THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 116

Record No. 2015/470

Ryan P.
Peart J.
Hogan J.

BETWEEN

ALDI STORES (IRELAND) LTD. AND ALDI GMBH & CO KG

PLAINTIFF/RESPONDENT

AND

DUNNES STORES

DEFENDANT/APPLICANT

JUDGMENT delivered by Ryan P. on the 6th day of April 2017

Introduction

1. This appeal is concerned with comparative advertising between supermarket chains. The rules applying to the whole of the European Union are now consolidated in a Directive of 2006 which has been transposed into Irish law by statutory instrument. The general policy underlying the European approach is to promote competition and to develop the internal market. Advertising is an integral feature of that process. It is important, however, to ensure that advertising is not misleading and to protect traders, while at the same time seeking to benefit consumers.

2. The question that arises in this case is whether comparative advertising carried on by Dunnes Stories was in compliance with the rules contained in the European Communities (Misleading and Comparative Advertising) Regulations (S.I. No. 774 of 2007) ("the 2007 Regulations"), which implement Directive 2006/114/EC and the Consumer Protection Act 2007 ("the 2007 Act"). The High Court found that each of three elements of the in-store advertising campaign was in breach of multiple regulatory provisions contained in both the 2007 Act and the 2007 Regulations. This is Dunnes' appeal against these findings.

3. Most people will be familiar with advertising signs and slogans in supermarkets. A key aspect of the 2006 Directive is that in principle it permits comparative advertising using the trade mark of a rival provided, however, that certain conditions are complied with. At the heart of this appeal lies the question of whether the price advertising campaigns employed by Dunnes' in the summer of 2013 which employed Aldi's trade marks for identification and comparison purposes complied with these conditions.

4. The specific context of this case may be illustrated by reference to some of the products with which the High Court was concerned. Can Dunnes' in their in-store advertising compare their own-brand tomato ketchup with Aldi's for the purposes of a price comparison when Aldi's ketchup has more tomato content? Or its own-brand shower gel when Aldi's has a small quantity of tea tree oil and Dunnes' does not? Or its own-brand pork sausages when the Aldi product carries the Bord Bia mark and Dunnes' does not? These are some of the questions that arise in this appeal.

The Background to the Proceedings

5. Dunnes' supermarkets ran an advertising campaign from June to August 2013 in which shelf-edge labels stated the Dunnes' prices and Aldi prices for 262 separate products that Dunnes maintain were comparable. The High Court held that differences between 14 of 15 products that it considered in detail meant that the labels were in breach of both the 2007 Regulations and the 2007 Act. The remaining 247 labels were condemned for similar infractions because they did not specify the compared products and they carried the words "Always Better Value" and "Guaranteed Lower Prices". The Court also found that the third limb of the campaign consisting of banners and floor stands was unlawful. These determinations were made in a careful and detailed judgment delivered by Cregan J on 9th June 2015. After a further hearing in the High Court the issue of remedy was debated and the court in its third judgment held that Aldi was entitled to a restraining injunction: see *Aldi Stores (Ireland) Ltd. v. Dunnes Stores (No.2)* [2015] IEHC 551.

6. At the heart of this appeal lie a number of important legal questions. First, did the trial judge apply the correct legal tests to the advertising? Secondly, did the judge err in assessing Dunnes' advertising of the different elements in dispute, namely, the 15 products, the other 247 shelf-edge labels and the banners and stands? Thirdly, was the judge in error in his evaluation of the expert evidence? Fourthly, was the High Court justified in finding that the advertising was misleading advertising within the meaning of either or both of the 2007 Regulations and the 2007 Act? Finally, if the appeal on these points fails, was an injunction appropriate or reasonable?

7. The table of contents in the lengthy judgment of the High Court helpfully outlines the judge's approach. He first considered the facts generally, the issues, the nature of Aldi's complaints and summarised the evidence of the parties in relation to the background to the dispute. Then he described the legal context, considering in turn Directive 2006/114/EEC on misleading and comparative advertising, the 2007 Regulations and the 2007 Act, the objectives of the Directive, and the case law.

8. Before proceeding further, it might be helpful if I were to sketch out the structure of this judgment. I propose first to address the function of this court in the appeal. I then propose to consider the regulatory regime on comparative advertising, some of the relevant case law, the High Court's interpretation of the applicable regulations, the 15 compared products, and the application by the High Court of the law to the facts as found by the judge. I will then express my conclusions in respect of the various issues outlined above before summarising my views overall.

Function of the Court of Appeal

9. Although I do not think that any major issue arises concerning the role of this court in considering the appeal, the matter was the subject of written and oral submissions and it is appropriate to say a brief word about it. In *Hay v O'Grady* [1992] 1 I.R. 210 McCarthy

J speaking for the Supreme Court said that an appeal court was bound by findings of fact made by the trial judge if they were supported by credible evidence. The court was not always in as good a position as the trial judge in regard to inferences of fact and it should be slow to substitute its own different inference if that depended on oral evidence of recollection of fact because the demeanour of a witness might give rise to an inference. Concerning inferences from circumstantial evidence the situation was different; the appellate court was in as good a position as the trial judge to draw appropriate inferences. Nevertheless, if the appeal court was satisfied on the facts found and inferences drawn by the trial judge or based on its own inferences that the trial judge had reached the wrong conclusion, the order of the court below would be varied accordingly. McCarthy J. in setting out these standards of review appropriate for an appellate court emphasised the importance of a clear statement by the trial judge of findings of primary fact, inferences drawn and the conclusions that the judge reached.

10. In *Doyle v Banville* [2012] IESC 25 Clarke J speaking for the Supreme Court revisited the principles enunciated in *Hay v O'Grady* in firstly confirming in respect of the trial court that it is

"important that the judgment engages with the key elements of the case made by both sides and explains why one or the other side is preferred." [Paragraph 2.3.]

Secondly, he said that

"the function of an appellate court is to ascertain whether there may have been significant and material error in the way the trial judge reached a conclusion as to the facts. It is important to distinguish between a case where there is such an error and one where the trial judge simply is called on to prefer one piece of evidence to another and does so for a stated and credible reason. In the latter case it is no function of the reviewing court to second-guess the trial judge's view." [at paragraph 2.7.]

11. It follows from these cases that the more directly the finding under appeal is a matter of assessment by the trial judge of witnesses in relation to disputed facts, the less inclined should the appellate court be to interfere. In this appeal there is no dispute as to the essential facts as they were found by the High Court. Inferences and deductions and conclusions are of course a different matter. I now turn to the legal context with a view to identifying the correct legal tests to be applied to the facts.

The Regulatory Framework
12. Comparative advertising is permitted under certain conditions that are prescribed by European Union law in Directive 2006/114/EC ("the 2006 Directive"). This 2006 Directive has transposed into Irish law by the 2007 Regulations

Article 4 of the 2007 Regulations
13. The key regulatory provision for the purposes of this appeal is Article 4 of the 2007 Regulations which is in the following terms: :

> "4(1) A trader shall not engage in a prohibited comparative marketing communication.
>
> (2) 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,
>
> ..... "

14. It follows from (a) and (b) above that Article 3 and the specified sections of the 2007 Act are relevant.

15. Article 3 provides:

> "(1) A trader shall not engage in a misleading marketing communication.
>
> (2) A marketing communication is misleading if:
>
> (a) in any way (including its presentation), it deceives or is likely to deceive in relation to any matter set out in paragraph (4) the trader to whom it is addressed or whom it reaches, and
>
> (b) (i) by reason of its deceptive nature, it is likely to affect the trader's economic behaviour, or
>
> (ii) for any reason specified in this paragraph, it injures or is likely to injure a competitor.
> (3) In determining whether a marketing communication under paragraph (2) is misleading, the marketing communication shall be considered in its factual context, taking account of all its features and the circumstances.
>
> (4) The following matters are set out for the purposes of paragraph (2)(a):
>
> (a) the existence or nature of the product;
>
> (b) the main characteristics of the product, including any of the following:"

16. I have omitted for the present the specified list of many features that are relevant to the consideration of the product. They appear later where they are relevant.

17. It should be noticed that Article 3 does not refer to a person to whom the communication is addressed but rather to "the trader"

to whom it is addressed or whom it reaches. As Laffoy J. has already observed in *Tesco (Ireland) Ltd. v. Dunne Stores* [2009] IEHC 569, the reference to "trader" would appear to be an error, having regard to the terms of Article 2 of the Directive and, accordingly, that this word should be instead understood to be "consumer". No issue arose on this at the trial. It is unnecessary therefore to consider the appropriateness of invoking the provisions of the Interpretation Act 2005 or principles of statutory construction.

18. By virtue of Article 4(2)(b), ss. 43 and 46 of the 2007 Act are relevant:

> "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
>
> 43(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 makes.

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."

The Case Law of the Court of Justice

19. I now turn to a consideration of some of the key case-law of the Court of Justice on this topic. The leading case is Case C-356/04 *Lidl Belgium GmbH & Co KG v Etablissementen Franz Colruyt NV* [2006] E.C.R. I-8501. This decision established that comparative advertising can relate collectively to selections of products but in certain cases it may be misleading. Although the Court was dealing with an earlier Directive the measures in question are the same as in the present consolidated Directive. The facts of the case are set out in the Court's judgment as follows:

"Lidl and Colruyt operated rival chains of stores in Belgium retailing basic consumables. Lidl challenged comparative advertising by Colruyt and the Brussels Commercial Court referred questions on the interpretation of the Directive on misleading and comparative advertising to the Court of Justice for a preliminary ruling. Two kinds of advertising were in issue. In the first, Colruyt compared the general level of the prices charged by itself and its competitors in respect of their ranges of comparable products and inferred from this the amount that consumers could save. Their general price levels were determined monthly, then annually, on the basis of a daily record of the individual prices of a very wide sample of basic consumables, whether identical (branded products) or similar (unbranded products or the chain's own brand). The second method of advertising was based on the assertion that all of Colruyt's products that had a red label bearing the word 'BASIC' were sold by it at the lowest price in Belgium. This selection of products consists of, first, branded products and, second, products sold unbranded or under Colruyt's own brand name."

20. The Court referred to settled case-law that the conditions of comparative advertising must be interpreted in the sense most favourable to such advertising. The Directive did not preclude comparative advertising that compared selections of basic goods whose individual products when compared with their comparators each satisfied the requirement of comparability. The products and prices and the comparisons with them did not have to be listed specifically in the advertisement provided that the consumer was able to verify the details or to have them verified. Comparative advertising of a selection of goods could be misleading in so far as it suggested that not just the selected goods but also the general level of prices in the advertiser's store was lower than the competitor's. That could give the false impression to consumers that they would make the advertised savings of the full range of their purchases if they shopped regularly with the advertiser. It was a matter for the national court taking all the relevant circumstances into account to decide whether the advertisement in question was misleading.

21. Speaking of the nature of the comparison of products, the Court emphasised that the features were to be compared objectively and the comparison was intended to avoid subjectivity: see paras 45 and 46 of the judgment. And at para 48, the judgment refers to the definition of comparative advertising in the Directive which, by implication, necessarily envisages the comparison of products.

22. The other major decision is Case C-155/09 *Lidl SNC v Vierzon Distribution SA* EU:C: 2010: 696.The facts of the case - which are not entirely dissimilar to the present appeal - are set out in paras 10 and 11 of the judgment of the Court of Justice.

> "10. On 23 September 2006, Vierzon Distribution placed an advertisement in a local newspaper ('the advertisement at issue'), which reproduced till receipts listing, by means of general descriptions, accompanied, as appropriate, by their weight or volume, 34 products, in the main foodstuffs, purchased from the store belonging to Vierzon Distribution and that operated by Lidl, respectively, and showing a total cost of EUR 46.30 for the Vierzon Distribution products as against EUR 51.40 for those of Lidl.
>
> 11. The advertisement also included the slogans 'Not everybody can be E. Leclerc! Low prices – And the proof is E. Leclerc is still the cheapest' and 'In English, they say "hard discount" – in French they say "E. Leclerc"'"

23. The judgment refers to interchangeability. Another expression is that the goods should be substitutable one for the other.

> "25. Article 3a(1)(b) of Directive 84/450 provides that, if comparative advertising is to be permitted, the comparison must relate to goods or services which meet the same needs or are intended for the same purpose. The Court has already held that that condition implies that the goods being compared must display a sufficient degree of interchangeability for consumers (*Lidl Belgium*, paragraph 26, and Case C 381/05 *De Landtsheer Emmanuel* [2007] E.C.R. I 3115, paragraph 44)."

24. The Court then concluded:.

> "45. As is apparent from the description given at paragraphs 10 and 11 above, the advertisement at issue is based on a selection of a limited number of products, for the most part foodstuffs, marketed by two competing stores. Those products are identified by generic names, accompanied, as appropriate, by their weight or volume, which appear on till receipts from each of those stores showing, in addition to the individual price of each of the products in question, the total amount paid to purchase such an assortment of goods. The advertisement also contains slogans of a general nature proclaiming that the store of the advertiser, whose till receipt is thus reproduced showing a lower total cost than that of its competitor, is cheaper."

25. The Court observed that the products do not have to be similar in order to be compared; in fact, such a requirement would be

anti-competitive.

> "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)."

26. The judgment then describes how the local court should consider the issues.

> "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)."

27. The cases have explained how the Directive applies and is to be applied to various different factual situations. The products compared do not have to be the same. A basket of goods may be compared, but there are dangers in doing so because it may be misleading. Care must be taken to ensure legitimate comparison of interchangeable goods and that the message is limited to the inferences that can be drawn from the selection made. The consumer is taken to be reasonably well informed and reasonably observant and circumspect. The notional consumer has common sense. These principles clearly inform the appropriate interpretation of Article 4 of the 2007 Regulations.

28. In the light of this case-law, the following issues would appear to arise on this appeal:

(1) Is the material in question a comparative marketing communication?

(2) If so, the following questions arise.

> (a) Is it misleading under Article3? Did it mislead or was it likely to mislead the consumer/shopper in relation to the nature of the product or its main characteristics or any other matter specified and

(i) by reason thereof was it likely to affect the person's economic behaviour, i.e., his or her decision to purchase or not?

or

(ii) for any reason specified in the paragraph did it injure or was it likely to injure a competitor?

> (b) Is it a misleading commercial practice under any of ss. 43 to 46 of the 2007 Act? That is:-
>
> > (1.) Section 43: Did the representation provide false information in relation to the nature of the product or its main characteristics or any other matter specified in subsection (3) and would that information be likely to cause the average consumer to decide to buy the product or not?
> >
> > (2.) Section 43: Did the representation make a representation in relation to a promotion of the product that was likely to cause the average consumer to be deceived or misled in relation to the nature of the product or the main characteristics of it or any other specified matter and to make a decision to purchase or not to purchase the product?
> >
> > (3.) Section 46: Did the representation omit or conceal material information that the average consumer would need, in the context to make a decision to purchase or not to purchase the product and was that likely to cause the average consumer to make a decision [to purchase] that he or she would not otherwise make?
>
> (c) Does it compare products meeting the same needs or intended for the same purpose?
>
> (d) Does it objectively compare one or more material, relevant, verifiable, and representative features of those products, which may include price?

29. This skeleton questionnaire naturally omits a great deal of detail, but it has the merit of laying out the essentials of the scheme of comparative advertising that is contained in the Regulations and in the corresponding parts of the Directive. It reveals that what can be compared are products meeting the same needs or intended for the same purpose but that is subject to the comparison not being outlawed as being misleading in one or more of a number of modes. If the advertisement – "comparative marketing communication" in the language of the Regulations – compares products meeting the same needs or intended for the same purpose, it is permissible unless it falls foul of Article 3 or of ss. 43 to 46 of the 2007 Act.

30. Article 4(2)(d) specifies how the products are to be compared. The communication must objectively compare one or more of the features of the products. The feature or features compared must be material, relevant, verifiable and representative. These features include the price. It is clear, therefore, that a comparison of products meeting the same needs or intended for the same purpose may be compared by reference only to price, always assuming that the comparison is not outlawed as being misleading. The point needs to be emphasised that subparagraph (c) is not dependent on the following subparagraph (d). They serve different purposes: sub-paragraph (c) provides for *what* may be compared under the Regulations, while sub-paragraph (d) specifies and mandates *how* the comparison that may be made. It is a mistake to confuse the nature of the comparison that is permitted under subparagraph (d), which refers to material, relevant, verifiable and representative features including price, and permits one or more of those features to be selected for comparison, and the preceding subparagraph (c) as to what may be compared. This, unfortunately, is an error into

which, with respect, the court of trial fell and it gives rise to a major difficulty in the judge's analysis of the case.

31. The conditions in the Directive are to be interpreted in the sense most favourable to permitting legitimate comparative advertisements: see the judgment of the CJEU in *Vierzon* at paragraph 21. The 2007 Regulations provide that the court is to take into account all the interests including the public interest.

High Court's Interpretation of the 2007 Regulations
32. The first major criticism that the appellant makes in respect of the judgment concerns the trial judge's application of the rules of comparative advertising in the 2007 Regulations. Dunnes submits that the erroneous interpretation appears as early as paragraph 3 of the judgment under appeal where the trial judge stated:

"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."

33. At para. 276 the trial judge stated:

"It is therefore helpful, and in my view instructive, to analyse Article 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 Article 4(2)(d). If so, then the comparative advertisement is unlawful and it is not necessary to even consider whether it is misleading".

34. Paragraphs 284 and 285 reflect the trial judge's acceptance of tests proposed by Aldi's expert witnesses and his view that the court should employ them in determining whether the differences in the products were material, relevant etc. and whether the products were comparable. In those paragraphs he stated:

> "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 Article 4(2)(d) (i.e., an objective comparison of one or more material, relevant, verifiable and representative features of such goods.)"

35. It would have been possible to consider the question whether the differences in the products were material or sufficiently material to render the advertising misleading and so to invalidate the comparison, but that is not what the High Court did. Rather Cregan J. applied the subparagraph (d) test which is the mode of comparison provision to the question of comparability, to which it was irrelevant.

36. Paragraph 306 of the judgment again refers to comparability in relation to a submission made by counsel for Dunnes:

"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)."

37. Paragraph 337 makes this point again, when the trial judge stated:

"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." (Emphasis added)

38. Again, at paragraph 374 the trial judge states that consumers:

"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."

39. At the hearing of the appeal Dunnes relied heavily on its argument that this represented a fundamental error of approach. Aldi for its part accepted that the Regulations did not require comparison of all material features, all relevant features, all representative and verifiable features. They acknowledged that the trial judge might have misstated the position, but submitted that when he came to applying the law to the case he did so correctly. It was therefore merely an error in the written judgment which had not affected the trial judge's analysis of the case and his decision. They referred to a number of occasions in the judgment where the position is correctly stated. These include paragraphs 280, 285 and 301 in which the following quotations appear:

> "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"…
>
> 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.)"

40. This paragraph must, however, be read in the context of paragraphs 283 and 284 which it follows and which are set out above:

> "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."

41. Therefore, although the trial judge did refer to the terms of Article 4(2)(d) accurately on a number of occasions, it is apparent that his understanding was that comparability of products was governed not only by subparagraph (c) – subject of course to the restriction on misleading communications – but also by (d). The conclusion is therefore unavoidable that the trial judge began with an erroneous interpretation of the 2007 Regulations. It remains to be seen by analysis of the other findings made by the High Court whether this misunderstanding affected the conclusions that the judge reached, or whether notwithstanding his view of the effect of the provisions he nevertheless employed correct tests in applying the law to the facts as he had found them. In my view, however, it is apparent that the court followed through in a consistent manner with this erroneous interpretation.

The Test applied by Aldi

42. Aldi's submissions on the appeal contend that Dunnes approach is completely misconceived because of the former's concentration on Article 4(2)(c), the comparability subparagraph. They say that Aldi always accepted that the products intended to be compared by the shelf-edge labels met the same needs or were intended for the same purposes but that their objection and the thrust of their evidence was that the communications were misleading. That may well have been the object of Aldi's expert evidence. The question, however, is not what was the intended direction of the evidence but rather what was the approach adopted by the trial judge. Obviously, if there were sufficient differences in the nature of the products or their composition or other features as listed at Article 3 or in the 2007 Regulations, that could have outruled the validity of the communication in the labels. As I said above, even if the court of trial approached the questions to be decided on the basis of an erroneous understanding, it is still possible that it might have applied the correct legal criteria to the specific products that were under consideration and to the more general questions. I do not agree with the submission made by Aldi that Dunnes have fundamentally misconceived the issues on the appeal.

43. This profound disagreement between the parties to the appeal in respect of a matter of law that is central to the case calls for some exploration. The submission made by Aldi, if correct, means that the appellant has founded its case on a misunderstanding of the law that applies to the issues. On the other hand, if Dunnes are correct it means that Aldi's position in this court and, indeed, in the High Court reflects a mistaken understanding of the regulatory regime for comparative advertising. There is, I think, an explanation for this striking divergence between the parties. It is reflected in the approach adopted by Aldi's expert witness, Professor Berryman, to his examination of the 15 products and to his evidence generally, a matter which is of great significance in the case because the trial judge relied so heavily on this expert in reaching his conclusions. Professor Berryman is a food scientist and consultant attached to the University of Reading.

44. It is not the case that Professor Berryman followed the same understanding as the trial judge as indicated in the passages quoted above. Professor Berryman's approach was significantly different, but I also think, with respect, mistaken, in regard to the 2007 Regulations and their meaning and effect. His evidence, although based on a different understanding, was nonetheless sufficiently coherent with the judge's interpretation for the difference not to be obvious, and perhaps that explains why the position was not clarified. The problem with the trial judge's analysis of the 15 products is not that the judge simply proceeded on foot of his mistaken understanding of the Regulations. While he undoubtedly did that the situation is actually more complicated because the judge conducted his analysis by reference to evidence that was itself based on an erroneous understanding of the Regulations. In these circumstances it is necessary for me to set out why I consider Professor Berryman's method was incorrect, so that it will become clear why the appellant and respondent differ so much in their understanding of the issues on the appeal, and why each is imputing to the other a fundamental misconception..

45. A crucial issue in the appeal is whether Professor Berryman in his evidence, and the trial judge in his acceptance of that evidence, applied the correct analytical method having regard to the relevant legal rules. The approach adopted by the judge was heavily influenced by the methodology employed by this expert. In respect of the 15 products, it is clear that the High Court accepted his evidence over that of the defendant's experts in almost every instance. At paragraph 21 of his expert report Professor Berryman had set out the test for comparative advertising that he employed as follows:

"Comparative advertising is permissible where the products being compared are interchangeable or meet the same needs of a consumer. However comparative advertising of products based on price will be misleading if the products (whilst ostensibly interchangeable) had different features capable of significantly affecting the average consumer's choice without such difference being apparent from the advertising concerned."

46. The essence of this statement is repeated at para 137 of Aldi's submissions in the appeal:

> "137. From the foregoing statement in *Lidl v. Vierzon* (and, in particular, paragraphs 51 and 54 thereof) it is clear that comparative advertising of products based on price will be misleading if the products (whilst ostensibly interchangeable) had different features capable of significantly affecting the buyer or consumer's choice without such difference being apparent from the advertising concerned."

47. This emphasis on the differences between products and the requirement for notification are important features of the trial judge's reasoning in the case, particularly with regard to the 15 compared products. I do not agree, however, that this approach is correct having regard to the provisions of the 2007 Regulations, the 2006 Directive which it implements, and the jurisprudence, including the case that is cited as the source of the rule as stated. It does not appear that Professor Berryman addressed himself specifically to the terms of either the 2007 Regulations or the 2006 Directive. The language of his report and his evidence are not couched in the term of these measures. In my view, he proceeded on a basis that is not correct having regard to the terms of these relevant legal measures.

48. As is clear from the earlier discussion in this judgment, my understanding based on the terms of the 2007 Regulations as interpreted in the light of the 2006 Directive and the case-law, is as follows. Comparative advertising is permitted if certain conditions are fulfilled; and all of the requirements must be met because they are cumulative and not alternative. Comparative advertising that does not fulfil the conditions is not permitted. The fundamental requirement is that the goods must be comparable in the sense of meeting the same needs or being intended for the same purpose. The Court of Justice has held that this means that the products must be interchangeable or substitutable: tomato ketchup is a good example and shower gel would seem to be another.

49. Another requirement, which is obvious and understandable, is that the advertising must not be misleading either because the comparison itself is misleading and so constitutes misleading advertising, or because the advertising amounts to a misleading

commercial practice. The details of these potential disqualifiers need not trouble us just for the moment. The point is that comparative advertising that offends the rule in Article 3 as to misleading advertising is not permitted. A court will order the discontinuation of such advertising if application is made in that regard. The same applies to comparative advertising that constitutes a misleading commercial practice under ss. 43 to 46 of the 2007 Act.

50. To complete this outline of the relevant rules on comparative advertising it is necessary to mention one further rule. Article 4(2)(d) provides that the advertising has to compare objectively one or more material, relevant, verifiable and representative features of the goods, which may include price. A comparison based on price alone is thus permitted if it complies with the other conditions.

51. I have repeated the effect of these provisions in order to clarify my disagreement with the approach adopted by Professor Berryman as he outlined it at the beginning of his report. The instruction appears to imply a requirement to make known to the consumer in comparative advertising any material, relevant, verifiable and representative differences of features between products. It is apparent that the basis for those instructions emanates from the judgment of the Court of Justice in *Lidl v. Vierzon* which we will have to examine in order to see if it is an accurate extract expressing the rationale of the decision. This point is important because the trial judge based his approach to the analysis of the 15 products not only on Professor Berryman's evidence as to the composition of the goods, but, it would seem, also on this legal test as to permitted comparative advertising. In short, the judge applied a requirement for differences to be stated as a condition of permitted comparative advertising. I do not agree that there is such a requirement for the purpose of comparability under Article 4(2)(c). If, however, the statement in the instructions from the solicitors is a correct summary of the legal rule to be applied, the trial judge was in this respect correct - as was Professor Berryman - and my view is incorrect. It is, accordingly, necessary to examine *Lidl v. Vierzon* and particularly in the cited paragraphs to see what the Court of Justice actually determined.

52. The facts of *Lidl v. Vierzon* are important because they furnish the context in which the Court of Justice expressed itself in the terms that are the basis of the statement in the solicitors' instructions to Professor Berryman. I quote here paras 45 to 56, a passage which begins with a summary of the facts, and ends with the answer given by the Court to the question referred by the Tribunal de Commerce de Bourges:

"45. As is apparent from the description given at paragraphs 10 and 11 above, the advertisement at issue is based on a selection of a limited number of products, for the most part foodstuffs, marketed by two competing stores. Those products are identified by generic names, accompanied, as appropriate, by their weight or volume, which appear on till receipts from each of those stores showing, in addition to the individual price of each of the products in question, the total amount paid to purchase such an assortment of goods. The advertisement also contains slogans of a general nature proclaiming that the store of the advertiser, whose till receipt is thus reproduced showing a lower total cost than that of its competitor, is cheaper.

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.

55. In such cases, the fact that the consumer is not informed of the differences between products being compared in terms of price alone may deceive the consumer as to the reasons for the difference in prices claimed and the financial advantage that can in fact be obtained by the consumer by buying his goods from the advertiser rather than from a given competitor and have a corresponding effect on the consumer's economic behaviour. The latter may thus be led to believe that he will in fact obtain an economic advantage because of the competitive nature of the advertiser's offer and not because of objective differences between the products being

compared.

56. In the light of all the foregoing, the second part of the answer to be given to the question referred by the tribunal de commerce de Bourges is that Article 3a(1)(a) of Directive 84/450 is to be interpreted as meaning that an advertisement such as that at issue in the main proceedings may be misleading, in particular if:

> – it is found, in the light of all the relevant circumstances of the particular case, in particular the information contained in or omitted from the advertisement, that the decision to buy on the part of a significant number of consumers to whom the advertisement 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, or
>
> – it is found that, for the purposes of a comparison based solely on price, food products were selected which, nevertheless, have different features capable of significantly affecting the average consumer's choice, without such differences being apparent from the advertising concerned."

53. In *Vierzon* there was, therefore, a comparison consisting of copies of till receipts in respect of a selection of food items identified by generic names with a total price in each case, together with a statement of how much will be saved by shopping in the advertiser's store as opposed to its competitor. The Court of Justice held that it was a matter for the national court of trial to ascertain whether the advertising was misleading, taking account of the average consumer who was reasonably well-informed and reasonably observant and circumspect. The trial court was to take into account all the relevant facts, the information contained in the advertisement and all its features. An omission may, of course, make advertising misleading, particularly if it seeks to conceal a fact which, if known, would have deterred a significant number of consumers from making a purchase.

54. The Court further acknowledged that the advertisement in question could be misleading – the decision was one for the court of trial – if that court found that because of the information contained in the advertisement or because of omissions from it, a significant number of consumers might be misled. They might buy their goods in the mistaken belief that the price comparison of the advertised selection of goods was representative of the general level of prices in the advertising store, enabling them to make savings of the kind set out in the advertisement on a regular basis. Or they might think that this advertisement showed that all the advertiser's goods were cheaper than the named competitor's. So, the trial court, having heard the evidence, was then required to determine that the advertisement was misleading because consumers might buy their goods from the advertiser in these mistaken beliefs. The advertisement might give misleading information by implication from the selection of goods whose total prices in the rival stores were given in the advertisement.

55. Another way in which the advertisement could be misleading – which was again a matter for the local court of trial - was if the goods that were compared were objectively different and the differences were capable of affecting the consumer's choice. In that circumstance, the Court of Justice said that if the differences were not disclosed the advertising based solely on price may mislead the consumer into thinking that the goods are equivalent and may also have an effect on his or her choice. The Court also referred to other kinds of difference that could render an advertisement misleading, such as not comparing similar brands in the case of branded products, or if other features of the goods were different, such as the composition or place of origin, if those things might have a significant effect on the buyer's choice.

56. In those cases that were given by way of example by the Court of Justice in dealing with a comparison of a basket of products identified generically for the purpose of a price comparison of the total, the Court concluded that differences in the products compared might invalidate the price comparison of the total and could deceive the consumer if he or she was not informed of the differences in the products that were listed. The Court of Justice then answered the relevant part of the question in the reference that touched on these questions by saying that an advertisement may be misleading in the ways described above. The answer given at para 56 was in its second element that an advertisement such as that at issue might be misleading if:

"56. It is found that, for the purposes of a comparison based solely on price, food products were selected which, nevertheless, have different features capable of significantly affecting the average consumer's choice, without such differences being apparent from the advertising concerned."

57. It is this part of the judgment which appears to be the source for the summary of the legal position with regard to comparative advertising that was furnished to Professor Berryman and on which he based his report. My disagreement is that the statement seems to be based on paragraphs in the judgment that are dealing with a specific kind of advertisement and the circumstances in which it may be considered misleading. It is not a warrant for the proposition that an advertisement cannot express a price comparison alone in respect of goods that are not precisely the same, unless it includes a description of the differences. In my view, the essence of the 2007 Regulations is that products serving the same needs may be compared, unless to do so would be misleading. Professor Berryman, the Aldi submissions, and the trial judge, all appear to proceed from the premise that there is a rule that the differences must be specified, otherwise the advertising is misleading. I respectfully disagree. This misunderstanding unfortunately undermines the comparative analysis and the conclusions that were reached by Professor Berryman and which were accepted by the trial judge.

58. The Court of Justice was dealing with an advertisement that compared a basket of products sold by the advertiser with a similar collection sold by a competitor. This context needs to be remembered in considering the discussion as to the various ways in which the advertising could be misleading. First, at para 50 the judgment alerts the trial court to the fact that the selection could be misleading by giving a false impression that the selection chosen is representative of all the prices in the advertiser's store and that the savings described in the advertisement are to be enjoyed by regularly shopping in the advertiser's store as compared with the competitor. That is one risk perceived by the Court of Justice which it warns the national court to look out for.

59. The Court of Justice next stressed (at para 51) that the advertisement could also be misleading if the goods chosen for comparison by the advertiser were objectively different, and the differences were capable of having a significant effect on the choices made by a consumer. This applies to a comparison based solely on price. The advertisement may be misleading because the products of the advertiser and the competitor are different – objectively different – and the differences are capable of significantly affecting the buyer's choice. This is again a matter for the national court to determine. In a list of products which are advertised for comparison, there has to be a fundamental similarity between the goods – if there is not, that represents a breach of the 2006 Directive and, by extension, Article 3 of the 2007 Regulations.

60. The Court of Justice observed (at para. 52) that if those differences are not disclosed – these are objective differences in the

products that are capable of affecting the consumer's decision to buy – the comparison based entirely on price may lead the consumer into thinking that the products are actually equivalent when, in fact, they are not. This is the paragraph that seems to me to give rise to confusion and misunderstanding. In my view, the basic principle is that comparative advertising is permitted provided it is not misleading, and one of the ways in which it can be misleading is if the products are objectively different. It is not so much that misleading - and, therefore, impermissible - advertising is saved by the inclusion of information about material differences. Information about the product being compared may be necessary because consumers need it for their decisions and, absent such information, the advertisement may be misleading and therefore not permitted for comparative advertising. It is not that the information saves the otherwise prohibited advertisement. Neither is it the case that the Court of Justice declared that a party advertising its goods by comparison with a competitor's must highlight all the differences.

61. Where I think the erroneous view has arisen is in failing to understand the context of these quoted paragraphs, particularly para 52. In *Vierzon* the Court was dealing with a basket of goods and it ruled that if the products listed were actually not properly comparable with the competitor's products, that would be misleading. If you are going to compare a basket of your goods with a total price against your competitor's products, you have to make it clear - if it is the case - that some of the products are not equivalent and, in those circumstances, you have to describe the differences. That does not affect the general rule that the comparison itself is invalid and not permitted if the products are objectively different within the meaning of Article 3 and the corresponding part of the 2006 Directive. Paragraph 54 is part of the reasoning by which the Court of Justice explained how the particular advertisement could be misleading in a number of different ways which it was for the trial court to determine.

The 15 Compared Products
62. It is necessary at this point to go to the High Court's consideration of the 15 compared products before then proceeding to the shelf-edge labels generally and the banners and "toblerones." The trial judge made the following findings of fact in respect of the 15 specific items that Aldi claimed were in breach of the 2007 Regulations.

Tomato ketchup

"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."

63. The judge makes three distinct findings. The products are not comparable; the shelf-edge labels only identify the Dunnes' Stores product and not the Aldi one; the labels did not highlight all material information which would permit the consumer to make a properly informed comparative choice.

64. At paragraph 300, the judge made a finding about 14 of the products that is relevant to the issue of misleading, whether in relation to advertising or commercial practices.

"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."

65. It is not seem to me that the conclusions as to misleading in either sense of the term can be derived from the factual findings made by the Court. This problem recurs in the conclusions about some other of the 14 products.

Pork sausages

"(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."

66. In respect of this product, the judge finds that the products were not comparable because of the Bord Bia mark and the difference in the quantity of fat, which were pieces of information that should have been given to the consumer.

White sauce

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

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

(c) 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.

(d) 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

"(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

"(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

"(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

"(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

"(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

"(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

"(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.

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

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

67. The High Court held that this was a borderline case and did not reach any conclusion in respect of these products.

Tinned Chicken Dog Food

"(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

"(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

"(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

"(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."

Expert Evidence

68. Another ground of concern for the appellant is that the judge accepted and preferred the evidence of Professor Berryman over their witness, Dr. Ennis, who, they submitted, was qualified in the specific area of consumer behaviour that was required to be addressed under the rules concerning misleading advertising. Dr Ennis's evidence was scarcely mentioned by the trial judge and Dunnes protest that it was doubly unsatisfactory to have the opposing witness preferred and relied upon so heavily when his expertise was in a different area, namely, as a food scientist rather than in the field consumer behaviour. It would, I think, be preferable if the trial judge had recited and discussed the evidence of Dr. Ennis and various other experts - especially those called by Dunnes Stores - whose evidence he was not accepting. This was particularly relevant where the discussion centred on consumer behaviour, as was the case with Dr. Ennis. It seems to me that the trial judge endeavoured to address the facts and the law as comprehensibly as possible. The fact, nevertheless, that Dunnes' expert is referred to only twice in the judgment whereas Professor Berryman is referred to on some 80 occasions is, I think, not entirely satisfactory.

69. The structure of the judgment leads me to conclude that the trial judge considered Dr. Ennis's opinions, but rejected them. The rationale for taking this course of action is not, with respect, altogether clear. The inference is that the High Court rejected Dr. Ennis's evidence by necessary implication and accordingly preferred Professor Berryman's evidence. In circumstances where the High Court relied so heavily on one expert to the almost complete exclusion of the opposing witness, it is unsatisfactory not to have the benefit of the judge's reasoning for this preference. The question whether this point alone would be determinative of the appeal is a difficult one. Taking the case as a whole, I would not overturn the decision of the High Court on this ground alone. I do not think the decision on the appeal could stand or fall on the basis that Dr. Ennis' evidence was not being expressly referred to and analysed against other experts' testimony.

Application of the Law to the Facts

70. The trial judge considered the 2007 Regulations and the provisions of ss. 43 and 46 of the 2007 Act, and applied them first to the 14 products in respect of which he had made the above specific findings, secondly, to the banners and "toblerones" and, thirdly, to the other shelf-edge labels. Cregan J. concluded – based on this analysis of these provisions - that the three elements of the Aldi complaint were made out in that they were in breach of all of the relevant provisions. In regard to the 2007 Regulations, the judge considered sub- paragraphs (d) and (c) of Article 4(2). It is clear from another paragraph of the judgment when the judge is discussing Article 4(2)(c) that he accepted that these products met the same needs or were intended for the same purposes, a point with which Aldi is in agreement. Indeed, it says that the matter was never in doubt. Secondly, Aldi acknowledges that the fact that there is difference between the goods compared does not exclude them from being comparable for the purposes of Article 4(2)(c)..

71. The trial judge applied Article 4(2)(d) to the question of comparability. When he condemned the labels in the particular cases of the 14 products, he did so by reference to this subparagraph. It would, however, appear that the evidence of Professor Berryman - on which the judge so heavily relied - and the other experts, was directed to whether the labels constituted misleading advertising under Article 3 or misleading commercial practices under the 2007 Act. On one view, this conflation of the issue of comparability and the mode of comparison could be said to invalidate the entire process. On the other hand, it is possible to analyse the factual findings by the judge and his conclusions against the background of misleading advertising and misleading commercial practices.

Article 4(2)(d) of the 2007 Regulations
72. Article 4(2)(d) of the 2007 Regulations provides:

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

73. The judge began by explaining why, in light of his factual conclusions as to the differences in the products, he was satisfied that Dunnes' shelf- edge labels comparing the 14 products infringed Article 4(2)(d). Using the words of the Regulation, he stated (at para. 282 of his judgment) that they did not objectively compare one or more of features of those products including price. Cregan J. went on to state that the characterising ingredient of each product was a highly material, relevant and representative feature and that "a difference of 10% or more of such an ingredient was a reasonable tolerance to use to assess whether the difference was material, relevant or representative of the products." He further stated (at para. 284) that the other tests used by the plaintiffs' experts, (*e.g.* a comparison of nature, quality, substance, provenance and quantity) were also "reasonable tests to use to consider whether the difference in products being compared is material, relevant and/or representative." I would observe in passing, however, that save for the reference to quality, each of the points is listed in Article 3 of the 2007 Regulations.

74. These tests were, he stated (at para. 285 of his judgment):

"helpful in considering whether such products fulfil the legal test of comparability, for example, that contained in Article 4(2)(d) (*i.e.* an objective comparison of one or more material, relevant, verifiable and representative features of such goods.)".

75. In relation to the first compared item, tomato ketchup, the trial judge stated that Dunnes' comparison "omitted to draw the consumer's attention to the fact that the Aldi product was a higher quality product [and] that is a material and relevant feature of these products [and] is also verifiable and representative." He proceeded to cite differences in all the other 13 products, reaching the same conclusion that the Dunnes' advertisement "did not objectively compare one or more material, relevant, or representative features of the two products." He went on to note at para. 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."

Discussion
76. The trial judge held that Dunnes had failed to make known to consumers the differences that he found to exist between the products and that this constituted a breach of Article 4(2)(d). I respectfully disagree with this analysis. In order to explain my disagreement I would refer to the following paragraph from the judgment:

"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."

77. Some points of fact should be made. The reference to paragraph 56 of *Vierzon* referred to in the passage quoted at para. 57 above appears to be an error. Paragraphs 53 to 55 would appear to be what the court intended to refer to. But even that passage from the judgment of the Court of Justice is not very relevant. It says that comparison of products in terms of price alone may deceive the consumer as to the reason for the difference in prices when it omits a much better-known brand name or some other feature of the products compared, where that may significantly affect the buyer's choice. The consumer may be led to believe that he will obtain an economic advantage because of the competitive nature of the advertiser's offer and not because of objective differences between the products being compared.

78. The methodology employed by the Aldi experts is not to be found in the 2006 Directive or the 2007 Regulations or in the jurisprudence. This is not to declare that it is necessarily wrong or unhelpful in deciding whether advertising is misleading. These experts identified a characterising ingredient and then measured the amount that the rival products contained, and where they found a difference of more than 10% they declared the products to be not comparable. The judge referred to the other tests, which are listed above and they are found in Article 3 and in the 2007 Act, with the exception of the test of quality. Obviously, that is a matter of opinion.

79. Professor Berryman expressed strong views in that regard on some half of the items compared and the trial judge accepted his evidence in that regard. Leaving aside, however, the applicability of these tests to the part of the 2007 Regulations under consideration, consideration of quality as a distinguishing feature of a product seems to me to be the opposite of what the provision contemplates. It is not mentioned in the 2007 Regulation. Comparison is to be made by reference to "one or more material, relevant, verifiable and representative features … which may include price". The intention is that the consumer is able to judge. An opinion as to quality does not sit with these product features

80. The more fundamental point is that the whole basis of the analysis of Article 4(2)(d) is mistaken. This is the same crucial error that I identified earlier, namely the confusion between what products can be compared (Article 4(2)(c) and how that comparison may be made (Article 4(2)(d)). The court could have considered whether the comparative advertising was not permitted because of differences in nature, composition etc., but that is a different matter. It is true that the trial judge did go on to find that these practices were misleading under all the headings but that cannot overcome the court's analysis in relation to comparability.. The trial judge considered that Dunnes was obliged by virtue of Article 4(2)(d), to include in their advertisement any difference that could be classified as material, relevant, verifiable and representative features, but that, with respect, is incorrect. This part of the 2007 Regulations allows for comparison by price alone of products that are not identical, subject to the prohibition of unfair practices in the comparison. The provision of information may also be necessary to ensure compliance with ss. 43 and 46 of the 2007 (namely, misleading commercial practice, as defined in s. 2 of the 2007 Act).

81. A comparison based on price alone is permitted by the 2007 Regulations and the 2006 Directive. The compared products do not have to be identical. The court could have engaged in an analysis as to whether the advertising was misleading either under Article 3 because of differences in composition of the products or, alternatively, because certain important information was not included, or under the 2007 Act, or indeed under both. In order to make that finding, the court would have had to follow up by deciding on the consequential requirements that arise in the case of allegedly misleading advertising of competing products. The difficulty with the judge's analysis, however, is that he simply does not distinguish the various different questions. The position is clear under the 2007 Regulations that a comparison (provided it is not otherwise misleading) is legitimate if confined to price alone. That is a decision for the advertiser to make – to use the words of the Court of Justice in *Vierzon* - in the exercise of his economic freedom.

82. The judge's conclusion that the differences were "capable of significantly affecting the consumer's choice of product" is also not appropriate for this part of the Regulations. Besides, it is not a form of words that is used in the 2007 Regulation or in the 2007 Act or, for that matter, in the 2006 Directive. This, with respect, is more than a quibble. The concepts of misleading advertising and misleading commercial practices describe conduct that no major commercial enterprise would want to have marked against it. A judgment that advertising by a store group deceives consumers or that it withholds information or conceals facts that would be relevant in the consumers' decisions are all very serious matters. They require careful examination of the facts and circumstances and of the legal standards to be applied. To say that something is capable of significantly affecting the consumer's choice of product is different from saying, as Article 3 requires – that the advertising was misleading because it deceived or was likely to deceive the consumer and that, as a result, it was likely to affect the person's economic behaviour – namely, the decision to purchase or not – or that it injured or was likely to injure a competitor. If the material in question did not come within that definition, it was not misleading advertising within the meaning of Article 3.

83. Other issues arise in relation to the condemned commercial practices under the 2007 Act. As outlined above, the question under s. 43 of the 2007 Act is, first, whether the representation provided false information in relation to the nature of the product or its main characteristics as specified in sub-section (3); secondly, whether the information would be likely to cause the average consumer to decide to purchase the product or not to do so. Questions along the same lines arise under s. 43(2) and s.46. The addition by the judge of his comments about the effect on the consumer is obviously intended to refer to the consequential conditions associated in the 2007 Regulations with misleading advertising, and, in the Act, with misleading commercial practices. My observations on these conclusions are very much subsidiary to the principal decision on this part of the judgment that the trial judge proceeded on foot of a misunderstanding of the regulatory scheme for comparative advertising. It is entirely possible that Aldi's expert witnesses intended that their evidence would go to establishing breaches of Article 4(2)(a) and (b) rather than (d), but that is not how the trial judge approached this provision.

84. The court in its consideration had to allow for differences in the products so the question was one of degree of difference in the first place and then of assessment of the impact on the consumer. But that did not happen. The court concluded that the comparison by price alone was not permissible in circumstances where it found significant differences, and moved seamlessly to confirm the likely effect on the shopper. That question did not arise under subparagraph (d). If the court was going to conclude that the products were not comparable, it could have done so on the ground that the advertisement comparing them was misleading, either by reason of Article 3 or because it was contrary to the provisions of ss. 43 to 46 of the 2007 Act. It was not sufficient to find that there were differences. In order to reject the comparison as being misleading the court had to find that the advertisement - which in this case was the in-store shelf-edge label - deceived or was likely to deceive the customer and, as a result of the deception, that it was likely to affect the person's economic behaviour or, alternatively, to injure or be likely to injure a competitor.

85. It follows, therefore, that the findings of the High Court regarding a breach of Article 4(2)(d) of the 2007 Regulations cannot be sustained.

Article 4(2)(c) of the 2007 Regulations
86. Article 4(2)(c) of the 2007 Regulations provides:

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

87. The trial judge's ruling on this issue is as follows.

"308. This test is a different test to that set out Article 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 Article 4(2)(c) but as they were not, the defendant's advertisements did indeed infringe Article 4(2)(c).

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

Discussion
88. Article 2(c) of the 2006 Directive defines comparative advertising as meaning any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor. The labels in this case explicitly identified Aldi and did so while describing the product offered by Dunnes. The tomato ketchup on offer at the particular price notified on the label is compared with the Aldi product whose price is also stated. As the judge says, these are all products that meet the same needs or are intended for the same purpose. For my part, I would not qualify this observation by saying, as he did at the end of para. 308 above, that they do so "in broad terms". It seems to me that they do so in very precise terms. It is not, however, necessary that the products should be identical. It is sufficient for comparability that they are essentially substitutable or interchangeable: see *Vierzon* at para. 25.

89. This decision is also authority for the proposition that the compared goods do not have to be lined up or pictured or more specifically identified if there is no risk of confusion. That might arise if the competitor had a range of goods of the same kind and the advertiser chose the most expensive item, or one of the more expensive items, for a price comparison. There is, however, no suggestion in this case that there was a range of tomato ketchups on sale in Aldi so that a consumer would not have known which

one was being compared. There was, in fact, no difficulty in identifying the particular allegedly matching items. I do not consider that a consumer would be unable to compare shower gels between one supermarket and another and the same is doubtless true of products such as cat food and dog food (and, indeed, the other articles among the 15 assessed by the trial judge). In my view, neither *Vierzon* and *Colruyt* require any such specificity.

90. This point, if it is correct, is true for all of the 262 compared products. The 2006 Directive is intended to promote competition as well as protecting traders from misleading advertising. The recitals declare that the completion of the internal market means a wide range of choice. Advertising plays an important role in making goods available and helping the consumer to know the availability of competing enterprises. It is contrary to the policy of the 2006 Directive - and, therefore, the 2007 Regulations - to adopt an over-technical approach to competition in such an important area as supermarkets. It must be recalled that this case concerns mundane domestic items that are available in supermarkets in every Member State of the European Union. It is, therefore, unnecessary - and, indeed, at odds with the fundamental principles of the internal market and workable competition as reflected in the 2006 Directive - to require a precise specification of simple everyday products that would regularly be in the shopping baskets of consumers.

91. In my opinion, the High Court was in error in looking for a more detailed setting out of the compared products. That was unnecessary. If the goods were of an unusual or highly specific kind that might well have been appropriate. That does not apply to standard grocery items and other regular shopping requisites available in supermarkets in own brand versions and which can be described generally and generically. The notional consumer - as envisaged by the Court of Justice its cases such as *Colyrut* and *Vierzon* - is well capable of understanding the comparison of prices of own brand tomato ketchup or shower gel or strawberry yoghurt or the other products that were in issue in the case.

92. To repeat a point already made in the discussion of Article 4(2)(d) above, it would have been possible for the High Court to have concluded that some or all of the 14 products ultimately in dispute could not have been the subject of valid comparative advertising because of a difference that was sufficient, in, for example, their nature or composition, to make the comparison invalid and the advertising accordingly misleading. For example, the pork sausages had a Bord Bia mark of quality assurance, which is within the category of relevant matters in Article 3(4)(*e*) "the existence, extent or nature of any approval or sponsorship (direct or indirect) of the product by others". That, however, is not how the court approached the questions.

93. In the circumstances, I would respectfully disagree with the conclusions of the trial judge on this issue also. It is clear from what I said earlier that I think the High Court was mistaken in thinking that the test under this heading was a different one from (d) of Article 4 (2).Sub-paragraph (c) says what can be compared; sub-paragraph (d) says how the comparison is to be made.

Article 4(2 (b) – misleading practice under Sections 43 to 46 of the 2007 Act
94. The judgment under appeal dealt with misleading commercial practices by reference to the factual basis of findings on the 14 products.. These conclusions are subsidiary and dependent, and would seem to follow, as the judge saw it, from his decisions on the specific 15 products and the remaining compared items that were the subject of the shelf-edge labels. At para. 334 Cregan J. stated:

"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"

At paras. 428 – 432 he stated:

"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).

[This should be a reference to section 43 (1)]

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)."

Discussion
95. The implication of the judge's findings on the 15 compared products is that the advertising would have been compliant if the labels stated the other features that he held were relevant, material etc. I respectfully disagree for all the reasons that I have already explained. However, on the judge's reading it followed that he would condemn the absence of that information as a misleading commercial practice because of what it said and also what it omitted. In this respect also these ss. 43 and 46 findings are dependent on, and ancillary to, the court's interpretation of the permitted modes of comparison. The Court's findings are accordingly based on the failure of the advertisements to state a difference in each case. The only reason, therefore, why the information was considered inadequate or false was that it did not point out the difference with the compared Aldi product.

96. In respect of ss. 43 to 46 of the 2007 Act, the questions as outlined earlier required in the particular application to the case some quite specific findings in relation to each product. Under s. 43(1) of the 2007 Act the question was, firstly, whether the representation provided false information in relation to the nature of the product or its main characteristics or the other specified matters and, secondly, whether that false information was likely to cause the average consumer to decide to purchase the product or not to do so. By virtue of s. 43(2)|, the question was whether the consumer was likely to be deceived or misled by the representation in relation to the nature of the product etc., and to make a decision as a result. Section 46 provides for representations that omit or conceal material information that the average consumer would need in making a purchase decision, and requires also that the missing information is likely to cause the average consumer to make a purchase decision he or she would not otherwise make.

97. The court was thus required to make assessments of these matters before it could hold that the shelf-edge labels were representations that were in breach of the statutory provisions. As with the provisions of Article 3, so the breach of ss. 43 to 46 would, if present, invalidate the comparison invited by the labels. However, the trial judge approached the question of comparability not by reference to Article 3 or those sections of the Act, but rather by reference to Article 4 (2) (d). It is true that he went on in these subsequent paragraphs to decide that the in-store materials constituted breaches of ss. 43 and 46, but that was not, with respect, a satisfactory mode of analysis.

98. These findings of misleading commercial practices are obviously very serious matters for any trader, and possibly even more so for a major supermarket chain. Providing false information, misleading or deceiving consumers and concealing information constitute conduct that only needs to be stated to be understood as a grave indictment of a retailer. Something more than a formulaic declaration of breaches was therefore required.

99. As a matter of interpretation of the sections, it seems to me that they are addressing different aspects of retail presentation of products, and it would be unusual, but not impossible, to have an advertisement that breached the entire catalogue of commercial wrongs described. A judgment declaring such to have occurred would require a detailed consideration and analysis of all the evidence.

100. Can the findings of misleading advertising and breaches of the 2007 Act stand in light of my conclusions on the approach adopted by the Court? For my part, I do not think they can. Firstly, these determinations by the High Court are obviously consequential on the findings of fact which have been discussed above and which I would set aside. Secondly, the court did not address these issues in any sufficient detail. Thirdly, on a more fundamental level I think that these added and more serious infractions are not appropriate in the circumstances of an open and declared intention by one supermarket chain to challenge its rivals in a campaign of comparative advertising. The intention was comparison, not deceit and neither was there any case of deliberately seeking to mislead consumers. Fourthly, I do not consider that the evidence was there to justify such serious conclusions.

101. My conclusion in regard to the 15 products is that the trial judge proceeded from an incorrect premise so far as the construction of the 2007 Regulations is concerned and that this error invalidates the conclusions that he reached in regard to these products.

Shelf-edge Labels Generally
102. The judge dealt with the shelf-edge labels generally, holding that they were in breach of various provisions. He firstly described them as follows:

"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"…

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."

103. It is unnecessary to return to a detailed discussion of the High Court's understanding of Article 4(2)(d). The failure to identify specifically the Aldi product has also been considered. To repeat, it was unnecessary in circumstances where it was not contested that there was a corresponding product fitting the description. Therefore, when Dunnes stated on the label of their own-brand product that it was tomato ketchup or shower gel, that was sufficient for a consumer to know what Aldi product was the subject of comparison by price. What other information was required for the purpose of identification and comparison? It is obviously a different matter to say whether the comparison failed because of the rules on misleading advertising or outlawed commercial practices. The mere fact that there was some difference in the composition of the products did not rule out comparison for these purposes. As I have said above, that would be contrary to the 2007Regulations and the 2006 Directive and the policy underlying them. This is recognised in the jurisprudence. It would be a simple matter for any trader in the market to prevent comparison of prices or other features by introducing some small modification into its own-brand standard item. It follows that the points made in paragraph 362 (1) of the judgment of the trial judge are not correct as a matter of law.

104. Comparison by implication is expressly envisaged by the 2006 Directive. The consumer is taken to be reasonably well informed and reasonably observant and circumspect. The notional person has common sense. What else is the consumer going to think is being

compared when told that this is Dunnes' own brand tomato ketchup at this price and that Aldi's price is in the same amount? Obviously the situation would be different if Aldi had a number of tomato ketchup products and the advertiser had chosen the most expensive one for comparison when there were significant differences that were likely to mislead.

105. Concerning point (2) in the paragraph, this is a matter of inference by the trial judge from evidence that is available to this court. It is therefore open on appeal for a different view to be taken. It is not a matter in which the trial judge resolved disputed direct evidence as to facts. It is also clear that the issue addressed is one with which every person who shops in a supermarket is familiar. The point is that the label containing the price, and in this case also the price comparison with Aldi, carries advertising slogans. In the relevant instances the prices stated are actually the same and indeed the banners which Aldi also complains about say "Aldi Match". They do not say that Dunnes is cheaper than Aldi or has lower prices. It seems to me that no sensible person could be misled by the use of general slogans that are the commonplace stuff of most advertising. As the Court of Justice itself made clear in Verizon, I think that shoppers have to be given some credit for intelligence and appreciation of common marketing practices. A lawyer's exegesis of the words used is wholly inappropriate and it would correctly be brushed aside as unworldly and unrealistic by any average shopper. In my view, the proposition accepted and adopted by the trial judge in this regard is, with respect, unrealistic and inconsistent with the attitude to be ascribed to a reasonably well-informed and circumspect shopper.

106. If, moreover, this Court were to take a different view of the evidence that consumers would be misled by these slogans, in circumstances where comparative advertising may take place by implication, it would be open to any other competitor in the market to challenge these advertisements without reference to any particular products. I also think that the erroneous fundamental approach of the High Court in this case tends to invalidate dependent and ancillary findings.

107. Having regard to the judgments of the Court of Justice in *Lidl Belgium v. Colruyt* and *Lidl v. Vierzon* in which the advertisement in each case made comparisons of goods described or to be identified in the most generic terms and not specified with any particularity, it is difficult to see how Dunnes' advertising can be condemned. The particular article on sale in Dunnes is available for inspection, and the implied comparison is with the corresponding own brand product in Aldi. The price is given for each product. Consumers are thus directed to the comparison being made. To require more seems to me to run counter to the Regulations and the Directive and the policy behind them. In all the circumstances, therefore, I do not think that this finding of lack of specificity of comparison can stand.

108. As stated above, the fact that the product is specified and the price given as well as the Aldi price on a label that has a panel devoted to advertising the general merits of the advertiser does not seem relevant in any way to the comparison made. Any reasonably, well-informed consumer who is reasonably observant and circumspect will understand the difference between an advertising slogan and specific information.

Banners

109. The trial judge held that the banners infringed Article 4(2)(d) of the 2007 Regulations and on this point I am in agreement that they are impermissible, but for a more basic reason. It seems to me that these banners do not constitute comparative advertising. They use the Aldi name, and they would be entitled to do that in principle if they actually amounted to comparative advertising which was not misleading. Insofar as the banners contain pictures of a cluster or a basket of goods, it could also be argued that if those goods were sufficiently identifiable and if one could line up products meeting the same needs etc, then it could be said that the banners in question amounted prima facie to comparative advertising. That, however, is not the case. It is clear that the banners, and more particularly the one-third of the triptych that applies to Aldi, does not actually constitute comparative advertising. The basic point is that an advertiser may engage in comparative advertising of the products that he sells by reference to his competitor's product if the products meet the same needs or are intended for the same purpose, provided that he objectively compares a feature, such as the price, and the advertising is not misleading. When we look at the text in the banner advertising that relates to Aldi, I do not think it can reasonably be said to comply with this description. The part of the banner referring to Aldi does not objectively compare the prices or other specified features of the rival products.

110. The remaining question about this element of the case is whether it could reasonably be thought that the banners and toblerones are all part of the same advertising campaign as the shelf materials and could be justified on that basis by association. I cannot, however, agree, particularly as the 2006 Directive and the 2007 Regulations permit the a trader to make reference to and even use the trade marks and logos of rivals, provided only that the terms of the comparative advertising rules are satisfied.

111. The banners and toblerones did not fulfil the necessary conditions to attract the necessary statutory immunity for comparative advertising. Overall, I think that the banners did not actually constitute comparative advertising which meant that Dunnes was not entitled to use Aldi's name. The High Court held that they were in breach of the 2007 Regulations, but this probably comes to the same thing. I would hold that failure to identify or reference expressly or by implication specific goods is not actually comparative advertising for the purposes of the 2007 Regulations and, therefore, does not attract the protection from a claim of trademark infringement.

112. In this regard, I take the view that the banners do not satisfy the criteria prescribed by the Court of Justice in *Colruyt* and *Vierzon* for baskets of products. The particular circumstances do not go close to the factual information contained in the advertisements involved in the cited cases. Dunnes also said that the goods were pictured for illustration purposes only, which may be regarded as somewhat mysterious, but is, on any view, lacking in the clarity required for a legitimate comparison. In my view, this was not misleading. It was not actually comparative advertising at all. It did not purport to offer a comparison of goods within the meaning of Article 4(2)(c) on the basis of price or other relevant feature as specified in Article 4(2)(d). In respect of the banners, I would uphold the judgment of the High Court that they were impermissible under the Regulations.

Overall Conclusions

113. On the basis of the conclusions I have reached in this judgment, I would allow the appeal against the findings of the High Court of breaches of the 2007 Regulations, and of the 2007 Act in respect of the 15 shelf-edge labels and the labels generally. I would replace the decision with regard to the banners with a declaration that they were not permitted because they did not constitute comparative advertising. It seems obvious in the circumstances of the substantial success by the appellant that the injunctive relief ordered by the High Court should be set aside, the unlawfulness of the banners notwithstanding.

114. The question remains however whether this court should direct a retrial by the High Court of Aldi's challenge to the lawfulness of the 15 comparisons and the labels generally since those issues were not evaluated at first instance according to the appropriate rules. The Court will hear further submissions from the parties as to how the matter should now proceed.