QORTI TAL-APPELL

IMĦALLFIN

ONOR. IMĦALLEF GIANNINO CARUANA DEMAJO
PRESIDENT

ONOR. IMĦALLEF TONIO MALLIA

ONOR. IMĦALLEF ANTHONY ELLUL

Seduta ta' nhar il-Ħamis, 25 ta' Marzu, 2021.

Numru 4

Rikors maħluf numru 253/2019/1 MCH

Av. Antonio Ghio bħala mandatarju speċjali tas-soċjetà estera *International Tobacco p.l.c.*

v.

P.L. Madeleine Firman kuratur deputat sabiex tirrappreżenta lis-soċjetà estera *BR International Holdings Inc.* maħtura b'dikriet tat-2 ta' April 2019

1. Dan huwa appell tas-soċjetà konvenuta minn sentenza mogħtija mill-Prim'Awla tal-Qorti Ċivili fis-17 ta' Ġunju 2020 li laqgħet it-talbiet tas-soċjetà attriċi biex *trademark* reġistrat f'isem il-konvenuta jitneħħa mir-reġistru ta' *trademarks* ta' Malta. Il-konvenuta qiegħda tappella wkoll minn dikriet fl-20 ta' Diċembru 2019 li ikkonferma dikriet ieħor tal-11

ta' Diċembru 2019 li bih l-ewwel qorti kienet iddifferiet il-kawża għas-sentenza. Il-fatti relevanti huma dawn:

2. Il-konvenuta għandha reġistrazzjoni mal-Kontrollur tal-Proprjetà Industrijali ta' *trademark* bl-isem *Business Royals Premium* u bin-numru TM52531. L-attriċi iżda tgħid illi sa ħames snin wara r-reġistrazzjoni l-konvenuta naqset milli tinqeda b'dan it-*trademark* u lanqas hemm raġunijiet xierqa għal dan in-nuqqas, li hu bi ksur tal-art. 42(1)(*a*) tal-Att dwar it-*Trademarks* ["Kap. 416"] li kien fis-seħħ fiż-żmien relevanti[1]. Tgħid ukoll illi:

> »… … … effetivament dan it-*trademark* kien ġie reġistrat b'mod abbużiv u illegali *ab initio stante* illi l-intimata qatt ma kellha l-intenzjoni li tagħmel uħu minnu ġaladarba l-prodotti minnha suppliti ma humiex konformi mal-liġijiet vigenti kif ukoll mat-*Tobocco Products Directive* (2014/40/EU) u għalhekk mhux talli qatt ma nbigħu jew ġew prodotti jew tqiegħdu fuq is-suq ġewwa Malta, talli kien ikun illegali kieku dan sar.«

3. L-attriċi għalhekk talbet illi l-qorti:

> »(1) tiddikjara illi s-soċjetà *BR International Holdings Inc.* naqset milli tagħmel użu tat-*trademark* bin-numru ta' reġistrazzjoni TM52351 għal *oltre* minn ħames snin mid-data ta' reġistrazzjoni u sħansitra qatt ma għamlet użu mill-istess *trademark*;
>
> »(2) konsegwentament tirrevoka r-reġistrazzjoni tat-*trademark* numru TM52531 - *Business Royals Premium* u dana *ai termini* tal-artikolu 42(1)(*a*) tal-Kap. 416 tal-Liġijiet ta' Malta u/jew kull liġi oħra li din l-onorabbli qorti jidhrilha xierqa u opportuna;
>
> »(3) tordna illi t-*trademark* numru TM52531 - *Business Royals Premium* tiġi mneħħija mir-reġistru ta' *trademarks* ta' Malta.«

4. Bejn l-istess partijiet hemm kawża oħra fl-ismijiet Av. Paul Micallef Grimaud *noe v. International Tobacco p.l.c. et* (rikors maħluf nru 1287/2018) fejn il-konvenuta tallum hija attriċi u l-attriċi tallum hija fost il-konvenuti. F'dik il-kawża l-konvenuta tallum talbet rimedju għax

[1] Il-Kap. 416 illum hu sostitwit bil-Kap. 597.

tgħid illi l-attriċi tallum daħħlet ġewwa Malta merkanzija bit-*trademark* li dwaru saret il-kawża tallum bi ksur tad-drittijiet tagħha fuq dak it-*trademark*. Fis-seduta tal-14 ta' Ottubru 2019 f'dik il-kawża ġie verbalizzat hekk:

> »Id-difensuri tal-partijiet jaqblu li l-provi f'din il-kawża sa fejn huma relevanti għandhom jiffurmaw parti mill-atti tal-kawża numru 253/2019« [*i.e.* il-kawża tallum].

5. Fis-seduta tal-11 ta' Diċembru 2019 fil-kawża tallum, ġie verbalizzat hekk:

> »L-atturi jiddikjaraw li qed jagħalqu l-provi.
>
> »Id-difensuri tal-partijiet jiddikjaraw li m'għandhomx aktar provi u li l-kawża tista' tmur għas-sentenza.
>
> »Bi ftehim l-attur għandu sal-aħħar ta' Jannar 2020 biex jagħmel nota ta' sottomissjonijiet bil-*visto* anke informali tad-difensur tal-kontro-parti u l-konvenuta għandha sal-aħħar ta' Frar 2020 biex tagħmel nota bl-istess *visto*.
>
> »Kawża differita għat-23 ta' Marzu 2020 fid-9.00 *am* għas-sentenza.«

6. L-għada, it-12 ta' Diċembru 2019, l-ewwel qort tat dikriet li jgħid hekk:

> »Billi l-provi fil-kawza nru 1287/2018 għadhom mhux magħluqa l-qorti tistieden lill-partijiet jinfurmaw lill-qorti b'nota fi żmien erbat ijiem jekk il-kawża nru 253/2019 għandhiex tibqa' differita għas-sentenza kif ġà degretat, jew hemmx lok li xi parti titlob is-sospenzjoni tal-prolazzjoni tas-sentenza sakemm jingħalqu l-provi fil-kawża nru 1287/2019.«

7. B'nota tas-16 ta' Diċembru 2019 il-konvenuta iddikjarat hekk:

> »… … … ladarba l-provi fil-kawża bin-numru 1287/2018 għad ma humiex magħluqin, u tali provi, fuq ftehim tal-partijiet, ukoll jiffurmaw parti mill-kawża odjerna sa fejn rilevanti, il-prolazzjoni tas-sentenza … … … għandha tiġi sospiża sakemm jingħalqu l-provi fil-kawża bin-numru 1287/2018, u dan *stante* illi għad jistgħu jiġi rilevati fatti li huma ta' rilevanza għall-eżitu tal-kawża odjerna.«

8. Fl-20 ta' Diċembru 2019 l-ewwel qorti tat dikriet li jgħid hekk:

> »Il-qorti, wara li rat in-nota tal-partijiet wara d-digriet tagħha tat-12 ta' Diċembru 2019, tqis illi l-partijiet iddikjaraw li għalqu l-provi f'kawża li mhix strettament marbuta mal-mertu tal-kawża 1287/2018 u għalhekk qed tikkonferma l-verbal u digriet tal-11 ta' Diċembru 2019.«

9. Imbagħad, bis-sentenza tas-17 ta' Ġunju 2020 li minnha sar ukoll dan l-appell, l-ewwel qorti laqgħet it-talbiet tal-attriċi għal raġunijiet li fissrithom hekk:

> »Din l-azzjoni hi waħda bbażata fuq l-artikolu 42(1)(*a*) tal-Kap. 416 li tgħid hekk:
>
> > »"Ir-reġistrazzjoni ta' *trademark* tista' tiġi revokata għal xi waħda minn dawn ir-raġunijiet li gejjin –
> >
> > »"(*a*) li fil-perjodu ta' ħames snin wara d-data tat-temm tal-proċedura ta' reġistrazzjoni din ma tkunx tqiegħdet f'użu ġenwin f'Malta, mill-proprjetarju jew bil-kunsens tiegħu, għar-rigward tal-oġġetti jew is-servizzi li dwarhom tkun reġistrata, u ma jkunx hemm raġunijiet xierqa għaliex ma tkunx qiegħda hekk tintuża."
>
> »Din il-kawża hi intiża sabiex il-qorti tirrevoka r-reġistrazzjoni tat-*trademark Business Royals* f'isem is-soċjetà intimata minħabba r-raġuni ta' non użu.
>
> »Dan l-artikolu jitfa' prova negattiva ta' non użu għal tali revoka li *stante* n-natura tagħha din il-prova tissussisti bil-fatt stess tat-talba sakemm ma tiġix opposta u *sta* għas-soċjetà intimata bħala proprjetarja li tipprova hi li fil-fatt l-użu sar jew qed isir fit-terminu tal-istess artikolu.
>
> »Għalhekk l-oneru tal-prova hu spostat mis-soċjetà attriċi għal dik intimata. Dan hu konfermat mill-artikolu 87 tal-Kap. 416 li jgħid hekk:
>
> > »"Jekk fi proċedimenti ċivili taħt dan l-Att tqum xi kwistjoni dwar l-użu li *trademark* reġistrata seta' sar minnha, l-oneru tal-prova li jkun sar xi użu partikolari minnha jaqa' fuq il-proprjetarju."
>
> »Min hu proprjetarju ta' marka jrid jagħraf li dan mhux biss privileġġ għalih, iżda wkoll li bħala detentur ta' monopolju fuq dik il-marka għandu obbligu li jinqeda biha fil-limiti tal-poteri konċessi lilu bil-liġi, u l-liġi ma tridx li dak il-proprjetarju jibqa' jgawdi b'dak il-monopolju meta jkun naqas, għar-raġunijiet tiegħu, milli jinqeda bih għal tul ta' ħames snin (ara sentenza Avukat Dr Luigi Sansone *v. Marsovin Ltd*, App. 24/02/2012).
>
> »Fil-każ in eżami Ahmed Said Guedi, *general manager* tas-soċjetà intimata xehed li t-TM 52531 ġiet reġistrata Malta fit-2014 u r-*renewal* tagħha hija fit-2023. *Independent Tobacco FZE*, li tipproduċi l-*Business Royals* dahlet f'*non-exclusive distributorship agreement*, datat 8 ta' Marzu 2018, ma' *Azpet Group Ltd* għad-distribuzzjoni ta' Business Royals *products* f'Malta. Hemm *agreements* oħra li għad iridu jiġu negozjati u konklużi. Igħid li huma qed jagħmlu *marketing* għad-distribuzzjoni tal-prodotti *BR*. Li jonqos huwa li jsiru l-*mandatory testing*. *BR* qed iżżid il-*portfolio* tagħha billi fil-2019 daħħlet applikazzjonijiet oħra għal *trademarks* f'Malta. Bħalissa qed tagħmel *marketing* fl-Ewropa kollha imma s-sigaretti *Business Royals* għadhom ma ġewx distribwiti Malta. Jaħsbu li jkunu jisgħtu jidħlu fis-suq fil-2020.
>
> »Min-naħa l-oħra, Sergio Calleja, rappreżentant tas-soċjetà attriċi xehed li t-*trademark* 52531 qatt ma ntużat Malta u qatt ma ra Malta

prodotti b'dik it-*trademark* fis-suq Malti. Kien reċentement, fil-2019, li s-soċjetà attriċi applikat għal *trademarks* oħra f'Malta.

»George Agius, rappreżentant tal-Kontrollur tad-Dwana, xehed li ma jidhirlux li l-konvenuti qatt importaw sigaretti b'dan il-markju, għax mhumiex reġistrati mal-liġi Ewropeja. Hu jgħid li t-*trademark* 52531 mhijiex reġistrata mal-*EUIPO*[2] skond l-artikolu 2 *subsection* 2(A)(B)(C) tal-EC Regolament 608/2013 jew artikolu 2 *subsection* (*a*)(i) tal-Kap. 414 biex tirċievi protezzjoni għal ksur.

»Illi kif gie deċiz fis-sentenza c.f. *Hermes* [1982] R.C.P. 425:

> »"It is suggested that, to constitute genuine use, the use relied upon must be use in the course of trade. In this context, the proviso to section 46(3) draws a clear distinction between use and preparation for use. Preparations for use do not constitute use, althoughit migħt be quite difficult to fix the line between the two. It is suggested that trade in the goods or services in question must have commenced ... In all cases the decision is whether genuine use has been established."

»Fil-fehma tal-qorti l-prova li kellha tagħmel is-soċjetà intimata ma saritx u fil-fatt ma tressqet ebda prova mis-soċjetà intimata illi qatt użat jew tat il-kunsens għall-użu tal-imsemmija *trademark* f'Malta tul il-ħames snin mindu ġiet reġistrata fl-2014. Hemm provi li dina *trademark* qatt ma ġiet użata Malta; li l-prodott *Business Royals* qatt ma ġie distribwit fis-suq Malti; li l-prodott għad irid jiġi ttestjat qabel jidħol fis-suq u l-*agreements* li semmiet is-soċjeta intimata għadhom biss qed jiġu negozjati u jridu jiġu konklużi. *Preparation for use* mhux *use of trade*.

»Darba jirriżulta li, bħala fatt, is-soċjetà intimata naqset milli tagħmel użu mill-marka *Business Royals* għal aktar minn ħames snin, u ma kinux jeżistu raġunijiet li għal din il-qorti jistgħu jitqiesu "xierqa" għaliex ma tkunx qiegħda hekk tintuża, allura, fit-termini tal-artikolu 42(1)(*b*), il-qorti tista' tipprovdi għar-revoka tal-istess reġistrazzjoni.

»*Decide*.

»Għal dawn il-motivi, il-qorti tiddeċiedi billi:

»tiddikjara illi s-soċjeta *BR International Holdings Inc*. naqset milli tagħmel użu tat-*trademark* bin-numru ta' reġistrazzjoni TM52351 għal *oltre* minn ħames snin mid-data ta' reġistrazzjoni u saħansitra qatt ma għamlet użu mill-istess *trademark*;

»konsegwentament tirrevoka r-reġistrazzjoni tat-trademark numru TM52531 *Business Royals Premium* u dana *ai termini* tal-artikolu 42(1)(*a*) tal-Kap. 416 tal-Ligijiet ta' Malta;

»tordna illi t-*trademark* numru TM52531 *Business Royals Premium* tiġi mneħħija mir-reġistru ta' *trademarks* ta' Malta.

»Bl-ispejjeż kontra s-soċjetà intimata.«

---

2 *European Union Intellectual Property Office*.

10. Il-konvenuta b'rikors tas-6 ta' Lulju 2020 appellat kemm mid-dikriet tal-20 ta' Diċembru 2019 kif ukoll mis-sentenza. L-attriċi wieġbet fit-28 ta' Lulju 2020.

11. Nibdew bl-appell mid-dikriet tal-20 ta' Diċembru 2019. L-aggravju ġie mfisser hekk:

> »… … … il-provi li ġew preżentati fil-kawża konnessa kienu rilevanti għall-kawża odjerna u ma ġewx riprodotti fil-kawża odjerna minħabba fil-verbal tal-14 ta' Ottubru 2019.
>
> »Illi fil-waqt li huwa minnu illi d-digriet tal-20 ta' Diċembru 2019 fil-kawża odjerna ma biddel xejn mill-verbal imsemmi tal-14 ta' Ottubru 2019 fil-kawża konnessa bin-numru 1287/2018 fl-ismijiet Av. Paul Micallef Grimaud *noe v International Tobacco plc et*, safejn jirrigwarda l-provi li kienu ġà prodotti fil-kawża bin-numru 1287/2018 fis-sens li dawn jibqgħu jgħoddu għall-kawża odjerna u huma parti integrali tal-kawża odjerna, u fil-waqt li huwa minnu ukoll illi l-eżitu tal-kawża odjerna ma jiddeterminax l-eżitu tal-imsemmija kawża konnessa, iżda jibqa' l-fatt illi d-dikjarazzjoni tal-qorti fid-digriet tagħha tal-20 ta' Diċembru 2019 fil-kawża odjerna hija, bir-rispett, żbaljata in kwantu hemm konnessjoni ċara bejn il-mertu taż-żewġ kawżi u l-fatti u x-xhieda riprodotti fiż-żewġ kawżi.
>
> »… … …
>
> »Illi b'dan ii-mod l-ewwel onor. qorti f'daqqa biddlet posizzjoni maqbula bejn il-partijiet illi l-provi kollha li kienu ser jinġabru tul il-kawża konnessa bin-nru 1287/2018 fl-ismijiet Av. Paul Micallef Grimaud *noe v International Tobacco plc et*, sa fejn rilevanti għall-kawża odjerna, kienu jiffurmaw parti mill-kawża odjerna.
>
> »Illi ladarba l-provi fil-kawża konnessa nru 1287/2018 … għadhom qed jinġabru, l-appellanti ġiet miċħuda l-opportunità illi, permezz tal-provi li għadhom qed jinġabru fl-imsemmija kawża konnessa, tkompli ssaħħaħ l-argumenti li ġew esposti hawn fuq u tagħmel argumenti oħra permezz ta' fatti ġodda li għad jistgħu joħorġu permezz tal-provi li għadhorn qed jinġabru fl-imsemmija kawża konnessa.«

12. Dan l-aggravju kien ikollu meritu li kieku l-appellanti issenjalat xiehda mressqa fil-kawża numru 1287/2018 wara l-20 ta' Diċembru 2019 li għandha ukoll relevanza għall-kawża tallum, iżda ma għamlet xejn minn dan; kulma qalet hu illi "fatti ġodda … għad jistgħu joħorġu". Fi kliem ieħor trid li jitħassar id-dikriet appellat – u konsegwentement

ukoll is-sentenza appellata – minħabba l-possibilità li "għad jistgħu joħorġu" fatti ġodda.

13. Il-fatt illi x-xiehda mogħtija fil-kawża numru 1287/2018 tista' titqies ukoll fil-kawża tallum ma jfissirx illi l-partijiet ma setgħux ukoll iressqu fil-kawża tallum xiehda relevanti għal din il-kawża. Iżda meta qiesu l-posizzjoni fil-11 ta' Diċembru 2019 "id-difensuri tal-partijiet jiddikjaraw li m'għandhomx aktar provi u li l-kawża tista' tmur għas-sentenza", li għandu jfisser illi fehmu illi x-xiehda li għad tista' titressaq fil-kawża 1287/2018 ma hijiex relevanti għall-kawża tallum. Il-possibilità li joħorġu fatti ġodda, li l-konvenuta ma tagħti l-anqas l-iċken indikazzjoni ta' x'jistgħu jkunu, ma hijiex biżżejjed biex is-sentenza fil-kawża tallum tibqa' ma tingħatax għax forsi possibilment għandu mnejn illi fil-kawża l-oħra tista' toħroġ xi ħaġa ġdida.

14. Barra minn hekk, l-ewwel qorti qalet sew illi l-kawża tallum "mhix strettament marbuta mal-mertu tal-kawża 1287/2018". *Se mai* hija l-kawża 1287/2018 li tintlaqat bl-eżitu tal-kawża tallum, u mhux *vice versa*, għax loġikament il-kwistjoni jekk it-*trademark* tal-konvenuta għandhiex jew le titħassar – meritu tal-kawża tallum – tiġi qabel il-kwistjoni jekk l-attriċi għamlitx xi ħaġa bi ksur tad-drittijiet tal-konvenuta fuq dak it-*trademark*, u ma tiddependix fuq jekk seħħx dak il-ksur jew le.

15. L-aggravju dwar id-dikriet tal-20 ta' Diċembru 2020 huwa għalhekk miċħud.

16. Ngħaddu issa għall-aggravji li jolqtu s-sentenza. L-ewwel aggravju huwa effettivament eċċezzjoni ta' nuqqas ta' integrità tal-ġudizzju għax "l-ordni tal-qorti biex il-markju numru TM52531 *Business Royals Premium* 'tiġi mneħħija mir-reġistru ta' *trademarks* ta' Malta' ma tistax tiġi mwettqa in kwantu l-unika persuna li tista' twettaqha, ossija il-Kontrollur tal-Proprjetà Industrijali, mhuwiex parti fil-kawza u għalhekk din l-ordni ma tistax tiġi indirizzata lilu".

17. Il-Kontrollur tal-Proprjetà Industrijali ma huwiex persuna b'interess ġuridiku fil-kawża u għahekk ma huwiex kontradittur leġittimu. Hekk kif ir-Reġistratur taż-Żwieġ ma għandux interess ġuridiku f'kawża dwar nullità ta' żwieġ, u għalhekk ma jiġix imħarrek bħala konvenut għal-kemm imiss lilu li jirreġistra l-annullament, hekk ukoll il-Kontrollur tal-Proprjetà Industrijali ma kellux ikun konvenut fil-kawża tallum għal-kemm ikun hu li jwettaq is-sentenza jekk it-talba tal-attriċi tintlaqa'. L-interess tiegħu huwa biss fl-esekuzzjoni tas-sentenza mhux fil-kontestazzjoni tal-kawża.

18. L-ewwel aggravju hu għalhekk miċħud.

19. It-tieni aggravju hu msejjes fuq dak li l-konvenuta ssejjaħlu "r-retroxena tal-kawża", *viz.* illi din il-kawża nbdiet mill-attriċi "bi tpattija u b'ritaljazzjoni" għall-kawża l-oħra msemmija fuq, numru 1287/2018, mibdija mill-konvenuta tallum kontra l-attriċi u oħrajn li bis-saħħa tagħha talbet illi merkanzija tal-attriċi miżmuma fuq talba tal-konvenuta f'idejn il-Kontrollur tad-Dwana tinqered għax allegatament "kontrafatta" bi ksur tad-drittijiet tal-konvenuta fuq it-*trademark* li dwaru

saret il-kawża tallum. Tkompli tfisser din l-ewwel parti tat-tieni aggravju hekk:

> »Illi kif jirrizulta mill-provi fil-kawza numru 1287/2018 is-soċjetà appellanti hija l-unika soċjetà madwar id-dinja li hija rikonoxxuta illi għandha d-dritt tuża l-markju *Business Royals*, tant illi għandha markji reġistrati ġewwa 37 pajjiż fid-dinja, inkluż 25 Stat Membru tal-Unjoni Ewropea … … …
>
> »Illi għall-kuntrarju ta' dan, is-soċjetà appellata ma għandha l-ebda markju ta' *Business Royals* reġistrat imkien fid-dinja.
>
> »Illi għas-soċjetà appellata r-reġistrazzjoni tal-markju mertu tal-kawża f'Malta kienet parti integrali tal-kummerċ globalizzat tagħha, fil-waqt li s-soċjetà appellata qatt ma ppruvat tirreġistra markju f'Malta qabel ma ġew istitwiti l-kawżi imsemmija.
>
> »Illi kif jirriżulta mill-*Customs House* [*recte*, *Companies House*] tar-Renju Unit, u *cioè* r-reġistru tal-kumpanniji tar-Renju Unit, is-soċjetà appellata l-anqas biss teżerċita negozju, tant li ilha għal dawn l-aħħar snin iddaħħal "*accounts for a dormant company*" u kienet fuq ix-xifer, sena wara l-oħra, li tiġi *struck off*.
>
> »Illi għalhekk l-kawża tas-soċjetà appellata m'hi xejn ħlief waħda tattika magħmula *in mala fede* bi skop li tweġġa' u tippreġudika lis-soċjetà appellanti fil-kummerċ tagħha u sabiex tipprova twaqqa' l-kawża l-oħra fl-ismijiet inversi istitwita mill-appellanti, tant illi f'dik il-kawża s-soċjetà appellata qajmet l-eċċezzjoni tan-nuqqas ta' interess ġuridiku, minkejja illi ma għandhomx bażi għal tali eċċezzjoni.
>
> »Illi għalkemm dawn il-fatti huma kollha pertinenti għall-kawża odjerna … … … l-ewwel onor. qorti ma kkunsidrat xejn minn dan kollu.«

20. Il-fatt illi l-attriċi tallum hija mħarrka fil-kawża mibdija mill-konvenuta ma jfissirx bilfors li l-kawża tallum għamlitha bi tpattija; jekk id-difiża tagħha għax-xilja li għamlet użu illeċitu mit-*trademark* tal-konvenuta hi li tgħid illi l-konvenuta ma għandhiex jedd għal dak it-*trademark*, din il-kawża tallum hija mezz leġittimu ta' difiża għall-attriċi.

21. Il-fatt imbagħad illi l-konvenuta għandha l-istess *trademark* reġistrat f'pajjiżi oħra mhux bilfors huwa konklużiv, għax il-kwistjoni ma hijiex kemm għandha l-konvenuta reġistrazzjonijiet tat-*trademark* f'pajjiżi oħra iżda jekk hijiex tagħmel "użu ġenwin" tat-*trademark* f'Malta, għax il-kawża hija dwar *trademark* fuq ir-reġistru ta' Malta.

22. It-tieni parti tal-aggravju tolqot il-konklużjoni li ma kienx hemm "użu ġenwin" tat-*trademark*:

> »… … … l-ewwel onorabbli qorti naqset milli tqis illi l-prodotti mertu tal-kawża huma prodotti tat-tabakk, u *cioè* sigaretti, li kif ġie spjegat fl-*affidavit* tal-*general manager* tas-soċjeta appellanti tal-25 ta' Settembru 2019 jirrikjedu li jiġu ttestjati għas-suq partikolari, f'dan il-każ Malta, u jridu ukoll jgħaddu minn proċess ta' kwalità ta' kontroll strett u t-testijiet tas-saħħa li jieħdu ż-żmien tagħhom.
>
> »Illi għall-ewwel qorti l-fatt illi s-soċjetà appellanti kienet ikkonkludiet kuntratt ta' distribuzzjoni tal-prodotti tat-tabakk tagħha ġewwa Malta ma kienx biżżejjed biex jiġi meqjus li kien hemm użu tal-markju mis-soċjetà appellanti.
>
> »Illi l-anqas ma kien biżżejjed għall-ewwel qorti illi d-distributur kien innegozja l-bejgħ tal-prodotti ġewwa Malta ma' *supermarket* u *franchise* popolari ta' ħwienet li jinsabu mferrxin ma' Malta kollha *(*il-*Convenience Shop).*
>
> »Illi dawn l-azzjonijiet kollha jaqgħu taħt il-kappa ta' "*genuine use*" fi kliem il-Qorti Ewropea li, kif ċitata[3], tfisser illi "*Use of the mark must therefore relate to goods or services already marketed or about to be marketed and for which preparations by the undertaking to secure customers are under way*" u fejn *"when assessing whether there has been genuine use of the trade mark, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, in particular whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark*".
>
> »Illi l-appellanti rnexxielha tagħmel kuntratt ta' distrbuzzjoni ma' soċjetà Maltija li minn rajha kien irnexxielha tinnegozja l-bejgħ tal-prodotti f'Malta fejn il-markju kien fattur determinanti *in vista* tal-isem tal-prodotti magħruf internazzjonalment.
>
> »Illi fih innifsu n-negozjar u qbil tal-kuntratt ta' distrubuzzjoni huwa attività ekonomika bbażata fuq il-markju. Fl-istess mod in-negozjati mal-ħwienet da parti tad-distributur li kien u għadu qed jirriklama l-prodotti mal-ħwienet ġewwa Malta.
>
> »Illi l-appellanti wriet ukoll kif hija għamlet ħilitha sħiħ biex tippenetra s-suq tat-tabakk ġewwa Malta, suq li huwa mifqugħ bi prodotti varji u fejn l-ittestjar tal-prodott huwa essenzjali kemm għall-kwalità tas-sigaretti kif ukoll sabiex ikun jista' jiġi importat minħabba raġunijet ta' saħħa – proċess li, kif intqal hawn fuq, jirrikjedi ammont ta' żmien, b'konsegwenza li dan iwassal għal dewmien inevitabbli fir-rigward tad-distribuzzjoni jew it-tqegħid ta' dawk il-prodotti fis-suq.
>
> » Illi għalhekk, b'kull dovut rispett, jiġi sottomess illi fid-deċiżjoni tagħha l-ewwel onor. qorti naqset milli tieħu in konsiderazzjoni ċ-ċirkostanzi partikolari tas-suq tat-tabakk, kemm b'mod ġeneraIi kif ukoll dak ta'

[3] *Ansul BV v Ajax Brandbeveiliging BV*, C-40/01, 11 ta' Marzu 2003.

Malta – kriterju u rekwiżit li huma ben stabbiliti permezz tal-preċitata deċiżjoni f'*Ansul* u l-każistika sussegwenti tal-Qorti Ewropea:

> »"Assessing the circumstances of the case may thus include giving consideration, *inter alia*, to the nature of the goods or service at issue, the characteristics of the market concerned and the scale and frequency of use of the mark."«

23. L-attriċi wieġbet hekk:

> »… … … minkejja d-diversi sottomissjonijiet f'dan l-istadju tal-appellanti, imkien ma ġie ribadut il-punt kruċjali, u *cioè* li minkejja l-preparamenti sabiex jiġi użat il-markju fis-suq Malti, dawn il-preparament baqgħu proprju preparamenti, u ma sar ebda użu fil-kors tal-kummerċ la fir-rigward xi distributuri u wisq iktar fir-rigward tal-konsumatur aħħari.
>
> »… … … l-appellanti fl-ebda stadju ma ġabet xi prova li turi li l-użu tagħha jikkombaċa mar-rekwiżiti ta' dan il-każ u *cioè* li skond kif ċitat mill-appellanti stess: "*whether such use is viewed as warranted in the economic sector concerned*".
>
> »Illi ċertament kif tgħid l-appellanta stess … is-sempliċi fatt illi *BR International Holdings Inc.* ikkonkludiet kuntratt ta' distribuzzjoni tal-prodotti jew negozjar ta' xi bejgħ, proprju ma jikkonstatawx prova ta' użu ġenwin tal-markju figurattiv kif reġistrat. Illi pjuttost l-appellanti bħal donnu qed tipprova tagħti l-impressjoni li għax ġew negozjati xi kuntratti b'referenza ġenerika għal sigaretti prodotti mill-appellanti, mela allura din tissodisfa l-użu ġenwin tal-markju figurattiv kif reġistrat. F'dan ir-rigward jiġi ribadut illi fl-ebda stadju u fl-ebda dokument prodott li xehed xi tip ta' relazzjoni ma' distributuri ma qatt ġie użat il-markju reġistrat numru TM52531.
>
> »Illi għalkemm meta wieħed jara r-rikors tal-appellanti wieħed forsi jinsa, hawn si tratta ta' markju figurattiv, liema markju ma ġie pruvat li ntuża mkien, la fil-preparamenti, la fil-kuntratti ta' distribuzzjoni u wisq iktar fil-kors tal-kummerċ tal-appellanti.
>
> »Illi l-istess każ ċitat mill-appellanti dwar il-markju *Minimax* quddiem il-Qorti tal-Gustizzja Ewropeja C-40/01 jgħid primarjament li:
>
> > »"36. Genuine use must therefore be understood to denote use that is not merely token, serving solely to preserve the rights conferred by the mark. Such use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin."
>
> »Illi l-konklużjoni u d-*decide* proprja ta' din ir-referenza li saret lill-qorti Ewropea tgħid hekk:
>
> > »"43. … there is "genuine use" of a trade mark where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the

> mark. When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark."
>
> »Illi ċertament f'kwalunkwe industrija inkluż dik tat-tabakk, is-settur ekonomiku jirrikjedi illi sabiex tmanti u tkun kompettitiv fis-suq fir-rigward tal-prodott tiegħek għandek tuża markju sabiex jidentifikah; altrimenti tibqa bi prodott anonimu. Għall-kuntrarju tat-tifsira li qed tipprova tagħti l-appellanta, "*whether such use is viewed as warranted in the economic sector concerned*" tirreferi għall-analiżi li għandha ssir sabiex taċċerta l-użu ġenwin ta' markju fil-kuntest tal-prodott li għalih huwa reġistrat. Dan jingħad għaliex meta per eżempju għandek markju li jintuża fir-rigward ta' servizzi professjonali jew *business to business* mela ma tagħmilx sens li tanalizzah minn lenti tal-konsumatur normali, però ċertament f'dan il-każ il-konsumatur jixtri t-tabakk minn fuq l-ixkafef u mhux permezz ta' kuntratti sigrieti bejn distributuri li lanqas biss jirriproduċu l-markju kif reġistrat … … …«

24. L-art. 42(1) tal-Kap. 416, li fuqu hija msejsa din il-kawża, kien igħid hekk:

> »**42.** (1) Ir-reġistrazzjoni ta' *trademark* tista' tiġi revokata għal xi waħda minn dawn ir-raġunijiet li ġejjin –
>
> »(*a*) li fil-perjodu ta' ħames snin wara d-data tat-temm tal-proċedura ta' reġistrazzjoni din ma tkunx tqiegħdet f'użu ġenwin f'Malta, mill-proprjetarju jew bil-kunsens tiegħu, għar-rigward tal-oġġetti jew is-servizzi li dwarhom tkun reġistrata, u ma jkunx hemm raġunijiet xierqa għaliex ma tkunx qegħda hekk tintuża;«

25. Essenzjalment il-konvenuta appellanti tgħid (i) illi l-prodott għadu ma tqigħedx fis-suq għax għadu għaddej minn proċess ta' kontroll ta' kwalità mill-awtoritajiet għal raġunijiet ta' saħħa u (ii) illi, għalkemm, għal din ir-raġuni, għadu ma tqigħedx fis-suq, saru atti bi tħejjija għad-distribuzzjoni tiegħu fis-suq billi saru ftehimiet ma' ħwienet u *outlets* mnejn il-prodott għad jinbigħ.

26. Il-kwistjoni mela hija jekk dawn l-atti preliminari għad-distribuzzjoni effettiva tal-prodott jitqisux "użu ġenwin" għall-għanijiet tal-liġi.

27. Dwar jekk iż-żmien ta' stennija sakemm jinkisbu l-permessi tal-awtoritajiet biex jista' jibda jinbigħ il-prodott jitqiesx żmien ta' użu ġenwin, il-Qorti tal-Ġustizzja tal-Unjoni Ewropea qalet hekk fis-sentenza tat-3 ta' Lulju 2019 *in re* *Viridis Pharmaceutical Ltd v. EUIPO* (C-338/17):

> »37 By its first ground of appeal, Viridis submits that the General Court's assessment of genuine use of the contested mark is vitiated by errors of law. According to Viridis, the General Court was wrong, first … to lay down the principle that use capable of maintaining rights in respect of a medicinal product can exist only where a marketing authorisation has been granted for that medicinal product and, second … to rule out the possibility of use of the trade mark in the context of a clinical trial constituting genuine use.
>
> »38 According to settled case-law, there is genuine use of a trade mark … where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark (judgments of 11 March 2003, *Ansul*, C-40/01, EU:C:2003:145, paragraph 43, and of 8 June 2017, *W. F. Gözze Frottierweberei and Gözze*, C-689/15, EU:C:2017:434, paragraph 37 and the case-law cited).
>
> »39 Genuine use of the mark thus entails use of the mark on the market for the goods and services protected by that mark and not just internal use by the undertaking concerned. Use of the mark must relate to goods or services already marketed or which are about to be marketed and for which preparations by the undertaking to secure customers are under way, particularly in the form of advertising campaigns (see, to that effect, judgment of 11 March 2003, *Ansul*, C-40/01, EU:C:2003:145, paragraph 37).
>
> »40 On the other hand, the affixing of a mark to goods which are not distributed in any way with the aim of penetrating the market for the goods covered by the registration of the mark cannot be classified as genuine use of that mark, since such affixing of a mark does not contribute to creating an outlet for the goods or to distinguishing, in the interest of the consumer, those goods from the goods of other undertakings (see, to that effect, judgment of 15 January 2009, *Silberquelle*, C-495/07, EU:C:2009:10, paragraph 21).
>
> »41 When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial use of the mark is real, particularly the practices regarded as warranted in the relevant economic sector as a means of maintaining or creating market shares for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark (judgments of 11 March 2003, *Ansul*, C-40/01, EU:C: 2003:145, paragraph 43, and of 31 January 2019, *Pandalis* v *EUIPO*, C-194/17 P, EU:C:2019:80, paragraph 83).

»42 In the present instance … the General Court stated that, on the basis of the evidence adduced by Viridis before EUIPO for the purposes of establishing the genuine use of the contested mark … it could be found that Viridis had undertaken preparatory acts, consisting in the implementation of a clinical trial procedure carried out with a view to submitting an application for marketing authorisation and including certain acts of a promotional nature in relation to that trial.

»43 However … the General Court stated that '[that] mark could be put to outward public use only if a marketing authorisation were obtained from the competent authorities', since the legislation on medicinal products prohibits advertising of medicinal products which have not yet been granted marketing authorisation and, therefore, any act of communication intended to obtain or preserve a market share.

»44 … … … the General Court added that, although there may be genuine use before any marketing of the goods covered by a mark, this is the case only if the marketing is imminent. However, in the case in point, in the General Court's view, Viridis had not shown that the marketing of a medicinal product covered by the contested mark that was intended for the treatment of multiple sclerosis was imminent, since it had failed to adduce evidence to support the finding that the clinical trial was about to conclude.

»45 Lastly, in response to certain arguments put forward by Viridis … the General Court assessed the specific circumstances of the use of the contested mark in the context of the clinical trial at issue and found, in essence, that that use fell within the scope of internal use and that it was not established that the scale of that internal use was significant in the pharmaceutical industry.

»46 In the first place, it is thus apparent from the considerations set out by the General Court in the judgment under appeal that, in accordance with the case-law recalled in paragraphs 38 to 41 of the present judgment, the General Court carried out a specific assessment of all the facts and circumstances of the present case with a view to determining whether the acts of use relied on by Viridis could reflect use of the contested mark consistent with its function of indicating the origin of the goods covered and with its commercial *raison d'être*, namely to create or preserve an outlet for the goods in respect of which it had been registered.

»47 With regard to Viridis's argument that … the General Court laid down the principle that a trade mark registered for a medicinal product can be put to genuine use only where a marketing authorisation has been granted for that medicinal product, it should be noted that, as part of its specific assessment, the General Court simply drew the appropriate conclusions from its finding that, in accordance with the applicable legislation, a medicinal product for which marketing authorisation has not yet been granted cannot even form the subject of advertising intended to obtain or preserve a market share. It is therefore impossible to use a mark covering such a medicinal product on the market concerned, contrary to the requirement laid down in the case-law cited in paragraph 39 of the present judgment.

»48 It should be added that the fact, assuming it to be established, that the acts of use relied on by Viridis were, as Viridis submits, consistent with the applicable legal requirements cannot be sufficient

> to establish the genuine nature … of that use, since such use is assessed, in specific terms, in the light of all the facts and circumstances of the case in question and cannot depend exclusively on the lawfulness of the acts of use. The present instance did not concern use on the market for the goods protected by the contested mark.
>
> »49 In so far as Viridis relies on the alleged insufficiency, in the case of the pharmaceutical industry, of the five-year period provided for in Article 51(1)(a) of Regulation Nº 207/2009, it should be observed … that that period applies regardless of the economic sector within which the goods or services for which the mark at issue is registered fall. This argument is therefore ineffective.
>
> »50 In the second place, in response to certain arguments put forward by Viridis, the General Court stated … that the use of the contested mark in the context of a clinical trial could not be equated with placement on the market or even with a direct preparatory act, but was to be regarded as being internal in nature, since it had taken place outside of competition, within a restricted circle of participants, and without being designed to obtain or preserve market shares.
>
> »51 In so doing, the General Court did not disregard the case-law cited in paragraph 39 of the present judgment and relied on by Viridis stating that there may be genuine use of an EU trade mark when the goods covered are not yet being marketed. On the contrary, the General Court correctly observed … that a mark can be found to be put to such use only if the marketing of the goods at issue is imminent, and held … that Viridis had not proved that that was the case here.
>
> »52 In particular, by examining whether the alleged use of the contested mark was made in relation to third parties and whether the volume of use was sufficiently significant in the light of the contingencies specific to the pharmaceutical industry, the General Court examined, in accordance with the case-law of the Court of Justice, whether that use was genuine.
>
> »53 In the light of the case-law cited in paragraphs 38 to 41 of the present judgment … the view should be taken that, inasmuch as the genuine use of an EU trade mark cannot be established by acts of use related to a stage prior to the marketing of the goods or services covered unless the marketing is imminent, the acts of use capable of establishing such genuine use must be external in nature and produce effects for the future public of those goods or services, even in such a pre-marketing phase.
>
> »… … …
>
> »58 It follows that the first ground of appeal must be rejected as being, in part, ineffective and, in part, unfounded.«

28. Partikolarment relevanti huwa dak li jingħad fil-para. 53 tas-silta tas-sentenza tal-Qorti tal-Ġustizzja miġjuba fuq: "*the genuine use of an EU trade mark cannot be established by acts of use related to a stage*

prior to the marketing of the goods or services covered unless the marketing is imminent". Tassew illi dik is-sentenza kienet dwar *trademark* ewropew iżda tgħodd ukoll għal *tardemark* malti ladarba d-disposizzjoni relevanti tal-liġi hija l-istess. Meta xehed b'*affidavit* maħluf fil-25 ta' Settembru 2019[4] l-institur tas-soċjetà konvenuta xehed illi nbeda l-proċess "*to ensure that the health standards in European Union member states including Malta are met*", iżda ma qalx f'liema stadju wasal dan il-proċess ta' kontroll ta' kwalità, u jekk huwiex mistenni li l-permessi meħtieġa jinħarġu dalwaqt. Ma jistax għalhekk jingħad illi saret il-prova illi huwa "imminenti" li l-prodot jitqegħed fis-suq. Il-fatt li sallum għadu ma tqigħedx fis-suq ikompli juri kemm tassew meta nfetħet il-kawża sentejn[5] ilu aktar u aktar ma setax jingħad li "*marketing is imminent*".

29. L-istess konsiderazzjonijiet igħoddu għall-ftehim milħuq bejn is-soċjetà konvenuta u ħwienet u *outlets* oħra ta' distribuzzjoni. Il-ftehim bejn il-konvenuta u d-distributuri[6] sar fit-8 ta' Marzu 2018, tliet snin ilu, li ikompli juri li dan l-att ta' tħejjija ma sarx meta t-tqegħid tal-prodot fis-suq kien appik li jsir. Għalhekk ma jistax jitqies bħala att preparatorju fis-sens tas-sentenza ta' *Ansul*[7] ċitata mill-konvenuta.

30. Tifdal il-kwistjoni relatata jekk l-istennija sakemm jinħarġu l-permessi mill-awtoritajiet, għalkemm ma titqiesx użu ġenwin, titqiesx fost ir-

---

4 *Foll*. 46 *et seqq.* tal-proċess tal-ewwel qorti.

5 Ir-rikors maħluf li bih infetħet il-kawża ġie preżentat fit8 ta' Marzu 2019.

6 *Foll.* 86 *et seqq.* tal-proċess tal-ewwel qorti.

7 Ara nota 3, *supra.*

"raġunijiet xierqa għaliex [it-*trademark*] ma tkunx qegħda hekk tintuża", li huwa l-meritu tat-tielet aggravju tal-konvenuta:

> »… … … il-qorti naqset li tikkunsidra jekk xi element hawn fuq imfisser, u li ġie ipprovat, li wassal għad-dewmien tal-użu tal-markju meritu tal-kawża odjerna fil-bejgħ tal-prodotti lill-konsumaturi, kien jikkwalifika bħala raġuni xierqa għan-nuqqas ta' użu *ai termini* tal-artikolu 42(1)(*a*) tal-Kap. 416.
>
> »Illi l-fatt illi, bir-rispett kollu, l-ewwel onorabbli qorti ma għamlet l-ebda apprezzament ta' dan il-fatt iwassal għall-konklużjoni illi d-deċiżjoni appellata hija żbaljata u għandha tiġi mħassra.
>
> »Illi r-raġunijiet li wasslu għad-dewmien fl-użu tal-markju fil-bejgħ tal-prodotti lill-konsumatur huma … raġunijet leġittimi u reali li huma komuni fis-suq tat-tabakk, fejn il-prodotti jridu jgħaddu minn skrutinju u ttestjar kemm għar-raġunijiet taż saħħa u anke sabiex jiġi stabbilit kif l-istess prodott jista' jippenetra suq ġà kkonċentrat bi prodotti simili, u dan aktar u aktar fejn is-suq huwa wieħed żgħir, bħalma huwa dak ta' Malta, minħabba d-daqs tal-popolazzjoni, u wisq aktar in-numru ta' persuni li jpejpu.
>
> »Illi l-ewwel onor. qorti naqset milli anke tikkunsidra dan kollu u sempliċiment ikkonkludiet, mingħajr l-ebda apprezzament tal-fatti f'dan il-kuntest, illi ma kinux jeżistu raġunijist li għal dik il-qorti setgħu jitqiesu bħala xierqa għaliex il-markju ma kienx qed jintuża.«

31. Dwar dan l-argument il-Qorti tal-Ġustizzja kompliet tgħid hekk fl-istess sentenza ta' *Viridis* imsemmija fuq:

> »»64 By its second ground of appeal, Viridis submits, in essence, that the General Court infringed Article 51(1)(a) of Regulation No 207/2009 by finding that the performance of a clinical trial could not constitute a proper reason for non-use of the contested mark.
>
> »65 In that regard, it should be recalled that, pursuant to Article 51(1)(a) of Regulation No 207/2009, proper reasons for non-use may preclude the revocation of an EU trade mark for lack of genuine use in the circumstances laid down in that provision.
>
> »66 According to the case-law of the Court, only obstacles having a sufficiently direct relationship with a trade mark making its use impossible or unreasonable, and which arise independently of the will of the proprietor of that mark, may be described as 'proper reasons' for non-use of that mark. It must be assessed on a case-by-case basis whether a change in the strategy of the undertaking to circumvent the obstacle under consideration would make use of that mark unreasonable (judgments of 14 June 2007, *Häupl*, C-246/05, EU:C:2007:340, paragraph 54, and of 17 March 2016, *Naazneen Investments* v *OHIM*, C-252/15 P, not published, EU:C:2016:178, paragraph 96).
>
> »67 In addition, it must be made clear that Article 19(1) of the TRIPS Agreement, to which the European Union is a party and account of which was taken by the Court in the case-law set out in the previous

paragraph, cites, amongst the examples of valid reasons justifying non-use of a trade mark, government requirements for goods or services covered by that mark.

»68 In the present instance, it was on the basis of that case-law, recalled in essence in paragraph 53 of the judgment under appeal, that the General Court held, in paragraph 61 of that judgment, that, although the performance of a clinical trial may constitute a reason for non-use of a trade mark, the acts and events to which Viridis refers in this instance and which were assessed by the General Court in paragraphs 55 to 60 of the judgment were within its field of influence and area of responsibility, so that they could not be regarded as being obstacles independent of its will.

»69 In particular, it is clear, in essence, … that, first, the General Court found that it was on account of its own choice, and not of a legal obligation, that Viridis applied for the registration of the contested mark as early as 2003, even though there was great uncertainty as to both the date and the possibility of the marketing of the product covered by that mark since that product was at the clinical trial stage. Secondly, the General Court took account of the fact that the alleged difficulties experienced in the course of the clinical trial at issue, the completion date of which moreover remained uncertain, related back to the insufficient investment committed by Viridis in the light of the specific characteristics of the industry concerned. Thirdly, the General Court observed that Viridis's application to conduct a clinical trial was made more than three years after the contested mark was registered.

»70 Thus, contrary to what Viridis suggests in the context of the present appeal, the General Court by no means ruled out the possibility of a clinical trial being capable of constituting a proper reason for non-use of a mark. On the contrary, the General Court applied the case-law of the Court of Justice cited in paragraph 66 of the present judgment in conducting a specific assessment of the facts alleged before it.

»71 Nor did the General Court err in law where it found that the passage of time between, on the one hand, the dates of the application for and registration of the contested mark and, on the other, the date on which the clinical trial was launched, as well as the duration of that trial and the financial resources committed for the purposes of its rapid completion, fell, in principle, within the responsibility of the proprietor of that mark and could not therefore be regarded as obstacles independent of that proprietor's will.

»72 Furthermore, contrary to Viridis's submissions, the approach adopted by the General Court does not effectively render the five-year period referred to in Article 51(1)(a) of Regulation No 207/2009 meaningless. The existence of that period does not mean that the proprietor of the mark concerned does not have to complete in good time all the necessary preparations in order to be able to put the mark to genuine use once that period has expired.

»73 Indeed, it is apparent, in the light of recital 10 of Regulation No 207/2009, that it would be contrary to the broad logic of Article 51(1)(a) of that regulation to confer too broad a scope on the concept of 'proper reasons for non-use of a mark' (see, by analogy,

> judgment of 14 June 2007, *Häupl*, C-246/05, EU:C:2007:340, paragraph 51).
>
> »74 In the light of the foregoing, the second ground of appeal must be rejected as unfounded and, therefore, the appeal must be dismissed in its entirety.«

32. Fl-*affidavit* tiegħu l-institur tal-konvenuta jgħid illi "*products bearing the registered logos and designs of BR … are currently being tested*"[8]. Ma qalx meta dan il-proċess beda, fiex wasal u x'qiegħda tagħmel il-konvenuta biex jitmexxa. Il-konvenuta ma ressqitx rappreżentant tal-awtoritajiet biex jixhed dwar dan il-proċess u lanqas ippreżentat dokumenti relativi.

33. Billi huwa fuq il-konvenuta l-oneru tal-prova li hemm raġunijiet xierqa għala ma hijiex tagħmel użu mit-*trademark*, u din il-prova ma saritx, l-aggravju ma jistax jintlaqa'.

34. Il-qorti għalhekk tiċħad l-appell u tikkonferma s-sentenza appellata. L-ispejjeż, kemm tal-ewwel grad u kemm tal-appell, tħallashom is-soċjetà konvenuta.

Giannino Caruana Demajo President	Tonio Mallia Imħallef	Anthony Ellul Imħallef

Deputat Reġistratur
rm

[8] Para. 7 tal-*affidavit*, *fol.* 48 tal-proċess tal-ewwel qorti.