JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
15 February 2005 *

In Case T-296/02,

Lidl Stiftung & Co. KG, established in Neckarsulm (Germany), represented by P. Groß, avocat,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs), represented by A. von Mühlendahl, B. Müller and G. Schneider, acting as Agents,

defendant,

* Language of the case: German.

the other party to the proceedings before the Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs), intervener before the Court of First Instance, being

REWE-Zentral AG, established in Cologne (Germany), represented by M. Kinkeldey, lawyer,

ACTION against the decision of the Third Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 17 July 2002 (Case R 0036/2002-3), relating to opposition proceedings between Lidl Stiftung & Co. KG and REWE-Zentral AG,

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: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 18 May 2004,

gives the following

Judgment

Background to the dispute

1 On 16 September 1997, the intervener before the Court of First Instance applied to the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('the Office') for registration as a Community trade mark of the sign

LINDENHOF.

2 The trade mark application relates, inter alia, to goods falling within Classes 30 and 32 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 corresponding for each of those classes to the following description:

— Class 30: '... chocolate goods; ... chocolate beverages; ... marzipan and nougat products; ... pralines, including filled pralines ...';

— Class 32: 'Beers, mixed drinks containing beer, mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices, vegetable juices; syrups and other preparations for making beverages; whey beverages ...'.

3 On 10 August 1998, the trade mark application was published in *Community Trade Marks Bulletin* No 60/98.

4 On 26 October 1998, the applicant gave notice of opposition against the registration of the mark requested, on the basis of the following word and figurative mark registered in Germany with a date of application for registration of 24 December 1991 ('the earlier trade mark').



5 Registration of the mark requested was opposed in respect of all the goods mentioned in paragraph 2 above. The opposition was based on the goods covered by the earlier trade mark, called 'sparkling wines', in Class 33.

6 In support of its opposition, the applicant relied on the relative ground for refusal under Article 8(1)(b) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended.

7 Since the intervener raised a plea of non-use of the earlier trade mark as provided for in Article 43(2) and (3) of Regulation No 40/94, the applicant produced a sworn statement by one of its managers, to which were attached a list setting out the number of units sold for the period 1995 to 2000 and a picture showing the form used for those sales, reproduced below.



8 By decision of 8 November 2001, the Opposition Division found, firstly, that the genuine use of the earlier trade mark had been proven. Secondly, it upheld the opposition in so far as it concerned goods called 'beers, mixed drinks containing beer', on the ground of a likelihood of confusion. It rejected the remainder of the opposition on the ground of absence of such a likelihood. Finally, it ordered each party to bear its own costs.

9 On 7 January 2002, the applicant brought an appeal against that decision with regard to the goods called 'mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices' in Class 32 ('the drinks covered by the trade mark application').

10 By decision of 17 July 2002 ('the contested decision'), the Board of Appeal dismissed the appeal and ordered the applicant to pay the costs.

Procedure

11 By application lodged at the Registry of the Court of First Instance on 27 September 2002, the applicant brought the present action.

12 By letter of 14 January 2003, the Office informed the Court that it had found an absence of proof as to the extension of the period of protection of the earlier trade mark. By letter received on 10 March 2003, the applicant sent that proof to the Court.

13 The Office and the intervener lodged their responses on 3 and 4 February 2003 respectively.

Forms of order sought

14 The applicant claims that the Court should:

— annul the contested decision;

— order the Office to pay the costs.

15 The Office contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

16 The intervener contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs incurred by the intervener.

Arguments of the parties

17 In support of its application, the applicant advances a single plea in law, alleging infringement of Article 8(1)(b) of Regulation No 40/94, in that the Board of Appeal wrongly found that there was no likelihood of confusion between the goods called 'sparkling wines', on the one hand, and the drinks covered by the trade mark application, on the other ('the goods in question').

18 With regard to the goods in question, the applicant submits, firstly, that customarily they have a common source. In that regard, it produces documents, with witness evidence offered in support, to show the existence of German wineries producing wine and sparkling wine, which also produce fruit juices, fruit wines, sparkling fruit wines and wine-based mixed drinks. That fact is known to the target public. Furthermore, according to the applicant, the existence of wineries also marketing table water or mineral water cannot be excluded. Finally, it claims that, conversely, the manufacturers of the drinks covered by the trade mark application are also extending their range of products.

19 The applicant also submits that the final products in question are similar. All are drinks for everyday consumption and are sold side by side both in shops and on drinks menus. Advertising for them is similar, usually showing a person who, whilst drinking the beverage concerned, enjoys a moment of happiness. Like sparkling wines, the drinks covered by the trade mark application and, in particular, fruit-based alcoholic drinks, are also drunk on special occasions and, like those drinks, sparkling wines are also drunk with meals. Moreover, many drinks other than wine are sparkling. Finally, the applicant observes that, like sparkling wine, certain non-alcoholic drinks, fruit drinks and other fruit juices may be produced, inter alia, from grapes. It concludes that since the goods in question bear similar signs, they could be thought to have the same commercial origin.

20 With regard to the signs in question, the applicant submits that they are similar to the extent that their phonetic difference is hardly noticeable and their conceptual difference is not particularly striking, which would not in the present case lead the public to look into their meaning.

21 With regard to the target public, the applicant claims that since the goods in question are for everyday consumption, the public will not pay them any great attention.

22 The applicant also submits that the earlier trade mark is very distinctive in nature. Sparkling wines have been sold under that mark for more than seven years in more than 4 000 of the applicant's subsidiaries, most of which are in Germany. The sworn statement mentioned in paragraph 7 above proves that those sales generated a large turnover in Germany from January 1995 to January 2000. Extensive advertising was undertaken in that regard. The applicant points out that the word 'linderhof' is not descriptive of sparkling wines.

23 In answer to the assertion that some of its arguments had been made too late, the applicant contended at the hearing that its main argument had already been put to the Board of Appeal.

24 The Office, for its part, considers that the Board of Appeal correctly held that there was no likelihood of confusion.

25 In that regard, the Office submits, inter alia, that the applicant's arguments based, firstly, on the common usual source of the goods in question and, secondly, on the fact that mixtures of the products in question are proposed, were made too late, in view of Rules 16(3), 17(2) and 20(2) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1), of

Article 74(1), in fine, of Regulation No 40/94 and of the judgments in Case T-232/00 *Chef Revival USA* v *OHIM — Massagué Marín (Chef)* [2002] ECR II-2749 and Case T-388/00 *Institut für Lernsysteme* v *OHIM — Educational Services (ELS)* [2002] ECR II-4301, paragraph 21 et seq. According to the Office, the first argument was put forward clearly only before the Court and the second argument was made there for the first time. Nor do those arguments support or add anything to an argument already put forward before the Opposition Division. The Office adds that if it did not clearly indicate to the applicant which facts and evidence were to be submitted, it was for the applicant to decide for itself. Furthermore, the Office was not in a position to give such an indication, since it did not have sufficient knowledge of the market in question. Finally, the Office submits that the applicant itself headed the relevant part of its application 'new facts'.

26 The same is true, according to the Office, of the argument alleging the very distinctive nature of the earlier trade mark because of its use, since nor was that argument put forward before it. The Office notes that, before the Board of Appeal, the applicant submitted merely that the earlier trade mark was 'at least normally distinctive in nature'. Furthermore, the Office submits that the facts and other evidence put forward by the applicant to prove use of the earlier trade mark are neither an express nor an implied appeal to the great reputation acquired by that mark because of its use.

27 The intervener relies, firstly, on a plea based on infringement of Articles 15 and 43 of Regulation No 40/94, in that the Board of Appeal should have dismissed the appeal on the ground of the absence of proof of genuine use of the earlier trade mark.

28 Secondly, the intervener submits that there is no likelihood of confusion.

29 At the hearing, the intervener supported the arguments of the Office to the effect that certain of the applicant's arguments were made too late.

Findings of the Court

Admissibility of certain arguments put forward by the applicant

30 The Office and the intervener submit that the arguments based, firstly, on the common usual source of the goods in question, secondly, on the fact that mixtures of the products in question are offered for sale and, thirdly, on the very distinctive nature of the earlier trade mark were made too late.

31 In that regard, it should be noted that the purpose of actions brought before the Court of First Instance is to review the legality of the decisions of the Boards of Appeal within the meaning of Article 63 of Regulation No 40/94. Facts which are relied upon before the Court without having been first brought before the departments of the Office can affect the legality of such a decision only if the Office should have taken them into account of its own motion. In that regard, it follows from Article 74(1), in fine, of that regulation, under which, in proceedings relating to relative grounds for refusal of registration, the Office is to be restricted in its examination to the facts, evidence and arguments provided by the parties and the relief sought, that it is not required, of its own motion, to take into consideration facts which were not put forward by the parties. Such facts cannot, therefore, call into question the legality of a decision of the Board of Appeal.

32 With regard to the first argument mentioned in paragraph 30 above, it must be found that the applicant asserted before the Board of Appeal that the goods in question were manufactured, substantially, in identical companies, as can also be seen from paragraph 14 of the contested decision. The first argument cannot, therefore, be considered not to have been raised before the Office, contrary to the claims of the Office and the intervener.

33 It is appropriate to add that, admittedly, the applicant put forward the assertion mentioned in the previous paragraph for the first time before the Board of Appeal. However, according to the case-law the Boards of Appeal may, subject only to Article 74(2) of Regulation No 40/94, allow the appeal on the basis of new facts relied on by the party who has brought the appeal or on the basis of new evidence adduced by that party (judgment in Case T-308/01 *Henkel* v *OHIM — LHS (UK) (KLEENCARE)* [2003] ECR II-3253, paragraph 26).

34 With regard to the reference made by the Office to the *ELS* judgment, cited above (paragraph 21 et seq.), it should be noted that it relates, inter alia, to the production of proof of use of the earlier trade mark relied on in support of the opposition which, in the present case, is not at issue at this stage of the proceedings.

35 The same is true of the reference made to the *Chef* judgment, cited above. That concerned the failure to produce, within the period laid down by the Opposition Division, the translation into the language of the opposition proceedings of the registration certificate for the mark relied on in support of the opposition (see paragraphs 53 and 57 of that judgment). That is not the situation in the present case.

36 It follows that the argument based on the common usual source of the goods in question is admissible.

37 With regard, on the contrary, to the documents submitted by the applicant in support of that argument and referred to in paragraph 18 above, it must be found that they were submitted for the first time before the Court. Moreover, the applicant has not claimed otherwise.

38 Those documents cannot, therefore, be taken into consideration by the Court.

39 With regard to the second argument mentioned in paragraph 30 above, according to which mixtures of the products in question are offered for sale, it must be stated that it was not put forward by the applicant before the Office, as can be seen from paragraph 42 of the contested decision, according to which the applicant did not put forward any argument in that regard. More specifically, although in its pleading of 24 March 2000 submitted to the Opposition Division the applicant referred to the existence of 'recreational drinks, containing "sparkling wine"', that reference concerned the link not between the goods in question but between, on the one hand, sparkling wines and, on the other, goods referred to in the trade mark application which are no longer the subject of the present dispute.

40 It follows that the argument based on the fact that mixtures of the goods in question are offered for sale cannot be taken into account by the Court.

41 With regard to the third argument mentioned in paragraph 30 above, nor was it put forward by the applicant before the Office. More particularly, before the Board of Appeal, the applicant merely claimed that the earlier trade mark had an average level of distinctiveness.

42 Therefore nor can the argument based on the very distinctive character of the earlier trade mark be taken into consideration by the Court.

Substance

43 It is appropriate to examine first the plea raised by the applicant before examining in due course that raised by the intervener. If it were to be concluded, contrary to the applicant's claims, that the Board of Appeal was right to dismiss the appeal brought before it on the ground of the absence of likelihood of confusion, it would no longer

be necessary to examine whether, as the intervener claims, it should have done so on the ground of absence of proof of genuine use of the earlier trade mark.

44 Under Article 8(1)(b) of Regulation No 40/94, upon opposition by the proprietor of an earlier trade mark, a trade mark is not to be registered if, because of its identity with or similarity to an earlier trade mark and the identity or similarity of the goods or services covered by the two 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.

45 In the present case, the earlier trade mark is registered in Germany. Therefore, when assessing the conditions referred to in the previous paragraph, account must be taken of the point of view of the German public. Furthermore, given that the goods in question are for everyday consumption, that public is average consumers. The average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect (judgment in Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 26). The applicant's assertion that, since the goods in question are for everyday consumption, the target public will not pay any great attention, cannot be accepted, since it is not supported by any precise information corroborating the validity of that general statement with regard to the goods in question.

46 It is established case-law that the risk 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. The likelihood of confusion as to the commercial origin of the goods or services must be assessed globally on the basis of the perception that the relevant public has of the signs and goods or services in question and taking into account all factors relevant to the circumstances of the case, inter alia of the interdependence between the similarity between the trade marks and between the goods or services identified (judgment in Case T-162/01 *Laboratorios RTB* v *OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)* [2003] ECR II-2821, paragraphs 29 to 33, and the case-law cited).

47 According to that case-law, the more distinctive the earlier trade mark, the greater the likelihood of confusion (see, by analogy, judgments in Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 18, and *Lloyd Schuhfabrik Meyer*, cited above, paragraph 19).

48 Furthermore, it is clear from the wording of Article 8(1)(b) of Regulation No 40/94 that a likelihood of confusion within the meaning of that provision presupposes that the goods or services covered are identical or similar. Therefore, even where the mark applied for is identical to a mark which is particularly distinctive, it is still necessary to adduce evidence of similarity between the goods or services covered by the two marks (see, by analogy, *Canon*, cited above, paragraph 22).

The goods in question

49 In assessing the similarity of the goods in question, all the relevant factors relating to the link between those goods should be taken into account. Those factors include, inter alia, their nature, their intended use, their method of use and whether they are in competition with each other or are complementary (*Canon*, cited above, paragraph 23).

50 Admittedly, sparkling wines, on the one hand, and the drinks covered by the trade mark application, on the other, have points in common as regards their basic ingredients and are often sold side by side both in shops and on drinks menus.

51 However, it should be noted, as did the Board of Appeal, that the average German consumer will consider it normal and, therefore, will expect sparkling wines, on the one hand, and drinks called 'mineral and aerated waters and other non-alcoholic

drinks; fruit drinks and fruit juices', on the other, to come from different companies. More particularly, sparkling wines and the abovementioned drinks cannot be regarded as belonging to the same family of beverages or as items in a general range of drinks likely to have a common commercial origin.

52 Furthermore, before the Board of Appeal, the applicant cited only one company making both sparkling wines and drinks covered by the trade mark application (see paragraph 14 of the contested decision). With regard to the documents which it submitted in that connection to the Court, seeking to show the existence of German wineries for wine and sparkling wine also producing fruit juices, fruit wines, sparkling fruit wines and wine-based mixed drinks, it has already been held in paragraphs 37 and 38 above that they cannot be taken into account by the Court.

53 Moreover, the drinks covered by the trade mark application are admittedly called 'mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices'. The term 'non-alcoholic' therefore does not refer to 'fruit drinks and fruit juices' so that, in theory, those latter products could be considered to include alcoholic drinks. However, there are grounds for considering that, in practice, the German terms 'Fruchtgetränke und Fruchtsäfte' used in the original trade mark application, just like the French terms 'boissons de fruits et jus de fruits' and the equivalent terms in other Community languages, are reserved for goods without alcohol. As a result, the drinks covered by the trade mark application must be considered to include only non-alcoholic drinks. Furthermore, the finding of the Board of Appeal that sparkling wine 'falls within the category of alcoholic drinks, unlike the goods covered by the trade mark application' (paragraph 37 of the contested decision) was not contested by the applicant.

54 Sparkling wines are alcoholic drinks and, as such, clearly distinct from non-alcoholic drinks such as the drinks covered by the trade mark application, both in shops and on drinks menus. The average consumer, deemed to be reasonably well-informed

and reasonably observant and circumspect, is used to and aware of that distinction between alcoholic and non-alcoholic drinks, which is, moreover, necessary, since some consumers do not wish to or cannot consume alcohol.

55 Furthermore, if the drinks covered by the trade mark application are drunk on special occasions and for enjoyment, they are also consumed, if not substantially, on other occasions and for relaxation. Thus they are rather everyday consumer items. Sparkling wines, on the other hand, are drunk almost solely, if not solely, on special occasions and for enjoyment and much less frequently than the goods covered by the trade mark application. They are in a much higher price bracket than are the drinks covered by the trade mark application.

56 Finally, sparkling wines are no more than an atypical replacement for the drinks covered by the trade mark application. The goods in question cannot therefore be considered to be in competition with each other.

57 The fact referred to by the applicant that the goods in question may be consumed one after the other or even mixed is not such as to alter the findings set out in the preceding paragraphs. It is true of many drinks which are not, however, similar (for example rum and cola).

58 The same is true of the fact referred to by the applicant that the advertising for the goods in question always shows a person who enjoys a moment of happiness whilst drinking the beverage concerned, inasmuch as that fact applies to almost all drinks, even the most varied.

59 In view of the above, it must be concluded that the goods in question are more dissimilar than they are similar. However, the differences between them are not sufficient of themselves to exclude the possibility of a likelihood of confusion, in particular where the mark applied for is identical to an earlier mark which is particularly distinctive (see paragraph 48 above).

The signs in question

60 It is clear from paragraph 48 of the contested decision that the Board of Appeal based its comparison of the signs in question, as regards the earlier trade mark, on the form reproduced in paragraph 7 above, on the ground that that form does not differ from the registered form of the earlier trade mark, that is to say that shown in paragraph 4 above, such that its distinctiveness would be thereby reduced.

61 It is not necessary to decide whether, in so doing, the Board of Appeal made a mistake. The differences between the two forms referred to in the previous paragraph are not such as to alter the result of the comparison between the signs in question or, therefore, that of the assessment of the likelihood of confusion, as will be shown below.

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

63 At the visual and aural levels it should be noted that, in the two forms of the earlier trade mark referred to in paragraph 60 above, the verbal component 'linderhof' is predominant. The verbal component consisting of the expression 'vita somnium breve' occupies a subsidiary position in that it is written in considerably smaller characters than those used for the word 'linderhof'. That verbal component is therefore secondary to the dominant verbal component 'linderhof' (see, to that effect, the judgment in Case T-104/01 *Oberhauser* v *OHIM — Petit Liberto (Fifties)* [2002] ECR II-4359, paragraph 36). With regard to the components 'trocken' and 'sekt', the average German consumer will immediately understand that they serve only to indicate that it is a dry wine and a sparkling wine respectively. To that extent, those components are also secondary to the component 'linderhof'. Finally, the figurative components of the two forms of the earlier trade mark referred to in paragraph 60 above are merely decorative. Nor are they, therefore, such as to weaken the predominance of the component 'linderhof'.

64 Since the component 'linderhof' is predominant in the earlier trade mark, it must be considered similar to the mark applied for at the visual and aural levels. The visual and aural differences between the terms 'linderhof' and 'lindenhof' are not likely immediately to be noticed by the average German consumer.

65 At the conceptual level, it should be noted that, in paragraph 52 of the contested decision, the Board of Appeal observed that the term 'linderhof' refers to the castle of 'Linderhof' of King Ludwig II of Bavaria, whilst the term 'lindenhof' means 'courtyard of lime trees'.

66 In that regard, even though a certain conceptual dissimilarity can in fact be observed, it is doubtful whether the average German consumer would notice it. Moreover, the average consumer in Germany cannot be expected to know of the castle of 'Linderhof'. A consumer who does not know of that castle will be more likely to find a conceptual similarity between the terms 'lindenhof' and 'linderhof' to the extent that, in both cases, he will think of a 'courtyard' or 'estate'.

67 In those circumstances, the inevitable conclusion is that there is a conceptual similarity between the signs.

68 It follows that the signs must be considered to be similar.

The likelihood of confusion

69 In paragraph 55 of the contested decision, the Board of Appeal concluded that, although it had found that there was great aural similarity between the signs in question, given the normal distinctiveness of the earlier trade mark and the clear distance between the goods in question, there is no significant likelihood of confusion on the part of the target public in Germany, particularly because it is not the marginal fraction of the hurried and superficial public which is relied on in the present case, but the average, reasonably well-informed and reasonably observant and circumspect consumer.

70 That conclusion is not vitiated by error.

71 The Court considers that the dissimilarities between the goods in question, noted in paragraphs 51 to 56 above, are greater than the similarities between the signs in question, so that the average German consumer will not believe that those goods, bearing those signs, have the same commercial origin. Furthermore, as follows from paragraph 42 above, the earlier trade mark cannot be considered to be very distinctive in character.

72 It follows that, by rejecting the appeal against the decision of the Opposition Division on the ground of absence of likelihood of confusion, the Board of Appeal did not infringe Article 8(1)(b) of Regulation No 40/94.

73 The sole plea in law advanced by the applicant cannot therefore be accepted.

74 The action must therefore be dismissed without there being any necessity to consider the plea in law put forward by the intervener.

Costs

75 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.

76 In the present case, the applicant has been unsuccessful. The Office contends that the applicant should be ordered to pay the costs and the intervener contends that the applicant should be ordered to pay the intervener's costs. The applicant should therefore be ordered to pay the costs both of the Office and of the intervener.

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 15 February 2005.

H. Jung
Registrar

J. Pirrung
Le président