



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

12 July 2012*

(Appeals — Community trade mark — Regulation (EC) No 40/94 — Article 7(1)(b) — Word mark
WIR MACHEN DAS BESONDERE EINFACH — Mark consisting of an advertising slogan —
Distinctive character — Refusal to register)

In Case C-311/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on
17 June 2011,

Smart Technologies ULC, established in Calgary (Canada), represented by M. Edenborough QC, and
T. Elias, Barrister,

applicant,

the other party to the proceedings being:

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

defendant at first instance,

THE COURT (Fifth Chamber),

composed of M. Safjan, President of the Chamber, M. Ilešič (Rapporteur) and J.-J. Kasel, Judges,

Advocate General: N. Jääskinen,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 1 March 2012,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By its appeal, Smart Technologies ULC ('Smart Technologies') seeks the annulment of the judgment of the General Court of the European Union in Case T-523/09 *Smart Technologies v OHMI (WIR MACHEN DAS BESONDERE EINFACH)* ('the judgment under appeal') by which that court dismissed

* Language of the case: English.

its application for annulment of the decision of the second chamber of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 29 September 2009 (Case R 554/2009-2), concerning an application for registration as a Community trade mark of the word sign ‘WIR MACHEN DAS BESONDERE EINFACH’ (‘the contested decision’).

Legal context

- 2 Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) was repealed and replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1), which entered into force on 13 April 2009. However, given the date the application for registration was lodged, the present dispute is still governed by Regulation No 40/94.
- 3 Article 7(1) of Regulation No 40/94 provided:

‘The following shall not be registered:

...

(b) trade marks which are devoid of any distinctive character;

...’

Background to the dispute and the contested decision

- 4 On 17 October 2008, Smart Technologies filed an application with OHIM, pursuant to Regulation No 40/94 for registration of the word sign ‘WIR MACHEN DAS BESONDERE EINFACH’ (we make special (things) simple) as a Community trade mark. The goods in respect of which registration was sought are in Class 9 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following description:

‘Computerised systems for capturing coordinate inputs, namely graphics, script, drawings and gestures, for interaction with a computer generated display utilizing a pen, stylus, finger or hand; coordinate input capturing devices for use with front projection, rear projection, and direct view displays; absolute and relative position detection devices that utilise mechanically and optically based sensors which enable interaction with a digitiser, touch surface, touch panel, image display, or within a region of interest relative to a display; scalable position detection systems with input generated via passive and/or active input tools; imaging systems for capturing text and graphical images; software for processing text and graphical images, and sharing and/or storing text and graphical images over a computer network; software for sharing collaboration data and images locally or in geographically dispersed locations; software for viewing, editing, and sharing data and images locally or in geographically dispersed locations.’

- 5 By fax of 21 January 2009, the examiner raised objections to registration of the mark applied for based on Article 7(1)(b) of Regulation No 40/94. By letter of 19 March 2009, the applicant responded to the examiner’s objections.
- 6 By decision of 7 April 2009, the examiner refused the trade mark application, pursuant to Article 7(1)(b) of Regulation No 40/94, in respect of all the goods referred to in the application, on the ground that the trade mark applied for lacked distinctive character.

- 7 By the decision at issue, the First Board of Appeal of OHIM dismissed the appeal filed by Smart Technologies against the examiner's decision.

The proceedings before the General Court and the judgment under appeal

- 8 By the judgment under appeal, the General Court dismissed the action brought by Smart Technologies on 23 December 2009 against the contested decision. The General Court thus rejected the single plea relied on by the applicant alleging infringement of Article 7(1)(b) of Regulation No 207/2009, in so far as the Board of Appeal wrongly found that there was no distinctive character.
- 9 First, in paragraphs 22 to 31 of the judgment under appeal, the General Court recalled the relevant case-law for establishing whether a mark has distinctive character and, in particular, Case C-398/08 P *Audi v OHIM* [2010] ECR I-535, concerning the distinctive character of marks consisting of advertising slogans. In that regard, the General Court pointed out, in paragraphs 25 to 27 of that judgment, that, even though it is inappropriate to apply to slogans criteria which are stricter than those applicable to other types of sign, the possibility cannot be excluded that that the case-law according to which it could prove more difficult to establish distinctiveness in relation to marks of certain categories might also be relevant to word marks consisting of advertising slogans.
- 10 In that connection, the General Court observed, in paragraph 29 of the judgment under appeal, that the mere fact that a mark is perceived by the relevant public as a promotional formula is not sufficient, in itself, to support the conclusion that that mark is devoid of distinctive character. Such a mark can be perceived by the relevant public both as a promotional formula and as an indication of the commercial origin of the goods or services concerned. The General Court thus held, in paragraph 30 of the judgment, that it is not sufficient, in the analysis of distinctive character, merely to highlight the fact that that mark consists of and is understood as a promotional formula.
- 11 The General Court concluded, in paragraph 31 of the judgment under appeal, that a mark consisting of an advertising slogan must be regarded as being devoid of distinctive character if it is liable to be perceived by the relevant public as a mere promotional formula. However, such a mark must be recognised as having distinctiveness if, apart from its promotional function, it may be perceived immediately as an indication of the commercial origin of the goods or services in question.
- 12 Second, in paragraphs 32 to 42 of the judgment under appeal, the General Court examined whether the trade mark applied for had distinctive character. Having recalled, in paragraphs 33 and 34, that the relevant public will be made up of German speakers who are specialists in the computer field and that the mark in respect of which registration is sought is made up of a combination of five standard German words, the General Court, in paragraphs 35 and 36 of the judgment, described the mark as an advertising slogan containing a laudatory message, which contains no unusual variations in regard to German rules of syntax and grammar.
- 13 In that regard, the General Court first held, in paragraph 37 of the judgment under appeal that the concise nature and the terms of that slogan do not introduce any word play or elements of conceptual intrigue or surprise such as to confer distinctive character on the mark applied for in the minds of the relevant public. The General Court pointed out, in particular, that the specific features of that mark do not give it any particular originality or resonance or trigger in the minds of the relevant public a cognitive process or interpretative effort such as to make that mark, in the perception of that public, anything other than a mere advertising message extolling the qualities of the goods covered by the trade mark application. Moreover, in paragraph 38 of that judgment, the General Court observed that the finding that that mark is merely an advertising slogan referring to the qualities of the goods is not called into question by the fact that an internet search did not reveal any uses of the same mark by third parties.

- 14 Next, in paragraphs 39 and 40 of the judgment under appeal, the General Court dismissed the argument, relied on by Smart Technologies, that in referring to the manufacturer by using the element 'wir' ('we') the mark applied for contains an indication of the commercial origin of the goods and services covered. In particular, in paragraph 40, the General Court pointed out that the use of that element takes away nothing from the fact that the mark remains a mere advertising slogan liable to be used by any trader, in the computer technology field just as in many other fields, and that the relevant public will not tend to perceive in the sign any particular indication of commercial origin, beyond that promotional information.
- 15 Finally, as regards the argument raised by Smart Technologies that the Board of Appeal made certain statements without supporting evidence, the General Court held, in paragraph 41 of the judgment under appeal, that nothing prohibits OHIM from taking well-known facts into consideration in its assessment, such as the fact that other undertakings assert in their advertising for smart technologies that their products are simple to use, or that consumers are accustomed to short, compact and punchy promotional messages and do not accord trade mark value to such claims.

Forms of order sought

- 16 By its appeal, Smart Technologies primarily asks the Court of Justice to annul the judgment under appeal and alter the contested decision so as to authorise the registration of the trade mark applied for or, in the alternative, to annul that decision and order OHIM to pay the costs.
- 17 OHIM contends that the Court should dismiss the appeal and order Smart Technologies to pay the costs.

The appeal

- 18 In support of its appeal, Smart Technologies relies on two grounds of appeal alleging, respectively, that Article 7(1)(b) of Regulation No 40/94 was infringed and that certain findings of fact were described as well-known by the General Court although they were not backed by evidence.

The first ground of appeal — infringement of Article 7(1)(b) of Regulation No 40/94

- 19 The first ground of appeal consists of three limbs. By the first limb, Smart Technologies submits that the General Court applied the wrong criteria when assessing the distinctive character of the trade mark applied for. By the second limb, that company argues that the General Court made an error of law in categorising that mark as a slogan and in taking the view that the distinctive character of advertising slogans is more difficult to establish than for other categories of marks. By the third limb, the applicant criticises the General Court for not concluding that a lower level of distinctiveness of the mark in question would suffice in this case, given that the relevant public is a specialist public.

The first limb of the first ground of appeal

– Arguments of the parties

- 20 By the first limb of its first ground of appeal, Smart Technologies criticises the General Court for confining itself, in its analysis of the distinctive character of the trade mark applied for, to examining whether it was perceived, by the relevant public, as a mere promotional formula. In so doing, the General Court misapplied the criteria for the assessment of the distinctive character of an advertising slogan set out by the Court of Justice in its judgment in *Audi v OHIM*. More specifically, the appellant points out that paragraph 31 of the judgment under appeal contradicted paragraph 45 of

Audi v OHIM in so far as the Court of Justice found, in that paragraph, that the fact that the mark is understood as a promotional formula has no bearing on its distinctive character. Moreover, that same error of law was made in paragraphs 37 and 38 of the judgment under appeal, in which the General Court focuses on whether the mark is perceived as merely an advertising slogan, when it should have focused on whether, irrespective of any promotional function, the mark possesses any distinctive character.

- 21 OHIM considers that paragraph 31 of the judgment under appeal is not vitiated by an error of law, because the first sentence of that paragraph must be read in the light of the following sentence, according to which a mark consisting of an advertising slogan must be recognised as having distinctiveness if it may be perceived immediately as an indication of the commercial origin of the goods or services in question. OHIM maintains that the General Court, in paragraphs 37 and 38 of the judgment, clearly analysed the distinctiveness of the trade mark applied for in that it made reference to the relevant goods and service and took the view that the sign is not perceived by the public as an indication of the commercial origin of the goods.

– Findings of the Court

- 22 Article 7(1)(b) of Regulation No 40/94 provides that trade marks which are devoid of any distinctive character are not to be registered.
- 23 According to settled case-law, the distinctiveness of a mark within the meaning of that article means that the mark serves to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (Joined Cases C-468/01 P to C-472/01 P *Procter & Gamble v OHIM* [2004] ECR I-5141, paragraph 32; Case C-64/02 P *OHIM v Erpo Möbelwerk* [2004] ECR I-10031, paragraph 42; Case C-304/06 P *Eurohypo v OHIM* [2008] ECR I-3297, paragraph 66; and *Audi v OHIM*, paragraph 33).
- 24 Again, according to settled case-law, such distinctiveness can be assessed only by reference, first, to the goods or services in respect of which registration is sought and, second, to the relevant public's perception of that sign (*Procter & Gamble v OHIM*, paragraph 33; *Eurohypo v OHIM*, paragraph 67; and *Audi v OHIM*, paragraph 34).
- 25 As regards marks made up of signs or indications that are also used as advertising slogans, indications of quality or incitements to purchase the goods or services covered by those marks, registration of such marks is not excluded by virtue of such use (*OHIM v Erpo Möbelwerk*, paragraph 41, and *Audi v OHIM*, paragraph 35). As regards the assessment of the distinctive character of such marks, it is inappropriate to apply to slogans criteria which are stricter than those applicable to other types of sign (*OHIM v Erpo Möbelwerk*, paragraph 32, and *Audi v OHIM*, paragraph 36).
- 26 However, it is apparent from the case-law of the Court that, whilst the criteria for assessing distinctiveness are the same for the various categories of trade mark, it may become apparent, when applying those criteria, that the relevant public's perception is not necessarily the same in relation to each of those categories and that, therefore, it may prove more difficult to establish the distinctiveness of the marks in certain categories than of those in other categories (*Procter & Gamble v OHIM*, paragraph 36; *OHIM v Erpo Möbelwerk*, paragraph 34, and *Audi v OHIM*, paragraph 37).
- 27 While the Court has not excluded the possibility that that case-law may, in certain circumstances, be relevant to word marks consisting of advertising slogans, it has however stated that difficulties in establishing distinctiveness which may be associated with word marks consisting of advertising slogans because of their very nature — difficulties which it is legitimate to take into account — do not justify

laying down specific criteria supplementing or derogating from the criterion of distinctiveness as interpreted in the case-law referred to in paragraphs 23 and 24 of the present judgment (see *OHIM v Erpo Möbelwerk*, paragraphs 35 and 36, and *Audi v OHIM*, paragraph 38).

- 28 The Court has also held that an advertising slogan cannot be required to display ‘imaginativeness’ or even ‘conceptual tension which would create surprise and so make a striking impression’ in order to have the minimal level of distinctiveness required under Article 7(1)(b) of Regulation No 40/94 (*OHIM v Erpo Möbelwerk*, paragraphs 31 and 32, and *Audi v OHIM*, paragraph 39).
- 29 Moreover, the Court has observed that, while it is true that a mark possesses distinctive character only in so far as it serves to identify the goods or services in respect of which registration is applied for as originating from a particular undertaking, the mere fact that a mark is perceived by the relevant public as a promotional formula and that, because of its laudatory nature, it could in principle be used by other undertakings, is not sufficient, in itself, to support the conclusion that that mark is devoid of distinctive character (*Audi v OHIM*, paragraph 44).
- 30 On that point, the Court has noted, in particular, that the laudatory connotation of a word mark does not mean that it cannot be appropriate for the purposes of guaranteeing to consumers the origin of the goods or services which it covers. Thus, such a mark can be perceived by the relevant public both as a promotional formula and as an indication of the commercial origin of goods or services. It follows that, in so far as the public perceives the mark as an indication of that origin, the fact that the mark is at the same time understood — perhaps even primarily understood — as a promotional formula has no bearing on its distinctive character (*Audi v OHIM*, paragraph 45).
- 31 The first limb of the ground of appeal put forward by Smart Technologies in support of its appeal should be examined in the light of those principles.
- 32 In that regard, it must be held that, contrary to the submission of Smart Technologies, the findings of the General Court in paragraph 31 of the judgment under appeal do not disclose a misreading of the principles established by the Court of Justice, inter alia in paragraph 45 of *Audi v OHIM*, in which the Court held that, in so far as the public perceives the mark as an indication of the commercial origin of goods or services, the fact that the mark is at the same time understood — perhaps even primarily understood — as a promotional formula has no bearing on its distinctive character.
- 33 Although the formulation used by the General Court in paragraph 31 of the judgment under appeal is different from that used in paragraph 45 of the judgment in *Audi v OHIM*, by that formulation, read in its context, the General Court confirmed that the distinctive character of the mark applied for depends only on whether it is perceived, by the relevant public, as an indication of the commercial origin of the goods and services concerned, whilst accepting that that mark may be understood by the same public as both a promotional formula and an indication of commercial origin.
- 34 In that regard, it must be noted that not only did the General Court expressly refer, in paragraph 29 of the judgment under appeal, to the points set out in paragraphs 44 and 45 of the judgment in *Audi v OHIM*, but also, in paragraph 32 and the following paragraphs of its judgment, made an analysis of the distinctiveness of the trade mark applied for, based on those points. In particular, as is apparent from paragraph 40 of the judgment under appeal, that analysis led the General Court to the conclusion that the relevant public, when reading that sign, would not tend to perceive in the sign any particular indication of commercial origin, beyond the promotional information that the goods in question make the performance of a complex task simple.
- 35 It is thus clear from the analysis made by the General Court that it reached the conclusion that the mark was devoid of distinctive character not on the ground that it was a promotional formula but on the ground that it was not perceived by the relevant public as an indication of the commercial origin of the goods and services concerned.

36 The first limb of the first ground of appeal must, therefore, be rejected as unfounded.

The second limb of the first ground of appeal

– Arguments of the parties

37 The second limb of the first ground of appeal can be divided into two distinct parts. Under the first part of that limb, Smart Technologies argues that the judgment under appeal is vitiated by an error of law, given that the subcategory of ‘slogan’ in which the General Court placed the trade mark applied for, does not appear in the regulations governing Community trade marks, as it is not mentioned in Article 4 of Regulation No 40/94. Under the second part of that limb, the appellant criticises the General Court for making an error of law in reaching the conclusion, in paragraphs 26 and 27 of the judgment under appeal, that it is more difficult to establish distinctiveness in relation to advertising slogans, just as it is for three dimensional marks, than in relation to other categories of marks. In that regard, the appellant disputes the possibility, confirmed by paragraph 35 of the judgment in *OHIM v Erpo Möbelwerk*, of applying, by analogy, to word marks consisting of advertising slogans the reasoning of the Court in paragraph 36 of the judgment in *Procter & Gamble v OHIM*, according to which the distinctiveness of a three dimensional mark might be more difficult to establish than that of a word mark or figurative mark.

38 OHIM contends, as regards the first part of this second limb, that the General Court did not introduce a subcategory of marks relating to ‘slogans’, but referred to the word mark at issue as a slogan, which is, moreover, confirmed by paragraphs 24 and 29 of the judgment under appeal. As regards the second part of this limb, OHIM maintains that it must be held manifestly inadmissible, given that the finding of the General Court, in paragraph 27 of the judgment under appeal is a literal citation of paragraph 35 of the judgment in *OHIM v Erpo Möbelwerk*, which cannot constitute an error of law.

– Findings of the Court

39 As regards the first part of the second limb of the first ground of appeal, it must be found, first, that, contrary to the claim of Smart Technologies, the General Court, by describing the mark applied for as a slogan, did not create a special subcategory or even a separate one from that of other word marks. On the contrary, by that description, the General Court only asserted that this was a word mark which, as pointed out, inter alia, in paragraph 35 of the judgment under appeal, conveys to the relevant public a laudatory message, or indeed, as stated in paragraph 37 of that judgment, extols the qualities of the goods covered by the trade mark application.

40 Next, the fact that the term ‘slogan’ is not expressly used in Regulation No 40/94 is not such as to establish that the General Court considered advertising slogans to be a subcategory of trade marks. Article 4 of the regulation, in listing the types of sign capable of constituting a trade mark within the meaning of the regulation, in no way had the purpose of establishing or defining different categories of trade marks consisting of signs. The concept of a ‘slogan’, like that of a ‘word sign’ or ‘word mark’ was developed by the case-law on the interpretation of that regulation, without such slogans being considered to be a special subcategory of word signs, or even a distinct category thereof. The Court has, on several occasions, classified word signs with a laudatory connotation as slogans (see, inter alia, Case C-517/99 *Merz & Krell* [2001] ECR I-6959, paragraphs 39 and 40; *OHIM v Erpo Möbelwerk* paragraphs 35, 36, 41 and 44; and *Audi v OHIM*, paragraphs 56, 58, and 59).

- 41 Finally, although the General Court characterised the trade mark applied for as an advertising slogan, it must be held that, in any event, it did not use different criteria to assess its distinctive character from those used for other word signs. On the contrary, as is clear from paragraph 25 of the judgment under appeal, read in combination with paragraphs 24 and 28, the General Court considered that it was inappropriate to apply to slogans criteria which are stricter than those applicable to other types of sign.
- 42 It follows that the first part of the second limb of the first ground of appeal must be rejected as unfounded.
- 43 As regards the second part of this limb, it must be observed that, although the General Court, in paragraphs 26 and 27 of the judgment under appeal, cited the case-law of the Court of Justice, as recalled in paragraphs 26 and 27 of the present judgment, according to which the possibility cannot be excluded that, in certain circumstances, it may be difficult to establish the distinctiveness of advertising slogans, the fact remains that, in the specific analysis of the distinctiveness of the trade mark applied for, it did not base its conclusion on the presumption that the distinctiveness of that sign is more difficult to establish than that of other word signs.
- 44 Accordingly, the second part of the second limb of the first ground of appeal by which Smart Technologies seeks to call into question the case-law on the distinctive character of word signs, must be rejected as ineffective.

The third limb of the first ground of appeal

– Arguments of the parties

- 45 By the third limb of its first ground of appeal, Smart Technologies argues that, in the present case, a lower level of distinctiveness than is generally required is sufficient to enable the trade mark applied for to be registered, given that the relevant public is a specialised public whose level of attention and knowledge is higher than that of the average consumer. It maintains that the fact that it is the sole user of such a mark, as research carried out on the Internet has shown, proves that this mark is sufficiently original to exceed the low threshold for distinctiveness and that it is capable of identifying it as being the origin of the goods and services concerned.
- 46 OHIM contends that Smart Technologies seeks, by this limb of the first plea, to call into question the assessment of the facts made by the General Court. As no distortion of the facts and evidence has been alleged by the appellant and cannot be raised in the present case, the third limb of the first ground of appeal must, according to OHIM, be declared manifestly inadmissible.

– Findings of the Court

- 47 As regards the third limb of the first ground of appeal, it must be observed at the outset that the General Court held, in paragraph 33 of the judgment under appeal, that the relevant public is made up of German speakers who are specialists in the computer field and whose level of knowledge in the area is greater than that of the general public.
- 48 In that regard, it must be held that the fact that the relevant public is a specialist one cannot have a decisive influence on the legal criteria used to assess the distinctive character of a sign. Although it is true that the degree of attention of the relevant specialist public is, by definition, higher than that of the average consumer, it does not necessarily follow that a weaker distinctive character of a sign is sufficient where the relevant public is specialist.

- 49 According to the settled case-law of the Court, in order to assess whether or not a trade mark has any distinctive character, the overall impression given by it must be considered (see, inter alia, *Procter & Gamble*, paragraph 44; Case C-286/04 P *Eurocermex v OHIM* [2005] ECR I-5797, paragraph 22; and Case C-238/06 P *Develey v OHIM* [2007] ECR I-9375, paragraph 82).
- 50 However, that principle might be undermined if the distinctiveness threshold of a word sign depended generally on the degree of specialisation of the relevant public.
- 51 In any event, as to the question whether the trade mark applied for has reached the distinctiveness threshold, it must be pointed out that the findings in relation to the attentiveness, the perception and the attitude of the relevant public concern appraisals of fact (see, to that effect, Case C-144/06 P *Henkel v OHIM* [2007] ECR I-8109, paragraph 51; orders of 9 July 2010 in Case C-461/09 P *The Wellcome Foundation v OHIM*, paragraph 20, and in Case C-87/11 P *Fidelio v OHIM*, paragraph 66).
- 52 Under Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal lies on a point of law only. The General Court thus has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and the assessment of that evidence thus do not, save where the facts or evidence are distorted, constitute points of law subject, as such, to review by the Court of Justice on appeal (see, inter alia, Case C-16/06 P *Les Éditions Albert René v OHIM* [2008] ECR I-10053, paragraph 68; Case C-254/09 P *Calvin Klein Trademark Trust v OHIM* [2010] ECR I-7989, paragraph 49; and Case C-88/11 P *LG Electronics v OHIM* [2011] ECR I-0000, paragraph 36).
- 53 Such distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence (see *Les Éditions Albert René v OHIM*, paragraph 69; *Calvin Klein Trademark Trust v OHIM*, paragraph 50; and *LG Electronics v OHIM*, paragraph 37).
- 54 As the appellant has not adduced evidence showing that the General Court distorted the facts with regard to the assessment of the distinctiveness of the trade mark applied for, the third limb of the first ground of appeal must be dismissed as inadmissible and must therefore be rejected.

The second ground of appeal, that the General Court made findings of fact in the absence of any evidence

Arguments of the parties

- 55 By its second ground of appeal, Smart Technologies criticises the General Court for upholding, in paragraph 41 of the judgment under appeal, certain findings of fact made by the Board of Appeal which were not supported by evidence, in particular the fact, described by the General Court as well-known, that consumers do not accord trade mark value to marketing claims. However, according to paragraph 59 of the judgment in *Audi v OHIM*, consumers can make assumptions about the origin of products on the basis of slogans. Consequently, it is not possible to consider it to be a well-known fact that consumers cannot perceive marketing claims as constituting trade marks.
- 56 OHIM maintains that it is a well-known fact that consumers are accustomed to short, compact and punchy promotional messages, and that those messages are perceived first and foremost as a laudatory advertising claim, to which they do not, generally, accord trade mark value. However, OHIM does not deny that such messages may be perceived as designating the origin of products, provided that they are not purely promotional and laudatory expressions, devoid of distinctive character, or have acquired distinctive character through use. That was the case in *Audi v OHIM*, in which the slogan is one with a reputation, unlike the one in the present case.

Findings of the Court

- 57 As regards the second ground relied on by Smart Technologies in support of its appeal, it must be recalled that, according to the settled case-law of the Court, the finding, by the General Court, as to whether the facts on which the Board of Appeal of OHIM has based its decision are well known or not is a factual assessment which, save where the facts or evidence are distorted, is not subject to review by the Court of Justice on appeal (Case C-25/05 P *Storck v OHIM* [2006] ECR I-5719, paragraph 53; orders of 3 June 2009 in Case C-394/08 P *Zipcar v OHIM*, paragraph 42, and of 15 January 2010 in Case C-579/08 P *Messer Group v Air Products and Chemicals*, paragraph 37).
- 58 In so far as Smart Technologies criticises the General Court for rejecting, in paragraph 41 of the judgment under appeal, its argument that the Board of Appeal made certain findings of fact without backing them up with evidence, suffice it to observe that, by raising such a ground of appeal, it is calling into question findings of fact which fall exclusively within the jurisdiction of the General Court.
- 59 Since no distortion of the facts or evidence submitted to the General Court has been invoked with regard to those findings, the second ground relied on by Smart Technologies in support of its appeal must be rejected as unfounded.
- 60 It follows from all of the foregoing considerations that neither of the two grounds on which the appellant relies in support of its appeal can succeed and that the appeal must therefore be dismissed.

Costs

- 61 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As OHIM sought an order for costs against Smart Technologies, and the latter has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (Fifth Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders Smart Technologies ULC to pay the costs.**

[Signatures]