Neutral Citation Number: [2026] EWHC 767 (IPEC)

Case No: IP-2024-000031

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY ENTERPRISE COURT

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

Date: 1 April 2026

Before :

HIS HONOUR JUDGE HACON

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Between :

EASYGROUP LIMITED	**Claimant**
- and -	
(1) EASYFEETSTORE OÜ	
(2) ANDRIY KLISHYN	
(3) EASYFEET INC.	**Defendants**

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Jamie Muir Wood (instructed by **Potter Clarkson LLP**) for the **Claimant**
Henry Edwards (instructed by **Briffa Legal Limited**) for the **Defendants**

Hearing dates: 17-18 February 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 1 April 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE HACON

Judge Hacon :

Introduction

1. This is the latest in a line of claims brought by the claimant ('easyGroup') against parties trading under a name which begins with the word 'easy'. The claim is for trade mark infringement and passing off.

2. easyGroup was incorporated in 2000 to be the owner and licensor of all intellectual property rights relating to the various 'easy' businesses set up by Sir Stelios Haji-Ioannou, the best known of which is easyJet.

3. The first defendant ('Easyfeetstore') is an Estonian company. It sells orthopaedic and orthotic insoles and related accessories online in several territories including the United Kingdom. The insoles are placed into footwear and are designed to support, align and improve foot function and are intended to relieve pain from conditions such as plantar fasciitis, arthritis and flat feet.

4. 'Orthopaedic' and 'orthotic' are the defendants' descriptions. No distinction was drawn between them at the trial, save that 'orthopaedic' more than 'orthotic' implies a medical connotation.

5. The second defendant ('Mr Klishyn') is a 50% shareholder in Easyfeetstore and the sole director of the third defendant ('Easyfeet Inc').

6. Easyfeet Inc is a company incorporated under the laws of Wyoming, USA. It markets and sells orthopaedic and orthotic insoles, mainly in the United States.

7. The defendants' insoles are advertised and sold under the trade name 'Easyfeet' and under the following sign:

8. easyGroup alleges that such trading by Easyfeetstore and Easyfeet Inc infringed their trade mark rights under s.10(2) and s.10(3) of the Trade Marks Act 1994 ('the 1994 Act') and also constituted passing off.

9. easyGroup relies on seven trade marks, one of which is a series trade mark consisting of four individual 'easyGroup' marks. Mr Klishyn is alleged to be jointly liable for the acts of infringement and passing off.

10. Easyfeetstore owns UK Trade Mark No. 3621537 in the form of the word EASYFEET, registered in respect of orthopaedic soles in class 10 ('the Easyfeet Mark'). easyGroup seeks a declaration that the Easyfeet Mark is invalid.

11. The claim began in the general intellectual property list and was transferred to this Court by the Order of Master Kaye dated 8 March 2024.

12. Jamie Muir Wood appeared for easyGroup, Henry Edwards for the defendants.

The trade marks

13. The seven trade marks relied on by easyGroup are set out in the table below with their specifications. Giving them labels they are, in order, the 'easyJet Mark', the 'easyGroup Mark', the 'easyFood Mark', the 'easyFoodstore Mark', the 'easyTravelseat Mark', the 'easylife device Mark' and the 'easylife word Mark':

Marks	Goods or Services
EASYJET No.901232909	transportation of passengers and travellers by air
easyGroup EASYGROUP easyGroup easyGroup No.2294415	dissemination of advertising; the commercial administration and management of the licensing of goods and services, including the administration and management of brand licences; the provision of general support, marketing, advertising, administration and management services to licensees of goods or services
EASYFOOD No. 917808098	printed matter and publications; magazines; teaching and instructional materials; promotional and advertising material; advertising; retail services connected with the sale of food and drink; retail services connected with the sale of prepared meals; listing restaurant and take away restaurant particulars and menus on the internet; restaurant and take away restaurant directory and search services; internet advertising services for restaurants and take away restaurants; order procurement services for restaurants and take away restaurants online retail services connected with the sale of food and drink; operation of a website for the ordering of takeaway restaurant and restaurant meals; transport, packaging and storage of goods, transportation of goods ... by... land; arranging of transportation of goods, by land; providing temporary use online of non-downloadable software to facilitate the processing, tracking and delivery of customer orders
easyFoodstore No.3012320	advertising; retail services connected with the sale of food and drink

easyTravelseat No.917986557	support devices for medical use; supportive medical apparatus and instruments; medical supports for legs
easylife lifestyle solutions No.903367695	providing advertising and promotional space in printed publications; the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase those goods from a general merchandise catalogue by mail order or by means of telecommunications; the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase those goods from a general merchandise internet web site
easylife Easylife No.3532904	advertising and marketing services; retail services conducted by mail order, retail services including on-line retailing, including in relation to clothing, footwear, socks, safety clothing, gymnastic and sporting articles

Section 11A defence

14. There is no counterclaim alleging that any of the foregoing trade marks is invalid, but the defendants rely on s.11A of the 1994 Act in relation to three marks: the easyGroup series Mark, the easyFoodstore Mark and the easylife device Mark.

15. Non-use of the easyGroup Mark was alleged only in respect of 'dissemination of advertising'. easyGroup did not pursue an allegation of infringement of that mark in the course of any dissemination of advertising by the defendants, so the easyGroup Mark fell away so far as s.11A was concerned.

Associated indicia

16. The Particulars of Claim plead reliance on the trade marks in suit and 'associated Indicia'. The Defence notes that no associated Indicia are particularised in easyGroup's pleading, which seems to be right, and denied therefore that easyGroup could rely on them. Associated Indicia did not feature in argument at the trial.

Relevant dates

17. It was agreed that the relevant date for assessing infringement under both s.10(2) and s.10(3) is the date on which the accused signs were first used by the defendants and that in the case of s.10(3) this is also the date as of which the question of whether the mark has a reputation in the UK must be assessed. The same date is relevant for the assessment of passing off, see *Starbucks (HK) Limited v British Sky Broadcasting Group plc* [2015] UKSC 31, at [16]. The accused signs were first used in the UK in September 2021.

18. It was agreed that the validity of the Easyfeet Mark is to be assessed as of 18 November 2020.

The witnesses

19. easyGroup had four witnesses whose evidence was primarily given to establish use of the trade marks in support of easyGroup's contention that six of the seven trade marks in suit (all but the easyTravelseat Mark) have a reputation in the United Kingdom, that they have enhanced distinctive character and, where relevant, to establish genuine use for the purpose of s.11A.

20. The first was Joshua Wintersgill who is the founder and owner of Able Move Limited, a company which markets products and offers consulting services for wheelchair users. One such product is a sling/seat which helps wheelchair users to transfer from one chair to another, such as to or from an aircraft seat. Shortly after a meeting between Mr Wintersgill and Sir Stelios in November 2018 easyGroup applied for the easyTravelseat Mark. On 7 December 2018 Able Move entered into a licence agreement with easyGroup. In March 2019 the sling/seat product was launched under the name 'easyTravelseat'. Able Move has since launched other products under different (non-easy) names, all of which are available on the easyTravelseat.com website.

21. The second witness was Chrys Chrysostomou who gave evidence about a group of companies that provides mail order services under the name 'Easylife', which was the name used by Mr Chrysostomou to refer to the group. Since late last year Mr Chrysostomou has been the sole director and 75% shareholder of the holding company, Easylife Holdings Limited. Mr Chrysostomou said that Easylife is one of the UK's largest catalogue retailers and distributors of products for the home and garden. It uses brand names for its products such as 'easyclean', 'easy green' and 'easycare'. Aside from catalogue sales Easylife sells through third parties such as Amazon.

22. Mr Chrysostomou exhibited pages from the Easylife website which featured for sale, among other products, the 'Easylife Double Shock Men's Orthotic Insoles' and 'Easylife Happy Feet Orthotic Insoles'.

23. Easylife registered the easylife device Mark shown in the table above in the early 2000s. In 2021 easyGroup brought legal proceedings against Easylife. The case settled. As part of the settlement agreement Easylife became a licensee of easyGroup.

24. Thirdly there was evidence for easyGroup from Gurpreet Sidhu. Mr Sidhu is the founder and director of Empowered Restaurants Limited which trades as 'easyFood', the name I will use for that company. Since 2006 easyFood has had an online food ordering platform providing a service along similar lines to Deliveroo or Uber Eats. In 2017 Sir Stelios raised objections to easyFood's trading under that name, following which it became a licensee of easyGroup. Since 2019 easyFood has traded as a franchise business. Mr Sidhu described its business model as 'B2B2B2C': easyFood grants a franchise licence to another business, a franchisor, which signs up restaurant businesses, which sell food to consumers.

25. easyFood trades using the easyFood Mark, generally in the form shown below or something similar:

26. easyGroup's final witness was Anthony Anderson. Mr Anderson is a former marketing director of easyGroup, later easyGroup and then easyCafe. He is now a self-employed consultant. Mr Anderson, who appears regularly for easyGroup in trials such as this, gave evidence about the history and operation of easyGroup and other companies within the group.

27. The defendants' only witness was Mr Klishyn.

28. All the witnesses gave answers in cross-examination which were clear and to the point.

Section 10(2)

29. Section 10(2) of the 1994 Act provides:

> '*(2) A person infringes a registered trade mark if he uses in the course of trade a sign where because –*
>
> *(a) the sign is identical with the trade mark and is used in relation to goods or services similar to those for which the trade mark is registered, or*
>
> *(b) the sign is similar to the trade mark and is used in relation to goods or services identical with or similar to those for which the trade mark is registered,*
>
> *there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the trade mark.*'

30. Aside from the usual considerations which go into the multi-factorial analysis of the likelihood of confusion under s.10(2), easyGroup relied on two further matters, both of which were said to increase the likelihood of confusion in this case. The first was that some of the trade marks in suit have an enhanced distinctive character. The second was that five of the trade marks (excluding the two easylife Marks) are part of a family of 'easy' marks. The two contentions are related in that part of the case on enhanced distinctive character was that the enhancement came from the marks being part of the family.

Enhanced distinctive character

31. I found easyGroup's argument on enhanced distinctive character as advanced independently of the family of marks contention hard to pin down.

32. There was a tendency in argument to use 'acquired distinctive character' and 'enhanced distinctive character' interchangeably. For clarity of discussion I will separate the two.

33. Distinctive character is a quality possessed by a mark which may be inherent and/or generated by use of the mark. It is a measure of the degree to which the mark is capable of identifying the trade origin of goods or services, see *W3 Ltd v easyGroup Ltd* [2018] EWHC 7 (Ch), at [157].

34. 'Acquired distinctive character' is a term found in s.3 of the 1994 Act. Whether a mark has acquired distinctive character is strictly an issue that can only arise in the context of a challenge to the validity of a mark under s.47(1) and s.3(1)(b), (c) or (d), or in a challenge to its registration under s.3(1)(b), (c) or (d) (neither the case here).

35. 'Enhanced distinctive character' is not a term found in the statute. It is a judge-made concept used in the case law of the CJEU and the English courts to mean an increased degree of distinctiveness generated by use of the mark over and above the mark's inherent distinctive character. Enhanced distinctive character of a mark, where it exists, is one of the factors to be taken into account when assessing the likelihood of confusion under s.5(2) or s.10(2) of the 1994 Act.

The law

36. Acquired or enhanced distinctive character can only be generated through use of the mark as a trade mark, i.e. use which serves to identify the trade origin of the goods or services for which it is registered, see *W3* at [161].

37. It follows while the extent of use of a trade mark is plainly relevant to a claim that it has enhanced distinctive character, the proprietor of the mark will have to do more than set out the scale of use. In *W3* Arnold J considered (at [160]) the sort of evidence likely to be required (in the context of acquired distinctive character but the same applies to enhanced distinctive character):

> '… 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.'

38. In this court a trade mark proprietor may sometimes be given leeway in its obligation to provide necessary evidence of enhanced distinctive character. More specifically, it

will be rare that a party is permitted to deploy an opinion poll given the time and costs constraints in this court.

The parties' cases

39. There was some confusion as to how many of the seven marks in suit were alleged to have an enhanced distinctive character. Paragraph 8 of the Particulars of Claim suggests that all of them do, while paragraphs 9 to 27 suggest that this applies only to easyJet, easyGroup, easyFood and easyFoodstore.

40. The defendants admit that the easyJet Mark has an enhanced distinctive character but say that the enhancement is only in relation to airline services. The defendants deny that any of the other marks in suit has an enhanced distinctive character.

Discussion

41. I will take the easyJet Mark first. The Particulars of Claim plead that it has been used for services other than airline services, namely for hotel and car reservations, ski accommodation, airport parking and insurance. I accept that. The evidence showed the scale of use for airline services but not for any other services separated out. All the use has been in what might be called the holiday and travel sector.

42. It seems to me the defendants' argument that the enhanced distinctive character of the easyJet Mark is limited to airline services is not to the point. Distinctive character, whether inherent, acquired or enhanced, is a characteristic of a mark in itself. A mark may become well-known in a particular context – say, MERCEDES-BENZ in relation to vehicles – but that does not make it less known when considered in relation to other products. The nature of such other products is certainly relevant to the scope of protection provided by a mark. If a sign identical to the MERCEDES-BENZ trade mark (as registered for vehicles) were used by an unlicensed party, the likelihood of confusion would depend on the products or services in relation to which the sign is used, but the trade mark would still have an enhanced distinctive character. Very enhanced in that example – use of an identical sign on a wide range of goods or services would probably lead to a likelihood of confusion.

43. The point is that the enhanced distinctive character of the easyJet Mark does not fall away as a relevant consideration when a sign identical to it is used for products or services other than airline services. It is admitted that the mark has enhanced distinctive character and I will assume that the enhancement is significant.

44. Turning to the other marks, the evidence suggested that the distinctive character of the easyGroup, easyFood and easyFoodstore Marks, which are not purely descriptive marks, has been enhanced to a modest degree, maybe very modest, through use.

45. The evidence did not support any significant enhancement of the distinctiveness of the easyTravelseat or easylife Marks. However, I accept that those marks are not purely descriptive and so have some limited degree of inherent distinctiveness.

46. easyGroup's argument on enhanced distinctive character focussed more on enhancement by reason of their forming part of a recognised family of easy marks. Aside from the easyJet Mark, I find that there is only any significant enhancement of

the distinctiveness of any of the marks for which it is claimed if easyGroup's contention about the family of marks holds good.

Family of marks

The law

47. It was common ground that the existence of a family of trade marks which share common features can increase the likelihood of confusion where the accused sign uses one or more of those features, see for example *W3 Ltd v easyGroup Ltd* [2018] EWHC 7 at [234] and the authorities referred to in that paragraph. Where this is the case the distinctive character of any mark in the family is, in effect, enhanced by the features in question and the perception on the part of the average consumer that their presence in a trade mark means that it belongs to the family.

easyGroup's case

48. The members of the family were said to be easyJet, easyGroup, easyFood, easyFoodstore and easyTravelseat.

49. The obvious difficulty for easyGroup in asserting public recognition of an 'easy' family of marks is that the only feature common to all of them is the word 'easy', a conspicuously descriptive word. easyGroup pleads its case in this way:

> ' … the use of a composite mark beginning with the word "easy" with a second word or other indication relating to the goods or services or other characteristics offered under the mark [has] come to indicate to the average consumer … the goods and services of the Claimant, or those of or connected with a business operated or licensed by the Claimant, or otherwise the subject of some commercial arrangement involving a business operated or licensed by the Claimant, and none other.'

50. Despite Mr Anderson's evidence about the family of marks being presented to the public in orange – orange of a particular pantone number – in Cooper Black font, 'easy' having a lower case 'e' and the attached word beginning with an upper case letter, those features are not relied on. Nor need the attached second word allude to any particular category of goods or services.

51. The logic of easyGroup's case, therefore, is that the average consumer would take any mark consisting of 'easy' attached to any other word that alludes to either goods or services of any kind to be a member of the family. This is an argument which has been run before. In *easyGroup Ltd v Beauty Perfectionists Ltd* [2024] EWHC 1441 (Ch), Bacon J said at [103]:

> 'I do not accept easyGroup's pleaded claim that its use of a family of marks has come to indicate to the average UK consumer, by any date relevant in these proceedings, that the use of a mark comprising "easy" before or as a prefix to a word or words alluding to goods and services was a reference to goods and services associated with, approved, authorised or endorsed by easyGroup alone, and no other entity. That is an extreme proposition which is not remotely established on the evidence before the court.'

52. The same is true about the evidence in this case. In *easyGroup Ltd v Jaybank Leisure Ltd* [2025] EWHC 3077 (IPEC) I was told and recorded in the judgment (at [2]) that since 2015 easyGroup has brought 52 'easy' trade mark and passing off proceedings. In these proceedings the defendants said that according to the litigation analytics tool *Solomonic* there have been 76 claims since 2015. The exact number doesn't matter. On any view there have been many actions, mostly in the general intellectual property list, free of the time and cost constraints of IPEC, so with every opportunity to assemble on at least one previous occasion evidence in support of its case on a family of marks. I infer that no such evidence exists but anyway none has been deployed here.

53. It is possible that a significant impediment to the production of such evidence has been that there are entities which trade under a name beginning with 'Easy' and which do not belong to the family, as was common ground. It is further possible that any recognition of a family depends on the sign being in orange, in Cooper Black font and with a first e in lower case. If so, the absence of all or any of those features in a sign may actively lead to a perception that the sign is not part of the family. In the event, the evidence presented in these proceedings did not point one way or the other.

54. easyGroup's contention that any mark consisting of 'Easy' or 'easy' with a suffix alluding to a type of goods or services, or a store in which they can be obtained, will be connected in the course of trade to the 'easy' family of undertakings was not made out.

Average consumer

55. The likelihood of confusion 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' (*Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41, at [31]).

56. The parties' arguments about the average consumer tended to go forward on the basis that this will be the average consumer of the goods or services for which each of easyGroup's trade marks is registered – so several average consumers. In my view there is just one.

57. In *Sky plc v Skykick UK Ltd* [2018] EWHC 155 (Ch), Arnold J said (at [275]):

> 'The average consumer for the purposes of an infringement claim must be a consumer of the relevant goods and/or services who is both (i) familiar with the trade mark and (ii) exposed to, and likely to rely upon, the sign. In the present case, because SKY is accepted to be a household name at least in relation to television broadcasting, telephony and broadband provision, it can be safely assumed that all the potentially relevant consumers are familiar with it. Accordingly, attention can be focussed upon those who are exposed to, and likely to rely upon, the sign SkyKick.'

58. This implies that the average consumer is a consumer who is in the market for the type of goods or services marketed under the accused sign, as opposed to those sold under the mark in suit. Of course the average consumer must be in a position to make an assessment of the likelihood of confusion, so he or she is assumed to be familiar with the trade mark.

59. Arnold J referred to the judgment of Floyd LJ in *London Taxi Corporation Ltd v Frazer-Nash Research Ltd* [2017] EWCA Civ 1729:

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

60. In *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc* [2025] UKSC 25, Lord Briggs and Lord Stephens, with whom the rest of the Court agreed, also referred to the judgment in *London Taxi*:

> '[29] The average consumer includes "any class of consumer to whom the guarantee of origin is directed and who would be likely to rely on it, for example in making a decision to buy or use the goods": *London Taxi Corpn Ltd v Frazer-Nash Research Ltd* [2018] FSR 7, para 34, per Floyd LJ.'

61. Their Lordships added:

> '[36] The average consumer is only a consumer of the particular type of goods or services concerned. There is no requirement that the average consumer is an actual purchaser who buys or who has bought the specific goods or services in respect of which a potentially infringing sign is used. Where the goods are consumer goods in almost universal use in the United Kingdom, the relevant public consists of a very wide group of the members of the public. As this case concerns footwear, it was common ground that the public concerned with footwear is the UK adult population generally …'.

62. The accused sign in *Iconix* was used on a wide variety of footwear. *Iconix* reinforces the principle that the average consumer is someone who is interested in the type of goods or services marketed under the accused sign rather than those marketed under the trade mark in suit.

63. The guarantee of origin in the present case, assuming any is perceived, operates in the mind of an average consumer who is an actual or potential purchaser of orthotic insoles.

64. The defendants preferred the term 'orthopaedic insoles' and contended that the average consumer is a professional medical advisor who recommends the use of such products, the point being that a professional would pay a higher degree of attention and is less likely to be confused.

65. Mr Klishyn's evidence was that sales in the UK are made only through the Amazon website. The average consumer is therefore a member of the public interested in orthotic insoles (or orthopaedic insoles if there is a difference) available freely online. He or she is not a medical professional.

Infringement under s.10(2)

66. As is often the case, infringement under s.10(2) turns on whether there would have been a likelihood of confusion between each of the seven trade marks on the one hand and the Easyfeet and Easyfeetstore signs used by the defendants on the other.

67. easyGroup's argument was that there would have been indirect confusion (see *Match Group* at [29]), that is to say the average consumer would not mistake the sign for the trade mark but would believe that the goods offered for sale under the sign come from one of the 'easy' group of companies.

The law

68. Lord Briggs and Lord Stephens, with whom the other members of the Supreme Court panel agreed, summarised the law on likelihood of confusion under s.10(2) of the 1994 Act in *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc* [2025] UKSC 25, at [38]-[39]:

> '[38] The manner in which the requirement of a likelihood of confusion in article 9(2)(b) of Regulation 2017/1001 and article 10(2)(b) of Directive 2015/2436 (see paras 13–14 above), and the corresponding provisions concerning relative grounds of objection to registration in Directive 2015/2436 and Regulation 2017/1001, should be interpreted and applied has been considered by the CJEU in a large number of decisions. In order to try to ensure consistency of decision making, a standard summary of the principles established by these authorities, expressed in terms referable to the registration context, has been adopted in this jurisdiction. The current version was set out by Arnold LJ in *Match Group LLC v Muzmatch Ltd* [2023] Bus LR 1097, para 27, as being:
>
> "(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;
>
> "(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
>
> "(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
>
> "(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components but it is only

when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

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

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

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

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

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

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

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

[39] Having set out the standard summary of the principles in terms referable to the registration context, Arnold LJ went on to state, at para 28 that:

> "The same principles are applicable when considering infringement although it is necessary for this purpose to consider the actual use of the sign complained of in the context in which the sign has been used."

[40] The context in which the sign has been used was considered by Kitchin LJ in *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2012] FSR 19. Kitchin LJ, at para 87, stated:

> "In my judgment the general position is now clear. In assessing the likelihood of confusion arising from the use of a sign the court must consider the matter from the perspective of the average consumer of the goods or services in question and must take into account all the circumstances of that use that are likely to operate in that average consumer's mind in considering the sign and the impression it is likely to make on him. The sign is not to be considered stripped of its context."'

69. To these must be added the evidence of actual confusion – or its absence. Clear evidence of confusion is likely to lend powerful support to a contention that there exists a likelihood of confusion, see *Maier v ASOS plc* [2015] EWCA Civ 220, at [80]. Where there is no evidence of actual confusion the position is more nuanced. In *Maier* it was said (at [80]) that where this is the case, despite side-by-side use of the trade mark and the sign, this may be powerful evidence against a likelihood of confusion. A more recent approach has been to note that there may be several factors which in any particular case make the emergence of actual confusion more or less likely. These must be taken into account in giving relevance and weight to the absence of evidence of actual confusion, i.e. this forms a multi-factorial assessment of its own within the global assessment of the likelihood of confusion, see *Match Group, LLC v Muzmatch Limited* [2023] EWCA Civ 454, at [45]-[53] and *easyGroup Ltd v Nuclei Ltd* [2023] EWCA Civ 1247, at [91]-[96].

Visual, oral and conceptual similarities

70. Given that there is no visual, oral or conceptual similarity between any of the suffixed words of the seven trade marks and either 'feet' or 'feetstore', easyGroup was obliged to argue that although the comparison is between the overall impressions of each of the marks and the signs, the average consumer would focus on the 'easy' prefix since both 'feet' and 'feetstore' would be discounted as merely allusive to the type of goods on offer and the stores in which they can be found. All the more so, it was argued, because the average consumer would be familiar with the 'easy' family of marks.

71. I have found that easyGroup's argument regarding the perception of a family of marks was not made out. The average consumer (and the relevant public under the law of passing off) had no understanding one way or the other regarding a sign consisting of 'easy' plus a suffix of the type referred to. That leaves the word 'easy' as the only factor common to the seven trade marks and the signs. Every case must turn on its own evidence. The evidence in the present case did not displace what one might expect and what was held in *easyGroup Ltd v Beauty Perfectionists Ltd* [2024] EWHC 1441 (Ch), at [121]:

> 'The "easy" element of the [easyJet] mark, however, has no inherent distinctive character: it is a descriptive word, which indicates that the services are easy to use.'

72. easyGroup advanced no argument contrary to that finding. It follows that there is nothing by way of visual, oral or conceptual similarity which lends support to a likelihood of confusion.

Similarity between orthotic insoles and the relevant goods or services

73. In closing easyGroup limited its case on the likelihood of confusion to two potential instances: (1) the easyTravelseat Mark and the sign Easyfeet and (2) the Easylife Marks and Easyfeet.

74. For both, easyGroup relied on 'easy' being the common factor and, in the case of easyTravelseat and Easyfeet, the family of marks point. I have discussed both. easyGroup also said that the goods for which easyTravelseat is registered cover goods identical to orthotic insoles. I accept that.

75. easyGroup relied on one further similarity. Mr Chrysostomou's evidence was that the group of companies operating under the name 'Easylife' is controlled by someone he has known for over 25 years, Greg Caplan. He added in his oral evidence in chief that since the end of December 2025 he has owned a majority shareholding in the Easylife group. As I understood it, this was an addition to his evidence to support his having knowledge about how the Easylife group trades. Mr Chrysostomou said that the Easylife group has sold a wide range of goods by mail order, including insoles. It has also sold insoles on Amazon under trading names which include 'Easylife'. During cross-examination he added that substantial numbers of insoles have been sold over the last 7-8 years, including sales on Amazon 'for some time'.

76. The services for which the two Easylife Marks are registered are so broad that inevitably they could be said to have a potential connection with orthotic insoles. This it is too tenuous to be of any significance. In principle the nature of goods sold under the Easylife Marks could have been relevant if, for example, the evidence had shown that the goods sold have been wholly or predominantly orthotic insoles. In that case, it could have been said that the context of use of the trade marks was such that the average consumer had come to associate the Easylife Marks primarily with orthotic insoles.

77. Instead, the evidence was that the marks are used for the marketing of a very wide range of goods which, to an extent unquantified, includes insoles. That evidence carries no real weight in the assessment of the likelihood of confusion.

Context of use of the sign

78. easyGroup argued that the defendants' signs are used in the context of a triangular device (see above) which is similar to the triangle which serves as the dot above the 'i' in the Easylife device Mark. To my mind, even if the average consumer noticed both triangles, they are of very different sizes and serve different purposes within the mark and the sign. Nothing would be made of it by way of a connection between the services supplied under the mark and the goods supplied under the sign.

No evidence of actual confusion

79. easyGroup argued that the absence of any evidence of actual confusion proved nothing. A contented customer of the defendants' orthotic insoles would have no reason to contact either party. A discontented customer of the defendants who assumed a connection with the 'easy' family would complain to the defendants but there would be no reason to mention that assumed connection. easyGroup also pointed to modest sales by the defendants and argued that this too meant that any evidence of confusion was unlikely to emerge.

80. Mr Klishyn's evidence was that in the years 2012 to 2014 17,644 insoles were sold in the UK under the Easyfeet sign of which 783 were returned. Presumably the customers of the 783 returns were unhappy for one reason or another and some of them probably felt they had cause for complaint. It seems to me more likely than not that if any of those customers believed that the insoles had been sold by a member of the 'easy' family, then somewhere on social media where the public vent their disapproval about such things there would be mention of this. It also seems to me to be likely that a well-funded company like easyGroup which seems to be doing all it can to prevent the use of 'easy' signs without its licence would have the resources to search for and find

comments making the connection if they exist. Although the absence of any evidence of actual confusion is not by itself conclusive, it is relevant and consistent with there being no likelihood of confusion.

Conclusion on the likelihood of confusion

81. I have found that there is no relevant similarity between any of the seven trade marks and either of the defendants' signs and, in the case of six out of the seven trade marks, no similarities in goods or services.

82. Taking all the foregoing into account, it is not cumulatively sufficient to give rise to a likelihood of confusion. The absence of any evidence of actual confusion is consistent with that conclusion.

83. The case on infringement under s.10(2) of the 1994 Act fails.

Infringement under s.10(3)

84. easyGroup alleges infringement under s.10(3) of the 1994 Act in respect of all its trade marks except the easyTravelseat Mark.

85. Section 10(3) and (3A) of the 1994 Act state:

> '*(3) A person infringes a registered trade mark if he uses in the course of trade, in relation to goods or services, a sign which —*
>
> *(a) is identical with or similar to the trade mark,*
>
> *(b)* [no longer in force]
>
> *where the trade mark has a reputation in the United Kingdom and the use of the sign, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.*
>
> *(3A) Subsection (3) applies irrespective of whether the goods and services in relation to which the sign is used are identical with, similar to or not similar to those for which the trade mark is registered.*'

86. Arnold LJ summarised the requirements under s.10(3) in *Lidl Great Britain Ltd v Tesco Stores Ltd* [2024] EWCA Civ 262:

> '[13] In order for such a claim to succeed, the following requirements must be satisfied: (i) the registered trade mark must have a reputation in the relevant territory; (ii) there must be use of a sign by a third party in the relevant territory; (iii) the use must be in the course of trade; (iv) it must be without the consent of the proprietor; (v) it must be of a sign which is identical with or 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.

87. Of these, the defendants accepted that requirements (ii) to (iv) and (vi) are satisfied.

88. In respect of (v) I have found that the only similarity between any of the trade marks and the signs is the word 'easy' which lacks any significant distinctive character.

Reputation

89. Reputation and goodwill were lumped together in the Particulars of Claim along with enhanced distinctive character, such that easyGroup's case on each of them was treated in the same way. They need to be distinguished.

90. The distinctive character of a mark exists on a spectrum between the mark being highly distinctive and wholly descriptive. By contrast, the reputation of a trade mark under s.10(3) is a knowledge threshold. It is a binary concept: either the mark has a reputation or it does not. It does if a sufficient proportion of the relevant public knew of the mark on the date at which the accused sign was first used, see *Burgerista Operations GmbH v Burgista Bros Ltd* [2018] EWHC 35 (IPEC), at [69], drawing on the judgment of the CJEU and Opinion of Advocate General Wahl in *Iron & Smith kft v Unilever NV* (C-125/14) EU:C:2015:539 and the judgment of the CJEU in *PAGO International GmbH* (C-301/07) EU:C:2009:611 and *Ornua Co-operative Ltd v Tindale & Stanton Ltd España SL* (C-93/16) EU:C:2017:571.

91. If a trade mark has a reputation according to the criteria established by the CJEU and if the other requirements of s.10(3) are satisfied, the extended protection afforded by that subsection covers signs being used in respect of goods and/or services entirely dissimilar to those in respect of which the mark is registered, see s.10(3A). It therefore makes little sense to define the reputation of a mark in terms of a particular sector of commerce as was done in argument.

92. The CJEU has several times considered the criteria which govern the existence of a reputation. In relation to one of them the CJEU has been ambiguous. In *General Motors Corporation v Yplon SA* (Case C-375/97) EU:C:1999:408, [1999] 3 CMLR 427, the Court said:

> '[22] … It cannot be denied that, in the context of a uniform interpretation of Community law, a knowledge threshold requirement emerges from a comparison of all the language versions of the Directive.
>
> [23] Such a requirement is also indicated by the general scheme and purpose of the Directive. In so far as art. 5(2) of the Directive, unlike art. 5(1), protects trademarks registered for non-similar products or services, its first condition implies a certain degree of knowledge of the earlier trade mark among the public. It is only where there is a sufficient degree of knowledge of that mark that the public, when confronted by the later trademark, may possibly make an association between the two trademarks, even when used for non-similar products or services, and that the earlier trade mark may consequently be damaged.
>
> [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 art. 5(2) of the Directive that the trademark 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.'

93. Paragraph 24 implies that the relevant public is the public concerned with the sector of commerce in which the goods were actually marketed under the earlier trade mark. Paragraph 26 could be taken to mean the sector which forms the market for the goods and/or services for which the mark is registered. The same ambiguity was maintained in *Pago International GmbH v Tirolmilch Registrierte Genossenschaft mbH* (C-301/07) EU:C:2009:611, at [22] and [24].

94. In *Iron & Smith*, on the other hand, the CJEU appeared to favour the knowledge of the public concerned by the products and/or services for which the earlier mark is registered:

> '[17] In that connection, as regards art.9(1)(c) of Regulation 40/94, the Court held that the concept of "reputation" assumes a certain degree of knowledge amongst the relevant public, which must be considered to be reached when the Community trade mark is known by a significant part of the public concerned by the products or services covered by that trade mark (see judgment in *PAGO International* (C-301/07) EU:C:2009:611 at [21] and [24]).'

95. In *Sazerac Brands LLC v Liverpool Gin Distillery Ltd* [2020] EWHC 2424 (Ch), Fancourt J said:

> '[34] The relevant public which must have some knowledge of the earlier trade mark is therefore that concerned by it. That must mean the part of the public that has had contact with or exposure to the goods or services on which the owner of the mark has used it. The extent of the public that must have some knowledge of the trade mark therefore depends on the product or service marketed by its owner. But not all of that sub-set of the public needs to have knowledge: it suffices that a significant part of the public concerned has knowledge.
>
> [35] The parties did not agree whether, as concerns Eagle Rare's reputation, the relevant part of the UK public was: (1) that with contact with or exposure to the whisky market generally; or (2) that with contact with or exposure more specifically to the bourbon market; nor is this a point that has been expressly decided in any domestic or European authority that the parties' lawyers could find. The claimants submitted the latter, on the basis that they had only marketed

> bourbon and so could only have established a reputation for a brand of bourbon. The defendants submitted the whisky market generally, on the basis that the first claimant's UK trade mark is registered for the broader specification of "whisky", not "bourbon", as the EU trade mark is. They argued that an attempt to gain wider protection of the mark in the whisky market as a whole meant that a reputation had to be established across that wider market, if reputation was to be invoked, otherwise a claimant could obtain much wider extended protection for a mark on the basis of a broad specification but narrow use.
>
> [36] In my judgment the claimants are right on this issue, both in principle—where the alleged infringing use is in the narrower class of goods—and as a matter of interpretation of the ruling of the CJEU. Paragraph 24 of the judgment in *General Motors v Yplon* makes it clear that the extent of the reputation that needs to be established depends on the use of the trade mark on products or services actually marketed, and that it is only the part of the public concerned by the actual use of the mark that must have the relevant knowledge of it. The words of [26] ("the products or services covered by that trade mark"), though capable of being read as a reference to the specification of the trade mark, are not in context making that reference: [26] explains that only a significant part of the public concerned, as identified in [24], and not the whole of it, needs to have knowledge of the trade mark. It would be illogical for the owner of the mark to have to prove a reputation in a field in which the mark has not yet been fully deployed, or deployed at all, if all that they were seeking to do was restrain infringement in a narrower field in which the mark had been used. Were the owner of a mark seeking to restrain infringement under art.9(2)(c) that went beyond the scope of the use of the mark then a different conclusion might well be reached, on the basis that reputation on a wider basis needed to be proved to restrain a wider infringement.'

96. *Sazerac* went to the Court of Appeal where s.10(3) was not considered. I agree with Fancourt J that knowledge of the trade mark in suit must mean that sector of the public which was likely to have encountered the goods or services in respect of which the mark has in fact been used up to the relevant date.

97. Sometimes the existence of a relevant reputation turns on the geographical extent of knowledge of the mark, see for instance *Burgerista Operations GmbH v Burgista Bros Ltd* [2018] EWHC 35 (IPEC). That was not a matter in issue in the present case. Where reputation was disputed the defendants just said that the mark had not been used enough to generate a reputation.

98. The Court of Appeal recently observed in *TVIS Ltd v Howserv Services Ltd* [2024] EWCA Civ 1103, at [46]:

> 'Although the threshold for reputation for the purposes of extended protection is not particularly high, it is far from a trivial one.'

99. It was not disputed that easyJet has a reputation. The defendants argued that the easyFood and easyFoodstore Marks do not have a reputation and in closing easyGroup did not press a case for easyFoodstore.

100. Mr Sidhu explained that the easyFood platform provides a means for customers to order restaurant food online from alternative restaurants. It was launched in 2006. The business became part of the 'easy' family in September 2017 and has operated through franchisees since 2019. Around 2000 restaurants use its services in Birmingham, Leicester, Newcastle and Scotland. The business has been advertised on radio and television and there was evidence of press coverage. The business operates social media accounts. I find on that evidence that the easyFood Mark has a reputation.

Link

101. The law on establishing a link between a trade mark and a sign was summarised in *Thatchers Cider Co Ltd v Aldi Stores Ltd* [2025] EWCA Civ 5:

> '[41] 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 having regard to all the circumstances of the case: see *Adidas-Salomon v Fitnessworld* at [29]-[30], *Adidas v Marca Mode* at [42] and Case C-252/12 *Specsavers International Healthcare Ltd v Asda Stores Ltd* [EU:C:2013:497], [2014] F.S.R. 4 ("*Specsavers (CJEU)*") at [120]. 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] E.C.R. I-8823 at [60] and *Specsavers (CJEU)* at [121].'

102. I have found in the discussion above on the likelihood of confusion under s.10(2) that there is no similarity between any of the seven trade marks and either of the defendants' signs save for the descriptive prefix 'easy', and in the case of six out of the seven trade marks there is no similarity in goods or services. The exception is easyTravelseat and Easyfeet but there remains the lack of any visual, oral or conceptual connection except for 'easy'. There is no evidence that any member of the public has made any link between any of the trade marks and the defendants' signs.

103. easyJet has a reputation and I have found that it is the only trade mark in suit with a significant distinctive character. I have also found that there is no likelihood of confusion between any of the trade marks and either of the signs.

104. Taking all those matters into account, I find that no link exists between any of the marks and the signs. easyGroup's allegation of infringement under s.10(3) therefore fails but I will also consider the other elements of s.10(3).

Detriment to the distinctive character or repute of the trade mark

105. Detriment was defined by the CJEU in *L'Oréal SA v Bellure NV* (C-487/07) EU:C:2009:378:

> '[40] As regards detriment to the repute of the mark, also referred to as 'tarnishment' or 'degradation', such detriment is caused when the goods or services for which the identical or similar sign is used by the third party may be perceived by the public in such a way that the trade mark's power of attraction is reduced. The likelihood of such detriment may arise in particular from the fact

> that the goods or services offered by the third party possess a characteristic or a quality which is liable to have a negative impact on the image of the mark.'

106. In *Intel Corp Inc v CPM United Kingdom Ltd* (C-252/07) EU:C:2008:655 [2009] RPC 15, the CJEU said:

> '[76] … detriment to the distinctive character of the earlier mark is caused when that mark's ability to identify the goods or services for which it is registered and used as coming from the proprietor of that mark is weakened, since use of the later mark leads to dispersion of the identity and hold upon the public mind of the earlier mark.
>
> [77] It follows that proof that the use of the later mark 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 earlier mark was registered consequent on the use of the later mark, or a serious likelihood that such a change will occur in the future.'

107. In *Environmental Manufacturing LLP v OHIM* (Case C-383/12 P) EU:C:2013:741 the CJEU referred to the foregoing paragraph in *Intel*:

> '[34] According to the Court's case-law, proof that the use of the later mark 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 earlier mark was registered, consequent on the use of the later mark, or a serious likelihood that such a change will occur in the future (*Intel Corp* , paragraphs 77 and 81, and also paragraph 6 of the operative part of the judgment).
>
> …
>
> [36] The wording of the above case-law is explicit. It follows that, without adducing evidence that the condition is met, the detriment or the risk of detriment to the distinctive character of the earlier mark …cannot be established.
>
> [37] The concept of "change in the economic behaviour of the average consumer" lays down an objective condition. That change cannot be deduced solely from subjective elements such as consumers' perceptions. The mere fact that consumers note the presence of a new sign similar to an earlier sign is not sufficient of itself to establish the existence of a detriment or a risk of detriment to the distinctive character of the earlier mark within the meaning of Article 8(5) of Regulation No 207/2009, in as much as that similarity does not cause any confusion in their minds.
>
> …
>
> [42] Admittedly, Regulation 207/2009 and the Court's case-law do not require evidence to be adduced of actual detriment, but also admits 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 … must be founded on "an analysis of the probabilities and by taking into account of the normal practice in the relevant commercial sector as well as all other circumstances of the case.'

108. In *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41, the Court of Appeal noted the strict requirement of evidence (at [117]) where detriment is alleged and then quoted paragraphs 42 and 43 of *Environmental Manufacturing*. In relation to those two paragraphs the Court of Appeal said:

> '[118] Here the Court of Justice has explained that a serious risk of detriment may be established by deduction, but any such deduction cannot be supposition and must instead be founded properly on all the circumstances of the case and the nature of the trade in issue.'

109. Thus, if a party alleges that there has already been detriment to the distinctive character or repute of a trade mark, the party must provide evidence of a change in the economic behaviour of the average consumer of the goods or services for which the earlier mark was registered consequent upon use of the later mark, or the accused sign, as the case may be. If the allegation is that there is a serious risk of such detriment, while self-evidently there will be no evidence of detriment having occurred, evidence must be provided based on an analysis of the probabilities, the normal practice in the sector and all other relevant circumstances.

110. Where there has been side-by-side trading for some years, it is to be expected that a change of economic behaviour on the part of the average consumer will have happened if it is ever going to happen, so that it is not enough to rely on a serious risk of detriment, see *Lidl Great Britain Ltd v Tesco Stores Ltd* [2023] EWHC 873 (Ch), at [158], not challenged on appeal ([2024] EWCA Civ 262, at [69]).

111. It was argued in the *Lidl* appeal that it had not been open to the trial judge merely to infer a change in economic behaviour of the average consumer where the allegation was that there had already been detriment. In that instance the trade mark proprietor (Lidl) had invited the court to draw the inference from the fact that it had felt obliged to advertise its prices in comparison with those of the defendant (Tesco) in response to Tesco's use of the accused sign which, Lidl contended, conveyed to consumers that Tesco's prices were the same as or lower than Lidl's.

112. Arnold LJ held that the judge had been entitled to find that the price-matching allegation had been established and noted that even if it had not been, there was also a finding that the Tesco's use of the accused sign had slowed the progress of customers switching purchases from Tesco to Lidl. He concluded that pleaded allegation of a change in economic behaviour of consumers had been made out on the evidence (at [163]-[167]). Birss LJ was of the view that the case on detriment depended on the finding that use of the sign conveyed price matching (at [198]), that the judge was entitled make that finding and to hold that there had been detriment. Lewison LJ said that Lidl's pleaded case depended on the price-matching allegation (at [203]-[204]). The finding at first instance that the allegation was made out was surprising but one that the judge had been entitled to make on the evidence (at [220]-[222]).

113. Taken together, the judgments of the Court of Appeal in *Lidl* indicate that it may be sufficient for a trade mark proprietor to present evidence from which it can be inferred that the average consumer has changed their economic behaviour as a consequence of use of the accused sign.

114. easyGroup's pleaded case on infringement in the present case is:

> '… the use of the [Easyfeet and Easyfeetstore] will limit the ability of the Claimant to license the easy Brand. Such use therefore causes detriment to the reputation thereof.'

115. It is not clear whether this is an allegation of past detriment or a serious risk of detriment in the future. Submissions did not clarify the point. The pleading does not allege detriment to distinctive character or the repute of any of the trade marks in suit. There is no pleading of a change in the economic behaviour of the average consumer and no evidence was advanced of such a change, whether direct or inferred. I reject easyGroup's case on detriment.

Unfair advantage

116. In *L'Oréal* the CJEU defined unfair advantage in this way:

> '[41] 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.'

117. The CJEU expanded on that last sentence in *L'Oréal*:

> '[49] … 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.'

118. An allegation that a defendant has taken unfair advantage of the distinctive character or the repute of a trade mark must also be supported by evidence of a change in economic behaviour, but not on the part of the average consumer of the goods or services for which the trade mark is registered, instead on the part of the customers of the defendant's goods or services marketed using the accused sign, see *easyGroup Ltd v Easy Live (Services) Ltd* [2022] EWHC 3327 (Ch), at [187] (the ruling on s.10(3) of the 1994 Act did not form part of the appeal [2023] EWCA Civ 1508) and the passage from *Argos Ltd v Argos Systems Ltd* [2018] Civ 2211 there referred to.

119. easyGroup argued that the perception of a link between the 'easy' family of trade marks and the signs Easyfeet and Easyfeetstore, even if no connection in the course of trade is assumed, has led to greater attention being paid to the signs and goods offered under them, which is an advantage for which the defendant have not paid and which is therefore unfair.

120. If, which I have held not to be the case, there was a link in the mind of the average consumer between the accused signs and the 'easy' family of mark, there was no evidence of a change in the economic behaviour by the defendants' customers consequent upon that link having been made, neither direct evidence nor evidence from which such a change can be inferred. No unfair advantage has been established.

Without due cause

121. That the use of an accused sign is without due cause may or may not be subsumed into a finding of unfair advantage where there is one, see the *Lidl* appeal [2024] Civ 262, at [199] and [208]-[215]. To the extent that this is a matter which falls to be considered here – the defendants argued that it is not – very little was said about it. Given the findings I have already made, I need not discuss due cause.

The defence under s.11A of the 1994 Act

122. Section 11A provides:

> *11A.(1) The proprietor of a trade mark is entitled to prohibit the use of a sign only to the extent that the registration of the trade mark is not liable to be revoked pursuant to section 46(1)(a) or (b) (revocation on basis of non-use) at the date the action for infringement is brought.*
>
> *(2) Subsection (3) applies in relation to an action for infringement of a registered trade mark where the registration procedure for the trade mark was completed before the start of the period of five years ending with the date the action is brought.*
>
> *(3) If the defendant so requests, the proprietor of the trade mark must furnish proof –*
>
> > *(a) that during the five-year period preceding the date the action for infringement is brought, the trade mark has been put to genuine use in the United Kingdom by or with the consent of the proprietor in relation to the goods and services for which it is registered and which are cited as justification for the action, or*
> >
> > *(b) that there are proper reasons for non-use.*
>
> *(4) Nothing in subsections (2) and (3) overrides any provision of section 46, as applied by subsection (1) (including the words from "Provided that" to the end of subsection (3)).*

123. Section 46(1) and (3) provide in relevant part:

> *46.(1) The registration of a trade mark may be revoked on any of the following grounds –*
>
> > *(a) That within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;*
> >
> > *(b) That such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use; …*
>
> *(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection 1(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:*
>
> *Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparation for the commencement or resumption began before the proprietor became aware that the application might be made.*

124. The criterion applied under s.46(1)(a) is a lack of genuine use without proper reason within the relevant five year period. Arnold LJ considered the law on genuine use in *easyGroup Ltd v Nuclei Ltd* [2023] EWCA Civ 1247, at [130], more recently repeated in abbreviated form in *easyGroup Ltd v Easyfundraising Ltd* [2025] EWCA Civ 1000, at [24] (original ellipses):

> '[106] Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:
>
> > (1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark ...
> >
> > (2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark …
> >
> > (3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin …
> >
> > (4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns … Internal use by the proprietor does not suffice … Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter … But use by a non-profit making association can constitute genuine use …

> (5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial raison d'être of the mark, which is to create or preserve an outlet for the goods or services that bear the mark …
>
> (6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark …
>
> (7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services …
>
> (8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use …
>
> [107] The trade mark proprietor bears the burden of proving genuine use of its trade mark … The General Court of the European Union has repeatedly held that genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned…'

125. By the time of the trial, s.11A was relevant only in respect of the easyFoodstore Mark and the easylife device Mark. It was agreed that the issue raised was whether those two marks were put to genuine use within the five year period preceding the date of the claim form, i.e. 27 June 2018 to 26 June 2023. If not, those trade marks or either of them may not be relied on to prohibit the defendants from using any of the signs complained of.

126. I was shown evidence of an archived web page dated 2 December 2021 advertising the easyFoodstore retail store at Park Royal in London, including announcements made on 30 July 2018, 26 March 2019 and 17 November 2020 of successive new opening hours. I accept that this is sufficient evidence of genuine use in the relevant period.

127. The defendants conceded that some limited use was made of the easylife device Mark in the relevant period. That mark is registered for services in class 35 which amount to retail services by mail order catalogue, by phone or via a website. The defendants submitted that the specification should be limited to retail services by mail order catalogue 'in relation to clothing, tools and gardening equipment'.

128. easyGroup relied on use of several variants of the easylife device Mark. The evidence produced by easyGroup undoubtedly established that the mark has been used in the relevant period for retail services online, and the goods offered possibly covered a broader range than clothing, tools and gardening equipment. There was undated evidence that the variants have been used in relation to the advertising of insoles for sale. Mr Chrysostomou said in cross-examination that he has been supplying orthotic insoles to easylife for at least 7 to 8 years, presumably up to the date of his giving oral evidence. In my view, this assertion, made orally without any documentary evidence to confirm it, is not sufficient to establish genuine use of the easylife Mark in relation to orthotic insoles in the relevant period.

129. The question, therefore, is whether easyGroup is entitled to rely on the evidence of use of the mark and variants of it, as has been established, i.e. use in relation to retail services for some types of goods but not including insoles.

130. The CJEU has stated that where an application is made for a mark to be registered in respect of retail services, the applicant must specify the goods or types of goods to which those services relate, see *Praktiker Bau- und Heimwerkemärkte AG* (C-418/02) EU:C:2005:425 at [50] and *Tulliallan Burlington Ltd v EUIPO* (Joined Cases C-155-158 P) EU:C:2020:151 at [131] and [134]-[137].

131. I am not satisfied that the relationship between that principle of law and the requirement to prove relevant use for the purpose of s.11A of the 1994 Act was sufficiently explored at the trial. Since the defendants do not need to rely on a defence under that section I will take it no further.

Passing Off

132. easyGroup did not press its allegation of passing off in the event I were to find against it under s.10(2) of the 1994 Act.

Targeting

133. Easyfeet is incorporated in Wyoming, USA. It trades in the USA, Canada, Mexico and Australia. There was a dispute about whether Easyfeet's Instagram site was targeted at UK consumers and whether, had I found the trade marks to have been infringed, this would accordingly have meant that Easyfeet committed acts of infringement (as well as Easyfeetstore).

134. There was a single sentence reference to *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8 in one of the written arguments but no developed submissions from either side regarding whether the differences in the facts of this case from those of *Lifestyle Equities* mean that the result on targeting differs. It seems to me that the point may not be straightforward. It was not argued out and since it is not necessary for me to decide the point, I will not do so.

Joint liability

135. Mr Klishyn admitted personal joint liability for the acts of infringement of trade marks and passing off committed by Easyfeetstore if there were any. easyGroup pleaded that he is also jointly liable for the acts of Easyfeet. There is no pleaded denial of that allegation in the Defence.

136. Mr Klishyn stated that marketing and sales in the US were carried out by him before Easyfeet was incorporated. Mr Klishyn is one of two owners of the shares in Easyfeet and is the company's sole director. No other figure with any control over the acts of Easyfeet was advanced as an alternative person who could have directed the acts of Easyfeet. Had Easyfeet been liable for trade mark infringement and passing off, I would have found that Mr Klishyn is jointly liable.

Revocation of Easyfeetstore's EASYFEET trade mark

137. Easyfeetstore has registered UK Trade Mark No. 3621537, EASYFEET and easyGroup seeks a declaration that the Easyfeet Mark is invalid. easyGroup relied on their earlier registered trade marks in suit and argued that s.5(2)(b), s.5(2)(c) and s.5(4)(a) of the 1994 Act apply.

138. Sections 5(2)(b) and (c) raise the same issues that arise in relation to easyGroup's allegation that the sign Easyfeet infringes their trade marks pursuant to s.10(2) and 10(3) of the 1994 Act. The parties were agreed that a declaration of invalidity of the EASYFEET mark stands or falls with a finding that the sign Easyfeet infringes under s.10(2) and s.10(3). They were also agreed that the allegation of invalidity under s.5(4)(a) stands or falls with easyGroup's allegation of passing off.

139. Accordingly the application for a declaration that the EASYFEET mark is invalid is dismissed.

Conclusion

140. easyGroup's claims of infringement of its trade marks, its claim for passing off and the application for a declaration the Easyfeet Mark is invalid are all dismissed.