

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

1 March 2005 *

In Case T-185/03,

Vincenzo Fusco, residing in Sarmeola di Rubano (Italy), represented by B. Saguatti,
lawyer,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs)
(OHIM), represented by O. Montalto and P. Bullock, acting as Agents,

defendant,

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

Antonio Fusco International SA Lussemburgo, Lugano subsidiary, established in
Lugano (Switzerland), represented by M. Bosshard, S. Vereá and K. Muraro,

* Language of the case: Italian.

ACTION brought against the decision of the Fourth Board of Appeal of OHIM of 17 March 2003 in Case R 1023/2001-4,

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

composed of J. Pirrung, President, A.W.H. Meij and N.J. Forwood, Judges,
Registrar: B. Pastor, Deputy Registrar,

having regard to the application lodged at the Registry of the Court of First Instance on 27 May 2003,

having regard to the response of OHIM lodged at the Registry on 17 September 2003,

having regard to the response of the intervener lodged at the Registry on 10 September 2003,

having regard to the applicant's reply lodged at the Registry on 5 November 2003,

following the hearing on 22 June 2004,

gives the following

Judgment

Background to the dispute

- 1 On 21 January 1998, the applicant filed an application for a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('OHIM') pursuant to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).
- 2 The trade mark in respect of which registration was sought was the sign ENZO FUSCO.
- 3 The goods in respect of which registration was sought are in Classes 3, 9, 18, 24 and 25 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 for each of those classes to the following description:
 - 'Soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices', within Class 3;

- ‘Spectacles, spectacle cases’, within Class 9;

 - ‘Leather and imitations of leather; and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; bags and rucksacks; umbrellas, parasols and walking sticks’, within Class 18;

 - ‘Textiles and textile goods, not included in other classes; bed and table covers’, within Class 24.

 - ‘Clothing, footwear, headgear’, within Class 25.
- 4 The trade mark application was published in *Community Trade Mark Bulletin* No 2/1999 of 11 January 1999.
- 5 On 8 April 1999, the intervener filed a notice of opposition against the trade mark applied for pursuant to Article 42 of Regulation No 40/94.
- 6 The mark relied on in support of that opposition was the Community word mark ANTONIO FUSCO, filed on 10 October 1997 and registered on 8 March 1999.
- 7 The goods in respect of which that earlier trade mark was registered correspond to the following descriptions:
- ‘Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions, dentifrices’, within Class 3;

- ‘Spectacles; scientific, nautical, surveying, electric, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus’, within Class 9;

- ‘Precious metals and their alloys and goods in precious metals or coated therewith, not included in other classes; jewellery, precious stones; horological and chronometric instruments’, within Class 14;

- ‘Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery’, within Class 18;

- ‘Furniture, mirrors, picture frames; goods (not included in other classes) of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-pearl, meerschaum and substitutes for all these materials, or of plastics’, within Class 20;

- ‘Textiles and textile goods, not included in other classes; bed and table covers’, within Class 24;

- ‘Clothing, footwear, headgear’, within Class 25.

- 8 By decision of 28 September 2001, the Opposition Division rejected the application for registration pursuant to Article 8(1)(b) of Regulation No 40/94.
- 9 On 5 December 2001, the applicant filed a notice of appeal with OHIM against the decision of the Opposition Division.
- 10 By decision of 17 March 2003 ('the contested decision'), the Fourth Board of Appeal of OHIM dismissed the appeal. The Board of Appeal found essentially that the surname 'Fusco', which appears in both signs and which in Italy was neither rare nor particularly common, was more distinctive than the forenames 'Antonio' and 'Enzo' which were both common forenames. It described the degree of similarity between the signs as neither negligible nor marked, but average. As the goods covered were identical, the Board of Appeal concluded that the presence of the word 'Fusco' in both signs was such as to give rise to a plausible likelihood of confusion in the mind of the reference public.

Forms of order sought

- 11 In its application, the applicant claims that the Court should:

- primarily, annul the contested decision of the Board of Appeal;

- declare that ENZO FUSCO can be registered as a Community trade mark;

- in the alternative, if the Court finds that the marks are likely to engender confusion, specify the precise territorial scope of the decision;

 - primarily, hold that the conversion procedure laid down in Article 108 of Regulation No 40/94 will not be barred except for the territory in respect of which there is expressly found to be a likelihood of confusion;

 - order OHIM and the intervener to pay the costs or, in the alternative, order that the costs be shared.
- 12 At the hearing, the applicant withdrew his second and third heads of claim, and the Court took formal notice of that withdrawal. He also acknowledged that the fourth head of claim concerns a future question which only arises if the action is dismissed.
- 13 OHIM and the intervener contend that the Court should:
- dismiss the action;

 - order the applicant to pay the costs.

Law

Admissibility

Arguments of the parties

- 14 The intervener points out that the signatures of the lawyer which appear on the application and on the authority to act *ad litem* are different. Moreover, the copies of the application were not certified as genuine by a member of the Bar of one of the Member States. At the hearing, the intervener submitted to the Court three documents setting out expert evidence from graphologists to justify the fact that it considered it necessary to raise the question of the authenticity of the signature of the applicant's lawyer.
- 15 In his reply and at the hearing, the applicant's lawyer asserted that the signatures on the application and on the authority to act *ad litem* are his, one in its legible and complete form and the other in the form of initials. Moreover, the applicant attached to the reply seven copies of the application certified as genuine by his lawyer.
- 16 The applicant claimed that the three graphologists' expert opinions were produced out of time. OHIM stated that it was inclined to share that view.

Findings of the Court

- 17 Since the applicant's lawyer has asserted that the signatures on the application and on the authority to act *ad litem* are his and the graphologists, in their expert opinions, pointed out that the signatures on the basis of which they gave their opinions do not enable it to be ruled out that those signatures were by the same person, the Court finds that the intervener's first plea of inadmissibility should not be upheld and the Court does not need to adjudicate on whether or not the graphologists' expert evidence was produced out of time.
- 18 As for the certified copies, it suffices to note that the applicant has regularised the application.

The application for annulment

Arguments of the parties

- 19 In support of its claim for annulment the applicant raises a single plea in law, alleging an infringement of Article 8(1)(b) of Regulation No 40/94.
- 20 The parties are in agreement that the goods covered by the opposing trade marks are the same. Furthermore, the parties refer exclusively to the Italian market.

- 21 The applicant submits essentially that the Board of Appeal erroneously applied the principles governing the assessment of the likelihood of confusion.
- 22 First, the applicant alleges that the Board of Appeal erred in its application of the principle that the comparison of the opposing signs must be made in a uniform and synthetic manner by taking account of the overall impression produced by them. In its view, the Board of Appeal wrongly concentrated its comparison on the single feature 'Fusco'. in a
- 23 Second, the applicant considers that Board of Appeal based its reasoning on the presupposition that, in a trade mark made up of a forename and a surname, the dominant and distinctive feature is always the surname. It considers that the assessment of such signs must be based on the same principles as those governing the comparison of other signs. At the hearing, the applicant referred to a series of recent judgments of the German and Spanish courts which decided that the average modern consumer will not a priori think that a surname constitutes the dominant feature of a sign composed according to the formula 'forename + surname'.
- 24 Third, the applicant submits that the Board of Appeal based the contested decision on inaccurate information. First of all, contrary to the Board of Appeal's finding in its decision, the surname 'Fusco' is not rare but reasonably common. Next, whilst it is true that the forenames 'Antonio' and 'Enzo' are common in Italy, it is nevertheless the case that they are very different. According to the applicant, the identical nature of the surname in the signs in question is mitigated by the difference between the forenames 'Enzo' and 'Antonio' and by the fact that 'Fusco' is a reasonably common surname in Italy.

- 25 Fourth, according to the applicant, the Italian consumer of items of clothing is particularly observant and circumspect and will be perfectly able to associate the various items covered by the opposing trade marks with two different designers without risk of confusion of the origin. The applicant challenges the findings of the Board of Appeal that that capacity for discernment may be the result of a learning process over time but that it does not exist a priori.
- 26 Fifth, the Board of Appeal misinterpreted the relevance of how well known are the trade marks in question. First, the earlier mark has no reputation at all. Given that, the degree of similarity between the opposing trade marks is not sufficiently high to give rise to a likelihood of confusion. Next, the Board of Appeal should have taken account of the fact that the trade mark ENZO FUSCO has been protected in Italy since 1982 and that the applicant is a recognised designer who has been working for more than 30 years.
- 27 OHIM replies that the Board of Appeal correctly applied the principles governing the comparison of opposing signs. It points out in particular that the surname 'Fusco' is the dominant feature of both signs for the reasons set out in the contested decision.
- 28 According to the intervener, the surname is the principal distinctive feature of the marital status of a person and will therefore be perceived by the consumer as the dominant feature of a trade mark based on the formula 'forename + surname'. Moreover, the intervener considers that, when faced with the opposing marks, the consumer might believe that there is a family connection between the owners of the two trade marks. In support of that argument, it cites various judgments of the Italian courts on the matter.

- 29 As regards whether the signs in question are well known, OHIM and the intervener consider essentially that the arguments put forward by the applicant are immaterial.

Findings of the Court

- 30 Article 8(1)(b) of Regulation No 40/94 states 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.
- 31 According to settled 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.
- 32 According to the same case-law, the likelihood of confusion must be assessed globally, according to the perception that the relevant public has of the trade marks and the goods or services in question and taking into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity between the trade marks and between the goods or services identified (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 there cited).

— The target public

- 33 In the present case, the earlier trade mark is a Community trade mark. It follows that the territory in which the earlier mark is protected is that of the European Community. However, it follows from the unitary character of the Community trade mark laid down in Article 1(2) of Regulation No 40/94 that an earlier Community trade mark is protected in the same way in all Member States. Earlier Community trade marks may therefore be pleaded in opposition to any subsequent application to register a trade mark which infringes their protection, even if it does so only in relation to the perception of the consumers of part of the Community. It follows that the principle laid down in Article 7(2) of Regulation No 40/94, that it suffices, in refusing to register a trade mark, that an absolute ground for refusal exists only in part of the Community, also applies by analogy to a relative ground for refusal under Article 8(1)(b) of Regulation No 40/94.
- 34 Although the Board of Appeal referred at paragraph 15 of the contested decision to the 'Community' consumer, it follows from the entirety of the reasoning which follows that the Board of Appeal examined the Italian market alone. Thus in paragraph 20 of the contested decision it refers to the statistics on the frequency of the surname 'Fusco' in Italy. In paragraph 22 of that decision it examines the perception which the 'Italian consumer' will have of the earlier mark. It follows from the context that paragraph 23 of the contested decision refers solely to the perception of Italian consumers, even though that paragraph does not expressly refer to the Italian market. That paragraph contains a line of reasoning which is parallel to that in the preceding paragraph which does expressly refer to the Italian market.
- 35 Moreover the arguments put forward by the parties refer to Italy alone.

36 It follows that the examination of the contested decision should be limited to the likelihood of confusion in the mind of the Italian consumer alone.

37 Neither the Board of Appeal nor the Opposition Division of OHIM made an express finding on the composition of the relevant public. It nevertheless follows from the decision of the Opposition Division that it assessed the likelihood of confusion in relation to the perception of an average consumer who is reasonably well informed and reasonably observant and circumspect. The Board of Appeal impliedly approved that finding and neither the applicant nor the intervener has challenged it.

38 It follows that the Court should assess the likelihood of confusion in relation to the perception of the average, non-specialist Italian consumer.

— Similarity between the goods

39 The parties did not challenge the finding of the Board of Appeal that the goods identified by the trade marks in question are identical. Therefore, the Court finds that it should start from that premiss.

— Similarity between the trade marks

40 It is common ground between the parties that the Italian consumer will perceive the trade marks as having the same structure, consisting of a forename followed by a surname ('forename + surname').

41 Both visually and aurally the opposing trade marks resemble each other because of the presence of the surname 'Fusco' in both signs. They are distinguishable on the other hand by the forenames preceding that word, namely 'Antonio' and 'Enzo', the latter being the diminutive of the forename Vincenzo. The parties agree that those forenames are neither visually nor aurally similar.

42 Conceptually, the Court considers that the consumer will ordinarily infer from the fact that the forenames are different that the words 'Enzo Fusco' and 'Antonio Fusco' refer to two different people. Moreover, it is not in dispute that there is no semantic relationship between the trade marks and the goods they cover, but that they will be perceived as being proper nouns.

43 The Board of Appeal found that the surname 'Fusco' was the dominant and distinctive feature of the two signs, first, because it is a surname, second, because that name is not particularly common in Italy and, third, because neither 'Antonio' nor 'Enzo' are unusual forenames in Italy.

44 The dispute therefore turns principally on whether the presence of different forenames suffices, in the present case, to exclude a likelihood of confusion in the mind of an Italian consumer, as the applicant argues, or whether, on the contrary, in the signs in question, the word 'Fusco' is so dominant a feature as to subordinate or eclipse in the perception and memory of the consumer, the presence of the forenames 'Enzo' and 'Antonio', which are completely different.

45 It should be noted as a preliminary point that Article 4 of Regulation No 40/94 provides that a Community trade mark may consist of any signs capable of being represented graphically, including personal names. Articles 7 and 8 of that

regulation, on refusal of registration, do not distinguish between signs of a different type. The assessment of likelihood of confusion, within the meaning of Article 8(1) (b) of Regulation No 40/94, between such signs must therefore be made according to the same principles as those concerning any other sign. That does not however exclude the possibility that the fact that a sign is made up of the name of a person may have a bearing on the perception of that sign by the relevant public.

46 As is apparent from settled case-law, the assessment of the likelihood of confusion, as far as concerns the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, inter alia, their distinctive and dominant components (see Case T-292/01 *Phillips-Van Heusen v OHIM — Pash Textilvertrieb und Einzelhandel (BASS)* [2003] ECR II-4335, paragraph 47, and the case-law there cited). The consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind (Case C-342/97 *Lloyd Schufabrik Meyer* [1999] ECR I-3819, paragraph 26). In general it is the dominant and distinctive features of a trade mark which are most easily remembered (see, to that effect, Case T-104/01 *Oberhauser v OHIM — Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 47 and 48). Therefore the requirement to assess the overall impression given by a mark does not exclude an assessment of each of its components in order to determine its dominant features.

47 It follows that by determining, first, the similar and different features of the opposing signs and, second, whether there is a dominant feature which will be more easily recalled by the consumer, the Board of Appeal did not infringe the principles laid down in the case-law.

48 It is, however, necessary to examine in greater detail the relevance of the argument, adopted by the Board of Appeal, that the surname 'Fusco' is the dominant feature of the signs in question.

49 It should be stated, first of all, in this regard that, at first sight, in the two signs in question, the word 'Fusco' is not emphasised either visually or aurally. In the case of the earlier trade mark, the forename 'Antonio' appears at the beginning of the sign. Moreover, both visually and aurally, that word is longer than the word 'Fusco' which follows. In the case of the forename 'Enzo', which appears at the beginning of the sign applied for, that is visually slightly shorter than the word 'Fusco', whereas aurally the words 'Enzo' and 'Fusco', both comprising two syllables, are of equal length.

50 OHIM and the intervener, like the Board of Appeal in the contested decision, nevertheless consider that, in a sign composed of a forename and a surname, it is the latter which confers on the trade mark its distinctive character and therefore constitutes its dominant feature unless it is a very common surname, which will therefore be much less distinctive.

51 The Court notes, first of all, that none of the parties has challenged the finding of the Board of Appeal that neither 'Enzo' nor 'Antonio' will be perceived as being more important, characteristic or distinctive than the word 'Fusco'.

52 It should be noted next that the perception of signs made up of personal names may vary from country to country within the European Community. In determining whether, in a particular country, the relevant public generally attributes greater distinctiveness to the surname than the forename, the case-law of that country, although not binding on the Community courts, may provide useful guidelines.

- 53 In the present case, account should be taken of the perception that the relevant Italian public has of the signs in question. The Court notes in that respect that, as the intervener pointed out, Italian case-law generally considers that the surname constitutes the heart of a sign made up of a forename and a surname. Moreover, it is common ground between the parties that 'Fusco' is not one of the most common surnames in Italy.
- 54 In those circumstances, the Court considers that there is no need in the present case to overturn the finding of the Board of Appeal, also shared by the Opposition Division, that the Italian consumer will, as a general rule, attribute greater distinctiveness to the surname than to the forename in the marks in question.
- 55 Consequently, the Court considers that there is a certain similarity between the signs in question by reason of the fact that their most characteristic feature is the same. In the light of the other features present in the signs, that is the forenames 'Antonio' and 'Enzo', that similarity is neither negligible nor marked.

— The likelihood of confusion

- 56 According to settled case-law, the assessment of the likelihood of confusion implies some interdependence between the relevant factors, and in particular between the similarity between the trade marks and between the goods or services covered. Accordingly, a lesser degree of similarity between these goods or services may be offset by a greater degree of similarity between the marks (see by analogy Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 17, and, in the application of Regulation No 40/94, *GIORGIO BEVERLY HILLS*, paragraph 32). According to that same case-law, the more distinctive the earlier mark, the greater will be the

likelihood of confusion (see, by analogy, Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 24; *Canon*, paragraph 18; and *Lloyd Schufabrik Meyer*, paragraph 20).

- 57 In the present case, the applicant submits, first, that the target public is particularly observant when buying the goods in question.
- 58 In this respect it is clear from the case-law that the consumer's level of attention is likely to vary according to the category of goods or services in question (see, by analogy, *Lloyd Schufabrik Meyer*, paragraph 26). As OHIM rightly pointed out, it is not, however, sufficient that the applicant asserts, in general terms and without supporting evidence, that the level of attention of the consumer of the goods in question is high. It follows that the applicant's argument that the target consumer is particularly observant cannot be upheld.
- 59 The applicant considers, second, that the Board of Appeal should have taken account of the fact that the earlier trade mark has no reputation at all.
- 60 The Court notes that the intervener does not allege that the earlier trade mark is highly distinctive because it is known on the Italian market. However, OHIM and the intervener rightly point out that the applicant is mistaken about the inferences to be drawn from any lack of reputation of the earlier mark, by submitting that the earlier mark has only a reduced level of protection in that case. The distinctive character of the earlier trade mark, which it derives from the inherent qualities of that mark or its reputation, must be taken into account when determining whether the similarity between the goods or services covered by the two trade marks is sufficient to give rise to a likelihood of confusion (*Canon*, paragraphs 18 and 24). By contrast, the existence of a reputation is not a prerequisite of the protection of the earlier right.

- 61 Third, the applicant submits that the Board of Appeal should have taken account of the fact that the trade mark ENZO FUSCO has been protected in Italy since 1982 and that the applicant is a designer who has been established for more than 30 years.
- 62 On that point, the Board of Appeal stated in paragraph 18 of the contested decision that the acquisition of formal rights over the trade mark ENZO FUSCO in Italy since 1982 had no bearing on the outcome of the dispute, given that the only rights to be taken into consideration were the two Community trade marks in question.
- 63 That finding must be upheld. If the applicant holds a national trade mark which predates the Community trade mark ANTONIO FUSCO and which is, at least in substance, the same as the Community trade mark applied for, it is for him, if he considers that he is so entitled and if he so wishes, to seek its protection by means of opposition or annulment proceedings or, where appropriate, before the competent national court in the context allowed by Article 106 of Regulation No 40/94, as the case may be. By contrast as long as the earlier Community trade mark ANTONIO FUSCO is in fact protected, the existence of a national registration predating that Community mark is irrelevant in the context of opposition to a Community trade mark application, even if the Community trade mark applied for is the same as a national trade mark held by the applicant which predates the opposing Community trade mark (see, to that effect, concerning the existence of an earlier trade mark as an absolute ground for refusal to register, Case T-6/01 *Matratzen Concord v OHIM — Hukla Germany (MATRATZEN)* [2002] ECR II-4335, paragraph 55).
- 64 In so far as the applicant's argument seeks to show that the distinctiveness of the earlier Community trade mark is reduced on the ground that it has peacefully coexisted with the Italian trade mark ENZO FUSCO, which allegedly has been protected since 1982, it should be noted that even if that argument were to be accepted, the period of coexistence of those two trade marks was too short to have influenced the perception of the Italian consumer. It is apparent from the file that

the earlier Community trade mark was lodged on 10 October 1997 and registered on 8 March 1999. As the application for the trade mark in question was lodged on 21 January 1998, the relevant period was not even four months.

- 65 Lastly, as for the applicant's professional and personal history or the possible reputation of the name 'Enzo Fusco', the Court finds that the applicant has not adduced the evidence necessary to enable it to assess the materiality or even the relevance of those factors. In particular he failed to show how those factors would influence the Italian consumer's perception of the signs in question.
- 66 In the global assessment of the likelihood of confusion, a lesser degree of similarity between the signs may be offset by other relevant factors such as a strong similarity between the goods.
- 67 In the present case, the Court considers that, since the Italian consumer generally attributes greater distinctiveness to the surname than the forename, he will keep in mind the name 'Fusco' rather than the forenames 'Antonio' or 'Enzo'. Moreover, the goods in question are the same. In those circumstances, the Board of Appeal was entitled to find without erring in law that a consumer faced with goods bearing the trade mark applied for ENZO FUSCO might confuse it with the earlier trade mark ANTONIO FUSCO, so that there is a likelihood of confusion.
- 68 Since the sole plea in law, alleging infringement of Article 8(1)(b) of Regulation No 40/94, is unfounded, the applicant's principal claim must be rejected.

The alternative claim seeking a declaration that the conversion procedure is not barred

69 Under Article 108(1)(a) of Regulation No 40/94, the applicant for a Community trade mark may request the conversion of his Community trade mark application into a national trade mark application to the extent that the Community trade mark application is refused.

70 In the present case, it must be found that the applicant has not yet requested the conversion of his Community trade mark application. The alternative claim essentially seeks a declaration from the Court, at the outset and without reference to a reviewable decision for the purposes of Article 63 of Regulation No 40/94, of the existence of an obligation on the part of OHIM.

71 Since the Court has no jurisdiction to make such a declaration, the alternative claim must be rejected as inadmissible.

Costs

72 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 the applicant has been unsuccessful, he must, in accordance with the forms of order sought by OHIM and the intervener, be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

- 1. Dismisses the action;**

- 2. Orders the applicant to pay the costs.**

Pirrung

Meij

Forwood

Delivered in open court in Luxembourg on 1 March 2005.

H. Jung

Registrar

J. Pirrung

President