

- Allow the appellant's application for annulment of the decision of the Board of Appeal of the CPVO of 2 May 2006 (Reference A003/2004) made in the proceedings at first instance.

With regard to point 2, in the alternative:

- Refer the case back to the Court of First Instance for fresh judgment.
- Order the CPVO to pay all the costs arising from the present proceedings, the proceedings before the Court of First Instance and the proceedings before the Board of Appeal.

Pleas in law and main arguments

The object of the present appeal is the judgment of the Court of First Instance by which the appellant's action against the decision of the Board of Appeal of the Community Plant Variety Office concerning the application for Community plant variety rights in respect of the plant variety SUMCOL 01 was dismissed. By that judgment which is subject to the present appeal the Court of First Instance confirmed the decision of the Board of Appeal, according to which the candidate variety was not clearly distinguishable from the reference variety, which was to be regarded as a matter of common knowledge.

The appellant's first ground of appeal refers to a number of procedural errors. In its review of the decision of the Board of Appeal the Court of First Instance made findings the incorrectness of which is immediately apparent from the pleadings. In addition it distorted facts and evidence, imposed excessive demands with regard to the applicant's submissions, drew contradictory conclusions and infringed the appellant's right to be heard. The Court of First Instance for example ignored large parts of the appellant's submissions and numerous offers of evidence made by him, rejecting them by pointing out that the submissions were too general. The Court of First Instance in so doing also overlooked the fact that it was in part objectively impossible for the appellant to be any 'more specific' in his submissions. It thus infringed both the appellant's right to be heard and the principles governing the burden of proof and evidence-gathering. Furthermore the Court of First Instance unlawfully expanded the subject-matter of the appeal proceedings by basing the judgment which is subject to the present appeal on reasoning which was not used either by the Office or by the Board of Appeal.

By its second ground of appeal the appellant argues that the Court of First Instance infringed Community law when interpreting Article 7(2) of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights by regarding the written description of a variety in the academic literature as proof that it was a matter of common knowledge. In addition, the appellant contends that infringements of Article 62 of the abovementioned Regulation and Article 60 of Regulation (EC) No 1239/95 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office occurred.

Action brought on 2 February 2009 — Commission of the European Communities v Italian Republic

(Case C-47/09)

(2009/C 82/33)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: F. Clotuche-Duvieusart and M. Nardi, Agents)

Defendant: Italian Republic

Form of order sought

The Commission claims that the Court should:

- Declare that, by making it possible to add the adjective 'puro' or the phrase 'pure chocolate' to the sales names of chocolate products which do not contain vegetable fat other than cocoa butter, the Italian Republic has failed to fulfil its obligations under Article 3 of Directive 2000/36/EC ⁽¹⁾ in conjunction with Article 2(1)(a) of Directive 2000/13/EC ⁽²⁾ and Article 3(5) of Directive 2000/36;
- order the Italian Republic to pay the costs.

Pleas in law and main arguments

The labelling and, in particular, sales names of chocolate products have been totally harmonised within the Community, with the aim of ensuring that the consumer is given accurate information, by means of the directive on labelling (2000/13) and the directive on chocolate products (2000/36). Directive 2000/36 provides that products which contain a maximum of 5 % of certain vegetable fats are to be allowed to retain their sales names unchanged but the labelling of those products must contain the specific statement, in bold letters, 'contains vegetable fats in addition to cocoa butter'.

The Italian legislation at issue, which restricts the addition of the word 'puro' to the sales name of products containing only cocoa butter by way of fat alters the harmonised definitions adopted at Community level and undermines them. Given that, in Italian, the word 'puro' means unadulterated, untouched and therefore genuine, consumers are led to believe that goods which, while complying with the directive and the conditions laid down therein relating to sales names, contain vegetable fats other than cocoa butter and are not pure, that is to say, they are adulterated, processed and not genuine. That is attributable to the simple fact that those products contain vegetable fats of a kind and in an amount which are nevertheless permitted by the legislation itself without requiring a change in the sales name.

Moreover, the word 'puro' is an adjective which qualifies the noun and its use in sales names is subject to compliance with a number of conditions. In particular, Article 3(5) of Directive 2000/36 provides that the use of information or descriptions relating to quality criteria is subject to compliance with

conditions laying down a minimum content for dry cocoa solids which is greater than that laid down for the use of names in which those descriptions do not appear. The Italian legislation makes the use of the word 'puro' subject simply to the presence of cocoa butter by way of fat and there is no requirement to comply with the higher minimum content for dry cocoa solids. That constitutes an infringement of Article 3(5) of the directive and is misleading for the consumer.

(¹) Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption (OJ 2000 L 197, p. 19).

(²) Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs (OJ 2000 L 109, p. 29).

trade mark protection, independently of whether the criteria of art. 7(1)(e)(ii) CTMR as defined by the Court in the Philips/Remington decision (²) are fulfilled or not.

- b) applied the wrong criteria in the identification of the essential characteristics of a three-dimensional trade mark: and
- c) applied an incorrect functionality test in that it i) did not limit its assessment to the essential characteristics of the trade mark at issues and, ii) did not define the appropriate criteria for assessing whether a characteristic of a shape is functional and, in particular, refused to take into account any potential alternative designs.

(¹) OJ L 11, p. 1.

(²) Case C-299/99 *Philips* [2002] ECR I-5475.

Appeal brought on 2 February 2009 by Lego Juris A/S against the judgment of the Court of First Instance (Eighth Chamber) delivered on 12 November 2008 in Case T-270/06 Lego Juris A/S v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Other party before the Board of Appeal, intervener before the Court of First Instance Mega Brands, Inc.

(Case C-48/09 P)

(2009/C 82/34)

Language of the case: English

Parties

Appellant: Lego Juris A/S (represented by: V. von Bomhard, Rechtsanwältin, T. Dolde, A. Renck, Rechtsanwälte)

Other parties to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs), Megabrand, Inc.

Form of order sought

The appellant claim that the Court should:

- set aside the judgment of the Court of First Instance, because it violates Article 71(1)(e)(ii)CTMR (¹)

Pleas in law and main arguments

The appellant submits that the contested judgment infringes art. 7(1)(e)(ii) of the Community Trade Mark Regulation. The appellant maintains that the Court of First Instance:

- a) interpreted art. 7(1)(e)(ii) CTMR in such a way as to effectively preclude any shape which performs a function from

Action brought on 4 February 2009 — Commission of the European Communities v Ireland

(Case C-50/09)

(2009/C 82/35)

Language of the case: English

Parties

Applicant: Commission of the European Communities (represented by: P. Oliver, C. Clyne, J.-B. Laignelot, Agents)

Defendant: Ireland

The applicant claims that the Court should:

- declare that by failing to transpose Article 3 of Council Directive 85/337/EEC (¹) on the assessment of the effects of certain public and private projects on the environment as amended;
- declare that by failing to ensure that, where Irish planning authorities and the Environmental Protection Agency both have decision-making powers on a project, there will be complete fulfilment of the requirements of Articles 2, 3 and 4 of that Directive;
- declare that by excluding demolition works from the scope of its legislation transposing that Directive, Ireland has failed to fulfil its obligations under that Directive.
- order Ireland to pay the costs.