BL O/0882/25

TRADE MARKS ACT 1994
IN THE MATTER OF UK TRADE MARK APPLICATION NO. 3694283
FOR "MIND THE GAP"
IN THE NAME OF TRANSPORT FOR LONDON
AND OPPOSITION NO. 43511 THERETO
BY GAP (ITM) INC.

DECISION

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1. This is an appeal by the Applicant, Transport for London ("TfL"), against a partially successful opposition against registration of its mark MIND THE GAP in Class 18 for the following goods:

> Purses and wallets, including purses for travel cards and passes, purses for payment cards; wallets for travel cards and passes, and wallets for payment cards; card cases and holders for cards and passes.

2. The Opponent/Respondent is GAP (ITM) INC ("GAP"), the well-known retailer.

3. The decision appealed from was given by Hearing Officer Allan James and is dated 6 January 2025 ("the Decision"). In the Decision the Hearing Officer held that there was no likelihood of confusion with GAP's class 25 clothing registration for GAP arising from TfL's application to register MIND THE GAP in classes 9 & 18. GAP does not appeal this finding. However, the Hearing Officer refused registration of the goods above for other reasons and this is the subject of TfL's appeal.

4. The proceedings are unusual in that the issue before me turns on the construction of a settlement agreement reached between the parties in 2004 in relation to previous trade mark litigation ("the 2004 Agreement"). The question is whether TfL's attempt to register MIND THE GAP for the goods identified above is in breach of the 2004 Agreement and as a consequence contrary to ss.3(6) and/or 5(4)(b) Trade Marks Act 1994.

5. At a hearing on 17 September 2025 the Appellant/Applicant was represented by Jamie Muir Wood and the Respondent/Opponent by Thomas St Quintin. I am grateful to both of them for their careful and detailed submissions.

Confidentiality

6. I should deal with the issue of confidentiality at the outset. The public version of the Decision has been redacted because it refers to the 2004 Agreement, which the parties had agreed between themselves to keep confidential. The parties have no wish themselves to make public the terms of the 2004 Agreement in potential breach thereof. However, as against that there is the requirement for open justice and for material in legal decisions to be made sufficiently public so that the reasoning can be understood. I also observe that, although still operative, the 2004 Agreement is now over 20 years old.

7. Balancing these interests, I do not consider that it is possible to understand the full ambit of the Decision and therefore the basis for this appeal by reference to the redacted version alone. Having discussed this with the parties at the hearing, I order that the unredacted version of the Decision be designated as non-confidential and published alongside this decision.

8. At the same time and for the same reasons this decision will be public. I have restricted discussion of the 2004 Agreement to the terms which I consider are necessary to follow the reasoning below.

Standard of Appeal

9. There was no dispute that the well-known principles most recently expressed by the Supreme Court in *Iconix* and *Lifestyle Equities* apply. I should allow the appeal if there is an identifiable flaw in the Hearing Officer'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. However, it is not enough to show, without more, that I might have arrived at a different evaluation.

10. However, as noted above, this is not a “standard” appeal from the registry because it turns on the construction of a contract. The *Iconix* and *Lifestyle Equities* principles continue to apply, but the points arising are narrower – some are pure points of law – and more removed from the multi-factorial global assessments of likelihood of

confusion often at large in appeals to the Appointed Person. I shall bear that in mind as I assess each ground.

Grounds 1 & 2

11. I can take these together as they are interrelated. The point can be stated shortly. TfL submits that as a result of the UK's departure from the EU the 2004 Agreement is no longer binding on TfL's activities in the UK. This is because the relevant clause in the 2004 Agreement is as follows:

> 4.1 This Agreement applies to all countries of the European Union as constituted from time to time.

12. TfL submits that because the UK is no longer a country of the European Union, the obligations it agreed to no longer apply to a UK trade mark application.

13. The Hearing Officer determined otherwise. He held that there was ambiguity in the meaning of the words and that taking into account the surrounding circumstances and applying commercial common sense (at §148):

> the agreement was intended to cover the countries who were members of the EU at the time of the agreement and any countries that joined the EU in the future.

14. Mr Muir Wood on behalf of TfL challenged this finding in two ways. First, he submitted that the meaning of the words was not ambiguous, so the Hearing Officer was wrong to take into account the surrounding circumstances. Secondly, he submitted that in any event upon a proper construction of the 2004 Agreement the UK was now excluded. It is convenient to deal with both of those arguments together.

15. There was no dispute that the relevant principles governing the construction of commercial agreements have been set out in a number of recent Supreme Court cases, including *Arnold v Britton* [2015] UKSC 36 and *Wood v Capita Insurance* [2017] UKSC 24. The Hearing Officer referred to both of these cases. I was also referred to the well-known text *The Interpretation of Contracts*, 8th Edition, by Sir Kim Lewison.

16. In *Wood v Capita Insurance*, Lord Hodge explained at [10]:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on

the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.

17. I consider that the first attack on the Hearing Officer's approach is mistaken in law because it seeks to promote textualism over contextualism. The authorities are clear that contractual interpretation is a unitary process intended to ascertain the objective meaning of the language chosen by the parties. In order to do that it is necessary to ascribe to the reasonable person all the background knowledge available to the parties. Thus, the process involves more than just looking at the disputed text in isolation, and only going to the context if there is ambiguity. It is necessary to look at the context in any event, which may or may not dislodge the strict textual meaning.

18. The factual matrix in the present case as recorded by the Hearing Officer included the following:

> 139. It is evident from the fourth recital to the 2004 agreement, and clauses 2.1 and 2.2, that the catalyst for the settlement agreement was the applicant's UK trade mark application No.2153485 to register MIND THE GAP in classes 16, 25 and 42. The opponent had opposed the application relying on its earlier rights in GAP. The agreement contains restrictions on the applicant's use of MIND THE GAP in relation to clothing, clothing accessories and personal care items. In return, the opponent agreed to withdraw its opposition to trade mark application No.2153485 and not to challenge the registration of that mark in the future.
>
> 140. The agreement also made provision for future trade mark applications. Broadly speaking, it permitted the applicant to register further marks with the words MIND THE GAP in relation to clothing (with certain specific exceptions), clothing accessories and personal care items provided the words were contained within the well-known London Underground logo shown at paragraph 7 above.

19. The logo cited in paragraph 7 of the Decision is referred to in some places as the London Underground "Roundel":

20. In other words, the 2004 Agreement was put in place to settle a dispute about a UK trade mark application. This was in the context of GAP's longstanding use of GAP on clothing in the UK and Europe and TfL's longstanding use of MIND THE GAP in the UK, as the recitals to the agreement record. The parties were seeking to enter into a coexistence agreement which allowed them to continue their activities in the UK in parallel and make provision for the future.

21. However, when it came to defining the geographical scope of the agreement, they elected to use words which referred to "*all countries of the European Union as constituted from time to time*". Mr Muir Wood conceded that it was not in the contemplation of either party at the time that the UK might leave the European Union.

22. The words need to be interpreted in the light of the underlying factual matrix. As to this, the Hearing Officer expressed himself as follows:

> 147. In my view, there is some ambiguity about the meaning of the words "countries of the European Union as constituted from time to time." Firstly, as counsel for the opponent pointed out, the territory of the agreement is defined as "countries of the European Union" rather than directly by reference to the territory of the EU. The focus is on countries. Secondly, the words "…the European Union as constituted from time to time" (emphasis added) are ambiguous as to whether a country that was in the EU at the time of the agreement, but is no longer so, is included.
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> 148. Looking at the surrounding circumstances at the time of the agreement and applying commercial common sense to resolve the ambiguity leads to only one plausible answer: the agreement was intended to cover the countries who were members of the EU at the time of the agreement and any countries that joined the EU in the future. This is consistent with the agreement being partly intended to resolve outstanding opposition proceedings between the parties in relation to a UK trade mark application. The alternative meaning, that the parties intended to exclude the UK from the scope of the agreement if it left the EU, is inconsistent with one of the specific purposes of the agreement. It also seems unlikely because of the UK- centric nature of the applicant's business. The fact that in 2004 virtually no one was expecting the UK to leave the EU makes it even less likely that the parties intended clause 4.1 to have the effect of excluding the UK from the scope of the agreement in the event of Brexit.

23. As I point out above, I am not sure it is necessary to identify a textual ambiguity in order to take into account the surrounding circumstances. Instead, the text has to be read with the surrounding circumstances already in mind. Once that has been done it seems to me clear that the primary intention of the parties in reaching the

2004 Agreement was to regulate the position in the UK. At the same time the parties took the opportunity to make provision for future applications throughout the wider European Union, of which no-one contemplated that the UK one day might not be a part. This explains the choice of language in clause 4.1.

24. So whether the text of 4.1 is on its face ambiguous or not, the intention of the parties was clear that it should encompass the UK and the remaining EU countries, including any that might be added over the years. That was achieved by defining the geographical scope in terms of 2004 EU membership and any future members. The wording does this by reference to "all countries of the European Union as constituted from time to time". I reject the submission of TfL that GAP simply entered into a bad bargain because the parties chose wording which, on TfL's interpretation, excluded the UK as a result of its unexpected (in 2004) departure from the EU.

25. I consider that clause 4.1, when construed in the light of the factual matrix, is broad enough to encompass the UK even post its departure from the EU for the reasons given by the Hearing Officer. So I consider the Hearing Officer was correct to reach the conclusion he did about the interpretation of clause 4.1.

Respondent's Notice 1

26. If I had decided the interpretation of clause 4.1 of the 2004 Agreement in TfL's favour, GAP sought to run an argument that the application date of the opposed mark was not the date of the UK application, in September 2021 (and so after Brexit), but the date of the EU application, 13 July 2018, when the UK was still a member of the EU.

27. This argument was based upon Article 59(1) of the Withdrawal Agreement (emphasis added):

> Right of priority with respect to pending applications for European Union trade marks, Community designs and Community plant variety rights
>
> 1. Where a person has filed an application for a European Union trade mark or a Community design in accordance with Union law before the end of the transition period and where that application was accorded a date of filing, that person shall have, for the same trade mark in respect of goods or services which are identical with or contained within those for which the application has been filed in the Union or for the same design, the right to file an application in the United Kingdom within 9 months from the end of the transition period. An application made pursuant to this Article **shall be deemed to have the same filing date and date of priority as the**

> **corresponding application filed in the Union** and, where appropriate, the seniority of a trade mark of the United Kingdom claimed under Article 39 or 40 of Regulation (EU) 2017/1001.

28. GAP also sought to rely on Schedule 2A to the Trade Marks Act 2024 at §25(2)(b) (emphasis added):

> **Application for registration under this Act based upon an existing EUTM application**
>
> 25(1) This paragraph applies where a person who has filed an existing EUTM application or a successor in title of that person applies for registration of the same trade mark under this Act for some or all of the same goods or services.
> (2) Where an application for registration referred to in sub-paragraph (1) is made within a period beginning with IP completion day and ending with the end of the relevant period—
>
> (a) the relevant date **for the purposes of establishing which rights take precedence** is the earliest of—
> (i) **the filing date accorded pursuant to Article 32 to the existing EUTM application**;
> (ii) the date of priority (if any) accorded pursuant to a right of priority claimed pursuant to Article 35 in respect of the existing EUTM application; and
> (b) **the registrability of the trade mark shall not be affected by any use of the mark in the United Kingdom which commenced in the period between the date referred to in paragraph (a) and the date of the application under this Act**.

29. The Hearing Officer rejected these arguments. He held that the Withdrawal Agreement was concerned only with priority and Schedule 2A applied only to disputes between parties on relative grounds.

30. I now do not need to decide this point and I decline to do so. Nevertheless, I consider there is merit in the Respondent's arguments that the Withdrawal Agreement and Schedule 2A should be understood to support its interpretation. However, this debate would be assisted by submissions on behalf of the Registrar and if the point ever needs to be decided in a future case I consider that this would help the appropriate tribunal.

Ground 3

31. Under ground 3 TfL challenges the Hearing Officer's interpretation of the operative parts of the 2004 Agreement, which read as follows (emphasis added):

1.3 For personal care items and **Clothing Accessories ("Clothing Accessories" at a minimum shall include jewellery and handbags)**, [the applicant] agrees that it **will only use MIND THE GAP within the Roundel or in close proximity to the Roundel**. In the event MIND THE GAP is used in close proximity to the Roundel, [the applicant] agrees that the Roundel shall have equal prominence to the words MIND THE GAP.

…

2.3 In relation to any further applications by [the applicant] in any jurisdiction which concerns **products governed by clauses 1. 2 or 1. 3 herein**, [the applicant] agrees **that it will only apply to register marks consisting of or containing MIND THE GAP if those words appear within the Roundel**.

32. The present application by TfL for MIND THE GAP does not include the Roundel and GAP argues that TfL is therefore in breach of clause 2.3 of the 2004 Agreement because the application concerns products governed by clause 1.3. The dispute therefore turns on whether the goods listed in the first paragraph of this decision are "Clothing Accessories" within the meaning of clause 1.3 of the 2004 Agreement. The Hearing Officer concluded that they were.

33. His reasoning began with his own understanding as to what "clothing accessories" means as follows:

> 152. In my experience, 'clothing accessories' is usually understood to mean an item commonly bought to be worn or carried with matching or co-ordinating clothing to enhance the user's overall aesthetic appeal.

34. He then went through various of the other goods in the specification and rejected the notion that they comprised Clothing Accessories. This included the following goods: garment bags, spectacles/spectacle cases, rucksacks/shopping bags, document bags and cases, portfolios, briefcases attaché cases, music cases, beach bags, sports bags, school bags and school satchels. Much of his reasoning was based on the evidence of the categorisation used by retailers in 2024 on their websites of "clothing accessories", including that of TfL. He also held in relation to cases for toiletry or cosmetic items that these are usually carried in a suitcase.

35. He then turned to the goods in issue on this appeal. I set out his reasoning in full below:

> 176. There was some discussion at the hearing about whether the meaning of 'clothing accessories' should be assessed as at the date of the agreement in 2004 or the date of the application in 2021. The key issue is what the parties intended these words to

mean in the 2004 agreement. The parties clearly recognised that the term 'clothing accessories' was ambiguous because they specified that "as a minimum" it covered jewellery and handbags. They left open the question of what else it covered. The agreement addresses the parties' obligations going forward. Therefore, it is likely they meant the term to cover items that were, or would come to be, generally recognised as clothing accessories.

177. In paragraph 45 above I noted Ms Mahon's evidence showing that large retailers and luxury brands sell purses and wallets, some of which appear to be designed to be seen when carried or worn by the user and are finished in such a way they could be used to match or co-ordinate with their clothing.[26] [See exhibit PM44, particularly page 13] They are similar in nature and purpose (and, in some cases, appearance) to small 'hand bags', which are expressly identified as examples of 'clothing accessories' in the agreement. I therefore accept that purses and wallets are 'clothing accessories' for the purposes of the agreement. I find that applying to register the mark in relation to purses and wallets, including purses for travel cards and passes, purses for payment cards, wallets for travel cards and passes, and wallets for payment cards in the application, was contrary to clause 2.3.

178. What about card cases, key cases, holders for payment cards, travel cards and travel passes? The difference between, on the one hand, wallets, and purses and, on the other hand, card cases and holders for cards and passes, is elusive.[27] [See exhibit RM7 at page 20] Therefore, including these goods in the application was also contrary to clause 2.3.

179. By contrast, key cases appear to be a different category of products. There is no evidence key cases are bought and sold as clothing accessories. Therefore, including such goods in the application did not contravene clause 2.3 of the agreement.

36. Unpacking this, I consider that the Hearing Officer was correct in his observations in §176 (although I might have used the term "non-limiting" instead of "ambiguous" to describe the term "Clothing Accessories" in the 2004 Agreement, but nothing turns on this).

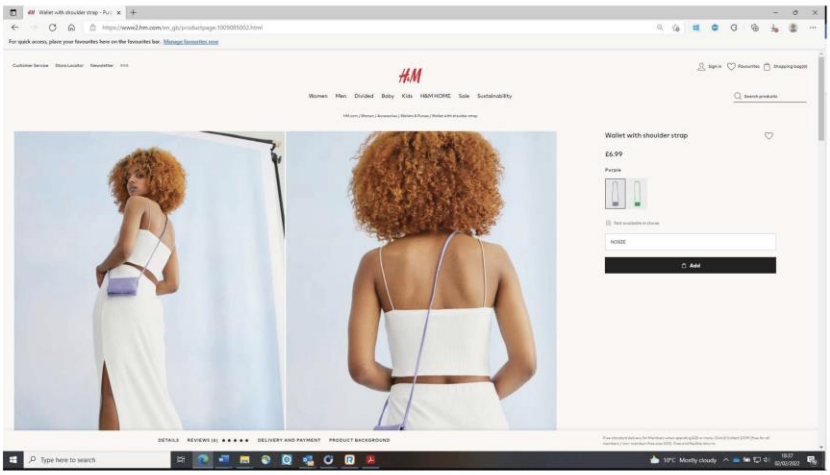
37. Next he referred to his earlier observations in §45. This was a part of the Decision where he was dealing with a comparison of goods for the purposes of a s.5(2)(b) opposition. This paragraph together with the one preceding it are set out below (emphasis added):

44. The opponent submits that:

"**The bags and luggage** [covered by class 18 of the application] **are similar to clothing to an average to high degree**, depending upon the particular type of bag: handbags, for example, are highly similar to clothing because they share the same users, have the same outlets, **can be chosen to coordinate with clothing** (and/or footwear), and are goods that consumers know are often produced by the same undertakings. Sports bags have the same users as sports clothing, and are complementary to sports clothing."

45. **I accept the example of a bag cited by the opponent – a hand bag - is similar to clothing and footwear because they are 'complementary' goods within the meaning of the case law**. However, although the applicant's specification includes bags that are carried by hand (e.g., shopping bags) **it does not include hand bags of the kind that would normally be chosen to co-ordinate with clothing or footwear. The closest goods to hand bags of that kind appear to be wallets and purses**. Ms Mahon provides some evidence of large retailers such as Zara, H&M and Mango, and luxury brands such as Chanel and Burberry, selling purses and wallets as well as clothing.[10] [See exhibit PM44, particularly page 13] Some of these goods appear to be designed to be carried by the user and be visible in normal use rather than placed inside a handbag or inside an item of clothing. Therefore, the reasons why hand bags are considered complementary goods to clothing appears to extend to some designs of wallets and purses. **I find wallets and purses are similar to clothing to a medium degree**.

38. So the premise for his decision that wallets and purses fell within the description of "Clothing Accessories" in the 2004 Agreement was his earlier finding that these were complimentary goods to clothing and/or similar goods to clothing to a medium degree, and that they were similar to hand bags. He relied for this particularly on the evidence on page 13 of exhibit PM44. This contained the following screen shot from the retailer H&M in 2024:

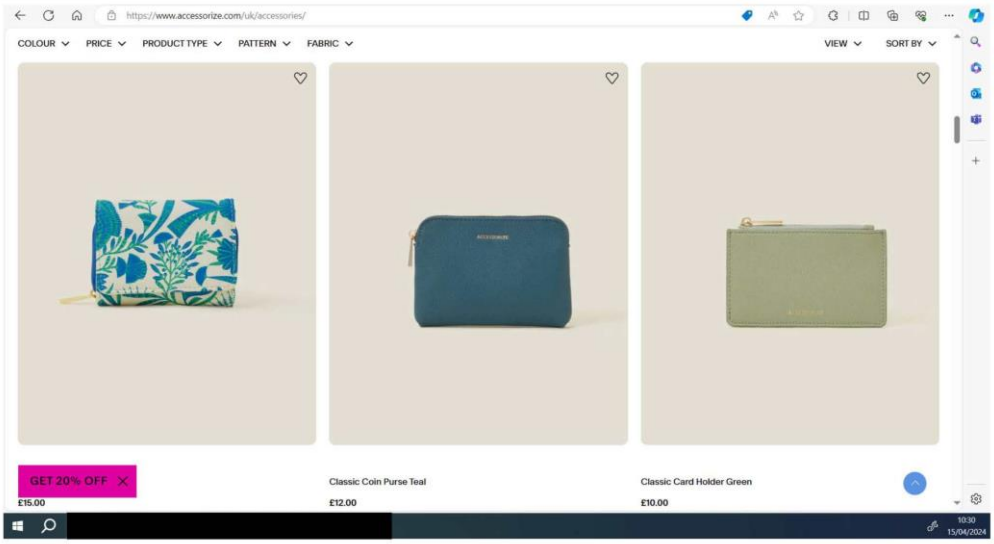


13

39. As can be seen, the website depicts an article being worn by a model which is described as a “wallet with shoulder strap”.

40. Returning to §177, the Hearing Officer held that purses and wallets were similar in purpose, and in some cases appearance, to hand bags, which are defined as “Clothing Accessories” within the 2004 Agreement. That was enough for him to determine that purses and wallets fell within what the parties intended to mean by “Clothing Accessories”.

41. In §178 he held the same for card cases, key cases, holders for payment cards, travel cards and travel passes, on the basis that the differences between them and purses and wallets were “elusive”. He did this by reference to the following exhibit:



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42. It is not clear to me what he meant by this as the exhibit shows a conventional wallet and card holder, neither of which are being worn in the way shown on the H&M website. Perhaps all he meant is that card holders look like purses, but that does not in itself answer the question whether either are “Clothing Accessories”.

43. I am conscious of the high barrier which applies to the reversal of first instance decisions and I bear in mind the authorities and principles I have cited above. I am also well aware of the experience of Mr James as a Hearing Officer in the Registry. But on this occasion I consider that the Hearing Officer misdirected himself and therefore committed an error of principle in the way he set about deciding this issue.

44. As shown above, as his starting point the Hearing Officer approached the issue from the perspective of the 2024 evidence which had been filed for the purposes of analysing the similarity of goods for the s.5(2)(b) argument. This was perhaps understandable in the context of the Decision as a whole, because he had been required to carry out this exercise earlier in the Decision, and there were multiple points which he had to decide. However, I think this was the wrong approach – his task was not to decide whether purses and wallets were similar to clothing as a precursor; it was simply to decide if they were “Clothing Accessories”. His starting point should have been the 2004 Agreement and the purpose of the parties in agreeing clauses 1.3 and 2.3, objectively assessed. Perhaps because of the multiplicity of points before him, the Hearing Officer did not spend time analysing the purpose of the 2004 Agreement before going on to compare the various goods in Class 18. For this reason I consider that I need to analyse the issue afresh.

45. The purpose of the 2004 Agreement was to prevent GAP and TfL treading on the toes of each other when it came to their respective trade marks. To that end TfL was prohibited from applying MIND THE GAP to denim clothing, khakis or twill clothing at all (clause 1.1), and restricted to its use for "other clothing" in class 25 except within the well-known TfL Roundel logo (clause 1.2). In my judgment the intention of clause 1.3 was to extend the protection for "other clothing" to encompass goods outside class 25 which might also be worn ("Clothing Accessories") such as jewellery and handbags.

46. This is reflected in the recitals to the 2004 Agreement, as follows (emphasis added):

> (A) Gap itself and through its licensees and predecessors in business has carried on business as a retailer operating GAP, THE GAP, GAPKIDS, GAP OUTLET and BABYGAP stores offering for sale **clothing, footwear, headgear, bags, jewellery, organisers, belts and other clothing accessories**, **personal care products (namely perfumes, soaps, shampoos, conditioners, body lotions and bath salts),** sunglasses, toys and a variety of other products which have been sold under the trade mark GAP and GAP composite marks and operates its internet websites at "www.gap.com", "www.gapkids.com" and "www.babygap.com". Gap is the proprietor of trade mark applications and registrations for the GAP mark in numerous classes including Classes 3, 4, 9, 14, 16, 18, 24, 25, 28, 30, 35, 36, 37, 38, 40 and 42 in various countries including the United Kingdom.
>
> …
>
> (C) TFL or its predecessors in title has been using the phrase MIND THE GAP for many years and has sold **clothing and other merchandise** bearing this phrase in United Kingdom and various other countries.

47. So from this it can be seen that although GAP was the purveyor of a variety of goods in addition to clothing and the proprietor of a variety of trade marks, including in class 18, the focus of the agreement was on clothing, clothing accessories and personal care products. The 2004 Agreement did not seek to extend to other products (such as organisers) or classes of goods even though those were acknowledged to be sold/registered by GAP. Equally, the recitals mention TfL's activities selling "clothing and other merchandise", but none of the other merchandise is specified any further. This is consistent with the focus being on regulating the future relationship between the parties in relation to clothing.

48. As such, I consider that the parties intended "Clothing Accessories" to be construed relatively narrowly and limited to goods that are related to clothing because they are worn. Some guidance was provided as to what were "Clothing Accessories" – "at a

minimum…jewellery and handbags" – but the parties did not expand on this. Had it been the intention to construe it widely, the parties would have been expected to provide more examples of such items, all of which were readily available to them in the light of the recitals and the factual matrix underlying the agreement.

49. As a result I consider that, objectively construed, the purpose of clause 1.3 was to prevent TfL applying MIND THE GAP to "Clothing Accessories" in the sense of items which could be worn, of which jewellery and handbags were the prime examples. It encompassed other "Clothing Accessories" but it did not extend to items which were not "Clothing Accessories", even if they were similar to such items. In other words, there was no intended penumbra of protection around the definition of "Clothing Accessories", which should therefore be interpreted narrowly. Clause 1.3 was itself the penumbra intended to protect GAP's core interest in clothing under clauses 1.1 and 1.2.

50. With that in mind I turn to the question before me, which is whether "purses and wallets" within class 18 of the NICE Classification are "Clothing Accessories" within the meaning of the 2004 Agreement I have identified above. Class 18 focusses on goods made of leather and imitation leather.

51. There is a preliminary point about the date of the evidence before the Hearing Officer. TfL submitted that there was no evidence at all that purses and wallets were sold to match or co-ordinate with clothing in 2004. That may be, but the 2004 Agreement was intended to regulate the relationship between the parties in 2004 and beyond. As GAP submitted, whilst the definition of "Clothing Accessories" must remain constant, if there are items in existence in 2024 which fall within that definition which may not have existed in 2004, they will still be caught by clause 1.3.

52. So the question is whether purses and wallets described in TfL's 2018/2021 trade mark application are Clothing Accessories as defined in the 2004 Agreement, bearing in mind the purpose of that agreement. Unlike the Hearing Officer I have ascribed a relatively narrow understanding to that term based on my objective assessment of the 2004 Agreement.

53. The high point in the evidence before the Hearing Officer is page 13 of Exhibit PM44 which describes "wallet with shoulder strap". However, unlike the Hearing Officer, and once the precursor point about the similarity with clothing is ignored and the purpose of the 2004 Agreement is taken into account, I do not consider that this is sufficient basis for a finding that purses and wallets in class 18 are Clothing

Accessories. Notwithstanding the description used on the H&M website, in my view this picture depicts a handbag, not a wallet or purse as the language would be normally understood within class 18. The item, if sold by TfL under the MIND THE GAP mark without an accompanying Roundel, might well be caught by clause 1.3, but that is because in ordinary parlance it is not a wallet but a handbag and is capable of being worn or displayed alongside clothing, for which the parties intended to legislate. However, that is not the question before me, which is instead whether the term "purses and wallets" in class 18 are Clothing Accessories.

54. As to that, in my judgment and having regard to the descriptors within class 18, purses and wallets are not Clothing Accessories. They are not as a matter of normal language or use intended to be worn or displayed when carried such that they could be said to accessorise the wearer's clothing. They are instead normally intended to be carried in a pocket, rucksack or within a handbag (which, in contrast, is intended to be worn or displayed, hence its express inclusion within clause 1.3). The exhibit p.13 example on the H&M website using the word "wallet" cannot alter this.

55. The exhibit does contain other pages showing wallets or card holders with embossed/decorative exteriors, but these are not displayed as being "worn". I acknowledge that there is one leopard skin print card holder on the H&M website resembling a wallet which has a small tag on the side which would enable it to be attached to e.g. a rucksack or bag, but that does not amount to "wearing" and is not way that such items are normally used. For this reason I do not consider that the parties intended in 2004 for such items or for purses and wallets generally to be classified as Clothing Accessories.

56. The same can be said for the remaining goods: card cases, key cases, holders for payment cards, travel cards and travel passes. The Hearing Officer described the differences between them and purses and wallets as "elusive". Again, he was not asking himself the correct question and was distracted by questions of similarity and/or complementarity. He should instead have been asking himself whether these items were "Clothing Accessories". In my view they are not, and there is no basis in the evidence for finding that they are. For all the reasons I have given above, I do not consider that it was the intention of the parties that such items should be included within clause 1.3 because none of them are items which are traditionally worn or displayed when being carried. They are not "Clothing Accessories" within the meaning of the 2004 Agreement.

57. For all these reasons I consider that the appeal succeeds under ground 3.

Ground 4

58. In light of the above it is not necessary for me to decide Ground 4 or the Respondent's Notice point 2. These raise interesting questions as to whether an alleged unintentional breach of an agreement could be said to be "bad faith" within s.3(6) Trade Marks Act 1994, or whether alternatively such a breach falls within the definition of "an earlier right" in s.5(4)(b) Trade Marks Act 1994. These are both novel points which, again, might benefit from more expansive argument in a case where it matters. The Hearing Officer held that if TfL was in breach of the 2004 Agreement, this would have been bad faith but was not encompassed within s.5(4)(b) of the Act. I have some sympathy with the notion that a party should not be better off where it has been found to be expressly in breach of an agreement than where no such agreement existed, but whether this is more properly to be categorised under s.3(6) or s.5(4)(b) is a more difficult question to resolve.

Costs

59. As TfL has been successful it is entitled to its costs of this appeal. I assess those in the sum of £300 for drafting the grounds of appeal/considering the Respondent's Notice points and £1200 for preparing for and attending the 3 hour hearing before me

60. Below, the Hearing Officer made no order as to costs. This was because, even though TfL was largely successful, he penalised it for taking what he considered to be an unreasonable approach to making GAP prove use and reputation in relation to its marks. It was said on behalf of GAP that even if TfL was successful on this appeal, I should not interfere with the costs order below because they did not merely follow the event. I agree. I am simply not in a position to conduct a reassessment of the balance the Hearing Officer reached in his supplementary decision on costs and I decline to do so.

61. So I order GAP to pay to TfL £1500 by 4pm on 15 October 2025.

62. I also direct that TfL's MIND THE GAP mark should be allowed to proceed to registration in its entirety.

Thomas Mitcheson KC
The Appointed Person
23 September 2025