

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

18 February 2004 \*

In Case T-10/03,

Jean-Pierre Koubi, residing in Marseilles (France), represented by K. Manhaeve,  
lawyer, with an address for service in Luxembourg,

applicant,

v

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

defendant,

\* Language of the case: French.

the other party to the proceedings being

**Fabricas Lucia Antonio Betere, SA (Flabesa)**, established in Madrid (Spain),  
represented by I. Valdelomar, lawyer,

ACTION brought against the decision of the Fourth Board of Appeal of the  
Office for Harmonisation in the Internal Market (Trade Marks and Designs)  
(OHIM) of 16 October 2002 (Case R 542/2001-4) relating to opposition  
proceedings between Mr Koubi and Fabricas Lucia Antonio Betere, SA (Flabesa),

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

composed of: H. Legal, President, V. Tiili and M. Vilaras, Judges,

Registrar: B. Pastor, Deputy Registrar,

having regard to the written procedure and further to the hearing on  
20 November 2003,

gives the following

## Judgment

### Background to the dispute

- 1 On 13 May 1999, the applicant filed with the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) an application for registration of a Community trade mark 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 mark in respect of which registration was sought was the word mark CONFORFLEX.
- 3 The goods and services in respect of which registration of the mark was sought fall within Class 20 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Trade Marks of 15 June 1957, as revised and amended, and correspond to the following description: ‘bedroom furniture’.
- 4 The application for a Community trade mark was published in *Community Trade Marks Bulletin* No 93/99 of 22 November 1999.

5 On 21 February 2000, Fabricas Lucia Antonio Betere, SA ('the intervener') gave notice of opposition under Article 42(1) of Regulation No 40/94. The ground relied on in support of the opposition was the likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 40/94, between the mark sought and four earlier marks owned by the intervener.

6 In its decision of 23 March 2001, the Opposition Division found, first of all, that no evidence of genuine use had been adduced with respect to two of the four earlier marks and therefore took account only of the following two marks:

— the figurative mark shown below, which is registered in Spain under No 1 951 681

The image shows a stylized, bold, black and white logo for the word "FLEX". The letters are thick and blocky, with a slightly distressed or textured appearance. The 'F' is particularly prominent, with a horizontal bar that extends to the left and then curves back to the right.

— the figurative mark shown below, which is registered in Spain under No 2 147 672

The image shows a stylized, bold, black and white logo for the word "FLEX", similar to the one above. It includes registration information: "REG. N.º 2 147 672" above the 'F', "Fabricas Lucia Antonio Betere, S.A." above the 'L', and "Madrid 1994" below the 'X'. The logo itself is centered and has a slightly distressed or textured appearance.

- The goods in respect of which the earlier marks are registered fall within Class 20 of the Nice Agreement and are described as follows: ‘beds, mattresses and pillows made on the basis of wool, flock and thatch palm, horsehair and similar, mixed mattresses with elastic springs, pillows and mattresses of rubber, foam and all kinds of polyurethane foam; cradles, divans; straw mattresses with wood and iron-framed springs; bunks, bedside tables, cradles, furniture for camping and beach, furniture of all kinds, including of metal, convertible furniture, desks, metallic and tubular spring mattresses, air mattresses (not for medical purposes), mattresses and spring mattresses for beds, (wooden) bed-frames; articles for beds (except bed covers); bed fittings (not of metal), bed wheels (not of metal); spring mattresses for beds, hospital beds; hydrostatic beds (not for medical purposes); furniture, mirrors, 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’.
- 8 The Opposition Division then rejected the opposition on the ground that, since the marks in question were not similar, there was no likelihood of confusion between them.
- 9 On 18 May 2001, the intervener lodged an appeal under Article 59 of Regulation No 40/94, seeking annulment of the decision of the Opposition Division.
- 10 By decision of 16 October 2002 (‘the contested decision’), which was notified to the applicant on 7 November 2002, the Fourth Board of Appeal of OHIM upheld the appeal and, consequently, annulled the decision of the Opposition Division and refused the application for a Community trade mark. Essentially, the Board of Appeal found that the signs in question shared the same reference to flexibility and had strong conceptual similarities which had not been examined by the Opposition Division. Moreover, the Board of Appeal stated that, while the term

‘flex’ might be evocative, the applicant had failed to prove that it is often used on the Spanish market by other undertakings to designate bedroom furniture. Having regard also to the fact that the goods concerned were identical, the Board of Appeal therefore concluded that there was a likelihood of confusion between the mark sought and the earlier marks.

### **Procedure and forms of order sought by the parties**

11 By application lodged at the Registry of the Court on 13 January 2003, the applicant brought the present action.

12 The intervener and OHIM lodged their replies at the Registry of the Court on 16 April and 12 May 2003 respectively.

13 The applicant claims that the Court should:

— annul the contested decision;

— order OHIM to pay all the costs.

14 OHIM contends that the Court should:

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

15 The intervener claims that the Court should:

- dismiss the action;
  
- refuse the mark sought;
  
- give a decision on the costs which is in its favour.

## Law

16 The applicant relies, essentially, on a single plea alleging infringement of Article 8(1)(b) of Regulation No 40/94.

*Arguments of the parties*

- 17 As a preliminary point, the applicant, relying on the judgment in Case C-251/95 *SABEL* [1997] ECR I-6191, observes that the likelihood of confusion on the part of the public must be appreciated globally, taking into account all factors relevant to the circumstances of the case and, in particular, any aural, visual or conceptual similarity between the marks in question as well as any distinctiveness of those marks.
- 18 The applicant claims, first, that the signs in question are not similar.
- 19 As regards visual similarity, it points out that the earlier marks are composed of one or more figurative elements and a word element, whereas the mark sought is purely verbal and, moreover, gives the term 'flex' no particular emphasis.
- 20 As regards aural similarity, it submits that the fact that the single syllable of the earlier marks is identical to the third syllable of the Community trade mark sought is insufficient for a finding that the marks in question are aurally similar. It claims that, as was pointed out by a Board of Appeal in a case concerning the opposition of the marks INCEL and LINZEL (*Vertex Pharmaceuticals Inc. v Almirall-Prodesfarma SA*, Decision R 793/2001-2 of 16 October 2002), consumers generally pay greater attention to the beginning of a mark than to the end. Moreover, when the word mark sought is pronounced in Spanish, the first syllable is emphasised since the accent places considerably more stress on the first syllable than on the second and third syllables.

- 21 As regards conceptual similarity, the concept of the earlier marks is as much based on the swan symbol as on the evocation of the notion of flexibility whereas the concept of the mark sought consists of ‘bringing to mind’ the notions of comfort and flexibility, the emphasis being placed, however, on the notion of comfort evoked by the first syllable of the mark.
- 22 Secondly, the applicant observes that the Board of Appeal was able to find a similarity only in relation to the term ‘flex’, which is common to the two marks in question and which the Board of Appeal regarded as the dominant element of the earlier marks. Even if that statement could be considered correct, the applicant claims that that dominant element must be distinctive in order to have any bearing on the assessment of the likelihood of confusion. According to the judgment in *SABEL*, cited above, the more distinctive the earlier mark, the greater will be the likelihood of confusion.
- 23 Relying on the judgment in Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, the applicant states that, when assessing the distinctiveness of a mark, account must be taken of all relevant factors and, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered.
- 24 The term ‘flex’ clearly and immediately evokes the notion or the quality of flexibility. Moreover, it is the root of the Spanish words ‘flexibilidad’ and ‘flexible’ and is, as such, the shortest expression which can be used to evoke that characteristic.
- 25 The applicant submits that, since flexibility is an essential quality of any item of bedding or bedroom furniture, several Community, international and merely Spanish marks use the term ‘flex’ to designate that kind of item.

26 Thus, the term ‘flex’, which evokes the quality of flexibility, is customary in so far as it appears in several marks. The applicant claims that the distinctiveness of the earlier marks cannot arise from a customary element, even if that element is dominant. It argues that it cannot reasonably be found that there is a likelihood of confusion between two marks where the similarity between those marks is limited to the fact that they contain the same customary element. Given that the Board of Appeal was able to detect a similarity between the marks only in relation to the common inclusion of the word sign ‘flex’, which is a term customarily used to designate items of bedding and bedroom furniture, the applicant concludes that there is no likelihood of confusion between the earlier marks and the mark sought.

27 Thirdly and lastly, the applicant submits that the contested decision does not call into question the Opposition Division’s finding that the intervener had failed to adduce evidence relating to the reputation of the earlier marks and claims that those marks were assigned to Flex Equipos De Descanso, SA, a company established under Spanish law, which is therefore the current proprietor of those marks.

28 OHIM contends that, in line with the approach taken by the Court in its judgment in Case T-247/01 *eCopy v OHIM (ECOPY)* [2002] ECR II-5301, the Court may not take into account the new documents submitted to it by the applicant with a view to showing that the term ‘flex’ lacks distinctive character. Moreover, even if the Court were able to consider those documents, they cannot offer sufficient proof that, at the time of filing of the application for a Community trade mark, the term ‘flex’ was used on the Spanish market by other undertakings in relation to furniture and, in particular, bedroom furniture and that, therefore, it is regarded by consumers as being devoid of any distinctiveness.

29 OHIM also claims that, having taken account of the fact that the goods concerned are identical and that the signs in question are similar, the Board of

Appeal was entitled to conclude that there was a likelihood of confusion, including a likelihood of association, in Spain, the territory in which the earlier marks are protected.

- 30 The intervener first of all asks the Court not to take account of the documents annexed to the application and intended to establish that the term ‘flex’ lacks distinctiveness, since those documents were submitted for the first time before the Court and it is not the Court’s task to reopen opposition proceedings. Moreover, the intervener submits that the word sign ‘flex’ is perfectly distinctive in itself.
- 31 The intervener claims that the signs in question must be regarded as similar because they have in common a highly distinctive word element which is used in an entirely identical way in visual, aural and conceptual terms, namely the term ‘flex’. The likelihood of confusion is increased by the fact that the signs in question are meaningless and by the reputation of the earlier marks in Spain, as is apparent from the documents annexed to the intervener’s reply.
- 32 Finally, the intervener argues that it may be inferred from the reference in Regulation No 40/94 to the likelihood of association with earlier marks that it is possible to rely on likelihood of confusion in cases in which the public does not necessarily confuse two marks but rather only components of those marks. Thus, there is a likelihood of association where the public perceives a component common to two signs as a reference to the proprietor of the earlier mark. The intervener claims that the public is inclined to believe that elements added to a principal component shared by the two marks in question serve the purpose of distinguishing a given product belonging to the line of products designated by that principal component and that all the goods originate from the same company. In the present case, the public will perceive CONFORFLEX as another trade mark of the company that distributes the goods designated by the mark FLEX.

*Findings of the Court*

## Preliminary observations

- 33 Both in its application and at the hearing, the applicant claimed that the intervener is no longer the proprietor of the earlier marks, those marks having been assigned to another company governed by Spanish law. Apart from the fact that that claim is not substantiated by any documentary evidence and was not confirmed by OHIM, which was not notified of any assignment of the earlier marks, it should be noted that the intervener describes itself as the proprietor of those marks in its reply and that its company name is expressly referred to in the contested decision. Having regard to the wording of Article 134(1) of the Court's Rules of Procedure, the company *Fabricas Lucia Antonio Betere* must therefore be regarded as an intervener in the present proceedings.

## The claim for refusal of the trade mark sought

- 34 By its second head of claim, the intervener is essentially asking the Court to order OHIM to refuse to register the mark sought.
- 35 Under Article 63(6) of Regulation No 40/94, OHIM is required to take the measures necessary to comply with the judgment of the Court of Justice. Accordingly, the Court of First Instance is not entitled to issue directions to OHIM. It is for OHIM to draw the appropriate inferences from the operative part of the judgment given by the Court of First Instance and the grounds on which it is based. The second head of claim submitted by the intervener is therefore inadmissible (Case T-331/99 *Mitsubishi HiTec Paper Bielefeld v OHIM (Giroform)* [2001] ECR II-433, paragraph 33; Case T-34/00 *Eurocool Logistik v OHIM (EUROCOOL)* [2002] ECR II-683, paragraph 12).

## The claim for annulment of the contested decision

- 36 Under Article 8(1)(b) of Regulation No 40/94, which governs opposition by the proprietor of an earlier 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; the likelihood of confusion includes the likelihood of association with the earlier trade mark'. Furthermore, Article 8(2)(a)(ii) of Regulation No 40/94 defines earlier trade marks as trade marks registered in a Member State with a date of application for registration which is earlier than the date of application for registration of the Community trade mark.
- 37 The likelihood of confusion on the part of the public, to which application of Article 8(1)(b) is subject and which is defined as 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 (Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 29; *Lloyd Schubfabrik Meyer*, cited above, paragraph 17; and Case T-104/01 *Oberhauser v OHIM — Petit Liberto (Fifties)* [2002] ECR II-4359, paragraph 25), must be assessed globally, taking into account all factors relevant to the circumstances of the case (*Canon*, cited above, paragraph 16; *Lloyd Schubfabrik Meyer*, paragraph 18; and *Fifties*, cited above, paragraph 26).
- 38 This global assessment implies some interdependence between the relevant factors and, in particular, a similarity between the trade marks and between the goods or services concerned. Accordingly, a lesser degree of similarity between those goods or services may be offset by a greater degree of similarity between the marks, and vice versa (*Canon*, cited above, paragraph 17, *Lloyd Schubfabrik Meyer*, paragraph 19, and *Fifties*, cited above, paragraph 27).

39 In addition, the perception of the marks in the minds of consumers of the goods or services in question plays a decisive role in the global assessment of the likelihood of confusion. In this case, given the nature of the goods concerned, namely items of bedding and bedroom furniture, which are everyday consumer items, and the fact that the earlier marks are registered and protected in Spain, the target public by reference to which the likelihood of confusion must be assessed is composed of average consumers in Spain. The average consumer, who is deemed to be reasonably well-informed and reasonably observant and circumspect, normally perceives a mark as a whole and does not analyse its various details (*SABEL*, cited above, paragraph 23, *Lloyd Schuhfabrik Meyer*, paragraph 25, and *Fifties*, cited above, paragraph 28). Moreover, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks and must place his trust in the imperfect image of them which he has retained in his mind and that his level of attention is likely to vary according to the category of goods or services in question (*Lloyd Schuhfabrik Meyer*, paragraph 26, and *Fifties*, cited above, paragraph 28).

40 In the light of those considerations, it is appropriate to compare both the goods concerned and the conflicting signs.

41 First, as regards the comparison of the goods, the goods covered by the mark sought, namely ‘bedroom furniture’ falling within Class 20, are part of the very wide category of goods covered by the earlier marks, which falls within the same class. The latter range of goods covers all sorts of furniture, including bedroom furniture.

42 Accordingly, like the Board of Appeal (paragraph 14 of the contested decision), the Court finds that the goods covered by the mark sought and those covered by the earlier marks are identical. Moreover, the applicant raises no argument in its application against that finding by the Board of Appeal.

- 43 Secondly, with respect to the comparison of the marks in question as regards their visual, aural or conceptual similarity, it follows from the case-law that the global assessment of the likelihood of confusion must be based on the overall impression created by them, account being taken, in particular, of their distinctive and dominant components (*SABEL*, cited above, paragraph 23, and *Lloyd Schuhfabrik Meyer*, cited above, paragraph 25).
- 44 In the contested decision, the Board of Appeal noted that the word element of the earlier marks is dominant (paragraph 13) and found that there were strong conceptual similarities between the conflicting signs which outweighed the visual and aural differences referred to in the Opposition Division's decision (paragraph 19).
- 45 In this case, the term 'flex' certainly appears to be the dominant element in the overall impression created by the earlier marks. The word element, which, for the public, is the most important means of identifying the marks, clearly dominates the figurative part, which is negligible and even insignificant in the case of the mark registered under No 1 951 681. Moreover, it should be borne in mind that the average consumer retains only an imperfect image of the mark in his mind, which increases the importance of any elements which are particularly visible and easy to detect, such as the term 'flex' in the present case, which is the root of the Spanish words 'flexibilidad' and 'flexible'.
- 46 A comparison of the dominant word element of the earlier marks with the word mark sought reveals some visual similarity between them (*Fifties*, paragraph 37). The addition of the word element 'confor' in the mark sought does not give rise to a difference sufficiently great to cancel out any similarity arising from the fact that the essential part, namely the term 'flex', is the same. Nevertheless, in the context of a visual assessment of the conflicting signs as a whole, the fact that the earlier marks contain figurative elements, albeit insignificant ones, reveals a dissimilarity between them.

- 47 Having regard to the considerations set out above in relation to the fact that the earlier marks and the mark sought have the same dominant element, comparison of the aural aspect of the conflicting signs shows there to be some aural similarity between them. However, when the conflicting signs are assessed globally, the addition of the term ‘confor’ to the term ‘flex’ in the mark sought gives rise to a dissimilarity between them.
- 48 As regards the conceptual comparison, it should be borne in mind that the common word element of the conflicting signs, namely the term ‘flex’, is the root of the Spanish words ‘flexibilidad’ and ‘flexible’. It appears therefore that those signs have a similar semantic content in so far as they clearly suggest to Spanish consumers the notion of flexibility. The addition of the term ‘confor’ to the term ‘flex’ in the mark sought merely complements and reinforces that notion. As OHIM rightly pointed out, the word element ‘confor’ clearly refers to the notion of comfort, which is associated with the notion of flexibility in the bedroom furniture sector. It may be concluded on the basis of that finding that there is a strong conceptual similarity between the signs in question.
- 49 It follows from the above findings that the goods designated by the signs in question are identical and that there is a strong conceptual similarity between those signs.
- 50 It is appropriate at this stage to point out that, with respect to the assessment of the likelihood of confusion, both the applicant and the intervener raised in their pleadings the question of the degree of distinctiveness of the earlier marks, both relying on the *SABEL* judgment cited above. It is clear from that judgment, and from those in *Lloyd Schuhfabrik Meyer* and *Canon*, cited above, that the distinctiveness of an earlier mark, derived either from its inherent qualities or from 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*, cited above, paragraphs 18 and 24, and *Lloyd Schuhfabrik Meyer*, cited above, paragraph 20).

In addition, the Court of Justice has held that, since the more distinctive the earlier mark, the greater will be the likelihood of confusion (*SABEL*, cited above, paragraph 24), marks with a highly distinctive character, either per se or because of the recognition they possess on the market, enjoy greater protection than marks with a less distinctive character (see *Canon*, cited above, paragraph 18, and *Lloyd Schuhfabrik Meyer*, cited above, paragraph 20).

- 51 In the present case, the applicant argues that the fact that a number of national and Community trade marks registered for items of bedding and bedroom furniture and containing the term ‘flex’ co-exist on the Spanish market shows that that term is customary and therefore cannot fulfil the function of indicating commercial origin. Since the similarity between the signs in question is limited to the inclusion of a shared customary element, there can be no likelihood of confusion between them. The intervener contends in turn that the earlier marks have a strong reputation in Spain.
- 52 By way of evidence of its claims, the applicant has produced a number of documents giving details of Spanish and Community registrations of marks containing the term ‘flex’ in respect of bedding and bedroom furniture. However, it is common ground that those documents were produced for the first time before the Court and that, therefore, they must be excluded from consideration, without there being any need to examine their probative value (see, to that effect, Case T-85/02 *Díaz v OHIM — Granjas Castelló (CASTILLO)* [2003] ECR II-4835, paragraph 46; *ECOPY*, cited above, paragraphs 45 to 48; and Case T-237/01 *Alcon v OHIM — Dr. Robert Winzer Pharma (BSS)* [2003] ECR II-411, paragraph 62). The same approach must be taken with regard to the documents submitted for the first time before the Court by the intervener with a view to proving the reputation of its marks in Spain. Accordingly, both the applicant’s line of argument concerning the customary nature of the word element shared by the two signs in question and that of the intervener concerning the reputation of the earlier marks must be rejected.

- 53 Finally, as part of its line of argument concerning the degree to which the earlier marks are distinctive, the applicant, relying on the judgment in *Lloyd Schuhfabrik Meyer*, cited above, (paragraphs 22 and 23), also claimed that the term ‘flex’ is descriptive of an essential quality of any item of bedding and bedroom furniture, namely flexibility, and that it therefore cannot be regarded as distinctive.
- 54 In response to that argument of the applicant, the Board of Appeal stated that, while the term ‘flex’ may be evocative, the earlier marks comprising it have been validly registered, in association with a device, by the authorities of a Member State and that, consequently, they enjoy exclusive rights which are effective against any third party (paragraph 17 of the contested decision).
- 55 In so far as it does not constitute recognition that the term ‘flex’ is evocative, that reasoning appears to be irrelevant. According to both Article 8 of Regulation No 40/94 and the case-law of the Court of Justice laying down that protection of a ‘registered’ trade mark depends on there being a likelihood of confusion (*Canon*, cited above, paragraph 18), prior national registration of a mark allows the proprietor of that registered mark, where appropriate, to enter an opposition to an application for registration of a sign which may give rise to a likelihood of confusion on the part of the public, but it does not, in itself, affect the assessment of whether there is such a likelihood. Moreover, the purpose of the present assessment is not to call into question the national registration of the earlier marks but solely to establish whether those marks are highly distinctive or not.
- 56 Whilst, from the point of view of the public concerned, the term ‘flex’ may indeed be regarded as evocative of a characteristic of the goods in question, namely flexibility, the earlier marks do not, on that account, have a highly distinctive character, as OHIM conceded at the hearing.

57 However, the erroneous assessment made by the Board of Appeal in paragraph 17 of the contested decision has no bearing on the outcome of the dispute, since the finding that there is a likelihood of confusion remains entirely valid (see, to that effect, Case T-99/01 *Mystery Drinks v OHIM — Karlsberg Brauerei (MYSTERY)* [2003] ECR II-43, paragraph 36).

58 Given that the factors relevant to the assessment of whether there is a likelihood of confusion are interdependent, the fact that the designated products are identical, coupled with the fact that the opposed signs are conceptually very similar, is sufficient for a finding that there is such a likelihood in the present case.

59 It should be pointed out that, because the average consumer retains only an imperfect image of the mark, the predominant component of that mark is of major importance in the context of the global assessment of the likelihood of confusion. Thus, the dominant word element of the earlier marks, ‘flex’, is of major importance when analysing those marks as a whole, because the average consumer looking at a label on an item of bedding or bedroom furniture takes in and remembers the predominant word element of the marks, which enables him to make the same choice on the occasion of a subsequent purchase (see, to that effect, *Fifties*, cited above, paragraph 47).

60 Since the average consumer will, amongst other things, retain in his mind the predominant word element of the earlier marks, that is to say, the term ‘flex’, when he finds goods of the same kind designated by the mark CONFORFLEX he might think that those goods have the same commercial origin. Apart from the fact that the conflicting signs have entirely the same semantic content, it should be noted above all that the term ‘confor’, when used in connection with bedroom furniture, may objectively be regarded as descriptive of an essential quality of the goods concerned — in the present case, comfort — and, therefore, as devoid of distinctive character. Accordingly, the addition of the term ‘confor’ to that of

'flex' in the mark sought will not enable consumers to distinguish the conflicting signs to a sufficient degree. Consequently, even if the average consumer is capable of detecting certain visual or aural differences between the two conflicting signs, which differences are, however, to a large extent cancelled out by the strong conceptual similarity between those signs, the risk that he might associate the signs with each other is very real (see, to that effect, *Fifties*, cited above, paragraph 48).

61 Furthermore, it is quite possible for an undertaking active on the market for bedding and bedroom furniture to use sub-brands, that is to say signs that derive from a principal mark and which share with it a common dominant element, in order to distinguish his various lines from one another, particularly in terms of the quality of the goods concerned. As OHIM stated in its pleadings, it is therefore conceivable that the targeted public may regard the goods designated by the conflicting signs as belonging to two, admittedly distinct, ranges of products but as coming, none the less, from the same manufacturer (see, to that effect, *Fifties*, cited above, paragraph 49).

62 It follows from the foregoing that the Board of Appeal was right to find that there is a likelihood of confusion between the mark sought and the earlier marks for the purposes of Article 8(1)(b) of Regulation No 40/94. The action must therefore be dismissed.

## Costs

63 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 and both OHIM and the intervener have applied for costs, the applicant must be ordered to pay their costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

hereby:

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

Legal

Tiili

Vilaras

Delivered in open court in Luxembourg on 18 February 2004.

H. Jung

Registrar

H. Legal

President