



Neutral Citation Number: [2022] EWCA Civ 825

Case No: CA-2021-000669

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE UPPER TRIBUNAL**  
**(TAX AND CHANCERY CHAMBER)**  
**[2021] UKUT 0067 (TCC)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21 June 2022

**Before:**

**LORD JUSTICE NEWEY**  
**LADY JUSTICE ASPLIN**  
and  
**LADY JUSTICE WHIPPLE**

-----  
**Between:**

<b>BUILD-A-BEAR WORKSHOP UK HOLDINGS LIMITED</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS</b>	<b><u>Respondents</u></b>

-----  
**Laurent Sykes QC** (instructed by **Addleshaw Goddard LLP**) for the **Appellant**  
**Owain Thomas QC** and **Paul Reynolds** (instructed by **the Solicitor for HMRC**) for the  
**Respondents**

Hearing date: 11 May 2022  
-----

**Approved Judgment**

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand down is deemed to be 10.00 AM on Tuesday 21st June 2022.

## LADY JUSTICE WHIPPLE:

### Introduction

1. This appeal raises an issue about the classification for customs duty purposes of accessories imported for use with stuffed toys in both human and animal form that are sold by the Appellant, Build-A-Bear or “BAB”. Before the First Tier Tribunal (“FTT”) and Upper Tribunal (“UT”) a number of different types of accessories were in issue, but before us the dispute has narrowed to three sorts of accessories: clothes, wigs and shoes (the “items”). BAB argues that the items should be classified as accessories of dolls, in which event they would benefit from a nil rate of customs duty. HMRC say that these items are to be classified as accessories of stuffed toys, in which event they are subject to customs duty at 4.7%. The FTT and UT agreed with HMRC and dismissed the Appellant’s appeal in relation to these items. The FTT neutral citation number is [2019] UKFTT 707 (TC). The UT neutral citation number is [2021] UKUT 0067 (TCC).
2. The Appellant originally advanced four grounds of appeal to this Court. Nugee LJ granted permission to appeal limited to the Appellant’s third ground, which relates to the meaning and application of Note 3 to Chapter 95 of the Combined Nomenclature as it applied in the context of clothes and wigs. Note 3 provides so far as is relevant as follows:

“...parts and accessories which are suitable for use solely or principally with articles of this chapter are to be classified with those articles.”
3. Permission to appeal was refused on the first two grounds. It is important to be clear, therefore, about what is *not* within the scope of this appeal. By the first ground, the Appellant had wished to challenge the UT’s conclusion that Note 3 is capable of identifying one article only as being the article with which it is solely or principally suitable for use and falls to be classified (this came to be known as the “one answer” ground); by the second ground, the Appellant had wished to challenge the UT’s dismissal of the Appellant’s appeal from the FTT’s finding that the items were suitable principally for use with animal toys as opposed to dolls (this came to be known as the “suitability ground”). The refusal of permission for these two grounds means that it is settled that Note 3 is only capable of identifying one article as being the article with which the part or accessory is used; and that in meeting that Note 3 test, the items are suitable principally for use with animal toys, not dolls.
4. Nugee LJ adjourned the question of permission on ground 4 to this Court. Ground 4 related to the position for footwear, as distinct from clothes or wigs (and came to be known as the “footwear ground”).
5. The Respondents have lodged a Respondents’ Notice in which they seek to uphold the UT’s decision on further or alternative grounds.
6. BAB was represented in this Court as below by Laurent Sykes QC. HMRC were represented here as below by Owain Thomas QC and Paul Reynolds (Mr Reynolds became involved when the case was before the UT). I have been greatly assisted by their written and oral submissions.

## Background Facts

7. The background facts are set out by the UT at paragraphs 5 to 8, where the UT in turn cited passages from the FTT. I reproduce those paragraphs, adopting the UT's definitions:

“5. The FTT described BAB's business in paragraph [8] of the FTT Decision as follows:

“BAB offers an experience whereby, at BAB's “workshops” or online, customers can choose a “skin” to create their own stuffed toy or doll in the form of an animal, including bears, or a human (“BAB stuffed animals” and “BAB stuffed dolls and together “BAB stuffed toys”). At the workshop children participate in stuffing the skin, with the assistance from a store associate, before it is stitched into the finished BAB stuffed toy by a store associate. As set out below, a textile heart is always inserted into the skin before it is finally stitched together to form the finished product. BAB also sell a range of other toys and dolls as set out below. The items are included within the extensive range of clothing and other “accessories” which BAB also sells which can be used with BAB stuffed toys and other toys BAB sells. Customers can purchase the items separately without the need to purchase a toy.”

6. The Build-A-Bear group's business was traditionally focussed on toys in the form of animals, including bears. In 2009, the Build-A-Bear group introduced a “Sweetheart” range of stuffed dolls in human form, branded as “Honey” and “Daisy”. These are rounded in size and shape and were originally sold in the United States, but sales in the United Kingdom began in 2012. From sometime in 2015 onwards, BAB has also sold (under license) a range of four “Lalaloopsy” dolls in a human form.

7. The Accessories in dispute are all sold and used with both stuffed bears (the “**BAB Bears**”), and with the Sweetheart and Lalaloopsy dolls (the “**BAB Dolls**”).

8. In order to accommodate the particular (non-human) features of the BAB Bears, clothes sold by BAB feature slits (relevant to this appeal are the slits which are formed in the unsealed sections of the seam of clothing items such as trousers and shorts) which allow the tail of the bear to be pulled through them, thus permitting the clothing to fit properly. Similarly, wigs sold by BAB for dressing up a BAB Bear as a special character feature two small loop-holes of around 10cms, which allow the protruding ears of a bear to be pulled through so that the wig sits better on the bear's head. Various different types of footwear are produced by BAB, including football boots,

walking shoes, slippers and sandals. These all have a rounded appearance and generally feature BAB’s paw print logo on the tread of the sole.”

8. In addition to clothes, wigs and shoes, the UT noted that the range of accessories also included textile and plastic hearts which are inserted into the BAB Bears and BAB Dolls (“hearts”). These are of some significance in the debate about the meaning and scope of Note 3 although they are not directly subject to this appeal.
9. The customs duty in issue was notified by HMRC to the Appellant in two C18 post-clearance demands dated 18 October 2012 and 22 July 2013 in relation to items imported prior to those dates. The imports in question were all subject to the EU wide system known as the Community Customs Code to which the UK was a party at that time. The amount at stake in the current appeal, as it has narrowed to the items still in issue, is approximately £660,000. The determination of the issues raised on this appeal will have consequences in relation to subsequent imports meaning that a greater amount of customs duty is in reality at issue.

## **Legal Framework**

### *The Customs Community Code*

10. The classification for customs duty purposes of goods imported from outside the European Union is based on the Combined Nomenclature adopted under Article 1 of Regulation 1658/1987 (the “Tariff Regulation”). The Combined Nomenclature (or “CN”) is derived from the World Customs Organisation’s harmonised system of commodity nomenclature as laid down by the International Convention on the Harmonized Commodity Description and Coding System 1983 to which the EU is a party.
11. The legal framework was described by Lawrence Collins J in *Vtech Electronics (UK) plc v Commissioners for Customs and Excise* [2003] EWHC Ch 59 at [6]-[12], in a passage later cited with approval by this Court in *Invamed Group Ltd v Revenue and Customs Commissioners* [2020] EWCA Civ 243. I adopt the same abbreviations and definitions:

“6. The Common Customs Tariff came into existence in 1968. By Article 28 of the revised EC Treaty Common Customs Tariff duties are fixed by the Council acting on a qualified majority on a proposal from the Commission.

7. The level of customs duties on goods imported from outside the EC is determined at Community level on the basis of the Combined Nomenclature (“CN”) established by art 1 of Council Regulation 2658/1987. The CN is established on the basis of the World Customs Organisation’s Harmonised System laid down in the International Convention on the Harmonised Commodity Description and Coding System 1983 to which the Community is a party.

8. Article 3(1)(a)(ii) of the International Convention provides that, subject to certain exceptions, each contracting party undertakes “to apply the General Rules for the interpretation of the Harmonised System and all the Section, Chapter and Subheading Notes and shall not modify the scope of the Section, Chapters or subheading of the Harmonised System”. The International Convention is kept up to date by the Harmonised System Committee, which is composed of representatives of the contracting states.

9. The CN, originally in Annex 1 to Regulation 2658/87, is re-issued annually... The CN comprises: (a) the nomenclature of the harmonized system provided for by the International Convention; (b) Community subdivisions to that nomenclature (“CN subheadings”); (c) preliminary provisions additional section or chapter notes and footnotes relating to CN subheadings.

10. The CN uses an eight-digit numerical system to identify a product, the first six digits of which are those of the harmonised system, and the two extra digits identify the CN sub-headings of which there are about 10,000. Where there is no Community sub-heading these two digits are “00” and there are also ninth and tenth digits which identify the Community (TARIC) subheadings of which there are about 18,000.

11. There are Explanatory Notes to the Nomenclature of the Customs Co-operation Council, otherwise known as Explanatory Notes to the Harmonised System (“HSENS”). The Community has also adopted Explanatory Notes to the CN (pursuant to Article 9(1)(a) of the Council Regulation 2658/87, known as “CNENS”).

12. Binding Tariff Information is issued by the customs authorities of the Member States pursuant to art 12 of the Common Customs Code (Council Reg 2913/92/EEC) on request from a trader. They are called BTIs, and such information is binding on the authorities in respect of the tariff classification of goods...”

### *General Rules of Interpretation*

12. Section 1 of Part 1 of the Annex to the Tariff Regulation contains general rules for the interpretation of the CN. These are known as “GIRs”. It is only GIR 1, 3 and 6 which are in issue in this case. They provide as follows:

“1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and provided

such headings or notes do not otherwise require, according to the following provisions.

2. ...

3. When, by application of rule 2(b) or any other reason, goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows:

(a) the heading which provides the most specific description preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods;

(b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable;

(c) when goods cannot be classified by reference to 3(a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4. ...

5....

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section and chapter notes also apply, unless the context requires otherwise.”

13. The GIRs are supplemented by HSEs. GIR 3 is accompanied by this HSEN:

“(I) This rule provides three methods of classifying goods which, *prima facie*, fall under two or more headings, either under the terms of Rule 2(b) or for any other reason. These methods operate in the order in which they are set out in the Rule. Thus Rule 3(b) operates only if Rule 3(a) fails in classification, and if both Rules 3(a) and (b) fail, Rule 3(c) will apply. The order of priority is therefore (a) specific

description; (b) essential character; (c) heading which occurs last in numerical order.”

14. GIR 6 is accompanied by this HSEN:

“(II) For the purposes of Rule 6, the following expressions have the meanings hereby assigned to them:

...

“(b) “unless the context otherwise requires”: except where Section or Chapter Notes are incompatible with subheading texts or Subheading Notes.

This occurs, for example, in Chapter 71 where the scope assigned to the term “platinum” in Chapter Note 4(B) differs from that assigned to “platinum” in Subheading Note 2. For the purpose of interpreting subheadings 7110.11 and 7110.19, therefore, Subheading Note 2 applies and Chapter Note 4(B) is to be disregarded.”

#### *General Principles in Case Law*

15. There is extensive case law from the Court of Justice and domestic courts on the approach to the classification of goods under the CN. The general principles are not in dispute and I gratefully adopt the UT’s summary of them:

“16. For present purposes, suffice to say that:

- (1) The GIRs provide a set of rules for interpretation of the CN in order to ensure that all products are classified under the correct code and (unlike the HSEs and CNENs) all have “the force of law” (*Vtech* [16]).
- (2) It is common ground that, in the interests of legal certainty and ease of verification, the decisive criteria for the tariff classification of goods must be sought in their objective characteristics and properties as defined by the wording of the relevant heading of the CN and of the notes to the sections or chapters of the CN (*Holz Geenen GmbH v Oberfinanzdirektion Munchen* (Case C-309/98) at [14]).
- (3) The intended use of the goods may be considered as part of the classification analysis where that use is inherent to the goods and that inherent character is capable of being assessed by reference to the objective characteristics and properties of the goods (see *Hauptzollamt Hamburg-St. Annen v Thyssen Haniel Logistic GmbH* (Case C-459/93) (“*Thyssen Haniel*”) at [13]).
- (4) Having regard to the objective characteristics and properties of the goods, a combined examination of the

wording of the headings and the explanatory notes to the relevant sections and chapters should be undertaken to determine whether a definitive classification can be reached, in accordance with GIR 1 and GIR 6. If not, then in order to resolve the conflict between the competing provisions, recourse must be had to GIRs 2-5 (see the opinion of Advocate General Kokott in *Uroplasty v Inspector van de Belastingdienst* (Case C-514/04) (“*Uroplasty*”) at [42].

- (5) GIR 3 will apply only when it is apparent that goods are prima facie classifiable under a number of headings (see *Kip Europe SA & Ors and Hewlett Packard International SARL v Administration de douanes* (Cases C-362/07-C363/07) (“*Kip Europe*”) at [39] and the wording of GIR 3 itself).
  - (6) Classification must proceed on a strictly hierarchical basis, taking each level of the CN in turn. The wording of headings and subheadings can be compared only with the wording of headings and subheadings at the same level (see the opinion of Advocate General Kokott, *Uroplasty* [43]).
  - (7) The HSEs and the CNEs are an important aid to the interpretation of the scope of the various tariff headings but do not themselves have legally binding force. The content of the HSEs and the CNEs must therefore be compatible with the provisions of the CN, and cannot alter the meaning of those provisions (see *Revenue and Customs Commissioners v Honeywell Analytics Limited* [2018] EWCA Civ 579 per Davis LJ (“*Honeywell Analytics*”) at [95] and *Invamed* per Patten LJ at [12]).”
16. We were taken to a recent decision of the CJEU, Case C-760/19 *JCM Europe (UK) Ltd v Revenue and Customs Commissioners* [2021] 4 WLR 44 where at [32] the Court emphasised the point made at (2) above.

### **The Combined Nomenclature**

17. The accessories which are the subject of this appeal fall to be classified within Chapter 95 of Section XX of the CN which is titled “Toys, Games and Sports Requisites, Parts and Accessories thereof”. The Chapter is in the following form so far as is relevant:



CN Code	Description	Conventional Rate of Duty (%)
<b>9503 00</b>	<b>Tricycles, scooters, pedal cars and similar wheeled toys; dolls' carriages; dolls; other toys; reduced-size (scale) models and similar recreational models, working or not; puzzles of all kinds:</b>	
9503 00 10	- Tricycles, scooters, pedal cars and similar wheeled toys; dolls' carriages.....	Free
	- Dolls representing only human beings and parts and accessories thereof:	
9503 00 21	- - Dolls.....	4,7
9503 00 29	- - Parts and accessories .....	Free
...	...	
	- Toys representing animals or non-human creatures:	
9503 00 41	- - Stuffed.....	4,7
9503 00 49	- - Other.....	Free

18. The dispute in this case centres on two subheadings: first, the subheading for “Dolls representing only human beings and parts and accessories thereof”, which I shall refer to as the “Dolls Subheading”; and secondly the subheading for “Toys representing animals or non-human creatures” which I shall refer to as the “Toys Subheading”. These are both “one dash” subheadings, which sit beneath the bold (“nil dash”) heading numbered 9503 00.
  
19. The Chapter includes certain notes. Note 1 contains a series of exclusions, none of which are relevant to this case. The important note for current purposes is Note 3 to which I have already referred, and given its central importance in this appeal, I set it out again here:
 

“3. Subject to note 1 above, parts and accessories which are suitable for use solely or principally with articles of this chapter are to be classified with those articles”.
  
20. The HSEs for Chapter 95, Heading 9503, provide as follows, so far as relevant:
 

“Each of the headings of this Chapter also covers identifiable parts and accessories of articles of this Chapter which are suitable for use solely or principally therewith, and provided they are not articles excluded by Note 1 to this Chapter”.

...

“Parts and accessories of dolls of this heading include: heads, bodies, limbs. Eyes (other than those unmounted of glass, of heading 70.18), moving mechanisms for eyes, voice-producing or other mechanisms, wigs, dolls’ clothing, shoes and hats”.
  
21. Under the heading “Parts and Accessories”, the HSEs for Heading 9503 provide that:

“This heading also covers identifiable parts and accessories of the articles of this heading, which are suitable for use solely or principally therewith and provided they are not articles excluded by Note 1 to this Chapter.”

22. The CNENs for Chapter 95 cross refer to the HSEs for Chapter 95 and contain other guidance not of direct relevance to this appeal.

### **The FTT’s Decision**

23. In a clear and detailed decision, the FTT (Judge Harriet Morgan) addressed the many categories of items which were in dispute at that stage. So far as clothing and wigs were concerned, the FTT found at [187] that:

“whilst the clothing items can plainly be used on any toy or doll of an appropriate size, the fact is that they are, according to their objective design characteristics, suitable principally for use with stuffed toys.”

24. The FTT made similar findings in respect of shoes, finding at [203(1)] that:

“The size and rounded shape of the footwear, as designed specifically to fit BAB’s stuffed bears, clearly indicates that the footwear is suitable for use principally, in the sense of for the most part or chiefly, with stuffed bears.”

25. The FTT applied Note 3 (the interpretation and application of which is the subject of this appeal) to conclude that the clothing, wigs and shoes fell within the Toys Subheading, and not the Dolls Subheading. The FTT dismissed the Appellant’s appeal in relation to these items, see [170].

26. It is worth recording the FTT’s conclusions on the scope and effect of Note 3. The FTT held that Note 3 applies to Chapter 95 generally with no exclusions, and that:

“177. ... it is likely that [Note 3] is intended to apply to the reference to “parts and accessories thereof” in the Dolls Subheading. If that was not the intention the wording of note 3 could have been modified accordingly. Moreover, it would be very odd if “parts and accessories” are to be classified with articles in headings in chapter 95 (a) which do not specifically mention “parts and accessories” only if they are suitable for use solely or principally with those articles but (b) which specifically mention “parts and accessories” by reference to some lesser test. I also think it likely that, in any event, the terms “parts and accessories *thereof*” in the [Dolls Subheading] is to be interpreted as meaning that an item must be mainly or principally intended for or suitable for use with human dolls for it to be an accessory of such a doll.”

27. It followed that if an item cannot be identified as an “accessory” in the sense of being suitable for use solely or principally with articles within a particular heading or subheading of Chapter 95, then it is to be classified as an item in its own right

elsewhere in the CN; that would be the case for an item which was equally suitable for use in BAB Dolls and BAB Bears ([178] and [188(a) and (b)]).

### The UT's decision

28. In a similarly clear and detailed decision, the UT (Joanna Smith J and UTJ Ashley Greenbank) identified three main questions in relation to clothes and wigs (see [65]): (i) at what stage does Note 3 apply? (ii) What is the true interpretation of Note 3 (including the true interpretation of the words “suitable” and “principally”)? And (iii) what is the effect of Note 3 on the Dolls Subheading?
29. In relation to (i), the UT rejected BAB's submissions that Note 3 applied *only* to determine whether the parts and accessories in issue came within Chapter 95 and not beyond that to classify them. Rather, the UT held that by operation of GIR 1 and 6, Note 3 applied to provide a definitive classification of the relevant part or accessory alongside articles in respect of which it was solely or principally suitable for use ([71]-[72]).
30. As to (ii), the UT upheld the FTT's decision that ‘suitable’ and ‘principally’ were words of ordinary use, and that an accessory can only be suitable for use principally with one article or subheading for the purposes of Note 3 ([81]-[82]). The FTT had held that the clothing and wigs were principally suitable for use with stuffed toys (FTT Decision at [90], [93] and [94]). This provided the “one answer” which was required by Note 3.
31. As to (iii), the UT rejected HMRC's argument that Note 3 should be read into the Dolls Subheading to narrow the meaning of parts and accessories in that subheading to parts and accessories solely or principally used with dolls. It said:

“105. We are not convinced by HMRC's submissions on this issue. GIR 1 and GIR 6 require classification to be undertaken by reference to the terms of the headings and subheadings and the relative section notes and chapter notes, unless the context otherwise requires. That must mean that classification is to be undertaken by reference to the wording of the headings and subheadings. For this reason, we do not find attractive an interpretation which requires us to ignore the wording of the Dolls Subheading (or to regard it as being of no significance) as HMRC invite us to do. We start from the premise that, when engaging in an exercise of classification for the purpose of the CN, we must seek to give effect to the wording of the Dolls Subheading, which, in simply referring to “parts and accessories” without more, is different from Note 3.”
32. The UT held that the clothing and wigs fell within Chapter 95 without need of or reference to Note 3, because they were parts and accessories suitable for use with articles within the heading, having regard to the HSEs which support that analysis. That meant that they would remain within that heading even if, for example, they were suitable for use *equally* with both dolls and stuffed toys. This led to a rejection of HMRC's submission that parts and accessories equally suitable for use with two types of articles listed in the heading would necessarily fall outside the chapter altogether because they would not meet the terms of Note 3 (see [108]). The UT

disagreed with HMRC's argument that it is necessary to read Note 3 into each heading and subheading within Chapter 95 and held that the FTT had erred in law at [177] of its decision (UT at [112]). The UT was "inclined to accept" that the specific reference to parts and accessories in the Dolls Subheading must import a different test to that in Note 3 and that in this context it may be appropriate to have regard to a (as opposed to the) main intended use of an item, noting the judgment of Davis LJ in *Honeywell Analytics* ([119]). However, if there was to be a competition between the Dolls Subheading and the Toys Subheading, Note 3 took precedence and determined the items were to be classified within the Toys Subheading; this was not a case where the suitability for use was finely balanced between the two headings in which case the tie-breaker provisions of GIR 3 might be resorted to, instead the FTT had found that the clothes and wigs were suitable for use principally with the BAB Bears ([123]), and that met the terms of Note 3 ([124]); GIR 3 had no application ([126]). On this analysis, the reference to "parts and accessories" in the Dolls Subheading was not redundant because there were circumstances where dual use items would not fall within the Toys Subheading by application of Note 3 ([125] and [127]). In consequence, the FTT's conclusion stood undisturbed even though the UT held that it had erred in its analysis.

33. So far as footwear was concerned, the UT relied on the FTT's findings that the shoes were suitable for use principally with BAB Bears. The UT's analysis of footwear followed that for clothing and wigs to the same conclusion, that footwear fell to be classified under the Toys Subheading ([137] and [139]).
34. So far as hearts were concerned, the UT overturned the FTT's conclusion, which was that hearts fell to be classified outside Chapter 95 altogether as HMRC had argued. Instead, the UT held that the hearts were suitable for use solely or principally as an accessory of articles which fall within Chapter 95 (namely BAB Dolls and BAB Bears) and that at the heading level, it was sufficient that BAB Dolls and BAB Bears are within the same heading ([154]). Hearts were, on the FTT's findings, equally suitable for use in BAB Dolls and BAB Bears, and therefore Note 3 did not provide a definitive classification; instead, the classification followed the objective characteristics of the hearts and the terms of GIRs 1 and 6 ([157]). The better view was that hearts could not be classified in the Toys Subheading because they are not suitable for use *principally* with stuffed toys which comes under that subheading. Instead, they were classified under the Dolls Subheading as parts and accessories of BAB Dolls ([161]); alternatively, the tie-breaker in GIR 3 would suggest the Dolls Subheading as the more specific heading ([162]-[164]).

### **Submissions of the Parties**

#### *BAB's submissions*

35. BAB lodged a skeleton seeking permission which attached draft grounds, only one of which was given permission (ground 3). It then served a revised skeleton argument and in due course a supplementary skeleton argument, both focussing on that ground and answering HMRC's Respondents' Notice.
36. BAB's case is that there is a conflict or tension between the Dolls Subheading and Note 3. BAB argues that the two provisions are doing different things. The Dolls Subheading refers to parts and accessories whereas Note 3 refers to parts or

accessories suitable for sole or principal use. Hearts illustrate the difference between the two concepts: hearts are equally used in BAB Dolls and BAB Bears, and they come within the Dolls Subheading as parts and accessories, although they do not meet the Note 3 test and even though they can be used in non-doll toys such as BAB Bears. HMRC have not appealed the UT's conclusion to that effect. Hearts only get into Chapter 95 by Note 3 applying at heading level, and that shows that Note 3 applies at that level in a general way to bring in parts and accessories which are associated generally with the types of articles listed in the heading. The Dolls Subheading contains an express reference to parts and accessories, and it is wrong to narrow those words by Note 3. Instead, the words are to be given their ordinary meaning, relying on *Amoena (UK) Ltd v Revenue and Customs Commissioners* [2016] UKSC 41; [2016] 1 WLR 2904, specifically at [31] and [40] where Lord Carnwath JSC appeared to accept the proposition that parts and accessories could be used in a variety of ways (using the example of a bicycle bell). Two further authorities confirm that an article should be classified according to its actual use and not on the basis of theoretical possibilities: *Honeywell Analytics* at [67] and [116] and *Commissioner for HMRC v Huxley (UK) Ltd* [2017] UKUT 393 (TCC) at [59]-[61]. In *Honeywell Analytics*, Davis LJ recognised that there could be more than one main use, at [112]. So the words “parts and accessories” as they appear in the Dolls Subheading just mean parts and accessories of dolls even if they are also used in other things. The items meet this test, on the FTT's findings. In practice, all BAB parts and accessories must go into the Dolls Subheading unless they are clearly for animal use only.

37. The tension is resolved by the proviso to GIR 6 which disapplies Note 3 at the subheading level. GIR 6 applies chapter notes at subheading level “unless the context otherwise applies”. The HSEN to GIR 6 explains the meaning of this proviso and provides one example of where it applies in relation to conflicting definitions of platinum (see paragraph 14 above). A second example of the application of the proviso to GIR 6 is to be inferred from heading 9506 (the “ice skates heading”) which provides as follows:

CN Code	Description	Conventional Rate of Duty (%)
<b>9506</b>	<b>Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included else-where in this chapter; swimming or paddling pools:</b>	
...	...	
<b>9506 70</b>	<b>- Ice skates and roller skates, including skating boots with skates attached:</b>	
9506 70 10	-- Ice skates.....	Free
9506 70 30	-- Roller skates.....	2,7
9506 70 90	-- Parts and accessories.....	2,7

38. Mr Sykes argues that parts and accessories of ice skates and roller skates are clearly in the two-dash subheading 9506 70 90 because GIR 6 has disapplied Note 3 from the other subheadings. By parity of reasoning, GIR 6 must disapply Note 3 from both the

Dolls Subheading and the Toys Subheading, because to allow Note 3 into the latter would create a conflict between the Dolls and the Toys Subheading.

39. An alternative way of getting to the same result is by GIR 3(a). On the basis that the items *prima facie* fall under two subheadings, the Dolls Subheading is more specific than the Toys Subheading, because it refers expressly to parts and accessories (and so the UT found, see [162]). The analysis is the same as for hearts, which the UT accepted fell under the Dolls Subheading. GIR 3(a) calls for an evaluation of which heading provides the most specific description of the relevant goods: see *Hasbro European Trading BV v Revenue and Customs Commissioners* [2018] EWCA Civ 1221; [2018] All ER (D) 15 at [41] and *Xerox Ltd v Commissioners for HMRC* [2015] UKUT 631 (TCC) at [50]. The answer here is clear, and the Dolls Subheading prevails.
40. As Advocate-General Leger confirmed in Case C-350/03 *Schulte v Deutsche Bausparkasse Badenia AG*, the Court should interpret the provisions of the CN according to their unambiguous words and regard to the purpose of any given provision is only permissible in cases of ambiguity ([85]). So, argues Mr Sykes, the words of the Dolls Subheading are clear and unambiguous, and extend to all parts and accessories which can be used with dolls.
41. Footwear is different from clothes and wigs because, so Mr Sykes argues, their rounded design feature makes them equally suitable for BAB Dolls as for BAB Bears. The FTT's conclusion that they were more suitable for use with BAB Bears was illogical because bears do not wear shoes, these are humanoid accessories which naturally fall to be classified with humanoid toys, either because of their objective characteristics or, in the alternative, because on a true analysis footwear is like hearts, it is an "equal use" accessory to which Note 3 has no application. They are like hearts which the UT (correctly) classified under the Dolls Subheading.
42. By way of answer to HMRC's arguments, Mr Sykes argues that Note 3 applies at heading level to extend to parts and accessories of this "sort of" toy – the sort, or genus, signalled by the nil dash heading. The subheadings then achieve precise classification. To do otherwise is to render the subheadings redundant.
43. At subheading level, BAB rejects HMRC's suggestion that Note 3 should be read into the Dolls Subheading to narrow the words "parts and accessories" to mean only those parts and accessories which are suitable for use solely or principally with dolls, arguing that if that result were intended, the CN would have expressed it in clear terms and that too would lead to words being redundant. Further, to embark on a process of reading in and narrowing the terms of the subheadings in this way is to disrespect the ordinary language of the subheadings, which is not permitted: see *Hasbro v HMRC* [2018] EWCA Civ 1221 at [24] and [35]. The words should be given their ordinary meaning, and that is not one that is limited by the concept of sole or principal suitability for use.
44. It is perfectly clear that the FTT did consider these items to be suitable for use with dolls, even if not principally so, and the findings of fact are sufficient.

*HMRC's submissions*

45. HMRC lodged a Respondents' Notice which resisted BAB's appeal and advanced further or alternative grounds for seeking to uphold the conclusions of the UT, relating to two points (i) the scope and effect of Note 3; and (ii) the application of GIR 3(a). It also lodged a skeleton argument and a Note of Response.
46. In answer to BAB's appeal, HMRC rely on Note 3, which they say provides the definitive answer. GIR 1 and 6 apply Note 3 at both heading and subheading level to determine classification: see *Epson Telford v Commissioners for HMRC* [2008] EWCA Civ 567, [2008] All ER (D) 301, at [8]-[10], and *Vtech* at [105]-[107]. Note 3 requires parts and accessories to be classified with the article with which they are solely or principally suitable for use. The FTT has made findings about suitability for use, in relation to all of these items, and those findings effectively determine this appeal.
47. Mr Thomas took us to three cases which he said demonstrated the principle that Note 3, or equivalent section or chapter notes dealing with parts and accessories, determine classification. The most recent and significant of those was *Amoena (UK) Ltd* which concerned the correct classification of a mastectomy bra to be worn with an artificial breast form by women who had undergone mastectomy. The issue was whether the mastectomy bra was an orthopaedic appliance under chapter 90 or a bra under chapter 62. Importantly, the wording of the orthopaedic appliance subheading extended to an "artificial part of the body" and was to be read with chapter note 2(b) which stated (emphasis added) "Other parts and accessories, if *suitable for use solely or principally* with a particular kind of ... apparatus ... are to be classified with the ... apparatus of that kind". The Supreme Court confirmed that the breast form was an artificial part of the body within Chapter 90. The Court noted and agreed with the UT's conclusion that the mastectomy bra was an accessory ([43]) and held, applying note 2(b), that the mastectomy bra therefore fell within Chapter 90 ([44]).
48. The second case is Case C-500/04, *Proxxon GmbH v Oberfinanzdirektion Köln*. The case concerned the classification of spanner parts. Chapter 82 of the CN covered articles made of base metal. It was to be read with chapter note 2(b) which stated that "Parts of base metal of the articles of this chapter are to be classified with the articles of which they are parts, except parts separately specified as such and tool-holders for hand tools". The CJEU addressed three questions, each question dealing with a different type of product. The Court held that screwdriver bits were classified under heading 8207 which was specific to screwdriver bits (noting that part of the Court's reasoning was that those words should not be rendered redundant) (question 1, [27]); products which were part of a system of connecting pieces for use with a spanner system were classified as parts of that spanner system, by operation of note 2(b), under heading 8204 (question 2[32]-[33]); and torque meter wrenches were classified under heading 9204 because they were expressly mentioned in that heading (question 3, [37]). Mr Thomas places particular emphasis on the answer to question 2 and the application of Note 2(b) to determine classification.
49. Thirdly, we were taken to Case C-265/15 *GD European Land Systems-Steyr GmbH v Zollamt Eisenstadt Flughafen Wien*, where the Court considered whether a turret system for armoured fighting vehicles should be classified under heading 8710 of the CN, which refers to "tanks and other armoured fighting vehicles... and parts of such

vehicles” read with section note 3 which provides that (emphasis added) “...‘parts’ or ‘accessories’ do not apply to parts or accessories which are not *suitable for use solely or principally* with the articles of those chapters...”, or Chapter 93 which is entitled “arms and ammunition; parts and accessories thereof”. The Court held that the turret system could only be regarded as a part of armoured fighting vehicle if it was suitable for use solely or mainly with an armoured fighting vehicle, by operation of note 3 ([32]); that if the turret system met that note 3 test and was intended “principally” for use in armoured fighting vehicles, then it should be classified under heading 8710 ([37]); but if that was not the case, the referring court should consider whether the turret was a part of or accessory to a military weapon such that it would be classified under heading 9305 ([38]).

50. Mr Thomas says that these authorities show that once the relevant note dealing with parts and accessories is met, according to its particular test (in this appeal, as in *Amoena* and *GD European Land Systems*, the test was one of suitability for sole or principal use), there is nothing else to ask or consider, the classification of the part or accessory is established. There is no authority at all to support Mr Sykes’s submission that you look beyond the particular section or chapter note to consider other possible headings, which in this case would *ex hypothesi* relate to articles with which these items are not principally suitable for use.
51. In any event, noting BAB’s reliance on GIR 6, Mr Thomas says that there is no conflict between the Dolls Subheading and the Toys Subheading, and no reason therefore to invoke the proviso to GIR 6 or to disapply Note 3. Rather, Note 3 should be read into both subheadings even if that renders the words “parts and accessories thereof” in the Dolls Subheading redundant; on this point the FTT was correct (at [177]) and the UT was in error (at [105]).
52. Separately, HMRC challenge BAB’s attempt to rely on GIR 6. HMRC invite this Court to refuse BAB permission to resurrect this argument which was not advanced at either level below although it was advanced on the pleadings. It is too late now to raise it, it is an issue of mixed fact and law and to permit it to be advanced now would prejudice HMRC, and it is in any event a collateral challenge to the ‘one answer’ conclusion on Note 3 given by the UT, in relation to which permission to appeal has been refused.
53. HMRC argue that GIR 3 is not applicable, because this is not a case where two or more subheadings are *prima facie* applicable: Note 3 applies to determine classification under the Toys Subheading and no other subheading comes into play. But if GIR 3 does apply, HMRC argue (in pursuit of the second point in their Respondents’ Notice) that the UT was wrong to hold that the Dolls Subheading was more specific; properly read, they say that the Toys Subheading is more specific; or, if both are equally specific, that the tie-breaker must be achieved by deploying GIR 3(c) which would favour the Toys Subheading, as the last in order.
54. In any event, HMRC argue that there is no finding that these items are accessories of dolls at all, so the argument that the items should be classified under the Dolls Subheading is simply not open to BAB. To the extent that BAB relies on *Honeywell Analytics*, Mr Thomas submits that Davis LJ was in error in suggesting that “a” main or intended use might be sufficient (see [112]); instead, classification of parts and



accessories must follow “the” main intended use, applying case law, and there is no finding that the items’ main use is in relation to dolls.

55. In pursuit of the first point in the Respondents’ Notice, Mr Thomas argues that Note 3 applies to each heading and subheading. Note 3 determines the classification at heading level and there was no need to go to the subheadings at all. This is the “one time use” approach to Note 3 (which was not, as far as I can see, articulated before or decided upon by the FTT or the UT in terms). One time use means that hearts, which do not meet the test in Note 3, are excluded from Chapter 95 altogether; Mr Thomas says the UT was wrong to decide otherwise at [108] although he has not appealed that conclusion.
56. HMRC say the position for footwear is no different from clothing and wigs, and that permission should be refused on ground 4. There is nothing illogical in the FTT’s conclusions which are anyway not under challenge in this Court (and could only be challenged on *Edwards v Bairstow*) grounds, which is not how BAB puts its case.

### Issues

57. The overarching issue in this appeal relates to the way in which Note 3 is to be reconciled with the wording of the Dolls Subheading. The parties hold differing views on that issue and on the wider issue of how Note 3 applies in the context of Chapter 95 generally.
58. There are a number of sub-issues which I approach in this order: first, there are two relatively short preliminary matters, namely (i) the UT’s approach to using HSEs to guide its conclusions on the application of Note 3 at heading level; and (ii) the parties’ arguments on the alternative test for “parts and accessories thereof” under the Dolls Subheading. I then turn to the issues of substance in this appeal, namely (continuing the numbering): (iii) the application of Note 3 at heading level; (iv) the application of Note 3 at subheading level, which will require me to consider the application of (a) GIR 6 and (b) GIR 3(a) at subheading level; (v) conclusion on classification; (vi) Ground 4.

### Preliminary:

#### Issue (i) UT’s Approach to interpretation of Note 3

59. The UT noted the parties’ agreement that the items fell within heading 9503 and HMRC’s submission that this was because Note 3 applied at heading level. However, the UT relied on the HSEs to reach its conclusion, regardless of whether Note 3 applied or not. It said this (with emphasis added):

“108. In the present case, it is accepted by the parties that the clothing items and wigs fall within heading 9503. HMRC say that this is because Note 3 applies to bring them within the heading. But, *even without Note 3*, in our view, the clothing items and wigs would fall within heading 9503; *the HSEs in two separate places* – first under the heading “General” in the notes to Chapter 95 and second under the heading “Parts and Accessories” – *support the view that the headings in the chapter (including heading 9503) extend to parts and accessories*

*which are suitable for use solely or principally with articles within the heading. At that level, the clothing items and wigs would fall within heading 9503 on the basis that the clothing and wigs are suitable for use solely or principally with articles within the heading, that is dolls and/or toys, both of which are referred to in the heading. They would not fall out of the heading, even applying the interpretation of “principally” to which we have referred to above, if they were suitable for use both with dolls and with toys but it was not possible to determine which was the predominant use. The strict hierarchical process would then require that we move on to classify all of the items that have fallen within that heading within a relevant subheading of heading 9503.”*

60. At [45] of its skeleton, BAB says that the UT was wrong to read the HSEs into the heading, citing *Hasbro* at [35] where the Court of Appeal held, in the context of GIR 3(a), that the focus should be on the words of rival headings and not on words of the HSEs which are not replicated in the actual headings. Further, BAB points out that the HSE itself assumes that Note 3 applies to that heading. At [60] of their skeleton, HMRC agree with BAB’s position, citing C-15/05 *Kawasaski Motors Europe NV v Inspecteur van de Belastingdienst* [2006] ECR I-3659 at [37] for the proposition that explanatory notes to the CN and HS are an important aid to the interpretation of tariff headings but they do not have legally binding force, and that the content of those explanatory notes cannot therefore alter the meaning of those provisions in the CN; this is, in effect, to repeat the point I have already made at paragraph 15 above, quoting the UT at [16(7)]. Thus, neither party seeks to uphold the reasoning of the UT in this passage.
61. I accept the joint view of BAB and HMRC that the UT was in error to the extent that it read the HSEs into the heading in this way. Case law confirms that HSEs cannot be used in this way. Note 3 does apply at heading level, that is agreed, although the way Note 3 operates at that level is disputed and I shall consider that as issue (iii).

Issue (ii) Alternative test for parts and accessories under the Dolls Subheading

62. Both parties advanced submissions on the meaning of the words “parts and accessories thereof” in the Dolls Subheading. BAB positively relies on the different language in the Dolls Subheading to suggest that Note 3 does not apply; BAB offers an interpretation of those words distinct from Note 3. HMRC argued that the wording in the Dolls Subheading should be read subject to and narrowed by the words of Note 3 but if that was not correct, HMRC disputed BAB’s interpretation of those words and in any event suggested that the FTT had not made any finding about whether the items in question met the alternative meaning for which BAB argued.
63. The rival submissions on interpretation of the words “parts and accessories thereof” (in the absence of Note 3) were based on authorities dealing with intended use, summarised by the FTT at [126] to [130]: Case C-480/13 *Sysmex Europe GmbH v Hauptzollamt Hamburg-Hafenfor*, *Thyssen Haniel* and *HMRC v Huxley*. The FTT concluded that these cases address “when and how a principal or main intended use is to be applied when such a test is not expressly provided for in the CN or related GIRs” (FTT at [179(1)]). The FTT also dealt with *Honeywell Analytics* at [137]-[159], which would also fit into that category. The FTT was not persuaded that “parts

and accessories thereof’ had a meaning different from Note 3, and instead found that it was governed by Note 3. The UT dealt with these cases at [115]-[118] of its decision, found that Note 3 did not apply at heading level, and inclined to acceptance of BAB’s proposition that the words had a meaning which was different to Note 3 and that there may be circumstances in which it is appropriate to have regard to a main use which is not the predominant use of an item: see [119] of the UT’s decision.

64. For reasons set out below (issue (iv)), I agree with the UT that Note 3 does not apply to the words “parts and accessories” in the Dolls Subheading and that those words have a meaning independent of Note 3. Like the UT, I do not consider that there is any need to decide precisely what that meaning is, because it will not affect the outcome of this case (UT at [120]). That issue is not straightforward, and it has not been centre stage in this appeal. That issue may be important in another case where it does affect the outcome. It should properly be decided in that case. It is therefore not necessary to discuss further whether “a” (as opposed to “the”) main intended use of an item is sufficient (see *Honeywell Analytics* per Davis LJ at [112]). Nor is it necessary to address Mr Thomas’ arguments concerning the sufficiency of the findings of fact by the FTT: that point falls away.

## Substantive Issues

### Issue (iii) The application of Note 3 at heading level

65. The GIRs establish principles for classification of goods in the CN. GIR 1 states that classification is to be determined according to the terms of the headings and any relative section or chapter notes unless the context requires otherwise. There is no suggestion that the context of heading 9503 requires otherwise, and it is established that Note 3 applies at the level of the heading. However, there is disagreement on how Note 3 applies at that level.
66. HMRC argue by their Respondents’ Notice that Note 3 applies in the same way and with the same rigour at heading as at subheading level, so that it is necessary to ascertain whether the parts and accessories meet the Note 3 test of suitability for use solely or principally by reference to *individual items* listed in the heading, i.e. by reference to one of (and only one of) “tricycles, scooters, pedal cars and similar, wheeled toys, dolls’ carriages, dolls, other toys, reduced-size (scale) models and similar recreational models, working or not, puzzles of all kinds”. HMRC say that the items are suitable for use principally with stuffed toys (i.e. BAB Bears), and they fall within the description of “other toys” in the heading. Thus, say HMRC, Note 3 serves not only to import those items into heading 9503, but also to classify them definitively, in a single step, by application at heading level. This is the ‘one time use’ argument.
67. One time use explains HMRC’s case in relation to parts and accessories which are equally suitable for use with one or more articles in the heading. They say that “equal use” parts and accessories do *not* meet the test in Note 3 because they are *not* suitable for use solely or principally with any single article in the heading, so they are not imported into Chapter 95 at all, and therefore are classified elsewhere in the CN according to their objective characteristics. The exemplar of this category of equal use parts and accessories is hearts, which HMRC argue fall outside Chapter 95 altogether. Hearts are not subject to any appeal directly, but their classification has significance

in the context of determining how Note 3 applies at heading level. A further example debated in argument is a scarf, which is equally suitable for use with BAB Bears and BAB Dolls.

68. BAB accepts that Note 3 applies at heading level, but urges a different, and more pragmatic mode of application at that level. It is sufficient, according to Mr Sykes, for the Note 3 enquiry to establish that parts and accessories are suitable for use solely or primarily with the *sort of articles* listed in the heading, and if they meet that more general test, they come into heading 9503 and are classified in accordance with the subheadings and ordinary rules of interpretation of the CN. This is a global, or composite approach, contrasted with HMRC's individual approach. So, on BAB's analysis, the clothes, wigs and footwear come into heading 9503 as parts and accessories related to (i.e. suitable principally for use with) dolls and/or other toys; they then find their right place in the tariff under the relevant subheading. Equal use parts and accessories, such as hearts, also come into heading 9503 because they too are parts and accessories related to dolls and/or toys and they too are then definitively classified under the relevant subheading and in accordance with the interpretive rules. The UT was with BAB on this point: see [109]-[111].
69. HMRC's one time use analysis has the advantage of simplicity, because classification is achieved in a single step. It also has the advantage of consistency, because it means that Note 3 is applied in precisely the same way, regardless of whether it is operated at heading or (notionally) at subheading level. Further, it is consistent with the HSEN to Note 3 which says that the headings to the chapter cover identifiable parts and accessories which are "suitable for use solely or principally therewith".
70. However, on balance, I prefer BAB's analysis and concur with the view taken by the UT on this issue, for the following reasons.
71. First, the headings within Chapter 95 do not precisely replicate the articles which are covered in subheadings (at one dash, two-dash or three dash level). For example, heading 9503 only refers to "dolls" and "other toys" whereas the two-dash headings are more specific to various types of toys, ie dolls which are defined as representing human beings, toys which represent animals or non-human creatures, other toys put up in sets or outfits, and a catch all category for "other toys" which do not fit within any of the previous subheadings. The subheadings therefore offer a list of specifically defined articles, with a catch all to ensure that all articles of the sort (or genus) described in the heading find a place; this is the hierarchical approach to classification at work. (Another example of the same point is contained at heading 9506 which refers amongst other things to "articles and equipment for general physical exercise" which is then particularised at one, two or three dash subheading level to include articles such as snow skis, water skis, golf clubs and so on. This illustrates the generality of the heading compared to the specificity of the subheadings.) The structure of the CN, with general headings, supported by detailed subheadings in a hierarchy, is a pointer away from definitive classification taking place at heading level.
72. Secondly, there are obvious problems of interpretation in relation to articles in the list which are themselves composite: "pedal cars and similar wheeled toys" is an example: are they to count as one or two, on HMRC's analysis? The way in which the headings are phrased leads to significant practical problems in establishing what

counts as an individual item at heading level. I am not persuaded by Mr Thomas' answer which is that the subheading should inform the interpretation of the heading; this seems to apply the hierarchical approach in the wrong direction, with the lower subheadings being used to interpret the heading.

73. Thirdly, there is no violence to the language of Note 3 if it is applied in this looser way at heading level. Note 3 applies to parts and accessories which are suitable for use solely or principally with “articles” with which they are to be classified. At heading level, where the articles are only referred to in a general sense, it is perfectly possible to read Note 3 as applying to a class or type of goods as described in the heading. There is no offence to the language of Note 3 in doing so, nor, read in this way, is there any contraindication in the applicable HSEs which also refer to “articles”.
74. Fourth, to adopt such an approach would not undermine the UT's conclusion that Note 3 only permitted of “one answer”. That conclusion was reached in the context of Note 3 applying at subheading level. At that level, one answer, in relation to one article, is required in order to reach a definitive classification. One answer, in relation to one article, is not required at the heading level, where the enquiry is different.
75. Fifth, this approach avoids the words “parts and accessories thereof” as they appear in the Dolls Subheading and in the two-dash subheading beneath it being redundant. On HMRC's argument, these words can serve no useful purpose because the only parts and accessories to come within the heading would be those which met the terms of Note 3, i.e. those suitable for use solely or primarily for use with articles within the heading, in which event no more or different words beneath heading level would be needed. Mr Thomas acknowledged that his argument led to these words being redundant but he says that should not concern this Court because it is simply a consequence of the way the CN works. But even accepting that the CN is a very different type of instrument from a domestic legislative provision, a conclusion which avoids redundancy is still to be preferred, not least because it is much more likely to accord with the intention of the draftsman of either sort of instrument. I note, in passing, that the CJEU was keen to avoid words becoming redundant in *Proxxon*.
76. Sixth, to apply Note 3 in this way potentially solves the riddle of equal use parts and accessories. Subject to the caveat signposted above in the context of issue (ii) (see paragraphs 62-64 above), in the event that accessories are suitable for use equally in two or more articles which fall under the same heading, the equal use accessories would then be imported and classified under that heading. That is a much more satisfactory outcome than HMRC's answer which excludes those equal use parts and accessories from Chapter 95 altogether.
77. Last but not least, I have in mind the words of AG Kokott in *Uroplasty*:
- “42. First, the intended use and material composition of the article must be precisely determined. Next, in the light of the wording of the headings of the relevant sections and chapters a provisional classification must be undertaken to the article's intended use and material composition. There must then be considered whether on a combined examination of the wording of the headings and the explanatory notes to the relevant

sections and chapters a definitive classification may be reached. If not, then in order to resolve the conflict between the competing provisions recourse must be had to Rules 2 to 5 of the general rules. Lastly, classification must be made under the subheadings.

43. Classification must proceed on a strictly hierarchical basis taking each level of the CN in turn. The wording of one heading can be compared only with the wording of another heading; the wording of a first subheading can be compared only with the wording of other first subheadings of the same heading; and the wording of a second subheading can be compared only with the wording of other second subheadings of the same first subheading.”

To approach Note 3 in this way is to follow the sequence urged by AG Kokott. It is to arrive at a provisional classification at heading level, and then proceed to definitive classification on the basis of a combined examination of the headings (and, I interpose, the subheadings) together with explanatory notes (and, I interpose, GIRs and section and chapter notes). This is entirely consistent with the strictly hierarchical basis of classification.

78. In summary, I would reject HMRC’s arguments that Note 3 applies at heading level to determine classification at that level on the basis of one time use. Instead, Note 3 operates in a broader and more generic way at heading level. It follows that at heading level, parts and accessories can be provisionally linked with two or more individual articles in the heading. Definitive classification is then determined on a strictly hierarchical basis having regard to the subheadings, properly construed.

Issue (iv) Application of Note 3 at subheading level

79. On its face, Note 3 requires, first, a factual enquiry about the uses for which particular parts and accessories are suitable, specifically whether the parts and accessories in question are suitable for use solely or principally with articles in the chapter. If suitability is established, the second aspect of Note 3 becomes relevant, which is to require those items to be classified with those articles. In that way, Note 3 determines classification.
80. The FTT has made findings about the suitability for use of the items in question. Those findings were upheld by the UT and are not under appeal.
81. Mr Thomas submits that those findings really mark the end of this appeal. He says that Note 3 requires parts and accessories such as these items to be classified with the toys with which they are suitable principally for use, emphasising the importance of the chapter notes and the hierarchical approach recognised in cases like *Epson Telford*. He submits that the items fall under the Toys Subheading and the FTT and UT were both correct so to conclude.
82. BAB says that Note 3 is not determinative, for one of two reasons. First, it says that GIR 6 disapplies Note 3 entirely from the subheadings, alternatively it argues that GIR 3(a) resolves the dispute. I now turn to those arguments.

(a) GIR 6

83. GIR 6 confirms that chapter notes *do* apply to subheadings, on the understanding that only subheadings of the same level are comparable (the Dolls Subheading is the same level as the Toys Subheading, so that aspect of GIR 6 poses no difficulty). But GIR 6 contains the proviso that chapter notes will apply at this level “*unless the context requires otherwise*” and it is on that proviso that BAB relies. So, BAB’s argument goes, the context does require otherwise, because there is a conflict between the Dolls Subheading and the Toys Subheading, so that Note 3 is disapplied from both and the issue is resolved by reference to GIR 3 which would put these items into the Dolls Subheading as the more specific provision.
84. HMRC object to BAB’s reliance on GIR 6 at this stage. Mr Thomas says that the point is raised too late, it is an issue of mixed fact and law and HMRC are prejudiced. Mr Sykes accepts that his skeleton seeking permission to appeal did not place reliance on GIR 6, and that GIR 6 was not relied on before the FTT or the UT although it was raised in BAB’s Notice of Appeal to the FTT. But he says it is a point of law which is important to BAB’s appeal.
85. I would admit BAB’s argument in relation to GIR 6. I do not accept that the argument has any factual component at all. It is an argument of pure law, and if it is correct, it would be artificial for this Court to determine this appeal without regard to it. It now plays a central role in BAB’s case. I am satisfied that HMRC have had the opportunity to address the point and are not prejudiced.
86. The crux of the issue is whether the context requires Note 3 to be disapplied. Mr Sykes points to two examples of where the proviso to GIR 6 does apply, namely the HSEN to GIR 6 and the skates’ heading. I have not been assisted by either example:
- i) The HSEN to GIR 6 gives an example of the proviso working to disapply a chapter note in the context of the meaning of platinum in chapter 71. That is a long way distant from the facts of this case.
  - ii) The skates’ heading is different in structure from heading 9503 which is at issue in this case: skates and roller skates are classified under a one-dash subheading which contains no reference to parts and accessories (9506 70); the skates subheading is followed by three two-dash subheadings which refer to skates, roller skates and parts and accessories, respectively; even if Mr Sykes is right in contending that the proviso to GIR 6 disapplies Note 3 from the first two two-dash subheadings so that parts and accessories automatically fall into the third two-dash subheading, that does not assist in the analysis of this appeal because the skates subheading is different and there is no read-across to the subheadings at issue in this appeal.
87. Note 3 is only disapplied by GIR 6 if the “context so requires”. In my judgment, context must be considered in relation to each of the Dolls and Toys Subheadings separately, at least as a first step, before putting the two subheadings together and deciding whether any further disapplication is required by context at that stage.
88. So far as the Dolls Subheading is concerned, there is a tension between the words “parts and accessories thereof”, which are not limited by any further words, and Note

3, which describes parts and accessories which are suitable for use “solely or principally” with articles. The two sets of words are different and obviously so. It seems to me that the context does require Note 3 to be disapplied from the Dolls Subheading. On that footing, the Dolls Subheading would be unaltered and would provide: “*Dolls representing only human beings and parts and accessories thereof*”.

89. I turn to the Toys Subheading to undertake a similar exercise. That subheading is silent on parts and accessories. There is no tension, and no reason to disapply Note 3. The effect of reading Note 3 into the Toys Subheading is to import parts and accessories which are solely or principally suitable for use with toys into that subheading. By reading in Note 3 in this way, the Toys Subheading would extend to (additional words underlined): “*Toys representing animals or non-human creatures and parts and accessories thereof which are suitable for use solely or principally with such articles*”.
90. There is no tension between the two subheadings, construed in this way. The context does not require any further disapplication of Note 3. The two subheadings work alongside each other so that parts and accessories suitable solely or principally for use with BAB Bears are classified under the Toys Subheading by operation of Note 3. The words in the Dolls Subheading would extend, at least, to parts and accessories suitable for use solely or principally with dolls and may well reach further, depending on the conclusion to issue (ii). Working in this way, the words in the Dolls Subheading are not rubbed out or rendered redundant.
91. In summary, in my view, GIR 6 does have a limited role in disapplying Note 3 from the Dolls Subheading. But the proviso to GIR 6 has no application in relation to the Toys Subheading and Note 3 applies to that subheading.

(b) GIR 3(a)

92. Construing the Dolls Subheading and the Toys Subheading in this way reveals no tie-breaker situation where GIR 3 might be engaged. The items are not *prima facie* classifiable under two or more headings or subheadings, which is the predicate for GIR 3 to apply: the items are solely or principally suitable for use with BAB Bears, and they are therefore classified as accessories of stuffed toys. They are not *prima facie* classifiable under the Dolls Subheading, they never get there. GIR 3 is not engaged.

v) Conclusion on classification

93. Having dismissed both of BAB’s main arguments on this appeal, the appeal can be resolved without difficulty. The FTT found that the items were suitable for use principally with BAB Bears. As HMRC say, those findings do indeed mark the end of this appeal. Those findings answer the Note 3 test. The result is that the items must be classified with the articles to which they principally relate: the BAB Bears, under the Toys Subheading.
94. I am fortified in this conclusion by the three cases on which Mr Thomas relied (*Amoena*, *Proxxon* and *GD European Land Systems*). The same thread runs through all of them. Where a chapter or section note such as Note 3 applies, classification is



determined according to that chapter or section note, and no further enquiry or comparison with any other subheading is required or permitted.

Issue (vi) Ground 4

95. Footwear does not raise any different point of principle. Contrary to Mr Sykes' submissions, there is no illogicality in the FTT's findings that footwear is like wigs and clothing, and suitable principally for use with BAB Bears. This was a conclusion which the FTT was entitled to reach on the evidence before it and for the reasons it gave.
96. In any event, the only way such findings could be reversed would be on the basis of an *Edwards v Bairstow* challenge and that is not how ground 4 is put, and nor could it be. I would refuse permission to appeal on ground 4.

**Summary**

97. I would dismiss this appeal. I would do so on the basis that:
- a) By application of GIR 1 and 6, and as agreed, Note 3 applies both at heading and subheading level.
  - b) At heading level, Note 3 applies generically. The effect is to import into heading 9503 those parts and accessories which are suitable for use solely or principally with articles in the heading, without at that stage necessarily identifying any one single article. This is a provisional classification. There is no one time use of Note 3.
  - c) At subheading level, Note 3 applies unless the context otherwise requires, in which event the proviso to GIR 6 permits Note 3 to be disapplied.
  - d) The context does require Note 3 to be disapplied from the Dolls Subheading. But the context does not require that Note 3 is disapplied from the Toys Subheading.
  - e) There is no conflict or tension between the Dolls Subheading and the Toys Subheading interpreted in this way. There is no reason for any further disapplication of Note 3.
  - f) GIR 3 is not relevant, because the items are not *prima facie* classifiable in more than one subheading.
  - g) The items, including footwear, are classified within the Toys Subheading, on the basis of the FTT's findings of fact and by operation of Note 3.

**LADY JUSTICE ASPLIN:**

98. I agree with Lady Justice Whipple's clear and comprehensive judgment. I too, would dismiss the appeal for the reasons she gives.

**LORD JUSTICE NEWHEY:**

99. I also agree.