IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
INTELLECTUAL PROPERTY ENTERPRISE COURT

Birmingham Civil Justice Centre
Priory Courts
33 Bull Street
Birmingham B4 6DS

Neutral Citation Number: [2019] EWHC 19 (IPEC)
Date: 09 January 2019

Before :

HER HONOUR JUDGE MELISSA CLARKE
(sitting as a Judge of the High Court)

- -

BETWEEN :

Claim No: IP-2017-000106

(1) APT TRAINING & CONSULTANCY LIMITED
(2) MR WILLIAM DAVIES **Claimants**

- and -

BIRMINGHAM & SOLIHULL MENTAL HEALTH NHS TRUST
Defendant

- -

Ms Charlotte Blythe (instructed by **Howes Percival LLP**) for the **Claimants**
Mr Steven Reed (instructed by **Birmingham and Solihull Mental Health NHS Trust Legal Department)** for the **Defendant**

Trial date: 8 October 2018

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JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Her Honour Judge Melissa Clarke:

INTRODUCTION

1. This is my judgment following the first IPEC trial ever to be heard outside London. Paragraph 1.5 of the Intellectual Property Enterprise Court Guide of July 2016 makes clear that the Judges of IPEC are able and willing to sit outside London if the parties wish it and inform the court in good time for arrangements to be made. The parties in this case asked for it to be heard in Birmingham for their convenience and the court was able to accommodate that request. I do not know why it has taken so long, but I hope that it is the first of many IPEC trials to be heard elsewhere in England and Wales.

2. This is a claim for trade mark infringement and passing off in the arena of the provision of psychiatry and mental health training courses to those caring for people with mental health and behavioural issues.

3. The Second Claimant is a director of the First Claimant and the registered proprietor of the following trade marks, of which the First Claimant is the exclusive licensee:

   i) UK Trade Mark No. 1515793 for the word mark "RAID" registered with effect from 15 October 1992 in respect of "educational services; provision of training; conferences; seminars; teaching; tuition; correspondence courses; all relating to psychology, behavioural problems, business and commerce" in Class 41 ("**UK Mark**");

   ii) EU Trade Mark No. 8509242 for the word mark "RAID" registered with effect from 25 October 2009 in respect of, inter alia, "printed matter and publications; books, manuals; leaflets' instructional and teaching materials; pamphlets; brochures;

stationery" in Class 16 and "educational and training services including educational and training services relating to psychology, mental health, behavioural problems, learning disabilities, substance misuse" in Class 41 ("**EU Mark**")

(together, the "**Registered Trade Marks**")

iii) the unregistered word mark 'RAID' (the **"RAID Mark**")

4. The sign RAID as used by the First Claimant is an acronym for 'Reinforce Appropriate, Implode Destructive', which is the underlying message of training courses that it provides in a positive behaviour support approach for tackling challenging behaviour at source ("**RAID Courses**").

5. The First Claimant and its predecessors in title have been in the business of providing mental health training courses under and by reference to the RAID Mark (and later the Registered Trade Marks) since 1990. From 1990 to 20066 those courses were provided by the Second Claimant and his wife operating in partnership, and the Claimants say that in May 2006 the business of that partnership, including all of the goodwill built up in the RAID Mark and the UK Mark, was transferred to the First Claimant. It is not disputed that the NHS is the First Claimant's biggest customer and the First Claimant regularly runs RAID Courses within the NHS.

6. The Defendant is an NHS foundation trust that provides mental health care to people living in Birmingham and Solihull. NHS foundation trusts are semi-autonomous organisational units within the National Health Service. The Defendant provides a service under and by reference to the sign 'RAID' ("the **Defendant's Sign**") as an acronym for 'Rapid Assessment Interface and Discharge'. The Defence describes this as 'a new model for patient assessment and

discharge for individuals experiencing severe mental health crises and trauma who attend at hospitals, including those presenting to accident and emergency' ("**D's RAID Service**"). The acute hospitals in which the Defendant provides such services are City Hospital, Queen Elizabeth Hospital, Solihull Hospital, Heartlands Hospital and Good Hope Hospital ("**the Birmingham Hospitals**"). These are run by different NHS Trusts to the Defendant, and the services are provided pursuant to a service level agreement dated 6 June 2012.

THE PARTIES' POSITIONS

7. The Claimants allege that the Defendant's use of the Defendant's Sign in respect of the D's RAID Service infringes the Registered Trade Marks pursuant to sections 10(1), 10(2) and/or 10(3) of the Trade Marks Act 1994 ("**TMA**") and Articles 9(2)(a), 9(2)(b) and/or 9(2)(c) of the EU Trade Mark Regulation No. 2017/1001 ("**EUTMR**") and/or amounts to passing off of the RAID Mark.

8. The Defendant accepts that it uses the Defendant's Sign but denies that any such use amounts to infringement of the Registered Trade Marks or passing off.

THE ISSUES

9. His Honour Judge Hacon at a Case Management Conference on 31 January 2018 identified a list of issues, which is attached as Annex 1. I have reordered them and slightly reworded them to reach the following list of issues:

Infringement

i) Is the Defendant's Sign identical or similar to the Registered Trade Marks?

ii) Has the Defendant used the Defendant's Sign in the course of trade in relation to education and training services relating to health and related printed matter?

iii) Are the goods/services provided by the Defendant under the Defendant's Sign identical, and/or similar to the goods/services specified in the Registered Trade Marks?

iv) Who is the relevant public / average consumer?

v) Is the Defendant's use of the Defendant's Sign liable to affect the origin function of the Registered Trade Marks?

vi) Is there a likelihood of confusion between the Registered Trade Marks and the Defendant's Sign?

vii) Do the Registered Trade Marks have a reputation within section 10(3) of TMA /Article 9(2)(c) EUTMR? [This is no longer in dispute as the Defendant accepts that it does]

viii) Is the Defendant's use of the Defendant's Sign detrimental to the distinctive character and/or repute of the Registered Trade Marks?

Passing off

ix) Does the First Claimant own goodwill in the RAID Mark? [This is no longer in dispute as the Defendant accepts that it does]

x) Does the Defendant's use of the Defendant's Sign amount to a misrepresentation to the public?

xi) Have such misrepresentations caused damage to the First Claimant?

THE TRIAL

10. Although listed for 1.5 days the trial was heard on a single day on 8 September 2018 at Birmingham Civil Justice Centre. The Claimants were represented by Ms Charlotte Blythe, the Defendant by Mr Steven Reed. I thank them for their very helpful and well-structured written and oral submissions.

11. The Claimants rely on evidence of the following witnesses:

    i) Dr William Davies, the Second Claimant. He filed a witness statement dated 13 April 2018, attended trial and was cross-examined.

    ii) Ms Cheryl Knowles. She filed a witness statement dated 13 April 2017. She did not attend court. Her evidence is of limited relevance as much of it relates to reputation in the Registered Trade Marks and goodwill in the RAID Mark which are no longer disputed.

12. The Defendant relies on evidence of Professor George Tadros. He filed two witness statements dated 13 April 2018 and 27 April 2018. He was cross-examined and re-examined.

Dr Davies

13. Dr Davies is a consultant psychologist. His evidence is that he began to develop the RAID programme in 1990 as a new and positive approach to working with challenging behaviour. He started to provide courses shortly after. In 1992 he applied for the UK Mark in Class 41, later extended to Class 16 and extended specification for Class 41.

14. In 2000 Dr Davies wrote a book entitled "*The RAID Manual: A Relentlessly Positive approach to working with Extreme Behaviour*". By May 2006 he incorporated the First Claimant and transferred the goodwill in the RAID Mark and the UK Mark to it. The First Claimant has carried out all RAID Courses since then. Dr Davies' evidence is that more than 100,000 professionals and others have attended courses provided by the First Claimant, of which about 20,000 attended Raid Courses. He says the First Claimant employs circa 100 clinical and educational psychologists on a consultancy basis to

deliver such courses. Dr Davies' evidence is that the First Claimant has continually run RAID Courses, which have been the top selling courses for the First Claimant and its predecessors in title, for the last 30 years. He described the RAID Courses as *"the core of the First Claimant's business"* and responsible for circa £300,000 of the First Claimant's annual turnover.

15. Dr Davies says that the NHS is the First Claimant's largest client and the First Claimant has run RAID Courses for numerous NHS Trusts, although not for the Defendant. It does run 32 other courses for the Defendant, however. None of the evidence I have summarised so far is disputed by the Defendant, and I accept it.

16. I found Dr Davies to be a good, thoughtful and open witness who was both credible and reliable. He was very careful, particularly in his oral evidence, to limit his evidence to what he had experienced and what he was able to recollect. I accept his evidence. Where the evidence of Dr Davies and Professor Tadros conflicts, and where there is support from other evidence or the inherent probabilities, I prefer the evidence of Dr Davies. Dr Davies expressed his admiration for the work that the Defendant was doing within the D's RAID Service, and made clear to the court that the Claimants have no desire to prevent that work continuing. They just wish it to continue under another name.

Professor Tadros

17. Professor George Tadros is a Consultant Psychiatrist employed by the Defendant. He was appointed in 2001 by the predecessor Trust to the Defendant as a community consultant psychiatrist for the elderly. In November 2009 he moved to the RAID Service which had started in September 2009 and since March 2015 he has been the Clinical Director for Urgent Care Pathway at the Defendant. This is a

directorate that covers services designed to assess, manage and support patients with mental health crisis and which includes the D's RAID Service. He is also a professor of Liaison Psychiatry and Dementia at Aston Medical School, Aston University and the Deputy Medical Director for Professional Practice, Legal and Transformation at the Defendant.

18. I regret that I found Professor Tadros a less than satisfactory witness. In my judgment he did not give his evidence in a straightforward manner to assist the court with the facts as he remembered them, but rather I felt he sought to provide evidence which would best support the Defendant's defence. He was somewhat argumentative in oral evidence and strayed into advocacy. For example, he repeated various 'talking points', even though he was not asked about them and I do not believe they have direct relevance to the issues: e.g. that the training the Defendant provided did not result in the issuance of certificates or accreditation; and that the training could not be 'formal' because the staff chose the topics themselves.

19. My concerns about Professor Tadros as a witness can best be seen in his evidence that the Defendant provided no formal training in relation to the D's RAID Service, and that the only training provided by the Defendant was (i) hands-on, clinical training by observation of medical professionals during the course of provision of clinical care; or (ii) ad hoc training, where he or other medical professionals would sit down with staff when they had the opportunity, to give informal talks on topics requested by staff. I found this evidence impossible to reconcile with the significant number of speeches/presentations, papers and other training-related documents relating to the D's RAID Service disclosed by the Defendant to the Claimants during these proceedings. Not all of those have been placed in the bundle, but a

selection of them have. I have considered them carefully and discuss them, and his evidence, later on in this judgment.

20. For reasons which I give later, I do not believe that his evidence on this point was honestly given. Of course that does not mean that all of his evidence was not honestly given. However, I treat the rest of his evidence with some caution and look for support from other credible and reliable evidence or the inherent probabilities before accepting it.

THE LAW

Trade Mark Infringement

21. Section 10 of the 1994 Act provides

> "(1) A person infringes a registered trade mark if he uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.
>
> (2) A person infringes a registered trade mark if he uses in the course of trade a sign where because –
>
> (a) the sign is identical with the trade mark and is used in relation to goods or services similar to those for which the trade mark is registered, or
>
> (b) the sign is similar to the trade mark and is used in relation to goods or services identical or similar to those for which the trade mark is registered,
>
> there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the trade mark.
>
> (3) A person infringes a registered trade mark if he uses in the course of trade, in relation to goods or services, a sign which is identical with or similar to the trade mark, where the trade

mark has a reputation in the United Kingdom and the use of the sign, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark."

22. Articles 9(2) (a), (b) and (c) EUTMR are materially similar to section 10 of the 1994 Act save that they have an EU-wide effect.

Use of a sign in the course of trade

23. Use of a sign is non-exhaustively described in section 10(4) TMA / Article 9(3) EUTMR and includes, *inter alia*, offering or supplying services under the sign or using the sign on business papers or in advertising.

24. The exclusive rights of a trade mark owner are to prevent a third party from using a sign if the use in question prejudices or is liable to prejudice the functions of the trade mark, in particular its essential function of guaranteeing to consumers the origin of the goods or services (per *Anheuser-Busch Inc. v Budejovicky Budvar, Narodni Podnik* (C-245/02) [2004] ECR I-10989; [2005] ETMR 286).

25. In this case the Defendant accepts that it has used the Defendant's Sign. The key (but not only) issues on infringement are whether it has done so in relation to services which are identical or similar to those for which the Registered Trade Marks are registered, and whether it has used them 'in the course of trade'.

26. Section 103(1) of TMA defines trade as including any business or profession. The CJEU has held, in a long line of cases beginning with *Arsenal Football Club plc v Matthew Reed* (Case-206/01) [2003] CH 454; [2003] WLR 450; ECR I-10273 at paragraph 40, that any use of a sign: (i) in the context of commercial activity with a view to economic advantage; (ii) and not as a private matter; no matter how modest,

will be sufficient to satisfy the requirement for 'use in the course of trade'.

27. In *Och-Ziff Management Europe Ltd and Anor v Och Capital LLP and Ors* [2010] EWHC 2599 (Ch); [2011] Bus. LR 632, Arnold J described the meaning of the words 'in the context of commercial activity with a view to economic advantage' as *"…not entirely free from difficulty"*. In fact they did not pose any particular problem for him in that case, as he easily found that the use in question, which was in the context of the provision of financial services, fell within this description. They are a central issue in this case, however. It is the Defendant's case that its use of the Defendant's Sign is not in the context of commercial activity with a view to economic advantage as it is a non-profit making entity whose primary function is the provision of services to the health service in England pursuant to section 43 of the National Health Services Act 2006, and its activities are not commercial.

28. Arnold J then went on to consider the additional wording 'and not as a private matter', from paragraphs 56 to 66 of *Och-Ziff.* Mr Reed's submission at paragraph 13 of his skeleton is: *"at [60] [of Och-Ziff] Arnold J held that the words 'and not as a private matter' are an additional criterion to the requirement of commercial activity"*. With respect, although Ms Blythe did not raise any objection to this, that misstates Arnold J's careful analysis.

29. Arnold J identified at paragraph 56 that the words 'and not as a private matter' could be read in two ways: (i) simply as providing a contrast to the words 'in the context of commercial activity…' without amounting to a separate criterion, or alternatively (ii) as imposing a separate criterion. He then considered the previous authorities set out at paragraph 54 in his judgment, to see whether they assisted him on the point. He considered that only *Google France SARL v Louis Vuitton*

Malletier SA (Joined Cases C-236-238/08) [2011] Bus LR 1 at paragraphs 51-58 provided such assistance. He set out those paragraphs in full. At paragraph 59, Arnold J noted that the CJEU's starting point in *Google* was that it was common ground that Google was carrying out a 'commercial activity with a view to economic advantage', but nevertheless the CJEU held that there was no 'use in the course of trade' by Google as it did not itself use the sign in question, because it did not use the sign *"in its own commercial communication"*.

30. At paragraph 60 of his judgment in *Och-Ziff*, Arnold J offered two possible interpretations of this reasoning: *"The first is that the referencing service provider [Google] does not use the sign "in the course of trade" because its use is "as a private matter" even though it is "in the context of commercial activity with a view to economic advantage". In other words, "and not as a private matter" is an additional criterion which is not satisfied in these circumstances"*. I pause there to note that this is not a finding, as misunderstood by Mr Reed, but only one potential interpretation. Arnold J continued: *"The second is that the referencing service provider does not "use" the sign at all within the meaning of article 5 of the Directive and article 9 of the Regulation: it simply provides the medium for the use made by the advertiser."*

31. He gives his preferred interpretation in paragraph 61:

> "Although in most cases it will not matter which interpretation is adopted, since the result will be the same, I consider that the second interpretation is to be preferred since it more closely reflects what the Court of Justice actually says in this passage. (No doubt for this reason, it was common ground between the parties in *Interflora Inc v Marks & Spencer plc* [2010] EWHC 925 (CH): see para 12(i).)"

32. Arnold J also considered, in paragraph 62, that this second interpretation was easier to reconcile with the CJEU's jurisprudence

as to the meaning of the expression "genuine use" in the context of sanctions for non-use, in particular *Ansul BV v Ajax Brandbeveiliging BV* (Case C-40/01) [2005] Ch 97 and *Verein Radetzky-Orden v Bundesvereinigung Karmeradschaft "Feldmarschall Radetzky"* (C-422/07) [2008] ECR I-09223; [2009] ETMR 269; [2009] Bus LR D48.

33. Both of these cases refer to 'internal use' of a trade mark by a trade mark proprietor. In *Ansul* at para 37 the CJEU held that *"…genuine use of the mark entails use of the mark on the market for the goods or services protected by that mark and not just internal use by the undertaking concerned… the consequences of registering it in terms of enforceability vis-à-vis third parties cannot continue to operate if the mark loses its commercial raison d'être, which is to create or preserve an outlet for the goods or services which bear the sign of which it is composed, as distinct from the goods or services of other undertakings."*

34. In Verein Radetzky-Orden at paragraph 22, the CJEU held that: *"…in accordance with the finding of the court in para 37 of the Ansul case… use of a trade mark by a non-profit making association during purely private ceremonies or events, or for the advertisement or announcement of such ceremonies or events, constitutes an internal use of the trade mark and not 'genuine use' for the purposes of article 12(1) of the Directive."*

35. Arnold J drew these threads of his analysis together in paragraphs 65 and 66 of Och-Ziff:

> "[65] It is clear from these authorities that purely internal use of a trade mark by its proprietor is not "genuine use" of that mark. It seems to me that the underlying rationale for this is that internal use is not "use" of the mark as a trade mark at all. To use the language of the Court of Justice in the Google France case… it is not use as part of (or even preparatory to) a commercial communication with a third party. Thus Google's use of the signs complained of in the Google France case was neither infringing use, nor use that would suffice to maintain a

> trade mark registration for those signs. In my view that makes sense: compare Jacob LJ's remarks in Reed Executive plc v Reed Business Information Ltd [2004] RPC 767, para 149(a).
>
> [66] For these reasons, I conclude that OCH Capital's uses of the sign "OCH" in internal emails did not constitute "use" of the sign within the meaning of article 9(1)(a) at all; but if they did, they were not use "in the course of trade" because the use was "as a private matter".

36. I respectfully agree with Arnold J's conclusion that the CJEU's rationale in Google France is that internal use of a trade mark is not "use" of a trade mark at all, and that this is logical and well-supported by the authorities on genuine use, but in my judgment it does not answer the question which was the starting point of his analysis – what is the meaning of "and not as a private matter", and is it an additional criterion which must be satisfied or simply a counterpoint to the requirement that the context must be commercial activity with a view to economic advantage? Accordingly, I must respectfully disagree with Arnold J's statement in paragraph 58 of *Och-Ziff* that the judgment in *Google France* is of assistance in determining whether "and not as a private matter" is an additional criterion to determining whether use is "in the course of trade". In that interpretation, *Google France* does not engage with use "as a private matter" at all, unless that is synonymous with "internal" use, in which case it is not "use" for the purposes of trade mark infringement at all, and so cannot be use "in the course of trade".

37. If that is so, then there appears to be no jurisprudence supporting the reading of the words "not as a private matter" as imposing a separate, additional criterion. In this case the Defendants do not seek to argue that there is any use "as a private matter" which is not "internal". Accordingly I do not need to consider whether use "as a private matter" is synonymous with "internal" use in the context of genuine

use, in order to determine whether there it forms an additional criterion to, or simply provides a contrast or counterpoint to, the words "in the context of commercial activity with a view to economic advantage" when assessing whether use is "in the course of trade".

38. The *Verein Radetzky-Orden* case bears further consideration as it provides useful guidance in relation to the use of marks by non-profit organisations:

> "[16] With regard to the question whether a non-profit-making association, carrying on activities such as those described in [7] and [9] of the present judgment, may be regarded as making genuine use of a trade mark within the meaning of [*Ansul BV v Ajax Brandbeveiliging BV* (Case C-40/01) [2005] Ch 97; [2004] 3 WLR 1048; [2003] ECR I-2439], it should be pointed out that the fact that goods or services are offered on a non-profit-making basis is not decisive.
>
> [17] The fact that a charitable association does not seek to make profit does not mean that its objective cannot be to create and, later, to preserve an outlet for its goods or services.
>
> [18] In addition, as the Radetzky-Orden admitted in its written observations submitted to the court, paid welfare services exist. In modern society, various types of non-profit-making associations have sprung up which, at first sight, offer their services free but which, in reality, are financed through subsidies or receive payment in various forms.
>
> [19] It cannot be ruled out, therefore, that trade marks registered by a non-profit-making association may have a raison d'être, in that they protect the association against the possible use in business of identical or similar signs by third persons.
>
> [20] As long as the association in question uses the marks of which it is the proprietor to identify and promote the goods or services for which they were registered, it is making an actual use of them which constitutes "genuine use" within the meaning of art.12(1) of the Directive.

39. I have already set out paragraph 22 of the judgment dealing with internal use of a trade mark, but the CJEU also found some genuine use of the mark at paragraph 24 which it distinguished because it was 'public' use of the mark:

> [24] In the light of the forgoing considerations, the answer to the question referred must be that art.12(1) of the Directive is to be construed as meaning that a trade mark is put to genuine use where a non-profit-making association uses the trade mark, in its relations with the public, in announcements of forthcoming events, on business papers and on advertising material and where the association's members wear badges featuring that trade mark when collecting and distributing donations."

Likelihood of confusion/Average consumer

40. Likelihood of confusion is considered from the point of view of the average consumer of the products concerned, comparing the marks as a whole. The average consumer is that described by Kitchin LJ with whom Black LJ and the President of the Queen's Bench Division agreed in *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2012] EWCA Civ 24, [2012] FSR 19 at paragraph 52(b) as one 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"*. He also, at paragraph 52(c) *"normally perceives a mark as a whole and does not proceed to analyse its various details"*.

41. Kitchin LJ summarised the process that a court should undertake at paragraph 87 of *Specsavers*: *"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."

42. The average consumer must, for the purposes of trade mark infringement, be confused about the source or origin of the goods or services. However there will also be a likelihood of confusion if he incorrectly assumes that there is some broader kind of economic connection between users of the marks. That likelihood of confusion must be genuine and properly substantiated and not hypothetical and remote.

Passing Off

43. The law in relation to passing off is well established. For the claim to succeed in passing off the Claimants must satisfy the court of the "classic trinity" of elements identified by the Court of Appeal in the *Jif Lemon* case (*Reckitt & Colman Products Ltd v Borden Inc* [1990] RPC 341) at p. 406 per Lord Oliver of Aylmerton and p. 417 per Lord Jauncey of Tulichettle. These are that:

i) the Claimants' goods or services have acquired goodwill in the market and are known by some distinguishing name, mark or other indication;

ii) there is a misrepresentation by the Defendant, whether or not intentional, which has led, or is likely to lead, the public to believe that goods or services offered by the Defendant are goods or services of the Claimants, or connected with them; and

iii) the Claimants have suffered, or are likely to suffer, damage as a result of the erroneous belief engendered by the Defendant's misrepresentation.

EVIDENCE AND FINDINGS

The D's RAID Service

44. Professor Tadros explained that the Defendant is an NHS Trust which provides psychiatric liaison services including: (i) direct patient care; and (ii) what he called *"staff upskilling"* (and others might call training); to the Birmingham Hospitals pursuant to a service level agreement dated 6 June 2012 entered into by the Defendant with the Birmingham East and North Primary Care Trust **("the SLA").**

45. This SLA sets out the specification for the provision of the D's RAID Service in Schedule 2 part 1, which is entitled *"2011/12 Standard Terms and Conditions for Mental Health and Learning Disability Services – Multilateral"*. The Service is described as *"Rapid Assessment Interface and Discharge (RAID) – PILOT"*, but I understand has rolled over past the pilot period. It is not disputed that the D's RAID Service is now established in each of the Birmingham Hospitals. Professor Tadros said that it is providing care to about 1500 patients per annum, presenting with wide variations of psychiatric disorders and needs.

46. Schedule 2 part 1 to the SLA is quite detailed, and includes details of training required to be provided by the Defendant as part of the D's RAID Service:

   i) At the top of page three (in section 1.4) it provides that one of the 'Objectives' is:

      > "To provide training and supervision to staff in acute settings demonstrably increasing knowledge and skills with regard to the identification and treatment of patients in the target group."

That target group is described in the 'Service Description' (section 2.1) as *"service users over the age of 16 years who present with alcohol, substance use issues, mental health disorders, confusion states and memory problems in A&E and acute settings"*.

ii) The service *"will include provision of informal opportunistic training to ensure that all staff in general acute settings are able to identify alcohol and substance use disorders and respond appropriately"* (section 2.1);

iii) In addition to direct clinical work with service users the Defendant will provide *"liaison, informal and opportunistic training for staff in acute settings intended to reduce stigma associated with mental illness, improve identification, increase psychological mindedness and increase the ability of staff to manage and care for service users with a range of mental health conditions"* (section 2.1);

iv) The Defendant will also *"have sufficient and skilled staffing to provide care, clinical need and safely to deliver the outcomes required…"* (section 2.5);

v) *"The staff will undertake appropriate training to ensure they are kept up to date with best practice and training will be developed in line with new policy and guidance and best practice"* (section 2.5);

vi) Section 3.1 describes the 'Service Model' as offering *"both specialist mental health assessment and treatment and supervision and training intended to build skills and capacity amongst general acute staff"*.

47. Professor Tadros described NHS service level agreements as *"not commercial contracts as there is no power to sue another NHS Trust within the agreement; they are based on an NHS standard agreement under which two or more NHS organisations agree on how a service will be delivered for*

the benefit of patients and the portion of allocated funding that will transfer from one provider Trust to another provider Trust in order for that service to be delivered."

48. It is for me to determine whether this is a commercial contract. As far as there being no power to sue another NHS Trust party to the agreement, his evidence is simply not correct:

    i) The SLA describes itself in clause 60 ('Governing Law and Jurisdiction') as *"a contract made in England"*, subject to the laws of England, and it gives exclusive jurisdiction to the courts of England to hear and settle any action, suit, proceeding or dispute arising from it;

    ii) The SLA provides for specific remedies as between the parties in a number of places, for breach or as a result of termination (including, for example, an indemnity in clause 36.1 ('Consequences of Expiry or Termination'));

    iii) Clause 58 ('Remedies') provides that, save as expressly provided, *"no remedy conferred by any provision of this Agreement is intended to be exclusive of any other remedy and each and every remedy shall be cumulative and shall be in addition to every other remedy given hereunder or existing at law or in equity, by statute or otherwise"*.

49. The SLA provides for payment to the Defendant for all services delivered by it in accordance with the 'National Tariff' (set by the Department of Health) plus an index factor called the Market Forces Factor, or at locally negotiated rates for services to which the National Tariff does not apply. Professor Tadros accepted the following in cross-examination:

i) a variety of NHS or private providers could have been commissioned to provide the services that they provide under the SLA, and so the Defendant was effectively competing for commissions and funding;

ii) if the Defendant provided the D's RAID Service well, it was likely to be recommissioned at the end of the contract, or commissioned to provide that service in other hospitals, but if it did not then it may lose its commission to another healthcare provider, whether NHS or private;

iii) part of providing the D's RAID Service well, was to achieve cost and efficiency savings for the Birmingham Hospitals as made clear in the 'Expected Outcomes' in the SLA which seeks reductions in: inappropriate and unplanned admissions; delayed transfers of care; readmissions; length of stay; short stay admissions;

iv) the efficiency and cost savings shown to be achievable by the D's RAID Service during the pilot period led to the Defendant being commissioned for that service by each of the five Birmingham Hospitals;

v) he had emphasised the cost and efficiency savings achieved by the D's RAID Service in a number of speeches/presentations (summarised below).

50. The importance of the D's RAID Service in achieving cost savings is evidenced:

i) In the Defendant's 17 January 2017 response to the Claimants' pre-action letter of 16 December 2016:

> "…The financial impact of the RAID model at City Hospital was also assessed. Data on the three key areas of

length of stay, reduced admissions and admission avoidance was independently collected an analysed to identify cost savings. It was found that RAID: Reduced the length of stay by 21,509 bed days over 12 months with an associated cost saving of around £4.5 million; Reduced admissions by 1,800 admissions over 12 months saving approximately £5.4 million; Saved £454,500 through admission avoidance with 202 patients being identified as not requiring admission to the medical assessment unit (MAU). Those patients received a reduced tariff of £750 rather than the £3000 an admission would have cost… the RAID service in City Hospital demonstrated that for every £1 spent, £4 could be saved. In recognition of the pilot's success in improving patient care and substantial savings that it had created for City Hospital, funding was found to promote the adoption of the model across the West Midlands Region. In the Birmingham area, funding for the RAID service is now provided by Birmingham's three acute hospitals and the pan-Birmingham Commissioners. There is now a RAID service established in every acute hospital in Birmingham and Solihull and in 2014 it was reported that 27 organisations nationwide had taken up RAID. In its 2014 document "Achieving Better Access to Mental Health Services by 2020", the Department of Health highlighted strong evidence that the RAID model can deliver clinical and cost-effective care to patients with a range of mental health problems".

ii) On the Defendant's website: "'RAID team wins a prestigious Health Service Journal Award for Best Innovation in Mental Health' 2010 – *The results – with NHS funding being tighter than ever, RAID has shown that it is possible to improve outcomes whilst saving money. RAID has not just resulted in better, more holistic, patient care but has also streamlined services and been shown to make significant savings, as it has avoided unnecessary admissions onto busy medical wards…. RAID has shown that it can reduce the length of stay for dementia patients in City Hospital by at least 7.5 days per admission. This is the equivalent to £2m saving in vital NHS funds*

that can be sent elsewhere… by rolling the service out to other acute hospitals in Birmingham and beyond, RAID has the potential to save millions of pounds for the NHS, improve efficiency and improve patient experience."

iii) Cost savings were also emphasised by Professor Tadros in his speeches on D's RAID Service, copies of the slides of which are seen in the bundles: *"Is Liaison Psychiatry the saviour of our NHS? The Birmingham RAID Experience"*. This contains a section evaluating RAID in terms of costs savings. In particular, it summarises the results of a costs review carried out by the London School of Economics in August 2011 (which he describes as very thorough, detailed and vigorous). That provided a conservative estimation of cost savings from the D's RAID Service at £3.55 million to the NHS, 44 beds per day and £60,000 per week to social care costs. It found a return of £4 for every £1 spent, and recommended the model to the NHS confederation.

iv) A second speech by Professor Tadros to the Royal College of Psychiatrists has a section evaluating cost savings in similar terms to the previously described speech.

v) Also in the bundle are the slides from a talk given by Steven Wyatt entitled *"Independent RAID Financial Evaluation by Central Midlands CSU – Economic Evaluation of the Birmingham and Solihull Roll-Out"* of October 2012. That assesses financial outcomes across the Birmingham Hospital sites in terms of both commissioner and provider savings, showing significant savings which were three times greater than the incremental cost of the D's RAID Service, with those savings falling 64% to the benefit of the hospital healthcare providers and 36% to the commissioner of the service (Birmingham North East Primary Care Trust).

51. I am satisfied, on this evidence, that the D's RAID Service provides a significant financial benefit to the Birmingham Hospitals (and the two NHS Trusts that operate them), Birmingham North East Primary Care Trust, and potentially to the NHS as a whole arising from the wider roll-out and implementation of similar services to the D's RAID Service in other parts of the country.

The origins of the dispute

52. Dr Davies says that about three years ago, on a date he cannot remember, he received a phone call from a woman who wished to discuss RAID training for her organisation. She said that she had read about RAID on the web, but on discussion with her, it appeared to him that the course that she was describing was different to the RAID Courses provided by the First Claimant. He terminated the call, but his interest was sufficiently piqued to then carry out a number of internet searches to see what she could have been referring to.

53. In his witness statement Dr Davies said that he had searched for *"RAID in mental health"* but in oral evidence he could not remember exactly what searches he made. He said that he thought he would have searched 'RAID' and 'mental health'. In any event, he says, within the top results returned on the search he found reference to the Defendant and the D's RAID Service. He said that his impression was that *"the Defendant was providing mental health services under the sign RAID and promoting these widely"*. He said that until then, the First Claimant had been the only organisation operating in the mental health sector which had utilised the term RAID, and it had spent a considerable amount of time and effort building up its reputation. Dr Davies said that he also found evidence online that the Defendant was providing training. He described what he saw as provision of shorter courses at a lower level than the First Claimant's RAID

Courses which concerned him as he thought it risked his RAID methodology as provided on the RAID Courses appearing to provide a less significant intervention than it is.

54. In cross-examination Dr Davies confirmed that he kept no record of his initial searches following that phone call, and no note of the telephone call which prompted them. If the woman who called him told him her name, he says, he cannot now remember it.

Use of the Defendant's Sign in relation to Training

55. The Defendant's response to the Claimants' pre-action letter says this about training in its description of the D's RAID Service:

> "Acute hospital staff also received training on mental health awareness and interventions. Acute staff reported this training was highly relevant and led to improvements in their practice and ultimately patient experience and safety."

56. Professor Tadros' evidence is that training is provided only as a necessary support to the Defendant's main function of providing psychiatric liaison services to each of the Birmingham Hospitals. I accept that evidence. If the Defendant did not provide such psychiatric services then I find on the balance of probabilities it would not be commissioned merely to provide training.

57. This is supported by the SLA. Training is required as part of the D's RAID Service, as I have set out above but, as Professor Tadros highlights in his witness statement, the Defendant *"does not receive a separate income for the training provided to each acute hospital"*. The training is integral and necessary to the provision of the D's RAID Service, but not paid for separately.

58. Professor Tadros describes the training as:

i) In-house training for RAID staff to ensure that they have the required competencies to carry out their job effectively. It is delivered when areas of staff development are identified by the staff themselves in their personal development plans, or by their managers. Most of this in-house training is provided by the RAID team members in their areas of expertise and on an ad-hoc basis, which may take the form of work shadowing;

ii) Training to acute hospital staff not part of the RAID team to *"up-skill their knowledge and competences to manage patients with mental illness in their care in their acute hospital"*. This takes the form of *"hands-on opportunistic training"* within a clinical setting, using the clinical case in hand to illustrate the knowledge base and improve skills competence, and *"classroom teaching"* which Professor Tadros says takes place *"on an ad-hoc basis depending on the need and availability of acute hospital staff. There is no manual for this training or fixed programme of delivery. This training stream has never been offered for fees and does not give academically accredited certificates"*;

iii) Participation by RAID team members in induction programmes for junior doctors and nurses employed by the Defendant and in the Birmingham Hospitals.

59. Since these proceedings began, the Defendant has disclosed slides from more than forty training courses or presentations which it has run under the Defendant's Sign, which Dr Davies says cover the same subject matter as the RAID Courses, including managing mental health and behavioural issues. He describes them as being *"aimed at the same audience, people dealing with mental health issues every day"*. Those which appear in the bundle all contain the Defendant's Sign *simpliciter* on the front and/or internal pages and some also contain the Defendant's Sign in stylised form on the front and/or internal

pages. Some contain the Defendant's Sign in both forms on the same page.

60. They include a presentation given by Professor Tadros himself entitled: *"The journey of RAID through evolution"* to the Royal College of Psychiatrists. This contains a slide headed 'Teaching and Evaluation' stating that 158 hospital staff had been trained, all had completed the evaluation, 61% found it excellent, 36% found it good and 3% were neutral, with no poor or very poor evaluations. Professor Tadros in cross-examination said that this training had not been in the way of a course, but by hands on clinical training given while he and other medical professionals were seeing patients. He said that he collected evaluation forms from each person involved in this 'hands-on' training during the pilot programme, but stopped collecting such forms after the pilot. I have no other evidence to support his contention that the evaluation forms related only to clinical training. However, in my judgment, training which requires participants to complete an evaluation form to assess the quality of that training is formalised training, whether provided in a clinical environment or not.

61. The disclosed documents also include a slide pack introducing a 2-day training programme (found at page 266-278 of the bundle) delivered by Dr Eliza Johnson of the D's RAID Service on 27 June and 6 July 2016. On each page it is marked with the wording *"Brought to you by Birmingham and Solihull NHS"* with the Defendant's logo, and on the first page it also has the Defendant's Sign in stylised form. Within the pack it has the Defendant's Sign *simpliciter*. Professor Tadros was asked whether this was a training course provided by the Defendant and he replied: *"No. That is a misunderstanding. We are not providing any training courses… We do not have training courses."* When asked if it was a training session, he replied: *"I don't know. If I was to*

guess, it is a training activity. Not a training course. I don't know the source of it." In fact, the document refers to itself as both a training programme and a course. When this was drawn to his attention, Professor Tadros said: *"We don't have any courses. It looks like a training day. I didn't write this."*

62. I am not sure what Professor Tadros' semantic gymnastics were intended to achieve. Whether it was a training course or a training programme or a training activity or a training day, in my judgment it was clearly organised, pre-arranged, training with planned content to support the work of the D's RAID Service, and it was explicitly presented to the participants as being provided by the Defendant in relation to the D's RAID Service.

63. Professor Tadros was then shown an evaluation sheet headed *"Evaluation of 2 x 2 day mental health training provided by RAID to acute hospital staff"* by Dr Eliza Johnson and Ellen Hughes. It describes itself as a poster, and states that it *"represents recent evaluation of our 2 x 2 day training sessions delivered by the RAID team at City Hospital, Birmingham… in April and October 2015"* (the **"Evaluation Poster"**).

64. This appears to be a similar course in terms of format and scope to that which Dr Johnson provided in 2016. Again, it contains the name of the Defendant in the top right hand corner and the Defendant's Sign in stylised form in the top left. The Defendant's Sign *simpliciter* is found within the body of the poster. Professor Tadros described the poster in cross-examination as *"not authorised"* and when asked by Ms Blythe if the training it was evaluating was a training programme, he replied: *"That is a fictitious programme. There is no programme… People are taking their own initiative to support colleagues. This poster was submitted without authorisation"*. In cross-examination Professor Tadros said if there was such a training programme in 2015 he didn't

know about it, but agreed that he was leading the D's RAID Service at the time and should have known about it, if it had happened.

65. The Evaluation Poster states:

> "the RAID service is committed to delivering regular, high-quality training to colleagues in acute care… RAID services in Birmingham now straddle 5 hospitals and, as such, a training strategy has been developed to ensure quality, consistency and effectiveness across the sites. In essence the strategy aims to ensure:
>
> - All training is consistent with PLAN and CR 183 (2014) recommended curriculum.
> - There is co-production and delivery with Experts by Experience and acute colleagues.
> - A minimum standard of 2 x 2 days are offered to acute staff across the sites, to compliment other training offered e.g. to junior doctors."

66. This is entirely contradictory of Professor Tadros' evidence that there is no training strategy, no curriculum, and no formalised or regular training for the D's RAID Service, in my judgment. The Evaluation Poster sets out at table 1 a *"typical two day training programme"*. The width of the programme is highlighted in the *"Conclusion"* section:

> "The two day mental health training courses are very well received and deemed very necessary by acute hospital staff. There is a need to ensure training is effectively targeted and marketed to inpatient staff and that everyone has the opportunity to attend. Future directions include RAID teams delivering and evaluating the two day training programme across all of the acute hospitals in Birmingham".

67. It appears from the documentation that the course was indeed delivered at least once again, over two days in 2016, making three times in total in 2015 and 2016.

68. I do not accept Professor Tadros' evidence that any training relating to the D's RAID Service was limited to the merely informal and ad-hoc, or delivered in the course of providing clinical care to patients. I accept that those types of training may well have been (and on the balance of probabilities was) provided, but in my judgment there is ample evidence of regular, planned and formal training, to a curriculum:

    i) in the Evaluation Poster;

    ii) in the programme of the 2 x 2-day training; and

    iii) in the multiple references in speeches/presentations by him and others to training being an important and integral part of the success of the D's RAID Service;

    iv) in the training evaluation forms collected by Professor Tadros himself which he said related to the pilot period of the RAID Service.

69. I find that training courses or programmes were delivered by the Defendant in at least 2015 and 2016. In my judgment, this finding is supported by the fact that the Evaluation Poster was published on the Royal College of Psychiatrists website – and so made available publicly to users of that website as a form of publicity or advertising of the D's RAID Service and the training programme itself. The Evaluation Poster itself identifies that more advertising of the training programme is required. I also consider that it is supported by the inherent probabilities: I find it inherently implausible that the D's RAID Service, which appears to be highly organised, very well run,

achieved measurable successes and has been replicated in a number of other NHS Trusts (as discussed below), would not have a formalised training and evaluation programme of the type so succinctly yet comprehensively described in the Evaluation Poster.

70. I have thought carefully whether Professor Tadros' evidence dismissing:

i) the existence of the 2 x 2-day 2015 and 2016 formalised training courses as unauthorised and unknown to him;

ii) the Evaluation Poster as an *"unauthorised poster – anyone can make a poster"*; and

iii) that the training courses were ever advertised, saying in cross-examination: *"no advertisement ever happened"* (although he later accepted (a) he didn't know if training was advertised or not; and (b) the Evaluation Poster was published on the RCOP website as a form of advertisement);

could have been honestly but misguidedly given, as I am satisfied on the balance of probabilities that the 2015 and 2016 2 x 2 day training courses happened, that the Evaluation Poster was genuine and accurate, and that it was publicised on the RCOP website.

71. I bear firmly in mind that Professor Tadros is a respected and high-achieving medical professional and my starting point is that it is inherently improbable that he came to court to mislead it. I remind myself of the important guidance about the balance of probability standard given by Lord Nicholls in the family case *In re H (Minors)* [1996] AC 563 at 586, that:

> "…the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence

> before the court concludes that the allegation is established on the balance of probability… Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability of the event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred."

72. I have weighed the evidence carefully, and given the inherent probabilities sufficient weight. I am satisfied that at the relevant time Professor Tadros was managing the D's RAID Service very closely. I consider it unlikely that: training courses were run at least three times over two years; evaluated on at least one occasion; promotional/advertising information material based on the training and evaluation was produced in the form of the Evaluation Poster; and the Evaluation Poster was published by the RCOP website; without Professor Tadros knowing about any of it. He could provide no explanation for how or why Dr Johnson could or would carry out such extensive training and evaluation work within the Birmingham Hospitals without informing him, merely saying *"she no longer works for the Defendant"*. I do not consider that to be a satisfactory answer.

73. I also bear in mind that it was not put to Professor Tadros in cross-examination that he was being dishonest. No doubt Ms Blythe did not consider that she had sufficient basis for doing so. However, having listened closely to his evidence, and considered it together with the documentary evidence before me, and weighed it against the inherent probabilities, I am satisfied on the balance of probabilities that his evidence on these points was not honestly given. I consider that Professor Tadros was seeking to minimise the scope of the training

provided by the Defendant in order to strengthen the Defendant's case.

74. It is convenient to note at this point that after the trial, an application was made by the Claimants who sought permission to admit evidence in the form of a paper written by Professor Tadros which had been disclosed to it by the Defendant, but which they had not put in the trial bundle, which they said called into question the veracity of certain elements of his evidence. The Claimants asked the court to reopen the trial, allow Professor Tadros to file a witness statement dealing with the issue if so advised, and then be recalled for cross-examination. The application was listed before me on 8 November 2018 and after hearing from counsel for both parties, I dismissed it. I then put it out of my mind. I record here that the Claimants' application and the allegations made against Professor Tadros formed no part of my consideration in reaching my findings set out in the paragraph above, which are based only on the evidence before me at trial.

Similarity between the D's RAID Service and the RAID Courses

75. Professor Tadros seeks to distinguish the D's RAID Service from the First Claimant's RAID Courses in a number of ways. He says:

    i) The D's RAID Service does not cover children under the age of 16, patients with learning disabilities, patients in secure or forensic services, patients in challenging behaviour units or psychiatric intensive care units, all of which are covered by the RAID Courses;

    ii) The Claimants operate RAID Courses in forensic psychiatry whereas the Defendant and the D's RAID Service is concerned with liaison psychiatry for individuals in immediate crisis

through acute psychosis, dementia or delirium. He says that this is a clear distinction for anyone who works in the area of mental health provision and who might be seeking additional training;

iii) The Claimants' business is the provision of stand-alone training courses whereas the Defendant does not provide any RAID training of the type of stand-alone courses offered by the Claimants nor does it offer certificates or accreditation, nor does it offer external training courses under the Defendant's Mark.

76. I accept the first point but do not think it takes me much further. The fact that the First Claimant's RAID Courses cover a much wider patient group than the D's RAID Service does not assist the Defendant, if the constituency of the D's RAID Service is also encompassed within the RAID Courses.

77. That brings me to Professor Tadros' second point. Dr Davies' accepted that there was a distinction between liaison and forensic psychiatry, but said that the RAID Courses were applicable across the board. He said *"The idea is that when working with difficult and challenging behaviour, it is better to play it down so far as safety allows and work on developing adaptive and helpful behaviours so they displace challenging behaviours. It can be applied wherever you like. It could be in a forensic setting but absolutely not exclusively a forensic setting"*. His evidence, which I accept, is that the First Claimant's RAID Courses are attended by health care professionals from both within and outside the NHS, most of whom are employed at the level of healthcare assistant or qualified nurse, but some of whom are clinical psychologists and psychiatrists.

78. Dr Davies pointed out that the Defendant's 2 x 2 day course in 2016 included a section on dealing with challenging behaviours on wards, which he says is *"exactly what we deal with. Those who enrol on our*

courses are NHS employees, who are our major market". I note that and agree it undermines Professor Tadros' point.

79. In my view Dr Davies' evidence is supported by a number of reviews of RAID Courses provided by healthcare professionals and published on the First Claimant's website. For example, Robert Evans, a Ward Manager said *"All staff working in mental health should attend RAID training"*. Joseph Okanlawon, HCA, said *"The RAID training has definitely afforded me with the opportunity of better understanding of how to approach patients on my ward with extreme behaviour with ease. I recommend this training to all clinical staff working [in] mental health*." Miriam Hogan, Clinical Lead, said *"I am sorry I have had to wait until over 50 years before learning the RAID approach (have been nursing 27 years)"*. Of course these are hearsay statements and I do not put much weight on them for that reason, but they do provide some support for Dr Davies' position.

80. Taking all that evidence into account, I prefer Dr Davies' evidence and find on the balance of probabilities that the RAID Courses are applicable to liaison psychiatry as well as forensic psychiatry.

81. Professor Tadros' third point, about stand-alone courses, also does not take me any further in my judgment. I have already found that I am satisfied the Defendant has provided 2 x 2 day training programmes attended by staff of the Defendant and acute hospital staff of the Birmingham Hospitals on at least three occasions in 2015 and 2016. I accept that it does not provide external training courses, accreditation or courses that do not relate to the D's RAID Service in the field of mental health.

The RAID Network

82. Dr Davies says that he has become aware that the Defendant is participating in the roll-out of the D's Raid Service in other NHS Trusts through a network called the RAID Network. The Claimants are concerned that the distinctiveness of RAID Courses as those run by the First Claimant is becoming diluted as services similar to D's Raid Service and using the RAID mark are launched in NHS Trusts, many of which are also the First Claimant's customers.

83. The RAID Network has a website at www.raidnetwork.org which uses the Defendant's Sign *simpliciter* in the text and in stylised form on the landing page. The stylised form appears both as the Defendant's Sign alone and also as incorporated within a new logo "National RAID Network" where the word RAID is the Defendant's Sign in stylised form. Professor Tadros confirmed in cross-examination that the website is hosted by the Defendant, who sends out emails to members from it. The website makes clear that the National RAID Network is open *"to anyone who works in or is interested in liaison mental health services"*. It is free to join, but requires registration with an *"NHS/work email address"*. It enables members to share information resources, and arranges meetings for members.

84. The RAID Network was referred to in the Defendant's response to the Claimants' pre-action letter: *"in 2014 it was reported that 27 organisations nationwide had taken up RAID".*

85. Professor Tadros' evidence is that it is a feature of the NHS that good practice is shared with clinicians around the country. His evidence is that the RAID Network was set up to provide a free of charge, non-commercial clinical support network to those interested in sharing best practice in the areas covered by the D's RAID Service. He says that the RAID Network provides no training or education and does

not provide accreditation to other training courses. It has bi-annual meetings.

86. In cross-examination, Professor Tadros confirmed that the RAID Network had no sponsorships, no profits were generated by it, there were no fees charged to attendees, venues were provided for free, and no speaking fees were offered or paid to speakers. He said that the venue for meetings moved between organisations who participated in it, and the organisation providing the venue also made the arrangements for each meeting. I accept Professor Tadros's evidence on these points.

87. In relation to the RAID Network, Professor Tadros' evidence is that there is no training but merely the sharing of best practice between mental health professionals. I have read the description of the aims of the RAID Network set out on the website printout in my bundle. These go a little further than Professor Tadros' description but not much. Certainly it seems to me that the collection of reference information and lectures on the website and provision of talks and lectures at the bi-annual sessions are what lawyers would term continuing professional development. Those are opportunities for learning and as such, in my judgment, use of the Defendant's Sign in relation to the RAID Network falls into the category of use in relation to education services relating to health and related printed matter.

Other uses of the Defendant's Sign

88. Dr Davies further points to use of the Defendant's Sign within the Birmingham Hospitals and attaches images of such use to his witness statements. Those include signs on office doors and corridors in various of the Birmingham Hospitals in which the Defendant operates, directing people to the D's RAID Service::

i) a direction sign to *"RAID Liaison Psychiatry"* with the Defendant's Sign in simple monochrome font;

ii) various door signs saying *"RAID team"* in simple monochrome font, both with and without an additional use of the Defendant's Sign in a monochrome stylised form on the corner of the door plate;

iii) a door sign saying *"RAID duty room"* in simple monochrome font with an additional use of the Defendant's Sign in a monochrome stylised form on the corner of the door plate; and

iv) a door sign saying *"Solihull RAID Assessment Room"* in simple monochrome font.

89. The Defendant's Sign in stylised form is also used on the letterhead of correspondence from the D's RAID Service, and in *simpliciter* form within correspondence from the D's RAID Service.

Confusion

90. Dr Davies' evidence is that the professional mental health sector is a small community and the Claimants work with some of the same people as the Defendant appears to be targeting for the D's RAID Service. Professor Tadros accepts Dr Davies' characterisation of those working in Mental Health as a relatively small community, but says that it is a discriminating one and well informed. He does not consider that there is any possibility of confusion between the D's RAID Service and the RAID Courses, and is not aware of any instances of actual confusion where anyone has thought that the D's RAID Service was provided by or linked to the Claimants. I accept his evidence.

91. Dr Davies relies on two instances of confusion: the first is the phone call which was the genesis of these proceedings, which I have described. The second is from a review posted by an attendee of a RAID Course who appears to have mistaken the course as being provided by the NHS. I will come back to those.

ANALYSIS OF ISSUES

Trade Mark Infringement

Issue (i) – Is the Defendant's Sign identical or similar to the Registered Trade Marks?

92. In LTJ Diffusion SA v Sadas Vertbaudet SA (Case C-291/100) [2003] ECR I-2799 the CJEU held, at para 54, that:

> "…a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer."

93. I must consider whether the marks are similar or identical by comparing the overall impression created by them, including their visual, aural and conceptual similarities (*Lloyd Schuhfabrik Meyer & Co GmbH v Klijesn Handel BV*, Case C-342/97).

94. The Defendant has used the Defendant's Sign in two ways. The first is use of the Defendant's Sign *simpliciter*: on its website; on its correspondence; on the RAID Network website; on emails sent from the RAID Network website; within the domain name *raidnetwork.org*; on and within a number of the presentations and training documents contained in the bundle; and on some door signage and direction signage within Birmingham Hospitals (other door signage uses the

Defendant's Sign in stylised form). I am satisfied that this is identical use to the Registered Trade Marks, which are word marks. They are visually identical, pronounced the same so are aurally identical, and there is no conceptual difference between them.

95. The Defendant makes a late oral submission in closing (which is not pleaded nor in Mr Reed's skeleton argument) that when the Defendant uses RAID not in a stylised form it is using it as a defined term and not as a mark. The rules and procedures of IPEC are intended to prevent arguments being sprung upon one party by another a late stage. This was made at the last possible stage, without warning to the Claimants, which I consider was prejudicial to them as Ms Blythe was left in her reply trying to leaf through the bundle, find examples of where the Defendant's Sign *simpliciter* was used, and make submissions on the hoof about whether they could or could not be said to be used as defined terms. I do not consider that to be fair. For that reason I do not consider that unpleaded case any further.

96. The second type of use of the Defendant's Sign is use in stylised form (see Annex 2). The Defendant now accepts that the Defendant's Sign in stylised form is similar to the Registered Trade Marks, but maintains its denial that it is identical. Mr Reed for the Defendant submits that the Defendant's Sign is a device where the text is shadowed to give a 3D effect and the word RAID is combined with a swirl. It is not visually identical and the differences between it and the Registered Trade marks are not, he submits, insignificant to an average consumer.

97. Ms Blythe for the Claimants submits that the Defendant's Sign in stylised form is identical to the Registered Trade Marks. Her primary position is that the stylisation adds nothing to the word mark save the use of a specific colour and everyday font, with a few curved lines

around the end of the word. These lines are, she submits, wholly non-distinctive and would go unnoticed and be given no significance by the average consumer. If I am not with her on that, then Ms Blythe submits in the alternative that the Defendant's Sign in stylised form is highly similar to the Registered Trade Marks: the differences are merely banal and wholly unimportant visual ones and the distinctive and dominant element of both marks, the word 'RAID', is identical.

98. I do not find the Defendant's Sign in stylised form to be identical to the Registered Trade Marks. If the stylisation consisted merely of use of the commonplace sans-serif all-capital font, with shadowing, with or without the addition of colour to the font, I would likely be persuaded on the point. However, I consider that the addition of the rays emanating from, and slightly obscuring the shape of, the letter 'D' are sufficiently distinctive that they would not go unnoticed by the average consumer (described later in this judgment) who, I remind myself, is reasonably observant.

99. I also remind myself of the *Specsavers* guidance that the relevant consumer rarely has the chance to make direct comparisons between marks, and normally perceives a mark as a whole without analysing its various details. Accordingly the overall impression is of key importance. In my judgment, those rays lift the Defendant's Sign in stylised form out of identity with the Registered Marks, because the overall impression of the Defendant's Mark in stylised form is that the rays are at least as dominant as the 'RAID' element, and more distinctive than the 'RAID' element. This is particularly the case in the coloured version, but I am satisfied it is also true of the monochrome version also used by the Defendant.

100. However, as accepted by the Defendant, it remains similar to the Registered Trade Marks and I accept Ms Blythe's submission that it is highly similar.

Issue (ii) – Has the Defendant used the Defendant's Sign in the course of trade in relation to education and training services relating to health and related printed matter?

Use in the course of trade

101. Mr Reed submits for the Defendant:

i) The Defendant is not using the Defendant's Sign 'in the course of trade' in relation to education and training services relating to mental health and related printed matter because there is no 'commercial activity' and the Defendant's activities are not 'commercial'. The Defendant's primary aim is not profit but rather pursuant to section 43 of the National Health Services Act 2006, which states that *"the principal purpose of an NHS foundation trust is the provision of goods and services for the purposes of the health service in England."*

ii) The Defendant only provides training on an *ad hoc* basis and internally to those involved in providing the D's RAID Service to patients. Accordingly it is not provided 'in the course of trade' but is a 'private matter' and is not 'identified or promoted as services to the general public'.

102. As I have set out in my analysis of the law, I consider that Mr Reed's second submission amounts to a submission that the Defendant has used the sign only internally, and per *Google France* and *Och-Ziff*, this goes to whether there is "use" at all, rather than whether the use is in the course of trade. For that reason I will consider his submission on

internal use first, before then going on to consider whether there is use in the course of trade.

103. Ms Blythe for the Claimants submits:

i) The fact that the Defendant is a not-for-profit public benefit corporation forming part of the NHS does not mean that the Defendant's use of the sign RAID is not in the context of commercial activity with a view to economic advantage, nor does it mean that it is 'a private matter'.

ii) At present the Defendant is commissioned to provide psychiatric liaison services to the Trusts responsible for each of the Birmingham Hospitals and in return for payment pursuant to the SLA. If the Defendant provides its services efficiently, it may be commissioned to provide those services to other Trusts or in respect of other acute hospitals. If it provides its services inefficiently it may lose its commission to another provider, who may be a private mental health care provider.

iii) Accordingly, although the Defendant's mental health care services are provided free of charge to patients, in fact the Defendant receives payment for those services in an alternative form, and those services amount to commercial activity operated with a view to economic advantage.

iv) As the Defendant's training services in relation to the D's RAID Service are fundamental to it, they too amount to commercial activity operated with a view to economic advantage. It would be artificial to sever the mental healthcare part of the D's RAID Service from the training services which also form part of the D's RAID Services, and say that one is provided for economic advantage and the other is not.

Internal Use

104. Mr Reed's submits that the Defendant's provision of education and training services is merely a private matter, as they are provided only 'internally' within the Defendant and the Birmingham Hospitals, and in an ad hoc and informal manner.

105. I have already found that the training was not only informal and ad hoc but also planned and formal and accordingly that part of the submission must fail on the facts. But I also find it to be legally misconceived, as there is no statutory requirement or authority which requires use to be formal in order for there to be infringement. Use of a trade mark in the course of informal and ad hoc training which is otherwise than internal, is "use" for the purposes of infringement in the same way that formal training is.

106. The questions for the purposes of this case are – is it internal? If so, it is not "use" of the trade mark at all. If not, is it in the context of commercial activity for economic advantage? If so, it is use in the course of trade (because as I have noted, the Defendants do not seek to argue that there is any use as a private matter which is not 'internal').

107. In relation to the use of the Defendant's Sign in the provision of education services and related materials, namely the RAID Network, I do not understand there to be any real argument that such use is purely internal, either to the Defendant or to the Defendant and the Birmingham Hospitals together. I am satisfied that it is not. The RAID Network is open to membership to anyone, anywhere, working in mental health services who can provide a work email address, and Professor Tadros' evidence is that the membership is drawn widely and nationally from within and outside the NHS.

108. In relation to use of the Defendant's Sign in the provision of training services and related materials, there is also evidence before me that some of those are publically accessible on the internet. Dr Davies has printed off such materials which he has found by conducting internet searches. That cannot, in my judgment, be considered to be 'internal use', per *Verein*, which found that communications to the public were genuine use.

109. I have found that the Defendant uses the Defendant's Sign in the provision of training services and related materials to *"RAID staff or staff associated or linked to the RAID service"* and that this includes *"acute hospital staff"*. Professor Tadros makes this point in both of his witness statements, and such training is also required by the SLA. That training is therefore provided not only to those staff who are involved with D's RAID Service who are employed by the Defendant, but also those that are employed by the Trusts that operate the Birmingham Hospitals.

110. I do not accept the Defendant's contention that staff of the five Birmingham Hospitals involved with D's RAID Service, who are employed by two different NHS Trusts to the Defendant, are 'internal' to the Defendant. They are not, in my judgment. Each of those trusts (including the Defendant) are separate entities. Their relationship is of service provider and service user pursuant to a commercial contract for economic gain.

111. I remind myself that the CJEU held, in para 22 of *Verein Radetzky-Orden* in the context of genuine use of a trade mark, that: *"…genuine use of the mark entails <u>use of the mark on the market</u> for the goods or services protected by that mark <u>and not just internal use by the undertaking concerned</u>."* (my emphasis). In my judgment, the use of the Defendant's Sign in relation to both the training and healthcare

elements of the D's RAID Service to the Birmingham Hospitals is use "on the market", because it is use for the provision of services commissioned from Defendant in what Professor Tadros accepted was a competitive marketplace with other potential providers.

112. I consider Ms Blythe was quite right to remind me of the importance of considering the essential function of a trade mark as a guarantee of origin, when determining this point. That is made clear in *Arsenal FC v Reed* at para 54:

> "The proprietor may not prohibit the use of a sign identical to the trade mark for goods identical to those for which the mark is registered if that use cannot affect his own interests as a proprietor of the mark, having regard to its functions."

113. As I will go on to discuss in relation to issue (v), I am satisfied that use by the Defendant of the Defendant's Sign can and does affect the Claimants' interests in the Registered Trade Marks. For all these reasons I reject the Defendant's submission that the uses of the Defendant's Sign complained of amount to internal use.

114. Finally, the use of the Defendant's Sign on door signs and signage in the Birmingham Hospitals are visible to all those who work within and those hospitals and permitted visitors. I am also satisfied that is not internal use as the Birmingham Hospitals are not internal sites to the Defendant.

Commercial Activity with a view to Economic Advantage

115. The provision by the Defendant of the D's RAID Service to the Birmingham Hospitals is provided for payment, pursuant to a contract, following a commissioning process, subject to service objectives and requirements, and susceptible to termination: on notice; for breach of contract; on an insolvency event; in the case of

force majeure; and the other termination events set out in clause 35 of the SLA.

116. In addition, as Professor Tadros has accepted, NHS England and the Clinical Commissioning Groups commission services from a variety of providers, including not only NHS Foundation Trusts like the Defendant, but also private providers. Commissioned entities receive funding allocations for the goods and services they provide. As Professor Tadros accepted, the Defendant is therefore effectively competing for commissions and funding with these other potential providers in the marketplace.

117. Mr Reed submits that it is not commercial activity because the primary aim of the Defendant is not profit. I am satisfied that there is nothing in the relevant legislation or the authorities requiring the primary aim of a party to be profit. Indeed *Verein Radetzky-Orden* makes clear in the context of genuine use that the fact that an entity is not-for-profit is not decisive in determining whether it is using a trade mark in the course of commercial activity per *Ansul*. It highlights at paragraph 18 that *"various types of non-profit making association have spring up which, at first sight, offer their services free but which, in reality, are financed through subsidies or receive payment in various forms."* The Defendant is such an entity, in my judgment.

118. Is this commercial activity for economic advantage? I am satisfied that the Defendant gains an economic advantage from the provision of the D's RAID Service, as it obtains payment under the terms of the SLA. That is a key part of the context in which the Defendant uses the Defendant's Sign.

119. I have also found that the D's RAID Service also provides a significant financial benefit to the Birmingham Hospitals (and the two NHS Trusts that operate them), Birmingham North East Primary Care

Trust, and potentially to the NHS as a whole arising from the wider roll-out and implementation of similar services to the D's RAID Service in other parts of the country. That too is commercial activity with a view to economic advantage, in my judgment, and I am satisfied they are important parts of the context in which the Defendant has used the Defendant's Sign.

120. I have also found that the provision of training services by the Defendant to its own staff and the acute frontline staff of the Birmingham Hospitals is an integral part of the D's RAID Service. Accordingly, I am satisfied that such training is also provided by the Defendant in the context of commercial activity for economic advantage in the same way that the healthcare element of the D's RAID Service is. It would not be right to sever those two elements in this analysis, in my judgment.

121. In relation to the RAID Network, I have accepted Professor Tadros' evidence that the D's RAID Service is improved by the Defendant's participation in the RAID Network, which provides support and the sharing of best practice to members, who include the Defendant's staff and acute frontline staff of the Birmingham Hospitals, amongst others. Accordingly those education services, in my judgment, are also provided in the context of commercial activity for economic advantage, because they improve the D's RAID Service, and support and educate those working with the D's RAID Service including the Defendant's own staff.

122. For all those reasons, I am satisfied that the Defendant's use of the Defendant's Sign in relation to educational and training services and related materials is "use" for the purposes of trade mark infringement, and that such use is use "in the course of trade".

Issue (iii) – Are the goods/services provided by the Defendant under the Defendant's Sign identical and/or similar to the goods/services specified in the Registered Trade Marks?

123. Mr Reed accepted that if I found that the Defendant had provided training services and related materials (as I have done), those would be identical services to those specified in the Registered Trade Marks. I so find. **Accordingly I find the Defendant's use of the Defendant's Sign *simpliciter* in relation to training services and related materials infringes the Registered Trade Marks pursuant to Section 10(1) TMA / Article 9(2)(a) EUTMR.**

124. However, in respect of the RAID Network, Mr Reed submits that, if I find the Defendant had provided educational or training services (as I have done), then they are similar but not identical to those specified in the Registered Trade Marks. I find it difficult to understand the basis on which he makes this submission as it seems to me that they are identical. I do not understand what distinctions he draws between the educational services and related materials that I have found the Defendant provided through the RAID Network and the specification of the Registered Trade Marks. I perhaps should have asked him to expand upon his submission and if he wishes to make further submissions on this point before the judgment is handed down in final form, I will hear them. At present, I am satisfied that they fall squarely within *"educational… services relating to psychology, mental health, behavioural problems, learning disabilities, substance misuse"* in Class 41 and *"Instructional and teaching materials"* in Class 16, and so I accept Ms Blythe's primary submission for the Claimants that they are identical. **Accordingly I find the Defendant's use of the Defendant's Sign *simpliciter* in relation to the Raid Network infringes the Registered Trade Marks pursuant to Section 10(1) TMA / Article 9(2)(a) EUTMR.**

125. In relation to the provision of the mental healthcare element of the D's Raid Service, Mr Reed submits for the Defendant that the Defendant's primary mental healthcare service is not identical or similar to the educational and training services (and related printed matter) registered or provided by the First Claimant.

126. Ms Blythe submits that there is a degree of similarity between those services and the services the subject of the Registered Trade Marks, specifically *"educational and training services relating to psychology, mental health, behavioural problems, learning disabilities, substance misuse"* in Class 41, because, inter alia:

    i) The mental healthcare sector and mental health training sector are inextricably linked. As Dr Davies explained in his oral evidence, people come to the First Claimant's RAID Courses in order to then implement a RAID-informed service in their provision of mental healthcare to others. Similarly, it is not possible for the Defendant to rollout new mental health services across five hospitals without training staff in the new approach.

    ii) Both the RAID Courses and the D's RAID Service have as their subject matter health care services related to mental health issues and psychiatric illnesses. The Registered Trade Mark specifications do not confine themselves to any particular type of mental health issue.

127. I accept Ms Blythe's submissions. I found Dr Davies' oral evidence on the point convincing. He said: *"We provide training which is part of the service provided to patients. Take St Andrew's healthcare. They used our RAID training and then their service was based on that. In my mind the training and service is inextricable. There is no point providing training unless it manifests itself in a service. It is applied psychology, not an academic exercise. The whole point is it is part of the service."* Professor

Tadros accepted that training was a necessary support for the D's RAID Service. That importance is emphasised in the training materials and many of the speeches and presentations in the trial bundle. I am satisfied that it is artificial, as I think Ms Blythe put it, to sever one from the other. If the training and healthcare service are inextricably linked and necessary for each other, which I have found that they are, then it follows that that I am satisfied that the D's RAID Service, which has as an integral and necessary part of it mental health training, is similar to the services the subject of the Registered Trade Marks, as it overlaps to a material extent with them.

128. I have set out my findings of infringement under 10(1) TMA / Article 9(2)(a) EUTMR in respect of some uses by the Defendant of the Defendant's Sign. My findings on the issues so far mean that the other uses by the Defendant of the Defendant's Sign will infringe the Registered Trade Marks pursuant to section 10(2) TMA / Article 9(2)(b) EUTMR only if I am satisfied that there exists a likelihood of confusion, which includes a likelihood of association with the Registered Trade Marks. The likelihood of confusion is considered from the point of view of the average consumer of the goods and services concerned. Those other uses are:

i) Use of the Defendant's Sign *simpliciter* in relation to the mental healthcare element of the D's RAID Service (identity of mark; similarity of service);

ii) Use of the Defendant's Sign in stylised form in relation to the Defendant's training services and related materials, the RAID Network and the mental healthcare element of the D's RAID Service (similarity of sign; identity or similarity of service).

Issue (iv) – who is the average consumer?

129. Mr Reed for the Defendant submits that the average consumer of the D's RAID Service is a person with mental health difficulties presenting to A&E or other acute hospital departments; the average consumer for the Defendant's RAID training is one made up of the Defendant's staff and staff associated or linked with the D's RAID Service; and the average consumer of the First Claimant's services is someone working with: (i) adults suffering from mental illness in challenging behaviour units and psychiatric intensive care units, (ii) children and young people in residential or domestic settings, (iii) people with learning disabilities, (iv) people in secure units and (v) people with a forensic background, either in residential units or the community. Of course I have rejected the Defendant's argument that the Claimants operate solely in the field of forensic psychiatry.

130. I also do not consider that the correct approach is to identify a separate average consumer for each of the Claimants' and Defendant's services. The Court of Appeal in *Comic Enterprises Ltd v Twentieth Century Fox Film Corp* [2016] EWCA Civ 41 at paragraph 34 (i) described the average consumer as, inter alia, *"… a hypothetical person or, as he has been called, a legal construct; he is a person who has been created to strike the right balance between the various competing interests including, on the one hand, the need to protect consumers and, on the other hand, the promotion of free trade in an openly competitive market, and also to provide a standard, defined in EU law, which national courts may then apply."*

131. Ms Blythe submits that the average consumer of the First Claimant's *"educational and training services"* in Class 41 and *"instructional and teaching materials"* in Class 16 includes both the general public and the professional public working in mental health, as anyone and everyone could partake in education and training services; and the average consumer of the First Claimant's educational and training

services relating specifically to *"psychology, mental health, behavioural problems, learning disabilities, substance misuse"* is a construct of those working in or involved in mental health services. I think the former puts it too wide in the circumstances of this case, where the use complained of is entirely in the sphere of mental health services.

132. Both parties agree that the average consumer of the First Claimant's services is likely to be well informed, with a high attention to detail. Both agree that they are likely to be, but are not always, specialist.

133. I consider that the average consumer in this case is a consumer of mental health-related educational and training services and instructional and teaching materials. As well as his deemed features described in *Specsavers* sub-paragraphs 52(b) and 52(c), I find that he:

i) is a construct from a spectrum of mainly, but not exclusively, professional healthcare providers with different job roles at all levels, and different working experiences and working environments, but each with a professional interest in mental health care. The spectrum will include nurses, support workers, medical professionals, psychologists and healthcare assistants, with a professional interest in forensic or liaison psychiatry, working in a variety of different healthcare, residential, secure and community settings. Those who are not professional are likely to be in mental health caring roles;

ii) may be male or female and is of working age;

iii) will exercise an high attention to detail.

Issue (v) – Is the Defendant's use of the Defendant's Sign liable to affect the origin function of the Registered Trade Marks?

134. The Defendant makes only a bare assertion that the Defendant's Sign is not liable to affect the origin function of the Registered Trade Marks.

135. Ms Blythe for the Claimants submits that it is, because the Defendant's Sign *simpliciter* is used as the name of its mental health care service, and described as such on the Defendant's website: "RAID is a multidisciplinary mental health service". It is, she submits, used to distinguish the Defendant's mental health care services and its training services from those of others in the same way that the Defendant's logo is.

136. In the same way, she submits, the Defendant's Sign in stylised form is also used in relation to the Defendant's mental health care service on the Defendant's website and its correspondence, and used to signpost that service within the Birmingham Hospitals. In addition, it is used in relation to the RAID Network and featured on various of the Defendant's and training materials and related publications. Ms Blythe submits that the Defendant's Sign in stylised form incorporates the same 'rays' element as used in the Defendant's logo, and looks like a brand stamp.

137. I accept those submissions. I am satisfied that the average consumer is likely to interpret the use of the Defendant's Sign in these forms and ways as designating the undertaking from which the D's RAID Service (both health care and training services) and the RAID Network originates. I agree that the incorporation of the 'rays' element from the Defendant's logo into the Defendant's Sign in stylised form appears to form part of a cohesive brand strategy across the Defendant's logos which increases the effect of the Defendant's use of the Defendant's Sign on the origin function of the Registered Trade Marks to the Claimants' detriment.

138. ***Issue (vi) – Is there a likelihood of confusion between the Registered Trade Marks and the Defendant's Sign?***

139. Mr Reed's submission for the Defendant is that there is no possibility that the average consumer would be confused into thinking that the Registered Trade Marks and the Defendant's Sign were in any way linked, or that the training or services provided by the Defendant were those of the First Claimant. That is perhaps in part because he sees the average consumer for the Defendant's RAID Service as people with mental health difficulties presenting with acute issues to the Birmingham Hospitals; and the average consumer for the Defendant's RAID training as D's staff and hospital staff associated or linked with the RAID Service, etc. I have found that this is not the average consumer.

140. Ms Blythe submits that there is a likelihood of confusion seen through the eyes of the average consumer, who will believe that the D's RAID Service and the RAID Courses come from the same or economically linked undertakings because:

i) Upon seeing the use of the Defendant's Sign in stylised form in respect of training services and related materials and the RAID Network, the average consumer will be confused into believing that they are provided by the First Claimant or provided in conjunction with the First Claimant; and

ii) Upon seeing the use of the Defendant's Sign in *simpliciter* and stylised form in respect of mental health care services, the average consumer will be confused into believing that there is a commercial connection between the Defendant and the First Claimant, for example that it provides the training for people working with the Defendant's RAID Service, or that the Defendant is an approved or accredited RAID provider.

141. There is very little evidence of actual confusion before me. I accept Dr Davies' account of his telephone call with the lady three years ago, but he has a very poor recollection of that conversation and so it is not possible for me to determine the extent of her confusion (or even if she was confused at all, or had merely got hold of the wrong telephone number when trying to contact the Defendant about its RAID Service). There is very little that I can do with it. Similarly, I can see a review on the First Claimant's website from a Ms Young that appears to show that she thought the NHS had provided the RAID Course she attended (which the Claimants rely on as "wrong way around" evidence of confusion), but I cannot not know whether this had anything at all to do with the Defendant's use of the Defendant's Sign, or not. It may be no evidence of confusion at all. In my judgment I cannot place any weight on either of these accounts.

142. I do not find Ms Blythe's submission that there has been limited opportunity for real confusion to occur to be a particularly strong one. The Defendant's RAID Service launched as a pilot in September 2009 and was in each of the Birmingham Hospitals out of pilot by the end of December 2014, when the RAID Network was launched. It appears to have been extremely successful and highly publicised. Even on launch, the RAID Network had some 27 other NHS Trusts interested in what it had achieved. There has been opportunity for confusion to show itself. However I do accept that confusion about whether the First Claimant or the Defendant had run some training courses could have occurred but not been reported to either party. This is particularly so, in my judgment, given that both the First Claimant and the Defendant appear to be highly competent at what they do, and so any confusion is unlikely to have given rise to complaints.

143. Lack of actual evidence of confusion is not fatal, however. I must look at the matter globally, taking account of all relevant factors, through

the eyes of the average consumer. In my judgment those factors include the following:

i) Although the Registered Trade Marks are not particularly distinctive in their own right (although they are not descriptive of the services that they cover), the First Claimant has been providing training courses in mental health under the 'RAID' mark for thirty years. The evidence before me, which includes extensive positive reviews and Dr Davies' evidence of the popularity of the RAID Courses and number of people trained over the years, satisfies me on the balance of probabilities that they have acquired enhanced distinctiveness through such use;

ii) I have accepted Dr Davies' evidence that the NHS is one of the First Claimant's biggest customers, that the First Claimant has provided RAID Courses to numerous NHS Trusts, (although not the Defendant), and that it has provided some 30 other training courses to the Defendant. The average consumer who is likely to be a professional and may be an employee of the NHS is likely to be aware that the NHS uses private training providers like the First Claimant, and so may believe that there is a commercial relationship between the Claimants and the Defendant as a result of the Defendant's use of the Defendant's Sign.

iii) Per *Specsavers* (paragraph 52(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. As I have found, the Defendant's Sign in stylised form is highly similar to the Registered Trade Marks and used on identical services. I have also found that Defendant's mental health care services have significant similarities with the services the subject of the Registered Trade Marks, and the Defendant's Sign *simpliciter*

used in relation to those mental health care services has identity with the Registered Trade Marks;

iv) Although the average consumer displays a higher than average level of attention to detail, because of the close similarity of services and marks as describe above, there are few details or differences for the average consumer to notice.

144. Taking all of these factors into account, I am satisfied on the balance of probabilities that there is a likelihood of confusion. I consider that the Defendant's use of:

i) the Defendant's Sign *simpliciter* in relation to the mental healthcare element of the D's RAID Service; and

ii) Use of the Defendant's Sign in stylised form in relation to the Defendant's training services and related materials, the RAID Network and the mental healthcare element of the D's RAID Service;

would cause the average consumer to believe that they come from the Claimants or that they are economically linked to the Claimants as submitted by Ms Blythe. **Accordingly I find the Defendant's use of the Defendant's Sign in each of these ways infringes the Registered Trade Marks pursuant to Section 10(2) TMA / Article 9(2)(b) EUTMR.**

Conclusion

145. As I have found that all the Defendant's uses of the Defendant's Sign infringe the Registered Trade Marks pursuant to 10(1) and 10 (2) of TMA/ Articles 9(2)(a) and (b) EUTMR, I will not go on to consider section 10(3) of TMA/Article 9(2)(c) EUTMR which is no longer relevant, or passing off.

146. The Claim succeeds.

Annex 1

List of issues identified at the CMC on 31 January 2018

i) Does the RAID Mark have a reputation within section 10(3) of TMA?

ii) Does the First Claimant own goodwill in the RAID Mark?

iii) Has the Defendant used the Defendant's Sign in the course of trade in relation to education and training services relating to health and related printed matter?

iv) Who is the relevant public / average consumer?

v) Is the Defendant's Sign identical to the RAID Mark?

vi) Are the goods/services provided by the Defendant under the Defendant's Sign identical, and/or similar to the services specified in the Registered Trade Marks?

vii) Is the Defendant's use of the Defendant's Sign liable to affect the origin function of the Registered Trade Marks?

viii) Is there a likelihood of confusion between the RAID Mark and the Defendant's Sign?

ix) Is the Defendant's use of the Defendant's Sign detrimental to the distinctive character and/or repute of the Registered Trade Marks?

x) Does the Defendant's use of the Defendant's Sign amount to a misrepresentation to the public?

xi) Have such misrepresentations caused damage to the First Claimant?

Annex 2

The Defendant's Sign in stylised form