Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

15 January 2013*

((Community trade mark — Application for Community word mark ecoDoor — Absolute ground for refusal — Descriptive character — Article 7(1)(c) of Council Regulation (EC) No 207/2009))

In Case T-625/11,

BSH Bosch und Siemens Hausgeräte GmbH, established in Munich (Germany), represented by S. Biagosch, lawyer,

applicant,

v

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

defendant,

Action brought against the decision of the First Board of Appeal of OHIM of 22 September 2011 (Case R 340/2011-1) concerning an application for registration of the word sign ecoDoor as a Community trade mark.

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and M. van der Woude, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the application lodged at the Registry of the General Court on 2 December 2011,

having regard to the response lodged at the Registry of the General Court on 1 March 2012,

further to the hearing on 13 November 2012,

gives the following

* Language of the case: German.

Judgment

Background to the dispute

1 On 8 July 2010, the applicant, BSH Bosch und Siemens Hausgeräte GmbH, filed an application for registration of a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) under Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

2 The mark for which registration was sought is the word mark ecoDoor.

3 The goods in respect of which registration was sought are machines and devices that fall within Classes 7, 9 and 11 of the Nice Agreement of 15 June 1957 concerning the International Classification of Goods and Services for the Purposes of Registration of Marks, as revised and amended, as well as the components for those machines and devices.

4 By a decision of 22 December 2010, the examiner refused the application for registration for the following goods:

— Class 7: 'Electrical household and kitchen machines and apparatus (included in class seven), appliances and devices for making beverages and/or food, pumps for dispensing chilled beverages for use in combination with devices for chilling beverages; dishwashers; electric machines and devices for cleaning laundry and clothing (included in class seven), including washing machines, spin dryers';

— Class 9: 'Electric automatic dispensing machines for beverages or foodstuffs, automatic vending machines';

— Class 11: 'Apparatus for heating, steam generating and cooking, in particular stoves, baking, roasting, grilling, toasting, defrosting and heating devices, water heaters, immersion heaters, refrigerating apparatus, in particular refrigerators, chest freezers, refrigerated cabinets, beverage-cooling apparatus , fridge-freezers, ice-machines and apparatus, sorbet makers and appliances for making ice-cream, drying apparatus, in particular including tumble dryers, laundry drying machines.'

5 According to the examiner, as regards the products listed in paragraph 4 above, the trade mark applied for is descriptive for the purposes of Article 7(1)(c) of Regulation No 207/2009, and devoid of any distinctive character for the purposes of Article 7(1)(b) of the regulation.

6 The applicant lodged an appeal with OHIM under Articles 58 to 64 of Regulation No 207/2009 against the examiner's decision.

7 By a decision of 22 September 2011 ('the contested decision'), the First Board of Appeal of OHIM rejected the appeal. Firstly, it held that the relevant public was made up of English-speaking consumers. Secondly, it held that, within the trade mark applied for, the relevant public would distinguish, on the one hand, the element 'eco', which it would understand to mean 'ecological', and on the other hand, the element 'door'. Consequently, according to the Board of Appeal, the mark applied for would be perceived by the public as meaning 'a door the construction and mode of operation of which are ecological'. Thirdly, in so far as the goods listed in paragraph 4 above contain doors and consume energy, the Board of Appeal held that the mark applied for provided information as to their energy efficiency and their ecological character, and were therefore descriptive of their kind, their intended purpose and their nature for the purposes of Article 7(1)(c) of Regulation No 207/2009. Fourthly, in so far as the expression 'ecodoor' referred to the fact that the goods

covered were equipped with an ecological door, according to the Board of Appeal it did not distinguish the applicant's goods from those of other undertakings and, as a consequence, was devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation No 207/2009.

Forms of order sought

8 The applicant claims that the Court should:

— annul the contested decision;

— order OHIM to pay the costs.

9 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

10 In support of its action, the applicant put forward two pleas, the first alleging infringement of Article 7(1)(c) of Regulation No 207/2009, and the second alleging infringement of Article 7(1)(b) of the regulation.

11 As regards the first plea, the applicant claims that the Board of Appeal committed an error by holding that the mark applied for was descriptive of the goods listed in paragraph 4 above.

12 OHIM disputes the merits of the applicant's arguments.

13 Under Article 7(1)(c), of Regulation No 207/2009, trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, time of production of the goods or of rendering of the service, or other characteristics of the goods or service, are not to be registered. Those descriptive signs are deemed incapable of fulfilling the essential function of trade marks of indicating origin (Case C-191/01 *OHIM* v *Wrigley* [2003] ECR I-12447, paragraphs 29 and 30).

14 Article 7(1)(c) of Regulation No 207/2009 pursues an aim which is in the public interest, which requires that signs or indications which may serve, in trade, to designate characteristics of the goods or services for which registration is sought, may be freely used by all. That provision accordingly prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks (see, to that effect, Case C-173/04 P *Deutsche SiSi-Werke* v *OHIM* [2006] ECR I-551, paragraph 62 and the case-law there cited).

15 From that viewpoint, the signs and indications referred to in Article 7(1)(c) of Regulation No 207/2009 are those which may serve in normal usage from a consumer's point of view to designate, either directly or by reference to one of their essential characteristics, goods or services such as those in respect of which registration is sought (Case C-383/99 *P Procter & Gamble* v *OHIM* [2001] ECR I-6251, paragraph 39, and *Metso Paper Automation* v *OHIM* (*PAPERLAB*) [2005] ECR II-2383, paragraph 24).

16 It follows that, for a sign to be caught by the prohibition set out in Article 7(1)(c) of Regulation No 207/2009, there must be a sufficiently direct and specific link between the sign and those goods or services to enable the public concerned immediately to perceive, without further thought, a description of the goods and services in question or one of their characteristics (*PAPERLAB*, paragraph 15 above, paragraph 25).

17 Thus, the descriptiveness of a trade mark must be assessed, first, by reference to the goods or services in respect of which registration of the sign is sought and, second, by reference to the perception of the relevant public, which is composed of the consumers of those goods or services (Case T-207/06 *Europig* v *OHIM* (*EUROPIG*) [2007] ECR II-1961, paragraph 30).

18 As a preliminary point, it should be stated that a large part of the findings of fact made by the Board of Appeal in the contested decision and set out in paragraph 7 above are not in dispute. Thus the applicant does not dispute, first, the definition of the relevant public adopted by the Board of Appeal, second, the finding that, within the mark applied for, the relevant public will distinguish the elements 'eco' and 'door', third, the fact that the word 'door' has its usual meaning in English, and, fourth, the finding that the goods listed in paragraph 4 above may include doors and consume energy.

19 Furthermore, as these findings are not vitiated by error, the only issues that must be decided are the relevant public's perception of the element 'eco', and of the mark applied for as a whole, and whether or not the sign applied for is descriptive from the point of view of the relevant public with respect to the goods listed in paragraph 4 above.

20 First, as regards the element 'eco', the applicant claims that the relevant public will not immediately take this to mean 'environmentally friendly' or 'cost effective in terms of energy'.

21 However, as the Board of Appeal pointed out, the prefix 'eco' is an abbreviation commonly used for the word 'ecological'. The term 'eco' is often used when marketing goods and services to indicate the ecological origin of the product or the fact that it does not have any impact on the environment (judgment of 24 April 2012 in Case T-328/11 *Leifheit* v *OHIM* [2012] (*EcoPerfect*), not published in the ECR, paragraphs 25 and 45).

22 In these circumstances, the Board of Appeal rightly held that the element 'eco' would have been perceived by the relevant public as meaning 'ecological'.

23 Secondly, the applicant claims that the meaning of the mark applied for, perceived overall, is vague.

24 However, as the element 'eco' will be perceived to mean 'ecological', as is apparent from paragraphs 20 to 22 above, and the element 'door' has its normal meaning, the Board of Appeal rightly held that the term 'ecodoor' would be understood immediately by the relevant public to mean 'a door the construction and mode of operation of which are ecological'.

25 Thirdly, concerning the descriptive character of the mark applied for, the applicant claims that, as a result of its limitation of the list of goods in the application, the mark no longer covers components of the machines and devices, such as doors, but only the machines and devices themselves. In those circumstances, it is alleged that the mark applied for is not descriptive of the goods which it covers, including the goods listed in paragraph 4 above, but at most, of one of their components.

26 In that regard, a sign that is descriptive of a characteristic of a component incorporated in a product can also be descriptive of the product itself. That is the case where, from the perception of the relevant public, the characteristic of the component described by the sign could have a significant impact on the essential characteristics of the product itself. In this case, the relevant public will, immediately and without further thought, take the characteristic of the component described by the sign to mean the essential characteristics of the product in question.

27 In the present case, it is apparent from paragraphs 20 to 24 above that the mark applied for will be interpreted by the relevant public as meaning 'a door the construction and mode of operation of which are ecological'.

28 As the Board of Appeal pointed out in paragraph 17 of the contested decision, a finding that is not disputed by the applicant, the goods listed in paragraph 4 above may contain doors. In those circumstances, the mark applied for may describe the ecological qualities of the door which the product in question is equipped with.

29 Similarly, as was stated in paragraphs 19 and 20 of the contested decision, as regards the goods listed in paragraph 4 above, the ecological qualities of the door are important for the ecological character of the product in which it is installed.

30 Consumers are increasingly mindful of the ecological quality of goods, including their energy consumption, and of environmentally friendly manufacturing processes (see *EcoPerfect*, paragraph 21 above, paragraph 45). This is particularly true in relation to goods such as those listed in paragraph 4 above, especially since they consume energy. Consequently, as the applicant itself admits, the ecological character is an essential characteristic of these same products.

31 In those circumstances, the Board of Appeal was entitled to hold that, in the perception of the relevant public, the mark applied for was descriptive of an essential characteristic of the goods listed in paragraph 4 above, namely their ecological character, in that it described the ecological qualities of the door which they are equipped with.

32 The applicant also claims that the mark applied for does not make it possible to identify which characteristic or specific purpose relating to the environment is covered. There are several possibilities in that regard, such as environmentally friendly production, the use of natural materials, the possibility of environmentally friendly waste disposal, or environmentally friendly functioning.

33 On this point, it suffices to state that all the possibilities relied upon by the applicant refer to the fact that the product covered by the mark applied for has an ecological character because of the qualities of the door it is fitted with. In those circumstances, irrespective of the relevant public's exact interpretation of the mark applied for, it will be perceived as describing directly an essential quality of the goods concerned.

34 In light of the foregoing, the Board of Appeal rightly held that the mark applied for was descriptive of the goods listed in paragraph 4 above for the purposes of Article 7(1)(c) of Regulation No 207/2009.

35 Consequently the first plea must be rejected as unfounded.

36 Furthermore, under Article 7(1) of Regulation No 207/2009, it is sufficient that one of the absolute grounds for refusal listed in that provision obtains in order for the sign not to be registrable as a Community trade mark (see Case C-104/00 P *DKV* v *OHIM* [2002] ECR I-7561, paragraph 29, and Case T-183/03 *Applied Molecular Evolution* v *OHIM* (*APPLIED MOLECULAR EVOLUTION*) [2004] ECR II-3113, paragraph 29). In those circumstances, having regard to the finding made in paragraph 34 above, the appeal should be dismissed in its entirety, and there is no need to examine the second plea alleging infringement of Article 7(1)(b) of the regulation.

Costs

37 Under Article 87(2) of the Rules of Procedure of the Court, 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, in accordance with the form of order sought by OHIM.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders BSH Bosch und Siemens Hausgeräte GmbH to pay the costs.

Pelikánová Jürimäe Van der Woude

Delivered in open court in Luxembourg on 15 January 2013.

[Signatures]