

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK APPLICATIONS Nos. 2521514 & 2492278  
IN THE NAME OF ADELPHOI LIMITED**

**AND IN THE MATTER OF CONSOLIDATED OPPOSITIONS Nos. 99812 & 99914  
BY DC COMICS (A GENERAL PARTNERSHIP)**

**AND IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON  
AGAINST A DECISION OF MR. OLIVER MORRIS DATED 19 DECEMBER 2012  
BY THE APPLICANT**

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**DECISION**

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**Introduction**

1. This is an appeal against a decision of Mr. Oliver Morris, acting for the Registrar, dated 19 December 2012, BL O/504/12, taken in consolidated proceedings in which he allowed two oppositions brought by DC Comics (A General Partnership) (“DC Comics”) against two applications in the name of Adelphoi Limited (“Adelphoi”) under Section 5(2)(b) of the Act. That made it unnecessary for Mr. Morris to decide the other objections raised by DC Comics under Section 5(3) and 5(4)(a) of the Act. In the absence of a Respondent’s Notice, the appeal was therefore confined to the Hearing Officer’s findings under Section 5(2)(b).

**Standard of review**

2. As to my approach to this appeal, Mr. Baldwin QC representing DC Comics, directed me to the judgment of HHJ Birss QC in *Société des Produits Nestlé SA v. Cadbury UK Limited* [2012] EWHC 2637:

*“The approach to appeals from the Registrar of Trade Marks*

14. By section 76 of the Trade Marks Act 1994, an appeal from the decision by the Registrar may be brought to an Appointed Person or to the court. Ms Himsworth submitted that the nature and approach to such appeals had been helpfully summarised by Daniel Alexander QC, sitting as a Deputy High Court Judge in *Digipos Store Solutions Group Ltd v. Digi International Inc* [2008] EWHC 3371 (Ch); [2008] RPC 24 at paragraphs [5] and [6] in which he stated:

5. It is important at the outset to bear in mind the nature of appeals of this kind. It is clear from *REEF Trade Mark* [2003] R.P.C. 5 (“REEF”) and *BUD and BUDWEISER BUDBRÄU Trade Marks* [2003] R.P.C. 25 (“BUD”) that neither surprise at a hearing officer's conclusion nor a

belief that he has reached the wrong decision suffice to justify interference by this court. Before that is warranted, it is necessary for this court to be satisfied that there is a distinct and material error of principle in the decision in question or that the hearing officer was clearly wrong (REEF). As Robert Walker L.J. (as he then was) said:

"... an appellate court should in my view show a real reluctance, but not the very highest degree of reluctance to interfere in the absence of a distinct and material error of principle" (REEF, para. 28)

6. This was reinforced in BUD, where the Court of Appeal made it clear that it preferred the approach of the appellate judge but nonetheless held that there was no error of principle justifying departure from the hearing officer's decision. As Lord Hoffmann said in *Biogen Inc v. Medeva plc* [1997] R.P.C. 1 at 45, appellate review of nuanced assessments requires an appellate court to be very cautious in differing from a judge's evaluation."

3. Mr. Malynicz, Adelphoi's Counsel, did not dissent from that approach.

#### **Adelphoi's applications**

4. The appeal concerns two applications. Application number 2521514 ("the 514 application") was filed by Adelphoi on 21 July 2009, requesting registration of the word BATSMAN for use as a trade mark in the UK in respect of:

##### Class 5

Dietary supplements; nutritional supplements; vitamin, mineral and protein preparations and substances; dietetic foods and beverages; medicated beverages

##### Class 30

Snack foods and snack bars; nutritional, energy, protein and weight gain confectionery bars; cereal bars, biscuits, cakes, pastry and confectionery

##### Class 32

Beers; mineral and aerated waters; non-alcoholic drinks; fruit drinks and fruit juices; energy drinks; protein based fruit drinks; syrups for making beverages

5. The 514 application was published in the Trade Marks Journal on 21 August 2009 and opposed by DC Comics on 23 November 2009.
6. The second application can be differentiated *inter alia* because the goods and services applied for were qualified by limitations introduced by Adelphoi during these opposition proceedings seeking to relate many of their goods and services to the sport of cricket. Application number 2492278 ("the 278 application") was filed by Adelphoi on 9 July 2008 for BATSMAN for a specification which on the Register currently reads (emphasis in italics mine; limitations added by Adelphoi shown in bold):

## O-440-13

### Class 16

Printed matter, stationery, books, newspapers, magazines, newsletters, periodicals, posters, stickers, transfers, decals, pens, pencils, pencil sharpeners, erasers, pen and pencil cases, note books, papers, envelopes, diaries, address books, art prints, cards, postcards, gift cards, greeting cards, calendars, paintings, photographs, writing paper, writing implements; **all the foregoing goods relating to the sport of cricket**

### Class 25

Clothing, footwear, headgear; **all the foregoing goods relating to the sport of cricket**

### Class 38

Telecommunications; communications; broadcasting; broadcasting and transmission of radio and television programmes; interactive broadcasting and communications services; data transmission and data broadcasting; cellular telephone communication services; cable satellite and terrestrial broadcasting services; broadcasting via the world wide web; electronic mail services; interactive video text services; news information and news agency services; message sending; communications by and/or between computers and computer terminals and computer networks; telecommunication access services for access to a communications or computer network; retrieval, provision and display of information from a computer stored database; electronic display of information, text, images, messages and data; on-line communication services; providing on-line chat room for transmission of messages among computer users concerning topics of entertainment and sports; providing on-line electronic bulletin boards for transmission of messages among computer users concerning topics of entertainment and sports; **all the foregoing services relating to the sport of cricket**

### Class 41

Sporting activities; sporting services by or relating to television or radio; organisation, production and presentation of events for sporting purposes; organisation, production and presentation of sporting events and sporting tournaments; organisation, production and conducting of exhibitions and training courses; information relating to sporting events provided on-line from a computer database or the Internet; reservation and booking services for sporting events; information and advisory services relating to all the aforesaid services; *but none of the aforementioned services relating to cricket*; education; entertainment; cultural activities; education, entertainment and cultural services by or relating to television or radio; organisation, production and presentation of events for educational, entertainment and cultural purposes; organisation, production and presentation of games, competitions, contests, exhibitions, quizzes, concerts, road shows, staged events, live performances; organisation, production and conducting of conferences, seminars, workshops, symposiums, congresses and colloquiums; publishing services; publication of books, training manuals, periodical publications, magazines, newspapers and newsletters; providing on-line electronic publications (not downloadable); publication of electronic books and journals on-line; production and presentation of interactive entertainment, CDs, CD-ROMs and computer games; information relating to education, entertainment and cultural events provided on-line from a computer database or the Internet; reservation and booking services for educational, entertainment and cultural-events; **all relating to the sport of cricket**

7. The 278 application was published in the Trade Marks Journal on 25 September 2009 and opposed by DC Comics on 21 December 2009. The emboldened limitations were added by Adelphoi on 8 July 2011.
8. DC Comics' observations in reply to the appeal included that the limitations "relating to the sport of cricket" were meaningless in relation to several of the goods and services at issue, for example, pens and pencils, erasers, electronic mail services. Mr. Baldwin relied on a number of authorities where sporting limitations were held to be unrealistic to distinguishing the relevant public particularly in relation to clothing (Case T-356/10, *Nike International Ltd v. OHIM* [2011] ECR II-0329, *ICE MOUNTAIN Trade Mark*, BL O/008/06, *ANIMAL Trade Mark* [2004] FSR 19 and see more recently, *Maier v. Asos plc* [2013] EWHC 2831 (Ch)).
9. Mr. Malynicz objected to this line of submission on the basis of the lack of Respondent's Notice. Whilst the Hearing Officer noted the limitations, he did not rule on their effectiveness or validity.
10. Since one of Adelphoi's arguments on appeal was the state of mind of the "cricketing goods and services purchaser", I considered that Mr. Baldwin's submissions on the meaning and effect of the limitations in context were proper and pertinent in reply.
11. As I have said, the Hearing Officer did not decide on the admissibility of the limitations to the goods and services in the 278 application. However, I felt constrained to point out at the hearing that the specification of Class 41 was contradictory in its first and second parts (e.g.: (1) reservation and booking services not relating to cricket; (2) reservation and bookingservices relating to cricket). Mr. Baldwin commented that this was OK because the Class 41 limitation was meaningless anyway. Had it been pivotal to my decision, I would have queried whether the Class 41 specification as presently worded met the requirement for certainty (Case C-307/10, *Chartered Institute of Patent Attorneys v. Registrar of Trade Marks*, 19 June 2012).

### **DC Comic's oppositions**

12. DC Comics' oppositions to the applications were the same in each case and relevantly based under Section 5(2)(b) of the Act on their Community trade mark registration number 002974673 covering goods and services *inter alia* in Classes 5, 16, 25, 30, 32, 38 and 41. CTM 002974673 was filed on 13 December 2002 and registered on 12 April 2005. Since it was less than five years old at the dates of publications of the applications, it was not subject to proof of use (Section 6A of the Act).
13. The Hearing Officer held that there was identity between the respective goods and services with the exceptions of some of Adelphoi's goods in Class 30 (cakes, pastry) and Adelphoi's beers in Class 32, which were similar to those in the earlier CTM. There was no challenge to these findings of identity and similarity in the respective goods and services and I do not, therefore, list the goods and services of CTM 002974673 in this decision.

**Appeal and routemap**

14. Adelphoi filed Notice of appeal to the Appointed Person under Section 76 of the Act against the Hearing Officer's decision to allow the oppositions under Section 5(2)(b) on 15 January 2013.
15. Mr. Malynicz stressed on me that the crux of the appeal was that the Hearing Officer should have, but did not, assess the likelihood of confusion through the eyes of the limited range of average consumer of cricket related goods and services. That, of course, concerned only the 278 application because the goods in the 514 application were not subject to a cricketing or any other limitation<sup>1</sup>. In answer to my question, Mr. Malynicz confirmed that Adelphoi wished to pursue the appeal also in connection with the 514 application on the grounds stated in the Statement of grounds of appeal.
16. I propose, therefore, to deal with the appeal as follows: (1) grounds common to the 514 and 278 applications; (2) conclusion on the 514 application; (3) points special to the 278 application; (4) overall conclusion and costs. This usefully also follows the order adopted by the Hearing Officer.

**(1) Grounds common to the 514 and 278 applications**

**Purchasing act**

17. Having set out the usual list of principles from the case law of the Court of Justice of the European Union, including that the average consumer is deemed to be reasonably well informed and reasonably circumspect and observant, the Hearing Officer made two general observations on the purchasing act:

“25) The conflict involves a wide variety of goods and services. The degree of care and consideration may vary accordingly. However, Mr. Malynicz did not argue that any of the goods and services at issue would be subject to a highly considered purchasing process. The degree of care and consideration will therefore be no higher than the norm (in some instances the degree of care and consideration may be lower than the norm). In terms of the goods and services in question, it seems that the primary means of selection and perusal will be via visual stimuli, however aural considerations will still be borne in mind. To the extent that it becomes necessary, I will comment further upon these matters when I determine whether there exists a likelihood of confusion.”

18. Adelphoi criticised the Hearing Officer's focus on visual aspects, contending that he was wrong, in connection with the 514 application, to say that the goods would be bought by eye. In fact, he said that the 514 goods would be “bought more by the eye than by the ear” (para. 38), and as regards both applications (para. 25 above), that although the purchase of the goods and services would primarily be visual, aural aspects could not be ignored. Given the nature of the goods and services, I do not think this can be faulted.

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<sup>1</sup> Adelphoi did not question the Hearing Officer's finding in relation to the 514 application that: “even if the limitation is significant in respect of the other application [278]I do not consider that there is potential to apply anything similar here given that the goods in question are not ones which have particular cricketing subsets”.

19. Mr. Malynicz disputed that he did not argue that any of the goods or services would be subject to a highly considered purchasing process. He particularly pointed to nutritional products in Classes 5 and 30 and broadcasting services in Class 38. No argument was directed to this point in Adelphoi's skeleton argument for the hearing before the Hearing Officer<sup>2</sup>.
20. Further, the Hearing Officer did not say that the 514 goods would be bought without care or consideration as maintained in the Statement of grounds of appeal and Adelphoi's skeleton argument on appeal. He said that those goods would be "purchased with no more than an average level of care and consideration; some of the goods (confectionery, for example) may be purchased with a lower than normal level of confusion". That coupled with his recognition that the average consumer is deemed to be reasonably well informed and reasonably circumspect and observant, is in my view a correct assumption for the goods at issue, including nutritional products.
21. As for the services, e.g., broadcasting, whilst I agree with Mr. Malynicz that the average consumer would include business consumers or professionals as well as the general public, the likelihood of confusion must be assessed in relation to the part of the public whose attention is lower (see e.g., Case T-448/11, *Golden Balls Ltd v. OHIM*, 16 September 2013, para. 26), although in any event, the Hearing Officer relied on an average consumer (reasonably well informed and reasonably circumspect and observant) paying an average level of attention (para. 41).

### **Comparison of the marks**

22. The Hearing Officer held that there was a high degree of visual similarity between BATMAN and BATSMAN. There is no appeal against that finding.
23. Instead, Adelphoi challenges the Hearing Officer's conclusion on aural similarity. The Hearing Officer followed the pronunciations put forward by Adelphoi that is, BAT-MAN v. BATS-MUN, and agreed with Mr. Malynicz that there was less aural than visual similarity. The Hearing Officer did not agree with the argument that the differences resulted in low aural similarity. He thought that the similarities still resulted in a reasonably high degree of aural similarity. That was a question of weight for the Hearing Officer with which it is improper for me to interfere on appeal.

### **Conceptual counteraction**

24. It was accepted by the parties and by the Hearing Officer that the meanings of BATMAN and BATSMAN would be well known to the public: (a) BATMAN as the cartoon, TV and film superhero; (b) BATSMAN as someone who bats in cricket.
25. Adelphoi criticised the Hearing Officer for noting that BATSMAN also meant an aircraft safety officer. I do not see why since this is one of its dictionary definitions (Second Witness Statement of Jay Kogan, dated 30 July 2012).
26. The Hearing Officer agreed with Mr. Malynicz that there was "as a matter of fact, conceptual dissonance between BATMAN (the name of a well-known comic book

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<sup>2</sup>Any transcript of the hearing below was not available at the appeal hearing.

character) and BATSMAN (a type of cricketer or an aircraft safety officer)”. I reject the contention that the Hearing Officer wrongly carried out the conceptual comparison.

27. Adelphoi argued that the Hearing Officer failed to give the conceptual counteraction principle sufficient (or any) weight, and was wrong to rely on Case T-460/07, *Nokia Oyj v. OHIM* [2010] ECR II-0089 because in *Oyj* there was some conceptual similarity, whereas here there was not.

28. This is what the Hearing Officer said:

“39) As has been stated many times by the courts, conceptual differences may have a counteractive effect on the other aspects of similarity (see, for example, Case C-361/04 P *Ruiz-Picasso and Others v OHIM* [2006] ECR I-643). However, conceptual differences do not always succeed in having a counteractive effect (see the GC’s judgment in *Nokia Oyj v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-460/07). Thus, there being a difference in concept is not a silver bullet to avoid confusion. The meanings behind the words in question are very different. However, the marks are very close. Mr Malynicz argued that the existence of such different meanings, coupled with the fact that the different meanings provide a clear certainty of recollection, meant that confusion was not likely. Whilst I have borne in mind Mr Malynicz’s detailed submissions on the various conceptual counteraction cases, it is my view that the marks in this case, when used on the identical goods at issue, may easily be mistaken for one another. I do not quite agree with Mr Baldwin’s assessment that in the context of trade mark use the meaning behind BATSMAN will not be perceived, but, nevertheless, the degree to which the average consumer considers these purchases is not one for which the difference in concept will readily leap out. The marks look (and sound) so close that the difference in concept is likely to go unnoticed. If the difference goes unnoticed then the conceptual difference has no material effect. **There is a likelihood of confusion.** This applies also to the goods which are not identical; the relationships between the various factors are close enough for there to be a likelihood of confusion ...”

29. Conceptual similarity or dissimilarity in the marks is just one of the factors to take into account in the global assessment of likelihood of confusion. The CJEU made this clear when they considered the principle in Case C-361/04 P, *Claude Ruiz-Picasso v. OHIM* [2006] ECR I-0643:

“18. As is apparent both from the tenth recital in the preamble to Directive 89/104 and the seventh recital in the preamble to Regulation No 40/94, the assessment of the likelihood of confusion depends on numerous elements and, in particular, on the recognition of the trade mark on the market, on the association which can be made with the used or registered sign and on the degree of similarity between the trade mark and the sign and between the goods or services identified. The likelihood of confusion must therefore be appreciated globally, taking into account all factors relevant to the

circumstances of the case (see to that effect, regarding Directive 89/104, *SABEL*, paragraph 22).

19. Furthermore, that global appreciation of the visual, aural or conceptual similarity of the marks in question must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components (see, in particular, *SABEL*, paragraph 23).

20. By stating in paragraph 56 of the judgment under appeal that, where the meaning of at least one of the two signs at issue is clear and specific so that it can be grasped immediately by the relevant public, the conceptual differences observed between those signs may counteract the visual and phonetic similarities between them, and by subsequently holding that that applies in the present case, the Court of First Instance did not in any way err in law.

21. As OHIM rightly maintains, such a finding is, in this case, entirely part of the process designed to ascertain the overall impression given by those signs and to make a global assessment of the likelihood of confusion between them.

22. It must be borne in mind that, in paragraph 54 of the judgment under appeal, the Court of First Instance found that the two signs at issue are visually and phonetically similar, but that the degree of similarity in the latter respect is low. It also held in paragraph 55 of that judgment that those signs are not similar from a conceptual point of view.

23. Thereafter, the Court of First Instance ruled, in paragraph 56 et seq. of the judgment under appeal, on the overall impression given by those signs and concluded, following a factual assessment which it is not for the Court to review in an appeal where there is no claim as to distortion of the facts, that there was a counteraction of the visual and phonetic similarities on account of the particularly obvious and pronounced nature of the conceptual difference observed in the present case. In doing so, the Court of First Instance, in its overall assessment of the likelihood of confusion and as is apparent from paragraph 59 of that judgment, took account in particular of the fact that the degree of attention of the relevant public is particularly high as regards goods like motor vehicles.

24. In paragraph 61 of the judgment, the Court of First Instance also ruled on whether the mark PICASSO has a highly distinctive character capable of heightening the likelihood of confusion between the two marks for the goods concerned.

25. Thus, it is only following consideration of various elements enabling it to make an overall assessment of the likelihood of confusion that the Court of First Instance concluded, in paragraph 62 of the judgment under appeal, that the degree of similarity between the marks at issue is not sufficiently great for it to be considered that the relevant public might believe that the goods concerned come from the same undertaking or, as the case may be, from economically linked undertakings, so that there is no likelihood of confusion between those marks.”



30. It seems to me that the Hearing Officer performed exactly this exercise. He considered the conceptual counteraction principle (being well aware that both marks had “very different meanings”) but decided in his global assessment that there was nevertheless due to other relevant factors a likelihood of confusion. That was a question of weight, with which the appeal tribunal should not interfere.
31. Further his citation of *Nokia* appears from his preceding sentence to be intended to refer to the statement of the GCEU in *Nokia* at paragraph 66, that real conceptual differences may be insufficient to neutralise visual and aural similarities between marks (in turn, it is clear from the GCEU’s reference (at para. 66) to Case C-16/06 P, *Éditions Albert René v. OHIM* [2008] ECR I-1053, para. 98, that this was merely a negative statement or statement in reverse of the *Picasso* conceptual counteraction principle).

**Enhanced distinctive character**

32. Finally on the generally applicable grounds of appeal, Adelphoi maintained that although the Hearing Officer correctly found that the BATMAN had an enhanced distinctive character through use, he failed to appreciate that it had no reputation for the goods in the 514 application and no reputation for cricket related goods and services in the 278 application.
33. I do not consider that this criticism has any substance. The Hearing Officer agreed with Mr. Malynicz’s submissions in this regard. Further he held that BATMAN was in any event possessed of high distinctive inherently so that the point made little difference anyway:

“34) The degree of distinctiveness of the earlier mark must be assessed. This is because the more distinctive the earlier mark (based either on inherent qualities or because of use made), the greater the likelihood of confusion (see *Sabel BV v. Puma AG*, paragraph 24). In terms of inherent characteristics, the mark is highly distinctive. It is a word with no allusion to anything other than a combination of a bat and a man.

35) That then leads to the use provided by DC. Whilst Mr Malynicz accepted that the earlier mark had a reputation for films, printed matter (such as comic books), and television programmes, he did not accept that BATMAN had a reputation as a trade mark for anything else. Mr Baldwin argued that the extensive use that had been put forward by Mr Kogan proved the contrary. I am more in line with Mr Malynicz than Mr Baldwin. Whilst a lot of evidence has been provided about DC’s merchandising activities, this does not of itself equate to the trade mark BATMAN having a specific reputation for the goods merchandised. The revenue figures provided vary considerably between the categories of goods and, furthermore, those categories are diverse with numerous types of goods falling within. However, bearing in mind the revenue figures, together with the examples of use exhibited, I am prepared to accept that in addition to those items referred to by Mr Malynicz, the mark also has a reputation (and thus an enhanced level of distinctiveness) for toys. For the rest of the goods, the mark still has an inherently high level of distinctiveness, so this finding may not be overly significant anyway.”

**(2) Conclusion on the 514 application**

34. Adelphoi's appeal against the Hearing Officer's decision under Section 5(2)(b) in relation to the 514 application fails as disclosing no material error of principle or that the Hearing Officer was plainly wrong.

**(3) The 278 application**

35. Mr. Malynicz's main argument on appeal was that the Hearing Officer failed to judge the likelihood of confusion from the perspective of the right purchaser, who he submitted "would be looking for cricket-related goods and services, so it can be presumed that they have a reasonably high level of awareness both of the attributes of those goods and services and specifically the word BATSMAN". (This argument could not, of course, apply to the services listed in the first part of the Class 41 specification which exclude cricket-related services (see paras. 6 and 11 above)).

36. In support, Mr. Malynicz referred me (as he had done below) to Case T-517/10, *Pharmazeutische Fabrik Evers GmbH & Co. KG v. OHIM*, 12 July 2012, for the proposition that:

"As a general rule, when the goods covered by one of the marks are included in the wider designation of the other mark, the relevant public is defined by reference to the more specific wording (GCEU, para. 28)."

37. He said that the Hearing Officer was directed to the same point in Case T-408/09, *ancotel GmbH v. OHIM*[2011] ECR II-0151, paragraph 39, and he referred me to a number of other instances in the case law of the GCEU (including Case T-581/08, *Perusahaan Otomobil Nasional Sdn Bhdv. OHIM*, 27 September 2011, para. 27, Case T-353/11, *Event Holding GmbH & Co. KG v. OHIM*, 21 March 2011, para. 30 and Case T-504/11, *Paul Hartmann AGv. OHIM*, 4 February 2013, para. 30).

38. Mr. Baldwin in reply contended:

- (1) The cricketing limitations were meaningless in the context of the goods and services at issue (or descriptive<sup>3</sup>).
- (2) Unlike in the *Pharmazeutische Fabrik Evers* case, where the overlapping public were those concerned with cholesterol-related ailments, there was no specific section of the public concerned with goods or services related to cricket, which was a traditional sport of interest across all society.

39. Whilst I had some sympathy for Mr. Baldwin's points, the fact of the matter was that the Hearing Officer did take on board Mr. Malynicz's arguments about the state of mind of the "cricketing purchaser".

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<sup>3</sup>Mr. Baldwin pointed to a copy of a screenshot of a web page on Adelphoi's informational, news and social media website relating to cricket included in Adelphoi's skeleton argument on appeal, where "batsman" (preceded by Adelphoi's registered trade mark for a batsman logo) appears in the banner at the top of the webpage above pictures of ranked named batsmen.

40. The contentious findings are at paragraph 41, where in assessing the likelihood of confusion with regard to the 278 application, the Hearing Officer said:

“The goods/services are different from the application already assessed, but the primary added factor here is the cricketing limitation that has been added to the specifications. This may result in the meaning of the word BATSMAN being more readily apparent, i.e. that because the goods/services relate to cricket, the cricketing reference will not be missed. I put to one side the argument as to whether the goods/services in question can have a true cricketing subset, and also whether a better form of wording is available. This is because even if the goods/services do relate to cricket then the closeness of the marks and the likelihood of this causing confusion is not diminished. The goods/services are still identical. Counterintuitive as it may seem, DC’s earlier mark will include goods relating to cricket. So even in this context, given the closeness of the marks, the identity of the goods/services, and the no more than average degree of care and attention used by the average consumer when selecting them, there is an equally great propensity for the marks to be mistaken for one another. **There is a likelihood of confusion.**”

41. Adelphoi argued that the Hearing Officer did not judge the 278 application through the eyes of a purchaser interested in cricket (i.e., define the relevant public by the more limited cricket related wording) but instead reverted back to the fact that the goods/services of the parties were identical.
42. I consider that to be an unfair reading of paragraph 41.
43. Read fairly, it seems to me that the Hearing Officer, on the one hand, (a) took the limitations on the 278 goods/services at face value, and (b) accepted that the use of BATSMAN on cricket related goods/services might accentuate the meaning of that word to the purchaser of those products. On the other hand, he noted that (c) the same purchaser might also encounter cricket related goods/services bearing the mark BATMAN (because such goods/services were covered by DC Comic’s earlier CTM registration), and (d) because of the closeness of the marks BATMAN and BATSMAN, the likelihood of confusion was not diminished.
44. I do not, therefore, accept that the Hearing Officer erred or was plainly wrong in his conclusion on the 278 application. That conclusion was as the result of a multifactorial assessment (where no distortion of the facts has been shown) and one that the Hearing Officer was entitled to make.

**Actual confusion**

45. On a final note, Adelphoi argued that there was no actual evidence of confusion but as Mr. Baldwin rightly observed, Adelphoi had not commenced use of BATSMAN at the relevant date (i.e., the date of filing) so this was unsurprising.

**(4) Conclusion and costs**

46. In the event, the appeal has failed. There was no award of costs below, which stands. I will order Adelphoi to pay on-scale costs of £850 as a contribution towards DC Comic's costs of this appeal, such sum to be paid within 21 days of the date of this decision.
47. For completeness, I should mention that Mr. Malynicz offered on behalf of Adelphoi to further/alternatively limit the 278 application, but no concrete proposal was put forward and I do not see how this could assist Adelphoi in any case.

Professor Ruth Annand, 31 October 2013

Mr. Simon Malynicz of Counsel instructed by The Trademark Café Limited appeared on behalf of Adelphoi Limited (Applicant/Appellant)

Mr. John Baldwin of Queen's Counsel instructed by Edwards Angell Palmer Dodge UK LLP appeared on behalf of DC Comics (A General Partnership) (Opponent/Respondent)