IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1433/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 29th September 2025

Before:

Justin Turner KC
Derek Ridyard
Greg Olsen
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dr Liza Lovdahl Gormsen

Class Representative

v

Meta Platforms, Inc. and Others

Defendants

A P P E A R AN C E S

NIRANJAN VENKATESAN KC, SARAH O'KEEFFE & IAN SIMESTER On behalf of Dr Liza Lovdahl Gormsen (Instructed by Quinn Emanuel Urquhart & Sullivan UK LLP)

MARIE DEMETRIOU K.C., TONY SINGLA K.C. & JAMES WHITE On behalf of Meta Platforms (Instructed by Herbert Smith Freehills Kramer LLP)

Monday, 29 September 2026

(10.30 am)

Housekeeping

THE CHAIR: Some of you are joining us livestream on our website so I must start with a warning. An official recording is being made and an authorised transcript will be produced. It is strictly prohibited for anyone else to make an unauthorised recording, either audio or visual, of the proceedings, and breach of that provision is punishable as contempt of Court.

Good morning.

Submission by MR VENKATESAN

MR VENKATESAN: Thank you, sir. Good morning, members of the Tribunal. I appear in this matter for the Class Representative, alongside Ms O'Keeffe and Mr Simester. My learned friends Ms Demetriou KC, Mr Singla KC and Mr White appear for the Meta entities, the Defendants.

Subject to the Tribunal, I propose to address three topics in my submissions today. First, I will, if I may, make some introductory observations about the legal nature of user damages in the light of the One Step case.

Second, I will deal with what we have called "Issue 1" in our Skeleton Argument, namely whether the

amendments for which we are seeking permission have a real prospect of success as a matter of law, and, third, I will deal with Issue 2, namely whether the certification requirements are satisfied.

Subject to the Tribunal, that is the proposed running order, as it were.

THE CHAIR: Yes. If you could just give us a second I do not seem to have a transcript at the moment. (Pause)

MR VENKATESAN: If it assists I am told it is under the "Realtime" tab. (Pause)

THE CHAIR: We have read the Skeleton Arguments and looked at the authorities carefully. We are of the view that this can be dealt with in a day, if you could keep that in mind with your submissions.

MR VENKATESAN: Yes. I am grateful for that indication, sir.

I will turn, then, if I may, to the first of my three topics which concerns some brief introductory observations about the legal nature of user damages, and there are four propositions that we advance about the legal nature of user damages, one of which is common ground, but the other three are not, or may not be.

First, user damages are compensatory in nature.

Second, user damages constitute compensation for loss, albeit, as Lord Reed put it in ^One Step, and I

will go to it, loss of a different kind, but they constitute compensation for loss.

THE CHAIR: One has to be a little bit careful because in some of the cases it is not clear whether user damages has been used in the compensatory sense or in the account of profits sense, so one needs to be cautious.

MR VENKATESAN: I absolutely accept that, sir. I mean, one of the problems in this area of the law is terminology, because, as you say, in some authorities -- indeed, we have identified in our Skeleton Argument five or six different labels, and that is -- but one of the advantages, if I could put it that way, of the ^One Step case, is that it is almost a restatement of the law in the light of the previous authorities, and a fresh start in some respects, but I take the point that one needs to be careful about terminology. That is proposition two.

Proposition three is that user damages represent an application of the ordinary compensatory principle, not an exception to that principle. I will come on to develop that in a moment.

Fourth, although user damages are or can be measured by reference to a hypothetical negotiation, that is only a valuation tool, and it does not change the nature of user damages. So, those are four propositions that we advance about what user damages are in the light of the

^One Step case, and the first one, namely that user damages are compensatory in nature is common ground, because it is accepted by my learned friends, just to give you the reference, at paragraph 34 of their first Skeleton {C5/2/15} and footnote 10 of their second Skeleton, that is {F9/2/6}.

My learned friends are right to accept that first proposition because in the ^One Step case in 2018 the Supreme Court resolved a long-standing debate, both judicial and academic, as to the nature of user damages, partly because of the point you mentioned earlier, sir, namely some cases have treated it as gains-based rather than loss-based, but the Supreme Court has resolved that debate by treating user damages as a compensatory award. That is my proposition 1 which is common ground.

2 to 4 may not be common ground, but we submit that all of them can be derived from ^One Step itself, and perhaps I can just show the Tribunal that. You have ^One Step at authorities bundle G4, tab 6. {G4/6/1}.

If I can invite the Tribunal to go to page {G4/6/21}, paragraph 25 on page 21 is where Lord Reed commences his analysis of user damages in tort, and it is significant that he commences it by referring to ^Livingstone v Rawyards's Coal Co which is a classic case in the law of tort for its articulation of the

compensatory principle.

Then at paragraphs 26 to 29, which I was not proposing to read, Lord Reed discusses certain cases in which user damages have been awarded in the law of tort, namely cases concerning the wrongful use of tangible property, and then, by extents, patent infringement.

Then, at paragraph 30 at page {G4/6/23}, which is an important passage, Lord Reed said this:

"In these cases, the courts have treated user damages as providing compensation for loss, albeit not loss of a conventional kind. Where property is damaged".

THE CHAIR: We have obviously got this in mind. We have read it. Yes. There is no need to read it out.

MR VENKATESAN: I am grateful. I will just make the points I wanted to make about that passage, if I may.

So the first sentence of the passage says in terms that user damages are treated as providing compensation for loss, albeit of a different kind, which is my proposition 2. That different kind of loss is then identified in the third sentence of paragraph 30 which says that if an unlawful use is made of property, and the right to control its use is a valuable asset, then the owner suffers a loss.

What is also apparent from paragraph 30, we would suggest, and, indeed, some other passages I will take

you to in a moment, is that user damages represent an application of the compensatory principle, not an exception to it, which is my proposition 3, and I say that because if one looks at letter F in paragraph 30, user damages are described as a different method, and I would emphasise the word "Method" of assessing damages but they have the same objective as an award of conventional damages, namely to remedy the loss caused by the Defendants' wrongful conduct, by putting the Claimant as nearly as possible in the same position as if the wrongdoing had not occurred.

So, in a nutshell, the method is different but the objective is the same.

That is why both ^One Step and ^Lloyd v Google say in terms that user damages are not inconsistent with the compensatory principle articulated by Lord Blackburn in ^Livingstone v Rawyards's. In ^One Step one can see that at paragraph 91, if I can invite the Tribunal briefly to turn that up? That is at page 40 in the same document. {G4/6/40}. The Tribunal may be familiar with it in which event I will not read it, but the sentence that I wanted to draw attention to --

THE CHAIR: Sorry, which paragraph?

MR VENKATESAN: I am sorry, sir. It is paragraph 91.

THE CHAIR: Yes. I am familiar with it.

MR VENKATESAN: If one looks at the first sentence he starts this passage by saying that user damages -- and, in particular, the use of an imaginary negotiation, a point my learned friends also make in their Skeleton -- he starts by saying that that can give the impression that user damages are incompatible with the compensatory purpose, and one can see, just pausing there, he says that, because if you have a hypothetical negotiation to release the Defendant from the obligation of which it was in breach, it can look like you are not compensating for the wrongdoing, you are rather positing a situation in which the wrongdoing did not happen, and that is the problem, as it were, that he is dealing with, but he goes on to explain why that impression is misleading, and that is at letter D. He says:

"The impression of fundamental incompatibility is misleading. There are certain circumstances in which the loss for which compensation is due is the economic value of the right which has been breached considered as an asset".

This is, then, the important sentence:

"The imaginary negotiation is merely a tool at arriving at that value. The real question is as to the circumstances in which that value constitutes the measure of the Claimant's loss".

A similar observation was made in ^Lloyd v Google. Perhaps I can quickly show you that. That is at {G4/8/52}.

THE CHAIR: Sorry, start again. I beg your pardon.

MR VENKATESAN: Not at all, sir. If you have {G4/8/52}, it is paragraph 156 at the bottom of the page if the Tribunal has that in the judgment of Lord Leggatt.

In the first sentence Lord Leggatt says:

"As explained in ^Morris-Garner, the obligation of an award of user damages is to compensate the Claimant for use wrongfully made by the Defendant of a valuable asset protected by the right infringed".

Which we would respectfully suggest is a helpful encapsulation of the principle, but what is particularly significant, in my submission, is if one looks at the final sentence in that paragraph at the bottom of the page, Lord Leggatt says this -- actually, the penultimate sentence:

"Imagine in a hypothetical situation, as Lord Reed explained at paragraph 91, it is merely a tool for arriving at this estimated sum".

Then this:

"As in any case where compensation is awarded, the aim is to place the Claimant as nearly as possible in the same position as if the wrongdoing had not

occurred".

We rely on that as authority for the proposition, as ^One Step itself is, that user damages are just as compensatory as conventional damages, and represent an application of the compensatory principle just as conventional damages do. What differs is the method, not the objective or the nature of the remedy.

I have sought to make this point at this early stage in my submissions because, as we will see, some of my learned friend's arguments on this application seem to derive from an assumption that user damages, by contrast to conventional damages, do not seek to put the Claimant in the position in which they would have been if the wrongdoing had not occurred, and we say that is wrong, as Lord Leggatt says in terms at paragraph 1.4.

Those are the introductory observations I wanted to make about user damages.

Before I turn to Issue 1, I can just make a more general point about the nature of the application and what the Tribunal has to decide.

This is, of course, an Amendment Application. Meta's principal argument is that the amendments are unarguable as a matter of law, and the main point they take in support of that, and I am going to devote the bulk of my submissions to this, is that you can never

get user damages for breach of competition law. They say there is a rule to that effect. That is their case.

Now, as the Tribunal knows, my learned friends have served two Skeleton Arguments running in total to 89 pages. Despite doing that, they have not identified a single authority that says in terms that user damages can never be awarded for breach of competition law, nor a single authority in which user damages were actually claimed for a breach of competition law but rejected.

Now, I do not say that that is conclusive, but I do say that it is not a promising start for what is, in substance, a strike-out application, and a submission that our case is unarguable.

One might think that that is reinforced by the fact that the two Skeleton Arguments submitted by Meta do not speak with one voice. Indeed, various points taken in the first Skeleton -- we counted at least three -- have been abandoned in the second. I would not normally make that point because it is a jury point, but in the circumstances of this application it is not a jury point because it tends, again, to illustrate the difficulties that Meta faces in surmounting the high threshold it has to meet, namely that our case is unarguable, but I will obviously need to develop that.

Having made those introductory observations, can

I turn, then, to the first of the two issues that arise for the Tribunal's determination, namely the arguability of the amendments?

Now, having reflected on my learned friend's Skeleton Arguments, it seems to us, and I hope it is helpful to the Tribunal to identify this, that Issue 1 gives rise to four distinct sub-issues for you to decide the way the case is put. I will just identify them before then addressing them in turn, just so we have a roadmap, as it were.

First, what is the correct test or principle for determining when user damages are available at common law?

In particular, are user damages limited to specific causes of action, as my learned friends contend, or does their availability depend, as we contend, on the substance of the right infringed, irrespective of its source or legal classification? That is a conceptual issue or a point of principle, and it is Issue 1(a), as it were.

Second, is it the case, as my learned friends contend -- this is probably the high point of their case on which they place the greatest reliance -- is it the case that there is binding authority that user damages can never be awarded for a breach of competition law?

That is Issue 1(b).

Third, would it be conceptually incoherent, as my learned friends put it, for user damages to be awarded in a case of this kind? That is Issue 1(c).

Fourth, should the points of law raised by the Amendment Application be decided now or left to be decided at trial. That is Issue 1(d).

I will, as I say, take those in turn, if I may.

So, Issue 1(a): what is the test at common law for user damages? Because, when I made those introductory observations I was focused on the nature of abuse analogy, but the more difficult question is "When do you get it", and that is what Issue 1(a) is about.

On my learned friend's case, user damages at common law are, to use their language, "Tethered" to specific causes of action, so only available, again to use their words in paragraphs 15 to 17 of their Skeleton, only available in respect of specific causes of action. That is their case.

By contrast, on our case, user damages are available at common law if the Defendant wrongfully used property or other assets, and thereby prevented the Claimant from exercising a right to control the use of that asset.

I formulate it that way at this early stage in my submissions because that is the proposition we are going

to keep coming back to. On our case that is the test that you get from ^One Step and other cases for when user damages are available: did the Defendant wrongfully use property or other assets, and thereby prevent the Claimant from exercising a right to control the use of that asset? It takes a while to say that, members of the Tribunal, so with your permission I am going to refer to that principle I have just formulated as "The wrongful use" principle, just by way of shorthand.

What one can see is if we are right that that is the principle, then what matters is the substance of the right infringed, not the source of the right, which could be contract, property, tort or anything else.

There are two submissions we make in support of the principle for which we contend. First, in each category of case mentioned in ^One Step v Morris-Garner what I have described as the wrongful use principle is the reason why user damages were found to be available. That is our first submission, and I will develop that in a moment.

Second, just to foreshadow it, there are categories of cases not mentioned or not analysed in detail in ^One Step in which, again, user damages are available for the same reason, namely the wrongful use principle.

Starting with ^One Step, the first category

mentioned in it is the wrongful use of tangible property. I will not read it because I know the Tribunal has it, but this is addressed at paragraph 30 which we looked at earlier {G4/6/23}. What is significant about paragraph 30 is the reason Lord Reed gives for why you are getting damage -- if somebody walks over my land or takes away my bicycle, or whatever -- it is because they have wrongfully used property and prevented me from exercising my right to control its use.

Another category which we --

THE CHAIR: Lord Reed does not say that damages are available in the context of other torts.

MR VENKATESAN: He does not say that --

THE CHAIR: He gives a reason why --

MR VENKATESAN: Yes.

THE CHAIR: -- there are challenges and how to view the challenges and relevance of the test, but he does not, then, go on to say that they are available in other causes of action.

MR VENKATESAN: That is fair, sir. I make two points in response to that if I may. First, he does not expressly say, I would accept, that it is available for all torts, nor does he say, though, that they are confined to the particular categories he identifies, so that is my first

point.

THE CHAIR: He does not say one way or the other.

MR VENKATESAN: He does not say one way or the other. What we would submit is significant is -- well, perhaps two things. First, he identifies a principle for the categories where he says you do not get user damages he gives a reason. Ordinarily, one would expect that if that same reason is engaged by some other cause of action, then the law of remedies, because it is intended to be coherent, would respond in the same way, but --

THE CHAIR: You are saying this is a natural application for principle. Paragraph 30 in this case.

MR VENKATESAN: Indeed.

THE CHAIR: Are you saying it is a natural extension of the law to cover this Class of cases, or are you saying that has already been established in the law?

MR VENKATESAN: I would accept it is an extension in this sense: there is no case that says in terms that you can get user damages for breach of competition law. So, if what one means by extension is "Are we going further than the authorities already go?" yes, but it is not an extension in a different and perhaps more important sense, which is we are not extending the principle, we are applying the same principle to a different fact pattern, which is, in fact, if one thinks about it, user

damages have been around for at least -- probably more than 200 years because the Vay Leave(?) cases in which this originates --

THE CHAIR: It is undecided.

MR VENKATESAN: It is an undecided --

THE CHAIR: And you submit that it is not appropriate on a strike-out application to decide that point.

MR VENKATESAN: Absolutely, sir, so that is Issue 1(b), but I also say in a way, and this is my primary case although it makes no difference for our purposes if we win, whether we win on our primary case or our alternative case, we say Meta's points are wrong as a matter of law but at a minimum they raise difficult points which should not be decided summarily, but that is why the batting order is what it is. I just want to identify our answers --

THE CHAIR: You are going to have to assist us on where they are wrong as a matter of law.

MR VENKATESAN: Absolutely.

THE CHAIR: I understand the submissions that this is all a matter for argument in the future.

MR VENKATESAN: Absolutely.

THE CHAIR: But if you are saying that they are definitely wrong at this stage it seems quite a thing to stretch but you will assist me with that.

MR VENKATESAN: No, I accept that, sir, and one way to test it is suppose we had already pleaded this, would we be seeking summary judgment. I think it is fair to say probably not, but I think the point I am making is: to the extent you need to grapple with the substance of the case, it passes the preferrable analysis to this, but you may well decide and indeed you might have to decide, if that is where you go, that this is not a sort of -- the sort of point that should be grappled with summarily. So, that is why I am relying on the substance of the points, just to show that there is only no knock-out blow, on balance, they are wrong, which is not to say that I would be seeking summary judgment if the shoe were on the other foot, but just coming back to paragraph 30, so that is why you get user damages for tangible property.

Then, on a similar basis you get it for intellectual property infringement, but a particularly important category of case, because it undermines my learned friend's analysis, we say, is breach of contract -- the reasons given by the Supreme Court for why you get user damages for breach of contract. That is explained at paragraph 84 which is at {G4/6/38}.

This is an important passage, at least to our case, and perhaps, with your permission, I will read it. 84:

"There have also been cases in which negotiating damages have been treated as available at common law in cases of breach of contract. An example is ^Vercoe v Rutland ... which also concerned the breach of a joint venture agreement, where the Defendants used the information provided by the claimants about a commercial opportunity without including them in the transaction. There were breaches both of a confidentiality agreement and of an equitable duty of confidentiality. It was agreed that damages should be assessed on the basis of a hypothetical release fee. In effect, the court awarded damages based on the commercial value of the information which the Defendants misused, as in a number of earlier cases concerned with breach of confidence. These cases can be understood as proceeding on the footing that the result of the breach of contract was that the claimants lost a valuable opportunity to exercise their right to control the use of the information."

The final sentence in particular is, in my submission, significant because it shows the reason why you get user damages for breach of contract is exactly the same reason why you get it in tort.

THE CHAIR: Misuse of confidential information, is it not?

MR VENKATESAN: Or a breach of contractual obligation of confidentiality.

THE CHAIR: It is misuse of confidential information. It just has a contractual underpinning. That is all.

MR VENKATESAN: Yes. I am grateful for that because it was a point I was going to come on to. You could have a case where the duty of confidence exists only in equity. It is a purely equitable duty of confidence and that is breached. For instance, where there is no contract at all, but I impart information to somebody in circumstances that give rise to a duty of confidence, it is established, and has been established since at least the Force India case in 2012, Arnold, J (as he then was) the (inaudible) for that -- in the equitable cause of action for breach of confidence, and what paragraph 84 is doing is explaining why, in both of those categories of cases, contractual duty of confidence, equitable duty of confidence, why you get user damages, and the answer is in the final sentence, because when this happens, when somebody misuses confidential information, what they do is they wrongfully use an asset, namely the information, and prevent me from exercising a right that I have to control its use, but what is significant about the question the Chair put to me is: it makes no difference what the source of that right is. It could be contract, it could be equity, but the response of the law of remedies is the same, because what it responds to

is the substance of the right infringed.

THE CHAIR: I mean, this is well-established in various aspects of intellectual property law --

MR VENKATESAN: Yes.

THE CHAIR: -- that remedies available include account of profits, they include -- normally referred to as a royalty, but as you point out it is a form of user damages, but this is well-established.

MR VENKATESAN: Precisely. Indeed, it comes -- one of the classic cases is the ^Watson Laidlaw case which is cited with approval here, but we say that is a point in our favour because, just standing back, it is common ground between the parties that there are a number of different causes of action on the law as it stands, without having to extend anything, where you do get user damages -- wrongful use of tangible property, various intellectual property causes of action, as is pointed out, certain types of breaches of contract -- but that is not random. There is a reason for that, and one has to ask "What is it about these causes of action that you can get user damages, whereas you cannot get them for other causes of action?" it is not a question my learned friends really grapple with, with respect, but we say the answer is that there is a single principle running through all of these categories of case, and the significance of the

^One Step decision is that it extracts that principle, which was previously illusive, partly because, as you pointed out earlier, the terminology is very difficult in this area of the law, so the Supreme Court begins by defining its terminology.

It then considers all the categories of cases in which, as at 2018 you could have got user damages, and it extracts from those cases an underlying principle.

On my learned friend's case, the story stops there. You cannot go beyond that, or at least you can go beyond it but not to competition law, but we say that if that is the right principle, if that is the ^One Step principle, and if you have some other type of cause of action where exactly the same principle is engaged, you would expect to get user damages. Indeed, I can put the point in a different way as well.

In the last 130 years when we have had user damages there have been various points in the history of the law when user damages were not available for a particular cause of action, but then became available for it. For instance, when this starts, it is confined to the Vay Leave cases, then you get it for trespass to land, then you get it for patent infringement, then you get it for detinue, but in all of these instances this would have been one case which decided, for the first time, that

for this cause of action you can get user damages, and they did it because they said the same principle is engaged, and that is my submission.

Now, before I leave ^One Step, there are just two passages I should point you to, because it responds to a question the Chair asked me about whether this is an extension of the law. What -- just to identify the proposition before I go to the passages -- what both passages suggest is that the Supreme Court decided in ^One Step that the response of the law of remedies should be consistent, so if you have an obligation of a certain kind which is breached, the remedy should not differ according to how that cause of action is labelled, because what matters is the substance of the right. You can see that first of all at paragraph 33, that is {G4/6/24}.

So, Lord Reed says that that is not to say that damages in contract will always be different from damages in tort. He then gives the example of medical negligence:

"Damages awarded in cases of medical negligence do not depend on whether the Claimant was a private patient. The substance of the obligation breached ..."

I would emphasise those words:

" ... and the recoverable harm are normally the

same, whether the cause of action is framed in contract or in tort. Equally, the user principle derived from the property cases discussed earlier is of potential relevance whether the wrongful use of property arises in a contractual or a tortious context".

A similar point is made at paragraph 77. That is {G4/6/37}.

Just below line 8, picking it up in the third line, Lord Reed says -- I am sorry, we should actually start at the bottom of page 36:

"In the circumstances of the case, these were not merely arbitrary matters of legal categorisation but more directly on the damages awarded, as has been explained. That is not to say that common law damages for a particular breach of contract are necessarily different from damages for analogous breaches for other types of obligation".

Then this:

"As was said earlier in circumstances where the rights and obligations are analogous, it would be reasonable to expect some consistency in approach".

Now, just pausing there, members of the Tribunal, let us assume for a moment that what I have sought to describe as the wrongful use principle is, in fact, the true principle that tells you when you get user damages

at common law. Let us assume that for a moment.

If that is right, then the position at common law is that if somebody wrongfully uses property or other assets and prevents me from exercising my right to control its use, I can get user damages. If a dominant firm abuses its dominant position, and as a result acquires and uses the data or some other asset of users, it would be surprising, in our submission, if the mere fact that it is a competition case should exclude user damages in circumstances where the wrongful use principle applies in the same way. That, in some ways, is the key issue that the Tribunal needs to decide, either now or at trial, depending on what view you take on suitability, but we do say at paragraphs 33 and 37 of ^One Step point you in the direction for which we contend.

That is all I wanted to say about Issue 1(a).

Actually, just as a footnote to make this point, I am not sure where my learned friend's case on Issue 1(a) really goes, because in paragraphs 15 to 17 of their Skeleton they say user damages are tethered to specific causes of action. It is not clear whether what they mean by that is there is an exhaustive or closed list of causes of action for which you can get user damages. Indeed, at paragraph 48 of their Skeleton, they accept,

having said the opposite in their first Skeleton, that the ^One Step categories are not exhaustive. If they are going to run the case that there is an exhaustive or closed list, it is immediately going to run into problems. One is that it would freeze or ossify the law of user damages because on that hypothesis you could only ever get it for a cause of action for which it has previously been awarded, and that is inconsistent with the entire evolution of the law relating to user damages -- over 200 years -- because as I submitted earlier there have been stages at which it was not there for a particular cause of action and then became available by extending the principle to it.

Another problem is they would not be able to explain the breach of contract cases if they run the exhaustible closed list argument because we know from ^One Step itself that you do not get user damages for all breaches of contract, only for a breach of contract which prevents me from exercising a right to control the use of an asset such as a contractual obligation of confidence.

If there is no closed list, so I imagine that whatever paragraphs 15 to 17 of their Skeleton may say, my learned friend will back away from any contention that there is a closed or exhaustive list, but the

moment you back away from that, the moment you accept that there is not a closed or exhaustive list, you have to identify some principle or test, because otherwise if there is neither a closed list nor a principle, you can never work out whether you will get user damages or not, but they have not identified any principle either -- they had in their previous Skeleton but not in this one -- and you have my submission as to what the true principle is.

That is what I wanted to say about Issue 1(a).

Can I turn, then, to Issue 1(b) which is, as I say, probably their main argument which is their contention that there is binding authority that whatever the position at common law you just cannot do it, user damages for competition law. They rely on two different lines of authority, and I will take them in turn.

The first line of authority is referred to at paragraphs 18 to 23 of their Skeleton, and they cite nine cases which, according to them, decide that there is no actionable claim in competition law unless conventional loss has been sustained, and, therefore, that user damages can never be awarded. That is their case.

We respectfully submit that there are a number of reasons why this argument is misconceived. The first,

and perhaps simplest reason, members of the Tribunal, is this: those nine cases cannot be authority for any proposition about user damages because user damages were not claimed in any of them, nor did any issue arise as to whether user damages are recoverable for a breach of competition law or not. I will go to some of those to make it good, but just on that point of principle about --

THE CHAIR: We have that in mind. Yes. I do not know how much time you need to spend on them.

MR VENKATESAN: I am grateful for that indication. Can I just give you this reference? At paragraph 82 of ^One Step, {G4/6/27}, Lord Reed observed that ^Attorney General v Blake cannot be authority for any proposition about user damages because it was not claimed in that case. We say if it was not claimed in these nine cases, the same must be true of those nine cases as well. It is a point we have made in our Skeleton at paragraph 74, but my learned friend's Skeleton does not deal with it but, in a way, that is the shortest answer to it, and if I am right about that, one does not need to get into the detail of these nine cases, but just so I have made my submissions, I will deal with them very briefly. I will go only to two of those cases, if I may, in the interests of time.

THE CHAIR: Yes.

MR VENKATESAN: None of them even says that you cannot get user damages. I will start with the ^Garden Cottage case, because my learned friends say that is the starting point. It is at {G4/10/1}.

Now, just to put this in context very quickly, members of the Tribunal, you may be familiar with it, but what happened in this case is that the Milk Marketing Board had been supplying bulk butter to Garden Cottage, a business in Sussex, for some years. They then refused to stop supplying it, and ^Garden Cottage brings a claim alleging that the refusal of the MMB to continue doing business with it is an infringement of what was then article 86 and what is now Article 102 of the TFEU.

Now, Garden Cottage sought an interim injunction, an interim mandatory injunction. That was refused at first instance by Parker, J, but it was granted by the Court of Appeal. The main ground on which the Court of Appeal granted the interim injunction was that they thought it doubtful whether you can at all get damages for a breach of what is now Article 102 TFEU, and so they said if you cannot get damages, then obviously damages cannot be an adequate remedy which then justifies --

THE CHAIR: It was about whether you could get damages or

not, was it not, still less user damages.

MR VENKATESAN: Precisely so, sir. Precisely so. That is the same issue in the House of Lords, but what I need to deal with, because this is a point my learned friends take, is at -- if you go to {G4/10/12}, please, the passage on which my learned friends rely is just above letter E, about halfway down the page. It says:

> "A breach of the duty imposed by Article 86 not to abuse a dominant position in the Common Market or in a substantial part of it can thus be characterised in English law as a breach of statutory duty that is imposed not only for the purpose of promoting the general economic prosperity of the Common Market, but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty".

Those words, "Loss or damage is caused by a breach of that duty" is at the heart of the case my learned friends advance, because they read that as excluding user damages --

THE CHAIR: You say there has been no such thing and one has to understand these statements in the context of the facts and issues in dispute in the particular case.

MR VENKATESAN: Precisely so, sir. I do not need to spend long on it. That is my point. In fact, just thinking about this after we saw their Skeleton, it seems to us,

when you analyse that submission that they make, it is important, it seems to us, to separate out two different questions. One question is: are these words "Loss or damage caused by breach of duty", are they conceptually capable of including user damages? The answer is plainly yes after ^One Step because it says so in terms.

THE CHAIR: If you relied on it for that purpose today you would be taking the decision out of context.

MR VENKATESAN: Precisely, which is why I am not saying that this is an authority that shows that user damages are available, I am just saying that it does not rule it out, but I do say this, sir: user damages conceptually constitute compensation for loss or damage caused by breach of duty, so while I cannot pray ^Garden Cottage~--

THE CHAIR: You make that point. You say it is compensatory anyway.

MR VENKATESAN: Yes, so one would expect it to follow this formulation but there is a different, and this is why I said it is important to separate it out, my learned friends make a different point. They refer to other passages in the case where Lord Diplock goes on to explain what he thought the loss or damage would be on the facts, and I accept that what he thought ^Garden Cottage could actually claim at trial was conventional

loss, but that is because it was not ^Garden Cottage's case that its property had been wrongfully -- it seems to me with respect that what has gone wrong in my learned friend's submission is that they are contending that only something that Lord Diplock at the time considered would constitute loss or damage falls within the statement of principle, and that cannot be right.

THE CHAIR: We have in point this mind. Yes.

MR VENKATESAN: The one example I should have in mind before I move very quickly on is interest, because this is the example that occurred to us. This case is decided in 1983. In 1983 it was not possible to recover interest as damages because there is a longstanding common law rule from, I think, the 1830s until it was overturned in 2007, that you can never recover interest as damages, so Lord Diplock, when he used the words "Loss or damage" could not have that compound interest would fall within it, but plainly it would not be tenable to argue that you can never get compound interest for competition law breaches and indeed it has been recently certified.

Just to conclude on this point, the error, as we see it in my learned friend's approach to ^Garden Cottage and the other cases, is they seek to take a snapshot of the law of damages as it stood in 1983, and then to impose that snapshot on competition law for all time to

come. That is not the right approach to construction -- even of a statute, let alone a judgment. So, that is what we say about ^Garden Cottage.

Now, the other eight cases on which my learned friends rely -- I was not proposing to go to them. They fall into exactly the same category. All of them contain broad statements of principle that you cannot -- you do not have a cause of action in competition law without loss or damage, but none of them is prescriptive about what constitutes loss or damage.

The only reference I ought to give you, because my learned friends rely heavily on it, is the recent ^Cabo case. That is {G4/16/1}, pages 97 onwards, but it falls into the same category. It says you do not have a cause of action for competition law in the absence of loss or damage, but that does not take us anywhere in this application.

The only other case I wanted to go to on this issue, because we say it is actually inconsistent with their case, is ^BritNed, and ^BritNed is at {G4/13/1}.

Now, ^BritNed is -- as you may recall it is not an abuse of dominance case, it is a cartel case, but what we say is inconsistent with my learned friend's case is at paragraph 422, and I will just identify the proposition to save time.

This case says in terms that a competition law infringement is actionable in the absence of conventional financial loss, at least in the context of the Chapter I Prohibition.

Picking it up, if we may, at paragraph 422 at page 127, so {G4/13/127}, the learned judge says, in the first sentence of 422:

"The first question that I must consider is what constitutes the gist or actionable damage to complete the cause of action for breach of statutory duty".

I go to that because what he then goes on to consider is what you need to have an actionable claim in competition law. He then answers that question at paragraph 427 at page 128 {G4/13/128}. He says at 427:

"When seeking to articulate what constitutes actionable harm, it is necessary to have regard to the object and scope of the statutory duty imposed".

Meta accept that in their Skeleton that that principle is right. The learned judge then says:

"In this case the obligation and scope of the provision is the preservation and protection of competition from collusive efforts to undermine it. This purpose must inform the gist or actual damage that a Claimant must show when bringing a private action for damages".

Then picking it up at subparagraph (3) over the page if we may at page {G4/13/129}, the learned judge says:

"What the collusive misconduct of cartelists does is prevent, restrict or distort competition. To require a claimant to show monetary harm in order to found a cause of action is to ignore the purpose of Article 101 TFEU and to impose too great a burden on the claimant. Rather, what the claimant must show, as the 'gist' damage, is that the unlawful conduct of the defendant has, on the balance of probabilities, in some way restricted or reduced the level of the claimant's consumer benefit. In other words, that the claimant has suffered as a result of the prevention, restriction or distortion of competition created by the cartel. Such a restriction or reduction of consumer benefit might take the form of an increased price payable, but equally it might take the form of a reduction in the number of suppliers properly participating in a tender process. I regard consumer benefit as a broad concept, and there will be many ways in which conduct infringing Article 101 TFEU will adversely affect it".

So just pausing there, as we read that passage that is saying in terms that you have a complete cause of action of an infringement which is now the Chapter I Prohibition, even if you did not suffer any monetary

loss.

So, it must follow from that, contrary to what my learned friends contend, that the courts have already decided that monetary harm or conventional financial loss is not required to establish actionable harm for a breach of competition law, at least in the context of the Chapter I Prohibition, and there is, we would submit, no reason why the position should be any different for the Chapter II Prohibition, nor do my learned friends identify it.

Now, this part of ^BritNed was not addressed in my learned friend's first Skeleton, but in their second Skeleton at paragraph 32 they seek to distinguish this passage, 427. They seek to distinguish it by saying that, yes, you may have a cause of action, even if you did not suffer any monetary harm, but you will only get nominal damages. They rely, in support of that submission, on paragraph 429 where the learned judge envisages that where the quantification exercise is actually conducted, ^BritNed might just get nominal damages, but in my respectful submission there are two reasons why that argument does not work.

First, if one just goes back and asks "What proposition is Meta seeking to extract from these nine cases that we are now discussing?" the proposition is

that a competition law infringement is not actionable -- in other words, you do not even have a cause of action in the absence of conventional financial loss -- and they say that in terms at paragraph 23 of their second Skeleton {F9/2/15}.

^BritNed shows that that is wrong. That cannot be right, that you do not have a cause of action. You might or might not have nominal damages, but you do have a cause of action, which itself casts doubt on the correctness of the submission more generally, but, second, even taking the submission on its own terms, the learned judge in ^BritNed is not saying ^BritNed will get only nominal damages if it has not suffered monetary loss, and in any event, even if he had said that, that would not be surprising because ^BritNed is a cartel case. It does not lend itself to the user damages. The logic of the wrongful use principle normally would not extend to a cartel case because if you are affected by a cartel, what you are complaining of is not that your property was wrongfully used or some other asset was wrongfully used in preventing you from exercising a right to control it, so you might get nominal damages, but that does not tell us anything about the Chapter II Prohibition.

That is all I wanted to say about this line of

authority.

What that then leaves, as part of Issue 1(b), is Meta's reliance on the ^Wass case, ^Stoke-on-Trent Council v Wass and ^Devenish Nutrition which also, they say, is binding authority that you can never get user damages.

Now, I will start with ^Wass, if I may. That is {G4/3/1}.

Now, before we look at this, again, perhaps I can identify for the Tribunal what proposition Meta seeks to get from it. It is set out in paragraph 24 of their second Skeleton. What they say is that ^Wass is authority for the proposition that you can never get user damages for any non-proprietary statutory tort. So, the submission is not even confined to competition law. They say that according to this case it is impossible, whatever the circumstances, to award user damages for a statutory tort which is non-proprietary.

Now, I will go to the case in a moment, but the example that occurred to us as a useful way to test Meta's submission is this: --

THE CHAIR: Thank you. I mean, I do not want to become too erudite about it, this very much seems to turn on its facts, that this was about the statutory right to hold a market, and in those circumstances user damages were not

appropriate, and in particular it was held that the normal remedy is an injunction in these cases, and to start awarding damages just did not make sense.

MR VENKATESAN: I respectfully agree and adopt that, sir. It is simply that I am dealing with the submissions that have been made.

THE CHAIR: We can see what Ms Demetriou makes of it, but that was our reading of it, so take it fairly quickly.

MR VENKATESAN: Yes. In which case I will take it very, very quickly, just so my learned friend has the submission I make in response to her Skeleton, which is not in mind, but it is really the point you have just put to me. Three headline points without developing them. First, ^Wass is not a case about competition law. That is common ground, or even about breach of statutory duty, because the cause of action there was the tort of nuisance -- Nourse, LJ says that -- so it cannot be authority for any proposition about user damages for competition law or even breach of statute.

Second, neither Nourse, LJ nor Nicholls, LJ who gave the two judgments in that case actually say that user damages are not available for non-proprietary --

THE CHAIR: Do not seek to define the limits of user damages at all.

MR VENKATESAN: No, they do not, and, third, if, contrary to

our primary case, somehow Nourse, J's judgment is authority for that proposition, my learned friends do not suggest that Nicholls, LJ' judgment is, and then it does not survive ^One Step because then it would depend on the idea that user damages are gains-based which they are not. We know that now even if we did not then.

I wonder if I should just leave that and deal with it in reply if I need to?

THE CHAIR: Yes. You can deal with it in reply.

MR VENKATESAN: Can I turn, then, to ^Devenish Nutrition?

Again, just to identify at the outset the proposition my learned friends seek to get from it, they say that it is authority for the proposition that the only remedy available in competition law is conventional damages, and that user damages can never be awarded. It is footnote 34 of their second Skeleton, that is F9, tab 2 --

THE CHAIR: This is another cartel case.

MR VENKATESAN: This is another cartel case.

THE CHAIR: They were seeking to claim the profits that had been made by the cartel.

MR VENKATESAN: Precisely so.

THE CHAIR: There was not user damages in the sense that we are using user damages.

MR VENKATESAN: No, indeed. I mean, this goes back to a

point that you put to me at the outset of my submissions. There is some terminology in the case which would now perhaps be inapposite, as my learned friends also acknowledge, but the substance of the case is very clear. I respectfully adopt what you just said. Indeed, if one looks at the procedural history of the case, it starts -- it begins life in the Chancery Division, Master Moncaster frames preliminary issues about whether you can get three particular remedies, all are gains-based -- sorry, one was exemplary damages, the other was account of profits, the third was a restitutionary award, so two gains-based remedies are exemplary damages. At first instance, Lewison, LJ, (as he then was), says he cannot get any of these three remedies for breach of competition law. In the course of his judgment he says in terms that user damages, by contrast, are compensatory, but Devenish --

THE CHAIR: Can you show me where that is?

MR VENKATESAN: Yes of course. So, the preliminary issues as set out --

THE CHAIR: It was just that comment of Lewison, LJ.

MR VENKATESAN: It is at paragraph 26, if I remember correctly. Yes. So, if we go to {G4/4/17}, Lewison, LJ quotes a passage from the ^Mediana which is a famous case about user damages. That is quoted at paragraph

25. It is famous for the example given by the Lord Chancellor, that if somebody takes my chair away and sits on it --

THE CHAIR: I have that in mind.

MR VENKATESAN: -- yes, and then he makes some observations about that passage at 26:

"There are a number of points I should make about this passage. First, Lord Halsbury ..."

The Lord Chancellor:

"... was treating the award of damages for the temporary loss of the lightship as an award of general damages, akin to damages in personal injuries actions for pain and suffering, which need not be pleaded or proved with the same precision as special damage. Second the damages are compensatory damages. Third, the damages are assessed on an objective (but to some extent hypothetical) basis, namely the price for the hire of the thing of which the claimant has been temporarily deprived. This is an example of the award of user damages, which are still compensatory".

That is what he is saying, but the problem was, and this goes back to the Chair's observation, ^Devenish could not claim that because this is a cartel case, so there was no arguable basis for user damages. It is not a case in which you are saying that somebody wrongfully

used a property or other assets and prevented you from --

THE CHAIR: There was no suggestion, at least at that stage of the proceedings, that conventional damages would not be available to the Claimants. Is that right?

MR VENKATESAN: No, but what the Claimants were arguing was that it would be extremely difficult to prove what the conventional damages are because you would have to --

THE CHAIR: Well, because there was pass on and they --

MR VENKATESAN: Yes. Indeed.

THE CHAIR: -- did not suffer any loss.

MR VENKATESAN: Indeed. I think the main argument of -- we can see it in the report of the argument of the Court of Appeal -- the main argument for ^Devenish on appeal was the only practical remedy is gains-based because we cannot prove loss if we had to or at least an anything that the law would recognise, even with the assistance of the broad axe as sufficiently precise, and this, in a way, ties in with what is, I am afraid, a straw man one sees in my learned friend's Skeleton Argument. They say a number of times "You cannot get user damages just because that is just a response". That has never been our case. We say that user damages are available here not because of some loss appeal to discretion or justice, but because the legal principles governing user

damages are satisfied here, and enable the Court or the Tribunal to achieve what we say is the just outcome. That is paragraph 26.

Now, what happens is after ^Devenish lose before Lewison, LJ they then abandon their claim for exemplary damages. So, by the time the case gets to the Court of Appeal the only thing that is in issue is account of profits, so there is -- the exemplary damages is gone, they are never claiming user damages, and all three members of the Court of Appeal say that you cannot get an account of profits, a gains-based remedy, for a breach of competition law, but it says nothing at all about user damages. Perhaps I can just show you one or two passages on which my learned friends rely.

So, page 46 {G4/4/46}, my learned friends rely on paragraph 4 of the judgment of Arden, LJ at page 47. There is a partial quotation of that in their Skeleton, but it is worth looking in the passage as a whole, paragraph 4. What it says is:

"My essential conclusion on the Blake issue is this. The overall holding in ^Blake's case is that the law on remedies for interference with property, damage unless view of an injunction, damages for breach of fiduciary duty and breach of contract should be coherent and the same remedies should be available in the same

circumstances even if the cause of action is different".

That, in a way, is inconsistent with the whole premise of Meta's case on this application, but putting that to one said, Arden, LJ then says:

"On that basis a restitutionary award ..."

And I would emphasis those words:

"... is available in tort unless it is precluded by the Wass case or the Halifax case. In my judgment it is precluded by the Wass case".

Supposing there, members of the Tribunal, what Arden, LJ, (as she then was) is saying, is that a restitutionary award, that is to say a gains-based award, is precluded. She is not saying that user damages are precluded, and it is not surprising that she is not saying that because why would she about something that was not even being claimed?

Now, I think my learned friend's answer to this, as we understand it, is to rely on paragraph 2 at page 46 where there is a reference to user damages. It says:

"The aim of the law of tort is to compensate for loss suffered, the courts have exceptionally also awarded damages, commonly called user damages by reference to the fair value of the right of which the Defendant has wrongly deprived the Claimant, and those awards have been made even if the Claimant would not

himself have sought to use that right and so incur no loss. However, there is no question in this case of Devenish having been deprived of a proprietary right, that is to say a right arising from property to which such awards were formally confined".

We make two submissions about that passage. First, it is not saying anything about whether user damages are or are not available. What it is saying is what user damages are, and then it is pointing out that ^Devenish had not been deprived of a property right so ^Devenish cannot claim user damages, so it is just irrelevant, and, second, although one does not need to decide this, to the extent Arden, LJ suggested that it is an exception, she uses the word "Exceptionally", user damages exceptionally are awarded, to the extent she is saying that it is an exception to the compensatory principle, that may have been the understanding of the law at the time, but it is not now, because ^One Step v Morris-Garner says in terms that it is compensatory and not an exception to the compensatory principle, but the simple point is this does not go anywhere on this application, and that is also confirmed, that reading of paragraphs 2 and 4, is also confirmed --

THE CHAIR: Exceptionally? Arden, LJ is using "Exceptionally" in that sense? Sorry.

MR VENKATESAN: She may not have been.

THE CHAIR: Exceptional in unusual.

MR VENKATESAN: Exactly, and that may be the right reading of it. She may be making the factual observation that this sort of thing does not happen as often as conventional damages, which would undoubtedly be true, at least in some areas of the law, if not in others.

But that reading of paragraphs 2 and 4 we would submit is confirmed by paragraph 74 of Arden, LJ's judgment at page 69, which also undermines my learned friend's interpretation of the ^Wass case, but 74, paragraph 74 is at page 69 {G4/4/69}, and what it says is:

"The ratio of the judgment of Nourse, LJ".

That is in the ^Wass case with which Lord Justice man agreed:

" ... is therefore that the user principle ought not to be applied to the right to hold a market where no loss had been suffered by the market owner".

Pausing there, that chimes with what the Chair put to me which advances the case of market rights, so the ratio of the ^Wass case is about market rights. It is irrelevant to any other cause of action.

What I would accept is Arden, LJ goes on to say, over the page at {G4/4/70}, picking it up just below

letter B, if you have that, there is a sentence beginning with the words "Nonetheless":

> Nonetheless, it was an essential part of Nourse LJ's reasoning that damages by reference to the benefit obtained by the defendant could only be awarded in those limited situations, and it would in my judgment have to be shown that his circumscription of the cases where damages were not assessed on a purely compensatory basis could not stand with Blake's case".

Now, that proposition is in terms directed to damages awarded by reference to the benefit obtained by the Defendant.

THE CHAIR: Which is account of profits.

MR VENKATESAN: Exactly, yes, so it is irrelevant to user damages. It cannot be saying anything about whether you can get user damages or not because whatever may have been the understanding of user damages at the time, and I would accept that before 2018 there were two schools of thought as to the juridical nature of user damages. Indeed, even now in academic literature one can find two schools of thought -- some people say ^One Step is wrong but it is the law -- but after 2018, one thing is clear, is that user damages are not gains-based, so this passage cannot be --

THE CHAIR: Let me just ask, there is reference to

restitutionary claims and account of profits, or similar language to that. Are they being used interchangeably?

MR VENKATESAN: They are not being used interchangeably but they are both being used as gains-based awards. One can see a definition of these terms in paragraph 14 of Lewison, J's judgment.

THE CHAIR: Just take me to that.

MR VENKATESAN: Of course. Paragraph 14 is at page {G4/4/13}. Actually, I am grateful for my learned junior. He rightly reminds me that there is a better reference than the one I just gave you and that is paragraph 1 of Arden, LJ's judgment {G4/4/46}. So she defines there what she means by "Restitutionary award":

> "A sum of money assess by reference to the gain which the wrongdoer has made as a result of the wrong in place of compensatory damages, that is, damages which compensate the Claimant for loss suffered as a result of the wrongdoing".

THE CHAIR: Right. How does that assist me on my question? Can you just tell me the page number you are on? 46, is it?

MR VENKATESAN: Page 46, paragraph 1.

So to answer your question, sir, the way we read the Court of Appeal judgment is that they use the words "Restitutionary award" as a reference to an account of

profits, in other words, a gain.

THE CHAIR: Sorry, I thought that is what I put to you and you said I was wrong.

MR VENKATESAN: On reflection I think I was wrong to say that it is not interchangeable.

THE CHAIR: I mean, I appreciate the two are not necessarily the same generally.

MR VENKATESAN: No, indeed. One passage that helps make it --

THE CHAIR: Was it paragraph 58 of her judgment, Arden, LJ's judgment?

MR VENKATESAN: Paragraph 58? Yes.

THE CHAIR: It makes it clear what she is talking about. Sorry, that may not be helpful.

MR VENKATESAN: Paragraph 58 is at page 63. {G4/4/63}.

THE CHAIR: Page 63?

MR VENKATESAN: Yes.

Again, that ties a restitutionary award to an account of profits, but what we would submit says clearer than that is paragraph 151 at page 89, the judgment of Tuckey, LJ {G4/4/89}. Tuckey, LJ says that:

"... I think I should add that at the end of the hearing before us Devenish formulated its claim for the wrongful net profit made by the Defendants ..."

So that tells us the only claim that was in issue by

the time the case gets to the Court of Appeal, and it is an account of profits, so they say that --

THE CHAIR: So they are using the (Inaudible) let us say, they seem to be using "Restitution" and "Account of profits" interchangeably --

MR VENKATESAN: Yes.

THE CHAIR: -- at least in the context of this, when it gets to the Court of Appeal, but I may be wrong about that.

MR VENKATESAN: I respectfully agree with that, sir. In a way, there is a simpler way in which I can make my point which is they cannot have been using it as a reference to user damages, because not only was that not claimed, Arden, LJ says in paragraph 1 it could not have been claimed by ^Devenish, so whatever it means, we say it is a reference to account of profits. It is not reference to damages. So, that is what we say about ^Devenish.

THE CHAIR: Yes.

MR VENKATESAN: I have addressed the detail of all of the cases they say constitute binding authority -- indeed, in some respects it might be thought to be an interrorem submission because we encountered this, and the phrase "Binding authority" appears some 29 times across the two Skeleton Arguments, but it is not authority for what they want it to be. What it decides is that a different remedy, which is not in issue on this application, is

not available for a breach of competition law, and one might wish to stand back and ask oneself why, as a matter of principle, would these cases be saying what Meta contend, namely you can never get user damages for a breach of competition law. What would be the rationale for that, if one asks rhetorically.

In its previous Skeleton Argument Meta engaged with that, and it said the rationale is that user damages are available only for the infringement of a right that protects purely non-financial interests. That is how it was put at paragraph 43(c) of their first Skeleton, that is {C5/2/20}, but that argument has been abandoned in the second Skeleton. It was always unsustainable, we would submit, because there are a number of cases --

THE CHAIR: I can see what they say (Inaudible).

MR VENKATESAN: I am grateful, so that is all I wanted to say about Issue 1(b). There is no binding authority, or indeed any authority that says you cannot avoid damages~--

THE CHAIR: Where are we going now?

MR VENKATESAN: Issue 1(c) which is Meta's submission that it is conceptually incoherent for user damages to be awarded for a breach of competition law, but --

THE CHAIR: Probably covered this. I just wonder if now is an appropriate moment to have a five-minute break for

the stenographer.

MR VENKATESAN: I am grateful.

(11.40 am)

(A break was taken)

(11.47 am)

MR VENKATESAN: I am grateful, sir. I am, with your permission, going to take issue 1(c) very quickly because I am not sure it actually arises, and I will explain why I saw that.

THE CHAIR: You have sort of covered it.

MR VENKATESAN: I have sort of covered it. There are one or two additional points. But what is common to all of this is, so, they take four points at paragraphs 34 to 38 of the Skeleton Argument and the punchline in each instance is the same. They say it would be, quote-unquote "Conceptually incoherent" for one reason or another. The user damages to be available either for competition law generally or in this case.

Now, my first and in some respects shortest answer to this is these are not points that can realistically be deployed to defeat an Amendment Application. If they want to take these points at trial they can, because, of course, the fact that we get leave to amend -- it does not automatically follow from that that we will win. It just means that it is on the table at trial. So we do

say that it is important to analyse Issue 1(c) --

THE CHAIR: So you say if there is not authority against you, and that we are doing this from first principles, really we cannot do that today.

MR VENKATESAN: Indeed sir. Because, as you say, we only get to this stage of the analysis, 1(c), if Meta are wrong about ^One Step, wrong about ^Wass, wrong about ^Devenish, wrong about ^Garden Cottage, but at that stage, surely, it must at least be arguable --

THE CHAIR: I understand.

MR VENKATESAN: So I wonder if I should just leave 1(c) and address it in reply. The only point I should probably flag is that there is an argument at paragraph 39 of their Skeleton which is that somehow the pleaded case on abuse in this case is incompatible with user damages. We say that is just wrong.

It seems to depend on the premise that if you could get conventional damages, so if the right which you say has been infringed is suitable for an award of conventional damages, then it is either that or bust. That seems to be the argument, but it is just wrong as a matter of law, because there are any number of cases in which the Court has awarded user damages in circumstances where financial -- conventional financial all loss could have been caused but was not. Indeed,

that is usually why Claimants seek user damages, so there is no inconsistency in our pleading both conventional damages and user damages, and there is a case which I will not go to, I will if I need to in reply called Whitwham v Westminster Brymbo Coal where actually both were awarded and the Court did not see any inconsistency.

THE CHAIR: But you are not seeking both, you are seeking user damages in the event, is that right, in the alternative?

MR VENKATESAN: Yes. So, we would have to elect but not now, at trial, so we would not be able to get, as it were, two damages awards. We would elect for the higher remedy but that election, in the usual way, would fall to be made before judgment is entered, so at this stage all we are saying is it should be on the table at trial.

THE CHAIR: Meta is advancing a positive case that you are not entitled to conventional damages?

MR VENKATESAN: Sorry, sir, I did not catch that.

THE CHAIR: Sorry, Meta is advancing a positive case that you are not entitled to conventional damages?

MR VENKATESAN: Yes.

THE CHAIR: And there may be a point where actually you are entitled to elect, or if you are, in fact, entitled to conventional damages on the basis of the price that

would have been paid to you on the counterfactual, it may well be that you are not entitled to elect for user damages. That is a point that is not before us today, as I understand it.

MR VENKATESAN: It is not before you today and, I mean, that would probably have to be fought out at trial. I am not sure I would accept that. It would depend on why they say we are not allowed to elect.

THE CHAIR: You may -- it may be that you are put to an election before it gets to trial or, alternatively, you may not be entitled to elect if conventional damages are available to you, but that is not a matter that we have heard argument on.

MR VENKATESAN: Precisely. Those are all points, if Meta wants to take, that can be fought out either at trial or, as you say, in advance of it in a case management context but it is not a point that could help Meta defeat the amendment if we are otherwise right.

I believe I may move on from Issue 1(c), and I will come back to it in reply if I need to.

That, then, takes us on to Issue 2, which is: are the certification requirements satisfied?

Now, the first point I would make about this is we only get to this if you have decided Issue 1 in our favour. In other words --

THE CHAIR: Yes. I understand that. So, we have already established it is an arguable case. The other matter to keep in mind is that its claim has already been certified.

MR VENKATESAN: Indeed. Indeed.

THE CHAIR: So that is not to say we can revisit certification at any stage.

MR VENKATESAN: Yes.

THE CHAIR: But the claim is going to trial.

MR VENKATESAN: Indeed.

THE CHAIR: To what extent do we need to scrutinise -- neither of you really address this in your Skeletons -- do we need to scrutinise -- it is not an alternative case in the sense that you are withdrawing your first claim, you are adding an additional claim. Is there authority on what the correct approach to certification is in those circumstances?

MR VENKATESAN: We have not found any authority on it but we are going to make some submissions by reference to what the Tribunal itself said in the second certification judgment. Indeed, one of the points we are going to make is that Meta's argument on Issue 2 is really a collateral attack on points it took but were rejected, both by the Tribunal and then on appeal by the Court of Appeal, but I will come on to that and make those

submissions, but I just realised that there is one point I meant to address and forgot to address and that is to answer a question you asked me at the outset of my submissions about "Is this really suitable for amendment -- to grapple with now or should it be decided at trial".

There is a point my learned friends take about that which I should respond to before I get to Issue 2, and I can do it quite quickly.

So, you will have seen in our Skeleton argument we have cited authority, notably Begum v Martin for the proposition that if there is a point of law which is novel, complex, or concerns a developing area of jurisprudence, we say there is a general principle that such points of law should not be resolved summarily, whether on a strike-out or on an Amendment Application but only at trial and the rationale for that principle is that such points of law should only be decided in the light of actual findings of fact rather than assumptions.

Now, my learned friends take two points in response to this. Their first point is they say there is no such general principle and that you only defer points of law to trial if the answer to the point of law is likely to be affected by factual findings that are made at trial

and not otherwise.

We say they are wrong about that. They are wrong about that because in ^Begum v Marin and I will just give you a reference in the interests of time --

THE CHAIR: I am not sure one needs to -- I mean, one can just see on the number of the cases that have been -- that we have been looking at is actually, when it comes to the analysis, they do draw on the facts as to whether user damages are available, it seems. We can see what Meta say about that and then come back to it.

MR VENKATESAN: At a minimum you would have granular factual findings which assumptions can never replicate.

The only other point I would make is that Meta are actually wrong about that because there is a more general principle that the very fact that a point of law is novel or complex, irrespective of whatever factual findings may affect the answer to it, mean that it should be left to be decided at trial, and one --

THE CHAIR: We are familiar with that proposition.

MR VENKATESAN: Yes. I will then turn to Issue 2, if I may, on certification.

Now, so the first point that arises under Issue 2 concerns the commonality requirement. Now, at paragraph 69 of their first Skeleton, it may be worth turning this up briefly --

THE CHAIR: Before you get to that, I was having some difficulty with the distinction -- I have obviously read your experts' -- both expert reports on this -- and although in theory there is no difference between theory and practice, but in practice there is, I understand theoretically there could be a difference between how you approach the two calculations. That is your conventional damages and user damages, but in practice that does not seem to be when it actually comes to working through the numbers and things, there does not seem to be a cigarette paper between the two calculations.

MR VENKATESAN: I respectfully agree, sir, and the reason for that is while of course the legal nature of conventional damages is different from user damages, certainly in a case of this kind, the economic logic is not different, because certainly the way it has been done, and I am not saying it is impossible to do it in some other way, but the way it has been done, it has already been certified, is what our expert has done for the conventional damages claim is to posit what Meta would have had to do, acting non-abusively, in a collective hypothetical negotiation with the Class to avoid infringing the rights which we must assume for present purposes it did infringe, but that is very

similar, and indeed almost identical to the hypothetical calculation you would or could do to calculate user damages, because you are, once again, asking, subject to the points my learned friends take about commonality, section 47(c)(ii) which I am going to come to, subject to all that, the economic logic is indifferent. You are asking in a world in which Meta is not acting abusively, what would it reasonably have had to pay the Class to avoid infringing the rights that it did.

THE CHAIR: (Inaudible).

MR VENKATESAN: Well, Meta say that.

THE CHAIR: Then you come to your user damages, but in the end the hypothetical bargain, assuming it is not done individually, there is that point about (Inaudible) but when one gets to the hypothetical part, I assume you are looking at it from a collective analysis, at least for practical purposes, then the assessment is going to be very, very similar.

MR VENKATESAN: Indeed sir, and that is why we say it is a point in our favour, and that is why we say the Tribunal should be slow to permit Meta to reargue these points because they ran the very points they are now running, albeit by reference to the conventional damages claim for which they were seeking certification, they lost, they are taking what are, in substance, exactly the same

points about individualisation and so on, albeit now by reference to user damages, so I do not go so far as to say that there is an estoppel or an abuse of process because I accept, as my learned friends rightly say in their Skeleton, that at that stage we were seeking conventional damages, but the problem about Meta's argument is everything it now says to you is something it said at the time. The substance of the point has not changed. It lost before the Tribunal. It lost before the Court of Appeal after a normal hearing, and we say that shows at a minimum that Meta's points are bad points. I do not need an estoppel or an abuse here, but that is how I put it. I will just take their points in turn.

Indeed, it seems to us ultimately it all boils down to their commonality point, so they say at paragraph 69 of their first Skeleton, it may be worth looking at this briefly on the screen because they have backed away from it {C5/2/32} at paragraph 69, first sentence, this was Meta's case:

"By their nature, user damages claims do not (and, indeed, cannot) give rise to a common issue for the purpose of section 47B ..."

Then they explained why, they say it would require a highly individualised assessment of the right held by

each Class member and the infringement of it because some people will use Facebook more actively than others, and so on.

So, pausing there, as originally put, Meta's case was that user damages are incapable of being certified, because that must be what they meant by the words, "Do not and indeed cannot give rise to a common issue".

Unsurprisingly, perhaps, my learned friends have backed away from that in their second Skeleton because they now say at paragraph 55 of their second Skeleton that many user damages claims will fail the commonality requirement, but that not all of them would, but whichever way the case is put, we respectfully submit that it is a bad point, and there are three reasons why we say that.

The starting point is that -- and this is our first reason -- the starting point is, as we have already discussed, the economic model used by Professor Scott Morten, our expert, posits a collective hypothetical bargain between Meta and the Class as a whole, not because such a bargain would actually have taken place, but as a valuation tool, as Lord Reed explained at paragraph 91 of ^One Step which we looked at, to identify what sum of money Meta, acting reasonably and non-abusively, would have had to pay to obtain their off

Facebook data. I mentioned that because it is a Class-based or collective approach, as it were, not an attempt to posit some individualised bargain, hypothetically, with each individual Class member.

Now, if that approach is legitimate, then plainly there is no individualisation in this claim because you just posit a hypothetical bargain and then you ask what amount does that model generate, so my learned friend's argument must depend upon establishing, as they seek to, that it is somehow illegitimate to adopt this Class-based approach to the quantification of user damages, and they seek to do it by suggesting that it is prohibited by the Supreme Court decision in ^Lloyd v Google. So, just to give you a reference, that is at paragraph 71 of their first Skeleton, and 52 to 53 of their second Skeleton, and they rely on the observation of Lord Leggatt in that case that a user damages claim requires an analysis of the wrongful use made of each individual's data before you can work out what, hypothetically, would be a reasonable fee for releasing it.

Now, ^Lloyd v Google we submit is actually a case that undermines my learned friend's argument. It is at {G4/8/31}. Again, just to give you the proposition before we look at the passage --

THE CHAIR: Paragraph, sorry?

MR VENKATESAN: It is paragraph 80 at the bottom of page 31.

Just to identify, if I may, what we seek to get from this passage, the important thing to remember about ^Lloyd v Google is that it was a representative claim under CPR19.8. It was not a collective action under the Competition Act 1998.

Lord Leggatt says expressly at paragraph 18 that what requires or gives rise to the need for an individualised assessment of user damages is the compensatory principle, so you can see that over the page at page {G4/8/32}. Lord Leggatt says:

"The potential for claiming damages in a representative action is, however, limited by the nature of the remedy of damages at common law".

This is really the critical sentence:

"What limits the scope for claiming damages in representative proceedings is the compensatory principle on which damages for a civil wrong are awarded with the objective of putting the Claimant as an individual in the same position as best money can do it as if the wrong had not occurred. In the ordinary course this necessitates ..."

In other words, the compensatory principle necessitates:

" ... an individualised assessment which raises no issue and cannot fairly or effectively be carried out without the participation in the proceedings of the individuals concerned, a representative actions is therefore not suitable for such an exercise".

But, of course, the compensatory principle is disapplied by section 47(c)(ii) of the Competitive Act in a collective action and therefore so is the need for individualised assessment, and as it happens that was explained in the same case by Lord Leggatt at paragraph 29 at page 16. {G4/8/16}.

Lord Leggatt says at paragraph 29:

"Compared to group actions, the method of collective redress which is now available in the field of competition law offers significant advantages for Claimants, particularly where many people have been affected by the Defendant's conduct but the value of each individual claim is small".

Then, picking it up at paragraph 31, if we may, that is page {G4/8/17}, over the page, Lord Leggatt says this:

"A second significant feature of the collective proceedings regime is that it enables liability to be established and damages recovered without the need to prove that members of the Class had individually

suffered loss".

It is sufficient to show that loss has been suffered by the Class viewed as a whole and he says that that is the effect of section 47(c)(ii) of the Competition Act 1998. It follows, we submit, that it is -- if you are in a collective action under the Competition Act 1998, legitimate to quantify user damages collectively by positing a hypothetical collective bargain, and necessarily that individualised assessment to which Lord Leggatt refers does not arise in a collective action because the thing that gives rise to the need for individualised assessment, namely the compensatory principle, is disapplied.

THE CHAIR: I understand that, but in terms of, again, coming back to the conventional claim where one -- tell me if I have this wrong -- one is asking what Facebook would have paid in the counterfactual, precisely the same point could be said, could it not, that, well, what they would have paid would depend on how much data you have. Somebody might have -- I mean, I have almost none and then there is somebody else who has reams and reams of very interesting data on their apps, and perhaps even because of their age or because of their personal circumstances, and at the moment, I am obviously going to hear from Meta, I do not quite understand why that is

not a problem in conventional damages and it is a problem in user damages. It is essentially the same bargain one is investigating.

MR VENKATESAN: Indeed. I respectfully agree, sir. In fact, I was debating internally whether I should start with the point I have just made or that point but that, actually, is the shortest answer to this, and in our Skeleton that is our first point.

THE CHAIR: Both points are important.

MR VENKATESAN: Indeed.

If what you put to me is right, and we respectfully say it is and adopt it, then one never gets into the details of Issue 2 because Meta would have to show you that the assessment of user damages is more individualised than the assessment of conventional damages because if it is not, if they are simply taking the same points they took in resisting certification the first time around, and the very fact they lost is an answer to those points, and it is not different -- the economic logic is not different, and importantly the variability --

THE CHAIR: They are not formally precluded from having a bash, I suppose, but they may face an uphill struggle.

MR VENKATESAN: I said at the outset, I am not saying there is an estoppel or abuse, I just say the fact they lost

twice in a sense is more powerful than anything I can submit.

Now, what I do need to address is what my learned friends say in their Skeleton about section 47(c)(ii). They say we cannot invoke 47(c)(ii). They say we have conflated 47(c)(ii) with 47(b)(vi). Now this, with respect to my learned friends, is another bad point and we have four answers to it and I will take them quite quickly.

First, what it overlooks, this argument, so-called conflation, is that if 47(c)(ii) applies, then the compensatory principle is disapplied. That, in turn, means the damages, whether conventional or user can be assessed collectively. In other words, top down rather than bottom up, so that is the effect of 47(c)(ii), but if 47(c)(ii) enables that, you could not then re-introduced individualised assessments of 47(b)(vi) because that would be to read the two provisions consistently.

Second, Meta's argument that somehow 47(b)(vi) and 47(c)(ii) are sealed from each other, is inconsistent with the fact that in ^Lloyd v Google itself which we just looked at, Lord Leggatt said in terms that the compensatory principle is what gives rise to the need for individualised assessment, that it is disapplied by

47(c)(ii), and that, therefore, that collective proceedings, as he put it, offer significant advantages to consumer, but it could not offer those advantages if Meta is right because what 47(c)(ii) dispenses with is on Meta's case put back in through 47(b)(vi) which is unlikely he to be right.

Third, and perhaps most importantly, Meta's interpretation of the relationship between 47(b)(vi) and 47 (c)(ii) is directly inconsistent with what the Court of Appeal said in the ^Merricks case. Now, the facts of that case are complex. The Tribunal is probably more familiar with it than I am, but in a nutshell what happened was MasterCard charged a fee known as an interchange fee, both to the cardholder's bank, the bank which issues my card, and to the merchant's bank, that is to say the person who sells goods or services to me, against the credit card, and both of those fees are then passed on to the merchant in the form of a charge called the merchant service charge or the MSC. What was alleged in the ^Merricks case was that the merchants in turn passed on the MSC to consumers by increasing prices and that was the loss for which damages were sought in a collective action. At first instance the Tribunal found that the amount of the overcharge passed on to the consumers was not a common issue, did not satisfy the

commonality requirement in 47(b)(vi), and the reason why it came to that conclusion was that the amount of the pass-on was different in different sectors of the economy, unsurprisingly so. Indeed, some consumers may not have suffered any loss because they may not have been subject to any overcharge, but the Tribunal's finding was overturned by the Court of Appeal. We have that at {G5/28/15}. The Tribunal's finding is recorded at paragraph 30. I just wanted to give you that reference. Patten, LJ giving the judgment of the Court says that:

"The degree to which the overcharges were passed on to consumers in the form of price increases and the amount which each individual claimant spent with those merchants were not in the view of the CAT common issues in the sense of being same, similar or related"

As I say, that was overturned, and the reason it was overturned appears at paragraphs 46 to 47 which is at page {G5/28/22}. Can I invite the Tribunal, please, to read 46 and 47, or I can read it.

THE CHAIR: We will read it to ourselves. Thank you very much.

MR VENKATESAN: I am grateful. (Pause)

I am grateful, sir. So, members of the Tribunal, one can see that at letter D at paragraph 46 Patten, LJ

held that the reason why the commonality requirement in 47(b)(vi) is satisfied is that the need for a bottom up individualised assessment is removed by 47(c)(ii), so he refers to 47(c)(ii) in the second sentence. He then says because of 47(c)(ii) in this collective action you do not have to worry about which individual consumer spent how much, because you can do it on a collective basis. He then says that is why 47(b)(vi) is satisfied.

Now, MasterCard did not appeal that conclusion and the case went to the Supreme Court but it was endorsed by both the majority and the minority. I will just give you the reference -- paragraph 64(a) and 65 in the majority judgment of Lord Briggs, that is {G5/32/25}, paragraph 170 in the minority judgment of Lord Sales and Lord Leggatt, that is {G5/32/48}.

So ^Merricks, we would respectfully submit, is directly contrary to the argument my learned friends advanced about 47(b)(vi) and it is therefore perhaps unsurprising that they have not been able to cite any authority in support of it. That is our third point.

Now, what I would say is that in subsequent cases Defendants have repeatedly attempted to distinguish ^Merricks. They have said it was all about the data, not about any principle, it is distinguishable on the facts which have been firmly rejected by the courts, the

attempt to distinguish ^Merricks. I do not know if I need to give you the references but -- so those are my first three points about this argument they may take on 47(b)(vi).

The fourth point, picking up on what the Chair put to me, the very fact that the conventional damages claim was certified shows that Meta's interpretation of 47(b)(vi) must be wrong, because otherwise you would have the same argument there and they have not even attempted to show that the assessment of user damages is any more individualised. So that is the first of our three reasons why Meta's case on commonality is unsustainable.

The second is, in some respects, even simpler. We only get to this Issue 2 if the Tribunal resolves Issue 1 in our favour, but if you have done that then you will have decided that user damages, at least arguably, are an available remedy for a breach of the Chapter II prohibition. If you have decided that, it is inherently unlikely that user damages are incapable of certification which is the practical consequence of the argument my learned friends advance, because you could say in every case if what they are saying is true that there are thousands of people, and they would have done different things with their data. It would make it

impossible, ever, to certify a user damages claim, at least in the context of data.

THE CHAIR: It is dangerous for a Tribunal to generalise. I think we have to deal with what is in front of us.

MR VENKATESAN: I accept that sir, and that is why my learned friends skillfully, in their second Skeleton, backed away from the submission they advanced in the first, and that is why I took you to it. In the first Skeleton they were taking the absolutist position that it is impossible for a user damages claim, even if it is available as a matter of law to be certified.

Now they say most user damages claims will not satisfy commonality, but the reality is, if one just asks oneself, if Meta's interpretation of commonality is correct, the practical reality is that it will be impossible for user damages claims to be satisfied. Anyway, you have the point, and the reason I make the point is it has been known for many years -- the Supreme Court has said so -- that the only realistic means of redress for consumers is collective action, so it is not likely that Parliament would, on the one hand, make user damages an available remedy, but the on the other hand, create obstacles to certification that mean that you cannot, in practice, use it. I am not saying that is conclusive, but it is a pointer towards what Parliament

intended, and my third point is actually the point we have already discussed, so I have taken it very shortly, which is the supposed need for individualisation all derives from what Meta says about the Class. It says different people would use Facebook differently, but Meta actually took these very points, and I will give you the reference, at the second certification hearing, and contended, as it does now, that the conventional damages claim does not give rise to a common issue. There are many examples, I will give you just one. Volume A, tab 13, page 3, if we could call that up, please. This is from the transcript of the second certification hearing. If one looks at lines 19 to 22, my learned friend was submitting at the time that -- and we say that in this situation there is no pecuniary loss when users consent to Facebook using their Off-Facebook Data, then he said this: If one was seeking to measure --

THE CHAIR: Yes.

MR VENKATESAN: It is the same point, but Meta lost, and just to give you the reference, it is paragraph 29 of the second certification judgment which concluded that the use of a collective rather than individualised bargain --

THE CHAIR: Show me that, please.

MR VENKATESAN: Of course. It is Volume A, tab 15, page 21. {A/15/21} it says:

"Meta contended that the PCR had failed to articulated a true connection between the abuses pleaded in loss or damage".

Then it is this sentence:

"It was suggested by Meta that the PCR had failed to articulate the basis for a collective bargain model for establishing the price that would be paid to the users in the Class had the abuses not occurred".

Then:

"We do not consider there to be any substance in Meta's contentions" and reasons are given. So, we read that passage as the Tribunal endorsing the use of a collective bargaining model which is, of course, the model that --

THE CHAIR: Can we just scroll on to the next page?

MR VENKATESAN: So we do say that if they were wrong then they are going to be wrong now because nothing has changed.

That is all I was going to say about commonality. I do not need to say anything about suitability because, in their second Skeleton, Meta accepts their case stands or falls, their case on suitability stands or falls with commonality, that is paragraph 61 of their second

Skeleton.

Finally, and I can take this very shortly indeed, there is a suggestion that our expert methodology is defective in some way, but in truth that is all parasitic on all Meta's earlier arguments. I have already explained what Professor Scott Morten is seeking to do. She has confirmed that her model will not require any material adjustment to quantify user damages because, as we have discussed, the economics are not materially different.

Now, Meta makes various criticisms of Scott Morten 3 which is where Professor Scott Morten explains this.

THE CHAIR: Yes. Well, we have that and we will see (Inaudible).

MR VENKATESAN: May I just have a moment?

THE CHAIR: Yes. (Pause)

MR VENKATESAN: Subject to anything the Tribunal would like me to address those are my submissions in opening. I am grateful.

Submissions by MR DEMETRIOU

MS DEMETRIOU: May it please the Tribunal, I am going to make my submissions in the following order: first of all, address the law, so why the Class Representative is wrong to say that user damages are available in competition claims; secondly, I will say something about

timing, why we invite you to rule on this point now, and, thirdly, I will deal with certification.

So, starting with the law, and before developing our submissions, I would like to crystallise why we say the Class Representative is wrong on the law.

It comes down to two related points. The first point is that we say that the Tribunal is bound by the Court of Appeal in ^Devenish. In ^Devenish the Court of Appeal held that it was bound by ^Wass to conclude that user damages are not available in competition damages claims. Now, pausing there, you can see that this is not just a point of law that we are raising that is arguable either way, it is a crisp point of law in the sense that we are saying that there is binding precedent which precludes this claim from being advanced, and that does tie into the timing point, as I am going to come on to say, because if we are right about that, if we are right that this claim is precluded as a matter of precedent, then the Class Representative will need to try to persuade the higher courts that the claim is, nonetheless, permissible, and we say that it is much more efficient that the Court decides today, having heard full argument, the Tribunal decides today whether we are right or wrong on that, so that any appeals can proceed in parallel with the main proceedings.

The second point is that that conclusion, so the conclusion that the Tribunal is bound by ^Devenish that user damages are not available in competition claims, is consistent with the principled approach to user damages set out in ^One Step and also in ^Lloyd v Google, and, in particular, we say this, we say that all the tort cases in which a claim to user damages has been recognised are cases in which the tort in question creates or specifically protects the relevant property right or valuable asset. That is why there is loss that needs to be compensated.

So, the tort of trespass, for example, protects a person's land from invasion. It confers -- the tort itself confers a right over property, so if that right is breached then there is a loss, even if not financial loss, and that is because the tort gives the landowner the right to control his or her own land, and to charge people for entering it, and the opportunity to charge has been lost -- similarly with patents. Patent law confers as monopoly over the patent -- a legal monopoly on the patent owner, and if someone infringes the patent then the patent owner suffers a loss because by virtue of the patent he is entitled to charge to license it, and so in all of the cases in which user damages have been recognised, the property right emanates from the

legal rules, so the -- either patent legislation or the relevant tort on which the cause of action is based, and that is what we mean in our Skeleton when we say the availability is tethered to the cause of action.

THE CHAIR: How do you draw the distinction between -- I mean, you talk about patent case, but you also -- I think Lord Sumption refers to the rights in the confidential information cases, I think, or maybe the judgments do, and how do you distinguish those sorts of entitlements to control your confidential information from this case where you are concerned with -- it is not a million miles away -- concerned with your interest in data.

MS DEMETRIOU: Sir, yes, that is a very good question, with respect, and our answer to the question is as follows: so where you have a breach of confidence claim, the claim itself is what confers the right over the asset, ie the confidential information. So, you have a claim in breach of confidence, and it is that claim that confers on the owner of the confidential information the right to keep that information confidential, such that if there is a breach of that right there is automatically loss even if not pecuniary loss, because the loss of control -- there is a loss of control over the information.

Contrast competition claims where the purpose of competition law is not to confer any property right on anyone at all or any right to confidential information, it is concerned with preventing anti-competitive conduct on the market, and it provides a corollary right on those who have suffered loss as a result of that anti-competitive conduct to claim damages.

THE CHAIR: That is avoiding the specifics of this particular abuse which we have seen against you for present purposes, which is the extraction by what would be said to be foul means of data, and there does seem to be -- they do seem to be not a huge distance apart. So, by saying that compare confidential information cases to abuse cases in general, I understand the force of your point, but if you say compare competition -- sorry -- confidential information case to the particular species of abuse that is alleged in this case, I wonder if the distinction is as clear.

MS DEMETRIOU: Sir, I understand the point, but can I put it this way: there are two answers to it with respect. So, the first point is that, of course, what the Class Representative is doing is skipping straight to, oh well, this is an invasion of our property rights. In fact, the abuse that is claimed is, first of all, an abuse which comprises an excessive price, and, secondly,

an abuse which they say is -- the other side of exactly the same coin -- comprising an unfair contractual term. Those are the abuses that are pleaded. Those are not abuses which are -- which comprise unlawful or breach of a right to control property, it is the upshot of those things, some way down the road, where they say, oh well, if that abuse happened, what that would have involved, in fact, is an incursion into our property rights. That is the first point that I make.

The second point that I make is that what is alleged, as I say, as an abuse of a dominant position comprising those two things. What is the legal obligation on Meta? Let us assume against us now that there is a dominant position, and let us assume that Meta has acted abusively. What Meta needs to do is organise its business so that it does not abuse its dominant position. It is not required to pay anybody anything for their property rights if it can operate in a way that is not abusive, and so that is why there is a very tenuous link -- in a way, one might say that the invasion of property rights that have caused the Class Representative for these purposes focuses on so heavily is incidental to the tort.

Can I try and illustrate my response by reference to another hypothetical example? Take the tort of

fraudulent misrepresentation. Now, there has been no case in which user damages are available for breach of the tort of fraudulent misrepresentation, and when I come to take you to ^One Step, I am going to show you why, as a matter of principle, that is not so.

Let us say somebody commits a fraudulent misrepresentation, and as a result they take somebody's property as a result of the misrepresentation. Then, of course, there is a monetary claim, there is a claim for damages if the Claimant suffered financial loss, but what the Claimant cannot do if they have not suffered financial loss is say "Oh well, the tort of fraudulent misrepresentation actually confers a property right on me and that has been breached and I am entitled to user damages". They cannot do that. They could, in the tort of conversion, because that tort does confer the property right, but in my example of fraudulent misrepresentation the invasion of property rights is simply incidental. It is not because of any right conferred by the obligation in question, and that is where we are with competition law too. That is why I say that the Court of Appeal's conclusion in ^Devenish is completely at one with the principled approach taken in the authorities.

Now, may I develop those points please?

THE CHAIR: Of course. Yes.

MS DEMETRIOU: So starting with ^Wass, and I am afraid I am going to have to take you back to it, and if I am taking it too slowly because I know you have done lots of reading please say, but I do need to take this quite carefully because our key point is that you are bound by ^Devenish, and I do need to make that good.

If we go, please, to {G4/3/1}, that is where we will find ^Wass. You know the facts. I am not going to rehearse those. Let us please look at, of the report, 1410 which is page {G4/3/5}, please.

Now, looking between letters G and H, the general rule -- this is Nourse, LJ:

"The general rule is that a successful Plaintiff in an action in tort recovers damages equivalent to the loss which is suffered no more and no less. If he suffered no loss, the most he can recover are nominal damages. Second general rule is that where the Plaintiff has suffered loss to his property or some proprietary right he recovers damages equivalent to the diminution in value of the property or right. The authorities establish that both these rules are subject to exceptions. These must be examined closely in order to see whether a further exception ought to be made in this case".

That is the task that he is setting himself. Then what he does is he identifies the exceptions to the general rule that you need to show -- I am going to say financial loss as a shorthand.

We see at the bottom of that page that the first exception is trespass to land. That is the first exception. Then if we go over the page, please, to letter E, you see that the second exception is debt anew, so unlawful retention of goods, and one can see why that is, because the tort itself confers the right not to have your property taken away, such that if it is, you are losing the right to charge somebody else to use the property.

Then we have at 412(d), so on page 7, the third exception is infringement of the patents, and precisely the same point of principle arises there.

What these three exceptions have in common, just pausing for a moment, is that the torts of trespass and debt anew and the law of patents all creates rights over property. That is what those laws do, and when these rights are infringed there is damage because the owner of the property has lost the right to charge for use of his property. Very different to competition law.

Then we have at -- sorry, further down this page:

"So these exceptions to the general rules in tort

must be added the decision in ^Root v Park".

Then if we go over the page to page {G4/3/8} of the bundle, you see at letter F the same approach as in Root v Park applies where damages are awarded in lieu of a final injunction, and then you go to, please, page {G4/3/9} of the bundle, letter B:

"In light of those exceptions, Nourse, LJ then asks whether the authority's support an award of damages in accordance with the user principle where an unlawful rival market has caused no loss to the market owner".

He finds that they do not support such an award, so that is his conclusion, and we see that at the bottom of the page between letters G and H, so he considers -- he thinks the trespass cases are the most difficult to address because there is a superficial analogy, but then he says:

"It seems to me that the trespass cases really depend on the fact that the Defendant's use of the Plaintiff's land deprives the Plaintiff of any opportunity of using it himself".

He says:

"The same can be said of an unlawful detention of the Plaintiff's chattel. On the other hand, an unlawful use of the Plaintiff's right to hold his own market does not deprive him of the opportunity of holding one

himself. Such, indeed, has been the state of affairs in the present case. Of course, if the Plaintiff can show he suffered loss, nobody would suggest he should not receive substantial damages, but why should he receive them when he has been able to hold his own market and has suffered no loss from the Defendants".

So, that is what Nourse, LJ says, and then you see at letter F on the same page, the conclusion:

"These considerations have led me to conclude that the user principle ought not to be applied to the infringement of a right to hold a market where no loss has been suffered by the market owner".

So that is Nourse, LJ. I am showing you this because I want to show you, in a minute, what the Court of Appeal made of this in ^Devenish, and then turning to Nicholls, LJ, if we go forward, please, to page 13 of the bundle, so between letters F and H, so before that Nicholls, LJ flirted with an analogy between infringement of patents and infringement of a market right, and then he says at F, letter F, he has concluded that the analogy is unsound, and that the application of the user principle in the case of the disturbance of a market right would not accord with the basic principles applicable to that cause of action, and he explains -- he then explains why that is, and can I just ask you to

read down to letter H to yourselves? (Pause)

Then just over the page, just to complete the picture at letter F:

"In my view to award damages on the user principle in such a case in respect of the period prior to the grant of an injunction would lead to the owner of the market right obtaining a greater measure of relief than would be justified by the nature of his right".

So that is ^Wass.

Now, my learned friend says --

THE CHAIR: Are you going to go on to the next --

MS DEMETRIOU: I am.

THE CHAIR: Just explain how one would have calculated the user damages in that case.

MS DEMETRIOU: So, I suppose one would have -- I mean, the argument being made, I think here, was that one calculates user damages --

THE CHAIR: The price of releasing the --

MS DEMETRIOU: Exactly. So, here is a right that we have that the council avails itself of, and that is something which we could charge people for, and we have lost the opportunity of charging for this, and so therefore --

THE CHAIR: I am not sure that is right because that would be conventional damages, so I think what they -- the user damages, I mean, it is stated somewhere that it

would be the right to --

MS DEMETRIOU: Yes. So, Mr Singla shows me that it is -- if we go to page 2 of the bundle --

THE CHAIR: Yes. Sorry. I should have asked. {G4/3/2}.

MS DEMETRIOU: We can see there, so if we go down to letter G, so Peter Gibson, J held that it was for the council to prove that the company's market had shown -- had caused loss to the council's other day markets, that none had been shown.

THE CHAIR: That is the conventional.

MS DEMETRIOU: That is the conventional loss. Oh yes, and the judge -- I can show you in a moment where the judge is quoted to show that there is no -- why there is no conventional loss.

THE CHAIR: I understand that.

MS DEMETRIOU: And then it says -- but that it was nevertheless entitled to an award of damages on the basis of what would have been an appropriate license fee to require for the company to operate its market from the date when the council (Inaudible) first opened up to the date of his order, and I suppose it is a bit like in a patent case, and I am being very, very cautious, I perhaps should not have embarked on patent analogies given my Tribunal, but one might have a patent case where, in fact, the patent owner is not going to compete

in the relevant market at all, they just have no intention of doing it, so they have not actually lost sales, but they have lost the right to license, and I think that is the -- that is really the point that is being made here.

That is the point that the Class Representative, that is the case they want to advance, so their case is, well, if we do not succeed in showing, in our conventional damages claim, so we do not succeed in showing that the price --

THE CHAIR: You draw an analogy with patent, and say patents, yes, it is fine, market rights, that area of enormous public interest, it is not fine, how does any of this help us? You are about to come on to it but how does any of this help us when we come to competition law?

MS DEMETRIOU: Yes, so can we turn to ^Devenish?

THE CHAIR: Yes.

MR VENKATESAN: So ^Devenish is at {G4/4/46} and the Court of Appeal's judgment starts at page 46 of the bundle, and I am going to tell you first of all what we take from ^Devenish and why it is important, and then I am going to show you the relevant passages of the judgment.

THE CHAIR: Yes. It is a very long learned judgment.

MS DEMETRIOU: It is a very long judgment. I will take it

as briskly as possible.

THE CHAIR: No, take your time, please. This is obviously important.

MS DEMETRIOU: The case was a follow-on claim for damages following a commission finding that certain vitamin manufacturers had entered in a cartel, and the question for the Court was whether the Claimants could seek a restitutionary award of damages or an account of profits. We accept, just to make this clear at the outset, that those are both gains-based remedies, so we accept that.

THE CHAIR: Right. How did they differ? Sorry. This the context of a case like this, how does a restitutionary claim differ from an account of profits, or maybe it does not matter. If it does not matter --

MS DEMETRIOU: I am not sure it matters. Let me come back to that but for my purposes it does not matter.

Now, the Court of Appeal held that such damages, so the damages being claimed, were not available in competition claims, but the basis, and this is the important bit, the basis on which the Court of Appeal reached that conclusion was that ^Wass bound the Court of Appeal to conclude that user damages are not available in competition claims, and that conclusion is binding on this Tribunal, and we say that is the

short --

THE CHAIR: We will get to that, but the facts are very different here, because how in this case would you have described the user damages? If they had said yes, user damages are permissible, how would one have articulated them, and how different would that have been to the case which is before the Tribunal today?

MS DEMETRIOU: So, sir, they were not -- I accept they were not advancing a claim for user damages in that case in ^Devenish, but what you have is a binding finding of law that user damages are not available in competition claims.

Now, the Class Representative --

THE CHAIR: I am not going to let you duck that question quite so swiftly. If you had articulated a claim to user damages, because you say this is binding on a case about user damages, how could you, on the facts of that case, have articulated the claim to user damages?

MS DEMETRIOU: We say that, with respect, that is not -- I do not need to explain that because I accept -- so it is not the right question, in my respectful submission. I do not know, is the answer, how you would --

THE CHAIR: So you are not disputing that user damages could not have arisen in this case?

MS DEMETRIOU: Well, that they did not. I am not going to

concede that somebody could not have dreamt up an argument, but it is irrelevant. They were not claimed in that case, and that is the point that my learned friend puts against me, so the Class Representative says that the Court of Appeal's judgment is not binding on the Tribunal in respect of its application to amend because, my learned friend says, the Claimants were not, in fact, seeking an award of user damages in ^Devenish, and the Court of Appeal's judgment, he says, was concerned with restitutionary awards of damages, so that is the point against me, but we say that that submission is incorrect, and you need to -- we submit -- identify two stages in the Court's reasoning.

So, the first and critical stage for present purposes is that the Court of Appeal determined that it was bound by ^Wass to find that no user damages are available for breach of competition law. That is the first stage of its reasoning. I am going to show you that.

So, the Court of Appeal said, "We are bound by ^Wass to say that you cannot claim user damages in competition law" and that is what we rely on.

The second stage is that the Court held that it followed from that, followed from that first-stage finding, that no claims in restitution are available in

competition law, and the reason why the Court of Appeal reasoned, thought that the second step followed from the first, was because you will have seen that prior to ^One Step there was disagreement as to whether user damages are restitutionary or compensatory in nature.

Now, the Class Representative says in its Skeleton, well, we reserve our rights to challenge that second finding if the case goes further, but it is the finding at the first stage that is critical for our purposes. The very basis for the Court's reasoning on what was being claimed in that case, restitutionary damages --

THE CHAIR: Shall we have a look at that, then?

MS DEMETRIOU: -- was ^Wass. So, turning to the judgment, and starting on page 46, and we can see this from paragraph 2 {G4/4/46}, so just remind yourself, please, of what is said at paragraph 1 and then I am going to read you paragraph 2 and tell you what I take from it.

THE CHAIR: Fine. Just give me a second.

MS DEMETRIOU: So that is the point that they were looking at, so is a gains-based remedy available, and then at 2:

"This appeal involves a fundamental issue for the purposes of the law of tort, which may be summarised as follows. The aim of the law of tort is to compensate for loss suffered. The courts have exceptionally also awarded damages (commonly called 'user damages') by

reference to the fair value of a right of which the defendant has wrongly deprived the claimant, and these awards have been made even if the claimant would not himself have sought to use that right and so incurred no loss. However there is no question in this case of Devenish having been deprived of a proprietary right".

Then we see that ^Devenish relies on the recent case of Attorney General v Blake {2001} AC 268, in which a remedy of the type that it seeks in this case was awarded for a breach of contract not involving the deprivation of any property. It contends that compensatory damages will not be an adequate remedy. The Defendants contend that this court cannot apply the principle established in Blake's case to a purely personal tortious claim, and in particular that this court is precluded by precedent, namely the decisions of this court in Stoke-on-Trent City Council v W & J Wass Ltd {1988} 1 WLR 1406 and Halifax Building Society v Thomas {1996} Ch 217, from holding otherwise. The Defendants accept that a restitutionary award could be made for a proprietary tort. By a 'proprietary' tort I mean a tort for which a claimant entitled to property or a property right is entitled to sue for interference on the basis discussed ...in Blake's case. Thus the expression includes trespass to land or wrongful

interference with goods".

So pausing here, you can see that the way that the argument was put by the Claimants is, oh well, you can see that in the ^Attorney General v Blake's case, that essentially a form of user damages was awarded, and that is why there is a focus by the Court on user damages in order to establish whether the restitutionary claim, even though they were not seeking user damages, whether the restitutionary claim was available, and one can see why, because there was a debate, which has though been cleared up by the Supreme Court in ^One Step, as to whether user damages were themselves -- whether they were themselves restitutionary or compensatory, and then you see at paragraph 3 --

THE CHAIR: Sorry, I am not following. It is my fault. Do you mind just saying all that again, please?

MS DEMETRIOU: Of course. So, although the claim was a claim for restitutionary damages, the way that the argument was put by the Claimant was: well, these are available, restitutionary damages are available in competition claims, because, look, there are other torts in which user damages have been found to be available, and they refer to ^Blake's case, Attorney General v Blake, in that context.

THE CHAIR: Right.

MS DEMETRIOU: So they thought to say, well, because user damages are available in torts --

THE CHAIR: But leaving aside the nomenclature, they are talking about claims made on the profits of the infringer.

MS DEMETRIOU: So that is the claim that was being made in this case, but the way the argument ran was that the Claimants were seeking -- so the Defendant said, hang on, you cannot get gains-based remedies in non-proprietary torts, so that is what the Defendants were saying, and the Claimant said, "Yes you can, look at the user damages cases", and just pausing there to make a footnote point, the reason, no doubt, they said that is because there was confusion, there was a debate before ^One Step, as to whether user damages were, in fact, compensatory or restitutionary.

Their answer to the Defendant's point which was "You cannot get restitution for non-proprietary torts" was to say "Look at the user damages cases", and so then the Court of Appeal said, "well, hang on, is that right or are we, in fact, bound by ^Wass?" And the Court found that they were bound ^Wass to say that they were only -- user damages are only available in proprietary torts. Let me just show you that, where the Court finds that.

So before I do that, you can see at 3, paragraph 3,

that Arden, LJ calls this issue "the ^Blake issue", so that is what she calls it in the judgment.

Then you see at paragraph 4 over the page --

THE CHAIR: Sorry, you are saying that the ^Blake issue is user damages -- all species of user damages and not just gains-based user damages?

MS DEMETRIOU: Yes. She is using that as a shorthand -- I am going to show you -- for saying that are user damages available for non-proprietary torts, because, as I say, the argument went as follows: the Defendant said you cannot get restitution for non-proprietary torts, the Claimant said have a look at ^Blake and other cases, you can have user damages. They are not just for non-proprietary torts, and so the Court of Appeal was saying, well, is that right? Actually, it is not, because ^Wass finds that user damages are only available in the proprietary torts. That is our reading of the judgment, and let me just show you, let me follow that through.

So if you look at paragraph 4, so my essential conclusion on the ^Blake issue is this:

"The overall holding in Blake's case is that the law on remedies for interference with property damages in lieu of an injunction, damages for breach of fiduciary duty and breach of contract should be coherent

and that the same remedies should be available in the same circumstances, even if the cause of action is different".

So that is a finding, so her inclination is against us. She is saying, well, as long as you can show some interference with property, it should not matter what the cause of action is. That is what she gets from Blake, and then she says:

"On that basis, a restitutionary award is available in tort unless it is precluded by the Wass case {1988} 1 WLR 1406 or the Halifax case {1996} Ch 217. In my judgment, it is precluded by the Wass case. However, if I am wrong in that conclusion..."

We do not need to worry about that.

THE CHAIR: She is talking about -- what I am going to call "an account", not on anything else. You say, if you go back to ^Wass, it is not talking about an account.

MS DEMETRIOU: Exactly, and so -- so she is simply -- it is just a question of label.

THE CHAIR: Ratio of this case can only be about accounts of profits. You say it is binding, and I understand you may say it is a strong obiter, but I do not understand how you are saying it is binding.

MS DEMETRIOU: We say it is binding for this reason, that her -- the Court's conclusion, the conclusion that

gains-based remedies, which is what I accept we are being asked for in ^Devenish --

THE CHAIR: But I am not being asked for in this case.

MS DEMETRIOU: No, I accept that as well, but I am focusing on what is binding in ^Devenish. So, the Court's conclusion was that gains-based remedies are not available in competition claims for non-proprietary torts, but then one has to ask yourselves what is the basis for that conclusion.

THE CHAIR: Why?

MS DEMETRIOU: Why, and the "Why" is that ^Wass precludes a finding that user damages are available for non-proprietary torts.

THE CHAIR: Okay, well, we will come on to how they deal with ^Wass, but I will need assistance on -- even if that is right, I will need assistance on why the ratio of this case extends beyond accounts.

MS DEMETRIOU: Yes. Well, let me take you through the rest of the case and then we can come back to that, if that is okay.

THE CHAIR: Yes.

MS DEMETRIOU: So, can we go on, please, to page 56? {G4/4/56}, and paragraph 38.

So, can I just ask you to read paragraph 38 to yourselves? (Pause)

What Arden, LJ is saying there is that there are similarities between user damages and the remedies being sought in this case, and she is saying there that if the law of remedies were to be required to be coherent in economic terms, and if that were the critical factor, the same remedies ought to be provided in these situations, and so that is a point, as it were, that is in -- that would be in the Class Representative --

THE CHAIR: When she refers to "User damages" in this paragraph, what is she referring to?

MS DEMETRIOU: She has defined that at the beginning of her judgment, so she said -- so if you go back to paragraph 2 on page 46?

THE CHAIR: Yes. If we could just go back to that? Sorry. {G4/4/46}.

MS DEMETRIOU: So that is our understanding of user damages. It is the same understanding that we have today.

THE CHAIR: Right.

MS DEMETRIOU: Then if we go to the next page, page 57, the bottom of the page, you see the heading "The first sub-issue, was the judge correct to hold that a restitutionary award cannot be made for a non-proprietary tort" {G4/4/57}, and you have at paragraph 42 --

THE CHAIR: Sorry, which paragraph?

MS DEMETRIOU: Paragraph 42. I just read the heading above that.

THE CHAIR: I just want to make sure I do not miss anything. Yes. Sorry, start again at 42.

MS DEMETRIOU: So, sorry, paragraph 42, so she is addressing what she calls "the first sub-issue" which is defined above in the heading, so was the judge correct to hold that a restitutionary award could not be made for a non-proprietary tort, and she says:

"To answer this sub-issue, I consider under separate sub-headings the general basis for assessing damages in tort, the decision ... in Blake... the cases applying Blake's case, and earlier decisions of this court relied on by the Defendants as constituting binding precedent precluding this court from holding that Blake's case applies to non-proprietary torts".

Then she says:

"I conclude on this sub-issue that it is consistent with Blake's case for a restitutionary award to be available in the case of a non-proprietary tort ... but that the decision of this court in Stoke-on-Trent City Council v W & J Wass Ltd {1988} 1 WLR 1406 precludes this court from reaching that conclusion: see para 76 below."

Then, if we go on to page 63, please, bottom of the

page {G4/4/63}, this is the bottom of page 58, she is talking here about ^Blake, but then she says:

"However, this is not a line of thought which I can pursue if, as the Claimants submit, this Court has held that such an award can only be made in the case of a proprietary tort in a manner binding on this Court on this appeal. Therefore I need to consider the decisions of this Court in ^Wass and Halifax".

So she is considering here that the question whether a restitutionary award is available depends on whether ^Wass binds the Court of Appeal, and of course ^Wass was considering user damages --

THE CHAIR: Can we just go on, just scroll down a little bit? She says she is going on to consider --

MS DEMETRIOU: There is then a lengthy consideration of ^Wass which we can see if we go to page 67 {G4/4/67}, you can see just above paragraph 71:

"Earlier decisions of this court relied on by the Defendants as constituting binding precedent precluding this authority from holding that ^Blake applies to non-proprietary torts".

There is then a lengthy consideration of ^Wass. If we go on to page {G4/4/69} we can see that she then reaches a conclusion at paragraph 74 as to the ratio of the judgment of Nourse, LJ with which Mann, LJ agreed,

is that the user principle ought not to be applied to the infringement of a right to hold a market where no loss had been suffered by the market owner, and then if we go over the page, please, to page {G4/4/70} --

THE CHAIR: Can you just go back, sorry? Read to the end of that paragraph. I mean, so she is stating the ratio, arguably narrowly, at the first sentence of 74. Right. Sorry. Yes. Where do you want to go next?

MS DEMETRIOU: Where I want to go is over the page, and if we go -- if we look --

THE CHAIR: 77?

MS DEMETRIOU: Page 70, and then at just below letter B:

"Nonetheless it was an essential part of Nourse, LJ' reasoning that damages by reference to the benefit obtained by the Defendant could only be awarded in those limited situations".

Those limited situations are the ones I took you to in the ^Wass judgment, so namely trespass, debt anew, patent, ^Root v Park damages in lieu of an injunction.

And it would, in my judgment, have to be shown that his circumscription of the cases where damages were not assessed on a purely compensatory basis could not stand with ^Blake's case".

In other words, it had been overtaken by ^Blake:

"I do not consider this can be shown. ^Blake's case

does not discuss non-proprietary torts".

So then she says:

"In my judgment, while an extension of ^Blake's case to non-proprietary torts on the same basis would be likely to be consistent with ^Blake's case, ^Blake's case was applied to a breach of contract which did not involve a proprietary right, it cannot be said that a case that holds that damages assessed on a purely compensatory basis are the only damages available for the torts other than proprietary torts necessarily overruled".

So she is saying there that ^Wass binds us not on the narrow market point but on the point that there are only these limited exceptions to the availability of user damages for non- -- such that they do not -- they are not available in the case of non-proprietary torts. That is what she is saying.

THE CHAIR: So you are saying -- you are arguing that the ratio in this case is her interpretation of the judgment in ^Wass?

MS DEMETRIOU: Yes. That is the essential --

THE CHAIR: That is not the ratio. That is part of her reasoning.

MS DEMETRIOU: Well, sir, the ratio -- what she has found is that the gains-based damages sought by the Claimants are

not available, but then you have to say, well, why has she found that? She has found that she is bound by the Court of Appeal in ^Wass to find that user damages are not available for non-proprietary torts, and that is binding on this Tribunal.

THE CHAIR: Yes, but, I mean, this all has to be understood in the context of the facts which she is dealing with. Arden, LJ was not faced with this type of case, and she was looking at ^Wass from the perspective of an account, an account of profits, so to say that one should not look at ^Wass to see how it assists in this case, but one should look at Arden, LJ's interpretation of ^Wass is -- makes everything rather difficult. It does not sort of mean there is a clear ratio. You do not go to ^Wass for your ratio. You go to -- or for what is binding -- because if you go to ^Wass you do not find it there, but you say look at the interpretation in a very different context that Arden, LJ reached in ^Devenish, and then you apply that. That is a -- I mean, these may be very powerful submissions, but that is a step away from saying that her reasoning in the context of an account is binding on this Tribunal, dealing with user damages in the compensatory sense.

MS DEMETRIOU: Well, sir, we say two things. So, we say that the Court in ^Wass did, indeed, find that user

damages are not available outside the circumstances in which Nourse, LJ said they were available, so that is a binding finding --

THE CHAIR: That is the -- we do not need to go to Arden, LJ --

MS DEMETRIOU: We do rely on ^Devenish because Arden, LJ is there concerned with a competition claim, and so if there were any doubt that the conclusion in ^Wass is of application to a competition claim, that is erased by Arden, LJ's conclusion.

Can I just show you two more sections of the judgment and I will return to this theme because it is very important.

THE CHAIR: Can you do that at 2 o'clock? It is probably too important to rush this part of your submissions, I expect.

MR OLSEN: Can I just ask a question? Part of her analysis, though, is based on the treatment of ^Wass as being restitutionary rather than compensatory. That goes to the heart of it. It has now been considered that actually user damages are compensatory, so is there not a flawed premise? Because she is relying on it for a point which has actually been established not to be the case.

MS DEMETRIOU: But, sir, if there is a flawed premise, that

comes at the second stage. As I said, there is two stages to her reasoning. The first stage, and this is because it was how it was argued, is that user damages are not -- are not available for non-proprietary torts. That is the first stage. Then she reasons from that that restitution claims are not available, and so the point that you are putting to me is, well, that bit sounds wrong because, actually, now, they have been determined to be compensatory, but if there is a flaw there it does not affect the first and necessary plank of her reasoning, because you, sir -- because it is absolutely clear that ^Wass only concerned user damages, and so user damages, whatever label you put on them, user damages, she finds, are only available in proprietary torts.

(1.04 pm)

(Luncheon adjournment)

(2.00 pm)

MS DEMETRIOU: Thank you. So, there are just a couple more passages in ^Devenish that I want to take you to and then I will just draw together my submissions on ^Devenish and then I need to go to ^One Step.

So, on ^Devenish, can we just pick it up again, please, at page 67? So we are at {G4/4/67}. Paragraph 71, I just wanted to show you, under the heading "The

Consideration of Wass". I just wanted to show you that the Court of Appeal in ^Devenish's understanding of what the claim being made in ^Wass was, was a claim for user damages and, moreover, if you look by letter E:

"However, he made an award of user damages, that is ..."

That is the first instance judge in ^Wass:

" ... that is an award of damages calculated by reference to the licence fee that the council could reasonably have required for the operation of the Defendant's market".

So we're all on the same page.

THE CHAIR: Classical user -- what we're calling classical user damages.

MS DEMETRIOU: Yes. So, then just at letter F Nourse and Nicholls, LJ both gave reasoned judgments and the third member of the court, Mann, LJ. agreed with both judgments:

"Accordingly this court is bound by the ratio of either of the reasons judgments".

THE CHAIR: Yes.

MS DEMETRIOU: Then just pausing there, of course, the ratio that the Court of Appeal was bound by was not a ratio that you cannot get user damages for markets, it is not that narrow finding. The ratio was the one that we see

on page 70 {G4/4/70} that you can only get user damages in certain limited situations, and as far as torts are concerned --

THE CHAIR: Whereabouts in 70?

MS DEMETRIOU: By letter B.

THE CHAIR: Yes.

MS DEMETRIOU: So B to D. So, the ratio that they were bound by was the finding that you can only get user damages in the limited circumstances set out in Nourse, LJ' judgment, and as far as tort is concerned, that is only for proprietary torts.

THE CHAIR: Yes. It is just finding that in Nourse, LJ's judgment which is challenging. I appreciate that was, I think --

MS DEMETRIOU: I can go back to that, sir, if you like, but I did take you to where he -- shall we just go back to it so we can --

THE CHAIR: Yes, absolutely.

MS DEMETRIOU: If we go back to {G4/3/1}, if we start at page {G4/3/8}, if we look at the bottom of the page, letter H, this is in --

THE CHAIR: Sorry, I am just going to take this slowly, apologies. So, we're going back to page 8, did you say?

MS DEMETRIOU: Yes. I showed you the exceptions earlier, so he went through the exceptions. Do you remember that?

THE CHAIR: Yes, I do remember that.

MS DEMETRIOU: Then if we look at H:

"As I understand these authorities ..."

So, that is the exceptions:

" ... their broad effect is this: in cases of trespass to land and in some cases of debt anew and nuisance, the Court will award damages in accordance with what Nicholls, LJ has aptly termed the user principle".

Then I took you, I think, over the page to where he finds that they are not available outside those categories.

THE CHAIR: Show me where that is again.

MS DEMETRIOU: The previous pages, he has dealt with the categories.

THE CHAIR: I have that.

MS DEMETRIOU: Then he says "Those are the categories" and then he says "Do the authorities", at B on the next page, " ... support an award of damages in accordance with the user principle where there is a market" and then he reasons through why not, and we can see that takes us through to the end of the page, and then over on the next page, page {G4/3/10} at letters C to D:

"If the user principle were to be applied here there would be an equal difficulty in distinguishing other

cases of more common occurrence, particularly in nuisance".

So essentially his conclusion is that --

THE CHAIR: Sorry, I beg your pardon, I am just trying to take some notes at the same time. So, page 10, letter C to D?

MS DEMETRIOU: C to D. So, he is saying that if you were to say that user damages were available outside those categories to apply to the present case, that would, in a sense, open up the applicability of user damages, or the availability of user damages, to all sorts of other cases where they are not available, including nuisance.

THE CHAIR: So one could say that he is making a finding that does not apply to the tort of nuisance.

MS DEMETRIOU: Then at the bottom of the page at H:

"It is possible that the English law of tort, more especially of the so-called proprietary torts will, in due course, make a more deliberate move towards recovery based not on loss but on unjust enrichment, but that cannot begin at this level".

The reason he is talking about unjust enrichment was because, of course, although he was looking at user damages, he thought that those were an example of --

THE CHAIR: It is very difficult to say the ratio in this case is that you cannot get user damages in any

competition case. It is very difficult to get that from taking this in isolation, and then one goes to the next case and looks at the paraphrasing by Arden, LJ and suddenly you have a ratio why you did not have a ratio.

MS DEMETRIOU: The reason why ^Devenish is very important is because what Arden, LJ finds, and, of course, the Court of Appeal in that case is binding on this Tribunal, what Arden, LJ finds is that user damages are not available outside the proprietary tort, so not available in a competition case. That is what she finds.

THE CHAIR: Yes, although in the context of an account of profits --

MS DEMETRIOU: Correct, but, sir, that goes back to the point that I made previously, that the very basis for her finding that the claim for account of profits and for the restitutionary award is not available -- was not available -- was precisely and only that ^Wass found that user damages are not available outside the proprietary torts, and so that is the important step, in my respectful submission, and that is what is binding on this Tribunal.

THE CHAIR: I understand that now. I am grateful. Anything in the other judgments that we should look at?

MS DEMETRIOU: Can I just show you just a couple --

THE CHAIR: Sorry, yes.

MS DEMETRIOU: I think it may just be helpful, just because some of the questions that you were asking me, sir, before lunch about why ^Wass was important in ^Devenish, can we just, perhaps, go back to see how the first instance judge, Lewison, LJ (as he then was) addressed the point, so if you go to page 36 of the bundle, paragraph 99, this is in the first instance judgment, sorry, this is the same tab, so {G4/4/36}. It is paragraph 99:

"The post ^Blake cases thus far have all been cases of breach of contract. As I have said, the Defendants say that this flexible response is not available in tort. In support of this proposition they rely on the decision of the Court of Appeal in ^Wass".

So that is how it cropped up. Then if you look at the next page, please, paragraph 103 on page {G4/4/37} he says:

"It is fair to say that ^Wass has been criticised by commentators but it has not, however, been suggested that it has been overruled or disapproved in previous cases".

Then page {G4/4/38}, paragraph 106:

"^Wass, in my judgment, shows that a restitutionary award is not yet generally available in all cases of tort. Both these cases are decisions of the Court of

Appeal and hence binding on me".

So it is not just Arden, LJ, Lewison, LJ also considered that ^Wass was binding on him to find that user damages are not available all cases of tort, and then paragraph 110 on page {G4/4/39}:

"The Defendant's primary position is that ^Wass precludes an account of profits just as it precludes the restitutionary award".

So you can see that, going back to the two stages in the Court of Appeal's reasoning, you can see why the Court of Appeal reasoned the case in that way, because the way it was being argued was that the Defendants were saying that restitutionary claims are not available in -- for breach of competition law, the Claimants were saying, well, hang on, look at user damages, because, of course, at that stage, there was a debate as to whether user damages were restitutionary in character.

THE CHAIR: There may be differences as to what definitions apply to what, but there clearly is a huge difference between user damages and an account of profits, user damages in the sense we're using it today, and an account of profits. They are very, very different, and it is unclear to me why there was confusion that they are different things. I appreciate the terminology may have changed, and I do not know why it required the

Supreme Court to explain that, if there was confusion before. It just seems self-evident that an account of profits -- we have looked at patent law, it has been different for a hundred years, and account of profits is something completely different to a royalty.

MS DEMETRIOU: I do not think that there was necessarily confusion about whether account of profits and user damages were different. Indeed the courts say that they are different in this judgment, but I think the confusion was whether -- the debate, rather, was whether one properly characterises "User damages" as being compensatory in nature, or having a restitutionary character, and so --

THE CHAIR: You still have the fact that ^Wass was concerned with user damages in the sense we are using it today -- a compensatory claim -- although it failed for various reasons as a compensatory claim. Well, maybe that is why the two were drawn together. Maybe that is actually precisely the problem.

MS DEMETRIOU: Exactly.

THE CHAIR: Clearly in ^Devenish we are talking about an account of profits.

MS DEMETRIOU: Correct. So, the question for the Tribunal is to what extent is ^Devenish binding on us, and in support of what proposition, and our answer to that is

that ^Devenish is binding on you insofar as it finds, which it does find, that user damages are not available outside -- in tort claims -- outside proprietary torts, and particularly --

THE CHAIR: The ratio cannot be that -- if you accept that user damages involves a collection of different types of damages, the ratio just cannot be that wide.

MS DEMETRIOU: So let me put it more narrowly, then.

So, what ^Wass -- sorry -- what the Court of Appeal certainly finds is that user damages are not available in competition claims. So, they say they are bound by Wass -- they are bound by Wass to find that user damages are not available in competition claims, so that is stage one, and then they say because of that we find that account of profits is not available.

Now, we do not have to address stage two. It is not relevant to the present debate. The point is that the very basis for their finding at stage two is stage one. That is what the case was all about. I have taken you through the various paragraphs that make that good. You see, if you look at paragraph -- just finally, final paragraph on ^Devenish, if you go to page 74, so {G4/74} and look at paragraph 87, so this -- the second sub-issue, so you see that just above paragraph 87:

"Would a restitutionary remedy be available in the

circumstances of this case? This issue only arises if I am wrong on my conclusions about Stoke-on-Trent and Wass", so it is incontrovertible that the basis for the Court of Appeal's finding that there was no claim for restitution or account of profits is the first plank of its reasoning, that user damages are not available in competition claims, and that is what is binding on this Tribunal, and that is why we say, sir, that with respect to my learned friend who says "Oh well, this can all be deferred until trial" although he gives no good reason for that, with respect to that argument, this is a crisp point, and we say that we are right on this, that this Tribunal is bound by that conclusion in the Court of Appeal, and that if the Class Representative wants to advance a claim for user damages in a competition claim in circumstances where the Court of Appeal has found that is not available, it will have to take this point further to the higher Courts, and that is why it should be determined now by this Tribunal so that that process can ensue, if that is what the Class Representative decides she wants to do.

Just to remind you at paragraph 4 on page 47, you can see there, so I have shown you this already, but you can see there that it is central {G4/4/47}, that is the summary of the conclusion, central to the summary of the

conclusion that the award was precluded by the ^Wass case. What is ^Wass about? User damages.

So, sir, that is what I want to say about ^Devenish, and it really is our key point, but I do also want to take you to ^One Step and ^Lloyd v Google briefly. I know you have read them both but just to make some points --

THE CHAIR: I just want to know what you say about the other two judgments. So, the other two judgments, do they make the link you say as part of the ratio?

MS DEMETRIOU: So ...

THE CHAIR: Longmore, LJ deals with Stoke-on-Trent --

MS DEMETRIOU: So, Longmore, LJ dissents, and Tuckey, LJ --

THE CHAIR: Sorry, he dissents? Oh yes, he dismisses the appeal.

MS DEMETRIOU: And so if you go to page 90 --

THE CHAIR: Hold on, I'm getting confused now. All three judges dismissed the appeal.

MS DEMETRIOU: Can I just take you, first of all, to Tuckey, LJ's judgment?

THE CHAIR: Yes.

MS DEMETRIOU: So if we go to page {G4/4/90}, paragraph 156, so that is the same point on ^Wass and I just ask you to read that to yourselves.

THE CHAIR: Unless I'm misunderstanding, all he is saying

here is that ^Wass does not overrule --

MS DEMETRIOU: Does not overrule ^Blake.

THE CHAIR: Does not overrule ^Blake.

MS DEMETRIOU: That is the same point Arden, LJ was determining, because the Claimants were saying "Look at ^Blake, it is all quite loose and flexible", and I showed you the point in Arden, LJ's judgment where she said, well, ^Blake was a contract case and it does not --

THE CHAIR: He goes on and says it -- "non-proprietary torts do still fall to be considered as an exception to the general principles articulated by Lord Nicholls of Birkenhead in ^Blake's case".

MS DEMETRIOU: "Unless and until the ^Wass case is overruled".

THE CHAIR: And the principles, sorry, of Lord Nicholls in ^Blake -- non-proprietary torts do still fall to be -- okay. I understand. Yes.

MS DEMETRIOU: And Longmore, LJ is against him on this point. He dissented on this point.

THE CHAIR: Where -- sorry, just help me where that is.

MS DEMETRIOU: So if we go to page {G4/4/89}, so it is 149, I think, but in any event he dissented on this issue, so it is really Arden, LJ and --

THE CHAIR: Sorry, I have lost everything.

MS DEMETRIOU: 145, if we look at 145 on page {G4/4/87}, so he is looking at ^Blake and ^Wass, and then he says, just below letter E --

THE CHAIR: "I do not consider that the ^Wass case is authority for the proposition".

MS DEMETRIOU: So he differs on that point.

THE CHAIR: Right. Thank you.

MS DEMETRIOU: Just now to go to ^Morris-Garner, and the reason why I go to this is to show you that, in fact, the approach of the Court ^Devenish, so it is not only that ^Devenish is binding, but the approach of the Court is consistent with ^Morris-Garner and ^Lloyd v Google, so let me just show you why we say that.

So ^Morris-Garner is at {G4/6/1} and if we can just jump straight to the conclusion, the conclusory part of Lord Reed's reasoning at page {G4/6/41} of the bundle. I know that you've read the judgment carefully but this is at the end of surveying all of the authorities on user damages, and at paragraph 95 he draws together his conclusions. So, could I just ask you to read to yourself subparagraphs 1 and 2 and then I'll make a submission?

Subparagraph (1) identifies the cases in which user damages are available in tort at common law, and as I said at the outset, what these cases all have in common

is that the obligation, so trespass, debt anew, conversion, all create a right over property, and loss arises because that right is interfered with in circumstances where the Claimant could have required payment for access to their property, and precisely the same point arises by analogy in patent infringements, so that is subparagraph (2). We say that the Chapter I and Chapter II prohibitions in the Competition Act 1998 do not, by contrast, create any property right. They simply do not. So, they are completely different. They require -- they create a right to expect that the market is going to be undistorted, and so they create an obligation on businesses undertaking not to act anti-competitively, and they can do what they want, subject to that, so they are not torts which -- that breach of is it duty is different to what is being considered in (1) and (2).

Paragraphs (3) and (5) are concerned with damages in lieu of an injunction, and then subparagraph (6) to (12) are concerned with the circumstances in which user damages are available for breach of contract, which was the point in issue in ^One Step, of course, and the principles that the Supreme Court lays down here are also very instructive, and let me explain why.

Could I just ask you first to read to yourselves

subparagraphs (6) to (9)?

So, so far, what Lord Reed is saying here is that generally, as a general matter, the user damages are generally not available for breach of contract, and then we have subparagraph (10):

"Negotiating damages can be awarded for breach of contract where the loss suffered by the Claimant is appropriately measured by reference to the economic value of the right which has been breached considered as an asset. That may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed. The rationale is that the Claimant has, in substance, been deprived of a valuable asset and his loss can therefore be measured by determining the economic value of the right in question considered as an asset. The Defendant has taken something for nothing for which the Claimant was entitled to require payment".

So consistently with the thinking on tort and patent law, there is a limited exception to when negotiating damages can be claimed for breach of contract, and that is when the contract confers a right to a valuable asset, in the same way that the tort of trespass confers a right to property -- again, different to competition law.

Then we see the point at paragraph -- subparagraph (12):

"The common law damages for breach of contract are not a matter for discretion, they are claimed as of right and they are awarded or refused on the basis of legal principle".

Again, we say you cannot just pitch up and say, well, my conventional claim, which I have, does not work, therefore I am going to claim user damages. That is not how it works.

THE CHAIR: How would it work if, in this case, the Class Representative was to say that the information which Facebook have obtained is confidential information -- they may already have pleaded it, sorry, I have not checked -- but it is confidential information, and is a property right in that -- quasi-property right -- in that sense, and to bring it into line with the misuse of information cases which is a damage which is available, so at the heart of it you have confidential information, although obviously you are having a misuse arising from the breach of competition law.

MS DEMETRIOU: Yes. So, there are two answers to that. One is the answer which I am going to come on to give you which I can illustrate by reference to ^Lloyd v Google, which is that it is not enough to look at the substance

of the rights and say "Oh well, this fraudulent misrepresentation has resulted in an invasion of my property, therefore I am entitled to user damages, it has got to be the tort in question, the obligation in question which confers or directly protects the property right". That is true of confidential information.

THE CHAIR: But that does not work for patent cases, does it?

MS DEMETRIOU: It does, with respect.

THE CHAIR: The patent property, patents can be a piece of property which you can buy and sell, but I am not sure that -- when somebody is infringing, quite how the property analogy works. They are not wrongly acquiring the patent.

MS DEMETRIOU: So the patent -- so the patent legislation gives the patent owner a monopoly right over the invention, and so if the patent is infringed, then it is that right that is directly being infringed, so that is similar to breach of confidence or trespass -- not exactly the same -- but it is similar, because the legal right that you are relying on to make your claim --

THE CHAIR: Is the statutory tort.

MS DEMETRIOU: It is the statutory tort.

THE CHAIR: Here, why are we any different here? If you have a right which is your personal information which is

a proprietary or quasi-proprietary right, and the tort is the invasion of that proprietary right, why is it not analogous with the patent cases?

MS DEMETRIOU: Because the tort here -- so competition law does not give anyone a right to have their information -- to control their information. It simply does not. So, to explain how --

THE CHAIR: It gives a right not to be abused.

MS DEMETRIOU: It does. It gives a right not to be abused and Meta and any -- if it is in a dominant position -- and any undertaking in a dominant position can organise its affairs in such a way so as to ensure that it is not abusing its dominant position. That does not mean that it has to pay anyone for information, and so the defence that Meta has put forward in this case is that in the counterfactual, so absent the infringement, it would not pay anyone for information so it would be entitled to organise its affairs in such a way that it is not required to pay anyone for information, and so in those circumstances --

THE CHAIR: On the conventional -- on the claim that is in the case at the moment, Meta is going to say that you are not entitled to damages, even if there is an abuse, you are not entitled to damages because we would never have paid that?

MS DEMETRIOU: Yes.

THE CHAIR: So you say the consequences of all that is that notwithstanding that you are in a dominant position, I am not saying you are, of course, if there were findings to that effect, you are in a dominant position, and you abused, you do not have to make a payment.

MS DEMETRIOU: No. Exactly, and so --

THE CHAIR: I was not putting that as a point in your favour.

MS DEMETRIOU: No, let me explain why. We say "Exactly" but let me explain why that is. I do have to grapple with that.

So if the -- so let me put it this way: the facts of this particular case cannot drive the question of whether user damages are available for breach of the competition rules. The abuse that has been put forward, so the unfair term in the contract that has been put forward, that is an allegation about an unfair term in the contract. It is a huge leap from that to say "Ah, competition law gives me a property right which sounds in user damages", and we say conceptually it makes no sense, because what you would be hypothesising, when you are hypothesising this negotiated license, which is what the Class Representative says must happen, is a negotiated license as a waiver in return for a waiver of

the abuse. That just simply does not work.

So, we say -- come back to my analogy with the tort of fraudulent misrepresentation. Say as a result of fraud, somebody -- I have had to give up some property to somebody --

THE CHAIR: But we do not know what the answer of fraudulent -- I do not find that a very helpful analogy because we do not have any cases on fraudulent misrepresentation as such that the analogy helps, have we?

MS DEMETRIOU: No, but what we have is ^Morris-Garner --

THE CHAIR: Shifting a very difficult problem to another difficult problem.

MS DEMETRIOU: Well, sir, but in a sense, it is illuminating, that we do not have any cases on all of these areas and what we do have is the Supreme Court in ^Morris-Garner saying when it comes to tort it is really trespass and debt anew and --

THE CHAIR: We have that point.

MS DEMETRIOU: I think the final point that I want to take you to, the final case, is ^Lloyd v Google.

THE CHAIR: Yes.

MS DEMETRIOU: Can we please turn that up at {G4/8/1}? This, of course, was a representative action against Google for misuse of personal data without consent, and the claim was brought under section 13 of the Data

Protection Act, and the question for the Supreme Court or a question was whether user damages were available for that breach of statutory duty, and you can see, if we take it, please, from page {G4/8/38} of the bundle, paragraph 100, what we see here is that the Claimant relied on the ^Gulati case in order to found or base its claim for user damages and we can see at paragraph 102 the bit of ^Gulati that they relied on, and it is in the citation:

"The essential principle was that by misusing their private information MGN deprived the Claimants of their right to control the use of private information".

Then if we go on, please, to page {G4/8/40}, paragraph 108:

"The Claimant seeks to break new legal ground by arguing that the principles identified in Gulati as applicable to the assessment of damages for misuse of private information at common law, also apply to the assessment of compensation under section 13.1 of the DPA".

Then if we go on -- the next page, please {G4/8/41}, paragraph 111, one of the bases for that argument was that it was said that there were a common -- there was a common source, in the sense that underlying both the DPA, the statutory duty imposed by the DPA, and the

principle, the common law principle in ^Gulati, was the same rule of law, so a concern for privacy all based on the ECHR.

So, in a sense, sir, just going back to the question you put to me a moment ago, when you said, well, why is this not the case, the same as a breach of confidence case? ^Lloyd v Google, the claim for user damages there, on the basis of the breach of the statutory duty, was much, much closer, because that was a statute directly conferring a right to keep information private, and there we can see the argument clearly put on the same page at paragraph 112. Can I just ask you to read that paragraph to yourselves? (Pause)

Pausing here, this is really exactly what the Class Representative is arguing here. They are saying, well, come on, there is a common law breach of confidence claim, this is now an invasion on the facts of our personal -- of our confidential information, we should, therefore, get a claim for user damages.

THE CHAIR: I mean, if the Court goes on, at paragraph 114 and says -- the end of 114:

"The only question in this case is what the words of the relevant statutory provision mean".

MS DEMETRIOU: Yes.

THE CHAIR: There they just did it as a matter of statutory

construction.

MS DEMETRIOU: So, they did it as a matter of statutory construction but what they are looking at is what the scope of the breach of statutory duty is, so they are not saying, oh well, because -- which is really the point you were putting to me a few moments ago and it is definitely the point my learned friend was putting, which is, oh well, this is all about confidential information, therefore there should be a user damages claim because one is available at common law. No. You do have to look at the statutory duty, and here the statutory duty is the competition rules, nothing to do with protecting private information. Any incursion --

THE CHAIR: The point they make above is it was a statute which did not expressly confer a right to compensation on a person affected by a breach of statutory duty, nevertheless conferred such a right implied. Sorry, I'm misunderstanding but I thought it was just like -- you don't get compensation for breaches of section 13.

MS DEMETRIOU: You do get compensation, but just not user damages.

THE CHAIR: Right, and the compensation you get is identified --

MS DEMETRIOU: It is material damage and distress.

THE CHAIR: Yes of course. Sorry. I remember now. That is

actually set out in the statute.

MS DEMETRIOU: It is, but the argument -- so it is set out in the statute, and so of course that statutory construction question was a bit different to the one you are faced with, but we say that what this disposes of, so what this case disposes of, is the argument that simply because you can get damages, user damages, or you may be able to get user damages for breach of confidence in -- under common law, ergo you must be able to also get it for breach of the competition rules, which is the point that is put against me, and also the point that you, sir, put against me.

THE CHAIR: Clearly in the bundles there are cases where user damages have been available and there are plenty of cases where they have not been available.

MS DEMETRIOU: Yes.

THE CHAIR: I think the point you really have to deal with is whether we can say unarguably this is one of those cases where you cannot, as opposed to it being a subject of further argument and identification of the relevant facts and so forth, and then you are back --

MS DEMETRIOU: Then we are back to ^Devenish.

THE CHAIR: You really have to succeed on ^Devenish, have you not?

MS DEMETRIOU: ^Devenish is obviously the most crisp answer

to it, but we also --

THE CHAIR: But if ^Devenish is not binding, and ^Wass is not binding on the points you have to win on, then it is a tricky point that has got to go off to trial.

MS DEMETRIOU: No, it is not, with respect, a tricky point that has to go to trial because we say that it is -- that one has to look at what the duty is, the duty is not to act anti-competitively, and so we are a million miles away from these torts and from patent law where you can see what the loss is because the obligation gives the property owner, or the owner of the confidential information, the right to charge for it, and so it is easy to see why there is loss. We are not there.

Any interference with the data of the Class members is purely incidental. It is not a loss that is envisaged by the tort, and we say that is clear.

THE CHAIR: Yes. I expect the Class Representative may say it is more than incidental, they might say it is at the heart of the case.

MS DEMETRIOU: Well, sir, we say that -- well, the heart of the case is still competition law. The heart of the case is: is there an excessive price and is there an unfair term. What they are doing is jumping to a factual consideration and saying, oh well, there is this

fact that we are alleging, therefore it follows from this factual circumstance that we are entitled to user damages, and we say, well, no, ^Lloyd v Google makes clear that is not clear. You have to look at what the statutory duty is intended to protect people against, and it is not invasion of their property rights.

Sir, just on why -- just a point you put to me a moment ago, you said, well, if I am wrong on ^Devenish, this is all a very tricky point that should go to trial, can I say why it should not go to trial?

THE CHAIR: Do you say we should grasp the nettle and -- the facts are irrelevant, yes?

MS DEMETRIOU: They are irrelevant, and the Class Representative who has every interest in saying to you, actually, these facts at trial is going to make a difference, has not been able to point to any factual determination at trial that will affect the resolution of this point, and so, sir, we do say to you that you should grasp the nettle, with respect. It has been fully argued before you. You have read very diligently, I can see, all of the lengthy written arguments, and you have had a day of oral arguments. We have pointed you to all the relevant authorities. This is not a point that is going to improve at trial, and it would be better for everybody to know what the trial is and it

would also be better to have the inevitable appeals on this issue determined in parallel rather than at the end of the proceedings, and we, indeed, do not understand why the Class Representative would want to prolong proceedings by having an appeal on this point at the end of proceedings. ^Devenish itself was just legal argument. It was taken as a preliminary point. It was not decided on the basis of factual determinations, and as I say, there are no factual findings here that will improve the argument one way or the other.

So, sir, that is what we say about the point of law. I need now to deal with certification unless there is anything else -- no one is urging me to say anything else.

On certification, I think one question that you asked my learned friend was, well, do we have to look at certification again, and we say that it is clear that you do because what you are faced with now -- so, of course, certification only arises if, contrary to the submissions we've made so far, the Tribunal finds that user damages either are available as a matter of law, or you decide not to decide it, if I can put it that way, and so if user damages are in the frame, then there has to be a plausible methodology under Pro-Sys to determine what they are, and you've seen Professor Scott

Morten's -- I think it is third report -- which is very slim, and she says "I am basically resting on my methodology for conventional damages", and so you do, with respect, have to decide whether that is a plausible methodology, not for conventional damages, that ship has sailed, but for user damages.

THE CHAIR: Yes, but just explain what the difference calculation is. I probably need a little bit of help on this.

MS DEMETRIOU: They have put forward no difference. So, they have said it is exactly the same methodology.

THE CHAIR: Yes.

MS DEMETRIOU: We say that that methodology will not do for user damages, and the reason it will not do for user damages is that they are measuring something different, so user damages, for user damages you need to look at the extent of the incursion into the personal data rights.

THE CHAIR: What about conventional damages?

MS DEMETRIOU: No, because for conventional damages you do not necessarily have to do that because you are looking at a but for -- so but for the infringement, what would have happened --

THE CHAIR: But for the infringement you would have paid me, Mr X, a larger sum than Mrs Y because I have a whole

host of personal data and Mrs Y does not have any.

MS DEMETRIOU: Well, that may or may not be the case, but what they have succeeded in -- so --

THE CHAIR: Why wouldn't it be the same -- when it comes to assessment on the user damages, I do not understand -- when it comes to getting your pen and paper out and trying to identify a hypothetical bargain, why it is different in character. It may produce slightly different results, but why is it different in character?

MS DEMETRIOU: Can I show you -- I just want to show you -- ^Lloyd v Google and then I will answer the question because I am hoping that --

THE CHAIR: Well, I can't see -- this must be a question of -- all right. It must be a question of facts on this case rather than a binding authority on it, but let's have a look at ^Lloyd v Google.

MS DEMETRIOU: It is the latter part of ^Lloyd v Google, so not the parts that I have been showing you up to now, so if we take it, please, from page {G4/8/49}, at the bottom of page 49, do you see there is a heading "F: the need for individualised evidence of misuse"?

THE CHAIR: Yes.

MS DEMETRIOU: So what Lord Leggatt says there is:

"There is a further reason why the Claimant's attempt to recover damages under section 13 by means of

a representative claim cannot succeed. Even if, contrary to my conclusion, it were unnecessary in order to recover compensation to show that an individual has suffered material damage or distress, it would still be necessary for this purpose to establish the extent of the unlawful processing in his or her individual case".

Then if we go forward, please --

THE CHAIR: You have not answered my question. I think it is my fault for asking -- wrapping up two questions. In terms of the calculation, what is going to be different, and why, in one, do you need to look at it individually and in the other you do not need to look at it individually?

MS DEMETRIOU: Because -- I am going to show you this by reference to Professor Scott Morten's report.

THE CHAIR: Just tell me. Professor Scott Morten does not go into a lot of detail.

MS DEMETRIOU: So her report, her methodology for conventional damages seeks to hypothesise a negotiation between, on the one hand, all of the Class and Meta on the other, and then --

THE CHAIR: Are you talking about conventional, or --

MS DEMETRIOU: Conventional, but she wants to use the same.

THE CHAIR: The Class are negotiated -- it is a hypothetical negotiation between the Class and Meta, and the purpose

of that negotiation is to establish what?

MS DEMETRIOU: Well, for conventional damages it is to establish, she says, what the Class would have received absent the infringement.

THE CHAIR: Okay, and are both sides putting an input into that? It is a hypothetical bargain.

MS DEMETRIOU: Yes, so --

THE CHAIR: So Facebook say, hypothetically, give a sum, Class, maybe they go out to consultants, I don't know, but Class put a sum and they arrive at somewhere in the middle?

MS DEMETRIOU: What she says is that you have to split the profits that Meta made, so you look at the profits that Meta made --

THE CHAIR: Sure. You can do it various ways, but that is the methodology she is putting. Now explain to me what happens when it is user damages.

MS DEMETRIOU: So she says the same thing -- so for user damages she proposes the same methodology, so she says you have to hypothesise this negotiation and the upshot is that you have to look at the profits that Meta made as a result of the -- using the off Facebook data, and divide those by two, and we say the flaw in that is that what ^Lloyd v Google establishes is that -- that is all very well for but for conventional damages, but what

^Lloyd v Google establishes is that for user damages you need to be looking at the extent of the unlawful processing, and let me just explain why they are not the same thing.

So you could have, for example, a lot of data being transferred, as it were -- I am going to just -- it is not exactly how it happens -- but there could be a lot of data that Meta has the right to use, and, in fact, it does not process most of that data at all, but its profits are tied to just the processing of a tiny amount of that data, and so there is no necessary link between the extent to which individuals' data has been used, which is the investigation that you need for user damages, and profits which is the metric that Professor Scott Morten is using for conventional damages. That is the short point.

THE CHAIR: (Inaudible).

MS DEMETRIOU: Yes.

THE CHAIR: But I still do not quite understand why that is materially different. I understand you want to chop it up into little pieces and then it becomes materially different for that reason, but if one were doing it as a Class, and hypothesising Class-negotiated user damages, or a bargain which represents user damages, why is it going to be any different?

MS DEMETRIOU: Because, as I say, there is no necessary link. What is important is the extent that users -- collectively users' data was processed by Meta, and that is what ^Lloyd v Google establishes. Can I just show you the relevant passages?

THE CHAIR: I have read ^Lloyd v Google. I have read the case and I understand the passages, but I do not understand your case at the moment. You seem to be arguing the reverse. You need to -- so if there has been -- I see. You are saying that in user damages you have to -- you already assume that Facebook has accessed the data.

MS DEMETRIOU: No, in user damages you have to look at the extent to which -- I mean, can I just show you -- can I just remind you of the relevant passage?

THE CHAIR: I just want to get it on this first then we can go to the authorities.

MS DEMETRIOU: Yes. Have you to look at the extent to which the wrongful use was made of the data. That is user damages. So, then what you are doing --

THE CHAIR: You have to look at the extent to which the wrongful use --

MS DEMETRIOU: Yes.

THE CHAIR: I thought you were trying to identify the sum that Facebook would have to pay to get access to the

data, so you will not know what use is made of it, and you are trying to say, look, you can have access to my data, you may use it any time over the next 10, 20, 30 years. How can they know what access to the data is going to be made?

MS DEMETRIOU: That is why I say ^Lloyd v Google is important because what that establishes -- like the trespass cases -- so you have to look at -- for a trespass case, if somebody just pops into your field for ten minutes then the amount that you are going to pay them --

THE CHAIR: But this is the not point. I understand all those arguments, but what I do not understand is why the user damages, the sort of questions you need to ask and the sort of -- are different to the conventional damages, and assuming you are negotiating as a Class, they seem to be very similar. The difference you pointed out to me was that you have to assume -- you will know that Facebook -- what use Facebook has made of the data and I am not, at the moment, clear where you are getting that from because I thought this negotiation would take place in advance of Facebook accessing the data.

MS DEMETRIOU: So the -- so just stepping back to first principles, so user damages is the amount that would be

paid in order to allow the particular use of property.

THE CHAIR: The release. Yes.

MS DEMETRIOU: The release. So, in order to work out what that amount is, you need to work out what the use is that is being made of the property.

THE CHAIR: As a Class. We are assuming it is as a Class at the moment.

MS DEMETRIOU: Well, there is a question as to whether that can, coherently, be done as a Class when it is actually very individual in nature.

THE CHAIR: Right, but then the same applies to your damages -- your conventional damages calculation. You have to say what would Facebook have paid. It seems to be the other side of the coin. What would Facebook have paid, and then you are going to say, well, it depends on what use they made of the data.

MS DEMETRIOU: Well, the reason it is not the other side of the coin is because what you are doing for the conventional damages claim is asking in a but for world what is it that these consumers would have received from Meta.

THE CHAIR: What should Facebook have paid.

MS DEMETRIOU: What should they have paid, what is the fair price, but for user damages, you are not asking what the fair price is, you are asking --

THE CHAIR: You are asking what the fair price to be released is.

MS DEMETRIOU: Exactly, and so what that requires you to look at is what use is being made of the data, and the short point is that there is no proposal to investigate what use is being made of the data.

THE CHAIR: All right. So, let us have a look at the case you wanted to look at. ^Lloyd v Google, I think.

MS DEMETRIOU: So if we go to page 50 {G4/8/50}, so top of the page:

"Even if, contrary to my conclusion, it were unnecessary in order to recover compensation under this provision to show that an individual had suffered material damage or distress" --

THE CHAIR: Sorry, which paragraph?

MS DEMETRIOU: Top of page 50.

THE CHAIR: I have a different numbering, that is all. Paragraph 144.

MS DEMETRIOU: It says -- so, the bit I am relying on says:

"It would still be necessary for this purpose to establish the extent of the unlawful processing in his or her individual case. So, that is the first point.

Then if we move forward in the judgment to page 52 of the bundle, paragraph 154 {G4/8/52}, the Claimant's case is not improved by formulating the claim as one for

user damages quantified by estimating what fee each member of the representative Class could reasonably have charged, or which would reasonably have been agreed in a hypothetical negotiation for releasing Google from the duties which it breached.

I have already indicated why user damages are not available, but even if, contrary to that conclusion, user damages could, in principle, be recovered, the inability or unwillingness to prove what, if any, wrongful use was made by Google of the personal data of any individual, again, means that any damages awarded would be nil, and then we see why, so 155:

"The claimant asserts, and I am content to assume, that if, instead of bypassing privacy settings through the Safari workaround, Google had offered to pay a fee to each affected Apple iPhone user for the right to place its DoubleClick Ad cookie on their device, the fee would have been a standard one, agreed in advance, rather than a fee which varied according to the quantity or commercial value to Google of the information which was subsequently collected ..."

So that is the premise which the judge was content to assume and that is really the premise for the methodology of Professor Scott-Morten:

"However, imagining the negotiation of a fee in

advance in this way is not the correct premise for the valuation. As explained in Morris-Garner {2019} AC 649, the object of an award of user damages is to compensate the claimant for use wrongfully made by the defendant of a valuable asset protected by the right infringed. The starting point for the valuation exercise is thus to identify what the extent of such wrongful use actually was: only then can an estimate be made of what sum of money could reasonably have been charged for that use or put another way, for releasing the wrongdoer from the duties which it breached in the wrongful use that it made of the asset. Imagining a hypothetical negotiation... is merely 'a tool' for arriving at this estimated sum. As in any case where compensation is awarded, the aim is to place the claimant as nearly as possible in the same position as if the wrongdoing had not occurred".

Then we see at 157:

"Applying that approach, the starting point would therefore need to be to establish what unlawful processing by Google of the Claimant's personal data actually occurred".

THE CHAIR: We have read this, yes.

MS DEMETRIOU: So it is that that we rely on and we see there that what Lord Leggatt is rejecting is precisely

the sort of methodology that Professor Scott Morten has put forward for conventional damages.

THE CHAIR: The point made against you is that this is a Class action. Entirely different considerations occur which I think is what you need to address.

MS DEMETRIOU: Well, it is an aggregation of individual claims. Now, I do not accept that -- the point put by my learned friend was -- he put the point far too broadly. He said, well, where you have a right to aggregate damages, somehow that sweeps away any problems that you might have in having to look at individual claims of Class members. Not so. In the ^Merricks litigation a claim that was not certified was a claim for compound interest on behalf of the Class. Now, I argued for Mr ^Merricks, well, we have an aggregate award of damages, why not have a claim for compound interest because we can aggregate any individual features and just look at the upshot. We can look at publicly-available data as to what people in general in the population did in terms of saving, and the Tribunal said no, it is too individual. You cannot. So, that is really our point.

We say here there needs to be an investigation of the unlawful use by Meta of the data of individuals. That is the basis for the hypothetical release fee. You

cannot just skate over that and recycle exactly the same methodology that they used for conventional damages.

I am almost done, but just to go back to ^Lloyd v Google at {G4/8/53} --

THE CHAIR: Sorry, give me a paragraph number because I have different pagination.

MS DEMETRIOU: 157. He says:

"Applying that approach, the starting point ..."

So the not end point, not a plausible methodology, but the starting point:

" ... would therefore need to be to establish what unlawful processing by Google of the Claimant's personal data actually occurred only when the wrongful use actually made by Google is known is it possible to estimate its commercial value".

So that is why we say -- that really is a fundamental point and you cannot simply wish it away by referring to the right to aggregate claims under this collective procedure.

So, sir, I do not think I need to take you to Professor Scott Morten. The point that I was going to show you was that it is basically splitting the profits and that does not cater for this point.

Sir, unless you have any questions, those are my submissions.

THE CHAIR: I'm grateful. Thank you very much.

Reply by MR VENKATESAN

MR VENKATESAN: Sir, in reply I was proposing to focus, if I may, on the ^Wass, ^Devenish points because that seems to be, in the end, what my learned friend relies most heavily on.

We say that my learned friend's argument about those cases fails at multiple levels. Can I just, as it were, in a list identify them and then I will very quickly develop them?

First, even if my learned friend's reading of ^Devenish is correct and I will explain why we say it is not, there are two separate reasons why it is not capable of being a binding authority, and that is what my learned friend needs it to be.

Reason number one: user damages were not, it is common ground, claimed in that case from which it necessarily follows --

THE CHAIR: In which case?

MR VENKATESAN: In ^Devenish -- from which it necessarily follows, given how the doctrine of precedent works, and I will go to authority on this, that that case cannot be binding authority as to the availability or otherwise of user damages. That is reason one.

Reason two, in any event, even if I am wrong about

that, my learned friend's argument that it is binding depends, in the end, only on the judgment of Arden, LJ, but even if my learned friend's reading of that judgment is right, it was a minority view because it was not endorsed either by Longmore, LJ or by Tuckey, LJ, so that is the first level at which we say the argument fails, but the second, and maybe more fundamental level, is my learned friend's reading of Arden, LJ's judgment, we submit, is simply wrong -- again, a number of reasons for that.

First, her reading of ^Wass is wrong, and that is going to infect, we submit, her reading of ^Devenish's treatment of ^Wass. Number two, even looking at Arden, LJ's judgment in isolation, it neither says nor assumes that user damages are unavailable for a breach of competition law, third, if it did say or assume that, then that would be inconsistent with ^One Step which, of course, is subsequent Supreme Court decision, so if all else failed --

THE CHAIR: Why is it inconsistent?

MR VENKATESAN: Because what my learned friend says ^Devenish is authority for via its reading of ^Wass, is that you cannot get user damages in tort for non-proprietary torts. That cannot, we would submit, survive ^One Step.

THE CHAIR: Why can that not survive ^One Step?
MR VENKATESAN: Because if you look at the categories of case in which ^One Step says you can get user damages, they are not confined to proprietary torts, they extend beyond them.
THE CHAIR: Only to the IP cases.
MR VENKATESAN: Well, but the breach of contract cases are significant because Lord Reed says in paragraph -- I think it is 91 or 92 -- that the same underlying principles explain the contract cases and the tort cases, but obviously a proprietary --
THE CHAIR: We are dealing with non-proprietary torts. We are not really dealing with contracts here, so --
MR VENKATESAN: I accept that sir. We're not dealing with contracts.
THE CHAIR: So the question was, was the -- and I thought your submission was that, really, ^One Step is just silent on whether that list is exclusionary or not. It just does not assist one way or the other, so if ^Wass and ^Devenish do say that it is limited to that list, I am not sure that ^One Step rescues you.
MR VENKATESAN: I see what you mean, sir, and I will come on to develop that, but just to give you an answer in a nutshell, before I get there, my learned friends accept that you can get user damages for the tort of misuse of

private information which is not mentioned in ^One Step. It is mentioned in ^Lloyd v Google.

Now, the tort of misuse of private information is a tort. It is not a cause of action in equity, it is a distinct tort. It has become a distinct tort. It is not a proprietary tort, yet user damages, they accept are available for it, and that is inconsistent, we would submit, with any limitation, if it assists, that you can never get user damages in tort law for non-proprietary torts, because if that were true you could not get them for the tort of misuse of private information but we know you can, both from Gulati and ^Lloyd which endorses ^Gulati, so the problem about this argument, and this is why it is the last of my multiple reasons, this all fails at a prior stage. There never has been a rule that you can only get user damage for proprietary torts, but if there is, that cannot survive ^One Step or ^Lloyd, and I will come on to develop that.

Can I start with the ratio point, as it were, and can I invite the Tribunal, please, to turn up ^One Step? It is a passage I mentioned briefly in opening, but I do not think I ultimately took you to it. It is {G4/6/37}.

THE CHAIR: Paragraph?

MR VENKATESAN: Paragraph 82 at the bottom of the page. I think I did go to it briefly in anticipating.

So, what Lord Reed says, referring to ^Blake, is that:

"The meaning and effect of Lord Nicholls' discussion of damages for breach of contract have been much debated. It is unnecessary to pursue the matter further for the purposes of the present case. Negotiating damages ..."

That is user damages:

" ... were not sought in Attorney General v Blake and were not before the Court. As the Earl of Halsbury LC observed in Quinn ... is only an authority for what it actually decides..."

I would emphasise the word "Decides" because, putting my learned friend's case at its highest, and obviously you know I do not accept this, but assuming that Arden, LJ had said or implied that you can only get user damages for proprietary torts, that was not an issue which arose for decision, as distinct from reasoning in ^Devenish because it is common ground that nobody was seeking user damages, so while it could, on that hypothesis, be reasoning, powerful reasoning, being that of a Lady Justice of Appeal, it is not capable of constituting binding authority because of the principle identified in ^Quinn.

And if it is not binding, then on this application

^Devenish is, we say, not going to help my learned friend. So, that is my first point. If I am right about that nothing else really arises, but my second point is if one looks at ^Devenish itself, for it to be binding it would have to be a majority view.

THE CHAIR: I understand that. I have that point in mind. Just explain to me what -- it would be helpful to start with what you say Arden, LJ decided in ^Devenish and then go back to ^Wass, I think will be the more convenient way to do it.

MR VENKATESAN: Of course. I was going to do it the other way around but I am in your hands only because looking at ^Wass helps us to understand --

THE CHAIR: Let's try it this way and see where we get to.

MR VENKATESAN: Of course.

THE CHAIR: You say she had not decided what -- leaving aside whether it is a ratio or not -- she had not decided what matters say she decided.

MR VENKATESAN: Indeed.

THE CHAIR: I just want to understand that.

MR VENKATESAN: Yes. I am just going to turn up ^Devenish. Okay.

Just to put this into context, by the time the case gets to the Court of Appeal, the claim for exemplary damages has been abandoned. It's common ground that the

only remedy being sought in the Court of Appeal is an account of profits. Arden, LJ, in paragraph 4, says in terms that what is precluded by the ^Wass case is a restitutionary award. That is at {G4/4/47}.

So G4/4/47, just below:

"On that basis, a restitutionary award is available in tort unless it is precluded by the ^Wass case. In my judgment it is precluded by the ^Wass case".

So --

THE CHAIR: But the ^Wass case was never concerned with restitutionary claims.

MR VENKATESAN: Precisely, but the reason why Arden, LJ says this, and this is why I wanted to start with ^Wass, as part of Nourse, LJ's reasoning he refers both to user damages and to gains-based remedies and formulates -- and identifies certain categories of case which are an exception to the compensatory principle, and others which are not, and he actually says user damages are not an exception, so they are not gain.

THE CHAIR: She says things are binding on her.

MR VENKATESAN: Yes.

THE CHAIR: That is what I wanted to understand, what she is saying is binding on her from the ^Wass case.

MR VENKATESAN: Yes. I will take you to ^Wass. What she is saying, as we read the judgment, is binding on her from

the ^Wass case, are certain exceptions identified by Nourse, LJ --

THE CHAIR: Can we have a look at that, where she says that?

MR VENKATESAN: Sorry, I misunderstood. Of course. (Cross talk).

THE CHAIR: Sorry, it would just really help me if we could just see where you say (cross talk) ^Devenish is the case that is relied on, not ^Wass, and of course one has to go back to ^Wass to understand ^Devenish, but I just want to see what the propositions are first, and then we can dissect them.

MR VENKATESAN: I apologise. I misunderstood you. So, the best reference is probably paragraph 72 at page {G4/4/67}.

THE CHAIR: She relied on 71, Ms Demetriou relied on 71 first.

MR VENKATESAN: Yes. So, 71 summarises the facts of ^Wass.

THE CHAIR: She says she is bound by the ratio --

MR VENKATESAN: Either of the reasoned judgments, and then at 72 she starts considering first of those judgments, namely that of Nourse, LJ, and then she says this:

> "At the outset of his analysis, Nourse, LJ identified two general rules, the first being the general rule that damages are compensatory. He held that user damages were not an exception to this rule,

but merely went to the manner in which damages were assessed".

So just pausing there, what Arden, LJ is saying is that on her reading of Nourse, LJ, user damages are not an exception to the rule that damages are compensatory. In other words, that user damages are compensatory.

So, from that what we understand that to mean is that it forms no part of Arden, LJ's interpretation of ^Devenish -- sorry, of ^Wass -- that user damages are gains-based. On the contrary, she is saying that what ^Wass says is that user damages are compensatory, so then it cannot have been an element of her reasoning --

THE CHAIR: Just do not bring it together yet, just keep going. So, what else does she decide on this?

MR VENKATESAN: Yes, and just -- I should show you 58 at page {G4/4/63}.

THE CHAIR: So when she was bound by the ratio, what was she ...

MR VENKATESAN: So the ratios identifies by --

THE CHAIR: "This court is bound by". What is she bound by?

MR VENKATESAN: So she is bound by two things, as we read it. The first is to be found in paragraph 74, first sentence.

THE CHAIR: Okay.

MR VENKATESAN: So that says that -- which we have looked

at:

"The ratio of the judgment of Nourse, LJ with which Mann, LJ agreed, is therefore that the use of principle ought not to be applied to the infringement of a right to hold a market where no loss had been suffered by the market owner". That is just a narrow point about markets.

The second point is at 76. It is important it look at that carefully. The first sentence, she says {G4/4/69}:

"Nourse, LJ regarded the underlying rule as a general rule only".

Now, just pausing there, what she describes as the underlying rule is the general rule to which she had referred in 72, which we looked at earlier. Then she says --

THE CHAIR: Hold on. Sorry. Okay.

MR VENKATESAN: Then returning to 74 she says that Nourse, LJ regarded that not as an absolute rule but as a general rule. Then she says:

" ... but the exceptions to it are those that he specifies".

So Arden, LJ regards herself as bound by the exceptions to the general rule identified --

THE CHAIR: Yes.

MR VENKATESAN: Then over the page, she says that:

"None the less, it was an essential part of Nourse LJ's reasoning that damages by reference to the benefit obtained by the defendant could only be awarded in those limited situations..."

that is to say his exceptions:

"... and it would in my judgment have to be shown that his circumscription of the cases where damages were not assessed on a purely compensatory basis could not stand with Blake's case".

So, that is what Arden, LJ takes from ^Wass, and --

THE CHAIR: Right, and by "the benefit obtained" you say she is talking about gains-based assessment and account?

MR VENKATESAN: Precisely. The reason I took you to 72 is it seems to me that is of some assistance --

THE CHAIR: Why was that an essential part of Nourse, LJ's reasoning? It does not seem to have been a central part of Nourse, LJ's reasoning at all.

MR VENKATESAN: Indeed. That is one of the difficulties about this exercise using judgment two to construe judgment one, and, indeed, I think you put this to my learned friend, if, looking at judgment one, we do not think it means X --

THE CHAIR: You are submitting that it is not clear why Arden, LJ was having regard to, in that sentence -- is

that what you are saying, with all due deference to --

MR VENKATESAN: Indeed, sir. I think I am saying two things. I am saying that and I am saying that if you read 72 an 76 consistently, so 72, which is at the bottom of page 67 --

THE CHAIR: Hold on. Let me just go back. "At the outset of his analysis".

MR VENKATESAN: So Arden, LJ, in the second sentence of 72 recognises that user damages, according to Nourse, LJ, are compensatory -- in other words loss-based.

THE CHAIR: Yes.

MR VENKATESAN: So then, with the benefit of that, if one then looks at 76, when she says that it was an essential part of Nourse, LJ's reasoning that damages by reference to the benefit cannot be awarded, except in those limited situations, that category cannot include user damages, because Arden, LJ has already recognised this that is not gains-based but rather loss-based.

Put another way, 76 does what it says on the tin. It says you cannot get gained-based remedies. It does not say anything either way about whether you can or cannot get user damages. That is my submission.

THE CHAIR: But you are saying you cannot find that as an essential part of Nourse, LJ' reasoning.

MR VENKATESAN: Sorry, what -- just to make sure I have

understood you sir, sorry?

THE CHAIR: So 76, Arden, LJ is stating:

"As an essential part of Nourse, LJ's reasoning, the damages by reference to the benefit obtained ..."

And you just explained if you keep in mind paragraph 72 it has to be talking about an account of profits there:

" ... by the Defendant could only be awarded in those limited situations".

The limited situations she is talking about, she has referred to ^Blake, she has referred to Hendrix.

MR VENKATESAN: Yes. I mean, what is slightly unclear is whether the words "Limited situations" are a reference back to Hendrix and ^Blake or actually a reference back to the exceptions identified by Nourse, LJ which Arden, LJ refers to at paragraph 76 on the previous page, because she does say there that the exceptions to "It" are those that he specifies, the "It" being the general rule.

THE CHAIR: Sorry, say that again.

MR VENKATESAN: So 76 at the bottom of page 69, Nourse, LJ regarded the underlying rule as a general rule only. It was not an absolute rule but the exceptions to it are those that he specified, so that is Arden, LJ's reading of Nourse, LJ's judgment, the general rule and the

exceptions.

THE CHAIR: You just said the general rule was that found in 72.

MR VENKATESAN: Yes.

THE CHAIR: Are you now positing an alternative?

MR VENKATESAN: No, I am not positing an alternative, I am simply saying that when one looks over the page, the phrase we were looking at earlier "Limited situations", it could be a reference back to Nourse, LJ's exceptions.

So, for those reasons we do say that Arden, LJ is not only -- let me just start again.

So we say two things. First, in the light of 72 and 76 read together, Arden, LJ recognised that ^Wass treats user damages as compensatory, that is to say loss-based and not gains-based. That is the first point. Second, when she comes to formulate the rule we are looking at at page 70 between letters B and C where she says "It was an essential part of Nourse, LJ's reasoning" what you have to decide is what does she mean by the words "Damages by reference to the benefit obtained by the Defendant", and we say that whatever those words are a reference to, they do not include user damages, because Arden, LJ herself has clarified that used damages are measured by reference to loss and not gain.

THE CHAIR: I understand.

MR VENKATESAN: That is the point.

My learned friend -- I will go to ^Wass in a moment, but my learned friend took you to Lewison, LJ at first instance. I don't know if it would assist to have submissions about that. It is ultimately the --

THE CHAIR: (Inaudible) just trying to interpret Arden, LJ's judgment.

MR VENKATESAN: I respectfully agree. I mean, the only point I was going to make about it, I don't need to take you to it, I can just make the submission, Lewison, LJ actually recognised in terms, he uses damages are compensatory and I gave you an example of that, I think it is paragraph 26 and also paragraph 94, the first instance judgment. What he said is not available is the restitutionary award or an account of profits, so it does not help my learned friend.

Would it assist, perhaps, to look at ^Wass? It certainly helped me when I was --

THE CHAIR: Yes. Let's go back to ^Wass now. It would be helpful to see what they said about ^Blake. Remind me of what they said about ^Blake.

MR VENKATESAN: So if we start, if we may, at {G4/3/5}, just below letter G on that page, one sees the general rule to which Arden, LJ is referring to --

THE CHAIR: Sorry, this is ...

MR VENKATESAN: {G4/3/5}.

THE CHAIR: Yes?

MR VENKATESAN: Just below letter G, Nourse, LJ says:

"The general rule is that a successful Plaintiff in an action in tort recovers damages equivalent to the loss which he has suffered, no more and no less".

So that is general rule number one. Then he identifies a second general rule at letter H which he says is that where the Plaintiff has suffered loss to his property or some proprietary right, he recovers damages equivalent to the diminution in value of the property or right.

Now, just pausing there, members of the Tribunal, the reason why the judgment is not entirely easy to read is he has identified two general rules. He comes on to identify various exceptions, but those exceptions are only exceptions to one or other of the general rules, and that is what he comes on to explain, but the other point I would make while we have this open is general rule number one, namely that you can only recover damages equivalent to the loss that you have suffered, that is the compensatory principle, and that is what Arden, LJ is referring to at 72 when she says that Nourse, LJ identified a general --

THE CHAIR: Sorry, she is -- just say that again.

MR VENKATESAN: So when Arden, LJ, in paragraph 72 of ^Devenish refers to a general rule identified by Nourse, LJ that damages are compensatory, what she has in mind is this sentence just below letter G, starting with "The general rule" --

THE CHAIR: So the first general rule?

MR VENKATESAN: The first general rule, exactly.

He then comes on to identify the exceptions. I will not read them all but I will identify them. So the first exception he says is trespass to land. We have that at the bottom of page 5. Then over the page he says the second exception is debt anew. That is just above letter F. Then at page 7, the third exception is identified which is patent infringement, and he refers to the ^Watson Laidlaw case, so at this point he is identifying exceptions but he has not yet told us whether it is an exception to general rule number one or general rule number two. That comes later. Then over the page, that is to say page 8, internal page 1413, he has discussed Wootton Park, and cases that apply Wootton Park such as Bracewell and then letter H is where Nourse, LJ tells us which exception is an exception to which general rule, so if we pick it up at H he says:

"As I understand these authorities {G4/3/8} ..."

THE CHAIR: Sorry, where are you reading?

MR VENKATESAN: Page 8, and letter H, there is a sentence beginning with:

"As I understand these authorities their broad effect is this: in cases of trespass to land and patent infringement and in some cases of debt anew and nuisance the Court will award damages in accordance with what Nicholls, LJ has aptly termed the user principle".

Then he says:

"An analogous case is a breach of restricted covenant".

Then this is the important sentence, the very bottom of the page. It begins with, "But it". It says:

"But it is only in the last-mentioned case and in the trespass cases that damages have been awarded in accordance with either principle without proof of loss to the Plaintiff. In all the other cases the Plaintiff, having established his loss, the real question has not been whether substantial damages should be awarded at all, but whether they should be assessed in accordance with the user principle or by reference to the diminution in the value of the property or right. In other words, those other cases are exceptions to the second but not to the first of the general rules stated above".

That we would submit is an important sentence in his

judgment, because what -- as we read that sentence what it is saying is that in the categories of case he is referring to there, user damages are awarded not as an exception to the first general rule but as an application of it. In other words, as compensatory damages. That is he says they are an exception only to general rule number two and not to general rule number one.

THE CHAIR: Okay.

MR VENKATESAN: So leaving aside trespass and restrictive covenants which I will come back to in a moment, Nourse, LJ's analysis is that user damages are compensatory, not that they are gains-based, and that is what Arden, LJ understands him to have decided in paragraph 72 which we looked at earlier. So, that is inconsistent with Meta's case.

Now, what I would accept is that trespass and restrictive covenant, those cases are categories of case, are regarded by Nourse, LJ as exceptions to the general rule, so his analysis is yes, you can get user damages for trespass to land, and for the breach of a restrictive covenant, but those are not compensatory, but that cannot survive ^One Step, because ^One Step says in terms that damages for the breach of a restrictive covenant, and for trespass, are

compensatory.

THE CHAIR: What paragraph in ^One Step was that?

MR VENKATESAN: I will just give you the reference. It is 30, 91, 92 and 95.

THE CHAIR: Which paragraph?

MR VENKATESAN: 30, 91, 92 and 95. That, we would submit, may be why, if you look at ^One Step in the Supreme Court, they refer to the ^Wass case, but only to the judgment of Nicholls, LJ, which is endorsed, and not to the judgment of Nourse, LJ on which my learned friends rely. I will just give you the reference to that as well. It is paragraph 29 in the majority judgment, paragraph 110 in the judgment of Lord Sumption, and paragraph 133 in the judgment of Lord Carnwath. All the three judgments refer --

THE CHAIR: What was the first one?

MR VENKATESAN: 29, 110 and 133. All three refer to ^Wass but only to Nicholls, LJ.

THE CHAIR: Sorry, I am in a muddle now. So Nicholls, LJ in?

MR VENKATESAN: ^Wass. So, just drawing the threads together, looking at ^Wass on its own, it does not come anywhere near being binding --

THE CHAIR: Sorry, I am still scratching my head about what this sentence means in paragraph 76 of ^Devenish.

MR VENKATESAN: Yes.

THE CHAIR: So having now been through ^Wass, again, now explain how this maps on to the ^Wass judgment.

MR VENKATESAN: Yes. So, how we say it maps on to the ^Wass judgment is that Arden, LJ is saying that the only circumstances in which you can in tort claims get damages by reference to the benefit obtained by the Defendant are those identified by Nourse, LJ in his exceptions, but she is not saying anything either way about user damages.

THE CHAIR: But you say the benefit obtained by the Defendant means an account of profits.

MR VENKATESAN: Yes.

THE CHAIR: And you say you get that because of paragraph 72, but where is that -- sorry, the bit you have not shown me is why, in ^Wass, they are talking about an account of profits.

MR VENKATESAN: Or it could be some other form of gains-based remedy -- restitution of unjust enrichment. My point is simply that --

THE CHAIR: Just help me, where in ^Wass is it clear that they are talking about -- that is a limited -- some form of account of profits or restitutionary claim is an exception.

MR VENKATESAN: Yes. The difficulty, and you are right about this, the difficulty does not refer in terms to

restitution rewards or to an account of profit, so it is not easy to work out why Arden, LJ thought, in paragraph 76, that the exceptions --

THE CHAIR: Your submissions are, first of all, one needs to treat this with caution insofar as one is trying to paraphrase the ^Wass judgment.

MR VENKATESAN: Precisely.

THE CHAIR: And then you say furthermore this is not something -- this is a minority --

MR VENKATESAN: Yes. Yes.

THE CHAIR: -- this is not part of the ratio you might say for other reasons as well, but one of the reasons is that it was not adopted in the other two judgments.

MR VENKATESAN: Precisely sir, that is my submission, and, of course, that is all a fallback to the point I started with, which is in light of the principle of ^Quinn, this cannot be binding authority anyway --

THE CHAIR: Sorry, in the light of the principle --

MR VENKATESAN: In the light of the principle in ^Quinn about what a case is capable of being binding authority for which Lord Reed refers to.

THE CHAIR: You get that from Lord Reed and then the other point is it is still -- in the light of ^One Step, it is not clear that ^Wass is wholly correct either.

MR VENKATESAN: Yes.

THE CHAIR: Trespass -- so it was wrong to say that trespass is an exception to the compensatory principle.

MR VENKATESAN: Correct, and likewise --

THE CHAIR: So this whole area is fraught with complexity.

MR VENKATESAN: Indeed, and one might take the view that ^One Step should therefore be regarded as a fresh start. That is what the Supreme Court --

THE CHAIR: Well, that is going a little too far, maybe, because ^One Step does not really deal with torts. I mean, it refers to the background -- them as background, but it is really all about these claims -- user claims in contract, so one needs to be a little bit cautious in saying that it has got a ratio which cuts through torts, because it is dealt with fairly shortly and in fairly general summary of the law sort of -- I don't know, maybe I'm wrong about that.

MR VENKATESAN: No, sir, I accept that is fair up to a point, because, of course, as you say, and this may be the point you had in mind, in the end, ^One Step is a breach of contract case. That is what the claim is about and that is what the Court was deciding. But the reason why I say that ^One Step has particular significance is not merely that it is a Supreme Court decision, it is a panel of seven convened precisely because, as one can see in paragraph 1, the law was in a very unsatisfactory

state at the time. What the Supreme Court is seeking to identify, in their own words, is the "theoretical underpinning", quote-unquote, of this remedy, not just in breach of contract cases. Indeed, if one looks carefully at the judgment, the nature of the task the Supreme Court set itself becomes apparent. It was to look at all categories of case in which, at the time, user damages had been awarded, and to try to extract from them some underlying principle which would impose coherence on this area of the law, which they thought was not there, and so yes, it is only a breach of contract case, but the reasoning in ^One Step, and this is my third point, is we submit impossible to reconcile with my learned friend's reading of ^Wass or ^Devenish, or put it another way, if all the points I have been making now are wrong, and if you were to take the view that ^Devenish constitutes authority that you can never get user damages for non-proprietary torts, I do say that cannot stand with ^One Step, even though it is a breach of contract case and I will just try and make that good as quickly as I can.

So first of all, on the nature of the task the Supreme Court was undertaking {G4/6/16}, paragraph 1, I mean, the first sentence reinforces the point you just put to me because it refers specifically to breach of

contract.

THE CHAIR: Sorry, just tell me what the point you are dealing with here -- I didn't quite --

MR VENKATESAN: So the point I'm dealing with here, I'm seeking to make good my submission by reference to three or four passage in ^One Step, that if my learned friend's reading of ^Devenish and ^Wass is correct then those cases cannot survive ^One Step.

THE CHAIR: Right, and the reason is?

MR VENKATESAN: The reason is that after ^One Step it is clear that user damages are not confined to proprietary torts, which is what my learned friend --

THE CHAIR: It does not deal with non-proprietary torts, it is about contract.

MR VENKATESAN: It is about contract, but the reasoning in it is inconsistent with the proposition for which my learned friend contends.

THE CHAIR: Right. Okay. Just take this fairly swiftly then.

MR VENKATESAN: Of course. So, in the first paragraph Lord Reed identifies, just above line C, that the state of the authorities is confused, and there is lack of clarity as to the theoretical underpinning of such awards, and consequent uncertainty as to when they are available.

He then notes that this is the first occasion on which the issue has come before the highest Court for decision, which rather suggests that what they are seeking to do is provide that theoretical underpinning, not just for breach of contract, but for this remedy more generally.

Second, if, as my learned friends contend, user damages were confined to proprietary torts, then you couldn't explain why user damages were available for patent infringement, and, two, for the tort of misuse of private information.

Now, I share my learned friend's reluctance for the same reason to make any submissions about patents --

THE CHAIR: Patents are, in some respects, proprietary rights. I think Meta's point is, look, competition law, however you want to describe patents, as proprietary or quasi-proprietary, or -- they are very different in their nature to competition claims, and at some level that must be right.

MR VENKATESAN: Of course, and of course I accept that, but one has to ask, what is the underlying reason why you have these damages in parallel in patent infringement? Paragraph 119, Lord Sumption answers the question.

THE CHAIR: Well, Lord Sumption -- you have to treat Lord Sumption's judgment with some caution because his

analysis was (cross talk) in the other judgments and --

MR VENKATESAN: Yes, as to the theoretical framework.

THE CHAIR: Let's have a look at the bit you want to go to.

MR VENKATESAN: It is paragraph 119 on page 52. {G4/6/52}.:

> "It is right to say that a patent is a species of profit, albeit in corporally can be assigned like any other".

THE CHAIR: I have this in mind.

MR VENKATESAN: I think this is the point you were putting to my learned friend. I accept, of course, that that is not the majority --

THE CHAIR: This is where he goes on to deal with misuse of confidential information as another example.

MR VENKATESAN: Likewise, but in a way a better example for me, because I appreciate Lord Sumption's judgment is not the majority judgment, is the tort of misuse of private information. That is not expressly dealt with in ^One Step, but it is dealt with in ^Lloyd v Google, and in ^Gulatie. My learned friends accept you can get user damages for the tort of misuse of private information. One has to ask why is that. So the misuse of proprietary information is not a proprietary tort, because information does not constitute property in the strict sense of the term. We know that from -- I will get the reference in a moment -- but it is paragraph 376 of the

Force India case, Arnold,~J, who reviewed the --

THE CHAIR: There are other cases that say similar things but it is -- I think the state of the law is that, as Arnold,~J rightly points out, it is inequitable (Inaudible) duty, and not properly analysed as a proprietary right.

MR VENKATESAN: Precisely, sir, but the reason why it has particular significance is -- obviously there is a cause of action in equity for breach of confidence which is much older than the tort of misuse of private information. The tort of misuse of private information I think comes from ^Campbell v MGN in the House of Lords, if I remember correctly, relatively recently, and the point is that the tort of misuse of private information is a tort to state the obvious. It is not a proprietary tort, but you get user damages. That is impossible to reconcile with my learned friend's case.

If they are right, then you would have to get rid of this remedy for the tort of misuse of private information, but the more likely inference is they are not right, and that ^Wass and ^Devenish do not say what my learned friends seek to ascribe to those cases.

THE CHAIR: Yes. I mean, I find it difficult to say this is complicated enough and then start saying, well, how does it apply if other situations. It does get -- one's head

1 does start spinning.
2 MR VENKATESAN: Yes. I mean, my learned friend --
3 THE CHAIR: Those problems are for another day, I sort of
4 feel.
5 MR VENKATESAN: My learned friend's defeat example is
6 perhaps in that category but one benefit of the tort of
7 misuse of private information is that there is a Supreme
8 Court decision about it, ^Lloyd v Google, and there is
9 an explanation in that case about why you get user
10 damages by reference to ^Gulati. Can I just very
11 quickly show you that? I'm conscious of the time. It
12 is {G4/8/49}.
13 THE CHAIR: Which paragraph?
14 MR VENKATESAN: 141. I may have gone to it in opening.
15 What Lord Leggatt says is that a Claimant tort for
16 misuse of private information, based on the factual
17 allegations made in this case, would naturally lend
18 itself to an award of user damages. The decision in
19 ^Gulati shows that damages may be awarded for the misuse
20 of private information itself on the basis that apart
21 from any material damage or distress that it may cause,
22 it prevents the Claimant from exercising his or her
23 right to control the use of the information, nor can it
24 be doubted that information about a person's browsing
25 history is a commercially-valuable asset.

Now, pausing there, we take two points from that. First, information we know is not property. It is an asset but it is not property in the strict sense, yet user damages are available for the tort of misuse of private information.

Second, just above letter B, the reason given by the Supreme Court for that, namely the availability of user damages for a non-proprietary tort, is that it prevents the Claimant from exercising his or her right to control the use of information, so that is the test or principle.

^Gulati itself is of assistance -- I will not go to it because of the time but I can make the submission -- ^Gulati is a well-known case in which what happened was victims of phone hacking brought a claim against -- I think it was MGN, the newspaper. At first instance, Mann, LJ awarded damages for each instance of hacking irrespective of whether it had actually resulted in any publication. The argument of Lord Pannick QC who appeared for MGN on appeal, was that this was an impermissible form of vindicatory damages because what you are doing is providing compensation for the bare fact of the infringement of a right as distinct from any loss that it has caused, so what was squarely in issue before the Court of Appeal in ^Gulati was: is there any

loss if somebody has a right to control information, and they are prevented from exercising it, because if that constitutes loss, then damages are not vindicatory, they would be constituting compensation for loss, albeit of a different kind, and Arden, LJ, as it happens, who gave the leading judgment in ^Gulati, said in terms that loss of control does constitute a form of loss, and I should just show you that. It is {G4/5/20}. Paragraph 45:

"This is a very important point in the context of the awards made in the present case because if Lord Pannick is right, damages will be much reduced. In my judgment the judge was correct to conclude that the power of the Court to grant general damages was not limited to distress and could be exercised to compensate the Claimants also for the misuse of their private information".

Then this:

"The essential principle is that by misusing their private information, MGN deprived the Claimants of their right to control the use of private information".

Then picking it up at 48 at page {G4/5/21}:

"I agree with Mr Sherborne's submission on Vidal-Hall. There was no claim in that case beyond damages for distress".

Then this is what we rely on:

"I also accept his submission about vindicatory damages. Damages in consequence of a breach of a person's private rights are not the same as vindicatory damages to vindicate some constitutional right. In the present context, the damages are an award to compensate for the loss or diminution of a right to control formerly private information and for the distress that the claimants could justifiably have felt because their private information had been exploited and are assessed by reference to that loss"

I mean, this may only be a forensic point, but it is very unlikely that Arden, LJ who gives the judgment both in ^Gulati and --

THE CHAIR: Do they use the term "User damages"?

MR VENKATESAN: No. So, this was not calculated as user damages because we do not have it in the bundles, but Mann, LJ at first instance had awarded a per capita sum for each instance of hacking, taking into account in a rough and ready way, and you can do that because you do not have to do it by reference to a hypothetical negotiation, that is how it is normally done, but there are --

THE CHAIR: Why is that not (Inaudible).

MR VENKATESAN: Well, it depends on what one means by the label. It is damages for the infringement of a right to

control, it is just not measured by reference to hypothetical negotiation so it is user damages calculated in a different way.

THE CHAIR: Yes. Okay.

MR VENKATESAN: But we say that that is another example of a non-proprietary tort for which user damages are available, ^Gulati and ^Lloyd, obviously those post-date ^Wass and ^Devenish, and the very fact Arden, LJ gave this judgment suggests that it is --

THE CHAIR: Sorry, say that again? You say it is another example -- you are going to this because you say it is an example of non-proprietary tort for which user damages are available.

MR VENKATESAN: Precisely.

THE CHAIR: Therefore those classes cannot be closed.

MR VENKATESAN: Those classes cannot be closed, and also ^Wass and ^Devenish cannot be authority for the proposition for which my learned friends cite them, namely that user damages in tort law are confined to proprietary torts, because that would then be irreconciling with these cases.

THE CHAIR: Unless you were right in your first response to say that these are not user damages.

MR VENKATESAN: But ^Lloyd is. This one isn't.

THE CHAIR: But ^Lloyd is saying that they are --

MR VENKATESAN: ^Lloyd is saying that they are user damages. ^Lloyd failed for different reasons.

THE CHAIR: Yes. I understand that.

MR VENKATESAN: I mean, again, it is a problem with terminology. If one just steps back and says "What is the type of loss for which you get damages in these cases", the answer is, well, you are prevented from exercising --

THE CHAIR: I understand.

MR VENKATESAN: That is all I wanted to say, subject to anything the Tribunal would like me to address on this part of the case, ^Devenish and -- the only other point I wanted to make, very quickly, is should this be left to be decided at trial or should it be decided now. My learned friend's main argument -- well, I suppose it is two-fold. First, she says if she is right about ^Devenish then there is binding authority. She then makes a case management point which is that appeals are likely and it is better for the appeals to run now rather than later. I think I can dispose of, I hope, the second point quite swiftly, which is in all of these cases are points of law are left to be decided at trial, there can be an appeal from the trial judgment, and if this issue arises it can be appealed then. There is no particular advantage for appeals to run in parallel.

One might even think it is distracting, so it all turns on the first point.

You have my submission that ^Devenish and ^Wass are not binding. If that is right then there is no reason to grapple with what is, on any view, a difficult point now, but even if ^Devenish and ^Wass are binding, it does not necessarily follow you should decide this now, and there is one case that illustrates that, the ^Standard Chartered case, and I will very quickly summarise what happened there, a very recent case.

Claimants had brought claims under section 90(a) of the Financial Services and Management Act, so these are Class typically -- they were not Class actions but essentially claims that listed securities, loss has been caused by purchasing listed securities because of misstatements made by the company. Now, a pure point of law arise for determination, namely whether you can bring these claims without pleading and proving that you were aware of the representation, either directly or indirectly, because many Claimants could not plead that. They pleaded that they just assumed, because the share price was what it was, that there were no misstatements. They had not read the actual statements which were alleged to be false.

What is important about the ^Standard Chartered Bank

is that in an earlier case called ^Barclays Bank Leech, J had actually decided this pure point of law in favour of the banks and struck out a variety of claims, saying "You have not pleaded an essential element of your cause of action".

^Standard Chartered on the back of this bring a strike-out application to strike out the same type of claims in their case, but that application failed because Michael Green, J said even if I am formally bound by the judgment of Leech, J, this is a developing area of the law, there is no case management benefit to grappling with it now, and it is better for it to be decided at trial.

I will just give you a reference.

THE CHAIR: I don't think that (Inaudible).

MR VENKATESAN: No. It is cited in our Skeleton. I'll not take it any further.

I was not going to make any submissions about the other points my learned friend made about whether there is really an analogy, what is the true nature of the compensation law rights. You have our submissions on that. Issue 2 I was not proposing to address unless there is anything you would like me to. I'm grateful.

THE CHAIR: Thank you. So, we finished in good time today. I think we will give judgment tomorrow. I would suggest

at 11 o'clock if that is convenient for everyone. Just give me a minute.

MR VENKATESAN: Sir, did you envisage it will be an oral judgment with attendance, I'm being asked?

THE CHAIR: Yes.

MR VENKATESAN: We have some difficulties tomorrow.

THE CHAIR: This was down for two days.

MR VENKATESAN: It was down for a day.

THE CHAIR: It was a day with a day in hand.

MR VENKATESAN: My understanding is we wrote requesting that but we were told it would be only one day.

THE CHAIR: Right. Well, someone is free to attend, presumably.

MR VENKATESAN: I understand my learned junior is available.

THE CHAIR: If there is any -- do not read anything into this because I would have thought -- but if there are any points that arise that need further argument we can always make sure you are both available if you need to be to accommodate those. I'm sorry, I had not appreciated this was down -- I thought this was down -- it has been in my diary for two days, but is someone free to attend?

MS DEMETRIOU: I can attend, anyway, so yes.

(3.49 pm)

(Hearing concluded)

I N D E X