IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2025] SGCA 28

Court of Appeal / Civil Appeal No 57 of 2024

Between

East Coast Podiatry Centre Pte Ltd

… *Appellant*

And

Family Podiatry Centre Pte Ltd

… *Respondent*

In the matter of Originating Claim No 33 of 2022

Between

East Coast Podiatry Centre Pte Ltd

… *Claimant*

And

Family Podiatry Centre Pte Ltd

… *Defendant*

JUDGMENT

[Intellectual Property — Trade marks and trade names — Infringement — Internet usage]

Version No 1: 19 Jun 2025 (12:00 hrs)

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East Coast Podiatry Centre Pte Ltd
v
Family Podiatry Centre Pte Ltd

[2025] SGCA 28

Court of Appeal — Civil Appeal No 57 of 2024
Sundaresh Menon CJ, Steven Chong JCA and Andrew Phang Boon Leong SJ
7 April 2025

19 June 2025 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 The present appeal arises from trade mark infringement proceedings commenced by the appellant against the respondent. The respondent is alleged to have infringed the appellant's registered mark when it used Google's advertising services (which we refer to in this judgment as "Google Ads") to display internet advertisements which contained words that are allegedly so similar to the appellant's registered mark that it infringed the appellant's rights as the owner of that mark.

Background to the appeal

The parties

2 The appellant is East Coast Podiatry Centre Pte Ltd (the "Appellant"), a Singapore-registered private company in the business of providing podiatry services. The Appellant is the registered proprietor of the composite mark EAST COAST PODIATRY (the "Mark") in Classes 5, 10, 25 and 44 of the International Classification of Goods and Services. The Appellant operates four podiatry centres across Singapore, respectively in the Kembangan, Orchard, Novena and Bukit Timah areas. Mr Jevon Tay is the sole shareholder and director of the Appellant.

3 The respondent is Family Podiatry Centre Pte Ltd (the "Respondent"). It too is a Singapore-registered private company in the business of providing podiatry services. The Respondent currently operates two podiatry centres in Singapore, located in the Bukit Timah and Joo Chiat areas. Mr Mark Reyneker is the sole shareholder and director of the Respondent.

Background facts

4 The Appellant discovered on three separate occasions between 14 April 2022 and 28 July 2022, that the Respondent had used the words "east coast podiatry", "Podiatry East Coast" and/or "Podiatrist East Coast" (collectively referred to as the "Signs") in internet advertisements that the Respondent had created using Google Ads. These advertisements (the "Respondent's Ads") appeared in various permutations, but it suffices for us to display one of these advertisements as an example below:

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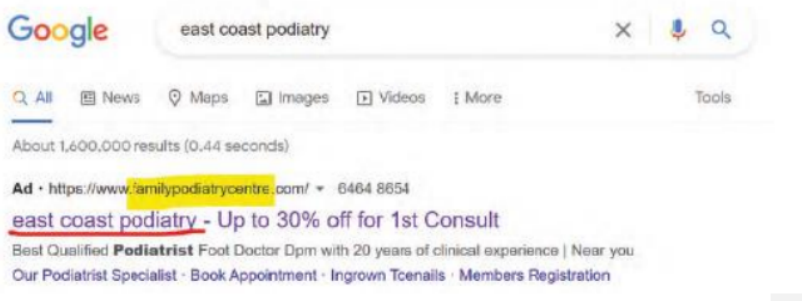
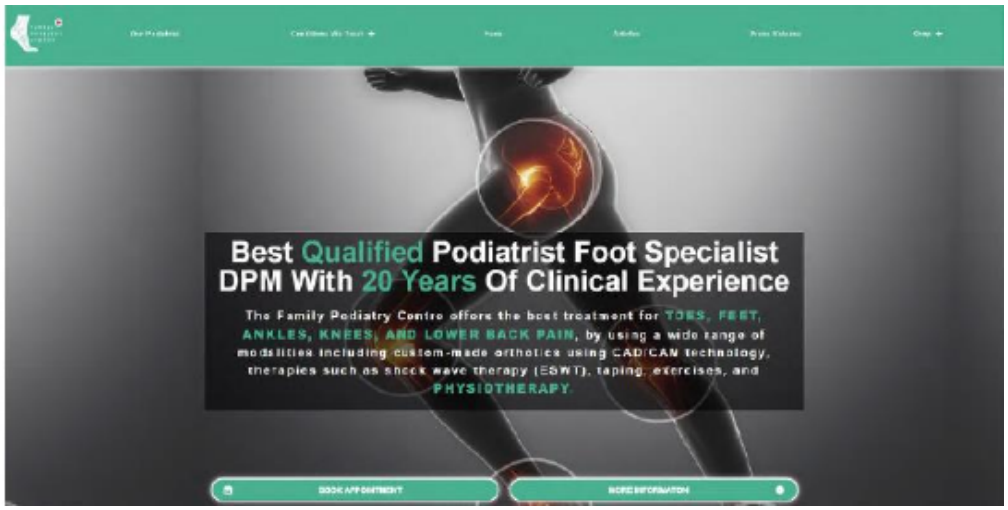


5 The Respondent's Ads essentially advertised the Respondent's services in a few words with a hyperlink, such that when an internet user clicked on the advertisement, he or she would be redirected to the "home page" of the Respondent's website, which contained no reference to the Mark, the words "east coast podiatry", or any of its variants. A screenshot of the Respondent's website at the material time is set out below:



6 On 6 April 2022, prior to the Appellant's discovery of the Respondent's Ads, Mr Reyneker had signed a letter of intent to rent a shophouse at 170 Joo Chiat Road, which is located near the eastern coastline of Singapore. He subsequently signed a tenancy agreement for those premises on 22 April 2022.

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According to Mr Reyneker, he had included the Signs in the Respondent's Ads as part of the Respondent's campaign to advertise the impending opening of its newest branch office, which eventually commenced operations at 170 Joo Chiat Road on or about August 2022. This was because he had been advised by a Google consultant to use location-based keywords to improve the likelihood of Google search users finding the Respondent's new branch office in their Google search results.

The decision below

7 The Appellant filed the present suit against the Respondent, claiming trade mark infringement pursuant to ss 27(1) and/or 27(2)(*b*) of the Trade Marks Act 1998 (2020 Rev Ed) ("TMA") as well as damages for the tort of passing off. The Respondent denied both claims, averring that the phrase "East Coast Podiatry" was descriptive and that its use of the Signs did not give rise to any likelihood of confusion. The Respondent also argued that it would, in any event, satisfy the defence under s 28(1)(*b*)(i) of the TMA because it had used the Signs to describe the geographical location of its new branch.

8 The matter came before a judge of the General Division of the High Court ("the Judge"), who found in favour of the Respondent and dismissed the Appellant's claims for trade mark infringement and for passing off: see *East Coast Podiatry Centre Pte Ltd v Family Podiatry Centre Pte Ltd* [2024] SGHC 102 (the "Judgment").

9 The Judge's findings in relation to trade mark infringement may be summarised as follows:

(a) It was undisputed that the Respondent had used the Signs in the course of trade. The Judge "assume[d] without deciding" that the

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Respondent had used the Signs "in a trade mark sense": Judgment at [47]–[48].

(b) There was no identity between the Signs and the Mark. The Mark was a composite mark which included a small white cross over a green square background (the "Device"), thus making it visually different from the Signs used in the Respondent's Ads: Judgment at [49]. However, the Judge was prepared to "assume without deciding" that the Mark and Signs were similar. He also accepted that the parties' services were identical: Judgment at [51]–[52].

(c) The Judge considered that the Respondent's website, which a consumer would be redirected to upon clicking on the Respondent's Ads, was an admissible consideration in determining whether there would be a likelihood of confusion arising from the allegedly infringing use: Judgment at [81]–[82]. On this basis, the Judge found that there was no trade mark infringement because the Respondent's website would have dispelled any confusion that might have initially arisen: Judgment at [84]–[95].

(d) As there was no trade mark infringement, it was unnecessary to decide whether the Respondent's use satisfied the defence under s 28(1)(*b*)(i) of the TMA: Judgment at [24] and [94].

10 On the tort of passing off, the Judge held as follows:

(a) There was goodwill in the Appellant's business at the material time: Judgment at [99].

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(b) The Mark was sufficiently distinctive because it was used for podiatry services in geographical regions in Singapore other than the East Coast region: Judgment at [108].

(c) However, given that the Respondent's website would have dispelled any confusion that might have initially arisen, the claim failed as the Appellant had failed to show a misrepresentation giving rise to actual confusion or a likelihood of confusion: Judgment at [110].

Arguments on appeal

11 Although the Appellant appealed against the whole of the Judge's decision, it has clarified in its written submissions that it only takes issue with the Judge's decision on its claim for trade mark infringement under s 27(2)(*b*) of the TMA.

12 The Appellant's primary contention is that the Judge erred in considering the Respondent's website in assessing the likelihood of confusion (the "Confusion Inquiry"). Relying on our earlier decision in *Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide, Inc and another and another appeal* [2014] 1 SLR 911 ("*Staywell*"), the Appellant submits that the Respondent's website is a "superficial marketing choice" as opposed to a factor which is intrinsic to the very nature of the goods and/or that affects the impact that the similarity has on consumers. It is therefore an extraneous factor which cannot be considered as part of the inquiry into whether there was likely to be confusion as to the origin of the services in question ("the Confusion Inquiry").

13 The Appellant further contends that even if the website is permitted to be considered in the context of the Confusion Inquiry, the Judge erred in finding

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that there would be no difficulty for the relevant segment of the public to ascertain that the podiatry services referred to in the Respondent's Ads did not originate from the Appellant. The Appellant contends that the relevant members of the public who viewed the Respondent's Ads and the Respondent's website would, or at least reasonably but incorrectly could, believe that the Appellant and the Respondent are economically linked.

14 For its part, the Respondent aligns itself completely with the Judge's decision. The Respondent argues that the Judge was in fact cognisant of the guidance set out in *Staywell* but had made the necessary adjustments to accommodate the facts of the present case. In particular, *Staywell* was decided in the context of opposition proceedings, where it was necessary for the court to consider all the actual and notional fair uses by the parties of the respective marks. In contrast, the present case concerns infringement proceedings in the specific context of internet advertising. The Judge therefore rightly considered the website in the context of the Confusion Inquiry because it was inextricably linked to the Respondent's Ads.

15 Given the nature of the issues before us, which were somewhat novel given the context of alleged infringement in relation to internet advertising, we invited Professor Gordon Ionwy David Llewelyn ("Prof Llewelyn") to address us as Independent Counsel on two questions: (a) whether it is permissible for the court to consider the Respondent's website as part of the Confusion Inquiry in such circumstances; and (b) whether the decisions of the Court of Justice of the European Union ("CJEU") and the English courts which the Judge had relied on were applicable to the inquiry under s 27(2) of the TMA. Prof Llewelyn's answers were extremely helpful in assisting the court with identifying the proper issues to be determined, and we shall refer to them at the

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appropriate point in our analysis below. For now, we simply wish to record our gratitude to Prof Llewelyn for his able assistance.

Issues before this court

16 The central issue that arises for our consideration in the present appeal is whether the Judge erred in dismissing the claim for trade mark infringement under s 27(2)(*b*) of the TMA.

A primer on search engines and Google advertisements

17 We begin by considering the context in which the alleged infringing use arises in the present case, namely, internet advertisements created using Google Ads.

18 At the outset, we should highlight that there is no material dispute between the parties as to the operations of Google's search engine and Google Ads. No expert evidence was adduced and thus the Judge took judicial notice of the explanations set out in various textbooks and foreign cases concerning trade mark infringement on the internet: Judgment at [39]–[41].

19 For our part, we find the explanation provided by Kitchin LJ in *Interflora Inc and another v Marks and Spencer plc* [2015] IP & T 109 ("*Interflora (CA)*") at [14]–[17] to be very helpful:

> 14. … In broad outline, this service works in the following way. A user of the Google search engine who has carried out a search is presented with a search engine results page or SERP which usually contains three elements. The first is the search box which contains the search term, a word or phrase typed in by the user. The second contains links to websites which appear to the Google search engine to correspond to the search term. These are known as the 'natural' or 'organic' results of the search and are usually displayed in order of relevance. The third comprises links, referred to as 'sponsored links', to

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> websites which are displayed because the operators of those websites have paid for them to appear. They are, in effect, advertisements and are usually displayed in one or more parts of the SERP, namely in a shaded box in the upper part of the page (above the natural search results), in a panel on the right hand side of the page (to the right of the natural search results), or in a panel at the bottom of the page (under the natural search results). Over the years the labelling of these sponsored links has varied, but they have generally been headed with the words 'Sponsored Links' or 'Ads' or variations of them.
>
> 15. A sponsored link appears when a user enters one or more particular words in to the search engine through the search box. These words, known as 'keywords', are secured by the advertiser in return for a fee. This is called 'purchasing' or 'bidding on' the keyword. The sponsored link contains three elements. The first is an underlined heading which functions as a hyperlink to the advertiser's website. This may or may not contain the keyword. The second is a short commercial message or advertisement which, once again, may or may not contain the keyword. The third is the Uniform Resource Locator or URL of the advertiser's website.
>
> …
>
> 17. The search term entered by a user of the Google search engine and the keyword selected by the advertiser do not have to be identical for the sponsored link to appear on the SERP. One reason for this is that advertisers have the ability to choose different match types in relation to each keyword, and these match types govern the circumstances in which the sponsored links associated with those keywords will appear. For example, 'exact match' requires the search term to be identical to the keyword; 'phrase match' requires the search term to contain the same words as the keyword in the same order, but it may include additional words before or after the keyword; and 'broad match' simply requires the search term to correspond to variations of the keyword, such as plurals. By 2008 Google had also introduced a development of broad matching known as 'advanced broad matching' which causes the sponsored link to appear if the Google search engine deems the keyword relevant to the search term. So, by way of illustration, a search for the term 'flowers' might be deemed to match the keyword 'florists'.

20 As it is common ground that Mr Reyneker had selected the Signs as the relevant keywords, and the resultant advertisements displayed the Signs in their headlines, this explanation in *Interflora (CA)* would be sufficient background for us to discuss the relevant issues that arise in this case. We are mindful, of

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course, that as technology (and for that matter, Google itself) evolves, it may not always be the case that the Google search engine and/or Google Ads continue to function the same way. For example, it is apparent that a sponsored link may contain more than the three elements set out by Kitchin LJ in *Interflora (CA)* at [15]. Some of these additional elements include a logo, a thumbnail (meaning a reduced-size image providing the user with a preview of the website's contents), or a list of secondary headlines that redirect a user to different pages within a website. However, nothing in the present appeal turns on these nuances.

21 On appeal, the Appellant has also sought to distinguish what it terms "keyword use" cases and "ad text use" cases. Keyword use cases are cases where the use complained of concerns the defendant's act of using a sign as a keyword that triggers the display of an advertisement which may not necessarily include the sign in question, whereas ad text use cases are cases where the use complained of concerns the defendant's use of the plaintiff's sign within the text of the resulting advertisement, meaning in the headline, commercial message or the URL. The Appellant's position is that the use complained of in the present case concerns ad text use as opposed to keyword use and we proceed on this basis, although as we will explain, our observations in the present case are equally applicable to keyword use cases.

Requirements for infringement under s 27(2)(*b*) of the TMA

22 In that light, we turn to consider the requirements to establish trade mark infringement under s 27(2)(*b*) of the TMA, which states:

> (2) A person infringes a registered trade mark if, without the consent of the proprietor of the trade mark, the person uses in the course of trade a sign where because —
>
> …

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> (*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.

23 In order to establish infringement under s 27(2)(*b*) of the TMA, three factors must be shown: (a) the alleged offending sign must be similar to the registered mark; (b) both the sign and the mark must be used in relation to similar goods or services; and (c) on account of the presence of the first two conditions, there must exist a likelihood of confusion on the part of the public (*Hai Tong Co (Pte) Ltd v Ventree Singapore Pte Ltd and another and another appeal* [2013] 2 SLR 941 ("*Hai Tong*") at [15]–[16], citing *The Polo/Lauren Co, LP v Shop In Department Store Pte Ltd* [2006] 2 SLR(R) 690 ("*Polo*") at [8]). In *Polo* (at [8]), this court observed that there will be no infringement under s 27(2)(*b*) of the TMA if the likelihood of confusion was brought about by some factor other than the similarity between the registered mark and the allegedly infringing sign and the similarity between the goods or services for which the former was registered and those in relation to which the latter was used.

24 The TMA is modelled after the Trade Marks Act 1994 (c 26) (UK) ("UK TMA"), which in turn implements the European Community's First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (the "Directive"). Section 10 of the UK TMA (the equivalent to s 27 of the TMA) gives effect to Art 5 of the Directive. Case law from the English courts and the CJEU therefore provides often useful, but not binding, guidance on the interpretation of s 27 of the TMA (*City Chain Stores (S) Pte Ltd v Louis Vuitton Malletier* [2010] 1 SLR 382 ("*City Chain*") at [15]).

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Threshold issue: trade mark use

25 In Singapore, it is well-established that to constitute infringement under s 27 of the TMA, a claimant must first satisfy a threshold issue, namely that the use complained of must be use which denotes the trade origins of the goods or services in question, in contradistinction to non-origin-related uses such as descriptive use or decorative use (see our previous decisions in *City Chain* at [36]; *Hai Tong* at [17]; and *Burberry Ltd v Megastar Shipping Pte Ltd and another* [2019] 1 SLR 536 ("*Burberry*") at [32]). This is provided for implicitly in s 27 of the TMA, which requires that the use in question be "in relation to goods or services", meaning use in such a way that a link is established between the signs and the goods or services concerned so as to identify the trade origin of the goods or services (see Tan Tee Jim SC, *Law of Trade Marks in Singapore* (4th Ed, Sweet & Maxwell, 2021) at para 11.090).

26 It is not contested by the parties that this requirement is applicable in the present case. However, it became apparent to us in the course of argument that there is a material difference between our approach and the manner in which the English courts and the CJEU have approached this threshold issue. This issue is especially pertinent because the Judge relied on the principles derived from English and European case law which were *developed in the context of the threshold issue* in coming to his conclusions on the *Confusion Inquiry*. As we will shortly explain, we respectfully do not consider the Judge's approach to be appropriate in this regard, though this has no bearing on the outcome in this case.

The position in Singapore

27 We first consider the position in Singapore as set out in *City Chain* and applied in subsequent decisions.

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28 The plaintiff in *City Chain* was the well-known designer goods brand Louis Vuitton Malletier. It was the registered proprietor of a mark containing a device shaped like a flower, known as the "Flower Quatrefoil" mark. The defendant, who operated an established chain of watch shops, sold watches under the brand "SOLVIL" which also contained a device shaped like a flower (the "Solvil Flower") on its dial and strap. There was no uniformity in how the Solvil Flower was displayed on the watches: the shape and size of the Solvil Flowers varied; some of the petals of the bigger Solvil Flowers on the watch dials were cut off; and incomplete Solvil Flowers were sometimes present on the watch straps. The plaintiff sued the defendant for trade mark infringement under ss 27(1) and 27(2) of the TMA, among other causes of action.

29 One of the questions that arose for our determination in *City Chain* was whether the defendant's use amounted to infringing use. We observed, at the time, that it was an open question in both England and Singapore as to whether the alleged infringing use by the defendant must constitute use as a trade mark in the first place (*City Chain* at [16]). This issue was unsettled in England at the time because of various decisions of the CJEU which appeared to cast doubt on that once established requirement. In particular, it appeared that the CJEU favoured a broader approach premised on "whether the infringing use was liable to affect the functions of the registered trade mark" (see *City Chain* at [20]–[21], citing the CJEU's decision in *Arsenal Football Club plc v Reed* [2003] Ch 454 ("*Arsenal*") at [48]–[53] and applied by the English Court of Appeal in *Arsenal Football Club plc v Reed* [2003] IP & T 880 at [37]; as well as the subsequent decisions of the CJEU namely *Anheuser-Busch Inc v Budejovicky Budvar, NárodnÍ Podnik* [2007] IP & T 348 ("*Anheuser-Busch*") at [59]; *Adam Opel AG v Autec AG* [2007] IP & T 408 ("*Adam Opel*") at [21]–[22]; and *Céline Sarl v Céline SA* [2008] IP & T 684 ("*Céline*") at [16]).

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30 We further observed, however, that the CJEU's pronouncement on the applicable test in *Arsenal* had not been uniformly interpreted and applied by the English courts (*City Chain* at [24]). For instance, in *R v Johnstone* [2003] 1 WLR 1736 ("*Johnstone*"), Lord Nicholls of Birkenhead concluded that *Arsenal* was consistent with finding that non-trade mark use was not within ss 10(1) to 10(3) of the UK TMA (the equivalent to s 27 of the TMA). We set out a part of his reasoning (at [13]–[17]) below:

> 13. … [T]he essence of a trade mark has always been that it is a badge of origin. It indicates trade source: a connection in the course of trade between the goods and the proprietor of the mark. That is its function. Hence the exclusive rights granted to the proprietor of a registered trade mark are limited to use of a mark likely to be taken as an indication of trade origin. Use of this character is an essential prerequisite to infringement. Use of a mark in a manner not indicative of trade origin of goods or services does not encroach upon the proprietor's monopoly rights. …
>
> …
>
> 16. For some time questions were raised on whether, given its derivation from article 5 of the Trade Mark Directive, non-trade mark use could be caught by section 10(1) to (3): see *British Sugar Plc v James Robertson & Sons Ltd* [1996] RPC 281, 291, *per* Jacob J, *Philips Electronics NV v Remington Consumer Products* [1998] RPC 283, 311–312, *per* Jacob J, and in the Court of Appeal, [1999] R.P.C. 809, 823, *per* Aldous LJ. These doubts must now be regarded as laid to rest by the decision of the European Court in the "football souvenirs" case of *Arsenal Football Club Plc v Reed* (Case C-206/01) [2003] 3 WLR 450, 473. The court, at p 479, para 48, re-affirmed its characterisation of the purpose of a trade mark in terms which accord with the approach of English law:
>
> > "the essential function of a trade mark is to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin. For the trade mark to be able to fulfil its essential role in the system of undistorted competition which the Treaty seeks to establish and maintain, it must offer a guarantee that all the goods or services bearing it have been manufactured or supplied under the control of a

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> single undertaking which is responsible for their quality".
>
> 17. The court [in the *Arsenal Football Club* case] then considered, at p 480D–G, paras 51–54, the scope of the exclusive right conferred on the proprietor of a trade mark under article 5(1)(a) of the Trade Mark Directive, which corresponds to section 10(2)(a) of the 1994 Act. The court held that the scope of this right is coterminous with the function of registered trade marks:
>
> > "… the exclusive right under Art.5(1)(a) of the Directive was conferred in order to enable the trade mark proprietor to protect his specific interests as proprietor, that is, to ensure that the trade mark can fulfil its functions. *The exercise of that right must therefore be reserved to cases in which a third party's use of the sign affects or is liable to affect the functions of the trade mark, in particular its essential function of guaranteeing to consumers the origin of the goods* … The exclusive nature of the right conferred by a registered trade mark on its proprietor under Art.5(1)(a) of the Directive can be justified only within the limits of the application of that article. … The proprietor may not prohibit the use of a sign identical to the trade mark for goods identical to those for which the mark is registered if that use cannot affect his own interests as proprietor of the mark, having regard to its functions. Thus certain uses for purely descriptive purposes are excluded from the scope of Art.5(1)(a) of the Directive because they do not affect any of the interests which that provision aims to protect, *and do not therefore fall within the concept of use within the meaning of that provision* …" (Emphasis added)
>
> Plainly, s.10 of the 1994 Act is capable of being so construed. In accordance with the *Marleasing* principle (*Marleasing* [1990] E.C.R. I-4135), it should therefore be so construed. **Non-trade mark use is not within s.10(1) to (3)**.
>
> [emphasis in original in italics; emphasis added in bold]

31 Lord Walker of Gestingthorpe, who delivered the other substantive speech of the House of Lords in *Johnstone*, appeared to adopt a slightly different interpretation of *Arsenal*. After considering the case law in England as well as the CJEU's decision in *Arsenal*, Lord Walker explained his concerns with the *Arsenal* decision in the following terms (*Johnstone* at [86]–[87]):

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> 86. *The difficulty arises, I think, because between cases which are clearly at the opposite extremes of "distinctiveness" and "descriptiveness" there is something of a no man's land of debateable cases, and the problem of analysis varies with the character of the mark and the character of the goods to which it is affixed.* Disputes about books, and scarves, and compact discs, cannot easily be resolved by a single test. Most people would have an intuitive feeling that to label a compact disc with the words "Rolling Stones" is less purely descriptive than entitling a biography "Wet Wet Wet". That is no doubt because a group of musicians are in some sense the authors (or at least the performers) of what is on the disc, but are not the authors of an unauthorised book about themselves. But in that case is not their real grievance infringement of their copyright or their performing rights, rather than of their trade mark? Was not Mr Holterhoff's real complaint (Holterhoff v Freiesleben (Case C-2/00)[2002] ECR I-4187) infringement of his design right in two new methods of cutting precious stones (if indeed he had invented those methods) rather than of his trade mark?
>
> 87. These are difficult questions which it is not necessary for your Lordships to determine in order to dispose of this appeal. Whatever uncertainties there are about the decision of the European Court of Justice in the Arsenal case, its likely effect is that the province of trade mark use has annexed a significant part of the no man's land in which elements of distinctiveness and descriptiveness overlap. …
>
> [Emphasis added in italics]

32 In *Nation Fittings (M) Sdn Bhd v Oystertec plc* [2006] 1 SLR(R) 712 ("*Nation Fittings*"), Andrew Phang Boon Leong J (as he then was) considered that the requirement that there be use as a trade mark in the context of infringement under the TMA (in particular, the views espoused by Lord Nicholls in *Johnstone*) was both logical and fair (at [72]–[73]). We expressed our agreement with this approach in *City Chain* at [36]. In coming to this conclusion, we were cognisant that pursuant to Art 5(5) of the Directive, member states were entitled to enact laws to extend the protection accorded to a registered mark even to cases where the use of a sign by a third party did not seek to distinguish the goods or services as originating from that third party, that is to say even to cases where the sign was not being used as a trade mark (see

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City Chain at [35]). We considered that the inclusion of Art 5(5) would only make sense if Arts 5(1) to 5(4) of the Directive, from which s 27 of the TMA was indirectly derived, were only intended to apply to situations where the sign *was used as a trade mark* by the defendant (*City Chain* at [35]).

33 We accordingly concluded in *City Chain* that the object of trade mark law was "probably narrower than that of the law on passing off", and consequently, we were inclined to take the narrower view that the infringing use had to be use as a trade mark (at [36]). We highlighted that while the broader approach which was favoured by the CJEU had some advantages, this had to be balanced against the need to ensure that the protection afforded to trade mark proprietors did not give rise to unnecessary or excessive monopoly rights *beyond* what was legitimately envisaged under the trade mark registration regime (*City Chain* at [28]–[29] and [33]–[34], citing Ng-Loy Wee Loon and Tan Tee Jim SC, "Intellectual Property Law" (2005) 6 SAL Ann Rev 334 at para 16.80, and Ng-Loy Wee Loon, "Time to Re-think the Ever Expanding Concept of Trade Marks?" [2008] EIPR 151).

34 Applying this test to the facts of *City Chain*, we concluded that the predominant use of the Solvil Flower was for decorative purposes (at [38]). It was therefore not trade mark use. However, had we adopted the broader approach favoured by the CJEU, further inquiry would have been necessary given that the prominent manner in which the Solvil Flower pattern was displayed on the mark could potentially affect the origin function of the plaintiff's Flower Quatrefoil mark.

35 Our decision in *City Chain* has been followed in two subsequent decisions of the Court of Appeal, namely *Hai Tong* and *Burberry*.

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36 First, in *Hai Tong*, we were faced with the question of whether the defendant's use of the words "Rose Lady" on the packaging of its products amounted to use in a trade mark sense as opposed to being descriptive of the ingredients contained in the defendant's products, namely the *rosa canina* ingredient (at [7]). We rejected the defendant's arguments. While "Rose" and "Lady" were common words, the combination of both words resulted in a sign that went beyond merely describing the product in question. This was even more apparent when one of the defendant's witnesses conceded that the words "Rose Lady" were used as a name of a particular range of products rather than to describe any of the ingredients in the products (at [18]). We further considered that even if the words "Rose Lady" were capable of being descriptive in nature, it was used in that instance as a badge of origin because it was "prominently displayed" on the packaging of the defendant's products (at [20], citing *Super Coffeemix Manufacturing Ltd v Unico Trading Pte Ltd* [2000] 2 SLR(R) 214 ("*Super Coffeemix*") at [28]). Moreover, the inclusion of the words "Rose Lady" on the packaging would not, without more, have been understood as a mere description of the *rosa canina* ingredient (at [20]).

37 Next, *Burberry* concerned a case where the signs had been displayed on products intended for export and sale outside of Singapore. In the course of the arguments in *Burberry*, Prof Llewelyn, who was Independent Counsel in that case as well, had argued that if consumers in Singapore were not intended to see the infringing sign, there was no use in Singapore for the purposes of trade mark infringement. We disagreed with this submission (at [34]–[37]):

> 34. … In our view, the requirement of trade mark use concerns how the sign interacts with and is represented on goods. This is why trade mark use is often contrasted to decorative use. The purpose of this requirement is to prevent trade mark proprietors from appropriating a sign even when it is not used as a badge of origin. Although how the average consumer perceives a sign in relation to the goods may be relevant to the

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> overall question of infringement, the inquiry as to trade mark use is directed at the relationship between the sign and the goods. It does not depend on whether the trade mark is actually seen by anyone in Singapore.
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> 35. If it is necessary that consumers in Singapore see the sign or are intended to see the sign before it could be said to be used in a trade mark sense, then importers of counterfeit goods who intend to sell such goods to parties outside Singapore would not have committed any infringement. Similarly, persons affixing signs onto goods in a warehouse or other premises closed to the public would be able to contend that they are not liable for trade mark infringement. However, ss 27(4)(*a*) and 27(4)(*c*) of the TMA clearly list such activities as infringing uses. Therefore, with respect, we disagree with the view that consumers in Singapore must see the sign or are intended to see the sign before it could be said to be used in a trade mark sense.
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> …
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> 37. … The concept of trade mark use should be confined to how it was explained and applied in *City Chain* and that means that the sign was intended to depict a trade mark and thereby the origin of the goods and was not used merely for artistic or decorative purposes.

38 There are also several decisions of the High Court which have applied *City Chain*. We highlight one example.

39 In *Dr Who Waterworks Pte Ltd and others v Dr Who (M) Sdn Bhd and others* [2023] SGHC 156 ("*Dr Who*"), the plaintiffs were proprietors of the "DR. WHO" word mark which was registered for bottled water. The defendants had used the sign "www.drwho.com.my" on their commercial vehicles as well as the sign "www.drwho.asia" at the bottom of cartons of water which they offered for sale in Singapore. It was alleged by the plaintiffs that these uses, as well as the meta-titles found on the two websites, amounted to infringing use by the defendants.

40 The question of whether the first two categories of use amounted to "infringing use" fell to be determined according to the test set out in *City Chain*.

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Among other things, the Judge considered that the manner in which the signs were displayed was a relevant factor. In relation to the commercial vehicles, the Judge held that where the signs were displayed in an incomprehensible manner, this rendered the signs incapable of being used in a trade mark sense as there was no clear depiction of any source or origin to which consumers could be brought (at [76]–[77]). Conversely, for the cartons of water sold by the defendants, the Judge held that it was evident from the "larger context surrounding its use" that it was used in a trade mark sense. Specifically (at [113]):

> … The sign was applied to the cartons together with the text "Distributed by" as well as various pieces of information regarding the defendants' undertaking. This indicated to the average consumer that the "www.drwho.asia" sign was related to the undertaking stated as the distributor. Moreover, in the absence of further details regarding the manufacturer of the Cartons, the indicated distributor would be taken to be the trade origin of the Cartons. The average consumer would have therefore understood the source of the Cartons to be the distributor, *ie*, the undertaking using the "www.drwho.asia" sign.

41 The Judge then went on to consider whether the use of the signs on the websites amounted to infringing use. The Judge first considered whether the websites were targeted at consumers in Singapore. In this regard, while the domain name of the "www.drwho.com.my" website contained a country code top-level domain (namely, ".my") which suggested that the website was primarily targeted at consumers in Malaysia, the Judge relied on the content located on the home page of the website, which alluded to clientele in both Singapore and Malaysia, in coming to his conclusion that the website also targeted consumers in Singapore (at [126]–[129]). The Judge then went on to consider whether the signs were used in a trade mark sense. He found that the meta-titles would have been viewed by the average consumer as denoting the

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source of the goods listed on the websites and therefore constituted use in a trade mark sense (at [133]–[134]).

42 For completeness, it may be noted that the Judge's findings on trade mark infringement in *Dr Who* were upheld on appeal by the Appellate Division without written grounds.

43 In our view, the requirement of trade mark use (meaning use as a badge of origin) is well entrenched in Singapore and has been applied by the courts as a threshold inquiry when assessing various forms of allegedly infringing use, including use in advertising and use on websites which offered goods or services for sale.

Developments in English and European jurisprudence

44 We turn to the manner in which the English courts and the CJEU have approached the requirement of trade mark use.

45 We observed in *City Chain* (at [20]) a growing acceptance by the CJEU of the broader approach premised on "whether the infringing use was liable to affect the functions of the registered trade mark", in particular its essential function of guaranteeing to consumers the origin of the goods. We further observed (at [22] and [27]) that subsequent English decisions such as *Rxworks Ltd v Dr Paul Hunter* [2008] RPC 13 appeared to recognise the shift in approach brought about by CJEU jurisprudence, which focuses the inquiry on the "ultimate impact on the proprietor's interests in the registered mark" rather than whether the use in question was "descriptive use" or "trade mark use" from the perspective of the alleged infringer. We will refer to this broader inquiry as the "effect-centric" approach.

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46 The effect-centric approach does not appear to be limited to protecting the origin function of the registered trade mark. This was established by the CJEU in *L'Oréal SA and others v Bellure NV and others* [2009] IP & T 783 ("*L'Oréal (CJEU)*") where the court made clear that a trade mark proprietor was entitled to ensure that third parties do not adversely impact the *non-origin related* functions of his registered trade mark, such as those of communication, investment or advertising (at [58] and [65]). However, when the case resumed in the Court of Appeal of England and Wales ("EWCA"), Jacob LJ (with whom the rest of the court agreed) expressed his reservations over the CJEU's decision in the following manner (*L'Oréal SA and others v Bellure NV and others* [2010] IP & T 1094 ("*L'Oréal (CA)*") at [30]–[31]):

> 30. I am bound to say that I have real difficulty with these functions when divorced from the origin function. There is nothing in the legislation about them. Conceptually they are vague and ill-defined. Take for instance the advertising and investment functions. Trade mark owners of famous marks will have spent a lot of money creating them and need to continue to spend to maintain them. *But all advertisements for rival products will impinge on the owner's efforts and affect the advertising and investment function of the brand in question.* No one would say such jostling for fame and image in the market should be stopped. *Similarly all comparative advertising … is likely to affect the value of the trade mark owner's investment.*
>
> 31. So far as this case is concerned, however, it seems that the court has indicated the answer as to whether the use is within art 5(1)(a). According to the court the use goes beyond 'purely descriptive' use because it is used for advertising. A line is apparently to be drawn between something like a discussion between a would-be seller and his potential customer ('I can supply a diamond cut in the same shape as Spirit Sun'), which is apparently not 'advertising' even though 'Spirit Sun' is being used to gain a sale, and an out-and-out general purpose advertising aid such as a comparison list. I confess I do not know where that line is, but this case falls the wrong side of it. Why? Because the court has said so. It regards the use as affecting the communication, advertising and investment functions of the mark.
>
> [Emphasis added in italics]

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47 It was against this backdrop that the CJEU had occasion to consider the issue of infringement in the context of internet keyword advertising in *Google France SARL and another v Louis Vuitton Malletier SA and other cases* [2010] IP & T 992 ("*Google France*"), a decision which featured significantly in the arguments before us. There, the plaintiffs had filed suit against the defendant (Google) on the basis that Google had allowed third parties to use as keywords, words which were identical to the registered marks of the plaintiffs. The French Cour de Cassation had referred the case to the CJEU seeking a preliminary ruling on the question of:

> … whether the provider of a paid referencing service who made available to advertisers keywords reproducing or imitating registered trade marks and arranged by the referencing agreement to create and favourably display, on the basis of those keywords, advertising links to websites offering infringing goods, was using those trade marks in a manner which their proprietor was entitled to prevent.

48 The CJEU first considered the question of whether there was "use in relation to goods and services" when a third party advertiser used a sign in internet keyword advertisements. As regards ad text use cases, the CJEU held that these were similar to established categories of conduct listed in Art 5(3) of the Directive (such as affixing a sign onto goods and offering the goods for sale) and so could constitute use "in relation to goods and services" (*Google France* at [62]). The court came to a similar conclusion in respect of keyword use cases (*Google France* at [73]). This conclusion, however, was premised on two assumptions: (a) an advertiser intends that internet users who enter a keyword corresponding to another person's trade mark as a search term should click on the advertising link of the advertiser (*Google France* at [67]); and (b) in most cases, an internet user entering the name of a trade mark as a search term is looking for information or offers on the goods or services covered by that trade mark and may therefore perceive advertising links to sites offering competing

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goods or services as offering an alternative to the goods or services of the trade mark proprietor (*Google France* at [68]).

49 The CJEU then went on to consider whether the use in question adversely affected any of the functions of the registered trade mark (*Google France* at [76]–[77], citing *L'Oréal (CJEU)* at [58]). On the function of indicating origin, the CJEU laid down the following test (*Google France* at [84]):

> 84. The function of indicating the origin of the mark is adversely affected if the ad does not enable normally informed and reasonably attentive internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to by the ad originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party (see, to that effect, the *Céline* case (para 27) and the case law cited).

50 This would in turn depend on the particular manner in which the advertisement was displayed (*Google France* at [83]). The CJEU further clarified that there would be an adverse effect on the function of indicating origin where: (a) the third party's advertisement suggests that there is an *economic link* between that third party and the trade mark proprietor; and (b) where the advertisement is *vague* to such an extent on the origin of the goods or services at issue that normally informed and reasonably attentive internet users are unable to determine, on the basis of the advertising link and the commercial message attached thereto, whether the advertiser is a third party vis-à-vis the trade mark proprietor, or on the contrary, economically linked to that proprietor (*Google France* at [89]–[90]).

51 The CJEU finally considered whether such use would have any adverse effects on the advertising function of the trade mark proprietor's rights. Although it was clear that the use by third parties would have certain

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repercussions on the advertising use of that mark by the trade mark proprietor, such as having to agree to pay a higher price-per-click to ensure that its own advertisement appears before those of other operators, the CJEU held that these repercussions did not of themselves constitute an adverse effect on the advertising function of the trade mark (*Google France* at [93]–[95]). The CJEU concluded, based on the fact that the proprietor's advertising page remained prominently displayed when internet users entered the trade mark as a search term, that the advertising function of the trade mark was not adversely affected (*Google France* at [96]–[98]).

52 The *Google France* test was subsequently applied by the CJEU in the context of Art 5(1)(b) of the Directive (equivalent to s 27(2)(*b*) of the TMA, which concerns the use of *similar* as opposed to identical signs) in the cases of *Die BergSpechte Outdoor Reisen und Alpinschule Edi Koblmüller GmbH v Guni* (Case C-278/08) [2010] ETMR 33 ("*BergSpechte*") as well as *Portakabin Ltd and another v Primakabin BV* [2011] Bus LR 1339 ("*Portakabin*"). After summarising the principles set out in *Google France* for infringement cases brought under Art 5(1)(a) of the Directive, the CJEU held that the principles set out in *Google France* were applicable by analogy for the purposes of assessing the likelihood of confusion under Art 5(1)(b) of the Directive (*BergSpechte* at [38]–[40] and *Portakabin* at [51]–[53]). It thus appears from *BergSpechte* and *Portakabin* that the CJEU draws no distinction between on the one hand, the general test to be applied under Art 5(1)(a) of the Directive in considering the impact of keyword advertising on the origin function of a trade mark, and on the other hand, the test for assessing the likelihood of confusion under Art 5(1)(b) of the Directive.

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53 This leads us to consider how the English courts have interpreted the CJEU's decisions in *Google France*, *BergSpechte* and *Portakabin*. We highlight four key observations by the English courts.

54 First, the English courts recognise that the *Google France* test is effect-centric in nature. It is neither a necessary nor sufficient condition to show that an advertiser's sign was used as a trade mark in relation to the goods or services in question (see *Datacard Corpn v Eagle Technologies Ltd* [2012] Bus LR 160 ("*Datacard*") at [262]). Instead, the critical question to be answered in such a case is whether the advertisement does not enable normally informed and reasonably observant internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to in the advertisement originate from the trade mark proprietor or an undertaking economically connected to it, or on the contrary, originate from a third party (*Interflora (CA)* at [75]–[77]). In other words, the focus is on the effect that the resulting advertisement has on the relevant public's ability to assess the origin of the goods or services offered in the advertisement.

55 Second, the *Google France* test appears to be a new test developed specifically in the context of keyword advertising cases. It was founded upon certain generic characteristics of internet advertisements (in particular, the fact that the advertisement appears immediately after an internet user enters the trade mark as a search term, and is displayed at a point when the trade mark is, in its capacity as a search term, also displayed on the screen) and a recognition by the court of the need for transparency about the origin of the goods and services so advertised (*Interflora (CA)* at [132] and [143]; see also *Google France* at [85]–[86]; and *Victoria Plum Ltd (trading as Victoria Plumb) v Victorian Plumbing Ltd and others* [2017] Bus LR 363 ("*Victoria Plumb*") at [51]).

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56 Third, following from the CJEU's reasoning in *BergSpechte* and *Portakabin*, the same test appears to apply when assessing whether the use in question affects or is liable to affect the origin function in a claim under Art 5(1)(a) of the Directive, and also when assessing the likelihood of confusion in a claim under Art 5(1)(b) of the Directive (*Interflora (CA)* at [149]). Here, we note that Arnold J (as he then was) had expressed his concern in *Datacard* at [266] (which he echoed in *Interflora Inc v Marks and Spencer plc* [2013] IP & T 931 ("*Interflora (HC)*") at [238]–[239]) that applying the same test would potentially be inconsistent with the statutory framework because it would impermissibly introduce a requirement for the trade mark proprietor to prove something akin to a likelihood of confusion in the context of cases falling within Art 5(1)(a) of the Directive. He therefore interpreted *Google France* as laying down a likelihood of confusion test but with a reversed burden of proof (*Datacard* at [263] and *Interflora (HC)* at [267(ii)]). However, the Court of Appeal in *Interflora (CA)* was not persuaded by this reasoning. The court held (at [132] and [148]):

> 132. … contrary to the view expressed by the judge, we do not recognise in this passage from the decision of the court in *Google France* any conventional formulation of a likelihood of confusion test; nor do we detect any suggestion, still less a finding, that it imposes a burden of proof upon the third party. This is a matter which we develop below.
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> …
>
> 148. … In our judgment it is important always to have in mind that, despite the 'absolute' nature of the protection afforded by art 5(1)(a) (and art 9(1)(a)) against the use of signs identical to the trade mark in relation to identical goods or services, the court has consistently held that it is limited to those cases in which the use of the sign by a third party adversely affects or is liable adversely to affect one of the function of the trade mark. Those functions include but are not limited to the essential function of indicating origin. By contrast, art 5(1)(b) (and art 9(1)(b)) has a wider ambit in that it extends to the use of similar signs in relation to similar goods or services. But it only affords protection if there is a likelihood of confusion.

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57 Fourth, although the *Google France* test applies by analogy when assessing the likelihood of confusion, the two inquiries are analytically different. This is apparent from the Court of Appeal's reasoning in *Interflora (CA)* at [132], cited above. In *E-Accounting Solutions Limited (trading as Advancetrack) v Global Infosys Limited (trading as GI Outsourcing* [2023] EWHC 2038 (Ch) ("*E-Accounting*"), His Honour Judge Tindal explained that there were three ways in which the tests differed (at [75(iii)]):

> (a) One, they have a different *target*. The *Google France* test assesses the advertisement generated by the keyword used as the "sign", whereas the likelihood of confusion inquiry assesses the "sign" itself.
>
> (b) Two, they have a different *focus*. The *Google France* test is concerned with whether the resulting advertisement enables an internet user to determine its origin, whereas the likelihood of confusion inquiry involves a comparison between "mark" and "sign".
>
> (c) Three, they have a different *threshold*. The *Google France* test requires the trade mark proprietor to show that the advertisement does not enable the relevant public to ascertain its origin, whereas the likelihood of confusion requires the trade mark proprietor to show that the mark and sign were "confusingly similar".

58 We turn to consider how the English courts have applied these principles with reference to the facts of *Interflora*. The plaintiff, Interflora, operated a flower delivery network in the United Kingdom. The network comprised over 1,600 members who conducted business through 1,800 florist shops. The Interflora network florists traded under their own brand names as well as under the Interflora brand. A substantial number of orders were placed through Interflora's website, which were then fulfilled by a network florist. The

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defendant, M&S, which was not a member of the Interflora network, had also sold its flowers online, although it did not have as strong a reputation for online flower delivery compared to Interflora. In 2008, M&S bid on the word "Interflora" (and close variants thereof) as a keyword which, when entered into Google's search engine, triggered the display of advertisements for "M&S Flowers Online". The word "Interflora" did not appear in the advertisements, such that this was a case concerning keyword use rather than ad text use.

59 Arnold J at first instance applied the principles in *Google France* (as interpreted in *Datacard*) and found that M&S's advertisements did not enable reasonably well-informed and attentive internet users, or enabled them only with difficulty, to ascertain whether the service referred to in the advertisements originated from the trade mark proprietor or an undertaking economically connected to it, or if it originated from an unrelated third party (*Interflora (HC)* at [318]). He concluded that M&S's advertisements had an adverse effect on the origin function of Interflora's marks, after considering the following factors (*Interflora (HC)* at [295]–[297]): first, it was not generally known that M&S's flower delivery service was not part of the Interflora network; second, M&S's advertisements did not enable the reasonably well-informed and observant internet user to tell that M&S's flower delivery service was not part of the Interflora network; and third, the nature of the Interflora network made it particularly difficult for the reasonably well-informed and observant internet user to determine, in the absence of any indication in the advertisement, whether M&S's service was part of that network or not. These findings of fact were not reversed on appeal.

60 It may be noted that the M&S witnesses accepted in evidence that consumers searching for "interflora" were looking for Interflora. These consumers were not using "interflora" as a generic search term. While Arnold J

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accepted that a majority of consumers who clicked on M&S's advertisements did so because they were persuaded to take their custom to M&S and not because they believed that M&S was part of the Interflora network, that did not exclude the possibility that a significant proportion of consumers did in fact believe that there was such a connection (*Interflora (HC)* at [310]).

61 Subsequently, in *Interflora Inc and another v Marks and Spencer plc and another (No 3)* [2013] IP & T 1023 ("*Interflora (No 3)*"), Arnold J dealt with the consequential issues arising from his main judgment. Apart from the complaint that M&S had bid on the "interflora" sign as a keyword, Interflora also sought to restrain M&S from bidding on other flower-related terms without necessarily matching "interflora". As a result of Google's advanced broad matching algorithm, a consumer who searched for "interflora" might nonetheless trigger the display of M&S's advertisement because M&S had bid, for example, on phrases such as "flower delivery". Arnold J held that there was use of the sign "interflora", albeit in a less direct way, because what M&S was doing had the "object and effect that a search by a consumer for 'interflora' results in the display of M&S's advertisement" (at [11]). He considered it immaterial that this was achieved by a technical means which did not involve M&S selecting "interflora" as a keyword.

62 On appeal, the Court of Appeal agreed with Arnold J that the selection of generic terms as a keyword could potentially amount to infringing use if the trader had chosen the term "with the object and effect of triggering the display of his advertisement in response to a search by a consumer of a term including or consisting of a sign which is the same as or similar to the trade mark of a rival" (*Interflora (CA)* at [191]–[192]).

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Analysis

63 Returning to the present matter, the Judge considered the *Google France* test to be a "useful test" in the context of s 27(1) of the TMA, because that would prevent s 27(1) from being applied in a mechanical manner once identity of marks and goods or services is established by looking at the underlying function of a trade mark as a badge of origin. As for s 27(2) of the TMA, the Judge considered the *Google France* test to be equally applicable to determine the likelihood of confusion in the sphere of internet keyword advertising: Judgment at [57].

64 However, as Prof Llewelyn highlighted to us, and as we have explained above, the *Google France* test was not developed in the context of the threshold test of "trade mark use" or under the Confusion Inquiry. Rather, it was intended as a "new test" in the context of keyword advertising cases to determine whether the use complained of "has adversely affected, or is liable to adversely affect, the origin function of a trade mark" (*Interflora (CA)* at [132]). Thus, reliance on the *Google France* test necessarily presupposes an acceptance of the broader approach to the threshold issue, which was eschewed in our earlier decision in *City Chain*. This raises the question of whether we should depart from our earlier decision on account of the unique challenges arising from the use of internet advertisements.

65 Although the issue was not fully argued before us (given that both parties agreed that the threshold test of "trade mark use" was applicable), we consider that the threshold requirement of "trade mark use" remains good law in Singapore, even in the context of internet advertisements.

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66 We have previously held in *City Chain* (at [35]) that the threshold test of "trade mark use" is consistent with the fundamental purpose of our trade mark law, which concerns itself primarily with protecting trade mark proprietors from the use of identical or similar marks by third parties *for the purpose of distinguishing their goods and services*. This inquiry is directed at the relationship between the sign and the goods and does not depend on how the public perceives the sign (*Burberry* at [34]). In our judgment, this means that the focus of the inquiry at this threshold stage should be on the *nature of the defendant's use of the signs* rather than the *effect of such use on the claimant's registered mark*.

67 It seems to us that the effect-centric approach, especially as formulated in *Google France* in the context of internet keyword advertising, contains a significant degree of overlap with the analysis conducted under the Confusion Inquiry. For instance, while the *Google France* test is concerned with whether the normally informed and reasonably observant internet user is able to ascertain the origin of the goods or services referred to in the advertisement, this simply appears to be another way of asking whether the relevant public is likely to be confused as to the origin of the goods or services in question. We therefore see force in the claim that the *Google France* test introduces some, perhaps diluted, version of the requirement for a likelihood of confusion for trade mark infringement claims made under s 27(1) of the TMA (see Arnold J's criticism in *Datacard* at [266] and Sir James Mellor *et al*, *Kerly's Law of Trade Marks and Trade Names* (17th Ed, Sweet & Maxwell, 2023) at para 28-090).

68 Such an approach is inconsistent with our statutory framework. Under s 27(1) of the TMA, there is no requirement to prove a likelihood of confusion where a trader uses a sign identical to the proprietor's mark on goods or services that are identical to the proprietor's goods or services. Indeed, in such

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circumstances, a likelihood of confusion is *presumed* (see Art 16(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights).

69 Further, an effect-centric approach could unintentionally widen the scope of infringing uses. As we recognised in *City Chain*, purely decorative use of a sign could potentially affect the origin function of a trade mark even though the sign was not used as a badge of origin. Likewise, using generic words for purely descriptive purposes could also potentially affect the origin function of a trade mark. This would appear to fall within the realm of fair competition, and we would not generally consider it appropriate to proscribe such conduct.

70 We accept that there are peculiar risks which are associated with internet keyword advertising, such as the fact that the advertisement appears on the search engine results page ("SERP") immediately after entry of the trade mark as a search term, which results in a particular need to ensure that there is transparency in internet keyword advertising (see *Google France* at [85]–[86]; and *Interflora (CA)* at [132]). However, we consider these risks to be adequately addressed by preventing third parties from using the trade mark as a badge of origin in their internet advertisements (whether as keywords or as part of the ad text) without the consent of its proprietor. In our view, a robust application of the threshold test will involve at least the following three considerations.

71 First, in determining whether the signs were used as a badge of origin, the court will consider the objective circumstances surrounding their use. Regard should be had to the resulting advertisement and how it is presented to consumers; the prominence and apparent purpose with which the signs are used; and what other signs are used in the advertisement (see *Hai Tong* at [20], citing *Super Coffeemix* at [28]; see also *Johnstone* at [87]). We also observed in *Burberry* (at [35]) that it is unnecessary that the public should have to see the

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signs before such use could constitute infringement. This in our view makes it clear that keyword use cases can amount to infringement even though the resulting advertisement does not display the impugned signs.

72 The intention of the defendant also appears to be of some relevance (*Super Coffeemix* at [28]; *Burberry* at [37]), particularly if the defendant *admits* to using the signs as a badge of origin. We have previously explained that the inquiry as to trade mark use concerns how the sign interacts with and is represented on goods (*Burberry* at [34]). Thus, if the defendant intended for the sign to be used as a badge of origin, this would certainly be a useful, but not necessarily decisive, factor in the court's analysis. We emphasise that the inquiry is an *objective* one and the court will consider all the circumstances surrounding the defendant's use (*Super Coffeemix* at [28]; *Hai Tong* at [20]).

73 Second, the inherent distinctiveness of the defendant's sign would also play a significant role in the determination of whether the sign (which is putatively identical or similar to the claimant's mark) was used as a badge of origin (see *Johnstone* at [85]). Greater latitude must be afforded to a defendant who uses words or ideas of a generic nature, even if these have some similarity to what is found in the registered mark (*Hai Tong* at [30]; *Staywell* at [25]). While we agree with Carr J in *Victoria Plumb* (at [51]) and the CJEU in *Google France* (at [68]) that an internet user who searches by reference to a brand name is likely to be looking for that brand, this would usually only be true where the brand name is distinctive. Where, on the other hand, the brand, or the relevant part used in the search, is generic and descriptive, it would be wrong to ignore the reality that internet users would typically employ a wide range of generic search terms in the hope of finding a suitable match on the SERP. In our judgment, bearing in mind the characteristics which are peculiar to the manner in which the display of an internet advertisement is triggered, allowing a trade

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mark proprietor to prevent the use by third parties of generic search terms as keywords would be the quintessential definition of "unnecessary or excessive monopoly rights" (*City Chain* at [29], citing *Nation Fittings* at [62]) and would in practice "prevent the legitimate use of an unacceptably large spectrum of common words and ideas" (*Hai Tong* at [30]). In contradistinction to "trade mark use", an advertiser who uses as a keyword words or phrases of a generic nature would be more likely to be found to have used those terms in a *descriptive* sense rather than as a badge of origin, and this might be so regardless of whether the use in question pertained to keyword use or ad text use.

74 Third, we consider that it is permissible for the court to consider the content of the website in assessing whether there was trade mark use, particularly where what is at issue are words or concepts that are of a generic nature (and consequently where it may be vague on the face of the internet advertisement as to whether the defendant had used the signs as a badge of origin). Much of the argument before us concerned the question of whether the court could consider the website *in the context of the Confusion Inquiry*, with the Appellant arguing on the basis of *Staywell* that it would be impermissible to do so. Prof Llewelyn took the position that once the court had determined that the mark and the sign were more similar than dissimilar, it would not be permissible to then go into the website to negative a likely consequential finding of confusion arising from such similarity (echoing our *dicta* in *Staywell* at [86]). However, here we are not considering the website for the purposes of assessing the likelihood of confusion on the part of the average consumer, but rather for the purposes of determining whether the advertiser had intended the use of the impugned signs in the internet advertisements to serve as a badge of origin.

75 In this regard, it is well-established in our case law that the court is entitled to look at the wider context of the allegedly infringing use to determine

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if there was trade mark use, for example, by considering how the sign is situated within the packaging of the products offered for sale (see *Hai Tong* at [18] and [20]; *Super Coffemix* at [28]; *Dr Who* at [113]; see also David Llewelyn, Ng Hui Ming and Nicole Oh Xuan Yuan, *Cases, Materials and Commentary on Singapore Intellectual Property Law* (Academy Publishing, 2018) at para 07.204).

76 In so far as internet advertisements are concerned, we accept that the website forms part of the context of the advertisement as a whole. This is because unlike other traditional forms of advertising such as flyers or brochures, internet advertisements are *interactive* in nature and are intended to "entic[e] internet users to click on them to be redirected to the advertiser's website": Judgment at [70]. Indeed, this appears to be the very premise upon which Google Ads operates by collecting a fee from the advertiser for each time an internet user clicks on the advertising link (see *Google France* at [25]). It has also been observed that "hyperlinks play a critical role in the operations of search engine operators" and that these hyperlinks, which are "generated as part of the organic search results as well as paid/sponsored search results", will direct the internet user to third-party content hosted elsewhere on the internet (see Warren B Chik and Saw Cheng Lim, *Information and Communications Technology Law in Singapore* (Singapore Academy of Law, 2020) at para 09.003).

77 The SERP functions for the most part as an index page which contains relatively brief details on each search result. In our judgment, where the signs used by the defendant are of a generic and descriptive nature, it will often be difficult to discern solely from the internet advertisement as to whether or not the signs were used in a trade mark sense given the dearth of information that will be found in the internet advertisement. Thus, to properly appreciate whether

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this was indeed the case, it would accord with common sense and logic that the court should look at the website that the internet advertisement is intended to redirect internet users towards for the limited purpose of determining the apparent purpose of the defendant's use of the signs.

78 Finally, we should also highlight that the Appellant does not seem to dispute that the court may look into the website in assessing whether there was use in a trade mark sense. Indeed, one of the arguments the Appellant advances in this regard is that the court should consider the fact that no efforts were made to advertise the impending opening of the Respondent's Joo Chiat branch on the Respondent's website. This suggests that the court is entitled to look at the Respondent's website in coming to its decision on whether the Signs were used in a trade mark sense.

79 We summarise our analysis as follows:

(a) The *Google France* test, which adopts an effect-centric approach, is inconsistent with the TMA because it impermissibly imposes a requirement akin to a likelihood of confusion for cases falling within s 27(1) of the TMA. Moreover, an effect-centric approach could unintentionally widen the scope of infringing uses to include purely decorative or descriptive use, which does not constitute infringing conduct under the TMA (see [66]–[69] above).

(b) Conversely, the threshold test of "trade mark use" is applicable in the context of infringement claims involving internet keyword advertising. A robust application of the threshold test will typically involve a consideration of the following:

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(i) The objective circumstances surrounding the defendant's use of the signs. This will necessarily entail a consideration of the interaction between the defendant's signs and the resulting advertisement. The defendant's subjective intentions may also be a relevant, but not necessarily decisive, factor (see [71]–[72] above).

(ii) The inherent distinctiveness of the signs used by the defendant. Greater latitude is afforded to a defendant who uses words or ideas of a generic nature, bearing in mind the reality that internet users would typically employ a wide range of generic search terms when conducting an internet search (see [73] above).

(iii) The website which an internet user is redirected to upon clicking on the defendant's advertisement. This factor is aimed at helping the court to assess the apparent purpose for which the signs were used, particularly where the advertisement itself contains few details (see [74]–[77] above).

Application to the facts

80 The Judge had assumed without deciding that the Respondent used the Signs in a trade mark sense.

81 On appeal, the Appellant submits that the Respondent had used the Signs in a trade mark sense. It advances the following submissions:

(a) First, the Signs were not descriptive of the Respondent's services because the Respondent did not have any clinics in the east of Singapore at the material time, nor did the Respondent's website advertise the

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impending opening of its Joo Chiat branch. It also made no sense for the Respondent to use the phrase "east coast" when it would have been more accurate for the Respondent to refer to "Joo Chiat" instead.

(b) Second, while the terms "east coast", "podiatry", and "podiatrist" are generic terms, the combined phrases used by the Respondent do not make grammatical sense or convey any sensible meaning. The resulting terms are distinctive and capable of being used as a badge of origin.

(c) Third, the manner in which the relevant signs were presented suggests that they were used as a badge of origin. In particular, the relevant signs were prominently displayed in the headlines of the Respondent's Ads in large, bold and striking blue texts. The relevant signs were in a larger font size than any other words in the Respondent's Ads. The commercial message, as well as the other additional terms in the headlines of the Respondent's Ads, were descriptive and functioned as promotional blurbs or described the qualities of the Respondent. As for the URL, it was in small black font and was subdued in comparison with the headlines.

82 We disagree with the Appellant's submissions. In our judgment, the use of the Signs was clearly descriptive in nature. As the Judge observed, the term "east coast" refers to a geographical area. In Singapore, the words "East Coast" are commonly used as a proper noun referring to a district or area that includes Joo Chiat Road. When used in conjunction with the terms "podiatry" or "podiatrist", the resulting phrase would be descriptive of podiatry services offered in the east coast region. To contend otherwise on the basis of the grammatical accuracy of the phrase "east coast podiatry" as the Appellant does

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is, with respect, pedantic. Likewise, given that Joo Chiat Road is part of the east coast of Singapore, it cannot be said that the Respondent's use of the phrase "east coast" was an inaccurate description of the location of its new branch.

83 Mr Reyneker's evidence is that he had inserted the relevant signs into the headlines of the Ads as part of the Respondent's campaign to advertise the impending opening of its Joo Chiat branch, and further, that he had done so after a consultant from Google advised him to use "location-based keywords" (see [6] above). His evidence is consistent with the objective facts, namely that the Respondent intended to and did in fact open a new branch in the east coast region of Singapore shortly after its advertising campaign. The Appellant's submission that the Respondent did not have any operating clinics in the east coast at the material time misses the point because there is nothing improper in the Respondent pre-empting the opening of its new branch by ramping up its marketing efforts.

84 The manner in which the relevant signs were presented in the Respondent's Ads was clearly a function of how sponsored links generally appear on the SERP. We would not generally assume that the words used in the headlines of the advertisement are necessarily used as a badge of origin.

85 Viewing the Respondent's Ads in their context (including the website), it did not appear to us that the Respondent was seeking to portray its services as originating from an entity known as or related to "East Coast Podiatry". Rather, it is clear from the URL as well as the placement of the Respondent's own branding on the website that it was offering its services under its own name. Bearing in mind the inherently descriptive nature of the Signs, the Appellant has to show to a more compelling degree that the Signs were indeed used in a trade mark sense rather than a descriptive sense.

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86 Finally, we deal briefly with one other contention raised by the Appellant concerning Mr Reyneker's intentions in using the Signs. The Appellant submits that the Respondent had used the Signs with the specific intention of confusing prospective clients who might have been looking for the Appellant's services. Although this argument was advanced in the context of the Confusion Inquiry, it would have a significant bearing on whether the Respondent had used the Signs in a trade mark sense, if the allegation could be proven. Unfortunately for the Appellant, there is no credible evidence to support this contention. The only evidence the Appellant adduced is a series of messages exchanged between Mr Tay and Mr Reyneker, where Mr Reyneker had responded somewhat sarcastically after Mr Tay had informed him that the Respondent's Ads potentially infringed upon the Appellant's Mark:

> You are so sensitive. Why am I suddenly getting all these love letters from you?
>
> You take yourself too seriously. Common rookie mistake.
>
> 1. Emily and Kerry were out of a job when I hired them.
>
> 2. You bidded on my company name and my personal name for years.
>
> 3. You just opened a clinic next to me.
>
> That's why I'm having such a good laugh here. Because you can't take your own medicine.

87 These messages, which were sent by Mr Reyneker in response to Mr Tay's initial approach, are ambiguous as to Mr Reyneker's intention in using the Signs in the Respondent's Ads. As we stated above, we accept Mr Reyneker's evidence that he had used the Signs to pre-empt the launch of the Respondent's new branch. That there seemed to be some history of bad blood between them is insufficient basis for concluding that there was trade mark use. This is unlike the situation in *Interflora (No 3)*, where the court was of the view that the infringer had *accepted* that it used the sign by *arranging* for

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the display of its advertisement whenever an internet user searched for "interflora", regardless of the precise keyword that the infringer had chosen to bid on (at [8] and [11]).

88 In our judgment, therefore, the Appellant has failed to show that the Respondent had used the Signs in a trade mark sense. The Appellant's claim thus fails at the threshold, and the appeal should be dismissed.

Similarity of Mark and Signs

89 Even if the Appellant were able to get past the threshold issue of trade mark use, we are satisfied that the Appellant has failed to show that the Mark and Signs are similar within the meaning of s 27(2)(*b*) of the TMA.

90 It is firmly established that the similarity of two competing marks is a question of fact and degree for the court to determine by looking at the two signs as a whole (*City Chain* at [47], citing *Polo* at [8]). There are three aspects of this evaluation, namely visual, aural and conceptual similarities, although it bears repeating that these factors are merely intended to aid the court's evaluation by signposting its inquiry and this should not be applied as a mechanistic formula (*Hai Tong* at [40(a)]; *Staywell* at [18]). The comparison is to be done mark-for-mark without consideration of any external matter (*Hai Tong* at [40(b)]; *Staywell* at [20]).

91 Crucially, the distinctiveness of a mark plays an integral role in the marks-similarity inquiry. We have considered the relevant principles in our discussion on the threshold issue, but for ease of reference we set out the salient principles here. A mark can be inherently distinctive because it consists entirely of inventive words without any meaning or is used in a way that is completely arbitrary in relation to the goods and services in question (*Hai Tong* at [31];

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Staywell at [24]). A mark which has greater inherent distinctiveness will enjoy a high threshold before a competing sign will be considered dissimilar to it; however, greater latitude is afforded to a defendant in using words or ideas of a generic nature, even if these have some similarity to what is found in the registered mark (*Hai Tong* at [30]; *Staywell* at [25]). That said, even a mark that is not inherently distinctive may acquire distinctiveness through long-standing or widespread use (*Hai Tong* at [32]–[33]; *Staywell* at [24]).

92 Ultimately, the ability of the mark to function as a strong badge of origin must be assessed by looking at the mark as a whole, bearing in mind its distinctive and dominant components (*Staywell* at [25]–[26]). Where composite marks are concerned, the overall impression conveyed to the public may, in certain circumstances, be dominated by one or more of its components. Where the other components of a composite mark are of negligible significance, it is permissible to make the comparison solely on the basis of any dominant element(s) (*Hai Tong* at [62]; *Staywell* at [28]–[29]).

93 In the present case, the Mark is a composite mark comprising the Device and the words "East Coast Podiatry" in block letters. The Judge had assumed without deciding that the Mark and the Signs are similar.

94 The Appellant contends that the words are the dominant component of the Mark because the words feature more prominently in the Mark than the Device. It further contends that the amalgamation of the words "East Coast" and "Podiatry" creates a unique textual juxtaposition which is distinctive and not descriptive of the relevant goods. We disagree. The Appellant's approach appears to fall within the kind of overly mechanistic exercise which we have previously eschewed in earlier decisions (see for example, *Staywell* at [17], citing *Polo* at [35]). In our judgment, the Mark's ability to function as a badge

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of origin is derived entirely from its use as a *composite* mark. Individually, each of its components lacks inherent distinctiveness. The words are descriptive of podiatry services offered in a region near an eastern coastline, whereas the device is a simple and commonly used symbol in the healthcare industry (a simple green cross). Without the Device, the words are simply *not capable* of functioning as a badge of origin (and *vice versa*). Each element thus forms a crucial part of the Mark. In this regard, the public will generally not consider a descriptive element forming part of a composite mark as the distinctive and dominant element of the overall impression conveyed by that mark (*Ceramiche Caesar SpA v Caesarstone Sdot-Yam Ltd* [2017] 2 SLR 308 at [41]; *Hai Tong* at [62(e)(ii)]). Consequently, we consider that the marks-similarity inquiry must necessarily be made with reference to the composite mark.

95 On this basis, we find that the Mark and the Signs are clearly dissimilar. The Signs do not contain a crucial element of what makes the Mark distinctive, namely the Device. The Appellant is thus unable to satisfy us that the elements of trade mark infringement set out in s 27(2)(*b*) of the TMA are made out.

The Confusion Inquiry

96 Given our findings above, it is not necessary for us to address the question of whether it would be permissible to consider the Respondent's website in the Confusion Inquiry in light of our earlier guidance in *Staywell*. However, given that this issue was discussed extensively by the parties and by Prof Llewelyn, we consider it appropriate to set out our preliminary views below.

97 In *Staywell*, the applicant had applied to register a mark which comprised a device and the words "PARK REGIS" for advertising and

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marketing services as well as for hotel services, hospitality, food and beverage and related services. The opponents were the registered proprietors of the word mark "ST. REGIS" for hotel and hospitality services, among others. The High Court decided that there was no likelihood of confusion between the applicant's "PARK REGIS" mark and the opponents' "ST. REGIS" mark, having regard to the parties' websites, the modes in which hotel bookings were usually made, and the star-ratings of the parties' hotels. Specifically, the applicant's hotel was a 4-star hotel while the opponents' hotel was a 6-star one.

98 On appeal, we held that it was not legitimate to consider these factors in the Confusion Inquiry. In particular, we highlighted that because *Staywell* concerned opposition proceedings and not infringement proceedings, a focus on the actual and particular circumstances and the way in which the mark was used on the services in question would be misplaced for the purpose of determining whether the registration should be permitted to proceed (at [98]).

99 As we explained in *Staywell*, extraneous factors may be considered to the extent that they inform the court as to how the similarity of the marks and goods will likely affect the consumer's perception as to the source or origin of the goods (at [83]). These would include factors that *motivate* the consumer to exercise care in the purchase in question directed at, among other things, the forming of a judgment over the source of the product, and factors that *enable* the consumer to exercise such care (at [93]). In other words, the permissible factors were those which: (a) are intrinsic to the very nature of the goods and/or (b) affect the impact that the similarity of marks and goods has on the consumer (at [95]). The impermissible factors, on the other hand, are those differences which are created by a trader's differentiating steps, meaning factors which are not inherent in the goods, but are susceptible to changes that can be made by a trader from time to time (at [95]).

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100 The Appellant submits on the basis of *Staywell* that the Respondent's website should not be considered in the Confusion Inquiry as it is an impermissible extraneous factor. The Appellant also relied on the case of *E-Accounting*, where Tindal J addressed the issue of confusion in the context of an ad text use case, having regard only to the internet advertisement and not the website of the trader. According to the Appellant, considering the website in the Confusion Inquiry would be inconsistent with *Staywell* as it would allow an advertiser to avoid a finding of confusion as long as it took steps to ensure that its website sufficiently differentiates the advertiser's business from the registered proprietor's business.

101 Prof Llewelyn similarly submitted that if there was found to be similarity in the signs used in the internet advertisement, it would not be permissible or logical to hold, after considering the website, that the internet advertisement was not confusingly similar. He submits that in so far as the relevant purchasing practice of a consumer is concerned, the inquiry stops once the consumer has obtained the relevant results from the SERP. Viewing the contents of the website would be the online equivalent of a defendant trader's differentiating steps in the real world.

102 There is force in these submissions. Where the court has already found that there is similarity in the marks and the goods or services, such that having regard to the characteristics of the likely consumer, there would be a likelihood of confusion, then it would not be permissible to have regard to further extraneous considerations that might have the effect of diminishing the likelihood of confusion (*Staywell* at [86]). Otherwise, an advertiser would be able to use signs in internet advertisements that are very similar to a registered mark, for the purposes of advertising similar if not identical goods and yet avoid liability by means either of an express disclaimer, or by using cheaper materials

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and selling his goods at a much lower price and saying that because of these steps, there is no likelihood of confusion notwithstanding the high degree of similarity or even identity having been found at the antecedent stages of the inquiry (*Staywell* at [90]). The observations made in *Rolex Internet Auction* [2005] ETMR 25 (cited in *Staywell* at [91] and which were raised during the hearing) are pertinent:

> Risk of confusion … is not excluded by the fact that the goods offered are designated 'replicas' or 'imitations'. This is because … *the basic consideration does not concern a specific selling situation in which a risk of confusion in itself existing can be cleared up by means of explanatory notes or in some other way, for example low price*, but relates to the abstract risk of confusing the two identifying marks. [Emphasis added in italics]

103 Importantly, however, we also qualify our observations by noting that at least in infringement proceedings, it would be permissible to consider the actual circumstances in which the allegedly infringing signs were deployed (*Staywell* at [61] and [84]). We observe, in particular, that the facts of *Staywell* concerned opposition proceedings as opposed to infringement proceedings, and moreover, we are here concerned specifically with infringement through use in internet advertising. In this regard, it is potentially relevant to take into account the interactive nature of internet advertisements, and the fact that the purpose of internet advertisements is generally to entice users to click into the relevant website, in so far as it relates to the impact of marks-similarity and goods-similarity on consumer perception. Having said that, as it is not necessary for us to come to a decided view on this question, we prefer to leave it open for consideration if and when it is necessary to do so.

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Conclusion

104 For the reasons we have given, we dismiss the appeal. Costs of the appeal are fixed at $45,000 payable by the Appellant to the Respondent.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Andrew Phang Boon Leong
Senior Judge

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