

# World Trademark Review Daily

**Interflora - a further move towards tighter control of witness gathering exercises?  
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In *Interflora Inc v Marks and Spencer Plc* ([2012] EWHC 1722 (Ch)), as part of the case management process in a wider action concerning the alleged infringement of two of Interflora's trademarks through Marks & Spencer's use of several keywords for Google AdWords, the Chancery Division of the High Court of England and Wales has ruled on the admissibility of witness evidence gathered through use of consumer surveys.

The judgement reiterates both the need to apply to the court to adduce such evidence and the principles that a court will apply when assessing whether permission should be granted. The judgment also raises questions over the validity of the current policy of the High Court to permit such evidence in circumstances where the applicant does not also seek to adduce the survey used to identify those witnesses.

Earlier in the action, Mr Justice Arnold had ordered that the permission of the court would be required if survey evidence was to be adduced by either party at trial. Interflora wished to rely upon witness evidence gathered as a result of two different surveys, but not the surveys themselves. Following the judgment of Mann J in *Specsavers International Healthcare Ltd v Asda Ltd* ([2010] EWHC 1497 (Pat)), it was not contested that survey evidence in the context of this order would encompass the evidence of witnesses gathered as a result of a survey. Interflora therefore applied to the court for the necessary permission.

Arnold J began his judgment by repeating several paragraphs of Mann J's judgment in *A&E Television Networks LLC v Discovery Communications Europe Ltd* ([2011] EWHC 1038 (Ch), April 20 2011), as guidance to follow in this type of application. When turning to the case before him, Arnold J reiterated that the permission hearing should not turn into a cost-generating exercise - or, in his words, "a major piece of satellite litigation". In this regard, Arnold J considered that certain aspects of the parties' preparation for this application, including the use of expert evidence, were inappropriate.

As might well be expected on an application of this nature, Arnold J was required to consider the nature of the questions in the surveys used to identify the witnesses. Marks & Spencer identified two questions in Interflora's surveys, reproduced below, that it alleged were objectionable:

- Question 1 (from survey 1): "Thinking specifically about this search result (points to Marks & Spencer result), what, if anything, do you think this tells you about any relationship between Interflora and Marks & Spencer?"
- Question 2 (from survey 2): "Thinking specifically about this search result (points to Marks & Spencer result), is there anything that tells you it is not related to Interflora?"

The first of these questions was found by the judge to be "open to criticism", but not "so flawed as to taint any evidence that may be obtained from witnesses as a result". The second question was found to fall the other side of the line. The judge found it to contain an implication of a connection with Marks & Spencer and thus to be misleading. As any response to such a question was found to be of "no value" in resolving the issues between the parties, the evidence of witnesses obtained through answering that question was found by the judge to be "so tainted to be of no value". Permission was therefore refused in relation to witnesses identified using the second Interflora survey.

In making this assessment, Arnold J expressed the view that it was "not possible to draw a hard and fast distinction between questions which are objectionable and questions which are not objectionable" and that there was "a spectrum of questions" ranging from "questions which are completely open-ended on the one hand... to questions that are completely misleading on the other end of the spectrum". Any consideration of the nature of survey questions and their possible impact upon the admissibility of evidence obtained through the use of such questions would be "a matter of judgment in the individual case".

A particularly interesting aspect of the judgment arises in relation to a more general objection raised by Marks & Spencer, which claimed that it was illegitimate to place witness evidence before the court in circumstances where the witnesses were put forward as representative of the relevant public, but where the applicant was not seeking to put the originating survey evidence before the court. Arnold J saw "considerable force" in this argument, but was unable to act due to the current practice of the Chancery Division and the fact that such evidence had not only been admitted by, but also relied upon by, judges of that division:

*"The problem, as I see it, at this level of the judicial hierarchy is that there is considerable*

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*precedent for judges of this division taking into account the evidence of witnesses obtained by means of a survey in circumstances where the survey itself is either not relied upon or is conceded not to have statistical validity... Furthermore, in a number of those cases, the judges in question not merely admitted, but also relied upon, the evidence of witnesses obtained by such surveys in circumstances where they acknowledged that the questions posed in the surveys were flawed.*

*In those circumstances, it seems to me that the present state of the law is that evidence obtained from witnesses by virtue of the fact that they have been respondents to a survey is admissible and may be probative, even though the survey itself is not and cannot be relied upon and even though the questions posed in the survey were flawed.”*

It is yet to be seen whether this view is echoed by other judges and whether the days of the witness gathering exercise, as a way to circumvent the need to submit meaningful statistical data, is numbered.

Arnold J has left open interesting questions regarding the consequences for the applicant of the admission of such evidence, particularly in relation to privilege associated with communications between the witnesses and Marks & Spencer’s solicitors. For those involved in preparing evidence to support passing off and trademark litigation in the United Kingdom, this is a case to keep an eye on.

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