

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

6 November 2007*

In Case T-407/05,

Société anonyme des eaux minérales d'Évian (SAEME), established in Évian-les-Bains (France), represented by C. Hertz-Eichenrode, lawyer,

applicant,

v

Office for Harmonization in the Internal Market (Trade Marks and designs) (OHIM), represented by G. Schneider, acting as Agent,

defendant,

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

A. Racke GmbH & Co. OHG, established in Bingen (Germany), represented by N. Schindler, lawyer,

* Language of the case: German.

ACTION against the decision of the Fourth Board of Appeal of OHIM of 22 July 2005 (Case R 82/2002-4) relating to opposition proceedings between Société anonyme des eaux minérales d'Évian (SAÈME) and A. Racke GmbH & Co. OHG, and also against decision No 2754/2001 of the Opposition Division of OHIM of 23 November 2001,

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

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

Registrar: K. Andová, Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 16 November 2005,

having regard to the response of OHIM lodged at the Registry of the Court on 1 March 2006,

having regard to the response of the intervener lodged at the Registry of the Court on 3 March 2006,

further to the hearing on 28 March 2007,

gives the following

Judgment

Legal framework

- ¹ Article 42(3) and Article 74 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended, provide:

‘Article 42

Opposition

...

3. Opposition must be expressed in writing and must specify the grounds on which it is made. It shall not be treated as duly entered until the opposition fee has been paid. Within a period fixed by the Office, the opponent may submit in support of his case facts, evidence and arguments.

...

Article 74

Examination of the facts by the Office of its own motion

1. In proceedings before it the Office shall examine the facts of its own motion; however, in proceedings relating to relative grounds for refusal of registration, the Office shall be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought.

2. The Office may disregard facts or evidence which are not submitted in due time by the parties concerned.'

- 2 Rule 16, Rule 17(2) and Rule 20(2) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1; 'the implementing regulation') provide:

'Rule 16

Facts, evidence and arguments presented in support of the opposition

1. Every notice of opposition may contain particulars of the facts, evidence and arguments presented in support of the opposition, accompanied by the relevant supporting documents.

2. If the opposition is based on an earlier mark which is not a Community trade mark, the notice of opposition shall preferably be accompanied by evidence of the registration or filing of that earlier mark, such as a certificate of registration. If the opposition is based on a well-known mark as referred to in Article 8(2)(c) of the Regulation or on a mark having a reputation as referred to in Article 8(5) of the Regulation, the notice of opposition shall in principle be accompanied by evidence attesting that it is well known or that it has a reputation. If the opposition is entered on the basis of any other earlier right, the notice of opposition shall in principle be accompanied by appropriate evidence on the acquisition and scope of protection of that right.

3. The particulars of the facts, evidence and arguments and other supporting documents as referred to in paragraph 1, and the evidence referred to in paragraph 2 may, if they are not submitted together with the notice of opposition or subsequent thereto, be submitted within such period after commencement of the opposition proceedings as the Office may specify pursuant to Rule 20(2).

Rule 17

Use of languages in opposition proceedings

...

2. Where the evidence in support of the opposition as provided for in Rule 16(1) and (2) is not filed in the language of the opposition proceedings, the opposing party

shall file a translation of that evidence into that language within a period of one month from the expiry of the opposition period or, where applicable, within the period specified by the Office pursuant to Rule 16(3).

...

Rule 20

Examination of opposition

...

2. Where the notice of opposition does not contain particulars of the facts, evidence and arguments as referred to in Rule 16(1) and (2), the Office shall call upon the opposing party to submit such particulars within a period specified by the Office. Any submission by the opposing party shall be communicated to the applicant who shall be given an opportunity to reply within a period specified by the Office.'

Background to the dispute

- 3 On 21 September 1998, A. Racke GmbH & Co OHG filed an application for a Community trade mark at the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) pursuant to Regulation No 40/94.

- 4 The mark in respect of which registration was sought is the following figurative sign in gold, black and white:

REVIAN'S

- 5 The goods covered by the trade mark applied for are 'wine and sparkling wine' 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.
- 6 The application for registration of the mark was published in *Community Trade Marks Bulletin* No 58/99 on 26 July 1999.
- 7 On 26 October 1999, Société anonyme des eaux minérales d'Évian (SAEME) filed notice of opposition on the basis of Article 8(1)(b) and Article 8(5) of Regulation No 40/94. The opposition was based on the following earlier rights:
- the German word mark DE 1 185 308 evian ('the German trade mark'), which had been filed on 11 November 1985 and registered on 10 July 1992 in respect of 'mineral waters' in Class 32, protection of the mark having been renewed until 30 November 2015;

- the French figurative mark FR 98712542 (evian and a mountain motif) ('the French trade mark'), filed on 12 January 1998 and registered in respect of various goods and services;

 - the international mark IR 696812 ('the international trade mark'), registered on 6 July 1998 on the basis of the French trade mark referred to above and effective in Denmark, Germany, Spain, Italy, Austria, Finland, Sweden, the United Kingdom and the Benelux countries;

 - the earlier trade mark evian, well known in Belgium and in France for 'mineral water' ('the well-known trade mark').
- 8 The notice of opposition was accompanied by a copy of the German trade mark, a copy of the French trade mark (in the original language, French) and a copy of the international trade mark (in the original language, French). Also attached was a translation into the language of the proceedings (German) of the list of goods in Classes 32 and 33 of the Nice Agreement to which the opposition based on the French and international trade marks relates.
- 9 By letter of 16 December 1999, the Opposition Division requested the applicant, pursuant to Rule 15(2)(c) and Rule 18(2) of the implementing regulation, to send it three copies of its French and international trade marks within a period of two months, stating that if the applicant should fail to do so, its opposition would be declared inadmissible.

- 10 The applicant sent those documents by letter of 8 February 2000.
- 11 By a standard letter dated 28 February 2000, the Opposition Division allowed the applicant a period of four months to submit any additional facts, evidence or arguments that it considered necessary to substantiate its opposition, stating that the documents should be supplied in the language of the opposition proceedings or be accompanied by a translation.
- 12 On 29 August 2000, the intervener sent its statement to the Opposition Division, claiming *inter alia* that no evidence of the existence or legal validity of the French and international trade marks had been produced, since the applicant had not supplied a translation of the registration certificates for those trade marks. The applicant was subsequently notified of the statement by letter of 19 September 2000 and allowed a period of two months within which to reply to the intervener's arguments.
- 13 On 22 November 2000, thus within the period of two months provided for in the letter of 19 September 2000 for filing its arguments in reply to those of the intervener, the applicant sent a full translation of the registration certificates for its French and international trade marks.
- 14 By decision No 2754/2001 of 23 November 2001, the Opposition Division rejected the opposition as unfounded in so far as it was based on the French and international trade marks. It refused to take into account the registration certificates produced, on the ground of the late submission of the translation of those certificates into the language of the opposition proceedings, and took the view that the existence and legal validity of the two earlier trade marks had not been established. The opposition was rejected also in so far as it was based on the German trade mark, in particular because of the considerable disparity which the Opposition

Division found existed between the goods. Finally, the opposition was rejected also in so far as it was based on the well-known mark.

- 15 On 21 January 2002, the applicant brought an appeal against the decision of the Opposition Division.
- 16 On 22 July 2005, by decision R 82/2002-4, the Fourth Board of Appeal dismissed the applicant's appeal against the decision of the Opposition Division. It approved the Opposition Division's exclusion of the registration certificates for the French and international trade marks on the ground of the late submission of the translation of those certificates into the language of the opposition proceedings. It went on to find, as regards the likelihood of confusion with the German trade mark, that the Opposition Division had been right to conclude that no such likelihood existed, in view of the fact that there was sufficient difference between the goods concerned and between the opposing signs. The Board of Appeal's decision was notified to the applicant on 16 September 2005.
- 17 The applicant subsequently decided not to pursue further its opposition in relation to the French trade mark and the well-known trade mark. As a result, it is challenging the decision of the Opposition Division and of the Board of Appeal on the basis only of the international and the German trade marks.

Forms of order sought by the parties

- 18 The applicant claims that the Court of First Instance should:

— annul the decision of the Opposition Division;

— annul the decision of the Board of Appeal;

— order OHIM to pay the costs.

19 The applicant is challenging the decisions of the Opposition Division and of the Board of Appeal on the basis only of its international trade mark and of its German trade mark.

20 Moreover, the applicant explained at the hearing that its international trade mark had been partly removed from Class 32 and completely removed from Class 33, and that it therefore no longer covers anything other than 'still or sparkling water (mineral or non-mineral)' in Class 32. It also applied for the intervener to be ordered to bear its own costs.

21 OHIM contends that the Court of First Instance should:

— dismiss the action;

— order the applicant to pay the costs.

22 The intervener contends that the Court of First Instance should:

— dismiss the action;

— order the applicant to pay the costs.

Law

- 23 The applicant raises two pleas in law in support of annulment, the first relating to an infringement of fundamental principles of procedural law — specifically of Article 42(3) and Article 74 of Regulation No 40/94 and also of the principle of the right to be heard —, the second relating to an infringement of Article 8(1)(b) of Regulation No 40/94.

Arguments of the parties

- 24 The applicant takes the view that the Board of Appeal infringed Article 42(3) and Article 74 of Regulation No 40/94 by refusing to take the international trade mark into consideration on the erroneous ground that the translation of that mark was not supplied when the opposition was entered and that it had only belatedly been produced.
- 25 The applicant claims, first, that its opposition satisfies the requirements of Article 42(3) of Regulation No 40/94. The notice of opposition and its annexes, referred to in paragraph 8 above, provided the intervener with all essential information, such as the date of filing of the international trade mark, the date of its registration, a reproduction of the mark and also a translation of the list of goods in Classes 32 and 33 of the Nice Agreement which are protected by that mark and to which the opposition relates. The Board of Appeal was wrong, therefore, to take the view that it was neither disproportionate nor unreasonable to demand the translation into the language of the proceedings, German, of documents submitted in French. Similarly, it is critical of the fact that the Board of Appeal was silent as to other particulars which the Board wanted to have translated.

- 26 The applicant relies on Case T-107/02 *GE Betz v OHIM — Atofina Chemicals (BIOMATE)* [2004] ECR II-1845, noting that, unlike the absence of a translation of the lists of goods and services of the earlier mark — which contravenes Rule 15(2) of the implementing regulation, read in conjunction with Rule 17(1) —, the absence of a translation of the registration certificate for the earlier mark does not contravene any provision of Regulation No 40/94 or of the implementing regulation. It follows that, as regards its international trade mark, its opposition was validly entered.
- 27 Second, the applicant denies that the full translation of the international registration certificate was submitted out of time. It relies in that regard on Case T-275/03 *Focus Magazin Verlag v OHIM — ECI Telecom (Hi-FOCuS)* [2005] ECR II-4725, in which it was held that a translation of a registration certificate was not submitted out of time for the purposes of Article 74(2) of Regulation No 40/94, where it was annexed to an appeal before the Board of Appeal. Taking into account the continuity in terms of functions between the Opposition Division and the Board of Appeal, the Court pointed out in that case, first of all, that the Board of Appeal is required to base its decision on all the matters of fact and of law introduced before both the Opposition Division and the Board of Appeal, unless they have been submitted out of time for the purposes of Article 74(2) of Regulation No 40/94 (paragraphs 37 and 38). The Court went on to find that the translation of the registration certificate which was submitted with the appeal brought before the Board of Appeal had been produced in due time. The applicant infers that there is all the more reason in the present case not to take the view that production was out of time for the purposes of Article 74(2) of Regulation No 40/94, since the applicant replied within the period specified to the plea in law raised by the intervener, by submitting to the Opposition Division the full translation of the registration certificate for the international trade mark in the language of the proceedings.
- 28 OHIM takes the view that the applicant's reasoning is based on a misunderstanding of the statutory arrangement of Rule 15 et seq. of the implementing regulation. It believes that it is appropriate to make a distinction between the notice of opposition and the evidence submitted in support of the opposition.

- 29 If the notice of opposition does not comply with the provisions of the implementing regulation, the opposition must be rejected as inadmissible, subject to the opportunity to remedy deficiencies found pursuant to Rule 18(2) of the implementing regulation. If OHIM does not reject the opposition as inadmissible, inter partes opposition proceedings are commenced by communicating the notice of opposition to the applicant.
- 30 By contrast, the evidence to be submitted in support of the opposition, including, in particular, evidence relating to the existence and validity of the earlier right, does not have to be produced together with the notice of opposition. It may be submitted subsequently, within a period after commencement of the opposition proceedings specified by OHIM (Rule 16(3) of the implementing regulation). OHIM states that the evidence derived from the registration certificates must satisfy the language requirements set out in Rule 17(2) of the implementing regulation, failing which the opposition must be rejected as unfounded.
- 31 As regards whether or not the document in question was filed out of time, OHIM claims that it is apparent from the judgment in Case T-388/00 *Institut für Lernsysteme v OHIM — Educational Services (ELS)* [2002] ECR II-4301 that, if an opponent has not complied with the time-limit which it was set for the production of evidence, that evidence is accordingly excluded until proceedings are brought for a declaration of invalidity. Its appeal before the Board of Appeal does not, therefore, start time running again for the production of evidence. Accordingly, the Board of Appeal was right to reject the opposition in so far as it was based on the international trade mark, since the translation of that mark was filed outside the time-limit set by the Opposition Division.
- 32 The intervener takes the view that the only relevant factor is the applicant's objective failure to comply with the procedural rules, which cannot be remedied by the subsequent submission of documents after the time-limits have expired.

Findings of the Court

33 In the arguments which it puts forward in support of its first plea in law, the applicant states, first of all, that it complied with the language requirements which the legislation imposes on opposition proceedings, and then denies that the translation of the international trade mark was submitted out of time. In examining that first plea in law, it is appropriate to analyse each of those two points in turn.

The language requirement in opposition proceedings

34 First of all, it must be borne in mind that, under Rule 16(2) of the implementing regulation, if the opposition is based on an earlier non-Community trade mark, the notice of opposition should preferably be accompanied by evidence of the registration or filing of that mark, such as a certificate of registration.

35 It is apparent from the case-law that Rule 17(2) of the implementing regulation, according to which the evidence submitted in support of an opposition must be submitted in the language of the opposition proceedings or accompanied by a translation into that language (see paragraph 2 above), is justified by the necessity to observe the principle of the right to be heard and to ensure equality of arms between the parties in inter partes proceedings (Case T-232/00 *Chef Revival USA v OHIM — Massagué Marín (Chef)* [2002] ECR II-2749, paragraph 42, and *BIOMATE*, paragraph 72).

36 It also follows from the case-law that, while it is true that the opposing party is not in any way obliged to provide a full translation of the registration certificates for the

earlier trade marks, that does not mean that the Opposition Division is obliged to take into account, when considering the substance of the opposition, registration certificates provided in a language other than that of the opposition proceedings. In the absence of a translation of the registration certificates into the language of the proceedings, the Opposition Division may lawfully reject the opposition as unfounded unless, in accordance with Rule 20(3) of the implementing regulation, it can give a ruling on it on the basis of the evidence which it may already have before it (*Chef*, paragraph 44, and *BIOMATE*, paragraph 72).

37 Finally, while the evidence stems from the registration certificates and not from a translation of them, the fact remains that if that evidence is to be taken into account it must comply with the language requirements imposed by Rule 17(2) of the implementing regulation (*BIOMATE*, paragraph 73).

38 In the present case, it is common ground that the notice of opposition was accompanied only by a copy of the international trade mark in the original language, French, and by a translation into the language of the proceedings, German, of the list of goods in Classes 32 and 33 of the Nice Agreement, that is to say, those to which the opposition based on the international trade mark relates.

39 Having regard to the foregoing, and contrary to the view taken by the applicant, the abovementioned annexes to the notice of opposition cannot comply with the language requirements arising from Article 42(3) of Regulation No 40/94 and Rule 17(2) of the implementing regulation.

40 As regards the need, which the intervener disputes, to translate the international registration certificate in its entirety, the question whether certain parts of the document may be considered irrelevant for the opposition at issue and therefore not be translated is a matter for the discretion of the opposing party. However, it must

be observed that only the parts actually translated into the language of the proceedings are to be taken into consideration by the Board of Appeal. Furthermore, in the present case it is apparent from the case-file that the length of the international trade mark's registration certificate — provided in French — is not such, in particular compared with the translated list of goods, that the obligation to provide a translation thereof may be regarded as disproportionate and unreasonable (see, to that effect, *BIOMATE*, paragraph 74).

41 Next, the applicant's argument, set out in paragraph 27 above, that *BIOMATE* duly confirms that its opposition was indeed validly entered as far as the international trade mark is concerned, must be rejected, as it is based on confusion between the provisions of the implementing regulation concerning the notice of opposition and those referring to the evidence and documents supporting the opposition.

42 In fact, it follows from Article 42 of Regulation No 40/94, read in conjunction with Rules 16 to 18 and 20 of the implementing regulation, that the legislature makes a distinction between, on the one hand, the conditions which the notice of opposition must satisfy, which are conditions of admissibility of the opposition, and, on the other hand, the submission of the facts, evidence and arguments and of the documents supporting the opposition, which are matters falling within the scope of the examination of the opposition (*Chef*, paragraph 31).

43 The legal requirements concerning, in particular, the evidence, the supporting documents — such as the registration certificate for an earlier trade mark — and their translation into the language of the opposition proceedings are not conditions of admissibility of the opposition falling within the scope of Rule 18(2) of the implementing regulation but substantive conditions of the opposition (*Chef*, paragraph 52).

44 However, the opposition in the present case was not rejected as inadmissible — the notice of opposition submitted by the applicant having satisfied the conditions set out in Rules 16 and 18 of the implementing regulation — but was declared unfounded for lack of evidence.

The delay in the submission of the translation of the registration certificate for the international trade mark

45 It is noted that, by a standard letter dated 28 February 2000, the Opposition Division allowed the applicant a period of four months to submit any additional facts, evidence or arguments that it considered necessary to substantiate its opposition, stating that any document should be drawn up in the language of the opposition proceedings or be accompanied by a translation.

46 It must be held that that standard letter complies with Article 42 of Regulation No 40/94 and with Rule 16(2) and (3) and Rule 17(2) of the implementing regulation inasmuch as those provisions provide that the facts, evidence and arguments to be presented in support of the opposition may be so presented within a period fixed by OHIM. Moreover, that letter is headed by a reference to Rule 19(1), Rule 16(3), Rule 17(2) and Rule 20(2) of the implementing regulation.

47 However, the applicant failed to send the translation of the registration certificate for the international trade mark within the period specified by the Opposition Division in that letter. That translation was filed by the applicant only as an attachment to a letter of 22 November 2000, in response to the intervener's arguments specifically criticising the absence of the document in question, which were transmitted by the Opposition Division on 19 September 2000.

- 48 The applicant claims, however, that the translation of that document was submitted before the Board of Appeal in due time, relying in that regard on *Hi-FOCuS* (paragraphs 37 and 38) in which the Court, on the basis of the continuity in terms of functions between the departments of OHIM, held that the translation of a registration certificate submitted when lodging an appeal before the Board of Appeal had not been out of time for the purposes of Article 74(2) of Regulation No 40/94, because it was submitted within the four-month time-limit for appeal laid down in Article 59 of Regulation No 40/94.
- 49 Indeed, the established case-law shows that there is continuity, in terms of their functions, between the different departments of OHIM, namely the examiner, the Opposition Division, the Administration of Trade Marks and Legal Divisions and the Cancellation Divisions, on the one hand, and the Boards of Appeal, on the other (Case T-308/01 *Henkel v OHIM — LHS (UK) (KLEENCARE)* [2003] ECR II-3253, paragraph 25; Case T-323/03 *La Baronía de Turis v OHIM — Baron Philippe de Rothschild (LA BARONNIE)* [2006] ECR II-2085, paragraph 57; and Case T-252/04 *Caviar Anzali v OHIM — Novomarket (Asetra)* [2006] ECR II-2115, paragraph 30).
- 50 It follows from that continuity in terms of functions between the departments of OHIM that, in the review of decisions taken by the departments of OHIM hearing the application at first instance that the Boards of Appeal must undertake, the Boards of Appeal are required to base their decision on all the matters of fact and of law which the parties concerned introduced either in the proceedings before the department which heard the application at first instance or in the appeal (*KLEENCARE*, paragraph 32; Case T-57/03 *SPAG v OHIM — Dann and Backer (HOOLIGAN)* [2005] ECR II-287, paragraph 18; *Hi-FOCuS*, paragraph 37; *LA BARONNIE*, paragraph 58; and *Asetra*, paragraph 31).
- 51 Thus, the Boards of Appeal may, subject only to Article 74(2) of Regulation No 40/94, allow the appeal on the basis of new facts relied on by the party which has brought the appeal or on the basis of new evidence adduced by that party

(*KLEENCARE*, paragraph 26, and Case T-16/02 *Audi v OHIM (TDI)* [2003] ECR II-5167, paragraph 81). The review undertaken by the Boards of Appeal is not limited to the lawfulness of the contested decision, but, by virtue of the devolutive effect of the appeal proceedings, it requires a reappraisal of the dispute as a whole, since the Boards of Appeal must re-examine in full the initial application and take into account evidence produced in due time (*LA BARONNIE*, paragraph 59, and *Asetra*, paragraph 32).

52 However, contrary to the applicant's claim, Article 59 of Regulation No 40/94 cannot be interpreted as starting a new time-limit for the person bringing such an appeal in which to submit facts and evidence in support of his opposition (Case C-29/05 P *OHIM v Kaul* [2007] ECR I-2213, paragraph 61).

53 Article 59, which lays down the conditions for bringing an appeal before the Board of Appeal, does not — unlike Article 42(3) of Regulation No 40/94 — refer to the submission of facts or evidence, but only to the filing, within a time-limit of four months, of a written statement setting out the grounds of appeal (*OHIM v Kaul*, paragraph 60).

54 In the present case, since the applicant did not submit the translation of the document in question within the period set for that purpose pursuant to Regulation No 40/94 or, therefore, 'in due time' within the meaning of Article 74(2) of the Regulation, the appropriate conclusions must be drawn.

55 It must be stated at the outset, as is apparent also from the wording of Article 74(2) of Regulation No 40/94, that OHIM may disregard facts or evidence which are not submitted in due time by the parties concerned.

- 56 It follows from that wording that, as a general rule and unless otherwise specified, the submission of facts and evidence by the parties remains possible after the expiry of the time-limits to which such submission is subject under the provisions of Regulation No 40/94, and that OHIM is in no way prohibited from taking account of facts and evidence which are submitted or produced late (*OHIM v Kaul*, paragraph 42).
- 57 However, it is equally apparent from that wording that a party has no unconditional right to have facts and evidence submitted out of time taken into consideration by OHIM. In stating that the latter 'may', in such a case, decide to disregard facts and evidence, Article 74(2) of Regulation No 40/94 grants OHIM a wide discretion to decide whether or not to take such information into account, while nevertheless being required to give reasons for its decision in that regard (*OHIM v Kaul*, paragraph 43).
- 58 Where OHIM is called upon to give judgment in the context of opposition proceedings, taking such facts or evidence into account is particularly likely to be justified where OHIM considers, first, that the material which has been produced late is, on the face of it, likely to be relevant to the outcome of the opposition brought before it and, second, that the stage of the proceedings at which that late submission takes place and the circumstances surrounding it do not preclude such matters being taken into account (*OHIM v Kaul*, paragraph 44).
- 59 The possibility for the department called upon to make a decision in a dispute of taking into account facts and evidence submitted late by the parties is, at least in respect of opposition proceedings, likely to contribute to ensuring that marks whose use could later successfully be challenged by means of annulment or infringement

proceedings are not registered. As the Court has already held, reasons of legal certainty and sound administration speak in favour of that approach (*OHIM v Kaul*, paragraph 48).

- 60 In the present case, the Court finds that the Board of Appeal restricted itself to concluding that the Opposition Division was right not to take into consideration, on account of their late submission, the translations submitted by the applicant during the opposition proceedings. However, it is not apparent from the case-file that the Board of Appeal exercised the discretion granted to it by Article 74(2) of Regulation No 40/94 to determine whether or not it should take account of the document in question, or at least it does not appear to have given reasons for its decision on that point.
- 61 In fact, the reasons given by the Board of Appeal relate only to the need to translate into the language of the opposition proceedings the evidence submitted in support of the opposition, and to the absence of any obligation on the Opposition Division to take into account documents submitted in a language other than the language of the proceedings; no reasons are given, however, as to whether or not the translation submitted out of time should be taken into account.
- 62 Furthermore, the arguments put forward at the hearing by OHIM, that the Board of Appeal exercised its discretion, are irrelevant. OHIM claims that the Board of Appeal raised the question whether the Opposition Division's refusal to take into account the document in question was well founded and took the view, in paragraph 43 of its decision, that it would be contrary to the principle of equality of arms to fix a new time-limit for a party which had allowed the time-limit for submitting evidence to elapse, because the other party was invoking precisely that failure to submit that evidence.

63 However, the considerations set out in paragraph 43 of the decision of the Board of Appeal do not permit the Court to check that the Board of Appeal actually familiarised itself with the document in question in order to determine whether that document was, on the face of it, likely to have any real relevance in the opposition proceedings. Nor do they permit the Court to verify whether the circumstances of the case and the stage of the proceedings at which that late submission took place preclude that document being taken into account.

64 The Board of Appeal therefore infringed Article 74(2) of Regulation No 40/94 by failing to exercise, or at least by failing to explain how it exercised, the discretion granted to it by that article, and thus by failing to give reasons to the requisite legal standard for its decision not to take into account the translation of the registration certificate for the international trade mark.

65 However, it is necessary to examine the inferences that must be drawn from that infringement of Article 74(2) of Regulation No 40/94. According to settled case-law, a procedural irregularity will entail the annulment of a decision in whole or in part only if it is shown that in the absence of such irregularity the contested decision might have been substantively different (*LA BARONNIE*, paragraph 69). Similarly, under Article 63(2) and (3) of Regulation No 40/94, decisions of the Boards of Appeal may be annulled or altered only where they contain a substantive or procedural irregularity (*LA BARONNIE*, paragraph 69).

66 In the present case, it cannot be ruled out that the evidence which the Board of Appeal failed to take into consideration might be capable of altering the substance of the Board's decision. It is not, however, for the Court of First Instance to take the place of OHIM in assessing the evidence in the case.

67 It follows that, on that ground alone, the decision of the Board of Appeal must be annulled, without there being any need to rule on the question of the infringement of the principle of the right to be heard which was raised in relation to the first plea in law, or on the second plea in law, and without the Court having to rule on the admissibility of the application for annulment of the decision of the Opposition Division.

Costs

68 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. In the present case, OHIM has been unsuccessful and the applicant has applied for OHIM to be ordered to pay the costs.

69 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener to bear its own costs. In the present case, the intervener, like OHIM, has been unsuccessful. However, the applicant has applied for the intervener to be ordered to bear only its own costs and OHIM did not address the head of claim according to which OHIM alone should be ordered to pay the costs incurred by the applicant.

70 Accordingly, OHIM must be ordered to pay its own costs and those incurred by the applicant, and the intervener must be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

- 1. Annuls the decision of the Fourth Board of Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) of 22 July 2005 (Case R 82/2002-4);**
- 2. Orders OHIM to pay its own costs and those incurred by the applicant;**
- 3. Orders the intervener to bear its own costs.**

Cooke

Labucka

Prek

Delivered in open court in Luxembourg on 6 November 2007.

E. Coulon

J.D. Cooke

Registrar

President