Neutral Citation [2015] IEHC 495

THE HIGH COURT

COMMERCIAL

[2013 No. 13177 P]

BETWEEN

ALDI STORES (IRELAND) LIMITED AND ALDI GMBH & CO KG

PLAINTIFFS

AND

DUNNES STORES

DEFENDANT

JUDGMENT OF MR JUSTICE CREGAN DELIVERED ON THE 9TH DAY OF JUNE, 2015

PART 1 - THE FACTS

Introduction

1. It is often said that one cannot compare apples and oranges. This is because they are regarded as entirely different "things" and therefore, as a matter of logic, any comparison between them is meaningless. However, of course, that is only half the truth. At a higher level of generality, one can indeed compare apples and oranges. They are both fruit and they are both edible foodstuffs. Yet what they have in common seems to miss the essential point. It is how they are different that makes it difficult to compare them. However although it is said that one cannot compare apples and oranges, one can compare apples and apples. Although both products might ostensibly be the same, there may nevertheless be significant differences between them. I have emphasised this point because the issue which is at the heart of this case is how does one properly compare certain products which are sold in supermarkets.

2. This definition and comparison of "things" by what they have in common but also by what differentiates them is captured by the maxim – "*per genus et differentiam*" (by family/ type and by differences). In other words, the proper approach when trying to compare products is not only to assess what they have in common but also to assess what their differences are. If the products are identical, or almost identical, they are of course comparable. However if the products, although ostensibly similar, have markedly different characteristics then they are not really comparable. To use an example given during the trial, chocolate biscuits and ordinary biscuits are both biscuits. To that extent they are comparable. But a chocolate biscuit is clearly different to an ordinary biscuit. There is a clear qualitative difference between the products. To that extent, they are not comparable. These differences might be significant enough to persuade a consumer to choose biscuit A over biscuit B.

3. The question then is; how does one assess this difference in quality or nature of a product. The question arises in this case because under EU and National law, comparative advertising (whereby one trader compares his products with those of another trader) is permitted but only if certain conditions are fulfilled. One of these conditions is, for example, that the comparative advertisement must objectively compare the material, relevant, verifiable and representative features of these goods. This requirement encapsulates, in a legal formula, the maxim "*per genus et per differentiam*" because it requires the two products to be compared with reference to all their material features, all their relevant features and all their representative and verifiable features. Thus, for example, two goods might both be biscuits, yet within the category of biscuits they have material and relevant differences which means they are not properly comparable.

4. This issue of how to properly compare products is not mere idle philosophical speculation. In fact, the proper approach as to how one compares products is at the heart of the different methodological approaches adopted by the expert witnesses on behalf of the plaintiffs and the defendant. The key battleground in this case was whether a proper comparison had been made by Dunnes Stores in respect of fifteen specific products where it had compared its products with those of Aldi. The question which then arose was; how does one properly compare such products. The plaintiffs' experts sought to consider all the attributes of both products and to consider not only what they had in common but also any essential differences between them. By applying this approach the plaintiffs' experts assessed whether the products were in fact comparable. The plaintiffs' experts, in my view, adopted the correct approach as a matter of logic and as a matter of law. The defendant's experts in contrast, chose to emphasise what the products had in common and thus to conclude that they were comparable. However their analysis, in my view, failed entirely to consider how they differed. I shall consider these approaches later in my judgment. Before I do however, it is necessary to set out the background and legal context to these proceedings.

The parties

5. The first plaintiff carries on business as a food discount chain in Ireland. The second plaintiff is a company incorporated in the Federal Republic of Germany and is the ultimate parent of the first plaintiff.

6. The defendant carries on business of operating a chain of supermarkets in Ireland.

The issues

7. The plaintiffs' essential claim in these proceedings is that the defendant has engaged in unlawful comparative advertising in its stores. The plaintiffs say that the defendant's comparative advertising, which refers to Aldi products, does not comply with the EU Directive on Misleading and Comparative Advertising (Directive 114/ 2006/ EC), the European Communities (Misleading and Comparative Advertising) Regulations 2007 ("the 2007 Regulations") and the Consumer Protection Act 2007 ("The 2007 Act"). The plaintiffs say that the defendant's comparative advertisements are unlawful and are a breach of the 2007 Regulations and the 2007 Act.

8. The plaintiffs also allege that because the defendant is using the plaintiffs' trademarks in a manner which breaches the 2007 Regulations and the 2007 Act, the defendant is therefore infringing the plaintiffs' trademarks.

9. As a result, the plaintiffs seek an injunction to restrain the defendant from infringing the plaintiffs' trademarks, and damages.

The nature of the plaintiffs' complaints
10. The plaintiffs complain that the defendant has engaged in unlawful comparative advertising in respect of three particular forms of comparative advertising:

(1.) Comparative advertising in respect of fifteen products on shelf- edge labels
The first issue about which the plaintiffs complain is the defendant's use of an item called a "shelf- edge label". These shelf- edge labels were displayed in all the defendant's supermarkets on the relevant shelf at which the defendant's products were sold. These shelf- edge labels, according to the plaintiffs, compared the defendant's products with those of the plaintiffs in circumstances where the shelf- edge labels incorrectly stated the price/rate/volume of the plaintiffs' products, or compared the defendant's products with the plaintiffs' products when the two products were not properly comparable or failed to properly compare the two products. The plaintiffs have set out in Appendix 4 to the Statement of Claim, a list of 21 products in which they say the defendant made unlawful comparisons between the defendant's products and the plaintiffs' products. Of these 21 products, some 15 products are still being pursued in these proceedings as examples of unlawful comparative advertising.

(2.) Banners
The second complaint is that the defendant used what are called "banners" which were displayed in the defendant's supermarkets. These contained the plaintiffs' trademarks and also contained the words "Lower price guarantee" and "Guaranteed lower prices on all your family essentials every week" and the words "Aldi match". The plaintiffs say that the banners did not comply with the 2007 Regulations or the 2007 Act as they did not objectively compare one or more verifiable and representative features of the defendant's products with those of the plaintiffs. Moreover, the plaintiffs say that the banners conveyed the impression that the "family essentials" available in the defendant's supermarkets were cheaper than those in the plaintiffs', when the defendant had no basis for such a claim. (The plaintiffs also complained about a variant of the banners called "Toblerones" which are one panel of a banner in a free standing display on the ground of a store).

(3.) Other shelf- edge labels
The third category of comparative advertising about which the plaintiffs complain are also shelf- edge labels displayed in the defendant's shops which compared its products with those of the plaintiffs and which contain the words "lower price guarantee" and "always better value". The plaintiffs' essential allegation here is that, whereas the shelf labels set out at (1) above referred to the plaintiffs' products as an "Aldi match" (i.e. a representation that the defendant matched the Aldi product on price), the issue in this third category is that, according to the plaintiffs, the defendant's use of the words "lower price guarantee" and "always better value" essentially mean that the defendant is making a representation that the defendant's products are cheaper than those of the plaintiffs' when, the plaintiffs say, that is not the case.

The Trademarks
11. Mr. Martin David gave evidence on behalf of the plaintiffs. He is the managing director of the second named plaintiff. He confirmed that the second named plaintiff was the registered proprietor of the Irish trade marks which were set out in the Statement of Claim (i.e. Trade marks (a) 175361, (b) 141943, (c) 217357).

12. In addition, he confirmed that the second plaintiff was the registered proprietor of certain European Community trademarks which are set out at para. 5 of the Statement of Claim. These are: (d) 2071728, (e) 3360914.

13. In addition, he confirmed that he signed the licence agreement between the second named plaintiff and the first named plaintiff, dated 2nd July, 2008 and that he was fully authorised to sign this agreement. This license agreement grants to the licensee a non exclusive licence to use the trade marks for the manufacture, promotion, sale and distribution of the goods and services within the relevant territory during the term of this agreement.

14. It is clear therefore that the plaintiffs are the registered proprietors of the relevant trade marks in these proceedings.

Summary of evidence for Aldi
15. Mr. Niall O'Connor, Managing Director of Aldi Stores gave evidence on behalf of the plaintiffs. He explained that Aldi is a limited line discounter which means that Aldi only stock and sell a range of approximately 1,350 products as opposed to a larger grocery store such as Dunnes Stores which would sell approximately 18,000 products in each store. He stated that the products which they sell are those which are required on an everyday basis for a family shop. He also gave evidence that Aldi benchmark their products to their branded counterparts in the market and sell those under an "own label" which is registered to Aldi. He also indicated that Aldi does very little comparative advertising and such as it does do is against the branded equivalent of Aldi products. He also gave evidence that it was normal practice for members of the plaintiffs' buying team to visit stores of its competitors on a weekly basis to keep an eye on market developments - including developments in terms of price and product range - in order to keep properly informed about what its competitors are doing. He also said that Aldi purchases the goods of its competitors on a regular basis and that many of these products are then sampled and compared with Aldi products. Mr. O'Connor gave evidence that on or about 20th June, 2013, he observed an in-store comparative advertising campaign in the defendant's stores particularly in the Newbridge store. He observed that Dunnes Stores had undertaken what appeared to be a significant campaign of shelf- edge label comparison which included a reference to a lower price guarantee. Subsequently, two of his colleagues (Ms. Eva Conlon and Ms. Teresa Stobie) visited stores in order to photograph examples of in - store comparative advertising undertaken by Dunnes Stores. The witness statements of Ms. Conlon and Ms. Stobie have been admitted into evidence. Ms. Conlon and Ms. Stobie visited the Newbridge store and took various photographs of the shelf- edge labels. These include shelf- edge labels in relation to tomato ketchup, sunflower spread, and various other products the subject matter of the current dispute. Mr. O'Connor gave evidence that the comparative advertisements on the shelf- edge labels comparing the defendant's products to those of the plaintiffs' were inaccurate in a number of different respects, depending on the products. These inaccuracies included:

1. Comparing products which were not of the same quality and therefore giving an inaccurate comparison.

2. Comparing products which were of different weights and therefore making inaccurate calculations which failed to show a proper comparison on a pro-rata basis for customers.

3. Giving an inaccurate price of the plaintiffs' products at the time of the comparison.

16. Mr. O'Connor gave evidence that his colleagues and assistants gathered the information, as best they could, on the shelf- edge labels which existed in the Newbridge store and brought the information back, where it was then passed to the buying directors responsible for those products. The buying directors then went through a process of examining the Dunnes Stores product with the Aldi product and assessing whether the products were comparable or not. Mr. O'Connor stated that the relevant Dunnes Stores products would have been constantly available in the plaintiffs' storerooms.

17. Subsequently Mr. O'Connor sought to understand whether this campaign was being executed at a local level or at a national level. Thus, he instructed the buying team within the plaintiffs' business to visit a large number of the defendant's stores nationwide and to take photographs of the comparative advertising undertaken by the defendant. As a result, a number of the plaintiffs' employees visited Dunnes Stores supermarkets throughout the country. Many of these furnished witness statements all of which were admitted into evidence.

18. These visits showed that the defendant was engaged in a nationwide campaign of comparative advertising which contained a significant number of shelf- edge labels which sought to compare the plaintiffs' products with those of the defendant.

19. Subsequently on 26th July, 2013 the plaintiffs' solicitors wrote to Dunnes Stores setting out the plaintiffs' complaints and claiming that the shelf- edge labels were misleading because they suggested that the Dunnes Stores products being compared with those of Aldi, were cheaper than the plaintiffs' products when that was not the case. The letter of July, 2013 set out complaints in respect of 27 specific products. No response was received to that letter. A reminder letter was sent about a month later but again no response was received to that letter.

20. Mr. O'Connor gave evidence that on 10th October, 2013 he attended at the Dunnes Stores supermarket in Charleville where he saw a banner with the plaintiffs' trademarks and containing the words "Lower Price Guarantee" and "Guaranteed Lower Prices on all your family essentials every week." Aldi was opening a new store in Charleville and, as part of that process, Mr O' Connor visited the competitors' grocery stores in the town to understand the competitors' response to Aldi's arrival. Mr. O'Connor said when he saw this banner (or toblerone) that he was "quite shocked" because he believed "it to be an escalation of a campaign that we had already complained of". In fact, he said that he became very concerned when he looked at the toblerone/banner because his understanding from this toblerone panel was that Dunnes Stores had developed a specific range of products which were matching those of Aldi and it was then offering that range at a lower price than Aldi. Mr. O'Connor indicated that that would have been a major concern for Aldi because the limited range of essential family products is effectively what the Aldi business model is about and for one of its competitors to have launched a new range of products or to have moved their prices to compete with the plaintiffs' range of products was a significant concern. The second main concern he had was the Dunnes Stores claim that Dunnes Stores were actually cheaper because he said that "strategically that would be a concern for us as a business given our positioning in the market."

21. Mr. O'Connor gave evidence that what he understood by the term "family essentials" was that it was "the weekly shop" which every family undertakes, which varies depending on the family, but covers all the essentials that one would need to live on from one week to the next. However he did not believe the term "family essentials" to be referable to a certain set of products because there was no qualification to it i.e. it meant whatever families would buy on a weekly basis (e.g. meat, vegetables, school lunches, dog food, etc.) It was, in his view, a variable set of products.

22. Mr. O'Connor also gave evidence - in response to the defendant's suggestion that the banner was only one element of a joint advertising campaign (with the shelf- edge labels in the shop being another) - that he did not see how this could be so because the banners were not displayed next to any other labels in the store, let alone shelf- edge labels. Indeed his evidence was that the banner/toblerones were quite some distance from the other labels in the store.

23. The other problem he had with the toblerones and banners was that there was no specific comparison between a specific Aldi product and a specific Dunnes Stores product which could be validly and objectively compared or verified.

24. Mr. O'Connor's evidence also was that the phrase "Images for illustration purposes only", at the bottom of the banner, meant a representative segment of the entire Aldi product range.

25. Mr. O'Connor's understanding of the words "Aldi match" was that one of Aldi's competitors, (in this case Dunnes Stores) had launched a range of products "which would have been very carefully selected and matched, quality for quality, size for size in direct competition with Aldi". He stated that he took this as a "very targeted strategic challenge to Aldi where a range of products had been produced in order to compete with us on a like for like basis. That in itself was fine and it wasn't unusual as I said at the time. What worried me was the claim that it was lower priced and that was something that was going to be guaranteed", (because the banners, toblerones and shelf- edge labels all contained the words "lower price guaranteed".)

26. The defendant's evidence, (through Mr. Wilson), was that the title of the campaign was "Lower Price Guarantee" and that the use of those words on the promotional materials (including the banners, the toblerones and the shelf- edge labels) was intended to convey, in respect of Dunnes Stores own brand products, that the prices of these products were now lower than they had previously been and also lower than the branded alternatives available in the store.

27. However Mr. O'Connor gave evidence that that would not be his interpretation of the wording in the banners, toblerones and shelf- edge labels. His evidence was that when a retailer wished to highlight a price reduction in its own products, they carried out what was called a "was/now approach". In other words, the retailer would have a sign saying "product was €1, now 90 cent".

28. Mr. O'Connor also gave evidence that the Bord Bia logo which was on some of the plaintiffs' products, but not on the defendant's products (relevant to this case) had "significant resonance in the Irish market" and that it would have "much more resonance than something like BRC grade one". He also stated that Bord Bia go to great lengths in terms of their logo and what it signifies. Moreover he gave evidence that Bord Bia in its 2012 Annual Report stated that they had undertaken research which had demonstrated that over 90% of Irish consumers recognise the Bord Bia logo and that over 70% of consumers are influenced in making a purchasing decision by it. He said that it was on that basis that the plaintiffs made their assessment to challenge certain Dunnes Stores products for lack of comparability i.e. because in certain cases the Aldi products contained a Bord Bia mark whereas the Dunnes product did not.

29. Evidence was given that the Dunnes Stores campaign ran for June, July and August, 2013 and that in or about August 2013 it was discontinued because Dunnes Stores wished to commence a new campaign called the "Back to School Campaign". However the plaintiffs' evidence was that, despite this, the Dunnes Stores banners, toblerones and shelf- edge labels still appeared in numerous Dunnes Stores supermarkets throughout the country after August (including September and October).

Admitted evidence
30. Numerous witness statements were filed in court on behalf of the plaintiffs. Many of these witness statements were admitted into evidence by the defendant. In summary, the evidence given by all these witnesses is that on various dates, at various times, in various locations throughout the country, the plaintiffs' employees visited the defendant's supermarkets and saw examples of either banners, or shelf- edge labels which contained material about which the plaintiffs complain. Thus the Court had before it a considerable body of evidence which shows that throughout the country and in various stores the defendant made widespread use of banners and shelf- edge labels to compare its products with those of the plaintiffs'.

31. It is unnecessary for the purposes of my judgment to set out all this evidence in detail. It suffices to say that there is evidence before the Court that the defendant used banners and shelf- edge labels as point of sale material in which it compared the defendant's products to those of the plaintiffs.

32. The issue which arises in these proceedings is whether these comparisons were lawful, as the defendant says, or, whether they were unlawful.

Summary of Dunnes Stores Evidence
33. James Wilson, Director of Food in Dunnes Stores, gave evidence on behalf of Dunnes Stores. He described the Dunnes Stores campaign. His evidence was that the campaign at issue in these proceedings – which he called the "Lower Price Guarantee" campaign - emerged from an earlier "Price Drop" campaign that was devised in around May, 2013. As part of its "Price Drop" campaign Dunnes Stores dropped the prices of 125 of its products to match those of Aldi and Lidl. The products that formed part of this "Price Drop" campaign were selected on the basis of regular price surveys carried out by Dunnes Stores in respect of its competitors' prices. Dunnes Stores carries out such price checks against its competitors on a regular basis in respect of hundreds of products. These price checks are undertaken by Dunnes Stores buyers who visit competitors' stores in order to check their prices. On the basis of these price checks, the senior buyers in each of Dunnes Stores product departments identified which products from their particular department were to form part of the price drop campaign. On 23rd May, 2013, Mr Wilson issued a memorandum to all Dunnes Stores supermarkets in Ireland instructing them, that effective from 24th May 2013, the prices of the 125 products (on the list attached to the memorandum) were to be dropped to the prices specified therein. His evidence was that following this "Price Drop" campaign the "Lower Price Guarantee" campaign was then devised. It was, he said, intended as a means by which Dunnes Stores could communicate all the different types of value that were now available to its own customers in store, both as a result of the "Price Drop" campaign and the "Lower Price Guarantee" campaign, which matched the prices of Dunnes products with comparable products in Aldi/ Lidl and/or Tesco/ SuperValu.

34. The campaign in these proceedings introduced an umbrella slogan or logo called the "Lower Price Guarantee", which could be identified at the front of the Dunnes store and then carried through to each relevant shelf- edge label. As a result, according to Dunnes, the customer knew that when they saw that logo on the shelf- edge label, the relevant product was part of the campaign. There were three messages contained in the campaign and reflected in three separate panels on the banners i.e.:

> (i) In relation to "own brand products," the campaign was intended to inform customers that Dunnes Stores had recently lowered the prices of certain of its own brand products to match those of the discounters, (including Aldi).
>
> (ii) In respect of branded products, the campaign was intended to inform customers that prices of selected branded products in Dunnes Stores were lower than the prices of those same branded products in both Tesco and Supervalu.
>
> (iii) In relation to promotional prices, the campaign was intended to inform customers that Dunnes Stores had more promotions and special offers on a weekly basis than any of its competitors.

35. Promotional materials in respect of the campaign were sent to all Dunnes stores that sold food in June 2013. These materials were intended to replace the earlier "Price Drop" campaign promotional material that had been on display since May, 2013. The promotional material sent to each of the defendant's 100 food stores in Ireland included the banners and the shelf- edge labels. They also included outdoor banners to be placed outside stores, posters to be placed at the front of stores and the toblerones to be placed at the front of stores. The banners were to be hung near the entrance to the stores and the product - specific banners or shelf- edge labels were to be displayed on the shelf near the product in question.

36. Mr Wilson said that the title of the campaign "Lower Price Guarantee" and the use of those words on the promotional materials in respect of the campaign (including the banners and shelf- edge labels) were intended to convey (in respect of own brand products) that the prices of certain of those products were now lower than they had previously been and also lower than the branded alternatives available in the store. He said that the use of these words was never intended to suggest that the prices of Dunnes Stores own brand products were lower than the prices of comparable products in Aldi. He also gave evidence that the downward pointing arrow and tick used on the promotional materials were also intended to convey the message (in respect of own brand products), that Dunnes Stores had dropped its prices in respect of hundreds of such products and that the prices of their own brand products were now lower than they had previously been. The tick was to symbolise and indicate that they had been price checked. Again, he said, this element of the design of the promotional materials was never intended to convey an impression that Dunnes Stores prices were lower than Aldi, but rather, that the prices of hundreds of Dunnes Stores own brand products had been lowered to match the prices of comparable products in Aldi or Lidl. He said that "wherever a reference to Aldi appeared in the banners, the words "Aldi Match" always appeared. He also said that the shelf- edge labels at issue in these proceedings represented a very small proportion of the total campaign. He also said that he did not believe that customers would have been deceived or misled into thinking that the prices of the relevant Dunnes Stores products were lower than the prices of comparable products in Aldi.

37. He said that the phrase "Always Better Value" had been used on campaign promotional materials because it had been a Dunnes Stores slogan for a long period of time and was derived from the "Better Value" slogan used by Dunnes Stores since it opened its first store in Ireland, in Cork in 1945.

38. Mr. Wilson did not accept that there was any foundation to the complaint in relation to the words "Family Essentials" on the campaign promotional materials. In his view, the reference to "Family Essentials" was not to a specific, identifiable class or category of products; instead the words were used in a generic way and were intended to refer to the types of products that families tend to purchase and use most on a regular weekly basis.

39. Mr. Wilson also gave evidence about how the products were compared for the campaign. He said that the Aldi products (against which the Dunnes Stores products were compared) were selected on the basis of various criteria. He said that "these included our knowledge of the results of internal benchmarking tests, which Dunnes Stores carries out on a regular basis in respect of its products and those of its competitors, the weight and price of the products, and Dunnes Stores' knowledge and understanding of the quality of

the relevant products in question and that they fulfilled the same needs or were intended for the same purpose".

40. Mr. Wilson also gave evidence that comparing non - branded or own brand products is always more difficult than comparing branded products. This is because competitors' own brand product ranges are rarely identical in terms of ingredients and specifications. However, his view was that although the products may not have identical ingredients and specifications "it does not necessarily follow that the products are not comparable". Mr. Wilson also stated that "I do not believe that consumers choose which products to purchase based on a detailed or scientific analysis of the ingredients or specifications of the products or on compositional comparability as suggested by Aldi, but rather that they choose which products to purchase on the basis of the appearance and packaging of the product and their overall general sense of the quality of the product and the retailer brand. Fundamentally, they are comparing Dunnes Stores own label products with Aldi's own label products. Consumers repeat purchase these items based on the taste and performance of the product against the purpose for which they were bought and this is why bench marking tests form such an important part of our product development". He also stated that if Aldi's test as to compositional comparability was the appropriate test, it was difficult to see how any comparative advertising of own label products with those of a competitor could ever take place.

41. Mr. Wilson also gave evidence that a total of 262 comparisons were made between Dunnes Stores products and Aldi products which were the subject of comparative shelf- edge labels.

42. In order to ensure that Dunnes Stores had the correct prices for the Aldi products which were to be used as part of the comparisons, a list of products to be purchased in Aldi was sent to the Dunnes Stores store in Beacon Court, Dublin 18. These products were then purchased in Aldi's Sandyford store on 7th June, 2013 and on a number of other dates in June 2013 and the receipts were held at head office.

43. Mr. Wilson gave evidence that the campaign was only ever intended to run for the summer months and that stores were instructed to take down all promotional material in relation to the campaign, (including the banners and the shelf- edge labels) on 16th August 2013 to make way for the "Back to School" campaign. Frequent reminders in this regard were sent to all Dunnes Stores stores. He did accept however that it was possible, that, through inadvertence, a certain limited amount of this promotional material was left on display in certain stores (although he did not believe that this would have been widespread). In his view, the campaign ended on 16th August, 2013 and it was certainly not the case that the campaign was still a "nationwide" campaign until October 2013.

44. Mr. Wilson confirmed that the total marketing spend by Dunnes Stores in respect of the campaign was €22,000 per week for nine weeks throughout the summer. By contrast the Dunnes Stores "Back To School" campaign was a far larger campaign and Mr. Wilson confirmed that the relevant marketing spend on the "Back To School" campaign was approximately €200,000 per week.

45. It is also clear from Mr. Wilson that when Dunnes received Aldi's letter of complaint dated 26th July, 2013 in respect of 27 products, the decision was taken by Dunnes Stores to take down the shelf- edge labels in respect of 21 of the 27 products complained of – not because Dunnes were of the view that Aldi were correct – but as a matter of prudence pending a more thorough review. Moreover the campaign was coming to an end in any event on 16th August, 2013.

The effectiveness of the campaign
46. Mr. Wilson's evidence on behalf of Dunnes Stores was that Dunnes were unhappy with the results of the campaign. He stated that it was not successful in the context of sales or retention of customers. He said that Dunnes' market share did not improve throughout the period of the campaign. He also indicated that the switching of Dunnes customers to other retailers actually got worse during the campaign period and that they probably lost more to their competitors during this period.

47. Dunnes Stores relied on Kantar data which showed that Dunnes overall market share fell each month during the period of the campaign from June to August. By contrast the Kantar data indicated that Dunnes Stores grocery market share increased substantially during the "Back To School" campaign. Dunnes Stores sought to rely on this evidence to establish that the campaign in this case was not effective.

48. However, in my view, the Kantar data does not establish this as a matter of fact. It is clear that there might have been a whole range of factors as to why customers moved from Dunnes Stores to any other supermarket (including Aldi and Lidl) during this time.

49. Dunnes Stores sought to make much of the fact that Niall O'Connor did not apparently notice the banners or make any complaint to Dunnes Stores about the banners until October 2013. Dunnes say that this is so despite the fact that the banners were displayed in each of 100 Dunnes Stores throughout the country for the duration of the campaign from mid- June until mid- August 2013. The letter of complaint dated 26th July, 2013 did not refer to the banners because Mr O'Connor accepted that they had not been noticed at that time. Dunnes make the point that it is astonishing that the banners were not noticed despite the fact that a number of Aldi staff specifically visited Dunnes Stores to examine the shelf- edge labels in the campaign. However, in my view, this issue is more relevant to the extent of damages rather than the issue of whether the banners per se infringe the 2007, Comparative Advertising Regulations.

50. Dunnes submit that the reason banners were never noticed by Aldi personnel was because they were simply "impressionistic invitations to come into the store and see at the shelf what was being compared".

51. Dunnes also complain that Aldi and other undertakings in the supermarket trade have engaged in similar comparative advertising practices to those complained of in the proceedings. However, in my view, that is irrelevant to the issues I have to consider. The central issue in these proceedings is whether the Dunnes Stores advertisements contravene the Comparative Advertising Directive and 2007 Regulations. It is no defence for Dunnes to say that Aldi are doing the same and in any event, in my view, the Dunnes case on these points has not been proved.

PART 2 - THE LEGAL CONTEXT

Directive 2006/114/EC on misleading and comparative advertising
52. The main directive on misleading and comparative advertising is Directive 2006/114/EC of 12th December, 2006.

53. Some of the relevant recitals are as follows:

> *"(3) Misleading and unlawful comparative advertising can lead to distortion of competition within the internal market.*
>
> *(4) Advertising, whether or not it induces a contract, affects the economic welfare of consumers and traders.*

(6) The completion of the internal market means a wide range of choice. Given that consumers and traders can and must make the best possible use of the internal market, and that advertising is a very important means of creating genuine outlets for all goods and services throughout the Community, the basic provisions governing the form and content of comparative advertising should be uniform and the conditions of the use of comparative advertising in the Member States should be harmonised. If these conditions are met, this will help demonstrate objectively the merits of the various comparable products. Comparative advertising can also stimulate competition between suppliers of goods and services to the consumer's advantage.

(7) Minimum and objective criteria for determining whether advertising is misleading should be established.

(8) Comparative advertising, when it compares material, relevant, verifiable and representative features and is not misleading, may be a legitimate means of informing consumers of their advantage. It is desirable to provide a broad concept of comparative advertising to cover all modes of comparative advertising.

(9) Conditions of permitted comparative advertising, as far as the comparison is concerned, should be established in order to determine which practices relating to comparative advertising may distort competition, be detrimental to competitors and have an adverse effect on consumer choice. Such conditions of permitted advertising should include criteria of objective comparison of the features of goods and services.

(14) It may, however, be indispensable, in order to make comparative advertising effective, to identify the goods or services of a competitor, making reference to a trade mark or trade name of which the latter is the proprietor.

(15) Such use of another's trade mark, trade name or other distinguishing marks does not breach this exclusive right in cases where it complies with the conditions laid down by this Directive, the intended target being solely to distinguish between them and thus to highlight differences objectively."

54. The relevant articles of this Directive which I must consider in these proceedings are as follows:

"Article 1

The purpose of this Directive is to protect traders against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.

Article 2

For the purposes of this Directive:

(a) 'advertising' means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations;

(b) 'misleading advertising' means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor;

(c) 'comparative advertising' means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor;

(d) 'trader' means any natural or legal person who is acting for purposes relating to his trade, craft, business or profession and anyone acting in the name of or on behalf of a trader;

Article 3

In determining whether advertising is misleading, account shall be taken of all its features, and in particular of any information it contains concerning:

(a) the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;

(b) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided;

(c) the nature, attributes and rights of the advertiser, such as his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions.

Article 4

Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met:

(a) it is not misleading within the meaning of Articles 2(b), 3 and 8(1) of this Directive or Articles 6 and 7 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive') (1);

(b) it compares goods or services meeting the same needs or intended for the same purpose;

(c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;

(d) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services,

activities or circumstances of a competitor;

(e) for products with designation of origin, it relates in each case to products with the same designation;

(f) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

(g) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;

(h) it does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor."

The European Communities (Misleading and Comparative Advertising Communications) Regulations 2007 (S.I. 774/2007)

55. Council Directive 2006/114/EC was implemented in Ireland by the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007.

Section 2 (1) provides:

"Comparative marketing communication" means any form of representation made by a trader that explicitly or by implication identifies a competitor of the trader or a product offered by such a competitor;"

"Representation" is defined as including:

"(a) any oral, written, visual, descriptive, or other representation by a trader, including any commercial communication, marketing or advertising, and

(b) any term or form of a contract, notice or other document used or relied on by a trader in order to promote the supply of a product".

56. Regulation 3 (1) provides that:

"A trader shall not engage in a misleading marketing communication."

57. Regulation 4 (1) provides that:

"A trader shall not engage in a prohibited comparative marketing communication."

58. Regulation 4 (2) provides that:

"A comparative marketing communication is prohibited if, as regards the comparison—

(a) it is misleading under Regulation 3,

(b) it is a misleading commercial practice under any of sections 43 to 46 of the Consumer Protection Act 2007 (No. 19 of 2007),

(c) it does not compare products meeting the same needs or intended for the same purpose,

(d) it does not objectively compare one or more material, relevant, verifiable, and representative features of those products, which may include price,

(e) it discredits or denigrates the trade marks, trade names, other distinguishing marks, products, activities, or circumstances of a competitor,

(f) for products with designation of origin, it does not relate in each case to products with the same designation,

(g) it takes unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products,

(h) it presents goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name, or

(i) it creates confusion among traders—

(i) between the trader who made the comparative marketing communication and a competitor or,

(ii) between the trade marks, trade names, other distinguishing marks, goods or services of the trader who made the comparative marketing communication and those of a competitor."

59. Regulation 5 of the statutory instrument provides as follows

"5. (1) A trader or other person may, upon giving notice of the application to the trader against whom the order is sought, apply to the Circuit Court or the High Court for an order prohibiting that trader from—

(a) engaging in, or

(b) continuing to engage in, a misleading marketing communication or a prohibited comparative marketing

communication.

(2) If, in any proceedings under this Regulation, the truth of a factual claim in a representation is an issue, and the trader against whom the order is sought does not establish on the balance of probabilities that the representation is true, then the representation shall be presumed to be untrue.

(3) In determining an application under this Regulation, the Court shall consider all interests involved and, in particular, the public interest."

The Consumer Protection Act 2007 – Sections 42 to 46

60. Sections 42 – 46 of the Consumer Protection Act 2007 provide as follows:

"Misleading Commercial Practices

42. (1) A trader shall not engage in a misleading commercial practice.

(2) Without prejudice to the amendments of the Hallmarking Act 1981 made by section 99, sections 43 to 46 specify the various circumstances in which a commercial practice is misleading.

43. (1) A commercial practice is misleading if it includes the provision of false information in relation to any matter set out in subsection (3) and that information would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make.

(2) A commercial practice is misleading if it would be likely to cause the average consumer to be deceived or misled in relation to any matter set out in subsection (3) and to make a transactional decision that the average consumer would not otherwise make.

(3) The following matters are set out for the purposes of subsections (1) and (2):

(a) the existence or nature of a product;

(b) the main characteristics of a product, including, without limitation, any of the following:

(i) its geographical origin or commercial origin;

(ii) its availability, including, without limitation, its availability at a particular time or place or at a particular price;

(iii) its quantity, weight or volume;

(viii) its composition, ingredients, components or accessories;

(ix) the specifications of the product, including, without limitation, the grade, standard, style, status or model of the product;

(c) the price of the product, the manner in which that price is calculated or the existence or nature of a specific price advantage;

(4) If the commercial practice in subsection (2) involves the provision of information, it is not a defence in any proceeding to show that the information is factually correct.

(5) In determining whether a commercial practice under subsection (1) or (2) is misleading, the commercial practice shall be considered in its factual context, taking account of all of its features and the circumstances.

46. (1) A commercial practice is misleading if the trader omits or conceals material information that the average consumer would need, in the context, to make an informed transactional decision ("material information") and such practice would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make.

(2) A commercial practice is misleading if—

(a) the trader—

(i) provides material information referred to in subsection (1) in a manner that is unclear, unintelligible, ambiguous or untimely, or

(ii) fails to identify the commercial intent of the practice (if such intent is not already apparent from the context), and

(b) such practice would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make.

(3) If a commercial practice is or includes an invitation to purchase, each of the following constitutes material information for the purposes of this section, unless already apparent to the consumer in the context of the

commercial practice:

(a) the main characteristics of the product, to an extent appropriate to the medium and the product".

61. Section 2 of the Consumer Protection Act defines "commercial practice" as meaning *"any conduct (whether an act or omission) course of conduct or representation by the trader in relation to a consumer transaction including any such conduct or representation made or engaged in before during or after the consumer transaction"*.

62. Section 2 of the same Act also defines a "transactional decision" as meaning *"in relation to a consumer transaction, any decision by the consumer concerning whether, how or on what terms to do, or refrain from doing any of the following:*

(a) Purchase the product;

(b) Make payment in whole or in part for the product;

(c) Retain or return the product after its purchase;

(d) Dispose of the product;

(e) Exercise a contractual right in relation to the product".

The Objectives of the Comparative Advertising Directive

63. The recitals to the Comparative Advertising Directive are indicators of its purposes and objectives. Despite the fact that it clearly has a number of different purposes, both parties in these proceedings have sought to lay emphasis on different recitals. The defendant in particular has sought to lay emphasis on the fact that the purpose of the Comparative Advertising Directive is to promote comparative advertising. That may be so, but it is only to promote comparative advertising where such advertising fulfils the various requirements set out in the Directive.

64. The defendant sought to rely on statements made by the Court of Justice of the European Union, (the CJEU) in *O2 Holdings Limited and Others v. Hutchison 3G UK Limited* Case C-533/06 [2008] ECR I-04231 where the CJEU stated at para. 38 of its decision that:

> *"However, as is apparent from recitals 2 to 6 in the preamble to Directive 97/55, the Community legislature was intending to promote comparative advertising, stating, inter alia, in recital 2, that comparative advertising 'can also stimulate competition between suppliers of goods and services to the consumer's advantage' and, in recital 5, that it 'may be a legitimate means of informing consumers of their advantage'."*

65. The CJEU also stated at para. 45:

> *"Consequently, in order to reconcile the protection of registered marks and the use of comparative advertising, Article 5(1) and (2) of Directive 89/104 and Article 3a(1) of Directive 84/450 must be interpreted to the effect that the proprietor of a registered trade mark is not entitled to prevent the use, by a third party, of a sign identical with, or similar to, his mark, in a comparative advertisement which satisfies all the conditions, laid down in Article 3a(1) of Directive 84/450, under which comparative advertising is permitted."* (Emphasis added).

66. Thus the owner of a registered trade mark can prevent the use by a third party of his trade mark in a comparative advertisement but only if the comparative advertisement does not satisfy all the conditions laid down in the Comparative Advertising Directive (as implemented into national law).

67. I have also had regard to the principle enunciated in a number of CJEU decisions that the conditions required of comparative advertising must be interpreted in the sense most favourable to such advertising.

Review of case- law

(I) Lidl Belgium GmbH & Co KG v Etablissementen Franz Colruyt NV (Case C-356/04) [2006] ECR I-08501

68. In this case Lidl issued proceedings against Colruyt about a mail shot which Colruyt sent its customers. In this mail shot Colruyt stated that a family spending €100 each week in Colruyt's stores saved between €155 and €293 over the course of a year by shopping at Colruyt, instead of a hard discounter such as Aldi or Lidl. The letter at issue and the checkout receipts also referred to Colruyt's website where, it was said, further explanation could be found of the system of price comparison applied by it and a method of calculating the price index. Lidl argued that the advertising at issue was not objective, not verifiable and misleading. It argued that the advertising did not specify the products being compared, the number of them or their prices. Moreover, the general price level calculated on the basis of a sample of products was extended by extrapolation to the advertiser's entire product range. The national court referred a matter to the CJEU for a preliminary ruling.

69. At para. 40, the CJEU noted that the question referred was as follows:

> *"40. By its third question, the referring court seeks to ascertain whether Article 3a(1)(c) of the Directive [now Article 4 (c) of the current Directive] must be interpreted as meaning that the requirement, laid down by that provision, that the advertising 'objectively compares' the features of the goods concerned signifies, in the event of comparison of the prices of a selection of basic consumables sold by chains of stores or of the general level of the prices charged by them in respect of the range of comparable products which they sell, that all the products and prices compared, that is to say both those of the advertiser and those of all of his competitors involved in the comparison, must be expressly listed in the advertisement."*

70. The CJEU answered this question at para. 54 of its decision saying that

> *"Having regard to all of the foregoing, the answer to the third question should be that the requirement, laid down by Article 3a(1)(c) of the Directive, that the advertising 'objectively compares' the features of the goods at issue must be interpreted as not signifying, in the event of comparison of the prices of a selection of comparable basic consumables sold by competing chains of stores or of the general level of the prices charged by them in respect of the range of*

comparable products which they sell, that the products and prices compared, that is to say both those of the advertiser and those of all of his competitors involved in the comparison, must be expressly and exhaustively listed in the advertisement." (Emphasis added).

71. Thus, in a general comparison of products and prices between A and B, it is not necessary for party B to expressly and exhaustively list all the products and prices of competitor A and of competitor B.

72. However, the Court in its judgment also stated as follows (at para. 61):

> *"61. It must be pointed out, however, that in order for the prices of the goods comprising a selection of products or the general level of the prices charged by a chain of stores in respect of its selection of comparable goods to be verifiable, it is a necessary precondition that, even though, as is apparent from paragraph 54 of the present judgment, the goods whose prices have been thus compared are not required to be expressly and exhaustively listed in the advertisement addressed to the consumer, they must nevertheless be capable of being individually and specifically identified on the basis of the information contained in that advertisement. The prices of goods can necessarily only ever be verified if it is possible to identify the goods."* (Emphasis added).

73. At para. 71 the court also stated:

> *"71. However, the possibility that consumers can obtain from the advertiser, in administrative or judicial proceedings, proof of the factual accuracy of claims in the advertising is not capable of releasing the advertiser, when the products and the prices compared are not set out in the advertisement, from the obligation to indicate, in particular for the attention of the persons to whom the advertisement is addressed, where and how they may readily examine the details of the comparison with a view to verifying their accuracy or having it verified."*
>
> *"74. Having regard to all the foregoing considerations, the answer to the fourth question should be that Article 3a(1)(c) of the Directive must be interpreted as meaning that a feature mentioned in comparative advertising satisfies the requirement of verifiability laid down by that provision, in cases where the details of the comparison which form the basis for the mention of that feature are not set out in the advertising, only if the advertiser indicates, in particular for the attention of the persons to whom the advertisement is addressed, where and how they may readily examine those details with a view to verifying, or, if they do not possess the skill required for that purpose, to having verified, the details and the feature in question as to their accuracy."* (Emphasis added).

(II) Lidl SNC v. Vierzon Distribution SA (Case C-159/09) [2010] ECR I- 11761

74. Lidl operated a chain of supermarkets in France and in particular a store located near to that of Vierzon Distribution which sold everyday consumer goods under the name "Leclerc". In September 2006 Vierzon placed an advertisement in a local newspaper which reproduced till receipts listing approximately 34 products and foodstuffs purchased from the Vierzon store and the Lidl store respectively. These till receipts showed that the total Vierzon bill was €46.30 and the total Lidl bill was €51.40. The advertisement also included the slogan promoting the Leclerc as still the cheapest supermarket. In March 2007, Lidl brought an action seeking an order that the defendant pay damages on the grounds of unfair competition. Lidl argued that the advertisement deceived or misled consumers both as a result of the presentation and also because Vierzon selected only products which placed it in an advantageous position after aligning, where necessary, its prices with those of its competitors. It also argued that the products were not comparable since their qualitative and quantative differences meant they did not meet the same needs. Vierzon disputed the claim and submitted that two products which are not the same, may be compared provided that they meet the same needs or are intended for the same purpose and therefore are sufficiently interchangeable.

75. In its judgment, at para. 20, the Court stated that:

> *"20. …Thus, it is apparent from a reading of recitals 2, 7 and 9 in the preamble to Directive 97/55 that the aim of Article 3a of Directive 84/450 is to stimulate competition between suppliers of goods and services to the consumer's advantage, by allowing competitors to highlight objectively the merits of various comparable products while, at the same time, prohibiting practices which may distort competition, be detrimental to competitors and have an adverse effect on consumer choice (L'Oréal and Others, paragraph 68).*
>
> *21. It follows that the conditions listed in Article 3a (1) of Directive 84/450 must be interpreted in the sense most favourable to permitting advertisements which objectively compare the characteristics of goods or services, while ensuring at the same time that comparative advertising is not used anti-competitively and unfairly or in a manner which affects the interests of consumers (L'Oréal and Others, paragraph 69).*
>
> *22. It should also be noted that Directive 84/450 carried out an exhaustive harmonisation of the conditions under which comparative advertising in Member States might be permitted and that such a harmonisation implies by its nature that the lawfulness of comparative advertising throughout the European Union is to be assessed solely in the light of the criteria laid down by the European Union legislature (see Case- C 44/01, Pippig Augenoptik [2003] ECR I-3095, paragraph 44)."*(Emphasis added).

76. Moreover at para. 32 the European Court stated as follows:

> *"32. The fact that products are, to a certain extent, capable of meeting identical needs leads to the conclusion that there is a certain degree of substitution for one another (De Landtsheer Emmanuel, paragraph 30 and the case-law cited).*
>
> *33. Before it can be concluded that there is a real possibility of substitution, in accordance with Article 3a (1) (b) of Directive 84/450, an individual and specific assessment of the products which are specifically the subject of the comparison in the advertisement is necessary (De Landtsheer Emmanuel, paragraph 47). Such a specific assessment of the degree of substitution falls within the jurisdiction of the national courts.*
>
> *34. Thirdly, other considerations preclude any interpretation of Article 3a (1) (b) of Directive 84/450 which would essentially result in prohibiting comparative advertising relating to food products unless such products are identical.*

35. First, there is nothing in the wording of that provision to suggest any such prohibition.

36 Secondly, such a prohibition would, by means of a broad interpretation of that condition governing whether comparative advertising is permitted, lead to a considerable restriction on the scope of comparative advertising (see, by analogy, De Landtsheer Emmanuel, paragraphs 70 and 71).

37 As pointed out by, inter alia, the Czech Government and the Commission, to decide that, unless they are identical, two food products cannot be regarded as comparable within the meaning of Article 3a (1) (b) of Directive 84/450 would effectively rule out any real possibility of comparative advertising regarding a particularly important category of consumer goods, irrespective of the angle from which the comparison is made.

38 The outcome of such a prohibition would therefore run counter to the Court's settled case-law that the conditions required of comparative advertising must be interpreted in the sense most favourable to it (De Landtsheer Emmanuel, paragraph 63).

39 In the light of all the foregoing, the first part of the answer to be given to the question referred by the tribunal de commerce de Bourges is that Article 3a(1)(b) of Directive 84/450 is to be interpreted as meaning that the fact alone that food products differ in terms of the extent to which consumers would like to eat them and the pleasure to be derived from consuming them, according to the conditions and place of production, their ingredients and who produced them, cannot preclude the possibility that the comparison of such products may meet the requirement laid down in that provision that the products compared meet the same needs or are intended for the same purpose, that is to say, that they display a sufficient degree of interchangeability.

40 The specific assessments as to whether there is such a sufficient degree of interchangeability between the food products that are the subject of the comparison in the main proceedings fall within the jurisdiction of the referring court, as stated at paragraph 33 above."

77. It should be noted that these statements of the court relate to the interpretation of Article 3 (a) (1) (b) of Directive 84/450, now Article 4 (b) of Directive 2006/114, ("the Directive"). It is clear that food products come within the scope of comparative advertising; it is also clear that the fact that products are capable of meeting identical needs means that there is a certain degree of substitution for one another; it is also clear that the CJEU was of the view that a rule which required two food products to be regarded as identical before they could be comparable was too restrictive an interpretation. Thus, the products do not have to be identical to be comparable. They can be comparable even if they are different. However the scope or extent of the difference is a question for the national court. Thus, there could be a marginal difference between food products and they can still be regarded as comparable. By contrast, there could be a considerable difference between the products and then the products might not be comparable. Indeed, it could be the case that the products are substitutable for one another because they meet the same needs or are intended for the purpose and yet not be comparable. For example, two types of tomato ketchup are clearly products which meet the same need or are intended for the same purpose. The products are therefore substitutable. Nevertheless, the two products may have material, relevant, verifiable and representative features which make them quite different and therefore not properly comparable. Thus, a product might infringe Article 4 (d) of the Directive but infringe Article 4 (c) of the Directive. That is the case here.

78. The court in *Vierzon* also interpreted Article 3a (1a) of Directive 84/450 which provides that if comparative advertising is to be permitted, the comparison must not be misleading. (This is now Article 4(a) of the current EU Directive). (The Directive is implemented by Regulation 4 (a) and (b) of the 2007 Irish Regulations). Regulation 4(2) (b) refers to s.43 to 46 of the Consumer Protection Act, 2007 which in turn refers to "misleading commercial practices". Those sections in turn refer to consumers. Therefore the dicta of the CJEU in *Lidl v. Vierzon* on consumers are of relevance. At para. 46 and following its judgment the Court stated as follows:

"46. It is for the referring court to ascertain in the circumstances of each particular case, and bearing in mind the consumers to which such advertising is addressed, whether the latter may be misleading (see Lidl Belgium, paragraph 77 and the case-law cited).

47 That court must, first, take into account the perception of an average consumer of the products or services being advertised who is reasonably well informed and reasonably observant and circumspect. As regards an advertisement such as that at issue, it is not disputed that it is addressed not to a specialist public but to end consumers who purchase their basic consumables in a chain of stores (see Lidl Belgium, paragraph 78 and the case-law cited).

48 In carrying out the requisite assessment, the national court must also take account of all the relevant factors in the case, having regard, as follows from Article 3 of Directive 84/450, to the information contained in the advertisement at issue and, more generally, to all its features (see Lidl Belgium, paragraph 79 and the case-law cited).

49 The Court has also held that an omission may render advertising misleading, in particular where, bearing in mind the consumers to whom it is addressed, the advertising seeks to conceal a fact which, had it been known, would have deterred a significant number of consumers from making a purchase (Lidl Belgium, paragraph 80 and the case-law cited).

50 In those various respects, advertising such as the advertisement at issue could, first, be misleading, as is apparent from case-law, if the referring court were to find that, in the light of all the relevant circumstances of the particular case, in particular the information contained in or omitted from the advertisement, the decision to buy on the part of a significant number of consumers to whom the advertising is addressed may be made in the mistaken belief that the selection of goods made by the advertiser is representative of the general level of his prices as compared with those charged by his competitor and that such consumers will therefore make savings of the kind claimed by the advertisement by regularly buying their everyday consumer goods from the advertiser rather than from the competitor, or in the mistaken belief that all of the advertiser's products are cheaper than those of his competitor (see, to that effect, Lidl Belgium, paragraphs 83 and 84).

51 An advertisement such as that at issue could also be misleading if the referring court found that, for the purposes of the price-based comparison in the advertisement, food products were selected which are in fact objectively different and the differences are capable of significantly affecting the buyer's choice.

52 If such differences are not disclosed, such advertising, where it is based solely on price, may indeed be perceived by the average consumer as claiming, by implication, that the other characteristics of the products in question, which may

also have a significant effect on the choices made by such a consumer, are equivalent.

53 The Court has already held, inter alia, with regard to a comparison based on the prices charged by two competing stores, that, in cases where the brand name of the products may significantly affect the buyer's choice and the comparison concerns rival products whose respective brand names differ considerably in the extent to which they are known, omission of the better-known brand name goes against Article 3a(1)(a) of Directive 84/450 (Pippig Augenoptik, paragraph 53).

54 The same may be true, in some cases, with regard to other features of the products compared, such as their composition or the method or place of production, to which the question for a preliminary ruling refers, where it is apparent that such features may, by their nature, in the same way as the price itself, have a significant effect on the buyer's choice." (Emphasis added).

79. Moreover the CJEU in *Vierzon* also considered the issue of verifiability. At paras. 59 – 64, the Court stated as follows:

"59. In the light of the information available to it and the arguments submitted to it, the Court intends, in the circumstances of this case, to rule exclusively on the question of the requirement of verifiability.

60 It should be noted that, in Lidl Belgium, which concerned comparative advertising in which the comparison was based on price, the Court held that, in order for the prices of the goods comprising two selections of products to be verifiable, it is a necessary precondition that the goods whose prices have been thus compared must be capable of being individually and specifically identified on the basis of the information contained in the advertisement. The prices of goods can indeed necessarily only ever be verified if it is possible to identify those goods (see, to that effect, Lidl Belgium, paragraph 61).

61 Such identification makes it possible, in accordance with the objective of consumer protection pursued by Directive 84/450, for the persons to whom an advertisement of that kind is addressed to be in a position to satisfy themselves that they have been correctly informed with regard to the purchases of basic consumables which they are prompted to make (Lidl Belgium, paragraph 72).

62 It is for the referring court, in the present case, to verify whether the description of the products compared, as set out in the advertisement at issue, is sufficiently clear to enable the consumer to identify the products being compared for the purpose of checking the accuracy of the prices shown in the advertisement.

63 As the Commission stated at the hearing, that could not be the case if, inter alia, it transpired that the stores referred to in the advertisement at issue marketed a number of food products which might tally with the descriptions given on the till receipts reproduced on that advertisement, so that it is not possible to identify precisely the goods thus compared.

64 In the light of the foregoing, the third part of the answer to be given to the question referred by the tribunal de commerce de Bourges is that Article 3a(1)(c) of Directive 84/450 is to be interpreted as meaning that the condition of verifiability set out in that provision requires, in the case of an advertisement, such as that at issue in the main proceedings, which compares the prices of two selections of goods, that it must be possible to identify the goods in question on the basis of information contained in the advertisement." (Emphasis added).

(III) De Landtsheer Emmanuel SA v Comité Interprofessionnel du Vin de Champagne, Veuve Clicquot Ponsardin SA (Case C-381/05) [2007] ECR I-03115

80. In *De Landtsheer Emmanuel* the court stated at para. 17 of its judgment:

"17 The test for determining whether an advertisement is comparative in nature is thus whether it identifies, explicitly or by implication, a competitor of the advertiser or goods or services which the competitor offers (Toshiba Europe, paragraph 29).

18 The mere fact that an undertaking solely refers in its advertisement to a type of product does not mean that the advertisement in principle falls outside the scope of the directive.

19 Such an advertisement is capable of being comparative advertising provided a competitor or the goods or services which it offers may be identified as actually referred to by the advertisement, even if only by implication.

22 It is for the national courts, in each individual case, to determine whether, having regard to all the relevant elements of the case, an advertisement enables consumers to identify, explicitly or by implication, one or more specific undertakings or the goods or services that they provide as actually referred to by the advertising.

23 Those courts, when making that assessment, must take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect (see Pippig Augenoptik, paragraph 55, and Lidl Belgium [2006] ECR – 8501, paragraph 78).

35 According to settled case law, the conditions required of comparative advertising must be interpreted in the sense most favourable to it (Toshiba Europe, paragraph 37, Pippig Augenoptik, paragraph 42 and Lidl Belgium, paragraph 22).

62 As already pointed out at paragraph 34 of the present judgment, comparative advertising helps to demonstrate objectively the merits of the various comparable products and to stimulate competition between suppliers of goods and of services to the consumer's advantage. In the wording of recital 5 in the preamble to Directive 97/55, comparative advertising, when it compares material, relevant, verifiable and representative features and is not misleading, may be a legitimate means of informing consumers of their advantage.

63 It is settled case-law that the conditions required of comparative advertising must be interpreted in the sense most favourable to it (see paragraph 35 of this judgment)." (Emphasis added).

(IV) Posteshop SpA (Case C-52/13) ECLI:EU:C:2014:150
81. In Posteshop v. Autorita Garante the CJEU stated at para. 22:

> *"22 In the present case, it must first be observed that, pursuant to Article 1 of Directive 2006/114, that directive has a dual objective which consists in protecting traders against misleading advertising and the unfair consequences thereof, on the one hand, and in laying down the conditions under which comparative advertising is permitted, on the other.*
>
> *23 Secondly, it must be noted that the terms 'misleading advertising' and 'comparative advertising' are the subject of two separate definitions, set out in points (b) and (c) of Article 2 of Directive 2006/114 respectively.*
>
> *25. Fourthly, it is evident from Directive 2006/114 that the provisions concerning misleading advertising and those concerning comparative advertising pursue different aims. Article 3 of that directive provides minimum criteria and objectives for determining whether advertising is misleading and therefore unlawful, while Article 4 of that directive lists various cumulative conditions which comparative advertising must meet in order to be permitted (see, by analogy, Case C- 487/07 L'Oréal and Others [2009] ECR I-5185, paragraph 67, and Case C- 159/09 Lidl [2010] ECR I-11761, paragraph 16), recital 8 in the preamble to Directive 2006/114 also observing that comparative advertising may be a legitimate means of informing consumers of their advantage.*
>
> *26 It is apparent from those factors that, in that directive, misleading advertising and unlawful comparative advertising each constitutes a separate infringement.* (Emphasis added).

82. It is important to note that the CJEU has specifically referred to the fact that the conditions laid down in Article 4 of the Directive are cumulative. Thus, the plaintiffs only have to establish that Dunnes has infringed one of these conditions for the advertisement to be unlawful whereas Dunnes must establish that it has satisfied all of the relevant conditions.

The burden of proof
83. It is clear that in this case, as in all cases of this type, the burden of proof is on the plaintiff to establish its case on the balance of probabilities.

84. This point was considered, and indeed confirmed, in *Interflora Inc. v. Marks and Spencers Plc* [2014] EWCA 1403, by the UK Court of Appeal. At para. 136 of his judgment Kitchin LJ states as follows:

> *"Second, it seems to us that, as matter of principle, the burden of establishing the necessary elements of a claim for trade mark infringement must normally lie upon the party making the allegation, and that is so as a matter of EU or English law. We are confirmed in this view by the decision of the Court of Justice in Case C-405/03 Class International BV v Colgate-Palmolive Company [2005] ECR I-8735"*
>
> The Court cited paras. 70 to 74 of the CJEU decision and then stated at para. 137:
>
> *"Accordingly, the general position under EU law is that the burden of proving an allegation of infringement lies on the person making the allegation. The position under English law is, of course, exactly the same."*

85. An issue has arisen between the parties in relation to the burden of proof under the Irish Regulations implementing the Comparative Advertising Directive.

86. Regulation 5 (2) provides as follows

> *"If, in any proceedings under this Regulation, the truth of a factual claim in a representation is an issue, and the trader against whom the order is sought does not establish on the balance of probabilities that the representation is true, then the representation shall be presumed to be untrue."*

87. The plaintiffs, in their legal submissions, submit that by virtue of Regulation 5 (2) the burden of proof is on the defendant to demonstrate the truth of each and any representation contained in the banners, the lower price labels and the appendix four labels (for the fifteen products). They also submit that the defendant has not established the truth of these claims. Therefore they submitted that the representations in the banners, the lower price labels and the appendix four labels shall be presumed to be untrue. Therefore they say they are entitled to an order that the defendant is in breach of the regulations.

88. The plaintiffs accept that the burden of proof is on the plaintiffs to establish that the defendant has used the plaintiffs' trademarks for the purposes of establishing that the marks have been infringed under s.14 (1) of the Trade Marks Act 1996, or Article 9 (1)(a) of the CTM Directive. The plaintiffs, however, submit that the evidence adduced in this case shows that they have discharged this burden of proof. The plaintiffs submit that, as they have established that the defendant has used the plaintiffs' trademark in the course of trade, then the burden of proof shifts to the defendant to demonstrate that its use of the plaintiffs' trade marks complied with the 2007 Regulations. The plaintiffs' argument is that the defendant is seeking to argue by way of defence that it is entitled to use the plaintiffs' trademark in cases of comparative advertising. The plaintiff submits that as the defendant is raising this as a defence, then the defendant bears the burden of establishing that it has complied with the relevant conditions for comparative advertising.

89. However, I note that in the plaintiffs' amended statement of claim, they acknowledged that the defendant was entitled to make use of the plaintiffs' marks for the purpose of comparing the defendant's goods with those of the plaintiffs. It also pleaded:

> *"However such use must comply with the European Communities (Misleading and Comparative Advertising Regulations 2007 (the 2007 Regulations) and the Consumer Protection Act 2007 (the 2007 Act). The manner in which the defendant used the marks did not comply with the 2007 Regulations or the 2007 Act."*

90. In paragraph 9 of the amended statement of claim, the plaintiffs plead that the defendant's actions constituted a breach of the 2007 Regulations and the 2007 Act and that the said breaches were deliberate and intentional. The plaintiff also pleads that by reason of these actions, the plaintiffs have suffered loss and damage.

91. In circumstances where the plaintiff has pleaded (i) that the defendant is entitled to make use of the plaintiffs' trade marks for

the purpose of comparing the defendant's goods with those of the plaintiffs, and (ii) in circumstances where it is common case that parties such as the defendant may use the plaintiffs trademark for the purposes of comparative advertising if the comparative advertising complies with the Comparative Advertising Directive and 2007 Regulations, then, in my view, the burden of proof remains with the plaintiff to establish that the defendant's comparative advertising has not complied with the terms of the Comparative Advertising Directive. 'He who alleges must prove' is the general principle. It is the plaintiff who is making the allegation that the defendant is in breach of the Comparative Advertising Directive and Regulations. The plaintiffs therefore bear the burden of proving that this is so on the balance of probabilities. If they establish that, then, absent other matters, the plaintiffs can thereby establish that the defendant has infringed the plaintiffs' trade marks.

92. In my view therefore, the burden of proof of establishing that the defendant's comparative advertisements are in breach of the Directive and 2007 Regulations remains with the plaintiff.

93. In any event, I am satisfied, having heard all the evidence in this case, that the plaintiffs have established each element of their case on the balance of probabilities. Thus, even if the plaintiffs are correct, that on certain issues, the burden of proof shifts to the defendant under Regulation 5 (2), I have considered the evidence in this case as if the burden of proof of all matters was on the plaintiff. I am satisfied, having considered the burden of proof in these terms, that - even on these terms - the plaintiffs have discharged the burden of proof to the required standard.

94. Having set out the factual background and the legal context, I turn now to a consideration of the matters at the heart of this dispute: whether the comparative advertisements in respect of fifteen products are unlawful.

PART 3 - COMPARATIVE ADVERTISING IN RESPECT OF THE FIFTEEN CONTESTED PRODUCTS

(I) Introduction
95. The plaintiffs maintain that there are at least fifteen products in which the defendant has unlawfully engaged in comparative advertising. These products are as follows:

1. Tomato Ketchup.
2. Pork sausages.
3. White sauce.
4. Day cream.
5. Turkey breast mince.
6. Sparkling orange drink.
7. Shower gel.
8. Toilet tissue.
9. Strawberry flavour yoghurt.
10. Peach flavour yoghurt.
11. Sunflower spread.
12. Tinned dog food.
13. Tinned dog food with beef.
14. Tinned dog food in six packs.
15. Dry cat food.

96. Much of the evidence as to fact, and the expert evidence, was taken up in respect of these various products. I set out below details of the expert witnesses who gave evidence, a review of the methodology of the plaintiffs' and defendant's experts and their detailed evidence in respect of each of these products.

(II)The Expert Witnesses

(i) Professor Berryman
97. Professor Berryman gave evidence on behalf of the plaintiffs. Professor Berryman is a food technologist and chemist and has six degrees. His primary degree is in HND Food technology. He also has a B.Sc in Chemistry, an M.Sc in Analytical Chemistry, a Masters in Chemical Analysis, an MBA and a PhD. He is a chartered scientist, a chartered chemist and a chartered biologist. He is a member of the Society of Biology, a Fellow of the Institute of Food Science and Technology and a Fellow of the Royal Society of Chemistry. Full details of his CV and academic and professional experience are set out in his report.

98. Professor Berryman assessed twenty cases of the comparative advertising claims brought by Aldi. However he did not agree with his client's claims in every respect. Thus, in relation to the fruit crumble yoghurts, he was of the view (despite his client's claim) that the fruit crumble yoghurts of Aldi and Dunnes Stores were largely comparable. Likewise, in relation to the medallions of beef, he believed that the various products were comparable. These two items therefore are no longer in issue between the parties in these proceedings. I point this out merely to highlight that Professor Berryman did not give an opinion which was favourable to his client on every single product. This is certainly to his credit. It demonstrates his independence and allows the Court to place considerable emphasis on other matters in his report.

(ii) Dr Lawlor
99. Dr. Fiona Lawlor also gave expert opinion evidence on behalf of the plaintiffs. Dr. Lawlor has a B.Sc. in Chemistry, an M.Sc. in Human Nutrition and a PhD in Food Regulation. She is currently Regulatory Affairs Manager at Food for Health Ireland in University

College Dublin - a food research consortium funded principally by Enterprise Ireland but also by a number of different dairy companies in Ireland. Her evidence only related to food products – non food items were outside her remit.

100. Dr. Lawlor produced a report for the court in relation to all of the food products set out above. In relation to all the food products about which she gave opinion evidence, her views concurred with those of Professor Berryman - that the Dunnes Stores food products were not comparable to the Aldi food products.

(iii) Dr. Ashurst
101. Dr. Ashurst gave evidence on behalf of the defendant on the food products. Dr Ashurt has a B.Sc. and PhD in Chemistry. He is a Fellow of the Royal Society of Chemistry and of the Institute of Food Science and Technology of the United Kingdom.

(iv) Dr. Dodd
102. Dr. Dodd gave expert evidence on behalf of the defendant. Dr. Dodd is a Veterinary Surgeon and he gave evidence on the animal food products only. Dr Dodd is a member of the Royal College of Veterinary Surgeons, London. He holds a doctorate in Veterinary Clinical Medicine and he previously held the post of Statutory Lecturer in the Faculty of Veterinary Medicine in University College Dublin for many years.

(III) Methodology of the plaintiffs' and defendant's experts

(i) The approach of the plaintiffs' experts
103. As noted above, one of the key issues in this case is how to properly compare the products at issue. Professor Berryman indicated that he considered the comparability of the products using a number of different approaches which he referred to as "the five cornerstones of the comparison":

1. Comparison of quantity.
2. Comparison of provenance.
3. Comparison of nature.
4. Comparison of substance.
5. Comparison of quality.

104. Thus, for example, in respect of quantity, he was of the view that it would be unfair to compare the price of 150 grams of product A to 160 grams of product B. Thus, if products are available in packets of different weights, then a pro rata comparison must be made and the information must be made available in such a way that an average consumer can make a reasonable comparison without the need to make complicated calculations. Likewise with regard to provenance, he indicated that it is unfair to compare Champagne with Cava because a premium is attached to their places of origin. In relation to the nature of products, his opinion was that it would be unfair to compare a chocolate biscuit with a plain biscuit even though both products are biscuits. With regard to quality, he was of the view that this was more difficult to compare because sometimes perceptions of quality are subjective. The consumer may regard a product as a quality product just because of the brand, or the particular taste, or the provenance, or ethical considerations. Thus, he stated in his evidence that in considering differences based on quality, he has erred on the side of caution and has only supported the plaintiffs' position where there was a clear difference in one or more "characterising ingredients".

105. Professor Berryman gave evidence that "a characterising ingredient is typically the one that is most expensive and which most affects the taste and quality of a product". Thus a characterising ingredient would be (i) the one mentioned in the name of the product (for example tomato in tomato ketchup); or (ii) the product on the front of the label (e.g. a tomato example in tomato ketchup, or orange in orange juice or strawberry in strawberry yoghurt) or (iii) one which characterised the flavour (e.g. almonds in marzipan). When comparing two products, he preferred the percentage of the characterising ingredient in each product to be more or less the same. However, he indicated that when he had acted as a public analyst, the general rule was to normally allow a small difference provided it was less than, or up to, 10%.

106. Professor Berryman stated that he adopted a 10% tolerance of the characteristic ingredient in each product to decide whether or not the products were comparable. If a product exceeded the 10% tolerance then, in his opinion, one product was of a higher quality than the other and therefore the products were not comparable. It was put to Professor Berryman in cross- examination that this was an inflexible rule (i.e. a 10% cut off point) but, as he responded, the purpose of the 10% rule was to have 10% flexibility rather than requiring all products to be absolutely identical.

107. Professor Berryman also referred to consumer information law which, he stated, required that the amount of a characterising ingredient be set out in the ingredients list because consumer information law provides that it is important that the consumer can make a comparison of those items. He referred to it as the "Declaration on the characterising ingredient" which is called a Quantitative Ingredient Declaration (QUID). Dr Lawlor also adopted a similar approach.

108. Professor Berryman was cross- examined about taste tests. Aldi engaged in taste testing whereby they identified the market leader (whether branded or unbranded products) and conducted taste tests with persons to compare the Aldi products with the brand leaders. However, Professor Berryman stated that although these tests went on and he had conducted thousands of these tasting tests for all of the big retailers in the UK, that if one were to use taste as an instrument in comparative advertising, it would be necessary to ensure that the taste tests were scientifically designed.

109. Dr. Lawlor also used a 10% tolerance when comparing two different foodstuffs. Thus, if the Aldi product had 10% more of a characterising ingredient than the Dunnes Stores product, then it was, in her opinion, a higher quality product and thus not comparable. Dr. Lawlor gave evidence that the 10% tolerance was chosen by her as a reasonable guide to comparing products and that it had been chosen by her on her own without consultation with Professor Berryman. Thus, the Court was presented with two independent experts who both decided independently to use a tolerance of 10%. Dr. Lawlor was cross- examined on this issue but it was clear that she did indeed arrive at the 10% tolerance independently of Professor Berryman. That is a factor to which the Court should give some weight.

(ii) The defendant's experts' approach- Nutritional composition test
110. Whereas the approach taken by the Aldi experts was to compare products on the five different criteria set out by Professor Berryman (including where appropriate, the declared amount of characterising ingredients that are present), the Dunnes Stores

experts believed that to compare products based on nutritional composition was the most appropriate means of assessment. Thus the defendant's experts compared the nutritional composition of both products and if they were similar, then they believed that the products were comparable.

111. The Aldi experts however were of the view that the nutritional composition of the products was too general and too generic to give a meaningful comparison and that in any event, in several cases, the nutritional composition of the Aldi and Dunnes products was also significantly different.

Comparison of experts' methodologies
112. Having considered the evidence of all expert witnesses on behalf of the plaintiffs and the defendant, it is clear, in my view, that the plaintiffs' experts are correct in their methodology. The more appropriate criteria by which to assess these products are what Professor Berryman referred to as the five cornerstones of product comparability (i.e. comparison of quantity, provenance, nature, substance and quality). These criteria, when properly applied to the products at issue in these proceedings, allow for a more accurate, a more specific and a more appropriate assessment of the comparability of the plaintiffs' and the defendant's products. Thus, in certain cases, the proper test might be the nature of the product and the characterising ingredient; in other cases it might be comparing quantities on a like for like basis.

113. I would conclude therefore that the defendant's nutritional composition test is not the correct test to apply in the present case. It is too generic and it is too general to allow for meaningful comparisons of the products at issue in these proceedings. It allows a comparison to be made, but only at a nutritional composition level. It compares apples and oranges at the more generalised level i.e. that they are both fruit. However, it does not allow a comparison to be made at the more specific level of weight, provenance, quality, quantity and/or nature which is what is required here.

114. It is in fact not just what the products have in common, but what differentiates them, that allows for a proper comparison to be made in many cases. The logical flaw in the defendant's methodology is clear when one considers that the nutritional composition of tinned beef dog food is the same as tinned chicken dog food. They have the same protein content. Thus, from a nutritional composition point of view, the products are comparable. However, it is clear that beef and chicken could not really be regarded as comparable products.

115. Therefore, the methodological error, in my view, which lies at the heart of the defence case was to seek to concentrate on what the products had in common at too high a level of generality and not to focus, at the appropriate level of specificity, on their differences.

116. However, I am also of the view that the defendant's experts not only erred as a matter of logic or principle, but they may have also considered the wrong legal test. Oftentimes, they considered whether the products "met the same needs" or "were intended for the same purpose". That is certainly the test for Article 4 (b) of the Directive and Regulation 4 (2) (c) of the 2007 Regulations. However it is not the only test. It is also necessary, for example, to consider and objectively compare one, or more, or all of the material, relevant, verifiable and representative features of those products (which is the test set out in Article 4 (c) of the Directive and Regulation 4 (2) (d) of the 2007 Regulations).

(IV) The 15 Products

Tomato Ketchup
117. In its shelf- edge label, the defendant made a comparison between the defendant's St. Bernard Tomato Ketchup with Aldi's Tomato Ketchup. The defendant says that its tomato ketchup is €0.65 (per 495 grams) and that Aldi's product is €0.75 (per 563 grams).

118. The plaintiffs' experts say that these products are not comparable because the amount of tomato in the plaintiffs' product is significantly higher (at 189 grams per 100 grams) than it is in the Dunnes product (115 grams per 100 grams) of product.

119. Professor Berryman noted that the tomato content of the Aldi product at 189 grams was much higher than that of Dunnes. The differential was 74 grams. Therefore, because this differential was in relation to the characterising ingredient (namely tomato), and because it was greater than 10%, he was of the view that the plaintiffs' product was a higher quality product and therefore the products were not comparable.

120. Professor Berryman's evidence was that although the products were: *"ostensibly interchangeable because they are both tomato ketchup, there is obviously a key piece of information not given to the consumer, i.e. that the Bramwell's one [that of Aldi] contains almost twice as much tomatoes. Though I have looked at all of the advertising on the shelf- edge labels and it doesn't even actually mention which brand of Aldi product it is compared to let alone what the tomato content is"*. Professor Berryman stated that he had seen the shelf- edge labels but noted that the shelf- edge labels only identified the Dunnes Stores product and therefore only gave half the picture. He noted that no identification of the Aldi product was attempted on the shelf- edge label and commented *"to be fair, a comparative advert must actually describe both products and it must also highlight any information that could mislead the consumer"*.

121. He also indicated that the difference in the amount of tomatoes per 100g would have *"quite a big influence on the flavour and the quality and the taste"* and stated that *"the key point is that the consumer only knows that the tomato ketchup is on the shelf in front of him or her in the store but knows nothing about what it is being compared to. So as a consumer, I would take it as read, that if a declaration was being made, they were of similar quality because there is no other evidence given to me, or other information given to me, to suggest that one is a lot lower tomato content than the other".* He also stated that the products were not of similar quality and that a consumer would be prejudiced in getting something of a much lower quality thinking that it was equivalent to the Aldi product.

122. Professor Berryman also gave evidence that whilst he was Research Director at Leatherhead Food Research in the UK, he directed thousands of properly conducted scientific taste tests *"and it tends to be the product with the most characterising ingredient that do best in test tastes. So if there is more pork, it gets the thumbs up compared to one that is lower pork or if there is higher tomato or if there is higher orange. So it has a direct correlation to the taste and the consumer preference"*.

123. The defendant's experts agreed that the tomato content was significantly different but, taking into consideration both the tomato content and the overall nutritional value, the defendant's experts were of the view that the products were comparable.

124. Dr. Ashurst for Dunnes Stores, noted that the Heinz tomato ketchup was only 148 grams per 100 grams and the Chef tomato

ketchup was 140 grams per 100 grams. Moreover the reformulated Aldi tomato ketchup was only 132 grams per 100 grams. In his view therefore the 10% rule was irrelevant to considering the character of these products and their comparability. In his view therefore the products were comparable.

125. Dr. Ashurst gave evidence that he did not view the quality entirely on the basis of their tomato content but that comparing the nutritional values gives a wider comparison; he stated that the Dunnes product had a significantly higher energy value than that of the Aldi product mainly due to the increased carbohydrate content and he stated that; "he would argue that depending on factors that the individual consumer considers important there is likely to be no significant difference in the overall quality".

126. Dr Ashurst, however, also accepted that no one bought tomato ketchup for nutrition, and that the most important characteristic of ketchup is its flavour.

127. Professor Berryman gave his opinion that he did not agree with the defendant's expert on this point. In his view, the key differentiator was the tomato content and the nutritional value was not the first thing a consumer would look at when they buy a bottle of tomato ketchup. In any event, according to Professor Berryman, the Dunnes product has much higher sugar and less tomato so it doesn't have the same nutritional value.

128. In Professor Berryman's view the nutrition was not as important in relation to tomato ketchup as the issue of taste - which in turn depends on the quality of the ingredients (particularly the tomato) and the percentage of tomato was of greater significance.

129. Having considered all the evidence, I am of the view that the plaintiffs' expert evidence is correct. In my view, the defendant's view that the products are comparable – at the level of nutritional composition – is unpersuasive. I would therefore make the following findings of fact in relation to this product:

1. The Aldi product is made with 189 grams of tomato per 100 grams of ketchup whereas the Dunnes product is made with 115 grams of tomato per 100 grams of ketchup.

2. Such a difference in the amount of tomatoes per 100g would have an influence on the flavour and quality of the product.

3. The Aldi product is a better quality product.

130. I would therefore conclude that the Dunnes product and the Aldi product are not comparable products. In addition I would also note that the shelf-edge labels only identify the Dunnes Stores product and that no identification of the Aldi product was given. The shelf-edge labels did not highlight all material information which would permit the consumer to make a properly informed comparative choice.

Pork Sausages

131. The plaintiffs also say the defendant made an unlawful comparison between the defendant's pork sausages (at €1.59 per 454 grams) with Aldi's pork sausages (€1.59 per 450 grams).

132. Professor Berryman compared the plaintiffs' pork sausages with those of the defendant. There were two differences between the products. The plaintiffs' pork content was 70%, the Dunnes product was 65%. Thus the plaintiffs' sausages had 7.7% more pork than that of Dunnes Stores. Pork was the characteristic ingredient. However it was within the tolerance of 10% and therefore the differential was acceptable according to Professor Berryman.

133. However the Aldi product had a "Bord Bia" logo but the Dunnes Stores product did not. In Professor Berryman's opinion this was a significant difference. His view was that the Bord Bia mark was a quality assurance mark and an indicator of provenance. It was a matter of importance to consumers and it was information which could affect consumer choice. Therefore, he was of the opinion that because the Aldi pork sausages did have a Bord Bia mark, whereas the Dunnes products did not, the products were not comparable.

134. Professor Berryman's opinion was that the Bord Bia approval was a quality system and that the retailer had to jump through certain hoops to get the authority to use this Bord Bia approval. Bord Bia insist on a minimum of 70% pork to bear that logo. So the Bord Bia approval is information which, in his opinion, needed to be made absolutely clear to the consumer in order not to mislead them. Thus, because the Bord Bia did not deal with a 5% or 10% tolerance but set an absolute minimum, the fact that there was a Bord Bia approval was a significant issue. In Professor Berryman's opinion the fact that a Bord Bia logo was attached to a product is information that could affect consumer choice because if a consumer felt strongly about the provenance of a product, a product carrying the Bord Bia approval would carry more weight than one that did not.

135. Professor Berryman noted that Aldi also sold pork sausages with only 57% pork and no Bord Bia logo. In his view, if Dunnes Stores had compared its product with the Aldi 57% pork sausage product, there would have been no prejudice to the consumer. Dunnes would then have been comparing its pork sausages (which had 65% pork) with the Aldi product (with 57% pork) to the benefit of the consumer and there would be nothing hidden relating to the provenance of the product. In his view, this would have been acceptable.

136. Professor Berryman also confirmed that he had examined the shelf- edge labels and noted that there was no indication whatsoever that the Dunnes Stores shelf-edge labels either stated what the Aldi product was, or stated that the Aldi product was Bord Bia approved (whereas the Dunnes product was not). He said, this information should have been made clear to the consumer, but it was not.

137. The defendant's experts' evidence was that the difference in pork content was not significant and, taking into account the nutritional content, the two products were broadly similar and therefore comparable. Dr. Ashurst disagreed that the Bord Bia approval was a material difference, stating that both products were made in Ireland. He also indicated that he had been advised by Dunnes Stores that the pork meat used by them was Bord Bia approved but that the company did not use a Bord Bia recipe because it was not preferred by consumers.

138. Dr. Ashurst was of the view that the fact that the Dunnes Stores product was made in a factory to a British Retail Consortium Grade A standard – (which requires very high standards of quality assurance) and was in effect equivalent to a Bord Bia mark. However, Dr. Ashurst's main point was that he had compared the respective nutritional composition of the plaintiffs' and the defendant's products and that they were comparable.

139. However Professor Berryman noted that, having looked at the nutritional composition of both products, the fat content and saturated fat content were different. Professor Berryman noted that the fat content in the Dunnes Stores sausage was 26g compared to only 17.2g for the Aldi product. That, in his opinion, was a significant difference and therefore it could not be argued that they had the same nutritional composition - even if the nutritional composition was a relevant consideration (which in his opinion it was not). In his opinion, if a consumer was trying to cut down on fat, then that consumer should be given that information so they could see the difference. But, as he said, there was no way the consumer could check that because on the shelf-edge label there was no proper comparison made with an Aldi product. The label only mentioned the Dunnes product.

140. It was put to Professor Berryman that various ranges of sausages were sold in Ireland without the Bord Bia mark and that indeed some of the market leaders in sausage products had no Bord Bia mark. However, Professor Berryman's response was that if the Dunnes Stores product had been compared with a non- Bord Bia approved product he would have had no issue with that comparison.

141. Dr. Lawlor gave evidence that the origin of meat was an important extrinsic cue for perceived product quality because consumers use quality cues to predict the attributes they desire in a product. Consumer research on country of origin revealed that domestic consumers prefer food from their own countries - particularly for fresh meat.

142. Dr. Lawlor also referred to, and gave evidence of, a "Behaviour and Attitudes" study. Behaviour and Attitudes is an independent market research agency and it was commissioned by Bord Bia to conduct a study on its quality assurance mark and its impact in the market place. Dr. Lawlor gave evidence that the actual details of the full report were not released by Bord Bia, and that, like anyone else, all she could have access to was "top line information". Based on this study, 93% of Irish shoppers were aware of the Bord Bia quality mark and the majority declared that seeing such a logo on meat products made them more likely to buy them. Dr. Lawlor also gave evidence about the Bord Bia quality assurance scheme and stated that it was a standard which runs from the farm through to the retailer. With the Bord Bia quality assurance scheme, retailers are entitled to put a logo on the front of their packs. There are two key issues that Bord Bia communicates by means of the logo: firstly that the product was sourced in Ireland and secondly that it has met quality standards. These quality standards would go beyond the regular requirements and would include traceability, animal husbandry, animal welfare, diets of the animal, staff and training.

143. Dr. Lawlor was also of the view that the Dunnes Stores sausages were not comparable to the Aldi sausages because the Aldi product carried the Bord Bia quality assurance logo and the Dunnes Stores did not. Thus there was information communicated to the customer through the Aldi product which the Dunnes Stores product did not carry.

144. Having considered all the evidence, I am of the view that the plaintiffs' evidence is correct. I would therefore make the following findings of fact:

(i) The plaintiffs' product is Bord Bia approved – the Dunnes product is not.

(ii) The Bord Bia mark is a quality assurance mark and an indicator of provenance.

(iii) The Aldi pork sausage had only 17.2 grams of fat whereas the Dunnes Stores sausage had 26 grams of fat. This is a significant nutritional composition difference.

(iv) This information was not given to the consumer. This information should have been given to the consumer so they could be informed of the difference.

145. In the light of the above evidence, I would conclude that the Dunnes product and the Aldi product were not comparable.

White Sauce

146. The third issue about which the plaintiff complained was the comparison between the defendant's St. Bernard White Sauce (€0.49 per 17 grams) with Aldi's White Sauce (€0.49 per 18 grams).

147. The plaintiffs' experts said that this product was not comparable because the Aldi product contained 18 grams of ingredients compared to only 17 grams in the Dunnes product. The plaintiffs' experts also say that even though both sachets made half a pint of sauce, the Aldi sauce contained different ingredients (and more of them) making a stronger sauce. The plaintiffs' experts also were of the view that the nutritional composition was not the same because the saturated fat content was significantly different.

148. Professor Berryman said that, in his view, this was a simple difference. There was a difference in weight. It was simply not correct to compare two products and say they are the same price when the Aldi product is a higher weight. In his view, these products were not comparable for this reason.

149. He noted the defence argument, that both products made the same amount (i.e. one pint) of white sauce, but in his view the composition of that one pint was different by virtue of the weight of each packet. Thus he concluded that the products were not comparable.

150. The defendant's experts noted that both sachets made half a pint of sauce and the nutritional composition was similar - making the two products comparable. It was noted that the fat and saturated fat content of the two products were different but the products were considered comparable. However, Professor Berryman stated that his argument was a straight – forward argument about quantity. His view was that it should have been made clear to the consumer that one was 18 grams and one was 17 grams. The products should have been compared on a gram for gram basis. Moreover he did point out that the nutrition of both products was significantly different in terms of the fat and saturated fat. Thus, even if one makes half a pint of sauce they make two different half pints of sauce. One has more fat and different ingredients in it.

Moreover, Professor Berryman, having considered the nutritional analysis offered by Dr. Ashurst, came to the conclusion that the amount of fat in the Dunnes Stores product was double the amount of fat in the Aldi product and in his opinion that was an important difference. In his view, the nutritional composition was not equivalent and this was information which should have been pointed out to the consumer because it could have affected consumer behaviour.

151. It was put to Professor Berryman that the difference between 18 grams and 17 grams was only approximately 5% and therefore fell within this 10% tolerance but Professor Berryman rejected this. In his view, the 10% tolerance was one which was only used in respect of a characterising ingredient. This rule was not necessary when two products can simply be compared immediately on weight grounds for a pro rata comparison.

152. Again and again Professor Berryman stated that the problem with the Dunnes advertisements was that nowhere had Dunnes compared anything with anything; Dunnes had set out its own product but it had not set out the Aldi product and therefore, there was not proper, or fair, comparative advertising. The absence of this proper comparison could significantly affect a consumer's decision in his view.

153. Dr Ashurst noted that there are packaging regulations which allow a 9% tolerance above or below the stated weight. Dr Ashurst's evidence on this matter was that given the 9% rule, the 17 grams could in fact have gone up to 18 grams and therefore as a matter of substance the products might have been an identical weight.

154. However that 9% tolerance works both ways and it is of course possible that the plaintiffs' products instead of being 18 grams could have also gone up to 19 grams. Therefore, this 9% rule is really of no avail to the defendants. The 9% tolerance applies to both products and therefore when comparing like with like one has to assume, that for the purposes of this comparison, one product has 17 grams and the other product has 18 grams.

155. Moreover, Dr. Ashurst was of the view that any additional amount of fat in the Dunnes Stores product might in fact be beneficial in making up the white sauce and therefore improve the quality of the product. Thus, in his view, it could not be said that the additional amount of fat in the product makes the products incomparable. In his view, what concerns most consumers, is whether the product makes one pint, or half a pint, of white sauce.

156. Dr. Ashurst's evidence was that he did not really think that the consumer was concerned about whether the product was 17 grams or 18 grams provided they both make a half pint of finished product. In his view, it was in any event a marginal difference. He accepted that the formulation, in terms of fat and saturated fat was different but it was not sufficiently different to be of material difference to the consumer.

157. However Dr. Ashurst accepted that if the products were compared side by side, on a pro rata basis, that the consumer would purchase the cheaper product (given that they made the same amount of white sauce and were identical in nutritional terms).

158. Having considered the evidence, I would prefer the plaintiffs' expert evidence. I would therefore make the following findings of fact:

(i) The Aldi product weighs 18 grams, the Dunnes Stores product only weighs 17 grams.

(ii) The price of the Dunnes products and the Aldi products were not set out on a pro rata, per gram price.

(iii) The nutritional composition of the product was different: the fat content of the Dunnes Stores product was double the amount of fat in the Aldi product.

(iv) Moreover this information was not pointed out to the consumer in the shelf-edge label. This was information which could have affected consumer behaviour.

159. I would therefore conclude that the Dunnes product and the Aldi product were not comparable.

Day Cream

160. The fourth product was the defendant's comparison between the defendant's day cream (€1.49 per 50g) and Aldi's anti-wrinkle day cream (€1.99 per 50g)

161. However the Aldi product had a special sun protection ("SPV") factor of 6. The Dunnes day cream had no such sun protection factor. In Professor Berryman's view this SPV factor 6 was important. It gave six times as much protection against the sun as no SPV factor. It protected against wrinkles. In his view this was a significant difference between the plaintiffs' and the defendant's products. In his view, the products were therefore not comparable.

162. In the joint experts' report, the defendant's experts agreed that the plaintiffs' and defendant's day cream products were not comparable and that Aldi's assertion was supported. That is a significant concession in the context of this case.

163. However, in his direct evidence, Dr Ashurst said that, although he had agreed in the joint expert report that the products were not comparable, he had no real expertise in this type of product and therefore could not really express a formal opinion on this point. However, even if this is so, I must now exclude Dr. Ashurst's evidence on this point and I am therefore left with the evidence of Professor Berryman who is of the view that these products were not comparable.

164. I would therefore conclude that:

(i) The Dunnes product is not comparable to the Aldi product because the Aldi product had a special sun protection factor of 6.

(ii) This information was not made available to the consumer by Dunnes Stores.

(iii) This was information which could have affected consumer behaviour or choice.

Turkey Breast Mince

165. The fifth issue was the comparison between the defendant's fresh Irish turkey breast mince (€3.59 per 400 grams) with Aldi's turkey breast mince (€3.95 per 400 grams).

166. The plaintiffs' expert evidence was that the Aldi product was not comparable because the Aldi product carried the Bord Bia quality assurance logo whereas the Dunnes Stores product does not. That is the only difference.

167. However, again in Professor Berryman's view the Bord Bia mark was an important indicator of provenance and it would, or could, influence consumer behaviour and therefore it should have been brought to the consumers' attention. Because it was not, he was of the view the products were not comparable.

168. The defendant's experts' position was that the source for the turkey supplied into the final suppliers is EC approved and therefore the products were comparable to the Aldi products.

169. However Professor Berryman was of the view that provenance is of considerable importance and the Bord Bia logo shows that the product is sourced in Ireland. It stands to reason therefore that this could significantly affect a consumer's choice of product and therefore that it is material. It was, he said, no answer to say that the defendant's products were EC approved and therefore the products were comparable - particularly in the context where a consumer may wish to purchase meat which is sourced in Ireland and processed in Ireland.

170. Having considered the evidence, I am of the view that the plaintiffs' evidence is to be preferred. In the light of the evidence, I find as a fact that:

> (i) The Aldi product contains the Bord Bia mark and the Dunnes product does not. There is therefore a difference in provenance between the products.

171. I would therefore conclude that these products were not comparable products.

Sparkling Orange Drink
172. The sixth issue about which the plaintiffs complain is the comparison between the defendant's Cadet Sparkling Orange (€1.79 per 2 litre) with Aldi's Sparkling Orange (€1.79 per 2 litre)

173. The Aldi product has an orange juice concentrate of 7.6%. In addition it has orange comminute of 2.3%. The Dunnes product has only 2% orange juice from concentrate.

174. Professor Berryman noted that the Aldi product had nearly four times more orange juice content than the Dunnes Stores product. Given that this was the characteristic ingredient of sparkling orange drink, he was of the view that this was a significant difference. It meant that the Aldi product was of a higher quality and therefore the products, in his view, were not comparable.

175. Professor Berryman noted that - in relation to labelling requirements - the parties only have an obligation to quantify the percentage of the characterising ingredient. There is no obligation to list the percentages of any other ingredients. Professor Berryman noted that although both products are carbonated drinks, the Aldi product is of a higher quality because it has more orange in it, where that is the characterising ingredient. His conclusion was that information should have been provided to the consumer pointing out the difference in orange content.

176. In the joint experts' report, the defendant's experts conceded that the plaintiff and the defendant's products were not comparable and that the Aldi assertion was supported. Again this was a significant concession.

177. However, when Dr. Ashurst gave his oral evidence it appeared as if he was in fact now seeking to argue that the products were comparable. Thus he said these products contained a mixture of orange juice concentrate and orange comminute and that, in his opinion, the overriding flavour in this product would come from added flavouring and not from the orange juice or the comminute.

178. Dr. Ashurst accepted there were significant differences between the products and that the Aldi product contains several times the amount of actual orange fruit. But, in his view, it would provide the consumer with the same need.

179. However having considered the expert evidence, I find the plaintiffs' expert evidence more persuasive. I would therefore make the following findings of fact in relation to this product:

> (i) The Aldi product had an orange juice concentrate of 7.6%; the Dunnes product had only a 2% orange juice concentrate. Thus, the Aldi product had nearly four times more orange juice content than Dunnes Stores.
>
> (ii) The Aldi product was of a higher quality than the Dunnes product.
>
> (iii) Moreover the Dunnes Stores shelf-edge label did not bring this information to the attention of the consumer. This was information which could or might have affected consumer behaviour.

I would therefore conclude that the products are not comparable.

Shower Gel
180. The seventh product is the comparison between the defendant's shower gel (€1.19 per 275 ml) with Aldi's shower gel (€1.19 per 250 ml)

181. The plaintiffs' experts say that the products are not comparable because the plaintiffs' product contains an extra ingredient (i.e. tea tree oil) which is a significant differentiating factor as it is an expensive oil and also has antiseptic properties. The defendant's product does not contain tea tree oil but only lemon oils.

Professor Berryman gave evidence that the tea tree oil was an expensive essential oil, that it had mildly antiseptic qualities (depending on the amount put into it) and that it gave a different fragrance. In his view, the addition of a tea tree oil was a significant differentiating factor and therefore in his opinion the two products were not comparable.

182. It was put to Professor Berryman that there was only a miniscule amount of tea tree oil in the shower gel i.e. 0.05%. However Professor Berryman responded that one did not need very much of these oils to characterise the fragrance. It was like a perfume – a small amount was all that was required to give it quite a strong perfume. (However, he accepted that in relation to having antiseptic qualities, the percentage would have to be 2 to 3%.) However he stuck by his original opinion that one was a lemon shower gel and the other was a lemon and tea tree oil shower gel so therefore the products were not comparable.

183. Moreover, significantly, the defendant's experts in the joint experts' report also conceded that the plaintiff and the defendant's products were not comparable and that the Aldi assertion was supported.

184. However, in his oral evidence, Dr. Ashurst gave evidence that the tea tree oil ingredient added to the shower gel by Aldi only amounted to 0.05% of the product and in the context of a product of 250ml, this amounted to approximately ⅛th of 1 millilitre. Dr. Ashurst also gave evidence that when he smelled the product he could not detect the smell of tea tree oil which was very

characteristic. In his view therefore, this was a product where Aldi had sought to come up with something which was slightly different than a competitor's product by adding some product and then trying to distinguish it from the product. Thus, in his oral evidence, he said these products were comparable.

185. However, having heard all the evidence in this matter, I prefer the plaintiffs' evidence. I would therefore make the following findings of fact in relation to this matter:

(i) The Aldi product contains tea tree oil. The defendant's product does not contain tea tree oil.

(ii) The addition of tea tree oil – even in small quantities – was a significant differentiating factor.

186. I would therefore conclude that the two products are not comparable.

Toilet Tissue
187. The eighth product is the comparison between the defendant's toilet tissue (€2.69 per 9 pack) with Aldi's toilet tissue (€2.69 per 9 pack)

188. The plaintiffs' experts say that these products are not comparable for two reasons:

(i) The plaintiffs' products are heavier (being 963 grams to the defendants 730 grams.)

(ii) The plaintiffs products are much longer than the defendant's products and therefore provide more value for money.

189. The Aldi product weighs 963 grams. Each roll is 29.48 metres long. The Dunnes toilet tissue weighs 730 grams. Each roll is 23.1 metres long

190. In Professor Berryman's view the Aldi product is longer (approx 25- 30% longer) and therefore there is more of the product. It also weighs more and therefore it is a higher quality product. In his view, therefore, the two products were not comparable. Moreover in the Dunnes advertisement, no Aldi product was actually highlighted in the shelf-edge label. Professor Berryman was of the opinion that they were of different qualities and that the consumer would not know that because the Aldi product was not actually highlighted. In his view there was information missing which could affect consumer choice.

191. The defendant's experts conceded that the plaintiff and the defendant's products were not comparable.

192. I would therefore make the following findings of fact

(i) The Aldi product is approximately 25 – 30% longer and therefore there is more of the product.

(ii) The Aldi product weighs more and therefore is of a higher quality.

(iii) Moreover in the Dunnes shelf-edge label no Aldi product was highlighted for comparison.

(iv) There was information missing which could affect consumer choice.

193. I would therefore conclude that the two products are not comparable.

Strawberry Yoghurt
194. The ninth product is the comparison between the defendant's low fat large yoghurt pot strawberry flavour (€0.99 per 500 grams) with Aldi's strawberry yoghurt (€0.99 per 500 grams.)

195. The plaintiffs' experts say that the plaintiffs' product contains significantly more strawberries than the defendant's products. In addition the plaintiffs' products have significantly less sugar than the defendant's products so the nutritional profile is significantly different and the products are not comparable. The defendant's experts say that - based on the "nutritional composition" of the food content - the two products are broadly similar and are comparable.

196. The Aldi product contains 12% strawberry. The Dunnes product contains only 10.6% strawberry. Thus the Aldi yoghurt contains 13% more strawberry than the Dunnes product. In Professor Berryman's view the characteristic ingredient of this product is strawberry. It was, in his view, "the sort of key ingredient you are paying for". Thus, given that the Aldi yoghurt contains over 13% more strawberry than the Dunnes yoghurt, he was of the view that it was a higher quality product and therefore the products were not comparable. In his view, if full and proper information had been given to the consumer, it might have affected consumer choice to know that there were 13% more strawberries in the Aldi product for the same price. He also said that comparing both without highlighting the difference was unfair.

197. In relation to his "10% rule" Professor Berryman gave evidence that this was not simply his rule of thumb, it was a rule or tolerance which was "commonly adopted amongst public analysts and enforcement authorities just to, sort of, give the benefit of any doubt." There would be some differences in tolerance but rather than having a "strictly rigid" rule there was a general rule of thumb of 10% so that the rules are not applied too regularly.

198. The defendant's expert's view was that the products were comparable - based on the nutritional characteristics of each product.

199. However Professor Berryman noted that, even on the nutritional composition, the Dunnes Stores product had 2.4 grams of fat per 100 grams compared to just a trace of 0.2 grams per 100 grams of fat in the Aldi product. Therefore the Aldi product was virtually fat free and the Dunnes Stores product was not. Professor Berryman's opinion was that consumers do indeed buy yoghurt based on whether they are low fat or not low fat and that information should be present to enable them to make a decision. Thus, in his view, the nutritional composition of both these products was not the same and they were therefore not comparable even on grounds of nutritional composition.

200. Mr. Howard SC, for the defendant, put to Professor Berryman that the difference in the strawberry content between the Dunnes Stores and Aldi products was only approximately 5 grams of strawberries. He produced a beaker in which there were 5 grams of strawberries supposedly to show how little it was. Professor Berryman was unmoved. In his view it was the percentage of the

characterising ingredient in the compared products which was significant. In his opinion, the difference was sufficient to give rise to the possibility that it could significantly affect the consumer's decision because the consumer should be able to make that comparison. Professor Berryman also emphasised that it was not possible for a consumer to compare this because the information was not available to the consumer.

201. The defendant however submitted that both products could be referred to as "low fat" yoghurts because the requirements state that to be regarded as low fat it has to be less than 3 grams per 100 grams.

202. Dr. Ashurst gave evidence that strawberry yoghurt is prepared in such a way that a strawberry jam or paste is usually added to a yoghurt base to enable the manufacturer to say it was a strawberry yoghurt. In his view, strawberries would add almost nothing to the flavouring. The flavouring is given to the product by a strawberry flavouring. The purpose of adding strawberry was to enable the manufacturer to say it is a strawberry yoghurt and also to provide a certain amount of texture. In his view the products were comparable.

203. Having considered the evidence however, I am more persuaded by the plaintiffs' experts. I would therefore make the following findings of fact in relation to strawberry yoghurt.

(i) The Aldi product contains 12% strawberry, the Dunnes product contains only 10.6% strawberry. Thus the Aldi yoghurt contains 13% more strawberry than the Dunnes product.

(ii) The Aldi product is a higher quality product.

(iii) The Dunnes Stores product had 2.4 grams of fat per 100 grams compared to just a trace of 0.2 grams per 100 grams in the Aldi product. Thus the Aldi product was virtually fat free, the Dunnes Stores product was not.

(iv) Moreover this information was not given to the consumer by the Dunnes shelf-edge label.

(v) This information might have, or could have, affected consumer choice.

204. I would therefore conclude that the products are not comparable.

Peach Yoghurt/Peach and Nectarine Yoghurt
205. The tenth product about which the plaintiffs complain is the defendant's comparison between the defendant's low- fat, peach flavour, large yoghurt pot (€0.99 per 500g) with Aldi's peach and nectarine yoghurt (€0.99 per 500g).

206. The plaintiffs' experts submit that the Aldi product contains both peach and nectarine and a total fruit content of 10% whereas the Dunnes products contain only peach and a fruit content of only 6.9%. The defendant's experts submit that despite a difference in fruit content these products are comparable in nutritional composition.

207. The Aldi product contains 10% fruit consisting of both peach and nectarine. The Dunnes product contains only 6.9% fruit and no nectarine. Thus, as Professor Berryman pointed out, the Dunnes product had 44.9% less fruit. He was of the view that the products were not comparable for two reasons:

(1.) They were of different natures and fruit types i.e. Aldi's product was peach and nectarine whereas Dunnes' was only peach.

(2.) The Aldi product had a much higher amount of fruit.

208. He also noted that the Dunnes shelf-edge label just mentioned the Dunnes product; it did not even specify the Aldi product.

209. Professor Berryman agreed with Dr. Ashurst that they were comparable nutritionally but they had significantly different fruit content. In addition, one product would taste of peach and nectarine and the other would taste of peach. There was some considerable discussion in cross- examination as to whether there was much difference in taste between peach and nectarine. But Professor Berryman was of the view that nutrition was not a very good way of comparing products for reasons stated earlier.

210. It was also put to Professor Berryman that peach and nectarine were botanically indistinguishable except that the peach had a furry sort of skin. Professor Berryman accepted this, but he still noted that the products were different. He was challenged as to his evidence that there was a difference in taste but he maintained his position that they have slightly different flavours and that they are two different fruits. Given that the skin of both fruit is taken off before it goes into the yoghurt, he was asked how he could justify saying there was a difference in taste given that both products were botanically the same and how he could quantify that difference. His answer was that he could not quantify the difference, that he would simply say that they would have the texture and flavour of two fruits and pointed out that two varieties of tomato are botanically the same but the taste between a plum tomato and a cherry tomato is different.

211. Dr. Ashurst gave evidence that nectarines and peaches were essentially the same botanical species but that nectarines have an additional gene which gives them a smooth skin, as opposed to the rough skin of a peach, but it would not affect the flavour or nature of the fruit. He also gave evidence that the skin of the fruit would be removed. Thus, in his view, any distinction between peach and nectarine versus peach was essentially illusory and in his view the products were comparable.

212. Dr. Ashurst was also of the view that these differences would not be of great importance to most consumers. In his view, the level of difference between the fruit would have very little impact on the actual perception of the product because the majority of the flavour comes from the added flavouring. His view was that although there were differences, they were not material differences. He did however accept in cross- examination that the amount of fruit in a yoghurt was a decision which carried a cost implication because clearly the more fruit in a yoghurt the more costly it is to produce. He also accepted (from publications he himself had written on the topic) that there was certainly a consumer interest in the amount of fruit in a product and he accepted that a product with 1% fruit and a product with 10% fruit would not be interchangeable. His evidence however was that the difference between 6.9% and 10% was not likely to be noticed by most consumers. He also accepted that the whole idea of requiring a characterising ingredient to be quantified on a packet was so that the consumer was well- informed (if he was buying for example a peach yoghurt, how much peach there was in it). He also accepted that in order to be able to call a product peach yoghurt, it had to have peach fruit in it and he accepted that a manufacturer had to have a minimum of 2% of the product in order to be able to make that claim.

213. He accepted in cross- examination that the amount of characterising ingredient in a product is something which the regulatory authorities believe the consumer should be told about and that this is of interest to a consumer. He also accepted that the amount of, or percentage of, fruit in a product was something to be taken into account.

214. Dr. Ashurst also accepted that "one of the overriding difficulties in this situation" is that the consumer did not have both products in front of them in order to make a proper comparison. He also accepted that all a consumer knew about the Aldi comparator product is that the word "Aldi" and the price appeared on the Dunnes Stores shelf-edge label and that no nutritional or compositional information of any kind whatsoever was supplied. He accepted that the consumer therefore was not looking at two competing brands on a shelf and evaluating them for themselves – the consumers were taking the evaluation in relation to comparability "on faith from Dunnes".

215. Dr. Ashurst fairly accepted that - even though he was of the view that the proper basis for comparing the products was nutritional composition -, on the facts of this case, the consumer had absolutely no idea from the Dunnes Stores shelf-edge labels whether Aldi product were the nutritional equivalent or not. As he said, "that is one of the problems here".

216. Dr. Ashurst also accepted that there were certain cases where using nutritional composition to decide whether products were comparable was not a good basis for making a judgment on comparability. For example, olive oil and extra virgin olive oil may have a similar nutritional composition but extra virgin olive oil is of a higher quality and higher price. Similar differences in quality arise in relation to organic milk, manuka honey etc. where its nutritional composition is the same but there is a difference in quality of the products. This again provides, in my view, another reason why one cannot use nutritional composition as a way of deciding whether many of these products are fairly comparable.

217. Dr Ashurst accepted that the Dunnes Stores product had 6.9% fruit content and the Aldi product had 10% which was a difference of more than 40%. He also accepted that if the two products were side by side and one said 40% more fruit content, that this probably would have an effect on the consumers.

218. Dr Ashurst also accepted that, in the absence of any other data, nutritional composition was a very general test. He accepted that the nutritional composition test tells a consumer what the products have in common rather than what differentiates them. He also accepted that a consumer would rely on other information on the label to make that differentiation - for example the list of ingredients and the description of the product. He also accepted that he had never sought to argue that information about the characterising ingredient was irrelevant.

219. Dr Ashurst also accepted that there could be a synthesis - between his expert view and the plaintiffs' expert view - in that one could look at nutritional value/composition and then look at other compositional characteristics - for example the characteristic ingredient.

220. Dr Ashurst also accepted - in response to a question from the court - that the use of the 10% rule was a reasonable rule to adopt in the absence of any other rule. He stated "I think it's a reasonable approach". He also said "I think I don't disagree that a 10% approach is, if you like a reasonable approach. I don't, as I said repeatedly, think it's the whole story".

221. Having considered the expert evidence, I prefer the plaintiffs' evidence. I would therefore make the following findings of fact:

(i) The Aldi product contains 10% fruit consisting of both peach and nectarine; the Dunnes product contains only 6.9% fruit and no nectarine.

(ii) The Dunnes product had 44.9% less fruit.

(iii) The Aldi product was of a different nature and fruit type. The Aldi product was peach and nectarine, whereas the Dunnes product was only peach.

(iv) Moreover this was information which was not given to the consumer in the Dunnes shelf-edge label.

(vi) This was information which could significantly affect the consumer's decision.

222. I would therefore conclude that the products were not comparable.

Sunflower Spread

223. The next product is the comparison between the defendant's sunflower spread (€0.55 per 500 grams) with Aldi's sunflower spread (€0.55 per 500 grams).

224. The plaintiffs' experts submit that the Aldi product contains significantly more sunflower oil (10%) and therefore the products are not similar. The defendant's experts submit that the "nutritional composition" of the two products is broadly similar and therefore the two products are comparable.

225. The Dunnes Stores product contains 20% sunflower oil. The Aldi product contains 22% sunflower oil. Therefore, as Professor Berryman noted, the Aldi product contains 10% more sunflower oil than the Dunnes product. He accepted, however, that this was borderline having regard to his 10% tolerance rule but his view was that one had to draw the line somewhere and on this basis the Aldi product was a higher quality product and the products were not comparable. However during his cross- examination, he was happy to accept that it was borderline and that he could concede on this point. Dr. Lawlor however stuck to her view that the products were not comparable because of the 10% differential.

226. However, as one of the plaintiffs' experts accepted that this matter was borderline, I do not propose to make any conclusion in relation to this product.

Tinned Chicken Dog Food

227. The next product is a comparison between the defendant's tinned dog food (chicken in jelly flavour) (€0.52 per 400 grams) and Aldi's dog food (chicken in gravy) (€0.52 per 400 grams).

228. The plaintiffs' expert's evidence was that the Aldi products contain 4% chicken and 4% carrot whereas the Dunnes product contains 4% chicken and no carrot. They are therefore of a different nature and so not comparable. The defendant's experts submit that the "nutritional composition" of both products is the same and therefore they are suitable for comparison.

229. Professor Berryman was of the view that Dunnes Stores were not comparing like with like and that the products were two different products. He noted that the case being made by Dunnes Stores was that the need that has to be fulfilled by a tin of dog food was simply to give the dog a nourishing meal. His response to that was that all dog food should satisfy the nutritional requirements of the dog but the consumer is the purchaser of the product and dog owners buy dog food for all sorts of different reasons. If they realised that the Aldi product was chicken and vegetable they might think it was a higher quality product. Moreover the Dunnes shelf-edge label did not mention at all what the Aldi product is so the consumer could not make an informed decision in comparing the two products.

230. Again and again Professor Berryman, in respect of many of the product comparisons, commented that there was no way the consumer would know any of the relevant Aldi information because the Aldi product was never highlighted. The Dunnes Stores shelf-edge labels simply talked about the Dunnes Stores product and then gave two prices. Moreover, the consumer could not even acquaint himself with the products being referred to, because if a consumer went to an Aldi store to compare the two products, the consumer would not know which Aldi product to look at because there was no Aldi product actually specified on the shelf-edge label.

231. The defendant's experts were of the view that the nutritional composition of both products was the same and therefore they were suitable for comparison. However in Professor Berryman's opinion that ignores the key characterising ingredient of carrot. Professor Berryman agreed with Dr. Dodd that they were the same nutritionally but in his view that was not the key point. The Aldi product had a 4% vegetable content and the fact that there are additional ingredients in it, which is not mentioned on the shelf-edge label, is clearly information which could affect consumer choice.

232. Dr. Dodd (the defendant's expert on the veterinary food products), laid emphasis on the nutritional quality of the products and, in his opinion, the nutritional composition of the defendant's products and the plaintiffs' products was similar and therefore the products were comparable. However, in Professor Berryman's opinion one would take it as read that a pet food would actually be suitable for the health and nutrition of the pets and that pet foods would be nutritional for cats and dogs. However, his opinion was concentrated entirely on the consumer experience and that when someone was buying a product they should have all the evidence in front of them so that they can make an informed decision. Thus, if one product was 8% meat compared to another product which was 4% meat that is clearly information which could affect the buying decision. Thus, in his view, the comparisons were unfair and misleading.

233. It was put to Professor Berryman in cross- examination that under the requirements of Council Regulation E.C. 767/2009 of 13 July, 2009 (on the placing on the market and use of feed), there was a difference between what was called "complete feeds" – which had to meet all the nutritional requirements of a pet – and what are called "complementary foods" – which had to be added to something else to provide the daily ration. (In the products at issue in this dispute, all the examples were complete foods and therefore they supplied all the nutritional requirements of the animal.) Professor Berryman accepted that entirely and stated that he did not disagree with the defendant's expert, Dr. Dodd, about the nutritional qualities of the defendant's products but that his concern was the lack of information about key ingredients like carrot content etc.

234. Having considered the evidence, I am of the view that the plaintiffs' expert evidence is more persuasive. I would therefore make the following findings of fact:

(i) The Aldi product consists of 4% chicken plus 4% carrot. The Dunnes product contains 4% chicken and no carrot.

(ii) The two products therefore are of a different nature.

(iii) The Dunnes shelf-edge labels never gave proper information about the Aldi product.

(iv) This was information which could affect consumer choice.

235. I would therefore conclude that the two products were not comparable.

Tinned Beef Dog Food

236. The next product is the comparison between the defendant's tinned dog food (beef in gravy flavour) (€0.52 per 400 grams) and Aldi's dog food (beef in jelly) (€0.52 per 400 grams).

237. The plaintiffs' experts noted that the Aldi products contain 4% beef and 4% carrot whereas the Dunnes product contains 4% beef and no carrot. They are therefore not comparable. The defendant's experts submit that the nutritional composition of both products is the same, and therefore they are suitable for comparison.

238. Professor Berryman was of the view therefore that the two products were of a different nature because the Aldi product contained 4% carrot. Therefore, in his view, the products were not comparable for the reason set out above under "tinned chicken dog food".

239. This issue is very similar to the previous product. I have come to a similar conclusion. I would therefore make the following findings of fact:

(i) The Aldi product is of a different nature because the Aldi product contains 4% carrot.

(ii) The Dunnes Stores shelf-edge label did not set out a proper comparison with the Aldi product and this was information which could have affected consumer choice.

240. I would therefore conclude that the products are not comparable.

Six Pack Dog Food

241. The next issue is the comparison between the defendant's Patch dog food (6 x 400 grams) (€2.99 per 2400 grams) with Aldi's 6 pack of dog food (€2.99 per 2400 grams).

242. The product was a six pack of six tins of dog food with three different varieties.

(i) In the first variety, the Aldi product had 4% chicken 4% turkey and 4% vegetable. By comparison, the Dunnes product had 4% chicken 0% turkey and 0% vegetables. Thus Professor Berryman was of the view that there was a qualitative difference between these two products and therefore they were not comparable.

(ii) In respect of the second variety, Professor Berryman noted that the Aldi product had 4% chicken 4% beef and 4% vegetable. The Dunnes Stores product by comparison had 0% chicken 4% beef and 0% vegetable. Again, Professor Berryman's conclusion was that the Aldi product was of a higher quality because it had 8% chicken and/or beef and 4% vegetable. Thus there was a qualitative difference between the products and they were not comparable.

(iii) In relation to the third variety, Professor Berryman noted that the Aldi product consisted of 4% lamb and 4% vegetable. The Dunnes product consisted of 4% lamb and 0% vegetable. In his view there was a clear difference in quality between the products and they were therefore not comparable.

243. The defendant's experts submit that the nutritional composition of both multipacks is the same and therefore it is reasonable to compare them.

244. This product is similar to the previous two. I would therefore, for the reasons given above, prefer the plaintiffs' experts and I would make the following findings of fact:

(i) The plaintiffs' product has in one case twice as much chicken and/or turkey and also 4% vegetable. Thus there is a qualitative difference between these products. The Aldi product is of a higher quality.

(ii) In the second variety the Aldi product had 8% chicken/beef and 4% vegetable, the Dunnes product had only 4% beef and 0% vegetable. The Aldi product was of a higher quality.

(iii) The third variety, the Aldi product, had 4% lamb and 4% vegetable. The Dunnes product had 4% lamb and 0% vegetable. The Aldi product was a higher quality product.

(iv) Moreover the Dunnes shelf- edge label did not highlight a particular Aldi product and thus a consumer would not be able to check out the Aldi product's information. This was information which could have affected consumer choice.

245. In the light of the above, I would conclude that the products were not comparable.

Dry Cat Food

246. The plaintiffs' next product is the comparison between the defendant's St. Bernard complete dry cat food product (€2.25 per 2 kilograms) with Aldi's complete cat food (€2.25 per 2 kilograms). The plaintiffs' experts submit that the plaintiffs' products contain 4% chicken and 4% liver whereas the Dunnes Stores product contains 4% chicken only. In addition the plaintiffs' product has significantly more fat so the nutritional profiles are different. Thus, the plaintiffs' experts submit that these products are not comparable.

247. The defendant's experts agree that the fat content was different and that the Aldi product contains more meat. However, the defendant's experts submit that these distinctions are without significant meaning in nutritional terms and that therefore the products are comparable.

248. Professor Berryman's evidence was that, in his opinion, there was a qualitative difference between the two products, they were of a different nature and therefore they were not comparable. Professor Berryman noted that the Aldi product had twice as much meat in it and that a cat owner would want to know that information because they might think they were getting a bargain by getting the Dunnes product as cheap as an Aldi product whereas in fact the Aldi product contains twice as much meat. In his view, that was information that should be available so that the consumer could make an informed choice. He was of the view that it was a poorer quality product than the Aldi product.

249. Dr. Dodd, who gave evidence on behalf of the defendant, was of the view that the nutritional composition of the Dunnes and Aldi products were comparable. However, he also accepted in his evidence that although the nutritional qualities of dog food and cat food are the same, over the long term one could not use dog food for cats and vice versa because it would lead to a deficiency. Thus, there is evidence before the Court that even though the nutritional composition of dog food and cat food is similar, it is clear that there are important differences between these products and one could not use dog food for cats and vice versa over a long period of time. Again, in my view, this shows the difficulty of using nutritional composition as the test for comparing the products.

250. Having considered the expert evidence, I am of the view that the plaintiffs' expert evidence is correct. I would therefore make the following findings of fact:

(i) The Aldi product had 8% chicken/liver; the Dunnes product had only 4% chicken.

(ii) There was a qualitative difference between the two products. They were of a different nature. The Aldi product was of a higher quality.

(iii) Certain information was not available to the consumer. This information could have affected consumer choice.

251. I would therefore conclude that these products were not comparable products.

The Effectiveness of the Campaign

252. In the course of the trial I heard evidence from four expert witnesses in relation to the issue of the effectiveness of the campaign or the effectiveness of comparative advertisements upon consumers. Professor Dobson and Professor Fahy gave evidence on behalf of the plaintiffs; Professor Barwise and Dr. Ennis gave evidence on behalf of the defendants. Their qualifications and expertise are set out in their reports to the Court. Their evidence was also helpful to me in assessing these issues.

253. Professor Dobson provided expert evidence on two questions. These were:

(a.) What influence do comparative advertising campaigns have on consumers?

And

(b.) Assuming that they do have an influence, what objectives are retailers seeking to achieve with such campaigns and in particular what was the likely objective of Dunnes Stores with such a comparative advertising campaign?

254. His answer to the first question, having reviewed the academic studies in this area, is that comparative advertising campaigns

can have a significant effect on consumers. The answer to the second question is that the objective of Dunnes Stores with such a campaign was an attempt to neutralise its rivals' [Aldi and Lidl] comparative advantage on price image, to help ensure that it retains its customers and thus to protect its market share. Professor Fahy in his report stated that he fully supported Professor Dobson's analysis and conclusions. He also provided some additional evidence in support of these conclusions.

255. Moreover Professor Dobson's report also established that the evidence was that only 2% of grocery shoppers in Ireland now do their full shop in just a single store. Thus 98% of Irish shoppers now complete their shop in multiple stores. Moreover 90% of shoppers say price remains a determining factor of where to shop. 68% of shoppers complete their shop in multiple stores because of price.

256. Professor Fahy also stated that the reasons why comparative advertising regulations exist is because there is an awareness that comparative advertising campaigns can influence consumers and therefore protection is needed, with regulations to ensure that consumers are not misled or misinformed. Professor Dobson's evidence was that comparative advertising campaigns are becoming more prevalent precisely because they are effective.

257. Interestingly, Professor Barwise also agreed with Professor Dobson (and Professor Fahy's) analysis of Professor Dobson's first question i.e that comparative advertising can indeed influence consumer attitudes and purchasing behaviour. In the light of all the experts' views, therefore I find as a fact that comparative advertising can indeed influence consumer's attitudes and purchasing behaviour.

258. In relation to the banners, Professor Dobson and Professor Fahy's evidence was that the message contained on the banners was a "very powerful message" because it was making a claim in respect of hard discounters such as Aldi, that Dunnes Stores was matching them on "all your family essentials". Dunnes Stores case is that these words, such as "lower price guarantee" etc. cannot be read literally. But Professor Dobson entirely disagreed. He said that if you used words such as "lower price guarantee" they have a powerful meaning and that you need to live up to that guarantee. In his expert opinion the banners could mislead consumers because of the phrases "lower price guarantee" and "Aldi match".

259. Professor Dobson also noted that the issue here was not about market shares going one way or the other, it was the counterfactual: what would have happened if there had not been this campaign. His answer was that "we don't know the extent to which it would have had an effect but we do know there would have been an effect and so the counter factual is, in the absence of that campaign, that effect wouldn't have arisen…..for me that's an open and shut issue….."

260. Professor Fahy agreed, on all the essential points, with Professor Dobson's analysis and conclusions.

261. Professor Barwise also considered the second issue which Professor Dobson considered and again he agreed with Professor Dobson's conclusions about the objectives of Dunnes Stores in this campaign. However he then went on to consider what he said was the fundamental issue in this case – viz. which supermarket to shop in. As he said, " In [my] view, fundamental to the case, this campaign was not about which brand of toilet tissue or tomato ketchup to buy, it was about whether to shop at Dunnes or at Aldi, Tesco, Lidl, SuperValu or elsewhere." Thus, he says, the question was whether the impact of the Dunnes campaign was big enough to significantly affect the consumers' choice of supermarket.

262. The balance of Professor Barwise's report considered that question.

263. However, in my view, he has considered the wrong question and perhaps misinterpreted the legal issues which arise in this case. The question in this case is about the lawfulness of comparative advertising in respect of specific goods or products. The comparative advertising must fulfil all of the requirements of the Directive and the 2007 Regulations. There is nothing in the Directive or Regulations about the effect on consumers of their choice of supermarket. The Directive and Regulations are focused exclusively on "products" or "goods" and "services". Indeed Mr. McDowell SC, for Aldi put it to Professor Barwise that he had asked himself the wrong question and that therefore most of his report was misconceived. Professor Barwise's reply was that he was influenced by market share data provided in this case and that market share data was not about individual products but about the competition between Dunnes, Aldi and other major supermarkets. He also said that he was "looking at the case in the round…and what is in dispute is whether a campaign run by one of these [supermarket] groups was in some way unfair and therefore damaged the other supermarket group".

264. However, in my view, that is not the issue in this case. The issue in this case is whether the comparative advertisements used by Dunnes Stores infringed the Comparative Advertising Directive and the Irish implementing Regulations. In my view therefore Professor Barwise has misinterpreted the legal issues which arise in this case.

265. Dr. Ennis also gave evidence for the defendant about the nature, purpose and use of comparative advertising and he also accepted that it was, or could be, effective. He also gave detailed evidence on the nature of the Irish grocery market and the habits of Irish shoppers. In addition, he gave evidence as to whether consumers could have been deceived or misled by the banners and shelf- edge labels. He concluded that the banners would not have misled Dunnes Stores customers because they reflected consistent themes used by Dunnes Stores over 40 years. However, his evidence conflicts with that of Professor Dobson and Professor Fahy and I am more persuaded by their evidence. The issue for Dunnes Stores is that once it engaged in comparative advertising in its banners and its shelf- edge labels, then it had to comply with all of the requirements of the Comparative Advertising Directive and Regulations. For reasons set out in my judgment I have concluded that these comparative advertisements did not comply with the Directive and Regulations.

266. The defendant relied on the Kantar market data which it said established that throughout the campaign Dunnes Stores lost increasing numbers of customers to Aldi. It also said that this increasing loss of customers was only reversed but not eliminated by the introduction of the "Back To School" campaign. However, having heard all the evidence on the Kantar data, it is clear that the reasons why consumers might move from Dunnes Stores to Aldi are multi- factorial. It cannot be said, with any reliability, that just because some customers were moving to Aldi, that the comparative advertisements were ineffective. For example, it might be the case that a significant number of extra consumers might have moved to Aldi but for the Dunnes Stores campaign. I do not believe therefore that the Kantar data proves what the defendant relies on it to prove.

PART 4 - APPLICATION OF THE LAW TO THE FACTS

Introduction

267. Having set out the factual background to these proceedings, the legal context in which these issues need to be considered, and having considered the comparability of the 15 sets of products, I turn now to the application of the law to the facts.

268. In this case, the plaintiffs make complaints about three separate types of comparative advertisements. These are:

(a) The comparison of fifteen products by Dunnes on shelf- edge labels

(b) The banners

(c) The shelf- edge labels/ lower price labels generally (apart from the fifteen products)

269. The plaintiffs' legal case is that the comparative advertisements of the defendant in respect of all three matters infringe the relevant provisions of the EU Directive on misleading and comparative advertising and the Irish implementing Regulations. In particular, the plaintiffs complain that the actions of the defendant contravene:

(1) Regulation 4 (2) (b) of the 2007 Regulations/ Article 4 (a) of the Directive

(2) Regulation 4 (2) (c) of the 2007 Regulations/ Article 4 (b) of the Directive

(3) Regulation 4 (2) (d) of the 2007 Regulations/ Article 4 (c) of the Directive.

270. It is therefore necessary to consider whether the advertisements of the defendant in relation to (i) the fifteen products, (ii) the banners, and (iii) the shelf- edge labels/ lower price labels generally contravene:

(1) Regulation 4 (2) (b)

(2) Regulation 4 (2) (c)

(3) Regulation 4 (2) (d)

271. I will begin with Regulation 4 (2) (d) because, in my view, this allows an analysis of the issues, without any reference to the concept of "misleading advertising".

Do the defendant's shelf- edge labels comparing the fifteen products comply with Regulation 4 (2) (d) - i.e. do they objectively compare one or more material, relevant, verifiable and representative features of those products which may include price?

(I) Introduction

272. It is important to note that the EU Directive on misleading and comparative advertising deals with two separate concepts – (1) misleading advertising and (2) comparative advertising - although there is an overlap. Article 4 of the Directive provides that comparative advertising shall, insofar as the comparison is concerned, be permitted when the conditions set out at Article 4 (a) to (h) are met. The overlap occurs because the first of these conditions is that comparative advertising shall be permitted if it is not misleading within the meaning of Articles 2 (b), and 3 and 8 (1) of the Directive.

273. However it is clearly the case that each of the conditions laid down in Article 4 of the Directive are independent and cumulative (see Posteshop SpA, Case C- 52/13 at para. 25). Thus, if a party, (such as the defendant in these proceedings) breaches any one of the conditions in Article 4 of the Directive, then the comparative advertising is not permitted and is unlawful.

274. It should also be noted that, of the eight alternative conditions in the Directive which must be met before comparative advertising is permitted, it is only Article 4 (a) which refers to misleading comparative advertisements. Thus Article 4 (b) provides that comparative advertising shall be permitted if, as far as the comparison is concerned, "it compares goods or services meeting the same needs or intended for the same purpose". Likewise, Article 4 (c) provides that comparative advertising shall be permitted if it "objectively compares one or more material, relevant, verifiable and representative feature of those goods and services which may include price".

275. Article 4 (c) of the Directive has been transposed into Regulation 4 (2) (d) of the 2007 Regulations. The wording of Regulation 4 (2) (d) is that a comparative marketing communication is prohibited if it does not objectively compare one or more material, relevant, verifiable and representative features of those products which may include price.

276. It is therefore helpful, and in my view instructive, to analyse Regulation 4 (2) (d) of the 2007 Regulations first, because if the plaintiffs can establish that the defendant's advertisements do not objectively compare the relevant features of the relevant products, then the defendant's advertisements infringe Regulation 4 (2) (d). If so, then the comparative advertisement is unlawful and it is not necessary to even consider whether it is misleading.

277. If the defendant's advertisements are unlawful, then the use of the plaintiffs' trademark is also unlawful and an infringement of their trademark.

(II) What is the relevant test for Regulation 4 (2) (d)

278. The defendant has, in its submissions, sought to argue that there is one test for all the different sections of the Regulations. That, in my view, is mistaken. Each section may need a separate analysis. There is no one over- arching test. In particular, it is not necessary to have a test of "misleading" for all comparative advertising because, when properly analysed, a comparative advertisement could infringe the Directive and 2007 Regulations without being misleading at all.

279. To some extent, the wording of Regulation 4 (2) (d) is self - explanatory. It refers to "objectively compare". Thus, the Court in assessing the comparative advertisements of the defendant must "objectively compare" the plaintiffs' products with the defendant's products featured in the advertisements. The test is clearly an objective test and is specifically so mandated by the Directive and the Regulations.

280. Moreover what is to be compared objectively are one or more "material" "relevant" "verifiable" and "representative" features of those goods "which may include price".

281. I note also the remarks of the CJEU in *Vierzon* on verifiability. It is therefore in the light of these considerations that I now turn to consider the defendant's comparative advertisements in respect of the contested fifteen products.

(III) Do the defendant's shelf- edge labels comparing the fifteen products infringe Regulation 4 (2) (d)?
282. I have set out in an earlier section of my judgment, my analysis - product by product - in respect of the fifteen contested products. I have also set out therein my findings of fact in respect of each of these products. It is not necessary for me to repeat this analysis, in this section of my judgment. However, I would conclude, based on that analysis and the legal test which I have to consider, and applying the legal test to the findings of fact, that in each and every one of the fifteen products, (with the exception of one which was effectively conceded by the plaintiffs' experts) the defendant's advertisements do not - as regards the comparison - objectively compare one or more material, relevant, verifiable and representative features of those products including price.

283. I am of the view that the ingredients of each product are clearly material, relevant and representative features of the product being compared. It follows therefore that the characterising ingredient of each product is highly material, relevant and representative in comparing the two products. I am also of the view that a difference of 10% or more of such an ingredient is a reasonable tolerance to use to assess whether the difference is material, relevant or representative of the products.

284. I am also of the view that the other tests used by the plaintiffs' experts, (e.g. a comparison of nature, quality, substance, provenance and quantity) are also reasonable tests to use to consider whether the difference in products being compared is material, relevant and/ or representative.

285. Thus, insofar as Aldi's experts have used these tests to compare and contrast the products, I am of the view that such tests are helpful in considering whether such products fulfil the legal test of comparability, for example, that contained in Regulation 4 (2) (d) (i.e. an objective comparison of one or more material, relevant, verifiable and representative features of such goods.)

286. In relation to tomato ketchup, it is clear that the defendant's comparison did not objectively compare its product with that of Aldi. It omitted to draw the consumer's attention to the fact that the Aldi product was a higher quality product. That is a material and relevant feature of these products. It is also verifiable and representative.

287. In relation to the pork sausages, the Dunnes advertisement did not draw any attention to the fact that the Aldi product had a Bord Bia approval logo. This is an indicator of provenance and quality. It is therefore a "material, relevant, verifiable and representative" feature of these products. It was not contained in the advertisement of Dunnes. Dunnes, therefore, did not objectively compare one or more material, relevant, verifiable and representative features of the two products.

288. In relation to the white sauce, there was clearly a difference in weight between the two products. The plaintiffs' product was eighteen grams, the defendant's product only seventeen grams. The defendant's products therefore are not comparable to the plaintiffs' products. There is a clear difference in weight which on a per gram basis equates to a difference in price. Dunne's advertisement failed to set this out. Thus the advertisement did not objectively compare one or more material, relevant verifiable and representative features of the product.

289. In relation to day cream, it was conceded by the Dunnes experts that the Aldi and Dunnes products were not comparable because the plaintiffs' product contained a sun protection factor of six, whereas the defendant's product did not. This information was not contained in the comparison. Therefore the advertisement did not objectively compare one or more material, relevant, or representative features of the two products.

290. In relation to turkey breast mince, again, the plaintiffs' product contained a Bord Bia quality assurance logo whereas the Dunnes product did not. The advertisement did not contain this material fact. Thus the advertisement did not objectively compare one or more material, relevant, verifiable and representative features of both products.

291. In relation to the sparkling orange drink, again the defendant's experts effectively conceded that the plaintiffs' and the defendant's products were not comparable. The Aldi product had nearly four times more orange content than the Dunnes Stores product. This is a significant and objective difference. The Dunnes Stores advertisement did not therefore objectively compare the two products. It omitted this feature. It therefore infringed Regulation 4 (2) (d).

292. In relation to the shower gel, it was conceded by the defendant's experts that the plaintiffs' and defendant's products were not comparable. The plaintiffs' products contained tea tree oil. The defendant's products did not. This was not set out in the advertisement. Therefore the advertisement did not objectively compare one or more material, relevant, verifiable and representative features of the product.

293. Likewise, with the toilet tissues: the plaintiffs' toilet tissue was heavier and longer. These features of the plaintiffs' products were not set out in the defendant's advertisement. Therefore the defendant's comparative advertisement did not objectively compare all material, relevant, and representative features of those products.

294. The strawberry yoghurt products likewise were not comparable. The plaintiffs' yoghurt contained 13% more strawberry than the defendant's product. This was the characterising ingredient of the product. The Dunnes advertisement did not draw attention to this. The advertisement therefore did not objectively compare a material, relevant, and representative feature of those products.

295. The plaintiffs' peach and nectarine yoghurt had 44.9% more fruit than the defendant's products. Moreover, the plaintiffs' product was of a different nature, being peach and nectarine whereas the defendant's product was only peach. The defendant's advertisement did not draw attention to these features in the advertisement. Thus, the comparative advertisement did not objectively compare material, relevant, and representative features of those products.

296. In relation to the tinned chicken dog food, the plaintiffs' product contained 4% carrot whereas the defendant's products contained no carrot. The plaintiffs' expert evidence was that the two products were of a different nature and therefore not comparable. The defendant's advertisement did not, as regards the comparison, therefore objectively compare a material, relevant, and representative features of those products. It therefore infringed Regulation 4 (2) (d).

297. In relation to the tinned beef dog food, again the plaintiffs' product contained 4% carrot whereas the defendant's product contained no carrot. They were therefore not comparable. There was a difference in quality. This was not set out in the comparative advertisement. Therefore the advertisement did not objectively compare a material, relevant, verifiable and representative feature of those products.

298. In respect of the six pack of dog food, the expert evidence was that the three different varieties of Aldi product all contained either additional meat or extra vegetables when compared with the Dunnes Stores product. The products were therefore not the same and not comparable. However the Dunnes advertisement did not - as regards the comparison - objectively compare a material,

relevant and representative features of those products. It therefore infringed Regulation 4 (2) (d).

299. In respect of the dry cat food, the plaintiffs' product contained 4% liver whereas the Dunnes Stores product contained no such liver. Thus the products had a qualitative difference and were of a different nature and not comparable. However the Dunnes advertisement made no reference to this. As such therefore, it infringed Regulation 4 (2) (d).

300. Moreover both parties accept that one of the principles set out in Vierzon (at para. 56) is that an objective difference between two compared products must only be disclosed where it is capable of significantly affecting the consumer's choice. In fourteen of the fifteen cases considered here, it is clear that none of these objective differences between products were disclosed at all and I am of the view that all are capable of significantly affecting the consumer's choice of product

301. I would therefore conclude that - in respect of fourteen out of the fifteen product comparisons, - the defendant's comparative advertisements, did not objectively compare one or more material, relevant, verifiable and representative features of these products. Thus these comparative marketing communications are prohibited.

Did the defendant's shelf- edge labels in respect of the 15 products comply with Regulation 4 (2) (c) – i.e. did they compare products meeting the same needs or intended for the same purpose?

Introduction
302. In the EU Directive on Misleading and Comparative Advertising, Article 4 (b) provides that comparative advertising shall be permitted when "it compares goods or services meeting the same needs or intended for the same purpose".

303. This is implemented into Irish law by Regulation 4 (2) (c) of the 2007 Regulations which provides that a comparative marketing communication is prohibited if, as regards the comparison, it does not compare products meeting the same needs or intended for the same purpose.

304. The plaintiff submits that the defendant's fifteen product comparisons all infringe Regulation 4 (2) (c) also.

The relevant test under Regulation 4 (2) (c)
305. The question then arises as to what is the relevant test which the Court must consider in assessing this provision. The wording of the Regulation is that a comparative advertisement is prohibited if the comparison does not compare products meeting the same needs or intended for the same purpose. It does not use the word "objectively" as Regulation 4 (2) (d) does. Having said that, it seems clear, in my view, that the comparison exercise which must be undertaken under Regulation 4 (2) (c) must, as a matter of common sense, also be an "objective comparison" or an objective test.

306. One of the errors in the defendant's submissions is its contention that the only test for comparability is whether the products in question meet the same needs as a consumer or are intended for the same purpose. That is certainly the test for article 4(b) of the Directive and Regulation 4 (2) (c) of the Irish Regulations. However, it is not the only test. There are other tests for Regulation 4 (2) (d) and Regulation 4 (2) (b).

307. I turn now to consider whether the defendant's advertisements in respect of the fifteen products infringe Regulation 4 (2) (c).

Do the fifteen product comparisons infringe Regulation 4 (2) (c)?
308. This test is a different test to that set out at Regulation 4 (2) (d) and therefore a different result could emerge once the analysis is conducted. Thus, for example, in relation to tomato ketchup, the Dunnes advertisement purported to compare its tomato ketchup to the plaintiffs' tomato ketchup. These products meet the same needs or are intended for the same purpose. Similarly, in relation to all the other fourteen products, they are all products which in broad terms meet "the same needs" or are "intended for the same purpose".

309. However, the problem here is that the defendant's shelf- edge labels did not in fact even make a proper comparison between its products and the plaintiffs' product. What each advertisement did, in fact, was to set out the Dunnes product – and to refer to "some" unidentified Aldi product, with a price. Thus the Dunnes comparative advertisement did not - as a matter of fact - actually compare "products" meeting the same needs or intended for the same purpose. It purported to do so but did not in fact do so. If the products had in fact been set out, then there would not, in my view, have been an infringement of Regulation 4 (2) (c) but as they were not, the defendant's advertisements did indeed infringe Regulation 4 (2) (c).

310. I would conclude therefore, that the defendant's shelf edge labels which compared the fifteen products also infringed Regulation 4 (2) (c).

Do the defendant's advertisements in respect of the fifteen products infringe Regulation 4 (2) (B) – are they misleading commercial practices under ss. 43 to 46 of the Consumer Protection Act 2007?

Introduction
311. I turn now to consider whether the defendant's advertisements in respect of the fifteen products infringe Regulation 4 (2) (b) of the 2007 Regulations.

312. It is noteworthy that Article 4 of the Directive provides that comparative advertising shall be permitted when the conditions set out at (a) to (h) are met. There are eight conditions in the European Directive. By contrast, in the Irish Regulations at Regulation 4 (2), a comparative marketing communication is prohibited if it infringes any of the conditions set out at (a) to (i). Thus there are nine conditions. The extra condition which is inserted into the Irish Regulations is the condition at Regulation 4 (2) (b) – whether it is a "misleading commercial practice" within the meaning of ss. 43 to 46 of the Consumer Protection Act 2007. However, Regulation 4 (2) (b) is also an implementation of that part of Article 4 (a) of the Directive which refers to the Unfair Commercial Practices Directive. The Consumer Protection Act 2007, in its Long Title, states that it is an Act to give effect to the Unfair Commercial Practices Directive. It is the case therefore, that both Regulation 4 (2) (a) and (b) implement Article 4 (a) of the EU Directive.

313. Thus it is a breach of the 2007 Regulations (Regulation 4 (2) (b)) if there is a breach of sections 43 to 46 of the Consumer Protection Act 2007. I therefore now turn to a consideration of these provisions.

Analysis of sections 43 to 46 of the Consumer Protection Act 2007
314. I have set out above the relevant statutory sections of this Act. Section 42 (1) provides that a trader shall not engage in a misleading commercial practice. Section 43 (1) of the Act provides that a commercial practice is misleading if it includes the provision

of false information in relation to any matter set out in subsection (3) and that information would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make.

315. Section 43 (2) provides that "a commercial practice is misleading if it would be likely to cause the average consumer to be deceived or misled in relation to any matter set out in subsection (3) and to make a transactional decision that the average consumer would not otherwise make."

316. Section 43 (3) provides that:

> *"The following matters are set out for the purposes of subsections (1) and (2):*
>
> *(a) the existence or nature of a product;*
>
> *(b) the main characteristics of a product, including, without limitation, any of the following:*
>
> *(i) its geographical origin or commercial origin;*
>
> *(ii) its availability, including, without limitation, its availability at a particular time or place or at a particular price;*
>
> *(iii) its quantity, weight or volume;*
>
> *(viii) its composition, ingredients, components or accessories;*
>
> *(c) the price of the product, the manner in which that price is calculated or the existence or nature of a specific price advantage"*

317. Section 43 (5) provides that:

> *"In determining whether a commercial practice under subsection (1) or (2) is misleading, the commercial practice shall be considered in its factual context, taking account of all of its features and the circumstances."*

318. Section 46 (1) of the Act provides:

> *"A commercial practice is misleading if the trader omits or conceals material information that the average consumer would need, in the context, to make an informed transactional decision ("material information") and such practice would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make."*

319. The side note to s.46 states "Misleading: withholding, omitting or concealing material information." This is to be contrasted with s.43 which side note reads "Misleading: false, misleading or deceptive information". It is clear, therefore, that s.43 deals with the provision of false, misleading or deceptive information and s.46 deals with the withholding, omitting or concealing of material information.

The appropriate test

320. The defendant has made much in its legal submissions of what is the appropriate test for assessing Regulation 4 (2) (b) (c) and (d) of the 2007 Regulations. I have set out in relation to Regulation 4 (2) (d) and (c) what, in my view, is the appropriate test or the appropriate approach to be adopted when construing these sections and applying them to the facts. The defendant in its submissions sought to argue that the appropriate test set out in Regulation 4 (2) (b) (which is dealing with misleading comparative advertising or misleading commercial practices) is also the applicable test for Regulation 4 (2) (c) and (d). The plaintiffs have criticised this submission and have stated that the defendant has sought to confuse the issue and to conflate the relevant test for "misleading commercial practices" under Regulation 4 (2) (a) and (b) with the relevant tests for Regulation 4 (2) (c) and (d). In my view that submission by the plaintiffs is correct.

321. The relevant test for Regulation 4 (2) (b) which deals with "misleading commercial practices" under the Consumer Protection Act 2007 is the test set out at s.43 (1) and (2) and s.46 of the Consumer Protection Act 2007

322. The relevant test in section 43 (1) of the 2007 Act is that a commercial practice is misleading if:

> *(1). It includes the provision of false information in relation to any matter set out in subsection (3) and*
>
> *(2). That information would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make.*

323. The relevant test at section 43 (2) is that a commercial practice is misleading if:

> *(1). It would be likely to cause the average consumer to be deceived or misled in relation to any matter set out in subsection (3) and*
>
> *(2). to make a transactional decision that the average consumer would not otherwise make.*

324. The relevant test in section 46 (1) is that a commercial practice is misleading if:

> *(1). The trader omits or conceals material information that the average consumer would need, in the context, to make an informed transactional decision and*
>
> *(2). such practice would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make.*

325. Therefore there are different tests for different statutory subsections (but to some extent they are similar and in certain cases,

overlap).

326. It is also clear that the plaintiffs in this case could succeed on only one of these subsections, and they would have succeeded in their case.

327. I note that section 46 defines "material information" as information that the average consumer would need to make an informed transactional decision.

328. It is clear, in my view, that again the test is an objective test - whether it is considered under section 43 (1) section 43 (2) or section 46 (1). The question is whether false, misleading or deceptive information has been given, withheld, omitted or concealed. The question is also whether the giving or withholding of such information would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make. The test is that of the average consumer. It is an objective test.

329. The question then is whether the defendant's advertisements in respect of the fifteen products have given misleading information, or concealed material information, or omitted or withheld material information, about the nature of a product, or about the main characteristics of a product, or about the quantity, weight or volume of a product, or about the composition, ingredients or components of a product, or about the price of a product. (See section 43 (3) of the Act).

330. Another error in the defendant's submissions is its contention that a critical question in this case is, what influence did the comparative advertisement have on a consumer's decision as to which supermarket to shop in. That is not a criterion set out in the Directive or the Regulations. The Regulations provide, for example, at Regulation 4 (2)(d) that the advertisements must objectively compare one or more material, relevant, verifiable and representative features of the products. It does not refer to "supermarkets" at all. Likewise, Regulation 4 (2) (b) which refers to sections 43 – 46 of the Consumer Protection Act, provides that a commercial practice (e.g. a comparative advertisement) is misleading if it would be likely to cause the average consumer to be misled or deceived in relation to the nature or characteristics of a product, (see section 43 (3)) and to make a transactional decision that the average consumer would not otherwise make. Again, there is no reference to a consumer's decision as to which supermarket a consumer might shop in. The point is that the scheme of the Directive and the Regulations is focused on "products", not supermarkets.

331. In the light of that analysis I turn now to consider whether the defendant's advertisements in respect of the 15 products infringe sections 43- 46 of the Consumer Protection Act.

Do the defendant's comparisons of fifteen products infringe sections 43 – 46 of the Consumer Protection Act 2007?

332. I have set out above my analysis of the defendant's comparative advertisements of its products and the plaintiffs' products in respect of the fifteen contested products. That analysis does not need to be repeated. I have also set out above, in my analysis of Regulation 4 (2) (d), why, in my view, the defendant's comparative advertisements infringe Regulation 4 (2) (d).

333. The analysis I gave of these fifteen products in relation to Regulation 4 (2) (d) is, in my view, also of application here.

334. In my view, the defendant's advertisements either gave false information or omitted or concealed material information in relation to tomato ketchup, (the tomato content of the plaintiffs' product), in relation to the plaintiffs' pork sausages (the Bord Bia logo), in relation to white sauce (the correct weight of the plaintiffs' product), in relation to day cream (the sun protection factor of 6) in relation to the turkey breast mince (the Bord Bia logo), in relation to the sparkling orange drink (the fact that the plaintiffs' product had four times more orange juice content) in relation to the shower gel (the fact that the plaintiffs' product contained an extra ingredient, tea tree oil), in relation to toilet tissue (that the plaintiffs' products are longer and heavier and therefore of a better quality and more value for money), in relation to strawberry yoghurt (that the plaintiffs' product contains 13% more strawberries), in relation to peach and nectarine yoghurt (that the plaintiffs' product contains 44% more fruit and contains two different fruits), in relation to the tinned chicken dog food (that the plaintiffs' product contained 4% carrot and the defendant's product contains none), in relation to the tinned beef dog food (that the plaintiffs' product contained 4% carrot and the defendant's product contains none), in relation to the six pack dog food (that the plaintiffs' product contains additional meat and vegetables compared to the defendant's product), and finally in relation to the dry cat food (that the plaintiffs' product contained 4% liver whereas the Dunnes product contains no liver).

335. In each of the fifteen products (with the exception of the product conceded by the plaintiffs' expert) the defendant gave false information either about the nature of the product, the main characteristics of the product, its quantity, weight or volume, its composition, ingredients, components, or the price, in a manner which was, in my view, misleading. In addition, in my view, the defendant provided information which would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make. The defendant's comparative advertisements therefore infringed the provisions of Article 43 (1).

336. I am also of the view that the defendant's comparative advertisements were misleading because they were likely to cause the average consumer to be deceived or misled in relation to the existence or nature of a product, or the main characteristics of a product, or its quantity, weight or volume, or its composition, ingredients or components and/or its price and to make a transactional decision that the average consumer would not otherwise make. I would therefore conclude that the defendant's comparative advertisements infringed the provisions of s.43 (2) also.

337. I am also of the view that the provision of incorrect, incomplete and/ or misleading information by the defendant in its comparative advertisements would be likely (or would have been likely) to cause the average consumer to be deceived or misled. If all material and relevant features of both products are not set out in the comparative advertisement then it is bound to mislead. Moreover I am also of the view that the provision of such false and/ or misleading information is (or was) likely to cause the average consumer to make a transactional decision, that such an average consumer would not otherwise make.

338. I am also of the view that the defendant's comparative advertisements omitted or concealed material information on the existence or nature of a product, or on the main characteristics of a product or on its quantity, weight or volume, or its composition, ingredients or components or about its price. In so doing, the defendant concealed material information that the average consumer would need to make an informed transactional decision. I am of the view that such a practice would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make. I would therefore conclude that the defendant's actions also infringed s.46 (1) of the Consumer Protection Act, 2007.

339. Thus in relation to fourteen of the fifteen contested products I am of the view that the defendant's comparative advertisements

were misleading commercial practices within the meaning of the Consumer Protection Act, 2007.

340. I would therefore conclude that the defendant's advertisements infringed s.43 (1), s. 43 (2) and s.46 (1) of the Consumer Protection Act, 2007.

341. I would also therefore conclude that the defendant's comparative marketing communications infringe Regulation 4 (2) (b) of the 2007 Regulations and as such are prohibited.

Did the banners comply with Regulation 4 (2) (d) – do they objectively compare material, relevant, verifiable and representative features of the compared products?

Introduction
342. I have heard a considerable amount of evidence from experts on both sides about banners, slogans, price guarantees, price matching, pricing strategies and the nature of the groceries market in Ireland. I have considered all this evidence. However, the net issue that I have to consider is whether the banners contravened the provisions of Regulation 4 (2) (d) (c) and (b).

343. A copy of the banner is appended to this judgment at Appendix 1. The banners consisted of three separate panels as follows:

1. Panel 1 was a comparison between Dunnes' products and that of Aldi and Lidl

2. The middle panel was a comparison between Dunnes' products and Tesco/Supervalu

3. The third panel was a panel on which Dunnes stated it had more special offers than other supermarkets every week

344. No complaint is made by the plaintiffs in respect of the second and third panel. Their complaints are in relation to the first panel.

345. The first panel in turn could be divided into a number of different elements as follows (working from top to bottom)

1.) The first element is the "Lower Price Guarantee" logo at the top of the panel

2.) Then there follows the wording "Guaranteed Lower Prices on all your family essentials every week".

3.) Then the words "Aldi match" and "Lidl match"

4.) Then the graphic/illustration of a number of different products

5.) Then the phrase "Images for illustration purposes only".

346. It is not in dispute that the defendant used the Aldi trademark on the banners. It is also agreed that the defendant can only use the Aldi trademark if it can establish that its comparative advertisements comply with all the requirements of the European and Irish legislation in relation to comparative advertising.

347. It is not in dispute that the banner is a comparative marketing communication.

348. In assessing whether the banners contravene Regulation 4 (2) (d) the question is whether the banners, as regards the comparison, "do not objectively compare one or more material, relevant, verifiable and representative features of those products which may include price".

Assessment
349. In my view, the banners did infringe Regulation 4 (2) (d) for the following reasons:

(1.) The logo with the words "Lower Price Guarantee" together with the words "Aldi match" would seem to suggest that there is a comparison on price and that the defendant's products will either match Aldi's prices and/or that there is a guarantee that the Dunnes' product has a lower price. However, it is impossible on the face of the banner to see which products are being objectively compared in respect of price.

(2.) The phrase "Guaranteed Lower Prices on all your family essentials every week" is vague and deliberately vague. The phrase "family essentials" is clearly an uncertain phrase. No one could possibly deduce from this phrase what is in a basket of goods for family essentials every week. One could of course surmise as to what it might contain but it would simply be that – a guess. The phrase "family essentials" does not objectively compare Dunnes' products with those of Aldi with any specificity. Therefore it is not possible to "objectively compare one or more material, relevant, verifiable and representative features of those products."

(3.) Various graphics or illustrations of various products are contained on the banner. The products illustrated therein are stated to be for illustrative purposes only. They appear to include products such as cornflakes, flour, orange juice, vegetable oil and some vegetables, but the illustrations of the vegetables are somewhat vague. These products - which are specifically stated to be "for illustrative purposes" - also do not objectively compare material, relevant, verifiable, and representative features of Dunnes and Aldi products.

(4.) The circle with the words "Aldi match" contained there, also seems to make a comparison between the Dunnes family essential products and the Aldi family essential products and to suggest that the Dunnes products match the price of Aldi. It is however, not possible to verify this claim because the products are not stated with any degree of specificity nor are they as verifiable as they should be (see *Lidl Belgium v Colruyt* (Case C- 356/04 [2006] ECR I- 8501)).

(5.) Thus the comparative advertisement contained in the banner does not objectively compare material, relevant, verifiable and representative features of the Dunnes and the Aldi products to allow a proper comparison to be made, or indeed, a verifiable comparison to be made.

350. I heard a significant amount of evidence from witnesses as to fact, and expert witnesses, about the banners. However, in my view much of this evidence was not particularly helpful to the legal issues I have to consider. In essence, the legal issues to be considered are relatively straightforward in relation to the banners. When one considers the various items set out in the banner and

the test under Regulation 4 (2) (d), it is clear in my view that the banner does not fulfil the relevant requirements of Regulation 4 (2) (d).

351. In those circumstances I conclude that the banners infringe Regulation 4 (2) (d).

Do the banners infringe Regulation 4 (2) (c)?
352. The question here is whether the banners compare products meeting "the same needs or intended for the same purpose".

353. The problem with the banners is that almost every element of it is vague and uncertain. The first part of the banner contains the phrase "Lower Price Guarantee" but further down the banner it refers to "Aldi match"; Secondly, it states that there will be "Guaranteed lower prices on all your family essentials every week" and yet also contains the phrase "Aldi match"; It refers to "all your family essentials" without specifying in any way what those products might be; It sets out illustrations of a number of products on the banner - but these are stated to be for illustrative purposes only. The problem is that the banners are so vague and uncertain that they do not compare all the family essentials products, but simply constitute an advertisement that the Dunnes products will be lower in price, or, will match the Aldi price, on all family essentials. Thus it seeks to make a comparative advertisement on price without properly comparing any products. As such therefore, the advertisement does not compare products "meeting the same needs or intended for the same purpose" at all. It therefore infringes Regulation 4 (2) (c) also.

Are the banners a misleading commercial practice within Sections 43 to 46 of the Consumer Protection Act 2007?

354. I turn now to consider whether the banners infringe Regulation 4 (2) (b) – in other words, are they misleading commercial practice within the meaning of sections 43 to 46 of the Consumer Protection Act 2007.

355. I have set out above my analysis of these provisions, and that analysis does not need to be repeated. In my view the banners are a misleading commercial practice within the meaning of the 2007 Act for the following reasons:

Section 43 (1):

(1.) By purporting to engage in a comparative advertisement which refers to "All your family essentials every week", by using the phrase "Guaranteed Lower Prices", by using the phrase "Lower Price Guarantee", and also by using the phrase "Aldi match," the banner creates a clear impression in the mind of the consumer that Dunnes' products are either matching Aldi prices or are guaranteed to be lower prices. In circumstances where the evidence has established that, on numerous products, the Dunnes product was not a lower price and in certain cases did not match the Aldi price because the products are not comparable, the banner includes "the provision of false information in relation to any matter set out in subsection (3)" within the meaning of section 43 (1) of the Act.

(2.) It is also clear in my view that such information would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make.

(3.) I would therefore hold that the banners infringe the provisions of s.43 (1) of the 2007 Act.

Section 43 (2):

(4.) Moreover, I am also of the view that the banners, for all of the above reasons, are also likely to cause the average consumer to be deceived or misled in relation to any of the matters set out in s. 43, within the meaning of s. 43 (2) of the 2007 Act.

(5.) In addition, the banners would also be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make. I therefore find that the banners also infringe the provisions of s. 43 (2) of the 2007 Act.

(6.) In particular I am of the view that the banners infringe s.43 (3) of the Act because they purport to compare "all your family essentials every week" without properly setting out the exact products which are being compared, the existence or nature of such products, the main characteristics of such products including its quantity, weight or volume, the compositions, ingredients or components of such products, or the price of such products. As such, therefore, the banner contravenes the requirements of s.43 (3) (a), (b) and (c).

Section 46 (1):

(7.) In addition, I am of the view that the banners omit or conceal material information that the average consumer would need, in the context, to make an informed transactional decision. As stated above, I am also of the view that the information in the banners (or the information not contained in the banners which should have been contained therein) constitute a practice which would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make.

(8.) I am of the view therefore that the banners are misleading and that they constitute a misleading commercial practice because they withhold, omit or conceal material information which should be made available to the consumer. As such the banners infringe s.46 (1) of the 2007 Act.

Do the shelf- edge labels/ lower price labels generally infringe Regulation 4 (2) (d) of the 2007 regulations?

Introduction
356. The final issue about which the plaintiffs complain are other shelf-edge labels on which the plaintiffs' trademark appears and which took the form of signs or labels which were located or affixed to shelves on which the defendant's products were for sale. The plaintiffs, in their legal submissions, referred to them as "lower price labels" to differentiate them from the shelf- edge labels in respect of the fifteen products which are in dispute. I shall refer to them as the "shelf- edge labels/ lower price labels."

357. (An example of a shelf- edge label is appended to this judgment at Appendix 2).

358. As is apparent from a shelf- edge label/ lower price label, it consists of the following elements:

> (1.) On the left hand side there is a yellow arrow pointing downwards with the words "Lower Price Guarantee" in the arrow.
>
> (2.) Underneath the arrow, are the words "Always Better Value".
>
> (3.) To the right of the arrow is a white rectangular box in which, for example, in the example in Appendix 2, is contained the words "Dunnes' rich and creamy yoghurt 4 x 125g and then underneath that a yellow circle with the word "€1.99" and to the right of that "Aldi €1.99".
>
> (4.) In small print, at the bottom right hand side of the shelf- edge label, the following words appear: "Price correct at time of print. Aldi prices checked in a Dublin Aldi store on 19/06/2003".

359. The plaintiffs complain that many of these shelf- edge labels/lower price labels contain inaccurate, or incomplete, or misleading comparisons between the plaintiffs' products and the defendant's products. I have dealt with many of these complaints above in relation to the fifteen products.

360. The plaintiffs also state that it is clear from the photographs that the defendant has used the "Aldi" trademark on the "shelf-edge labels"/ lower price labels and that such a use is only permitted if the defendant can demonstrate that these shelf- edge labels/lower price labels comply with the European Directive on Comparative Advertising and the Irish Regulations.

Assessment
361. I turn therefore to consider first whether the shelf- edge labels/lower price labels are in accordance with the requirements of Regulation 4 (2) (d) (i.e. whether the comparative advertisement "objectively compares one or more material, relevant, verifiable and representative features of those products which may include price").

362. I am of the view that the shelf- edge labels/lower price labels do not conform with Regulation 4 (2) (d) for the following reasons:

> (1.) These shelf- edge labels clearly specify the defendant's product but they do not specify in any way which of the plaintiffs' products it is being compared to. It is not that these shelf-edge labels/lower price labels omit one feature of the Aldi product – they omit any reference to the Aldi product entirely. They are therefore clearly not objectively comparing features of two products. All they are doing is referring to a putative Aldi product - which is not identified - and saying that the Dunnes' product is the same price. This comparison on price is done without any objective comparison of any material, relevant, verifiable or representative features of the two products. It is therefore an infringement of Regulation 4 (2) (d).
>
> (2.) The use of the phrase "lower price guarantee" and "always better value" creates an impression in the mind of the consumer that although prices appear to be the same (at €1.99), that, in fact, the Dunnes product is set at a lower price or is always better value. This claim about a lower price guarantee or "always better value" is done without any objective comparison of any of the relevant, material, verifiable or representative features of the Aldi product. It therefore infringes Regulation 4 (2) (d) for that reason also.

363. As Professor Dobson (an expert on behalf of the plaintiff) stated at para. 50 of his witness statement:

> *"In particular, mirroring the wording used in the banners, Dunnes Stores has been displaying shelf- edge labels or "shelf talkers" containing the words 'lower price guarantee' and 'always better value' and next to this, its product description of a Dunnes Stores product and alongside this, a quoted price referring to an Aldi product at identical price. This helps reinforce the credibility and salience of the general message through actual examples which, with a sufficient number of examples would build up a 'halo effect' whereby a string of reinforcing examples is taken by consumers to give credibility and believability to the general message and interpretation that consumers make in the form that Dunnes Stores matches Aldi prices on a very wide range of products. Because the references are to 'lower price' and 'always better value' some consumers are likely to read this as going further than Dunnes Stores simply matching price but also offering either lower prices or better value (which could be interpreted through a superior product offering in terms of quality or freshness) when there is no basis for such a claim."*

364. Moreover, it is clear that on the facts and evidence presented in this case, it was not possible for a consumer to actually verify the Dunnes claim because it was not clear what Aldi product was being compared.

365. I find therefore that the shelf- edge labels/lower price labels infringe Regulation 4 (2) (d).

Do the shelf- edge labels/lower price labels contravene Regulation 4 (2) (c)?
366. The issue here is whether the shelf- edge labels/lower price labels compare products "meeting the same needs or intended for the same purpose".

367. In fact, on the face of the shelf- edge labels/ lower price labels, the product which is set out is, for example, Dunnes' rich and creamy yoghurt and the price. The only comparison which is made, is with an Aldi price. No Aldi product whatsoever is referred to on the shelf- edge label. It is therefore on the face of the advertisement not comparing products meeting the same needs or intended for the same purpose. It is therefore an infringement of Regulation 4 (2) (c).

368. However it is clear, by implication, that Dunnes Stores is comparing its "rich and creamy yoghurt" at a price of €1.99 to an Aldi yoghurt at a price of €1.99. One must of course assume – as I do in this case - that Dunnes is making a comparison between a Dunnes yoghurt and an Aldi yoghurt and not between a Dunnes yoghurt and an entirely different Aldi product (e.g. a crème fraiche or even a low-fat yoghurt). However, this is not clear on the face of the advertisement. As such, therefore, the advertisement does not expressly compare products meeting the same needs or intended for the same purpose.

369. I would conclude therefore that because the shelf- edge labels/ lower price labels do not expressly set out the specific Aldi product to which the Dunnes product is being compared, it follows that the comparative advertisement does not compare "products" meeting the same needs or intended for the same purpose. Therefore it infringes Regulation 4 (2) (c). The advertisement may have

intended to do so but it does not in fact actually do so.

Are the shelf- edge labels/lower price labels an infringement of Regulation 4 (2) (b)?

370. The next question is whether the shelf- edge labels/lower price labels are a misleading commercial practice under s.43 to 46 of the Consumer Protection Act 2007.

371. Having regard to the evidence in this case, the factual background, and the legal analysis set out above, I am of the view that the shelf- edge labels/lower price labels also infringe s. 43 (1) of the 2007 Act for the following reasons:

> (1) The shelf- edge labels, in effect, include the provision of false information in relation to some of the matters set out in section 43 (3) - namely the main characteristics of a product, its quantity, weight or volume and its composition. It purports to be identifying like with like when, as seen above, that is not the case. Thus the information provided by the defendant is false. Moreover the use of the phrase "Lower Price Guarantee" and "Always Better Value" on the shelf- edge label is clearly false information. I am also of the view that that information would clearly be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make. I conclude therefore that these shelf- edge labels/lower price labels infringe s. 43 (1) of the 2007 Act.
>
> (2) I am also of the view that, for the reasons given above, that these shelf- edge labels/lower price labels are misleading because they are likely to cause the average consumer to be deceived or misled in relation to any of the matters set out in section 43 (3) of the 2007 Act - for example, the nature of the product, its quantity, weight or volume, its composition or ingredients and its price. I also believe that the deceiving, or misleading, of an average consumer in relation to these matters would cause the average consumer to make a transactional decision that the average consumer would not otherwise make (i.e. to purchase the Dunnes products). I would therefore conclude that the shelf- edge labels/lower price labels also contravene s. 43 (2) of the 2007 Act.
>
> 3. For reasons similar to those given above in relation to the fifteen products and the banners, I am also of the view that the shelf- edge labels/lower price labels also constitute advertisements in which the Defendant has omitted or concealed material information that the average consumer would need in the context to make an informed transactional decision. This material information which is omitted or concealed is information about the main characteristics of the Aldi product and the proper price of the product. I am also of the view that the omission or concealing of such material information would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make. I would therefore conclude that the shelf- edge labels/lower price labels infringe the provisions of s. 46 (1) of the 2007 Act.

The average consumer

372. I have considered the dicta of the CJEU about the "average consumer". I have also had regard to the extensive evidence given by both parties about "the consumer experience" in a grocery supermarket setting.

373. I have also considered the decision of the UK Court of Appeal in *Interflora Inc. v. Marks and Spencers Plc* [2014] EWCA Civ 1403. At paragraph 113 of the judgment, Kitchin LJ stated as follows:

> *"113. Second, the average consumer in any context is a hypothetical person or "legal construct" as Lewison LJ described him in Interflora (CA I) at [44] and [73]. We would add that he is a person who has been created to strike the right balance between various competing interests including, on the one hand, the need to protect consumers and, on the other hand, the promotion of free trade in an openly competitive market, and also to provide a standard, defined in EU law, which national courts may then apply.*
>
> *114. Third, the average consumer test is not a statistical test. The national court must exercise its own judgment, in accordance with the principle of proportionality and the principles explained by the Court of Justice, to determine the perceptions of the average consumer in any given case in light of all the relevant circumstances.*
>
> *115. Fourth, and again as Lewison LJ explained in Interflora (CA I) at [45] to [50], in a case concerning ordinary goods or services, the court may be able to put itself in the position of the average consumer without requiring evidence from consumers, still less expert evidence or a consumer survey. In such a case, the judge can make up his or her own mind about the particular issue he or she has to decide in the absence of evidence and using his or her own common sense and experience of the world."* (Emphasis added).

374. I have therefore in this judgment taken into account the perception of an average consumer "who is reasonably well informed and reasonably observant and circumspect". Such a consumer would not buy his or her goods hastily. They would wish to be reasonably well informed about the two products which are being compared; they would be reasonably observant about the nature and quality of the products being compared; they would also be reasonably circumspect about the products being compared. Such a consumer would pay reasonable attention to the Dunnes product and the Aldi product being compared. They would want all material and relevant information. As I have found in this case, not all such relevant, material information was supplied by Dunnes. In my view, the reasonably informed, reasonably observant and circumspect, average consumer would have required this information. The fact that it was not provided means that they were deprived of material information upon which to make a decision.

375. The defendant sought to argue that it did not receive a single complaint from a consumer in relation to the campaign. However that is hardly surprising because consumers would not have been aware of the proper comparison of all of the objective features of the products which have emerged during this trial.

The issue of whether the comparative advertisements "significantly affect" the choice of a "significant number" of consumers.

376. Dunnes Stores submitted, that in order to be unlawful, comparative advertising must (a) significantly affect the consumer's choice and (b) affect a significant number of consumers. In the defendant's submission, this means that empirical evidence is required. In its view this requirement was set out by the CJEU in a number of decisions including *Lidl Belgium v Colruyt* (Case C- 356/04 [2006] ECR I- 8501) and at paras. 50- 54 in *Lidl v. Vierzon* (Case C- 159/09 [2011] 2 CMLR 10).

377. However, before turning to analyse these decisions, I would note that Article 2 (b) of the Directive (which contains the definition of "misleading advertising") does not contain the words "significantly affect" or indeed the words a "significant number of consumers". The wording in Article 2 (b) is whether the misleading advertising "deceives or is likely to deceive the persons to whom it is addressed or whom it reaches" and which by reason of its deceptive nature "is likely to affect their economic behaviour" or which for those reasons injures or is likely to injure a competitor.

378. Likewise Article 3 of the Directive does not contain any express wording which provides that, in determining whether advertising is misleading, account shall be taken of whether it "significantly affects" the choice of a "significant number" of consumers.

379. Moreover Article 4 (a) of the Directive provides that comparative advertising shall be permitted when it is not misleading within the meaning of Articles 2 (b), 3 and 8 (1) of this Directive. Again there is no mention in Article 4 or indeed Article 8 (1) of "significantly" affecting the choice of a "significant number" of consumers.

380. Turning to the 2007 Regulations, I note that neither Regulation 4 (1) nor Regulation 4 (2) (b), (c) and (d) contain any reference to "significantly" affecting the choice of a "significant" number of consumers.

381. I also note that s.43 and s.46 of the Consumer Protection Act 2007 do not refer to "significantly" affecting the choice of a "significant number" of consumers. In fact, the opposite is the case. Section 43 and 46 provide that the practice is prohibited if it would be likely to cause "the average consumer to make a transactional decision" that the "average consumer would not otherwise make".

382. If the defendant's submissions were correct, then the addition of a requirement that the comparative advertising must "significantly affect" the choice of a "significant number" of consumers would raise the bar for a plaintiff and make it more difficult to ensure that the objectives of the Regulations are fulfilled. It is therefore necessary to consider carefully whether the CJEU decisions in *Colruyt* and in *Lidl v. Vierzon* are, in fact, authority for what the defendant proposes.

383. I turn first to consider the decision of the CJEU in *Lidl Belgium v. Colruyt* (Case C-356/04) [2006] I-08501. The defendant, in its legal submissions, has sought to rely on various dicta of the CJEU in *Colruyt* and in particular para. 84. The CJEU's analysis of this issue begins at para. 75 of its judgment. It notes that the question from the referring court was whether an advertisement must be regarded as misleading advertising for the purposes of Article 3 (a) (1) of the Comparative Advertising Directive. At para. 76 of its decision, the court sets out the wording of Article 2 (2) of the Directive. It also notes at para. 77, that it is for the national courts to ascertain whether the advertising is misleading. It also states, at para. 78 that the national courts must take into account the perception of an average consumer who is reasonably well informed and reasonably observant and circumspect. It also states, that in carrying out the requisite assessment, the national court must also take into account all of the relevant factors of the case (see para. 79). At para. 80 the court stated as follows:

> *"80. The Court has thus held that an omission may render advertising misleading, in particular where, bearing in mind the consumers to which it is addressed, the advertising seeks to conceal a fact which, had it been known, would have deterred a significant number of consumers from making a purchase (X, paragraph 15)."* (Emphasis added).

384. Therefore, it is clear from the context that it is for the national court, taking into account the perception of an average consumer, to consider whether certain comparative advertisements "would have deterred a significant number of consumers". (Emphasis added). The wording is not "have in fact, deterred a significant number of consumers". This means that the national court engages in this analysis taking into account the perception of an average consumer of the products. It also means, by implication, that it is not necessary for empirical evidence or evidence of consumer surveys to be proved in court to establish this point. The relevant consideration (according to para. 80 of *Colruyt*) is whether the comparative advertisement "would have deterred a significant number of consumers from making a purchase". (Emphasis added).

385. However, although paras. 80 and 82 of the CJEU judgment in *Colruyt* use wording that says advertising will be misleading if it is "such as to deceive a significant number of persons to whom the advertising is addressed", I note that in para. 85 (which is the CJEU's formal answer to the referring court's question), the phrase "a significant number of persons" is not repeated. Paragraph 85 also, (in its third indent) refers to a range of amounts "that may be saved by consumers…and the amount that consumers are liable to save". I am of the view therefore, that the tenor of Colruyt, when properly analysed, is that it is for the national court to consider whether the comparative advertisement would have affected a consumer (or even a significant number of consumers) taking into account the perception of the average consumer, who is reasonably well- informed, reasonably observant and circumspect. It does not require empirical evidence.

386. In *Lidl v. Vierzon*, paras. 50 to 54 of the judgment relied upon by the defendant, are given in the context of the court's analysis of Article 3 (a) (1) (a) of Directive 84/450, that the comparison must not be misleading. The court again notes that the national court must first take into account the perception of the average consumer of the products who is reasonably well informed, reasonably observant and circumspect (para. 47). It notes that in carrying out this assessment, the national court must also take into account all the relevant factors in the case, having regard to the information contained in the advertisement at issue, and more generally to all its features (see para. 48). It then notes that the Court has held that an omission may render advertising misleading where it seeks to conceal a fact which "would have deterred" a "significant number of consumers" from making the purchase (para. 49). It then goes on at para. 50 to state that:

> *"In those various respects, advertising such as the advertisement at issue could, first, be misleading, as is apparent from case law, if the referring court were to find that, in the light of all the relevant circumstances of the particular case, in particular the information contained in or omitted from the advertisement, the decision to buy on the part of a significant number of consumers to whom the advertising is addressed may be made in the mistaken belief that the selection of goods made by the advertiser is representative of the general level of his prices as compared with those charged by his competitor and that such consumers will therefore make savings of the kind claimed by the advertisement by regularly buying their everyday consumer goods from the advertiser rather than from the competitor…" (para. 50.)* (Emphasis added).

It is clear therefore that the CJEU refers to the fact that the decision to buy "may be made". It does not refer to the fact that such decisions "have been made," or that specific empirical evidence of this is required.

387. Likewise at para. 52, the CJEU states that an advertisement could also be misleading if the differences in the products are "capable of" significantly affecting the buyer's choice. At para. 52 the court refers to advertising "which may also" have a significant effect on the choices made by a consumer. At para. 53 the court talks about whether the comparison "may significantly affect the

buyer's choice". At para. 54, the CJEU again talks about features of the products compared which "may by their nature have a significant effect on buyer's choice". It is clear therefore that a proper reading of the CJEU decisions in *Colruyt* and *Vierzon* leads to the conclusion that the CJEU's interpretation of the Directive is that the national courts must take into account the perception of an average consumer of products who is reasonably well- informed, reasonably observant and circumspect. By implication therefore, no empirical evidence is required.

388. Indeed, one might well ask why a national court should have to have any regard to the interests of such an average consumer if empirical evidence of actual consumer behaviour was required. The answer is of course that a national court must consider the perception of the average consumer precisely because no empirical evidence is required.

389. Moreover, if empirical evidence was required it would undoubtedly reduce the efficacy of the Comparative Advertising Directive because it would be extremely difficult, if not impossible, in many cases to obtain such consumer evidence. It is precisely to avoid this problem that the CJEU has developed the legal construct of the average consumer who is reasonably well- informed, reasonably observant and circumspect.

390. I have also *considered R. (Sainsbury's Supermarket Ltd) v. The Independent Reviewer of Advertising Standards Authority Adjudications and Advertising Standards Authority Ltd and Tesco Ltd* (2014 EWHC 3680, a decision of the English High Court). In his judgment, Wilkie J. reviews the principles in *Lidl v. Vierzon* [2011] 2 CMLR 10 which I have set out above.

391. I do not believe, therefore, that it is necessary for the Court to have empirical evidence of actual consumer behaviour. The Court is well placed to make its decision based on the average consumer and indeed whether, in its view, a significant number of average consumers might have been affected by the comparative advertisements. In my view, on the facts of this case, I have no doubt that a significant number of consumers would, or could have, been significantly affected by all the comparative advertisements in this case.

The requirement for interchangability
392. The defendant has also sought to lay some emphasis upon the requirement of "interchangability". The defendant submitted that if the goods being compared are interchangeable, then the comparative advertisement conditions are fulfilled. In other words, the defendant submitted that if the goods were interchangeable, then all of the conditions of the Directive or Regulations were satisfied. That, in my view, is not correct. This issue of interchangability or "sufficiently interchangeable" must be understood in context. It relates to Article 4 (b) of the Directive only. Article 4 (b) provides that comparative advertising shall be permitted when the advertisement compares goods or services "meeting the same needs or intended for the same purpose". In other words, when defendants (such as Dunnes Stores) engage in comparative advertisements, these advertisements must compare goods "meeting the same needs or intended for the same purpose". It cannot compare goods which meet different needs, or which are intended for different purposes. It is one of the conditions which must be fulfilled in Article 4 of the Directive. Similar requirements pertain in the Irish Regulations. However, it does not mean that if the defendant engages in a comparative advertisement which does, in fact, compare goods which meet the same needs or are intended for the same purpose, that the advertisements are therefore lawful. All it means is that the advertisement fulfils one of the conditions of Article 4 of the Directive i.e. Article 4 (b). However, as I have stated above, it must fulfil all the conditions of Article 4 in order to be "permitted" as a comparative advertisement. That this is so is clear from the decision of the CJEU in *Lidl Belgium v. Colruyt* (at para. 26) where the CJEU states as follows:

> *"26 Article 3a(1)(b) of the Directive sets out that requirement, laying down that, if comparative advertising is to be permitted, the competing goods being compared must meet the same needs or be intended for the same purpose, that is to say they must display a sufficient degree of interchangeability for consumers.*
>
> *27 It is true, therefore, that in order to satisfy the condition laid down by that provision, all comparative advertising must, in the interests of both consumers and competitors, rest in the final analysis on the comparison of pairs of products satisfying that requirement of interchangeability. (Emphasis added)*

It is clear from these statements of the CJEU, that this requirement of "interchangeability" arises in a consideration of Article 4 (b) of the Directive. It may well be a test for Article 4 (b) of the Directive. That does not mean it is a test for Article 4 (a) or Article 4 (c) of the Directive.

Requirements of Directive are cumulative
393. I also note that the defendant, in its submissions, seeks to argue that Regulation 4 (2) (c) (d) and (a) are not cumulative. That, in my view, is simply not correct as a matter of law. If one looks at Article 4 of the Comparative Advertising Directive, it provides that "comparative advertising shall be permitted when the following conditions are met". It then sets out conditions (a) to (h). It follows that if one of the conditions is not met then the comparative advertising is not permitted. Thus the conditions are cumulative in that a defendant, such as Dunnes Stores, must meet all of the conditions set out in Article 4 before any of its comparative advertising shall be permitted. That is obvious from a reading of Article 4 of the Directive. It has also been put beyond doubt by the CJEU decisions in *Posteshop* (para 25) and *Lidl v. Vierzon* (para 16) as set out above.

394. It is also clear from Regulation 4 (2), that a comparative marketing communication is prohibited if it offends against the requirements under (a) to (i). All of these conditions are also cumulative. It is clear from Regulation 4 (2) that a trader such as Dunnes Stores who wishes to engage in comparative advertising may only do so if it fulfils all of the conditions set out in Regulation 4 (2) (a) to (i). Thus, if it infringes one of these prohibitions then the comparative advertisement is prohibited. That, in my view, is clear as a matter of statutory interpretation.

The principle of proportionality
395. I have also considered the principle of proportionality and any application of a *de minimis* principle. However, I am of the view that the comparative advertisements organised by Dunnes Stores in this case were part of a calculated and protracted nationwide campaign running from June to August 2013 in every Dunnes Stores supermarket in Ireland. I have no doubt that this was a calculated, strategic and commercial campaign to take on Aldi. There is nothing unlawful in such a campaign generally. Indeed it is essential in a competitive market. However, if Dunnes Stores chooses to engage in comparative advertising it must obey the rules of comparative advertising. This it failed to do. I do not believe that this failure was minimal or insignificant. Therefore, even applying the principle of proportionality to this case, I am of the view that the Dunnes advertisements are a clear infringement of the Directive and the Regulations.

The public interest
396. Regulation 5 (3) of the 2007 Irish Regulations provides:

"In determining an application under this Regulation, the Court shall consider all interests involved and, in particular, the public interest."

397. Regulation 5 (4) provides

"If the Court considers it necessary or appropriate in the circumstances, taking into account all the interests involved and, in particular, the public interest, the Court may make an order under paragraph (1)(b) without proof of any actual loss or damage on the part of the person making the application, or any intention or negligence on the part of the trader against whom the order is sought."

398. I have considered this Regulation and I have also considered the public interest. In my view, it is clear that there is a "public interest" in ensuring that the actions of Dunnes Stores, (in engaging in prohibited comparative advertising of the sort described in these proceedings) should be prohibited.

WAS THERE AN INFRINGEMENT OF THE PLAINTIFFS' TRADEMARKS?
399. The plaintiffs' complaint is that the defendant has infringed the plaintiffs' trademark which is registered as a trademark in Ireland and also as a European Community trademark. The essence of the complaint is that the defendant has used the plaintiffs' trademark in its banners, and in its shelf- edge labels whilst making reference to the plaintiffs and their products. It is common case between the parties, and the plaintiffs accept, that the defendant is entitled to use the plaintiffs' trademark for the purpose of comparing the plaintiffs' products with those of the defendant if the comparative advertising used by Dunnes Stores complies with the provisions of the Comparative Advertising Directive and the implementing regulations in Ireland.

400. As I have found above, the defendant's comparative advertising has not complied with all of the provisions of the Comparative Advertising Directive and indeed the Irish regulations. It has infringed several of these regulations. It is therefore unlawful.

Relevant provisions of the Trade Marks Act 1996
401. Sections 14 (1) and (2) of the Trade Marks Act 1996 provides as follows:

"14. (1) A person shall infringe a registered trade mark if that person uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.

(2) A person shall infringe a registered trade mark if that person uses in the course of trade a sign where because—

(a) the sign is identical with the trade mark and is used in relation to goods or services similar to those for which the trade mark is registered, or

(b) the sign is similar to the trade mark and is used in relation to goods or services identical with or similar to those for which the trade mark is registered, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association of the sign with the trade mark."

402. The Trade Mark Act 1996 implements Council Directive 89/104 on Trade Marks which in turn has been replaced by Council Directive 2008/95/EC.

Provisions of Council Regulation 207/2009 on the Community Trade Mark
403. Article 9 of the Community Trademark Regulations (CTM) provides as follows:

"Article 9

Rights conferred by a Community trade mark

1. A Community trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

(a) any sign which is identical with the Community trade mark in relation to goods or services which are identical with those for which the Community trade mark is registered;

(b) any sign where, because of its identity with, or similarity to, the Community trade mark and the identity or similarity of the goods or services covered by the Community trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;

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

2. The following, inter alia, may be prohibited under paragraph 1:

(d) affixing the sign to the goods or to the packaging thereof;

(b) offering the goods, putting them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder;

(c) importing or exporting the goods under that sign;

(d) using the sign on business papers and in advertising."

404. It is submitted by the plaintiffs that the effect of Article 14 (1) of the Trade Marks Act 1996, is that the owner of an Irish registered trade mark is entitled to prevent other parties from using a sign which is identical with the trademark in relation to goods or services which are identical with those for which it is registered. It is also submitted by the plaintiffs that, in a similar fashion, the effect of Article 9 (1) (a) of the CTM Regulation is that the owner of a community trademark is entitled to prevent any other party

from using a sign which is identical with a trademark in relation to goods or services which are identical with those for which it is registered.

405. It is also clear from the evidence in this case that on the banners, the shelf- edge labels/lower price labels and the labels in respect of the fifteen products that the defendant has indeed used the plaintiffs' trademarks.

406. The plaintiffs submit, therefore, that the defendant is guilty of infringing the trademarks unless it can establish that it is entitled to rely on one or more of the defences to a claim for infringement of a trademark under the Trademarks Act or the CTM Regulation.

Defences – Section 14 (6) of the Trade Marks Act 1996
407. Section 14 (6) provides the following defence to an infringement claim

> *"Nothing in the preceding provisions of this section shall be construed as preventing the use of a registered trade mark by any person for the purpose of identifying goods or services as those of the proprietor or licensee of the registered trade mark; but any such use, otherwise than in accordance with honest practices in industrial or commercial matters, shall be treated as infringing the registered trade mark if the use without due cause takes unfair advantage of, or is detrimental to, the distinctive character or reputation of the trade mark."*

408. However the exact status of s.14 (6) in the light of the Comparative Advertising Directive appears to be uncertain. Thus it appears to be the case that s.14 (6) permits the use of a registered trademark by any person for the purposes of identifying goods as those of the proprietor or licensee of the trademark but that such use must be "in accordance with honest practices in industrial or commercial matters" and also must not take unfair advantage of, or be detrimental to, the distinctive character or reputation of the trade mark. In *O2 Holdings Limited & O2 (UK) Limited v. Hutchison 3G Limited* [2006] EWCA Civ 1656, the High Court in England (Lewis J) held that in order to rely on the English equivalent of s.14 (6) as a defence to an action for infringement of a trademark, the defendant's use of the trademark must have complied with the EU Directive on Comparative Advertising. This view was confirmed on appeal by the Court of Appeal which held that a comparative advertisement which used the trademark of a competitor, but which complied with the EU Directives on Comparative Advertising would not constitute an infringement of such a trademark. However, the Court stated, in respect of the English equivalent of s.14 (6) as follows:

> *"The judge held that this provision adds nothing to the CAD (Comparative Advertising Directive). Neither side relied on it before us. It is a pointless provision (and could not apply to a Community Trademark). It should be repealed as an unnecessary distraction in an already complicated branch of the law".* (See para. 58 of the judgment)

409. The matter was referred to the European Court of Justice which also held that the use of a trademark in a comparative advertisement which satisfied all the requirements of the relevant EU Directive on Comparative Advertising did not constitute an infringement of that trademark under Articles 5 (1) and (2) of the Trademark Directive (which were implemented in Ireland by virtue of sections 14 (1) (2) of the Trademarks Act.

410. Thus, the plaintiffs throughout this trial accepted that if the defendant's comparative advertising complied with the requirements of the Comparative Advertising Directive and implementing Regulations, then there was no infringement of the plaintiffs' trademark. This was also accepted by the defendant.

411. Indeed, I note that the defendant (at para. 85 of its first legal submissions) made no real point in relation to section 14 (6). As they say, "Accordingly in determining whether a person's trademark can be used by a competitor for the purposes of comparative advertising, the sole test is whether such use complies with the comparative advertising legislation".

412. However, given my findings above, that the defendant's comparative advertisements do not comply with the provisions of the 2007 Regulation, it follows therefore that the defendant's actions have infringed the plaintiffs' trademarks.

413. The defendant however, submits that s.14 (6) of the Trade Marks Act 1996 remains on the Irish statute books and that there is no suggestion that s.14 (6) is no longer good law in Ireland. Despite the dicta of the UK Court of Appeal in respect of the English equivalent of s.14 (6), it does not seem to me that s.14 (6)of the Irish Act is abrogated by the Comparative Advertising Directive and implementing Regulations.

414. However, it is clear to me that, in light of all the factual evidence which I have heard, and in the light of the legal conclusions that I have come to above, in respect of the defendant's infringements of the Comparative Advertising Directive, that the use by the defendant of the plaintiffs' trademarks has "taken unfair advantage of" and/or is "detrimental to the distinctive character or reputation of the trademark" without "due cause". Moreover, insofar as I have found that the comparative advertisements were misleading and/or advertisements which could deceive the consumer, they are therefore advertisements which use the plaintiffs' trademark "otherwise than in accordance with honest practices in industrial or commercial matters".

415. I am therefore of the view that the defendant cannot rely on s.14 (6) as a defence to the infringement proceedings taken by the plaintiffs.

Observations on the Irish Regulations implementing the Directive
416. The plaintiffs in these proceedings chose to rely on Regulation 4 (2) (b) (c) and (d) only of the Irish Regulations implementing the Directive. They chose not to rely on Regulation 4 (2) (a).

417. It appears that they chose not to rely on Regulation 4 (2) (a) because there is a real issue as to whether Regulation 4 (2) (a) properly implements – in part – Article 4 (a) of the Directive. (Article 4 (a) of the Directive is also implemented by Regulation 4 (2) (b)).

418. Under Article 2 (b) of the Directive, misleading advertising is defined as any advertising which is likely to deceive "the persons to whom it is addressed or whom it reaches". (Emphasis added).

419. Regulation 3 (2) of the implementing Regulations provides:

> *"that a marketing communication is misleading if it deceives or is likely to deceive… the trader to whom it addresses or whom it reaches.*

420. Thus the phrase in the *Directive "the persons to whom it is addressed"* is replaced in the Irish regulations as *"the trader to*

whom it is addressed".

421. A "trader" is defined in the Irish regulations at regulation 2 (1) as meaning a person "*who is acting for purposes relating to the persons trade, business or profession or a person acting on behalf of such a person"*.

422. The defendant seems to have accepted that the reference to "the trader" in the 2007 regulations is incorrect. I was also referred to a decision of Laffoy J in an interlocutory decision in *Tesco Ireland Ltd v. Dunnes Stores* 2009 IEHC 569 when the learned judge considered that the reference to trader should [be] a reference to "consumer".

423. However, the actual wording of the Directive is whether the advertising is likely to deceive "the persons to whom it is addressed or whom it reaches". This could include a consumer but it is drafted more broadly in the Directive.

424. It is clear therefore that there is an infelicity in the drafting but it is not central to the issues which I have to decide upon. This is because the matter can be decided on the basis of Regulation 4 (2) (b) (c) and (d) of the 2007 Regulations. However there is a real question as to whether Article 4 (a) has been fully and correctly implemented into Irish law. In my view it has not.

PART 5 - CONCLUSIONS

425. I would therefore conclude that in relation to the shelf- edge labels on fourteen out of the fifteen products, in relation to the banners and in relation to the shelf- edge labels/lower price labels that the comparative advertisements of Dunnes Stores all infringe the 2007 Regulations.

426. I would conclude that the Dunnes Stores comparative advertisements did not objectively compare one or more material, relevant and/or representative and verifiable features of these products. Thus they infringed Regulation 4 (2) (d).

427. I would also conclude that the comparative advertisements did not compare products meeting the same needs or intended for the same purpose. Thus they infringed Regulation 4 (2) (c).

428. I would also conclude that the Dunnes Stores comparative advertisements were a misleading commercial practices within the meaning of s. 43 – 46 of the Consumer Protection Act 2007 (contrary to Regulation 4 (2) (b).)

429. I would conclude that the Dunnes Stores comparative advertisements included the provision of false information (in relation to fourteen out of the fifteen products set out above) including information about their nature or characteristics, composition or ingredients (contrary to s. 43 (1) of the Consumer Protection Act 2007).

430. I would also conclude that such information would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make (contrary to s. 43 (2) of the Consumer Protection Act 2007).

431. I would also conclude that the Dunnes Stores comparative advertisements were misleading because they were likely to cause the average consumer to be deceived or misled in relation to the nature or characteristics of a number of products (contrary to s. 43 (2) of the Consumer Protection Act 2007).

432. I would also conclude that Dunnes Stores omitted, or concealed, material information in relation to its comparative advertisements that the average consumer would need to make an informed transactional decision (contrary to s. 46 (1) of the Consumer Protection Act 2007).

433. In the light of these findings, I will hear further submissions from the parties about the nature and scope of any potential remedy and the form of the Order.