



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

26 September 2013*

(Appeal — Revocation proceedings — Community word mark CENTROTHERM — Genuine use — Evidence — Sworn statement — Burden of proof — Examination of the facts by OHIM of its own motion — Additional evidence adduced before the Board of Appeal — Regulation (EC) No 207/2009 — Articles 15, 51 and 76 — Regulation (EC) No 2868/95 — Rule 40(5))

In Case C-610/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 25 November 2011,

Centrotherm Systemtechnik GmbH, established in Brilon (Germany), represented by A. Schulz and C. Onken, Rechtsanwälte, and by F. Schmidt, Patentanwalt,

applicant,

the other parties to the proceedings being:

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

defendant at first instance,

centrotherm Clean Solutions GmbH & Co. KG, established in Blaubeuren (Germany), represented by O. Löffel and P. Lange, Rechtsanwälte,

intervener at first instance,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, U. Löhmus, M. Safjan and A. Prechal (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 7 February 2013,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2013,

gives the following

* Language of the case: German.

Judgment

- 1 By its appeal, Centrotherm Systemtechnik GmbH ('Centrotherm Systemtechnik') seeks to have set aside the judgment of the General Court of the European Union of 15 September 2011 in Case T-434/09 *Centrotherm Systemtechnik v OHIM - centrotherm Clean Solutions (CENTROTHERM)* [2011] ECR II-6227 ('the judgment under appeal'), by which that court upheld its action for partial annulment of the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 25 August 2009 (Case R 6/2008-4) ('the contested decision') relating to revocation proceedings brought by centrotherm Clean Solutions GmbH & Co. KG ('centrotherm Clean Solutions') against the Community word mark CENTROTHERM, which is held by Centrotherm Systemtechnik.
- 2 It should be noted that, on 15 September 2011, the General Court also gave judgment in a parallel case between the same parties and also involving the contested decision: Case T-427/09 *centrotherm Clean Solutions v OHIM - Centrotherm Systemtechnik (CENTROTHERM)* [2011] ECR II-6207, by which it upheld the action brought by centrotherm Clean Solutions for partial annulment of that decision.
- 3 That judgment is the subject-matter of an appeal brought by Centrotherm Systemtechnik (Case C-609/11 P).

Legal context

Regulation (EC) No 207/2009

- 4 Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1) codified and repealed Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).
- 5 Recital 10 in the preamble to Regulation No 207/2009 reads:

'There is no justification for protecting Community trade marks or, as against them, any trade mark which has been registered before them, except where the trade marks are actually used.'
- 6 Article 15 of Regulation No 207/2009 provides, under the title 'Use of Community trade marks':

'1. If, within a period of five years following registration, the proprietor has not put the Community trade mark to genuine use in the Community in connection with the goods or services in respect of which it is registered, or if such use has been suspended during an uninterrupted period of five years, the Community trade mark shall be subject to the sanctions provided for in this Regulation, unless there are proper reasons for non-use.

...'
- 7 In section 4, entitled 'Observations by third parties and opposition', under Title IV of Regulation No 207/2009, entitled 'Registration procedure', Article 42 thereof provides, under the title 'Examination of opposition':

'1. In the examination of the opposition [OHIM] shall invite the parties, as often as necessary, to file observations, within a period set them by [OHIM], on communications from the other parties or issued by itself.

2. If the applicant so requests, the proprietor of an earlier Community trade mark who has given notice of opposition shall furnish proof that, during the period of five years preceding the date of publication of the Community trade mark application, the earlier Community trade mark has been put to genuine use in the Community in connection with the goods or services in respect of which it is registered and which he cites as justification for his opposition, or that there are proper reasons for non-use, provided the earlier Community trade mark has at that date been registered for not less than five years. In the absence of proof to this effect, the opposition shall be rejected. ...

...'

- 8 In section 2, entitled 'Grounds for revocation', under Title VI, entitled 'Surrender, revocation and invalidity', of Regulation No 207/2009, Article 51 thereof provides, under the title 'Grounds for revocation':

'1. The rights of the proprietor of the Community trade mark shall be declared to be revoked on application to [OHIM] or on the basis of a counterclaim in infringement proceedings:

- (a) if, within a continuous period of five years, the trade mark has not been put to genuine use in the Community in connection with the goods or services in respect of which it is registered, and there are no proper reasons for non-use; ...

...

2. Where the grounds for revocation of rights exist in respect of only some of the goods or services for which the Community trade mark is registered, the rights of the proprietor shall be declared to be revoked in respect of those goods or services only.'

- 9 In section 5, entitled 'Proceedings in [OHIM] in relation to revocation or invalidity', under Title VI of Regulation No 207/2009, Article 57 thereof, entitled 'Examination of the application', provides:

'1. On the examination of the application for revocation of rights or for a declaration of invalidity, [OHIM] shall invite the parties, as often as necessary, to file observations, within a period to be fixed by [OHIM], on communications from the other parties or issued by itself.

2. If the proprietor of the Community trade mark so requests, the proprietor of an earlier Community trade mark, being a party to the invalidity proceedings, shall furnish proof that, during the period of five years preceding the date of the application for a declaration of invalidity, the earlier Community trade mark has been put to genuine use in the Community in connection with the goods or services in respect of which it is registered and which he cites as justification for his application, or that there are proper reasons for non-use, provided the earlier Community trade mark has at that date been registered for not less than five years. ... In the absence of proof to this effect the application for a declaration of invalidity shall be rejected. ...

...'

- 10 Under section 1, entitled 'General provisions', of Title IX, entitled 'Procedure', of Regulation No 207/2009, Article 76 states, under the title 'Examination of the facts by [OHIM] of its own motion':

'1. In proceedings before it [OHIM] shall examine the facts of its own motion; however, in proceedings relating to relative grounds for refusal of registration, [OHIM] shall be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought.

2. [OHIM] may disregard facts or evidence which are not submitted in due time by the parties concerned.’

11 Article 78(1) of Regulation No 207/2009 provides:

‘In any proceedings before [OHIM], the means of giving or obtaining evidence shall include the following:

...

(f) statements in writing sworn or affirmed or having a similar effect under the law of the State in which the statement is drawn up.’

Regulation (EC) No 2868/95

12 Rule 22(2) to (4) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1), as amended by Commission Regulation (EC) No 1041/2005 of 29 June 2005 (OJ 2005 L 172, p. 4) (‘Regulation No 2868/95’), states:

‘2. Where the opposing party has to furnish proof of use or show that there are proper reasons for non-use, [OHIM] shall invite him to provide the proof required within such period as it shall specify. If the opposing party does not provide such proof before the time limit expires, [OHIM] shall reject the opposition.

3. The indications and evidence for the furnishing of proof of use shall consist of indications concerning the place, time, extent and nature of use of the opposing trade mark for the goods and services in respect of which it is registered and on which the opposition is based, and evidence in support of these indications in accordance with paragraph 4.

4. The evidence shall be filed in accordance with Rules 79 and 79a and shall, in principle, be confined to the submission of supporting documents and items such as packages, labels, price lists, catalogues, invoices, photographs, newspaper advertisements, and statements in writing as referred to in Article [78](1)(f) of [Regulation No 207/2009].’

13 Under Article 40 of Regulation No 2868/95:

‘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 [51](1)(a) of [Regulation No 207/2009], [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*.
6. If the applicant has to furnish proof of use or proof that there are proper reasons for non-use under Article [57](2) or (3) of [Regulation No 207/2009], [OHIM] shall invite the applicant 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 application for declaration of invalidity shall be rejected. Rule 22 (2) (3) and (4) shall apply *mutatis mutandis*.'

Background to the dispute

14 The facts of the dispute were set out as follows by the General Court in paragraphs 1 to 13 of the judgment under appeal:

- '1 On 7 September 1999, [Centrotherm Systemtechnik] filed an application for registration of a Community trade mark at [OHIM] under [Regulation No 40/94].
- 2 The mark for which registration was sought is the word sign CENTROTHERM.
- 3 The goods and services in respect of which registration was sought are in Classes 11, 17, 19 and 42 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 ...
- 4 The mark CENTROTHERM was registered for the goods and services referred to in paragraph 3 above on 19 January 2001 as a Community trade mark.
- 5 On 7 February 2007, [centrotherm Clean Solutions], filed with OHIM, under Articles 15 and 50(1)(a) of Regulation No 40/94 (now Articles 15 and 51(1)(a) of Regulation No 207/2009) an application for revocation of the mark CENTROTHERM for all of the registered goods and services.
- 6 The application for revocation was notified to [Centrotherm Systemtechnik] on 15 February 2007, which was invited to submit any comments and proof of genuine use of the mark at issue within a period of three months.
- 7 In its comments of 11 May 2007, [Centrotherm Systemtechnik] contested the application for revocation and, in order to demonstrate genuine use of its mark, produced the following:
 - 14 digital photographs;
 - 4 invoices;
 - a declaration, headed "eidesstattliche Versicherung" (sworn declaration), made by Mr W., acting in his capacity as manager of [Centrotherm Systemtechnik].
- 8 [Centrotherm Systemtechnik] stated that it was in possession of many other copies of invoices which, at the outset, it would not be submitting, for reasons of confidentiality. Asserting that it could submit other documents, [Centrotherm Systemtechnik] asked the Cancellation Division of OHIM to therefore adopt a procedural measure accordingly in the event that it wished that other evidence and individual documents be added to the file.

- 9 On 30 October 2007, the Cancellation Division revoked the CENTROTHERM mark, finding that the evidence adduced by [Centrotherm Systemtechnik] was insufficient to demonstrate genuine use of that mark.
- 10 On 14 December 2007, [Centrotherm Systemtechnik] filed an appeal against that decision, which the Fourth Board of Appeal upheld in part by decision of 25 August 2009 (“the contested decision”). [Centrotherm Systemtechnik] in particular claimed that the Cancellation Division should have requested other pieces of information. [Centrotherm Systemtechnik] also submitted that the Cancellation Division did not take account of the factors included in the file of another case also pending before OHIM regarding the CENTROTHERM mark.
- 11 The Board of Appeal annulled the decision of the Cancellation Division and dismissed the application for revocation in respect of the goods “exhaust gas pipes for heating installations, chimney flues, boiler pipes (tubes) for heating installations; brackets for gas burners; mechanical parts for heating, mechanical parts for gas installations; faucets for pipes; chimney blowers” in Class 11, “junctions for pipes, pipe sleeves, reinforcing materials for pipes, flexible pipes, all the aforesaid goods not of metal” in Class 17, and “pipes, pipework, in particular for building; branching pipes; chimney shafts” in Class 19. The Board of Appeal dismissed the remainder of the appeal.
- 12 In particular, the Board of Appeal found that evidence of genuine use of the CENTROTHERM mark, in respect of the period of five years preceding submission of the application for revocation, namely 7 February 2007 (“the relevant period”), for the goods mentioned in paragraph 11 above had been adduced, since the photographs submitted by [Centrotherm Systemtechnik] demonstrated the nature of the mark’s use and the invoices produced showed that the goods mentioned had been marketed under the mark at issue.
- 13 However, the Board of Appeal found that [Centrotherm Systemtechnik] had solely provided the statement of its manager by way of evidence in relation to the other goods and services for which the CENTROTHERM mark had been registered (see paragraph 3 above), which, according to the Board of Appeal, was insufficient to show genuine use of the mark. In that regard, the Board of Appeal pointed out that the Cancellation Division was neither obliged to ask for other documents nor to take account of the file of another case also pending before OHIM.’
- 15 The following remarks on the background to the case as outlined by the General Court are in order.
- 16 It is apparent from paragraph 36 of the contested decision that, as regards the additional evidence provided by Centrotherm Systemtechnik before the Board of Appeal, the Board considered that such ‘additional evidence was adduced out of time and cannot be taken into consideration’ as the ‘time-limit referred to in the second sentence of Rule 40(5) of [Regulation No 2868/95] is a limitation period non-compliance with which entails revocation of the trade mark pursuant to the third sentence of Rule 40(5) [of that regulation]’. In paragraph 37 of that decision, the Board of Appeal added in that regard that even though it is free, under Article 76(2) of Regulation No 207/2009, to take account or not of evidence adduced out of time, there were no grounds in that case for it to exercise that discretion in favour of the applicant before it. The Board added that the applicant had put forward only general arguments about the role and value of the trade mark right and had not argued that it was impossible to make out proof of use at first instance.

The judgment under appeal

- 17 By application lodged at the Registry of the General Court on 26 October 2009, Centrotherm Systemtechnik brought an action for annulment of the contested decision in so far as it had upheld the application for revocation of the mark CENTROTHERM.

- 18 In support of that action Centrotherm Systemtechnik relied on three pleas in law, alleging: (i) incorrect assessment of the evidence adduced before the Cancellation Division of OHIM; (ii) infringement of the obligation to examine the facts of its own motion, as required by Article 76(1) of Regulation No 207/2009; and (iii) failure to take account of the evidence adduced before the Board of Appeal, contrary to Article 76(2) of that regulation. Centrotherm Systemtechnik raised, in the alternative, a plea of illegality of Rule 40(5) of Regulation No 2868/95.
- 19 By the judgment under appeal, the General Court dismissed that action.
- 20 In paragraphs 21 to 24 of the judgment under appeal, the General Court began by referring to the objective of the sanction of revocation, the procedural rules and the principles governing evidence in revocation proceedings, as evidenced in particular by Article 51(1)(a) of Regulation No 207/2009 and Rule 40(5) of Regulation No 2868/95.
- 21 Next, in paragraphs 25 to 30 of that judgment, the General Court discussed a number of aspects from the case-law relating to the concept of genuine use and the circumstances in which genuine use can be held to have been demonstrated.
- 22 After stating, in paragraph 31 of the judgment under appeal, that the question whether the Board of Appeal had been right to consider that the evidence adduced by Centrotherm Systemtechnik before the Cancellation Division did not show genuine use of the CENTROTHERM mark for the goods and services other than those referred to in paragraph 11 had to be assessed in the light of the considerations just discussed in paragraphs 21 to 30 therein, the General Court stated the following in paragraphs 32 to 34 of its judgment:
- ‘32 It should be borne in mind that the evidence adduced by the applicant to the Cancellation Division to show genuine use of its mark are the sworn statement of its manager, 4 invoices and 14 digital photographs.
- 33 At the outset, it is important to note that it is settled case-law that, in order to assess the probative value of “statements in writing sworn or affirmed or having a similar effect under the law of the State in which the statement is drawn up” within the meaning of Article 78(1)(f) of Regulation No 207/2009, it is necessary to check the probability and the veracity of the account it contains, by taking account of, inter alia, the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears sound and reliable ...
- 34 It must therefore be considered that, in view of the clear links between the author of the statement and the applicant, a probative value cannot be attributed to that statement unless it is supported by the 14 photographs and the 4 invoices in question.’
- 23 In paragraphs 35 to 43 of the judgment under appeal, the General Court, following on from paragraph 34, proceeded to examine the photographs and invoices submitted by Centrotherm Systemtechnik before the Cancellation Division of OHIM. The General Court observed inter alia the following the paragraphs 36 and 37 of its judgment:
- ‘36 Those invoices show multiple products related to plumbing (pipes, pipe sleeves, sets for connecting boilers, revision elbows, exhaust system covers) were sold by the applicant to four clients for a sum which corresponds, including the invoice from 2007, to less than 0.03% of the turnover which the applicant’s manager declared to have achieved in 2006 with the sale of the goods under the CENTROTHERM mark.

- 37 It follows that, before OHIM, the applicant adduced relatively weak evidence of sales as compared with the sum indicated in the statement of its manager. Consequently, even if the Board of Appeal had taken that statement into account, it should be noted that there was insufficient evidence in the file supporting the statement as regards the value of sales. Moreover, as regards the temporal aspect of the use of the mark, those invoices concern a very short, even selective, period, namely 12, 18 and 21 July 2006 and 9 January 2007.’
- 24 After having examined the invoices and photographs submitted, the General Court concluded as follows in paragraphs 44 and 45 of the judgment under appeal:
- ‘44 It follows from the above that neither the photographs nor the invoices corroborate the statement of the applicant’s manager, in so far as he maintains that the following goods had been marketed under the CENTROTHERM mark during the relevant period: mechanical parts for air-conditioning, steam generating, drying and ventilating installations; air-filter apparatus and parts therefor; seals, packing materials; packing, stopping and insulating materials; semi-processed plastics in extruded form for use in manufacture; building materials; reinforcing materials for building purposes; wall linings, building panels, panels; lengthening pieces for chimneys, chimney cowl, chimney pots and mantelpieces.
- 45 Accordingly, it must be held that an overall assessment of the evidence in the file does not allow the conclusion, without resorting to probabilities or presumptions, that the CENTROTHERM mark was the subject of genuine use during the relevant period for the goods and services other than those referred to at paragraph 11 above.’
- 25 The second plea was rejected by the General Court on the following grounds, set out in paragraphs 53 to 55 of the judgment under appeal:
- ‘53 According to Article 51(1) of Regulation No 207/2009, the rights of the proprietor of the Community trade mark are to be declared to be revoked if, within a continuous period of five years, it was not put to genuine use (Article 51(1)(a) of Regulation No 207/2009), if, in consequence of acts or inactivity of the proprietor, the trade mark has become the common name in the trade for a product or service in respect of which it is registered (Article 51(1)(b) of Regulation No 207/2009) or if, in consequence of the use made of it by the proprietor of the trade mark or with his consent, the trade mark is liable to mislead the public (Article 51(1)(c) of Regulation No 207/2009).
- 54 Although the last two conditions relate to absolute grounds for refusal, as is apparent from Article 7(1)(b) to (d) and (g) of Regulation No 207/2009, the first condition relates to a provision falling within the examination of relative grounds for refusal, namely Article 42(2) of Regulation No 207/2009. Consequently, it must be concluded that OHIM’s examination of the question of genuine use of the Community trade mark in revocation proceedings is subject to Article 76(1), *in fine*, of Regulation No 207/2009, which provide that that examination is limited to facts provided by the parties.
- 55 Accordingly, the applicant’s premiss, according to which OHIM erred in limiting its examination to evidence which it submitted, is incorrect.’
- 26 The third plea was rejected by the General Court, which gave the following reasons:
- ‘61 Firstly, it should be recalled that OHIM’s examination of the question of genuine use of the Community trade mark is, as noted in paragraphs 51 to 54 above, subject to the application of Article 76(1), *in fine*, of Regulation No 207/2009. That provision provides that the examination by OHIM shall be restricted to the facts provided by the parties. It follows that the applicant’s contention that OHIM was obliged to complete its file of its own motion must be rejected.

- 62 Secondly, the possibility for parties to proceedings before OHIM to submit facts and evidence after the expiry of the periods specified for that purpose does not exist unconditionally, but, as follows from case-law, is subject to the condition that there is no provision to the contrary. It is only if that condition is met that OHIM has a degree of latitude as regards the taking into account of facts and evidence submitted out of time ...
- 63 In the present case, there is a provision which precludes the taking into account of the material submitted to the Board of Appeal, namely Rule 40(5) of Regulation No 2868/95.'
- 27 Lastly, regarding the objection of illegality of Rule 40(5) of Regulation No 2868/95, the General Court held *inter alia* as follows in paragraphs 67 to 70 of the judgment under appeal:
- '67 The General Court finds that, although it is true that the rules of Regulation No 2868/95 cannot contradict the provisions and scheme of Regulation No 207/2009, there is no inconsistency to be found between Rule 40(5) of Regulation No 2868/95 and the provisions on revocation in Regulation No 207/2009.
- 68 Although Regulation No 207/2009 lays down the substantive rule, namely revocation for Community trade marks which have not been put to genuine use, Regulation No 2868/95 specifies the applicable procedural rules, in particular allocation of the burden of proof and the consequences of failure to meet the time limits imposed. Moreover, as already noted ..., it is apparent from the scheme of Regulation No 207/2009 that, as regards the application for revocation for lack of genuine use, the extent and intensity of OHIM's examination are constrained by the facts, evidence and arguments provided by the parties.
- ...
- 70 As regards the alleged breach of the principle of proportionality, it should be noted that non-compliance, without just grounds, with time limits, which are of fundamental importance to the proper functioning of a Community system, may be penalised in Community legislation by forfeiture of a right, without it being inconsistent with that principle of proportionality ...'

Forms of order sought by the parties before the Court of Justice

- 28 By its appeal, Centrotherm Systemtechnik asks the Court to set aside the judgment under appeal, to uphold its action at first instance and to order OHIM and centrotherm Clean Solutions to pay the costs.
- 29 OHIM contends that the appeal should be dismissed or, in the alternative, that the action at first instance should be dismissed, and that Centrotherm Systemtechnik should be ordered to pay the costs.
- 30 centrotherm Clean Solutions contends that the appeal should be dismissed and that Centrotherm Systemtechnik should be ordered to pay the costs.

The appeal

- 31 Centrotherm Systemtechnik relies on four grounds in support of its appeal.

Preliminary remarks

- 32 It will be apparent from the discussion of the background to the case set out in paragraph 14 of this judgment that, although the revocation proceedings in question were brought pursuant to Regulation No 40/94, the contested decision was delivered by the Board of Appeal of OHIM after Regulation No 207/2009 entered into force.
- 33 However, since the latter regulation merely codified Regulation No 40/94 and the relevant provisions thereof did not undergo any amendment in the course of that codification, references will be made only to Regulation No 207/2009 in the discussion below.

Consideration of the first ground of appeal: infringement of Article 51(1)(a) of Regulation No 207/2009

Arguments of the parties

- 34 By its first ground of appeal, Centrotherm Systemtechnik submits that, in stating in paragraph 34 of the judgment under appeal that a probative value cannot be attributed to a sworn statement such as that referred to in Article 78(1)(f) of Regulation No 207/2009 unless it is supported by the other evidence produced, the General Court misinterpreted the probative value attaching to such statements, to the point of depriving them of any independent probative weight. Moreover, in failing to take account of the fact that, in this case, the content of the statement at issue was not disputed by the other parties, the General Court infringed the rule that genuine use must be appraised from an overall standpoint, taking into account all the relevant factors of the case.
- 35 That disregard of the probative value attaching to sworn statements led the General Court to conclude, contrary to Article 51(1)(a) of Regulation No 207/2009, that proof of genuine use of the mark at issue had not been made out.
- 36 OHIM and centrotherm Clean Solutions submit that it is apparent from paragraph 34 of the judgment under appeal that the General Court did not state as a matter of general principle that sworn statements may not have any probative value. Rather, it examined the statement in question and found, at the end of an assessment which may not be reviewed on appeal that, in the case before it, additional evidence was necessary, given the links between the author of the statement in question and Centrotherm Systemtechnik.

Findings of the Court

- 37 It is clear that paragraph 34 of the judgment under appeal, which must be read inter alia in the light of the preceding and subsequent paragraphs, does not have the scope that Centrotherm Systemtechnik – incorrectly – seeks to attach to it.
- 38 First of all, in paragraph 32 of the judgment under appeal, the General Court considered both the sworn statement of Centrotherm Systemtechnik's manager and the invoices and photographs produced to be 'evidence adduced by the applicant'.
- 39 Next, contrary to Centrotherm Systemtechnik's assertions, the General Court did not rule out the possibility that a sworn statement might have probative value. On the contrary, in paragraph 33 it stated that, in order to assess a sworn statement's probative value, it is necessary to check the probability and the veracity of the account it contains, by taking account of, inter alia, the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears sound and reliable.

- 40 It was only then, and after conducting a specific examination of the statement at issue in the present case, that the General Court held, in paragraph 34, that in view of the clear links between the author of the statement and the applicant, a probative value could not be attributed to that statement unless it was supported by the 14 photographs and the 4 invoices submitted in evidence.
- 41 Thus, inter alia in paragraphs 36 and 37 of the judgment under appeal, the General Court, without in any way indicating thereby that Centrotherm Systemtechnik ought to have submitted invoices supporting the full amount of the turnover alleged in the sworn statement at issue, instead emphasised the vast difference between reports of annual turnover figures allegedly achieved by Centrotherm Systemtechnik between 2002 and 2006 contained in that sworn statement and the relatively minimal and limited sales volumes for a very short, even selective, period, as indicated in the invoices actually produced by Centrotherm Systemtechnik
- 42 After the detailed examination in paragraphs 35 to 43 of the judgment under appeal of the invoices and photographs produced, the General Court found in paragraph 44 that in the case before it those photographs and invoices did not corroborate the manager's statement that the goods referred to in that paragraph had been marketed under the mark at issue.
- 43 Thus, the General Court did not err in law in finding, in paragraph 45 of its judgment, that an overall assessment of the evidence in the file – thereby including the sworn statement in question – did not, in the circumstances, allow the conclusion, without resorting to probabilities or presumptions, that the mark at issue was the subject of genuine use during the relevant period for the goods and services involved in the case before it.
- 44 It should, moreover, be borne in mind that the assessment of the facts and evidence and, in particular, the probative weight to be given to the sworn statement produced by Centrotherm Systemtechnik, conducted by the General Court for that purpose, comes within the scope of the facts of the case (see, to that effect, Case C-234/06 P *Il Ponte Finanziaria v OHIM* [2007] ECR I-7333, paragraph 75) and, save where they are distorted, are accordingly not a question of law which is subject to review by the Court of Justice on appeal.
- 45 Lastly, as regards the fact that the content of that statement was not specifically challenged by the applicant in the revocation proceedings before OHIM, suffice it to note that it could not in any way prevent the General Court from making the required assessment of the facts and evidence in order to ascertain whether proof of genuine use of the earlier mark had been made out before OHIM and, consequently, to rule on the dispute before it.
- 46 It follows from all the foregoing considerations that the first ground of appeal must be dismissed.

Consideration of the second ground of appeal and the first part of the third ground of appeal: infringement of Articles 51(1)(a) and 76(1) of Regulation No 207/2009

Arguments of the parties

- 47 By its second ground of appeal, Centrotherm Systemtechnik submits that, contrary to the ruling of the General Court in paragraphs 54 and 55 of the judgment under appeal, the rule that OHIM is to assess the facts of its own motion, laid down in Article 76(1) of Regulation No 207/2009, applies in the context of revocation proceedings. Since an application for revocation may be lodged by any party wishing to do so, the proceedings are not covered by the exception provided for in that provision, which concerns proceedings relating to relative grounds for refusing to register a mark.

- 48 By the first part of the third ground of appeal, Centrotherm Systemtechnik further argues that, contrary to what the General Court held in the judgment under appeal, in revocation proceedings the burden of proving genuine use does not rest with the trade mark proprietor.
- 49 Whilst Articles 42(2) and 57(2) of Regulation No 207/2009 provide that the proprietor of the earlier mark must furnish proof of genuine use of that mark, failing which his application for a declaration of invalidity must be rejected, Article 51 of that regulation contains no similar specifications for revocation proceedings. In those circumstances, Rule 40(5) of Regulation No 2868/95 requiring the trade mark proprietor to prove genuine use disregards Regulation No 207/2009. It follows that the Board of Appeal is required to take account of all evidence adduced before it as part of its obligation to examine the facts of its own motion under Article 76(1) of Regulation No 207/2009.
- 50 In OHIM's submission, given the inter partes and sui generis nature of revocation proceedings, which are not proceedings relating to absolute or relative grounds for refusing to register a trade mark, the principle that OHIM is to examine the facts of its own motion is not applicable and it is for the proprietor of the mark, who is in possession of the requisite evidence for that purpose, to prove that he made genuine use of that mark.
- 51 centrotherm Clean Solutions adds that Article 76(1) of Regulation No 207/2009 does not apply to revocation proceedings. Rule 40(5) of Regulation No 2868/95, however, determines the detailed procedural rules applicable to revocation proceedings, by providing expressly that the proprietor of the mark must furnish proof of genuine use of that mark.

Findings of the Court

- 52 By its second ground of appeal and by the first part of its third ground of appeal, which should be dealt with together, Centrotherm Systemtechnik submits, in essence, that in revocation proceedings OHIM is not called on to examine evidence of genuine use of the earlier mark, but rather that the burden of proving genuine use rests solely with the proprietor of that mark and that, in failing to sanction the Board of Appeal for not having taken into account all of the evidence in its possession, the General Court disregarded Articles 51(1)(a) and 76(1) of Regulation No 207/2009.
- 53 In that regard it should be borne in mind, first of all, that, as is apparent from Article 15 of Regulation No 207/2009, if, within a period of five years following registration, the proprietor of a Community mark has not put it to genuine use in the European Union, the trade mark is to be subject to the sanctions provided for in that regulation, including in particular revocation of the trade mark rights.
- 54 Recital 10 in the preamble to that regulation makes it clear that the European Union legislature intended to make the preservation of the rights connected to the trade mark conditional upon it actually being used. A Community trade mark which is not used could obstruct competition by limiting the range of signs which can be registered as trade marks by others and by denying competitors the opportunity to use that trade mark or a similar one when putting onto the internal market goods or services which are identical or similar to those covered by the mark in question (see Case C-149/11 *Leno Marken* [2012] ECR, paragraph 32).
- 55 Secondly, Articles 42(2) and 57(2) of Regulation No 207/2009 state specifically that it is for the proprietor of the mark to furnish proof of genuine use or proper reasons for non-use, failing which the application for a declaration of invalidity is to be rejected.

- 56 In that regard the fact that, unlike Articles 42(2) and 57(2) of Regulation No 207/2009, Article 51(1) of that regulation does not specify that it is for the proprietor to furnish proof of genuine use or of the presence of proper reasons for non-use cannot, contrary to Centrotherm Systemtechnik's assertions, be interpreted as meaning that the European Union legislature intended that the principle of the burden of proof should not apply in revocation proceedings.
- 57 The absence of specific provision regarding the burden of proof in Article 51(1) of Regulation No 207/2009 can, moreover, be explained easily given that the purpose of Article 51(1), entitled 'Grounds for revocation', is to set out the grounds for revocation of the mark, which does not require specific provision to be made regarding the issue of the burden of proof.
- 58 Articles 42 and 57 of that regulation, by contrast, are essentially procedural provisions. Moreover, the specific purpose of paragraph (2) of each of those articles is to lay down the framework for when a procedural issue is raised by a defendant wishing to question the right of the applicant to bring the proceedings he has initiated.
- 59 It is because of that procedural context, which is specific to opposition and invalidity proceedings and which the European Union legislature has laid down in order to settle such procedural issues – that must be resolved prior to the main proceedings of which they are a part – that the proof that the earlier mark has been put to genuine use must be made out by the proprietor of the mark and that, in the absence of such proof, the opposition or invalidity proceedings are to be dismissed.
- 60 By contrast, the fact that any procedural issue of this nature by definition cannot arise in the context of revocation proceedings readily justifies the situation that, although Article 57 of Regulation No 207/2009 concerns both revocation proceedings and invalidity proceedings, a provision such as Article 57(2) is restricted to invalidity proceedings.
- 61 Thirdly, it is clear that the principle reflected in Articles 42(2) and 57(2) of Regulation No 207/2009, under which it is for the proprietor of the earlier mark to prove genuine use of that mark, is in reality merely an application of common sense and requirements of procedural efficacy.
- 62 It is common ground that the proprietor is the best placed – and in some cases the only party able – to furnish specific proof in support of the assertion that he has made genuine use of his mark or set out the proper reasons for non-use of the mark. This includes inter alia evidence establishing such use, of which Rule 22(4) of Regulation No 2868/95 provides a list of examples, such as packages, labels, price lists, catalogues, invoices, photographs or newspaper advertisements.
- 63 Thus, it may be inferred from a combined reading of Articles 15, 42(2), 51(1) and 57(2) of Regulation No 207/2009 that, in proceedings for revocation of a mark, it is for the proprietor of the mark, and not OHIM of its own motion, to establish genuine use of that mark.
- 64 Similarly, the conclusion in that regard must be that since Rule 40(5) of Regulation No 2868/95 provides that proof of genuine use must be made out by the proprietor of the mark, that rule merely specifies a principle relating to the burden of proof which, far from disregarding Regulation No 207/2009, on the contrary derives from the provisions and scheme of that regulation.
- 65 In those circumstances, the rule that OHIM is to examine facts of its own motion, as laid down in Article 76(1) of Regulation No 207/2009, does not apply to the question of proof of genuine use of the mark in revocation proceedings brought before OHIM.

- 66 It follows inter alia from the foregoing that, although the reasoning and grounds set out in paragraphs 53 and 54 of the judgment under appeal are incorrect, the conclusion reached by the General Court in paragraph 55 of its judgment, namely that Article 76(1) of Regulation No 207/2009 does not oblige OHIM to examine of its own motion facts tending to establish genuine use of the mark revocation of which is sought before it, is well founded in law.
- 67 Since the General Court's judgment is thus well founded on legal grounds other than those it actually used, the judgment cannot be set aside on the basis of its dismissal of the plea alleging infringement of Article 76(1) of Regulation No 207/2009, as contained in paragraph 56 of the judgment under appeal.
- 68 Moreover, as is clear from the foregoing, the General Court did not err in law in finding in the judgment under appeal that the burden of proof of genuine use of the mark in the context of revocation proceedings rests with the proprietor of the mark.
- 69 In view of the foregoing considerations, the second ground of appeal and the first part of the third ground of appeal must be rejected.

Consideration of the second part of the third ground of appeal: infringement of Articles 51(1)(a) and 76(2) of Regulation No 207/2009

Arguments of the parties

- 70 By the second part of the third ground of appeal, Centrotherm Systemtechnik submits that, in holding in paragraphs 62 and 63 of the judgment under appeal that the Board of Appeal did not have discretion as regards the taking into account of facts and evidence of proof of use of the mark at issue submitted to it out of time, the General Court disregarded Article 76(2) of Regulation No 207/2009.
- 71 Whilst observing that it is apparent from paragraph 42 of the judgment in Case C-29/05 P *OHIM v Kaul* [2007] ECR I-2213 that the discretion conferred on OHIM by that provision for the purpose of taking into account evidence submitted out of time is present only 'unless otherwise specified', Centrotherm Systemtechnik submits that the General Court found, incorrectly, that Rule 40(5) of Regulation No 2868/95 did specify otherwise.
- 72 OHIM contends that, given the presumption of legality of European Union legislation, the Board of Appeal had no other choice on the date when it delivered the contested decision than to take account of the fact that Rule 40(5) prevented it from taking into account evidence submitted after expiry of the limitation period allowed under that provision, as held by the General Court.
- 73 OHIM adds in that regard, however, that the General Court's case-law has evolved since the judgment under appeal was delivered. The General Court held, inter alia, in paragraph 31 of its judgment of 29 September 2009 in Case T-415/09 *New Yorker SHK Jeans v OHIM – Vallis K. – Vallis A. (FISHBONE)* that, notwithstanding Rule 22(2) of Regulation No 2868/95, the possibility must remain open for the Board of Appeal to take into account evidence of genuine use of the mark submitted after expiry of the time limit granted by OHIM under that provision, in keeping with Article 76(2) of Regulation No 207/2009, at the very least when that evidence merely completes the evidence submitted by the time limit and the party concerned did not in any way employ delaying tactics or demonstrate manifest negligence.
- 74 Endorsing that interpretation, OHIM considers that the same approach should be adopted with respect to Rule 40(5) of Regulation No 2868/95.

75 In centrotherm Clean Solutions' submission, the General Court was correct to hold that the latter provision, which introduces a derogation from Article 76(2) of Regulation No 207/2009, has the effect of not allowing the Board of Appeal to take account of evidence of proof of use of the mark submitted to it out of time.

Findings of the Court

76 It should be borne in mind that Article 74(2) of Regulation No 207/2009 provides that OHIM may disregard facts or evidence which are not submitted in due time by the parties.

77 According to the case-law of the Court of Justice, it results from the wording of that provision that, as a general rule and unless otherwise specified, the submission of facts and evidence by the parties remains possible after the expiry of the periods to which such submission is subject under the provisions of Regulation No 207/2009 and that OHIM is in no way prohibited from taking account of facts and evidence which are submitted or produced late (*OHIM v Kaul*, paragraph 42).

78 In stating that OHIM 'may' decide to disregard such facts and evidence, Article 76(2) of Regulation No 207/2009 grants OHIM a wide discretion to decide, while giving reasons for its decision in that regard, whether or not to take such information into account (*OHIM v Kaul*, paragraph 43).

79 Regarding more specifically the submission of evidence of genuine use of the mark in the context of revocation proceedings brought on the basis of Article 51(1)(a) of Regulation No 207/2009, it should be noted, first of all, that that regulation does not contain any provisions specifying the time period in which such evidence must be adduced.

80 By contrast, Rule 40(5) of Regulation No 2868/95 provides in that regard that OHIM is to invite the proprietor of the Community trade mark to furnish proof of genuine use of the mark within such period as it may specify.

81 In the present case, the Cancellation Division of OHIM applied that provision and gave Centrotherm Systemtechnik a period in which to furnish such proof. It is, moreover, common ground that Centrotherm Systemtechnik adduced various pieces of evidence of use of the mark at issue within that time.

82 Next, it should be borne in mind that Rule 40(5) further states, in the second sentence, that if the proof of use of the mark is not provided within the time limit set by OHIM, it is to be revoked.

83 Thus, as evidenced by paragraphs 62 and 63 of the judgment under appeal, the General Court interpreted that second sentence as meaning that the time period thus set by OHIM is, in any event, a limitation period upon the expiry of which no further evidence may be adduced. The General Court thus found that, if evidence of use of the mark was indeed adduced within the period set, no additional evidence could be submitted after the expiry of that time limit, with the result that OHIM is required to revoke the mark if the evidence initially adduced is insufficient to make out proof of the genuineness of that use.

84 The interpretation endorsed by the General Court led it to conclude that the second sentence of Rule 40(5) of Regulation No 2868/95 constitutes, for the purposes of the case-law referred to in paragraph 77 above, a provision contrary to Article 76(2) of Regulation No 207/2009, with the consequence that the Board of Appeal was not free to take into account the additional evidence of use of the mark adduced by Centrotherm Systemtechnik in support of the action brought before it.

85 In so doing, the General Court endorsed an incorrect interpretation of Rule 40(5) of Regulation No 2868/95.

- 86 In that regard, although it does follow from the wording of that provision that, where no proof of the use of the mark in question is produced within the time period set by OHIM, it must, as a rule, revoke the mark of its own motion, this is not required where evidence of that use is produced within that time.
- 87 In that case, unless it emerges that that evidence is entirely irrelevant for the purpose of establishing genuine use of the mark, the proceedings must take their course. OHIM must inter alia, as provided for by Article 57(1) of Regulation No 207/2009, invite the parties, as often as necessary, to file observations on communications from the other parties or issued by OHIM itself. Should those proceedings subsequently lead to revocation of the mark, it will not be as a result of the application of Rule 40(5) of Regulation No 2868/95, which is an essentially procedural provision, but solely of the application of the substantive provisions in Articles 51(1) and 57 of Regulation No 207/2009.
- 88 It follows inter alia from the foregoing that, as observed in paragraph 77 above, it remains possible to submit evidence of use of the mark in addition to the evidence adduced within the time period set by OHIM under Rule 40(5) of Regulation No 2868/95 after expiry of that time limit and that OHIM is in no way prohibited from taking account of additional evidence which is submitted after that time.
- 89 Furthermore, as observed in paragraph 81 of this judgment, it is common ground that, in the present case, Centrotherm Systemtechnik had adduced various pieces of evidence to prove use of the mark at issue within the time set by OHIM. It is also common ground that the evidence initially adduced was not entirely irrelevant for that purpose, since inter alia it led the Board of Appeal to dismiss the application for revocation in part on the ground that genuine use had been established for a certain number of goods.
- 90 In those circumstances, the General Court did err in law in holding, in paragraphs 62 and 63 of the judgment under appeal, that Rule 40(5) of Regulation No 2868/95 prevented the Board of Appeal from exercising the discretion conferred on it by Article 76(2) of Regulation No 207/2009 in order to take into account any additional evidence submitted to it.
- 91 It follows that the second part of the third ground of appeal must be upheld and that, consequently, the judgment under appeal must be set aside.

Consideration of the fourth ground of appeal: inapplicability of Rule 40(5) of Regulation No 2868/95

Arguments of the parties

- 92 By its fourth ground of appeal, Centrotherm Systemtechnik submits that the General Court erred in law in failing to hold that Rule 40(5) of Regulation No 2868/95 was inapplicable to the present case.
- 93 First of all, and for the same reasons as set out in support of the first part of the third ground of appeal, that rule disregards Regulation No 207/2009 in placing the burden of proof of genuine use of the mark with the proprietor of that mark.
- 94 Secondly, a strict application of that rule infringes the principle of proportionality. The purpose of the rule, which is to ensure procedural efficacy, must be weighed up against the heavy, definitive judicial consequences of revocation of a mark.
- 95 centrotherm Clean Solutions submits that neither OHIM nor the General Court may refrain from applying Rule 40(5) of Regulation No 2868/95, as the principle of legality entails the obligation to acknowledge that regulations are fully effective so long as they have not been declared to be invalid by a competent court in proceedings provided for that purpose.

Findings of the Court

- 96 The appellant's line of argument in respect of the first part of this ground of appeal, alleging infringement of Regulation No 207/2009, must be rejected on the same grounds as those which resulted in this Court's rejecting the first part of the third ground of appeal.
- 97 As regards the second part of this ground of appeal, alleging the disproportionality of a revocation under Rule 40(5) of Regulation No 2868/95, as in the present case, suffice it to observe that the line of argument developed by Centrotherm Systemtechnik is based on an incorrect premiss as to the scope of that rule.
- 98 As evidenced by paragraphs 85 to 87 above and contrary to what the Board of Appeal found in the contested decision and the General Court held in the judgment under appeal, there may be revocation under that provision only when no proof of the use of the mark at issue is produced within the time period set by OHIM, or it emerges that that evidence is entirely irrelevant for the purpose of establishing genuine use of the mark.
- 99 That is not the situation in the present case, however, since, as is apparent from the examination of the second part of the third ground of appeal, the submission of evidence of use of the mark by Centrotherm Systemtechnik within the time period set by OHIM automatically precluded any revocation under the second sentence of Rule 40(5) of Regulation No 2868/95 and precluded the Board of Appeal from finding, as it did incorrectly in the contested decision, that it had no discretion to take into account additional evidence submitted subsequently.
- 100 It follows from the foregoing considerations that the fourth ground of appeal must be dismissed.

The action at first instance

- 101 According to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the latter may, where the decision of the General Court has been annulled, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.
- 102 The Court considers that the state of the proceedings does so permit and that, accordingly, it may give final judgment in the matter.
- 103 It should be remembered that, by its action at first instance, Centrotherm Systemtechnik is seeking partial annulment of the contested decision in so far as it upholds the application for revocation of the mark at issue. That action is thus directed against point 2 of the operative part of that decision, by which the Board of Appeal partially dismissed Centrotherm Systemtechnik's action for annulment of the decision of 30 October 2007 of the Cancellation Division of OHIM.

Arguments of the parties

- 104 In support of its action brought before the General Court, Centrotherm Systemtechnik submits that, contrary to what the Board of Appeal found, incorrectly, in paragraph 36 of the contested decision, the Board did have discretion under Article 76(2) of Regulation No 207/2009 to take into account additional evidence submitted by Centrotherm Systemtechnik in support of its action before the Board.

- 105 As that evidence was intended to complement evidence submitted in due time, it should have been taken into account by the Board of Appeal, in keeping with the guidance from *OHIM v Kaul*. In Centrotherm Systemtechnik's submission, this should have resulted in particular from the obvious relevance of that additional evidence for the outcome of the proceedings, the continuity in terms of their functions between the Board of Appeal and the Cancellation Division of OHIM, the absence of major procedural drawbacks weighing against that evidence being taken into account and, lastly, the need to ensure that a balance is struck between the need for proper conduct of the proceedings and a just substantive result, as the consequences of the outcome of the proceedings are liable to be as significant as those of revocation of the mark.
- 106 OHIM and centrotherm Clean Solutions contend that this ground of annulment should be rejected. In their submission, Rule 40(5) of Regulation No 2868/95 rules out the possibility of any disputed additional evidence being taken into account by the Board of Appeal in the present case. Even if the Board of Appeal did have discretion under Article 76(2) of Regulation No 207/2009 to take that additional evidence into account, it in fact made use of that power in stating, in paragraph 37 of the contested decision, what the outcome would have been of using that power if it had in fact made use of it, which it did not do in that case.

Findings of the Court

- 107 It is apparent from paragraph 36 of the contested decision that the Board of Appeal considered that the additional evidence submitted to it by Centrotherm Systemtechnik could not be taken into account by it by virtue of the discretion generally conferred on OHIM by Article 76(2) of Regulation No 207/2009, given that that evidence was submitted after expiry of the time limit referred to in the second sentence of Rule 40(5) of Regulation No 2868/95, which constitutes a limitation period non-compliance with which automatically entails revocation of the mark.
- 108 Furthermore, it follows from paragraphs 85 to 90 of this judgment that such an assessment is based on an incorrect interpretation of Rule 40(5) and disregards Article 76(2) of Regulation No 207/2009.
- 109 Moreover, and contrary to the assertions of OHIM and centrotherm Clean Solutions, the defect thus vitiating the contested decision cannot be remedied by the mere fact that the Board of Appeal subsequently stated in paragraph 37 of that decision that, even if it may assess freely the relevance of taking into account evidence submitted out of time, there were no grounds for it to have exercised that discretion in favour of the applicant before it, who had put forward only general arguments about the role and value of the trade mark, without arguing that it had been impossible to adduce evidence of use of the mark at first instance.
- 110 Such general, categorical assertions do not in any way establish that the Board of Appeal effectively exercised the discretion conferred on it by Article 76(2) of Regulation No 207/2009, in order to decide, in giving proper reasons and taking account of all relevant facts, whether or not to take into account the additional evidence submitted to it in order to make the decision it is called upon to give (see, to that effect, *OHIM v Kaul*, paragraphs 43 and 68).
- 111 It must be emphasised at the outset that any taking into account by OHIM of that additional evidence is in no way a 'favour' granted to one party or the other, but rather must result from an objective, reasoned exercise of the discretion conferred on OHIM by Article 76(2).
- 112 It should also be borne in mind that the statement of reasons thus required is all the more necessary when OHIM decides to reject the evidence submitted out of time.

- 113 The Court has held *inter alia* that where OHIM is called upon to give a decision in opposition proceedings, taking facts or evidence submitted out of time into account is particularly likely to be justified where OHIM considers, first, that the material which has been produced late is, on the face of it, likely to be relevant to the outcome of the opposition brought before it and, second, that the stage of the proceedings at which that late submission takes place and the circumstances surrounding it do not argue against such matters being taken into account (*OHIM v Kaul*, paragraph 44).
- 114 Similarly and *mutatis mutandis*, such considerations are particularly likely to justify OHIM's taking into account, when it is called upon to rule on an application for revocation, evidence of use of the mark which, although not submitted within the time limit set under Rule 40(5) of Regulation No 2868/95, is submitted at a later stage of the proceedings by way of complement to the evidence submitted within that time limit.
- 115 In the present case, relevant circumstances liable to be taken into consideration include the fact that the revocation decision of the Cancellation Division of OHIM was given after initial evidence had been submitted – within the time set by the Cancellation Division – of use of the mark at issue, accompanied by remarks expressing reservations as to confidentiality and containing an offer to furnish additional evidence.
- 116 Yet it does not seem that the Board of Appeal conducted a proper examination of these aspects, or of any other potentially relevant evidence. Nor does it seem to have considered the potential relevance of the additional evidence submitted by Centrotherm Systemtechnik.
- 117 Moreover, contrary to what is suggested in paragraph 37 of the contested decision, it is not necessary that the party concerned be unable to submit evidence within the time limit in order for additional evidence of use of the mark submitted after expiry of the time limit referred to in Rule 40(5) of Regulation No 2868/95 to be taken into account.
- 118 It follows from the foregoing considerations that the contested decision must be annulled in so far as the Fourth of Board of Appeal of OHIM thereby dismissed Centrotherm Systemtechnik's action brought against the decision of the Cancellation Division.
- 119 It is for the Board of Appeal to assess, *inter alia* in keeping with the guidance provided in this judgment and in taking due account of all relevant circumstances and providing reasons for that aspect of its decision, whether or not account must be taken of the additional evidence submitted to it by Centrotherm Systemtechnik, in order to make the decision it is called upon to give in the action which is still pending before it.

Costs

- 120 Under Article 184(2) of the Rules of Procedure of the Court, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs.
- 121 Under Article 138(3) of those rules, applicable to the procedure on appeal pursuant to Article 184(1) thereof, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.
- 122 In the present case, whilst Centrotherm Systemtechnik has been successful with one of its grounds of appeal and that point of the judgment under appeal has been set aside, the other grounds of appeal have been rejected by the Court.

¹²³ Moreover, it should be noted with respect to the action at first instance that, in annulling the contested decision in part, this Court has also upheld one of Centrotherm Systemtechnik's grounds of appeal. However, it is apparent from the judgment under appeal that Centrotherm Systemtechnik was unsuccessful with the other pleas it put forward at first instance; this Court has not overruled those points of that judgment.

¹²⁴ In those circumstances, and since the parties have each been partially unsuccessful in their submissions, both at first instance and on appeal, they must each be ordered to bear their own costs.

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

- 1. Sets aside the judgment of the General Court of the European Union of 15 September 2011 in Case T-434/09 *Centrotherm Systemtechnik v OHIM – centrotherm Clean Solutions (CENTROTHERM)*;**
- 2. Annuls point 2 of the operative part of the decision of the Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 25 August 2009 (Case R 6/2008-4);**
- 3. Orders Centrotherm Systemtechnik GmbH, the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) and centrotherm Clean Solutions GmbH & Co. KG to bear their own costs at first instance and on appeal.**

[Signatures]