

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

14 June 2011 *

In Case T-68/10,

Sphere Time, established in Windhof (Luxembourg), represented by C. Jäger,
N. Gehlsen and M.-C. Simon, lawyers,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs)
(OHIM), represented by D. Botis, acting as Agent,

defendant,

the other party to the proceedings before the Board of Appeal of OHIM being

* Language of the case: English.

Punch SAS, established in Nice (France),

ACTION brought against the decision of the Third Board of Appeal of OHIM of 2 December 2009 (case R 1130/2008-3), concerning invalidity proceedings between Punch SAS and Sphere Time,

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and M. van der Woude, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the application lodged at the Court Registry on 15 February 2010,

having regard to the response lodged at the Court Registry on 1 June 2010,

having regard to the written question from the Court to the applicant,

further to the hearing on 18 January 2011,

gives the following

Judgment

Background to the dispute

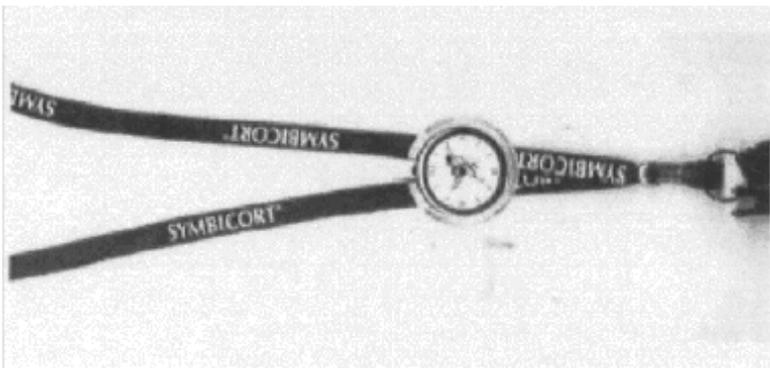
- 1 The applicant, Sphere Time, is the holder of the Registered Community Design No 325949-0002, filed on 14 April 2005 ('the contested design'). The contested design, intended to be used for watches, is represented as follows:



- 2 On 26 March 2007, the other party before the Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Punch SAS, filed an application for a declaration of invalidity in respect of the contested design with OHIM, based upon Article 25(1)(b) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs (OJ 2002 L 3, p. 1). In the application for a declaration of invalidity, the other party before the Board of Appeal maintained that

the contested design was not new and that it lacked individual character within the meaning of Article 4 of Regulation No 6/2002, read in conjunction with Articles 5 and 6 of that regulation.

- 3 In support of its application for a declaration of invalidity, the other party before the Board of Appeal submitted several designs that allegedly had priority over the contested design.
- 4 Firstly, the other party before the Board of Appeal submitted a catalogue showing two watch designs made by Fuzhou Eagle Electronic Co. Ltd ('the C and F designs'), as well as a certificate from that company stating that the C and F designs had been marketed in Europe in 2001.
- 5 Secondly, the other party before the Board of Appeal submitted a catalogue showing two watch designs made by Great Sun Technology Corp., as well as a certificate from that company stating that those designs had been marketed in Europe since 2004. Those items were accompanied by a shipping invoice and a certificate of origin relating to the delivery of 2 000 samples of one of the said two designs, covered by the trademark SYMBICORT, in April 2004 to a client situated in the Netherlands (the latter design being hereinafter referred to as 'the SYMBICORT design'). The SYMBICORT design was represented as follows:



- 6 By decision of 31 March 2008, the Invalidity Division declared that the contested design was invalid. It considered it to lack individual character since it produced the same overall impression as the C and F designs. The applicant filed a notice of appeal against that decision on 13 May 2008.

- 7 By decision of 2 December 2009 ('the contested decision'), the Third Board of Appeal of OHIM dismissed the appeal. As a preliminary point, the Board of Appeal held that the shipping invoice and certificate of origin relating to the delivery of the SYMBICORT design were sufficient legal proof that that design had been disclosed before the date on which the application for registration of the contested design was filed. Taking into account the comparison between the contested design and the SYMBICORT design, as they would be perceived by an ordinary consumer familiar with watches attached to a lanyard, the Board of Appeal held, firstly, that they were very similar, secondly, that the differences were insignificant and, finally, that, while the designer had freedom in the creation of the design, in particular in relation to the watch face, little use had been made of that freedom. In summary, the Board of Appeal found that, in so far as the contested design produced the same overall impression on the informed user as the SYMBICORT design, it lacked individual character.

Forms of order sought

- 8 The applicant claims that the Court should:

— annul the contested decision;

— order (i) OHIM to pay the costs of the proceedings before the Court and (ii) the other party before the Board of Appeal to pay the costs of the proceedings before the Board of Appeal of OHIM.

9 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

10 The applicant puts forward three pleas in law. The first plea alleges, according to the wording of the application, an infringement of Articles 4 and 5 of Regulation No 6/2002 concerning the novelty of the contested design. The second plea alleges an infringement of Articles 4 and 6 of Regulation No 6/2002 concerning the assessment of the individual character of the contested design. The third plea alleges a misuse of powers. The applicant also submits that, in light of the content of the contested decision, the assessment of the C and F designs does not form part of the subject-matter of the action before the Court. In that regard, in the contested decision, the Board of Appeal wrongly departed from the decision of the Invalidity Division, since it merely compared the contested design with the SYMBICORT design and did not give reasons for that choice.

- 11 OHIM contests the merits of the three pleas. It submits, further, that the subject-matter of the dispute before the Court includes the similarity of the contested design with both the C and F designs and the SYMBICORT design, the Board of Appeal merely having added a further reason to the decision of the Invalidity Division.
- 12 As a preliminary point, it should be noted that the Board of Appeal was entitled to base its decision on the comparison between the contested design and the SYMBICORT design.
- 13 Indeed, it follows from Article 60(1) of Regulation No 6/2002 that, through the effect of the appeal before it, the Board of Appeal is called upon to carry out a new, full examination of the merits of the application for invalidity, in terms of both law and fact (Case C-29/05 P *OHIM v Kaul* [2007] ECR I-2213, paragraph 57). That means that the Board of Appeal may base its decision on any of the prior designs raised by the applicant for invalidity, without being bound by the decision of the Invalidity Division and without having to provide specific reasons in that regard.
- 14 In this case, it is not disputed that the SYMBICORT design was raised by the other party before the Board of Appeal during the proceedings before the Invalidity Division.
- 15 Accordingly, it is not necessary to determine, at this stage, whether the assessment of the C and F designs forms part of the subject-matter of the action before the Court. Consideration should, however, first of all be given to the possible merits of the action in so far as it relates to the assessment of the SYMBICORT design carried out in the contested decision. It is only if the Court finds that that assessment is vitiated by illegality that the assessment of the C and F designs may, if need be, prove relevant for the determination of the dispute before it.

The first plea, alleging an infringement of Articles 4 and 5 of Regulation No 6/2002

Arguments of the parties

- 16 The applicant submits that, in relation to the date of disclosure of the SYMBICORT design, the provision made by Article 7(2)(b) of Regulation No 6/2002 should be taken into account. Consequently, in this case, the date that should be taken into account is not the date on which the application for the contested design was filed, that is 14 April 2005, but 14 April 2004.
- 17 The shipping invoice concerns a delivery of merchandise of the SYMBICORT design which took place on an unspecified date in April 2004. As that document was drawn up on 3 April 2004 in Hong Kong (China), it is very likely, in view of the distance between Hong Kong and the Netherlands, that the entry into the European market of the SYMBICORT design samples and, therefore, the disclosure of that design to the public, was later than 14 April 2004.
- 18 The applicant adds that the shipping invoice was furnished to the other party before the Board of Appeal by the manufacturer of the SYMBICORT design watches, which has an interest in proving the priority of that design. Similarly, it is not certain that the original of that invoice was submitted to OHIM. The applicant therefore submits that that document cannot be taken into account.
- 19 In those circumstances, the applicant submits that the prior disclosure of the SYMBICORT design has not been proven. It thus concludes that the contested design must be considered to be new.

20 OHIM contests the merits of the applicant's submissions.

Findings of the Court

21 According to the wording of the application, the first plea alleges an infringement of Articles 4 and 5 of Regulation No 6/2002, concerning the novelty of a Community design. As noted by OHIM, the contested decision is not based on the lack of novelty of the contested design.

22 In point of fact, the first plea concerns the question of prior disclosure of the SYMBI-CORT design. Thus, it concerns, in actual fact, an alleged infringement of Article 6(1) of Regulation No 6/2002, read in conjunction with Article 7 of that regulation.

23 Those provisions provide as follows:

Article 6

Individual character

1. A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public:

...

- (b) in the case of a registered Community design, before the date of filing the application for registration or, if a priority is claimed, the date of priority.

...

Article 7

Disclosure

1. For the purpose of applying Articles 5 and 6, a design shall be deemed to have been made available to the public if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed, before the date referred to in [Article] ... 6(1)(b) ... except where these events could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the Community ...

2. A disclosure shall not be taken into consideration for the purpose of applying Articles 5 and 6 and if a design for which protection is claimed under a registered Community design has been made available to the public:
 - (a) by the designer, his successor in title, or a third person as a result of information provided or action taken by the designer or his successor in title; and

- (b) during the 12-month period preceding the date of filing of the application or, if a priority is claimed, the date of priority.

...'

- 24 In relation, firstly, to the applicability of Article 7(2) of Regulation No 6/2002 to this case, it should be noted that the objective of that provision is to offer a creator or his successor in title the opportunity to market a design, for a period of 12 months, before having to proceed with the formalities of filing.
- 25 Thus, during that period, the creator or his successor in title may ascertain that the design concerned is a commercial success before incurring the costs relating to registration, without fear that the disclosure that takes place at that time may be successfully raised during any invalidity proceedings brought after the possible registration of the design concerned.
- 26 It is apparent from the foregoing that, for Article 7(2) of Regulation No 6/2002 to be applicable in the context of invalidity proceedings, the owner of the design that is the subject of the application for invalidity must establish that it is either the creator of the design upon which that application is based or the successor in title to that creator.
- 27 Thus, in this case, the applicant must establish that it is the creator of the SYMBI-CORT design or his successor in title.

- 28 The applicant does not even claim that such is the case.
- 29 Consequently, Article 7(2) of Regulation No 6/2002 is not applicable to the disclosure of that design.
- 30 Thus, secondly, taking account of the fact that the applicant did not claim priority for the contested design, it must be examined whether the information provided to OHIM shows that the SYMBICORT design had been disclosed to the public before 14 April 2005, which was the date of the filing of the application for the contested design.
- 31 In that regard, the other party before the Board of Appeal provided a shipping invoice relating to the delivery of 2 000 watches of the SYMBICORT design to a client in the Netherlands. According to that invoice, the items at issue were shipped from Hong Kong on 3 April 2004.
- 32 Thus, taking account of the normal length of time for transport, the shipping invoice indicates that the watches at issue were delivered to the Netherlands and, therefore, that the SYMBICORT design was disclosed to circles specialised in the sector concerned, operating in the Community, before 14 April 2005, which is the date of filing of the contested design. Moreover, the applicant did not put forward any element capable of establishing that that disclosure had not taken place or that it had done so after that date of filing.
- 33 Thirdly, as to the probative value of the shipping invoice, Great Sun Technology, which manufactures the watches of the SYMBICORT design and which provided the document in question to the other party before the Board of Appeal, admittedly has

an interest in the contested design being declared invalid. Indeed, that result will allow it to pursue the marketing of its goods within the European Union.

34 While that fact may cast a doubt on the credibility of the statement of the manager of Great Sun Technology, also provided to OHIM, the same conclusion cannot be applicable to the shipping invoice.

35 Indeed, that latter document was not created specifically to serve as evidence in the context of the invalidity proceedings, but was created in the context of current commercial operations, in order to certify that a service had been provided and to request the debtor to pay the agreed price.

36 Further, the shipping invoice is not addressed to the other party before the Board of Appeal, but to a third party company, and it was issued in April 2004, almost three years before the application for invalidity was brought on 26 March 2007.

37 In those circumstances, it cannot be held that the probative nature of the shipping invoice is affected by the fact that it was provided to the other party before the Board of Appeal by the manufacturer of watches of the SYMBICORT design.

38 As to the fact that a copy of the shipping invoice was provided, rather than the original thereof, that fact does not amount, in itself, to a barrier to that document being taken into consideration.

- 39 The provision of the original of that document could, depending on the circumstances, be relevant if the copy were illegible or if there were indications that the document had been tampered with in order to modify its content. The applicant does not raise submissions to that effect and the examination of the shipping invoice, as provided to OHIM, does not give rise to questions in that regard.
- 40 Consequently, the fact that a copy of the shipping invoice was provided, rather than the original, does not affect the probative nature of the document produced either.
- 41 In light of all the foregoing, it must be concluded that the Board of Appeal did not err in holding that it had been established that the SYMBICORT design had been disclosed to the public before the date of filing of the application for the contested design. Therefore, the first plea must be rejected.

The second plea, alleging an infringement of Articles 4 and 6 of Regulation No 6/2002

Arguments of the parties

- 42 The applicant submits that, in finding that the contested design produced the same overall impression as the SYMBICORT design, the Board of Appeal made an error of assessment.

- 43 Firstly, the applicant submits that, given that the SYMBICORT design was intended to be used for marketing purposes, the informed user is a professional wishing to acquire promotional items. It submits that, given that there are a large number of lanyards on the market, the informed user would look closely at the specific character of a given lanyard.
- 44 The applicant goes on to take issue with the Board of Appeal, firstly, for not taking account of all the relevant elements of the two designs in issue, namely the lanyard, the watch case, the watch itself and the attachment clip. Indeed, the Board of Appeal merely compared the watch screen, the position of the watch and the colour of the two designs. In so doing, it ignored the fact that the freedom of the designer of an analogue watch is limited. Conversely, the designer has great freedom in relation to the lanyard and the attachment clip.
- 45 Secondly, in the representation provided to OHIM, the SYMBICORT design was not depicted in its entirety in that it shows only two strips going in two different directions, but no loop joining them together. Given that the comparison of the designs must be carried out in the light of the way in which they are represented, the Board of Appeal should not have assumed that the SYMBICOURT design had a lanyard allowing a watch to be worn around the neck.
- 46 Thirdly, the applicant objects to the statement of the Board of Appeal that the attachment clip of the contested design was represented by dotted lines. The attachment clip in question was represented by solid lines and should therefore have been taken into consideration, particularly because it constitutes an important component of the contested design. Indeed, the attachment clip would attract the attention of the informed user in so far as, on the one hand, the freedom of the designer is not limited in that regard and, on the other hand, its shape determines which objects can be attached to the lanyard.

- 47 The applicant argues that, in this case, firstly, the attachment clip of the SYMBICORT design is not visible on the representation provided to OHIM, so that it cannot be ascertained whether it has an attachment clip and, if it does, what the characteristics of it are. Secondly, the attachment clip of the contested design is clearly different from the end part of the SYMBICORT design.
- 48 OHIM contests the merits of the applicant's submissions.

Findings of the Court

- 49 According to Articles 4 and 6 of Regulation No 6/2002:

'Article 4

Requirements for protection

1. A design shall be protected by a Community design to the extent that it is new and has individual character.

...

Article 6

Individual character

1. A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public:

...

(b) in the case of a registered Community design, before the date of filing the application for registration or, if a priority is claimed, the date of priority.

2. In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration.'

⁵⁰ Therefore, it must be examined whether, from the point of view of the informed user and taking account of the degree of freedom of the designer of a watch attached to a lanyard, the overall impression produced by the contested design differs from that produced by the SYMBICORT design.

— The informed user

- 51 With regard to the interpretation of the concept of informed user, the status of ‘user’ implies that the person concerned uses the product in which the design is incorporated, in accordance with the purpose for which that product is intended. The qualifier ‘informed’ suggests in addition that, without being a designer or a technical expert, the user is familiar with the various designs which exist in the sector concerned, possesses a certain degree of knowledge with regard to the features which those designs normally include, and, as a result of his interest in the products concerned, shows a relatively high degree of attention when he uses them (Case T-153/08 *Shenzhen Taiden v OHIM - Bosch Security Systems (Communications equipment)* [2010] ECR II-2517, paragraphs 46 and 47).
- 52 In this case, at paragraph 21 of the contested decision, the Board of Appeal held that the informed user is an ordinary consumer who is familiar with watches attached to a lanyard and suspended from the neck.
- 53 It is not disputed that the SYMBICORT design, like the contested design, is a promotional item. In relation to such items, the concept of informed user, as defined at paragraph 51 above, includes, firstly, a professional who acquires them in order to distribute them to the final users and, secondly, those final users themselves.
- 54 Consequently, in this case, the informed user should be held to be both the average consumer, referred to in the contested decision, and the professional buyer, mentioned by the applicant.

- 55 That said, the applicant does not put forward any submissions suggesting that the perception of the designs at issue by the two groups of users is different.
- 56 Moreover, in any event, the fact that one of the two groups of informed users mentioned above perceives the designs at issue as producing the same overall impression is sufficient for a finding that the contested design lacks individual character.
- 57 Accordingly, the fact that the contested decision does not mention the professionals among the informed users of watches attached to a lanyard does not affect the legality of that decision.

— The degree of freedom of the designer

- 58 Before examining the degree of freedom of the designer, which, according to the applicant, is limited in relation to the watch and extensive in relation to the lanyard and the attachment clip, it is necessary to determine which elements are actually protected by the contested design and are, as a consequence, relevant in the context of the comparison of that design with the SYMBICORT design.
- 59 In this regard, paragraph 11.4 of the examination guidelines for Community designs, adopted by decision EX-03-9 of the President of OHIM, of 9 December 2003, headed ‘Format of the Representation of the Design’, provides:

‘...

The representation of a design should be limited to the features for which protection is sought. However, the representations may comprise other elements that help identify the features of a design for which protection is sought. In an application for registration of a Community design the following identifiers will be allowed:

1. Dotted lines may be used in a view either to indicate the elements for which no protection is sought or to indicate portions of the design which are not visible in that particular view, i.e. non-visible lines. Therefore, dotted lines identify elements which are not part of the view in which they are used.

...'

⁶⁰ The applicant does not dispute that rule. However, relying on the representation of the contested design in the contested decision, in the *Community Designs Bulletin* and in the Community designs database available on the OHIM website, it maintains that, contrary to what was held by the Board of Appeal at paragraph 20 of the contested decision, the attachment clip of the contested design is not represented by dotted lines.

⁶¹ In that regard, firstly, it should be observed that the representation of the contested design in the contested decision is irrelevant in relation to the scope of the protection of that design.

⁶² Secondly, it can be seen from the summary depiction of the contested design, reproduced in the *Community Designs Bulletin* and in the Community designs database, that certain elements of that design, and in particular its attachment clip, are

represented by less pronounced lines than those showing the other elements, such as the lanyard and the watch case. However, due to the reduced size of the summary depiction, it is not possible to be certain that the elements at issue are represented by dotted lines.

- 63 Thirdly, the possible uncertainty on that point is dissipated by the full view of the contested design, available from the summary depiction in the electronic version of the *Community Designs Bulletin* and the Community designs database, and identical moreover to the representation of the contested design appearing in the application for registration presented by the applicant to OHIM. Indeed, that depiction clearly shows that the attachment clip of the contested design is represented by dotted lines, as are the hands of the watch and the rectangular element affixed to the watch face.
- 64 Accordingly, it must be held that the attachment clip of the contested design, the hands of the watch and the rectangular element affixed to the watch face do not form part of the elements that are protected by the contested design. That finding means that the degree of freedom of the designer with regard to those elements is irrelevant in this case.
- 65 As regards the other elements put forward by the applicant, firstly, the applicant exaggerates the degree of freedom of the designer in relation to the lanyard.
- 66 While there is some room for variation as regards the length and width of that element, those characteristics must not, however, affect the possibility of wearing the lanyard comfortably around the neck. The same conclusion is applicable in relation to the positioning of the watch on the lanyard.

- 67 Consequently, the findings of the Board of Appeal to that effect, at paragraph 21 of the contested decision, are not vitiated by error.
- 68 Secondly, in relation to the degree of freedom of the designer in relation to the watch, an analogue watch must, admittedly, contain certain elements in order to fulfil its purpose, such as a face, hands placed approximately in the centre of the face and a knob for setting the time.
- 69 However, those constraints relate to the presence of certain elements in a watch, but do not influence, to a significant degree, its shape and general appearance. Thus, in particular, the face and the watch case may take various shapes and may be structured in various ways, as was stated, in substance, by the Board of Appeal at paragraph 21 of the contested decision.

— The comparison of the overall impressions produced by the two designs at issue

- 70 Having regard to what has been stated above concerning the elements that are protected by the contested design and the degree of freedom of the designer of a watch attached to a lanyard, the overall impression produced by the contested design must be held to be determined by the following elements:

— a lanyard, the strips of which are joined at one end, then overlap and form a loop at the other end;

- a round watch attached to the lanyard at the place where the two strips of the lanyard move away from each other;

 - two concentric rings around the edge of the watch, the outer ring with a gap in the top part in which the knob for setting the time is placed.
- 71 As to the overall impression produced by the SYMBICORT design, consideration must be given first of all to the applicant's argument that the Board of Appeal should not have presumed that the SYMBICORT design had a lanyard allowing the watch to be worn around the neck.
- 72 In that regard, it is true that the representation of the SYMBICORT design provided to OHIM merely shows two strips going in two different directions, but no loop supposed to be worn around the neck.
- 73 However, in the assessment of prior designs, their graphic representations should not be examined in isolation and exclusively: instead all the elements presented should be subject to a global assessment allowing the overall impression produced by the design at issue to be determined in a sufficiently precise and certain manner.
- 74 Indeed, in relation, in particular, to a design that has been used directly in trade, without being registered, it may be the case that there is no graphic representation of the design showing its relevant details, comparable to the representation appearing in an application for registration. In those circumstances, it would be unreasonable to require the applicant for invalidity to provide such a representation in all cases.

- 75 In this case, firstly, on the reproduction of the SYMBICORT design provided by the other party before the Board of Appeal, the two strips of the lanyard are sharply interrupted and the term 'symbicort' is only partially represented on one of them. That suggests that the absence of a loop is due to the incomplete nature of the reproduction and not to the actual appearance of the design at issue.
- 76 Secondly, it is apparent both from the shipping invoice and the certificate of origin that the consignment dispatched by Great Sun Technology to the Netherlands, on 3 April 2004, contained 2 000 examples of "SYMBICORT" lanyard with watch.
- 77 It cannot be denied that the function of a lanyard such as the one at issue is to allow an object to be worn around the neck.
- 78 Accordingly, taking into account that the overall impression produced by a design on the informed user must necessarily be determined also in the light of the manner in which the product at issue is used (*Communication equipment*, cited above, paragraph 66), the Board of Appeal was correct to hold, at paragraph 20 of the contested decision, that the SYMBICORT design did in fact entail a lanyard allowing the watch to be worn around the neck, despite the incomplete graphic representation presented before OHIM.
- 79 In light of the foregoing, it must be held that the overall impression produced by the SYMBICORT design is determined by the elements set out at paragraph 70 above. Indeed, as the Board of Appeal correctly held at paragraph 19 of the contested decision, the SYMBICORT design also shows a lanyard with essentially the same proportions, to which is attached, in the same place, a round analogue watch. Similarly, the edge of

the watch is surrounded by two concentric rings, the outer ring being broken by a gap on the same side, in which a knob for setting the time is placed.

80 Moreover, the Board of Appeal was correct in holding, at paragraph 20 of the contested decision, that the differences between the designs at issue, put forward by the applicant, were negligible.

81 Thus, firstly, no significant difference can be held to exist in relation to the relative length and width of the lanyards of the designs at issue.

82 Next, the fact that the lanyard of the SYMBICORT design is represented in black is not significant, given that no colour has been claimed for the contested design. Similarly, inasmuch as the contested design represents a promotional item, it is reasonable to hold that, when it is used, it will carry a trade mark. Consequently, the presence of the SYMBICORT mark in the SYMBICORT design does not amount to a significant difference either.

83 Finally, the details of the watch cases and the watch faces of the two designs are not sufficiently striking to have any influence on the overall impression produced by the designs. That is *a fortiori* the case since, as is apparent from paragraphs 58 to 64 above, the watch's hands and the rectangular element affixed to the face of the watch are not among the elements that are protected by the contested design.

84 In light of all the foregoing, it must be held that the contested design and the SYMBICORT design produce the same overall impression on the informed user. Therefore, the Board of Appeal was correct in arriving at that same conclusion, at paragraph 22

of the contested decision, and in inferring therefrom that the contested design was devoid of individual character within the meaning of Article 6 of Regulation No 6/2002 and was therefore to be declared invalid.

85 Accordingly, the second plea must be rejected.

The third plea, alleging a misuse of powers within the meaning of Article 61(2) of Regulation No 6/2002

Arguments of the parties

86 The applicant submits that the Board of Appeal misused its powers in that: (i) it did not consider in sufficient detail the submissions of the applicant and the evidence that was furnished, in particular the shipping invoice; (ii) it misinterpreted the freedom of the designer as regards the lanyard and the attachment clip; and (iii) it based the contested decision on an incorrect assessment of the attachment clip of the contested design. In this regard, the applicant submits that the Board of Appeal did not carry out a proper examination, but instead merely expressed findings which were not supported by explanation or references to evidence, thereby infringing its rights of defence. Furthermore, it is possible that, in making reference to the fact that the attachment clip was represented by dotted lines, the Board of Appeal was referring to an unknown design.

87 OHIM contests the merits of the applicant's submissions.

Findings of the Court

- 88 It should be borne in mind that the concept of misuse of powers has a precisely defined scope in European Union law and refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it. In that respect, it has been consistently held that a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated (Joined Cases T-551/93 and T-231/94 to T-234/94 *Industrias Pesqueras Campos and Others v Commission* [1996] ECR II-247, paragraph 168, and Case T-19/99 *DKV v OHIM (COMPANYLINE)* [2000] ECR II-1, paragraph 33).
- 89 In this case, the applicant has not established, or even alleged, that such evidence exists. The alleged misuse of powers it raises amounts, at the most, to potential errors of assessment that may result in an infringement of Articles 4, 6 and 7 of Regulation No 6/2002. However, it is apparent from the examination of the first and second pleas that the applicant's allegations in this regard are, in any event, unfounded.
- 90 In relation to the alleged infringement of the applicant's rights of defence, it is apparent from Article 62 of Regulation No 6/2002 that OHIM's decisions may be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments. In this case, before the adjudicating bodies of OHIM, the applicant expressed its opinion on the probative force of the shipping invoice, on the freedom of the designer, on the incomplete nature of the representation of the SYMBICORT design and on the importance of the attachment clip in the overall impression produced by a watch attached to a lanyard. The fact that the attachment clip is not among the elements protected by the contested design was expressly mentioned at paragraph 21 of the decision of the Invalidity Division; the applicant was thus in a position to present its observations on that point in the context of the appeal

proceedings. Accordingly, the complaint alleging an infringement of the applicant's rights of defence must also be rejected.

91 To the extent that the arguments put forward in the context of the third plea may further be interpreted as concerning an infringement of the duty to state reasons, as specified in Article 62 of Regulation No 6/2002, or the duty to examine facts, evidence and arguments provided by the parties, as laid down in Article 63(1) of that regulation, it must be stated that the contested decision sets out, in a coherent and sufficiently detailed manner, the reasons for which the Board of Appeal considered, firstly, that the evidence relating to the SYMBICORT design, in particular the shipping invoice, was credible and probative (paragraphs 7 and 15 to 17 of the contested decision) and, secondly, that, in the perception of the informed user, the contested design produced the same overall impression as the SYMBICORT design, taking account of the freedom of the designer (paragraphs 18 to 22 of the contested decision). Thus, the contested decision is not vitiated by illegality in that regard.

92 In light of the foregoing, the third plea must be rejected.

93 Since none of the pleas put forward by the applicant is well-founded in so far as those pleas relate to the disclosure of the SYMBICORT design and the comparison between that design and the contested design, there is no longer any need to examine them in relation to the C and F designs, as has been explained at paragraphs 12 to 15 above. In those circumstances, the comparison between the contested design and the SYMBICORT design carried out by the Board of Appeal is a sufficient basis for the contested decision.

94 Therefore, the action must be dismissed in its entirety.

Costs

⁹⁵ Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is 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, as applied for by OHIM.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Sphere Time to pay the costs.**

Pelikánová

Jürimäe

Van der Woude

Delivered in open court in Luxembourg on 14 June 2011.

[Signatures]