

Pleas in law: Infringement of Article 43(2) of Council Regulation 40/94 and/or of Rule 22(3) of Commission Regulation No 2868/95 ⁽¹⁾ as the Board of Appeal erred in its finding the evidence submitted by the other party to the proceedings before the Board of Appeal was capable of proving use of Spanish trade mark registration No 255 186; Infringement of Article 8(1)(b) of Council Regulation 40/94 as the Board of Appeal wrongly assessed that there was a likelihood of confusion between the Community trade mark concerned and Spanish trade mark registration No 2 529 728; Infringement of Rules 20(7) of Commission Regulation No 2868/95 as the Board of Appeal stated inapplicable grounds for refusing to grant a suspension of proceedings pending determination of the opposition to Community trade mark application No 3 064 219.

⁽¹⁾ Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1).

Action brought on 27 January 2009 — Hipp & Co v OHIM — Nestlé (Bebio)

(Case T-41/09)

(2009/C 82/56)

Language in which the application was lodged: English

Parties

Applicant: Hipp & Co (Sachseln, Switzerland) (represented by: A. Bognár and M. Kinkeldey, lawyers)

Defendant: Office for Harmonisation in the Internal Market (Trade Marks and Designs)

Other party to the proceedings before the Board of Appeal: Société des Produits Nestlé, S.A. (Vevey, Switzerland)

Form of order sought

— Annul the decision of the Second Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 25 November 2008 in case R 1790/2007-2; and

— Order OHIM to pay the costs.

Pleas in law and main arguments

Applicant for the Community trade mark: The applicant

Community trade mark concerned: The word mark 'Bebio', for goods in classes 5, 29, 30 and 32

Proprietor of the mark or sign cited in the opposition proceedings: The other party to the proceedings before the Board of Appeal

Mark or sign cited: International trade mark registration No 187 436 of the word mark 'BEBA' for goods in classes 5, 29 and 30; Community trade mark registration No 3 043 387 of the word mark 'BEBA' for goods in classes 5, 29 and 30

Decision of the Opposition Division: Partially upheld the opposition

Decision of the Board of Appeal: Dismissed the appeal

Pleas in law: Infringement of Article 8(1)(b) of Council Regulation 40/94 as the Board of Appeal wrongly assessed that there was a likelihood of confusion between the trade marks concerned

Action brought on 9 February 2009 — Commission v Antiche Terre

(Case T-51/09)

(2009/C 82/57)

Language of the case: Italian

Parties

Applicant: Commission of the European Communities (represented by: A. Dal Ferro, lawyer, V. Joris, Agent)

Defendant: Antiche Terre scarl Società Agricola Cooperativa (Arezzo, Italy)

Forms of order sought

— Order the defendant to repay the principal sum of EUR 479 332,40, together with the interest accrued at the rate set out in Article 5.4.3 of the general conditions of the Contract (ECB rate + 2 %) from the date of receipt of the sums (from 4 December 1997 for the sum of EUR 461 979,00, and from 18 December 1997 for the sum of EUR 17 353,40) until 1 April 2003, in addition to the interest accrued at the same rate from 4 January 2004 until the date of final settlement, less the sum of EUR 461 979 called on and paid on 25 January 2005;

— In the alternative, order the defendant to repay the principal sum of EUR 479 332,40, together with the interest accrued at the Italian statutory rate from 4 January 2004 until the date of final settlement, less the sum of EUR 461 979 called on and paid on 25 January 2005;

— In any event, order Antiche Terre Società Agricola Cooperativa to pay the costs.

Pleas in law and main arguments

By the present action, brought under Article 238 EC, the Commission seeks the repayment of the sums advanced to the limited liability cooperative Antiche Terre scarl Società Agricola Cooperativa ('Antiche Terre'), in the context of the THERMIE programme, for the creation of an installation producing electricity (10 MWe) through an innovative biomass combustion process. The reference contract (No BM/188/96) was drawn up between the Commission, Antiche Terre (as coordinator) and two other companies having their seats in Finland and Spain respectively.

Antiche Terre built up a number of significant delays in commencing its own task, and it requested several extensions so as to be able to complete its work, which it obtained. It also proposed a substantial change to the installation, which would have meant abandoning the innovative biomass combustion process and producing energy in substantially smaller quantities than had been estimated.

The Commission was unable to authorise such a fundamental change to the project, which would have had no chance of funding under the THERMIE programme.

Consequently, since it was found that Antiche Terre would not have completed the installation in accordance with the terms of the project originally submitted, the Commission was forced to withdraw from contract BM/188/96, making it clear moreover that the failure to complete the original project could have entailed the repayment in whole or in part of the advance paid to Antiche Terre.

The Commission therefore asked Antiche Terre on a number of occasions to repay the sums advanced, in the amount of EUR 479 332,40, but it did not receive any payment. After calling on the guarantee, and after further requests for repayment of the balance, the Commission therefore brings the present action before the Court of First Instance.

Action brought on 11 February 2009 — Nycomed Danmark v EMEA

(Case T-52/09)

(2009/C 82/58)

Language of the case: English

Parties

Applicant: Nycomed Danmark ApS (Roskilde, Denmark) (represented by: C. Schoonderbeek, H. Speyart van Woerden, lawyers)

Defendant: European Medicines Agency

Form of order sought

- annul the contested decision;
- order the EMEA to pay its own costs and those of Nycomed.

Pleas in law and main arguments

By means of the present application, the applicant seeks the annulment, pursuant to Article 230 EC and to Article 73a of Regulation (EC) No 726/2004⁽¹⁾, as amended by Regulation (EC) No 1901/2006⁽²⁾ of the European Parliament and of the Council, of the decision 'EMEA-000194-IPI01-07' of 28 November 2008 of the European Medicines Agency ('EMEA') rejecting its application for a product specific waiver provided for in Article 11(1)(b) of the aforementioned regulation.

The applicant applied for such a waiver in respect of an ultrasound echocardiographic imaging agent to be marketed under the brand name Imagify, intended to diagnose coronary artery disease ('CAD') in adults. Through its contested decision, the EMEA denied that waiver to the applicants on the grounds that the disease or condition for which the medicinal product is intended is not CAD but myocardial perfusion defects, which also occur in children.

The applicant claims that the contested decision is unlawful in that it is based on an interpretation and application of the concept of 'disease or condition for which the medicinal product is intended' within the meaning of Article 11(1)(b) of Regulation (EC) No 1901/2006 which according to the applicant is incorrect in that it does not take into account the therapeutic indication applied for in the concomitant Community market authorisation application and that myocardial perfusion defects are not a disease or condition, but a sign of various diseases.