

O-023-08

**IN THE MATTER OF INTERNATIONAL REGISTRATION No 817390
AND THE REQUEST BY KONINKLIJKE PHILIPS ELECTRONICS N.V.
TO PROTECT THE TRADE MARK BRILLIANCE IN CLASSES 9 & 10**

**AND IN THE MATTER OF OPPOSITION THERETO UNDER NO 71220
BY BELDEN TECHNOLOGIES INC.**

**AND IN THE MATTER OF AN APPEAL FROM A DECISION OF MR
GEORGE SALTHOUSE DATED 7 AUGUST 2007**

DECISION

Introduction

1. This is an appeal against a decision of Mr. G. Salthouse, dated 7 August 2007, in which he rejected the opposition by Belden Technologies to the registration by Koninklijke Philips Electronics N.V. of the trade mark BRILLIANCE for a number of goods in Classes 9 and 10.

Background

2. On 17 December 2003, Koninklijke Philips Electronics N.V. ("Philips") requested protection in the United Kingdom of the trade mark BRILLIANCE on the basis of an international registration based upon its registration held in Benelux. An International Priority date of 2 July 2003 was claimed with regard to its Benelux registration. Protection was sought for:

Class 9: Electric apparatus and instruments for recording, processing, analyzing and reproducing medical data; recorded computer (software) programs for medical applications; all for use in CT-scanning; and
Class 10: CT-scanners.

The United Kingdom Trade Marks Registry accepted and published the request.

3. On 27 July 2005, Belden Technologies Inc., a US company, (“Belden”) filed notice of opposition based upon its CTM registration BRILLIANCE no. 3204351, registered with effect from 30 May 2003 for ‘electrical cables and wires; electronic cables and wires; microphone cables for sound and audio applications’ all in Class 9. Belden claimed that the marks were identical or similar and that the goods were similar, so that the mark applied for offended against sub-sections 5(2)(a) & (b) of the Trade Marks Act 1994.
4. Philips filed a counter-statement accepting that the marks were identical, but denying that the goods were the same or similar. It claimed to have been using its mark since 1991 but in the event produced no evidence of use. Belden alone filed evidence in the opposition proceedings, consisting of a witness statement from the marketing manager of its subsidiary in the Netherlands. Neither side wished to be heard, although the opponent filed written submissions.

The Hearing Officer’s decision

5. Mr Salthouse summarised Belden’s evidence, and I shall not repeat it here, save to note that it led the Hearing Officer to conclude that the cables which had been sold by Belden under the mark were primarily aimed at the audio/visual market, such as cables for hi-fi connections and speakers, as well as connections between TVs and DVD/video players.
6. The Hearing Officer set out sub-sections 5(2)(a) and (b) and section 6 of the 1994 Act. He referred to the usual guidance of the ECJ in *Sabel BV v Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* [1999] E.T.M.R. 1, *Lloyd Schuhfabrik Meyer & Co. GmbH v*

Klijzen Handel B.V. [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG and Adidas Benelux B.V.* [2000] E.T.M.R 723 and set out the principles to be derived therefrom in the usual terms adopted by the Registry. At paragraph 12 of his decision, he set out the test to be applied under section 5(2), and the appellant does not suggest that he erred in concluding that:

“The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those different elements taking into account the degree of similarity in the goods, the category of goods in question and how they are marketed. Furthermore, I must compare the applicant’s mark and the marks relied upon by the opponent on the basis of their inherent characteristics assuming normal and fair use of the marks on a full range of the goods covered within the respective specifications.”

7. The Hearing Officer also referred to the decision of David Kitchin Q.C. sitting as the Appointed Person in *Steelco Trade Mark* (BL O/268/04). Mr Kitchin, and especially the impact of paragraph 17 of his decision. He continued:

“14. The opponent has provided some evidence of use. However, the average sales in the four years prior to the relevant date amount to approximately £670,000 per annum. The opponent has not supplied any indication of market share or the total sales in the cable market. Nor has it supplied any evidence from the trade. The opponent, therefore, cannot benefit from an enhanced level of protection due to reputation. I also have to consider whether the opponent’s mark is inherently distinctive. The opponent’s mark consists of the word BRILLIANCE. The mark is registered for, *inter alia*, electronic cables and wires. “Brilliance” is a well known English word and whilst when used on audio cables it alludes to the sound quality it must still be regarded as inherently distinctive.”

No issue is taken with the conclusions reached in paragraph 14. Mr Salthouse continued:

“15. In the applicant’s counter-statement it is accepted that the marks are identical. I therefore move onto consider the specifications of both parties. For ease of reference these are as follows:

Applicant’s specification	Opponent’s specifications
In Class 9: Electric apparatus and instruments for recording, processing, analyzing and reproducing medical data; recorded computer (software) programs for medical applications; all for use in CT scanning.	Electrical cables and wires; electronic cables and wires; microphone cables for sound and audio applications.
In Class 10: CT-scanners	

16. In carrying out the comparison of the specifications of the two parties I take into account the factors referred to in the opinion of the Advocate General in *Canon* [1999] ETMR 1. In its judgement, the ECJ stated at page 6 paragraph 23:

“23. In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, *inter alia*, their nature, their end users, their method of use and whether they are in competition with each other or are complementary.”

17. I must also consider the average consumer for the types of goods covered by the specifications of both parties. In my opinion, they would fall into two camps. The applicant's goods are highly specialised and would be purchased for hospitals and other large medical centres by a professional group consisting of doctors and procurement departments. By contrast the applicant's goods, although capable of being used in conjunction with very specialised machinery are also purchased by the general public for use in the home on hi-fi systems and televisions. The applicant's goods are, I would suggest, unlikely to be purchased without very careful study of the specifications which would probably entail a visit to the medical facility by a representative of either the applicant or one of its agents. The opponent's goods will be sold in shops and via catalogues and the internet. I accept that it is possible that the opponent's cables might be used to connect parts of the equipment supplied by the applicant. However, in my opinion there is a considerable difference between an extremely complex piece of advanced medical equipment and a piece of cable.

18. Taking account of all of the above when considering the marks globally, I believe that, despite the marks being identical, there is not a likelihood of the relevant consumers being confused into believing that the goods provided by the applicant are those of the opponent or provided by some undertaking linked to them. The opposition under Section 5(2)(a) & 5(2)(b) therefore fail."

The appeal

8. Belden appealed against the rejection of its opposition, on the grounds that the Hearing Officer erred in his assessment of the facts of the case and

especially (and I summarise the detailed Grounds of Appeal) (i) that he had failed properly to assess the likelihood of confusion across the full range of the respective specifications, especially in so far as Belden's specification covered electrical/electronic cables and wires in unqualified terms, (ii) that he erred in categorising Philips' goods as medical equipment, when its class 9 goods are really items for data processing, (iii) that he focused too much on one category of end users of the opponent's goods and (iv) that he failed to give sufficient weight to the identity of the marks.

Standard of review

9. This appeal is a review of the Hearing Officer's decision. That decision with regard to each of the issues in this case involved a multi-factorial assessment of the kind to which the approach set out by Robert Walker LJ in *REEF TM* [2002] EWCA Civ 763, [2003] RPC 5 at [28] applies:

“In such circumstances 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. A decision does not contain an error of principle merely because it could have been better expressed.”

This has recently been further explained by Lindsay J in *Esure Insurance Limited v Direct Line Insurance Plc* [2007] EWHC 1557, 29 June 2007 who said, at paragraph 12:

“... an error of principle such as to justify or require departure from the decision below ... includes the taking into account of that which should not have been, the omission from the account of that which should have been within it and the case (explicable only as one in which there must have been error of principle) where it is plain that no tribunal properly instructing itself could, in the circumstances, have reasonably arrived at the conclusion that it reached.”

Merits of the appeal

10. Philips did not appear before me or make any representations on the appeal. Belden was represented by Mr Simon Bentley of Messrs Abel & Imray, its trade mark attorneys.

11. Mr Bentley helpfully broke down the various goods in Philips' specification in the following manner:
 - (a) Electric apparatus and instruments for recording, processing, analyzing and reproducing medical data, all for use in CT scanning;
 - (b) Recorded computer (software) programs for medical applications; all for use in CT scanning; and
 - (c) CT-scanners.

12. First, Mr Bentley argued that the Hearing Officer failed to carry out a sufficiently rigorous analysis of the nature of and relationship between the "sub-sets" of goods broken down into the 3 categories shown above. It was submitted that Mr Salthouse had not made any finding of similarity between the goods. I accept that Mr Salthouse did not specifically say that he found any particular category of the applicant's goods to be similar to Belden's specification, or to what degree he found them to be similar, and to that extent I think that it may be said that his decision could have been better expressed. However, it is plain from paragraph 17 of his decision that he was carrying out an assessment of the likelihood of confusion in the light of the authorities which he had cited. He would only have done so if he had considered that there was some similarity between the respective goods. In the light of the so-called interdependency principle, as re-affirmed in the case law of the ECJ, the level of similarity need not have been great, but plainly he considered that there was some similarity.

13. Mr Bentley argued that the failure sufficiently to analyse the different categories of goods was compounded by the Hearing Officer's failure to

consider properly the full and unqualified breadth of Belden's specification, rather than the narrower range of goods upon which Belden's evidence showed that it had used its CTM. Mr Bentley argued that the Hearing Officer had failed to take into account that in its broadest form, Belden's specification covers all kinds of electrical/electronic cables and wires. Had a proper comparison been made, he said, the Hearing Officer would have found such similarity between Philips' electrical apparatus and instruments (category (a) in paragraph 11 above) and Belden's electrical/electronic cables and wires for there to be a likelihood of confusion between them.

14. Belden argued that "electronic cables and wires" denotes an enormous range of products of all kinds, and would certainly include cables designed to transmit medical data to equipment such as a CT scanner. Electronic cables and wires are "application or data neutral", so they could easily be used with the applicant's goods which, as to category (a) in paragraph 11 above, are essentially data processing equipment proper to class 9 not class 10. Mr Bentley argued that these facts rendered "Electric apparatus and instruments for recording, processing, analyzing and reproducing medical data, all for use in CT scanning" similar to "electronic cables and wires." For the purposes of the appeal, Belden concentrated upon the comparison of these two parts of the respective specifications, which Mr Bentley accepted were the high point of the appellant's arguments. If no likelihood of confusion exists between those two parts of the specification, then none will exist in relation to categories (b) and (c) set out in paragraph 11 above.

15. Emphasising the broad scope of the opponent's registration for electronic cables and wires, Mr Bentley submitted that the Hearing Officer had made the mistake of viewing the opponent's goods as limited to consumer items (such as those shown in the exhibits to the witness statement of Mr Eich); this was shown, he said, in the Hearing Officer's reference to Belden's

goods being “sold in shops and via catalogues and the internet.” Mr Bentley submitted that this showed that the Hearing Officer had drawn a false distinction between the likely channels of sale of the opponent’s goods and the apparently more specialised channels of sale of the applicant’s goods.

16. I do not accept that the Hearing Officer made the error of viewing the opponent’s goods only as those for which it had provided evidence of use, that is to say, as limited to goods sold through normal retail channels to average members of the public. He specifically said that its goods were “capable of being used in conjunction with very specialised machinery” as well as being “purchased by the general public for use in the home on hi-fi systems and televisions.” He also accepted that “the opponent’s cables might be used to connect parts of the equipment supplied by the applicant.” In the circumstances, it does not seem to me that the Hearing Officer did make the mistake of artificially narrowing down the scope of the opponent’s specification and I reject this ground of appeal.

17. Mr Bentley next submitted that both parties’ goods are effectively “application neutral” data carriers, (or data processors and carriers) and that their respective natures are similar because they form part of the same integrated unit used to process, analyse and reproduce data, with the same end users. He submitted that the fact that the applicant’s goods are intended for medical applications is incidental to the analysis of their nature, given the breadth of the opponent’s specification. At the least, he said, the parties’ respective goods are complementary. The latter point (rightly, in my view) was accepted by the Hearing Officer, but the difficulty with accepting the former point, it seems to me, is that it ignores the impact of the applicant’s goods being delimited by the words “for ... medical data”, “for medical applications” and “all for use in CT-scanning”. Those limitations on the applicant’s specification appear to have been given significant weight by the Hearing Officer, as affecting both the likely

purchasers of the applicant's goods and highlighting the differences between a complex piece of medical equipment and a piece of cable which might be a component part of it or be used with it. Even if the parties' respective goods are properly categorised as data processors or carriers, the Hearing Officer appears to have considered these differences to be material, and I do not consider that he can be said to have committed an error of principle in so doing.

18. The fact that the applicant's goods are limited to apparatus etc used "for ... medical data", "for medical applications" and "all for use in CT-scanning" suggests that the Hearing Officer was right to find that the 'consumers' and end users of those goods are likely to be well-informed professionals. Such end users will approach the purchase of such goods, or parts for those goods, with the benefit of specialist knowledge and with a level of care appropriate to the highly specialised and expensive goods concerned. This was, I think, a significant factor in the Hearing Officer's assessment of the likelihood of confusion and I do not consider that he can be said to have fallen into error in that respect. Even if the opponent's cables were being sold for use with CT scanning equipment, I think that the Hearing Officer took the view that the sophisticated end user of the applicant's goods purchasing or, I suppose, repairing the applicant's goods would be able to make the necessary distinctions to avoid any likelihood of confusion. I do not consider that it is right to say that he erred in principle or omitted to take relevant factors into account in that aspect of his assessment of the likelihood of confusion. I therefore reject this ground of appeal.

19. Lastly, Belden submitted that the Hearing Officer failed to give sufficient weight to the fact that these are identical marks. Again, I do not consider that this ground of appeal is made out: Mr Salthouse specifically referred to the identity of the marks in paragraph 18 of his decision, and appears to

have taken this into account in his global assessment of the likelihood of confusion.

20. As to categories (b) and (c) in paragraph 11 above, it seems to me that it can be said in support of the appeal that the Hearing Officer might usefully have considered them as separate categories. In this respect his decision could indeed have been clearer. However, as Mr Bentley accepted, if Belden cannot succeed in respect of category (a), then (b) and (c) fall away too.

21. For all these reasons, the appeal fails. In the circumstances, however, I make no order as to the costs of the appeal.

Amanda Michaels
29 January, 2008