



Neutral Citation Number: [2024] EWHC 2282 (Ch)

Claim No. IL-2022-000075
and IL-2023-000133

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

Rolls Building
Fetter Lane
London
EC4A 1NL

Handed down by email
Date: 4 September 2024

Before :

MR NICHOLAS CADDICK K.C.
(sitting as a Deputy High Court Judge)

B E T W E E N:

EASYGROUP LTD

Claimant

and

(1) EASY LIVE (SERVICES) LIMITED
(2) ACHILLEAS PAVLOU ACHILLEOUS
(3) JONATHAN RICHARD DEAN BURNSIDE

Defendants

MICHAEL EDENBOROUGH KC and STEPHANIE WICKENDEN (instructed by **Edwin Coe LLP**) for the Claimant

CHRIS AIKENS (instructed by **Hansel Henson Limited**) for the Defendants

Hearing dates: 8th, 9th and 10th May 2024

JUDGMENT

Nicholas Caddick K.C. (sitting as a Deputy High Court Judge):

INTRODUCTION

1. This is a trade mark infringement action brought by the Claimant under s.10(2)(b) of the Trade Marks Act 1994. It is brought against the First Defendant as the primary infringer and against the First Defendant’s directors, the Second and Third Defendants, as joint tortfeasors. For convenience, I will, in general, refer to the Defendants collectively.
2. The Claimant is part of the “Easy” group of companies controlled by Sir Stelios Haji-Ioannou, who founded the well-known airline, easyJet. As appears from the facts of this case and from other easyGroup cases included in the authorities bundles, the Claimant has brought various actions against others who use the word “easy” as part of their trading name. The present action is another such action.
3. The Defendants provide back-office software for use in the auctioneering trade. More importantly, they also provide, via a website at “easyliveauction.com” (“the **Defendants’ Website**”), an online platform which allows auction houses to broadcast auctions to customers and allows customers to bid on lots in those auctions in real time.
4. In the course of their business, the Defendants have used the following signs (the “**Defendants’ Signs**”):
 - a. “EASY LIVE” and “EASY LIVE AUCTION” (and variations, such as “easy live”, “Easy Live”, “EasyLiveAuction” and “EasyLiveAuction.com”);
 - b. “EASY LIVE (SERVICES) LTD” (the First Defendant’s corporate name); and
 - c. The stylised signs shown below, to which I will refer, respectively, as the “**Easy Emphasised Logo**” and the “**Auction Emphasised logo**”:



5. The First Defendant is also the proprietor of a UK trade mark (registration number 3372957, effective from 5 February 2019) for the word marks “EASY LIVE AUCTION” and “EASYLIVEAUCTION”, registered as a series for a range of goods and service in classes 9, 38 and 42 (the “**Defendants’ Mark**”).
6. This is the second action that the Claimant has brought against the Defendants. In its first action, commenced in 2019, it succeeded on some points¹ but its claim that the Defendants’ use of the name “Easy Live Auction” was an infringement of various “easy” trade marks² and its claim to invalidate the Defendants’ Mark both failed.³ However, those failures do not prevent it seeking similar relief in the present case which is based on different trade marks.

¹ Its claims under s.10(3) and in passing off in relation to the Defendants’ historic use of figurative signs, neither of which is relevant to the present action.

² The marks relied on by EasyGroup in the first action included various word and stylised marks featuring the words “EASYJET”, “EASYGROUP”, “EASYMONEY”, “easyProperty” and “EASY NETWORKS”.

³ The decisions of Sir Anthony Mann, and of the Court of Appeal in the first action are reported at [2022] EWHC 3327 (Ch) and at [2023] EWCA Civ 1508.

7. The trade marks now relied on by the Claimant (the “**Easylife Marks**”) feature the word “easylife”. They are:

a. UK trade mark No.90 3367 695, shown below:



This stylised mark (the “**Easylife Stylised Mark**”) was registered with effect from 22 September 2003 in respect of services which are set out in more detail later in this judgment including class 35 services for advertising and promotion and for the bringing together of goods to enable them to be viewed and purchased by customers.

b. UK trade mark no.3 532 904. This is for the following word marks as a series:

“easylife” and “Easylife”

This word mark (the “**Easylife Word Mark**”) was registered with effect from 14 September 2020, in respect of services in class 35 including, inter alia, advertising and marketing services and retail services, including on-line retailing and retailing through the medium of broadcasting for a wide range of goods.

8. The Easylife Marks were previously owned by Easylife Holdings Limited (in the case of the Easylife Stylised Mark) and its subsidiary Easylife Limited (in the case of the Easylife Word Mark). Since around 2000, these companies (collectively as “**Easylife**”) have operated a general merchandise catalogue retail business under the name “easylife”. They did so initially by mail-order and, shortly thereafter, online. Since 2005, they have also provided a service advertising third parties’ products by means of paper inserts placed within the Easylife catalogues.

9. Like the Defendants, Easylife was also the target of an action brought by the Claimant. In 2017, it was sued by the Claimant for trade mark infringement and passing off, principally in relation to its use of the words “easylife group”. That claim was dismissed by Chief ICC Judge Briggs in July 2021.⁴ However, on 21 July 2022, after the Claimant had obtained permission to appeal that decision, the Claimant and Easylife entered into a settlement agreement whereby the Easylife Marks were assigned to the Claimant, but Easylife was allowed to continue using them as a licensee of the Claimant.

10. Having acquired the Easylife Marks, the Claimant brought this new action against the Defendants. Its claim is that the Defendants’ Signs are similar to the Easylife Marks and are being used in relation to services that are identical or similar to those for which the Easylife Marks are registered in circumstances where there exists a likelihood of confusion – an infringement under s.10(2)(b) of the Trade Marks Act 1994. The Defendants deny infringement (although they accept that, if the First Defendant is liable, then so too are the Second and Third Defendants).

11. Both sides attack the other’s trade marks. The Claimant seeks a declaration that the Defendants’ Mark is invalid by reason of the earlier Easylife Stylised Mark. Meanwhile, the Defendants seek an order revoking the registration of the Easylife Stylised Mark on the basis of non-use and a declaration that the Easylife Word Mark is invalid in view of the earlier Defendants’ Mark and the goodwill the Defendants claim to have acquired in Defendants’ Signs by reason of their earlier trading.

⁴ See [2021] EWHC 2150 (Ch).

THE WITNESSES

12. There was no reason to criticise any of the witnesses.

The Claimant's witnesses

13. *Gregory Caplan* - the Claimant's principal witness was Mr Caplan, who was the founder and sole director of Easylife. His witness statement dealt with the history of that company, its use of the Easylife Marks and its success. His position was unusual in that he had previously given evidence on these matters against the Claimant in its 2017 action against Easylife. Indeed, he had been a personal defendant in that action. Now, as a result of the assignment of the Easylife Marks to the Claimant, the Claimant was relying on his evidence. Even more unusual was the fact that he was cross examined in the present action by the same counsel (Mr (Chris) Aikens, representing the Defendants in this action), who had previously represented him and Easylife as defendants in the 2017 action. Indeed, in his cross examination before me (which was conducted remotely, as Mr Caplan was in Bali), Mr Caplan's rather surprising first words were "Yes, good evening, Chris". Despite this, I am satisfied that Mr Caplan was a good witness giving his evidence fairly and doing his best to assist the court. Probably unsurprisingly, Mr Aikens did not suggest otherwise.
14. *Chrys Chrysostomou* – Mr Chrysostomou was and is the managing director of a company called Direct Response Marketing Group Limited ("DRMG"), which works with Easylife. He dealt with the use of the Easylife Marks between 2009 and 2019 and the arrangements between DRMG and Easylife by which third parties were able to place inserts into Easylife's catalogues. He had also been involved in the 2017 action which the Claimant had brought against Easylife but, unlike Mr Caplan, solely as a witness. Now he was appearing as a witness for the Claimant in its claim against the Defendants. He too was cross-examined and I am satisfied that he too was a good witness doing his best to assist the court.
15. *Robert Wise* - Mr Wise is the Operations Director of Easylife and has been involved in the Easylife business since 2000 (with the exception of a break between 2014 and 2018). His evidence dealt with the use of the Easylife Marks in marketing emails sent to customers from 2013 onwards. His evidence was not challenged.
16. *James Oakenfold* – Mr Oakenfold is a freelance marketing professional who had been the Commercial Director of Easylife from 2018 to 2023. His evidence dealt with Easylife's branding strategy from 2018 to 2023 and with the use of the Easylife Marks in marketing emails sent to customers during this period. Again, his evidence was unchallenged.

The Defendants' Witnesses

17. *Achilleas Pavlou Achilleous* – Mr Achilleous is the Second Defendant and a director of the First Defendant. His evidence dealt with the nature and history of the Defendants' business, the choice of its brand name and how it has used the signs complained of. He was cross examined and although the Claimant questioned the relevance of some of his evidence, they rightly did not criticise him as a witness. I find that he was a helpful witness who engaged constructively with the cross examination.
18. *David Hansel* – Mr Hansel is a partner of Hansel Henson Limited, solicitors for the Defendants. He has acted for more than 30 business who have used the word "easy" in their names (to which he referred as "easy+" businesses). These included a number whose use of the word "easy" had been challenged by the Claimant. He gave evidence regarding his understanding of the expressions "easy" and "easy life", of uses made of those expressions in news articles and of businesses who have used the "easy life" brand (or variations of it) in relation to the provision of goods or services in the UK. In the Appendix to his statement, he listed the documents to which he referred in preparing his statement. He was cross examined about some of these and readily accepted that there were some mistakes in them. In closing, Mr Edenborough pointed

out that Mr Hansel's list of "easy+" branded businesses providing services in the UK⁵ does not provide turnover details for those businesses (although it did specify the nature of the business conducted) and that Mr Hansel had not carried out a statistical analysis to support his assertion⁶ that the phrase "easy life" was a commonly used English (descriptive) phrase. However, in my judgment, none of this undermines Mr Hansel's credibility as a witness.

SUMMARY OF THE CLAIMS

19. The claims and the Defendants' responses to them can be summarised as follows.

Infringement of the Easylife Stylised Mark

20. The Claimant claims that the Defendants' use of the Defendants' Signs infringes the Easylife Stylised Mark under s.10(2)(b) of the Trade Marks Act 1994.

21. The Defendants deny that they are liable under s.10(2)(b) on four grounds, namely that:

- a. There can be no infringement of the Easylife Stylised Mark because, as set out in their Counterclaim, that Mark should be revoked under s.46 of the Trade Marks Act 1994 (at least in relation to the services relied on by the Claimant in this action) for lack of genuine use;
- b. The services in relation to which the Defendants' have used the Defendants' Signs are not identical or similar to those for which the Easylife Stylised Mark is registered;
- c. There is no likelihood of confusion because the common element ('easy') is not distinctive, and is descriptive, in relation to each of the services in issue; and,
- d. Even if there was a likelihood of confusion at the time when use of the Defendants' Signs commenced, there had been 12.5 years of honest concurrent use of those Signs with the Easylife Stylised Mark before the first complaint.

Infringement of the Easylife Word Mark

22. The Claimant claims that the Defendants' use of the Defendants' Signs is also an infringement of the Easylife Word Mark under s.10(2)(b).

23. As the Easylife Word Mark was only registered on 19 August 2022, it is not vulnerable to a revocation attack based on non-use. However, the Defendants again deny that they are liable under s.10(2)(b). They assert that:

- a. Whilst some of the services in relation to which the Defendants have used the Defendants' Signs are identical to some of those for which the Easylife Word Mark is registered, others of the services are not even similar;
- b. There is no likelihood of confusion because, although the Mark and the Defendants' Signs both feature the word 'easy', that word is not distinctive but is descriptive;
- c. There has been 12.5 years of honest concurrent use of the Defendants' Signs with this Mark before the first complaint; and
- d. If the facts would support the Claimant's claim under s.10(2)(b), then (as set out in the Counterclaim), then those same facts would also support the conclusion that the registration of the Easylife Word Mark with effect from 14 September 2020 should be declared invalid under s.5(4)(a) of the Trade Marks Act 1994 because of the substantial use which the Defendants had made of the name "EASY LIVE AUCTION" prior to that. The Defendants' Counterclaim also asserts that the Easylife Word Mark would be invalid under s.5(2)(b) because of the earlier Defendants' Mark (registered with effect

⁵ Annex 2 to his witness statement

⁶ Annex 3 to his witness statement

from 5 February 2019), but they accept that this is unlikely to succeed if their s.5(4)(a) counterclaim fails.

Declaration that the Defendants' Mark is invalid

24. The Claimant's final claim is that the Defendants' Mark should be declared invalid under s.47(2) of the Trade Marks Act 1994 on two grounds, namely that:
- a. The Defendants' Mark was registered contrary to s.5(2)(b) of the Trade Marks Act 1994 because there was a likelihood of confusion between the sign "Easy Live Auction" and the earlier Easylife Stylised Mark; and
 - b. The Defendants' Mark was registered contrary to s.5(4)(a) of the Trade Marks Act 1994 because of the Claimant's goodwill in the "easylife" mark.

It is common ground that the result of this invalidity claim will follow that of the infringement claim.

The relevant dates

25. Before dealing with these claims, I should deal with two issues of general relevance. The first is the relevant date(s) by reference to which the various trade mark claims are assessed. The parties agreed that it is unlikely that the answer to this question will have any material impact on the case. However, neither was prepared to concede the point.
26. The starting point is *W3 Ltd v easyGroup Ltd* [2018] EWHC 7 at [213]-[218]. From this, the following general principles emerge:
- a. Subject to (b) and (c) below, the question whether the use of a sign infringes a trade mark is assessed as at the date that the use of the sign commenced;
 - b. If at a later date the defendant has used the sign in a materially different manner or context, then a new global assessment had to be made as of that later date; and
 - c. The relevant date cannot be earlier than the date from which the trade mark is effective.
27. Notwithstanding this, Mr Edenborough argues that where the allegedly infringing use started more than six years before the Claim Form (i.e. outside the limitation period), then the relevant date is taken to be the cut-off date for limitation purposes. In support of this he referred to the decisions of Bacon J in *easyGroup Ltd v Nuclei Ltd* [2022] EWHC 901 at [295] and Arnold J in *Walton International Limited v Verweij Fashion BV* [2018] EWHC 7 at [95] referring back to Arnold J's earlier decision in *Stichting BDO v BDO Unibank Inc* [2013] EWHC 418 (Ch) at [98]. However, as Mr Aikens points out, in the previous action between these parties, Sir Anthony Mann declined to follow that approach – pointing out that paragraph [98] of *Stichting BDO* did not actually support the proposition for which it was cited in the other cases and noting that an analysis whereby the intervention of a limitation period shifted the relevant date was illogical given that a limitation period simply operates to limit the period of time for which a remedy can be obtained and not to extinguish an earlier breach. On this basis, he concluded that (subject to points (b) and (c) above), the relevant date remains the date when the infringing use commenced and is not affected by the intervention of the limitation period (see *easyGroup Ltd v Easy Live (Services) Limited* [2022] EWHC 3327 (Ch) at [118]-[126]).
28. To the extent that it is relevant, I agree with Sir Anthony Mann for the reasons he gave. On this basis, I find that the relevant dates of assessment are:

- a. In respect of the claim that the Easylife Stylised Mark has been infringed by the use of the signs “EASY LIVE AUCTION”, “EASY LIVE” and “EASY LIVE (SERVICES) LTD”⁷ - January 2012;⁸
- b. In respect of the claim that the Easylife Stylised Mark has been infringed by the use of the Easy Emphasised Logo (for convenience, shown again below) - April 2016 (as that was the date when that logo was first used);
- c. In respect of the claim that the Easylife Stylised Mark has been infringed by the use of the Auction Emphasised Logo (shown below) – May 2019 (as that was the date when that logo was first used);
- d. In respect of the claim that the Easylife Word Mark has been infringed by the use of any of the Defendants’ Signs or logos – 20 September 2020 (as that was the date when the Easylife Word Mark was registered); and
- e. I will deal with the relevant dates in relation to the revocation and invalidity claims when dealing with those claims (see below).

The average consumer

29. The second issue of general importance is the identity and characteristics of the average consumer – the hypothetical person through whose eyes many of the issues which arise are assessed.
30. Both parties referred me to *easyGroup Ltd v Easyway SBH* [2021] EWHC 2007 (IPEC) at [18] where Douglas Campbell Q.C. noted that the relevant average consumer is the average consumer of the services for which the mark in issue was registered. Accordingly:
 - a. In the case of the Easylife Marks, it appears to be common ground that there are two relevant average consumers - first, the general public and, second, business organisations (or a person working within such an organisation) reflecting the two types of service for which the Easylife Marks are registered – the bringing together services and the advertising and promotion services.
 - b. In the case of the Defendants’ Mark, it is again common ground that there are two relevant publics – first, members of the general public who go online to view and bid in online auctions and, second, auction houses looking to advertise and conduct their auctions online.
31. In the context of an infringement claim, it is common ground that the relevant average consumer is both (i) familiar with the trade mark and (ii) exposed to and is likely to rely on the defendant’s sign.
32. The level of attention and care the average consumer will display with regard to trade mark issues will depend on the nature of the goods or, in this case, of the services involved and on how they are acquired. Each case will turn on its own facts but it is often the case that, as Sir

⁷ And including variations such as “Easylive”, “Easy Live” etc.

⁸ It appears that there was some use of the mark a little earlier than this (in 2010). However, January 2012 is the date when the First Defendant was incorporated and started using these signs. It is not suggested that anything turns on this difference in dates.

Anthony Mann found in the previous action between these parties (see [129]), a professional acquiring services can be expected to pay more attention than a lay person.

33. On the facts of the present case, it seems to me that given the nature of the services directed at them, the business organisations (in the case of the Easylife Marks) and the auction houses (in the case of the Defendants' Mark) are likely to be more attentive to trade mark issues than the general public. This is relevant when it comes to comparing the advertising services which are directed at those consumers rather than at the general public.

INFRINGEMENT OF THE EASYLIFE STYLISTED MARK

34. Turning to the claims relating to the Easylife Stylised Mark.

Revocation of the Easylife Stylised Mark

35. The Defendants deny infringement of the Easylife Stylised Mark on the basis that the registration of that mark should be revoked under s.46 of the Trade Marks Act 1994 for non-use. If the Defendants' counterclaim for revocation succeeds, it is a complete answer to the Claimant's infringement claim based on that mark.

36. So far as is relevant, s.46 of the Trade Marks Act 1994 provides that:

- (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;
 - (...)
- (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).
- (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 preparation for the commencement or resumption began before the proprietor became aware that the application might be made.

(...)
- (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.

37. The Defendants' pleaded case was that s.46 applies because there was no relevant use of the Easylife Stylised Mark in five separate five-year periods. However, at trial, it was common ground that, because of s.46(3), only the fifth of those periods (that ending on 18 August 2022,

the day before the date of the Claim Form) is relevant to the issue of revocation of the Easylife Stylised Mark.⁹

38. The Claimant accepts that Easylife had not used the Easylife Stylised Mark in its registered form but claims that it had used five signs which qualify under s.46(2) as variant forms of that mark in relation to certain of the “bringing together” services for which that mark was registered and that four of those signs had been used in relation to advertising services and promotion services for which that mark was registered. The Defendants deny that any of these five signs was a variant form of the registered mark but accept that there had been some uses of some of those signs in relation to some of the services for which the Easylife Stylised Mark was registered.
39. The issues, therefore, are whether the five signs relied on by the Claimants are variant forms of the Easylife Stylised Mark within the meaning of s.46(2). If none of them is, then that mark falls to be revoked in its entirety. If, however, any of them is a variant form of the mark, the issue is the extent to which Easylife used it in relation to services for which the mark was registered and, therefore, whether or not there is a case for partial revocation of the mark.

Variant forms – the law



40. The law with regard to what constitutes a variant form of a registered mark under s.46(2) of the Trade Marks Act 1994 was considered by Arnold J in *Walton v Verweij Fashion* [2018] EWHC 1608 (Ch) at [119] to [123]. From this, I note the following:
- a. The objective of s.46(2) is to allow the proprietor of the mark, in the commercial exploitation of the sign, to make variations in the sign, which, without altering its distinctive character, enable it to be better adapted to the marketing and promotion requirements of the goods or services concerned (see *Walton* at [119], citing Case C-252/12, *Specsavers International Healthcare Ltd v Asda Stores Ltd* at [29]).
 - b. There are two parts to the necessary inquiry. First, to identify the points of difference between the mark as used and the mark as registered and, second, to ask whether those differences alter the distinctive character of the mark as registered (see *Walton* at [120], citing *BUD and BUDWEISER BUDBRAU Trade Marks* [2002] EWCA Civ 1534).
 - c. The normal approach to the assessment and comparison of distinctive character applies in this context. Accordingly, it is necessary to analyse the ‘visual, aural and conceptual’ qualities of the mark as used and of the mark as registered and to make a ‘global appreciation’ of their likely impact on the average consumer (see *Walton* at [122]-[121], citing *BUD and BUDWEISER BUDBRAU* at [45] and Case C-501/15 *European Union Intellectual Property Office v Cactus SA* at [68]-[71]).
41. In closing, the Claimant also relied on Case T-24/17 *LA Superquimica SA v EUIPO*, where the General Court stated:
- “46 Thus, a finding that the distinctive character of the mark as registered has been altered requires an assessment of the distinctive and dominant character of the added elements based on the intrinsic qualities of each of those elements and the relative position of the various elements within the arrangement of the trade mark”
- 47 For the purposes of that finding, account must be taken of the intrinsic qualities and, in particular, the greater or lesser degree of distinctive character of the earlier mark used solely as part of a complex trade mark or jointly with another mark. The weaker the distinctive character, the easier it will be to alter it by adding a component that is itself

⁹ The third five-year period (leading up to 5 February 2019), is the relevant period for the purposes of the Claimant’s claim to invalidate the Defendants’ Mark (as to which, see below), as that was the filing date of that mark.

distinctive, and the more the mark will lose its ability to be perceived as an indication of the origin of the product it designates. The reverse is also true ...”.

48 In addition, it must be remembered that, in order for point (a) of the second subparagraph of Article 15(1) of Regulation No 207/2009 to apply, the additions to the registered mark must not alter the distinctive character of the mark in the form in which it was registered, in particular because of their ancillary position in the sign and their weak distinctive character ...”.

42. In support of their case that the signs used were variant forms of the Easylife Stylised Mark, the Claimant relied on *BUD and BUDWEISER BUDBRAU Trade Marks* [2002] EWCA Civ 1534. In that case, the sign used (shown to the right in the table below) was found to be a variant form of the registered mark (shown to the left):


<i>Registered Mark</i>	<i>Sign used</i>
	

43. In reaching this decision, the Hearing Officer, whose decision was upheld by the Court of Appeal, decided that the distinctive feature of the registered mark was the words “Budweiser Budbrau” and that the different font and the absence of underlining in the variant sign did not detract from or alter that distinctive feature. In effect, as perceived by the average consumer, the word features of the mark spoke more loudly than the figurative elements or, putting it another way, the words were of such significance as to reduce to insignificance the other elements of the registered mark - see Lord Walker at [11] to [12].

44. The Claimant also referred to Case T-792/22 *Quatrotec Electronica SL v EUIPO* (“Woxter”) where the General Court held (at [91] and [92]) that use of the word “Woxter” (i.e. omitting elements of stylisation and colour) on invoices in order to designate the origin of goods did not alter the distinctive character of the registered mark shown below:



45. Finally, the Claimant referred to Case T-521/21 *6minutes Media GmbH v EUIPO* T521/21 (“Ad Pepper”), where the signs used (as shown below) were found to be variant forms (i.e. not to alter the distinctive character) of the registered mark shown below:

<i>Registered Mark</i>	<i>Signs used</i>
	



46. In reaching this conclusion, the General Court:

- a. At [40]-[46], agreed with the EUIPO that the words “ad pepper” constituted the distinctive and dominant feature of the registered mark and noted that, even if it was only weakly distinctive, it was likely to impose itself on the mind of a consumer in part because of its positioning but also because such verbal components of a mark:

“...are, on principle, more distinctive than [its figurative components], because the average consumer will more easily refer to the product in question by referencing the name rather than by describing the figurative component of the trade mark”.





In effect, where a mark contains words and a figurative element, the word element will usually be more significant in terms of the distinctive character of the mark as a whole. Accordingly, changes in figurative elements are usually less likely to change that character than changes to the word element.

- b. At [47], noted that, whether due to nature, meaning or size, the figurative elements of the three peppers did not dominate the mark.
- c. At [50]-[51], commented that the fact that the signs used omitted the words “the e-advertising network” but included words such as “digital pioneers since 1999”, “Spain” and “Germany”, did not affect the distinctive character of the mark given that they were of “a descriptive element and devoid of distinctive character”.
- d. At [56], with regard to the changes made to the figurative element of the mark (the circle around the depiction of the three peppers), commented that:

“ ... the additional shape of the circle is one of the most simple and common shapes, and amounts to one of the most basic geometric elements. For this reason it has no distinctive character. It follows that the added circle is of a purely ornamental nature which does not alter the distinctive character of the contested mark, just as the fact that, within the circle, the three peppers are shown slightly smaller. That conclusion is strengthened by the fact that the shape of the peppers accords both in the signs used, as in the Contested Mark.”

Variant forms – the present case

47. Turning to the present case, the Claimant’s registered mark (the Easylife Stylised Mark) and the five signs which the Claimant says are variant forms of it are shown in the table below:

<i>The registered mark</i>	<i>Signs used</i> ¹⁰
	1 
	2 
	3 
	4 EASYLIFE LIFESTYLE SOLUTIONS
	5 EASYLIFE

Sign 1

48. Looking first at Sign 1 and adopting the approach set out in *Walton*, the differences between that sign and the Easylife Stylised Mark are:
- The use in Sign 1 of a conventional dot over the letter “i” in “easylife” in place of the triangle which, in the mark, had acted as the dot over that letter “i” and, by means of different degrees of shading, contained a tick device;
 - The addition in Sign 1 of a larger white tick contained in a black circle placed in front of the word “easylife” (“the tickball”); and
 - The use of a different font for the word “easylife”;
49. In my judgment, viewed through the eyes of the average consumer of both types referred to in paragraph 30 above, these differences (whether taken individual or together) do not alter the distinctive character of the registered mark. Accordingly, I find that Sign 1 is a variant form of the Easylife Stylised Mark within the meaning of s.46(2).
50. First, in my judgment, both types of average consumer would see the dominant element of both the Easylife Stylised Mark and Sign 1 as being the word “easylife”. Aurally, that word is unaltered and, as was the case in *Ad Pepper*, the average consumer is far more likely to use that word when identifying the origin of the relevant goods or services than to try to describe the figurative elements of the mark or of Sign 1. Visually, the ways in which that word is depicted in the mark and in Sign 1 are very similar. In both cases it is depicted without a break using lower case letters throughout and I do not think that the relatively small difference in the fonts used would be seen as of any real significance. Conceptually, also, the word “easylife” is the dominant element of both the mark and Sign 1. Whilst the fact that the words “easy” and “life” would be seen as normal descriptive words with a clear meaning (in contrast to, say, the words “Budweiser Budvar” or Woxter in the cases referred to above), the fact that they are pushed together to form a made-up word would, in my judgment, give the combination an element of distinctiveness in the eyes of the average consumer whilst also alluding to the customer experience offered by Easylife – the possibility of an easier life and a stress-free experience – a concept reinforced by the “tick” element that is contained in both the mark and in Sign 1.

¹⁰ I have numbered these signs because I have dealt with them in a different order to the order in which they were dealt with in the pleadings and in the parties’ submissions (which identified them by letters A to E). Sign 1 is Sign C; Sign 2 is Sign B, Sign 3 is Sign A, Sign 4 is Sign E and Sign 5 is Sign D.

51. As regards that tick, it is clearly more prominent in its “tickball” form in Sign 1 than it is in the triangle in Easylife Stylised Mark. However, I do not accept the Defendants’ argument that the average consumer would not perceive the tick within the triangle in the Easylife Stylised Mark. Whilst the shading of the triangle does not serve to emphasise the tick as strongly as the tickball, the tick is undoubtedly present and the unusual use of a triangle (as opposed to the conventional dot) to form the “i” of the word “easylife” would draw the attention of the average consumer, and the average consumer would recognise it as reinforcing the concept (as I have said above) of the word “easylife”. Accordingly, notwithstanding Mr Caplan’s comment that the tickball was a core part of and fundamental to Easylife’s branding, I do not think that this difference alters the distinctive character of the mark. As set out above, changes to figurative elements of a mark are less likely to be regarded as changing the distinctive character of a mark and, in my judgment, the dominant feature was and remained the word “easylife”. Adopting the approach of the General Court in *Ad Pepper* (see paragraphs 45-46 above), it seems to me that the average consumer would be more influenced by the continued presence of the “tick” than by the change in the geometric shape surrounding it, the change in colour or the change in position.

Sign 2



52. Differences (a) to (c) in relation to Sign 1 also apply in relation to Sign 2. However, here there are some additional differences, namely:
- d. The use in Sign 2 of the colour blue for the font and the circle; and
 - e. The change in the lower strapline so that in Sign 2 it reads “everyday solutions” instead of “lifestyle solutions”.
53. If, as I have concluded, Sign 1 does not alter the distinctive character of the Easylife Stylised Mark, then it seems to me that the same must apply as regards Sign 2. In the first place, I do not think that the adoption of a blue font for the word “easylife” and for the circle around the tick would be seen as significant in terms of the distinctive character of the Easylife Stylised Mark. The same seems to me to be the case in relation to the change in the lower strapline. In my judgment, notwithstanding Mr Caplan’s evidence that this change had been a deliberate marketing decision, given that the words of the strapline are of little distinctive character and are depicted in a much smaller font than the word “easylife”, the average consumer would not regard this change as altering the distinctive character of the mark.

Sign 3



54. Sign 3 moves further away from the Easylife Stylised Mark in that here, in addition to differences (a) to (d) above, the lower strapline is removed altogether. However, if (as I have concluded) the average consumer would not regard those words as being of any particular trade mark significance, I do not think that the average consumer would see this change as altering the distinctive character of the mark.

Sign 4

EASYLIFE LIFESTYLE SOLUTIONS

55. Sign 4 omits all of the figurative elements and stylisation of the Easylife Stylised Mark. However, like that mark, it contains the words “easylife” and “lifestyle solutions” – albeit arranged differently (on a single line) and with the latter words now being in the same size font as the word “easylife”. The Defendants accept that this is the variant form that is closest to the Easylife Stylised Mark and, in my judgment, the differences do not change the distinctive character of the mark for which, as set out above, the word “easylife” is the dominant element.

I am, therefore, satisfied that this is also a variant form of that mark within the meaning of s.46(2).

Sign 5

EASYLIFE

56. Sign 5 uses simply the word “EASYLIFE” in capital letters without stylisation or any of the figurative elements of the Easylife Stylised Mark. However, it also omits the words “lifestyle solutions”. However, I do not believe that those words would be seen as particularly significant by the average consumer and, given my conclusion that the word “easylife” has some distinctive character and is the dominant element of the Easylife Stylised Mark, I am satisfied that use of Sign 5 constitutes use of that mark. Indeed, I note that this is consistent with the decision in the *Woxter* case referred to above.

Use of the Signs – the uses made of the Signs

57. If, as I have found, the signs referred to above were variant forms of the Easylife Stylised Mark, then, given that the Defendants concede that there had been some use of some of these signs in respect of some of the registered services, this is not a case where the mark should be revoked in its entirety. The next issue, therefore, is whether there should be a partial revocation. For this, it is necessary to consider the nature and extent of Easylife’s use of the signs and the extent to which such use was in relation to the services for which the mark is registered.

The services for which the Easylife Stylised Mark is registered

58. The Easylife Stylised Mark is registered for:

Class 35

(a) Advertising services; promotion services; *(b)(i)* the bringing together, for the benefit of others, of a variety of goods, through a television shopping channel, enabling customers to conveniently view and purchase those goods by means of telecommunications; *(b)(ii)* the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase those goods from a general merchandise catalogue by mail order or by means of telecommunications; *(b)(iii)* the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase those goods from a general merchandise internet web site; *(b)(iv)* the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase those goods in a wholesale outlet. (NOTE - I have added the text shown above in underlined italics for ease of reference in this judgment)

Class 39

Transport; packaging and storage of goods.

59. The class 35 registration, therefore, included two categories of service – (a) the advertising and promotion services and (b) four types of “bringing together” service.

The parties’ pleaded cases regarding use

60. The Defendants’ original pleaded case in their Counterclaim was that the Easy Stylised Mark had not been put to genuine use in relation to the services for which it is registered (i.e. for any of the services referred to above). On that basis, the Defendants sought an order for the revocation of the mark in its entirety.
61. The Claimant’s response, in its Re-Amended Defence to Counterclaim, was that:
- a. The five variant forms of the Easy Stylised Mark had been used for the following Class 35 services for which it was registered:

“...the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase those goods from a general merchandise catalogue by mail order or by means of telecommunications; the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase those goods from a general merchandise internet web site...” (i.e. services within (b)(ii) and (b)(iii) of the registration as set out above); and

- b. Four of the variant forms (Signs 1, 2, 3 and 5) had been used in relation to the Class 35 advertising services and promotion services for which the mark was registered (services within (a) above).
62. The Claimant did not, therefore, suggest that the Easylife Stylised Mark had been used in relation to all of the services covered by the registration. In particular, it did not claim that it had been used in respect of two of the class 35 “bringing together” services (i.e. service (b)(i) - bringing together a variety of goods through a television shopping channel, and service (b)(iv) - bringing together a variety of goods shopping channel in a wholesale outlet) nor in respect of the class 39 services (transport, packaging and storage of goods).
63. In their Reply to Defence to Counterclaim, the Defendants:
- a. Admitted that Signs 1, 2, 3 and 5 had been used in relation to the services referred to in paragraph 61(a) above (which I will call “the **Admitted Bringing Together Services**”) (such uses being on the Easylife catalogues, on the Defendants’ website and in the Easylife emails) but denied that Sign 4 (the words “EASYLIFE LIFESTYLE SOLUTIONS”) had been used for those services; and
- b. Denied that there had been any use of the signs in respect of the advertising and promotion services for which it was registered, save that they admitted there had been use of Sign 5 (the word “EASYLIFE”) in the third and fifth five-year periods in respect of services which the Defendants argue was a narrow sub-category of advertising services – namely the provision of “advertising space by way of printed inserts into printed retail catalogues” (I will refer to this as “**Easylife’s Insert Service**”).

Use in relation to the Admitted Bringing Together Services

64. On this basis, the only issue with regard to the use of the Easylife Stylised Mark in respect of Admitted Bringing Together Services is whether Sign 4 (“EASYLIFE LIFESTYLE SOLUTIONS”) was used for those services.
65. In this regard, the only evidence provided by the Claimant to support its case that there had been any such use of Sign 4 is in the form of some pages from the Amazon and Fruugo websites. These pages show the results of searches in respect of the brand “Easylife Lifestyle Solutions” and many of the results are identified as “easylife lifestyle solutions” products. This is clearly use of Sign 4. However, I agree with the Defendants that it is not use in relation to the services as registered because it was not Easylife that was providing the service of bringing these products together, rather it was Amazon and Fruugo.

Use in relation to the advertising and promotion services

66. As regards use of the Easylife Stylised Mark for “advertising and promotion” services, it appears to be common ground that the only service falling within this class of service was Easylife’s Insert Service. There is, however, an issue as to whether there had been any use of Signs 1, 2 or 3 in relation to that service in addition to the admitted use of Sign 5 (“EASYLIFE”).¹¹

¹¹ As set out above, the Claimant does not suggest that Sign 4 was used in relation to such services and the Defendants admit that there had been use of Sign 5.

67. The Defendants' admission that Sign 5 had been used in relation to Easylife's Insert Service was based on Easylife's dealings with DRMG. The evidence showed that DRMG had identified third parties who wished to place advertising inserts in Easylife's catalogues, that Easylife had provided the space for such inserts in its catalogues and had invoiced DRMG accordingly, and that DRMG had invoiced the third parties. As (which Mr Aikens accepted) those third parties would have known that their inserts were being placed in Easylife Catalogues (indeed DRMG's invoices to the third parties referred to the "EASYLIFE CATS"), the Defendants admit that Sign 5 was used in relation to the service of providing advertising space by way of printed inserts into printed retail catalogues but they assert that there had not been any use of Signs 1, 2 or 3 in relation to that service. I do not agree. In the first place, Sign 2 (in a blue font) (and sometimes Sign 1) was used in a very prominent position on most of the invoices that Easylife rendered to DRMG in respect of Easylife's Insert Service in the five years up to 18 August 2022. Moreover, it is clear from Mr Chrysostomou's evidence that DRMG was well aware that Easylife used Signs 1, 2 and 3 in relation to the catalogues in which Easylife was offering to place the inserts and it seems probable that the third party advertisers would have been aware of that too, given the numbers of those catalogues being distributed and those advertisers' likely interest in the effectiveness of this form of advertising. In the circumstances, it seems to me that Signs 1, 2 and/or 3 had also been used in relation to Easylife's Insert Service.

Partial revocation – the law

68. On the basis of my finding that the signs were variant forms of the Easylife Stylised Mark, it is common ground that that mark does not fall to be revoked in its entirety. Rather the issue is whether, given the use which I have found had been made of variant forms of the mark in the relevant period, that mark should be partially revoked in accordance with s.46(5) of the Trade Marks Act 1994.
69. So far as I could tell, there was no dispute as to relevant legal principles and, in this regard, I was referred to the following passage from *Merck KGaA v Merck Sharp and Dohme Corp* [2017] EWCA Civ 1834:

"245. First, it is necessary to identify the goods or services in relation to which the mark has been used during the relevant period.

246. Secondly, the goods or services for which the mark is registered must be considered. If the mark is registered for a category of goods or services which is sufficiently broad that it is possible to identify within it a number of subcategories capable of being viewed independently, use of the mark in relation to one or more of the subcategories will not constitute use of the mark in relation to all of the other subcategories.

247. Thirdly, it is not possible for a proprietor to use the mark in relation to all possible variations of a product or service. So care must be taken to ensure this exercise does not result in the proprietor being stripped of protection for goods or services which, though not the same as those for which use has been proved, are not in essence different from them and cannot be distinguished from them other than in an arbitrary way.

248. Fourthly, these issues are to be considered from the viewpoint of the average consumer and the purpose and intended use of the products or services in issue. Ultimately it is the task of the tribunal to arrive at a fair specification of goods or services having regard to the use which has been made of the mark."

70. In addition, Mr Edenborough referred me to Case T-242/22, *Omniactive Health Technologies v Pharmaselect International Beteiligungs*, where the General Court stated that:

"62 ... the concept of 'part of the goods or services' cannot be taken to mean all the commercial variations of similar goods or services but merely goods or services which are sufficiently distinct to constitute coherent categories or subcategories ...

...

64. As regards the question whether goods are part of a coherent subcategory which is capable of being viewed independently, it is apparent from the case-law that, since consumers are searching primarily for a product or service which can meet their specific needs, the purpose or intended use of the product or service in question is vital in directing their choices. By contrast, the nature of the goods at issue and their characteristics are not, as such, relevant with regard to the definition of subcategories of goods or services ...”

Mr Edenborough also referred me to Case C-714/18, *ACTC GmbH v EUIPO* where the CJEU stated that:

“44. With regard to the relevant criterion or criteria to apply for the purposes of identifying a coherent subcategory of goods or services capable of being viewed independently, the court has held, in essence, that the criterion of the purpose and intended use of the goods or services at issue is an essential criterion for defining an independent subcategory of goods ...”

Partial revocation – the present case

71. As matters stand, it is unclear whether, given the pleadings, there should be a partial revocation insofar as the registration includes the class 39 services, in respect of which the Claimant has not identified any use of the Easylife Stylised Mark. I will, therefore, leave that to be dealt with at the form of order hearing that will follow the handing down of this judgment.
72. Turning to the class 35 “bringing together” services. As I have mentioned, it is common ground that Signs 1, 2, 3 and 5 were used in relation to the Admitted Bringing Together Services. However, it is unclear whether there should be a partial revocation to reflect the fact that there had been no use of the Easylife Stylised Mark with regard to the two other forms of “bringing together” services for which it was registered (i.e. those referred to in *(b)(i)* and *(b)(iv)* of the registration – see paragraph 62 above). Again, I will leave that to be dealt with at the form of order hearing that will follow the handing down of this judgment.
73. What clearly is in issue is whether there should be a partial revocation with regard to the registration of the Easylife Stylised Mark for “advertising and promotion services” within class 35 (i.e. category *(a)* above). The Defendants’ case here is that the service for which the mark was used (Easylife’s Insert Service) would be seen by the average consumer as a discrete subcategory and capable of being treated independently of “advertising and promotion services”. They point out that, in the earlier action between the parties, it was found (see [2022] EWHC 3327 (Ch) at [47]-[52]) that the service of providing business support, marketing and advertising services to licensees was in a different category to the service of providing advertising and promotional support to the business community generally. On this basis, they argue that a fair specification, one reflecting the use made of the mark, would be “providing advertising space by way of printed inserts into printed retail catalogues” and they seek partial revocation of the registration to reflect this.
74. In my judgment, the facts of the earlier case were quite different to those of the present case. The earlier case concerned a service where the trade mark proprietor provided support to its own licensees; a service which, as Sir Anthony Mann pointed out, would require a very different business model to a service which was being provided to the business community generally. In the present case, the respective advertising services are being offered to the same type of third party customer for the same purpose (advertising that customer’s goods or services). As appears from *Merck* and the other cases referred to above, the purpose for which the services are provided is important and here, whilst it is possible to describe the service provided by Easylife in narrower terms than those of the registration, the purpose of the service being provided seems

to me to be the same as that provided for under the registration. The customer is looking for a means to advertise its goods or services. The fact that that service is provided through providing space for inserts in a catalogue is, as Mr Edenborough submits, a means for delivering an advertising service rather than being indicative of a different or distinct category of service.

75. In my judgment, therefore, whilst there may be partial revocation of the class 39 registration, I reject the counterclaim for revocation as regards the registration of services in class 35.

Infringement under s.10(2)(b)

76. Having rejected the Defendants' claim to revoke the relevant parts of the Easylife Stylised Mark registration, I will now deal with the Claimant's infringement claim in relation to that mark.
77. This claim is based on s.10(2)(b) of the Trade Marks Act 1994 – namely that the Easylife Stylised Mark was infringed by the Defendants' use of the Defendants' Signs, for convenience shown again below:

“EASY LIVE”

“EASY LIVE AUCTION”

“EASY LIVE (SERVICES) LTD”



As I have already mentioned, the relevant dates with regard to the Defendants' uses of these signs are January 2012 in the case of the three word signs, April 2016 in the case of the Easy Emphasised Logo and May 2019 in the case of the Auction Emphasised Logo.

Section 10(2) of the Trade Marks Act 1994

78. So far as relevant, s.10(2) provides that:

10 Infringement of registered trade mark.

...

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

(a) ...

(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.

79. Accordingly, to establish infringement under s.10(2), it is necessary for the Claimant to satisfy the following six conditions:
- (i) that there has been use of a sign by the Defendants within the relevant territory;
 - (ii) that such use was in the course of trade;
 - (iii) that such use was without the consent of the proprietor;
 - (iv) that such use was of a sign which is identical with or similar to the trade mark;

- (v) that such use was in relation to goods or services which are identical with or similar to those for which the trade mark is registered; and
- (vi) that such use gave rise to a likelihood of confusion.

80. In the present case, it is common ground that conditions (i), (ii) and (iii) are satisfied. I need, however, to consider conditions (iv), (v) and (vi) with the relevant dates being those referred to in paragraph 28 above. I also need to consider the application of the so-called honest concurrent use defence.

81. The principles to be applied in relation to a claim under s.10(2) were summarised by Arnold LJ in *Liverpool Gin Distillery Ltd v Sazerac Brands LLC* [2021] EWCA Civ 1207 (see [8]-[9]) 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;

(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."

Are the Defendants' Signs similar to the Easylife Stylised Mark?

82. To succeed in a claim under s.10(2)(b), a claimant must establish that the sign in issue is identical or similar to the registered mark – condition (iv) referred to above. The Defendants accept that there is a similarity between the Defendants' Signs and the Easylife Stylised Mark. However, as appears from the summary of principles set out in paragraph 81 above, it remains necessary to consider the nature and extent of that similarity as it is relevant to the likelihood of confusion.
83. I considered the distinctive character of the Easylife Stylised Mark when dealing with the issue of the variant forms of that mark (see paragraphs 50-51 above). It lies, in summary, in the combination of the two words "easy" and "life" to allude to the easy life, a concept reinforced by the triangular device containing a tick which replaced the dot over the letter "i" in the word "life".
84. In the case of the Defendants' Signs, the dominant element seems to me to be the particular combination of the words used to make up those signs – the combination of some or all of "easy", "live", "auction", ".com" and "Services Ltd" - and, in the case of the logos, the additional blue colouring and stylisation adopted.
85. There is clearly a visual and aural similarity between the Easylife Stylised Mark and the Defendants' Signs in that they all feature the word "easy" and they all use that word in conjunction with a similar second word (i.e. the word "life" in the case of the mark and the word "live" in the case of the signs). Aurally and, particularly, visually those words are the most important part of the mark/sign as a whole. A further similarity is that, in the case of the Defendants' two logos shown above, the two words are run together without a gap just as they are in the mark.
86. Despite this, I find that the average consumer would see the mark and the signs as having, at best, a moderate level of similarity. The word "easy" is a simple descriptive word that is frequently used both by itself and also (as Mr Hansel's evidence showed) in combination with other words to form a brand (what Mr Hansel called "easy+" use). In the case of the Easylife Stylised Mark, that word is used in combination with another simple descriptive word "life" – a combination which (as Mr Hansel's evidence also showed) is used in normal speech and which has also been used by third parties as a brand or part of a brand. The average consumer would be aware of this. Further, the average consumer looking at the Defendants' Signs, would see that the word "easy" is being combined with a different descriptive word ("live"), to create "easylive" which is conceptually very different to "easylife". Conceptually, the mark "easylife" stands by itself – a person can have an easy life. Nothing more needs to be said. In contrast, "easylive" does not stand by itself but is adjectival in nature. It needs something more and it begs the question – an easy live what? In three of the signs, the answer is provided – the word "Auction", with a capitalised first letter and, in the case of the Auction Emphasised Logo, with emboldening to give it further prominence. I do not think that the average consumer would skate over the inclusion of that word in these signs. In the other cases, the question is likely to be answered by the context in which the sign is used and which, in this case, is likely to make clear that it is a live auction - a real time auction made easy by being accessible online rather than in person.
87. Another important difference (visually and conceptually) is that none of the Defendants' Signs include anything even remotely resembling the triangular device containing a tick that is a feature of the Easylife Stylised Mark. As I have found when dealing with the issue of revocation

(see paragraph 51 above), that device served to emphasise the concept created by the word “easylife” and it would be seen by the average consumer as an important part of the mark. Its absence from the signs is, therefore, a significant difference and, as I have mentioned, highlights the different conceptual message that the signs convey.

88. Finally, the average consumer would note other differences, albeit of lesser distinctive significance, between the Defendants’ Signs and the Easylife Stylised Mark – such as the omission of the words (in small font) “Lifestyle Solutions” and the inclusion of additional words such as “.com” or “(Services) Ltd”.

Are the services identical or similar?

89. To succeed in a claim under s.10(2)(b), a claimant must also establish that the goods or services provided under the defendant’s sign are identical or similar to those for which the mark is registered – condition (v) referred to above. If there is some similarity, then (as appears from the principles summarised above) the extent of such similarity is again relevant to the issue of the likelihood of confusion.

90. I did not detect any difference between the parties as to the correct approach to this issue. In this regard, Mr Aikens referred me to the guidance provided in *Montres Breguet S.A. v Samsung Electronics Co. Ltd* [2022] EWHC 1127 (Ch) at [119] to [123] including, most importantly, that:

- a. Goods or services can be treated as identical where one is a subset of another; and
- b. Similarity is assessed by reference to all relevant factors, including the nature of the goods, their end users, their method of use and whether they are in competition with each other or are complementary.

91. I was also referred to *Sky plc v Skykick UK Ltd* [2020] EWHC 990 (Ch) at [56] where Arnold LJ stated that:

“(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.

(2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

(3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.

(4) A term which cannot be interpreted is to be disregarded.”

92. In making the necessary comparison, the services for which the mark is registered must be taken to be the class 35 services for (a) advertising and promotional services and (b) the various services for the “bringing together” of goods. Given my conclusions on the issue of partial revocation (see paragraphs 73-75 above), I reject the Defendants’ argument that those services should be limited to simply Easylife’s Insert Service.

93. Those services for which the mark is registered are to be compared with three categories of service that are provided by the Defendants, namely:

- a. The service of advertising auctions and upcoming auctions (with a link to the relevant auction catalogue) provided on the Defendants’ Website and in emails sent to

customers who had registered with the Defendants to receive such emails – I will refer to this as “the **Defendants’ Advertising Service**”;

- b. The service which allows auction houses to upload their auction catalogues and auction event details on to the Defendants’ Website where they can be viewed by customers - “the **Defendants’ Catalogue Service**”; and
- c. The service which provides an online platform for auction houses to broadcast their auction sales to customers and for customers to bid for lots for sale in those auctions in real time – “the **Defendants’ Auction Broadcast Service**”.¹²

Similarity in relation to the Defendants’ Advertising Service

94. The Defendants made a number of submissions relating to the differences between the Defendants’ Advertising Service and Easylife’s Insert Service. However, given my findings on the issue of partial revocation (see paragraphs 73-75 above), that is not the correct comparison. If, as I have found, the registration of the Easylife Stylised Mark in respect of advertising and promotion services is not invalidated for non-use, then it is against the services included in that registration (and not just Easylife’s Insert Service) that the Defendants’ Advertising Service must be compared. The Defendants correctly accept that, if that is the comparison, then their Advertising Service is identical to the advertising services for which the Easylife Stylised Mark is registered.

Similarity in relation to the Defendants’ Catalogue Service and Auction Broadcast Service

95. Although the Defendants’ Catalogue Service and Defendants Auction Broadcast Service can be taken to be separate services, for the purposes of the comparison, it is convenient to deal with them together.
96. The Claimant’s case is that these services are identical or at least highly similar to the following class 35 services for which the Easylife Stylised Mark is registered:
- a. The bringing together services referred to above - namely the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase those goods (i) from a general merchandise catalogue by mail order or by means of telecommunications or (ii) from a general merchandise internet website; and
 - b. Advertising and promotional services.
97. The Claimant argues that the Defendants bring together a variety of goods shown in an auction house’s catalogue, which catalogue is uploaded onto the Defendants’ Website where the goods in the catalogue can be conveniently viewed and bought by customers by means of telecommunications and/or from the website. Further, given that to the average consumer (of both types) looking at the Defendants’ Website, the Defendants’ brand would be far more prominent than the name of the auction house, the Claimant argues that customers who view and bid to buy any of the goods are likely to see it as being the Defendants who have brought those goods together.
98. The Defendants, in response, argue that the Claimant’s registration is in respect of what would now be called “retail services” and that the Defendants are not providing retail services but are

¹² In my judgment, this better describes this aspect of the Defendants’ services than the alternatives of “Sales Broadcast Services” suggested by the Claimant or “Platform Services” suggested by the Defendants in submissions. The former (wrongly) suggests that it is the Defendants that are making the sales. The latter is too broad as it covers services (the uploading of catalogues on to the platform) that are the subject of a separate category of services identified by the Defendants (Catalogue Services – see below).

merely providing a platform. Retail services, they argue, consist of selecting an assortment of goods to sell. But here, the Defendants do not create the catalogues or decide what goods to include in them and it is not them that sell the goods to the customers. In closing, Mr Aikens went on to list 14 features of the way in which Easylife operated was different to the way in which the Defendants operate – including that Easylife sources and selects the goods that it brings together, that those goods are all new, that Easylife is in total control of how those goods are presented for viewing and purchase by customers, that only Easylife deals with the customer, that goods are never auctioned but are sold at the stated price set by Easylife and it is Easylife that is paid for the goods.

99. All of this is true and because of the issue of the enhanced distinctiveness of the Easylife Stylised Mark, will be relevant to the issue of a likelihood of confusion (see below). However, it does not assist the Defendants in their assertion that there is no similarity in the parties' respective services. This is because the required comparison is not with how Easylife has in fact operated, rather it is with the services for which the Easylife Stylised Mark is registered. In my judgment, the service provided by the Defendants falls within the words of the registration. I fully accept that it is the auction houses who put together and upload a list (a catalogue) of products to be viewed by customers and it is the auction houses with whom the customers deal online to buy goods from that list. However, the Defendants are undoubtedly providing a service whereby that list and those goods are brought together on the Defendants' Website where those goods can be viewed and purchased by customers. In this regard, I do not think that it matters that the Defendants do not curate the goods to be included in the catalogue, nor that it is not the Defendants who make the sale. Ultimately, as Mr Edenborough submitted, the average consumer (of both types) would regard what the Defendants are doing as the provision of a marketplace – an online equivalent to the sort of service that large department store or markets often provide whereby third-party concessions can operate on the service provider's premises.
100. Accordingly, in my judgment, the Defendants' Catalogue Service and Auction Broadcast Service are identical or highly similar to the bringing together services for which the Easylife Stylised Mark is registered.
101. I should note that the parties did not develop their cases with regard to whether the Defendants' Catalogue Service and Auction Broadcast Service are identical or similar to the class 35 advertising and promotional services for which the Easylife Stylised Mark is registered and, given the above conclusion, it is not necessary for me to determine the point. For what it is worth, my impression is that there is an identity or strong similarity in that the Defendants are providing auction houses with a means to advertise or promote their oncoming auctions to customers who access the Defendants' Website and/or who have signed up to receive the Defendants' emails notifying them of such events.

Other goods/services

102. Finally, I should note that, as Mr Aikens pointed out, the Defendants must be taken to be intended to use the Defendants' registered mark for "EASY LIVE AUCTION" or "EASYLIVEAUCTION" for all of the classes of goods and services for which it is registered, including (in summary):
- a. Class 9: electronic publications and computer software featuring or relating to auctions and/or art, furniture, jewellery and collectables.
 - b. Class 38: providing access to online computer databases and providing live streams or webcasting services in relation to antiques, art, furniture, jewellery, collectables and/or auctions.

- c. Class 42: providing a platform or software as a service enabling or facilitating auctions.
103. However, neither party addressed any submissions as to whether these goods or services were or were not identical or similar to any service for which the Easylife Stylised Mark is registered and the List of Issues referred only “the Defendants’ Services” made up of those referred to in paragraph [93] above. I will assume, therefore, that no issue arises in that regard.

Condition (vi) – is there a likelihood of confusion?

104. The next issue is whether, applying the principles summarised in paragraph 81 above, the use of the Defendants’ Signs gave rise to the requisite likelihood of confusion. Looking at the facts as a whole and for the reasons set out below, I am satisfied that there is no real likelihood of confusion in this case and on this basis, I reject the Claimant’s infringement case based on the Easylife Stylised Mark.

Significance of the similarities between the mark/signs

105. I have already dealt with how the average consumer would have viewed the Easylife Stylised Mark and the Defendants’ Signs (see paragraphs 83 to 88 above). Whilst there is a moderate similarity between them, the average consumer of both types (a member of the general public or customers looking to advertise their goods) would have been well aware that that similarity arose from the use of a word (“easy”) that was a normal word, a word that is widely used and which is capable of being used descriptively, but that was given some level of distinctiveness in the mark by being used in combination with the word “life”, the words “lifestyle solutions” and the triangle/tick device. It seems to me that the average consumer would not assume that a party trading, even trading in relation to identical or similar services, using another sign that featured the word “easy” was the Claimant or associated in some way with the Claimant and/or its mark. The average consumer may well be aware of extensive use made of the word “easy” by the Claimant and its group of associated companies but I do not think that that person would assume that the Claimant had a monopoly of such use.
106. Here, the average consumer would see that, in the case of the Defendants’ Signs, the word “easy” had been combined with the word “live” which, whilst sharing 3 of the 4 letters of the word “life”, has created something which, as set out above, is conceptually quite different to the Easylife Stylised Mark. The average consumer would also note the omission of the triangle/tick device and the other differences to which I have referred. All of this suggests that the average consumer is not likely to be confused, despite the identical or similar nature of the parties’ respective services.

Significance of the use made of the mark

107. A point relied on by Mr Edenborough was that, as appears from principle (h) referred to above, there is a greater likelihood of confusion where a mark has acquired an enhanced distinctive character by reason of the use made of it. Here, the evidence of Mr Caplan shows that there has been very extensive use of the “Easylife Stylised Mark” (in the form of the variants referred to above) on branded mail order catalogues since 2000 and via the website at easylifegroup.com (and subsequently, at easylife.co.uk) since January 2004. Such catalogues were mailed to around 200,000 people in 2000 but, by 2005, were being mailed to 2 million people and were being inserted into around 50 million magazines and newspapers a year. By 2010/11, these figures had risen to 4 to 5 million and 150 million respectively. Over the course of its trading under this name, Easylife has had around 7 million customers placing around 15 million orders. More recently, since 2016, it has processed around 5,000 orders per day and turnover has increased from around £15 million p.a. in 2006 to 2010 to around £30m-35m in the years since 2016.

108. I accept that this establishes an enhanced distinctive character for the Easylife Stylised Mark. However, I agree with the point made by Mr Aikens in opening that this does not mean that the average consumer was any more likely to be confused. I have to say that I am not certain whether it would be correct to say that the enhanced distinctive character was limited to the business actually conducted under the Easylife name (which, as Mr Aikens argued – see paragraph 98 above, was quite different to that being conducted by the Defendants). But even if it was not so limited, I do not accept that the enhanced distinctive character in this case would have led to any real likelihood of confusion given the descriptive (and common) nature of the word “easy” and the very clear conceptual differences between the Easylife Stylised Mark and the Defendants’ Signs to which I have referred above.

Actual confusion – the law

109. In determining whether there is a likelihood of confusion, evidence (or a lack of evidence) of *actual* confusion can be important. The court’s approach to such evidence has been considered in a number of cases.
110. First, as appears from *W3 Ltd v easyGroup Ltd* [2018] EWHC 7 per Arnold J at [254], it is necessary for a court to be cautious when interpreting written communications said to evidence confusion in cases where the authors of those communications are not called to give evidence.
111. Second, in *W3* Arnold J also pointed out at [277] that the fact that there are a few instances of confusion does not preclude a finding that there is no likelihood of confusion – presumably on the basis that those examples may not be representative of the views of the average consumer.
112. Third, in *TVIS Limited v Howserv Services Limited* [2023] EWHC 2589 (Ch), Ian Karet (sitting as a Deputy High Court Judge) considered a large number of examples of what were said to be confusion and, at [167]-[168], concluded that:
- “167. The great majority of these examples do not show confusion of the type required for section 10(2) of the Act. They show “administrative” errors of the type described in *The European v The Economist* [1998] FSR 283. This is not surprising given that names in issue contain descriptive elements relating to the services provided.
168. There are thus incidents of mis-naming by consumers and a number of cases of mistakes occurring in a vet’s practice. The picture that they give is consistent with the fact that both parties’ names are of a descriptive nature and that their elements may be interchanged by mistake – but there does not appear to be confusion as to the parties providing the services. A number of the callers have not taken care before initiating a call and a number have made mistakes based on internet searches. It is not apparent that they are paying attention to the matter at hand in a way that the average consumer would.”
113. As each case turns on its own facts, it is not particularly helpful to look at the precise facts in *TVIS*. However, the point being made was that mere mistakes and the misnaming in cases where parties are using names of a descriptive nature (in that case “VETSURE” and “PETSURE”) may not be evidence of relevant confusion. Further, whilst the courts in *The European Limited v The Economist Newspapers Limited* litigation do not appear themselves to have used the expression “administrative” errors, the Court of Appeal in that case (see [1998] F.S.R. 283) upheld the decision of Rattee J [1996] F.S.R. 431 where, at pp.439-440, he held that examples of customers telephoning *The European* newspaper when they had intended to contact *The European Voice*, were not examples of relevant confusion – particularly where the court was unable to ascertain the reason for the mistake.

114. Finally, it is worth bearing in mind the comments of Arnold LJ in *Easygroup Ltd v Nuclei Ltd* [2024] EWCA Civ 1247 at [77]:

“... As I discussed in *Match Group LLC v Muzmatch Ltd* [2023] EWCA Civ 454 ... at [39], with the agreement of Nugee LJ and Lord Burnett of Maldon CJ, absence of evidence of actual confusion is not necessarily fatal to a claim under section 10(2)/Article 9(2)(b). The longer the use complained of has gone on in parallel with use of the trade mark without such evidence emerging, however, the more significant it is. In considering the weight to be attached to this factor, it is relevant to consider what opportunity there has been for confusion to occur and what opportunity there has been for any such confusion to have been detected.”

Actual confusion – the evidence

115. Turning to the evidence. The Claimant points, first, to the many examples where employees of the Defendants, auction houses, and/or their customers referred to the Defendants as “Easy Live” (or some variant of that). These examples are listed at Annexes 1 and 2 to the Claimant’s Skeleton Argument and the Claimant laid particular emphasis on the fact that the Defendants had asked around 100 auction houses to “set up a merchant account under your company (not Easy Live)”. As I understand it, the Claimant does not suggest that these are examples of *actual* confusion. Indeed, it is clear that they are not as they involve people who knew that they were dealing with the Defendants and who were in no way confused. Rather the Claimant says that these examples suggest that there is a likelihood of confusion because they show a tendency in people to abbreviate the Defendants’ trading name and to adopt the short form, “Easy Live”, which is closer to the Claimant’s registered Easylife Marks. However, for the reasons set out above, I do not think that people seeing or hearing of an entity trading as “Easy Live” are likely to think that that entity is in some way associated with the Claimant or Easylife. It does not seem to be that this evidence suggests a likelihood of confusion. It is simply evidence of people, when referring to the Defendants’ business, using an abbreviation of the Defendants’ name.
116. The Claimant also relied on evidence of what it says is actual confusion. None of this evidence is supported by first hand witness evidence. Rather, it comprises 87 examples taken from the documents, as summarised in Annex 3 to the Claimant’s Skeleton Argument.
117. Having been through these 87 examples, the vast majority (some 76) of them are of the Defendants or auction houses or their customers referring to the Defendants as “Easy Life” rather than as “Easy Live” (emphasis added) – the point being that “Easylife” is, as I have found, an important part of the Easylife Stylised Mark. However, it is clear from these documents that these references to “Easy Life” are not evidence of actual confusion. It is clear that in each case the people making these references know exactly to whom they are referring, namely the Defendants. There is no relevant confusion. Further, I cannot see that the fact that such people have wrongly abbreviated the Defendants’ name as “Easy Life” means that there is a likelihood that the average consumer will be confused into believing that the Defendants and their business was in any way associated with Easylife. It seems more likely that the error is a simple typographical error based on the fact that the letter “f” is next to the letter “v” on the standard QWERTY keyboard. Indeed, on occasions, the same document contains references to both “Easy Life” and “Easy Live”.
118. Of the remaining eleven examples included in Annex 3, four do not seem to me to evidence any relevant confusion. These include four examples where customers of the Claimant wrongly referred to the Claimant as Easy Live” as opposed to “Easy Life”. However, the position here is much the same as that in paragraph 117 above. These customers know with whom they are dealing – in this case, the Claimant – the mistake is not because they are confused as to the source of the service in question, they have simply used the wrong name, possibly due to the same typographical error.

119. Of the 87 examples relied on, there are only seven which seem to me to raise a possible suggestion of confusion. These were:
- a. The Defendants' record of a call received in July 2017 from a lady complaining about being "harassed by people that phone you from easylife". However, her message expressly stated "I don't know if you're the right number" and she apologised in advance in case she was making a mistake – which turned out to be the case ("she wanted to contact easy life not easy live"). It is hard to see this as real confusion as opposed to mere uncertainty.
 - b. An email exchange in October and November 2017. In this, a person (who had clearly been a customer of both Easylife and the Defendants) emailed Easylife regarding an entry on her debit card statement for the sum of £3. It turned out that the payment was to the Defendants and was nothing to do with Easylife. This does seem to involve some confusion although this could be due to a misreading of the statement rather than a mistake as to the trade origin of the relevant services and it is hard to attribute much weight to this incident without knowing more about how the transaction appeared on the credit card statement and why the mistake was made.
 - c. A similar mistake and similar reservations apply with regard to an email exchange in September 2021 when a customer of the Defendants emailed Easylife seeking a refund of the £3 registration fee for an auction.
 - d. Another example, from April 2021, involved a customer of both Easylife and the Defendants. His credit card statement showed a payment of a £3 registration fee to the Defendants in respect of an auction at the Peebles Auction House and, on the same day, a payment of £59.99. At 12.01 he emailed the Defendants querying that latter payment as he had not bid for anything at the auction. Then, at 12.07, he emailed again saying the Defendants should ignore his earlier email as the payment had been "to Easy Life, not Easy Live" and had related to a purchase from Easylife made in the previous month. Clearly, without the Defendants even having to respond, the customer had easily been able to correct his own mistake presumably after looking at his credit card statement more carefully. This does not seem a promising basis on which to find a *likelihood* of confusion.
 - e. An exchange of emails in July 2021 between the Defendants and a person asking to be unsubscribed from "this site" (which site was unspecified). On the Defendants pointing out that they had no account for him, he responded confirming that that was correct but stating that "the email which plugged me in to you was from Pickering Auctions" and going on to say that that he had "bought items from Easy Life catalogues in the past but never authorised receiving emails from any companies with which you have arrangements". It has to be said that the position is unclear save for the fact that this person was clearly annoyed and had made some form of link between his dealings with Pickering Auctions (presumably a customer of the Defendants) and Easylife.
 - f. An email exchange in August 2021 where a customer who had bought an eleccoter bicycle from Easylife wrongly emailed the Defendants about the fact that it had not been delivered. The reason for this mistake is unclear.
 - g. Finally, in June 2023 where a customer of Easylife initially emailed a query regarding an order to help@easylive.co.uk and, having received a failed message response, forwarded it to the correct address for Easylife. Again, no explanation was provided for the initial mistake.

120. In the context of the facts as a whole, this evidence is not sufficient to undermine the conclusion that I would have reached without such evidence – namely that there is no real likelihood of confusion. None of the seven examples is particularly convincing or strong evidence of relevant confusion.
121. Further, it is undoubtedly the case that an absence (or relative absence) of evidence of actual confusion is not necessarily fatal to a claim under s.10(2)(b) (the case of *Match* being an example). However, the fact that there are only these seven examples notwithstanding the scale of Easylife’s business and notwithstanding the fact that the Easy Live Auction name has been used since January 2010 (some 14 years) suggests that the likelihood of confusion is very low, indeed insignificant.
122. It is also possible that, with the passage of time, evidence of actual confusion might be difficult to find. However, the parties have undergone very extensive searches on the issue of confusion. The Defendants claim to have searched some 44,628 customer records and their social media feeds. Further, according to Mr Chrysostomou in cross examination, some 1.44m Easylife customer records have been searched and two of the examples of confusion date from 2017. So, clearly there have been searches covering the last 7 years at least. Thus, even if I had found that the seven examples referred to above were evidence of actual confusion, if there was a real *likelihood* of confusion, I would have expected to find more than those seven examples.

Infringement under s.10(2)(b) – honest concurrent use

123. The final basis on which the Defendants deny liability under s.10(2)(b) is that, even if there was a likelihood of confusion at the time when use of the Defendants’ Signs commenced, there had been 12.5 years of honest concurrent use of those Signs with the Easylife Stylised Mark before the first complaint.
124. The relevance of so-called “honest concurrent use” was explained by Arnold LJ in *Easygroup Ltd v Nuclei Ltd* at [78] as follows:
- “I considered the doctrine of “honest concurrent use” in *Match v Muzmatch* at [64]–[117]. I concluded that honest concurrent use of the sign complained of is not a defence to a claim for trade mark infringement under section 10(2)/Article 9(2)(b), but may be relied upon as a factor in the infringement analysis. If the claimant establishes a prima facie case of likelihood of confusion, the burden shifts to the defendant to establish that, by virtue of its honest concurrent use, there is nevertheless no adverse effect on any of the functions of the trade mark. In exceptional cases, honest concurrent use may lead to the conclusion that there has been no infringement, even though there is a small level of actual confusion between the trade mark and the sign, if most of the relevant class of consumers have come to understand that the trade mark and the sign denote different trade origins.”
125. On this basis, the Defendants now accept that the issue of “honest concurrent use” is merely a factor in the general infringement analysis.
126. In my judgment, given my conclusion that there is no likelihood of confusion in this case, the issue of honest concurrent use does not arise – although I have to say that if I was wrong regarding the likelihood of confusion, I am not convinced that this would be one of those “exceptional cases” where the long period of trading side by side would assist the Defendants. Given the absence of evidence of confusion, the only real relevance of that long period of co-existence in this case is that it helps show that there is no real likelihood of confusion and that the average consumer never saw these businesses as being connected.

INFRINGEMENT OF THE EASYLIFE WORD MARK

127. I turn now to the Claimant's case that the Defendants' use of the Defendants' Signs is an infringement of the Easylife Word Mark (i.e. the word "easylife" or "Easylife").
128. This infringement claim is also based on s.10(2)(b) of the Trade Marks Act 1994 and I have already summarised the relevant law and dealt with many of the issues that arise when dealing with the claim in relation to the Easylife Stylised Mark.
129. There is a difference in that, in the case of the Easylife Word Mark, the relevant date for assessing the issues that arise is 14 September 2020 (the effective date of the registration of that mark) as opposed to the dates of 2010/2012, 2016 or 2019 which applied with regard to the infringement claim based on the Easylife Stylised Mark. However, it seems to be common ground that nothing turns on this difference.

Similarity between the mark and the signs

130. As with the Easylife Stylised Mark, there are no issues with regard to conditions (i) to (iii) referred to in paragraph 79 above.
131. As regards condition (iv), it is common ground that the Defendants' Signs are similar to the Easylife Word Mark. The extent of this similarity is somewhat greater than it was for the Easylife Stylised Mark because the Easylife Word Mark does not contain any stylisation, so the comparison is simply between the word "easylife" and the Defendants' Signs which all feature the word "Easy Live".
132. Mr Edenborough submitted that the similarity was "at least to a moderate degree". In my judgment, given the important conceptual difference referred to in paragraph 86 above (which applies equally in the case of the Easylife Word Mark) and given the other (albeit less important) distinguishing features,¹³ I conclude that the level of similarity is moderate.

Similarity in services

133. As to condition (v), I have already considered (at paragraph 93 above) the three types of service provided by the Defendants – namely the Defendants' Advertising Service, the Defendants' Catalogue Service and the Defendants' Auction Broadcast Service.
134. These are to be compared with the services for which the Easylife Word Mark is registered and which include class 35 advertising and marketing services and class 35 retail services, including on-line retailing and retailing through the medium of broadcasting for a wide range of goods.
135. It is common ground that the Defendants' Advertising Service is identical or at least highly similar to the advertising and marketing services for which the Easylife Word Mark is registered. Further, for the reasons set out when dealing with the Easylife Stylised Mark (see paragraphs 95 to 101 above), it seems to me that the Defendants' Catalogue Service and the Defendants' Auction Broadcast Service are identical or at least highly similar to the Defendant's registration for retail services, including on-line retailing and retailing through the medium of broadcasting in respect of a wide range of goods.

Likelihood of confusion

136. Turning to condition (vi), the likelihood of confusion. As with the Easylife Stylised Mark, I am satisfied that there is no likelihood of confusion arising in relation to the Easylife Word Mark and, on this basis, I also reject the Claimant's infringement case based on this mark.

¹³ e.g. The inclusion of the words ".com" and "(Services) Ltd".

Significance of the similarities between the mark/signs

137. In the first place, whilst the absence of stylisation means that the Easylife Word Mark is somewhat closer to the Defendants' Signs than the Easylife Stylised Mark had been, I remain of the view the average consumer (of both types) would still see the similarity as arising from the use of the word "easy" - a normal and widely used word of a descriptive nature. Indeed, in the absence of any stylisation, the average consumer would if anything be even less inclined to assume that another sign including the word "easy" was the Claimant or Easylife or associated in some way with the Claimant and/or Easylife and/or the Easylife Word Mark.

Significance of the use made of the mark

138. Secondly, whilst it seems probable that the Easylife Word Mark could have acquired an enhanced distinctive character by reason of Easylife's extensive trading since September 2020, for the reasons set out in paragraph 108 above, I do not see that such enhanced distinctive character would assist the Claimant in showing any real likelihood of confusion between this mark and the Defendants' Signs.

Actual confusion

139. Third, whilst it is possible that evidence of actual confusion might have helped establish a likelihood of confusion (even when it related to events before the relevant date for this mark - i.e. September 2020¹⁴), for the reasons set out when dealing with the Easylife Stylised Mark, I do not see that there is any such evidence in this case.

Honest concurrent use

140. As with the Easylife Stylised Mark, the Defendants rely on the concept of honest concurrent use in denying infringement of the Easylife Word Mark. Again, given my finding that there is no likelihood of confusion between the Defendants' Signs and the Easylife Word Mark, the concept of honest concurrent use is irrelevant.

The counterclaim for invalidity of the Easylife Word Mark

141. The Defendants' fourth line of defence to the infringement claim based on the Easylife Word Mark is that, as set out in their Counterclaim, that mark should be declared invalid under s.47(2) of the Trade Marks Act 1994.
142. Originally, the Defendants argued that the Easylife Word Mark was invalid on the basis that it had been registered contrary to s.5(2)(b) of the Trade Marks Act 1994 because of a likelihood of confusion with the Defendants' Mark which pre-dated the Easylife Word Mark.¹⁵ However, at trial, they focussed on their alternative claim, namely that the Easylife Word Mark had been registered contrary to s.5(4)(a) of the Trade Marks Act 1994 because (as at 14 September 2020) its use was liable to be prevented by a rule of law (such as the law of passing off) protecting the Defendants' Signs.¹⁶

The relevance of this defence, given the finding of no likelihood of confusion

¹⁴ If people had been confused by the Defendants' use of "Easy Live" or "Easy Live Auctions" in the past, that may suggest that, in future there may also be confused in relation to the Easylife Word Mark.

¹⁵ For "EASY LIVE AUCTION" and "EASYLIVEAUCTION", registered with effect from 5 February 2019.

¹⁶ In their Skeleton, they explained that the focus was on s.5(4)(a) because the issues it raised matched the infringement analysis set out above more closely and it was difficult to conceive of any circumstances where a s.5(2)(b) claim would succeed if their s.5(4)(a) claim failed.

143. In the Defendants' Skeleton, they explained that their invalidity counterclaim in relation to the Easylife Word Mark:

“... is only run as a “squeeze”, so it is only necessary for the court to consider it if it finds that there is a likelihood of confusion as between Ds' signs used in relation to the Defendants' Services and the [Easylife Word Mark]. If the court finds that there is no likelihood of confusion, then the counterclaim falls away altogether.”

144. Given that I have concluded that there was no likelihood of confusion between the Easylife Word Mark and the Defendants' Signs (including the Defendants' Mark for “Easy Live Auction”), this invalidity claim (run as explained above, as a squeeze) is unnecessary and falls away.

What if there had been a likelihood of confusion?

145. I will deal briefly with the position if (contrary to the above) I had concluded that there was a likelihood of confusion between the Defendants' Signs and the Easylife Word Mark.
146. The Defendants' argument is that, if there had been a likelihood of confusion between their signs and the Easylife Word Mark then, for that very reason, they would have been entitled to object to the registration of that mark as at its filing date of 14 September 2020. This is because their rights in those Signs were earlier rights and under the law of passing off they could have opposed Easylife's use of that mark. On that basis, they would now be entitled to a declaration to invalidate the registration of that mark. Hence the “squeeze”.
147. The Claimant disputes this. It asserts that the earliest date on which the Defendants could have acquired goodwill in the Defendants' Signs was 2010 or 2012.¹⁷ Therefore, such rights acquired by the Defendants would themselves have been pre-dated by the Claimant's rights in (i) the Easylife Stylised Mark (registered with effect from September 2003) and/or (ii) the goodwill attaching to the Easylife name due to the use made of that name by the Claimant's predecessor in title which use (as evidenced by Mr Caplan and Mr Wise) went back to around 2000. On this basis, the Claimant asserts that, if there had been a likelihood of confusion, the Claimant's predecessor would have been able to prevent the Defendants' use of the Defendants' Signs and that, as a result, the Defendants' claim to invalidate the Easylife Word Mark must fail.
148. If I had found that there was a likelihood of confusion, then I would have found in favour of the Claimant in relation to its argument based on its earlier rights in the Easylife Stylised Mark and, subject to one point, also in relation to its argument based on its earlier rights in the goodwill created by the use of the Easylife name by the Claimant's predecessors in title.
149. As regards that one point, the Defendants relied on the comments of Geoffrey Hobbs QC sitting as an Appointed Person in *Croom's Trade Mark Application* [2005] RPC 23 at [45] to the effect that a person with earlier rights could be precluded from asserting those earlier rights where to assert them would be inequitable. The Defendants argued that it would be inequitable for the Claimant here to rely on the earlier goodwill in the Easylife name given (i) that Easylife had allowed the Defendants to use their signs for over a decade before applying to register the Easylife Word Mark and (ii) the fact that the complaint about the Defendants' signs only arose after Easylife had assigned its marks to the Claimant in 2022.
150. I have two difficulties with the Defendants' argument. In the first place, if we are proceeding on the assumption that there was a likelihood of confusion, I cannot see why it would be inequitable for the Claimant to enforce its rights. Mere inaction, even over a long period, does

¹⁷ As mentioned above, whilst there was some use of the name Easy Live Auction in 2010, it was not until 2012 that the First Defendant was incorporated and started using that name. Use of the other Defendants Signs started in 2016 and 2019.

not generally give rise to an estoppel. Secondly, I am not convinced that the inequitable test referred to in *Croom's Trade Mark Application* is valid in the light of the decision of Males J in *Marussia Communications Ireland Limited v Manor Grand Racing Limited* [2016] EWHC 809 (Ch). If, as *Marussia* establishes, a defendant cannot rely on a defence (such as estoppel) in a trade mark infringement claim because such a defence falls outside the scope of the defences envisaged by the EU Trade Mark Directive, then it is hard to see why such a defence should apply in relation to a claim to invalidate a trade mark. However, given that this issue is academic, I think it is better to leave it unresolved.

THE CLAIM TO INVALIDATE THE DEFENDANTS' MARK

151. The Claimant's final claim is that the Defendants' Mark (for "EASY LIVE AUCTION" and "EASYLIVEAUCTION", registered with effect from 5 February 2019) should be declared invalid under s.47(2) of the Trade Marks Act 1994 on two grounds.

- a. That it had been registered contrary to s.5(2)(b); and/or
- b. That it had been registered contrary to s.5(4)(a).

The s.5(2)(b) invalidity claim

152. The Claimant's invalidity claim based on s.5(2)(b) was that the Claimant (or Easylife) could have opposed registration of the Defendants' Mark because it was similar to the Claimant's earlier trade mark (i.e. the Easylife Stylised Mark, registered with effect from September 2003) and was registered in relation to identical or similar goods or services for which that mark was registered in circumstances giving rise to a likelihood of confusion.

153. On this basis, subject to two points, the issues that arise in relation to this claim are the same as those which arise in relation to the Claimant's infringement claim based on the Easylife Stylised Mark. The two points of difference are, first, that for the purposes of the invalidity claim the relevant date on which to assess the likelihood of confusion is the date of filing of the Defendants' Mark (rather than the earlier dates that applied to the infringement claim). The second point is the Claimant could not rely on this mark to invalidate the Defendants' Mark if the former had not been used in the 5 years before the effective date of filing of the Defendants' mark.¹⁸ However, it appears to be common ground that, on the facts, neither of these differences is material and that the result of this invalidity claim will mirror that of the infringement claim.

154. Accordingly, having rejected that infringement claim on the basis there is no likelihood of confusion, the Claimant's invalidity claim founded on s.5(2)(b) must also fail.

The s.5(4)(a) invalidity claim

155. The invalidity claim based on s.5(4)(a) was that, given the earlier goodwill that (as is clear from my earlier findings) the Claimant had in the name "easylife", the Claimant could have opposed registration of the Defendants' Mark on the basis of the law of passing off.

156. Once again, the Claimant recognised that the result of this invalidity claim was also likely to mirror that of the infringement claim. Accordingly, it too must fail.

CONCLUSIONS

157. For these reasons, I dismiss the Claimant's claims against the Defendants under s.10(2) and its claim to invalidate the Defendants' Mark.

¹⁸ i.e. in the third period referred to in footnote 9 above.

158. I also dismiss the Defendants' counterclaim for a declaration of invalidity in respect of the Easylife Word Mark and their counterclaim for revocation of the Easylife Stylised Mark. However, I will hear further submissions from the parties as to whether it is appropriate to order partial revocation of the Easylife Stylised Mark in respect of those services for which that mark has not been used in the requisite 5-year period – namely the class 35 bringing together services referred to in (b)(i) and (b)(iv) of the registration and the class 39 services (see paragraphs 71 and 72 above).