



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

21 May 2014*

(Community trade mark — Application for a Community figurative mark NUEVA — Article 60 of Regulation (EC) No 207/2009 — Failure to comply with the obligation to pay the appeal fee within the period prescribed — Ambiguity in a language version — Uniform interpretation — Unforeseeable circumstances or force majeure — Excusable error — Obligations of care and diligence)

In Case T-61/13,

Research and Production Company ‘Melt Water’ UAB, established in Klaipėda (Lithuania), represented by V. Viešūnaitė and J. Stucka, lawyers,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by V. Melgar and J. Ivanauskas, acting as Agents,

defendant,

ACTION brought against the decision of the Fourth Board of Appeal of OHIM of 3 December 2012 (Case R 1794/2012-4) relating to an application for registration of the figurative sign NUEVA as a Community trade mark,

THE GENERAL COURT (Eighth Chamber),

composed of M. Jaeger, President, D. Gratsias and M. Kancheva (Rapporteur), Judges,

Registrar: J. Weychert, Administrator,

having regard to the application lodged at the Court Registry on 6 February 2013,

having regard to the response lodged at the Court Registry on 22 April 2013,

further to the hearing on 9 January 2014,

gives the following

* Language of the case: Lithuanian.

Judgment

Background to the dispute

- 1 On 19 January 2012 the applicant, Research and Production Company ‘Melt Water’ UAB, filed an application for registration of a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) pursuant to 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 figurative sign reproduced below:



- 3 The goods in respect of which registration was sought fall within Class 32 of the Nice Agreement on 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: ‘Mineral and aerated water and other non-alcoholic beverages; mineral water (non-medicinal); mineral water [beverages]; mineral water; mineral and aerated water and other non-alcoholic beverages; bottled water, water; spring water; (drinking) water (bottled); drinking water (bottled); aerated water; mineral water [beverages], tonic water [non-medicinal beverages], soda water, table water; mineral water (non-medicinal), flat water; mineral water’.
- 4 By decision of 18 July 2012, the examiner rejected the application for registration in respect of all of the goods referred to in paragraph 3 above on the basis of Article 7(1)(b) and (c), as well as Article 7(2), of Regulation No 207/2009, on the ground that the sign at issue was descriptive and devoid of any distinctive character.
- 5 In the last paragraph of his decision refusing registration, the examiner stated, in Lithuanian, the following:

‘You are entitled to file an appeal [“apeliacija” in Lithuanian] against this decision in accordance with Article 59 of Regulation No 207/2009. In accordance with Article 60 of Regulation No 207/2009, the notice of appeal [“pranešimas apie apeliaciją” in Lithuanian] must be filed in writing at OHIM within two months after the date of notification of the decision appealed from and a written statement [“rašytinis prašymas” in Lithuanian] setting out the grounds of appeal must be filed within four months after the same date. The statement [“prašymas” in Lithuanian] shall be deemed to have been filed only when the appeal fee of EUR 800 has been paid.’
- 6 The applicant was notified of the examiner’s decision on 28 July 2012.
- 7 On 25 September 2012, the applicant lodged an appeal, pursuant to Articles 58 to 64 of Regulation No 207/2009, against the examiner’s decision.

- 8 On 4 October 2012, OHIM contacted the applicant by telephone, pointing out that the appeal fee had not been paid. In reply to that observation, by letter of the same day, the applicant explained to OHIM that it followed from the examiner's decision and from Article 60 of Regulation No 207/2009 that that fee could be paid up to the date on which the written statement setting out the grounds of appeal was lodged, that is to say, within four months following notification of the decision.
- 9 On 5 October 2012, OHIM sent the applicant a notification informing it that the appeal fee had not been paid within the period prescribed, which had, according to OHIM, expired on 28 September 2012. The applicant, invited to submit its observations, cited its letter of 4 October 2012.
- 10 On 9 October 2012, the applicant lodged a written statement setting out the grounds of its appeal. On 10 October 2012, OHIM received payment of the appeal fee, which the applicant had made the previous day.
- 11 By decision of 3 December 2012 ('the contested decision'), the Fourth Board of Appeal of OHIM deemed the applicant's appeal not to have been filed. In the first place, it took the view that the wording of Article 60 of Regulation No 207/2009 had been correctly reproduced in the examiner's decision. It then stated that the sentence '[t]he notice shall be deemed to have been filed only when the fee for appeal has been paid' contained in that article could be linked only to the preceding sentence on the filing of the notice of appeal, prescribing a period of two months, and not to the following sentence relating to the filing of the written statement, which provides for a period of four months. It also noted that Rule 49(3) of 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) stipulated that, if the fee were to be paid after expiry of the period for the filing of an appeal provided for in Article 60 of Regulation No 207/2009, the appeal would be deemed not to have been filed and the appeal fee would be refunded to the party appealing. In the present case, the Board of Appeal found that the applicant had paid the appeal fee on 10 October 2012, after the expiry of the two-month period prescribed for filing the appeal and paying the fee, which had occurred on 28 September 2012. Accordingly, it essentially treated the appeal as not having been filed, pursuant to Article 60 of Regulation No 207/2009, and ordered that the appeal fee be refunded pursuant to Rule 49(3) of Regulation No 2868/95.

Forms of order sought by the parties

- 12 The applicant claims that the Court should:
- annul the contested decision;
 - treat its appeal before the Board of Appeal as having been filed;
 - order OHIM to pay the costs.
- 13 OHIM contends that the Court should:
- dismiss the action;
 - order the applicant to pay the costs.

Law

Admissibility of the applicant's second head of claim

- 14 By its second head of claim, the applicant requests that its appeal before the Board of Appeal be treated as having been filed and, accordingly, that the General Court essentially order the Board of Appeal to declare that appeal to have been filed.
- 15 In this regard, it is sufficient to point out that, according to settled case-law, in an action before the Courts of the European Union against the decision of a Board of Appeal of OHIM, OHIM is required, under Article 65(6) of Regulation No 207/2009, to take the measures necessary to comply with judgments of the Courts of the European Union. It is therefore not for the General Court to issue directions to OHIM; rather, it is for OHIM to draw the appropriate inferences from the operative part and grounds of the judgments of the Courts of the European Union (see Case T-443/05 *El Corte Inglés v OHIM - Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)* [2007] ECR II-2579, paragraph 20 and the case-law cited).
- 16 The applicant's head of claim by which it requests the Court to order OHIM to declare the appeal before it to have been filed is therefore inadmissible.

Substance

- 17 In support of its action, the applicant raises a single plea in law, alleging infringement of Article 60 of Regulation No 207/2009. It takes the view, essentially, that its appeal was filed before the Board of Appeal, on the ground that it paid the appeal fee within the period prescribed by the Lithuanian version of that article, which is authentic. It maintains that the wording of that article in its Lithuanian version indicates clearly and unambiguously that the payment of the appeal fee is linked to the filing of the written statement setting out the grounds of appeal and prescribes, to that end, a period of four months, and not a period of two months as in the case of the filing of the notice of appeal.
- 18 OHIM takes issue with the applicant's arguments.
- 19 Article 60 of Regulation No 207/2009, entitled 'Time limit and form of appeal', is worded as follows:
- 'Notice of appeal [against the OHIM decisions referred to in Article 58 of that regulation, including those of the examiner; "pranešimas apie apeliaciją" in Lithuanian] must be filed in writing at [OHIM] within two months after the date of notification of the decision appealed from. The notice ["prašymas" in Lithuanian] shall be deemed to have been filed only when the fee for appeal has been paid. Within four months after the date of notification of the decision, a written statement ["rašytinis prašymas" in Lithuanian] setting out the grounds of appeal must be filed.'
- 20 According to settled case-law, drawing from Article 314 EC and Article 55 EU, all the language versions of a provision of European Union law must be regarded as being equally authentic and, in principle, recognised as having the same weight, and this cannot vary according to, inter alia, the size of the population of the Member States using the language in question (see, to that effect, Case C-296/95 *EMU Tabac and Others* [1998] I-1605, paragraph 36; Case C-152/01 *Kyocera* [2003] I-13821, paragraph 32; and judgment of 20 September 2012 in Case T-407/10 *Hungary v Commission*, not published in the ECR, paragraph 39).
- 21 In the present case, it is common ground that the Lithuanian version of Article 60 of Regulation No 207/2009 is authentic, in the same way as the other versions of that provision in the official languages of the European Union.

- 22 With regard to the wording of the Lithuanian version of Article 60 of Regulation No 207/2009, it is appropriate to highlight, in the first sentence of that article, the term ‘pranešimas’, literally meaning ‘declaration’, referring to the notice of appeal to be filed with OHIM, and, in the third sentence, the term ‘prašymas’, literally meaning ‘request’, referring to the written statement setting out the grounds of appeal. The second sentence of that text also indicates that the notice (prašymas) is to be deemed to have been filed only when the fee for appeal has been paid.
- 23 It must be noted that, in the second sentence of Article 60 of Regulation No 207/2009, the term ‘prašymas’ appears to be ambiguous. On the one hand, as the applicant claims, it appears to make reference, not to the different term used in the first sentence to designate the notice of appeal to be filed with OHIM, but to the identical term used in the third sentence to refer to the written statement setting out the grounds of appeal, thereby suggesting that the period prescribed for payment of the fee for appeal is, in the same way as the period for the filing of the written statement, four months. On the other hand, as OHIM contends, the position of that term in the second sentence suggests that it is connected to the preceding sentence, dealing with the notice of appeal to be filed with OHIM within two months, and not to the following sentence, which deals with the written statement setting out the grounds of appeal.
- 24 It follows that, contrary to the opposing assertions of clarity made by the parties in their written submissions, the Lithuanian version of Article 60 of Regulation No 207/2009 is not unambiguous and raises doubts as to its interpretation and its application.
- 25 It is therefore necessary to establish the correct and uniform interpretation of Article 60 of Regulation No 207/2009 and to examine the legal consequences, in the present case, of OHIM’s application of that article.
- 26 According to settled case-law, the wording used in one language version of a provision of European Union law cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement that European Union law be applied uniformly (Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 16; Case C-187/07 *Endendijk* [2008] ECR I-2115, paragraph 23; and Case C-239/07 *Sabatauskas and Others* [2008] ECR I-7523, paragraph 38).
- 27 First, the need for a uniform interpretation of European Union law makes it impossible for the text of a provision to be considered in isolation but requires, in case of doubt, that it be interpreted and applied in the light of the versions existing in the other official languages (Case 9/79 *Koschniske* [1979] ECR 2717, paragraph 6; see also Case C-64/95 *Lubella* [1996] ECR I-5105, paragraph 17 and the case-law cited, and judgment of 15 September 2011 in Case T-271/09 *Prinz Sobieski zu Schwarzenberg v OHIM — British-American Tobacco Polska (Romuald Prinz Sobieski zu Schwarzenberg)*, not published in the ECR, paragraph 38 and the case-law cited).
- 28 Second, the need for a uniform interpretation of European Union law requires, in the case of divergence between the various language versions of a provision, that the provision in question be interpreted by reference to the general scheme and purpose of the rules of which it forms part (see, to that effect, Case 30/77 *Bouchereau* [1977] 1999, paragraph 14; *Kyocera*, cited in paragraph 20 above, paragraph 33; and Case C-190/10 *Genésis* [2012] ECR, paragraph 42 and the case-law cited).
- 29 With regard to the versions of Article 60 of Regulation No 207/2009 set out in the other official languages of the European Union, in particular the five working languages of OHIM, it must be stated that, in the French, English, German, Italian and Spanish versions, the terms ‘recours’, ‘notice’, ‘Beschwerde’, ‘ricorso’ and ‘recurso’ used in the second sentence of that article refer clearly to the same term used in the first sentence to designate the notice of appeal to be filed with OHIM within

two months after the date of notification of the decision under appeal, and not to the different term used in the third sentence to refer to the written statement setting out the grounds of appeal which must be filed within four months.

- 30 Next, with regard to the general purpose and scheme of the second sentence of Article 60 of Regulation No 207/2009, that sentence should be regarded as seeking to prevent the lodging of merely formal appeals that are not followed by a written statement setting out the grounds of appeal, or indeed to discourage the lodging of unrealistic appeals.
- 31 Consequently, Article 60 of Regulation No 207/2009 must be interpreted uniformly as meaning that payment of the appeal fee is required in order for the appeal to be regarded as having been filed, with the result that that payment is linked to the filing of the notice of appeal and must be made, in the same way as that filing, within a period of two months following the date of notification of the decision under appeal. The period of four months following the date of notification of the decision applies solely to the lodging of the written statement setting out the grounds of appeal, and not to the payment of the appeal fee.
- 32 Furthermore, it should be noted, as the Board of Appeal did in paragraph 13 of the contested decision, that this uniform interpretation is corroborated by Rule 49(3) of Regulation No 2868/95. That rule, the wording of which is clear and unambiguous both in Lithuanian and in the other languages mentioned in paragraph 29 above, provides that, if the fee for appeal has been paid after expiry of the period for the filing of the appeal provided for in Article 60 of Regulation No 207/2009, the appeal is to be deemed not to have been filed and the appeal fee is to be refunded to the appellant. The expression 'period for the filing of appeal' must be regarded as referring here to the period of two months for the filing of the appeal, and not to the period of four months for the filing of the written statement setting out the grounds of appeal.
- 33 With regard to the applicant's assertion, set out in its written submissions, that Article 60 of Regulation No 207/2009 must, in order to ensure legal certainty, be interpreted in the manner most consistent with the applicant's interests, it is appropriate to note at the outset, that, at the hearing, the applicant stated that that assertion did not constitute a separate head of complaint, alleging infringement of the principle of legal certainty, but was formulated merely in support of its single plea in law, alleging infringement of that article, a statement which was noted in the minutes of the hearing.
- 34 Suffice it to point out that it is the principle of legal certainty itself, in conjunction with the principle of equality and non-discrimination, that required the Board of Appeal to interpret Article 60 of Regulation No 207/2009 in a uniform manner, consistent with the interpretation set out in paragraph 31 above, and prohibited it from departing from such an interpretation in favour of the applicant. That uniform interpretation, being based on the versions of that article existing in the other official languages of the European Union and on its general scheme and purpose, is the only one which is consistent with the principle of legal certainty. Compliance with procedural time-limits, particularly in relation to appeals, is a matter of public policy, and any interpretation other than that uniform interpretation is liable to undermine legal certainty (see, to that effect and by analogy, judgment in Case T-267/11 *Video Research USA v OHIM (VR)* [2012] ECR, paragraph 35, and order of 24 October 2013 in Case T-451/12 *Stromberg Menswear v OHIM — Leketoy Stormberg Inter (STORMBERG)*, not published in the ECR, paragraph 38).
- 35 The Board of Appeal therefore acted correctly in law, in paragraph 12 of the contested decision, in interpreting Article 60 of Regulation No 207/2009 as requiring that the appeal fee be paid within the two-month period prescribed for the filing of the notice of appeal, in order for that notice of appeal to be deemed to have been filed.

- 36 In respect of the applicant's contention that the OHIM examiner specifically reproduced, in his decision, the Lithuanian version of Article 60 of Regulation No 207/2009 without providing further explanation, it should be noted, at the outset, that, in the notification of his decision refusing registration (see paragraph 5 above), the OHIM examiner reproduced the ambiguity affecting the Lithuanian version of that article in respect of the time-limit for payment of the appeal fee, as established above (see paragraphs 22 to 24), without drawing the applicant's attention to that ambiguity or to the discrepancy between that version and the other authentic language versions. Furthermore, during the hearing, OHIM acknowledged the existence of that ambiguity and that discrepancy, of which it said it had been unaware until the present case, but maintained that, in any event, the need for a uniform interpretation of that provision had not been brought into question.
- 37 It is therefore necessary to examine whether, in the present case, the applicant may rely on the OHIM examiner's reproduction of the ambiguity affecting the legality of the Lithuanian version of Article 60 of Regulation No 207/2009 in order to depart from the uniform interpretation of that article and to justify the non-payment of the appeal fee within the period prescribed.
- 38 According to settled case-law, no derogation from the European Union rules on procedural time-limits may be made save where the circumstances are quite exceptional, since the strict application of those rules serves the requirements of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (Case 42/85 *Cockerill-Sambre v Commission* [1985] ECR 3749, paragraph 10). Regardless of whether such circumstances are considered unforeseeable or to amount to *force majeure* or excusable error, they include, in any event, a subjective element involving the obligation, on the part of the party acting in good faith, to exercise all the care and diligence required of a normally well-informed trader to monitor the course of the procedure set in motion and to comply with the prescribed time-limits (see, to that effect, Case C-195/91 P *Bayer v Commission* [1994] ECR I-5619, paragraphs 31 and 32; Case C-426/10 P *Bell & Ross v OHIM* [2011] ECR I-8849, paragraphs 47 and 48; and order in Case T-468/10 *Doherty v Commission* [2011] ECR II-1497, paragraphs 18, 19, 27 and 28 and the case-law cited).
- 39 In the present case, however, it must be concluded that the applicant did not demonstrate the care and diligence required for the purposes of monitoring and complying with the time-limit prescribed for payment of the appeal fee.
- 40 First of all, it must be held that a normally careful and diligent applicant for a Community trade mark ought to have checked Article 60 of Regulation No 207/2009 against Rule 49(3) of Regulation No 2868/95 (see paragraph 32 above), the wording of which is clear and unambiguous, in Lithuanian as in the other languages mentioned in paragraph 29 above, and which makes the filing of the appeal subject to payment of the corresponding fee within the period prescribed for the lodging of the notice of appeal itself, independently of the period allowed by that article for the subsequent lodging of the written statement setting out the grounds of appeal. Moreover, during the hearing, the applicant confirmed that it had been aware of that rule at the time when it filed its notice of appeal.
- 41 In addition, a normally careful and diligent applicant for a Community trade mark which, just like the applicant, has chosen English as the second language in its application for a Community trade mark ought at least to have been able to verify the wording of the English version of Article 60 of Regulation No 207/2009, according to which '[t]he notice shall be deemed to have been filed only when the fee for appeal has been paid'. That wording in English thus clearly links the payment of the fee for appeal to the filing of the notice of appeal, which is subject to a period of two months, and not to the lodging of the statement setting out the grounds of appeal, which is subject to a period of four months.
- 42 It follows from the lack of care and diligence on the part of the applicant that it cannot properly rely on any unforeseeable circumstance or *force majeure*, or on any excusable error, in order to justify its failure to pay the appeal fee within the prescribed period (see, by analogy, order of 15 April 2011 in

Case T-96/11 *Longevity Health Products v OHIM — Biofarma (VITACHRON female)*, not published in the ECR, paragraph 19). Furthermore, the applicant has not relied on any head of complaint expressly deriving from the fortuitous or excusable nature of that failure.

- 43 In addition, and in any event, it should be noted that the applicant, after having been informed by OHIM that the appeal fee had not been paid within the period prescribed and of the risk that its appeal would consequently be deemed not to have been filed, was not deprived of all recourse before OHIM itself. Even on the assumption that the applicant sought to argue that, although it had exercised all due care required by the circumstances, it had been unable to comply with the time-limit for payment of the appeal fee, it did have the possibility of bringing *restitutio in integrum* proceedings before OHIM and could have submitted an application under Article 81 of Regulation No 207/2009 (see, by analogy, judgment of 11 May 2011 in Case T-74/10 *Flaco-Geräte v OHIM — Delgado Sánchez (FLACO)*, not published in the ECR, paragraph 26).
- 44 In those circumstances, the Board of Appeal cannot be accused of having infringed Article 60 of Regulation No 207/2009 in finding that, pursuant to that article, read in conjunction with Rule 49(3) of Regulation No 2868/95, the appeal fee had been paid by the applicant after expiry of the two-month period prescribed for its payment, and it cannot be criticised for its conclusion that, in the absence of compliance with that time-limit, the applicant's appeal had to be deemed not to have been filed and that the appeal fee had to be refunded to the applicant.
- 45 In the light of all of the foregoing, the single plea must be rejected as unfounded and, consequently, the action must be dismissed in its entirety.

Costs

- 46 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. However, the first subparagraph of Article 87(3) of those Rules of Procedure provides that the Court may order that the costs be shared where the circumstances are exceptional.
- 47 In the present case, it is appropriate to balance, on the one hand, the need for a uniform interpretation of Article 60 of Regulation No 207/2009 and the duty of care and diligence devolving on the applicant against, on the other hand, the ambiguity affecting the Lithuanian version of that article, as reproduced by the OHIM examiner in the notification of his decision refusing registration.
- 48 In view of those exceptional circumstances, within the meaning of the first subparagraph of Article 87(3) of the Rules of Procedure, fairness requires that OHIM should bear its own costs and pay those incurred by the applicant (see, to that effect and by analogy, judgment of 23 November 2011 in Case T-320/07 *Jones and Others v Commission*, not published in the ECR, paragraph 158, and order in Case T-278/11 *ClientEarth and Others v Commission* [2012] ECR, paragraph 51).

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) to bear its own costs and to pay those incurred by Research and Production Company 'Melt Water' UAB.**

Jaeger

Gratsias

Kancheva

Delivered in open court in Luxembourg on 21 May 2014.

[Signatures]