

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

9 October 2002 \*

In Case T-360/00,

**Dart Industries Inc.**, established in Orlando, Florida (United States), represented by J. Gray and K.-U. Jonas, lawyers,

applicant,

v

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

defendant,

ACTION brought against the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 22 September 2000 (Case R 278/2000-1) on the registration of 'UltraPlus' as a Community trade mark,

\* Language of the case: English.

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

composed of: R.M. Moura Ramos, President, J. Pirrung and A.W.H. Meij,  
Judges,

Registrar: J. Plingers, Administrator,

having regard to the application lodged at the Registry of the Court on  
25 November 2000,

having regard to the response lodged at the Registry of the Court on 8 March  
2001,

further to the hearing on 29 May 2002,

gives the following

### Judgment

#### Background to the dispute

1 On 23 December 1997, 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 of which registration was sought is 'UltraPlus'.
  
- 3 The goods in respect of which registration was sought are plastic ovenware for use in microwave, convection and conventional ovens in Class 21 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.
  
- 4 By decision of 20 January 1999, the examiner refused the application for registration under Article 38 of Regulation No 40/94 on the ground that the mark applied for was not distinctive within the meaning of Article 7(1)(b) of that regulation.
  
- 5 By decision of 22 September 2000 ('the contested decision'), the First Board of Appeal dismissed the appeal brought by the applicant against the examiner's decision.
  
- 6 Essentially, the Board of Appeal found that the term in respect of which registration was sought was descriptive of the qualities of the goods in question and incapable of acting as a distinguishing sign since potential consumers would perceive it as merely expressing a strong claim by the manufacturer regarding the quality of its goods.

Forms of order sought by the parties

7 The applicant claims that the Court should:

- annul the contested decision;
  
  
- order that the application for registration be referred back to the Office to be published there;
  
  
- order the Office to pay the costs.

8 The Office contends that the Court should:

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

- 9 At the hearing, the applicant withdrew its claim that the Office should be ordered to publish the application to register ‘UltraPlus’ in accordance with Article 40 of Regulation No 40/94. Furthermore, it stated that it did not intend to raise as separate pleas in law its observations relating to the principle of equal treatment and to the failure to take into consideration a document (addendum of 2 June 2000) during the proceedings before the Board of Appeal but that it maintained those observations in order to clarify for the Court the terms of reference of the dispute.

## Law

- 10 In support of its application, the applicant raises two pleas alleging infringement of, first, Article 7(1)(c) of Regulation No 40/94 and, second, Article 7(1)(b) of that regulation.

### *The plea alleging infringement of Article 7(1)(c) of Regulation No 40/94*

#### Arguments of the parties

- 11 The applicant submits that, in the view of the Boards of Appeal, a sign is not descriptive if it is merely allusive. That is true of UltraPlus, which does not exclusively and directly designate the goods themselves or the qualities which the consumer might be looking for.

- 12 Moreover, the applicant cites several examples to show that the Office registers signs consisting of laudatory terms which, taken as a whole, have no direct meaning and even signs consisting of the words 'ultra' or 'plus' combined with a noun or an adjective.
  
- 13 The applicant then points out that 'UltraPlus' is not used in the general or specialised language of the trade circles concerned, that it is not customary in the household sector for designating ovenware and that there is no indication that it may become so.
  
- 14 The applicant further claims that the mark at issue does not prevent its competitors from using the words of which it is composed and that it is not necessary for the term to remain available. In that respect, the applicant draws attention to the fact that Article 12 of Regulation No 40/94 would permit descriptive use of 'ultraplus'.
  
- 15 In conclusion, the applicant asserts that the mark UltraPlus is a newly invented word with no grammatical meaning which does not describe the goods concerned or any of their qualities.
  
- 16 The Office argues that the descriptiveness of a sign must be assessed by reference to the meaning perceived by the consumer in relation to the goods and services in question.
  
- 17 It adds that if, in relation to the goods concerned, a term has an ambiguous and suggestive meaning which is open to several interpretations, it is not descriptive.

18 In the present case, the Office considers that ‘UltraPlus’ describes, directly and without requiring further thought, the particular quality or the nature of the product or an essential feature thereof, namely the very good quality of the ovenware. Therefore, in its submission, that term is not merely allusive but clearly descriptive.

19 Moreover, the Office observes that an Internet search in different Member States shows that ‘ultraplus’ is used in relation to the durability of a product. The term is commonly used to praise the high quality of the materials used, particularly in the plastics industry of which the ovenware in question is part.

### Findings of the Court

20 Article 7(1)(c) of Regulation No 40/94 provides that ‘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.

21 Article 7(1)(c) of Regulation No 40/94 prevents the signs and indications therein referred to from being reserved to one undertaking alone because they have been registered as trade marks. That provision therefore pursues an aim which is in the public interest, namely that descriptive signs or indications may be freely used by

all (Case T-358/00 *DaimlerChrysler v OHIM (TRUCKCARD)* [2002] ECR II-1993, paragraph 25).

- 22 From that point of view, the signs and indications referred to in Article 7(1)(c) of Regulation No 40/94 are those which may serve in normal usage from the point of view of the relevant public to designate, either directly or by reference to one of their essential characteristics, the goods or services in respect of which registration is sought (Case C-383/99 P *Procter & Gamble v OHIM* [2001] ECR I-6251, paragraph 39). Accordingly, a sign's descriptiveness can only be assessed by reference to the goods or services concerned and to the way in which it is understood by a specific intended public (*TRUCKCARD*, cited above, paragraph 26).
- 23 In the present case, the Board of Appeal found, on the basis of English-language dictionaries, that the sign consists of, first, the prefix 'ultra', which means 'going beyond, surpassing, transcending the limits of...' or 'exceeding in quantity, number, scale, minuteness,...' and, second, the suffix 'plus', which means that the product is 'of superior quality; excellent of its kind'. It considered that those two words are laudatory terms used to claim the excellence of the products in question. Thus, it found that 'UltraPlus' is descriptive for any type of goods or services.
- 24 In that regard it should be noted, on the basis of those definitions and the lexical rules applying to them, that if the term consisted of, for example, the prefix 'ultra' and an adjective, it could indeed be held that the adjective directly and immediately informs the consumer about a characteristic of the product and that, since the prefix merely reinforces the characterisation thus given to the product, a sign composed in this way is descriptive.



- 25 However, in the present case, the word ‘ultra’ does not designate a quality, quantity or characteristic of the ovenware which the consumer is able to understand directly. That word, as such, is only capable of reinforcing the designation of a quality or characteristic by another word. Likewise, the word ‘plus’ does not in itself designate a quality or characteristic of the plastic ovenware concerned which the consumer is able to understand directly and which could be reinforced by the word ‘ultra’.
- 26 In that regard, it is not apparent from the contested decision that the relevant public would immediately and without further reflection make a definite and direct association between plastic ovenware and ‘UltraPlus’ (see, to that effect, Case T-359/99 *DKV v OHIM (EuroHealth)* [2001] ECR II-1645, paragraph 35).
- 27 When an undertaking extols, indirectly and in an abstract manner, the excellence of its products by way of a sign such as ‘UltraPlus’, yet without directly and immediately informing the consumer of one of the qualities or specific characteristics of the ovenware, it is a case of evocation and not designation for the purposes of Article 7(1)(c) of Regulation No 40/94 (see, to that effect, Case T-24/00 *Sunrider v OHIM (VITALITE)* [2001] ECR II-449, paragraph 24)
- 28 In that regard, the Office’s arguments that ‘UltraPlus’ designates the very good quality of the goods, and in particular — as was alleged at the hearing — the excellence of the plastic which makes the products light and resistant to changes in temperature, do not make it possible to characterise the sign as descriptive. Such characteristics are neither indicated nor singled out by the sign at issue and remain, where the public might imagine that they are alluded to, too vague and

indeterminate to render that sign descriptive of the goods in question (see, to that effect, Case T-87/00 *Bank für Arbeit und Wirtschaft v OHIM (EASYBANK)* [2001] ECR II-1259, paragraph 31).

- 29 It follows from the above considerations that, in failing to relate its analysis to the goods in question and in failing to show that ‘UltraPlus’ may serve to designate those goods directly, the Board of Appeal infringed Article 7(1)(c) of Regulation No 40/94.
- 30 Finally, it must be added that the fact that a sign is not descriptive does not automatically mean that it is distinctive. That character may also be lacking if the relevant public cannot perceive in that sign an indication of the commercial origin of the goods (see, to that effect, Opinion of Advocate General Ruiz-Jarabo Colomer of 31 January 2002 in Case C-363/99 *Koninklijke KPN Nederland*, pending before the Court of Justice, paragraph 44, and *EuroHealth*, cited above, paragraph 48). It is therefore necessary to consider the plea alleging infringement of Article 7(1)(b) of Regulation No 40/94.

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

Arguments of the parties

- 31 According to the applicant, the underlying principle of the Community trade mark is that a sign is eligible for registration if it is capable of distinguishing the goods of one undertaking from those of another.

- 32 In that regard, it points out that the Boards of Appeal have held that a minimum degree of distinctive character is sufficient and that a mark can be distinctive even if it contains descriptive elements. Similarly, a descriptive sign may be registered if it is used as a new word which is not univocal and makes no understandable reference to specific goods or services.
- 33 It submits that 'UltraPlus' has an unusual spelling since it includes a capital 'P'. Moreover, the term is invented and does not appear in any English dictionary. Finally, 'UltraPlus' is not univocal and has no precise meaning since its components have several meanings and their combination is more than ambiguous for the consumer.
- 34 In accordance with the principles laid down by the Boards of Appeal, the applicant submits that the words 'ultra' and 'plus' are perceived as laudatory terms only where they are used with the quality which they emphasise. Where used together, they have no meaning and do not denote a quality or provide any information relating to the goods in question. Accordingly, 'UltraPlus ovenware' has no descriptive or qualitative meaning.
- 35 Furthermore, according to the applicant, if the words 'ultra' and 'plus' combined with an adjective or a noun can be distinctive, the juxtaposition of the two, which leaves more to the imagination, must be distinctive for any type of goods. The applicant states that the Office confined itself to refusing the mark on the ground that the two words are perceived as laudatory, without considering that their juxtaposition has no real meaning or only an allusive meaning.

- 36 The Office observes that signs which are descriptive generally fall within the scope of both Article 7(1)(c) and Article 7(1)(b). That overlap is obvious since a descriptive sign is not capable of distinguishing products from different vendors.
- 37 In the present case, the words ‘ultra’ and ‘plus’ convey an idea of excellence and of the ‘superior quality’ of the goods, whatever they may be. The Office submits that two laudatory words, even when combined, do not have any distinctive character. In its submission, ‘UltraPlus’ is not distinctive for any type of goods.
- 38 The Office does not agree with the applicant’s analysis with respect to the unusual spelling and inventive nature of the sign at issue. It argues that the capitalisation of the letter ‘P’ adds to the overall laudatory character by distinguishing ‘Ultra’ from ‘Plus’.
- 39 The Office accepts that signs must be assessed in a consistent and non-discriminatory manner. Nevertheless, it asserts that the Board of Appeal’s refusal to register ‘UltraPlus’ is entirely consistent with its previous decisions. In that connection, the defendant cites, by way of example, numerous decisions on signs containing the prefix ‘ultra’ or the suffix ‘plus’.
- 40 Finally, the Office disputes the applicant’s claim that ‘ultraplus’ is not customary in the household goods sector. In that respect, it puts forward several uses of the term, particularly for plastic ovenware, in order to demonstrate that it is used in certain countries as a descriptive or generic term for a particular type of ovenware.

## Findings of the Court

- 41 Under Article 7(1)(b) of Regulation No 40/94 ‘trade marks which are devoid of any distinctive character’ are not to be registered.
- 42 The signs devoid of any distinctive character, referred to in Article 7(1)(b) of Regulation No 40/94, are 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 purchased them 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.
- 43 A sign’s distinctiveness can be assessed only by reference, first, to the goods or services in respect of which registration is sought and, second, to the relevant public’s perception of that sign.
- 44 In the present case, the Board of Appeal concluded that ‘UltraPlus’ lacked distinctiveness from its finding that the words combined were laudatory and that there were no additional elements which might make the term fanciful, unusual or thought-provoking. Furthermore, the Board found that, since the consumer would perceive that term as expressing a strong claim by the manufacturer regarding the quality of its goods, he would not see it as a distinctive sign of their origin.

- 45 The first point to be noted is that, in order to establish the distinctive character of a sign, it is not necessary to find that the sign is original or fanciful (see, to that effect, Case T-135/99 *Taurus-Film v OHIM (Cine Action)* [2001] ECR II-379, paragraph 31, and Case T-34/00 *Eurocool Logistik v OHIM (EUROCOOL)* [2002] ECR II-683, paragraph 45).
- 46 As regards the relevant public, it should be observed that kitchenware, in particular plastic ovenware for use in microwave ovens, is intended for the general public and thus for consumers whose level of attention has no special feature such as to influence their perception of the sign. The relevant public is therefore average consumers 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, and *EuroHealth*, paragraph 27).
- 47 As regards the perception by the relevant public of the term at issue, it should be noted that both of the words of which it is composed can be used to form comparatives and superlatives by being added to a noun or an adjective and are thus not normally used together in the same combination. In that respect, 'UltraPlus' constitutes a syntactically unusual juxtaposition from a lexical point of view in both English and other Community languages (see, to that effect, *Procter & Gamble*, cited above, paragraph 44). Thus, more than signs composed of words which, because of their intrinsic meaning, may enable the consumer to imagine the type of goods or services to which the mark relates, a sign such as 'UltraPlus', which is devoid of 'descriptive character', as was found above, and is perceptibly different from a lexically correct construction, may be distinctive in relation to ovenware.
- 48 Such a sign can be easily and instantly memorised by the relevant public and can enable it to repeat a positive experience of purchasing ovenware inasmuch as the sign is not already commonly used, as such, for that type of goods, which usage

would prevent the consumer from distinguishing immediately and with certainty the applicant's goods from those of other undertakings.

- 49 In that regard, the Office claims to have found numerous descriptive and generic uses of the term *ultraplus* for plastic goods, including ovenware. Accordingly, as the Board of Appeal found, the customer would not regard that term as a distinctive sign of origin.
- 50 However, having regard to the certificate of registration of a Community trade mark presented by the applicant at the hearing, it must be stated that the alleged uses of '*ultraplus*' in Germany and in Italy as a customary, laudatory sign unrelated to commercial origin, which the Office relied on its response, are in fact uses of the Community trade mark *UltraPlus* in a figurative form, owned by the applicant, to designate its products.
- 51 Furthermore, the other examples given by the Office in its response cannot be accepted as relevant since plastic goods in general, including tools and electrical parts, do not constitute the reference sector for plastic ovenware.
- 52 Moreover, it might be considered that, in view of the examples put forward at the hearing, '*UltraPlus*' is not used in a descriptive sense but as an equivalent of a noun designating the applicant's goods or those of other trade mark holders, in the form of a trade mark. However, whether, in fact, the way in which the sign is used or displayed on the goods, whether as a trade mark or in connection with a

different type of usage, might lead the consumer to regard it not as a distinctive sign of origin but as a mere commercial declaration forms part of an analysis related to usage which cannot be taken into account in assessing eligibility for registration (see, to that effect, *TRUCKCARD*, paragraph 47).

53 As to the examples given by the Office of its settled practice of refusing to register signs containing the word 'ultra' or the word 'plus', it must be stated that those signs are not composed of the words 'ultra' and 'plus' together in that order. Where they are composed of the prefix 'ultra' and a noun or an adjective, they are generally caught by Article 7(1)(c) of Regulation No 40/94.

54 In view of the above considerations, it must be concluded that, in finding that there is nothing unusual in the choice of the words forming the term UltraPlus and in failing to establish that the term formed in this way is, taken as a whole, commonly used in relation to ovenware, the Board of Appeal infringed Article 7(1)(b) of Regulation No 40/94.

55 It follows from all the above that the contested decision must be annulled.

## Costs

56 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 Office has been unsuccessful and the applicant has asked for costs to be awarded against it, the Office must be ordered to pay the costs incurred by the applicant.



On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Annuls the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 22 September 2000 (Case R 278/2000-1);
2. Orders the defendant to pay the costs.

Moura Ramos

Pirrung

Meij

Delivered in open court in Luxembourg on 9 October 2002.

H. Jung

R.M. Moura Ramos

Registrar

President