



Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

13 February 2015 *

(Community trade mark — Revocation proceedings — Community word mark HUSKY — Genuine use of the trade mark — Partial revocation — Extension of the time-limit — Rule 71(2) of Regulation (EC) No 2868/95 — Translation into the language of the proceedings)

In Case T-287/13,

Husky CZ s.r.o., established in Prague (Czech Republic), represented by L. Lorenc, lawyer,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by P. Geroulakos and I. Harrington, acting as Agents,

defendant,

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

Husky of Tostock Ltd, established in Woodbridge (United Kingdom),

ACTION brought against the decision of the First Board of Appeal of OHIM of 14 March 2013 (Case R 748/2012-1), relating to revocation proceedings between Husky CZ s.r.o. and Husky of Tostock Ltd,

THE GENERAL COURT (First Chamber),

composed of H. Kanninen (Rapporteur), President, I. Pelikánová and E. Buttigieg, Judges,

Registrar: J. Weychert, Administrator,

having regard to the application lodged at the Court Registry on 24 May 2013,

having regard to the response lodged at the Court Registry on 1 August 2013,

further to the hearing on 1 July 2014,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

- 1 On 1 April 1996, Husky of Tostock Ltd ('the proprietor of the mark') filed an application for registration of a Community trade mark with the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), pursuant to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1)).
- 2 The trade mark in respect of which registration was sought is the word sign HUSKY.
- 3 The goods in respect of which registration was sought are in Classes 3, 9, 14, 16, 18 and 25 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, for each of those classes, to the following description:
 - class 3: 'Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; non-medicated toilet preparations and substances; dentifrices';
 - class 9: 'Spectacles; sunglasses; anti-glare glasses, visors and shades; binoculars; eyeglass cases; eyeglass chains; chronographs; compasses; containers for contact lenses; eyeglass frames; eyepieces; optical apparatus and instruments; telescopes';
 - class 14: 'Jewellery, precious stones; horological and chronometric instruments';
 - class 16: 'Paper, cardboard and goods made from these materials, not included in other classes; printed matter; book binding materials; photographs; stationery; artists' materials, paint brushes; typewriters and office requisites (excluding furniture); instructional and teaching materials (excluding apparatus); plastic materials and packaging (not included in other classes); playing cards; printers' type; printing blocks';
 - class 18: 'Leather and leather imitations and articles made from these materials which are not included in other classes; animal skins, bags, trunks and travelling bags, umbrellas, parasols and walking sticks, whips and harness-maker's products';
 - class 25: 'Shirts, shorts, skirts, blouses, trousers, jackets, coats, waistcoats, hats, neckties, articles of underclothing; lingerie, hosiery, pyjamas, night-dresses, sleeping garments, negligees, dressing gowns, jumpers, cardigans, pullovers, sweaters, overalls, swimming costumes; dresses, dungarees, over-trousers, boots, shoes, sandals, slippers, tops, caps, scarves, robes, capes, aprons, jeans, socks, leg-warmers, dancewear, wrist-bands, head-bands, gloves; mittens, belts; head-gear and footwear'.
- 4 On 30 November 1998, the trade mark applied for was registered under number 152546.
- 5 On 2 April 2006, the registration of the trade mark was renewed.
- 6 On 11 March 2009, the applicant, Husky CZ, s.r.o., filed an application for revocation of the trade mark for which the registration had been renewed ('the mark at issue'), on the basis of Article 50(1)(a) of Regulation No 40/94 (now Article 51(1)(a) of Regulation No 207/2009), on the ground that that mark had not been put to genuine use in connection with the goods in respect of which it had been registered.

- 7 On 17 March 2009, the Trade Marks and Cancellation Department of OHIM invited the proprietor of the mark to provide evidence of genuine use of the trade mark by 17 June 2009.
- 8 On 16 June 2009, the proprietor of the mark submitted evidence, but explained that the mark at issue was used by a licensee and that, for that reason, it was requesting an extension of time in order to comply fully with the request.
- 9 On 19 June 2009, the Trade Marks and Cancellation Department granted the request for an extension of time until 17 September 2009.
- 10 On 9 September 2009, the proprietor of the mark submitted additional evidence and indicated that it wished to provide information about the expenditure incurred in connection with promoting the mark at issue. It requested a further extension of time, to 17 October 2009.
- 11 The Trade Marks and Cancellation Department granted that extension.
- 12 On 19 October 2009, the proprietor of the mark submitted invoices relating to promotional expenditure.
- 13 The applicant having submitted an objection, the Trade Marks and Cancellation Department notified the objection to the proprietor of the mark and invited it to submit observations by 13 March 2010. On 12 March 2010, the proprietor of the mark indicated that the evidence was almost complete and requested an additional period of one month, providing justifications for the extension of time. The Department granted its request.
- 14 On 9 April 2010, the proprietor of the mark submitted additional evidence.
- 15 By decision of 16 February 2012, the Cancellation Division of OHIM granted in part the application for revocation. It decided that the mark at issue could remain registered in respect of goods corresponding to the following descriptions:
 - ‘bags’, in Class 18;
 - ‘shirts, trousers, jackets, coats, waistcoats, jumpers, pullovers, sweaters, boots, shoes, tops, jeans, belts; footwear’, in Class 25.
- 16 On 16 February 2012, the applicant filed a notice of appeal with OHIM, under Articles 58 to 64 of Regulation No 207/2009, against the decision of the Cancellation Division.
- 17 By decision of 14 March 2013 (‘the contested decision’), the First Board of Appeal of OHIM dismissed the appeal.
- 18 In the first place, as regards the applicant’s argument that various extensions of time had wrongly been granted to the proprietor of the mark, in that they had been granted without the prior agreement of the other party, the Board of Appeal took the view that the English version of Rule 71(2) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1), as amended (‘the Implementing Regulation’), had to be interpreted in the light of the other language versions of that provision and paragraph 1 of that rule. According to the Board of Appeal, where a party requests an extension of time, OHIM may, but is not required to, request the consent of the other party, and must, in particular where it chooses not to seek that consent, take into account the circumstances surrounding the request for an extension of time.

- 19 The Board of Appeal, in explaining why the Trade Marks and Cancellation Department was correct to grant the extensions without making them subject to the agreement of the other party, stated that, in the present case, the department had considered that some documents proving genuine use of the mark at issue could be provided only by a third party established abroad, which constituted one of the allowable circumstances. In addition, the proprietor of the mark had provided reasonable evidence and grounds for requesting an extension of time. Moreover, the period requested was short and it was in the interests of the proceedings that a decision on an issue as important as revocation not be taken in haste. Also, after the applicant claimed that, in fact, the mark at issue was used by a third party and not the proprietor of the mark, the Trade Marks and Cancellation Department, in the Board of Appeal's view, was right to invite the proprietor of the mark to submit comments in that regard and right to accept the evidence submitted by the proprietor of the mark.
- 20 The Board of Appeal observed that although, in the present case, the opportunities to provide evidence had been more numerous than is usual in revocation proceedings, the Cancellation Division had shown flexibility by accepting the extensions, having regard to the complexity of the case and inasmuch as the mark at issue had been used by several entities over the reference period.
- 21 In the second place, as regards the applicant's argument that the proprietor of the mark had not provided English translations of documents drafted in Italian, which made it impossible to determine whether the term 'husky' is a generic term in Italian, the Board of Appeal pointed out, first of all, that the proprietor of the mark had translated the documents or excerpts from documents that consisted of long texts. The applicant had not indicated what evidence ought to have been translated and had not complained about the absence of translations when it commented on the documents submitted. It had referred to the absence of translation on only one occasion, in relation to a document that was not decisive for the resolution of the case.
- 22 Moreover, the Board of Appeal observed that it was clear from the pictures provided that the term 'husky' is used as a registered brand name. It was not a generic term in Italian. The term 'husky' is referred to in an online dictionary as a 'Commercial name ° of a quilted impermeable jacket' ('Nome commerciale ° di un giaccone impermeabile trapuntato'), which confirms that it is a registered trade mark.
- 23 In the third place, as regards the applicant's argument that the Cancellation Division examined evidence which did not relate to the relevant period or which was undated, the Board of Appeal found that the documents referred to by the applicant were invoices the dates of which fell within the relevant period. The other documents referred to by the applicant were solely intended to show how the trade mark is displayed on the wares and the range of goods in respect of which the trade mark is used. Accordingly, the fact that they are undated was irrelevant.
- 24 Moreover, as regards the argument that the documents show genuine use of a figurative mark which could not be of benefit to the mark at issue, it being a word mark, the Board of Appeal noted that, in the present case, only one trade mark was at issue, and that the judgment of 13 September 2007 in *Il Ponte Finanziaria v OHIM* (C-234/06 P, ECR, EU:C:2007:514), relied on by the applicant, was not relevant in the circumstances.
- 25 The Board of Appeal added that the manner in which the HUSKY mark had been applied to the products, with a slight stylisation of the letters or with a logo representing the letter 'h', along with a figurative element representing a husky dog, did not affect the distinctive character of the mark as registered. That distinctive character lay exclusively in the concept of 'husky', which is a dog typical of arctic regions.

26 Lastly, the Board of Appeal addressed the applicant's arguments as to the use of the trade mark by its proprietor and the evidence relating thereto, finding that the proprietor of the mark had explained in good time how its trade mark had been used by several licensees over time and the forms in which it had been used.

Forms of order sought

27 The applicant claims that the Court should:

- annul the contested decision;
- order OHIM and the proprietor of the mark to pay the costs.

28 OHIM contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

Law

29 The applicant relies on three pleas in law. The first concerns the taking into account of evidence submitted out of time; the second, the taking into consideration of untranslated documents; and the third, the taking into consideration of undated documents.

The plea in law concerning the taking into account of evidence submitted out of time

30 In support of this plea in law, the applicant takes the view that OHIM ought not to have taken into account the evidence submitted by the proprietor of the mark after the period prescribed for responding to the application for revocation. In the first place, according to the applicant, Rule 71(2) of the Implementing Regulation is to be interpreted as meaning that the grant of an extension of time sought by a party is subject to the other party's consent. OHIM interpreted incorrectly the English version of that rule. The applicant also relies on the Czech version of that provision, which it claims would be logical to apply. That version is identical to the English version and the Slovak version of the provision in question.

31 OHIM contests those arguments.

32 As a preliminary point, it should be recalled that under Rule 40(1) to (5) of the Implementing Regulation:

- (1) Every application for revocation or for declaration of invalidity which is deemed to have been filed shall be notified to the proprietor of the Community trade mark. When [OHIM] has found the application admissible, it shall invite the proprietor of the Community trade mark to file his observations within such period as it may specify.
- (2) If the proprietor of the Community trade mark files no observations, [OHIM] may decide on the revocation or invalidity on the basis of the evidence before it.
- (3) Any observations filed by the proprietor of the Community trade mark shall be communicated to the applicant, who shall be requested by [OHIM], if it sees fit, to reply within a period specified by [OHIM].

- (4) Save where Rule 69 otherwise provides or allows, all observations filed by the parties shall be sent to the other party concerned.
- (5) In the case of an application for revocation based on Article 50(1)(a) of [Regulation No 40/94], [OHIM] shall invite the proprietor of the Community trade mark to furnish proof of genuine use of the mark, within such period as it may specify. If the proof is not provided within the time-limit set, the Community trade mark shall be revoked. Rule 22(2), (3) and (4) shall apply *mutatis mutandis*.’

33 Under Rule 71(1) of the Implementing Regulation, relating to the duration of time-limits:

‘Where [Regulation No 40/94] or [the Implementing Regulation] provide[s] for a period to be specified by [OHIM], such period shall, when the party concerned has its domicile or its principal place of business or an establishment within the Community, be not less than one month, or, when those conditions are not fulfilled, not less than two months, and no more than six months. [OHIM] may, when this is appropriate under the circumstances, grant an extension of a period specified if such extension is requested by the party concerned and the request is submitted before the original period expired.’

34 The English version of Rule 71(2) of the Implementing Regulation states that ‘[w]here there are two or more parties, [OHIM] may extend a period subject to the agreement of the other parties’. The applicant states that the Czech and Slovak versions of that provision are similar to the English version and that, having regard also to its place of establishment, it would be logical to apply the Czech version in the present case.

35 It is common ground that the English version and certain other language versions of the provision concerned are different from the German, Spanish, French and Italian versions of that provision, those latter four languages being, along with English, the five working languages of OHIM. The German, Spanish, French and Italian versions of Rule 71(2) of the Implementing Regulation, but also, for example, the Bulgarian, Greek, Portuguese and Romanian versions, state that ‘[w]here there are two or more parties to the proceedings, [OHIM] may subject the extension of a period to the agreement of the other parties’.

36 OHIM states that it has inserted a footnote in its official publications and on its website, as regards the English version of Rule 71(2) of the Implementing Regulation to indicate that that provision is to read as follows: ‘... [OHIM] may subject the extension of a period to the agreement of the other parties’. According to OHIM, it is the provision as it emerges from the German, Spanish, French and Italian versions that ought to prevail.

37 First of all, it must be recalled that, according to settled case-law, the need for uniform application and, accordingly, for uniform interpretation of a European Union measure makes it impossible to consider one version of the text in isolation, but requires, on the contrary, that it be interpreted on the basis of both the real intention of its author and the aim the latter seeks to achieve, in the light, in particular, of the versions existing in all the other official languages (judgments of 3 June 2010 in *Internetportal und Marketing*, C-569/08, ECR, EU:C:2010:311, paragraph 35, and 9 June 2011 in *Eleftheri tileorasi and Giannikos*, C-52/10, ECR, EU:C:2011:374, paragraph 23).

38 Accordingly, for the purposes of its application and interpretation, Rule 71(2) of the Implementing Regulation cannot be examined on the basis of one language version alone.

39 Next, it does not follow from the wording of the provisions of the Implementing Regulation that Rule 71(2) ought to be applied and interpreted other than in conjunction with Rule 71(1).

- 40 Indeed, the Court has held, as regards the second sentence of Rule 71(1) of the Implementing Regulation, that the extension of a period specified is not automatic, and that it depends on the specific circumstances of each individual case making it appropriate to grant an extension, as well as on the submission of a request for an extension (judgment of 12 December 2007 in *K & L Ruppert Stiftung v OHIM — Lopes de Almeida Cunha and Others (CORPO livre)*, T-86/05, ECR, EU:T:2007:379, paragraph 21). The Court added that the proposition that an extension depends on the specific circumstances of the individual case making it appropriate to grant an extension and on the submission of a request for an extension, also holds especially true in *inter partes* proceedings, in which an advantage granted to one of the parties constitutes a disadvantage for the other, OHIM having therefore to ensure that it remains impartial with regard to the parties (see, as regards opposition proceedings, judgment in *CORPO livre*, EU:T:2007:379, paragraph 21).
- 41 As the present case involves *inter partes* proceedings, it must be held that the extension of the period must also be 'appropriate in the circumstances' when the proprietor of the mark requests such an extension in order to provide evidence of the use of the mark at issue. The parties have, moreover, acknowledged that when extensions are requested under Rule 71(2), the circumstances, as referred to in Rule 71(1) of the Implementing Regulation, must make those extensions appropriate.
- 42 It is for the party requesting the extension to plead the circumstances making it appropriate, since it is in the interests of that party that the extension is sought and may be granted. Furthermore, where those circumstances are — as is the case here — specific to the party requesting the extension, that party is the only one who can provide OHIM with the relevant information regarding them (see, to that effect, judgment in *CORPO livre*, cited in paragraph 40 above, EU:T:2007:379, paragraph 22).
- 43 Although Rule 71(2) of the Implementing Regulation is to be interpreted in conjunction with Rule 71(1), Rule 71(2) must be held to allow OHIM, where there are two or more parties to the proceedings, to subject the extension of a period to the agreement of the other parties and not, as the applicant maintains, to making the extension conditional on the consent of the parties.
- 44 The interpretation proposed by the applicant would result in the decision as to whether to grant the extensions of time requested being left to the parties alone, in this instance, to the applicant in the present case, whereas that decision falls within the scope of OHIM's discretion and the possibility open to OHIM, in the context of its impartial role, to extend periods specified pursuant to Rule 71(1) of the Implementing Regulation.
- 45 Lastly moreover, making the grant of an extension of time conditional only on the consent of the parties might have the effect, as OHIM correctly points out, of depriving the party seeking the extension of the opportunity to defend itself. It may also run counter to the sound administration of the proceedings and be contrary to the aim pursued by Rule 71, which is precisely to allow the extension of periods specified when this is appropriate in the circumstances.
- 46 The Board of Appeal did not err, therefore, in holding that Rule 71(2) of the Implementing Regulation is to be interpreted as meaning that when a party, in *inter partes* proceedings, requests an extension of time, OHIM may, but is not required to, seek the consent of the other party and that that provision has to be read in conjunction with Rule 71(1), from which it follows that OHIM, in particular when it decides not to seek the other party's consent, must take account of the circumstances surrounding the request for an extension of time.
- 47 In the second place, the applicant claims that, in the present case, there were no circumstances, as referred to in Rule 71(1) of the Implementing Regulation, such as to make the extension of time appropriate, on the ground, first, that the proprietor of the mark had been in possession, from the outset, of the document showing use by a third party of the mark at issue.

- 48 Suffice it to point out that, even if that fact were proved, the licence agreement alone is not capable, on its own, of establishing use of the mark at issue and the provision of additional evidence was necessary for the establishment thereof, which would therefore have made the extensions of time granted appropriate.
- 49 Second, the applicant claims that the proprietor of the mark may have used the extensions of time in order to draw up additional evidence. However, such an argument cannot be accepted since it is not based on any evidence.
- 50 Therefore, having regard to the arguments put forward by the applicant in support of its complaint, the Board of Appeal did not err in taking the view that, taking account of the documents to be provided, the behaviour of the proprietor of the mark and the grounds advanced by it, the extensions of time were appropriate in the circumstances.
- 51 It follows from all of the foregoing that the first plea in law must be rejected as unfounded.

The plea in law concerning the taking into consideration of untranslated documents

- 52 The applicant claims that the term ‘husky’ is a generic term in Italian for jackets and, even more specifically, for a padded winter jacket, according to several dictionaries. The extracts from websites that it provided show that jackets are designated by the term ‘husky’ and the online dictionary cited by OHIM shows that the protection of the mark at issue is limited to goods of only one type, namely padded jackets. The mere fact that the mark at issue exists does not mean that the term ‘husky’ could not have become a generic term, that possibility being referred to in Article 51(1)(b) of Regulation No 207/2009. The applicant claims that all the documents ought to have been translated into English and that untranslated documents in Italian ought not to have been accepted.
- 53 OHIM contests those arguments.
- 54 First, as regards the argument that certain documents ought to have been translated before being submitted, a preliminary point that must be noted is that Rule 22(6) of the Implementing Regulation, on which OHIM relies in order to justify the fact that, in the absence of an express request by the applicant, it was not obliged to seek a translation of the documents showing genuine use of the mark from the proprietor of the mark, is a provision applicable to opposition proceedings. Rule 40(5) of the Implementing Regulation applicable to revocation proceedings does not expressly provide that Rule 22(6) of the Implementing Regulation is to apply *mutatis mutandis* to revocation proceedings.
- 55 However, it must be observed that Rule 22(6) of the Implementing Regulation supplements and further elaborates on the provisions of Rule 22(2) to (4) of the regulation, applicable *mutatis mutandis* to revocation proceedings pursuant to Rule 40(5) of the regulation. Accordingly, Rule 22(6) of the Implementing Regulation is applicable to revocation proceedings based on Article 51(1)(a) of Regulation No 207/2009, which, moreover, is not disputed by the parties.
- 56 It is apparent from Rule 22(6) of the Implementing Regulation that OHIM is able to request of the party submitting documents that they be translated where the documents submitted are not in the language of the proceedings (judgment of 27 September 2012 in *El Corte Inglés v OHIM — Pucci International (Emidio Tucci)*, T-373/09, EU:T:2012:500, paragraph 24).
- 57 In this case, OHIM did not err in not requesting an English translation of documents provided in Italian. First, the applicant does not dispute the fact that it did not itself request, during the revocation proceedings, that the proprietor of the mark provide a translation of those documents. Second, the

applicant's arguments focus on extracts from online dictionaries, which show translations of words from English into Italian or from Italian into English, which renders any request for translation nugatory.

- 58 As regards the argument concerning Article 51(1)(b) of Regulation No 207/2009 and that the documents produced show that the term 'husky' is a generic term used in Italian for 'jackets', it should be pointed out that, at the hearing, the applicant conceded that its application for revocation was based solely on Article 51(1)(a) of the regulation and that it was not claiming, in the context of that application, that the term 'husky' was generic in nature.
- 59 It follows from the foregoing that the second plea in law must be rejected as unfounded.

The plea in law concerning the taking into consideration of undated documents

- 60 According to the applicant, all the documents must be dated and correspond to the relevant period, that is, from 11 March 2004 to 10 March 2009. As regards the pictures of goods submitted by the proprietor of the mark, the applicant claims that OHIM erred in taking as a basis, in determining the range of goods for which the mark at issue is used, undated documents or documents that do not contain any indication making it possible to attribute a date to them. The judgment in *Il Ponte Finanziaria v OHIM*, cited in paragraph 24 above (EU:C:2007:514), is relevant in the present case, in that it concerns the question whether use of a registered trade mark in a slightly different form may be extended to a disputed mark that is similar to it. Accordingly, the Board of Appeal ought to have disregarded the evidence that shows that the sign HUSKY is used in a form different from that protected by the mark at issue. OHIM erred in stating that the logo used will be perceived by reasonably attentive consumers as the abbreviation of the term 'husky' and the figurative element of the dog as the representation of what that term means. The applicant claims that that line of argument is not relevant for the application of Article 15(1)(a) of Regulation No 207/2009. Lastly, the invoices submitted by the proprietor of the mark do not make it possible to ascertain which of the proprietor's trade marks or unregistered signs were used on the goods covered by the invoices.
- 61 OHIM contests those arguments.
- 62 As regards, first, the argument that none of the undated documents ought to have been taken into consideration and that undated documents could not establish use of the mark at issue during the relevant period, it should be recalled that, under Rule 22(3) of the Implementing Regulation, which applies *mutatis mutandis* to revocation proceedings in accordance with Rule 40(5) of the regulation, evidence of genuine use of a trade mark must concern, as cumulative requirements, the place, time, extent and nature of the use made of the trade mark (see, to that effect, judgments of 8 July 2004 in *Sunrider v OHIM — Espadafor Caba (VITAFRUIT)*, T-203/02, ECR, EU:T:2004:225, paragraph 37, and 27 September 2007 in *La Mer Technology v OHIM — Laboratoires Goëmar (LA MER)*, T-418/03, EU:T:2007:299, paragraph 52).
- 63 When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark (see judgment in *LA MER*, cited in paragraph 62 above, EU:T:2007:299, paragraph 55 and the case-law cited).

- 64 In order to examine, in a particular case, whether an earlier trade mark has been put to genuine use, an overall assessment must be carried out, which takes into account all the relevant factors of the particular case. That assessment entails a degree of interdependence of the factors taken into account (judgment in *VITAFRUIT*, cited in paragraph 62 above, EU:T:2004:225, paragraph 42).
- 65 It should be pointed out that although Rule 22 of the Implementing Regulation refers to indications concerning the place, time, extent and nature of use, and gives examples of acceptable evidence, such as packages, labels, price lists, catalogues, invoices, photographs, newspaper advertisements, and statements in writing, that rule does not state that each item of evidence must necessarily give information about all four elements to which proof of genuine use must relate, namely the place, time, nature and extent of use (judgments of 16 November 2011 in *Buffalo Milke Automotive Polishing Products v OHIM — Werner & Mertz (BUFFALO MILKE Automotive Polishing Products)*, T-308/06, ECR, EU:T:2011:675, paragraph 61, and 24 May 2012 in *TMS Trademark-Schutzrechtsverwertungsgesellschaft v OHIM — Comercial Jacinto Parera (MAD)*, T-152/11, EU:T:2012:263, paragraph 33).
- 66 Moreover, it is settled case-law that it cannot be ruled out that an accumulation of items of evidence may allow the necessary facts to be established, even though each of those items of evidence, taken individually, would be insufficient to constitute proof of the accuracy of those facts (judgment of 17 April 2008 in *Ferrero Deutschland v OHIM*, C-108/07 P, EU:C:2008:234, paragraph 36, and judgment in *MAD*, cited in paragraph 65 above, EU:T:2012:263, paragraph 34).
- 67 Proof of genuine use of the mark at issue must be established by taking into consideration all of the evidence submitted to the Board of Appeal for assessment.
- 68 Accordingly, the argument by which the applicant claims merely that the undated documents cannot establish use of the mark at issue during the period under consideration cannot be accepted, particularly since the pictures of the goods that the applicant referred to — before the Board of Appeal — as examples of undated documents, may be intended, as may be seen in the contested decision, to show how the mark at issue was displayed on the wares and the range of goods in respect of which it was used, which does not require that the pictures be dated. In those circumstances, the Board of Appeal was properly entitled to take the view that the fact that the pictures submitted as evidence were undated was irrelevant.
- 69 Similarly, the applicant's argument that the invoices submitted by the proprietor of the mark ought to be disregarded on the ground that they do not make it possible to ascertain whether they relate to the mark at issue or to any other sign or any other trade mark, cannot be accepted. The fact that those invoices do not specify whether they relate to goods covered by the mark at issue does not mean that they relate *ipso facto* to other trade marks. At the very most, in analysing the accumulated evidence, the probative value of those invoices may be qualified, but not dismissed.
- 70 Next, as regards the argument that the Board of Appeal ought to have found the judgment in *Il Ponte Finanziaria v OHIM*, cited in paragraph 24 above (EU:C:2007:514), to be relevant in the present case, in the first place, it must be pointed out that, in the case that gave rise to that judgment, the factual background was different from that in the present case. Paragraph 85 of that judgment states that, since use of the first trade mark had not been established, it could not serve as evidence of genuine use of the second trade mark. Unlike that case, in the present case, use of the figurative trade mark consisting of the word 'husky' written in slightly stylised letters and accompanied by the symbol ®, which is used in order to demonstrate the use of the word mark HUSKY, has not been disputed.
- 71 In the second place, it should be pointed out that, in the judgment in *Il Ponte Finanziaria v OHIM*, cited in paragraph 24 above (EU:C:2007:514, paragraph 86), the Court of Justice held that it was possible to consider a registered trade mark as used where proof is provided of use of that mark in a slightly different form from that in which it was registered. The fact that, in the same judgment, the

Court of Justice made clear that it is not possible, however, to extend, by means of proof of use, the protection enjoyed by a registered trade mark to another registered mark, the use of which has not been established, on the ground that the latter is merely a slight variation on the former, is irrelevant to the present case. The proprietor of the mark at issue has not claimed the protection of the rights of that trade mark solely on the ground of the registration of another mark.

- 72 In the third place, in order to establish use of a trade mark, the proprietor of that mark may legitimately rely on the fact that it is used in a form which differs from the form in which it was registered, without the differences between the two forms altering the distinctive character of that trade mark, and even though that different form may itself be registered as a trade mark (see, to that effect, judgment of 25 October 2012 in *Rintisch*, C-553/11, ECR, EU:C:2012:671, paragraph 30). In the present case, the applicant has not invoked any alteration of the distinctive character of the mark at issue. The proprietor of the mark could therefore legitimately rely on its use in a form which differs from the form in which that mark was registered.
- 73 Lastly, it is not disputed that the word mark HUSKY has been used mainly in black capital letters. The fact that the Board of Appeal took into account, as evidence of use, another trade mark or signs such as a logo representing the letter 'h' or a figurative element representing a husky dog, is therefore not decisive. Accordingly, the applicant's argument challenging the Board of Appeal's approach in this regard cannot succeed. It should be pointed out, moreover, that the applicant does not deny that the differences between the mark at issue and the other mark were limited to a slight stylisation of letters and that the letters are very close together; nor does the applicant deny that the mark at issue, on the one hand, and the signs of the logo representing the letter 'h' or the figurative element of the husky dog, on the other, were consistently displayed separately on the goods.
- 74 It follows from the foregoing that the third plea in law must be held to be unfounded.
- 75 The action must therefore be dismissed.

Costs

- 76 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered 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 incurred by OHIM in accordance with the form of order sought by OHIM.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Husky CZ s.r.o. to pay the costs.**

Kanninen

Pelikánová

Buttigieg

Delivered in open court in Luxembourg on 13 February 2015.

[Signatures]