

Case T-169/02

Cervecería Modelo, SA de CV

v

**Office for Harmonisation in the Internal Market
(Trade Marks and Designs) (OHIM)**

(Community trade mark — Opposition proceedings — Application for a Community figurative mark representing a bottle of beer including the verbal element 'negra modelo' — Earlier national figurative mark Modelo — Likelihood of confusion — Article 8(1)(b) of Regulation (EC) No 40/94)

Judgment of the Court of First Instance (First Chamber), 15 February 2005 II - 507

Summary of the Judgment

- 1. Community trade mark — Appeals procedure — Appeals before the Community judicature — Legality of the decision of a Board of Appeal adjudicating in opposition proceedings — Challenge in reliance on new elements of law or fact — Not permissible (Council Regulation No 40/94, Arts 63 and 74(1))*

2. *Community trade mark — Definition and acquisition of the Community trade mark — Relative grounds for refusal — Opposition by the proprietor of an earlier identical or similar mark registered for identical or similar goods or services — Likelihood of confusion with the earlier mark — Figurative marks NEGRA MODELO and Modelo (Council Regulation No 40/94, Art. 8(1)(b))*

1. Under Article 74(1) of Regulation No 40/94 on the Community trade mark, in proceedings relating to relative grounds for refusal of registration, the examination is to be restricted to the facts, evidence and arguments provided by the parties and the relief sought. It follows that, in relation to a relative ground for refusal of registration, elements of law and of fact which are pleaded before the Court without having previously been raised before the departments of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) cannot affect the legality of a decision of the Office's Board of Appeal.
2. There is, for the average Portuguese consumer, a likelihood of confusion between the figurative sign representing a bottle of beer bearing various colours and including the verbal element 'negra modelo', registration of which as a Community trade mark is sought in respect of 'Beer' within class 32 within the meaning of the Nice arrangement, and the figurative mark 'Modelo', previously registered in Portugal for 'syrups, beers, refreshing drinks and non-alcoholic beverages' in the same class, in so far as the aural and conceptual identity between the dominant component 'modelo' of the mark proposed for registration and the earlier mark neutralises the visual differences deriving from the graphic particularities of the mark proposed for registration, so that those differences do not serve to dispel a likelihood of confusion. The identity of the good designated by the conflicting signs merely reinforces the similarity between them.

Consequently, in the context of the review of the legality of decisions of the Office's Boards of Appeal, for which the Court has jurisdiction under Article 63 of Regulation No 40/94, those elements of fact and of law cannot be examined for the purpose of assessing the legality of the decision of the Board of Appeal and must therefore be declared inadmissible.

(see paras 22-23)

(see paras 40, 43, 46)