

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

27 September 2005\*

In Case T-123/04,

**Cargo Partner AG**, established in Fischamend (Austria), represented by M. Wolner,  
lawyer,

applicant,

v

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

defendant,

\* Language of the case: German.

ACTION brought against the decision of the First Board of Appeal of OHIM of 26 January 2004 (Case R 346/2003-1), in relation to the application for registration of the word sign CARGO PARTNER as a Community trade mark,

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

composed of J.D. Cooke, President, R. García-Valdecasas and V. Trstenjak, Judges,

Registrar: J. Plingers, Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 31 March 2004,

having regard to the response of OHIM lodged at the Court Registry on 9 July 2004,

further to the hearing on 9 March 2005,

gives the following

## Judgment

### Background to the dispute

- 1 On 14 May 2002, Cargo Partner AG 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), as amended.
- 2 The trade mark for which registration was sought was the word sign CARGO PARTNER.
- 3 The services in respect of which registration of the mark was sought are in Classes 36 and 39 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:
  - Class 36: 'Insurance';
  - Class 39: 'Transport; packaging and storage of goods; travel arrangement'.

- 4 By decision of 19 March 2003 the examiner, in application of Article 7(1)(b) and (c) of Regulation No 40/94, refused the application for registration in respect of services of transport, packaging and storage of goods in Class 39 on the ground of the absence of distinctive character and the descriptive character of the word sign in question.
  
- 5 On 19 May 2003 the applicant lodged at OHIM a notice of appeal under Articles 57 to 62 of Regulation No 40/94 against the examiner's decision to refuse registration of the mark for the services mentioned in paragraph 3 above.
  
- 6 By decision of 26 January 2004 given in Case R 346/2003-1 ('the contested decision'), the First Board of Appeal of OHIM dismissed the appeal on the ground that the mark sought was devoid of any distinctive character within the meaning of Article 7 (1)(b) of Regulation No 40/94 and thereby confirmed the decision of the examiner of 19 March 2003.
  
- 7 In assessing whether the word sign CARGO PARTNER was distinctive, the Board of Appeal stated that the target public was the English-speaking public as a whole.
  
- 8 The Board essentially considered that, as regards their meaning in English, the terms 'cargo' and 'partner' were devoid of any distinctive character in relation to the list of services at issue, consisting in transport services and related services, such as packaging and storage of goods. The Board considered that the English expression 'cargo partner' could be translated into German by 'Frachtpartner' or 'Transportpartner' and that the formation of that expression was in conformity with the grammatical rules of the English language.

- 9 The Board of Appeal then stated, referring to an internet site, that the sign CARGO PARTNER was already used to designate freight partners. The Board added that it was of no significance that as yet this expression was not contained in any specialist dictionary.
- 10 The Board of Appeal considered that there was no evidence enabling it to assert that, taken as a whole and viewed in relation to the services in question, the sign CARGO PARTNER represented more than the sum of the elements of which it is composed. The Board concluded that that sign was devoid of the minimum distinctive character required for the purposes of registration and, consequently, it was excluded from registration by virtue of Article 7(1)(b) of Regulation No 40/94.

### **Forms of order sought by the parties**

- 11 The applicant claims that the Court should:
- vary the contested decision so as to allow registration of the trade mark sought;
  - in the alternative, refer the case back to OHIM;
  - in any event, award costs to the applicant.

12 OHIM contends that the Court should:

- dismiss the application;
  
- order the applicant to pay the costs.

### **Admissibility**

13 At the outset, OHIM raises three pleas of inadmissibility, two in relation to the admissibility of the application as submitted and the third in relation to the admissibility of the first head of claim of the application. The applicant, on the other hand, maintains the admissibility of its application.

#### *The first plea of inadmissibility*

#### Arguments of the parties

14 OHIM pleads that the application is inadmissible on the ground that the applicant's representation does not comply with Article 19 of the Statute of the Court of Justice. It draws attention to the fact that, under that provision, parties other than the institutions and the Member States must be represented by a lawyer authorised to practise before a court of a Member State. According to the application, the

applicant is represented by the limited liability company Gassauer-Fleissner Rechtsanwälte. However, that reference is accompanied on the application by a signature which it was not possible to identify as corresponding to the names Gassauer or Fleissner.

- 15 In its reply OHIM acknowledges that a legal person can also be authorised to practise the profession of lawyer through its associates authorised to represent it. However, OHIM maintains that the representation of a party by a legal person, in the circumstances of the present case, is not in conformity with Article 19 of the Statute of the Court of Justice. At the hearing, OHIM observed that representation before the Court of First Instance must be by a natural person whereas the applicant instructed a legal person to represent it.
- 16 OHIM also claims that the file contains no list of the associates authorised to represent Gassauer-Fleissner Rechtsanwälte. OHIM claims that, even though there is a document which confirms the authorisation of a certain Michael Wolner, that person is not mentioned as a representative either in the authority issued by the applicant or in the application itself. Further, no extract from the business registry has been presented in respect of Gassauer-Fleissner Rechtsanwälte.
- 17 OHIM infers that, at the time the application was lodged, the authorisation of the applicant's lawyers to represent it before the Community Courts had not been established, which amounts to an infringement of essential procedural requirements leading to the inadmissibility of the present application.

### Findings of the Court

- 18 The effect of the third and fourth paragraphs of Article 19 of the Statute of the Court of Justice, which governs the procedure before the Court of First Instance pursuant

to the first paragraph of Article 53 of that Statute, is that only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area (EEA) may validly undertake procedural steps before the Court of First Instance on behalf of parties other than the States and the institutions (Order of the Court of First Instance of 24 February 2000 in Case T-37/98 *FTA and Others v Council* [2000] ECR II-373, paragraph 20, and Order of the Court of First Instance of 9 September 2004 in Case T-14/04 *Alto de Casablanca v OHIM — Bodegas Chivite (VERAMONTE)* [2004] ECR II-3077, paragraph 9).

19 It follows from the first paragraph of Article 21 of the Statute of the Court of Justice, which also governs the procedure before the Court of First Instance pursuant to Article 53, cited above, that the application must be signed by a person entitled to represent the applicant in accordance with Article 19 of the Statute of the Court of Justice (*FTA and Others v Council*, cited above, paragraphs 21 and 22). Moreover, the first subparagraph of Article 43(1) of the Rules of Procedure of the Court of First Instance requires the original of every pleading to be signed by the party's agent or lawyer. In fact, the handwritten signature of the lawyer or agent representing a party, on the original of every procedural document, constitutes the sole means of ensuring that responsibility for such a document is assumed by a person entitled to represent the party before the Community Courts, in accordance with Article 19 of the Statute of the Court of Justice (*FTA and Others v Council*, cited above, paragraphs 23 and 26).

20 As is clear from the annexes to the application, the Vienna Bar confirmed that Gassauer-Fleissner Rechtsanwälte was registered on the list of companies practising the profession of lawyer and that it was authorised to practise, through its associates authorised to represent it, the profession of lawyer in Austria and to appear before all Austrian courts.

21 Further, contrary to the claims of OHIM, a list of the associates of Gassauer-Fleissner Rechtsanwälte is to be found in the heading of the application, one of whom is Michael Wolner. As is clear from the file, he is registered as a lawyer at the Vienna Bar.

- 22 It follows that Gassauer-Fleissner Rechtsanwälte can, notably through Mr Michael Wolner, practise the profession of lawyer and appear before the Austrian courts.
- 23 In addition, in reply to a question posed by the Court of First Instance, Mr Wolner confirmed, by fax received at the Court on 27 October 2004, that it was his signature that appeared on the documents lodged by the applicant.
- 24 The first plea of inadmissibility raised by OHIM must therefore be rejected.

*The second plea of inadmissibility*

Arguments of the parties

- 25 OHIM maintains that the application does not fulfil the conditions of Article 44 of the Rules of Procedure by reason of the brevity of the statement of the pleas made by the applicant, which are limited to pleading the opposite of what was decided by the Board of Appeal. OHIM points out that, according to the case-law of the Court, it is not sufficient to invoke an infringement of the law. It is, in fact, necessary to substantiate such an allegation by legal or factual arguments (Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441, paragraph 184, and Case T-77/92 *Parker Pen v Commission* [1994] ECR II-549, paragraphs 99 and 100). Further, at the hearing, OHIM maintained that the applicant had put forward in support of the present application the same arguments as those relied on before OHIM.

## Findings of the Court

- 26 Under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure, every application is to contain a summary of the pleas in law on which it is based and that information must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court of First Instance to rule on the action. The same considerations must apply to all claims, which must be accompanied by pleas and arguments enabling both the defendant and the Court to assess their validity (*Dunlop Slazenger v Commission*, cited above, paragraph 183).
- 27 In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential facts and law on which it is based must be apparent from the text of the application itself, at the very least summarily, provided that the statement is coherent and comprehensible (Case T-387/94 *Asia Motor France and Others v Commission* [1996] ECR II-961, paragraph 106, and Order of 29 November 1993 in Case T-56/92 *Koelman v Commission* [1993] ECR II-1267, paragraph 21).
- 28 In this case the application satisfies the conditions of Article 21 of the Statute of the Court of Justice, which governs the procedure before the Court of First Instance pursuant to the first paragraph of Article 53 of that Statute, and Article 44(1)(c) of the Rules of Procedure. The applicant intends to challenge the finding of the Board of Appeal according to which the word sign proposed for registration is devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94. Although the statement of the evidence in support of the application is succinct, it is sufficient to enable the Court to identify the arguments constituting the legal and factual basis of the application.
- 29 The fact of repeating, wholly or in part, the arguments already invoked before OHIM and not simply referring to them, does not amount to an infringement of

Article 21 of the Statute of the Court of Justice or Article 44 of the Rules of Procedure. Provided an applicant contests the interpretation or application of Community law made by OHIM, the points of law examined by OHIM can be debated again in an action before the Court. This forms part of the review by the courts to which the decisions of OHIM are subject under Article 63 of Regulation No 40/94, according to which an action against decisions of the Boards of Appeal may be brought in particular on grounds of infringement of the Treaty, of that regulation or of any rule of law relating to their application.

30 The second plea of inadmissibility raised by OHIM must therefore be rejected.

*The third plea of inadmissibility*

Arguments of the parties

31 OHIM submits that the application is inadmissible in so far as the applicant seeks the variation of the contested decision with the aim of having the sign CARGO PARTNER registered as a trade mark. In fact the Court cannot authorise the registration of a mark sought. Firstly, it follows from Article 233 EC and Article 63 (6) of Regulation No 40/94, as well as from the case-law, that OHIM is required itself to take the necessary measures to comply with the judgments of the Community Courts (Case T-163/98 *Procter & Gamble v OHIM (BABY-DRY)* [1999] ECR II-2383, paragraph 53). Secondly, the next stage in the procedure for registration as a Community trade mark is not registration of the mark sought, but the publication of the application in accordance with Article 40 of Regulation No 40/94.

## Findings of the Court

- 32 Under Article 63(6) of Regulation No 40/94, OHIM is required to take the measures necessary to comply with the judgment of the Community judicature. Accordingly, the Court of First Instance is not entitled to issue directions to OHIM. Where the Court accepts the pleas made by the applicant, it is for OHIM to draw the appropriate inferences from the operative part of the Court's judgment and the grounds on which it is based. A request to the Court for a direction to continue the registration procedure is therefore inadmissible (Case T-331/99 *Mitsubishi HiTec Paper Bielefeld v OHIM (Giroform)* [2001] ECR II-433, paragraph 33, and Case T-34/00 *Eurocool Logistik v OHIM (EUROCOOL)* [2002] ECR II-683, paragraph 12).
- 33 However, in so far as the applicant, in its second head of claim, claims in the alternative that the case should be referred back to OHIM, it implicitly requests the annulment of the contested decision.
- 34 Further, if, despite the wording of the form of order sought in the application, it is clear from the application that the applicant seeks, in substance, the annulment of the contested decision, the application must be considered to be admissible (Case T-169/94 *PIA HiFi v Commission* [1995] ECR II-1735, paragraph 17, and Order of 19 June 1995 in Case T-107/94 *Kik v Council and Commission* [1995] ECR II-1717, paragraph 30 and 32).
- 35 In this case, having regard to the content of the arguments which the applicant develops in support of its claims, it must be considered that they in fact concern the annulment of the contested decision. In its application the applicant submits arguments seeking to establish the illegality of the refusal to register the word sign CARGO PARTNER.

36 Accordingly, in so far as the application is to be interpreted to that effect, it is admissible.

## Substance

37 The applicant bases its application on two pleas, the first alleging infringement of Article 7(1)(b) of Regulation No 40/94 and the second alleging breach of the principle of non-discrimination.

*The first plea in law alleging infringement of Article 7(1)(b) of Regulation No 40/94*

## Arguments of the parties

38 The applicant states that, according to the judgment in Case C-383/99 P *Procter & Gamble v OHIM* [2001] ECR I-6251, any perceptible difference between the terms of a word sign submitted for registration and the terms used in the common parlance of the relevant class of consumers to designate the goods or services or their essential characteristics is apt to confer distinctive character on that sign, enabling it to be registered as a Community trade mark. The applicant adds that, where a combination of two words gives rise, by itself, at least by association or allusion, to a number of meanings, the sign is deprived of any descriptive function (Case T-193/99 *Wrigley v OHIM (DOUBLEMINT)* [2001] ECR II-417). When, moreover, a combination of words allows room for the sign to have a suggestive effect, that

suffices to confer on it a distinctive character. The applicant relies in this regard on the judgment in Case T-87/00 *Bank für Arbeit und Wirtschaft v OHIM (EASYBANK)* [2001] ECR II-1259.

- 39 The applicant also recalls that where a word can be easily and instantly memorised by the section of the public targeted, taken as a whole it is inherently capable of being perceived by that public as a distinctive sign. It is not necessary that the word have an additional element of imagination, be particularly original or striking. A mark is based only on its ability to distinguish goods or services on the market from the goods or services of the same kind offered by competitors (*EUROCOOL*, cited above).
- 40 The applicant maintains that, in this case, the denomination 'cargo partner' is totally unusual and thereby capable of distinguishing the services which it provides. The applicant essentially bases this assertion on the following three arguments. Firstly, in order to describe the services at issue, it is not the sign CARGO PARTNER which is normal, but 'your partner for cargo' or similar expressions. For this reason, the denomination at issue is already perceived by the public as distinguishing the services provided by the applicant. Secondly, where the word 'partner' is used in relation to a company, the public expects it to be used in the plural. In addition, as confirmed by the applicant at the hearing in this case, the word 'partner' is not indicative of a method of organisation of the company, but a particular relationship with clients. Thirdly, the denomination 'cargo partner' features in the business name of the applicant and has, for years, been capable of distinguishing it from its competitors.
- 41 OHIM points out that a mark is devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94 where it is not capable of characterising goods or services according to their commercial origin. This is usually the case where a mark is confined to characterising the type of goods or services or to describing their characteristics.

42 OHIM states that the applicant does not refute the finding of the Board of Appeal, in paragraph 19 of the contested decision, according to which the sign CARGO PARTNER is used by companies to designate their commercial freight partner. According to OHIM, this was substantiated by the reference to an internet site in the contested decision and can be corroborated by other examples, such as a communication from Air France announcing itself as ‘cargo partner’ for two Picasso exhibitions in India and a communication from Cargo Counts, a subsidiary of Lufthansa, according to which it is the new ‘cargo partner’ for Frankfurt airport.

43 According to OHIM the applicant’s assertion that it is not ‘partner’ in the singular but ‘partners’ in the plural which is used in business is not at all proven and is manifestly incorrect.

### Findings of the Court

44 Article 7(1)(b) of Regulation No 40/94 provides that ‘trade marks which are devoid of any distinctive character’ 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’.

45 It is clear from the wording of Article 7(1)(b) of Regulation No 40/94 that a minimum degree of distinctive character is sufficient to render inapplicable the ground for refusal set out in that article (*EUROCOOL*, paragraph 39).

- 46 The absence of distinctive character cannot arise merely from the finding that the sign in question lacks an additional element of imagination or does not look unusual or striking (*EASYBANK*, cited above, paragraph 39).
- 47 The distinctiveness of a trade mark within the meaning of Article 7(1)(b) of Regulation No 40/94 means that the mark in question makes it possible to identify the product or the service for which registration is sought as originating from a given undertaking and therefore to distinguish the product or service from those of other undertakings and, therefore, is able to fulfil the essential function of the trade mark (Case C-64/02 P *OHIM v Erpo Möbelwerk* [2004] ECR I-10031, paragraph 42 and the case-law there cited).
- 48 A mark's distinctiveness can only be assessed, firstly, by reference to the goods or services in respect of which registration is sought and, secondly, on the basis of the perception of that sign by the relevant public (Case T-122/01 *Best Buy Concepts v OHIM (BEST BUY)* [2003] ECR II-2235, paragraph 22; Case T-305/02 *Nestlé Waters France v OHIM (Shape of a bottle)* [2003] ECR II-5702, paragraph 29; Case T-402/02 *Storck v OHIM (Shape of a sweet wrapper)* [2004] ECR II-3849, paragraph 48, and *OHIM v Erpo Möbelwerk*, cited above, paragraph 43).
- 49 In order to assess whether a word sign is capable of distinctiveness, it is therefore necessary to put oneself in the shoes of a consumer speaking the language of that sign (*BABY-DRY*, cited above, paragraph 42).
- 50 In this case, since the services at issue are transport and the packaging and storage of goods, the target public is the English-speaking public taken as a whole, as correctly concluded by the Board of Appeal in the contested decision.

- 51 From the point of view of the English language, the sign CARGO PARTNER is not contrary to the grammatical rules of that language and is not therefore unusual in its structure.
- 52 The word ‘partner’ is used in various contexts, including the supply of services, to describe relationships of association or partnership by suggesting positive connotations of reliability and continuity (Case T-270/02 *MLP Finanzdienstleistungen v OHIM (bestpartner)* [2004] ECR II-2837, paragraph 23).
- 53 The term ‘cargo’ indicates that the services at issue are freight services and the packaging and storage of goods.
- 54 Therefore, it must be concluded that the terms ‘cargo’ and ‘partner’ are generic words which are accordingly not capable of distinguishing the applicant’s services from those of other undertakings.
- 55 As regards trade marks composed of words, such as the mark at issue here, the absence of distinctive character must be determined not only in relation to each word taken separately but also in relation to the whole which they form. Any perceptible difference between the terms of a word sign submitted for registration and the terms used in the common parlance of the relevant class of consumers to designate the goods or services or their essential characteristics is apt to confer distinctive character on that sign enabling it to be registered as a trade mark (*BABY-DRY*, cited above, paragraph 40).

- 56 In this case there are no elements which indicate that in English the expression 'cargo partner' has, in common parlance, a meaning other than that of presenting the partner offering services of transport, packaging and storage of goods. In relation to the terms which compose it, the sign CARGO PARTNER does not present any additional characteristic capable of making the sign as a whole appropriate to distinguish the services of the applicant from those of other undertakings in the mind of the relevant public.
- 57 It is the case that the applicant is established in Austria, a German-speaking country. However, since registration may be refused once there are grounds for refusal in part of the Community, it is clear that, where it is established that there is a ground for refusal in the English-speaking part of the Community, the existence of such a ground in other parts of the Community does not affect the outcome of the present case (*bestpartner*, cited above, paragraph 21).
- 58 Moreover, it must be stated for the sake of completeness that the two words 'cargo' and 'partner' can also be used in German with substantially the same meaning as in English.
- 59 It follows that the sign 'CARGO PARTNER' is, from the point of view of the relevant public, devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94 as far as services of transport and packaging and storage of goods are concerned.

- 60 As regards the fact put forward by the applicant that the denomination CARGO PARTNER features in its business name, it does not change the findings made up to this point.
- 61 It follows from the preceding considerations that the plea based on an infringement of Article 7(1)(b) of Regulation No 40/94 cannot be accepted.

*The second plea in law alleging breach of the principle of non-discrimination*

Arguments of the parties

- 62 By its second plea the applicant claims in substance that the Board of Appeal failed to have regard to the decision-making practice of OHIM by applying to its request for registration a considerably stricter criterion than in the case of other applicants, in breach of the principle of non-discrimination. In this regard, it cites the registration as trade marks of the signs Finishing Partner, Partner Marketing, Partner Store, YOUR CULINARY PARTNER, INHOUSE-OUTSOURCING, TRANSEUROPA, alltravel, MEGATOURS, Data Intelligence Group. According to the applicant, those marks, and in particular Finishing Partner, are not different from the sign CARGO PARTNER. Accordingly, OHIM's practice in relation to registration supports the registration of the sign CARGO PARTNER as a Community trade mark.
- 63 At the hearing, the applicant claimed that the present case was different from the case giving rise to the *bestpartner* judgment, cited above, in three ways. Firstly, in that case, a specialist public was envisaged, whereas in this case the target public is made up of average consumers. Secondly, *bestpartner* is more a slogan than is

CARGO PARTNER. Thirdly, whereas the word 'best' is an indication of the quality of the undertaking concerned, this is not the case for the word 'cargo'.

64 OHIM concedes that parties in proceedings before it rightly expect comparable facts to give rise to comparable decisions. However, that expectation must be distinguished from the question of whether the parties to the proceedings may successfully rely on the outcome of parallel proceedings where the OHIM examiner and the Board of Appeal, taking account of the relevant circumstances, reach in another case a result which is not, or not entirely, in line with the first.

65 According to OHIM, the applicant does not explain at all how the previous decisions of OHIM which it cites are comparable to the situation in this case.

66 In addition OHIM states that, even if it is in fact a matter of comparable cases, its previous decisions are not of binding legal effect. In this regard, it refers to the judgment in Case T-106/00 *Streamserve v OHIM (STREAMSERVE)* [2002] ECR II-723, paragraph 66, according to which the legality of the decisions of Boards of Appeal must be assessed solely on the basis of Regulation No 40/94, as interpreted by the Community judicature, and not on the basis of a previous decision-making practice of those boards.

67 OHIM thereby concludes that if the previous decisions were unlawful they can in no way justify a new unlawful decision. However, if they were lawful and in fact related to cases comparable to that at issue in the contested decision, that decision could be

annulled only on the ground of a misapplication of Regulation No 40/94 and not because of a breach of the principle of non-discrimination.

## Findings of the Court

- <sup>68</sup> It must be remembered that, whilst it may be accepted that factual or legal grounds contained in an earlier decision might constitute arguments to support a plea alleging infringement of a provision of Regulation No 40/94, it does not take away from the fact that the legality of the decisions of Boards of Appeal must be assessed solely on the basis of this regulation, as interpreted by the Community judicature, and not on the basis of a previous decision-making practice (*STREAMSERVE*, cited above, paragraphs 66 and 69).
- <sup>69</sup> Two hypotheses therefore exist. If, by accepting, in a previous case, the registrability of a sign as a Community mark, the Board of Appeal correctly applied the relevant provisions of Regulation No 40/94 and, in a later case comparable to the previous one, the Board of Appeal adopted a contrary decision, the Community judicature will be required to annul the latter decision because of infringement of the relevant provisions of Regulation No 40/94. In this first hypothesis, the plea alleging breach of the principle of non-discrimination must therefore fail (*STREAMSERVE*, cited above, paragraph 67).
- <sup>70</sup> By contrast, if, by accepting in an earlier case the registrability of a sign as a Community mark, the Board of Appeal erred in law and, in a later case, comparable to the previous one, the Board of Appeal adopted a contrary decision, the first decision cannot be successfully relied on to support an application for the

annulment of the latter decision. It is clear from the case-law of the Court of Justice that the principle of equal treatment can be invoked only in the context of observance of the principle of legality (Joined Cases 55/71 to 76/71, 86/71, 87/71 and 95/71 *Besnard and Others v Commission* [1972] ECR 543, paragraph 39, and Case T-90/92 *Magdalena Fernández v Commission* [1993] ECR II-971, paragraph 38) and that no person may rely, in support of his claim, on unlawful acts committed in favour of another (Case 188/83 *Witte v Parliament* [1984] ECR 3465, paragraph 15, and Case T-22/99 *Rose v Commission* [2000] ECR-SC I-A-27 and II-115, paragraph 39). On the basis of this second hypothesis, the plea alleging breach of the principle of non-discrimination must therefore also fail (*STREAMSERVE*, cited above, paragraph 67).

71 It follows that the plea alleging a failure to observe the decision-making practice of OHIM must fail.

72 It follows from all the foregoing that, since none of the pleas raised has been accepted, this action seeking annulment of the contested decision must be dismissed as unfounded.

## Costs

73 Article 87(2) of the Rules of Procedure provides that the unsuccessful party will 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 OHIM pursuant to the form of order sought by it.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

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

Cooke

García-Valdecasas

Trstenjak

Delivered in open court in Luxembourg on 27 September 2005.

H. Jung

Registrar

J.D. Cooke

President