Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

21 July 2016*

(Appeal — EU trade mark — Application for EU word mark English pink — Opposition by the proprietor of the word mark PINK LADY and the figurative marks including the word elements 'Pink Lady' — Opposition dismissed — Decision of an EU trade mark court — Alteration — Res judicata)

In Case C-226/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 18 May 2015,

Apple and Pear Australia Ltd, established in Victoria (Australia),

Star Fruits Diffusion, established in Caderousse (France),

represented by T. de Haan, avocat, and P. Péters, advocaat,

appellants,

the other parties to the proceedings being:

European Union Intellectual Property Office (EUIPO), represented by J. Crespo Carrillo, acting as Agent,

defendant at first instance,

Carolus C. BVBA, established in Nieuwerkerken (Belgium),

intervener at first instance,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Fourth Chamber, C. Lycourgos (Rapporteur), E. Juhász and C. Vajda, Judges,

Advocate General: M. Bobek,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 4 February 2016,

after hearing the Opinion of the Advocate General at the sitting on 13 April 2016,

* Language of the case: French.

gives the following

Judgment

1 By their appeal, Apple and Pear Australia Ltd and Star Fruits Diffusion ask the Court to set aside the judgment of the General Court of the European Union of 25 March 2015 in *Apple and Pear Australia and Star Fruits Diffusion* v *OHIM — Carolus C. (English pink)* (T-378/13, 'the judgment under appeal', EU:T:2015:186), in so far as, by that judgment, the General Court dismissed their action requesting, primarily, alteration of the decision of the Fourth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 29 May 2013 relating to opposition proceedings between themselves and Carolus C. BVBA ('the contested decision').

Legal context

2 Recitals 16 and 17 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), read as follows:

'(16) Decisions regarding the validity and infringement of EU trade marks must have effect and cover the entire area of the Union, as this is the only way of preventing inconsistent decisions on the part of the courts and the Office and of ensuring that the unitary character of EU trade marks is not undermined. The provisions of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [(OJ 2001 L 12, p. 1)] should apply to all actions at law relating to EU trade marks, save where this Regulation derogates from those rules.

(17) Contradictory judgments should be avoided in actions which involve the same acts and the same parties and which are brought on the basis of an EU trade mark and parallel national trade marks. …'

3 In accordance with Article 6 of Regulation No 207/2009, an EU trade mark is to be obtained by registration.

4 Article 8(1)(b) and (5) of that regulation provide:

'1. Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered:

...

(b) 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.

...

5. Furthermore, upon opposition by the proprietor of a registered earlier trade mark within the meaning of paragraph 2, the trade mark applied for shall not be registered where it is identical with, or similar to, an earlier trade mark, irrespective of whether the goods or services for which it is applied are identical with, similar to or not similar to those for which the earlier trade mark is registered, where, in the case of an earlier EU trade mark, the trade mark has a reputation in the Union

or, in the case of an earlier national trade mark, the trade mark has a reputation in the Member State concerned, and where the use without due cause of the trade mark applied for would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.'

5 Article 9(1)(b) and (c) of that regulation provide:

'An EU trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

…

(b) any sign where, because of its identity with, or similarity to, the EU trade mark and the identity or similarity of the goods or services covered by the EU trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;

(c) any sign which is identical with, or similar to, the EU trade mark in relation to goods or services which are not similar to those for which the Community trade mark is registered, where the latter has a reputation in the Union and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the EU trade mark.'

6 In accordance with Article 41(1) of Regulation No 207/2009, within a period of three months following the publication of an EU trade mark application, notice of opposition to registration of the trade mark may be given on the grounds that it may not be registered under Article 8 of that regulation.

7 Article 42(5) of Regulation No 207/2009 provides:

'If examination of the opposition reveals that the trade mark may not be registered in respect of some or all of the goods or services for which the EU trade mark application has been made, the application shall be refused in respect of those goods or services. Otherwise the opposition shall be rejected.'

8 In accordance with Article 56(3) of that regulation, '[a]n application for revocation or for a declaration of invalidity shall be inadmissible if an application relating to the same subject matter and cause of action, and involving the same parties, has been adjudicated on by a court in a Member State and has acquired the authority of a final decision.'

9 Under Article 65(3) of that regulation, '[t]he Court of Justice has jurisdiction to annul or to alter the contested decision'.

10 Article 95(1) of that regulation provides:

'The Member States shall designate in their territories as limited a number as possible of national courts and tribunals of first and second instance, hereinafter referred to as "EU trade mark courts", which shall perform the functions assigned to them by this Regulation.'

11 Article 96 of Regulation No 207/2009 provides:

'The EU trade mark courts shall have exclusive jurisdiction:

(a) for all infringement actions and — if they are permitted under national law — actions in respect of threatened infringement relating to EU trade marks;

…

(c) for all actions brought as a result of acts referred to in Article 9(3), second sentence;

(d) for counterclaims for revocation or for a declaration of invalidity of the EU trade mark pursuant to Article 100.'

12 Article 100(1), (2) (6) and (7) of that directive provides:

'1. A counterclaim for revocation or for a declaration of invalidity may only be based on the grounds for revocation or invalidity mentioned in this Regulation.

2. An EU trade mark court shall reject a counterclaim for revocation or for a declaration of invalidity if a decision taken by the Office relating to the same subject matter and cause of action and involving the same parties has already become final.

...

6. Where an EU trade mark court has given a judgment which has become final on a counterclaim for revocation or for invalidity of an EU trade mark, a copy of the judgment shall be sent to the Office. Any party may request information about such transmission. The Office shall mention the judgment in the Register of EU trade marks in accordance with the provisions of the Implementing Regulation.

7. The EU trade mark court hearing a counterclaim for revocation or for a declaration of invalidity may stay the proceedings on application by the proprietor of the EU trade mark and after hearing the other parties and may request the defendant to submit an application for revocation or for a declaration of invalidity to the Office within a time limit which it shall determine. If the application is not made within the time limit, the proceedings shall continue; the counterclaim shall be deemed withdrawn. Article 104(3) shall apply.'

13 Article 109(2) and (3) of that regulation provides:

'2. The court hearing an action for infringement on the basis of an EU trade mark shall reject the action if a final judgment on the merits has been given on the same cause of action and between the same parties on the basis of an identical national trade mark valid for identical goods or services.

3. The court hearing an action for infringement on the basis of a national trade mark shall reject the action if a final judgment on the merits has been given on the same cause of action and between the same parties on the basis of an identical EU trade mark valid for identical goods or services.'

Background to the dispute

14 On 13 October 2009, Carolus C. filed an application for registration of an EU trade mark at EUIPO under Regulation No 207/2009. The mark for which registration was sought is the word sign 'English pink'.

15 The goods in respect of which registration was sought are in Class 31 of the Nice Agreement concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks of 15 June 1957 ('the Nice Agreement'), as revised and amended, and correspond, inter alia, to fresh fruit and vegetables.

16 On 20 April 2010, the appellants filed a notice of opposition, pursuant to Article 41 of Regulation No 207/2009, to registration of the mark applied for in respect of the same goods.

17 The opposition was based on the following earlier marks:

— EU word mark PINK LADY, registered on 27 February 2003 under number 2042679 and designating the following goods in Class 31 of the Nice Agreement and corresponding to the following description: ‘Agricultural, horticultural products, including fruit, grains, plants and trees, in particular apples and apple trees’;

— EU figurative mark No 4186169, registered on 15 December 2005, represented below and designating inter alia the following goods in Class 31 and corresponding to the following description: ‘Fresh fruit; apples, fruit trees; apple trees’:



— EU figurative mark No 6335591, registered on 30 July 2008, represented below and designating goods in Class 31 and corresponding to the following description: ‘Agricultural, horticultural products, including fruit, grains, plants and trees, in particular apples and apple trees’:



18 The grounds relied on in support of the opposition were those referred to in Article 8(1)(b) and (5) of Regulation No 207/2009.

19 By decision of 27 May 2011, EUIPO’s Opposition Division rejected the opposition.

20 On 7 June 2011 the appellants filed an appeal with EUIPO, under Articles 58 to 64 of Regulation No 207/2009, against the decision of the Opposition Division.

21 By judgment of 28 June 2012, delivered pursuant to an action for infringement brought by the appellants on the basis of the earlier EU word and figurative marks and Benelux mark No 559177, the tribunal de commerce de Bruxelles (Commercial Court, Brussels) (Belgium), in its capacity as an EU trade mark court, annulled the Benelux mark ENGLISH PINK and ordered Carolus C. to refrain from using that sign in the European Union. By correspondence of 4 July 2012, the appellants provided EUIPO with that judgment. By letter of 29 August 2012, they informed EUIPO that Carolus C. had accepted the judgment, which had accordingly become final.

22 By the contested decision, the Fourth Board of Appeal of EUIPO dismissed the appellants' action against the decision of EUIPO's Opposition Division. The Fourth Board of Appeal of EUIPO stated inter alia that there was no similarity between the marks at issue on the visual, conceptual and phonetic levels and concluded that there was no likelihood of confusion.

23 It also found that EUIPO's Opposition Division had given an accurate summary of the ample evidence provided by the appellants and a proper set of reasons as to why all that evidence was insufficient and inconclusive.

The proceedings before the General Court and the judgment under appeal

24 By application lodged at the General Court Registry on 23 July 2013, Apple and Pear Australia and Star Fruits Diffusion brought an action seeking, principally, alteration of the contested decision, and, in the alternative, annulment of that decision.

25 They raised seven pleas in law in support of that action. The first plea, which alleged infringement of Article 75 of Regulation No 207/2009, on the ground that the contested decision contains no statement of reasons as to the inferences to be drawn from the judgment of the tribunal de commerce de Bruxelles (Commercial Court, Brussels) of 28 June 2012. The second plea alleged an infringement of the principle of *res judicata*. By the third plea the appellants alleged infringement of the general principles of legal certainty, sound administration and protection of legitimate expectations. The fourth plea was based on infringement of Article 76 of Regulation No 207/2009. The fifth and sixth pleas alleged infringement of Article 8(1)(b) and Article 8(5) of Regulation No 207/2009 respectively. The seventh plea was based on infringement of Article 75 of that regulation, alleging that the Fourth Board of Appeal of EUIPO had based the contested decision on grounds on which the parties were not able to adopt a position.

26 By the judgment under appeal, the General Court annulled the contested decision because it had not taken account of the judgment of the tribunal de commerce de Bruxelles (Commercial Court, Brussels) of 28 June 2012 and had not assessed the potential impact that that judgment could have on the outcome of the opposition proceedings. The General Court rejected Apple and Pear Australia and Star Fruits Diffusion's action as to the remainder. As regards the appellants' form of order seeking alteration of the contested decision, the General Court considered, in essence, in paragraphs 68, 70 and 71 of the judgment under appeal, that the appellants could not argue that the judgment of the tribunal de commerce de Bruxelles (Commercial Court, Brussels) of 28 June 2012 was *res judicata* and that, since the Fourth Board of Appeal of EUIPO had failed to take account of that judgment and to assess the potential impact of that judgment on the outcome of the dispute, the General Court was not in a position to determine which decision the Board of Appeal was required to take and could not therefore exercise its power of alteration.

Forms of order sought

27 By their appeal, Apple and Pear Australia and Star Fruits Diffusion request the Court:

— to set aside the judgment under appeal, in so far as it dismissed their action seeking, principally, to alter the contested decision;

— to alter the contested decision to the effect that the action brought by the appellants before the Fourth Board of Appeal of EUIPO is well-founded and, consequently, their opposition to registration of the EU trade mark application English pink should be upheld; and

— to order EUIPO to bear all the costs of the appellants in relation both to the appeal and to the proceedings at first instance.

28 EUIPO contends that the Court should:

— dismiss the appeal; and

— order Apple and Pear Australia and Star Fruits Diffusion to pay the costs.

The appeal

29 In support of their appeal, Apple and Pear Australia and Star Fruits Diffusion raise three grounds of appeal. The first ground alleges an infringement of the principle of *res judicata*. The second alleges infringement of the general principles of legal certainty, sound administration and the protection of legitimate expectations. The third alleges infringement of Article 65(3) of Regulation No 207/2009.

Admissibility

30 EUIPO takes the view that the appeal is inadmissible unless, as the appellants maintain, the judgment of the tribunal de commerce de Bruxelles (Commercial Court, Brussels) of 28 June 2012 was *res judicata*, and therefore was binding on the Fourth Board of Appeal of EUIPO and on the General Court.

31 It should be noted, in that regard, that the plea of inadmissibility raised by EUIPO falls within the substantive assessment of the grounds of appeal. The question whether the judgment of the tribunal de commerce de Bruxelles (Commercial Court, Brussels) of 28 June 2012 had become *res judicata* and therefore was binding on the Fourth Board of Appeal of EUIPO is the subject of the substantive analysis of the appeal.

32 EUIPO's general plea of inadmissibility should therefore be rejected.

Substance

The first and second grounds of appeal

– Arguments of the parties

33 By their first and second grounds of appeal, which should be considered together given the connection between them, the appellants claim that the General Court committed an error of law by considering that the final decision of the tribunal de commerce de Bruxelles (Commercial Court, Brussels) of 28 June 2012 was insufficient to determine which decision the Fourth Board of Appeal of EUIPO was required to take.

34 They claim, by their first ground of appeal, that, by finding, in paragraph 64 of the judgment under appeal, that *res judicata* does not apply either to the Board of Appeal of EUIPO or to the EU judicature in the context of its review of the lawfulness and its power of alteration under Article 65(3) of Regulation No 207/2009, the General Court failed, without valid justification, to give effect to the general principle of *res judicata*. They add, by their second ground of appeal, that the General Court, itself, infringed the general principles of legal certainty, sound administration and the protection of legitimate expectations.

35 By the first argument of the first ground of appeal, the appellants state that it is wrong and incomplete to consider, as the General Court held in paragraphs 59 and 63 of the judgment under appeal, that the lawfulness of decisions of Boards of Appeal of EUIPO must be assessed solely on the basis of Regulation No 207/2009, as interpreted by the EU judicature. EUIPO is not exempt from compliance with the general principles of EU law, which include the principle of *res judicata*.

36 The appellants state, by their second argument of the first ground of appeal, that, unlike an administrative decision given in the context of opposition proceedings, a judicial decision, such as that of the tribunal de commerce de Bruxelles (Commercial Court, Brussels) of 28 June 2012 is *res judicata*. In that regard, solely a final decision of EUIPO on invalidity or revocation of a mark already registered is *res judicata* and binding on the EU trade mark courts.

37 By their third argument of that first ground of appeal, the appellants claim that the tribunal de commerce de Bruxelles (Commercial Court, Brussels) ruled, pursuant to Regulation No 207/2009, in the context of the European Union's autonomous trade mark system of which it is part. That court, acting under Article 95 of Regulation No 207/2009, found the existence of a likelihood of confusion and infringement of the appellants' well-known mark solely under that regulation. Accordingly, the prohibition of the use of the word sign 'English pink' was issued for the entire territory of the European Union in order to protect the appellants' rights under EU law.

38 The appellants claim that, unlike the situation giving rise to the judgment in *Emram* v *OHIM — Guccio Gucci (G)* (T-187/10, EU:T:2011:202), the parties to the proceedings before the tribunal de commerce de Bruxelles (Commercial Court, Brussels) and before EUIPO are the same, act in the same capacity and rely on the same rights pursuant to solely Regulation No 207/2009, in relation to the same contested word sign.

39 By their fourth argument of the first ground of appeal, the appellants state that recital 17 and Article 109(2) and (3) of that regulation confirm that the general principle of *res judicata* must prevail over the independence of the autonomous EU trade mark system.

40 By their fifth argument of that ground of appeal, the appellants claim that, contrary to what the General Court held in paragraphs 60 and 63 of the judgment under appeal, the lack of specific provisions in Regulation No 207/2009 indicating that EUIPO is bound, in the context of opposition proceedings, by a decision of an EU trade marks court cannot justify a refusal to apply the principle of *res judicata*.

41 In that regard, the appellants are of the view that the General Court's refusal to alter the contested decision is even less justified since the general scheme, the objectives and the purpose of Regulation No 207/2009 require that final decisions of EU trade mark courts are not called into question by EUIPO, and vice versa, in particular those made 'between the same parties'.

42 By their sixth argument of the first ground of appeal, the appellants state that the judicial prohibition issued by the tribunal de commerce de Bruxelles (Commercial Court, Brussels) concerns the use of the word sign 'English pink' throughout the Union. The General Court, in that regard, erred in law in considering, in particular in paragraphs 63 and 65 of the judgment under appeal, that the judicial infringement proceedings covered only a national mark or were intended solely to annul the Benelux mark ENGLISH PINK and prohibit use of that mark.

43 The appellants claim, by their seventh argument of that ground of appeal, that, contrary to what the General Court stated in paragraphs 65 to 68 of the judgment under appeal, the cause of action and the subject matter of the infringement action settled by the tribunal de commerce de Bruxelles (Commercial Court, Brussels) and the pending infringement action in the form of opposition proceedings before EUIPO are identical. Accordingly, the General Court was wrong to refuse to apply the principle of *res judicata*, as reflected in Regulation No 207/2009 and Regulation No 44/2001.

44 As regards the cause of action for those two actions, namely the legal rule relied on as the basis of the application, the appellants consider that it does not vary according to the numbering of the articles or paragraphs relied on. In that regard, solely the legal basis is relevant, namely the applicable legal concept. In the present case, the 'likelihood of confusion' and 'infringement of an EU trade mark' within the meaning of Regulation No 207/2009 were invoked both before the tribunal de commerce de Bruxelles (Commercial Court, Brussels) and before EUIPO. They are two unique concepts which are found throughout that regulation, irrespective of the numbering of the various articles of that regulation.

45 As regards the subject matter, which is the purpose of the application, the appellants submit that it cannot be restricted to the formal identity of an application. The applications before EUIPO and before the tribunal de commerce de Bruxelles (Commercial Court, Brussels) seek the recognition, in application of Regulation No 207/2009, of infringements caused by the word sign 'English pink' to the appellants' exclusive rights in their earlier EU trade marks. Accordingly, the subject matter of both applications is the same, namely to determine the liability of Carolus C. for infringement of the appellants' rights. In that regard, the fact that the authorities sanction that same subject matter differently, namely, on the one hand, by prohibiting the use of the word sign 'English pink' as a Benelux mark and, on the other, by refusing registration of the word sign 'English pink' as an EU trade mark, does not alter the subject matter in itself in any way.

46 EUIPO submits that the first and second grounds of appeal must be rejected as being unfounded.

– Findings of the Court

47 By their first and second grounds of appeal, the appellants claim, in essence, that the judgment of the tribunal de commerce de Bruxelles (Commercial Court, Brussels) of 28 June 2012 was *res judicata* and, consequently, that judgment was binding on the Fourth Board of Appeal of EUIPO which examined their opposition to the registration of the word sign 'English pink' as an EU trade mark.

48 It should be noted at the outset that, as stated by the Advocate General in point 51 of his Opinion, no provision of Regulation No 207/2009 envisages the procedural situation of the present case, namely the interplay between an infringement action before an EU trade mark court concerning an earlier EU trade mark and a national trade mark on the one hand, and opposition proceedings before EUIPO invoking the same earlier EU trade mark and the same sign as the national trade mark for which registration is sought on the EU level, on the other. More specifically, as the General Court noted in paragraph 60 of the judgment under appeal, Regulation No 207/2009 does not contain any provision by which EUIPO is bound by a decision, even now definitive, by an EU trade mark court delivered in an action for infringement, in the context of the exercise of its exclusive jurisdiction over registration of EU trade marks and, in particular, when, in so doing, it examines oppositions lodged against applications to register EU trade marks.

49 That said, it follows in particular from recitals 16 and 17 of that regulation that the EU legislature has established mechanisms to ensure the uniform protection of the EU trade mark throughout the European Union, accordingly confirming the unitary character of the EU trade mark. As the General Court stated in paragraph 58 of the judgment under appeal, the EU legislature created, in that context, the EU trade mark courts having jurisdiction to order the cessation of acts of infringement or threatened infringement of an EU trade mark extending throughout the territory of the Union.

50 In contrast, it follows from Regulation No 207/2009, and, in particular, Title IV thereof, relating to the procedure for registration of an EU trade mark, that EUIPO has exclusive jurisdiction over registration and opposition to such registration of an EU trade mark. The General Court stated, correctly, in paragraph 63 of the judgment under appeal, that EUIPO is the only body empowered by the Union legislature to examine registration applications and, accordingly, authorise or refuse registration of an

EU trade mark. The absence of provisions laying down that EUIPO's adjudicating bodies, when exercising their competence concerning the registration of an EU trade mark or the opposition to such registration, are bound by a final decision of an EU trade mark court is therefore the consequence of the exclusive nature of EUIPO's competence in that area.

51 Moreover, attention should be drawn to the importance, both in the legal order of the European Union and in national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that decisions of courts or tribunals which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question (judgments of 10 July 2014 in *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 58, and 6 October 2015 in *Târşia*, C-69/14, EU:C:2015:662, paragraph 28).

52 In that regard, it should be noted that, although Regulation No 207/2009 does not explicitly define the concept of '*res judicata*', it follows, in particular, from Article 56(3) and Article 100(2) of that regulation that, in order that decisions of a court of a Member State or EUIPO which have become final are *res judicata* and can therefore be binding on such a court or EUIPO, it is required that parallel proceedings before them have the same parties, the same subject matter and the same cause of action.

53 Since it is undisputed that the proceedings before the tribunal de commerce de Bruxelles (Commercial Court, Brussels) and the Fourth Board of Appeal of the EUIPO involved the same parties, it is appropriate, therefore, to determine whether the subject matter of those proceedings was the same.

54 In the present case, the respective subject matter, namely the claims, of the cases examined by the tribunal de commerce de Bruxelles (Commercial Court, Brussels) and by EUIPO are not identical. The action for infringement before the Belgian court sought annulment of the Benelux mark ENGLISH PINK and an order to refrain from using that sign throughout the territory of the Union, whereas the subject matter of the proceedings before EUIPO was opposition to the registration of the EU trade mark ENGLISH PINK.

55 The appellants claim, in that regard, that the proceedings concerned may have the same subject matter even if they concern formally different applications. The application before EUIPO and that before the tribunal de commerce de Bruxelles (Commercial Court, Brussels) sought to have recognised, pursuant to Regulation No 207/2009, the infringement by Carolus C.'s word sign 'English pink' of the appellants' exclusive rights to their earlier EU trade marks. Accordingly, the subject matter of both applications is allegedly the same, namely to determine Carolus C.'s liability in the infringement of the appellants' rights.

56 That line of argument cannot be accepted. As regards, first, the registration of a mark as an EU trade mark, its purpose is, as is clear from Article 6 of Regulation No 207/2009, to obtain such an EU trade mark. Accordingly, the opposition to such registration is intended to prevent the applicant for that registration from obtaining the mark in question. In that regard, in accordance with Article 42(5) of that regulation, following the examination of the opposition to the registration, either the application for registration of the mark is refused in respect of all or part of the goods or services for which that mark is sought, or the opposition is rejected.

57 In those circumstances, the appellants cannot claim that the aim of the opposition procedure to the registration was to determine Carolus C.'s liability in the infringement of their exclusive rights to their earlier EU trade marks.

58 As regards, second, the infringement action brought before a national court acting as an EU trade marks court, the proprietor of the earlier EU trade mark asks, in the context of such an action, that court to prohibit the use of a sign creating a likelihood of confusion with that of the earlier EU trade mark. The proprietor of the EU trade mark accordingly seeks to render the infringer liable for infringement of its exclusive rights.

59 In the present case, by the judgment of the tribunal de commerce de Bruxelles (Commercial Court, Brussels) of 28 June 2012 the appellants obtained the annulment of the Benelux mark ENGLISH PINK and the prohibition of use of that sign in the European Union.

60 While it is true that, in particular in paragraphs 10 and 65 of the judgment under appeal, the General Court wrongly described that prohibition as the order to refrain from using the Benelux mark ENGLISH PINK throughout the territory of the Union, that inaccuracy does not call into question the conclusion in paragraph 54 of the present judgment that the respective subject matter of the cases examined by the tribunal de commerce de Bruxelles (Commercial Court, Brussels) and by EUIPO are not identical and, therefore, that inaccuracy is not capable of resulting in the annulment of the judgment under appeal.

61 It should be noted, moreover, that the Court of Justice has already distinguished, although in a different factual context, between the subject matter of infringement proceedings, actions for a declaration of invalidity and proceedings concerning registration, under Regulation No 207/2009, to the effect that the possibility for the proprietor of an earlier EU trade mark to bring infringement proceedings against the proprietor of a later registered EU trade mark cannot render either the bringing of an application for a declaration of invalidity before EUIPO or the mechanisms for prior control available under the procedure for registering EU trade marks devoid of all purpose (see, to that effect, judgment of 21 February 2013 in *Fédération Cynologique Internationale*, C-561/11, EU:C:2013:91, paragraph 48).

62 In the light of the exclusive competence of EUIPO's adjudicating bodies to authorise or refuse the registration of an EU trade mark, reiterated in paragraph 50 of the present judgment, the subject matter of any proceedings before EUIPO relating to registration of an EU trade mark or opposition to that registration necessarily is different to any proceedings before a national court, even where that court acts as an EU trade marks court.

63 Accordingly, it must be stated that the subject matter of the proceedings before the tribunal de commerce de Bruxelles (Commercial Court, Brussels) and of those before EUIPO was different and, consequently, the General Court did not err in law by making such a finding. Since the conditions relating to the identity of the parties, the subject matter and cause of action are cumulative, such a finding is sufficient to conclude that the judgment of the Tribunal de commerce de Bruxelles (Commercial Court, Brussels) of 28 June 2012 was not *res judicata* with regard to the contested decision.

64 Therefore, the General Court was able to find, without erring in law, that the principle of *res judicata* did not mean that the Fourth Board of Appeal of EUIPO was bound by the judgment of the tribunal de commerce de Bruxelles (Commercial Court, Brussels) of 28 June 2012.

65 Consequently, the first and second grounds of appeal must be rejected as being unfounded.

The third ground of appeal

66 By their third ground of appeal, the appellants claim that the General Court infringed Article 65(3) of Regulation No 207/2009 by refusing to alter the contested decision. The appellants submit that both the Fourth Board of Appeal of EUIPO and the General Court were required to decide in the same

way as the judgment of the tribunal de commerce de Bruxelles (Commercial Court, Brussels) of 28 June 2012 under the general principle of *res judicata* and the general principles of legal certainty, sound administration and the protection of legitimate expectations.

67 As the General Court noted in paragraph 56 of the judgment under appeal, its power to alter decisions does not have the effect of conferring on it the power to substitute its own assessment for that of a Board of Appeal of EUIPO, or of carrying out an assessment on which that Board of Appeal has not yet adopted a position (judgment of 5 July 2011 in *Edwin* v *OHIM*, C-263/09 P, EU:C:2011:452, paragraph 72).

68 The success of the third ground of appeal therefore depends, as recognised by the appellants in their appeal, on the merits of their argument that the Fourth Board of Appeal of EUIPO was required to decide in the same way as the tribunal de commerce de Bruxelles (Commercial Court, Brussels). It follows, however, from the rejection of the first and second grounds of appeal that that was not the case.

69 The third ground of appeal must accordingly be rejected as being unfounded.

70 It follows from the foregoing that, since none of the grounds of appeal was upheld, the appeal must be dismissed in its entirety.

Costs

71 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

72 Since EUIPO has applied for costs and the appellants have been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby

1. Dismisses the appeal;

2. Orders Apple and Pear Australia Ltd and Star Fruits Diffusion to pay the costs.

[Signatures]