IN THE COURT OF APPEAL (CIVIL DIVISION) **CA-2025-002757**
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
CASE NO. 1433/7/22
JUSTIN TURNER KC, DEREK RIDYARD, GREG OLSEN

BETWEEN:

DR LIZA LOVDAHL GORMSEN

Class Representative/Respondent

and

(1) META PLATFORMS INC
(2) META PLATFORMS IRELAND LIMITED
(3) FACEBOOK UK LIMITED

Defendants/Appellants

RESPONDENT'S APPEAL SKELETON ARGUMENT
dated 20 March 2026

In this document, the Class Representative is referred to as '**the CR**', the Defendants are collectively referred to as '**Meta**', the Competition Act 1998 is referred to as '**CA 1998**', and the duty in section 18 CA 1998 is referred to as '**the Chapter II prohibition**'. The Tribunal's judgment dated 30 September 2025 ([2025] CAT 55) is referred to as the '**Judgment**'.

A. INTRODUCTION

1. In these proceedings, the CR alleges that Meta abused its dominant position to acquire and use the personal data of c.50 million Facebook users, contrary to section 18 CA 1998. The claim has been certified and a 10-week trial is presently listed for September 2027.

2. On this interlocutory appeal, Meta seeks to challenge the Tribunal's decision to give the CR permission to amend her claim form to include a further or alternative remedy, namely the remedy of user damages. 'User damages', as the Supreme Court has explained,[1] are damages measured by reference to the sum that could reasonably have been charged in a hypothetical negotiation to license the defendant's wrongful act.

3. The Tribunal permitted the amendment because: (i) it is '*plainly arguable*' that the remedy of user damages will be available if Meta is found to have acted abusively as alleged; and (ii) in any event, the amendment raises an important issue of law '*which is properly to be determined in the light of findings of fact and is not suitable for summary determination*': [44]-[45]; PTA Ruling, [1].

[CB/4/58]
[CB/5/74]

4. Meta disputes this; and the grounds on which it does so give rise to two distinct issues for determination on this appeal.

5. Issue 1 is whether this Court is bound by ***Devenish***[2] to hold that user damages are unavailable in all competition claims. That is Meta's primary (and in truth only) argument on this appeal, i.e. that ***Devenish*** is binding authority that user damages are available only for '*proprietary torts*' and can therefore never be awarded in competition cases: [3(a)], [28]. But ***Devenish*** does not say any such thing; and it would be surprising if it did because there is Supreme Court authority confirming that user damages are available for various non-proprietary causes of action, such as misuse of private information, breach of confidence and certain types of breach of contract: see paras 72-74 below. A further difficulty about Meta's argument is that Meta itself says (see [18], [29]) that user damages were understood to be restitutionary in nature in ***Devenish***. But that premise cannot survive ***One Step***, which decides that user damages are compensatory and not restitutionary in nature. ***Devenish*** is not therefore authority (let alone binding authority) that user damages are available only for proprietary torts; and Meta's case on Issue 1 is accordingly unsustainable.

6. Issue 2 is whether, leaving aside ***Devenish***, there is some other reason why user damages

[1] ***One Step v Morris-Garner*** [2019] AC 649, [91]; ***Lloyd v Google*** [2022] AC 1217, [139].

[2] ***Devenish Nutrition Ltd v Sanofi-Aventis SA*** [2009] Ch 390.

are unavailable in this case. But Issue 2 is likely to be academic. This is because, absent binding authority in Meta's favour, there is no proper basis to interfere with the Tribunal's case management decision that the availability of user damages is unsuitable for summary determination and should be left to be decided at trial. That is reinforced by the fact that: (i) the user damages issue raises a complex point of law; (ii) a trial will be required in any event; and (iii) allowing the amendment will not make any difference to the length of the trial.

7. It may therefore be unnecessary to engage with the substance of Meta's arguments under Issue 2. But those arguments are in any event flawed. The main flaw is that the remedies for a breach of a statutory duty must depend on the purpose of the duty in question. It cannot therefore be the subject of any exclusionary rule at common law that operates independently of the language and purpose of the statute. The relevant statutory duty in this case (of which Meta must be assumed to be in breach on this appeal) is the Chapter II prohibition. One purpose of that duty is to prevent and deter dominant firms from exploiting consumers.[3] If, therefore, a dominant firm is able by abusing its dominant position to obtain and use the data or some other asset of consumers, there is no reason why it should not pay user damages, just as any other wrongdoer who wrongfully uses such assets is required to do under the general law. To hold otherwise would not only undermine the purpose of the Chapter II prohibition but also give wrongdoers who abuse their dominant position a free pass that other wrongdoers would no doubt like but do not have. In short, as Lord Reed put it in ***One Step***, [30], if someone wrongfully '*takes something for nothing*', they should pay for it; and wrongdoers under the Competition Act are not exempt from that basic principle.

8. For these reasons, developed below, the Court will be invited to dismiss the appeal.

9. This skeleton argument is organised as follows. **Sections B** and **C** summarise the background and relevant legal principles, respectively. **Section D** addresses Issue 1, which is the ***Devenish*** issue. **Section E** addresses Issue 2, which concerns the other authorities or arguments on which Meta relies. **Section F** briefly identifies further points which support the Tribunal's decision to permit the amendment.

10. One of the difficulties about navigating this area of the law is terminology. In this document, the phrase '*user damages*' is therefore used as a reference to (and only to) damages measured by reference to the sum that would reasonably have been agreed in a hypothetical negotiation between willing parties to license the defendant's wrongful act. But the same concept has

[3] ***London & SE Rly v Gutmann*** [2022] ECC 26, [93]; see further para 86 below.

also been described as '*Wrotham Park damages*', '*the principle of price or hire*', '*licence fee damages*', '*negotiation damages*' and '*negotiating damages*' (the terminology preferred in ***One Step***).

B. BACKGROUND

[SB/12/200] [CB/4/48-49]

11. The CR's case is summarised in the RACF and in paragraphs 2-8 of the Judgment. It suffices for present purposes to summarise it as follows.

12. The CR represents c.46.6 million users of Facebook who accessed the platform whilst in the UK at least once between 14 February 2016 and 6 October 2023.

13. The CR's case is that: (i) Meta holds a dominant position in the relevant market; (ii) Meta abused that dominant position by making access to Facebook conditional upon users giving up access to certain personal data concerning their off-Facebook activities (referred to by the CR as 'Off-Facebook Data') without receiving a value transfer in return; (iii) this constitutes an 'unfairness' abuse contrary to section 18(2)(a) CA 1998; and (iv) the unfairness can be analysed either as the imposition of an unfair trading condition or as an unfair price, but these are in practice two sides of the same coin.

14. The CR also says that the data that Meta took and used to make very substantial profits often included deeply sensitive personal data: for example, in one case, when a user clicked a link on a UK police force website to '*securely and confidentially report rape or sexual assault*', Meta received a parcel of data that included the sexual nature of the offence, the time the link was clicked and a code denoting the user's Facebook account ID. Similarly, Meta is reported to have obtained from an NHS trust details of a user viewing a patient handbook for HIV medication, including the name of the drug, the NHS trust in question, the user's IP address, and details of their Facebook user ID: see RACF, [91].

[SB/12/249-251]

15. The German Federal Supreme Court has already concluded that Meta's acquisition and use of Off-Facebook Data in this way constitutes an abuse of dominant position under a provision that is identical to the Chapter II prohibition. Its approach has been cited without disapproval by Green LJ, who described it as an example of the application of the Chapter II prohibition to an '*unfair intrusion into consumer rights*': ***Gutmann*** (above) [97]-[100].

16. As to causation and loss, the CR's case is that, absent the abuse in question, Meta would have had to offer a fair bargain to users and that any such fair bargain would have resulted in a value transfer to them. One of Meta's defences is that, even if the abuse is established, users should not receive any compensation because Meta would not have been willing to

pay anything for the data that it (*ex hypothesi* wrongfully) took and used.[4]

17. However, if, as the CR contends, user damages are available, that defence falls away. This is because the fact that the parties would not actually have negotiated a licence (or D would not actually have made a payment to C) is irrelevant to an award of user damages.[5] This reflects the nature of user damages: they constitute compensation for '*the economic value of the right which has been breached, considered as an asset*'; and the hypothetical negotiation commonly used to quantify such loss is '*merely a tool for arriving at that value*': see ***One Step***, [91].

C. RELEVANT LEGAL PRINCIPLES

18. The legal principles relevant to the determination of this appeal are summarised below, taking in turn: (i) the test for amendments; (ii) the test for appellate interference with an order giving leave to amend; and (iii) the nature of, and test for, user damages.

C1 The test for amendment

19. It is common ground that the test for leave to amend is the same as the test for strike out applications. However, in both procedural contexts (i.e. amendment and strike out), it is well-established that even pure points of law may be unsuitable for summary determination if they are novel or concern an area of developing jurisprudence: ***Begum v Maran*** [2022] 1 All ER (Comm) 940, [23]-[24] (Coulson LJ). The rationale for this is that decisions as to novel points of law (and any further development of the law) should be based on actual findings of fact at trial rather than assumed facts: see White Book 2025 vol 1, p 96.

C2 The nature of an appeal from an order giving leave to amend

20. Where, as in this case, the court below permits an amendment, it does not make a final determination of the parties' legal arguments: it simply holds that there is a real prospect of success. A decision to give leave to amend is therefore equivalent to a decision to refuse reverse summary judgment, as the effect of the decision in both cases is to leave the point to be determined finally at trial; and that constitutes a case management decision with which the Court of Appeal will not lightly interfere: see ***Allied Fort Insurance v Ahmed*** [2015] EWCA Civ 841, [100]-[102] (in the context of reverse summary judgment).

[SB/13/501] [4] Defence [263(iv)]; Transcript of the CAT hearing/125/21 – 126/1.

[SB/11/196-197] [5] See, e.g., ***Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd*** [2011] 1 WLR 2370, [49].

C3 User damages: an overview

The legal nature of user damages

21. The existence of user damages has been well established since the 1800s.[6] But their juridical basis (i.e. as compensatory or restitutionary) was for many years controversial and the subject of inconsistent authority. In ***One Step***, the Supreme Court authoritatively resolved this controversy by clarifying that user damages are compensatory. This is why Meta accepts at [29] that '…*user damages are to be analysed as compensatory in nature*'. But this is not merely an exercise in taxonomy: it means that user damages constitute compensation for loss, albeit loss of a different kind to that for which damages are usually awarded. Thus, any claimant who obtains user damages has by definition suffered loss because user damages could not otherwise be awarded: see ***One Step***, [30], quoted in the Judgment, [12].

[CB/4/49-50]

22. Lord Reed also said in ***One Step*** that the compensatory analysis '*need not be regarded as strained or artificial*' because the loss for which user damages constitute compensation is '*the economic value of the right which has been breached, considered as an asset*': [91]. Similarly, in ***Lloyd***, [156], Lord Leggatt said that the object of user damages is, '*[a]s in any case where compensation is awarded…to place the claimant as nearly as possible in the same position as if the wrongdoing had not occurred*'.

23. Two simple examples illustrate the compensatory nature of user damages. The first is patent infringement. If a patent is infringed and C has lost sales of its own product as a result, C can recover damages for that loss on conventional principles without having to seek user damages. But even if C has not lost any sales (e.g., because the infringer's products are sold in a market in which C does not operate), C can recover user damages because the infringer prevented C from exercising his right to license such use and the value of that right is objectively treated as a loss.[7] In such cases, user damages are not awarded as a form of restitution: they are awarded as a form of compensation for loss, albeit of a different kind.

24. The second example concerns cases in which D does not profit from its wrongful conduct. For example, in ***Inverugie Investments Ltd v Hackett*** [1995] 1 WLR 713, D (hotel operators) wrongfully ejected C (a lessee) from 30 apartments within a hotel complex and thereafter occupied and used those apartments. Although D operated the hotel at a loss, C was found to be entitled to a substantial award of user damages. As Lord Lloyd observed at p 718 (emphasis added): '*[i]f a man hires a concrete mixer, he must pay the daily hire, even though he*

[6] See, e.g., ***Whitwham v Westminster Brymbo Coal and Coke Co*** [1896] 2 Ch 538.

[7] ***Watson, Laidlaw & Co Ltd v Pott*** 1914 SC 18, 30; ***One Step***, [27]-[30], [95(1)-(2)].

may not in the event have been able to use the mixer because of rain…In the present case the defendants have had the use of all 30 apartments for 15½ years. Applying the user principle, they must pay the going rate, even though they have been unable to derive actual benefit from all the apartments for all the time.'

The test for user damages

25. The points made above concern the nature of user damages (i.e. as compensatory rather than restitutionary). But ***One Step*** is also the leading authority as to the test or principle that determines when user damages are available at common law and when they are not.

26. Meta, for its part, appears to contend that there is no test or underlying principle. Meta does not say so in terms, but its case is in effect that user damages are available only in the categories of case actually identified in ***One Step***: see Judgment [15], [19]; and Skeleton, [37], where Meta says that user damages in tort are confined to proprietary torts merely by virtue of the fact that all the examples discussed in ***One Step*** have an '*inherently proprietary character*'.

[CB/4/52-53]

27. There are a number of reasons why this argument is wrong, even on its own terms, and those are set out separately at paras 69-74 below. But an overarching difficulty with it is that it misunderstands what the Supreme Court was seeking to do in ***One Step***. What it was seeking to do was to derive from the authorities across all categories of case an underlying principle as to when user damages are available. That underlying principle is that user damages are available if D wrongfully uses property or other assets and thereby prevents C from exercising a right to control the use of that asset: see eg ***One Step***, [30], [66], [84], [89].

28. Formulated in those terms, the principle can be seen to depend on the substance of the right infringed, not on its legal classification (e.g. contract/tort); and the particular categories identified in ***One Step*** can equally be seen to be examples of that principle, not a substitute for it. There is therefore no closed list of causes of action for which user damages are available. That is also demonstrated by the fact that the availability of user damages for breach of contract is not 'all or nothing': they are available if the breach of contract in an individual case '*resulted in the loss of a valuable asset created or protected by the right which was infringed*': ***One Step***, [95(10)]. Thus, it is not the nature of the cause of action (i.e. breach of contract) which is determinative of whether user damages are available, but the substance of the contractual right infringed in an individual case. This, of course, means that user damages may be available in some contract cases but not others, but there is nothing anomalous about that: it reflects the fact that rights come in different shapes and sizes, some of which are suitable for user damages while others are not.

29. In summary, ***One Step*** decides that user damages are available if the defendant wrongfully used an asset and thereby prevented the claimant from exercising a right to control the use of that asset. The Tribunal permitted the amendment (see, e.g., [44]) because it is at least arguable that this is what Meta did by wrongfully taking the data of Facebook users.

[CB/4/58]

D. ISSUE 1: IS *DEVENISH* BINDING AUTHORITY IN META'S FAVOUR?

30. As noted above, Meta's primary argument on this appeal is that the reasoning of the majority in ***Devenish*** (and, in particular, their interpretation of the ***Wass*** case[8]) constitutes binding authority that user damages are unavailable for '*non-proprietary statutory torts, including competition claims*': Skeleton, [3(a)], [28(a)]. Both ***Wass*** and ***Devenish*** therefore require careful analysis.

D1 *Wass*

31. In ***Wass***, until it was restrained by an injunction, D operated a Thursday market in Longton, which was within an area for which C had market rights. C claimed damages in respect of the operation of D's market prior to the injunction. Peter Gibson J found that D's market did not cause C any loss because C's own market was unaffected by D's market and failed for unrelated reasons: 1410A-D. But he awarded damages measured by the licence fee that would have been charged by C in a hypothetical negotiation. The issue on appeal was whether Peter Gibson J was right to do so. The Court of Appeal held that he was not.

32. Meta seeks to contend that this is because the Court of Appeal '*unanimously held that user damages were only available for proprietary torts and the cause of action being advanced was not a proprietary tort*': Meta's Skeleton, [20]. That is a striking suggestion, which might be thought to give rise to a simple question: why does Meta need to rely upon ***Devenish***, as it does, if the Court of Appeal really did say in ***Wass*** that user damages are only available for proprietary torts?

33. The answer is that the Court of Appeal said no such thing in ***Wass***.

34. The first judgment was given by Nourse LJ, whose reasoning may be summarised as follows:

    (1) The levying of an unlawful rival market is actionable in the tort of nuisance: 1410G.

    (2) There are two general rules in the law of tort: first, a claimant can recover damages equivalent to the loss he has suffered; and second, where the claimant has suffered loss to his property or some proprietary right, he can recover damages equivalent to the diminution in value of the property or right: 1410G-H.

[8] ***Stoke on Trent City Council v W&J Wass Ltd*** [1988] 1 WLR 1406.

(3) There are exceptions to both of these general rules, including the award of user damages: (i) for trespass to land, detinue and patent infringement; (ii) for breach of a restrictive covenant, as in ***Wrotham Park***;[9] and (iii) as damages in lieu of an injunction.

(4) Of those, only the trespass cases and ***Wrotham Park*** are an exception to the first general rule; the others are exceptions only to the second rule: 1414B. This is because C does suffer loss in the detinue, patent infringement and damages in lieu cases and user damages are only a method of assessment of that loss: 1412G, 1413G, 1414A.

(5) The question is whether a claim for user damages for a market right infringement is '*to be governed by the principle of the trespass cases and that of the Wrotham Park case*', i.e., whether it should be treated as an exception to the first general rule: 1414B.

(6) Nourse LJ's answer was no. If an exception to the first general rule were made for a market right infringement, it could not logically be confined to a market right infringement and would also extend to other types of nuisance, such as the breach of a right of light or right of way: 1415D. That would '*revolutionalise the tort of nuisance by making it unnecessary to prove loss*' and potentially also other torts: 1415E-F.

(7) Accordingly, '*…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*': 1415F-G.

35. Three points, all inconsistent with Meta's case on this appeal, are apparent from the foregoing summary of Nourse LJ's reasoning:

(1) First, although Nourse LJ concluded that user damages are not available for a market right infringement, nowhere did he say that user damages are available only for proprietary torts, nor does Meta even attempt to identify any such statement in his judgment. The Tribunal also made this point at [31] and was right to do so. [CB/4/55]

(2) Second, Nourse LJ's reasoning is by implication inconsistent with the proposition that Meta seeks to extract from it, because market rights are proprietary.[10] To say that user damages are available only for proprietary torts would not therefore explain why they are not available for a market right infringement, which was Nourse LJ's conclusion.

(3) Third, Nourse LJ considered that some instances of user damages constitute restitution of unjust enrichment rather than compensation for loss: see, e.g., 1413H,

[9] ***Wrotham Park Estate Co Ltd v Parkside Homes Ltd*** [1974] 1 WLR 798 (ChD).

[10] Hough [2005] PL 586, 588; ***Spook Erection Ltd v Secretary of State*** [1989] QB 1 300, 305.

which describes user damages for trespass and the breach of a restrictive covenant as exceptions to Nourse LJ's first general rule (i.e. that damages in tort are compensatory). As Meta seems to accept, this understanding of user damages cannot survive ***One Step***, but that itself suggests that ***Wass*** is unlikely to be reliable (let alone binding) authority as to when user damages are now available in tort.

36. There is therefore nothing in Nourse LJ's judgment that supports Meta's central argument on this appeal, namely that user damages are unavailable for non-proprietary torts.

37. Nicholls LJ's judgment does not support that proposition either. Nicholls LJ decided the case on a different and narrower ground, namely that C's market right was not a right of exclusivity but merely a right to operate its own market without disturbance. Accordingly, if (as was the case on the facts) an unlawful market is held without disturbing the lawful market, there is no remedy: 1418G. Again, Nicholls LJ did not say that user damages are unavailable other than for such torts: indeed, he expressly declined to determine the '*boundary separating causes of action*' in which user damages are available from those in which they are not: 1420B.

38. For these reasons, the CR respectfully submits that the Tribunal was correct to conclude at [CB/4/53] [23] that ***Wass*** is not authority for the proposition that user damages are unavailable in competition claims or for non-proprietary torts more generally. All that it decides is that user damages are not available for an infringement of a right to hold a market.

39. Meta seems implicitly to recognise this because it no longer seeks to rely directly on ***Wass***. Instead, it relies on the interpretation of Nourse LJ's decision by the majority in ***Devenish***: see [28(a)]. However, there are a number of reasons, set out below, why this attempt to rely indirectly on ***Wass*** is unsustainable.

D2 *Devenish*

40. ***Devenish*** concerned a follow-on damages claim against vitamin manufacturers who were party to a worldwide cartel. Master Moncaster ordered the trial of a preliminary issue, namely whether on the facts found in the EC Decision, Devenish would be entitled to: (i) an account of profits; (ii) restitution of unjust enrichment; and (iii) exemplary damages.

41. At first instance, Lewison J held that none of those remedies was available to Devenish: see [74], [107]-[109], [117]. But he did not decide whether user damages can or cannot be awarded in competition cases or for non-proprietary torts: that issue did not arise because Devenish was not seeking user damages.

42. By the time the case went to the Court of Appeal, Devenish had abandoned its claim for

exemplary damages. The only issue on appeal was therefore whether Devenish could claim what it described as a '*restitutionary award*', namely an account of the profits illegitimately made by the defendant cartelists.[11] The Court of Appeal held that it could not, albeit for different reasons. The majority judgment was given by Arden LJ, with whom Tuckey LJ agreed. Longmore LJ disagreed with their reasoning but concurred in the outcome.

43. Meta contends that the majority judgment of Arden LJ states that she was bound by ***Wass*** to conclude that user damages can never be awarded for non-proprietary torts, including competition claims. However, Meta's skeleton at [26] simply reproduces a series of quotations from Arden LJ's judgment, none of which contains that proposition; and Meta then asserts at [28] that Arden LJ's judgment is authority for that proposition, without identifying which passage it is said to derive from. Meta's case can therefore fairly be described as elusive, but the CR submits in any event that Meta is wrong because:

(1) Arden LJ's judgment does not say what Meta ascribes to it.

(2) If it does, it is either not good law or not binding in view of subsequent authority.

Does Arden LJ's judgment say what Meta ascribes to it?

44. There are three reasons why Meta's interpretation of Arden LJ's judgment is wrong.

[CB/4/57] 45. **First**, at para 74 (cited in the Judgment at [37]), Arden LJ said that '*the ratio of the judgment of Nourse LJ…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*'. That proposition, by itself, is of no use to Meta because it makes no reference to non-proprietary torts or competition law: it says only that user damages are not available for the infringement of a market right. But the fact that Arden LJ stated what she described as the ratio of ***Wass*** in that narrower form itself suggests that she is unlikely to have regarded it as authority for the wider proposition that Meta seeks to extract from it, i.e., that user damages are available only for proprietary torts.

[CB/4/52] 46. **Second**, the judgment in ***Gulati v MGN Ltd*** [2017] QB 149 was also given by Arden LJ. As the Tribunal recognised at [15]-[16], that case confirms that user damages are available for misuse of private information, which is not a proprietary tort. It is unlikely that Arden LJ, who gave the leading judgment in both ***Devenish*** and ***Gulati***, came to mutually irreconcilable conclusions, as Meta's reading of her judgment entails. The more likely explanation is that Meta's interpretation of ***Devenish*** is wrong and that Arden LJ was not

[11] ***Devenish***, [140]-[141] (Longmore LJ). See also the worked example given by Tuckey LJ at [151].

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.

47. **Third**, para 76 of Arden LJ's judgment, on which Meta appears principally to rely, says only that restitutionary remedies are not available for what Meta calls '*non-proprietary torts*': it does not say anything, one way or the other, about the availability of user damages, which are not restitutionary. Insofar as relevant, para 76 reads as follows (emphasis added):

> 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 specifies…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…I do not consider that this can be shown.

Meta's case at [26]-[29] appears to be that: (i) the words underlined above are capable of extending to user damages because user damages were (at the time) considered to be restitutionary rather than compensatory; and (ii) para 76 is accordingly authority for the proposition that user damages can never be awarded save in the situations identified by Nourse LJ in ***Wass***, which Meta characterises as '*proprietary torts*'. However:

(1) Devenish was seeking an account of profits, a restitutionary remedy, i.e. a remedy designed to reverse the defendant's benefit rather than compensate the claimant's loss.

(2) The words '*the underlying rule*' in para 76, quoted above, are a reference to the first general rule formulated by Nourse LJ. That general rule, in Arden LJ's own words at para 74, is that '*damages in tort are compensatory*'. Arden LJ then said that '*the exceptions to it are those*' specified by Nourse LJ. Thus, Arden LJ was concerned with the exceptions identified by Nourse LJ to the general rule that damages in tort are compensatory.

(3) The phrase '*damages by reference to the benefit obtained*' in para 76 is therefore a reference to restitutionary remedies which, by definition, are not compensatory. This is why Arden LJ regarded them as an exception to Nourse LJ's first general rule; it is also why Arden LJ expressly used the word '*benefit*' in that sentence.

(4) Thus, all that Arden LJ said at para 76 is that restitutionary remedies in tort are available only in the situations specified in ***Wass***. But Arden LJ was not saying anything in that passage about whether user damages are restitutionary or not.

(5) In this context, it is important to distinguish between: (i) whether a particular remedy

is restitutionary in nature; and (ii) when restitutionary remedies are available in tort. Question 1 goes to the nature of a particular remedy as compensatory or restitutionary. Question 2 goes to the circumstances in which a restitutionary remedy is available.

(6) At para 76, Arden LJ was answering only Question 2, i.e. when restitutionary remedies are available. Arden LJ answered it by cross-reference to ***Wass***, i.e. by saying that restitutionary remedies are available only in the situations identified by Nourse LJ; and it is true that some of the situations identified by Nourse LJ involved user damages. But this does not mean that Arden LJ was seeking to answer Question 1, namely whether user damages are restitutionary in nature: it means only that Arden LJ assumed (or may have assumed) that user damages are restitutionary in some of the situations identified by Nourse LJ. That assumption is now known to be false (see below); but the point is that this was, at most, a background premise, not what Arden LJ was actually saying in para 76. Put another way, para 76 is not saying anything about the availability of user damages if they are compensatory rather than restitutionary: it is only saying that restitutionary remedies (whatever that category might include) are not available in tort, save in the situations identified by Nourse LJ.

48. This analysis accords with the subsequent observation of Lord Burrows (writing extra-judicially) that '*[i]t was held by a majority …(Arden and Tuckey LJJ) that a restitutionary award could not be made for the tort of breach of statutory duty in issue in this case because it was not a proprietary tort. Wass was held to be binding authority for refusing restitution except for proprietary torts…*'.[12] Thus, Lord Burrows' summary of Arden LJ's judgment makes no reference to user damages.

49. For these reasons, Meta is wrong to attribute to Arden LJ the proposition that user damages are available only for proprietary torts: Arden LJ said no such thing.

If Arden LJ's judgment says what Meta ascribes to it, is it good law?

50. If (contrary to the above) Arden LJ's judgment is authority for that proposition, there are a number of reasons why it is, with respect, either not good law or not binding.

51. **First**, as noted above, it is common ground that Devenish did not actually seek user damages: Meta's Skeleton, [23]. That is an inauspicious starting point for Meta. This is because, as Lord Reed said in ***One Step***, [82] (a passage on which Meta itself relies at fn 15):

> [User] damages were not sought in *Attorney General v Blake* and were not before the

[12] Burrows, Remedies for Torts, Breach of Contract, and Equitable Wrongs (4th edn) 350-351.

court. As the Earl of Halsbury LC observed in *Quinn v Leatham* [1901] AC 495, 506, a case is only an authority for what it actually decides.

[CB/4/53-54, 57] What is true of ***Blake*** must be true of ***Devenish***. As the Tribunal said at [24], [41], Meta's attempt to elevate ***Devenish*** into a binding authority about user damages is therefore flawed.

52. **Second**, any assumption or conclusion[13] that user damages are not available in tort except in the situations identified by Nourse LJ was not a necessary step of Arden LJ's reasoning and is therefore not ratio. Arden LJ's reasoning involves only three necessary steps:

(1) Step 1: the Court in ***Devenish*** was bound by Nourse LJ's first general rule in ***Wass***.

(2) Step 2: Devenish's claim for an account of profits (a form of '*damages by reference to the benefit obtained by the defendant*') would require a departure from Nourse LJ's first general rule. But the exceptions to that rule are only those identified by Nourse LJ, unless it could be shown that limiting the exceptions in this way is inconsistent with ***Blake***.

(3) Step 3: that could not be shown as ***Blake*** does not discuss non-proprietary torts.

None of these steps entails that user damages (as opposed to an account of profits) are unavailable for non-proprietary torts. Accordingly, any views that the majority might have had about the legal nature or availability of user damages are not ratio because they do not form part of the '*rule or principle explaining (or, one might say, justifying) the result*…',[14] namely the result that Devenish's claim for an account of profits was precluded by ***Wass***.

53. **Third**, on Meta's own case, Arden LJ's judgment can have decided that user damages are limited to proprietary torts only on the premise that user damages were understood to be restitutionary rather than compensatory. Meta seems to accept this at [18] and [29], where it says that '…*at that time, user damages were widely considered to be restitutionary in nature*'. It is common ground that this premise is now known to be false in view of ***One Step***. But that is fatal to Meta's case because it is well-established that a proposition of law founded upon a premise that is subsequently falsified in this way ceases to be good law. For example:

(1) In ***Cackett v Cackett*** [1950] P 253, Hodson J (as he then was) considered the status of ***Cowen v Cowen*** [1946] P 36. In ***Cowen***, the Court of Appeal had held, relying on

[13] If it was only an assumption, it is not binding in any event: ***FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd*** [2020] Ch 365, [136] (Leggatt LJ).

[14] Lord Burrows, Precedent and Overruling in the UK Supreme Court (2024) p 5; see also ***Harbour Assurance Ltd v Kansa Ltd*** [1993] QB 701, 716A.

a passage in an earlier authority called *D v A*, that the practice of *coitus interruptus* constituted a wilful refusal to consummate a marriage. In a subsequent case, ***Baxter***,[15] which was not concerned with *coitus interruptus*, the House of Lords said that the Court of Appeal in ***Cowen*** had misunderstood the passage in *D v A*. Although ***Baxter*** had expressly left open whether *coitus interruptus* amounted to a wilful refusal to consummate a marriage, Hodson J held that ***Cowen*** was no longer binding authority on that question because its premise (namely its understanding of *D v A*) had been falsified. As Hodson J put it at p 258: '*[s]ince the whole foundation of the conclusion arrived at by the Court of Appeal was destroyed, in my judgment the conclusion is also destroyed and the matter is in the fullest sense of the word left open*' (emphasis added).

(2) In ***Pankhania***,[16] Mr Tedd QC (sitting as a deputy) considered the status of the rule that a misrepresentation of law is not actionable. He noted at [51] that the rule had its origins in an analogy with the different rule that a payment made under a mistake of law cannot be recovered. However, in 1999, the House of Lords abolished the latter rule.[17] Since the former rule was '*logically inter-dependent*' with the latter, it was no longer binding: [49], [57]. That was cited with approval in ***Briggs v Gleeds*** [2015] Ch 212, where Newey J (as he then was) held that pre-1999 authority that a representation of law cannot give rise to an estoppel likewise did not survive ***Kleinwort Benson***: see [26]-[34]. Thus, in both cases, otherwise binding authority was no longer good law because it was founded on a premise that had subsequently been falsified.[18]

(3) Accordingly, on Meta's own case, which is that ***Devenish*** understood user damages to be restitutionary rather than compensatory, ***Devenish*** cannot be authority for any proposition that depends upon that false premise.

54. **Fourth**, even if para 76 were not founded upon a false premise, the ultimate proposition that Meta seeks to extract from it cannot be binding because it is inconsistent with subsequent decisions of the Supreme Court and this Court. The ultimate proposition, as noted above, is that user damages can never be awarded for non-proprietary torts. However, as the Tribunal noted at [15]-[16], the Supreme Court held in ***Lloyd***, [141], that user damages

[CB/4/52]

[15] ***Baxter v Baxter*** [1948] AC 274.

[16] ***Pankhania v Hackney*** [2002] EWHC 2441 (Ch), approved in ***Brennan*** [2005] QB 303.

[17] ***Kleinwort Benson Ltd v Lincoln City Council*** [1999] 2 AC 349.

[18] See also ***Pittalis v Grant*** [1989] QB 605, 615G, 617B, 618G, 619A.

are available for the tort of misuse of private information, endorsing ***Gulati***; and misuse of private information is not a proprietary tort because information does not constitute property in the strict sense.[19] Thus, if ***Devenish*** does restrict an award of user damages to proprietary torts, as Meta contends, it is inconsistent with both ***Gulati*** and ***Lloyd***.

55. **Fifth**, there is also a different inconsistency between Meta's reading of ***Devenish*** and subsequent authority. As noted above, Meta contends that ***Devenish*** precludes any restitutionary remedy (which it says was at the time thought to include user damages) for non-proprietary torts. However, the Supreme Court recently held that a restitutionary remedy is available for the tort of bribery.[20] Bribery is not a proprietary tort. If, therefore, Meta's reading of ***Devenish*** is correct, then it is inconsistent with ***Hopcraft***, which is itself based on a long line of House of Lords, Supreme Court and Court of Appeal authority going back to 1890: [113], [229], [232]. ***Devenish*** cannot therefore be authority that restitutionary remedies are confined to proprietary torts, still less that user damages are so confined.

56. **Sixth** and finally, even if all the points made above are wrong, a further exception to *stare decisis* is engaged in this case. The existence of this exception was recently endorsed by Arnold LJ.[21] It is that a prior (and otherwise binding) decision is not binding if the decision or the reasoning in it involved a '*manifest slip or error*'. This is to be invoked only in a rare case where the '*slip or error is truly manifest*'. If all of her prior points fail, the CR respectfully submits that there are three manifest errors in ***Devenish*** which engage this exception:

    (1) The first is at [71], where Arden LJ stated that she was bound by the ratio of <u>either</u> of the judgments of Nourse LJ and Nicholls LJ in ***Wass*** because Mann LJ agreed with both. However, Arden LJ does not appear to have been referred to ***Gold***,[22] in which Lord Greene MR said (emphasis added):

        > In a case where two members of the court base their judgments, the one on a narrow ground confined to the necessities of the decision and the other on wide propositions which go far beyond those necessities, and the third member of the court expresses his concurrence in the reasoning of both, I think it right to treat <u>the narrower ground as the real ratio decidendi</u>.

    If, as Meta contends, Arden LJ did take Nourse LJ to have decided in ***Wass*** that user

[19] ***Force India Formula One v 1 Malaysia Racing Team Sdn Bhd*** [2012] RPC 29, [376].

[20] ***Hopcraft v Close Brothers Ltd*** [2025] 3 WLR 423, [125], [232].

[21] ***Mercy Global Consult Limited v Adegbuyi-Jackson*** [2023] EWCA Civ 1073, [31]-[32].

[22] ***Gold v Essex County Council*** [1942] 2 KB 293, 298.

damages are unavailable for all non-proprietary torts, that went further than Nicholls LJ, who decided the case on the narrower ground that user damages are unavailable for a market right infringement. Thus, had ***Gold*** been cited to Arden LJ, she would have recognised that only Nicholls LJ's judgment was binding. In that event, ***Devenish*** would have been decided differently because Arden LJ concluded, against her own preferred view, that she was bound by Nourse LJ's judgment to hold that an account of profits was not available to Devenish: see paras 4, 58 and 76.

(2) The second slip or manifest error is Arden LJ's conclusion at para 76 that the exceptions identified by Nourse LJ to his first general rule are the only exceptions. Nourse LJ did not anywhere say that; and the fact that he considered making a further exception in ***Wass*** itself suggests the opposite. Indeed, even to the extent that Arden LJ considered herself bound to conclude that restitutionary remedies (rather than user damages) are confined to the exceptions identified in ***Wass***, that has been criticised, one commentator noting that '*no judge or jurist had proposed such an interpretation of Wass in the 20 years between its publication and the Court of Appeal's decision in Devenish*' and that '*how a majority of the court in Devenish drew such a ratio from Wass is something of a mystery*'.[23]

(3) The third slip or manifest error is Arden LJ's view (if Meta is right to attribute that to her, which it is not) that ***Wass*** holds that user damages are available only for proprietary torts. ***Wass*** does not say any such thing and if that is right this Court is entitled so to hold by construing ***Wass*** for itself.

57. For these reasons, the Tribunal was correct to conclude that ***Devenish*** is not binding authority in Meta's favour. If it remains binding authority at all, that is only for what it actually decides, i.e. that an account of profits is unavailable for a breach of competition law.

E. ISSUE 2: ARE USER DAMAGES PRECLUDED FOR OTHER REASONS?

58. If Issue 1 is resolved against Meta, that is in truth the end of this appeal. That is because Meta does not suggest that anything other than ***Devenish*** could constitute binding authority in its favour; and, in the absence of binding authority, it is not easy to see how Meta could seek to go behind the Tribunal's case management decision that the availability of user damages in this case is unsuitable for summary determination: [45]. This overarching point [CB/4/58]

[23] Rotherham (2010) 126 LQR 102, 110-111; see also Odudu and Virgo (2009) 68(1) CLJ 32, 33; Burrows, fn 12 above. See also the 'obscurity' principle in Cross and Harris, Precedent in English Law (4th edn) 100-101 and ***Actavis UK Ltd v Merck & Co Inc*** [2009] 1 WLR 1186, [82]-[84].

is addressed first before considering the individual arguments advanced by Meta.

E1 The *Begum* principle and the Tribunal's case management decision

59. The Tribunal's case management decision reflects the fact that the user damages issue raises a point of law that is: (i) novel; (ii) complex; and (iii) concerns a developing area of the law.

60. It is novel because there is no authority directly in point. It is complex because the answer turns on a careful analysis of (at least): (i) the nature of user damages; (ii) the boundaries of ***One Step***; (iii) the nature of Meta's wrongdoing; and (iv) the degree to which that wrongdoing is analogous to the categories of case in which user damages are available.

61. It concerns a developing area of the law because: (i) there is no closed list of cases in which user damages are available, as is reflected in Lord Burrows' observation that '…*it is hard to understand where the precise line is being drawn'* in *One Step* and that '…*the position remains unclear*': Burrows (above) 305, 307; (ii) even leaving aside user damages, this claim arises in an '*area of law which is, par excellence, new and evolving*' and in which '*[t]he use of data as a proxy for monetary payment…is generating a range of new legal issues*': ***Gormsen*** (below) [30]; and (iii) the law on unfairness abuses is itself '*in a state of development*': ***Gutmann***, [91].

62. Thus, applying the principle in ***Begum*** (see para 19 above), which was cited to the Tribunal although it is not expressly referred to in the Judgment, the user damages issue is a good example of an issue that is unsuitable for summary determination.

63. Meta advances two criticisms of the Tribunal's application of the ***Begum*** principle. The first (at [43]) is that the availability of user damages turns on the pleaded cause of action, not on any facts that might be found at trial. However, if Meta fails on Issue 1 (i.e. ***Devenish***), it has not identified any case that limits user damages to a closed list of causes of action.

64. Meta's second criticism (at [46]) is that it was not '*open*' to the Tribunal to apply the ***Begum*** principle without identifying '*specific facts*' that might affect the availability of user damages at trial. This is also wrong. In summary:

    (1) No such gloss appears in authoritative summaries of the ***Begum*** principle;[24]

    (2) Any such gloss is positively inconsistent with a point often made in the authorities in this area, namely that there is no rule that '*difficult points of law, particularly those in*

[24] See, e.g., ***Vedanta Resources v Lungowe*** [2020] AC 1045, [48]; and see also para 19 above.

developing areas, should be grappled with on summary applications';[25]

(3) It is also inconsistent with cases that apply the ***Begum*** principle without identifying specific facts that might be relevant, e.g. because there is a pure point of law that does not turn on any facts but should nonetheless not be determined summarily;[26] and

(4) More generally, Meta's objection overlooks the rationale for the ***Begum*** principle, which is that the common law should be developed on the basis of actual and not hypothetical facts.[27] That rationale does not require the gloss proposed by Meta, which represents an undesirable fetter on the court's case management powers.

65. Thus, neither of Meta's two criticisms of the Tribunal is sustainable; and Meta has not identified any other reason that could enable it to surmount the high bar for a case management appeal. If that is right, it is unnecessary to engage with the substance of Meta's arguments under Issue 2, but they are briefly addressed below.

E2 The '*other authorities*' on which Meta relies

66. Apart from ***Devenish***, Meta says that there are '*other authorities*' that preclude an award of user damages in this case; and the principal '*other*' authority on which it relies is ***One Step***.

67. In the first of its two skeletons for the Tribunal, Meta contended at [29]-[32] that the ratio [SB/10/174-176] of ***One Step*** is that user damages are available only in one of three categories: (i) proprietary torts; (ii) breaches of contractual obligations that confer non-financial benefits; and (iii) damages in lieu of an injunction. This was always unsustainable and appears now to have been abandoned, but what Meta actually seeks to make of ***One Step*** is consequently unclear.

68. Meta now says that: (i) ***One Step*** sought to address the lack of clarity in this area of the law by identifying '*specific types of action*' in which user damages are available, '*thereby bringing clarity to the law*': [36], [51]; and (ii) the torts that Lord Reed identified as cases in which user damages are available have an '*inherently proprietary character*': [37]-[39].

69. But one might ask rhetorically: so what? Neither (i) nor (ii) above can assist Meta on this appeal unless what Meta is saying is that user damages in tort are confined to the '*specific types of action*' identified by Lord Reed. If that is Meta's case, it is the same 'closed list' thesis that

[25] ***TFL Management Services Ltd v Lloyds TSB Bank*** [2014] 1 WLR 2006, [27].

[26] See, e.g., ***Bull v Gain Capital Holdings*** [2014] EWHC 539 (Comm) [198]-[210].

[27] ***AK Investment*** [2012] 1 WLR 1804, [84]; ***AFM v SSIT*** [2025] EWHC 1944 (Ch) [41].

Meta unsuccessfully ran below. There are a number of reasons why it fares no better now.

70. **First**, as already noted at para 27 above, the Supreme Court did not seek to formulate a closed list of categories in which user damages are available. On the contrary, Lord Reed began his judgment by observing that ***One Step*** was the first time '*the theoretical underpinning*' of user damages had come before the highest court, suggesting that this is what he was seeking to identify in his judgment, rather than any closed list. It is therefore unsurprising that Meta is unable to point to any passage in ***One Step*** that actually says that there is a closed list of causes of action. Indeed, if such a list existed, the law of user damages would ossify, confined as it would be to the causes of action identified in ***One Step*** in 2018, without the possibility of extension to any other. But that is not how the common law works.

71. **Second**, Lord Reed did not anywhere refer to proprietary torts or torts that have an '*inherently proprietary character*', still less say that user damages in tort claims are confined to them. Thus, at [95(1)], Lord Reed said that user damages are '*readily awarded*' for the invasion of rights to tangible moveable or immoveable property by detinue, conversion or trespass. But he did not say that they are only awarded for those torts. On the contrary, he proceeded in the next sentence to identify the '*rationale*' for such awards, which was 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*'. That principle does not depend on whether the cause of action has an '*inherently proprietary character*': it depends on the substance of the right infringed (i.e. a right to control the use of an asset).

72. **Third**, Meta's contention that user damages are limited by ***One Step*** to proprietary torts is contrary to ***One Step*** itself, in addition to other authority. In summary:

    (1) User damages are available for patent infringement. But patent infringement is not a proprietary tort: while a patent constitutes property, an infringer does not appropriate or use a patent in the way that someone who trespasses on land does: ***One Step***, [119]. But user damages are available because this is treated as analogous to the infringement of a right to control the use of property: ***One Step***, [95(2)], [135]. This was also put to Meta by the Chair (a distinguished patent lawyer) in argument below [124/7-14]. [SB/11/195]

    (2) Breach of confidence is an equitable cause of action which is not proprietary in nature: see Snell's Equity (35th edn) [9-002]. If, as Meta contends, user damages in tort are confined to proprietary torts, one would expect user damages to be unavailable for breach of confidence. But they are available and that was endorsed in ***One Step*** itself. For example, Lord Sumption observed at [120] that user damages are available *'in other*

cases of tortious competition, which involve no invasion of property rights unless property is so broadly defined as to encompass any right whatever', giving breach of confidence as an example of this: see also [135] (Lord Carnwath) and [84], [92] (Lord Reed) (although Lord Reed was referring to a contractual right to control the use of information, the same principle applies to an equitable right to control information[28]).

(3) As noted at para 46 above, user damages are available for the tort of misuse of private information, which is not a proprietary tort.

(4) Meta's contention is inconsistent (or at least sits uneasily) with ***Lloyd***. In that case, a claim for user damages under section 13 of the Data Protection Act 1998 (a non-proprietary tort) failed. However, as Meta acknowledges (and as the Tribunal explained at [42]), the reason why Mr Lloyd's claim failed was that the Supreme Court concluded, by reference to the language of section 13, that any claim under it requires '*material damage*', i.e. '*financial loss or physical or psychological injury*': [92]. That point of construction would not have arisen if (as Meta contends) ***One Step*** says that user damages are unavailable for non-proprietary torts: in that event, Mr Lloyd's claim was bound to fail irrespective of the statutory language.

[CB/4/57-58]

(5) In ***Devenish***, Lewison J said at [26] that the principle in ***The Mediana*** (a tort case about user damages famous for the example about the Earl of Halsbury's chair) '*does not appear to be confined to interference with property rights*'. Arden LJ said in the same case at [68] that it is '*now clear that the principle underlying user damages does not depend on there being some misuse of a property right of the claimant*'. Similarly, Lord Burrows, writing extra-judicially, has observed that user damages have been awarded in respect of rights that are analogous to property, '*whether created by operation of law or contract*'.[29]

73. **Fourth**, Meta's contention that ***One Step*** limits user damages in tort to proprietary torts would produce anomalous consequences that the Supreme Court is unlikely to have intended. For example, if there is a contractual or equitable right to control the use of information, Meta accepts that user damages are available. Yet, if there is a statutory right, identical in content, to control the use of the same information, on Meta's case user damages would be unavailable (because breach of statutory duty is a non-proprietary tort). This would

[28] ***Henderson & Jones v Salica Investments*** [2025] EWHC 475 (Comm) [327]-[328].

[29] Burrows (fn 12 above), 329. See also Burrows, 'Negotiating Damages' in Mitchell & Watterson (eds), The World of Maritime and Commercial Law (2020) 297, 307.

make the availability of user damages vary according to the source of a right rather than its content, which is the very distinction deprecated in ***Blake***, p 283C-D and ***Devenish***, [68].

74. **Fifth**, the attempt to limit user damages to proprietary torts is contrary to principle. It is striking in this respect that Meta does not anywhere attempt to identify a rationale for this limitation; and the suggested limitation is undermined by the availability of user damages for certain types of breach of contract,[30] which is not a '*proprietary*' cause of action. It is also inconsistent with Commonwealth authority, notably ***Larrikin Music***,[31] in which user damages were awarded for a non-proprietary statutory tort.

75. For all of these reasons, ***One Step*** does not assist but rather undermines Meta's case.

E3 The other points raised by Meta

76. Meta advances a constellation of further arguments at [39]-[56], most of which do not even attempt to make good its overarching claim that '*other authorities are clear that user damages are not available in competition claims*'. For that reason, they can be taken shortly.

77. Meta's first argument is that there are '*conceptual difficulties*' with awarding user damages because the CR's primary case on abuse is an '*unfair pricing*' case, which lends itself to an award of conventional damages. However: (i) the suggested conceptual difficulties are illusory; and (ii) any such difficulties are in any event irrelevant to this appeal because they could not establish that it is unarguable that user damages are available. As to (i):

    (1) As Meta accepts, the CR's pleaded case is that the abuse of dominant position took two forms: the imposition of an unfair trading condition or the imposition of an unfair price. The CR also says (and the Tribunal has previously accepted) that these amount in practice to two sides of the same coin.

    (2) Although it did below, Meta no longer contends that there would be any '*conceptual difficulties*' in awarding user damages for abuse by the imposition of the unfair trading condition: see Skeleton, [40], which takes the point by reference to unfair price alone.

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[30] See, eg, ***Mahmood v The Big Bus Co*** [2021] EWHC 3395 (QB). In ***Experience Hendrix v PPX Enterprises*** [2003] 1 All ER (Comm) 830, C obtained user damages for D's wrongful use of its own property in breach of C's right to control its use. Thus, in ***Hendrix***, as in the patent infringement cases discussed at para 72(1) above, C's property was neither used nor taken by D.

[31] ***Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd*** [2010] FCA 698, cited with approval in ***Eight Mile Style, LLC v New Zealand National Party*** [2017] NZHC 2603.

But if they are two sides of the same coin, that tacit concession ought to be fatal.

(3) Even looking at the unfair price case in isolation, Meta's argument entails that user damages cannot be awarded for a tortious cause of action that lends itself to an award of conventional damages: see [40]. But that could only be the case if there is a rule that user damages cannot be obtained for wrongdoing that is capable of causing conventional loss. There has never been any such rule: on the contrary, in ***Whitwham***, for example, user damages were awarded even though the wrongdoing was not only capable of causing but actually caused conventional loss.

78. Meta's **second** point is that competition law '*serves to protect the public generally*' and that it is therefore '*simply not in the gift of any given person*' to waive abusive conduct: [41]. However:

(1) This misunderstands the nature of user damages. The hypothetical negotiation is not assumed actually to take place, nor is there any waiver of the duty. The negotiation is rather a tool to value the right which the claimant was wrongfully prevented from exercising, namely the right to control the use of the asset: see ***One Step***, [91].

(2) Meta's argument is also inconsistent with the authorities about trespass on another person's land and conversion. Where user damages are awarded for such torts, C does not actually release D from the underlying tortious duty, which remains: having paid user damages, the trespasser does not somehow acquire a licence to commit a further trespass (whether against C or anyone else). Thus, in those cases, as in this, the hypothetical bargain is only a tool to value what C has lost by reason of D's conduct.

79. Meta's **third** argument (at [52]-[53]) is that '*there is a very long line of case law*' in which conventional damages have been recognised as the remedy for financial loss in competition cases. Meta then says that it is '*manifestly inconsistent*' with this line of authority to suggest that user damages might be available in competition law. This, with respect, is declamation, not analysis. It also tends to provoke a simple question: if there really is such a long line of case law, why is it relegated in Meta's skeleton to two paragraphs under the heading '*[f]urther reasons why Meta's appeal should be allowed*'? The answer is that those cases say no such thing.

80. Meta's **final** argument (at [54]) is an *in terrorem* submission that the Tribunal's judgment is liable to lead to '*highly unpredictable and/or arbitrary results*' because it is unclear how the availability of user damages in a competition claim is to be ascertained. However:

(1) That does not come anywhere near showing that it is unarguable that user damages are available in this case.

(2) It is in any event wrong because the availability of user damages turns on the application of the underlying principle in ***One Step***, which is identified at para 29 above; and that is the principle which applies in all cases, including competition claims.

F. THE CR'S POSITIVE CASE FOR USER DAMAGES

81. If Meta fails on Issues 1 and 2, it is not necessary to address the CR's positive case for user damages, but that is briefly summarised below because it is this case that the Tribunal considered to be '*plainly arguable*'. The starting point is the CR's pleaded case that Meta infringed the Chapter II prohibition by making access to Facebook conditional upon users giving up access to their Off-Facebook Data without a value transfer in return. As part of this case, the CR also pleads, e.g., that Meta was required to obtain the consent of users specifically to the collection and use of their data but failed to do so: see, e.g., S.15, S.23, [152(c)]. In short, the essence of the complaint is that the abuse was exploitative or extractive in nature, i.e. that Meta abused its dominant position to acquire and use the data of users.

[SB/12/203-205]
[SB/12/207-208]
[SB/12/311-313]

82. If that pleaded case succeeds at trial, it will have two legal consequences. The first is that the Tribunal will have found that Meta's acquisition and use of the class members' data constituted a breach of the statutory duty in section 18. The second consequence is that Meta will also have infringed the correlative rights of the class members not to have their data abusively extracted. Such correlative rights exist because: (i) a statutory duty imposed for the benefit of particular persons gives rise to '*a correlative right in those persons who may be injured by its contravention*';[32] and (ii) in any event, an obligation not to engage in anticompetitive conduct has always given rise to equivalent rights to restrain such conduct.[33]

83. Accordingly, if the CR's pleaded case on abuse is assumed to be correct (as it must be for the purposes of this appeal), then it follows that this is a case in which Meta abusively collected and used the data of Facebook users by infringing their right to control the collection and use of that data. Thus, the question is not whether user damages are available generally in competition cases but whether they are available for wrongdoing of that kind.

84. The CR's case is that they are, because (as the Tribunal recognised) wrongdoing of the kind described above is materially indistinguishable from wrongdoing for which user damages are currently available, namely the wrongful use of property or other assets where the claimant has a right to control the use of the asset. It could not be disputed that user data is an '*asset*'

[32] ***Black v Fife Coal*** [1912] AC 149, 165.

[33] ***Garden Cottage Foods v Milk Marketing Board*** [1984] 1 AC 130, 141C-D (Lord Diplock).

for this purpose or that the right to control it is valuable (***Lloyd***, [141]); and in any event Lord Leggatt's observations in ***Rukhadze*** suggest that data should be treated as or as akin to property for the purposes of deciding what remedies are available for its wrongful use.[34]

85. There is only one distinction between this case and the category of case, identified above, in which user damages are available. The distinction is that what made the use of the asset wrongful in this case is a statutory provision, whereas what made it wrongful in the category of case identified above is a common law rule (e.g. the law of property or contract). But this distinction if anything strengthens the CR's case for user damages. As noted above, it is common ground that the remedies for the breach of any statutory duty must depend on the nature and purpose of the duty in question. There could not therefore be any rule of law that certain remedies are always available (or unavailable) or that certain forms of loss can always be (or not be) the subject of compensation. This is why the Court observed in ***BritNed***, a competition case, that '*when seeking to articulate what constitutes actionable harm, it is necessary to have regard to the object and scope of the statutory duty imposed*'.[35]

86. The purpose of the Chapter II prohibition is to deter anti-competitive conduct and to protect individuals from abusive conduct that is exploitative or extractive in nature. As Green LJ said in ***Gutmann***, [93], '*the law relating to abuse is concerned with consumer unfairness because when an undertaking is dominant it is, by definition, freed from the competitive shackles which otherwise incentivise and discipline it to maximise consumer welfare and benefit*'.[36] If, therefore, the wrongful taking of data in breach of the claimant's right to control its use constitutes a loss (as it does), there is no reason why it should not be the subject of compensation under s 18. So to hold would in fact undermine the purpose of s 18 by excluding one form of loss alone from its ambit, i.e. that described by Lord Reed as '*loss, albeit not of the conventional kind*'.

87. That is reinforced by the fact that actions for damages are an integral part of the system for enforcing competition law. As noted in ***Merricks***, '*justice requires that the damages be quantified for the twin reasons of vindicating the claimant's rights and exacting appropriate payment by the defendant to reflect the wrong done*'; and that latter point is '*fortified by the perception that anti-competitive conduct*

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[34] ***Rukhadze v Recovery Partners GP Ltd*** [2025] 2 WLR 529, [103].

[35] ***BritNed Development Ltd v ABB AB*** [2019] Bus LR 718, [427].

[36] This is consistent with the fact that an abuse has been found in cases involving the infringement of a right of control over a valuable asset: see, e.g., ***BRT v SABAM II*** [1974] 2 CMLR 238; Autorité de la concurrence, Decision 20-MC-01 of 9 April 2020, [192], [201], [234]-[237], [260].

may never be effectively restrained in the future if wrongdoers cannot be brought to book by the masses of individual consumers who may bear the ultimate loss from misconduct which has already occurred'.[37]

88. These concerns are still more acute in relation to a breach of competition law involving user data because: (i) as this Court has observed, the '*use of data as a proxy for monetary payment is a rapidly increasing phenomenon of modern digital life*';[38] (ii) the abusive extraction and use of data by dominant entities is increasingly of global concern under competition law;[39] and (iii) as the CJEU has said,[40] the efficacy of competition law depends on its ability to respond to economic change, including the extraction and use of vast amounts of personal data by dominant entities operating in the digital economy. That is *a fortiori* where (as here) the dominant entity uses that data to generate substantial profits and the individuals whose data is taken have no effective ability to prevent its extraction and use. Accordingly, if an entity abuses its dominance to acquire and use personal data, there is no reason why it should not make an '*appropriate payment…to reflect the wrong done*', to use Lord Reed's words in ***One Step***.

[CB/4/52] 89. The Tribunal was therefore right to recognise at [17] that the CR advances a narrow case. The CR does not say that user damages are available in every competition case or even in every case in which the Chapter II prohibition has been infringed. Rather, the CR says that they are available if the abuse of dominant position involves the wrongful acquisition and use of data or some other relevant asset, as it does in this case. This is because: (i) user damages are already available for wrongdoing of that kind; (ii) the same wrongdoing should not be treated differently merely because what makes it wrongful is a statutory provision (i.e. section 18) rather than a rule of the common law; and (iii) on the contrary, an award of user damages is warranted by the purpose of section 18 and the underlying statutory scheme.

G. CONCLUSION

90. For all of these reasons, the Court is respectfully invited to dismiss the appeal.

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Ian Simester

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[37] ***Mastercard Inc v Merricks*** [2021] 3 All ER 285, [53] (Lord Briggs).

[38] ***Gormsen v Meta Platforms Inc*** [2024] EWCA Civ 1322, [30].

[39] See, eg, OECD Paper No. 310, 'The Intersection between Competition and Data Privacy' (2024).

[40] ***Meta Platforms Inc v Bundeskartellamt*** [2023] 5 CMLR 22, [50]-[51].