

IN THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER OF REGISTRATION NO. UK00003918109 IN THE NAME OF FESTUS EJIKE EZEH FOR THE FOLLOWING TRADE MARK

Greymate Care

IN CLASSES 44 AND 45

AND IN THE MATTER OF AN APPLICATION FOR A DECLARATION OF INVALIDITY THERETO UNDER NO. 506526 BY GREYMATE CARE LTD

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF S WILSON (O/0643/25) DATED 15 JULY 2025.

DECISION

Introduction

1. The trade mark Greymate Care ("**the contested mark**") is owned by Festus Ejike Ezeh ("**Respondent**"). The contested mark was filed on 1 June 2023 and registered on 8 September 2023. It stands registered for the services listed in the Annex to this decision.
2. On 18 September 2023, Greymate Care Ltd ("**Appellant**") applied to invalidate the contested mark pursuant to sections 47 and 5(4)(a) of the Trade Marks Act 1994 ("the Act"). The Appellant relies upon the sign Greymate Care, which it claims to have used in Aberdeen, Scotland since 20 January 2022 in relation to "social work activities without accommodation for the elderly and disabled", "providing non-medical in-home care services for individuals" and "companionship services for the elderly and disabled". The Appellant claims that use of the contested mark would be contrary to the law of passing off.
3. The Respondent filed a counterstatement, claiming to have been using the contested mark in the UK since 2018 and denying the grounds of invalidation. Both sides filed evidence. Neither party requested a hearing, and only the Respondent filed written submissions in lieu.
4. Ms S. Wilson for the Registrar dismissed the application for invalidity. On 22 July 2025 the Appellant filed a Notice to Appeal to the Appointed Person against the Decision under Section 76 of the Trade Marks Act 1994.

The Hearing Officer's decision

5. The Hearing Officer held as follows (in summary, and insofar as is relevant to this appeal):
 - a. On the evidence, the Respondent had engaged with UK-based customers under the Greymate Care brand from at least April 2018, which was therefore treated as the relevant date for assessing the claim.

- b. Although the Appellant began preparations to trade in early 2022, its first invoice was dated October 2022. It therefore had no goodwill as at the relevant date of 30 April 2018.
- c. Even if the relevant date had been the filing date of the contested mark (1 June 2023), the Appellant had traded for only a short period by that date. The Hearing Officer held that the Appellant's evidence was insufficient to establish substantial or significant goodwill for the purposes of section 5(4)(a).
- d. The application for invalidation therefore failed.

Grounds of Appeal

- 6. The Appellant's Grounds of Appeal are as follows:
 - a. **Ground 1:** The Hearing Officer misinterpreted the requirements of "use in the UK";
 - b. **Ground 2:** The Hearing Officer did not take into account that personal care in the UK is a regulated activity under the Health and Social Care Act 2008, requiring registration with the Care Quality Commission or Care Inspectorate (equivalent in Scotland);
 - c. **Ground 3:** The Hearing Officer should have held that the Respondent had failed to prove continuous and targeted commercial activity;
 - d. **Ground 4:** The Hearing Officer misapplied the passing off test.
- 7. The Respondent filed a Respondent's Notice. Both sides filed skeleton arguments and expanded upon their arguments at the hearing, and I set out below further details as are necessary to understand my overall conclusions.

Standard of review

- 8. The approach to be adopted in an appeal hearing has been laid down a number of times in case law, most recently in *Iconix Luxembourg Holdings SARL v. Dream Paris Europe Inc* [2025] UKSC 25 at §§94-95:

"94. It is perhaps obvious, and certainly an inevitable conclusion drawn from experience, that reasonable minds, and in particular reasonable judicially trained minds, each faithfully applying the relevant law and principles, will come to different conclusions about the answer to these multifactorial questions. While of course the decision of an appellate court trumps that of the court below, the law has imposed structured constraints designed to prevent a free for all in a higher court whenever a party (with the necessary resources) wishes to challenge the first instance decision of the trial judge. The reasons for these constraints are set out in a string of well-known authorities including, in the intellectual property context, *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, per Lewison LJ at para 114. The reasons there set out relevantly include the following:

- (i) The trial is not a dress rehearsal. It is the first and last night of the show.
- (ii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court.

(iii) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

95. In *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8; [2024] Bus LR 532 this court reviewed those constraints in a trade mark context. After citing from the *Fage* case this court in a joint judgment said, at paras 49- 50:

"49. That does not, however, mean the appeal court is powerless to intervene where the judge has fallen into error in arriving at an evaluative decision such as whether an activity was or was not targeted at a particular territory. It may be possible to establish that the judge was plainly wrong or that there has been a significant error of principle; but the circumstances in which an effective challenge may be mounted to an evaluative decision are not limited to such cases. Many of the important authorities in this area were reviewed by the Court of Appeal in *In re Sprintroom Ltd* [2019] 2 BCLC 617, paras 72–76. There, in a judgment to which all members of the court (McCombe, Leggatt and Rose LJ) contributed, the court concluded, at para 76, in terms with which we agree, that on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion.

50. On the other hand, it is equally clear that, for the decision to be 'wrong' under CPR r 52.21(3), it is not enough to show, without more, that the appellate court might have arrived at a different evaluation."

9. Further guidance was provided in *Axogen v Aviv* [2022] EWHC 95 (Ch) at §24-25:

"24. Although I was referred to numerous cases on the subject (including *English v Emery Demibold & Struck Ltd* [2002] 1 WLR 2409, *REEF Trade Mark* [2003] RPC 5, *Fine & Country Ltd v Okotoks Ltd* [2014] FSR 11, *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, *Shanks v Unilever Plc* [2014] RPC 29, *TT Education Ltd v Pie Corbett Consultancy* [2017] RPC 17, *Apple Inc v Arcadia Trading Limited* [2017] EWHC 440 (Ch), *Actavis Group PTC v ICOS Corporation* [2019] UKSC 1671 and *NINEPLUS O/039/21*), the approach of the appeal court to a statutory appeal under section 76(1) of the TMA is uncontroversial. I bear the following principles, relevant to the issues before me, firmly in mind:

- i) The appeal is by way of a review, not a rehearing (see *TT Education Ltd v Pie Corbett Consultancy Ltd* (O/017/17) at [52(i)]);
- ii) The appeal court will allow an appeal where the decision of the lower court was "wrong" (see CPR 52.11). Neither surprise at a Hearing Officer's conclusion, nor a belief that he or she has reached the wrong decision suffices to justify interference (*NINEPLUS O/039/21* at [14]);
- iii) The decision of the lower court will be "wrong" if the judge makes an error of law, which might involve asking the wrong question, failing to take account of relevant matters or taking into account irrelevant matters. Absent an error of law, the appellate court would be justified in concluding that the decision of the lower court

was wrong if the judge's conclusion was "outside the bounds within which reasonable disagreement is possible" (*Actavis Group* at [81]);

- iv) The approach required by the appeal court depends on a number of variables including the nature of the evaluation in question (*REEF Trade Mark* [2003] RPC per at [26]). There is a "spectrum of appropriate respect for the Registrar's determination depending on the nature of the decision" (*TT Education* at [52(ii)]), with decisions of primary fact at one end of the spectrum and multi-factorial decisions (of the type which the parties agree were made in this case by the Hearing Officer) being further along the spectrum.
 - v) In the case of a multifactorial assessment or evaluation, involving the weighing of different factors against each other, the appeal court should 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. Special caution is required before overturning such decisions (*TT Education* at [52(iv)], *REEF* at [28] and *Fine & Country* at [50]-[51]).
 - vi) An error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. The evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge's conclusion is outside the bounds within which reasonable disagreement is possible (*Actavis Group* at [80]).
 - vii) Another variable to be taken into account will be "the standing and experience of the fact-finding judge or tribunal" (*REEF* at [26], *Actavis Group* at [78]). Expert tribunals are charged with applying the law in the specialised fields and their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts (*Shanks* at [28] citing the warning given by Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49).
 - viii) The appellate court should not treat a judgment as containing an error of principle simply because of its belief that the judgment or decision could have been better expressed; "The duty to give reasons must not be turned into an intolerable burden" (see *REEF* at [29]). The reasons need not be elaborate. There is no duty on a judge, in giving her reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what she says shows the basis on which she has acted (*English* at [17], *Fage* at [115]). The issues the resolution of which were vital to the judge's conclusions should be identified and the manner in which she resolved them explained (*English* at [19]).
 - ix) In evaluating the evidence, the appellate court is entitled to assume, absent good reason to the contrary, that the first instance judge has taken all of the evidence into account (*TT Education* at [52(vi)])."
10. To the above should be added the judgment of the Court of Appeal in *Lidl Great Britain Ltd v. Tesco Stores Ltd* [2024] EWCA Civ 262, where Arnold LJ said at §110 "It is common ground that,

in so far as the appeals challenge findings of fact made by the judge, this Court is only entitled to intervene if those findings are rationally insupportable”.

11. I shall bear all the above in mind when reviewing the Decision.

Preliminary issue – the Grounds of Appeal

12. The Appellant’s Form TM55, in the section headed “Reasons for Appeal” and the accompanying continuation sheet, lists four separate grounds of appeal, which I set out at paragraph 6 above. The Appellant’s skeleton argument contains five separate grounds. Prior to the hearing, I sought to match up so far as possible the grounds in the skeleton argument to those in the Form TM55. Grounds 1 and 2 in the skeleton argument correspond to grounds 1 and 3 in the TM55. Grounds 3 and 5 in the skeleton argument correspond to ground 4 in the TM55. Ground 2 in the TM55 does not appear in the skeleton argument, but the Appellant confirmed at the outset of the hearing that it still pursues ground 2. Ground 4 in the skeleton argument – an allegation of inconsistent treatment of evidence by the Hearing Officer – is not foreshadowed at all in the TM55. As I explained to the Appellant at the hearing, it would be unfair on the Respondent to allow the Appellant to advance a case at the hearing that the Respondent had been unable to consider and respond to. Accordingly, I shall not consider that particular argument any further, but will confine myself to the grounds as set out in the Form TM55 and expanded in the Appellant’s skeleton argument.

Discussion

(1) The Hearing Officer misinterpreted the requirements of “use in the UK”

(3) The Hearing Officer should have held that the Respondent had failed to prove continuous and targeted commercial activity

13. I shall deal with these two grounds together as they raise overlapping issues. The Appellant has three main criticisms of the Hearing Officer’s finding that the relevant date is 30 April 2018 rather than the filing date of the contested mark. First, it contends that the Respondent’s evidence simply does not support its contention that its use of the contested mark began in April 2018. Secondly, the nature of the Respondent’s alleged use does not satisfy the legal requirements of “use” in passing off law. Thirdly, the Respondent’s evidence is not supported by any evidence of sustained or repeated business activity in the UK.
14. Dealing with the criticisms in turn, the Appellant contends that “The Decision incorrectly assumes that a single invoice dated April 2018 to a UK resident for services rendered exclusively in Nigeria constitutes use in the UK for the purposes of establishing an earlier relevant date”. However, that is not an accurate summary of the Hearing Officer’s findings. At §17 she said:

“In this regard, I note that the proprietor’s evidence is provided in the form of a witness statement from Ms Madubuko, who states that she is the beneficiary of the contested mark, which is held on trust for her by the proprietor. A trustee agreement is in evidence. This evidence does not appear to be challenged by the applicant, nor does the applicant appear to take issue with the proprietor’s ability to rely upon the evidence of Ms Madubuko”.

15. The Hearing Officer then reviewed the Respondent’s evidence at §20, before concluding at §21:

“The evidence as to the proprietor’s use prior to the filing date is certainly thin. However, it appears to me from this (unchallenged) narrative evidence that there were business

activities ongoing under the Greymate Care brand in the UK from 2018. Ms Madubuko explains that UK-based customers were engaging with the Greymate Care brand, albeit the care services were actually being provided in Nigeria. My understanding from Ms Madubuko's explanation is that care services were not provided in the UK until sometime later (with plans having been delayed by the pandemic). This is what Ms Madubuko means when she says that Greymate Care was not "formally operational" in the UK i.e. she had not yet established a UK-based company and commenced the provision of care services in the UK. However, she was approaching and promoting her services to UK-based customers at that time".

16. Consequently, whereas the invoice may be the only piece of corroborating evidence filed by the Respondent, it is not the only evidence of use relied upon by the Hearing Officer, as she also took into account the Respondent's witness evidence. The difficulty for the Appellant is the principle set forth at §10 above – a finding of fact is challengeable on appeal only if it is "rationally insupportable". The Hearing Officer rightly recognised that the Respondent's evidence was thin, but in my view the evidence was sufficient to support the finding she made.
17. Secondly, the Appellant contends that "mere sales to UK-based individuals abroad or promotional contact with UK residents do not amount to "use in the UK" where the service is performed outside the jurisdiction". I do not agree. In the case of *Hotel Cipriani SRL & Ors v Cipriani (Grosvenor Street) Ltd* [2010] EWCA Civ 110, Jacob LJ said at §118:

"I would hold that the First Claimant did have goodwill here on the basis that, in April 2004 (the relevant moment for passing-off) it had a substantial reputation in England and a substantial body of customers from England, in part as a result of significant marketing efforts directed at the relevant public here, and a significant volume of business was placed directly from this country, either by individual clients by telephone or the like, or via travel agents or tour operators. On that basis it seems to me clear that the international reputation of Hotel Cipriani, and the use of the mark Cipriani, was something that brought in business from England – it was an attractive force that brought in English custom - and accordingly the business had goodwill in England at the relevant time".
18. *Hotel Cipriani* was considered and approved by the Supreme Court in *Starbucks UK Ltd & Anor v British Sky Broadcasting Group PLC & Ors* [2015] UKSC 31, and therefore remains good law.
19. The circumstances of the Respondent's activities in this case are very similar to those in *Hotel Cipriani*: UK-based customers placing orders for services to be provided abroad. *Hotel Cipriani* was concerned with generation of goodwill rather than mere "use in the UK", but in my view if a use is capable of generating actionable UK goodwill, it will certainly satisfy the requirements of "use in the UK" for establishing the date of first use.
20. Thirdly, the Appellant contends that the Respondent's evidence is not supported by any evidence of sustained or repeated business activity in the UK, which does not meet the requirement for actionable use capable of defeating a claim in passing off. It relies on the decision of Thomas Mitcheson QC (as he then was) sitting as the Appointed Person in *Smart Planet Technologies, Inc. v Rajinda Sharma* BL O/304/20, in which Mr Mitcheson held that substantial or significant goodwill, rather than a nominal or one-off activity is required to generate sufficient goodwill to support a passing off claim.

21. However, the Appellant is conflating the issue of establishing sufficient goodwill to found a passing off claim with that of proving date of first use. The Hearing Officer had this distinction well in mind – at §18 she said:

“In its written submissions, the proprietor claims to have built up goodwill in the UK prior to the applicant. In this regard, I am reminded of the words of Mr Thomas Mitcheson KC, sitting as the Appointed Person in CASABLANCA Trade Mark, in which he stated:

“35. I think it is clear from the remainder of §165 of the judgment of Kitchin LJ that generation of goodwill by the applicant is not required. This is because he goes on to explain that it is the opponent who must show that he had the necessary goodwill and reputation to render that use actionable on the date that it (i.e. the applicant’s use) began.

36. [...]

37. Accordingly, the relevance of the activities of the applicant is limited to establishment of the date that the actionable use began. Once that date is established, the only question of goodwill arises in respect of the opponent’s activities. As the Applicant in the present case pointed out, self-evidently it would only be in very exceptional circumstances that a party would have established goodwill at the point in time at which it commenced the use complained of. The establishment of goodwill would take much longer. But the authorities recognise that it is the date that the activity commenced which is the crucial one, and so in my judgment it cannot be necessary for goodwill to have been accrued at that time.” (Hearing Officer’s emphasis)”

22. The Hearing Officer was not required to, and did not, make any finding of goodwill owned by the Respondent in 2018. Rather, she was simply required to identify the date of first use by the Respondent. As I said above, her finding that it was in April 2018 is rationally supportable, and cannot therefore be challenged in this appeal.
23. Finally, during the hearing the Appellant contended that the trust relied upon by the Respondent should, by law, have been registered. This argument was not set out in the Form TM55 (or indeed in the Appellant’s skeleton argument), and so far as I can ascertain was not raised before the Hearing Officer. I therefore do not take it into consideration in this appeal.
24. I dismiss the first and third grounds of appeal.

(2) The Hearing Officer did not take into account that personal care in the UK is a regulated activity under the Health and Social Care Act 2008

25. The Appellant contends that “The decision does not take into account that personal care in the UK is a regulated activity under the Health and Social Care Act 2008, requiring registration with the Care Quality Commission or Care Inspectorate (equivalent in Scotland). The Respondent has no such registration, in 2018 prior to the trade mark registration and till date. Any claim of offering regulated care services in the UK, formally or informally, would be unlawful. Therefore, the use cited in April 2018 would not only be insufficient, but also legally inadmissible as it implies a service not permitted without license”.
26. I can deal with this ground shortly. As above, the Appellant is conflating the issue of goodwill with that of first use. The circumstances in which a party may be denied protection under

passing off law are reviewed in Wadlow on the Law of Passing Off at 9-45, where Professor Wadlow states “The claimant in an action for passing-off or injurious falsehood cannot claim the protection of a court of justice for whatever is illegal, fraudulent or deceptive”. However, the same principle does not apply to assessment of the date of first use. A first use by a defendant (or in this case, the Respondent) which may have been illegal will still constitute the relevant date for the purposes of assessing the claimant’s (or in this case, the Appellant’s) goodwill.

27. The fact that the Respondent may not have fulfilled its registration requirements is therefore not a relevant factor, and I dismiss the second ground of appeal.

(4) The Hearing Officer misapplied the passing off test

28. At §§29-34, the Hearing Officer considered what the position would have been had the relevant date been the filing date of the contested mark, i.e. 1 June 2023. She said:

“29. However, even if I am wrong in my finding that there is an earlier relevant date, I would still have found that in favour of the proprietor. This is because, in my view, the applicant’s evidence is insufficient to demonstrate the requisite goodwill. Dr Onochie explains that from 20 January 2022 to 14 August 2022, the applicant was going through “pre-licensing transactions and correspondence”. This appears to be a reference to activities such as setting up bank accounts, domain registrations and taking out business insurance. In other words, the applicant was undertaking the preparations required to commence trading.

30. However, to establish goodwill it is necessary to demonstrate trade. The earliest invoice evidence which shows actual trade is dated 5 October 2022. Dr Onochie gives the following turnover figures:

2022/2023 £121,600

2023/2024 £426,233

31. Bearing in mind that trade cannot have commenced prior to 14 August 2022, which is the date Dr Onochie gives for the finalisation of pre-trade activities, trading must have started somewhere between that date and the first invoice (being 5 October 2022). At best, therefore, the applicant had been trading for 10 months at the prima facie relevant date; at worst, it had been trading for 8 months. Trade had not, therefore, been particularly long-standing.

32. I have no way of knowing what dates the above turnover figures relate to; this is important because the prima facie relevant date falls halfway through 2023. It is not clear to me, therefore, whether all of the turnover identified as being for the year 2022/2023 relates to the period prior to the relevant date, or whether some of it relates to activities undertaken afterwards. The same is also true of the 2023/2024 figures, although plainly much of this (if not all of it) will relate to the period after the relevant date.

33. [...]

34. It is also important to bear in mind that the burden of proving a protectable goodwill is on the applicant. In my view, taking the evidence as a whole into account, it is insufficient to demonstrate that a protectable goodwill had been established by the prima facie relevant date”.

29. The Appellant contends that the Hearing Officer erred in “not analysing what portion of the Appellant’s turnover fell before 1 June 2023, despite clear invoice dates”. I believe there is some force in this criticism. Whereas the Hearing Officer was correct to note that the burden of proof lay with the Appellant, the Appellant did file sufficient evidence to enable the Hearing Officer to analyse the dates to which the claimed turnover relates to. If grounds 1-3 had succeeded, I would have remitted this matter back to the Hearing Officer for reconsideration of the Appellant’s goodwill as at 1 June 2023. However, given that the Hearing Officer’s finding that the relevant date is April 2018 has not been overturned, there is no utility in doing so.
30. Finally, the Appellant contends that “The decision also did not take into account the existence of a cease-and-desist letter from the Respondent to the Appellant with a demand to transfer ownership of all existing UK holdings and materials to the Respondent which supports the passing off element of a misrepresentation leading to a likelihood of deception and potential damage resulting from the misrepresentation”.
31. The letter in question was apparently sent by the Respondent to the Appellant three days after registering the contested mark. The Appellant argues that the contents of the letter undermine the submissions filed by the Respondent to the Hearing Officer, in which it argued that there is no misrepresentation and no likelihood of damage to goodwill. However, even if that contention is correct, it would be material only if the relevant date was 1 June 2023, rather than April 2018.
32. I dismiss this fourth ground of appeal.

Conclusion

33. The Appellant’s appeal is dismissed, and the Hearing Officer’s Decision accordingly stands. The contested mark shall therefore remain registered.

Costs

34. The Respondent has been successful and entitled to a contribution towards his costs. As the Respondent is unrepresented, a costs proforma was filed on 15 October 2025. The Respondent has claimed as follows:

Considering forms filed by the other party	6 hours
Preparation of Respondent’s Notice	15 hours
Preparation of written submissions	20 hours
Preparation for hearing	7 hours
Attendance at hearing	3 hours
TOTAL	51 hours

35. In my view, whereas the time claimed for considering forms and preparation for the hearing is reasonable, the others are too high. I consider that 10 hours for each of preparation of the Respondent’s Notice and preparation of written submissions is reasonable. The hearing itself only took around an hour. I award the Respondent £646, comprising 34 hours at the hourly rate of £19 as set out in The Litigants in Person (Costs and Expenses) Act 1975 (as amended).
36. The Hearing Officer’s costs order still stands, and the Appellant must pay the Respondent the sum of £1,453.50 by 5 November 2025.

Dr. Brian Whitehead

15 October 2025

Representation

Dr Miriam Onochie, Director of the Appellant, in person

Ms Chika Madubuko for the Respondent

ANNEX

The contested mark stands registered for the following services:

Class 44

Nursing care; Health care; Palliative care; Nursing care services; Home-visit nursing care; Medical care; Home health care services; Advice relating to the personal welfare of elderly people [health]; Medical clinic day care services for sick children; Provision of nursing care; Nursing care (Provision of -); Managed health care services; Advice relating to the medical needs of elderly people; Health care services for treating Alzheimer's disease; Medical care services; Services for the care of the skin; Respite care services in the nature of home nursing aid; Provision of health care services; Postnatal care services; Psychological care; Provision of health care services in domestic homes; Medical care of feet; Respite care services in the nature of nursing aid services; Health care in the nature of health maintenance organizations; Respite care (provision of); Health care relating to homeopathy; Health care relating to therapeutic massage; Advisory services relating to health care; Geriatric nursing; Consulting services relating to health care; Providing long-term care facilities; Providing information relating to nursing care services; Health care services offered through a network of health care providers on a contract basis.

Class 45

Foster care; Companionship services for the elderly and disabled; Providing patient advocate services to hospital patients and patients in long term care facilities; Providing non-medical in-home care services for individuals; Fraud detection services in the field of health care insurance.