



Neutral Citation Number: [2020] EWHC 40 (Ch)

Case No: IL-2017-000030

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
EU TRADE MARK COURT

Rolls Building, Royal Courts of Justice
Fetter Lane, EC4A 1NL

Date: 14 January 2020

Before :

MR JUSTICE NUGEE

Between :

EASYGROUP LIMITED

Claimant

- and -

**(1) EMPRESA AÉREA DE SERVICIOS Y
FACILITACIÓN LOGÍSTICA INTEGRAL S.A. –
EASYFLY S.A.**

**(a company incorporated under the laws of
Colombia)**

(2) MR ALFONSO ÁVILA VELANDIA

Defendants

**(3) GIE AVIONS DE TRANSPORT RÉGIONAL
trading as ATR AIRCRAFT**

**(an economic interest grouping existing under the
laws of France)**

**Proposed
Defendant**

**Mr Michael Bloch QC and Ms Stephanie Wickenden (instructed by Shoosmiths LLP) for
the Claimant**

**Ms Denise McFarland and Robert Dougans, solicitor-advocate (respectively instructed by,
and of, Preiskel & Co LLP) for the 1st and 2nd Defendants**

Ms Emma Himsworth QC and Mr Jaani Riordan (instructed by **Allen & Overy LLP**) for
the **proposed 3rd Defendant**

Hearing dates: 31 October and 1 November 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this
Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE NUGEE

Mr Justice Nugee:

Introduction

1. I have heard a number of applications together which concern the jurisdiction of the English court to hear claims of trade mark infringement, passing off and conspiracy against a Colombian domestic airline and a French aircraft manufacturer. I give the detail of the applications below.
2. The Claimant, easyGroup Ltd (“**easyGroup**”), is an English company and the owner of the “easy” family of brands, the most well-known of which is “easyJet”. It is the registered proprietor of a large number of UK and EU trade marks, which it licenses to the relevant operating businesses (such as the easyJet Airline Company Ltd (“**easyJet**”) which operates the airline business). In this action it complains of infringement of certain of its trade marks, together with associated claims for passing off and conspiracy to use unlawful means.
3. The 1st Defendant (“**Easyfly**”) is a Colombian company which operates an airline providing domestic flights in Colombia. Although its full name appears to be Empresa Aérea de Servicios y Facilitación Logística Integral S.A. – Easyfly S.A., it trades under the name Easyfly (which, it may be noted, is almost, but not quite, an abbreviation of its full name). It is part of easyGroup’s case that since “easy” is not a Spanish word (nor for that matter is “fly”), it is to be inferred that Easyfly adopted its name to take advantage of the reputation of the “easy” brand, which, owing to easyJet, is strongest in relation to passenger aircraft services. easyGroup however accepts that it cannot in this action complain of Easyfly’s actions in Colombia. (There has in fact been some litigation in Colombia as I refer to below). What it complains of are infringing acts which it says have been carried out in the UK and the EU.
4. The 2nd Defendant (“**Snr Ávila**”) is a Colombian national who is founder and President of Easyfly. easyGroup seek to make him liable for infringement, passing off and conspiracy. I will refer to Easyfly and Snr Ávila together as “**the Defendants**” (the proposed 3rd Defendant not yet being joined).
5. easyGroup applied without notice for permission to serve the Defendants out of the jurisdiction in Colombia (its claims at that stage being limited to infringement and passing off). Permission was granted by Morgan J on 15 February 2018. By application dated 15 June 2018 the Defendants have applied to set aside that permission, and in the alternative for easyGroup’s claims to be struck out, or that the proceedings be transferred to the Intellectual Property Enterprise Court (“**IPEC**”). easyGroup has recently made a responsive application, dated 18 October 2019, seeking in effect retrospective validation of the original service in the event that it be found that there was any defect in that service.
6. The proposed 3rd Defendant (“**ATR**”) is a French entity, known as a GIE or Groupement d’Intérêt Économique. This is a type of joint venture under French law, in ATR’s case between two major European aeronautics businesses, Airbus SE (a French company) and Leonardo SpA (an Italian company). It is based in Toulouse at the Airbus campus adjacent to Toulouse’s international airport (Blagnac) and does not have any establishment in the UK. It manufactures turboprop aircraft and in 2018 it

agreed to supply a number of such aircraft which were for the ultimate use of Easyfly. They were manufactured, and painted with Easyfly's logos, in France, flown on test flights in France, delivered in France, and then flown to Colombia via the Canaries. ATR announced the sale, referring to Easyfly, in a press release, copies of which were available at the Farnborough airshow which took place in the UK in July 2018.

7. easyGroup initially applied to join ATR by application notice dated 5 October 2018. At that stage it was also seeking to join another two proposed defendants, and sought permission to amend its Particulars of Claim accordingly. It later abandoned the idea of joining the other two proposed defendants as it had become unnecessary, and by a further application notice dated 22 May 2019 sought instead to join ATR alone as 3rd Defendant, and permission to amend its Particulars of Claim in line with a further draft which (i) pleads claims against ATR and (ii) expands the claims against the Defendants to introduce new allegations of infringement and conspiracy. ATR opposes the joinder.
8. Although, as Mr Bloch said, this is not the trial of anything but only a series of interlocutory applications, a very large number of points, both substantive and procedural, were argued in the course of the hearing, and this judgment is necessarily long and intricate as a result.

Facts

9. The facts have of course not been found at this stage but many of them have not been actively disputed and I can take them as they appear to be from the material in evidence before me.
10. easyGroup is the private investment vehicle of Sir Stelios Haji-Ioannou, the founder of easyJet. Among the many trade marks which it owns are EU and UK trade marks for the word mark "EASYJET", and an EU trade mark for the word mark "EASYFLY". easyJet, and the other associated businesses, also use a distinctive shade of orange as part of their branding and another of easyGroup's EU trade marks is a figurative mark consisting of the word "easyFlights" in a rectangle coloured in that shade of orange.
11. Ms Emma Himsworth QC, who appeared for ATR, said that easyGroup had acquired notoriety for pursuing any trader anywhere in the world who happened to be using the word "easy" in its name, no matter how remote their field of activity from its own, and suggested that numerous examples could be found of its pursuit of hopeless or tendentious claims, or speculative claims against foreign traders having little or no connection to the UK. She instanced the recent decision of Arnold J in *easyGroup Ltd v Easy Fly Express Ltd* [2018] EWHC 3155 (Ch) ("*Easy Fly Express*") where the defendant was a Bangladeshi domestic airline (unconnected with the Colombian Easyfly), and permission to serve out was refused on the basis that the claim had nothing to do with the UK. Mr Michael Bloch QC, who appeared for easyGroup, said that he made no apologies for the fact that easyGroup had brought many actions and sometimes pursued what might appear to be relatively modest claims in themselves: he said that the trade marks owned by easyGroup are its crown jewels and that there is a real problem with traders who adopt "easy" names but are based abroad. I do not propose to decide who might be right or pay any further attention to these matters: I obviously have to decide the present case on the material relevant to this case, not by

reference to whether easyGroup's overall litigation strategy is or is not a justified or successful one.

12. Mr Bloch identified 5 acts that are complained of. I will take them in the same order that he did.
 - (1) *Press release*
13. As already referred to, ATR is a manufacturer of turboprop aircraft and in 2018 agreed to supply a number of such aircraft (of 2 different models) for the use of Easyfly. The sale was not in fact direct to Easyfly but to a Panamanian company called Luftwinds SA ("**Luftwinds**"), but as will appear, it was known that they were destined for Easyfly. ATR entered into Heads of Agreement with Luftwinds on 10 July 2018 (signed on behalf of Luftwinds in Colombia and on behalf of ATR in France) which contemplated the parties negotiating and concluding a definitive sale and purchase contract within 30 days. (Such a contract ("**the Sale and Purchase Contract**") was in due course executed on 3 August 2018, again signed on behalf of Luftwinds in Colombia and on behalf of ATR in France; it provided for the sale initially of 5 aircraft, but with options to Luftwinds to purchase further aircraft.) The Heads of Agreement provided that the aircraft should be delivered to Luftwinds at Blagnac for immediate export. Annexes included in the Heads of Agreement showing the cabin layout described the aircraft as "for Easyfly".
14. ATR issued a press release ("**the Press Release**") announcing the deal on 18 July 2018. It was published on ATR's website, which is hosted in France. But it was also made available in hard copy at the Farnborough Air Show, a well-known aviation exhibition attended by, among others, aircraft enthusiasts and industry representatives, which takes place every two years at Farnborough in Hampshire and which in 2018 took place between 16 and 22 July. About 15 copies of the Press Release were made available in hard copy at ATR's stand for distribution to any journalists who were interested. There is no evidence before me as to how many, if any, of the 15 or so copies were in fact picked up by journalists (or anyone else); and no evidence of any journalist in fact writing an article, or of there being any other publication, on the basis of the Press Release.
15. The Press Release is in English with a byline of "Farnborough, 18 July, 2018". It is headed "Easyfly signs for five ATR -600s" followed by a sub-heading "Colombian carrier to expand and renew its fleet with three ATR 72-600s and two ATR 42-600s". That accurately indicates the nature of the Press Release, the body of which refers to Easyfly (referred to as "Colombian airline Easyfly") and ATR having signed a Memorandum of Understanding for the purchase of 5 aircraft. It contains a quote from Snr Ávila (referred to as "Easyfly President, Alfonso Avila") which said that Easyfly had experienced sustained growth since incorporating ATR aircraft into their fleet and that they intended to continue their development by acquiring the aircraft; and another from ATR's CEO referring to Easyfly as using the new aircraft to continue to satisfy the demand in Colombia's domestic market. It also contains a brief note about Easyfly, describing it as a "regional carrier that operates in Colombia", whose main focus was to serve intermediate cities and whose main base was at the airport in Bogotá.
16. The evidence from M Buompane of ATR is that the Press Release was similar to

other announcements of sales made by ATR on a reasonably frequent basis; and that ATR usually obtains a third party's consent before publishing a press release, especially where, as here, a third party is quoted. The evidence from Snr Triana of Triana, Uribe & Michelsen, the Colombian attorneys acting for the Defendants, is that they do not have any operation or representatives in England (or the rest of the UK) and hence that they "could not and did not participate in any act or authorization in this jurisdiction": Mr Bloch pointed out that Snr Triana did not say that they had not approved or authorised the Press Release at all.

(2) *Branding of new aircraft*

17. The Sale and Purchase Contract provided for ATR to construct the aircraft to the standard defined in an annexed Specification. That included exterior decoration, the livery to be defined by the Buyer (Luftwinds); a standard livery included one logo on the fuselage or fin. The aircraft were built by ATR at its facilities at Blagnac. 7 aircraft had been delivered under the contract at the time of the hearing, with 2 more due in November and December 2019. Apart from the first, which was delivered in October 2018 simply painted white, each of the others that have been delivered between December 2018 and August 2019 have been painted with Easyfly's logos, as will be the remaining two. The logos consist of the word "EASYFLY" at the front of the fuselage, and "EASYFLY.com.co" at the back; in each case the "EASY" is in blue and the "FLY" in orange, in a shade that appears not dissimilar to easyJet's orange branding; the ".com.co" is white outlined in blue which makes it much less distinctive, the body of the planes also being white. An example of the latter logo is as follows:



The painting was carried out for ATR by subcontractors, mostly also based at Blagnac, although one of them is based at another Toulouse airport called Francazal.

18. ATR's aircraft undergo a number of test flights before delivery, between 3 and 10 each in the case of the aircraft supplied to Luftwinds. Painting typically takes place before the test flights. These usually take place for 2 to 3 hours, with take-off and landing at Blagnac, and are carried out entirely in French airspace.
19. Once testing is complete an aircraft is then delivered to the purchaser at Blagnac by means of a bill of sale which transfers title. Once title is transferred it is the purchaser's responsibility to collect the aircraft and fly it to where it is wanted, generally without additional passengers. In the case of the Luftwinds contract, that was Colombia. That is too far for a turboprop to reach in one go and a number of refuelling stops are required. The typical route to Bogotá involves a first refuelling stop at Lanzarote in the Canaries. The Canaries are part of the Kingdom of Spain and hence within the EU. There is evidence that planespotters have taken, and published on the internet, photographs of aircraft painted with the Easyfly logos both at Blagnac in July 2019 (which would appear to be a test flight as there was no delivery on or about that date) and at Lanzarote in August 2019.
20. Those are the only two acts for which easyGroup seek to make ATR responsible (as well as the Defendants). The remaining acts are complained of against the

Defendants alone.

(3) *Ticketing*

21. Easyfly's website allows customers to buy tickets. On 14 February 2019 Mr Gabriel Rodriguez-Cleary of Shoosmiths LLP (easyGroup's solicitors) accessed the website from the UK and bought a ticket for a flight on 27 March between Bucaramanga and Cartagena (two cities in Colombia). He entered a UK e-mail address and received an e-mail at that address confirming the purchase with an e-ticket attached. The ticket (headed "Tiquete electrónico") is in Spanish and records the price paid in Colombian pesos. It has the "EASYFLY.com.co" logo in blue and orange in the top left. It invites the purchaser to print the ticket.
22. Mr Bloch accepted that a ticket such as this would only be sent to the UK or the EU when a person arranged their internal Colombian flights from the UK or Europe, and that the evidence is that this would not happen very often. But he said that did not affect the fact that it was part of Easyfly's modus operandi and that they had not put in place anything to stop it happening.

(4) *Direct marketing*

23. Easyfly send marketing e-mails to customers who have provided e-mail addresses. Two examples are in evidence. First, in July 2018 Ms Tanya Kenan of Stephenson Harwood LLP, the Claimant's former solicitors, bought a ticket through a broker and gave her e-mail address (at Stephenson Harwood). She is a UK citizen and resident in the UK. On 17 August 2018 she received an e-mail offering a special offer for one week. The e-mail was in Spanish and had the same logo at the top.
24. Second, Mr Francisco Del Campo Wright, described as a consultant of easyGroup in the draft amended Particulars of Claim, has bought a number of Easyfly tickets. He is a Mexican citizen and resident in Monaco. He gave a "yahoo.com" e-mail address. On 1 April 2019 he received an e-mail at that address with a number of promotional offers. Again the e-mail, in Spanish, contains the same "EASYFLY.com.co" logo; it also makes liberal use of orange in the text. Although this was relied on as an example of an e-mail sent to someone based in the EU, Monaco is not in fact part of the EU; I have no evidence where he in fact accessed his e-mail. Since Yahoo is, I believe, a web-based service, I assume that he could in principle have accessed it anywhere where he happened to be and had access to the internet, whether that was in Monaco, the EU, Mexico or anywhere else.

(5) *Website*

25. Easyfly maintains a website at "easyfly.com.co". The .co suffix is the country suffix for Colombia. The website is in Spanish and has the same "EASYFLY.com.co" logo as on the aircraft, ticket and marketing e-mails. It is similar to other familiar airline websites, and as already referred to enables customers to buy tickets, which are priced in Colombian pesos. The colours used in the website are predominantly blue and orange.

Jurisdiction in relation to the claims against the Defendants

26. I propose to consider first the question of jurisdiction in relation to the claims against the Defendants. I will put on one side for the moment the points taken by the Defendants on the alleged defects in procedure.
27. By CPR r 6.36 the claimant may serve a claim form out of the jurisdiction with the permission of the Court if one of the gateways set out in Practice Direction 6B paragraph 3.1 applies. The principles applicable to the grant of permission are well established. They were summarised by Lord Collins JSC in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 at [71]. The claimant has to satisfy the Court of three requirements:
- (1) That there is a serious issue to be tried on the merits. The current practice in England is that this is the same as the test for summary judgment, namely whether there is a real (as opposed to fanciful) prospect of success.
 - (2) That there is a good arguable case that the claim falls within one of the gateways.
 - (3) That in all the circumstances of the case England is clearly or distinctly the appropriate forum for the trial of the dispute. This requirement is reflected in CPR r 6.37(3) which provides that the Court will not give permission unless satisfied that England and Wales is the proper place to bring the claim.
28. Some of the submissions of Ms Denise McFarland, who appeared for the Defendants, suggested that in order to meet the second requirement, it was or might be necessary for the claimant to show a good arguable case on the substantive merits. I do not understand this to be the law. As I understand it, it is only necessary for the claimant to show a serious issue to be tried on the substantive merits; the claimant must then show that there is a good arguable case that that claim (assuming it to be a good one) is one that comes within the relevant gateway: see *Easy Fly Express* at [32] per Arnold J which deals with this point.

Trade mark claims

29. I will consider the trade mark claims first. The legal basis on which the claims are made is as follows:
- (1) Use, in the course of trade in the UK and the EU, of identical or confusingly similar signs to easyGroup's marks in relation to identical or similar services, contrary to s. 10(1) and (2) of the Trade Marks Act 1994 ("**TMA 1994**"), and art. 9(2)(a) and (b) of the EU Trade Mark Regulation, Regulation (EU) 2017/1001 of the European Parliament and of the Council ("**EUTMR**"), respectively.
 - (2) Use, in the course of trade in the UK and the EU, of signs which are similar to easyGroup's marks, which marks have a reputation, where the use of the signs, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of easyGroup's marks, contrary to s. 10(3) of TMA 1994, and art. 9(2)(c) of EUTMR, respectively.

30. The substantive argument here, as against the Defendants, is over the first requirement, that there is a serious issue to be tried. If there is, I do not think there is any difficulty in the second and third requirements being met, for essentially the same reasons as given by Arnold J in *Easy Fly Express Ltd*: see at [31]-[33].
31. Thus so far as the second requirement is concerned, Easyfly's application relied on the gateways in paragraphs 3.1(2), (9)(a), (11) and (20)(a) of Practice Direction 6B. Those respectively refer to cases where a claim is made for an injunction ordering the defendant to refrain from doing an act within the jurisdiction (para 3.1(2)); where a claim is made in tort where damage was sustained or will be sustained within the jurisdiction (para 3.1(9)(a)); where the subject-matter of the claim relates wholly or principally to property within the jurisdiction (para 3.1(11)); and where a claim is made under an enactment which allows proceedings to be brought which are not covered by any of the other gateways (para 3.1(20)(a)).
32. In the case of the alleged acts of infringement of the UK trade marks, the first and third of these are plainly satisfied: the UK trade marks are property situate in the jurisdiction, and easyGroup seeks an injunction restraining the Defendants from doing acts within the UK. So in my judgment is the second: the damage claimed is loss of reputation in the shape of dilution of the brand, and that loss seems to me to be suffered where the trade marks are situated, namely in the UK.
33. In the case of the alleged acts of infringement of the EU trade marks, there is equally no difficulty. easyGroup relies for the purposes of gateway (20)(a) on the provisions as to jurisdiction of EUTMR. Chapter X of EUTMR deals with jurisdiction and procedure in legal actions relating to EU Trade Marks. Art. 123 requires the Member States to designate national courts as EU trade mark courts. The High Court has been so designated and is therefore an EU trade mark court. Art. 124(a) provides that the EU trade mark courts shall have exclusive jurisdiction for all infringement actions and – if they are permitted under national law – actions in respect of threatened infringement relating to EU trade marks.
34. easyGroup rely as against the Defendants only on art. 125(2) of the EUTMR, but I will have to consider the provisions in more detail later when dealing with the claims against ATR, and it is therefore convenient to set out art. 125 and art. 126 in full. They provide as follows:

Article 125

International Jurisdiction

1. Subject to the provisions of this Regulation as well as to any provisions of Regulation (EU) No 1215/2012 applicable by virtue of Article 122, proceedings in respect of the actions and claims referred to in Article 124 shall be brought in the courts of the Member State in which the defendant is domiciled or, if he is not domiciled in any of the Member States, in which he has an establishment.
2. If the defendant is neither domiciled nor has an establishment in any of the Member States, such proceedings shall be brought in the courts of the Member State in which the plaintiff is domiciled or, if he is not domiciled in any of the Member States, in which he has an establishment.

3. If neither the defendant nor the plaintiff is so domiciled or has such an establishment, such proceedings shall be brought in the courts of the Member State where the Office has its seat.
4. Notwithstanding the provisions of paragraphs 1, 2 and 3:
 - (a) Article 25 of Regulation (EU) No 1215/2012 shall apply if the parties agree that a different EU trade mark court shall have jurisdiction;
 - (b) Article 26 of Regulation (EU) No 1215/2012 shall apply if the defendant enters an appearance before a different EU trade mark court.
5. Proceedings in respect of the actions and claims referred to in Article 124, with the exception of actions for a declaration for non-infringement of an EU trade mark, may also be brought in the courts of the Member State in which the act of infringement has been committed or threatened, or in which an act referred to in Article 11(2) has been committed.

Article 126

Extent of jurisdiction

1. An EU trade mark court whose jurisdiction is based on Article 125(1) to (4) shall have jurisdiction in respect of:
 - (a) acts of infringement committed or threatened within the territory of any of the Member States;
 - (b) acts referred to in Article 11(2) committed within the territory of any of the Member States.
 2. An EU trade mark court whose jurisdiction is based on Article 125(5) shall have jurisdiction only in respect of acts committed or threatened within the territory of the Member State in which that court is situated.
35. As against the Defendants the application of these provisions is straightforward. Those defendants are neither domiciled nor have an establishment in the UK. That means that, subject to art. 125(5), art. 125(2) requires proceedings for infringement to be brought in the courts where the Claimant is domiciled, namely the UK; and art. 126(1)(a) confers jurisdiction on the UK court in respect of acts of infringement committed or threatened within the territory of any of the Member States. That therefore includes all the acts of infringement complained of in this action that have taken place anywhere in the EU, and enables the UK court to grant a pan-EU injunction. It is true that art. 125(5) also confers jurisdiction on the courts of the Member State in which an act of infringement has taken place, so that the appropriate French and Spanish courts would have jurisdiction over any acts that took place in France and Spain respectively, but by art. 125(2) such courts could only deal with acts taking place within their territory and they would not be able to grant pan-EU relief.
36. Nor is there any difficulty over the third requirement. If there is a serious issue to be tried, I am satisfied that England is clearly the appropriate forum and the proper place in which to bring the trade mark claims: there is no other court that can try the UK trade mark claims, and for the reasons just given no other court that can grant pan-EU relief in respect of the EU trade mark claims.

Serious issue to be tried – website

37. So the significant question is whether there is a serious issue to be tried. I will start with the website. It is common ground that trade mark rights are territorial. Thus the proprietor of a UK trade mark has exclusive rights which are infringed “by use of the trade mark in the United Kingdom without his consent” (s. 9(1) TMA 1994); the same applies to EU trade marks, which have effect “throughout the Union” (art. 1(2) of EUTMR). I consider in more detail below what this requirement of territoriality means in practice, but there is no dispute that it certainly means that an infringing act committed outside the UK or EU (as appropriate) cannot be sued on as an infringement of a UK or EU trade mark: *Kerly’s Law of Trade Marks and Trade Names* (16th edn, 2018) §16-134.
38. The fact that websites can be accessed anywhere in the world does not mean that, for trade mark purposes, the law regards them as being used everywhere in the world (*ibid*). It is necessary to consider whether the website is “targeted at” the UK or EU. I can conveniently take the law from the judgment of Arnold J in *Easy Fly Express* at [11]-[13] as follows:

“11. There is no dispute as to the legal principles, which have been considered in two recent decisions of the Court of Appeal. In *Merck KGaA v Merck Sharp & Dohme Corp* [2017] EWCA Civ 1834, [2018] ETMR 10 [“*Merck*”] Kitchin LJ, having considered the judgments of the Court of Justice of the European Union in Joined Cases C-585/08 and C-144/09 *Pammer v Reederei Karl Schluter GmbH & Co. KG and Hotel Alpenhof GesmbH v Heller* [2010] ECR I-1252 [“*Pammer*”], Case C-324/09 *L’Oréal SA v eBay International BV* [2011] ECR I-6011 [“*L’Oreal*”] and Case C-173/11 *Football Dataco Ltd v Sportradar GmbH* [EU:C:2012:642], [2013] FSR 4, and a number of domestic authorities, summarised the relevant principles as follows:

“[167] First, in determining whether an advertisement of goods bearing a trade mark on the website of a foreign trader constitutes use of the trade mark in the UK, it is necessary to assess whether the advertisement is targeted at consumers in the UK and in that way constitutes use of the mark in relation to goods in the course of trade in the UK.

[168] Secondly, the mere fact that a website is accessible from the UK is not a sufficient basis for concluding that an advertisement displayed there is targeted at consumers in the UK.

[169] Thirdly, the issue of targeting is to be considered objectively from the perspective of average consumers in the UK. The question is whether those average consumers would consider that the advertisement is targeted at them. Conversely, however, evidence that a trader does in fact intend to target consumers in the UK may be relevant in assessing whether its advertisement has that effect.

[170] Fourthly, the court must carry out an evaluation of all the relevant circumstances. These may include any clear expressions of an intention to solicit custom in the UK by, for example, in the case of a website promoting trade-marked products, including the UK in a list or map of the geographic areas to which the trader is willing to dispatch its products. But a finding that an advertisement is directed at consumers in the UK does not depend upon there being any such clear evidence. The

court may decide that an advertisement is directed at the UK in light of some of the non-exhaustive list of matters referred to by the Court of Justice in *Pammer* at [93]. Obviously the appearance and content of the website will be of particular significance, including whether it is possible to buy goods or services from it. However, the relevant circumstances may extend beyond the website itself and include, for example, the nature and size of the trader's business, the characteristics of the goods or services in issue and the number of visits made to the website by consumers in the UK."

12. What the Court of Justice said in *Pammer* at [93] was as follows:

"The following matters, the list of which is not exhaustive, are capable of constituting evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile, namely the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists."

13. In *Argos Ltd v Argos Systems Inc* [2018] EWCA Civ 2211 Floyd LJ observed at [48]:

"Targeting is not an independent doctrine of trade mark law. It is, in essence, a jurisdictional requirement. Because trade marks are territorial in effect, those who are doing business exclusively outside the United Kingdom should not have their dealings subjected to the trade mark law of the United Kingdom. Failure to recognise this principle is a failure to give effect to the territoriality of the underlying rights. Moreover the fact that a website is accessible from anywhere in the world, and therefore may attract occasional interest from consumers there when this is not intended, should not give rise to any form of liability."

39. Mr Bloch also referred to what Arnold J had said about *Pammer* in *Stichting BDO v BDO Unibank Inc* [2013] EWHC 418 (Ch) ("**BDO**") at [103]:

"The Court held at [69]-[75] that it was not sufficient for this purpose that a website was accessible in Member States other than that in which the trader concerned was established: "the trader must have manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer's domicile". It went on at [80]-[81] to say that relevant evidence on the point would be "all clear expressions of the intention to solicit the custom of that state's customers". Such a clear expression could include actual mention of the fact that it is offering its services or goods "in one or more Member States designated by name" or payments to "the operator of a search engine in order to facilitate access to the trader's site by consumers domiciled in various member states"."

40. Such being the law, Mr Bloch submitted that Easyfly's website was targeted at the UK and the EU, or at least that at this stage that was fairly arguable with a real prospect of success. He relied on the fact that Easyfly had chosen the name Easyfly. As already referred to, "easy" is not a Spanish word, but it is a word strongly associated, in the field of passenger aircraft services, with the reputation of the "easy" brands owned by easyGroup, particularly the easyJet brand. He said that it would be very surprising if those who had chosen the name had done so without being aware of that reputation; it was inherently unlikely that someone would have chosen to use "Easy" as a name for an airline service in Colombia by coincidence, and it would beggar belief that they had not only stumbled by chance on the name but had also used an orange branding. The likelihood was therefore that they had deliberately sought to take advantage of easyGroup's reputation.
41. He referred me in that respect to the litigation which had taken place in Colombia. In those proceedings Easyfly was the claimant and easyGroup and easyJet were defendants. Easyfly was complaining of infringement by easyGroup and easyJet of a number of marks (or 'brands') registered in Colombia of which it was the proprietor, including "Easyfly" and "Easyjet". In a judgment dated 7 October 2019 the Colombian court dismissed the claim. In the course of his judgment, the judge (Judge Adriana Ayala Pulgarín) said (in the translation before me):

"All of the above, allows us to conclude that at the time when EASYFLY started the proceedings for the registration of, amongst others, the EASYJET brand, the defendant companies already existed and exercised in the European and UK market, activities inherent to their corporate purpose, under the family of brands with the "easy" expression that they hold.

In this vein, it is unjustifiable for the plaintiff who at the time of registering their brand in Colombia was aware of the existence of the brands associated with the defendants, and despite that decided to work in the same market and under the same distinguishing symbol and brands, to [now] pretend to be a victim of brand infringement in view of the risk of confusion or the unauthorised use of the brand, when they promoted or facilitated the situation."

Ms McFarland said that what the Colombian judge had said is not binding on me; Mr Bloch accepted that that was so but said that the reasoning was compelling.

42. Mr Bloch then submitted that the use of the name conveyed the message to EU consumers that the services offered were for them, and it was significant in this context that the services offered by Easyfly were the same services as easyJet provides. That by itself would convey the message to anyone who made the link that Easyfly was looking for customers including easyJet customers. A very large proportion of such easyJet customers will be based in the UK or EU: it is well-known that easyJet flies from the UK to Europe, and leaving aside any question of judicial notice, there is in fact evidence before me that in 2014 the airline operated 675 routes of which the vast majority were to/from the UK or other EU countries, only 50 being to or from non-EU countries. Mr Bloch said that a website aimed at easyJet customers is therefore aimed at the UK and the EU. (Mr Bloch also had a point that customers familiar with the easyJet name might assume that the Easyfly name was used instead of easyJet because the aircraft used were not jets but turboprops, but I doubt this particular point adds much).

43. Mr Bloch pointed to the fact that there was evidence of one example of actual confusion: Mr del Campo Wright met a German citizen, Ms Gina Griesbach, in Colombia who had bought an Easyfly flight through the website and had assumed that Easyfly and easyJet (with which she was very familiar) were in some way connected. Ms McFarland said that it was not clear where or how she had bought her ticket, and that her evidence was potentially tainted as it might have been elicited by Mr del Campo Wright, who was acting for easyGroup: I agree with Mr Bloch that these are matters for trial, and do not affect the point that there is before the Court evidence that if taken at face value shows actual confusion.
44. He also pointed to a number of other factors: the international nature of the activity; the fact that the Easyfly website accepts international credit card payments; the fact that the website invites customers to contact Easyfly through the WhatsApp messaging service, giving an international dialling code (and there is evidence that this has in fact been used by EU customers to contact Easyfly); and that Easyfly has a Facebook page accessible in English (the 'landing page' is in Spanish but users can select a number of languages including English), which directs the consumer to the Easyfly website. In his written submissions he also relied on the fact that there is evidence that Easyfly has used European brokers; there is a substantial dispute of fact in relation to this last point as to whether such brokers were or were not authorised by Easyfly, but I need not consider it as in oral submissions in reply Mr Bloch confirmed that he was not asking me to take any account of sales that had taken place through brokers.
45. In summary Mr Bloch said that while the website was no doubt primarily accessed in Colombia, it was directed at the UK and the EU among other places. Easyfly were willing to serve international customers. It was in the nature of the business that someone from the UK or the EU who wished to plan a trip to Colombia could access the website and believe that the services there offered were directed at them. Before disclosure it was impossible to know how many such customers had in fact used the website.

Is it a defence that the services are provided only in Colombia?

46. Ms McFarland had a number of overarching points that applied generally to the infringements relied on. One concerned the need for easyJet to be joined as an exclusive licensee; a second the availability of an 'own name' defence to Easyfly; and a third the question whether Snr Ávila was personally liable for acts of Easyfly. I consider those below. But it is convenient to deal here with another overarching point she relied on.
47. This is that the services which Easyfly offer are all provided in Colombia. Whether one considers the website, the marketing e-mails or the tickets sent to the UK, no-one would see this as relevant to any services other than services in Colombia. That means, she submitted, that there is no infringing use. She referred me in this connection to the decision of Jacob J in *Euromarket Designs Inc v Peters* [2001] FSR 20 ("*Crate & Barrel*") which concerned both online and offline advertising of the defendant's business, a shop in Dublin. The offline advertising was in *Homes & Gardens*, a magazine which circulated in the UK as well as Ireland. That was held not to be an infringement of a UK trade mark. She submitted that that was authority that even an act of Easyfly deliberately targeting UK customers would not be an infringing

act as the underlying services all take place in Colombia.

48. I do not think *Crate & Barrel* establishes this. First, it is technically only a decision that summary judgment should not be granted against the defendant, and Jacob J recognised that his view was only provisional, the extent to which national trade mark law impinges on other countries being a question that might ultimately have to be considered by the European Court of Justice (now the CJEU): see at [20]. His decision now of course has to be read subject to the later decisions of that Court.
49. Second, what Jacob J actually decided was as follows. He rejected the contention of the claimant that all that it needed to show was use in the UK and that since the advertisement in Homes & Gardens appeared in the UK that was enough: see at [13]-[16]. He then expressed the view that the phrase (in s. 10 TMA 1994) “using in the course of trade ... in relation to goods or services” was a composite phrase and the question is therefore not just whether the use is in the UK, but whether there is use in the course of trade in the UK; one needs to ask whether the defendant has any trade here (at [19]). That was approved by Kitchin LJ in *Merck* at [163] as follows:
- “in considering whether the accused use constitutes an infringement, it is always necessary to have in mind that the question is ultimately a unitary one, namely whether the defendant has used the impugned sign in the course of trade in relation to relevant goods or services in the territory in issue.”
50. That still leaves a question what is meant by use in the course of trade in relation to goods or services in the UK. Do the *goods or services* have to be supplied in the UK, or is it enough that the *use in the course of trade* is in the UK? In relation to goods, the question will often not arise as in most cases someone who is using a sign in the course of trading here will be offering to supply goods here. This is the sort of case Jacob J had in mind in *Crate & Barrel* where he referred to a trader from state X trying to sell goods into state Y, and to UK customers buying goods for consumption here (at [19]). But the same is not necessarily true of services. Of course a business in state X may sell services into state Y where the services will be supplied and consumed in state Y. But it is also entirely possible for a business in state X to sell to consumers in state Y services that will be supplied to them in state X. Mr Bloch gave the hypothetical example of a business in the UK that sold to UK consumers trekking holidays in the Himalayas. He said that that would be a trade in services in the UK even though the services would be supplied in India (or Nepal), and that if such a business marketed its holidays under the name “North Face”, that would be use of that name in the course of such a trade. If one assumes (as is presumably the case) that there is a registered proprietor of a UK trade mark for North Face, it would, he said, be no defence to an action for infringement that although the use in the course of trade was here, the services supplied were not.
51. In my judgment Mr Bloch is right about this. If Ms McFarland were right, it would mean, as she accepted, that Easyfly would not be committing an act of infringement even if it deliberately and unequivocally targeted UK consumers, for example by erecting a billboard at Luton airport advertising its services and encouraging the use of its website. Indeed it would appear to mean that there would be no act of infringement even if Easyfly opened a physical shop on every High Street in the UK so long as it only sold tickets for flights in Colombia. That I think would be a surprising result.

52. It would also seem to run counter to the cases in the ECJ/CJEU, and here, on the targeting of websites. The whole question in *Pammer* was whether a website was directed at consumers in one Member State where the services were to be supplied in another Member State: in one of the two conjoined cases an Austrian resident booked a sea-voyage starting from Trieste in Italy, and in the other a German resident booked a stay in an Austrian hotel. Those were admittedly not trade mark cases, but the principles were subsequently applied in *L'Oreal* and in the domestic cases without there being any suggestion that different considerations applied in trade mark cases. Indeed Kitchin LJ's summary in *Merck* (cited in paragraph 38 above) refers to "use ...in the course of trade in the UK" (at [167]) and "intention to solicit custom in the UK" (at [170]), both of which refer naturally to the question whether acts in the course of trade are done in the UK, not to the question where the underlying services are supplied; and see also the analysis of Arnold J in *BDO* at [137] where he concluded that an advertisement promoting the services of the defendant bank in the Philippines to foreign investors was targeted at consumers in the UK, without any suggestion that this could be affected by whether the services would be supplied only in the Philippines.
53. For all these reasons I am not persuaded by Ms McFarland's submission that the fact that all the services supplied by Easyfly are supplied in Colombia is an overarching answer to the claims for infringement; at the very least I am satisfied that there is a serious issue to be tried on the point.
54. So far as the website specifically is concerned, Ms McFarland pointed to the fact that the website was in Spanish, with a Colombian domain name (indicated by the .co suffix) and that the prices were quoted only in Colombian pesos; and payments could only be made in Colombian pesos or US dollars, not in Euros or sterling. She also said that it is not enough that anyone can view the website from the UK; what needs to be considered is the content.
55. The question as I understand it from the authorities is whether the average consumer in the UK or the EU would consider that the website was targeted at them, or was not for them; see also the reference in *Pammer* at [92] to the trader:
- "envisaging doing business with consumers domiciled in one or more member states, including the member state of that consumer's domicile, in the sense that it was minded to conclude a contract with them."
- It seems to me that Mr Bloch is right that there is a serious issue to be tried in this respect. There are undoubtedly missing many of the features listed in *Pammer* at [93] as matters capable of constituting evidence that the trader's activity is directed to a particular Member State: the website does not use a language or a currency other than that used in Colombia; it does not provide facilities for making reservations other than in Spanish; it does not use a top-level domain name other than that of Colombia; it is not suggested that it mentions an international clientele.
56. On the other hand this list is non-exhaustive, and the very nature of the activity is likely to be of interest to visitors to Colombia from other countries. There is force in the point made by Mr Bloch that some backpackers (or other visitors) from Europe planning to travel to Colombia are likely to try and arrange internal Colombian flights before leaving Europe, and if they were to do so would not necessarily be deterred by

the website being in Spanish and the price in Colombian currency. A substantial number of EU citizens speak Spanish and it is not difficult for others to translate websites through a browser; and so long as international credit cards are accepted, the fact that prices are quoted in local currency is not likely to be a deterrent either. The website contains an invitation to contact Easyfly's call centre through a WhatsApp messaging service with an international dialling code. Mr Bloch may also be right that the very name and get-up acts as a lure to UK and EU consumers to think that the website is for them.

57. Mr Bloch accepted that there was scope for argument to the contrary, but these matters seem to me sufficient to raise an arguable case with a real prospect of success, which at this stage is all that is required.

Ticketing and marketing e-mails

58. Having reached this conclusion, I can deal with the next two matters much more briefly, namely the sending of electronic tickets and direct marketing e-mails to e-mail addresses of UK (and EU) consumers.
59. Here Mr Bloch said that distributing tickets (which are evidence of a right to fly) was use in the course of trade in the UK and EU. So was direct mail advertising (a classic form of infringement). It did not matter that Easyfly may not have specifically set out to target UK and EU customers with its advertising; it was part of Easyfly's modus operandi that if you flew with them and gave them an e-mail address, they would send you direct mail, and there were practical steps that they could take to avoid that.
60. Ms McFarland said that the tickets were not used in the UK; they were a receipt for payment and permission to fly, but they could only be used in Colombia, and there was nothing indicating that they should be printed in the UK or in any particular location. All that needed to be done was to present them in Colombia. As to the direct marketing, she said that that was only actionable if targeted at the UK and EU.
61. Given the decision I have already come to on the website, I am satisfied that there is a serious issue to be tried in relation to both the sending of electronic tickets and direct mail advertising. The former seems to me to be part and parcel of the process by which UK and EU consumers can use the website to buy tickets, with the result that if the website is arguably infringing as being directed at the UK and the EU, so must the sending of the tickets be. I do not think it matters whether they are printed here or not: they are received here, and there must be an arguable case that that is enough. (I should make it clear that that is not based on any technical evidence as to how e-mails work, but on an instinctive view that when a UK resident opens their e-mail in the UK and sees the content, that is receipt of the e-mail in the UK). As Mr Bloch submitted, a ticket would appear to be both a business paper and a form of advertising, and use of a sign on business papers or in advertising are examples specifically mentioned in the legislation (s. 10(4)(d) TMA 1994, art. 9(3)(e) of EUTMR). Mr Bloch may well be right that the sending of tickets would be infringing even if the website were found not to be directed at the UK or EU (on the basis that the sending of an individual ticket to an individual consumer in the UK or EU is necessarily use in the course of trade in the UK or EU), but I need not decide this.
62. As to the direct marketing, this is another form of advertising, and indeed a specific

invitation to the recipients to do business via the website, and it again seems to me that there is at the lowest a serious issue to be tried that, if sent to e-mail addresses in the UK or EU, this amounts to an infringing use in the course of trade in the UK and EU.

The Press Release

63. I consider next the Press Release. There is of course no doubt that this constitutes use of the word “Easyfly” in the UK. Mr Bloch said that the press release is not just referring to the purchase by the Easyfly company of a number of aircraft but is promoting an airline business, and refers, for example in the quote attributed to Snr Ávila, to the services that it provides. There was, he said, a sufficient argument that that amounted to use of Easyfly as a trade mark.
64. Ms McFarland said that the Press Release was generated by ATR and there was no evidence that the Defendants were complicit in its terms. I do not accept this: the evidence is that there is a likelihood, not denied in terms by Snr Triana, that the Press Release was authorised by Easyfly (and, in view of the quote, by Snr Ávila personally).
65. Ms McFarland said that the use of Easyfly in the Press Release was as a corporate name not as a trade mark. She adopted the submissions on this point made by Ms Himsworth. These were made by reference to the decision of the Court of Justice in *Céline SARL v Céline SA* (C-17/06) [2007] ETMR 80 (“*Céline*”) at [20ff]. This establishes that (i) there is only use of a sign in relation to goods or services if it used for the purpose of distinguishing the goods or services in question from those of other proprietors [20]; (ii) the purpose of a company or trade name is not of itself to distinguish goods or services – the purpose of a trade name is to distinguish a business that is being carried on, and [21]:
- “Accordingly, where the use of a company name, trade name or shop name is limited to identifying a company or designating a business which is being carried on, such use cannot be considered to be “in relation to goods or services” ”
- (iii) there is however use in relation to goods or services where the third party uses that sign in such a way that a link is established between the sign which constitutes the company or trade name of the third party and the goods or services provided by the third party [23]; and (iv) unauthorised use of a sign cannot be prevented unless it is liable to affect the functions of a registered mark, in particular its essential function of guaranteeing to consumers the origin of the goods or services [26]. Use for purely descriptive purposes that does not affect the functions of the mark is not infringing use: *Case C-206/01 Arsenal Football Club v Reed* [2003] Ch 454 at [42].
66. Ms Himsworth said that, applying these principles, the Press Release did not constitute an infringing use. The Press Release, which was issued by ATR, did no more in effect than say “we have sold some planes to Easyfly; Easyfly is a Colombian domestic airline that flies people around Colombia.” That was a use of “Easyfly” to refer to the company which had bought ATR’s aircraft and a purely descriptive statement of who Easyfly are and what they do. That is not capable of affecting the essential function of easyGroup’s trade marks because it is a purely descriptive (and truthful) statement. ATR are not offering any goods or services under the Easyfly

name. Moreover although the Press Release was made available at Farnborough in the UK, it related to aircraft which by its own terms were to be supplied to a Colombian airline for use in Colombia. That had no effect on easyGroup's ability to enforce easyGroup's trade mark rights in the UK.

67. Ms McFarland similarly said that the Press Release was not offering any services in either the UK or the EU; it was not seeking to sell holidays, tickets, travel or anything else. The quote from Snr Ávila in effect said no more than that "we are doing well" and was just a puff. This was not a trade mark use.
68. In my judgment however Mr Bloch is right that there is at least a serious argument that the use of "Easyfly" in the Press Release is a relevant trade mark use. If one goes back to *Céline*, it is clear that the ECJ accepted that not all references to a corporate name are trade mark uses: for example a reference to a company's shareprice or to its employment practices might very well not say anything about the goods or services the company provides. But the critical question, identified by the ECJ in *Céline* at [23], is whether the third party uses a sign in such a way that "a link is established" between the sign which constitutes the company or business name of the third party and the goods it markets or services it provides. Mr Bloch said that the name Easyfly was here being used to promote the company's services. That was another form of advertising. The question is whether that use of the sign established a link between Easyfly and the services it offers. I agree that it is at least seriously arguable that it did.
69. The next question is whether the use of the sign is liable to affect the functions of the registered trade mark, in particular its essential function of guaranteeing to consumers the origin of the goods or services in question: see *Céline* at [26]. Here Mr Bloch said that any use which causes people to believe that there is another airline associated with easyGroup does affect that function. As the ECJ put it in *Céline* at [27]:

"That is the situation where the sign is used by the third party in relation to his goods or services in such a way that consumers are liable to interpret it as designating the origin of the goods or services in question. In such a case, the use of the sign is liable to imperil the essential function of the mark, since, for the trade mark to be able to fulfil its essential role in the system of undistorted competition which the EC Treaty seeks to establish and maintain, it must offer a guarantee that all the goods or services bearing it have been manufactured or supplied under the control of a single undertaking which is responsible for their quality."

Again I agree that that gives rise to a triable issue, namely whether the terms of the Press Release are such that those reading it would interpret the use of the name Easyfly as designating the origin of the services referred to as being associated with the easyGroup.

70. In principle therefore I agree that there is an arguable case of infringement against Easyfly. But there is a real question whether this claim is *de minimis*. Mr Bloch admitted that the actual infringement, if any, is very minor. No more than 15 or so paper copies were made available at ATR's booth at Farnborough. It is unknown whether any of them were picked up, but no evidence has been adduced that any journalist wrote up the story, or that the contents of the Press Release have been published or distributed at all. Even if there were a technical infringement, it would neither be plausible to suggest, nor is in fact suggested, that easyGroup has sustained

any significant damage; nor is it suggested that there is any threat to repeat it. Mr Bloch said that it was incorrect to say that the owner of a trade mark had to put up with a certain level of infringement; but I am not sure this is an answer. I will return to this point below.

Branding the aircraft

71. The final act of infringement relied on against the Defendants is the painting of the aircraft with the Easyfly logos and flying them, so painted, in Europe.
72. Mr Bloch said that painting the name Easyfly on the aircraft was a form of branding. My note of his oral submissions is that he accepted that the fact of painting was not by itself an infringement, but in response to my draft judgment to this effect, it was said that this was wrong and that the painting was in fact alleged to be an infringement, as being the affixing of signs to goods, under art. 9(3)(a) of EUTMR. I need not consider this particular point further as Mr Bloch undoubtedly said that when the aircraft were thereafter taken out of the hangar and flown, either on test flights in France, or from Toulouse to Lanzarote, in each case necessarily in view of the public, that was a form of advertisement to the effect that air services were being offered under the name Easyfly. It did not matter that the flights were not in fact carrying passengers; nor the fact that it was on its way to Colombia, which is not a defence known to law. He gave an analogy of an ice cream van being driven around London with “Cadbury” painted on it: it would be no defence to an action for infringement to say that there was not in fact any ice cream on board, nor that the van was only being driven in London en route to India.
73. Ms McFarland made a number of points. She said that Easyfly was not the contracting party, which was Luftwinds. That is so, and under the Sale and Purchase Contract the specification, including the livery, was a matter for Luftwinds; but it is not, and could not realistically be, disputed that the aircraft were destined for Easyfly, and the obvious inference is that Luftwinds was acting in the contract for the benefit of Easyfly and at Easyfly’s request. She said that the pleading was not detailed enough. But what is sought to be pleaded in the Amended Particulars of Claim is that the Defendants authorised ATR, or acted in common design with ATR, to do certain things, including applying the Easyfly logos to aircraft, exporting the aircraft under those signs, and using those signs in the advertising of their services. That seems sufficiently pleaded to me. She said that the aircraft had never touched UK airspace and there was no contract made in the UK. I accept that this particular complaint is not based on any acts in the UK. But for reasons already given that does not prevent a complaint being made before the English court against the Defendants of acts of infringement of the EU trade marks under art. 125(2) of EUTMR, and the acts complained of undoubtedly took place in the EU. She said that flying a plane was not an infringing use. But Mr Bloch’s case is that flying a plane painted with the Easyfly logo in view of the public is an infringing use because it is a form of advertisement, and I do not think that can be regarded as not raising a triable issue. Finally she said that it was not Easyfly who flew the planes. But whether that is so or not, there is again sufficient evidence that the contract was entered into at Easyfly’s request, and that contract inevitably envisaged that the planes would have to be flown out of France once painted. If this is an act of infringement, it seems to me that there is at least a serious issue to be tried that Easyfly are responsible for it.

74. I have now considered the five matters complained of against the Defendants, and have concluded that easyGroup have shown that there is a serious issue to be tried in relation to each of them (subject to the *de minimis* point in relation to the Press Release). I now consider some overarching points made by Ms McFarland.

s. 31 TMA 1994

75. The first was based on the provisions of s. 31 TMA 1994. The general effect of s. 31 is to permit an exclusive licence to be granted on terms that the licensee can bring infringement proceedings themselves. By s. 31(1) an exclusive licence may provide that, to the extent as may be provided by the licence, the licensee shall have the same rights and remedies as if the licence had been an assignment, and such provision enables the licensee to bring infringement proceedings in his own name; by s. 31(2) those rights and remedies are concurrent with those of the proprietor; and by s. 31(4):

“Where proceedings for infringement of a registered trade mark brought by the proprietor or an exclusive licensee relate wholly or partly to an infringement in respect of which they have concurrent rights of action, the proprietor, or, as the case may be, the exclusive licensee may not, without the leave of the court, proceed with the action unless the other is either joined as a plaintiff or added as a defendant.

This does not affect the granting of interlocutory relief on an application by a proprietor or exclusive licensee alone.”

76. easyGroup’s pleaded case is that it has granted exclusive licences to easyJet to use certain marks, but as can be seen from the terms of s. 31(1) the section only applies where a licence contains a provision conferring concurrent rights on the licensee. The terms of any relevant licence are not in evidence and I am not told what they say. Mr Bloch said that if the point had been raised earlier (as far as I am aware it was first raised in Ms McFarland’s oral submissions) it would have been possible to address it, but it was no reason not to deal with the applications as they stood. If the action proceeded, and the licences once examined turned out to confer concurrent rights, easyJet could be joined. The obvious intent of the section was to prevent the defendant from being at risk of being sued twice.
77. I accept Mr Bloch’s submissions. I cannot determine on the state of the evidence whether easyJet does or does not have concurrent rights under s. 31 TMA 1994, but even if it does, I can, pursuant to the proviso to s. 31(4), grant interlocutory relief on the application of easyGroup alone, or alternatively give leave to easyGroup to proceed with the action to the extent of dealing with the applications before me. I propose to do so. It seems to me that no-one is prejudiced by proceeding at this stage even in the absence of easyJet. No doubt if easyJet does have concurrent rights it is important to ensure that it is joined before any action proceeds to trial, but s. 31(4) does not in my judgment mean that I should not decide the applications before me.

‘Own name’ defence

78. Ms McFarland made the point in the course of her submissions that all of the alleged infringements were defensible on the basis of an ‘own name’ defence. I did not understand her to be suggesting that this is something I can resolve now or that amounts to a good reason for concluding that there is no serious issue to be tried; I understood her merely to put a marker down, to avoid it being said later that she had

not mentioned it.

79. If I am wrong about that and she was relying on it as relevant to the current applications then I have no hesitation in saying that it does not constitute a knock-out defence such as to enable me to conclude that the claims of infringement have no real prospect of success. The own name defence is provided for in the legislation (s. 11(2)(a) TMA 1994, art. 14(1)(a) EUTMR), but in the case of EUTMR, it is limited to natural persons, and on the face of it therefore is not available to Easyfly at all. In the case of TMA 1994, it was not formerly not so limited, but since 14 January 2019 it too has been limited to individuals; further it is in any event subject to a proviso (mirroring a similar proviso in art. 14(2) EUTMR) as follows:

“provided the use is in accordance with honest practices in industrial or commercial matters.”

80. Mr Bloch referred me to *BDO* at [181] where Arnold J considered a list of factors relevant to the question whether use is in accordance with honest practices. The first is whether the defendant knew of the existence of the trade mark. See also the Opinion of Advocate-General Eleanor Sharpston QC in *Céline* at [54]:

“A person cannot normally be said to be acting in accordance with honest commercial practice if he adopts a name to be used in trade for purposes of distinguishing goods or services which he knows to be identical or similar to those covered by identical or similar existing trade mark[s].”

In the light of the conclusions of Judge Pulgarín in the Colombian proceedings Mr Bloch said that it could not be said that easyGroup did not get over the arguability hurdle in this respect. I agree.

Passing off

81. easyGroup also brings a claim in passing off against the Defendants. There was no dispute as to the elements of this tort, which can be summarised briefly by saying that the claimant must establish the relevant goodwill, a misrepresentation by the defendant, and resultant damage. The claim is only brought in respect of goodwill in the UK, and confined to the effect on UK consumers. As with the alleged trade mark infringements, if there is a serious issue to be tried, I do not think there is any difficulty over jurisdiction being established. Any such claim would fall within one or more of the gateways relied on, on the basis that easyGroup claims both an injunction to restrain acts in the jurisdiction (para 3.1(2) of Practice Direction 6B), and damages based on damage having been sustained within the jurisdiction (para 9(a)); and England is clearly the appropriate forum for the trial of the dispute.
82. So far as whether there is a serious issue is concerned, Mr Bloch relies on easyGroup’s reputation in the family of “easy” brands, and submitted that it was seriously arguable that the Defendants’ use of their signs was a misrepresentation that their services were associated with easyGroup; that would be deceptive and would be liable to cause damage to easyGroup’s reputation in the shape of dilution of easyGroup’s brand. Although easyGroup could not point to any lost sales, that, he submitted, was sufficient to justify an award of damages on the principle of “user damages” as explained by the Supreme Court in *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20 (see eg per Lord Reed JSC at [95]).

83. Ms McFarland said that there had to be something more than “muddle and wonder”. She said that there had to be some real damage, but suggested there was none: easyGroup could not claim for lost sales as it did not fly in Colombia, and the claim for a licence fee made no sense as there was nothing to license. It was not suggested that what Easyfly had done had impinged on any of easyGroup’s commercial rights in the UK. There was no evidence from UK consumers, no evidence of actual deception, and no evidence of actual damage. There was a natural division between what easyGroup did and what Easyfly was doing, and in the absence of any such evidence being adduced, she said the natural conclusion was that it did not exist. She also said that the relief sought was wider than could be justified.
84. I accept Mr Bloch’s submissions that these points do not prevent there being a serious issue to be tried. He accepted that mere “muddle and wonder” was not enough to establish a deceptive misrepresentation but he said that there was enough here to make an arguable case that Easyfly’s use of its signs was misleading. As to the suggestion that there was insufficient evidence of real damage, he said that for easyGroup to lose control over the brand was of real importance and very great concern. There was nothing surprising in that; such loss of control was a central concern for any party suing in respect of passing off and trade mark infringement. Some of the relief sought might be ambitious, but that was a matter for trial. I agree that there is a serious issue to be tried as to whether Easyfly’s acts in the UK amount to a misrepresentation of association with easyGroup; that if they do, there is a serious issue as to whether that erodes or dilutes the brand in the eyes of UK consumers; and that any such dilution is (or at the lowest arguably is) something for which damages can be awarded, or injunctive relief granted, even in the absence of any suggestion of lost sales. These all seem to me to raise triable issues, and the claim cannot be regarded at this stage as having no real prospects of success.

Conspiracy

85. easyGroup seek to make the Defendants liable for conspiracy to use unlawful means. That is pleaded both as a conspiracy between the two Defendants, and as a separate conspiracy between them and ATR. I consider the latter below, and at this stage concentrate on the conspiracy between Easyfly and Snr Ávila. There is also a plea that the two Defendants are joint tortfeasors. Although they are theoretically different, it is not immediately clear what the practical difference is between these two pleas. Both raise the question whether there is a sufficiently arguable case against Snr Ávila personally as well as against Easyfly.
86. Mr Bloch relied on the following. Snr Ávila is the founder and president of Easyfly (so described by Snr Triana). He is listed as the “Registrant” for one of Easyfly’s domain names (easyfly.aero). Both the Heads of Agreement with ATR, and the Sale and Purchase Contract, contained provisions for service of notices on Luftwinds at a number of addresses including Snr Ávila at Presidencia@easyfly.com.co. Snr Triana’s evidence is that he plays an active role in the overall management of Easyfly, but certainly does not personally operate or maintain Easyfly’s website or Facebook page, something Mr Bloch is happy to accept. Mr Bloch however says that the matters easyGroup complain of are not matters of day-to-day detail: they are concerned with the acquisition of the airline’s most important assets (its aircraft) and most important marketing tool (its website). That was sufficient to raise a case that Snr Ávila had procured or authorised the acts complained of so as to make himself

liable as joint tortfeasor; and had combined with Easyfly in such a way as to make himself liable for conspiracy. The elements of an unlawful means conspiracy are a combination to use unlawful means that is directed at the claimant and that causes loss. Mr Bloch relied on the trade mark infringements as the unlawful means (accepting that one needs to appreciate the nature of the acts to be done to be liable as a conspirator), and on the same damage as for the passing off claim.

87. Ms McFarland said that apart from the Press Release there had been no attempt to identify or plead what Snr Ávila had done that exposed him to personal liability. She said that it was not good enough to rely on inference or surmise, and that the burden was on the claimant to plead out how it was alleged that he was liable. She referred to *MCA Records Inc v Charly Records Ltd (No 5)* [2001] EWCA Civ 1441 for a statement of the relevant principles by Chadwick LJ at [48]-[53], including the statement that a director of a company does not become liable as joint tortfeasor with the company if he does no more than carry out his constitutional role by voting at board meetings (at [49]). But it is to be noted that Chadwick LJ also said (at [51]) that at least in the field of intellectual property:

“liability as a joint tortfeasor may arise where ... the individual “intends and procures and shares a common design that the infringement takes place”.”

and (at [53]) that it was:

“necessary and sufficient to find that he [ie the individual defendant] procured or induced those acts to be done by CRL [ie the company] or that in some other way, he and CRL joined together in concerted action to secure that those acts were done.”

A reading of the whole judgment reiterates that questions such as this are very fact-sensitive.

88. I accept the submission of Mr Bloch that at this stage the matters on which he relies are a sufficient basis to invite the Court to infer that Snr Ávila had personally procured or directed the acts to be done of which easyGroup complains, and that there is a serious issue to be tried in that respect.

Full and frank disclosure

89. Ms McFarland relies on what are said to be a number of procedural failings by easyGroup as a reason for setting aside the permission granted by Morgan J by his Order dated 15 February 2018 (“**the Order**”). They can be summarised as follows:

- (1) A failure to make full and frank disclosure.
- (2) A failure to include in the Order a statement of the Defendants’ right to set aside service.
- (3) A failure to serve the Order on Snr Ávila.
- (4) A failure to serve all the supporting evidence.

90. The first, and most serious, allegation is the failure to make full and frank disclosure. It is well established, and was not disputed, that it is the duty of an applicant on a

without notice application to make full and frank (or fair) disclosure of matters material to the application: see the notes in the *White Book (Civil Procedure 2019)* at §6.37.4. The application notice asked the Court to make an order without a hearing and there is no indication on the face of the Order that there was a hearing so I assume that Morgan J dealt with the matter on paper. The evidence in support of the application was the first witness statement of Mr Kramer dated 5 December 2017, and there is nothing to suggest that Morgan J had any other material before him, so I will assume that that was the totality of the material he was asked to consider.

91. In his evidence in support of the application to set aside the Order, Snr Triana refers to a number of matters. I can deal with some of them quite briefly. So far as Snr Ávila is concerned, Snr Triana complains that his firm of Triana, Uribe & Michelsen was not in fact acting for him; that a letter before action sent in July 2017 was not in fact sent to the Defendants but only to Easyfly; that a reply written by his firm dated 11 August 2017 (and exhibited by Mr Kramer) was similarly not in fact written on behalf of both Defendants but only Easyfly; that there were no claims of primary infringement alleged against him; and that there was no reason to infer that Snr Ávila could be served at his firm. None of this seems to me sufficiently material to amount to a breach of the duty of full and frank disclosure. Mr Kramer explains the basis on which the claim was sought to be brought against Snr Ávila personally. He made it clear that he did not know whether Triana, Uribe & Michelsen were acting for him, although he inferred that it was likely that they were, but suggested an alternative address for service in the event that was not the case.
92. In relation to the claim against Easyfly, Snr Triana refers first to the fact that there was no reference in Mr Kramer's witness statement to the history of trade mark disputes between the parties. That referred in particular to litigation that was threatened by easyGroup against Easyfly in the USA, but which was not in fact brought. I agree with Mr Bloch that it is not apparent why that is material to the question whether permission should be given to bring claims in this jurisdiction. Snr Triana also refers to a statement in Mr Kramer's evidence that the Defendants operated cargo airline services, which is accepted to be a mistake; it seems to have been simply careless as the draft Particulars of Claim put before Morgan J correctly identified the services as passenger airline services. I do not think this particular error was material, or had any effect on the substantive question.
93. That leaves however one other point referred to by Snr Triana, which is that Mr Kramer says in his evidence (at paragraph 22.4):

“At the date of issue, the Defendants' Services are offered for sale and it is inferred sold to persons wishing to travel from London, or other airports in the EU, to Colombia.”

A similar statement is found in the draft Particulars of Claim. A natural reading of this suggests that Easyfly might be offering flights from London or the EU to Colombia. This was not what was meant, which was only that persons travelling from London or the EU to Colombia could buy internal Colombian Easyfly flights before they left. That would not matter if it was made clear elsewhere that all that Easyfly did was offer internal Colombian flights. But I cannot find any statement to that effect in Mr Kramer's evidence. At paragraph 5 he introduces Easyfly as a Colombian company based in Bogotá that is offering cargo airline services but does

not say where they fly. At paragraph 22 he refers again to the Defendants operating cargo airline services and says they promote their business from websites accessible from and/or directed to customers in the UK and the EU, with some particulars, including the fact that the Defendants' Services are offered to UK and EU consumers through a broker (see below). In the draft Particulars of Claim, the Defendants' Services are referred to under the heading "The Acts of which Complaint is Made" at paragraph 35 as follows:

"The Defendants have, since a date unknown, but from at least May 2016, in the course of trade, and without the consent of the Claimant, offered passenger airline services ("**the Defendants' Services**") in the European Union and/or the UK under or by reference to: [various signs are then set out]."

This does not make it clear that the passenger airline services are all domestic flights in Colombia, and that when it is pleaded that the Defendants have "offered ... airline services in the EU and/or UK", what is meant is that the *offer* has been in the EU and/or UK, not the *services*. Indeed I think the more natural reading of this allegation on its own is that it is the services that the Defendants are offering which are in the EU or UK. Again it is now clear that that was not what was meant (and if it had been one would have expected a rather different emphasis in the evidence), but I do not think this plea, any more than Mr Kramer's evidence, can be said to make the position clear.

94. It is true that Mr Kramer exhibited the letter of 11 August 2017 from Triana, Uribe & Michelsen which said in terms that Easyfly did not operate services into or out of the UK or EU, but unless a judge's attention is specifically drawn to some point, it cannot be assumed that he or she will have picked up something that can only be found in exhibits. It has long been established that material facts should be clearly drawn to the judge's attention: see the notes in the *White Book* at §6.37.
95. Ms McFarland said that there were other matters not disclosed in Mr Kramer's evidence, notably that the website was in Spanish and only accepted payment in Colombian pesos or US dollars, and that Triana, Uribe & Michelsen's letter of 11 August 2017 had disavowed responsibility for sales through brokers in the following terms:

"Our client has not directly or indirectly made any marketing activities directed to the United Kingdom or the European Union and the evidence you gathered is of a third party with no direct relation with **EASYFLY S.A.** If third parties offer **EASYFLY S.A.**'s services, **EASYFLY S.A.** is not liable for them, nor they constitute an infringement."

As I have said that letter was exhibited by Mr Kramer, but he does not in his witness statement draw attention to this explicit denial of marketing directed at the UK and EU. The only reference by Mr Kramer to the letter in his witness statement is in the context of how the Defendants can be served.

96. Do these matters amount to a failure to make full and frank (or fair) disclosure of material matters? Mr Bloch accepted that not everything that Ms McFarland now said should have been before Morgan J was before him, but said that all material matters were drawn to his attention having regard to their materiality. He said that what may be alleged on the *inter partes* hearing to be material may be very hard to determine at

an early stage of the proceedings; and that since a finding of a failure to make full and frank disclosure had the potential to affect reputations, the Court should not be too quick to make it.

97. I have come to the conclusion however that there was a failure to disclose all material matters fairly. I should state clearly that I do not find that there was any deliberate decision not to refer to anything that it was known ought to be disclosed, but I have been particularly struck by the fact that nowhere did Mr Kramer really set out that what easyGroup were seeking to do in this action was to bring a claim in England against a domestic Colombian airline that only offered internal flights in Colombia, and I think the ambiguous phrases in the evidence and the draft pleading (“the Defendants’ Services are offered for sale ... to persons wishing to travel from London ... to Colombia”; “the Defendants have ... offered passenger airline services ... in the European Union and/or in the UK”) leave the position very unclear, and may have unwittingly misled Morgan J. Nor was it clearly explained that the basis on which the action was brought was that it was possible to buy flights through a broker in circumstances where Easyfly’s case was that it did not market its services in the UK or EU at all. In the application before me, Mr Bloch was careful to identify with precision the specific acts taking place in the jurisdiction which easyGroup relies on, and as already referred to I have accepted that they do give rise to triable issues of trade mark infringement and passing off in this country and the EU. By contrast I do not think the material put before Morgan J on paper (and so without the benefit of any oral explanation) really made it clear that the Defendants’ case was that their business was an entirely Colombian one and that they had done nothing in the jurisdiction at all, or explained on what basis easyGroup suggested that jurisdiction could nevertheless be asserted. It was presented, as I have already referred to, as a case of a Colombian airline offering services in the EU and UK, without any clear statement (or really any statement at all) that all Easyfly’s services were actually provided in Colombia.
98. Nor was any real detail provided by Mr Kramer as to the specific acts relied on in support of the assertion that the Defendants were offering services in the EU and UK. The only specifics given by him in his statement as to what the Defendants had actually done is in paragraph 22. This asserted that they promoted their business from websites “accessible from and/or directed to (amongst other countries) customers in the UK and the EU.” Paragraph 22.1 then refers to the fact that the Defendants’ websites are “accessible” in the UK, and paragraph 22.3 the fact that Easyfly’s Facebook page is “accessible” in the UK and Europe. On the basis of the EU jurisprudence this is insufficient by itself to amount to evidence that they were targeted or directed at the UK; nor is there any reference to the facts (such as the website being in Spanish and priced only in Colombian pesos) that might point the other way. Paragraph 22.2 refers to the fact that services were offered via a broker, kiwi.com (something not relied on before me, and as I have already said something denied in the 11 August 2017 letter). There is then paragraph 22.4 which I have already quoted (paragraph 93 above) and which makes a general assertion that the Defendants’ services are offered for sale to those wishing to travel from London, without explaining how or by whom such offers were made.
99. In essence I think the case sought to be made at that stage was effectively based on the ability to buy tickets through kiwi.com. Although there was a reference to the

websites being directed to customers in the UK and the EU, Morgan J was given no real assistance in Mr Kramer's evidence as to what actual features of the websites were relied on to make this assertion. The only specific instance of the Defendants' services being offered in the UK or EU was via the kiwi.com website. In those circumstances I think some reference should have been made to Easyfly's disavowal of responsibility for services offered by brokers. Where a letter before action is sent, and a reply received from the prospective defendant, I think it is good practice to specifically draw the judge's attention to the points made in that reply when applying for permission to serve out. It has been said that such an application should bring to the attention of the Court any matter which the other party would wish the Court to be aware of, and where a prospective defendant has in fact articulated its answer to the claim, the easiest course is to put the points made squarely before the Court. I do not think Mr Kramer's evidence really did this; Morgan J might well have been left with the impression that Easyfly did not dispute offering its services in the UK.

100. In all the circumstances in my judgment there was a failure on the application to Morgan J to put material matters fully frankly and fairly before him. That raises the question as to what the Court should now do, which I revert to below, after considering the other procedural points.

Other procedural points

101. The second matter relied on is the failure to comply with CPR r 23.9(3). CPR r 23.9 is headed "Service of application where application made without notice" and applies where the Court has disposed of an application which it permitted to be made without service of a copy of the application notice. CPR r 23.9(3) reads:

"The order must contain a statement of the right to make an application to set aside ... or vary the order under rule 23.10."

CPR r 23.10 provides that a person not served with a copy of the application notice before an order was made under r 23.9 may apply to the Court to have the order set aside or varied, and that any such application must be made within 7 days after service of the order on that person.

102. The Order did not contain any statement of a right to set it aside or vary it under CPR r 23.10. It granted permission to serve the Defendants out of the jurisdiction, and (as required by CPR r 6.37(5)) specified a period for service of the Acknowledgment of Service and Defence. That is said by Ms McFarland in her written submissions to be a serious breach of the CPR which easyGroup has never sought to remedy. Mr Kramer in his second witness statement accepted that the Order did not include an express notice of the right to apply to set it aside, but said that the very fact that the Defendants had applied to do so showed that there was no prejudice. I received, I think, no oral submissions expanding on these points at all.
103. In those circumstances the question whether CPR r 23.9(3) did require the Order to refer to the right to set it aside under CPR r 23.10 was not argued before me. But I think that very doubtful. First, CPR r 23.9 only applies where the Court has "disposed of an application which it *permitted* to be made without service of a copy of the application notice" (r 23.9(1)), and it is perhaps doubtful if that is an apt description of an application under CPR r 6.37(5) which is necessarily made without service of an

application notice, as service of the application notice out of the jurisdiction would itself require permission (see CPR r 6.38 and 6.39): see CPR r 23.4(2) which draws a distinction between a case where making an application without notice is permitted by a rule, and a case where it is permitted by the Court.

104. Second, CPR r 23.10 provides for a party to have 7 days from service of an order to apply to set it aside, and what CPR r 23.9(3) requires is a statement of the right to apply under r 23.10. But the CPR contains its own code for a party wishing to dispute jurisdiction. This is found in CPR Pt 11, which only contains one rule, CPR r 11. For my part I would have thought that this specific and detailed regime for challenging the exercise of the Court's power to grant permission to serve out under CPR r 6.37 displaces the provisions of CPR r 23.10, and indeed that it would have been misleading for the Order to state that the Defendants had only 7 days from its service to apply to set it aside under CPR r 23.10, as under CPR r 11(4) they in fact had 14 days from filing the Acknowledgment of Service, and by Practice Direction 6B paragraph 6.3 (and the Table there referred to) they had 22 days after service of the Particulars of Claim to file an Acknowledgment of Service, as the Order directed.
105. There are in fact noted in the *White Book* at §23.10.1 two decisions which appear to support the proposition that CPR r 23.10 gives way to CPR r 11, that of Rix J in *BUA International v Hai Hing Shipping Co* [2000] 1 Ll Rep 300, and that of the Court of Appeal in *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203. Neither was however cited to me, and I do not think I ought to reach a conclusion on a point which was not argued, so I will assume, contrary to my own view, that the Order was defective in this respect.
106. Nevertheless I do not regard this as a serious breach of the CPR, effectively for the reasons given by Mr Kramer. It is to be noted that when the claim form is served, it is to be accompanied by a Response Pack in the form of N9. That was done in the present case. Form N9 includes under the heading "Acknowledgment of Service" a box for a defendant to tick if he intends to contest the jurisdiction and a warning that if he does not file an application to do so within 14 days of filing the Acknowledgment of Service, it will be assumed that he accepts the Court's jurisdiction and judgment may be entered against him. That seems to me, even on the assumption that the Order should have referred to CPR r 23.10, a sufficient (and indeed more useful) indication of the right of the defendant to apply to the Court if he wishes to contest the jurisdiction; the Defendants in fact instructed English solicitors (Preiskel & Co LLP) by 25 May 2018 at the latest, and have been in receipt of English legal advice since then; they each duly returned Acknowledgments of Service dated 1 June with the box ticked indicating that they intended to contest the jurisdiction; and on 15 June 2018 they brought their application to set aside the Order. In those circumstances I do not think they have been prejudiced at all. No express sanction is provided in the rules for failure to comply with CPR r 23.9(3), so there is no question of easyGroup having to apply for relief from sanctions.
107. In my judgment therefore, even on the assumption I am making that the Order was defective, it was not a serious defect or one that had serious (or any) consequences and does not justify setting aside the Order.
108. The third point taken is that the Order was not served on Snr Ávila. This at any rate was a point raised by Snr Triana in his evidence in support of the Defendants'

application, to which there was a general cross-reference in Ms McFarland's written submissions, and although not specifically argued by her orally, it was not abandoned either. But I do not understand the basis for it. The Order permitted service not only of the Claim Form and Particulars of Claim but of "any other document in these proceedings" on "the Defendants" (in the plural) by service on Triana, Uribe & Michelsen at their address in Bogotá. "Any other document" in my judgment includes the Order itself, and "the Defendants" plainly includes Snr Ávila. Snr Triana's own evidence is that a package of documents was received by his firm on 11 May 2018, including the Order. That seems to me to be sufficient to establish that Snr Ávila was duly served in accordance with the Order.

109. It may be that Snr Triana's point was that no service had taken place on Snr Ávila personally, or at his home or business address; it may be that it was that Snr Ávila had not instructed the firm to accept service, or indeed at all, by 11 May 2018 (Snr Triana says that they were not instructed by him until 31 May 2018). If either of these is the basis for Snr Triana's statement, it seems to me irrelevant: Morgan J was expressly entitled to give directions about the method of service by CPR r 6.37(5)(b), and the documents were served in accordance with those directions. That was enough to constitute good service. If Snr Triana had some other basis for his statement, I do not know what it was. In these circumstances there has in my judgment not been shown to be any defect in service of the Order on Snr Ávila at all.
110. The fourth matter that is relied on is a failure to serve easyGroup's evidence (that is the evidence in support of the application to serve out) on the Defendants or on Triana, Uribe & Michelsen. It does appear that the evidence, consisting of Mr Kramer's first witness statement and two exhibits, was not included in the package of documents initially served. I think it should have been. If CPR r 23.9 applied, then it was required by r 23.9(2). But even if CPR r 23.9 did not technically apply, it is obvious that a person affected by an order made without notice should not only know what the order says, but also be told on what evidence it was based. This is particularly so with an order giving permission to serve out, as a defendant so served has a right to dispute the Court's jurisdiction, or argue that the Court should not exercise it, under CPR r 11, but can only sensibly do so once given the evidence on which it was made.
111. Nevertheless in this case Preiskel & Co LLP requested the evidence from easyGroup's solicitors, Stephenson Harwood LLP, on 25 May 2018, and received Mr Kramer's witness statement on 30 May, and the exhibits on 1 June. That enabled them to bring the application on 15 June 2018 as already referred to. In those circumstances the failure to serve the evidence with the initial package of documents has not prejudiced the Defendants, and was shortly after corrected. Once English solicitors were instructed and had asked for the documents, it was quite unnecessary for any further steps to be taken to serve them on Triana, Uribe & Michelsen as it could be assumed that Preiskel & Co would pass anything to that firm that they thought it ought to see. I do not think the failure to serve them initially had any serious consequences, nor do I consider that it justifies setting aside the Order.
112. Ms McFarland referred to two further points in her written submissions, which were neither dealt with in the evidence of Snr Triana, nor the subject of any oral argument. One was a failure to include in the Spanish translation of the documents served on Triana, Uribe & Michelsen a statement from the translator as required by

CPR r 6.45(3). I have not seen the translated documents and cannot assess this point as I do not have any evidence on it (other than a statement by Snr Ricardo Escobar of easyGroup's Colombian lawyers that the translator was in fact one certified by the Colombian Ministry of Foreign Affairs); but what is notable is that it is not suggested that the translation was inaccurate or misleading, or that this point has caused any practical difficulties at all. The other point is that the Defendants have not seen any copy of the formal undertaking required by CPR r 6.46: this is I think simply a bad point as that rule only applies to a request for service under CPR r 6.43 (service through foreign governments, judicial authorities etc) or CPR r 6.44 (service on a State), neither of which would appear to have any application here. The service of the package of documents on Triana, Uribe & Michelsen was carried out, according to Snr Escobar, by a certified courier in accordance with Colombian Law.

113. I conclude that save for the failure to make full and frank disclosure which I have found, none of the other procedural failings which are relied on, insofar as they are established at all, are of any significance, or such as to justify setting aside the Order.

Should the Order be set aside for failure to make full and frank disclosure?

114. I can now revert to the question whether the Order should be set aside for failure to make full and frank disclosure. It is clear on the authorities that the Court has a discretion in this respect: see *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31 ("*NML*") at [136] per Lord Collins JSC. The Court can either (a) set aside the order for service and require a fresh application or (b) treat the claim form as validly served and deal with the non-disclosure if necessary by a costs order.
115. *NML* was not a case of failing to make full and frank disclosure: it was a case where at the without notice hearing before David Steel J the claimant (*NML*) had relied on one argument to establish that the defendant (*Argentina*) was not entitled to state immunity, whereas on *Argentina's* application to set aside the permission to serve out before Blair J, *NML* had accepted that its original argument was flawed and relied on a different argument. *NML* was not seeking to rely on a different cause of action, or relying on different facts from those put before David Steel J. In those circumstances, Lord Phillips PSC (with whom on this point the others agreed) held that Blair J had been entitled in his discretion to allow *NML* to rely on alternative reasons why *Argentina* had no immunity, and that there were no valid grounds for challenging his decision, saying (at [80]):

"It has not been suggested that *Argentina* would be any better off if *NML* is required to start proceedings afresh. To require them to do so would be a waste of time and money."

116. But although it is clear that the discretion exists, I was given no real help, and shown no authorities, as to when it is appropriate to exercise the discretion one way or the other. Ms McFarland referred me to a note in the *White Book* at §6.37.4 to the effect that where there had been deliberate withholding of information that the applicant knew would or might be material, the order "should be set aside"; I am willing to accept that in principle, but I have not found any deliberate non-disclosure here. The same note indicates that the mere fact that non-disclosure is innocent does not deprive the Court of its discretion to set aside an order for service out if the applicant has failed to make sufficient disclosure of material facts. Again however that does not

provide any guidance as to how the discretion should be exercised.

117. Ms McFarland briefly submitted that the Order should be set aside, relying on the following points. She said that it was not credible to suggest that there had been no prejudice to the Defendants as costs had been incurred. That however does not seem to me to carry any weight, as it can be catered for by appropriate orders as to costs. She said that the effect of allowing the existing proceedings to stand rather than requiring easyGroup to start again would be to enable easyGroup to claim 2 years' worth of extra damages (the Claim Form having been issued on 15 November 2017). She also said that the Court in exercising its discretion should not do anything which would have the effect of encouraging claimants to think that a failure to comply with the duty of full and frank disclosure was not that important.
118. Mr Bloch also dealt very briefly with this aspect of the case. He suggested that unless the points taken affected the substantive question whether leave to serve out should be given, they should not lead to the Order being set aside.
119. I suspect that I would have benefited on this aspect of the case from more detailed submissions both as to the principles on which the discretion should be exercised and the reasons for exercising it one way or the other on the facts of the present case. But in the absence of that, I have to make a decision on the basis of the very limited material and arguments I have had. On that basis, I have decided to accept Ms McFarland's submissions.
120. Unlike *NML* where Argentina would not be any better off if *NML* were required to start again, it can indeed be said that the effect of requiring easyGroup to start again will be that they will only be able to claim damages for 6 years back from the date of any fresh proceedings rather than 6 years from the date of the existing proceedings. It is true that the claim for damages is not the primary relief that easyGroup seek; what they really want is for Easyfly to change its name, and they hope to achieve that by obtaining suitable injunctions against the use of the name in the UK and EU. But they do have a claim for damages, and as already referred to (paragraph 82 above), that is not confined to identifiable financial loss (which might indeed be difficult to establish) but to damages on the user principle. I have no evidence as to what the quantum of such a claim might be, but if such a claim is worth pursuing, it is worth resisting, and I must assume that it might be reasonably substantial. I therefore do not think I can regard the benefit to the Defendants of escaping potential liability for 2 years' extra damages as nugatory. In those circumstances I do not think it can be said, as it was in *NML*, that requiring easyGroup to start again would simply be a waste of time and money that would achieve nothing of practical value.
121. There is also this consideration. This is not a case where the causes of action and facts now relied on by easyGroup are the same as they were before Morgan J. On the contrary many of the facts now relied on did not feature in the case as presented to him; and the facts relied on before him (the sale through kiwi.com) were no longer relied on before me. In a very real sense the case is a new and different case from that started 2 years ago. That, on the authority of *NML*, does not prevent the Court from granting permission to amend and dealing with the case as newly presented, but it is in my judgment a factor which points towards making easyGroup start again. This is not a case, as *NML* was, where if the original permission were set aside the claimant would simply issue an identically worded duplicate set of proceedings. In the present

case easyGroup wishes to make very substantial changes to the case as originally presented to Morgan J, and indeed Mr Bloch accepted that even the amended Particulars of Claim he put before me would benefit from some tidying up in the light of the evidence on this application. I think there is in those circumstances something to be said in any event for requiring easyGroup to start again, so that it can put forward the case it now wishes to put forward as a fresh start.

122. In those circumstances I propose to set aside the Order of Morgan J granting permission to serve the Defendants out of the jurisdiction.

The claim against ATR

123. The formal application against ATR is an application to join them as 3rd Defendant to the existing proceedings, and for permission to amend the Particulars of Claim to plead easyGroup's claims against them. As already referred to, the only acts which Mr Bloch now relies on against them are the issue of the Press Release and the branding of the aircraft, and the only claims pursued against them are infringement of trade marks, and conspiracy with the Defendants to use unlawful means (the unlawful means being the same trade mark infringements).
124. Since I have decided to set aside the Order of Morgan J as against the Defendants, there are no extant proceedings into which ATR can be joined, and formally the application must be dismissed. But in case I am wrong, and in any event because it may assist the parties if easyGroup is contemplating fresh proceedings, I will consider the questions that would have arisen had the proceedings continued.
125. The Court may order a person to be added to existing proceedings if it is desirable to add the new party so that the Court can resolve all the matters in dispute in the proceedings (CPR r 19.2(2)(a)), or if there is an issue involving the new party and an existing party which is connected to the matters in dispute and it is desirable to add the new party so that the Court can resolve that issue (CPR r 19.2(2)(b)). In either case, the permission of the Court would be required under CPR r 19.4(1), the claim form having been served.
126. Ms Himsworth suggested that for this purpose it was necessary to show a "good arguable case" citing *PeCe Beheer BV v Alevere Ltd* [2016] EWHC 434 (IPEC) at [32] per HHJ Hacon, but although he did refer to earlier judgments of Pumfrey J and Laddie J where this phrase had been used, it is clear from his judgment that he was not endorsing any suggestion that the hurdle for joining a defendant should be any higher than that which would be applicable to the question whether a claim against an existing defendant could survive an application to strike it out (under CPR r 3.4(2)(a) or (b)) or for reverse summary judgment (under CPR Pt 24): see at [36]-[39]. In the context of the present case, where the application is to join a defendant out of the jurisdiction, I do not think there is any reason to adopt a different merits test when considering whether a new foreign defendant should be joined to existing proceedings from that applicable to the service out of a foreign defendant in the first place. In other words what needs to be shown is a serious issue to be tried on the merits. In the end Ms Himsworth did not quibble with this.

The branding of the aircraft

127. I have considered above (paragraphs 72-3) the question whether there is a serious issue to be tried in relation to the branding of the aircraft as against the Defendants and concluded that there is. For similar reasons there is in my judgment a serious issue to be tried on the merits against ATR. Ms Himsworth made a number of additional points but I do not think any of them affects the position. A number of pleading points were taken, but Mr Bloch accepted that the amended pleading was settled before seeing ATR's evidence and that now that that evidence was available the pleading would benefit from tidying up in any event. The points of substance taken were that ATR did not itself paint the aircraft, nor did it export them from France. Neither seems to me a complete answer to the claim: whether ATR used subcontractors to do the actual painting or not, it arranged for the painting to be done, and in any event the acts relied on as infringements are not, or not only, the actual painting by itself, but the flying of the planes once painted in view of the public. As to the fact that ATR handed over the planes to Luftwinds before they were exported, it is at least arguable that ATR bears responsibility for this by agreeing to deliver them in France painted with the logos in circumstances where it was inevitable that the purchaser would have to fly them in French (and/or Spanish) airspace to export them to Colombia; in any event it is not disputed that ATR was responsible for the carrying out of the test flights.
128. The main point however taken by Ms Himsworth was that the English court lacked subject-matter jurisdiction in relation to the claims against ATR. All the acts complained of took place out of the UK, in France (and arguably Spain if ATR could be held responsible for the flying of the aircraft from France to Colombia). They do not therefore amount to infringements of the UK trade marks, but only at best of the EU trade marks. Proceedings in respect of such acts are governed by the EUTMR, and in particular by art. 124(a) under which the EU trade mark courts have exclusive jurisdiction for infringement actions and (if permitted under national law) actions in respect of threatened infringement relating to EU trade marks. The English court can therefore only hear such actions in its capacity as an EU trade mark court, and subject to the rules on jurisdiction in arts. 125 and 126.
129. Arts. 125 and 126 are set out at paragraph 34 above. By art. 125(1) the default position is that the proceedings shall be brought in the courts of the Member State where the defendant is domiciled: in ATR's case this is France. Neither art. 125(2) nor art. 125(3) applies to ATR because each only applies if the defendant is neither domiciled nor has an establishment in a Member State. Art. 125(4) does not apply as it is not suggested that ATR has either (a) agreed that the English court should have jurisdiction, or (b) entered an appearance before the English court. That leaves art. 125(5) under which proceedings may also be brought in the courts of the Member State in which the act of infringement has been committed or threatened. In the present case that would also be France (and possibly Spain). It follows that none of the provisions of art. 125 confer jurisdiction on the English court to hear actions based on acts of infringement said to have been carried out by ATR in France and Spain. Ms Himsworth said that that was conclusive to establish that the English court had no subject matter jurisdiction under the EUTMR.
130. Mr Bloch had two answers to this submission. The first was not developed extensively in oral argument, but as I understand it was as follows. Mr Bloch

accepted that the jurisdiction rules in the EUTMR were a specific regime (or in the language of the CJEU jurisprudence a *lex specialis*) which excluded the general jurisdiction rules in the Brussels Regulation 1 Recast (Regulation (EU) No 1215/2012) (“**Brussels 1 Recast**”): see eg Case C-172/18 *AMS Neve Ltd v Heritage Audio SL* EU:C:2019:674 (“*AMS Neve*”) at [34]. But he said that that did not altogether exclude the principles under Brussels 1 Recast, and given the general desirability of avoiding duplicative proceedings and the risk of inconsistent judgments (as exemplified by arts 29 and 30 of Brussels I Recast), it followed that once the English court had jurisdiction over the Defendants for the acts taking place in France (as it undoubtedly did under art. 125(2)), then it must also have jurisdiction over anyone else alleged to be jointly liable for the same acts of infringement. The logic of ATR’s position was that easyGroup had to sue the Defendants in England (pursuant to art. 125(2)) and ATR in France (pursuant to art. 125(1) or art. 125(5)) for the same acts of infringement and that would be perverse. One would expect that it would be possible to determine all the issues in one place.

131. I am not persuaded by this argument. It is incorrect to say that ATR’s argument requires easyGroup to sue the Defendants and ATR for the acts in France in two different courts. The effect of art. 125 is that a claimant always has a choice either to base jurisdiction on whichever of arts. 125(1)-(3) (or where appropriate art. 125(4)) applies to the claim; or alternatively to base jurisdiction on art. 125(5): see *AMS Neve* at [40]. Where therefore the claimant wishes to sue more than one defendant in respect of the same act of infringement and the places indicated by arts. 125(1) to (4) diverge, it can nevertheless ensure that all the defendants are sued in the same place by relying on art. 125(5). In the present case easyGroup can bring proceedings in France against both the Defendants and ATR in relation to the acts in France. That would avoid the risk of duplicative proceedings and inconsistent judgments in relation to the same acts.
132. It is true that on this view what easyGroup could not do is bring before one court in a single action its claims against all the defendants based on all the acts of infringement that have taken place anywhere in the EU. In relation to the Press Release, for example, easyGroup can only sue the Defendants in England, whether under art. 125(2) or art. 125(5), and it follows that if easyGroup wish to sue the Defendants and ATR for both the issue of the Press Release in England and the flying of the branded planes in France, there is no single court that could hear both claims against both sets of defendants. But whereas it is easy to see that it would be desirable for the claims against all parties in respect of the same infringing acts to take place in a single court, it is not obvious that the same applies to joinder of claims based on different acts in two different Member States. In *AMS Neve* at [42] the CJEU said that actions involving the same parties and concerning the use of the same sign but in different territories:

“do not have the same subject matter and are therefore not subject to the rules on *lis pendens*”

and that it therefore followed that where actions are brought in the courts of different Member States based on the acts committed within that State, those courts could not deliver “contradictory judgments”. It would seem to follow that if easyGroup sued all defendants on the Press Release in England and all defendants on the flying of the branded planes in France, that would not be regarded by the CJEU as giving rise to

duplicative proceedings or the risk of inconsistent judgments, as the subject matter of each action would not be the same. If such actions do not have the same subject matter, it does not seem to me a perverse result that a claimant may not be able to get relief in a single court against all defendants alleged to be responsible for infringements in more than one Member State.

133. In those circumstances I do not consider that art. 125(2) enables easyGroup to sue ATR in England for the acts of infringement said to have taken place in France, even though it does enable (but not oblige) easyGroup to sue the Defendants in England for the same acts.
134. Mr Bloch's second argument was as follows. easyGroup can sue ATR in England on the basis of the issue of the Press Release in England, either under art. 125(5), or under art. 7 of Brussels 1 Recast. So far as the latter is concerned I do not see how that can be so. Mr Bloch in his written submissions referred to art. 7(1) of Brussels 1 Recast but that is concerned with claims in contract, and I assume that what he intended was art. 7(2) which is concerned with claims in tort and enables claims to be brought where the harmful event occurred or may occur. But art. 122(2)(a) EUTMR expressly provides that in proceedings based on art. 124, art. 7(2) of Brussels 1 Recast does not apply. I do not see any answer to that. On the other hand there was no dispute that, subject to Ms Himsworth's other points, art. 125(5) would permit easyGroup to sue ATR on the Press Release in England.
135. Mr Bloch then said that the English court would (i) therefore have ATR properly before it; (ii) be dealing with the wider claims, including the flying of the branded planes in France, against the Defendants anyway; and (iii) as an EU trade mark court be able to grant pan-EU relief. There was therefore no reason why it should not also be able to deal with the acts of infringement in France against ATR. There might be a question of what relief it could grant against ATR, and in particular whether it could grant pan-EU relief, but that was not a question of jurisdiction.
136. I do not accept this way of putting the point either. On its face the combined effect of art. 125 and art. 126 is as follows. If a claimant wishes to pursue pan-EU relief against a defendant, it must bring its claim in the relevant Member State indicated by arts. 125(1) to (4). In such proceedings the effect of art. 126(1) is that it can rely on acts of infringement taking place anywhere in the EU, and the court can grant EU-wide relief accordingly. If however a claimant brings its claim in reliance on art. 125(5), the effect of art. 126(2) is that it can only rely on acts of infringement committed or threatened within the territory of the Member State in which that court is situated, and the court's ability to grant relief is limited accordingly: see *AMS Neve* at [40]. I do not see in this clearly expressed dichotomy any room for an interpretation under which a court exercising jurisdiction over a particular defendant under art. 125(5) can grant relief against that defendant in relation to acts committed or threatened outside the territory of that court simply because it also has before it another defendant where jurisdiction was established under arts. 125(1) to (4). Mr Bloch said that this was a question of interpretation, but I do not see which words he wants to interpret differently from what appears to me to be their plain meaning.
137. Had the question been a live one therefore, I would have accepted Ms Himsworth's submission that the English court had no jurisdiction against ATR under the EUTMR for acts of infringement taking place in France or Spain. That includes not only the

acts of branding and flying the planes in Toulouse and from France en route to Colombia, but also the issue of the press release on ATR's website, hosted in France.

Press Release

138. Ms Himsworth accepts that the English court would have subject-matter jurisdiction in relation to claims against ATR based on the issue of the Press Release in the UK, both in relation to the UK trade marks and (under art. 125(5) EUTMR) in relation to the EU trade marks.
139. Apart from the points I have already considered when considering the claims against the Defendants (paragraphs 63-70 above), the main point made by Ms Himsworth was that the use was *de minimis* for the reasons given in paragraph 70 above. Ms Himsworth relied on *Jameel v Dow Jones & Co* [2005] EWCA Civ 75 where the Court of Appeal stayed defamation proceedings where there had been minimal publication within the jurisdiction. The juridical basis for that was that it was an abuse of process to continue to commit the resources of the court to an action where so little was now seen to be at stake, and there was no likelihood of repetition of the article in the same form such as to justify an injunction; see at [70] and [75].
140. In the light of my previous decision, I do not have to finally decide the point, but I consider that Ms Himsworth is right. So far as the actual Press Release is concerned, only 15 or so copies were available at Farnborough, but there is in fact no evidence at all that any of them were read by any members of the press or public. I do not see any significant distinction between a claim for libel based on minimal publication, and a claim for trade mark infringement based on minimal use of the sign. If one is liable to be stayed as an abuse so I think is the other. Mr Bloch said that there had been no undertaking proffered in relation to further similar press releases. But I think it is equally true to say that there has been no threat to republish this press release, and no reason to suppose that ATR will continue to issue press releases of a similar type in this jurisdiction. In those circumstances I would have refused to allow ATR to be joined into the action if the only claim against it that could be pursued were that based on the issue of the Press Release in the UK, whether that were pursued as a claim for trade mark infringement or as a claim for conspiracy.
141. Different considerations might however arise if a claim in conspiracy in relation to the branding in France could also be pursued against ATR, as in that case it could be said that there was a substantial claim against it in any event. I will consider that next.

Conspiracy

142. For reasons just given the relevant question is whether easyGroup could pursue a claim in conspiracy against ATR based on the branding of the planes in France: if the only conspiracy claim against ATR that could be heard here were based on the Press Release, it would add nothing to the substantive claim for trade mark infringement.
143. ATR is domiciled in France. By art. 2 of Brussels 1 Recast, it is therefore *prima facie* to be sued in France. By art. 7(2) it can also be sued:

“in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur”.

The leading case on the application of this provision to the tort of conspiracy is *JSC BTA Bank v Ablyazov* [2018] UKSC 19 (“*Ablyazov*”), a decision on the substantially identical provision in the Lugano Convention in which the claimant bank’s claim was based on an alleged conspiracy to assist a defendant to conceal and dissipate his assets in breach of a freezing order.

144. The points confirmed or decided by *Ablyazov* include the following. The special jurisdiction provisions in the Brussels/Lugano scheme are derogations from the general rule and must be strictly interpreted [31]. The provision in question has two limbs, covering both the place “where the damage occurred” and the place “of the event which gives rise to and is the origin of that damage” [28]. In a conspiracy claim, it is the making of the conspiratorial agreement that should be regarded as the harmful event for the purposes of the second limb, not the acts taken in implementation of it [41].
145. In the present case easyGroup has no basis to assert that any conspiratorial agreement between ATR and the Defendants in relation to the branding of the aircraft took place in England: the Heads of Agreement, and Sale and Purchase Agreement, were each signed in France and Colombia, and there is nothing that can be pointed to as constituting the making of any agreement in England.
146. It is therefore necessary for easyGroup to rely on the first limb of art. 7(2). This was not considered by the Supreme Court in *Ablyazov*, as the Court of Appeal had there upheld the judge in rejecting the bank’s case that damage was sustained in England where its freezing order and judgments were based, preferring the view that damage was sustained where the dissipated assets were located; and permission to cross-appeal to the Supreme Court was refused: see at [29].
147. Ms Himsworth says that the acts complained of in France could not damage easyGroup in its capacity as owner of the UK trade marks, as nothing done abroad could affect those marks. That seems to me right. So the only question is where easyGroup can claim to have sustained damage in its capacity as owner of the EU trade marks. She submitted that it was difficult to see what damage could be suffered in England where the acts complained of only took place in France.
148. I accept this submission. The foundation of easyGroup’s claims in relation to the branding of the aircraft is that once painted they were flown on test flights, and en route to Colombia, in full view of the public. But the public which might have viewed the planes were the public in France and Spain, not the public in the UK. That might amount to a dilution in the brand in the eyes of the French and Spanish public, but it is difficult to see how it could affect the brand in the eyes of the UK public, or otherwise cause easyGroup to sustain loss in the UK. Mr Bloch said that if such a plane crashed, the news would not stop at the Channel and it might adversely affect easyGroup’s reputation in the UK, but no such damage has in fact occurred, and it seems to me far too speculative to say that it may occur. As already referred to, Mr Bloch also relied on easyGroup having suffered damage on the user principle (paragraph 82 above), but it seems to me that damages awarded on this basis would be damages for the loss of an opportunity to exploit easyGroup’s marks by licensing them to be used in France and Spain, and that for the purposes of the first limb of art. 7(2) such damage would therefore be suffered in France and Spain as that is where the relevant exploitation of the asset would otherwise take place.

149. I therefore conclude that easyGroup has not shown that it can bring the conspiracy claim (insofar as based on trade mark infringements in France) within either limb of art. 7(2) of Brussels I Recast, and has not therefore established jurisdiction in the English court to hear it.
150. Mr Bloch also submitted that there was a single conspiracy and so long as some of the damage was sustained in England (by virtue of the Press Release) that entitled all the damage to be sued on in England. I do not think that is right either. The foundation of conspiracy is the combination or agreement: see *Ablyazov* at [9]. In the present case it seems to me that there are two separate combinations or agreements which are complained of. The first is an agreement by ATR to paint the aircraft with the logos specified by Luftwinds and everything that flowed from that. That agreement was no doubt found in the Heads of Agreement, the Sale and Purchase Agreement and the specification of the livery in fact adopted. The second was the arrangement to publicise the sale through the Press Release. There is nothing to suggest that this was implicit in the Heads of Agreement, or to displace the natural inference that this was a separate arrangement entered into *ad hoc* once the sale was agreed. In those circumstances I do not see that the fact that the latter may have involved a (very minor) infringement of easyGroup's rights in the UK means that easyGroup can also bring English proceedings in relation to alleged acts of infringement in France arising from the former and which on the view I take caused easyGroup no discernible damage in the UK.
151. In those circumstances I would have held, had the point been a live one, that easyGroup should not have permission to amend to join ATR so far as concerns the conspiracy in respect of the branding and flying of the aircraft in France and Spain. It is not necessary to consider a number of other points relied on by Ms Himsworth as to why such a conspiracy was inadequately pleaded or unsustainable.

Conclusion

152. It may be helpful if I state my conclusions briefly:
- (1) There is a serious issue to be tried in relation to each of the claims now sought to be brought by easyGroup against the Defendants Easyfly and Snr Ávila.
 - (2) There was however a failure to make full, frank and fair disclosure to Morgan J, and in the circumstances his Order should be set aside. None of the other procedural defects, insofar as established at all, would have justified doing so.
 - (3) The question of amending to bring claims against ATR does not arise. But if it had, I would have held that there was no jurisdiction for the English court to hear the claims based on the acts in France (or Spain), whether based on trade mark infringement or conspiracy. There is jurisdiction to hear the claims based on the issue of the Press Release in the UK, but I would have refused permission to amend to bring such claims on the basis that they were *de minimis*.