JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

6 October 2004 *

In Joined Cases T-117/03 to T-119/03 and T-171/03,

New Look Ltd, established in Weymouth, Dorset (United Kingdom), represented by R. Ballester and G. Marín, lawyers,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by O. Montalto, J. García Murillo and S. Laitinen, acting as Agents,

defendant,

the other party to the proceedings before the Board of Appeal of OHIM being **Naulover S.A,** established in Barcelona (Spain),

* Language of the case: Spanish.

FOUR ACTIONS brought against the decisions of the First Board of Appeal of OHIM of 27 January 2003 (R 95/2002-1, R 577/2001-1 and R 578/2001-1) and 15 April 2003 (R 19/03-1) relating to opposition proceedings between Naulover SA and New Look Ltd,

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by O. Montalto, J. García Murillo and S. Laitinen, acting as Agents,

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

composed of: J. Pirrung, President, A.W.H. Meij and N.J. Forwood, Judges,
Registrar: J. Palacio González, Principal Administrator,

having regard to the applications lodged at the Registry of the Court of First Instance on 4 April 2003 (Cases T-117/03 to T-119/03) and 19 May 2003 (Case T-171/03),

having regard to OHIM's responses lodged at the Registry of the Court of First Instance on 25 September 2003 (Cases T-117/03 to T-119/03) and 8 October 2003 (Case T-171/03),

having regard to the order of the President of the Second Chamber of the Court of First Instance of 1 April 2004 joining the cases for the purposes of the hearing and judgment,

following the hearing on 28 April 2004 at which the applicant did not appear,

gives the following

Judgment

Background to the dispute

1 On 5 May 1998 (in Cases T-117/03 to T-119/03) and 19 February 1999 (in Case T-171/03), the applicant filed an application 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, for registration of four Community trade marks.

2 The marks in respect of which registration was sought were the following figurative signs:

— in Case T-117/03: NLSPORT

— in Case T-118/03: NLJEANS

— in Case T-119/03: NLACTIVE

— in Case T-171/03: NLCollection

3 The goods in respect of which registration was sought and with which the present dispute is concerned are within Class 25 of the Nice Agreement concerning the

International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following description: 'Articles of clothing, footwear and headgear for women and girls' in the applications for the marks NLSPORT, NLJEANS and NLACTIVE, and 'Articles of clothing, footwear and headgear' in the application for the mark NLCollection.

4 On 11 June 1999 (Cases T-117/03 to T-119/03) and 3 January 2000 (Case T-171/03), the other party to the proceedings before the Board of Appeal gave notice, pursuant to Article 42(1) of Regulation No 40/94, of opposition to each of the applications for a Community trade mark.

5 The opposition in each case was based on the existence of Community Figurative Mark No 13417 ('the earlier trade mark'), applied for on 1 April 1996 and registered on 1 February 1999, which is reproduced here:



6 That trade mark is registered for the following goods which are all within Class 25 of the Nice Classification: 'Sweaters; jerseys; waistcoats; jackets; skirts; trousers; shirts; blouses; dressing gowns; underwear; gowns; bathing costumes; raincoats; dresses; stockings; socks; scarves; neckties, headgear and gloves (clothing).'

7 In support of its oppositions the other party to the proceedings before OHIM invoked the relative ground for refusal under Article 8(1)(b) of Regulation No 40/94.

8 By decisions of 10 April 2001 (Decision No 939/2001 in Case T-119/03), 27 April 2001 (Decision No 1106/2001 in Case T-118/03), 23 November 2001 (Decision No 2765/2001 in Case T-117/03) and 29 October 2002 (Decision No 3138/2002 in Case T-171/03), the Opposition Division dismissed those oppositions. The Opposition Division considered essentially that the marks in question were visually and phonetically different and that none of them had any particular conceptual meaning.

9 On 7 June 2001 (Cases T-118/03 and T-119/03), 22 January 2002 (Case T-117/03) and 24 December 2002 (Case T-171/03), the other party to the proceedings before the Board of Appeal filed a notice of appeal against each of the Opposition Division's decisions.

10 By decisions of 27 January 2003 (Cases T-117/03 to T-119/03) and 15 April 2003 (Case T-171/03), the First Board of Appeal of OHIM annulled the decisions of the Opposition Division and dismissed the applications for a Community trade mark for all the goods within Class 25 of the Nice Classification. The Board of Appeal essentially considered, first, that the dominant element of each of the marks applied for was the letter combination 'NL' since the words 'sport', 'jeans', 'active' and 'collection' are only slightly distinctive in the clothing industry. Next, it found that the opposing Community trade marks were only slightly visually similar because of the particular conception of the written form of the earlier mark and the presence of the words 'sport', 'jeans', 'active' and 'collection' in the marks NLSPORT, NLJEANS, NLACTIVE and NLCollection in respect of which registration is sought. By contrast, the Board of Appeal found that the opposing Community trade marks were phonetically and conceptually similar because the letter combination 'NL' which constitutes the earlier trade mark is reproduced as the dominant element in the marks NLSPORT, NLJEANS, NLACTIVE and NLCollection in respect of which registration is sought. The Board of Appeal considered that in the clothing industry, it is common for the same trade mark to have different configurations depending on the type of goods to which it refers and that sub-brands are often used to distinguish the different product ranges. It considered therefore that the consumer could be misled into thinking that the goods of the marks NLSPORT, NLJEANS and

NLACTIVE in respect of which registration is sought belong to lines for young people or, in the case of the mark NLCollection, that it relates to new lines brought out each season, whereas the goods of the earlier mark belong to a more sophisticated range of clothing. The Board of Appeal concluded from this that there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94.

Forms of order sought

11 The applicant claims in each case that the Court should:

— annul the decision of the Board of Appeal;

— order OHIM and, where applicable, the intervener to pay the costs of the present proceedings and of the proceedings before the Board of Appeal.

12 OHIM contends in each case that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

Arguments of the parties

13 Except in certain minor respects, the pleas and arguments of the parties are the same in all four of the present cases. In support of its actions the applicant raises a single plea in law alleging infringement of Article 8(1)(b) of Regulation No 40/94.

14 First, the applicant submits that the Board of Appeal erred in its analysis of the trade marks applied for by concentrating on the letter combination 'NL' and thus by separating those letters from the words which follow, namely 'sport', 'jeans', 'active' and 'collection'.

15 Second, the applicant considers that the letter combination 'NL' is neither the dominant element of each of the marks applied for nor the constituent element of the earlier Community trade mark. As regards, first, the marks in respect of which registration is sought, the applicant challenges the finding that the words 'sport', 'jeans', 'active' and 'collection' are slightly distinctive in the industry in question. Next, as regards the earlier trade mark, the applicant submits that it is impossible to determine with certainty the letters of which it is composed. According to the applicant, besides the letters 'NL', it could be the letters 'ALV', 'AVOL', 'AOL' or 'AL'. It further considers that if the consumer perceives the earlier trade mark back to front, it is possible to discern the letters 'JRV' or 'JPV'. Finally, the applicant adds that according to settled case-law and academic opinion, trade marks composed of only two or three letters are inherently slightly distinctive and those letters cannot therefore constitute the dominant element of a sign. In support of its argument, the applicant refers to paragraph 8.3 of OHIM's guidelines on examination and cites a judgment of 21 January 1993 of the Tribunal Supremo (Spanish Supreme Court) according to which it is not possible to appropriate the phonetic aspect of particular letters of the alphabet for one's own use. It further points to the coexistence of several registered trade marks at national and Community level comprising the letter combination 'NL'.

16 Third, the applicant points out that, as regards the visual aspect of the signs in question, the earlier mark is 'distinctly baroque in character'. It claims that the Board of Appeal failed to recognise the importance of that figurative character.

17 Fourth, the applicant considers that the Board of Appeal's reasoning in respect of the phonetic similarity of the signs is inconsistent in so far as it finds simultaneously that the marks in question are phonetically both similar and identical. Furthermore, the applicant complains that the Board of Appeal focused its comparison on the letter combination 'NL'.

18 The applicant submits, lastly, that the average consumer in the clothing sector is particularly attentive to trade marks when buying clothes, so that it is difficult for him or her to be misled.

19 According to OHIM, the applicant's criticism is unfounded. It considers that there is a likelihood of confusion between the earlier trade mark and the marks in respect of which registration is sought for the reasons set out in the decisions of the Board of Appeal.

20 OHIM denies that the average consumer in the clothing sector is particularly well informed and attentive. At the hearing, OHIM stated that the degree of attention that the consumer pays to the mark depends in particular on the value of the product in question and the degree of specialisation of the target public. In the present case, the applicant merely asserts, without any explanation supported by evidence, that the degree of attention that the consumer pays to trade marks is higher in the clothing sector than in other sectors.

21 OHIM contends that the opposing signs are aurally and conceptually similar. At the hearing OHIM stated that the fact that the dominant element of those signs is a letter combination does not imply that greater weight should be attributed to the different visual features than to the phonetic and conceptual similarity of the signs. OHIM recognises that, as a general rule, the figurative element does render distinctive a sign constituted of a letter or combination of two letters, but it emphasises that the assessment of the likelihood of confusion is also governed by other principles. In its view, if a sign is in fact distinctive, even slightly, and was validly registered as a trade mark, that mark qualifies for protection under Article 8 (1)(b) of Regulation No 40/94. OHIM does not exclude the possibility of according different weight to the visual, phonetic and conceptual similarity of the signs in question depending on the conditions in which the goods are marketed on the specific market. Given that the goods in question are identical and that the use of sub-brands is common in the clothing industry, OHIM considers that there is a likelihood of confusion in the present case.

Findings of the Court

22 Under Article 8(1)(b) of Regulation No 40/94, upon opposition by the proprietor of an earlier trade mark, the trade 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. Under Article 8(2)(a)(i) of Regulation No 40/94, earlier trade marks means, inter alia, Community trade marks in respect of which the date of application for registration is earlier than that for registration of the Community mark.

23 According to settled case-law, a likelihood that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings constitutes a likelihood of confusion.

24 According to that case-law, the likelihood of confusion must be assessed globally, in the light of the perception of the signs and the goods or services in question on the part of the relevant public and, taking into account all factors relevant to the case, in particular the interdependence of the similarity of the signs and that of goods or services identified (Case T-162/01 *RTB* v *OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)* [2003] ECR II-2821, paragraphs 31 to 33, and the case-law cited there).

25 In this case, the goods in question (clothing, particularly clothing for women and girls) are everyday consumer items (Case T-104/01 *Oberhauser* v *OHIM— Petit Liberto (Fifties)* [2002] ECR II-4359, paragraph 29, and Case T-292/01 *Phillips-Van Heusen* v *OHIM — Pash Textilvertrieb und Einzelhandel (BASS)* [2003] ECR II-4335, paragraph 43). The trade mark on which the opposition is based is registered as a Community trade mark. It follows that the relevant public by reference to which the likelihood of confusion must be assessed is composed of average consumers in the European Community.

26 It is not in dispute between the parties that the goods covered by the trade marks applied for are partly similar and partly identical.

27 In those circumstances, the outcome of the action depends on the degree of similarity between the signs in question. As is clear from settled case-law, the global assessment of the likelihood of confusion, as far as concerns the visual, aural or conceptual similarity of the opposing signs, must be based on the overall impression given by those signs, bearing in mind, inter alia, their distinctive and dominant components (see *BASS*, paragraph 47, and the case-law cited).

28 As regards their visual aspect, the Board of Appeal described the earlier trade mark as being 'formed of two capital letters, "NL", aligned vertically and with a design font called, in English, "Stephenson Blake", sloping to the right' (paragraph 32 of the decision of the Board of Appeal in Case T-117/03, paragraph 31 of the decisions of the Board of Appeal in Cases T-118/03 and T-119/03, and paragraph 28 of the decision of the Board of Appeal in Case T-171/03). The Court finds that description to be accurate. In the earlier trade mark, the letter 'L' is clearly recognisable. It is positioned below and to the right of the other letter. Since text is normally read from left to right and from top to bottom, the letter 'L' is not the first in the letter combination. Between the left part of the letter 'N', which could form the apex of a letter 'A', and the upper part of the letter 'L' there is a space in which it may clearly be seen that it is not the transversal bar of a letter 'A'. Therefore the first letter will not be read as an 'A'. Moreover, the upper part of the letter 'L' cannot be read as forming a letter 'O'. Finally, it should be noted that it is necessary to compare the signs as they are protected and not as they might be perceived by the consumer reading them back to front. Accordingly, the applicant's doubts about how the earlier sign might be perceived are not justified.

29 Each of the signs applied for is made up of a figurative sign composed of the letters 'NL', followed directly by a word in capital letters in Cases T-117/03 to T-119/03 and by a word comprising a capital letter and nine lower-case letters in Case T-171/03. In each sign, the letter combination 'NL' appears in bold type whilst the other letters are printed in normal type. It follows that the letters 'NL' are the dominant visual element of each of the trade marks applied for, as stated — rightly — in the decisions of the Board of Appeal.

30 OHIM rightly points out that the signs applied for are similar in morphosyntactical structure. Only NLCollection differs slightly in that the sign is not composed entirely of capital letters and the word NLCollection is enclosed in a black rectangular frame. Even if the applicant rightly criticises the fact that the decision of the Board of Appeal of 15 April 2003, by following the model of the decisions of 27

January 2003, has not taken account of those particularities, the Board of Appeal's assessment of the visual aspect of the sign remains correct in that the letter combination 'NL' constitutes the dominant visual element of 'NLCollection' in respect of which registration is sought.

31 When comparing visually the earlier sign and the signs applied for, the Board of Appeal found there to be slight similarity. The applicant has not challenged that finding.

32 As regards the conceptual similarity of the signs in question, it should be noted that the signs applied for are composed of the letters 'NL' and the words 'sport', 'jeans', 'active' and 'collection'. The earlier trade mark consists solely of the letter combination 'NL'. As the Board of Appeal rightly found, 'NL' has no meaning in the clothing sector.

33 By contrast, as OHIM rightly pointed out, the words 'sport', 'jeans', 'active' and 'collection' in the English and French languages each have a conceptual content descriptive of the goods covered. In the clothing sector, the word 'sport' evokes the idea of sportswear or clothing which is sporting in style. The word 'jeans' is identified as descriptive of denim clothes. The word 'collection' refers to a group of items of clothing designed for one season. The word 'active' refers rather to the use of the goods, namely clothes for active people or which allow them to be active.

34 The Court notes that the public will not generally consider a descriptive element forming part of a complex mark as the distinctive and dominant element of the overall impression conveyed by that mark (Case T-129/01 *Alejandro* v *OHIM — Anheuser-Busch (BUDMEN)* [2003] ECR II-2251, paragraph 53). In this regard it

suffices that the descriptive nature of such an element is perceived in a part of the Community. Although Article 8 of Regulation No 40/94 does not contain a provision similar to Article 7(2) of that regulation, the Court has inferred from the principle of the unitary character of the Community trade mark set down in Article 1(2) of that regulation that registration must be refused even if a relative ground for refusal obtains in only part of the Community (Case T-355/02 *Mühlens* v *OHIM — Zirh International (ZIRH)* [2004] ECR II-791, paragraphs 35 and 36, appeal pending).

35 In the present case, the signs applied for contain elements which have a conceptual content descriptive of the goods covered, at least for the English-speaking public and French-speaking public. The Board of Appeal therefore rightly found that, at least for them, the dominant conceptual element of each of the marks applied for is the letter combination 'NL' which is the sole element of the earlier trade mark.

36 As for aural similarity, it should be noted that, in the light of the assessment made at paragraphs 28 to 30 above in respect of visual similarity, since the earlier trade mark is composed of the letters 'N' and 'L', it will be pronounced as 'N-L' in the majority of languages of the European Community including in particular French and English. NLSPORT will, at least in French or English, be pronounced 'N-L-sport'. The other marks applied for will be pronounced 'N-L-jeans', 'N-L-active' and 'N-L-collection'. It follows that aurally the letter combination 'N-L' which constitutes the earlier mark is included in each of the marks applied for. At least for French- and English-speaking consumers, the words sport, jeans, active and collection will be perceived as descriptive elements of the goods or of their intended use. Therefore, the letter combination 'NL' constitutes — at least for that public — the dominant phonetic element. The findings of the Board of Appeal at paragraphs 33 (Case T-117/03), 32 (Cases T-118/03 and T-119/03) and 29 (Case T-171/03) of the decisions of the Board of Appeal must therefore be upheld. It must also be stated

that the Board did not find that there was phonetic identity between the signs but phonetic identity between the dominant element of the signs applied for, 'NL', and the letter combination 'NL' of the earlier trade mark.

37 The fact that the sign comprising the earlier mark is wholly incorporated in the dominant element of each of the signs applied for justifies the conclusion that there is significant phonetic similarity (see, for the opposite case, *Fifties*, paragraph 40).

38 The applicant submits that the Board of Appeal did not carry out a global assessment of the similarity of the signs but separated the signs applied for into the letter combination 'NL' and the words 'sport', 'jeans', 'active' or 'collection'.

39 It should be noted in this regard that, whilst the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 23), in general it is the dominant and distinctive features of a sign which are more easily remembered (see, to that effect, *Fifties*, paragraphs 47 and 48). Consequently, the Board of Appeal cannot be criticised for having examined what are, in the consumer's perception, the distinctive and dominant elements of the marks which the consumer will retain in mind.

40 Accordingly the Board of Appeal did not err in law in finding that there was phonetic and conceptual similarity between the signs in question.

41 As regards the global assessment of the likelihood of confusion, the Board of Appeal concluded that there was such a likelihood given the phonetic and conceptual similarity of the signs, the identity of the goods and the conditions under which they were marketed in the clothing sector in which the use of sub-brands and the presentation of a sign in several configurations is common. The applicant challenges that finding for two reasons.

42 First, the applicant considers that, in the clothing sector, the average consumer is particularly attentive to trade marks so that it is difficult for that person to be misled.

43 It should be noted in this regard that the average consumer's level of attention may vary according to the category of goods or services in question (see, by analogy, Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 26). As OHIM rightly pointed out, an applicant cannot simply assert that in a particular sector the consumer is particularly attentive to trade marks without supporting that claim with facts or evidence. As regards the clothing sector, the Court finds that it comprises goods which vary widely in quality and price. Whilst it is possible that the consumer is more attentive to the choice of mark where he or she buys a particularly expensive item of clothing, such an approach on the part of the consumer cannot be presumed without evidence with regard to all goods in that sector. It follows that that argument must be rejected.

44 Second, the applicant submits that letter combinations are by nature not very distinctive. Furthermore, according to the applicant it is not possible to appropriate the phonetic aspect of a letter combination for one's own use; the applicant relies in this respect on a decision of the Tribunal Supremo of 21 January 1993 concerning a

sign composed of the letter 'D'. Finally, the applicant points out that there are several national and Community trade marks comprising the element 'NL' and there has not been found to be any likelihood of confusion between them.

45 As regards the fact that several trade marks containing the letter combination 'NL' have been registered, the Court finds that the applicant has not shown that those cases are transposable to the present case. Furthermore, OHIM points out, without being contradicted, that the Community registrations to which the applicant referred have never been the subject of opposition proceedings. As for the decision of the Tribunal Supremo, OHIM rightly pointed out that that case concerned a trade mark composed of a single letter. Finally, the legality of decisions of the Boards of Appeal must be evaluated solely on the basis of Regulation No 40/94, as interpreted by the Community Courts (*BUDMEN*, paragraph 61, and the case-law cited). It follows that that part of the argument must fail.

46 As for the argument that the earlier trade mark cannot monopolise the phonetic aspect of 'NL', that amounts in substance to denying the aural distinctiveness of that mark and consequently to the conclusion that phonetic similarity cannot contribute to a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94.

47 Article 4 of Regulation No 40/94 states that a Community trade mark may consist of any signs capable of being represented graphically, particularly words and letters, provided that they are capable of distinguishing the goods or services of one undertaking from those of other undertakings. The legislature thus expressly included signs composed of a letter or letter combination in the list of examples in Article 4 of that regulation of signs which may constitute a Community trade mark, subject to any absolute or relative grounds for refusal upon which opposition to registration may be based.

48 Articles 7 and 8 of Regulation No 40/94 concerning refusal of registration do not lay down specific rules for signs composed of a letter combination not forming a word. It follows that the global assessment of the likelihood of confusion between such signs pursuant to Article 8(1)(b) of Regulation No 40/94 in principle follows the same rules as that in respect of word signs comprising a word, a name or an invented term. Accordingly, the applicant's argument that signs composed of a letter combination are by their nature not phonetically distinctive must be rejected.

49 However, it should be noted that in the global assessment of the likelihood of confusion, the visual, aural or conceptual aspects of the opposing signs do not always have the same weight. It is appropriate to examine the objective conditions under which the marks may be present on the market (*BUDMEN*, paragraph 57). The extent of the similarity or difference between the signs may depend, in particular, on the inherent qualities of the signs or the conditions under which the goods or services covered by the opposing signs are marketed. If the goods covered by the mark in question are usually sold in self-service stores where consumers choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any aural similarity between the signs.

50 The applicant has not mentioned any particular conditions under which the goods are marketed. Generally in clothes shops customers can themselves either choose the clothes they wish to buy or be assisted by the sales staff. Whilst oral communication in respect of the product and the trade mark is not excluded, the choice of the item of clothing is generally made visually. Therefore, the visual perception of the marks in question will generally take place prior to purchase. Accordingly the visual aspect plays a greater role in the global assessment of the likelihood of confusion.

51 Nevertheless it is common in the clothing sector for the same mark to be configured in various ways according to the type of product which it designates. It is also common for a single clothing manufacturer to use sub-brands (signs that derive from a principal mark and which share with it a common dominant element) in order to distinguish its various lines from one another (*Fifties*, paragraph 49, and *BUDMEN*, paragraph 57). In the present case the conceptual content of the marks applied for may reinforce the consumer's perception of them as sub-brands of a mark NL. Even if the consumer were faced with only one of the signs in question, the separate perception of 'NL' in bold type, first, and then of the following word, which may evoke the idea of a certain style of clothing, might lead the consumer to identify it as a sub-brand of the mark NL. Moreover, the different written form of the letter combination 'NL' in the signs applied for as compared with that of the earlier trade mark NL could be perceived as a particular configuration of that mark. Accordingly, the conclusion of the Board of Appeal that the consumer may perceive the marks applied for as special lines originating from the undertaking which is the proprietor of the earlier trade mark must be upheld.

52 Article 8(1)(b) of Regulation No 40/94 requires that there exist a likelihood of confusion but not that the confusion be established. In those circumstances, whilst it is true that the Board of Appeal could have examined the particular written form of the letter combination 'NL' in the earlier trade mark whose appearance differs from that of the letters 'NL' in the trade marks applied for and which constitutes the most striking inherent element of the earlier trade mark, the conclusion to which the Board of Appeal came was the correct one. Given the identity of the goods and the conditions under which they are marketed referred to in the preceding paragraph, the degree of similarity between the signs suffices in the present case to establish the existence of a likelihood of confusion.

53 It follows that the single plea in law, alleging infringement of Article 8(1)(b) of Regulation No 40/94, is unfounded. The action must therefore be dismissed.

Costs

54 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. Since the applicant has been unsuccessful it must be ordered to pay the costs of OHIM, in accordance with the form of order sought by it.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Pirrung Meij Forwood

Delivered in open court in Luxembourg on 6 October 2004.

H. Jung — Registrar

J. Pirrung — President