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Neutral Citation Number: [2021] EWHC 2150 (Ch)

Case No: IL-2017-000028

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

Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 29/07/2021

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS
(Sitting as a High Court Judge of the Chancery Division)

Between:

EASYGROUP LIMITED	<u>Claimant</u>
- and -	
(1) EASYLIFE LIMITED	<u>Defendants</u>
(FORMERLY EASYLIFE GROUP LIMITED)	
(2) MR GREGORY GRANT CAPLAN	

TOM MOODY-STUART QC and JAMIE MUIR WOOD (instructed by **STEPHENSON HARWOOD LLP**) for the **Claimant**
CHRIS AIKENS (instructed by **ANDREW CLAY LEGAL LIMITED**) for the **Defendants**

Hearing dates: 7, 8, 9 and 13 July 2021

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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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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

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Chief ICC Judge Briggs:

1. The first Defendant (“easylife” or the “Defendant”) uses the signs ‘easylife group, ‘easylifegroup.com’, ‘easyclean’, ‘easy green’ and ‘easycare’ within the UK in the course of trade. It is said that they are used for similar goods or services as easyGroup’s registered marks which gives rise to a likelihood of confusion on the part of the public. Other than infringement, the Claimant claims passing off. The Defendants deny infringement and passing off on various grounds, and counterclaim for revocation of and

in respect of some trade marks, a declaration that three of the registered marks relied upon were invalidly registered by way of a squeeze, or a reduction in their specification.

2. The case has a long history with four amendments made to the particulars of claim and a direction that new claims be heard at a separate trial. A considerable volume of material has been provided to the court electronically (in excess of 59,000 documents) with an index running to 198 pages. The court was taken to a fraction of the documents. Updated bundles emerged almost daily during trial. The documentation is said to support matters such as confusion, the genuine use of the trade marks under attack, reputation, usage, goodwill, family of marks, and honest concurrent use.
3. The parties have agreed a list of 33 issues to be decided by the court.

Background

4. The background of easyGroup provides context and is relied upon to demonstrate the matters mentioned in the introduction. Sir Stelios Haji-Ioannou, described as the “founder and director” of easyGroup, has provided a witness statement providing background to the easyGroup enterprise and trade mark acquisitions. He did not attend court. There are no significant challenges to his evidence which was admitted by way of a Civil Evidence Act notice.
5. Tony Anderson had worked for various easyGroup companies in the period to 2000. He now acts as a consultant. In that capacity he was engaged to chronicle the first 10 years of the enterprise. He gave evidence at trial. Much of the background material provided by Mr Anderson was not challenged.
6. In a recent case, *W3 Limited v easyGroup* [2018] EWHC 7, W3 Limited had tried to sell its business and faced difficulties due to complaints made by easyGroup as to the trading name EASYROOMMATE. W3 brought proceedings claiming that easyGroup had made groundless threats. easyGroup counterclaimed. The claim and counterclaim came on for trial before Arnold J (as he then was). In his judgment Arnold J provided a full picture of the background to easyJet and other companies using the “easy+” trade mark. I understand from counsel who acted in W3 that the Judge drew heavily from the statement of Sir Stelios for this purpose.

7. For further background I have been referred to the easyGroup website for “the full 27 year history of the ‘easy’ family of brands”.
8. I draw upon these sources to the extent that the facts are not seriously challenged, to provide the background to easyGroup, its businesses and trade marks.

easyJet

9. In 1995 Sir Stelios founded the budget airline easyJet. easyJet Airline Company Ltd was incorporated on 17 March 1995. The first easyJet flight was from Luton to Glasgow on 10 November 1995. From the outset, easyJet used a distinctive get-up consisting of the brand name in Cooper Black font printed in white on an orange (Pantone reference 021C) background. The unchallenged evidence of Mr Anderson is that he sat next to Sir Stelios and designer Barry Debenham of White Knight Design during a number of working sessions as the brand identity took shape. The result of the collaboration is the sign



10. Whenever “easyJet” was written, the lower case “e” and a capital “J” was used. The aircraft had the name painted in orange on a white background. Prominent use of orange was made throughout easyJet’s marketing and promotional materials; even the exterior of the company's offices was painted orange.
11. Also from the outset, Sir Stelios planned to create a family of “easy+” prefixed brands, with a view to emulating Sir Richard Branson’s success in extending the Virgin brand from one industry to another. easyJet’s address was easyLand, easyWay, Luton Airport; the in-flight magazine was initially called easyCome easyGo (easyRider from 1998); the in-flight food and drinks service was called easyKiosk; and maintenance and repair of the aircraft was carried out by a sub-contractor called easyTech (pursuant to a formal licence agreement from February 1999). In addition, easyJet adopted the designation EZY as part of its flight numbers.
12. easyKiosk sold food and drink as well as goods from the first easyJet flight. The snacks were licensed to a company called Alpha In-Flight in 1995 which also used the easyKiosk brand name. There was a good deal of overlap in services. easyJet carried the passengers,

the inflight magazine was for the use of the passengers and provided a useful advertising tool. For example it advertised a menu of available food and drink for passengers. Mr Anderson says that an easyKiosk domain name still exists.



13. The airline was an immediate success. It quickly grew in size and the number of routes increased rapidly. Flights were limited to the UK at first, but soon expanded to the Netherlands (first flight to Amsterdam on 24 April 1996), Spain (first flight to Barcelona on 12 June 1996), Italy (first flight to Rome on 25 November 1998), Germany (first flight to Munich on 25 November 1998), Portugal (first flight to Faro on 28 March 1999), Ireland (first flights to Shannon, Cork and Knock on 28 January 2005), Belgium (first flight to Brussels on 29 June 2007) and Austria (first flight to Vienna on 29 October 2007) as well as other countries (such as France, first flight to Nice on 1 November 1997). As at 30 September 2000, easyJet operated 28 routes with 18 aircraft.

14. The number of passenger flights represented in the following table is not disputed:

Year/Period	Number of passenger journeys
1995	30,000
1996	420,000
1997	1,140,000
1998	1,880,000
1999	3,670,000
2000	5,996,000
2001	7,664,000
2002	11,400,000
1/2/2003 to 31/1/2004	21,259,358
1/2/2004 to 31/1/2005	26,116,482
1/2/2005 to 31/1/2006	30,534,888
1/2/2006 to 31/1/2007	33,932,607
1/2/2007 to 31/1/2008	38,422,844
1/2/2008 to 31/1/2009	44,661,510
1/2/2009 to 31/1/2010	46,380,471
1/2/2010 to 31/1/2011	50,320,074
1/2/2011 to 31/1/2012	55,456,681
1/2/2012 to 31/1/2013	59,354,758
1/2/2013 to 31/1/2014	61,475,841
1/2/2014 to 31/1/2015	65,349,451
1/2/2015 to 31/1/2016	70,082,951
1/2/2016 to 31/1/2017	74,921,296

15. It is not necessary to provide all the turnover figures but the following is not disputed:

Year	Revenue in GBP
2004/2005	1,341,400,000
2005/2006	1,619,700,000
2006/2007	1,797,200,000
2007/2008	2,362,800,000
2008/2009	2,666,800,000

16. There is little doubt that the turnover figures demonstrate exploitation of the easyJet trade mark and goodwill that pre-dated 2005. The success of easyJet was assisted by the fact that it was featured in a popular TV documentary series called Airline, which was broadcast by ITV from January 1999. This is documented in Mr Anderson's work 'easyHistory'.
17. A second series was broadcast in Summer 1999, a third series in June 2000 and a fourth series in March 2001. The second and fourth series reached about 9 million viewers per episode and the third about 7.5 million viewers per episode. Fifth to ninth series followed between April 2002 and September 2006. The programme was also broadcast in many other countries worldwide. This was in addition to the advertising carried out by easyJet. easyJet's approximate expenditure on press advertisements was £4.4 million in 1999 and £4.9 million in 2000. In addition to advertising and the TV series, easyJet has received significant editorial coverage in the press.
18. easyJet's business has always relied heavily on the internet. It was and remains a ticketless airline, and the vast majority of flights have been sold via easyJet's own website at www.easyjet.com. By 2001 the website was operational in French and Spanish as well as English, and by 2003 it was also in Dutch, German, Italian and Danish.
19. easyJet plc was incorporated on 24 March 2000 and became the parent company of, amongst other companies, easyJet Airline Company Ltd on 30 April 2000. On 15 November 2000 easyJet plc was partially floated on the London stock market.
20. The numbers of passengers flown per year climbed rapidly from 30,000 in the first month to just short of 6 million in 2000 and then increased by around 5 million per year to reach some 65 million in the year ending 31 January 2015.
21. easyJet claims to be one of the largest airlines in the world, operating in over 30 countries and carrying almost 80 million passengers a year. Its website receives visits from over 200 million users per year. Prior to the Covid-19 pandemic annual revenues reached over £6 billion with easyJet carrying close to 100 million passengers a year in a fleet of 350 Airbus aircraft. As at 3 March 2021 easyJet had a market cap of £4.7 billion.
22. easyJet has sold advertising for hotels in the UK, and subsequently European destination countries, in its in-flight magazine since its first issue in March/April 1996. From

Summer 1998 it also provided passengers with the opportunity to book discounted hotel accommodation (among other services) via a concession called easyExtras which was promoted in the easyJet in-flight magazine. It also sold advertising space to accommodation booking providers of various kinds. By February 2000 easyExtras had been replaced by a preferred supplier called Travel Extras, and by November 2000 the easyJet website provided a link to the Travel Extras website.

23. From at least 2010 accommodation has been available to book via the easyJet website (hotels.easyJet.com). Between 2010 and 2015 a total of over 2,356,000 hotel room nights were booked by users of the easyJet website, excluding hotel rooms sold as part of easyJet holidays. The range of accommodation advertised in the in-flight magazine and via the website is very broad, covering hotels, hostels, villas and apartment rentals.
24. Since 2015 the easyJet in-flight magazine has carried references to “easy portal easy.com”

easyEverything, later easyInernetcafé

25. In 1998 an internet café business was founded. easyEverything Ltd was incorporated as easyCafe Ltd on 16 September 1998 and changed its name to easyEverything Ltd on 8 December 1998 and to easyInernetcafé Ltd in October 2001. Internet cafés provided access to the internet to those without, or away from, home computers in the days before widespread use of mobile devices with internet connectivity.
26. The first easyEverything internet café, which had 400 terminals, opened in London opposite Victoria station on 21 June 1999. The opening was heralded by a considerable amount of press coverage. A further four stores had been opened in London by 4 February 2000, followed by one in Edinburgh on 18 May 2000. By 10 June 2000 easyEverything had 2,300 terminals in its London stores. Over the period from 5 June 2000 to 14 December 2000 easyEverything opened internet cafés in the Netherlands, Spain, Belgium, Germany, Italy and France (and also New York). By 3 February 2001 easyEverything had 8,100 terminals in 20 stores worldwide.
27. Like easyJet, easyEverything used the Cooper Black font and white print on an orange background for its brand name, which was prominently displayed on the fascias and elsewhere.

28. The internet cafés were open 24 hours a day. By the end of 2000 easyEverything had around 10 million customers per year, around double the number that flew with easyJet at the time. Turnover was impressive:

28.1. 1999 - £392,000

28.2. 2000 - £6.66 million

28.3. 2001 - £11.01 million

28.4. 2002 - £3.07 million

28.5. 2003 - £4.28 million

28.6. 2004 - £4.26 million

28.7. 2005 - £3.01 million

29. In addition to charges for using the terminals, printing and coffee, easyEverything generated further revenue by the sale of advertising on the premises themselves and on the screensavers of the computer terminals. It cross-promoted easyJet in its stores and paid easyJet to advertise in the easyJet in-flight magazine. There were links between the respective websites and easyEverything was also promoted on the easy.com website.

30. During the period from 2002 to 2004 easyInternetcafé grew from 20 stores to 70 outlets, most of which were concessions within other retail stores such as McDonald's, Burger King, Sainsbury's and Subway. In June 2004 it sold its flagship Oxford Street store. By 2009 it was operating on a franchise model.

easyRentacar, later easyCar

31. In 1999 Sir Stelios founded a car rental business called easyRentacar, later easyCar's. easyRentacar (UK) Ltd was incorporated on 30 July 1999 and changed its name to that name on 17 September 1999. easyRentacar began trading from premises near London Bridge on 20 April 2000, followed by sites in Glasgow on 24 April 2000 and Barcelona on 26 April 2000. These openings were preceded by significant press coverage. Customers were able to book rentals in advance by telephone or via easyRentacar's website. easyRentacar changed its name to easyCar in early 2001.

32. Like easyJet and easyEverything, easyRentacar used the Cooper Black font and white print on an orange background for its brand name, which was prominently displayed on the fascias and elsewhere. The same is true of the other businesses referred to below, and I shall not continue to repeat this point.
33. easyRentacar/easyCars turnover in the period up to 30 September 2000 was £3.34 million. By the year ending 30 September 2002, this had increased to £32.5 million. The business benefitted from significant press coverage and substantial sums were spent on advertising. By March 2000 £245,000 was spent on press advertising. easyRentacar/easyCar was also promoted on the easyJet and easy.com websites.
34. A sister brand, easyVan, was launched in 2006 to operate alongside easyCar and continues to operate today. The concept is the same: easyVan operates as a van rental brokerage, working alongside companies such as Europcar, Sixt and Thrifty to provide van hire for work or domestic use. As always, the visual get-up and overall branding is consistent with all companies in the easy family. easyCar has morphed from a car rental business to a car rental comparison and booking site. Mr Anderson explains easyGroup has licensed an airport transfer service in the UK and Europe called easyBus. I turn to the Claimant, easyGroup.

easyGroup

35. easyGroup (UK) Ltd was incorporated in November 1998. It had an office in Camden, London and was intended to explore and incubate new ventures and to extend the “easy+” family of brands.
36. Mr Anderson explains that a strategy was formed to create a single and diverse portfolio of brands and to hold the brands and related IP rights created in one holding company. A key impetus for this strategy was the pending easyJet IPO. The IP holding company was incorporated as easyGroup IP Licensing Ltd on 25 August 2000 and kept that name until 2014 when it became easyGroup.
37. In furtherance of the strategy easyGroup entered into an agreement known as the “easy Brand Consolidation Agreement” with 37 companies, including easyJet plc, easyEverything Ltd, easyRentacar (UK) Ltd and easyGroup (UK) Ltd. By that agreement the parties agreed that, as it was put in recitals J and K, the parties to the agreements other

than easyGroup would transfer to easyGroup all interests they then held in the intellectual property rights that “support or derive from the easy Brand and Getup”, and that in return easyGroup would license the relevant rights back to each party on terms containing common restrictions “that are intended to sustain the high level of quality and value expected by easy brand customers, and to ensure that use of the easy brand is strictly policed and brand piracy vigorously pursued”. Appendix 1 to the agreement was an Agreed Form IP Assignment, and Appendix 2 was an Agreed Form Brand Licence. The “easy brand” was defined as “the combination of the word 'easy' with a word which refers or alludes to the services provided by the company in question so as to form one new word (e.g. easyJet, easyRentacar)”. The “Getup” was defined as meaning “(a) white lettering on an orange background (pantone 021C on glossy print materials; on other surfaces the nearest practical equivalent) and (b) in Cooper Black font (not bold, italics, outline nor underlined) the word 'easy' in lowercase followed (without space) by another word, only the initial letter of which is capitalised”.

38. Pursuant to the easy Brand Consolidation Agreement, a series of assignments and licences were executed in the agreed forms. By way of example, easyJet plc entered into an assignment and a licence both dated 5 November 2000. The licence contained (at clause 3.2) a provision that all goodwill derived from the use of the rights licensed accrued to the benefit of easyGroup. It also contained (at clause 6.1.8) a provision that the licensee should not use the licensed rights or carry on its licensed activities “in any manner which (as compared with the standards of the industrial, professional, ethical, national or cultural context in which the use complained of takes place would be (or on a reasonable analysis would be highly likely in due course to be) materially detrimental to or inconsistent with the good name, goodwill, reputation and image” of easyGroup.
39. The licence was amended and re-stated on 10 October 2010 as part of the settlement of litigation between easyGroup and easyJet in which easyGroup alleged that easyJet had acted in breach of the original licence agreement. The amended and restated licence agreement provides (in clause 5. 7.2) that easyJet is permitted to sell advertising in a defined Field to any third party “provided that the third party is not an Unethical Business”. It also provides (in clause 18.4) that easyGroup “shall, to the extent that it is aware of an issue, procure that its sub-licensees shall not conduct any business which is an Unethical Business”. “Unethical Business” is defined (in clause 1.1) as “any business

or company that routinely disregards applicable laws and regulations and/ does not conform to the generally accepted standards of the industrial, professional, ethical, national or cultural context in which the business or company operates”.

40. As a result of the brand consolidation exercise, easyGroup became the holder of all the registered and unregistered intellectual property rights exploited by easyGroup's licensees. Since then, easyGroup has been the applicant for any new trade mark registrations. easyGroup changed its name to its present one on 22 May 2014.
41. Since early 2000, first easyGroup (UK) Ltd and then easyGroup has maintained a “portal” website at www.easygroup.co.uk which gives consumers details of all of its activities and an up-to-date list of its brands and licensees with links to their respective websites. The first archived screenshot dates from 26 January 2000. Its appearance is difficult to make out from the archive, but it appears to have displayed logos for easyJet, easyEverything and easyRentacar with links to the respective websites.
42. Since early 2000 first easyGroup (UK) Ltd and then easyGroup has maintained a website at www.easy.com. The first archived screenshot dates from 1 March 2000. This stated:
- “A business plan is being developed to transform easy.com into a web based email provider, and ISP and/or portal site.”
43. By August 2000, www.easy.com was also being used as a “portal” website in parallel with www.easygroup.co.uk. From at least 2011 www.easy.com has been easyGroup's principal portal. Since at least 9 October 2011 www.easygroup.co.uk has redirected to the www.easy.com website.
44. In about January 2001 easyGroup launched a free email service via www.easy.com which provided users with email addresses in the format name@easy.com. The evidence at trial is that the email address is still available and still free to users This service used the white and orange get-up and emails contained a footer stating “Sent by Mail at easy.com, an easyGroup company”. The email service provider, Commtouch, sold banner advertising which appeared at the bottom of the www.easy.com email interface. www.easy.com continues to provide a free email service which is currently used by about 5,000 people.

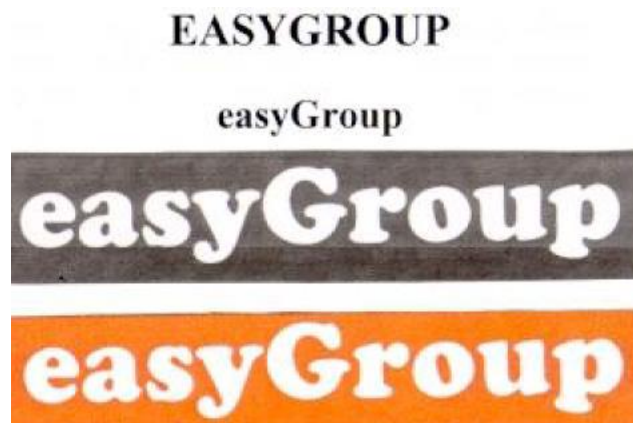
45. Prior to 7 January 2001 there were over 23,600 users of the easy.com website. In the period from then until 5 December 2004 there were over 126,000 new users. In the years from 2006 to 2015 the number of users varied from a low of around 676,000 in 2013 to a high of over 1,205,000 in 2016.

46. In recent years, easyGroup has increasingly promoted itself as the licensor of the “easy-” brands and the easy.com website as a central source of information about those brands, using the slogan “easy.com the easy portal”. By way of example, on 29 September 2014 easyGroup placed an advertisement in The Guardian newspaper that explained, easyGroup “owns all the rights to the easy brand and is in the business of extending into other activities” beyond easyJet. Bianca Luxton explains:

“easyGroup is the proprietor of the easyJet Mark. easyGroup has licensed the use of the easyJet Mark exclusively to easyJet Airline Company Limited (“easyJet”), with the right to sub-license.”

47. The evidence she gave is consistent with the publicity (courted by easyGroup).

48. The sign used by easyGroup follows the established formula beginning with the word “easy” followed by the word “group” with a capital “G”. It may also take the form of all capitals. The get-up follows suit using an orange background with white lettering in cooper black font but can be used without the background colours as depicted here:



easyHotel

49. This enterprise was launched in September 2004. Initially the business operated as a hotel booking facility via a website where customers could book rooms in over 19,000 hotels worldwide.
50. On 1 August 2005 the first easyHotel opened in Kensington, London. Subsequently easyHotels have been opened in a series of other countries, including Germany (Berlin) in 2010, the Netherlands (Amsterdam) in 2011 and Belgium (Brussels) in 2016. There are now 25 easyHotels in 16 cities and 8 countries, including some 13 cities in the EU.
51. Both the launch of the business and the opening of the easyHotels attracted media coverage. In addition, easyHotel has engaged in online advertising. It has at all times been cross promoted via the easy.com portal.
52. easyHotel's annual turnover has grown from £189,000 in the year ending September 2005 to just under £20 million in the year ending September 2015.
53. In June 2014 EASYHOTEL was floated on the junior market of the London Stock Exchange. The recognition of the mark "EASYHOTEL" is evidenced by media reports. However, it is denied by the Defendants that by the time the easylife group signs complained about were first used, EASYHOTEL had come to indicate the services of easyGroup.

easyValue

54. easyValue was an online price comparison website that operated from November 2000 until 2004 from a website at www.easyvalue.com. It was promoted at easy.com and itself entered a sponsorship agreement with easyEverything. As with the launch of other "easy-" businesses, there was significant press coverage both before and after the launch. In December 2000 nearly £72,000 was spent on press advertising. By June 2001 monthly visits to the easyValue website had reached over 1 million and yearly turnover was over reaching tens of thousands of pounds.

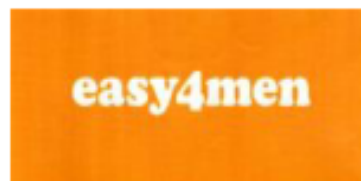
easyMoney

55. Trade commenced under the easyMoney Sign in August 2001 from the website hosted at the domain easyMoney.com. In September 2001, the business began taking on-line credit card applications and launched the first dynamically personalised credit card in the world.

This credit card allowed the customer to alter the rates of interest, cash-back and annual fees to suit their individual financial needs. In 2006, as a result of the sale of the credit card business to Lloyds TSB, this card was no longer available to new customers and the 27,000 customers who held an account had their accounts migrated to Lloyds TSB Bank. Since 2006 a range of financial services have been provided under and by reference to the easyMoney Sign. Since 2017 those services have included an Individual Savings Account.

easy4men

56. From 2004 to 2006 a partnership with Boots for the sale of men's toiletries was operated under the sign "easy4men".



easyLand

57. easyLand is intended to be a retail outlet for the easyJet range of products such as mugs, pens, model planes, notepads, rulers, bags, beach balls, cosmetics, money boxes, books and coasters, all of which are branded with an easyGroup's trade mark registrations. The first easyLand shop was opened in November 2016 in Croydon, South London. In fact, it occupies a single room on the ground floor of easyHotel Croydon. Until recently it was only accessed through the lobby of the hotel. There is no sign attracting the general public to easyLand, it is not staffed, and the sales may fairly be described as *de minimis*.

easylife

58. Easylife does not produce the items it sells. It sells items, purchased from suppliers, often branded with the easylife logo. One possible description of the business is that it deals in retail sale of a variety of clothing, homewares, household goods, gadgets, motoring accessories, and health and mobility items targeting the over 65-year-old demographic. The description, however, is not complete. Mr Caplan (the second Defendant) explains:

“EasyLife has also developed a range of its own brands which don’t have the word easy in them. For example EasyLife has a range of watches and clocks, sold under the Tavistock & Jones brand (which is also abbreviated to T & J on the products), the Good Ideas brand (which we use for various cleaning/disinfecting products including the Oven Genie product), Schloff for mattress toppers and other bedding products, Cucinare, for kitchen products, Featherlight for shoes, Happy Feet for foot products, GoHeater, and the Genius brand which is used on our Safety Ladder and numerous other products. EasyLife has also sold many products bearing third party brands such as Cataclean catalytic converter cleaner, some Westland lawn care products, Sursol hand sanitisers and many others.”

59. Mr Caplan began the business using the initials of his name “GCE”.
60. He explains that GCE initially bought advertising space in the Home Free catalogues, owned by Innovations, and the Ideal Home catalogues, owned by Wrightway Marketing Ltd.
61. The Innovations catalogue was full of gadgets and innovative products designed to make life *easier* for the targeted demographic. Catalogue sales produced the main income stream for GCE but it also acted as a wholesaler to Innovations.
62. At the time when Innovations and Wrightway Marketing Ltd began moving to television sales GCE started its own catalogue and explored the use of the internet. On 17 February 2000, the domain name easylifeonline.com was acquired and in March 2000 a new trading company known as easylifeonline.com Limited was incorporated.
63. The ‘online.com’ form of name proved alienating to the demographic and so Mr Caplan changed the branding on the catalogues to simply ‘easyLife’ in the summer of 2000, shortly after the initial launch of the new catalogue. The catalogues have used the same ‘easyLife’ name continuously for the last 21 years.

64. In August 2001, easyEverything, easyRentacar and easyGroup, wrote by their solicitors to easylifeonline.com Ltd to allege that the use of the sign easylifeonline.com as the domain for, and name of, easylifeonline.com Ltd's retail website infringed various trade marks owned by the complainants and amounted to passing off. No complaint was raised in relation to the easylife catalogue business, even though it was on a significantly larger scale than the online operation at that time. Correspondence ensued, and in January 2002, Particulars of Claim were sent in draft. The solicitors acting on behalf of easylifeonline.com Ltd denied that the trade marks had been infringed, and the online and catalogue business continued. easyGroup did not pursue any action.
65. In 2004, following a suggestion from his accountant, Mr Caplan restructured the corporate affairs of the easylife retail business incorporating a trading entity and subsidiary of easylifeonline.com Ltd. In his statement he explains that he received advice from an accountant that:
- 65.1. A trading company should be set up as a subsidiary of Easylife Holdings and the business and assets/liabilities of Easylife Holdings should be hived down to that trading company;
 - 65.2. Shares he held in GCE would be transferred to Easylife Holdings; and
 - 65.3. An offshore employee benefit trust would be set up to own the shares of Easylife Holdings.
66. A domain name was also obtained: easylifegroup.com (the "Domain"). The Domain is said to have been used continuously since at least September 2004 and used for the purpose of easylife's services. The sign Easylife Group and easy Life Group has been used since Autumn 2004.
67. There is a factual contest as to whether Mr Caplan knew if easyGroup existed in 2004: he says not in his written evidence. He says he became aware later in March 2013 after he received a letter before action from easyGroup: "[the] letter did make me aware of the name easyGroup and that the Claimant owned a large number of trade marks containing the word 'easy'."

68. The name chosen for the trading company was an idea, according to Mr Caplan, of his accountant: “Easylife Group Limited”. It is convenient to set out his evidence on the “group” name here:

“There was no discussion between myself and Mr. Strauss [the accountant] or between me and anyone else that the choice of the name Easylife Group Limited might help the new business cash in on the goodwill or reputation of the Claimant or any of the brands or businesses that it had set up. That idea was never discussed at that time and has never been discussed.”

69. The sign used includes a white tick inside a circle with a blue background. The word “easylife” is in lower case, coloured blue accompanied by words “everyday solutions” underneath in different and smaller font.



70. It was at the time of reorganisation that the domain was acquired for the trading company to utilise. Mr Caplan says:

“I chose it to match the proposed name of Easylife Group Limited which Mr. Strauss had suggested. I wanted the new domain name to incorporate the name easylife, which by then had a lot of goodwill in it.”

71. Although acquired in June 2004 the domain name was not used until in or around September 2004. The transfer of the trading business to easylife took place about a year later in October 2005.

72. The use of the ‘easyclean’ brand began in 2010 (“EC Sign”). The first product sold under that name was a fox repellent spray. It was subsequently used on several different animal repellent and cleaning products such as ‘oven shine’:



73. Other such products and the dates on which the Defendants began use of the EC Sign are:

- 73.1. 'Shoe Stretch Cream' (from January 2011);
- 73.2. 'Stone, Patio and Decking Cleaner' (from September 2011);
- 73.3. 'Cat & Dog Stayaway' (from September 2011);
- 73.4. 'Spider StayAway [sic]' (from September 2011);
- 73.5. 'uPVC Reviver' (from April 2012);
- 73.6. 'Mattress Cleaner' (from October 2011);
- 73.7. 'Mattress Stain Remover' (from July 2012)
- 73.8. 'Washing Machine Disinfectant' (from March 2012);
- 73.9. 'Moth Repellent Spray' (from September 2012);
- 73.10. 'Spray n Seal – Black' (from January 2013);
- 73.11. 'Spray n Seal – Clear' (from January 2013); and
- 73.12. 'Frost Free' (from April 2013)

74. More recently, a stairlift cleaner, a wheelchair cleaner and a mobility scooter cleaner were offered for sale bearing the sign 'easycare' (the "Easycare Sign"). Easylife also offered another product under the sign 'easy green' (the "EG Sign"). The EC, EG and Easycare

signs (as they have been referred to in the pleadings) are also the subject of easyGroup's trade mark infringement and passing off claims in this litigation. I shall refer to them collectively as the "Product Signs". It is said that the Product Signs have been used in relation to goods that are similar to the goods and / or services in relation to which easyGroup's marks are registered marks exist in favour of easyGroup and that there is a likelihood of confusion on the part of the public between the Product Signs and those registered marks owned by easyGroup.

75. On 14 June 2011, Mr Caplan registered the domain easy-life-group.com.

76. The scale of the easylife business is not questioned by easyGroup. It has relevance to the complaints made in respect of the business relied upon by easyGroup as evidence of detriment. The uncontested evidence of Mr Caplan is as follows:

The number of mailings sent out by Easylife Holdings would have started at a few hundred thousand per year (using my Home Free and Ideal Home databases). By 2005/2006 we would have been mailing about 500,000 easylife branded catalogues quarterly to our database (owned and bought) and inserting into national and regional newspapers and magazines at least 50 million white label/co-branded catalogues and at least another 50 million Easylife branded catalogues a year. The key to the success of my business is high volume, in order to benefit from the economies of scale of printing catalogues, purchasing product from China and fulfilment processing. The higher the volume, the lower the cost per unit and per order. At that time, the web traffic accounted for less than 10% of orders, as it wasn't until home broadband became much more established that our 65+ year-old customers started ordering online, even then, it was less than 20% until 2015, and is only slightly higher today, circa 25% - 30%.

Like most businesses Easylife has had its share of ups and downs in terms of trading volumes, being affected by the financial crash and numerous other issues. However by

2010/2011, Easylife was distributing about 150 million insert catalogues in newspapers and about four to five million catalogues were being mailed to our database. By 2010/2011 the internet was becoming much more significant and we were likely getting hundreds of thousands of visitors a year to the site by that point. The turnover from 2010 to about 2016 would have been about £15m a year. From 2016 we put a lot of effort into growing the business through general expansion with the purchase of a major competitor, Tensor Marketing Ltd and by offering a bigger book with a greater number of pages and products. Since 2016 our annual turnover has more typically been about £30 - 35m. Now in our 21st year, we have inserted well over one billion insert catalogues and mailed out well over one hundred million catalogues to our customer database and served over 5 million customers, with over 10 million orders.

77. To help with the volumes of business and the large number of customer contacts easylife is assisted by Direct Response Marketing Group Limited (“DRMG”). DRMG is based in Kent and provides what is described as marketing, sales and customer support services. It subcontracts “the delivery” of its services to a company called First Choice Group Limited (“First Choice”) which is based in Larnaca, Cyprus. DRMG and First Choice operate call centres.
78. First Choice provides the bulk of the call centre services to easylife and has done so since at least 2016. DRMG assists with sales calls on an overflow basis when First Choice is very busy. This occurred during the pandemic when orders increased significantly. First Choice also deals with easylife customer service calls on a different telephone number. DRMG receives calls relating to what have become known as easylife’s clubs.
79. In February 2021, just a few months before trial, easyGroup sought to amend its particulars of claim to include the easylife Clubs. The matter came before Deputy Master Bowles. In his judgment he observes:

“The amendments which are now sought to be brought fall into primarily three classes. The first and perhaps the most

important one is what is termed "the brand extension claim", and that relates to the fact that the claimant has, it says, relatively late in the day, and primarily by reason of the disclosure process in the current litigation, learnt that the defendant is using, in relation to its activities and in relation to websites pertaining to those activities, names, or signs, such as Easylife Gardening Club, Easylife Car Club, Easylife Travel Club and so on. These names have been referred to, generically, today as brand extensions of the Easylife brand... The brand extensions claims are entirely new claims. They are not amendments of the existing claims."

80. On the issue of whether the new claims should be permitted the judge said:

"It is undoubtedly utterly unfair to the defendants, who have to meet these claims, to expect them to go through all the processes required to bring these new claims to trial in the time available. There is a lot of evidence about what facts might be and brought into play, what disclosure might be brought into play. A large amount of work and material, over and above that which is already extant, is going to arise if these amendments are allowed."

81. The decision made by the judge was a case management decision. It has not been appealed. I understand that easyGroup has launched a separate claim relating to the easylife clubs. Deputy Master Bowles had the benefit of the draft amended particulars of claim. That assisted him to understand the significance of the proposed amendment. His observations provide insight:

"It would be untrue to say that there is no degree of overlap, but it would be equally untrue to say that the overlap is overly considerable. The area where there might be a degree of overlap is to do with claims made, in the current proceedings, that the defendant might be producing a family of names or a family of brands, given that that will undoubtedly be one of the

arguments raised in the brand extension proceedings, if brought separately. I note, however, from the pleadings that the way the brand extension plea is put and the way that the current claim in respect of easyGroup is put in terms of a family of brands are different; one concerns the use of the name "easy", and one concerns the use of the name "Easylife".

82. The judge was also asked to permit an amendment reintroducing a claim that the use of the easylife sign by itself infringed easyGroup trade marks. This element of the claim was abandoned in an amended particulars of claim in April 2020. The sole ground relied upon for the reintroduction of the infringement claim was the discovery of the easylife clubs through the disclosure exercise. The judge, having decided that claims in respect of easylife clubs should form part of a separate claim, was not prepared to allow the reintroduction of the alleged infringement by the use of the easylife sign alone as it could be pleaded in any new claim. This precluded easyGroup from using the easylife club documents for the purpose of supporting the infringement claim.
83. The brand extension issue is not now used to bolster easyGroup's claim that easylife was seeking to create a family of brands. The documents obtained during the disclosure process are put before the court as evidence of detriment or likelihood of detriment to easyGroup's reputation. Given that this experienced judge was not (i) prepared to permit the reintroduction of the easylife signs which relied upon the disclosure documents, and given that (ii) he was not invited to give any directions as to the use of such material in this trial the admission of such documents late in the day for a different purpose in circumstances where easylife has not had an opportunity to investigate, interrogate (in circumstances where there is no direct control by easylife or the second Defendant due to the licensing arrangement) and produce evidence to counter the conclusions easyGroup invite the court to make as a result of it, gives rise to a degree of inequality and unfairness. The admission of the evidence for the new purpose of demonstrating damage to repute would invariably lead to a contravention of the overriding objective. Dealing with a case justly entails ensuring that the parties are on an equal footing, enabling them to participate fully in the proceedings and witnesses to give their best evidence.
84. There have been other developments along the way that are material to these proceedings. easyGroup complained about easylife's use of the sign 'easylife' in relation to the

catalogue retail services, launch of a loan product under easylifemoney and the website at www.easylifegroup.com in a letter from its solicitors in early March 2013. The response was “to make easyGroup go away we stopped using the easylifemoney brand and easyGroup’s complaint then seemed to fizzle out”.

85. On 12 September 2016, solicitors acting for easyGroup wrote direct to Mr Caplan. They referred to complaints made in the 2013 correspondence.

86. Mr Caplan replied at the end of September 2016 through his solicitors. No immediate action was taken. Eventually these proceedings were issued in 2017.

87. Soon after in January 2018 a statement began to appear in the catalogues of easylife explaining that easylife was not associated with easyGroup.

88. At some point between then and trial easyGroup dropped its objection to ‘easylife’ and other signs incorporating easylife. Subsequently easylife changed its name to Easylife Ltd with effect from 25 January 2021.

89. Mr Caplan had decided on a course of appeasement. He explains his reasons

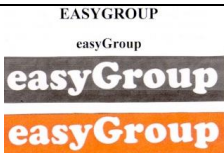
“I was aware by this stage that easyGroup is a serial litigator with a multi-million-pound budget to spend on this kind of complaint and that it gets 90% of its legal costs paid by easyJet plc under its brand licence. I was (and remain) fearful that, backed by its billionaire founder, easyGroup would simply keep going with these actions to put me out of business. I therefore decided to phase out Easylife’s use of Easylife Group, easylifegroup.com, easy-life-group.com and easyclean. I bought the easylife.co.uk domain name from a third party (AEI Security & Communications Limited) for £50,000 in June last year and Easylife’s website was switched to that domain name in early August 2020. At the same time, the catalogues began to promote easylife.co.uk and not easylifegroup.com. Easylife then phased out, in July/August 2020, the use of the easyclean brand and two other brands – easy green and easycare. We also

stopped the domain name easy-life-group.com pointing at Easylife’s website at about this time.”

90. In 2021 EasyLife Group became EasyLife Limited.

Infringement of registered marks

91. The registered trade marks relied upon by easyGroup in this litigation are as follows:

No	Mark	Goods and/or services relied on	Filing date	Date registered
UK2 0167 85	EASYJET	39: Transportation of passengers and travellers by air; arranging of transportation of passengers and travellers by land; airline services; arranging, operating and providing facilities for vacations; travel agency and tourist office services;	5/4/95	4/10/96
UK2 2944 15		3: preparations and substances for use in the care and appearance of the hair, face, skin; non-medicated toilet preparations; cleaning preparations; shampoos 35: business organisation, business administration and business management services; the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and to purchase those goods through a retail general merchandise shop	4/3/02	17/10/03

UK2 2733 62	easyLand	35: the bringing together for the benefit of others of a variety of goods, enabling customers conveniently to view and to purchase such goods through general merchandise retail shops	22/6/01	17/5/02
UK9 0376 3489	easy4men	3: shower gels, shaving lotion, shaving balm; hair care products including shampoo (all in class 3).	13/4/04	3/11/05

92. As can be seen there are two marks which are registered in relation to services in class 35, two marks which are registered in relation to goods in class 3 and one which is registered in relation to services in class 39.

93. Sir Stelios sums up the case for easyGroup in the following way:

“As I have explained at length I have spent more than two decades and invested a great deal of money, as have investors I have worked with, building up and protecting the distinctive EASY family of brands. It seems completely obvious to me that unauthorised trade mark use of EASY, especially together with elements of our get up, is likely to dilute the EASY brand and make it less distinctive.”

94. As well as reliance on the class 3, 35 and 39 marks, easyGroup relies on the goodwill and public awareness of marks as part of a wider “family” of marks. In particular easyGroup rely on use of the signs easyEverything, easyInternetcafé, easyValue, easyMoney, easyCruise, easyKiosk, easyRider, easyRamp, easyTech, easy.com, easyHotel, easyRentacar and easyCar as forming a family of marks alongside the Registered Marks.

95. It is argued that the larger the “family” of marks the greater the risk of trade mark infringement and passing off on any one of the marks. This is because consumers are more likely to make a link between marks which share the common feature ‘easy’.

96. easyGroup claims an injunction to restrain the Defendants from using the ‘easylife group’ sign, the Domain and the Product Signs, infringing the Registered Marks, passing off any entity or business or goods or services as being of or connected or associated with easyGroup or procuring a breach of the injunctions sought. It also asks the court to order the Defendants to procure a transfer of the Domain to easyGroup. It had asked for easylife to change its name, but that is no longer pursued in this action given the concession that the ‘easylife’ sign does not infringe any of the Registered Marks.

The Challenge

97. easylife denies infringement and seeks revocation of the registered trade marks for non-use. Reliance is made on section 100 of the Trade Mark Act 1994 (the “TMA”):

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

98. The class 39 mark is challenged on the ground that its scope is too wide as no tourist office services have been shown to exist.

99. The easyGroup easyJet mark for “the management, administration and organisation of intellectual property for licensees” is said to be too broad. The mark should remain registered only for the services that have been used. This requires a consideration of categories and subcategories to permit a surgical knife to cut out those subcategories that are unused. A delicate exercise.

100. The easyGroup class 3 mark has not in reality been used. In relation to the easy4men mark, easyGroup rely on the sale of easy4men 3-day travel packs but it is said that given that they are sold from easyLand at a price of 0.25p per pack and the packs are 14 years old or more, there is no commercial exploitation of the mark and it no longer serves a purpose.

101. The easyLand class 35 mark is said to be defunct. There is no evidence of commercial exploitation in the period 4 years and 9 months before the issue of the counterclaim: section 46(3) TMA.

Key statutory provisions

102. The key statutory provisions are contained within the TMA. Section 1 defines a trade mark as meaning any sign which is capable-

(a) of being represented in the register in a manner which enables the registrar and other competent authorities and the public to determine the clear and precise subject matter of the protection afforded to the proprietor, and

(b) of distinguishing goods or services of one undertaking from those of other undertakings. A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals, colours, sounds or the shape of goods or their packaging.

103. Section 2 of the TMA gives statutory force to the proprietary nature of a trade mark accompanied by statutory remedies whilst preserving the common law right to bring an action for passing off.

104. Section 9 provides the “proprietor” of a trade mark with exclusive rights in the trade mark that is infringed. The acts amounting to infringement, if done without the consent of the proprietor, are provided for in section 10:

(1) A person infringes a registered trade mark if he uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.

(2) A person infringes a registered trade mark if he uses in the course of trade a sign where because—

(a) the sign is identical with the trade mark and is used in relation to goods or services similar to those for which the trade mark is registered, or

(b) the sign is similar to the trade mark and is used in relation to goods or services identical with or similar to those for which the trade mark is registered, there exists a likelihood of

confusion on the part of the public, which includes the likelihood of association with the trade mark.

(3) A person infringes a registered trade mark if he uses in the course of trade in relation to goods or services, a sign which—

(a) is identical with or similar to the trade mark,

(b) where the trade mark has a reputation in the United Kingdom and the use of the sign, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

(3A) Subsection (3) applies irrespective of whether the goods and services in relation to which the sign is used are identical with, similar to or not similar to those for which the trade mark is registered.

105. Section 46 specifies the grounds upon which a trade mark may be revoked:

(1) The registration of a trade mark may be revoked on any of the following grounds—

(a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c) that, in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service for which it is registered;

(d) that in consequence of the use made of it by the proprietor or with his consent in relation to the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

(2) For the purposes of subsection (1) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) An application for revocation may be made by any person, and may be made either to the registrar or to the court, except that—

(a)if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and

(b)if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(5)Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6)Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from—

(a)the date of the application for revocation, or

(b)if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date.

106. Whilst the Defendants object to what they characterised as the Claimant's unpleaded reliance on section 46(3), in the end it was agreed that on the facts of this case, the proviso in that sub section means that use had to be demonstrated to the satisfaction of the court in the following periods: (i) for the easyJet, easyGroup and easyLand marks: February 2013 to November 2017 (ii) for the easy4men mark: August 2015 to May 2020.

107. I now turn to witnesses of fact.

Witnesses of fact

Witnesses called by easyGroup

108. easyGroup called five witnesses including two solicitors engaged by easyGroup to act on its behalf.

109. The first in time was Mr Anderson. He explained that he was employed as Head of Marketing at easyJet between 1 May 1995 and 30 November 1998. He was also

employed by easyCafe (trading as easyEverything) as Marketing Director between 1 December 1998 and 31 March 1999 and employed by easyGroup as Marketing Director between 1 April 1999 and 10 March 2000. His full-time employment ended at that point but has had some involvement as a consultant since. His current role is “brand historian”. He did not have first-hand knowledge of the licensing arrangements in respect of easyGroup in the period 2000-2010. His source of information was a friend who worked at easyGroup and his research. The research was primarily based on articles written about the easy+ companies. He accepted the following in cross examination:

- 109.1. he had been paid by easyGroup to provide his witness statement and for his time at court.
- 109.2. he understood that easyKiosk was “only ever” used for the purpose of selling items such as food and drink during a passenger flight.
- 109.3. easyKiosk was not separate entity: it was not a trading company. Neither was easyRider, easyTech or easyLand.
- 109.4. part of his role was to help bring the 16 brands existing at that time together under one umbrella, that being easyGroup.
- 109.5. easy.com was set up to assist with the umbrella concept.
- 109.6. easyBank did not materialise: “Stelios was often talking about new ventures. An idea is not the same as establishing a company.”
- 109.7. He was not sure that easyKiosk or easyLand could be “classified as a venture”. easyKiosk is a licensed to an operator.
- 109.8. easyGroup was not a venture in its own right. It provided services in support of the licensees.

Assessment

110. Mr Anderson although not having first-hand knowledge of all events, and thus his evidence carries less weight on those issues, provided fair and straightforward evidence accepting that easyGroup held the IP and dealt with licensees but essential to easyGroup is easyJet.

111. As I have mentioned Stephenson Harwood LLP are engaged to act for easyGroup in these proceedings. Joshua Cunnington is an associate at that firm. His evidence is generally of limited value. He had carried out various internet searches, made a visit to a premises occupied by easyGroup known as easyLand in April 2021 and whilst there bought some goods. He was also responsible for writing e-mails to customers of easylife in the hope of obtaining actual evidence that they had either been confused or that the reputation of easyGroup had been damaged as a result of their experience with easylife.

Assessment

112. Mr Cunnington was a truthful witness and gave his evidence fairly, not hesitating to accept that at least one e-mail he had sent could have been misunderstood with the result that responses were of limited value.

113. Bianca Luxton has been employed by easyGroup since October 2018 and holds the position of in-house Brand Protection lawyer. She has given two witness statements in this action. The first is heavily redacted. She explains that in her role she has engagement with the majority of easyGroup's licensees, including prospective ones. The focus of her evidence was to answer the counterclaim made that the trade marks relied upon by the Claimant should be revoked for non use, namely the trade marks for EASYGROUP (UK trade mark 2,294,415), EASYJET (UK trade mark 2,016,785), easyLand (UK trade mark 2,273,362), and easy4men (EU trade mark 3,763,489 or its UK comparable mark).

114. She was cross-examined for several hours. She admitted that although she gave evidence in her statement about easyLand, she had not in fact been to the premises. It is her evidence that easyHub (in Croydon) currently runs a genuine retail shop known as easyLand.

115. I shall go into her evidence in more detail. In the period 2016-2019 easyLand was only accessible via the entrance lobby of the easyHotel. She accepted that easyLand could be described as a tool to promote the easy brand. There are no recent sales details. It now occupies 215 square feet of space, has no back office and no till. An honesty box is placed in the room to collect takings. There are no accounts for easyLand. No one is directly employed by easyLand. Ms Luxton gave evidence that someone employed by easyHub deals with easyLand. She did not know the identity of such a person. easyLand

is not advertised on the outside of the hotel and thus the general public would not know it existed by passing-by. Given the evidence of Sir Stelios and Mr Anderson that great expenditure has been made on educating the public about the brands and advertising, it can readily be inferred that easyLand is not taken seriously by the directors and shareholders of easyGroup or any of the easy+ companies.

116. Some of the evidence she gave was troubling. First, easyLand is no longer managed by easyHotel where it is located. When asked she remained adamant that easyLand represents a genuine retail enterprise. In light her lack of personal knowledge and in the teeth of the evidence already given I find her answer, “you can exchange money for goods”, a poor attempt to obfuscate. She did not seek to answer whether it was a genuine retail enterprise and, in my judgment chose her responding words carefully. I do not accept her evidence on this issue.

117. She was taken to her statement:

“In the majority of cases, the business is carried out by an independently owned licensee or franchisee company, which has entered into a licence or franchise agreement with easyGroup to use their easy brand name. However, as discussed further below, easyLand and easy4men are both operated and under the direct control of easyGroup, and the easyGroup IP name was included on the packaging of easy4men travel products. easyGroup continues to act as a prudent brand owner, protecting the brand from infringement and other unauthorised use. easyGroup also publishes a brand manual for the benefit of its franchisees, licensees and potential business partners, to maintain continuity across the family of brands.”

118. She agreed that easyGroup does not provide services direct to the public. The goods and services provided by easyGroup are provided to the licencees in general.

119. She was taken to the home page of the easy.com portal where a full list of businesses in the “easy family of brands” can be found. easyLand and easy4men are not listed. Mrs Luxton suggested that the reason for their absence on the home page is that they are

brands and not companies, however she accepted that easyGroup (a company) is not listed on the site. The significance is that it may be inferred that easyGroup is not an important company to list for the purpose of bringing it to the attention of the public.

120. In respect of easy4men Ms Luxton explained that easyGroup had manufactured a large number of packs designed to be taken on board a passenger aircraft in compliance with the liquid limit of 100ml. She was unable to recall where the packs were manufactured but was sure that they had been manufactured in a factory by easyGroup. There is no documentary evidence to support the assertion. The brand was used to sell a range of toiletries in a joint venture with Boots the chemist until 2006 when the line was discontinued. Ms Luxton accepted that the last time an advertisement promoting the packs is recorded was in 2007. If three packs were purchased for £11.95 the consumer would receive a free watch. The easy4men brand did not appear on the website from around 2010/2011. There is no evidence of promotions or sales from that point until at least 2016 when the remaining packs were taken to easyLand in Croydon. The packs were then sold for 0.25p (with a minimum purchase of 12 easyLand items). All goods in easyLand were priced at the same amount. The packs displayed and photographed at easyLand included easyGroup's former name, which was changed in 2014, and were imprinted with easyGroup's previous address, which it vacated in 2006. As no more easy4men travel packs were manufactured after the collaboration with Boots ended, it is likely that easyGroup have sold very few easy4men products in the last 15 years. Ms Luxton rejected the notion that easyGroup controls easy4men.

121. What is known is that some easy4men products have been purchased recently by witnesses for the Claimant (for the purpose of giving evidence that the product exists) but there are no records of any other sales. I infer from these facts that there are either no sales or no sales capable of sustaining a genuine commercial enterprise for any length of time let alone 15 years.

Assessment

122. Overall, my assessment of Mrs Luxton is that she had little first hand knowledge of many of the events she was questioned about. She knew little or no detail about easyLand or easy4men. Her evidence in respect of these brands I discount. Generally, where she had first-hand knowledge her evidence was credible such as the evidence she gave

concerning easyGroup: that it acts and has acted as an umbrella company for intellectual property rights and is not public facing.

123. Mark Kramer previously acted for easyGroup as an associate at Stephenson Harwood when this claim was issued. He has since moved firms and no longer acts for easyGroup. His evidence concerns visits to easyLand in Croydon. The cross-examination focussed on the easyHotel and the shop. The evidence is relevant to whether the retail business is a genuine commercial business. He agreed that only guests of the easyHotel would know that easyLand occupied a room on the ground floor of the easyHotel. There were no external signs informing the public that it was located at the Croydon premises.

Assessment

124. The evidence given by this witness was from his own knowledge, fair and reliable.

125. Mehreen Parvez was previously employed as brand protection coordinator for easyGroup. She explains that her job was: “to nurture and protect the easy brand and this family of brands”. She said that her witness statement was general in nature and not necessarily produced for the purpose of these proceedings. She left her job in September 2018. It primarily concerns the opening in November 2016 of easyLand. She remembered attending easyLand on one occasion possibly two. She recalls the first occasion. She confirmed that only guests of easyHotel would know that easyLand was situated in the premises as far as she knew and that every item for sale was for £0.25p

126. She was taken to sales spreadsheets for easyLand. The record demonstrated sparse sales and limited number of different items for sale. She accepted that although easyLand in its 1500 square feet (prior to September 2019) was tangible, its real purpose was to promote the “family brands” rather than produce an income from retail: sales between November 2016 and end of January 2017 were approximately £250, insufficient to cover the cost of any genuine business overheads let alone an employee. She was taken to a receipt that had been disclosed in the course of the litigation which purports to represent sales at easyLand. She agreed that it was dated a few days before she signed her statement in January 2017 and that it contained no mention of easyLand on it or easyGroup. Her evidence is corroborated by a picture on the easyGroup website carrying a heading “free

promotional items” under an explanation that easyLand “showcases a range of promotional items”. She did not think that easyLand employed a salesperson in the shop.

Assessment

127. Ms Parvez gave her evidence in an apparently impartial manner and had knowledge of the facts about which she spoke. Her evidence was provided honestly and fairly.

128. That leaves the 49-page generic statement of Sir Stelios dated 4 August 2017 that was served with, and expressly relied on in, the Particulars of Claim. That statement describes much of the history of easyJet, other businesses which he was involved in setting up under “easy+” names and the development of easyGroup’s licensing business.

129. The reason given for Sir Stelios’s non-attendance in the CEA Notice is: “Sir Stelios is unable to travel to the UK to give evidence.” No reason is given as to why he could not attend remotely. In so far as his statement contains evidence of historical matters that do not directly concern these proceedings, I shall give it some weight. Otherwise I attach little weight to his statement. Mr Moody-Stuart had not suggested that the court should approach his evidence in any other way.

Witnesses called by easylife

130. There are four categories of witnesses called for the Defendant. The first is those who work for DMRG or First Choice. The second is those (namely Mr Caplan in this case) who work directly for easylife and the third are consumers of easylife products. I shall deal with the witnesses in the order they were called starting with those working for DMRG and First Choice.

131. Mr Chrys Chrysostomou gave evidence first for easylife. He is a Cypriot but has lived in England since 1974. He has known Mr Caplan (the founder and CEO of easylife) for more than 25 years. He is the managing director of DRMG and other companies such as First Choice and “Direct Response Fulfilment”. A good deal of the direct marketing is done through call centres.

132. At the start of his evidence he corrected his statement by explaining that usually letters received by the agencies that required “escalation” were passed to easylife to deal with. This related to “physical” letters. During the pandemic (from 15 March 2020) there was a

division of labour between the agencies and easylife where they would share customer issues more evenly due to the lack of capacity.

133. The agencies use a system known as the Priam Customer Relationship Management System that is intended to record activity for its customers. Mr Chrysostomou explained in cross examination that it would not record a call where a customer had expressed confusion about an association between easylife and easyGroup.

134. On what appeared to be said on a hypothetical basis, Mr Chrysostomou said that if he came across a customer who had confused easylife with easyGroup he would inform the customer that easylife was nothing to do with easyGroup. If a caller asked to purchase something on the easylife website, they would be directed back to the website.

135. During cross-examination he explained how he or one of the workers at the agencies may have telephone contact with a customer:

“The order form in the promotional material that EasyLife sends out, the customer fills out the form, attaches a cheque to the value of their order and we receive it. We then process it on Priam, as you refer to it, and there will be occasions where we need to call the customer if, for example, they have not put the correct colour or size, something missing or if the cheque numbers do not correspond with the letters or they have not signed it, all kinds of reasons why you make the phone call. It is quicker these days especially since the pandemic. The Royal mail delivery service I am afraid is way out of sync and it is easier to make a phone call. It is also cheaper than sending a letter these days.”

136. A phone call would only be made from the Cypriot centre if there was a note on the system otherwise the calls would be made from Kent or an e-mail would be sent to the customer.

137. In terms of recording a complaint where a customer may have confused easyGroup with easylife Mr Chrysostomou explained that a note would only be added to the Priam

system if it was relevant to the transaction such as issuing a refund or sending a replacement.

138. One particular exchange between counsel and Mr Chrystostomou is worth setting out as the witness was asked directly about confusion on behalf of a customer. The witness could not see how a customer would make a link with easyGroup, an umbrella company holding intellectual property and dealing with licensees, and easylife where they had completed an order form in a catalogue to supply batteries:

“Q. Okay, are you -- you say it looks like it, can people cut and paste e-mails into Priam?

A. You can cut and paste contents of an e-mail into Priam.

Q. Is that generally what your telephone service operators do, do they cut and paste e-mails in, or the e-mail responders?

A. Sometimes. They can do either. It depends how the e-mail is and whether -- how much of it is relevant to the customer's issue and query.

Q. Okay. So here there is a comment has been made, and the notes are here on Priam and can we just read them together?

A. Yes.

Q. It says: "Thank you for your reply e-mail" -- I think it looks like it is a complaint or a query about a missing alkaline battery charger being out of stock, yes?

A. Yes.

Q. And then attempts to phone customer services on two occasions, delays, which is unfortunate, and then "When the opportunity to speak to a member of easyGroup is possible the telephone line was disconnected!" There we have someone who is calling, and it happens, an unfortunate thing has gone on, but they have, or they have sent an e-mail, someone has sent an e-

mail and they have mentioned easyGroup and they could be referring as an abbreviation to Easylife Group, could they not?

A. I would think it is exactly what happened.

Q. Or they could be referring to easyGroup thinking it is a connection with my client, it is possible?

A. Only if he sells alkaline battery chargers.

Q. Well, no, because if they were confused as to some sort of connection they could certainly think there was a connection with the easyGroup, could they not?

A. No, but this e-mail is in relation to some items ordered from Easylife and I do not see the connection, myself, but we all have our views, I guess.”

139. There was no suggestion that the batteries had logos imprinted on them. The confusion that counsel was discussing, I infer, would have been in relation to the easylife catalogue: a confusion that easyGroup had started a catalogue business named easylife without using the easy+ get-up.

140. He was asked whether there would be a recording of someone calling a centre mentioning Sir Stelios or easyJet; that supervisor would not hear of this confusion. The response was clear. It would be so unusual that it would be “raised through the chain of command and it would come through eventually to me”. He was also asked about a confusion as to products sold by easyJet and easyGroup. He tried to put a percentage chance on this occurrence: “that situation is likely to have arisen in more than 0.001% of”. His answer was cut short but I have no doubt he meant unlikely rather than likely. He was not aware of “significant” customer complaints made by customers of easylife.

Assessment

141. Mr Chrysostom’s evidence was honest, provided fairly and I regard it as reliable.

142. Tracey Drury is a Call Centre Manager for DRMG in Kent. She was promoted to supervisor in 2002 and later became a manager. She explains the call centre quickly becomes familiar with common complaints:

“These relate to a broad range of issues: problems with a particular product, with delivery, returns and refunds, guarantees etc. During shifts at DRMG, staff raise issues with their supervisor or me as and when they arise (frequently during the call with the customer) and, as we all work in the one area (and during the Covid lockdown we all have access to our WhatsApp group chat), I would expect to know about any issues raised by operators. In addition, operators take regular breaks and invariably informally discuss with each other, supervisors and managers issues that have arisen during calls that day. This informal process is backed up by specific notifications from operators and supervisors to me as the Call Centre Manager about issues that arisen during calls that day.”

143. Her evidence is that she has never been told by an operator of confusion:

“I do not recall ever being told of any such confusion or having any such instance escalated to me. I would have remembered any such instance of confusion being raised with me.”

144. Cross examination exposed the nature and extent of the calls received at the call centre (overflow from First Choice or sales calls) would not ordinarily incorporate an opportunity for a complaining customer. There was limited opportunity for this call centre to deal with confused customers in recent years but there was a time when it did deal with complaints:

“Q. And in terms of thinking back to the overflow sales calls, if a customer calls to place an order based on the catalogue, because that is where they dial the number from, right?

A. They do, yes.

Q. Even if they were confused -- just assume for me at the moment, assume they were confused that Easylife Group was in some way connected to easyGroup, my clients, yes?

A. Yes

Q. You cannot think of any reason why they would mention it to you in the sales call, can you?

A. No...

So the opportunity for you to become aware of confusion or some misapprehension between Easylife Group and my clients really only arises in complaint calls or e-mails, which you do not deal with?

A. Mm-mh, yes...

Q. So unless someone during this time, so when you were doing customer service calls, mentioned easyJet or Stelios to you, there is no way that you or your DRMG colleagues would be aware of customer confusion in the period when you were carrying it out. That is right, is it not?

A. Yes, that is right.

Assessment

145. There is no criticism levelled at this witness. She provided clear and reliable evidence.

The evidence given in cross-examination was consistent with her evidence in chief. I infer that she had no experience of a customer calling to complain, make a purchase or otherwise make an inquiry and mentioning easyJet or Sir Stelios.

146. Lennard Andreou gave evidence from his office at First Choice in Cyprus where he is the Operations Manager. He explains that First Choice handles inbound and outbound sales calls and customer service communications for DRMG's clients, including delivery queries, product support and resolving customer questions and complaints. His evidence

is that First Choice uses Priam, and DRMG and First Choice are remotely linked onto the same system. Priam has been used in the call centre since 1996.

147. His evidence in chief is that he has never come across an instance when an easylife customer thought there was an association with easyGroup or there was a product confusion between the entities.

148. Mr Andreou, like other witnesses, had not heard of easyGroup prior to these proceedings. He was very aware of easyJet and Sir Stelios who is “well-known” in Cyprus. He accepted that he would not necessarily hear if a response was given to an e-mail by a colleague asked whether easylife was part of easyGroup. Two examples were given to him. This was not necessarily inconsistent with his evidence in chief where he stated that if a customer did make a link between easyGroup and easylife it would have been “on a very small scale”. He was challenged on the size of the scale but stood his ground insisting his evidence in chief was correct.

Assessment

149. No criticism is levelled at the evidence given by Mr Andreou. He provided clear and unequivocal evidence. The lack of complaints concerning confusion may be explained on the basis that the customers were never confused about with whom they had dealings; alternatively that there is some process barrier that makes it difficult to record or recognise confusion; or that the customer base of easylife represents the ordinary well-informed but circumspect customer who is not, in fact, confused. Mr Andreou had not heard of easyGroup before these proceedings. That is likely to be because easyGroup is not customer facing. This is consistent with his evidence, that any confusion brought to the attention of First Choice would have been on a “very small scale”. That is not to say that customers had never made inquiries as to whether Sir Stelios was involved in easylife or whether a product could be purchased on a flight. It tells the court nothing or very little about whether the average consumer would be confused.

150. Mr Gregory Caplan. He was subjected to extensive cross-examination by Mr Moody-Stuart. Given that it is difficult to replicate the evidence by simply reading a transcript, I made notes on my thoughts as the examination progressed.

151. Mr Caplan agreed that he had not carried out a trade mark search prior to choosing easylife group limited or the easylife brand.

152. He explained that adding “Group” was to further an exit strategy and designed to make the enterprise appear larger than it was in fact. It would not be unusual to call easylife holdings and other companies under easylife holdings a group. The plan was to grow the business. He explained:

“At the time, there was interest in purchasing GCE in those days, as it was, Gregory Caplan Enterprises Limited, and we knew this was going to come up later on with the company growing and opportunities. We were kind of the first in the market in those days when TV shopping was coming in and we were approached by a number of companies to sell to them.”

153. He thought that using the word “group” was not an unusual thing to do to identify a company as an umbrella company. He had not heard of easyGroup when complaints were received saying “I think easyGroup only came into existence in 2004...”

154. Cross-examination turned to the easylife product line. It was suggested that there was a deliberate policy to extend the product range under an easylife umbrella. Mr Caplan disagreed. He said if there had been an intention to build a group of companies he would have had a range within an umbrella entity such as easygardening or easykitchen. He said there was no desire to do this. He provided examples of other product lines that do not use the word “easy” such as ‘Tavistock and Jones’ watches rather than easywatches. The use of the word ‘easy’ was and is, says Mr Caplan, descriptive of the product. He further explained that the easylife business was “about your database and finding products that your database would want.”

155. His evidence that he tried different products, some sold well, others were withdrawn for lack of sales:

“I think one has to draw a distinction between putting a label on a product or building an entire category of products, and EasyKitchen, EasyHome, if you want to call it a family of brands, EasyHome, EasyKitchen, yes, maybe, but it is not, it is

more of a category, I would say; so it is not a family of brands.
A family of brands is very broad.”

156. He did accept that the use of the easyclean range was to extend the easylife brand into other product categories but was adamant that a distinction should be drawn between a product range and branding:

“to put it into context, the labelling of the product and branding I see as two totally different things. So on the label, we have the descriptive use of "easy" and "easy mop", or an easy this or and easy that, that is not a brand...many things are called “easy”, it is such a generic term...”

157. Mr Caplan pointed to products in the easylife catalogue that had been named by the originator such as “light n easy steam mops”. The use of easy is not front ended but it emphasised that the term “easy” was used by the originator to explain to customers that the steam mops were light and easy to use.

158. Mr Caplan faced two serious challenges to his evidence. The first was that he had signed a statement of truth attached to a response to a Part 18 request “unfairly”. Mr Caplan had said that table B to the request illustrated the use of the adjective “easy” in respect of the products and was not branding. His first response was that he thought he should have been more “forthright” and the question was put again:

“Q. Mr. Caplan, I suggest that if you had been acting fairly, you would not have put your name to a statement of truth in relation to this statement in your Part 18 response whereby you are suggesting that none of the uses in the schedule are to do with the use of "easy" as part of a brand?

A. I do not see ‘easy’ as part of a brand.”

159. It is said that the statement of truth was given falsely. I do not accept that this evidence is sufficient to reach that conclusion either reading it again or as a matter of impression when in court. The second serious challenge concerned the defence and counterclaim

statement of truth where he had attempted to quantify the number of oven shine products that had been sold:

“Q. How did you come to give that as a statement when in fact sales were very much significantly greater of that product?”

160. He had sworn to a “few hundred” having been sold. I shall not repeat here all the evidence in response or the repeated attempts to obtain an admission as to his dishonesty. He had already apologised for providing an incorrect number sold: the correct number was 18,000 but he explained that he signed the statement during lock down in South Africa, had little or no access to the records and by stating that only a few hundred were sold he intended to say an insignificant amount such as a few hundred. He would have said the same about 18,000. He was not attempting to mislead. Mr Moody-Stuart was blunt: “you are prepared to at least bend the truth in support of your interests in this case and that is why you underestimated significantly the degree of trade in the oven shine product.” Mr Caplan’s short response, I accept as the truth:

“The facts are that I said it was a few hundred and it was actually 18,000. Those are the facts. What is around the facts is to take into account that in my mind, when I thought it was an insignificant product and it was, like a colloquial, it was a few hundred, to me it was an insignificant product and 18,000 units and 3,500 units a year is just an insignificant system...I attempt at all times to be honest and clear in what I do.”

161. In the course of his evidence Mr Caplan accepted that easylife had suffered reputational harm, at least during the pandemic. He explained that there were significant problems with delivery and significant issues with obtaining products from China. He was taken to some Instagram and Trustpilot reviews. Mr Caplan agreed the reviews were not good but asked that they be put in context. He said that there are about 500 reviews that were bad, and they mostly concerned delivery. During the pandemic easylife despatched approximately 150,000 orders a month. He fairly agreed that any bad review could injure and in this case has damaged easylife’s reputation.

162. He also accepted that easylife had been subject to a Trading Standards investigation but added that it had always satisfied Trading Standards' enquiries and implemented any recommendations made.

163. He was taken to reviews in the Mail on Sunday, the rejection by the Guardian newspaper of advertising due to a failure to deliver and investigations by the Information Commissioner Office:

“There was definitely reputational harm about delivery of goods. When it comes to the quality of our products, there is certainly no problem there.”

164. His answers to questions about the Guardian newspaper were deliberately evasive. He was asked if the Guardian newspaper had recently rejected his business. He responded, “we do not advertise with the Guardian”. When he was taken to an e-mail stating that the Guardian had indeed rejected easylife he explained his earlier answer by reference to “off the page advertising” rather than “catalogue” advertising. On one hand the apparent evasiveness did not do him credit. On the other hand he had little to gain as he had already accepted that easylife had experienced reputational harm. I think he quickly came to realise this:

“We only have a limited amount of time. Mr. Caplan, I asked you about being dropped by The Guardian. Here, The Guardian are saying that they will not take your advertising. It was unfair of you in your response to say, "Well, you are asking me about catalogues; it does not matter." If you had been giving evidence that was the truth, the whole truth and nothing but the truth, you would have said, "Yes, we have had reputational damage in The Guardian. They have refused to take our adverts"?”

A. I agree with you on this. I made a mistake in that. I really think of the inserts and the catalogues in my business. The off-the-page advertising we did for the first time for a few months during the pandemic. It is not really a focus. I am thinking of catalogues and inserts. That is the main business.”

Assessment

165. Overall I evaluate Mr Caplan's evidence as credible. I reach the conclusion that he did not seek to deceive when signing the statement of truth on the defence and counterclaim or the response to the Part 18 request.
166. Mr Aikens accepts that he cannot be described as a "model witness". I am not sure there is such a thing as a model witness but understand that he was accepting that Mr Caplan had made mistakes whilst giving evidence via video link from South Africa. Those mistakes do not undermine the entirety of his evidence.
167. In particular I find, as a matter of fact, that Mr Caplan's evidence may be relied upon in respect of the following matters:
- 167.1. he only became aware of easyGroup in March 2013 after he received a letter before action from easyGroup;
 - 167.2. he was not seeking to gain an advantage by using the word "easy" before the product name, domain name or any of the signs;
 - 167.3. to extend his existing business from catalogue to online he acquired easylifeonline.com in February 2000 and set up easylifeonline in March 2000;
 - 167.4. easylifeonline changed to easylife;
 - 167.5. the extension from catalogue to online built on the extensive database of the existing companies including GCE;
 - 167.6. easylife was chosen to describe the ethos of the existing business which was to sell products that "solved every-day practical problems and so made life just a bit easier for its 65+ year old customers";
 - 167.7. he knew of easyJet before using "easy" but did not know of any of the easyGroup's alleged "family of brands";
 - 167.8. one line of product sold related to cleaning. easylife has sold hundreds of different types of cleaning and personal care products;

- 167.9. easylife developed a number of joint venture relationships with the national newspapers and publishers to produce own brand insert catalogues for them, essentially white labeling variations of the Easylife catalogues for the News of The World, the Sun, the Daily Mail, the Mirror, the Telegraph, the Guardian, the Radio Times, etc. Some of those catalogues were co-branded with easylife;
- 167.10. due to a failure to supply during the pandemic the Guardian newspaper dropped easylife as an advertiser;
- 167.11. the reorganisation of easylife in 2003 was done for rational reasons unrelated to easyGroup;
- 167.12. the reorganisation led to the acquisition of easylifegroup.com in January 2004 which is likely to have been before Mr Caplan had heard of easyGroup;
- 167.13. the success of easylife depended on turnover. In the year ending 2006 it had mailed 500,000 branded catalogues quarterly to its database and inserted in the region of 50 million catalogues into national newspapers which rose to 150 million by 2010;
- 167.14. it is estimated that the business has served 5 million customers with over 10 million orders;
- 167.15. there was no intention to build a family of brands. Other brands were used as well as “easy” such as “Wenko” and GCE;
- 167.16. the acquisition of easy-life-group.com was to prevent third parties from using it. It is more likely than not that the acquisition occurred prior to the letter before action was received from easyGroup. The use of the domain is to point to easylife’s website;
- 167.17. easylife launched three products under the easycare brand being a stairlift cleaner, a mobility scooter cleaner and a wheelchair cleaner. The sales of those products were very poor and all three lines were discontinued quickly. However existing stock continued to be sold; and

- 167.18. easylife did not intend to deceive the public into thinking there was an economic association between it and its products, signs or domain and easyJet or easyGroup.
168. I find the knowledge and actions of Mr Caplan, as I have found, were imputed to easylife so that easylife had attributed to it the knowledge of Mr Caplan.
169. I take the scale of the business into account when objectively considering the issue of infringement.
170. Mr Clay. The court had the benefit of hearing evidence from consumers of easylife products. Five people agreed to give evidence for easylife. The evidence was aimed at negating the claim that the average consumer would confuse easylife with easyGroup. They were invited to through the medium of an e-mail sent by Mr Caplan that was drafted by Mr Clay. Mr Clay gave evidence.
171. It is said that he gave his evidence as if an advocate for his client. In my judgment his evidence carries little weight. He was tested about how he contacted, drafted witness statements and retained records of his contact with the consumer witnesses. Mr Clay could not recall whether he had had direct contact with any of the consumer witnesses save for one where an attendance note had been kept. In my judgment it is more likely than not that this was the only direct contact he had with a witness. The attendance note does not provide much detail. He explained that as a small practice he must do everything including posting the letters. He decided, as time was short, to simply put the content of the telephone conversation with one witness directly into the witness statement and that would also stand as an attendance note. This explains the abbreviated note.

Assessment

172. I had the distinct impression that Mr Clay was an anxious witness. He has lived with the case for a long time and felt uncomfortable giving evidence on behalf of his client. As it turned out the examination of his evidence mostly concerned his processes, records and selection of the consumer witnesses. In respect of the last of these the lack of records available to easyGroup (because privilege was claimed) is said to have put the Claimant at a disadvantage. Mr Clay explained in the course of cross examination that he took his

duties as an officer of the court seriously. In my judgment he did not betray those duties and did the best he could to assist when giving evidence.

173. Before turning to the consumer witnesses themselves, it is valuable to set out the email sent by Mr Caplan to encourage them to give evidence. It was drafted by Mr Clay for Mr Caplan so that he could tailor it to the customer:

“I am the CEO and founder of Easylife.

I have been looking through some customer care emails as I like to from time to time as it is how I find out what is really going on! I saw your email below.

I would firstly like to apologise for the delay you experienced in getting your XXX. We were exceptionally busy over the summer period because of the pandemic, issues in our warehouse caused by social distancing and also because of difficulties with shipping.

As a valued customer, I would like to send you a £25 gift token to go some way to making up for the inconvenience you had to suffer. Could you please confirm your address is still XXX so that I can be sure that the gift token is sent to the right address.

By the way I noticed that in the email you sent through on 27 July you referred to us at one point in your email as Easy Group. We are Easylife. Was that just a mistake or did you think that we were associated with easyGroup, which is the business owned by Stelios (easyJet founder)? I would be interested to hear about that as our brand messaging is very important to us.”

174. There are several complaints about the e-mail. First, it is said to be leading and reduce the value of any evidence given. Reference is made to the last paragraph for this proposition. Secondly, Mr Caplan was seeking to ingratiate himself with the customer so that they would give evidence on his behalf. Thirdly, it is said that the offer of a £25 gift

would have endeared them to him and persuaded them to give evidence. I do not consider the first complaint of such weight that it undermines the evidence given at trial. The recipient was asked a question with alternative answers and attended trial to be tested. It does appear from the live evidence that most customers who gave evidence were pleased that Mr Caplan had taken the opportunity to correspond with them personally and that may have given them a favourable impression of him. Again, I do not consider that this undermines the evidence given. They swore statements of truth and gave evidence on oath. As regards the token, I understand only one witness accepted the token or received a token. The token was not linked to giving evidence. Nevertheless it is argued that the evidence of what actually happened is tainted by the process of recording it into a witness statement. It is said that only by following judicial guidelines can survey evidence be of value.

Consumer evidence

175. Ross Bayne. He posted a positive message about easyGroup on Trustpilot. In his witness statement he states that he intended to write ‘easylife’ rather than ‘easygroup’. Prior to the drafting of the witness statement he had received the e-mail (above) from Mr Caplan. He says he received it in 2017. He believed that Mr Caplan was making sure that he understood the distinction between easygroup and easylife. He had later written to the solicitor acting for easylife saying his first reaction was one of disbelief, incredulity over something like this he said that “easylife have existed and traded for years and years, easyJet...no idea.”

Assessment

176. Mr Bayne gave fair and honest evidence.

177. Jeff Cooper. He posted a message on Trustpilot on 16 June and updated in July after receiving an automated response and receiving the goods he had ordered. saying that the service provided by easylife was poor. He was cross examined on his review and the connection between easylife and easyGroup. His answer was revealing. He had no idea that there was an easyGroup. He was aware of easyJet, easyHotel and easyCars. He said he would “never have put the two [easylife and easyJet] together.” This is consistent with

his written evidence when he said that he had made an “unknowing mistake”. He rejected the idea that he had been led by the e-mail.

Assessment

178. Mr Cooper gave his evidence fairly and honestly.

179. Maria Gillespie. She sent an email to easylife using the title “Easygroup”. Her evidence is that she had not heard of easyGroup when she sent the e-mail and did not think that easylife was connected with easyJet or easyGroup Limited. She had received the same e-mail from Mr Caplan as the other consumer witnesses.

Assessment

180. She gave careful evidence.

181. Jenny Hall. She e-mailed easylife starting: “Dear Easygroup” in June 2020. Her written evidence is that when she wrote “that email I knew that easyGroup Ltd was connected to the travel industry, air flights, holidays, car hire, cruises etc. I have used their services several times i.e. flights, holidays so I was fully aware that my email was not directed to them but to a separate company. It was only by accident that I inadvertently used their name because of my failure to check easylife’s company name.”

182. She was tested on communications between the solicitor asking her about her experience. She explained, as did the other witnesses, that Mr Clay had no contact. I knew it was “easylite” or easylife. It was late in the night and so I chose easyGroup, not knowing it would lead to this.” She agreed with the proposition put to her that she used “group” as a generic term not concerned about whether it was correct.

Assessment

183. Mrs Hall gave evidence fairly, and her explanation was truthful.

184. Cecil Graham. He also referred to “easygroup” in an e-mail. He explains that he knew the difference between easyGroup and easylife. His evidence is that he did not know of easyGroup or that it licensed trade marks when he wrote the e-mail to “easygroup”. In cross-examination it was put to him that the e-mail sent by Mr Caplan led him to make the distinction he made. He said that this was not the case, that using “easygroup” was a

“lazy” response. He knew the distinction between the enterprises since easyJet flew frequently from Belfast where he lives.

Assessment

185. He gave careful and fair evidence.

Consumer evidence- weight

186. It is contended that the evidence from the consumer witnesses is survey evidence (in the broadest sense) and cannot be relied upon, or if it is to be relied upon little weight should be given to the evidence by the court. If that is correct it is surprising that the evidence was not simply admitted as read.

187. There is a considerable amount of law concerning survey evidence as detailed in Kerly on Trade Marks (16th ed). It would not be a useful exercise in this judgment to summarise it. The recent trilogy of cases, *Interflora v Marks & Spencer* [2012] EWCA Civ 1501; *Interflora v Marks & Spencer* [2013] EWCA Civ 319 (sometimes known as *Interflora 1* and *2* respectively) and *Zee v Zeebox* [2014] EWCA 82 provide guidance. The *Interflora* cases explain that permission for a survey should be raised as part of case management and only if it can be shown that the evidence will add real value should a survey be undertaken, using the guidance provided in *Imperial v Philip Morris* [1984] R.P.C 293.

188. I understand the Deputy Judge hearing the pre-trial review admitted the evidence and decided to follow *Zee* leaving the issue of weight to the trial Judge. In any event in closing, no doubt following the line taken in *Enterprise Holdings, Inc v Europcar Group UK Ltd and another* [2015] EWHC 17 [30], no objections were made as to admissibility whereas forceful submissions were made as to weight.

189. In *Neutrogena v Golden* [1996] R.P.C. 473 Jacob J (as he was) said [486]:

“[P]ure questionnaire evidence is seldom helpful—there are almost inevitable faults with the questions or the record of the answers as well as in later stages of the processing. Of course the court needs to know what evidence was collected, and needs to have the full picture, including particularly what failed

surveys, if any there were. But unless one can have some real evidence, tested in cross-examination, one cannot really be sure of what was passing through people's minds. Those cases where surveys have proved to be useful have all involved some of the 'pollees' coming to court."

190. Jacob J permitted the evidence holding that it was more than *de minimis* or trivial. The analysis survived the Court of Appeal although the terms he used were said to be avoided. It is important to note that these terms were used in the context of passing off and not infringement as different tests apply: *Interflora* 1 at [34]. The terms used by the Judge were not helpful because the task for the court in passing-off is to decide if the claimant has proved the likelihood of confusion among a substantial number of the public.

191. However even if the "pollees" come to court the process of selection has to be fair. A claimant or defendant cannot choose those who support their case and disregard the rest. Although the evidence before the court may be termed "survey" evidence there has been no survey as such in this case. Mr Clay sent a letter with a questionnaire to customers selected by a key word search. They were asked if they would agree to give evidence: some did agree.

192. The process by which the evidence was gathered has been criticised by easyGroup for failing to be transparent. In my judgment the criticisms are well founded. Mr Clay has not disclosed, or may not have disclosed, all the documents that concern the collection of this evidence. If material is privileged and not waived neither the opposing party nor the court is able to scrutinise it to ensure that the witness collection procedure has been fair and open. The process is important as explained by Jacob J in the passage I referred to in *Neutrogena*.

193. I have been invited to attach no weight to the evidence as a result. The lack of transparency would lean in favour of such a ruling. That leaves the thorny issue of whether that ruling should be altered as a direct result of the witnesses having been called and cross-examination undertaken. The calling of the witnesses provided easyGroup with an opportunity to ask each consumer, their motives for agreeing to give evidence, how their witness statements were produced and why they agreed to attend court for cross-examination. In this respect the evidence seems to me to carry some weight due to the

“coming to court” and giving evidence. Indeed, experienced counsel tested all the elements of evidence I have mentioned. Nevertheless, the evidence needs context.

194. In my judgment the evidence provided by the consumers is not so significant as to answer the question before the court on infringement and has at best doubtful statistical validity for passing-off, even if the substantial number of the public test is “necessarily crude”.

195. The evidence I have heard from the consumers merely feeds into the value judgment I need to make taking account of all the circumstances: *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 159; *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2012] EWCA Civ 24 [87]. It is a qualitative assessment: *Interflora* [2012] EWCA Civ 1501 [36]. The task for the court in respect of infringement is to “inform itself, by evidence, of the matters of which a reasonably well informed and reasonably observant and circumspect consumer of the products would know; and then, treating itself as competent to evaluate the effect which those matters would have on the mind of such a person with that knowledge”: *Bach and Bach Flower Remedies Trade Marks* [2000] RPC 513, 535; *Interflora 1* [41-43]. These principles lead me to conclude that it would be an error to attach no weight to these witnesses. Due to transparency issue the weight I do attach is not that which would ordinarily be given to those who are prepared to have their evidence tested. In my judgment the correct approach is to include the evidence within the “global assessment” required.

Principles of law and assessment

General principle

196. It is apparent that a trade mark is a property right and easyGroup as proprietor of trade marks has the rights and remedies provided by the TMA. The TMA does not oust the common law remedy available for passing off. The purpose of a trade mark has been the subject of Trade Mark Directives, the European Trade Mark Regulation and can be found in case law in various forms: “the protection afforded by the registered trade mark, the function of which is in particular to guarantee the trade mark as an indication of origin, is absolute in the case of identity between the mark and the sign and goods or services.” 10th recital in the preamble to Directive 89/104; “The protection afforded by the

registered trade mark, the function of which is in particular to guarantee the trade mark as an indication of origin ...” cited in *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] E.T.M.R 1; and “the purpose of a trade mark which, broadly speaking, is to operate as a guarantee of origin to those who purchase or use the product.”: *London Taxi Corporation Ltd v Frazer-Nash Research Ltd* [2017] EWCA Civ 1729, [2018] F.S.R. 7. More expansively the purpose has been described as including “the quality of the goods or services, and those of communication, investment or advertising”: *L’Oréal v Bellure* (C-487/07) EU:C:2009:378 at [58]. Although these have been described as derivatives of the function of origin, and should not be considered as an exhaustive list, they are core components of the guarantee, which itself is the fundamental principle of trade mark law. In my judgment the fundamental principle is at the heart of this case. I have it firmly in mind.

197. The relevant sections in this case are sections 10(2), 10(3) and 46. Since the introduction of the TMA there has been a considerable amount of judicial scrutiny of these provisions. Very recently they were considered by Arnold J (as he was) in *W3 v easyGroup* where the court was asked to determine whether the claimant was making groundless threats. easyGroup contended that it held a number of EU trade marks containing the prefix EASY for a wide range of services, including temporary accommodation, advertising, marketing and publicity services in classes 35, 36 and 43. W3 operated an online service for sharing accommodation in the UK and other Member States under the name EASYROOMMATE. It had registered a stylised form of EASYROOMMATE as a UK trade mark for services in classes 35, 36 and 43. easyGroup sent the claimant three letters complaining about the EASYROOMMATE name and seeking broad undertakings in respect of its use. Arnold J (as he then was) found that the word EASY, when used in relation to advertising and temporary accommodation services, conveyed to the average consumer of those services the message that the services provided were easy to purchase or use. His finding that EASY is a common descriptive word was of significance. It was not distinctive and denoted a particular “quality” or “characteristic” of the service in question (*cf. W3* at [169]). The result was that easyGroup’s “EASY” trade mark had been invalidly registered in relation to “advertising” and “temporary accommodation”. The court further held that W3 had not infringed any of easyGroup’s EU trade marks by use of the signs complained of in the UK, and that it was not liable for passing off.

Average consumer

198. Referring to *London Taxi Corporation Ltd v Frazer-Nash Research Ltd*, Arnold J considered [at 50] that it is settled that many issues in trade mark law fall to be assessed from the perspective of the “average consumer” of the relevant goods or services, who is deemed to be reasonably well-informed and reasonably observant and circumspect. On appeal Floyd LJ said:

“31. I agree ... that the notion of an average consumer requires the court to consider any relevant class of consumer, and not to average them. I believe that conclusion to be consistent with the approach taken by this court in *Interflora Inc and another v Marks and Spencer plc* ...

34. As with all issues in trade mark law, the answer to disputed questions is normally provided by considering the purpose of a trade mark which, broadly speaking, is to operate as a guarantee of origin to those who purchase or use the product. In principle, therefore, and in the absence of any authority cited to us which is directly in point, I would consider that the term average consumer includes any class of consumer to whom the guarantee of origin is directed and who would be likely to rely on it, for example in making a decision to buy or use the goods....”

The present case

199. easyGroup submit that the average consumer for the purposes of easyGroup’s infringement claims is a consumer of the services provided by easyGroup and easylife. easylife submit that the average consumer is one who purchases the goods and services offered by easylife. That is those within the targeted demographic. It is submitted that this demographic would be blessed with a relatively high level of attention given that the act of purchasing includes the completion of an order form.

200. The average consumer for the purposes of an infringement claim is a consumer of the relevant goods and/or services within the class of those who are: (i) familiar with the

trade mark and (ii) exposed to, and likely to rely upon, the sign: *Sky Plc v Skykick UK Ltd* [2018] R.P.C 59 [para 275]. In *W3* the average consumer for the purposes of easyGroup's infringement claims was a consumer of the services provided by *W3* under the signs complained of. In my judgment, the average consumer is the consumer of the goods and services in relation to which the signs complained of have been used. However, I do not exclude the average consumer of the class of products and services provided by the Claimant. This is how the evidence has been led in this case.

201. In the event the definition of the average consumer as well-informed, reasonably observant and circumspect is likely to embrace a notional person who exercises reasonable levels of attention when purchasing goods or services. I cannot say I find it helpful to categorise the average consumer as having low, moderate or high levels of attention dependent on the product. The average consumer is just that, blessed with the attributes I have mentioned. If one is reasonably observant one may infer a reasonable degree of attention for the product base: *Schutz v Delta* [2011] EWHC 1712 [98]. Nevertheless as I have had the advantage of seeing witnesses who are consumers of easylife products I would categorise them as having reasonably high levels of attention.

Relevant date of assessment

202. It is common ground that the question whether the use of a sign infringes a trade mark falls to be assessed as at the date that the use of the sign was commenced: see Case *C-145/05 Levi Strauss & Co v Casucci SpA* [2006] ECR I-3703. In closing I was informed that the parties who were once apart on the issue of date of assessment are now agreed. The dates are as follows:

202.1. Use of the easylife group signs: 3 September 2004;

202.2. Use of the easyclean sign: November 2010;

202.3. Use of the easy green sign: March 2013;

202.4. Use of the easycare sign: December 2018.

Revocation

203. Arnold J provided a summary of principles applicable to this area of trade mark jurisprudence in *The London Taxi Corp Ltd (t/a London Taxi Co) v Frazer-Nash Research Ltd* at [217]-[219]. His judgment was affirmed on appeal. He applied this in *W3 Ltd v Easygroup Ltd* at [194]-[195]:

“(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark:

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin:

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: Internal use by the proprietor does not suffice: Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: But use by a non-profit making association can constitute genuine use:

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark:

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial

exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use:

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no de minimis rule:

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: ...”

Proposition (3) has subsequently been reinforced by the ruling of the CJEU in Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795 that:

“Article 15(1) of Regulation ... 207/2009 ... must be interpreted as meaning that the affixing of an individual EU trade mark, by the proprietor or with his consent, on goods as a label of quality is not a use as a trade mark that falls under the

concept of ‘genuine use’ within the meaning of that provision. However, the affixing of that mark does constitute such genuine use if it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality. ...”

204. The decision of the General Court of the CJEU in Case C-141/13 *P Reber Holding & Co KG v OHIM ECLI:EU:C:2014:2089* provides a useful illustration that evidence of retail sales under or by reference to the trade mark may be insufficient to prove genuine use.

205. In *London Taxi*, Arnold J referred to the analysis of *Reber* by Professor Ruth Annand sitting as the Appointed Person in *SdS InvestCorp AG v Memory Opticians Ltd* (O/528/15); [2016] ECC 15, at [24]–[45]. Professor Annand explained that use was proven of the mark ‘Walzertraum’ in the form of retail sales of a range of praline chocolates from a bakery in a small tourist town on the German border. There had been retail sales from the bakery of about 40 to 60 kg of such chocolates every year, and it was accepted that such sales had been continuous. Nonetheless, it was held that the ‘Walzertraum’ mark had not been genuinely used during the relevant period. The decision of the General Court was affirmed on the law by an Order of the CJEU. Paragraph [32] of the Order of the CJEU stated “classification of the use of a trade mark as genuine likewise depends on the characteristics of the goods or services concerned on the corresponding market.... Accordingly, not every proven commercial use may automatically be deemed to constitute genuine use of the mark in question.”

206. With those principles in mind I turn to consider if easyGroup has discharged the evidential burden in respect of the various trade marks, as the onus is on the trade mark proprietor to prove that there has been real commercial exploitation of the mark.

EasyLand

207. The trade mark easyLand is registered in relation to “the bringing together for the benefit of others of a variety of goods, enabling customers conveniently to view and to purchase such goods through general merchandise retail shops”.

208. easyGroup rely on the witness evidence I have assessed above to support genuine exploitation of the mark in the period 4 years and 9 months to November 2017 (beginning February 2013).
209. First the evidence of Mr Anderson. As I set out above he was employed by easyJet between 1995 and 2000. He has acted as an ad hoc consultant during the Relevant Period. He visited easyLand 2 in Park Royal on 26 April 2019 (outside the Relevant Period) and saw that there was a “retail outlet” at the easyHotel. He has no personal knowledge of the business and contributes nothing to the issue of whether genuine use was being made of the mark in question in the Relevant Period.
210. Ms Luxton never visited easyLand in Croydon, and had no personal knowledge of its operation in the Relevant Period. She accepted, quite properly, easyLand had no direct employee, that its stock had little if any value as the prices of items sold were so low. Her written evidence is that “visitors to easyLand 1 can purchase a wide range of products and merchandise, with about 8,000 items stocked” but there was no outside sign to signify easyLand at easyHotel and, as I have mentioned, the space currently occupied by easyLand is a small single room. There are no accounts. The documentary evidence comprises a few receipts that do not carry the easyLand logo or any detail of easyLand.
211. I have found that her evidence on the issue of easyLand is to be treated with some caution. I exercise that caution in evaluating her evidence now. In any event as the main witness for easyGroup she was unable to tender any evidence relevant to the commercial exploitation of the mark other than to say that goods could be exchanged for money. She has provided no evidence of the retail general merchandise market in goods or characteristics of the market concerned such as competitors, or how the mark is used for the purpose of marketing the general merchandise. At best the retail element is minimal and although minimal use may qualify as genuine, she has provided no evidence to justify retail market share or economic preservation of retail market share for the relevant goods.
212. Mark Kramer provided no useful evidence. He had no first-hand evidence that is capable of contributing to an evaluation of genuine market exploitation of the mark in the Relevant Period.

213. Mehreen Parvez accepted that the figure of 8,000 items was likely to be wrong and that the real purpose for easyLand was to “promote the easy family of brands”. She thought that in the period late 2016 to late 2017 easyLand Croydon may have sold goods to the value of £250.
214. Sir Stelios Haji-Ioannou’s evidence was, as I have mentioned, generic in nature, and he did not attend for cross-examination. I provide little weight to his evidence. In any event it is doubtful that he has first-hand knowledge regarding exploitation of the mark in the Relevant Period.
215. A second easyLand outlet opened in Park Royal in early 2018, but it is not suggested that this was in the Relevant Period.
216. Reliance is made on the fact that easyLand is mentioned on the websites www.easyland.co.uk and www.easyland.biz and that there have been Facebook postings. This is not evidence of commercial exploitation of the UK trade mark and in any event the easy.com portal where a full list of businesses in the “easy family of brands” can be found does not include easyLand.

Assessment

217. In my judgment easyGroup has failed to discharge the burden to demonstrate that the UK trade mark was genuinely exploited in the Relevant Period. There has been no attempt to provide evidence of a commercial enterprise; no attempt to provide turnover or overhead costs. There is no evidence that tax was paid in the Relevant Period. Evidence was given that easyLand currently depends on the goodwill of customers to use the “honesty box”.
218. Having regard to all the relevant facts and circumstances there is no evidence of real commercial exploitation of the mark. There is no evidence to support the view that it can be warranted in the retail sector to maintain a share in the market for the services in question. Although goods may be purchased at the easyHotel, the sale of those goods are not dependent upon the retention of the easyLand mark. The evidence of scale and frequency of use of the mark is limited to a sign in the Croydon easyHotel and a website. There is no evidence of a connection between the mark and marketing of the goods in question. If anything, the easyLand mark is superfluous and provides no valuable

purpose. There is no or insufficient evidence to discharge the onus on easyGroup that easyLand is used in the sense required.

219. As there is no genuine use of the mark I shall direct it be revoked.

easy4men- class 3

220. In closing easyGroup conceded that the class 3 trade mark had not been put to genuine use. Accordingly, the easyGroup trade mark should be revoked in respect of “preparations and substances for use in the care and appearance of the hair, face, skin; non-medicated toilet preparations; cleaning preparations; shampoos”.

221. For the sake of completeness this is a finding I would have made in any event. Having regard to all the relevant facts and circumstances there is no evidence of real commercial exploitation of the mark. The mark has not been exploited for other product lines within class 3; genuine usage relies solely on a product that was produced 14 years ago. easyGroup have chosen to rely on accounts and photographic evidence of the existence of the travel packs. As regards the figures the number of travel packs sold is insufficient to demonstrate genuine use. Some may regard the sale of travel packs at 0.25p as a “fire sale”. Exploitation cannot be said to have been made in these circumstances. The Claimant failed to meet the burden of proof that there has been a genuine use of the mark in the Relevant Period.

easyGroup UKTM class 35

222. I begin my reminding myself that in *Merck KGaA v Merck Sharp & Dohme Corp & Ors* [2017] EWCA Civ 1834 Merck Global had registered its trade mark for the broad specification of “pharmaceutical substances and preparations and “medical products included in [Class 5]”. Merck US contended that Merck Global had only used Merck Global's trade marks for a specific number of indications (including the treatment of cancer, multiple sclerosis, infertility, etc) and that it had not shown use for several sub-categories of “pharmaceutical substances and preparations”. The question was: should there be a partial revocation? The Court of Appeal explained [245-248] that if goods and services registered are broadly described and subcategories can be identified that are not used, as perceived by the average consumer, those subcategories may be revoked. This is a summary only, and reference should be made to the paragraphs that I have identified.

223. As it happens a concession was made late in the day during closing. easyGroup conceded in its written closing submissions that the mark had not been put to genuine use, and accepted it should be revoked, in relation to “the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and to purchase those goods through a retail general merchandise shop”

224. In her evidence in chief Ms Luxton’s said that easyGroup’s principal activity is the creation, ownership, protection, exploitation and licensing out for royalty income of the easy family of brands.” Mr Anderson described easyGroup as an umbrella company. This is consistent with the evidence provided by Ms Parvez: “easyGroup holds registrations for over 100 trade marks in Europe alone.” And “easyGroup is constantly being sought out to work on opportunities to expand the easy brand into new areas.”

225. I am satisfied on the evidence that easyGroup does expand the brand into new areas, holds and protects intellectual property rights, licenses services, markets (as a subcategory of marketing) and supports licences. I do not detect there is anything between the parties on this issue.

226. easyGroup suggest, and easylife did not object, that a fair description is: “the commercial administration and management of licensing of goods or services, including the administration and management of brand licences; the provision of general support, marketing, advertising, administration and management services to licensees of goods or services”.

227. I agree. The evidence supports this as a fair description.

easyJet

228. The class 39 services listed in the specification for the easyJet trade mark are: “Transportation of passengers and travellers by air; arranging of transportation of passengers and travellers by land; airline services; arranging, operating and providing facilities for vacations; travel agency and tourist office services.” The challenge relates to non use of “and tourist office services”.

229. The issue has not been tackled in the closing submissions of the Claimant as reliance is made on a schedule produced for the court that is said to provide references to supporting

evidence in favour of genuine use. The references are numerous and deal with each aspect of the description. Focusing on “tourist office services” the evidence does not support a finding that easyJet has ever operated a “tourist office”. Using the ordinary meaning of the word “office” (a set of rooms, or building used as a place for commercial, professional, or bureaucratic work), which is used to assist the “tourist” and in the context of the description where services for “arranging, operating and providing facilities for vacations” are not limited to being provided in an “office”, the meaning is, in my judgment, likely to be intended to convey a trade mark for a tourist office with a physical presence or services particularly directed to tourist offices in the UK. The addition of the words “and tourist office services”, I take to mean something more than the services provided under the foregoing parts of the description.

230. The evidence produced by Mrs Luxton is that there has been use of the services by reference to:

230.1. holidays packages (flights, luggage and hotel, including food and drink where all-inclusive) offered under the easyJet UKTM through the websites www.easyjet.com/en/holidays and www.holidays.easyjet.com;

230.2. advertisements in the easyJet Traveller magazine and sales campaigns promoting easyJet Holidays;

230.3. hotel booking services offered under the easyJet UKTM through the websites www.easyjet.com and www.hotels.easyjet.com in partnership with Bookings.com;

230.4. destination guides provided under the easyJet UKTM through the websites, the easyJet Traveller magazine website (traveller.easyjet.com) and the ‘Cheap Flights’ section of the easyJet website; and

230.5. tours, attraction and activity bookings under the easyJet UKTM through the website activities.easyjet.com

231. The documentary evidence relied upon is, not unsurprisingly, print outs from the various websites; a TimeOut advertisement for easyJet Holidays dated 10 January 2017; an easyJet holidays promotion sent in November 2016 and March 2017; an article in The Sun dated 20 June 2017 titles ‘Taking the P! EasyJet Holidays are

offering customers hotel transfers for just two pence per person'; an advert from the easyJet Traveller magazine promoting easyJet Holidays; a table of holiday bookings from October 2016 to March 2020; a table of hotel bookings; a press-release launching tours and activities in partnership with easyJet dated 9 May 2017; printouts from the website traveller.easyjet.com; and destination guides in the easyJet Traveller magazine.

232. The chronicles of Mr Anderson do not mention a tourist office in the UK. In my judgment the provision of services such as organising tours, attraction and activity bookings and guides are services that are likely to be found at a tourist office. The services have been provided and there is no argument that they have been provided within the Relevant Period. There is, however, no escaping the evidential failure to demonstrate genuine or any use of an office for tourists to visit to obtain such services in the UK.

Assessment

233. The evidence produced by easyGroup supports the trade mark description except tourist office services. I have in mind that even minimal use may qualify as genuine use if it is deemed to be justified. There can be no such justification where there is no use in the Relevant Period (or at all) in the UK.

234. The guides and tours I have mentioned are services expected to be found in a tourist office. I shall direct that part of the trade mark description be clarified. I shall hear counsel as to how it can be clarified at the hand down on this judgment. A reasonable starting point is: "and the provision of services to tourists".

Infringement- section 10(2) TMA

235. As a result of my assessments in respect of revocations the claim is significantly cut-down for the purpose of the infringement claim made against easylife. The focus for infringement is the signs complained of at paragraph 48 of the fourth amended particulars of claim, easyJet UKTM registered in relation to class 39 and easyGroup UKTM registered in relation to class 35:

235.1. easyJet: "Transportation of passengers and travellers by air; arranging of transportation of passengers and travellers by land; airline services; arranging,

operating and providing facilities for vacations; travel agency and tourist office services” as amended to subtract the word “office”

235.2. easyGroup: “the commercial administration and management of licensing of goods or services, including the administration and management of brand licences; the provision of general support, marketing, advertising, administration and management services to licensees of goods or services”;

236. It is accepted that attached to the easyJet mark is goodwill and reputation (the quality of the reputation is doubted, it being said that easyJet has received many poor reviews). Turnover for easyJet in the year ending 2004 was in excess of £1 billion and by the year ending 2016 in excess of £4.5 billion.

237. easyGroup does not provide turnover figures or details of standalone reputation.

238. The pleaded case is that the easylife group sign, the Domain, the EC Sign, the EG Sign and the Easycare Sign are similar to the easyJet and easyGroup sign and have been used in relation to services that are similar with the goods and/or services for which the easyJet and easyGroup marks are registered such that, by reason of such similarities, there exists a likelihood of confusion on the part of the public.

239. The legal principles are usefully and comprehensively set out in *W3* [229-236]:

“In order to establish infringement under Article 9(1)(b) of the Regulation, six conditions must be satisfied: (i) there must be use of a sign by a third party within the relevant territory; (ii) the use must be in the course of trade; (iii) it must be without the consent of the proprietor of the trade mark; (iv) it must be of a sign which is at least similar to the trade mark; (v) it must be in relation to goods or services which are at least similar to those for which the trade mark is registered; and (vi) it must give rise to a likelihood of confusion on the part of the public. In the present case, there is no issue as to conditions (i)-(iv).

Comparison of services. In considering whether services are similar to each other, all relevant factors relating to the services

must be considered, including their nature, their end users, their method of use and whether they are in competition with each other or are complementary: see Case C-106/03 Canon KKK v Metro Goldwyn Mayer Inc [1998] ECR I-5507 at [23].

Likelihood of confusion. The manner in which the requirement of a likelihood of confusion in Article 9(1)(b) of the Regulation and Article 5(1)(b) of the Directive, and the corresponding provisions concerning relative grounds of objection to registration in both the Directive and the Regulation, should be interpreted and applied has been considered by the CJEU in a large number of decisions. The Trade Marks Registry has adopted a standard summary of the principles established by these authorities for use in the registration context. The current version of this summary, which takes into account the decision of the Court of Appeal in *Maier v ASOS plc* [2015] EWCA Civ 220, [2015] FSR 20, is as follows:

"(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall

impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

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

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

The same principles are applicable when considering infringement, although as noted above it is necessary for that purpose to consider the actual use of the sign complained of in the context in which it has been used.

Common elements with low distinctiveness. If the only similarity between the trade mark and the sign complained of is a common element that is descriptive or otherwise of low distinctiveness, that points against there being a likelihood of confusion: see *Whyte and Mackay Ltd v Origin Wine UK Ltd* [2015] EWHC 1271 (Ch), [2015] FSR 33 at [43]-[44].

Family of marks. Where it is shown that the trade mark proprietor has used a "family" of trade marks with a common feature, and a third party uses a sign which shares that common feature, this can support the existence of a likelihood of confusion. As the Court of First Instance (as it then was) explained in *Case T-287/06 Miguel Torres v Office for Harmonisation in the Internal Market* [2008] ECR II-3817:

"79. As regards the applicant's argument that its earlier marks constitute a 'family of marks' or a 'series of marks', which can increase the likelihood of confusion with the mark applied for, such a possibility was recognised in *BAINBRIDGE* and confirmed in *Case C-234/06 P Il Ponte Finanziaria* [2007] ECR I-7333.

80. According to that case-law, there can be said to be a 'series or a 'family' of marks when either those earlier marks reproduce in full the same distinctive element with the addition of a graphic or word element differentiating them from one another, or when they are characterised by the repetition of the same prefix or suffix taken from an original mark (*BAINBRIDGE*, paragraph 123). In such circumstances, a likelihood of confusion may be created by the possibility of

association between the trade mark applied for and the earlier marks forming part of the series where the trade mark applied for displays such similarities to those marks as might lead the consumer to believe that it forms part of that same series and therefore that the goods covered by it have the same commercial origin as those covered by the earlier marks, or a related origin. Such a likelihood of association between the trade mark applied for and the earlier marks in a series, which could give rise to confusion as to the commercial origin of the goods identified by the signs at issue, may exist even where the comparison between the trade mark applied for and the earlier marks, each taken individually, does not prove the existence of a likelihood of direct confusion (BAINBRIDGE, paragraph 124). When there is a 'family' or a 'series' of trade marks, the likelihood of confusion results more specifically from the possibility that the consumer may be mistaken as to the provenance or origin of goods or services covered by the trade mark applied for and considers erroneously that that trade mark is part of that family or series of marks (Il Ponte Finanziaria, paragraph 63).

81. However, according to the above case-law, the likelihood of confusion attaching to the existence of a family of earlier marks can be pleaded only if both of two conditions are satisfied. First, the earlier marks forming part of the 'family' or 'series' must be present on the market. Secondly, the trade mark applied for must not only be similar to the marks belonging to the series, but also display characteristics capable of associating it with the series. That might not be the case, for example, where the element common to the earlier serial marks is used in the trade mark applied for either in a different position from that in which it usually appears in the marks belonging to the series or with a different semantic content (BAINBRIDGE, paragraphs 125 to 127)."

I do not understand it to be in dispute that it is not necessary for this purpose for all of the trade marks in the family to have been registered at the relevant date, provided that at least one was registered and a number were in use.

Colour. Where the trade mark proprietor has used the trade mark in a particular colour or combination of colours, and a third party uses a sign in the same colour or combination of colours, this can support the existence of a likelihood of confusion even if the trade mark is not registered in colour. The CJEU ruled in *Specsavers* (CJEU) that:

‘Article 9(1)(b) and (c) of Regulation No 207/2009 must be interpreted as meaning that where a Community trade mark is not registered in colour, but the proprietor has used it extensively in a particular colour or combination of colours with the result that it has become associated in the mind of a significant portion of the public with that colour or combination of colours, the colour or colours which a third party uses in order to represent a sign alleged to infringe that trade mark are relevant in the global assessment of the likelihood of confusion or unfair advantage under that provision.’”

240. It was submitted that the court should have greater regard to principles set out by the same Judge in *Sky Plc v Skykick UK* where he had refined his analysis. In my judgment even if the language used was slightly different the principles condensed into the paragraphs referred to in *W3* are not different in substance to those in *Sky Plc*: the Judge placed reliance on *Maier v ASOS plc* [2015] EWCA Civ 220 and *Canon Kabushiki Kaisha v Metro Goldwyn Mayer Inc* [1998] E.C.R. I 5507, in both *Sky Plc* and *W3*.

easyJet Assessment

241. Similar goods and services. The intended use of the goods sold by easylife are domestic in nature, to be used direct by the consumer. The service provided by easylife is a shopping forum (either by way of a paper brochure or online website) where the goods

are brought together in one place. The customer need not go to different suppliers in search of an item they wish to purchase. Indeed, some customers may not realise they want a particular item until they see it in a brochure. The service extends to supplying the goods direct by post to the customer.

242. The signs complained of in the fourth amended particulars of claim relate to a catalogue and online service selling products to clean the home or items generally associated with the home, enhancing the garden and repellents.

243. The services provided by easyJet are concerned with carriage of passengers. Ancillary to such carriage are comforts during the flight and tourist services at destination.

244. In my judgment the services provided by easyJet (class 39) and the service and goods supplied by easylife (class 3) are not identical or similar. The following table helps illustrate:

Services in specification	Ds' goods and services
Class 39: Transportation of passengers and travellers by air arranging of transportation of passengers and travellers by land airline services arranging, operating and providing facilities for vacations travel agency and tourist office services	Retail sale of a variety of clothing, homewares, household goods, gadgets, motoring accessories, health and mobility items for the elderly and/or infirm, and other miscellaneous goods
	Domestic cleaning products
	animal repellents
	lawn colouring dye product

245. Comparison of signs. In *W3 Arnold J* found [242-243] that the use of the word “easy” was not the distinctive and dominant component of the trade mark in question. I have been urged not to follow the finding of Arnold J on the basis that (a) it was a finding of

fact between different parties and (b) the trade mark in question was an EU mark. I agree, the Court should make its own assessment. The exercise of the court does not involve simply following suit.

246. The reasoning, analysis and approach of Arnold J are matters, in my judgment, that the court may have regard to.

247. It is conceded that easyJet and easyGroup have a distinctive mark and had the distinctive marks at the relevant dates for assessment. It is not accepted that the word “easy” is distinctive.

248. In this case, unlike *W3*, there is some acceptance by easylife that evidence has been adduced to support a family of marks. However it is argued that (i) the pleaded case fails to provide evidence that the family of marks existed in 1996; (ii) easy4men was not used until 2004; (iii) easyGroup was not used until 2016 and (iv) the late inclusion of other easyGroup companies and trade marks should not be relied upon.

249. The following further points are made by easylife which are well founded:

easyEverything	This mark was used on a substantial scale in relation to a chain of internet cafes from 1999 to October 2001, at which point the name changed to easyInternetcafe. There is no evidence of use since then in relation to any goods or services.
easyInternetcafe	The use started declining when the flagship store on Oxford Street was sold in June 2004. There was no remaining business to speak of by 2009. Ultimately it was a commercial disaster – the company was liquidated in 2016, having lost its shareholders £92m.
easyValue	An online price comparison site was operated under this name from 2001 to around 2004. Again, it was not a success. Its annual turnover figures were in the low £10s of thousands and it lost over £1m for 3 years in a row.

easyMoney	A credit card business was set up under this name in 2001 but was short-lived. The trading company (Easymoney (UK) Ltd) appears to have stopped trading in 2003.
easyCruise	This operated cruises from around 2005 until a date that is unclear, but at some point before 2013.
easyKiosk	<p>This was used in relation to catering and retail services provided on easyJet flights from around the launch of the airline in 1995. It is the name of the food and drink trolley service and is also used in an onboard catalogue containing details of goods available for purchase onboard. It appears from easyGroup's disclosure that the use of the name onboard was phased out in around 2007.</p> <p>This mark has not been used outside the airline.</p>
easyRider	This was the name of the easyJet inflight magazine from around 1997. It appears that easyJet had stopped using this name by January 2002, when the relatively newly floated easyJet Plc rebranded the inflight magazine as easyJet.
easyRamp	<p>easyGroup alleges that ground handling services were provided in connection with easyJet flights under this name from 1998/1999.</p> <p>There is no evidence of consumer-facing use of this name.</p>
easyTech	This appears to have been used by a company called FLS Aerospace in relation to the maintenance of easyJet's aircraft from 1998/1999. The only customer was easyJet and again, this was not a consumer-facing business.
easyHotel	The first easyHotel was opened in Kensington, London on 1 August 2005. A number of other hotels followed in the

	UK and it subsequently developed into a substantial business. easyGroup has claimed that this mark had a reputation from 2006.
easyRentacar	This was a car rental business that was launched in April 2000, initially from premises in London Bridge. It was a substantial concern. The name changed to easyCar in around 2003. As with easyEverything / easyInternetcafé, this business was never profitable, lost huge sums of money for the shareholders in the relevant period and was discontinued in the mid-late 2000s.
easyCar	Ms Luxton's evidence is that easyCar is now a third party agent / booking platform.

250. For the purpose of the claims under sections 10 (2) and (3) TMA I am prepared to accept that there is a family of marks but as this table demonstrates, it is not as extensive as that claimed nor does it reach as far back as 1996.

251. Although a family of marks may make, as a matter of common sense and law, confusion more likely, it does not make it inevitable.

252. A common feature in respect of the signs complained of, the domain name and the trade marks is the use of the descriptive word "easy" followed by a second word, usually a noun or verb.

253. There has been a concession in these proceedings that "easylife" does not infringe two trade marks (or any trade marks) now vested in easyGroup.

254. I turn to evidence of actual confusion. The disclosure certificate show that easyGroup has searched its electronic records and email server "comprising the work email archive hosting emails of Sir Stelios and employees of the Claimant, such archive holding approximately 17 million emails, over 13 million files and over 2 terabytes of data in

total". Searches have also been made of files of the various solicitor firms that have acted for easyGroup.

255. easylife has searched all customer record databases, including those kept by their customer service contractors. The records searched include:

255.1. social media sites;

255.2. DRMG records of customer service issues (not orders) on the Priam Customer Relationship Management System;

255.3. Padtor / LTH Holdings CRM Records;

255.4. Padtor / LTH Holdings Limited Phone recordings;

255.5. Emails received or sent to customers of easylife;

255.6. Physical letters sent to or received from customers; and

255.7. Customer service emails from DRMG's back-up tapes, which contained over 700,000 emails going back as early as 2007.

256. In total it has been estimated that easylife has searched some 1,855,625 emails, approximately 2.4 million Priam CRM records and 19,300 physical letters.

257. I am informed that easylife and easyGroup have searched tens of thousands of reviews on review websites.

258. Despite this loss of proportion easyGroup are not satisfied that sufficient searches have been undertaken, as some physical letters have not been retained.

259. With these gigantic efforts easyGroup has provided a table that it says supports actual confusion by references to 150 instances spanning a 10 year period, 2010 to 2020.

260. It is worth repeating the evidence of Mrs Hall under cross examination:

Q. Did you look at another e-mail from Easylife Group or was it that you just looked more closely at the invoice of the first e-mail?

A. I looked more closely. I think it had been a bit of a fraught day and I had scanned the order confirmation e-mail from them rather too quickly and I missed the column which did actually give a delivery date, but that date had now elapsed by about so many days so I thought I would get in contact with them to say I knew the date, now I had found it, but it had elapsed anyway.

Q. Very clear. When you made your statement, did anyone ask you, in the run-up to preparing your statement, about the e-mail or the materials from Easylife Group that you had been looking at, and looking at first quickly and then more in detail, before sending that second e-mail saying, "Dear easyGroup" I am sorry, that is a very long question. A. Yes, could you just repeat the first part again? Did I look again at the confirmation order e-mail, are you saying?

Q. What I am saying -- and his Lordship will be smiling and saying it is my own fault for asking a silly question, but there you are -- what I am trying to work out, and what is important to us for these proceedings, is what you saw when, who has said what to you when, and what e-mails you got when, because we are trying to work out your thought processes at very stage of your correspondence here; okay?

A. Right. If I believe I am answering the right question ----

Q. I have not asked it yet ----

A. The solicitor was not aware of my original order confirmation e-mail.

Q. Right. So when the solicitor, Mr. Clay, sent you his e-mail 8 on 10th March ----

A. Yes.

Q. ---- and it set out the "Dear easyGroup" bit in the body of that, that is on pages 1 and 2 of the clip of stuff we provided you with.

A. Yes.

Q. He then included the questionnaire?

A. Yes, that is right.

Q. When you answered that, he did not know about the earlier e-mail, did he?

A. No, he did not.

Q. He did not ask you to think about what you were looking at when you sent the later e-mail, did he?

A. No, he just wanted an explanation for my use of easyGroup in that second e-mail.

Q. Yes. I just want to say, having looked at those two e-mails, as we have, the first one and then the second one, and given they were only six minutes apart, I would suggest that the reason you said "easyGroup" rather than "Easylife Group" was probably just an abbreviation from Easylife Group, which you had looked at on the first e-mail, to easyGroup; is that fair?

A. Well, I knew that there was a lite or an easy -- it was either Easylife or Easylite. I could not remember exactly. I was too tired -- it was late in the evening -- to go and determine which it actually was so I just termed it "easyGroup", not knowing that it would lead to this...I can specifically remember thinking, "Was it Easylife or lite?" and thinking "oh, who cares" and putting "group" instead as a sort of a term at the end. I could have put "easycompany". It was just what came into my head

late at night, at the end of a long day. I did not bother to check...”

261. This passage of evidence is useful to demonstrate first, the process of obtaining the evidence was scrutinised in cross-examination and secondly the explanation for the apparent confusion. The explanation is of particular interest.

262. There are three matters, in my view, to note. First, the schedule of actual confusion produced by the Claimant contains four admissions by the Defendants. Secondly, the explanation provided by Mrs Hall in cross-examination is a useful reminder that the schedule of evidence does not always tell the whole story. This leads me to conclude that, save for the admissions, it is unsafe to rely without more on the untested evidence contained in the Claimant’s schedule. Lastly, even if each of the scheduled instances were to be substantiated, having regard to (i) the length of time easylife has traded; (ii) the number of orders the first Defendant fulfilled; (iii) the number of members of the public the first Defendant has on its data base who have had dealings with easylife; (iv) the substantial advertising commissioned by easylife during its trading life; and (v) the substantial searches undertaken during these proceedings to support confusion, the scheduled number of confused member of the public is a drop in the ocean or trivial.

Assessment

263. The Claimant’s claim is that the Defendants’ Signs, the EC Sign, the EG Sign and the Easycare Sign are similar to the its registered marks, and have been used in relation to services (or the advertisement) that are similar with the goods and/or services for which the registered marks are registered such that, by reason of such similarities, there exists a likelihood of confusion on the part of the public, and that the likelihood of confusion is increased by the apparent attempt by the Defendants to create their own family of brands under composite signs incorporating the word ‘easy’.

264. Other than the “actual confusion” in the schedule I have mentioned in paragraph 262, the pleaded case particularises instances of press or other confusion but that my judgment is insignificant when measured against the amount of business undertaken by easylife over a number of years.

265. In argument the Claimant says that the prime element for confusion is the use of the word “easy” in the signs complained of.

266. The starting point then, is the word “easy” since this is the word that the Claimant particularly objects to. In my judgment the word “easy” is not distinctive. It is a descriptive word. I accept that this is the same conclusion reached in an earlier case: I form this view independently of that finding. The use of this adjective is not distinctive, or if it has a distinction is of low value. This is likely to lead to the conclusion the average consumer will not be confused when it is used to describe a product as it has in the signs complained of.

267. When making the assessment the court needs to look through the eyes of the average consumer of the goods or services in question, where that consumer is deemed to be reasonably well informed and reasonably circumspect and observant. That consumer is unlikely to analyse the details of the mark but have regard to the overall impression which in this case will include the colour combination used in the Claimant’s marks.

268. The concession that the Claimant has a distinctive mark may lead to a greater likelihood of confusion because of the use that has been made of it. On the other hand the use in this case relates to dissimilar services. That a greater likelihood of confusion may arise from the distinctive character of the mark *per se* is a relevant factor that feeds into the “global assessment”.

269. The following factors, in my judgment, negate average consumer confusion: (i) the second word of the signs complained of is visually, aurally and conceptually different to those in the family of marks and easyGroup; (ii) with the exception of “easy4men”, the easyGroup mark, including those in the easyGroup family of marks, use one word after the word “easy”; (iii) that second word begins with a capital; (iv) the get-up is distinctly different to those marks complained of; (v) the low distinctiveness of the word “easy” and (vi) the incidences of actual confusion identified by the Claimant are insignificant.

270. My global assessment is that the average consumer would not be confused by the signs complained of.

Infringement- section 10(3) TMA

271. I am helpfully assisted by the decision of Arnold J who provides in *W3* [288-301] the legal framework for a claim made under section 10(3) of the TMA.

272. In order to succeed the Claimant needs to demonstrate that the registered trade marks or signs are identical to or similar to the trade mark used by easylife. There is no question that the signs complained of are not identical.

273. The Claimant needs to demonstrate that its trade mark has a reputation.

274. I have found as a matter of fact that there was no subjective intention on behalf of the Defendants to benefit from the reputation and goodwill of the Claimant's trade marks. It is not necessary to prove subjective intent but it remains a factor.

275. I have found above that the adjective "easy" is not distinctive or has low distinctive value and the average consumer will not be confused.

276. easyGroup must demonstrate that there is a "link" between the sign and the trade mark in the mind of the average consumer. And that link gives rise to one of three types of injury without due cause.

Assessment

277. easyGroup have demonstrated, in my judgment, that the easyJet mark had a reputation in the Relevant Period. In this respect the pleaded case is made out. On the other hand the evidence is weak in respect the reputation in respect of easyGroup mark in the Relevant Period is weak. That is not surprising given that its reputation, if any, is not consumer facing but relates to safeguarding intellectual property rights and licenses. The easyGroup mark was not known by a significant part of the public.

278. As regards the link even though I acknowledge the "threshold" is low, I find on a "global assessment" and on the balance of probabilities that the average consumer would not make a link between the signs complained of and easyGroup UKTM and easyJet UKTM. First, easyJet is reputationally and substantively a passenger airline. Secondly, easylife is factually a consumer facing retailer of home products. Thirdly, easyGroup is not consumer facing as it is an umbrella organisation. Fourthly, the word "easy" is not distinctive. It is descriptive. Fifthly, the get up of the signs complained of is very different to the distinctive get up of the Claimant. Lastly, there is no evidence that easylife

operated with knowledge of easyGroup operations or existence until it received a solicitor's letter. Accordingly, the pleaded case that stands or falls by an inference that the Defendants have chosen to continue the use of the Defendants' Signs, and the EC Sign and to start using the EG Sign and the Easycare Sign once they were aware of the "Easy" family mark reputation and/or of the reputation of the easyJet UKTM and easyGroup UKTM, so as to exploit the reputations and to profit from that exploitation with the likelihood of the Defendants taking unfair advantage without due cause is too remote to be made out.

279. I find on a "global assessment" that (a) despite praying in aid the family mark, no link has been established on the facts; (b) there is insufficient evidence of detriment to the distinctive character of the Claimant's trade marks. There is no evidence of a change in the economic behaviour of the average consumer or serious likelihood of a change in the future; (c) insufficient evidence has been adduced to support detriment to the repute and no evidence that the Claimant's reputation has been diminished by the average consumer who, as I have found, is not confused; and (d) given the evidence of Mr Caplan and making a global assessment the inference of unfair advantage cannot be made on the facts. In short, I find that there has been no tarnishment or dilution of the reputation in the mark.

Passing-off

280. There appears to be no disagreement on the law in respect of passing-off. The parties refer me to *Reckitt & Colman Products Limited v Borden Inc* [1990] RPC 341 and the opinion of Lord Oliver at 406:

"The law of passing off can be summarised in one short general proposition – no man may pass off his goods as those of another. More specifically, it may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. These are three in number. First he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get-up' (whether it consists simply of a brand name or trade description, or the individual

features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff. Whether the public is aware of the plaintiff's identity as the manufacturer or supplier of the goods or services is immaterial, as long as they are identified with a particular source which is in fact the plaintiff. Thirdly he must demonstrate that he suffers, or in a quia timet action that he is likely to suffer, damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff."

281. I am referred to *IRC v. Muller* [1901] AC 217 for the proposition that goodwill comprises different elements and maybe defined as "the benefit and advantage of the good name, reputation, and connection of a business". It is perhaps of less importance to define it in this case as it is accepted that easyJet has attached to it goodwill and reputation as I have mentioned.

282. easyGroup have to demonstrate to the satisfaction of the court that easylife has deceived. This is explained by the same Judge who provided judgments in *Sky TV* and *W3* after elevation to the Court of Appeal in *Glaxo Wellcome v Sandoz* [2019] EWHC 2545 (Ch) by reference to an earlier decision of Jacob J:

"158 As Jacob J forcefully stated in *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1994] 1 WLR 1564 at 1569-1570:

"I turn to consider the law and begin by identifying what is not the law. There is no tort of copying. There is no tort of taking a man's market or customers. Neither the market nor the customers are the plaintiff's to own. There is no tort of making

use of another's goodwill as such. There is no tort of competition. ...

At the heart of passing off lies deception or its likelihood, deception of the ultimate consumer in particular. Over the years passing off has developed from the classic case of the defendant selling his goods as and for those of the plaintiff to cover other kinds of deception, e.g. that the defendant's goods are the same as those of the plaintiff when they are not, e.g. *Combe International Ltd v. Scholl (UK) Ltd* [1980] R.P.C. 1; or that the defendant's goods are the same as goods sold by a class of persons of which the plaintiff is a member when they are not, e.g. *Erven Warnink Besloten Vennootschap v. J. Townend & Sons (Hull) Ltd* [1979] A.C. 29 (the *Advocaat* case). Never has the tort shown even a slight tendency to stray beyond cases of deception. Were it to do so it would enter the field of honest competition, declared unlawful for some reason other than deceptiveness. Why there should be any such reason I cannot imagine. It would serve only to stifle competition.

The foundation of the plaintiff's case here must therefore lie in deception...”

159. It is not enough if members of the public are merely caused to wonder. As Jacob LJ explained in *Phones 4U Ltd v Phone4U.co.uk Internet Ltd* [2006] EWCA Civ 244, [2007] RPC 5:

“16. The next point of passing off law to consider is misrepresentation. Sometimes a distinction is drawn between ‘mere confusion’ which is not enough, and ‘deception’, which is. I described the difference as ‘elusive’ in *Reed Executive Plc v Reed Business Information Ltd* [2004] R.P.C. 40. I said this, [111]:

‘Once the position strays into misleading a substantial number of people (going from ‘I wonder if there is a connection’ to ‘I assume there is a connection’) there will be passing off, whether the use is as a business name or a trade mark on goods.’

17. This of course is a question of degree—there will be some mere wonderers and some assumers—there will normally (see below) be passing off if there is a substantial number of the latter even if there is also a substantial number of the former.

18. The current (2005) edition of Kerly contains a discussion of the distinction at paras 15–043 to 15–045. It is suggested that:

‘The real distinction between mere confusion and deception lies in their causative effects. Mere confusion has no causative effect (other than to confuse lawyers and their clients) whereas, if in answer to the question: “what moves the public to buy?”, the insignia complained of is identified, then it is a case of deception.’

19. Although correct as far as it goes, I do not endorse that as a complete statement of the position. Clearly if the public are induced to buy by mistaking the insignia of B for that which they know to be that of A, there is deception. But there are other cases too—for instance those in the Buttercup case. A more complete test would be whether what is said to be deception rather than mere confusion is really likely to be damaging to the claimant's goodwill or divert trade from him. I emphasise the word ‘really’.”

160. In order for there to be passing off, a substantial number of members of the public must be misled: see *Neutrogena Corp v Golden Ltd* [1996] RPC 473 at 493-494 (Morritt LJ). Furthermore, it is not enough that careless or indifferent people

may be led into error: see *Norman Kark Publications Ltd v Odhams Press Ltd* [1962] 1 WLR 380 at 383 (Wilberforce J).

161. The correct approach to this question was well described by Jacob J at first instance in *Neutrogena* at 482:

“The judge must consider the evidence adduced and use his own common sense and his own opinion as to the likelihood of deception. It is an overall ‘jury’ assessment involving a combination of all these factors, see ‘GE’ Trade Mark [1973] R.P.C. 297 at page 321. Ultimately the question is one for the court, not for the witnesses. It follows that if the judge's own opinion is that the case is marginal, one where he cannot be sure whether there is a likelihood of sufficient deception, the case will fail in the absence of enough evidence of the likelihood of deception. But if that opinion of the judge is supplemented by such evidence then it will succeed. And even if one's own opinion is that deception is unlikely though possible, convincing evidence of deception will carry the day. The Jif lemon case (*Reckitt & Colman Products Ltd. v. Borden Inc.* [1990] R.P.C. 341) is a recent example where overwhelming evidence of deception had that effect. It was certainly my experience in practice that my own view as to the likelihood of deception was not always reliable. As I grew more experienced I said more and more ‘it depends on the evidence.’”

283. Millett LJ (as he was) helped illuminate the test in *Harrods Ltd v Harrodian School Ltd* [1996] RPC 697, where he said [714]:

“The absence of a common field of activity, therefore, is not fatal; but it is not irrelevant either. In deciding whether there is a likelihood of confusion, it is an important and highly relevant consideration

“...whether there is any kind of association, or could be in the minds of the public any kind of association, between the field of activities of the plaintiff and the field of activities of the defendant”:

Annabel's (Berkeley Square) Ltd. v. G. Schock (trading as Annabel S Escort Agency) [1972] R.P.C. 838 at page 844 per Russell L.J.

In [Lego System A/S v. Lego M. Lemelstrich Ltd. [1983] FSR 15] Falconer J. likewise held that the proximity of the defendant's field of activity to that of the plaintiff was a factor to be taken into account when deciding whether the defendant's conduct would cause the necessary confusion.

Where the plaintiff's business name is a household name the degree of overlap between the fields of activity of the parties' respective businesses may often be a less important consideration in assessing whether there is likely to be confusion, but in my opinion it is always a relevant factor to be taken into account.

Where there is no or only a tenuous degree of overlap between the parties' respective fields of activity the burden of proving the likelihood of confusion and resulting damage is a heavy one. In *Stringfellow v. McCain Foods (G.B.) Ltd.* [1984] R.P.C. 501 Slade L.J. said (at page 535) that the further removed from one another the respective fields of activities, the less likely was it that any member of the public could reasonably be confused into thinking that the one business was connected with the other; and he added (at page 545) that:

“even if it considers that there is a limited risk of confusion of this nature, the court should not, in my opinion, readily infer the likelihood of resulting damage to the plaintiffs as against an

innocent defendant in a completely different line of business. In such a case the onus falling on plaintiffs to show that damage to their business reputation is in truth likely to ensue and to cause them more than minimal loss is in my opinion a heavy one.”

284. The parties agree that the relevant date for assessing goodwill and misrepresentation is the same as that for trade mark infringement, namely the date of the commencement of the conduct complained of.

285. easyGroup seek support from the family of marks.

Assessment

286. As is apparent the court is required to make value judgments in respect of several issues. The first factor is the proximity of easylife’s field of activity to that of the easyGroup. The further removed from one another the respective fields of activities, the less likely it is that any member of the public could reasonably be confused into thinking that the one business was connected with the other. The activities are fields apart.

287. This necessarily feeds into the second value judgment concerning relevant economic connection: what is the degree of likelihood that an online retail business which also sells via catalogue direct to customer homes using lower case “easy” a dissimilar sign and selling retail products is likely to deceive?

288. I have previously found that Mr Caplan did not know about easyGroup until March 2013 after he received a letter before action from easyGroup; he had known of easyJet prior to the letter; did not know of any of the easyGroup’s “family of brands”; was not seeking to gain an advantage by using the word “easy” before the product name, domain name or any of the signs; had an online presence from March 2000; and easylife did not intend to deceive the public into thinking there was an economic association between its product signs or domain and easyJet or easyGroup.

289. I have mentioned that the Claimant has provided evidence, summarised in a schedule, of actual confusion. The test of confusion is not apt for a claim in passing-off but may form part of the factual matrix. The three observations I made in paragraph 262 above apply equally here.

290. It is said that the family of marks assists with an inference of deception. Some weight may be given as a result but the pleaded family of marks (having regard to the Part 18 response) is mostly limited to the business of and associated with the passenger airline services.

291. In my judgment this is not a case where a substantial number of the public will be going from ‘I wonder if there is a connection’ to ‘I assume there is a connection’. Standing back and taking account of the factual matrix, the respective fields associated with the trade marks of easyGroup and the marks complained of, how the relative businesses are conducted I find objectively that a substantial number of the public will not be induced to buy goods from easylife by mistaking the insignia of easyGroup.

292. In my judgment there is no convincing evidence to support a finding that that a substantial number of the public would be deceived in these different fields of activities. The high point of the Claimant’s case is the use of the word “easy”. That in my judgment is insufficient and is not improved by other evidence.

293. I find that there is no real likelihood that the use of the signs complained of has been or will be damaging to the Claimant's goodwill or will divert trade from it. easyGroup has failed to discharge the heavy burden to show false representation so that the public believe that the goods or services of easylife are that of easyGroup or otherwise connected in the relevant economic way: *Harrods Ltd* [547].

Conclusion

294. easyGroup’s trade mark registrations for easyLand and easy4men shall be revoked for non use. The easyGroup registered trade mark is to carry a specification that aligns with its use. easyJet UKTM is not to be registered in relation to “tourist office services”.

295. The infringement and passing-off claims prosecuted by easyGroup against the first and second Defendants shall stand dismissed.

296. I have not dealt with the defence of honest concurrent use, own name defence or the squeeze invalidity argument as it became unnecessary to do so.