

Neutral Citation Number: [2015] EWHC 1840 (Ch)

Claim No: HC2014-002085

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 July 2015

Before:

RICHARD SPEARMAN Q.C.
(sitting as a Deputy Judge of the Chancery Division)

Between:

THE LONDON TAXI CORPORATION LIMITED
(trading as THE LONDON TAXI COMPANY)

Claimant

- and -

(1) FRAZER-NASH RESEARCH LIMITED
(2) ECOTIVE LIMITED

Defendants

Douglas Campbell (instructed by Browne Jacobson LLP) for the Claimant

Philip Roberts (instructed by Herbert Smith Freehills LLP) for the Defendants

Hearing date: 15 June 2015

RICHARD SPEARMAN Q.C.:

Introduction

1. This is an application by the Claimant for permission (a) to adduce in evidence the results of a pilot survey for the purposes of establishing its case on passing off, (b) to carry out a full survey in the form of that pilot survey and to adduce in evidence the results of that full survey for the same purposes, and (c) to rely upon evidence from respondents to both those surveys by adducing as their witness evidence the signed completed questionnaires of such respondents as the Claimant may identify to the Defendants suitably in advance of the trial. It involves applying the principles and guidance concerning the admission of surveys and evidence derived from surveys that are to be found in three relatively recent decisions of the Court of Appeal: *Interflora Inc v Marks & Spencer plc* [2012] EWCA Civ 1501, [2013] FSR 21 (“*Interflora 1*”), *Interflora Inc v Marks & Spencer plc (No 2)* [2013] EWCA Civ 319, [2013] FSR 26 (“*Interflora 2*”) and *Zee Entertainment Enterprises Ltd v Zeebox Ltd* [2014] EWCA Civ 82, [2014] FSR 26 (“*Zeebox*”).
2. The Claimant was represented by Mr Douglas Campbell and the Defendants by Mr Philip Roberts. I am grateful to both of them for their clear and helpful submissions.

Background and outline of the dispute

3. This case concerns taxis. The Claimant is a UK manufacturer of purpose built taxis. By a series of agreements made in 2013, the Claimant acquired intellectual property rights relating to various models of London black cab from the administrators of Manganese Bronze Holdings plc and its subsidiary LTI Limited, which those companies had been involved in designing, manufacturing and selling since 1972. In that year, Manganese Bronze Holdings plc acquired Carbodies Limited, one of three companies involved in commissioning the FX series of London black cab, a series which dates back to 1947.
4. The First Defendant carries on the business of researching and testing new solutions for transportation. The Second Defendant manufactures and sells motor vehicles.
5. In these proceedings, the Claimant alleges infringement of Community Trade Mark No 951871 (which depicts a version of the London black cab known as the Fairway, which is said to have been introduced in 1989) and UK registered trade mark No 2440659 (which depicts a version of the London black cab known as the TX1, which is said to have been manufactured and sold between 1997 and 2002, and to have been followed by later versions culminating, from 2007 down to the present day, in the TX4). The Claimant also alleges passing off, relying in that regard on the appearance of the Fairway, the TX1 and

the TX4. The claims relate to a number of aspects of the appearance of the Claimant's black cabs, which are said to be common to all such cabs.

6. The trade mark registrations look like this:



7. The Particulars of Claim include allegations that the designs of the vehicles referred to above share “a common design language which is, and which is intended to be, visually apparent to consumers so that the vehicles are instantly recognisable not merely as taxis but as London black cabs in particular” (paragraph 14), that substantial and valuable goodwill subsists in the appearance of “London black cabs” and that members of the public have come to recognise that appearance as “denoting the taxis of a single trade source and none other, which trade source is now in fact the Claimant” (paragraph 18), and that the appearance of the Defendants’ new prototype taxi (discussed further below) is shown in photographs annexed at Annex 7 to that pleading (paragraph 22). The particulars given in support of the pleaded case on goodwill include the following:

“The said goodwill extends to both members of the public wishing to purchase taxi services provided by operators of London black cabs, and members of the public wishing to purchase London black cabs.

So far as the former members of the public (ie taxi service consumers) are concerned, it is averred that London black cabs are used to provide taxi services to such members of the public without using any particular marks or signs which are recognised by the public as indicating trade origin. For instance although the letters “LTI” appear on the front grille of the cars manufactured by LTI, and the factory model designation (eg

“TX4”) often appears on the rear of the vehicle, both marks are small, inconspicuous, and rarely noticed by such members of the public; moreover, even when such marks are noticed by such members of the public they are given little or no significance. Similarly, new vehicles manufactured by the Claimant bear the “London Taxi Company” circular badge on the front grille but again this is rarely noticed and is given little or no significance. Members of the public hailing a taxi will generally look at the appearance of the vehicle, and the only mark or sign which is used by such persons to distinguish the trade origin of the taxi and/or the services provided by such vehicle from those of other traders is the appearance of the London black cab itself.

So far as the latter members of the public (ie taxi purchasers) are concerned, it is averred that purchasers of London black cabs are well aware of the goodwill which subsists in the appearance of London black cabs, and such goodwill forms an important part of their reason to purchase the same as opposed to other vehicles.”

8. The Defendants or their predecessors produced various models of Metrocab taxi between 1987 and (according to them) 2006. Some years ago the Defendants began to develop a new model of that vehicle (“the new Metrocab”), which is the subject of the present claims. They have publicised the new Metrocab in various ways, and have shown prototypes of the new Metrocab to potential purchasers. Three or four examples of the new Metrocab have been undergoing trials on the streets of London since about January 2015. However, commercial sales of the new Metrocab have not begun.
9. Accordingly, the present proceedings have been commenced and seem likely to come to trial (in November 2015) before significant numbers of the new Metrocab appear on the road. Any confusion between the Claimant’s black cabs and the new Metrocab or deception of the relevant public in that regard which may arise in the normal course of events is therefore unlikely to occur or to come to the Claimant’s attention before trial. For this reason, in particular, the Claimant seeks permission to rely on survey evidence.
10. The pilot survey sought, and the proposed full survey would seek, responses from actual or prospective taxi passengers. However, (among many other issues that are raised in their Defence – the validity of the trade marks being but one) the Defendants contend that this is not the relevant public, which is instead limited to purchasers of taxi cabs.
11. Another aspect of the Claimant’s pleaded case is that the Defendants’ acts were calculated and intended to deceive. In particular, the Claimant contends that the Defendants deliberately adopted an appearance for the new Metrocab which closely resembled the appearance of the Claimant’s black cabs in order to benefit from the Claimant’s extensive goodwill and reputation in that appearance. Among other things, the Claimant relies on a press release issued in January 2014 in which Sir Charles Masefield, described as the “Metrocab Chairman”, is quoted as saying that the new Metrocab is “Instantly recognisable as an iconic London Hackney Cab”. Although the existence and

contents of the press release are admitted by the Defendants, these allegations (like much of the contents of the Particulars of Claim) are otherwise denied.

12. These are merely examples of a host of issues raised by the parties' pleaded cases. It forms no part of my function on the present application to consider the merits of these rival contentions. I mention them merely to place that application in context, and, in particular, to record that there is a live issue as to whether the survey exercise may be directed at the wrong target, even if the Claimant is able to meet all the Defendants' other criticisms and complaints concerning it. As I indicated during the course of argument, while I do not consider that this could properly be decisive of the outcome of the application, this last consideration is clearly one that does not assist the Claimant.

The law

13. The applicable legal principles were largely not in dispute.
14. The question of whether the defendant is making a representation that is calculated to deceive is ultimately a matter for the trial judge alone. Both sides referred to *AW Spalding & Bros v AW Gamage Ltd* (1915) 32 RPC 273, Lord Parker of Waddington at p286: "... there can be no doubt that in a passing-off action the question whether the matter complained of is calculated to deceive, in other words, whether it amounts to a misrepresentation, is a matter for the Judge, who looking at the documents and evidence before him, comes to his own conclusion, and, to use the words of Lord Macnaghten in *Payton & Co. Ld v Snelling, Lampard & Co. Ld* (17 RPC 635) 'must not surrender his own independent judgment to any witness whatsoever' ..."
15. However, it is possible to conduct fair surveys which lead to responses which can be relied upon and which are of such value that it is appropriate for them to be admitted in evidence; and this evidence may even be capable of determining the outcome of a case.
16. The principles and guidance concerning the admission of surveys and evidence derived from surveys to be found in *Interflora 1*, *Interflora 2* and *Zeebox* revolve around the test of "real value". The heart of the matter is, perhaps, most clearly expressed in the following paragraphs of the judgment of Lewison LJ in *Interflora 1*:

144. ... The current practice... is to allow the evidence in unless the judge can be satisfied that it will be valueless. In my judgment that is the wrong way round. I consider that, even if the evidence is technically admissible, the judge should not let it in unless (a) satisfied that it would be valuable and (b) that the likely utility of the evidence justifies the costs involved ...

150. In deciding whether to give permission, the court must evaluate the results of whatever material is placed before it. Only if the court is satisfied that the evidence is likely to be of real value should permission be given ... Even then the court must be satisfied that the value justifies the cost.

17. Moreover, with effect from 1 April 2013, applications to adduce survey evidence have to take account of the overriding objective, as amended in light of the reforms of Jackson LJ. This involves dealing with cases not only justly and but also at proportionate cost.

18. In *Zeebox*, the Court of Appeal approved the following summary of the law provided by Birss J at first instance (see [2013] EWHC 1644 (Ch), [2014] FSR 10) at [14]-[22]:

14. *Imperial Group PLC v Phillip Morris* [1984] RPC 293 was the starting point for the modern approach to the admission of survey evidence in cases of trade mark infringement and passing off. In that case Whitford J laid down guidelines for the future conduct of surveys, which have since become known as the Whitford Guidelines. The Whitford Guidelines were recently summarised by Lewison LJ in *Interflora 1*. At paragraph 61 Lewison LJ said the following:

"(i) If a survey is to have any validity at all, the way in which the interviewees are selected must be established as being done by a method, such that a relevant cross section of the public is interviewed;

(ii) any survey must be of a size which is sufficient to produce some relevant result viewed on a statistical basis;

(iii) the party relying on the survey must give the fullest possible disclosure of exactly how many surveys they have carried out, exactly how those surveys were conducted and the totality of the number of persons involved, because otherwise it is impossible to draw any reliable inference from answers given by a few respondents;

(iv) the questions asked must not be leading and must not direct the person answering the question into a field of speculation upon which that person would never have embarked had the question not been put;

(v) exact answers and not some sort of abbreviation or digest of the exact answer must be recorded;

(vi) the totality of all answers given to all surveys should be disclosed;

(vii) the instructions given to the interviews must also be disclosed."

15. Lewison LJ, in *Interflora 1*, also said:

"Evidence that is not useful should not be allowed to distract the focus of a trial, even if it is technically admissible."

16. He indicated that surveys that are not fully compliant with the Whitford Guidelines are one example. At paragraph 21 he said:

"The value of the evidence is severely diminished if not eliminated by a failure to follow the Whitford Guidelines."

17. In *Interflora 1* Lewison LJ summarised that the standard practice in trade mark and passing off cases in future should be as follows:

"(i) A party may conduct a true pilot survey without permission, but at its own risk as to costs;

(ii) no further survey may be conducted or adduced in evidence without the court's permission;

(iii) no party may adduce evidence from respondents to any survey without the court's permission."

18. Then, at paragraph 151:

"When applying for permission, as referred to in subparagraph 2 above, the applicant should provide the court with:

(i) the results of any pilot survey;

(ii) evidence that any further survey will comply with the Whitford guidelines;

(iii) the cost of carrying out the pilot survey and the estimated cost of carrying out the further survey."

19. At paragraph 147 of *Interflora 1* Lewison LJ explained that such a procedure provides the court with the material it needs to rule definitively on whether the cost of the full survey should be undertaken. It would be a false kindness simply to permit the survey to go ahead on the basis that the trial judge can always subsequently rule it inadmissible. He said:

"The objective of such an application is to have a definitive ruling one way or the other. It is a natural temptation for a judge who is not immersed in the case to leave questions of admissibility to trial. It is the temptation to which I succumbed in *UK Channel Management Limited v E! Entertainment Television Incorporated*. But balancing the cost of a survey (or witness collection exercise) against its likely utility, this temptation should be resisted."

20. The test to be applied is a cost benefit test (see paragraph 150 of *Interflora 1*):

"In deciding whether to give permission, the court must evaluate the results of whatever material is placed before it. Only if the court is satisfied that the evidence is likely to be of real value should permission be given. The reliability of the survey is

likely to play an important part in that evaluation. Even then the court must be satisfied that the value justifies the cost. As Mr. Hobbs said, this requires the court to conduct a cost benefit analysis. In a case of trade mark infringement, in which the issue is one of deception in relation to the provision of ordinary consumer goods or services, these criteria are likely to be satisfied only in a special or unusual case."

21. Having dealt with paragraph 150, I will note that in this action it is the passing off case and not a trade mark case that I am being asked to adduce the survey in relation to.
22. The question of survey evidence returned to the Court of Appeal in *Interflora 2*. Lewison LJ, at paragraphs 26 to 28, said as follows:

"26. With the benefit of hindsight, perhaps I did not make my message clear enough in *Interflora 1*. Let me say it again but more loudly. A Judge should not let in evidence of this kind unless the party seeking to call that evidence satisfies him (a) that it is likely to be of **REAL** value; and (b) that the likely value of the evidence justifies the cost.

27. Thus, in my judgment, the judge should have asked himself whether the evidence was likely to be of real value. The negative way of framing the test means that evidence which was not of real value will be admitted in a case which, after all, is about the provision of ordinary consumer services.

28. I am unable to tell from the judge's statement that he considered that the evidence would be likely to have some value, whether he simply thought that the value would be more than minimal or whether he thought it would carry real weight. If the latter, I find it hard to identify why he thought that. In my judgment, therefore, the judge conducted a flawed analysis of the nature of the application, the quality of the raw data that supported the witness statement and ultimately applied too lax a test."

19. In *Zeebox*, the leading judgment was delivered by Floyd LJ (at [1]-[59]), Lewison LJ delivered a concurring judgment (at [60]-[65]), and Elias LJ agreed with both of them. The following further points emerge from, or are confirmed by, those judgments:

- (i) Different considerations may apply in passing off cases in comparison to trade mark infringement cases, such that the Court of Appeal appeared to accept that the test for admission of a survey may be lower in passing off cases. ([20], [23])
- (ii) The real value test is primarily directed to the value of the evidence, its weight in the scales. Thus, reliance on the survey itself falls to be contrasted with the practice of calling a few hand-picked members of the public who have responded to it. Further, the reliability of the survey forms an important part of the real value determination. However, even if the survey is reliable, the court must still be satisfied that the value justifies the cost. ([27]-[28])

- (iii) This does not require the court to evaluate the likely outcome of the case at the interim stage (although a party who cannot prove their case by any other means may have a stronger case for the admission of a properly conducted survey). It requires the judge to scrutinise the value of the survey as evidence. Accordingly: “Unless it is for some reason impossible to do so ... it is necessary, on an application of this kind, to assess on the available material whether the survey is likely to give rise to evidence of real value”. ([29]-[30] plus [42])
- (iv) Certain factors (for example, that a survey could provide reassurance for a judge that his or her view is not idiosyncratic, or that it could ensure that the judge is aware of the views of the relevant public) will be present in all passing off cases, and are unlikely to be sufficient to render the survey of “real value”. In contrast “one factor which might be of importance is where there is some special factor about the goods or services, or their consumers, which makes evidence of the kind likely to be of real value”. ([31]-[32])
- (v) Judges in passing off cases are familiar with taking into account any relevant characteristics of the purchasing public and making allowances for it. Where a case is about a very short English trade mark and logo delivered to the public in the way that the services in question are delivered to the public in this country, then “There is nothing in that which is likely to be unfamiliar or not readily understandable to the trial judge”. ([37]-[39]) In other words, if the goods or services in question are specialised or esoteric, a judge may need evidence from users of the goods or services in order to be able to form his or her own view about whether a mark has been infringed, but no such evidence is generally likely to be necessary in the case of ordinary consumer goods or services. ([61])
- (vi) The survey should be designed so that the artificiality of the survey situation does not introduce factors which would not be present in normal use of the disputed mark. Passing off “is a real world cause of action and the circumstances of the real world need to be present, so far as possible, in the survey's circumstances”. ([44])
- (vii) “If the questions are flawed and invite artificial speculation stripped of context, they do not show anything of value, whether described as a propensity to make a connection or deception”. ([51])
- (viii) The real issue in cases of passing off is deception. Accordingly, if the survey goes to the question of whether the public or the relevant public has a propensity to make a connection between the mark and the sign it is only going to a peripheral or

subsidiary issue, and this is itself a reason for degrading its value and not allowing it into evidence. ([65])

- (ix) If the justification for the survey is based on the supposed special characteristics of the target audience of the goods or services in question, the survey should be effectively targeted at that group, because otherwise the survey will include many who are of marginal or no relevance. The inclusion of the base population of respondents who are not part of the relevant public may undermine the statistical basis of the survey and may be sufficient by itself to undermine the validity of the survey. ([52])
- (x) While it is hard to design any survey that does not to some extent invite speculation, if the basis on which the judge would have to carry out the task of discounting the results by some measure to allow for the fact that the interviewees were or might have been led to speculate cannot be discerned, or if that task seems “impossible”, then the survey is likely to be fatally flawed. ([53])
- (xi) The fact that speculation is inherent in surveys “is precisely why surveys should be admitted into evidence only in special cases”, and the general run of cases tends to show that surveys have very limited value. ([64]) I do not understand this reference to “special cases” to be intended to introduce a discrete new test, akin to “exceptional circumstances”, but rather as convenient shorthand for the end result of the range of relevant considerations that are discussed in the three recent Court of Appeal cases.
- (xii) When striking the balance between benefit and cost, relevant factors include that the applicants would be prevented from adducing some potentially relevant evidence and whether they have other avenues open to them to prove their case. ([58])

20. Mr Campbell submitted that these decisions should be viewed in light of the following additional considerations:

- (1) *Interflora 1* and *Interflora 2* were trade mark cases, whereas the legal test in a passing off case is different, because such a case can succeed even where most people are not deceived, provided that a substantial number of them are deceived.
- (2) In practice surveys are done by Claimants, and seldom by Defendants. For that reason, any suggestion that the Defendant(s) might do a survey is, in general, fanciful (and should be discounted when undertaking the cost benefit analysis).

- (3) The major vice considered in *Interflora 1* related to “witness collection programmes”, and a major criticism in *Interflora 2* related to the attempt to rely upon witness statements instead of the raw data of answers to questionnaires. These practices have been avoided in the present case.
- (4) In contrast, properly conducted surveys can be of real value: see, for example, the judgment of Etherton J in *D Jacobson & Sons v Globe Ltd* [2008] FSR 21; *Numatic International v Qualtex* [2010] RPC 25, in which Floyd J said at [65]: “I have taken these criticisms into account, but even after doing so I think the survey provides enough evidence for me to be confident that the shape and bowler hat form prompt a strong recognition of the Henry. Whether that recognition is sufficiently strong to conclude that purchasers will be misled is a separate question, and one on which I prefer to rely on the oral evidence of the witnesses called.”; *Enterprise v Europcar* (costs) [2015] EWHC 300 (Ch), Arnold J at [40]: “In my judgment, the surveys were of real value in confirming the conclusion which I would otherwise have been minded - but only minded - to reach.” (Contrast *Specsavers v Asda* [2010] FSR 28).
- (5) It appears from *Interflora 1* at [86]-[87] that no fault was found with the approach in *Lego System v Lego M Lemelstrich* [1983] FSR 155 in which (a) the survey as a whole was “representative of the population as a whole” and (b) the Claimant selected witnesses from among those confused in order to show that a “substantial proportion of those surveyed” were confused.
- (6) It is not possible to draw a hard and fast distinction between those survey questions which are objectionable and those which are not, and where on the spectrum a particular question lies is a matter of judgment in the individual case: see the judgment of Arnold J at first instance in *Interflora 1*, in a passage referred to by the Court of Appeal at [22], and, as Mr Campbell submitted, without being criticised.

The surveys

21. The so-called “show material” comprises two photographs.
22. The first, labelled C2, is a photograph of the new Metrocab, taken from the Defendants’ publicity materials. This shows some of the livery of the new Metrocab depicted in the photographs contained in Annex 7 to the Particulars of Claim, namely a large and stylised “M” on the panel of the front passenger-side door. The Claimant is sceptical as to whether and to what extent the new Metrocab, when available for commercial sale, will incorporate that livery. That is an uncertainty which flows from bringing what is, in essence, a *quia timet* claim. Photograph C2 does not show any of the rest of that livery.

23. The second, labelled M7, is a photograph of one of the Claimant's TX4 taxis, and the Claimant's evidence is that this photograph was selected because it shows the TX4 from a similar "face on" angle to the photograph of the new Metrocab that is labelled C2.

24. The photographs look like this:

C2



M7



25. The pilot survey questionnaire comprised a preamble which involved handing photograph C2 to the respondent and saying “Please look at this. Let me know when you are ready to continue”, and then asking the following ten questions:

1.	What can you tell me about what you are looking at?
2.	Is there anything else you can tell me about it?
3.	You mentioned, what else, if anything can you tell me about this?
4.	Please look at this [M7]. Let me know when you are ready to continue.
5.	What would you say if I told you that there is no connection between the company that makes this vehicle [C2] and the company that makes this vehicle [M7]?
6.	Have you hailed a taxi or used a taxi from a taxi rank in London in the last year or so?
7.	Do you live in London?
8.	Do you work in London?
9.	Do you live in the UK?
10.	Why are you in London today?

26. For the pilot survey, a total of 98 interviews were conducted in and around Victoria Embankment, Leicester Square and the South Bank over a six day period in January 2015. Those interviewed comprised 51 men and 47 women; 67 people in full or part-time employment; and the survey achieved the following numbers in different age groups: 43 up to age 34, 28 aged 35-54, and 27 aged 55 or over. Further, 84 of the respondents are UK residents, of whom 59 live or work (or do both) in London. Slightly more than half of the total of 98 (51 people) said they had hailed a taxi or used a taxi in the past year or so.

27. After the first day, the survey was modified in three ways.

28. First, to add a new question 3b. According to the evidence of the Claimant’s survey expert, Philip Malivoire, the Claimant’s solicitors were interested in obtaining further feedback where respondents had used any of the following words in earlier answers: classic, traditional, typical, iconic, historic, authentic, distinctive, recognisable, existing and current. Mr Malivoire therefore designed the following question: “You mentioned, what do you mean by in relation to [C2].”

29. Second, to replace question 5 with the following question: “Do you think there is a connection between the company that makes this vehicle [C2] and the company that

makes this vehicle [M7]?” In his witness statement in support of the present application, Mr Malivoire states: “I believe that this question is substantially similar and, indeed, covers similar ground to the original question 5 but it is simpler to both ask and answer. I am conscious that this is a more leading question but I believe that comparing the answers to this question (either version) and the preceding questions illustrates that peoples’ answers to the other questions can be ambiguous even when they do possess a view about the relationship between the two images”.

30. Third, to add a new question 5b: “Why do you say that?”. Mr Malivoire’s evidence in this regard is as follows: “Although responses were to be recorded verbatim, I considered that this second version of the question could be more likely to obtain a ‘yes’ / ‘no’ type answer and therefore recommended the addition of a further question for such cases ...”

Initial discussion of the survey

31. The first four questions did not elicit answers which were of much, if any, assistance to the Claimant. Mr Malivoire sums up the position as follows: “By this stage of the interview, people had commented on both images. About one third of people had noted that the Claimant’s taxi was a newer or different version of the taxi/cab they are familiar with (but in almost all cases without commenting upon the identity of the manufacturer) while others appeared to recognise it as the taxi/cab that they are familiar with (but, again, without commenting upon the identity of the manufacturer). Thus, no respondent had unambiguously addressed the specific question the research needed to address: whether people believed that the Defendant’s cab is produced by the company that makes the existing London black taxis, or not. We anticipated that this might be the case and included a more closed question at the end of the questionnaire – question 5”.
32. Although he accepts that these are all ultimately matters for the court, Mr Malivoire adopted the following approach. He took the view that the answers that were obtained to question 5 can be broken down into the following categories: (1) “A response that indicated that the respondent believed there is or there might be a connection”; (2) “A response where it is simply not possible to tell”; and (3) “A response that indicated that the respondent does not or probably does not think there is a connection”. In his view, the answers given by respondents can be divided between those categories as follows: (1) 27; (2) 26; and (3) 45. Mr Malivoire also explains that, in addition to the 27 respondents who he would place in category (1), there are a further 8 respondents whose answers are “interesting”, such that there are a total of 35 responses which he considers to be “worthy of further inspection by the Court in order to determine the degree to which people believe that the Defendant’s taxi is connected with the Claimant”. Mr Malivoire also says

that there are two further respondents “who indicated that they had believed the Defendant’s taxi was connected to the Claimant until the final question was asked; it was the question itself that led them to consider that this might not be the case”.

33. In his witness statement, Mr Malivoire goes through the Whitford Guidelines, and explains why he considers that the sample survey complies with each of them. With regard to guideline (iv) (namely that “the questions asked must not be leading; and must not direct the person answering the question into a field of speculation upon which that person would never have embarked had the question not been put”), he states: “I believe that the survey has complied with this guideline, as far as is possible. I have acknowledged that question 5 is a more leading question but I believe that a review of the answers to this and the other questions justifies a question of this type at the end of the questionnaire. The other questions have obtained answers that are more or less useful but very few that provide an answer to the key purpose of the survey. As such, I believe that the inclusion of a more leading question at the end of the survey is justified”.
34. A large number of submissions were made to me about the pilot survey and the answers that it elicited. Among other things, Mr Roberts submitted that, on proper analysis, there are a number of respondents who Mr Malivoire categorised more favourably to the Claimant than their responses justify; whereas Mr Campbell submitted that, conversely, there a number of respondents who arguably belong in a category that is more favourable to the Claimant than the category into which they have been placed by Mr Malivoire.
35. Mr Roberts relied on over 20 sets of responses in support of various submissions. They included the following examples, all of which were placed by Mr Malivoire in category (1), and all of whom answered question 5 in its revised form. Mr Roberts submitted that these categorisations were either wrong or else told only part of the story (because, for example, the perceived “connection” was not based on a comparison between the appearance of the vehicles depicted in C2 and M7):
 - (1) Respondent 41 answered question 5: “I’m not an expert – but there might be – I can’t see the two makes”. He answered question 5b: “Because my brother works in the motor trade he tells me they are all made by the same people under the bonnet”.
 - (2) Respondent 49 answered question 5: “I could only hazard speculative guess, as far as I know all London cabs source their cabs from the same co[mpany], so my speculative guess would be yes, but they don’t look very much alike”. He did not answer question 5b.

(3) Respondent 60 answered question 5: “I would have assumed it was the same, I thought there was just one company that made these”. She did not answer question 5b.

(4) Respondent 70 answered question 5: “Oh goodness. Yes probably but really have no idea”. She did not answer question 5b.

(5) Respondent 75 answered question 5: “The grill in the front is large, they are not really similar, they are different shapes, the headlamps are round, that’s similar, the second is an older version of the first”. She did not answer question 5b.

(6) Respondent 92 answered question 5: “Yes, only because the one time I was in a cab the driver said there is only one company that makes black cabs, lots of companies had tried but only one had gotten it right – to turn around the way the city required”. He did not answer question 5b.

36. Mr Campbell countered by pointing to various instances in which, as he submitted, Mr Malivoire had categorised respondents in a manner that was, at least arguably, unduly unfavourable to the Claimant. For example, it is arguable that the following respondents who were placed by Mr Malivoire in category (3) in fact belonged in category (1):

(1) Respondent 24 answered question 5 in its original form as follows: “No connection? I’d agree, so I was wrong that that’s an official London taxi [C2]”. He was not asked question 5b.

(2) Respondent 27 answered question 5 in its revised form as follows: “They do look quite alike but slightly different, the first one looks posher – more shiny”. She did not answer question 5b.

37. In my judgment, for reasons which are probably self-evident from the above examples, there was force in both of these sets of submissions. However, neither helped the Claimant. First, they both tended to undermine the reliability of Mr Malivoire’s approach. Second, and more importantly, I consider they provided a foretaste of the kind of debate which, in my view, would be inevitable in the event that the Claimant was to succeed on the present application – whether between survey experts in their evidence in chief, or by way of their cross-examination, or by way of legal submissions, or (most likely) in all of those ways – and which would add significantly to the cost and duration of the trial.

38. Further points were raised in the evidence of the Defendants’ survey expert, Graham Williams, including (1) that the questionnaire is fundamentally flawed because it does not

contain a question enabling respondents to be excluded if they or anyone living with them works in specific industries or professions including journalists, lawyers, market researchers and those having connections with the black taxi market (sales, manufacturing and driving); (2) that in response to question 3, interviewers are required to write in the words and phrases mentioned by the respondent earlier on, and “This is quite a complex task for the interviewer and even on a cursory view, it is clear that the interviewers got it wrong on occasions. Some were not writing in the responses in the space above Q.3. and some were transposing the answers”; and (3) that with regard to question 3b: “There is no explanation as to why the listed words have been selected. The choice appears to be arbitrary, in particular since other words mentioned by respondents such as ‘standard’ or ‘old style’ were not picked up. Further, only showing the image of the Metrocab on its own and not any of the other types of black cabs available for hire in London (FX4, TX1/2, TX4 and old-style Metrocabs) means that it is not explicit which cab is being referred to by use of these words”. Mr Malivoire made a second witness statement in which he provided responses to all these points.

39. I do not propose to address all the points that were raised in the evidence and the submissions, because I consider that it is sufficient to dispose of the present application to focus on those points which assumed greatest significance as the argument progressed.
40. Before doing that, however, I should record that when I first read the papers my initial impression was that question 5 is the most important question, and that whatever answers were given to either of the forms in which that question was asked were not likely to be of “real value” so far as concerns the determination of the central issue of deception.
41. My main reasons for thinking this were, first, that “connection” is not a precise concept, and, second, that it is perfectly possible, and even likely, that respondents may think there is a “connection” between the companies that make the vehicles depicted in C2 and M7 for reasons which have nothing to do with deception. For that reason, it seemed to me that it was prudent, if not essential, for the Claimant to have added the further question 5b.
42. To my mind, those initial thoughts are confirmed by (a) the judgments in *Zeebox* and (b) a consideration of the range of answers that was elicited to question 5b.
43. So far as concerns those judgments, they refer to “a propensity to make a connection”, and say (among other things) that this is “a subsidiary issue”. Mr Campbell submitted that establishing “a propensity to make a connection” is not the same as establishing “a connection”, that the survey in the present case establishes that the public (or a substantial number of them) do make “a connection”, and that those observations of the Court of Appeal therefore do not apply with full force in this case. In my view, the Court of

Appeal's references to "a propensity to make a connection" apply to questions which go to the issue of "connection", and are not confined to cases where the answers given by respondents go no further than to reveal that they have "a propensity to make a connection". In any event, even if the Court of Appeal judgments are properly to be regarded as addressing a distinguishable point, their tenor is adverse to the Claimant.

44. Accordingly, even if I am wrong in thinking that the questions in the present case are addressed to an issue which is less "subsidiary" than the Court of Appeal had in mind, I nevertheless regard those judgments as providing support for my own initial view that asking respondents about a "connection" does not really address the issue of deception.
45. So far as concerns the answers to question 5b, in some instances these support the Claimant's case. For example, Respondent 31 answered the revised form of question 5 by saying simply "Yes", but added in answer to question 5b: "The similarity of the looks".
46. In other instances, however, it appears from the answers to question 5b that the reason why the respondent considers that there is a connection between the companies that make the vehicles depicted in C2 and M7 has nothing to do with any material deception. On the contrary, the answers are founded in beliefs based on extraneous knowledge. Examples of this are provided by Respondents 41, 49, 60 and 92 (discussed above). Another example of this is provided by Respondent 25, who was the first respondent to be asked the revised version of question 5, and who was placed by Mr Malivoire in category (1). He answered question 5 as follows: "Probably". However, he answered question 5b as follows: "Because many London taxis made by the same company – I don't know what".
47. Mr Campbell submitted that "since there is no connection between the Claimant and the Defendants, or their respective cabs, it follows that anyone who believes there *is* such a connection must have been deceived into that belief; and such deception must arise because of the similarity in appearance" and that "No tenable reasons to the contrary have been advanced by the Defendants".
48. I am unable to accept those submissions. In my judgment, they are contradicted by, and are untenable in light of, the results of the pilot survey alone: see, for example, the answers given to question 5 by Respondents 41, 49, 60 and 92 set out above. They do, however, serve to underline the danger of extrapolating from "connection" to "deception", and, *a fortiori*, to "deception because of the similarity of appearance".
49. I should say that I also have misgivings about the extent to which members of the public who are stopped in the street in central London and who come from a wide range of different backgrounds, including tourists whose first language may not be English, will

necessarily (a) fully understand question 5 and (b) pay careful heed to, and thus answer, the precise wording of question 5. In this regard, I consider that, in terms of being easy to follow, the revised form of the question is an improvement on the original version.

50. In some instances, a lack of understanding, or at least full understanding, is apparent from the answers given. Respondent 9, a Brazilian male aged 37, answered question 5 in its original form as follows: “It is difficult now for me, I do not understand the question”. Respondent 11, a French female aged 20, answered the same question as follows: “I don’t understand. This taxi [M7] is with a light, this one [C2] I don’t know”. Respondent 40, a British female aged 40, answered the same question as follows: “I would guess potentially the vehicles look different – as they are both black cabs I would assume they are, but as they are different maybe not”. Respondent 77, a British male aged 36, answered the same question as follows: “Hackney cabs”. My concern, however, (which is based on experience such as watching television footage of people who are asked questions in the street, for example about issues concerning public transport in London) is that even where initial answers appear to represent a clear and intended expression of the respondent’s views, they turn out, in light of further questions, to be not so dependable.

Is this an ordinary case, or one involving matters that are “specialised” or “esoteric”?

51. Mr Campbell submitted that there were three reasons in particular which took the present case outside the usual run of cases and produced the result that the trial Judge is likely to be assisted by the survey evidence in issue: (1) while the Judge is likely to be familiar with London taxis, he or she is unlikely to be familiar with how the public perceives the shape of London taxis; (2) the pilot survey suggests that the persons deceived constitute the minority, the Judge may fall into the same category as the majority and may be tempted to project his or her perception across the board, and survey evidence of people who are deceived may assist the Judge and may make a difference in avoiding that pitfall; and (3) the reactions of tourists are important, and this is not necessarily something with which a Judge will be familiar.

52. Mr Roberts submitted this is a case about ordinary everyday services, not esoteric services. It is not a “special case” in the sense discussed in *Zeebox*, and there are no special factors present. Hailing a taxi is within the experience of a Judge of the Chancery Division. The likelihood of deception of taxi passengers is a question of fact for the Judge alone who will not be assisted by the evidence of other taxi passengers who are, as Mr Roberts put it, “cherry-picked by the Claimant”.

53. In my judgment, there is nothing in Mr Campbell’s first point, and his second point is no, or little, more than a gloss on his first point. Both points are covered by the proposition, affirmed in *Zeebox*, that Judges in passing off cases are familiar with taking into account

any relevant characteristics of the relevant public and making allowances for it. On balance, I consider that the same considerations apply with regard to his third point, although I accept that a Judge may have more difficulty in assessing the perceptions of tourists. However, the survey is not targeted at tourists, and therefore, even if there was something in this third point, its “real value” would be undermined by that consideration.

54. I am not persuaded that there is anything that is likely to be unfamiliar or not readily understandable to the trial Judge in the present case such as would tend to suggest that he or she is likely to need, or derive assistance from the admission of, the results of the pilot survey, the results of a full survey, or the evidence derived from either of those surveys.

The show materials and replicating the real world

55. In support of the choice of photograph C2, Mr Campbell argued, in sum: (1) this particular image of the new Metrocab was extracted from the Defendants’ own publicity materials, and should be taken as depicting how they envisage a typical example of their own product in use; (2) while the photograph shows a London street at night, (a) that was how the Defendants chose to depict their product and (b) it is a fact of life that taxis are hailed at night; (3) further, none of the survey respondents complained about the fact that C2 showed a night scene; and (4) while the Defendants’ evidence asserts that the new Metrocab is distinctively branded on the front passenger door (a) the Defendants have given no undertaking that this branding will always be used and (b) they will have no control over that matter once they have sold their vehicles, and one reason to think that such branding may be sprayed over is that many London taxis are liveried with advertising which provides additional income to vehicle owners or drivers.

56. Mr Williams’ evidence included the following: “The pictures used for the showcards are taken at night from a corner angle. Both the lighting and angle of the shot mean that differences between the cabs which might have been apparent had a clearer picture [been used] are obscured. Further, the very large branding on the front passenger door of the Metrocab is obscured by reflections. It is understandable that the Claimant would choose a shot which they think shows the similarities of the two designs in the best way for them. However, it diminishes the credibility and value of the findings as the respondent is only able to comment on what they can see”.

57. In similar vein, Mr Roberts submitted that: “Presenting respondents with two carefully selected photographs of black cabs, devoid of context, taken at night, from one particular angle is far removed from the context in which passengers will encounter the [Defendants’] vehicles on the streets of London and does not do justice to the true distinctions between the parties’ respective vehicles”.

58. I consider that there is substance in these criticisms, and they are not met by the points made by Mr Campbell.

59. There are obvious difficulties for the Claimant in replicating the circumstances of the real world when the marketing of the new Metrocab has not reached the stage where it is possible to conduct a meaningful survey of those who have seen that vehicle on the streets of London and had occasion to travel in it or choose whether to travel in it. Further, it is true that taxis are hailed at night, and that C2 and M7 therefore depict the parties' vehicles as some passengers are likely to see them in some circumstances.

60. In my judgment, however, it does not follow that using these two photographs as show materials comes anywhere near to bringing the circumstances of the real world present, as far as possible, in the circumstances of the survey. On the contrary:

(1) It appears from the photographs contained in Annex 7 to the Particulars of Claim that there a number of differences (of varying degrees of magnitude) between the appearance of the Claimant's TX4 and the new Metrocab. Some of these differences are not apparent from photographs C2 and M7 because of the angle at which those photographs were taken, and others are more difficult to see than would be the case in ordinary daylight use of the vehicles because the photographs were taken at night.

(2) As Mr Williams states, in photograph C2 the very large branding on the front passenger door of the Metrocab is obscured by reflections, to such an extent that, in my judgment, the comparison that the respondents to the survey were invited to consider effectively excluded the Defendants' branded livery. That would not matter if the new Metrocab is not going to bear that livery when it is released. However, that is only one possibility. The survey does not address, or adequately address, the contrary scenario, although (a) that could have been done by using additional or alternative show materials (and asking the respondents appropriate further or alternative questions) and (b) that may transpire to be the real world scenario.

(3) The pilot survey results suggest that, contrary to the Claimant's pleaded case, at least some members of the public notice the signs on taxis and recognise them as indicating trade origin. The answers to questions asked in the pilot survey include the following: (a) Respondent 23 "... sign on front is different, indicates different makers", (b) Respondent 32 "... they are very different - the badges are different"; (c) Respondent 35 "... the badge on the front is different and the grille is different – which is what you would normally look for in manufacturing"; (d) Respondent 37 "... the badge on the grilles are different, whether they are the same manufacturer I couldn't tell you";

Respondent 46 "... the log[o] is different"; (e) Respondent 48 "... the manufacturers badge on grille is different"; (f) Respondent 58 "... looks like different manufacturers going on the badge on the front"; (g) Respondent 61 "... now when you look at them properly they do look different, different symbols on grille"; (h) Respondent 82 "... different badges". There are other answers referring to badges. In my view, there is a real risk that photographs C2 and M7 do not show this difference between the parties' respective vehicles in a way that replicates the real world sufficiently or fairly, and that the reliability of the survey answers is devalued or corrupted accordingly.

- (4) A similar point can be made with regard to the grilles of the respective vehicles, but I will not lengthen this judgment by quoting from answers which illustrate that point.
- (5) In my view, it is also clear from their answers that a number of the respondents expressed reservations about the information shown in photographs C2 and M7. Their answers included the following: (a) Respondent 55 "Not enough information to decide"; (b) Respondent 65 "I don't know, would it be possible to tell from looking at the photo?"; (c) Respondent 72 "The one on the left [M7] is too dark to see the frontage the grille you can see but the rest is too dark"; (d) Respondent 89 "It got a different grille, makes me think its different and what I can make out of the badge – looks a different one". Mr Campbell's observation that none of the respondents complained about the depiction of a night scene is therefore only part of the story.
- (6) All this arises before one gets to the question of whether and to what extent a perusal of still photographs (a) on the one hand, replicates or tends to replicate the perception that taxi passengers are likely to have of vehicles as they are driven around or wait at taxi ranks or (b) on the other hand, introduces factors which tend towards artificiality. On that issue, I entertain little doubt that the photographs are a poor substitute for the real world, and that in making his or her assessment, which will not be confined to reliance on still photographs, the trial Judge will be able to avoid the above pitfalls and will enjoy a major advantage over a survey based on these two photographs.

Compliance with the Whitford Guidelines

61. Mr Roberts concentrated his submissions on Whitford Guideline (iv), as summarised by Lewison LJ in *Interflora 1* at [61]. He submitted that question 5 was phrased as a leading question in its original form and became even more of a leading question when its form was revised. Mr Malivoire's explanation of the reason for this revision came down to an acceptance that, in the absence of a leading question, it did not even occur to passengers to consider who manufactured the taxis depicted in the photographs. That explanation (a) is unconvincing in its circularity, and (b) highlights and confirms that respondents are being directed by question 5 "into a field of speculation upon which that person would

never have embarked had the question not been put”. This is reinforced by considering the answers given to questions 5 and 5b.

62. Mr Campbell submitted that (1) it is unsurprising that answers to earlier questions did not elicit whether respondents thought that the Defendants’ cab was connected with the Claimant’s cab because of its appearance, as respondents would have no particular reason to offer that information to the interviewer at this stage; (2) as Mr Malivoire explains, question 5 (in both forms) was asked because although a substantial number of recipients had by this stage given answers which assist the Claimant’s case, nobody had directly addressed this specific question; (3) when placed on a spectrum between questions which are completely open-ended, through questions that prompt speculation, to questions that have a degree of leading quality to them, to questions that are completely misleading, question 5, in context, plainly falls in the right side of the line: (a) it is not prompting speculation, but, on the contrary, is trying to find out what the witness’s actual evidence is, in circumstances where the witness would (up to that point) have had no particular reason to offer it; and (b) moreover, the answers show that more interviewees said no than said yes, which is hardly what one would expect if the questions were leading; (4) the criticism that question 5 is addressing the issue of “connection” as opposed to the issue of deception or confusion is without substance; and (5) the Defendants have failed to identify any questions which they say should have been used instead in order to identify what interviewees thought about the key question, and/or which the Defendants intend to use in their own survey.
63. In my judgment, question 5 does not fall on the right side of the line. It is leading to an unacceptable degree (and even more clearly so in the revised form which the Claimant would seek to deploy if the Claimant was granted permission to carry out a full survey), and it directs respondents into a field of speculation upon which they would never have embarked had the question not been put. I consider that this is borne out by the answers (discussed above) provided by respondents to the pilot survey. The points made by Mr Campbell, such as that earlier questions had not elicited responses which went to the central issue of deception, that more respondents gave negative answers than gave positive answers, and that the Defendants have not put forward any better form of question which would address the issue of deception, do not meet these criticisms.
64. In any event, I consider that, in terms of whether the answers are of “real value”, question 5 (in both forms) is fatally flawed because (a) by asking respondents about a “connection” between the companies that make the vehicles depicted in photographs C2 and M7 the question does not grapple with the issue of deception and (b) as the answers provided by a number of respondents to the pilot survey to my mind make very clear, it is a fallacy to suggest that those who believe that there is such a connection have been deceived into that belief, and still less deceived because of any similarity in appearance between the two vehicles. I have addressed both of these points above.

The cost benefit analysis

65. The evidence as to costs before me is that a full survey of 500 persons would cost the Claimant £82,232 (of which nearly £46,000 has already been incurred), and a survey of 1000 persons, if so desired, would cost the Claimant £101,202. The latter sum is already provided for in the Claimant's costs budget, which contains a total figure of £488,000. Accordingly, the proposed survey is about 20% of the Claimant's total litigation budget. These figures include 5 or 10 hours respectively for attendance on survey respondents. The Claimant submits this is likely to be enough time to allow for contact with the relatively small number of respondents who want to be contacted.
66. The Defendants' costs budget also contains provision for survey costs. The Defendants budgeted £56,200 for a survey and £12,650 for expert evidence in connection with a survey, yielding a total of £68,850. The explanation for the Defendants' figures being lower than those of the Claimant appears to be that the Defendants only envisaged dealing with the Claimant's current application, attending the hearing of that application, and, in the event that the application is successful, reviewing the survey evidence gathered. The Defendants' total budgeted costs amount to £617,856, and their current proposed survey costs are therefore about 11% of their total.
67. Mr Campbell submitted that the costs of the survey are reasonable, both in the context of the litigation and having regard to the value of the survey, and were effectively agreed to be reasonable by the parties before Deputy Master Henderson on 3 September 2014 (because otherwise the parties' budgets would not have been agreed).
68. Mr Roberts submitted that, on the Claimant's own figures, as more fully explained in the second witness statement of Mr Daniels of the Claimant's solicitors at paragraphs 16-17, the survey will cost somewhere between £185,000 and £205,000. He suggested that, for the reasons set out in the witness statement of Mr Smith of the Defendants' solicitors at paragraphs 59-67, this is likely to be an underestimate. In particular, he contended that the Claimant appears to have paid insufficient attention to the impact of the resulting expert and factual evidence on the existing 5 day trial estimate.
69. Mr Campbell invited me to pay no heed to Mr Smith's contentions that the costs will be considerably more than allowed for in the budgets, on the basis that (a) they are based on unduly pessimistic assumptions (including that the number of interviewees who will attend to be cross-examined will mean that the trial will take days longer) and (b) in order to vary the existing costs budget "good reason" needs to be shown in accordance with CPR Part 3.18(b), and the fact that his estimate happens to be higher than that of the Defendants' previous legal representatives is not a "good reason" for such a variation.
70. According to Mr Campbell, passing off is essentially half the Claimant's case, and the relevance of the survey to the issues in the action should be viewed in that light.

According to Mr Roberts, a consideration of the agreed list of issues for trial reflects the fact that the case is more about trade mark infringement than about passing off, and the trade mark issues – which he described as “the circumstances under which manufacturers may obtain a perpetual monopoly in the shape of their goods” - are also of more general importance. In addition, the survey will not assist on whether purchasing decisions by taxi drivers are influenced because they are susceptible to deception or even because they think that the public are susceptible to deception.

71. Even if the survey had satisfied the criterion of being reliable, I doubt very much that its value would justify the costs that are produced by the Claimant’s own figures. In my view, those costs are significant whether viewed in absolute or proportionate terms, and all the more so because, on any view, the survey is only relevant to part of the case.
72. However, the factor which weighs most with me concerns the likely impact on the trial hearing. It is difficult to predict how many respondents the Claimant may wish to call as witnesses in the event that permission is given for a full survey, although plainly the number is likely to be greater in the event that it comprises not 500 people but 1,000 people, as Mr Roberts submitted would lead to a more statistically reliable result. In the course of argument, Mr Campbell accepted that if the answers were in line with the pilot survey, about a third of the respondents would be potential witnesses, although he submitted that in reality very few of them would be likely to be available to be called at trial. However, even if the number was only, say, 20, and leaving aside any difficulties about organising that number of individuals to give evidence in an orderly and efficient manner, I am very concerned that their cross-examination alone could take one or two days. On top of that, time would need to be spent on consideration of expert evidence, cross-examination of experts, and submissions on the reliability of the survey and on the evidence of the respondents. It seems to me likely that either the trial estimate would need to be increased, or a disproportionate part of the existing 5 day fixture would be spent on these matters. Either way, I find it hard to accept the game would be worth the candle.

Impact on trial timetable

73. If I had not ruled against the Claimant on other matters, I would not have been minded to refuse the application on the basis that it is made too late in the day, or because the steps necessary to give effect to the permission sought by the Claimant could not be carried out without jeopardising the trial date or causing such disruption to preparation for a trial in November 2015 as to make it wrong to grant that permission.

Conclusion

74. For all these reasons, this application is dismissed.