



**DECISION**  
**of the Third Board of Appeal**  
**of 19 October 2009**

In Case R 1080/2008-3

**AS Hallik**

O. Müntheri 1  
EE-46106 Tamsalu  
Estonia

Proprietor / Appellant

represented by AAA PATENDIBÜROO OÜ, Tartu mnt 16, EE-10117 Tallinn,  
Estonia

v

**Vaasan & Vaasan Oy**

Nuijalantie 13  
FI-02630 Espoo  
Finland

Invalidity applicant / Respondent

represented by HEINONEN & CO, Fabianinkatu 29 B, FI-00100 Helsinki, Finland

APPEAL relating to Invalidity Proceedings No 3937 (registered Community design  
No 000636071-0001)

**THE THIRD BOARD OF APPEAL**

composed of Th. Margellos (Chairperson and Rapporteur), D. T. Keeling (Member)  
and M. Bra (Member)

Registrar: J. Pinkowski

gives the following

## Decision

### Summary of the facts

- 1 AS Hallik ('the proprietor') is the holder of Registered Community Design No 000636071-0001 ('the contested RCD'), which has a filing date of 13 December 2006 and is registered for the product 'bread'. It is represented as follows:



- 2 On 11 June 2007, Vaasan & Vaasan Oy ('the invalidity applicant') filed an application for a declaration of invalidity against the contested RCD pursuant to Article 25(1)(b) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs ('CDR') (OJ EC 2002 No L 3, p 1). The invalidity applicant invoked Articles 5, 6 and 8(1) CDR.
- 3 The invalidity applicant claimed that the RCD lacked novelty according to Article 5(1)(b) CDR since it and other companies had been selling identical bread for many years. The invalidity applicant also claimed lack of individual character referring to Article 6 CDR because 'the design consists of the shape of an ordinary bread, which is completely without any individual character and which forms have been in use for decades. A simple rectangular form cannot be

remembered nor differentiated from other common breads with similar features'. It also considered that the RCD did not fulfil the requirements of Article 8 CDR, since the RCD was only a slice of bread and 'the surface of breads and bakery products, especially rye products are punctuated with small holes, to facilitate and help the baking process.' In support of its claims, the invalidity applicant submitted the following documentation:

- Some pages from the book 'Rye: Nutrition, Health and Functionality' by Tarja Kujala (Enclosure 1), which includes a 'Letter to the Reader' by Herman Adlercreutz dated 1 July 1999'. A rectangular-shaped bread with holes in the surface is depicted on pages 7 and 27 of that book.
  - Printouts of Vassan product brochures dated January to April 2005 and September to December 2004, depicting rye breads (Enclosures 2 and 3).
  - A copy from the publication 'Finnish bread, Finnisches Brot' by Ritva Koskinen, dated 1997, depicting a flat bread on the seventh page (Enclosure 4).
  - A copy of the publication 'Ruisaapinen' (Rye a-b-c) dated 30 July 1998 depicting flat bread on the front page, as well as on pages 8, 11 and 13 (Enclosure 5).
  - Chapter 11 on 'Sourdough Bread in Finland and Eastern Europe' by Teiji-Tuula Valjakka and Heikki Kerojoki and Kati Katina in the 'Handbook of Dough Fermentations' edited by Karel Kulp and Klaus Lorenz, with copyright dated 1993, depicting a flat bread on page 281 (Enclosure 6).
  - Copy of the front cover of an Estonian magazine dated 19-25 January 2003, depicting bread products (Enclosure 7).
  - Copy of the front cover of a Russian magazine No 3/2003 depicting *Rukkipala* bread (Enclosure 8).
- 4 On 21 September 2009, the proprietor replied arguing that the application for a declaration of invalidity had to be rejected. In particular, the proprietor argued that the invalidity applicant had failed to establish whether the designs depicted had become known in the normal course of business to the circles specialised in the sector concerned in the Community since it was unclear whether the evidence submitted had been published and distributed. According to the proprietor, the designs depicted in the enclosures were vague and could not be compared to the RCD. The proprietor also argued that the RCD was novel since none of the other designs were so narrow, so puffy in shape, so dark in colour and 'had so many punctuations' or such 'an intensive flour strew' as the RCD. Taking into account the limited degree of freedom of the designer in the shape and size of service crust bread, which must be rectangular and fit the toaster, it argued that the RCD had individual character since it was narrow, its upper crust was rounded, puffy and dark and it had thirteen punctuation holes and an 'intensive flour strew'. The proprietor did not deny that the punctuation holes facilitated the baking process and thereby performed a technical function, but argued that the pattern displayed

by the punctuation holes was not solely dictated by the technical function of bread.

- 5 On 10 January 2008, the invalidity applicant replied by contending that the publication dates could be inferred from or were indicated in the documentation, and that it was reasonable to assume from their printing that the brochures and publications were made available to the relevant business circles. It did not accept the proprietor's argument that the designs were unclear in the documentation and contended that they all demonstrated that the individual design features in the RCD were in use on similar or identical products prior to the filing date. The invalidity applicant maintained that the RCD was not new and the informed user would not distinguish between the RCD and the earlier design in the evidence since the design features of the RCD claimed were trivial and of no concern to that user. It also considered that with regard to the degree of freedom, there was no functional or other limitation affecting the design of the bread and that bread could be manufactured and consumed in a great variety of forms. It maintained that the punctuated holes, which were evenly distributed without any recognisable pattern, merely served the technical function of facilitating the baking process.
- 6 On 15 April 2008, the proprietor replied by reasserting the arguments raised earlier. It maintained that the designs depicted were unclear, that the publication dates could not be inferred from the documentation, and that it could not be inferred from their printing that the publications were made public. It emphasised that the CDR was novel and had individual character since none of the enclosures depicted a design that was so narrow, puffy or dark in colour, had so many punctuations and an intensive flour strew as the RCD. The proprietor also argued that since designers were free to choose the number of punctuation holes or their pattern, the extent of puffiness of the bread or its narrowness, the appearance of the CDR was not dictated by its technical function.
- 7 On 26 May 2008 the Invalidity Division of the Office issued a decision ('the contested decision') declaring the contested RCD invalid for lack of individual character according to Article 25(1)(b) CDR in conjunction with Article 6 CDR and ordered the proprietor to bear the costs. The reasoning in the contested decision may be summarized as follows:

*Enclosure 1*

- Enclosure 1 is a book comprising contributions from research groups from different Nordic countries. The 'Letter to the Reader' it contains is dated more than six years before the filing date of the RCD and is an indication that the book was finished and on its way to publication. Books normally become available to the public within two years after finalization. It is not necessary to establish the exact date of the book's disclosure. It is sufficient that the 'Letter to the Reader' is dated reasonably prior to the filing date of the contested RCD. It is, therefore, considered proven that the design was made available to the public within the meaning of Article 7(1) CDR.

*Technical function*

- The punctuation holes of the RCD that facilitate and help the baking process perform a technical function. To fulfil this technical function it is not necessary that the RCD has a specific amount or arrangement of punctuation holes. The appearance of the RCD is, therefore, not solely dictated by its technical function within the meaning of Article 8(1) CDR.

*Novelty*

- The RCD is a design of a narrow rectangular-shaped bread with a rounded shaped upper crust. It has, at least, nine cone shaped punctuation holes. The colour of the RCD is dark brown. The top and the bottom of the bread are partly covered by white flour.
- The prior design is depicted on pages 7 and 27 of Enclosure 1. These pages show narrow-shaped breads with a rounded shape of the upper crust and seven cone shaped punctuation holes. The colour of the bread is dark brown.
- The opposing designs are similar in shape and colour. They all have a narrow rectangular shape with similar proportions. However, the RCD and the prior designs differ in the following features, which are not immaterial:
  - The RCD appears narrower and longer than the prior designs as the ratio between its length and height is 2 to 1, whereas in the prior design it is 1.5 to 1.
  - The prior designs have only seven cone shaped punctuation holes while the RCD has at least eleven of them.
  - The brown colour of the RCD is slightly darker than that of the prior designs.
- Consequently, the RCD and the prior designs are not identical. The RCD is new in the meaning of Article 5 CDR.

*Individual character*

- The overall impression produced on the informed user by the contested RCD is the same as the overall impression produced by the prior designs disclosed in Enclosure 1. They all have in common a narrow rectangular shape. All are dark breads with a rounded upper crust and cone shaped punctuation holes distributed in a similar pattern. The impact of the differences in the proportions, in the number of the punctuation holes and in the shade of the colour brown is small as regards the overall impression of the designs, because the informed user will pay more attention to the general shape of the bread with a surface scattered with punctuation holes. Consequently, the RCD does not produce a different overall impression on the informed user from the earlier design depicted in Enclosure 1.

- 8 On 22 July 2008, the proprietor filed a notice of appeal against the contested decision. The proprietor submitted a statement of grounds on 25 September 2008.
- 9 On 15 December 2008, the invalidity applicant submitted its observations.
- 10 On 20 March 2009, the proprietor submitted its reply.
- 11 On 22 June 2009, the invalidity applicant submitted its rejoinder.

### **Submissions and arguments of the parties**

- 12 The proprietor requests the Board to annul the contested decision, reject the application for declaration of invalidity and order the invalidity applicant to bear the costs of the proceedings. Its arguments may be summarized as follows:

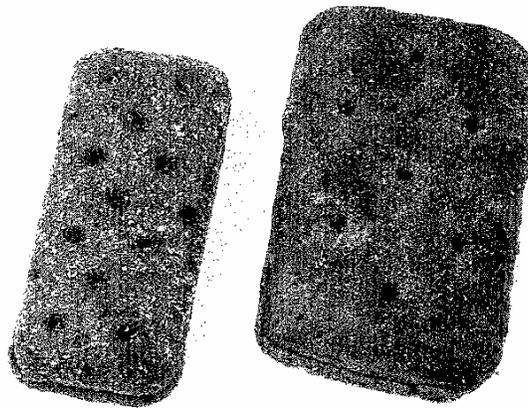
#### *Disclosure*

- The mere fact that the book (Enclosure 1) submitted as evidence has been created before the filing date of the contested RCD does not automatically mean that it has also been disclosed to the public. The findings in the contested decision concerning that book are not based on factual evidence but on presumptions. It has not been established whether the design in the book (Enclosure1) became known to the specialised circles in the sector during the normal course of business since there is no evidence submitted by the invalidity applicant regarding *inter alia* :
  - The first date of publication.
  - The number of published books.
  - The distribution; where books were sold.
  - The length of distribution period and whether it has been distributed within the European Union.

#### *Individual character*

- The Invalidity Division considered the overall bread sector in general. It did not take into account the fact that crust breads form a separate bread sector. In producing crust bread, however, the right proportion of crust is of the utmost importance and that is achieved by baking it flat, unlike regular bread. The degree of freedom of the designer is limited by the fact that for baking purposes crust breads have to be flat to ensure the most effective baking so that when they are cut they consist of two crusts with little bread. Crust bread should also fit into the toaster, as many consumers toast bread. The most effective shape is rectangular as the toasting compartment is rectangular.

- The informed user is aware that there are many rectangular shaped crust breads on the market. He will, therefore, pay more attention to other design features or characteristics enabling easier consumption, such as the intensive flour strew, the deep coned punctuation of the crust, the narrowness, the size, shape and pattern of the punctuation in the RCD. Taking into account the limitation on the freedom of the designer, the contested RCD produces an overall impression on the informed user that is different from the overall impression produced by the designs in Enclosure 1. The following picture comparing the appearance of both designs where the crust breads are depicted in their actual size is submitted:



- 13 The invalidity applicant requested that the appeal be dismissed. Its submissions are summarized as follows:
- It can be inferred from the ‘Letter to the Reader’ that the book in Enclosure 1 was published in 1999 or 2000. Taking into consideration that the material has been printed, it can be assumed that it was made available to the public and known to the specialized circles in the sector during the normal course of business prior to the filing of the RCD. It has used the earlier design since 1999.
  - The design features claimed by the proprietor are not elements of concern to the informed user as a bread consumer. He will not proceed to measure the bread’s thickness, consider its exact profile or make an exact calculation of the 13 punctuation holes in the bread. He will not analyze the shape or pattern of those holes. The user will simply see an ordinary rectangular shaped rye bread with punctuation holes and flour toppings. Therefore, these small differences cannot confer individual character on a rye bread design.
- 14 In its reply, the proprietor reiterated its previous arguments and added, in essence, the following:

- The invalidity applicant has not submitted evidence on the number of booklets published and distributed. Since the author of the book is employed by the invalidity applicant, the information and evidence requested could have been obtained.
  - The market for crust bread is different from that of regular bread.
- 15 In its rejoinder, the invalidity applicant essentially stated that it is not necessary to establish the exact date of public disclosure or the publication numbers. It considers that there is no separate market for crust bread.

### **Reasons**

- 16 The appeal complies with Articles 55 to 57 CDR and Article 34(1)(c) and (2) of Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs ('CDIR') (OJ EC 2002 No L 341, p. 28). It is therefore admissible.
- 17 Article 25(1)(b) CDR provides that a Community design may be declared invalid if it does not fulfil the requirements of Articles 4 to 9.
- 18 The finding in the contested decision that the RCD and the prior design are not identical within the meaning of Article 5 CDR is not contested. The finding in the contested decision that the appearance of the RCD is not solely dictated by its technical function within the meaning of Article 8(1) CDR is also not disputed.
- 19 Individual character is defined by Article 6 CDR :
1. A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public:
    - ...
    - (b) in the case of a registered Community design, before the date of filing of the application for registration or, if a priority is claimed, the date of priority.
  2. In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration.
- 20 Where the ground for invalidity is that a registered Community design does not fulfil the requirements of Article 5 or 6 CDR, Article 28(1)(b)(v) CDIR provides that an application for a declaration of invalidity must contain the indication and reproduction of the prior design that could form an obstacle to the novelty or individual character of the registered Community design, as well as the documents proving the existence of those earlier rights.

- 21 As to the prior design which has been made available to the public, the invalidity applicant refers inter alia to the design of a flat bread depicted on pages 7 and 27 of the publication 'Rye: Nutrition, Health and Functionality' by Tarja Kujala (Enclosure 1). The following designs of a rectangular flat bread with seven punctuated holes on the upper crust are shown in that book:



- 22 According to the preface in that book, the aim is to provide an 'easy reader' on the subject of rye for various professional groups associated with the food chain and introduce the rye grain, current rye products and their many physiological functions. It refers to research on the health effects of whole grain rye products, and identifies the invalidity applicant as one of the companies involved in that research. It includes a 'Letter to the Reader' by Herman Adlercreutz dated 1 July 1999, i.e. dated more than six years before the filing date of the RCD.
- 23 The flat bread depicted in the above mentioned book is obviously the invalidity applicant's rectangular Vaasan rye bread appearing in its 2004 and 2005 product catalogues (Enclosures 2 and 3). In particular, a Vaasan flat rye bread cut in two pieces, like the CDR, bearing an upper crust with seven punctuated holes appears on page 3 of the 2005 product catalogue as the rye bread design in Enclosure 1.
- 24 Chapter 11 headed 'Sourdough Bread in Finland and Eastern Europe' by Teiji-Tuula Valjakka and Heikki Kerojoki and Kati Katina from the publication 'Handbook of Dough Fermentations' edited by Karel Kulp and Klaus Lorenz, with copyright dated 1993, also shows on page 281, a rectangular flat bread similar to the one marketed by the invalidity applicant.
- 25 Taking into account the evidence as a whole, the Board considers that the earlier design is depicted clearly and unambiguously, and that the earlier design in the publication 'Rye: Nutrition, Health and Functionality' (paragraph 21) was made available to the public before the filing date of the RCD within the meaning of Article 7(1) CDR. The Invalidity Division rightly found that it was not necessary to establish the exact date of disclosure of the book and that it was sufficient that the date of the 'Letter to the Reader' was reasonably prior to the filing date of the contested RCD.
- 26 The class of products indicated in the registration is bread. Therefore, for the purposes of the assessment of individual character, the informed user is someone who is a user of bread. He is, thus, not a designer, a manufacturer or a specialist in the food industry. As the use of a foodstuff entails its consumption, the

informed user is someone who regularly consumes bread, including flat bread, and is informed about the ingredients of bread, how the bread is made and served, as well as about the overall appearance of bread (see, to that effect, decision of the Boards of 28 November 2006 in case R 1310/2005-3 'Galletas', at paragraph 13; and of 9 November 2007 in case R 1215/2006-3 'Meat foodstuffs', at paragraph 24).

- 27 In the assessment of the individual character, regard must be had to the degree of freedom of the designer in developing the design. As far as flat bread is concerned, the degree of freedom of the designer is only limited by the fact that the proportion of the crust is high in order to give flavour to the bread, that some punctuation is necessary for baking, and the fact that consumers prefer sliced bread for consumption. A rectangular shape is not necessary since toasters can accommodate many shapes. Thus, there is in principle no functional or other limitation affecting the shape of flat bread.
- 28 With regard to the shape and the degree of narrowness, the informed user will perceive no differences between the conflicting flat bread designs. Both are for dark flat breads with rounded corners and bear punctuation holes on the upper crust. The small differences in the proportions, in the number of the punctuation holes, in the hue of the colour brown and the flour strew are of minor impact on the overall impression and are not elements that are of concern to the informed user as consumer. Since the informed user's fundamental concerns are to factors such as taste, food preparation or cereal content, s/he will not consider the precise extent to which the rectangular shape and the pattern displayed by the punctuation differs. Consequently, s/he will perceive the designs in question to be similar. The Board, therefore, considers that the overall impression which the registered Community design produces on the informed user does not differ from the overall impression produced on that user of the design of the flat bread depicted on pages 7 and 27 of the publication 'Rye: Nutrition, Health and Functionality' (Enclosure 1).
- 29 For the above reasons, the appeal is dismissed and the contested decision declaring the registered Community design invalid for lack of individual character is upheld

### **Costs**

- 30 Since the appeal has been unsuccessful, the proprietor must be ordered to bear the fees and costs incurred by the invalidity applicant, in accordance with Article 70(1) CDR.

**Order**

On those grounds,

THE BOARD

hereby:

- 1. Dismisses the appeal;**
- 2. Orders the proprietor to bear the fees and costs incurred by the invalidity applicant.**

Th. Margellos

D.T. Keeling

M. Bra

Registrar:

J. Pinkowski