



Hilary Term  
[2024] UKSC 8  
*On appeal from: [2022] EWCA Civ 552*

## **JUDGMENT**

### **Lifestyle Equities CV and another (Respondents) v Amazon UK Services Ltd and others (Appellants)**

before

**Lord Hodge, Deputy President  
Lord Briggs  
Lord Hamblen  
Lord Burrows  
Lord Kitchin**

**JUDGMENT GIVEN ON  
6 March 2024**

**Heard on 15 and 16 November 2023**

*Appellants*

Daniel Alexander KC

Maxwell Keay

(Instructed by Hogan Lovells International LLP (London))

*Respondents*

Michael Edenborough KC

Thomas St Quintin

(Instructed by Brandsmiths (London))

**LORD BRIGGS AND LORD KITCHIN (with whom Lord Hodge, Lord Hamblen and Lord Burrows agree):**

**Introduction**

1. This appeal concerns the application of EU and UK trade mark law to the cross-border marketing and sale of goods on the internet. An essential feature of trade mark law is that it provides only territorial protection to the proprietor of the mark, that is, against its unauthorised use in the course of trade in the territory or territories where the mark is registered. Thus, for example, there would be no infringement of the rights of the proprietor of a UK trade mark if goods bearing the mark were advertised and sold to a UK-resident buyer on a visit to a shop in New York, and then brought back to the UK in the buyer's personal luggage. The seller would not be using the mark in the UK, and the buyer would not be importing the goods in the course of trade.

2. But the marketing and sale of goods on the internet knows no such territorial boundaries. The website marketing the goods may be viewed by consumers anywhere in the world where there is an internet signal. These consumers need never leave their homes to view, choose and buy the goods online, and can obtain delivery to their own front doors, even if the website advertising the goods may be said to be located abroad, and the goods are manufactured abroad and only imported to the buying consumer's country of residence after the sale and purchase has taken place. Furthermore the seller and buying consumer on the internet are in principle free to choose and agree where the sale should take place, so that, for example, the sale may be completed at the overseas seller's warehouse and then imported by the consumer as owner, even if the consumer uses and pays for the services of the seller in having the goods shipped to the consumer's country of residence. As in the old-fashioned example given in the previous paragraph, the seller has apparently made no use of the trade mark in the consumer's country of residence, while the consumer has been the importer of the goods into the territory protected by the mark although never leaving home, and the importation by the consumer is not in the course of trade.

3. Led by the Court of Justice of the European Union ("the CJEU"), EU jurisprudence has sought to chart a safe course between the Scylla of watching trade mark protection become entirely illusory in the context of internet marketing and sale, and the Charybdis of creating an exorbitant and unprincipled extension into the international sphere of the territorial jurisdiction to protect trade marks. It has done so by reference to two separate concepts. The first is by treating the advertisement and offering for sale of branded goods in a way which is targeted at a protected territory as a use of the mark in the targeted territory. The second concept is by treating a sale of branded goods as a use of the mark within the territory if the sale is made "to" a consumer in that territory pursuant to a contract of sale made outside it. The ambit of both those concepts is in issue in the present proceedings.

4. The appellants are all members of the Amazon group of companies. We will for convenience describe them collectively as “Amazon”. Although centred in the USA, Amazon has in recent years acquired a formidable international reputation for the marketing and sale of consumer goods on the internet. It may fairly be said that a major feature of Amazon’s attraction as a “place” at which to shop is that it enables consumers easily and quickly to shop for, choose and buy a wide range of goods for delivery to their front doors, on their computers or smart phones, without ever having to leave their homes. The coupling of purchase online with prompt home delivery is a key feature which has made Amazon sensationally successful in a market place which knows no territorial boundaries. Amazon operates a USA-based website called Amazon.com, together with websites in other territories such as Amazon.co.uk in the UK and Amazon.de in Germany. We will call the Amazon.com website “the USA website” and the Amazon.co.uk website “the UK website”.

5. The present proceedings concern alleged infringement of a group of trade marks (“the UK/EU Marks”) registered in the UK and the EU and owned and licensed respectively by the respondents, two companies in the Lifestyle Equities group, which we will for convenience call “Lifestyle”. The detail of the marks does not matter in relation to what we have to decide, but broadly they comprise either the words BEVERLY HILLS POLO CLUB or a logo consisting of those words coupled with a device of a horse and rider. They are registered in respect of various types of consumer goods including clothing. A relatively unusual but legally irrelevant feature of this case is that there exist corresponding trade marks registered in the USA which are owned by a commercially unrelated party, and used in the USA in connection with identical goods (“the US branded goods”). Lifestyle has never consented to the marketing of the US branded goods in the UK or the EU. It is common ground that such marketing or sale of the US branded goods in the UK or the EU would be an infringement of Lifestyle’s rights in the UK/EU Marks, although of course they can be, and are, marketed and sold perfectly lawfully in the USA.

6. The present dispute has arisen because Amazon has marketed and sold the US branded goods on its USA website, and Lifestyle contends (but Amazon denies) that those goods were both targeted at, and sold to, consumers in the UK and the EU. Some US branded goods were also marketed and sold on Amazon’s UK website and it became common ground during the proceedings that this gave rise to infringements of Lifestyle’s UK/EU Marks. Thus, the dispute which has persisted, as far as this court is concerned, is confined to Amazon’s use of its USA website.

7. It is also important to note that this dispute relates entirely to events that occurred before the UK left the EU, and these proceedings began before 31 December 2020, the end of the implementation period (“IP Completion Day”) provided for by section 1 of the European Union (Withdrawal Agreement) Act 2020. Thus, UK trade mark law was at that time substantially governed by EU legislation and jurisprudence. Further, the parties were agreed before the Court of Appeal that the issues arising on the appeal

concerning the EU Marks might be decided by reference to Parliament and Council Regulation 2017/1001 of 14 June 2017 on the European Union trade mark (“the EUTM Regulation”). It was also common ground that these issues were unaffected by Brexit. The only relevance of Brexit was that, although there was (just about) time for the trial judge to have referred any question of EU law to the CJEU, he sensibly exercised his discretion not to do so, and time for a reference had long passed when these proceedings reached the Court of Appeal. That by no means renders this appeal of merely historical interest or importance. UK trade mark law remains rooted in EU legal principles and the issues about the applicability of that law to internet marketing remain of prime and probably ever-increasing importance.

## **The Applicable Law**

8. All parties agree that we are concerned in this appeal with allegations that Amazon has used signs which are identical to Lifestyle’s UK and EU registered trade marks—the UK/EU Marks—in relation to goods which are identical to at least some of the goods for which those marks are registered.

9. The rights conferred by an EU trade mark are set out in article 9 of the EUTM Regulation which provides, so far as relevant:

“Rights conferred by an EU trade mark

1. The registration of an EU trade mark shall confer on the proprietor exclusive rights therein.

2. Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the EU trade mark, the proprietor of that EU trade mark shall be entitled to prevent all third parties not having his consent from using in the course of trade, in relation to goods or services, any sign where:

(a) the sign is identical with the EU trade mark and is used in relation to goods or services which are identical with those for which the EU trade mark is registered; ...

3. The following, in particular, may be prohibited under paragraph 2: ...

(b) offering the goods, putting them on the market, or stocking them for those purposes under the sign, or offering or supplying services thereunder; ...

(e) using the sign on business papers and in advertising; ...”

10. Section 10(1) and sections 10(4)(b) and (d) of the Trade Marks Act 1994 (“the 1994 Act”) apply to the claim for infringement of the UK trade marks, and are in materially the same terms as those of article 9 of the EUTM Regulation.

11. There were also allegations of infringement under articles 9(2)(b) and (c) of the EUTM Regulation and sections 10(2) and (3) of the 1994 Act, and of passing off. These deal with a broader range of circumstances, including the use of signs which are similar to the registered marks in relation to goods or services which are identical or similar to those for which the marks are registered, provided certain other conditions are also satisfied. They were, however, accepted by Lifestyle at trial to add nothing to the claims under article 9(2)(a) of the EUTM Regulation and section 10(1) of the 1994 Act. It is therefore not necessary to say anything more about them.

12. The essential elements of a claim for infringement in a case such as this, where there is an identity of marks and goods, were summarised by the Court of Appeal in *Interflora Inc v Marks and Spencer plc* [2014] EWCA Civ 1403; [2015] Bus LR 492; [2015] FSR 10, at para 67, in these terms, to which neither side in this appeal has taken objection:

“(i) there must be use of a sign by a third party within the relevant territory; (ii) the use must be in the course of trade; (iii) it must be without the consent of the proprietor; (iv) it must be of a sign which is identical with the trade mark; (v) it must be in relation to goods or services which are identical with those for which the trade mark is registered; and (vi) it must affect or be liable to affect one of the functions of the trade mark.”

13. It follows that we are not concerned here with whether Amazon has used signs which are similar to the registered marks and has done so in relation to goods which are the same as or similar to the goods for which the registrations have been secured. Nor are we concerned with whether any such similarity is likely to cause confusion. We are concerned instead with the more fundamental question whether Amazon has used the signs of which complaint is made in the course of trade in the relevant territory (here the UK) in relation to any relevant goods at all.

14. More specifically, in terms of the criteria set out in *Interflora* and as the trial judge in this case observed ([2021] EWHC 118 (Ch); [2021] FSR 19, at para 98), we are concerned with conditions (i) and (ii). It must also be borne in mind, however, that issue (i) itself imports two requirements: the alleged infringer (here Amazon) must have used the sign, and that use must have been within the relevant territory, here the EU or, in the case of the UK trade marks, the UK. Then, in order to satisfy condition (ii), that use by Amazon must have been in the course of its trade.

### **Targeting Consumers in the EU**

15. The concept of targeting of a commercial activity carried on through a website was first explored by the CJEU in considering the jurisdiction of national courts of a member state over consumer contracts under article 15(1)(c) of Council Regulation (EC) No 44/2001 of 22 December 2000. It was necessary to consider for that purpose whether the relevant contract had been concluded with a person “who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities”.

16. In *Pammer v Reederei Karl Schlüter GmbH & Co KG; Hotel Alpenhof GesmbH v Heller* (Joined Cases C-585/08 and C-144/09) [2010] ECR I-12527; [2012] Bus LR 972, the Grand Chamber of the CJEU explained (at para 75) that in order for article 15(1)(c) to be applicable, the accused trader must have manifested an intention to establish commercial relations with consumers from the member state of the relevant consumer’s domicile. Clear expressions of an intention to solicit custom from that member state’s consumers were relevant but not necessary. It was for the national court to ascertain from the website of the trader or intermediary and the trader’s overall activity whether it envisaged doing business with these consumers.

17. The CJEU then gave a non-exhaustive list of the matters to which the national court might have regard in determining whether a trader’s activities on a website were directed to consumers in any particular member state:

“93. The following matters, the list of which is not exhaustive, are capable of constituting evidence from which it may be concluded that the trader’s activity is directed to the member state of the consumer’s domicile, namely the international nature of the activity, mention of itineraries from other member states for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the member state in which the trader is established with the possibility of making

and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other member states, use of a top-level domain name other than that of the member state in which the trader is established, and mention of an international clientele composed of customers domiciled in various member states. It is for the national courts to ascertain whether such evidence exists.”

18. Accessibility of the website was not enough, however, as the court went on to explain, at para 94:

“On the other hand, the mere accessibility of the trader's or the intermediary's website in the member state in which the consumer is domiciled is insufficient. The same is true of mention of an e-mail address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the member state in which the trader is established.”

19. The requirement that activities conducted from a foreign website be directed at consumers in a particular territory does not appear in terms in the EUTM Regulation but, by analogy, the concept was always likely to be useful and important in the trade mark context, and it was adopted for that purpose, albeit with some caution, by the CJEU in *L'Oréal SA v eBay International AG* (Case C-324/09) [EU:C2011:474] [2011] ECR I-6011; [2012] Bus LR 1369, at paras 61 to 65. The court accepted (at paras 61 and 62) that the rules of Council Regulation (EC) 40/94 of 20 December 1993 on the Community trade mark applied as soon as it was clear that an offer for sale of a trade-marked product located in a third state was targeted at consumers in the territory covered by the trade mark. The court also accepted that, were it otherwise, operators using electronic commerce by offering for sale in an on-line marketplace targeted at consumers in the EU, trade-marked goods located in a third state, which it was possible to view on the screen and to order through that marketplace would, so far as offers for sale of that kind were concerned, have no obligation to comply with EU intellectual property rules, and so have an impact on their effectiveness.

20. The court went on, at para 63, to emphasise that the use by a third party of signs identical with or similar to trade marks which proprietors of those trade marks may prevent includes the use of such signs in offers for sale and advertising. The effectiveness of those rules would be undermined if they were not to apply to the use of the signs in an internet offer for sale or advertisement targeted at consumers in the EU

merely because the third party behind that offer or advertisement was established in a third state, because the server of the internet site used by the third party was located in a third state, or because the product the subject of the offer or advertisement was located in a third state.

21. On the other hand, the court continued, at para 64, mere accessibility of the accused website from the territory covered by the trade mark was not enough to establish targeting of consumers in that territory. That would have the consequence that such websites and advertisements which, although obviously targeted solely at consumers in third states, would wrongly be subject to EU law.

22. It therefore fell to national courts to assess, case by case, whether there were any relevant factors on the basis of which it might be concluded that an offer for sale, displayed on an online marketplace accessible from the territory covered by the trade mark, was targeted at consumers in that territory. The court also explained, at para 65, that, where the offer for sale was accompanied by details of the geographic areas to which the seller was prepared to dispatch the product, this kind of detail would be particularly important in the assessment.

23. The same principles have since been applied by the CJEU by analogy in relation to copyright in *Criminal proceedings against Donner* (Case C-5/11) [EU:C:2012:370]; [2015] ECDR 22 and database rights in *Football Dataco Ltd v Sportradar GmbH* (Case C-173/11) [EU:C:2012:642]; [2013] FSR 4.

24. The application of these principles in the context of a trade mark dispute arising from the advertisement of goods on a foreign website was considered by the Court of Appeal in *Merck KGaA v Merck Sharp & Dohme Corpn* [2017] EWCA Civ 1834; [2018] ETMR 10. There the Court of Appeal (Kitchin LJ with whom Patten and Floyd LJJ agreed) reviewed the case law of the CJEU and the relevant domestic authorities and summarised the relevant principles by reference to an advertisement of goods in the following terms:

“167. First, in determining whether an advertisement of goods bearing a trade mark on the website of a foreign trader constitutes use of the trade mark in the UK, it is necessary to assess whether the advertisement is targeted at consumers in the UK and in that way constitutes use of the mark in relation to goods in the course of trade in the UK.

168. Secondly, the mere fact that a website is accessible from the UK is not a sufficient basis for concluding that an

advertisement displayed there is targeted at consumers in the UK.

169. Thirdly, the issue of targeting is to be considered objectively from the perspective of average consumers in the UK. The question is whether those average consumers would consider that the advertisement is targeted at them. Conversely, however, evidence that a trader does in fact intend to target consumers in the UK may be relevant in assessing whether its advertisement has that effect.

170. Fourthly, the court must carry out an evaluation of all the relevant circumstances. These may include any clear expressions of an intention to solicit custom in the UK by, for example, in the case of a website promoting trade-marked products, including the UK in a list or map of the geographic areas to which the trader is willing to dispatch its products. But a finding that an advertisement is directed at consumers in the UK does not depend upon there being any such clear evidence. The court may decide that an advertisement is directed at the UK in light of some of the non-exhaustive list of matters referred to by the Court of Justice in *Pammer* at paragraph [93]. Obviously the appearance and content of the website will be of particular significance, including whether it is possible to buy goods or services from it. However, the relevant circumstances may extend beyond the website itself and include, for example, the nature and size of the trader's business, the characteristics of the goods or services in issue and the number of visits made to the website by consumers in the UK."

25. The Court of Appeal revisited the issue of targeting in *Argos Ltd v Argos Systems Inc* [2018] EWCA Civ 2211; [2019] Bus LR 1728. There, Floyd LJ (with whom Lord Kitchin JSC and Sir Colin Rimer agreed) emphasised, at para 48, that the mere fact that a website is accessible from anywhere in the world, and therefore may attract occasional interest from consumers there when this is not intended, should not give rise to any liability. He continued, at paras 51 and 52:

"51. These passages [from *Merck*] make it clear that evidence of subjective intention is a relevant, and possibly (where the objective position is unclear or finely balanced) a determinative consideration in deciding whether the trader's activities, viewed objectively from the perspective of the

average consumer, are targeted at the UK. Subjective intention cannot, however, make a website or page (or part of a page) which is plainly, when objectively considered, not intended for the UK, into a page which is so intended.

52. It is important to note that the summary of principles in [*Merck*] relates to the example of an advertisement for goods, where the role of the average consumer will be to determine whether the advertisement is targeted at him or her. In each case it will be necessary to look at the acts which are asserted to be use of the trade mark, and to focus on whether those acts are targeted at the UK. The scope of the enquiry will vary from case to case, as will the factors which are relevant to its determination. To that extent, I am prepared to accept that the role of the average consumer on the issue of targeting may differ from case to case.”

26. We see no reason to qualify any part of these summaries and we would affirm them as correct, but four points were the subject of discussion before us and merit elaboration.

(i) The Appropriate Perspective

27. The first concerns the appropriate perspective. As we have seen, the question whether an advertisement or offer sale is targeted at consumers in the UK is to be considered from the perspective of the average consumer. This person is a familiar friend to those concerned with trade marks, and provides a way of capturing and explaining the reaction of typical consumers to the activity in issue. The characteristics of the average consumer have been explored and summarised in many cases, including *Interflora* [2015] Bus LR 492, particularly at paras 107–130; and *Comic Enterprises Ltd v Twentieth Century Fox Film Corpn* [2016] EWCA Civ 41; [2016] ETMR 22; [2016] FSR 30. This average consumer is reasonably well informed and reasonably observant but does not call for the application of a statistical test; nor does this person represent a statistical average. We will return to the average consumer and what must be shown to establish infringement in considering some of the other issues to which this appeal gives rise.

(ii) The Question to be Answered

28. The question in this context is, in substance, whether the average consumer would consider the website to be directed at him or her. In order to answer it, the judge

must evaluate or, as it is sometimes put, carry out a multifactorial assessment of all the relevant circumstances.

29. These circumstances will include the appearance of the website, how it responds to the presence of the consumer, whether it is possible actually to buy goods and have them delivered, and how that is done. They may also include a range of other facts and matters such as (but by no means limited to) those referred to by the Court of Appeal in *Merck* at para 170, all of which may assist the court to assess the reaction of the average consumer and so answer the question whether the accused advertisements are targeted at consumers in the UK.

(iii) The Role of Intention

30. The third point concerns the role of the subjective intention of the foreign trader. Here we would emphasise that the task of the court is to decide whether the foreign trader's activities, viewed objectively, from the perspective of the average consumer, are targeted at such consumers in the UK. It is therefore not necessary to establish that the foreign trader had the subjective intention of targeting consumers in the UK. If, however, such a subjective intention is established, then, as it was put by counsel for the Lifestyle parties, it can ease the path to a finding that the foreign trader's activities, viewed objectively from the perspective of the average consumer, were and are targeted at consumers in the UK. There is no inconsistency or difficulty here: as the Court of Appeal explained in *Merck*, it simply reflects the reality that a trader may often be expected to have some understanding of the market it intends to penetrate, and it may not be difficult to infer that it has achieved or is likely to achieve what it set out to do. Accordingly, and as we think Amazon was disposed to accept, a subjective intention to target may properly be taken into account to the extent that it is relevant to the objective assessment the court must carry out.

(iv) No Single Meaning

31. The fourth point really follows from the others. The adoption here of the average consumer does not require the court to attempt to identify a "single meaning" of the activity in issue—it is enough that a significant proportion of the relevant consumers (that is to say, those who are reasonably well informed and circumspect) would consider the website to be directed and targeted at them.

### **Non-Targeted Sales to Consumers in the EU (the *Blomqvist* Issue)**

32. As noted in our introduction, the second concept by which EU jurisprudence has come to deal with internet sales of trade-marked goods is sale of the goods to consumers

in the EU. It operates entirely independently of targeting. Lifestyle contends that Amazon has infringed its registered trade marks by selling goods through the USA website to consumers in the UK, and delivering them to those consumers, even if the goods were not the subject, prior to the sale, of an offer for sale or an advertisement targeted at those consumers.

33. For its part, Amazon accepts that if and in so far as any sales were preceded by an offer or advertisement targeted at consumers in the UK, then they did amount to an infringement. But it challenges that outcome if, as it contends, there was no such targeting. As it was put by its counsel, the issue here is whether there can be infringement by sale and supply from a foreign website without targeting.

34. Here it is to be noted that the relevant sales by Amazon took place in the US and title to the goods and the risk of loss passed to the purchaser on delivery to the carrier in the US. Further, the purchasers of the goods acted in a purely personal capacity and not in the course of trade.

35. The concept of an infringing sale to a consumer in the UK from an overseas internet site rests on the decision of the CJEU in *Blomqvist v Rolex SA* (Case C-98/13) [EU:C:2014:55] [2014] Bus LR 356. The basic facts of the case were relatively straightforward. In 2010, Mr Blomqvist, a resident of Denmark, purchased a watch described as a Rolex from an online shop (i.e. internet site) in China. The order was placed and paid for through an English language website. The seller sent the watch from Hong Kong by post. It was inspected by customs authorities on arrival in Denmark, and those authorities, suspecting that it was a counterfeit, suspended customs clearance for it and informed Mr Blomqvist and Rolex accordingly. Following the procedure laid down by Council Regulation (EC) 1383/2003/EC of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods (“the Customs Regulation”), and after confirming that the watch was indeed a counterfeit, Rolex sought Mr Blomqvist’s consent to its destruction. Mr Blomqvist resisted, saying that he had bought the watch legally for his personal use. Accordingly, Rolex applied to the commercial court for an order that Mr Blomqvist allow the destruction of the watch without compensation. The court allowed that application.

36. On appeal by Mr Blomqvist to the Supreme Court of Denmark, various questions were referred to the CJEU for a preliminary ruling. They included questions concerning the proper interpretation of article 9 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (“the 2009 Regulation”), the predecessor to the EUTM Regulation, and the relevant provisions of the corresponding directive, article 5(1) and (3) of Council Directive 2008/95/EC of 22 October 2008 to approximate the laws of member states relating to trade marks (“the 2008 Directive”). The Danish Supreme Court noted (and apparently accepted) that Mr Blomqvist had bought the

watch for his personal use and so had not, himself, infringed any trade mark rights; but this raised the question whether the seller had infringed trade mark law in Denmark and, in particular (and so far as relevant to this appeal), whether there had been use in the course of trade in Denmark by the seller within the meaning of the 2009 Regulation and the 2008 Directive. The opinion of the Advocate General was not sought.

37. In answering the referred questions, the CJEU explained, so far as relevant to this appeal, first, that the Customs Regulation had not introduced any new criterion for the purpose of establishing an infringement of intellectual property rights. An infringement could be relied on to justify action by the customs authorities only if the sale of the goods was liable to affect the right conferred under the 2009 Regulation and the 2008 Directive (para 25). Further, the proprietor of a registered trade mark is entitled to prohibit a third party from using without the proprietor's consent a sign identical to the trade mark in the course of trade, in relation to goods or services which are identical with or similar to those for which the mark is registered, and in such a way as to affect or be liable to affect any of the functions of the trade mark ([2014] Bus LR 356, para 27).

38. Secondly, EU law required that the sale be considered in the territory of the member state to be a form of distribution to the public within the meaning of article 4(1) of Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, or use in the course of trade within the meaning of the 2009 Regulation and the 2008 Directive. Such distribution to the public must be considered proven where a contract of sale and dispatch had been concluded (paras 28 and 29).

39. Thirdly, it was not disputed that Rolex was the holder in Denmark of the copyright and trade mark rights which it claimed, and that the watch in issue was counterfeit and constituted pirated goods within the meaning of the Customs Regulation. Nor was it disputed that Rolex would have been entitled to claim infringement of its rights if the goods had been offered for sale by a trader established in that member state since, on the occasion of a sale, made for commercial purposes, use would have been made, on distribution to the public, of its rights in the course of trade (para 30). The question then was whether a holder of intellectual property rights, such as Rolex, might claim the same protection for its rights where, as in the main proceedings, the goods in issue were sold from an online website in a non-member country on whose territory that protection was not applicable (para 30).

40. The court emphasised that the mere fact that a website was accessible from the territory covered by the trade mark was not a sufficient reason for concluding that the offers for sale displayed there were targeted at consumers in that territory ([2014] Bus LR 356, para 31).

41. The court had held in an earlier decision, however, that the rights protected may be infringed where, even before their arrival in the territory covered by that protection, goods coming from non-member states were the subject of a commercial act directed at consumers in that territory, such as a sale, offer for sale or advertisement (*Blomqvist*, para 32; and see *Koninklijke Philips Electronics NV v Lucheng Meijing Industrial Co Ltd; Nokia Corpn v Revenue and Customs Commissioners* (Joined Cases C-446/09 and C-495/09) [EU:C:2011:796] [2011] ECR I-12435; [2012] Bus LR 1850).

42. It followed, as the court explained, at para 33, that goods coming from a non-member state which were imitations of goods protected in the EU by a trade mark right, or copies of goods protected in the EU by copyright (or a related right or a design) could be classified as “counterfeit goods” or “pirated goods” where “it is proven that they are intended to be put on sale” in the EU or offered for sale or advertised to consumers in the EU. The court continued that proof would be provided where it turned out that the goods had been sold to a customer in the EU or offered for sale or advertised to consumers in the EU.

43. In *Blomqvist* the goods plainly had been sold to Mr Blomqvist, a customer in the EU, and, so the court reasoned, this could not have the effect of depriving the holder of an intellectual property right over the goods of the protection given by the Customs Regulation, without it being necessary to verify whether the goods were, in addition, prior to that sale, the subject of an offer for sale or advertising targeting EU consumers (para 34).

44. The court then answered the referred questions in this way (para 35 and operative part). The Customs Regulation must be interpreted as meaning that:

“... the holder of an intellectual property right over goods sold to a person residing in the territory of a member state through an online sales website in a non-member country enjoys the protection afforded to that holder by [the Customs Regulation] at the time when those goods enter the territory of that member state merely by virtue of the acquisition of those goods. It is not necessary, in addition, for the goods at issue to have been the subject, prior to the sale, of an offer for sale or advertising targeting consumers of that state.”

45. The outcome for the parties was clear: Rolex enjoyed the protection afforded by the Customs Regulation at the time the counterfeit Rolex watch entered the territory of Denmark by virtue of Mr Blomqvist’s acquisition of it. It was not necessary for that watch to have been the subject of an offer or advertisement targeted at consumers in Denmark.

## The Correct Approach on Appeal

46. This is another important matter, and it is appropriate to summarise the correct approach at this stage. A finding that an activity is or is not targeted at consumers in the UK necessarily involves an evaluation by the judge of a range of different facts and matters. It requires, in other words, a multifactorial assessment of the documents, the evidence and the submissions made by the parties. The evaluation is also one which, when made in that way, the trial judge is peculiarly well placed to carry out.

47. Conversely, an appeal court is inevitably at a disadvantage, as Lord Hoffmann explained in *Biogen Inc v Medeva plc* [1997] RPC 1 at 4, and so, where the application of a legal standard such as negligence or obviousness involves no question of principle, but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation.

48. We consider that the position was well summarised by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29; [2014] ETMR 26 in these terms at para 114:

“Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] R.P.C. 1; *Piglowska v Piglowski* [1999] 1 W.L.R. 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 W.L.R. 1325; *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 W.L.R. 1911 and, most recently and comprehensively, *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include:

- i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
- ii) The trial is not a dress rehearsal. It is the first and last night of the show.

- iii) Duplication of the trial judge’s role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
  
- iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
  
- v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
  
- vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.”

49. That does not, however, mean the appeal court is powerless to intervene where the judge has fallen into error in arriving at an evaluative decision such as whether an activity was or was not targeted at a particular territory. It may be possible to establish that the judge was plainly wrong or that there has been a significant error of principle; but the circumstances in which an effective challenge may be mounted to an evaluative decision are not limited to such cases. Many of the important authorities in this area were reviewed by the Court of Appeal in *In re Sprintroom Ltd* [2019] EWCA Civ 932; [2019] BCC 1031, at paras 72–76. There, in a judgment to which all members of the court (McCombe LJ, Leggatt LJ and Rose LJ) contributed, the court concluded, at para 76, in terms with which we agree, that on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge’s treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion.

50. On the other hand, it is equally clear that, for the decision to be “wrong” under CPR 52.21(3), it is not enough to show, without more, that the appellate court might have arrived at a different evaluation.

51. We will return to the application of these principles and whether the court had any proper basis to interfere with the decision of the trial judge in this case in due course.

## The Decisions of the Courts Below

52. In a judgment handed down in January 2021 following a five-day trial Green J rejected Lifestyle's claims ([2021] ETMR 27). After a summary of the relevant law about targeting which we would not criticise he concluded that, weighing all relevant factors in the balance, the average consumer would conclude that Amazon's USA website was targeted at consumers in the USA and not the UK. He relied in particular upon the facts that (i) the USA website advised incoming consumers from the UK about the availability of the UK website, (ii) that this would for UK consumers produce lower delivery times and prices than the USA website, (iii) that there were statistically very few sales of the US branded goods to the UK, and (iv) that Lifestyle's purpose in bringing the claim was not so much to prevent sales to the UK but to prevent UK consumers who strayed onto the USA website learning of the low prices of the US branded goods, thereby downgrading the value of the marks.

53. The judge also rejected the alternative claim based upon the *Blomqvist* doctrine. In his view the sales of US branded goods from the USA website were not sales to consumers in the UK or EU. The sales were completed in accordance with their terms in the USA. He regarded the *Blomqvist* case as having turned on an assumption by the CJEU that the sale of the Rolex must have taken place in Denmark, or that in some way the watch was intended to be put on sale within the EU.

54. In a trenchant judgment with which the Master of the Rolls and Snowden LJ agreed, Arnold LJ allowed Lifestyle's appeal ([2023] Bus LR 1010). He concluded that the judge's analysis of the targeting issue had been vitiated by a number of errors, and that upon a re-analysis of that issue, it was plain on the face of the relevant electronic pages that by its USA website Amazon targeted the US branded goods at consumers in the UK. He also held that the sales of US branded goods from the USA website to consumers in the UK infringed Lifestyle's UK and EU marks under the *Blomqvist* doctrine.

55. The Court of Appeal interpreted the decision in *Blomqvist* as saying that where a sale of goods bearing the relevant sign is made through a foreign website to a consumer in the UK or EU, the sale constitutes use of the sign in the course of trade in the UK and EU by the foreign trader, and that is so even if the sale takes place abroad and even if the advertisements and offers for sale on the website do not target the UK or the EU.

56. On this further appeal, Amazon argues that the effect of the decision of the Court of Appeal is that the English court's jurisdiction catches acts undertaken by a foreign trader in a foreign country where there is no targeting, but where a UK consumer who chooses to visit that website of that trader abroad, buys goods and imports them for his

or her personal and private use. That, says Amazon, goes too far and was not the subject of a reference to or finding of the CJEU.

57. Lifestyle, on the other hand, argues that the decision of the Court of Appeal is plainly correct and invites us to dismiss this aspect of the appeal even on the assumption, (which it does not, of course, accept) that there was no targeting of consumers in the UK or the EU. The CJEU has, it continues, made clear that the sale and supply of goods by Amazon to a consumer in the UK does constitute an infringement irrespective of whether the sale was preceded by an advertisement or offer for sale targeted and directed at consumers in this jurisdiction.

### **Applying the Law to the Facts**

58. The only two of the classic *Interflora* conditions for trade mark infringement in issue in these proceedings are (i) and (ii) which, in combination, require the claimant to show that there has been a use of the mark within the territory in the course of trade. Literally speaking, there has been no such use. Amazon advertised the US branded goods on its USA website and sold them, even to consumers based in the EU, upon terms and conditions of sale under which title and risk passed to the consumer upon receipt of the goods from Amazon by the carrier in the USA. Although the consumers never left their member states, the goods only reached the EU consumers' front doors in member states because, as a matter of contract, the consumers imported them, albeit using the services of a carrier arranged by Amazon on their behalf in doing so, for which consumers paid Amazon. Michael Edenborough KC, counsel for Lifestyle, confirmed that there is no claim of importation by Amazon pursued on this appeal. In importing the goods (if that is what they did) the consumers were not doing so in the course of trade. Importation by Amazon was a point which, if successful on targeting or infringing sale, Lifestyle did not press the Court of Appeal to decide.

59. Rather, Lifestyle as proprietor of the UK/EU Marks relies upon each of the two types of deemed use in the EU by which EU jurisprudence has sought to grapple with internet selling, namely (i) targeting consumers in the EU and (ii) sale "to" consumers in the EU under the *Blomqvist* doctrine. It is convenient to look at targeting first, both because instances of actual sale are now only of historical concern and because the *Blomqvist* doctrine has been declared expressly in this case to be concerned only with non-targeted sales. Furthermore, it is conceded by Amazon that a sale to an EU-based consumer induced by targeted advertising which infringes the UK/EU marks is itself an infringing sale.

## Targeting Consumers in the EU

60. The requirement to consider all relevant facts and circumstances, but predominantly from the perspective of the average consumer, calls for a close, contextual examination of the way in which Amazon's USA website presents itself when accessed by a consumer situated in the EU, including the UK as a (then) member state within the EU. For present purposes the evidence deployed at the trial and then on appeal concentrated on alleged targeting of UK consumers rather than those in the EU, for reasons which will become apparent. At the heart of the necessary examination are the website pages which actually present or refer to the US branded goods, but those pages need to be seen in the context of the whole of the consumer's experience of the USA website. Furthermore, the factual conclusions as to how the US branded goods were actually presented have to be extrapolated in part from the way in which sample website pages presented goods bearing other marks. This was because, by the time when the evidence was being gathered, Amazon had ceased presenting the US branded goods on its USA website. But it is common ground that this was a legitimate extrapolation, because the US branded goods were displayed by Amazon in the same way as other similar branded goods.

61. So the examination begins with an assumption that the consumer has found their way to the first or "landing" page of the USA website. Various slightly different versions of this landing page were included in the trial bundle, all generated by Amazon's website software as the result of a visit to the USA website from a UK IP address at the relevant time. They all show, just beneath the Amazon logo at the top left corner of the page, the message "Deliver to **United Kingdom**". Clicking on or hovering over that reveals a pop-up box saying "**We ship internationally.** We're showing you items that ship to **United Kingdom**. To see items that ship to a different country, change your delivery address. Additional language and currency settings are available." There are then boxes offering "Don't Change" and "Change Address" as alternative choices. The "Change Address" option comes second, but is coloured yellow.

62. All versions of the landing page contain a box slightly lower down saying "You are on Amazon.com. You can also shop on Amazon UK for millions of products with fast local delivery. [*Then, in blue.*] Click here to go to Amazon.co.uk". Behind that message, in much larger print is a slideshow. One of its slides is a coloured section showing an aeroplane, a map of the world and a message saying "Welcome to Amazon.com. We ship over 45 million products around the world". Another slide (accessible by a sideways click from the one just described) contains the message "Click here to shop in your local currency" against a background displaying the signs for a number of national currencies, including euros and sterling. If that option is not engaged, prices on subsequent pages are shown in US dollars. If it is engaged, prices will be shown in the chosen currency.

63. Consumers can then roam through Amazon's online store or search for specific products by name. Typical pages thus revealed will display a number of products matching the search request, with a picture of the product, its name, price, customer ratings and (sometimes) limited availability. A consumer who has not changed his or her delivery address from the initial UK IP address in response to the choice in the pop-up box will still see the "Deliver to **United Kingdom**" message in the top left corner of the products page, and will be told under each displayed product whether it is available for delivery in the UK, by the presence or absence of the message "Ships to United Kingdom".

64. Clicking on a particular product available for shipping to the UK will trigger a series of pages where the consumer can view a larger picture of the product, add it to their virtual shopping cart and then complete various details about their specific delivery address, typically by logging in to their account with Amazon (if they have one) or opening a new account (if they do not). The virtual cart itself may be filled with several products, all deliverable to the UK, and the cart viewing page will continue to display the "Deliver to **United Kingdom**" message at the top left corner.

65. The consumer will eventually reach the "Review your order" page, which Amazon's software will have filled in by adding details of the consumer's name, UK shipping address and billing address, as well as the price for all the goods to be ordered, and details of a guaranteed delivery date and an option to choose between the guaranteed or accelerated delivery dates, with the prices chargeable for each. The prices will be displayed in whatever currency the consumer has chosen, with an up to date exchange rate with US dollars if (for example) sterling has been chosen. The contract of sale and delivery will be completed by the consumer clicking on the "Place your order" button at the top right hand corner of the page. By clicking on that button, a text below it states that "By placing your order, you agree to Amazon's privacy notice and conditions of use".

66. There are various earlier stages in the process at which the consumer may gain access to Amazon's conditions of use, although the consumer is not required to acknowledge that they have read them. Whether the average consumer would read them seems to us very doubtful but, if they did, they would reveal that the contract for sale and delivery of the goods is to be concluded on the basis that the sale takes place and title and risk pass upon delivery by Amazon to the carrier in the USA, and that Amazon's chosen carrier effects delivery to the buyer's UK address as the delivery agent of the buyer.

67. The point at which the consumer clicks on the "Place your order" button marks the end of the process of advertisement and offering for sale of the US branded goods by Amazon, within which any targeting of the UK must be found, if Amazon is to be held liable for infringement by targeting. It is of course the case that goods (including

the US branded goods) arrive in the UK as the inevitable result of the process of marketing and sale which we have just described. But the analysis in the *Blomqvist* case of a non-targeted sale under which the goods reached Denmark shows that, in EU trade mark law, targeting a member state is not a conclusion that flows inexorably from delivery to that member state. Accordingly, although it cannot be entirely ruled out as a relevant factor, we would not be inclined to treat the delivery of the goods to the UK, of itself, as weighty evidence that the advertisement and offers for sale were targeted at consumers there. Whether or not there has been targeting in the relevant sense depends upon what is done up to the moment of the conclusion of the contract of sale, not thereafter.

68. The judge reviewed a range of further factors in his analysis of whether the advertisement and offers for sale of US branded goods were targeted at consumers in the UK. As will appear, we do not, subject to one exception criticise him for taking them into account. They included the likelihood that the purchase of goods on the USA website would attract higher delivery prices (including import charges) and longer delivery times than the purchase of the same goods (if available) on the UK website, and that there had been very few sales of the US branded goods to the UK as compared with the USA. He also found (and this is the exception) to be “very revealing” (para 176) his perception that Lifestyle’s motive in bringing these proceedings was not simply or even primarily to prevent sales into the UK, but rather to ensure if possible that the US branded goods would not be visible to UK consumers on the USA website at the lower prices at which they were pitched in the US market.

69. It is convenient at this stage to set out our own conclusion about whether the evidence about the relevant factors discloses targeting by Amazon of the US branded goods at consumers in the UK on its USA website. We do so fully cognisant of the fact that, where the trial judge has conducted a multifactorial analysis of this kind, his conclusion is not vulnerable to being overturned by an appellate court merely because it would have reached a different conclusion. As already explained, the judge must be shown to have made some error of law or logic in his analysis, to have wrongly included or (as the case may be) excluded some relevant factor, or just gone “plainly wrong”. Where the Court of Appeal has properly conducted the multifactorial analysis afresh then a similar constraint affects this court, albeit lessened because the Court of Appeal shares with this court the lack of the advantages of time, immersion in the detail and (sometimes) seeing the witnesses enjoyed by the trial judge. So, the questions we need to answer are: (i) was the Court of Appeal entitled to reject the judge’s conclusion and consider the matter afresh and if so, (ii) is this court entitled to do so again, because of errors by the Court of Appeal, and if so, (iii) what is our own conclusion on the underlying question? As will appear, we have concluded that the answer to both questions (i) and (ii) is “yes”, but it is much easier to explain why against the backdrop of our own conclusions at stage (iii).

70. In our view, balancing the relevant facts about Amazon’s marketing and offer for sale of the US branded goods on its USA website does show with reasonable clarity that it was targeting the UK as a territory, ie targeting consumers accessing its USA website from the UK. This is because the factors favouring that conclusion greatly outweigh the factors which might be said to point in the opposite direction. In outline, viewed from the perspective of the average UK consumer, they are from start to finish in their encounter with the USA website being told that they will be shown goods (including the US branded goods) available for delivery to them in the UK, and that those goods will indeed be delivered there if they choose to make an online purchase of them from the USA website.

71. The pointers in that direction begin with the “Deliver to **United Kingdom**” message on the landing page, repeated on almost all subsequent pages, including those which first display the US branded goods. That is a message which Amazon’s software deliberately (ie by design) inserts into those pages wherever the website is visited by a consumer with a UK IP address, unless and until the consumer changes their delivery address by using the “Change Address” option in the pop-up box. This is an indication that Amazon has thought about whether it is seeking sales to UK consumers for delivery to the UK and decided that it is. The fact that this message is generated automatically by every enquiry from a UK IP address is neither here nor there. That piece of clever automation has been inserted by design. It is also nothing to the point that a Brazilian consumer would see a message saying “Deliver to Brazil”. It just shows, subject to other indicators, that the goods so designated on the USA website are targeted also at consumers in Brazil, as well as at the UK. In any event, unless they use the “Change Address” button, the average UK consumer only sees the “Deliver to **United Kingdom**” message.

72. Even more powerful an indicator of targeting consumers in the UK is the content of the pop-up box itself. That tells the UK consumer that they are about to be shown precisely those goods which are available for delivery to the UK. It says: “We’re showing you items that ship to **United Kingdom**”. The subsequent product pages make that good, not by excluding all other goods but by labelling precisely which of the goods displayed are so available. Again, it is irrelevant that this happens automatically, where the USA website is visited by a consumer with a UK IP address. It does so, extremely thoroughly across the entire product range, by design. In this context it must be assumed that the US branded goods were designated as items that ship to the UK. If they were not, then the case for targeting would of course fall flat on its face.

73. As the Court of Appeal found, the “Review your order” page contains numerous pointers to targeting consumers in the UK. It constitutes an offer for sale of the relevant goods to a consumer at a UK address, with UK specific delivery times and prices, the ability to pay in sterling coupled with an exchange rate. Contrary to Amazon’s case, these details were not merely the reprinting of information already supplied by the consumer, although of course the delivery address was. The delivery dates, prices and

exchange rate were calculated by Amazon specifically to populate the details of an offer to supply and deliver the goods to the UK.

74. Pointers which might be said to look the other way begin with the message on the landing page about using the UK website. But this is expressed only as an option. It clearly contemplates that the consumer may wish to continue on the USA website, and none of the subsequent pages repeat that message. It is not clear from that message that goods displayed on the USA website will also be available for purchase on the UK website, and the average consumer who continued on the USA website would think it odd for Amazon to explain in relation to every product displayed on its product pages whether it was or was not available for delivery to the UK, if consumers in the UK were not being targeted.

75. The fact that the default prices displayed on the USA website to UK consumers were in US dollars might be said to be a contrary indicator. But it is a very weak one because of the prominently displayed option to change currency on the landing page, with sterling expressly included as an option. Such a change would automatically (but again by design) alter all the dollar prices on the product pages to sterling.

76. There is more force in the judge's finding that, generally speaking, delivery times and charges (including import charges) for UK consumers were likely to be lower on the UK website than on the USA website. But we do not think that this factor retains real strength under scrutiny. First, this would only be apparent as a generalisation to a consumer who took the time and trouble to make multiple comparisons of the same goods on both websites. The average consumer is not a statistician or a litigator. Secondly the point has no force at all in relation to products only available on the USA website. Thirdly the generalisation does not mean that substantial differentials in times and prices would apply to each individual product displayed on both websites, and the average consumer might only want to buy one product, or just a very few. But finally, in relation to a product marked as available for delivery in the UK on the USA website, why should the average consumer think that Amazon did not wish to achieve UK sales of that product from that website, even if more expensive (after delivery charges) than the same product on the UK website, if that is how the consumer wished to buy them?

77. This point must also be viewed in the light of the concession made by Amazon that the display of the US branded goods on the UK website would infringe Lifestyle's trade marks, while it maintains its denial that display on the USA website would do so. This creates a scenario under which (assuming that Amazon complies with its own perception of its legal obligations), the only Amazon website where the US branded goods could be obtained is the USA website. At that point the comparison with the UK website must fall away. Amazon cannot be heard to say that the proffered option to use the UK website is a cheaper and therefore plainly recommended route to the purchase of the US branded goods.

78. We would place very little weight on the statistical fact that Amazon’s UK sales of the US branded goods were a very small fraction of its USA sales of the same goods. First, that fact would be entirely invisible to the average consumer. Secondly, the degree of relative success is not a reliable pointer to targeting. The question is whether the average consumer would think that Amazon was seeking to sell the US branded goods to consumers in the UK, not how successful that seeking had been.

79. Finally, we do not consider that Lifestyle’s motive in bringing these proceedings is even a relevant factor to be taken into account in this analysis. The trade mark proprietor either is or is not entitled to complain that a particular advertisement of a product amounts to an infringement of the mark. If it is, then he may have certain remedies in relation to that infringement, including an injunction against repetition. The fact that he may have some commercial purpose in seeking that remedy other than merely the prevention of infringing sales within the protected territory says nothing about whether, in the eyes of the average consumer, the alleged infringer was targeting the UK with its advertisement.

80. For those reasons, if free or compelled to conduct our own analysis, we would conclude that Amazon did target the UK as a destination for the US branded goods by its display of them on its USA website, provided of course that each product thus displayed was marked as available for shipment to the UK. That is, in our judgment, the view which an average consumer would clearly form as the result of their experience of the USA website, right through from the landing page to the moment of contract by clicking the “Place your order in GBP” button on the “Review your order” page. Nothing in the possible contra-indicators comes near to displacing that conclusion.

### **Errors on Targeting by the Courts Below**

(i) The Judge

81. At paras 68 to 73 of the judgment of Arnold LJ the Court of Appeal delivered an excoriating critique of the analysis of the judge. The following six supposed errors were identified:

(i) The judge focussed too much on the USA website as a whole, rather than on an analysis of each of the acts of targeting complained of.

(ii) The judge thought that because the USA website was primarily directed at US consumers, it followed that the relevant web pages were not targeted at UK consumers.

(iii) The judge's use (at para 124) of "taking deliberate aim" as a way of describing targeting displayed a mistaken focus upon Amazon's subjective intent.

(iv) The judge wrongly accepted, without evidence of a decision by Amazon to that effect, that the UK-oriented aspects of the web pages were merely designed to make the use of the USA website easy and painless for a (non-targeted) UK consumer.

(v) The judge failed to discount the relevance of lower shipping costs on the UK website because there was no evidence that this was not balanced out by price differentials, and because consumers would not in any event be likely to be aware of them.

(vi) The judge wrongly treated as relevant the evidence about the subjective motives of the Lifestyle companies in bringing these claims.

82. Taking those criticisms in turn:

(i) We do not consider that the judge was wrong to review the USA website as a whole. It is a necessary part of the appraisal of the targeting issue that the combined effects of a marketing website upon the perceptions of the average consumer are considered in the aggregate. But the judge did fail to focus in sufficient detail, stage by stage, upon the specific elements of the successive pages in the USA website as they would reveal themselves to the average consumer on their journey from landing to a decision to buy, before making his assessment of its overall effect.

(ii) It was an error by the judge to treat the fact that a website is primarily targeted at one territory as a weighty factor towards a conclusion that it is not targeted at one or more, or indeed many, other territories. This is especially the case where, as here, the USA website was designed so as to mould itself automatically to an incoming consumer's requirements by reference to the location of the consumer's IP address. The evidence does not reveal for how many different territories that moulding was built in, but it is sufficient for the present purpose that it was for the UK.

(iii) We do not regard the "taking deliberate aim" phrase as revealing an inappropriate focus on Amazon's subjective intent. It is a reasonable way of describing the effect of a targeted website on the perception of the average consumer. The consumer is treated as asking: "is this advertisement deliberately

aimed at British people, among others?” But in our view the judge was plainly wrong to answer that hypothetical question in the negative. For example, the pop-up box was plainly telling the consumer that they would find in the following pages those products available for shipment to the UK, as indeed they did.

(iv) We think that this “making it painless and easy” (judge, para 171) point raised a false hypothesis. It is a natural part of targeting consumers in a particular territory that the trader takes trouble to configure the website in as user-friendly way as possible for consumers in that territory. This is what the USA website did, in particular in highlighting all the goods available for shipment to the UK, and in giving the consumer an option to convert all US dollar prices to sterling, at a current exchange rate.

(v) We have already explained why, albeit for slightly different reasons than those of the Court of Appeal, we think that the judge’s heavy emphasis on typically higher delivery charges and longer delivery times, by comparison with the UK website, was a mistake. This is not just a matter of weight, where an appellate court will not usually intervene. The judge’s analysis of the point was seriously flawed.

(vi) It will already be apparent that we do not think that the subjective motivation of the Lifestyle companies for bringing these claims is of any relevance. The judge was wrong to bring it into account at all, and all the more wrong to give it the emphasis that he did.

83. Standing back from the detail, this is one of those perhaps unusual cases where, for whatever detailed reasons, the judge made material errors in the way he arrived at his evaluative conclusion and also got the answer wrong. As is well known, a judge does not always express in writing every factor which influences his ultimate conclusion on a multifactorial issue. Sometimes it is clear that a judge has gone wrong because, without knowing precisely how he got there, his conclusion was just not an available answer to the issue, once re-considered by reference to all the relevant factors. This is in our view one of those cases. We consider that an affirmative answer to the targeting issue was the only one available.

(ii) The Court of Appeal

84. In sharp contrast it will be apparent that in our judgment, for whatever precise reasons, the Court of Appeal got the answer right on targeting. The outcome of this appeal will therefore be the same whether we conclude that the Court of Appeal were entitled to reach the conclusion which they did, or say that they reached the right

conclusion, but using reasoning which is open to challenge. It was of course a necessary part of Amazon's case that the Court of Appeal did go wrong. Out of respect for the cogent submissions on the point we will therefore briefly address that issue.

85. Amazon's criticisms of the Court of Appeal's approach were in summary as follows:

(i) It focussed too narrowly on particular elements of only some of the pages on the USA website, to the exclusion of a review either of the effect of the website as a whole, or of a balanced weighing of all the factors identified by the judge.

(ii) It dismissed factors external to the USA website, such as the low volumes of sales, the higher delivery times and delivery (including import) charges, as if they were of no weight at all.

(iii) It worked backwards through the USA website, starting at the "review your order" page, and concentrated upon UK related details which had been supplied by the consumer, rather than material inputted by Amazon. It should have conducted a journey through the USA website from start to finish, as we have done in our own evaluation of the targeting issue.

(iv) Overall it applied such a low threshold to the requirement for targeting that it would be satisfied whenever a UK consumer purchased goods online from a non-UK website for delivery in the UK.

86. Taking those points in turn:

(i) It is certainly true that the Court of Appeal did appear to conduct a sequential but essentially self-contained review of a small number of specific pages in the USA website, with a view to deciding whether each, viewed separately but in context of the website as a whole, amounted to an act of targeting. It did so because, we think, they regarded a targeting conclusion as so obvious in relation to the "Review your Order" page, that the outcome could be concluded against Amazon by reference to that page alone. We do think that in many cases this will be an erroneous approach, not least because it may fail to reveal targeting as the effect of an online website as a whole, merely because no single page is so to be viewed on its own. Putting it shortly, it is an approach which may miss the wood for the trees.

(ii) We would not criticise the Court of Appeal for largely dismissing the evidence about delivery times and charges as pointing away from targeting. We have reached a similar conclusion, for slightly different reasons, albeit with less firmness than did the Court of Appeal.

(iii) The Court of Appeal did work backwards rather than forwards through the USA website, and their list of factors pointing towards targeting in the “Review your Order” page did not distinguish between those supplied by the consumer and those inputted by Amazon. The result was that it did not really address (as we have done) Amazon’s point that targeting should not be established merely because an online seller repeats order details supplied by the consumer. We would hesitate before concluding that a backwards journey through an online sales website is never appropriate, but we have certainly found that doing the review forwards rather than backwards better reveals what the average consumer is likely to see and conclude.

(iv) There is some force in this criticism about the low threshold applied by the Court of Appeal. It is hard to imagine any online sales website (for delivery of goods to the UK from abroad) having a “Review your Order” page significantly different from that used by Amazon on its USA website. Our conclusion that there was targeting is based not simply upon this page but upon the combined effect of all those aspects of the USA website that show how it is specifically designed to offer goods to a UK consumer, once its antennae pick up the fact that an incoming consumer enquiry is coming from a consumer with an IP address in the UK. To that extent we do consider that the approach of the Court of Appeal was too simplistic, even though it did not, in the event, lead it to the wrong conclusion.

87. Those are the reasons why we have decided that we should conduct the appraisal of the targeting afresh, rather than merely decide that the Court of Appeal was entitled to reach the conclusion which it did, and leave the matter there.

### **Non-Targeted Sales to Consumers in the UK (the *Blomqvist* Issue)**

88. We have already explained why we have addressed the targeting issue in detail first. Our conclusion that there was targeting of UK consumers on the USA website in relation to the US branded goods, coupled with Amazon’s concession that if and in so far as any sales were preceded by an offer or advertisement targeted at consumers in the UK, then the sales did amount to an infringement, means that it is unnecessary to consider the *Blomqvist* issue further.

89. Accordingly, we decline to decide this point, and with some relief. This is first because there is an air of unreality about addressing a doctrine about non-targeted sales in the context of our conclusion that, on the facts of this case, the relevant sales were targeted. Secondly, we are concerned that there are uncertainties about the underlying facts of the *Blomqvist* case [2014] Bus LR 356 which make it difficult to be sure about the extent of the ambit of the doctrine. There is no Advocate General's opinion, and the judgment of the Second Chamber of the Court of Justice does not reveal what were the terms of the contract for the sale by the Chinese manufacturer (or seller) of the fake watch and the buyer, Mr Blomqvist. We do not know when or where title or risk passed in relation to the goods, or who (as between seller, carrier and Mr Blomqvist) was to be regarded as the importer of the watch into Denmark. A decision about a matter of pure EU law, based upon facts including a sale contract in uncertain terms would be unlikely to do much for the relevant jurisprudence.

## **Conclusion**

90. For the reasons given, we would therefore dismiss this appeal. It follows in the ordinary course that the injunction granted and order relating to an enquiry made by the Court of Appeal must remain in place, the parties not having suggested the position should be otherwise were we to dismiss the appeal on the grounds for which permission to appeal was given. In these circumstances no issue arises before this court as to whether the injunction and related order are in an appropriate form having regard to the changes made to the jurisdiction of the UK courts, following the end of the implementation period or IP Completion Day, and having regard to the comparable trade marks to which each of the EU Marks gave rise in the UK from that day. We have not been addressed on this issue and we express no view on it in this appeal.