Neutral Citation Number: [2019] EWHC 950 (Admin)

Case No: CO/913/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 April 2019

Before :

MR JUSTICE MURRAY

- -

Between :

THE QUEEN on the application of CITYFIBRE LIMITED	**Claimant**
- and -	
(1) THE ADVERTISING STANDARDS AUTHORITY LIMITED	**Defendants**
(2) THE ADVERTISING STANDARDS AUTHORITY (BROADCAST) LIMITED	
- and -	
HYPEROPTIC LTD	**Intervener**

- -
- -

Ms Dinah Rose QC and **Mr Tristan Jones** (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimant**
Ms Catherine Callaghan QC and **Mr Ravi Mehta** (instructed by **Bates Wells & Braithwaite London LLP**) for the **Defendants**
The Intervener was not represented.

Hearing dates: 13 and 14 December 2018

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Approved Judgment

Mr Justice Murray :

1. The claimant challenges by way of judicial review the decision of the defendants set out in a letter to the claimant dated 21 November 2017 ("the Decision") that advertisements referring to part-fibre broadband services as "fibre" broadband services are unlikely to mislead consumers.

2. To understand this claim it is necessary to distinguish between the following types of technology, which are the four main technologies used to deliver broadband services to consumers and other end-users:

   i) ADSL: This involves data being transmitted via a copper cable running between the local exchange and the premises of the end-user. ADSL stands for "asymmetric digital subscriber line".

   ii) Fibre to the cabinet ("FTTC"): This involves data being transmitted via an optical fibre (fibre-optic) cable running from the local exchange to a street cabinet near the end-user's premises and then via a copper cable connecting the street cabinet to the premises.

   iii) Cable: This involves data being transmitted via an optical fibre cable running from the local exchange to a street cabinet near the end-user's premises and then via a copper coaxial cable connecting the street cabinet to the premises.

   iv) Fibre to the premises ("FTTP"): This involves data being transmitted via an optical fibre cable running from the local exchange to the end-user's premises. This could be directly into an end-user's home or, in the case of a building encompassing multiple dwellings or other premises, such as a block of flats or an office block, to a box in the building, and from there to each subscriber's premises via an Ethernet cable.

   Data travels in either direction along these connections, depending on whether it is being downloaded (received) or uploaded (transmitted) by the end-user.

3. ADSL uses the traditional copper wire telephone network and was the technology via which most consumer broadband users in the UK received broadband services at the time of the Decision (as may still be the case). It is also the slowest technology. The highest average speed available via ADSL in November 2017 was 11 megabits per second ("Mbps"), with the leading providers averaging 10 Mbps. These are download speeds. Upload speeds via ADSL are much lower.

4. Both FTTC and cable are part-fibre technologies, so references to "part-fibre" in this judgment refer to either, although they are different technologies, cable offering significant speed advantages over FTTC. As in the case of ADSL, upload speeds via part-fibre connections are considerably slower than download speeds. However, data speeds are considerably better, in general, than via ADSL.

5. FTTP is also referred to as "full-fibre" or "pure-fibre". Upload speeds and download speeds are the same across a full-fibre connection. In addition, FTTP, in general, provides faster speeds than part-fibre connections and has a number of other advantages over part-fibre, as I will discuss in more detail in a moment.

6. It is a central contention of the claimant that full-fibre is objectively superior to part-fibre technology, and therefore a provider of part-fibre services should not be able to advertise its broadband service using the word "fibre" without making it clear in the advertisement that it provides that broadband service via part-fibre technology. If it fails to do so, the advertisement is materially misleading.

7. The issues in this case are whether the defendants made an error of law and/or acted irrationally in reaching the view, reflected in the Decision, that the average consumer is unlikely to be misled by the unqualified use of the word "fibre" in advertisements for part-fibre broadband services targeted at consumers.

The claimant and the intervener

8. The claimant, CityFibre Limited ("CityFibre"), is the largest alternative builder and operator of wholesale full-fibre infrastructure in the UK market. A significant part of its business is the provision of full-fibre infrastructure for delivery of broadband services to consumers in the UK. Being a wholesale provider, it does not deal directly with consumers or with retail business users.

9. The intervener, Hyperoptic Ltd ("Hyperoptic"), obtained permission to intervene, in writing only (via a Statement of Intervention and an accompanying witness statement dated 19 October 2018 from Ms Dana Pressman Tobak, Chief Executive Officer of Hyperoptic), in order to support the submissions of CityFibre and to provide an additional perspective as a business that does deal directly with consumers. Hyperoptic specialises in installing fibre broadband infrastructure to buildings containing multiple dwelling units, such as blocks of flats. A typical Hyperoptic customer would be an occupier of a dwelling in such a building, who chooses to subscribe to Hyperoptic's broadband service. Hyperoptic also deals with retail business users.

The Advertising Standards Authority

10. The first defendant, the Advertising Standards Authority Limited ("ASAL"), regulates non-broadcast advertising. The second defendant, the Advertising Standards Authority (Broadcast) Limited ("ASABL"), regulates broadcast (television and radio) advertising. ASAL and ASABL operate under the umbrella term "the Advertising Standards Authority" ("the ASA"). Where it is not necessary to distinguish between ASAL and ASABL, I use the "ASA" or "the defendant" in this judgment.

11. Each of ASAL and ASABL is a company limited by guarantee. Each has a Council comprised of 12 members, two-thirds of whom must be independent of the advertising industry. Each Council is the Board of the company to which it relates. The Decision was formally a joint decision of the Councils of ASAL and ASABL. The ASA Executive manages each of ASAL and ASABL and makes recommendations to the Councils, but the Councils are not bound by those recommendations.

12. ASAL was established in 1962 to provide independent oversight of the self-regulatory system set up by the non-broadcast advertising industry. An industry body, the Committee of Advertising Practice Limited ("CAP"), is responsible for drafting and updating a code known as the UK Code of Non-broadcast Advertising and Direct &

Promotional Marketing ("the CAP Code") and for writing authoritative guidance on the rules in the CAP Code. The members of CAP are organisations representing advertisers, agencies, the media and other intermediaries. The 12th edition of the CAP Code came into force on 1 September 2010 and was in force at all relevant times for the purposes of these proceedings. Since 2011 ASAL's non-broadcast remit has extended to advertising claims on a marketer's own website and in other non-paid-for space online under its control, for example, its social media accounts.

13. Historically, rather than self-regulation, broadcast advertising was subject to separate statutory regulation by other bodies, including, from 2003, the Office of Communications ("Ofcom"), the principal regulatory body responsible for regulating communications in the UK. In 2004 Ofcom contracted out most of its powers under the Communications Act 2003 to regulate broadcast advertising to (i) the Broadcast Committee of Advertising Practice Limited ("BCAP"), an industry body similar to CAP but focused on broadcast advertising, and (ii) ASABL. This was done initially for a ten-year period and then renewed for a further ten years in 2014. BCAP drafted a code for broadcast advertising, the UK Code of Broadcast Advertising ("the BCAP Code" and, together with the CAP Code, "the Codes"), which came into force on 1 September 2010 and was in force at all relevant times for the purposes of these proceedings. The general structure and content of the BCAP Code is similar to the CAP Code, but its focus, of course, is broadcast advertising.

14. There is now, therefore, a parallel structure for the regulation of non-broadcast and broadcast advertising. For the purposes of this claim, it is not necessary for us to distinguish between the two regimes. Each of CAP and BCAP is a company limited by guarantee, and each is independent of the ASA. Members of each of CAP and BCAP agree, through their Memorandum and Articles of Association, that they will promote compliance with the Codes by their members and take action, where appropriate, to secure compliance where a member fails to observe the relevant Code.

15. The ASA promotes and enforces standards for non-broadcast and broadcast advertising by reference to the Codes. The ASAL Council acts as the "jury" that decides whether an advertisement has breached the CAP Code, and the ASABL Council performs the same function in relation to the BCAP Code.

Procedural history

16. The claimant filed its claim to challenge the Decision by way of judicial review on 19 February 2018 on six grounds. The claimant's application for permission to apply for judicial review was initially refused by Mr Justice Dove on 10 May 2018 following a review of the papers. The claimant renewed its application at an oral hearing on 12 June 2018 at which Mr Justice Turner granted permission on all grounds.

17. On 5 September 2018 the parties signed a consent order granting Hyperoptic permission to intervene in the proceedings on a limited basis, by filing a Statement of Intervention and a brief supporting witness statement of a witness of fact, subject to further limitations set out in the order, including Hyperoptic not making oral submissions at the substantive hearing. The consent order was approved by Mrs Justice Lang on 23 October 2018.

Legal framework

18. The ASA is a non-statutory body, independent of both the government and the advertising industry*: Buxton v ASA* [2002] EWHC 2433 (Admin) at [16]. It is common ground that its decisions are susceptible to judicial review. It is also well-established that the assessment of "[w]hether an advertisement is or is not likely to mislead the public is a matter which is best dealt with by an expert body such as the ASA": *Buxton* at [13].

19. I bear in mind Thirlwall J's self-direction in a case involving a judicial review challenge to a decision of the ASA, *R (Coys of Kensington) v ASA* [2012] EWHC 902 (Admin) at [19]:

> "I remind myself that the court's role is supervisory. The defendant is a specialist body; its principal task is to enforce the Code. In the course of so doing, it interprets the meaning of advertisements as a matter of routine. It has been doing so for over 50 years and the value of its experience and expertise should not be underestimated."

Thirlwall J briefly refers at [20]-[21] to earlier authorities making similar and related observations regarding the function and expertise of the ASA and the role of the court in relation to a challenge to a decision of the ASA. The *Coys of Kensington* case involved a challenge to a decision that advertisements placed by the claimant were misleading in breach of provisions of the 11th edition of the CAP Code. The principal ground was that the decision was irrational.

20. This claim involves the question of whether the use of the term "fibre" in advertising is likely to mislead consumers, and the grounds include error of law as well as irrationality. The claimant accepts that the ASA is an expert body but notes that there is no authority that suggests that the court should be slow to find that the ASA has made an error of law.

21. The ASA administers and enforces the Codes. For present purposes the provisions are essentially the same. Section 3 of each Code is concerned with misleading advertising. Rule 3.1 of the CAP Code provides:

> "Marketing communications must not materially mislead or be likely to do so."

22. Rule 3.3 of the CAP Code provides:

> "Marketing communications must not mislead the consumer by omitting material information. They must not mislead by hiding material information or presenting it in any unclear, unintelligible, ambiguous or untimely manner.
>
> Material information is information that the consumer needs to make informed decisions in relation to a product. Whether the omission or presentation of material information is likely to mislead the consumer depends on the context, the medium and,

> if the medium of the marketing communication is constrained by time or space, the measures that the marketer takes to make that information available to the consumer by other means."

23. Rules 3.1 and 3.2 of the BCAP Code are written in similar terms.

24. The Codes do not have the force of law, but the ASA maintains (which is not disputed) that they are intended to reflect accurately EU and domestic legislation relating to unfair and misleading advertising. This case concerns business-to-consumer advertising. The relevant EU legislation is Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22 ("the Directive"), which was implemented in the UK by the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277 ("the 2008 Regulations").

25. In this regard, Section 3 of the CAP Code states:

> "The ASA may take [the 2008 Regulations] into account when it rules on complaints about advertisements that are alleged to be misleading. See Appendix 1 for more information about those Regulations."

26. Appendix 1 summarises the 2008 Regulations and another set of regulations relevant to business-to-business marketing communications. In relation to the 2008 Regulations, Appendix 1 notes:

> "Whenever it considers complaints that a marketing communication misleads consumers or is aggressive or unfair to consumers, the ASA will have regard to the [2008 Regulations]. That means it will take factors identified in the [2008 Regulations] into account when it considers whether a marketing communication breaches the CAP Code.
>
> The notes below summarises those factors.
>
> Code rules that refer to misleading marketing communications should be read, in relation to business-to-consumer marketing communications, in conjunction with these notes."

27. Appendix 1 then summarises the relevant factors from the 2008 Regulations. Most relevant to the current case are the following passages:

> "The likely effect of a marketing communication is generally considered from the point of view of the average consumer whom it reaches or to whom it is addressed. The average consumer is assumed to be reasonably well-informed, observant and circumspect.
>
> …
>
> Marketing communications are misleading if they

> are likely to deceive consumers and
>
> are likely to cause consumers to take transactional decisions that they would not otherwise have taken.
>
> A 'transactional decision' is any decision taken by a consumer whether it is to act or not act, about whether, how and on what terms to buy, pay in whole or in part for, retain or dispose of a product or whether, how and on what terms to exercise a contractual right in relation to a product.
>
> Marketing communications can deceive customers by ambiguity, through presentation or by omitting important information that consumers need to make an informed transactional decision, as well as by including false information."

28. The origin of these provisions in the 2008 Regulations, as summarised in Appendix 1 of the CAP Code (and similarly in Appendix 3 to the BCAP Code) is, of course, the Directive. The Directive seeks to harmonise the laws of the member states of the EU in relation to:

> "… unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors. In line with the principle of proportionality, this Directive protects consumers from the consequences of such unfair commercial practices where they are material but recognises that in some cases the impact on consumers may be negligible." (Recital (6))

29. Recital 18 of the Directive reads as follows:

> "It is appropriate to protect all consumers from unfair commercial practices; however the Court of Justice has found it necessary in adjudicating on advertising cases since the enactment of Directive 84/450/EEC to examine the effect on a notional, typical consumer. In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark *the average consumer, who is reasonably well-informed and reasonably observant and circumspect*, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group. It is therefore appropriate to include in the list of practices which are in all

> circumstances unfair a provision which, without imposing an outright ban on advertising directed at children, protects them from direct exhortations to purchase. *The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.*" (emphasis added)

30. Article 5 of the Directive prohibits unfair commercial practices, including misleading practices. Article 6 concerns misleading practices and Article 7 concerns misleading omissions. The relevant provisions of each for present purposes are as follows:

> "*Article 6*
>
> **Misleading actions**
>
> 1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:
>
> …
>
> (b) the main characteristics of the product ….
>
> …
>
> *Article 7*
>
> **Misleading omissions**
>
> 1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.
>
> 2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context,

> and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.
>
> … ."

31. It is clear from the foregoing that the term "average consumer" has a specific meaning as a matter of law. Whether the ASA erred in its application of the law in reaching the Decision must be judged by reference to the meaning of that term. As we have already seen, the "average consumer" is "reasonably well-informed and reasonably observant and circumspect". In other words, a consumer who does not share those characteristics is not an average consumer for this purpose. This is confirmed, as a matter of English law, by a number of authorities, including *Secretary of State for Business, Innovation and Skills v PLT Anti-Marketing Ltd* [2015] EWCA Civ 76, [2015] Bus LR 959 (CA) (Briggs LJ) at [30]. The purpose of the Directive is "to protect from being misled consumers who take reasonable care of themselves, rather than the ignorant, the careless or the over-hasty consumer": *SSBIS v PLT Anti-Marketing Ltd* at [30].

32. So, the scope of the term "average consumer" is of central importance for the determination of this claim. In addition, an advertisement will be misleading only if it "causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise". This latter aspect is often referred to as the "transactional decision test".

33. Article 2(k) defines "transactional decision" as:

> "any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting"

34. The relevant provisions of the Directive are reflected, in somewhat different wording, in the 2008 Regulations. No issues, however, arise from any difference between the Directive and the 2008 Regulations, and therefore I will not set out the relevant provisions of the 2008 Regulations separately.

Factual background

35. Ofcom, the principal regulatory body responsible for regulating communications in the UK, publishes an annual report on the state of the UK's communications infrastructures entitled the "Connected Nations Report". Ofcom's 2016 Connected Nations Report was published on 16 December 2016 and was the most recent such report at the time of the Decision. The 2017 Connected Nations Report was published on 15 December 2017.

36. Fixed broadband services in the UK are largely provided over two networks:

    i) Openreach's public switched telephone network; and

ii) Virgin Media's cable network.

Openreach uses mainly FTTC. Virgin Media uses mainly cable technology. Each of these, as already noted, is a part-fibre technology. Openreach and Virgin Media also have full-fibre offerings, available only to a small number of consumers.

37. The 2016 Connected Nations Report showed that the majority of premises continued to rely on broadband delivered via ADSL, which, as I have already noted, had speeds averaging 10 Mbps. It also noted that 89 per cent of premises had access to "superfast" broadband services, being services delivering speeds greater than 30 Mbps, which are primarily delivered by part-fibre services. But only 31 per cent of premises actually subscribed to superfast broadband services. The 2016 Connected Nations Report also stated that only 1.7 per cent of premises had access to full-fibre services.

38. It is the claimant's case that full-fibre infrastructure is technically superior to part-fibre infrastructure in a number of important respects. The defendant accepts this, for the most part, but takes the view that the position is more "nuanced" than the claimant maintains. To illustrate this, the defendant notes that even FTTP requires some non-fibre element, typically involving copper wire (for example, via an Ethernet cable) to take the signal to a router inside the end-user's premises, so that the ultimate signal quality and speed will potentially be affected by those final connection elements. In response to this, Hyperoptic noted, in the evidence it filed, that where a CAT5e cable (a type of Ethernet cable) is used within the premises for that final connection, there is no loss of data quality or speed provided that the cable does not exceed 100 metres in length. The defendant gives other examples of the way it says the position is nuanced, but it is not necessary for me to resolve this. I proceed on the basis that, for all intents and purposes, full-fibre infrastructure is technically superior to part-fibre technology.

39. The key advantages of full-fibre infrastructure over part-fibre infrastructure are summarised in the 2016 Connected Nations Report and in witness statements and other documents provided by each of the parties. In summary, they are:

i) higher speed: full-fibre services can consistently provide download speeds of up to 1,000 Mbps, subject to the package purchased, in contrast to download speeds of up to 80 Mbps on the Openreach FTTC (part-fibre) network or up to 330 Mbps on Virgin Media's cable (part-fibre) network;

ii) consistency of speed: full-fibre services provide consistent speeds that do not depend on distance from the local exchange or the nearest street cabinet or congestion at peak times due to other users, whereas part-fibre service speeds vary greatly depending on the distance from the local exchange or street cabinet and degree of congestion (which is why part-fibre service providers should describe the available speeds as "up to" a particular fastest available speed, whereas it is not necessary for a full-fibre service provider to use those qualifying words);

iii) symmetry: full-fibre services provide symmetrical download and upload speeds, whereas part-fibre services offer far slower upload speeds than download speeds; and

iv) reliability: full-fibre infrastructure is more reliable and less prone to faults and interference from bad weather (for example, from water damage) than part-fibre, which relies on copper wire connection.

40. An important part of the greater reliability of full-fibre infrastructure is that it bypasses the need for a street cabinet, which has electronic components and needs a power supply and is therefore vulnerable to weather, power supply disruption and other potential issues.

41. The claimant also maintains that full-fibre infrastructure is "future-proof" in the sense that it will be able to meet future anticipated increased demand from consumers for bandwidth, whereas part-fibre infrastructure will need to be upgraded in the coming decades to meet that demand. This is supported by Ofcom, where in paragraph 4.50 of the 2016 Connected Nations Report it said:

> "The physical characteristics of full fibre networks mean that they are best placed to deliver reliable, ultrafast speeds both now and for the foreseeable future."

42. The UK government has indicated its support of the development of full-fibre broadband services in the UK, for example, in a speech given by Mr Matt Hancock MP, then Minister of State for Digital and Culture, on 19 October 2016. On 1 March 2017 the UK government published the UK Digital Strategy 2017, with a foreword by the then Secretary of State for Culture, Media and Sport, Ms Karen Bradley MP. The document recognised that the UK's digital infrastructure needed to develop in order to support ever-increasing demand for data. The announced "digital strategy" had seven strands, including building a "world-class digital infrastructure for the UK". As part of this strand, the document emphasised the need for effective regulation, in order to encourage investment in the UK's digital infrastructure. In that regard, the document said:

> "Improved regulation of the consumer market will also play an important role in improving connectivity. We are working with regulators and industry to ensure that advertising for broadband more accurately reflects the actual speeds consumers can expect to receive, rather than a headline 'up to' speed available only to a few, and accurately describes the technology used, using terms like 'fibre' only when full fibre solutions are used. There should not be a gap between what is promised by providers and what is experienced by the consumer. The non-statutory Advertising Standards Authority has already made some progress in ensuring that broadband prices are made clearer and costs to consumers are not hidden, and we will continue to work with them to ensure that the advertising of communications is accurate and fair."

43. My attention was also drawn to the following passage from a UK government White Paper entitled "Industrial Strategy", published on 27 November 2017 (six days after the Decision), where at page 154, in the section dealing with infrastructure, the government said the following regarding development of the UK's digital infrastructure:

> "[W]e need to provide reliable full-fibre connectivity to our towns, cities and rural areas. Only three per cent of the UK has full-fibre coverage – where full-fibre can connect directly to premises with significantly enhanced data capacity – compared with 70 per cent or higher in Spain, Portugal, Japan and South Korea. Our ambition is for ten million premises to be connected to the 'full-fibre' network, with a clear path to national coverage over the next decade."

On the following page, the White Paper noted that "[f]ull-fibre is the gold standard for fast and reliable broadband."

44. The White Paper (at page 156) under the heading "Case study: Vodafone and CityFibre" referred to a long-term strategic partnership between Vodafone and the claimant as the market response to the government's ambition to provide ten million premises with full-fibre broadband service, with the strategic partnership expected to bring full-fibre broadband to up to five million homes and businesses by 2025, comprising half the government's target.

45. The importance of these issues was also highlighted during a Westminster Hall Debate held on 8 March 2017 led by Mr Matt Warman MP on the topic of broadband speeds and advertising.

46. As part of its evidence, the claimant provided a witness statement dated 19 February 2018 from Mr Mark Grahame Collins, a founding partner of CityFibre and, since 2011, its Director of Strategy & Public Affairs. In his witness statement, having set out (in much greater detail than I have done) the background referred to above, including the various statements of the government and of Ofcom supporting development of full-fibre infrastructure, Mr Collins made the following points (among others):

    i) The vast majority of advertisements for broadband services are for part-fibre services. Most of them use the term "fibre" without further qualification. This causes confusion for consumers, who have trouble distinguishing advertisements for full-fibre and part-fibre services even after the distinction between the two technologies has been explained to them.

    ii) Full-fibre providers have sought to differentiate full-fibre from part-fibre through their advertising, but with limited success.

    iii) If the wholesale roll-out of full-fibre services across the UK is to be viable, then sufficient numbers of consumers will need to appreciate the superiority of full-fibre services and choose to take up full-fibre services over inferior part-fibre services.

47. Following a feature on the BBC television programme "Watchdog" on 9 November 2016 on slow broadband speeds, Mr Greg Mesch, the Chief Executive Officer of CityFibre, wrote to Mr Guy Parker, Chief Executive of the ASA, on 23 November 2016 raising in strong terms CityFibre's concern that consumers were being misled by the use of "up to" speed claims by broadband service providers.

48. In his response dated 7 December 2016, Mr Parker acknowledged the concern, but recommended that Mr Mesch contact a colleague, Mr Shahriar Coupal, Director of Committees at the ASA's sister bodies, CAP and BCAP, noting that they had announced a review of their guidance to advertisers on broadband speed claims with a view to reporting in spring 2017.

49. Further correspondence ensued between CityFibre and both CAP and ASA. On 20 March 2017 Mr Collins sent a letter to Mr Parker, together with a briefing paper, outlining the consumer and policy grounds for the ASA to review the "widespread misuse of the term 'fibre' in advertising to apply to broadband products that are not full-fibre but are part-fibre, part-copper". The briefing paper included a request for the ASA and CAP/BCAP to undertake as a priority a review of how the term "fibre" is used in broadband advertising.

50. Following further correspondence, in or around the beginning of April 2017 the ASA announced that it would be undertaking a review of how it interprets the CAP Code and the BCAP Code when judging the use of the term "fibre" to describe broadband services. In his witness statement dated 24 July 2018, Mr Miles Lockwood, Director of Complaints and Investigations at the ASA, acknowledged that its correspondence with CityFibre contributed to the ASA's decision to launch the review, which in turn led to the Decision.

51. On 7 April 2017 Mr Mesch of CityFibre wrote to Mr Parker of the ASA strongly welcoming the review. There then followed further correspondence between the ASA and CityFibre as part of the ASA's evidence-gathering for its review, during which it also contacted a range of other stakeholders, including providers of part-fibre and full-fibre services, consumer organisations, industry bodies and other regulators.

52. In a letter sent to CityFibre on 17 May 2017, which was in similar form to the letters sent to other stakeholders, the ASA said:

> "As you know, we have recently announced a review of how we interpret the Advertising Codes when judging the use of the term 'fibre' to describe broadband services. In particular, we are seeking to establish through this review whether consumers are likely to be misled by the use of the term 'fibre' when it is used in advertisements or marketing communications for part-fibre services."

The letter then set out a series of questions and requested a response by 16 June 2017 and promised an update on the progress of the review in July 2017.

53. On 30 June 2017 CityFibre provided its response to the ASA's request for information and included a report dated June 2017 prepared by the independent research firm Opinion Leader and entitled "Understanding Broadband Customer Responses to Use of 'Fibre' in Advertising" ("the Opinion Leader Report"). The Opinion Leader Report had been jointly commissioned by CityFibre, Hyperoptic and another full-fibre service provider, Gigaclear.

54. As part of its review, the ASA reviewed complaints made to the ASA on the use of the term "fibre" in advertising of part-fibre services. It concluded that hardly any of

the complaints revealed instances of consumers who considered themselves misled after purchasing part-fibre products and finding out that the last part of the connection was via copper wire rather than optical fibre. The ASA considered the level of complaints about "fibre" to be modest compared with complaints received about price, speed and lack of availability of faster broadband services in specific locations.

55. The ASA had significant doubts about the robustness of the research reflected in the Opinion Leader Report and of research supplied by other full-fibre providers. Broadly, the ASA's concerns with the Opinion Leader Report were that the sample size of consumers and businesses surveyed was modest, but more importantly that the exercise involved educating the participants "heavily and in detail" on the benefits of fibre, with the effect of "priming" the participants to prioritise fibre when considering purchasing broadband. Prior to the education of the groups involved in the Opinion Leader Research, fibre had generally been rated by members of those groups as a low, if not the lowest, priority when choosing a broadband service.

56. In addition to the Opinion Leader Report, the ASA was made aware by CityFibre of a poll conducted by the comparison website uSwitch. uSwitch conducted a "quick poll" on the broadband section of their website with the single question "Do you feel misled by ads for 'fibre broadband' that aren't a full fibre service?" Four options were given as answers, with 72.3 per cent of respondents selecting the answer: "Yes. Only full fibre services should be advertised as fibre". As the respondents were limited to anonymous users of the uSwitch website and the question was a leading one, the ASA concluded that it could not be relied on to show whether the "average consumer" was likely to be materially misled by the advertising of part-fibre services as "fibre".

57. The ASA was also made aware by Hyperoptic of a survey conducted by YouGov on behalf of Jones Consulting with fieldwork having been conducted on 23 and 24 March 2017, which asked four questions, focusing on participants' expectations of speed as well as the meaning of "full fibre". It did not, however, include questions on advertising. The ASA concluded that it could not be relied on to gain insight into the importance of fibre in a consumer's "broadband purchasing journey". Also, the YouGov survey took a quantitative approach, which did not throw light on whether the participants understood the questions they were being asked.

58. For the reasons I have indicated, the ASA concluded that not much weight could be placed on either the uSwitch or the YouGov surveys. It did, however, consider that the Opinion Leader Report, which took a qualitative approach but was, in the ASA's view, otherwise limited and of doubtful robustness, provided some evidence that consumers might be misled by "fibre" claims. The ASA therefore decide to extend its review and commission its own qualitative research.

The ASA's engagement with advertising of broadband services

59. Before turning to the research that ASA decided to commission, it is necessary to give some further background on the ASA and its general engagement with the advertising of broadband services. As noted by Mr Lockwood in his witness statement, while handling complaints about breaches of the Codes is a core area of activity of the ASA, it has in recent years:

> "increasingly taken a more proactive role in tackling important, sector-wide and thematic issues through project- and research-led initiatives which sit outside the complaints handling process".

60. This has included three projects on issues relating to broadband advertising, concerning (i) price, (ii) speed and (iii) the use of the word "fibre" in broadband advertising. According to Mr Lockwood's evidence, price has been the issue regarding which it has received the most complaints, with a headline broadband price often featured separately from less prominently featured information regarding other costs. In April 2016, after commissioning research jointly with Ofcom, the ASA Council decided that the then current practice of "partitioned" pricing was materially misleading.

61. In May 2016 the ASA introduced new rules applicable from 31 October 2016. In the view of the ASA, these rules have resulted in clearer pricing and fewer complaints. Part-fibre providers are now obliged to include line rental charges in their headline claim. Pricing for full-fibre services does not include such charges since it is not necessary to use a subscriber's telephone line to complete the connection to the subscriber's premises. Full-fibre providers therefore have benefited from the rule changes regarding advertising of pricing.

62. The second project undertaken by the ASA in relation to broadband advertising concerned the advertising of speed claims, with advertisers making claims to provide service at "up to" a certain speed. Following guidance in 2012 that stated that at least 10 per cent of customers must be able to achieve the advertised maximum speed in order for an advertiser to make the "up to" speed claim, there was a 60 per cent drop in complaints. Nonetheless, complaints remained at a significant level. CityFibre was one of the stakeholders who wrote to the ASA about this issue, in the letter to which I referred at [47] above. Others, including Members of Parliament, Peers and consumer groups such as Citizen Advice and Which? also argued strongly in favour of a further review of the guidance.

63. The ASA and CAP/BCAP commissioned the independent research firm GfK UK to undertake qualitative research into consumer understanding of "up to" speed claims. The research showed that consumers were being misled. CAP/BCAP then consulted with stakeholders on how speed claims could be presented more accurately to reflect consumers' experiences. One of the respondents was Which?. It said that, based on a survey of its members, consumers ranked speed second to price when choosing an internet provider. Neither the technology to deliver speed nor the issue of the use of the word "fibre" in broadband advertising emerged as an issue in the Which? survey.

64. On 23 November 2017 (two days after the Decision), CAP/BCAP issued new guidance entitled "Broadband Speed Claims", taking effect from 23 May 2018. The guidance recommended that, in order not to mislead, speed claims for residential broadband services should be available to at least 50 per cent (rather than 10 per cent, as previously) and described as "average". It should also be based on the peak-time download speed. Mr Lockwood noted in his evidence that, as in the case of the Which? survey, neither the technology to deliver speed nor the issue of the use of the word "fibre" in broadband advertising emerged as an issue in the commissioned research. Full-fibre providers have benefited from the rule changes regarding

advertising of speed claims, since not only are absolute speeds in general faster but also the speeds are consistent and reliable and therefore are not constrained by the requirement applicable to part-fibre services of stipulating an average speed that is lower than the maximum "up to" speed.

65. The third project undertaken by the ASA in relation to broadband advertising concerned the use of the word "fibre" in advertising. As I have already noted, at or about the time the project was undertaken, the ASA considered that the level of complaints received regarding this subject was modest compared with complaints about availability, price and speed issues. For the reasons I have already given, the ASA concluded, nonetheless, that it should undertake a review, commissioning its own independent qualitative research.

The Define Report

66. In her witness statement dated 24 July 2018, Ms Gemma Rosenblatt, a Research Specialist at the ASA, described the commissioning of the research. Her evidence supplements that of Mr Lockwood in setting out the reasons why the evidence provided by CityFibre and others, including the Opinion Leader Report, was insufficient. She also described, in considerable detail, the objectives and purpose of the research to be conducted, how the appropriate research approach was determined and the ASA's reasons for appointing the independent research firm Define Research & Insight Ltd ("Define") to conduct the research. She also described the process and criteria by which the participants in the research were recruited, the stages of the research and the materials used.

67. Define produced its final report entitled "Broadband Fibre Qualitative Research: Final Report" on or about the beginning of November 2017 ("the Define Report"). Ms Rosenblatt set out the conclusions of the Define Report, as well as her interpretation of the results, in some detail in her witness statement. Ms Dinah Rose QC, counsel for the claimant, submitted that I should treat her evidence with caution as in certain respects it went beyond what was appropriate for a witness of fact and purported to offer expert opinion. Ms Catherine Callaghan QC, counsel for the defendant, disputed that and noted that Ms Rose had not given any specific instances of Ms Rosenblatt's purporting to give expert opinion. No application was made by the claimant to exclude any part of Ms Rosenblatt's evidence. I have not found it necessary to rely on Ms Rosenblatt's evidence other than as providing explanatory background to the commissioning of the Define Report.

68. The Define Report set out the following as the overall aims of the research:

    i) to establish what consumers understood by the word "fibre" in the context of broadband advertising (and more generally); and

    ii) to understand whether the inclusion of "fibre" in broadband advertisements shaped consumers' views of the performance of specific packages and, if so, in what ways.

69. These aims were stated in the Define Report to be necessary because, in order to conclude that the term "fibre" is misleading in relation to part-fibre services, the ASA had to be satisfied that the term would be likely to be misunderstood by the average

consumer and would result in the average consumer taking a transactional decision that they would not otherwise have taken.

70. As the claimant was critical of a number of aspects of the Define Report, but in particular the sample of respondents recruited for interview, I set out below what the Define Report said about the research methods used, the sample and the stimulus examples used (pages 10 to 12 of the Define Report):

> "**C. Method, sample and stimulus examples**
>
> **Method**
>
> A mixed method approach was used, comprising:
>
> - **30 face-to-face depth interviews (90 minutes) in Stage 1.**
> - **79 hall test interviews (30 minutes) in Stage 2.**
>
> In total, 109 respondents were interviewed across the two stages.
>
> Both stages addressed the main research objectives but the focus was slightly different for each. **Stage 1** interviews explored broad consumer understanding of broadband fibre, other terminology and purchase journeys, while also looking at these issues in the context of broadband advertising. **Stage 2** interviews focused mainly on advertising, teasing out the impact of the term 'fibre' and various other elements within the selected ads and websites advertising broadband packages.
>
> All respondents in Stage 1 completed **pre-tasks** ahead of their interviews:
>
> Respondents who had recently switched their broadband provider or package were asked to complete a '**Customer journey diary**', describing the reasons for switching, key considerations and priorities influencing their decision. It also focused on any resources they had used for researching different packages.
>
> Respondents who were considering changing their broadband provider or package were asked to complete an online '**Mystery Shop**' exercise, where they researched potentially relevant packages and noted down their considerations, priorities and any sources used.
>
> The pre-tasks made the interview sessions more productive as respondents were **better prepared**. They were also an additional source of data to investigate consumer purchase journeys. Stage 2 respondents were not pre-tasked –this was to capture their **immediate reactions to ads** in a 'cold' state, i.e. before they became familiar with the topics under discussion.

> In the interview sessions, respondents were shown a range of broadband ads and other content, representing a cross-section of broadband providers, media and formats (print, out-of-home, direct mail, broadcast ad, provider websites and price comparison websites). …
>
> …
>
> **Sample**
>
> The **sample** was structured to reflect the following main criteria:
>
> - All respondents were recruited to be solely or jointly responsible for broadband purchasing decisions.
> - The sample was further divided evenly between those who had switched providers recently and those considering switching.
> - In addition, the sample included a wide range of respondents in terms of the level of their broadband usage and current broadband providers, as well as a range of demographic criteria (life stage, gender, age, SEG, household size).
> - Locations were chosen to include a mix of rural and urban areas.
>
> **Locations**
>
> Fieldwork took place across 11 locations in England (Northampton, Norwich, York, Nottingham, London, Manchester), Scotland (Paisley, Glasgow), Wales (Swansea, Cardiff) and Northern Ireland (Belfast). Stage 1 fieldwork was conducted in July and August 2017 and Stage 2 fieldwork was completed in September 2017." (emphasis as in original)

71. On pages 11 to 12 of the Define Report, examples of the stimulus material used were reproduced in the form of screenshots of on-line and broadcast advertisements and websites and examples of non-broadcast advertisements. A footnote referred readers of the Define Report to Appendix 1 for more detailed information about the stimulus used and examples of the advertisements shown to respondents. A footnote to the section on the sample referred readers to Appendix 2 for more detailed information about the composition of the sample, including the following:

> "*Additional criteria*
>
> **Across all respondents:**
>
> - All were responsible, or jointly responsible, for broadband purchase decision (choice of ISP and package)

- Half had switched ISP / broadband package or purchased their first broadband package in the past six months

- Half were considering switching ISP / broadband package

- A good mix of broadband providers across the sample and across these a spread of broadband technologies (including ADSL1 and ADSL2+, cable (fibre optic) and ideally fibre ('fibre to the cabinet')

- Good mix in terms of internet use, from heavy internet users to more casual internet users

- Good mix in terms of household sizes –included individual and multiple users of the internet in the property

- A good spread in terms of how knowledgeable and confident they felt about the internet/new technologies, including

  — screening out anyone who worked in a related field so would have better-than-average knowledge of broadband technology

  — within the remainder, maximum quotas for more 'technologically savvy' respondents to limit their number in the sample

- A good spread of age across the different life stages

- All respondents (esp. retired) were fully able to give informed consent to take part in interview"

72. The Define Report set out its principal conclusions in the Executive Summary in three bullet points ("the Define Bullet Points") as follows:

"The research shows:

- The term 'fibre' was not one of the priorities identified by participants when choosing a broadband package; it was not a key differentiator.

- The word 'fibre' was not spontaneously identified within ads – it was not noticed by participants and did not act as a trigger for taking further action. It was seen as one of many buzzwords to describe modern, fast broadband.

- Once educated about the meaning of fibre, participants did not believe they would change their previous purchasing decisions; they did not think that the word 'fibre' should be changed in part-fibre ads."

The Decision

73. The ASA Executive prepared a paper for the ASA Councils entitled "'Fibre' claims in broadband advertising" (November 2017) ("the ASA Council Paper"), describing the review undertaken by the ASA of "fibre" claims in broadband advertising and summarising:

    i) the broadband market in the UK;

    ii) criticisms that had been made of the ASA's position on "fibre" claims;

    iii) the responses to the ASA's call in April 2017 for information on this topic from key stakeholders and the evidence provided, including the Opinion Leader Report, the YouGov survey and the uSwitch poll to each of which I have referred;

    iv) the findings by Define set out in the Define Report;

    v) the ASA Executive's analysis of and its own conclusions on the evidence gathered.

74. In the final part of the ASA Council Paper, the ASA Executive set out its recommendations on the question of "fibre" claims in broadband advertising, for decision by the Councils.

75. The ASA Council Paper, together with the Define Report, were sent to members of the Councils ahead of the meeting of the Councils scheduled for 10 November 2017, for consideration at that meeting. The Opinion Leader Report and YouGov survey were indicated in the Table of Contents to the ASA Council Paper as available upon request. The discussion of the ASA Councils at their joint meeting held on 10 November 2017 was recorded in the minutes of the meeting ("the Minutes").

76. The Decision was sent by letter dated 21 November 2017 to Ms Victoria Read, Public Policy Consultant at CityFibre, under embargo until 00.01 on Thursday, 23 November 2017, when the Define Report was to be published, together with two press releases, one announcing the end of the review of "fibre" broadband and publication of the Define Report and the other announcing changes to the way broadband speed claims could be advertised.

77. The conclusions set out in the Decision were as follows:

> "We consider that ads that refer to part-fibre broadband services as 'fibre' broadband are unlikely to mislead consumers.
>
> However, we acknowledge that there are performance differences between different types of broadband service, including between 'part-fibre' and 'full-fibre' services. For this reason the ASA Council has indicated that it will have regard to the following key principles, and to the Define research, when it receives complaints about fibre advertising in the future:

- As has always been the case, ads should not describe non-fibre services as 'fibre'.

- Ads should make performance claims for 'fibre' services that are appropriate for the type of technology delivering that service, and should hold evidence to substantiate the specific claims made.

- Specifically, ads should refer to speed in a manner that is appropriate for the technology, including by having regard to CAP's new guidance on numerical speed claims.

- Ads should not state or imply a service is the most technologically advanced on the market if it is a part-fibre service.

Broadband providers should therefore ensure that their advertising is in line with these principles."

CAP's guidance on numerical speed claims referred to in the third bullet point above is the guidance to which I referred at [64] above.

78. After setting out its conclusions, the ASA noted that the Define research suggested that low consumer knowledge regarding broadband services was evidence of a barrier to consumers' choosing the best deal for their needs, and so the ASA intended to share its research with Ofcom to consider as part of its work on educating consumers in respect of the communications market.

79. The ASA also acknowledged that the Decision would be disappointing to some, but these were the correct conclusions to draw on the then current state of the evidence. The ASA would, however, respond appropriately if there were compelling evidence that consumer understanding of fibre claims needed to be reviewed again.

The grounds

80. Six grounds were set out in the claimant's Detailed Statement of Facts and Grounds. By the time of the hearing, the claimant had abandoned its fourth and fifth grounds, which had to do with the ASA's reliance on the transactional decision test. The third and sixth grounds concerned the claimant's contention that the ASA had placed undue reliance on the Define Report. At the hearing, the claimant chose not to pursue those as separate grounds but instead to address its various criticisms of the Define Report and the manner in which the ASA interpreted and relied on it as part of its submissions on its first and second grounds.

81. The first ground is that the defendant erred in its understanding and application of the relevant legal test. The second ground is that, on the evidence before the defendant, there was no rational basis on which it could have concluded (whether or not it was applying the correct legal test) that the average consumer would not be likely to be misled by advertisements for part-fibre broadband services that used the term "fibre" without qualification.

Error of law

82. In relation to the first ground, Ms Rose for the claimant made a number of submissions. Her core submission was that the ASA erred in its understanding and application of the relevant legal test. It should have asked whether advertising a part-fibre service as "fibre" without qualification is likely to mislead a notional consumer who is "reasonably well-informed, reasonably observant and circumspect". The correct question is whether that notional reasonably well-informed consumer, when faced with an advertisement which describes a part-fibre services simply as "fibre", is likely to be misled. In answering that question, it may be appropriate to have regard to the expectations of actual consumers, but only if and insofar as those expectations illuminate that question. That, Ms Rose submitted, is not the approach that the ASA adopted.

83. Ms Rose submitted that the ASA Council Paper made no mention of the need to identify a notional reasonably well-informed consumer nor is that need identified in the Minutes. Instead, the analysis supporting the Decision reflected in the ASA Council Paper, the Minutes and the Decision appears to rest almost entirely on the three Define Bullet Points. According to Ms Rose, there are several problems with this:

    i) The conclusions in the Define Report are drawn from a sample of ill-informed consumers, who were largely ignorant about the difference between full- and part-fibre services. The ASA failed to consider whether the views of such consumers are relevant to the test it had to apply.

    ii) It is clear as a matter of law that, whilst it is permissible for the ASA to have regard to empirical research as guidance for its judgement, the focus must be on the presumed expectations of a notional reasonably well-informed consumer. That is why Recital 18 to the Directive says:

> "The average consumer is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case."

    iii) The submission that the ASA impermissibly took a statistical approach is supported by the following passages from the ASA's Detailed Grounds for Resisting the Claim ("DGR"):

        a) from paragraph 72 of the DGR:

> ""… Whether a consumer is reasonably well informed is to be assessed relative to the knowledge of consumers generally about the issue at hand …. The participants in the Define research were representative of the range of real consumers in the broadband market (from which the 'average consumer' can be constructed). …"

b) from paragraph 74.1 of the DGR:

> "The 'average' consumer can only be identified in a relative sense, by a comparison of all consumers, identifying an approximate middle point as a matter of judgement, or equivalent to a significant proportion of those to whom the advertising is directed."

84. Ms Rose submitted that the ASA's approach is wrong in law. The "average consumer" in this context is a legal term of art defined in the Directive and illuminated by case law. It is legally irrelevant to have regard to the knowledge of a range of actual consumers, still less to search for "an approximate middle point" in the knowledge of actual consumers about a particular product or service. Instead, the test requires a relevant national court or authority to consider the responses of consumers who are reasonably well-informed in relation to the product and services in question. They need not have a full understanding of every aspect of those products or services, but they must have a reasonable level of information and understanding of features of the relevant product or service so that they can meaningfully assess what is being said about the product or service in the advertisement in question.

85. Ms Rose submitted that the foregoing understanding of the test reflects the public policy objectives of the Directive and the 2008 Regulations. The fact that most people are wholly or largely ignorant of the relevant features of a product or service is not a legitimate reason to permit advertising that misrepresents those features.

86. In Case C-210/96 *Gut Springenheide GmbH v Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung* [1999] 1 CMLR 1383, a case involving the marketing of eggs, the referring court had asked for guidance on the concept of "consumer" and, in particular, the extent to which the concept was to be constructed through evidence of actual consumers. The Court of Justice of the European Union ("CJEU") held at [37]:

> "The answer to be given to the questions referred must therefore be that, in order to determine whether a statement or description designed to promote sales of eggs is liable to mislead the purchaser, in breach of Article 10(2)(e) of Regulation 1907/90, the national court must take into account the presumed expectations which it evokes in an average consumer who is reasonably well-informed and reasonably observant and circumspect. However, Community law does not preclude the possibility that, where the national court has particular difficulty in assessing the misleading nature of the statement or description in question, it may have recourse, under the conditions laid down by its own national law, to a consumer research poll or an expert's report as guidance for its judgement."

87. Similarly, in Case C-220/98 *Estée Lauder Cosmetics GmbH & Co OHG v Lancaster Group GmbH* [2000] 1 CMLR 515, a case involving the marketing of a cosmetics product where the complaint was that the name of product was misleading, the CJEU held as follows at [32]:

> "…
>
> — It is for the national court to decide, having regard to the presumed expectations of the average consumer, whether the name is misleading.
>
> — Community law does not preclude the national court, should it experience particular difficulty in deciding whether or not the name at issue is misleading, from commissioning, in accordance with its national law, a survey of public opinion or an expert opinion for the purposes of clarification."

The same principles apply, of course, where, as in this case, a competent authority, rather than a court, is making the relevant determination.

88. This case law of the CJEU, now codified in Recital 18 of the Directive and in regulation 2 of the 2008 Regulations, makes clear that the focus must be on a notional reasonably well-informed consumer, rather than a consumer whose knowledge is somewhere in the mid-point of the knowledge of actual consumers.

89. The Court of Appeal reviewed the *Gut Springenheide* case and other relevant authorities (the *Estée Lauder* case having been mentioned in argument but not in the judgment) in *Interflora Inc v Marks & Spencer plc (No 5)* [2014] EWCA Civ 1403. The issue was whether the defendant's use of the Google AdWords service infringed the claimant's trademark, which required the court to consider when "a reasonably well-informed and reasonably circumspect Internet user" was able to ascertain whether goods or services originated from the trademark proprietor. Confirming first at [112] that "a reasonably well-informed and reasonably circumspect Internet user" and "an average consumer (who is reasonably well-informed and reasonably observant and circumspect)" are one and the same, Kitchin LJ also confirmed at [113] that the average consumer in any context is a hypothetical person or legal construct and at [114] that the average consumer test is not a statistical test.

90. Kitchin LJ made the following observations at [124]:

> "… [I]n referring to 'the average' member of the group at which a practice is specifically aimed, we do not believe the [EU] legislature had in mind anything so formalistic as a mathematical average and consider it was instead referring to a hypothetical person within that group who represents an appropriate normative standard. Further, in assessing whether a practice is deceptive from the perspective of such a person, we see no reason why, as a matter of principle, a national court may not properly have regard to the effect it has on a significant number of the persons to whom it is addressed. "

91. Ms Rose submitted that it follows from these passages that a decision-maker may have regard to evidence of actual consumers, but only if such evidence illuminates the relevant question, which is the impact on the hypothetical reasonably well-informed

person. She also highlighted the following further passage in *Interflora (No 5)* at [125]:

> "The judge suggested (for example at para 265 of the main judgment [under appeal]) that confusion on the part of Internet users who are ill-informed and unobservant must be discounted. Of course it must. But this formulation runs the risk of setting the bar too low and we prefer to put it differently. It is only the effect of the advertisements on Internet users who are reasonably well-informed and reasonably observant that must be taken into account. "

92. Ms Rose submitted that it follows from the foregoing EU and English law authority that if an advertisement would mislead a reasonably well-informed, reasonably observant and circumspect consumer, then it must be treated as an unlawfully misleading advertisement even if it would not mislead a consumer at the "approximate middle point" of actual consumers. It is proportionate, and appropriate, to protect reasonably well-informed consumers.

93. In reply, Ms Callaghan for the defendant submitted that CityFibre was wrong in its interpretation of the relevant test and wrong in its characterisation of the ASA's decision-making in this case. She said that it was common ground that the "average consumer" is "reasonably well-informed and reasonably observant and circumspect", that this is not a statistical test and that the ASA, in the words of Recital 18 to the Directive, "will have to exercise [its] own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case".

94. Ms Callaghan substantially agreed with the summary of the law given by Ms Rose but disagreed that it supported the claimant's case. Although the concept of "average consumer" is a hypothetical person or legal construct, the case law makes clear that the decision-maker is entitled to have regard to the impact of advertising on real consumers, for example, in the form of consumer surveys or expert evidence, in order to assist the decision-maker in assessing how the theoretical average consumer understands claims made in advertising. She submitted that all of the cases cited by the claimant supported the ASA's position that it was entitled to have regard to research for purposes of clarifying whether advertising claims are misleading, including *Gut Springenheide* at [36], *Estée Lauder* at [31] and *Interflora (No 5)* at [118] and [130]. Ms Callaghan observed that if the concept of "average consumer" was entirely theoretical, then research involving real consumers would not be capable of illuminating anything.

95. Ms Callaghan submitted that the principle that the average consumer test is not a statistical test simply means that it is a matter for the judgement of the relevant decision-maker to determine the perceptions of the average consumer in a given case (*Interflora (No 5)* at [114]). If the notional average consumer were unrepresentative of the consumers who were the targets of the advertising in question, that would defeat the purpose of the Directive, which is to protect real consumers. In support of this, Ms Callaghan cited the judgment of Briggs LJ in *SSBIS v PLT Anti-Marketing Ltd* at [30], a passage to which I referred at [31] above.

96. Ms Callaghan submitted that there is no support in the case law for the claimant's submission that the relevant decision-maker is required to consider the responses of the consumers who are reasonably well-informed in relation to "the features of" the goods or services in question. The case law supports the proposition that the average consumer is the reasonably well-informed consumer of the goods and services in question. In other words, the question whether the claims are misleading is to be judged by reference to the average consumer of the goods or services to whom the advertising is targeted.

97. In relation to the ASA's decision-making process, Ms Callaghan submitted that the ASA was entitled to commission independent research into consumer understanding of "fibre" to assist it in reaching a conclusion as to whether fibre claims in advertising are misleading. She noted that the claimant had welcomed the decision at the time and had, in fact, commissioned its own research involving actual consumers, resulting in the Opinion Leader Report. Ms Callaghan submitted that the ASA clearly understood that the purpose of the Define Report was simply to assist and inform the ASA in reaching its own judgement as to whether "fibre" claims are likely to mislead the average consumer. The participants in the research carried out by Define were designed to be representative of the range of real consumers in the broadband market, from which the average consumer of broadband services could be constructed.

98. Ms Callaghan submitted that, based on the totality of the evidence, the ASA concluded that the average, reasonably well-informed consumer in the broadband market understands that faster speeds mean better broadband, that prices increase as speeds increase and that other services are sold with broadband such as television and the value of the deal should take that into account. She submitted that the ASA concluded that the average, reasonably well-informed consumer paid little attention to the word "fibre" in advertisements or, if they noticed it, considered it to be a generic buzzword for modern fast broadband to which no greater significance is attached.

99. Ms Callaghan submitted that there was no merit in the claimant's argument that neither the ASA Council Paper nor the Minutes referred to the "average consumer" test. The test has for many years been an ingrained part of the Council's decision-making on complaints about advertising. Nothing can be deduced from the lack of an express reference to the test in the Minutes. I note that this submission is supported by the evidence of Mr Lockwood in his witness statement. Ms Callaghan noted that, in any event, members of the Councils were expressly reminded of the need to have regard to the average consumer and transactional decision tests by the Appendix to the ASA Council Paper.

100. Accordingly, Ms Callaghan submitted, the ASA addressed itself to the correct question and did not err in law in its application of the average consumer test. It was entitled to consider consumer understanding of fibre claims from the perspective of the reasonably well-informed consumer of broadband services generally, and it was entitled to have regard when doing so to the Define Report and other evidence.

101. In my view, it is clear that the ASA did not make an error of law in its application of the average consumer test. There is no authority for Ms Rose's submission that the correct test requires the average consumer to be reasonably well-informed about the "features" of the product or service being advertised if that means possessing a higher

level of information than is entailed by simply being reasonably well-informed about the product or service, which is the test the ASA applied.

102. It seems to me that there would be conceptual and practical difficulties with expanding the relevant test to embrace "features" of a product or service, the most prominent of which would be defining what constitutes a "feature". The claimant says that an important feature of broadband service is the mechanism by which it is delivered. The use of "fibre" is a feature of full-fibre and part-fibre broadband services, and it is a feature of a full-fibre service that the optical fibre cable establishes a connection between the exchange and the premises of the end-user.

103. It is essential to the claimant's case that an average consumer must be reasonably well-informed about the feature "fibre" in order to be considered reasonably well-informed when considering advertising of broadband services. Being reasonably well-informed on the claimant's conception would apparently extend to understanding the distinction between part-fibre and full-fibre. Ms Callaghan submitted, with some force, that a consumer with that level of knowledge about fibre is the least likely consumer to be misled by an unqualified reference to "fibre" in an advertisement for broadband services.

104. The term "feature" in relation to a product or service could be considered to have a wide meaning, embracing any characteristic of a product or service, or a narrower meaning, embracing only a distinctive or important characteristic.

105. Taking the wider meaning first, a broadband service will have many characteristics (for example, the composition of the material used to protect the optical core of optical fibre cable) that are irrelevant to an average consumer on any sensible interpretation of the test. Accordingly, it cannot sensibly be said that the average consumer must be reasonably well-informed about every characteristic of the product or service under consideration.

106. If a feature is a distinctive or important characteristic, then a judgement would need to be made as to whether a particular characteristic is sufficiently distinctive or important to constitute a "feature" of the product or service, about which the average consumer must be reasonably well-informed. There is no evidence in any of the authorities supporting the view that the test must be approached in this way. That is understandable, given that introducing that requirement into the test would give rise to additional potential points of conflict in litigation challenging whether the test had been applied correctly.

107. Although the "average consumer" is a hypothetical person or legal construct, it is somewhat different from legal constructs used in legal tests in other contexts, such as "the reasonable person", "the fair-minded observer" or "ordinary decent people", in that it is necessarily linked factually to a particular population of actual persons, namely, consumers at whom the relevant advertising is targeted. This is why the law permits the decision-maker applying the test to have regard, in appropriate circumstances, to a survey of consumer views or an expert's report.

108. The starting point is that the decision-maker needs to make a qualitative judgement about whether the average member of the group of persons at whom the advertising is targeted would be misled by it. The Directive makes clear, as did earlier case law, that

it is not a quantitative or statistical test. In making its qualitative judgement, the decision-maker need not have regard to "the ignorant, the careless or the over-hasty" consumer. It is not the purpose of the Directive to protect that population. In fact, Kitchin LJ in *Interflora (No 5)* at [125] makes it clear that the bar is set higher than that. The decision-maker need not have regard to any consumer other than one who is "reasonably well-informed and reasonably observant" and, of course, circumspect.

109. How does a decision-maker go about making this qualitative judgement? It must rely on its expertise and experience in the relevant subject matter, and it must exercise its faculty of judgement. It is permitted to have regard to other evidence, however, to aid it in making that judgement. Its judgement encompasses the question of how well-informed the average consumer must be in order to be considered "reasonably" well-informed.

110. Ms Callaghan in her submissions used the term "approximate mid-point" of the group of consumers, and that was said by Ms Rose to indicate that the ASA had taken an impermissible quantitative approach to determining the average consumer for the purposes of its Decision. Although it might have been better to have avoided that phrase in order to avoid that inference, I do not take the phrase to mean more than that the ASA started from a consideration of the group of actual consumers at whom broadband advertising is aimed to determine the theoretical "average" consumer. I agree with the ASA that one must start with a consideration of the characteristics, including level of knowledge, of that group in order to ensure that the right population is protected. The decision-maker must exercise its judgement to decide how well-informed a theoretical consumer must be in order to be "reasonably well-informed". In reaching that view, the decision-maker is entitled to consider the general state of knowledge of the group to be protected (excluding the ignorant, the ill-informed, those lacking in circumspection and so on). If necessary, it can have regard to independent research, as the ASA has done in this case.

111. The claimant, it seems to me, starts from the proposition that a consumer should understand the distinction between part-fibre and full-fibre. Only if they do understand the distinction can they be considered "reasonably well-informed" about broadband services. It is understandable that CityFibre, Hyperoptic and others who exclusively provide full-fibre services (as opposed to those who predominantly provide part-fibre services but also have a full-fibre offering in some locations) should want that to be the correct approach. It would suit their commercial interests if that were the case, given the difficulties described in the claimant's evidence of educating consumers about the difference between part-fibre and full-fibre services and of raising awareness of the importance of the distinction. The claimant also, clearly, feels strengthened by the UK government's interest in the question and support for restricting the ability of part-fibre providers to use the word "fibre" in advertising without qualification.

112. The ASA, however, is independent of government, and independent of the interests of both full-fibre and part-fibre broadband services providers. It must exercise its independent judgement, by reference to the actual group of consumers that it is seeking to protect, as to what the theoretical average member of that group *does* know about broadband services rather than what it *should* know.

113. The research sample designed for the Define Report was intended to be representative of the group of actual consumers the ASA was seeking to protect, hence criteria were articulated as summarised in the extracts from the Define Report set out at [70]-[71] above. This was clearly permissible. I am not persuaded by the claimant that the ASA failed to bear in mind or apply the correct test or that there was any defect in its decision-making in this regard.

114. Accordingly, the claimant's first ground fails.

Irrationality

115. In relation to the second ground, Ms Rose noted that the ASA does not contend that consumers can tell whether an advertisement is for full-fibre or part-fibre services where it has used only the word "fibre". She characterised the ASA's case, relying on the Define Bullet Points, as follows: a reasonably well-informed consumer does not consider the fibre content to be a particular priority and therefore being able to distinguish between the services on offer would not affect their purchasing decisions. Ms Rose submitted that this conclusion in the Decision was irrational for the following reasons:

    i) it failed to have regard to the recognised benefits of full-fibre;

    ii) it was made in reliance on conclusions drawn from ill-informed consumers surveyed by Define;

    iii) it was based on a misunderstanding by the ASA of the Define Report and therefore made in reliance on the Define Report in a manner that cannot be rationally sustained; and

    iv) it failed to take account of the Opinion Leader Report.

116. In relation to the recognised benefits of full-fibre, the ASA should have considered that the "overwhelming evidence" of the superiority of full-fibre, including in government and Ofcom publications, was so obviously material to the test that the ASA was required to apply that it should have been taken into account by the ASA making the Decision.

117. Ms Rose submitted that the consumers surveyed by the Define Report were, for the most part, ill-informed since, before being educated about the question, they did not understand the importance of fibre in relation to speed and reliability or the distinction between full-fibre and part-fibre services. Their views were therefore legally irrelevant to the test to be applied by the ASA and should not have been taken into account. The ASA's having taken them into account in making the Decision was therefore irrational.

118. Ms Rose submitted that the ASA failed properly to understand the Define Report and therefore relied on it in a manner that cannot rationally be sustained. Ms Rose's criticisms in this regard were directed principally to the three Define Bullet Points, which she said misstated or omitted findings in the Define Report that were centrally relevant to the question that the ASA was required to address. The ASA failed to consider the actual substantive findings of the Define Report and made no attempt to

explain how those findings could support or be consistent with the conclusions reached in the Decision.

119. Ms Rose's criticisms of the Define Bullet Points may be summarised as follows:

i) The first bullet point, that the term "fibre" was not one of the priorities identified by the consumers surveyed when choosing a broadband package was based on the views of ill-informed consumers. At page 16 of the Define Report, Define had noted that the heaviest internet users did know that they would need a fibre service to deliver the speed they were interested in. Given that full-fibre services are not only faster but also able to deliver guaranteed (rather than merely average) speeds, consumers who identified fibre as a priority due to its link with speed were likely to have an interest in whether it was part-fibre or full-fibre. The first bullet point failed to reflect this.

ii) The second bullet stated that the word "fibre" was not spontaneously identified in advertisements and did not act as a trigger for further action, but that, again, was based on the views of ill-informed consumers. The second bullet point was contradicted at page 29 of the Define Report where Define noted that it was spontaneously identified within adverts, albeit "rarely". Also, at page 31 Define stated that "fibre" was "more likely" to be ignored than to provoke thought or action, but that is inconsistent with the second bullet point, which stated that it never provoked further action.

iii) The third bullet point was that, once educated about the meaning of "fibre", participants did not believe that they would change their previous purchasing decisions. That, according to Ms Rose, significantly misstated Define's actual findings. She pointed to various places in the text of the Define Report which suggested that some participants would have changed their previous purchasing decisions or would in the future be interested in full-fibre when it became more widely available, if the cost was acceptable. She also criticised the way pricing information and costs were presented by Define to the survey participants in connection with questions about their purchasing decisions. The correct question would have been whether consumers considered fibre material to their purchasing decisions and whether they would have chosen full-fibre over part-fibre if all else (including costs) were equal. The evidence in the Define Report, if properly understood, supported the proposition that those consumers most likely to benefit from full-fibre (and in the claimant's view most closely approximating the reasonably well-informed "average consumer") are misled by advertisements that use the word "fibre" without qualification. Since full-fibre is objectively superior to part-fibre, if price is disregarded as it should have been, no other conclusion could rationally be sustained.

120. Finally, Ms Rose submitted that it was irrational for the ASA to ignore the findings of the Opinion Leader Report, which showed that participants in the research who had been educated about the differences between full- and part-fibre and were therefore reasonably well-informed consumers do consider the true fibre content of a service to be an important consideration. Ms Rose rejected the criticisms of the Opinion Leader Report made by the ASA, but noted that, in any event, those criticisms did not appear in the Minutes or in the Decision. She also noted that the Opinion Leader Report was

only made available to the ASA Councils "on request". She submitted that the ASA Councils did not consider the Opinion Leader Report at all, much less endorse any particular criticisms of it.

121. In reply, Ms Callaghan submitted that CityFibre did not come close to establishing that the ASA had acted irrationally in concluding in the Decision that the average consumer was not likely to be misled by the use of the term "fibre" to describe part-fibre services. The ASA had had regard to a range of evidence before reaching its decision. It was entitled to give limited weight to the Opinion Leader Report and the YouGov and uSwitch polls due to their flaws (which were summarised at pages 11 to 13 of the ASA Council Paper) and to place weight on the Define Report, which was based on an appropriate research methodology.

122. In relation to the argument that the ASA failed to have regard to the recognised benefits of full-fibre, Ms Callaghan submitted that the ASA was plainly aware of and took into account the performance advantages of full-fibre over part-fibre when reaching the Decision, as can be seen in various passages of the ASA Council Paper, the Minutes and the Decision. Moreover, the Decision included new guidelines that, along with the rule changes relating to advertising of pricing and speed claims in relation to broadband services, will help full-fibre service providers to differentiate their offering from that of part-fibre providers. (I have set out the new guidelines at [77] above.)

123. Ms Callaghan submitted that the ASA had had regard to the government's view on advertising of fibre claims. This was one of the triggers for its carrying out its own review. But the government's view is not relevant to the question whether the average consumer is likely to be misled by the use of "fibre" in advertising, nor are the performance advantages of full-fibre over part-fibre services relevant to that question.

124. In relation to the claimant's criticism that the participants in the Define research were for the most part "ill-informed", Ms Callaghan noted that the Define Report participants were carefully selected according to appropriate criteria to represent the range of real consumers in the broadband market, from which the "average consumer" could be constructed. Selecting only consumers already familiar with fibre as a delivery mechanism and with the distinction between full-fibre and part-fibre would have meant restricting the population to consumers considerably more knowledgeable than the vast majority of the universe of broadband services customers.

125. Ms Callaghan noted that most of the participants in the Opinion Leader Report fell below the standard for which CityFibre was advocating until educated about the benefits of full-fibre during the course of the Opinion Leader research. It was plainly rational for the ASA to place weight on the views of the participants in the Define research, who were properly representative of the range of consumers targeted by advertising of broadband services.

126. In relation to the ASA's reliance on the Define Report, Ms Callaghan submitted that the ASA clearly understood the Define Report and relied on it as a whole. Moreover, the Define Bullet Points accurately reflected the content of the Define Report:

    i) In relation to the first Define Bullet Point, the Define research showed that "fibre" was not one of the priorities identified by participants when choosing a

broadband package and was not a key differentiator. The primary priorities for participants were speed, cost, reliability (generally related to speed) and data allowances. "Fibre" was not even articulated as among secondary priorities, which for the participants included brand-related preferences, customer service, bundle packages and contract lengths. The focus of participants was on what they get and not on how they get it, namely, the delivery mechanism. That conclusion was, in fact, consistent with the Opinion Leader Report in relation to priorities of participants before they were educated about fibre by Opinion Leader. The fact that a small minority of participants in the Define research knew they would need fibre (by which they meant part-fibre) to get the speed they need does not mean that the participants were misled by fibre claims.

ii) In relation to the second Define Bullet Point, the Define research showed that participants, when viewing advertisements, engaged first with creative elements, then cost, then speed. Fibre content was mentioned rarely. The second Define Bullet Point summarised the trend, which is the nature of qualitative reporting. There is no basis for saying that the ASA Councils did not take the whole of the Define Report into account when reaching the Decision.

iii) In relation to the third Define Bullet Point, Ms Callaghan disputed Ms Rose's reading of the body of the Define Report. The Define research did not show that, after education about fibre, some participants were not satisfied with past purchasing decisions. As explained by Ms Rosenblatt in her evidence, Define did not find any participants who said they would have changed their previous purchasing decision. It is common ground that some participants expressed views about future purchasing decisions and a small proportion expressed an interest in purchasing full-fibre if available at a later date at an acceptable price. However, that information was, in any event, irrelevant to the question of what consumers understood, before education, by the term "fibre" and whether they were misled by the use of the term "fibre" in broadband advertisements.

iv) In relation to the third Define Bullet Point, Ms Callaghan also rejected the criticism that Define had not presented pricing information and costs in an appropriate way during the research. Define made no attempt to introduce the issue of price. They simply reported what the participants told them they had noticed in the advertisements they saw. The participants were provided with a range of advertisements, which included advertisements making no reference to price and even advertisements offering full-fibre at a lower price than part-fibre services. The ASA was not concerned to assess how much consumers were prepared to pay for a fibre service and did not seek to address whether consumers would be more likely to choose full-fibre than part-fibre, whether the price was the same or not. The ASA's sole concern was to assess consumer understanding of the term fibre and determine whether its use in advertising was misleading.

127. I am not persuaded by the claimant that the Decision was irrational. It is clear from the evidence that the ASA had regard to the recognised benefits of full-fibre. The differential between part-fibre and full-fibre broadband services was, in fact, reflected

in the guidelines set out in the ASA's conclusions in the Decision. The ASA's conclusion that the technical superiority of full-fibre over part-fibre was not relevant to the question it had set itself (namely, what consumers understand by fibre claims in broadband advertisements) was not irrational.

128. CityFibre's argument that it was irrational for the ASA to draw conclusions from views of the majority of participants in the Define research who, in the view of CityFibre, were "ill-informed" rests, of course, on its fundamental position that the "average consumer" cannot be "reasonably well-informed" about broadband services unless they are reasonably well-informed about fibre, including the distinction between full-fibre and part-fibre. I have already given my reasons for concluding that CityFibre's position does not reflect the application of the correct legal test.

129. In my view, there is no basis on which I can conclude that it was irrational for the ASA to rely on the sample of consumers selected to participate in the Define research. It was a matter for the expert judgement of the ASA what criteria it should stipulate to select participants in the Define research in order to illuminate its decision as to whether the "average consumer", with the necessary characteristics of being reasonably well-informed, reasonably observant and circumspect, would be misled by the unqualified use of the term "fibre" in advertising of broadband services.

130. CityFibre starts its analysis with the question: what does a theoretical average consumer need to know in order to be a reasonably well-informed average consumer? That is not the right approach. The ASA starts its analysis with the question: what is the level of knowledge of a theoretical average member of the group of consumers at whom the advertising is targeted? That is the right approach. The goal is to protect consumers at whom the relevant advertising is targeted from being misled, and therefore the general level of knowledge about the product or service being advertised needs to be judged by reference to that group.

131. For longstanding policy reasons, discussed in the case law to which I have already made reference, the relevant decision-maker is not concerned to protect those who are not reasonably observant, circumspect or, relative to their peer group, reasonably well-informed. The focus, however, is on determining, as a matter of judgement, the theoretical characteristics of the average member of the group of consumers who require protection from misleading advertising in relation to the particular product or service at issue.

132. In this case, after considering a variety of evidence, the ASA made its expert judgement about the theoretical characteristics of the average member of the group of consumers who are present or likely future consumers of broadband services. On the basis of that expert judgement, the ASA reached the conclusions set out in the Decision.

133. The ASA was required to judge the general level of knowledge of the theoretical average consumer before they were specifically educated about the characteristics of fibre-based delivery of broadband services, including the distinction between full-fibre and part-fibre and the advantages of the former over the latter. That is because, after such education, a consumer is no longer as well-informed as the average consumer, but is, in fact, better-informed. That, in a nutshell, is why it was not irrational for the ASA to give less weight to the evidence and conclusions in the

Opinion Leader Report, which relies on the education of the participants about fibre to reach its principal conclusions.

134. Having read the Define Report, I am unable to conclude that the ASA misunderstood it or relied on it in a way that cannot be rationally sustained. I also do not accept CityFibre's criticisms that the three Define Bullet Points do not accurately summarise the Define Report. It is possible that they could have been better expressed or expressed in a more qualified way. But there is inevitably a balance to be struck between clarity and accuracy when attempting to reduce the findings of dozens of pages of research to three bullet points. The authors of the Define Report were entitled to assume that the readers of the report would read it as a whole and understand that the Define Bullet Points were no more than a high-level summary of the trends identified by the research. The ASA Council Paper, the Minutes, the Decision and the evidence of Mr Lockwood and Ms Rosenblatt collectively provide ample evidence that the ASA had regard to the whole of the Define Report and not merely the Define Bullet Points.

135. In any event, as Ms Callaghan noted during her submissions, only the first two Define Bullet Points were strictly speaking relevant to the ASA's question as to what the average consumer understands by the term "fibre" when used in advertising of broadband services. The third Define Bullet Point concerned the position after education about fibre, after which the participants were no longer representative of the average consumer.

136. For the reasons given above, I am not persuaded that the Decision was irrational. Accordingly, this ground also fails.

Conclusion

137. For the reasons I have given, the claim is dismissed.