JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

17 March 2009 *

In Case T-171/06,

Laytoncrest Ltd, established in London (United Kingdom), represented by N. Dontas and P. Georgopoulou, lawyers,

applicant,

v

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

defendant,

* Language of the case: Greek.

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

Erico International Corp., established in Solon, Ohio (United States), represented by M. Samer, O. Gillert and F. Schiwek, lawyers,

ACTION brought against the decision of the Second Board of Appeal of OHIM of 26 April 2006 (Case R 406/2004-2) relating to opposition proceedings between Erico International Corp. and Laytoncrest Ltd,

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

composed of J. Azizi, President, E. Cremona and S. Frimodt Nielsen (Rapporteur), Judges,

Registrar: J. Plingers, Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 22 June 2006,

having regard to the response of OHIM lodged at the Registry of the Court on 15 December 2006,

having regard to the response of the intervener lodged at the Registry of the Court on 29 January 2007,

having regard to the changes in the composition of the Chambers of the Court,

having regard to the reassignment of the case to the Third Chamber on the ground that the Judge-Rapporteur initially designated was no longer able to act,

further to the hearing on 28 November 2008,

gives the following

Judgment

Background to the dispute

1 On 3 July 2001 the applicant, Laytoncrest Ltd, filed an application for a Community trade mark with the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) pursuant to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended.

2 The trade mark applied for is the word sign TRENTON. The goods in respect of which registration was sought are in Classes 7, 9 and 11 of the Nice Agreement of 15 June 1957 concerning the International Classification of Goods and Services for the Purposes of Registration of Marks, as revised and amended, and correspond, for Class 7, to the following description: 'Machines and machine tools; motors and engines (except for land vehicles); machine coupling and transmission components (except for land

vehicles); agricultural implements other than those operated manually; incubators for eggs'. The application for the Community trade mark was published in the *Community Trade Marks Bulletin* No 48/2002 on 17 June 2002.

3 On 16 September 2002 the intervener, Erico International Corp., filed a notice of opposition against registration of the trade mark applied for. The grounds relied on in support of that opposition were, inter alia, those referred to in Article 8(1)(b) of Regulation No 40/94.

4 The opposition was based on the Community word mark LENTON, registered on 20 December 2001 under number 1946045 in respect of goods in Classes 6 and 7, corresponding, for Class 7, to the following description: 'Threading machines, chasers, and gauges therefor, hydraulic wedge drivers, swaging machines, and wire tying machines'. The opposition was directed against the goods in Class 7 referred to in the trade mark application which correspond to the following description: 'Machines and machine tools; machine coupling and transmission components (except for land vehicles)'.

5 The applicant did not file any observations at that stage of the procedure. By fax of 1 July 2003, OHIM informed the applicant, pursuant to Rule 20(3) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1) that, on account of its failure to file observations within the prescribed period, OHIM would give a ruling on the opposition on the basis of the evidence before it.

6 By decision of 25 March 2004, the Opposition Division rejected the opposition. It found that the differences between the marks at issue did not allow for the conclusion that there was a likelihood of confusion despite the identity and partial similarity of the goods.

7 On 25 May 2004, the intervener lodged an appeal with OHIM, pursuant to Articles 57 to 62 of Regulation No 40/94, against the decision of the Opposition Division, claiming an infringement of Article 8(1)(b) of Regulation No 40/94. The intervener also claimed that the applicant did not exist, given its complete procedural inactivity.

8 The Board of Appeal sent the intervener's claims to the applicant and requested it to submit observations, both on the appeal in general and on the more specific issue of the applicant's existence. The applicant did not make any contact within the prescribed period. At the expiry of that period, the registry of the Boards of Appeal contacted the applicant's representative to confirm that the applicant did not have any observations to submit, a fact which was confirmed to him over the telephone.

9 By decision of 26 April 2006 ('the contested decision'), the Board of Appeal held that, on account of its complete procedural inactivity during the opposition and appeal stages, the applicant had implicitly withdrawn its Community trade mark application under Article 44(1) of Regulation No 40/94, which allows an applicant, at any time, to withdraw its application or to restrict the list of goods or services contained therein. The Board of Appeal also stated that, even though withdrawal would normally be made expressly, it is possible in certain cases that withdrawal of a trade mark application by an applicant may be implied inasmuch as that withdrawal may be inferred clearly from the circumstances, as such a possibility is not excluded by Regulation No 40/94.

10 Accordingly, the Board of Appeal decided to close the proceedings before it owing to the absence of a cause of action and, to declare the decision of the Opposition Division null and void. Since the applicant had withdrawn its Community trade mark application, the Board of Appeal also ordered it to pay the costs incurred in the proceedings, pursuant to Article 81(3) of Regulation No 40/94.

Forms of order sought

11 The applicant claims that the Court should:

— annul the contested decision;

— refer the matter back to the Boards of Appeal of OHIM for a decision on the merits;

— order OHIM and the intervener to pay the costs.

12 OHIM contends that the Court should:

— annul the contested decision;

— order each of the parties to bear its own costs.

13 The intervener contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

Admissibility

Arguments of the parties

14 The intervener claims that the action is inadmissible as it is not 'the proper legal route to dispute the [contested decision]'. Instead of bringing the present action, the intervener argues, the applicant should have acted in accordance with Rule 54 of Regulation No 2868/95. That analysis was challenged by the applicant and OHIM at the hearing.

Findings of the Court

15 Article 62(1) of Regulation No 40/94 states:

'Following the examination as to the allowability of the appeal, the Board of Appeal shall decide on the appeal. The Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution.'

16 Furthermore, Article 63(1) of Regulation No 40/94 states that '[a]ctions may be brought before the Court of Justice against decisions of the Boards of Appeal on appeals'.

17 In addition, Article 63(4) of Regulation No 40/94 provides that '[t]he action shall be open to any party to proceedings before the Board of Appeal adversely affected by its decision'.

18 In the present case, having opposed the Community trade mark application lodged by the applicant, the intervener decided to bring an appeal against the decision of the Opposition Division, which had rejected that opposition.

19 Ruling on that appeal, the Board of Appeal declared the opposition and appeal proceedings closed, ruled that the decision of the Opposition Decision was null and void, and ordered the applicant to pay the fees and costs incurred by the intervener (see paragraph 10 above). Furthermore, in paragraphs 16 to 23 of the contested decision, the

Board of Appeal set out the reasons why it took the view that, on account of its complete procedural inactivity, the applicant had implicitly withdrawn its Community trade mark application.

20 Therefore, in finding that there had been an implicit withdrawal of the Community trade mark application, the contested decision takes from the applicant the benefit of its procedural status as an applicant for a Community trade mark, and deprives it of the possibility of obtaining a definitive response to its claims, which it challenges in the context of the present action. In addition, the effects of that decision are not limited to only those goods against which the opposition was brought (goods in Class 7; see paragraph 4 above), but also extend to goods which were not relevant to that opposition (goods in Classes 9 and 11; see paragraph 1 above).

21 It follows from the foregoing that the Board of Appeal ruled, in the contested decision, on the appeal brought by the intervener against the decision of the Opposition Division for the purposes of Article 63(1) of Regulation No 40/94, and that that decision has binding legal effect in respect of the applicant, making that decision open to appeal before the Community Courts for the purposes of Article 63(4) of Regulation No 40/94, since it rules on the Community trade mark application filed by the applicant by finding that the application was implicitly withdrawn by reason of the applicant's procedural inactivity.

22 The intervener's observations on the admissibility of the action must therefore be rejected.

Substance

Preliminary observations

— Arguments of the parties

23 The applicant indicates that its financial means are limited, which explains why it did not submit observations to the Opposition Division and the Board of Appeal. In support of its action, it states that it has never withdrawn its trade mark application and raises — in essence — the following pleas and arguments: first, infringement of Article 73 of Regulation No 40/94 and Rule 54 of Regulation No 2868/95; second, infringement of Article 44(1) of Regulation No 40/94 and misinterpretation of the judgment of the Court of Justice in Joined Cases C-414/99 to C-416/99 *Zino Davidoff and Levi Strauss* [2001] ECR I-8691; third, infringement of Rule 20(3) and Rule 50(1) of Regulation No 2868/95; and, fourth, infringement of Article 63(2) and Article 74(1) of Regulation No 40/94.

24 OHIM joins in the applicant's line of argument, subject to a number of observations on the scope of the infringement of Article 74 of Regulation No 40/94.

25 The intervener contends that there is no evidence that the applicant's financial situation prevented it from participating in the procedure before the Opposition Division and the Board of Appeal. In the absence of evidence in that regard, the Board of Appeal was entitled to adopt the contested decision by reason of the applicant's procedural inactivity.

— Findings of the Court

26 As OHIM stated at the hearing, it should be noted that the present case concerns a particularly important issue in relation to its practice, since it allows for examination of the lawfulness of a Board of Appeal decision in which the lack of procedural activity, by the applicant for a Community trade mark, during the opposition and appeal proceedings has been treated as an implicit withdrawal of the application and as ending the appeal proceedings owing to the absence of a cause of action.

27 On that issue, OHIM pleads for the annulment of the contested decision on the ground that the majority of the arguments put forward by the applicant are well founded. In proceedings concerning a Community trade mark, brought against a decision of a Board of Appeal, nothing, in essence, precludes OHIM from endorsing the applicant's heads of claim, while putting forward all the arguments that it considers appropriate, in performance of its task relating to the administration of Community trade mark law and the functional independence which the Boards of Appeal are granted in the exercise of their duties (Case T-107/02 *GE Betz* v *OHIM — Atofina Chemicals (BIOMATE)* [2004] ECR II-1845, paragraphs 32 to 36).

28 In addition, it is irrelevant whether the applicant can rely on its financial situation to justify the fact that it did not submit observations to the Opposition Division and to the Board of Appeal, since that explanation has been put forward for the first time before the Court without it having been possible to examine it previously and, in any event, the applicant does not dispute its procedural inactivity during the opposition and appeal proceedings before OHIM.

29 It is in that context that the various pleas submitted by the applicant must be examined.

The first plea: infringement of Article 73 of Regulation No 40/94 and Rule 54 of Regulation No 2868/95

— Arguments of the parties

30 The applicant claims that the contested decision infringes Article 73 of Regulation No 40/94 and Rule 54 of Regulation No 2868/95. Before taking the contested decision, the Board of Appeal should have given the applicant the opportunity to state its view, which could have allowed it to indicate that it had no intention of withdrawing its Community trade mark application.

31 OHIM points out that, even on the assumption that the withdrawal of that application could be justified, the Board of Appeal should, in accordance with the aforementioned provisions, at least have requested the applicant to clarify its intentions by setting it a time-limit and by informing it expressly of the consequences of any failure on its part to respond within the period prescribed.

32 The intervener contends that it is difficult to understand why the contested decision does not respect the rights of the defence and the right to be heard, given that the applicant had been procedurally inactive before the Opposition Division and the Board of Appeal.

— Findings of the Court

33 In accordance with Article 73 of Regulation No 40/94, decisions of OHIM must state the reasons on which they are based and may be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments. Pursuant to Rule 54 of Regulation No 2868/95, if OHIM finds that the loss of any rights

results from that regulation or from Regulation No 40/94 without any decision having been taken, it must communicate that to the person concerned and draw his attention to the possibility for him, within two months after notification of that communication, to apply for a decision on the matter by OHIM.

34 In the present case, it is clear from the outline of the facts and the contacts which the Board of Appeal was able to have with the applicant (see paragraph 8 above), that the Board of Appeal did not at any time inform the applicant of its intention to find that the applicant had implicitly withdrawn its trade mark application by reason of its procedural inactivity.

35 As a result, even on the assumption that the Board of Appeal was entitled to find that the procedural inactivity during the opposition and appeal proceedings before OHIM was evidence capable of demonstrating that the applicant for a Community trade mark had lost all interest in registration of that mark and had therefore implicitly withdrawn its application, it must be held that, in any event, the contested decision was taken in breach of Article 73 of Regulation No 40/94 and Rule 54 of Regulation No 2868/95 and must for that reason be annulled.

36 Inasmuch as such an annulment leaves open the question whether the Board of Appeal may consider, as was decided in the present case, procedural inactivity during opposition and appeal proceedings to constitute a ground for implicit withdrawal of a Community trade mark application, the Court takes the view that it is appropriate to consider also the second and third pleas dealing with that issue.

The second plea: infringement of Article 44(1) of Regulation No 40/94 and the reference to the judgment in *Zino Davidoff and Levi Strauss*

— Arguments of the parties

37 The applicant claims that Article 44(1) of Regulation No 40/94 requires an express and unconditional withdrawal of the Community trade mark application (Case T-396/02 *Storck* v *OHIM (Shape of a sweet)* [2004] ECR II-3821, paragraph 19). That provision does not allow an implicit withdrawal of such an application to be inferred from procedural inactivity at the stage of the opposition or appeal proceedings before OHIM. In addition, the contested decision is based on a misinterpretation of the judgment in *Zino Davidoff and Levi Strauss*, cited in paragraph 23 above, which has a context that is entirely different and unrelated to that in the present case.

38 OHIM asserts that, in accordance with the letter and the spirit of Article 44(1) of Regulation No 40/94, the withdrawal of a Community trade mark application must be in writing, express and unconditional.

39 The intervener contends that the implicit withdrawal of a trade mark application is not excluded by Article 44(1) of Regulation No 40/94. It argues that the facts ruled on in the judgments in *Shape of a sweet*, cited in paragraph 37 above (paragraphs 5, 19 and 20), and in Case T-219/00 *Ellos* v *OHIM (ELLOS)* [2002] ECR II-753, paragraphs 60 to 62, to which the judgment in *Shape of a sweet* refers, are different in so far as, in those cases, there was a written, and therefore express, declaration of withdrawal of the application, whereas in the present case the declaration of withdrawal is implicit and arises from procedural inactivity.

— Findings of the Court

40 In the contested decision, the Board of Appeal bases its finding that the applicant had implicitly withdrawn its Community trade mark application on the following reasoning:

— first, it follows from Article 44(1) of Regulation No 40/94 that an applicant for a Community trade mark may at any time terminate the proceedings by withdrawing its application (paragraphs 17 and 19);

— second, even if the withdrawal of a Community trade mark application should, in principle, be expressly indicated,'it is conceivable that a withdrawal may be implied, as the law does not exclude it, provided that it may be inferred from the facts and circumstances, which in the Office's view unequivocally demonstrate that the applicant has withdrawn its application' (paragraph 20); in the present case, the applicant did not take part in any stage of the opposition or appeal proceedings, which '… unequivocally demonstrates that the applicant has lost all interest in registering its Community trade mark application, which implies its withdrawal and, therefore, the consequent termination of the proceedings' (paragraphs 16, 22 and 23);

— third, the foregoing reasoning relies on the application, by analogy, of the requirements for a renunciation of the rights accruing from the exclusive right which a trade mark confers on its proprietor, which are defined in *Zino Davidoff and Levi Strauss* (cited in paragraph 23 above, paragraph 46), to the withdrawal of a Community trade mark application (paragraph 21).

41 The first stage in that reasoning is correct, since, pursuant to Article 44(1) of Regulation No 40/94 '[t]he applicant may at any time withdraw his Community trade mark application or restrict the list of goods or services contained therein'.

42 In relation to the second stage of the Board of Appeal's reasoning, it must be borne in mind that Article 44(1) of Regulation No 40/94 is to be interpreted as meaning that the power to restrict the list of goods or services is vested solely in the applicant for a Community trade mark, who may at any time apply to OHIM for that purpose. In that context, the withdrawal, in whole or part, of an application for a Community trade mark or the restriction of the list of goods or services contained therein must be made expressly and unconditionally (*ELLOS*, cited in paragraph 39 above, paragraph 61, and *Shape of a sweet*, cited in paragraph 37 above, paragraph 19).

43 Admittedly, as the intervener points out, the judgments in *ELLOS*, cited in paragraph 39 above, and *Shape of a sweet*, cited in paragraph 37 above, concern cases in which the applicant had proposed, in the alternative, to restrict the list of goods covered by the application if the Board of Appeal were minded, principally, to reject the application for a Community trade mark in respect of all the goods covered. Those cases focus more on the conditional nature of the proposed restriction than on the need to make the withdrawal of that application in an express manner. Nevertheless, that specific factual context is not sufficient to justify the conclusion that the Board of Appeal may, as a consequence, infer an implicit withdrawal of the Community trade mark application from the applicant's procedural inactivity during opposition proceedings.

44 Article 44(1) of Regulation No 40/94 concerns only the applicant for a Community trade mark and not the Board of Appeal. The Board of Appeal cannot therefore rely on that provision to infer — by substituting itself for the applicant — from the applicant's procedural inactivity that there has been an implicit withdrawal of its trade mark application. Moreover, while the case-law cited above envisages situations in which the list of goods is restricted, the reasoning set out in the Court's judgments also refers expressly to the scenario of a straightforward withdrawal of the Community trade mark application (see paragraph 42 above and the case-law cited). The same logic necessarily applies in both situations, given that it is up to the applicant to indicate 'expressly and unconditionally' the content which he intends to give to his trade mark application. It is,

then, for the Opposition Division and the Board of Appeal to rule on the content of that application in the light of the arguments submitted in the opposition proceedings. That reasoning does not prevent OHIM from registering the trade mark sought for only a portion of the goods or services indicated, but that restriction will then occur following the assessment of the likelihood of confusion, which was advanced in the present case.

45 It should also be pointed out that the implicit withdrawal of the trade mark applied for, established by the Board of Appeal in the contested decision, applies to all of the goods covered by the Community trade mark application, even though the opposition was directed against only some of those goods (see paragraph 4 above). In any event, it cannot therefore be 'unequivocally' demonstrated that the applicant had lost all interest in registration of the trade mark applied for in its entirety by reason solely of the fact that it did not defend its position in the course of the opposition and appeal proceedings before OHIM relating to only some of the goods covered.

46 Consequently, Article 44(1) of Regulation No 40/94 cannot be relied upon to infer the implicit withdrawal of the Community trade mark application by reason solely of the fact that the applicant for that mark took no action in the course of the opposition and appeal proceedings before OHIM.

47 As regards the third stage of the Board of Appeal's reasoning, the application, by analogy, of the requirements for a renunciation of rights accruing from the exclusive right which a trade mark confers on its proprietor, which were defined by the Court of Justice in *Zino Davidoff and Levi Strauss*, cited in paragraph 23 above, is not necessary in the present case in view of the content of Article 44(1) of Regulation No 40/94 and the interpretation which has been given to that provision by the case-law. In the present case, it is irrelevant whether the Community trade mark proprietor's consent to the placing of the goods on the market in the European Economic Area (EEA) must be express. Furthermore, the Court of Justice held at paragraph 46 in *Zino Davidoff and Levi Strauss*, cited in paragraph 23 above, that, even though '[s]uch intention will normally be gathered from an express statement of consent[, i]t is conceivable that consent may, in some cases, be inferred from facts and circumstances prior to,

simultaneous with or subsequent to the placing of the goods on the market outside the EEA which, in the view of the national court, unequivocally demonstrate that the proprietor has renounced his rights.' Lastly, such an application by analogy fails to take account of paragraph 55 of that judgment, which states that 'implied consent to the marketing within the EEA of goods put on the market outside that area cannot be inferred from the mere silence of the trade mark proprietor'.

48 It follows from the foregoing that the contested decision infringes Article 44(1) of Regulation No 40/94 and must for that reason be annulled.

49 In so far as such an annulment is limited to assessing the legal basis relied upon by the Board of Appeal in the contested decision, the Court considers it appropriate also to examine the third plea, which concerns rules which the Board of Appeal did not contemplate applying.

The third plea: infringement of Rule 20(3) and Rule 50(1) of Regulation No 2868/95

— Arguments of the parties

50 The applicant alleges that the contested decision infringes Rule 20(3) and Rule 50(1) of Regulation No 2868/95, according to which the Board of Appeal is to rule on the substance even if the applicant does not submit any observations. The fact that the applicant did not submit observations cannot therefore be interpreted as amounting to an implicit withdrawal of its trade mark application.

51 OHIM remarks that it is normal that the applicable rules provide that the applicant's non-appearance in opposition proceedings cannot automatically lead to acceptance of the opposition, inasmuch as OHIM already has sufficient evidence to rule on that opposition. Rule 20(3) thus requires OHIM to rule on the substance of the dispute 'on the basis of the evidence before it', and therefore to act as if the applicant for the Community trade mark were present. In that regard, OHIM points out that that rule was amended by Commission Regulation (EC) No 1041/2005 of 29 June 2005 amending Regulation No 2868/95 (OJ 2005 L 172, p. 4). Previously, it stated that OHIM 'may give a ruling' on the opposition, whereas now it 'shall base its ruling [on the evidence before it]'. That amendment, made necessary following a number of decisions by Boards of Appeal finding that an applicant's silence was equivalent to acceptance of the opposition, sought to clarify the fact that the applicant's absence could not result in a loss of its procedural rights.

52 The intervener contends that the aforementioned provisions do not exclude the possibility that the fact of not making submissions, during both the opposition and appeal proceedings, may be treated as constituting a withdrawal of the Community trade mark application.

— Findings of the Court

53 The contested decision makes no reference to the principle pursuant to which both the Opposition Division and the Board of Appeal rule on the substance even if the applicant for a Community trade mark has submitted no observations during the opposition proceedings.

54 According to Rule 20(3) of Regulation No 2868/95, which deals with the assessment of the opposition,'[i]f the applicant submits no observations, [OHIM] shall base its ruling on the opposition on the evidence before it'. In addition, Rule 50(1) of Regulation No 2868/95 states that, '[u]nless otherwise provided, the provisions relating to proceedings before the department which has made the decision against which the appeal is brought shall be applicable to appeal proceedings *mutatis mutandis*'.

55 In the absence of any provision to the contrary, the Board of Appeal was thus bound to apply Rule 20(3) of Regulation No 2868/95 and, therefore, the applicant's procedural inactivity at the stage of the opposition and appeal proceedings could not be treated by the Board of Appeal as constituting a situation in which the applicant had implicitly withdrawn its Community trade mark application.

56 Consequently, the contested decision infringes Rule 20(3) and Rule 50(1) of Regulation No 2868/95 and must for that reason be annulled.

Conclusion

57 It follows from the foregoing that the first, second and third pleas are well founded and, therefore, the contested decision must be annulled on the basis of each of those pleas, without it being necessary to consider the fourth plea, the first branch of which, alleging an infringement of Article 63(2) of Regulation No 40/94, is put forward in the alternative by the applicant, and the second branch of which, alleging infringement of Article 74(1) of Regulation No 40/94, assumes the existence of a request submitted by one of the parties.

Costs

58 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Where there are several unsuccessful parties, the Court of First Instance is to decide how the costs are to be shared.

59 As OHIM has been unsuccessful, inasmuch as the contested decision is annulled, and the applicant has sought an order for costs against it, OHIM must be ordered to bear its own costs and to pay those incurred by the applicant.

60 The intervener is ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Annuls the decision of the Second Board of Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) of 26 April 2006 (R 406/2004-2);**

2. Orders OHIM to bear its own costs and to pay those incurred by Laytoncrest Ltd;

3. Orders Erico International Corp. to bear its own costs.

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 17 March 2009.

[Signatures]

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