *OHIM - Licorera Zacapaneca (VENADO with frame and Others)* [2006] ECR II-5409, paragraph 74).

31 In the present case, the Board of Appeal found, in paragraph 24 of the contested decision, that the earlier mark had an average degree of distinctiveness. The applicant does not dispute that finding, although it submits that that mark has at least that average degree of distinctiveness because of its unique and unusual appearance, confirmed by the various prizes received for the special design of the bottle. In any event, as the Board of Appeal noted, the applicant has not submitted any argument proving that its mark has acquired distinctiveness by virtue of intensive use or its reputation.

32 Since the signs at issue have significant differences and the applicant has not demonstrated in what way the earlier mark is highly distinctive, the mere fact that the two bottles have a helically formed neck does not lead to the conclusion that there is a likelihood of confusion between the marks at issue, despite the fact that the goods at issue are identical.

33 That conclusion is not affected by the applicant's argument that the tactile impression of the marks at issue plays an important role in the present case. As OHIM correctly points out, the selling arrangements for the bottles – namely their display as

labelled goods in the food aisles of supermarkets or their being ordered in a bar or restaurant – mean that prior to purchase the consumer will concentrate mainly on the word and figurative elements on their labels, such as the trade mark's name, logo and/or other figurative elements indicating the product's origin.

34 In the light of those considerations, the single plea must be rejected and, consequently, the appeal must be dismissed in its entirety.

Costs

35 Under Article 87(2) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

36 As the applicant has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by OHIM and the intervener.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders Weldebräu GmbH & Co. KG to pay the costs.

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 4 March 2010.

[Signatures]