

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

6 September 2006^{*}

In Case T-6/05,

DEF-TEC Defense Technology GmbH, established in Frankfurt am Main (Germany), represented by H. Daniel, lawyer,

applicant,

v

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

defendant,

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

Defense Technology Corporation of America, established in Jacksonville, Florida (United States), represented by G. Würtenberger and R. Kunze, lawyers,

* Language of the case: English.

ACTION brought against the decision of the Second Board of Appeal of OHIM of 8 November 2004 (Case R 493/2002-2), relating to opposition proceedings between DEF-TEC Defense Technology GmbH and Defense Technology Corporation of America,

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

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 12 January 2005,

having regard to the response of the intervener lodged at the Registry of the Court of First Instance on 18 April 2005,

having regard to the response of OHIM lodged at the Registry of the Court of First Instance on 2 June 2005,

further to the hearing on 7 March 2006,

gives the following

Judgment

Legal context

- 1 Article 8(3) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended, states that upon opposition by the proprietor of the trade mark, a trade mark is not to be registered where an agent or representative of the proprietor of the trade mark applies for registration thereof in his own name and without the proprietor's consent, unless the agent or representative justifies his action.
- 2 Rules 17, 55, 61, 65, 79 and 96 of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 (OJ 1995 L 303, p. 1) ('the implementing regulation') are worded as follows:

'Rule 17

Use of languages in opposition proceedings

(1) Where the notice of opposition is not filed in the language of the application for registration of the Community trade mark, if that language is one of the languages of the Office, or in the second language indicated when the application was filed, the opposing party shall file a translation of the notice of opposition in one of those languages within a period of one month from the expiry of the opposition period.

(2) Where the evidence in support of the opposition as provided for in Rule 16(1) and (2) is not filed in the language of the opposition proceedings, the opposing party shall file a translation of that evidence into that language within a period of one month from the expiry of the opposition period or, where applicable, within the period specified by the Office pursuant to Rule 16(3).

...

Rule 55

Signature, name, seal

(1) Any decision, communication or notice from the Office shall indicate the department or division of the Office as well as the name or the names of the official or officials responsible. They shall be signed by the official or officials, or, instead of a signature, carry a printed or stamped seal of the Office.

(2) The President of the Office may determine that other means of identifying the department or division of the Office and the name of the official or officials responsible or an identification other than a seal may be used where decisions, communications or notices are transmitted by telecopier or any other technical means of communication.

...

Rule 61

General provisions on notifications

(1) In proceedings before the Office, any notifications to be made by the Office shall take the form of the original document, of a copy thereof certified by, or bearing the seal of, the Office or of a computer print-out bearing such seal. Copies of documents emanating from the parties themselves shall not require such certification.

(2) Notifications shall be made

(a) by post in accordance with Rule 62;

(b) by hand delivery in accordance with Rule 63;

(c) by deposit in a post box at the Office in accordance with Rule 64;

(d) by telecopier and other technical means in accordance with Rule 65;

(e) by public notification in accordance with Rule 66.

...

Rule 65

Notification by telecopier and other technical means

(1) Notification by telecopier shall be effected by transmitting either the original or a copy, as provided for in Rule 61(1), of the document to be notified. The details of such transmission shall be determined by the President of the Office.

(2) Details of notification by other technical means of communication shall be determined by the President of the Office.

...

Rule 79

Communication in writing or by other means

Applications for the registration of a Community trade mark as well as any other application provided for in the Regulation and all other communications addressed to the Office shall be submitted as follows:

- (a) by submitting a signed original of the document in question at the Office, such as by post, personal delivery, or by any other means; annexes to documents submitted need not be signed;

- (b) by transmitting a signed original by telecopier in accordance with Rule 80;

- (c) by telex or telegram in accordance with Rule 81;

- (d) by transmitting the contents of the communication by electronic means in accordance with Rule 82.

...

Rule 96

Written proceedings

(1) Without prejudice to Article 115(4) and (7) of ... Regulation [No 40/94], and unless otherwise provided for in these Rules, in written proceedings before the Office any party may use any language of the Office. If the language chosen is not the language of the proceedings, the party shall supply a translation into that language within one month from the date of the submission of the original document. Where the applicant for a Community trade mark is the sole party to proceedings before the Office and the language used for the filing of the application for the Community trade mark is not one of the languages of the Office, the translation may also be filed in the second language indicated by the applicant in his application.

(2) Unless otherwise provided for in these Rules, documents to be used in proceedings before the Office may be filed in any official language of the Community. Where the language of such documents is not the language of the proceedings the Office may require that a translation be supplied, within a period specified by it, in that language or, at the choice of the party to the proceeding, in any language of the Office.’

- 3 Under Article 1 of Decision No EX-97-1 of the President of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) of 1 April 1997 determining the form of decisions, communications and notices from OHIM, where any decision, communication or notice from OHIM is transmitted by telecopier, it is to be a sufficient identification of the department or division of OHIM and of the responsible official or officials if the denomination of the department or division is stated in the letterhead and if at the end of the decision, communication or notice, the full name of the responsible official or officials is indicated. The indication of the name or names may be accompanied by the facsimile of the signature of the responsible official or officials.

Background to the dispute

- 4 On 16 September 1997 DEF-TEC Defense Technology GmbH filed an application for a Community trade mark at OHIM pursuant to Regulation No 40/94.

- 5 The trade mark for which registration was sought is the figurative mark FIRST DEFENSE AEROSOL PEPPER PROJECTOR, reproduced below:



- 6 The goods in respect of which registration was sought are in Classes 5, 8 and 13 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. For each of those classes, the goods correspond to the following descriptions:

- 'pharmaceutical, veterinary and sanitary preparations; dietetic substances adapted for medical use, food for babies; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides', in Class 5;

- 'hand tools and implements (hand operated); cutlery; side arms; razors', in Class 8;

- 'ammunition, projectiles, disabling sprays (chemical irritants), other objects for attack or defence', in Class 13.

- 7 The application for the Community trade mark was published in *Community Trade Marks Bulletin* No 93/1998 of 7 December 1998.
- 8 In October 1996 Defense Technology Corporation of America, a corporation established in Jacksonville, purchased the assets of Defense Technology Corporation of America ('the Wyoming corporation'), which is subject to the law of the US State of Wyoming. The intervener thereby acquired the FIRST DEFENSE mark.
- 9 On 8 March 1999 the intervener gave notice of opposition under Article 42 of Regulation No 40/94 to registration of the mark applied for.
- 10 In support of its opposition, the intervener relied, inter alia, on Article 8(3) of Regulation No 40/94, contending that the applicant was its agent within the meaning of that provision and that the applicant had applied, without the intervener's consent, for registration of a sign almost identical to the series of marks registered in the United States of which the intervener was the proprietor. In the present case the opposition was based on the United States FIRST DEFENSE marks covered by the following registrations:
- registration No 1 763 666 of 6 April 1993 for the word mark FIRST DEFENSE, in respect of a 'non-explosive defensive weapon in the nature of an organic irritant packaged in an aerosol container' in Class 13;
 - registration No 1 885 967 of 28 March 1995 for a figurative mark consisting in a device representing a flying eagle, in respect of goods in Class 13;

— registration No 1 792 165 of 7 September 1993 for the figurative mark DEF-TEC PRODUCTS inside a triangular device, in respect of a range of goods in Class 13.

- 11 By decision of 21 March 2002, the Opposition Division upheld the opposition in part, in so far as it was based on Article 8(3) of Regulation No 40/94, and thus rejected the application for a Community trade mark in respect of ‘side arms’ in Class 8 and ‘ammunition, projectiles, disabling sprays (chemical irritants), other objects for attack or defence’ in Class 13.
- 12 On 21 May 2002 the applicant filed a notice of appeal at OHIM under Articles 57 to 59 of Regulation No 40/94 against the decision of the Opposition Division.
- 13 By decision of 8 November 2004 (‘the contested decision’), the Second Board of Appeal of OHIM dismissed the appeal and ordered the applicant to pay the costs.

Forms of order sought

- 14 The applicant claims that the Court should:

— annul the contested decision;

- order OHIM to pay the costs.

15 OHIM contends that the Court should:

- dismiss the application for annulment as regards the first plea;
- dismiss the application as regards the second plea if the Court considers it appropriate to maintain the outcome of the contested decision with different reasoning and, in such a case, order the applicant to pay the costs;
- in the alternative, uphold the application only as regards the second plea, remitting the case to the Boards of Appeal and ordering each party to bear its own costs.

16 The intervener contends that the Court should:

- dismiss the application;
- order the applicant to pay the costs.

Law

- 17 In support of its action, the applicant puts forward two pleas. By the first plea, it claims that the decision of the Opposition Division, which was not duly signed, is void. By the second plea, it maintains that the contested decision infringes Article 8(3) of Regulation No 40/94.

The first plea: the decision of the Opposition Division is void

Arguments of the parties

- 18 The applicant submits that the decision of the Opposition Division, which was transmitted to it only by telefax, is void. It does not bear the signatures of the members of that division who adopted it. It is clear from Rule 79(a) and (b) of the implementing regulation that one of the methods of sending communications to OHIM is to transmit a signed original by telecopier. The fact that that contention was not raised before the Board of Appeal cannot rule out the conclusion that the decision of the Opposition Division is void.
- 19 OHIM contends that the plea is inadmissible in so far as the applicant requests the Court to declare that the decision of the Opposition Division is void. Furthermore, it asserts that the applicant is putting forward that plea for the first time, as it did not

contest the validity of the decision of the Opposition Division before the Board of Appeal. If the present plea is to be understood as arguing that the contested decision should be annulled because the Board of Appeal ought to have found of its own motion that the decision of the Opposition Division was vitiated by failure to comply with an essential procedural requirement, that argument is not well founded. OHIM observes that Rules 55, 61 and 65 of the implementing regulation must apply to the present case. Rule 55(2) empowers the President of OHIM to authorise various means of communication of decisions of OHIM, without necessarily requiring a signature of the members who adopted it. Decision No EX-97-1 in particular was adopted for that purpose. Consequently, a decision of OHIM which bears the printed names of the members of the Opposition Division who issued it complies with all the formal requirements laid down for its adoption.

20 The intervener takes the view that the plea is inadmissible.

Findings of the Court

— Admissibility

21 By virtue of Article 63(1) of Regulation No 40/94, actions may be brought before the Community judicature only against decisions of the Boards of Appeal. It must accordingly be held that it is only pleas directed against the decision of the Board of Appeal which are admissible in such an action (Case T-303/03 *Lidl Stiftung v OHIM — REWE-Zentral (Salvita)* [2005] ECR II-1917, paragraph 59).

22 However, the extent of the examination which the Board of Appeal must conduct in respect of the decision under appeal is not, in principle, determined exclusively by the grounds relied on by the party who has brought the appeal. Accordingly, even if the party who brought the appeal has not raised a specific ground of appeal, the Board of Appeal is none the less bound to examine whether or not, in the light of all the relevant matters of fact and of law, the decision under appeal could be lawfully adopted (see, to that effect, Case T-308/01 *Henkel v OHIM — LHS (UK) (KLEENCARE)* [2003] ECR II-3253, paragraph 29, and Case T-57/03 *SPAG v OHIM — Dann and Backer (HOOLIGAN)* [2005] ECR II-287, paragraph 18).

23 In this case, the applicant contends before the Court that the decision of the Opposition Division is void because it does not have signatures. Although that plea was not put forward before the Board of Appeal, and assuming that an infringement of the specific rules applicable were proven, the Board of Appeal should have raised it of its own motion.

24 The plea of inadmissibility put forward by OHIM and the intervener must therefore be rejected, since the Court has jurisdiction to determine whether the Board of Appeal failed to find of its own motion that the absence of signatures on the decision of the Opposition Division infringed an essential procedural requirement.

— Substance

25 First of all, it should be noted that the implementing regulation contains procedural provisions applicable to the present case. Contrary to what the applicant maintains,

Rule 79(a) and (b) of the implementing regulation cannot apply, given that it relates to the submission of communications to OHIM. Rules 55, 61 and 65 of the implementing regulation concern communications from OHIM and, accordingly, are the provisions which should be applied in the present case.

26 According to Rule 55 of the implementing regulation, any decision, communication or notice from OHIM is to indicate the department or division of OHIM as well as the name or the names of the official or officials responsible. It must be signed by the official or officials, or, instead of a signature, carry a printed or stamped seal of OHIM. The President of OHIM may also determine that other means of identifying the department or division of OHIM may be used where decisions, communications or notices are transmitted by telecopier or any other technical means of communication. Rule 61(2)(d) of the implementing regulation recognises the validity of notifications of decisions made by telecopier; the details of such transmission being determined by the President of OHIM in accordance with Rule 65(1) of the implementing regulation. Accordingly, under Article 1 of Decision No EX-97-1, it is sufficient if the denomination of the department or division is stated in the letterhead and, at the end of the decision, communication or notice, the full name of the responsible official or officials is indicated.

27 In this case it must be noted that the decision of the division includes, first, identification of the department and division of OHIM which adopted it and, secondly, the names of the officials responsible. Consequently, communication by telecopier of the decision of the Opposition Division without a signature complies with the requirements fixed by the implementing regulation and by Decision No EX-97-1. The contested decision was therefore validly communicated to the applicant.

28 The first plea must therefore be rejected as unfounded.

The second plea: infringement of Article 8(3) of Regulation No 40/94

Arguments of the parties

- 29 The applicant observes that in a declaration of 1 June 1996 Mr Oliver, the president of the Wyoming corporation, gave clear and specific consent for the applicant to arrange for registration of the mark applied for. Consequently, the purchase of the assets of the Wyoming corporation did not transfer any trade mark rights to the intervener in relation to the marks listed in the declaration of 1 June 1996, since those rights had been waived before the purchase agreement was concluded.
- 30 The applicant also claims that the intervener never attempted to revoke Mr Oliver's consent and merely asserted that it had not been informed of such consent. Moreover, the applicant cannot be held responsible for any failure by Mr Oliver to inform the intervener of the existence of the declaration of 1 June 1996 as the applicant took the view that it was not its task to check whether Mr Oliver had revealed the existence of the declaration of 1 June 1996. Any such lack of information concerns only the parties to the asset purchase agreement in respect of the Wyoming corporation, as those parties were bound to exercise due diligence in respect of the conclusion of that agreement.
- 31 Moreover, the applicant observes that no provision of Regulation No 40/94 indicates that there are temporal limits on the validity of a consent. Therefore the fact that the application for registration was not made until 1997 cannot affect the validity of the consent received. Furthermore, the Board of Appeal cannot support its position by stating that it is unusual for trade mark rights to be assigned for nothing in return,

because that declaration concerns business considerations which are outside its sphere of competence. Finally, the applicant notes that the declaration of consent represents sufficient justification for the filing of the trade mark applied for under Article 8(3) of Regulation No 40/94.

32 OHIM shares the applicant's view regarding the declaration of 1 June 1996, considering that that declaration contained the clear and specific consent of the proprietor of the mark at that time, authorising the applicant to apply for registration of the mark referred to in Europe. Furthermore, assuming that Mr Oliver did not inform the intervener of the existence of the declaration, that circumstance cannot affect the validity of the consent given. In so far as the contested decision did not acknowledge the validity of the consent received on 1 June 1996, the Board of Appeal reached an erroneous conclusion. However, that error does not make the contested decision void.

33 OHIM considers that the intervener is not bound by the consent of the president of the Wyoming corporation. In any event, OHIM takes the view that whether the intervener is bound by the previous proprietor's consent depends on the interpretation of the relevant contractual clauses and the various undertakings of the parties, in particular in the light of the United States contract law applicable. However, foreign law is a question of fact which was not examined by the Board of Appeal and, for that reason, the Court cannot base a finding on facts which were not considered in the contested decision.

34 First, assuming that the consent survived the purchase of the Wyoming corporation's assets by the intervener, OHIM takes the view that it should be determined whether the consent should be deemed to have been revoked on the day on which the business relationship between the applicant and the intervener came to an end. In that respect, OHIM contends that the declaration of 1 June 1996 is a waiver of the right to oppose the application for registration of the mark such as that made by the applicant and not an assignment of rights strictly speaking. Such a waiver could result in a unilateral declaration which is binding only on the person who made it, having effect merely *inter partes*. In any event, if it is accepted that the end of the business relationship with the agent means that there is no reason for the continued existence of the consent, the consent could not survive that purchase.

35 Secondly, assuming that the consent did not survive the purchase of the Wyoming corporation's assets by the intervener, OHIM takes the view that it must then be determined whether the applicant had a valid justification which could offset the lack of consent. It observes that the Board of Appeal appears to have accepted that the applicant knew, or at least ought to have known, that the intervener had not been informed of the June 1996 declaration, since it was not for the latter to prove that it was not bound by that declaration. Accordingly, the applicant ought to have informed the intervener of it or let it know of its intention to file the application for registration; the contested decision recognised that the applicant had acted in bad faith. In addition, by deliberately remaining silent *vis-à-vis* the intervener, the applicant lost any opportunity to claim that the application was filed with the proprietor's consent. In any event, the notice of opposition by the intervener demonstrates that it certainly does not accept the application for registration made by the applicant.

36 Consequently, OHIM takes the view that the Court should dismiss the present action if it considers it appropriate to maintain the outcome of the contested

decision with an alternative reasoning or, should that not be the case, grant the application only in relation to the second plea and remit the case to the Boards of Appeal.

- 37 The intervener notes that it is for the applicant to prove that the consent of the trade mark proprietor was validly given. Furthermore, the intervener submits that the declaration of 1 June 1996 should not be taken into account by the Court, since a translation of that declaration into English, the language of proceedings adopted in this case before OHIM, was provided by the applicant only in the present proceedings. According to Regulation No 40/94 and the implementing regulation, where evidence is not filed in the language of proceedings the party relying thereon must file a translation into the language of proceedings. In any event and notwithstanding that infringement of Regulation No 40/94, the declaration of 1 June 1996 cannot prove the existence of a consent validly given by Mr Oliver; ultimately the applicant did not furnish evidence to show that its application for registration was justified.

Findings of the Court

- 38 It should be noted that Article 8(3) of Regulation No 40/94 is designed to prevent the misuse of a mark by the trade mark proprietor's agent, as the agent may exploit the knowledge and experience acquired during its business relationship with the proprietor and therefore improperly benefit from the effort and investment which the trade mark proprietor himself made.

39 In this case, since the applicant did not challenge before the Court its position as agent of the trade mark proprietor, it must be determined whether the applicant obtained the trade mark proprietor's consent to make the application for registration it contemplated.

40 Accordingly, as regards the existence of clear, specific and unconditional consent given by the trade mark proprietor authorising the applicant to make the trade mark registration referred to, the Board of Appeal took the view that such consent cannot be inferred from the declaration of 1 June 1996.

41 OHIM contends in the written pleadings that the Board of Appeal wrongly concluded that the declaration of 1 June 1996 did not contain clear, specific and unconditional consent. As regards OHIM's procedural position in that respect, the Court took the view in Case T-379/03 *Peek & Cloppenburg v OHIM (Cloppenburg)* [2005] ECR II-4633, paragraph 22, that OHIM cannot be required to defend systematically every contested decision of a Board of Appeal or automatically to claim that every action challenging such a decision should be dismissed (Case T-107/02 *GE Betz v OHIM — Atofina Chemicals (BIOMATE)* [2004] ECR II-1845, paragraph 34). However, it cannot seek forms of order annulling or altering the decision of the Board of Appeal on a point not raised in the application or put forward pleas not raised in the application (see, to that effect, Case C-106/03 *P Vedial v OHIM* [2004] ECR I-9573, paragraph 34).

42 It follows that OHIM is entitled to depart from the reasoning of the Board of Appeal by putting forward legal views different from those expounded in the contested decision, provided that the arguments proposed by OHIM do not amount to new grounds for annulment.

43 As to the intervener's argument that the Board of Appeal ought not to have taken the declaration of 1 June 1996 into account because it was not translated into the language of proceedings, whereas the Board had refused the documents provided by the intervener as they had not been translated, it should be pointed out that the decision to refuse those documents was based on Rule 17(2) of the implementing regulation. That rule derogates from the rules governing languages generally applicable to the production and use of documents in proceedings before OHIM, as laid down in Rule 96(2) of that regulation, according to which, where those documents are not in the language of the proceedings, OHIM may require a translation to be produced in that language or, at the option of the party to the proceedings, in one of the languages of OHIM within the period laid down by it. Rule 17(2) of the implementing regulation therefore places on a party originating inter partes proceedings a burden greater than that generally placed on parties in proceedings before OHIM. That difference is justified by the need to observe fully the principle of the right to be heard and to ensure equality of arms between the parties in inter partes proceedings (Case T-232/00 *Chef Revival USA v OHIM — Massagué Marín (Chef)* [2002] ECR II-2749, paragraph 42).

44 As regards the translation of supplementary documents, that is left to the discretion of OHIM, in accordance with Rule 96(2) of the implementing regulation. In this case, the applicant complied with the requirement laid down in Rule 96(1) of the implementing regulation since it lodged an appeal in German and supplied a translation into English within the applicable time-limit (paragraphs 11 and 14 of

the contested decision). The fact that the Board of Appeal did not consider it necessary, pursuant to Article 96(2) of the implementing regulation, to obtain a translation of the declaration of 1 June 1996, a document annexed to the appeal, cannot constitute an infringement of the principle of equal treatment, given that Rule 96(1) and (2) of the implementing regulation govern objectively different situations.

45 As regards the content of the declaration of 1 June 1996, it should be noted that it stated that the Wyoming corporation 'expressly waives all of the rights' to the mark to be registered for Europe. Furthermore, the annex to the declaration of 1 June 1996, which the Board of Appeal allowed to be submitted in evidence, clearly stated which marks were covered by that declaration.

46 Moreover, the applicant and the Wyoming corporation were engaged in real and genuine commercial relations when the declaration of 1 June 1996 was adopted, a fact which may explain why the previous proprietor decided to grant that consent for no financial consideration. In any event, the fact that such an agreement may be atypical cannot, in itself, affect the validity of the consent effectively given, as inferred by the Board of Appeal.

47 As regards the possible failure by Mr Oliver to inform the intervener of the existence of the declaration of 1 June 1996, that cannot affect the validity of the consent received on that date.

48 The consent received by the applicant in June 1996 must therefore be regarded as being clear, specific and unconditional on that date.

49 As to whether the consent was still valid on the day of the application for registration, 16 September 1997, it should be noted that a change of proprietor of the trade mark took place between the day on which the consent was given and the day on which the application for registration of the mark was made. It is clear, however, that since the Board of Appeal wrongly took the view that the declaration of 1 June 1996 did not contain clear, specific and unconditional consent authorising the applicant to file the application for registration of the mark in question, it did not consider whether that consent had survived the purchase of the assets of the Wyoming corporation. The answer to that question is largely dependent on the law which should be applied to the legal and commercial relations between the parties, but since it was not examined during the proceedings before OHIM, the Court cannot rule on that point.

50 The Board of Appeal ought, in the light of the law applicable to the legal and commercial relations between the parties, to have determined whether and, if necessary, to what extent those relations had in fact survived the purchase of the assets of the Wyoming corporation, so that the intervener assumed the rights and, possibly, the obligations of the previous proprietor of the mark. In that context, it was a matter for the Board to determine, in particular, whether the consent obtained by the applicant on 1 June 1996 had survived the purchase of the assets of the Wyoming corporation. If so, it ought to have examined whether, on the day of the application for registration of the mark, the intervener was still bound by that consent. If the intervener was no longer bound by that consent, the Board of Appeal ought then to have determined whether the applicant had a valid justification which could offset the lack of such consent.

51 It follows from the foregoing that the second plea must be upheld inasmuch as the Board of Appeal failed to have regard to the validity of the consent of 1 June 1996, and the contested decision must therefore be annulled.

Costs

- 52 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since OHIM has been unsuccessful it must be ordered to pay, as well as its own costs, the applicant's costs, except those relating to the intervention, in accordance with the form of order sought by it. Since the applicant has not applied for costs against the intervener, as it could still have done at the hearing, it must bear the costs relating to the intervention.

On those grounds,

THE COURT OF FIRST INSTANCE

hereby:

- 1. Annuls the decision of the Second Board of Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) of 8 November 2004 (Case R 493/2002-2);**
- 2. Orders OHIM to bear its own costs and the costs of the applicant, except those relating to the intervention;**

3. Orders the applicant to bear the costs relating to the intervention;

4. Orders the intervener to bear its own costs.

Pirrung

Forwood

Papasavvas

Delivered in open court in Luxembourg on 6 September 2006.

E. Coulon

J. Pirrung

Registrar

President