

Case T-320/03

Citicorp

v

**Office for Harmonisation in the Internal Market
(Trade Marks and Designs) (OHIM)**

(Community trade mark — Word mark LIVE RICHLIY — Absolute grounds for refusal — Distinctive character — Article 7(1)(b) of Regulation (EC) No 40/94 — Right to be heard — Article 73 of Regulation No 40/94)

Judgment of the Court of First Instance (Third Chamber), 15 September 2005 II - 3415

Summary of the Judgment

1. *Community trade mark — Decisions of OHIM — Compliance with rights of the defence (Council Regulation No 40/94, Art. 73)*

2. *Community trade mark — Appeals procedure — Appeals before the Community judicature — Application to register a sign in respect of several categories of goods or services — Acknowledgement by the applicant that the subject-matter of the dispute is limited to a single category — Withdrawal of a plea concerning another category*
3. *Community trade mark — Definition and acquisition of the Community trade mark — Absolute grounds for refusal — Lack of distinctive character — Sign capable of bearing several meanings, being a play on words and being perceived as ironic, surprising and unexpected — Condition for registration — Ability to be perceived as an indication of the commercial origin of the goods or services covered*
(Council Regulation No 40/94, Art. 7(1)(b))
4. *Community trade mark — Definition and acquisition of the Community trade mark — Absolute grounds for refusal — Marks devoid of any distinctive character — Word sign LIVE RICHLI*
(Council Regulation No 40/94, Art. 7(1)(b))
5. *Community trade mark — Definition and acquisition of the Community trade mark — Absolute grounds for refusal — Lack of distinctive character of a sign — Finding of absence of an additional element of imagination or a minimum amount of imagination insufficient to hold a sign to be devoid of any distinctive character*
(Council Regulation No 40/94, Art. 7(1)(b))

1. According to the second sentence of Article 73 of Regulation No 40/94 on the Community trade mark, the decisions of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) are to be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments. The general principle of protection of the right to defend oneself, under which a person whose interests are appreciably affected by a decision taken by a public authority must be given the opportunity to make his point of view known, is enshrined in

the law of Community trade marks by that provision.

(see paras 21-22)

2. In proceedings contesting a decision of one of the Boards of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) refusing an application for registration of a trade mark in respect of several categories of goods or services, the Court of First Instance is not required to give a ruling on a plea concerning only one category of goods or services, where the applicant has withdrawn its plea and expressly acknowledged that the subject-matter of the dispute was limited to another category.

goods or services of the applicant for a trade mark from those of a different commercial origin.

(see para. 84)

(see para. 48)

3. The fact that a non-descriptive sign can have several meanings, that it can be a play on words and that it can be perceived as ironic, surprising and unexpected, does not suffice to make it distinctive within the meaning of Article 7(1)(b) of Regulation No 40/94 on the Community trade mark. Those various elements only make that sign distinctive in so far as it is immediately perceived by the relevant public as an indication of the commercial origin of the goods or services referred to, and so as to enable the relevant public to distinguish, without any possibility of confusion, the

4. The word sign LIVE RICHLI, in respect of which registration as a Community trade mark was sought for financial and monetary services falling within Class 36 of the Nice Agreement, lacks distinctive character, in regard to the relevant services, within the meaning of Article 7(1)(b) of Regulation No 40/94 on the Community trade mark, inasmuch as the relevant public — namely, the average reasonably well-informed and circumspect consumer, since the level of awareness can be relatively low when it comes to promotional indications, which a well-informed English-speaking public, or even one which is not so but which has sufficient knowledge of the English language, does not see as decisive — will, in the context of financial and monetary services, perceive that sign primarily as a promotional formula and not as an indication of the commercial origin of the services concerned. There is nothing about the sign in question that might, beyond its obvious promotional meaning, enable the relevant public to mem-

orise the sign easily and instantly as a distinctive trade mark for the services designated. Even if the sign were used alone, without any other sign or trade mark, the relevant public could not, in the absence of prior knowledge, perceive it other than in its promotional sense.

5. A trade mark's lack of distinctive character within the meaning of Article 7(1) (b) of Regulation No 40/94 on the Community trade mark cannot arise from the lack of an additional element of imagination, as a Community mark is not necessarily a work of invention and is founded not on any element of originality or imagination, but on its ability to distinguish goods or services on the market from goods or services of the same type offered by competitors.

(see paras 70, 74, 76, 85)

(see para. 91)