



IN THE SUPREME COURT OF GIBRALTAR

Neutral Citation Number 2025/GSC/054

2022/ORD/096

BETWEEN:

GIBTELECOM LIMITED

Claimant

-and-

(1) GIBFIBRE LIMITED

(2) GIBSAT LIMITED

(3) ALBERT XAVIER SHERIFF

(4) GENEVIEVE MARGOT SHERIFF

Defendants

Mr Anthony de Garr Robinson KC, Mr Moshe Levy and Mr Samuel Marrache
(instructed by **Hassans**) for the **Claimant**.

Mr Thomas Plewman KC, Ms Jagoda Klimowicz and Mr Gareth Jaffe
(instructed by **TSN**) for the **Defendants**.

Judgment date: 4 December 2025

JUDGMENT

HAPPOLD, J:

Introduction

1. By an application made on 8 October 2025, the Defendants ask me to strike out the expert report of Dr Andreas Groehn dated 22 August 2025 and his reply report dated 3 October 2025, and to order the Claimant to file and serve amended versions of the expert report and reply report of Mr Greg Harman with the sections referring and/or corresponding to Dr Groehn's expert report struck out. They do so on the basis that the Claimant does not have permission to call, or put in, survey evidence; that the court has a duty to restrict expert evidence to that which is reasonably required to resolve the proceedings; and that admitting this evidence would be contrary to the overriding objective. The Claimant disagrees, saying that the procedure and standards relied upon by the Defendants apply only in trademark infringement and passing off cases and not in other forms of litigation; that permission has been granted to adduce Dr Groehn's evidence; and that, as it passes the standard test for the admission of expert evidence, it should not be excluded.

The Procedural History

2. By an order of Restano J dated 9 July 2024, the Claimant and the Defendants were granted permission "*to call expert evidence in the fields of: (i) the technology and practice of the provision of digital television services: and (ii) quantum.*" The deadline for the exchange of expert reports was subsequently extended to 22 August 2025.
3. On 9 June 2025, Hassans wrote to TSN, stating, *inter alia*, in relation Restano J's order of 9 July 2024:

"As for expert evidence in relation to quantum, subject to what your client may say in response to this letter, our client intended to serve evidence in line with the draft List of Expert Issues which was enclosed with our letter of 5 June 2025. As part of that evidence, our client proposes to adduce survey evidence to substantiate its case on quantum. Please confirm the nature of your clients' intended evidence on quantum."

On 22 August 2025, the Claimant exchanged the expert reports of Dr Groehn and Mr Harman.

4. On 29 September 2025 TSN wrote to Hassans in relation to Dr Groehn's report. The letter stated that the "*survey evidence is a sub-type of expert evidence for which the permission of the Court needs to be specifically sought.*" Because permission had not been obtained, there had been "*a serious and, in the circumstances, irremediable procedural breach.*" The letter went on to say that Dr Groehn's report failed to provide sufficient disclosure and had no evidential value, The reference to survey evidence in Hassans' letter of 9 June 2025, was characterised as " *fleeting*" and as falling "*well short of providing the details and disclosure required properly to deal with the issue.*" The Claimant was invited to withdraw Dr Groehn's report, or the Defendants would apply to have it struck out.
5. By a letter dated 6 October 2025, Hassans replied rejecting the arguments made by TSN in its letter of 9 September 2025, refusing to withdraw Dr Groehn's report, and announcing the Claimant's intention to resist any strike-out application.
6. As already mentioned, the Defendants filed their application on 8 October 2025. After some difficulties in listing the matter occasioned by the nearness of the date of trial (listed to begin on 8 December 2024, now brought forward to 4 December) and the lack of court time before then, the application was heard on 5 November 2025.
7. On 27 October 2025, the Claimant applied for permission or rely on expert evidence in response to the Defendants' application. In the event, neither party objected to the other adducing expert evidence: the Claimant relying on additional reports by Dr Groehn and Mr Harman, the Defendants relying on one by their quantum expert, Dr Chris Williams.

The Expert Reports

8. Dr Groehn is "*an economic expert, specialising in market analysis*" (paragraph 8, expert report of Dr Groehn dated 22 August 2025 ("Groehn 1')). His report covers his design, conduct, and analysis of the results of a

conjoint survey to reveal Gibraltarian consumers' preferences for television services. Conjoint analysis is a survey-based statistical technique used to reveal consumer preferences based on the value consumers place on various features of a product (here price, number of TV channels, broadband speed and brand). Dr Groehn's analysis seeks to determine the change in the number of the Claimant's subscribers in two counterfactual scenarios: (i) the Defendants and U-mee cease broadcasting unlicenced TV channels and licence the licensable channels; and (ii) the Defendants but not U-mee cease broadcasting unlicenced channels and licences the licensable channels (see paragraphs 3 and 4 of the list of expert issues annexed to my directions order of 28 July 2025). This is because, if liability is established, damages will be assessed according to the "*but for*" test, so that the court will have to determine how the market would have developed had the Defendants not acted unlawfully.

9. The survey was undertaken by a local consumer research firm in July 2025 (paragraph 80, Groehn 1; and see now the witness statement of Michelle Tavares dated 26 October 2025). On his analysis of the results, Dr Groehn concluded that in the first scenario the Claimant's subscriber base would increase by 65.2% and by 30.2% in the alternative scenario (paragraph 115, Groehn 1).
10. Mr Harman is "*an expert in the areas of accounting, valuation, corporate finance, the assessment of loss, competition economics and economic regulation*" (paragraph 1.1.2., expert report of Dr Harman dated 22 August 2025 ("Harman 1")). His report seeks to quantify the losses that the Claimant has suffered as a result of the Defendants' conduct over the "*Relevant Period*" (that is, from 22 October 2016 to the present). Mr Harman's report relies in part on Dr Groehn's evidence to do so (paragraph 1.4.1, Harman 1). Given that Dr Groehn's survey and analysis were based on current – not historical – product offerings and consumer preferences, Mr Harman "*addressed this limitation by interpolating Gibtelecom's incremental subscribers for the years prior to 2024*" (paragraph 2.5.7 Harman 1). On the basis of his interpolations, Mr Harman calculated the

Claimant's lost revenues between October 2016 to 2024 as from *circa* £6,837,972 to *circa* £11,095,996 in the first counterfactual scenario, and from *circa* £3,156,628 to *circa* £5,158,685 in the alternative scenario (paragraph 2.5.11, Harman 11).

11. The Defendants also filed an expert report on 22 August 2025. The report of Dr Williams, an economist, concluded that on either counterfactual scenario, the Claimant would likely have suffered no loss. On the first scenario, only under an extreme assumption of symmetry would Gibtelecom have suffered any damage. Adjusting that assumption to account for variations in technology and quality, any losses in Gibtelecom's market share would have been a consequence of competition (paragraph 8.1.3, expert report of Dr Williams dated 22 August 2025 ("Williams 1")), On the alternative scenario, Gibtelecom's market performance would not have improved either. Any decline in Gibfibre's market share would have been matched by an improvement in that of U-mee, as provider of the best broadband and television package in terms of performance and price (paragraph 8.1.5, Williams 1).

The Defendants' Application

12. The Defendants' application was accompanied by a witness statement by Emma Dudley, which made the following arguments.

- (i) The filing of Dr Groehn's evidence was a serious procedural breach. Survey evidence is a sub-type of expert evidence for which permission needs specifically to be sought under CPR r. 35.4. The applicant must first conduct a pilot study and include it and an indication of the costs of the full study in its application. In deciding whether to grant permission, the court will consider whether, in the light of the "*Whitford Guidelines*" (so-named because they were originally set out by Whitford J in *Imperial Group plc v Philip Morris Ltd* [1984] RPC 293 at 302-3), the proposed survey has "*real value at proportionate cost*": *TJX UK v Sportsdirect.con Retail Ltd* [2019] EWHC 3246 (Ch)

at [23]. In the instant case, permission was neither sought nor obtained and no adequate notice given to the Defendants prior to the Claimant filing Dr Groehn's report. This is important because:

"survey evidence is expensive, time consuming and the has potential for bias in how questions are chosen and how evidence is obtained..., which undermines its evidential value... As such, it is fundamental to the inclusion of survey evidence that there is opportunity for reflection and discussion between the parties, so that the questions and method can be formulated in the most objective manner... If permission had been sought, the parties could have co-operated to design a proper survey that would be of assistance to the court." (paragraphs 16.1-16.3, witness statement of Ms Dudley)

- (ii) There has been insufficient disclosure to satisfy the court that the survey has any evidential value, let alone sufficient evidential value to outweigh its cost. There has been failure to disclose the questions and instructions given, and the answers provided; when and where the canvassers operated has not been adequately specified; and there has only been only minimal disclosure of demographic data.
- (iii) Despite the gaps in disclosure as to the methodology and results of the survey, it was nonetheless obvious that the survey has no evidential value and ought not to be admitted into evidence. The assumptions on which conjoint analysis are based render it unsuitable in the particular context of the case, and the way in which Dr Groehn conducted the analysis was flawed.
- (iv) Because there has been no disclosure by the Claimant of the costs of the exercise, the court cannot balance the value of the evidence against its cost.

13. The court was invited to strike out Dr Groehn's evidence pursuant to its powers under CPR r. 3.1(2)(p) to make any order for the purpose of managing the case and fulfilling the overriding objective, and under its power to control evidence under CPR r. 32.1(2) to exclude his evidence, on

the basis that the Claimant did not have permission to call an expert or put in expert evidence in relation to a conjoint survey, and because the court must give effect to the overriding objective, including, as far as practicable, ensuring that the parties are on an equal footing and that the case is dealt with expeditiously and fairly, and enforcing compliance with its orders (CPR r. 1.1(2)(a), (d) and (g)).

14. At the hearing, Mr Plewman argued that the survey evidence should be struck out, firstly, because the Claimant in adducing it had failed to comply with the requirements for the admission of survey evidence set out by the Court of Appeal of England and Wales in *Interflora Inc v Markes and Spencer plc* [2013] 2 All ER 663, [2012] EWCA Civ 1501 (“*Interflora I*”), and, secondly, because it had no real evidential value, so would not assist the court at trial.
15. The court has the power to control evidence, including by excluding evidence which would otherwise be inadmissible. No party may put in an expert report or call an expert witness without the court’s permission; the courts have taken a sceptical view of market survey evidence; and have set out specific principles and procedures for its admission.
16. In *Interflora I*, the Court of Appeal of England and Wales concluded that survey evidence requires specific permission which will generally not be given unless the evidence complies with the Whitford Guidelines. Any application to admit survey evidence must be made as early as possible and should include the results of a pilot survey and an indication of how much the costs will be. The test for admission is “*whether the survey has real value at proportionate cost*” (*Phipson on Evidence*, 20th ed., 34-43). These rules are of general application to survey evidence. Contrary to the Claimant’s contentions, they are not limited to trade mark and passing off disputes. The Claimant had been unable to point to any authority where survey evidence was admitted without reference to the *Interflora I* rules and procedures and there is no good reason why they should be so limited.

17. Mr Plewman's principal criticism of the Dr Groehn's evidence related to its use by Mr Harman. Conjoint analysis is usually used in forward-looking projects because a conjoint survey only provides evidence of consumer preferences at the time it was taken (here in July 2025). It cannot be used, as Mr Harman attempted with his "*interpolations*," to infer consumers' past preferences. This is particularly the case, as here, when there have been substantial changes in technology, market regulation and different suppliers' offerings over the Relevant Period. Additionally, Dr Groehn's analysis was itself defective. It was based on an incorrect figure for how Gibfibre's (and U-mee's) costs would increase in the two counterfactual scenarios; and, on Dr Groehn's own admission, his model only predicted "*71% of all 6,000 choices made in the conjoint study correctly*" (expert report of Dr Groehn dated 26 October 2025 ("Groehn 3')). The evidence had no value. It would not assist the court to make any decision it might need to make and it was no answer to say that the court might otherwise lack evidence on quantum. Expert evidence had been adduced by the Defendants which Mr Harman could address. As ever, "*the court must do its best on such evidence as it feels able to accept*" (*Zabihi v Janzemini* [2009] EWCA Civ 851 at [29]).
18. It was accepted by Mr Plewman that, as from 3 November 2025, there had been full disclosure in relation to the survey, in Groehn 3 and in the witness statement of Michelle Tavares, managing director of Mediatel Limited dated 26 October 2025 (Mediatel was the company which carried out the survey). In addition, the costs of the survey were disclosed in Mr Marrache's 4th witness statement, dated 26 October 2025. This did not, however, serve to cure the Claimant's procedural failures, nor mean that the Defendants had not been prejudiced.
19. The Defendants had been prejudiced because they had lost the opportunity to suggest modifications to the survey, and therefore to ensure that it was the best possible. They had also been prejudiced because they had had to make this application and have their expert respond to the deficiencies in

the Claimant's survey evidence, all in the period leading up to trial of this matter.

The Claimant's Response

20. Mr de Garr Robinson submitted that the Claimant did have permission to adduce survey evidence. There were no special principles or procedures for the admission of such evidence outside of trademark and passing off disputes, and for good reason. The judgments relied upon by the Defendants were in trademark or passing off disputes. The rules were applied to address a particular issue in trade mark infringement disputes. The general rule in CPR r. 35.1 applied to other categories of disputes, as was generally recognised. It was for the Defendants to show that *Interflora I* had been applied outside of the trade mark/passing off context, and they had not done so. There were examples of cases outside that context, in particular in competition law disputes, where parties had sought to adduce survey evidence without reference being made to *Interflora I*.
21. Even if the court were to find that there was a requirement to seek special permission to adduce survey evidence which the Claimant had breached, the breach was not serious and the Defendants had not been prejudiced. Hassan's letter of 9 June 2025 gave the Defendants notice of the Claimant's intention to rely on such evidence, to which the Defendants did not respond. Even had the Defendants been confused as to what the letter meant, they had not sought clarification.
22. In any event, the evidence of Dr Groehn met the *Interflora I* standard. It is of real value and the cost of it is more than justified by its utility. Groehn 1 goes into detail about the design and conduct of the survey, and disclosure of substantial "*Backup Materials*" and the "*Design File*" was made, respectively, on 22 August and 6 October 2025. The Whitford Guidelines had been complied with. Dr Williams' criticisms of the Claimant's experts' use of conjoint analysis have been subject to detailed rebuttal by Dr Groehn and Mr Harman. Such disagreement between the experts should be resolved

at trial. But even were the Defendants' arguments concerning the unacceptability of relying on the evidence of 2025 consumer preferences to determine past preferences to be accepted, the Claimant not only seeks damages but also an injunction restraining the Defendants' future conduct, and Dr Groehn's evidence speaks clearly to that issue.

23. Mr de Garr Robinson also pointed out that the Defendants' arguments had widened considerably since making their application. Whereas Ms Dudley, in her witness statement accompanying the application, focused on the survey's alleged deficiencies, Mr Plewman concentrated his criticisms on how use had been made of Dr Groehn's analysis by Mr Harman. But the Claimant should not be made required to hit a moving target and the court should determine the application based on the arguments originally put.

Discussion

24. CPR r. 35.4(1) provides that: "*No party may call an expert or put in an expert's evidence without the court's permission.*" The test for the grant of permission is set out in CPR r. 35.1, which states that: "*Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings*" (see also *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch) at [68]). As already mentioned, Restano J's order of 9 July 2024 granted the parties permission "*to call expert evidence in ... quantum.*" The Claimant says this means that permission has already been granted to adduce Dr Groehn's evidence. The Defendants, however, say that special rules apply in relation to survey expert evidence and that these rules are to be found in a series of judgments of the courts of England and Wales.

25. R. 6(1) of the Supreme Court Rules 2000 provides that:

"Where no other provision is made by these rules or by any Act, rule or regulation in force in Gibraltar, and subject to the express provisions of these rules, the rules of court that apply for the time being in England in the High Court shall apply to all original civil proceedings in the court."

Although r. 6(1) would not appear to bind this court to apply procedural rules developed by the courts of England and Wales but not embodied in the Civil Procedure Rules. S. 2(1) of the English Law (Application) Act 1962 provides that, subject to legislative modification or exclusion:

“The common law and the rules of equity from time to time in force in England shall be in force in Gibraltar, so far as they may be applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require...”

Consistency in civil procedure as between England and Wales and Gibraltar is a good thing that should be preserved unless local conditions require otherwise. Indeed, the contrary was not argued before me.

26. The issue is not so much what rules were laid down by the Court of Appeal of England and Wales in *Interflora I* as how widely it intended them to apply. Judgments, of course, are not statutes. As Lord Morris of Borth-y-Gest said in *Herrington v British Railways Board* [1972] AC 877 at 902:

“There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case.”

27. *Interflora I* followed and built upon Whitford J's judgment in *Imperial Group v Philip Morris* [1984] RPC 293, a passing off case in which the plaintiffs put in evidence the results of various market research surveys. Whitford J criticised the use of survey evidence as “*by and large...an unsatisfactory way of trying to establish questions of fact which are likely to be matters of dispute*” (*ibid*) and set out a series of criteria necessary for a survey to have any weight or validity (at 303-4). The Whitford Guidelines were summarised by Lewison LJ in *Interflora I* (at [61]).

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

- ii) any survey must be of a size which is sufficient to produce some relevant result viewed on a statistical basis;*
- iii) the party relying on the survey must give the fullest possible disclosure of exactly how many surveys they have carried out, exactly how those surveys were conducted and the totality of the number of persons involved, because otherwise it is impossible to draw any reliable inference from answers given by a few respondents;*
- iv) the questions asked must not be leading; and must not direct the person answering the question into a field of speculation upon which that person would never have embarked had the question not been put;*
- v) exact answers and not some sort of abbreviation or digest of the exact answer must be recorded;*
- vi) the totality of all answers given to all surveys should be disclosed; and*
- vii) the instructions given to interviewers must also be disclosed."*

28. *Interflora I* was an appeal from a decision of Arnold J allowing in part the claimants' application to call evidence from witnesses identified by a survey. The case was one of an alleged trade mark infringement relating to advertisements placed by M&S on Google. To decide whether M&S had infringed Interflora's trade mark, the court had to determine whether a reasonably well-informed and reasonably observant internet user would or would not understand the M&S advertisement as indicating that M&S was part of the Interflora network. Interflora sought to put before the court evidence from individuals identified by means of two surveys. It did not seek to rely on the surveys themselves. Indeed, it accepted that they were not statistically reliable. But it did propose to call as witnesses "*those participants whose answers to the questions are the most favourable to Interflora's case*" (at [19]).

29. The principal basis on which M&S objected was that, regardless of whether such evidence was technically admissible, the court should refuse to permit evidence to be adduced from witnesses selected as a result of a survey unless the survey itself was statistically reliable. As summarised by Lewison LJ:

“(i) The question at issue is whether the reasonably well-informed and reasonably observant internet user would or would not understand the M & S advertisement to indicate that M & S was part of the Interflora network. (ii) The reasonably well-informed and reasonably observant internet user is not a real person. He or she is a legal construct. As the [European] Court of Justice made clear, the fact that some internet users may have had difficulty grasping that the service provided by M & S is independent from that of Interflora is not a sufficient basis for a finding that the function of indicating origin has been adversely affected. (iii) Accordingly, simply to call some internet users to give evidence is not probative of the issue in the case. (iv) That evidence can only be probative if those who are called can in some way be seen to stand proxy for the legal construct through whose eyes the essential question must be judged. (v) Unless the survey used for witness collection is itself a reliable survey, the court will have no means of knowing whether the selected witnesses can be treated as reliable proxies for this legal construct. The problem is compounded where, as here, the party calling the witnesses is permitted to select those who give most support to its case. (vi) Even if the evidence of such witnesses is, in principle, admissible, it is likely to be of such marginal utility and so expensive and time consuming to collect, analyse and deal with in court, that the court ought to exclude it in exercise of its powers under CPR Part 1.4 (2) (h) and CPR Part 32.1 (at [24]).”

30. It can be seen that the argument put on behalf of M&S was attuned to the legal question that the court had to answer in order to determine the claim. Specifically, the evidence of the witnesses that Interflora sought to call was said not to be probative of the issue in the case because, like the average consumer, the reasonably well-informed and reasonably observant internet user was a notional, not a real, person. At best, such evidence was probative only if such witnesses could *“stand proxy for the legal construct through whose eyes the essential question must be judged,”* and that required being able to demonstrate the reliability of the survey used to select them. Indeed, even were the survey demonstrably reliable, the fact that the witnesses had been cherry-picked from those participating in it argued against their evidence being of real value.
31. Immediately following his summary of M&S’s objection, Lewison LJ referred to Interflora’s contention that the courts had previously admitted similar evidence, stating that:

“Mr Silverleaf [leading counsel for Interflora] relied on a number of cases in which surveys and evidence called from witnesses identified as a result of surveys. Many of them were cases of passing off. In my judgment passing off cases are of limited utility in a case such as this, because the legal question to be answered is a different one.” (At [26]).

The learned lord justice distinguished those cases on the basis that: “*the average consumer (In trade mark infringement) is conceptually different from the substantial proportion of the public test (in passing off)*” (at [34]).

See also [113]).

32. Lewison LJ accepted that “*a valid survey can be an accurate diagnostic or predictive tool.*” However, although a survey might “*say that a substantial proportion of the electorate will vote for candidate A.... what a survey does not ... tell you is: for whom will the **average** voter vote?*” (at [35]). The learned lord justice went on to state that:

“In our case the question is whether M & S’s advertisement would enable a reasonably well-informed and reasonably observant internet user to grasp without undue difficulty that Interflora and M & S were independent. This... is not a question of counting heads, but is a qualitative assessment. The fact that some internet users might have had difficulty in grasping that Interflora and M & S were independent is not sufficient for a finding of infringement” (at [36]).

33. Lewison LJ then turned to previous Court of Appeal judgments on trade mark infringement, which he interpreted as establishing that “*the evidence of members of the public could not stand proxy for the average consumer*” (at [40]), although evidence of what consumers knew might be helpful.

“Thus (for example) evidence of shopping habits might well be of value, especially in a case where the judge is unlikely to be familiar with the relevant goods or services. But absent special circumstances it does not generally help the court to call members of the public simply to say that they would (or would not be) confused” (at [42]).

Although the average consumer had been replaced by the reasonably well-informed and reasonably observant internet user, “*the underlying concept of a legal construct*” remained the same (at [44]).

34. The learned lord justice went on to state that it was:

“clear as a matter of domestic law that not only is the ultimate issue one for the judge, rather than the witnesses; but also that the judge can reach a conclusion in the absence of evidence from consumers. He or she is in the position of a notional juror, using his or her own common sense and experience of the world” (at [50]).

Nor did European law compel any different result (at [51]). Moreover, internet search results were “*ordinary consumer services in relation to which a judge can make up his or her mind without the need either for expert evidence or the evidence of consumers*” (at [59]).

35. It can be seen that Lewison LJ’s analysis of the utility of survey evidence (and of the evidence of consumers identified by means of surveys) was anchored to the role of the judge and the legal test which he or she had to apply to determine allegations of trade mark infringement. The learned lord justice’s dismissal of the passing off cases relied upon by Interflora because a different legal test applied in such cases makes this clear.

36. Lewison LJ went on to conduct an extensive analysis of how the courts previously had received surveys and the evidence of witnesses identified by means of surveys. Although such evidence had been put before the courts for many years, “*as knowledge about the methodology of the conduct of surveys has grown judges have become more sceptical about their value unless conducted rigorously*” (at 60]). In particular, *Imperial Group plc v Philip Morris Ltd* [1984] RPC 29 “*dealt a body blow to the reception of survey evidence*” (at [61]). Following it, surveys were subject to increasing criticism, leading parties to seek to use the evidence of members of the public identified by means of the survey, rather than the survey itself, as evidence. Lewison LJ was unimpressed by the value of such evidence (see [64]).

37. Given that “*witness collection programmes*” were expensive and time-consuming, a practice had developed of requiring directions to be sought before evidence obtained through such programmes was admitted (at [65]). As Lewison LJ described it, the purpose of the practice was “*not merely to avoid irrelevant (i.e. inadmissible) evidence [but]... also to avoid evidence which is unlikely to be of real value*” (at [67]). It is clear from the context and the cases referred to that the learned lord justice was referring to a practice in trade mark cases. And the learned lord justice, when addressing Interflora’s criticisms, again anchored the practice to the legal test to be applied, stating:

“I stress again that what is in issue is the effect on a hypothetical legal construct: the reasonably well-informed and reasonably observant internet user. In the absence of special circumstances, how can calling ten, twenty or thirty witnesses selected from a statistically invalid survey be extrapolated into the effect on that legal construct of the advertisement or sign in issue?” (at [73]).

38. Lewison LJ then referred to the Australian case of *Arnotts Ltd v Trade Practices Commission* [1990] FCA 473 (1990) 97 ALR 555 (at [74]). Mr Plewman emphasised that this was a competition case, not a trade mark case. This was acknowledged by Lewison LJ too. I do not consider, however, that this took his analysis beyond the trade mark context. The judgment of the Federal Court of Australia in *Arnott* was mentioned to answer the question asked by the learned lord justice at [73] reproduced in the preceding paragraph; just as that question was asked in relation to whether the witness evidence that Interflora sought to adduce ought to be admitted (see [76]).

39. Lewison LJ then undertook a lengthy examination of previous case law (at [77]-[134]), in which all of the judgments referred to were in trade mark and/or passing off cases. The learned lord justice concluded that:

“The upshot of this review is that courts have allowed the calling of evidence of the kind that Interflora wishes to call and have considered it, either in conjunction with or in the absence of a statistically valid and reliable survey. But it is generally of little or no value. Sometimes it does no more than confirm the conclusion that the judge would have reached without the evidence. In passing off cases it sometimes has

greater effect, but as I have said more than once, passing off raises a different legal question. Unless the court can be confident that the evidence of the selected witnesses can stand proxy for the persons or construct through whose perception the legal question is to be answered it simply represents the evidence of those individuals. In a case in which the witnesses are called in order to amplify the results of a statistically reliable survey their evidence may be probative. But unless the court can extrapolate from their evidence, it is not probative.” (at 135])

One might think this nothing more than a confirmation of the learned lord justice’s initial conclusions. Moreover, both the case law relied upon, and the framing of the learned lord justice’s conclusions locate them in the context of trade mark infringement cases and “*the legal question is to be answered*” to determine such disputes.

40. Nor did anything Lewison LJ say subsequently widen the scope of his conclusions. At [137], the learned lord justice listed a number of examples of when evidence might be called in trade marks cases, ending with “*where the cause of action is in passing off, which requires a different legal question to be answered.*” Lewison LJ then went on to say that “[o]utside these kinds of cases there may be others where a judge might think it would be useful to hear from consumers” (at [138]). The reference to “*consumers*” indicates that the context remained that of trade mark and passing off cases. Indeed, the learned lord justice continued:

“But (apart from those I have mentioned) the cases in which that kind of evidence might be of real use are difficult to imagine. I would not therefore hold that such evidence is inadmissible as a matter of law” (at [138]).

The reference to the earlier list, I consider, confirms that the discussion did not extend beyond the trademark /passing off context.

41. It was immediately following these remarks that Lewison LJ referred to the court’s power to control evidence, including by excluding evidence which would otherwise be admissible; and to further the overriding objective, including considering whether the likely benefits of taking a step justify the

costs of taking it (at [139]-[141]). Arnold J, Lewison LJ considered, had failed to consider the latter issue.

“I would accept Mr Hobbs’ [counsel for M&S’s] submission that even at an interim stage a judge who is asked for permission to adduce such evidence should evaluate it carefully in order to see (a) whether it would be of real utility and (b) whether the likely utility of the evidence justifies the costs involved” (at [142]).

42. This conclusion was repeated at [144], with Lewison LJ stating that: *“In the present case I do not consider that Interflora has demonstrated that the evidence it wishes to call would be of real value”* (at [146]). This was, of course, a conclusion prefigured at the beginning of the discussion at [19], when Lewison LJ noted that Interflora itself accepted that the surveys were not statistically reliable but sought *“to call as witnesses only those participants whose answers are the most favourable”* to its case. Indeed, Lewison LJ went on to repeat the point: *“To put it bluntly, Interflora starts with an unreliable dataset from which it proposes to select the witnesses most favourable to itself”* (at [146]). M&S’s objection was upheld and its appeal allowed.
43. There followed discussion as to *“the procedure that should be followed”* in future (at [147]). In my opinion, what is meant is the procedure to be followed in the types of cases previously discussed, and I am confirmed in my view by the citation in the same paragraph of *“the form of order that has evolved”* in trade mark and passing off cases (which already required the leave of the court to adduce survey evidence). Lewison LJ then considered whether that form of order caught witness collection exercises, stating that:

“For the future, the standard form of order should be redrafted so as to make it clear that (i) A party may conduct a true pilot survey without permission, but at his own risk as to costs; (ii) No further survey may be conducted or adduced in evidence without the court’s permission; and (iii) No party may adduce evidence from respondents to any survey without the court’s permission.” (at 149])

The reiterated reference to “*the standard form of order*” highlights that the context remains that of trademark and passing off cases.

44. The remaining paragraphs of the section simply expand on what was said at [149]: [150] covers the test to be applied when deciding to grant permission, which is whether the evidence is likely to be of real value and, even then, that the value of the evidence justifies its cost; [151] covers what is required to be provided to the court when permission is sought to carry out a survey, and [152] with what must be provided when permission is sought to call witnesses who have responded to a survey; [153] deals with waiver of privilege. Nothing in any of this extends the scope of the discussion beyond the trademark/passing off context.
45. To conclude: although lengthy, the judgment of Lewison LJ (with whom Etherton and Hughes LJJ agreed) is focused. It is focused on the decision appealed and the deficiencies in the evidence which Interflora sought to adduce. It is focused on the question which the judge has to answer in trade mark cases and the extent to which survey evidence, or the evidence of witnesses identified through surveys, could assist him or her doing so. Indeed, it is primarily concerned with the calling of witnesses obtained by means of a survey without reliance on the survey itself. It is focused in seeking to systematise and put on a principled basis practice already developed in trade mark and passing off cases requiring permission to be sought before admitting survey evidence and witness evidence obtained through witness collection programmes. That discussion was almost entirely confined to trade mark and passing off cases confirms this focus; and the reference to *Arnotts*, given the use to which that judgment was put, does not refute it. Finally, the judgment is clear as to how it is to apply in the future, including by redrafting the standard form of order for directions in trade mark and passing off cases. But there is nothing to indicate that this procedural change was intended to apply beyond that particular context.
46. Subsequent authorities, in my view, support my interpretation of *Interflora* I. When the case returned to the Court of Appeal of England and Wales in

Marks and Spencer plc v Interflora Inc [2013] EWCA 319 (*Interflora II*”), Lewison LJ commented that *Interflora I*:

“was intended to send the general message that evidence from consumers in this kind of case (i.e. trademark infringement involving ordinary consumer goods or services) should only be admitted if it is of real value; and even then only if the value justifies the cost; and that judges should be robust gatekeepers in that respect” (at [5]).

47. In *Zee Entertainment Enterprises Ltd v Zeebox Ltd* [2014] EWCA 82, Floyd LJ (with whom Lewison and Elias LJJ agreed) simply reproduced how the trial judge, Birss J, had summarised what he described as “*the modern approach to the admission of survey evidence in cases of trade mark infringement and passing off*” (at [13]). More recently, the reasons dictating judicial robustness were summarised by Arnold LJ in *Lidl Great Britain Ltd v Tesco Stores Ltd* [2024] EWCA 262:

“Surveys carried out for the purposes of trademark and/or passing off cases suffer from the same two problems as scientific experiments carried out for the purposes of patent litigation. First, they are expensive both to carry out and to analyse in court. Secondly, unless considerable care is taken, the money can be wasted because the evidence is not probative on any issue before the court. Accordingly, the permission of the court must be obtained before carrying out a survey or experiment (or, if that is not possible for good reason, at least before adducing it in evidence). In the case of a survey, permission will only be given if the evidence appears likely to have real value such that its cost is justified by its likely utility to the resolution of the dispute: see *Interflora Inc v Marks & Spencer plc* [2012] EWCA Civ 1501, [2013] FSR 21 (“*Interflora CA I*”) and *Interflora Inc v Marks & Spencer plc* [2013] EWCA Civ 319, [2023] FSR 26 (“*Interflora CA II*”). In order to be sufficiently reliable, a survey must comply with the guidelines laid down by Whitford J in *Imperial Group Ltd v Philip Morris & Co* [1984] RPC 293 at 302-303” (at [114]).

Those reasons are explicitly located in the trade mark/passing off context.

48. As for the judgment of Ms Pat Treacy, sitting as a Deputy Judge of the High Court of England and Wales, in *TJX UK v Sportsdirect.con Retail Ltd* [2019] EWHC 3246 (Ch), although the learned judge’s comments on the correct approach to the admission of survey evidence (at [21]-[30]) were in general

terms, they were made in the context of an application by the claimants in a trade mark infringement claim for permission to adduce survey evidence. They were expressly based on the learned judge's reading of *Interflora I* (in which "Lewison LJ set out the correct approach" (at [23])), *Interflora II* and *Zee Entertainment*. Indeed, the learned judge quoted a passage from the judgment of Morgan J in *Enterprise Holdings Inc v Europcar Group UK Ltd* [2014] EWHC 2498 (Ch) specifically locating those three Court of Appeal judgments in the trade mark/passing off context (at [26]).

49. The Court of Appeal in England and Wales, in *Interflora I* and *II*, *Zee Entertainment*, and *Lidl v Tesco* did not extend the requirement to obtain special permission to adduce survey evidence beyond trademark and passing off cases. Cherry-picking generally phrased passages from first instance judgments cannot change this, besides ignoring the fact that such passages need to be read in context.
50. It might also be thought, were there a general procedural rule that permission to adduce survey evidence had specifically to be applied for, that it would be reflected in the Civil Procedure Rules. But there is no such rule nor mention of any such requirement in the commentary to Part 35 (experts and assessors) in the *White Book (Civil Procedure 2025)*. Conversely, there is discussion of survey evidence in the commentary to Part 63 (intellectual property claims) at 2F-14.4 (in the section on registered trade marks and other intellectual property rights). Reference is made to *Interflora I* and *Interflora II*, and to the Whitford Guidelines, as summarised by Lewison LJ in *Interflora I*. The commentary continues by stating that:

"In both Maier v ASOS plc [2012] EWHC 3456 (Ch) and Fage UK Ltd v Chobani [2012] EWHC 3755 (Ch) it has been found that the general proposition (if not the precise standards) of Interflora I apply to passing off cases as well as trademark infringement cases..."

Whilst Interflora I and II were concerned with a case of trade mark infringement, the scepticism toward survey evidence expressed in these judgments has carried over into other types of action, even though it is acknowledged that the eventual legal test to be met is different: see the Court of Appeal in Zee [Entertainment Enterprises

Ltd v Zeebox Ltd [2014] EWCA 82] (application to adduce survey evidence refused in a passing off case)..."

There is no suggestion that *Interflora I* applies beyond trade mark and passing off cases.

51. For a wider application of *Interflora I*, The Defendants relied on *Phipson on Evidence* (20th ed.), which at 34-43 states that:

*"The Court of Appeal's judgment in *Interflora v Marks and Spencer*, established the modern basis for ensuring that survey evidence is admitted only if the court is satisfied that it is both likely to be of real value to the trial judge and that the likely value is proportionate to the costs involved in producing the evidence and dealing with it at trial. In *JTX UK v Sportsdirect.com Retail Ltd*, Ms Pat Treacey helpfully summarised the modern approach.*

- (i) *no survey evidence can be adduced without permission;*
- (ii) *any permission application should normally include the results of a pilot survey and an indication of how much the costs will be;*
- (iii) *if permission is granted the applicant may conduct a full survey; and*
- (iv) *the applicant would, as part of the application, also seek permission to adduce expert evidence about the methodology and results of the survey;*
- (v) *the test is whether the survey has real value at proportionate cost.*

The correct approach when considering an application to adduce expert evidence requires the court:

- (i) *to assess the methodological adequacy of any proposed survey, as this will affect its value as evidence;*
- (ii) *to review the evidence available from the pilot study against the relevant legal issues to assess how likely it is that the evidence will assist the trial judge;*
- (iii) *to bear in mind that it is not sufficient for the evidence to be of 'some value', it must be likely to make a real difference at trial;*
- (iv) *to decide whether in all the circumstances the party seeking to adduce the evidence has demonstrated that it will have real value to the trial judge; and*
- (v) *to consider whether the value of the survey is proportionate to the costs of dealing with the evidence, having regard to whether the impact of adducing the evidence, including the effect on costs and on Court time, is in accordance with the overriding objective.*

One of the main reasons that parties are required to seek permission to carry out a survey is so that consideration can be given to the probative value and the cost of the evidence before the bulk of the money is spent. That objective may be defeated if the opposing party saves its criticisms for trial, since then it is too late to modify the survey in response.”

52. The passage purports to say what the law is, not what the law ought to be. *Phipson*, however, despite the expertise of its authors, as a practitioner text is only of persuasive authority. In addition, the passage is at the end of a section which begins by stating that “*at common law... the results of a properly designed and conducted surveys are admissible as evidence*”, before going on to discuss the limits of the utility of such evidence by reference to the average consumer test in trade mark disputes and to two trade mark infringement cases (*Comic Enterprises Ltd v Twentieth Century Fox Film Corp.* [2016] EWCA Civ 41, and *Lidl Great Britain Ltd v Tesco Stores Ltd* [2024] EWCA Civ 262). Indeed, the section states expressly that survey evidence is “*subject to the case management provisions of Pt 35 of the Civil Procedure Rules 1998*,” including that permission is required to call such evidence. Only after that does the passage relied upon by the Defendants (reproduced above at paragraph 51 above) appear; and that description is based on what was said in *JTX UK v Sportsdirect.com Retail Ltd* [2019] EWCA 3246 (Ch), another trade mark case, which, does not support such a wide reading (see my analysis at paragraph 48 above). Read in context and in the light of the authorities on which it relies, *Phipson* provides no support for the existence of a special procedure for the admission of survey evidence outside of the trademark/passing off context.

53. I was also referred to various judgments of the Competition Appeal Tribunal (“*the CAT*”). I do not find any of them particularly helpful. The CAT has its own procedures, set out in the *Competition Appeal Tribunal Guide to Proceedings 2015*, and the various judgments to which I was referred related to situations very different from the one before me. More fundamentally, however, this is not a situation where it is for one side to show that the alleged procedure has been applied outside of the trade mark/passing off

context, or for the other to demonstrate that it has not. The issue is a question of law for me to decide as best I can on the basis of the authorities put before me by the parties.

54. In my opinion, two issues should be distinguished. The first is whether the procedure for permission to adduce survey evidence set out in *Interflora I* applies outside of trade mark and passing off cases. As I have already said, I do not think that the authorities indicate that it has any wider application.
55. Nor do I consider that it should. Ms Dudley in her witness statement, and Mr Plewman in his submissions, argued that the Defendants had been unable to have any input into the construction of the survey and had been disadvantaged thereby. As Ms Dudley put it in her witness statement:

“it is fundamental to the inclusion of survey evidence that there is opportunity for reflection and discussion between the parties, so that the questions and method can be formulated in the most objective manner” (at paragraph 16.3)
56. I disagree. Indeed, I suspect that it is an objection made tongue-in-cheek because deficiencies in one party’s evidence are likely to advantage the other. Nothing in the case law indicates that the requirement for special permission to adduce survey evidence in trade mark and passing off cases is to enable, still less oblige, *“reflection and discussion between the parties”* concerning the survey’s design. It is to ensure that the *“the evidence appears likely to have real value such that its cost is justified by its likely utility to the resolution of the dispute”* (*Lidl Great Britain Ltd v Tesco Stores Ltd* [2024] EWCA 262 per Arnold LJ at [114]). Subject to meeting that standard, it remains for the party adducing survey evidence to determine its methodology. There is no requirement for that decision to be a joint effort.
57. As regards the second issue - when the court should exercise the control it has over evidence to exclude survey evidence even if it is technically admissible - I do consider *Interflora I* to be of relevance. There is nothing in *Interflora I* to indicate that the Court of Appeal of England and Wales was acting outside of the Civil Procedure Rules. Lewison LJ made specific

reference to CPR rr 32.1 (the power of the court to control the evidence by giving directions), 1.4.1 (the duty of the court to further the overriding objective by actively managing cases) and 1.4(2)(h) (including “*considering whether the likely benefits of taking a particular step justify the cost of taking it*” as an aspect of active case management); and criticised Arnold J for failing to take that last step (at [139]-[142]). These are rules of general application, and it seems to me that *Interflora I* and the line of cases following it can best be explained as applying them to the use of survey evidence in trade mark and passing off cases.

58. It is open to the court, in exercise of its power to control the evidence and its duty to further the overriding objective by actively managing cases, to exclude survey evidence, even if otherwise admissible. I do not consider it either necessary or appropriate to decide whether the test for the admission of survey evidence in trade mark and passing off cases differs from that for the admission of expert evidence in CPR r. 35.1. I simply note that in *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch) Warren J, when setting out “*the correct approach to the admissibility*” of expert evidence at [68], stated that:

“*the court must ask itself the following important questions:*

- (a) *The first question is whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it seems to me that it must be admitted.*
- (b) *If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it...*
- (c) *Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings. In that case, the sort of questions I have identified in paragraph 63 above will fall to be taken into account.”*

At [63] the learned judge had stated that:

“A judgment needs to be made in every case and, in making that judgment, it is relevant to consider whether, on the one hand, the evidence is necessary (in the sense that a decision cannot be made without it) or whether it is of very marginal relevance with the court being well able to decide the issue without it, in which case a balance has to be struck and the proportionality of its admission assessed. In striking that balance, the court should, in my judgment, be prepared to take into account disparate factors including the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail...”

Some form of proportionality test (or cost/benefit analysis), therefore, is already implicit under CPR r. 35.1. Indeed, it would be surprising were it not to be, given the court’s duty to ensure that cases are conducted at proportionate cost.

59. It is open for a party – as the Defendants have here – to apply to the court to strike out expert evidence, relying on CPR 3.1(2) and r. 32.(2). It seems to me, however, that I should bear in mind that permission has already been granted by Restano J, applying the test in CPR r. 35.1, so that there has already been judicial determination that evidence on quantum is “*reasonably required*” to resolve these proceedings. Neither party argued to the contrary. Were the Defendants to be held liable under either or both of the conspiracy to cause loss by unlawful means or the causing loss by unlawful means claim application of the “*but for*” test to determine the quantum of damages requires consideration of what would be the situation under either the first or the alternative counterfactual scenario. Such evidence would also be relevant regarding whether it would be “*just and convenient*” to grant an injunction restraining the Defendants from continuing their unlawful behaviour.
60. The remaining issue, it seems to me, is whether Dr Groehn’s reports and those sections of Mr Harman’s reports referring and/or corresponding to them should be struck out because they lack evidential value and cannot assist the court in assessing the Claimant’s loss (if any). Here, I think the

Whitford Guidelines are very relevant, given they were designed to ensure the integrity and transparency of the methodology of any survey put as evidence (as were the criteria applied by the Federal Court of Australia in *Arnott*, themselves taken from the 1960 *US Judicial Conference Handbook of Recommended Procedures for Trial of Protracted Cases*). Applying the adage “*garbage in, garbage out*,” failure to comply with the Whitford Guidelines might well be a basis to strike out survey evidence.

61. That, however, is not the situation here, although the parties disagree as to when full disclosure for the purposes of the Whitford Guidelines was made. The Claimant says that substantial disclosure was made when Groehn 1 was served on 22 August 2025 with one, inadvertent, omission, rectified on 6 October 2025 when it came to light. The Defendants say that it was not made until 26 October 2025, when the Claimant served them with the witness statements of Mr Marrache and Ms Tavares.
62. In my view, it ill-behoves the Defendants to complain about any inadequacies in the Claimant’s disclosure. Hassans’ letter of 9 June 2025 (paragraph 3 above) gave them notice of the Claimant’s intention “*to adduce survey evidence to substantiate its case on quantum*”. On my reading, the letter was clear. The relevant passage appeared under the heading “*The Directions Order of 9 July 2024 (the Directions Order)*”. The paragraph in which it appeared began “*As for expert evidence in relation to quantum...*” It went on to say:

“our client intends to serve evidence in line with the issues listed in the Draft List of Expert Issues which was enclosed in our letter of 5 Juen 2025. As part of that evidence, our client proposes to adduce survey evidence to substantiate its case on quantum...” (my underlining)

The criticisms of the letter in TSN’s letter of 29 September 2025 are in my view entirely misconceived. Even had there been any confusion on the part of the recipient, it could have been cured by responding to the letter. Indeed, the letter continued:

“Please confirm the nature of your client’s intended evidence on quantum.

Please confirm your client’s position in relation to the above matters and provide any further comments on the draft List of Expert Issues by return.” (underlining in original)

The opportunity for clarification offered was not taken. If the Defendants have suffered any prejudice, it has resulted from their own inaction.

63. To return to the value of Dr Groehn’s evidence and the use put to it by Mr Harman, the Defendants have made a variety of criticisms. I will deal with them shortly as, ultimately, it seems to me that: (i) what the Defendants are really asking me to do is undertake a “*mini-trial*” to decide whether the evidence of the Claimant’s or the Defendants’ experts is to be preferred, and this is inappropriate: and (ii), even accepting the Defendants’ criticism of the use made of Dr Groehn’s analysis by Mr Harman, Dr Groehn’s evidence is still potentially relevant to an important issue in the case.
64. The Defendants’ criticisms are perhaps best set out in Dr Williams’ 3rd expert report, dated 31 October 2025. (“*Williams 3*”) They are listed as follows in its table of contents.

“The survey cannot be used to infer historical behaviour and to estimate damages.

The survey is central to the damages analysis.

The price increases applied to the demand curve estimated by the survey are unreliable and potentially overstated.

Mr Harman’s approach to interpolation is flawed.

Limitations of the use of a conjoint methodology to understand historical behaviour.”

It can be seen that what Dr Williams takes issue with is not so much the survey itself, as to the use to which it is put by Mr Harman. As Dr Williams states: “*the survey is central to the counterfactual analysis undertaken by Mr Harman and to his estimates of damages*” (paragraph 3.1.1, Williams 3). Criticism of Mr Harman’s use of Dr Groehn’s analysis cannot, however,

in my opinion be a basis for striking out Dr Groehn's report unless it can be shown that Dr Groehn's report is irrelevant or lacks evidential value.

65. Dr Williams links Mr Harman and Dr Groehn's analyses, in particular because Dr Groehn relies on Mr Harman's estimate that there would have been a 23% increase in Gibfibre and U-mee's prices in both counterfactuals. It does seem to me, however, that the assumptions criticised by Dr Williams on which this estimate is based – that the licensing costs incurred by Gibfibre and U-mee in the counterfactual scenarios would be the same as actual licensing costs incurred by Gibtelecom, and that those licensing costs would be fully passed through to consumers – are not obviously absurd. Any attempt to estimate Gibtelecom's market share in either of the counterfactual situations must base itself on assumptions. The real issue is how robust those assumptions are, and in the absence of their being obviously unrealistic or absurd, I do not think that is something that I should determine without hearing from the experts at trial. I also think the same as regards Dr Williams' criticisms of Mr Harman's methodology, but the Defendants' attack on his evidence (at least, as set out in Ms Dudley's witness statement in support of their application) was based on his reliance on what was said to be an unreliable survey rather than deficiencies in his analysis.
66. This brings me to my second point. Even accepting all of Dr Williams' criticisms of the use made of Dr Groehn's analysis by Mr Harman, it would not be appropriate to strike out Dr Groehn's reports unless they had no independent utility. The Claimant seeks not only damages but also an injunction, and even if it is conceded that Dr Groehn's analysis of consumer preferences in 2025 cannot serve as a basis to determine consumers' historical preferences throughout the Relevant Period, it remains relevant to the issue of whether the Claimant is continuing to suffer loss because of the Defendant's unlawful conduct, which is the basis on which an injunction is sought.
67. I did not find the Defendants' argument that the Claimant had not been able to instance a single case where a court had accepted conjoint survey

evidence convincing. Although in *Hunter v Amazon.com Inc.* [2024] CAT 8, the Competition Appeal Tribunal decided a “*carriage dispute*” against the applicant Ms Hunter, whose proposed methodology for estimating damages relied on a conjoint analysis. The Tribunal’s judgement was, however, a relative one, as made clear by its statement that it would be willing to lift the stay imposed on Ms Hunter’s application were that of Mr Hammond (the other applicant) to stumble, and its assessment that “*Ms Hunter’s application is not hopeless. It is well put together, and has simply come second in a hard-fought race*” (at [38]). It does appear that conjoint analysis has been used in litigation the US courts, although it has been controversial: see Joshua Hochberg and Shireen Meer, “How Courts Split on Damages Analysis in Automobile Suits”, *Law360*, 15 August 2024. In any case, there is always a first time for everything.

68. Returning to the issue of proportionality, I bear in mind that under CPR r. 35.4(2), parties applying for permission must provide an estimate of the costs of the proposed expert evidence, so that it seems to me that the argument that because there was no disclosure by the Claimant of the costs of the survey, the court cannot balance the value of the evidence against its cost, is rather a red herring. In any case, disclosure has now been made, the survey having cost around £25,000, for a total cost, factoring in the cost of instructing Dr Groehn, of some £220,000 (paragraph 53, 4th witness statement of Samuel Marrache dated 26 October 2025). Given the issues at stake (on which, see paragraph 10 above), I do not think this a disproportionate amount for the Claimant to spend. In addition, the Claimant, acting in reliance on Restano J’s order of 9 July 2024, has already incurred those costs. So even if I am wrong and the evidence does not prove of sufficient value to justify its cost, I consider that the issue is best dealt with when costs are assessed by the court.

My Conclusions

69. Returning to Ms Dudley’s witness statement in support of the Defendants’ application, the arguments that there has been insufficient disclosure to

assess whether the survey has any value or, because there has been no disclosure of the costs of the exercise, the court cannot balance the value of the evidence against its cost, have now fallen away. Disclosure has been made, and it is accepted that the construction and conduct of the survey complied with the Whitford Guidelines.

70. In addition, I do not consider either that the survey evidence has been adduced in breach of procedure or that it should be struck out. As regards the first issue, the procedure set down by Lewison LJ in *Interflora I* has not been extended to apply beyond trade mark infringement and passing off cases. Permission to adduce Dr Groehn's evidence was granted by Restano J's order of 9 July 2024, which permitted the parties to adduce expert evidence on quantum. Nor was that evidence "sprung" on the Defendants.
71. As regards the second, the court has a duty actively to manage cases in accordance with the overriding objective, including when exercising its power to control the evidence in a case. In some cases, it might be appropriate to strike out survey evidence if it would not assist the court to answer the questions it was required to answer to decide the case, or if deficiencies in the survey's methodology meant that it could not be viewed as reliable. But this is not the situation as regards the evidence of Dr Groehn (and that of Mr Harman, relying on Dr Groehn's analysis). There has been compliance with the Whitford Guideline; the validity of the Defendants' criticisms of Dr Groehn's analysis and the use made of it by Mr Harman seem to me to be matters for trial; and Dr Groehn's evidence of current consumer preferences potentially has independent relevance even accepting the Defendants' criticisms of the use of his analysis by Mr Harman. The Defendants' application is refused.

Matthew Happold

Puisne Judge

Date: 4 December 2025