

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

27 November 2003 *

In Case T-348/02,

Quick restaurants SA, established in Brussels (Belgium), represented by L. Van Bunnan, lawyer, with an address for service in Luxembourg,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by A. Rassat and S. Laitinen, acting as Agents,

defendant,

ACTION for partial annulment of the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 17 September 2002 (Case R 1117/2000-2) concerning registration of the word Quick as a Community trade mark,

* Language of the case: French.

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

composed of: V. Tiili, President, P. Mengozzi and M. Vilaras, Judges,

Registrar: B. Pastor, Deputy Registrar,

having regard to the written procedure and further to the hearing on 10 July 2003,

gives the following

Judgment

Background to the dispute

- 1 On 4 October 1996, the applicant filed an application for a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('the Office') 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 The trade mark for which registration was sought is the sign, described on the application form as 'figurative', reproduced below:



Quick

- 3 The products and services in respect of which registration was sought are in Classes 29 to 32 and Class 42 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:

- Class 29: 'Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces; eggs, milk and other milk products; edible oils and fats; preserved foodstuffs included in this class; pickles; foodstuffs, pre-prepared dishes included in this Class';

- Class 30: 'Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, biscuits, cakes, pastry and confectionary; honey, treacles; yeast, baking-powder; salt, mustard; pepper, vinegar, sauces (condiments); salad dressings; spices; ice for refreshment; preserved foodstuffs included in this class; foodstuffs, pre-prepared dishes included in this class';

- Class 31: ‘Agricultural, horticultural and forestry products and grains not included in other classes; live animals; fresh fruits and vegetables; seeds, natural plants and flowers; foodstuffs for animals; malt; foodstuffs, prepared dishes included in this class’;

- Class 32: ‘Beers, ale and porter; mineral and aerated waters and other non-alcoholic drinks; syrups and other preparations for making beverages; prepared drinks included in this class’;

- Class 42: ‘Distribution of prepared foodstuffs and beverages for consumption; tea rooms, snack bars, sandwich bars, canteens, chip shops, restaurants, self-service restaurants, fast food restaurants, drive-in restaurants, bars, cafes and similar establishments; food services, take-away dishes and drinks; catering’.

4 By decision of 18 September 2000, the Examiner, under Article 7(1)(b) and (c) of Regulation No 40/94, refused to register the mark applied for in respect of all the products and services described. In the Examiner’s view, the mark for which registration was sought consisted exclusively of a word which could be used, in trade, to describe a quality of the products and services mentioned above. Given that the word ‘quick’ accurately described the nature of the products and services referred to, the Examiner also concluded that the mark in question was devoid of any distinctive character in relation to all the products and services referred to in the trade mark application.

5 On 17 November 2000, the applicant appealed to the Office under Article 59 of Regulation No 40/94 against the Examiner’s decision. In its pleadings, the

applicant restricted its application for registration solely to the products referred to in the application which fall within Classes 29, 30, 31 and 32 of the Nice Agreement.

6 By decision of 17 September 2002 ('the contested decision'), the Second Board of Appeal upheld the Examiner's decision in so far as it refused the application for a trade mark in respect of the following products:

— Class 29: 'Foodstuffs, pre-prepared dishes included in this class';

— Class 30: 'Coffee, tea, cocoa, artificial coffee; foodstuffs, pre-prepared dishes included in this class;'

— Class 31: 'Pre-prepared dishes included in this class'.

7 On that point, the Board of Appeal found in essence that the mark applied for was devoid of distinctive character for the purposes of Article 7(1)(b) of Regulation No 40/94 as regards the products concerned, since, when applied to them, it was likely to suggest immediately to the English-speaking consumer that the products involved can be prepared and served quickly. It also found that the sign Quick consisted of an indication which could serve, in trade, to designate an important quality of the relevant products, namely the speed with which they can

be prepared and served, and that the sign was thus also descriptive within the meaning of Article 7(1)(c) of Regulation No 40/94. However, the Board of Appeal annulled the Examiner's decision so far as it concerned the other products and services covered by the trade mark application.

Procedure and forms of order sought

- 8 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 26 November 2002.

- 9 The Office lodged its response at the Court Registry on 26 February 2003.

- 10 By letter lodged at the Court Registry on 17 March 2003, the applicant sought leave, in accordance with Article 135(2) of the Rules of Procedure of the Court of First Instance, to submit a reply.

- 11 On 25 March 2003, the Court of First Instance (Fourth Chamber) decided that it was not necessary to undertake a further exchange of pleadings, given that the applicant would be able to develop its pleas and arguments and reply to the Office's response in the course of the oral procedure.

12 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure.

13 The parties presented oral argument and replied to the Court's questions at the hearing on 10 July 2003.

14 The applicant claims that the Court should:

— annul the operative part of the contested decision in so far as it partially refuses the application for a Community trade mark;

— uphold the contested decision as to the remainder;

— order the Office to pay the costs.

15 The Office contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

Preliminary observations

- 16 This action seeks partial annulment of the contested decision to the extent that it upholds the Examiner's decision of 18 September 2000, in so far as the latter refused the application for a Community trade mark for the products referred to in paragraph 6 above falling in Classes 29 to 31 of the Nice Agreement.
- 17 In its application, the applicant raises a single plea alleging infringement of Article 7(1)(c) of Regulation No 40/94. At the hearing, in response to a question from the Court, the applicant stated that it was not pleading infringement of Article 7(3) of Regulation No 40/94 concerning acquisition by the mark applied for of distinctive character as a consequence of use. Consequently, the Court does not need to adjudicate on whether the mark applied for has acquired distinctiveness through use. The applicant none the less argued that, since the mark applied for is in part the same as its corporate name, the mark has acquired a secondary meaning which, in its submission, is a factor to be taken into account in assessing whether the mark has distinctive character, even though the applicant has not formally raised in its application a plea alleging infringement of Article 7(1)(b) of Regulation No 40/94.

Plea alleging infringement of Article 7(1)(c) of Regulation No 40/94

Arguments of the parties

- 18 The applicant submits that the Board of Appeal's interpretation of Article 7(1)(c) of Regulation No 40/94 was incorrect. The provision reproduces verbatim Article 6 quinquies, point B 2, of the Paris Convention for the Protection of Industrial Property of 20 March 1883, as last revised at Stockholm on 14 July 1967, which allows trademarks to be denied registration only '... when they... consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production'. Thus, in the applicant's submission, the purpose of Article 7(1)(c) of Regulation No 40/94 is to prevent a single undertaking appropriating a term which must be available to all, including the general public, to designate precisely and accurately what is being sold or offered for sale under the sign concerned. That interpretation is also borne out by the Court of Justice's judgment in Case C-383/99 P *Procter & Gamble v OHIM* [2001] ECR I-6251, paragraphs 37 and 39, and by the judgment of the Court of First Instance in Case T-34/00 *Eurocool Logistik v OHIM (EUROCOOL)* [2002] ECR II-683, paragraph 45, as well as by various decisions of national courts.
- 19 That is not the case as regards foodstuffs, pre-prepared dishes and drinks (salads, portions of chips or other pre-prepared dishes containing meat, eggs or milk products) in packaging marked with the sign Quick. Quick, contrary to the Board of Appeal's finding, is an 'evocative' sign in relation to pre-prepared dishes and cannot be interpreted as designating an 'important quality, namely the speed with which those dishes can be prepared or served' and, therefore, as a descriptive sign. In fact, the word 'quick', when associated with pre-prepared dishes, is arbitrary and quite capable of distinguishing those dishes from take-away products of the

same type offered by competitors. It differs from the usual way of designating take-away dishes or their characteristics. In addition, the speed with which the products concerned can be prepared, which is evoked by the word Quick, does not affect the intrinsic quality of the food cooked and served. The salads and chips would look and taste the same regardless of whether they were prepared and served quickly or slowly.

- 20 The Office refers to the Court of Justice's judgment which found that it is clear from the provisions of Article 7(1)(c) together with those of Article 12 of Regulation No 40/94 that 'the purpose of the prohibition of registration of purely descriptive signs or indications as trade marks is... to prevent registration as trade marks of signs or indications which, because they are no different from the usual way of designating the relevant goods or services or their characteristics, could not fulfil the function of identifying the undertaking that markets them...' (*Procter & Gamble v OHIM*, cited above, paragraph 37). Furthermore, the judgment also states that the signs and indications envisaged in Article 7(1)(c) of Regulation No 40/94 are only those which may serve in normal usage from a consumer's point of view to designate, either directly or by reference to one of their essential characteristics, goods or services such as those in respect of which registration is sought (*Procter & Gamble v OHIM*, paragraph 39).

- 21 In those circumstances and given, in particular, the fact that the applicant disputes neither the meaning of the word 'quick' in English nor the fact that the trade mark Quick, for which registration is sought, displays no graphic feature likely to make a lasting impression on the consumer and to differentiate the mark from a word mark, the assessment of whether the mark has distinctive character is determined solely by whether it is possible to interpret the word 'quick' as a usual way, in everyday English, of presenting one of the fundamental characteristics of the designated products.

- 22 In that connection, the Office observes, first, that the foodstuffs in respect of which registration of the mark was refused all have to be prepared. Admittedly, it is not inconceivable that some of them (coffee, cocoa, granulated chicory and loose-leaf tea) may be offered in circumstances entailing no preparation and no fast service and that, therefore, the sign Quick is not descriptive so far as they are concerned. However, since the applicant has applied for registration of the word Quick for these product categories in general, without distinguishing between them, the Board of Appeal was right to assess the sign by reference to those product categories, which include those products which are part of the fast food industry (see, to that effect, Case T-359/99 *DKV v OHIM (EuroHealth)* [2001] ECR II-1645, paragraph 33, and Case T-355/00 *DaimlerChrysler v OHIM (TELE AID)* [2002] ECR II-1939, paragraph 34).
- 23 Second, the Office submits that Quick, applied to the products concerned, will suggest first and foremost to the English-speaking consumer that the products can be prepared and served quickly, speed — including convenience — being capable of constituting a key feature of quality for the relevant public. Therefore, the applicant cannot reasonably maintain that the speed of preparation suggested by the sign concerned ‘does not play a part in the end result or intrinsic quality’ of the relevant products. It is accepted that speed (and convenience) of preparation may be a selection criterion, something which potential buyers of these products expect, in which case that criterion does indeed constitute an essential quality, not possessed by all foodstuffs. It is therefore of little significance that the mark Quick does not describe either the appearance or the taste of the designated products.
- 24 Nor can the applicant validly maintain that Quick merely evokes the prepared dishes referred to in the application for registration. The word ‘quick’ does not refer indirectly to certain characteristics of the relevant products, and the message which it conveys requires no mental effort on the part of relevant consumers. Far from being purely evocative, ‘quick’ unequivocally and directly describes an essential quality of the relevant products. That is particularly clear

from internet research on a number of sites in the food sector, which use the word 'quick' as a usual way of designating a key quality. Quick is thus no different from the customary way of designating the pre-prepared foodstuffs referred to in the application for registration.

- 25 Finally, the Office notes that the contested decision is consistent with its standard practice of refusing registration of approbatory terms in relation to food (decisions of the Second Board of Appeal of the Office of 23 April 2002, QUICK R 414/2001-2, and of 2 July 2001, PURE PROTEIN R 680/1999-2; decision of the First Board of Appeal of 30 April 2001, Cremino R 517/2000-1).

Findings of the Court

- 26 Under Article 7(1)(c) of Regulation No 40/94 'trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service' are not to be registered. In addition, Article 7(2) of Regulation No 40/94 states that 'paragraph 1 shall apply notwithstanding that the grounds of non-registrability obtain in only part of the Community'.
- 27 There is case-law to the effect that Article 7(1)(c) of Regulation No 40/94 prevents the signs or indications referred to therein from being reserved to one undertaking alone because they have been registered as trade marks. That provision thus pursues an aim in the public interest, which requires that such signs or indications may be freely used by all (see Case T-219/00 *Ellos v OHIM (ELLOS)* [2002] ECR II-753, paragraph 27, and the case-law cited).

- 28 Furthermore the signs envisaged by Article 7(1)(c) of Regulation No 40/94 are signs regarded as incapable of performing the essential function of a trade mark, namely that of identifying the commercial origin of the goods or services, thus enabling the consumer who acquired the product or service to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition (*ELLOS*, paragraph 28).
- 29 The distinctiveness of a trade mark must be assessed, first, in relation to the goods or services in respect of which registration of the sign has been requested (see Case T-135/99 *Taurus-Film v OHIM (Cine Action)* [2001] ECR II-379, paragraph 25, and Case T-136/99 *Taurus-Film v OHIM (Cine Comedy)* [2001] ECR II-397, paragraph 25) and, second, in relation to the perception of the section of the public targeted, which is composed of the consumers of those products or services (*ELLOS*, paragraph 29).
- 30 In the present case, how the word 'quick' is perceived must be determined by reference to the English-speaking consumer in the Community, since it derives from, and is in everyday use in, the English language (see, to that effect, *Procter & Gamble v OHIM*, paragraph 42). Furthermore, the section of the public targeted is deemed to be composed of average English-speaking consumers within the Community, who are reasonably well-informed and reasonably observant and circumspect (see, to that effect, Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 26; *EuroHealth*, paragraph 27, and *ELLOS*, paragraph 30). Given their nature (foodstuffs), the relevant products are intended for general consumption.
- 31 In those circumstances, it is necessary to determine, in the context of the absolute ground for refusal laid down by Article 7(1)(c) of Regulation No 40/94, whether for the section of the public targeted there is a direct and specific relationship between the word Quick and the products in respect of which the application for registration was refused, i.e. 'foodstuffs, pre-prepared dishes, coffee, tea, cocoa and artificial coffee' within Classes 29 to 31 of the Nice Agreement.

32 As to whether, for the section of the public targeted, there is a direct and specific relationship between the mark applied for and the products concerned, the Board of Appeal found, rightly, that the word 'quick' consists exclusively of an indication which may serve, in trade, to designate an important quality of the relevant products, that is to say the speed with which they can be prepared and served. Thus, applied to the products concerned, the word immediately suggests to an English-speaking consumer in the Community that the products are ones which can be prepared and served quickly.

33 It follows that the word Quick enables the section of the public targeted to establish immediately, and without further thought, a specific and direct relationship between the sign and the products covered by the application for registration at issue.

34 It is true that some of the products covered by the trade mark application, including in particular 'coffee, tea, cocoa, artificial coffee', may sometimes be offered for sale in circumstances which do not entail any preparation or fast service, and accordingly Quick is not descriptive so far as they are concerned. However, the Court notes that the applicant sought registration of the sign at issue in respect of each of the categories of the designated products as a whole without distinguishing between them. Therefore, it is appropriate to confirm the finding of the Board of Appeal in so far as it relates to those categories of products as a whole (see, to that effect, *Eurohealth*, paragraph 33; *TELE AID*, paragraph 34; and Case T-356/00 *DaimlerChrysler v OHIM (CARCARD)* [2002] ECR II-1963, paragraphs 33 and 36) — *a fortiori* since the applicant does not put forward in its application any arguments challenging that finding.

35 In those circumstances, the link between the word Quick, on the one hand, and the relevant products in Classes 29, 30 and 31 of the Nice Agreement, on the other, appears sufficiently close to be caught by the prohibition laid down in Article 7(1)(c) and (2) of Regulation No 40/94 (see *ELLOS*, paragraph 37).

36 It follows that the Board of Appeal was right to confirm that under Article 7(1)(c) of Regulation No 40/94 the word Quick could not constitute a Community trade mark.

37 As is evident from Article 7(1) of Regulation No 40/94, it is sufficient that one of the absolute grounds for refusal listed in that provision applies for the sign at issue not to be registrable as a Community trade mark (Case C-104/00 P *DKV v OHIM* [2002] ECR I-7561, paragraph 29; and Case T-331/99 *Mitsubishi HiTec Paper Bielefeld v OHIM (Giroform)* [2001] ECR II-433, paragraph 30). Consequently, the action must be dismissed, without it being necessary to consider whether the plea alleging infringement of Article 7(1)(b) of Regulation No 40/94 is admissible (which is disputed by the Office), in the light of Article 21 of the Statute of the Court of Justice, which applies to proceedings before the Court of First Instance pursuant to Article 53 thereof, and of Articles 44(1)(c) and 130(1) of the Rules of Procedure.

Costs

38 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, it must be ordered to pay the costs incurred by the Office, in accordance with the form of order sought by the latter.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

hereby:

1. **Dismisses the action;**
2. **Orders the applicant to pay the costs.**

Tiili

Mengozi

Vilaras

Delivered in open court in Luxembourg on 27 November 2003.

H. Jung

Registrar

V. Tiili

President