

# MACFARLANES

## LOGOS AND NO-GOS



### IS WITNESS EVIDENCE FROM SURVEY RESPONDENTS ADMISSIBLE?

**Unless your survey evidence adds real value, it won't make the cut.**

In a recent decision in the protracted adwords clash between Interflora and Marks & Spencer (M&S), the Court of Appeal held, in M&S's favour, that witness evidence obtained for Interflora from survey respondents was not admissible, and provided new guidelines on the use and reliability of survey evidence specifically in trade mark infringement proceedings.

The decision considers three major issues: (i) the approach to determining confusion; (ii) what survey evidence will provide "real use"; and (iii) the Court's discretion in permitting such evidence.

#### JUDGE VS CONSUMERS

The Court of Justice has ruled that use of a trade mark in an adword by a competitor would have an adverse effect if the "reasonably well-informed and reasonably observant internet user" (the user) was unable to determine whether the goods/services originated from the owner or a competitor. The question here was whether or not that user would (or would not) perceive that M&S and Interflora were independent. Since the judge was a potential buyer of the goods in question, he would be able to step into the shoes of such a user and make up his own mind. Consequently, it was held that survey evidence from internet users was not required to establish Interflora's case. The Court concluded that survey evidence often has no value and merely confirms a judge's conclusions.

#### "REAL USE"

The Court held that survey evidence was not inadmissible as a matter of law in infringement cases, however it identified only a very limited number of situations in which such evidence would be of "real use", namely where: (i) the evidence consists of spontaneous reactions from the relevant public to the allegedly infringing sign/advertisement; (ii) the evidence from consumers is called to amplify the results of a reliable survey; (iii) the goods/services in question are not supplied to ordinary consumers and are unlikely to be within a judge's experience; (iv) the issue is whether a registered mark has acquired distinctiveness; or (v) where the action was in passing off. Unless you can fall within one of these exceptions, your survey evidence will not provide any real use to the Court.

#### COURT'S DISCRETION

The current practice is to permit witness evidence derived from surveys, unless the judge is satisfied that it will be valueless. The Court held that the approach should be reversed and a judge should instead be satisfied that the evidence is valuable and then that its likely use justified the costs involved. Here, Interflora had not demonstrated that its evidence would be of real value. The Court held that in future it should be clear to all parties that: (i) they can conduct a true pilot survey without permission, but at their own risk as to costs; (ii) no further survey should be conducted without the court's permission; and (iii) no party can adduce evidence from respondents to any survey without the court's permission.

The decision makes it clear that survey evidence will generally only be admissible if it is valuable and the cost in adducing it can be justified. Most parties, like Interflora, will now have to abandon survey evidence and hope that the judge's evaluation of the reasonably well-informed and reasonably observant user lives up to their expectations.

#### CONTACT DETAILS

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