

**Appeal brought on 21 November 2007 by Cain Cellars, Inc. against the judgment of the Court of First Instance (First Chamber) delivered on 12 September 2007 in Case T-304/05 *Cain Cellars, Inc. v Office for Harmonisation in the Internal Market (Trade Marks and Designs)***

(Case C-508/07 P)

(2008/C 22/57)

*Language of the case: German*

**Parties**

*Appellant:* Cain Cellars, Inc. (represented by: J. Albrecht, lawyer)

*Other party to the proceedings:* Office for Harmonisation in the Internal Market (Trade Marks and Designs)

**Form of order sought**

- Annul the contested judgment of the Court of First Instance of 12 September 2007 in Case T-304/05;
- Declare that the ground for refusal in Article 7(1)(b) CTR does not preclude registration of the trade mark sought;
- Order OHIM to pay the costs of the proceedings before the Board of Appeal of OHIM, before the Court of First Instance and of this appeal.

**Pleas in law and main arguments**

Summary of the grounds of appeal raised by the appellant in the appeal against the judgment of the Court of First Instance of the European Communities of 12 September 2007 in Case T-304/05

First ground of appeal

Breach of Article 7(1)(b) of Regulation (EC) No 40/94:

The appellant complains that in its examination of the facts material to the assessment of the distinctiveness of the device of a pentagon as a trade mark, the Court of First Instance did not have regard to essential circumstances and the relevant legal viewpoints and principles, in that it assessed the appellant's device of a pentagon on a purely theoretical and abstract basis and ignored the factually-oriented bases of assessment of the question of the distinctiveness of the representation of a pentagon, in particular its uniqueness in the extensive wine sector. The Court classified the sign as a simple 'geometric shape' and inferred a priori and in an abstract manner the lack of any distinctiveness of this category of simple signs.

Second ground of appeal

Breach of Article 67(3) of the Rules of Procedure of the Court of First Instance:

- (a) Under Article 67(3) of the Rules of Procedure of the Court of First Instance, the Court takes into consideration only documents which have been made available to the lawyers and agents of the parties and on which they have been given an opportunity of expressing their views. In paragraph 34, the judgment under appeal refers to documents which were submitted by OHIM for the first time with its response and on which the applicant had no opportunity of expressing its views (the written procedure was closed after submission of the response). The judgment is thus based on inadmissible evidence. The appellant's lack of opportunity of giving its views constitutes a breach of the principle of the right to a fair hearing.
- (b) Finally, the appellant alleges that the illustrations of goods produced in the oral procedure, to which OHIM consented, to prove the distinctiveness of the mark, which were particularly important to the question of the distinctiveness of the mark applied for, were not mentioned in the judgment under appeal and were not referred to in the findings of the Court regarding the question of distinctiveness. This also constitutes a breach of the principle of the right to a fair hearing.

**Action brought on 21 November 2007 — Commission of the European Communities v Kingdom of Belgium**

(Case C-510/07)

(2008/C 22/58)

*Language of the case: French*

**Parties**

*Applicant:* Commission of the European Communities (represented by: G. Rozet and B. Schima, Agents)

*Defendant:* Kingdom of Belgium

**Form of order sought**

The applicant claims that the Court should:

- declare that, by failing to adopt all such laws, regulations or administrative provisions as may be appropriate to maintain within the Community at all times the level of stocks of petroleum products in the second category of petroleum products listed in Article 2, the Kingdom of Belgium has failed to fulfil its obligations under Article 1(1) of Council Directive 68/414/EEC of 20 December 1968 imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products (1);
- order the Kingdom of Belgium to pay the costs.