

**BL O/1141/23**

Wednesday, 1<sup>st</sup> November 2023

**MR IAIN PURVIS KC  
SITTING AS THE APPOINTED PERSON**

**In the Matter of**

**UK Trade Mark Application No. 00003603480 for “YATTER”  
in Class 32 in the name of Yatter Ltd**

**And in the Matter of**

**UK Application for Rectification no. CA000504454  
by Dreem Media Ltd.**

**On Appeal from Decision O-0466-23 dated 17 May 2023 by the Hearing Officer Susan Hitchings on behalf of the Registrar of Trade Marks**

-----  
**DECISION**  
-----

This is the approved version of a transcript of the oral judgment given on 1 November 2023

**MR IAIN PURVIS KC SITTING AS THE APPOINTED PERSON:**

1. This is an appeal from a decision of the Hearing Officer Susan Hitchings, made on 17 May 2023 in relation to a rectification action brought by the proprietors of the trade mark PATTERN, an earlier trade mark under number 3494030, against a later trade mark obtained by the proprietor Yatter Limited for the word YATTER. The action was based on s5(2)(b) of the Trade Marks Act 1994, based on alleged likelihood of confusion between the marks.
2. The trade mark YATTER was registered for the following services in Class 35:

*Marketing services; Marketing consultation services, Marketing agency services; Advertising and marketing services; Advertising, marketing and*

*promotion services; Advertising, promotional and marketing services; Marketing, advertising and promotion services; Targeted marketing; On-line advertising and marketing services;*

3. The earlier trade mark PATTER was granted in respect of a wide range of goods and services including marketing agency services in class 35.
4. The Hearing Officer concluded that the services of the two marks were for material purposes identical, in that the services for which the contested mark YATTER was obtained in class 35 were all entirely covered by equivalent services in class 35 for the earlier mark PATTER.
5. Turning to the question of likelihood of confusion, the Hearing Officer ran through the facts and matters to be taken into account in a fairly conventional way. She commenced by considering the question of the average consumer and the nature of the purchasing act, and, in particular, considered the degree of attention which the average consumer could be expected to pay when selecting or purchasing the services in question.
6. In paragraph 23, she concluded that: there would be a range of services in terms of the nature, specification and level selected; the initial outlay could be substantial; the average consumer, being a business consumer, would pay a higher than average degree of attention during the purchasing act as they would want to ensure the services were appropriate to their particular business needs.
7. She then compared the marks in the usual manner: aurally, visually and conceptually. So far as visual similarity is concerned, she concluded that the

marks were visually similar to what she called a “higher than average” degree, although she noted that the differences lay in the first letter of the marks and referred to the decision *El Corte Inglés v OHIM* T-183/02 and T-184/02 at paragraph 81. This is the case usually cited for the proposition that the beginnings of words tend to have more visual and aural impact than the ends, although the Hearing Officer accepted that this was not always the case. The same went for aural similarity.

8. She then looked at conceptual similarity and here dealt with a dispute between the parties as to whether the word “yatter” would be taken by consumers as having a particular meaning. In paragraph 34, she refers to the fact that the word yatter appears in the dictionary where it is defined as “talking incessantly; chattering; or incessant talk”. The applicant for cancellation contended that the average consumer would understand the word as having this meaning and therefore relied on its similarity of meaning with that of the word “patter”, namely to speak quickly and enthusiastically (as in the phrase ‘sales patter’) as establishing conceptual similarity.
9. The Hearing Officer rejected this contention, finding that the word “yatter” would not in fact be understood by the average consumer as having any particular meaning in English. She applied the decision *Chorkee v Cherokee Inc* BL O/048/08, in which Anna Carboni, sitting as the Appointed Person, held that the presence of a word in a dictionary was not determinative as to its meaning to the average consumer. Ms Carboni held in that case that, unless the meaning of a word was so notorious that it could not be the subject of serious dispute, evidence

would be required to show that it had the relevant meaning to the average consumer.

10. In that case the word was ‘CHEROKEE’ which was the name of a particular native American tribe, or a member of that tribe, and appeared in the dictionary as having that meaning. However, there was no evidence as to the extent to which that meaning was understood by the public in the United Kingdom, and for that reason Ms Carboni was not prepared to hold that it had such a meaning to the average consumer.
11. Here there was no evidence as to the recognition of the meaning of the word ‘yatter’ on the part of the public. The Hearing Officer said she did not consider that any more than a negligible proportion of consumers would recognise the meaning of the word ‘yatter’ as it was defined in the dictionary, and therefore it was not a widely understood everyday word, nor a commonly used word. She concluded that the average consumer would therefore perceive it as an invented, conceptually neutral word.
12. She moved on to the distinctive character of the word patter. She held that the word was mildly allusive, in that it meant “fast continuous talking, often associated with sales people”, and therefore plainly had some relationship to marketing services. For that reason she concluded that the mark was inherently distinctive to no more than a medium degree.
13. She then turned to the overall question of likelihood confusion, distinguishing direct from indirect confusion, ran through her earlier findings, and then referred

to the *Picasso* case, *Picasso Estate v OHIM C-361/04 P*, in which the Court of Justice held that where one of the signs in issue had a clear and specific meaning such that it could be grasped immediately by the relevant public, the conceptual differences observed between the signs could counteract the visual and phonetic similarities between them. She noted however that it was not always the case that a conceptual difference of this kind would be enough to offset visual and aural similarities between the marks.

14. She then dismissed the argument that the absence of evidence of confusion was relevant in this case and proceeded to give her overall conclusion in paragraph 47. This was that the average consumer would be unlikely to mistake one mark for the other, indeed that such a consumer, being reasonably well informed and reasonably circumspect, would notice and recall the differences between the marks.
15. In reaching this conclusion, she particularly relied on two points she had made earlier, namely (i) that the differences between the marks appeared at the start of each mark, which tended to have more impact on consumers, and (ii) that consumers could be taken to be taking more than an average degree of attention when purchasing the services or selecting the services which are the subject of the registration. She said that, realistically, any likelihood of direct confusion between marks is negligible.
16. The matter has been appealed by the Applicant for rectification.

17. Mr. Tennant, appearing for the Appellant, took five points by way of challenge to the Hearing Officer's decision. He fairly recognised at the outset the heavy burden on an appellant when challenging a decision on likelihood of confusion under the Trade Marks Act made by an experienced Hearing Officer. Although nobody cited it, I would refer here to my own decision in ROCHESTER (O-049-17). where I considered the appellate function of the Appointed Person specifically in relation to decisions on likelihood of confusion in paragraphs 33 and 34. I stated there by way of conclusion that, in the absence of a distinct and material error of principle, the Appointed Person ought not to interfere unless the Hearing Officer's view was clearly wrong in the sense that it was outside the range of views which could have been reasonably taken on the established facts. I believe this is consistent with other recent authorities on this issue.
18. Turning to the points of appeal, the first challenge was to the Hearing Officer's finding that the meaning of the word *yatter* would not be understood by the average consumer.
19. Mr. Tennant was prepared to accept that he could not challenge the Hearing Officer's conclusion that, in the absence of evidence to establish that the word *yatter* was recognised as having its dictionary meaning by the average consumer, there was no basis for finding that it had such a meaning. His point, as he developed it, was that does not necessarily mean that the average consumer would think that it was a *made-up* word as opposed simply to being a word whose meaning was unknown.

20. Although I think I understand the logic of that in an abstract sense, it seems to me not to be helpful. We are concerned with average consumers confronted with a word which to them has no obvious 'dictionary' meaning and is being used in a trade mark sense (consistent with it having no such meaning). There is no way such an average consumer would be able to guess that it had an (unknown) dictionary meaning unless they had been told this in advance. Even if they did, since they do not know what the meaning is, the mark is conceptually neutral.
21. In the light of that it seems to me that there is no possibility of sensible challenge to the finding of the Hearing Officer in relation to the conceptual neutrality of the word Yatter as made in paragraph 35 of her decision.
22. The second ground was derived from the first and it concerns the Hearing Officer's reference to the *Picasso* case (to which I have already referred) in paragraph 45 of her decision. As I have said, the point of the reference to the PICASSO and PICARO case was to indicate that conceptual differences can be enough to offset visual and aural similarities.
23. Confronted by one trade mark which has a clear conceptual hook (in that case it was the word PICASSO), the average consumer who then comes across a different though very similar looking trade mark (in that case PICARO) which with no such conceptual meaning is unlikely to think that one is the same as, or connected in the course of trade, with the other. The vital conceptual idea provided by the original trade mark is simply not present in the later trade mark, and therefore, it is hard to see why one would be related to the other. Of course,

there can be cases where the marks are so visually similar that confusion is likely to occur despite a strong conceptual distinction (as the Hearing Officer noted).

24. It seems to me, given the acceptance by Mr. Tennant of the finding of fact on the lack of conceptual meaning of ‘yatter’, and the acceptance by both sides that ‘patter’ does have a conceptual meaning, that very little objection can sensibly be taken to the Hearing Officer’s reference to the *Picasso* case, or to her taking that point into account.
25. In fact, when we get to paragraph 47 of her decision when she gives her reasons, she does not appear to have taken the conceptual differences between the marks as the key factor negating the possibility of confusion. However, in any event I reject any submission that the Hearing Officer’s reference to the *Picasso* case was mistaken or inappropriate on the facts of this case. It seems to me there is no arguable error of law there.
26. The third ground related to something the Hearing Officer said in paragraph 47, when she was dealing with the question of visual and aural similarity. If I can quote from this paragraph she said this:

“I acknowledge the degree of visual and aural similarity between the marks, however, the differences between them appear at the start of each mark, which, as mentioned earlier in my decision, tends to have more impact on consumers than differences positioned at the end of a mark.”

27. The point made here by Mr. Tennant was that the Hearing Officer had, in fact, already factored in the point about the beginnings of words being more important than the ends of words in paragraph 31 of her decision by reference to the *El*

*Corte Inglés* case, and it was having made that reference that she then came to the conclusion that the marks were visually similar to a higher than average degree.

28. The argument was therefore that, when she acknowledged the degree of visual and aural similarity between the marks, she was referring back to her finding of a more than average degree of visual and aural similarity. Because she had already taken account of the differences appearing at the start of each mark in making that finding, it was therefore wrong, he says, for her to refer to that point again.
29. Again, although there is a certain amount of literal logic in that argument, it seems to me that it is founded on too close a textual analysis of paragraph 47. In my view all the Hearing Officer is doing is summarising the findings that she has already made on visual and aural similarity which factored in as a major point the fact that there are differences between the marks appearing at the start of each mark and that that is impactful.
30. I therefore do not think there is any valid criticism to be made of that sentence in her decision.
31. The fourth ground of appeal concerned the average consumer. The argument that was made, although I think Mr. Tennant accepted it was not the strongest point, was that the Hearing Officer was placing undue emphasis on purchases of higher-cost services rather than lower-cost services and was therefore over-estimating the degree of attention which the average consumer would pay to the contested mark. This point arises out of paragraph 23 of her decision.

32. I have to say it appears to me that paragraph 23 is a perfectly reasonable account of the way in which the services in this case would be selected and purchased by average consumers. The Hearing Officer has taken into account that there are a variety of services at a variety of costs, but the overall conclusion that average consumer will pay a higher than average degree of attention when making purchases of business services such as marketing and advertising services is a perfectly reasonable one, and certainly not one capable of challenge on appeal.
33. The final challenge to the decision was a global challenge to the overall findings made in paragraph 47 that there was no likelihood of direct confusion between these trade marks. Essentially, the argument was that the conclusion was outside the range of views that could have been reasonably taken on the established facts.
34. I disagree. It seems to me that the decision that was taken was perfectly reasonable and was well within the bounds of decisions which a reasonable Hearing Officer could have taken. It was supported by cogent arguments and a perfectly fair account of the evidence before her.
35. In conclusion, therefore, I reject this appeal and will uphold the decision of the Hearing Officer rejecting the rectification application. I award the Respondent the sum of £800 in costs to be paid within 21 days.

**IAIN PURVIS KC**

**29 November 2023**

**Approved Judgment**