Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

21 June 2017*

(EU trade mark — Opposition proceedings — Application for the EU figurative trade mark GPTech — Earlier EU word marks GP JOULE — Failure to produce before the Opposition Division proof of entitlement to file a notice of opposition — Proof first produced before the Board of Appeal — Failure to take into account — Discretion of the Board of Appeal — Circumstances precluding additional or supplementary evidence from being taken into account — Article 76(2) of Regulation (EC) No 207/2009 — Rules 17(4), 19(2), 20(1) and 50(1) of Regulation (EC) No 2868/95)

In Case T-235/16,

GP Joule PV GmbH & Co. KG, established in Reußenköge (Germany), represented by F. Döring, lawyer,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by E. Zaera Cuadrado, acting as Agent,

defendant,

the other party to the proceedings before the Board of Appeal of EUIPO being

Green Power Technologies, SL, established in Bollullos de la Mitación (Spain),

ACTION brought against the decision of the Second Board of Appeal of EUIPO of 9 February 2016 (Case R 848/2015-2), relating to opposition proceedings between GP Joule PV and Green Power Technologies,

THE GENERAL COURT (Seventh Chamber),

composed of V. Tomljenović, President, A. Marcoulli and A. Kornezov (Rapporteur), Judges,

Registrar: E. Coulon,

having regard to the application lodged at the Court Registry on 10 May 2016,

having regard to the response lodged at the Court Registry on 29 July 2016,

having regard to the change in the composition of the Chambers of the General Court,

* Language of the case: English.

having regard to the reassignment of the case to the Seventh Chamber and to a new Judge-Rapporteur,

having regard to the fact that no request for a hearing was submitted by the main parties within three weeks after service of notification of the close of the written part of the procedure, and having decided to rule on the action without an oral part of the procedure, pursuant to Article 106(3) of the Rules of Procedure of the General Court,

gives the following

Judgment[1] *[omissis]*

Forms of order sought

15 The applicant claims that the Court should:

— alter the contested decision and refuse to register the mark applied for;

— in the alternative, annul the contested decision.

16 EUIPO contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law *[omissis]*

The claim seeking annulment of the contested decision

23 The applicant puts forward, in essence, two pleas in support of its claim for annulment of the contested decision. The first plea alleges misapplication of the rules governing opposition proceedings and the second plea alleges misapplication of Rule 50(1) of Regulation No 2868/95 and Article 76(2) of Regulation No 207/2009.

[omissis]

The second plea in law, alleging misapplication of the third subparagraph of Rule 50(1) of Regulation No 2868/95 and Article 76(2) of Regulation No 207/2009 [omissis]

39 It should be recalled, at the outset, that the third subparagraph of Rule 50(1) of Regulation No 2868/95 provides that, 'where the appeal is directed against a decision of an Opposition Division, the Board of Appeal shall limit its examination of the appeal to facts and evidence presented within the time limits set in or specified by the Opposition Division in accordance with the Regulation and these Rules, unless the Board considers that additional or supplementary facts and evidence should be taken into account pursuant to Article [76(2) of Regulation No 207/2009]'.

40 Article 76(2) of Regulation No 207/2009 provides that EUIPO may disregard facts or evidence which are not submitted in due time by the parties concerned.

1 — Ne sont reproduits que les points du présent arrêt dont le Tribunal estime la publication utile.

41 Regulation No 207/2009 thus expressly provides that the Board of Appeal enjoys, when examining an appeal directed against a decision of the Opposition Division, the discretion deriving from the third subparagraph of Rule 50(1) of Regulation No 2868/95 and from Article 76(2) of Regulation No 207/2009 to decide whether or not to take into account additional or supplementary facts and evidence which were not presented within the time limits set or specified by the Opposition Division (judgments of 3 October 2013, *Rintisch* v *OHIM*, C-122/12 P, EU:C:2013:628, paragraph 33; of 3 October 2013, *Rintisch* v *OHIM*, C-120/12 P, EU:C:2013:638, paragraph 32; and of 3 October 2013, *Rintisch* v *OHIM*, C-121/12 P, EU:C:2013:639, paragraph 33).

42 In that context, the Court of Justice has already had the opportunity to observe that the French version of the third subparagraph of Rule 50(1) of Regulation No 2868/95 is different from the Spanish, German and English versions in one fundamental respect. Whereas the latter versions provide that the Board of Appeal must take into consideration only additional or supplementary facts and evidence, the French version describes that evidence as 'nouveaux ou supplémentaires' (new or supplementary) (judgment of 21 July 2016, *EUIPO* v *Grau Ferrer*, C-597/14 P, EU:C:2016:579, paragraph 23).

43 Based on the purpose and general scheme of the regulation, of which that provision forms part, and, in particular, Article 76(2) of Regulation No 207/2009, which constitutes the legal basis for Rule 50(1) of Regulation No 2868/95, the Court of Justice concluded that, with regard to proof of use of a mark, when no proof thereof is submitted within the time limit set by EUIPO, the opposition must automatically be rejected by EUIPO. However, when evidence is produced within the time limit set by EUIPO, the production of supplementary evidence remains possible (see, to that effect, judgment of 21 July 2016, *EUIPO* v *Grau Ferrer*, C-597/14 P, EU:C:2016:579, paragraphs 24 to 26 and the case-law cited)).

44 The Court of Justice has pointed out that Article 76(2) of Regulation No 207/2009 should be interpreted in the same way in relation to proof of the existence, validity and scope of protection of a trade mark, since that provision contains a rule which applies horizontally within the scheme of that regulation, inasmuch as it applies irrespective of the nature of the proceedings concerned. It follows that Rule 50 of Regulation No 2868/95 cannot be interpreted as meaning that it extends the discretion of the Boards of Appeal to new evidence (judgment of 21 July 2016, EUIPO v Grau Ferrer, C 597/14 P, EU:C:2016:579, paragraph 27), but only to evidence 'additional' or 'supplementary' to relevant evidence which was lodged within the time limit set (see judgment of 11 December 2014, CEDC International v OHIM — Underberg (Shape of a blade of grass in a bottle), T 235/12, EU:T:2014:1058, paragraph 89 and the case-law cited).

45 Accordingly, it must be determined whether the statement of 15 July 2015, first presented before the Board of Appeal, may be characterised as 'additional' or 'supplementary' within the meaning of the third subparagraph of Rule 50(1) of Regulation No 2868/95 and Article 76(2) of Regulation No 207/2009, as interpreted by the case-law cited in paragraphs 41 to 44.

46 It is established that the applicant presented no proof of its entitlement to file the notice of opposition under Rule 19(2) of Regulation No 2868/95, whether before the set time limit expired or, moreover, at any time in the proceedings before the Opposition Division, notwithstanding the fact that, as noted in paragraph 6 above, EUIPO had clearly informed the applicant that it had to present material to prove (i) its capacity of licensee and (ii) that it was authorised by the proprietor of the earlier marks to file the notice of opposition. In addition, it is common ground between the parties that no entry was made in the EUIPO register under Article 22 of Regulation No 207/2009 in respect of the grant of a licence for the earlier marks.

47 Furthermore, the language used in the applicant's observations of 20 February 2015, that it was the exclusive licensee of the proprietor of the earlier marks, is nothing more than a mere assertion that is not supported by any evidence. In those circumstances, the statement of 15 July 2015 cannot be considered to be evidence 'additional' or 'supplementary' to evidence already submitted by the applicant.

48 With regard to the applicant's claim that its entitlement to file the notice of opposition clearly followed from the fact its company name was identical to that in the earlier marks on which the opposition is based, suffice it to note, as EUIPO has, that it cannot be inferred from that circumstance that the applicant was entitled to do so. The mere fact that a sign coincides, whether in whole or in part, with the company name of an undertaking may be due to various circumstances in the course of business and clearly cannot replace documentary evidence such as a licence agreement, establishing both its capacity of licensee and the scope of its rights. In that regard, the rights of a licensee may be subject to various restrictions relating, inter alia, to the goods and services covered by the licence at issue, the territory for which the licence was granted and the conditions of authorisation to file an opposition.

49 Accordingly, the Board of Appeal rightly found that the statement of 15 July 2015 could not be characterised as 'additional' or 'supplementary' evidence and, therefore, could not be taken into account under the third subparagraph of Rule 50(1) of Regulation No 2868/95 and Article 76(2) of Regulation No 207/2009, as interpreted by the case-law cited in paragraphs 41 to 44.

50 The applicant's second plea must therefore be rejected as unfounded.

[omissis]

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. Dismisses the action.

2. Orders GP Joule PV GmbH & Co. KG to pay the costs.

Tomljenović Marcoulli Kornezov

Delivered in open court in Luxembourg on 21 June 2017.

E. Coulon President
Registrar