

IN THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK NUMBERS 3,403,096, 3,403,099 AND 3,400,688 IN
THE NAME OF EASIBATHE LIMITED

AND IN THE MATTER OF THE APPLICATION TO REVOKE THOSE MARKS UNDER
ACTION NUMBERS 508,536, 508,538 AND 508,539 IN THE NAME OF KILBURN &
STRODE LLP

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF LAURA BAILEY
(O/421/26) DATED 15 MAY 2026

DECISION

Introduction

1. The is an appeal from the decision of Laura Bailey, for the Registrar, dated 15 May 2026 (O/421/26). Kilburn & Strobe LLP made applications under section 46 of the Trade Marks Act 1994 to revoke various trade marks held by Easibathe Limited on the grounds of non-use. These applications were consolidated and heard together and Kilburn & Strobe had mixed success. Easibathe appeals the Hearing Officer's decision only in relation to three marks and some of the findings of non-use.
2. The word mark EASIRAIL (No 3,403,096) was partially revoked in relation to goods in Class 6. However, the appeal is confined to challenging the finding of non-use in relation to "grab rails of metal".
3. The word mark EASIACCESS (No 3,400,688) was partially revoked in Classes 19 and 27. The appeal is confined to the finding concerning "ramps being structures of non-metallic materials; non-metallic ramps" in Class 19.
4. The word mark EASITREAD (No 3,403,099) was partially revoked in Class 6. The appeal is limited to "Ramps being structures of metal; ramps of metal; metal ramps; Metal ramps [structures]; Platforms of metal".

Application to file new evidence

5. The Appellant made an application to file new evidence, namely a screenshot from Facebook dated 16 August 2022, which shows grab rails either side of a doorway and has the following text:

We've extended our Easirail product range! We now offer grabrails designed to enable the user to maintain balance or have something to grab onto to prevent a fall.

Installations for grab rails are underway, such as this example in Newcastle.

6. The Respondent played no part in the appeal, and did not oppose (or support) the application to admit this new evidence. However, even in the case of an unopposed application to admit new evidence, I still must consider whether admitting such evidence is appropriate.

7. The basic test for whether new evidence should be admitted is that set out in the judgment of Denning LJ in *Ladd v Marshall* [1954] 1 WLR 1489, 1491:

The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

8. In *Hunt-Wesson Inc's Trade Mark Application* [1996] RPC 233, Laddie J took the view that statutory monopolies bring in different considerations from cases between purely private litigants (at 241-242):

In *Ladd v. Marshall* the court was concerned with private litigation between two parties. If one of them failed to produce evidence which was relevant and helpful until too late, only it would suffer the consequences. However that is not the case here. An opposition may determine whether or not a new statutory monopoly, affecting all traders in the country, is to be created. Refusing permission to an opponent who files evidence late affects not only him but also may penalise the rest of the trade. That is particularly the case where, as here, it is alleged that the applicant is trying to monopolise a well known geographical location. Secondly, although the matter is not clear, it is probable that if the evidence is excluded and the opponent, as a result, loses then he will be able to return again in separate proceedings to seek rectification of the register. An advantage of allowing in the evidence at the appeal stage is that it may well avoid a multiplicity of proceedings. Thirdly the hearing before the High Court is a rehearing. In my view the more appropriate course to adopt now is to look at all the circumstances, including those factors set out in *Ladd v. Marshall* and to decide whether on the particular facts the undoubted power of the court to admit fresh evidence should be exercised in favour of doing so. With this in mind it seems to me that in any case the following matters (and there may well be others) are likely to be relevant:

1. Whether the evidence could have been filed earlier and, if so, how much earlier.
 2. If it could have been, what explanation for the late filing has been offered to explain the delay.
 3. The nature of the mark.
 4. The nature of the objections to it.
 5. The potential significance of the new evidence.
 6. Whether or not the other side will be significantly prejudiced by the admission of the evidence in a way which cannot be compensated, e.g. by an order for costs.
 7. The desirability of avoiding multiplicity of proceedings.
 8. The public interest in not admitting onto the register invalid marks.
9. The Court of Appeal considered the principles to be applied in trade mark cases in *El Du Pont De Nemours & Company v S.T. Dupont* [2003] EWCA Civ 1368, [2004] FSR 15. Its findings were summarised by Arnold J in *Omega Engineering Incorporated v Omega SA (Omega AG) (Omega Ltd)* [2010] EWHC 1211 (Ch), [2010] FSR 26, [97]:

The principles to be applied on an application to adduce further evidence in support of an appeal to the High Court against a decision of the Registrar in an inter partes case were considered by the Court of Appeal in *DU PONT Trade Mark* [2003] EWCA Civ 1368, [2004] FSR 15. In summary, these are as follows: (i) the factors set out in *Ladd v Marshall* [1954] 1 WLR 1489 are basic to the exercise of the discretion; (ii) *Ladd v Marshall* is no longer a strait-jacket, on the contrary the matter is to be looked at in the round to see that the overriding objective is furthered; and (iii) in the particular context of trade mark appeals, the additional factors set out in *Hunt-Wesson Inc's Trade Mark Application* [1996] RPC 233 may be relevant.

10. In relation to the first limb of the *Ladd v Marshall* test, the Appellant accepts that, had he known he would need the evidence, he could easily have obtained the screenshot and filed it at the proper time. In relation to the third limb, I have no doubt about the credibility of the evidence; that is, I am content to accept it is a screenshot from the Appellant's Facebook account which was posted on 22 August 2022. In relation to the second limb, it is my view that the Facebook post is evidence which might have had a material effect on the Hearing Officer's decision to revoke the EASIRAIL mark in relation to "grab rails".
11. The Appellant's explanation for why the evidence was not originally filed is a reasonable one, namely he originally believed that the evidence of the use of the mark in relation to the modular system (which has rails) would also be treated as evidence of use of that system as a grab rail.
12. The Respondent is a firm of patent and trade mark attorneys and so experienced in this sort of proceedings. But the Respondent did not take part in the appeal proceedings at all, and did not object to the admission of the evidence (the application having been included in a skeleton argument filed many weeks before the hearing). I therefore have no basis for concluding there would be any prejudice to the Respondent from the evidence being admitted.
13. This leaves me to consider the public interest. This is an important consideration and one that should not be skirted over lightly. Proprietors seeking to establish the use of their mark must be expected to do so during the usual rounds of evidence before the registrar. To use a common trope, the hearing before the registrar is not a dress rehearsal for proving use, it is the last night of the performance. This approach is taken because it would be quite wrong to allow proprietors to patch up their case by filing new evidence of use on appeal once the Hearing Officer has pointed out all the flaws in their original evidence.
14. It is also the case that litigants-in-person have to comply with the same strict standards for establishing use, and the same deadlines for filing evidence, as a professionally represented party: *Barton v Wright Hassell LLP* [2018] UKSC 12, [2018] 1 WLR 1119, [18]. Any allowance requested by a litigant-in-person, such as giving more time to collect or file evidence, should be dealt with by way of a case management application to the Hearing Officer.
15. Nevertheless, reluctantly, in light of the fact there is no objection from the Respondent, and because the explanation of the Appellant for why the Facebook post was not originally filed is reasonable, I am content to exercise my discretion in favour of admitting the additional evidence.

Standard of appeal

16. The standard of appeal is by way of review. Neither surprise at a Hearing Officer's conclusion nor a belief that the Hearing Officer has reached the wrong decision will suffice to justify interference in this sort of appeal. Before that is warranted, it is necessary for me to be satisfied that there was a distinct and material error of principle in the decision in question or that the Hearing Officer's findings were rationally insupportable. The principles to be applied were summarised by Joanna Smith J in *Axogen Corporation v Aviv Scientific Ltd* [2022] EWHC 95 (Ch), [24] and further explained in *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8, [49] and *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc* [2025] UKSC 25, [93] and [94].
17. When considering this appeal, and applying these principles, it is important to remember the high bar set.

Ground 1

18. There was no challenge to the principles applied by the Hearing Officer to assess genuine use: Decision, [11]-[13]. The first ground of appeal is dependent on whether I exercised my discretion to admit the additional evidence or not. As I have admitted that evidence, it seems to me there is now evidence of genuine use of the EASIRAIL mark in relation to grab rails. Accordingly, I allow the appeal in so far as it relates to "grab rails of metal" in Class 6.

Ground 2

19. The Hearing Officer found that there was "no evidence of ramps being made of non-metallic material" being sold under the EASIACCESS mark: Decision, [37].
20. The Appellant says this finding was contrary to the evidence. He points me to a photograph (Exhibit PP3, pg 2) which shows a social media post (dated "8 months ago") of the EASIACCESS stand at an Occupational Therapy Adaptation Conference in Wolverhampton. The mark is clearly visible on the stand's banner. The dating of the post relative to the date the evidence was filed suggests that the photograph represents use during both periods in respect of which non-use of this mark is alleged.
21. I was directed by the Appellant to look at the sample material which was placed in front of the middle part of the banner and to the middle photograph on the banner itself. The Appellant submits, and I accept, that the picture is of a ramp and that the sample material does not look like metal. I could not go further and accept his submission that the ramp was made of low density polyethylene as this was not in the evidence (and it is not possible for me to distinguish LDPE from other thermoplastics by sight alone). But it is clear that the material is not a metal and for the current purposes that is sufficient.
22. Accordingly, I also allow the appeal in relation to the EASIACCESS mark for "ramps being structures of non-metallic materials; non-metallic ramps" in Class 19.

Ground 3

23. The Hearing Officer found that there was "no evidence before me that the ramps/metal platforms are marked under the Easitread mark": Decision, [35].

24. The Appellant submits that there was evidence of use of the mark on metal ramps before the Hearing Officer. He pointed to invoices with entries such as “ET Platform Section 1200 x 1200” (Exhibit PP3 and PP4) His witness statement makes it clear that “ET” is an abbreviation used for “Easitread” (Paragraph 5). In conjunction with the explanation of the manufacturing process for Easitread, from the Screenshot of 14 July 2024, which includes the EASITREAD mark and refers to a metal platform being covered with further materials. This I think is sufficient evidence of genuine use of the EASITREAD trade mark in relation to platforms of metal and ramps of metal.
25. Accordingly, I also allow the appeal in relation to Class 6 for “Ramps being structures of metal; ramps of metal; metal ramps; Metal ramps [structures]; Platforms of metal”.

Correction

26. Finally, the Appellant states that the Hearing Officer’s decision refers to two of the marks covering “Doors (Installation of-)” as being in Class 27 (Decision, [28], [51] and Annex) when in fact the marks were registered in Class 37, Class 37 being the correct class for installation. In this respect the Appellant is clearly correct and the registrar should take this into account when giving effect to the Hearing Officer’s and my decision.

Conclusion

27. The Appellant has been entirely successful, but he specifically did not wish to seek costs and so I make no order as to costs. There was also no costs order below.
28. One final point, this case shows the difficulties that Hearing Officers face when determining a case purely on the papers. This becomes particularly acute in cases of non-use where there are a lot of exhibits. Had there been a hearing in this case it might have avoided any appeal on Grounds 2 and 3 because the Hearing Officer could have been directed to the evidence by the Appellant in the way that I was during the appeal hearing.

PHILLIP JOHNSON
13 September 2026