

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 16 March 2006¹

I — Introduction

II — Legal context

2. Article 8(1)(b) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark² provides that:

1. The parties are in dispute over whether the trade mark MISS ROSSI, registered in Italy and France, precludes the registration of the mark SISSI ROSSI as a Community trade mark. However, the problems of the appeal are essentially procedural. They concern the refusal to admit facts and evidence not submitted in due time and the question of whether evidence not available to the Board of Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) may be produced before the Court of First Instance. The appellant also objects to the finding by the Court of First Instance that neither the women's footwear and bags nor the two marks are similar enough to preclude the registration of the mark SISSI ROSSI.

'Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered:

(a) ...

(b) 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

1 — Original language: German.

2 — OJ 1994 L 11, p. 1.

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.'

3. Article 63(3) of Regulation No 40/94 establishes the jurisdiction of the Court in trade mark cases:

'The Court of Justice has jurisdiction to annul or to alter the contested decision.'

4. In accordance with the 13th recital, the reference to the Court of Justice is to be understood as a reference to the Court of First Instance.

5. Article 73 of Regulation No 40/94 requires decisions of the Office to state the reasons on which they are based. They may be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments.

6. Article 74 of Regulation No 40/94 concerns the examination of the facts by OHIM:

'1. In proceedings before it the Office shall examine the facts of its own motion; however, in proceedings relating to relative grounds for refusal of registration, the Office shall be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought.

2. The Office may disregard facts or evidence which are not submitted in due time by the parties concerned.'

III — The facts

7. The Court of First Instance described the background to the dispute as follows:

'1 On 1 June 1998, the intervener [Sissi Rossi Srl] filed with the Office for Harmonization in the Internal Market

(Trade Marks and Designs) (“OHIM”) an application for a Community trade mark under ... Regulation (EC) No 40/94

respect of the goods “leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags.”

2 The mark in respect of which registration was sought is the word mark SISSI ROSSI.

3 The goods in respect of which registration was sought fall primarily within Class 18 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 are described as follows: “leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery.”

4 The trade mark application was published in *Community Trade Marks Bulletin*, No 12/1999, on 22 February 1999.

5 On 21 May 1999, Calzaturificio Rossi SpA filed a notice of opposition under Article 42(1) of Regulation No 40/94 to registration of the mark applied for in

6 The trade marks relied on in support of the opposition are the word mark MISS ROSSI, registered in Italy on 11 November 1991 (No 553 016), and the international mark MISS ROSSI, registered on the same day with effect in France (No 577 643). The goods designated by those earlier marks are “footwear” in Class 25 of the Nice Agreement.

7 At the request of the intervener, Calzaturificio Rossi SpA submitted evidence of genuine use of the earlier marks during the five years preceding publication of the application for registration of the mark in question.

8 Following a merger acquisition of Calzaturificio Rossi SpA, which was recorded by a notarial act on 22 November 2000, the applicant, now called Sergio Rossi SpA, became the proprietor of the earlier marks.

9 By decision of 30 April 2002, the Opposition Division refused the application for registration in respect of all the goods covered by the opposition. It found, essentially, that the applicant had proven genuine use of the earlier marks only in relation to the goods “women’s footwear” and that those goods and the goods “leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags” covered by the trade mark application were similar. Moreover, the Opposition Division held that the marks were similar in the mind of the French consumer.

examined and rejected the argument that the goods “women’s footwear” and “women’s bags” were similar because they were complementary. Therefore, there was, in its view, no likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94.’

IV — Judgment of the Court of First Instance and forms of order sought by the parties

10 On 28 June 2002, the intervener brought an appeal against the decision of the Opposition Division before OHIM.

8. Sergio Rossi SpA claimed that the Court of First Instance should annul this decision. After an exchange of pleadings and an oral procedure, by judgment of 1 March 2005 in Case T-169/03 *Sergio Rossi v OHIM* [2005] ECR II-685 the Court dismissed the action.

11 By decision of 28 February 2003 (“the contested decision”), the First Board of Appeal of OHIM annulled the decision of the Opposition Division and rejected the opposition. The Board of Appeal found, essentially, that the marks in question were only vaguely similar. Moreover, having compared the distribution channels, functions and nature of the goods in question, it found that, for the most part, the differences between the goods outweighed their few common points. In particular, it

9. Sergio Rossi SpA then brought the present appeal in which it claims that the Court should:

- (1) set aside in full the judgment under appeal for infringement of Articles 8 and 73 of Regulation No 40/94 and Articles 44(1) and 81 of the Rules of Procedure of the Court of First Instance;

- (2) in the alternative, set aside in part the judgment under appeal only as regards the registration of the trade mark SISSI ROSSI in respect of 'leather and imitations of leather';
- order the appellant to pay the costs.

11. Finally, Sissi Rossi Srl claims that the Court should:

- (3) in the further alternative, uphold the right to produce evidence, set aside in full the judgment under appeal and refer the present dispute back to the Court of First Instance for it to examine the evidence held to be inadmissible or, in the alternative and pursuant to the right to be heard under Article 73 of Council Regulation (EC) No 40/94, refer the present dispute to the Board of Appeal of OHIM for it to set a time-limit within which the parties can present their comments;
- (1) completely dismiss the appeal and all the appellant's claims and uphold the judgment of the Court of First Instance of 1 March 2005 in Case T-169/03; and hence
- (2) completely endorse the claims at first instance of the trade mark applicant and defendant at first instance;
- (4) order the respondent, as the unsuccessful party, to pay the costs pursuant to Article 69(2) of the Rules of Procedure of the Court of Justice of the European Communities of 2 May 1991.
- (3) order the appellant to pay the costs of both instances pursuant to Article 69 of the Rules of Procedure of the Court of Justice.

10. For its part, OHIM claims that the Court should:

- dismiss the appeal in so far as the appellant claims the setting-aside of the judgment under appeal in full or in part;

V — Analysis

12. Sergio Rossi SpA bases its appeal on four grounds: failure to state reasons in respect of the primary claim (see below under A), refusal to examine new evidence (see below

under B) and infringement of Article 8 of Regulation No 40/94 with respect to the similarity of the products and the marks (for both, see below under C).

Procedure of the Court of First Instance. Moreover, in the oral procedure the submission had been wrongly rejected as not having been made in due time because it was not, in fact, a question of a new plea but of further arguments in support of an existing plea.

A — Grounds for the judgment with respect to other products

13. In its principal head of claim at first instance Sergio Rossi SpA expressly requested the annulment of the decision of the Board of Appeal in so far as it related to the product group ‘Leather and imitations of leather and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags’. However, in paragraphs 45 to 48, the Court of First Instance restricted the subject-matter of the dispute to ‘women’s bags’ and ‘women’s footwear’, since nothing was pleaded concerning other products. A corresponding submission in the oral procedure was rejected by the Court of First Instance as not having been made in due time.

14. In reply, Sergio Rossi SpA points out that the similarity between *all* the products of the product group is mentioned in numerous passages of the application at first instance. Consequently, the Court should not have restricted the assessment of similarity to women’s bags and women’s footwear and had infringed its obligation to state reasons under Article 81 of the Rules of

15. It is not apparent that in the present case the obligation under Article 36, in conjunction with the first paragraph of Article 53, of the Statute of the Court of Justice to state the reasons for judgments has been infringed. The Court of First Instance explained, clearly and precisely, why it had dealt only with the comparability of women’s footwear and bags, namely, because Sergio Rossi SpA had produced admissible evidence only with respect to those particular products. There was nothing in the application concerning other products and the evidence introduced at the hearing had not been submitted in due time.

16. Whether the restriction on the subject-matter of the dispute and the rejection of evidence were justified has nothing to do with the statement of reasons. However, contrary to the heading of the plea in law, Sergio Rossi SpA raises the question not only of the statement of reasons but also of the application of the procedural law of the Court of First Instance in these two respects.

17. The restriction imposed by the Court of First Instance on the subject-matter of the dispute is justified on the basis of Article 44(1)(c) of its Rules of Procedure, according to which an application must state the

subject-matter of the dispute and a summary of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application. It is therefore necessary for the basic legal and factual particulars on which a case is based to be indicated coherently and intelligibly in the application itself.³

20. Under Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. No such matters of law or of fact are present. Consequently, the Court was right to reject this evidence as not having been made in due time.

21. This plea in law should therefore be rejected.

18. In the present case, in the application Sergio Rossi SpA indicated legal and factual particulars relating only to the similarity of women's footwear and bags. These arguments could not be directly applied to the other goods. Consequently, the claim was inadmissible in so far as it related to the similarity of women's footwear and goods other than bags.

B — *Refusal to examine new evidence*

1. Restriction on the evidence submitted to OHIM

19. Accordingly, contrary to the view taken by Sergio Rossi SpA, the submission made in the oral procedure was not an elaboration of the pleas and arguments admissible under Article 47(1) of the Rules of Procedure of the Court of First Instance. It was more in the nature of a new plea that extended the subject-matter of the dispute.

22. In paragraphs 24 and 25, the Court of First Instance refused to examine evidence which Sergio Rossi SpA was introducing for the first time. The purpose of an action brought before the Court under Article 63 of Regulation No 40/94 is to seek a review of the lawfulness of decisions of the Office's Boards of Appeal. Facts relied on before the Court without previously having been submitted in the proceedings before OHIM can affect the lawfulness of such a decision only if OHIM ought to have taken account of them of its own motion. As follows from the final clause in Article 74(1) of Regulation No 40/94, in proceedings relating to relative

³ — Case C-178/00 *Italy v Commission* [2003] ECR I-303, paragraph 6, regarding the similarly worded Article 38(1)(c) of the Rules of Procedure of the Court of Justice.

grounds for refusal of registration, OHIM's examination is to be restricted to the facts, evidence and arguments provided by the parties and the relief sought. Therefore it is not required to take account, of its own motion, of facts which were not submitted by the parties. Accordingly, such facts cannot call into question the lawfulness of a decision of a Board of Appeal.⁴

decision, the arguments of OHIM were voiced for the first time in the administrative proceedings. Thus, Sergio Rossi SpA had had no opportunity during the administrative procedure to defend itself against these arguments. Consequently, the Court of First Instance could not bar Sergio Rossi SpA from introducing new evidence into the court proceedings to rebut the decision of the Board of Appeal.

23. Sergio Rossi SpA objects to this evidence being excluded since Article 44(1)(e) of the Rules of Procedure of the Court of First Instance allows evidence to be offered in support.

26. As for OHIM and Sissi Rossi Srl, they agree with the judgment of the Court of First Instance. The latter notes that under Article 135(4) of its Rules of Procedure the Court cannot change the subject-matter of the proceedings before the Board of Appeal.

24. It argues that the judgments cited by the Court of First Instance are not comparable with the present proceedings. In the earlier cases, both the relevant division of OHIM and the Board of Appeal had rejected the applicants' claims. Therefore, on those occasions, the applicants had had sufficient opportunity to present and prove their case to OHIM.

27. I consider the ruling of the Court of First Instance on this point to be correct.

25. By contrast, the Opposition Division had accepted Sergio Rossi SpA's claim and it was only rejected by the Board of Appeal. In this

28. The Court's reason for excluding evidence not before the Boards of Appeal is that the legality of a Community measure falls to be assessed on the basis of the elements of fact and of law existing at the time when the

⁴ — The Court refers to Case T-247/01 *eCopy v OHIM (ECOPY)* [2002] ECR II-5301, paragraph 46; Case T-128/01 *Daimler-Chrysler v OHIM (Grille)* [2003] ECR II-701, paragraph 18; and Case T-115/03 *Samar v OHIM — Grotto (GAS STATION)* [2004] ECR II-2939, paragraph 13.

measure was adopted.⁵ This corresponds to the case-law of the Court of Justice in direct proceedings.⁶ However, it does not necessarily rule out the introduction of new evidence for the purpose of further clarifying the facts at the time of the decision.

29. The problem is dealt with more comprehensively in the State aid case-law. The legality of a Commission decision concerning State aid should be assessed by the Court of Justice, within the context of an action brought by the Member State concerned, in the light of the information available to the Commission at the time when the decision was adopted.⁷ This is justified because the Member State could have provided all the relevant information concerning the State aid in the administrative procedure. The Court of Justice extended this case-law even to complaining aid recipients since, despite their restricted status under procedural law, they too could have submitted such information to the Commission in due time.⁸

30. The limits of this exclusion of new evidence are defined in an action brought by a candidate for a post under civil service law. In these proceedings, the Court of Justice ruled that the legality of a decision on recruitment must also be appraised in the light of the information available to the appointing authority when it adopted that decision. Nevertheless, further evidence concerning the accuracy of the information relevant to the decision could be introduced in the court proceedings. The evidence in question was provided by the appointing authority because the complaining candidate disputed the qualifications of the successful candidate on which the appointment was based.⁹ The situation would have had to have been differently assessed if the complaining candidate had wished to introduce new evidence of his own qualifications which he had failed to introduce during the administrative procedure.

31. This case-law can also be applied to decisions in Community trade mark opposition proceedings. In this context, the parties have, in principle, sufficient opportunities to submit all the relevant evidence to OHIM. As the Court of First Instance rightly points out in paragraph 25 of the judgment, as follows from the final clause in Article 74(1) of Regulation No 40/94, in proceedings

5 — *ECOPY* (cited in footnote 4), paragraph 46, with reference to Case T-123/97 *Salomon v Commission* [1999] ECR II-2925, paragraph 48, and Case T-126/99 *Graphischer Maschinenbau v Commission* [2002] ECR II-2427, paragraph 33.

6 — Joined Cases 15/76 and 16/76 *France v Commission* [1979] ECR 321, paragraph 7, for the closure of the accounts of the European Agricultural Guidance and Guarantee Fund, and in Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt and Stapf* [1997] ECR I-4475, paragraph 46, for the verification of the validity of a regulation under the reference for a preliminary ruling procedure.

7 — Case 234/84 *Belgium v Commission* [1986] ECR 2263, paragraph 16; Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 33; and Case C-276/02 *Spain v Commission* [2004] ECR I-8091, paragraph 31.

8 — Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-7869, paragraph 168 et seq.

9 — Case C-121/01 P *O'Hannrachain v Parliament* [2003] ECR I-5539, paragraph 28 et seq.

relating to relative grounds for refusal of registration, that is, in particular, in opposition proceedings, OHIM's examination is even to be restricted to the facts, evidence and arguments provided by the parties and the relief sought.¹⁰ Therefore, despite the obligation to examine the facts of its own motion laid down in the first clause in Article 74(1) of Regulation No 40/94, it would be prevented from taking subsequently introduced evidence on its own initiative.

32. Furthermore, under Article 74(2) of Regulation No 40/94, OHIM may even disregard facts or evidence not submitted in due time by the parties concerned.¹¹ However, evidence that was never before OHIM was, in any event, not submitted in due time and so cannot serve as a measure of the legality of the OHIM's decision.

33. Similarly, no obligation to take new evidence follows from the jurisdiction granted to the Court under Article 63 of Regulation No 40/94 to alter an OHIM decision. Thus, there can be no question of alteration unless the OHIM decision is at

least partially illegal. However, the legality must be determined on the basis of the information that was before OHIM.

34. Sergio Rossi SpA's reliance on the fact that only the Board of Appeal rejected its opposition, whereas the Opposition Division allowed it, cannot lead to another result. Thus, under OHIM procedural law, even in this situation Sergio Rossi SpA had ample opportunity to introduce all relevant evidence. A possible infringement of its procedural rights by OHIM should be dealt with not within the context of the offering of evidence but as an independent plea in law.

35. Consequently, the Court of First Instance was right to refuse to examine the legality of the decision of the Board of Appeal in the light of evidence that was not before it. This plea in law should therefore also be rejected.

2. Alternative plea — right to be heard

36. In the alternative, Sergio Rossi SpA claims infringement of the second sentence of Article 73 of Regulation No 40/94 by the

¹⁰ — This argument cannot, however, support the *ECOPY* and *Grille* judgments (both cited in footnote 4) since they concerned absolute grounds for refusing registration in accordance with Article 7 of Regulation No 40/94.

¹¹ — Recognised by the judgment of the Court of First Instance in Case T-388/00 *Institut für Lernsysteme v OHIM — Educational Services (ELS)* [2002] ECR II-4301, paragraph 27 et seq.

Board of Appeal since it was not able to comment on new arguments by OHIM before the Board of Appeal rejected its opposition. Sergio Rossi SpA first made this submission in the oral procedure before the Court of First Instance.

Rossi SpA had comprehensively pleaded the similarity of the products at issue. Finally, OHIM notes that the Board of Appeal was not under any obligation to inform Sergio Rossi SpA in advance how it intended to rule so as to enable it to submit further evidence.

37. In paragraphs 20 to 22, the Court of First Instance rejected this submission as a new plea not introduced in due time in accordance with Article 48(2) of its Rules of Procedure since it was not mentioned in the application. Sergio Rossi SpA was already aware when it lodged its application that the Board of Appeal had not warned of possible new considerations.

40. According to Sissi Rossi Srl, it is not for the Court of Justice but for the Court of First Instance to judge whether the Board of Appeal infringed the right to be heard.

38. In reply, in its appeal, Sergio Rossi SpA points out that this submission merely explained the plea in law within the context of which the new evidence was introduced. The Court should either have admitted the new evidence or annulled the decision of the Board of Appeal for infringement of the right to be heard.

41. Although with this plea Sergio Rossi SpA chose the right channel for introducing new evidence into the proceedings, its argument cannot prevail.

39. OHIM, on the other hand, agrees with the Court of First Instance and, moreover, considers that the Board of Appeal respected Sergio Rossi SpA's right to a fair hearing. The Board of Appeal had transmitted Sissi Rossi Srl's application to Sergio Rossi SpA so that it might comment. In its comments, Sergio

42. OHIM's failure to take account of certain evidence can be brought before the Court of First Instance only in the form of an objection on the grounds of procedural error since — as explained above — in opposition proceedings the taking of evidence is a task for OHIM. If the failure to take account is a result of the respondent's having had no opportunity to introduce the evidence, then

there may have been an infringement of the right to be heard.¹²

brought. Moreover, the *ECOPY* judgment of 12 December 2002 was already available for consultation when it lodged the application on 19 May 2003.¹⁵

43. In accordance with the second sentence of Article 73 of Regulation No 40/94, which establishes the right to be heard in OHIM proceedings, OHIM decisions are to be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments. New aspects may relate, in particular, to the taking into account of grounds for refusal of registration not yet discussed,¹³ but may also lie in the first appraisal of certain aspects by the Board of Appeal.¹⁴ A claim of infringement of the right to be heard is therefore an obvious way of introducing new evidence into the proceedings.

45. Since an appeal to the Court of Justice under Article 113(2) of its Rules of Procedure cannot alter the subject-matter of the dispute before the Court of First Instance, a plea that was not submitted to the latter in due time can likewise no longer be taken into consideration in the appeal proceedings. For this reason, the Court of Justice cannot substantively examine whether OHIM gave Sergio Rossi SpA a fair hearing. This ground for appeal is to that extent inadmissible.

44. In the proceedings before it, however, the Court of First Instance rightly dismissed this plea as not having been submitted in due time. In fact, it was first put forward at the hearing, but was not based — as required by Article 48(2) of the Rules of Procedure of the Court of First Instance — on matters of law or of fact which come to light in the course of the procedure. The procedure of the Board of Appeal was already known to Sergio Rossi SpA when the action was

46. Consequently, this ground for appeal should also be rejected, in part as unfounded and for the rest as inadmissible.

C — Article 8 of Regulation No 40/94

47. Article 8(1)(b) of Regulation No 40/94 states that an opposition to the registration

12 — If the evidence was introduced but ignored, then it is possible to plead, *inter alia*, insufficient investigation of the facts.

13 — See Case T-122/99 *Procter & Gamble v OHIM (Soap bar shape)* [2000] ECR II-265, paragraphs 39 to 47, and Case T-34/00 *Eurocool Logistik v OHIM (EUROCOOL)* [2002] ECR II-683, paragraphs 17 to 26.

14 — See Case T-36/01 *Glaverbel v OHIM (Surface of a plate of glass)* [2002] ECR II-3887, paragraph 48 *et seq.*

15 — According to the competent services of the Court of Justice, this judgment was already available in Italian on the day of delivery and was also published on the internet.

of a mark will succeed 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

1. Similarity of the products

50. Although the Court of First Instance recognised certain points of resemblance between women's bags and women's footwear, it finally denied that they were similar.

48. Sergio Rossi SpA puts forward two pleas against the application of this provision. It claims that the Court of First Instance infringed it when it confirmed the findings of the Board of Appeal concerning the insufficient similarity of women's footwear and bags and the marks MISS ROSSI and SISSI ROSSI.

51. For its part, Sergio Rossi SpA claims that the Court of First Instance failed to take sufficient account of the fact that for women, the relevant consumer group, the matching of shoes and bags is a matter of great importance. Today, moreover, with these products it is no longer possible to consider only the primary function, since the dictates of fashion, which require shoes and bags to match, have to be taken into account. OHIM agrees and takes the view that the two product groups are similar to each other.

49. It should first be pointed out that, in accordance with settled case-law, only the Court of First Instance is competent to appraise findings of fact. Therefore, save where the clear sense of the evidence presented to the Court of First Instance has been distorted, the appraisal of the facts does not constitute a point of law which is subject, as such, to review by the Court of Justice.¹⁶ Pleas that merely call into question the appraisal of the facts by the Court of First Instance are therefore inadmissible.

52. However, with this argument Sergio Rossi SpA merely calls into question the appraisal of the facts by the Court of First Instance and, as Sissi Rossi Srl rightly points out, this is inadmissible in appeal proceedings.

53. This plea in law must therefore be rejected as inadmissible.

¹⁶ — Case C-390/95 P *Antillean Rice Mills and Others v Commission* [1999] ECR I-769, paragraph 29, and Case C-237/98 P *Dorsch Consult v Council and Commission* [2000] ECR I-4549, paragraph 35 et seq.

2. Similarity of the marks

Sergio Rossi SpA points out that in France, the relevant market, marks using the family name ROSSI have been regularly rejected on account of the earlier mark MISS ROSSI.

54. The Court of First Instance considered that it was the first words of the marks, that is MISS and SISSI, respectively, that carried the most weight. It therefore held that the use of the same word ROSSI in both cases was less important. Accordingly, it ended by concluding that the two marks were only moderately similar.

56. With this submission too Sergio Rossi SpA calls into question only the appraisal of the facts by the Court of First Instance. Therefore this plea must also be rejected as inadmissible.

D — Conclusion

57. The pleas are in part inadmissible and for the rest unfounded.

55. Sergio Rossi SpA sees in this conclusion a contradiction of the *ENZO FUSCO* judgment of the Court of First Instance which established the similarity of the marks ANTONIO FUSCO and ENZO FUSCO.¹⁷ From the *Nichols* judgment of the Court of Justice, it follows that a possibly wider distribution of the surname ROSSI cannot lead to its being deprived of the distinctiveness that the Court of First Instance attributed to the surname FUSCO.¹⁸ Finally,

VI — Costs

58. Article 122, in conjunction with Article 118 and Article 69(2) of the Rules of Procedure of the Court of Justice, requires the unsuccessful party to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Sergio Rossi SpA has been unsuccessful with its appeal, it must be ordered to pay the costs.

¹⁷ — Case T-185/03 *Fusco v OHIM — Fusco International (ENZO FUSCO)* [2005] ECR II-715, paragraph 67: 'In the present case, ... since the Italian consumer generally attributes greater distinctiveness to the surname than the forename, he will keep in mind the name "Fusco" rather than the forenames "Antonio" or "Enzo".'

¹⁸ — Case C-404/02 *Nichols* [2004] ECR I-8499.

VII — Conclusion

59. I therefore propose that the Court of Justice should:

- (1) dismiss the appeal;
- (2) order Sergio Rossi SpA to pay the costs.