

Neutral Citation No. [2026] EWHC 2233 (IPEC)

CLAIM NO. IP-2025-000079

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

Before:

**Miss Recorder Amanda Michaels
(Sitting as a Deputy Judge of the Intellectual Property Enterprise Court)**

B e t w e e n :

FLOWERBX LIMITED

Claimant

and

FLOWERS BOX LONDON LIMITED

Defendant

ANDREW NORRIS KC (instructed by **Pillsbury Winthrop Shaw Pittman LLP**)
for the Claimant

SEAGHAN DAVEY (instructed by **Trade Mark Wizards**) for the Defendant

Hearing dates: 16 and 17 July 2026

APPROVED JUDGMENT

This judgment was handed down by the Court remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 7 September 2026

Miss Recorder Amanda Michaels:

1. This is my judgment following the trial of liability only in proceedings for trade mark infringement pursuant to ss 10(2) and (3) of the Trade Marks Act 1994 ('the Act'). The Claimant relied on a single mark, UK trade mark no. 3,223,726, for the word mark FLOWERBX ('the Mark') and complained of use of various signs by the Defendant, including FLOWERSBOX, FLOWERS BOX and FLOWERS BOX LONDON. In addition to denying infringement, the Defendant challenged the Claimant's trade mark registration, saying that the Mark was invalid as being descriptive of a number of the registered goods and services, and also claiming that it had not been put to genuine use across the whole of its specification.

Background

2. The Claimant company started trading in the UK in 2015. Its founder and chief executive officer, Whitney Bromberg Hawkings, had previously worked for many years in the fashion industry, notably at Gucci and then as Senior Vice President of Communications at Tom Ford. She gave evidence that she had found it frustrating that there was not an online solution for the kinds of elegant and modern flowers generally used in the high-end fashion business, and so she decided to open a business to fulfil that perceived need. She said that she conceived the FLOWERBX name which she felt would 'sound modern, disruptive and fashion-forward.'
3. Initially, she intended to create a direct-to-consumer business, but some of her contacts in the fashion business asked if the Claimant could provide flowers for events such as fashion shows, or for shops or restaurants, and so the company developed a business-to-business model. Later it developed a homeware range, after customers asked for flowers in vases, and that facilitated growth of the B2B side of the business. One of the Claimant's specialities is or was the delivery of bouquets or arrangements of single stem varieties. Ms Bromberg Hawkings also said that unlike many other UK florists, the Claimant's flowers are cut only after a customer places an order, minimising waste and improving freshness and quality.
4. On 7 April 2017, the Claimant filed its application for the Mark and it was registered on 14 July 2017. As I explain below, the Defendant alleged that the Mark had not been used across the whole of its specification. That challenge was resolved by consent at trial, leaving the specification set out at Annex A to this judgment, so that it is not in dispute that the Claimant had provided the range of goods and services set out in that list, which includes (by way of example) candles; printed cards; gift boxes; wrapping and packaging materials; packaging; cartons for packaging; cardboard packaging; household containers; chocolates; retail services connected with the sale of those goods; delivery services; and floral design services.
5. Ms Bromberg Hawkings's evidence was that high-end fashion and luxury brands used FLOWERBX 'for a supreme luxury experience and ... for events, gifting and large-scale installations.' For instance, the accounts for the year ending December 2019 showed over £500,000 turnover from 'London Events.' Her evidence was that by the

end of December 2019, FLOWERBX's turnover in the UK was over £2.2m. That was initially affected by a loss of B2B turnover during the Covid pandemic, but the Claimant was able to build up its direct to customer sales instead. The Claimant has expanded internationally, but obviously that is not relevant to this UK trade mark dispute.

6. The Claimant claimed that it had acquired distinctiveness in the Mark and had a reputation for 'luxury and stylish floral design of the highest quality.' It claimed to have spent substantial sums on marketing, and relied upon articles in the UK press mentioning the company. I discuss this further below.
7. The Defendant was not incorporated until April 2019, and did not plead any reliance on pre-incorporation activity, but in his evidence on its behalf one of its directors, Mr Gajewski, said that he had started trading as a florist in 2017, following in the footsteps of his mother who was a florist. He produced a small number of documents showing use of the name FLOWER BOX LONDON in late 2017 and 2018, when it seems that his flowers were offered through eBay. Mr Gajewski said that the flowers were promoted on social media. The available images from that period appear to show flowers being sold arranged in gift boxes. Some examples are in Annex B to this judgment. The first sale for £24 seems to have been made in December 2017, by 'Flowers Box London Ltd' (although there was at that date no such company). After the Defendant was incorporated on 17 April 2019, it began to supply flowers and bouquets of all kinds (i.e. not just as arrangements in a box) and plants, as well as gifts and gift cards, through online sales. It seems that it was targeting the luxury end of the market. Some of the evidence before the Court showed that the Defendant's business had moved on from the inexpensive flowers sold by Mr Gajewski before incorporation, and sold higher priced flowers (one example was a bunch of 30 tulips for about £87 in 2023) and its trade mark attorneys stated in a letter of 22 May 2025 'Our client's business is far distinct from your business given that our client targets audience in the luxury floral sector ...' In a letter dated 25 March 2026, the Defendant said that it had supplied a broad range of floristry products and services, as well as gift items like fruit, alcoholic drinks, cakes, balloons and cuddly toys, which Mr Gajewski said were generally ancillary to floral purchases.
8. It seems that before and after incorporation, the signs used were Flowers Box and Flowers Box London as well as the url www.flowersbox.co.uk. Where not used in plain type, the Defendant used the latter sign in a form where the words Flowers and Box appeared above and in larger font than London, for instance that was the form of Sign used on its website when the Claimant's Mr Williams looked at it in December 2024:

FLOWERS BOX
LONDON

9. The Defendant also used a form of the signs with a gold B above the words. Those forms have been used for some time, for instance the sign shown on the right below may be seen on an Instagram post from 2018 in Annex B:

The Claimant objects to the use of all of these signs ('the Signs').

10. The Defendant must have become aware of the potential for confusion between the parties almost immediately after it began to trade in 2019, as from July 2019 onwards it received a series of messages from Trustpilot, congratulating it for 5 star reviews for Flowerbx. The Defendant wrote to complain about the confusion in February 2022, when it was credited with a poor review, and told Trustpilot that it was not Flowerbx or Flower Box, and said that it got emails about undelivered orders all the time ‘where clients email us with issues from different companies as they just emailed wrong brand by accident.’
11. The Claimant became aware of instances of what it considered to be confusion with the Defendant in late 2023. Ms Blomberg Hawkings was told by her child’s school bus driver that he had bought flowers from the Claimant, but when she looked at a photograph she could see that they had come from the Defendant. She said that further instances of confusion followed. Ms Bromberg Hawkings’s evidence was that at first the Claimant was not in a position to pursue a claim about the Signs, but in about December 2024, after Mr Williams joined the company, it was agreed that it was necessary to do so.
12. In the meantime, Incopro/Corsearch, which had been carrying out some monitoring for the Claimant, found what it said were instances of the Defendant copying photographs from the Claimant’s website. It wrote to the Defendant on 22 July 2024 and again on 19 March 2025, complaining of copyright infringement, and those images were taken down. In the case of the 2024 complaint, it was taken down, with an apology, almost instantly. Mr Gajewski disclaimed any direct knowledge of the source of the photographs, and suggested that they may have been publicly available stock images, but I prefer the evidence of Mr Williams on this point that these were photographs taken by the Claimant’s staff, and it seems likely that the images were indeed sourced from the Claimant’s website.
13. Mr Williams wrote a formal letter of complaint to the Defendant on 3 February 2025 alleging trade mark infringement and passing off, asking for undertakings and for financial compensation. There was no immediate reply to that letter. However, it seems clear that the Defendant soon took advice about it. First, on 26 March 2025, and, as Mr Gajewski said in his oral evidence, in a defensive response to that letter, the Defendant applied to register FLOWERSBOX and FLOWERS BOX LONDON as trade marks for a wide range of goods and services, including flowers in Class 31, and related (and unrelated) retail services in Class 35. Oddly perhaps, Mr Gajewski said that he did not then consider FLOWERS BOX to be the Defendant company’s brand, that was just FLOWERS BOX LONDON. The Defendant’s trade mark attorneys who had filed the trade mark applications replied substantively to the letter from the Claimant on 22 May 2025 refuting the allegations of trade mark infringement and passing off in strong terms. They said ‘Our client had no knowledge of your trading activities and/or registrations. Therefore your excessive and unreasonable settlement proposals are ultimately rejected in their entirety.’ Despite the trade mark application they had filed for the Defendant, the Defendant’s attorneys alleged that the Mark had been registered in breach of s 3(1) (c) of the Act and alleged non-use. They said that they required the Claimant to surrender the Mark.

14. On 10 June 2025, the Claimant's then solicitors replied to Trade Mark Wizards' letter, with a formal letter of claim. On 11 June the Defendant applied to register the same signs with the gold B device, for Class 31 goods only.
15. The claim form was issued on 22 July 2025. A Defence and Counterclaim was filed and the case management conference was held on 9 February 2026. Permission was given for various amendments to the statements of case. The Order set out a List of Issues to be tried, in the manner usual in this Court. So far as relevant to this judgment, those were in summary terms:
 - 1) whether the Mark has an enhanced distinctive character;
 - 2) whether the Mark should be declared invalid pursuant to s 3(1)(c) of the Act (broadly, for descriptiveness);
 - 3) whether the Mark has been infringed under ss 10(2) and/or (3).
16. There were two issues in the List included in the CMC Order which did not survive until trial. First, there had been some uncertainty as to the range of goods/services provided by the Defendant. That was resolved in correspondence. Secondly, the Amended Defence and Counterclaim included a defence based upon s 11(2)(b) of the Act which was dropped not long before trial, as Mr Gajewski's witness statement made plain.
17. Another issue in the List related to the Defendant's counterclaim for revocation for non-use. Both parties had produced draft amended trade mark specifications based on the evidence before the Court, and during the course of Day 1 of the trial they very sensibly managed to agree a composite schedule of parts of the specification use of which was not in dispute. That Schedule is in Annex A to this judgment. The issue of genuine use therefore fell away.

The witnesses

18. I heard three witnesses for the Claimant. The first of these was Ms Whitney Bromberg Hawkings, who gave evidence about the company and its repute. Whilst she had a tendency to give rather lengthy answers to counsel's questions, and the Defendant's counsel criticised her for it, that garrulity can, I think, be put down to her enthusiasm for the business she had founded and its success as she saw it. If her evidence at times strayed beyond answering the question, or added to her witness statement, that did not affect my view of her veracity and reliability. For instance, she was asked about a floral installation which the Claimant provided for Scott's restaurant. When asked how the public would have known that it had been done by Flowerbx, she explained that there had been some co-branding at the time, for example on menus. I have no reason to doubt that such was the case, though in the absence of any documentation, I cannot judge the extent of such use of the Mark.
19. Next, I heard from Ms Michelle Kennedy, a long-term customer of the Claimant's business, who since 2022 had also been an investor in the business, who gave evidence as to reputation and also as to confusion. Mr Davey suggested that she could not be said to be independent, and her evidence about internet searches was basically speculative. I consider that she was giving truthful evidence and I accept her evidence as to her own

internet searches; evidence about other people's approach was hearsay, and I have not taken it into account. Lastly, I heard from Mr Michael Williams, in-house counsel at the Claimant company, who gave careful and thoughtful evidence about a number of instances of alleged confusion and the Defendant's alleged replication of some of the Claimant's photographic images on the Defendant's website. I consider that all of the Claimant's witnesses were truthful witnesses, doing their best to help the court.

20. The sole witness for the Defendant company was its founder and director Mr Lukasz Gajewski, who gave evidence about the Defendant's business and commentary about the alleged instances of confusion. I am afraid that I did not find him to be a helpful witness. As Mr Davey said, he was plainly nervous about giving his evidence, however, in my judgment that was not the sole reason for the unsatisfactory nature of his oral evidence. When asked about documents relating to matters some time ago, on a number of points he said he was unable to recall what he had known or thought at the time. That is understandable, but he was reluctant to accept any inferences which counsel drew from the documents, even where in my view the position was completely clear. For instance, he accepted that an email from Rima Events (discussed below) was meant for the Claimant, but then said he was not sure whether Rima was asking about the Claimant's products. That made no sense. Mr Gajewski was unclear in his evidence about how much he had known about the Claimant and its business before incorporating the Defendant company, or at various stages thereafter. He appeared reluctant to accept that he had known about the Claimant since at least July 2019, when the first 5-star review intended for the Claimant was credited to the Defendant on Trustpilot, although he then admitted that he knew about the Claimant when, later in the year, the Defendant again was informed of the Claimant's 5-star reviews. He was unclear as to when or how often he had looked at the Claimant's website, although he did accept that he had looked at it in 2019 and 'a few times' after that. In a chat on WhatsApp with a potential supplier in May 2021, he discussed the Claimant and mentioned that he had looked at it on the Companies House website. He said that he had signed up for the Claimant's marketing emails and also suggested that the Claimant sold relatively cheap flowers ('Tesco flowers'). As a result, his denial that he knew a lot about the Claimant by May 2021 was less than convincing. Overall, I consider that I can place little weight on his evidence, especially where it appeared to me to be contradicted by the contemporaneous documents in the case.

Average consumer

21. The characteristics and role of the average consumer relevant to various aspects of trade mark infringement were summarised by Arnold LJ in *Lidl Great Britain Limited v Tesco Stores Limited* [2024] EWCA Civ 262; [2024] FSR 17 at [16]-[20], reinforced in *Morley's (Fast Foods) Ltd v Nanthakumar* [2025] EWCA Civ 186; [2025] E.T.M.R. 26. The average consumer includes 'any class of consumer to whom the guarantee of origin is directed and who would be likely to rely on it, for example in making a decision to buy or use the goods': *London Taxi Corp'n Ltd v Frazer-Nash Research Ltd* [2017] EWCA Civ 1729; [2018] FSR 7 per Floyd LJ, at [34]. In this case, I consider that there are two classes of consumer: either the general public, who might buy flowers etc as a consumer, or a narrower cohort of fashion or leisure businesses who might seek floral decorations for commercial use. Private consumers would pay an average amount of

attention when purchasing the goods/services, whilst the business customers would be likely to pay more attention.

Counterclaim for partial invalidity

22. Before considering the infringement claim, it is necessary to decide whether (and, if necessary, to what extent) the Defendant's counterclaim for partial invalidity succeeds. As I have indicated, this was a counterclaim for invalidation of parts of the Mark based upon section 3(1)(c) of the Act. Initially, the Defendant pleaded that this objection applied 'in relation to goods and services related to "flowers".' The Claimant suggested in its Reply that this was unclear and pleaded that it proceeded on the basis of a list of certain goods/services in Classes 31 and 35. A few further items in those Classes were identified in the Defendant's Reply to Defence to Counterclaim. In its skeleton argument for the trial, the Defendant indicated that it wished to pursue this counterclaim in relation to specific goods and services in Classes 21, 31, 35, 39 and 44. However, the Claimant objected that the challenged range of goods and services was broader than that which had been pleaded. I agreed and I limited the Defendant to its pleaded objections, from which counsel realistically dropped a reference to herbs and vegetables, so that the list of goods and services in relation to which I need to decide the question of validity is:

Class 31: natural plants and flowers; flower bouquets; planted flowers; plants; foliage; living natural flowers; cut flowers; dried flowers; bouquets of fresh flowers; bouquets of dried flowers.

Class 35: [the bringing together in a retail, online or wholesale outlet, for the benefit of others of a variety of goods, namely,]... containers for flowers and plants, planters, natural plants and flowers; flower bouquets; planted flowers; plants; foliage; living natural flowers; cut flowers; dried flowers; bouquets of fresh flowers; bouquets of dried flowers.

23. Section 3(1)(c) of the Act provides:

'The following shall not be registered—

...

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services

...

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.'

Similarly, section 47(1) of the Act provides:

'The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for

refusal of registration).

Where the trade mark was registered in breach of subsection (1)(b), (c) or (d) of that section, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.”

24. Pursuant to s 72 of the Act, registration is *prima facie* evidence of validity so that the burden falls on the Defendant to satisfy the court that a reason or reasons for a declaration of invalidity exist and the burden then moves to the Claimant to satisfy the court that the mark has acquired distinctive character either at the filing date, satisfying the proviso to section 3(1) TMA, or by the date of issue of the invalidity claim, being in this case the date the Defendant's counterclaim was filed, 9 February 2026. The Claimant's position was that the Mark is inherently sufficiently distinctive not to fall within the sub-section, but, if and to the extent necessary, it claimed that the Mark had acquired a distinctive character, saving it under the proviso to s 3 and/or to s 47(1).
25. Section 3(1)(c) is intended to prevent traders from registering words that other traders might legitimately want to use in the course of their business and so will justify the invalidation of a mark only if it consists *exclusively* of a sign which may serve to designate the kind, quality, intended purpose of or other characteristic of the goods. Overall, a mark may be distinctive, or it may contain elements which are distinctive.
26. The law on s 3(1)(c) was set out in the first instance judgment of Arnold J in *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2012] EWHC 3074 (Ch); [2013] FSR 29 at [91]-[95]:

“91. The principles to be applied under art.7(1)(c) of the CTM Regulation were conveniently summarised by the CJEU in *Agencja Wydawnicza Technopol sp z oo v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (C-51/10 P)* [2011] E.T.M.R. 34 as follows:

“33. A sign which, in relation to the goods or services for which its registration as a mark is applied for, has descriptive character for the purposes of Article 7(1)(c) of Regulation No 40/94 is – save where Article 7(3) applies – devoid of any distinctive character as regards those goods or services (as regards Article 3 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40 , p. 1), see, by analogy, [2004] ECR I-1699, paragraph 19; as regards Article 7 of Regulation No 40/94, see *Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v Wm Wrigley Jr Co (C-191/01 P)* [2004] 1 W.L.R. 1728 [2003] E.C.R. I-12447; [2004] E.T.M.R. 9; [2004] R.P.C. 18, paragraph 30, and the order in *Streamserve v OHIM (C-150/02 P)* [2004] E.C.R. I-1461, paragraph 24).

36. ... due account must be taken of the objective pursued by Article 7(1)(c) of Regulation No 40/94. Each of the grounds for refusal listed in Article 7(1) must be interpreted in the light of the general interest underlying it (see, *inter alia*, *Henkel KGaA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (C-456/01 P)* [2004] E.C.R. I-5089; [2005]

E.T.M.R. 44, paragraph 45, and *Lego Juris v OHIM* (C-48/09 P), paragraph 43).

37. The general interest underlying Article 7(1)(c) of Regulation No 40/94 is that of ensuring that descriptive signs relating to one or more characteristics of the goods or services in respect of which registration as a mark is sought may be freely used by all traders offering such goods or services (see, to that effect, *OHIM v Wrigley*, paragraph 31 and the case-law cited).

38. With a view to ensuring that that objective of free use is fully met, the Court has stated that, in order for OHIM to refuse to register a sign on the basis of Article 7(1)(c) of Regulation No 40/94, it is not necessary that the sign in question actually be in use at the time of the application for registration in a way that is descriptive. It is sufficient that the sign could be used for such purposes (*OHIM v Wrigley*, paragraph 32; *Campina Melkunie*, paragraph 38; and the order of 5 February 2010 in *Mergel and Others v OHIM* (C-80/09 P), paragraph 37).

39. By the same token, the Court has stated that the application of that ground for refusal does not depend on there being a real, current or serious need to leave a sign or indication free and that it is therefore of no relevance to know the number of competitors who have an interest, or who might have an interest, in using the sign in question ([1999] *E.C.R. I-2779*, paragraph 35, and [2004] *E.C.R. I-1619*, paragraph 58). It is, furthermore, irrelevant whether there are other, more usual, signs than that at issue for designating the same characteristics of the goods or services referred to in the application for registration (*Koninklijke KPN Nederland*, paragraph 57).

...

46. As was pointed out in paragraph 33 above, the descriptive signs referred to in Article 7(1)(c) of Regulation No 40/94 are also devoid of any distinctive character for the purposes of Article 7(1)(b) of that regulation. Conversely, a sign may be devoid of distinctive character for the purposes of Article 7(1)(b) for reasons other than the fact that it may be descriptive (see, with regard to the identical provision laid down in Article 3 of Directive 89/104, *Koninklijke KPN Nederland*, paragraph 86, and *Campina Melkunie*, paragraph 19).

47. There is therefore a measure of overlap between the scope of Article 7(1)(b) of Regulation No 40/94 and the scope of Article 7(1)(c) of that regulation (see, by analogy, *Koninklijke KPN Nederland*, paragraph 67), Article 7(1)(b) being distinguished from Article 7(1)(c) in that it covers all the circumstances in which a sign is not capable of distinguishing the goods or services of one undertaking from those of other undertakings.

48. In those circumstances, it is important for the correct application of Article 7(1) of Regulation No 40/94 to ensure that the ground for refusal set out in Article 7(1)(c) of that regulation duly continues to be applied only to the situations specifically covered by that ground for refusal.

49. The situations specifically covered by Article 7(1)(c) of Regulation No 40/94 are those in which the sign in respect of which registration as a mark is sought is capable of designating a ‘characteristic’ of the goods or services referred to in the application. By using, in Article 7(1)(c) of Regulation No 40/94, the terms ‘the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service’, the legislature made it

clear, first, that the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service must all be regarded as characteristics of goods or services and, secondly, that that list is not exhaustive, since any other characteristics of goods or services may also be taken into account.

50. The fact that the legislature chose to use the word ‘characteristic’ highlights the fact that the signs referred to in Article 7(1)(c) of Regulation No 40/94 are merely those which serve to designate a property, easily recognisable by the relevant class of persons, of the goods or the services in respect of which registration is sought. As the Court has pointed out, a sign can be refused registration on the basis of Article 7(1)(c) of Regulation No 40/94 only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics (see, by analogy, as regards the identical provision laid down in Article 3 of Directive 89/104, *Windsurfing Chiemsee*, paragraph 31, and *Koninklijke KPN Nederland*, paragraph 56).’’

92. In addition, a sign is caught by the exclusion from registration in art.7(1)(c) if at least one of its possible meanings designates a characteristic of the goods or services concerned: see *OHIM v Wrigley* [2003] E.C.R. I-12447 at [32] and *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* (C-363/99 [2004] E.C.R. I-1619; [2004] E.T.M.R. 57 at [97].

93. Counsel for PCCW relied upon two other authorities. First, *Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v Celltech R&D Ltd* (C-273/05 P) [2007] E.C.R. I-2883; [2007] E.T.M.R. 52, in which the CJEU stated at [81]:

“In this case, it must be held that the Court of First Instance properly assessed the descriptive character of the mark CELLTECH considered as a whole and concluded that it was not established that the mark, even understood as meaning ‘cell technology’, was descriptive of the goods and services referred to in the application for registration. Therefore, it did not infringe Article 7(1)(c) of Regulation No 40/94.”

94. Secondly, *Europig SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (T-207/06) [2007] E.C.R. II-1961, in which the Court of First Instance (now General Court) said at [27]:

“It follows that, for a sign to be caught by the prohibition set out in [art.7(1) (c)], there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods and services in question or one of their characteristics (see *PAPERLAB*, paragraph 25, and the case-law cited there).”

95. I do not see any real difference between these statements of principle and those in *Technopol* [2011] E.T.M.R. 34, in particular at [50], and if there is a real difference it is the latter that should be given effect to. Nevertheless, I am content to proceed on the basis urged upon me by counsel for PCCW, namely that *Celltech* [2007] E.C.R. I-2883 emphasises the need for evidence except in clear cases and that *Europig* [2007] E.C.R. II-1961 emphasises the need for a sufficiently direct and specific relationship between the sign and the goods or services concerned.’

27. Applying those tests, in *Starbucks* Arnold J found that the mark, NOW, described a characteristic of the services on offer, i.e. the instant and immediate character of the service, and the mark was not saved by the inclusion in it of minimal, insignificant figurative elements. His judgment was approved on the s 3(1)(c) point by the Court of Appeal [2013] EWCA Civ 1465; [2014] F.S.R. 20. Sir John Mummery said:
- ‘39. I will not repeat the lengthy passages. The position in short is that a sign which designates a characteristic of the relevant service is devoid of any distinctive character. Such signs are often referred to as descriptive, as they are easily recognised by the relevant class of persons as describing the service in respect of which registration is sought or made.
40. As the judge stated at [92] of his judgment
- ‘[A] sign is caught by the exclusion from registration in Article 7(1)(c) if at least one of its possible meanings designates a characteristic of the goods or services concerned.’
41. The basic aim of such exclusions from registration is obvious: to prevent an undue monopoly in the course of trade of a designation that may be used descriptively of a service or of any of its characteristics. It is in the general public interest that undertakings should be able to describe freely any characteristic of their own service, irrespective of how commercially significant that characteristic may be.’
28. The position was also helpfully summarised by HHJ Melissa Clarke in *Dryrobe Ltd v Caesr Group Ltd* [2025] EWHC 3167 (IPEC), [2026] E.T.M.R. 10:
- ‘80. The test is that a sign can be refused registration under, in our case, section 3(1)(c) "only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics " per *Agencia Wydawnicza* at [50], and if at least one of its possible meanings designates a characteristic of the goods or services concerned, per Arnold J at [92] of *Starbucks v BskyB* relying on *OHIM v Wrigley* at [32] and *Koninklijke KPN Nederland v Benelux-Merkenbureau (C-363/99)* [2004] E.C.R. I-1619; [2004] E.T.M.R. 57 at [97]. It is irrelevant whether there are other, more usual signs than that at issue for designating the same characteristics of the goods or services referred to in the application for registration (see *Agencia Wydawnicza* at [39], from *Koninklijke KPN Nederland* at [57]). Arnold J further relied in [95] on the Court of First Instance's guidance at [27] of *Europig SA v OHIM (T-207/06)* [2007] E.C.R. II-1961, that:
- "...there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods and services in question or one of their characteristics (see *PAPERLAB*, paragraph 25, and the case-law cited there)."
29. The alteration of a descriptive word or a combination of descriptive words to form a ‘neologism’ may take a mark out of the ambit of s 3(1)(c), depending upon the impact on the mark as a whole, in effect whether there is a perceptible difference between the combination and the mere sum of its parts. The distinctive character of the mark must be assessed by reference to the goods or services in the challenged registration and the perception of the average consumer of those goods or services, who is deemed to be reasonably well-informed and reasonably observant and circumspect. The issue is how

the average consumer would perceive the mark in context: will the mark actually be recognised by the relevant class of persons as a description of one of the characteristics of the challenged goods/services?

30. First, I must consider the impact of the ‘concatenation’ of the two parts of the Mark – the combination of the word ‘flower’ and the letters ‘bx’ into a portmanteau word or neologism. It was the Claimant’s case that these changes to the simple words ‘flower’ and ‘box’ meant that the Mark did not consist *exclusively* of descriptive elements, and so escaped from s 3(1)(c). That argument appears to have some force, when viewed objectively. However, in my judgment it is hard for the Claimant to sustain the point when its own evidence was to the effect that the Mark was and is pronounced as ‘flower box’ so that the Mark would be seen, heard and understood as including those two words. Furthermore, the Claimant pleaded in its Amended Reply and Defence to Counterclaim that ‘The Mark is seen and understood as FLOWER BOX and, as such, describes a box, more particularly a box for flowers.’ On the Claimant’s own case, therefore, the Mark would be likely to be understood by the average consumer as a combination of the two words, rather than a true neologism, even if written as one combined word. In those circumstances, I struggle to see how it can sustain its argument that the Mark does not consist exclusively of the two descriptive words.
31. Plainly, if the Mark is seen as ‘flower box’, it consists of two ordinary, descriptive English words. Whether seen as such, or in its registered, contracted form, the validity of the Mark must be assessed as a whole, giving due weight to both of its words/elements. The issue is whether those enable the average consumer immediately to identify, without further thought, a characteristic or description of the goods or services in question, that is, to recognise that the words denote some characteristic of the goods/services in issue. It is notable that the Defendant did not specify *which* characteristic of the challenged goods and services ‘flower box’ is supposed to denote, other than to submit that it plainly describes ‘a box of flowers.’ Its arguments and evidence seem to me to have been aimed at the *kind* of goods/services – ‘a box of flowers’, descriptive of ‘the form in which they may arrive, be stored, transported and/or displayed’ – rather than at the *intended purpose* of the goods/services, reflecting the Claimant’s pleaded position mentioned above.
32. There was no evidence before me to show that members of the relevant public would be aware of a ‘flower box’ in the same way that they would be familiar with a shoe box, a horse box or a hat box. Each of the latter phrases, whether or not hyphenated or written as a single word, of course has a specific and well-known meaning. In my judgment, in the absence of evidence to the contrary, ‘flower box’ cannot be said to have one or more established meanings of which the relevant public would be aware.
33. Instead, in my judgment the average consumer must be expected to attribute to ‘flower box’ the most natural and literal meaning of the words, describing a box in which flowers are contained, whether to be transported or delivered to a retailer or wholesaler, or to the end customer, perhaps in a cardboard box designed to fit through a letter box, or in a gift box of some kind. Alternatively, potentially the average consumer could, in my view, think that ‘flower box’ means a box in which flowers are grown, as a synonym for a planter or window box, but there was no evidence to that effect. I do not accept the Defendant’s implicit submission that the words might be taken as descriptive of

flowers alone, as that would require the consumer to ignore the descriptive word ‘box.’

34. The Defendant gave evidence that flowers may be sold arranged in a decorative gift box, for example a deep box like a hat box, or a shallower box more like a chocolate box. Mr Gajewski had sold flowers in gift boxes on a small scale as a sole trader from late 2017 and 2018, and the Defendant has continued to sell flowers in gift boxes. Mr Gajewski also produced some web pages, undated but presumably from 2026 when he made his witness statement, showing other florists offering flowers in a variety of gift boxes. Whilst those pages were said to show other traders using ‘the term’ descriptively in fact they show a variety of terms being used, such as ‘hat boxes’ or ‘rose box’ and, as far as I can see, there was only one other use of ‘flower box.’ In the circumstances, there was insufficient evidence to show how widespread or common the use of the term ‘flower box’ for such boxes may be, and the evidence was certainly insufficient to conclude that the average consumer would be aware of such goods. Even if consumers were aware of those goods, the evidence does not show that anyone would be likely to see the term as descriptive of goods or services of a particular kind. In my view the words ‘flower box,’ if taken as having the meaning of a gift box for flowers, would at all times have been seen as referring primarily to the box, rather than to the flowers arranged in it. I do not consider that any of the evidence before me showed that ‘flower box’ would be taken to mean ‘flowers in a box’ or ‘flowers displayed in a box,’ nor is that the natural meaning of the words.
35. I turn to the challenged parts of the Claimant’s specification. As explained, this is limited to certain Class 31 goods and Class 35 services. The reference to storage and transport in the Defendant’s skeleton argument relates to the Class 39 services which are not part of its case on invalidity.
36. In my judgment, the words ‘flower box’ are not descriptive of any of the challenged Class 31 goods. The goods are all flowers, plants or foliage of various kinds, fresh or dried, or in bouquets. The specification does not refer to boxes or other containers, or packaging, or goods for displaying the flowers or plants, so that there is nothing to reflect the ‘box’ part of the Mark. The closest it gets is in the term ‘planted flowers.’ None of the evidence shows that the term ‘flower box’ would enable a consumer immediately to understand that it describes planted flowers. In the absence of any reference in this part of the specification to a box, container or planter, I am not persuaded that the words ‘flower box’ would immediately permit the average consumer to identify any characteristic of any of the challenged terms.
37. Similarly, I am not persuaded that ‘flower box’ can be said to be descriptive of the retail services challenged in Class 35. I note Mr Gajewski’s evidence that there are other florists using the words as part of their trading names, but that evidence, again from 2026, does not seem to me adequate to show that the average consumer would have been educated to assume, without further thought, that ‘flower box’ denotes the challenged services. On the contrary, it appears to show a number of other traders using ‘flower box’ to distinguish their businesses. The closest part of the specification to the meanings I have discussed above is ‘the bringing together in a retail, online or wholesale outlet, for the benefit of others of a variety of goods, namely, ... containers for flowers and plants, planters,’ but whilst ‘flower box’ might describe the container or planter

itself, goods which would be covered by the Claimant's unchallenged specification in Class 21, I do not consider that the Mark would permit the average consumer immediately to identify a characteristic of any of the challenged Class 35 services.

38. I do not agree with the Defendant's submission that the fact that consumers may have mistakenly searched for the Claimant by using the words Flower Box or Flowerbox instead of using the Mark shows that the Mark is descriptive within the meaning of s 3(1)(c). It may reflect the fact that it is known or pronounced as 'flower box' or simply arise from the ubiquitous poor typing habits of persons using an internet search engine.
39. For all of these reasons, I have concluded that the Mark was inherently distinctive in relation to the challenged goods and services as at the relevant date and I reject the Counterclaim for invalidity.

Acquired distinctive character

40. In closing, the Defendant's counsel accepted that the Mark had acquired a distinctive character by 9 February 2026, when the Amended Defence and Counterclaim was filed, and concentrated his arguments about enhanced distinctive character on the position at 17 April 2019, when the Defendant company started trading. However, he argued that the enhanced distinctiveness should be found only in relation to 'luxury and stylish floral design of the highest quality,' that being the business for which the Claimant claimed a reputation in paragraph 5 of the Particulars of Claim. In the circumstances, and in case my conclusions on inherent distinctiveness are wrong, I need to deal with the evidence of enhanced distinctive character, and for convenience I deal with the relevant periods for invalidity and infringement together.
41. The law was summarised by Arnold J in *Frank Industries Pty Ltd v Nike Retail BV* [2018] EWHC 1893 (Ch), [2018] F.S.R. 35:
- ‘69. First, for a trade mark to possess distinctive character, it must serve to identify the goods or services in respect of which registration is applied for as originating from a particular undertaking and thus to distinguish the goods or services from those of other undertakings.
70. Secondly, the distinctive character of a trade mark must be assessed by reference to (i) the goods or services in respect of which registration has been applied for and (ii) the perception of the average consumer of those goods or services, who is deemed to be reasonably well-informed and reasonably observant and circumspect.
71. Thirdly, the criteria for assessment of distinctive character are the same for all categories of trade marks, but nevertheless the perception of the relevant public is not the same for all categories of trade marks and it may therefore be more difficult to establish distinctive character in relation to some categories (such as shapes, colours, personal names, advertising slogans and surface treatments) than others.
72. Fourthly, in assessing whether a trade mark has acquired a distinctive character the competent authority must make an overall assessment of the relevant evidence, which in addition to the nature of the mark may include (i) the market share held by goods bearing the mark, (ii) how intensive, geographically widespread and long-

standing the use of the mark has been, (iii) the amount invested by the proprietor in promoting the mark, (iv) the proportion of the relevant class of persons who, because of the mark, identify the goods or services as emanating from the proprietor, (v) evidence from trade and professional associations and (vi) (where the competent authority has particular difficulty in assessing the distinctive character) an opinion poll. If the relevant class of persons, or at least a significant proportion of them, identifies goods or services as originating from a particular undertaking because of the trade mark, it has acquired a distinctive character.

73. Fifthly, with regard to the acquisition of distinctive character through use, the identification by the relevant class of persons of the product or service as originating from a given undertaking must be as a result of the use of the mark as a trade mark. The expression “use of the mark as a trade mark” refers solely to use of the mark for the purposes of the identification, by the relevant class of persons, of the product as originating from a given undertaking.

74. Sixthly, a trade mark may acquire a distinctive character in consequence of the use of that mark as part of, or in conjunction with, another trade mark (which may itself be a registered trade mark).

75. Seventhly, it is not possible to state in general terms, for example by referring to predetermined percentages relating to the degree of recognition attained by the mark within the relevant section of the public, when a mark has acquired a distinctive character through use. Nor can the results of a consumer survey be the only decisive criterion to support the conclusion that a distinctive character has been acquired through use.

76. Eighthly, the trade mark applicant or proprietor must prove that the relevant class of persons perceive the goods or services designated exclusively by the mark applied for, as opposed to any other mark which might also be present, as originating from a particular company. It is not sufficient for the applicant or proprietor to show that a significant proportion of the relevant class of persons recognise and associate the mark with the applicant or proprietor’s goods.’

42. Ms Bromberg Hawkings gave evidence about the claimed acquired distinctiveness and reputation of the Claimant’s business, its growth and the publicity generated for the Mark. The business commenced trading in 2015. Ms Bromberg Hawkings said that turnover had increased at least 30% a year since then, although she did not provide a complete set of figures, but only heavily redacted profit and loss accounts for 2016, 2019 and 2025. That for the year ended 31 December 2016 showed turnover of over £368,000, about two thirds of which was from trade with consumers, and that for the year ending 31 December 2019 was well over £2m, over half of which was from trade with consumers, although of course 8 months of that year post-dated the incorporation of the Defendant. The company has attracted investors, and has grown, so that in 2025 its turnover in the UK was about £4.3m. Ms Bromberg Hawkings explained in court that turnover peaks around Valentine’s Day, Mother’s Day and Christmas. There was no evidence as to the size of the UK market for flowers, plants and floristry services, and I think it fair to assume that the figures at least prior to 2025 represent a very small proportion of the market, even if, as Ms Bromberg Hawkings said, the Claimant was not aiming to sell mass market flowers, but more upmarket goods. She said that the Claimant had about 10,600 consumer customers by April 2019, and 110,000 by July 2025. She said that the Claimant has a ‘flagship atelier’ in West London, and on-site flower shops at two central London hotels. She did not explain whether the atelier was

open to the public, nor when it or the hotel florists opened, nor how much of the Claimant's business flowed from the atelier or shops rather than its online business.

43. Ms Bromberg Hawkings gave evidence of the Claimant's marketing efforts. She said that various channels were used, including billboards and social media posts. She produced copies of Instagram posts dating from September 2015. Most of these had fairly modest numbers of 'likes', for instance there were 605 likes for a post about an installation for Jimmy Choo in May 2017, and a post in February 2019 covering a Vogue/Tiffany BAFTA afterparty with flowers by the Claimant was liked by British Vogue and 1443 others. It is not clear to me when the numbers began to increase. However, a document exhibited by Ms Bromberg Hawkings showed that by June 2026 the Claimant had over 118,000 followers on Instagram, which she contrasted to 70,000 followers for Interflora. Ms Bromberg Hawkings said that the website had 770,000 hits in 2019, dropping to 660,000 in 2025.
44. The earliest significant traditional marketing took place before Christmas 2018, and in January and March 2019 (for Valentine's Day and Mother's Day respectively) when the Claimant paid for advertisements on the side of London buses, as well as on Tube platforms. Ms Bromberg Hawkings said that this cost over £100,000 and that the adverts would naturally have been seen by many people. The Claimant also placed flower stands in central London locations, such as Covent Garden market, the first of which in evidence dates from April 2018. There was little clear evidence of marketing spend on an annual basis, but the figure for 2018 was about £480,000. The Particulars of Claim claimed that the Claimant had spent 'up to £2.3 million per year on marketing and promotion' over the past few years. I accept that the statement of case was verified by a statement of truth, but full details were not provided in the evidence.
45. The Claimant also generated media coverage, some of which pre-dated the trade mark application. For instance, I was shown articles in Vogue from June 2015, headed 'Flowerbx: The Game-Changing Delivery Service' as well as less individualised articles from December 2016 and January 2017. The Defendant suggested that these concentrated on Ms Bromberg Hawkings herself, rather than the Claimant, but in my view most of the documents clearly identified the business by reference to the Mark. Articles were provided from May 2017 to February 2025, from The Telegraph, The Guardian, Forbes magazine, Elle UK, The Independent, Metro, The Standard, Time Out, Glamour UK and again in Vogue. A Vogue article from March 2019 described the Claimant as having 'become a favourite of the fashion set.' Several articles from 2019-2025 included the Claimant in a list of the best flower delivery services, such as one in The Standard in October 2023 which listed the Claimant first and described it as having a 'fiercely loyal following.' Some of these articles referred to collaborations between the Claimant and fashion designers or businesses. Ms Bromberg Hawkings explained that such collaborations were an important aspect of the Claimant's marketing and she listed the names of well-known people with whom the Claimant had collaborated in over the years. For example, she collaborated with Emilia Wickstead on a striking floral decoration of the front of Scott's restaurant in May 2017, which was reported in The Telegraph. Ms Bromberg Hawkings added that there were also references to the Claimant in the restaurant, although none were in evidence. Similarly, she gave fuller details of collaborations throughout 2019, including another large floral display outside Annabel's club in Mayfair for the Chelsea Flower Show in May 2019, which was not

only covered in Elle, but also generated over 45,000 likes on Annabel's Instagram account. An article in the Metro in August 2023 said that the Claimant delivered roses to Victoria Beckham, whilst The Mirror reported in April 2023 that 'Flowerbx's bouquets have been spotted time and again on Victoria Beckham's Instagram story.'

46. Ms Kennedy gave some limited evidence on the Claimant's reputation in the Mark. She first encountered the Claimant when she received a gift of some of its flowers in 2017. She was impressed and became, in her own words, a devoted and loyal customer of the Claimant. Her view was that the Claimant has been well-known since at least 2018, when she started using its services regularly, but she gave no further details as to why she considered its reputation to date back to 2018 and I do not consider that I can give this evidence any real weight.
47. Nevertheless, in the circumstances, I am satisfied that the Claimant's business has grown and has achieved media coverage in the national press and on social media at a level easily sufficient to have enhanced the distinctive character of the Mark. As a result, I am satisfied that as at the date of the Counterclaim a significant proportion of the relevant class of persons, both the general public and businesses, had come to identify the Claimant's goods and services as originating from the Claimant by use of the Mark, which had by that date acquired at least a medium level of distinctive character as a designation of origin of the challenged goods/services. It follows that the invalidity counterclaim fails, and the Mark will not be revoked pursuant to the proviso to section 47(1).
48. Moreover, in my view that was already the case (for the purposes of the infringement claim) by the date of the Defendant's incorporation in April 2019. I accept that the evidence of the Claimant's turnover prior to April 2019 is incomplete, but that is counter-balanced by the credible evidence of a significant marketing spend for the business in 2018, the striking examples of the adverts on London buses prior to April 2019, and the media coverage of the Mark up to the first quarter of 2019. I conclude that the Mark has benefited from acquired distinctiveness since early 2019, prior to the incorporation of the Defendant, and well before the counterclaim was filed in February 2026.
49. As I have said, the Defendant submitted that the Claimant's claim to enhanced distinctiveness related only to 'luxury and stylish floral design of the highest quality' but I do not read the statement of case as restricting the claim to enhanced distinctive character. If I am wrong, then I should say that I consider in any event that the pleaded phrase covers all of the Claimant's core goods/services, and all of those challenged by the invalidity counterclaim. The specification of the Mark is (naturally) not limited by reference to the quality of the goods/services. Mr Davey suggested that any reputation was linked or limited to the delivery of bouquets of single varieties of flowers, but if that were so (and I do not accept that the reputation is so limited) it would not help the Defendant, which also delivers bouquets of single varieties of flowers. The enhanced distinctiveness of the Mark was greatly strengthened by February 2026. I consider that the enhanced distinctive character applies to all of the challenged Class 31 goods and Class 35 services.

50. For all of these reasons, I consider that the Counterclaim for invalidity fails across the board.

Infringement

51. The Claimant relies on infringement under both s 10(2)(b) and (3). There was no dispute about the applicable principles.
52. Section 10(2)(b) provides:
- (2) 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
53. This means that six conditions must be satisfied by the proprietor of the mark: (i) that the Defendant has used within the relevant territory; (ii) in the course of trade; (iii) without the trade mark proprietor's consent; (iv) a sign which is at least similar to the mark; (v) in relation to goods or services which are at least similar to those for which the mark is registered; and (vi) that gives rise to a likelihood of confusion (see e.g. *Match Group LLC v Muzmatch Ltd* [2023] EWCA Civ 454, [2023] Bus L. R. 1097 at [26]). It was accepted that the Defendant had made use of its Signs in relation to identical goods/services to some of those within the Claimant's specification. Hence, only the last of these conditions was disputed here.

Likelihood of confusion

54. In undertaking a global assessment of a likelihood of confusion it is usual to consider a standard summary of the relevant principles. See for example *Match Group (supra)* per Arnold LJ at [27]:
- ‘(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.'

55. The question of likelihood of confusion is to be assessed in the context in which the sign complained of has been used, see *Specsavers v Asda Stores Ltd* [2012] EWCA Civ 24; [2012] FSR 19 at [87]. In addition, as Arnold J said in *Interflora v Marks & Spencer* [2013] EWHC 1291 (Ch); [2013] FSR 33 at [224], the question of a likelihood of confusion:

‘...is not a binary question: is the average consumer confused or is the average consumer not confused? Rather, it requires an assessment of whether it is likely that there is, or will be, confusion, applying the standard of perspicacity of the average consumer. It is clear from the case law that this does not mean likely in the sense of more probable than not. Rather, it means sufficiently likely to warrant the court's intervention. The fact that many consumers of whom the average consumer is representative would not be confused does not mean that the question whether there is a likelihood of confusion is to be answered in the negative if a significant number would be confused.’

Identity of the goods/services

56. There was no dispute about the identity of the Defendant's goods/services to those in the specification of the Mark. The Claimant relied in its skeleton upon ‘natural plants and flowers; flower bouquets; ... plants; foliage; ... cut flowers; ... bouquets of fresh flowers’ in Class 31; and ‘retail services connected with the sale of ... plants and flowers... confectionery, sweets...alcoholic beverages...plant pots...gift cards’ in Class 35. These are identical to the Defendant's goods and services.

Similarity of the Mark to the Signs

57. The similarity of mark to sign is generally assessed under three heads: visual, aural and conceptual. However, it is necessary to bear in mind that this is just part of the overall assessment of the likelihood of confusion. In *TVIS Ltd v Howserv Services Ltd* [2024] EWCA Civ 1103, [2024] FSR 34 Arnold LJ said:

‘35..., while it is conventional for first instance tribunals in trade mark cases to articulate their assessment of the degree of visual and aural similarity between signs and trade marks using words such as “high”, “medium” or “low”, there is no legal requirement for tribunals to do so. All that is required is for the tribunal to assess the nature and extent of any similarities. This is because what matters is not the verbal label that is applied to the assessment, but whether the similarities in conjunction with the other factors which must be taken into account lead to a likelihood of confusion. It is possible for there to be no likelihood of confusion despite a relatively high degree of visual and aural similarity. Equally it is possible for there to be a likelihood of confusion despite a relatively low degree of visual and aural similarity. It depends on the other factors that are in play.’

58. The Signs of which the Claimant complains are FLOWERSBOX, FLOWERS BOX and FLOWERS BOX LONDON. These are used in a variety of forms, as shown at paragraphs 8-9 above, such as in the Defendant’s url, <https://www.flowersbox.co.uk>, and its Instagram handle, and in the stylised forms with the addition of a gold capital B, also set out above. The Defendant submitted that in assessing the evidence of confusion I should bear in mind the descriptive nature of the words Flower(s) and Box. He relied heavily on the decision in *Oatly AB (2) Oatly UK Limited v Glebe Farm Foods Limited* [2021] EWHC 2189 (IPEC), [2022] FSR 12. However, the facts of that case can be distinguished from the facts here, as the judge found (see [98]) that there was a relatively low or, at best, very modest level of similarity between the sign and the marks which was due to the presence in both the sign and the mark of the letters ‘OAT’ that were descriptive of the relevant products. However, here I have found the combination of the two words ‘flower’ and ‘box’ to be distinctive and both parts of the Mark are reflected in the Signs.
59. All of the Signs have some level of visual similarity to the Mark. FLOWERSBOX is in my view the closest to FLOWERBX. Even allowing for the added S in the former, and the missing O in the latter, they are highly similar. Furthermore, when the two words are conjoined I consider that the S in the Sign might well go unnoticed by the average consumer. FLOWERS BOX is also similar to a high degree, although the gap between the words slightly reduces the similarity. Adding LONDON reduces the similarity further, as plainly the word is not visually negligible, but the Sign remains visually similar to the Mark, especially where the words FLOWERS BOX appear above LONDON, as in the example at paragraph 8. The addition of the fancy B reduces the similarity further, but in my view the Signs with the B still have a medium degree of visual similarity to the Mark, because of the high degree of overlap of the wording.
60. The Signs are all aurally similar to the Mark. The Defendant accepted that the B in the stylised signs would not be pronounced by the public. That being so, and given its case and the findings I have made about the Mark being pronounced as ‘flower box,’ aurally there is almost identity between the Mark and the versions of the Signs which use only the words Flowers and Box. The additional S would have very little aural impact. Versions which include the word London are less similar, but there is still a significant level of aural similarity.
61. Conceptually again I find there to be substantial similarity. The Mark and the Signs all combine the concept of a flower/flowers and a box. The contraction of the words in the

Mark and the addition of London and the B to some of the Signs does not obscure or vary the combined concepts, nor does adding the meaningless B or the geographical denominator London change the meaning of those Signs sufficiently to render them conceptually dissimilar to the Mark.

62. Overall, I consider that there is a high level of similarity of Mark to the Signs, even where the latter include London and/or the B.

Global assessment

63. I take into account the interdependency principle. The Mark benefited from an enhanced distinctive character at all material times, and there is a significant degree of similarity between the Mark and the Signs. The Signs are used in relation to goods or services identical to those of the Claimant. Both parties appear to be predominantly online businesses, at least in so far as they are supplying the general public. The evidence suggests that business customers of both parties may approach them by email, and perhaps by telephone. In those circumstances, the visual and conceptual aspects of the Mark/Signs are probably of more significance than the aural aspect, and in my judgment the impact of potential customers' reliance on internet searching is also important as part of the context of the alleged infringement.
64. The Claimant submitted that there was documentation before the court recording numerous examples of actual confusion which amounted to powerful evidence that there exists a risk of confusion. It identified and described a number of alleged instances of confusion in the Amended Particulars of Claim, and more examples were identified in the witness statement of Mr Williams. As is common in an IPEC trial, the Claimant did not call any witnesses of confusion but relied upon the documents largely speaking for themselves (see HHJ Clarke's comments on this practice at [187] of *Dryrobe*, *supra*). There were a large number of documents, filling five lever arch files, disclosed by both sides which, the Claimant said, also proved confusion. Given the limited time available at the trial, only a small minority of such documents were put to the witnesses, many others were not mentioned or described even in the skeleton arguments. When I expressed reluctance to go through the additional documents without the benefit of either evidence or specific submissions about them, Mr Norris KC suggested that I should first of all consider the instances of confusion discussed in Mr Williams' evidence, and should move on to the additional files, starting with the Claimant's single file, and then move on as needed to the 4 files of the Defendant's disclosure, if I was not satisfied that there was a likelihood of confusion from the first set of documents. Mr Davey submitted that I should not consider the wider documents without the benefit of evidence or submissions. I consider that Mr Davey's approach is safer and fairer to both sides, because a document which on the face of it seems to demonstrate confusion might be capable of satisfactory explanation, which could have been produced had that document been specifically identified in court. The evidential value of documents which have not been put to the witnesses, or, given the constraints of the IPEC procedure, mentioned in written or oral submissions, is limited, and it might not be possible to draw reliable conclusions from them. Moreover, in my view some of the alleged instances of confusion identified by the Claimant do not prove relevant

confusion for the purposes of trade mark infringement, and so it is possible that some of the additional documents in the court bundles may suffer from the same problems. In the circumstances, I decline to set off on a voyage of independent discovery, and have limited my consideration to documents identified before or at the trial.

65. I comment on some but not all of the alleged instances of confusion identified by the Claimant, many of which were rather similar in nature. I concentrate on the examples listed by Mr Williams, those put to the witnesses in cross-examination and a few additional examples discussed in the Claimant's skeleton argument:
- (a) Mr Williams exhibited a number of the Defendant's documents in which its customers complained that it was deliberately causing consumers to confuse it with the Claimant. In one example from April 2020 a Ms Phillips wrote 'I was under the impression I was ordering from <https://www.flowerbx.com> when in fact I ordered from <https://www.flowersbox.co.uk>. Not only is this extremely misleading I'm sure it's fraudulent misrepresentation ...' She did not explain how she made the mistake or how she had got the wrong impression that she was dealing with the Claimant. Similar documents were produced from various dates in 2024.
 - (b) Mr Williams referred to a complaint made to the Claimant on 11 June 2021 which turned out to relate to a bouquet ordered from the Defendant, as did a similar instance in August 2023. He exhibited documents from 2022 and 2023 where customers made enquiries about deliveries of the Claimant when they had ordered goods from the Defendant. Whilst these may show some confusion, the correspondence does not show how the customers came to complain to the Claimant having placed an order with the Defendant, nor whether some or all of the orders had been placed with the Defendant in the belief that they were being placed with the Claimant.
 - (c) A number of Trustpilot reviews were credited to the Defendant, although it seems clear that they were intended for the Claimant. It is not clear to me whether the fault lay with the reviewer or with Trustpilot itself, although I suspect it was the consumer who made the mistake. Some of the Trustpilot reviews pleaded at subparagraph 12 (d) of the Amended Particulars of Claim criticise the Defendant and point out the resemblance of the Mark/Signs, without necessarily indicating that the reviewers were confused. Where the Trust Pilot reviews got 5 stars, the Defendant did not seek to correct them, but he did so in response to some reviews in 2022, saying 'When you guys do this check make sure this is the right company they review... All very similar [*sic*] and can be mixed up easily [*sic*] by 1 letter. We all the time get emails about undelivered orders where clients email us with issues from different companies as they just emailed wrong brand by accident.' After a 1-star review in May 2024, Mr Gajewski again objected that the review related to a delivery from the Claimant, telling Trust Pilot 'We are often mistaken for FLOWERBX.' TrustPilot responded that it had checked the position and there was no mistake. It is unclear to me how any mistake was made, and by whom.
 - (d) In April 2022, the Defendant was contacted by e-mail by a Mr Page from the Serpentine Gallery asking for a quote for floral decorations for the Serpentine Pavilion opening on 7 June 2022, to match the flowers supplied in the previous year. A lady from the Defendant responded on the same day asking for pictures of the arrangements and Mr Page responded later that day, attaching a copy of the Claimant's branded proposal. In my view he clearly believed that he was

contacting the business which had provided the Gallery's floral decorations in 2021, especially as he commented in his second email that the budget for 2022 was smaller. That would only have made sense if he had thought he was addressing the supplier from 2021, namely the Claimant. There is no explanation as to how he came to contact the Defendant instead, as the Gallery ought to have had the Claimant's email address on file. I think it safe to assume that Mr Page had carried out an online search rather than searching through the Gallery's emails, but, if so, we do not know what search term he used. The Defendant did not explain to the Serpentine that it was not the Claimant but one of its competitors.

- (e) In March 2023, a Mr Guitard complained to the Defendant on WhatsApp about the quality of a bunch of tulips he had received from it. He said 'I have ordered from your business "flowerbox" instead of from flowerbx. I have paid for Tulips Nest bouquet 30 stems for £87.95 thinking they would look amazing as I thought it was flowerbx.' There followed quite an acrimonious exchange with Mr Gajewski. Mr Guitard felt that the image of the product he had bought from the Defendant was misleading and the quality of the flowers did not reflect the price paid. Again, though the tenor of the exchange was that the customer had not deliberately chosen the Defendant over the Claimant, one cannot tell why he thought he was buying from the Claimant. Mr Gajewski said that he could not recall what he had thought about this at the time.
- (f) In June 2023, someone called 'Tinx' messaged the Defendant complaining about flowers that they had ordered as a gift: 'I recently sent flowers via you guys to my mum and I am so upset with what was sent. I equate flowerbx with quality and what was sent was the opposite. ... I trusted that the flowers would be beautiful. I'm so disappointed and upset.' Again, one cannot tell from this why the customer thought they were buying from the Claimant, although it is plain that is what they had thought.
- (g) On 14 February 2024 someone whose name has been redacted contacted the Claimant, possibly through its website. This person wrote 'I thought I was ordering flowers from you and then was extremely disappointed when the bunch turned up with fewer stems than advertised... We have always had fantastic flowers from you in the past and so were not sure what happened. And then I realised I had bought from "Flowers Box" which brands itself on google like you.' Again, it is not possible to know what search term the customer used when looking for the Claimant, but it seems clear that they were existing customers of the Claimant and I think it reasonable to infer from the reference to 'google' that they mistook the Defendant's site for the Claimant's in Google search results.
- (h) On 16 February 2024, a Mr Conrad emailed the Defendant to complain about the quality of some flowers ordered from the Defendant at a cost of over £200. After some exchanges with the Defendant, he wrote 'I now realise calling yourself Flowers box you are purposely confusing consumers with the far more superior flowerbx. I thought I'd bought my flowers from flowers bx, so much so that I e-mailed them to complain about the unacceptable flowers ... It was only when they checked the order number again that we realised I had not bought the flowers from them.' As Mr Davey pointed out, Mr Conrad referred to 'flowers bx' rather than either the Mark or one of the Signs. However, in the same line of the email he had typed the Mark correctly, suggesting that 'flowers bx' was a typographical error and was not due to Mr Conrad's imperfect recollection of the Mark. It was

not clear how he came to make the mistake of placing his order with the Defendant if, as he said, he wished to order from the Claimant, although he appears to have attributed the mistake to the Defendant's use of the Sign Flowers Box.

- (i) Someone identified by the Defendant as Dan Fabian posted on TrustPilot on 6 May 2024: 'I ordered a plant ...from a company I thought was FlowerBX (I specifically wanted to use FlowerBX as they sell beautiful flowers). Only now from reading another review on here have I realised that this company is Flower Box and not Flower BX!' The Defendant pleaded that his email exchange with its customer service team at the time indicated that he was not confused at the point of sale, but he certainly says in the review that he was confused into thinking he was ordering from the Claimant. If he was confused at the point of sale, one cannot tell from this comment how he came to make that mistake, but it is clear that he knew of the Claimant. I note that even when he realised that he had used the wrong company he described the Defendant as 'Flower Box,' missing the 's' from Flowers. I also note that whilst he typed the Mark correctly twice in his review, he also mistyped it as Flower BX.
- (j) A Mr Lloyd-Goodwin posted on TrustPilot on 6 May 2024: 'Accidentally ordered from them instead of flower bx (a great company).' The Defendant pleaded that Mr Lloyd-Goodwin had previously purchased from it, so that he was not confused, but his review suggests that on this occasion at least he wished to use the Claimant not the Defendant. If he knew of both companies, it is all the more striking that he made the mistake. It is not possible to tell how Mr Lloyd-Goodwin placed his order with the wrong company, but again it is clear that he knew of the Claimant and wished to order from it.
- (k) A customer contacted the Claimant on 28 June 2024, concerned about a missing delivery. When it was clarified that the order had been placed with the Defendant the customer responded 'I thought the order had been put through your company. It has in fact been put through flowersbox. When you type in Flower Box in the search engine they came up first. We thought we had ordered with you.' Whilst it appears that the customer had searched for a term which was not identical either to the Mark or to the Signs, again they appear to have mistaken the Defendant for the Claimant in the search results.
- (l) A customer contacted the Defendant in July 2023 wanting credit for an unused voucher, as did another person in June 2024, wanting to redeem a Michael Kors voucher. In each case the Defendant explained that it was not their voucher, but one from the Claimant. It is not clear how the customers made the mistake of contacting the wrong company.
- (m) A Mr Mitchell complained to the Claimant about the quality of flowers delivered to him in January 2025 saying, 'We have used your service before and it has been brilliant.' When the Claimant pointed out to him that he had ordered from the Defendant, he said 'You are absolutely correct. It was Flowerbox. Really my mistake.' Again, the document does not show how that mistake was made, and I note that when he realised his mistake he described the Defendant as FlowerBox, rather than using a name identical to one of the Signs.
- (n) In September 2025 the Defendant was contacted by Rima Events in relation to a fundraising gala due to take place at the Savoy hotel. It is very clear that the e-mail was intended for the Claimant as it was addressed to 'Dear FLOWERBX Team' and went on to say, 'We admire FLOWERBX for redefining modern floral

design with elegance and simplicity and we would be honoured to feature your creations at this gala.’ The e-mail identified some orchids which they hoped the Claimant could supply. The Defendant (perhaps mindful of these proceedings) replied saying ‘We are not FLOWERBX.’ Nevertheless, Rima continued to discuss an order with them for flowers for the gala. Again, it is not clear how they came to contact the Defendant when they wanted the Claimant.

- (o) Ms Kennedy also gave evidence that she had on occasion clicked on the Defendant’s website believing it to be the Claimant’s site because of the similar name and the reference to ‘luxury flowers.’ She pointed out that she had made that mistake despite being a long-standing customer and investor in the Claimant.

66. The Defendant submitted that the evidence did not show relevant confusion but at worst showed administrative errors, arising after the point of sale. It is right that consumers may have searched by reference to a term identical to neither the Mark or a Sign, and some of the instances of supposed confusion, such as the complaints lodged with the wrong company, could be said to amount to no more than ‘administrative errors.’ That was broadly the approach taken at first instance in *TVIS*, but Arnold LJ considered that the judge had erred in saying that such confusion was not relevant to the likelihood of confusion:

‘77. I would add, in relation to the first criticism, that the judge cited at [167] the decision of the Court of Appeal in *The European Ltd v The Economist Newspaper Ltd* [1998] FSR 283. In that case the claimant was the proprietor of a device mark the main feature of which was the words THE EUROPEAN registered in respect of newspapers and the defendant published a newspaper called EUROPEAN VOICE. The claimant relied upon a number of instances of alleged actual confusion. At first instance Rattee J reviewed each of the instances relied upon in some detail and concluded that they did not demonstrate that the persons involved had been confused in the sense of believing that EUROPEAN VOICE was connected with the publisher of THE EUROPEAN: [1996] FSR 431 at 439-441. I cannot find any use of the expression “administrative errors” in his judgment. On appeal Rattee J’s decision was upheld. Neither Millett LJ nor Hobhouse LJ, who gave the two substantive judgments, reviewed the instances of alleged confusion, although Millett LJ said at 291 that the evidence was “singularly unimpressive” and there was “little or no” evidence of actual confusion while Hobhouse LJ said at 293 that he agreed with Rattee J’s assessment of the evidence. Again, I cannot find any use of the expression “administrative errors” in either judgment.

78. Despite the absence of any explicit foundation for the concept in that authority, I do not have any difficulty with the proposition that an instance of alleged confusion may turn out, upon examination, to involve some administrative error or other mistake which does not demonstrate any relevant confusion on the part of the person in question. In the present case, however, I consider that a number of the instances relied upon by TVIS do show relevant confusion. Even if that is open to doubt, they certainly demonstrate, as I have explained, that both the Trade Mark and the Sign are regarded by consumers as brand names, not descriptors, and that the supposed conceptual difference between them does not avoid the potential for confusion.

79. The judge explained some of the instances away in [168] on the basis that a number of those involved “have not taken care before initiating a call and a number have made mistakes based on internet searches”. I see no reason to think that any of those involved were atypical consumers of pet insurance. Nor do I see any reason to think that they were especially careless. It should be borne in mind that trade mark law is all about consumers’ unconscious assumptions. While I agree that mistakes made when carrying out internet searches may need to be treated with caution in some cases, there is no reason to think that any of the instances of apparent confusion considered above was an artefact of internet searching.

80. Turning to TVIS’s third criticism, I also agree with this. It is difficult to see why the existence of a number of instances of actual confusion is not probative of a likelihood of confusion in this case. The judge appears to have considered that the number of instances of confusion was too small, but as counsel for TVIS graphically submitted:

as ... the judge had noted himself at [59], the parties were small players in the market for pet insurance. ... that should have indicated something to him, namely that the presence of any cross-confection of this kind was not simply the result of the ubiquity of either player in the market. These were two relatively small ships in a vast ocean, and yet instance after instance of them crashing into each other.’

67. The parties here are (according to the Defendant) relatively small players in a crowded market. Moreover, the Defendant submitted that it is commonplace in that market to use descriptive terms such as those included in the Mark and the Signs. None of those points was satisfactorily proved by its evidence, although I may take judicial notice of the large number of providers of flowers, many of them selling flowers online. Nevertheless, it appears that a substantial number of customers have – one way or another - been led to confuse the parties, as has TrustPilot. Most of the instances of confusion appear to have arisen through use of the internet, and some of them may have arisen from people using search terms which were variations on the parties’ names or perhaps contained typographical errors. For others, there is no clear explanation of why a mistake was made. I do not accept the Defendant’s suggestion that the confusion can be explained by some of these customers being careless. Even limiting my consideration to the examples identified at trial, there are too many of these instances to be explained away by stigmatising all of these consumers as ‘a moron in a hurry.’ It seems to me an inevitable inference that it is the similarity of the Mark to the Signs which led to customers familiar with the Claimant, and wanting to deal with the Claimant, clicking through to the Defendant’s site rather than the Claimant’s, and not realising that they had done so until they had placed an order with the Defendant. If, as the Defendant showed, many internet searches are for descriptive terms (such as ‘next day flower delivery’), that would not preclude there being confusion when a customer seeking the Claimant instead found and used the Defendant’s site, by reason of the similarity of the Mark to the Signs, and the identity of the goods/services on offer. These parties have ‘crashed into each other’ despite there being many other florists in the market and online. In my judgment, the only likely explanation for that lies in the high degree of similarity of the Signs to the Mark and the close similarity of the parties’ activities.

68. It is abundantly clear that consumers have been confused, although as I have already

noted, the reason for a particular instance of confusion may not be equally clear. Nevertheless, as Arnold LJ said in *TVIS (supra)* at [68] and [71], at the very least this evidence demonstrates the clear potential for such confusion to occur notwithstanding the differences between the two names. The same point applies here. In my judgment, the small differences between the Mark and the Signs are insufficient to preclude otherwise inevitable confusion.

69. The Defendant submits that the fact that the Mark is descriptive weighs against a likelihood of confusion, and that if the distinctive character of the Mark lies in the concatenation of the words flower and box, and the abbreviation of 'box,' the Mark cannot give the Claimant a monopoly in the use of 'flower box' for flowers. That argument cannot stand, in my view, in the light of my findings as to the enhanced distinctive character of the Mark, even if seen or pronounced as 'flower box,' which it had at all material times from early 2019. The similarity of the Signs to the Mark is not merely attributable to their descriptiveness, and given the level of similarity between them, especially in respect of the Sign FLOWERS BOX, I am persuaded that the average consumer would be likely to misread, mistype, or mishear FLOWERS BOX or FLOWERSBOX for the Mark from time to time. The risk of a customer mistyping the Mark is reflected in a number of the documents discussed above, in which the customer referred to Flower Box or Flowerbox rather than to the Mark or one of the Signs, even when (as in, for instance, the case of Mr Conrad) they were certainly aware of the exact spelling of the Mark.
70. In my judgment, the enhanced distinctive character of the Mark, the close and confusing similarity between it and FLOWERS BOX, the identity of the goods and the moderate degree of attention paid by the average consumer all point towards a likelihood of confusion. Even the Signs which include LONDON and/or the gold B are close enough to the Mark, in my view, to be likely to lead to confusion when used in relation to identical goods or services to those for which the Mark is registered. Where the Sign includes 'London' that word is obviously descriptive and might be taken as a sub-brand, leading to a risk of indirect confusion (as explained in *Sazerac Brands, LLC v Liverpool Gin Distillery Ltd* [2021] EWCA Civ 1207, [2022] R.P.C. 5 at [10]-[11]). The evidence of alleged confusion, though far from perfect, confirms beyond doubt the risk of confusion in relation to all the Signs and reinforces my initial view that in all the circumstances of this case there is a likelihood of confusion. The claim to infringement under s 10(2)(b) therefore succeeds.

The claim under s 10(3)

71. The parties are in agreement as to the law. The principles are well known. The conditions for s 10(3) infringement were set out by Arnold LJ in *Thatchers v Aldi* [2025] EWCA Civ 5, [2025] FSR 9 at [38]. They are: (i) the trade mark must have a reputation in the UK; (ii) there must be use of a sign by a third party within the UK; (iii) the use must be in the course of trade; (iv) it must be without the consent of the proprietor of the trade mark; (v) it must be of a sign which is identical or similar to the trade mark; (vi) it must be in relation to goods or services; (vii) it must give rise to a "link" between the sign and the trade mark in the mind of the average consumer; (viii) it must give rise

to one of three types of injury, that is to say, (a) unfair advantage being taken of the distinctive character or repute of the trade mark, (b) detriment to the distinctive character of the trade mark (referred to as "dilution") or (c) detriment to the repute of the trade mark (referred to as "tarnishment"); and (ix) it must be without due cause. In *Thatchers* Arnold LJ added at [51]:

‘the case law of the Court of Justice establishes that infringement under section 10(3) requires evidence of a change in the economic behaviour of the average consumer of the goods or services for which the trade mark is registered, or a serious likelihood that such a change will occur in the future.’

72. The Claimant’s case under s 10(3) was put primarily on the basis that the Defendant’s use of the Signs took unfair advantage of the reputation in the Mark, resulting in a transfer of the reputation in the Mark to the Defendant and its goods and services. However, it also alleged that the use of the Signs would dilute the reputation of the Mark or tarnish it, by making a link to goods/services of inferior quality. Dilution was not, in the end, pursued separately at trial. The Defendant disputed reputation as at 2019, similarity of the Mark/Signs, link, unfair advantage, tarnishment and raised due cause. I have already dealt fully with the similarity of Mark to Signs, and need take that no further here.

Reputation and link

73. These factors are common to all of the kinds of damage pleaded by the Claimant and both were put in issue by the Defendant. It is not a high bar to prove a reputation for the purposes of section 10(3). A significant proportion of the relevant public must know the Mark in relation to the goods or services for which it is registered (or, here, for the sub-set of those goods/services for which a reputation is claimed). The size and scope of the Mark’s reputation is relevant to the question of whether a link will be made in the mind of the average consumer giving rise to one of the types of injury alleged. I have commented above on the difficulty in judging whether a significant proportion of the relevant public know the Mark, when there is no evidence as to the Claimant’s market share in any of the goods/services in which it claims a reputation. Nevertheless, for the reasons I have given in relation to the claim to enhanced distinctiveness, I consider that the Claimant has proved that it has a reputation as claimed for ‘luxury and stylish floral design of the highest quality’ and had acquired that reputation by April 2019 when the Defendant was incorporated and the acts complained of began. A further point weighing in my finding of a reputation is that Ms Bromberg Hawkings explained how their flowers are always extremely fresh, as they are ‘cut to order’ not kept in stock, to maintain quality, and that concern for quality was reflected in a number of the press articles relied upon. The Defendant suggested that any reputation should be narrow in scope, for instance linked to the delivery of bouquets of single stem varieties, but I am satisfied that the Mark has a reputation for all of its Class 31 goods and for those of its Class 35 services which relate to floral design, broadly being the services included in the Defendant’s unsuccessful invalidity counterclaim.
74. The question of whether use of the Signs would give rise to a link to the Mark, by calling the Mark to mind, must be addressed globally, like the likelihood of confusion. The Defendant’s written submissions that there would be no link were based on its

submissions as to the weak distinctive character of the Mark, the differences between the Mark and the Signs, the ‘crowded descriptive market’ and the narrowness of the Mark’s reputation. I have made no findings which would support those submissions. On the contrary I have found the Mark to have enhanced distinctiveness and a reputation, a high level of similarity between the Mark and the Signs, and a likelihood of confusion and the evidence did not adequately support the crowded descriptive market point.

75. I am satisfied that the same evidence relevant to s 10(2) likelihood of confusion leads to the conclusion that a substantial proportion of reasonably attentive consumers for whom the Mark has a reputation will link them to the Signs.

Unfair advantage

76. The Claimant alleged that the Defendant took unfair advantage of the reputation of the Mark by riding on its coat tails. It did not plead that the Defendant had a subjective intent to take unfair advantage, so that the only possible basis for a finding of unfair advantage would be that the objective effect of the Defendant’s acts is to take advantage of the Mark, see *Thatchers (supra)* at [48] where Arnold LJ said there was ‘nothing in the case law to preclude the court from concluding in an appropriate case that the use of a sign the objective effect of which is to enable the defendant to benefit from the reputation and goodwill of the trade mark amounts to unfair advantage even if it is not proved that the defendant subjectively intended to exploit that reputation and goodwill.’
77. The Claimant submitted that if customers would associate the Signs with the Claimant, that would as a matter of fact lead to a transfer of image and enable the Defendant to benefit from the power of attraction and the reputation of the Mark built up by the Claimant’s marketing efforts. In its submissions, the Defendant relied on Mr Gajewski’s use of the name Flowers Box from late 2017, however, it had not pleaded the point as justifying the Defendant’s activities and I do not consider it a point to which I can give much weight. The name may have been adopted innocently (although the Mark was in use and registered by the time Mr Gajewski started to use it in late 2017) and the Defendant may not have intended to take unfair advantage of its reputation, nevertheless, it traded with knowledge of the Claimant and its business, at the latest from July 2019 when the Defendant first received a Trustpilot review intended for the Claimant. That was reinforced by Mr Gajewski’s periodic visits to the Claimant’s website and his subscription to the Claimant’s marketing emails. The evidence that the Defendant used a very few of the Claimant’s photographs on its website, none of which were especially exciting, does not, it seems to me, take the point further, even though it is unfortunate that the Defendant did so a second time after the Claimant had complained about this. Equally, the fact that the Defendant has made its own marketing efforts, does not, in my judgment, preclude it from having taken advantage of the Mark’s reputation.
78. I have already found that consumers have bought the Defendant’s goods/services believing them to be those of the Claimant, in some cases stating after the event that they had intended to use the Claimant because of the quality of goods/services provided by it. This is evidence of a change in the economic behaviour of consumers. It may be that the confusion at Trustpilot gave the Defendant credit for 5-star reviews meant for

the Claimant which may also have influenced consumers to change their choice of provider. I am satisfied that the Defendant took unfair advantage of the distinctive character or repute of the Mark, as it gave the Defendant an advantage which was unfair because it enabled the Defendant to profit from the reputation achieved by the Claimant's hard work and marketing efforts. In my judgment, that suffices to show that a transfer of image has actually occurred and that the Defendant took unfair advantage of the reputation of the Mark. That was the objective effect of its use of the Signs.

Detriment or tarnishment

79. The Claimant's case on detriment was simple: it submitted that there was a serious risk of an injurious connection being made between the Mark and the Signs. It is necessary for that connection to have an impact upon the economic behaviour of consumers. Such a risk may be found by drawing logical deductions (see Case C 383/12, *Environmental Manufacturing LLP v OHIM*). In this case there was some evidence of customers logging complaints or dissatisfaction with the Defendant's goods/services, examples of which are described above, as well as some complaints about the level of its customer service. These represented a small minority of the Defendant's orders, but tend to suggest that the Defendant was at least on occasion supplying goods/services of a lesser quality than those of the Claimant. That would, I accept, be likely to be problematic for the Claimant which had worked to establish its business at the luxury end of the market.
80. The Defendant denied that the sale and supply of its goods and/or services was likely to have an impact upon the economic behaviour of consumers 'a fortiori where they are not confused.' In the light of my findings as to confusion, that does not help the Defendant. Moreover, there were examples which I have already discussed of confused customers placing orders with the Defendant rather than with the Claimant, as (they said) they had intended. In the circumstances, I am satisfied that there is the requisite likelihood of a change in economic behaviour (and, in fact, an actual change in economic behaviour) because of the link to the Mark. That could damage the distinctiveness of the Mark or tarnish its reputation. However, the evidence of complaints (in so far as I considered the documents in the trial bundles – as discussed above) was limited, and in the circumstances I am not persuaded that there is enough to justify a finding that there is a serious risk of detriment or tarnishment.

Due cause

81. The Defendant pleaded that it had due cause to use the Signs, but did not point to any factual matters which it said amounted to such due cause, appearing to accept that this raised effectively the same points as the question of unfairness. In *Lidl v Tesco (supra)* Arnold LJ said:
- '168. It is difficult to see how use of a sign which takes unfair advantage of the reputation of a trade mark can be with due cause, although it is perhaps easier to see how use which is merely detrimental to the distinctive character of the trade mark may be. Nevertheless, the legislation allows for both outcomes. Consistently with this, the Court of Justice's decision in *Leidesplein v Red Bull* establishes that, even if the use of the sign complained of does take unfair advantage of the reputation of the trade mark, the court is required to strike a fair balance between the competing interests in order to decide whether the use of the sign is with due

cause. As a matter of logic, the same test must apply where the injury is detriment to the distinctive character of the trade mark. This is the test that the judge applied. It is an evaluative test and therefore this Court can only interfere if the judge erred in law or principle.

169. Tesco contend that the judge erred in law or principle by citing and applying the earlier observation of Kitchin J in *Julius Samann Ltd v Tetrosyl Ltd* [2006] EWHC 529 (Ch); [2006] F.S.R. 42 at [84] that the test is "relatively stringent". I do not accept this. As the judge explained, all she understood Kitchin J to have meant by that observation was that it was not enough that the sign complained of was innocently adopted: there had to be something more which justified its use despite the injury to the trade mark. As she went on to find, in the present case there was nothing more. Tesco could easily have used a different sign to promote Clubcard Prices. There is no error of law or principle in that reasoning, and the conclusion is one that the judge was fully entitled to reach.'

82. It is possible that the Signs 'Flowers Box' and 'Flowers Box London' were adopted innocently by the Defendant simply following on from Mr Gajewski's use of the names since 2017, though not even that was pleaded to justify the Defendant's choice of name and Signs. It is harder to see how any later adopted Signs could be said to have been adopted innocently, when the Defendant was aware from at least July 2019 of the confusion being caused by the similarity of the Signs to the Mark. In any event, it is clear from *Lidl v Tesco* that something more than the possible innocent adoption of the Signs is needed to amount to due cause to use the Signs. In the circumstances I find that the Defendant did not have due cause to use any of the Signs.
83. For all those reasons, I find that there was also infringement of the Mark under s 10(3).
84. I find that the Mark is valid and has been infringed. I consider that the Counterclaim should be dismissed, subject only to the agreement reached between the parties as to the specification of the Mark following the dispute as to non-use.
85. This judgment will be handed down remotely. If the parties are unable to agree the appropriate form of order, a hearing will be listed through the usual channels to resolve the Order, and the time for appeal will, if necessary, be extended to run from the date of that hearing.

ANNEX A

Goods/Services Not in Dispute

Class 4: Candles and wicks; scented candles; special occasion candles.

Class 8: Hand tools and hand instruments included in Class 8; scissors; hand operated garden tools; pruners and secateurs.

Class 16: gift cards; printed cards; celebration cards; greeting cards; gift paper; gift bags; gift boxes; wrapping and packaging materials; packaging; cartons for packaging; cardboard packaging.

Class 21: Household...containers; ...articles of glassware, buckets, candle sticks.

Class 30: chocolates; chocolate based products and confectionery; chocolate confections.

Class 31: herbs and vegetables [*initially challenged for descriptiveness, but challenge dropped at trial*]

Class 35: retail services connected with the sale of...hand tools; plants and flowers, bouquets, plant pots, vases, gardening utensils; the bringing together in a retail, online or wholesale outlet, for the benefit of others of a variety of goods, namely,... candles and wicks; scented candles; special occasion candles; hand tools and hand instruments included in scissors, hand operated garden tools, pruners and secateurs; gift cards; printed cards; celebration cards; greeting cards; post cards; announcement cards; record cards; award cards; wrapping and packaging materials; packaging; cartons for packaging; cardboard packaging, household ... containers; vases; buckets, candle sticks; chocolates; chocolate based products and confectionery; chocolate confections; seeds; herbs and vegetables; advice, consultation and information services relating to the aforesaid services.

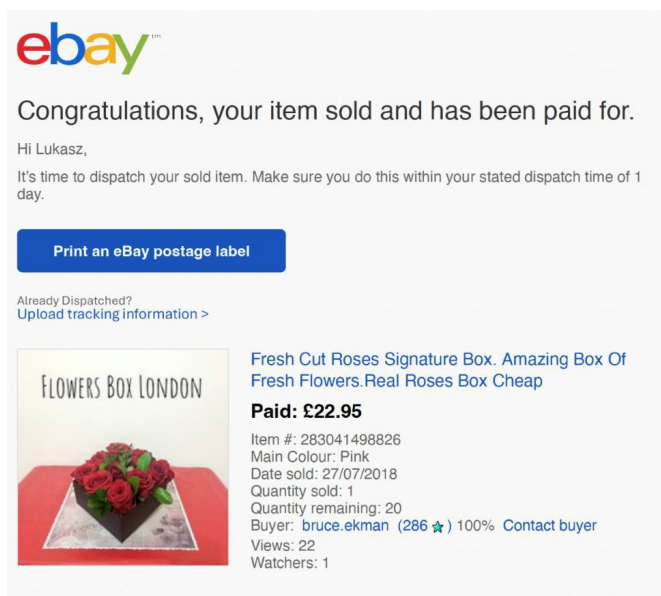
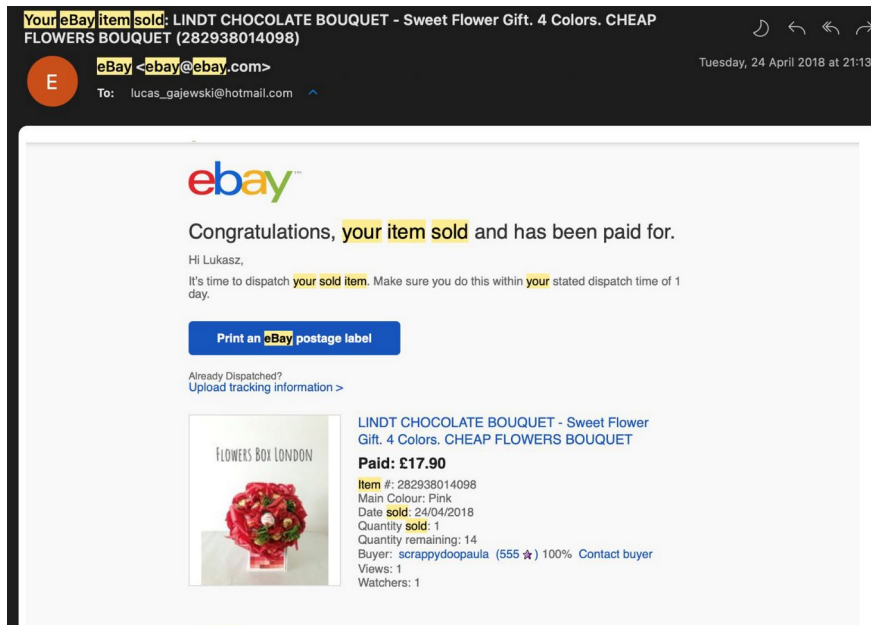
Class 39: delivery services; packaging and storage services; advice, consultation and information services relating to the aforesaid services.

Class 41: arranging, organising and conducting workshops; arranging and conducting events; advice, consultation and information services relating to the aforesaid services.

Class 44: floral design services; advice, consultation and information services relating to the aforesaid services.

ANNEX B

Examples of Flowers Box London sales before the incorporation of the Defendant:





flowersboxlondon
London, United Kingdom



Liked by zuzakaliszan and others

flowersboxlondon Visit www.flowersbox.co.uk #roses
#flowerbox #flowers #mothersday #flowersboxlondon
#flowersbox #florist

1 March 2018