

Court of Justice EU, 17 March 2016, Nazneen v OHIM

smart-water

## TRADE MARK LAW

### Genuine use of a trade mark:

- where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services;

genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark. When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark in the course of trade is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark (judgment in *Reber Holding v OHIM*, C-141/13 P, EU:C:2014:2089, paragraph 29 and the case-law cited).

### “Proper reasons” for non-use of that mark:

- only obstacles having a sufficiently direct relationship with a trade mark making its use impossible or unreasonable and which arise independently of the will of the proprietor of that mark

96. As regards, in the second place, the effect of the revocation proceedings, it should be recalled that, according to the case-law of the Court, only obstacles having a sufficiently direct relationship with a trade mark making its use impossible or unreasonable, and which arise independently of the will of the proprietor of that mark, may be described as ‘proper reasons’ for non-use of that mark. It must be assessed on a case-by-case basis whether a change in the strategy of the undertaking to circumvent the obstacle under consideration would make the use of that mark unreasonable (judgment in *Häupl*, C-246/05, EU:C:2007:340, paragraph 54).

- the fact that the claimed obstacle is independent of the will of the proprietor of the trademark is, on its own, not sufficient for those purposes

97. It follows that, contrary to what the appellant claims, the fact, on its own, that the claimed obstacle is independent of the will of the proprietor of the trade mark, although it admittedly constitutes a relevant factor for the purposes of verifying the existence of proper reasons justifying non-use of a trade mark, is nevertheless not sufficient for those purposes, since

such an obstacle must also have a sufficiently direct relationship with that mark making its use impossible or unreasonable.

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### Court of Justice EU, 17 March 2016

(A. Arabadjiev, S. Rodin, E. Regan, Rapporteur)  
JUDGMENT OF THE COURT (Sixth Chamber)  
17 March 2016 (\*)

(Appeal — Community trade mark — Regulation (EC) No 207/2009 — Revocation proceedings — Article 51(1)(a) — Community word mark SMART WATER — Genuine use — Obligation to state reasons — Article 75)

In Case C-252/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 27 May 2015,

Naazneen Investments Ltd, established in Limassol (Cyprus), represented by P. Goldenbaum and I. Rohr, Rechtsanwältinnen,

appellant,

the other parties to the proceedings being:

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by D. Gája and A. Folliard-Monguiral, acting as Agents, defendant at first instance,

Energy Brands Inc., established in New York (United States), represented by S. Malynicz, Barrister, and D. Stone and A. Dykes, Solicitors,

intervener at first instance,

THE COURT (Sixth Chamber),

composed of A. Arabadjiev, President of the Chamber, S. Rodin and E. Regan (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

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. By its appeal, Naazneen Investments Ltd seeks to have set aside the judgment of the General Court of the European Union of 18 March 2015 in *Naazneen Investments v OHIM — Energy Brands (SMART WATER)* (T-250/13, EU:T:2015:160, ‘*the judgment under appeal*’), by which the General Court dismissed its action for annulment of the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 18 February 2013 (Case R 1101/2011-2) relating to revocation proceedings between Energy Brands Inc. (‘*Energy Brands*’) and the appellant (‘*the decision at issue*’).

### Legal context

2. Article 15 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1) provides:

‘1. If, within a period of five years following registration, the proprietor has not put the Community

trade mark to genuine use in the Community in connection with the goods or services in respect of which it is registered, or if such use has been suspended during an uninterrupted period of five years, the Community trade mark shall be subject to the sanctions provided for in this Regulation, unless there are proper reasons for non-use.

...

2. Use of the Community trade mark with the consent of the proprietor shall be deemed to constitute use by the proprietor.'

3. Article 51(1) of that regulation states:

*'The rights of the proprietor of the Community trade mark shall be declared to be revoked on application to the Office or on the basis of a counterclaim in infringement proceedings:*

*(a) if, within a continuous period of five years, the trade mark has not been put to genuine use in the Community in connection with the goods or services in respect of which it is registered, and there are no proper reasons for non-use; however, no person may claim that the proprietor's rights in a Community trade mark should be revoked where, during the interval between expiry of the five-year period and filing of the application or counterclaim, genuine use of the trade mark has been started or resumed; the commencement or resumption of use within a period of three months preceding the filing of the application or counterclaim which began at the earliest on expiry of the continuous period of five years of non-use shall, however, be disregarded where preparations for the commencement or resumption occur only after the proprietor becomes aware that the application or counterclaim may be filed;*

...'

4. Under Article 75 of that regulation:

*'Decisions of the Office shall state the reasons on which they are based. They shall be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments.'*

#### **Background to the dispute**

5. On 29 June 1999, Water Concepts, Inc. obtained from OHIM the registration under the number 781153 of the Community word mark SMART WATER ('the mark at issue') on the basis of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), which was repealed and replaced by Regulation No 207/2009, which came into force on 13 April 2009.

6. The goods in respect of which the mark at issue was registered are in Class 32 of the Nice Agreement on the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following description: 'Beverages, namely water with dietary supplements' ('the goods concerned').

7. On 25 February 2002, OHIM was informed of the assignment of the mark at issue to Gondwana Trade Getränke GmbH & Co. KG, which later became Gondwana Trade International Brands GmbH & Co. KG ('Gondwana').

8. On 21 June 2007, OHIM was informed of the assignment of the mark at issue to the appellant, Naazneen Investments Ltd.

9. On 31 March 2008, the registration of the mark at issue was renewed until 24 March 2018.

10. By decision of 18 May 2011, the Cancellation Division of OHIM ('the Cancellation Division') upheld the application for revocation of the mark at issue that had been filed by Energy Brands in respect of all the goods concerned.

11. On 25 May 2011, the appellant filed a notice of appeal with OHIM against the decision of the Cancellation Division.

12. By the decision at issue, the Second Board of Appeal of OHIM ('the Board of Appeal') confirmed the decision of the Cancellation Division. The Board of Appeal stated that as the application for revocation had been lodged on 3 July 2009, the five-year period to be taken into consideration for the assessment of genuine use of the mark at issue was from 3 July 2004 until 2 July 2009. It found, first, that the evidence provided by the appellant did not make it possible to establish that the mark at issue had been put to genuine use. Second, it held that there were no proper reasons for non-use of that mark.

#### **The procedure before the General Court and the judgment under appeal**

13. By application lodged at the Registry of the General Court on 2 May 2013, the appellant brought an action for annulment of the decision at issue.

14. In support of its action, the appellant put forward two pleas in law, alleging infringement of Article 51(1)(a) of Regulation No 207/2009 and of Article 75 of that regulation, respectively.

15. By the judgment under appeal, the General Court rejected those two pleas in law and, consequently, dismissed the action in its entirety.

#### **Forms of order sought**

16. By its appeal, the appellant claims that the Court should:

- set aside the judgment under appeal and annul the decision at issue;
- in the alternative, refer the case back to the General Court;
- order OHIM to bear its own costs as well as those of the appellant, and
- order Energy Brands to bear its own costs.

17. OHIM and Energy Brands contend that the Court should:

- dismiss the appeal and
- order the appellant to pay the costs.

#### **The appeal**

18. In support of its appeal, the appellant relies on two grounds of appeal, alleging infringement of Article 75 of Regulation No 207/2009 and of Article 51(1)(a) of that regulation, respectively.

#### **The first ground of appeal**

##### **Arguments of the parties**

19. The appellant claims that the General Court was not entitled to regard the statement of reasons in the decision at issue as sufficient because, for the most

part, the Board of Appeal merely repeated the grounds set out by the Cancellation Division, without addressing the arguments submitted by the appellant. That approach cannot be regarded as an implicit rejection of the appellant's arguments.

20. Moreover, the appellant submits that the General Court was wrong in finding that the Board of Appeal had taken into account all the evidence provided, in particular, Annex 45 and the additional evidence included with its letter of 16 September 2011. Contrary to what the General Court found, since Annex 45 was submitted only in the course of the appeal proceedings, it could not have been part of the Cancellation Division's analysis. Furthermore, the decision at issue does not mention any of the additional evidence submitted by the appellant.

21. OHIM and Energy Brands contend that that ground of appeal is inadmissible, since it repeats the arguments put forward at first instance and seeks merely to have the application submitted to the General Court re-examined, which falls outside the jurisdiction of the Court of Justice. They submit that that plea in law is, in any event, unfounded.

#### **Findings of the Court**

22. As regards the admissibility of the first ground of appeal, it should be recalled, first, that it follows from the second subparagraph of Article 256(1) TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of the Rules of Procedure of the Court 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.

23. Thus, where, without even including an argument specifically identifying the error of law allegedly vitiating the judgment under appeal, an appeal merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the General Court, including those based on facts expressly rejected by that Court, it fails to satisfy the requirements to state reasons under the above provisions. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake (see, to that effect, *inter alia*, order in *Rajani v OHIM*, C-559/08 P, EU:C:2010:529, paragraph 41, and judgment in *Reber Holding v OHIM*, C-141/13 P, EU:C:2014:2089, paragraph 54).

24. However, where an appellant is disputing the General Court's interpretation or application of European Union law, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not base his appeal on pleas in law and arguments already relied on before the General Court in that way, an appeal would be deprived of part of its purpose (see, to that effect, *inter alia*, [judgment in \*Helena Rubinstein and L'Oréal v OHIM\*](#), C-100/11 P, EU:C:2012:285, paragraph 110).

25. In the present case, it should be stated, however, that, although admittedly, as OHIM observes, the first ground of appeal repeats, in part, the plea in law put forward at first instance, the fact remains that, by that ground of appeal, the appellant disputes — by indicating the passages in the judgment under appeal that it considers are vitiated by an error of law — precisely the interpretation and application of Article 75 of Regulation No 207/2009 by the General Court, while setting out the reasons why it considers that the General Court infringed that provision by rejecting its plea in law alleging a failure to state reasons in the decision at issue.

26. It follows that the plea of inadmissibility raised by OHIM and Energy Brands concerning the first ground of appeal in its entirety must be rejected.

27. Moreover, OHIM cannot complain that the appellant did not substantiate the complaint alleging a failure to state reasons in the judgment under appeal, since it is clear from the first ground of appeal that that ground of appeal does not include such a complaint.

28. As regards the substance of the first ground of appeal, it should be recalled that, under the first sentence of Article 75 of Regulation No 207/2009, OHIM decisions are to state the reasons on which they are based.

29. It is settled case-law of the Court that that obligation to state reasons has the dual purpose of enabling interested parties to know the purported justification for the measure taken so as to be able to defend their rights and of enabling the Courts of the European Union to exercise their jurisdiction to review the legality of the decision ([judgments in \*Helena Rubinstein and L'Oréal v OHIM\*](#), C-100/11 P, EU:C:2012:285, paragraph 111, and *Storck v OHIM*, C-96/11 P, EU:C:2012:537, paragraph 86).

30. In this case, as the General Court pointed out in paragraph 22 of the judgment under appeal, the Board of Appeal upheld the application for revocation lodged by Energy Brands by confirming the analysis made by the Cancellation Division, according to which proof of genuine use of the mark at issue had not been adduced, and thereby implicitly rejected the appellant's arguments on that point.

31. In this connection, the General Court stated correctly, in paragraphs 16 and 19 of the judgment under appeal, that the Cancellation Division's statement of reasons forms part of the context in which the decision at issue was adopted, a context which was known to the appellant and enabled the Court to carry out fully its review of legality (see, by analogy, order in *Wohlfahrt v OHIM*, C-357/12 P, EU:C:2013:356, paragraph 43).

32. However, the appellant has not disputed before the General Court, nor has it disputed in the present appeal, the sufficiency of the reasoning of the adjudicating bodies of OHIM to enable the appellant to know the purported justification for the decision at issue and to enable the General Court to exercise its jurisdiction to review the legality of that decision.

33. It is true that the appellant complains that the General Court found that the decision at issue was sufficiently reasoned even though that decision did not refer to the arguments put forward by the appellant before the Board of Appeal.

34. However, according to the case-law of the Court, the obligation on OHIM to state reasons, under Article 75 of Regulation No 207/2009, may be discharged without it being necessary to respond expressly and exhaustively to all the arguments put forward by an applicant (see, to that effect, [judgments in Helena Rubinstein and L'Oréal v OHIM](#), C-100/11 P, EU:C:2012:285, paragraph 112, and *Storck v OHIM*, C-96/11 P, EU:C:2012:537, paragraph 88).

35. Furthermore, the appellant has in no way identified the specific arguments that the Board of Appeal did not address, nor has it shown how the alleged failure to state reasons affected the exercise of its right of appeal.

36. In those circumstances, it must be concluded that the General Court did not in any way err in law in finding that the statement of reasons in the decision at issue was not vitiated by any infringement of Article 75 of Regulation No 207/2009.

37. Moreover, with regard to the complaint that the General Court was wrong in finding that the Board of Appeal had taken into account the additional evidence concerning the use of the mark at issue, the subject matter of Annex 45 and other annexes to the appellant's letter of 16 September 2011 produced before the Board of Appeal, it should be pointed out that the appellant's own explanations provided in support of its appeal state that that evidence merely supplemented the evidence already provided to OHIM in other documents, namely Annexes 22 and 26 to that letter, as the General Court noted — without being challenged on that point — in paragraph 19 of the judgment under appeal.

38. Indeed, in the present appeal, the appellant does not dispute that those last-mentioned annexes were taken into account by the Board of Appeal in the decision at issue.

39. Consequently, the first ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

#### **The second ground of appeal**

##### **The first part of the second ground of appeal**

##### **– Arguments of the parties**

40. By the first part of this ground of appeal, the appellant complains that the General Court erred in law when assessing the evidence intended to establish genuine use of the mark at issue.

41. In the first place, as regards the evidential value of the affidavits, the General Court erred in law, in paragraph 30 of the judgment under appeal, in finding that the Board of Appeal had confirmed the Cancellation Division's assessment, when the decision at issue did not deal with that question. In the absence of any indication to the contrary in the decision at issue, the appellant submits that it has to be assumed that the Board of Appeal shared the Cancellation

Division's incorrect view that the evidential value of those affidavits was questionable.

42. In the second place, as regards actual sales, the appellant submits that the General Court, first, erred in law in paragraph 33 of the judgment under appeal, in so far as there is nothing to preclude 'test sales' constituting genuine use. Furthermore, the appellant submits that, in the same paragraph of that judgment, the General Court distorted the facts submitted to it for assessment, in so far as the amount of EUR 800 referred to in the two invoices relating to the delivery of twelve pallets of bottles for the purposes of carrying out 'test sales' did not represent the price of the bottles, but the amount that had to be paid to the transport company for the transport of the goods.

43. Then, in paragraphs 35 and 51 of the judgment under appeal, the General Court erred in law in that it found that, where the market for the goods is of a significant size, the sale of a modest quantity of such goods cannot be sufficient to establish genuine use of the mark under which they are registered. The appellant submits that, in fact, the only relevant question is whether the activities of the proprietor of that trade mark constitute plausible attempts to gain market share. The General Court also erred in law in concluding that, with regard to mass consumption goods, the significant size of the market for the goods in question had automatically to result in higher requirements for the extent of use. The appellant submits that it would thus be incorrect to apply the same standards to an undertaking that is attempting to break into a market as those applicable to an undertaking that already has a substantial market share.

44. Lastly, the appellant submits that, in paragraph 36 of the judgment under appeal, the General Court made the same error of law as the Board of Appeal by not carrying out an overall assessment of the evidence contained in Annexes 19 and 24 to the appellant's letter of 16 September 2011. Those annexes ought to have been assessed in the context of the affidavit to which they were attached, which stated that actual sales had indeed taken place.

45. In the third place, as regards advertising and other promotional activities, the appellant submits that, in holding, in paragraph 40 of the judgment under appeal, that the relevant evidence related solely to the years 2006 and 2007, the General Court, first, failed to observe the principle that there is no minimum period that has to be covered in order to establish genuine use of a mark.

46. Next, the General Court failed to have regard to its own case-law by refusing to accept that the circumstances explaining the lack of use between August 2007 and July 2009 provided a sufficient explanation for the limited use of the mark. A large number of factors other than extensive and regular use of a trade mark may offset a small volume of sales. In this case, the genuine use of the mark in 2006 and 2007 ought to have been assessed on the basis of the situation at that time. In that regard, the appellant had explained that it had needed time to develop a new

strategy with a view to relaunching the goods concerned after the setback suffered in 2007 on account of their contamination and the bringing of revocation proceedings against its mark.

47. Lastly, the appellant submits that by holding, in paragraph 41 of the judgment under appeal, that only big advertising campaigns can be relevant, the General Court failed to have regard to its obligation to take into account all relevant factors in the overall assessment, such as the volume of commercial activity and production or marketing capacities.

48. In the fourth place, as regards the non-disclosure agreements, the General Court erred in law, in paragraph 44 of the judgment under appeal, by regarding these as irrelevant and not taking them into account in the required overall assessment.

49. In the fifth place, as regards the printouts from the appellant's website in Annex 35 to its letter of 16 September 2011, the appellant submits that, in paragraph 44 of the judgment under appeal, the General Court distorted the evidence submitted to it for its assessment when it stated that that website included the message '*site is under construction, please visit us again later!*'. That message was in fact displayed only from January 2010, namely, from a date that did not fall within the relevant period of five years, a point which the appellant explained on several occasions.

50. In the sixth place, the General Court erred in law, in paragraphs 46 and 47 of the judgment under appeal, by not raising the point that the Board of Appeal contradicted itself when it stated, on the one hand, that the total amount of transactions over the relevant period seemed to be token and, on the other hand, that it did not doubt the intention of the proprietor of the mark at issue to make real use of that mark. By holding that the Board of Appeal had used the term '*token*' not to categorise the use of the mark at issue but to describe the total amount of transactions, the General Court had misinterpreted that term. In paragraph 70 of the judgment in *Sunrider v OHIM* (C-416/04 P, EU:C:2006:310), the Court of Justice defined '*token*' use as use for the sole purpose of preserving the rights conferred by the mark.

51. In the seventh place, in paragraphs 54 and 55 of the judgment under appeal, the General Court, by holding that the period of almost three years between the attempt to launch the mark at issue and the end of the relevant period could not be considered to be a launch phase, distorted the facts and misinterpreted them.

52. First, the General Court made a calculation error, since there was less than two years between the deliveries of the goods in August 2007 and the end of the relevant period of five years on 2 July 2009.

53. Next, by not taking account of the fact that the relaunch phase had been disrupted by the defective nature of the first consignment of bottles delivered and the revocation proceedings, the General Court did not carry out an overall assessment of all relevant factors. The General Court erred in law in that regard in holding that those circumstances could not be taken into account in determining whether the limited use of

the mark at issue was nevertheless sufficient to be genuine use and that such circumstances could be taken into consideration only in the context of assessing whether there were proper reasons for non-use of a trade mark. The appellant claims that the present case does not involve '*non-use*' but '*limited use*'.

54. Lastly, the appellant submits that the reasons why a mark was not used more extensively do not need to satisfy the requirements as to proper reasons for non-use. On the other hand, they should be sufficient to render plausible the reasons why use has not been more extensive. In this case, neither the Board of Appeal, nor the General Court, disputed the fact that the proprietor of the mark at issue and the licensee repeatedly started to launch the goods concerned and persisted in their attempts to obtain a considerable market share.

55. OHIM and Energy Brands contend that the first part of the appellant's second ground of appeal is, in part, inadmissible, and, in part, unfounded.

#### – Findings of the Court

56. It should be recalled that, as the General Court stated correctly in paragraphs 25 and 26 of the judgment under appeal, there is genuine use of a trade mark where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark. When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark in the course of trade is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark (judgment in *Reber Holding v OHIM*, C-141/13 P, EU:C:2014:2089, paragraph 29 and the case-law cited).

57. In this case, it is apparent from paragraphs 29 to 61 of the judgment under appeal that the General Court found that the Board of Appeal was right in concluding that the mark at issue had not been put to genuine use during the period between 3 July 2004 and 2 July 2009, after having examined, respectively, the affidavits, the evidence as to the existence of actual sales, the evidence of promotional and advertising activities, the existence of non-disclosure agreements and the extracts from Gondwana's website, then having refuted a certain number of arguments put forward by the appellant based, inter alia, on the non-token use of the mark at issue, the absence of a quantitative threshold for determining genuine use, the failure to take into account the reasons for non-use of the mark at issue and the failure to carry out an overall assessment of the evidence.

58. In essence, by the first part of the second ground of appeal, the appellant is seeking to call in question the General Court's assessment of most of that evidence

and those arguments relating to genuine use of the mark at issue.

59. As regards, in the first place, the taking into account of the affidavits, it must be recalled that under Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal lies on points of law only. The General Court 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 (see, *inter alia*, [judgment in Il Ponte Finanziaria v OHIM](#), C-234/06 P, EU:C:2007:514, paragraph 38, and order in *Arnoldo Mondadori Editore v OHIM*, C-548/14 P, EU:C:2015:624, paragraph 38).

60. It must be stated that, by its arguments, the appellant is merely calling in question the General Court's assessment, in paragraph 30 of the judgment under appeal, of the evidential value of those affidavits and is thereby essentially asking the Court of Justice to substitute its own assessment of the facts and evidence for that of the General Court (see, by analogy, judgment in *Centrotherm Systemtechnik v OHIM*, C-610/11 P, EU:C:2013:593, paragraph 44). That line of argument is, therefore, inadmissible.

61. Moreover, the appellant cannot usefully complain that the General Court held that the Board of Appeal had confirmed the assessment made by the Cancellation Division on that point, since such a criticism is ineffective. Even if it were founded, it would nonetheless not follow that the General Court had erred in law, in paragraph 30 of the judgment under appeal, in deciding that affidavits from a person who has close links with the party concerned are of lower evidential value than those from third parties and that they cannot, therefore, on their own, constitute sufficient proof of use of the mark.

62. As regards, in the second place, the assessment of the evidence of the existence of actual sales, it should be stated, first, that, with regard to the taking into account of test sales, the appellant relies on a misreading of the judgment under appeal. The General Court stated, in paragraph 33 of that judgment, that the Board of Appeal had taken those test sales into account as evidence of actual sales to prove genuine use of that mark. For the same reason, the appellant cannot complain that the General Court distorted the price of the bottles in any way, since the General Court did not make any findings on that point.

63. Next, the appellant also misreads the judgment under appeal when it complains that the General Court laid down the principle that, in a market of a significant size, a small quantity of goods cannot be sufficient to establish genuine use of the mark under which those goods are registered. The General Court did not in any way lay down such a principle, but merely noted, in paragraphs 35 and 51 of the judgment under appeal, a series of facts that suggested, in its view, that the use of the mark at issue could not be regarded as sufficient, in

the economic sector concerned, to be deemed genuine. Such findings of fact — save where the facts are distorted, which has not been alleged in the present case — fall within the appraisal to be made by the General Court alone and, accordingly, cannot be contested in the present appeal.

64. Lastly, with regard to the taking into account of the evidence in Annexes 19 and 24 to the appellant's letter of 16 September 2011, the appellant is wrong in complaining that the General Court did not carry out an overall assessment of that evidence in so far as it failed to take into account the evidence in the affidavits. It is clear from paragraphs 29 to 37 of the judgment under appeal that the General Court examined all the evidence provided by the appellant concerning the existence of actual sales. In fact, it appears that, although purporting to complain that the General Court erred in law, the appellant is seeking rather to have the Court of Justice substitute its own appraisal of those facts and assessment of that evidence for those of the General Court, which does not fall within its jurisdiction in an appeal.

65. As regards, in the third place, the advertising activities, it must be stated, first, that the appellant relies on a misreading of the judgment under appeal when it complains that the General Court required genuine use of a trade mark to relate to a minimum period. It is clear from paragraph 40 of that judgment that the General Court did not lay down such a requirement, but observed merely that, in this case, the appellant's advertising activities related solely to the years 2006 and 2007, the appellant not having adduced any proof that the goods concerned were marketed between 2007 and the end of the relevant period, namely 2 July 2009.

66. Next, in so far as the appellant complains that the General Court did not regard the evidence it provided concerning the lack of use of the mark at issue between August 2007 and July 2009 as sufficient to dispel any doubts as to the genuineness of the use of that mark, suffice it to state that such a line of argument seeks to have the General Court's assessment of the evidence in paragraphs 40 and 41 of the judgment under appeal reassessed, which — save where that evidence is distorted, which has not been alleged — does not fall within the jurisdiction of the Court of Justice in an appeal.

67. Lastly, in so far as the appellant complains that the General Court held that only big advertising campaigns may be relevant in order to establish genuine use of a trade mark, it must be observed that the appellant is relying, once again, on a misreading of the judgment under appeal, since, in paragraph 41 of that judgment, in the context of its appraisal of the facts against which no appeal lies, the General Court stated merely that advertisements in two specialist German magazines cannot, on their own, constitute an '*advertising campaign*'.

68. In the fourth place, the appellant is wrong in complaining that the General Court did not take into account the existence of non-disclosure agreements

concluded between Gondwana and beverage manufacturers. As paragraph 44 of the judgment under appeal shows, the General Court did take that evidence into account, but it found, following an appraisal of the facts, that those agreements were not followed by contracts for the manufacture and delivery of the goods concerned, which appraisal — unless it is based on a distortion of the facts, which the appellant has not alleged in the present appeal — falls within the exclusive jurisdiction of the General Court.

69. In the fifth place, with regard to the allegation that the extracts from Gondwana's website, in Annex 35 to the appellant's letter of 16 September 2011, were distorted, it should be recalled that, given the exceptional nature of a complaint alleging distortion of the facts and evidence, Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of the Rules of Procedure of the Court provide, in particular, that an appellant must indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in its view, led to that distortion. Such distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and evidence (order in *Adler Modemärkte v OHIM*, C-343/14 P, EU:C:2015:310, paragraph 43 and the case-law cited).

70. In this case, it is common ground between the parties that, in stating, in paragraph 44 of the judgment under appeal, that the appellant had not put forward, before the Board of Appeal, any argument that would make it possible to call in question the Cancellation Division's finding that those extracts merely included the message '*site is under construction, please visit us again later!*', the General Court distorted the facts submitted to it. It is clear from the documents before the Court that the appellant explained to the Board of Appeal, in particular, in a letter of 9 August 2010, that that message was displayed only from January 2010, namely from a time that did not fall within the relevant period for the examination of genuine use of the mark at issue, and that the date of 4 March 2010 on the extracts from Gondwana's website relates to when they were printed and not to the period when that website could be consulted.

71. However, it must be noted that the appellant merely alleges such distortion, without explaining how this might affect the examination carried out by the General Court in paragraphs 29 to 61 of the judgment under appeal, which examination concluded that the mark at issue had not been put to genuine use, in circumstances where — as the General Court pointed out in paragraphs 58 and 59 of that judgment, without this being contested in the present appeal — that conclusion follows from an overall assessment of all the evidence produced before it.

72. As regards, in the sixth place, the argument that the General Court misinterpreted the term '*token*', suffice it to state that it is clear from paragraph 46 of the judgment under appeal that the Board of Appeal used

that term in the decision at issue not to categorise the use of the mark at issue, as the appellant claims, but to describe the total amount of transactions over the relevant period. The General Court was therefore entitled to infer, without being in error, that the Board of Appeal did not contradict itself when it stated moreover that it did not doubt the intention of the proprietor of the mark at issue to make real use of that mark.

73. As regards, in the seventh place, the argument relating to the relevance of a modest commercial volume in the relaunch of a product, the appellant cannot complain that the General Court distorted the facts when it stated, in paragraph 55 of the judgment under appeal, that a period of almost three years went by between the relaunch attempt and the end of the relevant period. As OHIM correctly observes, the appellant itself states in its appeal that '*the work on a relaunch started in 2006*'.

74. As to the complaint that the General Court ought to have taken into account, in the context of its overall assessment of genuine use of the mark at issue, the reasons why that mark was not used more extensively, it should be recalled that, in paragraph 56 of the judgment under appeal, the General Court held that the assessment of genuine use of a trade mark must take into account the evidence of the existence of such use and not evidence explaining non-use of that trade mark, the latter evidence being taken into account, on the other hand, in the assessment of the reasons for non-use of that mark.

75. That reasoning is not vitiated by any error of law.

76. As is apparent from the case-law of the Court referred to in paragraph 56 of the present judgment, genuine use of a trade mark requires proof of its use and proof that its commercial exploitation in order to create or preserve an outlet for the goods and services is real. In that context, the reasons for non-use are irrelevant. On the other hand, such reasons must be taken into account, under the first subparagraph of Article 15(1) and Article 51(1)(a) of Regulation No 207/2009, in the context of the examination of proper reasons for non-use.

77. In this connection, the appellant is wrong in claiming that cases in which there has been no use of a mark at all should be distinguished from cases, as in this instance, of limited use, in which proper reasons may be relevant for the purposes of determining whether use is genuine. There is nothing in the text of the first subparagraph of Article 15(1) and Article 51(1)(a) of Regulation No 207/2009 to suggest such a distinction. On the contrary, it follows from the very wording of those provisions that, where a trade mark has not been put to genuine use, the rights of the proprietor of that trade mark must be revoked unless he justifies that lack of genuine use by the existence of proper reasons.

78. It is clear that, since the objective of proper reasons is to make it possible to justify situations in which there is no genuine use of the mark in order to avoid revocation of the mark, and their function is thus

closely linked to that of genuine use (judgment in Häupl, C-246/05, EU:C:2007:340, paragraph 44), the 'non-use' referred to in the first subparagraph of Article 15(1) and Article 51(1)(a) of Regulation No 207/2009 must necessarily be understood as referring to a failure to put the trade mark to genuine use within the meaning of the first part of those provisions, including, therefore, both a complete failure to use a mark and limited use of a mark.

79. It follows from all the foregoing considerations that the first part of the second ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

#### **Second part of the second ground of appeal**

##### **– Arguments of the parties**

80. By the second part of the second ground of appeal, the appellant complains that the General Court concluded that there were no proper reasons justifying the non-use of the mark at issue.

81. In the first place, the appellant submits that, in paragraphs 66 and 67 of the judgment under appeal, the General Court was wrong in holding that the problems that occurred in 2007 relating to the manufacture of the goods concerned by a third party did not constitute proper reasons.

82. First, in holding that it was for Gondwana to control and supervise the manufacture of the goods concerned, the General Court infringed the appellant's right to be heard, since this was a new aspect that had not been raised before the Cancellation Division or the Board of Appeal.

83. Next, it was incorrect to regard Gondwana as being involved in the manufacturing process since this had been entrusted to an experienced supplier. The General Court therefore misinterpreted the criterion as to proper reasons when it dismissed the argument that the defective nature of the goods was independent of the will of Gondwana.

84. Lastly, the General Court held, in paragraph 68 of the judgment under appeal, that it was incorrect that the appellant had no choice but to stop using the mark at issue or to put consumers' health in danger, without having regard to the detailed explanations provided by the appellant on that point. In fact, the General Court only examined whether, in the period between September 2007 and July 2009, it had been impossible to manufacture and market new products, whereas it ought to have examined whether that would have been unreasonable.

85. In the second place, the appellant submits that, in paragraphs 71 to 73 of the judgment under appeal, the General Court was wrong in holding that the revocation proceedings did not constitute a proper reason for non-use of the mark at issue.

86. First, the bringing of revocation proceedings was independent of the will of the appellant and of Gondwana.

87. Next, it would not be reasonable to require the appellant and the licensee to use the mark at issue notwithstanding the pending revocation proceedings. In this connection, the General Court once again limited

its assessment to whether the revocation proceedings made use of that mark impossible, whereas it ought to have found that use of the mark in spite of the pending revocation proceedings would have been unreasonable.

88. Moreover, the General Court found that the payment of damages would not be a direct consequence of the revocation proceedings, without explaining why only direct consequences are relevant, or how such consequences are to be defined, or why it is not sufficient that an action for damages be foreseeable with some degree of probability. In so doing, the General Court misinterpreted the term 'unreasonable', such an interpretation having the effect of imposing an unfair burden on the proprietor of the mark and leading to a risk of abuse by third parties interested in a registered trade mark.

89. Lastly, pending revocation proceedings are a concrete attack on the validity of the mark concerned, and not merely a general and abstract risk incurred by every trade mark proprietor. If, in such a situation, all risks are borne by the proprietor, small and medium-sized undertakings would be the subject of discrimination since they will not take the risk of exposing themselves to the payment of damages.

90. OHIM and Energy Brands contend that the second part of the appellant's second ground of appeal is, in part, inadmissible, and, in part, unfounded.

##### **– Findings of the Court**

91. By the second part of the second ground of appeal, the appellant is seeking to call in question the General Court's examination, in paragraphs 62 to 74 of the judgment under appeal, of the reasons relied on by the appellant to explain the non-use of the mark at issue.

92. As regards, in the first place, the problems that occurred in 2007 relating to the manufacture of the goods concerned because of their defective nature, it should be observed, first, that the appellant is wrong in complaining that the General Court infringed its right to be heard when it stated, in paragraphs 66 and 67 of the judgment under appeal, that it was for Gondwana to control and supervise the manufacture of the goods concerned. That statement by the General Court is intended specifically to respond to the argument put forward by the appellant in its application at first instance that the Board of Appeal was wrong in finding that the interruption of sales on account of such problems could not constitute a proper reason.

93. Next, it must be pointed out that when the appellant complains that the General Court stated that Gondwana was involved in the manufacturing process of the goods concerned, although purporting to claim an error of law as to the criterion to be taken into account in the examination of proper reasons for non-use of a trade mark, the appellant is in fact seeking to have the General Court's assessment of the facts and evidence reassessed, which — save where those facts and that evidence is distorted by that court, which has not been alleged — does not fall within the jurisdiction of the Court of Justice in an appeal.

94. Moreover, the appellant's argument is based on a misreading of paragraph 67 of the judgment under

appeal, since the General Court did not state that Gondwana was involved in the manufacturing process of the goods concerned, it merely observed that it was for Gondwana to supervise and control the manufacture.

95. Lastly, as regards the argument that it is excessive to require proof that the manufacture and marketing of the goods concerned was impossible, suffice it also to state that, in paragraph 68 of the judgment under appeal, the General Court did not in any way set out such a requirement. In that paragraph, the General Court stated that since the appellant could have manufactured further products and placed them on the market within a reasonable period, it could not claim that the change in strategy of the proprietor of the mark at issue made use of that mark unreasonable, for the additional economic investments necessary for the manufacture of further products form part of the risks that an undertaking must face. Accordingly, in so doing, the General Court did not examine whether the claimed obstacle made use of the mark impossible but whether, in its own words, it made it unreasonable.

96. As regards, in the second place, the effect of the revocation proceedings, it should be recalled that, according to the case-law of the Court, only obstacles having a sufficiently direct relationship with a trade mark making its use impossible or unreasonable, and which arise independently of the will of the proprietor of that mark, may be described as '*proper reasons*' for non-use of that mark. It must be assessed on a case-by-case basis whether a change in the strategy of the undertaking to circumvent the obstacle under consideration would make the use of that mark unreasonable (judgment in Häupl, C-246/05, EU:C:2007:340, paragraph 54).

97. It follows that, contrary to what the appellant claims, the fact, on its own, that the claimed obstacle is independent of the will of the proprietor of the trade mark, although it admittedly constitutes a relevant factor for the purposes of verifying the existence of proper reasons justifying non-use of a trade mark, is nevertheless not sufficient for those purposes, since such an obstacle must also have a sufficiently direct relationship with that mark making its use impossible or unreasonable.

98. In paragraphs 71 and 72 of the judgment under appeal, the General Court stated that that was not the case in this instance, since the fact that revocation proceedings have been brought against a trade mark does not prevent the proprietor of that mark from using it and that, although it is always possible that, should such revocation proceedings lead to the revocation of that mark, an action for damages might be instituted, an order to pay damages is not a direct consequence of the revocation proceedings.

99. Clearly, although purporting to complain that the General Court erred in law as to the interpretation of the term '*unreasonable*', the appellant is, in fact, seeking by its argument to call in question those factual appraisals. Such appraisals, save where the facts are

distorted, which has not been alleged, fall outside the jurisdiction of the Court of Justice in an appeal.

100. It follows from all the foregoing considerations that the second part of the appellant's second ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

101. Consequently, the second ground of appeal must be rejected.

102. It follows that the appeal must be dismissed in its entirety.

#### Costs

103. In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

104. Since OHIM and Energy Brands have applied for costs and the appellant has been unsuccessful, the appellant must be ordered to pay the costs.

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

1. Dismisses the appeal;
2. Orders Naazneen Investments Ltd to pay the costs.

[Signatures]

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\* Language of the case: English.