

JUDGMENT OF THE GENERAL COURT (Second Chamber)

15 October 2018 (*)

(EU trade mark — Opposition proceedings — Application for EU word mark WILD PINK — Earlier EU and national word marks PINK LADY — Earlier EU figurative marks Pink Lady — Relative ground for refusal — Likelihood of confusion — Article 8(1)(b) of Regulation (EC) No 207/2009 (now Article 8(1)(b) of Regulation (EU) 2017/1001) — Article 8(5) of Regulation No 207/2009 (now Article 8(5) of Regulation 2017/1001))

In Case T-164/17,

Apple and Pear Australia Ltd, established in Victoria (Australia),

Star Fruits Diffusion, established in Le Pontet (France),

represented by T. de Haan, P. Péters and H. Abraham, lawyers,

applicants,

v

European Union Intellectual Property Office (EUIPO), represented by J. Ivanauskas and D. Walicka, acting as Agents,

defendant,

the other party to the proceedings before the Board of Appeal of EUIPO, intervener before the General Court, being

Pink Lady America LLC, established in Yakima, Washington (United States), represented initially by R. Manno and S. Travaglio, and subsequently by R. Manno, lawyers,

ACTION brought against the decision of the Fourth Board of Appeal of EUIPO of 10 January 2017 (Case R 87/2015-4), relating to opposition proceedings between Apple and Pear Australia and Star Fruits Diffusion, on the one hand, and Pink Lady America, on the other,

THE GENERAL COURT (Second Chamber),

composed of M. Prek (Rapporteur), President, E. Buttigieg and B. Berke, Judges,

Registrar: K. Guzdek, Administrator,

having regard to the application lodged at the Court Registry on 14 March 2017,

having regard to the response of EUIPO lodged at the Court Registry on 16 May 2017,

having regard to the response of the intervener lodged at the Court Registry on 19 June 2017,

further to the hearing on 20 February 2018,

gives the following

Judgment

Background to the dispute

1 On 29 March 2013, the intervener, Pink Lady America LLC, filed an application for registration of an EU trade mark with the European Union Intellectual Property Office (EUIPO) pursuant to Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended (replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p 1)).

2 Registration as a mark was sought for the word sign WILD PINK.

3 The goods in respect of which registration was sought are in Class 29 to 31 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 to the following description:

- Class 29: ‘Preserved, frozen, dried and cooked vegetables’;
- Class 30: ‘Fruit flavourings, other than essences; fruit vinegar; pierozki containing mince’;
- Class 31: ‘Mixed fruits [fresh]; fruit, fresh; fresh fruits and vegetables; raw fruits; mandarins (fresh fruit)’.

4 The EU trade mark application was published in *European Union Trade Marks Bulletin* No 96/2013 of 24 May 2013.

5 On 30 July 2013, the applicants, Apple and Pear Australia Limited and Star Fruits Diffusion, filed a notice of opposition pursuant to Article 41 of Regulation No 207/2009 (now Article 46 of Regulation 2017/1001) to registration of the mark applied for in respect of all the goods referred to in the application for registration.

6 The opposition was based on the following earlier marks:

- Benelux word mark PINK LADY, registered under number 559 177, covering, inter alia, goods in Class 31: ‘Agricultural, horticultural and silvicultural products and grains, not included in other classes; live animals; fresh fruits and vegetables; grains, live plants and flowers; foodstuff for animals, malt’;
- German word mark PINK LADY, registered under number 2 903 690, covering, inter alia, goods in Class 31: ‘Fresh fruits and vegetables; fodder; malt; agricultural, horticultural and forestry products and grains; live animals; seeds; live plants and natural flowers’;

- United Kingdom trade mark PINK LADY, registered under number 1 582 849, covering, inter alia, goods in Class 31: ‘Fresh fruit and vegetables; seeds; plants which bear pink coloured foliage or flowers’;
- French word mark PINK LADY, registered under number 92 420 538, covering, inter alia, goods in Class 31: ‘Apples, fruit trees and fresh fruit’;
- Community word mark PINK LADY, registered under number 2 042 679, covering, inter alia, goods in Class 31: ‘Agricultural, horticultural products, including fruit, grains, plants and trees, in particular apples and apple trees’;
- EU word mark PINK LADY, registered under number 2 266 948, covering, inter alia, goods in Classes 29 and 30: ‘Preserved, dried and cooked fruits; including apples’ (Class 29) and ‘Confectionery, including apple cakes and apple pies; cereal and oat based products including health bars; breads; and pastries such as apple strudel’ (Class 30);
- EU figurative mark registered under number 4 186 169, covering goods in Classes 29 to 31: ‘Preserved, dried, cooked and crystallised fruits; preparations made from preserved, dried, cooked and crystallised fruits; jams; compotes; fruit jellies; fruit salads; fruit yoghurts; fruit chips’ (Class 29), ‘Preparations made from cereals; cakes; biscuits; confectionery; ices, sorbets and ice-creams; sugar confectionery’ (Class 30) and ‘Fresh fruit; apples; fruit trees; apple trees’ (Class 31), reproduced below:
- EU figurative mark registered under number 6 335 591, covering goods in Class 31: ‘Agricultural and horticultural products; fruits, grains, plants and trees; apples and apple trees’, reproduced below:
- EU figurative mark registered under number 8 613 911, covering goods in Classes 29 and 30: ‘Preserved, dried, cooked and crystallised fruits, preparations made from preserved, dried, cooked and crystallised fruits, jams, compotes, fruit jellies, fruit salads, fruit yoghurts, fruit chips’ (Class 29) and ‘Preparations made from cereals, cakes, biscuits, confectionery, ices, sorbets and ice creams, sugar confectionery’ (Class 30), reproduced below:

7 The grounds relied on in support of the opposition were those set out in Article 8(1)(b) of Regulation No 207/2009 (now Article 8(1)(b) of Regulation 2017/1001) and Article 8(5) of that regulation (now Article 8(5) of Regulation 2017/1001).

8 By decision of 23 December 2014, the Opposition Division rejected the opposition.

9 The applicants filed a notice of appeal with EUIPO, pursuant to Articles 58 to 64 of Regulation No 207/2009 (now Articles 66 to 71 of Regulation 2017/1001), against the Opposition Division’s decision.

10 By decision of 10 January 2017 ('the contested decision'), the Fourth Board of Appeal of EUIPO dismissed the appeal.

11 In the first place, the Board of Appeal stated that it intended to analyse first the similarity of the signs as this was a prerequisite for the application of both the grounds of annulment raised by the applicants, namely breach of Article 8(1)(b) of Regulation No 207/2009 and of Article 8(5) of that regulation. In that context, it examined, first, the distinctiveness of the word element 'pink'. It observed that a Community plant variety right had been granted for a variety of apples called 'Cripps Pink', which is characterised by a pinkish red colour covering 40 to 70% of its surface, and that a short visit to any local fruit market is sufficient to show that apples exist in many shades of red, including pink. It inferred from this the word element 'pink' may be understood by the relevant public as a descriptive term indicating the colour of the goods concerned. Second, the Board of Appeal concluded that the marks at issue are visually and phonetically dissimilar on account of the reversed position within the marks of the common word element 'pink' and the fact that that element is descriptive. Third, it took the view that the marks at issue are conceptually dissimilar because the term 'pink lady' will be perceived as referring to a lady dressed in pink or characterised by that colour, whereas the term 'wild pink' will be understood as referring to a shade of pink that is 'somehow wild'. Fourth, with regard to the comparison of the mark applied for with the earlier figurative marks, the Board of Appeal stated that the graphic features, even though not very distinctive, added to the differences between the marks at issue. It concluded that the earlier word and figurative marks are different from the mark applied for and that it was necessary to reject the opposition, regardless of any reputation the earlier marks may enjoy.

12 In the second place, the Board of Appeal stated that the judgment of the Tribunal de commerce de Bruxelles (Commercial Court, Brussels, Belgium) of 28 June 2012 and other decisions relied on by the applicants could not be taken into account because the marks at issue were not the same, the parties were not the same and that it could not follow the approach adopted by the Belgian court as regards the dominant nature of the word element 'pink' as that element played only a minor role in the comparison of the signs.

Forms of order sought

13 The applicants claim that the Court should:

- annul the contested decision;
- order EUIPO and the intervener to pay the costs, including those incurred before the Board of Appeal;

14 EUIPO contends that the Court should:

- dismiss the action in its entirety;
- order the applicants to pay the costs incurred by EUIPO.

15 The intervener contends that the Court should:

- dismiss the action in its entirety and confirm the contested decision;

– order the applicants to pay the costs.

Law

16 In support of their action, the applicants rely on four pleas in law, alleging infringement of (i) Article 76(1) of Regulation No 207/2009 (now Article 95(1) of Regulation 2017/1001), (ii) Article 75 of Regulation No 207/2009 (now Article 94 of Regulation 2017/1001) and Article 296 TFEU, (iii) Article 8(1)(b) of Regulation No 207/2009 and (iv) Article 8(5) of that regulation.

17 The Court considers it appropriate to examine the first plea first, and then to analyse the third and fourth pleas.

The first plea, alleging infringement of Article 76(1) of Regulation No 207/2009 and breach of the applicants' rights of **defence**

18 In the first plea, the applicants submit that the Board of Appeal, of its own initiative and in breach of Article 76(1) of Regulation No 207/2009 and of their rights of defence, stated that 'a Community Plant Variety Protection has been granted for a variety of apples called "Cripps Pink", which is characterised by a pinkish-red colour covering 40% to 70% of its surface'. First, the applicants argue that those conclusions are not based on facts or evidence submitted by the parties. Second, they contest the claim that it is a well-known fact that 'apples exist in many shades of red, including pink'.

19 EUIPO and the intervener dispute those arguments.

20 Article 76(1) of Regulation No 207/2009 provides that in proceedings relating to relative grounds for refusal of registration, within the meaning of Article 8 of the regulation, EUIPO is restricted in its examination to the relief sought by the parties. Thus, the Board of Appeal, when hearing an appeal against a decision terminating opposition proceedings, may base its decision only on the relative grounds for refusal on which the party concerned has relied and the related facts and evidence the parties have presented. That does not, however, preclude the Board of Appeal from, *inter alia*, taking into consideration, in addition to the facts expressly put forward by the parties to the opposition proceedings, facts which are well known or from examining a matter of law, even when it has not been raised by the parties, if it is necessary to resolve that matter in order to ensure a correct application of the relevant legislative provisions (see, to that effect, judgment of 9 April 2014, *Pico Food v OHIM — Sobieraj (MILANÓWEK CREAM FUDGE)*, T-623/11, EU:T:2014:199, paragraphs 18 and 19).

21 It is in the light of that case-law that it is necessary to examine, in the first place, the claim that the conclusions are not based on facts and evidence submitted by the parties.

22 In the present case, it is clear that the considerations set out in paragraphs 17 and 18 of the contested decision concerning the pinkish-red colour of apples and, therefore, the descriptive nature of the word element 'pink' do not stem from the Board of Appeal acting on its own initiative and are in fact based on facts and evidence submitted by the parties.

23 The intervener expressly pointed out in paragraphs 17 to 19 of the observations it submitted in the proceedings before the Opposition Division and in paragraphs 2 to 5 of its

observations before the Board of Appeal that the colour pink has been used to distinguish apple varieties. First, it maintained that apples are pink, arguing that that colour was one of the *raisons d'être* of the Cripps Pink apple variety, which has been granted a United States plant patent that expressly states that the 'fruit has striking pink blush (absent of striping) covering 30-80% of the apple surface'. It stated that the apple variety known as Cripps Pink is protected in the European Union by plant variety certificate No EU1640. Next, it produced an extract from the *Apple Journal* describing the apple variety Pink Lady (Cripps Pink) as having an attractive pink colour. It also referred to the Community Plant Variety Office (CPVO) guidelines for testing apple varieties for distinctness, uniformity and stability, which stated that the apple variety Cripps Pink was 'pink red'. Lastly, it produced an article published in 1993 in the *HortScience* journal, headed "'Pink Lady' Apple", in which the authors, one of whom being J.E. Cripps, the inventor of the Pink Cripps variety, state that 40 to 70% of the surface of the apple is 'solid pinkish-red'.

24 The applicants submit, in the alternative, that the Board of the Appeal's assessment is at odds with the facts, since the original Community plant variety certificates for apples of the Cripps Pink variety make no mention of any pink colour and indicate that they are red. That argument can be rejected without there being any need to consider the admissibility of the original certificates, produced for the first time by the applicants before the General Court with the intention of demonstrating that the Board of Appeal distorted the facts.

25 Contrary to what the applicants maintain in essence, there is nothing in paragraph 17 of the contested decision to suggest that the Board of Appeal based its conclusion regarding the descriptive nature of the word element 'pink' on the fact that the Community plant variety certificate granted in respect of the Cripps Pink apple variety expressly states that one of the characteristics of the apple in question is that 40 to 70% of its surface is pink. The contested decision simply states that 'as the [intervener] pointed out', a Community plant variety right has been granted to that apple variety and that it is characterised by a pinkish-red colour covering 40 to 70% of its surface. The contested decision therefore contains two pieces of information, the first relating to the existence of an apple variety, Cripps Pink, protected in the European Union by a plant variety certificate, and the second concerning the colour of those apples. That cannot be interpreted as meaning that the European plant variety certificate itself is the source of the information relating to the pinkish-red colour of the apple. It is all the observations and documents referred to in paragraph 23 above, submitted by the intervener in the proceedings before EUIPO, which led the Board of Appeal to the conclusion that the word element 'pink' is descriptive, as it indicates a colour shade of the goods concerned. Accordingly, the applicants' claim that the Board of Appeal distorted the facts is not borne out.

26 For the same reasons, the Court also rejects the applicants' argument that their claim that the Board of Appeal distorted the facts is borne out by the fact that the plant variety certificate granted to the Cripps Pink apple simply refers to the apple being red and does not contain any express reference to those apples being pink in colour.

27 Similarly, the applicants cannot succeed with their claim that the Board of Appeal failed to have due regard to their rights of defence, on the basis that they were not given the opportunity to dispute the Board of Appeal's claim that plant variety certificate No EU1640 for the Cripps Pink variety of apples was granted for a 'pink red' apple variety. As is apparent from paragraphs 23 to 25 above, the Board of Appeal's conclusions concerning the colour of apples are not the result of its own initiative but are based on the observations and documents

submitted by the parties in the proceedings before EUIPO. The applicants were therefore perfectly able to dispute the conclusions relating to the colour of the apples before EUIPO, with the result that their rights of defence were not in any way infringed.

28 In the second place, the applicants contest the claim that it is well known that ‘a short visit to any local fruit market is sufficient to see that apples exist in many shades of red, including pink’ (see paragraph 17 of the contested decision). It should be noted at the outset that that statement was made by the Board of Appeal for the sake of completeness, the considerations in question being preceded by the expression ‘[f]urthermore’. Thus, in the light of the foregoing considerations, the applicants’ arguments cannot call into question the conclusion that neither Article 76(1) of Regulation No 207/2009 nor the applicants’ rights of defence were infringed.

29 In any event, it should be noted that a fact is well known if it is likely to be known by anyone or may be learnt from generally accessible sources (judgment of 9 February 2011, *Ineos Healthcare v OHIM — Teva Pharmaceutical Industries (ALPHAREN)*, T-222/09, EU:T:2011:36, paragraph 29). It is also established case-law that, in determining the perception that the relevant public will have of the marks at issue, Boards of Appeal can rely on matters of common knowledge, subject to the adversely affected party’s proving an error in assessing that common knowledge of those matters (see, to that effect, judgments of 17 October 2006, *Hammarplast v OHIM — Steninge Slott (STENINGE SLOTT)*, T-499/04, not published, EU:T:2006:324, paragraph 53, and of 30 June 2015, *La Rioja Alta v OHIM — Aldi Einkauf (VIÑA ALBERDI)*, T-489/13, EU:T:2015:446, paragraph 56 (not published)).

30 In order to prove that the Board of Appeal made an error of assessment of the kind referred to in paragraph 29 above, the applicants maintain, first, that the alleged matter of common knowledge is at variance with European legislation, from which it is apparent that the only selection criterion is the colour red.

31 However, as EUIPO was correct to observe, the classification of apples in Annex I to Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors (OJ 2011 L 157, p. 1) serves only for marketing standards purposes. The reference to such a classification criterion does not therefore prove that the Board of Appeal made an error of assessment as regards the presence on any local market of apples in a great variety of shades of red, including pink.

32 Second, the applicants take issue with the Board of Appeal for disregarding the judgment of the tribunal de commerce de Bruxelles (Commercial Court, Brussels), in its capacity as an EU trade marks court, that the colour pink is never present on the apples in question. They observe in that regard that, according to the judgment of 25 March 2015, *Apple and Pear Australia and Star Fruits Diffusion v OHIM — Carolus C. (English pink)* (T-378/13, EU:T:2015:186, paragraph 47), that judgment was, *prima facie*, a relevant factual element in the assessment of their rights.

33 That line of argument cannot succeed, for a number of reasons. First of all, as the Board of Appeal was correct to point out in paragraph 30 of the contested decision, the marks at issue and the parties to the proceedings are not the same.

34 Next, with regard in particular to the national court's assertion that the colour pink is never present on the fruit in question, it is clear that it was made in the very specific context in which that court sought to determine whether the colour pink used by the applicants in their figurative marks could be protected and, accordingly, the extent to which the colour pink is distinctive per se, not the extent to which the word element 'pink' is distinctive as such.

35 Lastly, in view of the reasons given in paragraph 17 of the contested decision, as set out in paragraphs 11 and 23 above, the Board of Appeal was right not to follow the approach adopted by the national court.

36 Third, the applicants cannot succeed with their claim that it is a well-known fact that apples are not pink. Indeed, in paragraph 17 of the contested decision, the Board of Appeal states that it is a well-known fact not that apples are pink, but that 'apples exist in many shades of red, including pink' and that 'the colour of pink could be present in apples'.

37 It follows that the complaint alleging infringement of Article 76(1) of Regulation No 207/2009 and the plea alleging infringement of the applicants' rights of defence must be rejected.

38 The first plea must therefore be rejected in its entirety.

The third plea in law, alleging infringement of Article 8(1)(b) of Regulation No 207/2009

39 In the third plea, alleging infringement of Article 8(1)(b) of Regulation No 207/2009, the applicants submit, first, that the relevant public was incorrectly defined and claim, citing the results of a survey in support, that the assessment of that public's perception of the word 'pink' is also incorrect. Next, they argue that the Board of Appeal failed to give appropriate weight to the word element 'pink' and that, as a result, it reached the incorrect conclusion that the signs at issue are visually and phonetically dissimilar. Lastly, with regard to the conceptual comparison of the signs at issue, the applicants claim that the Board of Appeal erred by failing to take account of the fact that a large part of the non-English-speaking public will not understand those signs and, therefore, that the conceptual comparison has no bearing on the assessment of the comparison of the signs, or that there is at least an average degree of similarity on account of the colour pink.

40 EUIPO and the intervener maintain, first of all, that the survey is out of time and, therefore, inadmissible. Next, they contend that the Board of Appeal did not err in concluding that the signs at issue are visually, phonetically and conceptually dissimilar.

41 As a preliminary issue, it is necessary to examine the claim made by EUIPO and the intervener that the survey presented by the applicants for the purpose of demonstrating that the majority of the persons questioned who understood the word 'pink' made a direct connection with the earlier mark and that none of those persons understood the word 'pink' as describing a colour found in apples should be rejected as inadmissible. They submit that the survey was not presented in the course of the proceedings before the bodies of EUIPO.

42 It should be noted that the purpose of an action before the Court is to review the legality of decisions of the Boards of Appeal of EUIPO, for the purposes of Article 65 of Regulation No 207/2009 (now Article 72 of Regulation 2017/1001). It is therefore not the

Court's function to re-evaluate the factual circumstances in the light of evidence which has been adduced for the first time before it (judgments of 6 March 2003, *DaimlerChrysler v OHIM (Calandre)*, T-128/01, EU:T:2003:62, paragraph 18, and of 25 June 2010, *MIP Metro v OHIM — CBT Comunicación Multimedia (Metromeet)*, T-407/08, EU:T:2010:256, paragraph 16).

43 In the present case, as the survey referred to in paragraph 39 above was produced for the first time before the Court, it may not be taken into consideration for the purpose of reviewing the legality of the contested decision and must therefore be disregarded.

44 In that context, the question of the relevant public's perception of the word element 'pink' was addressed in the proceedings before EUIPO. The intervener stated, inter alia, before the Opposition Division that there are more than 1 000 trade marks that use the word 'pink' and more than 300 marks registered for goods in Class 31 that include the word 'pink'. As noted by EUIPO, the applicants should have submitted the evidence referred to above to challenge the claim that that word element is descriptive before the Opposition Division or, at the latest, before the Board of Appeal.

45 With regard to the substance, it should be recalled that 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 cannot 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.

46 According to established 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 relevant public's perception of the signs and goods or services in question and taking into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the signs and that of the goods or services covered (see judgment of 9 July 2003, *Laboratorios RTB v OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)*, T-162/01, EU:T:2003:199, paragraphs 30 to 33 and the case-law cited).

47 It is in the light of those considerations that it is necessary to determine whether the Board of Appeal was right in finding that the marks at issue were different overall.

The relevant public

48 The applicants submit that the Board of Appeal incorrectly defined the relevant public and incorrectly assessed that public's perception of the word 'pink'. In that regard, it should be recalled that, where the protection of the earlier trade mark extends to the whole of the European Union, it is necessary to take into account the perception of the marks at issue by the consumer of the goods or services in question in that territory. However, for an EU trade mark to be refused registration, it is sufficient that a relative ground for refusal for the purposes of Article 8(1)(b) of Regulation No 207/2009 exists in part of the European Union (see, to that effect, judgment of 14 December 2006, *Mast-Jägermeister v OHIM — Licorera*

Zacapaneca (VENADO with frame and others), T-81/03, T-82/03 and T-103/03, EU:T:2006:397, paragraph 76 and the case-law cited).

49 In assessing the relevant public's perception of the signs, account should be taken of the average consumer of the category of goods concerned, who is reasonably well informed and reasonably observant and circumspect (judgment of 13 February 2007, *Mundipharma v OHIM — Altana Pharma (RESPICUR)*, T-256/04, EU:T:2007:46, paragraph 42).

50 The applicants rely on the case-law to the effect that the relevant public's understanding of a sign must be proved in respect of territories in which the relevant language is not the native language. In that regard, they take issue with the Board of Appeal for failing to distinguish between the English-speaking public and the relevant non-English-speaking public within the European Union and for failing, therefore, to take account of the fact that the latter will not understand a foreign language such as English.

51 First of all, with regard to the relevant consumer and his level of attention, the Opposition Division was correct to take the view that, bearing in mind the goods in question, the relevant consumer is the public at large and that its level of attention is low. That finding was called into question neither before the Board of Appeal nor before the Court and must be endorsed.

52 Next, it is necessary to examine whether the Board of Appeal was entitled to consider that the word 'pink' is an English word the meaning of which will be understood by the majority of the relevant public in the European Union and whether, therefore, there was no reason for it to make a distinction between English-speaking consumers and the non-English-speaking public.

53 According to case-law, it may be assumed that a sign will be understood if the sign is applied for in respect of a territory in which the language of the sign is the native language of the population of the territory and this has to be proved in respect of territories in which the relevant language is not the native language of the population, unless a sufficient knowledge of the language of the sign on the part of the target public in those territories is a well-known fact (judgment of 26 November 2008, *New Look v OHIM (NEW LOOK)*, T-435/07, not published, EU:T:2008:534, paragraph 22).

54 The Court has previously confirmed that a basic understanding of English on the part of the general public, in any event in the Scandinavian countries, the Netherlands and Finland, must be regarded as a well-known fact (judgments of 26 November 2008, *NEW LOOK*, T-435/07, not published, EU:T:2008:534, paragraph 23, and of 9 December 2010, *Earle Beauty v OHIM (NATURALLY ACTIVE)*, T-307/09, not published, EU:T:2010:509, paragraph 26). It may therefore be assumed that consumers in the countries mentioned above who have a sufficient basic knowledge of English will understand the meaning of the word 'pink', which is part of everyday vocabulary.

55 On the other hand, as regards the other EU countries in which English is not the native language, it cannot be assumed that the word 'pink' will be understood and this must therefore be proved, in accordance with the case-law cited in paragraph 53 above.

56 In that regard, first, it should be noted that the intervener has produced evidence showing that more than 300 trade marks have been registered for goods in Class 31 that

include the word element ‘pink’ and that there are more than 1 000 marks in the world that contain that word element.

57 Second, as regards words indicating a colour, it is settled case-law that the English word ‘blue’, denoting the colour blue, is regarded as part of basic English vocabulary known to the relevant public — the relevant public in the case in question being professionals and the general public in the European Union — and that, as such, it will probably be understood by the relevant public in non-English-speaking countries of the European Union (judgments of 12 November 2009, *ecoblue v OHIM — Banco Bilbao Vizcaya Argentaria (Ecoblue)*, T-281/07, not published, EU:T:2008:489, paragraph 30, and of 27 June 2013, *MOL v OHIM — Banco Bilbao Vizcaya Argentaria (MOL Blue Card)*, T-367/12, not published, EU:T:2013:336, paragraph 42). Similarly, it has been held that the element ‘red’ (denoting the colour red in English) of a contested mark will be directly understood by the relevant public — the relevant public in the case in question being, inter alia, average German consumers but who, in view of the high price and specialist nature of the good and services covered by the signs at issue, have a particularly high level of attention when purchasing those goods or services — as it is a basic English word and forms part of everyday English vocabulary (judgments of 13 October 2009, *Deutsche Rockwool Mineralwoll v OHIM — Redrock Construction (REDROCK)*, T-146/08, not published, EU:T:2009:398, paragraph 78, and of 8 July 2015, *Deutsche Rockwool Mineralwoll v OHIM — Redrock Construction (REDROCK)*, T-548/12, EU:T:2015:478, paragraph 39).

58 In the present case, the word ‘pink’ must be regarded, in the same way as the words ‘blue’ and ‘red’, as part of basic English vocabulary regularly used both in everyday life and in advertising. It is clear that the relevant public throughout the European Union has had extensive and repeated exposure to that word, as attested by the evidence, referred to in paragraph 56 above, submitted by the intervener in the proceedings before the bodies of EUIPO.

59 Accordingly, the Board of Appeal did not err in concluding, in essence, in paragraphs 18 and 20 of the contested decision, that the term ‘pink’ is a basic English word and that, regardless of the various languages spoken in the European Union, the average consumer of the general public, who is deemed to be reasonably well informed and reasonably observant and circumspect, is capable of understanding the meaning of that word.

60 It follows that the arguments alleging that the Board of Appeal incorrectly defined the relevant public and incorrectly assessed that public’s perception of the word ‘pink’ must be rejected.

The comparison of the signs

61 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, inter alia, their distinctive and dominant elements. The perception of the marks by the average consumer of the goods or services in question plays a decisive role in the global assessment of that 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 judgment of 12 June 2007, *OHIM v Shaker*, C-334/05 P, EU:C:2007:333, paragraph 35 and the case-law cited).

62 The signs at issue in the present case are the word signs PINK LADY and WILD PINK. The Board of Appeal stated, in paragraphs 17 to 19 of the contested decision, that there is a variety of apples called ‘Cripps Pink’ and that those apples are characterised by a pinkish-red colour. It inferred from this that the word element ‘pink’ may be understood by the relevant public as a descriptive term as it indicates a particular quality of the goods in question, namely their colour. In view of the minor impact of the word element ‘pink’, due to its descriptive nature, and the reversed position of that element within the signs at issue, it concluded that the signs are visually and phonetically dissimilar.

63 The applicants do not accept that the word ‘pink’ is descriptive. They consider that, in any event, the weakness of that word’s distinctive character does not render it negligible, that it must be taken into account in the assessment of the similarity of signs at issue and that the signs are visually and phonetically similar to at least an average degree.

64 EUIPO and the intervener contend that the Board of Appeal did not err in concluding that the signs at issue are visually and phonetically dissimilar, as the common word element ‘pink’ will be understood throughout the European Union as denoting a colour, that it is descriptive of the goods in question and that the reversed positions of that element within the signs at issue reinforces the different impression conveyed by the signs.

65 In the light of the applicants’ arguments, it is necessary, in the first place, to determine the distinctive and dominant elements of the signs at issue, if any.

– The distinctive and dominant *elements*

66 For the purposes of assessing the distinctive character of an element of a mark, an assessment must be made of the greater or lesser capacity of that element to identify the goods for which the mark was registered as coming from a particular undertaking, and thus to distinguish those goods from those of other undertakings. In making that assessment, account should be taken, in particular, of the inherent characteristics of the element in question in the light of whether it is at all descriptive of the goods for which the mark has been registered (judgments of 13 June 2006, *Inex v OHIM — Wiseman (Representation of a cowhide)*, T-153/03, EU:T:2006:157, paragraph 35, and of 13 December 2007, *Cabrera Sánchez v OHIM — Industrias Cárnicas Valle (el charcutero artesano)*, T-242/06, not published, EU:T:2007:391, paragraph 51).

67 Where some elements of a trade mark are descriptive of the goods and services in respect of which that mark is protected or the goods and services covered by the application for registration, those elements are recognised as having only a low, or even very low, distinctive character (see, to that effect, judgments of 12 September 2007, *Koipe v OHIM — Aceites del Sur (La Española)*, T-363/04, EU:T:2007:264, paragraph 92, and of 13 December 2007, *el charcutero artesano*, T-242/06, not published, EU:T:2007:391, paragraph 52 and the case-law cited). Most often, it will be possible to recognise those elements as being distinctive only because of their combination with the other elements of the mark. In view of their low, or even very low, distinctive character, descriptive elements of a trade mark are not generally regarded by the public as being dominant in the overall impression conveyed by that mark, unless, particularly because of their position or their size, they appear likely to make an impression on the public and to be remembered by them (see, to that effect, judgment of 13 December 2007, *el charcutero artesano*, T-242/06, not published, EU:T:2007:391, paragraph 53 and the case-law cited). That does not mean, however, that the

descriptive elements of a mark are necessarily negligible in the overall impression created by that mark.

68 First of all, the Court must determine whether the word ‘pink’ is descriptive of the goods covered by the signs at issue.

69 It may be concluded, on the basis of all the observations and documents, referred to in paragraph 23 above, submitted by the intervener in the proceedings before the bodies of EUIPO, that the Board of Appeal was entitled to take the view that the word element ‘pink’ is descriptive, as it indicates a specific quality of the goods in question, namely their colour.

70 In that regard, it is necessary to reject the applicants’ argument that, as the marks at issue are registered for fruits in general, an assessment confined to apples is insufficient for all fruits as they are not interlinked in a sufficiently direct and specific way as to form a category. As EUIPO observed, the broad specification ‘fruits’ includes apples and other fruits which may be pink in colour, such as raspberries, strawberries, cherries and pomegranates. It follows that the word ‘pink’ must be regarded as descriptive of the goods for the whole of the specification.

71 Second, it is necessary to examine whether, due to its descriptive nature, the word element ‘pink’ has as negligible role in the marks at issue.

72 It should be noted at the outset that, although it is true, as a general rule, that the public will not consider a descriptive element forming part of a mark as the distinctive and dominant element of the overall impression conveyed by that mark, that does not mean that a descriptive element of a mark is necessarily negligible in the overall impression produced by it (see, to that effect, judgment of 12 November 2015, *CEDC International v OHIM — Fabryka Wódek Polmos Łańcut (WISENT)*, T-449/13, not published, EU:T:2015:839, paragraph 101). It is necessary, in particular, to examine whether other elements of the mark are likely to dominate, by themselves, the relevant public’s recollection of that mark.

73 In the present case, while it is true that the term ‘pink’ plays a secondary role vis-à-vis that of the word ‘lady’, which is at the end of the earlier mark, and the word ‘wild’, which is at the beginning of the mark applied for, the words ‘lady’ and ‘wild’ cannot, in any event, be regarded as likely to dominate, by themselves, the relevant public’s recollection of those marks.

74 In the light of all the foregoing considerations, when comparing the signs in question, account must be taken of the fact that the word element ‘pink’ does not play a negligible role in the marks at issue and cannot therefore be disregarded.

– The visual, phonetic and conceptual comparison

75 Visually, the signs are the same in so far as they both contain the word ‘pink’.

76 The Board of Appeal found that the signs at issue are visually dissimilar on the ground that the common word element was in reverse positions within those signs and had a minor impact due to its descriptive character.

77 The Court finds that that conclusion is clearly based on the approach that the word element ‘pink’ is negligible. In other words, even though the Board of Appeal stated, in essence, that that word had a minor impact and therefore played a secondary role, it then went on to ignore it completely. Indeed, there is no justification for the view that the differences between the signs at issue are such that, from a visual point of view, they may be said to be visually dissimilar.

78 The signs at issue each have only two word elements. The different word element in the signs is relatively short, namely four letters for ‘wild’ and for ‘lady’. The word ‘pink’, present in each of the signs, also has four letters.

79 It may be concluded from the above that the signs have, at least, a low degree of visual similarity and that the Board of Appeal therefore made an error in that regard.

80 As regards the phonetic comparison of the signs at issue, the Board of Appeal took the view that the signs are dissimilar for the same reasons as those set out in paragraph 76 above, namely because of the reversed position of the common word element ‘pink’ in those signs and the minor impact of that element due to its descriptive character.

81 In so doing, the Board of Appeal ignored the word element ‘pink’ and thus, by implication, concluded that that element was negligible. It should have found that the signs at issue have, at the very least, a weak degree of phonetic similarity, and therefore also erred in that regard.

82 As regards the conceptual comparison, the Board of Appeal considered that the signs at issue are dissimilar as the expression ‘pink lady’ will be understood throughout the European Union as referring to the concept of a ‘lady in pink’, while the expression ‘wild pink’ will be perceived as referring to a colour, namely a sort of pink ‘that is somehow wild’ (see paragraph 20 of the contested decision).

83 The applicants contest those findings, maintaining, first, that the majority of the non-English-speaking public will not understand the meaning of the signs at issue and, second, that the reference to the colour pink is present in both marks, so that there is, at the very least, an average degree of similarity. EUIPO and the intervener argue that the earlier mark refers to the concept of a lady and the mark applied for to a colour. They contend that the link deriving from the reference to the same colour is too remote for it to be concluded that the signs are conceptually similar and that the conceptual similarity must be considered in the light of the fact that the word element ‘pink’ lacks distinctive character due to its descriptive nature.

84 It should be noted that, according to case-law, conceptual similarity arises from the fact that two marks use images with analogous semantic content (judgments of 11 November 1997, *SABEL*, C-251/95, EU:C:1997:528, paragraph 24, and of 21 April 2010, *Peek & Cloppenburg and van Graaf v OHIM — Queen Sirikit Institute of Sericulture (Thai Silk)*, T-361/08, EU:T:2010:152, paragraph 63).

85 In the present case, the Court finds that the English-speaking public of the European Union will perceive the presence of the word ‘pink’ in both the signs as denoting the colour ‘pink’. It will understand the expression ‘pink lady’ as referring to the concept of a ‘lady in

pink’ and the expression ‘wild pink’ as referring to a colour, namely a kind of pink to be found in the wild.

86 As regards the non-English-speaking public of the European Union, the Board of Appeal was correct to state that it will understand the meaning of the word ‘lady’. Although English in origin, that word can be found in most dictionaries in the official languages of the European Union and it may therefore be assumed that it is known by the public in the territory in which those languages are spoken. With regard to the territories in which the word does not appear in the dictionaries of the languages spoken there, it is clear that its meaning is well known because it is a common word in English and is very widely used both in most languages of the European Union and in the media. It should be noted in that regard, with reference to the requirement referred to in paragraph 29 above, that the applicants have not shown that the Board of Appeal made an error of assessment when it stated that that fact is well known. As regards the word ‘pink’, the non-English-speaking public in the European Union will understand what it means, as indicated in paragraph 55 to 59 above. On the other hand, it follows from the judgment of 7 March 2013, *FairWild Foundation v OHIM — Wild (FAIRWILD)* (T-247/11, not published, EU:T:2013:112, paragraph 39), that the word ‘wild’ is not regarded, a priori, as an English word known by the relevant public throughout the European Union and the intervener has failed to produce any evidence to the contrary.

87 The relevant non-English-speaking public will thus be confronted, as regards the earlier sign, with the concept of a lady dressed in pink, or otherwise characterised by that colour, and, as regards the sign applied for, by the adjective ‘pink’, if it does not understand the word ‘wild’.

88 It is clear that both the relevant English-speaking and non-English-speaking public will perceive the presence of the word ‘pink’ in both signs as denoting the colour pink. As both signs refer to the colour pink, it cannot be ruled out that there may be said to be a degree of conceptual similarity (see, to that effect, judgments of 12 November 2008, *Ecoblue*, T-281/07, not published, EU:T:2008:489, paragraph 35, and of 25 September 2015, *Copernicus-Trademarks v OHIM — Bolloré (BLUECO)*, T-684/13, EU:T:2015:699, paragraphs 57 and 58).

89 Nevertheless, account must be taken of the fact that the word element ‘pink’ has a low degree of distinctive character in the marks at issue due to its descriptive nature, as observed in paragraphs 68 to 74 above. In the light of the factors set out above, the signs at issue must be regarded as having a low degree of conceptual similarity.

90 With regard to the applicants’ argument that the presence of the pink square which dominates EU marks No 6 335 591 and No 8 613 991 suggests that the signs at issue are conceptually similar to an average degree, that argument must be rejected. The presence of that square does not convey any meaning other than the colour pink and cannot therefore affect the conclusions in paragraph 88 and 89 above that the signs at issue are conceptually similar to a low degree only.

91 It therefore follows from the foregoing that the Board of Appeal was incorrect to take the view that the signs at issue are visually, phonetically and conceptually dissimilar. On the basis of that incorrect assessment, it considered that it was entitled to conclude that the signs at issue were dissimilar overall, without carrying out any global assessment of the likelihood of confusion. In so doing, it infringed Article 8(1)(b) of Regulation No 207/2009.

92 It follows from all the foregoing considerations that the third plea must be upheld.

The fourth plea in law, alleging infringement of Article 8(5) of Regulation No 207/2009

93 In the fourth plea, the applicants submit that the types of damage referred to in Article 8(5) of Regulation No 207/2009 may arise because of the low degree of similarity between the marks at issue and that, even though the common word element ‘pink’ might not give rise to a likelihood of confusion, it undeniably constitutes a degree of similarity that will enable the relevant public to establish a certain link between the marks at issue, bearing in mind the strong reputation of the earlier marks, the fact that some of the goods are the same and the fact that the parties are direct competitors.

94 EUIPO contends that the reputation of an earlier mark must be taken into account when assessing the likelihood of confusion, not when assessing whether the marks at issue are similar. Relying on case-law, the intervener claims that, in the absence of any similarity between the two marks, it would appear difficult to establish a link between them under Article 8(5) of Regulation No 207/2009. The intervener also notes that the fact that the two marks contain the same descriptive word element does not automatically mean that the public will establish a link for the purpose of that provision.

95 It is apparent from the wording of Article 8(5) of Regulation No 207/2009 that its application is subject to three conditions: first, that the signs at issue are identical or similar, second, that the earlier mark cited in opposition has a reputation and, third, that there is a risk that the use by someone, without due cause, of the sign in respect of which registration as a trade mark is applied for will take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier mark. Furthermore, it is apparent from that wording that the three conditions referred to above must be regarded as cumulative. Lastly, it must be pointed out that the condition that the signs at issue must be identical or similar is common to Article 8(1)(b) and Article 8(5) of that regulation (judgment of 10 December 2015, *El Corte Inglés v OHIM*, C-603/14 P, EU:C:2015:807, paragraph 38).

96 Given that it is not apparent either from the wording of paragraph 1(b) and paragraph 5 of Article 8 of Regulation No 207/2009 or from the case-law of the Court of Justice that the concept of similarity has a different meaning in each of those paragraphs, it follows, *inter alia*, that, if, in examining the conditions for the application of Article 8(1)(b) of that regulation, the General Court concludes that there is no similarity between the signs at issue, paragraph 5 of Article 8 also necessarily does not apply to the case in point. Conversely, if the General Court takes the view, in the context of that same examination, that there is some similarity between the signs at issue, such a finding is equally valid with regard to the application both of Article 8(1)(b) and of Article 8(5) of that regulation (judgment of 10 December 2015, *El Corte Inglés v OHIM*, C-603/14 P, EU:C:2015:807, paragraph 39).

97 However, in a situation in which the degree of similarity in question does not prove to be sufficient to result in the application of Article 8(1)(b) of Regulation No 207/2009, it cannot be deduced from that that the application of paragraph 5 of that article is necessarily precluded (judgment of 10 December 2015, *El Corte Inglés v OHIM*, C-603/14 P, EU:C:2015:807, paragraph 40).

98 The degree of similarity required under Article 8(1)(b) of Regulation No 207/2009, on the one hand, and that required under Article 8(5) of that regulation, on the other, is different.

Whereas the provision of protection under Article 8(1)(b) is conditional upon a finding that there is such a degree of similarity between the marks at issue that there is a likelihood of confusion between them on the part of a relevant section of the public, the existence of such a likelihood is not necessary for the protection conferred by Article 8(5). Accordingly, the types of damage referred to in Article 8(5) of Regulation No 207/2009 may be the consequence of a lesser degree of similarity between the earlier marks and the mark applied for, provided that it is sufficient for the relevant section of the public to make a connection between those marks, that is to say, to establish a link between them (see judgments of 24 March 2011, *Ferrero v OHIM*, C-552/09 P, EU:C:2011:177, paragraph 53, and of 20 November 2014, *Intra-Press v Golden Balls*, C-581/13 P and C-582/13 P, not published, paragraph 72).

99 Article 8(5) of Regulation No 207/2009, like Article 8(1)(b), is manifestly inapplicable where the General Court rules out any similarity between the marks at issue. It is only if there is some similarity, even faint, between the marks at issue that the General Court must carry out an overall assessment in order to ascertain whether, notwithstanding the low degree of similarity between them, there is, on account of the presence of other relevant factors such as the renown or reputation enjoyed by the earlier mark, a likelihood of confusion or a link made between those marks on the part of the relevant public (judgments of 24 March 2011, *Ferrero v OHIM*, C-552/09 P, EU:C:2011:177, paragraph 66, and of 20 November 2014, *Intra-Press v Golden Balls*, C-581/13 P and C-582/13 P, not published, EU:C:2014:2387, paragraph 73).

100 As stated in paragraphs 75 to 81 and 91 above, the Board of Appeal infringed Article 8(1)(b) of Regulation No 207/2009 by taking the view that the marks at issue are visually, phonetically and conceptually dissimilar, by basing its conclusion that those marks are different overall on that incorrect premiss, and by failing, therefore, to take account of the fact that the signs at issue have, at the very least, a low degree of visual, phonetic and conceptual similarity.

101 Therefore, in accordance with the case-law cited in paragraph 99 above, the Board of Appeal erred in finding that Article 8(5) of Regulation No 207/2009 was not applicable without carrying out an overall assessment of the marks at issue in order to determine whether, as the case may be, a low degree of similarity between the signs may nonetheless be sufficient, on account of the presence of other relevant factors, such as the renown or reputation enjoyed by the earlier mark, for the relevant public to make a link between the marks.

102 In those circumstances, the Court finds that the Board of Appeal infringed Article 8(5) of Regulation No 207/2009 by concluding that it was necessary to reject the opposition in its entirety, irrespective of the reputation that the earlier marks may enjoy.

103 Consequently, the fourth plea must be upheld.

104 In view of all the foregoing, and without there being any need to rule on the second plea, the contested decision must be annulled.

Costs

105 Under Article 134(1) 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. Under Article 134(2) of those rules, where there is more than one unsuccessful party, the Court is to decide how the costs are to be shared.

106 In addition, pursuant to Article 190(2) of the Rules of Procedure, costs necessarily incurred by the parties for the purposes of the proceedings before the Board of Appeal are to be regarded as recoverable costs.

107 As EUIPO and the intervener have been unsuccessful, in addition to bearing their own costs, they must be ordered to pay the costs incurred before the General Court and the costs necessarily incurred before the Board of Appeal, in accordance with the forms of order sought by the applicants. It is fair in the circumstances of the case to order that EUIPO and the intervener are each to pay half of the costs and expenditure necessarily incurred by the applicants.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. Annuls the decision of the Fourth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 10 January 2017 (Case R 87/2015-4);

2. Orders EUIPO to bear its own costs and to pay half the costs incurred by **Apple and Pear Australia Ltd and Star Fruits Diffusion, including half the costs necessarily incurred by them for the purposes of the proceedings before the Board of Appeal of EUIPO;**

3. Orders Pink Lady America to bear its own costs and to pay **half the costs incurred by Apple and Pear Australia Ltd and Star Fruits Diffusion, including half the costs necessarily incurred by them for the purposes of the proceedings before the Board of Appeal of EUIPO.**

Prek

Buttigieg

Berke

Delivered in open court in Luxembourg on 15 October 2018.

E. Coulon

Registrar

M. Prek

President