

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

6 November 2007\*

In Case T-28/06,

**RheinfelsQuellen H. Hövelmann GmbH & Co. KG**, established in Duisburg  
(Germany), represented by W. Kellenter and A. Lambrecht, lawyers,

applicant,

v

**Office for Harmonization in the Internal Market (Trade Marks and Designs)**  
**(OHIM)**, represented by G. Schneider, acting as Agent,

defendant,

\* Language of the case: German.

ACTION brought against the decision of the Second Board of Appeal of OHIM of 17 November 2005 (Case R 1179/2004-2) concerning an application for registration of the word mark VOM URSPRUNG HER VOLLKOMMEN as a Community trade mark,

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

composed of J.D. Cooke, President, I. Labucka and M. Prek, Judges,

Registrar: K. Andová, Administrator,

having regard to the application lodged at the Court Registry on 24 January 2006,

having regard to the response lodged at the Court Registry on 13 April 2006,

further to the hearing on 15 May 2007,

gives the following

## Judgment

### Background to the dispute

- 1 On 8 August 2002, the applicant filed an application for a Community trade mark with the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) 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 in respect of which registration was sought is the word mark VOM URSPRUNG HER VOLLKOMMEN.
- 3 The goods in respect of which registration was sought fall within Classes 32 and 33 of the Nice Agreement of 15 June 1957 on the International Classification of Goods and Services for the Purposes of the Registration of Marks, as revised and amended, and correspond, for each of those classes, to the following description:
  - ‘beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages; mixtures of these drinks’, falling within class 32;

— ‘alcoholic beverages (except beers)’, falling within class 33.

- 4 By decision of 20 October 2004, the examiner rejected the application for registration pursuant to Article 38 of Regulation No 40/94, on the ground that the word mark was devoid of any distinctive character.
- 5 On 20 December 2004, the applicant lodged an appeal against the examiner’s decision with OHIM pursuant to Articles 57 to 62 of Regulation No 40/94.
- 6 By decision of 17 November 2005 (‘the contested decision’), the Second Board of Appeal dismissed the appeal on the ground that the sign in question was descriptive and was therefore covered by Article 7(1)(c) of Regulation No 40/94.

### **Forms of order sought**

7 The applicant claims the Court should:

— annul the contested decision;

— order OHIM to pay the costs.

8 OHIM claims the Court should:

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

## Law

9 The applicant raises two pleas seeking annulment of the contested decision: these allege infringement of Article 7(1)(c) and of Article 7(1)(b) of Regulation No 40/94.

## Arguments of the parties

10 With regard to the plea alleging infringement of Article 7(1)(c) of Regulation No 40/94, the applicant asserts that the trade mark applied for does not consist exclusively of indications that are descriptive of essential characteristics of the goods in respect of which registration is sought.

11 The applicant maintains first of all, in that regard, that the word sign in dispute is the product of an unusual and individual creative process and is not a combination of words in common usage in the German language.

- 12 Next, it contends that there is no current or future requirement to keep that slogan available in relation to the goods concerned. Neither the combination of the words as a whole nor its different components are customarily used to describe drinks and, in particular, mineral waters.
- 13 Finally, the applicant relies on the ambiguous character, in German, of the slogan in question. That ambiguity, it argues, derives from the abstract character of the word 'ursprung', from the range of possible interpretations of it with regard to the goods concerned, and from the ambiguous character and lack of clear meaning of the term 'vollkommen' in the context of drinks. It follows that the combination of the words 'vom ursprung her vollkommen' is itself also devoid of any clear or directly descriptive meaning. Furthermore, the most important words in the slogan do not, either individually or in combination, describe directly and clearly certain essential characteristics of the goods concerned.
- 14 OHIM maintains, first of all, that it suffices, for the assessment of the descriptive character of a sign, that it can be used on the market or in everyday language, without that use having to be effective.
- 15 OHIM next submits that registration of a sign should be refused if at least one of its meanings designates a characteristic of the goods or services concerned. In the present case, the most important words of the sign in question take on a clear meaning, in the context of the slogan, namely that the goods which it designates are perfect from the point of origin.
- 16 Finally, as regards the concept, OHIM considers that it is not relevant to know whether, on an economic level, the characteristics of the goods which are capable of description are essential or ancillary. The quality of the ingredients is described in

this case as being perfect. There is therefore no need to establish if that quality is an essential criterion for the consumer's choice of the goods or whether the reference to the quality does not describe certain essential characteristics of the goods. For Article 7(1)(c) of Regulation No 40/94 to apply, it suffices if the slogan as a whole is generally accessible, from the outset, to the consumer addressed, in whose mind it signifies an indication of quality, that is to say, the quality of being perfect from the point of origin.

### Findings of the Court

- 17 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', may not be registered.
- 18 By prohibiting the registration of such signs, that article pursues an aim which is in the public interest, namely that descriptive signs or indications relating to the characteristics of goods or services in respect of which registration is sought may be freely used by all. That provision accordingly prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks (Case C-191/01 P *OHIM v Wrigley* [2003] ECR I-12447, paragraph 31).
- 19 Furthermore, the signs envisaged by Article 7(1)(c) of Regulation No 40/94 are signs regarded as 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 acquired the product or service 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 (Case T-219/00 *Ellos v OHIM (ELLOS)* [2002] ECR II-753, paragraph 28, and Case T-348/02 *Quick v OHIM (Quick)* [2003] ECR II-5071, paragraph 28).

20 The signs and indications referred to in Article 7(1)(c) of Regulation No 40/94 are thus only those which may serve in normal usage from a consumer's point of view to designate, either directly or by reference to one of their essential characteristics, goods or services such as those 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 the relevant public (Case T-322/03 *Telefon & Buch v OHIM — Herold Business Data (WEISSE SEITEN)* [2006] ECR II-835, paragraph 90).

21 It must finally be pointed out that the criteria established by the case-law for the purpose of determining whether a word mark composed of several word elements is descriptive or not are identical to those applied in the case of a word mark containing only a single element.

22 In the present case, the goods referred to in the trade mark application are alcoholic and non-alcoholic drinks falling within classes 32 and 33. These are staple consumer goods aimed at a broad public and distributed not only by the intermediary of retailers (supermarkets, shopping centres or large stores) or by specialised outlets



and specialised mail order, but also in restaurants and cafés. The Board of Appeal therefore acted correctly in holding that the correct perspective to adopt was that of the average consumer, 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 Case T-359/99 *DKV v OHIM (EuroHealth)* [2001] ECR II-1645, paragraph 27).

23 Moreover, given that the word sign in question consists of German words, the relevant target public is German speaking. Thus, pursuant to Article 7(2) of Regulation No 40/94, the relevant public in relation to which the absolute ground for refusal should be assessed is that of German-speaking consumers (see, to that effect, *ELLOS*, paragraph 31, and Case T-334/03 *Deutsche Post EURO EXPRESS v OHIM (EUROPREMIUM)* [2005] ECR II-65, paragraph 28).

24 With regard to the meaning of the expression ‘vom ursprung her vollkommen’, that sign, according to paragraphs 34 to 40 of the contested decision and to the explanations provided by OHIM in its response and at the hearing, expresses in a directly perceptible manner that the goods which it designates are perfect from the point of origin, that is to say, from the beginning, and that they are therefore unequalled, without blemish and not in need of any processing or any improvement. The slogan thus indicates that the high quality of the product is based on the quality of the original product. OHIM is thus of the opinion that, in that slogan, the noun ‘ursprung’ refers to the source or origin, whereas the adjective ‘vollkommen’ indicates perfection, that is to say, maximum quality.

25 With regard to the relationship between the slogan and the goods concerned, the Board of Appeal took the view that the alcoholic and non-alcoholic drinks which the

slogan designates and the ingredients and preparations intended for their manufacture are perfect in quality from the outset, that is to say, from the source or place of origin.

<sup>26</sup> Taking into account the sign itself, the goods in respect of which registration is sought and the understanding of that sign by the relevant public, the Board of Appeal's assessment of the descriptive character of the mark applied for is demonstrably correct.

<sup>27</sup> With regard, first, to the applicant's claim based on the unusual character of the combination of words in dispute, shown in particular by the fact that the expression 'vom ursprung her vollkommen' cannot be found using an internet search engine, that claim cannot affect the Board of Appeal's assessment.

<sup>28</sup> First, that slogan is grammatically correct and does not constitute a combination of words which in German is unusual or striking. Second, according to the case-law, in order to refuse to register a trade mark under Article 7(1)(c) of Regulation No 40/94, it is not necessary that the signs and indications composing the mark that are referred to in that article actually be in use at the time of the application for registration in a way that is descriptive of goods or services in relation to which the application is filed or of characteristics of those goods or services. It is sufficient, as the wording of that provision itself indicates, that such signs and indications could be used for such purposes (Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraph 97; *OHIM v Wrigley*, paragraph 32; and the order in Case C-326/01 P *Telefon & Buch v OHIM* [2004] ECR I-1371, paragraph 28).

29 Second, the applicant wrongly contends that there is no requirement to make available the expression 'vom ursprung her vollkommen' on the ground that that combination of words is not a usual way to designate drinks.

30 It must, however, be pointed out that the principal words which make up the mark applied for have already been used in slogans concerning drinks. OHIM refers in this regard to the following examples: 'vollkommener genuß' of Efes Pilsener, 'gerolsteiner. einfach vollkommen' of Gerolsteiner, 'in jeder weise vollkommen' of Jacobs Kaffee, 'ursprung des biers' of Weihestephan or even, 'so gesund wie sein ursprung' of Volvic. The fact that no example of a slogan containing the two important words which make up the sign in dispute could be cited does not affect OHIM's conclusion regarding the existence of a requirement of availability. It follows from the case-law cited in paragraph 28 above that it is sufficient if those signs and indications are capable of being used for descriptive purposes.

31 It must in addition be pointed out that the Court of Justice has ruled that the application of Article 3(1)(c) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), the wording of which is identical to that of Article 7(1)(c) of Regulation No 40/94, does not depend on there being a real, current or serious need for a sign or indication to remain free (Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 35; Case T-356/00 *DaimlerChrysler v OHIM (CARCARD)* [2002] ECR II-1963, paragraph 27). For the purpose of applying Article 7(1)(c) of Regulation No 40/94, it is necessary only to consider, on the basis of the relevant meaning of the word sign at issue, whether, from the viewpoint of the public addressed, there is a sufficiently direct and specific relationship between the sign and the goods or services in respect of which registration is sought (see Case T-311/02 *Lissotschenko and Hentze v OHIM (LIMO)* [2004] ECR II-2957, paragraph 30 and the case-law cited).

32 Third, the applicant's argument that both the expression as a whole and its constituent elements are equivocal, open to interpretation, capable of being understood in a number of ways and therefore lacking a clear and specific meaning, is irrelevant. Taking into account the goods and services in respect of which registration is sought, the meaning attributed by the Board of Appeal is demonstrably correct. It must first be recalled that, in order for a word sign to come within Article 7(1)(c) of Regulation No 40/94, it is sufficient that at least one of the possible meanings of that sign designates a characteristic of the goods or services concerned (see, to that effect and by analogy, *Koninklijke KPN Nederland*, paragraph 32). Second, in the case of a compound word mark, the relevant meaning, established on the basis of all its constituent elements and not only on one of them, must be taken into account.

33 In that regard, while the word 'ursprung' can have several meanings, in the context of the slogan its meaning is clear, that is to say, 'source' or 'origin'. Likewise, while the term 'vollkommen' can be read both as an adjective and as an adverb, in the context of the slogan it cannot be perceived as other than an adjective. Thus, the applicant's argument that the expression is, as a whole, equivocal is based solely on the description of possible meanings of its individual constituent elements.

34 In that regard, the semantic interpretation of the mark applied for employed by OHIM is confirmed by the result of an internet search carried out by the applicant and on which it relied in its second plea in law. The phrase concerned is 'wasser muss vom ursprung her vollkommen sein' (water must be perfect from the point of origin), which derives from an internet site relating to goods marketed by the applicant itself. The expression does not therefore appear to be equivocal in any way.

- 35 Furthermore, the applicant submits, wrongly, that the slogan cannot make any sense in the mind of the consumer addressed, since there is no water, beer, lemonade or even fruit juice which is originally perfect, those different products having necessarily to undergo a variety of processes of filtering, purification, microbiological treatment and carbonation, or even of fermentation, before being bottled. In the context of the assessment of the absolute ground for refusal referred to in Article 7(1)(c) of Regulation No 40/94, the question whether the mark applied for has a technical meaning is not relevant.
- 36 The Court finds, finally, that the reference made by the conceptual content of the mark to the characteristics of the goods covered by the application for registration, that is to say, alcoholic and non-alcoholic drinks in classes 32 and 33, is sufficiently direct and concrete.
- 37 The slogan clearly refers to the purity and perfection of the ingredients of the drinks, and in particular to that of the water used. The purity and perfection of the ingredients are of particular significance for the goods falling within classes 32 and 33. With regard to mineral waters, the perfect state of the source water used is decisive in determining the quality of the drink, both as regards the taste and as regards health. So far as fruit juices, beers and other alcoholic drinks are concerned, the origin of their ingredients is also a factor of great significance in determining the quality of those products.
- 38 The Court therefore finds that those words, alone or in combination, refer directly and clearly to the characteristics of the goods in question and that, therefore, the applicant is wrong to argue that the sign refers at the very most to a perception or to a very general positive feeling.

39 In addition, it is reasonable to acknowledge that the purity and the original perfection of the ingredients of the drinks are characteristics which are taken into consideration by the consumer addressed when making his choice.

40 From the viewpoints of the public addressed, there is therefore a sufficiently direct and concrete relationship between the word combination concerned and the goods falling within classes 32 and 33.

41 In those circumstances, the applicant has clearly failed to advance any argument capable of justifying the annulment of the contested decision in which the Board of Appeal refused registration of the mark applied for by reason of its descriptive character.

42 The first plea, alleging an infringement of Article 7(1)(c) of Regulation No 40/94, must therefore be rejected.

43 In those circumstances, there is no need to examine the plea alleging infringement of Article 7(1)(b) of Regulation No 40/94. According to well-established case-law, for a sign to be ineligible for registration as a Community trade mark, it is sufficient that one of the absolute grounds for refusal enumerated in Article 7(1) of Regulation No 40/94 applies (Case C-104/00 P *DKV v OHIM* [2002] ECR I-7561, paragraph 29; Case T-360/99 *Community Concepts v OHIM (Investorworld)* [2000] ECR II-3545,

paragraph 26; Case T-331/99 *Mitsubishi HiTec Paper Bielefeld v OHIM (Giroform)* [2001] ECR II-433, paragraph 30; Joined Cases T-79/01 and T-86/01 *Bosch v OHIM (Kit Pro and Kit Super Pro)* [2002] ECR II-4881, paragraph 36; and *LIMO*, paragraph 49).

44 In particular, it is clear from the case-law that a word mark which is descriptive of the characteristics of goods or services for the purposes of Article 7(1)(c) of Regulation No 40/94 is, on that account, necessarily devoid of any distinctive character in relation to those goods or services within the meaning of Article 7(1)(b) of that regulation (Joined Cases T-367/02 to T-369/02 *Wieland-Werke v OHIM (SnTEM, SnPUR, SnMIX)* [2005] ECR II-47, paragraph 46; Case T-302/03 *PTV v OHIM (map&guide)* [2006] ECR II-4039, paragraphs 33 and 34; see, by analogy, Case C-265/00 *Campina Melkunie* [2004] ECR I-1699, paragraph 19).

45 The present action must accordingly be dismissed.

## Costs

46 Under Article 87(2) of the Court's 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 applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by OHIM.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

- 1. Dismisses the action;**
  
- 2. Orders RheinfelsQuellen H. Hövelmann GmbH & Co. KG to pay the costs.**

Cooke

Labucka

Prek

Delivered in open court in Luxembourg on 6 November 2007.

E. Coulon

J.D. Cooke

Registrar

President