Neutral Citation Number: [2026] EWCA Civ 993

Case No: CA-2025-002757

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
Justin Turner (Chair), Greg Olsen & Derek Ridyard
[2025] CAT 55

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2026

Before :

LORD JUSTICE GREEN
LORD JUSTICE PHILLIPS
and
LORD JUSTICE ZACAROLI

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Between :

Meta Platforms Inc.	**1st Appellant**
Facebook UK Limited	**2nd Appellant**
Meta Platforms Ireland Limited	**3rd Appellant**
- and -	
Dr Liza Lovdahl Gormsen	**Respondent**

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Marie Demetriou KC, Tony Singla KC & James White (instructed by **Herbert Smith Freehills Kramer LLP**) for the **Appellants**
Niranjan Venkatesan KC & Ian Simester (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Respondent**

Hearing dates: Tuesday 7th - Wednesday 8th July 2026

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Approved Judgment

This judgment was handed down remotely at 12 noon on Wednesday 29th July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Green:

A. Introduction: "user damages" and competition law

User damages

1. In most cases of tortious damage, recoverable loss is determined by reference to the sum needed to put the injured party in the position that would have prevailed but for the wrong in question.

2. The appropriateness of this approach is less obvious where there has been an invasion of rights to tangible moveable or immoveable property and where there has been no pecuniary loss or physical damage to the property in question. In these circumstances a defendant who wrongfully exploits another's property prevents the owner from exercising his right to obtain the economic value of the use in question. The law indicates that the defendant should compensate the owner because, as it has been put in case law (considered below): "*... he takes something for nothing, for which the owner was entitled to require payment*". Where compensation upon this basis is granted, it has been termed "*user damages*".

3. The issue on this appeal is whether user damages are recoverable as a remedy for breach of section 18 Competition Act 1998 ("*CA 1998*"), which prohibits the abuse of a dominant position by, *inter alia*, the imposition of unfair selling and purchasing terms.

4. The scope of user damages, and their relationship to conventional compensatory damages, was considered by the Supreme Court in *One Step v Morris-Garne*r [2018] UKSC 20, [2019] AC 649 ("*One Step*") at paragraphs [25] – [30], and this is a useful starting point for the analysis in this case:

> "25. In tort, although damages may in some circumstances be awarded for punitive purposes, the general principle is that damages are compensatory. As Lord Blackburn said in Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, 39: I do not think there is any divergence of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.
>
> 26. Lord Blackburn's principle can readily be applied in situations where some tangible loss has been sustained: for example, where real property has been damaged or taken by a trespasser (as in the Livingstone case itself), or where goods have been converted. Its application is less obvious in situations where there has been an invasion of rights to tangible moveable or immoveable property, but there has been no pecuniary loss or physical damage to the property in question. Nevertheless,

where a trespasser has made valuable use of someone else's land, without causing any diminution in its value, the landowner has been held to be entitled to damages measured as what a reasonable person would have paid for the right of user: see, for example, *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538. A similar approach has been adopted in cases of detinue, such as *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246. Damages are also available on a similar basis for patent infringement and breaches of other intellectual property rights.

27. The basis of the award of damages in cases of this kind was considered by Lord Shaw of Dunfermline in *Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson* 1914 SC (HL) 18; 31 RPC 104. The case concerned the sale of machines which infringed the pursuers patent. The issue in dispute was whether the pursuers were entitled to recover damages for sales which had been made by the defenders in a territory where the pursuers could not themselves have traded, and which, moreover, the defenders would have made even if the machines had not incorporated the infringing part. It was held that they were so entitled. Lord Shaw contrasted the principle underlying the assessment of "damages in general", whether in contract or in tort, which he described as the principle of restoration as he defined it, with a second principle of "price or hire" applicable not only to patent cases but "wherever an abstraction or invasion of property has occurred": 1914 SC (HL) 18, 29 - 31. As he explained, this distinction was relevant to the case before him, since the restoration principle could not support a claim by a patentee relating to a section of trade in which, it was argued, he can have sustained no damage, because he would never have sold his patented articles within that section: p 30.

28. Lord Shaw described the second principle as follows, in a passage at p.31 subsequently quoted by Brightman J in the *Wrotham Park Estate* [1974] 1 WLR 798, 813:

> "It is at this stage of the case, however, that a second principle comes into play. It is not exactly the principle of restoration, either directly or expressed through compensation, but it is the principle underlying price or hire. It plainly extends and I am inclined to think not infrequently extends to patent cases. But, indeed, it is not confined to them. For "wherever an abstraction or invasion of property has occurred", then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle, as I say, either of price or of hire."

He illustrated this by the example of the liveryman's horse, also at p 31:

> "If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise."

Lord Shaw also endorsed the view expressed by Fletcher Moulton LJ in *Meters Ltd v Metropolitan Gas Meters Ltd* (1911) 28 RPC 157, 165 that, even if it was not the claimants practice to grant licences, it would be right for the court to consider what would have been the price at which although no price was actually quoted could have reasonably been charged for that permission, and estimate the damage in that way.

29. The approach adopted in these cases was described by Nicholls LJ in *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406 as the user principle. He summarised it as follows, at p 1416:

> "It is an established principle concerning the assessment of damages that a person who has wrongfully used another's property without causing the latter any pecuniary loss may still be liable to that other for more than nominal damages. In general, he is liable to pay, as damages, a reasonable sum for the wrongful use he has made of the others property. The law has reached this conclusion by giving to the concept of loss or damage in such a case a wider meaning than merely financial loss calculated by comparing the property owners financial position after the wrongdoing with what it would have been had the wrongdoing never occurred. Furthermore, in such a case it is no answer for the wrongdoer to show that the property owner would probably not have used the property himself had the wrongdoer not done so. In The Mediana [1900] AC 113, 117, Earl of Halsbury LC made the famous observation that a defendant who had deprived the plaintiff of one of the chairs in his room for 12 months could not diminish the damages by showing that the plaintiff did not usually sit upon that chair or that there were plenty of other chairs in the room."

30. 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 loss suffered can be measured in terms of the cost of repair or the diminution in value, and damages can be assessed accordingly. Where on the other hand an unlawful use is made of property, and the right to control such use is a valuable asset, the owner suffers a loss of a different kind, which calls for a different method of assessing damages. In such circumstances, the person who makes wrongful use of the property prevents the

> owner from exercising his right to obtain the economic value of the use in question, and should therefore compensate him for the consequent loss. Put shortly, he takes something for nothing, for which the owner was entitled to require payment."

B. The claim against Meta: Abuse of a dominant position by the imposition of unfair selling and purchasing terms

The class action against Meta

5. The appeal arises out of a class action against Meta brought under section 47Bff CA 1998 which permits collective proceedings based upon a breach of competition law. The claimant, Dr Liza Gormsen, is the designated Class Representative ("*CR*"). The action has been certified by the Competition Appeal Tribunal ("*CAT*") as appropriate for collective proceedings. The class represents in excess of 46 million individuals who have or had a Facebook account ("*the Class*"). The certification is on an opt-out basis. It has been set down for trial in October 2028 with a time estimate of 10 weeks.

6. The central facts as alleged by the CR can be summarised shortly. I take them from the CR's Re-amended Claim Form dated 3 October 2025. It goes without saying that the facts will be for the CAT to decide at trial.

7. The CR pursues the claim on behalf of a class of individuals who had Facebook accounts and accessed that account at least once whilst in the UK between 14 February 2016 and 6 October 2023, inclusive ("*the Class Period*"). The CR claims aggregate damages on behalf of the Class in respect of the period between 14 February 2016 and the date of final judgment or earlier settlement of the present collective proceedings, inclusive ("*the Claim Period*").

8. Facebook is an online social service. It is accessible via a web browser or on mobile devices via the Facebook application. It is a multi-sided platform providing services to end users, advertisers and other business users. The service to users is funded primarily by advertising revenue. Personalised advertising is the basis of the multi-sided business model and permits Facebook services to be offered to users without monetary charge. The ability to direct advertising to relevant and engaged user audiences arises because Meta extracts extensive data from users which is, in pith and substance, the raw material used by Meta to provide an attractive platform to advertisers.

9. During the Claim Period, access to Facebook's personal social network service was, in a monetary sense, offered "*free*" to consumers. In a more substantive sense, users "*paid*" for the service by making available to Meta the data which Meta monetised in its relations with advertisers.

10. It is the CR's case that when signing up for Facebook, users had no effective choice but to agree to various terms and conditions imposed by Facebook. These included permitting Facebook to collect, share, and otherwise process users' data, both on and off platform. The CR pleads: "*The terms and conditions were presented in bulk, as part of Facebook's sign-up process, on a 'take-it-or-leave-it' basis – an individual could not join the Facebook social network service without accepting them…*".

11. The data includes "*Off-Facebook Data*" which comprises data concerning users' activities off Facebook's social network platform, including in particular data on user activity from: (i) other Meta products and services (e.g. Instagram); and (ii) third-party websites and apps visited, or used, by the User.

12. Facebook assigns such Off-Facebook Data to the individual Facebook accounts of users. The CR alleges that initially, during a period when it faced competition, Facebook positioned itself as a privacy-centric service with a view to differentiating itself from rivals. As it gained market power, so it increased the volume of data collected.

13. In the early period of its operation, Facebook did not collect Off-Facebook Data at all. The CR says that there was widespread opposition to collection of such data. In November 2007, Facebook released its "*Beacon*" advertising product which was its first attempt to track users on third-party websites, allowing it to monitor and record activities. It allowed Facebook to track the activity of all users away from the Facebook platform, regardless of whether they had provided consent. Following a public backlash, Facebook initially allowed users to opt out of Beacon. In September 2009 it shut Beacon down. In June 2014, having started collecting Facebook user data from Instagram in 2013, Facebook started to exploit data it collected from third-party websites and apps for advertising targeting purposes. Data was gathered via various technical means including: (i) Facebook software development kits; (ii) Facebook social plugins; and (iii), placing Facebook login within the third-party website/app in question.

14. In August 2016, Facebook announced that it had implemented changes to circumvent advertising blocking software, a means by which users had previously been able to prevent adverts from being shown to them on the Facebook site and/or third-party tracking and data collection by Facebook. The use of such blocking software by users had risen substantially in the period following Facebook's June 2014 announcements.

15. On or around 26 April 2021, Apple introduced an App Tracking Transparency framework ("*ATT*"). Users of Apple devices (with iOS version 14.5 or later installed) had to explicitly "*opt-in*" to tracking by a third-party app or website on their device. Previously users had to "*opt-out*". The advent of ATT led to a significant decrease in the share of iOS users that allowed their data to be collected and tracked by third parties when accessing apps via iOS devices. Facebook estimated that the financial impact of this on Facebook was in the order of $10b.

The pleaded abuse of dominance

16. The CR pleads that Meta has committed an abuse: (i) in imposing "*take it or leave it*" terms in relation to provision of Off-Facebook Data by users to Meta; and (ii) in relation to the payment or value passing between users and Meta for that data.

17. In relation to prices or value the CR pleads that the abuse can be seen as either abusive overcharging or abusive underpaying:

> "S.17 By making access to its platform contingent (or effectively contingent) on a new requirement that Users should

> give up not only their On-Facebook Data, but also Off-Facebook Data and without being paid for the latter data:
>
> a) Facebook was able to demand an unfairly high and abusive 'price' or 'payment in kind' (i.e. Users' Off-Facebook Data) for the provision of social networking services; and/or
>
> b) Facebook offered an unfairly low and abusive purchase price (i.e. the provision of social networking services) for Users' Off-Facebook Data.
>
> S.18. Whether Facebook's collection of Off-Facebook Data is viewed as involving: (i) the charging of unfairly high price; or (ii) the payment of an unfairly low purchase price, the essential concern is the same: that Facebook's collection of Off-Facebook Data as a condition of providing social networking services without a corresponding value transfer involves an unfair price (including taking into account the other side of the market involving advertisers) (the "Off-Facebook Data Price"). These two ways of articulating the unfair price abuse are closely related and do not constitute distinct alternatives: Section 18(2)(a) of the Competition Act 1998 and Article 102(a) TFEU refer expressly to "unfair purchase or selling prices."

18. The CR pleads that there are many ways of identifying a "*fair*" (non-abusive) value which include considering what the value would have been in the counterfactual of a reasonably effective competitive market:

> "S.19. The Class Representative contends that the Off-Facebook Data Price is unfair insofar as Facebook would have been unable to impose it under conditions of reasonably effective competition. In this regard, the Class Representative relies inter alia on the fact that: (i) under conditions of reasonably effective competition, Meta was only able to impose an on-Facebook data 'price' prior to the Claim Period; (ii) it was only when effective competition was eliminated that Meta switched from a price based on on-Facebook data to one based additionally on Off-Facebook Data. This provides a form of 'before and after' comparison of the kind frequently used in unfair pricing cases. Further and more particularly, the Class Representative relies on the flexible and adaptable United Brands legal framework on unfair pricing as follows in the circumstances of the present case."

19. The CR also explains that she will use a "*Nash*" analysis, a standard economic tool used in competition cases, to determine what a fair, non-abusive, price or value would be. The Scott Morton Report, served by the CR as encapsulating its case on abuse, explains the basic purpose of a Nash analysis in paragraph [176a]:

> "Scott Morton 1 proposes to use a Nash bargaining model (a standard economic tool which is widely used in competition law contexts and to assess bargaining) as a benchmark for a counterfactual fair bargain. The Nash bargaining model determines how the surplus (or net economic value) generated by an agreement should be split between the parties. As Scott Morton 1 explains, this is a function of: (i) each party's "threat point" or "outside option" (i.e. the profit or value absent the agreement); (ii) the "pie to be split" (i.e. the total incremental benefit of the agreement less the parties' threat points); and (iii) each party's "bargaining power" (also termed the "bargaining parameter") which determines how the surplus will be split."

20. In paragraph [176c] the pleading states: "*The use of the bargaining model reveals that under a fair bargain, some of the value of the Off- Facebook data to Facebook would indirectly accrue to Users*".

21. At trial a counterfactual Nash analysis might be only one piece of a wider bucket of evidence relied upon. For instance, the CR makes clear that she will seek disclosure from Meta concerning: the Off-Facebook Data collected from users; how this has increased over time; the precise means by which such data was collected including the interaction between Off-Facebook Data and on-platform data; the ways in which such data was monetised; and, the revenues derived therefrom. The Scott Morton Report gives examples of the sorts of other evidence it will look to in order to show abuse. These include:

    (i) An analysis of how value would be transferred in a workable competitive market where there were would be one or more reasonably scaled rivals to Facebook, which would have a strong incentive to try and win user attention from Facebook, which they could then monetise, through strategies such as product differentiation, differentiation on privacy settings, and/or financial inducements. Faced with competition pressure, Facebook would not have been able to collect ever more volumes of data and/or impose tracking on a take-it-or-leave-it basis.

    (ii) An analysis of how Meta's revenues increased over time and in particular by reference to the point when it began to extract Off-Facebook Data.

    (iii) An analysis of the ways in which other two-sided markets operated (i.e. comparables).

    (iv) A before and after analysis to demonstrate that in the period prior to the abuse Facebook was very profitable even though it did not, at that point, collect off- Facebook data.

The CR's case on loss and damage

22. In paragraphs [S.24] – [S.26], on loss and damage, the CR articulates the link between abuse and loss and damage. The test for abuse is materially identical to that for loss and damages. The abuse is the difference between the price/consideration that was charged and that which would/should have been charged in the counterfactual. The loss and damage is the difference between the sums/consideration paid and that which but for the abuse would have been paid:

"Loss and damage

S.24. Facebook's breaches of statutory duty particularised above have caused loss and damage to the Class. As a result of the abusively unfair bargain, or barter, made by Facebook with UK Users, Class Members were: (i) not adequately compensated for the economic value of their Off-Facebook Data collected and monetised by Facebook (for which Facebook would have paid in the counterfactual), which resulted from the abusive conduct; and/or (ii) prevented from exercising their valuable right to control the collection and/or use of their Off-Facebook Data, and they have therefore suffered compensatory loss in the form of: (i) conventional pecuniary loss; and/or (ii) the loss of a valuable opportunity to exercise the right to control the collection and/or use of their Off-Facebook Data.

S.25. In the counterfactual absent the abuse, Facebook would have been obliged not to impose unfair terms and/or prices and would have been obliged to negotiate a fair bargain, or barter, with Users. The outcome of that counterfactual bargain would have resulted in a monetary payment by Facebook to Users. In particular:

a) In the absence of the unfair trading condition, Users would have had an effective option to receive Facebook's social networking services without having to agree to Off-Facebook Data collection. Faced with such an effective option, Users would not have agreed to Off-Facebook Data collection absent some further economic incentive emanating from Facebook. In those circumstances, because of the considerable economic value of such data to Facebook, it would have been economically rational for Facebook to offer a transfer of value to Users in order to induce them to agree to Off-Facebook Data collection and economically irrational of Facebook not to do so.

b) In the absence of the unfair price, Users would have benefitted from a fair price in return for Facebook being able to collect their Off-Facebook Data. Since Users currently receive nothing in return for the collection of their Off-Facebook Data, a fair price would entail Users being compensated by way of a transfer of value from Facebook in relation to the collection of such data. Further or in the alternative, absent the unfair price, Facebook again would have sought to continue to collect Users' Off-Facebook Data given the considerable economic value of such data which would have led it to offer a transfer of value to Users.

S.26. In short, but for the unfair trading condition and/or the unfair price, Users would, in the counterfactual, have received a

> transfer of value from Facebook in return for the collection of their Off-Facebook Data. The aggregate value that would have accrued to Users in the counterfactual represents the aggregate loss they have suffered by reason of Facebook's abuse, because Users currently receive nothing in return for the collection of their Off-Facebook Data. Thus, the damage is the difference between: (i) the payment that Users receive for their Off-Facebook Data in the factual (i.e., nothing); and (ii) the payment that would have been made by Facebook to Users in the counterfactual. The Class Representative's case on loss therefore conforms to ordinary compensatory principles; but for the abuse Facebook would have paid Users."

Meta's defence to the claim

23. Meta challenges the claim in its entirety which includes *denials* that: (i) it is dominant; (ii) it has abused any dominant position it might be found to hold; and (iii), even if it is guilty of abuse of dominance as pleaded any loss or damage results as a matter of fact and/or law. In relation to loss and damage Meta pleaded:

> "25. The CR's case on causation, including her pleaded counterfactual "fair bargain" is denied. Without prejudice to the generality of the foregoing denial:
>
> (a)…
>
> (b) In any event, the "fair bargain" counterfactual allegation is denied. In the counterfactual Meta would not have made any "monetary payment" to users as alleged or otherwise. The CR ignores the fact that there are no real-world examples of online attention platforms making "monetary payment" to its users.
>
> (c) Further and in any event, it is denied that the alleged "unfair trading condition" on its own could have resulted in any compensatory loss to users either as alleged or otherwise.
>
> 26. In the premises, and in any event, it is denied that the Class Members have suffered any pecuniary loss or damage as a result of the conduct alleged by the CR."

As set out in paragraph [25(b)], Meta has averred that at trial it will say that in the counterfactual it would, as matter of fact, never have made any monetary payment at all. It has not elaborated upon this, but the inference is that any proposed counterfactual based upon a negotiated price would be artificial as divorced from reality and, presumably, thereby to be rejected.

The CR's response: The amendment to the Claim Form to raise the availability of damages based upon a hypothetical negotiation.

24. In view of this the CR applied to the CAT to amend its pleading by the addition of a new paragraph 26A. This pleads that even if Meta would not have engaged in

individualised negotiations in the counterfactual this makes no difference because the relevant counterfactual is a hypothetical negotiated bargain based upon a Nash analysis; and because it is hypothetical it is irrelevant that Meta might not have been prepared to negotiate. The CR sought to amend its pleading in the following manner:

> "S.26A. Further or alternatively, it nevertheless wrongfully interfered with the Users' valuable right to control the collection and/or use of their Off-Facebook Data. That being so, the Users are to be compensated for the loss of the value of the exercise of that right. That loss can be quantified by the use of the Nash bargaining model to assess the outcome of a hypothetical negotiation between Facebook, as a reasonable and willing buyer, and the Users, as reasonable and willing sellers, for permission to collect and use the Users' Off-Facebook Data."

25. In paragraph [S.27] the CR says that the Nash model is apt for use to calculate both conventional loss, reflecting the value transfer that Facebook would have made to Users, and "*user damages*" quantified in the manner set out in S.26A. She explains that the Nash model determines how the surplus (or net economic value) generated by an agreement should be split between the parties, in order to ensure that the joint surplus generated by users and Facebook as a result of Facebook's collection of users Off-Facebook Data is shared fairly between them in the counterfactual.

Meta's opposition to the CR's application for permission to amend – user damages

26. In light of this, Meta opposed the application by the CR to amend the Amended Claim Form. It argued that the proposed amended claim in paragraph [S.26A], involved a claim for user damages which were not available <u>in law</u> in a competition law claim. The judgment of the CAT, allowing the new paragraph (and other related amendments), is the judgment under appeal. Among other amendments, Meta has now added the following to paragraph [26] of its Amended Defence cited above (see paragraph [23] above): "*Further or alternatively, it is denied that the CR is entitled to recover user damages*."

<u>C. The judgment of the CAT</u>

27. The CAT, as observed, granted permission to amend. This was on two bases. First, in terms of case management, at paragraph [46], the CAT held:

> "We are not beguiled by Meta's suggestion that the facts are irrelevant and that this is a pure question of law such that we should "grasp the nettle". Whereas this does raise a question of law, that question needs to be answered in the context of specific facts. We have no agreed statement of facts and it is premature to say what facts may impact the decision. For example, a relevant consideration to whether user damages are available might be whether or not conventional damages are available. That will of course turn on the facts."

28. Secondly, the CAT examined the jurisprudence and held that the CR was correct to say that case law supported the making available of user damages, at least arguably, to a case such as the present. The CAT considered the judgment of the Supreme Court on the availability of user damages in relation to claims for breach of contract in *One Step*, and quoted from Lord Reed:

> "30. …Where property is damaged, the loss suffered can be measured in terms of the cost of repair or the diminution in value, and damages can be assessed accordingly. Where on the other hand an unlawful use is made of property, and the right to control such use is a valuable asset, the owner suffers a loss of a different kind, which calls for a different method of assessing damages. In such circumstances, the person who makes wrongful use of the property prevents the owner from exercising his right to obtain the economic value of the use in question, and should therefore compensate him for the consequent loss. Put shortly, he takes something for nothing, for which the owner was entitled to require payment."

29. The CAT also quoted from Lord Sumption who held that:

> "120. The same principle [of user damages] has been applied in other cases of tortious competition [outside the intellectual property context], which involve no invasion of property rights unless property is so broadly defined as to encompass any right whatever. For example, confidential information is not property in the proper sense of the word, for there is no title against the world but only a personal right against the person owing the duty of confidence. However, a notional royalty (or its capitalised value) is commonly awarded as damages for breach of a duty not to misuse confidential information, whether that duty arises from contract or from equitable doctrines…"

30. The CAT noted that the user damages concept had been extended to claims for the misuse of private information, including where that private information was "*information about a persons [sic] internet browsing history [which] is a commercially valuable asset*": *Gulati v MGN Ltd* [2015] EWCA Civ 1291 ("*Gulati*") at paragraph [141]. The CAT agreed with the CR that this judgment was inconsistent with the proposition advanced by Meta that user damages were strictly limited to proprietary torts.

31. The CAT also considered Meta's argument that *Stoke-on-Trent v W&J Wass Limited* [1988] 1 WLR 1406 ("*Wass*") and *Devenish Nutrition v Sanofi-Aventis* [2007] EWHC 2394 (Ch); and [2008] EWCA Civ 1086; [2009] Ch 390 (where both the HC and CA judgments are set out) ("*Devenish*") were authority for the proposition that user damages were unavailable in competition cases. The CAT rejected the submission. Cases where user damages were available, as discussed in *Wass*, did not represent an exhaustive list. *Devenish* concerned an impermissible restitutionary claim to the profits made by members of a cartel in circumstances where losses may have been passed on to the claimant's customers. The CAT considered it was not a claim for user damages in the manner sought in earlier cases and did not reflect the position in

the present case. The CAT further considered it was not possible to extract from existing case law a principle that user damages were unarguably unavailable for the statutory tort of breach of Section 18 CA 1998 in circumstances where a conventional claim to damages was not, or might not be, available. This was "*a developing area of law and therefore not one which is amenable to summary determination*".

D. Meta's submissions on the appeal

32. Meta submits that, contrary to the conclusion of the CAT, as a matter of law it is not arguable that user damages are available in a competition law case. The CAT therefore erred in granting permission to amend the Amended Claim Form. It advances four main reasons:

(i) The appeal raises a pure point of law which this Court should grapple with. It is divorced from any factual finding that the CAT might make.

(ii) The CAT was bound by the judgment of the Court of Appeal in *Devenish,* which was a competition damages case, which held that it was bound by the earlier majority judgment of the Court of Appeal in *Wass* which held that user damages were only available in a fixed and immutable list of cases where there had been breach of proprietary torts and where there was no material loss. The torts included: nuisance, trespass, detinue, and breach of patent. Competition law was not on the list.

(iii) In any event even if there was cause to extend the list user damages were still confined to cases where the law which had been violated protected property rights. Competition law did not protect property rights.

(iv) And further user damages were also only available where the property or asset in question had been wholly abrogated or violated and did not apply where the claimant had consented - as was the case here - to the use of the property or asset now complained of.

E. The exercise of case management discretion

33. I would dismiss the appeal. Since the appeal concerns the availability of a remedy in user damages its basic premise is that the CAT will have found Meta to have unlawfully abused a dominant position in an unfair and exploitative manner, by underpaying users for their data and/or overcharging them for the Facebook service. The issue therefore is only as to the remedy to address or obviate this abuse. Meta says no such remedy exists.

34. My starting point is that this Court should rarely interfere with a case management decision of the CAT. Here, the CAT, in an admirably short and concise judgment, delivered in a more or less extempore manner, which thereby saved time and permitted preparation for trial to proceed apace, concluded that the issue of user damages had to go to trial. It held, in paragraph [46] cited at paragraph [27] above, that it was premature to consider points of law divorced from the context of the facts and any findings the CAT might make at trial, for example as to the adequacy of ordinary compensatory damages. The CAT rejected Meta's argument that the issue of law could sensibly be divorced from the factual context.

35. This is not the sort of decision this Court should interfere with. This was an evaluative conclusion by the CAT about the way in which the facts might play out, which the CAT was best placed to make. There is an extensive body of case law which underscores the importance of not striking out issues of law which are divorced from fact findings where the law might be uncertain and/or capable of development. In *Begum v Maran* [2021] EWCA Civ 326, relied upon by the CR in this appeal, a range of authorities were cited including the speech of Lord Browne Wilkinson in *Barrett v Enfield London BC* [1999] 3 All ER 193 at 197, [2001] 2 AC 550 at page 557 who held:

> 'In my speech in X and ors (minors) v Bedfordshire CC [1995] 3 All ER 353 at 372–373, [1995] 2 AC 633 at 740–741, with which the other members of the House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff 's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out.'

Also cited was the observation of Lord Briggs in *Lungowe v Vedanta Resources PLC* [2019] UKSC 20:

> "[48] It might be thought that an assertion that the claim against Vedanta raised a novel and controversial issue in the common law of negligence made it inherently unsuitable for summary determination. It is well settled that difficult issues of law of that kind are best resolved once all the facts have been ascertained at a trial, rather than upon the necessarily abbreviated and hypothetical basis of pleadings or assumed facts."

36. There is considerable merit in the stance taken by the CAT. Competition cases are invariably heavily expert evidence led. At the outset it is hard to predict with accuracy what the case will end up looking like. Trying to foresee how litigation will evolve is often akin to seeking route directions from a small map placed 20 metres away through a thick fog. Importantly, *by design*, cases before the CAT are intended to evolve. They might start wide but as they progress the CAT expects and demands that the parties winnow, refine and narrow. Even when they reach trial the process of hot tubbing and questioning of experts operates upon the basis that the experts have an obligation to the tribunal to be realistic and not stick slavishly to positions that are becoming untenable, and to make proper concessions. They might even be required to respond to <u>new</u> hypotheses put forward by the CAT itself: see CAT Practice Direction 3/25 "*Expert Evidence*", and in particular paragraphs [3] and [34]:

> "3. The Tribunal expects experts to acknowledge and respond in a fair-minded manner to evidence and views that challenge

> their positions, changing their minds if appropriate, particularly where the facts change or new evidence emerges. The Tribunal also expects experts to engage constructively with one another and with the Tribunal, to assist the Tribunal to understand the differences between them and to help the Tribunal to make informed decisions. As part of that process, the experts may be asked by the Tribunal to address alternative hypotheses presented by the Tribunal."
>
> "34. Experts are expected to remain open-minded and objective, and to assist the Tribunal by making concessions where it is reasonable to do so, rather than treating their cross examination as an exercise in advocacy or defending their reports at all costs."

37. Meta seeks to undermine the CR's case at a very early point, before disclosure and before the whittling process has begun. Meta's argument will not stop or in any material way alter the scope of the trial which will be ten weeks regardless and will include a Nash type analysis as part of the CR's case on abuse. In principle, there is no fixed, canonical, list of evidence that is relevant to abuse: See e.g. *CMA v Flynn Pharma* [2020] EWCA Civ 339 at paragraph [97] and *Cinven Capital Management v CMA* [2025] EWCA Civ 578 paragraphs [23] and [24]. Meta, rightly, accepts that a Nash analysis can form part of the evidence going to abuse.

38. The CAT will be better placed to address Meta's argument once the evidence has been collected and analysed. I give one example. The CAT said that before it considered user damages it would wish to see if conventional damages were available and sufficient. It appears from the material the CR intends to adduce at trial, that there will be an array of different pieces of evidence that might establish the existence and the scale/quantum of the abuse. It might even be that the abuse, and its scale, are established without reference to a Nash analysis. Internal disclosure might for instance indicate that Meta itself considered the value of the data to users to be $*x* or £*y* and this might be compelling evidence of the scale of the abuse. Abuse and quantum are closely related. Upon the operative premise of this appeal, that abuse has been found, the CAT is likely to have quantified the overcharge/underpayment as part of its conclusions about abuse and that quantification is (at least *prima facie*) likely to play an important, and possibly dispositive, part in framing the loss and damages. A simple example makes the point:

- Abuse by underpayment: Meta pays users 50 units for their data when, in a counterfactual competitive market, it should have paid 90 units. The abuse is underpayment of 40 units.

- Overcharging: Meta provides Facebook to users receiving by way of consideration 90 units when, in a counterfactual competitive market, it should only have received consideration of 50 units. The abuse is overcharging by 40 units.

In both cases the abuse is quantified as 40 units. In respect of damages, in the "*but for*" counterfactual world where the abuse had not occurred, the damages would also therefore be 40 units. So, even if a Nash exercise formed a part of the evidence establishing abuse, it might have no further role to perform in relation to damages.

39. In short, the CAT was correct, as a matter of case management, to allow the issue to go to trial. I would dismiss the appeal upon this basis alone. I add that the level of detail in the judgment below was appropriate. This judgment is considerably longer but only because it addresses the refined and comprehensive arguments of Meta upon the appeal. It is not at all an indication of the level of detail needed to resolve case management disputes before the CAT.

F. The case law

The submission of Meta about the case law

40. I turn next to Meta's submissions about case law which I have summarised at paragraph [32] above. Meta's case turns upon an analysis of various authorities. I approach this in the following way. First, I consider the judgments in *Wass* in particular to determine whether they hold that the list of torts for which user damages are available is fixed. Secondly, and regardless of what *Wass* did or did not hold, I consider the judgments of the High Court and Court of Appeal in *Devenish* and whether that of the Court of Appeal held that *Wass* was binding precedent for the conclusion that user damages <u>are</u> confined to strictly limited groups of proprietary torts, which do not include competition law. Thirdly, I consider the more recent case law in *Gulati*, *One Step,* and *Lloyd v Google* [2021] UKSC 50 ("*Lloyd v Google*") to determine whether they explain the legal underpinning of the remedy of user damages, and whether they indicate that the list of case types where the remedy is available is fixed or can extend to cases of misuse of data. Finally, I consider the points made by Meta about the purpose of section 18 CA 1998 and the fact that on the facts users consented to their data being extracted and used.

Wass

41. I start with *Wass* and consider whether it held that user damages were limited to a fixed list of proprietary torts. The facts concerned a breach by the defendant of certain statutory market rights conferred upon the plaintiff. I draw from *Wass* that the availability of user damages is not determined by some fixed and immutable, pre-ordained, list, but can evolve. At page [1415H] Nourse LJ identified the general principle which was that where a plaintiff had suffered loss to his property or some proprietary right, damages could be recovered equivalent to the diminution in value of the property or right. This principle was subject to exceptions whereby damages could be calculated on a user basis which: "*…must be closely examined, in order to see whether a further exception ought to be made in this case*". At page [1415A – C] he stated that it was a characteristic of the development of the common law "... *that the invention and increasingly extended application of the user principle should appear to have come about by accident rather than by design*". He added: *"... in a process of development it is sometimes necessary to stand back from the authorities and to ask not simply where they have come to, but where, if a further extension is made, they may go next".*

42. In similar vein, Lord Justice Nicholls, at page [1418 C, D], observed: "…*the common law, however, is constantly being developed and adapted as social conditions change,*

and novelty by itself is not an answer to the present claim". He added that he had, during argument, been attracted by the analogy between infringements of a patent, where it was established that user damages were available, and infringement of a market right. However, he had concluded that, on reflection, the analogy was not apt and could not justify an extension of user damages to violations of statutory market rights. The reason flowed from the intrinsic nature of market rights as conferred by the statute in question. He observed (at page 1415G):

> "I have, however, 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. A market right confers a monopoly, as does a patent, but the protection which the law affords to the owner of a market right is limited to protecting him against being disturbed in the enjoyment of his right. If an unauthorised market is held without disturbing the lawful market, the owner of the lawful market has no remedy, either for damages or otherwise. In such an event there is no place for an award of damages to be assessed on the user principle. Thus, for example, if and in so long as the owner of the market right is currently not exercising or seeking to exercise his right, and is not holding a market at all, he has no cause of action against a person holding an off an unauthorised market, for in such a case he is not being disturbed in the enjoyment of his market right."

43. The logic of this reasoning is that Lord Justice Nicholls would have found user damages to be available for breach of statutory market rights had the analogy between a statutory market right and patent law been apposite.

44. Lord Justice Mann, the third member of the Court, agreed with both judgments and, it might reasonably be inferred, did not see a material difference between them. He must also be understood to have endorsed the approaches of both, which assume that the torts for which user damages might be available in the case of breach of duty, was not a closed list.

45. There is, in my view, no basis for a conclusion that *Wass* establishes the proposition that user damages are chained down to a prefixed list of very particular types of invasion of proprietary torts.

Devenish

46. I turn now to *Devenish* and consider whether it is authority for the proposition that *Wass*, contrary to the above, did find that the categories of tort for which user damages were available was fixed and could not extend to competition law. This was a claim for damages by purchasers of vitamins from members of a price fixing cartel who, in implementation of that unlawful agreement, had overcharged them. Before the High Court the claimants sought compensatory damages but, in the alternative, a restitutionary account of profits, and exemplary damages. They pursued an account because they were concerned that the quantification of damages upon an ordinary compensatory basis would be too complex, and because the defendants had pleaded

that any overcharge had been passed on by the claimants to their own customers and that they had not, thereby, suffered any material loss. There was no claim for user damages. At first instance Lewison J held that the account of profits and the compensatory overcharge had been calculated by an expert to be of the same order of magnitude. Compensatory damages for the overcharge were in his judgment therefore "*adequate*" according to normal "*but for*" principles. He cited, at paragraphs [15] – [18], the "*landmark*" judgment of the CJEU in *Case C-453/99 Courage v Crehan* [2001] ECR I-6314 at paragraphs [26] and [29], on a reference from the Court of Appeal, as authority for the proposition that any remedy for breach of the competition rules had to be effective and that damages were essential to secure the "*full effectiveness*" of the policy objectives behind the legislative prohibition on cartels. Otherwise, the "*... practical effect of the prohibition ... would be put at risk*". He was clear that an order of compensatory, conventional, damages would be effective and would meet the imperative of ensuring the practical effect of the prohibition.

47. The issue on the appeal concerned an account of profits only, the claim for exemplary damages having been abandoned. The task for the Court was to decide the narrow question whether a restitutionary account of profits was available for breach of competition law, where conventional damages were otherwise adequate.

48. In the course of the judgment the Court had to consider whether it was bound by *Wass* to hold that a restitutionary account of profit could not be awarded for a non-proprietary tort. Lord Justice Tuckey held that *Wass* was binding upon them. He held that, as to the question of "*[a]re we bound by [Wass] to hold that an account of profits cannot be awarded for a non-proprietary tort*", the answer was yes. He also held: "*Non-proprietary torts do still therefore fall to be considered as an exception to the general principles articulated by Lord Nicholls of Birkenhead in Blake's case unless and until the Wass case is overruled*" (paragraph [156]). Lady Justice Arden held to similar effect: paragraphs [4], [42], [71] and [76].

49. In written submissions Meta argues as follows:

> "Both the Tribunal and the Court of Appeal are bound by Devenish
>
> 28. Further to the above, the majority in Devenish held that:
>
> > a. the Court of Appeal was bound by Wass to find that user damages are not available for breaches of non-proprietary torts, including competition claims; and
> >
> > b. it followed from this that an account of profits and restitutionary damages (i.e. the remedies sought by the claimants in Devenish, which were not conventional damages) were not available in competition claims.
>
> 29. As referred to … above, the reason why the majority found that proposition (b) followed from (a) was because, at that time, user damages were widely considered to be restitutionary in nature. That position has now moved on in light of the Supreme Court's judgment [One Step], §95(1) …, which makes clear

> that user damages are to be analysed as compensatory in nature. Crucially, however, it is the Court of Appeal's decision at step (a) that is relevant in the present case and which Meta submits was binding on the Tribunal and is binding on this Court.
>
> 30. In other words, the ratio in Devenish encompasses both the conclusion on the issue on the pleadings in that case (i.e., that an account of profits and an award of restitutionary damages were not available in competition claims) and also, importantly, the basis for that conclusion, which was the anterior point that the Court of Appeal was bound by Wass to hold that user damages were not available in competition law claims."

50. Meta's argument is that the Court of Appeal in *Devenish* has decided, definitively, that user damages can never be available for breaches of competition law. They say this even though: (i) the sole issue arising was the availability of a restitutionary account of profits; (ii) user damages were not in issue; (iii) it was common ground that compensatory damages to recover the overcharge were adequate; and (iv) it is plain and not seriously in dispute, that the Court in *Wass* had not held that the list of cases where user damages were available was fixed. The contention that *Devenish* compels such a conclusion is problematic when the proposition formulated by Meta in this case was not remotely in issue. Neither that case nor *Wass* concerned the sort of fact-pattern arising in this case and the questions to which it might give rise. Neither concerned the possibility that, in breach of the prohibition on abusing a dominant position, an undertaking procured customers to give it access to data of considerable value to the undertaking, and neither case concerned the question how to value the loss suffered by customers in giving up that data. As the authorities cited in this judgment make clear, user damages is an area of the law, like much of the common law, where principles established in earlier cases adapt to meet changing circumstances. It runs counter to that to suggest that the decision in *Devenish* precludes application of the user damages approach to quantifying loss suffered in circumstances that were not on the radar of the court in that case.

51. Meta argues that, even if all of this be true, the Court of Appeal in *Devenish* <u>did</u> interpret *Wass* in a rigid, inflexible, manner and as limiting user damages to cases where proprietary rights had been violated and this Court is therefore bound by the construction placed upon *Wass*, even if wrong.

52. This led to argument before the Court as to the circumstances where a subsequent Court of Appeal (which would include this Court) is bound by a prior erroneous judgment. The CR cited various judgments indicating that in a case of "*manifest slip or error*" a subsequent Court of Appeal could depart from an earlier erroneous authority: cf *Mercy Consult Limited v Adegbuyi-Jackson* [2023] EWCA Civ 1073 per Arnold LJ at paragraph [32].

53. Is there an error? If there is an error it is that Arden LJ in *Devenish* held that following *Wass* the categories of cases where user damages were available was fixed and unamenable to evolutionary change. This is an error because, as set out of paragraphs [41] – [44] above, no such proposition can be found in *Wass*. As to this, the CR says that as a matter of straightforward interpretation the judgment of Arden LJ in *Devenish* does not endorse such a rule. I agree. I do not read the judgment in this way.

Indeed, it would be strange if it did express such a conclusion given that both Nourse LJ and Nicholls LJ in *Wass* so clearly came to the opposite conclusion. I construe the judgment of Arden LJ as confirming that a restitutionary account of profits is not available because of *Wass*, in circumstances where it is common ground that compensatory damages are adequate. If however this is wrong, and the judgment is to be construed as Meta submits, then I see real force in the CR's arguments that such a conclusion, at least arguably, rests upon a manifest error sufficient to release this Court from any duty to follow such a result.

Gulati

54. I turn to *Gulati*, which post-dates *Devenish*. The measure of damages for wrongful invasion of privacy was considered in depth by Mann J and by the Court of Appeal. The eight test claimants were individuals in the public eye whose mobile phones had been hacked. The defendant newspapers admitted liability for breach of privacy but disputed quantum. They argued that absent material damage, all the claimants could recover was for distress caused by the unlawful activities. At first instance the judge rejected that argument. Distress (or some similar emotion) was not the sole touchstone for damages. There was no reason in principle why an award should not be made "*...to reflect infringements of the right itself*". The Court referred to cases in which damages had been awarded to very young children (of a few months) for misuse of private information by publishing photographs of them even though, because of their age, they could not have suffered any distress. The Judge (*ibid* paragraph [144]) therefore approached quantum on the basis that *"... compensation can be given for things other than distress, and in particular can be given for the commission of the wrong itself so far as that commission impacts on the values protected by the right*".

55. The lead judgment in the Court of Appeal was given by Arden LJ. She dismissed the appeal and endorsed the conclusion of the High Court (ibid paragraphs [45], [47], [48], [111] and [112]). As the CAT observed (judgment paragraphs [15] – [16]) the judgment confirms that user damages are available for misuse of private information, which is not a proprietary tort. The CR argues that it is unlikely that Arden LJ, who gave the leading judgment in both *Devenish* and *Gulati*, came to mutually irreconcilable conclusions. I agree. The more likely, and the better, explanation is that Meta's interpretation of *Devenish* is wrong and that Arden LJ was not intending to formulate any rule in that case about the availability or legal nature of user damages, not least because user damages were not claimed. But at all events it makes the argument that we are bound by an earlier inconsistent judgment of Arden LJ less credible.

One Step

56. This case concerned whether user damages were available for breach of contract. Lord Reed JSC, with whom three of the other members of the Court agreed (Lord Sumption gave a separate judgment arriving at the same end result but by a somewhat different route), stated that the appeal raised an important question in relation to the law of contract. In paragraph [1], he observed that the debate, both judicial and academic, upon the issue of the scope of user damages "*...and the confused state of the authorities, have reflected a lack of clarity as to the theoretical underpinning of such awards, and consequent uncertainty as to when they are available*". This statement amounts, in itself, to a warning to other courts to be wary of reading too

much into earlier authorities. It also echoes the observations of Nourse LJ in *Wass* that the law seemed to have evolved through accident rather than design (see paragraph [41] above).

57. In paragraphs [91] – [95] Lord Reed articulated various conclusions about user damages. These stemmed from broader considerations which concerned the following:

- Whether the loss for which compensation is due was the economic value of a right which has been breached, "*considered as an asset*".
- An acknowledgement that the imaginary negotiation which underpinned user damages was merely "*a tool*" for arriving at compensatory value.
- An acceptance that the "*real question*" was as to the circumstances in which the value of an asset that had been wrongfully used by a defendant constituted the measure of a claimant's loss.
- Whether "*in substance*" the claimant had been deprived of a valuable asset which could be measured by determining the economic value of the asset in question.
- A determination whether if user damages were unavailable a defendant would have "*taken something for nothing*".
- Whether the right in issue was of "*such a kind*" that breach could result in an identifiable loss equivalent to the economic value of the right, considered as an asset even in the absence of any pecuniary losses measurable in the ordinary way.

58. Paragraphs [91] – [95] state as follows:

> "Conclusions
>
> 91 The use of an imaginary negotiation can give the impression that negotiation damages are fundamentally incompatible with the compensatory purpose of an award of contractual damages. Damages for breach of contract depend on considering the outcome if the contract had been performed, whereas an award based on a hypothetical release fee depends on considering the outcome if the contract had not been performed but had been replaced by a different contract. That impression of fundamental incompatibility is, however, potentially 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. The imaginary negotiation is merely a tool for arriving at that value. The real question is as to the circumstances in which that value constitutes the measure of the claimant's loss.
>
> 92 As the foregoing discussion has demonstrated, such circumstances can exist in cases where the breach of contract

results in the loss of a valuable asset created or protected by the right which was infringed, as for example in cases concerned with the breach of a restrictive covenant over land, an intellectual property agreement or a confidentiality agreement. Such cases share an important characteristic with the cases in which Lord Shaw's second principle and Nicholls LJ's user principle were applied. 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 asset in question. The defendant has taken something for nothing, for which the claimant was entitled to require payment.

93 It might be objected that there is a sense in which any contractual right can be described as an asset, or indeed as property. In the present context, however, what is important is that the contractual right is of such a kind that its breach can result in an identifiable loss equivalent to the economic value of the right, considered as an asset, even in the absence of any pecuniary losses which are measurable in the ordinary way. That is something which is true of some contractual rights, such as a right to control the use of land, intellectual property or confidential information, but by no means of all. For example, the breach of a non-compete obligation may cause the claimant to suffer pecuniary loss resulting from the wrongful competition, such as a loss of profits and goodwill, which is measurable by conventional means, but in the absence of such loss, it is difficult to see how there could be any other loss.

94 It is not easy to see how, in circumstances other than those of the kind described in paras 91—93, a hypothetical release fee might be the measure of the claimant's loss. It would be going too far, however, to say that it is only in those circumstances that evidence of a hypothetical release fee can be relevant to the assessment of damages. If, for example, in other circumstances, the parties had been negotiating the release of an obligation prior to its breach, the valuations which the parties had placed on the release fee, adjusted if need be to reject any changes in circumstances, might be relevant to support, or to undermine, a subsequent quantification of the losses claimed to have resulted from the breach. It would be a matter for the judge to decide whether, in the particular circumstances, evidence of a hypothetical release fee was relevant and, if so, what weight to place upon it. However, the hypothetical release fee would not itself be a quantification of the loss caused by a breach of contract, other than in circumstances of the kind described in paras 91—93 above.

95 The foregoing discussion leads to the following conclusions:

(1) Damages assessed by reference to the value of the use wrongfully made of property (sometimes termed "user

damages”) are readily awarded at common law for the invasion of rights to tangible moveable or immoveable property (by detinue, conversion or trespass). The rationale of such awards is that the person who makes wrongful use of property, where its use is commercially valuable, prevents the owner from exercising a valuable right to control its use, and should therefore compensate him for the loss of the value of the exercise of that right. He takes something for nothing, for which the owner was entitled to require payment.

(2) Damages are also available on a similar basis for patent infringement and breaches of other intellectual property rights.

(3) Damages can be awarded under Lord Cairns’s Act in substitution for specific performance or an injunction, where the court had jurisdiction to entertain an application for such relief at the time when the proceedings were commenced. Such damages are a monetary substitute for what is lost by the withholding of such relief.

(4) One possible method of quantifying damages under this head is on the basis of the economic value of the right which the court has declined to enforce, and which it has consequently rendered worthless. Such a valuation can be arrived at by reference to the amount which the claimant might reasonably have demanded as a quid pro quo for the relaxation of the obligation in question. The rationale is that, since the withholding of specific relief has the same practical effect as requiring the claimant to permit the infringement of his rights, his loss can be measured by reference to the economic value of such permission.

(5) That is not, however, the only approach to assessing damages under Lord Cairns’s Act. It is for the court to judge what method of quantification, in the circumstances of the case before it, will give a fair equivalent for what is lost by the refusal of the injunction.

(6) Common law damages for breach of contract are intended to compensate the claimant for loss or damage resulting from the non-performance of the obligation in question. They are therefore normally based on the difference between the effect of performance and non-performance upon the claimant’s situation.

(7) Where damages are sought at common law for breach of contract, it is for the claimant to establish that a loss has been incurred, in the sense that he is in a less favourable situation, either economically or in some other respect, than he would have been in if the contract had been performed.

> (8) Where the breach of a contractual obligation has caused the claimant to suffer economic loss, that loss should be measured or estimated as accurately and reliably as the nature of the case permits. The law is tolerant of imprecision where the loss is incapable of precise measurement, and there are also a variety of legal principles which can assist the claimant in cases where there is a paucity of evidence.
>
> (9) Where the claimant's interest in the performance of a contract is purely economic, and he cannot establish that any economic loss has resulted from its breach, the normal inference is that he has not suffered any loss. In that event, he cannot be awarded more than nominal damages.
>
> (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.
>
> (11) Common law damages for breach of contract cannot be awarded merely for the purpose of depriving the defendant of profits made as a result of the breach, other than in exceptional circumstances, following Attorney General v Blake [2001] 1 AC 268.
>
> (12) Common law damages for breach of contract are not a matter of discretion. They are claimed as of right, and they are awarded or refused on the basis of legal principle.

59. *One Step* demonstrates that user damages can be available for non-proprietary breaches of contract and accordingly undermines the proposition that they are limited to proprietary torts. It provides an important exegesis of the theoretical underpinning for user damages which indicates that user damages are an evidential tool for use to compute compensatory loss in various circumstances, where a valuable asset has been wrongly exploited by a defendant, in circumstances where conventional "*but for*" damages would not result in adequate compensation. It focuses upon the existence of an "*asset*" that has value, that the defendant has appropriated and asks whether, if no financial remedy is available, the defendant gets something for nothing. The judgment does not support Meta's submission.

Lloyd v Google

60. Finally, *Lloyd v Google*. The claimant, acting on his own behalf and as representative of a class in excess of 4m people, issued a claim against Google seeking compensation under section 13 of the Data Protection Act 1998 ("*DPA 1998*"). The claim was for damages sustained by reason of Google's breach qua data controller under the Act. The claimant alleged that Google had breached its duty under section 4(4) to comply with the data protection principles set out in Schedule 1 by tracking the activity of users of a particular smartphone without their consent and selling the accumulated data. The claimant contended that members of the class had suffered damage under section 13 by the loss of control over their data protection rights. They did not seek to allege or prove any distinctive facts affecting individual class members' save that they had not consented to the abstraction of their data. The judge dismissed the claimant's application for permission to serve the defendant outside the jurisdiction.

61. The Court of Appeal allowed an appeal, holding that an individual suffered damage under the Act on losing control of their personal data, even if they suffered no pecuniary loss and no distress; and that the claim should be allowed to proceed as a representative action under CPR r 19.6 on the basis that the claimant had the same interest as the persons he represented in the claim. On a further appeal the Supreme Court held that properly interpreted section 13 DPA 1998 was limited to material damage meaning financial loss or physical or psychological injury and distress. It did not confer upon an individual a right to compensation for any non-trivial contravention in relation to any personal data of which that individual was the subject without the need to prove that the contravention had caused material damage or distress to the individual concerned. The language of the section distinguished between damage suffered by an individual and a contravention of a statutory requirement by a data controller. The language was inconsistent with an entitlement to compensation based solely on proof of the contravention. In paragraphs [139] – [143] Lord Leggatt, giving a judgment the remainder of Court concurred with, made the following observations about user damages. I acknowledge that the comments might be viewed strictly as obiter (see Lord Leggatt at paragraph [143]), but these are still observations all the Justices concurred with:

> "9) The claim for user damages
>
> 139 User damages is the name commonly given to a type of damages readily awarded in tort where use has wrongfully been made of someone else's land or tangible moveable property although there has been no financial loss or physical damage to the property. The damages are assessed by estimating what a reasonable person would have paid for the right of user. Damages are also available on a similar basis for patent infringement and other breaches of intellectual property rights. Following the seminal decision of this court in One Step (Support) Ltd v Morris-Garner [2019] AC 649, it is now clear that user damages are compensatory in nature, their purpose being to compensate the claimant for interference with a right to control the use of property where the right is a commercially

valuable asset. As Lord Reed JSC explained in Morris-Garner, at para 95(1):

> "The rationale of such awards is that the person who makes wrongful use of property, where its use is commercially valuable, prevents the owner from exercising a valuable right to control its use, and should therefore compensate him for the loss of the value of the exercise of that right. He takes something for nothing, for which the owner was entitled to require payment.

140 Lord Reed JSC, at paras 27 and 29, cited authorities which make it clear that the entitlement to user damages does not depend on whether the owner would in fact have exercised the right to control the use of the property, had it not been interfered with. The loss for which the claimant is entitled to compensation is not loss of this conventional kind (para 30); rather, it lies in the wrongful use of the claimant's property itself, for which the economic value of the use provides an appropriate measure. This value can be assessed by postulating a hypothetical negotiation and estimating what fee would reasonably have been agreed for releasing the defendant from the duty which it breached. It is this method of assessment on which the claimant relies in the alternative formulation of the present claim.

141 A claim in tort for misuse of private information based on the factual allegations made in this case, such as was made in Vidal-Hall, would naturally lend itself to an award of user damages. The decision in Gulati shows that damages may be awarded for the misuse of private information itself on the basis that, apart from any material damage or distress that it may cause, it prevents the claimant from exercising his or her right to control the use of the information. Nor can it be doubted that information about a person's internet browsing history is a commercially valuable asset. What was described by the Chancellor in the Court of Appeal [2020] QB 747, para 46, as "*the underlying reality of this case*" is that Google was allegedly able to make a lot of money by tracking the browsing history of iPhone users without their consent and selling the information collected to advertisers.

142 The view has sometimes been expressed that asserting privacy in information is inconsistent, or at least in tension, with treating such information as a commercial asset: see e g Douglas v Hello! Ltd (No 3) [2006] QB 125, para 246; and on appeal sub nom OBG Ltd v Allan [2008] AC 1, para 275 (Lord Walker of Gestinghorpe). But once the basis of the right to privacy is understood to be the protection of a person's freedom to choose and right to control whether and when others have access to his other private affairs, I think that any tension

> largely disappears. It is common experience that some people are happy to exploit for commercial gain facets of their private lives which others would feel mortified at having exposed to public view. Save in the most extreme cases, this should be seen as a matter of personal choice on which it is not for the courts to pass judgments. Moreover, where the defendant's very purpose in wrongfully obtaining and using private information is to exploit its commercial value, the law should not be prissy about awarding compensation based on the commercial value of the exercise of the right. As was confirmed in Morris-Garner, the fact that the claimant would not have chosen to exercise the right himself is no answer to a claim for user damages. It is enough that, as Lord Reed JSC put it at paras 30 and 95(1) of his majority judgment, the defendant has taken something for nothing, for which the owner of the right was entitled to require payment.
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> 143 The point does not arise in the present case, however, because the claimant is not claiming damages for misuse of private information. As discussed, the only claim advanced is under the DPA 1998. Here it follows from the conclusion reached above about the meaning of section 13 that user damages are not available. This is because, for the reasons given, compensation can only be awarded under section 13 of the DPA 1998 for material damage or distress caused by an infringement of a claimant's right to have his or her personal data processed in accordance with the requirements of the Act, and not for the infringement itself. Although his reasoning was in part based on an understanding of user damages overtaken by this court's decision in Morris-Garner, it follows that Patten J was right to hold in Murray v Express Newspapers plc [2007] EMLR 22, at para 92, that the principles on which user damages are awarded do not apply to a claim for compensation under the DPA 1998."

62. I take from this a recognition that the law on user damages is capable of evolution and may apply to the wrongful appropriation and use of data. As Lord Leggatt put it, where a defendant's purpose in wrongfully obtaining and using the information is to exploit its commercial value, the law should not be "*prissy*" about awarding compensation based on the commercial value of the exercise of the right. And the fact that the claimant would not have chosen to exercise the right himself is no answer to a claim for user damages. A key question is whether, but for a remedy, the wrongdoer would get something for nothing. I do not see any inconsistency between this case and *One Step*, and it undermines Meta's argument and supports that of the CR.

Other points raised by Meta

63. Meta raises two other points about the scope of user damages, based upon its understanding of the case law. I address these briefly. First, at the heart of Meta's argument is the proposition that user damages are not available unless the cause of action within which they are claimed is one which specifically protects a property

right, and section 18 CA 1998 is not such a cause of action. Meta contends that section 18 CA 1998 is concerned with addressing distortions of competition (measured through counterfactual analysis) and nothing else. Secondly, and in any event, Meta says that user damages are only available where the violation of a proprietary right is total or absolute and not, as here, where the claimant has consented to the use by the defendant of its data. I take each point in turn.

64. As to the first, it is wrong to suggest that, in terms of its purpose, section 18 CA 1998 is not intended to prevent misuse of property rights and/or protect a third person's property rights. Section 18 CA 1998 is not "*specifically*" a statutory obligation focusing upon protection of property, but it is broad and encompasses the misuse of property rights by a dominant undertaking. The jurisprudence contains many examples of cases where, for example, an undertaking has used an intellectual property right, such as a patent, to unlawfully restrict competition. It can also extend to protecting property rights of third parties. For example, it might be an abuse for a dominant patentee to require, as a condition of the grant of an essential licence, that the licensee assign to the dominant undertaking that licensees own intellectual property rights. In *Wass* Lord Justice Nicholls engaged in an exercise to see whether, viewed from its statutory purpose, the market legislation in issue was intended to create a right for which user damages was appropriate: See paragraphs [42] – [43] above. In *Lloyd v Google*, the analysis also turned upon the types of remedy and relief that were apposite under the legislative scheme provided for under the DPA 1998: See paragraphs [60] – [62] above. In the context of the CA 1998 it is at the very least strongly arguable that if user damages were needed to ensure that the *purpose* of section 18 was met, then a court or tribunal would have the power to make such an award. It is also incorrect to say that section 18 is only concerned with distortions of competition and counterfactual analysis. It is also concerned with protection of consumers and abuse can be proven by means other than showing what might occur in a counterfactual market where there was no distortion of competition: See eg *London and Southeastern Railway Limited and others v Justin Gutmann* [2022] EWCA Civ 1077 paragraphs [93]-[102] and case law cited thereat.

65. Next, there is the argument that only a violation that is absolute warrants an award of user damages and because the Class consented to the expropriation of their property this is deemed to amount to consent and expunges any right to compensation. The argument is advanced even though, on the present premise, consent was procured by unfair and exploitative conduct - the "*take it or leave it*" clause - and is unlawful. This seems, at least for the purposes of arguability, such an extreme proposition, and runs so counter to the basic tenets of competition law, that I cannot see it being attractive to any court, tribunal or decision maker. It must be at least arguable that if Meta obtains consent that is unlawful under section 18, because it has been unfairly and exploitatively acquired, it becomes void or would be declared to be of no effect by the CAT in judgment.

Conclusion on case law

66. In conclusion, permission to amend was correctly given by the CAT to enable the CR to raise the issue of user damages.

67. It is strongly arguable that *Devenish* is not authority for the proposition that user damages do not apply in competition law cases. It is equally arguable that the law can

evolve and competition law is a prime candidate where a court or the CAT might consider that it should order such a remedy, if needs be, to ensure that an abuse was adequately and effectively redressed. Cases subsequent to *Devenish*, and in particular *Gulati*, *One Step* and *Lloyd v Google*, all indicate that the law can evolve, and is not limited to a narrow band of proprietary torts and can apply to the unlawful extraction of data in circumstances similar to the present. Were it otherwise the statutory prohibition on abuse of a dominant position would risk being severely undermined in its ability to apply in this new and vastly important world where data is rapidly becoming a proxy for money.

G. Disposition

68. For all the above reasons I would dismiss the appeal.

Lord Justice Phillips:

69. I agree.

Lord Justice Zacaroli:

70. I also agree.