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Case No: IL-2020-000032

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

The Rolls Building  
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**Before:**

**HHJ PAUL MATTHEWS**

**Between:**

**EASYGROUP LIMITED**

**Claimant**

**- and -**

**BEAUTY PERFECTIONISTS LIMITED AND  
OTHERS**

**Defendants**

**MS STEPHANIE WICKENDEN** appeared for the **Claimants**

**MR JAMES ABRAHAMS KC and MAXWELL KEAY** appeared for the **Defendants**

**JUDGMENT**  
**(As approved)**

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**HHJ PAUL MATTHEWS:**

1. In the course of this pre-trial review for a trial which is due to begin in a window commencing on 11th March, so within a few weeks, I have been asked to deal with an application to amend a response (already amended once) to an RFI under CPR Part 18. The RFI was made by the Defendants in this trademark infringement claim, and the response was originally given by the Claimant. It was then, as I say, amended, and now permission is sought by the Claimant for a further amendment to that response.
2. The application is opposed by the Defendants on the basis that this means in effect a new or an extra case to meet on their part. The claim itself began quite a long time ago in March 2020. It is a claim brought under European Regulation 2017/1001 for EU trademark infringement under Articles 9(2)(b) and (c).
3. The particulars were served with the claim form. However, after the pleadings had been served, the matter came before Master Clark who directed a stay to enable the parties to consider their position in light of the fact that the United Kingdom was leaving the EU. Subsequently, after consideration had been given to their position, the Defendants brought an application to strike out the claim. That application was dismissed by the Chancellor in December 2021. Subsequently, the Defendants were granted permission to appeal, but the appeal was later withdrawn. So, this all took a great deal of time, and it was not until November 2022 that there was a CCMC, and directions were given to trial. The reason for mentioning all of that is just to show why it has taken such a long time for us to get where we are.

4. At all events, we now have up-to-date statements of case. There is a defence and counterclaim, which has been amended. There is a reply and defence to counterclaim, which also has been amended. The Claimant served an RFI on the Defendants, and the Defendants served an RFI on the Claimants. Today we are concerned with the response by the Claimant to the Defendants' RFI, and so in effect part of the particulars of claim. More recently, the evidence-in-chief was filed and exchanged in December last year, and evidence in reply has been filed in the last couple of weeks.
5. The issue that I am dealing with, as I say, is this question of the reamended amended response to the RFI made by the Defendant to the Claimant. There are two matters. One does not cause a problem. This is that the Claimant seeks to clarify the tax status of the retail services in the particulars of claim at paragraph 10. That is not opposed, and, therefore, I am happy to give permission for that. The second, however, is more difficult, because it involves the insertion of a new subparagraph in the paragraph in the answer to question 1 in the RFI, dealing with the services in which reputation is claimed.
6. The question is:

For each of the registered marks which EasyGroup contends as being infringed pursuant to Article 9 (2) (c), please identify the goods and/or services for which EasyGroup claims such registered mark has a reputation in the EU which is relied on in these proceedings.

7. The answer originally given was:

In respect of paragraph 12, the Claimant shall contend for the purpose of these proceedings that the EasyJet marks have

a reputation in: (a) transportation of goods, passengers and travellers by air; (b) travel agency and tourist office services; (c) travel arrangement; and (d) airline services.

8. That was amended on an earlier occasion by removing the word "goods" in subparagraph (a) and removing subparagraph (b), "travel agency and tourist office services" in its entirety.

9. However, it is now proposed that a new subparagraph (e), consisting of:

Retail services connected to the sale of cosmetics and fragrances

should be inserted at the end. What the Defendants say here is that that amounts to a new case, whereas the Claimant says it simply reflects the disclosure that has been given and the evidence which has been filed in support of their case. It is confirmed on behalf of the Claimant that it will not be adducing any new evidence or making any further disclosure. In the Claimant's view, there is no prejudice to the Defendants.

10. The Defendants have referred me to the authorities, or some of the authorities, relating to amendment applications, and I think this was not controversial. The first of the authorities is the decision of Coulson J, as he then was, in *CIP Properties (CIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC). There the Judge set out (at [19]) a number of principles lettered (a), (b), (c), (d), (e) and (f):

(a) The lateness by which an amendment is produced is a relative concept. An amendment is late if it could have been advanced earlier or involves the duplication of costs and effort or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and experts' reports) which have been completed by the time of the amendment;

(b) An amendment can be regarded as very late if permission to amend threatens the trial date, even if the application is made some months before the trial is due to start. Parties have a legitimate expectation the trial dates will be met and not adjourned without good reason;

(c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise. In essence, there must be a good reason for the delay.

(d) The particularity and/or clarity of the proposed amendment then has to be considered because different considerations may well apply to amendments which are not tightly drawn or focussed.

(e) The prejudice to the resisting parties if the amendments are allowed will incorporate at one end of the spectrum the simple fact of being ‘mucked around’ to the disruption of and additional pressure on their lawyers in the run-up to trial and to the duplication of costs and effort at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments.

(f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered. Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise.

11. In the subsequent decision of *ABP Technology v Voyetra Turtle Beach* [2022] EWCA Civ 594, Birss LJ, in the Court of Appeal, endorsed these principles, and (at [24]) he emphasised this:

The simple point about lateness is that it calls for an explanation justifying the lateness. That is because an amendment which might otherwise be allowed could well be refused if its lateness has caused unjustifiable prejudice to the other party. Therefore an explanation is needed in order for the court to work out whether or not it is a case in which, despite the prejudice caused by the lateness, nevertheless the balance comes down in favour of allowing the amendment.

12. Mr Abrahams KC, on behalf of the Defendants, puts forward four reasons why this application should not be allowed. As he himself says, and I agree, of

these the first two are by far the more important. The first one is that this amendment will, contrary to what is stated by the Claimants, radically change the nature of the Claimant's case, because this would deal with the use of the easyJet trademark for the sale of cosmetics. His submission was that the enhanced reputation that is necessary in such a case under Article 9 (2) (b) was not already in play in this case. He took me through various parts of the statements of case and submitted that the pleadings do not at present turn on the question of reputation of the easyJet trademark for the sale of cosmetics.

13. In relation to 9 (2) (c), he submitted that the Claimant was claiming a reputation for easyJet in relation to airline services. That was not disputed, and they have pleaded some other marks and reputation in relation to that. Now, said Mr Abrahams, they wanted to claim a reputation for selling cosmetics under the easyJet trademark, and this amendment would allow them to do that. That, in turn, feeds into causes of action already pleaded in relation to taking an unfair advantage of a reputation and detriment for reputation under paragraph 55 of the particulars of claim.
14. However, Mr Abrahams said, the problem is that, in the form in which the claim had been advanced before, the Defendants were content with model B disclosure because there was little point in asking for any different model. They were not then considering the question of cosmetics. They would also have wanted to look at the question of market share. In this regard I was referred to the quotation from *General Motors v Yplon* [1999] ECR 1-5421 in *W3 Ltd v EasyGroup* [2018] FSR 16, [27], a decision of Arnold J, as he then was. That, of course, is something that would need some time and take some

effort. Moreover, the question of expert evidence had been considered and ultimately not pursued at the CCMC because they were dealing with the case which they were dealing with then and not the case which they say they would have to deal with now. So, for all those reasons, they say, the decision would not be the same in approaching this case. They would want to do different things, and that is entirely in addition to the question of disclosure that might, in fact, be given. As to that, there is now no possibility of carrying it out in time for the trial in only a few weeks.

15. The second objection which Mr Abrahams put forward was that emphasised by Birss LJ in the extract to which I have already referred, and that is a lack of explanation for wanting to make this change at this very late stage. I am quite satisfied that this is a very late stage because it would not be possible for carry out a further disclosure exercise or further preparation of evidence at a time when everyone is gearing up for a trial in just a few weeks.
16. So, the question is, could this allegation have been made at an earlier stage of the proceedings, or even at the outset? It is interesting to note that the Claimant, after producing the response to the RFI originally, revisited it in January 2023 when certain parts of the answer, No.1, were in fact deleted. However, this point was not dealt with at that stage. Here we are more than a year later, and the point is now being considered again.
17. In order to try and deal with this question, the Claimant relies on the witness statement of Mr Richard Jacob, the Claimant's solicitor, which was made on 19th February 2024. That is just two days ago, and I am bound to say that, in so far as it gives an explanation, something I will come back to, it is a very



late explanation. I know that Mr Jacob says this is written in response to things in the skeleton argument. That is all well and good, as far as it goes, but the point is that explanations ought to have been given at an earlier stage than two days before a hearing of the application.

18. The explanations which are given, I am bound to say, I do not find very satisfactory. As Mr Abrahams says, the Claimant seems to have adopted a kind of 'kitchen sink' approach to pleading reputation, and a number of marks have been prayed in aid, including easyCoffee and easyProperty. It is simply unclear why no such similar approach was taken in relation to cosmetics, given that reliance was being placed on all these other matters in a cosmetics case. Nor does Mr Jacob actually explain what steps he took to decide what kinds of reputation to plead, even though, as is obvious, the Claimant was instructing the solicitors to plead a claim against someone selling cosmetics.
19. It is true that Mr Jacob says that he thought that the enhanced distinctiveness point was already in the case. But it is difficult to understand why, in that case, reputation had not already been pleaded. As Mr Abrahams says, if you have got the one, you normally expect to plead the other.
20. There are some suggestions that at some point in the recent past the Claimant appears to have realised for the first time that it could plead a reputation in relation to cosmetics. However, that is not in itself an explanation as to how it did not come to do it at an earlier stage. To say: "I didn't realise until yesterday or the day before that I could do it," is not much of an explanation in the circumstances.

21. It further appears that much of the disclosure which has been given, and maybe relied on, in this case in order to prove reputation consists of documents which were disclosed at a much earlier stage in the proceedings, in the first round of disclosure. So that does not help to explain the lateness here. One point was made in relation to a particular document which dates only from December 2023, but that cannot be the only reason for changing your mind.
22. So, I have to say overall, first of all, I do think that these allegations make a new case. They make a case which is much wider than before, and much more serious. The Defendants will be in some difficulty in responding properly to it, and I do not think that is fair at this late stage. Secondly, I think that the explanation that could have been given has not been given. I know that Mr Jacob says or, rather, his counsel says: "You can't expect me to disclose privileged information. You can't expect me to reveal my case strategy." However, to that I answer: "Well, it is up to you. You want the benefit of the amendment. You must do whatever it takes to explain why it is you did not do it before, and that is a balance which only you can resolve."
23. In my judgment, taking account of just the first two points that Mr Abrahams puts forward, I am entirely satisfied that justice requires that this application be refused.

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