

O-300-09

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 2464158

BY

PLANT HANDLING LIMITED, TRADING AS EASYRAMPS

TO REGISTER THE TRADE MARKS (A SERIES OF TWO):

**EASYRAMP
EASYRAMPS**

IN CLASS 7

AND

THE OPPOSITION THERETO

UNDER NO 96863

BY

THORWORLD INDUSTRIES LIMITED

Trade Marks Act 1994

**In the matter of application no 2464158
by Plant Handling Limited, trading as Easyramps
to register the trade marks (a series of 2):**

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1) On 14 August 2007 Plant Handling Limited, trading as Easyramps (Plant) applied to register EASYRAMP and EASYRAMPS as a series of two trade marks. The application for registration was published for opposition purposes on 28 March 2008 with the following specification:

loading ramps; lifting ramps; metal loading ramps; container ramps; mobile loading container ramps; trailer ramps; platform ramps; apparatus used for loading and unloading containers; hydraulic lifting ramps; hydraulic lifting ramps; hydraulic mechanisms; hydraulic pumps; hydraulic mobile platforms; handles being part of mechanically operated tools; wheel chocks; clamp attachments; ramps for the loading and unloading of goods vehicles; wheelchair ramps; doorway/threshold ramps; curb/step ramps; parts and fittings relating to the aforementioned.

The above goods are in class 7 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

2) On 14 April 2008 Thorworld Industries Limited (Thorworld) lodged an opposition to the registration of the trade mark under sections 5(1), 5(2)(a), 5(2)(b) and 5(4)(a) of the Trade Marks Act 1994 (the Act). Sections 5(1) and 5(2) of the Act read:

“5. - (1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.

(2) A trade mark shall not be registered if because –

(a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the earlier trade mark is protected, or

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

The opposition under sections 5(1), 5(2)(a) and 5(2)(b) of the Act is based upon United Kingdom trade mark registration no 2448353. This registration is for the trade mark EASYRAMP. At the time of the filing of the opposition this trade mark was being opposed by Plant. It has now been registered with the following specification:

wheelchair ramps; doorway/threshold ramps; curb/step ramps.

The above goods are in class 7 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended. The application for the registration was made on 3 March 2007 and the registration procedure was completed on 28 August 2009; so Thorworld’s trade mark is an earlier trade mark and is not subject to proof of use. At the time of the filing of the opposition Thorworld’s application included *ramps for the loading and unloading of goods vehicles*, as a result of the opposition these goods have been struck out of the specification. *Ramps for the loading and unloading of goods vehicles* were included as part of the basis for the opposition. Thorworld claims that the respective trade marks are identical or similar and that the respective goods are identical or similar.

3) Section 5(4)(a) of the Act reads:

“(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade”.

Thorworld claims that it has used the trade mark EASYRAMP in the United Kingdom since 1996 in respect of *ramps for the loading and unloading of goods vehicles; wheelchair ramps; doorway/threshold ramps; curb/step ramps*. It claims that the trade mark has been used on its brochures and on its website.

4) Plant filed a counterstatement. It states in its counterstatement that Thorworld’s trade mark application, as it then was, was not valid and was subject to opposition. On this basis it denies the grounds of opposition under sections 5(1) and 5(2) of the Act. It denies that registration of its trade mark would be contrary to section 5(4)(a) of the Act.

5) Both parties filed evidence. The parties were advised that they had a right to a hearing and that if neither party requested a hearing a decision would be made from the papers and any written submissions that were received. Neither party requested a hearing, nor did they furnish written submissions.

Evidence of Thorworld

Witness statement of John Meale

6) Mr Meale is the managing director of Thorworld. He states that Thorworld has used EASYRAMP, sometimes with a final 's', since 1996. He states that at the outset EASYRAMP was a brand name for a range of products for people with disabilities. He states that over the years the brand has been used sporadically for other ramps. EASYRAMP products represent a small amount of Thorworld's business, with sales of £50,000 per annum. Mr Meale cannot trace any documentary evidence of use in 1996. Mr Meale states that Thorworld did have printed sales brochures, usually up-dated biannually, but in 1999 it was decided to place greater emphasis on Thorworld's website. However, Thorworld does supply brochures on request to customers who have limited or no access to the Internet. He exhibits at JM1 a copy of part of the 1997 brochure. Three pages are reproduced which show EASYRAMP products, at the top of the pages the wording "EASYRAMP FOR THE DISABLED" appears. A number of ramps are shown being used by persons in wheelchairs. The lightweight EASYRAMP is shown being used to facilitate the movement of goods on a trolley through a doorway. The wheelchair EASYRAMP is shown as is the doorway EASYRAMP, which is described as allowing a disabled person to exit/enter by themselves. The photographs relating to the latter product show a woman in a wheelchair negotiating a doorway. A standard door frame entry ramp is shown, it is explained that "[m]any situations exist where disabled persons have great difficulty in gaining access to or exiting from buildings where a door frame surround exists." A picture relating to the product shows a man on a motorised chair negotiating a doorway with the aid of the ramp. The final page of the exhibit relates to the lightweight curb/step EASYRAMP and the lightweight high entry EASYRAMP. In both cases people in wheelchairs are shown using the products. The lightweight high entry EASYRAMP product is described as being for areas where there is a high height difference between two locations. It is designed for use by lightweight traffic such as motorcycles, wheel chairs and sack trucks in order to gain access to trains, buildings and vehicles. The lightweight EASYRAMP can be purchased with or without castors. The wheelchair EASYRAMP is foldable, the doorway EASYRAMP has a lifting cord and is for use with sliding doors, the standard door frame entry ramp is for use in conjunction with lightweight ramps and wheelchair ramps, the lightweight curb/step EASYRAMP can be stored on a wheelchair, lightweight high entry EASYRAMP is of a folding design and has built-in wheels. All of the ramps are made of aluminium.

7) Mr Meale states that he first became aware of Plant and its use of EASYRAMPS in 2005 or 2006, when he noticed the appearance of the name in some journals. He states that at the time Thorworld was not particularly concerned as Plant was very small and insignificant as a competitor. Thorworld became more concerned in 2007 when it was noticed that the ® symbol following EASYRAMPS was used in a journal, indicating that the trade mark had been registered. Mr Meale states that checks revealed that Plant did not in fact have a registration.

8) Mr Meals states that in 13 August 2004 Thorworld registered four domain names:

easy-ramp.com;
easy-ramp.co.uk;
easy-ramps.com;
easy-ramps.co.uk.

Witness statement of Robert Scott Chalmers

9) Mr Chalmers is managing director of Tartan Web Scotland Ltd (Tartan) (previously known as Viking Technology Limited). Tartan has provided marketing, design, registration and hosting services to Thorworld and maintains a comprehensive back-up system of its work for Thorworld. Tartan's first involvement with the name EASYRAMP(S) was in relation to a design and marketing exercise for ramps for persons with disabilities. At the time it was believed that this was potentially a very large market worthy of specific branding and the branding EASYRAMP(S) dates from then.

10) The following are exhibited:

- At RSC1 - A letter dated 2 September 1996 from Mr Chalmers to Mr Meale re suggestions for branding for products for home use, for people with disabilities and the shop locations. The following names were suggested: EzeeRamp, Rampease, EasyRamp and EazyRamp. Included with the letter were proposals for leaflets aimed at persons with disabilities. They bear the names RAMPEASE, EZEERAMP and EASYRAMP. The pictures appear to be the same as those that were used in the catalogue referred to in paragraph 6.
- At RSC2 - A letter dated 14 January 1997 from Mr Chalmers to Mr Meale which states that 2000 leaflets will be produced bearing the EasyRamp logo and information on the EasyRamp range of products for use at trade shows, product displays etc.
- At RSC3 - A letter dated 12 February 1998 from Mr Chalmers to Mr Meale re amendments to the reprinting of a brochure. Copies of three pages are attached. They all bear EASYRAMP prominently. Many of the

photographs appear in the catalogue referred to in paragraph 6. All of the pages show people in wheelchairs using ramps. The following is written on the first page:

“Many situations exist where access to buildings, shops, offices, transport and houses, etc., is difficult for disabled persons. These ramps are designed to provide a lightweight, easy-to-store solution to the problem.”

- At RSC4 - A letter dated 3 April 2000 from Mr Chalmers to Mr Meale. In this letter Mr Chalmers states:

“In response to your specific enquiries re. EasyRamp – All original artwork, flyers etc. are still intact and can be updated / amended for use with your latest brochures and catalogues.”

Also included in the exhibit are two early artwork proposals for how EASYRAMP(S) might be used.

11) Mr Chalmers states that Tartan retains “back-ups” which were updated yearly for trade shows and the like until 2002 when more emphasis was placed on website advertisement/promotion.

12) Mr Chalmers considers that EASYRAMP(S) has never been a major line for Thorworld, he states that the market for persons with disabilities did not materialise as expected.

Second witness statement of John Meale

13) In this witness statement Mr Meale makes points in relation to his first witness statement.

14) He notes that on page 26 of the brochure exhibited at JM1 the lightweight EASYRAMP can be seen, with both versions DSCC1-1 and DSCC-2; the one with wheels for pushing the other with wheels for pulling. He notes that in the photograph a woman operative can be seen using a sack barrow loaded with cartons whilst using DSCC-1/1 ramp. He notes that on the last page of JM1 there is a description of the lightweight high entry EASYRAMP, the description advises that the product can be used by motorcycles, wheelchairs or sack trucks in order to gain access to trains, buildings or vehicles. He refers to the end of the description: “thereby taking up minimal space on the loading dock or work area. He refers to the front cover of JM1. He notes that the top right hand photograph shows a male operative wheeling a sack barrow loaded with cartons over a DSCC-1/2 ramp. He calls attention to the long vehicle sign affixed to the back of the vehicle. He states that this is used as a container loading/unloading ramp in

commercial/industrial use and dates from at least 1997. He notes that the yard ramp shown is not sold under the EASYRAMP brand.

Evidence of Plant

14) This consists of a witness statement by Josh Fagan. Mr Fagan is a partner in Plant. He states that Plant operates a business selling and renting container loading ramps under the trade mark EASYRAMPS. He states that Plant trades as Easyramps. Performance Handling Limited, a name that appears on some of his exhibits, is the predecessor in title to Plant.

15) Mr Fagan states that Plant started trading in the container loading ramp market in 2003, prior to this it had only been trading in forklift trucks. He states that demand for container loading ramps began to increase as it was becoming increasingly popular for importers and exporters to use container lorries to transport goods rather than the traditional side loading flat bed lorries. Plant began to look at ways to meet this demand. Mr Fagan states that Plant began importing container loading ramps from a supplier in the United States of America under the name Copperloy and then selling them. Plant conducted business on this basis between 2003 and mid-2004. Mr Fagan states that it was during this period that the name EASYRAMP was adopted. After a "significant" number of container loading ramps had been sold another partner in the company, Dilyan Alexiev, decided that Plant should produce its own ramps and brand them EASYRAMPS. Mr Fagan states that Plant conducted research to ascertain who was offering the same product. This research showed three competitors: Lantern Engineering Limited, trading as Magic Yard Ramps, Chase Equipment Limited, trading its Titan range of loading ramps and Thorwold, trading in Thorworld ramps. Mr Fagan states that to the best of Plant's knowledge EASYRAMPS was not being used in the market and so could be used uniquely by Plant.

16) Mr Fagan states that it was decided to separate the EASYRAMPS container loading arm of the business for the rest of the business in order to create a separate identity. In order to effect this the domain names easyramps.co.uk and easyramps.com were registered. The domain names were registered on 18 June 2004. The first EASYRAMPS container loading ramp was built by Plant on 15 June 2004. At JF3 a 'to whom it may concern' letter from William S Graham Ltd is exhibited. The letter is dated 7 February 2008, it states that an EASYRAMP product was first purchased in September 2004 and that two units have been on continuous hire for almost two years. (As the contents of the letter should have been in a proper evidential form, eg a witness statement, it must be treated as hearsay evidence.) Mr Fagan states that in late 2004 a graphic designer was employed to design the EASYRAMPS logo and website. Exhibited at JF4 is a printout from easyramps.co.uk, it was downloaded on 5 March 2009, so well after the date of application. The EASYRAMPS product is described as a mobile loading container ramp. Illustrations show a forklift truck using a ramp to

gain access to a container on the back of a lorry. Exhibited at JF5 are a compliments slip, a business card and headed letter paper, all of have EASYRAMPS in a slightly stylised form upon them. The following amounts have been spent on promoting EASYRAMPS goods and services:

2004	£200
2005	£800
2006	£16,000

The following material is exhibited:

- JF6 – An invoice dated 7 October 2006 for £10.45 from Nixen Master Ltd. It relates to easyramps.com. Mr Fagan states that this invoice demonstrates Plant’s investment in building a presence on Google® through the trade mark EASYRAMPS.
- JF7- An invoice dated 16 April 2007 for £468.83 from Marketise UK Ltd. The service supplied is described as:

“1000 qualified visitors to your site driven via Google. Traffic to be sent to www.easyramps.co.uk”.

- JF8 – Copies of 5 acknowledgments of order from Metropolis Mr Fagan states that they relate to advertisements in *IEM* (formerly known as *Industrial Exchange and Mart*), which he describes as a trade magazine. The acknowledgments are for advertisements to appear on 13 March 2006, 20 March 2006, 27 March 2006, 3 April 2006, 10 April 2006, 17 April 2006, 24 April 2006, 1 May 2006, 8 May 2006, 15 May 2006, 5 June 2006 and 12 June 2006. The advertisements are classified as being for: “Fork Lift Trucks For Sales/Want” and “Fork Lift Truck Accessories”. All of the advertisements appeared in the storage, handling and distribution section. All of the acknowledgments are addressed to PERFORMANCE HANDLING LTD/EASYRAMP.
- JF9 – A copy of two pages from *IEM* of 26 February 2007. The second page includes an advertisement for EASYRAMPS, the advertisement advises that “BRITAIN’S BIGGEST SELLING CONTAINER RAMP WILL BE ON DISPLAY AT IMHX 2007
- JF10 – A copy of a page from *IEM* of 26 February 2007. This page includes an advertisement by Thorworld. This advertisement relates to mobile yard ramps. It does not include any reference to EASYRAMP.
- JF11 – Copies of 4 media releases. They are dated 12 January 2006, 17 May 2006, 22 February 2007 and 26 February 2007. The first release advises that Easyramps is seeking more dealers around the world. The release advises that 100 units have been sold over the past 18 months. Easyramps is described as a container loading ramp specialist. The release of 17 May 2006 advises that 120 units have been sold over the past 18 months and announces a new model using galvanised mesh

which will benefit businesses which work with chemicals, fertilizers or are exposed to high levels of salinity. The release of 22 February 2007 announces that Easyramps will be attending IHMX 2007. This release states that Easyramps has sold or rented over 100 years since beginning production 18 months before. The release of 26 February 2007 is the same as that of 22 February 2007 other than that the former includes a hyperlink to arrange a meeting at IMHX. The media releases emanate from the website FORKLIFTACTION.COM.

- JF12 – Copies of correspondence relating to Plant's attendance at IMHX 2007, which took place from 13 – 16 March 2007 at the NEC, Birmingham.
- JF13 – Pictures of the Easyramps stand at IMHX. A ramp can be seen on the stand.
- JF14 – A copy of a printout of the details of the company Easyramp Limited, which has the same address as that of Thorworld. The company was incorporated on 14 March 2007. Its status as of 5 March 2009, the date of the printout, was dormant.
- JF15 – A Google® search for easyramps. As this was conducted on 5 March 2009, it does not have a bearing upon the case.
- JF16 - A Google® search for container loading ramps. As this was conducted on 5 March 2009, it does not have a bearing upon the case.
- JF17 – Copies of 2 invoices. The invoices bear the name EASYRAMPS in a slightly stylised form. The first invoice is dated 30 July 2004 and is for one product (easy 7.1) at a cost of £5,816.25 (including VAT). The second invoice is dated 23 December 2004 and is for one product (ER10.1) at a cost of £6,168.75 (including VAT).
- JF18 and JF19 – A letter dated 11 May 2007 from Plant to the trade mark attorneys for Thorworld, Hulse & Co, and the response dated 20 June 2007 from Hulse & Co. The first letter is marked "without prejudice". Despite the heading I cannot see that it represents a part of negotiations genuinely aimed at settling a dispute (or a passing shot prior to the commencement of negotiations), nor can I see that the reply falls within the parameters of the privilege of "without prejudice". In reaching this conclusion I have considered the judgment of Auld LJ in *Framlington Group Limited and AXA Framlington Group Limited v Ian Barnetson* [2007] EWCA Civ 502¹. The letter from Plant states that it is aware that

¹ 22. Written or oral communications made as part of negotiations genuinely aimed at, but not resulting in, settlement of a dispute are not generally admissible in evidence in litigation between parties over that dispute. It is trite law that the use or non-use of the words "without prejudice" in such negotiations may indicate whether the communication(s) in question may attract the privilege, but is not necessarily determinative on the point; see *Phipson*, para 24-16 to 24-18.

27. It follows that, for the "without prejudice" rule to give full effect to the public policy underlying it, a dispute may engage the rule, notwithstanding that litigation has not yet begun. If there were any doubt about that bare proposition, it is dispelled by the following authorities and applications of it.

28. In *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066, AC, the House of Lords proceeded upon the basis that exchanges some 21 months before the start of litigation could attract the rule in the same way as exchanges after the start of litigation. The issue there was whether admissions by a mortgagor in default as to his liability to pay the amount outstanding, against whom his mortgagee had obtained possession, were admissible in subsequent proceedings by the mortgagee for the arrears. No point arose on the appeal as to the exchanges in question having taken place before commencement of the relevant litigation, the only question being whether an acknowledgement of debt, as distinct from an offer in negotiations with a view to compromise of a disputed liability, was caught by the rule. The House held that it was outside the rule, as not coming within the public policy interest of encouraging settlement of a dispute. It was implicit in all their Lordships' speeches that the rule, if applicable at all, included exchanges in negotiation before the start of the proceedings for the arrears. Lord Walker of Gestingthorpe, for example, described the public policy interest, at paragraph 37:

"in encouraging the settlement of disputes so as to avoid (or at least shorten) litigation"

Lord Mance, at paragraph 81, indicated the breadth of the policy, albeit obiter, by reference to Lord Griffiths's observations in *Rush v Tompkins*:

"The existence of a dispute and of an attempt to compromise it are at the heart of the rule whereby evidence may be excluded (or disclosure of material precluded) ... The rule does not of course depend upon disputants already being engaged in litigation. But there must as a matter of law be a real dispute capable of settlement in the sense of compromise (rather than in the sense of simple payment or satisfaction)".

See also per Lord Hoffmann, at paragraph 18, in his reference to the background for the ruling of Court of Appeal in *Unilever PLC v The Proctor & Gamble Co* [2000] WLR 2336.

29. A good instance of the working of the rule can be seen in the "opening shot" cases, in which an initial proposal in negotiations before commencement of proceedings may be protected by the privilege. Were it not so, a party to a dispute could never safely make, by way of negotiation, an initial offer in response to a claim; see *South Shropshire District Council v Amos* [1986] 1 WLR 1271, CA, a Lands Tribunal case, which concerned "without prejudice" negotiations in a dispute that arose long before reference to the Tribunal as to the amount of compensation payable in respect of a discontinuance of business use order made under section 51(1) of the Town and Country Planning Act 1971. Parker LJ, giving the judgment of the Court upheld, at 1276D-1278A, the ruling of Gatehouse J that "without prejudice" negotiations could begin with an "opening shot", that is, an initial offer from one party in dispute with another setting out his proposal for settlement of his or the other's claim giving rise to the dispute, and could continue with the ensuing exchanges, all before the commencement of proceedings.

32. The question remains, how proximate, if at all, must unsuccessful negotiations in a dispute leading to litigation, be to the start of that litigation, to attract the "without prejudice" rule. Must there be, as Mr Oldham contended, an express or implied threat of litigation underlying the negotiations, or, failing any such threat, some proximity in time to the litigation eventually begun? In answering that question, the courts are logically driven back, as Mr Nicholls submitted, to the public policy interest behind the rule, of encouraging parties to settle their disputes without "resort" to litigation or without continuing it until the needless and bitter end. If the privilege were confined to settlement communications once litigation had been threatened or shortly before it is begun, there would be an incentive on both sides to escalate their dispute with threats of litigation and/or to move quickly to it, before they could safely start talking sensibly to each other. That would be a slippery slope to mutual hardening of positions and commencement of litigation – hardly the encouragement to settle their disputes without *resort* to litigation that Oliver J had in mind in *Cutts v Head*.

Thorworld has filed an application to register the trade mark EASYRAMP in class 7. It goes on to state:

“We wish to let it be known that Thor Industries is aware of us and is our competitor and that we have been using the term “Easyramps” as an unregistered Trade Mark since 30 July 2004 in commercial correspondence and as our registered domain name for our website www.easyramps.co.uk since 18 June 2004.

We believe that your client’s application is too close to our unregistered Mark to be eligible for grant and that if we were to oppose Thor World’s application at the Trade Mark office that, in due course, we would secure the Mark for ourselves.

We also believe that if Thor were to use the Mark in this manner we would believe this to be a case of passing off.

We look forward to hearing whether your client is prepared to withdraw their application, or to transfer it to use in due course for a consideration.”

In the response Hulse & Co refer to a registration held by easyGroup IP Licensing Limited for the trade mark easyRamp for, inter alia, *transportation of goods; baggage handling services; cargo handling and freight services*. Reference is made to an application by Portes Bisbal SA before the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) to register the trade mark EASY-RAMP, filed on 26 May 2005, for, inter alia, *metal ramps for loading bays and components*. It

33. On the other hand, the ambit of the rule should not be extended any further than is necessary in the circumstances of any particular case to promote the public policy interest underlying it. The critical question for the court in such a case is where to draw the line between serving that interest and wrongly preventing one or other party to litigation when it comes from putting his case at its best. It is undoubtedly a highly case sensitive question, or put another way, the dividing line may not always be clear. The various judicial pronouncements in the leading cases to which I have referred do not provide any precise pointers, and there are seemingly no other authorities directly in point.

34. However, the claim to privilege cannot, in my view, turn on purely temporal considerations. The critical feature of proximity for this purpose, it seems to me, is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties. Would they have respectively lowered their guards at that time and in the circumstances if they had not thought or hoped or contemplated that, by doing so, they could avoid the need to go to court over the very same dispute? On that approach, which I would commend, the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree. Confining the operation of the rule, as the Judge did, to negotiations of a dispute in the course of, or after threat of litigation on it, or by reference to some time limit set close before litigation, does not, with respect, fully serve the public policy interest underlying it of discouraging recourse to litigation and encouraging genuine attempts to settle whenever made.

is noted that this application has been opposed by a Swedish undertaking, Carlo AB, which claims to have prior rights dating from 22 March 1989. Hulse & Co advise that a Newport company appears to have been selling ramps, particularly for horse boxes, since 2003 under the name EASY RAMP UK. The letter concludes in the following manner:

“Consequently, a range of parties appear to have, or to be claiming, rights in different version(sic) of EASYRAMP for cargo handling/ramps, such that we see no difficulty in the appearance of yet another version (our Clients), and as our Client’s (sic) version would appear in their leaflets and/or website as a Thor World Industries product, we see no danger of confusion with easyGroup, Bisbal, Carlo, the Newport company or yourselves.

If follows that, just as we believe that neither easyGroup, Portes Bisbal, or Carlo would be interested in transferring the Application/registration for their version of the mark to yourselves, neither are our Clients. Should you require a registration for your version, then you should file an Application, but there is of course no problem in your continuing to use your version of the mark, unregistered, if you so choose, and if your fear is that our Clients would seek to restrain your use of your version of the mark should they be granted registration, this is unfounded.”

Mr Fagan considers that the use of the conditional form ‘would’ in the letter from Hulse & Co is significant. He comments that this contradicts the statement by Mr Meale of continuous use of EASYRAMP by Thorworld since 1996. Mr Fagan also comments in his statement that he believes that any use that there was by Thorworld was minimal and occurred in 1997 and that the trade mark has not been used since.

17) Mr Fagan states that whilst at the IMHX 2007 exhibition he was approached by Mr Meale of Thorworld. He states that Mr Meale said that he had noticed that EASYRAMPS was slowly becoming more prominent on Google®. Mr Fagan states that this comment was witnessed by Mrs Sarah Whiffen of Holygrove Farm, Castle Hill, Rotherfield. Mr Fagan states that Mr Meale visited the stand on one further occasion whilst he was present as did two members of his staff.

18) Sales of goods and service in the three years before the date of application were:

2004	£114,255
2005	£228,245
2006	£388,810

Mr Fagan states that Plant has customers across the United Kingdom, including the following locations: Greater London, Plymouth, Exeter, Southampton, Swindon, Cardiff, Gravesend, Wolverhampton, Tunbridge Wells, Birmingham, Coventry, Leeds, Rotherham, Durham, Manchester, Bury, Carlisle, Glasgow and Belfast.

Findings in relation to the evidence

19) It is necessary to establish the material date in respect of the grounds of opposition based on the law of passing-off. This basis is based on section 5(4)(a) of the Act. A similar provision is to be found in Article 8(4) of Council Regulation 40/94 of December 20, 1993. This was the subject of consideration by the Court of First Instance in *Last Minute Network Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Joined Cases T-114/07 and T-115/07. In that judgment the CFI stated:

“50 First, there was goodwill or reputation attached to the services offered by LMN in the mind of the relevant public by association with their get-up. In an action for passing off, that reputation must be established at the date on which the defendant began to offer his goods or services (*Cadbury Schweppes v Pub Squash* (1981) R.P.C. 429).

51 However, according to Article 8(4) of Regulation No 40/94 the relevant date is not that date, but the date on which the application for a Community trade mark was filed, since it requires that an applicant seeking a declaration of invalidity has acquired rights over its non-registered national mark before the date of filing, in this case 11 March 2000.”

I apply the reasoning of the CFI, *mutatis mutandis*, in relation to the Act. So the material date is the date of the applications for registration, 14 August 2007. However, if there had been use of the trade marks by Plant prior to the dates of application this would have to be taken into account. It could establish that it was the senior user, that there had been common law acquiescence or that the existing position should not be disturbed and so use would not be liable to be prevented by the law of passing-off².

20) How goodwill is to be established has been dealt with in several judgments³. *Phones 4u Ltd v Phone4u.co.uk. Internet Ltd* establishes that one cannot just follow a formula or demand certain predetermined requirements to be met. In

² See, for instance: *Croom's Trade Mark Application* [2005] RPC 2 and *Daimlerchrysler AG v Javid Alavi (T/A Merc)* [2001] RPC 42.

³ *South Cone Inc v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19, *Loaded BL O/191/02, Phones 4u Ltd v Phone4u.co.uk. Internet Ltd* [2007] RPC 5 and *Minimax GmbH & Co KG v Chubb Fire Limited* [2008] EWHC 1960 (Pat).

Minimax GmbH & Co KG v Chubb Fire Limited Floyd J commented directly upon *South Cone Inc v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)*:

“8 Those observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be answered of passing off. I do not understand Pumfrey J to be laying down any absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least prima facie, that the opponent's reputation extends to the goods comprised in the application in the applicant's specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application.”

21) The evidence filed by Plant establishes that it has been using the sign EASYRAMPS since 2004 in relation to container loading ramps, the invoice exhibited at JF17 establishes such use as of 30 July 2004 at the latest. The media releases exhibited at JF11 show the nature of the goods, the container loading ramps include a hydraulic mechanism and so are appropriate to class 7.

22) In his evidence Mr Fagan challenges the evidence of Mr Meale as to the continuous use of the trade mark EASYRAMP by Thorworld. In *Tripp Limited v Pan World Brands Limited* [2008] RPC 2 Mr Richard Arnold QC, sitting as the appointed person stated:

“36. Where, however, evidence is given in a witness statement filed on behalf of a party to registry proceedings which is not obviously incredible and the opposing party has neither given the witness advance notice that his evidence is to be challenged nor challenged his evidence in cross-examination nor adduced evidence to contradict the witness's evidence despite having had the opportunity to do so, then I consider that the rule in *Brown v Dunn* applies and it is not open to the opposing party to invite the tribunal to disbelieve the witness's evidence.”

There is nothing obviously incredible in the evidence filed on behalf of Thorworld. It is sparse in terms of detail and exhibits but this does not give rise to incredulity. The brochure from 1997 establishes use at this date of EASYRAMP. There are no downloads from the Thorworld website showing use of the trade mark, historic web pages can be accessed using the Wayback Machine. Mr Meale's statement that EASYRAMP products accounted for some £50,000 of sales per annum is vague; no breakdown is given by year. Exhibit RSC3 shows an interest in the trade mark in February 1998 with the amendments to the brochure. The redesigned pages promote use of the ramps only for persons with disabilities. There is no hint of use for other users, uses that were shown in the pages from the 1997 brochure exhibited at JM1. It appears that from 1998 the ramps were being used for granting ingress and egress to persons with

disabilities and not for any more general use. The letter of 3 April 2000 exhibited at RSC4 tells one little, other than that a query was made as to the continuing existence of artwork and flyers. Indeed the letter could be read as indicating that there was no current use of EASYRAMP, as otherwise why would there be an enquiry as to the existence of the artwork and flyers? However, this cannot be taken as the only or definitive interpretation of the short letter. Equally I do not consider that the use of 'would' in the letter from Hulse & Co can be interpreted as meaning that there was no current use of EASYRAMP by Thorworld. In August 2004 Thorworld applied for the four domain names. This tells one very little; it might indicate an interest rather than use. It might be interpreted as a reaction to Plant's use of EASYRAMPS, as could be the registration of the company name. Mr Chalmers backups for the artwork were updated yearly for trade shows until 2002; this suggests that EASYRAMPS was being used at trade shows until 2002, but does no more than suggest that. The statement by Mr Chalmers that Tartan provided Thorworld with other uses of the name EASYRAMP up to 2004 in relation to product lines indicates a potential for use and not actual use.

23) There are no examples of the nature of the use of EASYRAMP by Thorworld after 1998, consequent upon this there is no clear evidence as to the nature of the goods upon which EASYRAMP had been used after 1998. So from 1998 to 14 August 2007 the picture is blank, other than knowing that there was an annual turnover of £50,000 approximately. One does not know to what products this turnover relates or the number of products to which it relates. It is for Thorworld to establish that as of 14 August 2007 it had a goodwill in goods by reference to the sign EASYRAMP. Bearing in mind the findings in *Tripp Limited v Pan World Brands Limited* I do not consider that it is appropriate to doubt the statements made on behalf of Thorworld. However, an absence of doubt in relation to what has been said does not have the sequitur of deciding that as of 14 August 2007 Thorworld has demonstrated that it had a goodwill by reference to the sign EASYRAMP. Owing to the lacunae and sparseness of the evidence I do not consider that Thorworld has established that as of 14 August 2007 it had the requisite goodwill. It would have been very easy for Thorworld to have brought detail to the blank period, through such things as the adducing of invoices and screen prints from its website (using for instance the Wayback Machine). For the sake of completeness I would add that the scale and nature of the use that is shown prior to 1999 is not such that it can be assumed that there would a residual goodwill at the material date arising from that use.

24) As Thorworld has failed to establish that it had a goodwill at the material date the claim under section 5(4)(a) of the Act in relation to the law of passing-off must be dismissed.

Sections 5(1) and 5(2) of the Act

25) Section 5(1) of the Act states:

“(1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.”

26) In *LTJ Diffusion SA v Sadas Vertbaudet SA* Case C-291/00 the European Court of Justice stated :

“54 In those circumstances, the answer to the question referred must be that Art.5(1)(a) of the directive must be interpreted as meaning that a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer.”

Comparison of trade marks

27) EASYRAMP and EASYRAMP are obviously identical. It is common to use the plural and possessive of trade marks and names. I consider that the presence of the letter 's' in EASYRAMPS is so insignificant that it will go unnoticed by the average consumer and so this trade mark is identical to the trade mark of Thorworld.

Comparison of goods

28) The goods of the earlier registration are:

wheelchair ramps; doorway/threshold ramps; curb/step ramps.

The goods of the application are:

loading ramps; lifting ramps; metal loading ramps; container ramps; mobile loading container ramps; trailer ramps; platform ramps; apparatus used for loading and unloading containers; hydraulic lifting ramps; hydraulic lifting ramps; hydraulic mechanisms; hydraulic pumps; hydraulic mobile platforms; handles

being part of mechanically operated tools; wheel chocks; clamp attachments; ramps for the loading and unloading of goods vehicles; wheelchair ramps; doorway/threshold ramps; curb/step ramps; parts and fittings relating to the aforementioned.

As per *Altecnic Ltd's Trade Mark Application* [2002] RPC 34 the class in which goods has been placed has to be taken into account. Class 7 encompasses the following goods:

“[m]achines and machine tools; motors and engines (except for land vehicles); parts of engines and motors; machine coupling and transmission components (except for land vehicles); exhausts and starters (for vehicles); vacuum cleaners; electric drills; electric screwdrivers; incubators for eggs.”⁴

The class fundamentally includes machines, machine tools, motors and engines and parts of motors and engines. The products in relation to which Plant has used its trade mark include a hydraulic motor and so fall within class 7. The goods in relation to which Thorworld has shown use are goods of common metal, aluminium. Some of them may be used with wheels but they are not machines or analogues to machines. The registrar places ramps in three classes, dependent on their material or their nature: classes 6, 7 and 19. The goods in relation to which Thorworld has shown use fall within class 6, as goods of common metal. In considering the respective goods I have to consider the actual specifications and not the goods in relation to which use has been shown and so the goods in relation to which use has been shown by Thorworld are not illustrative of the goods for which it has cover in class 7.

29) Wheelchair ramps; doorway/threshold ramps; curb/step ramps of the application are rehearsed in the specifications of both trade marks and so are identical and in relation to them the application must be refused under section 5(1) of the Act.

30) Section 5(2) of the Act states:

“(2) A trade mark shall not be registered if because –

(a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the earlier trade mark is protected, or

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade marks is protected,

⁴ As per International Classification of Goods and Services for the Purposes of the Registration of Marks Ninth Edition.

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

31) I have already found that the marks are identical; under the 5(2)(a) ground I must assess the likelihood of confusion based on identical marks for similar goods. It follows that any success for Thorworld under section 5(2)(a) would also mean success under section 5(2)(b), which envisages a distance between both the marks and the goods. The leading authorities which guide me are from the European Court of Justice (ECJ): *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77, *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723. It is clear from these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG*,

(b) the matter must be judged through the eyes of the average consumer for the goods/services in question; *Sabel BV v Puma AG*, who is deemed to be reasonably well informed and reasonably circumspect and observant; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*,

(c) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*,

(d) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v Puma AG*,

(e) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*,

(f) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*,

(g) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV v Adidas AG and Adidas Benelux BV*,

(h) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section;

Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.

Comparison of goods

32) In assessing the similarity of goods and services it is necessary to take into account, inter alia, their nature, their intended purpose⁵, their method of use and whether they are in competition with each other or are complementary⁶. In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281, Jacob J gave guidance as to how similarity should be assessed⁷.

33) Some of the goods listed in the application are evidently for use in commercial or industrial situations: container ramps; mobile loading container ramps; trailer ramps; apparatus used for loading and unloading containers; ramps for the unloading of goods vehicles. Loading ramps; lifting ramps; metal loading ramps; hydraulic lifting ramps; hydraulic mobile platforms could also be for use in commercial or industrial applications. These are not limited to an area of use; consequently, they cover non-commercial/industrial application. For instance, ramps are used in farming vehicles, temporary polling stations use ramps for accessibility for wheelchairs and parents with pushchairs, and swimming pools and theatres use hydraulic lifting platforms. Trailer ramps could be for commercial car transport trailers, agricultural trailers or for the boat enthusiast. In all cases, the purpose is to provide accessibility, whether for a person or for goods.

34) These are not self-serve consumer items. They are both in competition and complementary; one might choose a platform as providing more accessibility than a ramp. The goods in the application which are not actual ramps or

⁵ The earlier incorrect translation of 'Verwendungszweck' in the English version of the judgment has now been corrected.

⁶ *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117.

⁷ He considered that the following should be taken into account when assessing the similarity of goods and/or services:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors."

platforms could form the parts and fittings of ramps and platforms and so are complementary in the sense that, for example, handles and hydraulic mechanisms require something to be attached to in order to perform their function.

35) An assessment of trade channels presents more difficulty owing to the array of possible uses for the goods which are unlimited as to area of use. Some of the evidence filed in these proceedings (exhibit JF9) shows that container ramps; mobile loading container ramps; trailer ramps; apparatus used for loading and unloading containers; ramps for the unloading of goods vehicles are purchased through specific trade channels, rather than retail/domestic channels. There has been little evidence filed in the proceedings to guide me as to whether, for example, domestic wheelchair ramps would or would not be sold through the same trade channels as ramps for the loading of goods vehicles. However, Thorworld's specification also includes doorway/threshold ramps and curb/step ramps. These could be for loading bay applications and so come much closer to container and goods ramps. In medical, hotel, retail, domestic and community environments where accessibility is an issue, wheelchair ramps and lifting platforms perform interchangeable functions. The trade channels for each of these could be very close, or identical.

36) Taking into account the multiple uses of the applicant's unlimited goods and the unlimited nature of most of Thorworld's goods, my conclusion is that there is a high degree of similarity between the goods of the opponent and the following goods in the application (I have removed the goods which I have already found must be refused under section 5(1) of the Act):

loading ramps; lifting ramps; metal loading ramps; container ramps; mobile loading container ramps; trailer ramps; platform ramps; apparatus used for loading and unloading containers; hydraulic lifting ramps; hydraulic lifting ramps; hydraulic mobile platforms ramps for the loading and unloading of goods vehicles.

37) *Hydraulic mechanisms; hydraulic pumps; handles being part of mechanically operated tools; wheel chocks; clamp attachments;* could have applications which are far removed from ramps; however, they are not limited to use and so include uses in relation to ramps. They are therefore highly similar to the opponent's goods. *Parts and fittings relating to the aforementioned* are also highly similar to ramps; because the parts and fittings are for ramps, they are complementary to ramps⁸.

⁸ *Oakley, Inc v OHIM*, Case T-116/06 (CFI): "52 Regarding, third, the complementary nature of the services and goods in question, found to exist by the Board of Appeal in paragraph 23 of the contested decision, it should be pointed out that, according to settled caselaw, complementary goods are those which are closely connected in the sense that one is indispensable or important for the use of the other, so that consumers may think that the same undertaking is responsible for both (see, to that effect, *SISSI ROSSI*, paragraph 49 above, paragraph 60; *PAM PLUVIAL*,

38) All the goods of the application are highly similar to those of the earlier mark.
Average consumer and purchasing process

39) Thorworld's mark had not been registered at the time the application was published for opposition purposes and so it is not subject to proof of use⁹. That being the case, I must consider the relevant public across the entire range of the goods and services. The matter must be judged through the eyes of the average consumer for the goods or services in question (*Sabel*), so I have to assess the nature of the average consumer and how they are most likely to encounter and/or purchase the goods.

40) I have already found that there is a large range of uses to which ramps and platforms can be put. The relevant user in materials handling is not the same as someone making their domestic premises more accessible. The goods will vary in price according to their nature: industrial hydraulic platforms will be more expensive than loading ramps. The average consumer is circumspect is to be regarded as reasonably observant and circumspect (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27). This general presumption can, however, change depending on the particular goods in question (see, for example, the decision of the CFI6 in *Inter-Ikea Systems BV v OHIM* (Case T-112/06). The purchase of a ramp, platform or lift is unlikely to be a casual purchase. It is likely to be an infrequent purchase. Prior to the purchase the product specification is likely to be examined for precise information about its functionality, weight restrictions, power rating and so on. The identification of the trade mark will be an element of the information gathering exercise, so it is primarily a visual purchase, and one that is made carefully.

Conclusion in relation to likelihood of confusion

41) It is necessary to consider the distinctive character of the earlier trade mark; the more distinctive the earlier trade mark (either by nature or nurture) the greater the likelihood of confusion¹⁰. The distinctive character of a trade mark can be appraised only, first, by reference to the goods or services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public¹¹. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make

paragraph 49 above, paragraph 94; and *PiraÑAM diseño original Juan Bolaños*, paragraph 49 above, paragraph 48)."

⁹ See section 6A of the Act (added by virtue of the Trade Marks (Proof of Use, etc.) Regulations) 2004 (SI 2004/946) which came into force on 5th May 2004.

¹⁰ *Sabel BV v Puma AG* [1998] RPC 199.

¹¹ *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91.

an overall assessment of the greater or lesser capacity of the mark to identify the goods for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings¹². The trade mark identifies goods that are ramps which are easy to use. It is clearly allusive of the goods and will leave little to the imagination of the average, relevant consumer. Thorworld's evidence does not boost the earlier mark's inherently moderate distinctive character.

42) The marks are identical and so the likelihood of comparison hinges upon the comparison of goods because a greater degree of similarity between the marks may be offset by a lesser degree of similarity between the goods. I have found that there is a high degree of similarity between the goods. In making my prospective analysis of the likelihood of confusion, I consider that there would be a likelihood of confusion. The opposition succeeds in relation to all the goods of the application.

Costs

48) Thorworld has been successful and is entitled to a contribution towards its costs. I award costs on the following basis:

Notice of opposition and fee:	£500
Filing evidence	£200
Considering evidence of applicant:	£200
Total:	£900

49) I order Plant Handling Limited, trading as Easyramps, to pay Thorworld Industries Limited the sum of £900. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 29th day of September 2009

**Judi Pike
For the Registrar,
the Comptroller-General**

¹² *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.