

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

19 September 2001 *

In Case T-30/00,

Henkel KGaA, established in Düsseldorf (Germany), represented by H.F. Wissel and C. Osterrieth, lawyers, with an address for service in Luxembourg,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by A. von Mühlendahl, D. Schennen and S. Laitinen, acting as Agents,

defendant,

* Language of the case: German.

APPLICATION brought against the decision of the Third Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 25 November 1999 (Case R 75/1999-3), which was notified to the applicant on 10 December 1999,

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

composed of: A.W.H. Meij, President, A. Potocki and J. Pirrung, Judges,

Registrar: D. Christensen, Administrator,

having regard to the application lodged at the Court Registry on 16 February 2000,

having regard to the response lodged at the Court Registry on 4 May 2000,

further to the hearing on 5 April 2001,

gives the following

Judgment

Background to the dispute

- 1 On 2 June 1998, the applicant filed an application for a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (hereinafter 'the Office') under Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended.

- 2 In the part of the application form on which the type of mark applied for is to be indicated, the applicant checked the box 'figurative mark'. The trade mark for which registration was sought is the representation, seen in perspective, of a rectangular tablet with slightly rounded corners, comprising two layers, whose colours, white (lower part) and red (upper part), are also claimed for registration.

- 3 The products and services in respect of which registration of the mark was sought are in classes 3 and 42 of the Nice Agreement concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the description: 'washing or dishwashing preparations in tablet form' and 'research in the field of

laundry and dishwashing preparations'. The applicant claimed a right of priority on the basis of an application for registration filed in Germany.

- 4 By letter of 14 July 1998, the examiner raised an objection to that claim, stating that the application for registration lodged in Germany concerned a three-dimensional mark. In a letter received by the Office on 17 July 1998, the applicant stated that its application, submitted on 2 June 1998, actually sought registration of a three-dimensional mark.

- 5 By letter of 1 December 1998, the examiner raised objections in respect of the application for a Community mark, which he based on Article 7(1)(b) of Regulation No 40/94.

- 6 The applicant submitted observations by letter dated 3 December 1998. In a letter dated 6 January 1999, addressed to the Office, the applicant pointed out that a competitor's application relating to similar washing tablets had been published in the Community Trade Marks Bulletin.

- 7 By decision of 26 January 1999, the examiner refused the application under Article 38 of Regulation No 40/94 on the ground that the three-dimensional mark applied for did not have any distinctive character.

- 8 On 5 February 1999, the applicant appealed against the examiner's decision to the Office under Article 59 of Regulation No 40/94.

- 9 Having been asked by the Board of Appeal to express an opinion on the amendment of the application for registration in the course of the procedure and on whether it was even possible to make such amendment, the applicant stated that it intended its application to be treated as seeking registration of a figurative mark or a colour mark.
- 10 By decision of 25 November 1999 ('the contested decision') the Board of Appeal annulled the examiner's decision in so far as the refusal to register concerned services falling within class 42 of the Nice Agreement, on the ground that the mark applied for had, as regards those services, the requisite minimum degree of distinctiveness. It dismissed the remainder of the appeal.
- 11 The Board of Appeal considered the examiner's decision to be incorrect in so far as the examiner had not adjudicated on the figurative mark originally applied for but on a three-dimensional mark, even though amendment of the type of mark was not permissible after the date of application was settled. Nevertheless, the Board of Appeal accepted that it was competent, under the second sentence of Article 62(1) of Regulation No 40/94, to adjudicate on the application for a figurative mark.
- 12 In essence, the Board of Appeal found that Article 7(1)(b) of Regulation No 40/94 prevented registration of the trade mark sought for washing machine and dishwasher products. In order to be registered, a trade mark had to enable the products in respect of which it was filed to be distinguished by reference to their origin and not by reference to their nature. It added that it could not be denied outright that a figurative mark consisting of the faithful representation of a product might have a distinctive character. However, that presupposed that the product's shape was sufficiently unique to imprint itself easily on the mind and that it stood out from whatever was normal in the trade. Given the fact that protecting the representation of the product entailed a risk that the owner of the mark would be granted a monopoly on it, the standard for assessing distinctive character was higher. In the instant case, the trade mark applied for did not meet those enhanced requirements. The representation claimed by the applicant

depicted a product whose shape was neither particularly special nor unusual but one of the basic shapes typical of the market under consideration. Likewise, the arrangement of the colours, namely red and white, did not add any kind of distinctive feature to the image claimed. Neither the lack of uniformity in the Office's previous decisions nor the earlier registrations on which the applicant relied could be binding for the purposes of the decision.

Forms of order sought by the parties

13 The applicant claims that the Court should:

- annul the contested decision;

- order the defendant to pay the costs.

14 The Office contends that the Court should:

- dismiss the action;

- order the applicant to pay the costs.

The law

- 15 First of all, it is appropriate to point out that it is only point 3 of the operative part of the contested decision that denies the applicant's claims. This action for annulment may therefore lie only against that point.

- 16 The applicant advances two pleas in law. The first alleges infringement of Article 7(1)(b) of Regulation No 40/94. The second alleges 'misuse of powers' and breach of the principle of equal treatment.

The plea alleging infringement of Article 7(1)(b) of Regulation No 40/94

- 17 The applicant is of the opinion that the Board of Appeal erred in failing to recognise that the mark applied for had distinctive character, since a minimum degree of distinctiveness is sufficient to justify protecting a sign under Regulation No 40/94. To determine whether a figurative mark, consisting of the faithful representation of a product, has distinctive character, it is necessary, in the applicant's view, to take the product itself as a starting point for any argument.

- 18 It claims that the mark applied for is distinctive on account of the arrangement of its colours and observes that, under Regulation No 40/94, colours may be

registered as trade marks. It cites the opinion of one author who argues that the registration of colours and colour combinations as trade marks must not be barred by a restrictive application of the grounds for refusal.

19 The applicant considers that the mark applied for is also distinctive on account of the shape of the product represented and criticises the position taken by the Board of Appeal, which requires a shape to evince particular character and to be easily impressed on the mind, that is, to be original in such a way as to distinguish it from whatever is normal in the trade. According to the applicant, the fact that the product's shape is individual or original is a decisive factor only for the purposes of the assessment of the conditions under which designs are protected. As regards the distinctive character of a figurative mark consisting of the representation of the product, the only question is whether the representation, characterised by a specific combination of shape and colours, is capable of being perceived by the public as indicative of the product's origin.

20 The applicant maintains that that is the case here, since it is appropriate to assess the distinctive character of the mark applied for by reference to the criteria applicable to figurative marks. A minimum degree of distinctiveness is sufficient for figurative marks to be registered and the same is also true of a figurative mark consisting of the image of the product and representing not only the shape of the product but also, as in this case, other features, such as a certain colouring. There is a difference between three-dimensional marks and figurative marks. Whereas, in the case of the former, distinctiveness is based on the product's shape, in the case of the latter (including marks consisting solely of a faithful representation of the product), features other than shape, such as for example colouring, are more significant. Consequently, it is not primarily the product's shape that confers on the figurative mark the function of identifying the product's origin but the combination of all the individual features of the mark that can be seen on the image. Further, as a general rule, other features are in practice added to the figurative mark itself, such as for example the product's name or the get-up of the packaging. Those features enhance the figurative mark's ability to denote the product's origin.

- 21 The applicant also argues that registering a figurative sign consisting of the representation of a product, which, apart from its shape, also has other features, does not prevent competitors of the owner of the figurative mark from using, for their own products, the shape of the product depicted, where those competitors add other distinctive features to the latter, such as, for example, another colour combination. Registration of a two-dimensional figurative mark does not entail, to the same extent as registration of a three-dimensional mark, protection of the shape of the product itself, which is, as a matter of principle, outside the scope of trade mark law. As a result of that difference in nature between the two types of mark, the assessment of distinctive character in relation to the product's shape has to be less strict in the case of a figurative mark than in the case of a three-dimensional mark.
- 22 The applicant gives an account of the development of the various ways in which preparations for laundry and dishes have been presented. It states that presentation in two-colour tablet form is recent and that such tablets may come in a variety of shapes. Likewise, the choice of colours and their arrangement on the tablet may vary a lot.
- 23 According to the applicant, the limited number of leading manufacturers and the extremely small number of products presented in two-colour tablet form on the various domestic markets are characteristics of the market in these products. In such circumstances, consumers have always associated washing products put up in two-colour tablet form with a very small number of manufacturers of branded products, of whom the applicant is one. That consumer attitude has been strengthened and sustained by intensive and ongoing advertising, which has highlighted the two colours giving the product its distinctive appearance and the particular shape of the washing tablets. The applicant draws attention to the substantial expenditure that it has invested in that advertising and to the turnover generated by the products concerned.
- 24 In concluding that it is indefensible to maintain that a specific combination of shape and colours in a figurative mark is inherently incapable of serving as an

indication of the origin of the product concerned, the applicant refers to the clear situation on the market and the concern of any manufacturer to distinguish its products from those of other manufacturers by virtue of a particular shape and arrangement of colours and to make its products visible in that shape on its packaging as well. The question of the extent to which such a mark should be protected must be examined separately. The fact that such protection may be very limited in a particular case does not, in its view, justify an outright refusal to accept that a figurative mark having a given combination of shape and colour has any distinctive character.

- 25 The applicant considers that the Board of Appeal erred when it found, in paragraphs 22 and 23 of the contested decision, that it was necessary to assess the distinctive character of the mark applied for more rigorously, on the ground that all that the public sees in the representation of a washing tablet is an indication of the specific design of the product and not an indication of its origin. The Board of Appeal took as its reference point (in paragraph 23 of the contested decision) the perception of a 'casual' consumer, whereas it is the perception of the average reasonably well-informed and reasonably observant and circumspect consumer which should be taken into account. Such a consumer will realise, on seeing the mark applied for, not just that the tablet reproduced constitutes an indication of the product's get-up but that, owing to its particular arrangement of shape and colours, it also gives an indication of the product's origin.
- 26 The applicant produces a substantial number of documents and refers to various applications, at both national and international level, for trade marks in respect of washing and dishwashing products in tablet form, some of which have resulted in registration. It also relies on the publication by the Office of application no. 924 829 relating to a three-dimensional Community mark in the form of a tablet for washing machines and dishwashers. The applicant submits that it is apparent from all that information, first, that all the well-known manufacturers of branded articles in the sector for washing and dishwashing products have always taken the

view that the particular shape and colouring of the tablets are distinctive features identifying the manufacturer and, second, that several trade mark offices have recognised the tablets as trade marks. It also cites a decision of an Italian court, which recognised the validity of a three-dimensional trade mark consisting of a two-coloured washing machine tablet.

- 27 According to the applicant, the distinctive character of the mark applied for must be assessed at the date on which the application for registration is lodged, so that the use of similar shapes and colours after that date by its competitors cannot be relied on as a reason to deny that the mark claimed has distinctive character. However, it submits that that point is not decisive in the present case, since it is the only manufacturer to produce washing machine and dishwasher tablets consisting of a red layer and a white layer.
- 28 Finally, the applicant argues that the mark in respect of which registration is sought has, under Article 7(3) of Regulation No 40/94, become distinctive in relation to its product, Somat 'Profi', in consequence of the use which has been made of it, and in particular because of its unique colour combination (red and white).
- 29 The Office states, first, that the mark applied for in the present case is a figurative mark consisting of a faithful representation of the product's shape. The representation of the mark supplied by the applicant in this case is not distinguishable in any way from that at issue in Case T-335/99 (three-dimensional mark in the form of a rectangular red and white tablet). It is thus important, at the outset, to define the criteria governing the registration of three-dimensional marks, and, next, to ascertain whether those criteria are different when the representation of the product is not claimed as a three-dimensional mark but as a figurative mark and whether, as a consequence, the assessment of distinctive character must be carried out by reference to less stringent requirements. It explains the principles governing the registration of three-dimensional marks, referring to the various grounds for refusal which may come into play in that context.

- 30 According to the Office, a trade mark has distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94 if it enables the products or services in respect of which registration of the mark is sought to be distinguished by reference to their origin and not by reference to their properties or other features.
- 31 It argues that the criteria for assessing the distinctive character of a figurative mark, consisting, as in the present case, of a faithful representation of the shape of the product itself, are no different from the criteria for assessing the distinctive character of three-dimensional marks consisting of the shape of the product.
- 32 It considers that, although the terms used by the Board of Appeal in the contested decision, which may be understood as asserting that more stringent criteria are necessary in the case of a figurative mark consisting of a faithful representation of the product (paragraphs 21 and 22 of the contested decision), give rise to confusion, that point is not decisive in the context of the contested decision. In this instance, the Board of Appeal was right to hold that the mark applied for was devoid of any distinctive character.
- 33 Second, the Office goes on to analyse the trade mark in respect of which registration is sought.
- 34 According to the Office, the tablet's rectangular shape, as it appears on the representation claimed, is not unusual but commonplace and current on the market.

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- 35 As regards the colours, the Office considers that the addition of a red layer does not render the sign applied for distinctive. Adding a single colour to the basic colour (white or grey) of washing machine or dishwasher products does not constitute a colour combination.
- 36 According to the Office, the colour claimed is one of the basic colours. All the tablets on the market, composed of two colours, have one coloured layer consisting of one of the basic colours (red, green or blue).
- 37 It submits that the colours, which are applied to different layers or parts of the tablet, indicate the presence of various active ingredients and therefore serve to inform the consumer about the product's properties, something which is highlighted in the tablet advertising. Furthermore, it follows from the way in which the tablets are used that the consumer does not view their colours as indicative of the product's origin.
- 38 The Office disputes the applicant's argument that a representation of the product on the packaging is more easily perceived as an indication of origin than the shape of the product itself. Where such a representation is — like the mark applied for — devoid of any additional features, it merely enables the consumer to obtain information about what the packaging contains, whilst the consumer refers to the word mark appearing on the packaging to distinguish the product that it designates from the products of other manufacturers.
- 39 The Office considers that the argument that the applicant is the only undertaking to produce red and white tablets is irrelevant. Considerations relating to the use made of the trade mark form part of an assessment for the purposes of Article 7(3) of Regulation No 40/94 and the applicant cited that provision for the first time in its application, and therefore at too late a stage. The applicant has

not shown that the mark applied for acquired distinctive character in all the Member States before the date of application.

- 40 The Office contends that it does not follow from the fact that the applicant's competitors have chosen other colours for their tablets that the colours enable the products to be distinguished according to their origin. The choice of different colours can be explained by the large number of trade mark applications filed at the various offices for Community and national trade marks for products designed for washing machines and dishwashers since the recent launch of those products. The Office points out that, given that certain national offices have registered the trade mark, a manufacturer would be ill-advised to present his product in a form similar to a mark in respect of which a competitor has been granted registration, or even one claimed by a competitor, before the position is clarified by a judicial ruling.
- 41 Third, as regards the registration by national offices in the Member States of three-dimensional trade marks consisting of the shape of tablets for washing machines or dishwashers, the Office states that the practices of those offices are not uniform.
- 42 According to the Office, the mark's distinctive character must be assessed at the time of registration. It points out that the applicant's competitors began marketing rectangular tablets before the present trade mark application was filed.

Findings of the Court

- 43 The distinctive character of a trade mark must be assessed in relation to the goods or services in respect of which registration of the mark is sought.

- 44 The mark in respect of which registration is sought in the present case consists of the representation of a washing machine or dishwasher tablet, that is, of the representation of the product itself.
- 45 As the Board of Appeal has rightly pointed out, it cannot be immediately denied that a graphic or photographic representation of the product itself, even one faithful to reality, has distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94.
- 46 According to Article 7(1)(b) of Regulation No 40/94, ‘trade marks which are devoid of any distinctive character’ are not to be registered. A mark which enables the goods or services in respect of which registration of the mark has been sought to be distinguished as to their origin is to be considered as having distinctive character. It is not necessary for that purpose for the mark to convey exact information about the identity of the manufacturer of the product or the supplier of the services. It is sufficient that the mark enables members of the public concerned to distinguish the product or service that it designates from those which have a different trade origin and to conclude that all the products or services that it designates have been manufactured, marketed or supplied under the control of the owner of the mark and that the owner is responsible for their quality (see, to that effect, Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 28).
- 47 It is clear from the wording of Article 7(1)(b) of Regulation No 40/94 that a minimum degree of distinctive character is sufficient to render the ground for refusal set out in that article inapplicable. It is therefore appropriate to ascertain — in an a priori examination not involving any consideration of the use made of the sign within the meaning of Article 7(3) of Regulation No 40/94 — whether the mark applied for will enable the members of the public targeted to distinguish the products concerned from those having a different trade origin when they come to select a product for purchase.

- 48 Article 7(1)(b) of Regulation No 40/94 does not distinguish between different categories of trade marks. The criteria for assessing the distinctive character of figurative marks consisting of the representation of the product itself are therefore no different from those applicable to other categories of trade marks.
- 49 Nevertheless, when those criteria are applied, account must be taken of the fact that the perception of the relevant section of the public is not necessarily the same in relation to a figurative mark consisting of a faithful representation of the product itself as it is in relation to a word mark or a figurative or three-dimensional mark not faithfully representing the product. Whilst the public is used to recognising the latter marks instantly as signs identifying the product, this is not necessarily so where the sign is indistinguishable from the appearance of the product itself. It follows that an assessment of distinctive character cannot result in different outcomes for a three-dimensional mark consisting of the design of the product itself and for a figurative mark consisting of a faithful representation of the same product.
- 50 The Board of Appeal rightly points out that, as regards the perception of the public concerned, the products for which trade-mark registration was refused in the present case, namely washing machine and dishwasher products in tablet form, are widely used consumer goods. The public concerned, in the case of these products, is all consumers. Therefore, in any assessment of the distinctive character of the mark for which registration is sought, account must be taken of the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect (see, by analogy, Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraphs 30 to 32).
- 51 The way in which the public concerned perceives a trade mark is influenced by the average consumer's level of attention, which is likely to vary according to the

category of goods or services in question (see Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 26). In that regard, the Board of Appeal rightly held that the level of attention given by the average consumer to the appearance of washing tablets, being everyday goods, is not high.

- 52 In order to ascertain whether the representation claimed, given the combination of the shape and the arrangement of the colours of the tablet represented, may be perceived by members of the public as an indication of origin, the overall impression produced by that representation must be analysed (see, by analogy, Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 23). That is not incompatible with an examination of each of the individual features making up the representation in turn. As regards a mark consisting of the faithful representation of the product, it is necessary to ascertain, first, whether the design of the product represented may, in itself, make an impact on the public mind and, second, whether the way in which the product is represented has some distinctive feature capable of denoting the product's origin.
- 53 The shape represented by the image for which registration has been sought, namely a rectangular tablet, is one of the basic geometrical shapes and is an obvious one for a product intended for use in washing machines or dishwashers. The slightly rounded corners of the tablet are dictated by practical considerations and are not likely to be perceived by the average consumer as a distinctive feature of the shape at issue, capable of distinguishing it from other washing machine or dishwasher tablets.
- 54 As to the tablet's two layers, one of which is white and the other red, the public concerned is used to seeing different colour features in detergent preparations. Powder, the form in which such products are traditionally presented, is usually

very light grey or beige and appears almost white. It often contains particles of one or more different colours. The advertising carried out by the applicant and other manufacturers of detergents tends to highlight the fact that those particles indicate the presence of various active ingredients. The coloured particles thus suggest certain qualities, although that does not mean that they can be regarded as a descriptive indication in terms of Article 7(1)(c) of Regulation No 40/94. However, it does not follow from the fact that that ground for refusal is inapplicable that the coloured elements necessarily confer a distinctive character on the mark applied for. Where, as in the present case, the target sector of the public sees the presence of coloured elements as a suggestion that the product has certain qualities, and not as an indication of its origin, there is no distinctive character. The fact that consumers may nevertheless get into the habit of recognising the product from its colours is not enough, in itself, to preclude the ground for refusal based on Article 7(1)(b) of Regulation No 40/94. Such a development in the public's perception of the sign, if proved, may be taken into account only for the purposes of Article 7(3) of Regulation No 40/94.

- 55 The fact that in the present case the coloured particles are not spread evenly over the whole of the tablet represented, but are concentrated on its upper part, is not sufficient for the tablet's appearance to be perceived as indicative of the product's origin. Where various ingredients are to be combined in a washing machine or dishwashing product in tablet form, adding a layer is one of the most obvious solutions.
- 56 It does not make any difference in that regard that the applicant is the only undertaking to use the colour red for tablets made up of two layers. The use of basic colours, such as blue or green, is commonplace and is even typical of detergents. The use of other basic colours, such as red or yellow, is one of the most obvious variations on the typical design of these products.

- 57 It follows that the design of the product, the representation of which constitutes the mark applied for, consists of a combination of obvious features typical of the product concerned.
- 58 It should be added that it is possible to obtain different combinations of those features by varying the basic geometric shapes and by adding to the product's basic colour another basic colour either as a layer in the tablet or as speckles. The ensuing differences in the appearance of the various tablets are not sufficient to enable each of those tablets, or a representation thereof, to function as an indication of the product's origin, inasmuch as those differences are, as in the present case, obvious variations on the product's basic shapes.
- 59 The representation in respect of which registration was sought shows a tablet, seen in perspective. The consequence of it being in perspective is that the tablet's shape is somewhat distorted. The way that it is represented in the present case is thus slightly different from a representation which is wholly faithful to reality. However, as the applicant itself acknowledged at the hearing, this perspective view of the tablet cannot confer distinctive character on the mark applied for. It does not constitute a distinctive feature capable of having such an impact on the consumer's mind as to enable him to distinguish the tablet represented from other tablets for washing machines or dishwashers.
- 60 Given the overall impression created by the shape of the tablet in question and the arrangement of its colours, the mark applied will not enable consumers to distinguish the products concerned from those having a different trade origin when they come to select a product for purchase.

- 61 It should be added that the inability of the mark applied for to indicate, a priori and irrespective of the use actually made of it, the product's origin is not affected by how many similar tablets are already on the market. Consequently, it is not necessary to decide here whether the distinctive character of the mark concerned should be assessed by reference to the date on which the application for registration is filed or the date of actual registration.
- 62 Next, as regards the applicant's arguments concerning the practices of national trade mark offices and the fact that an Italian court has recognised that a three-dimensional mark consisting of a two-colour washing tablet has distinctive character, it must be reiterated that registrations already made in the Member States are only one factor which may be taken into consideration, without being given decisive weight, in the registration of a Community trade mark (Case T-122/99 *Procter & Gamble v OHIM* (Soap shape) [2000] ECR II-265, paragraph 61; and Case T-24/00 *Sunrider v OHIM* (VITALITE) [2001] ECR II-449, paragraph 33). The same considerations apply to cases decided by the courts of the Member States. Furthermore, it is clear from the Office's replies to this Court's questions that the practices of the national trade mark offices, as regards three-dimensional marks consisting of washing machine and dishwasher tablets, are not uniform. Consequently, any criticism that the Board of Appeal has failed to have regard to those practices or to national case-law is groundless.
- 63 It follows that the Board of Appeal was right to hold that the figurative mark applied for is devoid of any distinctive character.
- 64 The fact that the criteria applied to assess distinctive character, in the case of a figurative mark consisting of a representation of the product itself, are not more rigorous than those applying to other categories of trade marks does not alter that conclusion.

- 65 The factors which led the Board of Appeal to find that the mark applied for was devoid of any distinctive character constitute valid reasons for drawing the same conclusion with regard to the criteria for the assessment of distinctive character applying to all trade marks, whether they are word marks, figurative marks or three-dimensional marks.
- 66 The applicant also argues, without specifically raising a plea alleging infringement of Article 7(3) of Regulation No 40/94, that the mark applied for has distinctive character in consequence of the use which has been made of it. Since that argument was not raised before the Board of Appeal, it cannot be considered by the Court of First Instance (see Case T-163/98 *Procter & Gamble v OHIM* (BABY-DRY) [1999] ECR II-2383, paragraphs 48 to 51).

The plea alleging 'misuse of power' and breach of the principle of equal treatment

Arguments of the parties

- 67 In support of its plea alleging 'misuse of powers', the applicant argues that the Office authorised publication of certain applications for Community trade marks similar to its own in respect of products falling within the same sector or a related

sector. It cites, in particular, application no. 809 830 for a Community trade mark filed by Benckiser N.V. The applicant considers that the Board of Appeal thereby acted in breach of the principle of equal treatment.

- 68 The applicant also submits that the contested decision is contrary to the higher aim of Community law in general, and of the Regulation on the Community trade mark in particular, which seeks to harmonise trade mark law at the Community level. According to the applicant, harmonisation cannot actually be achieved unless trade mark law is interpreted uniformly.
- 69 The Office states that the trade mark application cited by the applicant did not result in registration. Further, even supposing that the Office had actually registered that trade mark, the decision would be incorrect and the applicant could not rely on it to ask for a decision which would repeat the error.

Findings of the Court

- 70 The concept of misuse of powers has a precisely defined scope in Community law. It refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it. In that respect, it has been consistently held that a decision may amount to misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated (see, *inter alia*, the judgment in Joined

Cases T-551/93, T-231/94, T-232/94, T-233/94 and T-234/94 *Industrias Pesqueras Campos and Others v Commission* [1996] ECR II-247, paragraph 168). The applicant has not put forward any evidence from which it could be concluded that the adoption of the contested decision had any purpose other than that of ascertaining whether the mark applied for complied with the conditions for registration prescribed by Regulation No 40/94.

- 71 In so far as this plea seeks to demonstrate that there has been a breach of the principle of equal treatment, it is clear from the Office's replies to the Court's questions that the trade mark application whose publication has been relied on by the applicant was refused by the examiner after commencement of the present action and that that decision is currently being reviewed by a Board of Appeal. Consequently, the argument based on publication of that trade mark application has become otiose in any event. It follows that this plea is unfounded.
- 72 In the light of the foregoing considerations, the action must be dismissed.

Costs

- 73 Under Article 87(3) of the Rules of Procedure, the Court may rule that costs are to be shared or that each party is to bear its own costs where each party succeeds on some and fails on other heads, or where the circumstances are exceptional. Since the wording of the contested decision was capable of giving rise to doubts as to whether the Board of Appeal had in this case correctly applied Article 7(1)(b) of Regulation No 40/94, it is appropriate to order the parties to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the action;
2. Orders the parties to bear their own costs.

Meij

Potocki

Pirrung

Delivered in open court in Luxembourg on 19 September 2001.

H. Jung

Registrar

A.W.H. Meij

President