

**IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM HIS MAJESTY’S COURT OF APPEAL (ENGLAND)
(CIVIL DIVISION) [2025] EWCA Civ 1117 (King, Warby, Whipple LLJ)**

BETWEEN

**MICHAEL FARLEY
and 431 others set out in Annex 1 to the Claim Form**

Respondents

and

**PAYMASTER (1836) LIMITED
(trading as EQUINITI)**

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) OPEN RIGHTS GROUP**

Interveners

WRITTEN CASE FOR THE RESPONDENTS

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A. INTRODUCTION

1. As set out in the agreed Statement of Facts and Issues, this appeal gives rise to a single issue: whether a ‘threshold of seriousness’ applies to claims for damages under the General Data Protection Regulation (Regulation EU 2016/679) (“**GDPR**”) and the Data Protection Act 2018 (“**DPA 2018**”). The Court of Appeal was correct to conclude that no such threshold exists. The Respondents’ position in outline is as follows:
2. In order to be entitled to compensation for an infringement of the GDPR a claimant is required to prove three, and only three, things: (1) an infringement of the GDPR; (2) that he or she has suffered material or non-material damage; and (3) that the damage suffered was caused by the infringement. Not all emotional responses to an infringement will necessarily constitute suffering damage, and damage must be proved. However, there is no proper basis for the imposition of an additional hurdle or requirement that the damage must reach or cross a threshold of seriousness.
3. First, the imposition of such a threshold is not consistent with the wording of the GDPR (or the UK GDPR). Article 82(1) provides for a right to compensation where a person “*has suffered material or non-material damage*” as a result of an infringement of the regulation. The natural meaning of those words is that there is a right to compensation for any damage. There is nothing in the language of Article 82(1) which is consistent with some additional threshold of seriousness being imposed over and above the need to prove that damage.
4. Second, the imposition of such a threshold would be inconsistent with the policy objectives of the GDPR and the UK GDPR. Those objectives include the fundamental right of persons to protection of their data (Article 1). Further, Recital (146) in both the GDPR and the UK GPDR makes clear that compensation should be provided for “*any damage a person may suffer*”; that the “*concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice*”; and that data subjects should receive “*full and effective compensation*” for damage they have suffered as a result of an infringement of the regulation.

5. Third, there is a consistent line of post-Brexit CJEU case law holding that there is no threshold of seriousness. There is no good reason to depart from that case law; on the contrary, there are good reasons to follow it.
6. Fourth, there is no good policy reason for imposing a threshold of seriousness. In order to be entitled to compensation a claimant must prove that he or she has suffered consequences that amount to damage. The fact that they may only be entitled to a modest sum in compensation is not a reason to prevent them bringing a claim. Small sums of money may be of significance to some data subjects. Further, the Appellant's contention that a threshold is necessary to prevent trivial or unmeritorious claims is mistaken. The courts have existing powers to strike out claims that are an abuse of process, and to ensure that claims are litigated proportionately. It is not, of itself, an abuse to seek to recover a sum of damages that is relatively modest.
7. Fifth, there is no suggestion by the Appellant that a threshold of seriousness applies to claims for material damage. It appears (correctly) to be accepted that a claim could be brought for any material damage, however modest. It would be inconsistent and unprincipled to apply a threshold to claims for non-material damage but not to apply a threshold to claims for material damage.
8. Sixth, the Supreme Court in Lloyd v Google did not, on proper analysis, conclude there was any such threshold.
9. The Appellant argues the Respondents are seeking (and the Court of Appeal contemplated) "*the provision of a remedy for every trivial fleeting negative emotion*"¹. However, that is mistaken. The Court of Appeal made clear that not all negative emotional responses to an infringement would necessarily constitute non-material damage². The Respondents accept that not every negative emotion or subjective reaction necessarily constitutes non-material damage. Whether an emotional response constitutes

¹ See in particular paragraphs 20 and 3 of the Appellant's Written Case.

² See [71] and [50] of the Court of Appeal's Judgment.

damage will be fact sensitive. Applying a threshold to the *meaning* of damage would be imposing an unjustified and inevitably somewhat arbitrary additional requirement.

10. Further, it is not entirely clear to the Respondents what order the Appellant seeks. The Respondents' case is that, even if there is a threshold of seriousness, the Respondents' claims cross that threshold. The Respondents do not claim for "*trivial or trifling non-material damage*". On the contrary, each of the Respondents claims to have suffered actionable distress or an equivalent emotion.
11. The Court of Appeal remitted the Respondents' claims to the High Court for a determination of whether any of the individual claims should be disposed of by way of summary judgment or struck out on the grounds that they do not set out "*a reasonable and well-founded basis for a claim to compensation which might succeed at trial having regard to the principles in respect of non-material damage identified in the Judgment*" and/or on the grounds that the claim amounts to an abuse. That process has been halted pending this appeal.

B. BACKGROUND FACTS

12. The parties have agreed a Statement of Facts and Issues. However, at section B of its Written Case, under the heading "*factual background*", the Appellant has set out various matters which are controversial and are not agreed. MHB/4-13
13. At paragraph 11 of its Written Case the Appellant describes the breach giving rise to the claim as a "*trivial, one-off breach which cannot conceivably have given rise to genuine feelings of distress*".
14. The Appellant's breach of its duties under the GDPR was not a trivial or one-off breach. The Respondents' Annual Benefit Statements ("**ABSs**") were sent to out-of-date addresses as a result of systemic breaches by the Appellant of its duties as a data

controller and/or data processor. These include:³ setting up its systems to have two address locations or fields (in breach of the data minimisation principle and accuracy principle);⁴ failing to update the information in its databases;⁵ as well as causing the statements to be sent to incorrect addresses.⁶

15. This was also not the first time that the Appellant had posted pension statements of members of the Sussex Police to out of date addresses. This is apparent from the minutes of a meeting of the Sussex Police Pension Board dated 16 May 2019, some 3 or 4 months before the Respondents' ABSs were sent to incorrect addresses⁷. The minutes refer to an earlier incident in which 174 ABSs had been sent to out-of-date addresses. This earlier incident also appears to have been caused by the Appellant failing to update the data it held.

**MHB/
568-575**

16. By an order made by Master Dagnall dated 27 April 2022, the claimants were each directed to file a schedule, verified by a statement of truth, giving details of their claim, including details of whether they had suffered “(a) annoyance and/or (b) distress and/or (c) anxiety”.⁸ Following that order, some of the claims were discontinued, as some individual claimants accepted they had not suffered from distress or an equivalent emotion. However, each of the Respondents has served a schedule stating that they have suffered from distress or an equivalent emotion and has provided details.

**MHB/
502-506**

17. At paragraph 13 of its Written Case the Appellant states: “*Reference is made throughout the Individual Schedules to the Claimants having suffered mere annoyance or irritation as distinct from, or in addition to, distress*”. However, the Respondents were obliged by the order of Master Dagnall which directed the schedules to state whether they had

³ The Respondents were directed to file and serve Draft Amended Master Particulars of Claim by the Court of Appeal as related to the appeal as brought (“DAMPOC”): paragraph 5 of the order of Lord Justices Jackson and Warby dated 9 July 2024. However, the references in this paragraph have always been the Respondents’ case.

⁴ Para. 8.2 of DAMPOC

⁵ Para. 8.6 of DAMPOC

⁶ Para. 8.7 of DAMPOC

⁷ [MHB/568-575]

⁸ Paragraph 1.7 of the order of Master Dagnall dated 20 May 2022.

**MHB/
261-281**

suffered “*annoyance*”. It is therefore unsurprising that many of the Respondents stated that they had suffered annoyance and irritation as well as distress.

18. Out of the 432 Respondents, 398 state in their schedules that they suffered distress as a result of the breach. The remaining 34 Respondents who do not use the word distress, all claim they suffered from anxiety and explain their emotional reaction to the breach. A schedule was before the lower courts relating to these Respondents.⁹

MHB/
464-474

19. Forty-two of the Respondents served a report from a medical practitioner in support of their claims, who opined that the relevant Respondent had suffered a recognised illness as a result of the breach (in many cases the exacerbation of a pre-existing injury).

20. The Appellant argues that a police officer “*cannot conceivably*” and genuinely have suffered distress or other non-material damage as a result of the mis-posting of an ABS¹⁰. However:

(1) That is effectively an argument that the Respondents are dishonest and/or are presenting something other than genuine claims. That is a bold submission to make in respect of claims brought by over 400 police officers, some of senior rank. (The Respondents range in rank from police constable through to Chief Inspector and Superintendent.) It is certainly not a conclusion that should be reached without hearing evidence from them.

(2) The fact that so many police officers state that they did suffer distress as a result of not knowing what had become of their ABSs in fact lends support to their case that this was not a trivial incident, and that their responses were rational. The Appellant has suggested that police officers ought to be more robust than ordinary members of the public. However, it may be that because of their jobs and their knowledge of

⁹ This was responsive to evidence filed in the High Court and was also before the Court of Appeal.

¹⁰ See paragraph 11 of the Appellant’s Written Case.

the potential consequences of a data loss that they are more susceptible than members of the general public.

(3) As noted above, 42 of the claims are supported by medical reports from practitioners who have interviewed the individual Respondents. The practitioners clearly considered that it was credible that a person could suffer from a recognised psychiatric injury as a result of an ABS being sent to an out-of-date address.

**MHB/
507-546**

(4) Both Mr Justice Nicklin and the Court of Appeal have rejected the Appellant's contention that the breach "*cannot conceivably have given rise to genuine feelings of distress*". Both correctly concluded that whether the Respondents suffered non-material damage would require an investigation of each Respondent's individual circumstances.

21. The Respondents accept that they are not in a position to prove that the ABSs were opened. That is not the same as knowing that they were not opened. Although some of the ABSs were returned, it was often many months before the relevant Respondent was told that they had been returned. In the majority of cases it is not clear what became of the ABS.

22. Further, the knowledge that the individual Respondents had as to what had become of their ABS is fact and case specific. For example, one of the claimants (Sapna Patel) pleads in her schedule that she went to the address where it had been sent, and was advised that it had not been received. She was concerned that she was being told lies. As a further example, one of the claimants (Mark O'Brien) states that the ABS was sent to the address of his wife, with whom he was going through an acrimonious divorce. He states that he had reason to believe his wife was opening any post being sent there, and that she would use the ABS to gain leverage over him.

**MHB/
339-345**

23. Complaint is made by the Appellant about proportionality and the Respondents' costs. However, the amount of costs is in large part a consequence of how the Appellant has chosen to defend the claims. That was recognised by the Court of Appeal who stated at

[105]: *“The scale of the costs incurred is partly explained by the fact that the respondent has chosen to contest issues of principle. That is the respondent’s right, but the resulting expense cannot fairly be weighed in the balance against the appellants, at least at this stage.”*

MHB/168

24. The Respondents’ position has always been that there should be a trial of a small number of lead or test cases, to determine the liability issues and to give guidance on causation and quantum in individual cases. The Appellant’s position has been to persist in seeking detailed information from each of the Respondents and then seek summary disposal of their claims.
25. The result of the Appellant’s approach has been that although the claims were issued over five years ago, there has not yet been any substantive case management other than a direction that the Respondents each serve a schedule of information. Had the Appellant accepted the Respondents’ approach there could by now, and at lower or certainly no greater cost, have been a trial of lead / test cases. If the Appellant was able to make good its defence, it may by that approach have had a judgment in its favour on liability, and a judgment on the facts in sample cases that those Respondents (on the Appellant’s case) had suffered no or only trivial loss. In reality, it is plain that the Appellant is not confident of its case on liability, nor that detailed examination of some individual cases will assist it.

C. DATA PROTECTION LEGISLATION

26. When interpreting Article 82 of the GDPR, the Respondents submit there is value in understanding its history and objectives.

Treaty 108

27. On 21 January 1981, the Council of Europe opened the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (“**Treaty 108**”)

for signature. Treaty 108 was signed by the United Kingdom on 14 May 1981 and entered into force on 1 December 1987.

28. The Preamble to Treaty 108 stated that the right of protection as relates to personal data had to take account of the “*increasing flow across frontiers of personal data undergoing automatic processing.*”
29. Thus, the primary aim of Treaty 108 was to reconcile the need for privacy which was contained in the Human Rights Convention with the cross-border¹¹ free flow of information, the preamble describing these values as “*fundamental*”. It set out the underpinnings of modern data protection legislation, and provided for the rights of data subjects, with Article 10 making provision for signatories to “*establish appropriate sanctions and remedies for violations of provisions of domestic law*”.
30. Treaty 108 led to the enactment of the Data Protection Act 1984 (“**DPA 1984**”).
31. The United Kingdom has subsequently signed the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows, opened for signature on 8 November 2001; and additionally, the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data on 18 May 2018.
32. Treaty 108 is defined as the “*Data Protection Convention*” in section 3 of the Data Protection Act 2018, and its importance is fully recognised, alongside the ability, as provided for in section 183, to reflect changes to it as may be made.

¹¹ The signatories to Treaty 108 do not only constitute Members of the Council of Europe but include non-Members, namely, Argentina, Cabo Verde, Mauritius, Mexico, Morocco, the Russian Federation, Senegal, Tunisia and Uruguay.

The Data Protection Act 1984

33. The DPA 1984 gave effect to Treaty 108, and marked the beginning of the “*three main phases*” of the development of data protection law in this jurisdiction.¹²
34. The DPA 1984 created a new but relatively basic regime to protect individuals against misuse of personal data being processed by computers. The DPA 1984 took up the requirement in Article 10 of Treaty 108 and provided for a remedy to an individual who is the subject of personal data in section 23 in these terms:

“Compensation for loss or unauthorised disclosure

(1) An individual who is the subject of personal data held by a data user or in respect of which services are provided by a person carrying on a computer bureau and who suffers damage by reason of—

(a) the loss of the data ;

(b) the destruction of the data without the authority of the data user or, as the case may be, of the person carrying on the bureau; or

(c) subject to subsection (2) below, the disclosure of the data, or access having been obtained to the data, without such authority as aforesaid,

shall be entitled to compensation from the data user or, as the case may be, the person carrying on the bureau for that damage and for any distress which the individual has suffered by reason of the loss, destruction, disclosure or access.”

35. This was the first iteration of the modern remedy with which the Court is concerned and provided a right to compensation for “*damage and ... any distress which the individual has suffered.*”

The 1995 Directive

36. Directive 95/46 of the European Parliament and of the Council 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 (“**1995 Directive**”) marked a step forward in relation to

¹² As described by the Court of Appeal in R (Delo) v Information Commissioner [2024] 1 WLR 263 at [9].

data protection and reiterated and continued to underline the concept of the protection of fundamental rights and freedoms in respect of individuals.

37. In particular, there was a strong recognition that the free movement of personal data was of continued importance balanced against the individual's rights: see in particular Recitals (3) and (5) to (10) and Article 2 which states: "*Member States shall neither restrict nor prohibit the free flow of personal data*".

MHB/
654-657

38. Article 23(1) of the 1995 Directive provided as follows:

*"Article 23
Liability*

- 1. Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered."*

MHB/657

The Data Protection Act 1998

39. The 1995 Directive was implemented in the United Kingdom by the Data Protection Act 1998 ("**DPA 1998**"). Section 13 provided:

"Compensation for failure to comply with certain requirements.

- (1) An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.*
- (2) An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that distress if—*
- (a) the individual also suffers damage by reason of the contravention, or*
- (b) the contravention relates to the processing of personal data for the special purposes."*

MHB/580

40. The Court of Appeal in Google Inc v Vidal-Hall and Ors [2015] EWCA Civ 311 disapplied section 13(2) in order to make the DPA 1998 compatible with the 1995 Directive, and in doing so took an unrestricted view of the meaning of "damage" in

MHB/
1505-1561

Article 23 of the 1995 Directive with the effect that damage covered not only financial loss (material damage) but also non-material damage.

41. Additionally, the court rejected an argument that a data protection claim could only be brought if it was also a claim for breach of privacy rights pursuant to Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms: [81]. Specifically, the court recognised that some data breach claims may engage privacy rights, but some may not, and Article 23 “*does not distinguish between different categories of data breach (ie those which technically engage article 8 rights and those which do not)*” [81].

MHB/1540

The GDPR

42. On 25 May 2018, the GDPR came into force in the United Kingdom replacing the 1995 Directive. At the same time, the DPA 2018 came into force supplementing the GDPR.
43. The GDPR had direct effect in the UK until 11.00pm on 31 December 2020, being the implementation period completion day as defined in section 39 of the European Union (Withdrawal) Act 2018 (as amended) (“**EUWA 2018**”) (“**IP Completion Day**”). Accordingly, following the United Kingdom’s withdrawal from the EU, by section 3 of the EUWA, the GDPR became part of domestic law on IP Completion Day. It originally formed part of the body of ‘*retained EU law*’ as defined by s 6(7) of the EUWA 2018.
44. The relevant parts of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 also came into force at the same time. They made various amendments to the DPA 2018 and to the GDPR in consequence of the United Kingdom’s exit from the EU in creating the ‘UK GDPR’ (“**UK GDPR**”).¹³

MHB/
634-635

MHB/642

¹³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation) (Text with EEA relevance) (Retained EU Legislation)

45. The UK GDPR has now been reclassified as ‘*assimilated law*’ following the passing of the Retained EU Law (Revocation and Reform) Act 2023.
46. The claims in these cases arise under the GDPR because the breaches took place prior to IP Completion Day.
47. The GDPR has as its objective the ‘*protection of natural persons with regard to the processing of personal data*’ and ensuring that such protection allows ‘*the free movement of personal data*’: Article 1(1). Article 1(2) then describes that the protection afforded relates to the “*fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.*” MHB/690
48. These principles are further explained in the Recitals:
- (1) Recital 1: the protection in respect of the processing of personal data is a “*fundamental right*”. MHB/659
- (2) Recital 2 states:
- “The principles of, and rules on the protection of natural persons with regard to the processing of their personal data should, whatever their nationality or residence, respect their fundamental rights and freedoms, in particular their right to the protection of personal data. This Regulation is intended to contribute to the accomplishment of an area of freedom, security and justice and of an economic union, to economic and social progress, to the strengthening and the convergence of the economies within the internal market, and to the well-being of natural persons.”* (emphasis added) MHB/659
- (3) Recital 6 recognises the need for particular protection as a result of rapid technological developments and for “*a high level of the protection of personal data*”. MHB/660
- (4) Recital 7 notes the need for “*a strong and more coherent data protection framework in the Union*”. MHB/660

- (5) Recital 9 makes clear that the objectives and principles of the 1995 Directive remain, but there are different levels of protection in Member States due to differences in the implementation of the 1995 Directive. MHB/660
- (6) In recognition of the disparate implementation of the 1995 Directive, the GDPR sought to promote the “[c]onsistent and homogenous application of the rules for the protection of the fundamental rights and freedoms of natural persons” as set out in Recital 10. MHB/660
- (7) Recital 11 states that effective protection of personal data throughout the EU requires: “*equivalent powers for monitoring and ensuring compliance with the rules for the protection of personal data and equivalent sanctions for infringements in the Member States.*” MHB/661
- (8) Recital 13 notes the need for ensuring a “*consistent level of protection*” and that all natural persons in the Member States should have “*the same level of legally enforceable rights*”. MHB/661
- (9) Recital 14 provides that the protection provided to individuals should apply “*whatever their nationality or place of residence*”. MHB/661
- (10) Recital 146 states:
- “The controller or processor should compensate **any damage** which a person may suffer as a result of processing that infringes this Regulation.
- ...
- The concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of this Regulation.
- ...
- Data subjects should receive **full and effective compensation** for the damage they have suffered.
- ...” (emphasis added) MHB/685

49. The compensation provisions are set out in Article 82:

“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.

2. Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation. A processor shall be liable for the damage caused by processing only where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller.”

**MHB/
739-740**

50. Therefore, in line with the historic development of the right to a remedy by way of compensation for harm, the right to compensation under the GDPR remains unfettered, unconditional and unqualified. Whereas there is a requirement for a breach, causation and harm to be shown, there is no qualitative restriction on either the seriousness of the breach itself or the seriousness of the harm sustained.

51. Recital (146) makes clear this is a deliberate decision by the legislator. The imposition of a threshold would be inconsistent with the objective set out in Recital (146) that *“the concept of damage should be broadly interpreted”* and that *“data subjects should receive full and effective compensation for the damage that they have suffered”* as a result of an infringement.

MHB/685

52. At paragraph 26 of its Written Case the Appellant argues that: *“The text of Article 82(1) also does not exclude the possibility of [a threshold of seriousness]. In particular, Article 82(1) does not mandate that any damage suffered because of an infringement, no matter how trivial, be compensated”* (emphasis in the original). However, Recital (146) states in terms that compensation should be provided for *“any damage”* a person may suffer as a result of an infringement. Damage in Article 82 should therefore be interpreted as including any damage.

53. At paragraph 85 of its Written Case the Appellant draws attention to the reference in Recital 85 to *“significant economic or social disadvantage”* and argues that this provides some support for a threshold of seriousness. However, that wording simply comes as part of a non-exhaustive list of examples of things that might constitute damage, a list which also includes *“loss of control over their personal rights”*. It is also

**MHB/
674-675**

of note that the Advocate General in UI (considered further below), whose opinion is relied on by the Appellant, considered that the wording of Recital (85) was not “*helpful when it comes to answering the referring court’s question*”¹⁴.

54. As to the territorial scope of the GDPR, Article 3 provides that it applies as follows:

(1) to processing carried out anywhere but where processing is “*in the context of the activities of an establishment of a controller or a processor in the Union*”: Article 3(1);

(2) to processing activities, broadly related to the offering of goods or services to a data subject in the EU or monitoring of data subjects in the EU where processing takes place anywhere and the data controller or data processor is located other than in the EU: Article 3(2); and

(3) to processing by a controller not in the EU, but subject to Member State law by reason of public international law: Article 3(3).

MHB/
690-691

55. Further, as noted by both the Information Commissioner (“**the Commissioner**”) and the Open Rights Group (“**the ORG**”) in their Written Cases, the adequacy rules in Article 45 of the GDPR mean that post-Brexit, the EU has to ensure that the United Kingdom has sufficient protections in place to effectively permit the free-flow of data internationally. In particular, Article 45 of the GDPR provides that the EU must be satisfied that the United Kingdom ensures an adequate level of protection for personal data which is transferred from the EU into the United Kingdom.

MHB/
719-720

56. Article 45(2) states that the assessment of adequacy will require, amongst other matters, that account be taken of (1) relevant legislation; (2) the implementation of such legislation; (3) case-law; (4) effective and enforceable data subject rights; and, (5) effective judicial redress.

¹⁴ [98] of the Advocate General’s opinion.

MHB/1890

57. Originally, Commission Implementing Decision (EU) 2021/1772 (28 June 2021) (“**2021 Implementing Decision**”) concluded that the United Kingdom did ensure appropriate protection, but that came to an end on 27 June 2025 and has been replaced by the Commission Implementing Decision dated 19 December 2025, amending 2021/1772 (“**2025 Implementing Decision**”).¹⁵ Paragraph (6) of the 2025 Implementing Decision makes clear that the Commission’s monitoring since the 2021 Implementing Decision included “*case law developments*”.
58. If the United Kingdom takes a different stance to the EU as to the accessibility to justice by EU data subjects whose data has been transferred to the UK, there would be a substantial difference in and erosion of the rights of EU data subjects. Whereas this may or may not have a material impact on the Commission’s future decisions concerning adequacy, it would trigger a self-reporting of any altered position under paragraph (121).

MHB/
779-845

MHB/
749-778

750

MHB/776

The Data Protection Act 2018 (as amended)

59. The DPA 2018 came into force on 25 May 2018 and supplemented the GDPR as relates to “*general processing*” in Part 2 of the DPA 2018: section 4.
60. The Explanatory Note to the Bill states in relation to what was then ‘clause 166’ (and which became section 168) that:
- “*The 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.*”
61. This represented a widening of the concept of damage, not just in terms of the unification that Vidal-Hall had created in respect of the dichotomy between ‘damage’ and ‘distress’, but on a broader scale such that it encompassed damage of any nature,

MHB/589

MHB/617

¹⁵ Commission Implementing Decision of 19.12.2025 amending Commission Implementing Decision (EU) 2021/1772 of 28 June 2021 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom (notified under document C(2021)(4800). See further Opinion 26/2025 of the European Data Protection Board (16 October 2025).

without constraint. In a likely response to the difficulties which Vidal-Hall sought to remedy and for the avoidance of any doubt, section 168 of the DPA 2018 makes clear that the term “*non-material damage*” in Article 82 of the GDPR (and latterly, the UK GDPR) *includes* distress.

MHB/599

62. Section 168 therefore adopts Article 82 of the GDPR. There is no conditionality in the section as to how serious (or otherwise) any damage has to be before compensation may be awarded. In deciding not to interfere with or otherwise qualify the wording of Article 82, Parliament can be presumed to have had in mind the words in Recital (146) that an objective of the GDPR is to compensate individuals for “*any damage*”.
63. Significantly, where the DPA 2018 intends that an obligation is only triggered when damage reaches a certain level of seriousness, it says so. For example, section 25 of the DPA 2018 (manual unstructured data used in longstanding historical research) disapplies certain provisions of the UK GDPR where there was processing prior to 24 October 1998 for the purposes of historical research, where processing is not in relation to measures or decisions relating to a data subject, and where processing does not cause and is not likely to cause “*substantial damage or substantial distress*”.¹⁶
64. Further provisions in the DPA 2018 use these same words: section 41 (safeguards: archiving); schedule 1 paragraph 8 (equality of opportunity or treatment); schedule 1 paragraph 9 (racial and ethnic diversity at senior levels of organisations); schedule 1 paragraph 22 (political parties), each of which demonstrates the draftsman placing a form of qualification or conditionality on the degree of damage or distress which is not in section 168 or elsewhere by reference to Article 82.

**MHB/
591-592**

s.41	MHB/593
§8 Sch 1	MHB/610-611
§9 Sch 1	MHB/612-613
§22 Sch 1	MHB/614-615

¹⁶ This is developed from section 33 of the 1998 Act, which contained the words “*substantial damage or substantial distress*”.

**MHB/
581-582**

The UK GDPR

65. As set out above, the UK GDPR applies to processing since IP Completion Day.
66. The UK GDPR has retained the great majority of the GDPR. It appears to be common ground that none of the modifications is material to this appeal.
67. As the Court of Appeal observe at paragraph 67 of their Judgment and so far as is material to this case, Parliament has therefore chosen in post-Brexit legislation to adopt language which is materially identical to the GDPR. In particular, Parliament has chosen to retain as objectives of the legislation the “[c]onsistent and homogenous application of the rules for the protection of the fundamental rights and freedoms of natural persons” (recital 10), the requirement that a controller or processor should compensate for “*any damage*” to a person caused by an infringement (Recital 146), and that the “*concept of damage should be broadly interpreted in the light of the case-law of the [CJEU]*” (Recital 146). MHB/559
68. For completeness, it should be noted that the Data (Use and Access) Act 2026 (“**DUA 2026**”) made certain changes to the UK GDPR, some of which came into force on 5 February 2026. Although this occurred after the events with which the court is concerned, it should be noted that the DUA 2026 added Articles 84A – 84D to the UK GDPR which build on section 25 of the DPA 2018 relating to “*research, archives and statistics*” and again uses the words “*substantial damage or substantial distress*”¹⁷ in this context. MHB/
624-631

D. CJEU JURISPRUDENCE

69. There is a consistent line of authority from the CJEU that there is no threshold of seriousness in relation to claims for damages, and that the imposition of such a threshold would be inconsistent with the objectives and wording of the GDPR. In an

¹⁷ See in particular Article 84C(2)

annex to its Written Case, the Commissioner has helpfully set out 13 separate decisions of the CJEU in which it interprets Article 82 and concludes there is no threshold. The most significant of those decisions are summarised below.

70. At paragraph 88 of its Written Case the Appellant argues: “*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) [EUWA] does not accord more weight to the latter*”. The Respondents submit this is wrong. The opinions expressed by the Advocates General are not decisions of the CJEU, and they should be accorded less weight than decisions of the CJEU. In any event, as developed below, although the CJEU in UI and VB do not accept all of the opinions expressed by the Advocates General in those cases, their opinions do not provide the support for the Appellant’s case that the Appellant contends.

UI v Österreichische Post AG (Case C-300/21) [2023] 1 WLR 3702 (“UI”)

MHB/1876

Advocate General’s opinion in UI (6 October 2022)

MHB/1879

71. The claimant in UI alleged breaches of the GDPR by the processing of data internally by Österreichische Post AG, an address broker. Österreichische Post AG had collected data from UI and, with the assistance of an algorithm, drew an inference he had a high degree of affinity with a certain Austrian political party. The data and inference was never communicated to a third party. UI claimed that the processing was “*insulting and shameful*” and damaging to his reputation, causing “*upset, a loss of confidence and a feeling of exposure*”. He sought compensation of EUR 1,000.
72. The Austrian appellate court ruled that only damage that went beyond the upset or feelings caused by the breach were actionable. Three questions were referred to the CJEU by the Austrian Supreme Court. The first question related to the issue of whether a breach alone with no harm was actionable. The third question was then framed in these terms [14]:

**MHB/
1880-1881**

“Is it compatible with EU law to take the view that the award of compensation for non-material damage presupposes the existence of a consequence of the infringement of at least some weight that goes beyond the upset caused by that infringement?”

73. At [114] the Advocate General, in his opinion, stated that it would not be efficient to include *“mere upset in the category of non-material damage eligible for compensation”*. At [115] the Advocate General described the consequences of an infringement that would not justify compensation as being *“vague, fleeting feelings or emotions connected with the infringement of rules on processing”*.

MHB/1891

MHB/
1891-1892

74. The Advocate General then stated at [116]:

“... there is a fine line between mere upset (which is not eligible for compensation) and genuine non-material damage (which is eligible for compensation) and I am also aware of how complicated it is to delimit, in the abstract, the two categories and apply them to a particular dispute. That difficult task falls to the courts of the member states, which will probably be unable to avoid in their rulings the perception prevailing in society at a given time regarding the permissible degree of tolerance where the subjective effects of infringement of a provision in this area do not exceed a de minimis level.”

MHB/1892

75. The Appellant places considerable reliance on this point. However, it bears careful analysis. The reference to *“de minimis”* is a reference to the *“subjective effects”*: in other words, the feelings of the individual affected. What the Advocate General actually says is that it is for the court to reach a reasoned decision on the effect of an infringement having regard to the tolerance in society at any given time as to the impact of those subjective effects.

76. The Advocate General’s proposed answer to the referring court was [117]:

“The compensation for non-material damage provided for in the Regulation does not cover mere upset which the person concerned may feel as a result of the infringement of the provisions of Regulation 2016/679. It is for the national courts to determine when, owing to its characteristics, a subjective feeling of displeasure may be deemed, in each case, to be non-material damage”.

MHB/1892

77. Therefore, the Advocate General considered there is a need for a careful judicial consideration of whether a given reaction constitutes non-material damage. Further it is clear he considered that “*a subjective feeling of displeasure*” could, in at least some circumstances, amount to non-material damage. He appears to conclude that a national court could impose some form of threshold, but does not suggest that Article 82 must be interpreted as requiring a threshold of seriousness.

CJEU’s decision in UI (4 May 2023)

MHB/1900

78. The CJEU held in relation to the first question referred (whether there could be compensation on a breach alone) that there was a requirement to show harm.
79. As to the third question, the CJEU rejected the notion of there being a threshold of seriousness, reasoning as follows:

(1) The concept of non-material damage within article 82 “*must be given an autonomous and uniform definition specific to EU law*” [44].

**MHB/
1907-1908**

(2) Article 82 states that non-material damage “*may give rise to a right to compensation, without any reference being made to any threshold of seriousness*” [45].

MHB/1908

(3) It would be contrary to Recital (146) and the concept of a broad definition of damage to limit the definition of damage to a particular level of seriousness: [46].

MHB/1908

(4) That interpretation is supported by the objectives of the GDPR. The Court held that any interpretation of damage had to be in the context of a remedy that “*fully reflects the objectives of this Regulation*”, going on to note that Recital (10) provides for a “*consistent and high level of protection of natural persons*”: [47] and [48].

MHB/1908

80. The CJEU concluded at [49], that:

“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.”

MHB/1908

81. The CJEU made clear that there was still a requirement to prove non-material harm in order to have an entitlement to compensation [50].

MHB/1908

VB v Natsionalna agentsia za prihodite (Case C-340/21) [2024] 1 WLR 2559 (“VB”)

MHB/1911

82. VB concerned a cyberattack on the Bulgarian National Revenue Agency in which personal data of over six million individuals was placed on the internet. The question referred to the CJEU was whether fear was capable of amounting to non-material damage. The Court applied UI as to there being no threshold of seriousness and held that there is scope for non-material damage to cover a fear of future misuse of personal data [80].

Advocate General’s opinion in VB (27 April 2023)

MHB/1914

83. The Advocate General’s opinion in VB was given before the CJEU had given its judgment in UI.

84. At [82] the Advocate General stated that potential misuse of personal data may give rise to a right to compensation *“provided that the data subject demonstrates that the fear of such misuse has actually and specifically caused him or her actual and certain emotional damage”*.

MHB/1927

85. At [83] the Advocate General stated:

“There is undoubtedly a fine line between mere upset (which is not eligible for compensation) and genuine non-material damage (which is eligible for compensation), but the national courts, which have the task of establishing that line on a case-by-case basis, should carry out a detailed assessment of all the elements provided by the data

subject seeking compensation, who will have the burden of producing precise, and not generic, evidence actually capable of establishing the existence of “non-material damage actually suffered” as a result of the personal data breach, without, however, that damage having to reach a predetermined threshold of particular gravity: what matters is that it is not a mere subjective perception, changeable and dependent also on character and personal elements, but actual inconvenience, even slight but demonstrable, to his or her physical or psychological sphere or to his or her personal relationships;...” (emphasis added)

MHB/
1927-1928

86. Therefore, the Advocate General rejected the concept of a threshold, but considered that the national courts would need to undertake a fact sensitive and detailed assessment of whether the claimant had suffered non-material damage. Further, the Advocate General’s opinion was that “*actual inconvenience, even slight*” to the claimant’s “*psychological sphere*” would amount to non-material damage so long as it was demonstrable.
87. At paragraphs 88 and 93 of its Written Case the Appellant relies on and seeks to adopt the opinions of the Advocates General in UI and VB and relies on the “*cogency and persuasiveness*” of their reasoning. However, those opinions do not support the Appellant’s case, and the Advocate General in VB rejects the imposition of a threshold of seriousness.

CJEU’s decision in VB (14 December 2023)

MHB/1932

88. At [83] the CJEU referred to Recital (146) and the need to ensure a high level of protection for data subjects and stated:

“An interpretation of Article 82(1) of the GDPR to the effect that the concept of ‘non-material damage’, within the meaning of that provision, does not include situations in which a data subject relies solely on the fear that his or her personal data will be misused by third parties, in the future, would not be consistent with the guarantee of a high level of protection of natural persons with regard to the processing of personal data within the European Union, which is the aim of that instrument.”

MHB/1947

89. The CJEU also noted that before being entitled to compensation the claimant would have to demonstrate that the negative consequences caused by the breach constituted non-material damage [84] and that where a claimant claims compensation on the basis

of a fear that his or her data will be misused “*the national court seised must verify that the fear can be regarded as well founded*” [85].

MHB/1947

VX v Gemeinde Ummendorf (14 December 2023) (Case C-456/22) (“VX”)

MHB/1949

90. In VX an agenda of a meeting was published online containing personal data of some individuals, others having been redacted. The question referred to the CJEU is set out at [11] and was interpreted by the CJEU as asking whether Article 82 must be interpreted as precluding national legislation or a national practice which set a ‘*de minimis* threshold’ in respect of non-material harm.

MHB/1951

91. The CJEU applied UI and referred to VB and concluded that Article 82(1) must be interpreted as precluding such a *de minimis* threshold. The CJEU again considered that such a threshold would undermine the objectives of the GDPR to ensure a consistent and high level of protection: [20].

MHB/1953

92. At [22] the CJEU stated:

“In those circumstances, although there is nothing to preclude the publication on the internet of personal data and the consequent loss of control over those data for a short period of time from causing data subject ‘non-material damage’, within the meaning of Article 82(1) of the GDPR, giving rise to a right to compensation, those persons must also demonstrate that they have actually suffered such damage, however minimal.”

MHB/1953

93. Thus, in order to be entitled to compensation, a claimant must demonstrate that they have suffered damage, but it can be a minimal level of damage.

BL v MediaMarktSaturn Hagen-Iserlohn GmbH (25 January 2024) (Case C-687/21) [2024] 1 WLR 2597 (“BL”)

MHB/1756

94. The claimant in BL made a claim for compensation following a loss of their personal data in circumstances where documents had been given to a third party and returned within half an hour, the recipient being unaware they had the documents. Several questions were referred to the CJEU including whether the unauthorised disclosure to a third party was of itself sufficient to establish a right to compensation, or whether the claimant had to establish non-material damage [28]. The CJEU held that in order to be

MHB/
1763-1764

entitled to compensation the claimant had to establish non-material damage “*however minimal*” [66]. The CJEU referred to both UI and VB and reaffirmed that there was no threshold of seriousness [58]-[59].

MHB/1770
MHB/
1768-1769

Agentsia po vpisvaniyata v OL (4 October 2024) (Case C-200/23) (“OL”)

MHB/1705

95. This decision was not before the Court of Appeal below, but reiterates the law as set out in UI and VB. One of the questions referred to the CJEU (the seventh question) was whether Article 82(1) should be interpreted as meaning that a loss of control of data for a limited period may of itself suffice to cause non-material damage.

96. The CJEU held that there are three, and only three, conditions to entitlement to compensation: proof of damage, proof of an infringement, and proof of causation [140]. It would be wrong to add other conditions “*such as the tangible nature of the damage or the objective nature of the infringement*” [148].

MHB/1738

97. The CJEU re-iterated that a mere infringement is not sufficient to confer a right to compensation, and that a claimant must establish damage [142]. However, it held that the concept of non-material damage “*cannot be limited to damage of a certain degree of seriousness, in particular as regards the duration of the period during which the negative consequences of the infringement of that regulation were suffered by the data subjects*” [147]. Further, there was no requirement that the damage reach a *de minimis* threshold [149].

MHB/1737

MHB/1738

IP v Quirin Privatbank AG (4 September 2025) (Case C-655/23) [2026] 1 CMLR 22 (“IP”)

MHB/1799

98. The claimant (IP) applied for a job and an employee of the company sent a message intended for the claimant to a third party who knew him and forwarded it on to him asking if he was seeking employment. The Bundesgerichtshof referred several questions to the CJEU including:

“(4) Must Article 82(1) of the GDPR be interpreted as meaning that mere negative feelings such as annoyance, displeasure, dissatisfaction, worry and fear, which are in

themselves part of the general risk of life and often part of everyday experience, are sufficient for the assumption of non-material damage within the meaning of that provision? Or is a disadvantage to the natural person concerned which goes beyond those feelings necessary for the assumption of damage?”

99. In answering that question, and with reference to BL and OL, the CJEU described it as “settled case-law” that the concept of non-material damage “must be given an autonomous and uniform definition specific to EU law” [55].

**MHB/
1808-1809**

100. The CJEU re-confirmed that damage had to be shown and that there is no threshold of seriousness [58], concluding that although feelings of “fear or annoyance” may form part of the “general risk inherent in everyday life”, such feelings were nevertheless capable of amounting to non-material damage if those feelings can be shown with “negative consequences” [62].

**MHB/
1809-1810**

101. Further, the CJEU stated at [63]:

“that interpretation is consistent with the wording of Article 82(1) of the GDPR, read in the light of recitals 85 and 146 of that regulation, which encourage the acceptance of a broad interpretation of the concept of ‘non-material damage’, within the meaning of Article 82(1) of that regulation. In addition, it is supported by the objective of that regulation, as set out in Article 1 and recitals 1 and 10 thereof, which is to ensure a high level of protection of natural persons with regard to the processing of personal data”.

MHB/1810

102. There is therefore, as noted by the Court of Appeal at [54], a settled and consistent series of decisions by the CJEU confirming that domestic courts must not impose a threshold of seriousness, and that to do so would be contrary to the wording of Article 82 and contrary to the objectives of the GDPR.

MHB/1808

E. TREATMENT OF POST-BREXIT CJEU DECISIONS

103. The Respondents submit that the Court should, in accordance with its discretion under section 6(2) of the EUWA 2018 follow the decisions of the CJEU summarised above. **MHB/639**
The Respondents submit they are highly persuasive.
104. First, the judgments of the CJEU form a consistent and substantial line of authority. They are well-reasoned and their interpretation of Article 82 and the objectives of the GDPR is correct.
105. Second, as stated by the Court of Appeal at [67], the GDPR is an international legal instrument and that “*divergent interpretations of the same legislative text undermine legal certainty*”. **MHB/159**
106. The Respondents adopt and support the points made by the Commissioner at paragraphs 22-25 of his Written Case in relation to the practical problems and disadvantages of divergent interpretations. The GDPR applies in various extra-territorial contexts, and data controllers and businesses will frequently be transferring data between countries. Businesses and data controllers will often be subject to duties under the GDPR in EU member states. There is a strong practical advantage to common interpretation of identically worded provisions. **MHB/104-107**
107. Further, as submitted by the Commissioner and the ORG, a divergent interpretation and the imposition of a threshold of seriousness would create the risk of the loss of the UK’s ‘adequacy status’ under Article 45 of the GDPR.
108. Third, it is submitted that a starting point for the application of the discretion under section 6(2) of the EUWA 2018 is that the Act’s principal purpose was to preserve the vast majority of EU law that was in force immediately before IP Completion Date (see Lipton, particularly at [90]) so that law post-IP Completion Date continues to align with the law pre-IP Completion Date unless and until Parliament (by an Act) or the Executive (by a statutory instrument) change the law. Until such time as there is a **MHB/1105, 1139**

conscious divergence between UK domestic law and EU law there are obvious advantages to a congruent interpretation of legislation between the UK courts and the CJEU.

109. Very far from signalling a divergence between EU law and domestic law, Parliament has chosen by enacting the UK GDPR following Brexit to adopt, so far as is relevant to this appeal, identical language to the GDPR. Not only has Parliament thus decided against adopting a divergent approach, the UK GDPR includes Recital (146) and the wording that the “*concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice*”. By using those words, Parliament can be presumed to have intended that the decisions of the CJEU would be relevant to the interpretation of the concept of damage following Brexit.

110. It is also of note that Parliament has retained Recital (10) with its objective of a “*consistent and high level of protection*” which is equivalent in all Member States. It has also retained Recital (11) with its objective of equivalent methods of ensuring compliance, and Recital (13) with its objective of ensuring consistent levels of protection and preventing divergences. MHB/660
MHB/661
MHB/661

111. The Appellant asserts at paragraph 3 of its Written Case that the CJEU’s judgments were the “*sole basis*” for the Court of Appeal’s conclusion that there is no threshold of seriousness. That is wrong. The Court of Appeal set out in some detail why it considered that the CJEU’s decisions and their interpretation of Article 82 were correct: see in particular the Judgment at [70] and [71]. MHB/
159-160

112. The Appellant suggests that the Court of Appeal misinterpreted section 6 EUWA 2018 by suggesting that post-IP Completion Date decisions should be followed unless there were “*sufficiently compelling legal reasons*” to depart from them. The Respondents do not understand the Court of Appeal by using those words to be setting out a test of general application as to how the discretion under section 6(2) EUWA 2018 should be

exercised¹⁸. How that discretion is exercised is always likely to be context specific. However, the circumstances of the GDPR and Parliament’s decision to adopt identical language in the UK GDPR are such that it would require “*sufficiently compelling*” reasons to depart from settled CJEU case law.

113. As to the Appellant’s criticisms of the CJEU’s reasoning, set out in paragraphs 101 and 102 of its Written Case:

- (1) Contrary to the Appellant’s submission, the fact that Article 82 does not refer to a threshold of seriousness is relevant and of assistance. The Appellant is seeking to read words into Article 82 that do not appear.
- (2) The Appellant argues that Recital (146) is of limited assistance because “*it does not provide that any level of damage must be compensated*”. However, the first sentence of Recital (146) does state that there should be compensation for “*any damage which a person may suffer as a result of processing that infringes this Regulation*”. Further, the suggestion that the reference in Recital (146) to the fact that “*the concept of damage should be broadly interpreted in the light of case-law of the Court of Justice*” is only included to make clear that non-material damage is included, makes no sense. If the only intention was to make clear that damage includes non-material damage that could have been stated in terms. Further, it does not explain the reference to the case-law of the CJEU.
- (3) The Appellant is also wrong to contend that “*consistent and homogenous*” application of the GDPR is no longer a relevant consideration. Consistency of application is still a legitimate aim. Further, it is clear from the fact that Recitals (10) and (11) are retained in the UK GDPR that Parliament considers it a relevant objective.

¹⁸ In Various Claimants v Mercedes-Benz Group AG and Others [2026] EWHC 1753, Cockerill LJ at [259] considered that the Court of Appeal in this case were not seeking to establish a test of general application.

114. There is therefore no merit to the Appellant’s criticism of the CJEU’s reasoning.

F. DOMESTIC AUTHORITY

Lloyd v Google

115. The Appellant places heavy reliance on the Supreme Court’s decision in Lloyd v Google LLC [2022] AC 1217. It is important to place Lloyd into its proper context. First, it was a decision under the DPA 1998 and not the GDPR or DPA 2018; the Supreme Court made clear at [16] that it was not considering the GDPR. Second, the case arose in the context of an application for permission to serve proceedings out of the jurisdiction. Third, the issues related to the availability of the representative claim procedure in CPR r. 19. Fourth, there was a concession by Mr Lloyd that there was a threshold of seriousness: see [153]. MHB/1186
MHB/1198
MHB/1237
116. Whether there is a threshold as to the seriousness of harm was simply not an issue in the case. The whole thrust of Mr Lloyd’s position was that all that had to be shown was a non-trivial breach and it was not necessary to show any damage: see [88]. MHB/
1219/1220
117. At paragraph 5 of the Appellant’s Grounds of Appeal and at paragraph 46 and footnote 46 of its Written Case, the Appellant refers to a number of paragraphs of the judgment as supporting the proposition that there is a seriousness threshold. The paragraphs of the judgment in question are: [88], [115], [128], [137] and [138]. However, each of those paragraphs relates to the seriousness of the breach, not the seriousness of the harm or damage. For example, [88] refers to: “*compensation for any (non-trivial) contravention*”. §88 MHB/1219
§115 MHB/1227
§128 MHB/1231
§137 MHB/1233
§138 MHB/1233
118. The Appellant places particular reliance on a single sentence in [153] stating: “*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.*” However, that sentence does not bear the weight that the Appellant seeks MHB/1237

to place on it. It is *obiter* and flows from Mr Lloyd’s concession that there was a threshold of seriousness, as is clear from the first sentence of [153]. It forms part of the Court’s rejection of Mr Lloyd’s case that there was an entitlement to compensation from a mere loss of control without the need otherwise to prove damage, and that a mere loss of control is not damage. Further, the Respondents support the point made by the Commissioner at [38] of his Written Case that the sentence and Mr Lloyd’s concession have to be seen in the context of the Supreme Court’s rejection of the ‘common source’ argument.

MHB/113

119. It is also important to note what Lord Leggatt said at [105]:

“...it would be open to Mr Lloyd to claim, at least in his own right: (1) damages under section 13(1) of the DPA 1998 for any distress suffered by reason of contravention by Google of any requirements of the Act”.

MHB/
1224-1225

120. Lord Leggatt noted at [106] that that was not what the claimant was claiming. However, had his claim been put on that basis, there is no suggestion by Lord Leggatt that he would have to cross any threshold of seriousness. All that would be required is proof of a breach, causation and damage. This is entirely consistent with the oft-repeated position of CJEU that there are three, and only these three, conditions for compensation under Article 82: see UI at [32], VB at [77], VX at [14]; and OL at [14] and [148].

UI MHB/1882
VB MHB/1927
VX MHB/1252
OL MHB/1710,
1738

Other domestic authorities

121. The Appellant relies on the Court of Appeal’s decision in Prismall v Google UK Ltd [2024] EWCA Civ 1516, but it does not advance matters and simply seeks to summarise the Supreme Court’s decision in Lloyd. The Court of Appeal dealt with Lloyd at [55] under the heading “*Representative actions*”. After setting out the facts, the court said that “[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.” It does not in that sentence make clear whether the threshold relates to the seriousness of the breach or the seriousness of the harm.

MHB/1300

122. At paragraph 60 of its Written Case the Appellant refers to a textbook in which the author, P. Coppel KC, with reference to Lloyd states: “[t]here is no entitlement to compensation for ‘trivial’ infringements of the data protection regime”. The author appears to be referring to the seriousness of the breach and not the seriousness of the harm. In any event, the Appellant’s overarching point that there is a general understanding that there is a threshold of seriousness in relation to harm is not borne out.

The *de minimis non curat lex* principle

123. The Respondents recognise that, as stated by Bennion in the passage cited by the Appellant¹⁹, the *de minimis non curat lex* “principle forms part of the context against which legislation is enacted and, when interpreting legislation a court should take it into account”. However, the principle does not justify or necessitate reading words into Article 82 or imposing the threshold contended for by the Appellant:
124. First, it is clear from the recitals and objectives of the GDPR that there should be compensation for all damage without a threshold.
125. Second, the CJEU were clearly aware of the principle when deciding whether there should be a threshold. The CJEU rejected a threshold and concluded that the *de minimis* principle did not apply.
126. Third, imposing a threshold in England which does not apply in the EU would undermine the objectives of the GDPR and UK GDPR of having equivalent levels of protection (Recital 10) and equivalent powers for ensuring compliance with the rules for the protection of personal data (Recital 11).
127. Fourth, the policy concerns that underlie the principle are met by a requirement that a claimant must prove damage, without the need for the imposition of a threshold. In practice, the requirement that a claimant must prove damage before being entitled to

¹⁹ At [64] of its Written Case

compensation meets the concern that courts should not be troubled by matters which are “*trifling, insubstantial, inconsequential, immaterial, irrelevant or negligible*” (the words of Lord Briggs JSC in Brown v Ridley [2025] AC 1155 at [30] when describing the principle).

128. Further, the application of the principle is likely in practice to be different in the case of EU derived as opposed to domestic legislation. In the Information Commissioner v Clearview AI Inc [2025] UKUT 319 (AAC) the Administrative Appeals Chamber of the Upper Tribunal concluded [362] that a *de minimis* threshold should not be applied in Article 3(2)(b) of the GDPR (concerning the monitoring of the behaviour of data subjects who are in the UK by data controllers not established in the UK), having regard to both the wording of the article and of the recitals.

MBH/1031,
1037

G. THRESHOLD OF SERIOUSNESS IN OTHER CAUSES OF ACTION

129. It is recognised that thresholds of seriousness exist in some other causes of action. However, comparisons with those other causes of action are of no real value in the interpretation of the GDPR, and in particular interpreting Article 82.

130. In Lloyd, the Supreme Court rejected the claimant’s ‘common source’ argument. As Lord Legatt pointed out at [124]: “*there is no reason on the face of it why the basis on which damages are awarded for an English domestic tort should be regarded as relevant to the proper interpretation of the word ‘damage’ in a statutory provision intended to implement a European Directive. It does not follow, however, from the fact that two different legal regimes aim, at a general level, to provide protection from for the same fundamental value that they must do so in the same way or to the same extent or by affording identical remedies*”.

MHB/
1229-1230

131. The Respondents adopt and support the submissions made in relation to other causes of action by the Commissioner at paragraphs [40] to [46] of his Written Case.

MHB/
113-116

132. As pointed out by the Commissioner at [44] of his Written Case, in defamation at common law, the focus of the threshold is on the tendency or propensity of the statement to cause harm of a certain threshold²⁰. The focus is not on the seriousness of the actual harm caused (though actual harm may be relevant). That position was amended by section 1 of the Defamation Act 2013 such that the application of the threshold of seriousness must be “*determined by reference to the actual facts about its impact and not just the meaning of the words*”²¹.
133. Therefore, the threshold at common law in defamation is different from the threshold proposed by the Appellant in this case, which (by reference to the words which the Appellant submits should be read in to Article 82) focuses on the seriousness of the harm actually caused.
134. A further reason for caution before drawing any parallels between data protection law and defamation, is that in a defamation claim the court is normally concerned with a tripartite situation between the claimant, defendant statement maker, and a third party to whom a statement has been made. The interests involved are therefore not just of the claimant and the defendant. The sole enquiry in a data breach claim is the breach of legislation and its effect on the claimant. No other interests exist at that stage.

H. PROPORTIONALITY

135. The Appellant seeks to rely on the principle of proportionality in aid of its argument that there should be a threshold.
136. The Respondents agree and adopt the points made by the Commissioner at [34] – [36] of his Written Case in relation to proportionality.

MHB/
111-112

²⁰ See Lachaux v Independent Print Limited [2019] UKSC 27, [2020] AC 612 per Lord Sumption at [8] and [9].

²¹ Lachaux at [12].

MHB/1065,
1074
1076

137. As a matter of principle, the right to compensation under Article 82 should only be eroded by virtue of a competing interest and the need for proportionality “*insofar as is strictly necessary*”: see Zaw Lin, Wai Phyo v Commissioner of Police for the Metropolis [2015] EWHC 2484 (QB) per Green J (as he then was) at [78] – [80] and the decision of CJEU in IPI v Engelbert (Case 473/12) [2014] 2 CMLR 9 which he cites. It is not necessary to impose a threshold.
138. It is of the nature of data breaches that they will not-infrequently give rise to a potentially significant number of relatively small scale harms. As the ORG points out at [21] – [22] of their Written Case, this was recognised and contemplated in the GDPR and UK GDPR. There is nothing disproportionate about bringing a claim for a relatively small sum in damages, or being entitled to bring a claim for relatively modest damage / harm. It would run wholly counter to the objectives of the GDPR if data controllers faced no effective sanction for causing large scale modest losses.

MHB/1597,
1622-1623

I. COMMONWEALTH AUTHORITY

139. The Appellant relies at paragraphs 77 – 82 of its Written Case on five Commonwealth authorities.
140. In the Singapore case of Reed v Bellingham [2022] SGCA 60, the plaintiff brought a claim under the Personal Data Protection Act 2012 (“**PDP 2012**”), section 32(1) of which gave a private right of action to any person who suffers “*loss or damage*” as a result of a breach.
141. The primary question was how section 32 should be construed and in particular whether it encompassed claims for loss of control and emotional harm. The Court of Appeal noted at [24] that the Judge in the lower court had stressed that:

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“...while Canada, New Zealand, Hong Kong and the United Kingdom (“UK”) allow private persons to sue for emotional distress, the relevant legislative provisions in these jurisdictions contain “express references to some form of emotional harm”. Cases in

the UK had also interpreted the relevant European Union (“EU”) statute to include compensation for distress.”

MHB/2036

142. It was against that background that the Court of Appeal decided that emotional harm was actionable, and in the face of an argument about the floodgates opening to allow a multitude of claims stated at [93] that “*trivial annoyance or negative emotions which form the vicissitudes of life will not be actionable*”.

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143. However, the PDP 2012 is a different statute with different wording from the GDPR. It does not have the same recitals. It does not describe either the right to the protection of personal data as a fundamental right, nor provisions as to any compensation being “*full and effective*”. Further, Singapore is not a signatory to Treaty 108 so has not based its data protection legislation on the “*fundamental*” protection of individuals. When construing section 32 of the PDP 2012, the Court had regard to its understanding of the intention of the Parliament of Singapore in passing the Act, making reference to Parliamentary debates²². In summary therefore, the decision involved the interpretation of a Singapore statute with reference to the intention of the Parliament of Singapore in enacting that statute.

144. In KW v Accor Management Canada Inc 2023 BCSC 1149, the Supreme Court of British Columbia refused to certify a class action stemming from an imposter’s unauthorised access to a database alleged to contain private health information. There were six causes of action relied upon, including one under the Canadian privacy legislation²³. They are dealt with separately by the court in its judgment. The Appellant relies on a passage at [60] to [62]. That passage is under the heading “*negligence*” and is concerned only with the seriousness of emotional or psychological injury that needs to be established in a claim in negligence.

MHB/1994

MHB/
2011-2012

145. It is hardly surprising that in the context of a claim in negligence the court required harm to reach an appropriate level to represent actionable personal injury. It is for this precise reason that the courts in the United Kingdom have determined that “*severe*

²² See for example [87].

²³ The 6 causes of action are set out at [36]. [35]

MHB/2051-2052
MHB/2005

shock and shaking up”,²⁴ an “*emotional reaction*”,²⁵ fright,²⁶ fear²⁷ and similar emotional states do not amount to actionable personal injury. This is a threshold below which a claim for *personal injury* cannot succeed. The case does not address whether there is a threshold of seriousness under the relevant Canadian privacy legislation, and provides no assistance at all as to whether such a threshold exists under the GDPR.

146. The other three authorities relied upon by the Appellant, Setoguchi v Uber BV 2023 ABCA 45, Bourbonnière v Yahoo! Inc 2019 QCCS 2624 and Royer v Capital One Bank 2023 QCCS 2993 are also all claims brought in negligence. They are of no assistance.

J. THE APPELLANT’S PROPOSED THRESHOLD

147. The Appellant has not identified exactly what threshold should apply, and how it would operate in practice. For example, does the Appellant suggest that a threshold should be as to duration of symptoms, as to seriousness of symptoms (even if short lived), as to whether the symptoms should be medically significant, or some vaguer test? This remains uncertain.
148. It is assumed that the Appellant submits that the threshold should only apply to non-material damage but not material damage. On that basis a claimant would be entitled to bring a claim for a financial loss of £5, but would not be entitled to bring a claim for non-material damage unless it crossed some (ill-defined) threshold. Assume for a moment that a judge concludes that a claimant has suffered modest non-material damage that would, if no threshold applies, merit compensation of £50. Does that cross the Appellant’s proposed threshold of seriousness? If not, what is the logic behind permitting a claim for £5 in material damage but not £50 in non-material damage?

²⁴ Nicholls v Rushton (1992) Times 19 June 1992, CA

²⁵ Simpson v ICI Ltd 1983 SLT 601 Ct of Sess.

²⁶ Behrens v Bertram Mills Circus Ltd [1957] 2 QB 1

²⁷ Kimanthi v Foreign and Commonwealth Office [2018] EWHC 1305 (QB)

149. At paragraph 106 of its Written Case, the Appellant argues that the Court of Appeal's decision has:

“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.”

150. The reference to an “early stage seriousness analysis” appears to be an analysis of the seriousness of the breach rather than an analysis of the seriousness of the damage caused. Further, the Appellant appears to be wishing to devise tests to determine whether a breach has the tendency or propensity to cause recoverable damage and/or to determine “particular scenarios” which do not give rise to recoverable damage, but which do not involve having to assess or examine the claimant's evidence as to the impact of the breach. The Appellant does not articulate what the tests should be, or how one decides what scenarios could not give rise to recoverable damage. In any event, this is wrong in principle.

151. The Respondents accept that in order to prove an entitlement to compensation a claimant needs to prove he or she has suffered damage caused by an infringement. In practice that will mean persuading a judge that they have suffered damage that justifies at least some compensation, albeit that compensation may be modest.

152. Plainly it would be possible to have a serious breach that could be anticipated to have a serious impact, but which does not in fact cause any damage. But the opposite is also possible. In other words, a breach that would not be expected to cause serious or any damage, but in fact does cause significant damage, for example because of the claimant's individual circumstances or vulnerabilities. Critically therefore, any

assessment of damage requires an assessment of the claimant's evidence and the impact of the infringement on that particular claimant.

153. To impose any antecedent formal or defined threshold – for example to duration of symptoms, severity of symptoms or type of symptoms, or alternatively as to the type of breach that could give rise to recoverable damage - would be wrong, as it would risk excluding a claimant who had in fact suffered significant damage.
154. It appears that the Appellant wishes an outcome whereby there is a defined threshold of seriousness (not articulated by the Appellant) which will mean future defendants facing mass data breach claims can attempt to filter out at the pre-action stage or by way of a summary determination those claims that do not meet the bar. However, that is a recipe for prolonged interlocutory battles of the type that have, as a result of the Appellant's approach, bedevilled this case at great cost. If a defendant thinks a claim is exaggerated or unmeritorious it can be tested on the evidence. In the case of a collective action, that can be achieved at proportionate cost by a trial of exemplar test or lead claims, with the defendant being given an opportunity to select test cases that best exemplify its case that they have suffered no or only trivial loss. The prospect of prolonged interlocutory battles disincentivises claimants from bringing claims and does not promote access to justice. Further, such battles are not proportionate in terms of cost and the unnecessary use of the court's resources.
155. The question of the *effect* of any breach should be considered by the court not in the sense of the imposition of a threshold, but by way of an evidential analysis as to whether the claimant has in fact suffered damage.

K. POLICY AND CASE MANAGEMENT CONSIDERATIONS

156. The Appellant argues (Grounds, paragraph 21) that a threshold is required so as to redress a “*significant and unfair imbalance between data subjects on the one hand and data controllers on the other, who now face the onerous burden of having to defend huge numbers of trivial claims over accidental, one-off breaches*”.

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157. If there was such an imbalance that would be a matter for Parliament to assess and to legislate for, if it considered necessary. However, the legislator has chosen to give a right to compensation with no threshold, and to impose such a threshold would undermine the policy objectives of the GDPR and UK GDPR.
158. But in any event, there is no such “*significant and unfair imbalance*”.
159. First, the Appellant points to no evidence that data controllers are “*having to defend huge numbers of trivial claims*”. Nor does it point to any evidence that such claims are giving rise to an “*onerous burden*”.
160. To the extent that the Appellant seeks to argue that the Respondents’ claims are trivial or arise from an accidental one-off breach, that is firmly denied. That will be a matter for evidence in due course. It certainly cannot be assumed.
161. Second, the courts already have power to strike out claims, including group claims, that are an abuse of the court’s process. In the context of group actions, this was noted by Stuart-Smith LJ in A.B. & Ors v John Wyeth & Brother Ltd and Ors [1994] PIQR P109 at p.113:
- “The Court is concerned to see that its proceedings are not used in a way that is oppressive and vexatious to the other party or which involves serious injustice to him. If the court is satisfied that the proceedings do have that effect, it has power to strike out on the grounds that they are vexatious and an abuse of process.”*
162. Third, even if the claims are individually modest, that is not a reason for preventing the claimants from bringing claims to recover modest damages. No doubt defendants would prefer not to have claims brought against them for small amounts. However, that does not make the claims improper nor does it mean that an unfair burden is being placed on the defendant.

MHB/896

MHB/900

L. CONCLUSION

163. In conclusion the Respondents submit that the Court should dismiss the appeal and find there is no threshold of seriousness as:

- (1) The imposition of a threshold would be inconsistent with the wording of Article 82.
- (2) A threshold would be inconsistent with the objectives of the GDPR and UK GDPR, including the objectives of: a high level of protection of personal data; a right to compensation for “*any damage*” caused by an infringement; a right to “*full and effective*” compensation for any breach; and the objective of a consistent and homogenous level of protection.
- (3) The Court should follow the settled case law of the CJEU that there is no threshold.
- (4) Applying a threshold would give rise to an inconsistent interpretation of an international legal instrument as between the UK and the EU, which would undermine legal certainty, pose a risk to the UK’s ‘adequacy status’, and was not Parliament’s intention.
- (5) There is no policy need for a threshold. A claimant is required to prove damage in order to have an entitlement to compensation. There are other controls over abusive or unmeritorious claims.

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28 August 2026