



Neutral Citation Number: [2020] EWHC 617 (IPEC)

Case No: IP-2018-000096

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 20 March 2020

Before:

MR DAVID STONE
(Sitting as an Enterprise Judge)

Between:

Natural Instinct Limited

Claimant

- and -

Natures Menu Limited

Defendant

Mr Jonathan Moss (instructed by **Irwin Mitchell LLP**) for the Claimant
Mr Michael Hicks (instructed by **Bristows LLP**) for the Defendant

Hearing dates: 13 and 14 February 2020

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR DAVID STONE
(Sitting as an Enterprise Judge)

DAVID STONE (sitting as an Enterprise Judge):

1. There are in the United Kingdom more than 10.9 million pet cats and more than 9.9 million pet dogs. Between them, they annually consume £2.54 billion in pet food. This case is about two competitors in the pet food market.
2. By its amended claim form filed on 11 June 2018, Natural Instinct Limited (“the Claimant”) sued Natures Menu Limited (“the Defendant”) for trade mark infringement and passing off. The Claimant is the registered proprietor of the following United Kingdom trade mark numbered 2626609, known as a series mark, registered for “foodstuffs for dogs and cats” in class 31 of the Nice Classification (“the Trade Mark”). The first mark in the series is registered in monochrome – the second mark is registered in colour. No issue arises in this case due to its being a series mark:



3. Trade mark infringement was alleged under sections 10(2) and 10(3) of the Trade Marks Act 1994 (“the Act”). The Claimant also alleged that the Defendant has engaged in unlawful passing off.
4. At the trial, Mr Jonathan Moss appeared for the Claimant and Mr Michael Hicks appeared for the Defendant.

List of Issues

5. The Case Management Conference was dispensed with and on 1 April 2019 HHJ Hacon ordered by consent the following list of issues for the purposes of the trial:
 - (1) Has the Trade Mark acquired a high level of distinctiveness and reputation for the purposes of sections 10(2) and 10(3) of the Act?
 - (2) Has the Claimant acquired goodwill under:
 - (i) the name “Natural Instinct”; and
 - (ii) the Trade Mark?
 - (3) Is the sign used by the Defendant in the course of trade ‘Natures Menu TRUE INSTINCT’ or ‘TRUE INSTINCT’?

- (4) By the time of the launch of the Defendant's TRUE INSTINCT range, was the Defendant's "Natures Menu" name well-known to members of the relevant trade and the public as a leading specialist supplier of raw dog food?
 - (5) Is the sign used by the Defendant similar to the Trade Mark?
 - (6) Does the Defendant's sign infringe the Trade Mark under section 10(2) of the Act?
 - (7) Does the Defendant's sign infringe the Trade Mark under section 10(3) of the Act?
 - (8) Is the presumption of validity under Article 127 of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark applicable in respect of EUTM 012786547?
 - (9) Can the validity of EUTM 012786547 be put into dispute in the context of these proceedings?
 - (10) Is a European Union trade mark "another registered trade mark" in accordance with section 11(1) of the Act?
 - (11) If the answer to (10) above is no, should the infringement provisions of the Act be interpreted and applied so as to give effect to the provisions of Article 18 of the Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks?
 - (12) Do the Defendant's acts amount to passing off?
6. By the end of the trial, issues (3), (4), (5), (8), (9), (10) and (11) no longer fell to be decided. I am grateful to the parties and those instructing them for narrowing the issues for determination.
 7. There were no disagreements between the parties on the relevant law to be applied: counsel for both parties agreed that this is a case that turns entirely on its facts.
 8. The parties were also agreed that nothing turned on the difference between dog food and cat food – both parties sell both (albeit in different quantities) and the Trade Mark is registered for both. I therefore do not draw any distinction between the two.

Background

9. The factual background is largely agreed, and can be briefly stated. The Claimant manufactures and sells raw pet food. Raw pet food is only part of the pet food market – and a comparatively small part at that. Significantly larger parts of the pet food market are occupied by dry food (such as kibble (which is extruded), flaked foods, biscuits (which are baked) and freeze-dried food) and wet food (which is cooked food with a high moisture content, usually sold in cans, foil trays or pouches). The Claimant's raw pet food is sold frozen in plastic tubs under the brand NATURAL INSTINCT, which is also the name of the company. The Claimant also sells a small number of dried "treats" (such as liver treats and chicken hearts) as well as raw "treats" (such as chicken carcasses and bones). Approximately 80% of the Claimant's business is dog food, and 20% is cat food.
10. The Claimant has had some success with its NATURAL INSTINCT brand. Having launched only ten years ago, the Claimant's turnover was nearly £10 million per annum by the end of 2017. It has sold more than 19 million units of its products. An example of the Claimant's packaging is shown here:



11. The Defendant is also a pet food manufacturer and seller, with a range of products which it sells under various brands, including its house brand, NATURES MENU. It has traded under the NATURES MENU brand for approximately 20 years, and is a major and long-standing player in the market. In September 2017, the Defendant launched its TRUE INSTINCT brand of pet food, which includes raw food, but also dry food and wet food. Sales to consumers of TRUE INSTINCT branded pet food began in January 2018. The Defendant's packaging initially used TRUE INSTINCT together with the house brand NATURES MENU and a roundel device, shown here:



12. This sign was and is used on packaging as shown here:



13. Recently, the Defendant dropped use of NATURES MENU on the pack (except for in very small font on the base of the pack), and used TRUE INSTINCT on its own, shown here:



14. The Claimant first wrote to the Defendant on 3 November 2017. It submitted that what it described as evidence of confusion started coming to its attention almost immediately after the first sales of the

TRUE INSTINCT product to consumers, that is, from March 2018. Since then, the Claimant has collated over 35 instances of what it says are examples of consumers being confused.

15. Further, the Claimant alleged that the Defendant had commissioned and received on 25 July 2017 a study from IPSOS called “new opportunities in the raw food market” (“the IPSOS Report”), which cited the Claimant and its NATURAL INSTINCT range as the most well-known and most frequently purchased competitor to the Defendant in the raw pet food market. The Claimant submitted that the IPSOS Report was the impetus for the Defendant adopting the name TRUE INSTINCT for its new range of raw pet food. The Defendant denied that allegation.

Witnesses

16. The Claimant provided witness statements from the following current and former members of its staff:
 - (a) Lucy Walker, until April 2019 the Claimant’s Customer Support Manager;
 - (b) Emma Cooper, until August 2019 the Claimant’s Marketing Assistant;
 - (c) Emma Brown, previously the Claimant’s Customer Support Manager;
 - (d) Amy Maisey, the Claimant’s Customer and Sales Support Manager;
 - (e) Rebecca Allison, the Claimant’s Relationship Manager;
 - (f) Hannah-Lucy Baker, until February 2020 a member of the Claimant’s Customer Support Team; and
 - (g) Joanna Taylor, the Claimant’s Wholesale Supervisor.
17. Each of the seven witnesses gave evidence of what were said to be instances of confusion. Each was cross-examined. No criticism was made by counsel for the Defendant of the way in which these witnesses gave their evidence, and I agree. All came to court (in some cases on behalf of a previous employer) to assist, and each gave her evidence clearly and cogently. There were criticisms of what that evidence proved (I return to that below), but no criticism of these witnesses.
18. Additionally, the Claimant relied on the evidence of its Administration Manager, Sara Kinge, who provided two witness statements. Ms Kinge gave evidence as to the operations of the Claimant, as well as reporting four further instances of what were said to be examples of confusion. Although Ms Kinge was skilfully cross-examined, in the end, no strong criticism was made of her evidence, and I accept it. As with any witness, there were boundaries to Ms Kinge’s knowledge, and her administrative role meant she was unable to answer some questions asked of her about the wider pet food market in the United Kingdom, but I do not consider that she can be criticised for that. She was an honest witness.
19. The Defendant relied on two witnesses. Julia Guy is the Defendant’s Digital Channels Director. She provided a witness statement dated 15 November 2019 which reviewed web searches that had been undertaken which she said showed that the Claimant had been bidding on the search term “true instinct” on the Google Ads program. Following evidence from Ms Kinge in her second witness statement that the Claimant had never bid on “true instinct” as a search term, Ms Guy retracted that aspect of her first statement in a second witness statement dated 10 February 2020, shortly before the trial began. She was cross-examined. Whilst the Claimant submitted that her evidence was irrelevant, no criticism was made of the way in which it was given.

20. In addition to Ms Guy, the Defendant relied on two witness statements of its Managing Director, Craig Taylor. Mr Taylor has worked in the pet food business for 40 years. Like Ms Guy, Mr Taylor's first witness statement dated 15 November 2019 asserted that the Claimant bids on Google Ads for "true instinct". Like Ms Guy, Mr Taylor signed a second witness statement resiling from this statement on 10 February 2020, shortly before the trial began. (I should add for completeness that on the first day of the trial, I acceded to the Defendant's unopposed application (made without the benefit of an application notice) to admit the additional two witness statements, and for relief from sanctions. Because of the lateness of the evidence, at the Claimant's request I reserved costs on this issue).
21. Mr Taylor's evidence was trenchantly criticised – counsel for the Claimant described him as a "self-confessed liar". Two examples were given. First, Mr Taylor told the court that all of the Defendant's products included the house brand NATURES MENU, when, as I have set out above, that is not the case. Second, he was unable to answer questions put to him about when he had changed his mind about the Claimant's bidding on "true instinct" as a Google Ad. I did not find Mr Taylor to be a helpful witness. He was argumentative, and prone to long exculpatory answers that did not address the questions put to him. He also refused to accept basic propositions put to him. In my judgment, he was neither frank nor forthright in his answers to the court, but was rather trying to give answers that he felt would assist the Defendant's case or would not compromise the Defendant's case. I therefore find myself, regrettably, unable to accept his evidence except in circumstances where it is corroborated by contemporaneous documents or other witnesses.

Disclosure

22. The Claimant submitted at the close of the trial that the Defendant's disclosure was inadequate. I must therefore say something about it. Counsel for both parties addressed the issue in their closing arguments. I also received detailed written submissions from counsel for the Defendant after he had read my draft judgment, to which counsel for the Claimant then responded. I have taken all those submissions into account. I doing so, however, I do not wish to encourage lengthy submissions post trial, and my review of the submissions in this case should not be taken as an invitation in future cases.

Background

23. The CMC was dealt with in writing and by consent on 1 April 2019. HHJ Hacon made the usual disclosure order for matters of this nature being heard in the IPEC. That order was:
- "The parties will make and serve on the other by 4pm on 31 May 2019 a list in accordance with Form N265 of documents in their control and upon which they will rely in support of their case in respect of issues 1, 2, 3, 4 and 12 in the Schedule to this order."
24. The Schedule included the list of issues set out above: relevantly, issue 12 was "do the Defendant's acts amount to passing off?"
25. Whilst it was not expressly recorded in his Honour's order, both parties accepted at the hearing before me that, following the introduction of the Disclosure Pilot for the Business and Property Courts under Practice Direction 51U on 1 January 2019, they were under an obligation also to disclose known adverse documents. This is IPEC practice, despite the Disclosure Pilot expressly excluding its application to the IPEC: see the IPEC Guide page 16 of the July 2019 update. The IPEC Guide states "Usually, whether or not other disclosure is ordered, the parties will be expected to disclose any 'known adverse documents' within the meaning of paragraph 2 of PD 51U".

26. Paragraph 2.8 of PD 51U defines “known adverse documents” as:

“documents (other than privileged documents) that a party is actually aware [of] (without undertaking any further search for documents than it has already undertaken or caused to be undertaken) [that] both (a) are or were previously within its control and (b) are adverse.”

27. PD 51U further notes at paragraph 2.9:

“For this purpose a company or organisation is ‘aware’ if any person with accountability or responsibility within the company or organisation for the events or the circumstances which are the subject of the case, or for the conduct of the proceedings, is aware. For this purpose it is also necessary to take reasonable steps to check the position with any person who has had such accountability or responsibility but who has since left the company or organisation.”

28. The Defendant disclosed a number of documents under two disclosure reports, both signed by Mr Taylor under a statement of truth.

29. Witness statements were filed thereafter. Ms Guy’s first witness statement signed 15 November 2019 included the following at paragraph 17:

“I understand from operators within our Customer Service team that we frequently receive calls from people who have mistaken us for Natural Instinct and also other companies such as Naturediet. This is to my mind just a typical consequence of bidding on competitor’s brand names, where some Internet users will click on the first search result that they see, be that at the top or near the top of the search results page and contact the company whose website they land on.”

Ms Guy also provided a screenshot of a Facebook communication referring to “Natural Instinct puppy kibble” (the Claimant does not sell puppy kibble under its NATURAL INSTINCT brand or at all, whereas the Defendant does sell puppy kibble under its TRUE INSTINCT brand).

30. Mr Taylor’s first witness statement was also signed on 15 November 2019. Having referred to the emails and Facebook messages shown to him on which the Claimant intended to rely to prove its case, Mr Taylor noted:

“I would like to comment on that in some detail, particularly as I understand it is likely to be important to [the Claimant’s] case.”

31. Mr Taylor then went on to discuss what he described as “many instances of customers and members of the public appearing to be confused over what are, on the face of it, very simple things.” However, he did not characterise these as instances of genuine confusion for a number of reasons which he set out in paragraphs 45(a), (b) and (c) of his first witness statement. For example, he described people being in a hurry or “simply seeking a shortcut to information they require”. He noted:

“Inevitably, people do get confused about all sorts of things. It does not necessarily mean that someone else has done something to cause them to be misled or that most other people would be confused in the same situation.”

32. He then wrote at paragraph 45(c):

“We have a customer service team comprised of 12 people who process around 1,100 orders per day. Anecdotally, our team has experience of people phoning us and asking us whether we are Naturediet, Natures Choice, Natural Choice and so on (we do not keep a log of these instances as it happens frequently). People make mistakes. This does not necessarily mean that they are confused. It may mean that they are careless or that they have, for example, ‘Googled’ search terms and made a false assumption from the search results, [sic] It happens to us and I am sure that it also happens to Natural Instinct.”

33. Mr Taylor’s witness statement then dealt in detail at paragraphs 50 to 57 with what he described as “Natural Instinct’s evidence of alleged confusion”.

34. Following receipt of those two witness statements, on 4 December 2019 the Claimant’s solicitors wrote to the Defendant’s solicitors referring to the excerpts from paragraph 17 of Ms Guy’s witness statement and paragraph 45(c) of Mr Taylor’s witness statement which I have set out above, and mentioning in terms the order of HHJ Hacon of 1 April 2019. The letter went on:

“Plainly, your client is aware of instances of confusion on the part of its customers, which is clear from the content of your client’s witness statements served on 15 November 2019. Nevertheless there is only 1 instance of confusion evidence which has been disclosed by it. We find this surprising.

Please therefore confirm whether your client has:

1. any written records of calls relating to instances of confusion between Natural Instinct and Natures Menu’s True Instinct brand;
2. any recordings of telephone conversations between members of your client’s customer support team (or other members of staff) and customers confused between Natural Instinct and Natures Menu’s True Instinct brand;
3. any Facebook or other messages on social media platforms (such as Twitter and Instagram) that demonstrate instances of confusion between Natural Instinct and Natures Menu’s True Instinct brand; and
4. any emails received by members of your client’s customer support team (or other members of staff) from customers confused between Natural Instinct and Natures Menu’s True Instinct brand.

We consider that it is highly unlikely that your client does not have evidence of instances of confusion. This view is bolstered by Craig Taylor’s own admission that Natures Menu frequently receives calls from customers confusing them for other competitors.”

35. The Defendant’s solicitors responded on 13 December 2019 under the heading “Disclosure” as follows:

“We can confirm that our client has conducted a reasonable and proportionate search for documents, pursuant to the CMC Order.

...

Our client would gain nothing by failing to disclose such documents revealed by its searches as they would serve to augment the points made in Mr Taylor and Ms Guy's evidence."

36. The Claimant's solicitors wrote again on 10 January 2020:

"You have not answered the questions that we clearly set out in our letter of 4 December 2019.

...

You will no doubt have provided [Mr Taylor] with full advice regarding his disclosure obligations, and evidence of confusion falls squarely within your client's obligations as it is relevant to issue 12 of the Directions Order."

37. The Defendant's solicitors responded on 17 January 2020:

"We have already confirmed to you that our client has conducted a reasonable and proportionate search for documents pursuant to the Directions Order."

38. At the trial before me, Mr Taylor gave the following answers whilst being cross-examined:

"Q. Do you delete e-mails from confused customers?

A. No.

Q. Do you delete Facebook messages from confused customers?

A. No.

Q. So you do have e-mails and Facebook messages from confused customers; is that correct?

A. The majority of customers who would contact anybody in our customer service team would either have been by the telephone, because we are a very, very strong customer service business in telephone and we take about 1100 telephone calls a day into our service team, and we try, wherever possible, to assist consumers.

Q. So you are saying there are no Facebook or e-mail messages from confused customers at all?

A. I do not To be honest, I would not know.

Q Did you look?

A. We did not look because, to be honest, we do not see it as a major issue when consumers are confused."

Submissions

39. Counsel for the Claimant submitted that the Defendant was under a duty to look for documents evidencing confusion and to disclose them. In the alternative, he submitted that any documents evidencing instances of confusion that came to the attention of the Defendant ought to have been

disclosed as known adverse documents. Thirdly and again in the alternative, he submitted that the documents relating to confusion had been referred to in Ms Guy's and Mr Taylor's witness statements and, as they were requested by the Claimant, they ought to have been provided under paragraph 21.1 of PD 51U. Fourthly, and in any event, the letter of 13 December 2019 from the Defendant's solicitors was misleading, and, had the Defendant set out then the position it put forward at trial, the Claimant would have made an application to the court for those documents to be disclosed in advance of the trial.

40. Counsel for the Defendant supported a strict reading of his Honour's order, suggesting that disclosure was only required of documents on which the Defendant relied to support its case. This, he said, was a very limited disclosure obligation which had the effect of bringing forward the provision of documents, rather than waiting and attaching them to witness statements. Whilst the Defendant was under an obligation to disclose known adverse documents, that did not require a search.
41. In reply, counsel for the Claimant submitted that any instances of confusion were disclosable, because the Defendant had clearly put a positive case of "frequent" low-level administrative confusion. Having put that positive case, the Defendant was required to search for and disclose documents that support that case.
42. In his written submissions following circulation of my draft judgment, counsel for the Defendant submitted:
 - (a) That this issue was not amongst the list of issues to be considered at trial, and no application for specific disclosure had been made by the Claimant;
 - (b) Whilst the Defendant accepted that there was a general obligation to disclose known adverse documents, this (i) was not an obligation that arose in this case and (ii) such an obligation does not require a search;
 - (c) Paragraph 21.1 of PD 51U and its equivalent at CPR 31.14 only require disclosure of document which are "cited" in a relevant document or to which there is a "direct allusion": see paragraphs 18 to 23 of the judgment of Rix LJ in *Expandable Limited and Anor v Rubin* [2008] EWCA Civ 59. The Claimant, he said, did not identify which documents were cited or alluded to by Mr Taylor and Ms Guy.
43. Counsel for the Claimant responded on two main points. First, in relation to the disclosure issue, he noted the IPEC Guide and its requirement to disclose known adverse documents, and he pointed to various other documents disclosed by the Defendant, suggesting an inconsistency in approach. Second, he made further submissions in relation to the correspondence from the Defendant's solicitors, noting that the Defendant's submissions (summarised in the previous paragraph) did not address that issue, and nor had the Defendant offered any explanation for why its solicitors said what they said.

Discussion

44. I accept counsel for the Defendant's submission that the adequacy of its disclosure was not an issue amongst the list of issues: it arose during the course of the trial. This was at least in part because of the answers that the Defendant's solicitors gave to the express questions asked of them. I return to this issue below. However, it seems to me that if those express questions had been answered properly at the time, the Claimant would have known then the Defendant's position and could have reacted accordingly. The Claimant having raised the issue, the Defendant had an opportunity to reply at trial, and has now, having seen my draft judgment, also filed detailed written submissions, which I

have taken into account. Both parties have been heard (orally and now in writing), and it is an issue I need to address.

45. It does seem to me that, on its terms, his Honour's disclosure order was very narrow. I do not accept counsel for the Claimant's position that I should read the "and" as a disjunctive – that is, that the obligation was to provide disclosure of all documents in the Defendant's control relating to the issue of passing off, and all documents on which the Defendant wished to rely in support of its case relating to the issue of passing off. I read "and" in his Honour's order as a conjunctive – the documents must be both in the Defendant's control *and also* documents on which the Defendant wishes to rely in support of its case. As the Defendant did not wish to rely on instances of confusion, in my judgment, it was not required to disclose any such documents under the terms of that order.
46. The Claimant's submission in reply is more difficult – it was throughout the trial clear that the Defendant's position was that there was "frequent" low-level administrative confusion, but this did not establish a likelihood of confusion/misrepresentation. However, this, of itself, did not bring any relevant documents within the disclosure obligation set out in HHJ Hacon's order. Whilst such documents would be documents on which the Defendant *could* rely, they were not documents on which the Defendant *wishes to* rely. In short, I do not read his Honour's order as providing for disclosure of anything other than documents on which the Defendant wished to rely – the order merely brings forward the provision to the other side of documents which the party would otherwise have had to attach to a witness statement or otherwise adduce in court in order to rely on them. It did not require a search for or the provision of documents which a party wished to hide from the other.
47. As noted above, both parties accepted at the hearing before me that they were under an obligation to disclose known adverse documents. In his written submissions following receipt of my draft judgment, counsel for the Defendant appeared to resile from that concession, submitting that this rule generally applies, but did not apply in this case. I do not accept that submission. The Disclosure Pilot has been in operation for over 12 months. Professionals who litigate frequently in the IPEC (and that is the case here) know that the obligation to disclose known adverse documents applies: it is expressly set out in the IPEC Guide. Counsel for the Defendant readily conceded as much in court – his argument at trial was that this obligation subsists, but does not require a search, a proposition which I accept.
48. Clearly, any documents evidencing consumer confusion/consumers who had been misled were relevant to the issues of trade mark infringement and passing off which were very much alive in this case. I do not accept Mr Taylor's testimony under cross-examination that it is not "a major issue". It was an issue central to the Claimant's case, as Mr Taylor acknowledged in his first witness statement.
49. As submitted by counsel for the Defendant, the obligation to disclose known adverse documents does not require a search. However, if a search is conducted and they are found, or they otherwise come to the attention of the party, they need to be disclosed. Given the length of time the proceedings have been on foot and Ms Guy's and Mr Taylor's own evidence, it is, in my judgment, highly likely that examples from amongst the many instances of confusion referred to by Ms Guy and Mr Taylor would have (a) been recorded in "documents" (Facebook messages, emails etc) and (b) come to the company's attention. I do not accept Mr Taylor's evidence where he denied knowledge of any Facebook or e-mail messages from confused customers, particularly in light of his non-answer to the previous question that had been asked of him:

"Q. So you do have e-mails and Facebook messages from confused customers; is that correct?"

A. The majority of customers who would contact anybody in our customer service team would either have been by the telephone, because we are a very, very strong customer service business in telephone and we take about 1100 telephone calls a day into our service team, and we try, wherever possible, to assist consumers.

Q. So you are saying there are no Facebook or e-mail messages from confused customers at all?

A. I do not To be honest, I would not know.”

50. Given the high level of traffic, I do not accept that consumer confusion only arose “frequently” in telephone calls, and never in writing (emails, Facebook etc). Certainly, the Claimant received many written communications from its customers, and I can see no reason why the Defendant’s customers would be different. Mr Taylor gave evidence that written correspondence was not deleted. It is highly likely that examples of confusion in written form existed and were known to Mr Taylor (I cannot see how he could have been aware of the frequent oral examples, but unaware of written examples). They should have been disclosed.

51. I also agree with the Claimant’s submission that the letters from the Defendant’s solicitors dated 13 December 2019 and 17 January 2020 were not as forthright as they ought to have been. The Claimant’s solicitors expressly asked, for example, for examples of confusion from Facebook. That was the time for the Defendant to say that it did not consider it had an obligation to look for such documents and therefore had not done so, rather than saying what it did. The responses given were misleading.

52. Counsel for the Claimant argued that the Claimant had expressly requested documents referred to in Ms Guy’s and Mr Taylor’s witness statements, and therefore they ought to have been disclosed under paragraph 21.1 of PD 51U or CPR 31.14. I disagree. I accept the submission of counsel for the Defendant that there was no relevant citation or direct allusion to specific documents in those witness statements such that, in my judgment, those provisions were not engaged.

53. In summary, I accept the evidence of Ms Guy and Mr Taylor that the Defendant received frequent contact from consumers which showed that they were confused/misled. I find that some of those communications would have been in writing. I also find, contrary to his oral testimony, that Mr Taylor was aware of such instances. These were relevant adverse documents and ought therefore to have been disclosed.

54. I return below to the impact of the Defendant’s inadequate disclosure.

Civil Evidence Act Notice

55. With its evidence, the Defendant filed a Civil Evidence Act notice attaching seven academic articles totalling over 100 pages:

- (a) “Advertising disclosures: measuring labelling alternatives in internet search engines”, Benjamin Edelman and Duncan Gilchrist, *Information Economics and Policy* 24 (2012) 75-89 which used an online experiment to measure users’ interactions with search engines;
- (b) “Using trademarks as keywords: empirical evidence of confusion”, Ronald Goodstein, Gary Bamossy, Basil Englis and Howard Hogan, *The Trademark Reporter*, May-June 2015, Volume 105 No 3, which explores the ramification of mixed motives in current search

engine business models and reports on empirical tests assessing whether current practices are infringing trade marks by causing confusion among consumers;

- (c) “Google, online search and consumer confusion in Australia”, Amanda Scardamaglia and Angela Daly, *International Journal of Law and Information Technology*, 2016, 24, 203 – 228 which seeks to address the question of consumer confusion in search results by drawing on empirical survey evidence of Australian consumers;
- (d) “The deceptiveness of sponsored news articles: how readers recognize and perceive native advertising”, Bartosz Wojdyski, 2016, *American Behavioural Scientist*, 1-17 which presents the results of a between-subjects experiment that tested the effects of proximity, visual prominence, wording clarity and logo presence on recognition of sponsored content;
- (e) “An empirical investigation on search engine ad disclosure”, Dirk Lewandowski, Friederike Kerkmann, Sandra Rümmele and Sebastian Sünkler, *Journal of the American Society for Information Science and Technology*, which presents the results of a study of German search engine users;
- (f) “VARN Original Research: almost 60% of people still don’t recognise Google paid ads when they see them”, 18 January 2018; and
- (g) “Two-thirds of people don’t know difference between Google paid and organic search results”, Mark Jones, *MarketingTech*, 6 September 2018.

56. Correspondence ensued between the parties, with the Defendant seeking to rely on these articles, and the Claimant seeking to resist such reliance.

57. In the end, it did not matter. On the first morning of the trial, having heard the parties' submissions, I suggested that the issue could be resolved by my taking judicial notice of the following propositions:

“First, that many people do not know or understand that there is a difference between natural search results and Google Ad results. Secondly, that users will tend to click the result at the top of the page.”

58. Both parties acceded to my suggestion. As a result, the Defendant did not press its reliance on the articles, they were not admitted into evidence and so I say no more about them. I have, however, taken judicial notice of the two propositions.

Trade Mark Infringement – the Law

59. As noted above, trade mark infringement was alleged under sections 10(2) and 10(3) of the Act. The parties were agreed as to the law to be applied. Section 10(2) provides:

“A person infringes a registered trade mark if he uses in the course of trade a sign where because –

...

(b) the sign is similar to the trade mark and is used in relation to goods or services identical with or similar to those for which the trade mark is registered,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the trade mark.”

60. The Defendant conceded that TRUE INSTINCT and NATURES MENU TRUE INSTINCT are signs similar to the Trade Mark, and that the goods sold by it under those signs are identical goods to those for which the Trade Mark is registered. In relation to likelihood of confusion, the parties agreed that I should apply the following summary of the law set out by Arnold J (as he then was) in *Sky Plc & Ors v SkyKick Ltd & Anor* [2018] EWHC 155 (Ch) at 287:

- “(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;
- (f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; and

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

61. In making the global comparison, the sign is to be considered in the context in which it is used. As Kitchin LJ (as he then was) said in *Maier & Anor v ASOS plc & Anor* [2015] EWCA Civ 220 at paragraph 79:

“the court must take into account all the circumstances of the actual use of the sign that are likely to operate in the average consumer’s mind in considering the sign and the impression it is likely to make on him. The sign is not to be considered stripped of its context.”

62. At paragraph 80 of his judgment, Kitchin LJ said:

“If the mark and the sign have both been used and there has been actual confusion between them, this may be powerful evidence that their similarity is such that there exists a likelihood of confusion.”

63. Section 10(3) of the Act provides:

“A person infringes a registered trade mark if he uses in the course of trade, in relation to goods or services, a sign which –

- (a) is identical with or similar to the trade mark...where the trade mark has a reputation in the United Kingdom and the use of the sign, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.”

64. The parties relied on the summary of the law used by the Trade Marks Registry and taken from the jurisprudence of the Court of Justice: Case C- 375/97, *General Motors Corp v Yplon SA* [1999] ECR I-5421; Case 252/07, *Intel Corporation Inc v CPM UK Limited* [2008] ECR I-8823; Case C-408/01, *Adidas-Salomon v Fitnessworld Trading Ltd* [2003] ECR I-12537; Case C-487/07, *L’Oreal v Bellure* [2009] ECR I-5185; and Case C-323/09, *Marks & Spencer plc v Interflora Inc* [2011] ECR I-08625. I gratefully adopt it:

- “(a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.
- (b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.
- (c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Salomon*, paragraph 29 and *Intel*, paragraph 63.
- (d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and

the strength of the earlier mark's reputation and distinctiveness; *Intel*, paragraph 42.

- (e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel*, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.
- (f) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora*, paragraph 74 and the court's answer to question 1 in *L'Oreal v Bellure*.)"

- 65. To this list should also be added that once the elements of infringement are established, it is for the defendant to show that the use has been with due cause (*Intel*, paragraph 39).
- 66. The relevant date for assessment of infringement is the date on which the allegedly infringing use commenced: Case C-145/05 *Levi Strauss & Co v Casucci SpA* [2006] ECR I-3703. The Defendant launched its TRUE INSTINCT product in September 2017, and first sold it to consumers in January 2018, but nothing turns on the two different dates, so I will use the earlier date.
- 67. Counsel for the Defendant also reminded me that if the only similarity between the trade mark and the signs complained of is a common element that is descriptive or otherwise of low distinctiveness, that points against there being a likelihood of confusion: *Whyte and Mackay Limited v Origin Wine UK Limited* [2015] EWHC 1271 (Ch). While the mark and the signs must be considered as a whole, the average consumer normally attaches most importance to the first part of a word: joined cases T-183/02 and T-184/02 *El Corte Inglés v OHIM* – counsel for the Defendant submitted that, logically, this must also apply to the first word of two words.

Passing Off – the Law

- 68. The law of passing off was summarised by Lord Oliver in the “Jif Lemon” case: *Reckitt & Colman Products Limited v Borden Inc* [1990] RPC 341 at 406 as follows:

“The law of passing off can be summarised in one short general proposition – no man may pass off his goods as those of another. More specifically, it may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. These are three in number. First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying “get-up” (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive

specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff. ... Thirdly, he must demonstrate that he suffers or, in a *quia timet* action that he is likely to suffer, damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.”

69. As with trade mark infringement, the relevant date for assessing goodwill and misrepresentation is the date that the alleged passing off commenced: *Starbucks (HK) Limited & Anor v British Sky Broadcasting Group plc & Ors* [2015] UKSC 31 at paragraph 16; *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1981] RPC 429 at 494. So I will again use the September 2017 launch as the relevant date.
70. Counsel for the Defendant reminded me to distinguish between “mere confusion” and “deception” or its likelihood: he reminded me that mere confusion may need to be tolerated in circumstances including (a) confusion caused by descriptive names; (b) confusion caused by features common to the trade; and (c) administrative confusion caused by similarities between marks. He referred to *HFC Bank v Midland Bank plc* [2000] FSR 176 where Lloyd J (as he then was) said this (at 200 and 201):

“I accept that the similarities have led or contributed to mistakes being made by various people: actual or would-be customers going to a branch of the wrong bank for a variety of purposes, communications of one kind or another going astray, police and others attending the wrong premises. The fact that people, including customers, make mistakes is not enough to prove that Midland’s use of the new brand name is a representation that there is a connection between the two entities.

...

Misapprehensions of this kind can be generated readily and unaccountably. They do not show that there has been any false representation by anyone. What they show is that people make assumptions, jump to unjustified conclusions, and put two and two together to make five.”

71. Further, counsel for the Defendant submitted, and I accept, that, for passing off to be found, it is not enough that careless or indifferent people may be led into error: *Norman Kark Publication Limited v Oldhams Press Limited* [1962] 1 WLR 380 at 383 per Wilberforce J (as he then was).
72. I was also reminded that it is not a necessary ingredient of the cause of action to show that the defendant intended to mislead consumers, but claimants sometimes seek to establish that the defendant has acted deliberately. As Lindley LJ said in *Slazenger & Sons v Feltham & Co* (1889) 6 RPC 531 at 538, the court will not “be astute to say that he cannot succeed in doing that which he is straining every nerve to do.”

Some Preliminary Questions

73. The list of issues set out a number of issues for determination which it is convenient to deal with first.

Issue 1 - Has the Trade Mark acquired a high level of distinctiveness and reputation for the purposes of sections 10(2) and 10(3) of the Act?

74. Reputation is an essential element for section 10(3) of the Act. Enhanced distinctiveness is not required for infringement under section 10(2) of the Act, but it does increase the likelihood of infringement. I was taken to documentary and other evidence to show the high distinctiveness/reputation of the Trade Mark in mid to late 2017. This included:
- (a) The IPSOS Report to which I have referred above, commissioned by the Defendant, and produced on 25 July 2017, that is, around the relevant date for assessment of both trade mark infringement and passing off. On page 16 of the IPSOS Report, the authors note under a heading “Category image, brand awareness and purchase” that “Natures:menu [sic], Natural Instinct and Country Hunter are the strongest raw food brands”. The first and last of these three are the Defendant’s brands – the second is the Claimant. Page 18 of the IPSOS Report sets out the authors’ survey of the market, in which they surveyed 1008 dog owners between 18 to 70 years old. Of those surveyed, 34% of respondents were aware of the Defendant’s NATURES MENU brand, and 22% were aware of the Claimant’s NATURAL INSTINCT brand. Whilst Mr Taylor sought to argue under cross-examination that this figure was not representative of the market, I do not accept his evidence on this point because it is not corroborated elsewhere – indeed, the IPSOS Report directly contradicts his position. I consider the IPSOS Report more likely to be correct – it was prepared at the relevant time, by an independent third party, prior to the first letter before action in these proceedings.
 - (b) Mr Taylor, with 40 years’ experience in the market, accepted during cross-examination that NATURAL INSTINCT is “one of the strongest raw food brands”.
 - (c) A copy of *Dogs Monthly* dated June 2016. *Dogs Monthly* is a magazine for dog owners. It surveyed dog owners and asked “which pet food company you trusted the most”. The Claimant ranked first of 67 companies. The Defendant ranked seventh. In the raw food category, the Claimant ranked first of “top 10 raw manufacturers”, and first for “most welcoming to new raw feeders”.
 - (d) Revenue figures, which showed sales of nearly 19 million units between 23 March 2010 and 31 December 2018. Each unit included the Trade Mark. Whilst this period goes beyond the relevant date for assessment of trade mark infringement and passing off, those figures were subdivided so as to show significant sales and revenue prior to 20 September 2017, i.e. around the relevant date.
 - (e) An evaluation report published by Crufts, the well-known annual dog show of The Kennel Club, relating to its 2017 event (“the Crufts Report”). The Crufts Report states that 38% of visitors had heard of the Claimant prior to visiting the show, which took place shortly before the relevant date.
 - (f) Website analytics which showed that the Claimant’s website at www.naturalinstinct.com had been visited by over 1.6 million users between 1 January 2013 and 12 November 2019, with over 19 million page views. The website includes the Trade Mark.
75. I was also shown examples of advertising of the NATURAL INSTINCT product dating back to February 2013 in publications such as *Dogs Monthly* (for dog lovers), *Dogs Today* (also for dog lovers), *Dog World* (“we know dogs”), and *Our Dogs* (“the real dog paper for real dog people”) as well as more general pet and general interest publications such as *Pet Gazette*, *Rescue a Pet and Animal Care Magazine*, *Smallholder*, *Daily Express*, *The Blackwater Buzz*, *Sporting Gun*, *Total Boarding Magazine*, *Total Grooming Magazine*, and *Animal Therapy Magazine*. These examples included use of the Trade Mark. Also in the evidence was the long list of shows and events which the Claimant has attended and sponsored since 2013.

76. In my judgment, this evidence, taken together, is overwhelming. According to the Defendant's own commissioned report, the Claimant's NATURAL INSTINCT brand was, at the relevant date, one of the leading brands within the raw dog and cat food market. The other evidence to which I have referred underlines this. I have no doubt that the Trade Mark, extensively used throughout that evidence, was at the relevant date a mark which has acquired a high level of distinctiveness for the purposes of section 10(2) of the Act and a mark with reputation for the purposes of section 10(3) of the Act.

Issue 2 – Has the Claimant acquired goodwill under (a) the name “Natural Instinct” and (b) the Trade Mark?

77. The Defendant admitted goodwill. As set out above, I have found that the Claimant enjoys a reputation in the United Kingdom in the Trade Mark. The same evidence establishes reputation in the United Kingdom in the words NATURAL INSTINCT, which are, in any event, the dominant element of the Trade Mark (I return to this below). The Claimant therefore also enjoys goodwill in NATURAL INSTINCT and in the Trade Mark, and has done so prior to the relevant date.

Issue 3 – Is the sign used by the Defendant in the course of trade “Natures Menu TRUE INSTINCT” or “TRUE INSTINCT”?

78. In the Defendant's skeleton argument, it conceded that it used both Natures Menu TRUE INSTINCT in the stylised form shown at paragraph 11 above, and also TRUE INSTINCT on its own. Mr Taylor's oral evidence was, initially, that TRUE INSTINCT was only ever used together with Natures Menu, but he resiled from that evidence when shown packaging with no obvious reference to Natures Menu (although those words appear in very small font on the base of the pack). That packaging is shown above at paragraph 13.

79. I therefore have no hesitation in holding that the Defendant used and uses both TRUE INSTINCT on its own, and Natures Menu TRUE INSTINCT in the form shown at paragraph 11.

Issue 4 – By the time of the launch of the Defendant's TRUE INSTINCT range, was the Defendant's Natures Menu name well-known to members of the relevant trade and the public as a leading supplier of raw dog food?

80. The Claimant conceded issue 4 – that is that by the time of the launch of the Defendant's TRUE INSTINCT range, its Natures Menu name was well-known to members of the relevant trade and the public as a leading specialist supplier of raw dog and cat food. The Defendant relied on this concession to submit that this reduced the risk of trade mark infringement under sections 10(2) and 10(3) of the Act, and reduced the risk of passing off. I disagree. I have found that the Defendant used both Natures Menu TRUE INSTINCT and TRUE INSTINCT on its own: the issue therefore does not arise in relation to uses of TRUE INSTINCT. Second, as the Court of Justice's decision in *THOMSON LIFE* (Case C-120/04 *Medion v Thomson Multimedia Sales Germany & Austria GmbH* [2005] ECR I-08551) demonstrates, a trader does not avoid trade mark infringement simply by adding a distinctive house mark. Arnold J (as he then was) applied that jurisprudence in *Aveda Corporation v Dabur India Ltd* [2013] EWHC 589 (Ch), a case where the non-house part of the mark was not identical to the earlier mark, but only similar. As a question of law, therefore, it cannot be said that adding a distinctive and reputed house mark to a mark which maintains its independent distinctive character avoids trade mark infringement. Further, on the facts of this case, the uses of Natures Menu are visually very small, such that the reasonably circumspect consumer will not pay them significant attention. Natures Menu is still part of the sign (as I have found), but it is not the dominant part of the sign. Further, I can see no reason why the Defendant's submissions should succeed in relation to passing off when they have failed in relation to registered trade mark infringement. In my infringement assessment below, I have taken account of how the Defendant uses

its signs. Some of the time, it uses Natures Menu TRUE INSTINCT. NATURES MENU was a reputed brand by mid to late 2017. But that does not absolve the Defendant of trade mark infringement or passing off.

81. The Defendant conceded issue 5 – that the signs it has used are similar to the Trade Mark.

Infringement under section 10(2) of the Act

Issue 6 – Does the Defendant’s sign infringe the Trade Mark under section 10(2) of the Act?

82. As noted above, the Defendant conceded that Natures Menu TRUE INSTINCT and TRUE INSTINCT are signs similar to the Trade Mark, but disputed that the similarities were at other than a low level. The signs to be compared are as follows:

The Trade Mark	The Defendant’s Signs

83. The Trade Mark consists of nine words, two of which, NATURAL INSTINCT are presented in a significantly larger font. On the other hand, the Defendant’s signs consist of four words in one case and only two words in the other. The Claimant described “dog and cat food as nature intended” as “some extra laudatory wording underneath”. That may be putting the matter insufficiently highly – but it seems to me that the dominant element of the Trade Mark is the words NATURAL INSTINCT: that is what will strike consumers, and how the product will be referred to. Of course, I must not ignore the additional laudatory words, but I find that the dominant visual element is the words NATURAL INSTINCT. Similarly, in relation to the four word sign, I cannot ignore the words NATURES MENU and the roundel device, but they are presented in a much smaller font – I consider the dominant element of this sign to be TRUE INSTINCT. There is therefore a clear similarity of the word INSTINCT as between the Trade Mark and the two signs.

84. It was suggested, based on Mr Taylor’s evidence, that INSTINCT is a descriptive term when it comes to pet food, because pets will “instinctively” eat the food they prefer. He listed in his first witness statement a number of third parties who he said sold products that include the word INSTINCT in their name. These included, for example, a German pet food company BEKURO Pet Food GmbH which sells an INSTINCT product in Germany, as well as other non-UK entities. Of the 13 examples he gave, most appeared to me not to be within the United Kingdom. As I have said, I have not accepted Mr Taylor’s evidence unless it is corroborated by other evidence. Under cross-examination, Ms Kinge accepted that Sussex-based Jack Wolf sells a range of food under the PRIMAL INSTINCT name and that K9 Instinct sells products under the K9 INSTINCT name in the UK. But there was no evidence as to how well-known these products were, the level of sales in the United Kingdom, the length of time they had been on the market, or whether they were available prior to the relevant date in 2017. This is therefore not sufficient to show significant use of INSTINCT for pet food in the United Kingdom so as to establish that the term is descriptive or even widely used. His written evidence also does not accord with what, in my judgment, consumers will take from the Trade Mark and from the signs. In my judgment, INSTINCT is not descriptive in relation to pet food.

85. In the case of the Defendant's four word sign, there is an added similarity to the second mark in the series, namely the use of the colour green. In the case of the Defendant's two word sign, the extra differences of Natures Menu and the roundel are not present.
86. In conclusion, the signs are visually similar to the Trade Mark to a low degree.
87. The position regarding aural similarity, is analogous. The dominant element of the Trade Mark is NATURAL INSTINCT. That is how consumers will refer to the product. There is therefore an aural similarity with the signs to a medium degree.
88. Turning to conceptual similarity: again, whilst I must not ignore the additional words in the Trade Mark, they are not the dominant aspect of the mark. Rather, consumers will be aware of the conceptual meaning of NATURAL INSTINCT, perhaps reinforced by the reference to "dog and cat food as nature intended". Conceptually, I consider NATURAL INSTINCT and TRUE INSTINCT to be conceptually close, with each meaning something close to REAL INSTINCT. When used in relation to pet food, I do not consider that "dog and cat food as nature intended" adds or detracts from that conclusion.
89. Therefore, as both the signs are similar visually (to a low degree), aurally (to a medium degree) and conceptually (to a high degree), I consider them both overall to be similar to the Trade Mark to a medium degree.
90. The Defendant conceded that the goods on which it uses its signs are identical to the goods for which the Trade Mark is registered. I have found that the Trade Mark had, by September 2017, acquired a high degree of distinctiveness through use, making a likelihood of confusion more likely. I have also held that, whilst Natures Menu was at the relevant date a well-reputed brand, that does not exculpate the Defendant from trade mark infringement. The parties agreed that the relevant consumer was an average, reasonably circumspect consumer, and given the high number of pet cats and dogs in the United Kingdom, that must be the case. Whilst pet owners care for their animals, they are no more than usually attentive. Taking into account the similarity of both signs to the Trade Mark (to a medium degree) and the identity of the goods, taking into account the context in which the signs are used, and the case law to which I was referred, in my judgment, there is a likelihood of confusion.
91. I therefore do not strictly need to address the evidence of alleged actual confusion. However, as it occupied most of the trial, I will say something about it.

The Defendant's general submissions on the evidence of confusion

92. Whilst, as I have set out above, the Defendant did not criticise the witnesses put forward by the Claimant on the question of likelihood of confusion, it made a number of general criticisms of the evidence itself.

Not enough

93. Towards the close of the trial, I asked counsel for the Defendant whether, if I were to find a *likelihood* of confusion on the basis of the use of the signs in context and without reference to the evidence of alleged *actual* confusion, he accepted that the evidence of actual confusion could only improve the Claimant's case. He did not accept that – but rather submitted that because there was what he described as comparatively little evidence, even if I were to find that it evidenced *actual* confusion, it would be *de minimis* given the huge number of transactions in which the Claimant and Defendant engaged in the two year period since the Defendant launched its TRUE INSTINCT products. In short, he submitted that even if I accepted the 35 examples as instances of actual confusion, that does not prove a likelihood of confusion without many more such examples. Having

so few examples therefore detracted from any preliminary finding of a likelihood of confusion so as, he submitted, to vitiate it.

94. This argument was ingenious, but flawed, for two primary reasons. First, I have found above that the Defendant failed to comply with its obligations to disclose to the Claimant documents evidencing apparent actual confusion. Mr Taylor's and Ms Guy's evidence was that this happened "frequently". Therefore, it cannot lie in the Defendant's mouth to say "you have not provided enough examples" where it failed to comply with an obligation to provide the examples of which it was aware. I cannot say how many such examples the Defendant had – but Mr Taylor's and Ms Guy's evidence was that confusion was "frequent". The Defendant cannot benefit from its failure to comply with its obligations: this argument is therefore not open to it. Second, I disagree with the Defendant on the basis of the facts of this case. Each case of trade mark infringement/passing off differs, but on the facts of this case, I do not consider that it can be said that the examples of apparent confusion that were evidenced were small in number, such that they annul my finding of a likelihood of confusion. There may be cases where a far greater number of instances of confusion might be expected – but this is not such a case.

Not first-hand evidence

95. The second criticism levelled at the Claimant's evidence of confusion was that it was not given by the allegedly confused people themselves, but, rather, was reported by employees and ex-employees of the Claimant. Counsel for the Defendant submitted that the usual approach in these sorts of cases is for the claimant to call a cohort of witnesses who are said to have been confused, and to allow them to be cross-examined to establish whether or not they were in fact confused and if so why. Rather, he said, the Claimant produced witnesses who can do no more than report on what they were told by the allegedly confused consumers. This was despite the Claimant having access to contact details for most of the relevant consumers, and the time and ability to approach them and bring them to court. As a result, said counsel for the Defendant, he was unable to ask the consumers questions, leaving the incidents of alleged confusion "floating and untested". Thus, he submitted that I was deprived of the opportunity to hear directly from any of the individuals said to have been confused or deceived and what actually caused them mistakenly to contact the Claimant rather than the Defendant.
96. The Claimant rejected this submission, arguing that had the Defendant wanted to contact the allegedly confused people, it was able to do so. Many of the exhibits included email addresses and/or telephone numbers for these people, and it was open to the Defendant to contact them had it so wished. Counsel for the Claimant submitted that the Claimant's approach was proportionate and entirely consistent with IPEC litigation requirements.
97. I agree with the Claimant. There is no property in a witness: the Defendant could have contacted the allegedly confused consumers had it wished to do so. It seems to me that the approach taken by the Claimant was entirely appropriate for the IPEC. I start with the proposition that evidence of actual confusion is not necessary to succeed in a trade mark infringement/passing off case. The Claimant had that evidence, and wanted to present it in a cost-effective way appropriate to the IPEC jurisdiction (where, it is to be remembered, trials are limited in most instances to two days and cost recovery is capped). It is unlikely that cross-examination of 35 witnesses could have been achieved in the time available, and the Claimant would not be able to recover within the cap its costs of preparing 35 witness statements. The approach the Claimant adopted enabled the evidence to be before the court, and to be tested at a level appropriate to this jurisdiction.
98. I add for completeness that the Defendant also had available to it the customers who "frequently" complained to it, and whom it could have brought to give evidence had it wished to do so.

Requests for free samples

99. Two of the examples of confusion appeared to be consumers requesting free samples of pet food. Mr Taylor gave evidence as follows:

“This sector is replete with ‘freeloaders’ who send scattergun requests for free samples. The requests tend to be pro forma and sent to any supplier who may be amenable to giving free samples. These are inherently unlikely to be (a) genuine customers or (b) customers who are confused as between the traders and website with which they are corresponding. We get many of these sort of approaches every month.”

100. In cross-examination, Ms Allison and Ms Kinge gave evidence that supported Mr Taylor’s comments that some members of the public request free samples. I therefore accept the Defendant’s submission that evidence in relation to these members of the public is unlikely to be evidence of actual confusion.

Specific evidence of actual confusion

101. Counsel for the Defendant urged me to treat carefully, and separately, each example of apparent confusion. I agree. As he said, 35 times nothing is still nothing. However, adopting a proportionate approach appropriate to the IPEC, rather than go through each of the 35 examples in this judgment, I have selected from that number six for a detailed discussion.

102. The parties suggested that I anonymise the names of the customers to whom I have referred. As they did not appear in the proceedings, and may be unaware of them, I have adopted that course, as nothing turns on the actual identity of the individuals concerned.

103. Before turning to the individual examples put forward by the Claimant, I need to say something about Google and its Ads program. The Google search engine has been the subject of a number of judgments of the High Court and the Court of Justice. It is unnecessary to delve into them in any detail, other than to note the following uncontentious propositions:

- (a) Google provides a program whereby traders can purchase search terms. Paid advertising content is then exhibited by the search engine in response to users entering those search terms in the search engine;
- (b) Whilst it was initially the position of the Defendant that it considered that the Claimant had purchased as search terms the Defendant’s “true instinct” mark, it resiled from this position on the first day of the trial. Ms Kinge gave uncontested evidence that the Claimant does not, and has never, purchased “true instinct” as a search term;
- (c) The Defendant, however, did purchase the Claimant’s trade marks as search terms. This is, in itself, entirely lawful, so long as the resulting advertisements fall within the ambit of the rules laid out by the Court of Justice, and there was no suggestion here that they did not;
- (d) Consumers searching for the Claimant’s trade marks would therefore be offered advertisements for the Defendant’s products;
- (e) Despite the Claimant not purchasing as search terms the Defendant’s trade marks, the search terms purchased by the Claimant were wide ranging, and included some generic terms such as “raw”. The result of this was that for some searches which included these generic terms *and* the Defendant’s trade marks, the Claimant’s advertisements would be displayed;

- (f) It was common ground that the Claimant's advertisements included its phone number and website address;
- (g) The option existed for the Claimant to "negative match" search results – for example, it is possible within the Google system for the Claimant to specify that it does not want its advertisements displayed in response to searches that include the Defendant's trade marks. It did not do so. There was some cross-examination of Ms Kinge on this point. In closing, counsel for the Defendant expressly said that he made no criticism of the Claimant for not negatively matching, but he did submit that if the Claimant wished to avoid administrative confusion, it should have negatively matched. It is difficult to see the difference between this submission as made and a criticism of the Claimant for not negatively matching. Either way, I reject the Defendant's position. The very purpose of the Google Ads program is to increase internet traffic for the purchaser of search terms. So long as the system is used lawfully, it does not seem to me that a trade mark owner can be criticised for using the system lawfully when it brings trade mark infringement proceedings against a third party which adopts a mark later in time. Put another way, a defendant cannot reasonably say "these examples of confusion may have been caused by the trade mark owner's failure to negatively match and therefore they cannot be relied on as evidence of actual consumer confusion". It also seems to me an odd criticism for the Defendant to make in circumstances where it was actively bidding on the Claimant's trade marks; and
- (h) The results displayed on a given computer in response to a search using the Google search engine depend on a number of factors, including the location of that computer, and its search history. It is therefore difficult to replicate search results and/or to know in any single instance why given results have been displayed.

104. Based on these facts, the Defendant's overall position was that the examples of apparent confusion resulted from people in essence using Google as a telephone book – but being misdirected in their searches as a result of the Google Ads program. Their search terms caused the Claimant's ads to be displayed, showing the Claimant's phone number and website address. In short, the Defendant submitted in relation to each example of apparent confusion that it could well be that the consumer was not confused, but only misdirected by Google so as to be caused to contact the Claimant when she/he wanted, and knew that she/he wanted, the Defendant.

JN, a cat owner

- 105. Ms Kinge gave evidence of contact with JN, a cat owner. JN wrote to retail@naturalinstinct.com, the email address given on the Claimant's website, under the heading VERY UNHAPPY WITH RECENT CHANGES TO CAT FOOD. JN's email stated that she had been "a customer of yours" since 2012. "We have been always quite happy with 'Nature's Menu'". She then went on to complain about what she described as changes to the product, noting "The pet shop owners where we buy 'Nature's Menu' (sorry prefer the old name!) said she did not know of any customers who were happy with the new form".
- 106. Email correspondence with Ms Kinge followed. JN responded "I am really confused. Please could you explain the difference between you and Nature's Menu as when I go on to the latter's website, True Instinct comes up. All I want is the old form of cat food that we used to have, not mushy pellets whether it is NM or TI." I take NM to be a reference to Natures Menu and TI to be a reference to True Instinct. She ended her email of 28 August 2018 with "Apologies for the mix-up of names".
- 107. Counsel for the Defendant submitted that the email chain was consistent with JN undertaking a Google search which triggered an advertisement, and email address, for the Claimant. I disagree. JN was clearly confused, even after Ms Kinge explained the difference between TRUE INSTINCT and

NATURAL INSTINCT. JN was apparently unable to understand the difference, even once she had visited the Defendant's website, because she saw there the TRUE INSTINCT product, and apparently could not tell it apart from the Claimant's. There is no suggestion that JN is other than a reasonably circumspect consumer – at the time of the email, she had been purchasing cat food for approximately six years. I find that JN was confused/misled by the similarities between the Trade Mark and the signs used by the Defendant.

KC, a cat owner

108. Ms Walker gave evidence in relation to KC. KC contacted the Claimant through its website, using a "Web-form contact us". Her form read "I am disgusted that your products are not anything like your pictures. I have a Norwegian forest cat that only eats [E]ncore [a competitor brand] due to stripped chicken like your picture so I invested in your product based on your description and picture on the front ... I was absolutely shocked that the product had more of a pate texture and nothing like your image. Safe to say my cat refused to touch it what a waste buying these. False advertising."
109. Ms Walker responded by email, with a prominent use of the Trade Mark under her email signature. At that point, Ms Walker had not twigged to any confusion between the Claimant and the Defendant, and offered to discuss KC's concerns. KC responded "I'm just very frustrated why this is clearly falsely advertised". She attached a picture of the packaging to which she referred. The packaging is the Defendant's product. Ms Walker responded stating as much.
110. Again, counsel for the Defendant submitted that Ms Walker's evidence is consistent with an angry and frustrated KC undertaking a Google search for TRUE INSTINCT, being provided with an ad for the Claimant, and then clicking through to the web contact form. That may be the case, but it does not explain why KC's confusion was not corrected by (a) the clear uses of the Trade Mark on the Claimant's website or (b) the clear uses of the Trade Mark in Ms Walker's emails or (c) the use of Ms Walker's email address @naturalinstinct.com. There was no suggestion that KC was other than a reasonably circumspect consumer – she expresses herself to be aware of other products on the market. I therefore find that she was confused/misled by the similarity between the Defendant's signs and the Trade Mark.

JB and Pets at Home

111. Ms Allison also gave evidence of JB, who engaged in live chat via the Claimant's website. A printout of the live chat feed was in evidence. JB asked, "I have just been told that you do a dry food that is stocked in some Pets at Home". Pets at Home is a pet store. The Claimant responded saying that it only sold raw food. JB then said "Thanks I knew they were wrong but the person would not have it – says she works there and they stock it – so thanks for clarifying". Later, JB commented "It seems she was confusing you with True Instinct a food made by Natures Menu".
112. Counsel for the Defendant criticised this evidence on the basis that it is double hearsay – Ms Allison is reporting what was said to her by JB, who is reporting what was said to her by the salesperson at Pets at Home. Counsel for the Defendant also relied on the use of "seems" in JB's comment about the apparent confusion by the salesperson. It is clear that JB herself was not confused – indeed, she was adamant that she was correct – she apparently knew the Claimant's range well. But she reported apparent confusion by a salesperson at Pets at Home, who one would assume would be more knowledgeable and attentive than the reasonably circumspect consumer. Whilst clearly not as useful as a first-hand account, this would appear to me to be unsolicited evidence of confusion on the part of the salesperson at Pets at Home. It is less consistent with the Defendant's submission that the salesperson undertook a Google search and was misdirected: a Pets at Home salesperson would know what they stock, and would not be using Google to locate it.

ZW, a puppy owner

113. Ms Cooper gave evidence of a Facebook message from ZW to the Claimant regarding puppy food. ZW wanted to switch her puppy from Royal Canin (a competitor brand) to “this food”. ZW purchased puppy food, apparently through the Amazon website. It was only after several messages back and forth with the Claimant that it became apparent that ZW had purchased the Defendant’s product. The exchange ended with ZW stating, “I thought you were the same company”.
114. Counsel for the Defendant suggested that this evidence was consistent with ZW undertaking a Google search which triggered an ad for the Claimant, and ZW clicking through to the Facebook button on the Claimant’s website. I disagree. Whilst it is not completely clear on the exchange, it seems likely that ZW wanted to purchase the Claimant’s products, and, having sought the Claimant’s advice, and then mistakenly purchased the Defendant’s products on Amazon.com. Alternatively, ZW had already purchased “this food” prior to contacting the Claimant, but did so thinking that the Claimant and the Defendant were the same company. In either case, ZW would appear to be a reasonably circumspect consumer, who contacted the Claimant through the Claimant’s Facebook page, where she would have seen the Trade Mark prominently displayed. She clearly cared enough to ask the question on how to switch from one food brand to another, and admitted, in terms, to thinking the Claimant and the Defendant were the same company. In my judgment, she was clearly relevantly confused/misled.

Bubbles Pet Care, Leigh

115. Bubbles Pet Care is a pet care store, the relevant branch of which is located in Leigh. Bubbles, Leigh stocks the Claimant’s products. Ms Allison gave evidence that on 29 March 2018 she was telephoned by a member of staff at Bubbles, Leigh, asking to order the TRUE INSTINCT range.
116. Counsel for the Defendant criticised this evidence on the basis that Ms Allison did not recall to whom she spoke, and it could have been a junior, temporary or otherwise less knowledgeable member of the Bubbles team. The reason for the apparent confusion is also not addressed. Counsel for the Defendant suggested that the evidence is entirely consistent with the caller using Google as a telephone directory and a search triggering the Claimant’s advertisement which included the Claimant’s phone number.
117. Whilst that is certainly possible, it does not seem to me entirely credible in all the circumstances. Whilst we cannot know what went on in the mind of the Bubbles staff member, in the circumstances where Bubbles stocks the Claimant’s products, the confusion of the Claimant’s own stockists, who would be within the Claimant’s reputation/goodwill, is relevant. I consider this relevant evidence of confusion.

PK, a driver

118. Ms Kinge gave evidence of PK, who emailed the Claimant alleging poor driving by one of its delivery drivers. After several email exchanges, PK reviewed his dash cam footage, and it became apparent that his allegations were against one of the Defendant’s drivers. He explained that he “Googled ‘True Instinct’ and your company came up first on the list, and I wrongly assumed ‘Natural Instinct’ was the same company, as you both deal [sic] animal food, I’m sure you can understand my mistake.”
119. Counsel for the Defendant criticised this evidence on the basis that it was not clear that PK was aware of either the Claimant or the Defendant or was a consumer of pet food. I agree. For the purposes of section 10(2) of the Act, he would need to be a reasonably circumspect consumer. For the purposes of section 10(3) of the Act, he ought to be within the reputation of the Claimant. For the

purposes of passing off, he would need to be within the Claimant's goodwill. In the absence of any of the above, his evidence shows little more than that the signs used by the Defendant on its vans are similar to the Trade Mark, which the Defendant has in any event conceded.

Overall

120. I have set out above examples of the evidence provided, drawing from complaints that came to the Claimant's attention in different ways – telephone calls, live chat, Facebook, emails etc. I have set out above my findings on the individual examples to which I have referred. It is not necessary for me to go through in detail the remaining examples, many of which appear to me to be reliable evidence of confusion. Having reviewed all the examples carefully, I conclude that there are clear examples of consumers being confused/misled. Those examples come from all levels of the trade channels, including suppliers, dog breeders, and consumers. They have also arrived with the Claimant via various sources, including Facebook, live chat, email messages and telephone calls.
121. I do not accept that the instances I have reviewed constitute “low-level administrative muddle” as the Defendant referred to it. A number of the consumers maintained their position through several exchanges – this is not a case where, on being told they'd got it wrong, the consumer immediately accepted that and acknowledged they had made an administrative mistake. On the contrary, a number of the consumers persisted in their confusion even after the situation had been fully explained to them. I make no criticism of them for that – it simply reinforces in my mind that they were actually and properly confused, rather than subject to low-level administrative muddle.
122. I have not taken into account evidence from persons with no connection with the United Kingdom: one of the examples given was from Italy and one was in Spanish, and I have ignored them. I have also not taken into account the evidence from two members of the public who were obviously looking to obtain free samples, for the reasons I have set out above.
123. Google is the most popular search engine in the United Kingdom by some margin. It has replaced phone books as the preferred method for discovering contact details for vendors, including vendors of pet food. By consent, I have taken judicial notice of two propositions put to me by the Defendant - that many people do not know or understand that there is a difference between natural search results and Google Ad results and that users will tend to click the result at the top of the page - and I have kept both propositions in mind in my analysis above.
124. Many cases such as this one are run without any evidence of actual confusion. Such evidence can be hard to come by, particularly in circumstances where the trade mark owner does not own and run its own bricks and mortar stores. Here, the Claimant deals directly with about half of its consumers, but these dealings are rarely face-to-face. Given that the majority of consumer contact is through the telephone, websites, Facebook etc, consumers' true motivations will rarely be crystal clear. I have reviewed the evidence carefully: it is clear to me that there is ample evidence of actual consumer confusion by relevant consumers to confirm my findings above that there is a likelihood of confusion in this case.

Infringement under section 10(3) of the Act

Issue 7 – Does the Defendant's sign infringe the Trade Mark under section 10(3) of the Act?

125. I have set out above the nine conditions that must be satisfied in order to establish infringement under section 10(3) of the Act:
 - (a) Reputation: the Defendant accepted that the Trade Mark had a reputation in the United Kingdom as at the relevant date, but suggested that it was not as extensive as the Claimant

claimed. I have found above that the Claimant enjoyed a reputation in the Trade Mark at that time: that, and the Defendant's appropriate concession, are sufficient to clear this low hurdle (*Sky v SkyKick* at para 307);

- (b) Use: use of a sign in the United Kingdom was conceded by the Defendant;
- (c) Course of trade: that the use was in the course of trade was also conceded by the Defendant;
- (d) Without consent: the Defendant also conceded that its use was without the Claimant's consent;
- (e) Similarity of signs: the similarity of the Defendant's two signs to the Trade Mark was also conceded, but was submitted to be at a low level. I have found above that the two signs used by the Defendant are similar to the Trade Mark to a medium degree;
- (f) Goods: the Defendant conceded that the use of its signs was in relation to goods;
- (g) Link: the Defendant did not accept that what it described as the low level of similarity between the Trade Mark and the Defendant's signs was sufficient to create a link in the mind of the average consumer. I have found that the signs are similar to the Trade Mark to a medium degree, and it seems to me, from that alone, that a link is likely to be formed in the mind of the average consumer given that both marks are used in relation to pet food. Further, the evidence of instances of actual confusion put forward by the Claimant establishes, at its lowest, that those consumers made a link: had they not done so, they would not have taken the steps that they did. I have found that the bulk of the evidence is of actual confusion – the Claimant's case of creation of a link is therefore also made out;
- (h) Detriment to the distinctive character etc: The Defendant relied on the summary of Arnold J (as he then was) in *Sky v SkyKick* at paragraphs 310 to 312 of the findings made by the Court of Justice in *Intel*, and submitted that, in this case:
 - (i) even if there is a link, it is a weak one;
 - (ii) the Trade Mark does not have a high distinctive character or reputation;
 - (iii) the Claimant must prove actual or present injury to its mark or a serious likelihood of such injury and it has not done so; and
 - (iv) there is no evidence of a change in economic behaviour caused by the similarity between the Trade Mark and the Defendant's signs.

I reject these submissions. I have found above that the link is not a weak one, and that the Trade Mark has both a reputation and a distinctive character enhanced through its use. Further, I have accepted that the Claimant's evidence does show that there has been confusion of reasonably circumspect consumers. In my judgment, based on the evidence, the logical deduction can be made that there are changes to consumers' economic behaviour: *Sky v SkyKick* at paragraph 311 and Case C-383/12 *Environmental Manufacturing LLP v OHIM*.

Further, Ms Kinge gave evidence, which was not contested, as follows:

“In my experience, pet owners are highly protective of their pets. As can probably be seen from the tone of some of the emails and messages that my colleagues and I have had to deal with, when the pet owners

feel that they have been let down by the dog or cat food providers, they are very upset about this. My view is that, in this industry, if there is one bad experience of a product it could lead to a situation where you stop using a brand or indeed, in Natural Instinct's case, if a customer or potential customer has confused us with a bad experience he or she has had with Natures Menu, we may never get another chance to supply product to that customer. It is a very sensitive market.

...

[W]hat is demonstrated by a number of the instances of confusion that members of the customer support team and myself have dealt with is that customers have contacted us to complain about issues that they have had with "True Instinct", which must cause Natural Instinct reputational harm"

This is borne out by the tone of the complaint emails which the Claimant received and put into evidence, some of which I have excerpted above.

For these reasons, I also find that the Claimant has established detriment to its repute. The survey of readers of *Dogs Monthly* put the Claimant as first in terms of trust felt by survey respondents – and the Defendant as seventh. In the circumstances, that emphasises the risk to the Claimant's high repute if, as Ms Kinge gave evidence, customers are not satisfied by the Defendant's product over which the Claimant has no control.

In relation to unfair advantage, this seems to me to be less certain. I have considered carefully the Claimant's submission that the Defendant adopted TRUE INSTINCT as a brand for raw food having received the IPSOS Report on 25 July 2017. Whilst the results of the IPSOS Report may have contributed to the Defendant proceeding with a launch of TRUE INSTINCT, it cannot, in my judgment, have been the instigator of the concept, because the Defendant registered the domain name www.trueinstinct.co.uk in December 2016, some 7 months prior to the IPSOS Report, and, further, the day after receiving the IPSOS Report, the Defendant entered into a written licence with a third party owner of an EUTM for TRUE INSTINCT – it is extremely improbable that that licence was negotiated and signed in under 24 hours. I have no hesitation in concluding that the Defendant was aware of the Claimant and its products at the time it adopted the TRUE INSTINCT brand. At the time of the launch of its TRUE INSTINCT product, it was aware that NATURAL INSTINCT was the second largest raw food seller in the market, after products sold under its own Natures Menu brand. But whether the Defendant intended to or not, the trust shown in the NATURAL INSTINCT brand (as demonstrated by the *Dogs Monthly* survey) indicates that, in fact, the Defendant is likely to receive a leg up as a result of the link formed in consumers' minds, and that advantage is, in my judgment, unfair.

- (i) Due cause: The other eight conditions having been satisfied, the onus shifts to the Defendant to prove that its otherwise infringing activity was with due cause. The Defendant did not address this condition in any detail – however, it suggested in another context that it was operating under a licence provided by the owner of an EUTM for a word mark for TRUE INSTINCT registered for pet food. This is EUTM 012786547 referred to in issues 8 and 9 which were not ultimately pressed. Nevertheless, that does not establish due cause within the case law as it is presently understood: see *Sky v SkyKick* paragraph 316 citing Case C-65/12 *Leidseplein Beheer BV v Red Bull GmbH*.

126. Therefore, in my judgment, the Claimant has made out the eight conditions it is required to meet, and the Defendant has failed to establish that it acted with due cause. The Defendant's use of the signs therefore infringes the Trade Mark under section 10(3) of the Act.

Passing Off

Issue 12 – Do the Defendant's acts amount to passing off?

127. I have found above that the Claimant has goodwill in NATURAL INSTINCT and in the Trade Mark as registered. A further argument was made, although not pressed with any enthusiasm, that the Claimant also has rights in the word "raw" and in the colourways it uses for its packaging, and that therefore the Defendant's use of the word "raw" and similar colours on its packaging also lead to passing off. In my judgment, "raw" is clearly a descriptive term for pet food which is not cooked – indeed, "raw" is acknowledged by both parties to be the name of the relevant market segment in which they both operate. Therefore, no one trader can monopolise the term – that would be akin to an argument that one brand of milk was passing off another because both were described as "homogenised". I also reject the Claimant's arguments based on the packaging colourways. Whilst both use various shades of browns and oranges, the packaging is not sufficiently similar, in my judgment, to constitute a misrepresentation – it is simply too different.
128. Whilst a likelihood of confusion in trade mark law and a misrepresentation in the law of passing off should not be elided, in this case, in my judgment, my findings in relation to a likelihood of confusion can be carried over into the claim of passing off.
129. It was not seriously contested that damage would follow, and some of the consumer complaints demonstrate that consumers thought less of the Claimant because of the activities of the Defendant. I find that there will be damage as a result of the misrepresentation.
130. The Claimant's passing off case also succeeds.

Summary

131. The Defendant's Natures Menu TRUE INSTINCT and TRUE INSTINCT pet foods infringe the Claimant's United Kingdom registered trade mark number 2626609 under sections 10(2) and 10(3) of the Trade Marks Act. The Defendant has also engaged in unlawful passing off.
