

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS
INTELLECTUAL PROPERTY ENTERPRISE COURT (ChD)

Rolls Building
New Fetter Lane
London

Neutral Citation Number: [2018] EWHC 2633 (IPEC)
Date: 9 October 2018

Before :

HER HONOUR JUDGE MELISSA CLARKE

BETWEEN :

Claim No: IP-2017-000049

(1) LINK UP MITAKA LIMITED trading as **Claimant**
THEBIGWORD

- and -

(1) LANGUAGE EMPIRE LIMITED **Defendants**
(2) YASAR ZAMAN

Mr Nick Zweck (instructed by **Virtuoso Legal**) for the **Claimant**
Mr Richard Carter (instructed by **JMW Solicitors**) for the **Defendant**

Hearing date: 12 June 2018
Judgment provided in draft 17 September 2018

JUDGMENT

Her Honour Judge Melissa Clarke:

INTRODUCTION

1. This is the judgment following the trial of an inquiry into damages payable to the Claimant in respect of its loss suffered as a result of the Defendants' trade mark infringement and passing off.
2. The Claimant carries on the business of providing translation and interpretation services in, inter alia, the UK and the EU under and by reference to the following trade marks:
 - i) UK trade mark no. 25708002 for 'THEBIGWORD' in classes 9, 16, 35, 40, 41 and 42;
 - ii) EU trade mark no. 010478972 for 'thebigword' in classes 9, 16, 35, 38, 40, 41 and 42;

("the Trade Marks").
3. The First Defendant also carries on the business of providing translation and interpretation services in, inter alia, the UK. The Second Defendant is the sole director and shareholder of the First Defendant.
4. These proceedings arise out of the activities of the Defendants in setting up maintaining and using two websites which the Claimant alleged in pre-action correspondence (beginning in February 2017) infringed the Trade Marks and amounted to passing off:
 - i) www.thebigwordtranslation.co.uk; and
 - ii) www.bigwordtranslation.co.uk;

(“the Websites”).

5. The domain addresses of the Websites were registered in the name of the First Defendant on 26 August 2010 (“Domains”). Up to 20 May 2014 the Domains displayed only a holding page but at some point after that, but prior to 18 December 2014, the Websites went live.
6. The Websites displayed the sign “Big Word Translation” (“the Infringing Sign”) and the following logo:



(“the Infringing Logo”).

7. They allowed for a “*Free no Obligation Quote*” to be requested by way of a web-form. They contained text which suggested that they were Websites connected with the Claimant. The text varies slightly as between the Websites but was very similar. That at www.thebigwordtranslation.co.uk was: “*Welcome to The Big Word Translation, the right place for professional translation services of the highest standard. Delivering translations in over 400 different languages and offering a 24 hour service, has made us one of the UK’s most popular providers of translation services*”. They both also contained a copyright notice “© 2014 The Big Word Translation All rights reserved”.

8. The Claimant sent pre-action correspondence alleging infringement of the Trade Marks and passing off from 24 February 2017.
9. The Defendants did not respond to that pre-action correspondence, in breach of the pre-action protocol. However the Websites were taken down shortly afterwards and The Second Defendant now accepts that they were taken down on his instruction.
10. The Claimant issued and served a Claim Form and Particulars of Claim on 10 March 2017 alleging the Defendants had, by setting up the Websites, deliberately infringed the Trade Marks and passed off the Websites as connected to the Claimant, as part of a deliberate search optimisation scheme set up by them to divert potential customers of the Claimant to the First Defendant. The Defendants did not file an Acknowledgment of Service or a Defence. The Claimant obtained judgment in default on 4 May 2017. There has been no application by the Defendants to set aside that judgment in default.
11. The judgment order of 4 May 2017 provided for an inquiry as to damages or an account of profits, at the Claimant's election. It also provided that the two Domains should be transferred to the Claimant.

POST-JUDGMENT CORRESPONDENCE BETWEEN THE PARTIES

12. The Defendants obtained legal advice from JMW Solicitors LLP who wrote a letter to the Claimant of 30 May 2017. It stated, inter alia:
 - i) Save for the two Domains which the Defendants would transfer to the Claimant in accordance with the 4 May 2017 Order, the Defendants do not hold any articles, documents or materials in relation to the Domains;

- ii) The two Domains are dormant and they have not used them: *“They were registered by an errant temporary marketing consultant and our clients have not received any enquiries from the two Domains (including by email, phone, by post, in person or any other format)”*.
13. The Claimant responded on 31 May 2017 expressing scepticism at the explanation provided and asking for: disclosure of documents and other communications to or from the *“errant marketing consultant”*; and an explanation for why the domain names were purchased as far back as 2010. The Claimant also asked for traffic statistics from the Websites.
14. On 9 June 2017 the Defendants’ solicitors responded by letter (“9.6.17 Response”). It is worth quoting from this letter extensively. They stated that their instructions were that:

“the two Domains... were registered by a temporary employee who was based in the UK for a matter of months during 2010 by the name of Mr. Rajeev Singh. Our clients did not register the Domains; Mr. Singh did on the basis of an oral agreement whereby he was going to generate web leads for our client. He registered approximately 70 domains in this regard, including the Domains. Our clients were not aware of any of the specific domain names registered by Mr. Singh.

Whilst Mr. Singh had complete autonomy regarding the registration of the domains, including the choice of the specific wording of each of the 70 domains, he used a company debit card belonging to Language Empire Limited. It was for this reason that Language Empire Limited was noted as the registrant of the Domains... all communications regarding these domains, including the Domains, would have been sent direct to [Mr Singh] using the email address he provided...

Mr. Singh had hoped to generate £4.00 per lead. However, only a small number of the 70 or so domains registered by Mr. Singh developed into

live websites... our clients' [sic] recall that Mr. Singh did not conclude this process until around 2012.

However at approximately the same time, Google Inc changed its in relation to domain name keyword searches, meaning that the Domains had no value and they were not developed further. The agreement with Mr. Singh was therefore terminated.

We are instructed that our clients did not receive any lead generations from the two Domains. As a result of this, our client has no direct statistics for leads generated to provide to your client.

Our client also does not have any documentation to provide to your client in relation to Mr. Singh as our client only holds such documentation for a period of 12 months and Mr. Singh undertook his activities during 2010.

Furthermore, in 2014, Language Empire Limited changed its email server from @language-empire.com to @empire-groupuk.com. As a result, our clients do not retain any email communications with Mr. Singh to send to you...

Any quick enquiry forms that were generated as a result of the Domains would have been sent direct to Mr. Singh. However, as stated above, the agreement with Mr. Singh was terminated and as such, he did not forward any enquiries to our clients.

As the domains were maintained by Mr. Singh, it was he who would have paid for the maintenance of the websites for the Domains. In such circumstances, we cannot see why this is so "*incredibly hard to believe*".

...In order to substantiate the events set out above, our clients have attempted to contact Mr. Singh and have asked him to provide as much information in relation to the Domains as possible. As soon as such

information is received it will be sent to you... our clients cannot guarantee that Mr. Singh will cooperate with this matter.

Since receipt of your letter our clients have contacted Mr. Singh with regards to the transfer of the Domains... Mr. Singh has confirmed that he will assist with the transfer of the Domains to your client via Nominet.”

15. The Claimant’s solicitors raised concerns about this response on 14 June 2017.

Of particular relevance is the following:

- i) They reviewed all of the 136 domain names owned by the Defendants and identified two further allegedly infringing domains: thebigwordinterpreting.co.uk and bigwordinterpreting.co.uk. They asked for those domains also to be transferred to the Claimant;
- ii) They pointed out that if Mr Singh was a temporary employee, as the letter of 9 June 2017 stated, then the First Defendant was bound by his acts and so their statement that the Defendants “*did not register the Domains*” was “*nonsensical*”;
- iii) They pointed out that the Defendants must exert some control over the Domains as the Websites were taken down after the pre-action correspondence was sent;
- iv) They raised issues with the chronology given, in particular that the Websites were launched on a date between 20 May 2014 to 18 December 2014, which does not support the position that Mr Singh was responsible for the infringing activity if the agreement with him was terminated and he ceased to act in 2012.

16. The Defendants’ solicitors responded on 22 June 2017 stating that the Defendants’ previous statement that Mr Singh was an employee was “*an error... Mr Singh was not employed by our client. Mr Singh was a freelance consultant.*”. They stated that there were no formal agreements with Mr Singh

and nothing to be disclosed. They reiterated that the Defendants had no control over the Websites or Domain Names, which were controlled by Mr Singh.

17. The Second Defendant filed an Affidavit on 31 July 2017 as required by paragraph 5 of the default judgment order. In it he said:

- i) Until receiving the pre-action correspondence, he had no knowledge of the Websites, which he conceded were live between 2014 and 2017;
- ii) The First Defendant knew of the registration of the Domains as it registered them but never had any control of the Domains (except immediately after their registration) or their content or function. (This contradicts the 9.6.17 Response which stated that the Defendants had no such knowledge);
- iii) The Second Defendant's brother, Nasir Zaman, was the person who liaised directly with Mr Singh, but had left the First Defendant's employment in or around January 2015 and the brothers no longer speak;
- iv) Mr Singh was a freelance marketing consultant, specialising in search engine optimisation, engaged by the First Defendant "*predominantly*" between 2010 and 2012, but the engagement continued until January 2015. (This contradicts the 9.6.17 Response which stated firstly that he worked 'for a matter of months' as a temporary consultant; and secondly that he finished his work and his employment was terminated in 2012). There was no written agreement;
- v) Mr Singh was engaged to create and host websites on behalf of the First Defendant to drive online traffic and to increase revenue". Mr Singh acted independently of the First Defendant and had full autonomy in devising the marketing technique whereby domains would be created using the highest ranking keyword searches by using Google keywords relating to the words 'interpreting' and 'translation'. Mr Singh was never instructed by the First Defendant to register domains using these keywords. These

websites would appear in Google search results for these words and generate leads for the First Defendant;

- vi) Mr Singh would be paid a commission by the First Defendant for each lead generated from the online enquiries received from the websites he developed;
- vii) The Defendants paid for the Domains (and other domains) and the “*initial payments*” for website development, but once registered they transferred the Domains (and other domains) to Mr Singh’s 123-reg account “*India Marketing Go*”, which gave him ownership and control of the Domains. (I note this contradicts the 9.6.17 Response which stated that Mr Singh paid for the Domains on a company credit card);
- viii) As at August 2014 there were 303 domains registered to the First Defendant. (I note this contradicts the 9.6.17 Response which stated that Mr Singh registered 70 domains);
- ix) The Websites (and other websites) were developed from 2010 until 2014 using freelancers to build the websites and write content. (I note this contradicts the 9.6.17 Response which stated that they were developed until 2012). They were ‘abandoned’ in late 2014 after Mr Singh advised the First Defendant that policy changes at Google meant that they would not be effective in yielding enquiries for new business. However the Websites remained live until they were taken down at the Defendants’ request after becoming aware of the Claimant’s claims of infringement and passing off.
- x) Although the Second Defendant (and so the First Defendant) knew the names of the domains that had been registered (in contradiction to the 9.6.17 Response which stated the Defendants were unaware of the domain names) the Defendants did not know that the domain names were infringing any intellectual property rights. They had no knowledge of the Websites and the content of the Websites including the copyright notices.

- xi) The first time the Second Defendant became aware of the infringing Domains and Websites was upon receiving the pre-action correspondence. However, he “... *did not recognise Link Up Mitaka Limited because the Claimant trades under a different name, namely TheBigWord. I mistakenly dismissed the correspondence as fraudulent or a scam*”.
 - xii) Once the Second Defendant became aware of the infringing Websites “*I contacted Rajeev Singh who confirmed that the websites were live and upon request the websites were taken down by him*” on or around March 2017.
18. Attached to this affidavit as Exhibit YZ8 (“YZ8”) was a document setting out a number of enquiries for interpretation and translation services that had been made via the Websites. The Second Defendant asserted that Mr Singh had produced this as a complete list of enquiries made via the Websites, and that none of these enquiries had been passed to the Defendants. He stated at paragraph 7 of the his first affidavit that “...*there have been no offers to supply or supplies of goods or services by [the First Defendant] in reference to the Claimant’s Trade Marks. There are no products, articles, documents or materials the sale or distribution of which would be in breach of the [judgment order of 4 May 2017], for the First and Second Defendant to deliver up pursuant to paragraph 4 of [that] Order.*”
19. On 27 September 2017 the Claimant elected for an inquiry as to damages and served its Points of Claim on 20 October 2017.

THE ISSUES

20. His Honour Judge Hacon made a directions order on 30 November 2017 which limited the issues for determination in this inquiry to the following:

- i) Whether the Defendants (or others acting as their agents) made any sales of translation and/or interpretation services as a result of enquiries made from potential customers who had visited the Websites;
- ii) If and to the extent that the Defendants (or their agents or employees) made sales of the kind described at issue 1 above but the Court finds that those sales did not deprive the Claimant of those sales, the reasonable royalty that would have been payable on those sales as between a willing licensor in the position of the Claimant and willing licensee in the position of the First Defendant (and if and to what extent a reasonable royalty would have included an amount to reflect the matters set out at paragraphs 21-22 of the Points of Claim);
- iii) Whether the Claimant is entitled to an award of damages in respect of the Defendants' unfair profits under regulation 3 of the Intellectual Property (Enforcement etc.) Regulations 2006 and articles 3(2) and 13(1) of the Enforcement Directive 2004/48 EC and if so the assessment of those damages.

THE PARTIES' POSITIONS AT TRIAL

21. The Claimant's primary position is that the Defendants converted enquiries made on the Websites by potential customers to sales, and so the court should award:
 - i) an amount for lost sales, alternatively a reasonable royalty;
 - ii) an uplift on those sales/royalty to reflect loss of repeat business from those potential customers, alternatively an additional sum under regulation 3 of the 2006 Regulations / art. 13(1) of the Enforcement Directive.
22. The Claimant's alternative position, in the event that the Court accepts the Second Defendant's evidence that the Defendants did not convert enquiries

made on the Websites by potential customers to sales, is that use of the Websites will have caused (i) damage to the goodwill in the Trade Marks; and (ii) damage to the Claimant's business by diverting potential customers away from the Claimant; which should be compensated by an award in the same amount as that submitted in relation to the reasonable royalty.

23. The Defendants' case is that:

- i) the First Defendant neither received nor acted upon any enquiries made on the Websites by potential customers, and did not convert any of them to sales so did not profit from them;
- ii) the Claimant has failed to show that it has suffered any or any substantial loss. Accordingly there should be no, or only a minimal, award of damages.

THE LAW

General principles relating to an inquiry as to damages

24. I do not understand there to be any dispute of law between the parties. I agree with Mr Zweck that a very helpful summary of the general relevant principles relating to an inquiry as to damages has been provided by His Honour Judge Hacon at para 31 of his judgment in *SDL Hair Limited v Next Row Limited* [2014] EWHC 2084 (IPEC) and I gratefully adopt it:

“[31] I derive the following principles from authorities in relation to an inquiry as to damages:

- (1) A successful claimant is entitled, by way of compensation, to that sum of money which will put him in the same position he would have been in if he had not sustained the wrong, see *Livingstone v Rawyards Coal Co.* (1880) 5 App.Cas., 25 per Lord Blackburn at 39.

(2) The claimant has the burden of proving the loss, see *General Tire and Rubber Company v Firestone Tyre and Rubber Company Limited* [1976] RPC 197, at 212.

(3) The defendant being a wrongdoer, damages should be liberally assessed but the object is to compensate the claimant, not punish the defendant, see *General Tire* at p.212.

(4) The claimant is entitled to recover loss that was (i) foreseeable, (ii) caused by the wrong and (iii) not excluded from recovery by public or social policy, see *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443, at 452.

(5) In relation to causation, it is not enough for the claimant to show that the loss would not have occurred *but for* the tort. The tort must be, as a matter of common sense, a cause of the loss. It is not necessary for the tort to be the sole or dominant cause of the loss, see *Gerber* at p.452.

(6) An inquiry will generally require the court to make an assessment of what would have happened had the tort not been committed and to compare that with what actually happened. It may also require the court to make a comparison between, on the one hand, future events that would have been expected to occur had the tort not been committed and, on the other hand, events that are expected to occur, the tort having been committed. Not much in the way of accuracy is to be expected bearing in mind all the uncertainties of quantification. See *Gerber* at first instance [1995] RPC 383, per Jacob J, at 395-396.

(7) Where the claimant has to prove a causal link between an act done by the defendant and the loss sustained by the claimant, the court must determine such causation on the balance of probabilities. If on balance the act caused the loss, the claimant is entitled to be compensated in full for the loss. It is irrelevant whether the court thinks that the balance only just tips in favour of the claimant or that the causation claimed is overwhelmingly likely, see *Allied Maples Group v Simmons & Simmons* [1995] WLR 1602, at 1609-1610.

(8) Where quantification of the claimant's loss depends on future uncertain events, such questions are decided not on the balance of probability but on the court's assessment, often expressed in percentage terms, of the loss eventuating. This may depend in part on the hypothetical acts of a third party, see *Allied Maples* at 1610.

(9) Where the claim for past loss depends on the hypothetical act of a third party, i.e. the claimant's case is that if the tort had not been committed the third party would have acted to the benefit of the claimant (or would have prevented a loss) in some way, the claimant need only show that he had a substantial chance, rather than a speculative one, of enjoying the benefit conferred by the third party. Once past this hurdle, the likelihood that the benefit or opportunity would have occurred is relevant only to the quantification of damages. See *Allied Maples* at 1611-1614.”

Reasonable royalty

25. If I am unable to establish a figure for damages from an assessment of lost sales, the Claimant asks me to award damages on the user principle, i.e. to assess the reasonable royalty which would have been payable had the Claimant and Defendants entered into a notional licence agreement as willing licensor and licensee. The principles for doing so are helpfully set out by Arnold J at para 386 of *Force India Formula One Team Limited v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch), as endorsed and expanded upon by Newey J in *32 Red plc v WHG (International Limited)* [2013] EWHC 815 (Ch). I will come back to those if I need to.

Directive 2004/48/EC on the enforcement of intellectual property rights (“The Enforcement Directive”)

26. Article 13 of the Enforcement Directive provides:

“1. Member states shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.

When the judicial authorities set the damages:

- a) They shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement;
- b) As an alternative to (a) they may in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

2. Where the infringer did not knowingly, or with reasonable grounds [to] know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established.”

27. Regulation 3 of the Intellectual Property (Enforcement etc.) Regulations 2006, which implements the Enforcement Directive pursuant to art.3(2) of the Enforcement Directive (“2006 Regulations”), provides:

“3(1) Where in an action for infringement of an intellectual property right the defendant knew, or had reasonable grounds to know, that he engaged in infringing activity, the damages awarded to the claimant shall be appropriate the actual prejudice he suffered as result of the infringement.

(2) When awarding such damages -

- a) all appropriate aspects shall be taken into account, including in particular –
 - i) the negative economic consequences, including any lost profits, which the claimant has suffered, and any unfair profits made by the defendant; and
 - ii) elements other than economic factors, including the moral prejudice caused to the claimant by the infringement; or
- b) where appropriate, they may be awarded on the basis of royalties or fees which would have been due had the defendant obtained a licence.

(3) This regulation does not affect the operation of any enactment or rule of law relating to remedies for the infringement or rule of law relating to remedies for the infringement of intellectual property rights except to the extent that it is inconsistent with the provisions of this regulation.”

28. In *Henderson v All Around the World Recordings* [2014] EWHC 3087 (IPEC), His Honour Judge Hacon considered what the term ‘unfair profits’ meant in the context of article 13(1)(a) of the Enforcement Directive:

“[80] I think art.13(1)(a) must contemplate something else, namely that wherever the court reaches the view that the claimant would not receive adequate compensation for the actual prejudice he has suffered if damages were to be assessed by reference to lost profits, moral prejudice and expenses (part of art.13(1)(a)), or royalties according to the ‘user principle’ (art.13(1)(b)), or an account of profits, there is flexibility under art.13(1)(a) to award an additional sum related to the profit the defendant has made from knowing infringement.”

29. I respectfully agree with His Honour Judge Hacon’s analysis.

WITNESSES

30. I heard only two witnesses at trial: Mr Mark Andrew Daly for the Claimant and Mr Yasar Zaman for himself and for the First Defendant. Mr Daly filed a witness statement dated 4 May 2018 upon which he was cross-examined. Mr Yasar Zaman filed two affidavits dated 31 July 2017, 21 November 2017 and three witness statements dated 6 March 2018, 26 March 2018 and 2 May 2018, upon which he was cross-examined and re-examined.
31. I have also read two witness statements of Mr Philip Partington for the Claimant and a witness statement of Mr David Bondt for the Defendant.

Mr Daly

32. I found Mr Daly to be a straightforward, professional, palpably honest witness. I have no doubt that he came to court to assist the court to the best of his abilities and recollection. He was careful only to give evidence within his own experience and knowledge, he made appropriate concessions in cross-examination, and fairly and openly accepted the limitations of the estimated values his team had produced for the enquiries shown on document YZ8. I found him to be a credible and reliable witness.

The Second Defendant

33. By contrast, the Second Defendant was an extremely poor witness. His evidence and the Defendants' case as a whole was, in my judgment, a tangled mass of contradictions, inconsistencies, unlikelihoods, implausibilities and untruths which obscured any truthful evidence he may have given such that I cannot identify it. I have already highlighted above how the Second

Defendant's first affidavit contradicted and was inconsistent with the Defendants' position as set out in the 9.6.17 Response from the Defendants' solicitor. That solicitor can only have been acting on instructions from the Second Defendant for himself and as director of the First Defendant. I will not set out all of the issues that I have with the Second Defendant as they are so many, but I highlight certain key areas of concern below.

Lack of response to pre-action correspondence

34. In relation to the failure to respond to the pre-action correspondence, the Second Defendant's assertion that "*I did not recognise Link Up Mitaka Limited because the Claimant trades under a different name, namely TheBigWord*" is fatally undermined, in my judgment, by a glance at the letter itself which refers to "*Link Up Mitaka Limited trading as thebigword*". In cross-examination he accepted he did know who the Claimant was when he received the letter.
35. His assertion that "*I mistakenly dismissed the correspondence as fraudulent or a scam*" is fatally undermined, in my judgment, by the facts that: (a) by his own first affidavit he states that the pre-action correspondence made him "*aware of the infringing Domains... and Websites*"; and (b) he did in fact, promptly, take down or arrange the taking down of the infringing Websites after receiving that letter. In addition, the letter came from a reputable firm of solicitors. I am satisfied that two minutes on the internet would have enabled him to establish that it was a firm regulated by the SRA with telephone numbers and address details as shown on the letterhead of the letter he received. In cross-examination it was put to him that the reason he didn't

respond to the pre-action correspondence was because he panicked, took the websites down and hoped that would be sufficient to make the matter go away. He denied it. I am satisfied that his two assertions I have highlighted were not truthfully made.

Inconsistencies in what the Second Defendant knew and when

36. Throughout the initial correspondence and his affidavits and witness evidence the Second Defendant asserted that he knew nothing of the Domains or the Websites, save that he fairly quickly accepted that he knew of the registration of the Domains. It would be difficult for him to deny this in circumstances where his personal credit card was used to pay for some of them. In cross-examination the Second Defendant said, again, that he knew of the strategy to set up keywords, create domains and create websites so that all enquiries from those websites would come to the Defendant, but: *“I knew the strategy and left Mr Singh and my brother to it. I accept I authorised it, but which websites were created and which domains were registered I didn’t know”*. However, in his letter to Mr Singh of 16 July 2017 (discussed below), he stated: *“You were liaising directly with my brother Nasir Zaman, until the end 2014 when he left the company. I recall that you created a number of websites during this time (2010-2014?) for the purposes of online SEO for example using the keywords such as [language] + Interpreter and [language] + Translator”*. This assertion in July 2017 that he recalled the creation of websites utilising the Interpreter and Translator keywords contradicts his oral evidence given at trial. He also accepted in cross-examination, when faced with documents evidencing the same, that the Domains were on a manual renewal and all

emails from Nominet notifying of the need for renewal were sent to him. He had arranged for the renewal payments of the Domains. Again, this contradicts his position in written evidence and correspondence that he knew nothing about the Domains once he had transferred them to Mr Singh.

37. In my assessment of the Second Defendant's credibility, I place particular importance on an extraordinary four-page letter he wrote to Mr Singh on 16 July 2017 ("the Singh Letter"). This repays close scrutiny. It is a letter which he purportedly sent to Mr Singh in order to obtain information from him about the creation and use of the Websites and Domains and the enquiries and sales which resulted from the use of the Websites and Domains. However, the Singh Letter actually sets out exactly the case that the Defendants are making to the Claimant by that date. To that extent it is, in my judgment, an entirely leading and self-serving document. In it, the Second Defendant tells Mr Singh exactly what it is that he is supposed to have done, to a high level of detail. For example, in relation to the background to the development and use of the Websites and Domains, the Second Defendant provides five paragraphs of text of which the first begins:

"I am not sure of the exact dates, I think it was in 2010 when I and my brother Nasir met with you in London, Ilford – we discussed marketing strategies, one of which were online marketing. If I remember correctly, you advised that we should create websites related to keywords interpreting and translation. To cut the long story short, sometime between 2010 and 2012 you ran some keyword searches which provided to my brother Nasir Zaman, who then registered the domains by purchasing them under Language Empire Ltd and or my name. The domains were then transferred over to your 123 reg account, which was India Marketing Go, so that you had full control of the domains."

38. It carries on. The Second Defendant covers all the relevant points – that Mr Singh was liaising with his brother; the dates his brother left the First Defendant’s employ; that Mr Singh created websites; the dates he did so; the reasons he did so; the terms of the agreement, i.e. that *“you would create the websites and host them, but only charge for any enquiries received from the websites from the search engine optimization work that you specialized in”*; that Mr Singh *“abandoned the project in 2013 or 2014”*; why he did so; that at the time the Second Defendant himself was *“extremely busy”* and *“didn’t pay any attention to what yourself or Nasir were trying to achieve in terms of SEO and website optimisation”*; etc., etc.

39. Before he gets to the questions he wishes Mr Singh to answer, The Second Defendant warns Mr Singh that:

“...the claimant is willing to instruct IT Forensics to Investigate this matter further, so I would prefer it if you can be as honest as possible. With IT forensics, they would want to see how many enquiries originating from these two websites you sent to Language Empire Ltd. I am more than happy to allow for this to take place, for the sake of transparency and to prove that Language Empire Ltd did NOT make sales or profit from the use of these 2 websites”.

40. The Second Defendant then poses questions to Mr Singh, but within the questions or commentary to the questions, tells him exactly how he wants them to answer them. For example Question 1:

“1. The claimant is asking for payment for royalties for sales which we have allegedly received by using their company name e.g. the website domains... But the truth is, you never provided us with enquiries which were received from these 2 specific domains, because the project was

abandoned and we never made any payment to you for leads/enquiries originating from these 2 websites. Can you confirm this specific point and confirm this point is true?”

Mr Singh in his answer provided some days later duly gives the confirmation sought.

41. An example of The Second Defendant leading the answer he seeks in the commentary to the question rather than the question itself is Question 4 of the Singh Letter:

“4. The claimant is asking for ALL the enquiries submitted through the enquiry forms for both these 2 website domains, I do not know where or to whom these enquiries point to. Can you provide details of ALL the enquiries received from the online web enquiry forms from these 2 websites please?

I would like you to provide ALL the enquiries, for the sake of transparency, I have nothing to lose or worry about as I've never seen any enquiries from you and you have never provided me or Language Empire Ltd with any enquiries, nor have I or Language Empire Ltd profited from sales from the use of these enquiries...”

Mr Singh provided the document YZ8, and duly confirmed that these were all of the enquiries made via the Websites.

42. Mr Zweck put it to the Second Defendant in cross-examination, and submits, that (a) the detailed knowledge he exhibited in the Singh Letter contradicts his stated position that he knew nothing of the Domains after they were transferred, and the Websites at all; (b) instead of asking Mr Singh what happened, by the Singh Letter he was telling him and providing him with the answers he wanted him to give. The Second Defendant denied both of these points, but I accept Mr Zweck's submissions. I am satisfied of the

contradiction as a matter of fact, and in my judgment the Singh Letter clearly shows the Second Defendant leading Mr Singh to the answers he wanted him to give.

43. There is no witness evidence from Mr Singh himself. The Second Defendant asserted in correspondence with the Claimant and in his third witness statement that he could only contact Mr Singh with difficulty “*because Mr Singh is based in India*”. This is the reason he gives for the delay in obtaining information from him, including the list of enquiries YZ8. However, it is clear from the documentary evidence that Mr Singh responded to emails at most within a few days (and in response to the Singh Letter, with multiple emails on 27 July 2017 providing the answers the Second Defendant sought, as well as answers to follow up questions, with a response time of as little as 35 minutes in one case). In my judgment, this evidence shows that the Second Defendant had little difficulty in contacting Mr Singh. In addition, at the beginning of that 27 July 2017 flurry of correspondence, Mr Singh also refers to speaking to the Second Defendant on the telephone: “*Further to our conversation, here are the responses to your letter*”. The Second Defendant initially denied in cross-examination that he had spoken to Mr Singh by telephone, but once shown that email said he “*might have called him to ask him to respond to the letter*”.

44. The Second Defendant says that after the correspondence between him and Mr Singh on 27 July 2017, he sent a further email on 17 October 2017 asking for further information about web leads/enquiries and traffic data, to which Mr Singh did not reply. He has not been able to contact him since. I find that odd,

given that Mr Singh was so prompt and, seemingly, helpful with his replies several weeks earlier. I have no evidence before me that the Second Defendant chased him for a response, or ever asked him to provide a witness statement. Mr Zweck put it to the Second Defendant that Mr Singh did not reply to that October 2017 email because the Second Defendant didn't want him to reply and provide any further information. The Second Defendant denied it.

45. In my judgment I cannot rely on the truth of any of the responses provided by Mr Singh to the Singh Letter and follow-up emails, because: (i) the questions asked of him in the Singh Letter were so leading; (ii) I am satisfied that they were asked by the Second Defendant in that way in order to lead Mr Singh and elicit the answers he wanted from him; (iii) Mr Singh has not filed a witness statement signed with a statement of truth providing his account in his own words.

Implausibility of the commercial arrangements with Mr Singh

46. The Defendants ask the court to accept that: (i) they paid no more than £25 in initial costs per domain (being 303 domains including the Domains) before transferring them to Mr Singh; (ii) Mr Singh spent up to 2 years developing the Websites, paying freelancers from his own pocket to carry out the development work and write the content; (iii) Mr Singh did so in anticipation of receiving £4 per enquiry forwarded to the Defendants once the Websites went live; (iv) only 38 enquiries were made to the Websites; (v) despite that, he forwarded none of the 38 enquiries made on the Websites to the Defendants; (vi) instead he sent them to a Gmail address which the Second Defendant says was set up by his estranged brother, Nasir Zaman, and to which

the Defendants have no access; (vii) no monies were paid to Mr Singh by the Defendants; and (viii) Mr Singh did not ask for any payment arising from those 38 forwarded enquiries.

47. The Second Defendant has provided the court with no plausible explanation for why Mr Singh would carry all the financial risk in this way, expending money on his own account for several years, and not even seek to retrieve the paltry reward arising from his work. That is because, in my judgment, the arrangement is so inherently implausible there is no plausible explanation for it.

Servers, archive policies, searches and disclosure

48. There are other unsatisfactory elements of the Second Defendant's evidence which I have not touched on. This section is long enough. The last one I will mention, however, relates to the Second Defendant's elaborate explanations about a server change and email domain change for the First Defendant in 2014 which together explain, he says in written evidence, why none of the Defendants' or Mr Nasir Zaman's company emails before that date have been able to be searched or disclosed. This was fatally undermined, in my judgment, by the presence of an email in the trial bundle from one of his employees utilising the 'old', apparently no-longer-existing domain in February 2016.
49. The Second Defendant's oral evidence in relation to the servers, the emails, what was archived when, and what he searched for the purposes of fulfilling his disclosure obligations (and specific disclosure orders) in these proceedings, was in my judgment both highly confused and also contradicted his already contradictory witness statements. For example, he said in cross-

examination, for the first time, that the old emails on the old server *did* move across to the new server and were searched as part of the disclosure process. He then tried to deny his previous written evidence that he couldn't search those emails because they no longer existed as the old server did not auto-archive them. In addition, an email from Mr Javid, an employee of the First Defendant, shows that he performed keyword searches for the purposes of disclosure on only three mailboxes. This was in direct contradiction of the Second Defendant's repeated assertions that the new server had been searched.

50. I am satisfied on the balance of probabilities that the Second Defendant gave untruthful evidence about the previous servers and domain used by the First Defendant, as well as the archive policies and what mailboxes and emails he had searched, in order to obfuscate what documents the Defendants could and could not find and disclose, and thereby withhold documents from the Claimant which would have cast light on the true number of enquiries the First Defendant received from the Websites and converted into sales.

Conclusion on the Second Defendant's credibility

51. For these reasons, I find that the Second Defendant's credibility is so severely undermined that I cannot rely on any of his evidence, except where it is supported by credible and reliable documentary evidence.

FINDINGS

How long were the Websites operational?

52. The Second Defendant says in his first affidavit that the websites were developed from 2010 to 2014. That accords with the information which can

be obtained from the Wayback Machine. This took a screenshot of the Domains on 20 May 2014 showing that they displayed only a holding page, and another on 18 December 2014 showing the Websites as live on the Domains.

53. The Claimant submits that it is appropriate for me to take 2012 as the operational starting date for the purposes of extrapolating lost sales, as that is the midpoint of the Second Defendant's range and his evidence in the first affidavit was that Mr Singh was predominantly utilised to carry out work in 2010 to 2012. I decline to do so, as the independent contemporaneous evidence provided by the Wayback Machine is that the Websites were not live on 20 May 2014 and there is no evidence that they were live at any time before that. I also note that the copyright notice on the Websites asserts copyright from 2014 which, although inaccurate as to the copyright owner, is in my judgment, a pointer to the date of their launch. As this period will be used to assess damages, if any are payable, I will assess the period liberally against the Defendants and take the launch date of the websites as 1 June 2014. It is not disputed that the Websites were taken down at the end of March 2017. Accordingly, I find that the Websites were operational for 34 months from 1 June 2014 to 31 March 2017.

Is YZ8 a true and complete document of all enquiries received on the Website?

54. YZ8 is said by the Defendants to have been produced by Mr Singh as a comprehensive record of all enquiries ever received on the Websites. The Claimant disputes this and Mr Zweck in closing submits that it is a constructed list of enquiries, cherry-picked from an undisclosed, full list of enquiries to

ensure that none of those chosen were clients of the First Defendant, and provided to the Claimant as a token gesture in order to hide that there were a large number of enquiries in relation to which the First Defendant made significant sales.

55. Mr Carter criticises Mr Zweck's submission, saying that it has caught the Defendants 'on the hop', as until the trial, and as he originally put to the Second Defendant in cross-examination before the short adjournment, the Claimant relied on YZ8 as representing the lost business to the Claimant arising from the Websites in 2016. What is more, Mr Zweck put it to the Second Defendant before lunch that Mr Singh had sent him the list as a mistake, and he never meant to disclose it. However, after lunch Mr Zweck put to the Second Defendant that the list was cherry-picked to show that there had been no sales arising from those enquiries. Mr Carter submits that this amounts to an accusation that the Second Defendant had conspired with Mr Singh to produce a document which amounted to a deliberate fraud on the court, or if not the Second Defendant, someone from the First Defendant - as in order to cherrypick the relevant entries, it would require some involvement from someone at the First Defendant to check the proposed list against its customer management system.

56. I am satisfied on the balance of probabilities that YZ8 does not represent a full and complete list of enquiries from the Websites for the following reasons:

- i) I cannot accept the uncorroborated evidence of the Second Defendant that it is a full list of enquiries and that Mr Singh provided it to him as a full list.

- ii) In my judgment, it is clear from looking at the document that it is constructed and not a print out. The various entries do not run parallel to each other, nor to the margins, and it looks like it is a literal, not virtual, cut and paste job. In other words, it looks as though someone has sat down with a print out, a pair of scissors and a photocopier to put this document together. It is inherently unlikely, in my view, that such person would go to the trouble of doing that if they were providing a full list of enquiries.
- iii) The document does not appear to be made of print-outs or screenshots of actual web-forms or web enquiries, as it contains no date fields, for example. It is made up of data entries which appear already to have been processed. In my judgment that, too, suggests that something is being hidden or withheld, because no such database has been disclosed.
- iv) I also bear in mind my finding that the Defendants have sought by their conduct and evidence in relation to disclosure of email and server evidence, to obfuscate and hide the true number of enquiries and sales arising from the Websites.
- v) The only dates in YZ8 are those which happen to be stated within the text-field of the actual enquiry submitted by the enquirer and copied into the data entry. Of those that mention dates, they all fit within a period of 9 months in 2016, and appear to show that the data entries are arranged chronologically. In my judgment it is inherently unlikely that all enquiries from 2014 to 2017 took place within that 9-month period in 2016. Accordingly, I am satisfied that this is more likely than not to be just a subset of a wider set of data and that more enquiries were received at other times.
- vi) Mr Carter submits that the reality is that little traffic was diverted through these Websites, and that is why so few enquiries were made. However the Defendants have disclosed no traffic data at all and so this submission is entirely unsupported. The Second Defendant's evidence is that such evidence is not available because it was attached to the account

of Mr Singh's with 123reg in India, which has been permanently closed. That strikes me as both extremely convenient and most unlikely. Why would a web marketing/search optimisation consultant holding 303 domains for one client alone close its web-hosting account so thoroughly that no evidence of it remains? In any event, I have found that I cannot rely on the Second Defendant's evidence unless it is supported by credible and reliable documentary evidence. There is none on this point.

- vii) Mr Daly's evidence, which is unchallenged, is that the Claimant's website traffic and enquiries flowing from that website traffic do not fluctuate wildly, but when the Websites were taken down, the Claimant's own web traffic increased 50% from 6,500 hits per month to 10,000 hits per month. There may be other reasons for this, but none have been suggested to me and Mr Daly, who I find truthful and honest, believes it is an indication of the level of traffic that was diverted away from the Claimant's website by the Websites. I am satisfied that this significant and provides me with the best quantitative evidence I have of the effect of the Websites on the Claimant's business. I accept Mr Zweck's submission that this fluctuation is consistent with the diversion of a significant amount of the Claimant's potential business to that of the First Defendant during the period when the Websites were online.

57. For all those reasons I am further satisfied on the balance of probabilities that:

- i) YZ8 shows only a small sample of 38 enquiries made on the Websites during a period of 9 months in 2016;
- ii) it was constructed for the purposes of defending against these proceedings with the intention of hiding the true number of enquiries made from the Websites;
- iii) it does not reflect all of the enquiries made on the Websites in that 9 month period;
- iv) the average rate and value of the enquiries across the period that the websites were live were, pro rata, no less than those contained in YZ8

for the 9 month period for 2016, and were more likely than not to be higher.

58. To the extent that I have found the 38 enquiries have been chosen from a much greater list of enquiries made during the period from 2014 – 2017, I accept Mr Zweck’s submission that it is a cherrypicked list. I am satisfied that it is open to me to infer that if whoever has constructed that document for the purposes of these proceedings has gone to the trouble and effort of cherry-picking enquiries to produce a truncated list with the purposes of:

- i) hiding the true number of enquiries and sales arising from the Websites (as I have found); and
- ii) showing, as the Defendants argue at trial, that no loss has been caused to the Claimant by the Defendants’ infringement of the Trade Marks and passing off;

that the enquiries that person chose to include on the list would generally be those of lesser quality which had not been successfully converted to clients by the First Defendant. I do draw that inference. I take it no further because the poor quality of the Second Defendant’s evidence and the lack of any evidence from Mr Singh is such that I am unable to determine whether it was Mr Singh, the Second Defendant, another employee of the First Defendant, or a combination of these persons who produced YZ8.

Did the Defendants receive enquiries from the Websites?

59. I do not accept the Second Defendant’s evidence that the enquiries were not sent to the First Defendant and I find that it is more likely than not that they were, for the following reasons:

- i) The email from Mr Singh in which he emailed the YZ8 document stated *“please see attached leads **you have received** via those websites”* (my emphasis);
 - ii) I have already found that YZ8 was constructed in order to provide a misleading picture of the number of enquiries, which were very much greater;
 - iii) I do not accept the evidence of the Second Defendant that the enquiries were sent to a Gmail address of his brother, to which the Defendants have no access, as there is no credible or reliable documentary evidence to support it and it is inherently unlikely that a corporate email address of the First Defendant would not have been used.
 - iv) It is inherently unlikely, in my view, that such enquiries would not be forwarded to the Defendants. What is the purpose of the purchase of the Domains and construction of the Websites over 2 years if not to achieve what it aimed to achieve – to capture customers who searched for and thought they had found the Claimant’s website?
 - v) I have already found that the Defendants made great efforts to avoid properly searching and fully disclosing their servers and emails in order to hide the enquiries received by the First Defendant from the Websites and the sales arising from such enquiries.
60. In making this finding I do bear in mind that Mr Daly did contact one of the enquirers from the YZ8 list, a Mr Napier of Edinburgh Citizens Advice Bureau. Mr Daly’s evidence is that Mr Napier did not want to talk him but did confirm that he had made that enquiry and he had received no response. Mr Carter submits that supports the Defendants’ case that they did not receive the enquiry. However the enquiry from Edinburgh CAB makes clear that it could not, as a charity, afford to pay full rates for services and was seeking

discounted or free services. This might provide a reason why the enquiry was not followed up.

Did the Defendants make significant sales by converting the enquiries from the Websites?

61. The Defendants say that none of the 38 enquiries from the Websites generated clients for the First Defendant because they did not receive any enquiries. I have found that they did receive those enquiries.
62. The Defendants have shown the Claimant a hard copy of the First Defendant's full customer list and the Claimant has confirmed that it is satisfied this was the full list. The enquirers on YZ8 do not overlap with the customer list, save for one (Ken Smith of Bury Council, which was a client before the relevant enquiry was made). However, I have found that YZ8 is a cherrypicked list of enquiries of lesser quality which were not successfully converted to clients, so that is not surprising.
63. I infer from the efforts that the Defendants have gone to hide the true number of enquiries and sales from the Websites by seeking to limit disclosure and constructing YZ8, that the First Defendant did make significant sales by converting enquiries. If they had not, there would be no need for the Defendants to make those efforts.
64. I have also found that average rate and value of the enquiries across the 34-month period that the Websites were live were, pro rata, no less than those contained in YZ8 for the 9 month period for 2016.

65. Mr Daly's evidence is that the Claimant's conversion rate of enquiries to sales is about 75%. I accept that evidence, and Mr Zweck's submission that in the absence of any evidence to the contrary, it is fair to assume that is also the First Defendant's conversion rate arising out of enquiries from the Websites.
66. Taking all those together, I am satisfied on the balance of probabilities that the Defendants did convert enquiries from the Websites into significant sales.

DETERMINATION OF ISSUES

Issue (i) - Did the Defendants (or others acting as their agents) make any sales of translation and/or interpretation services as a result of enquiries made from potential customers who had visited the Websites?

67. Yes, as I have found.

*Issue (ii) – (a) Was the Claimant deprived of the sales identified at Issue (i) above?
(b) If not, what is the reasonable royalty that would have been payable on those sales as between a willing licensor in the position of the Claimant and willing licensee in the position of the First Defendant (and if and to what extent a reasonable royalty would have included an amount to reflect the matters set out at paragraphs 21-22 of the Points of Claim)?*

68. Yes. The Claimant submits that because the Websites have been specifically designed to capture potential customers who have searched specifically for the Claimant, and to convince them that they were at the Claimant's websites once they arrive at the Websites (for example by the text referring to the Claimant's market position and the copyright notice), I can properly draw an inference

that each and every lost sale was a sale that the Claimant would have made. I agree, and do draw that inference.

69. What is the quantum of the lost sales? The Claimant is entitled to the sum of money which will put him in the same position he would have been in if he had not sustained the wrong. Following *Gerber*, the proper approach of the court is to assess what would have happened had the tort not been committed and to compare that with what actually happened.
70. It is clear from Mr Daly's evidence of the 50% increase in traffic to the Claimant's website after the Websites were taken down, that the Websites were diverting significant numbers of potential customers away from the Claimant's website. Even if half of that traffic increase is attributable to another unknown cause, that is still a highly significant increase in traffic. I remind myself that the potential customers who arrived at the Websites did so by carrying out a specific search for the Claimant by name, or by searching for the sorts of specialist translation and interpreting services provided by the Claimant. Accordingly they were likely already to be interested in the services that the Claimant offers and it is more likely than not, in my judgment, that a significant proportion of that traffic would have made an enquiry on the website, of which some 75% would have converted to sales.
71. The challenge facing me, however, is how to approach the assessment of quantum of lost sales arising from the 34 month operation of the Websites, when the only starting point is a limited selection of enquiries from 9 months of that period, specifically cherrypicked to be low quality enquiries that did not convert to sales.

72. In my judgment the answer is clearly not, as Mr Carter submits, to go through each of the 38 entries on YZ8, attack most of them on the basis that they were never likely to convert to sales, attack others on the basis that they cannot accurately be valued, and conclude therefore that the damage is nil.
73. However, nor can I estimate the likely rate and value of enquiries which might have arisen from the levels of traffic that Mr Daly's evidence suggests might have been diverted to the Websites (3,500 hits per month), and then apply a 75% conversion rate to that. I would merely be speculating.
74. Accordingly I accept Mr Zweck's submission that I must do the best I can and use as my starting point the flawed, cherry-picked and carefully constructed document YZ8, assessing it in light of the evidence that the Claimant has put before me of the estimated value of those enquiries. Mr Daly in cross-examination candidly accepted that these estimated values were imperfect because the information about the extent and scope of work contained in each was imperfect. His evidence was that the Claimant did the best it could to provide a fair estimate of the likely value of the enquiry on the information available to it, and in doing so utilised the Claimant's wide experience of providing estimates and quotes for work based on web enquiries. Having heard his evidence in cross-examination, I am satisfied that it did. The Claimant's estimates of value of the enquiries on YZ8 are £53,000 for translation services and £10,000 for interpreting services, being £63,000 in total.
75. The Claimant has taken the Claimant's 2016 profit rates of 46.6% for translation services and 34.5% for interpreting services and applied them to the Claimant's estimates of value of the enquiries on YZ8, leading to lost profit

figures of £24,750 for translation services and £10,000 for interpreting services being £28,200 in total.

76. The Claimant contends for this figure for the whole of 2016, and asks that the same lost profit figure be attributed for the other years for which it contends the Websites were operational. In my judgment, however, it is more appropriate to attribute this figure to 9 months in 2016, given my finding that the enquiries contained in YZ8 are a subset of the enquiries in that 9-month period. If I were to attribute it to the whole of 2016 I would, in my judgment, be undercompensating the Claimant. Accordingly I divide that lost profits figure by 9 (months) and multiply by 34 (months) to extrapolate the lost sales across the whole period that I have found the Websites to be operational. That gives me a figure of £106,533.

77. Finally, the Claimant seeks a 33% uplift to this figure, in order to account for

- i) the likelihood of substantial value not being accounted for in YZ8 for the limited period that I have assessed it relates to;
- ii) to account for Mr Daly's evidence that he would expect repeat work from a customer once a relationship is established, so the Claimant's damages for lost sales should be uplifted to reflect the loss of future work from lost new customers.

78. In relation to the point about future work, Mr Daly in oral and written evidence gave examples of initially quite small enquiries which now deliver substantial business to the Claimant. For example, an online shopping provider called Wish contacted the Claimant via its website in May 2017 and the Claimant has since provided it with services worth over £1,000,000. I accept that the sales

lost to the Claimant by the Defendants' wrongdoing include the loss of future repeat business from new customers.

79. In terms of the quantum of uplift sought, Mr Zweck submits that he has arrived at a figure of 33%, as that recognises that the number and quality of the enquiries hidden by the Defendants must be significant for them to go to the lengths they have gone to hide them, and provides an acknowledgment of the loss of repeat sales, but is not so high that the court falls into the danger of making a punitive award.
80. Alternatively, if I do not think it is appropriate to uplift the damages for lost sales in this way, Mr Zweck submits that I should make an award equivalent to the 33% uplift he seeks, as an additional sum under regulation 3 of the 2006 Regulations / art. 13(1) of the Enforcement Directive.
81. As I have said, YZ8 can only be a starting point. It is, in my judgment, a deeply flawed starting point because I have found: it contains only a limited subset of enquiries from a 9 month period in 2016; the enquiries it does contain are cherry-picked to be low quality enquiries which were not generally converted to customers; and so it almost certainly represents a significant underestimate of the number, value and quality of the enquiries made from the Websites during that 9 month period. That underestimate is then extrapolated across the whole period that the Websites were operational. In relation to the quality of the enquiries, I consider that encompasses issues of the likelihood of conversion but also the likelihood of repeat work arising from that enquiry. Taking all of this into account, I am satisfied on the balance of probabilities that the exercise I have carried out significantly undervalues the lost sales

arising from the Defendants' wrongdoing such that a significant uplift should be applied.

82. I do not think that significant undervalue can properly be compensated by an uplift of less than 33%. Perhaps it should be higher, but I appreciate the difficulties of assessing the appropriate figure given that the need to assess it arises from the fact that I do not have sufficient evidence available to me to accurately assess the correct figure in the first place, and I heed Mr Zweck's warning of the risk of over-estimating the uplift and thereby moving from compensating the Claimant to punishing the Defendants, which is not the aim of the exercise.

83. For those reasons I am content that the correct approach is to uplift the damages award by the 33% the Claimant seeks. That brings the award of damages from £106,533 to £142,044.

Issue (iii) – (a) Is the Claimant is entitled to an award of damages in respect of the Defendants' unfair profits under regulation 3 of the Intellectual Property (Enforcement etc.) Regulations 2006 and articles 3(2) and 13(1) of the Enforcement Directive 2004/48 EC? (b) If so, what is the Court's assessment of those damages?

84. Mr Zweck confirmed in closing that if I was to award the 33% uplift sought to the damages for lost sales, the Claimant did not pursue this additional award of damages. Accordingly I will not go on to consider it.

SUMMARY

85. I assess the damages payable by the Defendants to the Claimant in the sum of £142,044.