O-558-14

TRADE MARKS ACT 1994

**IN THE MATTER OF THE INTERNATIONAL REGISTRATION NO 1149765
DESIGNATING THE UNITED KINGDOM
BY DHC CORPORATION TO REGISTER THE TRADE MARK**

DHC

IN CLASS 5

**AND IN THE MATTER OF OPPOSITION
THERETO UNDER NO 400872
BY MUNDIPHARMA AG**

BACKGROUND AND PLEADINGS

1) DHC Corporation is the holder of international registration ("IR") 1149765 in respect of the mark DHC. Protection in the UK was requested on 27 December 2012, but with a priority date claimed from Japan of 11 December 2012. The request for protection was published in the United Kingdom, for opposition purposes, in the Trade Marks Journal on 21 June 2013. Protection was sought in respect of the following Class 5 goods:

> *Dietary supplements; mineral food supplements; nutritional supplements; vitamin supplements; dietary food supplements.*

2) On 19 September 2013, Mundipharma AG ("the opponent") filed notice of opposition to the granting of protection in the UK. The single ground of opposition is that the designation offends under Section 5(2)(a) of the Trade Marks Act ("the Act") because it is in respect of a mark that is identical to an earlier Community Trade Mark ("CTM") in the name of the opponent and in respect of similar goods. As a result, it is claimed that there is a likelihood of confusion. The relevant information relating to the opponent's earlier CTM is:

> CTM 4040143
>
> DHC
>
> Filing date: 17 September 2004
> Date of entry in register: 22 May 2012
>
> **Class 5:** *Pharmaceutical preparations for the treatment of pain; analgesic preparations and substances*.

3) The applicant subsequently filed a counterstatement admitting that the marks are identical but claims that "DHC" is a commonly accepted acronym for the drug dihydrocodeine and that the opponent's mark has little or no distinctiveness in respect to the goods for which it is registered. It also denies that the applicant's goods are similar to the opponent's goods. It did not put the opponent to proof of use.

4) Both sides filed evidence in these proceedings. Both sides ask for an award of costs. The matter came to be heard on 19 November 2014 when the opponent was represented by Mr Peter Charlton for Elkington and Fife LLP and the applicant represented by Dr Steve James for RGC Jenkins and Co.

Opponent's Evidence

5) This takes the form of a witness statement by Mr Charlton who is a partner of Elkington and Fife LLP. At Exhibit PJC1 is a copy of all seven pages of the

Wikipedia entry for Dihydrocodeine printed on 7 July 2014. In the second paragraph it is stated that Dihydrocodeine is also known as Drocode, Paracodeine and Parzone (but no mention is made of DHC) and “is a semi-synthetic opioid analgesic prescribed for pain ...” (page 1). On page 3 it also states:

> “Common trade names for the extended-release tablets are ... DHC, and DHC Continus.”

6) Exhibit PJC2 consists of an extract from the MHRA website entitled “Updated advice on non-prescription medicines containing codeine or dihydrocodeine”. “DHC” is not referred to.

7) Exhibit PJC3 consists of copies of “The Merck Index” (14th Edition) that describes itself as “An Encyclopedia of Chemicals, Drugs, and Biologicals”. It carries a 2006 copyright notice. The entry for “Dihydrocodeine” appears on page 16 of the exhibit. A number of alternative names are listed, but not “DHC”. Similar pages are also provided from the 15th Edition dated 2013 and do not make any mention of “DHC”.

8) At Exhibit PJC4 is a copy of a webpage from The Royal Society of Chemistry website that refers to the Merck Index as "the definitive reference work for scientists and professionals looking for authoritiv [text missing] on chemicals, drugs and biologicals".

9) Exhibit PJC5 consists of copies of pages from the 2007 printed edition of the publication Martindale: The Complete Drug Reference and also extracts from the current online version of the same. Under the heading "Analgesics Anti-inflammatory Drugs and Antipyretics". Dihydrocodeine is listed under "opioid analgesics". The drug is not referred to as "DHC". A similar extract, this time from Clarke's Analysis of Drugs and Poisons, 2011 edition is provided at Exhibit PJC6.

10) The entry for dihydrocodeine in the UK Monthly Index of Medical Specialities also known as "MIMS" is provided at Exhibit PJC9, printed on 7 July 2014. Dihydrocodeine is not referred to as "DHC". Exhibit PJC10 consists of the relevant web pages from the NHS's website for dihyrocodeine, dihydrocodeine tartate and dihydrocodeine tartate/paracetamol. There is no reference to "DHC".

Applicant’s Evidence

11) This takes the form of a witness statement by Dr James who explains that he is a trade mark attorney and partner at RGC Jenkins & Co., the applicant’s representative in these proceedings. His statement consists of a mix of evidence and submissions.

12) Dr James states that the applicant has offered an amendment to its specification. He reiterated this at the hearing and made a minor correction to the wording. This amended specification is:

> *Dietary supplements; mineral food supplements; nutritional supplements; vitamin supplements; dietary food supplements; none of the aforementioned goods containing dihydrocodeine and none of the aforementioned goods being for use in the treatment of pain or analgesia.*

13) Dr James provides the following evidence to support his submission that the relevant specialised public composed of scientists, professors and doctors commonly use the letters "DHC" as the acronym for the drug dihydrocodeine including at a time before the opponent's CTM application in 2004 as well as more recently:

- At Exhibit SRJ3, the first page of the *Wikipedia* entry for Dihydrocodeine, dated 13 November 2013 where it is states that "Dihydrocodeine is also known as DHC, ..."

- At Exhibit SRJ4, an extract from the Journal of Therapeutic Drug Monitoring, Volume 7, Number 5 (October 1998, pages 561 – 569). This is an article entitled "Formation and Clearance of Active and Inactive Metabolites of Opiates in Humans. The summary of the article that appears on page 561 includes the text "In Germany, dihydrocodeine (DHC) is prescribed as a heroine substitute, and relative overdoses are needed to be effective. DHC metabolism was studied ..." Subsequent references to the drug in the article use the acronym "DHC";

- At Exhibit SRJ5, an extract from the Journal of Chromatography B Biomedical sciences and applications, Volume 718, Number 1 – October 1998 (pages 55 – 60). This is a study entitled "Rapid detection of dihydrocodeine by thermospray mass spectrometry" and was accepted by the Journal in July 1998. The abstract begins "Rapid assay of dihydrocodeine (DHC) by thermospray mass spectrometry is explained." Subsequent references to the drug use the acronym "DHC".

- At Exhibit SRJ6, an extract from the British Journal of Pharmcology, Volume 52 – March 2001 (pages 35 – 43). This is an article entitled "Contribution of dihydrocodeine and dihydromorphine to analgesia following dihydrocodeine administration in man: a PK-PD modelling analysis". The "aim" of the study is expressed as follows: "It is not clear whether the analgesic effect following dihydrocodeine (DHC) administration is due to either DHC itself or its metabolite, dihydromorphine (DHM) ...". The drug is then referred to as DHC throughout the article.

- At Exhibit SRJ7, a report dated May 2006 by MHRA's Committee on Safety of Medicines entitled "Availability of codeine and dihydrocodeine containing OTC analgesics". The "problem statement" begins with the text: "This report examines the availability of OTC codeine and dihydrocodeine (DHC) containing analgesics in light of a report of dependency and medication overuse headache". Despite this, many of the future references to the drug are as "dihydrocodeine". "DHC" is used on three further occasions in the body of the paper.

- At Exhibit SRJ8, an extract from a journal entitled "Heroin Addiction and Related Clinical Problems", Volume 9, Number 2 – November 2007 (pages 55 – 63). The summary of the article begins: "Objective: In papers already presented at conferences we were able to report that a successful maintenance therapy for alcohol addicts is possible with Dihydrocodeine (DHC)." The drug is referred to as "DHC" throughout the rest of the article.

- At Exhibit SRJ9, an extract from the European Journal of Pain – Poster Sessions, Volume 13 – 2009. This reports on a study entitled "Tramadol, Dihydrocodeine and metabolites levels in cancer patients treated with controlled release dihydrocodeine and tramadol". The aim of the study is described as: "Assessment of tramadol, dihydrocodeine and their metabolites in patients treated with controlled release tramodol and dihydrocodeine (DHC)".

- At Exhibit SRJ10, a copy of a MHRA Public Assessment Report dated September 2009. The title of the report is "Codeine and dihydrocodeine-containing medicines: minimising the risk of addiction". The drug dihydrocodeine is referred to throughout as "DHC". At the top of the page is also a warning that states: "Please note that this summary is intended to be accessible to all members of the public, including health professionals".

- Exhibit SRJ11, an extract from the Journal of Analytical Toxicology, Volume 34, Number 8 – October 2010 (Pages 476 – 490). This is a study entitled "The Role of Dihydrocodeine (DHC) Metabolites in Dihydrocodeine-Related Deaths". The drug is referred to as "DHC" throughout. The cover price of the journal is shown in dollars and the organisation responsible for the journal is identified as the Society of Forensic Toxicology, Inc.

- Exhibit SRJ12, an extract from the International Journal of Clinical Practice, Volume 72, Number 2 - November 2010 (Pages 1981 - 1687). This is an original paper entitled "The impact of tramadol and dihydrocodeine treatment on quality of life of patients with cancer pain". Dihydrocodeine is referred to throughout the paper as "DHC".

- At Exhibit SRJ13, an extract from the British Journal of Clinical Pharmacology, volume 72, Number 2 - August 2011 (Pages 330 - 337) and is a report of a study entitled "Deaths of opiate/opioid misusers involving dihydrocodeine, UK, 1997 - 2007". One again, dihydrocodeine if referred to as "DHC" throughout.

DECISION

14) Section 5(2)(a) of the Act is as follows:

> "5(2) A trade mark shall not be registered if because-
>
> > (a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the trade mark is protected...there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark".

15) The following principles relevant to my considerations are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG,* Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc,* Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV,* Case C-425/98 and *Matratzen Concord GmbH v OHIM*, Case C-3/03:

> (a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;
>
> (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
>
> (c) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;
>
> (d) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
>
> (e) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(f) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(g) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

16) In the judgment of the Court of Justice of the European Union ("the CJEU") in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

> "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 intended purpose and their method of use and whether they are in competition with each other or are complementary".

17) The relevant factors identified by Jacob J. (as he then was) in the *British Sugar Plc v James Robertson & Sons Limited*, [1996] R.P.C. 281 ("*Treat*"), for assessing similarity were:

a) The respective users of the respective goods or services;

b) The physical nature of the goods or acts of services

c) The respective trade channels through which the goods or services reach the market

d) In the case of self serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

18) A number of cases provide guidance on how to construe words in specifications. In particular, I keep in mind the following comments of Floyd J. (as he then was) in *YouView TV Ltd v Total Ltd* ,[2012] EWHC 3158 (Ch):

"… Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

19) The meaning of complementary (one of the factors referred to in *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*) was discussed by the General Court ("the GC") in *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T- 325/06 where it stated:

"It is true that goods are complementary if there is a close connection between them, in the *sense that one is indispensable or important for the use of the other in such a way that* customers may think that the responsibility for those goods lies with the same undertaking (see, to that effect, Case T-169/03 *Sergio Rossi* v *OHIM – Sissi Rossi* (*SISSI ROSSI*) [2005] ECR II-685, paragraph 60, upheld on appeal in Case C-214/05 P *Rossi* v *OHIM* [2006] ECR I-7057; Case T-364/05 *Saint-Gobain Pam* v *OHIM – Propamsa* (*PAM PLUVIAL*) [2007] ECR II-757, paragraph 94; and Case T-443/05 *El Corte Inglés* v *OHIM – Bolaños Sabri* (*PiraÑAM diseño original Juan Bolaños*) [2007] ECR I-0000, paragraph 48)."

20) In relation to the meaning of "complementary", I also bear in mind the guidance given by Mr Daniel Alexander QC, sitting as the Appointed Person, in case B/L O/255/13 *LOVE* where he warned against applying to rigid a test:

"20. In my judgment, the reference to "legal definition" suggests almost that the guidance in *Boston* is providing an alternative quasi-statutory approach to evaluating similarity, which I do not consider to be warranted. It is undoubtedly right to stress the importance of the fact that customers may think that responsibility for the goods lies with the same undertaking. However, it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together. I therefore think that in this respect, the Hearing Officer was taking too rigid an approach to *Boston*."

21) For ease of reference, the respective goods are reproduced below:

Opponent's goods	Applicant's goods
Pharmaceutical preparations for the treatment of pain; analgesic preparations and substances	*Dietary supplements; mineral food supplements; nutritional supplements; vitamin supplements; dietary food supplements; none of the aforementioned goods containing dihydrocodeine and none of the aforementioned goods being in use in the treatment of pain or analgesia*

22) All of the applicant's goods have been limited as being *none of the aforementioned goods containing dihydrocodeine and none of the aforementioned goods being for use in the treatment of pain or analgesia*. The addition of this exclusion has the effect of removing any possibility of the respective goods being identical.

23) All of the applicant's goods are *supplements*. These can have a wide range of purposes that can all be categorised as protecting or improving health of the user. This can include protecting against, or for the treatment of, illness or disease. As Mr Charlton pointed out at the hearing, Dr James appears to recognise this at paragraph 7 of his witness statement where, when describing the goods of the applicant, he states "they are substances prepared for special dietary requirements with the purpose of treating or preventing disease..." The purpose of the opponent's goods is to relieve pain. Users may use both categories of goods in combination to tackle the symptoms of illness or disease. As a result of this, and as Mr Charlton submitted, they may also share trade channels and be available from the same outlets, whether this be a pharmacy or a more general retailer. Both categories of products can be in pill, liquid or other form. Consequently, the nature of the goods is similar. The opponent's goods are for the treatment of pain, but the applicant's goods are not, therefore, they do not share similarity of purpose. Merely having health properties is insufficient reason to find similarity of purpose (as Mr Charlton submitted). Methods of use may be the same with both parties' goods being used either occasionally as required, or as part of a regular treatment or dietary regime. The applicant's goods do not include those with analgesic purposes and therefore, they cannot be in competition and neither are they complementary in the sense that one is important or essential of the other.

24) Mr Charlton referred me to the practice at OHIM where dietetic substances and pharmaceutical preparations are considered to be similar. Section 1.3 of Annex II of Part C, Section 2, Chapter 2 of the OHIM Guidelines states:

> "*Dietetic substances and food supplements adapted for medical use* are substances prepared for special dietary requirements with the purpose of treating or preventing a disease. Bearing this in mind, their purpose is similar to those of *pharmaceutical products* (substances used in the

treatment of diseases) insofar as they are used to improve the medical condition of patients. The relevant public coincides and these goods generally share the same distribution channel. For the above reasons, these goods are considered to be similar."

25) Dr James directed me to OHIM opposition decision B2105909 where a distinction was made between the general term pharmaceutical preparations and the pharmaceutical preparations identified as having a particular application. In such circumstances it was stated that it was less likely that goods are similar. This is contrary to both the guidance of the OHIM and also to my findings in paragraph 24 above. As Mr Charlton submitted, this OHIM decision is just one decision and appears to contradict OHIM's published practice.

26) Taking all of this into account, I dismiss Dr James' argument and I conclude that there is similarity between the respective goods.

The average consumer

27) Matters must be judged through the eyes of the average consumer (*Sabel BV v.Puma AG*, paragraph 23), who is reasonably observant and circumspect (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V*., paragraph 27). The degree of care and attention the average consumer uses when selecting goods and services can, however, very depending on what is involved (see, for example, the judgment of the GC in *Inter-Ikea Systems B.V. v. OHIM*, Case T-112/06).

28) Dr James submitted that, in respect of the opponent's goods, there is a specialised medical public such as doctors and scientists. That said, he also accepted that the opponent's goods will eventually be taken by patients and can be bought without prescription. He further submitted that the opponent's goods are in a very specific medical sector where prescriptions are closely supervised by professionals specialised in the treatment of pain. The GC in *Ineos Healthcare Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-222/09, paragraph 44, has stated that "even in the case of medicinal products available only on prescription, it cannot be excluded that the average consumer form part of the relevant public". Therefore, Dr James' submission does not necessarily lead to a finding that the average consumer of the respective goods is different.

29) In any event, Dr James also acknowledged that the opponent's goods are not restricted to prescription drugs but also include goods where a prescription is not required. In such cases, the opponent's goods will be sold directly to the public and may be selected from a shelf or online equivalent in the same way as the applicant's goods, or via mail order. In such cases, the average consumer will be the same, namely the general public.

30) At the hearing, Mr Charlton submitted that the degree of care and attention paid during the purchasing act of both the opponent's and the applicant's goods is average. However, the GC in *Laboratorios Del Dr Esteve, SA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-230/07 (at paragraph 36) found that in respect of *vitamins, food supplements, herbal, medical and pharmaceutical preparations*, the consumer's level of attention "would be rather sustained" and "higher than average because consumers who are interested in that type of product take particular care of their health so that they are less likely to confuse different versions of the product". There is nothing before me that leads me to an alternative view.

Comparison of marks

31) It is common ground that the marks are identical.

Distinctive character of the earlier trade mark

32) I must consider the distinctive character of the earlier mark because the more distinctive it is, either by inherent nature or by use the greater the likelihood of confusion (*Sabel BV v Puma AG* [1998] RPC 199). The distinctive character of the earlier trade mark must be assessed by reference to the goods for which it is registered and by reference to the way it is perceived by the relevant public (*Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91).

33) At the hearing, Dr James drew back from the applicant's earlier position that the opponent's mark had no distinctive character, but maintained that it had only a low level of distinctive character because that relevant consumer will perceive it as the acronym for dihydrocodeine. In particular, he relied on his Exhibit SRJ3 that consists of the first page of the *Wikipedia* entry for dihydrocodeine as of 13 November 2013 where DHC is identified as another name of dihydrocodeine. Mr Charlton, on the other hand, provides the full *Wikipedia* entry dated 7 July 2014 where the reference that appears in the 13 November 2013 extract has been removed. Further, on page three "DHC" is identified as one of a number of trade names for dihydrocodeine in the form of extended release tablets. There is clear inconsistency in these two exhibits highlighting the fundamental flaw in relying upon *Wikipedia*. The information it contains is user generated and not necessarily from an official source. As such, it is unsafe for me to rely upon this evidence.

34) Dr James also relied upon his Exhibits SRJ7 and SRJ10 that are documents produced by the MHRA. He submitted that these demonstrate that medical professionals understand "DHC" as being an acronym for dihydocodeine. Mr Charlton submitted that the evidence fails to show that at the very least the part of the average consumer consisting of the general analgesic-taking public will not understand the meaning of DHC. Further, he argued that the evidence does not demonstrate that the medical practitioner recognises it either and that the

evidence consists of relatively obscure texts that only specialist scientists are likely to read.

35) The document provided at Exhibit SRJ7 is a paper produced by a body identified on the title page as the “Committee on Safety of Medicines” and the report is entitled “Availability of Codeine and Dihydrocodeine Containing OTC Analgesics”. It is an 18 page document, where I have located three occurrences of DHC being used as an abbreviation (two on page 8 and one on page 15). All other references to dihydrocodeine use its full name. Whilst this paper appears to provide information important for medical practitioners, just three occurrences of DHC is not persuasive evidence that medical practitioners in the UK will recognise the abbreviation, let alone the analgesic-purchasing public.

36) Exhibit SRJ10 is a MHRA report that uses DHC as an abbreviation for dihydrocodeine. Further, the report includes a statement that it is intended to be accessible to all members of the public. This is the single strongest piece of evidence in support of the applicant’s case. However, whilst the report may be available to the general public, it is a specialist paper that will be of primary interest to scientists and medical practitioners and of there is no evidence that its readership actually included the general public. Whilst medical practitioners form part of the average consumer for the goods at issue, I conclude that this one report is insufficient evidence to demonstrate that the average consumer (consisting of both the general public and medical practitioners) recognise the letters DHC as meaning dihydrocodeine.

37) The other exhibits provided in support of the applicant’s argument consist of reports of scientific studies. As Mr Charlton submitted, these will be targeted at fellow scientists rather than medical professionals and certainly not the general public. I agree. Further, one such study (Exhibit SRJ10) appeared in the “Journal of Analytical Toxicology” where the cover price is shown in dollars and the organisation responsible for the journal is called the “Society of Forensic Toxicology, Inc”. These two points suggest that the journal is produced in the US for a US readership.

38) The opponent, on the other hand, has provided extracts from a number of publications, namely The Merck Index, Martindale and MIMS all of which appear to be the type of reference materials that medical practitioners will refer. None of these make reference to DHC being used to indicate dihydrocodeine.

39) Taking all of the above into account, whilst it is clear that in some limited specialist situations, DHC is sometimes used as an abbreviation for dihydrocodeine, the evidence fails to support the contention that the average consumer will be aware of such use. I make this finding is in respect of not just the end consumer but also medical practitioners that will be involved in recommending or prescribing analgesic pharmaceuticals.

40) As a consequence of such a finding, I conclude that the opponent's mark has an average level of distinctive character. There is no evidence that this level of distinctiveness has been enhanced through use.

Likelihood of confusion

41) I must adopt the global approach advocated by case law and take into account that marks are rarely recalled perfectly with the consumer relying instead on the imperfect picture of them he has in kept in his mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27). I must take into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the marks and that of the goods or services designated (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*)

42) The opponent's single ground for opposition is based upon Section 5(2)(a) of the Act. I must adopt the global approach advocated by case law and take account of all the relevant factors. It is not disputed that the marks are identical. In addition, I have found that:

- the average consumer for the respective goods can, in some instances, be the specialist consumer in the form of medical practitioners, but will also include the less knowledgeable general public;

- Due to the nature of the parties goods, it is normal for there to be an enhanced degree of attention;

- the opponent's mark is endowed with an average level of distinctive character;

- all of the applicant's goods are similar to the opponent's goods;

43) At the hearing, Dr James relied upon the comments of the CJEU in *Backaldrin Österreich The Kornspitz Company GmbH v Pfahnl Backmittel GmbH*, C-409/12 in order to support his argument that the opponent's mark is of low distinctive character. This was a revocation case where, as a consequence of activity or inactivity by the proprietor, its mark has become the common name in the trade for a product in respect for which it is registered. In my considerations of the level of distinctive character I concluded that DHC was not the common name for the goods covered by the opponent's earlier mark. Therefore, the CJEU's comments in that case cannot assist the applicant here.

44) Further, Dr James submitted that whilst the marks are identical, their conceptual identity may vary depending on whether "DHC" was being used on goods containing dihydrocodeine or not. This is not relevant in light of my finding that the average consumer is not likely to recognise "DHC" as an acronym for the

dihydrocodeine. Insofar as the average consumer is the analgesic-purchasing general public, it is not clear to me that they will even be aware of dihydrocodeine, let alone an abbreviation for it.

45) Taking all of the above into account, I conclude that there is a strong likelihood of confusion where the average consumer will assume the goods of the applicant will be assumed as originating from the same or linked undertaking as the opponent's goods.

46) It follows from this conclusion that the limited specification offered by the applicant will not save its application. The opposition is successful against the whole of the application.

COSTS

47) The opponent has been successful and is entitled to a contribution towards its costs, according to the published scale in Tribunal Practice Notice 4/2007. I take account that both sides filed evidence and that a hearing was held. I award costs on the following basis:

Preparing a statement and considering the counterstatement	£300
Opposition fee	£200
Filing evidence and considering other side's evidence	£600
Preparation and attendance at hearing	£700
Total:	**£1800**

48) I order DHC Corporation to pay Mundipharma AG the sum of £1800 which, in the absence of an appeal, should be paid within seven days of the expiry of the appeal period.

Dated this 19th day of December 2014

Mark Bryant
For the Registrar,
the Comptroller-General