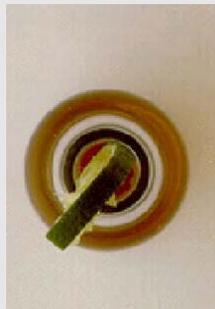


European Court of Justice, 30 June 2005, Eurocermex



TRADEMARK LAW

Distinctive character

- No distinctive character based on the overall impression which is conveyed by the shape and the arrangement of the colours of the mark applied for.

In the judgment under appeal, the Court of First Instance, after examining separately each of the elements comprising the mark applied for, likewise found that the mark was to be presumed to lack any distinctive character. However, in contrast to the assessment which it had carried out in SAT.1 v OHIM (SAT.2), the Court of First Instance continued its analysis by investigating in detail whether or not the mark, taken as a whole, displayed such character. It thus stated, in paragraph 32 of the judgment under appeal that, 'with more particular reference to the structure of the mark applied for, which is distinguished by the fact that the slice of lemon is plugged in the neck of the bottle, it is difficult to imagine other ways of combining those elements in a single three-dimensional form', that 'it represents the only way in which a drink can be decorated with a slice or a piece of lemon when the drink is consumed directly from the bottle' and that, consequently, 'the manner in which the elements of the composite mark in question are combined is not capable of giving it a distinctive character'. It likewise held, in paragraph 33 of the judgment under appeal, that 'any differences that may exist between the shape and the colour which constitute the mark applied for and the shape and the colour of other bottles used as a container for the products concerned do not alter that conclusion [as to the mark's lack of distinctive character]', be-

cause, 'seen as a whole, the mark applied for fails to differentiate itself materially from the ordinary shapes of the containers for the products concerned, which are commonly used in trade, but instead appears to be a variant of those shapes'. Finally it concluded, in paragraph 35 of the judgment under appeal, that 'the mark applied for, as perceived by the average consumer, who is reasonably well informed and reasonably observant and circumspect, is not capable of differentiating the products referred to in the application for registration and of distinguishing them from those of a different commercial origin'. It follows that the Court of First Instance correctly based its assessment as to whether the mark applied for has distinctive character on the overall impression which is conveyed by the shape and the arrangement of the colours of the mark applied for, as required by the case-law recalled in paragraph 22 of the present judgment.

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European Court of Justice, 30 June 2005

(P. Jann, K. Lenaerts, K. Schiemann, E. Juhász and M. Ilešič)

JUDGMENT OF THE COURT (First Chamber)

30 June 2005 (*)

(Appeal – Community trade mark – Article 7(1)(b) and (3) of Regulation (EC) No 40/94 – Three-dimensional shape of a long-neck bottle in the neck of which a slice of lemon has been plugged – Absolute ground for refusal – Distinctive character)

In Case C-286/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 29 June 2004,

Eurocermex SA, established in Evere (Belgium), represented by A. Bertrand, avocat, appellant,

the other party to the proceedings being:

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

defendant at first instance,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts, K. Schiemann, E. Juhász and M. Ilešič (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 In its appeal, Eurocermex SA ('Eurocermex') seeks to have set aside the judgment of the Court of First Instance of the European Communities of 29 April 2004 in Case T-399/02 Eurocermex v OHIM (Shape of a beer bottle) [2004] ECR II-0000 ('the judgment under appeal') by which the latter dismissed its action for annulment of the decision of the First Board of Appeal of

the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('OHIM') of 21 October 2002 (Case R 188/2002-1) refusing registration of a three-dimensional trade mark constituted by the shape of a long-neck bottle in the neck of which a slice of lemon has been plugged, with a claim for the colours yellow and green ('the contested decision').

Legal context

2 Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) provides in Article 7, which is headed 'Absolute grounds for refusal':

'1. The following shall not be registered:

...

(b) trade marks which are devoid of any distinctive character;

...

3. Paragraph 1(b), (c) and (d) shall not apply if the trade mark has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it.'

Background to the dispute

3 On 27 November 1998 Eurocermex, which markets and distributes the Mexican beer 'CORONA' in Europe, filed an application at OHIM, pursuant to Regulation No 40/94, for a three-dimensional Community trade mark.

4 The mark in respect of which the application for registration was made is constituted by the three-dimensional shape and colours of a transparent bottle, filled with a yellow liquid, having a long neck in which a slice of lemon with a green skin has been plugged.



5 The goods and services in respect of which registration of the trade mark was applied for come within Classes 16, 25, 32 and 42 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.

6 By decision of 21 December 2001, OHIM examiner refused the application for the goods 'beers, mineral and aerated waters, fruit juices', covered by Class 32, and the services 'restaurants, bars, snack bars', covered by Class 42, on the ground that the trade mark applied for was devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94 and that Eurocermex had failed to adduce evidence showing that the trade mark had become distinctive in consequence of the use which had been made of it.

7 By the contested decision, the First Board of Appeal of OHIM set aside that part of the decision of the examiner which refused the application in respect of

'mineral waters' under Class 32. It upheld the remainder of the examiner's decision.

The proceedings before the Court of First Instance and the judgment under appeal

8 Eurocermex brought an action before the Court of First Instance for annulment of the contested decision in so far as it rejected its application for registration of the trade mark in respect of the goods 'beers, aerated waters, fruit juices' and the services 'restaurants, bars, snack bars'.

9 It submitted, in its first plea in law, that the trade mark applied for was not devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94 and, in its second plea, that the trade mark had become distinctive in consequence of the use which had been made of it, within the meaning of Article 7(3) of that regulation.

10 In respect of the first plea, the Court of First Instance, relying in particular on its judgment in Case T-323/00 SAT.1 v OHIM (SAT.2) [2002] ECR II □ 2839, held in paragraph 18 of the judgment under appeal that the trade marks devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation No 40/94 'are, in particular, those which, from the point of view of the relevant section of the public, are commonly used, in trade, for the presentation of the goods or services concerned or with regard to which there exists, at the very least, concrete evidence justifying the conclusion that they are capable of being used in that manner'.

11 In paragraph 25 of the judgment under appeal, the Court of First Instance stated that while, in order to establish whether or not a complex mark, such as the mark applied for, has a distinctive character, the mark must be considered as a whole, that is not incompatible with an examination of each of its individual features in turn.

12 As regards, first, the goods 'beers, aerated waters, fruit juices', after examining in turn, in paragraphs 26 and 27 of the judgment under appeal, the bottle depicted in the mark applied for, in paragraph 28, the slice of lemon and, in paragraph 29, the colours used, the Court of First Instance concluded, in paragraph 30, that 'the trade mark applied for consists of a combination of features, each of which is capable of being commonly used, in trade, for the presentation of the products referred to in the application for registration and therefore lacks any distinctive character in relation to those products'.

13 In paragraph 31 of the judgment under appeal, the Court of First Instance held that 'if a composite mark comprises only features devoid of any distinctive character in respect of the products and services concerned, it may be concluded that the overall mark is likewise likely to be commonly used, in trade, to present those goods and services ([SAT.1 v OHIM (SAT.2), cited above], paragraph 49)' and that 'that would only not be the case if concrete evidence, such as, for example, the way in which the various features are combined, were to indicate that the composite trade

mark, taken as a whole, is greater than the sum of its parts’.

14 The Court of First Instance found, in paragraph 32 of the judgment under appeal, that such evidence did not exist on the ground, in particular, that, ‘with ... reference to the structure of the mark applied for, which is distinguished by the fact that the slice of lemon is plugged in the neck of the bottle, it is difficult to imagine other ways of combining those elements in a single three-dimensional form’ and that ‘it represents the only way in which a drink can be decorated with a slice or a piece of lemon when the drink is consumed directly from the bottle’. The Court added, in paragraphs 33 and 34 of the judgment under appeal, that ‘any differences that may exist between the shape and the colour which constitute the mark applied for and the shape and the colour of other bottles used as a container for the products concerned do not alter [the] conclusion [that the mark is devoid of any distinctive character]’.

15 The Court of First Instance therefore held, in paragraph 35 of the judgment under appeal, that that the mark applied for is not capable of differentiating the products ‘beers, aerated waters, fruit juices’ and of distinguishing them from those of a different commercial origin and that the mark thus lacks distinctive character in relation to those products.

16 As regards, second, the services ‘restaurants, bars, snack bars’, the Court of First Instance stated, in paragraph 36 of the judgment under appeal, that the particular aim of those services is the commercialisation of the products ‘beers, aerated waters, fruit juices’ and that the fact that the mark applied for is capable of being commonly used, in trade, for the presentation of those products is concrete evidence that that mark is also capable of being commonly used, in trade, for the presentation of those services. The mark thus also lacks a distinctive character in relation to the latter.

17 In respect of the second plea, the Court of First Instance held, in paragraphs 50 to 54 of the judgment under appeal, that Eurocermex failed to establish that the mark applied for had become distinctive throughout the Community in consequence of the use that was made of it within the meaning of Article 7(3) of Regulation No 40/94.

The appeal

18 The appellant advances two grounds of appeal and claims that the Court of Justice should:

- set aside the judgment under appeal;
- annul the contested decision.

19 OHIM requests the Court to dismiss the appeal and order the appellant to pay the costs.

The first ground of appeal, alleging breach of Article 7(1)(b) of Regulation No 40/94

The first limb, relating to taking into account the overall impression given by the mark applied for

20 In the first limb of its first ground of appeal, the appellant pleads that, when assessing whether the mark applied for has distinctive character, the Court of First Instance did not consider, as it was required to do, the overall impression given by the mark, but adopted the wrong approach by separating the mark into its compo-

nent parts and examining separately the shape of the bottle, the presence of the piece of lemon and the colours used.

21 OHIM states in response that it is apparent from paragraphs 25 and 31 to 36 of the judgment under appeal that, in concluding that the mark applied for lacks distinctive character in respect of the products and services concerned, the Court of First Instance relied on an examination of the mark taken as a whole.

22 As the Court has consistently held, and as the Court of First Instance indeed recalled in paragraph 25 of the judgment under appeal, the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. Thus, in order to assess whether or not a trade mark has any distinctive character, the overall impression given by it must be considered (see, *inter alia*, [Joined Cases C-468/01 P to C-472/01 P Procter & Gamble v OHIM \[2004\] ECR I-5141](#), paragraph 44, and [Case C-136/02 P Mag Instrument v OHIM \[2004\] ECR I-0000](#), paragraph 20).

23 That does not mean, however, that the competent authority, responsible for ascertaining whether the trade mark for which registration is sought is capable of being perceived by the public as an indication of origin, may not first examine each of the individual features of the get-up of that mark in turn. It may be useful, in the course of the competent authority’s overall assessment, to examine each of the components of which the trade mark concerned is composed (see, in particular, *Procter & Gamble v OHIM*, cited above, paragraph 45).

24 In the present case, after first examining in turn, in paragraphs 26 to 29 of the judgment under appeal, the bottle depicted in the mark applied for, the slice of lemon and the colours used, the Court of First Instance concluded, in paragraph 30, that the mark consists of a combination of features, each of which lacks any distinctive character in relation to the products ‘beers, aerated waters, fruit juices’.

25 In paragraph 31 of the judgment under appeal, the Court of First Instance held that ‘if a composite mark [such as the mark applied for] comprises only features devoid of any distinctive character in respect of the products and services concerned, it may be concluded that the overall mark is likewise likely to be commonly used, in trade, to present those goods and services’.

26 As the Court of Justice held in [Case C-329/02 P SAT.1 v OHIM \[2004\] ECR I-8317](#), at paragraph 35, in assessing whether a composite mark has distinctive character, the overall perception of the mark by the average consumer should be relied upon, and not the presumption that features individually devoid of distinctive character cannot, on being combined, display such character.

27 In that case, relating to registration of the term ‘SAT.2’ as a trade mark, the Court of Justice set aside the judgment of the Court of First Instance in SAT.1 v OHIM (SAT.2), on the ground that the refusal to register the term was founded on that presumption. The Court of Justice found that the Court of First Instance had examined the overall impression given by the term

only secondarily, refusing to give any relevance to aspects such as the existence of an element of imaginativeness, which must be taken into account in such an analysis (SAT.1 v OHIM, cited above, paragraph 35).

28 In the judgment under appeal, the Court of First Instance, after examining separately each of the elements comprising the mark applied for, likewise found that the mark was to be presumed to lack any distinctive character. However, in contrast to the assessment which it had carried out in SAT.1 v OHIM (SAT.2), the Court of First Instance continued its analysis by investigating in detail whether or not the mark, taken as a whole, displayed such character.

29 It thus stated, in paragraph 32 of the judgment under appeal that, 'with more particular reference to the structure of the mark applied for, which is distinguished by the fact that the slice of lemon is plugged in the neck of the bottle, it is difficult to imagine other ways of combining those elements in a single three-dimensional form', that 'it represents the only way in which a drink can be decorated with a slice or a piece of lemon when the drink is consumed directly from the bottle' and that, consequently, 'the manner in which the elements of the composite mark in question are combined is not capable of giving it a distinctive character'.

30 It likewise held, in paragraph 33 of the judgment under appeal, that 'any differences that may exist between the shape and the colour which constitute the mark applied for and the shape and the colour of other bottles used as a container for the products concerned do not alter that conclusion [as to the mark's lack of distinctive character]', because, 'seen as a whole, the mark applied for fails to differentiate itself materially from the ordinary shapes of the containers for the products concerned, which are commonly used in trade, but instead appears to be a variant of those shapes'.

31 Finally it concluded, in paragraph 35 of the judgment under appeal, that 'the mark applied for, as perceived by the average consumer, who is reasonably well informed and reasonably observant and circumspect, is not capable of differentiating the products referred to in the application for registration and of distinguishing them from those of a different commercial origin'.

32 It follows that the Court of First Instance correctly based its assessment as to whether the mark applied for has distinctive character on the overall impression which is conveyed by the shape and the arrangement of the colours of the mark applied for, as required by the case-law recalled in paragraph 22 of the present judgment.

33 The first limb of the first ground of appeal must therefore be rejected as unfounded.

The second limb, relating to finding that the mark applied for has distinctive character.

34 In the second limb of the first ground of appeal, the appellant contends that it is apparent from the documentation referred to by the First Board of Appeal of OHIM that the mark applied for is perfectly capable

of enabling consumers to identify the origin of the products bearing it.

35 The appellant puts forward three arguments with regard to the bottle depicted in the mark applied for, which is the bottle used as the container for CORONA beer. First, except for some Mexican beers, against whose producers judgments have been obtained in this respect, beers sold on the Community market either use bottles that are wide and stout at the base, with a neck accounting for less than a third of the overall height, or, when they have a shape analogous to the bottle depicted, are generally not transparent. Second, the shape of the bottle classically used for fruit juices displays no similarity at all with the bottle depicted, except for being manufactured in clear glass. Finally, the average consumer will not be accustomed to seeing 33 centilitre bottles used for lemonade, since this drink is offered for sale in 1 litre, or 1.5 litre, bottles.

36 Furthermore, the additional elements (the piece of lemon and the colours yellow and green) combined with this particular shape of bottle in any event confer distinctive character on the overall mark applied for. In particular, the practice of plugging a piece of lemon in the neck of the bottle is a feature specific to the appellant's products. Only beer marketed under the mark SOL appears with a piece of lemon in the neck of the bottle, but this is clearly a case of replicating the traditional way of sampling products bearing the CORONA trade mark.

37 Thus, in the appellant's submission, on the date upon which it filed its application with OHIM, the association of this particular shape of bottle, of the piece of lemon and of the claimed colours yellow and green was specific to its products. The mark applied for therefore enables the average consumer to identify the origin of the products and services marketed under it.

38 The appellant adds that, in any event, it cannot be maintained that it is entirely usual to decorate fruit juices and lemonade with a piece of lemon.

39 OHIM's primary claim is that the second limb of the first ground of appeal is inadmissible.

40 First, the appellant merely repeats some of the factual assertions already made at first instance, without articulating any specific complaint vis-à-vis the judgment under appeal. Such a plea constitutes nothing more than a request for re-examination of the application before the Court of First Instance, which, by virtue of Article 58 of the Statute of the Court of Justice, the latter has no jurisdiction to entertain.

41 Second, its arguments result in the appraisal of the facts by the Court of First Instance being contested. Save where the facts placed before the Court of First Instance are distorted, that appraisal does not constitute a point of law which is subject, as such, to review by the Court of Justice on appeal. OHIM submits that the findings made by the Court of First Instance disclose nothing from which distortion of the facts placed before it could be presumed. Nor does the appellant in any way plead such distortion.

42 As to those submissions, it follows from Article 225 EC, the first paragraph of Article 58 of the Statute

of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see, inter alia, Case C-352/98 P Bergaderm and Goupil v Commission [2000] ECR I-5291, paragraph 34, and Case C-234/02 P Ombudsman v Lamberts [2004] ECR I-2803, paragraph 76).

43 In addition, under Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice, an appeal lies on a point of law only. The Court of First Instance thus has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus do not, save where the facts and evidence are distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (Mag Instrument v OHIM, cited above, paragraph 39).

44 Here, in the second limb of the first ground of appeal the appellant merely asserts that the Court of First Instance wrongly concluded that the mark applied for lacks distinctive character, without specifying what error of law it made in interpreting and applying Article 7(1)(b) of Regulation No 40/94.

45 The appellant is therefore in actual fact requesting the Court of Justice to substitute its own appraisal of the facts for that made by the Court of First Instance when analysing whether the mark applied for has distinctive character.

46 Since no distortion of the facts and evidence by the Court of First Instance can be established here, the second limb of the first ground of appeal must be declared inadmissible on the grounds set out in paragraph 43 of the present judgment.

The third limb, relating to the contested decision's reasoning as regards the services 'restaurants, bars and snack bars'

47 In the third limb of the first ground of appeal, the appellant submits that the First Board of Appeal of OHIM does not in any way substantiate the reasons for which the mark applied for is unsuited for distinguishing the services 'restaurants, bars and snack bars' supplied by the appellant from those supplied by other undertakings.

48 OHIM states in response that, as regards the refusal to register the mark applied for in respect of those services, paragraph 36 of the judgment under appeal sufficiently sets out the reasons for the assessment of the Court of First Instance.

49 As pointed out in paragraph 42 of the present judgment, it follows from Article 225 EC, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal.

50 Where an appeal merely reproduces the pleas in law and arguments previously submitted to the Court of First Instance, without even including an argument specifically identifying the error of law allegedly vitiating the judgment under appeal, it fails to satisfy that requirement. In reality, such an appeal amounts to no more than a request for re-examination of the application submitted to the Court of First Instance, which falls outside the jurisdiction of the Court of Justice (see, in particular, Bergaderm and Goupil v Commission, cited above, paragraph 35, and Ombudsman v Lamberts, cited above, paragraph 77).

51 Here, the appellant merely reproduces the line of argument previously put forward at first instance concerning the alleged lack of reasoning in the contested decision, without indicating what error of law the Court of First Instance made in the judgment under appeal.

52 Accordingly, the third limb of the first ground of appeal must be rejected as inadmissible and, consequently, the ground of appeal must be rejected in its entirety.

The second ground of appeal, alleging breach of Article 7(3) of Regulation No 40/94

53 The appellant submits that, in light of the documents put in evidence, the mark applied for has been widely promoted in a vigorous, constant and continuous manner, so that it is fully associated by the public with the appellant's business.

54 As a preliminary plea, OHIM requests the Court to declare that certain documents annexed to the appeal are inadmissible on the ground that they were not adduced before the First Board of Appeal of OHIM or the Court of First Instance.

55 In addition, OHIM contends that the appellant merely summarises the factual assertions made before the Court of First Instance without pleading any error of law made by the latter in the judgment under appeal and that the Court of Justice therefore has no jurisdiction to entertain this ground of appeal.

56 As to those submissions, the appellant's assertion that it is apparent from the documents put in evidence that the mark applied for has become distinctive in consequence of the use which has been made of it seeks in reality to have the Court of Justice substitute its own appraisal of the facts for that of the Court of First Instance set out in paragraphs 48 to 54 of the judgment under appeal.

57 Since distortion by the Court of First Instance of the facts or evidence put before it has not been alleged in this ground of appeal, the latter must be rejected as inadmissible on the grounds set out in paragraph 43 of the present judgment, without it being necessary to consider OHIM's request that some of the documents annexed to the appeal be excluded from the proceedings because they were not adduced before the First Board of Appeal of OHIM or the Court of First Instance.

58 The entire appeal must therefore be dismissed.

Costs

59 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Arti-

cle 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since OHIM has applied for costs and the appellant has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeal;
 2. Orders Eurocermex SA to pay the costs.
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