

**THE HIGH COURT**

**COMMERCIAL – INTELLECTUAL PROPERTY AND TECHNOLOGY LIST**

**[2024] IEHC 590**

**RECORD NUMBER 2023/4905 P**

**BETWEEN**

**EASYGROUP LIMITED**

**AND**

**EASYGROUP IP IRELAND LIMITED**

**PLAINTIFFS**

**AND**

**EASY FOREX TRADING LIMITED**

**AND**

**BLUE CAPITAL MARKETS LIMITED**

**DEFENDANTS**

**JUDGMENT OF Mr Justice Twomey delivered on the 16th day of October, 2024**

**INTRODUCTION**

1. This is an application by the defendants (for ease, referred to as “**Easy Forex**”), domiciled in Cyprus, for an order from this Court that this Court does not have jurisdiction to hear the plaintiffs’ (“**EasyGroup**”) claim of trademark infringement and passing off against Easy Forex.
2. In very general terms, EasyGroup, which owns well-known brands such as easyJet, claims that its intellectual property rights are being breached by Easy Forex’s use of the term ‘Easy’ in relation to its provision of financial services to trade in foreign exchange, option contracts, etc.
3. However, Easy Forex claims that the Irish courts do not have jurisdiction to deal with the trademark infringement allegation under Article 125(5) of Regulation (EU) 2017/1001 of 14 June 2017 on the European Union trade mark (“**EUTMR**”).
4. Easy Forex also claims that the Irish courts do not have jurisdiction to deal with the passing off claims under the terms of Article 7(2) of Regulation (EU) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the “**Recast Brussels Regulation**”).
5. One of the key issues in the case was that Easy Forex (which is based in Cyprus) had 11,255 world-wide users of their web-based financial services. Of these users, some 16 were based in Ireland. Although one is dealing with the sale of services, as distinct from the sale of goods into a Member State, this raised the question of whether the sale of a service to even one person based in one Member State (Ireland) means that Easy Forex (based in another Member State – Cyprus) can be sued for trade mark infringement in Ireland rather than in that other Member State?

## **BACKGROUND**

6. Easy Forex is a provider of services for online trading of forward contracts, financial options, and other financial instruments. For this purpose, Easy Forex uses its website [www.easymarkets.com](http://www.easymarkets.com) and an app named ‘easyMarkets Online Trading’.

7. However, EasyGroup is the registered proprietor of five EU trade marks with the word ‘easy’, namely:

- EASY (word),
- EASYMARKETING (word),
- EASYSERVICES (word),
- easyMoney (figurative) and
- easy.com (figurative).

Accordingly, EasyGroup claims its trademarks are being infringed by Easy Forex’s use of the word ‘Easy’ in its financial services business.

8. As regards the passing-off claim, EasyGroup claims that it has a valuable reputation and goodwill in the name easyJet (which operates out of Belfast) and in the easy family of brands (such as a magazine entitled easyFood with an average readership of 80,364 in Ireland, an easyHotel in Stoneybatter in Dublin, and a range of easyCleaning products sold in Dunnes Stores throughout Ireland) which is the basis for its claim that Easy Forex is passing itself as part of the group that own these brands.

9. In the substantive proceedings issued by EasyGroup, it seeks, amongst other things, an injunction directing Easy Forex to change its name and not to use the word ‘Easy’ in its name.

10. In paragraph 10 of its Statement of Claim, EasyGroup states:

*“Pending discovery the Plaintiffs are unable to give particulars of all of the acts of trade mark infringement and passing off committed by the Defendants, but at the trial*

*of the action the Plaintiffs will claim in respect of all such acts. The best particulars which the Plaintiffs can give at this time are that:*

*(a) The first named Defendant, whose corporate name includes the word “EASY”, trades as “easyMarkets” (the “Infringing Name”), an online trading platform for stocks, shares and similar financial instruments operating from the web address [www.easymarkets.com](http://www.easymarkets.com), which is owned by that Defendant. The Infringing Name has an obvious similarity to the EUTMs and, in particular, EU Trade Mark Registration No. 018339087 EASYMARKETING referred to at paragraph 7(b) above.*

*(b) The second named Defendant is the owner of the figurative EU trade mark “easyMarkets Simply Honest” (EUTM 017881475) (the “easyMarkets Simply Honest EUTM”). It also operates an app named “easyMarkets Online Trading” (the “app”) which is used in connection with the aforementioned “easyMarkets” online trading platform.*

*(c) The website [www.easymarkets.com](http://www.easymarkets.com) is targeting individuals across Europe and, in particular, it is accessible from Ireland and the content thereof is capable of being viewed and interacted with in the English language. In particular, from Ireland it is possible to set up an account and to deposit money therein through the website [www.easymarkets.com](http://www.easymarkets.com) and to access the app from Ireland. This has been demonstrated by test activities conducted on behalf of the Plaintiffs by IP Forensics Limited.*

*(d) The targeting by the Defendants of, inter alia, Ireland is further demonstrated by the fact that the first named Defendant has obtained approval from the Cyprus Securities and Exchange Commission, the financial regulation*

*agency of Cyprus, to offer cross-border services to EU Member States, including Ireland. The first named Defendant's Client Agreement states (at Clause 3.2) that it offers cross-border services to EU Member States, including Ireland. A similar statement regarding the first named Defendant is set out on the second named Defendant's website, [www.bluecapitalmarkets.com](http://www.bluecapitalmarkets.com).*

*(e) The Defendants are also utilising (including on the aforementioned website and on Facebook) at least two infringing logos, copies of which are contained in Schedule 2 to the Plenary Summons herein (the "Infringing Logos"). Each of the Infringing Logos depicts the word "easy" with a lower case "e" followed by "Markets" with an upper case "M", a form of presentation that is redolent of the way in which the word "easy" is used in connection with the Plaintiffs' easy® family of brands."*

**11.** At para 11 of its Statement of Claim, EasyGroup states that:

*"The Infringing Name and each of the Infringing Logos is similar to the EUTMs (or one or other of them) and the Defendants are using them in respect of goods and/or services that are either identical or similar to the goods and/or services for which the EUTMs (or one or other of them) are respectively registered (and, in particular, those quoted in paragraph 7 above) such that there is a likelihood of confusion on the part of the public for the purposes of Article 9(2)(b) of Regulation (EU) No. 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark. Without prejudice to the foregoing, the Plaintiffs will contend that such likelihood of confusion is heightened by reason of the EUTMs being part of a family of marks containing the element and/or prefix "easy"."*

12. EasyGroup also provided evidence that a private investigator, based in Co. Laois, went on the easymarkets.com website and set up an account with easymarkets.com and executed a trade (i.e., a trade for €90 on the market for gold). In this regard, EasyGroup rely also on the fact that the Client Agreement between a customer and Easy Forex Trading Limited states that:

*“3. Our Services*

*3.2 [Easy Forex Trading Limited] offers Cross-border services to EU Member States: Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, **Ireland**, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the Netherlands. Easy Forex Trading Ltd also offers cross-border services to the three other countries of the European Economic Area (EEA) which are also covered by the Markets in Financial Instruments Directive (MIFID), namely Norway, Iceland and Lichtenstein.”* (Emphasis added)

13. EasyGroup also provided evidence that when a person based in Ireland went on the easymarkets.com website, the IP address of that person was recognised by the website as one that is based in Ireland and so the website automatically provided that person, based in Ireland:

- with an English version of the website (rather than say one of the other versions in Spanish etc), and
- when that person sought to contact the website, the website automatically populated the telephone contact number of that person (making contact with the website) with the Irish country code of 353, and
- when that person sought to put in their address in a form on the website, the website automatically populated the address with options based in Ireland.

14. For its part, Easy Forex has provided sworn evidence that it has a total of 16 clients based in Ireland out of a total of its 11,255 clients, which it says is simply a consequence of it being authorised to carry on business throughout the EU as an online trading platform and website combined with the fact that its website happens to be accessible, like everything on the internet, without any national boundaries. It points out that it does not target the Irish market and spends no money on advertising in Ireland, unlike, for example, its approach to the Spanish market, where it gave the example that it is a sponsor of the Real Madrid football club.

15. Nonetheless, based on the foregoing evidence, and the other evidence referenced below, EasyGroup believes that it is entitled to issue these proceedings in Ireland, rather than in the country of domicile of Easy Forex, Cyprus, or indeed a country such as Spain, where Easy Forex is operating under the Easy name and actively seeking customers.

16. For its part, Easy Forex claims that EasyGroup is not entitled to sue it in Ireland under Article 125(5) of the EU Trade Mark Regulation for trade mark infringement, or under Article 7(2) of the Brussels Recast Regulation for passing off.

### **THE RELEVANT LEGISLATIVE PROVISIONS**

17. As regards the action alleging infringement of a trade mark, Article 9(2) of the EUTMR provides that the owner of a trademark, such as EasyGroup, can prevent another party using its trademark where there is a likelihood of confusion. It states:

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

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

*(b) the sign is identical with, or similar to, the EU trade mark and is used in relation to goods or services which are identical with, or similar to, the goods or services for which the EU trade mark is registered, if there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;*

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

**18.** As regard the appropriate place in which an alleged infringer is to be sued, Article 125(1) of the EUTMR provides that a defendant is to be sued in its country of domicile, since it states that:

*“Subject to the provisions of this Regulation as well as to any provisions of Regulation (EU) No 1215/2012 applicable by virtue of Article 122, proceedings in respect of the actions and claims referred to in Article 124 shall be brought in the courts of the Member State in which the defendant is domiciled or, if he is not domiciled in any of the Member States, in which he has an establishment.”*

**19.** It is not in dispute that Easy Forex’s country of domicile is Cyprus. However, Article 125(5) provides an alternative to the general rule that a defendant is to be sued in the State in which it is domiciled. This is because Article 125(5) states:



*“Proceedings in respect of the actions and claims referred to in Article 124, with the exception of actions for a declaration of non-infringement of an EU trade mark, may also be brought in the courts of the **Member State in which the act of infringement has been committed or threatened**, or in which an act referred to in Article 11(2) has been committed”.* (Emphasis added)

20. Before considering whether or not this is a case in which, under Article 125(5) of the EUTMR, EasyGoup can sue Easy Forex in Ireland for the alleged trademark infringement, reference will be made to the passing off action. In this regard, the relevant Regulation is the Recast Brussels Regulation and Recitals 15 and 16 state:

*“(15) **The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile. Jurisdiction should always be available on this ground save in a few well defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.***

*(16) In addition to the defendant’s domicile, there should be alternative grounds of jurisdiction based **on a close connection between the court and the action or in order to facilitate the sound administration of justice.** The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.”*  
(Emphasis added)

**21.** Article 4(1) of the Brussels Recast Regulation provides that the default position is that a defendant is sued where it is domiciled:

*“Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State”.*

**22.** However, Article 7(2) provides an exception to that default rule, as it states that a person domiciled in a Member State may also be sued:

*“in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur”.*

### **THE RELEVANT CASELAW**

**23.** Easy Forex claims that it cannot be sued in Ireland because it is a business providing an online offering, in the sense that everything it provides is on the internet in the form of services (i.e., to buy and sell foreign exchange etc), and that it has no ‘off-line’ offering, since there is no delivery of goods to a client/customer in Ireland.

**24.** In particular, Easy Forex claims that the caselaw is clear regarding jurisdictional disputes over services which are offered on the internet and so are accessible in every country in the EU and beyond. In particular, Easy Forex states that before a defendant can be sued for trademark infringement in a particular country in which the online offering is *accessible*, it must be shown that the alleged infringer *is targeting* that country, and it claims that it is not targeting Ireland.

**25.** Easy Forex relies on the case of C-172/18 *AMS Neve Ltd & Ors v Heritage Audio SL & Anor* ECLI:EU:C:2019:674 which dealt with an alleged trademark infringement and considered the predecessor to Article 125(5) (but in identical terms to Article 125(5)). It concerned offering for sale of goods in the UK by a defendant domiciled in Spain. In this

context, in order to determine which country's courts had jurisdiction, the CJEU considered where the 'act of infringement' occurred.

26. At para 44, the CJEU stated:

*"The Court has stated, when called on to provide an interpretation of Article 93(5) of Regulation No 40/94, that the criterion for jurisdiction expressed in that wording relates to active conduct on the part of the person causing the alleged infringement".*

(Emphasis added)

27. At para 54, it stated:

*"Accordingly, the expression 'the act of infringement' must be understood as relating to acts, specified in Article 9, which the applicant claims to have been committed by the defendant, such as, in this case, acts specified in Article 9(2)(b) and (d) of that article, consisting of advertising and offers for sale under a sign identical to the mark at issue, and those acts must be held to have been 'committed' in the territory where they can be classified as advertising or as offers for sale, namely where their commercial content has in fact been made accessible to the consumers and traders to whom it was directed. Whether the result of that advertising and those offers for sale was that, thereafter, the defendant's products were purchased is, however, irrelevant".* (Emphasis added)

28. Crucially at para 56, the CJEU stated:

*"Accordingly, in circumstances such as those at issue in the main proceedings, if it is apparent from the content of the website and the platforms at issue submitted by the applicants in the main proceedings that the advertising and offers for sale which they contained were targeted at consumers or traders situated in the United Kingdom and were entirely accessible by them, which is a finding that it is for the referring court to make on the basis of, inter alia, the details contained on that website and those*

*platforms with respect to the geographical areas where the products at issue were to be delivered (judgment of 12 July 2011, L'Oréal and Others, C-324/09, EU:C:2011:474, paragraphs 64 and 65), those applicants have the right to bring, on the basis of Article 97(5) of Regulation No 207/2009, their infringement action before a court of the United Kingdom, seeking a declaration of an infringement of the EU trade mark in that Member State.”. (Emphasis added)*

29. It is clear from these passages that if online activity in the form of advertising and offers for sale are directed at consumers in one Member State (Ireland in this case) by a company in another Member State (Cyprus in this case), this entitles the proprietor of the trade mark to bring proceedings in the former Member State (Ireland) under Article 125(5).

30. However, it is also clear from the forgoing that a crucial factor, in determining which country has jurisdiction regarding online activity, is that it must be targeted consumers situated in that country (in this instance, Ireland).

31. In this regard it is clear from C-324/09 *L'Oreal and Others* EU:C:2011:474 at para 64 that simply because a website is *accessible* in one Member State does not mean that consumers in that Member State have been targeted by the owner/operator of the relevant website.

*“It must, however, be made clear that **the mere fact that a website is accessible from the territory covered by the trade mark is not a sufficient basis for concluding that the offers for sale displayed there are targeted at consumers in that territory** (see, by analogy, Joined Cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof* [2010] ECR I-12577, paragraph 69). Indeed, if the fact that an online marketplace is accessible from that territory were sufficient for the advertisements displayed there to be within the scope of Directive 89/104 and Regulation No 40/94, websites and advertisements which, although obviously targeted solely at consumers in third States,*

*are nevertheless technically accessible from EU territory would wrongly be subject to EU law.*” (Emphasis added)

## **ANALYSIS**

32. In this case, Easy Forex admits that it has 16 customers in Ireland. Indeed, EasyGroup relies on this admission to support its right to sue in Ireland and it also points to the fact that its private investigator was able to become a customer/client of the website. EasyGroup places particular reliance on the fact that sales, not of goods into Ireland but of services into Ireland, have occurred in its claim that Ireland has been *targeted* by Easy Forex. Accordingly, EasyGroup claims that it should be entitled to issue proceedings against Easy Forex in Ireland.

### **Is the existence of the sale of a service into Ireland sufficient to establish jurisdiction?**

33. EasyGroup claims that the fact that Easy Forex has 16 customers in Ireland for its financial trading platform, operated out of Cyprus, means that EasyGroup is entitled *per se* to sue Easy Forex in Ireland, and there is no necessity for EasyGroup to establish ‘*targeting*’ by Easy Forex of customers in Ireland.

34. It relies on the fact that Art 125(5) of the EUTMR provides that the proprietor of the trade mark can take proceedings in the place in which the act of infringement has been committed. When determining *the place* of an act of infringement, it is clear that you must first look at what the act is, and under Article 9(2), that ‘*act*’ is the use of the alleged infringing sign in the course of trade.

35. On this basis, EasyGroup relies on the judgment in C-98/13 *Blomqvist v Rolex SA* ECLI:EU:C:2014:55, which related to the sale of allegedly counterfeit goods. At para 26, 29, 33 and 35, the CJEU stated that:

“26. In those circumstances the questions referred must be understood as meaning that the referring court seeks to know whether it follows from the customs regulation that, in order for **the holder of an intellectual property right over goods sold to a person residing in the territory of a Member State through an online sales website in a non-member country** to enjoy the protection afforded to that holder by that regulation at the time when those goods enter the territory of that Member State, that sale must be considered, in that Member State, as a form of distribution to the public or as constituting use in the course of trade. The referring court also raises the question whether, prior to the sale, the goods must have been the subject of an offer for sale or advertising targeting consumers in the same State.

29. Accordingly, European Union law requires that the sale be considered, in the territory of a Member State, to be a form of distribution to the public within the meaning of the copyright directive, or use in the course of trade within the meaning of the trade mark directive and the Community trade mark regulation. Such distribution to the public must be considered proven where a contract of sale and dispatch has been concluded.

33. Thus, goods coming from a non-member State which are imitations of goods protected in the European Union by a trade mark right or copies of goods protected in the European Union by copyright, a related right or a design can be classified as ‘counterfeit goods’ or ‘pirated goods’ where it is proven that they are intended to be put on sale in the European Union, such proof being provided, *inter alia*, where it turns out that the goods have been sold to a customer in the European Union or offered for sale or advertised to consumers in the European Union (see, to that effect, *Philips*, paragraph 78).

35. *In the light of the foregoing, the answer to the questions referred is that the customs regulation must be interpreted as meaning that **the holder of an intellectual property right over goods** sold to a person residing in the territory of a Member State through an online sales website in a non-member country enjoys the protection afforded to that holder by that regulation at the time when those goods enter the territory of that Member State **merely by virtue of the acquisition of those goods. It is not necessary, in addition, for the goods at issue to have been the subject, prior to the sale, of an offer for sale or advertising targeting consumers of that State.***” (Emphasis added)

36. Thus, it is clear that the sale of goods in that case amounted to the use of a trademark in the ‘*course of trade*’, and on this basis there was no requirement for the proprietor of the trade mark to separately establish a targeting of the relevant country. This is because *the sale into a country of goods amounted to the use of the offending trade mark in the course of trade*. Accordingly, an act of infringement had been committed in that country for the purposes of the EUTMR.

37. EasyGroup *claims that the same applies to services*, and so the requirement of targeting of Ireland by Easy Forex is not necessary *if there has been a ‘sale’ of a service in Ireland since this amounts to the use of the allegedly offending trademark in the course of trade and so an act of infringement has been committed in Ireland*.

38. In support of this proposition, EasyGroup relies, in particular, on the final sentence of para 54 of the *AMS* decision which is set out above (i.e., “*Whether the result of that advertising and those offers for sale was that, thereafter, the defendant’s products were purchased is, however, irrelevant*”).

39. However, it seems to this Court that what is being stated in that sentence in *AMS* is that the fact that you happen to have a sale or not, after the alleged targeting, is irrelevant to the question of whether you had targeting in the first place. It is not, as suggested by EasyGroup,

that once you have just *one* sale of goods, or in this case *one* instance of the provision of a service, it means that there has been targeting and/or that one does not need to satisfy the test of targeting in order to sue in the relevant Member State. Consistent with this view is the statement of the UK Supreme Court in *Lifestyle Equities CV and Anor v Amazon UK Services Ltd and Ors* [2024] UKSC 8 at para 67 (considered in detailed hereunder) that:

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

40. If EasyGroup’s interpretation was correct, and that the principles which applied to the sale of goods into a territory automatically applied to the sale of services, it would mean web-based businesses, which did not target another Member State, could be sued if even one person in that Member State paid for its services. Remember this is against a background when websites offering services are generally accessible throughout EU. Thus, if EasyGroup was correct it would mean, for example, that if an Irish based firm called Golden Scissors, which was targeting say its hairdressing services at people in Cork (while allegedly infringing a trade mark of a company in Spain), and a person in Spain came across that website and became a client (by say paying for tips on hair management), then this transaction would amount to the



use of the offending sign in the course of trade such that the Irish hairdresser could be sued in Spain, rather than Ireland, for an alleged trade mark infringement.

41. Instead, it seems to this Court clear from the caselaw that there is a difference between the online sale of goods and the online sale of services and this is why the cases make clear that before the owner of an online business can be sued in another Member State for trade mark infringement, rather than in the default jurisdiction, i.e., its country of domicile, it must be clear that the business has *targeted* that other Member State rather there being simply a supply of a service which arose primarily because of the border-free nature of the internet.

42. While we are dealing at this juncture with the alleged trademark infringement, and so jurisdiction under the EUTMR and not under the Brussels Recast Regulation, nonetheless some support (*albeit* not determinative) for this conclusion can be found in Recital 16 of that latter Regulation, which sets out the principles underlying the approach to resolving jurisdiction issues in the EU.

43. This states that a defendant should not be '*sued in a court of a Member State which he could not reasonably have foreseen*'. In this regard, it is relevant to note that if EasyGroup was correct, and say, if the easymarkets.com website was available only in one of the official languages of Cyprus (say Turkish) and also, say, only provided for payment in the Turkish currency, and so was patently not targeting Ireland, it would nonetheless mean that if just one Turkish Cypriot who happened to be living in Ireland became a customer of Easy Forex, that Easy Forex could be sued in Ireland, a country it had absolutely no connection with (in this example) for an alleged trade mark infringement. This cannot be correct in this Court's view. Yet, on EasyGroup's analysis, the existence of just one customer in Ireland amounts to a 'sale' and thus the use of the offending trademark in the course of trade, and so an act of infringement has been committed in Ireland, thus obviating the requirement that Easy Forex have targeted

Ireland for it to be sued in Ireland. In this Court's view, this would be the antithesis of a defendant being able to reasonably foresee a jurisdiction in which she might be sued.

44. For these reasons, this Court does not accept that the fact that Easy Forex happens to have 16 customers in Ireland means that it can *per se* be sued in Ireland under Article 125(5) without any consideration of whether in fact Easy Forex is targeting customers in Ireland. Rather, as is clear from the *AMS* decision, there must be a 'targeting' of customers in Ireland for Easy Forex to be sued in Ireland.

45. However, it is also the case that EasyGroup claims that there was such targeting by Easy Forex of customers in Ireland and in doing so, it places particular reliance on the UK Supreme Court cases of *Lifestyle Equities CV and Anor v Amazon UK Services Ltd and Ors* [2024] UKSC 8. It is necessary to consider this case in detail and it will be considered next.

### **The Lifestyle case**

46. The *Lifestyle* case was one in which a seller of goods, Amazon, was held by the Supreme Court of the United Kingdom to be targeting the UK. It is clear from that case that the test of whether a country is being targeted is a multifactorial test. Paragraphs 46 and 60 of the joint judgment of Lord Briggs and Lord Kitchin (with whom the other judges agreed) state:

*"46. [...] A finding that an activity is or is not targeted at consumers in the UK necessarily involves an evaluation by the judge of a range of different facts and matters. It requires, in other words, a **multifactorial assessment** of the documents, the evidence and the submissions made by the parties. The evaluation is also one which, when made in that way, the trial judge is peculiarly well placed to carry out [...]"*

*"60. The requirement to consider all relevant facts and circumstances, but predominantly from the perspective of the average consumer, calls for a close, contextual examination of the way in which Amazon's USA website presents itself*

*when accessed by a consumer situated in the EU, including the UK as a (then) member state within the EU. For present purposes the evidence deployed at the trial and then on appeal concentrated on alleged targeting of UK consumers rather than those in the EU, for reasons which will become apparent. At the heart of the necessary examination are the website pages which actually present or refer to the US branded goods, but those pages need to be seen in the context of the whole of the consumer's experience of the USA website.*" (Emphasis added)

47. The UK Supreme Court then undertook that multifactorial assessment and concluded that the factors which favoured a conclusion of targeting of the UK as a territory, outweighed those against such a finding. It is necessary to set out in detail how this assessment was conducted by the UK Supreme Court. It noted that:

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

*62. All versions of the landing page contain a box slightly lower down saying "You are on Amazon.com. You can also shop on Amazon UK for millions of products with fast*

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

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

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

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

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

67. *The point at which the consumer clicks on the **“Place your order” button marks the end of the process of advertisement and offering for sale of the US branded goods by Amazon, within which any targeting of the UK must be found**, if Amazon is to be held liable for infringement by targeting. It is of course the case that goods (including the US branded goods) arrive in the UK as the inevitable result of the process of marketing and sale which we have just described. But the analysis in the Blomqvist case*

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

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

*69. It is convenient at this stage to set out our own conclusion about whether the evidence about the relevant factors discloses targeting by Amazon of the US branded goods at consumers in the UK on its USA website. We do so fully cognisant of the fact that, where the trial judge has conducted a multifactorial analysis of this kind, his conclusion is not vulnerable to being overturned by an appellate court merely because*

*it would have reached a different conclusion. As already explained, the judge must be shown to have made some error of law or logic in his analysis, to have wrongly included or (as the case may be) excluded some relevant factor, or just gone “plainly wrong”. Where the Court of Appeal has properly conducted the multifactorial analysis afresh then a similar constraint affects this court, albeit lessened because the Court of Appeal shares with this court the lack of the advantages of time, immersion in the detail and (sometimes) seeing the witnesses enjoyed by the trial judge. So, the questions we need to answer are: (i) was the Court of Appeal entitled to reject the judge’s conclusion and consider the matter afresh and if so, (ii) is this court entitled to do so again, because of errors by the Court of Appeal, and if so, (iii) what is our own conclusion on the underlying question? As will appear, we have concluded that the answer to both questions (i) and (ii) is “yes”, but it is much easier to explain why against the backdrop of our own conclusions at stage (iii).*

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

*71. The pointers in that direction begin with the “Deliver to United Kingdom” message on the landing page, **repeated on almost all subsequent pages, including those***

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

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

73. As the Court of Appeal found, the "Review your order" page **contains numerous pointers to targeting consumers in the UK. It constitutes an offer for sale of the**



*relevant goods to a consumer at a UK address, with UK specific delivery times and prices, the ability to pay in sterling coupled with an exchange rate. Contrary to Amazon's case, these details were not merely the reprinting of information already supplied by the consumer, although of course the delivery address was. **The delivery dates, prices and exchange rate were calculated by Amazon specifically to populate the details of an offer to supply and deliver the goods to the UK.***

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

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

#### **Applying the multifactorial test in this case**

48. In this instance, it seems to this Court that when one goes through all the factors indicating that there is a targeting of customers in Ireland as alleged by EasyGroup, this is not

a situation where, from *'start to finish'*, a consumer in their encounter with the easymarkets.com website is being targeted, *qua* Irish resident, by the website, unlike the situation in the *Lifestyle* case.

49. Firstly, the fact that a website recognises a person's IP address and automatically provides the Irish telephone code and Irish address options, when this is simply one of 100 or so telephone prefix and country address options available, is not evidence of targeting in this Court's view. This is a consequence of a website being accessible throughout not just Europe, but the world.

50. Similarly, the fact that an Irish person's IP address is recognised and the language of the website is then displayed in English, rather than say Spanish or some other language, is similarly not evidence of targeting. This is particularly so when English is the language of worldwide business and as averred on behalf of Easy Forex, is the *lingua franca* of the website.

51. The *AMS* case makes it clear at para 44 that there must be *'active conduct'* on the part of the person causing the infringement. Just as it is clear from the *L'Oreal* case that a website being *'accessible'* in a country is not sufficient evidence of *'targeting'*, so too it seems to this Court that the fact that, the website's software has over one hundred options for the various countries in which residents might access the site, which options then respond to the IP address of the person accessing the site, is not evidence of targeting. Rather, it seems to this Court that it is, in a sense, almost a necessary consequence of the site being accessible in 100 or so countries.

52. It also seems to this Court that these generic options (of telephone prefix, English language, and country addresses) are very different in nature to the alleged targeting that occurred in the *Lifestyle* case. This is because the website in that case sought, in effect, to proactively, and so *by 'active conduct'*, procure a sale from a particular named Member State (UK), in the sense of almost an invitation to treat, in the language of offer/acceptance i.e., by

the use of the option *'Deliver to United Kingdom'* enticing a person to click the *'place your order'* button. Similarly, and *'even more powerful'* (according to the Supreme Court in that case), was the pop-up box telling consumers precisely which goods are available for delivery to the UK. There is no equivalent *'powerful'* pointer in this case. In the language of the UK Supreme Court judgment, in that case, there were *'pointers'* in the direction of encouraging a delivery to the UK from *'start to finish'* and not simply an automatic drop down of a country code if a consumer in one of one hundred of more countries wants to contact the website (as in this case).

**53.** In this regard, it is to be noted that there is nothing to *distinguish* the approach to Ireland, in the reaction of the website to visitors, from other European countries. Unlike in the *Lifestyle* case (where from *'start to finish'* on the website as a person made their way through the website there is consistent *'pointers'* to the UK), in this case there is no equivalent reference to Ireland on the website when a visitor with an Irish IP address visits the site. Nor are there equivalents, in this case, to the *'precise'* ways (at para 72 of *Lifestyle*) in which Amazon sought to target customers in the UK. It is only if the visitor to the easymarkets.com website attempts to put in her address or her contact number that the website seeks to simply short circuit that process by providing a default telephone code and address options. (As noted below, the first reference to Ireland *anywhere* is a reference to Ireland, among 30 other European countries, and this is not even on the easymarkets.com *website*, but it is to be found in the standard terms and conditions of the Client Agreement).

**54.** In addition, it is to be noted that the contact number on the website, to which any queries are to be addressed, is a telephone number based in Cyprus and the contact address is an address in Cyprus. This is further evidence that the website is not seeking to target Ireland.

**55.** In this Court's view the fact that the currency on the website is in euros is not evidence that Ireland is being targeted, since this is the currency in most Member States of the EU and,

indeed like the use of English and the use of a .com website (rather than a .cy website in Cyprus), is something that this used by international business and therefore is not evidence of targeting Ireland.

56. In this Court's view these are all important reasons, why in this instance, there is not targeting, unlike the situation in the *Lifestyle* case.

57. While not determinative of this Court's decision, it is also to be noted that only 16 people in the entire country have become members to date of the Easy Forex platform (out of a total membership of 11,255). In this regard, Easy Forex provided uncontroverted sworn evidence that it spent no money on advertising in Ireland. Indeed, these numbers for Ireland suggest that either Easy Forex is not targeting Ireland, as it claims, or that if it is, as claimed by EasyGroup, it is not very successful. Ironically however, this Court must note that, from EasyGroup's perspective, the publicity, if any, which this case receives, could lead to more consumers in Ireland searching for the Easy Forex website even though Easy Forex is not targeting those customers. However, any increase in numbers arising from the publicity (unwanted from Easy Forex's perspective) regarding the accessibility of its website in Ireland, could not support the view the Easy Forex is targeting Ireland.

#### **The terms and conditions of use of the website in the Client Agreement**

58. The other evidence relied upon by Easy Group is the fact that the Client Agreement between Easy Forex Trading Limited and its clients, lists in Clause 3.2 (set out above) the 30 or so countries to which it provides cross-border services, one of which is Ireland. Easy Group seeks to emphasise that this is more than a website being *accessible* in these European countries, as it is *offering its services* in those countries.

59. Firstly, one must bear in mind that Easy Forex's EU authorisation as an online trading platform under the Market in Financial Instruments Directive (MIFID) means that Easy Forex is automatically authorised to provide these financial services throughout these countries, but

that ‘targeting’ involves ‘*active conduct*’ on the part of Easy Forex. It also must be remembered that this document is a form of standard terms and conditions (designed to cover all of the countries in which the website is accessible) and not a document tailored to a particular country.

**60.** For this reason, this Court does not see this document as anything more than an acknowledgement that the website is ‘accessible’ in Ireland and so, should a person in Ireland come across it, then Easy Forex is authorised by its EU wide licence to deal with that person. In addition as already noted, unlike the ‘*pointers*’ in the *Lifestyle* cases, this solitary reference to Ireland is not on the website itself, but rather in the terms and conditions of use, and as observed by the UK Supreme Court at para 66 of *Lifestyle* it is ‘*very doubtful*’ whether these types of documents are read by a visitor to the website. This is relevant since as noted in the *Lifestyle* case at para 60, one looks at, *inter alia*, the experience of the ‘*average consumer*’ to determine if there has been targeting. Accordingly, it seems clear that the average consumer is unlikely therefore to come across the solitary reference to Ireland.

**61.** Accordingly, in this Court’s opinion, Easy Forex is not targeting Ireland by its inclusion of a reference to Ireland in its company’s standard terms and conditions, along with 30 or so other European countries. This is of a very different nature to the type of targeting in the *Lifestyle* case. Indeed, it seems to this Court that it would have been equally accurate to say in these standard terms and conditions that the services are *accessible* in those 30 countries (and from a trade mark infringement perspective, there is no legal significance to services being accessible in Ireland) rather than the services being *offered* in those countries, and so, in this Court’s opinion, nothing of great significance attaches to the use of the word ‘*offers*’ in this context, when this Court has to determine if Easy Forex is targeting Ireland.

**62.** In this regard, it is to be noted that, while the Advocate General’s comments in *AMS* were neither endorsed nor rejected by the CJEU in that case, it is clear from his Opinion at para 90 that language which is directed at all the Member States as a group, as distinct from targeting

each of the countries individually, does not amount to targeting for the purposes of the predecessor to Article 125(5) (which was in identical terms to Article 125(5)):

*“[.]the fact that an offer for sale provides details regarding in the geographic areas to which the seller is willing to dispatch the goods may also paly a a significant role in determining jurisdiction on the basis of Article 97(5) of Regulation No 207/2009, provided that it is not a general indication which covers the whole of the European Union.”*

**63.** In this context, it seems to this Court that the Client Agreement is very much in the form of wording which is directed at the EU as a whole, arising primarily from the fact that Easy Forex is authorised throughout the EU to provide online platform services for trading. As such, as one is dealing with an *EU-wide authorisation*, it is not, in this Court’s view, ‘*active conduct*’ on the part of Easy Forex to target Ireland simply by listing Ireland *as one of the EU countries* in which it is authorised to provide those services along with all the other EU countries.

#### **Downloading of the easyMarkets app**

**64.** The other evidence of alleged targeting relied upon by EasyGroup is the fact that the easyMarkets app can be downloaded from the Google Play Store or the Apple App Store and that Easy Forex as the developer of that app must select the countries in which the app is to be made available for download and Ireland was obviously chosen, since the app can be downloaded in Ireland. Again however, this Court does not think that the selection of Ireland as one of the 148 countries in which Easy Forex chose to permit its app to be downloaded (or perhaps more accurately that Easy Forex failed to exclude Ireland from the list of countries in which the app could be downloaded) amounts to targeting by Easy Forex of Ireland. In this Court’s view, it is like the drop-down telephone pre-fix numbers which had Ireland’s international code included which this Court has concluded did not amount to targeting Ireland.

In much the same way as a website being accessible in Ireland is not targeting, it is this Court's view that the easyMarkets app being capable of being downloaded in Ireland does not amount to targeting of Ireland. This Court cannot see how this action of including Ireland (or perhaps failing to exclude Ireland) amounts to distinguishing Ireland from all, or some other countries, such as to amount to the targeting of Ireland.

**A .com website, rather than a .cy website**

65. EasyGroup also relies on the fact that the easymarkets.com website is a .com, rather than a .cy website (the website designation for Cyprus). If the website had been an .ie one this fact might support a claim that there was a targeting of Ireland. However, this Court cannot see how the use of a .com website, which, like the English language is the website ending of international commerce, is something which in any way targets or is distinct to Ireland so as to support a claim that Ireland is being targeted.

**The google adword search result**

66. After the proceedings in this case had issued, EasyGroup came upon evidence that if one searched for the term "easyMarkets" and "easy markets" on Google.ie, that Easy Forex's website came up as a sponsored search result.

67. In response to this, Easy Forex provided a detailed reply to the effect that the featuring of their website as a sponsored search result on Google.ie arose due to the actions of an advertising company, based in Vietnam, with no direct connection to Easy Forex. That advertising company arranged for paid search terms to be used on behalf of a separate third-party Vietnamese company) which earns commission for pushing traffic to the Easy Forex's website. Easy Forex provided sworn evidence that none of its members, servants or agents permitted, sanctioned, instructed or paid for the sponsored search terms on Google.ie, nor were

they aware they were in place prior to receiving the details from EasyGroup during the course of these proceedings.

68. Therefore, the evidence is that this advertising on Google.ie came about because a Vietnamese company (that gets paid commission from Easy Forex for directing consumers to the Easy Forex website arising from online searches ads procured by another Vietnamese company), did not have authority from Easy Forex to put ads on Google.ie, but it did so for a period of time.

69. In addition, Easy Forex's explanation regarding this issue was plausible and it was to the effect that this was done by that third party Vietnamese company in violation of its agreement with Easy Forex and so was not authorised by Easy Forex and furthermore that it was immediately stopped when it was brought to Easy Forex's attention.

70. It is also relevant to note that EasyGroup did not contest any of the explanation provided by Easy Forex in relation to the unauthorised nature of this advertising.

71. It seems to this Court that in these circumstances, this limited amount of *unauthorised* advertising on Google.ie does not amount to '*active conduct*' on the part of Easy Forex as regards the targeting of Ireland.

72. Although not determinative of whether there was targeting by Easy Forex in this context, this Court is supported in this conclusion by the fact that:

- when searching for "easy markets" and "easyMarket" on Google.ie that first result was the Easy Forex website. Thus, the use of sponsored search terms by this Vietnamese company did not provide any benefit to Easy Forex. It simply meant that the easymarkets.com website came up first as a sponsored result but that even without these sponsored search terms, it would have come as the first result on a 'natural' search;



- this unauthorised advertising, for however long it lasted, does not seem to have led to many new customers in Ireland, in view of the fact that there are only 16 customers based in Ireland;
- the existence of these ads on Google.ie was not a factor in EasyGroup’s claim that Easy Forex was targeting Ireland so as to justify the issue of the proceedings, since this unauthorised advertising on google.ie only came to EasyGroup’s attention *after* the proceedings issued; and
- Easy Forex has provided sworn evidence, which has not been controverted, that it has spent no money on advertising in Ireland.

### **Passing Off**

73. As regards the claim of passing-off, it is clear from Article 4 and Article 7(2) of the Brussels Recast Regulation, that the default position is that Easy Forex must be sued in Cyprus, where it is domiciled, but that Easy Forex may be sued in Ireland *if* the harmful event (in this case, the passing off) occurred in Ireland.

74. Recital 16 of the Brussels Recast Regulation is however of some relevance to this question of whether Easy Forex may be sued in Ireland. It states that a defendant should not be ‘sued in a court of a Member State which he could not reasonably have foreseen’. It also makes clear that when a plaintiff is suing in a court, which is not in the country of domicile of the defendant, there should be ‘a close connection’ between that court (i.e., the Irish courts) and the action (i.e., passing off) so as to avoid the possibility of a defendant, such as Easy Forex, being sued in a Member State (Ireland) which it could not possibly have foreseen.

75. For its part, Easy Group claims that as we are dealing with a jurisdictional issue, this Court does not look at the merits of the claim and must take the plaintiff’s claim at its height. In reliance on *C&A Modes & Anor v C&A (Waterford) Limited & Ors* [1976] IR 198 at p 213, it also points out that in a passing off action in Ireland, this Court assumes damage since the

damage lies in the appropriation of goodwill, and not on an actual financial loss being proved (see for example the case of *Flacon Travel Limited v Owners Abroad Group t/a Falcon Leisure Group* [1991] 1 IR 175 at p 182).

76. On this basis, and since in the proceedings EasyGroup has provided uncontroverted evidence of Easy Group's various businesses in Ireland, and so evidence of its goodwill in Ireland, EasyGroup claims that this means that this Court must find that Easy Group is entitled to issue proceedings for passing off in Ireland against a Cyprus domiciled company (Easy Forex).

77. In other words, Easy Group is, in effect, claiming that once it has shown that it has goodwill *in Ireland*, Easy Group has satisfied the condition in Article 7(2) that the place where the harmful event took place *is Ireland* (since one assumes damage, when dealing with a passing off action).

78. While it may be correct that, if this Court were dealing with the merits of the passing off claim, it would assume damage, it is important to note that this Court is not dealing with the merits of the claim. Rather it is dealing with whether this Court has jurisdiction to hear this dispute (rather than another court, such as one in Cyprus).

Therefore, for the purposes of that jurisdictional question and in light of the requirement in Recital 16 that there must be a close connection with the State in which the proceedings are issued, in this Court's view, some meaning has to be given to the expression '*where the harmful event occurred*'. Thus, one cannot simply make an assumption of a harmful event occurring in Ireland because a plaintiff happens to have a reputation/goodwill in Ireland. In light of the terms of Recital 16, this must mean that the alleged harmful events (in this case, of passing off) must have a close connection with Ireland. In view of the similarity between infringements of trade marks and claims of passing off, it seems to this Court that the '*close connection*', in the context of online offering of services (in the case of trade mark infringement and passing off), logically

should be the same. Thus, the close connection as set out in the *AMS* case, in the context of trade mark infringement, is the same as in the context of a passing off, i.e., the targeting of the relevant Member State. Accordingly, in this Court's view, Easy Group is not correct to say that it has satisfied Article 7(2) simply by establishing it has a reputation/goodwill in Ireland. It must also establish that Easy Forex has been targeting Ireland in relation to this alleged passing off by Easy Forex as its business being part of the Easy Group.

**79.** So, while for the purposes of the substantive law of passing off in Ireland damage is to be assumed, this does not mean that a court (when assessing under EU law whether to permit a defendant, with a reputation/goodwill in Ireland, to take a passing off action in Ireland against a defendant, domiciled in another Member State) simply permits that action. For the purposes of the jurisdictional question, the Court must examine the allegedly close connection between the defendant and the State in which the proceedings issued to see whether there has been a targeting of that State, such as to justify the defendant being sued there.

**80.** This conclusion is also supported by the fact that if EasyGroup's interpretation of Article 7(2) was right, it would mean it would not have to prove any connection between a defendant and Ireland, in order to sue in Ireland a defendant domiciled in another EU Member State, regarding an alleged passing off in Ireland. This would mean, to take the previous example, a Cork hairdresser trading say as Golden Scissors could be sued *in Spain* for passing off by a company based in Spain with that same name, even though the Cork hairdresser had no connection with Spain or had not even sold any services to a person based in Spain (if Spain also assumes damage in a passing off action), but simply because that hairdresser in Spain had established that it had goodwill in Spain. This cannot be correct in this Court's view.

**81.** This would breach the principle in Recital 16 that defendants (in that case, the Cork based hairdresser) should be reasonably able to foresee the possibility of being sued in a jurisdiction which is not their domicile. If that defendant had targeted its hairdressing services

towards the country in which it is being sued (which is *not* its country of domicile), then it would have been reasonably able to foresee that possibility. However, if it has not targeted that country, then this is not the case, and it should not be sued in that country.

**82.** As regards whether Easy Forex has targeted Ireland in the context of its alleged passing itself off as part of the EasyGroup, in its online offering, the evidence is the same as in the context of the trademark infringement claim.

**83.** Just as there was insufficient targeting to permit the trademark infringement proceedings to be heard in Ireland, so too, it seems to this Court, that there is insufficient targeting to permit the passing off proceedings to be heard in Ireland. To put it another way, there is not a sufficient '*close connection*' with Ireland for this Court to conclude that a harmful event has occurred or may occur in Ireland. Accordingly, this Court declines jurisdiction in respect of the passing off claim.

## **CONCLUSION**

**84.** For the reasons set out above, and in particular because there was no targeting by Easy Forex of Ireland for the purposes of its online activities, this Court does not believe that it can be sued in Ireland for the alleged infringements of EasyGroup's trademarks and the alleged passing off by Easy Forex of itself as part of the EasyGroup. Accordingly, this Court declines jurisdiction in respect of both of these claims.

**85.** This case will be provisionally put in for mention, at 10.30 a.m. a week from its delivery, to deal with any final orders and costs. However, on the assumption that it should not be necessary to expend costs on a further court sitting, and in order to facilitate the parties agreeing all outstanding matters, the parties have liberty to notify the Registrar if such a listing proves to be unnecessary. This is particularly so in light of the clear implication from the Court

of Appeal decision of *Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform* [2023] IECA 189 at para. [94], that there is an onus on lawyers to take a broad-brush approach to costs and not to engage in time consuming and costly ‘*nit-picking*’.