

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13 January 2015

Before :

THE HON MR JUSTICE ARNOLD

Between :

ENTERPRISE HOLDINGS, INC **Claimant**
- and -
(1) EUROPCAR GROUP UK LIMITED **Defendants**
(2) EUROPCAR INTERNATIONAL SASU

Henry Carr QC and Simon Malynicz (instructed by Lewis Silkin LLP) for the Claimant
Geoffrey Hobbs QC, Guy Hollingworth and Alaina Newnes (instructed by Squire Patton
Boggs (UK) LLP) for the Defendants

Hearing dates: 8-12, 18 December 2014

Judgment

MR JUSTICE ARNOLD :

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Introduction

1. The Claimant (“Enterprise”) and the Defendants (“Europcar”) are competitors in the field of vehicle rental services. Enterprise has for many years used a stylised lower case ‘e’ logo on a green background as a prominent part of its branding. Starting in December 2012, Europcar has made increasing use of a stylised lower case ‘e’ logo on a green background (referred to as the “e-moving logo”) as a prominent part of its branding. Enterprise alleges that Europcar have thereby infringed 10 United Kingdom Registered Trade Marks and Community Trade Marks (“the Trade Marks”) and committed passing off. Europcar denies this.
2. As is regrettably increasingly common with trade mark disputes between large companies, the parties have treated this dispute as if it were a state trial. A considerable number of issues were raised, although it is fair to note that both sides reduced the number of issues shortly before trial, Enterprise by abandoning an allegation that Europcar had intended to take advantage of the distinctive character and reputation of the Trade Marks and Europcar by abandoning a claim for revocation of two of Enterprise’s UK Trade Marks for non-use, and that some points were abandoned during the course of the trial. A large volume of evidence and documentation has been put before the court. There were 34 trial bundles, not including a number of “reserve” trial bundles available in court in case they were needed, of which five were in the event used. Enterprise called 14 witnesses and Europcar called 10 witnesses. Enterprise’s skeleton argument ran to 155 paragraphs and Europcar’s skeleton argument ran to 201 paragraphs. Enterprise’s written closing submissions ran to 204 paragraphs and Europcar’s written closing submissions ran to 100 paragraphs plus a 23 page annex.
3. As is also regrettably increasingly common in such cases, there have been a number of satellite disputes, in particular over survey evidence and the admissibility of evidence. I shall consider these matters below.
4. Europcar applied to register its e-moving logo as a Community Trade Mark on 13 November 2012. On 4 March 2013 Enterprise opposed the application on relative grounds, relying upon no less than 20 earlier Community Trade Marks, including the Community Trade Marks it relies on in the present proceedings. The opposition proceedings are presently pending before the Opposition Division of the Office for Harmonisation in the Internal Market (Trade Marks and Designs). Enterprise has also filed opposition proceedings against applications by Europcar to register the e-moving logo in 31 countries, relying upon various earlier trade marks. More generally, Enterprise and Europcar have become engaged in at least 98 trade mark disputes in registries around the world. As part of these disputes, Enterprise and Europcar have each challenged various earlier registrations of the other on the grounds of non-use.
5. It is manifest that the parties would be well advised to try to settle their differences on a global basis. It is also manifest that, whatever the legal merits of their respective positions may be in any particular country, the parties would be well advised to try to

resolve their differences in a manner which enables them to promote their respective services to consumers using branding that is distinctively different to each other's.

The rival logos

6. Enterprise's current 'e' logo (on the left) and Europcar's e-moving logo (on the right) are reproduced below. I must emphasise that, as explained below, this side-by-side comparison does not reflect the correct legal test.



The Trade Marks

7. Enterprise has alleged infringement of three UK Registered Trade Marks and seven Community Trade Marks. Some of the Trade Marks are black and white, while others are green and white. The Trade Marks are registered in respect of goods and services which include "vehicles" in Class 12 and "vehicle rental services" and "vehicle leasing services" in Class 39. The Trade Marks are registered with effect from dates ranging from 14 August 1993 to 14 September 2010. Two of the national registrations are subject to disclaimers of the right to the exclusive use of a letter 'E'. To complicate matters still further, as explained below, the claims for infringement of three of the Community Trade Marks have been stayed pursuant to Article 104 of Council Regulation 207/2009/EC of 26 February 2009 on the Community trade mark (codified version) ("the Regulation").

Stay pursuant to Article 104

8. Enterprise first became aware of the e-moving logo when it appeared in a Europcar press release dated 6 December 2012 (as to which, see further below) and on a Christmas card in December 2012. Enterprise raised an objection to the use of this logo in an email from Enterprise's General Counsel to Europcar's General Counsel dated 3 January 2013. On 14 January 2014 Europcar's General Counsel replied, making it clear that Europcar intended to continue the acts complained of.
9. As noted above, Enterprise opposed Europcar's Community Trade Mark application on 4 March 2013. On 10 April 2013 Europcar filed cancellation proceedings at OHIM in respect of seven of Enterprise's Community Trade Marks on the ground of non-use.
10. Enterprise commenced these proceedings on 27 June 2013. Three of the Community Trade Marks Enterprise relied on were among those which were the subject of Europcar's cancellation claim in OHIM. Europcar subsequently pleaded in their Defence and Counterclaim that the court should stay the infringement claims in

respect of those CTMs pursuant to Article 104 of the Regulation. They also alleged non-use of two of Enterprise's UK Trade Marks and counterclaimed for revocation of those Trade Marks.

11. On 10 September 2013 Europcar proposed that the order for directions should include a stay of the claim in respect of the three Community Trade Marks which were in issue at OHIM pursuant to Article 104. Enterprise agreed to this, and a consent order was made by Deputy Master Smith on 14 January 2014.
12. On 2 December 2014 Europcar abandoned their counterclaim for revocation of the UK Trade Marks. On the same date Enterprise asked whether Europcar would be prepared to agree to lift the stay on the three Community Trade Marks. On 3 December 2014 Europcar replied saying that they refused to agree to lift the stay and that there were no "special grounds" within the meaning of Article 104. No application for the stay to be lifted was made by Enterprise.
13. I have to say that it does not seem to me that it made sense for these infringement claims to be stayed. There can be little doubt that the Trade Marks in question have been used in relation to "vehicle rental and leasing services", which is all that matters for the purpose of the infringement claims. Furthermore, staying the infringement claims in respect of these Trade Marks potentially exposed the parties to the need for two trials. The potential problems caused by the stay are illustrated by the point about the scope of the black and white registration discussed below. In my view Europcar should have agreed to the stay being lifted, so as to enable all the issues between the parties with regard to infringement in the UK to be resolved in one trial.

497

14. At this trial, counsel for Enterprise focussed Enterprise's case on Community Trade Mark No. 9374497 ("497"), which is registered as of 14 September 2010 in respect of *inter alia* "vehicle rental and leasing services". 497 is registered in black and white, as shown below.



15. As discussed below, the fact that 497 is registered in black and white gives rise to a question with regard to its scope of protection having regard to the fact that Enterprise has used the mark in green and white. As it happens, I do not consider that this causes any real difficulty, but the question could have been avoided entirely if Enterprise had been able to rely upon one of the Community Trade Marks the claim for infringement of which has been stayed, namely No. 532126 ("126"), since 126 is registered in green and white.

16. Counsel for Enterprise accepted that, if Enterprise was unsuccessful in its claim for infringement of 497, then, with the possible exception of 126, Enterprise could not succeed in its claims for infringement of the other Trade Marks. Counsel for Europcar suggested that, even if Enterprise was successful in its claim for infringement of 497, it might be necessary for the court to rule on the other claims. At present I do not see why this should be so, but I will hear further argument on the point if necessary.

The territorial dimension to Enterprise's claim

17. As explained above, the claim on which counsel for Enterprise focused at trial is for infringement of a Community Trade Mark. As originally pleaded, Enterprise's case relied solely upon allegedly infringing acts committed by Europcar in the United Kingdom. On 22 September 2014 Enterprise applied to re-amend its Particulars of Claim so as to allege acts of infringement by Europcar "in the UK and/or elsewhere in the EU". On 30 September 2014 Morgan J gave Enterprise permission to amend its claim so as to allege acts of infringement "in the UK and/or France", but not elsewhere, for the reasons given in his judgment of that date ([2014] EWHC 3169 (Ch)). Accordingly, he gave directions for the service of further evidence relating to France. After the conclusion of the evidence, however, Enterprise abandoned its reliance upon acts of infringement committed in France.
18. Morgan J also held that it was open to Enterprise to seek a European Union-wide injunction. It was agreed between counsel that the territorial scope of any injunction would be the subject of further argument, if required, after the delivery of this judgment.

The witnesses

Enterprise's witnesses

19. Benjamin Lawson (Vice President of Rental Europe), Spencer King (Director of European Marketing Communications) and Leah Wilson (European Marketing Manager of Marketing Communications) of Enterprise gave evidence about Enterprise's history, business and use of its 'e' logos.
20. Enterprise adduced unchallenged evidence from Gary Matthews, of Freemantle Media, and Neil McCrossan, formerly Chief Executive of Nexus Vehicle Holdings, as to their experience as customers of Enterprise and their exposure to its 'e' logos.
21. Enterprise called a number of its branch managers or assistant branch managers to give evidence about confusion experienced by them and their staff: Andrew Moore (Gatwick Airport), Charlie Perkin (Heathrow Airport), John Martin (Newcastle Airport), Michael Bingham (Grimsby), Sharon Gibb (Stirling), Ashleigh Donovan (Southend-on-Sea) and Mehran Shahabadi (Luton Airport). By agreement between the parties, each of these witnesses gave evidence in the absence of the others and was instructed not to discuss the case with the others while the others were being cross-examined.
22. Simon Chapman of Enterprise's solicitors gave evidence about trade mark clearance searches, evidence in response to Ms Watchorn's evidence (as to which, see below) and evidence about certain other matters.

23. Philip Malivoire, a very well-known and experienced expert in the field of consumer surveys, particularly consumer surveys for the purpose of legal proceedings, gave evidence about four surveys he supervised on behalf of Enterprise.

Europcar

24. Roland Keppler (Chief Executive of the Second Defendant's German subsidiary from 2009 to February 2012 and Chief Executive Officer of the Second Defendant from February 2012 to 31 July 2014) and Caroline Verhague-Soudon (Brand and Loyalty Marketing Manager) of Europcar gave evidence about Europcar's history and business and about the development and use of the e-moving logo.
25. Europcar called a number of its branch managers or assistant branch managers to give evidence in response to that of the Enterprise branch managers: Michelle Kendrick (Gatwick Airport), Susanne Darling-Mguidich (Heathrow Airport), Brenda Littlefair (Newcastle Airport), Kevin Fenton (Grimsby), Nichola Dryden (Stirling), Richard Mareya (Southend-on-Sea) and Julia Lister (Luton Airport). Again, by agreement between the parties, each of these witnesses gave evidence in the absence of the others and was instructed not to discuss the case with the others while the others were being cross-examined.
26. Henrietta Watchorn of Europcar's solicitors gave evidence about searches she had undertaken for third party users of trade marks comprising a lower case 'e'.
27. Although Europcar had served a report from Adam Phillips, another experienced expert in the field of consumer surveys, commenting on the Enterprise surveys and on Mr Malivoire's evidence about them, Europcar did not in the end call Mr Phillips.

Admissibility of evidence

28. In counsel for Europcar's skeleton argument, Europcar objected to the admissibility of (a) four specific paragraphs in the witness statements of Mr Lawson, Ms Wilson and Mr King and (b) unspecified portions of the witness statements of the Enterprise branch managers on the grounds that (i) these passages constituted opinion evidence from non-experts and (ii) there was no scope for opinion evidence, whether from experts or non-experts, on questions of likelihood of confusion and dilution in cases involving ordinary, everyday consumer goods and services.
29. Enterprise did not accept the validity of this objection. Furthermore, Enterprise pointed out that the objection had not been taken by Europcar at the proper time, namely within 28 days of the service of the witness statement (see Appendix 9 paragraph 4 in the Chancery Guide) and that a proposed Pre-Trial Review had been cancelled because the parties had agreed that there were no issues to consider.
30. In those circumstances, it was agreed between the parties that the evidence in question would be received and cross-examined upon without waiver of objection and the court would be invited to rule upon the admissibility of the evidence in its substantive judgment. Although I expressed concern that it was rather a backwards way of proceeding, I acquiesced in this. In the event, however, counsel for Europcar sought in his cross-examination of the Enterprise witnesses positively to elicit their opinions with regard to a question concerning likelihood of confusion. Counsel for Enterprise

did not object to this, nor did I intervene. After all the witnesses had been called, however, I asked counsel for Europcar to consider whether Europcar wished to maintain their objections to the admissibility of such evidence. At the conclusion of the evidence, counsel for Europcar informed me that Europcar had decided to withdraw their objections to the admissibility of Enterprise's evidence.

31. It follows that I do not have to rule upon the issue. Nevertheless I wish to say a few words about it. In my view the two categories of evidence identified in paragraph 28 above stood in different positions. So far as category (a) was concerned, it seems to me that Europcar's objection was probably well founded. So far as category (b) is concerned, however, it seems to me that Europcar's objection was probably not well founded.
32. Counsel for Enterprise described this evidence as "trade evidence". I would prefer to reserve that label for evidence from witnesses in the relevant trade who are independent of the parties. Such witnesses are often retailers: they may be retailers of the claimant's goods or the defendant's goods or sometimes both. Such witnesses can give factual evidence as to the circumstances in which the relevant goods are sold, the characteristics of the consumers who purchase them and any instances of apparent confusion the witnesses (or their staff) have experienced. There is a controversial and difficult question as to whether such witnesses can go further and express opinions as to the likely reactions of customers to a particular sign, which involves consideration both of whether such evidence is expert evidence subject to CPR Part 35 and whether, even if it is not expert evidence, it can properly be admitted or given any weight in cases involving ordinary consumer goods and services: see the judgment of Birss J in *Fenty v Arcadia Group Brands Ltd* [2013] EWHC 1945 (Ch), [2013] FSR 37, an appeal from which has been argued before the Court of Appeal but not yet determined.
33. Although I would prefer not to describe Enterprise's evidence as "trade evidence", similar questions potentially arise. As discussed below, the Enterprise branch managers gave evidence as to incidents of confusion which they and their staff had experienced. They also gave evidence as to the reasons which consumers had expressed to them for being confused. In my view such evidence is proper evidence of fact. It is fair to say that a few passages in the witness statements were drafted in a way which shaded into expressions of opinion, but it would have been easy enough for the court to ignore those.

Weight of evidence

34. Although Europcar abandoned its objection to the admissibility of Enterprise's evidence, counsel for Europcar made two points with regard to the weight to be attached to the evidence of the branch managers. First, he pointed out that some of the evidence consisted of hearsay statements attributed to consumers and that, as such, it fell to be assessed in accordance with the criteria specified in section 4 of the Civil Evidence Act 1995. I accept that. Secondly, he pointed out that the branch managers generally did not know what information the consumers in question had (in particular, the extent to which the consumers had been exposed to either Enterprise's current 'e' logo or Europcar's e-moving logo) or what the consumers' thought processes had been. Again, I accept this. It follows that the evidence of the branch managers regarding alleged instances of confusion they had experienced must be approached

with some caution: see *My Kinda Town Ltd v Soll* [1983] RPC 407 at 418 (Lawton LJ) and 424-426 and 431 (Oliver LJ) (although it should be appreciated that there were complicating factors present in that case which are not present in this case).

Factual background

The vehicle rental market in the UK

35. Vehicle rental companies like Enterprise and Europcar have three main types of customer:
 - i) Private customers who rent vehicles for leisure or other personal use. Often, these are persons who are holidaying in the relevant area, particularly when the vehicle is rented from a transport hub such as an airport or railway station. Private customers may also need short-term use of a vehicle for another reason, such as a weekend trip or a house move.
 - ii) Corporate customers who rent vehicles for their employees on either a transaction by transaction or a fleet management basis.
 - iii) Customers who are provided with temporary replacement vehicles under insurance policies while their own vehicles are off the road after an accident or breakdown.
36. The vehicle rental market in the UK is the second largest in Europe after that in Germany, although the average total cost of a rental is lower than that in the other main markets (£107 in 2012). It is estimated that the market breaks down into 45% direct customers, 40% corporate and 15% insurance replacement. The market is dominated by five providers, namely Enterprise, Europcar, Avis, Hertz and Sixt, who between them had 84% of the market in 2012. The remainder of the market is made up of a number of smaller, independent, regional providers.
37. A large proportion of those who rent cars do so after making an advance booking. In the past, this was typically arranged via an intermediary such as a travel agent or directly by telephone. Nowadays, at least half of all rentals are made after bookings made on car rental companies' websites (or mobile apps) or via third party websites, and the proportion is rising. The remainder are either arranged on the spot or via the telephone. The third party websites include transport portals such as those operated by airlines and price comparison websites.
38. It is important to appreciate that the vehicle rental market is different to the market for many other types of goods and services in that it has a strongly transnational character. Although many of the vehicles rented in the UK are rented by UK residents, many vehicles (and at some locations, such as airports, the majority of vehicles) are rented by residents of other countries. In the case of vehicles rented in the UK, the foreign resident renters are mainly from elsewhere in Europe or from North America.

Enterprise

39. Enterprise was founded by Jack Taylor in St Louis, Missouri, USA in 1957, when he launched a car leasing business called Executive Leasing. In 1962 Mr Taylor started renting cars by the day under the name Executive Rent-A-Car. In 1967 Executive Leasing started using the logo shown below (“the old ‘e’ logo”) and Executive Rent-a-Car started using a yellow version of the same logo.



40. In 1969 the businesses were re-named Enterprise Leasing and Enterprise Rent-a-Car, after which both businesses used the green version of the old ‘e’ logo. It appears that the Enterprise Leasing name was discontinued in 1971. From 1971 to 1995 Enterprise Rent-a-Car used the following banner logo.



41. From 1995 to 2006 Enterprise Rent-a-Car used the following banner logo (“the old banner”).

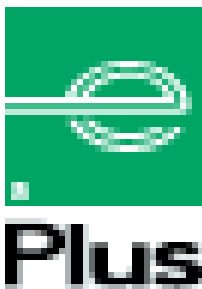


42. Since 2006 Enterprise Rent-a-Car has used the following banner logo (“the new banner”).



43. As can be seen, whereas the old ‘e’ logo was separate from the word “Enterprise” in the old banner, the current ‘e’ logo forms part of the word “Enterprise” in the new banner. The current ‘e’ logo is also used separately, as described below.

44. In addition to the logos and banners illustrated above, Enterprise has made extensive use of the colour green, together with black and white, in its corporate livery for several decades. These colours are used on premises, signage and vehicles and in advertising and promotional materials.
45. As described in more detail below, in August 2007 Enterprise Rent-a-Car acquired Vanguard Rental Holdings LLC (“Vanguard”), which owned National Car Rental (“National”) and Alamo Rent a Car (“Alamo”), from the private equity firm Cerberus. In 2009 Enterprise became the holding company for the group. For simplicity, I shall henceforward refer to Enterprise as having been the owner of the business at all times.
46. Enterprise is now the largest vehicle rental service provider in the world measured by revenue, employees and fleet size. In the year ended 31 July 2013 it had global revenues of \$16.4 billion, more than 78,000 employees and operated almost 1.4 million cars and vans from 8,100 locations in 50 countries. It remains a privately owned company with headquarters in St. Louis.
47. In the USA alone, Enterprise has over 5,500 locations. Enterprise’s market share in the USA in the first quarter of 2013 was 30%.
48. Since May 2007 Enterprise has operated a loyalty scheme called “Enterprise Plus”. It uses a logo referred to as the “e Plus logo” in conjunction with this scheme. The e Plus logo consists of the current ‘e’ logo together with the word Plus, as shown below. This logo has featured on the Enterprise UK website since 2010.



Enterprise in Europe

49. Enterprise commenced business in Europe when it opened a branch in Reading in the UK in 1994. By the year ending 31 July 2012, Enterprise’s UK operating subsidiary Enterprise Rent-A-Car Ltd had a turnover of £398.3 million, 3,203 employees, 360 locations and 52,600 vehicles. By then, Enterprise had a market share of 30.1%, making it the market leader in the UK. In the year ending 31 July 2013 Enterprise Rent-A-Car Ltd had a turnover of £457.2 million.
50. Between 14 February 2009 and 9 August 2014, 92,633 of Enterprise’s UK rental transactions were with customers who were resident in the USA. The number of such customers increased every year during this period. In 2013 the figure was 19,000 customers who yielded revenue of nearly £3.3 million. About 10,350 reservations were made via Enterprise’s UK website from US IP addresses in 2013. It appears that the remainder of the 19,000 reservations were made by customers after their arrival in the UK.

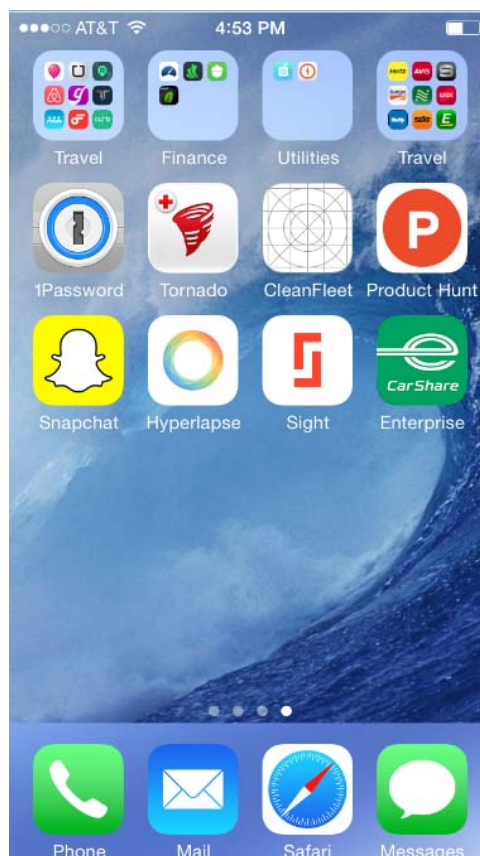
51. In 1997 Enterprise began trading in Germany and in the Republic of Ireland. By the year ending 31 July 2012, turnover in Germany was €336.6 million and turnover in Ireland was €21.7 million.
52. Enterprise acquired PSA Peugeot Citroën's French car rental subsidiary Citer SA and its Spanish subsidiary ATESA in February 2012. As explained in more detail below, at that time Citer and ATESA were franchisees of National and Alamo. The franchise agreements expired in January 2013. In December 2012 Enterprise announced that from 1 February 2013 it would commence re-branding its Citer and ATESA sites in France and Spain as Enterprise sites, and this process is ongoing. Enterprise's objective is to phase out the Citer and ATESA names, but this has not yet occurred.
53. Enterprise has franchise arrangements in 14 other Member States of the EU and in various non-EU countries in Europe.

Enterprise's use of its current 'e' logo in the UK

54. Enterprise's current 'e' logo was introduced into the UK in late 2006. Since then, Enterprise had made widespread use of the logo, both in *solus* form and as part of the banner. Examples include the following:
 - i) *Solus* and banner use on signage at rental locations throughout the UK. This includes (a) extremely prominent use of the 'e' logo in *solus* form on large exterior signs and (b) prominent use of the 'e' logo in *solus* form on illuminated interior signs.
 - ii) Prominent *solus* and banner use on Enterprise's airport shuttle buses. For example, at Heathrow, Enterprise has 12 shuttle buses which transport many thousands of customers every year to and from airport terminals, vehicle parks and vehicle drop-off points. Between January 2011 and August 2014, Enterprise completed more than 220,000 car hires at Heathrow and the vast majority of these customers used the shuttle buses to travel between the terminal and Enterprise's base where the vehicles are kept. The 'e' logo is displayed in *solus* form on the front, and in banner form on the sides and rear, of the buses.
 - iii) *Solus* use on stickers on the rear bumpers or boot lids of almost all rental cars in Europe. This commenced in 2006 and has continued ever since.
 - iv) Prominent use on the home page of Enterprise's European websites, including the UK website. This includes use in a banner form, *solus* use as part of the "e Plus" logo and use in the so-called "favicon" in the address bar. The favicon is of some importance, as when multiple tabs are open on a browser on a computer or tablet, it is the only visible means by which the site is accessed. The Enterprise UK website received 10.7 million unique visitors from unique IP addresses between August 2011 and July 2014.
 - v) *Solus* and banner use at various points of the process of booking online and collecting a car. This includes use on the website as referred to in the previous paragraph, on signage, on stanchion dividers, point of sale material, on screens, maps, cards, lanyards, staff badges and uniforms, forms and

agreements, shuttle buses, car keyrings, disk holders, rearview mirror hangers, etc.

- vi) Banner use in TV advertising, for example, the “Brad and Dave” TV campaign in 2012 and 2013 for the UK market which poked fun at the culture clash between brassy and direct US customer service values and the more understated British approach. The advertisements were shown very extensively and were estimated to have been seen at least once by between 57% and 73% of the UK population.
- vii) Banner use in online advertising on YouTube via “Brad and Dave webisodes” which are longer segments than the advertisements just referred to. There have been many hundreds of thousands of “views” of these clips.
- viii) Online banner advertising on third party websites.
- ix) *Solus* and banner use on social media websites such as Facebook and Twitter.
- x) Use on the Google search page. Enterprise pays for advertisements which results in prominent use of the ‘e’ logo in *solus* form.
- xi) Use on online directories such as Yell.
- xii) *Solus* use on merchandise such as juggling balls, carrier bags, hats, flags etc.
- xiii) Recent use in *solus* form to identify Enterprise’s CarShare mobile phone app, as shown below.



55. It should be noted that, as well as this widespread use of the current ‘e’ logo, Enterprise continues to make some use of the old ‘e’ logo, both in *solus* and banner form, in particular on signs at rental premises which have not yet been replaced by new signs.

Europcar

56. Europcar was founded as Europcars SA in Paris in 1949. It started using the trade mark EUROPCARS in 1951. In 1962 it adopted a logo focussing on an upper case ‘E’ (below left), which was simplified in 1965 (below right).



57. By 1970 Europcars was recognised as the largest car rental company in France, both in terms of numbers of cars and numbers of agencies. In that year Europcars developed an alliance with Renault and it was subsequently purchased by Renault. In 1971 Europcars adopted the following banner logo.



58. As can be seen, this banner included the word “europcars” with a lower case ‘e’ and a logo consisting of a letter ‘e’ within a letter ‘c’ which became known as the “escargot” mark.
59. In 1974 Europcar dropped the letter ‘s’ from its name and adopted the following banner logo.



60. During the 1970s Europcar began to expand throughout Europe, establishing franchisees and/or subsidiaries in Switzerland, Germany, Brussels, the Netherlands, Italy and Spain (amongst other places). Europcar entered the UK market in 1974, at which time it was operating the third largest car rental network in the world. In 1981 Europcar acquired the largest UK car rental company, Godfrey Davis Car Hire, which had more than 300 branches in the UK.
61. In 1988 Renault sold Europcar to the Wagon-lits Group, which subsequently sold a 50% stake to Volkswagen. In 1989 Europcar abandoned its orange, black and white colour livery and adopted a green and white colour scheme instead. As part of the re-design, Europcar adopted the following logo.



62. In 1989 Europcar adopted a revised logo which included what was called a yellow “horizon” under the word Europcar, as shown below.



63. In 1992 Accor purchased Wagon-lits and hence the latter’s 50% stake in Europcar. In the early-mid 1990s Europcar expanded into Eastern Europe and then into the Baltic states. In 1997 Europcar entered into a strategic alliance with Dollar Rent a Car in the USA which appears to have lasted for 10 years.
64. In 2003 Europcar entered into a partnership with easyJet which enabled easyJet customers to book their car rental through the easyJet website and receive a discount. Starting in December 2004, Europcar started to expand into South America and the Asia-Pacific region. In 2006 Europcar was acquired by the French investment company Eurazeo. As described in more detail below, in November 2006 Europcar acquired Vanguard Car Rental EMEA Holdings Ltd, the European business of Vanguard, and in February 2007 Europcar entered into a strategic alliance with Vanguard. In 2007 Europcar acquired its Spanish franchisee Betacar. In the financial year 2011-2012 Europcar was active in more than 130 countries, had global revenues of €1.93 billion and had a fleet of 180,000 vehicles. In 2013 Europcar entered into a new strategic alliance with Advantage Rent A Car in the USA. Other than through this alliance, however, Europcar has no presence in the USA.
65. In the UK, Europcar was the market leader in 2008 with a market share of 30.7%. Since then, it has been overtaken by Enterprise, and by 2012 its market share had dropped to 26%.
66. The colour green continues to this day to be used prominently and extensively by Europcar throughout its branches and on its website. The colour green is also extensively used on, amongst other things, shuttle buses, marketing material, stationery and uniforms and items promoting Europcar’s sponsorship arrangements.

Development of the e-moving logo

67. In late 2009 Europcar commissioned a study into the car rental market in Europe from Ipsos Marketing. In 2010 this was supplemented by a consumer perception study carried out by TNS Sofres in seven European countries, including the UK. The latter study showed, among other things, that consumers in the UK had a low spontaneous awareness of the Europcar brand compared to its competitors Hertz, Avis, Enterprise and Budget. These two studies were considered by Europcar’s senior management in the summer of 2010. They concluded that, although Europcar was the largest player in the car rental market in Europe, it did not have a high enough brand awareness among direct consumers. Traditionally, Europcar’s strength had been in the corporate and insurance sectors, but the importance of direct customer business was increasing. It

was therefore decided to initiate changes to refresh the public perception of the company.

68. In the first half of 2011 Europcar, together with an external advertising agency, devised a new slogan for the business in place of its existing slogan “you rent a lot more than your car”. The new slogan, or strapline, was “moving your way”.
69. In late August 2011 Europcar invited four creative agencies to tender for the task of developing an updated visual look and feel for the brand, and in particular a new logo, which would be consistent with the new strapline. Europcar’s brief stated that its current logo lacked modernity, impact and flexibility; that the new logo should include a symbol or icon (as with brands such as Apple and Volkswagen) which would enhance brand recognition; and that the need for online visibility meant the logo should be identifiable even in small sizes. After the four agencies had made proposals, an agency called Brand Image was selected.
70. After a hiatus during which the scope of the re-branding process was re-assessed and scaled back, Brand Image presented some revised proposals, which included two proposals for a new logo, in early July 2012. The two logos proposed by Brand Image were the e-moving logo and an arrow logo. Both Europcar’s marketing team and Mr Keppler preferred the e-moving logo, although some small refinements were requested. The choice was approved at meetings of Europcar’s senior management and with Eurazeo in August 2012.
71. The main banner logo which was adopted by Europcar at the conclusion of this process is reproduced below.



72. As can be seen, this comprises three elements: the Europcar name with its yellow horizon, the “moving your way” strapline and the e-moving logo, all on a green background.
73. In addition to the main banner logo, Brand Image developed an elaborate scheme for refreshing and unifying Europcar’s visual presentation. In particular, as discussed in more detail below, this involved the use of the e-moving logo as a visually unifying factor for all of Europcar’s sub-brands.
74. Europcar publicly announced the “reshaping” of its brand, together with a re-designed website, in a press release dated 6 December 2012. This stated:

“As part of the ‘Moving Your Way’ positioning, a new logo has been designed to symbolize mobility and act as a quality stamp on all Europcar sub-brands and offers.”

75. It is clear from the evidence of Mr Keppler and Ms Verhague-Soudon that part of the thinking behind the adoption of the e-moving logo was that the name Europcar was simply too long (i.e. it had too many characters) for flexible use in the digital environment. Furthermore, Europcar wanted to have a logo that, over time, would become a powerful symbol or icon for Europcar in its own right. For both of these reasons, Europcar's objective is to be able to use the e-moving logo on its own. Furthermore, Ms Verhague-Soudon's evidence was that, in the digital environment, this could happen "quite soon". In particular, she said that Europcar intended to use the e-moving logo as an app icon, as discussed below, but she was awaiting approval for this from Europcar's legal department. Consistently with this, Europcar has applied to register the e-moving logo as a Community Trade Mark in *solus* form and has declined to undertake not to use it in *solus* form.

Europcar's uses of the e-moving logo

76. The roll-out of the e-moving logo was intended to be, and has been, a gradual process. The e-moving logo has been used on the UK website since late November 2012 and on the French website since April 2013. The shuttle buses at Heathrow have now been re-branded to incorporate the e-moving logo and the logo has gradually been applied to the commercial truck and van fleet as well as to point of sale documentation in both France and the UK. It is also used on items such as posters, stickers and leaflets in branches and in various other ways. As at September 2014, the permanent signage on Europcar's UK branches and at airports was still in the process of being rebranded from the old logo, but there are examples of prominent use of the e-moving logo in such locations, such as Prestige signage with the e-moving logo on the exterior and interior of the communal car rental centre at Gatwick South Terminal.
77. Europcar has used the e-moving logo in three main ways:
- i) *Solus* use of the e-moving logo.
 - ii) Use in combination with descriptive words which denote Europcar's secondary brands such as "Prestige", "Chauffeur" or "Privilege" (although the e-moving logo is often larger and sometimes much larger). The word Europcar often appears in much smaller font in this branding.
 - iii) Use in combination with the word Europcar and often the strapline "moving your way" (although again the e-moving logo is often larger and sometimes much larger).
78. Examples of the second and third categories of use are shown below.



79. Ms Verhague-Soudon stated in her first witness statement that Europcar had a policy not to use the e-moving logo alone, but always to use it in conjunction with the Europcar logo. She also said that Europcar had a system to ensure that its branding was used consistently and that these guidelines were adhered to. Enterprise has found a number of examples where the guidelines have not been followed, however, and the e-moving logo has been used on its own. Ms Verhague-Soudon's explanation for this in cross-examination was that the countries were enthusiastic about the e-moving logo, were pushing its use and were not really looking at the guidelines, and that her department was unable to control everything that was done.
80. A specific example of this concerns two mobile phone apps called ToMyCar and Corporate Carsharing which Europcar launched in pilot form in July 2014. The e-moving logo was used as the icon for these apps, as shown below.



81. When Enterprise drew attention to this, Europcar changed the app icon to an upper case 'E' with a yellow horizon. As discussed above, however, Ms Verhague-Soudon confirmed that Europcar intended to use the e-moving logo as an app icon once this was approved by the legal department.

Arrangements between Vanguard, Europcar and Enterprise with respect to the National and Alamo brands

82. As mentioned above, in November 2006 Europcar acquired Vanguard's business in Europe, the Middle East and Africa ("EMEA"). Vanguard operated through subsidiaries and franchisees under two brands: National and Alamo. Europcar and Vanguard also entered into a Master License Agreement which gave Europcar the exclusive right to use the National and Alamo trade marks in EMEA.
83. In February 2007 Europcar entered into a strategic alliance with Vanguard in relation to the latter's North American business. This arrangement allowed each party to fulfil "outbound" customer demand on referral from the other in territories where it did not itself have a business: hence Europcar was able to offer its customers access to the National and Alamo networks in North America operated by Vanguard and *vice versa*.
84. In August 2007 Vanguard was purchased by Enterprise. Enterprise from that point became the owner of the National and Alamo trade marks, but subject to Europcar's exclusive licence to use those trade marks in EMEA. Consequently, Enterprise controlled the National and Alamo operations outside EMEA, but within EMEA the National and Alamo operations were controlled by Europcar. That remained the

position as at trial, although the exact scope of Europcar's rights in the National and Alamo brands in EMEA is the subject of pending arbitration proceedings.

85. The result of these arrangements is that from early 2007 onwards consumers in Europe would typically see the Europcar, Alamo and National marks used together on tri-branded signage indicating (correctly) that those three brands were under common control in Europe. The photograph below shows, by way of example, the desk at Luton airport.



86. In September 2008 Enterprise and Europcar concluded a revised strategic alliance agreement which replaced the one between Vanguard and Europcar. The strategic alliance between Enterprise and Europcar continued until August 2013, when it was terminated by Enterprise.
87. In August 2013 Enterprise began operating a worldwide scheme called “The Drive Alliance” which promotes the Enterprise, National and Alamo brands together. The Drive Alliance has its own website, with the tag line “Rent a car and earn rewards with Enterprise, National and Alamo worldwide”. The Drive Alliance website goes on to describe the scheme as follows:

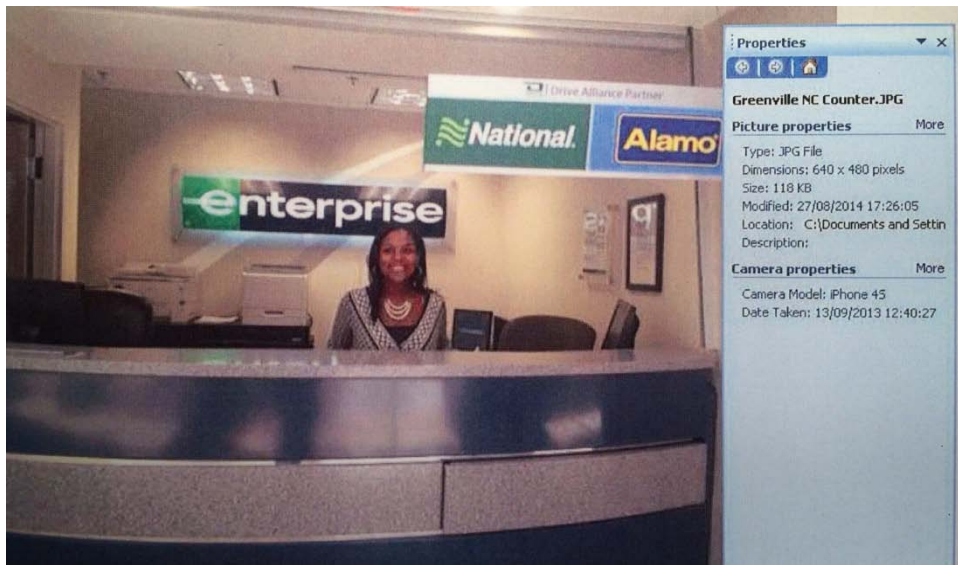
“... Enterprise ®, National ® and Alamo ® have formed an industry-first network to provide their customers with superior service and rewards worldwide. Now, if you travel to a destination where you can't rent with your preferred brand, you have the option to rent from the Drive Alliance SM network. What's more, Enterprise and National loyalty club members can earn toward free rental days and elite status with qualifying rentals from either member.

Through the Drive Alliance network, Enterprise Plus ® members can now earn points and elite status at participating Enterprise locations in Europe as well as throughout North America...”

88. The scheme is promoted on Enterprise's websites, including its European websites, which display the logos of Enterprise, National and Alamo at the foot of the page in the manner shown below.



89. In North America, where Alamo and National are under Enterprise's control, customers may see Enterprise rental branches displaying National and Alamo logos and branding. An example of this is shown below.



90. Still further, as mentioned above, in February 2012 Enterprise acquired Citer (in France) and ATESA (in Spain). At the time they were acquired by Enterprise, Citer and ATESA were franchisees of, and co-branded with, National and Alamo. The franchise agreements continued until January 2013, meaning that until that time consumers in France and Spain were exposed to the logos and trade dress of Citer or ATESA alongside that of National and/or Alamo. As noted above, since February 2013 Enterprise has been progressively re-branding these outlets as Enterprise locations.

Third party 'e' trade marks

91. Ms Watchorn, an employment lawyer, was provided with the filtered results of various trade mark searches for trade marks which comprised a lower case 'e' or a device which resembled a lower case 'e'. The searches had yielded nearly 4,000 registrations, from which trainee solicitors had selected nearly 400 for Ms Watchorn to investigate. She collated documentary evidence regarding the use of 20 of these trade marks in the UK. I reproduce what appear to be the best five examples from Europcar's perspective below.

a.



b.



c.



d.



e.



92. As Ms Watchorn confirmed in cross-examination, she did not separate out the search results to see which trade marks were registered in Class 39, which includes vehicle rental services. Had she done so, she would have realised that the results showed 11 Enterprise registrations in Class 39, one Europcar application, one registration by Air France and one registration by Elson GmbH. She had not selected either the Air France or Elson GmbH marks in order to investigate whether they had been used. Nor did she ask Europcar whether any of the trade marks that she had selected for her shortlist were significant competitors to them in the vehicle rental field.
93. Mr Keppler was asked about this in cross-examination. He had considerable experience of brands in the vehicle rental sector. When shown Ms Watchorn's shortlist of UK third party 'e' marks, the only company he had "probably" heard of was eRentals, which is not a vehicle rental provider, but a brokerage site, and which he did not regard as a significant competitor to Europcar. He agreed that the explanation for the fact that he had not heard of the others was that either they were not vehicle rental providers or they were commercially insignificant or both.
94. Accordingly, I accept the submission of counsel for Enterprise that the exercise undertaken by Europcar's solicitors does not show that there is common use of lower case 'e' trade marks in the vehicle rental sector in the UK. Still less does it show that the use of lower case 'e' logos on a green background is common. The opposite is true. As noted above, the sector is dominated by a small number of vehicle rental companies. Until Europcar adopted the e-moving logo, Enterprise was the only company in the sector which used a lower case 'e' logo on a green background.

The surveys

95. In accordance with the guidance given by the Court of Appeal in *Interflora Inc v Marks and Spencer plc* [2012] EWCA Civ 1501, [2013] FSR 21 (“*Interflora (CA I)*”) at [149], the agreed order for directions in this case required the court’s permission to be sought for any survey other than a pilot survey to be conducted or adduced in evidence.
96. On 28 February 2014 Enterprise applied for permission to adduce three surveys in evidence and for permission to carry out a further survey and adduce it in evidence, all for the purposes of establishing Enterprise’s pleaded case that the Trade Marks have an enhanced distinctive character and/or reputation and/or goodwill attached to them. The four surveys were as follows:
- i) a pilot survey which had been carried out for the purposes of the OHIM opposition proceedings between the parties (“the Pilot OHIM Survey”);
 - ii) a full survey which had been carried out for the purposes of the OHIM opposition proceedings between the parties (“the Main OHIM Survey”);
 - iii) a pilot survey which had been carried out for the purposes of these proceedings (“the Pilot Court Survey”);
 - iv) a full survey which Enterprise proposed to carry out for the purposes of these proceedings (“the Main Court Survey”).
97. The application came on for hearing before Morgan J on 20 June and 1 July 2014. For the purposes of that hearing, the parties served written evidence from Mr Malivoire and Mr Phillips.
98. In his judgment dated 22 July 2014 ([2014] EWHC 2498 (Ch)) Morgan J directed himself in accordance with the guidance given by the Court of Appeal in *Interflora (CA I)*, *Interflora Inc v Marks and Spencer plc* [2013] EWCA Civ 319, [2013] FSR 26 (“*Interflora (CA II)*”) and *Zee Entertainment Enterprises Ltd v Zeebox Ltd* [2014] EWCA Civ 82, [2014] FSR 26. As Lewison LJ stated in *Interflora (CA II)* at [5]:
- “Mr Hobbs QC rightly said that [*Interflora (CA I)*] was intended to send the general message that evidence from consumers in this kind of case (i.e. trade mark infringement involving ordinary consumer goods or services) should only be admitted if it is of *real* value; and even then only if the value justifies the cost; and that judges should be robust gatekeepers in that respect.”
99. As Morgan J noted in his judgment, Europcar contended that none of the actual or proposed surveys was of real evidential value for nine reasons:
- i) the samples were too narrow;
 - ii) the samples were too wide;
 - iii) there was a demographic bias;

- iv) the questions had a biasing or leading effect;
 - v) the questions invited speculation;
 - vi) the coding of the answers was inappropriate;
 - vii) there was no control survey;
 - viii) the results of the English pilot were less impressive from Enterprise's point of view than the results of the OHIM survey; and
 - ix) the dates of the surveys were after the relevant date for assessing distinctiveness, reputation or goodwill.
100. Morgan J considered each of these criticisms in turn at [46]-[68], and concluded that none of them was likely to deprive the surveys of real value. Accordingly, his overall conclusion at [72] was that it was likely that the surveys would be of real value at trial. He then considered whether the likely value of the surveys justified the cost. In that regard, he noted that the costs which had been incurred by the parties on the application were about the same as the estimated costs of carrying out the Court Surveys and responding to the survey evidence. In particular, Europcar's costs of resisting the application were greater than its estimated costs of responding to the evidence. Taking this into account, he concluded at [76] that the cost was justified by the likely value of the evidence. Accordingly, he granted Enterprise permission to adduce the results of the OHIM Surveys and the Pilot Court Survey and to carry out and adduce the results of the Main Court Survey. He also gave both parties permission to adduce expert evidence in relation to the surveys.
101. Pursuant to the permission granted by Morgan J, Enterprise duly carried out the Main Court Survey. Furthermore, both parties served experts' reports from their respective experts. As counsel for Enterprise pointed out, all that has really changed since the hearing before Morgan J is that the results of the Main Court Survey are now available. Although Mr Malivoire was cross-examined on his report, unsurprisingly he maintained his opinions. As noted above, Europcar did not in the end call Mr Phillips. Nevertheless, Europcar maintain most of the criticisms which they advanced before Morgan J.
102. It can therefore be seen that the result of the procedure prescribed in *Interflora (CA I)* and *Interflora (CA II)* has been to put the parties in the present case to the cost (amounting to some £215,000) of a two-day hearing in advance of trial which has not saved any costs at trial and to require the court to consider Europcar's criticisms of the surveys twice.

The OHIM Surveys

103. The OHIM Surveys were street surveys in which the respondents were stopped by interviewers in the street and, if willing to participate, asked questions. Third party data from TGI (a market research organisation) was used to identify an appropriate demographic profile for respondents. The OHIM Surveys were not confined to persons within this demographic profile. Instead, the OHIM Surveys were designed so

that 75% of the sample corresponded to this demographic profile and 25% comprised anyone who appropriately answered the recruitment questions.

104. Respondents were first asked if they or any close friend or family member worked in certain occupations, including car rental and as lawyers, and if so they were excluded. Respondents were then asked whether they had rented a vehicle in the UK in the last 10 years or would consider doing so in the future. If the answer was “yes”, the interviewers said to the respondents, “I’m now going to show you something”, and handed the respondents a card bearing Enterprise’s current ‘e’ logo. When the respondent was ready (Pilot) or after a five second pause (Main), respondents were asked two (Pilot) or three (Main) questions: (1) “Have you ever seen this before in relation to vehicle rental services?”; (2) If yes, “Where have you seen it before?”; and (3) “Is there anything else that you can tell me about it?”. Interviewers were instructed to record the answers verbatim.
105. The Pilot OHIM Survey involved 101 respondents and was conducted between 24 and 26 October 2013. The Main OHIM Survey involved 1038 respondents and was conducted between 2 and 30 November 2013.

The Court Surveys

106. The methodology of the Court Surveys differed somewhat from that used for the OHIM Surveys. Interviewers were provided with quotas designed to ensure that a sample representative of all British adults was selected. The recruitment questions were asked at the end and the main question contained no information about the product or service sector. As before, interviewers said to the respondents "I am now going to show you something" and showed them the card. After a five second pause, the interviewer then asked the respondents: (1) “What can you tell me about what you are looking at?”; (2) “Do you or any close friends or members of your family work in car rental services or as a lawyer?”; and (3) “Have you in the last 10 years rented or would consider in the future renting a vehicle in the UK?” People who answered question 2 “yes” were excluded.
107. The Pilot Court Survey involved 257 respondents. The 257 respondents included 100 who had rented a car in the last 10 years or would consider doing so in the future. The sample of 100 was matched against the TGI data and it was found that it broadly reflected that data. The Pilot Court Survey was conducted between 8 and 10 February 2014.
108. The Main Court Survey involved 2,978 respondents. These included 903 who had rented a car in the last 10 years or would consider doing so in the future. The Main Court Survey was conducted between 28 July and 6 September 2014.

The results

109. In the OHIM Surveys, 36% (410 out of 1139) of respondents mentioned Enterprise. In the Court Surveys, 24% (236 out of 1003) of respondents mentioned Enterprise. These figures exclude a small number of respondents who used the word “enterprise”, but in such a way that Mr Malivoire considered it unclear whether they were intending to refer to Enterprise. The TGI data show that people who rent vehicles are more likely to be male, aged 17-54, and from the ABC1 social groups. From that

segment of the population, 49% of respondents in the OHIM Surveys mentioned Enterprise and 41% in the Court Surveys. Furthermore, many respondents referred to Enterprise when shown the ‘e’ logo before they were asked any questions at all. The difference between the results in the two sets of Surveys is attributable to the fact that in the Court Surveys the respondents were provided with no indication of market sector.

The law

The key provisions of the Regulation

110. Article 9(1)(b) and (c) of the Regulation provide as follows:

“A Community trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

...

- (b) any sign where, because of its identity with, or similarity to, the Community trade mark and the identity or similarity of the goods or services covered by the Community trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the Community trade mark;
- (c) any sign which is identical with, or similar to, the Community trade mark in relation to goods or services which are not similar to those for which the Community trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the Community trade mark.”

111. Parallel provisions are contained in Article 5(1)(b) and (2) of European Parliament and Council Directive 2008/95/EC of 22 October 2008 to approximate the laws of the Member States relating to trade marks (codified version) (“the Directive”). Those provisions are implemented in the United Kingdom by section 10(2) and (3) of the Trade Marks Act 1994.

Article 9(1)(b) of the Regulation

112. In order to establish infringement under Article 9(1)(b) of the Regulation, six conditions must be satisfied: (i) there must be use of a sign by a third party within the relevant territory; (ii) the use must be in the course of trade; (iii) it must be without the consent of the proprietor of the trade mark; (iv) it must be of a sign which is at least similar to the trade mark; (v) it must be in relation to goods or services which are at least similar to those for which the trade mark is registered; and (vi) it must give

rise to a likelihood of confusion on the part of the public. In the present case there is no issue as to conditions (i)-(v).

113. *Likelihood of confusion.* The manner in which the requirement of a likelihood of confusion in Article 9(1)(b) of the Regulation and Article 5(1)(b) of the Directive, and the corresponding provisions concerning relative grounds of objection to registration in both the Directive and the Regulation, should be interpreted and applied has been considered by the Court of Justice of the European Union in a considerable number of decisions, and in particular the leading cases of Case C-251/95 *SABEL BV v Puma AG* [1997] ECR I-6191, Case C-39/97 *Canon Kabushiki Kaisha v Metro-Goldwyn-Meyer Inc* [1998] ECR I-5507, Case C-342/97 *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* [1999] ECR I-3819, Case C-425/98 *Marca Mode CV v Adidas AG* [2000] ECR I-4861, Case C-3/03 *Matrazen Concord GmbH v Office for Harmonisation in the Internal Market* [2004] ECR I-3657, Case C-120/04 *Medion AG v Thomson Sales Germany & Austria GmbH* [2005] ECR I-8551 and Case C-334/05 *Office for Harmonisation in the Internal Market v Shaker de L. Laudato & C SAS* [2007] ECR I-4529.
114. The Trade Marks Registry has adopted a standard summary of the principles established by these authorities. There are a number of slightly different versions of the summary. The most accurate version, and the one which was cited with approval by Kitchin LJ in *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2012] EWCA Civ 24, [2012] FSR 19 (“*Specsavers (CA I)*”) at [52], is as follows:
- “(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;
 - (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
 - (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
 - (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
 - (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;

- (f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; and
- (k) if the association between the marks causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion.”

115. As I have noted in a number of previous judgments, although this is a convenient summary of the relevant principles, there are cases in which it is necessary to look in more detail at aspects of the Court of Justice’s jurisprudence. In the present case, it is necessary to consider once again precisely what is meant by “a likelihood of confusion”. There are two points which arise.
116. First, it is important to note that what the Court actually said in *Canon* at [29], and has frequently repeated subsequently, is that “the *risk* that the public *might* believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion” (emphasis added).
117. Secondly, in *Comic Enterprises Ltd v Twentieth Century Fox Film Corp* [2014] EWHC 185 (Ch), [2014] FSR 35 at [123]-[126] Roger Wyand QC sitting as a Deputy High Court Judge held that instances of “wrong way round confusion”, i.e. consumers familiar with the *defendant’s* sign wrongly thinking that the *claimant’s* services were connected with the *defendant* as a result of seeing the *claimant’s* trade mark, constituted evidence of a likelihood of confusion. It is not necessary for present purposes to consider the extent to which this is an accurate and complete statement of the law, since there is no dispute that such instances are at least evidence that the sign and the trade mark are sufficiently similar to be mistaken for each other.

Article 9(1)(c) of the Regulation

118. In Case C-292/00 *Davidoff & Cie SA v Gofkid Ltd* [2003] ECR I-389 and Case C-408/01 *Adidas-Salomon AG v Fitnessworld Trading Ltd* [2003] ECR I-12537 the CJEU held that, although the wording of Article 9(1)(c) of the Regulation and Article 5(2) of the Directive refer to goods or services which are not similar to those for which the mark is registered, this form of protection also extends to cases where a sign which is identical with or similar to the trade mark is used in relation to goods or services identical with or similar to those covered by the trade mark. The Court of Justice also held in *Adidas-Salomon* that it is not necessary for the trade mark proprietor to establish a likelihood of confusion in order to succeed in such a claim.
119. Accordingly, in order to establish infringement under Article 9(1)(c) of the Regulation, nine conditions must be satisfied: (i) the trade mark must have a reputation in the relevant territory; (ii) there must be use of a sign by a third party within the relevant territory; (iii) the use must be in the course of trade; (iv) it must be without the consent of the proprietor of the trade mark; (v) it must be of a sign which is at least similar to the trade mark; (vi) it must be in relation to goods or services; (vii) it must give rise to a “link” between the sign and the trade mark in the mind of the average consumer; (viii) it must give rise to one of three types of injury, that is to say, (a) detriment to the distinctive character of the trade mark, (b) detriment to the repute of the trade mark or (c) unfair advantage being taken of the distinctive character or repute of the trade mark; and (ix) it must be without due cause. In the present case, there is no issue as to ingredients (ii), (iii), (iv), (v), (vi) or (ix). In relation to condition (viii), Enterprise alleges injuries (a) and (c), but not (b).
120. *Reputation of the trade mark.* This is not a particularly onerous requirement. As the Court of Justice explained in Case C-375/97 *General Motors Corp v Yplon SA* [1999] ECR I-5421:
 - “24. The public amongst which the earlier trade mark must have acquired a reputation is that concerned by that trade mark, that is to say, depending on the product or service marketed, either the public at large or a more specialised public, for example traders in a specific sector.
 25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.
 26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.
 27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.”

121. Although in the case of a Community trade mark the mark must be known by a significant part of the relevant public in a substantial part of the territory of the European Union, in an appropriate case the territory of a single Member State may suffice for this purpose: see Case C-301/07 *PAGO International GmbH* [2009] ECR I-9429.
122. *Link*. Whether the use of the sign gives rise to a link between the sign and the trade mark in the mind of the average consumer must be appreciated globally: see *Adidas-Salomon v Fitnessworld* at [29]-[30]. The fact that the sign would call the trade mark to mind for the average consumer, who is reasonably well informed and reasonably observant and circumspect, is tantamount to the existence of such a link: see Case C-252/07 *Intel Corp Inc v CPM United Kingdom Ltd* [2008] ECR I-8823 at [60].
123. *Detriment to the distinctive character of the trade mark*. In *Intel v CPM* the Court held as follows in relation to this type of injury:
- i) The more immediately and strongly the trade mark is brought to mind by the sign, the greater the likelihood that the current or future use of the sign is detrimental to the distinctive character of the mark: [67].
 - ii) The stronger the earlier mark's distinctive character and reputation, the easier it will be to accept that detriment has been caused by it: [69].
 - iii) The existence of a link between the sign and the mark does not dispense the trade mark proprietor from having to prove actual and present injury to its mark, or a serious likelihood that such an injury will occur in the future: [71].
 - iv) The more "unique" the trade mark, the greater the likelihood that use of a later identical or similar mark will be detrimental to its distinctive character: [74].
 - v) Detriment to the distinctive character of the trade mark is caused when the mark's ability to identify the goods or services for which it is registered and used as coming from the proprietor is weakened. It follows that proof that the use of the sign is or would be detrimental to the distinctive character of the earlier mark requires evidence of a change in the economic behaviour of the average consumer of the goods or services for which the mark is registered consequent on the use of the sign, or a serious likelihood that such a change will occur in the future: [77].
124. In Case C-383/12 *Environmental Manufacturing LLP v Office for Harmonisation in the Internal Market* [EU:C:2013:741] the Court of Justice re-iterated that proof that the use of the sign is, or would be, detrimental to the distinctive character of the trade mark requires evidence of a change in the economic behaviour of the average consumer of the goods or services for which the mark is registered consequent on the use of the sign, or a serious likelihood that such a change will occur in the future. In this connection, the Court held:
- "42. Admittedly, Regulation No 207/2009 and the Court's case-law do not require evidence to be adduced of actual detriment, but also admit the serious risk of such detriment, allowing the use of logical deductions.

43. None the less, such deductions must not be the result of mere suppositions but, as the General Court itself noted at paragraph 52 of the judgment under appeal, in citing an earlier judgment of the General Court, must be founded on ‘an analysis of the probabilities and by taking account of the normal practice in the relevant commercial sector as well as all the other circumstances of the case’.”
125. *Unfair advantage.* The Court of Justice described taking unfair advantage of the distinctive character or repute of a trade mark in Case C-487/07 *L’Oréal SA v Bellure NV* [2009] ECR I-5185 at [41] as follows:
- “As regards the concept of ‘taking unfair advantage of the distinctive character or the repute of the trade mark’, also referred to as ‘parasitism’ or ‘free-riding’, that concept relates not to the detriment caused to the mark but to the advantage taken by the third party as a result of the use of the identical or similar sign. It covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation.”
126. The Court of Justice explained the correct approach to determining whether unfair advantage has been taken of the distinctive character or repute of the trade mark in that case as follows:
- “44. In order to determine whether the use of a sign takes unfair advantage of the distinctive character or the repute of the mark, it is necessary to undertake a global assessment, taking into account all factors relevant to the circumstances of the case, which include the strength of the mark’s reputation and the degree of distinctive character of the mark, the degree of similarity between the marks at issue and the nature and degree of proximity of the goods or services concerned. As regards the strength of the reputation and the degree of distinctive character of the mark, the Court has already held that, the stronger that mark’s distinctive character and reputation are, the easier it will be to accept that detriment has been caused to it. It is also clear from the case-law that, the more immediately and strongly the mark is brought to mind by the sign, the greater the likelihood that the current or future use of the sign is taking, or will take, unfair advantage of the distinctive character or the repute of the mark or is, or will be, detrimental to them (see, to that effect, *Intel Corporation*, paragraphs 67 to 69).
45. In addition, it must be stated that any such global assessment may also take into account, where necessary, the fact that there is a likelihood of dilution or tarnishment of the mark.

...

49. In that regard, where a third party attempts, through the use of a sign similar to a mark with a reputation, to ride on the coat-tails of that mark in order to benefit from its power of attraction, its reputation and its prestige, and to exploit, without paying any financial compensation and without being required to make efforts of his own in that regard, the marketing effort expended by the proprietor of that mark in order to create and maintain the image of that mark, the advantage resulting from such use must be considered to be an advantage that has been unfairly taken of the distinctive character or the repute of that mark.”
127. It is clear both from the wording of Article 5(2) of the Directive and Article 9(1)(c) of the Regulation and from the case law of the Court of Justice interpreting these provisions that this aspect of the legislation is directed at a particular form of unfair competition. It is also clear from the case law both of the Court of Justice and of the Court of Appeal in this country that the defendant’s conduct is most likely to be regarded as unfair where he intends to take advantage of the reputation and goodwill of the trade mark. Nevertheless, in *Jack Wills Ltd v House of Fraser (Stores) Ltd* [2014] EWHC 110 (Ch), [2014] FSR 39 at [80] I held that there is nothing in the case law to preclude the court from concluding in an appropriate case that the use of a sign the objective effect of which is to enable the defendant to benefit from the reputation and goodwill of the trade mark amounts to unfair advantage even if it is not proved that the defendant subjectively intended to exploit that reputation and goodwill.

Contextual assessment

128. In determining whether there is a likelihood of confusion under Article 9(1)(b) of the Regulation, the court must take into account the precise context in which the sign has been used: see Case C-533/06 *O2 Holdings Ltd v Hutchison 3G UK Ltd* [2008] ECR I-4231 at [64], *Specsavers (CA I)* at [87] and Case C-252/12 *Specsavers International Healthcare Ltd v Asda Stores Ltd* [EU:C:2013:497] (“*Specsavers (CJEU)*”) at [45]. There is no dispute that the same principle must apply when determining whether the use falls within Article 9(1)(c) of the Regulation.

Date of assessment

129. It is common ground that, in general, the question whether the use of a sign infringes a trade mark falls to be assessed as at the date that the use of the sign was commenced: see Case C-145/05 *Levi Strauss & Co v Casucci SpA* [2006] ECR I-3703. Given the need for a contextual assessment, I held in *Stichting BDO v BDO Unibank, Inc* [2013] EWHC 418 (Ch), [2013] FSR 35 at [94] that, if the defendant used the sign in a materially different manner or context at a later date, a new assessment had to be made as of that date.

The average consumer

130. It is well established that many questions in European trade mark law, including infringement claims under Article 9(1)(b) and (c) of the Regulation, are to be assessed

from the perspective of the “average consumer” of the relevant goods or services, who is deemed to be reasonably well-informed and reasonably observant and circumspect. I discussed the concept of the average consumer at some length in *Interflora Inc v Marks and Spencer plc* [2013] EWHC 1291 (Ch), [2013] ETMR 35 (“*Interflora (Trial)*”) at [194]-[224] and again in *Jack Wills* at [50]-[68]. Since then, the matter has been considered by Kitchin LJ delivering the judgment of the Court of Appeal in *Interflora Inc v Marks and Spencer plc* [2014] EWCA Civ 1403 (“*Interflora (CA III)*”) at [107]-[130]. I would summarise the position as follows.

131. First, the average consumer is, as Lewison LJ put it in *Interflora (CA I)* at [44] and [73], a “legal construct”.
132. Secondly, the average consumer provides what the EU legislature has described in recital (18) of the European Parliament and Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market as a “benchmark”. By assessing matters from the perspective of a consumer who is reasonably well-informed and reasonably observant and circumspect, confusion on the part of those who are ill-informed or unobservant is discounted. In this way, as Kitchin LJ explained in *Interflora (CA III)* at [113], the court is able “to strike the right balance between various competing interests including, on the one hand, the need to protect consumers and, on the other hand, the promotion of free trade in an openly competitive market”.
133. Thirdly, as Lewison LJ stressed in *Interflora (CA I)* at [45]-[56], in a case concerning ordinary consumer goods and services, the court is able to put itself into the position of the average consumer without requiring expert evidence or a consumer survey. As Chadwick LJ said in *BACH and BACH FLOWER REMEDIES Trade Marks* [2000] RPC 513 at [41], in a passage which Lewison LJ emphasised in *Interflora (CA I)* at [41]-[43]:

“The task for the court is to inform itself, by evidence, of the matters of which a reasonably well informed and reasonably observant and circumspect consumer of the products would know; and then, treating itself as competent to evaluate the effect which those matters would have on the mind of such a person with that knowledge, ask the [relevant] question”.
134. Fourthly, the average consumer test is not a statistical test in the sense that, if the issue is likelihood of confusion, the court is not trying to decide whether a statistical majority of the relevant class of persons is likely to be confused.
135. Fifthly, the average consumer test does not amount to a single meaning rule or a rule restricting consideration to the reactions of a single hypothetical person. On the contrary, as Kitchin LJ explained in *Interflora (CA III)*:

“129. ... In deciding a question of infringement of a trade mark, and determining whether a sign has affected or is liable to affect one of the functions of the mark in a claim under Article 5(1)(a) of the Directive (or Article 9(1)(a) of the Regulation), whether there is a likelihood of confusion or association under Article 5(1)(b) (or Article 9(1)(b)), or whether there is a link

between the mark and the sign under Article 5(2) (or Article 9(1)(c)), the national court is required to make a qualitative assessment. It follows that it must make that assessment from the perspective of the average consumer and in accordance with the guidance given by the Court of Justice. Of course the court must ultimately give a binary answer to the question before it, that is to say, in the case of Article 5(1)(b) of the Directive, whether or not, as a result of the accused use, there exists a likelihood of confusion on the part of the public. But in light of the foregoing discussion we do not accept that a finding of infringement is precluded by a finding that many consumers, of whom the average consumer is representative, would not be confused. To the contrary, if, having regard to the perceptions and expectations of the average consumer, the court concludes that a significant proportion of the relevant public is likely to be confused such as to warrant the intervention of the court then we believe it may properly find infringement.

130. In the circumstances of this case we are, of course, concerned with a claim under Article 5(1)(a) (and Article 9(1)(a)) in the context of internet advertising and the question to be answered was whether the advertisements in issue did not enable reasonably well-informed and observant internet users, or enabled them only with difficulty, to ascertain whether the goods and services so advertised originated from Interflora or an undertaking economically linked to Interflora or, on the contrary, originated from M & S, a third party. In answering this question we consider the judge was entitled to have regard to the effect of the advertisements upon a significant section of the relevant class of consumers, and he was not barred from finding infringement by a determination that the majority of consumers were not confused.”
136. Sixthly, if it is shown that the claimant’s trade mark has a distinctive character, or an enhanced distinctive character, amongst a significant proportion of the relevant public, then it is necessary to consider the impact of an allegedly infringing sign upon the proportion of the relevant class of persons to whom the trade mark is distinctive. This does not require the court to assume that the mark is equally distinctive to all such persons, however.
137. Seventhly, the “relevant public” (an expression which is also frequently used by both the Court of Justice and the General Court) of whom the average consumer is representative normally consists of people with a spectrum of attributes such as gender, age, ethnicity and social group. But if there is evidence that the trade mark is more likely to have acquired distinctive character amongst one demographic segment of the relevant class of persons than another, it is proper to take that into account.
138. Eighthly, the level of attention exercised by the average consumer depends on the nature of the goods or services in issue.

139. An issue which arises in this case is whether the relevant public of whom the average consumer is representative can include residents of a foreign country, such as residents of the USA. It is settled that, in assessing matters from the perspective of the average consumer, the court must have regard to the social, linguistic, cultural and economic conditions in the Member State concerned, which may well vary as between Member States: see Case C-313/94 *Fratelli Graffione SNC v Ditta Fransa* [1996] ECR I-6039 at [22], Case C-220/98 *Estée Lauder Cosmetics GmbH v Lancaster Group GmbH* [2000] ECR I-117 at [29], Case C-421/04 *Matratzen Concord AG v Hulka Germany SA* [2006] ECR I-2303 at [25] and Case C-238/06 *Develey Holding GmbH v OHIM* [2007] ECR I-9375 at [58]. Neither side was able to cite any authority which directly addresses the present issue, however. Accordingly, I must consider it as a matter of principle. In that regard, the following points seem to me to be pertinent.
140. First, in the case of vehicle rental services in the UK, the service is physically provided in this country. In almost all cases, the consumer receives the vehicle here, drives it here and returns it here. Furthermore, in almost all cases, the rental contract will be entered into in this country. These factors are unaffected by the country of residence of the consumer.
141. Secondly, as I have already observed, the vehicle rental market has a strong transnational character. More specifically, many private consumers only rent vehicles when visiting a foreign country. Even in the case of corporate customers, as Mr Keppeler explained, larger companies often contract for vehicle rental services in respect of multiple territories.
142. Thirdly, given the circumstances outlined in the two preceding paragraphs, I consider that it would be artificial and wrong to exclude consumers of vehicle rental services who are resident abroad from the relevant public in the UK. On the other hand, I consider that the court should treat this part of the relevant public with some caution, since it will inevitably be harder for the court to put itself into the position of such consumers than into the position of consumers resident in the UK.
143. Fourthly, even if one disregards foreign residents, it is important to bear in mind that the population of the UK is very heterogeneous. In particular, the population includes a large number of people who are foreign nationals and who have been resident here for varying lengths of time. Some of those persons intend to return to their country of origin at some point, some intend to stay in this country indefinitely (and possibly become naturalised citizens) and others are uncertain as to their future plans. Many of these people are citizens of EU Member States, but others are citizens of other countries. For example, the 2011 census found that 177,185 people living in England and Wales were born in the USA.

Acquired distinctive character

144. I reviewed the law on this subject in *Société des Produits Nestlé SA v Cadbury UK Ltd* [2014] EWHC 16 (Ch), [2014] ETMR 17 at [39]-[48]. As I explained there, the following propositions of law are settled. First, for a trade mark to possess distinctive character, it must serve to identify the goods or services in respect of which registration is applied for as originating from a particular undertaking and thus to distinguish the goods or services from those of other undertakings.

145. Secondly, the distinctive character of a trade mark must be assessed by reference to (i) the goods or services in respect of which registration has been applied for and (ii) the perception of the average consumer of those goods or services, who is deemed to be reasonably well-informed and reasonably observant and circumspect.
146. Thirdly, the criteria for assessment of distinctive character are the same for all categories of trade marks, but nevertheless the perception of the relevant public is not the same for all categories of trade marks and it may therefore be more difficult to establish distinctive character in relation to some categories (such as shapes, colours, personal names, advertising slogans and surface treatments) than others.
147. Fourthly, in assessing whether a trade mark has acquired a distinctive character the competent authority must make an overall assessment of the relevant evidence, which in addition to the nature of the mark may include (i) the market share held by goods bearing the mark, (ii) how intensive, geographically widespread and long-standing the use of the mark has been, (iii) the amount invested by the proprietor in promoting the mark, (iv) the proportion of the relevant class of persons who, because of the mark, identify the goods or services as emanating from the proprietor, (v) evidence from trade and professional associations and (vi) (where the competent authority has particular difficulty in assessing the distinctive character) an opinion poll. If the relevant class of persons, or at least a significant proportion of them, identifies goods or services as originating from a particular undertaking because of the trade mark, it has acquired a distinctive character.
148. Fifthly, with regard to the acquisition of distinctive character through use, the identification by the relevant class of persons of the product or service as originating from a given undertaking must be as a result of the use of the mark as a trade mark. The expression “use of the mark as a trade mark” refers solely to use of the mark for the purposes of the identification, by the relevant class of persons, of the product as originating from a given undertaking.
149. Sixthly, a trade mark may acquire a distinctive character in consequence of the use of that mark as part of, or in conjunction with, another trade mark (which may itself be a registered trade mark).
150. Nevertheless, there are two issues which require consideration with regard to acquired distinctive character. First, in *Nestlé v Cadbury I* noted that the English courts have thus far held that it was not enough to prove that at the relevant date a significant proportion of the relevant class of persons recognise the mark and associate it with the applicant for registration’s goods in the sense that, if they were to consider who marketed goods bearing that mark, they would identify the applicant. Rather, the applicant must prove that a significant proportion of the relevant class of persons rely upon the mark (as opposed to any other trademarks which may also be present) as indicating the origin of the goods. Since it is not clear that this is a correct statement of the law, however, I referred the following question to the CJEU (question 1 in Case C-215/14):

“In order to establish that a trade mark has acquired distinctive character following the use that had been made of it within the meaning of Article 3(3) of Directive 2005/95/EC, is it sufficient for the applicant for registration to prove that at the relevant date a significant proportion of the relevant class of

persons recognise the mark and associate it with the applicant's goods in the sense that, if they were to consider who marketed goods bearing that mark, they would identify the applicant; or must the applicant prove that a significant proportion of the relevant class of persons rely upon the mark (as opposed to any other trademarks which may also be present) as indicating the origin of the goods?"

I do not understand it to be in dispute that, pending the Court of Justice's answer to this question, I should continue to apply the law as stated in *Nestlé v Cadbury*.

151. Secondly, counsel for Europcar drew attention to the following passage in the recent judgment of the Court of Justice in Joined Cases C-217/13 and C-218/13 *Oberbank AG v Deutscher Sparkassen- und Giroverband eV* [EU:C:2014:2012]:

“43. It should also be stated that Union law does not preclude the competent authority, where it has particular difficulty in assessing the distinctive character acquired through use of the mark in respect of which registration or a declaration of invalidity is sought, from having recourse, under the conditions laid down by its own national law, to an opinion poll as guidance for its judgment (see, to that effect, *Windsurfing Chiemsee* EU:C:1999:230, paragraph 53 and the case-law cited). If the competent authority finds it necessary to resort to such a survey, it must determine the percentage of consumers that would be sufficiently significant (see, by analogy, Case C-478/07 *Budějovický Budvar* EU:C:2009:521, paragraph 89).

44. However, the circumstances in which the requirement concerning the acquisition of a distinctive character through use, under Article 3(3) of Directive 2008/95, may be regarded as satisfied cannot be shown to exist solely by reference to general, abstract data such as predetermined percentages (*Windsurfing Chiemsee* EU:C:1999:230, paragraph 52, and *Philips* EU:C:2002:377, paragraph 62).

...

48. It follows from the foregoing that it is not possible to state in general terms, for example by referring to predetermined percentages relating to the degree of recognition attained by the mark within the relevant section of the public, when a mark has acquired a distinctive character through use and that, even with regard to contourless colour marks, such as the mark at issue in the main proceedings, and even if a consumer survey may be one of the factors to be taken into account when assessing whether such a mark has acquired a distinctive character through use, the results of a consumer survey cannot be the only decisive criterion to support the conclusion that a distinctive character has been acquired through use.”

152. Counsel for Europcar pointed out that, in the last sentence of [43], the Court of Justice had held that the competent authority “must determine the percentage of consumers that would be sufficiently significant”. In my judgment it is necessary to read this sentence in context. It is clear that the Court was not saying that, where an opinion poll is relied on, it has to be shown that the sign has become distinctive to any particular percentage of consumers. Rather, as I read this passage, what the Court is saying is that what percentage will suffice depends on the circumstances of the case, which it is for the competent authority to assess. This reading is supported by the Court’s reference to *C-478/07 Budějovický Budvar np v Rudolf Ammersin GmbH* [2009] ECR I-7721, which in turn refers back to Case *C-210/96 Gut Springenheide GmbH v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* [1998] ECR I-4657.

Black and white registrations

153. As noted above, 497 is registered in black and white, but Enterprise has made extensive use of it in green and white. Indeed, it does not appear from the evidence that Enterprise makes any significant use of 497 in black and white. In *Specsavers (CJEU)*, which also concerned a trade mark which had been registered in black and white but used in green and white, the CJEU ruled as follows:

“2. Article 9(1)(b) and (c) of Regulation 207/2009 must be interpreted as meaning that where a Community trade mark is not registered in colour, but the proprietor has used it extensively in a particular colour or combination of colours with the result that it has become associated in the mind of a significant portion of the public with that colour or combination of colours, the colour or colours which a third party uses in order to represent a sign alleged to infringe that trade mark are relevant in the global assessment of the likelihood of confusion or unfair advantage under that provision.”

154. Counsel for Europcar pointed out that in Case *T-623/11 Pico Food GmbH v OHIM* [EU:T:2014:199] at [37]-[39] the General Court had rejected the appellant’s argument that registration of a trade mark in black and white covers “all colour combinations which are enclosed within the graphic representation”. In my judgment this does not detract from the Court of Justice’s rulings in *Specsavers* and has no bearing on the present case.

Use of the sign in a colour associated with the defendant

155. As noted above, Europcar has made extensive use of the colour green in its branding and livery. The CJEU also ruled in *Specsavers (CJEU)* as follows:

“3. Article 9(1)(b) and (c) of Regulation 207/2009 must be interpreted as meaning that the fact that the third party making use of a sign which allegedly infringes the registered trade mark is itself associated, in the mind of a significant portion of the public, with the colour or particular combination of colours which it uses for the representation of that sign is relevant to

the global assessment of the likelihood of confusion and unfair advantage for the purposes of that provision.”

Passing off

156. The necessary elements for a claim in passing off were restated by the House of Lords in *Reckitt & Colman Products Ltd v Borden Inc* [1990] RPC 341 as follows:
- (1) the claimant's goods or services have acquired a goodwill in the market and are known by some distinguishing name, mark or other indication;
 - (2) the defendant has used, or threatens to use, a name, mark or other indication which has led, or is likely to lead, the public to believe that goods or services offered by the defendant are goods or services of the claimant, or connected with it, and thus to a misrepresentation by the defendant (whether or not intentional); and
 - (3) the claimant has suffered, or is likely to suffer, damage as a result of the erroneous belief engendered by the defendant's misrepresentation.
157. *Date of assessment.* The relevant date for the purpose of assessing Enterprise’s claim for passing off is the date of inception of the use complained of: see *Cadbury-Schweppes v The Pub Squash Co.* [1981] RPC 429 at 494, *Anheuser-Busch Inc. v Budějovický Budvar NP* [1984] FSR 413 at 462 and *Inter Lotto (UK) Ltd v Camelot Group plc* [2003] EWCA Civ 1132, [2004] RPC 9 at [7]. Neither side argued that the date or dates should be different to the date or dates at which the trade mark claim fell to be assessed.
158. *Standard of perspicacity.* It has long been the law that the correct approach is to consider whether, as Lord Cranworth LC put it in *Seixo v Provezende* (1865-66) LR 1 Ch App 192 at 196, “ordinary purchasers, purchasing with ordinary caution, are likely to be misled”. No claim for passing off lies if, as Foster J famously observed in *Morning Star Co-Operative Society Ltd v Express Newspapers Ltd* [1979] FSR 113 at 117, “only a moron in a hurry would be misled”. It has also long been the law that, as Romer LJ explained in *Payton & Co Ltd v Snelling, Lampard & Co. Ltd* (1900) 17 RPC 48 at 57, “[t]he kind of customer that the courts ought to think of in these cases is the customer who knows the distinguishing characteristics of the plaintiff's goods, those characteristics which distinguish his goods from other goods on the market so far as relates to general characteristics. The customer must be one who, knowing what is fairly common to the trade, knows of the plaintiff's goods by reason of these distinguishing characteristics.” Thus English passing off law requires the court to consider whether ordinary consumers who purchase with ordinary caution and who know what is fairly common to the trade are likely to be misled.
159. Counsel for Europcar submitted that European law now required claims for passing off to be assessed from the perspective of the “average consumer” discussed above in relation to trade marks. I am doubtful that this represents a materially different standard to that applied by the English law of passing off, although there is a conceptual difference. In any event, however, I do not accept this submission. In support of the submission, counsel for Europcar relied upon the decisions of the Court of Justice in *Gut Springenheide* and *Estée Lauder*. In my judgment, however, neither

of those decisions supports the submission. Passing off is part of the English law of unfair competition. Save to the limited extent effected by Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version), unfair competition law has not been harmonised within the European Union. It is true that the law of passing off must not be applied in a manner which creates an unjustified barrier to trade between Member States, but I do not consider that this requires claims for passing off to be assessed from the perspective of the average consumer.

160. *Deception of foreign customers.* There is substantial case law on the question of whether foreign traders who have a reputation, but no business, in England and Wales can bring an action for passing off here. This issue was most recently considered by the Court of Appeal in *Starbucks (HK) v British Sky Broadcasting* [2013] EWCA Civ 1465, [2014] FSR 20. An appeal from that decision is due to be heard by the Supreme Court later this year.
161. In this case a different question arises, which is whether, where the claimant does have a business and goodwill in England and Wales, it can rely upon deception of customers who are resident abroad, and in particular deception of customers who became aware of the claimant's business and trade mark in their home country and then encounter the defendant's sign in this country. Counsel for Enterprise submitted that this question should be answered in the affirmative. He cited a number of authorities in support of this submission, of which I shall mention three.
162. In *Globelgance BV v Sarkissian* [1973] FSR 461 the claimant, an Italian-based business which designed and sold women's clothes under the mark VALENTINO, was granted an interlocutory injunction preventing the defendant from operating a menswear business in London with the same name. In concluding that a substantial number of persons were likely to be misled, Templeman J took into account consumers who were resident abroad at 473:

“On that it seems to me that the actual user in this country in the way I have mentioned can be supplemented by the reputation of the plaintiff and by the activities of the plaintiff outside England. The number of persons who, going down Jermyn Street and seeing the defendants operating under the name ‘Valentino’, will include English people who have been abroad and may have seen one or more of the Valentino boutiques which are abroad, and they will include American and European visitors to this country who may also have seen Valentino boutiques abroad.”
163. In *Anheuser-Busch Inc v Budejovicky Budvar NP* [1984] FSR 413 the claimant had sold substantial quantities of BUDWEISER beer through specialist “PX” shops in US military bases in the UK. This beer was imported free of duty, priced in dollars and only sold to US military personnel. The claimant had not sold its beer in the general market, where the defendant's beer was being sold, however. The Court of Appeal held that the claimant had no goodwill in England and Wales and hence its claim for passing off failed.

164. In this context Oliver LJ said at 467 that:

“... no ordinary member of the public, whether he be indigenous or a foreign tourist, could consider himself a customer in this country for the plaintiffs’ beer.”

Similarly, Dillon LJ said at 476:

“If the question were whether, by sales of their beer to the general public, the plaintiffs had acquired a goodwill in this country, I would not think it right to exclude tourists, or foreign nationals working here, from the general public.”

165. In *Jian Tools For Sales Inc v Roderick Manhattan Group Ltd* [1995] FSR 924 the claimant, an American company that developed software called “BizPlan Builder”, was granted an interlocutory injunction to prevent the defendant selling equivalent software as “BusinessPlan Builder.” The defendant argued that the claimant had no goodwill in England, arguing that any sales and advertising carried out in England were *de minimis*. Part of its argument was that some at least of the UK customers should be disregarded as being customers of Jian's United States business rather than of any business Jian had in the UK. Knox J rejected this contention, observing at 933:

“I accept that this is so in relation to customers who are customers in the United States and then became United Kingdom residents without continuing to make purchases from Jian. But subject to that, I do not consider that it is right to disregard as customers of Jian within the United Kingdom who are relevant to the ascertainment whether Jian has goodwill within the United Kingdom, all those who bought Jian's product for reasons which have their origins outside the United Kingdom, such as a recommendation from an American friend. Although, as will appear later, I accept that goodwill is local as between jurisdictions, I do not accept that it follows from this that a business should be regarded as divisible in the same way and have apportioned for the purposes of determining where goodwill is situate, customers according to the historic reason for which they have become customers.”

166. Surprisingly, neither side cited the authority which appears to me to be most directly pertinent to this issue, which is the decision of the Court of Appeal in *Asprey & Garrard Ltd v WRA (Guns) Ltd* [2001] EWCA Civ 1499, [2002] FSR 31. In that case the claimant carried on the well-known Asprey jewellery, watches and guns business from its premises in Bond Street, London. It had a worldwide reputation and an international clientele. The defendants set up a competing business, which concentrated on guns, operating from a shop in Mount Street, London under the name William R. Asprey, Esquire. Jacob J granted the claimant summary judgment on its claims for passing off and trade mark infringement, a decision which was upheld by the Court of Appeal.

167. It is clear that, in considering the claim for passing off, both Jacob J and the Court of Appeal took into account deception of visitors to the UK. As Jacob J said at [11], in a passage quoted by Peter Gibson LJ at [17]:

“... the evidence that I have here from suppliers to the defendants does not really help me as to what the position is with people who may not know Aspreys very well but who have come to London and see the name Asprey on the defendant's shop. If you have an international trade, you must take your international customers as you find them. Some will speak English well, others will not speak English well. Some will know London well, others not.”

168. Similarly, Peter Gibson LJ said at [35]:

“The judge properly recognised that many would not be confused. The personal contacts, about whom William Asprey gave evidence, would not, nor would suppliers. But even the wealthy—and wealth is likely to be the chief common characteristic of the customers of both the claimant and the first defendant—may muddle the two companies, as some of the instances of confusion show, particularly when the customers include many foreigners, again as those instances illustrated. One does not have to postulate other than a ‘reasonably well informed and reasonably observant and circumspect’ customer (to use Chadwick L.J.'s phrase in *BACH and BACH FLOWER REMEDIES Trade Marks* [2000] R.P.C. 513 at p. 535) as the typical customer of both the first defendant and the claimant to recognise that there is still a likelihood of confusion and deception, as the judge found, of the public including but not limited to customers who happen to pass by in Mount Street.”

169. Accordingly, I accept the submission of counsel for Enterprise on this issue.

Date of assessment

170. Europcar contends that Enterprise’s claims should be assessed as at a single date, namely 6 December 2012, which is the date on which Europcar issued its press release announcing the adoption of the e-moving logo. Enterprise contends that its claims should be assessed as at a series of dates, as follows:

- i) November 2012/January 2013 (initial rollout);
- ii) September 2013 to March 2014 (first use of various sub-brands with the e-moving logo and also application of the logo to shuttle buses etc);
- iii) July to August 2014 (various *solus* uses of the e-moving logo).

171. In my judgment each of Europcar’s three main types of use raises different considerations. Therefore, to the extent that those uses first occurred on different dates, it is necessary to assess them as at different dates. To that extent, therefore, I

accept Enterprise's contention. It would not make a great deal of difference if I assessed all the uses as at 6 December 2012, however.

Enterprise's claim under Article 9(1)(b)

The average consumer

172. Enterprise's case is primarily focused on the private rental market. The average consumer in that market is an ordinary member of the public who rents a vehicle. As noted above, the evidence is that people who rent vehicles are more likely to be male, aged 17-54 and from the ABC1 social groups. As explained above, many consumers of vehicle rental services in the UK are resident abroad, in particular elsewhere in Europe and in North America. While there is some evidence as to the number of Enterprise customers who are resident in the USA (see paragraph 50 above), there is very little evidence as to the number resident elsewhere in Europe.
173. In addition, counsel for Enterprise placed some emphasis on the insurance replacement vehicle market. In particular, he pointed to the position of consumers who had been temporarily provided with an Enterprise vehicle under their insurance policy, and had been satisfied with the service, and who subsequently wished to rent a vehicle. Such persons would be exposed to Enterprise's branding, including the current 'e' logo, even though they had not contracted with Enterprise.

The average consumer's level of attention

174. In general, for the private consumer, renting a vehicle is both an infrequent and a considered transaction. Typically, a vehicle is hired for some specific, occasional purpose, such as a holiday. It is a moderately expensive transaction, but not particularly expensive. As discussed above, reservations are frequently made via the internet. The consumer may well have "shopped around" online or used a broker or other intermediary, looking for the best price for the desired specification of vehicle at the desired location and date. In that context, the consumer may be expected to have a moderately high level of attention.
175. It is very clear from the evidence in this case, however, that the average consumer does not always display that level of attention throughout their interaction with vehicle rental companies. On the contrary, in various circumstances, many consumers are stressed, in a hurry and relatively inattentive. This is particularly the case when they are collecting and returning vehicles in locations such as airports. But it may also be the case when collecting and returning vehicles in other locations.
176. Importantly, consumers do not always make reservations in advance. For a variety of reasons, consumers sometimes want to rent vehicles when they have not made a reservation. This can happen both at airports and at other locations. In such circumstances, the consumer's level of attention may vary depending on, for example, how much of a hurry the consumer is in.
177. There are two ways in which one might give effect to these considerations. The first is by positing that the average consumer represents consumers with a range of levels of attention, from moderately high to relatively low. The second is by positing that the average consumer has a single, average level of attention.

178. Counsel for Europcar pointed out that in Case C-361/04 P *Claude Ruiz-Picasso v OHIM* [2006] ECR I-643 the Court of Justice held as follows:

- “38. ... the Court has already held that, for the purpose of an overall assessment of the likelihood of confusion, it must be borne in mind inter alia that the average consumer’s level of attention is likely to vary according to the category of goods or services in question (*Lloyd Schuhfabrik Meyer*, paragraph 26).
39. Therefore, the Court of First Instance was fully entitled to hold, in paragraph 59 of the judgment under appeal, that, for the purposes of assessing, as provided for in Article 8(1)(b) of Regulation No 40/94, whether there is any likelihood of confusion between marks relating to motor vehicles, account must be taken of the fact that, in view of the nature of the goods concerned and in particular their price and their highly technological character, the average consumer displays a particularly high level of attention at the time of purchase of such goods.
40. Where it is established in fact that the objective characteristics of a given product mean that the average consumer purchases it only after a particularly careful examination, it is important in law to take into account that such a fact may reduce the likelihood of confusion between marks relating to such goods at the crucial moment when the choice between those goods and marks is made.
41. As to the fact that the relevant public is also likely to perceive such goods and the marks relating to them in circumstances unconnected with any act of purchase and to display, where appropriate, a lower level of attention on such occasions, the Court of First Instance was also fully entitled to observe, again in paragraph 59 of the judgment under appeal, that the existence of such a possibility does not prevent the taking into account of the particularly high level of attention exhibited by the average consumer when he prepares and makes his choice between different goods in the category concerned.
42. First, it is clear that, whatever the goods and marks at issue, there will always be situations in which the public faced with them will grant them only a low degree of attention. However, to require that account be taken of the lowest degree of attention which the public is capable of displaying when faced with a product and a mark would amount to denying all relevance, for the purpose of an assessment of the likelihood of confusion, to the criterion relating to the variable level of attention according to the category of goods, noted in paragraph 38 of this judgment.
43. Second, as observed by OHIM, the authority called upon to assess whether there is a likelihood of confusion cannot reasonably be required to establish, for each category of goods, the consumer’s average amount of attention on the basis of the level of attention which he is capable of displaying in different situations.”

179. I do not interpret this as prohibiting the court from taking into account the fact that, in circumstances such as those described above, consumers display a range of levels of attention.

180. For his part, counsel for Enterprise pointed out that in Case T-36/07 *Zipcar v OHIM* [2008] ECR II-96 the General Court considered the average consumer's level of attention concerning, among other things, car rental services. It held at [47]:

“It is true that the level of attention of the average consumer is likely to vary according to the category of goods or services in question (see *Top iX*, paragraph 45 and the case-law referred to). However, in the present case, there is no basis for the inference that the degree of attention of the relevant public is particularly high when a car rental supplier is being chosen. There are no factors present which encourage a high degree of attention, such as a high price or the technological nature of the service. Consequently, the applicant's argument that the relevant public is particularly attentive because of the nature of the services covered in the present case must be rejected.”

181. Again, I do not interpret this as prohibiting the court from taking into account the fact that consumers display a range of levels of attention. What does seem clear is that, if one takes the second approach described in paragraph 177 above, as the General Court appears to have done, the average level of attention should not be regarded as high.

182. In my view it is more realistic, and therefore preferable, to recognise that consumers in the field of vehicle rental services have varying levels of attention, just as they vary in gender, age, social grouping, ethnicity and residence. I do not consider that it would make any difference to the outcome, however, if one posited an average consumer with a single, average level of attention, namely a medium level of attention.

Inherent distinctive character of 497

183. In my view 497 has a fairly high degree of distinctive character. Although a lowercase 'e' is an extremely commonplace letter, and a letter that is widely used in both descriptive and denominative contexts, as discussed above, it is not widely used in logos to denote providers of vehicle rental services in the UK. Furthermore, 497 has a strong visual identity as a result of the double lines, which are suggestive of a dual carriage road, the extension of the horizontal bar of the 'e' to the left, the oval shape of the remainder of the 'e' and the clear contrast between the 'e' and the background.

Acquired distinctive character of 497

184. I shall consider each of the factors specified by the Court of Justice in turn.

185. *Market share.* As stated above, Enterprise's share of the vehicle rental market in the UK in 2012 was 30% and it was the market leader. Although it has only been the market leader since 2011, it has been a major player for a long time, with a substantial turnover, number of employees, number of locations and fleet size.

186. *How intensive, geographically widespread and longstanding.* Enterprise has made extensive use of its current ‘e’ logo in the ways described above. Such use has been made throughout the UK, both in national media (particularly TV advertising and Enterprise’s UK website) and at a large number of individual locations round the UK. The use is longstanding. The current ‘e’ logo has been used since 2006, and that use builds upon use of the very similar old ‘e’ logo, which started in the UK in 1994.
187. *Amount invested in promoting the mark.* Enterprise has spent very substantial figures on TV advertising and on online promotion. The advertising has reached a very significant proportion of the UK population. In addition, the relevant public are constantly exposed to the mark on signage at airports, stations and online.
188. *Trade evidence.* There is no evidence from a trade or professional association. In the absence of such evidence, counsel for Enterprise relied upon (i) evidence from Enterprise’s branch managers that customers recognised and relied on the ‘e’ logo, (ii) evidence from Europcar’s branch managers that they were familiar with Enterprise’s ‘e’ logo and (iii) the evidence from Mr Matthews and Mr McCrossan.
189. So far as category (i) is concerned, I do not find this evidence of much weight. Although I accept the evidence of the branch managers so far as it goes, as discussed above, the branch managers cannot read their customers’ minds. As to category (ii), this does not establish that consumers would be familiar with the Enterprise logo. In my judgment, however, the evidence in category (iii) is of some weight. Both Mr Matthews and Mr McCrossan gave unchallenged evidence on this topic. In particular, Mr McCrossan, who has 34 years of experience of the vehicle rental industry in the UK and Europe, said
- “Undoubtedly the green ‘e’ has a life of its own and in my experience from within the industry it is synonymous with Enterprise. In the field of car rental it is ‘short hand’ for Enterprise – a brand in its own right, much in the same way that McDonald’s ‘M’ is a shorthand for them in the fast food industry.”
190. *The Surveys.* Europcar criticised the Surveys on six main grounds which I shall consider in turn.
191. The first main criticism is that the Surveys were artificial, because they involved stopping people in the street and asking them questions about their response to a stimulus. While I accept that this means that the Surveys have to be treated with some caution, I do not accept that it means that the Surveys cannot be relied on. The same criticism would apply to most commercial survey work.
192. The second main criticism is that Europcar contends that, to have probative value, the Surveys should have been performed closer to the relevant date, which as noted above Europcar says is 6 December 2012, whereas the Surveys were carried out between October 2013 (OHIM Pilot Survey) and July-September 2014 (Main Court Survey). I do not consider this criticism has any substance, for a number of reasons. First, I have concluded that the first and second classes of use complained of by Enterprise fall to be assessed at later dates than December 2012. Secondly, it is common and almost inevitable for surveys to be conducted after the relevant date. This does not mean that

they cannot cast light on the position at the relevant date, unless there has been some intervening change in the position. Thirdly, there is no evidence of a material change in circumstances between December 2012 and the dates when the Surveys were carried out. In this regard, it was put to Mr Malivoire that a substantial amount of TV advertising had taken place shortly before the carrying out of the Court Surveys and that this might have had some impact on the number of people who were aware of Enterprise at the time. This line of questioning ignored the fact that the TV advertising was just as substantial in 2011, 2012 and 2013. Fourthly, there is no reason to think that the results from the earlier Surveys were materially different from the results from the later Surveys by reason of the differences in the dates on which they were carried out.

193. The third main criticism is that the respondents to the Surveys did not correspond to the relevant class of persons. As described above, respondents were asked whether they had rented a vehicle in the UK in the past 10 years or would consider doing so in the future. Europcar contends that they should have been asked whether they held a driving licence, how frequently they hired cars and which car rental companies they had heard of. Again, I do not consider this criticism has any substance. Vehicle rental is not a transaction that consumers enter into regularly. Some may only do so very occasionally, perhaps only every few years. Furthermore, it was desirable to include consumers who had not rented in the past, but intended to do so in the future. Thus I consider a sample consisting of people who have rented in the last 10 years or would consider doing so in the future is perfectly reasonable. It is noticeable that Mr Phillips criticised the sample on the basis that it would have been preferable to focus on a broader group consisting of all people who drive cars. Mr Malivoire disagreed with this, since that group would include people who did not rent cars, and Mr Phillips was not called. Counsel for Europcar submitted that it had not been shown that respondents were knowledgeable about the vehicle rental market, but the design of the survey was such as to include both those who were knowledgeable and those who were not. This favoured Europcar, not Enterprise, since the more knowledgeable the consumers were, the more likely it is that they would identify Enterprise's 'e' logo.
194. The fourth main area of criticism concerns the questions which were asked in the Surveys. Europcar criticised both the main question asked in the OHIM Surveys ("Have you ever seen this before in relation to vehicle rental services?") and the main question asked in the Court Surveys ("What can you tell me about what you are looking at?"). It was put to Mr Malivoire that the OHIM question was flawed because, together with the recruitment question, it suggested to respondents that the symbol on the showcard was something connected with vehicle rental services. It was put to Mr Malivoire that the Court question was flawed because it failed to provide the respondents with any context. These criticisms are, of course, mutually inconsistent. In my view the second criticism is sounder than the first. As discussed above, it is clear that the effect of providing the respondents with the context of vehicle rental services was, as one would expect, to increase the percentage who mentioned Enterprise. But even if one takes just the results from the Court Surveys, a substantial proportion mentioned Enterprise.
195. More generally, it was put to Mr Malivoire that the questions invited speculation and that it could be seen from some of the responses that respondents were treating the question as a quiz and guessing the right answer. He accepted that there was some

evidence that a minority of respondents had approached the Surveys in this way, but he considered that most had answered the question in a simple and straightforward way. I agree with this assessment. In my view the questions, and in particular the main question in the OHIM Surveys, are neither leading nor inviting of speculation.

196. The fifth main criticism concerned the percentages of respondents who mentioned Enterprise. It was put to Mr Malivoire that there was a degree of subjectivity in his analysis. He accepted this, but he pointed out that Mr Phillips had gone through all the responses to the Surveys and that there was very little disagreement between them as to how they should be categorised. Accordingly, there is nothing in this point. It was also put to Mr Malivoire that he had failed to use any control sample or benchmark. As he said, however, it is difficult to see the benefit of this. Suppose that the respondents had also been asked the same questions about the Mercedes star device and double the number had mentioned Mercedes: how would that assist the court? Mr Malivoire was also criticised for not offering any opinion as to the significance of the results he obtained. In my view it was entirely proper of him not to do so, since the significance of the results is a matter for the court.
197. The sixth main criticism is that, at best, the Surveys were evidence of association rather than true trade mark distinctiveness. It is true that the Surveys do not demonstrate that consumers rely on the Enterprise ‘e’ logo as a badge of origin. But in my view they do demonstrate that a significant percentage of the relevant class of persons recognise the logo and associate it with Enterprise. Given that it is a logo, rather than the shape or other characteristic of a product or service, and given that it has clearly been used as a trade mark, there is no reason to think that this does not amount to evidence of distinctiveness.
198. *Conclusion.* Overall, it seems to me that the Surveys are confirmatory of the conclusion which I would in any event be minded to reach in the light of all the other evidence in the case, namely that the current Enterprise ‘e’ logo (i.e. 497 in green and white) has an enhanced distinctive character as a result of the use which has been made of it in relation to vehicle rental services (which built on the use which Enterprise had previously made on its similar old ‘e’ logo).

Comparison between 497 and the sign

199. Since both 497 and Europcar’s sign are logos, the principal comparison is the visual one, but the conceptual comparison also has some significance. Although both logos can be pronounced as “e”, they are unlikely to be spoken at all in any normal commercial context and so the aural comparison is of little relevance.
200. So far as the visual comparison is concerned, when compared side by side, there are both similarities and differences between the Enterprise ‘e’ logo (i.e., 497 as it is used) and the Europcar e-moving logo. The similarities are as follows: both consist of a stylised lowercase ‘e’ printed in a lighter colour on a green background; and in both cases the e is formed out of two parallel lines. The differences are as follows: the Enterprise ‘e’ is white, whereas the Europcar ‘e’ is pale green; the Enterprise ‘e’ has lines of equal thickness, whereas the Europcar ‘e’ has lines of differing thickness; the Enterprise ‘e’ has a prominent long horizontal section, whereas the Europcar ‘e’ has a much less prominent short angled section; the remainder of the Enterprise ‘e’ is oval,

whereas the Europcar ‘e’ is circular; and the Europcar ‘e’ fades away to the right in a manner which has no counterpart in the Enterprise ‘e’.

201. As for the conceptual comparison, the Enterprise logo clearly conveys the concept of a lower case ‘e’ styled to resemble a dual carriage road on a green background. In my view the Europcar e-moving logo does not clearly convey any particular concept, but it might be interpreted variously as conveying the idea of a button or a rotating dial or a pair of roads, or a single road with two verges, of different widths.
202. Overall, it seems to me that there is some similarity between the two logos, but not a great deal. The similarity is not such that anyone who was able to compare the two logos would mistake them. Nor would someone who had a clear mental image of one logo be likely to mistake the other for it. But I consider that someone who only had an imperfect recollection of the Enterprise logo, and then saw the Europcar logo, could mistake the latter for the former, at least in the absence of any differentiating context. In particular, someone who recalled the concept of the Enterprise logo as I have described it could, when they saw the e-moving logo, see it as conveying a very similar concept. As is well known, the human eye is not an accurate recorder of detail and has a tendency to see what it expects to see.

Comparison between the respective services

203. It is common ground that Europcar has used its e-moving logo in relation to services which are identical to those for which 497 is registered.

Context of use

204. Europcar relies strongly on the context of its use of the e-moving logo as negating any likelihood of confusion. I also accept that the context will tend to reduce the likelihood of confusion. As explained above, Europcar is a well-established brand and competitor to Enterprise in the vehicle rental services field. Furthermore, Europcar has used banner logos incorporating the name Europcar and the yellow horizon on a green background for a long time, and these logos are quite different to anything used by Enterprise. Yet further, Europcar’s slogan “moving your way” is different to anything used by Enterprise.
205. Nevertheless, I do not accept that context is a complete panacea for Europcar. There are two main reasons for this. First, the context varies between the three categories of use. In particular, although Europcar asserted that it had not used, and did not intend to use, the e-moving logo in *solus* form, as discussed above, the evidence disproved these assertions. Furthermore, as I have said, I consider that there is a material difference between the second and third categories of use complained of by Enterprise. The difference lies in the immediate context in which the e-moving logo is used. The third category of use is more clearly differentiated from Enterprise than the second category because the word Europcar is considerably more prominent and the strapline “moving your way” is present. By contrast, the descriptive sub-brands in the second category of use provide little differentiation.
206. Secondly, and in any event, even when the e-moving logo is used together with the name Europcar and the strapline “moving your way”, this does not necessarily remove any potential for confusion. This is partly because of the nature of the sign: it

is a logo which stands apart from the brand name and the strapline. Unlike the situation where a word is used together with another word in a way which gives rise to different perceptions compared to the word on its own (for example CANARY WHARF versus CANARY), the e-moving logo retains what the Court of Justice calls an “independent distinctive role” (see Case C-591/12 P *Bimbo SA v OHIM* [EU:C:2014:305]) when combined with the other two elements of Europcar’s current banner logo. It is also partly due to the fact that Europcar uses the e-moving logo as a unifying visual element between its main brand and its various sub-brands. This in itself conveys the message to consumers that the logo links different brands.

Is Europcar under a duty not to exacerbate confusion?

207. Counsel for Enterprise submitted that there was evidence of an “undercurrent of confusion” between Enterprise and Europcar prior to the adoption of the e-moving logo. As discussed below, I agree with this. I consider that this was due to the combination of (a) the fact that both have names of a similar length beginning with E and (b) the fact that both use the colour green in their branding and corporate livery. Counsel for Enterprise submitted that, in those circumstances, Europcar was under a duty not to take steps which exacerbated the risk of confusion. I agree that the pre-existing undercurrent of confusion is a factor which the court must take into account when assessing likelihood of confusion, but I do not accept that this means that Europcar became subject to any special or different duty to any other defendant accused of infringement under Article 9(1)(b): see *Reed Executive plc v Reed Business Information Ltd* [2004] EWCA Civ 159, [2004] RPC 40 at [90]-[92] (Jacob LJ).

Is there evidence of actual confusion?

208. Enterprise relies on the evidence of both sides’ branch managers as establishing that Europcar’s use of its e-moving logo has led to actual confusion amongst consumers. Europcar disputes that the evidence establishes that any confusion that there may be is either attributable to its use of the e-moving logo or demonstrates that the reasonably well informed and reasonably observant and circumspect average consumer would be misled by the use of the logo as to the origin of its vehicle rental services. In their closing submissions, both sides helpfully provided me with detailed analyses of the evidence of the respective pairs of branch managers, location by location. I have given careful consideration to these analyses, but I do not propose to undertake the same exercise in this judgment. This is for two reasons. First, it would lengthen still further what is already a long judgment. Secondly, because I consider that what matters are the overall conclusions to be drawn from the evidence considered as a whole. In my judgment, the conclusions to be drawn are as follows. In reaching these conclusions, I have not forgotten the caveats I expressed in paragraph 34 above.
209. First, there is clear evidence of a significant level of confusion between Enterprise’s services and Europcar’s services amongst consumers of vehicle rental services in the UK. For example, Europcar’s own evidence shows that between January 2013 and October 2014 Europcar customers mistakenly got on to the Enterprise shuttle buses at Heathrow, rather than the Europcar shuttle buses, on at least 529 occasions. Furthermore, there is evidence that even that figure significantly understates the number of Europcar customers who made this mistake. The evidence is mainly of “wrong way round” confusion such as this, but there is also some evidence of “right

way round” confusion, such as customers with Enterprise reservations mistakenly going to Europcar desks or branches to obtain their cars. As discussed above, however, even “wrong way round” confusion is capable of being evidence that the e-moving logo is confusingly similar to the Enterprise ‘e’ logo. Although some of the evidence relates to incidents which have occurred when vehicles were being returned, which might perhaps be discounted on one basis or another, the bulk of the evidence concerns incidents which have occurred immediately prior to the reservation contract being entered into.

210. Secondly, such confusion existed prior to December 2012, but it has increased significantly since then, and in particular since about mid to late 2013.
211. Thirdly, there is no evidence of comparable confusion between Enterprise or Europcar and any of the other providers of vehicle rental services.
212. Fourthly, the undercurrent of confusion which existed prior to December 2012 was plainly due to factors others than the e-moving logo. To some extent this may have been due to inattentiveness on the part of consumers, but in my view the principal factors were the two I have identified in paragraph 207 above.
213. Fifthly, there are only two plausible reasons why confusion should have increased since December 2012, and in particular since mid to late 2013. The first is Enterprise’s Drive Alliance campaign described in paragraphs 87-88 above. I agree with Europcar that this has the potential to confuse consumers, and in particular consumers who are resident in North America, as to the relationship between National, Alamo, Enterprise and Europcar. I am not persuaded that this is a complete explanation, however, since the evidence suggests that relatively few people will have seen the tri-branded Drive Alliance material on which Europcar relies. Moreover, none of Europcar’s branch managers suggested that this was the explanation for the confusion. Nor is there any evidence that customers have given this as the explanation. The only other plausible explanation is Europcar’s increasing use of the e-moving logo.
214. Sixthly, it is fair to say that there is little hard evidence of consumers explicitly stating that they have been confused as a result of seeing the e-moving logo and mistaking it for the Enterprise ‘e’ logo. At best from Enterprise’s perspective, it appears that there have been comments from some consumers attributing their confusion to “the green ‘e’” or to “following the ‘e’” and the like. Even in those cases, one does not know to what extent they had been exposed to the respective logos or what their thought processes were. It is not surprising, however, that consumers who are concerned to get or return their vehicle should not take time to try and explain why they have been confused. Equally, it is plausible that not all consumers would necessarily be able to articulate the reason for their confusion. In any event, even if one discounts the comments attributed to consumers entirely, one is still left with substantial evidence that consumers have been confused by some cause which has only been operating since December 2012, and more so since mid to late 2013. For the reasons explained above, the most probable explanation is that the cause of the confusion is Europcar’s e-moving logo.
215. Accordingly, I conclude that Europcar’s use of the e-moving logo has caused actual consumer confusion. I would add three points. The first is that, considered as a whole,

I am satisfied that the evidence establishes confusion as to trade origin, and not merely mistakes caused by accidents, lack of care and so on. The second is that such confusion has been mainly, if not exclusively, caused by the second and third categories of use complained of by Enterprise, since there has been very little use in the first category to date. The third is that the evidence is unclear as to the extent to which such confusion is experienced by consumers who are resident in the USA, or North America more generally. My impression is that some, but far from all, of the confused consumers are North American.

Conclusion

216. Taking all the factors into account, my assessment is as follows. The inherent distinctive character of 497, its enhanced distinctive character acquired through use in green and white and the identity of the respective services are factors which support the existence of a likelihood of confusion. The average consumer's level of attention is a neutral factor. The relatively low degree of similarity between the e-moving logo and 497 is a factor which points away from a likelihood of confusion, but this factor does not compel the conclusion that there is no likelihood of confusion because it remains possible that the average consumer who does not have the opportunity to compare the sign and the trade mark side by side would mistake the former for the latter as a result of imperfect recollection. The context of Europcar's use is another factor which points away from a likelihood of confusion, but as explained above, the strength of this factor varies between the three categories of use. It is strongest in relation to the third category (use of the e-moving logo together with the Europcar logo and the strapline "moving your way"), weaker in relation to the second category (use with the descriptive sub-brands) and weakest in relation to the first category (*solus* use).
217. Even in the absence of the evidence of actual confusion, I would probably have concluded that there was a likelihood of confusion on the part of the average consumer as a result of the first category of use of the e-moving logo as at the relevant date, but I would have hesitated as to whether to reach the same conclusion in relation to the second category of use and, even more so, the third category. Given the evidence of actual confusion, however, I conclude that there is a likelihood of confusion on the part of the average consumer as a result of the second and third categories of use.

Enterprise's claim under Article 9(1)(c)

218. I shall assess Enterprise's claim under Article 9(1)(c) on the assumption, contrary to the conclusion I have just reached, that the use of e-moving logo does not give rise to a likelihood of confusion.

Reputation

219. For the reasons given in paragraphs 184-198 above, I conclude that 497 has acquired a reputation in the UK in the form in which it has been used i.e. green and white. Given the size of the UK market for, and the transnational character of, vehicle rental services, I consider that this is sufficient to constitute a reputation in the European Union.

Link

220. Although the similarity between the e-moving logo and 497 is relatively low, I consider that the similarity is sufficient, having regard to the reputation of 497 and the paucity of other 'e' logos in the field of vehicle rental services, for use of the e-moving logo to bring 497 to the mind of the average consumer, but not strongly so.

Detriment to distinctive character

221. Enterprise contends that Europcar's use of the e-moving logo is detrimental to the distinctive character of 497. Enterprise's argument is a classic dilution argument: Enterprise says that its 'e' logo (i.e. 497 as used in green and white) is strongly associated with its vehicle rental services in the minds of consumers, that until the adoption by Europcar of the e-moving logo there was no other logo like the Enterprise logo in this field and that the use by Europcar of the e-moving logo has the effect of lessening the distinctiveness of the Enterprise logo and hence its ability to identify Enterprise's services.
222. I confess to some sympathy with this argument. Nevertheless, I am unable to accept it. Assuming no likelihood of confusion, what is missing is evidence of any change in the economic behaviour of the average consumer or of a serious likelihood of this. As counsel for Europcar accepted, the economic behaviour of consumers can be affected via their perceptions of trade marks. As he also accepted, the Court of Justice has made it clear in *Environmental Manufacturing* that it is legitimate for the court to draw inferences from the facts and probabilities of the situation. As he submitted, however, it is equally clear that it is not permissible for the court simply to speculate. The dividing line between legitimate inference and impermissible speculation is not always easy to discern. In the present case, however, it seems to me that Enterprise's argument falls on the wrong side of the line.

Unfair advantage

223. As noted above, Enterprise has abandoned its case that Europcar has adopted and used the e-moving logo with the intention of taking advantage of the distinctive character and repute of the Trade Marks. Enterprise nevertheless contends that Europcar's use of the sign takes unfair advantage of the distinctive character and repute of 497. Enterprise relies on what I said in *Jack Wills* and contends that this is a parallel case.
224. I do not accept this. In my view the present case is distinguishable from the *Jack Wills* case for a number of reasons. First, the similarity between the sign and the Trade Mark, and in particular the conceptual similarity, is less. As a result, the average consumer is less likely to make a link between the two. Secondly, most of the time, the e-moving logo is used together with Europcar branding, unlike the logo in the *Jack Wills* case. Thirdly, Europcar does advertise and promote its services, unlike House of Fraser in relation to the goods involved in the *Jack Wills* case. Fourthly, the competitive context is quite different: Europcar is a leading player in the same market sector as Enterprise, not a retailer trying to boost its own goods by adopting a feature of branded goods.

225. On the assumption that there is no likelihood of confusion, I am not persuaded that Europcar's use of the e-moving logo takes advantage of the distinctive character or repute of 497, let alone unfair advantage.

Passing off

226. Having regard to the legal analysis and factual findings I have made above, I conclude that Enterprise's claim for passing off is made out for essentially the same reasons as its claim under Article 9(1)(b).

Summary of conclusions

227. For the reasons given, I conclude that:

- i) Enterprise's claim for infringement of 497 pursuant to Article 9(1)(b) of the Regulation succeeds in relation to all three categories of use of the e-moving logo;
- ii) if Enterprise's claim under Article 9(1)(b) failed, so too would its claim under Article 9(1)(c); and
- iii) Enterprise's claim for passing off succeeds.