JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
21 April 2005 *

In Case T-164/03,

Ampafrance SA, established in Cholet (France), represented by C. Bercial Arias, lawyer,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by A. Rassat and A. Folliard-Monguiral, acting as Agents,

defendant,

* Language of the case: French.

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

Johnson & Johnson GmbH, established in Düsseldorf (Germany), represented by D. von Schultz, lawyer,

ACTION brought against the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 4 March 2003 (Case R 220/2002-1) relating to opposition proceedings between Ampafrance SA and Johnson & Johnson GmbH,

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

composed of M. Jaeger, President, V. Tiili and O. Czúcz, Judges,

Registrar: J. Plingers, Administrator,

having regard to the application lodged at the Court Registry on 8 May 2003,

having regard to OHIM's response lodged at the Court Registry on 31 October 2003,

having regard to the response of the intervener lodged at the Court Registry on 31 October 2003,

further to the hearing on 2 December 2004,

gives the following

Judgment

Background to the dispute

1 On 13 June 1996, Ampafrance SA filed an application for a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('OHIM') under Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended.

2 The trade mark for which registration has been sought is the figurative sign reproduced below ('the monBeBé trade mark'):



3 The goods in respect of which registration of the mark was sought fall within Classes 3, 5, 8, 10, 11, 12, 16, 18, 20, 21, 22, 24, 25 and 28 under 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.

4 The application was published in *Community Trade Marks Bulletin* No 8/99 of 8 February 1999.

5 On 29 March 1999, Johnson & Johnson GmbH filed a notice of opposition, under Article 42 of Regulation No 40/94, against registration of that Community trade mark. The opposition was based on the word mark bebe, which has been the subject of the following registrations:

— German trade mark registration No 1168346 of 22 November 1990 for the following goods: 'skin and body care preparations, including preparations for protecting and cleansing the skin, in particular skin creams, skin lotions, body milk, cleansing tonic, moisturisers, suntan preparations, bath additives, bath gels, oils for the skin, shampoo, lip care preparations; soaps, cleansing preparations; cosmetic cleansing wipes; deodorants; teeth cleaning products, face powder, make-up removers, nail care preparations including nail varnish and varnish removers', falling within Class 3; the fact that the trade mark has a reputation, within the meaning of Article 8(5) of Regulation No 40/94, and is well known, within the meaning of Article 8(2)(c) of that regulation, within Germany was relied upon in support of the opposition;

— international registration IR 571254 of 19 December 1990, which has effect in Italy, Austria and the Benelux countries in particular, for the same Class 3 goods as those listed above, and in respect of the following goods:

  — Class 16: 'Napkins and wipes of paper for cosmetic purposes';

  — Class 24: 'Napkins and wipes of textile for cosmetic purposes'.

6 The opposition was based on all the goods covered by the earlier marks and was filed against some of the goods listed in the Community trade mark application, namely the following:

— Class 3: 'Soaps, cleansing preparations, skin care preparations, cosmetic preparations, shampoos, talcum powder, toilet water, dentifrices, bath preparations, cotton wool buds';

— Class 5: 'Sanitary preparations, dietetic preparations, dietetic foods, absorbent cotton, babies' napkins of absorbent cotton';

— Class 10: 'Feeding bottles, teats, dummies for babies; medical apparatus, pharmaceutical cases';

— Class 16: 'Paper and articles of paper, babies' napkins of cellulose'.

7 The grounds relied on in support of the opposition were those set out in Article 8(1)(b), (2)(c) and (5) of Regulation No 40/94.

8 During the opposition proceedings, on 21 February 2000, the applicant restricted the number of goods listed in its application for registration by withdrawing the Class 16 goods.

9 By decision of 27 February 2002, the Opposition Division rejected the opposition. It found essentially that that there was no likelihood of confusion between the trade marks concerned within the meaning of Article 8(1)(b) of Regulation No 40/94. As there was no similarity between the signs, the Opposition Division also rejected the opposition based on Article 8(2)(c) of Regulation No 40/94. Since the signs were different and the intervener had not furnished sufficient evidence that its German trade mark enjoyed a reputation, the opposition based on Article 8(5) of Regulation No 40/94 was also rejected.

10 On 12 March 2002, the intervener filed notice of appeal at OHIM, pursuant to Articles 57 to 62 of Regulation No 40/94, against the decision of the Opposition Division.

11 By decision of 4 March 2003 ('the contested decision'), the First Board of Appeal upheld the appeal in part. It held essentially that, particularly in view of the identity or similarity of the goods in Classes 3 and 5, similarities between the signs in issue and the reputation of the earlier marks for body care preparations, it was plausible that there was a likelihood of confusion on the part of the relevant consumer. The decision of the Opposition Division was therefore annulled in so far as it had rejected the opposition based on Article 8(1) of Regulation No 40/94, in respect of the following goods listed in the application: 'Soaps, cleansing preparations, skin care preparations, cosmetic preparations, shampoos, talcum powder, toilet water, dentifrices, bath preparations, cotton wool buds' falling within Class 3 and 'Sanitary preparations, absorbent cotton, babies' napkins of absorbent cotton' falling within Class 5.

12 As regards goods considered not to be similar, namely dietetic preparations and dietetic foods (Class 5) and feeding bottles, teats, dummies for babies, medical apparatus and pharmaceutical cases (Class 10), the Board of Appeal found that the conditions required for Article 8(5) of Regulation No 40/94 to apply were not met and the appeal was therefore dismissed on that point. Moreover, having allowed the

opposition based on Article 8(1)(b) of Regulation No 40/94 as regards 'cosmetic preparations, preparations for medical purposes, namely preparations for treatment of the skin' in Class 3, the Board of Appeal did not adjudicate on the opposition based on Article 8(2)(c) of Regulation No 40/94.

Forms of order sought

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

— annul or alter the contested decision in so far as it is unfavourable to it;

— grant the application for the Community trade mark monBeBé in its entirety;

— order OHIM to pay the costs relating to the opposition proceedings and appeal proceedings before the Board of Appeal and the Court of First Instance.

14 OHIM contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

15 The intervener contends that the Court should dismiss the application.

The issues

16 In a letter dated 25 November 2004, the applicant informed the Court that it had restricted its application for registration in respect of goods in Classes 3, 5 and 10 to goods intended for babies and young children.

17 It should be noted in this regard that, under Article 44(1) of Regulation No 40/94, the applicant may at any time withdraw his Community trade mark application or restrict the list of goods or services contained therein. The list of goods or services specified in a Community trade mark application may be restricted only in accordance with certain detailed rules, on an application for amendment of the application filed, in accordance with Article 44 of Regulation No 40/94 and Rule 13 of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1) (Case T-194/01 *Unilever* v *OHIM* (*Ovoid tablet*) [2003] ECR II-383, paragraph 13, and Case T-286/02 *Oriental Kitchen* v *OHIM — Mou Dybfrost (KIAP MOU)* [2003] ECR II-4963, paragraph 30).

18 In the present case, the applicant applied to restrict the list of goods only a few days before the hearing. Furthermore, at the hearing OHIM stated that it learned of that application only through the Court, because the applicant's formal application for restriction had not yet been added to the relevant administrative file.

19 It should also be noted that, for the purposes of applying Article 8(1)(b) of Regulation No 40/94, the likelihood of confusion must be assessed in relation to all the goods specified in the trade mark application (*KIAP MOU*, cited above, paragraph 30).

20 In this case, by the present application the applicant is not seeking to withdraw from the list one or more goods in respect of which similarity has been established, but to alter the intended purposes of all the goods claimed. It is possible that the alteration of the intended purposes of the goods might have an effect on the comparison of the goods made by OHIM when considering the likelihood of confusion and on the administrative procedure before OHIM.

21 In those circumstances, to allow such alteration of the intended purposes of the goods at this stage would be tantamount to changing the subject-matter of the dispute pending before the Court. Under Article 135(4) of the Rules of Procedure of the Court of First Instance, the parties' pleadings may not change the subject-matter of the proceedings before the Board of Appeal. The task of the Court of First Instance in the present proceedings is to review the legality of the decisions of the Boards of Appeal. An alteration to the list of goods specified would necessarily alter the subject-matter of the opposition and hence the scope of the dispute in a manner contrary to the Rules of Procedure.

22 In the light of the foregoing considerations, the alteration of the intended purposes of the goods listed in the initial trade mark application will not be taken into account in these proceedings. Accordingly, these proceedings relate to the position as the Board of Appeal considered it.

Admissibility of the applicant's second and third heads of claim

23 By its second head of claim, the applicant is essentially asking the Court to order OHIM to register the mark claimed. According to OHIM that application is inadmissible.

24 It is appropriate to recall in that regard that, under Article 63(6) of Regulation No 40/94, OHIM is required to take the measures necessary to comply with judgments of the Community Courts. Accordingly, it is not for the Court of First Instance to issue directions to OHIM. It is for the latter to draw the appropriate inferences from the operative part and grounds of the Court's judgments (Case T-331/99 *Mitsubishi HiTec Paper Bielefeld* v *OHIM (Giroform)* [2001] ECR II-433, paragraph 33; Case T-34/00 *Eurocool Logistik* v *OHIM (EUROCOOL)* [2002] ECR II-683, paragraph 12; and Case T-129/01 *Alejandro* v *OHIM — Anheuser-Busch (BUDMEN)* [2003] ECR II-2251, paragraph 22).

25 The applicant's second head of claim is therefore inadmissible.

26 By its third head of claim, the applicant is claiming that OHIM should be ordered to pay the costs relating to the opposition and appeal proceedings before the Board of Appeal and the Court of First Instance.

27 It should be observed that, under Article 136(2) of the Rules of Procedure, 'costs necessarily incurred by the parties for the purposes of the proceedings before the Board of Appeal and costs incurred for the purposes of the production, prescribed by the second subparagraph of Article 131(4), of translations of pleadings or other

documents into the language of the case are to be regarded as recoverable costs'. The costs incurred for the purposes of the opposition proceedings cannot therefore be regarded as recoverable costs.

28 The applicant's third head of claim regarding costs must therefore be rejected as inadmissible in so far as it relates to costs incurred for the purposes of the opposition proceedings.

Admissibility of evidence adduced for the first time before the Court of First Instance

29 The intervener annexed to its response of 31 October 2003 evidence which had not been submitted to the Board of Appeal, namely photographs taken on 4 and 6 October 2003, advertisements and a list of goods with the bebe mark. Those documents, produced for the first time before the Court, cannot for that reason be taken into consideration. The purpose of actions before the Court of First Instance is to review the legality of decisions of the Boards of Appeal of OHIM for the purposes of Article 63 of Regulation No 40/94, so it is not the Court's function to review the facts in the light of documents produced for the first time before it. Accordingly, the abovementioned documents must be excluded, without it being necessary to assess their probative value (Case T-10/03 *Koubi* v *OHIM — Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraph 52; Case T-399/02 *Eurocermex* v *OHIM* (*Shape of a beer bottle*) [2004] ECR II-1391, paragraph 52; and Case T-396/02 *Storck* v *OHIM* (*Shape of a sweet*) [2004] ECR II-3821, paragraph 24).

Substance

30 The applicant puts forward a single plea alleging infringement of Article 8(1)(b) of Regulation No 40/94.

Arguments of the parties

31 The applicant challenges the finding of the Board of Appeal that there is a likelihood of confusion between the bebe and monBeBé marks.

32 First of all, the applicant challenges the Board of Appeal's finding that there is a similarity between 'babies' napkins of absorbent cotton', designated by the trade mark claimed, and the Class 3 goods covered by the earlier marks, which are 'skin care and body care preparations, cosmetic preparations'. They are not goods of the same nature or composition. Moreover, babies' napkins do not meet an aesthetic need but a purely practical need, since their purpose is to keep babies' clothes dry.

33 Secondly, in the applicant's view, the degree of similarity between the signs in question is not sufficiently high to consider that there is a likelihood of confusion between the two. That is because of visual and phonetic differences and also because the word 'bebe', being descriptive, is not very distinctive.

34 In the applicant's submission, the visual features of the word element 'monBeBé', together with the oval frame surrounding it, produce an overall impression that is completely different from that produced by the earlier marks. Consumers may notice that the letters of the trade mark applied for are thick, very rounded and close together, with a sort of accent placed in an unusual way on the final 'e'. It should also be noted that the two letters 'b' are upper case, which is unusual for letters that are not the first letters of the word.

35 Furthermore, it is unrealistic to contend that, in view of the assumed recognition of the word 'mon', a German consumer would attach greater significance to the second element 'BeBé' than to the first element of the word sign, as asserted by the Board of Appeal. The applicant submits that the word is read from left to right and that consumers normally pay more attention to the first element of a word sign than to its last element.

36 Phonetically, too, the applicant maintains that a word of two syllables is not pronounced in the same way as a word of three syllables. According to the applicant, the pronunciation of the word 'mon' produces a specific sound which is not the same as that produced by the earlier marks.

37 As regards the conceptual point of view, the applicant mentions the descriptive nature of the word 'bebe', in the case of the intervener's goods, which enable their users to keep their skin like a baby's. In those circumstances, the word 'bebe' should remain available to all.

38 Thirdly, the applicant challenges the reputation of the trade mark bebe in Germany. Since the bebe mark is constituted by a word that is understood by all European Union consumers, including German consumers, it does not have a high degree of inherent distinctiveness in Germany. The applicant challenges the evidence adduced

in respect of recognition of the bebe marks among the relevant sections of the public. The applicant also points out that the Board of Appeal was incorrect in mentioning, in paragraph 40 of the contested decision, the existence of a reputation 'in German-speaking countries'. The intervener has never claimed such a reputation in those countries since in its notice of opposition it had expressly limited the question of reputation to Germany.

39 OHIM contends that the Board of Appeal did not infringe Article 8(1)(b) of Regulation No 40/94.

40 As regards the highly distinctive character of the earlier trade marks, OHIM points out that the German mark bebe was registered after it had been proved that it had acquired distinctiveness through use (durchgesetztes Zeichen) and that no objection had been raised in Austria to registration of the international trade mark.

41 According to OHIM, the applicant is wrong to challenge the contested decision in so far as it held that the bebe trade mark had acquired through use a highly distinctive character on the German market by 13 June 1996, the date on which the application for a Community trade mark was filed.

42 As regards Austria, OHIM contends essentially that the highly distinctive character of the intervener's trade mark in that country cannot be taken into account, since the intervener did not rely on this either in its notice of opposition or in the particulars of the facts, evidence and arguments presented in support of the opposition within the time-limit specified pursuant to Rule 20(2) of Regulation No 2868/95 (see, to that effect, Case T-232/00 *Chef Revival USA* v *OHIM* —

Massagué Marín (Chef) [2002] ECR II-2749, paragraphs 34 and 35). To accept the contrary would be liable to render meaningless the time-limits set by OHIM, to prolong proceedings excessively and even to encourage delaying tactics.

43 The intervener maintains that, on account of the similarity of the goods and signs in question, there is a likelihood of confusion between the bebe and monBeBé signs within the meaning of Article 8(1)(b) of Regulation No 40/94.

44 The intervener states that the bebe trade mark has been able to claim a significant reputation among the relevant sections of the public in Germany since 1995. That fact should be regarded as decisive in assessing the similarity of the signs in question. Given the reputation acquired by the significant and long-standing use of the bebe trade mark, it is irrelevant whether the word 'bebe' as such is or is not distinctive because of the 'suggestive' nature alleged by the Board of Appeal.

Findings of the Court

45 Article 8(1)(b) of Regulation No 40/94 provides that, upon opposition by the proprietor of an earlier trade mark, the mark applied for is not to be registered 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. Article 8(2)(a)(ii) and (iii) of Regulation No 40/94 provides that an earlier trade mark is a trade mark registered in a Member State with a date of application for registration which is earlier than the date of application for registration of the Community trade mark, and trade marks registered under international arrangements which have effect in a Member State.

46 According to settled case-law, there is a likelihood of confusion if the public might think that the goods or services at issue come from the same undertaking or, as the case may be, economically linked undertakings.

47 According to the same line of case-law, the likelihood of confusion must be assessed globally, according to the perception that the relevant public has of the signs and the goods or services at issue, and taking into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the signs and the similarity of the goods or services designated (see Case T-162/01 *Laboratorios RTB* v *OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)* [2003] ECR II-2821, paragraphs 31 to 33, and the case-law cited).

48 In the present case, the earlier bebe trade marks are registered, first, as an international trade mark, having effect, in particular, in Austria, Italy and the Benelux countries at the time when the application for a Community trade mark was filed and, second, as a national trade mark in Germany. As the opposition is based on the latter mark and on the international registration having effect in Austria, the relevant territory for the purpose of assessing the likelihood of confusion is Germany and Austria, in particular.

49 Since the goods in question are everyday consumer goods, the target public is the average consumer, who is deemed to be reasonably well informed and reasonably observant and circumspect.

50 In the light of the above considerations, it is appropriate, first, to make a comparison of the goods concerned, second, to compare the opposing signs and, third, to consider the allegedly highly distinctive character of the earlier marks, in order to determine whether registration of the sign monBeBé is liable to give rise to a likelihood of confusion with the earlier bebe trade marks.

Comparison of the goods

51 In this regard, the applicant is challenging only the Board of Appeal's finding that there is a similarity between babies' napkins of absorbent cotton falling within Class 5 for which the monBeBé trade mark is sought, and Class 3 goods covered by the earlier trade marks consisting of skin and body care preparations and cosmetic preparations.

52 According to settled case-law, in assessing the similarity of the goods concerned, all the relevant factors relating to those goods should be taken into account. Those factors include inter alia their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary (Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 23; Case T-85/02 *Díaz* v *OHIM — Granjas Castelló (CASTILLO)* [2003] ECR II-4835, paragraph 32).

53 It should be pointed out that napkins, whether intended for babies or incontinent adults, and cosmetic preparations are sold at the same points of sale. Moreover, the latter goods, when intended for washing and cleaning young children, are used in a way closely associated with the former goods. Napkins are therefore hygiene products which are normally used at the same time as skin care preparations and are complementary to them. Therefore, the napkins of absorbent cotton covered by the trade mark claimed, and the preparations for skin and body care and cosmetic preparations covered by the earlier trade marks can be regarded as similar goods.

54 Therefore the Board of Appeal did not make an error in comparing the goods at issue.

Comparison of the signs

55 It is clear from settled case-law that the global assessment of the likelihood of confusion must, as far as concerns the visual, phonetic or conceptual similarity of the signs at issue, be based on the overall impression given by the signs, bearing in mind, inter alia, their distinctive and dominant components (see Case T-292/01 *Phillips-Van Heusen* v *OHIM — Pash Textilvertrieb und Einzelhandel (BASS)* [2003] ECR II-4335, paragraph 47, and the case-law cited).

56 The Board of Appeal found that from the visual standpoint a comparison of the earlier word mark with the word element of the trade mark claimed revealed a certain visual similarity. The difference resulting from the addition of the word 'mon' in the trade mark claimed was not regarded as being sufficiently great to neutralise completely the similarity created by the fact that its essential part, namely the word 'bebe', is identical to the word constituting the earlier trade marks.

57 It should be pointed out that the earlier trade marks are constituted solely by the word 'bebe', written in lower case.

58 The trade mark claimed comprises the word element 'monBeBé', with alternating upper- and lower-case letters, all within a black oval frame. It can be divided into two elements 'mon' and 'BeBé'.

59 The figurative elements of the trade mark monBeBé applied for, namely the way in which 'monbebé' is written and the oval frame surrounding the word, are not sufficiently significant to make any more striking impression on the consumer than its word element. In addition, the accent on the final 'e' of the sign monBeBé is

hardly perceptible and the use of upper case for the letters 'b' does not create a marked difference in comparison with the letters on either side of them, contrary to the applicant's contention. However, the use of upper-case letters draws attention to the second element 'BeBé', so that this may be considered to be the dominant element of the sign monBeBé.

60 Since the earlier trade mark bebe is entirely included in the trade mark claimed, monBeBé, the difference consisting in the addition of the word element 'mon' at the beginning of the trade mark claimed is not sufficiently great to cancel out the similarity arising from the fact that the essential part of the trade mark claimed, namely the word 'bebe', is the same (see, to that effect, *CONFORFLEX*, cited above, paragraph 46).

61 Consequently, the Board of Appeal did not err in finding there to be a visual similarity between the signs.

62 As regards comparison of the phonetic aspect of the opposing signs, the Board of Appeal found there was some phonetic similarity between them.

63 It should be pointed out that, given the presence of the element 'bebe' in the earlier trade marks and in the trade mark claimed, the opposing signs have some phonetic similarity. However, the addition of the word 'mon' to the word 'bebe' in the mark claimed gives rise in the context of a global assessment to a dissimilarity between the signs in question (see, to that effect, *CONFORFLEX*, cited above, paragraph 47). The difference noted does not call into question the existence of a phonetic similarity, since it does not relate to the dominant component of the mark claimed.

64 The Board of Appeal did not therefore err in considering there to be some similarity between the signs in question from the phonetic standpoint.

65 As to conceptual similarity, the Board of Appeal found that, since the relevant public in Germany understood the meaning of both the word 'bebe' and the word 'mon', the signs in question were similar inasmuch as they had the word 'bebe' in common.

66 It should be pointed out that, contrary to the intervener's contention, the German-speaking public has no difficulty in understanding the word 'bebe' as meaning 'baby'.

67 As to whether the public makes a conceptual link between the words 'bebe' and 'monbebé', it is not impossible that German-speaking consumers understand that the word 'mon' means 'mein' ('my' in German). Indeed, German-speakers are familiar with certain French expressions, such as 'mon chéri' or 'mon amour', designating certain goods marketed in Germany. Therefore, if the relevant public understands the meaning of the word 'mon', there is no real conceptual difference between the opposing signs. The addition of a possessive pronoun does not significantly alter the conceptual content of the sign, which refers to a baby. Even if the relevant public did not perceive the meaning of the French word 'mon', it would recognise the French word 'bébé' and the presence of the word 'mon' does not alter the conceptual content attributed to that sign by the public.

68 In those circumstances, the Board of Appeal was right to find that there was a conceptual similarity between the opposing signs.

69 Consequently, there is a visual and conceptual similarity and some phonetic similarity between those signs. As part of the global assessment of the likelihood of confusion, it is also appropriate to consider whether the earlier trade marks have a highly distinctive character.

The highly distinctive character of the earlier trade marks

70 It is settled case-law that the more distinctive the earlier mark, the greater will be the likelihood of confusion (see, by analogy, Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 24). Marks with a highly distinctive character, either per se or because of the recognition they possess on the market, thus enjoy broader protection than marks with a less distinctive character (see, by analogy, *Canon*, cited above, paragraph 18, and Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 20).

71 In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, an overall assessment must be made of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, by analogy, Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 49, and *Lloyd Schuhfabrik Meyer*, cited above, paragraph 22).

72 In making that assessment, account should be taken, in particular, of the inherent characteristics of the trade mark, including whether it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant sections of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see, by analogy, *Windsurfing Chiemsee*, cited above, paragraph 51, and *Lloyd Schuhfabrik Meyer*, cited above, paragraph 23).

73 The distinctive character of the earlier mark, and in particular its reputation, is therefore one factor which must be taken into account when determining whether the similarity between the signs or between the goods and services is sufficient to give rise to a likelihood of confusion (see, to that effect, *Canon*, cited above, paragraph 24; Case T-311/01 *Éditions Albert René* v *OHIM — Trucco (Starix)* [2003] ECR II-4625, paragraph 61; and Case T-66/03 *'Drie Mollen sinds 1818'* v *OHIM — Manuel Nabeiro Silveira (Galáxia)* [2004] ECR II-1765, paragraph 30).

74 In the present case, the applicant contends that the mark bebe is not inherently highly distinctive. However, at no time has the intervener or OHIM contended that the mark bebe is inherently highly distinctive and it was because it was known on the market that it was considered to have a high degree of distinctive character.

75 It is therefore appropriate to consider whether the intervener adduced sufficient facts and evidence before OHIM to establish that its trade mark was actually known in Germany at the date on which application for the trade mark claimed was filed, namely 13 June 1996.

76 The intervener lodged with OHIM a number of documents in support of the existence of its earlier marks' reputation. The Board of Appeal acknowledged the existence of such a reputation on the basis of the survey carried out in 1995 by IMAS International GmbH (Muller, Schupfuer & Gauger) ('the IMAS survey') and the statutory declaration of the intervener's Marketing Director, Mr O. Albers. According to the applicant, that evidence does not establish that the trade mark bebe had a reputation in Germany as at 13 June 1996.

77 OHIM and the intervener submit that the IMAS survey is sufficient in itself to establish the high degree of distinctiveness of the trade mark bebe on the German market, although, according to the applicant, the survey only gives very rough percentages.

78 The documents in the case show that the IMAS survey was carried out in the months of October and November 1995. According to the document containing the survey, its purpose was to assess the rating of the trade mark bebe among the German population. In all, 2 017 people over the age of 16 were questioned orally. The results were set out in the form of percentages by reference to four different criteria: the total number of people questioned, gender, age (16 to 29, 30 to 49, over 50) and where they lived.

79 It should be pointed out that the applicant is wrong in asserting that no information is given about the composition of the group of people questioned. As has been stated, they were people aged 16 and over, men and women, divided into three separate age brackets, and living in almost all of the different *Länder*. Although the breakdown into those different categories is not given, there is nothing to show that those categories are not representative of the opinion of the average German consumer. Moreover, in the present case, a group of 2 017 people questioned should be regarded as being large enough to be representative.

80 Nor is it a matter of 'very rough percentages' as the applicant claims, since the results show, as OHIM contends, that the trade mark bebe does indeed have a high degree of distinctive character. The results of the survey show that the trade mark bebe was recognised by a significant section of the public on the German market before the application for a Community trade mark was filed. According to Tables I and III of the survey, 64% of the people questioned recognised, that is to say, had already read or heard, the word 'bebe' in relation to body and face care preparations.

Among women, 80% recognised the word. According to Tables II and IV, 66% of people who recognised the word (68% of women) thought that the term was used by a single manufacturer.

81 As regards the wording of the questions, which the applicant claims was not unbiased, it should be pointed out that, although the questions mentioned the word 'bebe', there is no reason to challenge the objective nature of the survey.

82 As regards the applicant's argument that the finding of the Board of Appeal that '66% of the population thought that the designation "bebe" [was] used by only one special producer' is incorrect, suffice it to say, as the Board of Appeal itself found, that 64% of the population recognised the word 'bebe' and that the 66% could therefore relate only to the section of the population who recognised the word. Despite the ambiguity of the wording used by the Board of Appeal, the latter did not therefore err in that regard.

83 The IMAS survey is therefore sufficient to show that the trade mark bebe had a high degree of distinctive character on account of its reputation in Germany at the time the trade mark application was filed.

84 There is therefore no need to consider the other evidence which the intervener submitted, either to the Opposition Division or to the Board of Appeal, but which the Board of Appeal did not take into account, in breach of its obligations under Article 61(1) and Article 62(1) of Regulation No 40/94 (Case T-308/01 *Henkel* v *OHIM — LHS (UK) (KLEENCARE)* [2003] ECR II-3253). There is therefore no need to annul the contested decision in that regard, given that it recognised the highly distinctive character of the German trade mark bebe.

85 Nor is there any need to consider whether the Board of Appeal erred in finding that the earlier trade mark had some reputation in Austria, since it is sufficient that there is a likelihood of confusion for one of the earlier marks.

86 Given the similarity of the goods in question, a certain degree of similarity between the opposing signs and the high degree of acquired distinctiveness of the earlier trade mark bebe, it must be stated that there is a likelihood of confusion in Germany at least.

87 Consequently, the applicant's single plea must be rejected and the application as a whole dismissed.

Costs

88 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 as applied for by OHIM. As the intervener has not applied for costs, it must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs incurred by the Office for Harmonisation in the Internal Market (Trade Marks and Designs);**

3. **Orders the intervener to bear its own costs.**

Jaeger Tiili Czúcz

Delivered in open court in Luxembourg on 21 April 2005.

H. Jung M. Jaeger

Registrar President