JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

17 September 2008 *

In Case T-218/06,

Neurim Pharmaceuticals (1991) Ltd, established in Tel-Aviv (Israel), represented by M. Kinkeldey, lawyer,

applicant,

v

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

defendant,

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

Eurim-Pharm Arzneimittel GmbH, established in Piding (Germany), represented by T. Raab, lawyer,

* Language of the case: German.

ACTION brought against the decision of the First Board of Appeal of OHIM of 2 June 2006 (Case R 74/2006-1), concerning opposition proceedings between Eurim-Pharm Arzneimittel GmbH and Neurim Pharmaceuticals (1991) Ltd,

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

composed of V. Tiili, President, F. Dehousse and I. Wiszniewska-Białecka (Rapporteur), Judges,

Registrar: K. Andová, Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 16 August 2006,

having regard to the response of OHIM lodged at the Registry of the Court of First Instance on 20 December 2006,

having regard to the response of the intervener lodged at the Registry of the Court of First Instance on 18 December 2006,

further to the hearing on 12 February 2008,

gives the following

Judgment

Legal context

1 Article 59 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended, states:

'Notice of appeal must be filed in writing at the Office within two months after the date of notification of the decision appealed from. The notice shall be deemed to have been filed only when the fee for appeal has been paid. Within four months after the date of notification of the decision, a written statement setting out the grounds of appeal must be filed.'

2 Article 78 of Regulation No 40/94 is worded as follows:

'Restitutio in integrum

1. The applicant for or proprietor of a Community trade mark or any other party to proceedings before the Office who, in spite of all due care required by the circumstances having been taken, was unable to observe a time-limit vis-à-vis the Office shall, upon application, have his rights reestablished if the non-observance in ques-

tion has the direct consequence, by virtue of the provisions of this Regulation, of causing the loss of any right or means of redress.

2. The application must be filed in writing within two months from the removal of the cause of non-compliance with the time-limit. The omitted act must be completed within this period …

3. The application must state the grounds on which it is based and must set out the facts on which it relies. It shall not be deemed to be filed until the fee for re-establishment of rights has been paid.

…'

3 Article 78a of Regulation No 40/94 states:

'Continuation of proceedings

1. An applicant for or proprietor of a Community trade mark or any other party to proceedings before the Office who has omitted to observe a time-limit vis-à-vis the Office may, upon request, obtain the continuation of proceedings, provided that at the time the request is made the omitted act has been carried out. The request for continuation of proceedings shall be admissible only if it is presented within two months following the expiry of the unobserved time-limit. The request shall not be deemed to have been filed until the fee for continuation of the proceedings has been paid.

…'

4 Rule 48 of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1), as amended, states:

'1. The notice of appeal shall contain:

…

(c) a statement identifying the decision which is contested and the extent to which amendment or cancellation of the decision is requested.

2. The notice of appeal shall be filed in the language of the proceedings in which the decision subject to the appeal was taken.'

5 Rule 49(1) of Regulation No 2868/95 states:

'If the appeal does not comply with Articles 57, 58 and 59 of Regulation [No 40/94] and Rule 48(1)(c) and (2), the Board of Appeal shall reject it as inadmissible, unless each deficiency has been remedied before the relevant time-limit laid down in Article 59 of Regulation [No 40/94] has expired.'

6 Rule 70 of Regulation No 2868/95, which relates to the calculation of time-limits, states:

'…

2. Calculation shall start on the day following the day on which the relevant event occurred, the event being either a procedural step or the expiry of another period. Where that procedural step is a notification, the event considered shall be the receipt of the document notified, unless otherwise provided.

…

4. Where a period is expressed as one month or a certain number of months, it shall expire in the relevant subsequent month on the day which has the same number as the day on which the said event occurred …'

7 Rule 96(1) of Regulation No 2868/95, which forms part of the general provisions section, under the heading 'languages', states:

'Without prejudice to Article 115(4) and (7) of the Regulation, and unless otherwise provided for in these Rules, in written proceedings before the Office any party may use any language of the Office. If the language chosen is not the language of the proceedings, the party shall supply a translation into that language within one month from the date of the submission of the original document …'

Facts

8 On 1 August 2002, the applicant, Neurim Pharmaceuticals (1991) Ltd, filed an application for a Community trade mark at the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), pursuant to Regulation No 40/94.

9 The trade mark in respect of which registration was sought is the following figurative sign:



10 The goods in respect of which registration of the trade mark was applied for are in Classes 5 and 10 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, for each of those classes, to the following description:

— Class 5: 'Pharmaceuticals, pharmaceutical preparations; pills for pharmaceutical purposes, chemical preparations for pharmaceutical purposes, chemical preparations for medical purposes, drugs for medical purposes';

— Class 10: 'Medical devices'.

11 The applicant filed the application for a Community trade mark in English, indicating German as second language.

12 The Community trade mark application was published in *Community Trade Marks Bulletin* No 28/03 of 31 March 2003.

13 On 27 June 2003, the intervener, Eurim-Pharm Arzneimittel GmbH, filed a notice of opposition to the registration of the mark applied for, on the basis of Article 8(1)(b) of Regulation No 40/94.

14 The opposition was based on the word mark EURIM-PHARM, registered as Community trade mark No 667 899 for 'medicines' falling within Class 5 and the German registration No 1 068 926 for 'medicines for veterinary and human purposes' falling also within Class 5, as well as on the German trade name Eurim-Pharm used in Germany in order to designate the manufacture and marketing of medicines, in particular the wholesale trade in medicines.

15 The notice of opposition was lodged in German. That language became the language of the case pursuant to Article 115(6) of Regulation No 40/94.

16 By decision of 14 November 2005, notified to the parties by fax the same day, the opposition division upheld the opposition and rejected the application for registration.

17 On 6 January 2006, the applicant filed an appeal against that decision. For that purpose, it used the notice of appeal form in English made available by OHIM, in which it wrote in field 31 headed 'Extent of appeal', in English, the following sentence:

'The decision in its entirety should be overturned and the application allowed to proceed to registration.'

18 On 18 January 2006, the OHIM Registry faxed two documents to the applicant's representatives: a two-page letter acknowledging receipt of the notice of appeal and a one-page communication informing it of a deficiency relating to the language in which the notice of appeal had been filed in the light of Rule 48(2) of Regulation No 2868/95. The latter communication requested the applicant to supply a translation of the notice of appeal into the language of the case within one month from the date of the submission of the original document, namely 6 February 2006 at the latest, in accordance with Rule 96(1) of Regulation No 2868/95.

19 The extract from the transmission report for the faxes produced by OHIM contains the indication 'OK' for the transmission of the two documents sent to the applicant's representatives on that date.

20 On 14 March 2006, the applicant filed a written statement in German setting out the grounds of its appeal.

21 On 22 March 2006, a member of staff at OHIM telephoned one of the applicant's representatives, informing him of the deficiency relating to the language of the appeal and of the communication that OHIM had sent in that regard on 18 January 2006. The applicant's representative indicated that he had not received that communication.

22 By letter of 7 April 2006, sent to OHIM by fax, the applicant's representative, referring to an earlier telephone conversation with a member of staff at OHIM, stated that he had received only one letter from OHIM on 18 January 2006, namely that acknowledging receipt of the notice of appeal. In support of that statement, he produced an extract from an electronic printout listing the faxes he had received on 18 January 2006. He also requested that a copy of the letter of 18 January 2006 concerning the incorrect use of language in the notice of appeal be resent to him.

23 By another letter of 7 April 2006, the applicant's representative sent OHIM a new notice of appeal, this time written entirely in German, requesting the continuation of the proceedings on the basis of Article 78a of Regulation No 40/94 and authorising its current account with OHIM to be debited by the amount of the fees to be paid.

24 On 23 May 2006, the applicant's representative filed an application for *restitutio in integrum* pursuant to Article 78 of Regulation No 40/94 and authorised its current account with OHIM to be debited by the amount of the fees to be paid. He claimed that he had given instructions to a secretary that a German version of the notice of appeal should be sent to OHIM on 6 January 2006 and that, for reasons which could not be explained but which did not constitute a breach of his duty to supervise, the second page of the notice of appeal form had been sent in English. He also stated that that secretary, who was experienced and whose work had not previously been called into question, had been faced with serious family problems at that time, of which her employers were unaware.

25 By decision of 2 June 2006 ('the contested decision'), the First Board of Appeal of OHIM dismissed the appeal as inadmissible in the light of Rule 49(1) of Regulation No 2868/95 read in conjunction with Rule 48(1)(c) and (2) of that regulation. It also held that the request for continuation of proceedings filed pursuant to Article 78a of Regulation No 40/94 and the request for *restitutio in integrum* filed pursuant to Article 78 of that regulation were 'deemed not to have been filed', as payment of the fees to be paid had not been authorised in good time.

Forms of order sought

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

— annul the contested decision;

— order OHIM to pay the costs.

27 OHIM contends that the Court of First Instance should:

— dismiss the action;

— order the applicant to pay the costs.

28 The intervener contends that the Court of First Instance should:

— uphold the contested decision;

— order the applicant to pay the costs.

Law

29 In support of its application, the applicant relies on four pleas in law, alleging, first, infringement of Article 59 of Regulation No 40/94, and Rule 48(1)(c) and (2), Rule 49(1), and Rule 96(1) of Regulation No 2868/95, secondly, infringement of Article 78a of Regulation No 40/94, thirdly, infringement of Article 78 of that regulation and, fourthly, breach of the principle of proportionality.

30 As the fourth plea, like the first plea, relates to the admissibility of the action before the Board of Appeal, it should be examined in the second place, after examining the first plea. The second and third pleas, linked, respectively, to the admissibility of the request for continuation of proceedings and the submission of the request for *restitutio in integrum* within the period allowed, will be examined in the third and fourth place.

The plea in law alleging infringement of Article 59 of Regulation No 40/94, and Rule 48(1)(c) and (2), Rule 49(1), and Rule 96(1) of Regulation No 2868/95

Arguments of the parties

31 The applicant submits that it filed an appeal against the decision of the Opposition Division in accordance with the provisions of Article 59 of Regulation No 40/94,

within the period allowed, in the proper form, and that only the description of the extent of the appeal was written in the language of the application for registration instead of in the language of the proceedings. The applicant has not received any communication in writing from OHIM informing it of the deficiency relating to the language in which the appeal was filed.

32 First, it claims that the fax transmission list for 18 January 2006 submitted by OHIM, containing the indication 'OK' for the transmission of the communication concerning the deficiency relating to the language of the notice of appeal, merely gives rise to a presumption that it was received. In accordance with the case-law and the OHIM directives concerning on-going proceedings before it, such a presumption may be rebutted if the addressee of a communication from OHIM is able to prove that it did not receive it. In the present case, the applicant has rebutted that presumption by producing a fax reception list for 18 January 2006 showing that it received only one communication from OHIM of two pages, which corresponds to the receipt of the notice of appeal. Accordingly, the communication concerning the deficiency relating to the language of the notice of appeal must be considered not to have occurred.

33 Second, it claims that OHIM's consistent practice is to apply Rule 96(1) of Regulation No 2868/95 to errors as to the language in which a notice of appeal is filed, which implies that it is possible to provide a translation of the original document in the language of the proceedings within a month of it being lodged. Another consistent practice of OHIM is expressly to inform applicants, by means of a communication, of their errors as to the language of the proceedings and the period for correcting those errors laid down in Rule 96(1) of Regulation No 2868/95.

34 The principle of equal treatment means that the applicant must be able to rely on those established administrative practices, which bind OHIM, being applied, particularly since, in the present case, a notice of appeal had already been filed and it was easy to notify the applicant of the irregularity in question again in the proper form before the expiry of the period allowed. The applicant's representatives requested this without success in a number of telephone conversations. In view of such a change to

the established administrative practice, in breach of the principle of equal treatment, the refiling of the notice of appeal on 7 April 2006, this time written in German, must be considered to have validly corrected the deficiency relating to the language of the notice of appeal.

35 OHIM contends that it is apparent from Rule 48(2), Rule 49 and Rule 96(1) of Regulation No 2868/95 that an appeal which, as in this case, was brought in a language other than the language of the proceedings without a translation being provided within the period allowed must be dismissed as inadmissible. The document produced by the applicant does not constitute sufficient evidence that the fax sent by OHIM informing it of the deficiency relating to the language of the notice of appeal was not received.

36 The intervener contends that, since the notice of appeal was filed in a language other than that of the proceedings, in breach of Rule 48(2) of Regulation No 2868/95, the appeal was validly dismissed pursuant to Rule 49(1) of that regulation. The practice of the Board of Appeal of pointing out to the parties any shortcomings in their formal documents does not constitute an obligation and, accordingly, can have no effect on the periods laid down. The extension of those time-limits might lead to unequal treatment.

Findings of the Court

37 It is clear from Rule 48(1)(c) and (2) of Regulation No 2868/95 that the notice of appeal is to contain a statement identifying the extent to which amendment or cancellation of the contested decision is requested and that that notice is to be filed in the language of the proceedings of that decision.

38 Pursuant to Rule 49(1) of Regulation No 2868/95, if the appeal does not comply inter alia with the conditions laid down in Rule 48(1)(c) and (2) of that regulation, the Board of Appeal is to reject it as inadmissible, unless each deficiency has been remedied before the period laid down in Article 59 of Regulation No 40/94 has expired, namely within two months after the date of notification of the contested decision.

39 According to Rule 96(1) of Regulation No 2868/95, unless otherwise provided for in that regulation, any party may use any OHIM language other than that of the proceedings if that party supplies a translation into that language within one month from the date of the submission of the original document.

40 In the present case, the contested decision of the Opposition Division was notified to the applicant by fax on 14 November 2005. As the notice of appeal was filed on 6 January 2006, the appeal was brought within the two months laid down in Article 59 of Regulation No 40/94. However, the notice of appeal, which contained, in accordance with Rule 48(1)(c) of Regulation No 2868/95, an indication of the extent to which the decision of the Opposition Division was to be annulled does not fulfil the condition laid down in Rule 48(2) of Regulation No 2868/95, because that indication was written in English and not in the language of the proceedings, namely German.

41 Pursuant to Rule 96(1) of Regulation No 2868/95, it would have been possible to provide a translation of the notice of appeal in the language of the proceedings within one month from the date of its submission, namely on 6 February 2006 at the latest. However, such a translation reached OHIM only when a new notice of appeal, written in German, was lodged on 7 April 2006, in other words two months after the expiry of the period allowed.

42 Therefore, the Board of Appeal did not err in law when it dismissed the appeal as inadmissible by virtue of Rule 49(1) of Regulation No 2868/95 and Rule 48(1)(c) and (2) of that regulation.

43 That finding is not called into question by the applicant's arguments concerning the alleged lack of notification by OHIM of the deficiency relating to the language of the notice of appeal and the alleged breach of the principle of equal treatment. It follows from Rule 49(1) of Regulation No 2868/95 that a failure to comply with Rule 48(1)(c) and (2) of that regulation will lead to the appeal being dismissed, directly and without prior notification, as inadmissible and that, in such an event, dismissal will occur after expiry of the period laid down in Rule 96(1) of that regulation. Neither the applicable legislation nor the case-law imposes an obligation on OHIM to alert potential appellants to boards of appeal to the consequences of a failure to comply with the formalities laid down in that legislation (see, to that effect, Case T-373/03 *Solo Italia* v *OHIM — Nuova Sala (PARMITALIA)* [2005] ECR II-1881, paragraph 59).

44 Even if it were OHIM's customary practice to inform appellants of formal shortcomings in their notices of appeal, that would have no effect on the present case. That practice cannot change the starting point for the period laid down in Rule 96(1) of Regulation No 2868/95 (see, to that effect, Case T-71/02 *Classen Holding* v *OHIM — International Paper (BECKETT EXPRESSION)* [2003] ECR II-3181, paragraph 41). Moreover, according to settled case-law, the rules on time-limits were laid down with a view to ensuring legal certainty and avoiding any discrimination or arbitrary treatment (see order in Case T-426/04 *Tramarin* v *Commission* [2005] ECR II-4765, paragraph 60 and the case-law cited). That general statement applies also to time-limits laid down in regulations on the Community trade mark. Accordingly, in applying, without modification, the time-limit laid down in Rule 96(1) of Regulation No 2868/95, the Board of Appeal did not breach the principle of equal treatment.

45 Accordingly, the present plea in law must be rejected.

The plea in law alleging breach of the principle of proportionality

Arguments of the parties

46 The applicant claims that the dismissal of its appeal by the Board of Appeal on grounds of inadmissibility, although, with the exception of one sentence in English, it was brought within the period allowed and in the prescribed manner, infringes the principle of proportionality by removing from the applicant the possibility of taking further steps in the procedure and defending its application for registration.

47 First, by balancing the intervener's interest in being able to understand the appeal easily and in the language of the proceedings being maintained against the applicant's interest in defending its application for registration, it would be unreasonable to dismiss the appeal solely because the formal requirement to file the notice of appeal in the language of the proceedings may not have been complied with.

48 Second, the Board of Appeal itself has previously acknowledged that the language regime introduced by Regulations No 40/94 and 2868/95 lacks clarity. It would be pointlessly strict and formalist to apply such rules to the notice of appeal, few elements of which require translation. The information to be provided in the notice of appeal form is minimal, including that concerning the extent of the appeal, which in the current version of the form comprises a simple box to be ticked.

49 Third, the choice of the language of the proceedings is restricted to languages which are most widely known in the European Community precisely so that the language of the proceedings will not be completely unknown to one of the parties to the proceedings. In the present case, the intervener was in a position to understand the content of the notice of appeal, including the information concerning the extent of the appeal written in English, since the application for registration against which it had brought its opposition was also written in English. There can be no doubt that the intervener understands English, particularly as it is a pharmaceutical company rather than an individual.

50 OHIM, in maintaining that the Board of Appeal lacks the power to review the proportionality of rules providing for the dismissal of an appeal brought in a language other than the language of the proceedings, contends that the very existence of different legal remedies enabling errors of form or the non-observance of time-limits to be overcome supports the proportionality of such rules. As the applicant did not avail itself of the legal remedies available to it and in view of its repeated failure to observe the time-limits which calls into question the diligence of its representatives, the proportionality of the legal bases in question cannot be contested.

51 According to the intervener, it is not disproportionate to require compliance with the rules on time-limits and the language of the proceedings, the application of which are not subject to a balancing of the interests of the parties. Moreover, since the applicant was able to submit a new application for registration, the dismissal of its appeal was not inequitable.

Findings of the Court

52 In dismissing the appeal as inadmissible, the Board of Appeal applied Rule 96(1), Rule 49(1), and Rule 48(1)(c) and (2) of Regulation No 2868/95. Since those rules were in force and governed the admissibility of the appeal in this case, the Board of Appeal was under a duty to apply them. A refusal to follow those rules would have disregarded the presumption of legality, according to which Community legislation remains fully effective until it has been found to be unlawful by a competent court (see, to that effect, Case T-120/99 *Kik* v *OHIM (Kik)* [2001] ECR II-2235, paragraph 55).

53 It is thus for the Court to rule on the legality of those rules in the light of the principle of proportionality since the applicant, in claiming that the inadmissibility of its appeal pursuant to those rules breaches the principle of proportionality, implicitly claims that those rules breach the principle of proportionality.

54 In that regard, it should be pointed out that those rules form part of the provisions governing the language regime introduced by Regulation No 40/94. According to the case-law, that language regime is compatible with the principle of proportionality (see, to that effect, Case C-361/01 P *Kik* v *OHIM* [2003] ECR I-8283, paragraphs 92 to 94, and Case T-120/99 *Kik* v *OHIM (Kik)* [2001], cited in paragraph 52 above, at paragraphs 62 and 63). Thus, those rules cannot be considered to be contrary to the principle of proportionality.

55 In addition, the failure to comply with obligations such as compliance with time-limits for appeals, which are of fundamental importance to the proper functioning of a Community system, may be penalised in Community legislation by forfeiture of a right, and that is not inconsistent with the principle of proportionality (see, to that effect, Joined Cases T-61/00 and T-62/00 *APOL* v *Commission* [2003] II-635, paragraphs 96 and 98).

56 It follows from the foregoing that the decision of the Board of Appeal to dismiss the appeal as inadmissible, pursuant to Rule 96(1), Rule 49(1) and Rule 48(1)(c) and (2) of Regulation No 2868/95 cannot be considered to be disproportionate. Accordingly, the present plea in law must be rejected.

The plea in law alleging infringement of Article 78a of Regulation No 40/94

Arguments of the parties

57 The applicant claims that Rule 72(1) of Regulation No 2868/95 on the expiry of prescribed periods must also be applied to the determination of the starting point of those periods, so as not to put an applicant at a disadvantage by reason of the medium used to communicate the filing of its appeal. That rule provides that, if a period expires on a day on which OHIM is not open for receipt of documents or on which ordinary mail is not delivered in the locality in which OHIM is located, the period is to extend until the first day thereafter on which OHIM is open for receipt of documents and on which ordinary mail is delivered. In the present case, the period of one month laid down in Rule 96(1) of Regulation No 2868/95 had thus not started to run on Friday, 6 January 2006, namely the day on which the notice of appeal was filed, since that day was a holiday, in accordance with the list of days on which OHIM was closed in 2006. The notice of appeal must be considered to have been submitted on 9 January 2006. It follows from this that the period of one month for submitting a translation of the notice of appeal in the language of the proceedings expired on 9 February 2006, and not, as OHIM contends, on 6 February 2006.

58 Thus, the request for continuation of proceedings, filed on 7 April 2006 with the translation into German of the notice of appeal and an order for payment of the fee for the continuation of the proceedings, was lodged in accordance with Article 78a of Regulation No 40/94. Consequently, in failing to allow that request, OHIM infringed Article 78a of Regulation No 40/94.

59 OHIM and the intervener dispute the applicant's arguments and state that, as the notice of appeal was filed in English on 6 January 2006, the period laid down in Rule 96(1) of Regulation No 2868/95 expired on 6 February 2006 and the period for submitting an application for the continuation of the proceedings laid down in Article 78a of Regulation No 40/94 expired on 6 April 2006. The application for continuation of proceedings, submitted on 7 April 2006, was thus submitted one day after the expiry of the period allowed.

Findings of the Court

60 By its plea concerning the admissibility of the application for continuation of proceedings, the applicant essentially criticises the Board of Appeal for not granting that request in finding that it had not been filed.

61 According to Article 78a of Regulation No 40/94, a party to proceedings before OHIM who has omitted to observe a time-limit may, upon application, obtain the continuation of proceedings, provided that, at the time the application is made, the omitted act has been completed. The request for continuation of proceedings will be admissible only if it is presented within two months following the expiry of the unobserved time-limit and will not be deemed to have been filed until the fee for continuation of the proceedings has been paid.

62 Rule 96(1) of Regulation No 2868/95 provides that the period of one month for supplying a translation into the language of the proceedings of an original document written in another language starts to run from the date of submission of that original document. Pursuant to Rule 70(4) of Regulation No 2868/95, where a period is expressed as one month or a certain number of months, it is to expire in the relevant subsequent month on the day which has the same number as the day on which the said event occurred.

63 In the present case, it is not contested that the notice of appeal, in its English version, was submitted to OHIM by fax sent on 6 January 2006. Accordingly, the Board of Appeal was correct to hold that the period of one month for the submission of the translation of the notice of appeal into the language of the proceedings had expired on 6 February 2006.

64 As the unobserved time-limit expired on 6 February 2006, the application for continuation of proceedings should have been filed and the payment of the fees to be paid should thus have been authorised on 6 April 2006 at the latest. The application for continuation of proceedings and the translation of the notice of appeal into the language of the proceedings were only filed and the payment of the fees was only authorised on 7 April 2006.

65 Accordingly, in finding the request for continuation of proceedings was deemed not to have been filed, the Board of Appeal did not err in law.

66 That finding is not invalidated by the applicant's argument that the date from which the period of one month started to run was 9 January 2006 rather than 6 January 2006, the date on which the fax of the notice of appeal was received. That argument is based on the rules relating to the expiry of prescribed periods in specific circumstances, which are not applicable to this case. Rule 70(2) of Regulation No 2868/95, which concerns the point at which time starts to run in cases where there is notification, must be applied. It lays down that it is receipt of the document notified which starts time running. In addition, Rule 79 of Regulation No 2868/95 provides that all communications sent to OHIM may be transmitted by fax and refers to Rule 80

of that regulation, which takes as the reference date the date the fax was received. Moreover, where a communication is sent to OHIM by fax, the event from which the period starts to run is the receipt of that fax by OHIM, regardless of whether the date of receipt is a holiday.

67 It follows from the foregoing that the present plea in law must be rejected.

The plea in law alleging infringement of Article 78 of Regulation No 40/94

Arguments of the parties

68 The applicant claims that a notification of a deficiency relating to the language of the notice of appeal will be valid only when it is made in writing, since the date of an informal communication given during a telephone conversation cannot be considered to represent the removal of the cause of non-compliance with the time-limit from which the period for filing a request for *restitutio in integrum* runs. As the deficiency relating to the language of the notice of appeal was not communicated to the applicant in writing, the cause of non-compliance was never removed and the request for *restitutio in integrum* cannot be regarded as out of time.

69 OHIM and the intervener contend that the cause of non-compliance in the present case ended on 22 March 2006 at the latest, when one of the applicant's representatives was informed by telephone of the deficiency relating to the language of the

notice of appeal. The period of two months laid down in Article 78(2) of Regulation No 40/94 expired on 22 May 2006 at the latest. The request for *restitutio in integrum* was thus filed one day late, on 23 May 2006. The Board of Appeal thus correctly found that the request for *restitutio in integrum* had not been validly filed.

Findings of the Court

70 Under Article 78(2) and (3) of Regulation No 40/94, an application for *restitutio in integrum* is to be filed in writing within two months from the removal of the cause of non-compliance with the time-limit resulting directly in the loss of a right or the loss of any right or means of redress. The application is to state the grounds on which it is based and the facts on which it relies and is not deemed to be filed until the fee for re-establishment of rights has been paid.

71 In the present case, the cause of non-compliance with the time-limit for filing a notice of appeal in the language of the proceedings of the decision against which the appeal was brought, as claimed by the applicant in its request for *restitutio in integrum*, consists of its representatives' unawareness of the fact that the notice of appeal was sent to OHIM on 6 January 2006 in an English version. The application for *restitutio in integrum* was filed on 23 May 2006.

72 On 22 March 2006, during a telephone conversation between a member of staff at OHIM and one of the applicant's representatives, the latter was informed of the deficiency relating to the language of the notice of appeal, as confirmed by OHIM in an internal note dated 24 March 2006 and by the applicant in its application.

73 During the hearing, the applicant stated that it doubted that that conversation was capable of constituting the removal of the cause of non-compliance with the time-limit and claimed that that took place instead on 27 April 2006, during a telephone conversation between the rapporteur of the Board of Appeal and one of the applicant's representatives.

74 That claim, even were it to be admissible, could not be accepted.

75 It is apparent from the statements of both OHIM and the applicant described above concerning the telephone conversation of 22 March 2006 that it was during that conversation that the applicant was informed of the deficiency relating to the language of the notice of appeal. Moreover, it is apparent from the administrative file that the first of the two letters sent by one of the applicant's representatives to a member of staff at OHIM on 7 April 2006 referred to their telephone conversation and to the fact that that conversation concerned OHIM's communication of 18 January 2006 which the applicant had not received. In view of the fact that that one-page communication dealt exclusively with the deficiency relating to the language of the notice of appeal, it is reasonable to infer from this that the deficiency in question was referred to during that telephone conversation. Furthermore, the second letter of 7 April 2006, sent immediately after the first, indicates that a new notice of appeal written in German was sent as a precaution, in view of the deficiency relating to the language of the notice of appeal alleged by OHIM.

76 It follows that the Board of Appeal was legitimately entitled to consider that the cause of non-compliance leading to the unobserved time-limit, as claimed by the applicant, ceased at the latest on 22 March 2006 and thus that the period of two months laid down in Article 78 of Regulation No 40/94 expired at the latest on 22 May 2006.

77 That finding cannot be invalidated by the applicant's argument that it was only from the moment when OHIM notified the deficiency relating to the language of the notice of appeal in writing that the period laid down in Article 78 of Regulation No 40/94 started to run. Article 78 of Regulation No 40/94 does not provide for such written communication. In addition, it is apparent from the case-law that OHIM is not under an obligation to inform the party concerned of deficiencies in the proceedings and, therefore, that a communication of that kind from OHIM cannot in any event affect the time at which the period granted for bringing an application for *restitutio in integrum* begins to run (*BECKETT EXPRESSION*, cited in paragraph 44 above, at paragraph 41).

78 Thus, as the payment of the fees to be paid was authorised only on 23 May 2006, the Board of Appeal did not err in law when it deemed the request for *restitutio in integrum* not to have been filed.

79 In any event, under Article 78(1) of Regulation No 40/94, *restitutio in integrum* is also subject to the condition that all due care required by the circumstances has been taken. Even if, as the applicant claims, the error in sending the notice of appeal, made by a secretary and of which the applicant's representatives were not aware, were to constitute a cause of non-compliance with the time-limit within the meaning of Article 78(1) of Regulation No 40/94, the applicant was required to establish before the Board of Appeal that it took all due care required by the circumstances. However, no evidence was presented by the applicant to that effect. Thus, the Board of Appeal did not err in law in finding that it had not been established that the applicant had taken all due care required by the circumstances.

80 It follows that the present plea in law must be rejected and, accordingly, that the action must be dismissed in its entirely.

Costs

81 Under Article 87(2) of the Rules of Procedure, 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, in accordance with the forms of order sought by OHIM and the intervener.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the action;

2. Orders Neurim Pharmaceuticals (1991) Ltd to pay the costs.

Tiili Dehousse Wiszniewska-Białecka

Delivered in open court in Luxembourg on 17 September 2008.

Registrar President

E. Coulon V. Tilli