

## Case T-28/05

**Ekabe International SCA**

**v**

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

(Community trade mark — Opposition proceedings — Application for the Community figurative trade mark OMEGA 3 — Earlier national word mark PULEVA-OMEGA 3 — Likelihood of confusion — Similarity of the signs — Article 8(1)(b) of Regulation (EC) No 40/94)

Judgment of the Court of First Instance (Fifth Chamber), 18 October 2007 II - 4311

### Summary of the Judgment

1. *Community trade mark — Appeals procedure — Appeals before the Community judicature*  
(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*  
(Council Regulation No 40/94, Art. 8(1)(b))
3. *Community trade mark — Observations of third parties and opposition — Examination of the opposition — Scope*  
(Council Regulation No 40/94, Arts 7 and 8(1)(b))
4. *Community trade mark — Appeals procedure — Appeals before the Community judicature*  
(Council Regulation No 40/94, Art. 63)
5. *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*  
(Council Regulation No 40/94, Art. 8(1)(b))

1. The purpose of actions brought before the Court of First Instance against decisions of the Boards of Appeal of the Office for Harmonization in the Internal Market (OHIM) is to review the legality of those decisions within the meaning of Article 63 of Regulation No 40/94 on the Community trade mark. Facts which are pleaded before the Court without previously having been brought before the departments of OHIM can affect the legality of such a decision only if OHIM should have taken them into account of its own motion.

which, in proceedings relating to relative grounds for refusal of registration, OHIM is to be restricted in its examination to the facts, evidence and arguments provided by the parties and the relief sought, that OHIM is not required to take account of its own motion of facts which have not been put forward by the parties. Therefore, such facts cannot affect the legality of a decision of the Board of Appeal.

(see para. 35)

In that respect, it follows from the concluding words of Article 74(1) of Regulation No 40/94, according to

2. When assessing a likelihood of confusion for the purposes of Article 8(1)(b)

of Regulation No 40/94 on the Community trade mark, a compound trade mark cannot be regarded as being similar to another trade mark which is identical or similar to one of the components of the compound mark, unless that component forms the dominant element within the overall impression created by the compound mark. That is the case where that component is likely to dominate, by itself, the image of that mark which the relevant public keeps in mind, with the result that all the other components of the mark are negligible within the overall impression created by it.

(see para. 43)

3. In the context of the examination of an opposition by the proprietor of an earlier trade mark, pursuant to Article 8(1)(b) of Regulation No 40/94 on the Community trade mark, whilst, on the one hand, the applicant for a Community trade mark cannot challenge the validity of the earlier mark put forward in opposition, on the ground that its registration would be contrary to Article 7 of Regulation No 40/94, where, on the other hand, an absolute ground of refusal precludes registration of the Community trade mark applied for, OHIM has the power,

in tandem with the opposition proceedings, to reopen the examination procedure in order to determine whether there may be such a ground.

(see para. 47)

4. An applicant challenging a decision of a Board of Appeal of OHIM has no legitimate interest in the annulment of such a decision where that annulment can only lead to the adoption of another decision having the same effect as the decision annulled.

(see para. 51)

5. For Spanish consumers, there is a likelihood of confusion between the figurative mark containing the word element 'omega 3', registration of which as a Community trade mark is sought for 'Margarine' in Class 29 of the Nice Agreement, and the national mark 'PULEVA-OMEGA3', previously registered in Spain for 'Meat, fish, poultry and game; meat extracts; preserved,

dried and cooked fruits and vegetables; jellies, jams; eggs; edible oils and fats; prepared dishes made from meat, fish or vegetables and especially milk and milk products' also in Class 29.

Since, visually and phonetically, the element 'omega 3' is at the same time the second of the two elements of which the earlier trade mark is composed (the first being the element 'puleva') and the only word element of the trade mark

applied for, of which it is the dominant component, the conflicting marks, each considered as a whole and bearing in mind in particular their distinctive and dominant features, are similar, with the result that the relevant public is likely to think that the food products covered by the trade mark applied for may come from the undertaking of the proprietor of the earlier trade mark.

(see paras 56, 59, 60)