

Case T-296/02

Lidl Stiftung & Co. KG

v

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

(Community trade mark — Opposition — Likelihood of confusion — Application for Community word mark LINDENHOF — Earlier word and figurative mark LINDERHOF — Article 8(1)(b) of Regulation (EC) No 40/94)

Judgment of the Court of First Instance (Second Chamber), 15 February 2005 II - 566

Summary of the Judgment

- 1. Community trade mark — Appeals procedure — Appeals before the Community judicature — Legality of the decision of a Board of Appeal ruling in opposition proceedings — Challenge by the submission of new facts — Not permissible (Council Regulation No 40/94, Arts 63 and 74(1))*

2. *Community trade mark — Appeals procedure — Appeal brought against a decision of a unit of the Office ruling at first instance and referred to the Board of Appeal — Taking account of new facts or evidence — Lawfulness — Scope (Council Regulation No 40/94, Art. 74(2))*
3. *Community trade mark — Definition and acquisition of the Community trade mark — Relative grounds for refusal — Opposition by the proprietor of an earlier identical or similar mark registered for identical or similar goods or services — Likelihood of confusion with the earlier mark — Word mark LINDENHOF and figurative word mark LINDERHOF (Council Regulation No 40/94, Art. 8(1)(b))*

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

own motion, to take into consideration facts which were not put forward by the parties. Such facts cannot, therefore, call into question the legality of a decision of the Board of Appeal.

(see para. 31)

In that regard, it follows from Article 74 (1), in fine, of that regulation, under which, in proceedings relating to relative grounds for refusal of registration, the Office is to be restricted in its examination to the facts, evidence and arguments provided by the parties and the relief sought, that it is not required, of its

2. In the context of a review by the Boards of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of decisions taken by the units of the Office ruling at first instance, the Boards of Appeal may, subject only to Article 74(2) of Regulation No 40/94 on the Community trade mark, allow the appeal on the basis of new facts relied on by the party who has

brought the appeal or on the basis of new evidence adduced by that party.

(see para. 33)

3. For the average German consumer there is no likelihood of confusion between the word mark LINDENHOF, registration of which as a Community trade mark is sought for 'mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices' in Class 32 of the Nice Agreement, and the figurative word mark which contains, in addition to incidental verbal elements and decorative figurative elements, the verbal element 'linderhof', previously registered in Germany for 'sparkling wines' in Class 33 of that Agreement.

Although it is true that the marks at issue, having regard to the similarity at the visual, aural and conceptual levels of the term 'lindenhof', on the one hand, and the predominant verbal element 'linderhof', on the other, must be considered similar, the dissimilarities between the goods in question, resulting, *inter alia*, from the fact that they cannot be regarded as belonging to the same family of beverages, are greater than the similarities between the signs in question, so that the target consumer will not believe that those goods, bearing those signs, have the same commercial origin. Furthermore, the earlier trade mark cannot be considered to be very distinctive in character.

(see paras 51, 64, 67-68, 71)