

Enterprise v Europcar - High Court Rules in Favour of Enterprise in the Battle of the Logos

Background

Enterprise and Europcar are among the five largest car and vehicle rental companies in the UK. By 2012, Enterprise had a 30.1% market share in the UK, and Europcar 26%. Since 1969, Enterprise has used a logo consisting of a lowercase letter 'e' on a green background. The logo was first used in the UK in 1994 and, although the appearance of the logo changed slightly in 2006, it has been used widely by Enterprise both on its own and in a banner format as part of the name "enterprise". The Enterprise "e" logo is the subject of various UK and European Community trade marks, some in black and white and others green and white. The current logo is shown below.



In 2012, Europcar began using a logo consisting of a lowercase letter "e" on a green background as shown below.



The Europcar 'e' is used on its own, as well as in combination with the (descriptive) names of secondary brands such as "Chauffeur", or in combination with the name Europcar and often the strapline "moving your way".

Enterprise issued proceedings against Europcar for trade mark infringement and passing off. The trade mark infringement claim was based on three UK trade mark registrations and seven CTM registrations. However, as three of its CTMs were the subject of cancellation proceedings before OHIM, Enterprise focussed its case on its CTM Registration No. 9374497 for its above 'e' logo in black and white, covering "vehicle rental and leasing services".

Survey Evidence

Prior to the High Court hearing, Enterprise applied for leave to adduce three existing surveys in evidence to support its claims of enhanced distinctiveness, reputation and goodwill, and for permission to carry out a further survey and adduce it in evidence. Applying the guidance given by the Court of Appeal in *Interflora (CA I)* and *Interflora (CA II)*, Morgan J concluded at an interim hearing that the surveys would be of real value at trial,

and that the cost of the surveys was justified by the likely value of the evidence, and granted Enterprise permission to adduce its existing surveys and to carry out and adduce the results of the fourth survey.

Despite Morgan J's conclusions, Arnold J made clear in his decision that he questioned their value, stating that "the result of the procedure prescribed in *Interflora (CA I)* and *Interflora (CA II)* has been to put the parties in the present case to the cost (amounting to some £215,000) of a two-day hearing in advance of trial which has not saved any costs at trial and to require the court to consider Europcar's criticisms of the surveys twice". He later went on to state that the survey evidence was merely "confirmatory of the conclusion which I would in any event be minded to reach in light of all the other evidence in the case, namely that the current Enterprise 'e' logo ... has an enhanced distinctive character as a result of the use which has been made of it in relation to vehicle rental services".

Likelihood of Confusion

The Average Consumer

In line with well-established practice, when determining whether there was a likelihood of confusion between Enterprise's 'e' and Europcar's 'e', Arnold J had to consider the perspective of the "average consumer" in the UK. The issue in this case was that a significant number of consumers of vehicle rental services are resident abroad. The question therefore arose as to whether the relevant public of whom the average consumer is representative can include residents of a foreign country. Arnold J considered that, as the service itself is physically provided in the UK, and given that the vehicle rental market has a strong transnational character, it would be wrong to exclude consumers who are resident abroad from the relevant public in the UK. He did, however, offer a word of caution, stating that it would inevitably be harder for the Court to put itself in the position of such consumers when making its assessment.

Black and White Registrations

Arnold J went on to consider the ruling of the Court of Justice of the European Union (CJEU) in *Specsavers v. Asda* in which it was held that, where a trade mark is not registered in colour, but the proprietor has used it extensively in a particular colour or combination of colours with the result that it has become associated in the mind of the public with that colour or combination of colours, the colour or colours which a third party uses in the allegedly infringing sign are relevant to the global assessment of the likelihood of confusion. It is also relevant to the assessment of the likelihood of confusion that the third party making use of the allegedly infringing sign is itself associated in the mind of the public with the colour or combination of colours

which it uses. Arnold J concluded that both Enterprise and Europcar had made extensive use of the colour green.

Similarity of the Marks

Arnold J held that, although the marks both consisted of a lowercase 'e' on a green background and there was some similarity between them, the similarity was not substantial, such that anyone who was able to compare the logos would not mistake them. That said, he considered that a consumer with only an imperfect recollection of the Enterprise logo who then came across the Europcar logo could mistake the latter for the former.

Relevance of Context and Evidence of Actual Confusion

Europcar argued that the context of its use of its 'e' logo negated any likelihood of confusion. On this point, Arnold J pointed out that, although Europcar's 'e' was sometimes used in conjunction with additional matter which might reduce the likelihood of confusion, it was also used on its own and, in any event, the 'e' logo retained an independent distinctive role when combined with the other elements of Europcar's branding.

Unfortunately for Europcar, its own evidence showed that Europcar customers had mistakenly got on Enterprise shuttle buses at Heathrow airport, rather than Europcar shuttle buses, on at least 529 occasions, and the evidence suggested that this figure significantly understated the actual number of Europcar customers who had made this mistake. There was also some evidence of customers with Enterprise reservations mistakenly approaching Europcar desks/branches to obtain their cars. Although most of the evidence pointed to "wrong way round" confusion (i.e. consumers mistaking Enterprise's services for those of Europcar) Arnold J considered that this was still capable of showing the confusing similarity between the respective logos, and concluded that the evidence established confusion as to trade origin. Furthermore, the confusion was caused mainly, if not exclusively by Europcar's use of its 'e' logo in combination with the other elements of its branding, as opposed to its use of the 'e' logo on its own.

Conclusion

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Arnold J held that Europcar had infringed Enterprise's 'e' logo trade mark under Article 9(1)(b), on the basis that there was a likelihood of confusion on the part of the public. Despite concluding that there was a relatively low degree of similarity between the marks, the enhanced distinctive character enjoyed by Enterprise's 'e' logo was a factor which supported the existence of a likelihood of confusion.

Arnold J stated that, even in the absence of the evidence of actual confusion, he would probably have concluded that Europcar's use of its 'e' logo on its own gave rise to a likelihood of confusion, though he would have hesitated as to whether to reach the same conclusion in relation to Europcar's use of its 'e' logo in combination with the other elements of Europcar's branding.

However, given the evidence of actual confusion, Arnold J concluded that there was a likelihood of confusion on the part of the relevant consumer in relation to all of the categories of use of Europcar's 'e' logo. For essentially the same reasons, he also concluded that Europcar's actions constituted passing off.

Arnold J did not find infringement under Article 9(1)(c) however. Although he considered Enterprise's use of its 'e' logo to be sufficient to have acquired a reputation in the EU, and the low level of similarity between the marks to be sufficient for consumers to make a link between the marks, he was not persuaded that Europcar's use of its 'e' logo would take unfair advantage of, or be detrimental to, the distinctive character of Enterprise's 'e' logo.

The case serves as a caution to brand owners to consider carefully whether a proposed new trade mark might infringe that of another entity, particularly where that other entity is a direct competitor, and reinforces the importance and value of having full availability searches conducted prior to adopting a new brand. It also highlights the persuasive value of evidence of actual confusion when pursuing an infringement action, even if the confusion is the "wrong way round" and, despite Arnold J's scepticism, provides some indication that survey evidence may, in appropriate circumstances, play an important role in trade mark infringement claims.

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