

# judgment

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DISTRICT COURT OF THE HAGUE

Civil-law division

case/docket number: 321649 / KG ZA 08-1322

## Judgment given in interim injunction proceedings on 15 December 2008

in the case of

1. the private company with limited liability  
**G-STAR INTERNATIONAL B.V.**,  
with registered office in Amsterdam,
2. the company organised and existing under foreign law,  
**G-STAR RAW DENIM KFT**,  
with registered office in Budapest, Hungary,  
plaintiffs,  
attorney: L.Ph.J. baron van Utenhove of The Hague,

versus

1. the corporation organised and existing under foreign law  
**PEPSICO INC.**,  
with registered office, at any rate having its place of business at Purchase, New  
York, United States of America,  
defendant,  
attorney: K. Limperg of Amsterdam.

The parties will further be referred to as G-Star (for reasons of clarity in the third person singular) and PepsiCo, and the plaintiffs individually also as G-Star International and G-Star Kft. The case was handled for G-Star by W.A. Hoyng and C. Shannon and for PepsiCo by K. Limperg and T. Cohen Jehoram, all of them attorneys of Amsterdam.

### **1. The proceedings**

- 1.1. The course of the proceedings is evidenced by:
  - the summons of 28 October 2008 with 34 exhibits;
  - exhibit 35 filed subsequently on behalf of G-Star;
  - the letter of 21 November 2008 filed on behalf of PepsiCo with eight exhibits;
  - the hearing of the case on 1 December 2008 and the written summaries of the oral arguments of the handling attorneys submitted on this occasion.

- 1.2. The judgment was scheduled for today.

### **2. Basic assumptions**

- 2.1. The court may base its assessment of these interim injunction proceedings on the following.
- 2.2. The group of which G-Star forms part manufactures *inter alia* denim fashion and other ready-to-wear clothing.
- 2.3. G-Star is the proprietor of the Community word mark RAW, registered on 15 October 2008 under number 4743225 for goods and services in classes 3, 25 (*inter alia* clothing) and 35. It is also the proprietor of the following trademark registrations:
- Benelux word trade mark GS RAW, registered on 1 May 2004 under number 745294 for goods in classes 3, 9, 14, 18 and 25 (*inter alia* clothing), which registration was renewed on 29 June 2006.
  - Benelux word trade mark RAW DENIM, registered on 1 November 1997 under number 606761 for goods in classes 24 and 25 (*inter alia* clothing), which registration was renewed on 24 May 2007;
  - Benelux word trade mark RAW ESSENTIALS, registered on 1 June 1998 under number 618182 for goods in classes 18, 24 and 25 (*inter alia* clothing), which registration was renewed on 24 May 2007;
  - The Benelux word/pictorial trade mark depicted below, registered on 1 June 1998 under number 618365 for goods in classes 18, 24 and 25 (*inter alia* clothing), which registration was renewed on 7 August 2007;



- the combined Community word/pictorial trade mark depicted below, registered on 28 August 2008 under number 5939947 for services in class 43 (providing of food and drink);



- Community word trade mark RAWSECCO, registered on 13 February 2007 under number 5006887 for goods in classes 16, 25 (*inter alia* clothing) and 33 (alcoholic beverages with the exception of beer);

- Benelux word trade mark CONTINENTAL RAW, registered on 1 August 2003 under number 728020 for goods in classes 18 and 25 (*inter alia* clothing);
- Benelux word trade mark LEGENDARY RAW, registered on 20 June 2007 under number 826890 for goods and services in classes 3, 9, 14, 18, 25 (*inter alia* clothing) and 35;
- Benelux word trade mark G-STORE RAW, registered on 5 October 2007 under number 1138024 for goods and services in classes 3, 9, 14, 18, 25 (*inter alia* clothing) and 35;
- Community word trade mark RAW FOOTWEAR, registered on 15 October 2008 under number 5429931 for goods and services in classes 18, 25 (*inter alia* clothing and footwear) and 35;
- Community word trade mark RAW SHOES, registered on 15 October 2008 under number 5429956 for goods and services in classes 18, 25 (*inter alia* clothing and footwear) and 35.

Furthermore, G-Star KFT is the proprietor of the following trade marks:

- Community word trade mark G-RAW, registered on 2 March 2006 under number 004017356 for goods in classes 3, 18 and 25 (*inter alia* clothing);
- Benelux word trade mark G-RAW, registered on 1 February 2005 under number 0757906 for goods in classes 3, 18 and 25 (*inter alia* clothing);
- Community word trade mark G-STAR RAW DENIM, registered on 12 July 2001 under number 1660018 for goods in classes 3, 18, 24 and 25 (*inter alia* clothing);
- Community word trade mark G-STAR RAW DENIM, registered on 18 October 2005 under number 3444171 for goods and services in classes 9, 14 and 35;
- the combined Community word/pictorial trade mark depicted below, registered on 3 September 2001 under number 1659895 for goods in classes 3, 18 and 25 (*inter alia* clothing);



- the Community pictorial trade mark depicted below, registered on 10 June 2005 under number 3446895 for goods and services in classes 9, 14 and 35;



- the Benelux pictorial trade mark depicted below, registered on 1 September 2000 under number 663186 for goods in class 25 (clothing);



- the combined Community word/pictorial trade mark depicted below, registered on 3 October 2001 under number 1860295 for goods in classes 3, 18 and 25 (clothing);



- the combined Benelux word/pictorial trade mark depicted below, registered on 1 December 2000 under number 668646 for goods in classes 3, 18 and 25 (*inter alia* clothing);



- the combined Community word/pictorial trade mark depicted below, registered on 1 June 2005 under number 3331857 for goods and services in classes 3, 18, 25 (*inter alia* clothing) and 35;



- the combined Community word/pictorial trade mark depicted below, registered on 19 May 2005 under number 344648 for goods in classes 9, 14 and 16:



- the combined Community word/pictorial trade mark depicted below, registered on 22 June 2005 under number 3612801 for services in class 41 (entertainment);



- the combined Benelux word/pictorial trade mark depicted below, registered on 6 July 2006 under number 799056 for goods and services in classes 18, 25 (*inter alia* clothing) and 35:



- the combined Community word/pictorial trade mark depicted below, registered on 26 June 2003 under number 2295392 for goods in classes 3, 18 and 25 (*inter alia* clothing);



- the combined Community word/pictorial trade mark depicted below, registered on 3 July 2001 under number 1659945 for goods and services in classes 3, 18 and 25 (*inter alia* clothing);



- the combined Benelux word/pictorial trade mark depicted below, registered on 1 September 2000 under number 663185 for goods in class 25 (clothing).



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- 2.4. In addition to the (chiefly) G-Star RAW clothing lines, G-Star has also linked the (G-Star) RAW sign to what it calls "crossovers - co-branding". Together with bicycle manufacturer Cannondale, for example, G-Star has developed and marketed a bicycle under the sign RAW Cannondale and together with the manufacturer of Land Rover a limited edition version of a jeep, which is marketed under the name of RAW Defender. Furthermore there are the RAW Ferry, the RAW Billiard, the RAW Arne Jacobson chair and RAW Secco prosecco.

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<sup>1</sup> In addition, G-Star invoked Community trademark filing number 4846598 for an application for a word trade mark 'LEGENDARY RAW', but the exhibit submitted in evidence shows that this sign has not yet been registered as a trademark.

- 2.5. Furthermore, G-Star also organizes so-called 'RAW Nights': parties for which the locations are appointed in a specific way, large advertisements are shown using the (G-Star) RAW signs, RAW Secco is served and personnel is dressed in T-shirts on which the 'RAW Cuisine - G-Star' logo is printed. 'RAW Nights' have been held so far in the United States of America and Japan. 'RAW Nights' are also planned in Europe for 2009.
- 2.6. Early 2008 PepsiCo launched a new (cola) soft drink on the English market under the sign Pepsi RAW, in a bottle looking as follows:



- 2.7. This new soft drink is promoted among other things via the web site [www.pepsiraw.co.uk](http://www.pepsiraw.co.uk). In addition, PepsiCo organises parties called 'RAW live' parties at which this product is served and advertisements are run in English magazines such as VICE and GQ.
- 2.8. On 7 and 12 March 2008, in reaction to this market introduction in the United Kingdom, G-Star sent PepsiCo demand notices relating to trademark infringement and unlawful act. Subsequent attempts to reach a settlement did not lead to a solution.
- 2.9. In the course of 2008 SevenUp Nederland B.V. - a third party - caused an (online) market survey of soft drink drinking behaviour to be carried out. Among other things the survey asked questions about several cola brands already available on the Dutch market and included one page of questions about Pepsi RAW.
- 2.10. PepsiCo unilaterally issued a so-called comfort letter to G-Star containing among other things a declaration, reinforced by a penalty, that PepsiCo would refrain from introducing the Pepsi RAW sign in other countries than the United Kingdom in Europe, in combination with a promise that it would notify G-Star well in advance of any future intention to introduce Pepsi RAW elsewhere after all. G-Star was not satisfied with this, however.

### **3. The dispute**

- 3.1. Briefly stated, G-Star's claim is that the interim injunction judge, in a judgment declared provisionally enforceable before execution is issued, prohibit PepsiCo from infringing the Community word trade mark RAW and all registered

trademarks mentioned above in para 2.3 in the Community, the Benelux or the Netherlands, subject to a penalty, awarding the costs of the proceedings against PepsiCo in accordance with the provisions of Section 1019 of the Dutch Code of Civil Procedure.

- 3.2. In substantiation of its claims G-Star alleges that pursuant to Article 9(1)(c) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (further referred to as: "CTMReg") or Article 2.20(1)(c) of the Benelux Convention on Intellectual Property (trademarks and drawings or designs) (further referred to as: "BCIP") PepsiCo is infringing the trademark rights of G-Star, including the Community trade mark 'RAW'. In addition G-Star alleges that PepsiCo, by latching on to the reputation of G-Star and its 'RAW' concept, is acting unlawfully towards G-Star.
- 3.3. PepsiCo has defended the action, stating reasons. The parties' allegations will be discussed below insofar as they are relevant.

#### **4. Assessment**

##### *Jurisdiction*

- 4.1. Having regard to the fact that plaintiff 1 is domiciled in the Netherlands the interim injunction judge has jurisdiction over the claims based on the Community trade marks pursuant to Article 93(2) in conjunction with Article 99(2) CTMReg read with Section 3 of the EC Regulation on the Community trade mark (Implementation) Act. By virtue of Article 4.6(1) BCIP the interim injunction judge also has jurisdiction over the claims based on the Benelux trade marks on account of threatened infringement in the Netherlands, also in this court district therefore. The claims based on unlawful act must be deemed to be connected with the latter and besides the court's jurisdiction over these claims has not been disputed.

##### *Urgent interest*

- 4.2. It is doubtful whether a sufficiently urgent interest exists in this case, as alleged by G-Star, but contested by PepsiCo. PepsiCo has issued a "comfort letter" reinforced by a penalty clause, in which it states that at present it will not bring Pepsi RAW on the market in any other Member State than the United Kingdom and will give G-Star three months' notice in the event of an imminent introduction elsewhere, so that G-Star will then be able to take timely legal action. In the United Kingdom it has already been on the market for about nine months with the knowledge of G-Star, against which no legal action has been or is being taken in that country. It is admitted between the parties (cf. written summary of oral argument Mr. Hoyng, para. 10) that under English procedural law this case (in any case at present) lacks the urgency in that country required for obtaining an interim injunction as sought in the present proceedings and which is to have effect in the United Kingdom (as well). For the purposes of interim injunction proceedings in the Netherlands, however, the urgency issue

must be assessed in accordance with the rules of Dutch civil procedural law (*lex fori*).

- 4.3. It is the preliminary opinion of the interim injunction judge that at present, in any case as far as the other countries outside the United Kingdom are concerned, this comfort letter takes away any urgent interest in the interim injunctions sought. The interim injunction judge finds that there is no threat of infringement elsewhere. The web site [www.pepsiraw.co.uk](http://www.pepsiraw.co.uk), which is not accessible via the various regular Pepsi sites, as PepsiCo has alleged and which was not contested, does not target consumers outside the United Kingdom. Contrary to what G-Star alleges, the (Dutch-language) survey carried out via the Internet by order of a third party, Seven Up Nederland B.V. and mainly covering, briefly stated,- in addition to other questions about lifestyle (clothes, mobile phones, TV viewing habits) - various Cola brands (Coca-Cola, Pepsi, Freeway, River, First Choice and others and since relatively recently also Pepsi RAW), does not have the effect of creating an urgent interest on account of threatened infringement in the Netherlands either, in particular not in the light of the comfort letter subsequently issued voluntarily. Consequently, any claim insofar as based on Benelux trade marks is ready to be dismissed. The alleged urgent interest on account of alleged threatened infringement in the Netherlands in the matter of G-Star Raw Denim Kft under Article 93(5) in conjunction with Article 94(2) CTMReg (cf. written summary of oral argument Mr. Hoyng, footnote 2) is likewise frustrated by this.
- 4.4. G-Star points out the risk that a recurring pattern might happen, through the fact that subsequently, in conformity with the comfort-letter system, PepsiCo might give three months' warning of its intention to enter the market in, for example, Germany, against which it would not be possible to take action in Dutch interim injunction proceedings either, and might then do the same in, for example, France. At present there is no real indication whatsoever of such a line of action. The question whether in such situations there would be a sufficiently urgent interest in obtaining "cross-border" interim injunctions in Dutch interim injunction proceedings will have to be assessed, if the occasion arises, on the basis of all specific circumstances of the case at the time in question. There is no reason to anticipate such a situation now.

*Also on the merits*

- 4.5. Things are different for the United Kingdom. But even if at law a sufficiently urgent interest in obtaining a "cross-border" injunction in these Dutch interim injunction proceedings should already exist merely because of the specific circumstances (of the parties) of the present case on account of the alleged continuing infringement in the United Kingdom<sup>2 3</sup>, it follows from a balancing

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<sup>2</sup> In spite of the fact that PepsiCo has already been openly marketing Pepsi RAW there for about nine months, without G-Star commencing any legal action while it subsequently, after settlement consultations had got bogged down - allegedly due to PepsiCo, but in fact broken off by G-Star itself in reaction to an Internet survey by a third party - it let months pass by before bringing an action in Dutch interim injunction proceedings.

<sup>3</sup> It is open to discussion whether this comes down to abuse of (procedural) law, since it looks very much like circumventing the English courts in the knowledge that these will not grant such an injunction, as PepsiCo has alleged, because according to the principal rules of Article 93(2) in conjunction with Article 99(2) CTMReg the Dutch interim injunction courts are the competent courts having, in so many words,



of interests in interim injunction proceedings that the ("cross-border") injunctions sought (with, at any rate at present, *substantive* effect only in the United Kingdom) would be too drastic, because of the prognosis for the outcome of the proceedings on the merits. The court takes the following grounds on this issue.

- 4.6. This case exclusively concerns a situation governed by Article 9(1)(c) CTMReg: Protection of well-known trade marks when used for similar and for non-similar goods without requiring likelihood of confusion (further also referred to as "sub c"). The recent *Intel* judgment of the Court of Justice (C-252/07, B9 7327) at [www.boek9.nl](http://www.boek9.nl) of 27 November 2008 - given two workdays before the oral hearing of this case - shows that the requirements for successful reliance on "sub c" are strict. A prognosis of the outcome of the proceedings on the merits<sup>4</sup> is that based on the presently available evidence no prima facie case has been made that G-Star has a good chance of being granted an infringement injunction "sub c" as claimed. This is compelling reason to refuse the injunctions sought.
- 4.7. Firstly, it is open to discussion whether (proof of) a reputation in one relatively small Member State like the Netherlands is sufficient basis to assume that the trade mark has a reputation in a substantial part of the Community within the meaning of Article 9(1)(c) CTMReg. This is controversial at present. This will probably become clearer after judgment has been given by the Court of Justice in Luxembourg in case C-301/07 *PAGO*. The question whether G-Star (and the same is true for combined word/pictorial trademarks which in each case contain the G-Star element or even in combination with just a stylized capital letter G) is a trade mark with a reputation is different from the question whether this is also true of RAW (by itself). Even leaving aside the reciprocal contestations of the relevance and accuracy of the surveys carried out in this case on both sides, though it is true that based solely on these surveys it must be deemed likely that RAW is a well-known trade mark in the Netherlands, but the same cannot be said for England (which is a large Member State, by the way) merely on the basis of the surveys carried out there. In the preliminary opinion of the court it has not been sufficiently substantiated in this case that the RAW trade marks of G-Star have a reputation elsewhere. Moreover, the criticism of these market

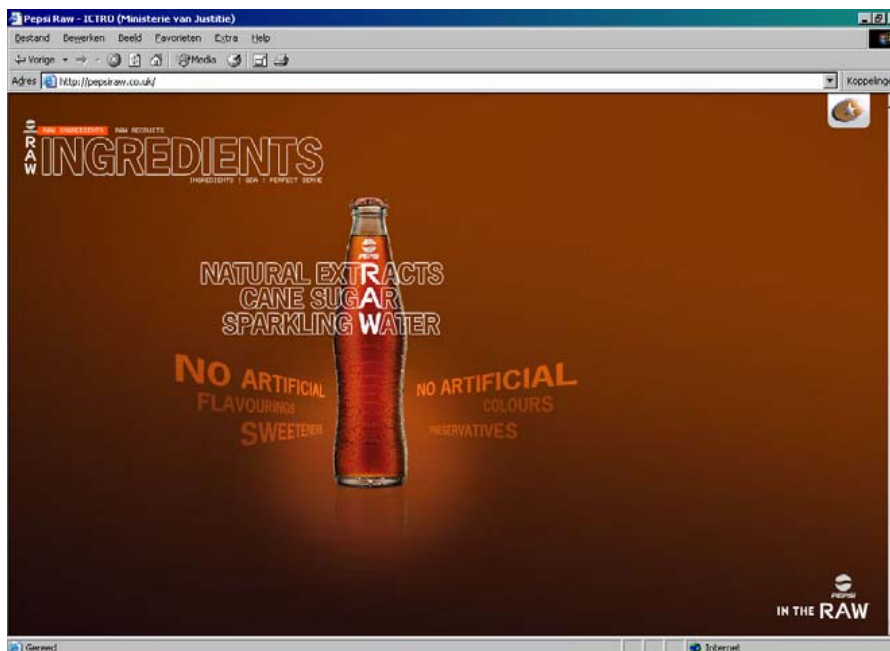
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"cross-border" jurisdiction, as G-Star has in itself rightly alleged. The doctrine of *forum non conveniens* does not apply here. The example given at the hearing by PepsiCo of a Community trade mark A for good X, which has only been proven to be a well-known mark in Latvia, while sign A is used in Spain for the clearly non-identical or non-similar good Y, against which a Community infringement injunction is then sought in interim injunction proceedings in Lithuania, because attempts to do so in Spain are unsuccessful, among other things for reasons of procedural law, falls short, because in the present case a plaintiff domiciled in the Netherlands sues a defendant not domiciled in the EU before the Dutch courts pursuant to Article 93(2) CTMReg. It appears to be the intention of the system implied in Articles 93, 94, 98 and 99 CTMReg, but in the preliminary opinion of the court it nonetheless leaves the doctrine of abuse of (procedural) law intact. Other Community trade mark courts are usually cautious in handling the possibilities based on Articles 93, 94 and 98 CTMReg, cf. for example para 4 of the *Whirlpool / Kenwood* case (proceedings on the merits) of the English Community trade mark court (<http://www.bailii.org/ew/cases/EWHC/Ch/2008/1930.html>). This is a view that may play a role in the background. In connection with the manner in which this case will be decided the question whether abuse occurs here may remain unanswered.

<sup>4</sup> The opinion of Daniel Alexander CQ (dated one week before to the *Intel* judgment) submitted in evidence by PepsiCo also assesses the merits of the regular proceedings as "weak". This is not changed by the fact that it is an opinion on how the English Community trade mark court would rule on this issue.

surveys expressed reciprocally cannot be preliminary considered irrelevant and these interim injunction proceedings are not a suitable context for the necessary further investigation of this issue, so that the surveys have only comparative relevance for the case under consideration. After judgment has been given in the aforementioned *PAGO* case it will probably also become clear whether in a situation of a trade mark having a reputation within the meaning of a "sub c" case in Member State A, but not in Member State B, the court can nevertheless issue a "sub c" injunction with effect in Member State B as well. For the purposes of these interim injunction proceedings it seems doubtful whether this is possible.

- 4.8. Secondly, it must be borne in mind, as PepsiCo rightly alleges, that in the English language (also proliferated in e.g. the Netherlands as such) "raw" is a common adjective with a connotation that may or may not be fashionable. In the preliminary opinion of the interim injunction judge the G-Star RAW trade marks do not have such a high degree of distinctive power that they can be said to be essentially unique trade marks within the meaning of para 56 of the *Intel* judgment. It has not been sufficiently demonstrated that PepsiCo uses this adjective in its Pepsi RAW sign otherwise than in the usual adjective and therefore descriptive meaning of raw, pure, natural or even "fat" or "cool". For the time being the court rejects, since insufficiently demonstrated, the allegation that PepsiCo, in its promotion of Pepsi RAW, is also or even mainly using RAW and/or is pushing its (reputed) combined word/pictorial trade mark Pepsi to the background, as G-Star alleges. On the "ingredients" opening page of the pepsiraw site, the sign RAW is made up of the letters R (first line) A (second line) and W (third line) from the elements "natural extRacts" "cane sugAr" and "sparkling Water" depicted below each other:



The whole product links up with a recent fashionable trend towards naturalness in various (lifestyle) fields.

- 4.9. Partly in connection with the above it has become plausible that G-Star will be able to prove in proceedings on the merits that the relevant section of the public will *link* the G-Star trade marks to Pepsi RAW as used by PepsiCo. Such linking - viz. that the relevant section of the public, when seeing the Pepsi RAW sign being used, associates it with the G-Star RAW trade marks without likelihood of confusion being required - is considered even more unlikely since in the preliminary opinion of the court and in spite of arguments of G-Star which partly point in a different direction, the goods concerned are (virtually all) clearly non-similar goods (cf. paras 49 to 55 of the *Intel* judgment, also in connection with the reputation issue of the G-Star RAW trade marks that are invoked, see above para 4.7). PepsiCo rightly alleges that the market surveys carried out by G-Star did not concern this issue. Otherwise, too, the court holds the preliminary opinion that G-Star has not made a sufficiently plausible case on this issue, even though G-Star did state, so the interim injunction judge understands, that it views this issue in particular also in connection with what it calls the "crossovers - co-branding" practised by it; collaboration with other trade mark proprietors resulting in RAW-Cannondale bicycles, RAW-Defender Landrovers, RAW-Secco Prosecco, RAW Ferry (boat in Amsterdam canals), RAW Arne Jacobson chair, RAW Billiard and G-Star Raw Nights (parties) - with in any case the G-Star RAW trademark being used as well in each case except for the Landrover, the chair and the Prosecco, so it appears. G-Star alleges that the RAW trade marks are lifestyle trade marks which stand for a certain non-conformist, adventurous, daring, "out of the ordinary" lifestyle and target a young, trendy public, which Pepsi RAW [sic! translator] allegedly also targeted or started targeting with its Pepsi RAW. One should not lose sight of the fact that the existence or otherwise of such a link must be assessed globally, taking into account all factors relevant to the circumstances of the case (para 62 *Intel*). In the absence of such a link in the mind of the public, there is no "sub c" infringement (*Intel* para 31). But even if such a link should be likely, partly because of the co-branding and the other circumstances mentioned, then merely this link alone is not sufficient to make the invocation of "sub c" infringement successful (cf. para 32 *Intel*).
- 4.10. In the preliminary opinion of the court there is no proof of (prima facie) *evidence* that by its use of the Pepsi RAW sign PepsiCo is taking unfair advantage of or causing detriment to the distinctive character or the repute of G-Star's trade marks and this, so the *Intel* judgment shows (paras 32, 37, 38 and 71), is required for the successful invocation of the "sub c" ground. This issue must also be assessed globally in the same sense as stated above in para 4.9 (para 79 *Intel*). The Court of Justice makes strict demands where it states clearly that the circumstances that a) the earlier trade mark has a huge reputation for certain specific goods (namely jeans) and b) those goods or services are not similar or not similar to a substantial degree to the goods or services of the challenged sign (in the present case: soft drink) and c) the earlier mark is unique in respect of any goods or services (as in the case of [*intel*], which as stated is not the case for [*raw*]) and d) said sign brings to mind the earlier mark, are *not* sufficient proof in the sense referred to here.
- 4.11. According to paras 38 and 39 of that judgment the minimum requirement for assuming that such unfair advantage is being taken (called "latching onto" by G-

Start) is that G-Star must *prove* that there are elements based on which it can be concluded that there is a serious risk that such an injury will occur in the future. It is the preliminary opinion of the court that the allegations G-Star has put forward so far do not justify such a conclusion. The allegation that the RAW element is the "DNA for G-Star" and that G-Star could actually be equated with RAW is relevant only in the sense that this must be so in the perception of this element of the relevant section of the public. G-Star has failed to demonstrate sufficiently that this section of the public will so strongly perceive this element in this sense argued by G-Star, that this will push the usual meaning of the adjective "raw" so much into the background in the context of the Pepsi RAW sign as to constitute proof of the serious risk referred to above. Apart from the grievances referred to in para 4.12, no further substantiated facts have been alleged or emerged in this respect and that does not suffice in the preliminary opinion of the court. It must be borne in mind that G-Star does not have the exclusive right to target a young (and therefore at the same time partly trendy and non-conformist ) public. Such targeting has already been a constant for a very long time in Pepsi's generally known publicity (accessible to the public via the Internet), with *inter alia* the following striking examples: "Now It's Pepsi, for Those Who Think Young" (early 19sixties), "Pepsi, The Choice of a New Generation" (1984) and "GeneratioNEXT" (1997).

4.12. Insofar as detriment to distinctive character is the steppingstone for G-Star, it is so that according to the *Intel* judgment proof of such detriment requires evidence of a *change* in the *economic behaviour* of the average consumer of G-Star clothes and related products and services as a result of the use of Pepsi RAW, or a *serious likelihood* that such a change will occur in the future (para 77 *Intel*). This, too, is a fairly high hurdle and it is the preliminary opinion of the court that insufficient real evidence has been put forward in this case to clear it. In fact the only available evidence at present is an alleged concern felt by some G-Star retailers and their reported expressions of similar concerns by some consumers. It is striking that this seems to occur mainly in Scandinavia, where Pepsi RAW is not on the market, and hardly at all in any country in which Pepsi RAW was launched early this year, as PepsiCo rightly alleges. PepsiCo rightly raises questions about these alleged murmurings from the market. The court rejects G-Star's presenting this as proof of confusion (written summary of oral argument by Hoyng, Nos. 86 et seq.), which according to *Intel* makes infringement a given. The same applies to G-Star's allegation that this constitutes "clear proof" in the aforementioned sense and that it is "clear" that this would result in changed commercial behaviour of consumers. It is the preliminary opinion of the court that all this is definitely insufficient.

4.13. It is the preliminary opinion of the court that insufficient prima facie evidence has been provided for the allegation that - in addition to the alleged trade mark infringement - PepsiCo has been unlawfully latching onto the reputation of G-Star and its "RAW concept" as G-Star calls it. It has been insufficiently refuted that the use of the adjective 'raw' in present-day trendy usage has acquired an accepted descriptive meaning as outlined above in para 4.7. It is the preliminary opinion of the court that it is not unlawful for PepsiCo to use the word in this sense in its publicity. Insufficient prima facie evidence has been provided in

these interim injunction proceedings of G-Star's allegation that such use injures its "RAW crossover concept".

### **Conclusion**

- 4.14. Based on the foregoing grounds the injunctions sought will be refused. G-Star, being the unsuccessful party, will be ordered to pay the reasonable and proportionate costs pursuant to Section 1019h of the Dutch Code of Civil Procedure. A communication sent to the interim injunction judge in advance shows that the parties agree that the amount of the cost award to be given on this basis is €15,000. Since the parties paid virtually no attention to the foundation on unlawful act, the court sees no reason to give a separate order of costs on this count. Consequently, the court will adopt the amount of the cost award under Section 1019h of the Dutch Code of Civil Procedure thus indicated. Since PepsiCo has not claimed that the cost award be declared provisionally enforceable before execution has been issued, such declaration will not be given.

### **5. Decision**

The interim injunction judge:

- 5.1. refuses the interim injunctions sought;
- 5.2. awards the costs of the proceedings against G-Star, which costs are taxed up to this judgment at €15,000 on the part of PepsiCo.

This judgment was given by G.R.B. van Peurseem and pronounced in open court on 15 December 2008 in the presence of court clerk R.J. van Doornmalen.