

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building,
Fetter Lane,
London, EC4A 1NL

Date: 31/07/2012

Before :

THE HONOURABLE MR. JUSTICE HILDYARD

Between :

(1) FINE & COUNTRY LIMITED
(2) GPEA LIMITED
(3) FCEA LIMITED

Claimants

- and -

(1) OKOTOKS LIMITED
(formerly SPICERHAART LIMITED)
(2) SPICERHAART GROUP LIMITED

Defendants

Mr Michael Hicks (instructed by **Wallace LLP**) for the **Claimants**
Mr Mark Platts-Mills QC and Ms Jessie Bowhill (instructed by **Manches LLP**) for the
Defendants

Hearing dates: 1,2,5,6,7,8,9,12,13,14 March 2012

Judgment

Mr. Justice Hildyard:

Introduction

1. The Claimants are in the business of providing services to estate agents, operating under, and licensing to independent local estate agencies the use of, the name “Fine & Country”. The Defendants are companies in a group which operates a number of national estate agencies, some under the name “Fine”, others under the name Haart (and various other names too).
2. The Claimants and the Defendants both operate in the premium property market. Although the Claimants’ direct customers are, in effect, its licensees (actual and prospective) its business depends on its reputation amongst vendors and purchasers of premium properties marketed under its brand name. The Claimants (and its licensees) and the Defendants are thus rivals.
3. The Claimants seek to stop the Defendants using the name and sign “Fine”. They claim that the Defendants are passing off their businesses as (or as connected with) that of the Claimants, and furthermore are in breach of the Claimants registered trade marks (“the F&C Marks”). They also claim damages or an account of profits.
4. The Defendants say that the claims constitute an inappropriate attempt to monopolise a descriptive word (“fine”) which is common in ordinary language and extensively deployed in the estate agency market. They say that the claims should be dismissed; and by Part 20 claims they seek also orders invalidating and revoking the F&C Marks.
5. The parties’ respective claims raise a plethora of points both legal and factual. Although ultimately many were not called and others were not cross-examined, some 44 individuals provided witness statements, and the documentation ranged over some 25 files. There was also extensive citation of authority: 4 large files. Counsel on each side conducted the case with model efficiency, and provided detailed and helpful written submissions in opening, which were supplemented in closing: but the hearing nevertheless took 10 days (not including reading days).
6. In the result I have concluded that the Claimants’ case is well-founded, and that they are entitled to injunctive relief and an inquiry into damages or an account of profits and ancillary relief accordingly. However, I need to address the variety of issues raised: hence this long judgment.

The F&C Marks and the FINE sign

7. The Claimants’ relevant business was started in 2001 and has at all times operated under the name “Fine & Country”. Advertisements, “for sale” signs, office fascias and signs and other advertising and marketing materials for the business make prominent and extensive use of the name Fine & Country and the Fine & Country Logo as shown below. (There are some minor variations in usage. For example the reference to the website is frequently, but not always used.)



8. The Defendants started using the name and sign “Fine” in about June or August 2009. The business typically uses the name “Fine” in the style of the logo shown below:



The name depicted in this way is often accompanied by the strap line:

“selling fine homes throughout the country”

9. The “Fine & Country” name and device is United Kingdom Registered Trade Mark No. 2287385 dated 5 December 2001 (“the UK Mark”) and also Community Trade Mark No. 8468837 registered on 21 January 2010 (“the CTM”). Both the UK Mark and the CTM are registered in class 36 in respect of real estate affairs (in the case of the UK Mark) and real estate agency services (in the case of the CTM).

The Claimants

10. Collectively (although their respective rights and activities are the subject of dispute, as I shall explain later) the Claimants conduct business under and by reference to the “Fine & Country” name and logo and advertise and promote such name and logo. Their guiding and driving force is Mr Malcolm Garland Lindley (“Mr Lindley”), who is Managing Director of each of the Claimants, and was, with Mr Jonathan Alistair Cooke (“Mr Cooke”), a founder shareholder of the group parent company, GPEA Limited (the Second Claimant, “GPEA”).
11. GPEA, in which Mr Lindley remains the majority shareholder, was formed in 1993: its original and primary activity was to create and organise an organisation called the “Guild of Professional Estate Agents” which is in essence an association for selected estate agents: it still operates.
12. GPEA now wholly owns and controls the First Claimant, Fine & Country Limited (“F&CL”). F&CL wholly owns and controls FCEA Limited (“FCEA”). It was at one time, but is no longer, disputed that F&CL is the registered proprietor of the trade marks at issue in these proceedings.
13. It is a curiosity of the case, which has provided one of the foundations of the Defendants’ Part 20 claim for revocation of trade mark, that both F&CL and FCEA have for some time now filed dormant company statutory accounts.

14. In the case of F&CL, its accounts have been drawn and filed on the basis that it has not traded since May 2006. In its accounts for the year to May 2011 it is stated that “The company did not trade during the year and it is not intended for the company to trade in the foreseeable future.”
15. In the case of FCEA, its accounts have presented it as dormant since its incorporation in 2008 (as a subsidiary of F&CL). The only one of the Claimants that is presented as actively trading is GPEA.
16. It is GPEA that purports to licence the use of the F&C Marks, in the name of F&CL until about 2008, and in the name of FCEA from then onwards (and continuing).

The Defendants

17. The Defendants’ group operates a number of estate agency brands. As well as “haart”, and now “FINE”, these include “spicerhaart”, “Felicity J Lord”, “Spicer McColl” and “Darlows”.
18. It is the Claimants’ case, and it was their justification for joining (at a relatively late stage) the Second Defendant into the proceedings, that in reality the Second Defendant runs the businesses of the various companies within the group (including the First Defendant) as its own divisions as if they were part of a single corporate entity.
19. The Spicerhaart Group website claims that its business is the “largest independent estate agency network in the UK”. But their focus has been largely on the non-premium, lower end, market. It was not disputed that the haart name and brand is associated with the lower end of the market.
20. For some time, the founder, majority shareholder and individual in control of Spicerhaart Group, namely Mr Paul Smith (“Mr Smith”), has wanted to move into the upper quartile premium market. He seems to have considered first using Fine & Country as a vehicle. Over the course of 2005 and 2006, Mr Smith made various approaches to Mr Lindley with a view either to acquiring about 20 licenses and an equity stake in the group (as he proposed towards the end of 2005) or acquiring the entire business (as he proposed in 2006). At one time Mr Lindley seemed amenable; but, to Mr Smith’s disappointment, Mr Lindley eventually declined.
21. Having been rebuffed by Mr Lindley, from 2007 onwards, Mr Smith concentrated instead on seeking to establish and home-grow a premium end business under the haart umbrella.
22. To this end, the “*fine* Haart” brand was launched in 2007 and following that a magazine known as “*fine*” began to be published. The success of that exercise was limited. The “haart” name remained associated with the lower end of the market; and the association made building a premium brand very difficult.

23. Then, in 2009, and with the assistance of both a new employee who had previously worked for the Claimants and a marketing company, the Defendants adopted new branding under the name and logo “FINE”. As appears above, the “FINE” logo, like the “Fine & Country” logo, is in capitals, with a font with serifs, gold underlining of the word, and a strap line which includes the word “country”. The style of the new branding is, to my mind, plainly similar to, or at least reminiscent of, the Fine & Country brand, as indeed those involved in the development of its design appreciated (as I later explain).

Summary of the parties’ respective cases

24. The Claimants contend that the result of the Defendants adopting the name and logo “FINE” has been very substantial confusion amongst members of the public and those involved in the property business, and especially amongst prospective purchasers and (particularly) vendors of high-end properties in the country offered for sale through local estate agents.
25. The Claimants’ primary case is that the Defendants are passing off or attempting to pass off their services as services of, or connected with, the Claimants. In addition, however, they have what their Counsel described as a “reserve” case for trade mark infringement: they claim that the First Defendant is infringing the Claimants’ UK trade mark and the CTM, and that the Second Defendant has procured or conspired with it to do so.
26. By these proceedings the Claimants seek injunctive and remedial relief accordingly. They seek relief primarily against the First Defendant, but also against the Second Defendant on the basis that it has acted pursuant to a common design with the First Defendant and/or procured and assisted the First Defendant to do such acts.
27. The Defendants, on the other hand, contend that both the F&C Marks and the Fine brand are descriptive, and that the Claimants are seeking to monopolise the use of an ordinary English descriptive adjective; that the Fine & Country mark has no distinctive character (or if it does, that character resides in elements of the mark that are absent from the Defendants’ sign); and that there is no likelihood of confusion, still less proof of deception, such as to found a claim for passing off. They say the evidence is flawed and in any event demonstrates no more than a lot of “muddle and noise”
28. The Defendants deny that the Claimants have any proper claim for trade mark infringement; and by Part 20 Claim they seek revocation of the Claimants’ marks. They contend that, to the extent that they have any distinctive character over and above their descriptive meaning, the F&C Marks have, as a consequence of the manner in which the licensees have used the marks, become deceptive as to their origin. They contend also that the F&C Marks have not been used with the consent of their true owner.
29. As to the claims in passing off, they contend that none of the three requirements of (1) goodwill (2) misrepresentation (as distinct from muddle or confusion) and (3) a real likelihood of damage is fulfilled in this case; and that if any goodwill exists it does not belong to the Claimants, but to the licensees.

30. Mr Hicks, Counsel for the Claimants, suggested in opening that the issue at the heart of the case (he said the pun was intentional) is one simple issue: are the Defendants causing confusion and deception by calling their business Fine?
31. Although Mr Platts-Mills QC QC (Leading Counsel for the Defendants) has raised a number of other points, including as to the use of the Fine & Country mark, and has depicted the case as epitomising an inappropriate attempt to “*enclose part of the great common of the English language and to exclude the general public of the present day and of the future from access to the enclosure*” (quoting Sir Herbert Cozens-Hardy MR in *Joseph Crosfield & Son’s Application* (1909) 26 R.P.C. 837 at 854), the ultimate issue is indeed simply stated. Its answer is, inevitably, longer.
32. The starting point as it seems to me is a comparison of the brands, and a description of their genesis.

“Fine and Country” brand

33. The origins of the Fine & Country business lay in Mr Cooke and Mr Lindley’s understanding that it was difficult for independent local estate agencies to compete at the upper end of the market dominated by such well known national estate agents as Knight Frank and Savills: they would lack both the necessary high profile, and (for example) a London presence and other marketing vehicles to market widely and effectively high value properties.
34. The concept behind the “Fine & Country” brand is that local estate agencies can acquire a licence which permits them both to trade under the Fine & Country name and logo (usually in conjunction with their own) and also to market premium properties, not only through their own offices but also through the Claimants’ office in Park Lane, London, and on the fineandcountry.com website and in other Fine & Country publications.
35. The gist and objective of the Fine & Country concept is thus to enable licensees to compete with well known national estate agencies (such as Knight Frank and Savills) in respect of properties at the upper end of the market by providing, for a fee, a high profile image, a national network of agencies with a London presence and office, and a significant investment in national and international advertising. It is a product primarily aimed at local or provincial estate agencies. The brand is intended to provide a high profile image and access to a national network of agencies with a central London presence, and a consistent national and international branding and presence, as well as support and advertising opportunities: all of which would be likely to be beyond the means of local estate agencies acting alone.
36. Although not themselves estate agents (they are not directly involved in property sales, a point much stressed by the Defendants), the Claimants are thus in the estate agency business, providing a marketing umbrella and vehicle for the various independent estate agency businesses that have signed up as licensees.
37. Licensees are allocated an agreed territory specified by postcodes. Under the licence they are entitled to market properties in the upper quartile of the market

under the brand. They are required by the licence terms to comply with a code of conduct, branding guidelines and an operations manual. Mr Lindley was adamant that this is not a franchise operation: the Claimants' licensees operate independently (albeit subject to the guidelines and terms mentioned above). However, he was equally adamant that the Claimants are vigilant and effective in enforcing licensees' obligations.

38. As well as using the brand, licensees may take up various other benefits which are included in the License fee. In addition to use of the Park Lane office for promotion and marketing, and inclusion of properties for sale on the Fine & Country website, licensees may also advertise through the Fine & Country national magazine currently called "Refined", use a referral network which allows them to refer a buyer or seller to another licensee for an agreed percentage of the commission. They have password protected access to the Fine & Country hub and database, and they may participate in various committees and conferences (national and international) designed to extend the brand and its marketing force, and pool the knowledge and experience of brand licensees. Licensees may also attend regional meetings of the National Advisory Committee (the "NAC"), which is comprised of representatives of UK licensees and which seeks to provide input and consultation in connection with the development, promotion and progress of the brand.
39. Additional benefits, for which a further charge over and above the license fee is made, include participation in combined national advertising campaigns (for example, in the Sunday Times and The Telegraph), use of space within "Exclusive Home Worldwide" international magazine, and the provision of high quality brochures for high-end properties, as well as participation in collective training and events in the market sector.
40. Some licensees have chosen to trade from stand-alone Fine & Country offices. Other licensees operate the Fine & Country business from within their existing business by, for example, dedicating a window or a specific area in their office to the Fine & Country brand.
41. The concept has been a considerable success. In the UK alone there are now some 79 licensees operating from about 41 stand-alone Fine & Country offices and about 156 dual branded offices; and there are also 57 offices overseas. Fine & Country has won numerous awards, and it consistently ranks at or towards the top of the list of estate agents with the largest number of sales of upper quartile properties, and the largest number of such properties on its books.
42. The evidence (which was not really disputed and which I accept) is that the Fine & Country name and logo has become and remains well known to members of the public and the trade, especially those interested in the sale and purchase of domestic properties at the upper end of the market.
43. Accordingly, it is the Claimants' case that as a result of the extensive use, advertisement and publicity made of the Fine & Country name and logo by the Claimants and their licensees:

- (1) both the UK Mark and the CTM have acquired a reputation in the UK and elsewhere in the European Union such that the provisions of section 10(3) of the Trade Marks Act 1994 (the “Act”) and articles 9(1)(c) of the Council Regulations 40/94 and 207/2009 on the Community Trade Marks (the “CTM Regulations”) apply to the Registered Trade Marks; and
- (2) a valuable goodwill and reputation attaches to the Fine & Country name and logo, and such goodwill and reputation belongs to the Claimants (or one or more of them).

The FINE brand

44. I have already alluded briefly to the genesis of the FINE brand. More detail has been provided by one of the witnesses called by the Defendants, namely Mr Dean Heaviside (“Mr Heaviside”). He is currently the Divisional Sales Director of the First Defendant. He previously held the title of “Fine Divisional Director” (a description which of itself, to my mind, connotes a non-adjectival or descriptive meaning of the word). Mr Heaviside is an important figure in the proceedings, since he was involved in the development of both the Fine & Country and the Fine brands, as I turn briefly to explain.
45. Between about January 2003 and January 2009 Mr Heaviside was a director of Tops Property Services Limited (“Tops”). In about September 2003, Tops opened (in Norwich) the first stand-alone Fine & Country office in the country. This became something of a test and pilot for the future of the brand. Prior to joining Spicerhaart with a brief to lead the launch of what was at that time the Finehaart brand Mr Heaviside had been closely involved in the development and growth of the Fine & Country brand, both as a result of his work as a Director of a licensee and also as a consequence of his appointment as a member of the NAC.
46. The depressed market conditions of 2008 took their toll on Tops; and although (so I understand from Mr Heaviside) the Fine & Country side of its business was resilient its general financial position deteriorated badly. Mr Heaviside began initial discussions with Mr Lindley in the latter part of 2008 with a view to acquiring the Fine & Country licence and business for Norfolk and North Suffolk. However, a group comprised of two former directors of Tops was also interested, and prevailed: in January 2009, Tops sold its businesses (including its Fine & Country business) to Norfolk Country Properties Limited (“NCPL”) which was and is operated by one of Tops’ former directors, and Mr Heaviside’s employment was transferred under TUPE to NCPL. Mr Heaviside was not happy there and left in early 2009.
47. After some further inconclusive discussions with Mr Lindley about the possibility of becoming a consultant to Fine & Country, he was employed by Spicerhaart. His brief was (and here I quote his witness statement) “to work on rebranding its then existing “finehaart” brand to deliver a consistent lifestyle brand across a controlled network”, with his first task being “to understand why the “finehaart” brand had not developed as hoped.”
48. Working together with a branding agency called The Marketing Café Limited (“TMC”) Mr Heaviside concluded that (to quote his witness statement again) “the

main reason for this was that the “Finehaart” brand was too close to the core brand [I interpolate, “haart”] and was unable to establish its own identity.” His and their prescription was “to develop the stronger elements of the “Finehaart” brand (most notably the “*fine*” magazine...) but transition to a more distinctive stand alone brand” focused on “the best element of the existing “Finehaart” brand [which] was the use of the word “Fine””.

49. The re-branding took place between April and June 2009, and over that short course of time all overt connection with the “haart” brand, however oblique, was progressively (and ultimately completely) eradicated. Thus, for example, after rebranding the business as “Fine” initial advertisements (in particular, in the Sunday Times on 14 June 2009) incorporated a small “haart” logo on the bottom right hand-side; but even this was dropped thereafter, lest it (however obliquely) undermine the impression of a business wholly separate from the “haart” brand.
50. Also as part of the rebranding, the font, colour and style of the “*finehaart*” logo were abandoned and replaced by the “FINE” branding to which I have referred above (capitals, font with serifs, gold underlining and strap line reading “Selling fine homes throughout the country”). This extended not only to advertisements and other sales literature but also to the magazine until then called “*fine*” (but retaining references associating it with haart): its italicised title was replaced, and all ostensible connection in the text with “haart” eradicated. In addition, the First Defendant replaced its domain name; it registered, and thereafter used, the domain name www.fine.co.uk.
51. It is the Defendants’ case that these changes were not calculated or intended to bring to mind the Fine & Country logo; and that the changes were neither influenced by that logo nor targeted at it or the Claimants’ business. Their case is that the new brand and its logo were derived simply from the old fine haart logo, adopting its stronger elements and excising those associating it with the Haart brand. The Defendants say that the adoption of the single word ‘FINE’ was based on the title of their magazine, and that the change in font and other elements of design were not influenced by Fine & Country, but by a desire for a crisp modern design.
52. This is, of course at the heart of the case and I return to it later. Suffice it to say for the present that it is not an easy position to accept, especially given references in the contemporaneous documentation to concerns on the part of Fine employees and contractors to avoid “plagiarism” and to internal questioning as to “Does it look too much like Fine & Country?”
53. For their part, the Defendants have sought to suggest, presumably adopting the old adage that attack is the best form of defence, that Fine & Country had in two respects itself sought to copy Fine. One suggested copying related to what was described as “Lifestyle marketing”. The other related to changes made by the Claimants during the course of about 2009.
54. The notion of “Lifestyle Marketing” was much dwelt upon by Mr Heaviside in his evidence. He sought to put it forward as a defining feature of Fine’s approach. He describes Lifestyle Marketing as involving, in broad terms, taking a property and using a lifestyle which potential purchasers are likely to aspire to as a

backdrop for the property description. Mr Heaviside is undoubtedly passionate about the potential of the technique, and he put it into practice whilst at Tops. But he felt his passion was not sufficiently shared by all the Committee, and though occasionally deployed within the Fine & Country stable now, he says that it was not earlier used consistently and never whole-heartedly; and Mr Heaviside told me that, in any event, there was not the cohesion and central control of licensees, nor the tight control of their marketing, necessary to drive its more extensive adoption.

55. I have dwelt a little on the matter of lifestyle marketing, to which I shall return, for two main reasons. The first is to explain the suggestion made that in this regard Fine & Country aped Fine. That I do not accept, since it seems to me that what Mr Heaviside was really saying was that he always wanted, even when at Fine & Country, to adopt it more vigorously, not that they did not deploy the technique at all. But, subject to one point, I rather agree with Mr Platts-Mills QC's resigned acceptance in his closing submissions that really this is unlikely to matter. The second is the point alluded to: it seems to me that the fact that both, to a greater or lesser extent, use the technique may be one of the factors that might lead to confusion between the two, even though in the case of Fine & Country, with less zeal and consistency than presently does Fine.
56. The second accusation levelled by Fine in its counter-attack is that after the adoption of the Fine sign, the Claimants altered the emphasis of its logo from the then prevalent (but not uniquely so) dark on light form (as in the UK and CTM registrations) to a light on darker form alleged to be closer to the style adopted by Fine. I reject this suggestion of copying also: as the Defendants accepted, the light on dark form was used occasionally by Fine & Country well before the launch of Fine.

Summary of main issues

57. Against this background, the main issues that arise may be summarised as follows:
- (1) Have the Claimants established the necessary elements for their claim in passing off (which Mr Hicks put forward as their primary case on the basis that it is in a sense legally the simplest and highlights the issues most clearly)? In particular have the Claimants established:
 - (a) the necessary goodwill or reputation;
 - (b) a misrepresentation (whether or not intentional); and
 - (c) damage or its likelihood?
 - (2) Are Fine & Country's two trade mark registrations liable to revocation? In particular:-
 - (a) Is the UK Mark liable to revocation under section 46(1)(b) of the Act on the ground of non-use?

- (b) Has the use made of both marks by or with the consent of the First Claimant been such that the trade marks have become liable to mislead the public as to the quality or origin of the goods or services supplied under the marks, thereby rendering them liable to revocation under section 46(1)(d) of the Act and Article 7(1)(g) of the CTM Regulation?
- (3) Are the marks invalid on the ground that they were, when registered, devoid of any distinctive character or consisted exclusively of signs or indications which serve to designate the kind and quality of the goods or services? See sections 3(1)(b) and (c) of the Act and Articles 7(1)(b) and (c) of the CTM Regulation.
- (4) If, at the time of registration, the marks were registered in breach of those provisions, have the marks subsequently acquired a distinctive character?
- (5) Has there been infringement under section 10(2) of the Act or Article 9(1)(b) of the CTM Regulation?
- (6) Has there been infringement under section 10(3) of the Act or Article 9(2) of the CTM Regulation?
- (7) Is Spicerhaart Group liable as joint tortfeasor with its subsidiary Okotoks Limited?

Passing off: the requirements

58. Adopting the sequence preferred by the Claimants, I address first the claim based on passing off under the 3 customary headings of (1) goodwill, (2) misrepresentation/deception and (3) damage.
59. These headings reflect the nature of the cause of action, which is the deceptive invasion of goodwill, goodwill being a species of property (and see *per* Jacobs LJ in *Phones4U Ltd v Phones4u.co.uk Internet Ltd* [2006] EWCA Civ 244, [2007] RPC 5 at paragraph 9). The gist of the cause of action is (*per* Lord Diplock in *Star Industrial Co. Ltd. v. Yap Kwee Kor* [1976] F.S.R. 256 at 269):

“invasion of a right of property not in the mark, name or get-up improperly used, but in the business or goodwill likely to be injured by the misrepresentation made by passing off one person’s goods as the goods of another.”
60. The requirements to be fulfilled, and the case law, reflect the fact that (to quote from a judgment of Gummow J. in the Federal Court of Australia in *ConAgra Inc. v McCain Foods (Aus) Pty Ltd* (1992) 106 ALR 465 at 517 which is in turn quoted in *Kerly’s Law of Trade Marks and Trade Names, 15th ed.* (“*Kerly*”) at 18-007):

“there are accommodated and adjusted inter se three sets of interests. There is the plaintiff’s interest in protecting his skill, effort and investment, the interest of the defendant in freedom to attract purchasers

for his goods and services, and the interests of consumers in having available a range of competitive goods and services for selection by consumers without the practice upon them of misrepresentations.”

Proof of distinctiveness and goodwill

61. As to (1) [goodwill], it is the Claimants’ case that, having regard to the very extensive advertising, promotion and use of the Fine & Country name and logo, and its standing and reputation in the market as confirmed by the many industry prizes awarded to it over the years, it cannot seriously be argued that the name and logo have not established and generated brand recognition and a distinctive reputation in the market. There is plainly attractive force in the name and logo. As previously noted, this was not seriously disputed: as the Claimants submitted in closing, no challenge was made to any of the Claimants’ evidence regarding advertising and promotion.
62. What the Defendants say, however, is that any goodwill has accrued to the licensees and not to the Claimants: the goodwill in question relates to and is developed in the course of the licensees’ businesses as estate agents, and not the Claimants’ business in licensing the use of the brand and in providing the other facilities described previously.
63. The Defendants contend that the Claimants, having themselves no business as estate agents properly so-called (since, as indicated above they do not themselves arrange or conduct property sales), cannot claim to have the benefit of goodwill generated by Licensees in the course of buying and selling property as estate agents. Put shortly (as it was summarised by Mr Platts-Mills QC in his oral submissions): “absent the estate agent business there is nothing. There is nothing there to attract goodwill.” Another way of putting that, as it seems to me, might be that any goodwill is generated in the business of the licensees’ estate agency; and any other goodwill is parasitic on that.
64. To this the Defendants add that the manner in which the F&C Marks are deployed, as an adjunct to the name of the particular licensee, means that the public recognise the “brand” as being the name of the estate agent whilst the F&C Marks describe the range of houses (i.e. fine country houses) sold under that “brand”. This (which they described as the problem of a “limping brand”) makes it both more difficult for the F&C Marks to establish recognition and distinctiveness and thereby goodwill and supports the argument that any goodwill developed enures to the licensee.
65. The Defendants also stressed in this context in particular the difference between reputation (for the purposes of section 10(3) of the Act) and goodwill, and the essential nature of goodwill as the “attractive force which brings custom” (*per* Lord Macnaghten in *IRC v. Muller & Co’s Margarine Limited* [1901] AC 217 at 223). They also cited Lord Oliver’s speech in *Reckitt & Coleman v Borden* [1999] RPC 341, 406:

“First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying “get-up” (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the Plaintiff’s goods or services.”

66. The Claimants contend that this analysis is misconceived. They submit first, that the services and facilities that they provide to licensees under the brand name Fine & Country, and the national advertising, brochures, web site, London office and other ways in which licensees are assisted by the Claimants, attract custom to the brand and thus to the business undertaken by the Claimants in providing them. They point to the success of the brand in terms of the numbers of their licensees and their willingness to pay substantial fees (£18,000 annually and sometimes even more), and the awards given to them in respect of the brand, as the proof of the distinctiveness and value of the brand and the goodwill attached to the business which makes it available and promotes it.
67. Secondly, the Claimants contend that there is no question or problem of a “limping brand”. The F&C Marks are distinctive in their own right; and that indeed is the value to the licensees of acquiring the right to use them. They are banners not postscripts.
68. Thirdly, the Claimants contend that under the terms of the licences, it is expressly stipulated that goodwill in the name and logo generated by licensees belongs to the Claimants and to the extent it arises is held on bare trust for the Claimants under the (same) express provisions.
69. Fourthly, the Claimants submit that even if goodwill in part accrues to the Claimants, but also in part to the licensees, any of the owners of goodwill may sue for passing off; they rely in this regard primarily on the old case of *Dent v. Turpin* (1861) 2 J&H 139. In that case, Father Dent (a master clockmaker) had 2 shops, one in the City and the other in the West End, and bequeathed one to each son, resulting in two clock businesses each called Dent. The goodwill attaching to the name was thus shared. It was held that both could sue a villain rather appropriately called Turpin for passing off. Though no such action would be available to either son against the other, passing off would lie against the third party usurper.
70. The Defendants submitted in respect of that second point that (a) neither an assignment in law nor a trust structure in equity could lawfully pass to the Claimants goodwill separate from the business of estate agency and (b) the purported trust arrangements, even if effective, would only vest an equitable interest, and not legal title to sue. The Defendants distinguished *Dent v Turpin*: in this case goodwill is not shared at all.
71. I do not accept the Defendants’ proposition that the business of the Claimants is incapable of generating goodwill separately from the licensees, nor the argument that any goodwill generated is attributable to and belongs exclusively to the licensees. In my judgment, that goodwill has, at least in substantial part, been

generated by the services and brand provided by the Claimants and accrues to the Claimants as the source of those services and that brand. The Claimants have developed an attractive force which brings custom to the services that they offer and the brand that they make available on licence. It is that attractive force that enables the Claimant to charge significant licence fees.

72. I return later to submissions made by the Defendants on the last day of trial as to whether the provision in the Claimants' licences for goodwill to be held by the licensees on trust for the Claimants precludes the Claimants from maintaining a claim in respect of that element of goodwill without joining the licensees as legal owners. This question seems to me to be largely relevant (if at all) to the quantification of damages. For the present suffice it to say that in my judgment the Claimants have plainly shown goodwill accrued to them such as to maintain a claim in passing off.

Passing off: misrepresentation/ deception

73. The next ingredient of the tort of passing off which I need to consider is whether there was misrepresentation or deception. Misrepresentation as such lies at the heart of an action for passing off (and see *Kerly* at 18-027). It is common ground that although a subjective intention to mislead or deceive is not required (and is indeed not here alleged), mere confusion is not sufficient. As Lord Greene MR said in *Marengo v Daily Sketch & Sunday Graphic Ltd* (1946) [1992] FSR 1 (at p.2):

“No one is entitled to be protected against confusion as such. Confusion may result from the collision of two independent rights or liberties, and where that is the case neither party can complain; they must put up with the results of the confusion as one of the misfortunes which occur in life. The protection to which a man is entitled is protection against passing off, which is quite [a] different thing from mere confusion”

74. The relevant mistake, to be actionable, must be induced by the provider of the goods or services: the mistake must have more substance and effect than an unresolved muddle, and its cause must be some misrepresentation. What must be demonstrated is:

- (1) (*per* Lord Oliver in *Reckitt & Colman v. Borden* [1990] RPC 340 (HL) (“*the Jif Lemon case*”)

“a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff”;

or

- (2) (*per* Goff LJ in *Bulmer (HP) Ltd v. Bollinger SA* [1978] RPC 79) that what is done

“represents the defendant’s goods [or services, see *Kerly* at paragraph 18-117] to be connected with the plaintiff in such a way as would lead people to accept them on the faith of the plaintiff’s reputation.”

75. For these purposes, the expressions “the public” or “people” connote customers or purchasers (actual or prospective) of the claimant or others with whom the claimant has business relations. Such people must be taken as they are found: and it is no defence that they would not be misled if they were more literate, careful, perspicacious, wary or prudent (see the *Jif* case at 415).
76. For the same reason, allowance must be made for the fact that marks are remembered rather by general impressions or by some significant detail than by any precise photographic recollection of the whole; and similarly, people’s recollection of the differences and similarities between two signs or marks may be imperfect: the one may yet be mistaken for the other in the memory and the mistake thus induced may be taken to be proof of deception, even though also the product of false recollection.
77. Moreover, even where members of the public notice differences between two names and the way they are written they may remain deceived: the one may be thought to be a re-brand, new modification or abbreviation of the other. Alternatively, variations in detail or abbreviations might well be supposed by customers to have been made by the owners of the mark that they were previously acquainted with for reasons of their own: and see *Kerly* at 18-145.
78. On the other hand, and for the same reasons (that is to say, the way people’s minds actually operate), the more expensive or important the transaction, the more deliberation and care a customer is likely (and thus assumed) to take. The casual or impulsive selection of a plastic bottle in the shape of a lemon is different from the choice of an agent to sell a house.
79. The distinction between mere confusion and unintentional deception is recognised to be “elusive”: as Jacob LJ explained it in *Reed Executive v Reed Business Information* [2004] RPC 767 at 797:

“Once the position strays into misleading a substantial number of people (going from “I wonder if there is a connection” to “I assume there is a connection”) there will be passing off, whether the use is as a business name or a trade mark on goods.”

80. Then in *Phones4U* Jacob J explained further:

[17] This of course is a question of degree -- there will be some mere wonderers and some assumers -- there will normally (see below) be passing off if there is a substantial number of the latter even if there is also a substantial number of the former.

...

[21] In this discussion of “deception/confusion” it should be remembered that there are cases where what at first sight may look like deception and indeed will involve deception, is nonetheless justified in law. I have in mind cases of honest concurrent use and very descriptive marks. Sometimes such cases are described as “mere confusion” but they are not really -- they are cases of tolerated deception or a tolerated level of deception.

[22] An example of the former is the old case of *Dent v Turpin* (1861) 2 J&H 139. Father Dent had two clock shops, one in the City, the other in the West End. He bequeathed one to each son -- which resulted in two clock businesses each called Dent. Neither could stop the other; each could stop a third party (a villain rather appropriately named Turpin) from using “Dent” for such a business. A member of the public who only knew of one of the two businesses would assume that the other was part of it -- he would be deceived. Yet passing off would not lie for one son against the other because of the positive right of the other business. However it would lie against the third party usurper.

[23] An example of the latter is *Office Cleaning Services v Westminster Window and General Cleaners* (1946) 63 RPC 39. The differences between “Office Cleaning Services Ltd” and “Office Cleaning Association,” even though the former was well-known, were held to be enough to avoid passing off. Lord Simmonds said:

“Where a trader adopts words in common use for his trade name, some risk of confusion is inevitable. But that risk must be run unless the first user is allowed unfairly to monopolise the words. The Court will accept comparatively small differences as sufficient to avert confusion. A greater degree of discrimination may fairly be expected from the public where a trade name consists wholly or in part of words descriptive of the articles to be sold or the services to be rendered” (p.43).

In short, therefore, where the “badge” of the plaintiff is descriptive, cases of “mere confusion” caused by the use of a very similar description will not count. A certain amount of deception is to be tolerated for policy reasons -- one calls it “mere confusion.”

81. Another (and earlier) way of putting this point (a point much stressed by the Defendants, as a facet of their primary contention that the words “fine” and “country” are merely ordinary descriptive words which have acquired no separate connotation) may be seen from the following passage of Lord Oliver’s speech in the *Jif Lemon* case (at 412):

“There is no “property” in the accepted sense of the word in a get-up. Confusion resulting from the lawful right of another trader to employ as indicative of the nature of his goods terms which are common to the trade

gives rise to no cause of action. The application by a trader to his goods of an accepted trade description or of ordinary English terms may give rise to confusion...But there can be no action in passing off simply because there will have been no misrepresentation. So the application to the defendants' goods of ordinary English terms such as "cellular clothing" (*Cellular Clothing Co. v. Maxton and Murray* (1899) 16 R.P.C. 397) or "Office Cleaning" (*Office Cleaning Services Ltd. v. Westminster Window and General Cleaners Ltd.* (1946) 63 R.P.C. 39) or the use of descriptive expressions or slogans in general use such as "Chicago pizza" (*My Kinda Town Ltd. v. Soll* [1983] R.P.C. 407) cannot entitle a plaintiff to relief simply because he has used the same or similar terms as descriptive of his own goods and has been the only person previously to employ that description...

Every case depends upon its own peculiar facts. For instance, even a purely descriptive term consisting of perfectly ordinary English words may, by a course of dealing over many years, become so associated with a particular trader that it acquires a secondary meaning such that it may properly be said to be descriptive of that trader's goods and of his goods alone, as in *Reddaway v Banham* [1896] AC 199."

82. As to the number of persons required to be deceived before an action will succeed, the test is whether, on the balance of probabilities, a substantial number of persons would be; it may not be possible to gauge how many, or to arrive at any quantitative or qualitative measure; but the measure must be substantial (see *Kerly* at 18-200) and sufficient for there to be likely to be a real effect on the plaintiff's trade or goodwill (and see *Neutrogena v. Golden* [1996] R.P.C. 473).
83. Lastly under this heading, I bear in mind that a decision on the question whether a mark or sign or get-up so clearly resembles another as to be likely to deceive is not an exercise of discretion but a finding of fact. As to this, in the *Neutrogena* case, Jacob J said this at first instance, in a passage approved by the Court of Appeal in the same case:

"The proper approach of the court to the question was not in dispute. The judge must consider the evidence adduced and use his own common sense and his own opinion as to the likelihood of deception. It is an overall "jury" assessment involving a combination of all these factors ... Ultimately the question is one for the court not for the witnesses. It follows that if the judge's own opinion is that the case is marginal, one where he cannot be sure whether there is a likelihood of sufficient deception, the case will fail in the absence of enough evidence of the likelihood of deception. But if that opinion of the judge is supplemented by such evidence then it will succeed. And even if one's own opinion is that deception is unlikely though possible, convincing evidence of deception will carry the day. The Jif lemon case ... is a recent example where overwhelming evidence of deception had that effect. It was certainly my experience in practice that my own view as to the likelihood of deception was not always reliable. As I grew more experienced I said more and more "it depends on the evidence".

84. The courts recognise, however, that finding and producing actual evidence of confusion is difficult. Members of the public are reluctant to attend court. Moreover, people who are confused and deceived may remain confused and deceived, and there is no reason why this should come to the attention of the parties. Furthermore, members of the public who were once deceived, but then appreciate that they were misled, will frequently have no reason to draw this to the attention of the parties, especially if the realisation comes some time after any relevant dealing with the parties. Finally, persons may be deceived, and decide not to do business with the claimant as a result. They have therefore no reason to contact the parties and inform them of the confusion. For these reasons, evidence of actual confusion and deception is often decisive, but its absence is not.

85. Thus, in *Phones 4U* at [45] Jacob LJ observed:

“It should also be remembered here that it is seldom the case that all instances of deception come to light -- the more perfect the deception the less likely that will be so.”

86. More recently in *Specsavers v. Asda Stores* [2010] EWHC 2035 at first instance, Mann J said in relation to a defence based on absence of confusion:

“First, Mr Purvis relied on a complete absence of complaints about confusion from Asda customers despite the 6 months that the logo had been present in the stores to the date of the trial. There was unchallenged evidence as to complaints procedures and handling, and none were recorded. I give this little weight. For this route to have yielded any relevant complaints there would have to have been customers who were confused, who then had their confusion removed, and who then felt sufficiently strongly about it to complain to Asda formally about it. This does not seem to me to be a likely scenario. I have difficulty in imagining how this can arise in practice.”

87. In *Harrods v. Harrodian School* Millett LJ said:

“Evidence of actual confusion is always relevant and may be decisive. Absence of such evidence may often be readily explained and is rarely decisive. Its weight is a matter for the judge.”

Kerr LJ (dissenting, but not on the approach to evidence of confusion) put the point this way:

“Even if there is no evidence of confusion whatever, the court must decide for itself, and may conclude that passing-off has been established: see e.g. per Sir Raymond Evershed M.R. in *Electrolux Ltd v. Electrix Ltd* (1953) 71 R.P.C. 23 (CA) at p. 31. Thus, it has often been said that the availability of such evidence is important, but not its absence, because it is notoriously difficult to obtain such evidence.”

88. Thus, the likelihood of deception is ultimately for the judge, who is entitled to give effect to his or her own opinion as to the likelihood of deception, and in doing so is not confined to the evidence of witnesses called at the trial: and see *per* Lord Diplock in *GE Trade Mark* [1973] RPC 297 at 321, cited by Morritt LJ (as he then was) in *Neutrogena Corporation and Anr v Golden Limited and Anr.* [1996] RPC 473 at 495. Of course, what is required is a finding of fact, not an exercise of discretion; the judge's approach should be the same as that of a jury; and the evidence may be such as to displace his or her own initial assessment; or confirm it; or simply leave it in place; but ultimately it is a question of fact for the judge.

Passing off: damage

89. Before turning to the evidence in this case, I should address the third element required to be established if a claim in passing off is to succeed: damage.
90. In *Chelsea Man v. Chelsea Girl* [1987] RPC 189 at 202, Slade LJ summarised the kind of damage which, if caused by misrepresentation, is actionable:

“(a) by diverting trade from the plaintiffs to the defendants;

(b) by injuring the trade reputation of the plaintiffs whose men's clothing is admittedly superior in quality to that of the defendants;
and

(c) by the injury which is inherently likely to be suffered by any business when on frequent occasions it is confused by customers or potential customers with a business owned by another proprietor or is wrongly connected with that business.”

91. Damage may occur even if deception is dispelled before the moment of purchase (or other commitment), if the claimant's goodwill is nonetheless harmed; and dispelled deception is actionable accordingly. Thus damage caused by passing off may successfully be claimed if a customer is deceived into going into one shop thinking it to be another if it can be established that, but for the deception, he or she might have gone in to the claimant's shop.
92. To a considerable extent, the prospect of damage and the fact of deception are intertwined: if deception is shown, damage is likely and usually assumed.

Evidence of confusion and deception

93. A considerable quantity of evidence was put before me, though Mr Platts-Mills QC depicted it as entirely lacking in quality. In addition to Mr Lindley, whose 3 witness statements explained in detail the context of the claims and the genesis of the proceedings, the Claimants put forward 35 witnesses, of whom the Defendants elected to cross-examine only 7. These statements exhibited voluminous numbers

of e-mails, evidencing or purporting to evidence instances of confusion and their consequences.

94. Of the Claimants' witnesses

(1) 3 (in addition to Mr Lindley) are directors of the Claimants (namely, Mr Richard Combellack, Mr Jonathan Cooke ("Mr Cooke") and Mr Matthew Pryke ("Mr Pryke"), of whom Mr Cooke and Mr Pryke were cross-examined. I should also explain that Mr Pryke is a solicitor. He was a partner (for some 5 years) in the intellectual property department of Wallace LLP (the Claimants' solicitors) before moving to GPEA in October 2011. He had conduct of the case when there (and a considerable involvement as group legal adviser thereafter).

(2) 11 are (or were) licensees, or employees of licensees, of the Claimants (together "the Licensees' witnesses", none of whom was cross-examined):

- (a) Mr Simon Bradbury ("Mr Bradbury");
- (b) Ms Clare Earthroll ("Ms Earthroll");
- (c) Mr Colin Shairp ("Mr Shairp");
- (d) Mr John Parry ("Mr Parry");
- (e) Mr John Howard ("Mr Howard");
- (f) Mr Andrew Kneale ("Mr Kneale");
- (g) Mr Jonathan O'Shea ("Mr O'Shea", who is now employed by the Defendants);
- (h) Mr Alan Collinge ("Mr Collinge");
- (i) Mr Trevor Michel ("Mr Michel");
- (j) Ms Heather Chidgey ("Ms Chidgey", who was slated to attend but in the end did not);
- (k) Ms Hannah Pawley ("Ms Pawley", though strictly she works for a telephone answering service retained by the Fine & Country office in Chelmsford and West Sussex).

(3) 7 (none of whom was cross-examined) are members of the public, but who had or have some connection to the Claimants, namely:

- (a) Mr Timothy Mullock (the Claimants' bank manager, "Mr Mullock");
- (b) Ms Samantha Andrews ("Ms Andrews");
- (c) Ms Christine Combellack ("Ms Combellack");

- (d) Mr Mark Burton (“Mr Burton”);
 - (e) Mr Nicholas Chaplin (“Mr Chaplin”);
 - (f) Mr Roger Wilkinson (“Mr Wilkinson”), who is the owner and director of an estate agency member of the Guild of Professional Estate Agents which is a business run by Mr Lindley through GPEA;
 - (g) Mr Donald William Cooke (“Mr D Cooke”, Mr J Cooke’s father).
- (4) 5 are members of the public who, it was common ground, have no connection to any of the parties (each of whom was cross-examined); they are (in the order in which they gave their oral evidence):
- (a) Mrs Frances Wilshere (“Mrs Wilshere”);
 - (b) Mrs Patricia Riley (“Mrs Riley”);
 - (c) Dr Pauline Desmond (“Dr Desmond”, who, though treated as independent, was a good friend of the owners of the Fine & Country branch in question);
 - (d) Mr Najib Hasnain (“Mr Hasnain”); and
 - (e) Ms Claire Appleby (“Ms Appleby”).
- (5) For comprehensiveness I should record that witness statements on behalf of the Claimants from a further 8 individuals were provided, namely (a) Ms Samantha Mercer, (b) Mr Howard Harris, (c) Ms Lucy Tinkler, (d) Ms Pamela Skeffington, (e) Mr Alan Brough, (f) Mr Michael Luff, (g) Mr Ralph Cross, and (h) Mr Jack Lane-Matthews. However, none of these was called. Except for the fact that in the Defendants’ closing submissions the witness statements of each but the last two were used to illustrate the Defendant’s submission that the statements had plainly been prepared using cut and paste since key phrases in them were substantially identical, it was agreed that I should not take their evidence into account.
95. The considerable volume of e-mails and other correspondence exhibited by the directors and licensees was helpfully collated in a separate bundle and its contents briefly summarised in a “Schedule of Instances of Confusion”, which was also attached to the Claimants’ written Closing Submissions (“the Schedule”). Although the references to the bundles (which were, of course, a useful tool for the hearing and in preparing this judgment) will no longer be of assistance, the comments provide a useful resumé: and I attach that schedule to this judgment to stand in as such.
96. For the Defendants the following were called, all of whom were cross-examined:
- (1) Mr Edward Mead (“Mr Mead”), a director of an independently owned firm of estate agents in Chelsea, who gave evidence of his experience in the field;

- (2) Mr Dean Heaviside (“Mr Heaviside”), whom I have already mentioned);
 - (3) Mr Jeremy Sice (“Mr Sice”);
 - (4) Mr Matthew Bowden (“Mr Bowden”);
 - (5) Mr Darren Neave (“Mr Neave”); and
 - (6) Mrs Anne-Marie Green (“Mrs Green”).
97. Witness Statements were also provided by Mr Thomas Rhys Phillips (“Mr Phillips”), a trainee solicitor employed by Manches, Solicitors to the Defendants, who put forward evidence of the use by estate agents of the terms “fine”, “finest” or “country” in their advertising and/or branding. Similarly, Mr Matthew William Bowden (“Mr Bowden”). He was not cross-examined: it is not disputed that such terms are in common use.
98. The Claimants have drawn attention to the fact that a number of individuals who might have been expected to be called by the Defendants were not, and in particular:
- (1) Mr Paul Smith (“Mr Smith”) , Chief Executive Officer of the Second Defendant, who was closely involved, and had the final say, in the adoption of the name Fine, and (especially) the style in which it would be and is now written (and who, so I understand, was in Court on at 2 days of the hearing);
 - (2) Mr Palmer, from the TMC, the branding agency instructed by the Defendants to re-think its branding;
 - (3) Mr Lucian Pollington (“Mr Pollington”), an executive director of each of the Defendants and General Counsel to the Spicerhaart group as well as Corporate Development Director, who provided 2 witness statements but was not cross-examined.
99. The Claimants also point out that only one branch manager or employee of the Defendants was called; that is Mrs Green, who admitted confusion and whose evidence I consider in greater detail later; no-one else was called to rebut evidence of confusion in other offices in which there was e-mail material suggesting it had arisen.
100. Foreshadowing later more detailed comments in respect of the Defendants’ evidence, I do consider the absence of witnesses who might have been called by the Defendants, without any specific reason being advanced, to be of some importance. This is especially so on in the context of the question which arises as to whether with knowledge of close similarities between their sign and the Claimants’ brand, the Defendants took a risk that people would indeed be deceived. But I shall return to that, after stating my views first on the Claimants’ witnesses and evidence, and the reasons put forward by Mr Platts-Mills QC why so many of the witnesses put forward by the Claimants were not cross-examined

(which go to the quality of that evidence and the methodology and manner of its collation and presentation).

101. In the latter regard, Counsel for the Defendants' overarching point was that the entirety of the evidence put forward was (to quote their admirably thorough Closing Submissions) "tainted to an unacceptable degree by the mechanisms under which it was collected" such that "this court can place no weight on it at all." They sought to justify and reinforce the conclusion thus urged by reference to criteria set out in relation to survey evidence by Whitford J in *Imperial Group PLC & Another v. Philip Morris Ltd & Another* [1984] R.P.C. 293.
102. The Defendants submitted that:
 - (1) what they described as "woeful" disclosure had been given of such matters as the totality of the persons interviewed and the number of complaints received in comparison to enquiries made for purchase or sales in F&C offices;
 - (2) the e-mail and questionnaire evidence from allegedly confused members of the public (a) could not be the subject of cross-examination, (b) was for the most part third hand, since the e-mails comprised reports from the licensees summarising complaints made to them and the questionnaires had not been completed by an allegedly confused member of the public, but by third parties who had not given evidence;
 - (3) the Claimants had failed to provide the exact complaints and answers provided by the relevant witnesses, and instead put forward highly edited versions in which the witnesses' own evidence was submerged;
 - (4) the inference from the actual wording of the introductory paragraphs of all the witness statements that interviewees (whether or not ultimately they became witnesses) had been asked questions, described by Mr Platts-Mills QC as "completely leading", on the assumption that they had indeed been deceived, and asked to find and put forward evidence to support an *a priori* conclusion of confusion;
 - (5) the witness statements were formulaic and/or expressed in conclusory or "boiler-plate" form, reinforcing the impression that witnesses signed up to notions or speculations put in their heads by others; and
 - (6) overall, what was put forward as evidence was tainted to an unacceptable degree by the mechanisms or processes under which it was collected and the formulaic way in which it was presented.
103. The manner in which most of the evidence was collected is evident from the e-mails from the Claimants which elicited it.
104. To initiate the process of collecting evidence of confusion there was a standard pattern or template e-mail sent to licensees in substantially the following form under a heading "The Fine brand". The following quotation from an e-mail from

the Claimants dated 24 February 2010 to one of their licensees demonstrates the template:

“We are currently taking advice as to potential action against Fine and an important element of this consideration is any confusion of the brand in customers’ minds.

Would you please, as a matter of urgency, reply to this e-mail with details of any such confusion you are aware of that has occurred with customers of your office. Please let me know if you have evidence of such confusion, i.e. correspondence.”

105. I should perhaps note in passing that the Defendants also make the point in this regard that prior to this letter, there is no documentation recording complaints of confusion. Mr Lindley confirmed that he would have retained any there had been (especially since his solicitors had made clear he must keep any such material when he saw them first in the Autumn of 2009); and it is thus to be assumed that there were none prior to February 2010. The Defendants further suggest that there was no real basis for the assumption of confusion; and indeed Mr Lindley accepted in cross-examination that he had no scientific or hard evidential basis for assuming there was confusion, and simply was aware of “a considerable amount of confusion and noise within the network, particularly from Gerrards Cross, where a Fine branch had opened.”
106. Subsequently, a form of Questionnaire was circulated to licensees to be used “to report any instances of confusion arising from the use of the brands “Fine & Country” and “Fine” (as used by Spicerhaart Limited).” The form sought particulars under 5 main headings: (1) “Details of the instance of confusion with Fine & Country which has occurred arising from the use of the “Fine” brand”; (2) “What evidence has been provided by the individual(s) reporting the confusion (e.g. email or letter or other supporting documents?) This should be attached to this form”; (3) “Name of the individual(s) reporting the confusion”; (4) Is the individual(s) reporting the confusion willing to be contacted further to discuss the matter?” (to which, I should note, without great surprise, the answer in most instances was “No”); (5) “Details of Fine & Country representative submitting this form”. Space is left also for “Additional Information.”
107. Later correspondence from Mr Lindley to licensees is more emphatic as to the need for evidence and for co-operation from licensees to ensure its collection. Even by May 2010 Mr Lindley was sending e-mails asking Licensees for their “active support in the provision of evidence”; and by June of that year licensees were being told that Mr Lindley was “extremely disappointed with the level of support received from the membership in terms of examples of brand confusion” and that unless they could provide “solid evidence of brand confusion then our chances of success are reduced and it could even be deemed that there is no case to bring.”
108. Continuing the sequence, Mr Lindley was cross-examined at some length on a letter dated 16 September 2010, part of which read as follows:

“As you are aware, we are deep into the litigation against Spicer Haart, the owners of Fine, and our lawyers have stressed the importance of gathering as much evidence of cases of confusion in the marketplace as possible.

Many of you have already supplied us with good examples of this but, the stronger and more expansive the level of evidence we can supply, the stronger our case becomes.

As a reminder, we need details of confusion that has arisen between your agency and the Fine brand such as – applicants contacting you to view properties on the market with Fine, vendors calling you to discuss a property they may have on with Fine, anecdotal examples of customers speaking to you having mistakenly contacted Fine, etc. [characterised by Mr Platts-Mills QC as “any old tittle-tattle”].

The more substantial the evidence the better; for example, the provision of names and contact details of customers who have been confused is very good – and it would be ideal to have correspondence from them to this effect. If you know anyone who would be willing to act as a witness, then would you please forward me their contact details.

Also very useful would be any evidence you have of the Fine brand copying your marketing activities and material, either now or when they were trading as FineHaart...”

109. As the time of trial grew closer, the correspondence requesting examples of confusion became more pressing. Quoting from an example (a e-mail dated 14 September 2011 to a licensee from Mr Lindley, now under the heading “Fine litigation”:

“The Fine litigation continues to progress towards the High Court hearing in February.

As you know, this is a case of Trade mark infringement and Passing Off and these issues are generally tested by the confusion such encroachment causes.

I know this is causing considerable confusion and I write again to ask you to notify us of any confusion you may encounter.

Please do not underestimate how important this is to the brand – please do not leave it to others – please do not think anything is too small or too trivial – and please do not think your clients are going to have to go to court or be

encumbered by officialdom...none of the above are the case.

Please report each and every case of confusion”

110. In some letters Mr Lindley emphasised also the obligations of both the Claimants and the licensees. Thus, in a letter dated 7th April 2011 to a licensee Mr Lindley wrote:

“...For the case to succeed, the test is ‘does the imitation cause customer confusion?’ Clearly it does and we do have a significant weight of evidence to prove this as being the case. However, it appears the confusion is deeper, more widespread and more rooted than just this, in day to day mistakes and it is that volume of mistakes I would like to try to measure between now and the hearing.

To this end I would ask that you copy and use Form 3 in your Fine & Country outlets on each occasion that you experience an instance of confusion...

This is a very serious and difficult litigation which we are bound to pursue in fulfilling our contractual obligations to yourselves and success will terminate their trade mark infringement and passing off of the Fine & Country brand. We do now need every Fine & Country licence holder to fulfil their contractual obligations under their licence – “To take such reasonable action as the Company shall direct in relation to any infringement of the Proprietary Marks.””

111. The Defendants submit in these circumstances that the questions asked of the licensees were leading and the evidence obtained was tainted from the outset, assuming what was required to be demonstrated.
112. My views in respect of the submissions on behalf of the Defendants intended to undermine, devalue or marginalise the process and production of the Claimants’ evidence are in summary as follows:

- (1) As to disclosure, I accept that I have not been provided with detailed analysis to allow me to assess what proportion of total licensees the responses represent, and still less with details of what proportion of licensees’ potential customers expressed confusion or appeared to be under a misapprehension. But it seems to me that the Defendants have exaggerated their concerns in this regard. The universe of licensees is not large; and it does seem that a substantial proportion have provided material suggesting some level of confusion (though its seriousness I accept is hard to assess).
- (2) I would add that I do not accept that the criteria derived from the *Imperial Group* case can simply be transcribed or adopted by analogy into the

present case. In the *Imperial Group* case Whitford J was assessing market research survey evidence. The difficulties inherent in such evidence are obvious. The nature of the exercise places a special significance on the way questions are phrased; the answers given may be inexactly stated; those participating seldom have any chance to modify their answers, and seldom are called upon to justify them; and the weight being usually on numbers giving the “right” answer, rather than the quality of the reply, not only the exact way but also the fullest disclosure of the number of persons involved in aggregate, and a record of all answers, is vital. However, I accept that there is a resemblance in the fact that it cannot be directly tested or cross-examined upon.

- (3) Overall, the body of hearsay evidence compiled and adumbrated in the Schedule attached to this Judgment (there having been no dispute as to the accuracy of the summaries) is suggestive, to my mind, of fairly widespread confusion of what I might call “a low level”: that is to say, some of it is more in the nature of somewhat casual surprise, and only a smaller part suggests confusion based on or demonstrative of a false assumption fixed in the mind by the FINE sign or other Fine marketing. In short, I consider the e-mail material to be indicative of noise which may amount to confusion; but it is for the most part untested and, of course, it would not suffice of itself to establish deception. With those caveats, I consider it appropriate to take it into account as background material in my assessment of the more specific and tested evidence of confusion to which I refer later and in forming my own conclusions based on the evidence as a whole and my own initial impressions.
- (4) Although some of the same concerns apply by way of weak analogy, I do not think they apply with much force or relevance to evidence given by witness statement where the witness not only formally signs his or her evidence but agrees to be cross-examined upon it having formally sworn or affirmed its truth.
- (5) There are nevertheless factors militating against giving great weight to that evidence. Plainly licensees were put under increasing pressure to demonstrate incidents of confusion, documented if possible: and the emphasis was on quantity rather than quality. That increases the danger, which I take into account, that in certain cases ‘confusion’ was implanted or promoted, and then exaggerated by the process of repetition and recording. Licensees were not really pressed to ascertain how serious the confusion was: they were told to come up with evidence of the fact of it. The focus on quantity, and the pressure to reply, has elicited responses that in some cases barely rise above the anecdotal.
- (6) The witness statements were for the most part in formulaic terms, which reinforced the feeling that the evidence was prompted. Their introductions followed a template: although Mr Pryke cavilled at the expression “cut and paste”, which was Mr Platts-Mills QC’ depiction of various very similar (often identical) paragraphs appearing in several of the Claimants’ witness statements. Mr Platts-Mills QC provided a detailed analysis that showed clearly the repeated use of extremely similar phraseology. Mr Pryke was

constrained to accept that he and those assisting him “used an approach that was similar.” I think that underestimates the degree of repetition. Presentationally at least this was not helpful to the Claimants. The sense I had was of witnesses who were signing up to conclusions presented to them: they lacked any spontaneity or freshness, and certainly conveyed no sense of the witnesses’ actual way of speaking.

- (7) However, more substantively, I do not accept that the witness statement evidence as a whole is thereby rendered of no weight. The fact is that the present processes do tend to increase the input of legal advisers; and the words of witness statements are seldom their own. The fact that a witness relies on a solicitor to express in more legalistic or formulaic language the witnesses’ own views does not of itself signify that the witness does not understand what he is saying, or not believe it to be true. On the contrary, the fact that all the named witnesses put forward by the Claimants were prepared to attend, swear or affirm their evidence and be cross-examined (as I understand to be the position) suggests to me that they were prepared to stand by what was said as being the truth as they perceived it, albeit expressed in a somewhat formulaic way.

113. I turn therefore, with those caveats, and an overall appreciation that proof of deception may be elusive, to the witness evidence itself.

Claimants’ witnesses

114. The first category of witnesses (adopting for present purposes the way that the Defendants categorised the remaining evidence) is comprised of the evidence of the Claimants’ Directors (other than Mr Lindley). Their evidence, like that of the witnesses in the second category identified (that of licensees) consisted for the most part of exhibited e-mails between other persons (and thus 2nd, 3rd or 4th hand hearsay) and (in the words of Mr Platts-Mills QC) amounted in the round to little more than “evidence about the actions and state of mind of third parties, most of whom were unidentified.” There is, to my mind, substance in this depiction of this category of evidence for the reasons and to the extent already mentioned: the fact that the e-mail material was presented by way of exhibits to a witness statement does not add to its reliability since there remained no-one really able to speak to, and be examined on, the substance of the expressed confusion.
115. Much of the evidence of the directors of the Claimants who provided witness statements (Mr Pryke, Mr Combellack, Mr Jonathan Cooke and Mr Lindley) goes to issues as to the ownership, registration, assignment and use of the trade marks in dispute, and the corporate structure of the Fine & Country group. I shall come back to that when addressing the Trade Mark claims: I focus now on any evidence they give relating to confusion or deception.
116. I have already referred to Mr Pryke’s responsibility for the preparation of the Claimants’ witness evidence. In addition, Mr Pryke gave examples of what he regards as examples of confusion that he had himself encountered. In particular, he referred to meetings with a Mr Tim Swaddle on 27 January 2012, a Ms Marilyn Acons in January 2012 and Ms Julia Buckworth in November 2011 in which, in

each case, the person had either researched Fine & Country or had worked for them, and yet had confused Fine. Thus:

- (1) Mr Swaddle, who in seeking to tender for a contract for the supply to Fine & Country of luxury furniture hire services, appears to have researched the company, had confused the offices of Fine in Esher and Dorking for Fine & Country office (in fact they have none there);
- (2) Ms Acons, a buying agent who apparently had worked with Fine & Country, and especially its Park Lane office for a number of years, had assumed that the Fine signs she had seen were re-branded versions of Fine & Country, and was said by Mr Pryke to have been shocked that she had confused the brands;
- (3) Mrs Buckworth, his sister-in-law, similarly had mistaken a Fine sign for a Fine & Country sign.

117. Mr Hicks pointed out that Mr Pryke was not cross-examined on this evidence. That is so: but the confusion suggested was not Mr Pryke's; and none of the persons mentioned themselves gave evidence: in their absence I do not think it right to attach more than a little weight to Mr Pryke's say-so.
118. Mr Combellack (who is the IT and Marketing Director of GPEA Limited) having stated that he had "been asked by the Claimants' solicitors...to provide details of my confusion in relation to the use of the brands "Fine & Country" and "Fine" (an inapposite formula further illustrating the formulaic nature of some of the evidence) gave evidence of "an instance of confusion" recorded in an e-mail prepared by his assistant and involving a potential purchaser of a £6 million property in Hackney. The purchaser telephoned Fine & Country on the basis that they were marketing the property and became irate when Mr Combellack could find no trace of it on Fine & Country's database. In fact, the property was being marketed by Fine, and not Fine & Country. Again, the person depicted as confused did not attend; again I can attach little weight to this say-so.
119. Mr J Cooke who has been an estate agent since 1986 and is a director of F&CL and GPEA, refers to a number of instances of confusion of which he is aware and exhibits correspondence illustrating it. The fact that his witness statement is the vehicle for the evidence in question adds no substantial weight to the fairly voluminous collection of incidents of confusion all assembled by the Claimants and summarised in a Schedule of Confusion.
120. Mr Lindley himself was cross-examined over the course of 3 days, though there were interruptions to interpose other witnesses for reasons of convenience. Mr Lindley's 3 witness statements provided very useful background and are (as will become apparent) important in the context of the group structure, the process whereby F&CL became the registered proprietor of the F&C Marks, and the trade mark claims; but his evidence on the question now addressed of confusion is of more limited assistance.
121. Apart from dealing with the issue of lifestyle marketing which I have already discussed, all he does in the particular context of alleged confusion is to state his

view that confusion between the two brands is widespread and inevitable and to highlight (this in his First Witness Statement) certain particular incidents summarised in the Confusion Schedule. This is not, to my mind, really surprising: whatever assessment he could make was derived from licensees and from the material they provided or forwarded. His commentary does not substantially, to my mind, add to the weight of the evidence comprised in the Confusion Schedule and the other evidence later addressed.

122. That said, I should record that Mr Lindley was to my mind a helpful, patient and straightforward witness, who spoke frankly: some of his answers (including his acknowledgment that initially he had little to go on but an amorphous description of confusion and noise, and that little effort was made really to ascertain the true facts) were disarmingly so.
123. However, on one point Mr Platts-Mills QC challenged his veracity and accused him of fabrication and forgery, and then invited me to regard his other evidence in that light; and I should address that accordingly. The point related to a letter which he had initially exhibited as dated 6 August 2008 and subsequently explained, exhibiting another version, was in fact dated 2009. The letter in question related to the launch of the rebranded Fine; the Defendants apparently have no record of its receipt at any time. Mr Platts-Mills QC submitted that Mr Lindley provided no rational explanation for any of this, that the only explanation was that one or other or both of the two versions must have been fabricated; and that all this “provides an insight into Mr Lindley’s attitude towards the evidence that he is prepared to give the Court.”
124. I accept that no cogent explanation was provided; but I am satisfied that whatever it is it must be the product of some muddle or word processor wrinkle: “cock-up not conspiracy” as Mr Lindley put it. In any event, it seems to me plain that the letter would not accurately have been dated 2008: that is before the Fine sign had been developed. The issue does not cause me to come to any other conclusion as to Mr Lindley’s reliability than that I have expressed; and I do not think that either the letter or the mystery that appears to surround it has any significant bearing on the case.
125. I shall return later to one aspect of Mr Lindley’s evidence, on the question of damage, later.
126. As to the second of the categories identified by the Defendants, that of the licensees, like the evidence of the Claimants’ Directors, to a considerable extent the witness statements were simply vehicles for placing correspondence or emails before the Court, the weight of which is not enhanced either by that choice of vehicle or by general statements introducing such evidence.
127. To take an example, I do not find assistance in such generalised assertions as the following in the witness statement of Mr Shairp (a licensee):

“I or representatives of my business have on several occasions encountered circumstances in which members of

the general public have experienced confusion in connection with the FINE and Fine & Country brands.”

Such evidence barely rises, if it rises at all, above the anecdotal. Of course the exhibited material to some extent speaks for itself: but it is untested, and suffers from its reduced status as hearsay evidence. Even when the evidence given by the witness at least relates to a specific conversation (such as Ms Earthroll’s description of her conversations with a Ms J McLeer and a Mr Tilley) the evidence soon reduces to the witnesses’ perception of the thoughts and feelings of the other party to the conversation: which, again, cannot be tested. Counsel for the Defendants’ decision not to cross-examine such witnesses is understandable, and the savings of time thereby achieved are much to be welcomed.

128. As to the third category of witnesses they identified (members of the public with some connection to the Claimants or their licensees) the Defendants characterised their evidence as unrepresentative of the average consumer and irrelevant accordingly. Their evidence was also criticised on the ground of having been “subjected to the methodology employed by the Claimants” with “their witness statements drafted in a way that simply cannot reflect their words.”
129. The Defendants also levelled various more particular criticisms of the evidence of individual witnesses within this third category:
 - (1) None was a purchaser or vendor, nor had changed their economic behaviour by reason of their alleged confusion in any way: they were at best supportive by-standers;
 - (2) Ms Andrews is the sister and Ms Combellack the mother of Mr Richard Combellack, a director of GPEA; and Mr D Cooke is the father of Mr J Cooke, a director of F&CL: their evidence is that of supportive friendly relations, all stated in a formulaic way, and evidencing at best a rather casual, possibly even contrived, confusion falling well short of being reliable evidence of deception;
 - (3) The evidence of Mr Chaplin and Mr Burton, 2 experienced surveyors/estate agents, that some 2 years after Fine had been advertised in the national press they had almost simultaneously each spotted a FINE board and both made the same assumption that this was a re-branding of Fine & Country is a coincidence so curious it is hard to credit;
 - (4) Mr Mullock’s evidence is of a false assumption he made, whilst driving along, that a FINE for sale sign was a Fine & Country sign: it is irrelevant.
130. In my view, these criticisms have considerable force; and I can understand why it was not thought proportionate to cross-examine any of them. They are at best a chorus, and a rather over-orchestrated one at that.
131. What then of the lead singers, the 5 independent members of the public, of whom one (Mrs Riley) was a purchaser and the rest were actual or potential vendors? I turn to discuss each in turn.

132. Mrs Wilshere helps her husband in the running of his company that operates a plastic injection moulding factory. They also engage in purchasing, renovating, renting and selling buy-to-let properties. She came across Fine in 2010, in the course of a visit to Haart's office in Great Shelford, Essex. She had previously been generally aware of Fine & Country, but not Fine. She knew of Haart. She associated them with lower end properties. During her visit she was surprised to see some more up market properties being advertised. Upon enquiry she was introduced to someone called Jason, who managed the Fine side of the office. He introduced himself as working for Fine: "I'm not Haart, I'm Fine." No mention was made of Fine & Country; but Mrs Wilshere rather casually assumed they were the same. She arranged for a valuation by the Fine part of the Haart office of her and her husband's mock Queen Anne house (Dunwich House) near Saffron Walden. However, when she told her husband of her visit and this arrangement he said "Well, we don't really want the posh side of Haart marketing this, do we, really?" She cancelled the valuation. In the end they instructed Savills, having been disappointed by other contenders. When it did not sell they decided to rent it out. Then in 2012 they again looked to sell.
133. They decided they wanted the property to be marketed over an area that included both Bishop's Stortford and Epping. She searched through the internet for an agent which covered both. She typed in "estate agents Bishop's Stortford/Epping" and Fine & Country popped up. She thought they seemed suitable: she knew "they were used to dealing with our type of property". The sale price sought was about £1.2 million. She contacted the office manager of the Bishop's Stortford branch of Fine & Country (a Mr Mark Davies) to discuss their possible instruction. She mentioned that she and her husband had a reservation though: this was a reluctance to instruct the "posh end of Haart". Mr Davies then explained that the two businesses were not related. She states in her Witness Statement that she was "surprised to hear this as I found it hard to believe that a company would use such a similar (practically identical) name for an identical business. If Mark had not explained the situation to me I would have continued to view Fine & Country as connected with Haart and therefore inferior to other agents that marketed luxury properties."
134. Mrs Wilshere was a conversational and straightforward witness, and transparently honest. She was proud of her acumen in buying and selling properties. She was, however, realistic: she and her husband recognised that purchasers tend to use the internet, and having identified a property then get in touch with the agent rather than vice-versa: "Rightmove is king". She also said: "we look at the properties, not the name" (when looking for property to buy). What really weighed with her in contacting them was the geographical area covered by Fine & Country's Bishop's Stortford office; and it seems she was prepared to consider instructing them even whilst under the impression they were connected with Haart.
135. Counsel for the Defendants submits that this evidence demonstrates more indifference than it does confusion: and certainly not such confusion as to have been operative. I accept that Mrs Wilshere was not in the event in fact deceived. I accept also that her confusion was temporary, and cleared up before it had any actual effect on her economic decisions. But it did influence her sufficiently to be wary of (or at least hesitate before) instructing Fine & Country until the difference

between it and Fine was made clear to her. The evidence suggests to me that the two may easily be confused by sensible people; that in the case of a vendor the confusion may well be cleared up before the point of actual instruction, but at a time when inertia may discourage changing in mid-stream; and that there is some risk, but not a great one, that initial confusion may dissuade people from dealing with Fine & Country at all when seeking to market an up-market property.

136. Mrs Riley, now retired, but previously employed carrying out clerical work involving the recruitment of doctors and nurses, had found a property she was interested in buying on Rightmove. This was in February 2012. The property concerned was in Great Bealings. The property details said that “Fine” were the agents. She had previously been registered with both Fine and Fine & Country but had only been into the latter’s Woodbridge office. This was in about November 2011: she dealt with a Ms Veronica Suckling. She seems to have assumed that the two were the same. This assumption was fed by her seeing the FINE sign. She told me this:

“The reason why I thought it might be connected was that I saw the FINE. I’ve seen them on the way down on the A12 advertising. I saw the squiggle, and the only reason that I thought it might have been connected was because, if you look at Fine & Country, underneath the picture of the property they’ve got a dark brown line with the writing of the address, and then, if you look at Fine, theirs is dark brown, not quite the same colour brown, but with Fine and the little squiggle under Fine. Because [both] were in Church Street, I just assumed they were part of...”

In re-examination Mrs Riley clarified that by “squiggle” she really meant “little line”.

137. When Mrs Riley telephoned the number for the Great Bealings property on the website she could not get through. So she decided to call Veronica to ask her about it. She appears to have thought Veronica worked for the same agency. Veronica explained that Fine & Country was not marketing any properties in Great Bealings, only in Little Bealings, and that Fine must be marketing the Great Bealings property. Veronica also explained that the two companies were wholly separate. Mrs Riley’s Witness Statement contains the following: “Until Veronica explained this to me I thought that “Fine & Country” and “Fine” were the same company. I find the similarity of the “Fine” name and branding to be very confusing and misleading.”
138. As far as it goes, the evidence is consistent with and confirmatory of the Claimants’ case that the brand and the sign are confusing (which is also relevant to the Claimants’ case based on Trade Marks); but it does not go very far. Mrs Riley told me she was not really bothered who the agents were; she simply wanted to see the property she had discovered on Rightmove. She was as helpful as she could be, and again was transparently truthful and straightforward; but I had the sense that she was surprised at what was being made out of the incident, and even more surprised to have been asked to give evidence: she told me “[Veronica] just

said to me: “This is silly”. Could I use your name, Patricia?” and I said “Yes”, but I hadn’t realised it would come to this.”

139. Dr Desmond is a qualified dentist with 17 years’ experience. She owns several buy-to-let properties and has a keen interest in the property market and looks at property websites regularly. She first dealt with Fine & Country in the spring and summer of 2010 when trying to find a property for her own use. She dealt with the Newmans Estate Agency which has a Fine & Country office in Rugby where she wishes to continue to live and where her children go to school. She is friendly with Sean and Caroline Newman, the owners of the office, whose children used to go to the same school as her own children.
140. During January 2011, she spotted a property for sale in Church Walk, Bilton on Rightmove which looked interesting. She says in her Witness Statement that she took the agents selling the property to be Fine & Country. She says also that when she mentioned her interest to her friends, they commented that they had seen the property marketed by Fine & Country as well. However, when she went to their offices in Rugby and asked for particulars the agent she spoke to was not aware of the property. She says she found this very surprising, and it made her uncertain whether she was making the right decision in thinking about placing her existing property on the market through them “if they were not even aware of the properties they were selling.” It was then explained to her by a Mr Chris Mobbs (“Mr Mobbs”) of the Fine & Country Rugby office, who she told me in cross-examination “realised in an instant what had happened”, that in fact the property was being marketed by Fine: he was aware of this because he had asked to value the property on a couple of occasions whilst being marketed by Fine. Dr Desmond was not until then aware of Fine, nor of any association with Haart.
141. In her witness statement Dr Desmond stated that until this explanation she had “assumed that the name “Fine” was a reference to the Fine & Country brand with which I was familiar. The similarity of the name and the way in which the “Fine” brand had been presented on Rightmove made me think that “Fine” was the same as or part of Fine & Country.” She explained that “when you make a search on Rightmove you get a list of properties with a photograph of the property on the left hand side, the property details in the middle and an image of the estate agent’s logo on the right hand side.” As to her confusion she accepted that the brand and sign were obviously different; but at a glance she had simply focused on Fine and made the assumption described above.
142. Dr Desmond also stated that Mr Mobbs explained to her that Fine & Country had issued a claim for trade mark infringement and passing off against Fine. He asked whether she would be willing to provide a letter to “confirm the details of [her] confusion if needed”. She did not do so at the time; but did some months later after being reminded she had agreed to do so by Caroline Newman. A copy of the letter was an exhibit to her statement. She did not refer in the letter to having come across the property on the internet; she said she had heard about it through friends; she explained this was an error in the letter, which she says she wrote quickly; although I do not regard the point as of any real importance, I accept that explanation.

143. I had the sense that Dr Desmond wrote in hurried satisfaction of a commitment to friends and because the incident had embarrassed both parties and some good could be made of it. In cross-examination she said this:

“Well, the reason I remembered it so distinctly was I was actually very embarrassed because, you know, I had corrected them, so as soon as he explained and we had that conversation then I just – I left. Initially I felt my head between my toes. I was very embarrassed because I felt how could I make that mistake? So I just – Yes, I laughed to myself obviously but, yes, I just left.”

144. Also in cross-examination Dr Desmond explained that although interested in the Church Walk property she was not at the time in a position to buy it, and would not be until the sale of her existing home (now on the market with both Strutt & Parker and Fine & Country). She was, she accepted, on an “information gathering exercise and window shopping kind of thing.” Counsel for the Defendants seek to marginalise her evidence on the ground that the incident had no effect on Dr Desmond’s economic activity, and she was in any event not more than a possible prospective purchaser.
145. I accept all Dr Desmond’s evidence: she was truthful and helpful. I take into account that she was personally embarrassed by what happened, and that this might be thought to connote that she thought her wrong assumption to be simply a silly mistake; but she struck me as an intelligent and sensitive person who would consider her wrong assumption to have put others as well as herself in an awkward position. In all the circumstances I do not think her personal embarrassment that she had made a wrong assumption, and persisted in it with those who knew she was making a mistake, is such as to discount that false assumption as mere confusion or muddle. Her assumption was to my mind induced by the Fine sign and it is indicative of that sign being likely to confuse others, even though in her case her confusion was quite soon dispelled.
146. I turn next to Mr Hasnain. I can be brief. His evidence was that he was cold-called by Fine just at a time when he was wanting to instruct Fine & Country (with whom he had dealt in the past) to re-value his home. He was out when the cold call came; and the caller for Fine left a message. The message was relayed by his wife to Mr Hasnain. He understood the message to be from Fine & Country. He scabbled for the number on yell.com, and telephoned what he thought was the Fine & Country office in Gerrards Cross. In fact it was Fine’s office. The mistake emerged when he asked to speak to his Fine & Country contact, who (of course) was not there. He did not speak to his contact at Fine & Country until a couple of months later.
147. Mr Hasnain struck me as a truthful but disorganised person. His witness statement did not disclose the quite important detail that it was not he but his wife who received the message. But I think that simply illustrates that the statements were obviously drafted by others, and are formulaic. As it seems to me, Mr Hasnain’s evidence demonstrates a muddle: but it is far short of evidence of deception. I am grateful for his attendance; but his evidence carries little weight.

148. Last, but by no means least, in this category of witnesses was Ms Appleby. Her evidence may be summarised briefly. Her property had been on sale since March 2010. She decided to instruct a new agent. She selected Fine & Country. She searched the web for the address of their local Norwich office. The number she found was in fact that of Fine. She completed a written contract in fact issued by Fine. But it is her unwavering evidence that at all times until some time after signing the contract she thought she was instructing Fine & Country. She is adamant that she simply considered Fine was a “modernised rebranding. I didn’t, at that stage, realise that it was a separate company”. She is unsure when she first discovered she had contracted with Fine, and not Fine & Country. When she did so, she tells me that she considered withdrawing from the contract. However, when she came to appreciate that the engagement was for a minimum period of 20 weeks she decided to adhere to the arrangement with Fine. No sale was achieved within the 20 week period. After its expiry she instructed Fine & Country, as she had originally intended.
149. Her confusion was supplemented by something of a vignette in the evidence. As part of the marketing exercise, and whilst still under the impression that she had instructed Fine & Country rather than (as was the fact) Fine, she agreed to a “For Sale” sign to be put up in her garden. In the event, the contractors instructed by Fine erected a Fine & Country sign instead of a Fine sign. When she came to realise that she had instructed Fine, Ms Appleby informed Fine, who replaced the sign. Truth can indeed be more tortuous and stranger than fiction.
150. Ms Appleby’s oral evidence and cross-examination was also memorable, though she herself professed to being barely able to remember anything. She explained that she was therefore apt to try and record things on computer and/or e-mail. This put into high relief her disclosure on the eve of her appearance of a number of e-mails, which she had searched (she explained in her examination in chief) “to try and remember exactly what had happened”. The copy e-mails thus suddenly disclosed were also blanked out as to part and Ms Appleby had made insertions (“[...]”).
151. This turn of events excited Mr Platts-Mills QC into a challenge to her veracity, and he put to her that she had “made other alterations to [the e-mails she produced] to bring them more into line with what you believed or wanted to believe were the facts.” A cavalcade then went to her home in Norfolk to inspect her e-mail system to test this somewhat rash suggestion, which after that inspection was not taken further. Counsel for the Defendants accepted in their written closing submissions that “nothing suspicious was discovered.”
152. The importance of the e-mails is that they constitute contemporaneous evidence demonstrating that, at the time, Ms Appleby plainly thought that she was dealing with Fine & Country; as do the copy diary entries which were also introduced into evidence at the same time. Amongst those diary entries there is a note for 21 July 2010 which reads “Darren from Fine & Country.” This is, it is to be assumed (and no suggestion was advanced to the contrary), a reference to Mr Neave, who gave evidence for the Defendants and was cross-examined on behalf of the Claimants. However, Mr Neave then (as now) worked for Fine, not Fine & Country. Indeed, he works in the same office as Mr Heaviside (in Norwich).

153. Mr Neave, the manager of Fine's Norwich branch, was called by the Defendants to contradict Ms Appleby's account. His witness statement was put forward late in the day: it was dated 9 March 2012. He told me in the course of cross-examination, however, that in fact he had been asked for his recollection of events some time ago: in the middle of 2011, he thought, when his recollection may have been clearer. Counsel for the Claimants put to him that it must have been impossible to remember the details of a meeting he had had with Ms Appleby in July 2010. Cross-examination proceeded thus:

“Q Presumably you were asked whether you had any written notes of a meeting with Clare Appleby, or any notes over and above this?

A That's correct.

Q And the answer is, presumably, you do not?

A I don't.

Q So you have been asked to remember a meeting you had with Clare Appleby in August, or July rather, of 2010, and in that time between now and July 2010 you have had dealings with numerous properties from both the buying and selling things, have you not?

A That's correct.

Q As well as running a busy Norwich office?

A That's correct.

Q I want to suggest to you it must have been impossible to remember the details of the meeting you had with Miss Appleby in July 2010, clearly, at this distance of time?

A Some people and some properties stay in your mind quite firmly and this is one and both the person that stayed in my mind.

Q Is that the truth?

A I wouldn't lie.”

154. The gist of Mr Neave's evidence was that Ms Appleby had deliberately chosen not to go to Fine & Country and consciously chose Fine instead, having been told that she could not use the Norwich branch of Fine & Country because her property was not located within its geographical area of business. Mr Neave's perception now (it is unclear what he thought at the time) is that Ms Appleby chose Fine because she wanted coverage of both the Diss and the Norwich areas, which were handled by separate Fine & Country offices with no cross-over between them (whereas the Fine office in Norwich covered both areas).
155. He elaborated that after an initial meeting with him Ms Appleby had called the Fine Norwich branch office and spoken to his colleague, a Ms Sarah Holmes. Mr Neave says he was told by Ms Holmes (who did not give evidence) that Ms Appleby wanted a Norwich-based agent who covered the whole county and “as such wanted to instruct Fine”. Mr Neave thereafter met Ms Appleby at her house for about one and a half hours. He says she stated that she had spoken to Savills and Bidwells, and also to Fine & Country (he believes that this was its Norwich branch), who had said she would need to instruct the Diss branch. He apparently left her with a sample property particulars, and explained the SpicerHaart history and Fine's connection. He points out that on the back of the particulars it is stated (under ‘Additional Information’) that “FINE is a trading style of Spicerhaart Limited...”
156. According to Mr Neave, Ms Appleby did not decide there and then to instruct Fine; but the next day she went into its Norwich office, and met Ms Holmes, who took her round and showed her various types of brochure. He says that Ms Holmes said that Ms Appleby had liked what she saw, and registered as an applicant. After the meeting and this update from Ms Holmes, Mr Neave says he sent an agency agreement to Ms Appleby in the post. This was on about 22nd July 2010. Some 4 days later he again spoke to Ms Appleby, this time on the telephone; he says that she queried the quoted fixed fee of £8,312.50 and stipulated that should only apply if the property were sold for £475,000; and that he agreed a 1.75% fee instead. He pointed out that on the signed Agency Agreement (which Ms Appleby signed and returned) she had circled the fixed fee figure of £8,321.50 and put a cross through the wording “if sold for £475,000”, suggesting some attention to detail.
157. Thereafter, photographs were taken of Ms Appleby's house, and the first run of Fine advertising took place on 3rd August 2010. The (wrong!) sale board was erected on 4th August 2010. A draft Fine brochure was sent to Ms Appleby at the end of August. Ms Appleby informed Fine that the wrong ‘For Sale’ board had been erected sometime in the week following it having been put up. Ms Appleby's property was removed from the Fine register on 2nd February 2011.
158. Ms Appleby was cross-examined strenuously by Mr Platts-Mills QC; as was Mr Neave by Mr Hicks. Ms Appleby remained adamant (and cross-examination did nothing to shift her from this) that she intended to, and thought she had, instructed Fine & Country, and that she thought Fine was simply a modern re-branding. She rejected the suggestion that she had chosen Fine in preference to Fine & Country because the latter's Norwich office did not deal with Diss: she had understood that

the Diss and Norwich offices shared properties between them, although (she said) this was not as important as having an agent with a London office. She denied any knowledge of a Fine office in Norwich (other than that she assumed to be Fine & Country under a modern re-brand). Mr Neave, for his part, adhered to his version of events, although he did at one point appear to accept the possibility that Ms Appleby was simply working on a false assumption:

“Q Could you just have a look at the next page of Miss Appleby's documents, p.4? You see this is a diary entry. You see she has you down as being "Darren from Fine & Country"?”

A I do.

Q So if this entry is accurate it would appear that she was under the impression that you were from Fine & Country?

A She may well have been.”

159. I have set out the evidence at some length because there is an obvious clash between what is said by Ms Appleby and what is said by Mr Neave; and the dispute goes to an important part of the Claimants' evidence of confusion. I have not found it easy to reconcile the two versions; nor to determine, as regards irreconcilable differences, where the truth lies.

160. Mr Neave struck me as someone doing his best to tell the truth whilst advancing the case of his employers and Mr Heaviside: and the possibility that Ms Appleby was put off Fine & Country because of a split between the Diss and Norwich offices is perfectly plausible. However, within the confines of her self-confessedly terrible memory, I also consider Ms Appleby to have been an obviously honest witness, believably indignant that her veracity should be questioned. Further, the fact that she was indeed at the time convinced she was dealing with Fine & Country is confirmed by the e-mails and diary entries: an understanding that she was dealing with Fine is simply inconsistent with, and indeed is belied by, that contemporaneous evidence. Against that Mr Neave has provided no documentary proof; and that part of his evidence relaying conversations between Ms Holmes and Ms Appleby is lessened in weight considerably by reason of its hearsay nature and the fact that Ms Holmes was never called.

161. I have concluded, and find, that on the balance of probabilities, Mr Neave is mistaken in his belief that Ms Appleby expressly mentioned or implied any reason for choosing Fine; and that either the two were throughout at cross-purposes, or at least Mr Neave never got through to Ms Appleby that Fine and Fine & Country were separate and different. I should also add that I agree with Counsel for the Claimants that the suggestion of forgery should be formally withdrawn.

162. That said, I also agree with Counsel for the Defendants that Ms Appleby was “rather an interesting witness”, “memorable”, very much her own person, set in

her ways, and fixed in her notions to a point that does rather distinguish her from the average consumer. Mr Platts-Mills QC said this of her:

“You could tell her until you were blue in the face that we are Fine, she may go home and think you are Fine & Country, even if you have done absolutely everything you possibly can, we do not know. She was a pretty strange witness, if I can put it that way.”

163. I would say simply that she was certainly fixed in her ways, and exceptionally difficult to move or dissuade from an initial perception. I do not think I can safely take from her evidence that any initial confusion is so deep-rooted that it cannot be dispelled. But I do think that her assumption that ‘Fine’ is a rebrand of or derived from ‘Fine & Country’ may be shared quite broadly, and although her confusion may have been particularly abiding I think it reflects what appears to me to be likely to be a fairly common perception.

Defendants’ evidence

164. Lastly under this heading, I turn to the evidence offered on behalf of the Defendants. I accept at once in this context that, whilst evidence of confusion is not easy to assemble and is almost certainly not comprehensive, evidence on lack of confusion suffers from the same difficulties always inherent in proving a negative. I would not have expected the Defendants to put forward much evidence on the factual issue of actual confusion.
165. Much more noteworthy, however, is how little evidence has been put forward on behalf of the Defendants to explain the genesis of the Fine sign, and more especially, its derivation and rationale. Although there are plainly differences between the Fine & Country brand and the Fine sign, so too (to my mind at least) there are substantial similarities: as it seems to me, these, and the reasons why Fine changed to become so much more similar to Fine & Country than the Finehaart brand had been, required explanation.
166. The only witnesses for the Defendants called to assist me in this regard were Mr Heaviside and Mr Sice.
167. I have already discussed Mr Heaviside’s evidence in relation to his contribution to the re-branding of the Fine haart brand, his conviction that any overt association with the core haart brand would be counter-productive in terms of achieving an up-market specialist image, and his zeal for “lifestyle marketing”. I need now to go into a little more detail as to his own involvement in the actual design process, and the division of responsibility and overall authority between him and the design team instructed and Mr Smith as Chief Executive of the Defendant companies.
168. I would summarise Mr Heaviside’s evidence in this regard as follows:

- (1) it was his analysis of the failure of the Finehaart brand to develop as had been hoped that caused him to identify the need to detach altogether the “fine” brand from the haart brand;
- (2) he told me under cross-examination that with (unidentified) others he felt that the “Fine” name was “a good name to re-use. It had...been around for two years. We thought it was a stronger element and we began to adopt that for the new brand...”
- (3) he (and unidentified others) targeted, not Fine & Country, but “specialist high end market operations, such as Savills, Knight Frank, Jackson-Stops, and so on”;
- (4) “...and the way we do that”, he told me, “is to look at the Savills model and how they developed their business over the years, and it’s that type of model that we followed, rather than any Fine & Country brand”;
- (5) Asked why he had in an e-mail expressed concern to change bits of a Fine & Country brochure “to avoid the F&C plagiarism” , he accepted that he wanted to use, and worked from, a handbag style brochure that he had used at Fine & Country; but (he told me) he “wanted to be seen to develop and move on, and that’s why I made the specific statement that I wanted to avoid any criticism of plagiarism”;
- (6) As to lifestyle marketing, in his witness statement he suggested that Fine & Country aped Fine at least partly because of “the successful use of Lifestyle marketing by the Defendant’s ‘Fine’ brand”;
- (7) He eventually accepted under cross-examination that “in particular” the font adopted for FINE, but also to a lesser degree (he felt) the underlining were similar to the Fine & Country sign, and might ring alarm bells: but as to that he said under cross-examination, when asked to compare two designs for the Fine sign put forward by TMC:

Q If you were worried about p.518 being too close to Fine & Country am I not right in saying that p.533 ought to have been ringing alarm bells loud and clear? This was much too close to Fine & Country.

A I would say all along I preferred a different option. I preferred something that looked more akin to what we developed on the Fine magazine just in terms of preferred style and the colours that we were working with.

Q Oh, I see, so somebody overruled you on the branding on p.533. Was that Mr. Smith who did it?

A I think that the final decisions on the board were taken out of my hands, but again I can understand that for a company that has at the highest level developed every single one of its for sale boards throughout its history.

Q So it was head office who overruled you and went for a design that was closer to Fine & Country than you would like?

A I would have preferred a different design altogether.

Q So the answer is "Yes"?

A The answer is I preferred a different style altogether.

Q And a controlling influence in head office is Mr. Smith, is it not?

A Yes, I would think so.”

(8) Thus, he attributed to Mr Smith the decision to adopt the font, serif and underlining in the Fine sign, instead of the flowing cursive “*fine*” motif that had featured in the magazine which he had explained was the template for the single name “Fine”.

169. Mr Hicks invited me to treat Mr Heaviside’s evidence “with caution”. He submitted that although he eventually accepted that the decision with regard to the style in which the name Fine should be written was something imposed upon him by head office and that he would have preferred something different he conspicuously failed to mention any of this in his witness statement. Further, Mr Hicks submitted that he had clearly provided Fine & Country materials to the Marketing Café “and was not straightforward when it was put to him”.

170. I accept these submissions. Indeed, I would go further as regards Mr Heaviside’s response to the suggestion that he provided material to TMC. In my view it is clear (and I so find) that:

(1) Mr Heaviside had as his template the brochures and other material he was familiar with when working for Fine & Country. Thus, for example, it

seems to me to be quite clear from the e-mail traffic passing between Mr Heaviside and Mr Ian Palmer of TMC that both had before them a Fine & Country brochure when designing a new style of Fine brochure, and that the references to plagiarism are made in that context and reflect the fact that the one is indeed being derived or fashioned from the other.

- (2) Mr Heaviside's suggestion that his template was the Savills model was not supported by any documentary or other evidence, and I do not accept it; I consider it clear that what he wanted was to translate more lifestyle marketing into what was basically the Fine & Country model with which he was so familiar and which he knew had proved so successful.
- (3) That this was the plan and the objective was obvious to industry observers at the time. Thus, Mr Heaviside was shown an article in Estate Agent Today for 3rd August 2009, which read in relevant part (under the heading 'Haart ups its game on fine and country properties') as follows:

"National estate agency chain haart has rebranded its prestige offering and is set to take on the Guild's hugely successful Fine & Country brand at its own game.

The former 'fine haart' brand is now to be known simply as 'fine'. It will be rolled out nationally.

It will employ 'lifestyle' marketing methods, as Fine and Country currently does – advertising properties by suggesting how owners might identify with making them their homes.

Heaviside was noted as an "expert in selling a lifestyle" by The Times last year, in an article on premium agency brands..."

- (4) In that sense, Fine & Country was his target, even if more generally the objective was to break into the upmarket group of which such firms as Savills and Knight Frank etc., were leading members.
 - (5) Mr Heaviside knew that the new design of Fine's sign was perilously similar to Fine & Country's brand: so much so that he would not have adopted it, and the decision was passed to and made by Mr Smith.
171. Apart from the somewhat unsurprising witness statements of Mr Bowden (an in-house solicitor within the group legal services department of the Spicerhaart group) on the use of descriptive words in the business of estate agency, of the Defendants' witnesses who were called there remains for me to address only Mr Sice, Mr Mead and Mrs Anne-Marie Green.
 172. Mr Sice gave evidence as to the development of the Fine sign. Mr Sice is the Chief Executive Officer and founder of a design and communications agency called Stocks, Austin, Sice Limited ("SAS"). He explained to me that SAS

develops brands, corporate identities and marketing communications for its clients, many of whom are in the property and estate agency industry.

173. Mr Sice was approached and engaged by Mr Smith in about 2007/2008. His brief was (quoting from Mr Sice's Witness Statement) "to lift the haart brand up a bit by adding a separate department and get the stock they were not already getting, namely, the finest stock." Mr Sice had earlier worked on a project for another estate agency, Foxtons, and had worked up the 'Foxtons Rare' marketing drive to get them into the "rare and unusual" property market. Mr Sice suggested to Mr Smith the name "Haart Premier", and then "Fine haart". It was Mr Smith (who Mr Sice confirmed was closely involved in that rebranding process) who chose the latter (once more confirming his pivotal role).
174. Mr Sice stated that when he was engaged and developed the fine haart brand the true competition so far as he was concerned would have been 'traditional' agencies such as Knight Frank, Savills, Chestertons and Strutt & Parker, but not Fine & Country (who he says were never mentioned). He also stated that he regarded "'fine' in the estate agency industry as a generic marketing term" and put forward his view that "in the brand development world, in any situation if there is a phrase that describes what the relevant market is then you use it." He added "I regarded, and still do regard, 'Fine' as an absolute descriptor for the segment of their business, reflecting the bespoke service they were offering to a bespoke market."
175. But Mr Sice did not, so far as I am aware, work on the later change from finehaart to Fine and entirely excising any reference to Haart as described by Mr Heaviside. It is that change that is at the nub of this case. SAS was not involved in that change: TMC was retained instead. Yet neither Mr Palmer (nor anyone else at TMC) provided a witness statement, still less attended to be cross-examined to assist me. No reason was given why not.
176. Even more significantly, Mr Smith did not offer any evidence, although it is quite clear (and indeed not contradicted) that he was closely involved with Mr Heaviside and TMC in the change to the Fine sign. Again, no reason at all was suggested why not; and as I have previously noted, Mr Smith was in Court on at least 2 days of the hearing: there appeared no obstacle whatever to him giving evidence. Nor did any other director of the Defendants give any evidence either. Particularly having regard to the express concerns expressed by TMC, I consider that the change to a logo and way of presenting the business now marketed as Fine called for an explanation and justification from the person with the final say in its adoption. In default, I consider I am entitled and indeed obliged to conclude that the explanation is that which appears to me to be suggested by the evidence put before me, which I summarise below.
177. Before considering the evidence of Mr Mead (who gave evidence as to how people choose their estate agents and the likelihood of confusion) and Mrs Green (who gave evidence on the question of actual confusion) it is convenient to state my views and findings in relation to the development and adoption of what became the FINE sign, and the responsibility for its final selection. I consider that:

- (1) The decision to rebrand and excise any reference to haart or the spicerhaart name was made because (a) the earlier rebranding (to finehaart) which had been based primarily on the success of 'Foxtan Rare' simply had not worked in attracting up-market properties to the haart group and (b) Mr Heaviside was convinced, and he convinced Mr Smith, that any overt association with the haart name was counter-productive in terms of attracting such properties because of haart's down-market image;
- (2) Mr Heaviside's model was Fine & Country, whom he had worked with successfully at Tops, and which as a brand had been extremely successful in attracting up-market properties to local agencies which otherwise were at an almost insuperable disadvantage compared to the traditional firms with a national presence and London offices;
- (3) Mr Smith had long admired and coveted Fine & Country's success in bringing up-market properties into local agencies: when rebuffed finally in his efforts to buy a share of the enterprise he determined to emulate their success, if necessary by copying their approach: and the fact that Mr Heaviside had Fine & Country as his model suited this purpose well;
- (4) Mr Smith was involved closely throughout in the development of Fine and its new signage, and encouraged TMC to move away from Mr Heaviside's preference for an italicised flowing '*fine*' sign to a font and a design strongly reminiscent of Fine & Country's existing sign;
- (5) As they worked on various designs, TMC (and, I suspect, Mr Heaviside) had real concerns, which they expressed (including to Mr Smith) that the design was becoming "too much like Fine & Country";
- (6) but Mr Smith rejected these concerns, and the FINE sign eventually selected, with its similar font, capitalisation of the word, underlining of the word, use of gold for the underline and use of 'country' in the strap line was (to my eye at least) probably the closest to the Fine & Country logo of any of the designs put forward;
- (7) I infer that Mr Smith was well aware of the resemblance, and the possibility that customers would mistake one for the other; if that was not his intention, he certainly was aware of the risk, and consciously decided to live dangerously;
- (8) I accept, and find, that the newly branded FINE business was intended by its Chief Executive and majority owner, Mr Smith, to compete directly with Fine & Country, and obtain for haart's local agencies the same kind of up-market business that the Fine & Country brand had secured for its licensees, using a logo so designed as to carry a real risk or "reasonably foreseeable result" (*per* Lord Diplock in *Warnink v Townend & Sons (Hull) Ltd* [1979] AC 731 at 742D-E), of which Mr Smith was aware, that customers might assume it to be connected with, or a new version of, the Claimants' brand and logo;

- (9) The FINE brand was thus calculated (in the sense used by Lord Diplock) to put customers in mind of the Fine & Country brand and assume a connection between the two; and the subjective intention of at least the First Defendant (through Mr Smith) was to sever any apparent connection with Haarts (which had been identified as a drag) and, taking the risk of confusion but not subjectively intending to deceive, to compete with Fine & Country licensees by marketing up-market properties through a web of predominantly rural estate agency offices.
- (10) I do not consider that either the evidence or the inferences that I may properly draw from it having regard to the conscious decision of the Defendants not to call either Mr Smith or Mr Palmer, justify a finding of intentional deception (and that is not indeed pleaded or pursued). Put another way, the presumption must be that they (subjectively) considered that the differences were sufficient to avoid deception but (to borrow words from Robert Walker J in *United Biscuits (UK) Ltd v Asda Stores Ltd* [1997] RPC 513 at 538) they “had that risk in mind, and...miscalculated the degree of “challenge” or “matching” or “parody” that was tolerable without the product being actually deceptive (in the material sense).”
178. In that latter connection, I have borne well in mind the warning in the judgment of Kitchin LJ in the *Specsavers* case (at 115) that
- “it is important to distinguish between a defendant who takes a conscious decision to live dangerously and one who intends to cause deception and deliberately seeks to take the benefit of another trader’s goodwill. It has long been established that if it is shown that a defendant has deliberately sought to take the benefit of a claimant’s goodwill for himself the court will not “be astute to say that he cannot succeed in doing that which he is straining every nerve to do”: see *Slazenger & Sons v Feltham & Co.* (1889) 6 RPC 130 *per* Lindley LJ. A trader who has taken the decision to live dangerously is in a different position, however. He has appreciated the risk of confusion and has endeavoured to adopt a sign which is a safe distance away. Further, it must be kept firmly in mind that the ultimate question whether or not the similarity between the trade marks and the sign is such that there exists the likelihood of confusion is one for the court to determine in the light of its assessment of all material factors, of which the intention of the defendant, as a person who knows the market in which he is offering his goods and services, is only one.”
179. Nevertheless, the fact that the First Defendant decided to live dangerously is, as it seems to me, still a factor which I am entitled to take into account as confirming my view that the average consumer might well be confused, and indeed to my mind should be taken as having been so: to quote again from the judgment of Robert Walker J (as he then was) in *United Biscuits (UK) Ltd v Asda Stores Ltd* [1997] RPC 513 at 531:

“I cannot escape the conclusion that, while aiming to avoid what the law would characterise as deception, they were taking a conscious decision to live dangerously. That is not in my judgment something that the court is bound to disregard.”

180. In my view, the recognition on the part of a defendant that his sign has the propensity to confuse and deceive, and that though he is himself satisfied that he is the right side of the line, there is an identified risk that he may not be, may well support a conclusion drawn from the court’s own perception and be evidence of (objective) deception. Further, it may colour the court’s approach in considering the evidence of the likelihood of confusion, to which I now return: I need to address the evidence in this context of the Defendants’ other ‘live’ witnesses, Mr Edward Mead and Mrs Green.
181. Mr Edward Mead (“Mr Mead”) is an estate agent in a well-known estate agency specialising in the sale of Central London properties, especially in Chelsea. He was interposed to give his evidence and was cross-examined on it early in the trial (on day 2). The essence of his evidence was, I think, well described by Mr Platts-Mills QC as being to bemoan the fact that there really was “not much in the way of brand interest amongst people who involve themselves with estate agents.” His thesis, based on his long (some 32-year) experience selling properties in what would now be the £350,000 to £3 million price range, is that prospective purchasers are really indifferent to the identity or name of the agent: they are simply interested in finding a suitable property; actual purchasers have no choice; and whilst prospective vendors are more focused on which agent they use, confusion is very rare: people are careful and deliberate in their choice, and are not swayed by impulse.
182. Mr Mead struck me as sensible and straight-forward, and plainly honest and reliable. I accept his evidence in respect of the market (in Central London) in which he has long operated. I accept also that prospective purchasers are very likely to be guided by the property and not the agent (indeed I think that all the witnesses before me were disposed to agree with this); whereas by contrast, a vendor’s choice of agents is likely to be a careful one. But I also accept his evidence that “Once [vendors] have selected their agent only for good reason will they decide to move to another agent.”
183. In my view, the risk of initial confusion or association, leading to the instruction of Fine on the assumption that it is, for example, Fine & Country re-branded, persists; and once made it may be that the prospective purchaser will stay put even when the confusion is dispelled. Furthermore, what is really in issue is the erosion of the Fine & Country mark: and the fact of a potentially accelerating number of false assumptions of that kind will be likely to have that effect. Thirdly, as it seems to me, the power of a ‘banner’ in provincial offices to encourage prospective purchasers may be stronger than in Central London.
184. Mrs Green had previously worked in the Winchester office of a Fine & Country licensee which sold out to Spicerhaart Limited (so that she now works for Fine). Unsurprisingly, she was cross-examined about an e-mail (dated 24 February 2010) she had sent to the Claimants recording an incident of confusion about a property

on the market with Fine in Petersfield, about which she had received enquiries whilst working for that licensee on the false assumption that it was indeed a Fine & Country property. She had stated in that e-mail:

“...As you are no doubt aware, the general enquirer seems to be confused and it takes quite a bit of explanation before they grasp the difference between the two brands.

These enquiries take a degree of time for our employees to investigate and respond to. Being professionally committed and helpful they will naturally take the time to help the caller.”

185. Mrs Green accepted (under cross-examination) that the similarity between the logos had indeed, in her experience, caused a number of people to ask her personally “Are the businesses the same?” This was despite that fact that in her witness statement Mrs Green, claimed confusion was “not an issue” and stated her view “that the two brands were clearly separate; Fine & Country has an insipid, pale colour scheme, while Fine has a bold and dominant logo and look.” It is I think worth quoting from her cross-examination, not only because she qualifies that evidence but also because it struck me as demonstrative of the likely reaction of many potential customers:

Q Do you remember getting an email that looks like the email at the bottom of p.9, asking for evidence or instances of confusion from Angela [a Fine & Country employee)?

A I do indeed, yes.

Q At the top of the page, there is a letter you have written back to her. You say:

"I can report we had a number of calls/enquiries regarding a property which is currently on the market with Fine in Petersfield".

Then you say:

"As you are no doubt aware, the general enquirer seems to be confused".

Stopping at that point, why do you say "As you are no doubt aware"?

A Just a figure of speech, I suppose. It doesn't indicate anything in particular. It's backing up

what I'm saying in my email, that there is obviously confusion with that particular enquirer.

Q You say:

"The general enquirer seems to be confused, and it takes quite a bit of explanation before they grasp the difference between the two brands".

Why do you say "It takes quite a bit of explanation before they grasp the difference between the two brands"?

A I just felt that, with the enquiries that had been made on this particular property, there was. Fine was a very new brand at that point. We're going back to February 2010. It was new in the area, and there was, with people that I spoke to on this particular property, obviously confusion, to some degree.

Q Confusion in the sense that people needed quite a bit of an explanation before they could understand that Fine was not the same as Fine & Country?

A I wouldn't say, my Lord, that they required quite a bit of explanation. They required an explanation. That's obviously, because they might have assumed that they were calling Fine & Country about that particular property. But, once explained, people did grasp the fact that that was the explanation and it was clear that there were two different brands here, and they had contacted the wrong office.

Q When you say you would not say it took quite a bit of explanation, that is exactly what you did say in the email. You said: "It takes quite a bit of explanation".

A Reading my email, it's just my words maybe. I don't remember it going on in any degree of explanation to any particular person, but it took an explanation, is what I was trying to say.

Q Yes.

A It required an explanation.

Q It was more than simply saying: "No, we are Fine & Country and they are Savills". The two names are completely different. That would be very easy to explain. What I wanted to suggest to you is that what you re saying in this email is it takes quite a bit of explanation because the enquirers were having trouble in understanding that Fine and Fine & Country were not the same.

A Reading my email, my Lord, I don't see that it says that people didn't grasp it. I am simply saying that it took an explanation. I am not saying that after that explanation there was still a confusion. A number of people have asked -- in my experience a number of people have asked me personally because I have been involved in those businesses: "Are the businesses the same?" Once explained it is quite clear that they are two different entities.

186. As to this, it seems to me that the dividing line between mere confusion and deception is likely to be all the more blurred if the circumstances reveal instances where what might have started as real confusion has fairly quickly been dispelled, especially if it is so before being acted upon. Put another way, and reflecting the way Jacob LJ put it in the *Phones 4U* case, it is not easy to assess whether and when confusion ("I wonder if there is a connection") crosses the line to deception (when the person is misled into thinking "I assume there is a connection"). I suspect that Mrs Green, whom the Claimants described as "generally an accurate witness", an assessment with which I agree, is correct in this: that whatever confusion there was could often be dispelled. That gives rise to the question whether whatever confusion there was had any substantial consequences; and that brings me to the issue (and the third ingredient of the tort) of damage to the Claimants' goodwill.

Evidence of damage to goodwill

187. The two ingredients of deception and damage are of course inter-linked, even though separated out in defining the tort and for the purposes of analysis. Indeed, as Beldam LJ noted in *Harrods Ltd. v. Harrodian School Ltd* [1996] RPC 697 at 731, although it is helpful to separate in order to assist analysis, the risk of deception and the risk of damage are in reality inseparable. In *Phones 4U* Jacob LJ also suggested (at para. 19 on p92) that "a more complete test" of the "elusive" dividing line between confusion and deception would be "whether what is said to be deception rather than mere confusion is really likely to be damaging to the claimant's goodwill or divert trade from him." He emphasised the word "really". Whereas mere confusion has no operative effect on the likely economic behaviour

of the person concerned (either because the confusion is in the nature of a passing uncertainty or something akin to idle curiosity, or because any confusion is likely to be dispelled by the sort of enquiry which would naturally be expected of a person before transacting any relevant business) deception informs and induces the relevant conduct, with adverse economic consequences to the claimant.

188. In this case, the Defendants contend that any confusion never crosses the line between wondering and assuming and amounts to no more than “noise”; they say that there is no evidence to suggest any real change, or likelihood of change, in the economic behaviour of any potential or actual customers of the Claimants such as to be likely to damage the goodwill of the Claimants. They rely further on Mr Lindley’s own evidence that the Defendants’ activities had not had any major effect.

189. Mr Lindley’s evidence in this context was as follows:

“Q ... You have lost some big agencies and gained some small agencies?

A Yes, that would be logical conclusion to draw from that. It is on the main part of it. It is considering -- to put it in context of the market place that we have been through the brand has remained amazingly stable actually. The brand and so our rise was quite meteoric and I think that we went through a bumpy patch say in 2008 as did the whole of the estate agency industry and since then I would say actually that the brand has continued to grow but quite stable on ----

Q Grow in a steady way?

A Yes.

Q Steady and satisfactory manner?

A Not very exciting but steady and satisfactory, yes.

Q Without any big marketing or effort on your part?

A It's a doddle. No, I'm being facetious. It's actually we work tremendously hard. As a company our whole culture is of small business determination and hard work.

Q And despite the arrival of my clients in 2009?

A Yes, my Lord.

Q So despite the arrival of my clients and whatever it is they have been doing, your company has sailed merrily on on its way?

A Yes, my Lord.

Q It certainly has not had any major effect on your activities?

A No, my Lord.

Q Now, would you go to tab 9 in bundle B and go to paragraph 43 and there are some figures there and so he is talking about the start of Fine, and he says that they rebranded approximately 40-50 Finehaart properties, so they changed those from Finehaart to Fine by the end of 2009:

"We had listed 149 in total by the end of 2009. 2010 we listed 468. In 2011 that figure had risen to 778."

Q Now, does that sound like a reasonable rate of growth and getting a business going? Do you have any view on that?

A I do have a view on it. My Lord, my view is that for the amount of money that has been apparently, from what I can see, thrown at this project I think it is a surprisingly small penetration into the market place I am afraid."

190. This evidence has caused me not a little pause for thought, even allowing for the fact that it may partly be explained by Mr Lindley's wish both to downplay the threat to his business, given the uncertainties inherent in any litigation, and to trumpet any failings of the FINE business so as to discomfit the Defendants. In addition to hesitation as to whether the Claimants have shown the real likelihood of damage to their goodwill, it has also caused me to re-question whether and to what extent the evidence given by its own Managing Director that the Claimants'

business has not been adversely affected and the Defendants' business has failed to develop undermines the Claimants' case on deception.

191. Addressing first the issue of damage itself, the Claimants pointed out, fairly as it seems to me, that the difficulty of identifying the effect, let alone the measure, of damage is notoriously difficult; and in many, if not most, cases the process of corrosion of a good name, or diversion of customers, may take a considerable time. They maintain that the third ingredient of damage is plainly established.
192. They contend first, that in this case, confusion with FINE carries the inevitable risk of association with Haart, and thus with a down-market image which is the antithesis of what the Fine & Country brand aims for. Secondly, they contend that this risk of confusion inevitably carries also the risk that Fine & Country's reputation for service is at the mercy of poor service on the part of FINE: a reflection of the more general point that this exposes Fine & Country to the danger of losing (to quote Millett LJ in *Harrods Ltd v. Harrodian School Ltd* [1996] RPC 697 at 715) "control over [its] own reputation." Thirdly, is evidence that FINE is beginning to attract contacts and potential licensees away from Fine & Country (a particular example being the applicant for a license in Chelsea, who apparently withdrew because of his perception, based on his experience in Surrey, of brand confusion). Fourthly, they contend that association with the more flowery and insistent versions of "lifestyle marketing" favoured (and now indulged in under the FINE sign) by Mr Heaviside may well ultimately damage the Fine & Country image and brand.
193. I accept that there is a realistic risk of damage to Fine & Country's goodwill in the future even if its effects have apparently not as yet been measurably felt.
194. As to the second facet, on balance I do not consider that the evidence as to the lack of measurable present effect is such as to upset the conclusion that otherwise I would reach, which is that the FINE sign is calculated to deceive in the relevant sense. Part of the explanation for the lack of presently discernible damaging effect may lie in the fact that some confusion may be dispelled; part may lie in the likelihood that the degradation of a brand or (using language more attuned to passing off) the loosening of the ties or erosion of the attractive force which goodwill represents is a gradual process, which may initially be difficult to discern but which may suddenly take effect.
195. In this regard, and returning to Mr Lindley's evidence which initially occasioned my concern, I have no real doubt that he is clear in his own mind that what the Defendants are doing constitutes a real threat to his business because it is likely to lead to the erosion or dilution of the F&C Marks and the distinctive brand and corporate identity that it has established and which is attached to the F&C Marks. His evidence suggesting that no measurable damage had been ascertained does not alter the fact that he perceives a more insidious and amorphous threat, and that this perception is well-founded.
196. At all events, I do not think I can ignore the many instances in the evidence of licensees expressing concern about the actual or prospective damage to their businesses; and though the damage may (as is often the case) be very difficult to quantify, there is a real prospect of it now or sometime in the future.

Defendants' supplemental argument: Claimants are not legal owners of goodwill and cannot sue

197. Before leaving the claim in passing off, I must return to an argument (briefly referred to above) which was advanced on behalf of the Defendants on the last day of trial, effectively by way of rejoinder to the Claimant's reliance in closing on clause 11.15.7 of the FCEA licence agreement; that clause obliges licensees

“To hold any goodwill relating to the Brand generated by the Member as bare trustee for the Company and shall at the request of the Company immediately and unconditionally assign (with full title guarantee) any interest or goodwill or other interest in the Brand to the Company.”

198. The Defendants' final argument was to this effect:

- (1) The Claimants have no goodwill of their own because they have no business and certainly no business as an estate agent.
- (2) The only goodwill that has been generated belongs to the Claimants' Licensees, and they hold this on trust for FCEA.
- (3) As equitable owners only of any goodwill the Claimants cannot obtain final relief whether by way of damages or injunction (see *Performing Right Society Ltd. v. London Theatre of Varieties* [1924] AC 1 at pages 14-15).
- (4) In order to bring a claim for passing off FCEA must perfect its legal title by taking an assignment of the goodwill. This it cannot do because it has no business to which that goodwill relates (see *The Law of Passing Off*, Wadlow 4th ed., ¶3-192). Any assignment of goodwill from the Licensees to the Claimants would amount to an assignment in gross and would sever the goodwill from the ownership of the business to which it relates (see *Pinto v Badman* (1891) 8 RPC 181 at 194).
- (5) Accordingly, the claim for passing off fails.

199. To this ingenious creation the Claimants advanced a short answer:

- (1) The fact that provision is made in the licence agreement for any goodwill generated by them in relation to the F&C brands to be held on trust does not signify that only the licensees generate such goodwill. On the contrary, the Claimants generate goodwill in their own right, created in consequence of their licensing activities, their Park Lane Office, their publicity material and the awards they have won, all of which enable them to charge licensees. They sue to protect that goodwill not as equitable, but as legal, owners.
- (2) In any case, the rule requiring joinder of equitable owners is a rule of practice and not of law: as stated in *Copinger and Skone James on Copyright*, 16th ed. at 21-24:

“A person entitled to the copyright in equity may start an action and seek interim relief relying on his equitable title. In general, however, he will not be entitled to final relief unless he has either joined the legal owner as a party (co-claimant or defendant) or obtained an assignment of the legal title. The purpose of the rule is to protect the defendant from the possibility of being sued again by the legal owner, in particular a bona fide assignee of the copyright for value without notice of the equitable owner’s rights. It follows that there may be cases where the Court can be satisfied that there is no real possibility of a claim by a legal owner or for some other reason the rule, which is a rule of practice, not law, can be relaxed. It is thought such cases will rarely arise.” (Reference is made to, amongst other cases, the *Performing Right Society* case, at page 18.)

200. With one reservation I accept the Claimants’ submissions in this regard. As it seems to me, the licensing operations conducted by the Claimants and the other facilities and products they make available generate goodwill which the Claimants as its owners are entitled to protect. Further, in my view, there is no room in the circumstances for the application of the *Pinto v Badman* case: the Claimants are, if not the only, then the principal generators of goodwill in respect of the business of making available their facilities, umbrella and name, and there is no question of any severance of the goodwill from the ownership of the business to which it relates. I do not, I consider, have to decide whether any other goodwill is generated by licensees and held on trust, unless perhaps damage to it is claimed as a head of loss in any inquiry as to damages.
201. The reservation I have mentioned is that if such loss is to be claimed then the question of joinder to the proceedings of the legal owners of whatever goodwill is referable exclusively to the licensees in relation to this aspect of their businesses may have to be reconsidered, although I would offer the tentative view that a representation order may suffice so long as one licensee said to have generated relevant goodwill is joined. But as I say, that is an argument for another day; in my judgment there is no bar or impediment to the Claimants maintaining the claim in passing off on this score.

Conclusion: passing off

202. Having set out, I fear somewhat discursively, the strands of the evidence before me on the Claimants’ case in passing off it is necessary for me to state my overall conclusions on this part of the case.
203. In my judgment:
- (1) the e-mail material is indicative of confusion, but is not compelling evidence of it, and it is not easy to distinguish between muddle and really substantial and operative confusion;

- (2) the witness statements of the directors and licensees (which exhibit much of that material) goes little further;
 - (3) the witness statements of persons with a connection with the Claimants is devalued for that reason;
 - (4) though, for the reasons I have set out in paragraph 147 above I do not consider I should attach weight to the evidence of Mr Hasnain, I do consider that the evidence of 4 of the 5 apparently independent witnesses for the Claimants who were cross-examined does provide support for a finding of confusion and deception (which in the case of Ms Appleby was acted upon);
 - (5) so too, to my mind, does the evidence that the Defendants decided to “live dangerously”: the risk of confusion was clearly there, and they appreciated it even if they thought they had done enough to avoid deception;
 - (6) taken together with Mrs Green’s evidence, the evidence as a whole is consistent with potential customers going beyond wondering and into making false assumptions: and that is such as to cross over to deception, even if it was not so deep-rooted that it could not be dispelled or corrected;
 - (7) I am entitled to come back to my own initial and abiding assessment: that the similarities between the F&C Marks and the Fine sign, and (perhaps ironically) the very unusual use by the First Defendant of the single descriptive word ‘Fine’ to denote its business, which to my mind calls to mind and easily leads to confusion with ‘Fine & Country’, are confusing and deceptive and/or are likely to confuse and deceive; and that erosion and damage to the Claimants’ business is likely in consequence. Even if the support in the evidence is not strong, in my view it is, in the round, strong enough, and it is consistent with, and indeed supportive of, that assessment;
 - (8) accordingly, on the balance of probabilities, if the Defendants are not restrained a substantial number of potential customers of licensees of the Claimants will be misled into dealing with the First Defendant in the belief (even if later dispelled) that they are dealing with the Claimants.
204. It follows, that in my judgment the Claimants have demonstrated the required ingredients of reputation/goodwill, deception/confusion and damage: and the Claimants common law claim against the First Defendant in passing off succeeds.
205. It will be recalled that the Claimants have made a further common law claim against the Second Defendant, alleging that it has acted pursuant to a common design with the First Defendant, and has also procured and assisted the First Defendant, in respect of the acts complained of. I deal with these claims for accessory liability in paragraphs 275 to 284 below (since they relate also to the claims for trade mark infringement, and can more conveniently be dealt with together).

Trade Mark infringement claims

206. I turn to the statutory claims, and to the Defendants' Part 20 claims seeking declarations that the F&C Marks are liable to be revoked and/or are (and always have been) invalid for the reasons set out in the Grounds of Invalidity served with those counterclaims.
207. As indicated above, the trade mark infringement claims arise under the provisions of section 10(2) of the Act and Article 9(1)(b) of the CTMR, and under section 10(3) of the Act and Article 9(1)(c) of the CTMR.
208. The rights conferred by a Community trade mark are set out in Article 9 of the CTM Regulation:

Article 9

Rights conferred by a Community trade mark

1. A Community trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

(a) any sign which is identical with the Community trade mark in relation to goods or services which are identical with those for which the Community trade mark is registered;

(b) any sign where, because of its identity with, or similarity to, the Community trade mark and the identity or similarity of the goods or services covered by the Community trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;

(c) any sign which is identical with, or similar to, the Community trade mark in relation to goods or services which are not similar to those for which the Community trade mark is registered, where the latter has a reputation in the Community and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the Community trade mark.

209. Sections 10 (2) and (3) of the Act are to the same effect. The Act implements the provisions of Article 5 of European Parliament and Council Directive 2008/95/EC of 22 October 2008 to approximate the laws of the Member States relating to trade marks (codified version) ("the Directive").
210. My conclusion that the claim in passing off is established means that, subject to the Defendants' claims to invalidate and revoke the trade marks, infringement under both sets of provision follows almost inevitably: implicit in a finding of deception is my acceptance of a likelihood of confusion for the purposes of

Article 9(1) (b) and section 10(2); and if there is passing off or infringement under Article 9(1)(b) and section 10(2) there must also be a likelihood of infringement of the broader protection afforded under Article 9(1)(c).

211. However, and as the Claimants submitted, even if the evidence were to fall short of confusion or deception, there could (and the Claimants contend would) nevertheless be infringement in this case. For it is the Claimants' case under this heading that:

- (1) The imitation of the first part of the name of the Claimants, including the font, capitalisation and underlining, alone and in conjunction with the use of the word "country" in the strapline and elsewhere, leads to an unjustified association with the Claimants' business;
- (2) This unfairly dilutes the Claimants' trade marks, causes tarnishment to those marks because of the Defendants' association with more down market properties and generally lowers their reputation.
- (3) Furthermore it constitutes an unfair free-riding on the goodwill and reputation developed by the Claimants over a period of 10 years.

212. Accordingly, and also in case I am wrong in my conclusion that the Claimants have established their claim in passing off, I should in due course address in turn the ingredients of the trade mark claims. However, since that analysis presumes the continued validity of the F&C Marks, it seems to me logical, in relation to such claims, first to deal with the Defendants' contention in their Part 20 Claim (as elaborated in their Amended Grounds of Invalidity and Revocation dated 20th February 2012).

The Defendants' Part 20 claims for revocation

213. The Defendants' first ground of attack in their Part 20 claim is that (and I quote from Mr Platts-Mills QC's oral submissions) "if the mark's essential character is "Fine & Country" then...the result is that the marks are invalid and ought to be removed, end of story. If we are wrong about that and there is something that has made these marks distinctive, then it must be the collocation of the logo. It cannot be in the word "Fine". It cannot be in the combination of the words "Fine & Country". It has to be in the collocation, the totality." Put another way, (and now quoting from the Defendants' written closing submissions), the Defendants submit that except when seen as a totality, "the Marks are devoid of any distinctive character and/or consist exclusively of indications which may serve to designate the kind and quality of services". They contend that on that basis the Marks were registered in breach of section 3(1)(b) and (c) TMA and Article 7(1)(b) and (c) CTMR.

214. Articles 7 and 52 of the Regulation provide, so far as relevant:

Article 7

Absolute grounds for refusal

1. The following shall not be registered:

...

(b) trade marks which are devoid of any distinctive character;

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

...

3. Paragraph 1(b), (c) and (d) shall not apply if the trade mark has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it.

Article 52

Absolute grounds for invalidity

1. A Community trade mark shall be declared invalid on application to the Office or on the basis of a counterclaim in infringement proceedings:

(a) where the Community trade mark has been registered contrary to the provisions of Article 7;

...

2. Where the Community trade mark has been registered in breach of the provisions of Article 7(1)(b), (c) or (d), it may nevertheless not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.

215. Sections 3(1)(b) and 3(1)(c) of the Act are in equivalent terms to Article 7(1)(a) and (b). Section 47(1) contains provisions equivalent to Article 51(1) and 52(2).

216. The principle enshrined in these provisions is the public interest in preventing the registration of trade marks devoid of any distinctive character, or consisting exclusively of descriptive signs or indications; as was explained in *Koninklijke*

KPN Nederland NV v Benelux-Merkenbureau (C-363/99) [2004] E.C.R. I-1619 (“*the Postkantoor case*”):

“55 That public interest requires that all signs or indications which may serve to designate characteristics of the goods or services in respect of which registration is sought remain freely available to all undertakings in order that they may use them when describing the same characteristics of their own goods. Therefore, marks consisting exclusively of such signs or indications are not eligible for registration unless article 3(3) of the Directive applies.”

217. *Kerly* at paragraph 8-016 states that in *Vibe Technologies* [2009] ETMR 12 at [61]-[65] the following five propositions were “correctly described as being well settled” (by Richard Arnold QC as he then was). Under each extensive authority is cited which, for ease of reading, is omitted in the following summary:

[61] ... First, for a trade mark to possess distinctive character, it must serve to identify the goods or services in respect of which registration is applied for as originating from a particular undertaking and thus to distinguish the goods or services from those of other undertakings: ...

[62] Secondly, the distinctive character of a mark must be assessed by reference to: (i) the goods or services in respect of which registration is applied for; and (ii) the perception of the average consumer of those goods or services, who is deemed to be reasonably well informed and reasonably observant and circumspect: ...

[63] Thirdly, the criteria for assessment of distinctive character are the same for all categories of trade marks, but nevertheless the perception of the relevant public is not the same for all categories of trade marks and it may therefore be more difficult to establish distinctive character in relation to some categories (such as shapes, colours, personal names, advertising slogans and surface treatments) than others: ...

[64] Fourthly, in assessing whether a trade mark has acquired a distinctive character the competent authority must make an overall assessment of the relevant evidence, which in addition to the nature of the mark may include: (i) the market share held by goods bearing the mark; (ii) how intensive, geographically widespread and long-standing the use of the mark has been; (iii) the amount invested by the proprietor in promoting the mark; (iv) the proportion of the relevant class of persons who, because of the mark, identify the goods or services as emanating from the proprietor; (v) evidence from trade and professional associations; and (vi) (where the competent authority has particular difficulty in

assessing the distinctive character) an opinion poll. If the relevant class of persons, or at least a significant proportion of them, identifies goods or services as originating from a particular undertaking because of the trade mark, it has acquired a distinctive character: ...

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

218. To these, *Kerly* adds three “obvious propositions” (at paragraph 8-017):
- (1) Whether a sign possesses distinctive character, inherent or acquired, is a question of fact;
 - (2) The assessment of inherent character depends upon the mark itself. This does not mean that the sign or mark is assessed in a vacuum: the trade of the goods or services in question provides the context;
 - (3) The assessment of distinctive character acquired through use requires an overall assessment of the way in which the mark has been used to ascertain whether the mark has become distinctive.
219. The Claimants urged on me the following points as being of relevance to both acquired and inherent distinctiveness:
- (1) What is under consideration is trade marks in relation to the business of an estate agency, not trade marks in relation to the properties themselves.
 - (2) It is correct that estate agents’ sales particulars may describe a property as being “fine” or in the “country”. However even in relation to the description of a property, the combination of the words Fine & Country is striking and unusual. This is all the more so when used as the name of an estate agency business. Indeed, as noted above, Mr Heaviside himself states that when considering the move from *fine* haart to Fine, he had in mind the choice of a “distinctive” name.
220. The Claimants submitted in the round that there is “quite simply overwhelming evidence” that the Fine & Country registered trade marks were highly distinctive in 2009 and remain highly distinctive today. They particularly emphasised the following:
- (1) The disclosure contains numerous examples of references to the Fine & Country business by others. In every case the words are used to denote and identify the Claimants’ business.

- (2) The evidence of the witnesses of confusion confirms that they regard the name Fine & Country as denoting the Claimants.
 - (3) Numerous industry awards recognise the Fine & Country brand.
221. The Claimants prayed in aid in addition three further indications that the mark is distinctive:
- (1) First, the Claimants themselves trust the marks to identify themselves. This is not a case where the claimants have a primary trade mark used in conjunction with a secondary perhaps more descriptive trade mark. The only means relied upon by the Claimants to identify their business to the trade and the public are the trade marks themselves.
 - (2) It would be surprising if licensees were willing to pay substantial sums year after year for the right to use trade marks which are not distinctive.
 - (3) No witness was called who was under the impression that the Fine & Country name and logo was anything other than distinctive. Moreover none of the 5 witnesses of confusion was cross-examined on the question of whether they thought the name was descriptive.
222. Against this the Defendants urged on me that:
- (1) The essence of the F&C Marks is the description 'Fine & Country', both visually and most certainly aurally. In the context of a market where combinations of words such as 'fine' or 'finest' and 'country' are common place descriptions (as I accept is the case) there is nothing to detract from the descriptive nature of the F&C Marks;
 - (2) The degree of descriptiveness is such that they are incapable of distinguishing properly, and render the F&C Marks devoid of distinctive character: Mr Platts-Mills QC cited in this regard Jacob J's judgment at first instance in *Philips Electronics BV v Remington Consumer Products* [1998] RPC 283 at 301-302 and the judgment of Aldous LJ in the Court of Appeal [1999] RPC 809 at 818.
 - (3) The test should be whether the words or mark are by reason of their collocation or some other factor incapable of application to the goods or services of anyone else or (if distinctiveness is claimed to have been acquired) have become so "by nurture, not nature" so as to connote the goods of a particular trader: Mr Platts-Mills QC again cited the *Philips Electronics* case;
 - (4) Alternatively, as to acquired distinctiveness, another way of approaching the matter is to ask whether the descriptive words have lost their descriptive meaning: Mr Platts-Mills QC quoted Viscount Maugham in *The Shredded Wheat Co. Ltd v. Kellogg Co. of Great Britain Ltd* (1940) 57 RPC 137 at 147-148:

“[I]t may be useful to cite the statement by Mr Justice Parker in re Gramophone Company's Application [1910] 2 Ch. 423 at page 437 since he was a master in this branch of law: “For the purpose of putting a mark on the register, distinctiveness is the all-important point, and in my opinion, if a word which has once been the name of the article ought ever to be registered as a trade mark for that article, it can only be when the word has lost, or practically lost, its original meaning. As long as the word can appropriately be used in a description of the articles or class of articles in respect of which a trade mark is proposed to be registered, so long, in my opinion, ought the registration of that word for those articles or that class of article to be refused.”

- (5) and quoted Jacob J in the *Treat* case (*British Sugar PLC v. James Robertson & Sons Ltd* [1996] RPC 281 at 302 and 306:

“it is precisely because a common laudatory word is naturally capable of application to the goods of any trader that one must be careful before concluding that merely its use, however substantial, has displaced its common meaning and has come to denote the mark of a particular trader...”

...In the case of common or apt descriptive or laudatory words compelling evidence is needed to establish this...it must be shown in a case of this sort that the mark has really become accepted by a substantial majority of persons as a trade mark is or is almost a household word.”

223. These various tests identified by the Defendants have caused me not a little hesitation (which of course fed back into my consideration of the case in passing off). Sometimes I look at the words separately as adjectives; sometimes as (as it were) I see them together as a household name. But on balance I have eventually concluded that the F&C Marks were on registration, and remain, sufficiently distinctive to have warranted and continue to warrant registration. Although wary of adopting yet another formulation, it seems to me that the mark has a recognisable and recognised separate existence apart from the descriptive and laudatory nature of the words themselves. The words in that context call to mind the relevant business, not their semantic meaning: in the manner and context in which they appear they serve to identify and distinguish the business. I accept therefore, the Claimants' case in this regard, and its supporting reasoning as adumbrated above.
224. The second basis on which the Defendants seek revocation is their contention that such use as has been made of the F&C Marks has rendered them deceptive as to trade origin. As I discuss later, the third limb of the Defendants' Part 20 claim is that actually there has been no qualifying use of the F&C Marks at all; but for the

purposes of this second limb I am to assume that the use of the UK Mark has been by or with the consent of the proprietor.

225. Section 46(1)(d) TMA and Article 51(1)(c) CTMR provide that a mark may be revoked on the ground that:

“if in consequence of the use made of it by the proprietor or with his consent in relation to the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services”.

226. The relevant date for assessing the position is as at the date of application for revocation. In this case the position therefore falls to be assessed as at 8 February 2012.

227. The Defendants’ pleaded case (in its Re-Amended Grounds of Invalidity and Revocation) is that the First Claimant has failed to control (or control sufficiently) the use that has been made of the F&C Marks. In particular, so it is pleaded, no control is placed over (a) the type of use that is made by licensees of the F&C Marks; and/or (b) the quality of the properties that are sold by licensees under the F&C Marks. Then it is pleaded that in the premises, the F&C Marks are liable to mislead the public, particularly as to the quality of the goods or services for which the First Claimant is registered.

228. In its presentation at trial the Defendants seem to me to have advanced a more general case under this heading. I hope I do justice to this case in this respect in summarising its building bricks as follows:

- (1) the Claimants expressly disavow that they operate any form of franchise operation: they leave their licensees to operate as independent companies under the F&C banner (either exclusively or as an adjunct or part of their business);
- (2) the objective of these independent licensees in using the F&C Marks is (quoting from Mr Platts-Mills QC’s Closing Submissions) “calculated to educate members of the public to believe that the business and associated names and descriptions are in fact the business of that licensee, used to identify a class of properties offered by the Licensee, and not the brand of the Claimants or any of them”;
- (3) the independence afforded to licensees is such that the Claimants neither would nor could exercise proper control over the use of their Marks; the product is in truth that of the licensees and not the Claimants;
- (4) the effect is to render the F&C Marks deceptive as to quality and origin: it may mean as many different things as there are different licensees using the Marks, and there is no control of quality; such as in each case to mislead the public.

229. I do not accept these arguments: I have concluded that the Defendants have not made good this aspect of their challenge. In my view:
- (1) Although the arrangements differ from or do not amount to a franchising operation, and licensees are permitted greater latitude, nevertheless I am satisfied that in principle and in practice (on the evidence) the Claimants retain and exercise a considerable degree of control (including quality control) over licensees, ensuring on the whole (on the evidence made available) reasonable and appropriate consistency of use and quality of service;
 - (2) The Defendants' arguments as to misleading origin, if accepted, would apply to many, if not most, licensee or franchise operations: and yet section 28 of the TMA makes special provisions for licensees: there may be difficult questions in a given case as to the attribution and ownership of goodwill arising from license or franchise operations: but on the facts here, they do not arise, since all goodwill arising either directly enures to or is held on trust for one or other of the Claimants under the contractual terms;
 - (3) Ultimately this ground of revocation raises a question of fact and I am not satisfied that the factual basis for it is established: a reasonably well informed and reasonably observant and circumspect consumer (be it a prospective licensee or a vendor or purchaser) is, in my judgment, unlikely to be misled as to origin or confounded as to quality;
 - (4) As a background observation the application of the relevant provision is relatively rare (and see *Kerly* at 10-137): and I am satisfied that this is not such a rare case.
230. The last of the grounds advanced for revocation applies only to the UK Mark. The elements of this plea to revoke the UK Mark pursuant to section 46(1) (b) TMA 1994 are as follows:
- (1) It is asserted that the First Claimant, which files accounts as a dormant company, does not trade; neither does the Second Claimant, which also files accounts as a dormant company; and none of the Claimants has made any use of the UK Marks;
 - (2) The purported licence from the First Claimant to FCEA can have no effect, both being inactive or dormant;
 - (3) Even if such licence has effect, under its terms it is an exclusive licence and
 - (a) the First Claimant is contractually prevented from granting any licence to any person other than FCEA;
 - (b) FCEA may grant sub-licences but sub-licensees may not grant sub-sub- licences; so that

- (c) The Claimants have by contract prevented themselves from granting any licence to GPEA.
- (4) It is pleaded that in the premises the UK Trade Mark has not been put to genuine use, either by the First Claimant or with its consent, throughout the period 8 February 2007 to 8 February 2012.
231. Although the dormant company status of the First and Second Claimant is a curiosity, the Defendants' arguments struck me initially and strike me now as somewhat unreal. The consent of the registered proprietor (which the Defendants do now accept is the First Claimant), if not express, has plainly been implicit, and has been formally ratified. All parties to the various contractual arrangements have made clear and confirmed their consent, and it would be most surprising if those arrangements were truly petards on which they have inextricably ensnared and now hung themselves so that they cannot achieve the purpose they are all agreed upon. Whether, as a matter of stating a true and fair view both to those dealing with it and HMRC, the presentation of the First and Third Claimants as dormant for accounting purposes is appropriate may require review; but I do not consider it really goes to the issue raised here of its consent to user. Nevertheless, the argument as to non-use has been quite strenuously pressed and I must deal with it.
232. The statutory foundation for the Defendants' argument as to non-use is section 46(1)(b), which provides as follows:
- “46. - (1) The registration of a trade mark may be revoked on any of the following grounds-
- (a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;
- (b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;”
233. Section 46(2) provides:
- “(2) For the purposes of subsection (1) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered ...”
234. The Defendants' contentions on the facts may be summarised as follows:
- (1) Prior to 2008, licences to use the F&C marks were purportedly granted by the First Claimant. However, on 31 May 2006 the First Claimant formally ceased to trade and since May 2006 it has filed accounts which state that it

has not traded. The Defendants contend it cannot now claim to have been trading, and cannot therefore be the source of consent to use.

- (2) The Second Claimant, which is the parent company in the group, is now and since about 2005/2006 has been engaged in the business of purportedly licensing the use of the F&C Marks and granting other rights to licensees. It has done this in the name of the First Claimant until about 2008, and thereafter in the name of the Third Claimant.
- (3) However, the Third Claimant has never traded, and since its incorporation in 2008 its accounts have stated it to be dormant.
- (4) On 18 November 2010, by an agreement in writing (“the Master Licence Agreement”) the First Claimant purportedly granted the Third Claimant an exclusive licence in the UK in respect of the F&C Marks.
- (5) If that agreement is valid (and the Defendants contend it was not since neither party was trading or otherwise undertaking business) the exclusive licence granted by it (a) prevents the First Claimant granting anyone else any licence and (b) by an express term within it permits the Third Claimant to grant sub-licences but bans the grant of sub-sub-licences.
- (6) Thus, the Defendants contend (a) that provides another reason why the source of any licence other than to the Third Claimant cannot have been the First Claimant; (b) any licence given by the Third Claimant might have sub-licensed the Second Claimant, but then the Second Claimant was barred from itself granting a licence (since that would be a prohibited sub-sub-licence); so that
- (7) No valid consent to the use of the F&C Marks by the licensees during the period in question can be shown.

235. To this the Claimants respond as follows:

- (1) To succeed in the argument the Defendants must show, amongst other things, that the First Claimant could not and/or did not give its permission for use.
- (2) The Master Licence Agreement expressly formalised the position for the future and ratified what had happened previously (the grant by the Third Claimant of UK licences).
- (3) There no longer being a dispute as to the First Claimant being properly registered as the owner of the F&C Marks the formalisation of matters for the future, at the least, comprised and made clear the registered owner’s permission to use the F&C Marks.
- (4) That neither the First nor the Third Claimants were or are trading was and is no impediment: that presentation may be right or it may be wrong but it does not operate as any bar to the First and Third Claimants in fact trading:

if the presentation in the accounts is false, that may give rise to complaint, but does not remove the power to do business.

- (5) Even if the presentation in the accounts is to be treated as improper or unlawful (and that has not been argued) that would not preclude the First Claimant relying on the Master Licence Agreement: it would not thereby be relying on its own wrong or forced to plead its own impropriety.

236. As foreshadowed above, I accept the Claimants' answers. In my opinion, this part of the Defendants' Part 20 Claim is misconceived.

237. Thus, it will be apparent that I do not consider any of the Defendants' Part 20 Claims for declarations of invalidity and revocation of the F&C Marks to be well founded. In my judgment, those claims must be dismissed.

Are the F&C Marks being infringed?

238. I turn, therefore, to consider the Claimants' alternative claims for infringement of its Trade Marks on the footing that they were validly registered and there is no basis for their revocation.

239. I have already set out Article 9 of the CTM Regulation (see paragraph 209 above). Article 9(1)(a) and section 10(1) are not of course in issue: the FINE sign is not identical with the F&C Marks.

Article 9(1)(b) and section 10(2)

240. To establish a claim under Article 9(1)(b) and section 10(2) against the user of a sign the proprietor of the relevant mark must establish a "likelihood of confusion" in consequence of that sign being identical or similar to the mark and used in relation to goods or services identical with or similar to those for which the trade mark is registered.

241. For these purposes (and the following is drawn largely from *Kerly* at 14-072 to 14-079):

- (1) The provision requires (a) identification of the sign used by the defendant and a determination of the goods and services (if any) in relation to which he is using it and (b) a comparison to a notional and fair use of the registered mark in relation to all of the goods and services covered by the registration.
- (2) The goods or services the subject of the registered mark must be identical or similar to those the subject of the alleged infringing use.
- (3) Similarity connotes the existence, in particular, of elements of visual, aural or conceptual similarity.
- (4) It is the overall impression of the registered mark, bearing in mind its distinctive and dominant components, which counts: it is the totality of the mark which gives it its distinctiveness. Thus, it is not legitimate to dissect the mark and compare parts of it with the sign alleged to infringe.

- (5) There can only be infringement where there exists a likelihood of confusion; but confusion includes a likelihood of association, and proof of likelihood suffices: it is not necessary to prove actual confusion at all.

It was accepted by the Defendants that “the respective services are identical.” So the case depends upon the degree of similarity and the likelihood of confusion or association.

242. In *Specsavers International BV v. Asda Stores Ltd.* [2012] FSR 555, Kitchin LJ summarised the manner in which the requirement of a likelihood of confusion in Article 9(1)(b) of the Regulation, Article 5(1)(b) of the Directive and Article 10(2) of the Act should be interpreted as follows:

“[51] The general approach to be adopted in assessing the requirement of a likelihood of confusion under the Regulation and Directive has been considered in a number of important decisions of the Court of Justice including Case C-251/95 *Sabel BV v Puma AG* [1997] ECR I-6191, Case C-39/97 *Canon Kabushiki Kaisha v Metro-Goldwyn- Meyer Inc* [1998] ECR I-5507, Case C-342/97 *Lloyd SchuhfabrikMeyer & Co GmbH v Klijsen Handel BV* [1999] ECR I-3819, Case C-425/98 *Marca Mode CV v Adidas AG* [2000] ECR I-4861, Case C-3/03 *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market* [2004] ECR I-3657, Case C-120/04 *Medion AG v Thomson Sales Germany & Austria GmbH* [2005] ECR I-8551 and Case C-334/05 *Office for Harmonisation in the Internal Market v Shaker de L. Laudato & C SAS* [2007] ECR I-4529.

[52] On the basis of these and other cases the Trade Marks Registry has developed the following useful and accurate summary of key principles sufficient for the determination of many of the disputes coming before it:

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall

impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion.”

243. In *Datacard Corporation v. Eagle Technologies Limited* [2011] EWHC 244 (Pat) [2011] RPC 17, Arnold J listed the same 11 principles and continued:

“[275] There is an important difference between the comparison of marks in the registration context and the comparison of mark and sign in the infringement context, namely that the former requires consideration of notional fair use of the mark applied for, while the latter requires consideration of the use that has actually been made of the sign in context. This was established by the judgment of the Court of Justice in *Case C-533/06 O2 Holdings Ltd v Hutchison 3G UK Ltd* [2008] ECR I-4231. In *Och-Ziff*

Management Europe Ltd v OCH Capital Ltd [2010] EWHC 2599 (Ch), [2011] ETMR 1 at [77]-[78] I held that this involved consideration of the circumstances of the use of the sign complained of, and not consideration of circumstances prior to, simultaneous with or subsequent to the use of the sign.

[276] I also held in *Och-Ziff* at [79]-[101] that Article 9(1)(b) of the Regulation extends to “initial interest confusion”, that is to say, confusion on the part of the public as to the trade origin of the goods or services in relation to which the impugned sign has been used arising from use of the sign *prior* to purchase of those goods or services, and in particular confusion arising from use of the sign in advertising or promotional materials. This conclusion applies equally to Article 5(1)(b) of the Directive.”

244. In the *Specsavers* case the defendants relied upon the context in which their sign was used as an answer to the contention that there was a likelihood of confusion. On appeal the question arose to the extent to which context was relevant. In the present case one aspect of the context of the use of the word “Fine” is the fact that it is often accompanied by the strap line “Selling fine homes throughout the country”. The Claimants contend that this exemplifies unnecessary use of the word country, which increases the prospects of confusion.
245. Kitchin LJ considered the point in paragraphs [76] onwards. At [80] to [84] he considered the *O2* case. He continued:

“[85] These paragraphs were considered by Arnold J in *Och-Ziff Management Europe Ltd v Och Capital LLP* [2010] EWHC 2599 (Ch), [2011] FSR 11. The case concerned a claim by Och-Ziff Management that Och Capital had infringed its Community trade mark registrations for the marks OCH-ZIFF and OCH by the use of the sign OCH Capital. After referring to the paragraphs of the decision of the Court of Justice in *O2 Holdings* set out above, he continued at [77]-[78]:

“77. The question which arises is this: how far do the “context” referred to by the Court at [64] and the “circumstances characterising that use” referred to by the Court at [67] extend? Counsel for Och-Ziff submitted that the context and circumstances were limited to the actual context and circumstances of the use of the sign itself. Thus, in the *O2* case itself, where the sign was used in a comparative advertisement, the context was the whole of the comparative advertisement, but no more. By contrast, counsel for the defendants submitted that the context and

circumstances included all circumstances relevant to the effect of the use of the sign, including circumstances prior to, simultaneous with and subsequent to the use of the sign.

78. In my judgment the context and circumstances are limited to the actual context and circumstances of the use of the sign itself. The Court of Justice explicitly said at [64] that the referring court was right to “limit its analysis” to the context in which the sign was used. Furthermore, it referred at [67] to the circumstances “characterising the use”, not to the circumstances more generally. Thus circumstances prior to, simultaneous with and subsequent to the use of the sign may be relevant to a claim for passing off (or, under other legal systems, unfair competition), but they are not generally relevant to a claim for trademark infringement under art.9(1)(b) . In saying this, I do not intend to express any view on the question of post-sale confusion referred to below.”

[86] It is not entirely clear to me what Arnold J and the parties had in mind by the phrase “circumstances prior to, simultaneous with and subsequent to the use of the sign” but it must, I think, be seen in light of the particular and rather specific issue in that case, namely whether Article 9(1)(b) extended to confusion arising from use of the sign in advertising and promotional materials, so called ‘initial interest confusion’, whether or not any sale resulted and whether or not the consumer remained confused at the time of any such sale. The judge held that initial interest confusion was actionable. At least in the circumstances of that case, it mattered not that it was dispelled at a later time.

[87] In my judgment the general position is now clear. In assessing the likelihood of confusion arising from the use of a sign the court must consider the matter from the perspective of the average consumer of the goods or services in question and must take into account all the circumstances of that use that are likely to operate in that average consumer’s mind in considering the sign and the impression it is likely to make on him. The sign is not to be considered stripped of its context.

[88] It necessarily follows that I would reject Mr Mellor’s first submission. The judge approached the issue of the likelihood of confusion arising from the use of the straplines entirely correctly. The average consumer would see the signs “spec saver” and “Spec savings” in the context of the straplines and, indeed, the posters and other materials on which they were used as a whole, and the judge was right to consider them on that basis.”

246. Having already found, in the context of the claim for passing off, confusion and deception sufficient to make good that claim, I accept the Claimants’ general submission that infringement of Article 9(1)(b) and section 10(2) necessarily

follows. I add the following points in summary form to make clear that I have nevertheless reached this conclusion after applying to the evidence before me the guidelines and principles outlined above, which are specifically applicable to the particular claim, and also (of course) in case my conclusion that the claim in passing off is incorrect.

247. First, comparing the F&C Marks and the FINE sign, I consider that:
- (1) as a matter of overall impression the mark and the sign are sufficiently similar to be likely to lead, and in my assessment have led, to confusion on the part of the average consumer;
 - (2) in particular, the same font, the gold underlining, the capitalisation, and the overall impression created by the two make it all too easy to mistake the one as the other, at least when the two are not laid out together for simultaneous comparison: and the strapline reference to “Country” in the strapline increases the similarities; that was my original instinctive and then more considered assessment; it abided with me, and was reinforced by the evidence (even acknowledging and taking into accounts its flaws).
248. In coming to this conclusion I have considered carefully the Defendants’ contention that, overall, the F&C marks and the FINE sign are quite different and readily distinguishable, and that there is a very low degree of similarity between them. The process of analysis the Defendants have encouraged has tended to erode my overall impression.
249. Upon analysis, and breaking the two down into their component parts, I accept that there are indeed substantial differences. As the Defendants point out the first comprises 3 words and a total of 4 syllables, and is significantly longer than the other; and visually, there are many additional elements in the F&C Marks that are not present in the FINE sign, including additional words, emphasis of the first word, the pillar device, the underlining of both words, and the positioning of “&” above the pillar. I would accept that aurally the two sound different.
250. But the fact to my mind remains that the two are easily confused in the mind’s eye when the two are not set side by side. Of course, as in the game, it is not difficult to spot the differences when the two are closely compared: but the overall impression, for whatever reason (and an impression inherently is difficult to rationalise entirely), is similar and thus confusing.
251. The evidence supports this assessment. I accept in that context that much of the witness statement evidence has a formulaic feel; and the witnesses’ own perception has in many instances been drowned by the words into which they have been straight-jacketed. Nevertheless, the message of confusion survives; and is amplified by the more informal body of e-mail reports of confusion put before me. As to the latter, I accept that much of it is more anecdotal than strictly probative; and that it has been elicited and collated by the Claimants and their licensees, much of it appears provoked and practically none of it seems spontaneous. But in this context too, the message of real as opposed to contrived confusion does, in my judgment, transmit.

252. Lastly, the fact that it seems to me clear that the Defendants and their designers did appreciate the risk of confusion, and (I consider it justified to infer) decided to take that risk and live dangerously, has further confirmed me in my conclusion: and see paragraphs 171-177 above.
253. In summary, for all the reasons that have weighed with me in reaching a finding that the Claimants have established their claim for passing-off, and the factors added or repeated above in the particular context of a breach of section 10(2), I consider that the Claimants have also proved a breach of Article 9(1)(b) CTM and section 10(2) of the Act.

Article 9(1)(c) and Section 10(3)

254. I turn next to the Claimants' further or alternative claim under Article 9(1)(c) and section 10(3) to the effect that the F&C Marks have a reputation in the UK and in the European Union, and that the use of the word 'FINE' by the First Defendant, being without due cause, takes unfair advantage of and/or is detrimental to the distinctive character and repute of the F&C Marks.
255. Article 9(1)(c) and section 10(3) establish, for marks with the requisite reputation, a wider form of protection than that laid down in Articles 9(1)(a) and (b) or sections 10(1) and (2). The focus of Article 9(1)(c) and section 10(3) is on the effect of the use of the sign on the mark (detriment) and in part the advantage that the user of the sign thereby gains (unfair advantage). Three types of situation are covered: damage to the distinctive character of the mark (dilution); tarnishing or degradation of the mark; and gaining an advantage or exploitation (free riding).
256. The essential elements of a successful claim under these provisions have comprehensively been explained by Arnold J in *Datacard Corporation v Eagle Technologies Limited* [2011] EWHC 244 (Pat), [2011] RPC 17 and now most recently by Kitchin LJ in the *Specsavers* case. These can be summarised for present purposes as follows:
257. The provisions apply in relation to goods and services identical with or similar to those in respect of which the mark is registered: Case C-292/00 *Davidoff & Cie SA v Gofkid Ltd* [2003] ECR I-389 and C-408/01 *Adidas-Salomon AG v Fitnessworld Trading Ltd* [2003] ECR I-12537.
258. The first requirement is that the Trade Mark has a reputation: as Arnold J puts it, citing Case C-375/97 *General Motors Corp v Yplon SA* [1999] ECR I-5421 at [24]-[27] and cf. Case C-301/07 *PAGO International GmbH v Tirolmilch registrierte Genossenschaft mbH* [2009] ECR I-9429 at [22]-[25], "this is not a particularly onerous requirement."
259. The next requirement is that the use of the signs complained of gives rise to a "link" with the Trade Mark in the mind of the average consumer as explained in Case C-252/07 *Intel Corp Inc v CPM United Kingdom Ltd* [2008] ECR I-8823. As explained by Kitchin LJ in *Specsavers*, it is not necessary that the degree of similarity is such as to create a likelihood of confusion, but it must be such that the average consumer establishes a link between the registered mark and the sign; and this is to be assessed having regard to all the circumstances of the case:

Kitchin LJ cited the ECJ in *Adidas-Salomon AG* [2004] FSR 21 at [29]-[30]. In that context, “the fact that, for the average consumer, who is reasonably well informed and reasonably circumspect, the sign would call the registered mark to mind is tantamount to the existence of such a link: *Intel Corp Inc v CPM United Kingdom Ltd.* (C-252/07) [2008] ECR I-8823; [2009] RPC 15 at [60].”

260. Finally, it must be shown that the use of the sign without due cause takes or would take advantage of, or is or would be detrimental to, the distinctive character or repute of the registered mark: there are three kinds of injury, as explained further by the Court of Justice in *L’Oréal v Bellure NV* (C-487/07) [2010] RPC 1 at [37]-[42] as follows:

“37. The existence of such a link in the mind of the public constitutes a condition which is necessary but not, of itself, sufficient to establish the existence of one of the types of injury against which Article 5(2) of Directive 89/104 ensures protection for the benefit of trade marks with a reputation (see, to that effect, *Intel Corporation*, paragraphs 31 and 32).

38. Those types of injury are, first, detriment to the distinctive character of the mark, secondly, detriment to the repute of that mark and, thirdly, unfair advantage taken of the distinctive character or the repute of that mark (see, to that effect, *Intel Corporation*, paragraph 27).

39. As regards detriment to the distinctive character of the mark, also referred to as ‘dilution’, ‘whittling away’ or ‘blurring’, such detriment is caused when that mark's ability to identify the goods or services for which it is registered is weakened, since use of an identical or similar sign by a third party leads to dispersion of the identity and hold upon the public mind of the earlier mark. That is particularly the case when the mark, which at one time aroused immediate association with the goods or services for which it is registered, is no longer capable of doing so (see, to that effect, *Intel Corporation*, paragraph 29).

40. As regards detriment to the repute of the mark, also referred to as ‘tarnishment’ or ‘degradation’, such detriment is caused when the goods or services for which the identical or similar sign is used by the third party may be perceived by the public in such a way that the trade mark's power of attraction is reduced. The likelihood of such detriment may arise in particular from the fact that the goods or services offered by the third party possess a characteristic or a quality which is liable to have a negative impact on the image of the mark.

41. As regards the concept of ‘taking unfair advantage of the distinctive character or the repute of the trade mark’,

also referred to as ‘parasitism’ or ‘free-riding’, that concept relates not to the detriment caused to the mark but to the advantage taken by the third party as a result of the use of the identical or similar sign. It covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation.

42. Just one of those three types of injury suffices for Article 5(2) of Directive 89/104 to apply (see, to that effect, *Intel Corporation*, paragraph 28).”

261. So far as unfair advantage is concerned, Lloyd LJ in *Whirlpool* interpreted the Court of Justice’s judgment in *L’Oréal v Bellure* as follows:

“112. Thus, the issue raised by Jacob L.J. at para.91 of his judgment in *L’Oréal v Bellure*, which led him to pose the fifth of the referred questions, has been answered, in essence, to the effect that an advantage obtained by the third party from the use of a similar sign, which is neither confusing nor otherwise damaging, is unfair if the advantage is obtained intentionally in order to benefit from the power of attraction, the reputation and the prestige of the mark and to exploit the marketing effort expended by the proprietor of the mark without making any such efforts of his own, and without compensation for any loss caused to the proprietor, or for the benefit gained by the third party.

....

136. ... It is not sufficient to show (even if *Whirlpool* could) that Kenwood has obtained an advantage. There must be an added factor of some kind for that advantage to be categorised as unfair. It may be that, in a case in which advantage can be proved, the unfairness of that advantage can be demonstrated by something other than intention, which was what was shown in *L’Oréal v Bellure*. No additional factor has been identified in this case other than intention.

137. The question of unfair advantage has to be considered in the round, using a global assessment as indicated in *Intel* in para.79 of the Court’s judgment. As Advocate General Sharpston said at para.65 of her Opinion in *Intel*, unfair advantage is the more likely to be found if the mark is more distinctive and if the goods or services are more similar. The Board of Appeal in *Mango* also said that unfair advantage is the more likely where there is greater similarity of goods as well as where the mark is more distinctive, but that was a case where the mark was

identical, and strongly distinctive, and the goods were not the same but they were in an associated or overlapping field. The Court in *L'Oréal v Bellure* also referred to the importance of the strength of the reputation of the mark, and the strength of the reminder, reiterating what had been said in *Intel*.”

262. As to the requirement that the use be without “due cause”, in *Specsavers Kitchen* LJ reviewed the latest ECJ cases, including the *Interflora* case (*Interflora Inc v Marks & Spencer plc* [2012] FSR 3), and concluded:

“[141] In my judgment these cases do reveal a development by the Court of Justice of its jurisprudence on the scope of Article 9(1)(c) of the Regulation. They establish that a proprietor of a trade mark with a reputation is not necessarily entitled to prohibit the use by a competitor of his mark in relation to goods for which it is registered even though the mark has been adopted with the intention and for the purpose of taking advantage of its distinctive character and repute, the competitor will derive a real advantage from his use of the mark, and the competitor will not pay any compensation in respect of that use. Consideration must be given to whether the use is without due cause. Specifically, the use of a trade mark as a keyword in order to advertise goods which are an alternative to but not mere imitations of the goods of the proprietor and in a way which does not cause dilution or tarnishment and which does not adversely affect the functions of the trade mark must be regarded as fair competition and cannot be prohibited.”

263. My conclusions in the context of the claims for passing-off and under Article 9(1)(b) and section 10(2) mean that I can be very brief on the question whether the F&C Marks have a reputation and the question whether a sufficient link between the marks and the sign has been established: in my judgment both have been established, for the reasons I have already sought to state.
264. Further, I accept the Claimants’ submission that even if the evidence had fallen (or is hereafter held to fall) short of confusion or deception, there would nevertheless be infringement in this case. The imitation of the first part of the name of the Claimants, including the font, capitalisation and underlining, alone and in conjunction with the use of the word “country” in the strapline and elsewhere, leads to an unjustified association with the Claimants’ business.
265. The Defendants contend, however, that even if that is taken to be so (and of course that is contrary to their case) the claims nevertheless should fail because (a) there is no or no sufficient evidence of any intention or other factor such as to satisfy the condition that any advantage obtained was “unfair”; (b) there is no evidence to establish detriment or dilution, nor indeed any proof of any actual or likely change in the economic behaviour of the consumer; and (c) the use made of the word “fine”, being a descriptive and laudatory term in widespread use in the

relevant trade or business, is within the ambit of fair competition and not “without due cause”. For (a) and (b) the onus of proof is on the Claimants; by contrast, it falls to a defendant to establish use not without due cause if the other elements of infringement are made out: see *Intel* at para. 39.

266. As to (a), the Defendants contend that no “unfair” factor other than intention has been raised by the Claimants, and that there is no basis for a finding that the First Defendant intended to “free-load”, “free-ride”, or “coat-tail” on the F&C Marks rather than to seek to establish and develop their own independent identity. They contend more particularly that it is not sufficient (if found, as I do find) that the Defendants were well aware of the F&C Marks and that they or their design agents (TMC) believed there was similarity between the marks and the FINE sign. The Claimants, on the other hand, contend that in this case there is sufficient evidence of an intention to encroach on and take advantage of the Claimants’ goodwill and reputation; and that in any event, unfairness may be established by other means (citing Arnold J in *Datacard* at [295]), including a general sense of unfairness.
267. In my judgment, there was unfairness in the intentional adoption of a sign which the First Defendant and TMC well appreciated was and is plainly similar in appearance to the F&C Mark. Mr Heaviside substantially accepted the similarity, saying also that he personally would have preferred a different design. He said this under cross-examination (the references to pages being to exhibits depicting the development of the FINE sign):

“Q If you were worried about p.518 being too close to Fine & Country am I not right in saying that p.533 ought to have been ringing alarm bells loud and clear? This was much too close to Fine & Country.

A I would say all along I preferred a different option. I preferred something that looked more akin to what we developed on the Fine magazine just in terms of preferred style and the colours that we were working with.

Q Oh, I see, so somebody overruled you on the branding on p.533. Was that Mr. Smith who did it?

A I think that the final decisions on the board were taken out of my hands, but again I can understand that for a company that has at the highest level developed every single one of its for sale boards throughout its history.

Q So it was head office who overruled you and went for a design that was closer to Fine & Country than you would like?

A I would have preferred a different design altogether.

268. The consciousness of the risk, and the decision which (it appears to me and I find) was ultimately made by Mr Smith to take it seems to be explicable most plausibly on the basis that even if Mr Smith and the First Defendant are not thereby to be taken as intending to deceive, the link or association with the F&C marks would enure to the benefit of the Defendants. I consider that the intentional taking of that risk in such circumstances and for such reasons was and is unfair.
269. As to (b), and focusing first on dilution (blurring of or detriment to the distinctive character of the F&C brand), the Claimants' case is that the association or link in the public mind between the F&C brand and the FINE sign inevitably does or will undermine or at least weaken the mark's ability to identify the goods or services for which it is registered: its hold on the public mind is attenuated. The rival magnet erodes the magnetic force of the brand. The Defendants dispute this: they contend that there is no evidence that there has been any change in such ability as there is in the F&C Marks to identify services provided by the licensees; and that this is further supported by the highly descriptive character of both the marks and the sign, and the very extensive use of such descriptions in the estate agency field.
270. My conclusion in the context of passing off and Article 9(1)(b) and section 10(2) as to the likelihood of confusion seems to me to lead inexorably to the further conclusion that dilution is indeed likely. Further, even if the evidence to which I have referred does not demonstrate confusion, or the confusion is held to be "mere confusion" in the sense that it is to be tolerated by reference to the commonplace nature of the words deployed, it also seems to me that the attractive power of the F&C Marks, their distinctiveness, and the Claimants' control over them, must be or be likely to become reduced or compromised by a sign so similar.
271. I have in this context also taken into account the evidence of Mr Lindley to which I have previously referred that (a) the Claimants' business continues to grow and (b) the Defendants' success has been limited, especially in comparison to the amount spent on development of the FINE sign (of which, I should perhaps acknowledge, I have not been provided with details). However, as it seems to me the effects may be more insidious and not immediately obvious; and likely to be exacerbated geometrically by any future arithmetic success on the part of the Defendants. So I would, if it were necessary (which in light of my other conclusions it is not) be disposed to accept that this head of damage is satisfied also.
272. Similarly, as to the second facet of (b) and the third head of damage, tarnishment or degradation, it is not strictly necessary for me to decide whether the Claimants' case under this head is made good. Now that the link between Fine and Haart has been ostensibly severed (which is, after all, what has really given rise to the similarities that have prompted this dispute) the issue seems to me quite evenly balanced.

273. The Defendants contend that the evidence demonstrates that the material produced by FINE is of an excellent standard, and that the whole rationale of the business dictates that this should continue to be so. On the other hand, the Claimants point to a number of factors, including (a) the Defendants' reputation for aggressive business practices that have led to complaints to the Advertising Standards Authority (some of which appear to have been upheld), (b) other aggressive marketing ploys, including fly-posting (when an agent illegally erects signs on public land) and (c) what Mr Lindley presented as an over-zealous adoption of lifestyle marketing such as might put customers off. On balance if this were the only head of damage I would not be inclined to find that element of the case proved.
274. In the round, however, I would find in favour of the Claimants: the elements of a successful claim for breach of Article 9(1)(c) and section 10(3) seem to me to be established. The question then arises whether the Second Defendant is jointly liable.

Joint liability of the Second Defendant

275. As previously mentioned, by re-amendment to their Particulars of Claim made on 30 January 2012 the Claimants joined the Second Defendant, alleging that it acted pursuant to a common design with the First Defendant to do the acts complained of and has also procured the First Defendant to do such acts (primarily through Mr Smith, who is CEO of the group and a director of both companies). The Claimants seek injunctive relief and damages and costs against it accordingly.
276. Mr Hicks confirmed to me that the real purpose was to ensure proper enforcement, not least in respect of costs. He explained also that the Claimants' concerns in this regard had developed in consequence of a number of incidents, including the First Defendant's sudden change of name from Spicerhaart Limited, the formation at the same time of a new Spicerhaart group subsidiary called Fine Estate Agency, and a long delay, despite repeated reminders, on the part of the First Defendant to pay a relatively small sum ordered to be paid on account of costs by Master Price in November 2011. It is in my view understandable that the Claimants should seek protection against the risk of being left with a claim against an abandoned and worthless vessel.
277. The Second Defendant denies that it had any involvement in the First Defendant's decision to adopt or trade under the name FINE; and more particularly, it denies that Mr Smith was himself involved or responsible. The Second Defendant pleaded and maintains that Mr Smith is not involved in day to day management of the First Defendant (now it appears undertaken by a Mr Chris Charlton); and that the decision to adopt or trade under the name FINE was a "matter for the operational management team of the First Defendant lead by Dean Heaviside". The Second Defendant has referred to and relied upon a passage in *Kerly* (at 20-050) which reads as follows:

“...it is frequently sought to join as a defendant the parent of the company actually carrying on the allegedly infringing acts, either in order to be able effectively to enforce any award for damages, or for disclosure. In such cases, it is

not enough to show that the parent company knew and approved of the acts concerned, or even that it knowingly assisted the conduct in question. It must be shown either that it procured or induced or conspired in the commission of the conduct, or was involved in its commission.” (Reference is made to *Credit Lyonnais v ECGD* [1998] 1 Lloyd’s Rep. 19 and *Sepracor v Hoechst Marion Roussel* [1999] FSR 746.)

278. The issue was considered by Mustill LJ in *Unilever Plc v Gillette (UK) Ltd.* [1989] RPC 583 and by Chadwick LJ in *MCA Records Inc v Charly Records Ltd* [2001] EWCA Civ 1441, [2002] FSR 26; and the distinction between indirect infringement by procuring and participation in a common design is expressed. In the latter context, it is to be noted that it is not necessary to find that the secondary offender has explicitly mapped out a plan with the primary offender; as Mustill LJ put it (at page 608):

“Their tacit agreement will be sufficient. Nor, as it seems to me, is there any need for a common design to infringe. It is enough that the parties combine to secure the doing of acts which in the event prove to be infringements.”

279. The Defendants submitted that there is not a scrap of evidence in this case that comes close to meeting the prescribed test or standard; all that could be shown, they submitted, was that Mr Smith took a very close interest in the activities of the operational subsidiaries, and that this is “neither here nor there.”

280. The Claimants, on the other hand, contended that the evidence clearly establishes that both Defendants have at all times operated according to a common design to use the name Fine and to use it in the particular manner complained of. In particular they stressed that:

- (1) The cross-examination of Mr Heaviside showed the close and ultimately decisive involvement of Mr Smith and other members of the parent company in the decision to use the name Fine and the way in which it was used;
- (2) In point of fact the group acts as a whole, with the parent company using various subsidiaries in effect as divisions within a co-ordinated whole directed by it through (especially) Mr Smith.

281. The Claimants particularly relied on the following documentary examples:

- (1) The Spicerhaart group website at <http://www.spicerhaart.co.uk> makes the following statements and references to the name “Fine”:
 - a) “We operate five well-known estate agencies in England – haart, Spicer McColl, Haybrook, Felicity J Lord and Fine”.
 - b) “*Fine*” is stated to be one of the “*divisions*” of the group.

- c) At the bottom of each or most pages of the Group Website, there is a list of estate agency brands operated by the group, which include the Fine name and Logo complained of above.
- d) There is a page dedicated to the business of “Fine Estate Agency” at <http://www.spicerhaart.co.uk/Spicerhaart-Fine.aspx>. It contains:
- a link to the *Fine.co.uk* website;
- the following statements:
- “Spicerhaart’s fine estate agency delivers an exceptional service for unique and individual homes at the upper end of the market”.
- e) The Group Website provides details of Mr Dean Heaviside which can be accessed on the page accessible at <http://www.spicerhaart.co.uk/spicerhaart-executive.aspx>. The website states that he is the “*Fine Divisional Director*” and that he is “*responsible for our Fine division, Spicerhaart’s estate agency for prestige properties ...*”.
- f) The “about us” page on the www.fine.co.uk website states:
- “Welcome to Fine, our exceptional estate agency service for high quality homes, brought to you by the UK’s largest independent estate agency group.”
- g) Okotoks most recent accounts for the years ending 31 December 2010 and 31 December 2009, show that about £5.9M and £3.1M respectively were owed by it to Spicerhaart Group and other members of the group. Such debts must have arisen as a result of the support given to the subsidiary by the parent, and such support would not have been given unless the two were working pursuant to a common design.
- h) Fine’s headed notepaper describes Spicerhaart Limited as “a Spicerhaart Group Business”;
- i) Yet the Agency Agreements are in the name of Spicerhaart Estate Agents Limited.
- j) Most of the responses to ASA complaints have been answered in the name of Spicerhaart Group Limited: and I note, for example, that the advertisement itself stated “*haart is the trading name of Spicerhaart Limited*”, but the response was still made in the name of the parent company.
- k) The letter before action was responded to by Mr Pollington on behalf of the group.

282. The Claimants make the further point that the Defendants produced no evidence to rebut this case. They have called no evidence to explain their intentions in changing the name of the First Defendant to one so different, and in forming a new subsidiary so identified with the Fine brand. Nor have they sought to explain their corporate structure, or the way the companies within the group are managed, to dispel the impression that the parent company runs the subsidiaries as if they were simply divisions or departments of the one company.
283. It is, in my view, clear that the strategic decision to sever any ostensible link with the haart brand must have been taken at parent company level, on the advice of Mr Heaviside; that the design of the FINE sign was ultimately decided (choosing between a range of options generated by TMC) by Mr Smith at parent company level; that as Mr Heaviside said, it was not his (Mr Heaviside's) preference, the decision was dictated by Mr Smith.
284. In my judgment, in those circumstances, the Defendants combined to secure the doing of acts which in the event I have found to be infringements, and the Second Defendant is jointly liable with the First Defendant accordingly.

Disposition of the case: summary of overall conclusions

285. I can summarise my conclusions as follows.
286. In my judgment:
- (1) The Claimants have established the triple requirements of a successful claim in passing off, which are goodwill, deception and damage; they are entitled to protect the goodwill generated by them in the course of their business and the fact that goodwill generated by their licensees is held on trust for them so they are not the legal owners of it does not prevent them maintaining a claim for permanent injunction: they succeed in their primary claim;
 - (2) It may be that the Claimants may wish, if they seek damages in respect of erosion of the goodwill held on trust for them, to join the legal owners or appoint one to be representative of the others or put in place some other mechanism to ensure all are finally bound: but that does not affect the disposition of the case now;
 - (3) The Defendants have not established that the F&C Marks are not being used by or with the consent of the proprietor (the First Claimant); nor have they established that the use made of the F&C Marks has rendered them deceptive as to trade origin: they have failed to show any grounds for a declaration of invalidity, or for revocation, of the F&C Marks and their Part 20 Claim must be dismissed accordingly;
 - (4) The Claimants have established infringement of their trade marks in terms of Article 9(1)(b) and Article 9(1)(c) of the CTMR and (correspondingly) of sections 10(2) and 10(3) of the TMA;

- (5) Subject to further submissions on the form of relief, it seems to me that the Claimants are entitled to injunctive relief and an inquiry into damages or an account of profits accordingly, as well as delivery up and/or destruction of offending material.
287. I shall need assistance from Counsel as to the precise form of Order. That, and any further matters, including costs, can be dealt with after this judgment has been formally handed down.
288. Finally, I am grateful to Counsel and their respective teams for their patience and assistance, and for the efficient but comprehensive way in which they presented their cases.

CLAIMANTS' SCHEDULE OF INSTANCES OF CONFUSION
(as referred to in paragraph 95, 112(3), 119 and 121 of the judgment)

1. This document attempts to take each instance of confusion contained in bundles E1 and E2 and provide the following information:
 - (1) Whether it is an instance involving a buyer or seller or some other category of person (e.g. a journalist).
 - (2) Its date and location.
 - (3) Where it is dealt with in evidence in chief or cross-examination and any other relevant references to the incident.

Each incident is referred to by reference to its tab number in bundle E1 or E2.

2. In addition, instances of confusion not contained in bundles E1 or E2 are documents and the same information provided. These instances are identified by letter – e.g. A, B, C etc.
3. In some instances multiple instances of confusion are recorded in the same report.

4. Summary:

Sellers:	50 instances
Buyers:	76 instances
Other professionals:	24 instances
Others:	23 instances
Unclassified:	15 instances

SELLERS

Sellers: instances not in bundle E1 or E2

	DATE	LOCATION	COMMENTS
A	21/08/2010	Gerrards Cross	Vendor had instructed F&C. Sue (Susan Anne Keveren) from FINE approached vendor in a touting process and sent him brochure. Vendor posted materials to FINE, thinking that he was actually posting them to Gari Holden at F&C. Angie Hannacher said in her email that: “Seems once again ‘Fine and Country’ are happy to ride on our marketing/profiling” .
B	24/08/2010	Gerrards Cross	Rahul Jagota ACA sent an email to Susan Keveren of FINE, thinking that he was sending an email to F&C, to instruct F&C as a “multi-agent”.

Sellers: bundle E1

Tab	DATE	LOCATION	COMMENTS
2.	24/02/2010	Petersfield, Hampshire	FINE approached a client of F&C selling a property at £1.35m implying that FINE were part of or associated with F&C and had recently opened an office in Petersfield. Client confused by similar marketing material.
4.	24/02/2010	Norwich	One F&C client believed F&C had changed its name. Another client said she had received F&C magazine in the post whereas it was in fact FINE’s magazine.
5.	24/02/2010	East Herts & West Essex	F&C talking to potential client over period of weeks about listing her house. Potential client confused - mistook a FINE magazine sent to her for a F&C magazine.

Tab	DATE	LOCATION	COMMENTS
6.	24/02/2010	Essex/Suffolk	On average three calls a week received where caller insists F&C have a property at a location which is in fact on offer by FINE. F&C have also been asked to value properties where the potential client has asked about the "one you sold up the road", which has turned out to be listed with FINE.
8.	26/05/2010	Gerrards Cross	(1) Numerous occasions of potential clients informing F&C agents that they had been into the "other office" (actually FINE's office) as they thought F&C had moved or that there were two offices in the same high street. (2) Vendor confused between brands by marketing literature posted to her and by for sale sign for FINE nearby. Vendor instructed F&C and representatives of FINE visited F&C office to ask for the letter of instruction that the Vendors reputedly told FINE representatives to collect from F&C. Vendor did not in fact give such permission.
14.	14/06/2010	Saffron Walden	Vendor selling property through F&C visited office to hand in marketing letter sent to him from FINE believing that F&C had sent him unsolicited marketing mail after sale already agreed on property. Vendor had eventually realized the difference between F&C and FINE and stated that appearance of the letter, typeface, layout and content seemed to be designed to mislead the public.
18.	26/06/2010	East Sussex	FINE gained instruction and Vendor thought they were instructing F&C. F&C had been chasing instruction and Vendor said that the property was already on with F&C but this turned out to be FINE.

Tab	DATE	LOCATION	COMMENTS
20.	01/07/2010	Woodbridge	(1) Vendors selling through F&C visited the office and enquired as to why FINE are copying F&C. (2) (See “Unclassified”) (3) Vendor confused between brands. (4) (see “Buyers”)
28.	09/08/2010	Norwich	Vendor selling through F&C complaining of publicity received from FINE and stating that this must be confusing for prospective purchasers and irritating for sellers.
32.	12/08/2010	Grattham, Cambridgeshire	Individual called, very agitated that F&C had not carried out instructions to remove property from rightmove.co.uk website despite vendor’s insistence that F&C cease marketing. Property in fact marketed through FINE not F&C. Reputation of F&C damaged.
38.	16/09/2010	Chelmsford	Call from vendor to F&C regarding property on the market through FINE.
42.	07/10/2010	Chelmsford	(1) (see “Buyers”). (2) F&C received a telephone call from a potential seller requesting a valuation saying that he had seen boards around with FINE on them and enquiring whether F&C are the same company.
43.	12/10/2010	St Ives	Vender selling through FINE came into the office to enquire why there would be a 2% charge on the sale of his property and to request further information prior to his appointment with the agent that afternoon.
44.	18/10/2010	Epsom, Leatherhead & Dorking	(1) Potential vendor called F&C asking to speak to someone who actually works for the Cobham office of Fine – however she was expecting to speak to F&C. (2) (See “Unclassified”).

Tab	DATE	LOCATION	COMMENTS
46.	14/10/2010	Suffolk	Michelle Smith (vendedor) instructed "Fine" in the mistaken belief that she was actually instructing F&C. On realizing the error, she dis-instructed "Fine" and instructed F&C as had been her original intention. Letter from her explaining incident.
49.	03/11/2010	Monmouth Usk Usk	(1) A long-standing friend of an F&C agent almost mistakenly instructed FINE to advise on selling his house and it took a telephone conversation with the F&C agent to realize that FINE was a completely different company. (2) (See "Buyers"). (3) (See "Buyers").
57.	13/01/2011	Cheltenham	One of F&C's clients saw his property advertised in the local paper and asked whether FINE was part of the same group as F&C as they advertised in the same paper. He said "they're the same colours, you could just put "& Country" after their name, and they'd be the same."
60.	27/01/2011	Woodbridge	Claire Appleby put her property on the market with Fine she thought that she had instructed F&C. Appleby XX: Q: ...that is clearly a Fine document... A: Except that, as I said to you, I thought that was a modernized rebranding. I didn't, at that stage, realise that it was a separate company. (p25/lines 13-16) Q: Well, why is it the same company? A: Well, because if somebody simply has a logo redesigned it doesn't make them a different company. It just means they have had their logo redesigned. (p25/lines 39-41)

Tab	DATE	LOCATION	COMMENTS
66.	29/03/2011	Suffolk	Seller on with FINE was advised by negotiator at Spicerhaart that Haart was their bottom brand, F&C was their middle brand and FINE was their cream brand – Seller therefore instructed FINE on that basis. Property called “Heathersett”
68.	05/04/2011	Suffolk	Client received unsolicited letter from FINE. She mistakenly thought this was from F&C and went to the F&C office to complain.
70.	07/04/2011	Portsmouth	Client received letters from what he thought was F&C’s new office in Petersfield. Actually a FINE office.
79.	17/05/2011	Hampshire	(1) (See “Buyers”). (2) Client rang F&C on a recommendation and asked if the “Petersfield” office could deal with the sale of their property. F&C do not have an office in Petersfield but FINE do.
80.	18/05/2011	Gerrards Cross	Client attended F&C office and explained that she was looking for Steve from FINE to discuss the date for her forthcoming valuation. F&C representative explained that Steve worked for and was connected with an entirely separate business (FINE) rather than F&C.
82.	04/06/2011	Cranbrook	Mrs Alma Leapa (whose property was sold by F&C) recommended the services of F&C to Mr John Evenden. Mr Evenden appointed FINE rather than F&C by mistake.
83.	08/06/2011	Chelmsford & West Essex	F&C have attended valuations where the client was under the impression that she had instructed Fine. In addition, F&C regularly receive calls from the public requesting details of properties that are actually on with FINE.
85.	14/06/2011	Wing	Vendor has been informed by FINE that FINE and F&C were once connected.

Tab	DATE	LOCATION	COMMENTS
87.	15/06/2011	West Buckinghamshire	Mrs Brogan booked a valuation with F&C after seeing advert in The Milton Keynes Post. Later Mrs Brogan cancelled the valuation as she considered the F&C office to be “too far away”. Mrs Brogan confirmed that when she booked the valuation she had wrongly assumed F&C was FINE who have an office in Milton Keynes close to Mrs Brogan’s property.
88.	17/06/2011	Kent	F&C had sold an apartment forming part of a house. The vendor recommended F&C to another resident. That client instructed FINE to sell his property in the belief that it was the agent that sold the first property. <i>(In ReX, Lindley clarified the provenance of his email)</i>
92.	19/08/2011	Gerrards Cross	(1) (See “Buyers”). (2) Call to F&C from potential clients asking for valuation. When the F&C representative attended the property it became clear that the client believed that the advertising which had been produced by FINE had been produced by F&C. Representatives of F&C’s Gerrards Cross office confirmed that the marketing materials which the clients had viewed in the FINE brochure were produced by an entirely different company and were unconnected with F&C.
93.	06/09/2011	Gerrards Cross	Mr Hasnain telephoned offices of FINE in Gerrards Cross under the mistaken belief he was telephoning F&C. When he asked to speak with Ms Gari Holden (of F&C), who he had had dealings with in the past, he was told that Gari did not work for FINE and that FINE was an entirely separate business from that of F&C.

Tab	DATE	LOCATION	COMMENTS
97.	15/09/2011	Hoddesdon, Hertfordshire	Telephone call from a vendor who was selling their property through F&C. They had received a letter touting for business which they wrongly assumed had been produced and delivered by another F&C office. After a long discussion with the vendor it became clear that the letter had been produced by FINE which the vendor found very confusing.
100.	16/09/2011	Harpenden	Alan Collinge of F&C Harpenden had recently been instructed by a member of the public to sell and market a £4.5m property. Following receipt of instruction, Mr Collinge returned to the customer's property. The customer produced (from a folder marked "Fine & Country") a "FINE" brochure for a property being marketed by FINE plus covering letter. The customer commented that he considered the brochure to be fabulous and was under the assumption that the brochure had been produced by Fine & Country. Mr Collinge explained that the brochure was produced by another company that was not in anyway connected with Fine & Country. Until this had been explained, the customer had confused the FINE brochure as being a brochure produced by the Fine & Country.

Sellers: bundle E2 ("101" refers to tab 1, "102" refers to tab 2, etc.)

Tab	DATE	LOCATION	COMMENTS
102.	16/09/2011	Grantham, Lincolnshire	Email of 21 January 2011 from a Mr Geoff Cook to F&C Grantham. Mr Cook referred F&C's newsletter article called "Sssh! House For Sale". Newsletter was actually produced by FINE.
103.	17/09/2011	Kingswood	F&C Kingswood were liaising with a vendor to arrange for the placement of an advertisement in the Sunday Times property section. Zoe Cox, of F&C Kingswood discussed the approach with the vendor and it was clear that the vendor had confused the

			advertising that appears in the Sunday Times placed by FINE with that produced by F&C.
105.	20/09/2011	Chelmsford & West Essex	Telephone call to F&C from member of the public who said that F&C had valued his property recently and that he wanted to discuss matters further. It transpired that the valuation had actually been undertaken by FINE.
106.	21/09/2011	Loughborough	A friend of F&C representative spoke to them about an unsolicited card which had been sent to their home by (apparently) F&C. At the time the property was on the market with other estate agents. Both friend and estate agent asked F&C to discontinue such approaches. It transpired that the marketing material had actually been produced by FINE. (See "Buyers"). (See "Others").
112.	27/09/2011	Chelmsford & West Essex	Telephone call received by F&C from member of the public asking for a Nick Curtis. The F&C representative explained that no Nick Curtis worked in that office and that she was after FINE.
117.	30/09/2011	Gerrards Cross	A client of F&C, Mr Flint, is selling his property through F&C. He received an unsolicited letter through the post which he believed came from F&C and commented to F&C that he thought that it was strange that F&C would send it given that they were already instructed. On investigation he discovered that the letter was actually sent by FINE. He said that he found the situation very confusing.

Tab	DATE	LOCATION	COMMENTS
118.	30/09/2011	Norwich	A lady contacted the F&C offices to explain that she had just instructed FINE in relation to the sale of her property under the mistaken believe that she was instructing F&C. She had previously sold a house through F&C and had searched online for F&C's number but found Fine's number by mistake. She then made an appointment for a valuation with Fine and told them that she had previously sold a property through them. Fine did not inform her that they were not F&C. She said that the contract which we signed was very similar to that of F&C.
124.	16/01/2010 07/06/2010	Bexley	<p>1. F&C representative attended at The Old House to carry out a market appraisal. While valuing the property the consultant asked, for market research purposes, why F&C had been chosen. Client said that F&C had her friend's house on the market in Bexley. Consultant advised that F&C did not have a property on the market in that area. Client asked if consultant had come from FINE. Consultant explained that they had not and explained the difference between the companies.</p> <p>2. F&C office contacted to carry out a market appraisal of their property as they believed that they were the FINE agents marketing the property in Bexley.</p>
127.	12/10/2011	Heathersett, Norfolk	<p>Letter received by F&C from member of the public stating that he and others had perceived that FINE and F&C were the same company, and stating that this had had a negative impact on the image of F&C. Also stating:</p> <p>FINE's logo, type of print, style of presentation are like those of F&C.</p> <p>His friend had informed him that his property was not displayed in F&C's window. Upon checking he found that his friend had been looking in FINE's window.</p> <p>Writer had also received post from FINE</p>

			<p>suggesting he might like to sell his house through them as well as being sent a glossy magazine full of properties. He was about to call to explain that he was already on with the agent and ask why his property was not in the magazine when he realized that FINE was not in fact the same as F&C.</p> <p>Ralph Cross</p>
137.	24/02/2010	Monmouth	<p>Potential client stating to F&C office that it had not done very well with a property for sale which was near his property. Agents eventually realised that he was referring to a property that was on the market with Fine, not F&C.</p>
155.	19/1/12	Saffron Walden	<p>Prospective seller approached Haart in relation to the valuation of her buy-to-let property. She saw display of expensive properties in the Haart office and was introduced to “Fine”. She came into contact with Fine and Country early 2012 in considering agencies to market her property. She mistook Fine & Country for “Fine” and incorrectly assumed that Fine & Country was the “posh end of Haart”.</p> <p>Wilshere XX (day 3, p52):</p> <p>A: By Fine. He said, “I am not Haart, I’m Fine”, and gave me a posh brochure... (lines 9-10)</p> <p>Q: ...</p> <p>A: Well, the thing is I thought all the time we were dealing with Fine & Country...(line 16)</p> <p>Q: ...</p> <p>Q: The brochure, okay.</p> <p>A: I think it had “Fine” on it and I think Fine was underlined and I think it was white background with a property on the front obviously just to draw your eye... (p53/lines 20-22)</p>
158.	23/09/11	Woodbridge	<p>Member of the public called F&C to say that F&C had sent her marketing material (it had in fact been sent by Fine). She said that she felt that the marketing method was</p>

			“intrusive” and that she would have assumed that it was sent by F&C had she not phoned in.
159.	11/04/2011	Ambleside	Potential seller could not understand why F&C had two separate adverts in the Sunday Times (i.e. “Fine & Country” and “Fine”). He thought that they were the same company and wanted to know how F&C differentiated between which properties to put on which advert.
Tab	DATE	LOCATION	COMMENTS
160.	07/04/2011	Portsmouth	Client advised F&C that he had received letters from what he initially thought was new F&C office in Petersfield and he was confused as F&C representative had not mentioned a new office.
163.	11/02/2012	Loughton	<p>1. (See “Buyers”).</p> <p>2. (See “Buyers”)</p> <p>3. Member of the public telephoned F&C regarding a complaint about a valuation. It transpired that Fine had valued the property and that the individual was calling to clarify the figures. F&C representative explained that they were not Fine. Individual said that it was very confusing.</p> <p>4. Potential client who is marketing her property with Fine telephoned by F&C representative to see how the marketing was proceeding. Potential client complained that F&C representative should know how the marketing was going as she had had no viewings on the property and we had been acting for several weeks. F&C representative had to explain that Fine and F&C were separate companies and that F&C was not acting for her. Potential client stated that it was very confusing.</p>
164.	13/02/2012	Berkhamsted	Individual telephoned F&C Berkhamsted branch asking why he had not heard anything further in relation to the marketing of his property. On investigation by F&C representative, it was discovered that the property was actually being marketed by

			Fine. However, the individual was under the impression that F&C Berkhamsted were marketing the property. F&C had previously marketed a property opposite the property in question.
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BUYERS

Buyers: instances not in bundle E1 or E2

	DATE	LOCATION	COMMENTS
C	24/11/2009	Grantham	James Eastaway reports confusion by actual purchaser. Bidwell reports that this is happening with irritating regularity.
D	Jan 2011	Rugby	Pauline Desmond, a dentist and a buyer with experience in buy-to-let, presently has 10 properties. She carried out a search on Rightmove, She went to F&C office in Rugby to pick up sales brochures, at which point she was told that the F&C did not market the property, and found out that the property was marketed by FINE. Desmond: “At a glance when I am looking at the other stuff I just saw Fine. Fine” (Desmond XX, day 5, p25/line s 24-25).

Buyers: bundle E1

Tab	DATE	LOCATION	COMMENTS
2.	24/02/2010	Wadhurst	Client believed property on offer in Wadhurst. In fact a FINE instruction. A further two clients believed that F&C had an office in Wadhurst, which is in fact a FINE office.

Tab	DATE	LOCATION	COMMENTS
6.	24/02/2010	Essex/Suffolk	On average three calls a week received where caller insists F&C have a property at a location which is in fact on offer by FINE. Usually calls originated from “For Sale” board. F&C have also been asked to value properties where the potential client has asked about the “one you sold up the road”, which has turned out to be listed with FINE.
7.	24/02/2010	Hampshire	Enquiries received from potential clients regarding a property on the market with FINE in Petersfield. Staff have to explain to each enquirer that property not on offer through F&C. Do we want to emphasis “this takes some time”? Do we want to cross reference with her witness evidence? Ann-Marie Green.
10.	27/05/2010	Buckinghamshire	Client saw a FINE property on a website and telephoned the number displayed but got no response. Found F&C on directory enquiries and F&C agent had to explain that the property was on the market with FINE not F&C.
11.	08/06/2010	Woodhouse Eaves, Leicestershire	Woman called F&C office frustrated as unable to find a property she saw on Rightmove. In fact property is on the market through FINE.
13.	10/06/2010	Surrey	F&C received two calls from potential purchasers looking to view a property on the market with FINE in Dorking.
16.	21/06/2010	Grantham, Lincolnshire	Two clients called F&C wishing to view properties that were in fact available through FINE.
17.	23/06/2010	Cambridge	Two examples of potential purchasers confusing FINE and F&C marketing in national newspapers.

Tab	DATE	LOCATION	COMMENTS
19.	30/06/2010	Norfolk & North Suffolk	Potential purchaser wished to view a property through F&C and was surprised when F&C did not have details of this on the system from previous viewing. Realised that it was a property previously viewed through FINE.
20.	01/07/2010	Woodbridge	(1) (See "Sellers"). (2) (See "Unclassified") (3) (See "Sellers"). (4) Client registered with F&C and purchased a property through FINE. Confused between F&C and FINE and states in a follow up courtesy call (incorrectly) that purchasing the property through F&C.
21.	06/07/2010	North Essex	Email enquiry received from potential client regarding property in fact being marketed by FINE. Property seen on rightmove.co.uk.
24.	15/07/2010	Felixstowe, Suffolk	Potential client saw a FINE board and mistook the property for one of F&C's.
29.	09/08/2010	Grantham, Lincolnshire	Query received from potential client regarding property advertised in The Times. Property in fact on market with FINE.
30.	09/08/2010	Grantham, Lincolnshire	Further example of potential client asking about a property which she could not see on F&C's website. In fact on market through FINE.
31.	09/08/2010	Essex	Potential client viewed advert for property being offered by FINE and could not get an answer from the advertised number on FINE advert so contacted F&C in Billericay (thinking it was a FINE office). F&C had to apologise for confusion as property on through FINE.
37.	15/09/2010	Colchester North Essex	Email from buyer to F&C intended for Darryl Parr , manager of FINE in Colchester.

Tab	DATE	LOCATION	COMMENTS
39.	20/09/2010	North & West Norfolk	Email query to F&C from potential client regarding property on the market through FINE and advertised on primelocation.co.uk.
42.	07/10/2010	Chelmsford	(1) F&C received a telephone call about a property for sale – the property is actually being sold by “FINE”. (2) F&C received a telephone call from a potential seller requesting a valuation saying that he had seen boards around with FINE on them and enquiring whether F&C are the same company.
45.	18/10/2010	Epsom	(1) F&C received phone call from potential buyer standing outside one of F&C’s properties enquiring why no one was there – she was actually due to view a different property with FINE. (2) F&C received a telephone call from a potential client asking to speak with someone from FINE. Caller was very insistent that he was speaking with FINE and that someone called Guy worked there.
48.	01/11/2010	Epsom, Surrey	Potential client contacted F&C in relation to a property he had seen advertised (by F&C) but he was under the impression that F&C and “Fine” Cobham office were the same thing.
49.	03/11/2010	Monmouth Usk Usk	(1) (seller) (2) Client of FINE visited F&C office to enquire why they were still advertising a property that her step-son had already agreed to buy. The property was in fact being purchased through FINE not F&C. (3) Potential client requested details of property in Ponthir that she had seen advertised in Hereford Times. Property was a FINE property and not an F&C one.
50.	22/11/2010	Colchester	Email to F&C in relation to a property that is being marketed by FINE.

Tab	DATE	LOCATION	COMMENTS
51.	21/11/2010	North Essex	F&C received an email about a property in Wivenhoe. The property was in fact being marketed by FINE.
52.	23/11/2010	Drayton, Hampshire	F&C received phone call from potential client in relation to a property that the client believed F&C were marketing as he had seen a sale board at the property - the property is actually being marketed by FINE.
53.	23/11/2010	Rugby	F&C received visit from potential client in relation to a property in Church Walk that was being marketed by FINE.
64.	14/02/2011	Epsom, Leatherhead and Dorking (Only the Epsom office is F&C)	Enquiry from potential customer requesting details of a property that is on the market with FINE.
65.	29/03/2011	Gerrards Cross	Potential client collected property details from F&C, having previously visited FINE office by mistake as she thought they were the same company.
69.	07/04/2011	Cambridge	Potential client spoke to F&C to confirm a viewing that he thought he had already booked with them – in fact he had booked it through FINE.
71.	11/04/2011	Suffolk	Potential client came into F&C office to enquire about a property but on being unable to locate it, simply said that they must have the wrong office and left. It subsequently transpired that the property was in fact being marketed by FINE.
72.	12/04/2011	Norwich	Potential client called F&C for details of property having seen board. Advised that the sale board was actually FINE's. Said that it was "very confusing".

Tab	DATE	LOCATION	COMMENTS
73.	15/04/2011	Norwich	Potential client visited F&C office to obtain details of a property. Property was actually advertised through FINE. Client very surprised and confused to find that they were separate companies.
75.	30/04/2011	Cranbrook	A member of the public attended F&C offices asking for details of a property that was in fact being marketed by FINE in Goudhurst. F&C representatives explained that F&C were not marketing the property and rather this was being marketed by FINE. The member of the public then left the offices.
76.	03/05/2011	Cranbrook	Telephone call received by F&C requesting details for a property in Goudhurst that was in fact being marketed by FINE.
77.	10/05/2011	Cranbrook	F&C client indicated that she had emailed site plans to the F&C Cranbrook office. These had not been received. When F&C representative followed up with client it was clear she had confused FINE with F&C and emailed the plans to Fine.
79.	17/05/2011	Hampshire	(1) Client looking at buying a property through F&C. When checked on rightmove.com, it transpired that the property was actually being marketed by FINE. (2) (see sellers)
84.	10/06/2011	St Neots	Mr Salmon called F&C office requesting details of a property that was actually being marketed by FINE. Representative of the F&C office explained that this was the case. Mr Salmon was upset to discover the confusion. He later contacted the F&C office to explain that he had just received an F&C brochure. This brochure was actually a FINE brochure.

Tab	DATE	LOCATION	COMMENTS
90.	20/06/2011	Cranbrook	Customer walked into F&C Cranbrook office to ask for details of a property that was being marketed by FINE in the Wealden Advertiser. F&C representative explained that this was not a property being marketed by F&C. Customer left the office.
92.	19/08/2011	Gerrards Cross	(1) Telephone call to F&C Gerrards Cross branch from member of the public to obtain details of a property in Black Park in Gerrards Cross. Property was in fact listed with Fine, not F&C. (2) (seller)
95.	11/09/2011	Cambridge	Simon Bradbury of F&C attended a viewing at a property with a potential client who complained (without prompting) how confusing it was to have two estate agency companies with names that were so similar "FINE" and "Fine & Country".
96.	14/09/2011	North Hampshire	Applicant contacted the North Hampshire branch of F&C believing that a property which was being marketed by Spicerhaart under the "FINE" brand which he had located on the primelocation.com website was actually being marketed by F&C. Representatives of the F&C office confirmed that the applicant had confused the property being marketed by Spicerhaart under the "FINE" brand as being a property marketed by F&C.
98.	15/09/2011	Chelmsford & West Essex	Telephone message left with Moneypenny (a telephone answering service) was forwarded to F&C Chelmsford & West Essex. Caller had said that it was a message for F&C, but it transpired that the property that he was enquiring about was being marketed by Fine.

Buyers: bundle E2 (“101” refers to tab 1, “102” refers to tab 2, etc.)

Tab	DATE	LOCATION	COMMENTS
104.	19/09/2011	Chelmsford & West Essex	Telephone call received by F&C from a member of the public who explained that she had called the office on Saturday and spoken to a lady regarding a property and that the lady was going to call her back. It turned out that the member of the public had spoken to Fine earlier, and not F&C.
106.	21/09/2011	Loughborough	(1) (see “Sellers”) (2) Numerous telephone calls received by F&C from members of the public interested in buying houses which are in fact being marketed by FINE. Members of public insist that F&C is wrong and that they have seen an F&C board. (3) (see “Others”)
110.	22/09/2011	Woodbridge	Member of the public telephoned F&C requesting further details regarding a property that she had seen on Rightmove. The representative of F&C explained that the property was not being marketed by F&C (although it had been previously) but by FINE. Member of the public had assumed that Fine was F&C. She was very insistent that the property showed on Rightmove as being marketed by F&C. Pryke: “...these references have come off Rightmoveplus. The reference is RMplus. That is actually the intelligence that sits behind that the agent has access to but the members of the public do not, so therefore both of the details were taken from Rightmoveplus, not the Rightmove site as available to the public.” (p44/lines 27-31)
113.	27/09/2011	Chelmsford & West Essex	F&C office received a call enquiring about a property in Kersey Tye. F&C representative explained that they were not acting on the sale of such property. Following the call representative identified the property on Rightmove. Property was being marketed by Fine.

Tab	DATE	LOCATION	COMMENTS
115.	28/09/2011	Woodbridge	Member of the public (Mr Clarke) attended F&C office requesting further details of a property in Trimley. Mr Clarke explained that he had called into the office at an earlier date and had been given a brochure. He required a further copy of the brochure. F&C representative asked if it could be a "Fine Haart" property. Mr Clarke said that he was sure that it was "Fine & Country". F&C representative could not locate the property on Rightmove. Later that day Mr Clarke telephoned the office to explain that he had discovered that the property was being marketed with FINE.
119.	03/10/2011	Gerrards Cross	Telephone call to F&C office from a member of the public (Ms Hunter) enquiring about 2 properties which were in fact being marketed by FINE. Ms Hunter explained that she had called the number given to her by directory enquiries for Fine.
120.	05/10/2011	Woodbridge	Email enquiry sent by member of the public to F&C office requesting details of a property that was actually being marketed by FINE not F&C.
122.	07/10/2011	Bishops Stortford	Two instances of confusion regarding a property being marketed by FINE: <ol style="list-style-type: none">1. A telephone enquiry to F&C office.2. An enquiry in person to the F&C office. Property had previously been marketed by F&C and enquirers had assumed that Fine were the same company.
125.	17/10/2011	Colchester	F&C office received a call from a member of the public asking about a property in Colne Engaine where he had seen "our board". F&C informed him that the property was actually on the market with FINE. He said "Aren't you one and the same?"

Tab	DATE	LOCATION	COMMENTS
128.	19/10/2011	Cambridge	<p>Email received by F&C from client stating that although a property “Long Acre” that he was purchasing had been removed from the books of FINE, “your adversaries” Fine & Country had not removed it. F&C asked whether he was confusing F&C with FINE given that the property had been removed from F&C’s books. The client confirmed that he had confused the two.</p> <p>Buyer has exchanged contract.</p>
130.	19/10/2011	Princess Risborough	<p>F&C office received a call from a Mr Saffron who was on his way to a viewing and wanted to speak with “Sue”. There is a Sue in the F&C Risborough office and calls are diverted to that office when busy. Sue had not heard of a Mr Safron so consultant called him back to clarify who he was trying to get in touch with. It transpired that he had wanted to speak with somebody at FINE. He stated that he knew that he had called Fine & Country but he thought they were the same company as FINE.</p>
131.	21/10/2011	Gerrards Cross	<p>Member of the public rang to speak to somebody handling the sale of a particular property (on the market with Fine). F&C agent pointed out that he needed to contact Fine. He replied “Is that not who I am through to, this was the number given to me”.</p>
132.	21/10/2011	Essex	<p>Member of the public called F&C office asking if a property in Gosfield was still available. The F&C office has never marketed a property in that town and the agent asked if the caller had meant to contact F&C or FINE. The member of the public replied “Oh are you different then? I thought you were all the same”.</p>

Tab	DATE	LOCATION	COMMENTS
134.	31/10/2011	Gerrards Cross	F&C office received a call from a member of the public regarding a property (which was actually for sale with FINE). The member of the public agreed that she had read the sale board as "FINE". However, she had (wrongly) assumed that the company was Fine & Country and looked up Fine & Country in the paper.
138.	10/11/2011	Stanton, Wolds	Client telephoned F&C office to organise a viewing of a property on the market with F&C. Client asked if he could also have details of another property that F&C were selling in Stanton in the Wolds. F&C consultant could not find it on their website. Client said that it was definitely being marketed by F&C because it had their FINE board outside it. It transpired that the property was actually on sale with FINE.
140.	15/11/2011	Park Lane	Potential client visited the Park Lane F&C office enquiring about a property he had seen advertised in either The Saturday Telegraph or The Financial Times. This property was in fact being marketed by FINE.
142.	26/11/2011	Chelmsford & West Essex	Answerphone message received from member of the public requesting details of a property which was in fact being marketed by FINE. Member of the public subsequently confirmed that she had seen the "for sale" board and assumed that FINE and F&C were the same.
143.	01/12/2011	Bishop Stortford	Member of the public stating that he had thought that a property he had viewed was not from the F&C office, stating that a representative of PrimeLocation had also been confused. The F&C consultant's explanation about there being two separate companies with similar names had now answered his questions regarding other properties that he had seen.

Tab	DATE	LOCATION	COMMENTS
144.	14/10/2011	Ipswich	Potential client contacted F&C office wanting to arrange a viewing of the property, having received an email with the property advertised. Following a long conversation it was established that the email had been sent to her by FINE not F&C. She had thought that they were part of the same group.
146.	3/01/2012	Chelmsford & West Essex	F&C answering service took a message from a member of the public requesting details of a property which was in fact being marketed by FINE.
147.	4/01/2012	Colchester	F&C office received an enquiry from a member of the public asking for details of two properties that were in fact being marketed by FINE. When informed of this the member of the public said "aren't you one and the same".
148.	16/01/2012	Monmouth	F&C office received email via Primelocation website from someone requesting details of a property. On looking at the Primelocation website it became clear that this was in fact a FINE property.
149.	16/01/2012	Cambridge	Potential buyer asked F&C to arrange a viewing for a property which F&C were not in fact instructed to sell. The potential buyer had confused F&C with FINE.
150.	17/01/2012	Kent	Member of the public contacted F&C office to discuss a property that she had seen on Rightmove. She had looked on Rightmove in order to find a property that she had seen in a Sunday Times advert. When the F&C employee enquired further, the member of the public described a property which was listed by FINE.

Tab	DATE	LOCATION	COMMENTS
151.	16/01/2012	Ipswich	F&C office received a call from a member of the public who wanted to view a property about which he said he had “spoken at length” to Fine & Country previously. It was subsequently established that this was in fact a property that was listed with FINE. The member of the public was quite confused and thought that the companies were connected.
154.	19/12/11	Cambridgeshire	Client phoned F&C office regarding a property he had seen on F&C website which was no longer there. It transpired that the property was in fact listed with FINE and that he had seen it on the FINE website. He had been confused with the Fine & Country website.
156.	15/03/2011	Huddersfield	Client enquired of F&C about a property that he thought was on with F&C’s Huddersfield office. It was actually being marketed by Fine.
157.	15/04/2010	Bury St Edmunds	Member of public called F&C on behalf of daughter who had asked her to call regarding a property. She said that the for sale board said “Fine & Country”. Computer search showed that the property was actually being marketed by Fine.
161.	11/10/2011	Woodbridge	Member of the public attended F&C office to enquire about a property. On investigation, F&C representative discovered that the property was actually being marketed by Fine.
162.	09/02/2012	Colchester	Member of public telephoned F&C office and left a message with answering service asking for ‘Hannah’. F&C explained to member of public that they are not Fine, but F&C. Member of public complained that she wanted Fine but that she cannot get hold of Fine and no one is calling her back.

Tab	DATE	LOCATION	COMMENTS
163.	11/02/2012	Loughton	<p>1. Potential client telephoned F&C to ask to view a property. F&C explained that the property was actually on the market with Fine. Client said that he thought it was F&C dealing with it and that he found it confusing with the close name association. He thought that he was phoning the agent dealing with the property.</p> <p>2. Potential client called F&C regarding a property that was actually being marketed by Fine. Member of public found it confusing with the name association.</p> <p>3. (see "Sellers").</p> <p>4. (see "Sellers").</p>
167.	20/02/12	Suffolk	<p>Riley telephoned F&C requesting details of a property. On investigation by F&C representative it was discovered that the property was actually being marketed by Fine. Riley assumed that Fine and F&C were the same company due to branding, name and location. Riley informed F&C representative that she had been confused and felt that it was misleading.</p>
169.	28/02/2012	Woodbridge	<p>Potential client telephoned F&C office asking for details of a property that was on the market Fine.</p>
170.	27/02/2012	Park Lane	<p>Potential client called F&C office asking to speak to Fine estate agents. It appeared that she had however called the number for the Fine & Country Hockley office from the Zoopla website.</p>

(Professionals – e.g. surveyors, council, journalists, other estate agencies, relocation agent):

Instances not in bundles E1 or E2

Tab	DATE	LOCATION	COMMENTS
E	16/11/2011	Leatherhead	FINE sent memorandum of sale. Sellers' solicitors sent letter wrongly to F&C rather than to FINE.
F	27/01/2012	F&C Park Lane Office	Mr Pryke, CEO of F&C, met Tim Swaddle of Roomservice, to discuss the possibility of Mr Swaddle providing luxury furniture hire services to F&C. Mr Swaddle said he had already attended the "F&C offices in Esher and Dorking". It transpired that Mr Swaddle had confused Fine and F&C. In fact Mr Swaddle had attended the Fine offices.
G	January 2012	F&C Park Lane Office	Mr Pryke met a buying agent, Marilyn Acons who said that she had seen Fine being advertised around the UK and had assumed that this was a re-branded version of F&C.

E1: professionals

Tab	DATE	LOCATION	COMMENTS
23.	14/07/2010	Cambridge	Letter from surveyors noting substantial similarity between F&C and FINE advertising and assumption that the trading entities must be related.
27.	06/08/2010	North Essex	Email from surveyor at Savills regarding her confusion upon seeing a FINE board outside a property and mistaking it for one of F&C's due to similarity in graphics and brand name.

Tab	DATE	LOCATION	COMMENTS
55.	04/01/2011	Park Lane	<p>F&C received a letter from Rushcliffe Borough Council accusing it of fly-posting. F&C do not have an office in the West Bridgford area and it is assumed that this letter was intended for FINE. Rushcliffe Borough Council subsequently confirmed that their letter had been sent to F&C in error and that they had confused F&C with FINE.</p> <p>Pryke: “On most of the occasions in these circumstances they would not want to admit that they have got something like this wrong. This was something that was an embarrassment for them and something that they did not want to go into a great amount of detail for. They were embarrassed at having accused a company of committing an offence when it had not actually been involved at all.” (p62/lines 1-6)</p>
56.	05/01/2011	Park Lane	<p>F&C was contacted by a journalist at the Mail on Sunday who wanted to do a feature on one of their properties. The property in question was in fact being marketed by FINE and not F&C.</p>
58.	24/01/2011	North Norfolk	<p>F&C were contacted by Richard Kennedy (a relocation agent), who is paid to assist families of the disabled with finding suitable properties. Both he and his client were under the impression that a particular property was being listed with F&C when it was actually listed with FINE. Richard was angry at the similarity between the brands as he had spent significant time searching the F&C website for a particular property which his client advised him was listed with F&C, only to discover that it was in fact listed with FINE. Richard is paid by the hour, and the confusion caused expense to his client for wasted work.</p>

Tab	DATE	LOCATION	COMMENTS
59.	24/01/2011	Park Lane	(1) F&C received an email from a sales and lettings manager who mistakenly believed that F&C had amalgamated with Spicerhaart and wanted to apply for a job with the new agency. (2) An article in "Estate Agent Today" headed "Fine & Country agent rebrands as arch rival FINE" caused the confusion above.
61.	28/01/2011	Cheltenham	Employee of letting agent next door to F&C asks for details of property advertised in a newspaper by FINE. He said that he saw the word "fine" and assumed it was F&C.
78.	12/05/2011	Kent	Account manager who sells advertising space to estate agencies thought that the FINE branded window in the Broadstairs branch of Haart was F&C because the window display and colours look very similar to the F&C brand.
81.	31/05/2011	Sheffield	The publication "Derbyshire Life" thought that F&C (Nottinghamshire) had taken half a page of adverts and asked F&C in Sheffield to fill the page with them. It transpired that the advert had in fact been taken by F&C.
86.	14/06/2011	National	Article in the Saturday Telegraph states that a property is being marketed by FINE but provides the F&C website for further information.
89.	20/06/2011	Park Lane, London	Richard Cutt of Knight Frank London attended F&C Park Lane offices. Mr Cutt spoke with representatives of F&C to discuss F&C and its approach to advertising. During the discussion it became clear that Mr Cutt believed that FINE and F&C were the same and that the FINE advertising was produced by F&C.

E2: professionals (“101” refers to tab 1, “102” refers to tab 2, etc.)

Tab	DATE	LOCATION	COMMENTS
107.	21/09/2011	Cambridge	Email from chartered surveyor (Nicholas Chaplin) to F&C. Mr Chaplin explained that he had just had a meeting with his Head of Commercial (another chartered surveyor, Mr Burton) who, when Fine and Country were mentioned said “Oh, yes, I’ve seen their boards around our area, they are calling themselves FINE now, aren’t they?”. Mr Chaplin explained that FINE was entirely unconnected to F&C as had been explained to him by a member of staff at F&C the previous day. Mr Burton commented: “But they are the same colour, the same style etc. I just assumed they were one and the same.”
108.	22/09/2011	Cambridge	Simon Bradbury (of F&C Cambridge) had a meeting with Nicholas Chaplin (chartered surveyor and owner of Hilbery Chaplin Estate Agents in Essex) to discuss the merits of premium branding. During the conversation Mr Chaplin commented that he particularly liked the “new logo” that F&C had recently adopted. It transpired that Mr Chaplin had mistaken the FINE logo as being the new logo of Fine & Country. Mr Chaplin is an experienced estate agent and chartered surveyor who is familiar with the industry and the major players within it.
109.	22/09/2011	Woodbridge	Nigel Broadhead Mynard solicitors sent two letters to F&C Woodbridge agent under the mistaken belief that they were dealing with the sale of the property. The property was actually being sold by FINE.
114.	27/09/2011	Gerrards Cross	F&C took a call from The Buying Solution (an arm of Knight Frank which deals with relocations). The representative of The Buying Solution asked about various properties being marketed by that F&C office including 3 properties which were in fact being marketed by FINE.

Tab	DATE	LOCATION	COMMENTS
121.	06/10/2011	Hampshire	Hampshire Chronicle article concerning a property being marketed by Fine. However, it appears that the property is being marketed by F&C as the F&C logo is at the end of the article.
129.	19/10/2011	Essex	F&C office received a call from Connells surveyors asking about a property F&C had sold in White Colne. The property had actually been sold by FINE.
133.	September/ October 2011	Cardiff	Publication called "Cardiff Life" featured a property which it stated was on the market with Fine & Country. The property was in fact on the market with FINE.
145.	22/12/2011	Colchester	Estate agency Fenn Wright made enquiries of F&C office regarding a property that was in fact being marketed by Fine in Witham.
152.	18/01/12	St Albans	Email from owner of property company stating that he thought that Fine & Country and FINE were the same company, one selling and one letting, the names and typefaces were so similar. He was surprised to find that they were different companies.
166.	16/02/12	Loughton	F&C representative received a call from the Essex Chronicle newspaper requesting an advertising copy for a booking. F&C representative did not have a space booked until 1 March 2012. F&C's advertising agency telephoned the Essex Chronicle to clarify and confirmed that it was a booking for an advertisement for Fine rather than F&C. The Essex Chronicle employee had been confused as to who he should contact as he believed Fine and F&C to be the same company.
170.	27/02/2012	Park Lane	Potential client called F&C office asking to speak to Fine estate agents. It appeared that she had however called the number for the Fine & Country Hockley office from the Zoopla website.

Others

Instances not in bundles E1 or E2

Tab	DATE	LOCATION	COMMENTS
H	November 2011	Wales	Mr Pryke met his sister-in-law and her husband. She saw a sign board which she thought was a F&C sign board, whilst he thought that Fine and F&C were the same company. The sign board turned out to be a Fine sign board.

E1: others

Tab	DATE	LOCATION	COMMENTS
9.	27/05/2010	Hampshire	Email sent from marketing and promotions agency to F&C offering "Haart" the opportunity to partner O2.
15.	16/06/2010	Uckfield, East Sussex	Letter from member of the public who believed he had seen an F&C for sale sign at a property and was subsequently corrected by a relative. Upon re-inspection of sign realized it was through FINE. Stated it was "very confusing."
22.	13/07/2010	Norfolk	Letter from client drawing F&C's attention to confusion between FINE and F&C. Client's friends and contacts also mentioned finding this confusing.
25.	26/07/2010	Park Lane	Call to F&C's Head Office from a member of staff from the FINE office in Cobham who had an enquiry from a friend of a Mr Peters regarding several properties to sell in Grenada, Spain and had called the F&C office confusing it for a FINE office. Evidence that even FINE staff are confused.
26.	29/07/2010	North Essex	Email from applicant for PA/secretary position at FINE sent to F&C in error. A friend had referred to FINE as Fine & Country when passing on details of the vacancy.

Tab	DATE	LOCATION	COMMENTS
33.	12/08/2010	St Neots	FINE staff admitting in a telephone call that confusion between brands happens regularly.
34.	12/08/2010	St Neots	Admission by member of FINE staff in an email that people confuse FINE with F&C as obviously the names are a “little similar”. Louise Budd said “ I think people confuse our Fine department with Fine & Country as obviously the names are a little similar.”
40.	20/09/2010	Norwich	FINE’s Norwich office took instructions on a local property and an F&C board was erected in error by the board erection company.
41.	05/10/2010	Mid Kent	Email query to F&C enquiring why property was not appearing on F&C website. Property was actually being marketed by “FINE”
47.	28/10/2010	Epsom, Letherhead & Dorking	Call to F&C from Strutt & Parker Estate Agent after Knight Frank suggested that they call “Fine” regarding a property.
54.	06/12/2010	Chelsea	A prospective licensee of F&C for the Chelsea area made a last minute decision not to proceed with the Licence, largely due to the large-scale brand confusion that he has seen between F&C and FINE in Surrey.
62.	28/01/2011		LinkedIn invitation stating that Dean Heaviside has indicated that Napoleon Wilcox (of F&C) is a colleague at FINE.
74.	22/04/2011		Sister of an employee of F&C thought that a FINE brochure was produced by F&C.

Tab	DATE	LOCATION	COMMENTS
94.	09/09/2011	Berkhamsted	Member of the public attended the Berkhamsted F&C offices to complain about a letter F&C had (apparently) sent to her stating that it had sold her property to her last year and offering a market appraisal. She had in fact used another agent and asked why F&C were sending out letters with false statements. F&C representative explained that F&C had not sent out the letter. On closer inspection of the letter it transpired that the letter had been sent by FINE. The member of the public was embarrassed when this was pointed out to her. F&C representative gave her the telephone number for FINE and advised her to take the matter up with FINE directly. The customer apologized for the confusion and left the office.

E2: others (101” refers to tab 1, “102” refers to tab 2, etc.)

Tab	DATE	LOCATION	COMMENTS
101.	16/09/2011	Gerrards Cross	Representative of F&C Gerrards Cross (Gari) took a telephone call from a member of the public (Ms Ward) asking to speak to “Sue”. Gari explained to Ms Ward that there was no Sue who worked for F&C Gerrards Cross and, knowing that there was a Sue working for the Gerrards Cross FINE office, explained that Ms Ward needed to call FINE. Ms Ward explained to Gari that she understood that she had called Fine & Country. Gari was required to re-emphasize that this was F&C and that Sue worked for FINE.
106.	21/09/2011	Loughborough	(1) (See “Sellers”). (2) (See “Buyers”). (3) F&C representative’s friends often ask how FINE is going. The friends live in West Bridgford where there is FINE branch.

Tab	DATE	LOCATION	COMMENTS
111.	24/09/2011	Epsom	A new employee of F&C who previously worked for Haart in Chigwell (which had a Fine division) informed F&C that they were always getting calls from people who thought they were telephoning F&C.
116.	30/09/11	Haslemere, Surrey	Relative of F&C employee received marketing material in the post which she assumed had been produced by F&C. They had in fact been produced by Fine.
123.	30/09/2011		Member of the public telephoned F&C to complain about two dogs running on her land which came from a property that she thought was on the market with F&C. She said that the property had recently been advertised in the "East Anglian". F&C consultant asked what the company logo at the top of the page said and caller said that it said "FINE". Consultant explained that this was a different company. Caller said that she thought that they were the same company.
141.	22/11/2011	Stratford Upon Avon	F&C licensee conducted a consultancy morning and training afternoon during which she mentioned Fine & Country. A director of the company taking the training observed that Fine & Country had changed their name to FINE. It transpired that he thought that this was the case because he had seen a recent newspaper advertisement which he felt was "so similar to Fine & Country" that they must have changed their name.

Tab	DATE	LOCATION	COMMENTS
170.	27/02/2012	Park Lane	Potential client called F&C office asking to speak to Fine estate agents. It appeared that she had however called the number for the Fine & Country Hockley office from the Zoopla website.

BUNDLE E1 and E2: UNCLASSIFIED

Tab	DATE	LOCATION	COMMENTS
3.	24/02/2010	Gerrards Cross	FINE preparing to open an office in Gerrards Cross down the road from F&C office. Clients enquiring as to when F&C are moving.
12.	08/06/2010	Chelmsford & West Essex	Agent reporting that F&C regularly receive calls from public insisting F&C send details of properties which are in fact on the market with FINE. Clients frequently upset, believing F&C unhelpful until situation explained. Most clients believe two brands to be the same.
20.	01/07/2010	Woodbridge	(1) (See "Sellers"). (2) Applicants also coming in to Woodbridge office asking for details of FINE properties. (3) (See "Sellers"). (4) (See "Buyers").
35.	20/08/2010	St Neots	Call from potential client to F&C asking to speak to someone from FINE.
36.	13/09/2010	Grantham	Call from potential client regarding property on the market with FINE.

Tab	DATE	LOCATION	COMMENTS
44.	18/10/2010	Epsom, Leatherhead & Dorking	(1) (See "Sellers"). (2) Telephone call from potential client to F&C asking to speak to someone who actually works for FINE. He then enquired whether he was speaking with F&C in Dorking. He had previously typed F&C into Google and got FINE's details, repeated the same search on the day of the call and got F&C's.
63.	09/02/2011		Enquiry from potential customer requesting details of a property that is on the market with FINE.
67.	30/03/2011	Suffolk	F&C received a call from a client asking for a gentleman at FINE in Woodbridge
91.	28/06/2011	Park Lane, London	Mr Ogden called the Park Lane F&C office to request a "FINE" brochure. He had first called the telephone number taken from FINE's Telegraph property advertising which did not work. Then he took the telephone number from the F&C advert, confusing F&C for FINE.
126.	15/10/2011	South & West Suffolk	F&C received a query via the Rightmove website which read: "Can you please advise are you related to the "fine" estate agents? Thank you." F&C spoke to the enquirer and advised that the companies were not related. He said that he was just curious as our logos, marketing etc were very similar.
135.	25/02/2010		Member of the public thought that F&C had rebranded their name and logo to burgundy. This was in fact the colour used by FINE. Member of the public was confused.
136.	25/02/2010	North Essex	F&C office experiences problems regarding confusion everyday. Some members of the public have become irate when F&C agent explains that a property was not in fact marketed by F&C but by FINE; F&C agent had had many conversations explaining that F&C and FINE are not the same company.

Tab	DATE	LOCATION	COMMENTS
139.	09/11/2011		Representative of a company rang F&C asking to speak to Dean Heaviside, director of FINE.
153.		Cambridgeshire	Member of the public thought that Fine & Country was listing a property in Romsey which was in fact listed with FINE.
168.	27/05/2011	Park Lane	Note left for F&C Park Lane Office requesting a copy of "Fine" magazine