

# Case T-39/01

Kabushiki Kaisha Fernandes

v

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

(Community trade mark — Opposition procedure — Earlier word mark  
HIWATT — Application for Community word mark HIWATT — Proof of  
genuine use of earlier mark — Article 43(2) and (3) of Regulation (EC)  
No 40/94 and Rule 22 of Regulation (EC) No 2868/95)

Judgment of the Court of First Instance (Fourth Chamber), 12 December  
2002 . . . . . II - 5236

## Summary of the Judgment

1. *Community trade mark — Observations by third parties and opposition — Examination of opposition — Proof of use of the earlier mark — Genuine use — Definition (Council Regulation No 40/94, Art. 43(2))*

2. *Community trade mark — Observations by third parties and opposition — Examination of opposition — Proof of use of the earlier mark — Genuine use — Assessment criteria — Requirement for specific and objective evidence*

(Council Regulation No 40/94, Art. 43(2); Commission Regulation No 2868/95, Art. 1, Rule 22(2))

1. Genuine use of the earlier Community trade mark, within the meaning of Article 43(2) of Council Regulation (EC) No 40/94 on the Community trade mark implies real use of the mark on the market concerned for the purpose of identifying the goods or services. Genuine use therefore excludes minimal or insufficient use when determining that a mark is being put to real, effective use on a particular market. In that regard, even if it is the owner's intention to make real use of his trade mark, if the trade mark is not objectively present on the market in a manner that is effective, consistent over time and stable in terms of the configuration of the sign, so that it cannot be perceived by consumers as an indication of the origin of the goods or services in question, there is no genuine use of the trade mark.

ing its essential function, which is to identify the commercial origin of the goods or services, thus enabling the consumer who acquired them to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent purchase.

(see paras 36-37)

Accordingly, not only does genuine use of a trade mark exclude artificial use for the purpose of maintaining the mark on the register; genuine use means that the mark must be present in a substantial part of the territory where it is protected, *inter alia* exercis-

2. For the purposes of assessing genuine use of a Community trade mark, within the meaning of Article 43(2) of Regulation (EC) No 40/94 on the Community trade mark, account must be taken of the facts and circumstances of each case, regard being had to the wording of Rule 22(2) of Regulation No 2868/95 implementing Regulation No 40/94, which states that the indications and evidence for furnishing proof of use are to consist of indi-

cations concerning the place, time, extent and nature of the use. Genuine use cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use

of the trade mark on the market concerned.

(see paras 38, 47)