

ENGLAND AND WALES / JUDGMENT

easyGroup Limited v easyfundraising Limited & Ors

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[2025] EWCA Civ 1000 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) Mr Justice Fancourt

[2024] EWHC 2323 (Ch) Case No: CA-2024-00277 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

- and -

(1) EASYFUNDRAISING LIMITED

(2) THE SUPPORT GROUP (UK) LIMITED

(3) IAN WOODROFFE

- -----

- ----- Claimant/ Appellant Defendants/ Respondents Simon Malynicz KC and Thomas St Quintin (instructed by Stephenson Harwood LLP) for the Appellant Emma Himsworth KC and Chris Aikens (instructed by Hansel Henson Ltd) for the Respondents
Hearing dates : 18-19 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. Judgment Approved by the court for handing down. easyGroup v easyfundraising Lord Justice Arnold:

Introduction

2. 3. This is an appeal by the Claimant (“easyGroup”) against an order made by Fancourt J on 21 November 2024 dismissing various claims for trade mark infringement, passing off and trade mark invalidity and revocation made by easyGroup against the Defendants and partly upholding counterclaims made by the Defendants against easyGroup. Whereas the judge

was faced with a complex set of claims concerning nine different trade marks, easyGroup has confined its appeal to claims for infringement of four trade marks. There is also a contingent cross-appeal by the Defendants concerning the judge's decision partially to revoke one of the trade marks for non-use which seeks a different restriction if the one imposed by the judge is not maintained. The judge's order was made for the reasons he gave in a careful and detailed judgment running to 372 paragraphs (plus a 3½ page schedule) dated 11 September 2024 [2024] EWHC 2323 (Ch). The appeal is brought on one ground for which the judge granted permission and on other grounds for which I granted permission. One of the reasons for the grant of permission both by the judge and by myself is inconsistent conclusions with respect to one of the Defendants' counterclaims reached by the judge in this case and by Nicholas Caddick KC sitting as a Deputy High Court Judge in *easyGroup Ltd v Easy Live (Services) Ltd* [2024] EWHC 2282 (Ch). We heard an appeal by easyGroup against the latter decision immediately before 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 four counsel. The judge used a series of defined terms in his judgment. In the interests of consistency with my judgment in *easyGroup v Easy Live (Services)* I shall use terms defined in that judgment where applicable. Otherwise, I will use the terms defined by the judge.

The parties

4. 5. 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. The First Defendant ("EFL") is a company founded in 2003 by the Third Defendant, Ian Woodroffe, which since November 2005 has operated a website at www.easyfundraising.org.uk. This is a platform for members of the public ("supporters") to use which enables them to click through to various retailers' websites and then buy goods or services from them. There are now thousands of retailers or other providers ("retailers" for short) who advertise on or participate in the platform, with links to their own websites. The supporters use the platform with the knowledge and intention that a small part of their total expenditure will then be remitted by each retailer to EFL ("the commission"), which in turn then passes on some of that commission to the charity or good cause that the supporter has registered on the platform as their chosen cause. EFL is not a registered charity or a not-for-profit organisation. Nor does it pass on all the commission to registered charities. It is Judgment Approved by the court for handing down. *easyGroup v easyfundraising* a business and retains about 50% of the commissions paid by advertisers and the entirety of further income that it receives for advertisements on its website, or other promotional material. Nevertheless, from its inception until the end of 2023, EFL had been able to pass on donations of over £50 million to charities and other good causes.

6. The Second Defendant owns EFL. For the purposes of the appeal it is not necessary to distinguish between the Defendants.

The Trade Marks

7. 8. On the appeal easyGroup relies upon the four trade marks described below ("the Trade Marks"). The first is UK Registered Trade Mark No. 903367695 consisting of the stylised mark shown below ("the Easylife Stylised Mark", referred to by the judge as "the first easylife 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 may be broken down 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”, described by the judge as “the second easylife 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 Judgment Approved by the court for handing down. *easyGroup v easyfundraising* 11. 12. 13. registration would be 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”.) The Easylife Stylised Mark and the Easylife Word Mark (collectively, “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”). 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 witnesses at the trial of this claim included Robert Wise and James Oakenfold of Easylife and Chris Chrysostomou of a company called Direct Response Marketing Group Ltd which works with Easylife. These witnesses also gave evidence in the Easy Live (Services) case. The third trade mark relied on by easyGroup is UK Registered Trade Mark No. 910584001 for the word EASYJET (“the second easyJet mark”) registered with effect from 24 January 2012 in respect of (following earlier restrictions) services in Classes 35, 39 and 43. The Class 35 services are “retail services connected with

the sale of jewelry [sic], watches, purses, wallets, pouches and handbags; games; inflight retail services connected with the sale of food and drink, preparations and substances for use in the care and appearance of the hair, lips, face, skin, nails and eyes, cosmetics, perfumes, fragrances, colognes and scents, sunscreening and tanning preparations, sunglasses". On the appeal easyGroup did not rely upon the "inflight" services. 14. The fourth trade mark relied on by easyGroup is UK Registered Trade Mark No. 2247942 for the word "easy.com" ("the easy.com mark") registered with effect from 6 October 2000 in respect of "electronic mail services" in Class 38. (My comment about the nature of the Easylife Word Mark also applies to the easy.com mark.) The Defendants' Signs 15. easyGroup alleges that the Defendants have infringed one or more of the Trade Marks by use of the following signs ("the Defendants' Signs"): i) ("the EF Sign"); Judgment Approved by the court for handing down. easyGroup v easyfundraising ("the 2015 EF Sign"); ("the 2022 EF Sign"); ii) iii) iv) v) vi) EASYFUNDRAISING; ; EASYSEARCH; and vii) @easyuk. The issues in broad outline 16. easyGroup contends that the Defendants have infringed the Trade Marks pursuant to section 10(2) of the Trade Marks 1994 because there is a likelihood of confusion between the Defendants' Signs and the Trade Marks. The Defendants deny infringement and counterclaim for revocation of the Easylife Stylised Mark, the second easyJet mark and the easy.com mark on the ground of non-use. easyGroup does not pursue claims for infringement pursuant to section 10(3) or for passing off on the appeal. The legislative framework 17. 18. 19. 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). 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 and save for one point concerning the easy.com mark, it is common ground that all of the requirements for infringement under section 10(2) are satisfied in this case. The Defendants' counterclaims for revocation for non-use are 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: Judgment Approved by the court for handing down. easyGroup v easyfundraising "(1) The registration of a trade mark may be revoked on any of the following grounds— 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; that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use; (a) (b) ... 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. 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. (2) ... (5) ...”

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) (b) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; 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 Judgment Approved by the court for handing down. easyGroup v easyfundraising 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; the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; 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; 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; 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; 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; 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; mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient; 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 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.” (c) (d) (e) (f) (g) (h) (i) (j) (k) 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). Judgment Approved by the court for handing down. *easyGroup v easyfundraising* 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)).

Genuine use 24. Neither side took issue with the accuracy of the following passage from my judgment in *easyGroup Ltd v Nuclei Ltd* [2023] EWCA Civ 1247, [2024] FSR 9 which the judge cited at [130]: “106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows: (1) (2) (3) (4) (5) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark ... The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark ... The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin ... Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are underway, particularly in the form of advertising campaigns ... Internal use by the proprietor does not suffice ... Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter ... But use by a non- profit making association can constitute genuine use ... The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark ... Judgment Approved by the court for handing down. *easyGroup v easyfundraising* (6) (7) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark ... Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services ... (8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use ...

107. The trade mark proprietor bears the burden of proving genuine use of its trade mark The General Court of the European Union has repeatedly held that genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned ...” Variant forms 25. Neither side took issue with the accuracy of the following passage from my judgment in *Walton International Ltd v Verweij Fashion BV* [2018] EWHC 1608 (Ch), [2018] ETMR 34 which the judge cited at [132]: “119. ... The CJEU stated in *Specsavers International Healthcare Ltd v Asda Stores Ltd* (C-252/12) [EU:C:2013:497], [2013] ETMR 46 (*Specsavers* (CJEU)) at [29] that the objective of what is now art.18(1)(a) of the Regulation was: ‘by avoiding imposing a requirement for strict conformity between the form used in trade and the form in which the trademark was registered, ... 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.’
120. In *BUD and BUDWEISER BUDBRAU Trade Marks* [2002] EWCA Civ 1534, [2003] RPC 25 Lord Walker of Gestingthorpe (with whom Pill LJ agreed) held that the correct approach to s.46(2) of the 1994 Act, which corresponds to art.15(2)(a) of the Regulation, was as follows: ‘43. ... The first part of the necessary inquiry is, what are the points of difference between the mark as used and the Judgment Approved by the court for handing down. *easyGroup v easyfundraising* mark as registered? Once those differences have been identified, the second part of the inquiry is, do they alter the distinctive character of the mark as registered? 44. The distinctive character of a trade mark (what makes it in some degree striking and memorable) is not likely to be analysed by the average consumer, but is nevertheless capable of analysis....
45. Because distinctive character is seldom analysed by the average consumer but is capable of analysis, I do not think that the issue of ‘whose eyes? - registrar or ordinary consumer?’ is a direct conflict. It is for the registrar, through the hearing officer’s specialised experience and judgement, to analyse the ‘visual, aural and conceptual’ qualities of a mark and make a ‘global appreciation’ of its likely impact on the average consumer, who: “normally perceives a mark as a whole and does not proceed to analyse its various details.”
121. As this indicates, and as the recent decision of CJEU in *European Union Intellectual Property Office v Cactus SA* (C-501/15) [EU:C:2017:750], [2018] ETMR 4 at [68]-[71] confirms, the normal approach to the assessment and comparison of distinctive character applies in this context.
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 *Sony Computer Entertainment Europe Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (T-690/14) [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 [165]-[169] a decision of the General Court cited by easyGroup: Case T-792/22 Quatrotec Electrónica SL v European Union Intellectual Property Office [EU:T:2024:69]. This is not assimilated law, but it is potentially persuasive. It suffices to say that in my judgment it neither adds to, nor detracts from, the principles I derived from 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]. Judgment Approved by the court for handing down. easyGroup v easyfundraising 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 [131] 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 [134] 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 Judgment Approved by the court for

handing down. *easyGroup v easyfundraising* 30. 31. 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 appeal, it is necessary to consider these two decisions in more detail. Both are assimilated law. 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”. 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 Judgment Approved by the court for handing down. *easyGroup v easyfundraising* 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, EU:C:2020:573, paragraph 51).” C-714/18 P, Judgment Approved by the court for handing down. easyGroup v easyfundraising 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 order adopted in this summary reflects the order of the grounds of appeal. It should be explained that, when it came to infringement pursuant to section 10(2), the judge grouped easyGroup’s allegations by reference to the relevant dates of assessment: November 2005/May 2007, September 2009, September 2015 and June 2022. I shall not follow that approach. This is not because there was anything wrong with it, but because easyGroup’s case on appeal is more limited as explained above and because neither side suggested that the differences in the dates were material to the issues on the appeal. Partly due to his chronological approach, the judge also addressed the infringement allegations concerning @easyuk separately from the other Defendants’ Signs. In this respect I shall follow the judge’s example. The average consumer 38. It is common ground that, so far as use of the Defendants’ platform by supporters is concerned, the average consumer is an ordinary member of the public who will pay an average level of attention. The judge found at [56] that: Judgment Approved by the court for handing down. easyGroup v easyfundraising “... no supporter who was at least reasonably attentive to what they were doing could have the impression, once they had clicked through to a chosen retailer’s website, that they were still on the easyfundraising platform or were transacting a purchase with easyfundraising, or indeed with anyone other than the chosen retailer whose website they had chosen to visit.” 39. It is also common ground that representatives of the retailers and advertisers who use the platform are business users who would pay a greater degree of attention than ordinary members of the public. Revocation of the Easylife Stylised Mark 40. 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 as shown below: The registered mark Signs used 2 4 EASYLIFE SOLUTIONS EASYLIFE LIFESTYLE 41. The judge set these signs out in a table in a different order and referred to them as “the Tickball Variant” (Sign 3), “the Tickball Everyday Variant” (Sign 2), “the Tickball Lifestyle Variant” (Sign 1), “the Text Variant” (Sign 5) and “the Text Lifestyle Variant” (Sign 4). As the judge explained, in closing submissions easyGroup accepted that there was no evidence of use of Sign 4 (otherwise, I presume, than in the form of Sign 1) during the relevant period. Accordingly, he did not need to consider whether Sign 4 was an acceptable variant of the Easylife Stylised Mark. 42. The judge assessed the distinctive character of the Easylife Stylised Mark as follows: Judgment Approved by the court for handing down. easyGroup v easyfundraising “155. The mark comprises the text, written in black type as a single word, all in lower case, with a strap line beneath that describes the nature of the goods sold, and a decorative element that can be seen either as a triangle, part of which is shaded to create a ‘tick’ shape, or (in 3D) as a pyramid, two faces of which are more darkly shaded. The font used for the text is unremarkable save for the even tracking of the characters. 156. The distinctive character of the mark is, in my judgment, partly in the conjoined word ‘easylife’ and partly in the design,

with strap line and decorative elements added. The word 'easylife' is weakly distinctive (as compared with, e.g., 'easytravel', which is not inherently distinctive) because the concept of an easy life, which is emphasised by the strap line, is recognisable as an idea that has some meaning. However, the word is not strongly distinctive. Such greater distinctiveness as the mark has is attributable to the design elements.

157. Mr Edenborough relied, in support of a case that the word 'easylife' was the only distinctive part of the mark, on the fact that Mr Wise said that the company was and is known as 'easylife'; but that is unsurprising, given that the tickball or any other figurative element would not be reproduced orally. As he accepted, aural characteristics were likely to be less material, given the use of the variants principally in catalogues and on websites....” 43. The judge held that Signs 1-3 altered the distinctive character of the Easylife Stylised Mark for the following reasons: “162. In my judgment, each of the three tickball variants creates visually a different overall impression from the mark: the design has been significantly changed. The prominent elements of the new designs are the word, the more decorative font and the outsize tickball motif. The changes in (or omission of) the strap line (in all cases except the Tickball Lifestyle Variant), the omission of the triangle/pyramid, the marked change of font, and especially the inclusion of the tickball (in the three tickball variants) all contribute to a different impression. What is distinctive of all three of the tickball variants is the word 'easylife' and the tickball; the change of font and the presence or absence of strap lines are somewhat less distinctive. 163. Surprisingly, in closing submissions Mr Edenborough said that the tickball element was 'entirely forgettable'. That is plainly wrong, both in terms of visual appreciation and on the evidence. Mr Wise ultimately accepted that the tickball (which is still used post-2022 in the new, easy+ branding of easyLife) was an essential element of the branding and an important part of the varied mark, whose purpose was to distinguish the brand. The tickball is a strong and distinctive element of the Judgment Approved by the court for handing down. *easyGroup v easyfundraising* variants on which it appears. Perhaps the idea of it came from the original design of the mark, but it would not be recognised as such by the average consumer. The ball is new, the tick is prominent, and the size and position (and impact) of the device are entirely different. 164. In my judgment, accordingly, the three tickball variants have, overall, a different distinctive character, given that the visual appreciation of them would be the most prevalent form. The difference derives from the visual and conceptual combination of the word 'easylife' and the strong tickball motif. They are distinctive in a different way from the registered mark.” 44. The judge held that Sign 5 altered the distinctive character of the Easylife Stylised Mark for the following reasons: “171. I have found that it is not the words 'easylife' alone that make the mark in this case distinctive. Accordingly, the loss or change of the other distinctive elements alters the distinctive character of the mark, and the Text Variant is not a variant form within s.46(2) either. There was no evidence from the Claimant that the variants in issue were used because they were more suited to inclusion on particular documents produced or used by the business, or that the first easylife mark could not be used. On the contrary, Mr Wise confirmed that the Tickball Variant was first used as early as 2001, and

other variants followed in 2013, 2019 and 2022, and he and Mr Oakenfold said that different signs were used in this way (often at the same time) to see which, if any, was most effective, but otherwise without discriminating between them. 172. This is therefore not a case of minor variations to a registered mark in order to accommodate particular locations of branding and what they could sensibly accommodate.” 45. The judge went on to explain that, after he had sent his judgment to the parties in draft, he had been provided with the judgment of Mr Caddick KC in the Easy Live (Services) case. The judge noted that Mr Caddick KC had come to the opposite conclusion with respect to the variants. The judge declined to follow Mr Caddick KC’s decision for the reasons he gave at [175]: “I have naturally read carefully the Deputy Judge’s reasoning for his conclusion to see whether I am persuaded that I should follow his decision, despite my own evaluative conclusion that the differences in the variants altered the distinctive character of the mark as registered. I am not persuaded that the word “easylife” is the only distinctive element of the mark, or that the average consumer would detect the tick within the triangle motif in the registered mark and link it to the tickball motif. Even placing the forms side-by-side, which the average consumer does not have the ability to do, it is not an obvious Judgment Approved by the court for handing down. easyGroup v easyfundraising connection. There was no evidence before me to support an argument that the aural characteristics of the mark and variants were of any real significance. For the reasons that I have given, I therefore decide that the distinctive character of the mark is varied by each of the variant forms.” 46. Partial revocation. The judge held that, if the variants did not alter the distinctive character of the Easylife Stylised Mark, the Class 35 services specification should be partially revoked for the following reasons: “188. Applying the guidance in Merck, the goods and services in relation to which the mark was used during the relevant period were, so far as advertising and promotion services were concerned, the provision of advertising by placing inserts in Easylife’s published catalogues. The specification of ‘advertising services; promotion services’ specified in the registered mark is very broad indeed: as Mr Aikens on behalf of the Defendants submitted, ‘it covers everything from a creative ad agency to providing advertising space in an in- flight magazine, to developing a media buying strategy for a multinational company, to Google running the Google sponsored online advertising market. The same can be said for promotion services.’ Mr Aikens went on persuasively to explain why banner advertising on a website is an entirely different sub-category, with different qualities and consequences, from DRMG’s clients’ physical inserts in the Easylife catalogue, but did not dissent from my suggestion that any kind of advertisement placed within a physical publication, whether inserted or printed on a page, may not, in its essentials, be different from the limited form of insert advertising carried on by Easylife. 189. The average consumer of advertising services of this kind is, in my view, likely to regard a physical, non-electronic advertisement of this kind differently from any more structured or web-based form of advertising. So, for that reason, there is an identifiable sub-category of advertising and promotional services concerned with advertising placed or inserted into printed publications. To confine the sub-category to inserts in catalogues would in my view unfairly limit the ability of Easylife to extend its range to cognate activities, though web- based

advertising (which Easylife at no stage conducted, either before or during the relevant period) would be a different sub- category.

190. Accordingly, in agreement with the Defendants' analysis, I consider that a fair specification of the first easylife mark as regards advertising and promotion services would have been 'providing advertising or promotional space in printed publications.'" Judgment Approved by the court for handing down. *easyGroup v easyfundraising* Partial revocation of the second easyJet mark 47. The judge found that the second easyJet mark had only been used during the relevant period in the way he described at [141]: "The facts are that all the goods in question are sold by easyJet to passengers who are flying on its planes, not in other outlets - though the goods wished to be purchased by passengers can be pre-ordered (by paying for them online) before they fly. There was no evidence to establish that any of the goods that easyJet sells can be collected by someone who is not an easyJet passenger on a plane, or delivered to them on land. In that sense, although the contract of sale and purchase does not have to be concluded on a plane or at an airport, the goods can only be delivered to an easyJet passenger in the air." 48. The judge agreed with Bacon J in *easyGroup Ltd v Beauty Perfectionists Ltd* [2024] EWHC 1441 (Ch), [2024] FSR 28 that this amounted to a coherent sub-category of retail services for the reasons he gave at [144]: "The provision of retail services in supplying certain goods (essentially of a gifts character) to those travelling by aircraft, which the passengers receive onboard and disembark with at their destination, is essentially different from providing a retail store, a market stall, wholesale premises or a website for purchase. It is an ancillary service of convenience to a very limited market. I would add two points to her reasoning. First, while at one level retailing other people's manufactured goods can be seen as a single descriptive category, in whatever exact way it is performed, in reality it is such a broad category of different types of services provided to different consumers that it ought to be susceptible to different subcategories, as long as these are not arbitrary. Second, that if the matter is looked at in terms of the final sentence of Kitchen LJ's fourth proposition ('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'), it is self-evidently fair to specify the services for which the Claimant has used the mark throughout the 5 years as being solely in connection with flights on aircraft, as there has been no other kind of retail of those goods; and no consumer would be likely to consider that offering the same goods for sale in a bricks and mortar store, or on a home delivery website, was anything to do with easyJet or easyGroup, given their wholly distinct retail operations." 49. Nevertheless, the judge did not restrict the part of the specification of services of the second easyJet mark which covered "retail services connected with the sale of jewelry [sic], watches, purses, wallets, pouches and handbags" to "inflight retail services" as Bacon J had done with a different part of the specification. Instead, he restricted it to "retail services provided to airline passengers". Judgment Approved by the court for handing down. *easyGroup v easyfundraising* Revocation of the easy.com mark 50. The judge found that the only evidence of use of this mark was as follows: "149. Mr Anderson's evidence, on which the Claimant relies, was that easyGroup offered free @easy.com email addresses from

2000 so that customers could see what other easy+ brands were available on the easy.com website. The question raised by the Defendants' challenge is whether this use (as to which no evidence of quantity was given) was merely promotional, in connection with the sale of other services or goods, and not to exploit commercially the mark for the relevant goods and services, namely 'electronic mail services'. 150. The website was just a webmail platform until 2002, but it was then a portal for the various easyGroup businesses. The commercial benefit of the exploitation of easy.com was therefore that of the other businesses, or easyGroup as the parent company (at that early time) and then licensor (in the relevant period). The email addresses were not provided to encourage consumers to buy more on easy.com or from easyGroup, to take out paying subscriptions, or with a view to charging for their use later, but only to use the website for the benefit of other businesses and, indirectly, easyGroup Ltd as their holding company. However, during the relevant period the businesses were not owned by the Claimant but by its licensees." 51. The judge accepted at [151] that it did not matter that "easyGroup gave away the email addresses for free", but nevertheless held that this was not genuine use of the easy.com mark for the following reasons: "152. ... No company in the easy+ group at the time was selling electronic mail services or intending to do so. As Mr Anderson said, the email addresses were used to entice consumers to a portal on which the other businesses provided links to or advertised their different goods and services. This seems to me to be the distribution of promotional items to encourage the sale of other goods and services ... 153. There was therefore no use of the requisite quality to amount to genuine use of the easy.com mark ..." Infringement of the Easylife Word Mark 52. 53. The Defendants accept that they have used the Defendants' Signs (other than @easyuk) in relation to services identical to the "advertising and marketing services" for which the Easylife Word Mark is registered. The judge assessed the similarity of the Signs with the Easylife Word Mark (and other marks relied upon by easyGroup) at [252]: Judgment Approved by the court for handing down. easyGroup v easyfundraising "There is some similarity of the 2022 EF Sign and the marks owing to use of the word 'easy' and the use of it as a prefix to a word describing the nature of the business, but otherwise no visual, aural or conceptual similarity between the marks and the Sign. In overall terms, the degree of similarity is low. The position is the same in relation to the simple word Signs EASYFUNDRAISING and EASYSEARCH and the second easylife mark: the similarity is limited to the word 'easy', which is not strongly distinctive; 'easylife' is conceptually distinct; and there is therefore only a low level of similarity in terms of global appreciation." 54. Despite the Defendants' concession of identity in relation to "advertising and marketing services", there was an issue as to similarity with respect to retail services. The judge's assessment at [257] was: "A secondary question arises in connection with the second easylife mark, as regards the on-line and mail order retail services that are part of its specification. EFL and easylife both provide services in connection with retail, namely a bringing together of products made or sold by other retailers; but there is also an important difference, namely that EFL provides a portal that a supporter can use to pass through (for a particular purpose) to buy products from other retailers. Easylife provides a website from which various products, including ones made by third parties, can be purchased directly from it.

There is therefore some similarity but only at a fairly high level, in that both are providing services in connection with online retail.” 55. The judge held that there was no likelihood of confusion for the following reasons: “258. I do not, however, consider that there is any risk of the average consumer confusing Easylife with easyfundraising, as the 2022 EF Sign, the plain word Sign and the second easylife mark only have limited similarity (the presence of the prefix ‘easy’), and there is only high level similarity in the retail services provided. Any user or intending user of the easyfundraising or easysearch site would be there for a specific reason, which is a service that only those sites provide. At the relevant date, Easylife advertised on easyfundraising’s platform, so it was evident on the platform that Easylife was something different.

259. As for indirect confusion, the presence of the word "easy" itself is not sufficient (in view of the substantial number of other users of that word) to lead an average consumer to think that easyfundraising or easysearch must be connected with Easylife, absent some additional common factor. The specific service that easyfundraising was providing, albeit in a retail context, was so different in substance from what Easylife offered that the average consumer would not have been likely to be confused about their origins or common ownership, Judgment Approved by the court for handing down. *easyGroup v easyfundraising* 260. 261. though the retail context might have brought Easylife to mind. The difference from easysearch is also marked. The issue of possible confusion in 2022 is therefore restricted to EFL’s provision of advertising and marketing services to its retailers or advertisers. The average consumer of the advertising and marketing services can be assumed to be sophisticated and careful. Indeed, in all but two cases, the services were provided to professional intermediaries acting on behalf of the retailers, the two exceptions being Amazon and eBay. There was no evidence about those who advertised on easysearch. The advertising clients would all have been aware of the nature of the business operation of EFL. They would likely have been aware of its having been carried on for a long time. The risk of confusion alleged is the risk that the average consumer might be confused as to whether easyfundraising (or presumably easysearch, though little was said about it) was another easy+ brand, or connected to the brands. Given the nature of the average consumer in relation to these services, there was no real risk of that confusion. Indeed, the family of brands relied on by the Claimant in support of its argument (and which I accept existed) militates against any such confusion, because the family of brands use the very distinctive white and orange get up. This was a requirement of the easy+ brands guidance, which Mr Anderson said was to be adhered to without exceptions, save where, e.g. planning constraints prevented the use of orange on shop fronts, or the cleaning product containers only accommodated an orange band rather than being completely white and orange. Whatever an uninformed member of the public might have thought, there was no risk of a sophisticated professional (or Amazon or eBay) being confused as to whether this relatively longstanding business was one of the easy+ companies or associated with them.

262. Unsurprisingly, there was no evidence of any confusion by advertisers, despite easyfundraising having been in operation since 2005 and easysearch since 2007, and despite the very extensive searches. If any sophisticated user acting as an intermediary was mistaken about the ownership or control of EFL, it is more likely than not that that mistake would have come to light in time, either by the professional in question realising their mistake or as a result of the content of communications between the professional and either EFL or easyGroup. The small size of the EFL operation in its early years, which was no longer the case by 2015, does not undermine that conclusion.” Judgment Approved by the court for handing down. *easyGroup v easyfundraising Infringement of the Easylife Stylised Mark* 56. In case he was wrong on revocation of the Easylife Stylised Mark, the judge assessed this at [225] as follows: “If the first easylife mark could have been relied on, in consequence of genuine use of a legitimate variant, there would be some high-level similarity of retail-connected services, for reasons given below in relation to the second easylife mark as at June 2022, but I would have found no risk of confusion for the same reasons given in [258] and [259] in relation to the second easylife mark. There would also be identity of advertising or promotion services, but again no risk of confusion, for essentially the same reasons as are given in [260]-[262]. Although Easylife was not part of the family of easy+ brands at the time in question, or at any time before 2022, the average consumer of advertising or promotional service would have been well able to distinguish between easyfundraising or easysearch on the one hand and Easylife on the other. There is no evidence to the contrary.” Infringement of the second easyJet mark 57. The judge assessed the similarity between the second easyJet mark and the Defendants’ Signs, focussing on the 2015 EF Sign, at [236] as follows: “In my judgment, there is less similarity between the 2015 EF Sign and the easyJet ... marks than there was between the EF Sign or the @easyuk handle and those marks. That is because the word ‘easy’, which is the only point of any similarity, is less prominent on the 2015 EF Sign, and because the 2015 EF Sign contains other text and a logo that are equally prominent. There is only very low similarity with the 3 easy+ marks.” 58. The judge held that the respective services were dissimilar for the reasons he gave at [239]: “.... As regards the second easyJet mark, EFL did not provide retail services to airline passengers, nor, for the same reasons that I have previously given, did it assume any kind of responsibility for any such services provided by its advertisers. There was no evidence of pages of the easyfundraising website alluding to some partnership between EFL and the retailers at that time, but even if there were pages similar to the 2023 pages that were in evidence, they do not, when assessed overall, amount to any indication of partnership or responsibility for the advertiser’s goods or services.” 59. The judge held that, even if there was some similarity in the services, there would be no likelihood of confusion. In this context he referred to eight instances of alleged Judgment Approved by the court for handing down. *easyGroup v easyfundraising actual confusion* relied upon by easyGroup, which he considered in the schedule to his judgment. He found that none proved actual confusion. Infringement by use of the @easyuk sign 60. The Defendants have used @easyuk as a handle on social media (specifically Twitter, now X) for promoting their platform. The judge assessed infringement by reference to three trade marks which are no longer relied

upon by easyGroup. Infringement of the easy.com mark 61. Since the judge revoked the easy.com mark for non-use, he did not make any finding as to whether it would have been infringed if he had not revoked it. This is understandable given the multiplicity of issues he was faced with. Standard of review on appeal 62. 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). easyGroup's grounds of appeal 63. easyGroup appeals on eight grounds which fall into two groups. Grounds 1-4 concern the judge's decisions concerning revocation of the Easylife Stylised Mark, the second easyJet mark and the easy.com mark. Grounds 5-8 concern the judge's decisions concerning infringement of the Trade Marks. The Defendants' respondents' notice 64. The Defendants contend that the judge's decisions should be affirmed on six additional or alternative grounds. Grounds 1 and 2 concern revocation. Grounds 3-6 concern infringement. Appeal ground 1: variant forms of the Easylife Stylised Mark 65. 66. easyGroup contends that the judge erred in law or principle in holding that the variant signs relied upon by easyGroup altered the distinctive character of the Easylife Stylised Mark. In its grounds of appeal and skeleton argument easyGroup only challenged the judge's conclusions with respect to Signs 2, 3 and 5 on this ground. During the hearing easyGroup applied for permission to amend the grounds of appeal to extend this challenge to Sign 1. The Defendants opposed this application. easyGroup argues that the judge made four errors. First, he erred in his evaluation of the distinctive character of the Easylife Stylised Mark. Secondly, he failed to consider the independent distinctive role of the word "easylife" in the variants. Thirdly, he wrongly required evidence of the reason for use of a variant form instead of the mark as registered. Fourthly, he took irrelevant evidence into account. Judgment Approved by the court for handing down. easyGroup v easyfundraising 67. 68. 69. 70. 71. Although counsel for easyGroup framed the first alleged error as an error of law, he was not able to point to any legal mistake in the judge's assessment of distinctive character. It may be noted that, unlike Mr Caddick KC, the judge did not ask himself what the dominant element of the Easylife Stylised Mark was; but counsel for easyGroup did not submit that this in itself amounted to an error of law. The real complaint, upon analysis, is one of either a gap in the logic or an inconsistency in the reasoning. In [155] the judge found that the strap line is descriptive, that the tick device that replaces the tittle (the dot over the "i") is decorative and that the font is unremarkable. It follows, easyGroup argues, that they are non-distinctive. Despite this, the judge concluded in [156] that the distinctive character of the Easylife Stylised Mark lay partly in the word "easylife" and partly in the strapline and decorative elements. The basis for this conclusion was that "easylife" was "weakly distinctive", and that "such greater distinctiveness as the mark has is attributable to its design elements". That could only be the case if those elements were distinctive. Furthermore, the judge accepted in [157] that the figurative elements would not be reproduced orally. I consider that this

criticism of the judge's reasoning is justified. For the reasons the judge recognised in [155] and [157], the memorable part of the Easylife Stylised Mark is the compound word "easylife". That word may not be particularly distinctive, but it is what gives the Easylife Stylised Mark almost all of its distinctive character. I would not go so far as to conclude that, even taken together, none of the other elements make any contribution to distinctive character at all, but their contribution is minimal. easyGroup's second criticism of the judge's reasoning was not clearly articulated in easyGroup's skeleton argument or oral submissions and only came into focus as a result of an observation from the bench. Counsel for easyGroup relied upon Kitchen LJ's statement in *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2014] EWCA Civ 1294, [2015] FSR 8 at [22] that "if the mark as registered ... is used only as part of a composite mark..., the use must be such that the mark as registered is itself perceived as indicative of the origin of the goods or services". On its face, this statement is not apposite to the present case, because none of the Signs relied upon by easyGroup consists of the Easylife Stylised Mark together with other elements. Counsel for easyGroup nevertheless argued that "easylife" played an independent distinctive role in each of the variants, and that the judge had fallen into error because he had neglected this. This argument makes more sense when turned around so as to focus on the role played by the other elements, particularly in the case of Signs 1-3. 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, in addition to *Specsavers International Healthcare Ltd Case C-12/12 Colloseum Holding AG v Levi Strauss & Co. v Asda*, Judgment Approved by the court for handing down. *easyGroup v easyfundraising* 72. 73. 74. 75. 76. 77. [EU:C:2013:253]. The change to, and omission of, the strapline in Signs 2 and 3 do not make any difference to this analysis. easyGroup's third criticism is that the judge was wrong, at [171], to rely upon the absence of evidence from easyGroup as to the reasons why the variants were used instead of the Easylife Stylised Mark as registered. I agree with this. The question is an objective one as to the effect of the variations on the distinctive character of the mark as registered. As the judge correctly noted at [133], the matter is to be considered "through the eyes of the average consumer of the goods or services in question". Evidence from the trade mark proprietor as to their subjective reasons for using variants instead of the mark as registered would be inadmissible. easyGroup's fourth criticism is that the judge was wrong, at [163], to have regard to the evidence of Mr Wise about the importance of the tickball. easyGroup contends that this evidence was irrelevant. Again, I agree with this. As I have said, the question is an objective one to be considered through the eyes of the average consumer. I would add that Mr Wise's evidence is perfectly consistent with the analysis set out in paragraph 71 above. Since the judge's evaluation was flawed, it is necessary for this Court to

reconsider the issue. In my judgment none of the variants altered the distinctive character of the Easylife Stylised Mark, for the reasons given in paragraphs 69-71 above in the case of Signs 1-3 and the reasons given by Mr Caddick KC in the case of Sign 5. I would add that I do not agree with the approach adopted by the judge at [175] when confronted with Mr Caddick KC's decision. On an evaluative decision such as this, it is of course possible for two courts to reach opposite conclusions without either making any error of law or principle. As noted above, on appeal an appellate court is not justified in substituting its own decision for that of the lower court just because it disagrees with it. In my judgment a court of coordinate jurisdiction should adopt the same approach to an earlier decision in respect of exactly the same issue, for essentially the same reasons as those articulated by the Supreme Court in *Iconix* at [94]. The judge did not identify any error of law or principle in Mr Caddick KC's reasoning, he simply disagreed with the conclusion. Furthermore, the judge failed to recognise that the effect of his doing so was to "trump" Mr Caddick KC's decision, because the judge's decision led to revocation of a trade mark registration that Mr Caddick KC had not revoked even though there was no material difference in the evidence. Finally, I must deal with easyGroup's application to amend its grounds of appeal. The Defendants objected to this on grounds of procedural fairness. As counsel for the Defendants pointed out, the Defendants noted that easyGroup was not relying upon Sign 1 in their skeleton argument dated 16 May 2025, yet no application to amend was made until the first day of the hearing. By then it was too late for the Defendants to respond by applying to amend their respondents' notice to challenge the judge's finding at [186] that there had been genuine use of Sign 1. At first blush this is a powerful objection. In the end, however, I am not persuaded by it for the following reasons. First, the objection is unconnected with the merits of ground 1. Indeed, ground 1 applies with more force to Sign 1 than it does to the other Signs. Thus there is nothing that the Defendants can say in opposition to ground 1 so Judgment Approved by the court for handing down. *easyGroup v easyfundraising* far as it concerns Sign 1 in addition to what they have already said in relation to Signs 2, 3 and 5. Secondly, easyGroup's omission of Sign 1 from this ground is inexplicable and appears to have been an oversight. Thus the application to amend should not have come as a surprise, even if its lateness did. Thirdly, Sign 1 is in issue on the *Easy Live (Services)* appeal, where the defendants are represented by the same solicitors and junior counsel (who argued this part of the case on the present appeal). If there was a viable point to have been raised by way of respondents' notice in this appeal, it would have been raised as part of the cross-appeal in the *Easy Live (Services)* appeal, where Mr Caddick KC made the same finding at [67], but no such ground was advanced. Lastly, although the amendment application was made very late, the Defendants could have advanced an argument in response on the second day of the hearing, but they did not attempt to do so. 78. Accordingly, I would grant easyGroup permission to amend its grounds of appeal to extend ground 1 to Sign 1, and allow the appeal on ground 1. Appeal ground 2 and respondents' notice ground 1: partial revocation of the Easylife Stylised Mark 79. 80. 81. 82. easyGroup contends that the judge was wrong to conclude that, if there had been permissible variant use of the Easylife Stylised Mark, the specification should be partially revoked so as to restrict the Class 35 specification to

“providing advertising and promotional space in printed publications” because that is not an independent sub-category of “advertising services; promotional services”. Respondents’ notice ground 1 supports this conclusion. 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. 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”. easyGroup argues that the judge erred in law because he failed to apply the criteria of purpose and intended use laid down in ACTC and Ferrari. I accept that the judge did fall into error in this respect, but I consider that he nevertheless reached the correct

conclusion.

83. I am not persuaded that it is possible to identify any narrower purpose served by Easylife’s Insert Service than advertising the customer’s goods or services. Judgment Approved by the court for handing down. *easyGroup v easyfundraising* 84. 85. 86. 87. That leaves the intended mode of use of Easylife’s Insert Services. Although the judge did not address this, it is implicit in his reasoning at [188] that advertising services can 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. The question is whether he was correct about this. 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. 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”. The judge’s reasoning in [189] 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 his reasoning at [188] 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. 88. I was at one stage concerned as to whether the wording adopted by the judge for the restricted specification was sufficiently clear and precise, but on reflection I have concluded that it is acceptable from that perspective. 89. Accordingly, I would dismiss the appeal on ground 2. Appeal ground 3 and the cross-appeal: partial revocation of the second easyJet mark 90. easyGroup contends that the judge was wrong partially to revoke the second easyJet mark so as to restrict “retail services connected with the sale of jewelry, watches, Judgment Approved by the court for handing down. easyGroup v easyfundraising 91. 92. 93. 94. 95. purses, wallets, pouches and handbags” to “retail services provided to airline passengers ...”. The Defendants dispute this, but if ground 3 is allowed the Defendants contend by their cross-appeal that the specification should be restricted to “inflight retail services ...”, which as noted above was the restriction adopted by Bacon J in the Beauty Perfectionists case. easyGroup again argues that the judge erred in law because he failed to apply the criteria of purpose and intended use laid down in ACTC and Ferrari. In addition, easyGroup argues that the judge erred in law because the CJEU held in ACTC at [53] that “the fact that the goods were aimed at different publics” was not a relevant criterion for defining an independent subcategory of goods. It is not necessary to decide whether the judge made the first error, because I agree that he made the second. Furthermore, I have some difficulty in understanding who qualifies as an airline passenger for this purpose. Counsel for the Defendants submitted that an airline passenger was someone who currently has a booking with an airline even if the flight is some time in the future. That definition fits the cohort of consumers referred to by the judge at [141], but it is not obvious that that is how the average consumer would understand the expression “airline passenger”. Furthermore, what is the position if the consumer in question cancels their flight or the airline cancels the flight? Turning to the cross-appeal, although the judge did not explicitly say so, it appears that the reason why he did not adopt Bacon J’s “inflight retail services” formulation is that the services are not all provided inflight. (There is a factual difference between this case and Beauty Perfectionists in this respect, because Bacon J did not find pre-ordering proved with respect to the goods then in issue.) On the contrary, as the judge found, the services are also

provided to persons who have not yet even arrived at the airport. In addition, even if the services are provided on board an aircraft, they may be provided while the aircraft is on the ground. Indeed, passengers may be encouraged to start browsing the selection of goods available before take-off. Thus Bacon J's formulation is simply not an accurate description of the services in question. During the course of argument, counsel for the Defendants submitted that an alternative formulation to those adopted by Bacon J and the judge would be "retail services in connection with the transportation of passengers by air". In my view this is more accurate than Bacon J's formulation, but it suffers from similar problems of uncertainty as the judge's formulation. More fundamentally, it is difficult to see how this formulation complies with ACTC and Ferrari. It is therefore necessary for this Court to apply the applicable principles afresh. So far as the purpose of easyJet's services is concerned, it is no different to that of any other retail service. It is to bring a selection of goods together to enable consumers of such goods conveniently to make a choice. I would add that I disagree with the judge's proposition in [144] that the goods are "essentially of a gifts character". They may be purchased in order to be given to another person, but they may also be purchased for the purchasers' own use. 96. Turning to the intended mode of use, it is difficult to see that there is any relevant distinction between the retail services received by a person who sits at home (or elsewhere) and orders goods from the easyJet website and the retail services received Judgment Approved by the court for handing down. *easyGroup v easyfundraising* 97. 98. by a person who sits at home (or elsewhere) and orders goods from another retail website. The only point of difference is that in the former case the goods are delivered to the purchaser onboard an aircraft. But I cannot see that that is a relevant distinction, particularly when the retail services concern goods which are at least primarily intended for use once the consumer has disembarked from the aircraft. On the other hand, I do not accept easyGroup's argument that it is not possible to discern independent sub-categories within "retail services". Counsel for easyGroup submitted that Case C-418/02 *Praktiker Bau- und Heimwerkermärkte AG* [2005] ECR I-5873 was authority for the proposition that it was not necessary to specify "retail services" in detail, rather what was required was to specify the goods or types of goods to which those services related. As can be seen from [40]-[42], however, the question which the Court of Justice was considering was whether it was necessary to "specify in detail the service(s) for which the applicant seeks protection" i.e. the specific services embraced by the concept of "retail services". The Court was not considering whether there are independent sub-categories within "retail services", which is a different question. It seems to me that, like "advertising services", retail services can be differentiated by medium, as exemplified by the (b) part of the Class 35 specification of the Easylife Stylised Mark. In the present case, easyJet provides two sub-categories of retail services: (i) retail services provided by means of an internet website and (ii) retail services provided on board an aircraft. Although an aircraft is, from this perspective, merely a type of premises, it is such a unique type that it can be differentiated from other kinds of premises. I do not think that the average consumer would think that retail services provided on board aircraft are provided by the same or economically- connected undertakings as retail services provided in a shop. By contrast, the average consumer might think that retail services

provided by means of an airline's website are connected with retail services provided by another website, not least because the software involved is likely to be similar in its functioning. 99. Accordingly, I would allow the appeal on ground 3, and dismiss the cross-appeal. I would substitute an order that the relevant part of the specification be amended to read "retail services connected with the sale of jewelry, watches, purses, wallets, pouches and handbags provided by means of an internet website or on board an aircraft". Appeal ground 4 and respondents' notice ground 2: genuine use of the easy.com mark 100.

easyGroup contends that the judge was wrong to hold that there had been no genuine use of the easy.com mark within the relevant period because he was wrong to regard the use made as purely promotional use. The Defendants support the judge's reasoning, but in the alternative the Defendants contend by their respondents' notice that he should have held that genuine use had not been established because there was no evidence of the number of active @easy.com email accounts during the relevant period.

101. Appeal ground 4 requires consideration of one of the points identified in *Nuclei* at [106](4). In Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759 the trade mark proprietor relied upon use of the trade mark WELLNESS (together with the word DRINK) upon soft drinks given to consumers who bought its clothes as being use of the mark in relation to non-alcoholic drinks in Class 32. The Judgment Approved by the court for handing down. *easyGroup v easyfundraising* 102. 103. trade mark was also registered in respect of clothing in Class 25, but there was no claim for revocation of that part of the registration. In answer to a question referred by the Oberster Patent- und Markensenat (Austrian Supreme Patent and Trade Mark Court), the Court of Justice held at [20] that there was no genuine use of a trade mark "where promotional items are handed out as a reward for the purchase of other goods and to encourage the sale of the latter". *easyGroup* argues that the judge was wrong to hold in [152] that the use of easy.com relied upon was use purely to promote the sale of other goods or services. *easyGroup* provided an electronic mail service to consumers under that sign, and there is no dispute that it is identical to the trade mark. Like many email services, it was provided free of charge, but it is common ground that this in itself does not prevent the use from being genuine use. *easyGroup* accepts that its commercial motivation for providing the service free of charge was to enable it to promote other goods and services marketed by *easyGroup* licensees to users of the email service. As *easyGroup* points out, however, users of the email service did not have to engage in any other transaction in order to obtain the email service. By contrast, in *Silberquelle* consumers only received the soft drink if they purchased an item of clothing. As the case law of the Court of Justice makes clear, the acid test is whether the use in question is apt "to create or preserve an outlet for the goods or services that bear" the trade mark (see e.g. *Silberquelle* at [18]). *easyGroup*'s use of the easy.com mark did create or preserve a share of the market for email services. The Defendants' answer to this argument is to submit that it is not necessary for the item only to be provided if the consumer purchases a different product or service in order for the use to qualify as promotional. I agree with this. It is not difficult to imagine scenarios in which consumers receive free promotional items without having to

purchase another product or service. On the facts of the present case, however, I do not consider that this is a sufficient answer. The question is whether the average consumer would perceive the provision of the item in question to be purely for the purpose of promoting the sale of other goods or services or whether they would perceive it to amount to trade in the item in its own right even if with the ulterior purpose of promoting the sale of other goods or services. As counsel for easyGroup submitted, services have a different quality to goods in this respect: a service is less likely to be perceived as being provided purely for the purpose of promoting the sale of other goods or services. In my judgment the recipients of easyGroup's email services would have perceived that they were receiving an email service that was competitive with other free email services, albeit that many of them would have appreciated easyGroup's commercial rationale for doing so. Thus I do not consider that the use was purely promotional. 104. I therefore turn to respondents' notice ground 2. The Defendants contend that, because there was no evidence before the judge of the number of active @easy.com accounts during the relevant period, easyGroup had not established genuine use of the mark. The judge noted the absence of this evidence at [149], but he did not hold that this meant that easyGroup had failed to prove genuine use of the mark. Instead, he held that the use was not "of the requisite quality". 105. Turning to the evidence, easyGroup's witness Anthony Anderson explained in his witness statement that easyGroup entered into an agreement with an email service provider in September 2000 to provide a service to people who wanted an @easy.com Judgment Approved by the court for handing down. easyGroup v easyfundraising email address. He said that the service had continued to be provided at easy.com until June 2020, when users were migrated to easyemail.org because Sir Stelios wanted to use @easy.com for corporate email addresses. 106. Thus the evidence establishes nearly 20 years' use, which extended into the relevant period (4 February 2017 to 3 February 2022). Furthermore, it was use on a sufficient scale to justify migrating users to a different address rather than simply closing the service down in June 2020. It is also relevant to note that Mr Anderson went on to say that from 2005 to 2017 there were almost 55 million pages views of the easy.com website and 10.7 million users. Furthermore, easyGroup relied upon documentary evidence that, between 1 January and 2 August 2017, the easy.com website had hundreds of thousands of users and several million page views. Although users of the website may not have been users of the email service, the website promoted the email service.

107. As counsel for the Defendants pointed out, easyGroup could easily have given evidence as to the number of email accounts, and it only has itself to blame for its failure to do so. I see the force of this, but even so I consider that the evidence just establishes use which is sufficient to create or preserve a market share for email services under the trade mark bearing in mind the nature of the service and that there is no de minimis rule (see *Nuclei* at [106](7)).
108. Accordingly, I would allow the appeal on ground 4 and dismiss respondents' notice ground 2. Appeal ground 5 and respondents' notice ground 3: infringement of the Easylife Word Mark 109. 110. easyGroup contends that the judge erred in principle when he held that there was no likelihood of confusion in relation to the Easylife Word Mark because he took into

account irrelevant factors and failed to take into account relevant factors. The Defendants contend that, even if the judge erred, he reached the right conclusion. easyGroup alleges four errors on the part of the judge. The first is that the judge based his comparison of retail services at [257] on what Easylife actually did, rather than on the services for which the Easylife Word Mark was registered. As the Defendants accept, easyGroup is correct that the services to be compared are those in the specification for the mark alleged to have been infringed rather than those actually provided under the mark. On the face of it, therefore, the judge did fall into error.

111. The Defendants nevertheless argue that the judge's description of what Easylife does at [257], namely that it "provides a website from which various products, including ones made by third parties, can be purchased directly from it", applies to all online retail services. It follows that it applies across the relevant part of the Easylife Word Mark's specification. Thus the error was not a material one. The services provided by the Defendants to supporters are different: as the judge put it at [210], the Defendants provide "a platform for fundraising by retail". Accordingly, the Defendants argue, the judge's conclusion at [257] that there was "some similarity but only at a fairly high level, in that both are providing services in connection with online retail [emphasis added]" was a sound one. Judgment Approved by the court for handing down. *easyGroup v easyfundraising* 112. easyGroup responds that the Defendants' services are very similar, if not identical, to "retail services" since they amount to the retailing of services (including retail services) provided by third parties. In support of this easyGroup relies upon Case C- 420/13 Netto Marken-Discount AG & Co KG v Deutsches Patent- und Markenamt [EU:C:2014:2069], in which the Court of Justice held that "the provision of services by an economic operator which consist in bringing together services so that the consumer can conveniently compare and purchase them may come within the concept of 'services' referred to in" what is now Directive 2015/2426. Counsel for easyGroup argued that the services provided by the Defendants were comparable to those provided by price comparison and aggregator sites, and that what mattered for these purposes was that they brought the retailers' offers together and enabled supporters to choose.
113. On this issue I prefer the Defendants' arguments. While I accept that, on one level, the Defendants' services can be viewed as amounting to the retailing of services, the average consumer would appreciate that the fundamental characteristic of those services is that they provide a convenient way for supporters indirectly to give money to good causes. As the judge found, the average consumer would appreciate that the underlying services were provided by third parties. The judge accepted that there was some similarity with retail services, but he made no error of principle in finding that the similarity was at a fairly high level. 114. Secondly, easyGroup argues that the judge erred at [261] in relying on the absence of the distinctive orange and white livery used by most of easyGroup's licensees. easyGroup is correct that this is irrelevant to the allegation of infringement of the Easylife Word Mark, but it is clear from [247] that the judge recognised that this is "a simple word mark". The judge only addressed the orange and white livery at [261] in the context of the "family of marks" argument raised by easyGroup. This argument was not relied on for the claim of

infringement of the Easylife Word Mark.

115. Thirdly, easyGroup contends the judge erred in [262] in relying on a lack of actual confusion in respect of advertising services. This was not a relevant consideration, easyGroup argues, because the actual use of the Easylife Word Mark had been for a particular type of advertising service which was quite different to the Defendants' advertising service. (I would comment in passing that this argument supports the judge's decision on partial revocation of the Easylife Stylised Mark.) I agree that, on the face of it, this again appears to be an error on the part of the judge. But the context was the judge's consideration of the likelihood of indirect confusion. easyGroup has not identified any cogent reason for concluding that indirect confusion is more likely on the correct premise that the services are identical, bearing in mind that the family of marks argument is not relied on for this purpose. 116. Fourthly, easyGroup says the Judge failed to take into account the identity of services when assessing likelihood of confusion. This is wrong: he expressly took this into account at [260] and [263].
117. Accordingly, I would dismiss the appeal on ground 5. Judgment Approved by the court for handing down. easyGroup v easyfundraising Appeal ground 6 and respondents' notice ground 4: infringement of the Easylife Stylised Mark
118. Appeal ground 6 is contingent on appeal ground 1 and affected by appeal ground 2. Since I have concluded that appeal ground 1 succeeds, but appeal ground 2 does not, infringement of the Easylife Stylised Mark must be considered on the footing that the specification falls to be partially revoked. The judge's assessment at [225] is not undermined by this, because he assumed for that purpose that the Mark was not to be revoked. easyGroup contends that the judge's assessment was infected with the same errors as his assessment with respect to the Easylife Word Mark, which are the subject of appeal ground 5. The Defendants again contend that, even if the judge erred, he reached the right conclusion. Since I have rejected ground 5, it follows that ground 6 must also be rejected. Appeal ground 7 and respondents' notice ground 5: infringement of the second easyJet mark
119. Appeal ground 7 is affected by appeal ground 3. The consequence of appeal ground 3 succeeding to the extent that it has is that infringement of the second easyJet mark must now be re-assessed on the basis that the relevant part of the specification is amended to read "retail services connected with the sale of jewelry, watches, purses, wallets, pouches and handbags provided by means of an internet website or on board an aircraft". The Defendants contend that the judge nevertheless reached the correct

conclusion.

120. 121. 122. easyGroup contends that the Defendants' services are very similar, if not identical to "retail services". This contention holds good for "retail services ... provided by means of an internet website". Nevertheless, I do not accept it for the reasons given in paragraph 113 above. easyGroup also contends that the judge erred in taking differences in font and colour

into account at [206] when comparing the EF Sign with a different easyJet trade mark, which although a word mark has been predominantly used in Cooper black font in orange and white. I do not accept this. The point the judge was making was a negative one: “Without the distinctive orange colour scheme and font, there would be little if any visual connection to easyJet”. In oral submissions junior counsel for easyGroup advanced a submission which was not foreshadowed in easyGroup’s skeleton argument that, in making its reassessment of likelihood of confusion, this Court should take into account the alleged instances of confusion considered by the judge in his schedule. He made it plain that easyGroup did not challenge the judge’s finding that none of the instances proved actual confusion, but argued that what the evidence showed was that the common “easy” element of the Trade Marks and the Signs was capable of causing confusion. In reality, however, this is a challenge to the judge’s reasoning in respect of which easyGroup does not have permission to appeal.

123. Accordingly, I would dismiss the appeal on ground 7. Judgment Approved by the court for handing down. easyGroup v easyfundraising Appeal ground 8 and respondents’ notice ground 6: infringement of the easy.com mark
124. Appeal ground 8 is contingent on appeal ground 4. Because the judge revoked the easy.com mark for non-use, he did not consider infringement. easyGroup contends that this Court should find that the easy.com mark has been infringed. The Defendants contend that this Court should find that it has not been infringed. 125. easyGroup argues that there is a likelihood of confusion for the following reasons: i) ii) iii) iv) v) The distinctive and dominant element of the easy.com mark is the word “easy”. That is the first part of each of the Defendants’ signs complained of, save that in the case of the sign “@easyuk” the judge correctly held at [229] that the only distinctive element of that sign was the word “easy”. The easy.com mark and the signs are similar. A factor in that similarity is that the “FUNDRAISING” and “SEARCH” elements of the signs allude to the services at issue, and so will have less significance in the average consumer’s perception. The “@easyuk” sign is similar to a very high degree. The email services for which the easy.com mark are registered are at least similar to the Defendants’ provision of email notification alerts, hosting of digital content and/or offering an online platform for creating online profiles. Consumers would be likely to believe they are types of services that a provider of email services would also provide. In particular, they overlap in their customers, trade channel (the internet) and purpose of use (the provision of online information or communication). The average consumer of the Defendants’ services and the services for which the easy.com mark are registered is a normal member of the public, and will pay a low to average level of attention to detail in selecting these free or low- cost and relatively commonplace services. 126. The Defendants argue that there is no likelihood of confusion for the following

reasons:

- i) ii) iii) The distinctive and dominant component of the easy.com mark is the combination of the two elements. “Easy” is a common descriptive adjective in everyday use, while “.com” is generic. The combination of the two has the minimum distinctive character to be validly registered, but no more. The judge made no finding that the Defendants provided the services relied upon by easyGroup, and the allegation of infringement should be dismissed for that reason alone. In any event, the word “easy” is the only common element between the mark and the signs complained of. Since it is of low descriptiveness, that points against there being a likelihood of confusion. Judgment Approved by the court for handing down. easyGroup v easyfundraising iv) v) The fact that the word “easy” is used by a substantial number of unconnected undertakings provides further support for that confusion. The average consumer would pay a normal level of attention, not a low to average one. 127. 128. I am unimpressed by the Defendants’ second point. The absence of a finding by the judge is explained by the fact that he did not consider infringement of the easy.com mark at all. In their Defence the Defendants admitted carrying out the acts in question, but they denied that the acts constituted a discrete category of service in relation to which they used the Signs. The significance of this distinction, if any, was not explained to us. On the other hand, it is clear that, as discussed above, the sign “@easyuk” was only used as a social media handle to promote the Defendants’ main services. Subject to that, I find the Defendants’ arguments more persuasive. easyGroup’s strongest case is probably in relation to @easyuk, but on balance I conclude that the difference in the services and between the easy.com mark and the sign mean that there is no likelihood of confusion. For completeness, I note that four of the instances of alleged confusion relied upon by easyGroup at trial concerned @easyuk, but even taken at their highest none of these suggested confusion with easy.com (as opposed to, at least in two cases, easyJet). Overall result 129. The overall result is that, although the appeal succeeds in certain respects with respect to revocation, it fails in relation to infringement. Lord Justice Zacaroli: 130. I agree. Lord Justice Coulson: 131. I also agree.

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