



Neutral Citation Number: [2024] EWCA Civ 1103

Case No: CA-2024-000277

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY**  
**COURTS, INTELLECTUAL PROPERTY LIST (ChD)**

**Ian Karet sitting as a Deputy High Court Judge**

**[2023] EWHC 2589 (Ch)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 2 October 2024

Before :

**LORD JUSTICE NEWEY**  
**LORD JUSTICE ARNOLD**  
and  
**LORD JUSTICE PHILLIPS**

Between :

**TVIS LIMITED**

**Claimant/  
Appellant**

- and -

**(1) HOWSERV SERVICES LIMITED**  
**(2) HOWSERV LIMITED**  
**(3) TICORP LIMITED**

**Defendants/  
Respondents**

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**Benet Brandreth KC** (instructed by **Mishcon de Reya LLP**) for the **Appellant**  
**Simon Malynicz KC and Chris Aikens** (instructed by **Simmons & Simmons LLP**) for the  
**Respondents**

Hearing date : 30 July 2024  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 2 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## **Lord Justice Arnold:**

### Introduction

1. In this trade mark dispute the essential question is whether the sign PETSURE used in relation to pet insurance is confusingly similar to the trade mark VETSURE registered for the same service. Ian Karet sitting as a Deputy High Court Judge held that the answer to that question was no for the reasons given in his judgment dated 18 October 2023 [2023] EWHC 2589 (Ch). The Claimant (“TVIS”) appeals against his consequential order dated 20 October 2023 with permission granted by myself.

### Factual background

#### *The market*

2. According to a Mintel report entitled *Pet Insurance, UK 2022*, the UK market for pet insurance was predicted to be worth over £1.48 billion that year. Over 3.7 million pet owners obtained cover from a wide range of insurers. Policies for dogs were likely to cost around £400 and for cats around £250. In 2021 there were over one million claims on pet insurance policies. The Mintel report said that the top six insurers had 89% of the market. 42% of pet insurance policyholders had a policy with a general insurance provider such as Direct Line, Tesco or More Than. 31% used specialist insurers. Well over 50 providers, of which TVIS is one, served about 20% of the market.
3. A number of insurers use the word “pet” in their brand name. These include Petplan (the market leader), petprotect, Petwise, petGuard, Petsathome, PerfectPet, HealthyPets, Purelypets and Manypets. There are two providers with the word “vet” in their brand names, VetsMediCover and TVIS. There are some whose names refer or allude to animals in other ways e.g. Animal Friends, Waggel, everypaw, 4paws and K9cover.

#### *TVIS and the Trade Mark*

4. TVIS was founded in 2009. It is a specialist insurer. It is the proprietor of three United Kingdom Registered Trade Marks, but attention can be confined to No. 2541905 VETSURE registered as of 15 March 2010 in respect of “pet insurance” in Class 36 among other goods and services (“the Trade Mark”).
5. TVIS’s business has three strands. The first is pet insurance sold under the names VETSURE and VETSURE PET INSURANCE. This covers the cost of veterinary treatments and optional extras such as pet death, loss or theft. The second strand is pet health plans sold under the name VETSURE PET HEALTH PLANS. These cover costs of vaccinations and flea and worm treatments. The third strand is a group buying service for vet practices securing products and services at reduced prices. At the end of 2022 there were 471 practices in the group.
6. Customers may buy pet insurance either through a vet’s introduction or directly from TVIS online or by telephone. The website vetsure.com is important for sales, and in recent years more policies have been sold online than by telephone. TVIS has a strong score on the Trustpilot website.

7. Part of TVIS's business model is that vets claim directly from TVIS rather than taking payment from a customer who then reclaims the payment from the insurer. TVIS is selective about which vets it works with. At the end of 2021 there were 746 vet practices in the Vetsure network.
8. TVIS does not market its services through insurance aggregator sites such as Comparethemarket.com. Nor does it use TV, national press or radio advertising. It does advertise in the veterinary trade press, and each year it runs a series of adverts in *The Veterinary Times* and *The Veterinary Edge*. It has also been the subject of some editorial coverage in those publications.
9. In 2021 TVIS had over 14,000 active policies and received total revenues in premiums of around £5.5 million.

#### *Howserv and the Sign*

10. The Defendants ("Howserv") are part of the Staysure Group, which was founded in 2004 and carries on travel insurance. In 2020 they decided to move into pet insurance under the sign PETSURE ("the Sign"). They own UK Registered Trade Mark No. 3539451 PETSURE registered as of 1 October 2020 in respect of "pet insurance" in Class 36 among other goods and services. They commenced trading under the Sign in July 2021.
11. Howserv market their business through substantial use of the internet and social media, including pay-per-click advertising, search engine optimisation, paid-for social media and through affiliates. They also use events to generate publicity. By the date of the trial Howserv had around 15,000 active pet policies. Thus TVIS's and Howserv's businesses were of similar sizes by that time, but each was a small player in the market.

#### *The dispute*

12. TVIS became aware of Howserv's trade mark application and objected in January 2021, although it appears to have been too late to oppose the application. At some point TVIS applied to the Trade Mark Registry for a declaration of invalidity in respect of Howserv's registration pursuant to sections 5(2), 5(3) and 5(4)(a) of the Trade Marks Act 1994. TVIS commenced these proceedings in October 2021 alleging trade mark infringement pursuant to sections 10(2) and 10(3) of the 1994 Act and passing off. The parties subsequently sensibly agreed that TVIS's claim for a declaration of invalidity would be determined as part of these proceedings.
13. The parties invited the judge first to consider TVIS's challenge to the validity of Howserv's registration and then to consider whether Howserv had infringed the Trade Mark and whether Howserv had committed passing off, on the basis that the first question fell to be considered as at October 2020 whereas the second and third questions were to be considered as at July 2021. Although that is perfectly logical, neither side contends that the difference in the dates of assessment should lead to different outcomes. In particular, neither side suggested that there was any material difference in the reputation of the Trade Mark as at October 2020 and as at July 2021. Nor does either side suggest that this is a case where the context of the use of the Sign makes a material difference to the infringement analysis. Nor does either side contend

that the claim for passing off could lead to a different outcome to the claim for trade mark infringement. It follows that, for the purposes of the appeal, attention can be concentrated on TVIS's claim that Howserv have infringed the Trade Mark pursuant to section 10(2) of the 1994 Act. (TVIS has been refused permission to appeal in respect of its claims under sections 5(3) and 10(3).)

### *The trial*

14. The case was tried in accordance with the Shorter Trials Scheme. The trial lasted three and a half of the four days permitted under the Scheme. That should have been ample time in which to address the issues. As the judge explained at [14]-[18], however, neither side seemed prepared to accept the limitations that the Scheme involved. One of the consequences of this was that, as explained in more detail below, there was insufficient time for the parties to make oral submissions on a key aspect of the case, namely evidence of alleged actual confusion relied on by TVIS.

### The legislative framework

15. Section 10(2) of the 1994 Act implemented successive EU Directives culminating in Article 10(2)(b) of European Parliament and Council Directive 2015/2436/EU of 16 December 2015 to approximate the laws of the Member States relating to trade marks (recast). Parallel provisions are contained in Article 9(2)(b) of European Parliament and Council Regulation 2017/1001/EU of 14 June 2017 on the European Union trade mark (codification).
16. These provisions provide that the proprietor of a registered trade mark is entitled to prevent third parties from using a sign in the course of trade without the proprietor's consent if the sign is identical with, or similar to, the trade mark and is used in relation to goods or services which are identical with, or similar to, the goods or services for which the trade mark is registered and there exists a likelihood of confusion on the part of the public. Save for likelihood of confusion, it is common ground that all of the requirements for infringement under section 10(2) are satisfied in this case.
17. Similarly, section 5(2) of the 1994 Act implemented what is now Article 5(1)(b) of Directive 2015/2436, which enables a trade mark proprietor to object to the registration of a later trade mark where the identity or similarity of the trade marks and the similarity or identity of the respective goods or services gives rise to a likelihood of confusion. Parallel provisions are contained in what is now Article 8(1)(b) of Regulation 2017/1001.

### Assessment of the likelihood of confusion: basic principles

18. The manner in which the requirement of a likelihood of confusion in what are now Article 10(2)(b) of Directive 2015/2426 and Article 9(2)(b) of Regulation 2017/1001, and the corresponding provisions concerning relative grounds of objection to registration in the Directive and the Regulation, should be interpreted and applied has been considered by the Court of Justice of the European Union in a large number of decisions. In order to try to ensure consistency of decision making, a standard summary of the principles established by these authorities, expressed in terms

referable to the registration context, has been adopted in this jurisdiction. The current version of this summary is as follows:

- “(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) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;
- (f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;
- (h) 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;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) 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; and

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

19. The same principles are applicable when considering infringement, but it is necessary for this purpose to consider the actual use of the sign complained of in the context in which the sign has been used: see *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2012] EWCA Civ 24, [2012] FSR 19 at [87] (Kitchin LJ).

#### The judge’s judgment

20. The judge’s findings and assessments may be summarised as follows.

#### *The average consumer*

21. It is common ground that the average consumer is a pet owner with a moderate level of attention. The average consumer will be prepared to spend the sums indicated above. They will see that the market contains many providers with names that refer to pets and their care. The average consumer would understand that the SURE element in the Trade Mark and the Sign refers to insurance.

#### *Visual, aural and conceptual similarity*

22. The judge found at [81] that the Trade Mark and the Sign “are visually and aurally similar”. They “have the same number of letters and similar sounds”.
23. The judge found that they were not conceptually similar for the following reasons:

“83. The words VET and PET mean different things, and the average consumer will, perceiving the marks as a whole, understand that. The marks are not conceptually similar; each refers to a different descriptive concept and the average consumer will distinguish them from one another. Both marks are descriptive and narrow in scope. The common feature between the signs is the word SURE, which is itself descriptive.

84. This is case where the descriptive nature of the words will have a significant impact on the overall impressions made by the marks. The average consumer would know that descriptive terms are commonly used in this field so that VET and PET are unlikely to indicate any particular source of pet insurance. The marks are for different concepts and that indicates the absence of a likelihood of confusion.”

#### *The distinctive character of the Trade Mark*

24. The judge assessed the distinctive character of the Trade Mark in the context of TVIS’s challenge to the validity of Howserv’s registration as follows:

“82. The mark VETSURE would be perceived by the average consumer as made up of two well-known words, VET and SURE. VET is descriptive of veterinary services and SURE will be understood to describe insurance services. The VETSURE mark is thus a combination that is itself descriptive.

...

85. The VETSURE mark has a descriptive nature and is used in a market in which many providers use descriptive or allusive names, as illustrated above. As a result it does not have a highly distinctive character ...”

25. Similarly, the judge assessed the distinctive character of the Trade Mark in the context of TVIS’s claim under section 10(2) at [110] as follows:

“In my view the Claimant has not established enhanced distinctive character in the VETSURE mark. The VETSURE business has a relatively small share in a market in which there are numerous providers. It has been trading since 2009 through a network of veterinary practices using a brand that itself contains the word ‘vet’. There is thus a directly descriptive element in the VETSURE name which is present in the use and presentation of the mark. The business has gained some press coverage and awards, but both of these are available for businesses that seek to promote themselves that way, and they do not in this case show the enhanced character required. The Claimant also relies on positive customer reviews, but these do not in my view establish the reputation in the circumstances of the use made of the mark.”

26. In the context of TVIS’s claim to extended protection under section 5(3), however, the judge’s assessment at [93] was as follows:

“In my view the VETSURE mark has the required reputation, but the strength of the mark is not high. It is made up of descriptive elements and it exists in a market full of signs containing descriptive references. The mark indicates that it is for a service relating to vets. It has some character acquired through use, but as a descriptive mark, it will have started from a low base. ...”

#### *Evidence of actual confusion*

27. TVIS relied at trial on evidence which it contended showed actual confusion amongst members of the public. This evidence consisted of emails, transcripts of telephone calls, social media posts and online chats disclosed by the parties. TVIS relied upon 25 examples drawn from its own disclosure and 17 examples drawn from Howserv’s disclosure, although Howserv did not search the records of their claim handlers as part of their disclosure. Neither side called any witnesses to testify to these incidents, and thus the judge was left to assess the documentary evidence as best he could.



Furthermore, for the reasons explained in paragraph 14 above, the parties addressed the evidence exclusively in written submissions and the judge did not have the benefit of oral submissions. Having noted at [115] that caution was required when trying to interpret such documents, particularly in the case of transcripts of telephone conversations, the judge considered each of the examples from TVIS's disclosure relied on at [119]-[147] and each of the examples from Howserv's disclosure relied on at [148]-[166].

28. The judge concluded as follows:

“167. The great majority of these examples do not show confusion of the type required for section 10(2) of the Act. They show ‘administrative’ errors of the type described in *The European v The Economist* [1998] FSR 283. This is not surprising given that names in issue contain descriptive elements relating to the services provided.

168. There are thus incidents of mis-naming by consumers and a number of cases of mistakes occurring in a vet's practice. The picture that they give is consistent with the fact that both parties' names are of a descriptive nature and that their elements may be interchanged by mistake – but there does not appear to be confusion as to the parties providing the services. A number of the callers have not taken care before initiating a call and a number have made mistakes based on internet searches. It is not apparent that they are paying attention to the matter at hand in a way that the average consumer would.

169. There is no indication from this selection that the average consumer would be confused in the relevant sense. I note that the absence of actual witnesses is not decisive on the question of confusion; the court may still conclude that there is likelihood of that. In this case the evidence shows the opportunity for mistakes to arise in various ways.

170. In some of the cases it is not possible to conclude what has happened or if there was confusion. It does appear there was confusion in a small number of instances, but I conclude from the evidence overall that there was no likelihood of confusion. I note that a similar result was reached in *W3 v easyGroup* and *easyGroup v easylife* [2021] EWHC 2150 (Ch). The picture here is consistent with people making administrative errors.”

#### *Overall assessment*

29. The judge's overall assessment in the context of TVIS's claim under section 5(2) was as follows:

“84. This is [a] case where the descriptive nature of the words will have a significant impact on the overall impressions made by

the marks. The average consumer would know that descriptive terms are commonly used in this field so that VET and PET are unlikely to indicate any particular source of pet insurance. The marks are for different concepts and that indicates the absence of a likelihood of confusion.

...

86. Looking at the matter in the round I conclude that there is not a risk that the public might believe that the goods and services come from the same or economically linked undertakings. The use of the VETSURE mark in a network is of little relevance to the average consumer because that network is for vets and purchasing products.
87. The Claimant relied on consumers' imperfect recollection when buying pet insurance. However, the market for pet insurance is full of names that relate to pets and their care and I do not think that it is likely that these two will be confused in a trade mark sense more than any other descriptive and allusive names."
30. The judge's overall assessment in the context of TVIS's claim under section 10(2) was as follows:
- "178. ... The use of PETSURE does not in my view give rise to a likelihood of confusion on the part of the public. As Millet LJ noted in *The European* at 289:
- ' . . . Where descriptive words are included in a registered trade mark, the courts have always and rightly been exceedingly wary of granting a monopoly in their use.'
- This is such a case.
179. The documents which I reviewed said to show actual confusion are consistent with that. The evidence that I considered is in line with my finding that there is no such likelihood. The instances are very largely of administrative errors. The small number that show actual confusion do not show a likelihood of confusion arising."

#### Standard of review on appeal

31. Since the judge's conclusion that there was no likelihood of confusion involved a multi-factorial evaluation, this Court can only intervene if he erred in law or in principle: compare *Actavis Group PTC EHF v ICOS Corp* [2019] UKSC 15, [2019] Bus LR 1318 at [78]-[81] (Lord Hodge) and see *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8, [2024] Bus LR 532 at [46]-[50] (Lord Briggs and Lord Kitchin).

### Grounds of appeal

32. TVIS has a series of grounds of appeal against the judge's rejection of its claims under sections 5(2) and 10(2) which I will consider in turn using the original numbering. For the reasons given in paragraph 13 above, it is not necessary separately to consider the grounds of appeal against the judge's rejection of the passing off claim.

#### *Ground 1: Visual and aural similarity*

33. TVIS argues that the judge erred in holding that PETSURE is, visually and aurally, merely "similar" to VETSURE and that he should have held that it was highly similar.
34. I do not accept this argument for two reasons. The first is that no error of principle on the part of the judge has been identified. The assessment of the degree of visual and aural similarity between a sign and a trade mark is a matter for the first instance tribunal. Nor can it be said that the judge's assessment is plainly wrong.
35. The second and more fundamental reason is that, while it is conventional for first instance tribunals in trade mark cases to articulate their assessment of the degree of visual and aural similarity between signs and trade marks using words such as "high", "medium" or "low", there is no legal requirement for tribunals to do so. All that is required is for the tribunal to assess the nature and extent of any similarities. This is because what matters is not the verbal label that is applied to the assessment, but whether the similarities in conjunction with the other factors which must be taken into account lead to a likelihood of confusion. It is possible for there to be no likelihood of confusion despite a relatively high degree of visual and aural similarity. Equally it is possible for there to be a likelihood of confusion despite a relatively low degree of visual and aural similarity. It depends on the other factors that are in play.
36. In the present case the judge correctly noted at [81] that "PETSURE and VETSURE have the same number of letters and similar sounds". Furthermore, he noted at [73] that only the first letter was different. Thus he made no error in his assessment of the nature and extent of the visual and aural similarities. The real question, as discussed below, is whether he properly assessed the likelihood of confusion having regard to those similarities and the other relevant factors.

#### *Ground 2: Conceptual similarity*

37. TVIS contends that the judge erred in holding that VETSURE and PETSURE were "not conceptually similar" and "for different concepts".
38. With respect to the judge, and counsel for Howserv's arguments to the contrary, I agree with this. There are three problems with the judge's approach to this issue. The first is that it muddles the assessment of conceptual similarity between the Sign and the Trade Mark with the assessment of the distinctive character of the Trade Mark. These are distinct matters for evaluation, even though in this case the issues are related.
39. The second problem is that, although the judge said that the Sign and the Trade Mark were "for different concepts", he did not explain what those concepts were or how

they differed. It appears from [82] that he considered that VETSURE would be understood to describe insurance for (the cost of) veterinary services. He went on in [83] to say that the average consumer would understand that the words VET and PET mean different things. He did not, however, state what PETSURE would be understood to describe. If one follows the logic in [82], it would presumably be understood to describe insurance for pets. But what insurance is needed for pets? Surely it is first and foremost insurance for veterinary services, which are one of the principal expenses of pet ownership. Moreover, insurance for veterinary services is the exact service that the Sign is used in relation to. Thus there is little conceptual difference between the Sign and the Trade Mark, but rather considerable conceptual similarity.

40. The third problem is that the judge appears to have been led into error as to the relevance of conceptual (dis)similarity in cases where the sign and the trade mark are visually and aurally similar. Contrary to what the judge seems to have thought, it is not necessary for the sign and the trade mark to be conceptually similar in order for there to be a likelihood of confusion. For example, there can be a likelihood of confusion where the trade mark and the sign are visually and aurally similar and both are meaningless.
41. Although the judge does not in terms refer to it in his judgment, it can be seen from Howserv's closing submissions at trial that Howserv relied upon the principle of "conceptual counteraction" established in the jurisprudence of the CJEU. This principle is that a conceptual difference between a sign and a trade mark can counteract visual and aural similarities in the assessment of likelihood of confusion. Conceptual counteraction is "exceptional", however, and can only occur where "at least one of the signs at issue has, from the perspective of the relevant public, a clear and specific meaning which can be grasped immediately by that public": see Case C-328/18 P *European Union Intellectual Property Office v Equivalenza Manufactory SL* [EU:C:2020:156] at [74]-[75]. In this Court counsel for Howserv accepted that this requirement was not satisfied in the present case. It follows that there can be no question of conceptual counteraction.

### *Ground 3: Distinctive character of the Trade Mark*

42. Ground 3 embraces four different criticisms of the judge's reasoning on this issue, but it is sufficient to confine attention to the first two. TVIS's first criticism concerns the judge's assessment of the inherent distinctive character of the Trade Mark. TVIS points out that the judge's finding at [82], repeated in both [83] and [84], was that the Trade Mark is "descriptive". TVIS argues that, given that the validity of the Trade Mark had not been challenged by Howserv, it was not open to the judge to find that the Trade Mark was lacking in distinctive character, relying upon Case C-196/11 P *Formula One Licensing BV v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2012:314].
43. Counsel for Howserv disputed that the judge had infringed this principle, but his arguments served to highlight what to my mind are the real problems with the judge's assessment of inherent distinctive character. The first is that it leaps from the undisputed premise that the component parts of the Trade Mark are descriptive to the conclusion that the combination is descriptive. That does not necessarily follow. As counsel for Howserv himself pointed out, VETSURE is an invented portmanteau

word which is not to be found in any dictionary. It certainly alludes to pet insurance, as TVIS accepts, but it does not describe it. For example, it could be understood to allude to professional indemnity insurance for vets, although again it does not describe such a service. It could also be understood to allude to something that does not involve insurance at all, such as a certification scheme for vets (“be sure of your vet”). Furthermore, it is on any view not descriptive of TVIS’s pet health plans (still less its group buying service, although that is less relevant for these purposes). Indeed, at one point in his submissions, counsel for Howserv went so far as to say that VETSURE and PETSURE “don’t have a meaning as such”.

44. The second problem is that the judge did not make any clear finding as to the inherent distinctive character of the Trade Mark. On the one hand, he repeatedly said that it was descriptive, which would imply that it had no inherent distinctive character. On the other hand, as counsel for Howserv emphasised, he said at [85] that the Trade Mark “does not have a highly distinctive character”, which leaves open the possibility that it had a moderate level of distinctive character. For the reasons I have given in the preceding paragraph, I disagree with the proposition that the Trade Mark is descriptive. Rather, I would assess it as having a low-to-medium level of inherent distinctive character.
45. TVIS’s second criticism concerns the judge’s assessment of the acquired distinctive character of the Trade Mark. This is that the judge’s reasoning is internally inconsistent: on the one hand, the judge rejected TVIS’s claim that the Trade Mark had enhanced distinctive character, and specifically the claim to reputation, at [110]; but on the other hand he found at [93] that it had “some character acquired through use”, and hence had “the required reputation” for extended protection.
46. Despite counsel for Howserv’s valiant attempt to argue to the contrary, I agree with TVIS that this reasoning is inconsistent. Although the threshold for reputation for the purposes of extended protection is not particularly high, it is far from a trivial one. It necessarily follows from the judge’s finding that the Trade Mark had the required reputation, which is not challenged by Howserv, that it had acquired at least some additional distinctive character over and above its low-to-medium degree of inherent distinctive character, and to that extent had an enhanced distinctive character. I would express this by saying that, overall, it had a moderate level of distinctive character at the relevant dates.

#### *Ground 4: Likelihood of confusion*

47. Given the errors identified above, it will be necessary in any event to re-evaluate the likelihood of confusion. It is convenient before doing so briefly to mention four criticisms which TVIS makes of the judge’s assessment of likelihood of confusion as well as TVIS’s other grounds of appeal.
48. First, TVIS contends that the judge failed properly to take into account imperfect recollection. Although the judge referred to imperfect recollection at [87], he did not directly address the possibility that it would lead consumers to mistake PETSURE for VETSURE. Furthermore, although the judge said that “the market for pet insurance is full of names that relate to pets and their care”, he ignored the fact that no other provider of pet insurance has a brand name with the suffix -SURE, still less -ETSURE

49. Secondly, TVIS argues that, perhaps due to the inconsistency of his reasoning with respect to the acquired distinctive character of the Trade Mark, the judge failed to consider likelihood of confusion from the perspective of consumers amongst whom VETSURE has a reputation. As is well known, the human eye has a tendency to see what it expects to see and the human ear to hear what it expects to hear. Accordingly, consumers who are familiar with VETSURE may misread and/or mishear PETSURE as VETSURE. Mishearing is particularly likely because PETSURE is so close in sound to VETSURE.
50. Thirdly, TVIS complains that the judge failed to give effect to the “interdependency” principle (paragraph (g) of the standard summary) given that the respective services in this case are identical.
51. In my view there is force in each of these criticisms. It is not necessary to decide whether they would have justified re-opening the judge’s evaluation of the likelihood of confusion in the absence of the other errors I have identified.
52. By contrast, I disagree with TVIS’s fourth criticism of the judge’s reasoning, which is that it fails to make allowance for indirect confusion (confusion as to commercial connection) as opposed to direct confusion (confusion between the Sign and the Trade Mark). If there is no likelihood of direct confusion, there is no reason to think that indirect confusion is likely in this case.

*Grounds 8 and 10: Inadequate reasons*

53. TVIS contends that the judge gave inadequate reasons for his finding that there was no likelihood of confusion. These grounds of appeal were barely pursued in oral argument, and I do not accept them. I have accepted that some of the judge’s reasoning was flawed, but that does not mean that his reasons were inadequate.

*Ground 14: Assessment of the evidence of actual confusion*

54. Finally, TVIS contends that the judge erred in his assessment of the evidence of actual confusion it relied upon. TVIS makes three main, overlapping, criticisms of the judge’s reasoning under this heading. The first is that the judge was wrong to dismiss many of the instances relied upon as “mistakes” or “administrative errors”. The second is that the evidence cannot be reconciled with the judge’s view that the Sign and the Trade Mark are sufficiently different, and in particular sufficiently conceptually different, to negate a likelihood of confusion. Still less does the evidence show that either VETSURE or PETSURE is treated by consumers as descriptive: on the contrary, it shows them being regarded as brand names. The third is that, having found that “there was confusion in a small number of instances”, it was inconsistent with that finding for the judge to conclude that there was no likelihood of confusion.
55. Unlike the judge, we had the benefit of oral argument about a number of the instances relied upon by TVIS. I will therefore concentrate on those examples, which are representative.
56. *Example 1 from TVIS’s disclosure.* This is a transcript of a telephone call in which RM telephoned TVIS on 30 August 2022. It is clear that RM had a policy with TVIS because she began by quoting her policy number. When asked the reason for her call,

RM said she had a query about when the policy would expire and what she needed to do about renewing it. The TVIS representative explained these points. At the end of the call, the following exchange took place:

“RM: OK. Can I just check that you are definitely Vetsure, not Petsure?”

TVIS: Nope, we are definitely Vetsure. There is a company called Petsure, but that’s not us (laughs).

RM: I know, I’m getting so confused because I got an email from Petsure and I thought Oh, Oh gosh. Ok, so I’ll look for Vetsure. OK brilliant.”

57. The judge’s assessment of this evidence was as follows:

“121. ... The Claimant says that the email had caused the customer to think that she had a policy with Petsure. Having considered this exchange, I disagree. The transcript indicates that the caller was able to distinguish between the parties and had called the right place.

122. It is clear from this example and others below that the staff at Petsure sometimes mentioned the Claimant to callers who were uncertain or mistaken in their calls. I do not take that as proof of a likelihood of confusion on the part of the customers.”

58. I agree with the judge that this transcript does not show that the email had caused RM to think she had a policy with Howserv. As counsel for TVIS submitted, however, that does not mean that this example provides no support for TVIS’s case. On the contrary, it demonstrates three things. First, it shows that Vetsure and Petsure are regarded as brand names, not descriptors. The same is true of all the subsequent examples, and so I shall not repeat the point. Secondly, it shows that RM was uncertain as to whether Petsure was different from Vetsure, and wanted confirmation from TVIS. This is obviously because of the similarity between the two names. Thirdly, it shows that the supposed conceptual difference between the Sign and the Trade Mark did not suffice to make it clear to RM that the two were not the same. Thus this evidence indicates that consumers may confuse the two due to the visual and aural similarities between them despite the supposed conceptual difference.

59. I am puzzled by the judge’s statement in [122] that this example shows that “the staff at Petsure sometimes mentioned the Claimant to callers who were uncertain or mistaken in their calls”. There is no evidence of this having occurred in this instance. But if in other cases consumers did call Howserv when they wanted TVIS and had to be re-directed, that would be clear evidence of confusion.

60. *Example 2 from TVIS’s disclosure.* This is a transcript of a telephone call in which TVIS’s representative VW returned a call from Mrs W on 7 September 2022. VW introduced herself as being “from Vetsure Pet Insurance”, and asked Mrs W whether she had a quote or if she wanted a quote. The following exchange then took place:

“Mrs W: I do have a quote. Just ... I think I do, oh no I don’t, no wait a minute I’m confused now.

VW: Don’t worry.

Mrs W: I’ve been searching everywhere for different prices. We’re with Petplan at the moment, umm we have been for seven years but it’s gone up ridiculously. Umm, so you’re Petsure are you?

VW: We’re Vetsure.

Mrs W: Vetsure, no I haven’t got a quote, I haven’t got a quote from you, no.

VW: OK, so Petsure are a different company completely.

Mrs W: Right, yeah, you’re Vet ... yeah that’s fine, yeah I haven’t got your quotes.”

61. The judge considered this example at [123]. Confusingly, he misidentified the consumer as “VW”. His assessment was as follows:

“This does not appear to be an instance of confusion, but rather mis-naming. The customer appears to have called the Claimant deliberately and expected a call back from them.”

62. I do not understand what the judge meant by “mis-naming” in this context. It is evident that Mrs W was shopping around for a new policy. While it is clear that Mrs W had called TVIS, when TVIS returned the call Mrs W appears initially to have thought that the call might be from Howserv, although she was plainly uncertain, which is why she asked for confirmation. Hence VW had to explain that the two companies were different. Thus this evidence again indicates that consumers may confuse the Sign and the Trade Mark due to the visual and aural similarities between them despite the supposed conceptual difference.

63. *Example 11 from TVIS’s disclosure.* This is a social media post by an events company EE in late 2022 saying “Below is one we installed just this week at London Vet Show for Petsure Vet Insurance”. The image shows a TVIS stand, The judge said at [133] that this had been corrected to read “Vetsure Pet Insurance”, but he had not been shown the original posting. Conversely, we were shown the original post, but not the correction. Be that as it may, the judge said that it was “not clear whether this was an incidence of confusion or a naming error”. I presume that what the judge meant by this is that EE could have made a typographical error, transposing the letters P and V. I accept that, but again this example demonstrates the risk of confusion between the Sign and the Trade Mark due to their close visual similarity.

64. *Example 14 from TVIS’s disclosure.* This is a set of documents relating to an insurance claim by BT in January 2023. BT filled in a TVIS claim form, but the policy number she gave was not for a TVIS policy, it was for a Howserv policy. The veterinary receptionist then emailed the form to TVIS together with the vet’s invoice



for £429.54. TVIS replied saying that it could not find the policy and asking for confirmation that the claimant was a Vetsure customer. The receptionist replied that the client had a policy with Petsure and that the claim form had been submitted by the policy holder. The receptionist asked whether the claim form was incorrect or the claim form was correct but TVIS was unable to locate the policy. TVIS replied:

“We are Vetsure not Petsure so I think that’s where the error is. The claim form you have used is ours but we are a different company to Petsure and have no link to them or their customers.”

65. All the judge said about this example at [136] is that “[i]t appears the policy holder submitted the wrong claim form to their vet, but there is no explanation why the error occurred.” The judge did not ask himself what the most probable explanation was. The most likely explanation is that both the client and the receptionist were confused: the client appears to have filled in a Vetsure claim form, and the receptionist to have sent it to TVIS, without either appreciating that the client’s Petsure policy was with a different company until TVIS explained this. At the very least this evidence demonstrates the clear potential for such confusion to occur notwithstanding the supposed conceptual difference between the two names.

66. *Example 19 from TVIS’s disclosure.* This is a set of documents relating to an insurance claim by SJ in April 2023. Again, SJ filled in a TVIS claim form, but the policy number she gave was not for a TVIS policy, it was for a Howserv policy. This was submitted to TVIS together with a Petplan claim form with no policy number incorporating a breakdown of a vet’s charges totalling £1,377.19 which appears to have been used in lieu of an invoice. There is a transcript of a subsequent telephone call between TVIS and the veterinary practice. The TVIS representative said that they “just can’t find the policyholder” and asked for more information. The practice gave the policy number again. The following exchanges then took place:

“TVIS: It’s not one of our policy numbers. Does it have the name of where their umm policy is?”

Practice: Er, it just says My Petsure.

TVIS: Oh, is it Petsure?

Practice: Ah possibly. We’ve got it as My Petsure ... where’s ... ah Vetsure and Petsure ...

...

TVIS: Yeah .. what it is, it’s just we, cos obviously it’s, it’s a close name, but erm ...

Practice: Yeah it’s going to get confusing, isn’t it?

TVIS: ... it would be just really helpful to know if it was the policyholder that provided the claim form or whether it was you guys that may have just printed it for them.

Practice: Yeah. I'm just seeing if it's one that we can print out from their website, because if it's not then we wouldn't have been able to. Ah yeah, so it is one that we could download, so potentially it was one of us that did it or possibly the owner. I'm not sure. I can't say for sure to be honest.

... they [sc. claim forms] just get handed in at reception ...

... so it could be .. aw that's weird, so on our reception list of when it was handed in, we've written Petsure, but then we've got the form for Vetsure so I've got a feeling that we might have done it and when we've googled Petsure, it possibly came up with Vetsure first and they've just gone with the first one that came up.

TVIS: No that makes sense, no, that's absolutely fine. So, erm, obviously I'll just disregard that one because I did do a search as well just to make sure ... ”

67. Again, confusingly, the judge misidentified the practice representative as “SJ”. All he said about this example at [141] was:

“The practice suggests that they may have made an error ‘when we googled Petsure [to download a form] it possibly came up with Vetsure first and they’ve just gone with the first one that came up’.”

68. Again, the judge did not ask himself what probably caused the error to be made. The most likely explanation is that at least the representative of the practice was confused, and possibly the client as well. The representative appears to have downloaded a Vetsure claim form, the client to have filled it in, and the representative to have sent it to TVIS, without either appreciating that the client's Petsure policy was with a different company until TVIS queried it. Again, at the very least this evidence demonstrates the clear potential for such confusion to occur notwithstanding the supposed conceptual difference between the two names.

69. *Example 20 from TVIS's disclosure.* This is a transcript of a telephone call in which Ms S called TVIS on 10 June 2023. After TVIS said “welcome to Vetsure” and “how can I help you?”, Ms S said:

“Oh hi, I've just started a policy with you and I've woken up this morning and gone, I've put that she was spayed on that policy and she's not spayed yet ...”

70. Ms S then gave her policy number, which was a Howserv policy number. TVIS could not find the policy and asked for her name. The following exchange then took place:

“Ms S: Hang on, I'm on, I'm phoning the wrong number. I'm sorry, not only do I not know that my dog is not spayed, I don't know who she is insured with.

TVIS: Are you sure you don't want me to check?

Ms S: No, I'm sure.

TVIS: OK.

Ms S: It's the 'sure' that got me going. You're Vetsure and I think I've just insured her with Petsure. So that's what happened."

71. The judge said at [142] that "[i]t is not clear that the caller was confused". I disagree. She was plainly confused, although she realised her mistake quite quickly. Not only that, but also she diagnosed the source of her confusion, namely the similarity between the brand names, specifically the common -SURE element. Again, at the very least this evidence demonstrates the clear potential for such confusion to occur notwithstanding the supposed conceptual difference between the two names.
72. *Example 3 from Howserv's disclosure.* This is an online chat between BP and Howserv via the latter's petsure.com website on 9 and 10 August 2021. BP wrote:

"Have been trying to get a 'Pet Health Plan', which is not health insurance. Have attached a photo from our vets."

The attached photo was of a Vetsure-branded Pet Health Plan poster. Howserv replied:

"... From the looks of the attachment, it looks like you are looking for Vetsure as appose [sic] to Petsure which is us. I am afraid that we have no relation to either the Pet Health Plan or Vetsure. I do hope you can get it sorted."

BP replied:

"It appears that I was having one of those moments, thank you for replying.

I found the site and signed up."

73. The judge said at [152] that BP "do[es] not appear to be confused". I disagree. BP wanted Vetsure, but contacted Petsure. The judge gave no alternative explanation for this other than confusion on the part of BP.
74. *Example 16 from Howserv's disclosure.* In this instance it suffices to quote what the judge succinctly said at [165]:

"The sixteenth is a series of messages by which a customer PG cancels their insurance with Petsure. She said 'I accidentally went for the wrong insurance. I was after Vetsure because they are linked to our vets'. The customer refers to this as an accident, but it appears in this case that there was some confusion."

75. There is no challenge to this finding by Howserv. TVIS submits that it is difficult to see why this is an instance of confusion, but not (say) the previous example. I agree with this.

76. *Conclusion.* Having reviewed each of these examples, I can return to TVIS’s criticisms of the judge’s assessment. It will already be clear from what I have said above that I agree with the first two criticisms.
77. I would add, in relation to the first criticism, that the judge cited at [167] the decision of the Court of Appeal in *The European Ltd v The Economist Newspaper Ltd* [1998] FSR 283. In that case the claimant was the proprietor of a device mark the main feature of which was the words THE EUROPEAN registered in respect of newspapers and the defendant published a newspaper called EUROPEAN VOICE. The claimant relied upon a number of instances of alleged actual confusion. At first instance Rattee J reviewed each of the instances relied upon in some detail and concluded that they did not demonstrate that the persons involved had been confused in the sense of believing that EUROPEAN VOICE was connected with the publisher of THE EUROPEAN: [1996] FSR 431 at 439-441. I cannot find any use of the expression “administrative errors” in his judgment. On appeal Rattee J’s decision was upheld. Neither Millett LJ nor Hobhouse LJ, who gave the two substantive judgments, reviewed the instances of alleged confusion, although Millett LJ said at 291 that the evidence was “singularly unimpressive” and there was “little or no[]” evidence of actual confusion while Hobhouse LJ said at 293 that he agreed with Rattee J’s assessment of the evidence. Again, I cannot find any use of the expression “administrative errors” in either judgment.
78. Despite the absence of any explicit foundation for the concept in that authority, I do not have any difficulty with the proposition that an instance of alleged confusion may turn out, upon examination, to involve some administrative error or other mistake which does not demonstrate any relevant confusion on the part of the person in question. In the present case, however, I consider that a number of the instances relied upon by TVIS do show relevant confusion. Even if that is open to doubt, they certainly demonstrate, as I have explained, that both the Trade Mark and the Sign are regarded by consumers as brand names, not descriptors, and that the supposed conceptual difference between them does not avoid the potential for confusion.
79. The judge explained some of the instances away in [168] on the basis that a number of those involved “have not taken care before initiating a call and a number have made mistakes based on internet searches”. I see no reason to think that any of those involved were atypical consumers of pet insurance. Nor do I see any reason to think that they were especially careless. It should be borne in mind that trade mark law is all about consumers’ unconscious assumptions. While I agree that mistakes made when carrying out internet searches may need to be treated with caution in some cases, there is no reason to think that any of the instances of apparent confusion considered above was an artefact of internet searching.
80. Turning to TVIS’s third criticism, I also agree with this. It is difficult to see why the existence of a number of instances of actual confusion is not probative of a likelihood of confusion in this case. The judge appears to have considered that the number of instances of confusion was too small, but as counsel for TVIS graphically submitted:
- “as ... the judge had noted himself at [59], the parties were small players in the market for pet insurance. ... that should have indicated something to him, namely that the presence of any cross-confection of this kind was not simply the result of

the ubiquity of either player in the market. These were two relatively small ships in a vast ocean, and yet instance after instance of them crashing into each other.”

81. The judge compared this case to *W3 Ltd v easyGroup Ltd*, but in that case, not only was the number of instances of confusion smaller, but also one came from Italy not the UK and many dated from long after the relevant date. Most importantly, there had been a long period of side-by-side use of the trade mark and the sign, and substantial effort had been put into finding evidence of confusion. In those circumstances, if there was a likelihood of confusion, one would expect more abundant evidence of confusion to have been found: see [2018] EHC 7 (Ch), [2018] FSR 16 at [276]. In the present case, by contrast, Howserv had only been trading under the Sign for a little over two years by the time of trial, and no particular efforts had been made to find evidence of confusion other than a review of the parties’ disclosure. As noted above, that had not extended to disclosure of Howserv’s claim handlers’ records.

#### Re-evaluation of likelihood of confusion

82. The visual and aural similarities between the Sign and the Trade Mark, the distinctive character of the Trade Mark and the interdependency principle all point to a likelihood of confusion taking the possibility of imperfect recollection into account. For the reasons explained above, the conceptual counteraction principle is not applicable in this case. If anything, the conceptual similarity between the Sign and the Trade Mark supports the existence of a likelihood of confusion.
83. That leaves the principle that, where a trade mark is largely descriptive, small differences may suffice to avoid confusion because the average consumer will recognise the trade mark to be largely descriptive, will expect others to use similar descriptive marks and thus will be alert for detail which differentiates one provider from another: see *Reed Executive plc v Reed Business Information Ltd* [2004] EWCA Civ 159, [2004] RPC at [84]-[85] (Jacob LJ).
84. It can be seen from what the judge said at [178] that he considered that this principle was engaged in the present case. While I do not intend to downgrade the importance of the principle, I disagree with this for three reasons. First, for the reasons explained in paragraph 43 above, I do not consider that VETSURE is largely descriptive. Secondly, as can be seen from paragraph 3 above, this market is replete with PET-prefixed (and -PET suffixed) brand names, but there is only one other VET- prefixed name and no other -SURE suffixed name. Moreover, some providers use animal-related names with neither PET- nor VET- prefixes. Thus there is no reason to think that the average consumer of pet insurance will be alert for the difference between VETSURE and PETSURE. Thirdly, the evidence of actual confusion confirms that some consumers do not notice this difference. Thus it supports the conclusion that one would draw from the factors mentioned in paragraph 82 above.
85. Overall, I conclude that there was a likelihood of confusion on the part of the public as at both of the relevant dates. Accordingly, TVIS’s claims under section 5(2) and section 10(2) both succeed, as does its claim for passing off.

Disposition

86. For the reasons given above, I would allow the appeal.

**Lord Justice Phillips:**

87. I agree.

**Lord Justice Newey:**

88. I also agree.