

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION No. 2448353  
IN THE NAME OF THORWORLD INDUSTRIES LIMITED**

**AND IN THE MATTER OF OPPOSITION No. 95405 THERETO  
BY PLANT HANDLING LIMITED TRADING AS EASYRAMPS**

**AND IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON  
AGAINST THE DECISION OF MRS ANN CORBETT  
DATED 13 OCTOBER 2008**

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**DECISION**

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**Background**

1. This is an appeal against a decision of Mrs Ann Corbett, acting for the Registrar, dated 13 October 2008, in which she partially upheld an opposition against Trade Mark Application number 2448353 in the name of Thorworld Industries Limited ("Thorworld").
2. Application number 2448353 is for the mark EASYRAMP. Registration of the mark was applied for on 3 March 2007 in respect of the following goods in Class 7:

Ramps for the loading and unloading of goods vehicles; wheelchair ramps; doorway/threshold ramps; curb/step ramps.
3. The mark was published for opposition purposes on 11 May 2007. On 10 August 2007, Plant Handling Limited trading as Easyramps ("Plant") filed notice of opposition under:
  - (a) Section 5(4)(a) of the Trade Marks Act 1994, on the ground that use of the mark in the United Kingdom was liable to be prevented by virtue of the law of passing off protecting Plant's unregistered trade mark EASYRAMPS;
  - (b) Section 3(6) of the Act, on the ground that the mark was applied for in bad faith.
4. Thorworld contested both grounds of opposition in a notice of defence and counterstatement dated 7 November 2007. Both sides filed evidence but neither side requested an oral hearing or made written submissions. The Hearing Officer issued a decision on the papers under number BL O/278/08, dated 13 October 2008.

**The Hearing Officer's decision**

5. For the purposes of section 5(4)(a), the Hearing Officer instructed herself by reference to *WILD CHILD Trade Mark* [1998] RPC 455, *South Cone Incorporated v. Jack Bessant and Others* [2002] RPC 19 and *Croom's Application* [2005] RPC 2. She also referred to the decision of Mr. Richard Arnold QC sitting as the Appointed Person in

*EXTREME Trade Mark*, BL O/161/07, as to unchallenged evidence. None of this is controversial.

6. She decided that on the evidence, Plant had shown actionable goodwill in the unregistered trade mark EASYRAMPS from June 2004 in relation to container loading ramps. There is no appeal against that part of the decision.
7. However, the Hearing Officer also found that Thorworld was the senior user in respect of EASYRAMP primarily for disabled ramps. That aspect of the decision is controversial, so I shall set out the relevant paragraphs in full:

"12. Mr Meale states that Thorworld began to use the mark EASYRAMP (sometimes as EASYRAMPS) in 1996 and use has been continuous since that time. The mark was first used specifically in relation to "a disabled range of ramp products". The mark has been used "sporadically" on other products though no details of these other products are provided. Mr Meale says that EASYRAMP goods were not core products of his company. He explains that by this he means that EASYRAMP products accounted for some £50,000 sales annually, which is "quite a small part of our overall business".

[...]

27. For its part, Thorworld claims to have used the mark since 1996 with sales of some £50,000 per annum having been made under it in relation to, primarily, a range of ramps for use by persons with a disability. A brochure dating from 1997 supports the claim that such ramps were available under the mark at that time. Witness statements from those involved in the ongoing preparation of sales and advertising material for those goods have also been filed. Use of the mark is said to have continued into 2004 (and beyond) and this is supported by the evidence of Mr Chalmers (paragraph 7) and Mr McSweeney (paragraph 6). Whilst the evidence of sales is not particularly detailed and, again, has not been put into context in terms of the market as a whole, none of the evidence has been challenged by Plant.

[...]

29. Thorworld claims to have used the mark EASYRAMP in relation to "a disabled range of ramp products" and "other ramps". What form these "other ramps" take has not been specified. Certainly the pages from the promotional brochure included at exhibit JM1 are headed "EASYRAMP © FOR THE DISABLED" and the evidence from Mr Chalmers indicates that his company was asked to produce design and marketing material in relation to "ramps for the disabled market".

8. The Hearing Officer's conclusions were therefore as follows:

"30. The parties agree that they are competitors in respect of loading ramps and that the market for ramps is large. Mr Fagan's evidence shows that container loading ramps are heavy duty products, used in commercial or industrial settings. They facilitate the loading of containers by spanning the gap between e.g. the loading bay platform and the container. The ramp allows apparatus including forklift trucks to be driven across the ramp and gain access to those containers. In contrast, Mr Meale's evidence shows that ramps for use by persons with a disability are marketed on the basis of their lightweight and portable qualities to facilitate safe access across doorways and kerbs, primarily by wheelchair users, in a domestic setting. It seems to me that container loading ramps and ramps for use by persons with a disability are within very different sectors of the ramp market. I am supported in my view by the fact that

neither party has produced any evidence of instances of confusion despite the level of sales each party has made under the mark, a mark which is far from being a strong one in relation to the goods concerned.

31. On the basis of the evidence before me, I am satisfied that Thorworld is the senior user of the mark in relation to ramps for use by persons with a disability and this includes *wheelchair ramps; doorway/threshold ramps; and curb/step ramps* as included within the specification of goods as applied for. I cannot be satisfied, however, that there is any use in relation to other ramps. I note that only the covers and pages 26 and 27 of the 1997 brochure have been supplied and that these have been selected to show use of EASYRAMP. It is a reasonable inference that the remainder of the brochure, which judging by its front page covered container ranges, involved other marks including, but not necessarily limited to THOR/THORWORLD. That being so, the ground of opposition under section 5(4)(a) succeeds in relation to *ramps for the loading and unloading of goods vehicles.*"

9. As far as section 3(6) was concerned, the Hearing Officer decided that the objection was unjustified in relation to that part of the specification, which she had allowed. The decision under section 3(6) is unchallenged.

### **The appeal**

10. On 29 October 2008, Thorworld filed notice of appeal to the Appointed Person against the Hearing Officer's decision under section 5(4)(a) of the Act.
11. As I have already mentioned, Thorworld does not appeal the Hearing Officer's finding of Plant's goodwill in relation to container loading ramps. Further, there has been no cross-appeal by Plant, so that the Hearing Officer's determination that Thorworld was the senior user primarily in relation to disabled ramps stands.
12. The ground for appeal, insofar as I understand it, is that the Hearing Officer misinterpreted Thorworld's evidence particularly Exhibit JM1 to the witness statement of John Meale, dated 3 March 2008, and should not have restricted the Application in the way that she did.
13. At the appeal hearing, Thorworld was represented by its trade mark attorney Mr E. A. Long, Hulse & Co. Plant neither appeared nor submitted any written observations.

### **Standard of appeal**

14. Mr Long accepted that the appeal was a review and not a rehearing and that since the Hearing Officer conducted a multi-factorial assessment for the purposes of section 5(4)(a), the approach on appeal was as stated by Robert Walker L.J. in *REEF Trade Mark* [2003] RPC 5, at paragraph 28:

"In this case the hearing officer had to make what he himself referred to as a multi-factorial comparison, evaluating similarity of marks, similarity of goods and other factors in order to reach conclusions about likelihood of confusion and the outcome of a passing-off claim. It is not suggested that he was not experienced in this field, and there is nothing in the Civil Procedure Rules to diminish the degree of respect which has traditionally been shown to a hearing officer's specialised experience. [...] On the other hand the hearing officer did not hear any oral evidence. In such circumstances an appellate court should in my view show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle."

See also *DU PONT Trade Mark* [2004] FSR 15, May L.J. at paragraph 94.

## Exhibit JM1

15. This is the crux of the appeal. Thorworld takes exception to the following, which it asserts are incorrect, and that JM1 unquestionably illustrates and/or describes ramps used in commercial and industrial settings:

1. In paragraph 12 of the Decision, there is the statement that  
"... no details of these other products are provided."
2. In paragraph 29 of the decision, there is the statement that  
"what form these "other ramps" take has not been specified."
3. In paragraph 30, it is stated that the Applicant's "disabled ramps" are not  
"container loading ramps ... used in commercial and industrial settings",  
and that Mr Meale's evidence shows ramp used only  
"in a domestic setting."

A preliminary observation is that it seems to me that 3. fails accurately to reflect what the Hearing Officer said at paragraph 30 (see paragraph 8 above).

16. Mr Long took me through a detailed investigation of JM1. The first page is the front cover of a brochure entitled "THOR" with "WORLD" in smaller type underneath followed by "the loading bay specialists". A box on the front cover is headed "FOR ALL YOUR LOADING BAY REQUIREMENTS". The box contains several pictures including someone wheeling boxes up what looks like a curb/step or threshold ramp into a "long vehicle". Underneath the pictures is the legend "THORWORLD INDUSTRIES incorporating EASYRAMP®".
17. The next two pages are presumably from the inside of the brochure and are numbered "26" and "27". Both pages 26 and 27 are headed "EASYRAMP® FOR THE DISABLED" encompassed within a black box. Mr Long took me in particular to the text and picture on the left hand side of page 26. The text is headed "Lightweight EASYRAMP®" and reads: "We offer a facility to manufacture ramps for the disabled and lightweight ramps of various sizes, the models detailed being some of our more popular sizes". It then goes on to state: "Product is a single piece full width ramp", "Built in side curbs 75mm high", "Two types of application are available for movement by castors. Type DSCC-1 and DSCC-2 which allows for the ramps to be either pushed or pulled (See applications opposite for detail)", "Lightweight aluminium construction", "Anti-slip surface", "Built in lifting handle", "Model is available without castors if required". The picture of a "DCSS-1 Application" shows a female wheeling boxes up a curb/step or threshold ramp into what seems to be commercial premises. Mr Long pointed out that that ramp appears to be the same as the ramp shown in the picture on the front cover that I have already described. A further picture shows her wheeling the ramp away.
18. I note that the rest of the text on page 26 describes the "Wheelchair EASYRAMP®" and the four other pictures show ramps for disabled access.
19. Page 27 is wholly devoted to disabled ramps: the "Doorway EASYRAMP® for Independent People", the "Standard Door Frame Entry Ramp" and the "Fixed EASYRAMP®". All the pictures appear to be set in domestic premises. Four show a

young woman in a wheelchair gaining access through patio doors and one an older gentleman on a motorised cycle entering a front door.

20. The last page of JM1 is not numbered and is perhaps the end cover of the brochure. It is likewise headed "EASYRAMP© FOR THE DISABLED". The left hand side of the page deals with a "Lightweight Curb/Step EASYRAMP©" and the pictures are again of the young woman in a wheelchair. Mr Long drew my attention to the right hand side of the page. That describes a "Lightweight High Entry EASYRAMP©" as follows: "This is a new aluminium ramp developed for areas where there is a high height difference between two locations by lightweight traffic, such as Motor-cycles, Wheel Chairs or Sack Trucks gaining to, for example, Trains/Buildings/Vehicles. The ramps are of a folding design and when loading or unloading is completed, the ramp is folded into half of its overall length and easily moved via built-in wheels. Incorporated in the ramp is a facility for it being self supporting in the vertical plane when not in use, thereby taking up minimal space on the loading dock or work area". Mr Long commented that motorcycles and sack trucks are not vehicles for the disabled and that loading docks are not found at a disabled person's residence, care home etc. but in industrial premises. The picture under the text shows a folding ramp being used to gain wheelchair access to an elevated threshold or doorway. (Two others show the folding ramp in stored position and being pushed by a woman).
21. Finally, Thorworld relies on the fact that four pictures on the front cover of its brochure show loading docks or loading bays. However, as the Hearing Officer noted, there is no indication that such loading ramps are sold under the mark EASYRAMPS and not THOR or THORWORLD or some other mark belonging to Thorworld.
22. I have taken careful note of Mr Long's arguments in relation to JM1. However I am unable to detect any error in the Hearing Officer's interpretation of Thorworld's evidence. Her findings were that Thorworld had used EASYRAMP primarily in connection with disabled ramps and primarily in a domestic context. That is borne out not only by JM1 but also by Thorworld's witnesses. The only other ramp specifically mentioned by those witnesses is a shop ramp (witness statement of David McSweeney, dated 9 April 2008, paragraph 6).
23. The specification the Hearing Officer allowed reflected those findings. She decided that the mark could proceed to registration in respect of *wheelchair ramps; doorway/threshold ramps; curb/step ramps*. Contrary to Thorworld's perceptions there is no overall limitation to disabled or to domestic use. In my judgment, the Hearing Officer was entitled to arrive at the determination she did under section 5(4)(a) of the Act.

### **Conclusion**

24. In the event the appeal fails. I have no reason to believe that Plant incurred any costs in relation to this appeal. I therefore make no order as to costs.

Professor Ruth Annand, 20 July 2009

Mr E A Long, Hulse & Co., represented Thorworld Industries Limited

Plant Handling Limited trading as Easyramps, did not appear and was not represented