

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

20 November 2007*

In Case T-149/06,

Castellani SpA, established in Campagna Gello (Italy), represented by A. Di Maso and M. Di Maso, lawyers,

applicant,

v

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

defendant,

* Language of the case: English.

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

Markant Handels und Service GmbH, established in Offenburg (Germany),

ACTION brought against the decision of the First Board of Appeal of OHIM of 22 February 2006 (Case R 449/2005-1), relating to opposition proceedings between Markant Handels und Service GmbH and Castellani SpA,

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

composed of J.D. Cooke, President, I. Labucka and M. Prek, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 17 May 2006,

having regard to the response lodged at the Court Registry on 13 September 2006,

further to the hearing on 6 February 2007,

gives the following

Judgment

Background to the dispute

- 1 On 25 September 2001, Castellani SpA filed an application for registration of a Community trade mark at the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) 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 Registration was sought for the following figurative mark:



CASTELLANI

- 3 The goods in respect of which registration was sought are in Class 33 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 correspond to the following description: 'Alcoholic drinks (except beers)'. During the opposition proceedings, the applicant restricted its application to 'alcoholic beverages except beer, liqueur, sparkling wine and Champagne'.
- 4 The application was published in *Community Trade Marks Bulletin* No 45/2002 of 10 June 2002.
- 5 On 4 September 2002, Markant Handels und Service GmbH filed a notice of opposition to registration of the trade mark applied for, under Article 42 of Regulation No 40/94. The opposition was based on the following earlier registrations:
- German registration No 1148027, CASTELLUM, dated 17 October 1989, for 'wines, with the exception of sparkling wine', in Class 33;
 - German registration No 39720803.0, CASTELLUCA, dated 20 August, 1997 for 'wines', in Class 33.
- 6 The opposition referred to all the goods covered by the earlier registrations and was directed against all the goods in respect of which registration was sought. The

ground relied on in support of the opposition was the likelihood of confusion on the part of the public due to the similarity between the earlier trade marks and the trade mark sought and the identity of the goods in question within the meaning of Article 8(1)(b) of Regulation No 40/94.

- 7 The applicant requested the opponent to furnish proof of genuine use of its earlier trade mark CASTELLUM. The opponent complied with that request on 31 July 2003.

- 8 By decision of 10 March 2005, the Opposition Division of OHIM rejected the opposition in its entirety. In its decision, it did not evaluate the evidence of use provided by the opponent and simply compared the trade mark sought with the two earlier marks on which the opposition was based. It was considered that the trade mark applied for and the earlier marks were visually and phonetically dissimilar and that, from the conceptual point of view, since all the signs were devoid of meaning in German, the relevant public would not perceive any conceptual similarity between the marks in dispute.

- 9 On 20 April 2005, the opponent filed an appeal, pursuant to Articles 57 to 59 of Regulation No 40/94, against the decision of the Opposition Division.

- 10 By decision of 22 February 2006 ('the contested decision'), the First Board of Appeal of OHIM annulled the decision of the Opposition Division and rejected the application for registration. Essentially, the Board of Appeal considered that, bearing in mind, in particular, the visual and conceptual similarity of the trade marks and the identity of the goods in question, there was a likelihood of confusion between the trade mark applied for and the earlier trade mark CASTELLUCA.

Forms of order sought by the parties

11 The applicant claims that the Court should:

- annul the contested decision;

- order OHIM to pay the costs.

12 OHIM contends that the Court should:

- dismiss the action in its entirety;

- order the applicant to pay the costs.

Law

13 In support of its application, the applicant relies on a single plea, alleging breach of Article 8(1)(b) of Regulation No 40/94.

Arguments of the parties

- 14 The applicant observes, first of all, that the Board of Appeal correctly compared only the trade mark applied for and the earlier trade mark CASTELLUCA, since the opponent had failed to furnish any appropriate proof of use of the earlier mark CASTELLUM during the five previous years in accordance with Article 43(2) and (3) of Regulation No 40/94.
- 15 As regards the comparison of the goods in question, the applicant acknowledges that the goods covered by the conflicting marks are identical, that is to say, wine.
- 16 On the other hand, as regards the comparison of the conflicting signs CASTELLANI and CASTELLUCA, the applicant considers that there is no similarity between them giving rise to a likelihood of confusion on the part of consumers, in particular German consumers, who are deemed to be reasonably well-informed.
- 17 On a visual level, the applicant points out that the trade mark applied for has features which are different from those of the earlier trade mark CASTELLUCA. First, there is the presence of the letters 'a', 'n' and 'i' in the mark applied for and the letters 'u', 'c' and 'a' in the earlier mark. Secondly, the trade mark applied for, unlike the earlier mark, is a figurative mark, consisting of the word 'Castellani' underlined by two horizontal lines with a turreted crown in the middle, and placed below a shield with a castle with two towers, surmounted by a crown with two palm branches and a Latin cross in the centre. The applicant considers that that figurative element is highly distinctive, in contrast with the prefix of the conflicting marks, which is devoid of distinctive character as regards the goods covered.

- 18 On a phonetic level, the applicant submits that there is a difference in the pronunciation of the two marks in all the European languages and, in particular, in German. It observes that, even though the prefix parts of the marks are alike and have the same pronunciation, the suffix parts are pronounced differently. The applicant adds that the earlier trade mark CASTELLUCA is a fanciful word and the correct pronunciation is [kastelluka], whereas the trade mark applied for is an Italian word, which is pronounced [kastellani].
- 19 On a conceptual level, the applicant points out that the two marks are not German words, even though the prefix ‘castel’ is the prefix of the Latin word ‘castellum’, meaning castle, and that prefix is translated into German by its phonetic equivalent ‘Kastell’.
- 20 The applicant adds that the two words have different connotations in that the earlier mark CASTELLUCA suggests ‘Luca’s Castle’ or ‘the Castle of Lucas’, whereas the component ‘castellani’ of the trade mark applied for is an Italian word (being the plural or the genitive of the word ‘castellano’) which means lords of the manor (Kastellan in German).
- 21 At the hearing, the applicant confirmed that Castellani is a patronymic and not the name of the estate. It stated that for almost a century the Castellani family has been producing and exporting wine abroad, in particular, to Germany.
- 22 The applicant disputes the Board of Appeal’s assertion that the attention of the consumer will focus on the prefix of the marks and points out that the idea of a ‘castle’ is very common in the wine sector. It states that, in the territory concerned, there are a number of registered trade marks containing the prefixes ‘castel’, ‘castle’, ‘Kastel’ or ‘château’ and that consumers identify a wine by means of the suffix attached to those prefixes, which are devoid of distinctive character. It follows,

according to the applicant, that the respective suffixes of the signs at issue must be regarded as the distinctive and dominant components which attract the attention of the consumer (Case T-202/04 *Madaus v OHIM — Optima Healthcare (ECHINAID)* [2006] ECR II-1115, paragraph 55).

- 23 As to assessment of the likelihood of confusion, the applicant claims that the public is not likely to believe that the goods or services come from the same undertaking or from economically-linked undertakings (Case T-31/03 *Grupo Sada v OHIM — Sadia (GRUPO SADA)* [2005] ECR II-1667, paragraph 42, and Case T-126/03 *Reckitt Benckiser (España) v OHIM — Aladin (ALADIN)* [2005] ECR II-2861, paragraph 78).
- 24 The applicant considers that, since the prefix ‘castel’ has little capacity to distinguish goods as coming from a particular undertaking, the average consumer who is reasonably well informed and observant cannot rely on that prefix to differentiate between the competing marks. According to the applicant, the average consumer knows that it is not necessarily the case that two wines whose trademarks begin with ‘castel’ come from the same undertaking or from economically-linked undertakings and that he must focus his attention on the name of the company, the type of grape, the provenance of the wine etc. It considers that, in the present case, the average consumer cannot be misled as to the origin of the wine when looking at the two marks in question, which are different, and, accordingly, the trade mark applied for cannot give rise to confusion on the part of German consumers.
- 25 In conclusion, the applicant claims that the earlier trade mark CASTELLUCA is not valid, since it has been using its mark CASTELLANI in Germany since 1978 for the same goods as those covered by the earlier mark, as it has proved, and that that use therefore preceded the registration of the earlier mark.

- 26 As a preliminary point, OHIM disputes the applicant's assertion that the Board of Appeal compared only the earlier mark CASTELLUCA and the mark applied for because the proof of use furnished in relation to the earlier mark CASTELLUM was insufficient. It confirms that the Board of Appeal did not assess that evidence because the opponent's claims in relation to the earlier mark CASTELLUCA, on which the opposition was also based, were upheld. OHIM points out, in this respect, that a finding that there is a likelihood of confusion on the basis of one of the earlier marks is sufficient for the Community trade mark application to be rejected as a whole and that it is therefore not obliged in such a case to enter into the examination of each of the earlier rights on which the opposition is based (Joined Cases T-183/02 and T-184/02 *El Corte Inglés v OHIM — González Cabello and Iberia Líneas Aéreas de España (MUNDICOR)* [2004] ECR II-965, paragraphs 70 to 72, and Case T-342/02 *Metro-Goldwyn-Mayer Lion v OHIM — Moser Grupo Media (Moser Grupo Media)*, [2004] ECR II-3191, paragraph 48).
- 27 As regards the goods in question, OHIM points out that it is common ground that the goods protected by the conflicting marks are identical.
- 28 With regard to the comparison of the signs in question, OHIM states that, on the visual level, as was observed by the Board of Appeal, the figurative elements of the contested application would be perceived simply as an illustration of a castle and those elements have but a weak distinctive character. It considers that the dominant feature of the mark applied for is the term 'castellani'. It is of the view, in this respect, that in the case of a compound trade mark, where there is a combination of figurative and word elements, the public usually attaches more significance to the word part and retains an imperfect recollection of the trade mark in its memory.
- 29 OHIM points out, first, that the use of figurative elements with a decorative function in conjunction with word elements is common in trade; secondly, consumers are not in the habit of ignoring word elements; and, thirdly, they do not identify the

commercial origin of the goods on the basis of such decorative elements. Thus, because of its position in the trade mark applied for, the element 'castellani' plays a predominant role, according to OHIM, when the relevant public identifies the sign and recalls it (Case T-312/03 *Wassen International v OHIM — Stroschein Gesundkost (SELENIUM ACE)* [2005] ECR II-2897, paragraphs 39 to 41).

30 As a consequence, although the marks in dispute are different in nature, since, first, the mark applied for is dominated by its word element 'castellani' and, second, the dominant elements 'castelluca' and 'castellani' of the conflicting marks have many letters in common and are of identical length, OHIM concurs with the contested decision in considering those marks to be visually similar.

31 On a phonetic level, OHIM points out that the marks in dispute would be pronounced in the relevant territory in four syllables, namely 'cas-te-llu-ca' and 'cas-te-lla-ni'. It submits that the Board of Appeal was correct in finding in the contested decision that the fact that the marks have different endings does not suffice for them to be considered phonetically dissimilar, since their two initial syllables are the same and their third syllables are clearly marked by the presence of the consonants 'll'.

32 OHIM contends that the applicant's assessment of the marks in dispute is incorrect, since it is the result of artificially dissecting those marks and not, as required by case-law, of analysing those marks in their entirety as the relevant public would perceive them. OHIM is of the view that, taking the marks as a whole, the signs in dispute also have a certain degree of phonetic similarity.

- 33 On a conceptual level, OHIM points out that the Board of Appeal was of the view that the relevant consumer will associate the two signs CASTELLANI and CASTELLUCA with the German word 'Kastell' (castle) and that this semantic concept renders the marks similar.
- 34 In response to the applicant's claim that the fact that the concept is the same is insufficient to render the signs in dispute conceptually similar in the relevant territory, OHIM states that there are few marks in the German Trade Mark Register composed of the prefix 'castell' followed by different endings, that there are a number of marks containing the word 'castello' followed by another term or terms, but that there are very few composed of the prefix 'castell' followed by a short ending, as is the case with the marks in dispute.
- 35 In this regard, OHIM points out that, as stated by the Board of Appeal in the contested decision, although none of the word elements of the marks in dispute has a particular meaning in German, the average German consumer may perceive in the beginning of both marks the semantic concept of a castle, on account of its similarity to the German word 'kastell'. It therefore considers that conceptual similarity between them cannot be ruled out.
- 36 As regards assessment of the likelihood of confusion, OHIM refers to the relevant case-law of the Court of Justice and the Court of First Instance on the subject and, in particular, all the factors to be taken into account in the overall assessment of the likelihood of confusion, namely the distinctive character of the earlier mark, the degree of similarity of the marks and of the goods, the nature of the goods involved and the degree of attention on the part of the relevant public.
- 37 Concerning the degree of distinctiveness of the element 'castell' in the relevant territory, OHIM points out that, while the distinctive character of the earlier mark must be taken into account when assessing the likelihood of confusion, it must also

be considered that such a factor is only one factor among others to be included in that assessment. Thus, even in a case involving an earlier mark of weak distinctive character, or, as in the current case, composed of an element ('castell') with weak distinctive character, there may be a likelihood of confusion due, in particular, to a similarity between the signs and between the goods or services covered (Case T-112/03 *L'Oréal v OHIM — Revlon (FLEXI AIR)* [2005] ECR II-949, paragraph 61, and Case T-29/04 *Castellblanch v OHMI — Champagne Roederer (CRISTAL CASTELLBLANCH)* [2005] ECR II-5309, paragraph 69).

38 As regards the degree of similarity between the marks, OHIM points out that the marks in dispute are visually similar, phonetically similar to a certain degree and that it cannot be excluded that the average German consumer will make a conceptual link between them. As regards the degree of similarity between the goods, OHIM notes that the goods in question must be regarded as identical.

39 As far as the goods in dispute are concerned, OHIM contends that the public targeted by those goods in this case is composed of average German consumers of wines and other alcoholic beverages. Regarding the degree of attention of the target public when purchasing the goods, OHIM is of the view that, as a general rule, it cannot be concluded that the average consumer of wines in Germany pays great attention when purchasing them, since the goods in question comprise a great variety of beverages both in terms of quality and price and the target public will not necessarily be expert or very attentive. It therefore considers that there is a likelihood of confusion in Germany, in the sense that the public may think that the goods in question come from the same undertaking or, as the case may be, from economically linked undertakings.

40 According to OHIM, it follows from all the above that the Board of Appeal was right in concluding that there is a likelihood of confusion for the purposes of Article 8(1)(b) of Regulation No 40/94 and that the applicant's plea must therefore be rejected.

Findings of the Court

- 41 Article 8(1)(b) of Regulation No 40/94 provides that, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered 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. Moreover, under Article 8(2)(a)(ii) of Regulation No 40/94, 'earlier trade marks' means trade marks registered in a Member State with a date of application for registration which is earlier than the date of application for registration of the Community trade mark.
- 42 According to established case-law, the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion (Case T-104/01 *Oberhauser v OHIM — Petit Liberto (Fifties)* [2002] ECR II-4359, paragraph 25; see also, by analogy, Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 29, and Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 17).
- 43 According to that same line of case-law, the likelihood of confusion must be assessed globally, according to the perception of the relevant public of the signs and the goods or services in question and taking into account all factors relevant to the circumstances of the case, in particular the interdependence of the similarity between the signs and between the goods or services designated (see Case T-162/01 *Laboratorios RTB v OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)* [2003] ECR II-2821, paragraphs 31 to 33 and the case-law cited).

44 It should also be observed that the perception of marks in the mind of the average consumer of the goods or services in question plays a decisive role in the global assessment of the likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (*Fifties*, paragraph 28, and Case T-355/02 *Mülhens v OHIM — Zirh International (ZIRH)* [2004] ECR II-791, paragraph 41; see, by analogy, Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 23, and *Lloyd Schuhfabrik Meyer*, paragraph 25). For the purposes of that global assessment, the average consumer of the goods concerned is deemed to be reasonably well-informed and reasonably observant and circumspect. Furthermore, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but has to rely on the imperfect image of them that he has retained in his mind. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (see, by analogy, *Lloyd Schuhfabrik Meyer*, paragraph 26, and *Fifties*, paragraph 28).

45 In the present case, it should be noted that the opponent lodged a notice of opposition to registration of the contested trade mark, pleading that there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 with the earlier German word marks CASTELLUM and CASTELLUCA, designating goods in Class 33 of the Nice Agreement.

46 The Board of Appeal concluded in the contested decision that, since the application for registration had been rejected on the ground that there was a likelihood of confusion between the trade mark sought and the earlier mark CASTELLUCA, there was no need to examine proof of use as regards the earlier mark CASTELLUM (points 15 and 23 of the contested decision).

- 47 Accordingly, for the purposes of examining the ground of annulment raised by the applicant, an assessment must be made of the likelihood of confusion between the trade mark applied for, on the one hand, and the earlier mark CASTELLUCA on the other.
- 48 In view of the fact that the goods in question are everyday consumer items and that the earlier marks are registered in Germany, the relevant public in respect of whom the likelihood of confusion must be assessed comprises average consumers in Germany.
- 49 Moreover, it is common ground that the goods covered by the conflicting marks are identical. In the light of the foregoing considerations, it is therefore necessary to compare only the conflicting signs.
- 50 It should be borne in mind, in that regard, that two marks are similar where, from the point of view of the relevant public, they are at least partially identical as regards one or more relevant aspects (Case T-6/01 *Matratzen Concord v OHIM — Hukla Germany (MATRATZEN)* [2002] ECR II-4335, paragraph 30, and judgment of 26 January 2006 in Case T-317/03 *Volkswagen v OHIM — Nacional Motor (Variant)*, not published in the ECR, paragraph 46).
- 51 The global assessment of the likelihood of confusion, as far as concerns the visual, aural or conceptual similarity of the signs in question, must, however, be based on the overall impression given by the signs, bearing in mind, inter alia, their distinctive and dominant components (Case T-292/01 *Philips-Van Heusen v OHIM — Pash Textilvertrieb and Einzelhandel (BASS)* [2003] ECR II-4335, paragraph 47, and the case-law cited).

52 In the present case, as regards the visual comparison, the trade mark applied for is a compound mark, composed of a word element, ‘castellani’, and a figurative element, consisting of two horizontal lines with a turreted crown in the middle and a shield with a castle with two towers, surmounted by a crown with two palm branches and a Latin cross in the centre.

53 With regard to the significance to be attached to the figurative element as a distinguishing feature, that cannot be the dominant element in the overall impression created by the trade mark applied for. In the present case, it is clear, as was stated by the Board of Appeal at point 19 of the contested decision, that the figurative elements of the mark in question will be perceived as an illustration of a castle and that those elements have but a weak distinctive character. In the case of a product like wine, a representation of a castle is not an element that allows the relevant public to perceive that figurative component as dominating the image they retain of the trade mark applied for. On the contrary, consumers usually describe and recognise wine by reference to the verbal element which identifies it, since this element designates in particular the grower or the estate on which the wine is produced (Case T-40/03 *Murúa Entrena v OHIM — Bodegas Murúa (Julián Murúa Entrena)* [2005] ECR II-2831, paragraph 56). Therefore, the dominant element of the contested trade mark is its verbal element, namely the word ‘castellani’.

54 The Board of Appeal also stated, at point 19 of the contested decision, that the first part of the signs, which in its view was visually the most prominent, namely ‘castell’, was identical. It is true that the word elements ‘castellani’ and ‘castelluca’ have a certain degree of visual similarity, since they are of the same length and the first seven letters are identical and placed in the same order (‘c-a-s-t-e-l-l’). However, although the consumer’s attention is often caught by the first part of words (*MUNDICOR*, paragraph 81), the applicant rightly points out that the use of the word ‘castle’ is very common for that particular category of goods. The consumer is presented with such a variety of names and goods containing a territorial designation associated with the words ‘castello’, ‘castel’, ‘château’, ‘Schloss’ or ‘castle’

that, in order to be able correctly to identify a wine whose name begins with one of those words, the consumer must examine the suffix attached to it very carefully. In the present case, the final letters of the conflicting signs, that is, ‘a’, ‘n’ and ‘i’ in the contested trade mark and ‘u’, ‘c’ and ‘a’ in the earlier mark, are different.

55 Accordingly, in the overall visual assessment of the signs, the difference established between the word elements ‘castellani’ and ‘castelluca’ is sufficient to rule out any visual similarity between the competing signs.

56 As regards the phonetic comparison, contrary to the Board of Appeal’s finding at point 20 of the contested decision, the dissimilarities between the signs, due to the difference between the suffixes — ‘ani’ in the trade mark applied for and ‘uca’ in the earlier mark — are sufficient for them to be distinguished aurally in German, in spite of the fact that the prefixes (‘castell’) are the same. If the relevant public pronounces the suffixes in question in German, the element ‘ani’ will be pronounced [ani] and the element ‘uca’ pronounced [uka].

57 As regards the conceptual comparison, the Court considers to be incorrect the Board of Appeal’s finding, set out at point 21 of the contested decision, that the average German consumer is likely to associate the two marks in the same way with the word ‘Kastell’, which means castle in German, so that the competing signs are conceptually similar.

58 In that regard, it should be noted, first, that the use of a word meaning ‘castle’ is common in the wine sector. Germany is the fourth biggest world market in terms of wine consumption. Although a large share of that market is covered by German wines, the predominant share consists of imports. Germany’s main suppliers of wine

are Italy, France and Spain. Consequently, the German consumer is accustomed to seeing a large number of trade marks for wine whose name begins with 'Schloss', 'castello', 'château', 'castel' or 'castle' when purchasing wine in a specialist shop, a supermarket or a hypermarket or when choosing a wine from a wine list in a restaurant. He will therefore attach less significance to the prefix and closely examine the suffix of the mark on the bottle label.

59 Secondly, the trade mark applied for contains an Italian family name, which will be recognised as such by the target public. Since Italian food and wine and Italian goods are widely available throughout Germany, the average German consumer is accustomed to identifying an Italian name and associating it with a family. It is highly unlikely that the average German consumer will associate the trade mark applied for with the German word 'Kastellan'. The earlier mark suggests the Castle of Luca or is associated with the town of Lucca, the capital of the province of Lucca in Tuscany, Italy. It follows that there is a conceptual difference between the two signs.

60 Thus, contrary to the finding in the contested decision, when making an overall assessment of the marks at issue, the visual, phonetic and conceptual differences between the conflicting signs are sufficient, in spite of the identical nature of the goods covered, to preclude the resemblances between them giving rise to a likelihood of confusion on the part of the average German consumer.

61 It follows from all of the foregoing that the single plea raised by the applicant must be upheld and that the contested decision must therefore be annulled.

Costs

- 62 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 63 Since OHIM has been unsuccessful, it must be ordered to pay the costs, as applied for by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Annuls the decision of the First Board of Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) of 22 February 2006 (Case R 449/2005-1);**

2. Orders OHIM to pay the costs.

Cooke

Labucka

Prek

Delivered in open court in Luxembourg on 20 November 2007.

E. Coulon

J.D. Cooke

Registrar

President