

Decision of the Board of Appeal: Annulled the contested decision and rejected the Community trade mark application

Pleas in law: Infringement of Articles 8(1)(b), 15(1), 42(2) and (3) of Council Regulation No 207/2009, insofar as the Board of Appeal wrongly concluded that there was a likelihood of confusion between the mark applied for and the earlier mark and that genuine use for the earlier mark was proven.

Action brought on 27 December 2011 — Spa Monopole v OHIM — Royal Mediterranea (THAI SPA)

(Case T-663/11)

(2012/C 65/30)

Language in which the application was lodged: French

Parties

Applicant: Spa Monopole compagnie fermière de Spa SA/NV (Spa, Belgium) (represented by: L. De Brouwer, E. Cornu and E. De Gryse, lawyers)

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

Other party to the proceedings before the Board of Appeal: Royal Mediterranea SA (Madrid, Spain)

Form of order sought

The applicant claims that the General Court should:

— annul the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 20 October 2011 in Case R 1238/2010-4;

— order the defendant to pay the costs.

Pleas in law and main arguments

Applicant for a Community trade mark: Royal Mediterranea SA

Community trade mark concerned: Word mark 'THAI SPA' for goods and services in Classes 16, 41 and 43

Proprietor of the mark or sign cited in the opposition proceedings: Spa Monopole SA/NV.

Mark or sign cited in opposition: Benelux registrations of word marks 'SPA' and 'Les Thermes de Spa' for goods and services in Classes 32 and 42 (now Class 44).

Decision of the Opposition Division: Rejection of the opposition.

Decision of the Board of Appeal: Dismissal of the appeal.

Pleas in law: Infringement of Article 8(1)(b) of Regulation No 207/2009 in that the Board of Appeal did not accept a simi-

ilarity between the 'restaurant services (food)' designated in Class 43 in the mark applied for and the 'mineral water and aerated waters and other non-alcoholic drinks; syrup and other preparations to make beverages' designated in the 'SPA' word mark registered in Benelux; infringement of Article 8(5) of Regulation No 207/2009 in that the Fourth Board of Appeal did not accept the existence of a 'link' between the 'SPA' mark in Class 32 and the 'THAI SPA' mark in Class 43; and infringement of the rights of the defence and of Article 75 of Regulation No 207/2009.

Action brought on 27 December 2011 — Spa Monopole v OHIM — Royal Mediterranea (THAI SPA)

(Case T-664/11)

(2012/C 65/31)

Language in which the application was lodged: French

Parties

Applicant: Spa Monopole compagnie fermière de Spa SA/NV (Spa, Belgium) (represented by: L. De Brouwer, E. Cornu and E. De Gryse, lawyers)

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

Other party to the proceedings before the Board of Appeal: Royal Mediterranea SA (Madrid, Spain)

Form of order sought

The applicant claims that the General Court should:

— annul the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 20 October 2011 in Case R 1976/2010-4;

— order the defendant to pay the costs.

Pleas in law and main arguments

Applicant for a Community trade mark: Royal Mediterranea SA

Community trade mark concerned: Word mark 'THAI SPA' for goods and services in Classes 16, 41 and 43

Proprietor of the mark or sign cited in the opposition proceedings: Spa Monopole SA/NV.

Mark or sign cited in opposition: Benelux registrations of word marks 'SPA' and 'Les Thermes de Spa' for goods and services in Classes 32 and 42 (now Class 44).

Decision of the Opposition Division: Rejection of the opposition.

Decision of the Board of Appeal: Dismissal of the appeal.

Pleas in law: Infringement of Article 8(1)(b) of Regulation No 207/2009 in that the Board of Appeal did not accept a similarity between the ‘restaurant services (food)’ designated in Class 43 in the mark applied for and the ‘mineral water and aerated waters and other non-alcoholic drinks; syrup and other preparations to make beverages’ designated in the ‘SPA’ word mark registered in Benelux; infringement of Article 8(5) of Regulation No 207/2009 in that the Fourth Board of Appeal did not accept the existence of a ‘link’ between the ‘SPA’ mark in Class 32 and the ‘THAI SPA’ mark in Class 43; and infringement of the rights of the defence and of Article 75 of Regulation No 207/2009.

Action brought on 27 December 2011 — Spirlea and Spirlea v Commission

(Case T-669/11)

(2012/C 65/32)

Language of the case: German

Parties

Applicants: Darius Nicolai Spirlea (Capezzano Piamore, Italy) and Mihaela Spirlea (Capezzano Piamore) (represented by: V. Foerster and T. Pahl, lawyers)

Defendant: European Commission

Form of order sought

- Accept the present application made on the basis of Article 263 TFEU;
- declare the application admissible; and
- declare it well-founded, and accordingly find that the Commission has committed substantial procedural irregularities and other substantive errors of law;
- on that basis annul the decision of the Commission’s Secretariat-General of 9 November 2011 (SG.B.5/MKu/rc-Ares(2011));
- order the European Commission to pay the costs.

Pleas in law and main arguments

In support of the action, the applicants rely on nine pleas in law.

1. Failure to adhere to the order of assessment in Regulation (EC) No 1049/2001 ⁽¹⁾

The applicants submit that the defendant failed to fulfil its assessment obligation under Article 4(4) of Regulation No 1049/2001 and to adhere to the mandatory order of assessment provided for by that regulation.

2. Breach of the principle of equality of arms

The applicants submit that the Member State concerned was informed of the substance of the applicants’ reasons for requiring access to the document requested, but that, by contrast, the contested decision contains only rudimentary statements regarding the substance of the German authorities’ response.

3. Breach of the applicants’ right to be heard

The applicants submit that the defendant withheld the substance of the German authorities’ answer from them and that the applicants were unable to comment on the merits of the Member State’s opposition having regard to the requisite exceptions under Article 4(1) and (2) of Regulation No 1049/2001.

4. Non-rejection of the second exception

In the applicants’ view, the defendant failed in its duty to rule out the second exception claimed by the German authorities (Article 4(1)(a), third indent, of Regulation No 1049/2001).

5. Failure to identify the document to which the applicants seek access

In the applicants’ view, the defendant failed in its duty to describe in precise terms — with regard to the number of pages and the author — the document to which access was refused.

6. Breach of the right to be heard in the context of the consultation procedure

The applicants submit that the defendant’s failure to make the request for consultation issued to the German authorities available to the applicants is contrary to recital 2 in the preamble to Regulation No 1049/2001. The applicants also object to the fact that the German authorities’ answer was not made available to them.

7. Unlawful application of Article 4(5) of Regulation No 1049/2001

The applicants object to the fact that the Commission extended the scope of application of Article 4(5) of Regulation No 1049/2001 to ‘German authorities’ and, moreover, made manifest errors of assessment in its examination of and reasoning as regards the circumstances provided for under Article 4(5) of Regulation No 1049/2001.