

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)
[2025] EWCA Civ 1117 (King, Warby, Whipple LJJ)

B E T W E E N:

MICHAEL FARLEY

(and 431 others as set out in Annex 1 to the Claim Form)

Claimants / Respondents

- and -

PAYMASTER (1836) LIMITED

(trading as EQUINITI)

Defendant / Appellant

- and -

(1) THE INFORMATION COMMISSIONER'S OFFICE

(2) OPEN RIGHTS GROUP

Interveners

WRITTEN CASE ON BEHALF OF THE APPELLANT

REFERENCES

References to the main hearing bundle are in the format: (1) Documents bundle **[Doc/tab/page]**; and (2) Authorities bundle **[Auth/tab/Page]**

References to documents are in the following format: (1) The judgment of Nicklin J dated 23 February 2024, [2024] EWHC 383 (KB) **[HCJ/paragraph]**; (2) the Judgment of the Court of Appeal dated 22 August 2025 [2025] EWCA Civ 1117, [2025] 2 All ER 414 **[CAJ/paragraph]**

[Doc/10/176-228]

[Doc/7/140-69]

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A. INTRODUCTION AND SUMMARY

1. This appeal is concerned with the issue of whether persons who have suffered trivial non-material damage as a result of an infringement of the GDPR are entitled to monetary compensation pursuant to Article 82(1) General Data Protection Regulation (“**GDPR**”) [Auth/9/739] read with section 168 of the Data Protection Act 2018 (“**DPA 2018**”). The Appellant’s case is that they are not so entitled because “*non-material damage*” in Article 82(1) GDPR should be interpreted to mean “non-trivial non-material damage”. This is because such claims are subject to a *de minimis* threshold also known as a threshold of seriousness. [Auth/2/599]
2. Such a construction is consistent with the objectives of the GDPR, the language of Article 82 GDPR and the broader legislative scheme. The Appellant’s construction accords with domestic case law in the data protection field to the effect that such a threshold applies as well as relevant and carefully reasoned Commonwealth case law from Singapore and Canada. It also accords with the general presumption, unless the contrary intention appears, that legislation imports the *de minimis* principle. Additionally, the Appellant’s construction is in line with thresholds recognised in other information law causes of action, including, but not limited to, the misuse of private information tort. There is no principled reason why a different approach should be taken in relation to claims for non-material damage brought pursuant to Article 82 GDPR. Indeed, the policy arguments for applying a threshold of seriousness to such claims are considerably stronger given the greater scope for large group claims with potentially hundreds of thousands or millions of claimants seeking compensation for trivial damage.
3. The Court of Appeal, however, concluded that the entitlement to compensation did extend to monetary compensation for trivial or trifling non-material damage and that no *de minimis* threshold applied to such claims. The sole basis for this conclusion was various post IP completion day decisions of the Court of Justice of the European Union (“**CJEU**”). The Court of Appeal suggested that such post IP completion day case law should be followed unless there were sufficiently compelling legal reasons to depart from such case law. This approach to such post IP completion day CJEU decisions was erroneous as it misunderstood domestic courts’ wide discretion in relation to such case law pursuant to section 6(1)-(2) European Union (Withdrawal) Act 2018 (“**EUWA**”) [Auth/5/639]

2018”). In the post Brexit era, there is no presumption that such case law should be followed, particularly where, as here, the CJEU’s reasoning is unpersuasive.

B. FACTUAL BACKGROUND

B.1 Introduction

4. The factual background is summarised in the agreed statement of facts and issues. It is important, however, to emphasize certain matters.

B.2 The Parties

5. The Claimants are 432 currently or formerly serving police officers. At the relevant time, each Claimant was a member of Sussex Police Force’s (the “**Force**”) pension scheme and the Defendant was the Force’s pensions administrator. The same facts as to infringement apply in every case. In August 2019, each Claimant’s Annual Benefit Statement (“**ABS**”) was accidentally sent by the Defendant to an outdated address which the Claimants had previously given as their correspondence address but subsequently updated. The claims were originally also brought in misuse of private information but are now solely for breach of the GDPR, which was in force at the relevant time, and the DPA 2018. Forty-two of the Claimants claim damages for personal injury in the form of psychiatric harm, but still arising from the same facts.

B.3 The ABSs

6. The ABSs which were mistakenly sent to out-of-date addresses contained an overview of the relevant member’s accrued pension benefits and were in the following form:

- (1) Each ABS was a letter contained in an envelope which had a window. Through the window only the address header could be seen, which contained the relevant scheme member’s name and the outdated address. The outside of the envelope was marked with the words “Private and Confidential” and the Defendant’s return address. There was no indication from looking at an unopened envelope that the intended recipient was a police officer; [Doc/21/475]
- (2) If opened, the subject line of the letter read “Sussex Police Pension Annual Benefit Statement” and the initial pages included no personal information aside from the name of the intended recipient and a reference number. In any event, [Doc/22/476]

the Claimants did not appeal against Nicklin J's finding that they could not make out their pleaded inferential case that the ABSs had actually been opened;

- (3) The remainder of the letter contained personal information, including the relevant member's date of birth, national insurance number and pensions-related information, such as their police service and salary details and pension benefits;
 - (4) Aside from the outdated address, no other contact information was contained in each ABS;
 - (5) The ABSs did not include any private and/or sensitive information such as bank account details, passwords or health information. Further, there was no information as to the Claimant's rank, particular deployment or area of policing.
7. The ABSs were posted in late August 2019. A potential breach was registered on 24 September 2019 by the Defendant's monitoring tool. The Defendant investigated the incident and compiled a report, which it shared with the Force on 4 October 2019. Also in early October 2019, the Force sent a notification letter to each affected officer. This informed the officer whether or not their particular ABS had already been returned to the Defendant or to the Force. It reported that "*the risk of harm arising from this breach is assessed as low*" but gave advice on protective steps which could be taken. Officers were offered the opportunity to sign up to the fraud protection service, CIFAS, at the Defendant's expense. The undisputed evidence is that only 37 of the Claimants ever did so; thus, over 90% of the officers were apparently so unconcerned about the matter that they did not bother to take up this free offer. Replacement ABSs were also sent out to each Claimant's respective correct address in early October 2019, along with an apology letter from the Defendant, as approved by the Force. A further general update was sent to all affected members on 4 November 2019, again, with reference to CIFAS. [Doc/23/499]
8. The Force, which has never denied being the data controller of the relevant personal data, also notified the Information Commissioner's Office (the "ICO"). The ICO noted that the Force had conducted a risk assessment which concluded that the risk of data subjects suffering significant consequences was "*unlikely*", since the data disclosed was "*limited in nature*" and each data set had "*only been sent to one household, who can be*

identified". The ICO further noted that advice on identity theft was to be given to the affected data subjects and ultimately concluded that no further action was required. [Doc/24/501]

9. As to what is known to have happened to a significant number of the ABSs: -

- (1) Eighty-three were returned unopened to the Defendant by 3 October 2019, those Claimants being informed of the same by the Force on or around 4 October 2019. Eighteen were returned unopened to the Defendant after 3 October 2019, those Claimants being informed of the same on 11 March 2021;
- (2) Sixty Claimants plead that they successfully retrieved their ABS, so as for it to be in their physical possession within weeks of the incident. A significant number of the ABSs had been sent to family members of Claimants because they had previously been living at home;
- (3) One Claimant believes, but is not certain, that the ABS reached him at his home address unopened. A further Claimant states that he received his ABS which, to the best of his knowledge, was reposted to him at the correct address.

B.4 The Claims

10. 474 claims in misuse of private information and data protection were issued on 22 April 2021. A Master Particulars of Claim was filed with no individual pleas as to damage and loss. The Claimants repeatedly refused to provide this information but were subsequently ordered to do so following a contested Part 18 application. Such individual particulars were served on 22 July 2022 in what has been referred to as the "Individual Schedules". On 17 October 2022, the Defendant applied to strike out and/or for reverse summary judgment, inter alia, on the basis that: [Doc/12/239]

"the Claimants had not suffered damage or distress above a *de minimis* level such as to cross the applicable threshold of seriousness." [Doc/19/459]

B.5 The Alleged Damage

11. Since the first correspondence by the Claimants, the Defendant has had very serious concerns over the lack of any real damage conceivably arising on the facts of this case. To summarise: hundreds of police officers, who it is reasonable to assume have had training in and at least some degree of experience of genuinely distressing events, are

alleging that they ought to be able to trouble the courts with claims for compensation arising out of their pensions forecast having been accidentally sent to their old address. The Defendant has consistently maintained that the incident complained of is precisely the sort of trivial, one-off breach which cannot conceivably have given rise to genuine feelings of distress, or any feeling of the same degree of seriousness and should not be taking up valuable court time and incurring huge levels of costs.

12. In the letter before action dated 28 February 2020, when the indication was that just 35 individuals would be bringing a claim, the only detail as to damage was given in relation to Claimant 1 (Mr Farley). In that letter, it was conceded that his ABS had been delivered to a house on the very same street as the property now occupied by him. However, the fact of his ABS being sent to one of his own neighbours, so as to be readily retrievable (unopened), was alleged to somehow be an aggravating factor, since it had “led to great embarrassment”. Even at this stage, the Defendant was concerned by the trivial nature of the intimated claims and the complete unreality of any actionable damage.
13. Reference is made throughout the Individual Schedules to the Claimants having suffered mere annoyance or irritation as distinct from, or in addition to, distress. In a case where the facts of the alleged breach are precisely the same for every Claimant, one Claimant’s feelings in response to that breach may, in fact, provide a useful indication of what might be a reasonable and well-founded reaction, as opposed to an exaggerated and baseless one. In that regard: -
 - (1) Thirty-four Claimants plead that they: (i) would not describe the feelings they suffered as distress; (ii) did not suffer distress; (iii) consider distress too strong a word to describe their experience or say that they are too resilient to have suffered distress; and/or (iv) confine their pleading to “stress” as distinct from “distress”;
 - (2) Fourteen Claimants plead that their reactions were only “mild”, “minor” or “temporary”;
 - (3) Fewer than ten officers made any complaint about the incident around the time of it occurring and the only formal complaint of any of the Claimants

was by Claimant 1, who referred to feeling worried, but not to suffering distress as a result of the incident.

14. At first instance, Nicklin J was also clearly troubled by the triviality of the claims. In his judgment, the threshold of seriousness issue was only dealt with in the context of the 14 (now settled) claims, in which the envelopes containing the ABSs were actually said to have been opened. Even then, the Judge found that certain aspects of those ostensibly more serious claims already seemed to be “*hopeless*” and that the alleged fears and concerns of at least some of the claimants appeared to be “*completely unreal*” and “*baseless*”. Nicklin J also warned that “*exaggerated claims*” as to impact would not serve to help the claimants.¹

C SUBMISSIONS

C.1 Introduction

15. These submissions first address the GDPR and DPA 2018 and explain why the Appellant’s construction of Article 82 GDPR is consistent with both the GDPR’s objectives and the text of relevant provisions including, but not limited to, that Article.² Second, they address the broader picture namely the domestic case law on the threshold of seriousness in data protection claims,³ the *de minimis non curat lex* principle,⁴ seriousness thresholds applicable in other information law claims,⁵ and comparative Commonwealth case law.⁶ Such matters are relevant when considering how persuasive the CJEU’s post IP completion day decisions on this issue are, and whether such decisions should be followed. Finally, the CJEU’s post IP completion day decisions are addressed along with the Court of Appeal’s approach to these decisions.⁷ The Appellant’s case is that the Court of Appeal adopted an erroneous approach to such decisions which are unpersuasive and based on purposes that, post Brexit, are of little or no relevance. By

¹ See [HCJ/155], [HCJ/157].

² See [16]-[37].

³ See [39]-[61].

⁴ See [62]-[67].

⁵ See [68]-[76].

⁶ See [77]-[82].

⁷ See [83]-[107].

contrast, the Advocate General’s (“AG”) opinions on this issue in *UI v Österreichische Post AG*⁸ and *VB v Natsionalna agentsia za prihodite*,⁹ are well reasoned and compelling. [Auth/48/1876-1910] [Auth/49/1911-48]

C.2 GDPR and DPA 2018

(1) Introduction

16. The relevant legislative instruments for the purposes of these claims (which concern a cause of action which accrued in late 2019 and a claim that was issued on 22 April 2021) are the GDPR and the DPA 2018. This is because the GDPR remained part of English law up until the end of the Brexit implementation period on 31 December 2020 (“**IP completion day**”) and continued to be enforceable up to that point: see sections 2, 3 and 6 EUWA 2018.¹⁰ This remains the applicable law in this case notwithstanding Brexit and the fact that the claims were not issued until after IP completion day.¹¹ [Auth/5/633-643]
17. The GDPR and the DPA 2018 applied with effect from May 2018, replacing the previous data protection scheme under the Data Protection Act 1998 (“**DPA 1998**”) which had been enacted to implement Directive 95/46/EC.¹²
18. The Appellant’s case is that the phrase “*non-material damage*” in Article 82(1) GDPR should be interpreted as meaning “non-trivial non-material damage” rather than “trivial and non-trivial non-material damage”. Such a construction is consistent with the objectives of the GDPR, the language of Article 82(1) GDPR and the broader legislative scheme which make clear that the GDPR is concerned with significant rather than trivial damage. [Auth/10/739]

⁸ Case C-300/21, [2023] 1 WLR 3702, considered at [93]. [Auth/48/1876-1910]

⁹ Case C-340/21, [2024] 1 WLR 2559. [Auth/49/1911-48]

¹⁰ [CAJ/29]. [Doc/7/149]

¹¹ See further *Lipton v BA CityFlyer Ltd* [2024] UKSC 24, [2025] AC 154, [66] *per* Lord Sales and Lady Rose JJSC; see also *Skykick v Sky Ltd* [2024] UKSC 36, [2025] Bus LR 251, [511] *per* Lord Reed PSC. [Auth/23/1105, 1133]

¹² Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L281, p 31). [Auth/8/654]

(2) Article 1 GDPR: Objectives

19. Article 1 of the GDPR¹³ provides that the GDPR is concerned with protecting natural persons' "*fundamental rights and freedoms*" and, in particular, their "*right to the protection of personal data*." It is further concerned with "*the free movement of personal data within the Union*."
20. One of the factors that has led to the recognition of a threshold of seriousness in privacy law was an acknowledgment that Article 8 ECHR is concerned with "*human rights and fundamental freedoms*".¹⁴ This same point applies as regards the GDPR: the first objective in Article 1 GDPR is the protection of fundamental rights and freedoms rather than the provision of a remedy for every trivial fleeting negative emotion which ought to be tolerated as part of the everyday rough and tumble of life, particularly in the digital age.
21. The second GDPR objective detailed in Article 1 GDPR, namely that protection is structured in such a way that "*the free movement of personal data*" within the European Union is neither restricted nor prohibited, also supports the Appellant's construction of Article 82(1) GDPR: imposing liability for trivial damage is likely to restrict such free movement by creating disincentives for data processing activities that are vital for the free movement of data.¹⁵

(3) GDPR obligations on data controllers

22. The GDPR enacts various data protection rights and obligations, including six data protection principles with which data controllers must comply when processing personal data (Article 5 GDPR). Controllers are also required, for example, to implement appropriate technical and organisational measures to ensure compliance (Articles 24, 25 and 32 GDPR). Such provisions impose very onerous obligations on data controllers,¹⁶ particularly in the light of the very broad definition of "*processing*" in the GDPR.¹⁷

¹³ See also Recitals 1 and 2 GDPR.

[Auth/9/690]

¹⁴ See [70].

¹⁵ *UI v Österreichische Post* Case C-300/21, [2023] 1 WLR 3702, AG, [51] and [109].

[Auth/48/1876-1910, 1885, 1897]

¹⁶ See *Lindqvist*, Case C-101/01, [2004] QB 1014, [87]-[89] quoted at [32].

[Auth/46/1826-55, 52-3]

¹⁷ See Article 4(2) GDPR; see also [CAJ/31-40] and the cases cited therein.

[Auth/10/691]; [Doc/7/150-2]

(4) Article 82 GDPR, Section 168 DPA and relevant recitals

23. Article 82 of the GDPR sets out when a right to compensation arises: [Auth/10/739-40]

“Article 82: Right to compensation and liability

1. Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.

.....”

(emphasis added)

24. Non-material damage is not defined in the GDPR. However, section 168(1) of the DPA 2018 provides the following partial definition: [Auth/2/599]

“(1) In Article 82 of the GDPR (right to compensation for material or non-material damage), “non-material damage” includes distress.”

25. There is no reference in section 168 to other, less serious, negative emotions such as upset or annoyance. Although not defined in the DPA 2018, “distress” is defined by the Shorter Oxford English Dictionary, 6th edn, as, “severe pressure of trouble, pain, sickness, or sorrow; anguish; hardship, privation, lack of money or necessities.”
26. Whilst the text of Article 82(1) GDPR contains no express reference to a threshold of seriousness, this is not determinative. The text of Article 82(1) also does not exclude the possibility of such a threshold. In particular, Article 82(1) does not mandate that any damage suffered because of an infringement, no matter how trivial, be compensated.
27. Similarly, section 168 makes no express reference to a *de minimis* threshold but again, it does not exclude the possibility of such a threshold. Indeed, the reference to “distress” but no reference to less serious emotional responses arguably supports the existence of a threshold which is concerned with monetary compensation being awarded for damage of real seriousness and significance.
28. Section 13 of the DPA 1998 (the predecessor to Article 82 of the GDPR) had similar language, without any reference to a threshold, and domestic courts, including the [Auth/1/580]

Supreme Court in *Lloyd v Google LLC*,¹⁸ nonetheless recognised that such a threshold existed.¹⁹ [Auth/24/1186-1239]

29. Further the language of Article 82 distinguishes between (a) an infringement of the GDPR; and (b) damage arising as a result of that infringement. Accordingly, it is clear that a mere “infringement” does not give rise to an entitlement to compensation: damage must be alleged and proven.²⁰ This same distinction applied under the DPA 1998 and the Supreme Court recognised that claimants were not entitled to vindictory or loss of control damages.²¹ However, the absence of a threshold of seriousness means that there is a real risk that compensation is, in reality, being sought and awarded for such non-recoverable damage.²²

30. Importantly, Recital 85²³ makes reference to “*significant economic or social disadvantage*” when addressing what may fall within material or non-material damage. No reference is made to minor emotional responses in the recital. The Court of Appeal rightly noted that this recital provides “*some support*” for the existence of a threshold.²⁴ [Auth/4/622]

31. Whilst Recital 146, provides that, “*the concept of damage should be broadly interpreted in light of the case law of the Court of Justice in a manner which fully reflects the objectives of this Regulation*”, this recital²⁵ does not preclude the existence of a *de minimis* threshold. Indeed, as detailed above, such a threshold would “*fully reflect the*” [Auth/4/623]

¹⁸ [2021] UKSC 50, [2022] AC 1217.

[Auth/24/1186-1239]

¹⁹ See [39]-[48].

²⁰ *UI*, [42].

[Auth/48/1907]

²¹ See *Lloyd v Google*, [115].

[Auth/24/1227]

²² See *UI*, AG, [113].

[Auth/48/1891]

²³ See also Recital 75 GDPR.

[Auth/9/673]

²⁴ [CAJ/70].

[Doc/7/159-60]

²⁵ Recitals are non-operative but are part of the contextual material relevant to purposive interpretation of EU law, see *Customs and Excise Commissioners v Zielinski Baker & Partners* [2004] UKHL 7, [2004] 1 WLR 707; *Assange v Swedish Prosecution Authority* [2012] UKSC 22, [2012] 2 AC 471.

objectives” of the GDPR.²⁶ The reference to a “*broad*” interpretation, as is outlined below at paragraph 102(2), was intended to make clear that “non-material” damage was included (which the GDPR’s predecessor, Directive 95/46/EC, had been silent on). It does not mean that any level of damage gives rise to compensation however trivial or trifling. The reference to “*the case law of the Court of Justice*” is a reference to case law that pre-dated the GDPR rather than case law decided some years later. There is no CJEU case law that pre-dated the GDPR in the data protection context that held that damages claims were not subject to a threshold of seriousness. In any event, Recital 146 now has to be read in light of section 6 EUWA which requires a different approach to be taken by the domestic courts to CJEU decisions issued after IP completion day. [Auth/5/639]

(5) Recital 4 and the principle of proportionality

32. It is well established that the proportionality principle is central to the interpretation and application of the GDPR. This is emphasized by Recital 4. In *Lindqvist*²⁷ the CJEU stated, in relation to the predecessor Directive, that:

“87... it is for the [supervisory] authorities of the Member States not only to interpret their national law in a manner consistent with Directive 95/46/EC but also to make sure they do not rely on an interpretation of it which would be in conflict ...with the general principles of Community law, such as inter alia the principle of proportionality.

88. Whilst it is true that the protection of private life requires the application of effective sanctions against people processing personal data in ways inconsistent with Directive 95/46, such sanctions must always respect the principle of proportionality. That is so a fortiori since the scope of Directive 95/46 is very wide and the obligations of those who process personal data are many and significant.”

(emphasis added)

33. The Appellant’s suggested construction of the phrase “non-material damage” in Article 82(1) GDPR is consistent with the principle of proportionality; the application of a *de*

²⁶ See [19]-[21].

²⁷ Case C-101/01, [2004] QB 1014, [87]-[89]. See also, T Tridimas, *The General Principles of EU Law*, 2nd edn, pp 169-173.

[Auth/46/1826-55,
52-3

[Auth/62/2246-51]

minimis threshold respects the principle of proportionality whilst a requirement to compensate for non-material damage, however trivial, does not. The various post IP completion day CJEU decisions followed by the Court of Appeal failed to address the principle of proportionality when considering whether a *de minimis* threshold applied to claims for compensation pursuant to Article 82 GDPR (as did the Court of Appeal itself).

(6) Other relevant provisions of the GDPR

34. Damages claims brought pursuant to Article 82 GDPR are not the only means by which individuals may seek redress in relation to their data protection rights under the GDPR.²⁸ The Claimants could alternatively have made a complaint to the supervisory authority (i.e., the ICO) pursuant to Article 77(1) GDPR. Unlike the right to compensation pursuant to Article 82 GDPR, the right to complain to a supervisory authority is not contingent on an individual establishing damage.
35. As set out above, Article 1 GDPR, Recitals 1, 2, 4, 75 and 85 and section 168 DPA 2018 suggest that the GDPR is concerned with substantial rather than trivial claims. Further indication is given elsewhere as to the GDPR and the DPA 2018 being concerned with infringements of a sufficiently serious nature:
- (1) Notification: Article 33 GDPR provides that the obligation on a data controller to notify the ICO of a breach does not apply where the breach “*is unlikely to result in a risk to the rights and freedoms of natural persons*”.
 - (2) Administrative fines: Article 83(1) GDPR provides that the supervisory authority shall ensure that the imposition of administrative fines shall be “*proportionate*”. Article 83(2) GDPR provides that when deciding whether to impose such a fine and its amount, due regard must be had to various factors, including “*the nature, gravity and duration of the infringement taking into account the nature, scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them*”, the “*intentional or negligent character*” of the infringement; “*any action taken by the controller or processor to mitigate the damage suffered by data subjects*”; and “*any other aggravating or mitigating factor applicable to the*

²⁸ UL, AG, [45]-[50], [109].

circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.”

- (3) Enforcement: under section 150(2) DPA 2018, in deciding whether to give an enforcement notice in reliance on section 149(2), “*the Commissioner must consider whether the failure has caused or is likely to cause any person damage or distress.*” In *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland*²⁹ the Supreme Court when considering precisely the same wording in section 40(2) DPA 1998 stated: “... *the commissioner has a discretion whether to take action. He need not, for example, necessarily issue an enforcement notice in a trivial case or one in which a contravention has caused no appreciable damage or distress.*” (emphasis added).

(7) UK GDPR

36. Since IP completion day, the applicable data protection regime has been the United Kingdom GDPR (“**UK GDPR**”) and DPA 2018, which adopted the regime under the GDPR with slight modifications.³⁰ For the purposes of this appeal, there is no material difference between Article 82 GDPR and the UK GDPR.³¹
37. The Court of Appeal suggested that the fact that Parliament had decided to “*adopt identical language*” was a reason to follow the post IP completion day CJEU decisions.³² However, as detailed above, the wording of the GDPR (and the UK GDPR) does not exclude the existence of a threshold of seriousness and, in fact, seems to support it. Moreover, the fact that the UK GDPR has adopted materially identical language to the GDPR does not lead to the conclusion that Parliament’s intention must have been to achieve complete harmonisation between domestic and EU law, such that all post IP completion day decisions of the CJEU must be followed, including on the specific

²⁹ [2015] UKSC 9, [2015] AC 1065, [13] *per* Lord Sumption JSC.

³⁰ The Data Use and Access Act 2025 further modified the regime.

³¹ As was noted by the Court of Appeal at [CAJ/29].

³² [CAJ/67].

[Doc/7/149]

[Doc/7/159]

question of when compensation will be recoverable.³³ Further, at the time that the UK GDPR was adopted, there was no suggestion that a threshold of seriousness did not apply to such damages claims; there is no pre-IP completion day case law to that effect and, by contrast, domestic case law consistently held that such a threshold did apply.³⁴ Thus Parliament, when the UK GDPR was enacted, must be taken to have understood that a threshold of seriousness did apply to such claims.

C.3 The Broader Picture

(1) Introduction

38. This section first addresses the domestic case law, particularly the Supreme Court judgment in *Lloyd v Google*, which recognises the existence of a threshold of seriousness in data protection claims. It then considers domestic law relating to the *de minimis* principle both generally and, in particular, in relation to information law claims. The Court of Appeal's conclusion that damages claims brought pursuant to Article 82 GDPR are not subject to a *de minimis* threshold is inconsistent with long established principles of English law. This is relevant when considering how persuasive the CJEU's post IP completion day decisions on this issue are, and whether such decisions should be followed. The Commonwealth jurisprudence from Singapore and Canada, whilst clearly also not binding, is, in stark contrast to the CJEU decisions followed by the Court of Appeal in this case, persuasive as it articulates a clear and compelling rationale for applying a threshold of seriousness to data protection claims.

(2) Domestic authorities

(i) The Supreme Court's judgment in *Lloyd v Google*

39. A threshold of seriousness has consistently been applied by the domestic courts in the context of data protection claims under the DPA 1998, the GDPR and the UK GDPR. While such authorities are not binding on the Supreme Court, they reveal the function such a threshold serves in excluding trivial claims and the rationales underpinning its existence.

³³ See further *UI*, [54] where the CJEU acknowledged that it was for national legal systems to prescribe the details rules for, inter alia, determine the extent of compensation payable.

³⁴ See [39]-[61].

40. The Appellant’s position is that the Supreme Court in *Lloyd v Google LLC*³⁵ recognised [Auth/24/1186-1239] that a threshold of seriousness is applicable to claims for compensation under section 13 DPA 1998. There is no principled reason why this finding is not equally applicable to claims for compensation under the GDPR and the DPA 2018, such as these proceedings. The Court of Appeal disagreed. In its opinion, the reasoning in *Lloyd v Google* on the seriousness threshold was *obiter* and not on point.³⁶ Whilst it is accepted that Lord Leggatt JSC’s consideration of this issue is not binding on the Court in relation to the correct interpretation of the GDPR, the Appellant contends that his judgment is clear and persuasive.
41. The claim was brought under CPR r.19.6, which allowed representative claims to be brought for persons who have the “*same interest*” in the claim. The claimant could not use this procedure if the compensation recoverable would need to be individually assessed.³⁷ The claimant argued that individualised assessment was not necessary because compensation was claimed for “*loss of control*” of personal data, which did not require proof of damage.³⁸
42. Lord Leggatt JSC, giving judgment for the Court, found the claim could not succeed, because it would require individualised assessment of compensation for two reasons. First, as detailed above, section 13 did not provide a right to compensation for “*loss of control*”, without the need to prove the contravention had caused material damage or distress to the individual concerned.³⁹ Section 13 distinguished between the concepts of a “*contravention*” and “*damage*” suffered and therefore mere infringement was not sufficient to give rise to compensation.⁴⁰

³⁵ [2021] UKSC 50, [2022] AC 1217.

[Auth/24/1186-1239]

³⁶ [CAJ/64].

[Doc/7/158]

³⁷ *Ibid*, [5].

[Auth/24/1196]

³⁸ *Ibid*, [5], [10].

[Auth/24/1196,
1197]

³⁹ *Ibid*, [138].

[Auth/24/1233]

⁴⁰ *Ibid*, [115].

[Auth/24/1227]

43. Second, there was a “*further reason*” why individualised assessment was necessary.⁴¹ Even if the Court were wrong and it were not necessary for an individual to show damage or distress to be entitled to compensation, it would still be necessary to assess individual circumstances in “*deciding what amount of damages, if any, should be awarded*”.⁴² (emphasis added).
44. The claimant argued that this issue could be adequately addressed by adopting the lowest common denominator of harm across all the individuals concerned. The Court rejected this argument noting that if no individual circumstances are taken into account, “*the facts alleged are insufficient to establish that any individual member of the represented class is entitled to damages.*”⁴³
45. Lord Leggatt JSC then considered the common facts of the cases.⁴⁴ Putting to one side any potential difficulties relating to proving of the membership of each class, the Court said that “*the question that must be asked is whether membership of the represented class is sufficient by itself to entitle an individual to compensation, without proof of any further facts particular to that individual*”.⁴⁵ (emphasis added).
46. Critically for the purposes of this appeal, the Court went on to state:⁴⁶
- “On the claimant’s own case there is a threshold of seriousness which must be crossed before a breach of the DPA 1998 will give rise to an entitlement to compensation under section 13. I cannot see that the facts which the claimant aims to prove in each individual case are sufficient to surmount this threshold. If (contrary to the conclusion I have reached) those facts disclose “damage” within the meaning of section 13 at all, I think it impossible to characterise such damage as more than trivial. What gives the appearance of substance to the*

⁴¹ Ibid, [144].

[Auth/24/1234-5]

⁴² Ibid, [144].

[Auth/24/1234-5]

⁴³ Ibid, [147].

[Auth/24/1235]

⁴⁴ Ibid, [148]-[152].

[Auth/24/1235-6]

⁴⁵ Ibid, [152].

[Auth/24/1236]

⁴⁶ Ibid, [153]. See also the references to “*non-trivial*” contraventions at [88], [115], [128], [137] and [138].

[Auth/24/1237,
1219,
1227,
1231,
1233]

claim is the allegation that Google secretly tracked the internet activity of millions of Apple iPhone users for several months and used the data obtained for commercial purposes. But on analysis the claimant is seeking to recover damages without attempting to prove that this allegation is true in the case of any individual for whom damages are claimed. Without proof of some unlawful processing of an individual's personal data beyond the bare minimum required to bring them within the definition of the represented class, a claim on behalf of that individual has no prospect of meeting the threshold for an award of damages."

(emphasis added)

47. Thus, Lord Leggatt JSC considered that individualised assessment would be necessary to determine that the claims met the threshold of seriousness to be awarded damages. Implicit in this reasoning was that such a threshold applied, otherwise this paragraph simply would not make sense.⁴⁷

(ii) *Lloyd v Google* indicates a threshold of seriousness applied to GDPR and DPA 2018

48. The Court of Appeal in the present case refused to follow *Lloyd v Google* because it concerned section 13 of the DPA 1998 (not the GDPR and the DPA 2018) and, in its opinion, the reasoning did not support the applicability of a threshold.⁴⁸ These criticisms of *Lloyd v Google* are misplaced.

49. First, there is no reason why the Court's analysis regarding the threshold of seriousness should not be applicable to Article 82(1) GDPR. There is no difference in substance or approach between section 13 DPA 1998 and Article 82 GDPR, which would justify the existence of such a threshold in respect of the former, but not the latter. Both provisions operate as a statutory gateway that a claimant must pass through to be entitled to compensation. The fact that section 13 used different terminology for the heads of damage which might be claimed (i.e. "damage" or "distress", rather than "material" or

⁴⁷ This reflected the position at first instance: [2018] EWHC 2599 (QB), [2019] 1 WLR 1265, [74], *per* Warby J and the Court of Appeal, [2019] EWCA Civ 1599, [2020] QB 747, [55] *per* Vos C.

⁴⁸ [CAJ/63-64].

“non-material”) has no bearing on why a threshold of seriousness would apply to one provision and not the other.⁴⁹

50. The similarities between section 13 DPA 1998 and Article 82 are reflected in the DPA 2018’s Explanatory Notes, which provides that “[t]he right to receive compensation set out in Article 82 is broadly equivalent to section 13 of the 1998 Act, with the exception that the type of damage which can be claimed is broader than that provided for in the 1998 Act” (emphasis added).⁵⁰ The reference to a broader “type of damage” was to make clear that it was not restricting damages for distress as had been the case under the disappplied section 13(2) of the DPA 1998.⁵¹ However, aside from this, the Explanatory Notes make clear the provisions were intended to be “*broadly equivalent*”.
51. This is not to say that every decision on DPA 1998 is applicable to the GDPR. Rather, given the similarities between section 13 and Article 82, there needs to be a principled basis for distinguishing the two. The fact that the Supreme Court in *Lloyd v Google* did not extend its reasoning to the GDPR, because no such claim was before it, does not mean that it is not appropriate to do so in this case.
52. Second, the Court of Appeal’s criticism of the substantive reasoning in *Lloyd v Google* (namely, that the issue of a threshold of seriousness did not arise), misunderstands certain passages relied on by the Appellant and ignores others.
53. The Court of Appeal’s reading effectively disregards the section of the Supreme Court’s judgment under the heading “*The need for individualised evidence of misuse*”.⁵² The Supreme Court chose to begin that section with “*there is a further reason why the claimant’s attempt to recover damages ... by means of a representative claim cannot succeed*”.⁵³ The Supreme Court considered this to be an additional reason that the

⁴⁹ C.f., [CAJ/63].

[Doc/7/157]

⁵⁰ DPA 2018, Explanatory Notes, [481].

[Auth/3/616-7]

⁵¹ See [CAJ/51].

[Doc/7/155]

⁵² *Lloyd v Google*, [144]-[157].

[Auth/24/1234-8]

⁵³ *Ibid*, [144].

[Auth/24/1234-5]

representative claim could not succeed (i.e. another reason individualised assessment was required). The mere fact this was an additional reason, does not mean it is not persuasive.

54. The issue arose in that case because the claimant argued that individualised assessment would not be necessary because it could rely on the lowest common denominator. The Court expressly disregarded this approach because individualised assessment would be necessary to determine what their entitlement to damages was “*if any*” and this required the threshold to be met.⁵⁴
55. The Court of Appeal also placed weight on the fact that paragraph 153 of the Supreme Court’s judgment falls under the heading “*The need for individualised evidence of misuse*”. However, in the opening paragraph of that section (i.e., paragraph 144) the Court made clear this was for the purposes of determining if damages would be awarded.
56. The fact that paragraph 153 begins with “*on the claimant’s own case*” does not mean that the Supreme Court did not itself consider that such a threshold was applicable.⁵⁵ Why else would the Court go on to apply that threshold to the facts before it and to conclude that the individual claims, without individualised assessment, had “*no prospect of meeting the threshold for an award of damages*”? If the threshold was not applicable, the Court would not have gone on to consider it in the detail that it did at paragraph 153. If the Court had doubts about the legality of the existence of such a threshold, it would have articulated them. The recognition of such a threshold is implicit in its reasoning.
57. This understanding of Lloyd v Google accords with that of the Court of Appeal in Prismall v Google UK Ltd,⁵⁶ which concerned a representative misuse of private information claim. The Court of Appeal referred to Lloyd v Google, because it addressed the requirements for bringing representative claims and provided a detailed summary of

⁵⁴ Ibid, [144], [153].

⁵⁵ Cf [CAJ/64].

⁵⁶ [2024] EWCA Civ 1516, [2025] KB 663.

[Auth/24/1234-5,
1237]

[Doc/7/158]

[Auth/27/1300-27]

its findings.⁵⁷ In doing so, the Court of Appeal observed⁵⁸ that in *Lloyd v Google*, the Supreme Court had held:

“[t]here was a threshold of seriousness to be crossed before a breach of the DPA 1998 gave rise to an entitlement to compensation under section 13” and that the lower denominator claimant was “insufficient to surmount the seriousness threshold which admittedly applied to the DPA 1998 claim, as it was impossible to characterise such damage as more than trivial”.

58. First instance courts have applied the threshold of seriousness to data protection damages claims brought pursuant to the DPA 1998,⁵⁹ GDPR⁶⁰ and UK GDPR.⁶¹ Further, the Singapore Court of Appeal in *Reed, Michael v Bellingham, Alex*,⁶² like the Court of Appeal in *Prismall*, understood *Lloyd v Google* as establishing a threshold of seriousness in relation compensation claims brought pursuant to section 13 DPA 1998. [Auth/55/2025-65]
59. There is no support in domestic authority (other than the Court of Appeal’s judgment in this case) for the position, either in data protection law generally or specifically as regards the GDPR, that all non-material damage, no matter how insignificant or trivial, gives rise to a claim for compensation.
60. Further, the Appellant’s understanding of the Supreme Court’s judgment has been reflected in one of the leading textbooks in this area: P Coppel KC, *Information Rights*, 6th edn. Citing the judgment, the author states “[t]here is no entitlement to compensation for ‘trivial’ infringements of the data protection regime”.⁶³ Coppel also later notes that

⁵⁷ Ibid [54]-[59].

[Auth/27/1320-1]

⁵⁸ Ibid, [55], [59].

[Auth/27/1320-1]

⁵⁹ See e.g., *TLT v Secretary of State for the Home Department* [2016] EWHC 2217 (QB), [15] *per* Mitting J; *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003, [81]-[82] both of which predated the Supreme Court’s judgement in *Lloyd v Google*. [Auth/30/1390-1402] [Auth/34/1505-61]

⁶⁰ See e.g., *Rolfe v Veale Wasbrough Vizards LLP* [2021] EWHC 2809.

⁶¹ See e.g., *Ashley v Amplifon Ltd* [2021] EWHC 2921 (QB).

⁶² [2022] SGCA 60 discussed at [78]-[80].

[Auth/55/2025-65]

⁶³ Paragraph 49-019.

“the courts generally expect a certain amount of stoicism on the part of victims of data protection infringement”.⁶⁴

61. In summary, the Court’s reasoning in *Lloyd v Google* including at paragraph 153 recognises the existence of a seriousness threshold in respect of section 13 DPA 1998. While not binding, this should be treated as persuasive in the context of the current issue before this Court, in particular because of the similarity to the relevant provisions in the GDPR and DPA 2018 and the fact that similar policy considerations underlying both legislative schemes.

(3) The *de minimis non curat lex* principle

62. The *de minimis* principle was first referred to as an implied qualification upon the operation of statutes by Lord Stowell in *The Reward*⁶⁵ This principle has been held to have application in a wide variety of scenarios, including in tort law. In *Waller-Edwards v One Savings Bank Plc*⁶⁶ the principle was summarised as follows:

“... I agree with the appellant that the de minimis principle is of such long standing that it is surprising to regard it as a source of unworkable uncertainty. Courts have little difficulty in identifying what is and is not caught by the principle. Lord Briggs, giving the judgment of this court in Brown v Ridley [2025] UKSC 7; [2025] 2 WLR 371, stated, at para 30, that:

“[The de minimis] principle is enshrined in the Latin tag de minimis non curat lex, which is often translated as meaning that the law is not concerned with trifles. Well-known authorities on the principle describe it as excluding matters which are trifling, insubstantial, inconsequential, immaterial, irrelevant or negligible: see eg Chatterton v Cave (1878) 3 App Cas 483, 490, 492, 499, and Fish & Fish Ltd v Sea Shepherd UK [2015] AC 1229, para 50.”

⁶⁴ Paragraph 49-025.

⁶⁵ (1818) 2 Dods 265 at 269–270 (165 ER 1482).

⁶⁶ [2025] UKSC 22, [2026] AC 182, [60] *per* Lady Simler JSC. See also, *Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10, [2015] AC 1229, [50] *per* Lord Sumption JSC (dissenting) and [57] *per* Lord Neuberger PSC; *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39, [2003] 1 WLR 1763, [33] *per* Lord Hutton.

63. In the negligence/personal injury context, the following was said by Lord Hope in Rothwell v Chemical & Insulating Co Ltd:⁶⁷

[Auth/29/1355-89]

“Whatever its strict meaning may be, the maxim in its less literal sense can be appealed to in the present context as an expression of legal policy. It is well settled in cases where a wrongful act has caused personal injury there is no cause of action if the damage suffered was negligible. In strict legal theory a wrong has been done whenever a breach of the duty of care results in a demonstrable physical injury, however slight. But the policy of the law is not to entertain a claim for damages where the physical effects of the injury are no more than negligible. Otherwise the smallest cut, or the lightest bruise, might give rise to litigation the costs of which were out of all proportion to what was in issue.”

(emphasis added)

64. *Bennion, Bailey and Norbury on Statutory interpretation*, 9th edn, summarises the position in the context of statutory interpretation as follows:⁶⁸

“9.4 It is a principle of legal policy that the law does not concern itself with trifling matters (de minimis non curat lex). This principle forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take into account.”

65. The High Court in TLT v Secretary of State for the Home Department,⁶⁹ when considering the position under DPA 1998, recognised the existence of a “threshold below which damages for “distress” may not be awarded in respect of it” but characterised it in the following way: “it is the de minimis principle. There is no other.”

[Auth/30/1390-1402]

⁶⁷ [2007] UKHL 39, [2008] 1 AC 281, [47]. See also Lord Hoffmann at [8]-[9] to similar effect.

[Auth/29/1355-89,
1373,
1363]

⁶⁸ This section of Bennion has been judicially approved, see R (National Council for Civil Liberties) v Secretary of State for the Home Department [2024] EWHC 1181 (Admin) DC, [51] per Green LJ, Kerr J. See to similar effect, *Halsbury’s Law of England, Statutes and Legislative Process*, Vol 96 (2024), para 708.

⁶⁹ [2016] EWHC 2217 (QB), [15] per Mitting J.

[Auth/30/1390-1402,
1395]

66. Just as in the negligence context, the “*smallest cut, or the lightest bruise*” ought not to be allowed to give rise to claims for compensation, the costs of which are out of all proportion to what is actually in issue, the need to avoid burdening the courts with trifling matters and the the need keep claims within proportionate bounds is, in fact, particularly pronounced in the data breach context give the potential numbers of claimants involved and the onerous burdens already imposed on data controllers.
67. The Appellant, of course, accepts that the case law detailed above concerns construction of domestic rather than European legislation. However, the *de minimis* principle is consistent with European law principles and, in particular, the principle of proportionality. As the CJEU held in *Lindqvist*,⁷⁰ sanctions for breach of data protection principles must reflect the principle of proportionality; claims for compensation for trivial or trifling damage are inevitably out of proportion. Put another way, the lack of any threshold of seriousness in claims brought pursuant to Article 82 GDPR risks entirely disproportionate litigation taking up valuable court time and routinely generating vast sums of costs. [Auth/46/1826-55]

(4) Seriousness thresholds in other information law claims

68. A threshold of seriousness must be met for claims brought under the tort of misuse of private information to be actionable.⁷¹ Although not all of the considerations in privacy which have led to the development of a threshold will apply to data protection claims (where Article 8 ECHR will not always be engaged), there are, as with proportionality and the *de minimis* principle, important common strands.

⁷⁰ Case C-101/01, [2004] QB 1014, [88] quoted above at [32]. *Lindqvist* concerned the predecessor Directive (Directive 95/46/EC) however, such statements are equally applicable to the GDPR. [Auth/46/1826-55]

⁷¹ *Prismall v Google UK Ltd* [2024] EWCA Civ 1516, [2025] KB 663, [42]. The Court of Appeal below in these proceedings accepted this at [CAJ/68]. [Auth/27/1300-27, 1317] [Doc/7/159]

69. In considering the circumstances in which a reasonable expectation of privacy arises, Lord Neuberger MR held as follows in *Ambrosiadou v Coward*:⁷²

“Just because information relates to a person’s family and private life, it will not automatically be protected by the courts: for instance, the information may be of slight significance, generally expressed, or anodyne in nature. While respect for family and private life is of fundamental importance, it seems to me that the courts should, in the absence of special facts, generally expect people to adopt a reasonably robust and realistic approach to living in the 21st century.” (emphasis added)

70. The justification for a threshold in privacy law was put as follows in *R (Gillan) v Commissioner of Police of the Metropolis*:⁷³

“It is true that ‘private life’ has been generously construed to embrace wide rights to personal autonomy. But it is clear Convention jurisprudence that intrusions must reach a certain level of seriousness to engage the operation of the Convention, which is, after all, concerned with human rights and fundamental freedoms....” (emphasis added)

71. A similar justification applies to damages claims under the GDPR; Article 1 makes clear that one of its objectives is protecting persons’ “*fundamental rights and freedoms*”.⁷⁴

72. In the defamation context, the cases of *Jameel v Dow Jones & Co Inc*⁷⁵ and *Thornton v Telegraph Media Group*⁷⁶ imposed a requirement that the damage to reputation must pass [Auth/20/1039-64]

⁷² [2011] EWCA Civ 409, [2011] EMLR 21, [30]. See also, *Campbell v MGN* [2004] UKHL 22, [2004] 2 AC 457, [157] *per* Lady Hale; *ZXC v Bloomberg* [2022] UKSC 5, [Auth/37/1635-93, 1685] [2022] AC 1158, [121]; *Wood v Commissioner of Police for the Metropolis* [2009] [Auth/35/1562-96, 1575] EWCA Civ 414, [2010] 1 WLR 123, [22] *per* Laws LJ.

⁷³ [2006] UKHL 12, [2006] 2 AC 307, [28].

⁷⁴ See [20].

⁷⁵ [2005] EWCA Civ 75, [2005] QB 946.

[Auth/20/1039-64]

⁷⁶ [2010] EWHC 1414 (QB), [2011] 1 WLR 1985.

a minimum threshold of seriousness.⁷⁷ Section 1 of the Defamation Act 2013 then raised the threshold of seriousness above that envisaged in *Jameel* and *Thornton*.⁷⁸

73. In defamation, *Jameel* abuse of process has now largely been subsumed by the section 1 ‘serious harm test’, but it has also been held to apply in relation to other causes of action, including, for example, malicious falsehood⁷⁹ and breach of confidence.⁸⁰ In the present case, despite its findings as regards the non-existence of a threshold of seriousness, the Court of Appeal accepted the applicability of *Jameel* abuse to claims in data protection which would seem to be inconsistent with its finding as regards the existence of a threshold of seriousness.
74. As detailed above, both the threshold of seriousness which applies in relation to privacy claims and *Jameel* abuse of process embrace considerations as to the engagement of Articles 8 and 10 ECHR which will clearly not apply in every data protection claim. However, *Jameel* abuse is also concerned with proportionality and the need to take account of the overriding objective in the Civil Procedure Rules⁸¹ and those are considerations which apply with equal, if not greater force, in the data protection context. As regards Article 8 ECHR, the Court of Appeal in *Vidal-Hall v Google Inc*⁸² held that [Auth/34/1505-61] it was unnecessary to distinguish between data protection claims that engaged Article 8 ECHR and those that did not since, “[i]f a case is not serious in terms of its privacy implications, then that by itself is likely to rule out any question of recovery of compensation for mere distress.”⁸³

⁷⁷ See *Lachaux v Independent Print Ltd* [2019] UKSC 27, [2020] AC 612, [7] *per Lord Sumption* JSC. [Auth/21/1065-81]

⁷⁸ *Ibid*, [12].

⁷⁹ *Tesla Motors Ltd v BBC* [2013] EWCA Civ 152, *Citation Plc v Ellis Whittam Ltd* [2013] EWCA Civ 155.

⁸⁰ *Abbey v Gilligan* [2012] EWHC 3217 (QB), [2013] EMLR 12.

⁸¹ *Lait v Evening Standard Ltd* [2011] WECA Civ 859, [2011] 1 WLR 2973, [42] *per Laws LJ*. [Auth/22/1082-1104]

⁸² [2015] EWCA Civ 311, [2016] QB 1003. [Auth/34/1505-61]

⁸³ *Ibid*, [82]. [Auth/34/1540]

75. The common strands which run through the threshold applicable in privacy law and *Jameel* abuse of process, as well as the *de minimis* principle, but which also apply in the data protection context are:
- (1) the need to distinguish between the everyday ‘rough and tumble’ of life, in relation to which a “*reasonably robust*” attitude ought to be expected, versus genuinely distressing events for which compensation ought to be available;
 - (2) the need for proper and appropriate recognition of human rights and fundamental freedoms, including when interpreting and applying laws designed to protect them;
 - (3) a concern to act in accordance with the overriding objective and to take proper account of proportionality. The *de minimis* principle would, in fact, seem to be primarily directed towards ensuring that the court’s resources are not wasted on low value, trivial claims or, in other words, that proper regard is had to a proportionate approach.
76. From a practical perspective, maintaining an entirely different approach towards a threshold of seriousness in privacy law versus data protection law also results in particular difficulties, given their common Article 8 ECHR source and the fact that, in any event, claims are routinely brought in relation to the very same data breach incident in both causes of action.

(5) Comparative Commonwealth case law

(i) Introduction

77. The Appellant accepts that judgments of Commonwealth courts, like post IP completion day decisions of the CJEU, are merely persuasive. However, unlike the CJEU’s reasoning in the various decisions relied upon by the Court of Appeal when concluding that no threshold of seriousness applied to damages claims brought pursuant to Article 82 GDPR, the reasoning of Singaporean and Canadian Appellate courts is both cogent and compelling. The Canadian approach requires compensable injury to rise above the “*ordinary annoyances, anxieties and fears that a person living in society may experience*” and the Singaporean approach similarly excludes damages claims in data

protection claims on *de minimis* grounds for “trivial annoyance or negative emotions which for part of the vicissitudes of life”.⁸⁴

(ii) Singapore

78. In Singapore, the Personal Data Protection Act (“PDPA”) provides a right for a person who has suffered “loss or damage” to seek relief in private civil proceedings. In *Reed, Michael v Bellingham, Alex*,⁸⁵ the Singapore Court of Appeal held that emotional distress directly suffered as a result of a contravention of the PDPA may constitute “loss or damage” for which a private action could be commenced.

79. Importantly, and partly in reliance on *Lloyd v Google*, which it understood as recognising a threshold of seriousness, the Singapore Court of Appeal determined that what was described as the “floodgates” concern would be sufficiently abated by appropriate control mechanisms.⁸⁶ The Court made clear that to factually prove emotional distress, a plaintiff would need to satisfy the rules of causation: the “loss or damage” must have been suffered “directly as a result of a contravention”. In addition, and by reference to the *de minimis* principle, the Singapore Court of Appeal went on to state:⁸⁷

“....even if emotional distress is an actionable head of loss, there is no reason for the principle that there is no legal recourse for minimal loss....not to apply. Thus, trivial annoyance or negative emotions which form part of the vicissitudes of life will not be actionable.”

80. The Court held that how a reasonable person would have reacted in the circumstances is of relevance as an “evidential tool”⁸⁸ (at [114]) to assess the individual plaintiff’s subjective state of mind. The Court detailed at [115] “a few non-exhaustive

⁸⁴ It is clear from the AG’s opinion in *UI* that a number of European countries also apply a *de minimis* threshold, see note 75 and the references to case law in Italy, Germany and Austria. See also, the European Group on Tort Law, 2005, *Principles of European Tort Law: Text and Commentary* which allows judges to disregard trivial damage. [Auth/48/1899] [Auth/60/2191-2204]

⁸⁵ [2022] SGCA 60. [Auth/55/2025-65]

⁸⁶ *Ibid*, [93]. [Auth/55/2053]

⁸⁷ *Ibid*, [93]. See also [116]. [Auth/55/2053, 2060]

⁸⁸ *Ibid*, [114]. [Auth/55/2059]

considerations” to guide the courts including the nature of the personal data involved in the breach, the nature of the breach and the nature of the defendant’s conduct.⁸⁹

(iii) Canada

81. There is a relevant line of authority from Canada relating to the authorisation of class actions in data breach claims.⁹⁰ Such authorities include an analysis of whether the relevant plaintiff has incurred a compensable injury as a result of the relevant breach.⁹¹ The Supreme Court of British Columbia in *K.W. v Accor Management Canada Inc.*,⁹² [Auth/53/1994-2013] when considering a proposed class action which was said to have arisen out of unauthorised access of a database containing health information, held at [60]-[62] that:

“For emotional or psychological injury to be compensable it ‘must be serious and prolonged and rise about the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly accept.

....

Based on the facts pled this Court finds the lost time and inconvenience alleged do not rise to meet the threshold of constituting annoyances and frustrations beyond those that people living in society in a digital age routinely, if sometimes reluctantly accept.”

82. Similar statements have been made by Court of Appeal of Alberta⁹³ and the Quebec Superior Court.⁹⁴

C.3 The Court of Appeal’s approach to the post IP completion day CJEU case law

(1) *The Court of Appeal erred in its approach to the CJEU decisions*

83. The Court of Appeal erred in following the post IP completion day CJEU decisions. In particular, the Court of Appeal misinterpreted section 6 EUWA 2018 when it concluded

⁸⁹ Ibid, [115]. [Auth/55/2059]

⁹⁰ Some of these claims are statutory in nature whilst some are brought in negligence.

⁹¹ See further, *Mustapha v Culligan of Canada Ltd* 2008 SCC 27. [Auth/54/2014-24]

⁹² 2023 BCSC 1149. [Auth/53/1994-2013]

⁹³ See *Setoguchi v Uber BV* 2023 ABCA 45, [51]-[58]. [Auth/57/2117-42]

⁹⁴ *Bourbonnière v Yahoo! Inc.*, 2019 QCCS 2624 [37]-[44]; *Royer v Capital One Bank* 2023 QCCS 2993, [180]-[181]. [Auth/52/1978-93] [Auth/56/2066-2116]

that such IP completion day CJEU decision should be followed unless there were “*compelling legal reasons*” to depart from such decisions.

84. Section 6 EUWA 2018 is entitled “interpretation of retained law” and provides: [Auth/5/639]

“(1) *A court or tribunal—*

(a) is not bound by any principles laid down, or any decisions made, on or after IP completion day by the European Court, and

(b) cannot refer any matter to the European Court on or after IP completion day.

(2) Subject to this and subsections (3) to (6), a court or tribunal may have regard to anything done on or after IP completion day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.”

(emphasis added)

85. The aim of section 6 of the EUWA 2018 is to reduce the influence of CJEU decisions on domestic law: *Lipton v BA Cityflyer Ltd.*⁹⁵ The courts may have regard to such CJEU [Auth/23/1105-85] decisions, so far as relevant to the matter before them. In doing so, the courts need to consider the reasoning underpinning those decisions and their relevance and persuasiveness in the domestic context. For example, in *Tower Bridge GP v HMRC*,⁹⁶ [Auth/31/1403-40] the Court of Appeal declined to follow a post IP completion day CJEU decision on the basis that it was inconsistent with previous CJEU jurisprudence and because the reasoning underpinning the decision was flawed.
86. In the present case, the Court of Appeal held that the CJEU decisions on the threshold of seriousness should be followed unless there were “*sufficient compelling legal reasons*”

⁹⁵ [2024] UKSC 24, [2025] AC 154, [22] *per* Lord Sales and Lady Rose JJSC. [Auth/23/1105-85, 1122]

⁹⁶ [2022] EWCA Civ 998, [2023] 1 CMLR 16, [119] *per* Lewison LJ. See also *Merck Serono v Comptroller-General of Patents* [2025] EWCA Civ 45, [2025] RPC 7, and [Auth/31/1403-40] *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441, [2021] Bus LR 1119 where [Auth/26/1277-99] the Court of Appeal also considered the approach to be taken to post IP completion day [Auth/32/1441-99] CJEU decisions.

to depart from it.⁹⁷ Such an approach does not accord with the clear language of section 6(2) of EUWA 2018 which merely provides that domestic courts “may have regard” to such decisions “*so far as it is relevant*”. Such post IP completion day CJEU decisions are thus similar in status to comparative case law from Commonwealth countries which domestic courts may also have regard so far as the court thinks relevant.

[Auth/5/639]

87. Section 6(2) provides the courts with a discretion to consider CJEU decisions; it does not create a presumption that they will be followed without good reason. In assessing CJEU decisions for the purposes of section 6(2), the courts must consider whether the reasoning underpinning the CJEU’s approach is convincing. Such an exercise is precisely what s.6(1) was intended to facilitate by not making CJEU decisions binding: it does not reserve the ability to plot a different course from CJEU decisions to that of “*political choice*”.⁹⁸ It is precisely this exercise that this Court must embark on in this appeal.

88. Further, in the present case, there are two lines of post IP completion day CJEU decisions that the Court may have regard to so far as relevant: first, those of the AG in UI and VB and second, the CJEU line of decisions starting with UI. Section 6(1)-(2) does not accord more weight to the latter. What matters for the purposes of section 6 EUWA is not the identity of the decision-maker but the cogency and persuasiveness of the reasoning.

89. Parliament made a positive choice not to impose a more onerous obligation on the courts in relation to post IP completion day CJEU decisions, including in relation to causes of action that arose pre-IP completion day. In particular, it rejected the approach adopted in section 2 Human Rights Act 1998 which provides that, “*a court or tribunal determining a question which has arisen in connection with a Convention right must take into account*

⁹⁷ [CAJ/67]. See also [CAJ/76] and the reference to “*any sufficiently weighty reason*”. *Bennion, Bailey and Norbury on Statutory interpretation*, 9th edn, 888 expressed doubt as to the Court of Appeal’s approach in *Farley* stating “[i]t is suggested that the decision should not be taken as laying down a generally applicable test of ‘sufficiently compelling legal reasons’ for not following a post-IP completion day decision of the Court of Justice.”

[Doc/7/159,
162]

⁹⁸ C.f., [CAJ/67].

[Doc/7/159]

any judgment, decision, declaration or advisory opinion of the European Court of Human Rights.” The Appellate courts are, in any event, increasingly willing to depart from judgments of European Court of Human Rights, including judgments of the Grand Chamber, if they conclude that the European Court’s reasoning is unpersuasive or that it is inconsistent with a fundamental feature of domestic law.⁹⁹

90. Account needs to be given to the fact that Brexit has changed the constitutional architecture which applies to frame the approach to interpretation of retained EU law.¹⁰⁰ Whilst a purposive approach to the interpretation of retained EU law may well be appropriate, UK law should not inherit all the purposes of EU law. In particular, purposes associated with European integration requiring harmonisation of laws are not purposes relevant in a post-Brexit legal system.

(2) The CJEU line of authority is unpersuasive

91. The CJEU position stems from *UI v Österreichische Post AG*,¹⁰¹ which arose out of a [Auth/48/1876-1910] claim for compensation for “*upset, loss of confidence and public exposure*” arising from the use of an algorithm to infer a data subject’s degree of affinity with a certain political party. The data had not been communicated to any third party. The Austrian court had rejected the claim because the damages sought did not reach a sufficient level of seriousness.

92. While the CJEU held that mere infringement, without damage, did not entitle a person to compensation (consistently with the position in *Lloyd v Google*), it interpreted Article 82 GDPR as precluding any national rule or practice which imposed a threshold of

⁹⁹ See e.g. *R v Abdurahman* [2019] EWCA Crim 2239, [2020] 4 WLR 6, [110]-[120]; *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2020] AC 279, [73] *per* Lord Mance JSC, [89] *per* Lord Wilson JSC.

¹⁰⁰ The potential need to take into account the change in constitutional architecture post Brexit was considered by Lord Sales JSC writing extrajudicially: Lord Sales, *Retained EU Law: Purposive Interpretation when the Constitutional Architecture Changes* [2004] EL Rev 49(1), 3-14. See also, the Retained EU Law Revocation and Reform Act 2023 which further reduces the influence of EU case law.

¹⁰¹ Case C-300/21, [2023] 1 WLR 3702.

[Auth/48/1876-1910]

seriousness on non-material damage.¹⁰² The CJEU’s conclusion that a threshold of seriousness was not open under Article 82 went against the AG’s opinion. The AG gave detailed reasons as to why it considered a threshold could be applied (which the Court of Appeal in these proceedings, admitted had “*some attractions*”).¹⁰³

93. In summary, the AG’s reasoning was:¹⁰⁴

- (1) The terms of Article 82 do not provide a direct answer as to whether a threshold can be applied;¹⁰⁵
- (2) Existing CJEU case law did not support a rule that “*all non-material damage, regardless of how serious it is, is eligible for compensation*”;¹⁰⁶
- (3) The GDPR’s sole aim was not “*the safeguarding of the fundamental right of personal data*”.¹⁰⁷ Further, Article 82 was a mechanism within a system of guarantees.¹⁰⁸ In this respect, Article 82 did not appear to be “*a suitable instrument for countering infringements ... where all those infringements create for the data subject is annoyance or upset*”;¹⁰⁹
- (4) A distinction between non-material damage and “*other inconveniences*” was an inevitable part of national legal systems, which the CJEU accepts in other areas of law. In data protection, this distinction is particularly relevant, given that *any* notification of breach leads to some negative reaction, including mere displeasure;¹¹⁰

¹⁰² Ibid, [42], [51].

[Auth/48/1907-8]

¹⁰³ [CAJ/70].

[Doc/7/159-60]

¹⁰⁴ This position was repeated by the AG in *VB v Natsionalna agentsia za prihodite*, Case [Auth/49/1911-48, C-340/21, [2024] 1 WLR 2559 at [77]-[83].
1927]

¹⁰⁵ Ibid, [98].

[Auth/48/1890]

¹⁰⁶ Ibid, [105].

[Auth/48/1891]

¹⁰⁷ See [19]-[21].

¹⁰⁸ Ibid, [109].

[Auth/48/1891]

¹⁰⁹ Ibid, [112].

[Auth/48/1891]

¹¹⁰ Ibid, [110]-[111], [113].

[Auth/48/1891]

- (5) Entitling persons to compensation arising from “*mere upset*” would have significant practical implications and place a disproportionate burden on national courts and defendants;¹¹¹ and
- (6) Given the distinction between “*mere upset*” and genuine non-material damage was difficult to delimit, it was best left to national courts to determine the relevant threshold, which would inevitably reflect current social perceptions of tolerance for minimal claims (as is done in respect of calculating compensation).¹¹²

94. However, the CJEU in Österreichische Post came to the opposite conclusion, finding that no threshold could be applied.

95. In Österreichische Post, the CJEU emphasised at the outset that Article 82 did not contain a reference to the law of member states and therefore the meaning of non-material damage had to be given an “*autonomous and uniform definition specific to EU law*”.¹¹³

96. The CJEU then gave three reasons why, in its view, it was not open to member states to impose a threshold of seriousness. First, the terms of Article 82 contained no reference to such a threshold.¹¹⁴ Second, Recital 146 stated that “*the concept of damage should be broadly interpreted in light of the case law of the Court of Justice in a manner which fully reflects the objectives of this Regulation*” and a threshold would be contrary to this “*broad*” conception of damage.¹¹⁵ Third, a threshold would be contrary to the objectives of the GDPR, which were as outlined in Recital 10:¹¹⁶

“...to ensure a consistent and high level of protection of natural persons with regard to the processing of personal data within the European Union and, to that end, to ensure consistent and homogeneous application of the rules for the protection of the fundamental rights and freedoms of natural persons with

¹¹¹ Ibid, [114].

[Auth/48/1891]

¹¹² Ibid, [116].

[Auth/48/1892]

¹¹³ Ibid, [30], [44].

[Auth/48/1906-8]

¹¹⁴ Ibid, [45].

[Auth/48/1908]

¹¹⁵ Ibid, [46].

[Auth/48/1908]

¹¹⁶ Ibid, [48].

[Auth/48/1908]

regard to the processing of personal data throughout the European Union.”
(emphasis added)

97. The CJEU went on to say:¹¹⁷

“Making compensation for non-material damage subject to a certain threshold of seriousness would risk undermining the coherence of the rules established by the GDPR, since the graduation of such a threshold, on which the possibility or otherwise of obtaining that compensation would depend, would be liable to fluctuate according to the assessment of the courts seised.”

98. A key driver of the CJEU’s conclusion was therefore that the level of any seriousness threshold would vary across member states and undermine the objective of ensuring the “consistent and homogenous” application of the GDPR. This reasoning has been repeatedly emphasised by the CJEU in subsequent decisions where it has re-iterated that no threshold can apply. In *VX v Gemeinde Ummendorf*,¹¹⁸ the CJEU observed again that a threshold “would risk undermining the coherence of the rules established by the GDPR”.

99. The subsequent CJEU decisions which have rejected a threshold of seriousness have adopted precisely the same reasoning as in *Österreichische Post* summarised above: *VB v Natsionalna agentsia za prihodite*,¹¹⁹ *VX*,¹²⁰ *BL v MediaMarktSaturn Hagen-Iserlohn GmbH*.¹²¹

100. The CJEU’s reasons for not accepting that a threshold of seriousness applies to such claims for damages are not persuasive, in the domestic context of England and Wales.

¹¹⁷ Ibid, [49]. [Auth/48/1908]

¹¹⁸ Case C-456/22 (EU:C:2023:988), [20]. [Auth/50/1949-54]

¹¹⁹ Case C-340/21, [2024] 1 WLR 2559, [78]. [Auth/49/1911-48]

¹²⁰ Case C-456/22 (EU:C:2023:988, [14]-[20]. [Auth/50/1949-54, 1952-3]

¹²¹ Case C-687/21, [2024] 1 WLR 2597, [59]. Since the Court of Appeal’s judgment in this case, the CJEU has further considered the issue of non-material damage in *IP v Quirin Privatbank AG* Case No-655/22 [2026] 1 CMLR 22 where the CJEU again concluded that non-material damage did not need to reach a *de minimis* threshold to give rise to compensation. [Auth/41/1756-71]

101. As to the first two reasons given in *Österreichische Post*:

- (1) The fact that Article 82's terms do not refer to a threshold of seriousness does not assist either way.¹²² As detailed above, Article 82(1)'s terms do not state that *any* level of damage gives rise to a right to compensation; and
- (2) Recital 146 is also of limited assistance. The reference to damage being "*broadly interpreted*" in the third sentence of Recital 146 refers to the heads of damage available, it does not provide that any level of damage must be compensated. This language in the third sentence of Recital 146 reflects an intention by the drafters to make it clear that "*non-material*" damage was included (which the GDPR's predecessor, Directive 95/46/EEC, had been silent on).¹²³ Moreover, the reference to "*breadth*" in Recital 146 is followed by a limitation that the interpretation of damage "*fully reflects the objectives*" of the GDPR, which as detailed above, support the existence of a threshold of seriousness;¹²⁴ and
- (3) Moreover, the fact that Recital 146 refers to an interpretation in light of the jurisprudence of the CJEU does not override the clear statutory intention of section 6 of EUWA 2018. This reference does not enable CJEU decisions which post-date both this reference and Brexit to have binding effect through the backdoor.¹²⁵

102. As to the CJEU's third and key reason for rejecting the possibility of a threshold of seriousness (the need to ensure a "*consistent and homogeneous*" application of the GDPR across the European Union), this is no longer a relevant consideration. Concerns relating to the need for uniformity across EU member states should not have any bearing on whether such a threshold exists in the post-Brexit context. Parliament, by enacting section

¹²² See AG opinion in *UI* [98].

[Auth/48/1890]

¹²³ The AG opinion in *UI* states at footnote 67: "*the negotiations prior to the adoption of the GDPR centred on dispelling the doubts surrounding the inclusion of non-material damage*".

¹²⁴ See [19]-[21].

¹²⁵ C.f., [CAJ/53].

[Doc/7/155]

6 EUWA, made a conscious political choice that domestic courts could reach different decisions to those of the CJEU and thus have a different rather than “*consistent and homogenous*”, application of retained EU law, including the GDPR.

103. Finally, it is important to note that the post IP completion day CJEU decisions do not mean that monetary compensation is payable in all cases where a person has suffered non-material damage as a result of an infringement of the GDPR. The CJEU in *A v Patērētāju tiesību aizsardzības centrs*¹²⁶ held that, in certain cases, an apology will be sufficient compensation by itself without the need to pay damages.

(3) The CJEU’s alternative approach, adopted by the Court of Appeal does not work

104. Despite continuing to hold that a threshold of seriousness does not apply, CJEU cases such as *BL* would, in any event, seem to be allowing for a threshold ‘via the backdoor’ (in that case, by carefully defining the circumstances in which a claimant’s fears over misuse will be sufficient).

105. Relying on the *BL* case, the Court of Appeal’s answer to why there is no “*sufficiently weighty reason for departing...from the settled CJEU jurisprudence*”.¹²⁷ appears to be that in a claim for damages based on a claimant’s fears over what has happened to his/her data, there will still be an analysis by the court of whether non-material damage has been suffered. So, in other words, although the court will not address whether a threshold of seriousness has been crossed, in a claim for compensation for fear of the consequences of an infringement, the court will consider whether “*the alleged fear is objectively well-founded*” as opposed to “*purely hypothetical or speculative*”.¹²⁸ Importantly, the Court of Appeal recognised that this provided a touchstone by which most, if not all, of the outstanding issues “*in this case*”¹²⁹ but not in data protection claims generally, could be fairly resolved.

¹²⁶ Case C-507/23.

[Auth/38/1694-1704]

¹²⁷ [CAJ/76].

[Doc/7/162]

¹²⁸ [CAJ/75].

[Doc/7/161-2]

¹²⁹ [CAJ/75].

[Doc/7/161-2]

106. In reaching that conclusion, (and, similarly, in remitting the issue of *Jameel* abuse of process) the Court of Appeal also appears to be implicitly recognising the need for some kind of threshold of seriousness. However, in confining that seriousness analysis to claims such as the present, which are solely based on fear arising from infringement, and channelling it through the prism of a non-material damage analysis, the Court of Appeal has: (1) entirely ignored those many claims which are trivial but not based on fear alone; and (2) produced a much more convoluted, uncertain approach when compared to the early stage seriousness analysis of every data protection claim which controllers have been conducting. No data protection claim is identical. As is clear from the common law and statutory thresholds which already arise in media and information law in this jurisdiction, a more general test allows for any case, regardless of how it might be framed, to be assessed for seriousness. Tests such as whether there is a ‘real and substantial tort’ (*Jameel*) or whether a statement has caused or is likely to cause ‘serious reputational harm’ (as under section 1 of the Defamation Act 2013) can be applied in all cases and prevent claimants or those representing them from cynically framing their claims in language which deliberately side steps particular scenarios which have been found not to give rise to recoverable damage.

107. It is not the case that the recognition of a threshold will lead to unfair imbalance between data subjects and data controllers, particularly given the availability in data protection, unlike in other torts, of a regulatory complaints process via the ICO. The threshold is also confined to compensation: data subjects are still able to seek different forms of relief such as a compliance order or rectification. By contrast, the obligations imposed on data controllers are already “*many and significant*” (*Lindqvist*) and the lack of any recognised threshold to exclude trivial, inconsequential damage will result in very significant and unfair imbalance which ought to be of serious concern.

E. CONCLUSIONS

108. The Court is invited to allow the appeal and hold that the Court of Appeal erred in finding a threshold of seriousness does not apply to claims for damages under the GDPR and the DPA 2018. If upheld, the position that no threshold exists is likely to have significant and far-reaching implications for domestic data protection law, particularly given the Court of Appeal’s recognition that the GDPR and UK GDPR are materially the same. It will burden the courts with a substantial volume of claims based on minor

emotional responses arising from trivial breaches. Such breaches are the inevitable consequence of existing in modern life, in particular given ever-increasing technological use and data flow.

109. As required by [5.15] of Practice Direction 5: Documents for the appeal hearing, in summary, the Appellant contends that a threshold of seriousness applies to the GDPR and DPA 2018 and “non-material damage” in Article 82 GDPR should be interpreted as meaning “non-trivial non-material damage” because:

- (1) Such a construction is consistent with the objectives and language of the GDPR and DPA 2018;
- (2) Such a construction is consistent with the Supreme Court’s finding in *Lloyd v Google* that such a threshold applied in the context of section 13 DPA 1998;
- (3) Such a construction is consistent with the *de minimis* principle which has broad application in tort law;
- (4) The reasoning underpinning the recognition of thresholds in other information law torts including misuse of private information, applies with equal if not greater force in the data protection context. In particular, the very important concern about proportionality and not over-burdening the courts in this jurisdiction with trivial claims;
- (5) Such a construction is consistent with the approach taken in other Commonwealth jurisdictions;
- (6) The non-existence of a threshold will expose already over-burdened data controllers to large class claims based only on minor emotional upset which ought to be tolerated in the modern age;
- (7) The CJEU’s reasoning, in post-IP completion day decisions, that no threshold of seriousness applies and damages can be recovered for trivial non-material harm is poorly reasoned, unpersuasive and should not be followed.

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12 August 2026