



Neutral Citation Number: [2025] EWCA Civ 946

Case No: CA-2024-002240

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY
COURTS OF ENGLAND AND WALES, INTELLECTUAL PROPERTY LIST (ChD)
Nicholas Caddick KC sitting as a Deputy High Court Judge
[2024] EWHC 2282 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 July 2025

Before :

LORD JUSTICE COULSON
LORD JUSTICE ARNOLD
and
LORD JUSTICE ZACAROLI

Between :

EASYGROUP LIMITED

**Claimant/
Appellant**

- and -

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

**Defendants/
Respondents**

Michael Edenborough KC and Thomas St Quintin (instructed by **Edwin Coe LLP**) for the **Appellant**

Chris Aikens (instructed by **Hansel Henson Ltd**) for the **Respondents**

Hearing date : 17 June 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 24 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Arnold:

Introduction

1. This is an appeal by the Claimant (“easyGroup”) against an order made by Nicholas Caddick KC sitting as a Deputy High Court Judge on 17 September 2024 dismissing easyGroup’s claims that (i) the First Defendant (“ELS”) has infringed two trade marks, namely the compound word “easylife” and a stylised mark including that compound word, by the use of various signs, in particular the words EASY LIVE AUCTION, compounds such as “EasyLiveAuction” and logos which include those words, and (ii) a trade mark registered by ELS is invalid. There is also a cross-appeal by the Defendants against the judge’s partial dismissal of their counterclaim to revoke one of the trade marks for non-use. The judge’s order was made for the reasons he gave in a judgment dated 4 September 2024 [2024] EWHC 2282 (Ch).
2. I granted permission for both the appeal and the cross-appeal, in part because of inconsistent conclusions with respect to the counterclaim reached by the judge in this case and by Fancourt J in *easyGroup Ltd v easyfundraising Ltd* [2024] EWHC 2323 (Ch). We heard an appeal by easyGroup against the latter decision immediately after this appeal, and we are giving judgment on both appeals at the same time. On this appeal we had the benefit of submissions from all three counsel.
3. The judge used a series of defined terms in his judgment which in the interests of consistency I will adopt.

The parties

4. easyGroup is a holding company established by Sir Stelios Haji-Ioannou in 2000 to be the owner and licensor of all intellectual property rights relating to the various “easy” businesses founded by Sir Stelios, the best-known of which is easyJet. Since 2000 those businesses have operated under licences granted by easyGroup.
5. ELS operates an online platform via a website located at www.easyliveauction.com (“the Defendants’ Website”) which enables auction houses to transmit auctions to customers and enables customers to bid on lots in those auctions in real time. It also supplies back-office software for use by auction houses. The Second and Third Defendants are the directors of ELS. It is common ground that, if ELS has infringed easyGroup’s trade marks, the Second and Third Defendants are jointly liable for such infringements. I will therefore follow the judge’s example of referring to the Defendants collectively.
6. This is the second claim which easyGroup has brought against the Defendants for trade mark infringement (and, in the first case, passing off). In the first claim easyGroup ultimately succeeded on some points, but its principal claims failed: [2022] EWHC 3327 (Ch) and [2023] EWCA Civ 1508.

The Easylife Marks

7. In this claim easyGroup relies upon the two trade marks described below (“the Easylife Marks”).

8. The first is UK Registered Trade Mark No. 903367695 consisting of the stylised mark shown below (“the Easylife Stylised Mark”) registered with effect from 22 September 2003 in respect of services in Classes 35 and 39.



9. The Class 39 services are not relied upon by easyGroup. The Class 35 services were helpfully broken down and enumerated by the judge as follows:

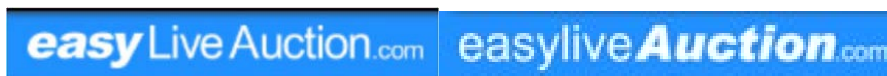
“(a) Advertising services; promotion services; (b)(i) the bringing together, for the benefit of others, of a variety of goods, through a television shopping channel, enabling customers to conveniently view and purchase those goods by means of telecommunications; (b)(ii) the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase those goods from a general merchandise catalogue by mail order or by means of telecommunications; (b)(iii) the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase those goods from a general merchandise internet web site; (b)(iv) the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase those goods in a wholesale outlet.”

10. The second is UK Registered Trade Mark No. 3532904 for the series of two compound words “easylife” and “Easylife” (“the Easylife Word Mark”) registered with effect from 14 September 2020 in respect of services in Class 35 including “advertising and marketing services” and “retail services including on-line retailing, retailing through the medium of broadcasting, retail services conducted by mail order, all connected with the sale of [a wide range of goods]”. (In describing this registration as being of word marks I have adopted the common approach of the parties, as did the judge, although the registration would more accurately be described as being of a series of two minimally-stylised forms of the word EASYLIFE: one all lower case and the other lower case with an initial capital. On the other hand, no-one suggests that the difference between these forms is of any significance, and it is convenient to refer simply to “easylife”.)
11. The Easylife Marks were previously owned by Easylife Holdings Ltd (in the case of the Easylife Stylised Mark) and its subsidiary Easylife Ltd (in the case of the Easylife Word Mark). Since around 2000, these companies (collectively “Easylife”) have operated a general merchandise catalogue retail business under the name “easylife”. They did so initially by mail order, and shortly thereafter online as well. Since 2005 they have also provided a service advertising third parties’ products by means of loose paper inserts placed within Easylife catalogues (“Easylife’s Insert Service”).

12. Like the Defendants, Easylife were also the target of a claim by easyGroup. That claim was dismissed: [2021] EWHC 2150 (Ch). On 21 July 2022, after easyGroup had obtained permission to appeal against that decision, easyGroup and Easylife entered into a settlement agreement whereby the Easylife Marks were assigned to easyGroup, but Easylife were allowed to continue using them as a licensee of easyGroup. In consequence, easyGroup’s principal witness at the trial of this claim was Gregory Caplan, Easylife’s founder and sole director. Robert Wise and James Oakenfold of Easylife also gave evidence, as did Chrys Chrysostomou of a company called Direct Response Marketing Group Ltd which works with Easylife. The latter three witnesses also gave evidence in the *easyfundraising* case.

The Defendants’ Signs

13. easyGroup alleges that the Defendants have infringed one or both of the Easylife Marks by use of the following signs (“the Defendants’ Signs”):
- i) EASY LIVE, particularly in the forms “easy live” and “Easy Live”;
 - ii) EASY LIVE (SERVICES) LTD;
 - iii) EASY LIVE AUCTION, particularly in the forms “EasyLiveAuction” and “EasyLiveAuction.com”; and
 - iv) The logos shown below (“the Easy Emphasised Logo” and “the Auction Emphasised logo” respectively).



The Defendants’ Mark

14. ELS is the proprietor of UK Registered Trade Mark No. 3372957 registered with effect from 5 February 2019 for the series of word marks EASY LIVE AUCTION and EASYLIVEAUCTION for a range of goods and services in Classes 9, 38 and 42 (“the Defendants’ Mark”).

The issues in broad outline

15. easyGroup contends that the Defendants have infringed the Easylife Marks pursuant to section 10(2) of the Trade Marks 1994 because there is a likelihood of confusion between the Defendants’ Signs and the Easylife Marks. easyGroup also contends that the Defendants’ Mark is invalidly registered by virtue of section 5(2) because there is a likelihood of confusion between the Defendants’ Mark and the Easylife Marks. It is common ground that the infringement claim and the invalidity claim stand or fall together, and accordingly attention may be confined to the infringement claim. The Defendants deny infringement and counterclaim for revocation of the Easylife Stylised Mark on the ground of non-use.

The legislative framework

16. Section 10(2) of the 1994 Act implemented successive European Union Directives culminating in Article 10(2)(b) of European Parliament and Council Directive

2015/2436/EU of 16 December 2015 to approximate the laws of the Member States relating to trade marks (recast). Parallel provisions are contained in Article 9(2)(b) of European Parliament and Council Regulation 2017/1001/EU of 14 June 2017 on the European Union trade mark (codification).

17. These provisions provide that the proprietor of a registered trade mark is entitled to prevent third parties from using a sign in the course of trade without the proprietor's consent if the sign is identical with, or similar to, the trade mark and is used in relation to goods or services which are identical with, or similar to, the goods or services for which the trade mark is registered and there exists a likelihood of confusion on the part of the public. Save for likelihood of confusion, it is common ground that all of the requirements for infringement under section 10(2) are satisfied in this case.
18. Similarly, section 5(2) of the 1994 Act implemented what is now Article 5(1)(b) of Directive 2015/2436, which enables a trade mark proprietor to object to the registration of a later trade mark where the identity or similarity of the trade marks and the similarity or identity of the respective goods or services gives rise to a likelihood of confusion. Parallel provisions are contained in what is now Article 8(1)(b) of Regulation 2017/1001.
19. The Defendants' counterclaim for revocation of the Easylife Stylised Mark for non-use is made under section 46(1)(b) of the 1994 Act. Section 46 implemented what are now Articles 16 and 19 of Directive 2016/2436. Parallel provisions are contained in what are now Articles 18 and 58 of Regulation 2017/1001.
20. Section 46 provides, so far as relevant:
 - “(1) The registration of a trade mark may be revoked on any of the following grounds—
 - (a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;
 - (b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;
 - ...
 - (2) For the purposes of subsection (1) use of a trade mark includes use in a form (the 'variant form') differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and use in the United Kingdom includes affixing

the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

...

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

...”

Assessment of the likelihood of confusion: basic principles

21. The manner in which the requirement of a likelihood of confusion in what are now Article 10(2) of Directive 2015/2426 and Article 9(2) of Regulation 2017/1001, and the corresponding provisions concerning relative grounds of objection to registration in the Directive and the Regulation, should be interpreted and applied had been considered by the Court of Justice of the European Union in a large number of decisions by 31 December 2020. 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 of this summary is as follows:

- “(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;
- (f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element

corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

- (g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;
 - (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
 - (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
 - (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; and
 - (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.”
22. The same principles are applicable when considering infringement, but 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: see *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2012] EWCA Civ 24, [2012] FSR 19 at [87] (Kitchin LJ).

Revocation for non-use: relevant principles

23. Section 46(1)(a) and (b) give effect to the “use it or lose it” principle which is a feature of most trade mark laws. EU and UK law enable a registration to be revoked where there has been no genuine use of the trade mark or an acceptable variant for five years. The burden of proving use lies upon the proprietor of the registration. Two aspects of the law concerning revocation for non-use are relevant to this appeal. The first is use of variant forms of the trade mark as registered (section 46(2)). The second is partial revocation of the specification (section 46(5)).

Variant forms

24. It is common ground that the judge accurately summarised the law in his judgment at [40]:

“The law with regard to what constitutes a variant form of a registered mark under s.46(2) of the Trade Marks Act 1994 was considered by Arnold J in *Walton v Verweij Fashion* [2018] EWHC 1608 (Ch) at [119] to [123]. From this, I note the following:

- a. The objective of s.46(2) is to allow the proprietor of the mark, in the commercial exploitation of the sign, to

make variations in the sign, which, without altering its distinctive character, enable it to be better adapted to the marketing and promotion requirements of the goods or services concerned (see *Walton* at [119], citing Case C-252/12 *Specsavers International Healthcare Ltd v Asda Stores Ltd* at [29]).

- b. There are two parts to the necessary inquiry. First, to identify the points of difference between the mark as used and the mark as registered and, second, to ask whether those differences alter the distinctive character of the mark as registered (see *Walton* at [120], citing *BUD and BUDWEISER BUDBRAU Trade Marks* [2002] EWCA Civ 1534).
- c. The normal approach to the assessment and comparison of distinctive character applies in this context. Accordingly, it is necessary to analyse the ‘visual, aural and conceptual’ qualities of the mark as used and of the mark as registered and to make a ‘global appreciation’ of their likely impact on the average consumer (see *Walton* at [120]-[121], citing *BUD and BUDWEISER BUDBRAU* at [45] and Case C-501/15 *European Union Intellectual Property Office v Cactus SA* at [68]-[71]).”

25. Although the judge did not specifically refer to it, there is no dispute either as the correctness of what I said in *Walton International Ltd v Verweij Fashion BV* [2018] EWHC 1608 (Ch) at [122]:

“As the case law of the General Court makes clear, alteration or omission of elements which are not distinctive is not capable of altering the distinctive character of a trade mark: see Case T-690/14 *Sony Computer Entertainment Europe Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:T:2015:950] at [45]. Furthermore, when a trade mark is composed of word elements and figurative elements, the former are, as a rule, more distinctive than the latter: see *Sony* at [49]. Accordingly, it is possible in an appropriate case for use of the word element on its own to constitute use of the trade mark: see *Sony* at [51].”

26. The judge discussed at [41] and [44]-[46] three decisions of the General Court cited by easyGroup: Case T-24/17 *LA Superquimica SA v European Union Intellectual Property Office* [EU:T:2018:668], Case T-521/21 *6minutes Media GmbH v European Union Intellectual Property Office* [EU:T:2022:520] and Case T-792/22 *Quatrotec Electrónica SL v European Union Intellectual Property Office* [EU:T:2024:69]. The latter two decisions are not assimilated law, but they are potentially persuasive. Although there was some discussion of these decisions during the course of argument on the cross-appeal, it suffices to say that in my judgment they neither add to, nor detract from, the principles I derived from *Sony Computer Entertainment Europe Ltd*

v Office for Harmonisation in the Internal Market (Trade Marks and Designs) [EU:T:2015:950].

Partial revocation

27. If use is only proved for some goods or services falling within the specification, a question may arise as to whether the registration should be partially revoked so as to limit the specification. The judge cited at [69] the following summary of the relevant principles by Kitchin LJ (as he then was) in *Merck KGaA v Merck Sharp and Dohme Corp* [2017] EWCA Civ 1834, [2018] ETMR 10:

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

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

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

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

28. The issue which arises on this appeal concerns the circumstances in which it is possible to identify within a category of goods or services one or more independent subcategories. As Lord Kitchin (as he had by then become) pointed out in *Sky Ltd v SkyKick UK Ltd* [2024] UKSC 36, [2025] Bus LR 251 (a judgment delivered after the judge’s decision in the present case) at [261], the approach explained in *Merck v Merck*:

“... must now be seen in light of the more recent guidance given by the CJEU in, for example: *Ferrari SpA v DU* (Joined Cases C-720/18 and C-721/18) EU:C:2020:854; [2021] Bus LR 106, at paras 36-53. There the CJEU explained, at para 40, that the essential criterion to apply for the purposes of identifying a coherent subcategory of goods or services capable of being viewed independently is their purpose and intended use.”

29. The judge quoted at [70] the Court of Justice’s earlier decision in Case C-714/18 *P ACTC GmbH v European Union Intellectual Property Office* [EU:C:2020:573] at [44]. That paragraph establishes the same proposition as Lord Kitchin extracted from Joined Cases C-720/18 and C-721/18 *Ferrari SpA v DU* [EU:C:2020:854] (which was not cited to the judge). Having regard to the arguments on the cross-appeal, it is necessary to consider these two decisions in more detail. Both are assimilated law.
30. In *ACTC* the opponent relied upon a registration of the word mark TAIGA in respect of “clothing; outer clothing; underwear; footwear; headgear for wear and headwear; work shoes and boots; working overalls; gloves; belts and socks” in Class 25. The applicant required the opponent to prove use of that mark. Thus the context was proof of use for the purposes of opposition, but it is well established that the same principles apply in that context as in the revocation context. The opponent only produced evidence of use of the mark in relation to various kinds of weather-protective outdoor clothing for protection against cold, wind and rain. The Fourth Board of Appeal of the European Union Intellectual Property Office held that the opponent had proved use in relation to “clothing; outer clothing; underwear; headgear for wear and headwear; working overalls; gloves; belts and socks”.
31. On appeals to the General Court and then to the Court of Justice the applicant argued that weather-protective outdoor clothing for protection against cold, wind and rain was an independent sub-category of each of the categories of goods in respect of which the Board of Appeal had found use. Both the General Court and the Court of Justice rejected this argument. Having reiterated in the paragraph cited by the judge that, as established by earlier case law, “the criterion of the purpose and intended use of the goods or services at issue is an essential criterion for defining an independent subcategory of goods”, the Court of Justice said at [46]:
- “In that regard, it should be noted that it is apparent both from the wording of the last sentence of Article 42(2) of Regulation No 207/2009 and from paragraphs 39 to 42 of the present judgment that it is important to assess in a concrete manner — principally in relation to the goods for which the proprietor of the earlier mark has furnished proof of use of the earlier mark — whether those goods constitute an independent subcategory in relation to the goods falling within the class of goods concerned, so as to link the goods for which genuine use of the earlier mark has been proved to the category of goods covered by the application for registration of that trade mark.”
32. It went on (internal citations omitted):
- “50. ... the aim of the criterion of the purpose and intended use of the goods in question is not to provide an abstract or artificial definition of independent subcategories of goods; it must be applied coherently and specifically
51. Accordingly, if, as in the present case, the goods concerned have several purposes and intended uses — as is often the case — determining whether there exists a separate subcategory of goods by considering in isolation each of the

purposes that those goods may have will not be possible, contrary to what the appellant claims. Indeed, such an approach would not enable independent subcategories to be identified coherently and would have the effect ... of limiting excessively the rights of the proprietor of the earlier mark, inter alia in that his legitimate interest in expanding his range of goods or services for which his trade mark is registered would not sufficiently be taken into consideration.

52. The General Court was therefore right not to take into account each of the uses of the goods at issue — to cover, conceal, adorn or protect the human body — in isolation, those different uses combining for the purpose of putting those goods on the market
 53. Last, the second complaint of the second part of the first ground of appeal, by which the appellant claims that the Court failed to take into account the fact that the goods were aimed at different publics and were sold in different shops, must also be rejected as unfounded, in so far as such criteria are not relevant for defining an independent subcategory of goods, but for assessing the relevant public”
33. In *Ferrari* Ferrari was the proprietor of an international registration protected in Germany of a stylised version of the word “testarossa” for “vehicles; apparatus for locomotion by land, air or water, in particular motor cars and parts thereof” in Class 12. Ferrari also had a German registration for the same mark in respect of a similar specification of goods. DU applied to revoke the registrations for non-use. Ferrari’s only evidence of use was in relation to (parts for) very high-priced luxury sports cars. The Landgericht Düsseldorf (Düsseldorf Regional Court) revoked both registrations. On appeal by Ferrari, the Oberlandesgericht Düsseldorf (Düsseldorf Higher Regional Court) referred six questions to the Court of Justice, the first of which asked in essence whether use in relation to very high-priced luxury sports cars was sufficient to maintain the breadth of the specification.
 34. Having repeated at [40]-[41] what it had said in *ACTC* at [44] and [46], the Court of Justice said:
 - “43. As is apparent from paragraph 37 of this judgment, the only relevant question in that regard is whether a consumer who wishes to purchase a product or service falling within the category of goods or services covered by the trade mark in question will associate all the goods or services belonging to that category with that mark.
 44. Such a situation cannot be excluded on the sole ground that, according to an economic analysis, the various goods or services included within that category belong to different markets, or to different market segments. This is all the more the case where there is a legitimate interest of the proprietor of a trade mark in expanding his range of goods or services for

which his trade mark is registered (see, by analogy, ... *ACTC v EUIPO*, C-714/18 P, EU:C:2020:573, paragraph 51).”

35. It went on to say that:

“the mere fact that the goods in respect of which a mark has been used are sold at a particularly high price and, consequently, may belong to a specific market is not sufficient for them to be regarded as an independent subcategory of the class of goods in respect of which that mark was registered” ([45]);

“the mere fact that the cars in respect of which a mark has been used are referred to as ‘sports cars’ is not sufficient to consider that they belong to an independent subcategory of cars” ([48]); and

“the concept of ‘luxury’ ... could be relevant to several types of cars, so that the fact that cars in respect of which a trade mark has been used are classified as ‘luxury cars’ is likewise not sufficient for them to be regarded as an independent subcategory of cars” ([49]).

36. Accordingly, the Court concluded at [51]:

“It therefore appears, subject to verification by the referring court, that the fact that the company which is the proprietor of the marks in question in the main proceedings has used those marks in respect of replacement parts and accessories for ‘very high-priced luxury sports cars’ is not sufficient to establish that it has used those marks in respect of only some of the goods covered by them, for the purposes of Article 13 of Directive 2008/95.”

The judge’s judgment





37. So far as relevant to the issues on the appeals, the judge’s findings and assessments may be summarised as follows.

The average consumer.

38. It was common ground that, in relation to the Easylife Marks, there were two relevant average consumers: first, the general public, and secondly, business organisations (or rather persons working within such organisations), reflecting the two broad types of service for which the Easylife Marks were registered – the “bringing together” or retail services on the one hand and the advertising and promotion services on the other. The judge held that the business organisations would be more attentive than the general public.

Counterclaim for revocation of the Easylife Stylised Mark

39. *Variant forms.* easyGroup accepted that Easylife had not used the Easylife Stylised Mark in the form in which it had been registered during the relevant period. It relied upon the use of five signs as being variant forms. The judge set these out in a table which I reproduce below:

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

40. In the case of Sign 1, the judge identified the differences between that sign and the Easylife Stylised Mark at [48] as follows:

- a. The use in Sign 1 of a conventional dot over the letter ‘i’ in ‘easylife’ in place of the triangle which, in the mark, had acted as the dot over that letter ‘i’ and, by means of different degrees of shading, contained a tick device;
- b. The addition in Sign 1 of a larger white tick contained in a black circle placed in front of the word ‘easylife’ (‘the tickball’); and
- c. The use of a different font for the word ‘easylife’.”

41. He held that, viewed through the eyes of the average consumers, these differences did not, whether taken individually or together, alter the distinctive character of the registered mark for the following reasons:

“50. First, in my judgment, both types of average consumer would see the dominant element of both the Easylife Stylised Mark and Sign 1 as being the word ‘easylife’. Aurally, that word is unaltered and ... the average consumer is far more likely to use

that word when identifying the origin of the relevant goods or services than to try to describe the figurative elements of the mark or of Sign 1. Visually, the ways in which that word is depicted in the mark and in Sign 1 are very similar. In both cases it is depicted without a break using lower case letters throughout and I do not think that the relatively small difference in the fonts used would be seen as of any real significance. Conceptually, also, the word ‘easylife’ is the dominant element of both the mark and Sign 1. Whilst the fact that the words ‘easy’ and ‘life’ would be seen as normal descriptive words with a clear meaning ..., the fact that they are pushed together to form a made-up word would, in my judgment, give the combination an element of distinctiveness in the eyes of the average consumer whilst also alluding to the customer experience offered by Easylife – the possibility of an easier life and a stress-free experience – a concept reinforced by the ‘tick’ element that is contained in both the mark and in Sign 1.

51. As regards that tick, it is clearly more prominent in its ‘tickball’ form in Sign 1 than it is in the triangle in Easylife Stylised Mark. However, I do not accept the Defendants’ argument that the average consumer would not perceive the tick within the triangle in the Easylife Stylised Mark. Whilst the shading of the triangle does not serve to emphasise the tick as strongly as the tickball, the tick is undoubtedly present and the unusual use of a triangle (as opposed to the conventional dot) to form the ‘I’ of the word ‘easylife’ would draw the attention of the average consumer, and the average consumer would recognise it as reinforcing the concept (as I have said above) of the word ‘easylife’. Accordingly, notwithstanding Mr Caplan’s comment that the tickball was a core part of and fundamental to Easylife’s branding, I do not think that this difference alters the distinctive character of the mark. As set out above, changes to figurative elements of a mark are less likely to be regarded as changing the distinctive character of a mark and, in my judgment, the dominant feature was and remained the word ‘easylife’. ... it seems to me that the average consumer would be more influenced by the continued presence of the ‘tick’ than by the change in the geometric shape surrounding it, the change in colour or the change in position.”
42. In the case of Sign 2, the judge identified the following additional differences at [52]:
 - “d. The use in Sign 2 of the colour blue for the font and the circle; and
 - e. The change in the lower strapline so that in Sign 2 it reads ‘everyday solutions’ instead of ‘lifestyle solutions’.”

43. He held that these additional differences did not change the assessment for the reasons he gave at [53]:

“If, as I have concluded, Sign 1 does not alter the distinctive character of the Easylife Stylised Mark, then it seems to me that the same must apply as regards Sign 2. In the first place, I do not think that the adoption of a blue font for the word ‘easylife’ and for the circle around the tick would be seen as significant in terms of the distinctive character of the Easylife Stylised Mark. The same seems to me to be the case in relation to the change in the lower strapline. In my judgment, notwithstanding Mr Caplan’s evidence that this change had been a deliberate marketing decision, given that the words of the strapline are of little distinctive character and are depicted in a much smaller font than the word ‘easylife’, the average consumer would not regard this change as altering the distinctive character of the mark.”

44. In the case of Sign 3, the judge noted at [54] that this moved further away from the Easylife Stylised Mark in that, in addition to differences (a) to (d), the strapline was omitted altogether, but held that the average consumer would not see this change as altering the distinctive character of the mark because “the average consumer would not regard those words as being of any particular trade mark significance”.
45. In the case of Sign 4, the judge noted at [55] that this omitted all of the figurative elements and stylisation of the Easylife Stylised Mark, but retained the words “easylife” and “lifestyle solutions”. He held that the differences did not change the distinctive character of the Easylife Stylised Mark.
46. In the case of Sign 5, the judge noted at [56] that this omitted all the elements of the Easylife Stylised Mark save for the word “easylife”. He was nevertheless satisfied that Sign 5 was an acceptable variant because (i) the words “lifestyle solutions” would not be seen as particularly significant by the average consumer and (ii) the word “easylife” had some distinctive character and was the dominant element of the Easylife Stylised Mark.
47. *Use.* As can be seen from paragraph 9 above, the judge divided the Class 35 services for which the Easylife Stylised Mark is registered into two categories (a) and (b), and further divided category (b) into four subcategories. In relation to category (a), it was common ground that there was only one service in relation to which any of the variant forms had been used during the relevant period, namely Easylife’s Insert Service. It was also common ground that at least some of the variant forms had been put to use in relation to the category (b)(ii) and (iii) services, but not the (b)(i) and (iv) services.
48. *Partial revocation.* The Defendants contended that a fair specification for category (a) services reflecting the use that had actually been made would be “providing advertising space by way of printed inserts into printed retail catalogues”. The judge declined to restrict the specification in that manner for the reasons he gave at [74]:

“... In the present case, the respective advertising services are being offered to the same type of third party customer for the

same purpose (advertising that customer's goods or services). As appears from *Merck* and the other cases referred to above, the purpose for which the services are provided is important and here, whilst it is possible to describe the service provided by Easylife in narrower terms than those of the registration, the purpose of the service being provided seems to me to be the same as that provided for under the registration. The customer is looking for a means to advertise its goods or services. The fact that that service is provided through providing space for inserts in a catalogue is, as Mr Edenborough submits, a means for delivering an advertising service rather than being indicative of a different or distinct category of service."

49. The judge revoked the registration in so far as it covered the (b)(i) and (iv) services.

Claim for infringement: the Easylife Stylised Mark

50. *Similarity between the Defendants' Signs and the Easylife Stylised Mark.* The Defendants accepted that the Defendants' Signs were similar to the Easylife Stylised Mark, but there was a dispute as to the nature and extent of that similarity. The judge's assessment was as follows:

"85. There is clearly a visual and aural similarity between the Easylife Stylised Mark and the Defendants' Signs in that they all feature the word 'easy' and they all use that word in conjunction with a similar second word (i.e. the word 'life' in the case of the mark and the word 'live' in the case of the signs). Aurally and, particularly, visually those words are the most important part of the mark/sign as a whole. A further similarity is that, in the case of the Defendants' two logos shown above, the two words are run together without a gap just as they are in the mark.

86. Despite this, I find that the average consumer would see the mark and the signs as having, at best, a moderate level of similarity. The word 'easy' is a simple descriptive word that is frequently used both by itself and also ... in combination with other words to form a brand In the case of the Easylife Stylised Mark, that word is used in combination with another simple descriptive word 'life' – a combination which ... is used in normal speech and which has also been used by third parties as a brand or part of a brand. The average consumer would be aware of this. Further, the average consumer looking at the Defendants' Signs, would see that the word 'easy' is being combined with a different descriptive word ('live'), to create 'easylive' which is conceptually very different to 'easylife'. Conceptually, the mark 'easylife' stands by itself – a person can have an easy life. Nothing more needs to be said. In contrast, 'easylive' does not stand by itself but is adjectival in nature. It needs something more and it begs the question – an easy live what? In three of the signs, the answer is provided –

the word ‘Auction’, with a capitalised first letter and, in the case of the Auction Emphasised Logo, with emboldening to give it further prominence. I do not think that the average consumer would skate over the inclusion of that word in these signs. In the other cases, the question is likely to be answered by the context in which the sign is used and which, in this case, is likely to make clear that it is a live auction - a real time auction made easy by being accessible online rather than in person.

87. Another important difference (visually and conceptually) is that none of the Defendants’ Signs include anything even remotely resembling the triangular device containing a tick that is a feature of the Easylife Stylised Mark. As I have found when dealing with the issue of revocation (see paragraph 51 above), that device served to emphasise the concept created by the word ‘easylife’ and it would be seen by the average consumer as an important part of the mark. Its absence from the signs is, therefore, a significant difference and, as I have mentioned, highlights the different conceptual message that the signs convey.
88. Finally, the average consumer would note other differences, albeit of lesser distinctive significance, between the Defendants’ Signs and the Easylife Stylised Mark – such as the omission of the words (in small font) ‘Lifestyle Solutions’ and the inclusion of additional words such as ‘.com’ or ‘(Services) Ltd’.”
51. *Similarity between services.* The judge divided the services provided by the Defendants into three categories as follows:
- i) The service of advertising auctions and upcoming auctions (with a link to the relevant auction catalogue) provided on the Defendants’ Website and in emails sent to customers who had registered with the Defendants to receive such emails (“the Defendants’ Advertising Service”);
 - ii) The service which allows auction houses to upload their auction catalogues and auction event details on to the Defendants’ Website where they can be viewed by customers (“the Defendants’ Catalogue Service”); and
 - iii) The service which provides an online platform for auction houses to broadcast their auction sales to customers and for customers to bid for lots for sale in those auctions in real time (“the Defendants’ Auction Broadcast Service”).
52. It was common ground that the Defendants’ Advertising Service was identical to “advertising services” in the Easylife Stylised Mark if that was not restricted. The judge found that the Defendants’ Catalogue Service and the Defendants’ Auction Broadcast Service were identical or highly similar to the “bringing together” services. Although it was not necessary to determine the point, he also said at [101] that “my

impression is that there is an identity or strong similarity” between those services and “advertising services”.

53. *Distinctive character.* The judge found that the Easylife Stylised Mark had acquired an enhanced distinctive character as a result of the very extensive use made of the variant forms of it by Easylife since 2000 and of the substantial and increasing scale of Easylife’s business over that period.
54. *Overall assessment.* The judge held that there was no likelihood of confusion. He divided his reasoning into three stages. First, he considered the significance of the similarities between the Easylife Stylised Mark and the Defendants’ Signs:

“105. I have already dealt with how the average consumer would have viewed the Easylife Stylised Mark and the Defendants’ Signs (see paragraphs 83 to 88 above). Whilst there is a moderate similarity between them, the average consumer of both types (a member of the general public or customers looking to advertise their goods) would have been well aware that that similarity arose from the use of a word (‘easy’) that was a normal word, a word that is widely used and which is capable of being used descriptively, but that was given some level of distinctiveness in the mark by being used in combination with the word ‘life’, the words ‘lifestyle solutions’ and the triangle/tick device. It seems to me that the average consumer would not assume that a party trading, even trading in relation to identical or similar services, using another sign that featured the word ‘easy’ was the Claimant or associated in some way with the Claimant and/or its mark. The average consumer may well be aware of extensive use made of the word ‘easy’ by the Claimant and its group of associated companies but I do not think that that person would assume that the Claimant had a monopoly of such use.

106. Here, the average consumer would see that, in the case of the Defendants’ Signs, the word ‘easy’ had been combined with the word ‘live’ which, whilst sharing 3 of the 4 letters of the word ‘life’, has created something which, as set out above, is conceptually quite different to the Easylife Stylised Mark. The average consumer would also note the omission of the triangle/tick device and the other differences to which I have referred. All of this suggests that the average consumer is not likely to be confused, despite the identical or similar nature of the parties’ respective services.”

55. Secondly, the judge considered the impact of the enhanced distinctive character at [108]:

“... I agree with the point made by Mr Aikens ... that this does not mean that the average consumer was any more likely to be confused. I have to say that I am not certain whether it would be correct to say that the enhanced distinctive character was

limited to the business actually conducted under the Easylife name (which, as Mr Aikens argued ... was quite different to that being conducted by the Defendants). But even if it was not so limited, I do not accept that the enhanced distinctive character in this case would have led to any real likelihood of confusion given the descriptive (and common) nature of the word ‘easy’ and the very clear conceptual differences between the Easylife Stylised Mark and the Defendants’ Signs to which I have referred above.”

56. Thirdly, the judge considered documentary evidence relied on by easyGroup as being evidence of actual confusion. easyGroup relied upon 87 instances. 76 of these were of the Defendants or auction houses or their customers referring to the Defendants as “Easy Life” rather than “Easy Live”. The judge found that these instances were not evidence of actual confusion because it was clear that in each case the person knew exactly to whom they were referring, namely the Defendants. It was probable that the error was a simple typographical error due to the fact that the letter “f” is next to the letter “v” on the standard QWERTY keyboard. Four instances were of customers of Easylife wrongly referring to “Easy Live” rather than “Easy Life”. Again, the judge found that these were not evidence of actual confusion, but more probably typographical errors.
57. There were only seven instances which seemed to the judge to raise a possible suggestion of confusion. The judge assessed these at [119] as follows:
- “a. The Defendants’ record of a call received in July 2017 from a lady complaining about being ‘harassed by people that phone you from easylife’. However, her message expressly stated ‘I don’t know if you’re the right number’ and she apologised in advance in case she was making a mistake – which turned out to be the case (‘she wanted to contact easy life not easy live’). It is hard to see this as real confusion as opposed to mere uncertainty.
 - b. An email exchange in October and November 2017. In this, a person (who had clearly been a customer of both Easylife and the Defendants) emailed Easylife regarding an entry on her debit card statement for the sum of £3. It turned out that the payment was to the Defendants and was nothing to do with Easylife. This does seem to involve some confusion although this could be due to a misreading of the statement rather than a mistake as to the trade origin of the relevant services and it is hard to attribute much weight to this incident without knowing more about how the transaction appeared on the credit card statement and why the mistake was made.
 - c. A similar mistake and similar reservations apply with regard to an email exchange in September 2021 when a customer of the Defendants emailed Easylife seeking a refund of the £3 registration fee for an auction.

- d. Another example, from April 2021, involved a customer of both Easylife and the Defendants. His credit card statement showed a payment of a £3 registration fee to the Defendants in respect of an auction at the Peebles Auction House and, on the same day, a payment of £59.99. At 12.01 he emailed the Defendants querying that latter payment as he had not bid for anything at the auction. Then, at 12.07, he emailed again saying the Defendants should ignore his earlier email as the payment had been ‘to Easy Life, not Easy Live’ and had related to a purchase from Easylife made in the previous month. Clearly, without the Defendants even having to respond, the customer had easily been able to correct his own mistake presumably after looking at his credit card statement more carefully. This does not seem a promising basis on which to find a *likelihood* of confusion.
- e. An exchange of emails in July 2021 between the Defendants and a person asking to be unsubscribed from ‘this site’ (which site was unspecified). On the Defendants pointing out that they had no account for him, he responded confirming that that was correct but stating that ‘the email which plugged me in to you was from Pickering Auctions’ and going on to say that that he had ‘bought items from Easy Life catalogues in the past but never authorised receiving emails from any companies with which you have arrangements’. It has to be said that the position is unclear save for the fact that this person was clearly annoyed and had made some form of link between his dealings with Pickering Auctions (presumably a customer of the Defendants) and Easylife.
- f. An email exchange in August 2021 where a customer who had bought an eleccoter [sic] bicycle from Easylife wrongly emailed the Defendants about the fact that it had not been delivered. The reason for this mistake is unclear.
- g. Finally, in June 2023 where a customer of Easylife initially emailed a query regarding an order to help@easylive.co.uk and, having received a failed message response, forwarded it to the correct address for Easylife. Again, no explanation was provided for the initial mistake.”

58. The judge’s overall assessment of this evidence was as follows:

- “120. In the context of the facts as a whole, this evidence is not sufficient to undermine the conclusion that I would have reached without such evidence – namely that there is no real likelihood of confusion. None of the seven examples is particularly convincing or strong evidence of relevant confusion.

121. Further, it is undoubtedly the case that an absence (or relative absence) of evidence of actual confusion is not necessarily fatal to a claim under s.10(2)(b) However, the fact that there are only these seven examples notwithstanding the scale of Easylife's business and notwithstanding the fact that the Easy Live Auction name has been used since January 2010 (some 14 years) suggests that the likelihood of confusion is very low, indeed insignificant.
122. It is also possible that, with the passage of time, evidence of actual confusion might be difficult to find. However, the parties have undergone very extensive searches on the issue of confusion. ... Thus, even if I had found that the seven examples referred to above were evidence of actual confusion, if there was a real *likelihood* of confusion, I would have expected to find more than those seven examples."

Claim for infringement: the Easylife Word Mark

59. *Similarity between the Defendants' Signs and the Easylife Word Mark.* It was common ground that the Defendants' Signs were similar to the Easylife Word Mark and that the extent of this similarity was greater than in the case of the Easylife Stylised Mark. The judge's assessment at [132] was as follows:

"... given the important conceptual difference referred to in paragraph 86 above (which applies equally in the case of the Easylife Word Mark) and given the other (albeit less important) distinguishing features, I conclude that the level of similarity is moderate."

60. *Similarity in services.* This was the same as with respect to the Easylife Stylised Mark.
61. *Distinctive character.* The judge said at [138] that "it seems probable that the Easylife Word Mark could have acquired an enhanced distinctive character by reason of Easylife's extensive trading since September 2020".
62. *Overall assessment.* The judge held that there was no likelihood of confusion for essentially the same reasons as in the case of the Easylife Stylised Mark. I should note, however, that in this context he said at [137]:

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

associated in some way with the Claimant and/or Easylife and/or the Easylife Word Mark.”

Standard of review on appeal

63. Since the judge’s decisions under appeal involved multi-factorial evaluations, this Court can only intervene if he erred in law or in principle, which includes a gap in logic, a lack of consistency or a failure to take into account a material factor that undermines the cogency of the conclusion: see *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8, [2024] Bus LR 532 at [46]-[50] (Lord Briggs and Lord Kitchin) and *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc* [2025] UKSC 25 at [94]-[95] (Lord Briggs and Lord Stephens).

Order of consideration

64. It is convenient to begin by considering the Defendants’ cross-appeal on revocation before turning to easyGroup’s appeal on infringement. This is the order in which the judge dealt with the issues, and it is a logical order because the scope of the registration potentially affects the infringement analysis. For those reasons, this was the order adopted by the Defendants in their skeleton argument. Furthermore, although the cross-appeal would be unnecessary if the appeal were dismissed, it is not framed in the respondents’ notice or skeleton argument as a contingent cross-appeal. Finally, it is the cross-appeal that raises the inconsistency between the decisions in this case and in the *easyfundraising* case.

The Defendants’ grounds of cross-appeal

65. The Defendants cross-appeal on two grounds. Ground 1 is that the judge erred in law or principle in holding that the differences between Signs 1-3 and 5 and the Easylife Stylised Mark do not alter the distinctive character of the Easylife Stylised Mark in the form in which it was registered, alternatively his decision was one that no reasonable tribunal could have reached. (The Defendants do not need to appeal with respect to Sign 4 having regard to the judge’s findings on use, which are not challenged by easyGroup.)
66. Ground 2 is that the judge erred in law or principle in holding that the use made of Signs 1, 2 and 3 justified the maintenance of “advertising services” and “promotional services” in the specification of the Easylife Stylised Mark, alternatively his decision was one that no reasonable tribunal could have reached. The Defendants contend that a fair specification would be “providing advertising space by way of printed inserts into printed retail catalogues”, alternatively “providing advertising or promotional space in printed publications”. (The alternative formulation is that of Fancourt J in the *easyfundraising* case.)

Cross-appeal ground 1: variant forms

67. The Defendants contend that the judge erred in law or principle for four reasons which I will consider in turn.
68. First, the Defendants argue that the findings the judge made were only open to him if he also found that all the other elements of the mark were negligible, but he made no

such finding. The basis for this argument is principle (d) of the standard summary for likelihood of confusion (paragraph 58 above). This is that 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.

69. I do not accept this argument. It is true that, as counsel for the Defendants emphasised, the normal approach to the assessment of distinctive character applies in this context. Principle (d) is not concerned with the assessment of distinctive character, however, but the comparison between the marks (or, in the infringement context, between the mark and the sign). The purpose of that comparison is to assess whether, in combination with the other relevant factors, there is a likelihood of confusion. While section 46(2) also requires a comparison to be made between the mark as registered and the sign as used, the purpose of the comparison is different, namely to assess whether the differences alter the distinctive character of the mark as registered.
70. Furthermore, the part of principle (d) relied upon by the Defendants is designed to ensure that the comparison is carried out on the correct basis. The principle is that the comparison may only be carried out *solely* on the basis of the dominant elements if the other components are negligible. Otherwise, the comparison must be on the basis of the mark as a whole. This derives from case law correcting courts and tribunals who made the mistake of just comparing the dominant elements of complex marks even though the other components were not negligible.
71. The Defendants' argument finds no support in the case law on variant forms. On the contrary, as counsel for easyGroup submitted, the authorities support the converse proposition. For example, in the *Sony* case, the General Court held at [48] that the figurative elements of the mark as registered "have only weak distinctive character and occupy merely an ancillary position in th[e] overall impression [of the mark]" and "have a relatively marginal visual impact". The General Court did not hold that the figurative elements were negligible. The General Court nevertheless upheld the Board of Appeal's finding that the omission of those figurative elements did not alter the distinctive character of the mark as registered.
72. The Defendants' second argument is that the judge's reasoning was internally inconsistent. They submit that the judge found in a number of places both when considering revocation (at [51]) and when considering infringement (at [87]-[88] and [105]-[106]) that the tick and, to a lesser extent, the strapline were important elements of the Easylife Stylised Mark; and that this is inconsistent with his conclusion that the omission of those elements did not alter the distinctive character of the Easylife Stylised Mark.
73. So far as revocation is concerned, there is no inconsistency in the judge's reasoning. He found that the average consumer would notice the triangular form above the letter "i" in the Easylife Stylised Mark as registered and would interpret it as a tick, but would regard it as reinforcing the concept of "easylife". Compared to Signs 1-3, he considered that the average consumer would be more influenced by the continuing presence of the tick than by the change in its position or presentation. Thus there was no alteration of the distinctive character. Compared to Signs 4-5, the judge acknowledged the absence of the tick, but concluded that this did not alter the distinctive character of the mark as registered because "easylife" was the dominant

element and the tick merely reinforced that concept. As for the strapline, he held that the average consumer would not regard this as being of any particular trade mark significance. Thus its variation or omission did not alter the distinctive character of the mark as registered.

74. Turning to infringement, I accept that there appears to be some tension between the judge's reasoning on the two issues. As I have explained, however, he was applying different tests for different purposes. Furthermore, even if there is inconsistency, that does not necessarily mean that the judge was wrong about revocation. The alternative possibility is that he was wrong about infringement. I will return to this question in that context.
75. The Defendants' third argument is again one of inconsistency, namely that the judge's findings in relation to the "easylife" element are inconsistent with his conclusion on variant forms. The Defendants contend that the judge's analysis in [50] amounts to a finding that the word "easylife" had no more than the minimum degree of distinctive character to get over the registrability threshold, and that it necessarily follows that adding or subtracting any element that has some distinctive character affects the distinctive character of the mark as registered. I do not accept the premise of this argument. The judge did not say that "easylife" had no more than the minimum degree of distinctive character to get over the registrability threshold. He said in [50] that it had "an element of distinctiveness" and in [56] that it had "some distinctive character". Given that "easylife" is, as the judge said in [50] "a made-up word" and "allus[ive]" (rather than descriptive of the services for which the Easylife Stylised Mark is registered), he plainly did not mean that it had no more than the minimum degree of distinctive character.
76. Finally, the Defendants argue that the judge's decision was one that no reasonable tribunal could have reached given Mr Caplan's evidence referred to by the judge at [51] and [53] that the tickball device was a core part of Easylife's branding and that the change in the wording of the strapline between Sign 1 and Sign 2 had been a deliberate marketing decision. I do not accept this argument. The judge was entirely correct not to surrender his judgment to that of any witness: see *Electrolux Ltd v Electrix Ltd (No 2)* (1954) 71 RPC 23 at 31 (Sir Raymond Evershed MR). It was his task objectively to assess the issue from the correct legal perspective. Mr Caplan's subjective opinion, even if admissible on this issue (a question which was not explored in argument), was not determinative.
77. Accordingly, I would dismiss ground 1 of the cross-appeal. I would nevertheless add that there is an alternative and preferable route to the conclusion which the judge reached with respect to Signs 1-3. Given that the tick in the mark as registered takes the place of the tittle (the dot of the "i"), and that it was found by the judge merely to reinforce the concept of "easylife" in the average consumer's perception of the mark, it would easily be forgotten by the average consumer. Although the case was argued before the judge on the footing that Sign 1 was a single sign, the better view is that it consists of two signs side-by-side: the tickball on the left and "easylife lifestyle solutions" on the right. If the mark as registered is compared with the righthand sign, then it is plain in my view that the differences do not alter the distinctive character of the former. The fact that the tickball sign is used together with that sign does not affect this. (It would be different if use of the mark as registered, or a variant thereof, as part of a composite sign or in conjunction with another sign affected the perception

of the average consumer of the mark as registered, or variant, as an indication of origin: see Case C-12/12 *Colloseum Holding AG v Levi Strauss & Co.* [EU:C:2013:253] and *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2014] EWCA Civ 1294, [2015] FSR 8.) The change to, and omission of, the strapline in Signs 2 and 3 do not make any difference for the reasons given by the judge. As can be seen from my judgment in the *easyfundraising* case, this analysis has some significance in that context.

Cross-appeal ground 2: partial revocation

78. The Defendants contend that the judge erred in law or principle because the judge did not ask himself what a fair specification of services would be having regard to the use that had actually been made of (the variant forms of) the Easylife Stylised Mark. In the alternative, the Defendants contend that the judge's conclusion was one no reasonable tribunal could have reached. The Defendants argue that "advertising services" is a very broad category of services, that the judge wrongly identified the relevant purpose as "advertising th[e] customer's goods or services" and that this would mean there could never be any subcategory of "advertising services". (Neither side distinguished between "advertising services" and "promotional services", and I shall follow their example.)
79. The first way the Defendants put this ground ignores the fact that, at the end of [73], the judge expressly recited the Defendants' argument that "a fair specification, one reflecting the use made of the mark, would be 'providing advertising space by way of printed inserts into printed retail catalogues'". In [74] he rejected that argument.
80. More fundamentally, this way of putting the argument does not grapple with the judge's reasoning. Although the judge did not articulate it in precisely this way, it seems to me that the reason why he reached the conclusion he did was that he was not persuaded that "providing advertising space by way of printed inserts into printed retail catalogues" was an independent subcategory of "advertising services". The real question is whether he was correct to reach that conclusion.
81. The judge's reasoning was that the purpose served by Easylife's Insert Service was "advertising th[e] customer's goods or services" and that the provision of advertising space by inserts in catalogues was "a means for delivery of an advertising service".
82. As the Court of Justice made clear in *ACTC* and *Ferrari*, the essential criteria which must be applied in determining whether a category of goods or services can be divided into independent subcategories are purpose and intended use. It is not sufficient that different goods may be aimed at different publics or sold in different shops or that different goods or services belong to different market segments. These criteria are easier to apply to goods than to services, in particular because it is easier to distinguish between the purpose and the intended use of goods than it is to distinguish between the purpose and the intended use of services. In the case of services, it seems to me that the logic of the Court of Justice's approach means that one should consider the intended mode of use of the services in question.
83. As the Court of Justice made clear in *Ferrari* at [43], the ultimate question is "whether a consumer who wishes to purchase a product or service falling within the

category of goods or services covered by the trade mark in question will associate all the goods or services belonging to that category with that mark”.

84. Although the Defendants argue that the judge was wrong to hold that the purpose of Easylife’s Insert Service was “advertising th[e] customer’s goods or services”, counsel for the Defendants was unable convincingly to identify any narrower purpose served by Easylife’s Insert Service than “advertising th[e] customer’s goods or services”.
85. That leaves the intended mode of use of Easylife’s Insert Services. The judge did not in terms address this question, but he did consider the “means for delivering” the service. In my judgment the judge was correct to decide that “providing advertising space by way of printed inserts into printed retail catalogues” was not an independent subcategory, because that means of delivery could not be distinguished by either purpose or intended mode of use from other means of delivery involving printed advertising. To take the most obvious illustration, the average consumer of advertising services would be likely to assume that the undertaking which provided Easylife’s Insert Service was the same as, or economically linked to, an undertaking which provided advertising space in the catalogues themselves.
86. The judge did not consider whether advertising services could be divided into independent subcategories by reference to the different media involved: printed publications, radio, television, outdoor (billboards and the like), direct mail and online. That is understandable because neither party argued for this. It is nevertheless worth noting that, in determining whether partially to revoke a specification of goods and services, the court is not limited to the wording proposed by the parties, but is at least entitled, if not positively required, to form its own view provided that it does so in a procedurally fair manner: see *Sky Ltd v SkyKick*, in particular at [327].
87. In considering this question, assistance is provided by consideration of the Nice Classification (12th ed, 2024 version). (For an explanation of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks and its role in the trade mark system, see *Omega Engineering Inc v Omega SA* [2010] EWHC 1211 (Ch), [2010] ETMR 49 at [6]-[27], affd. [2011] EWCA Civ 645, [2011] ETMR 40.) The judge was not referred to this. Nor did the parties raise it before this Court, but we invited written submissions on it after the hearing.
88. Among the services listed in Class 35 are “advertising by mail order” (basic number 350077), “direct mail advertising” (350024), “online advertising on a computer network” (350084), “outdoor advertising” (350152), “radio advertising” (350040) and “television advertising” (350044). Curiously, there are no entries for newspaper and magazine advertising. Nevertheless, it can be seen that the Nice Classification recognises a number of types of advertising service which are differentiated by the medium involved. The purpose for which it does so is, as easyGroup emphasised, solely that of classification. In that respect, what matters is what they have in common rather than how they differ. Nevertheless, it is pertinent to ask why these services are separately listed. In my judgment it is because, although they have the same purpose, their intended modes of use differ. Moreover, the average consumer of one of those services would not necessarily think that the provider of that service provided the

others. Thus if one applies the test laid down in *ACTC* and *Ferrari*, they are independent sub-categories of “advertising services”.

89. In the *easyfundraising* case Fancourt J took the view at [187]-[188] that “there is an identifiable sub-category of advertising and promotional services concerned with advertising placed or inserted into printed publications” because “any kind of advertisement placed within a physical publication, whether inserted or printed on a page, may not, in its essentials, be different from [EasyLife’s Insert Service]”. Although, as I discuss in my judgment in that case, Fancourt J did not apply the criteria of purpose and intended use, this reasoning recognises that the average consumer of advertising services might well assume that the undertaking that provided EasyLife’s Insert Service was the same as, or economically linked to, an undertaking which provided the services of placing printed inserts into other printed publications such as newspapers and magazines and of providing advertising space in such publications themselves. It is implicit in this reasoning that the average consumer of advertising services would not make the same assumption in respect of advertising services in other media such as online. Thus it accords with the principle that advertising services can be differentiated by medium, and hence intended mode of use, even though their purpose is the same.
90. I was at one stage concerned as to whether the wording adopted by Fancourt J was sufficiently clear and precise, but on reflection I have concluded that it is acceptable from that perspective.
91. I would therefore allow ground 2 of the cross-appeal to the extent that it espouses Fancourt J’s formulation of the appropriate wording. Accordingly, the Easylife Stylised Mark should partially be revoked so as to replace the words “advertising services; promotional services” in the Class 35 specification with the words “providing advertising or promotional space in printed publications”.

easyGroup’s grounds of appeal

92. easyGroup appeals on three grounds. Ground 1 is that the judge was wrong to find that the Easylife Marks and the Defendants’ Signs were conceptually very different. Ground 2 is that the judge was wrong in law to hold that the enhanced distinctive character of the Easylife Stylised Mark did not mean that the average consumer would be more likely to be confused. Ground 3 is that the judge made various errors in his assessment of likelihood of confusion.

The Defendants’ respondents’ notice

93. The Defendants contend that the judge’s decision on infringement should be affirmed on four additional or alternative grounds. Grounds 1 and 2 concern the comparison of services, and grounds 3 and 4 concern the enhanced distinctive character of the Easylife Marks.

Appeal ground 1: conceptual similarity

94. easyGroup contends that the judge erred in law or principle in concluding at [86] that “easylife” and “easylive” are “conceptually very different” and that that finding is in any event rationally insupportable (I will call this “Ground 1A”). easyGroup also

contends that the judge erred in law or principle when giving effect to this finding when assessing likelihood of confusion (“Ground 1B”).

95. In support of Ground 1A, easyGroup argues that the judge made errors of law and of principle. The error of law is that the judge wrongly took the services in relation to which the Defendants’ Signs had been used into account in ascertaining the meaning of “easylife”, whereas conceptual similarity should be considered without reference to the goods or services: *Case C-328/18 P European Union Intellectual Property Office v Equivalenza Manufactory SL* [EU:C:2020:156] at [70]-[73]. The error of principle is that the judge failed to explain what the two concepts were and how they differed: *TVIS Ltd v Howserv Services Ltd* [2024] EWCA Civ 1103, [2025] ETMR 2 at [39]. easyGroup contends that, if the judge had not made these errors, he could not have made a finding of conceptual difference since the word “easy” is the same in both the marks and the signs, and the words “life” and “live” have related meanings. Rather, he should have found conceptual similarity.
96. In considering these arguments, it is important to differentiate between the Defendants’ Signs. For this purpose, I consider that they fall into three groups: those listed in paragraph 13 above, subparagraphs (iii) and (iv); those listed in paragraph 13, subparagraph (i); and the sign listed in paragraph 13, subparagraph (ii).
97. The first group consists of the words EASY LIVE AUCTION in various different forms. In this context I consider that the judge was correct to say that the word “live” would be perceived by consumers as an adjective describing, together with the word “easy”, “auctions”. Thus the word “live” would be understood to be used in the sense “in real time”, and to be pronounced with a long “i”. The judge did not make the error of law he is argued to have made, because he correctly based his conceptual analysis of these Signs purely upon their semantic content. As for the error of principle he is alleged to have made, he did explain what the two concepts were and how they differed: “easylife” means an easy life (i.e. a life which is comfortable and free from conflict, hardship or stress), whereas “easy live” in this context means easy and in real time. I am not sure that I would go so far as to describe that as “conceptually *very* different [emphasis added]”, but that was an evaluative assessment which was open to the judge.
98. The second group consists of the words EASY LIVE in various forms. In this case I consider that the judge did err in law as easyGroup contends, but the error is at least partly due to a logically anterior flaw in the judge’s reasoning. In the case of the sign EASY LIVE there is nothing to indicate to consumers that the word “live” functions as an adjective and that it is to be pronounced with a long “i”. It is at least equally likely to be understood to function as a verb and to be pronounced with a short “i”. That would be ungrammatical, but plenty of trade marks are ungrammatical. If “live” is understood to function as a verb, then consumers would not (subconsciously) ask themselves the question posed by the judge (“an easy live what?”).
99. Furthermore, similarity cannot depend on the goods or services in relation to which the sign has been used, as the Court of Justice held in *Equivalenza* at [72], because otherwise the same mark and sign could be both similar and different depending on the goods and services. (It is perhaps worth explaining that in *TVIS v Howserv* the fact that the sign PETSURE had in fact been used in relation to pet insurance was purely confirmatory of the concept conveyed by the sign.) As discussed in *Iconix v Dream*

Pairs at [47]-[66], when considering infringement, the context in which the sign is used must be taken into account, and this may affect the average consumer's perception of the signs; but that is a different point.

100. The third group is the sign EASY LIVE (SERVICES) LTD. In my view the fact that the word SERVICES has a broad meaning and is in brackets means that the word "live" could perhaps be read as a verb, but it is rather more likely to be read as an adjective. If it is read as an adjective, then it will again be understood as meaning "in real time". Accordingly, the position in relation to this sign is essentially the same as with respect to the first group.
101. I would therefore allow the appeal on Ground 1A in relation to the second group of signs, but not the first and third groups. The consequence is that it is necessary for this Court to re-assess likelihood of confusion in relation to the second group.
102. Turning to Ground 1B, easyGroup argues that the judge made the same error as the error discussed in *TVIS v Howserv* at [40]-[41] of requiring conceptual similarity in addition to visual and aural similarity in order to find a likelihood of confusion. As easyGroup points out, and the Defendants accept, the judge did not find that this was a case of "conceptual counteraction".
103. It is only necessary to consider this argument with respect to the first and third groups of signs discussed in the context of Ground 1A.
104. *TVIS v Howserv* was a case where the trade mark (VETSURE) and the sign (PETSURE) were visually and aurally very similar and were being used in relation to identical services. The judge nevertheless reasoned that the supposed conceptual difference between them was sufficient *on its own* to prevent a likelihood of confusion. That was an error because, as the defendant accepted on appeal, it was not a case where the principle of conceptual counteraction applied.
105. Whatever might be said about the judge's reasoning in the present case so far as the second group of signs is concerned, I am not persuaded that his reasoning in relation to the first and third groups of signs is infected by this error. Rather, his reasoning was that there was no likelihood of confusion due to the conceptual difference together with the visual and aural differences, a view he considered to be confirmed by the absence of substantial evidence of actual confusion despite a reasonably long period of parallel trading. The judge undoubtedly emphasised the conceptual difference, but he also relied on the visual and aural differences, in particular at [87] and [88].

Respondents' notice grounds 1 and 2: comparison of services

106. The Defendants contend that the judge erred in law or principle in holding that their services were identical or highly similar to those for which the Easylife Marks are registered.
107. In the case of the Easylife Stylised Mark, my conclusion on cross-appeal ground 2 removes the basis for the judge's finding of identity of services in the case of "advertising services", which leaves the question of similarity. In my judgment there is a moderate degree of similarity between the Defendants' Advertising Service and the Defendants' Catalogue Service and "providing advertising or promotional space in

printed publications” in that they are all forms of advertising, but differentiated by medium (online versus print). In the case of the Defendants’ Auction Broadcast Service the similarity is low because this is not an advertising service.

108. My conclusion with respect to cross-appeal ground 2 does not affect the Easylife Word Mark. As noted in paragraph 52 above, the Defendants do not dispute that the Defendants’ Advertising Service is identical to “advertising services”. The Defendants nevertheless contend that the judge was wrong to hold that the Defendants’ Catalogue Service and the Defendants’ Auction Broadcast Service were identical or highly similar to the “bringing together” services in the specification of the Easylife Stylised Mark and to the “retail services” in the specification of the Easylife Word Mark. (As explained below, the “bringing together” wording is alternative wording for a retail service.) Given the concession with respect to the Defendants’ Advertising Service, this contention can only affect the extent of any infringement. I shall therefore address it relatively briefly.
109. The Defendants contend that their services differ from “retail services” because the Defendants do not conclude any sales with customers bidding on the Defendants’ Website. If the bidder is successful at auction, they transact with the auction house (or perhaps the vendor - it matters not for this purpose).
110. This argument is based on the judgment of the Court of Justice in C-418/02 *Praktiker Bau- und Heimwerkermärkte AG* [2005] ECR I-5873. In that case the Court was called upon to decide (i) whether, as a matter of principle, trade marks could be registered in respect of retail services, and if so (ii) the degree of specificity with which such services should be described. The Court’s answers were that (i) in principle a trade mark could be registered in respect of retail services, and (ii) it was sufficient to use general wording such as “bringing together of a variety of goods, enabling customers to conveniently view and purchase those goods”, but the goods or types of goods must be specified.
111. In that context the Court said at [34]:

“...the objective of retail trade is the sale of goods to consumers. That trade includes, in addition to the legal sales transaction, all activity carried out by the trader for the purpose of encouraging the conclusion of such a transaction. That activity consists, inter alia, in selecting an assortment of goods offered for sale and in offering a variety of services aimed at inducing the consumer to conclude the above-mentioned transaction with the trader in question rather than with a competitor.”
112. The Defendants argue that this demonstrates that a retail service must include a sale by the provider of the service. I do not accept this argument for a number of reasons. First, it ignores the Court’s reasoning at [35]-[49], all of which is focussed upon the services provided by a retailer which are distinct from sale of the goods.
113. Secondly, it would mean that a retail service is not provided to persons who browse in a shop, but do not purchase the goods then and there (e.g. because they go home and purchase the goods from the retailer’s website), which would be contrary to the

rationale for permitting registration of trade marks for retail services, namely that there is a value in the provision of retail services over and above the bare sales transaction.

114. Thirdly, as the judge pointed out, a department store or a market provides a retail service even if sales are made to consumers by third-party concessions operating within the store or market. It is true that, as counsel for the Defendants argued, those examples do involve sales, but the sales are not made by the provider of the overall retail service.
115. Fourthly, the argument would be inconsistent with the Court of Justice’s reasoning in the later case of Case C-420/13 *Netto Marken-Discount AG & Co. KG v Deutsches Patent- und Markenamt* [EU:C:2014:2069]. In that case the Court held that it was possible to register a trade mark in respect of the retailing of services, and not merely goods. While the Court’s judgment again refers at points to consumers purchasing the services, the core of the reasoning is at [34]:

“It is unnecessary to examine whether services can, like goods, be the subject of ‘retail trade’ in the proper sense of the term, since it is clear, as was pointed out by the governments which submitted observations to the Court and by the Commission, that there are situations in which a trader selects and offers an assortment of third party services so that the consumer can choose amongst those services from a single point of contact.”

116. While it will usually be in the trader’s own interest to ensure, so far as possible, that consumers purchase the service in question through the trader, the trader provides the service of enabling consumers to compare and choose between the services offered even if the consumer then goes directly to the source.

Appeal ground 2: enhanced distinctive character

117. easyGroup contends that the judge erred in law when he said in [108] that the enhanced distinctive character of the Easylife Stylised Mark “does not mean that the average consumer was any more likely to be confused” (and repeated the error in relation to the Easylife Word Mark at [138]), because that is contrary to principle (h) in the standard summary. I agree that, read in isolation, that sentence appears to be erroneous. As counsel for the Defendants submitted, however, [108] must be read as a whole. It is clear from the last sentence of [108] that what the judge meant was that the enhanced distinctive character was not sufficient to lead to any real likelihood of confusion having regard to the other relevant factors. That reasoning discloses no error.

Respondents’ notice grounds 3 and 4: enhanced distinctive character

118. The Defendants contend that the judge should have held that the enhanced distinctive character he found the Easylife Marks to have was confined to the services actually provided by Easylife. easyGroup disputes this, and contends that the enhanced distinctive character generated by use of the Easylife Marks extended beyond the services provided by Easylife. The judge was uncertain about this issue, but took the view that it did not matter.

119. Who is right about this is an issue of law. We were informed by counsel on both sides that there was no authority which determined this issue. I have to say that I find that difficult to believe, but I shall assume that the parties are correct. Approaching the issue as a matter of principle, I accept counsel for easyGroup's submission that the enhanced distinctive character generated by use of a trade mark will not be normally be confined to the precise goods or services in relation to the which the mark has been used. Rather, there will be a penumbra which extends beyond those goods or services. The extent of that penumbra will be a question of fact. In the present case, I am sceptical that the enhanced distinctive character of the Easylife Marks extends across the full breadth of the specifications, but it is not necessary to decide precisely how far it extends.
120. In the case of the Easylife Word Mark, the Defendants also contend that the judge made a separate error in that he held at [138] it was probable that the Mark had acquired a distinctive character "by reason of Easylife's extensive trading since September 2020". As the Defendants point out, the judge held at [28](d), and reiterated at [129], that the relevant date for assessing the infringement claim in relation to the Easylife Word Mark was 14 September 2020. The judge therefore cannot have intended to say "since September 2020" in [138], but it is not obvious what he did mean. The parties should have asked the judge to clarify this paragraph when the judgment was circulated in draft, but they did not. In those circumstances I accept counsel for easyGroup's submission that the most likely explanation is that the judge meant to say "before". This is because he found that the Easylife Stylised Mark had acquired an enhanced distinctive character by reason of the extensive use made of the variant forms of it, including Sign 5, since 2000. Given his assessment that none of the variant forms altered the distinctive character of the Easylife Stylised Mark, it would have been a short step to conclude that the Easylife Word Mark benefitted from that enhanced distinctive character from the effective date of its registration.

Appeal ground 3: likelihood of confusion

121. easyGroup argues that the judge made a number of errors of principle when assessing likelihood of confusion. I shall consider these in a slightly different order to the order in which they were argued.
122. First, easyGroup contends that the judge failed to consider the possibility of imperfect recollection of the Easylife Marks contrary to principle (b) of the standard summary. It is true that the judge did not expressly discuss this possibility when assessing likelihood of confusion, but he did set out and purport to apply the correct principles. Imperfect recollection is an elementary and fundamental concept in this area of the law, and I see no reason to think that the judge did not have it well in mind.
123. Secondly, easyGroup contends that the judge failed to apply the interdependency principle, principle (g) in the standard summary. It is again true that the judge did not expressly mention this when assessing likelihood of confusion, but he did take into account the identity or high similarity of the respective services.
124. Thirdly, easyGroup contends that there is a gap in the judge's reasoning between his finding at [121] that "the likelihood of confusion is very low" and his conclusion that there was no likelihood of confusion. This is a semantic point of no merit. Clearly what the judge meant is that there was no material likelihood of confusion. It is often

the case that it is not possibly entirely to exclude the risk of confusion. The court's task is to assess whether the risk is sufficiently material to warrant a finding of infringement.

125. Fourthly, easyGroup contends that there is an inconsistency between the judge's findings as to the significance of the similarities between the Easylife Word Mark and the Defendants' Signs at [137] and his findings with respect to the Easylife Stylised Mark, in particular at [85]. When considering the Easylife Stylised Mark, the judge recognised there was visual and aural similarity with the Defendants' Signs in that both featured "easy" in conjunction with "life" or "live", which were the most important elements, and that in some of the Defendants' Signs there was no gap between those two words. When considering the Easylife Word Mark, the judge said that, while it was somewhat closer to the Defendants' Signs due to the absence of stylisation, the average consumer "would still see the similarity as arising from the use of the word 'easy'", indeed in the absence of stylisation that similarity would be even less likely to lead to an association with the Easylife Word Mark.
126. Counsel for the Defendants disputed that this was an inconsistency. I disagree. On the face of it, the reasoning in [137] is inconsistent with the reasoning in [85]. The real question is whether this can be excused as a mere infelicity in drafting. With respect to the judge, I do not think that it can be. Even if the first sentence of [137] could be explained in that way, the reasoning in the second sentence completely ignores the "life"/"live" similarity. I therefore conclude that, in this respect, the judge did err in principle with respect to the Easylife Word Mark. He was right at [85], and wrong at [137].
127. Fifthly, easyGroup contends that the judge erred in principle in his assessment of the evidence of confusion it relied on. easyGroup does not challenge the judge's primary findings of fact. (During the course of argument counsel for easyGroup at times strayed into criticising the judge's findings, but that is not a ground of appeal.) easyGroup nevertheless contends that the judge made two errors.
128. The first concerns the judge's treatment of the 80 instances where people wrote "Easy Life" rather than "Easy Live" or vice-versa. easyGroup accepts the judge's finding that these instances were probably due to typographical errors and do not demonstrate actual confusion, because the people in question knew who they were referring to. easyGroup argues that this is not the end of the analysis, because what this evidence demonstrates is the ease with which such an error can be made without the persons in question noticing it. It thus confirms, if confirmation is needed, that "Easy Life" and "Easy Live" are confusingly similar. As has often been pointed out in this context, the human eye sees what it expects to see and the human ear hears what it expects to hear. It seems to me that there is force in this point, although its impact on the overall assessment is another matter.
129. The second point concerns the judge's treatment of the seven examples he discussed in [119]. easyGroup argues that the judge found that these were instances of actual confusion, and that it necessarily follows that he was wrong to conclude that there was no likelihood of confusion. I do not accept this argument. The judge does appear to have accepted that confusion was a possible reason for at least some of the mistakes, and he did not posit alternative explanations for them (unlike the typographical errors), but his overall finding in [120] was that "[n]one of the seven

examples is particularly convincing or strong evidence of relevant confusion”. In the absence of any challenge to that finding, and subject to my conclusions with respect to the other grounds of appeal, the judge was entitled to conclude in [122] that “if there was a real likelihood of confusion, I would have expected to find more than those seven examples” given the duration of parallel trading and the significant efforts made by the parties to find evidence of confusion.

Re-assessment of likelihood of confusion

130. It follows from my conclusions with respect to appeal ground 1 (conceptual similarity with regard to EASY LIVE) and appeal ground 3 fourth argument (error as to the assessment of likelihood of confusion with respect to the Easylife Word Mark) that it is necessary for this Court to re-assess likelihood of confusion to that extent (but only to that extent).
131. It is convenient to do so by first considering the Easylife Word Mark and the EASY LIVE sign. Both errors are relevant here. The judge found that this Mark had some inherent distinctive character and an enhanced distinctive character. There is considerable visual and aural similarity between “easylife” and EASY LIVE. (Although “easylife” is a compound word whereas EASY LIVE is two words, the average consumer would be likely either not to notice or to misremember this.) For the reasons given above, there is little conceptual difference, but rather some conceptual similarity. The judge found that the Defendants’ services are identical or highly similar to the services for which the Easylife Word Mark is registered. The 80 instances of typographical errors found by the judge confirm, if confirmation were needed, that “easylife” and EASY LIVE are confusingly similar. This may explain the seven examples of potential confusion found by the judge, although it is difficult to be sure about that. That leaves the small scale of the evidence of confusion. While I agree with the judge’s assessment of this with respect to EASY LIVE AUCTION and EASY LIVE (SERVICES) LTD, I do not consider that this is sufficient to negate the conclusion that there is a likelihood of confusion in the case of EASY LIVE. This is both because confusion is inherently more probable in the case of EASY LIVE and because the Defendants’ use of EASY LIVE was infrequent, whereas they used the other signs extensively. Thus confusion is less likely to have occurred and been detected in the former case.
132. The Defendants contend that, even if the judge was wrong (as I have held in paragraph 97 above) to take the services in relation to which the sign was used into account when assessing the similarity between the Easylife Marks and EASY LIVE, this was not a material error because of the requirement to take the context of use into account when considering infringement. The Defendants argue that, in the context of use (as opposed to the acontextual position considered in paragraph 96 above), LIVE would be understood by consumers to be adjectival and that this negates a likelihood of confusion even if it otherwise would otherwise exist. As I observed in *Lifestyle Equities CV v Royal County of Berkshire Polo Club Ltd* [2024] EWCA Civ 814, [2024] FSR 32 at [54], it is not clear how far the principle that the context of use must be taken into account when assessing infringement extends. Be that as it may, in the present case it does not assist the Defendants for two reasons. First, this is just an attempt to redeploy the argument that the services affect the similarity between the Easylife Marks and EASY LIVE. Secondly, it has not been shown that the context of use of EASY LIVE has always been such that consumers would all perceive LIVE as

being adjectival. If a significant number of consumers would perceive LIVE as being a verb, then that suffices for there to be a likelihood of confusion.

133. As for the Easylife Word Mark and the remainder of the Defendants' Signs, only the second error is relevant. Overall, I agree with the judge's conclusion.
134. Turning to the Easylife Stylised Mark, only the first error is relevant. easyGroup's case appears less strong than with respect to the Easylife Word Mark for the reasons recognised by the judge, namely the differences between the Easylife Stylised Mark and EASY LIVE due to the absence from the latter of (i) the stylisation of the words, (ii) the tick and (iii) the strapline. Nevertheless, none of these differences is significant in my judgment. The stylisation is fairly minimal. As I have commented in paragraph 77 above, the tick could easily be forgotten by the average consumer; and it would not feature in oral use anyway. As the judge recognised when considering the issue of variant forms, the strapline is of little distinctiveness. On the other hand, account now has to be taken of the restriction of the advertising services in the specification of the Easylife Stylised Mark, and the consequential assessments I have made as to the extent of the similarities between the respective services; but this does not affect the "bringing together" services. The position concerning the evidence of actual confusion is the same as with respect to the Easylife Word Mark. Overall, I conclude that there is a likelihood of confusion between EASY LIVE and the Easylife Stylised Mark at least with respect to the "bringing together" services.

Conclusion

135. For the reasons given above, I would allow both the appeal and the cross-appeal in part. I would allow the appeal to the extent of substituting a finding of infringement of both Easylife Marks by use of the sign EASY LIVE, but otherwise dismiss it. I would allow the cross-appeal to the extent of substituting "providing advertising or promotional space in printed publications" for "advertising services; promotional services" in the specification of the Easylife Stylised Mark, but otherwise dismiss it.

Lord Justice Zacaroli:

136. I agree.

Lord Justice Coulson:

137. I also agree.