Other parties to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs), centrotherm Clean Solutions GmbH & Co. KG

Form of order sought

— Set aside the judgment of the General Court of the European Union of 15 September 2011 in Case T-427/09,

— dismiss the action brought by centrotherm Clean Solutions GmbH & Co. KG against the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 25 August 2009 in Case R 6/2008-4,

— order centrotherm Clean Solutions GmbH & Co. KG to pay the costs.

Pleas in law and main arguments

The present appeal is brought against the judgment of the General Court dismissing the action of the appellant against the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 25 August 2009 on revocation proceedings between centrotherm Clean Solutions GmbH & Co. KG and Centrotherm Systemtechnik GmbH.

The appellant bases its appeal on the following grounds of appeal:

1. The contested decision infringes Article 65 of Regulation No 207/2009 [1] and Article 134(2) and (3) of the Rules of Procedure of the General Court. According to these provisions, the General Court was obliged to take account of all of the pleas in law made by the appellant.

2. Furthermore, the judgment under appeal is incompatible with Articles 51(1)(a) and 76 of Regulation No 207/2009. It relies on a mistaken premiss that it is the appellant that bears the burden of proof of use such as to preserve the rights attached to the contested marks. In actual fact, in revocation proceedings under Article 51(1)(a) of Regulation No 207/2009 and Article 76(1) of Regulation No 207/2009 the principle of a competent authority's duty to examine facts of its own motion applies. Moreover, it follows from the provisions and the scheme of Regulation No 207/2009, in particular from a comparison of the revocation procedure provisions with those governing opposition and invalidity due to relative grounds for refusal, that, in revocation proceedings, in principle it is not the proprietor of the contested mark who has to adduce evidence of use.

   It follows, in particular, that the failure of OHIM to take account of evidence on the ground of an alleged submission being out of time is not justified.

3. By wrongly accepting, in contrast to the case-law of the Court of Justice, that the concept of genuine use constitutes a contrast to mere minimal use, the General Court misinterpreted Article 51(1)(a) of Regulation No 207/2009.

4. Finally, OHIM's statement, which was not contradicted by the General Court, according to which the sworn statement of the manager of the appellant does not constitute evidence under Article 78(1)(f) of Regulation No 207/2009 is incorrect and contradicts the case-law of the General Court itself.

[1] Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ 2009 L 78, p. 1.

Appeal brought on 29 November 2011 by Centrotherm Systemtechnik GmbH against the judgment of the General Court (Sixth Chamber) delivered on 15 September 2011 in Case T-434/09 Centrotherm Systemtechnik v Office for Harmonisation in the Internal Market (Trade Marks and Designs)

(Case C-610/11 P)

(2012/C 80/09)

Language of the case: German

Parties

Appellant: Centrotherm Systemtechnik GmbH (represented by: A. Schulz and C. Onken, lawyers)

Other parties to the proceedings: Office for Harmonisation in the Internal Market (Trade Marks and Designs), centrotherm Clean Solutions GmbH & Co. KG

Form of order sought

— Set aside the judgment of the General Court of the European Union of 15 September 2011 in Case T-434/09,

— annul the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 25 August 2009 in Case R 6/2008-4, in so far as it grants the application for a declaration of revocation of Community trade mark No 1 301 019 CENTROTHERM,

— order the Office for Harmonisation in the Internal Market (Trade Marks and Designs) and centrotherm Clean Solutions GmbH & Co. KG to pay the costs.

Grounds of appeal and main arguments

The present appeal is brought against the judgment of the General Court dismissing the action of the appellant against the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 25 August 2009 on revocation proceedings between centrotherm Clean Solutions GmbH & Co. KG and Centrotherm Systemtechnik GmbH.

The appellant bases its appeal on the following grounds of appeal:

1. The contested decision infringes Article 51(1)(a) of Regulation No 207/2009 ([1]) in that it disregards the evidential value of the sworn statement of the manager of the appellant produced before the Cancellation Division. Contrary to the view of the Board of Appeal and the General Court, the sworn statement is indeed in accordance with the case-law of the General Court admissible evidence within the meaning of Article 78(1)(f) of the Regulation No 207/2009.

2. The General Court also misinterpreted Article 76(1) of Regulation No 207/2009. In contrast to the finding of the lower instances, according to the unambiguous wording of Article 76(1) of that Regulation as well as its scheme, in revocation proceedings under Article 51(1)(a) of Regulation No 207/2009, the principle is that the competent authority has a duty to examine relevant facts of its own motion.

3. The documents presented by the appellant in the proceedings before the Board of Appeal ought not to have been dismissed as being out of time. This arises from, first, the scheme of Regulation No 207/2009, in particular a comparison between the rules governing use in revocation proceedings and those in opposition and invalidity proceedings due to absolute grounds for refusal, and, second, from the general principles of the allocation of the burden of proof.

   In this context a teleological interpretation restricting the scope of Rule 40(5) of Regulation No 2868/95 ([2]) is necessary.

4. Should the Court of Justice reject such a teleological interpretation of Rule 40(5) of Regulation No 2868/95, that rule would be inapplicable, since it would be contrary to the provisions and the scheme of Regulation No 207/2009 and would infringe the general fundamental principle of proportionality.

([1]) Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ 2009 L 78, p. 1.
([2]) 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.

Reference for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 30 November 2011 — Niederösterreichische Landes-Landwirtschaftskammer v Anneliese Kuso

(Case C-614/11)

(2012/C 80/10)

Language of the case: German

Referring court

Oberster Gerichtshof

Parties to the main proceedings

Applicant: Niederösterreichische Landes-Landwirtschaftskammer

Defendant: Anneliese Kuso

Question referred

Does Article 3(1)(a) and (c) of Directive 76/207/EEC, ([1]) as amended by Directive 2002/73/EC, preclude national legislation under which discrimination on grounds of sex in connection with the termination of an employment relationship which is effected solely by lapse of time pursuant to a fixed-term individual employment contract entered into before the entry into force of the above directive (in this case before Austria's accession to the European Union) is to be examined not on the basis of a contractual provision stipulating the fixed term to be a 'condition governing dismissal' but only in connection with the rejection of the request for a contract extension as a 'condition governing recruitment'?

([1]) Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OJ L 39, 14.2.1976, p. 40, and amended by Directive 2002/73/EC of the European Parliament and the Council of 23 September 2002.