

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

19 June 2014 (*)

(Community trade mark — Opposition proceedings — Application for the Community figurative mark Nobel — Earlier national word mark NOBEL — Relative ground for refusal — Likelihood of confusion — Article 8(1)(b) of Regulation (EC) No 207/2009)

In Case T-382/12,

Kampol sp. z o.o., established in Świdnica (Poland), represented by J. Kępiński, lawyer,
applicant,

v

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

defendant,

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

Colmol — Colchões, SA, established in Oliveira de Azeméis (Portugal),

ACTION brought against the decision of the Fourth Board of Appeal of OHIM of 21 June 2012 (Case R 2286/2011-4), relating to opposition proceedings between Colmol — Colchões, SA and Kampol-K. Humiński & syn sp. z o.o.,

THE GENERAL COURT (Fifth Chamber),

composed of A. Dittrich (Rapporteur), President, J. Schwarcz and V. Tomljenović, Judges,

Registrar: J. Weychert, Administrator,

having regard to the application lodged at the Court Registry on 24 August 2012,

having regard to the response lodged at the Court Registry on 11 December 2012,

having regard to the reply lodged at the Court Registry on 8 March 2013,

having regard to the rejoinder lodged at the Court Registry on 26 April 2013,

having regard to the change in the composition of the Chambers of the Court,

further to the hearing on 5 March 2014,

gives the following

Judgment

Background to the dispute

1 On 5 May 2010, the applicant, Kampol sp. z o.o., formerly Kampol-K. Humiński & syn sp. z o.o., 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 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

2 The mark in respect of which registration was sought ('the mark applied for') is the following figurative sign:



3 The goods in respect of which registration was sought are in Classes 10 and 24 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, inter alia, to the following description:

- Class 10: ‘Cushions for medical purposes, blankets and quilts for medical purposes’;
- Class 24: ‘Woollen blankets, quilts, bed covers, pillowcases and mattress covers, duvets’.

4 The Community trade mark application was published in Community Trade Marks Bulletin No 163/2010 of 1 September 2010.

5 On 29 November 2010, Colmol — Colchões SA (‘Colmol’) filed a notice of opposition, pursuant to Article 41 of Regulation No 207/2009, against registration of the mark applied for in respect of the goods referred to in paragraph 3 above.

6 The opposition was based on the earlier Portuguese word mark No 373184 NOBEL, filed on 20 June 2003 and registered on 26 March 2007, designating goods in Class 20 corresponding to the following description: ‘Mattresses’ (the ‘Portuguese mark’).

7 The grounds relied on in support of the opposition were those set out in Article 8(1)(a) and (b) of Regulation No 207/2009.

8 On 7 September 2011, the Opposition Division upheld the opposition on the basis of Article 8(1)(b) of Regulation No 207/2009.

9 On 5 November 2011, the applicant filed a notice of appeal with OHIM, under Articles 58 to 64 of Regulation No 207/2009, against the decision of the Opposition Division.

10 By decision of 21 June 2012 (‘the contested decision’), the Fourth Board of Appeal of OHIM dismissed the appeal. In particular, it found that there was a likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 207/2009, between the marks at issue in respect of the goods in question.

11 The Board of Appeal found inter alia that the goods at issue were complementary to each other and were similar to an average degree.

12 Furthermore, the Board of Appeal found that the marks were visually highly similar, that they were phonetically identical and that, conceptually, the comparison of the signs was neutral.

13 Lastly, the Board of Appeal concluded that it was likely that the public would confuse the commercial origin of the goods in question when labelled with the marks at issue.

Forms of order sought

14 The applicant claims that the Court should:

- annul the contested decision;
- reject the opposition in its entirety;
- order OHIM to register the mark applied for;
- order OHIM to pay the costs;
- in the alternative, refer the case back to the Fourth Board of Appeal for it to be heard once again, in accordance with the binding criteria established by the Court of Justice.

15 OHIM contends that the Court should:

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

Law

16 In support of the action, the applicant relies on a single plea in law, alleging infringement of Article 8(1)(b) of Regulation No 207/2009.

17 The applicant submits that the Board of Appeal erred in finding that there is a likelihood of confusion between the marks at issue in respect of the goods in question. It maintains *inter alia* that the global assessment of the likelihood of confusion in the contested decision is incorrect, inasmuch as the Board of Appeal neither examined the marks at issue on the basis of the ‘global assessment’ or ‘overall impression’ criteria nor drew the correct conclusions with regard to the level of attention of the relevant public. Furthermore, it submits that the goods at issue are not similar.

18 OHIM disputes the applicant’s arguments.

19 Article 8(1)(b) of Regulation No 207/2009 provides that, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for must not be registered if because of its identity with, or similarity to, an earlier trade mark and the identity or similarity of the goods or services covered by the trade marks, there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected. The likelihood of confusion includes the likelihood of association with the earlier trade mark. Furthermore, under Article 8(2)(a)(ii) of Regulation No 207/2009, ‘earlier trade marks’ include trade marks registered in a Member State with a date of application for registration which is earlier than the date of application for registration of the Community trade mark.

20 According to settled case-law, the risk that the public might believe that the goods or services in question come from the same undertaking or from economically-linked undertakings constitutes a likelihood of confusion. According to the same case-law, the likelihood of confusion must be assessed globally, according to the perception which the relevant public has of the signs and the goods or services in question, account being taken of all factors relevant to the circumstances of the case, including the interdependence between the similarity of the signs and that of the goods or services covered (see Case T-162/01 *Laboratorios RTB v OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)* [2003] ECR II-2821, paragraphs 30 to 33 and the case-law cited).

21 The present action must be examined in the light of the abovementioned principles.

Preliminary observations

22 It must be pointed out at the outset that the applicant submits that the Board of Appeal should have taken into consideration the fact that, as it stated in the application for registration

of the Community trade mark in the section of the form relating to seniority, it is the proprietor of the national figurative mark NOBEL, which is identical in appearance to the mark applied for, was registered in Poland under the number 127201 and has a priority date of 18 February 1999 ('the Polish mark'), namely a date which precedes the priority date of the Portuguese mark. It states that it began to use the word 'nobel' on the European Union market before Colmol. The Polish mark is the earlier mark within the meaning of Article 8 of Regulation No 207/2009.

23 In that regard, it must be pointed out that, under Article 34(1) of Regulation No 207/2009, the proprietor of an earlier trade mark registered in a Member State, who applies for an identical trade mark for registration as a Community trade mark for goods or services which are identical with or contained within those for which the earlier trade mark has been registered, may claim for the Community trade mark the seniority of the earlier trade mark in respect of the Member State in which it is registered. According to paragraph 2 of that provision, seniority is to have the sole effect under Regulation No 207/2009 that, where the proprietor of the Community trade mark surrenders the earlier trade mark or allows it to lapse, he is to be deemed to continue to have the same rights as he would have had if the earlier trade mark had continued to be registered.

24 The proprietor of an earlier trade mark registered in a Member State may not, however, rely on the seniority of that mark outside of the territory in respect of which it is protected, in the present case Poland.

25 Claiming the seniority of a national mark does not therefore have the effect that the Community trade mark application enjoys a better priority right. The existence of the Polish mark does not therefore call into question the fact that the Portuguese mark is an earlier mark, within the meaning of Article 8(2)(a) of Regulation No 207/2009, in relation to the mark applied for.

26 The applicant's argument must therefore be rejected as irrelevant, without there being any need to examine its admissibility, which is disputed by OHIM.

The relevant public

27 According to the case-law, in the global assessment of the likelihood of confusion, account should be taken of the average consumer of the category of goods concerned, who is reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (see Case T-256/04 *Mundipharma v OHIM — Altana Pharma (RESPICUR)* [2007] ECR II-449, paragraph 42 and the case-law cited).

28 In the present case, the Board of Appeal found that the relevant territory for the purposes of the assessment was Portugal. Furthermore, it found that the goods at issue were aimed at the general public.

29 The applicant claims that, in so doing, the Board of Appeal did not correctly define the relevant public. First, it complains, in essence, that the Board of Appeal only took into account the perception of the public in Portugal. Secondly, it submits that the goods covered by the mark applied for are not aimed at the general public on account of their particular nature.

30 It must be pointed out, first of all, that Article 8(1)(b) of Regulation No 207/2009 states expressly that the trade mark applied for must not be registered if there exists a likelihood of confusion ‘on the part of the public in the territory in which the earlier trade mark is protected’. In the present case, since the earlier mark is a Portuguese trade mark, the Board of Appeal was right to base its assessment on the perception of the public in Portugal.

31 Furthermore, the Board of Appeal’s finding that the goods at issue are aimed at the general public must be upheld.

32 As regards the goods at issue in Classes 24 and 20, it is sufficient to state that items of bedding and mattresses are purchased by everyone.

33 As regards the goods at issue in Class 10, namely the ‘cushions for medical purposes’ and ‘blankets and quilts for medical purposes’, the applicant submits that the relevant public consists of consumers who have health problems, for example, allergies, problems with their spinal column or neurological disorders.

34 In that regard, it must be stated that ‘cushions for medical purposes’ and ‘blankets and quilts for medical purposes’ are not exclusively purchased by persons who have health problems, but also by consumers who simply seek additional comfort when sitting or sleeping. For example, cushions and blankets which are suitable for persons suffering from allergies are also purchased by consumers who do not suffer from allergies. Furthermore, there are special cushions which are suitable for persons suffering from problems with their spinal column, but are also purchased by persons who do not have health problems and simply seek to improve their comfort when sleeping.

35 The Board of Appeal was therefore right to find that all of the goods at issue were aimed at the general public.

The comparison of the goods

36 According to settled case-law, in assessing the similarity between the goods or services at issue, all the relevant factors relating to those goods or services should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary. Other factors may also be taken into account such as the distribution channels of the goods concerned (see Case T-443/05 *El Corte Inglés v OHIM — Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)* [2007] ECR II-2579, paragraph 37 and the case-law cited).

37 In the present case, the Board of Appeal found that the goods at issue were complementary to each other and that they were similar to an average degree.

38 The applicant takes the view that the goods at issue are not similar. According to the applicant, they are not complementary and their distribution channels are different.

39 OHIM disputes the applicant's arguments.

40 It must be borne in mind that complementary goods and services are those which are closely connected in the sense that one is indispensable or important for the use of the other in such a way that consumers may think that the same undertaking is responsible for manufacturing those goods or for providing those services. By definition, goods intended for different publics cannot be complementary (see Case T-316/07 *Commercy v OHIM — easyGroup IP Licensing (easyHotel)* [2009] ECR II-43, paragraphs 57 and 58 and the case-law cited).

41 As the Board of Appeal pointed out, in paragraph 11 of the contested decision, mattresses are used to sleep or rest on and, in order to fulfil that function, they need complements, such as the goods covered by the trade mark application. Cushions, blankets, quilts, bed covers and duvets are basic equipment which enables a mattress to be used as bed. Mattress covers are never used without a mattress and their sizes have to be adapted to that of the mattresses. Pillowcases are used in conjunction with cushions and mattresses for sleeping.

42 That connection with mattresses also exists as regards the goods in Class 10 covered by the mark applied for, namely the 'cushions for medical purposes' and the 'blankets and quilts for medical purposes'. The fact that they are cushions and blankets 'for medical purposes' in

no way alters the fact that they are cushions and blankets and that they serve as equipment which enables a mattress to be used as a bed.

43 The goods covered by the mark applied for and the ‘mattresses’ protected by the Portuguese mark are therefore closely connected.

44 Furthermore, cushions, blankets, quilts, bed covers, duvets, pillowcases and mattress covers are often marketed in the same specialist sales outlets as mattresses. Shops specialising in bedding usually sell mattresses as well as the goods covered by the mark applied for such as cushions, duvets, pillowcases and mattress covers.

45 That finding is also valid as regards the goods in Class 10 covered by the mark applied for. ‘Cushions for medical purposes’ and ‘blankets and quilts for medical purposes’ do not always constitute highly specialised goods which are only available in sales outlets such as shops specialising in orthopaedics. For example, it is usually possible to find in a bedding shop cushions, blankets and quilts which are suitable for persons suffering from allergies. Furthermore, it is usually possible to find in such a shop special cushions which are suitable for people suffering from problems with their spinal column, but are also purchased by persons who quite simply seek to improve their comfort when sleeping.

46 When it was questioned on that point at the hearing, the applicant admitted that the sales outlets for the goods in question could be identical, but stated that it marketed its goods through different distribution channels. That latter argument will be examined in paragraphs 60 to 63 below.

47 The close connection between the goods covered by the mark applied for and mattresses and the fact that those goods and mattresses are often sold in the same specialist sales outlets are capable of leading consumers to think that the same undertaking is responsible for the production of those goods (see, to that effect, *PiraÑAM diseño original Juan Bolaños*, paragraph 36 above, paragraphs 50 and 51, and judgment of 14 May 2013 in Case T-19/12 *Fabryka Łóżysk Tocznych -Kraśnik v OHIM — Impexmetal (IKFŁT KRAŚNIK)*, not published in the ECR, paragraph 35).

48 The Board of Appeal was therefore right to find that the goods covered by the trade mark application and ‘mattresses’ were complementary to each other and that they were similar to an average degree.

49 That outcome is not called into question by the applicant’s arguments.

50 In the first place, it is necessary to reject the so-called ‘economic’ definition of complementarity suggested by the applicant according to which complementary goods are those which have, in particular, the distinctive feature of being subject to parallel demand with the result that an increase or decrease in the demand for one product results in an increase or decrease respectively in the demand for the complementary product. No such condition is apparent from the case-law cited in paragraph 40 above.

51 It follows that the applicant’s argument that consumers purchase cushions and items of bedding more frequently than mattresses is irrelevant. The same is true of the claim that the Board of Appeal did not prove that consumers who bought, for example, cushions or blankets bought a mattress at the same time because the complementarity of goods is not dependent on those goods being subject to parallel demand. The fact that the goods covered by the mark applied for may be purchased more frequently than the ‘mattresses’ covered by the Portuguese mark does not alter the fact that the public may think that the same undertaking is responsible for manufacturing those goods, on account inter alia of the close connection between them.

52 In the second place, the applicant maintains that the definition of complementary goods must be interpreted restrictively in order to prevent the extension of the protection of a trade mark to goods for which the mark is neither registered nor used. According to the applicant, it is, inter alia, not justified to extend the protection of the Portuguese mark, which is registered for goods in Class 20, to goods in Classes 10 and 24.

53 That argument cannot be accepted. Article 8(1)(b) of Regulation No 207/2009 provides that a trade mark must not be registered if a likelihood of confusion exists ‘because of its identity with, or similarity to, an earlier trade mark and the identity or similarity of the goods or services covered by the trade marks’. A likelihood of confusion does not therefore necessarily presuppose that the goods covered by the earlier mark and those covered by the mark applied for are identical, but may also exist where those goods are similar.

54 Furthermore, it must be pointed out that, as stated in Rule 2(4) of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1), the classification of goods and services under the Nice Agreement is intended to serve exclusively administrative purposes. Therefore, goods may not be regarded as being dissimilar on the sole ground that, as in the present case, they appear in different classes under that classification (Case T-8/03 *El Corte Inglés v OHIM — Pucci (EMILIO PUCCI)* [2004] ECR II-4297, paragraph 40, and judgment of 7 February 2006 in Case T-202/03 *Alecansan v OHIM — CompUSA (COMP USA)*, not published in the ECR, paragraph 38).

55 In the third place, the applicant submits that the Board of Appeal failed to prove that the goods at issue are identical, similar or complementary on the market, but made statements without providing any justification or examples to prove the validity of its assumption and reasoning. Neither Colomol nor the Board of Appeal proved that consumers buy cushions, blankets and mattresses in the same sales outlets.

56 In that regard, it must be stated that, in order to arrive at the conclusion that the goods at issue are closely connected in the sense that one is indispensable or important for the use of the other and that there is an overlap of the distribution channels, the Board of Appeal, in essence, relied on facts which are well known, that is, which are likely to be known by anyone or which may be learnt from generally accessible sources.

57 The Board of Appeal may take into consideration such facts even if they have not been expressly put forward by the parties to the opposition proceedings (see judgment of 24 September 2008 in Case T-179/07 *Anvil Knitwear v OHIM — Aprile e Aprile (Aprile)*, not published in the ECR, paragraph 71 and the case-law cited). *A fortiori*, parties to opposition proceedings are not required to prove facts which are well known.

58 Furthermore, it is apparent from the case-law that the various bodies of OHIM are not obliged to establish in their decisions the accuracy of facts which are well known (order of 3 June 2009 in Case C-394/08 P *Zipcar v OHIM*, not published in the ECR, paragraph 42). Nor is the Board of Appeal required to provide specific examples (see, to that effect, Case C-25/05 P *Storck v OHIM* [2006] ECR I-5719, paragraph 54).

59 The applicant's argument must therefore be rejected.

60 In the fourth place, the applicant claims, first, that its goods are situated in the luxury segment and that they are unique on the market because of the special kind of wool of which they are made and, secondly, that its goods and Colmol's goods are not marketed via the same distribution channels because it mostly sells its goods by means of direct selling to consumers.

61 Those arguments are irrelevant. In the context of opposition proceedings, OHIM may only take account of the list of goods applied for as it appears in the trade mark application concerned, subject to any amendments thereto (judgment of 13 April 2005 in Case T-286/03 *Gillette v OHIM — Wilkinson Sword (RIGHT GUARD XTREME sport)*, not published in the ECR, paragraph 33, and Case T-364/05 *Saint-Gobain Pam v OHIM — Propamsa (PAM PLUVIAL)* [2007] ECR II-757, paragraph 89).

62 At the hearing the applicant requested that the Court alter that case-law and take into consideration the high quality of the goods it markets and their distribution channels. That proposal cannot be accepted. It is inappropriate to take the particular circumstances in which the goods in question are marketed into account in the prospective analysis of the likelihood of confusion between the marks, since those circumstances may vary over time and depending on the wishes of the proprietors of the marks at issue (judgment of 15 March 2007 in Case C-171/06 P T.I.M.E. ART v OHIM, not published in the ECR, paragraph 59).

63 As the quality of the goods actually marketed by the applicant and the distribution channels chosen by it are not apparent from the list of goods in the trade mark application, the Board of Appeal was right to find, in paragraph 13 of the contested decision, that it could not take them into consideration.

64 It follows from all of the foregoing that the Board of Appeal was right to conclude that the goods at issue were similar to an average degree.

The comparison of the signs

65 The global assessment of the likelihood of confusion, in relation to the visual, phonetic or conceptual similarity of the signs in question, must be based on the overall impression given by the signs, bearing in mind, in particular, their distinctive and dominant components. The perception of the marks by the average consumer of the goods or services in question plays a decisive role in the global appreciation of such likelihood of confusion. In this regard, the average consumer normally perceives a mark as a whole and does not engage in an analysis of its various details (see Case C-334/05 P *OHIM v Shaker* [2007] ECR I-4529, paragraph 35 and the case-law cited).

66 Assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components (see *OHIM v Shaker*, paragraph 65 above, paragraph 41 and the case-law cited). It is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element (*OHIM v Shaker*, paragraph 65 above, paragraph 42, and judgment of 20 September 2007 in Case C-193/06 P *Nestlé v OHIM*, not published in the ECR, paragraph 42). That could be the case, in particular, where that component is capable on its own of dominating the image of that mark which members of the relevant public keep in their minds, so that all the other components are negligible in the overall impression created by that mark (*Nestlé v OHIM*, paragraph 43).

67 In the present case, the Board of Appeal found that the signs at issue were visually highly similar on account of the fact that both of them include the same word element. According to the Board of Appeal, the word element is the only distinctive element of the mark applied for and its graphic elements are secondary. It also found that the signs were phonetically identical and that the conceptual comparison was neutral.

68 The applicant takes the view that the signs at issue are visually different on account of the presence of the graphic elements. It alleges that the Board of Appeal did not examine the marks according to the ‘global assessment’ or ‘overall impression’ criteria, inter alia by taking into account the graphic elements of the mark applied for. Furthermore, it maintains that the Board of Appeal erred in finding that the marks at issue were conceptually similar.

69 OHIM disputes the applicant’s arguments.

The visual comparison

70 As regards the visual comparison, it must be recalled, first of all, that there is nothing to prevent a determination as to whether there is any visual similarity between a word mark and a figurative mark, since the two types of mark have graphic form capable of creating a visual impression (see Case T-359/02 *Chum v OHIM — Star TV (STAR TV)* [2005] ECR II-1515, paragraph 43 and the case-law cited).

71 In the present case, the Portuguese mark is the word mark NOBEL. The mark applied for is a figurative mark including the word ‘nobel’ written in a style imitating black handwritten typeface. Furthermore, there is a golden and red crown above the combination of letters ‘el’ and the word and the crown are surrounded by an elliptical geometric shape and by a golden rectangle with rounded angles.

72 As regards the figurative elements in the mark applied for, it must be stated that the ellipse and the golden rectangle, in spite of their ornamental nature, have a certain impact on the overall impression created by that mark. The crown is also not a negligible element. Furthermore, it must be pointed out that the font used in the mark applied for also has a certain impact on the overall impression created by that mark, in particular because the initial capital letter ‘N’ is striking and much larger than the other letters.

73 It is true that, where a mark is composed of word elements and figurative elements, the former are, as a rule, more distinctive than the latter, as the average consumer will more easily

refer to the goods in question by citing the name rather than describing the figurative element of the mark (see Case T-50/12 *AMC -Representações Têxteis v OHIM — MIP Metro (METRO KIDS COMPANY)*, not published in the ECR, paragraph 29 and the case-law cited).

74 Nevertheless, it is apparent from the findings in paragraph 72 above that the word element of the mark applied for does not dominate it to the extent that all the other elements may be regarded as negligible.

75 The comparison must therefore, in accordance with the case-law cited in paragraph 66 above, be made by examining each of the marks in question as a whole.

76 It must be pointed out that there is a certain degree of visual similarity between the signs at issue on account of the fact that they both include the word element ‘nobel’.

77 However, having regard to the presence in the mark applied for of figurative elements which are not negligible in the overall impression created by that mark, the Board of Appeal erred in categorising that degree of similarity as high. On the contrary, it must be categorised as average.

78 Nevertheless, the applicant errs in alleging that the Board of Appeal did not examine the marks according to the ‘global assessment’ or ‘overall impression’ criteria. It is not apparent from the contested decision that the Board of Appeal overlooked the figurative elements of the mark applied for in the comparison. It did not find that the word element was dominant to the extent that all the other elements of the mark applied for were negligible. In this context, it must be pointed out that the Board of Appeal did not find that the signs at issue were visually identical, but only that they were visually highly similar.

The phonetic comparison

79 As the single word element in the mark applied for is identical to the Portuguese mark, the Board of Appeal was right to find that the signs at issue are phonetically identical, which the applicant also accepts.

The conceptual comparison

80 The Board of Appeal found, in paragraph 19 of the contested decision, that the word ‘nobel’ has no lexical meaning in Portuguese and that it is likely to be perceived by the

Portuguese public as a fanciful expression. In the absence of a reference to the word ‘prize’ or its equivalent in Portuguese, consumers would be unlikely to make an association with the famous Swedish inventor Alfred Nobel or with the Nobel prize when the marks at issue are used in connection with the goods in question. On its own, the word ‘nobel’ would be only a name which, as such, is not capable of representing a concept. Furthermore, the crown included in the contested sign might be perceived as a reference to royalty. It follows, according to the Board of Appeal, that the conceptual comparison of the marks is neutral for the outcome of the case.

81 The Board of Appeal’s finding that the conceptual comparison is neutral must be upheld.

82 Contrary to what the applicant submits, the Board of Appeal’s reasoning in that regard is not contradictory. The applicant’s argument that the Board of Appeal found that the signs at issue were conceptually similar has no factual basis. The Board of Appeal found, in paragraph 19 of the contested decision, that the conceptual comparison is neutral.

83 None of the arguments put forward by the applicant is capable of establishing that the signs are conceptually different.

84 First, the applicant submits that the Board of Appeal’s statement that the Portuguese public does not associate the word ‘nobel’ with anything is incomprehensible.

85 In that regard, it is sufficient to state that, if the Portuguese public were to associate the word ‘nobel’ with a concept, the fact that each of the signs at issue includes that word element would lead to their being conceptually similar or identical. A conceptual similarity or identity would therefore be added to the visual similarity and phonetic identity, which would make the signs at issue even more similar. Within the context of the examination of conceptual similarity, the finding that the Portuguese public does not associate the word ‘nobel’ with anything is therefore in the applicant’s favour.

86 In addition, the applicant conceded, in paragraph 25 of the reply, that the word ‘nobel’ does not have any meaning in Portuguese.

87 Secondly, according to the applicant, the Board of Appeal’s statement that the Portuguese public associates a crown with monarchy is also incomprehensible.

88 However, the applicant does not maintain that the relevant public associates a crown with another concept and that the signs at issue are conceptually different because there is no crown in the Portuguese mark.

89 Thirdly, the applicant alleges that the Board of Appeal only took into account the crown and not the other graphic elements of the mark applied for.

90 In that regard, it is sufficient to state that those graphic elements do not have any conceptual content and that the applicant does not claim that they have such a content.

91 As regards the applicant's observation that the Board of Appeal did not rule on the meaning of the word 'nobel' in any languages other than Portuguese, it is sufficient to point out that the Board of Appeal was right to base its assessment on the perception of the public in Portugal (see paragraph 30 above).

Conclusion in respect of the comparison of the signs

92 It follows from the foregoing that the signs at issue are visually similar to an average degree, that they are phonetically identical and that the conceptual comparison is neutral.

The likelihood of confusion

93 A global assessment of the likelihood of confusion implies some interdependence between the factors taken into account, and in particular between the similarity of the trade marks and the similarity of the goods or services concerned. Accordingly, a lesser degree of similarity between those goods or services may be offset by a greater degree of similarity between the marks, and vice versa (Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 17, and Joined Cases T-81/03, T-82/03 and T-103/03 *Mast-Jägermeister v OHIM — Licorera Zacapaneca (VENADO with frame and others)* [2006] ECR II-5409, paragraph 74).

94 In the present case, the Board of Appeal found that the distinctiveness of the Portuguese mark was average and that the relevant public's level of attention was average.

95 The Board of Appeal found that, in view of the average degree of similarity of the goods at issue and the degree of similarity of the signs at issue, the public was likely to confuse the commercial origin of the goods at issue when those goods were labelled with the marks at issue.

96 The applicant disputes the existence of a likelihood of confusion between the marks at issue in respect of the goods in question, whereas OHIM agrees with the Board of Appeal's assessment.

97 It must be pointed out, first of all, that the Board of Appeal was right to find that, as the word 'nobel' has no meaning in relation to the goods at issue in the perception of the relevant public, the distinctiveness of the Portuguese mark is average.

98 That finding is not called into question by the applicant's argument that trade marks using the word 'nobel' are quite common and its argument that OHIM's own database contains a number of marks which include the element 'nobel'.

99 Admittedly, the possibility cannot be entirely excluded that, in certain cases, the coexistence of earlier marks on the market could reduce the likelihood of confusion which the Opposition Division and the Board of Appeal find exists as between two marks at issue. However, that possibility can be taken into consideration only if, at the very least, during the proceedings before OHIM concerning relative grounds of refusal, the applicant for the Community trade mark duly demonstrated that such coexistence was based upon the absence of any likelihood of confusion on the part of the relevant public between the earlier marks upon which it relies and the intervener's earlier mark on which the opposition is based (see Case T-460/07 *Nokia v OHIM — Medion (LIFE BLOG)* [2010] ECR II-89, paragraph 68 and the case-law cited).

100 In the present case, as the applicant conceded at the hearing, it did not submit, during the proceedings before OHIM, that the Portuguese mark coexisted with other marks including the word 'nobel'. Those registrations, which were invoked for the first time before the Court, cannot therefore be taken into consideration (see, to that effect, Case T-31/03 *Grupo Sada v OHIM — Sadia (GRUPO SADA)* [2005] ECR II-1667, paragraph 82). In any event, the applicant's argument has not been substantiated because it has submitted a single specific example of a mark including the word element 'nobel'. Furthermore, the applicant has not put forward any argument to demonstrate that the coexistence was based upon the absence of any likelihood of confusion.

101 Secondly, it must be borne in mind that the Board of Appeal was right to find that the goods at issue are similar to an average degree. Furthermore, the signs are visually similar to an average degree and phonetically identical. The conceptual comparison between the signs is neutral.

102 In the present case, there is a likelihood that the relevant public will regard the goods at issue as having the same commercial origin if they are sold under the marks at issue. In that regard, it is *inter alia* necessary to point out that the only word element in each of the signs at issue is the same.

103 Contrary to what the applicant submits, the presence of the graphic elements in the mark applied for cannot eliminate the likelihood of confusion. The relevant public may be led, if faced with the mark applied for in relation to one of the products covered by that mark, to regard it as a mere variant of the Portuguese mark. In that connection, it must be borne in mind that the average consumer will more easily refer to the goods in question by citing the name of the mark rather than describing the figurative element of the mark (see paragraph 73 above).

104 It is not necessary to examine the applicant's argument that, contrary to what the Board of Appeal found, the relevant public's level of attention when purchasing the goods at issue is high.

105 In the circumstances of the present case, even a high level of attention on the part of the relevant public would not call into question the existence of a likelihood of confusion. It is true that a consumer displaying a high level of attention will notice the graphic elements in the mark applied for. However, even a high level of attention would not eliminate the likelihood that the consumer will think that the mark applied for is a variant of the Portuguese mark, because the two signs have the same single word element.

106 The applicant's claim that the Portuguese mark is used only in combination with other elements and in a specific graphic configuration must also be rejected as irrelevant.

107 For the purposes of the analysis of the likelihood of confusion, what must be taken into account are the signs as contained in the application for registration and in the registration of the earlier mark (judgment of 1 February 2012 in Case T-353/09 *mtronix v OHIM — Growth Finance (mtronix)*, not published in the ECR, paragraph 51).

108 It is not therefore necessary to rule on the admissibility of that claim and on the possibility of taking into account the documents submitted for the first time before the Court in support of that claim, which are disputed by OHIM.

109 It follows from all of the foregoing that the Board of Appeal was right to find that there is a likelihood of confusion between the marks at issue in respect of the goods in question.

110 The error made by the Board of Appeal in categorising the degree of visual similarity of the signs at issue as high cannot result in the annulment of the contested decision, because the likelihood of confusion may be established even on the basis of an average degree of visual similarity (see, to that effect, Case T-99/01 *Mystery Drinks v OHIM — Karlsberg Brauerei (MYSTERY)* [2003] ECR II-43, paragraph 36).

111 As the plea alleging infringement of Article 8(1)(b) of Regulation No 207/2009, which was put forward by the applicant in support of the form of order which it seeks, is unfounded, the action must be dismissed in its entirety, without it being necessary to rule on the admissibility of the applicant's second, third and fifth heads of claim.

Costs

112 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.

113 Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by OHIM.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Kampol sp. z o.o. to pay the costs.**

Dittrich

Schwarcz

Tomljenović

Delivered in open court in Luxembourg on 19 June 2014.

[Signatures]

* Language of the case: English.