Neutral Citation Number: [2026] EWHC 2228 (Ch)

Case No: IL-2019-000011

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY (ChD)

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 26 August 2026

Before:

MR JUSTICE MARCUS SMITH

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Between:

(1) MONTRES BREGUET S.A. **Claimants**
(2) BLANCPAIN S.A.
(3) MONTRES JAQUET DROZ S.A.
(4) OMEGA S.A.
(5) COMPAGNIE DES MONTRES LONGINES, FRANCILLON S.A.
(6) TISSOT S.A.
(7) MIDO S.A.
(8) HAMILTON INTERNATIONAL S.A.
(9) SWATCH S.A.
(10) GLASHÜTTER UHRENBETRIEB GmbH

-and-

(1) SAMSUNG ELECTRONICS CO LTD **Defendants**
(2) SAMSUNG ELECTRONICS (UK) LIMITED

Heard on 19, 22, 23 and 26 June 2026

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Daniel Selmi and **Dheemanth Vangimalla** (instructed by **Stephenson Harwood LLP**) for the **Claimants**
Daniel Alexander, KC and **Ashton Chantrielle** (instructed by **White & Case LLP** and **Bristows LLP**) for the **Defendants**

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Approved Judgment

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This judgment was handed down remotely at 10.30am on Wednesday 26 August 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE MARCUS SMITH:

INTRODUCTION

1. Over the course of four days in June 2026, I heard what the Claimants described as "the largest-ever trade mark inquiry before the UK Courts". For their part, the Defendants did not describe the dispute in this way, and would not have agreed with it in any event. Had they assayed a description, it might well have been "one of the smallest and most-trivial trade mark inquiries to have troubled the UK Courts".

2. The Claimants claimed "negotiation damages" for various trade mark infringements found by Falk J consequent upon a trial (the **Liability Trial**[1]) that took place some years ago and resulted in a judgment (the **Liability Judgment**) in 2022. The Claimants' expert (Mr Thayne Forbes of Intangible Business Ltd, **Mr Forbes**) put these damages at c. US$170 million. By contrast, the Defendant's expert (Mr Mark Bezant of FTI Consulting LLP, **Mr Bezant**) put damages for the same infringements at US$301.00.

3. It is a measure of the difficulty and interest of this claim that there is more or less equal force (or, perhaps better, lack of force) in both of these extremes. This Judgment, accordingly, must pick its way between these extremes and find a single figure that represents the correct assessment of damage, rationally and not arbitrarily calculated, basing itself on the evidence and not on extraneous factors.

4. The starting point is the findings made in the Liability Judgment.

THE LIABILITY JUDGMENT

The relevant judgments

5. Liability in this dispute between the Claimants and the Defendant[2] was determined in the Liability Judgment dated 20 May 2022 under Neutral Citation Number [2022] EWHC 1127 (Ch), affirmed on appeal by the Court of Appeal in a decision dated 15 December 2023 under Neutral Citation Number [2023] EWCA Civ 1478 (the **Appeal Judgment**, Lewison, Arnold and Elisabeth Laing LJJ).[3]

Findings of fact

6. Although the Court received some factual evidence at what I will refer to as the **Quantum Trial** before me, I cannot make findings that are inconsistent with those made at the liability stage. There were times during the Quantum Trial when the Court was being encouraged down this impermissible route. It is

[1] Annex 1 lists the terms and abbreviations used in the Judgment, together with the paragraph number where the term/abbreviation is first used.
[2] The Second Defendant, Samsung Electronics (UK) Ltd did not participate in the proceedings before me and nothing in this Judgment is to be taken as referring to the Second Defendant. See [3] of the Liability Judgment.
[3] There is a further, short, judgment of Falk J dealing with injunctive relief ([2022] EWHC 1895 (Ch)), which is immaterial for present purposes.

accordingly necessary to set out the factual findings already made in some detail.

7. In the following sub-paragraphs, and save where the contrary is stated, all references are to the Liability Judgment:

i) The Claimants are all members of the Swatch group of watch makers (**Swatch** and the **Swatch Group**): [2]. Save for the Tenth Claimant (Glashütter Uhrenbetrieb GmbH), which is incorporated in Germany, all of the Claimants and so all of the Swatch Group are incorporated and based in Switzerland: [2].

ii) Each of the Swatch Group has a distinct brand and associated trade marks, ranging from Swatch in the "basic range" (with prices below CHF 200), Tissot, Mido and Hamilton in the "middle range" (between CHF 300 to 1,000), Longines in the "high range" (CHF 1,000 to 5,000), Omega in the "luxury range" (CHF 3,000 to 10,000) and Breguet, Blancpain, Glashütte Original and Jaquet Droz in the most exclusive "prestige range", with some prices of those watches running into hundreds of thousands of Swiss francs or even more. Members of the Swatch Group also own other brands, namely Harry Winston, Union, Rado, Certina, Balmain and Flik Flak: [2].

iii) The First Defendant, Samsung Electronics Co Ltd (**Samsung**) is incorporated in South Korea and is the parent entity of this well-known technology group: [3].

iv) Between October 2015 and February 2019, a number of the Swatch Group's trade marks were infringed by multiple watch face "applications" or "apps" being made available in the Samsung Galaxy App store (the **SGA store**): [1], [4]. I shall refer to applications generally as **Apps** and, within this broad class, to **Watch Face Apps** as Apps which essentially do no more than replicate, on the LCD face of the smartwatch, a simulacrum of the face of a physical wristwatch.[4]

v) Within the class of Watch Face Apps, I shall refer to the Apps found to infringe the Swatch Group's trade marks as the **Infringing Watch Face Apps**. The Infringing Watch Face Apps were downloaded around 160,000 times in the UK and EU. In his expert report for the purposes of the Quantum Trial dated 6 March 2026 (**Bezant 1**), Mr Bezant set out the downloads of Infringing Watch Face Apps in a table:[5]

[4] This is a definition suited to the facts and matters of this case: doubtless, many Watch Face Apps were entirely original and may have borne little or no similarity to the face of a physical watch.
[5] Table 2-1 in Bezant 1. Although the significance of these figures was disputed, the figures themselves were common ground.

Brand	App No[6]	Dates on SGA store	Duration (months)	Downloads			
				Paid	Free	Total	Revenue (US$)
Prestige							
Breguet	3	10/11/17 to 26/12/18	14	21	0	21	21.02
Blancpain	13	8/12/17 to 11/1/19	13	25	0	25	32.13
Glashütte	1	30/11/17 to 29/3/18	4	151	0	151	363.48
	12	28/4/17 to 28/2/19	22	25	0	25	26.26
Jaquet Droz	2	15/10/18 to 26/12/18	2	0	0	0	0
	6	2/8/16 to 26/12/18	29	5	49	54	4.87
Total				227	49	276	444.76
Luxury							
Omega	16	5/3/17 to 27/12/18	21	58	0	58	115.90
	18	10/7/17 to 28/2/19	20	1	0	1	0.99
	20	22/8/18 to 15/2/19	6	40	0	40	72.61
	21	29/8/18 to 15/2/19	6	21	1	22	37.70
	22	13/9/18 to 15/2/19	5	48	0	48	85.97
	30	26/10/18 to 27/12/18	2	3	0	3	2.94
Total				171	1	172	316.11
High							
Longines	17	23/3/18 to 27/12/18	9	8	0	8	13.10
Middle							
Tissot	7	9/6/16 to 26/12/18	31	0	67,444	67,444	0
	8	25/1/18 to 27/12/18	11	0	75,175	75,175	0

[6] The app number derives from the numerical code allocated in the Liability Judgment at Appendix 2 (footnote 14).

	15	14/3/18 to 26/12/18	9	20	0	20	32.21
	26	23/10/18 to 27/12/18	2	96	0	96	93.98
	27	26/10/18 to 24/1/19	3	9	0	9	8.91
	28	23/10/18 to 24/1/19	3	9	0	9	8.85
Mido	29	1/12/17 to 27/12/18	13	25	0	25	24.80
Hamilton	14	9/11/16	26	4	12,565	12,569	2.27
Total				163	155,184	155,347	171.02
Basic							
Swatch	4	14/11/18 to 28/12/18	1	0	0	0	0
	5	23/3/18 to 26/12/18	9	31	0	31	35.74
	9	19/9/17 to 26/12/18	15	17	0	17	19.04
	10	11/10/18 to 26/12/18	3	0	1,147	1,147	0
	11	15/10/15 to 26/12/18	38	0	375	375	0
Total				48	1,522	1,570	54.78

Table 1: Data regarding the downloads of Infringing Watch Face Apps

vi) The Apps that were downloaded from the SGA store were generally developed by third parties and not by Samsung. These third parties are referred to as **App Developers**: [4].

vii) The watches made by the Swatch Group were all branded.[7] The conventional location of a trade mark on a watch, whether in word or figurative form or both, is generally the centre of the upper portion of the dial. **Dial Branding** refers to the appearance of the mark or sign on the watch face: [6].

viii) The infringing apps were made available in the SGA store at various times between October 2015 and February 2019. A number were available for free; others required a modest payment: [36]. The total number of downloads was 157,373, of which 617 were paid downloads

[7] Appendix 1 to the Liability Judgment sets out the various trade marks in issue.

and 156,756 "free".[8] The paid downloads generated a total revenue of US$1,002.77: [36]. The specific sums generated (to the extent they matter) are set out in Table 1.

ix) The Swatch Group began monitoring the SGA store in December 2018, when it became aware that potentially infringing Apps were available on it. Swatch first made contact with Samsung[9] in December 2018, demanding that infringing Apps be taken down, and by 9 January 2019, all of the Apps identified by Swatch had been taken down: [37].

x) A **Smartwatch** is a wearable electronic device with a digital interface that provides operational controls through software apps. Smartwatches tell users the time but also come with a number of additional features not provided for by traditional watches, such as the ability to make calls, listen to music, read messages or emails, make payments and track health and activity levels. Smartwatches are more like a "wearable computer" than a "traditional watch". Smartwatches are purchased predominantly for their ability to do things other than display the time: [39].

xi) The face of a Smartwatch consists of a digital display which, unless an "always on" feature is enabled, is switched on when prompted, whether by motion or by tapping the screen. When switched on, the default screen is a watch face which tells the time, although features such as incoming calls may be displayed instead. If an "always on" feature is available and enabled then a watch face will be displayed continually, although to preserve battery life and avoid screen damage the version of the watch face shown will generally be a simpler version as compared to the one displayed while the Smartwatch is in active use, using around 15% of the number of pixels. If that feature is not enabled, the watch face will change to a blank screen after a set number of seconds, the default being 15 seconds:[10] [40].

xii) Samsung Smartwatches (during the relevant period[11]) allowed significant flexibility for the user to configure the software on their Smartwatch as they chose, including by accessing the SGA store to download apps: [41]. A Samsung Smartwatch did not connect directly to the internet. Instead, it relied on a wireless connection to a smartphone (not necessarily a Samsung smartphone) with which it was linked. In order to create the connection, the user would have to download the "Samsung Wear" App to their smartphone: [42]. Samsung first launched

[8] "Free" means that the downloader did not pay for that specific download. But there is no such thing as a free lunch, and there will have been a price paid somewhere in the ecosystem of which the SGA store was a part.

[9] In fact, Samsung's Swiss subsidiary, but nothing turns on this.

[10] For the purposes of *infringement*, the duration of the display of the watch face was held to be irrelevant.

[11] This description focuses on the period of infringement, as (obviously) did the Liability Judgment. Post-infringement, things have moved on, but this is immaterial. This Judgment will not further qualify statements of fact by reference to the "relevant" or "infringing" period, but will take this qualification as read.

a Smartwatch in 2013. From 2018, Samsung's Smartwatch models were called the "Galaxy Watch". Models launched before then were called the "Samsung Gear" or "Galaxy Gear": [43]. Since 2015, Smartwatches produced by Samsung have been round in shape, like a traditional watch, with a bezel (the surround of a watch face that holds, or appears to hold, it in place) that also has the appearance of that for a watch. Samsung Smartwatches are held on to the wrist by a strap, again like a traditional watch: [44]. Samsung's Smartwatches were specifically marketed by Samsung for their watch-like qualities: [45]. These qualities could be individualised through the selection, by the user, of one of the pre-loaded watch styles or by downloading a watch style from the SGA store: [45]. In January 2020, there were about 96,000 Watch Face Apps available from the SGA store. Around 88% of the Apps available (ie, about 84,500 in number) were Watch Face Apps: [45] at footnote 3. The watch-like properties of Samsung Smartwatches were further enhanced by the "always-on" functionality: [45]. (I should note that there is an ambiguity in the 96,000 figure used in the Liability Judgment as to whether it refers to Apps or Watch Face Apps. I read it in the latter way. The relevance of the point is in relation to the review of Apps by Samsung. Here, I have taken the separate assessment set out in the Liability Judgment, which does not rely on this figure. I therefore do not propose to resolve this ambiguity, but I note it for the record.)

xiii) Samsung's business model involves producing and marketing the hardware (here: Smartwatches) pre-installed with a comparatively small number of Apps designed by Samsung to enable the hardware to function. This included around 20 watch faces that the user could choose from: [46]. The majority of Apps for use on a Samsung Smartwatch were, however, developed and provided by App Developers.[12] However, only 26% of UK Samsung Smartwatch users made active use of the SGA store, downloading an average of 4.6 Watch Face Apps each: [46]. As Table 1 shows, most of these Apps were free. If popular they might become paid for: [46]. Samsung Smartwatches were generally in use for a relatively short period of time. The average replacement cycle for a Samsung Smartwatch Dunn that in the UK was about 27 months: [47].

xiv) The SGA store was established and managed by Samsung specifically for Samsung devices. It was an online platform through which both Samsung and App Developers could make Apps available to users of Samsung products, including but not limited to Samsung Smartwatches: [48]. The SGA store comprised both "back-end" and "front-end" servers. The back-end comprised a developer portal where App Developers could upload Apps and an administration site where Samsung reviewed Apps before they were made available. The front-end was the part that was available to and accessible by consumers: [49]. The back-end portal offered App Developers the "Galaxy Watch Studio tool" which provided user-friendly instructions on how to create Samsung Smartwatch Apps: [50]. Once an App had been designed and

[12] Thus, 0.024% of watch face apps were provided by Samsung. The vast majority were provided by app developers. (20 Samsung apps / 84,500 app developer apps x 100 = 0.02367%).

uploaded to the SGA store, it was automatically submitted to Samsung's App review process, which had to be passed before the App was made available to consumers via the front-end server: [51]. In order to access the SGA store, users had to set up an SGA store account with Samsung, which involved providing a name, email address, country of residence and phone number, plus optional payment details. Watch Face Apps (and doubtless other Apps, but it is Watch Face Apps that we are interested in) available in the SGA store could only be viewed or downloaded by users with a Samsung Smartwatch connected to a smartphone. Once connected, Watch Face Apps could be viewed and downloaded to the Smartwatch by using either the phone or the Smartwatch: [52].

xv) The SGA store had a search function, although not a very efficient one in terms of enabling Swatch to identify infringing Apps. The search function was geared more towards users (which is not surprising, given that they were the consumers of the Watch Face Apps): [53] – [54].

xvi) App Developers wishing to upload an App to the SGA store needed to open an account with Samsung and submit the App to Samsung for evaluation, without any obligation on Samsung actually to make the App available on the SGA store. Samsung retained sole discretion as to how the App was made available (if at all), made decisions regarding placement and promotion of the App, and retained the right to remove the App "for any reason". An example of a reason for removal was infringement of intellectual property rights, and it was on this basis that the Infringing Watch Face Apps in this case were removed in January 2019. There was provision for revenue sharing between Samsung and App Developers, with Samsung being entitled to 30% of revenue raised.[13] Samsung had the right to licence the use of the App to users. App Developers warranted (amongst other things) that their original work did not violate any Samsung or third-party intellectual property rights. The App Developer was precluded from using any trade mark in any way that was likely or intended to cause confusion about the owner or authorised user. Samsung had the right to terminate the agreement with the App Developer in the case of repetitive infringers of intellectual property laws: [57].

xvii) Every third party App uploaded to the SGA Store was subject to both a technical and a content review by Samsung. The technical review was limited to checks for viruses and to ensure the App's functionality and compatibility with Samsung's operating system: [58]. The content review was conducted by a team described in the following terms at [59] of the Liability Judgment:

> Mr Le's team comprises around 14 individuals, all of whom are local Vietnamese and were generally recruited as new graduates. Most of the team, including Mr Le, are software engineers by background. My impression is that none of them have international or European market experience, and that while all have some level of English they are not fluent English speakers. Mr Le

[13] 20% in the case of a "Galaxy Apps Partner".

accepted that they would have had little knowledge of luxury brands when they were recruited. Mr Le's own knowledge of famous watch brands at the time appears to have been limited to what he had picked up from sports-related advertising.

Mr Le's team was overworked ("under-resourced both in numerical and skill terms" *pace* the Liability Judgment): between January 2018 and March 2019 each member of Mr Le's team reviewed on average 85 Apps per day, working a 44-hour week, a rate of about six minutes per App: [60]. The review was based on metadata, App names, tags, descriptions and screenshots provided by the App developer. The Apps as they would appear on a device would not ordinarily be reviewed. There was an ability to escalate borderline cases, but that was a process that was rarely used: [61]. The review process was informed by a "content review guide": [60], [66]ff. Once an App had passed the review process, it would go live on the SGA store within about 2 hours, unless the App Developer opted for later distribution. The App Developer determined the price of the App (within permitted parameters) or determined that the App was to be available for free: [62].

xviii) The SGA store operated a "notice and take down" process, whereby anyone could notify Samsung that a particular App infringed intellectual property rights. Samsung would investigate, suspending downloads of the App whilst doing so and would, when appropriate, remove the App from the SGA store: [70].

xix) Turning to the user of a Samsung Smartwatch, Smartwatch users were first introduced to the SGA store during the set-up phase of the Smartwatch, with a "welcome" screen. By clicking on the icon, the user was taken to a screen entitled "Legal information", containing terms and conditions which the user had to accept in order to proceed, commencing with the words "All content made available to you by the Samsung Galaxy Store is subject to the terms and conditions set forth below": [71]. Once accepted, the user was presented with a range of icons on the watch face, one of which was the SGA store. On accessing the SGA store different options were presented, one of which was "Watch Faces". Within this, users could scroll between different Watch Face Apps, or make searches. During this process, they would see the name of the App, a rating, a small icon previewing its design and an "install" button allowing for installation directly from that screen. No information regarding the App Developer was provided, save on installation, and no distinction was drawn between Samsung Apps and App Developer Apps until installation: [72]. Users could also search for Apps from their Smartphone, in which case more detail was provided: [73].

Holdings of infringement

8. It is unnecessary to set out the consideration in the Liability Judgment of how and why Samsung was found to infringe the trade marks of the Swatch Group. It is sufficient to identify the infringements found, which fall into three groups:

i) *Case 1.* This is where the Liability Judgment found that the infringement related to the relevant sign on the watch face *only*. This was the case with Apps 1, 4, 12, 15, 16, 18, 20 – 22 and 26-28 (using the numbering scheme in the Liability Judgment). I shall refer to these infringements as **Dial Branding Infringements**. Dial Branding Infringements are serious not only because the user of the Smartwatch will perceive a link between the Smartwatch and the Swatch Group brands, but so too will third persons who see the Smartwatch on the user's wrist. However, the extent of this perception will depend on the volume of downloads of Infringing Watch Face Apps, which in this case was about 160,000 downloads.

ii) *Case 2.* This is where the Liability Judgment found that the infringement related to the use of the sign in an app name only on the SGA Store. This was the case with Apps 11, 13, 17, 29 and 30. Here the only class of user who would perceive the linkage between the Swatch Group brands and Samsung would be those users accessing the SGA store. Third party perception would be limited, but the link between Samsung and the Swatch Group brands would be evident to all users of the SGA store searching for Watch Face Apps, even if such a user did not ultimately download the Infringing Watch Face App. The display of the Infringing Watch Face App was analogised to the display of a product on a supermarket shelf. The product is displayed whether or not there is a purchase. I find that a helpful analogy, provided it is not pressed too far. I shall refer to these infringements as **Store Display Infringements**.

iii) *Case 3.* This is where the Liability Judgment found that the infringement related to an infringing sign (a) in an app name and (b) on the watch face. In other words, these infringements combined both Dial Branding Infringements and Store Display Infringements. I shall refer to these infringements as **Double-Barrelled Infringements**.

9. The Swatch Group's written closing submissions provided a marked-up Annex 2 of the Judgment, differentiating between these three cases and providing visual representations of both the Swatch Group trade marks and the manner in which they were infringed. It is unnecessary to set out this detail in this Judgment.

10. It is, however, necessary to identify two important – if obvious – ways in which Samsung infringed the Swatch Group's trade marks. Dial Branding Infringements (Case 1) exist where the infringement is by way of an infringing sign on the watch face itself. In such a case, the infringement will occur where a user downloads a watch app. The extent of Case 1 infringements is thus directly related to the volume of downloads. Store Display Infringements (Case 2), by contrast, involve an infringement whether there is a download or not, because the infringement occurs by "advertising" or "promoting" the App on the SGA store. Double-Barrelled Infringements (Case 3) involve both Case 1 and Case 2 infringements.

Findings as to use

11. During the course of the Liability Trial, there was argument as to whether Samsung's infringing acts constituted "use" of a trade mark at all.[14] It is helpful to set out why the Liability Judgment concluded that there was use in these infringing cases. These findings – necessary to establish liability – are also of assistance (and binding on me) in the context of quantification of loss. It is necessary to set them out at some length:

> **[95]** I have reached the conclusion that Samsung did use the signs in the course of its trade…I should emphasise that, in reaching that conclusion, I have taken all the evidence relevant to this issue into account. Many of the features referred to below (including but not limited to assistance designed to make it easier for app developers to create apps, and providing an environment under which apps could be uploaded, stored and downloaded by customers) would not, or would be unlikely to, amount to use if taken in isolation. But that would not be the right approach. Instead, it must be correct to consider Samsung's conduct as a whole.
>
> **[96]** An initial, and overarching, point relates to the Samsung smartwatches themselves and the way in which they are marketed, as "truly watch-like", and also by reference to the wide variety of watch face apps available in the SGA store…
>
> **[97]** Samsung therefore specifically advertises the availability of a wide range of watch face apps in the SGA store. It clearly regards that as a feature worth promoting, with a view to making its products more attractive. It has made a commercial choice to design only a limited number of watch face apps itself, and instead to allow and indeed encourage app developers to develop the vast majority.
>
> **[98]** Mr Lee's unchallenged witness evidence also showed that there are additional reasons why it is in Samsung's commercial interests to host third-party apps, and in particular free apps (even though by definition such apps raise no revenue directly either for the developer or for Samsung). As I understood his evidence, Samsung regards it as desirable that free apps are developed and made available that can allow or highlight the use of functions or interfaces that are unique to Samsung devices, and in particular new models of them. In return, app developers can benefit from increased sales of paid-for apps (because the SGA store is configured to enable users to see other apps from the same developer) and promotional opportunities provided by Samsung.
>
> **[99]** I accept this evidence, which to my mind clearly indicates a symbiotic relationship between app developers and Samsung, going well beyond revenue derived from the sale of apps and benefitting both parties. The revenue raised is comparatively trivial and is clearly not a material motivating factor for Samsung.
>
> **[100]** No doubt reflecting its commercial interest, Samsung provides material assistance to developers of watch face apps, in the form of the Galaxy Watch Studio tool. That user-friendly tool was used to create all but one of the apps in dispute (the exception having been developed using an open source platform). Further, Samsung hosts developer conferences to inspire and showcase the capabilities of apps built on Samsung devices, with presentations available online so that app developers who did not attend in person can view them. Samsung enters into licensing arrangements with

[14] Liability Judgment at [92] – [93] (Samsung's submissions) and [94] (Swatch's submissions).

all app developers before they are permitted to use any of its development material or upload apps to the SGA store…

[101] It is also relevant that that the SGA store is a store that Samsung operates that is dedicated to apps for Samsung products, and that it reviews all apps for both functionality and content before they are made available in the SGA store. Although customers may be able to download watch faces for Samsung smartwatches from other sites, I find that the average consumer would understand that, unlike watch face apps in the SGA store, watch face apps available from other sites are not "official" and would not be understood to carry any assurance from Samsung that they would work satisfactorily on its products. In contrast, apps available in the SGA store would be understood by the average consumer to be made available by Samsung through its own store, and indeed to carry an implicit assurance that Samsung is satisfied with them and ought to provide assistance in the event that they prove problematic. Indeed, Samsung has specifically marketed its smartwatches by reference to the availability of watch face apps in its store.

[102] Further, in contrast to apps that obviously relate to goods or services provided by a third party and facilitate their provision (the Uber app was the example used at trial, but there are many others), watch face apps do not do so, and do not directly perform any such function. They are also grouped together in the SGA store with watch face apps designed by Samsung. They provide an optional alternative to the Samsung designed watch faces preloaded on the watch.

[103] The function of watch face apps is not to provide third party goods or services, but to adorn the smartwatch, tell the time and allow interaction with other functions. When in use the watch face app is the starting point for user interaction with the smartwatch. It is the interface that provides the "default" screen, but it is clearly not a simple wallpaper or background: it has an active role. Put another way, it can be perceived as a key part of both the cosmetic design and working mechanism of the smartwatch itself, rather than simply as an app that can conveniently be accessed though the watch.

[104] Further, the apps in question were designed exclusively for, and operated only on, Samsung smartwatches.

[105] Whilst the average consumer would understand that, say, the Uber app was provided by a third party and not by Samsung (not least because the app name will proclaim that, and it would also be understood that the Uber app is available on multiple devices), that is much less clear in respect of watch face apps that are quite obviously designed to fit on, and function as a key part of, a Samsung smartwatch, and where the apps are grouped in the SGA store with watch face apps designed by Samsung.

[106] Another aspect of content review is the means it provides to Samsung to ensure that only content that it considers appropriate for use on its products is made available. This is also linked to customer perception. The average consumer is unlikely to blame eBay itself for shoddy goods acquired through its market place. But a poor quality watch face app designed for the Samsung smartwatch and acquired through the SGA store would, in my view, reflect negatively on Samsung in the mind of at least a significant proportion of average consumers. A clear aim of the content review is to limit the risk of that occurring, and rather to ensure that the apps that make it through the review are good quality apps that will enhance, rather than diminish, customers' perceptions of Samsung's products. I note that the CRG specifically refers to the fact that apps should be "valuable, entertaining, unique or informative" (and should otherwise be rejected) and that they should be "designed by considering aesthetic factors".

[107] I also do not accept Samsung's arguments that app downloads were simply procured by customers for their own personal use, such that there was no use in the course of trade. As with the rest of the process, their provision to customers was orchestrated by Samsung…Samsung would also field customer complaints about them and provide a level of customer support. It would also share in any revenue raised…

[108] Similarly, the fact that, once an app had passed Samsung's review, the developer could control when it became available to consumers, and that it did so at a price that was (within limits) of the developer's choosing, is insufficient to alter the conclusion that there was use by Samsung…

Reputation and injury to the Swatch Group

12. The Liability Judgment found that Swatch had provided sufficient evidence to establish a reputation in respect of each of the marks in issue in the relevant location (the EU and in one case the UK only): [171]. The Liability Judgment went on to state (at [171]):

> …A significant amount of evidence was provided under a Civil Evidence Act notice covering, among other things, histories of the brands, brand rankings and market analysis, none of which was challenged by Samsung. Further, both Mr Steiger and Mr Dolla provided evidence of reputation which I accept. Mr Dolla's evidence focussed on Tissot, but Mr Steiger's was more general and encompassed all Swatch brands. Whilst the estimated turnover figures provided in the materials were worldwide rather than for the EU or UK specifically, I am satisfied from the remainder of the evidence…that sufficient evidence was provided to meet the reputation requirement, which as Arnold J remarked is not particularly onerous.

13. At the liability trial, Swatch relied on all recognized forms of injury, that is detriment to the distinctive character of the marks ("blurring"), detriment to the repute of the marks ("tarnishing") and unfair advantage being taken of the distinctive character or repute of the marks ("free riding").

EVIDENCE AT THE QUANTUM TRIAL

14. At the Quantum Trial, I received evidence from Ms Carole Aubert (who was not required for cross-examination, and whose evidence I accept) and Mr Sylvain Dolla on behalf of the Swatch Group; and from Ms Annika Bizon and Mr Nicholas Porter on behalf of Samsung.

15. Additionally, I heard from the two experts, Mr Forbes (for the Swatch Group) and Mr Bezant (for Samsung).

16. The Swatch Group's evidence emphasised the importance of branding to the Swatch Group and the value of the specific brands infringed by Samsung. This was not seriously contested by Samsung, the thrust of whose cross-examination centred on the extent to which the infringements found actually damaged the Swatch Group's brands. There was little or no evidence of any *damage* to the Swatch Group's brand, partly because damage to brands is extremely difficult to establish and partly because the Swatch Group had (rightly in my judgement)

taken the view that when assessing negotiating damages, a Court will primarily be concerned to assess the *value* of the infringed rights and not the extent to which any infringement has caused *damage* to the claimant.

17. I make the following findings in relation to the Swatch Group's brands. First, these were brands that had been carefully curated and promoted by the Swatch Group over decades, and formed a critical part of their business. Secondly, the value of a brand increases (or decreases) imperceptibly over time. Even a well-known brand like Coca Cola will have had small beginnings, and even once well-known brands (Atari or Commodore or Blockbusters) can fade. Thirdly, the Swatch Group did not license out its brands to entities outside the Swatch Group. To use the language of willing buyers and sellers, which constitutes one of the tests used in the assessment of negotiating damages, Swatch was, in the most extreme sense, an *unwilling* seller. Fourthly, brands can be extremely valuable. Mr Forbes, in the course of his cross-examination, made the point as follows:[15]

> Another way you can look at it is by looking at the impact of the brand for these types of brand [ie, watches], the cost of the hardware is irrelevant. To Samsung it is more relevant because their brand is more product-based, features-based. It is a good brand. I did give the example in my report of Tudor and Rolex. If Rolex is the king of the Swiss watch brand in terms of market value, I know from my experience that if you want a Rolex and you cannot afford for the name, you can essentially buy a Rolex watch but it is branded Tudor for half the price. Now, it is not presented like that to the market, but that is the truth behind it.

18. Samsung's witnesses, whilst not directly attacking the value of the Swatch Group's brands, did their very best to suggest that the value of those brands *to Samsung* was minimal. In doing so, they pushed against the findings in the Liability Judgment (by which I am bound) and against what I find to be the case. Thus:

    i) It was suggested that the SGA store was not an important part of Samsung's Smartwatch offering to the market. The basis for this suggestion was that only a minority of purchasers of Samsung Smartwatches actually went to the SGA store. Whilst I do not doubt the figures, the investment made by Samsung into the SGA store and the development of Apps through third party App Developers suggests (and I so find) a longstanding and serious commitment to this feature of Samsung's Smartwatches. It may be that after-the-event, Samsung considered that the SGA store had been a failure. Certainly, Samsung no longer operates its own, standalone, App store. But this sort of after-the-event fact is not particularly relevant to an assessment of negotiating damages.

    ii) It was suggested that Watch Face Apps were not particularly important applications within the universe of Apps offered to Samsung Smartwatch users. I reject that evidence. Given that the Samsung Smartwatches were marketed as *looking like* traditional watches, what filled the blank space within the circumference of the bezel was

[15] Cross-examination of Mr Forbes (Transcript Day 3, pp365-366).

obviously of importance, and there would have been significant interest to users in terms of what was displayed within this space. I consider that Watch Face Apps were an important part of the Samsung Smartwatch product, and that is reflected in the fact that most of the Apps for smartwatches available through the SGA store were Watch Face Apps.

iii) It was repeatedly suggested that the effect on third parties of Dial Branding Infringements would be insignificant. The Samsung witnesses were not qualified to opine on this, and I heard no credible evidence in this regard. I accept that there would not have been the usual effect on third parties of the display of a brand through a shop window (that is the province of the Store Display Infringements in this case), but even so I do not consider that the effect on third parties can be discounted to the extent suggested by Samsung. It seems to me that the ability to display a certain type of watch face on a Samsung watch, was of value to users of Smartwatches in part because of the effect this would have on third parties, and that Samsung would value this functionality accordingly. I do not consider the fact that the display might sometimes be "off" affects the point at all. When the Smartwatch is being used, the display will be visible.

QUANTIFICATION OF LOSS

Approach

19. As noted in paragraph 3, in this case the Court is faced with two calculations of loss produced by experts called by the parties which stand at extremes one to the other.[16] It is incumbent on the Court to determine either which one of these extremes is correct or to provide a reasoned and rational determination lying between these extremes that is based on the evidence before the Court.

20. Assessments of compensation, in English law, do not base themselves on the approach taken in pendulum arbitrations, where the tribunal must choose, on any disputed issue, one party's position over another's, without seeking to establish a middle ground.[17] Under English law, a tribunal acts as fact-finder. The tribunal applies the law to the facts and renders a judgment. The tribunal may not, in rendering judgment, stray outside the evidence adduced by the parties (the "record"). The more extreme the parties' positions, the less satisfactory the record is likely to be, and the harder the tribunal's task.

21. In an exceptional case, a tribunal may require further evidence to be adduced, post-trial. I raised this with the parties before and during the Quantum Trial because of the extremes in the expert evidence. The parties made clear that they

[16] In cases such as this, it may be that for the future a court-appointed expert is to be preferred.

[17] Pendulum arbitration – otherwise known as "final offer arbitration" – is a type of arbitration where the tribunal chooses one of the parties' proposals on a disputed issue. This approach, *provided* it is well-advertised in the rules, encourages settlement or (at worst) a moderation of extreme contentions. Parties who fail to settle or who adopt an extreme position run the risk of a total loss on the issue, because the tribunal adopts completely the position of another party.

considered it to be my primary responsibility to resolve the dispute without extending an already protracted litigation process.

22. In order to render a judgment along these lines, given the expert evidence adduced by the parties, I have found it helpful to locate "negotiation damages" in the wider context of compensatory relief for civil wrongs. That involves consideration of (i) the range of remedies available in civil actions and (ii) the significance of counter-factual analysis. These matters are considered first, before I turn to the law in regard to negotiation damages.

Remedies in civil actions

23. With the exception of exemplary or punitive damages, which are rare and not in issue here, damages for civil wrongs are assessed according to the principle of compensation. The claimant is to be compensated by the defendant.[18]

24. What constitutes compensation – how it is to be defined and measured – varies (i) according as to the cause of action and (ii) within causes of action according to specific factors. The law of obligations is rationally divided into three: contract, tort and restitution. Where damages are claimed consequent upon the establishment of a cause of action, the measure of those damages is very different according to whether the claim is contractual, tortious or restitutionary.

25. A further complexity arises out of the existence of property rights. English law does not recognise a specific remedy for an owner, but rather allows the owner to vindicate their rights through a tortious cause of action. Such torts – the torts of trespass, conversion and misuse of private information – may be called "proprietary torts", to differentiate them from other torts (eg, the torts of negligence or defamation) where property interests are not at stake.

26. Where a claim is contractual, the measure of damages is that sum of money that will put the claimant in as good a position (so far as money can do so) as if the contract had been performed to the minimal contractually compliant standard.[19] This protects the claimant's "expectation interest" – their expectation that the contract will be performed according to its terms, and that if it is not, the secondary remedy of damages will be calculated by reference to this interest. There is a significant policy element in this measure of compensation: it would be perfectly possible to calculate compensatory damages for breach of contract not by reference to the expectation interest, but by reference to the claimant's "reliance interest", where damages are measured by reference to the amount needed to ensure that the claimant is made no worse off than if the contract had

[18] Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed (2019) refers to a "goals-based" scheme of remedies: "The primary functions of the judicial remedies for torts and breach of contract can be expressed as follows: compensation, restitution (sometimes referred to as disgorgement), punishment, compelling performance of positive obligations, preventing a wrong, compelling the undoing of a wrong, declaring rights". Here, *compensation* is the goal; but, as will be seen, the borderline between *compensation* and *restitution* is a fine and difficult one.

[19] Burrows, *op cit*, 38; *Robinson v Harman*, (1848) 1 Exch 850 at 855 per Parke B: "The rule of the common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed".

not been made.[20] In fact, although not often asserted, a claimant seeking damages for breach of contract has an unfettered choice between damages calculated by reference to the expectation interest and damages calculated by reference to the reliance interest.[21]

27. Where a claim is tortious in nature, the compensatory measure is (absent "property" claims, to which reference is made below, where there are other additional measures) calculated by reference to:[22]

> …that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

The interest being protected, or by reference to which damages are being assessed, is neither expectation nor reliance. It may best be expressed as the "It shouldn't have happened" measure, to reflect the fact that torts are wrongs inflicted upon a non-consenting or involuntary claimant. The objective is to set back the clock and to identify an appropriate level of compensation in money terms, even if the damage done is impossible to compensate for in monetary terms.[23]

28. As in contractual cases, there are other measures of compensation available to a claimant. Before the legal map was re-arranged, lawyers spoke of "waiving" the tort and claiming "compensation" by reference to an alternative measure.[24] Birks used the term "restitution for wrongs":[25]

> …in this chapter, the plaintiff puts himself within the other sense of "at the expense of". His *prima facie* title to restitution rests on the statement that the defendant has enriched himself by committing a wrong against him. Having shown that that is so, he still has to establish that the wrong is one for which restitution is available, for it is incorrect to assert that the victim of every acquisitive wrong is entitled to claim the wrongdoer's gains.

29. Restitution for wrongs provides a restitutionary remedy where the cause of action is tortious or (sometimes) contractual. The cause of action does not lie in restitution. As Burrows puts it:[26]

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[20] See Fuller and Purdue, *The Reliance Interest in Contract Damages*, (1936-37) 46 Yale LJ 52 and 373; Burrows, *op cit*, 39-42.

[21] See Burrows, *op cit*, ch 6, esp 77; *Cullinane v British Rema Manufacturing Co Ltd*, [1954] 1 QB 292; *Anglia Television Ltd v Reed*, [1972] 1 QB 60; *CCC Films (London) Ltd v Impact Quadrant Films Ltd*, [1985] QB 16. It would appear that this measure of compensation is recognized in English law as the claimant's "unfettered choice" and not merely where it is not possible reliably to compute damages based on the expectation interest. This would appear to over-compensate the claimant in the case of a bad bargain where the contract, if performed, would have been loss-making to the claimant, but the law is (or tries to be) astute to guard against this.

[22] *Livingstone v Rawyards Co Ltd*, (1880) 5 App Cas 25 at 39; Burrows, 38.

[23] The injunction, in the case of a *committed* tort, is not available. Of course, where a tort is threatened, a *quia timet* injunction may lie, and the tort will never be committed.

[24] Birks, *An Introduction to the Law of Restitution*, 1st (paperback) ed (1989), 314.

[25] Birks, *op cit*, ch X. The quotation is from 313.

[26] In his chapter (ch 19) on "Restitutionary remedies (for torts and breach of contract)" at 335.

In this book we are concerned with only a part of the law of restitution, namely restitutionary remedies – that is, remedies reversing gains – for a tort or breach of contract…We are, in other words, concerned with restitution for wrongs and not restitution of an unjust enrichment.

Where the restitution is not based on a wrong the claimant seeking restitution must establish that the defendant has been unjustly enriched "at the claimant's expense" (and "at the claimant's expense means that there must have been a transfer of value from the claimant to the defendant). The claimant's payment of money, or rendering of services, to the defendant by mistake or under duress, or subject to a condition being fulfilled that has not been, are examples of the general cause of action of unjust enrichment which, subject to defences, will trigger restitution. But where there has been a wrongful enrichment, the law of restitution is concerned with the wrong as the cause of action not unjust enrichment. Hence the central distinction drawn in the law of restitution between restitution for wrongs and restitution of an unjust enrichment. In this chapter, we are solely concerned with restitution for wrongs where the wrong is a tort or breach of contract.

30. The Swatch Group do not seek a restitutionary remedy (although such a remedy was available to them). Nevertheless, the concept of *value* gained by a defendant as a result of a tort (or, less relevantly here, breach of contract) committed by them is informative (if only by way of contrast) of the process of assessing the "negotiation damages" that the Swatch Group *do* claim. The restitutionary remedy is best seen in the account for profits, an equitable remedy by which the defendant is required to draw up an account of the net profits they have acquired by particular wrongful conduct and then pay that amount to the claimant.[27] The account of profits is a useful remedy, but only where the account can sensibly be drawn by reference to money or money's worth. An account of profits is a remedy generally available where the tort involves an infringement of intellectual property rights.[28] There is, therefore, a proprietary backdrop to the remedy. The claimant owns property, which the defendant has used or exploited without permission. That exploitation – even if it does not clearly result in loss to the claimant – has a value which ought to be – and is – recognised in the remedies the law provides. These cases are difficult because intellectual property rights are replicable or non-rivalrous.[29] In this case, Samsung were able to replicate at practically zero cost to themselves and at no easily discernible cost or loss[30] to the Swatch Group the Swatch Group's marks. An account for

[27] Burrows, 341ff.
[28] Burrows, 341.
[29] See Fairfield, *Owned*, 1st ed (2017), 148: "Physical property encodes information about the number of people who can use it through the physical characteristic of rivalrousness. Rivalrousness means that if I have a thing, you don't. Imagine a vinyl record. If I give it to you, I don't have it any more. We are rivals for its possession, hence the term. If an asset is non-rivalrous, both you and I can have it at the same time. Consider the same recording, but as an MP3. I can give you an identical copy of the MP3 without giving up my own copy. The MP3 is non-rivalrous. Rivalrousness has always been the dividing line between traditional and intellectual property. As Judge Richard Posner has written, the key distinguishing feature of intellectual property is that others can copy it at near-zero cost. Physicality has been traditionally connected to rivalrousness, because it has traditionally cost more to make physical copies than to make digital copies…"
[30] That is not to say there was not damage to the Swatch group's brands. The point is more that this damage is very difficult to quantify. Nobody doubts that established brands are hugely valuable, but the process of building them up takes time and money and there is no guarantee of success. Equally, the

profits would thus commend itself but for the fact that the profits made by Samsung (even including those accruing to App Developers) were derisory. As Table 1 demonstrates, the total revenue of the downloads was US$1,002.77.

31. The restitutionary measure is not confined to non-rivalrous property. As Burrows notes, "[a]n award of money had and received is automatically restitutionary: ie, by its very nature it is looking at the defendant's receipt and not just the claimant's loss (if any)".[31] *Lamine v Dorrell*[32] and *Chesworth v Farrar*[33] were both claims based on the tort of conversion – a "proprietary tort" protecting a claimant's interest in their chattel. In *Lamine v Dorrell*, the defendant converted the claimant's debentures by selling them. The claimant recovered the actual sale price (ie, the defendant's enrichment as a result of their wrong) and not the market value of the debentures (ie, the measure of the claimant's loss). Again, in *Chesworth v Farrar*, a landlord wrongfully converted property by selling off property belonging to his tenant. Compensation was assessed by reference to what the landlord had received on the sale (the gain) and not by reference to what the property was worth in the tenant's hands (the loss). Edmund Davies J encapsulated the distinction neatly:[34]

> A person upon whom a tort has been committed has at times a choice of alternative remedies, even though it is a *sine qua non* regarding each that he must establish that a tort has been committed. He may sue to recover damages for the tort, or he may waive the tort and sue in quasi-contract to recover the benefit received by the wrongdoer.

32. The nexus between the remedy and the fact that the claimant has an interest in property which is protected by a tortious ("proprietary") claim is obvious, just as with the account of profits. Precisely the same rationale exists for the remedies for trespass to land.

33. The final cause of action to be considered is a restitutionary one, where both the claim and the remedy are restitutionary. A claim in unjust enrichment requires the claimant to show that the defendant has been (i) unjustly,[35] (ii) enriched, (iii) at the expense of the claimant. Factors (ii) and (iii) contain the "transfer of value" that is the essence of a "pure" restitutionary claim, where there is an equivalence between that given up by the claimant and the enrichment of the defendant.

Counterfactuals

34. Most tests for quantification of damage involve a counterfactual analysis, by which is meant an assessment of what would have been the case had something (generally a single variable) occurred when in the "real world" it had not occurred (or *vice versa* not occurred when in the "real world" it had occurred). This underlies the essential compensatory tests in both contract and tort: (i) what

erosion of an established brand is difficult to map or describe, and even if discernible, impossible to quantify in money or money's worth.

[31] Burrows, 340.

[32] (1701) 2 Ld Raym 1216.

[33] [1967] 1 QB 407.

[34] [1967] 1 QB 407 at 417.

[35] Unjust factors comprise factors like mistake, undue influence, absence of basis (a rationalizing catch-all). They need not be considered further.

would the position have been had the contract been performed? (ii) what would the position have been had the tort not occurred?

35. Counterfactual analysis does not involve the tribunal making findings of fact. Given the analysis is explicitly *counterfactual*, making findings of what occurred is not the point. Rather, the Court must consider what would have occurred on the basis of a certain specified assumption.

36. In many cases, the counterfactual assessment will look very much like a typical factual evaluation. Take the facts in *Lamine v Dorrell* or *Chesworth v Farrar*, but on the basis that the court was seeking to assess the claimant's loss, not the defendant's gain. The claimant's loss will be based upon what price the claimant would have achieved for the converted goods *assuming* they had chosen to sell at a given point in time (generally the time of conversion). The counterfactual analysis is – in such cases – based upon the market price that could have been achieved. Assuming there is a market, the analysis is straightforwardly factual even though quantum is being assessed on the basis of a counterfactual assumption.[36]

37. A gain-based analysis (whether an account of profits or assessing an "enrichment" in restitution) does not involve *any* counterfactual analysis: it is simply a question of working out what *in fact* the defendant gained by their wrong.

38. Counterfactual analyses are most well-known in personal injury cases. The law has evolved sophisticated tools for assessing the pecuniary and non-pecuniary losses that a claimant is entitled to on the assumption that the wrongful act – the tortious accident causing the injury – had not occurred. Pecuniary losses are assessed by comparing the claimant's actual and projected financial position as against what that position would have been, had the accident not occurred. It will be observed that in such cases, not only is there a counterfactual (eg, what would the claimant have earned over the course of their life had the accident not occurred) but also a future projection (ie, how, given their injury, will the claimant's career actually progress). Personal injury cases even wrestle successfully with non-pecuniary losses. To take a simple example, it is possible to assess how much the leg, that the claimant has lost as a result of the accident, is worth in terms of pain, suffering and loss of amenity.[37]

39. Problems arise in counterfactual cases where there is an absence of comparable material. Where there are many, similar, cases, the analysis is, in practice, a factual one. Put another way, the assumption that the counterfactual analysis required can itself be valued, with a high degree of accuracy (by which is meant consistency with other cases, leading to predictability), by reference to

[36] See Burrows, *op cit*, 340.

[37] Works such as Kemp & Kemp: Quantum of Damages, referring amongst other things to extensive case-based quantum decisions, provide comprehensive comparators for general damages (pain, suffering, loss of amenity). Whilst it is impossible in a single case to work out rationally what an injury is "worth", where there are sufficient comparable decided cases it is possible to achieve consistent and predictable outcomes. Personal injury cases settle precisely because experienced practitioners – having the right tools for the job in the form of information about precedent cases – can predict the likely outcome of litigation and so reach a settlement that is *objectively* defensible.

comparables. Burrows identifies the growing concerns around the use of economic analysis to resolve questions of remedy for civil wrongs.[38] Because economic theory is almost always detached from reality in terms of the assumptions it makes, an economic analysis requires (as does legal analysis) sufficient levels of statistically significant data derived from the "real world" in order safely to be able to draw conclusions. Lawyers have no difficulty in incorporating statistics into a quantification process where those statistics are reliable. Actuarial tables for life span have been used in personal injury cases for decades.

40. In short, counterfactual analysis – like findings of fact – becomes less certain and so more arbitrary the less data or evidence there is.

Negotiation damages/licence fee damages

What are negotiation damages?

41. "Negotiation damages" go by various names:[39]

> A mark of the difficulty in comprehending a doctrine can be the difficulty in giving it a meaningful label. The form of damages that is described in this chapter is "licence-fee damages" is a good illustration of this. These damages have been described as *Wrotham Park* damages, after a leading case where they were awarded for a claim that was treated as equivalent to a breach of contract. They have also been described as "negotiating damages" to describe one method, but not the only method, by which the damages are calculated, namely a hypothetical negotiation. They have also been described as "user" damages and, until the alternative conception was rejected in 2019, as "restitutionary" damages.

42. Negotiation damages are best initially described by what they are *not*. They are not restitutionary because they do not seek to reverse a gain or enrichment obtained by a defendant at the expense of a claimant. Indeed, they are not calculated by reference to the defendant's gain at all. Neither are they calculated by reference to the loss or damage sustained by the claimant.

43. Negotiation damages are best understood as the natural remedy where a claimant's property has been wrongfully used or infringed. Suppose a defendant trespasses on the claimant's land, without doing any damage or inconveniencing the claimant in any way and without making any monetary gain that might be disgorged. Because the claimant owns the land, the claimant has been deprived of their ability to *exploit* that resource, and it is this deprivation that negotiation damages seek to compensate for.

44. Where there is a market for the claimant's property (eg, a fixed rate for entering the land, as where eg, a defendant trespasses upon National Trust property during opening hours) negotiation damages are easy to compute. It is where there is no market – or, put another way, an absence of comparables – that the process of assessment becomes less straightforward.

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[38] Burrows, *op cit*, 16-18.
[39] Edelman (ed), *McGregor on Damages*, 22nd ed (2024), [15-001].

When are negotiation damages available?

45. Although Samsung at times came close to suggesting that negotiation damages were not available to the Swatch Group in this case, that proposition was never put in terms. Had it been it would have been wrong and I would have rejected the contention. Although there is some debate to be had as to which causes of action can generate a claim for compensation on this basis,[40] claims for trade mark infringement are claims that clearly *do* generate such a claim for compensation. In the end, Samsung's case boiled down to an insistence that negotiation damages, in this case, could only be assessed on an economic cost/economic benefit basis, which resulted (according to Samsung) in an award of (as has been described) US$301.

The origin of negotiation damages: Watson Laidlaw

46. The origin of licence-fee damages is *Watson Laidlaw & Co Ltd v Pott, Cassels and Williamson*.[41] A patentee claimant had sustained no damage which could be restored because the sales had been made by the defendants in a territory where the claimants could not themselves have traded. Lord Shaw addressed the argument that in those circumstances no damages could be awarded and rejected it.

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

47. Lord Shaw held that such "price of hire" damages were available wherever an invasion of property occurred. The claim for compensation is intrinsically linked to the unlawful invasion or infringement of the claimant's property. An owner's rights comprise (i) the right to transfer the property to a third party, (ii) the right to exclude third parties from the enjoyment of the property and (iii) the right to exploit the property, either by using it themselves or by permitting a third party to exploit it on terms agreed.

48. Negotiation damages provide an appropriate regime for compensation in those cases where an owner's rights have been infringed. Thus, where property is permanently taken without consent (ie, an unagreed transfer) the owner/claimant may recover the sale price (gain) achieved by the taker/defendant (although the owner will have other rights also). Where property is temporarily taken – the liveryman's horse – the owner/claimant is entitled to the rate for the hire of the horse. The owner did not want to (or could not) exploit their property in this way. As an unwilling hirer-out of horses, one measure of compensation is to give the owner that which they would have received had they willingly transacted.

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[40] See, for example, the consideration in *Morris-Garner v One Step (Support) Ltd*, [2018] UKSC 20.
[41] (1914) 31 RPC 104.

The teaching of General Tire

49. So far, we have only been considering rivalrous products, where the deprivation of or to the owner is most obvious. But the point applies with similar force to non-rivalrous property, like intellectual property rights. The whole point about intellectual property rights is that law creates scarcity by imposing property rights on that which can be copied at no or little overt cost to either owner or infringer. The invention, the copyright, the trade mark are only property because the law has defined them so. Tangible property is scarce without legal intervention – there is only one table in my kitchen, and if you take it, I cannot have it – and the legal rules simply determine the ambit of an owner's rights, including how infringements to those rights are to be compensated for. Where a third party infringes an owner's intellectual property rights, precisely the same owner rights are engaged and require protection, but those rights are in the first instance defined at law and not by the physical properties of the thing itself. This is the essence of the distinction that English law draws between a chose in action and chose in possession.

50. In *General Tire and Rubber Company v Firestone Tyre and Rubber Company*,[42] Lord Wilberforce outlined the legal principles of what are here referred to as "negotiating damages". Lord Wilberforce was considering patent infringement, but it is established that the same principles apply, *mutatis mutandis*, to all intellectual property rights:

i) One who infringes the patent of another commits a tort, the foundation of which is made clear by the terms of the grant. This, after conferring the monopoly of profit and advantage upon the patentee, concludes by declaring infringers "answerable to the patentee according to the law for damages thereby occasioned".[43]

ii) The object of damages (leaving on one side cases of exemplary damages) is to compensate for loss or injury. The general rule, at any rate in relation to "economic" torts is that the measure of damages will be, so far as possible, that sum of money which will put the injured party in the same position as he would have been in if he had not sustained the wrong.[44]

iii) In the case of patent infringement, a claimant has the option of seeking an account of profits. But a claimant may elect instead for damages. Where the claimant does so, there are two essential principles: (a) the claimant bears the burden of proving their loss; but (b) damages should be liberally assessed, the defendant infringer being a wrongdoer, but with the object of compensation, and not punishment.[45]

iv) In terms of assessing damages in patent infringement cases, the reported cases could be grouped in the following way:

[42] [1975] 1 WLR 819 at 824ff.
[43] At 824.
[44] At 824.
[45] At 824.

a) Many patents of inventions belong to manufacturers who exploit the invention to make articles or products which they sell at a profit. The benefit of the invention in such cases is realised through the sale of the article or product. In these cases, if the invention is infringed, the effect of the infringement will be to divert sales from the owner of the patent to the infringer. The measure of damages will then normally be the profit which would have been realised by the owner of the patent if the sales had been made by him.[46]

b) Other patents of inventions are exploited through the granting of licences for royalty payments. In these cases, if an infringer uses the invention without a licence, the measure of the damages he must pay will be the sums he would have paid by way of royalty if, instead of acting illegally, he had acted legally. The problem is to establish the amount of such royalty. The solution to this problem is essentially and exclusively one of evidence and as the facts capable of being adduced in evidence are necessarily individual, from case to case, the danger is obvious in referring to a particular case and transferring its conclusions to other situations.[47] It is at this point that "comparables" become potentially helpful. The best comparable is if the claimant actually licences their invention to others at a rate that can be applied to the case of the infringer. In *Aktiengesellschaft für Autogene Aluminium Schweissung v London Aluminium Co Ltd (No 2)*,[48] Sargent J stated:

> …what has to be ascertained is that which the infringer would have had to pay if, instead of infringing the patent, he had come to be licensed under the patent. I do not mean by that that the successful patentee can ascribe any fancy sum which he says he might have charged, but in those cases where he has dealt with his property merely by way of licence, and there have been licences at certain definite rates, there prima facie, apart from any reason to the contrary, the price or royalty which has been arrived at by means of a free bargain between the patentee and the person desiring to use the patented article has been taken as being the price or royalty that presumably would have to be paid by the infringer. In doing that, it seems to me that the court is certainly not treating the infringer unduly harshly; he should at least, in my judgment, have to pay as much as he would in all probability have had to pay had he to deal with the patentee by way of free bargain in the way in which other persons who took licences did in fact pay.

These are useful guidelines, but before a "going rate" can be taken as the basis on which an infringer should be held liable, it must be shown that the circumstances in which the going rate was paid are the same as or at least comparable with those in

[46] At 824.
[47] At 824-825.
[48] (1923) 40 RPC 107.

which the patentee and the infringer are assumed to strike their bargain.[49]

c) In some cases, it is not possible to prove either (as in (a)) that there is a normal rate of profit or (as in (b)) that there is a normal, or established, licence royalty. Yet clearly, damages must be assessed. In such cases, it is for the claimant to adduce evidence which will guide the court. This evidence may consist of the practice, as regards royalty, in the relevant trade or in analogous trades; perhaps of expert opinion expressed in publications or in the witness box; possibly of the profitability of the invention; and of any other factor on which the judge can decide the measure of loss. Since evidence of this kind is in its nature general and also probably hypothetical, it is unlikely to be of relevance, or if relevant of weight, in the face of the more concrete and direct type of evidence referred to under (b). But there is no rule of law which prevents the court, even when it has evidence of licensing practice, from taking these more general considerations into account. The ultimate process is one of judicial estimation of the available indications.[50]

51. As I will come to explain, the present case falls squarely within the third class, (c). The Swatch Group use their brands to sell their own products, but Samsung have not infringed by producing rival products and so diverted sales away from the Swatch Group. This is not a class (a) case. Nor is it a class (b) case: the Swatch Group does not licence its marks *at all*. Accordingly, it is necessary to consider the law concerning class (c) in greater detail.

The teaching of One Step

52. In *One Step*, the Supreme Court stressed that negotiating damages were compensatory in nature,[51] but that the compensatory test was harder to apply, its application less obvious, "in situations where there has been an invasion of rights to tangible moveable or immovable property, but there has been no pecuniary loss or physical damage to the property in question. Nevertheless, where a trespasser has made a valuable use of someone else's land, without causing any diminution in its value, the landowner has been held to be entitled to damages measured as what a reasonable person would have paid for the right of user".[52] It may be said that the position is *a fortiori* in the case of intangible property, in particular intellectual property.

53. The Supreme Court framed the loss to the claimant in such cases in the following terms:[53]

[49] At 825. This is a critical passage that needs to be borne in mind when considering "comparables". In order to be useful, "comparables" have to be genuinely comparable, otherwise the outcome is simply arbitrary.
[50] At 826.
[51] At [25]
[52] At [26].
[53] At [30].

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

54. *One Step* was principally concerned with negotiating damages as compensation for breach of contract, which is not this case, where the nexus between a proprietary tort and the infringement of an owner's property rights is absent. Nevertheless, the following passage on "imaginary negotiations" is a helpful guide in cases such as this:[54]

> The use of an imaginary negotiation can give the impression that negotiation damages are fundamentally incompatible with the compensatory purpose of an award of contractual damages. Damages for breach of contract depend on considering the outcome if the contract had been performed, whereas an award based on a hypothetical release fee depends on considering the outcome if the contract had not been performed but had been replaced by a different contract. That impression of fundamental incompatibility is, however, potentially misleading. There are certain circumstances in which the loss for which compensation is due is the economic value of the right which has been breached, considered as an asset. The imaginary negotiation is merely a tool for arriving at that value. The real question is as to the circumstances in which that value constitutes the measure of the claimant's loss.

55. Of course, contractual rights are not property in the sense that intellectual property rights are (a point made at [93]), and so *One Step* is of limited use when considering tortious infringement of intellectual property rights. As the Supreme Court noted (at [95]):

> (1) Damages assessed by reference to the value of the use wrongfully made of property (sometimes termed "user damages") are readily awarded at common law for the invasion of rights to tangible moveable or immovable property (by detinue, conversion or trespass). The rationale of such awards is that the person who makes wrongful use of property, where its use is commercially valuable, prevents the owner from exercising a valuable right to control its use, and should therefore compensate him for the loss of the value of the exercise of that right. He takes something for nothing, for which the owner was entitled to require payment.
>
> (2) Damages are also available on a similar basis for patent infringement and breaches of other intellectual property rights.

Framing a test for "negotiation damages"

56. In *Meters v Metropolitan Gas Meters*,[55] Fletcher Moulton LJ said:

> The reward to a patentee for his invention is that he shall have the exclusive right to use the invention, and if you want to use it your duty is to obtain his permission. I am

[54] At [91].
[55] (1911) 28 RPC 157 at 165.

inclined to think that it would be right for the court to consider what would have been the price which – although no price was actually quoted – could have reasonably been charged for that permission, and estimate the damage in that way.

57. In *Pell Fischman Engineering v Bow Valley*,[56] Lord Walker stated the following test:

> It is a negotiation between a willing buyer (the contract-breaker) and a willing seller (the party claiming damages) in which the subject-matter of the negotiation is the release of the relevant contractual obligation. Both parties are to be assumed to act reasonably. The fact that one or both parties would in practice have refused to make the deal is therefore to be ignored.

58. Neither of these tests assists particularly in deriving an outcome in a given case. In *One-Step*, Lord Reed stressed that "the aim is to arrive at an objective valuation",[57] and of course Fletcher Moulton LJ's "reasonable charge" fits with that. The objective is to determine the "economic value of the right in question".[58] The problem, in Case (c) instances, is that a general approach of "reasonableness" tells us nothing about what is, in fact, an objectively reasonable assessment of value.

59. The *Pell Fischman* test is, if anything, even less helpful in Case (c) cases. The reason was articulated in *One-Step*:

> **[74]** It is also necessary to recognise that the assessment of a hypothetical release is itself a difficult and uncertain exercise. In cases such as *Wrotham Park, Bracewell v Appleby* and *Jaggard v Sawyer*, judges estimated in a rough and ready way the amount which the claimant might fairly and reasonably have demanded as a quid pro quo for the relaxation of the obligation in question. More recently, the practice has developed of instructing forensic accountants to give expert evidence about a hypothetical negotiation between a reasonable person in the position of the claimant and a reasonable person in the position of the defendant. Such imaginary negotiations have become increasingly elaborate, and a host of questions can emerge as to the basis on which they should be hypothesised…
>
> **[75]** The artificiality of the exercise can be a further problem. Since the aim is to arrive at an objective valuation, the fact that the claimant might in reality have been unwilling to release the defendant from the obligation is not necessarily a problem…But the premise of the hypothetical negotiation – that a reasonable person in the claimant's position would have been willing to release the defendant from the obligation in return for a fee – breaks down in a situation where any reasonable person in the claimant's position would have been unwilling to grant a release, as was found to be the position in *Marathon Asset Management LLP v Seddon*…

60. In *Marathon Asset Management v Seddon*,[59] Leggatt J stated the problem neatly and clearly:

> **[234]** There are other cases, however, in which it is unrealistic to value the benefit obtained by the defendant in this way because the defendant could not reasonably have

[56] [2009] UKPC 45 at [49].
[57] At [75].
[58] At [95(10)].
[59] [2017] EWHC 300 (Comm).

expected to purchase a licence from the claimant for its activity…A patent, trademark, copyright or confidential information may be a means of generating revenue for the owner of the right through the granting of licences…But in other cases it may be relied on to protect intellectual property which the owner of the right would not be willing to allow anyone else to exploit at all – or not at a price which would rationally be paid for a licence.

[235] In cases where the defendant could not reasonably have expected to purchase a licence from the claimant for its use of the claimant's property (nor obtain an equivalent benefit in another way) it in my view makes no sense to value the benefit by postulating a hypothetical negotiation between a willing seller and a willing buyer. Such a method makes no sense because in such a context the negotiation is not merely fictional in the sense that it did not actually happen but fictional in the stronger sense that it lacks any verisimilitude. The law ought not to employ fictions of the latter sort.

61. This encapsulates the difference between Case (b) and Case (c). Where the claimant licences their product, there is (usually) a market, which provides objective evidence of economic value. There will (usually) be "comparable" transactions, which will provide objective data from which a "price" that is objectively defensible can be derived.[60] That is Case (b). Case (c) has no such objective touchstones, and resort to comparables is simply to import subjectivity and arbitrariness. Absent a market (and obviously one is assuming a market that is competitive), there will be no comparables worth using.

62. It is for this reason that reference to bargaining positions of the parties is similarly a hopeless guide. In *Force India Formula One Team v 1 Malaysia Racing Team*,[61] Arnold J articulated a variant of the *Pell Fishman* test:

The primary basis for the assessment is to consider what sum would have [been] arrived at in negotiations between the parties, had each been making reasonable use of their respective bargaining positions, bearing in mind the information available to the parties and the commercial context at the time that notional negotiation should have taken place.

63. If one has a comparable transaction that suggests a price of £X for the licence to use, then it makes sense to consider whether that price would have gone up or down given what the defendant buyer wanted to do with the licence (ie, how the defendant was going to monetise the rights they were acquiring) and other aspects going to bargaining position. The "going rate" of £X can thus be adjusted, by reference to objective factors. But an objective starting point is what is needed, and that is precisely what Case (c) lacks.

64. With that discouraging start, it is necessary to turn to the specific guidance that can be derived from the case law.

[60] As Bacon J noted in *Merck KGaA v Merck Sharp & Dohme LLC* [2025] EWHC 616 (Ch) at [82(a)] "[a] comparables approach would seek to value the royalty which would have been agreed under the notional licence by reference to similar licences which were based on the same or similar benefits".
[61] [2012] EWHC 616 (Ch) at [386(ii)].

Specific guidance to be derived from the case law in Case (c)

65. The following, more specific, points on the assessment of negotiating damages can be derived from the case law:

i) *The relevant counterfactual; or the "subject-matter" of the negotiation.* The question is, what does the defendant need from the claimant in order not to infringe? In *Merck KGaA v Merck Sharp & Dohme LLC*,[62] Bacon J noted that:[63]

> The starting point is that in a case where the damages payable in respect of an intellectual property infringement or breach of contract are quantified on a licence fee basis, the court postulates a hypothetical situation where the relevant infringing acts were instead carried out pursuant to a licence or agreed release of obligation.

Put another way, the starting point is what rights the infringer needs to acquire in order *not to infringe*. The subject-matter of the licence should be the specific infringing conduct that the infringer *intends to carry out* at the relevant time. Thus, in *32Red plc v WHG (International) Ltd*,[64] Newey J was considering an infringement of the mark "32Red" by use of the name "32Vegas". There was an infringement, but the price of a licence was to be calculated by reference to the infringement that was actually intended ("32Vegas") and *not* by reference to a potentially more serious infringement (use of an identical name, "32Red") for which the claimant might charge more. Similarly, in *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd*,[65] Arnold J stated:

> The defendants contend that the subject-matter of the negotiation would be the actual confidential information found to have been infringed by Aerolab/FondTech. Force India contends that the subject matter would be the entire aerodynamic design of the Force India car. The basis for the latter contention is that Aerolab and Fondtech had (almost) all of the aerodynamic design of the Force India car available to them to use as a reference, even if they only used a small proportion. I reject that contention, since it would mean that Aerolab/Fondtech would pay the same licence fee regardless of the extent of the misuse. This is contrary to principle, authority and basic fairness.

This approach is correct provided that the assessment is conducted on an *ex ante* and not *ex post* basis. The time of assessment of the negotiating damages fee is of considerable importance.

ii) *Time of assessment.* The approach endorsed by Bacon J in *Merck* was that damages should be assessed on the basis of a reasonable person's expectations as to the future, rather than with the benefit of hindsight.[66] That does not mean to say that hindsight or *ex post* information is

[62] [2025] EWHC 2376 (Ch).
[63] At [59].
[64] [2013] EWHC 815 (Ch) at [48]-[50].
[65] [2012] EWHC 616 (Ch) at [436].
[66] At [81].

irrelevant: it can act as a proxy for those expectations.[67] Nor is the rule as to time of assessment immutable. The point is that the Court must consider what the infringer intends to *do* with the rights that need to be licensed, for that will inform (i) what rights the infringer actually needs and (ii) what the infringer might reasonably be prepared to pay for such rights. In *Lunn Poly Ltd v Liverpool and Lancashire Properties Ltd*, Neuberger LJ said:[68]

> **[27]** It is obviously unwise to try and lay down any firm general guidance as to the circumstances in which, and the degree to which, it is possible to take into account facts and events which have taken place after the date of the hypothetical negotiations, when deciding the figure at which those negotiations would arrive. Quite apart from anything else, it is almost inevitable that each case will turn on its own particular facts…
>
> **[28]** Accordingly, although I see the force of what Mr Mann said in [13] of his judgment, it should not in my opinion be treated as being generally applicable to events after the date of breach where the court decides to award damages in lieu on a negotiating basis as at the date of breach. After all, once the court has decided on a particular valuation date for assessing negotiating damages, consistency, fairness and principle can be said to suggest that a judge should be careful before agreeing that a factor which existed at that date should be ignored, or that a factor which occurred after that date should be taken into account, as affecting the negotiating stance of the parties when deciding the figure at which they would arrive.
>
> **[29]** In my view, the proper analysis is as follows. Given that negotiating damages…are meant to be compensatory, and are normally to be assessed or valued at the date of breach, principle and consistency indicate that post-valuation events are normally irrelevant; but, given the quasi-equitable nature of such damages, the judge may, where there are good reasons, direct a departure from the norm either by selecting a different valuation date or by directing that a specific post-valuation date event be taken into account.[69]

iii) *The dangers of hindsight*. The dangers of hindsight are multiple. For example: the infringer may expect a reasonable profit, but find their venture to be wildly successful or massively unsuccessful. It would be wrong to inflate or deflate the price at the hypothetical negotiation by reference to such matters. Equally, the infringer may, at the time of the negotiation, consider that they need an extensive licence from the claimant, but (after the event) may find that they needed much less from the claimant. Again, the price should not (in this case) be reduced by reference to such matters. Thus, the Court of Appeal commented on Arnold J's judgment (set out above) in the following terms:[70]

> **[95]** However, this does not deal with Force India's point that whatever the extent of Aerolab's actual use of the confidential information, their aerodynamicists and CAD draftsmen regarded themselves as free to use it as

[67] At [81].
[68] [2006] EWCA Civ 430.
[69] Although Neuberger LJ was considering the position under Lord Cairns' Act, the position is unlikely to be different in this case.
[70] [2013] EWCA Civ 780.

they thought fit. I do not think that the judge made findings of fact about this, although he dealt with the point obliquely in the section of his judgment on quantum. He said at [436]:

[The passage is set out above.]

[96] Whether Aerolabs aerodynamicists and CAD draftsmen regarded themselves as free to use the CAD files as they thought fit is essentially a question of fact, which turns on the state of mind of the people in question. We were not shown any evidence about that, nor any questions put to the witnesses about their state of mind. In those circumstances, I do not consider that we are in a position to make a finding of fact that the judge did not make. That said, if the judge had made that finding, then it seems to me that compensation should have been assessed on the basis of the value to Aerolab of the whole corpus of information. After all, if A wrongfully retains B's dictionary, it does not matter that he only looked up a few definitions.

iv) *The parties to the licence. Prima facie*, these will be the claimant and the defendant. If there are licensees of the claimant whose licences impact the extent of the licence that the infringing defendant needs, then that would be a relevant factor. But the fact that there exist other parties who ought to be licenced, but are not, is altogether irrelevant. Samsung contended (but did not in the end seriously advance the argument) that it was the App Developers who needed a licence, not Samsung. That may very well be right, and if such licences had existed at the relevant time, I would have had regard to them. But they did not; and the fact that it might be said that other parties should have been licensed is irrelevant for these purposes.

v) *Duration of the licence.* In *32Red*, Newey J stated this as his approach:

[51] …there was debate as to the length of the hypothetical licence. 32Red's position is that the parties should be taken to have negotiated on the basis that the licence was to be for an indefinite, or at least lengthy, period. In this connection, Mr Bezant said that there was nothing to suggest that the parties would have agreed at the outset that a licence should be for the actual period of William Hill Online's infringement (viz some seven months). Mr Bezant was also instructed to assume that the end date of the hypothetical licence might be later than that on which William Hill Online ceased to use the name 32Vegas, on the footing that existing customers of the 32Vegas casino are likely to have continued to play at William Hill Online's casinos for a period.

[52] My own view is that the hypothetical licence must be for the period of infringement. The hypothetical licence has to be in respect of what William Hill Online actually did. It in fact used the name 32Vegas for about seven months. The parties are therefore to be assumed to have entered into a licence for that period. On the other hand, they are also, as it seems to me, to be taken to have been aware that William Hill Online could continue to derive benefits from its use of the 32Vegas name for some time after the end of the seven-month period and to have borne in mind when negotiating payment for the licence.

Since these damages are compensatory, it makes sense for the licence payment to be calculated by reference to the period of infringement. But that must be subject to the nature of the hypothetical licence that would be negotiated *ex ante* and to the rule (if different) that damages are assessed on a forward looking basis. The period of infringement is therefore unlikely to be known by the parties. Thus, it may very well be the case that the licence will be calculated by reference to periods of time; but, equally, a licence may be on a "per unit sold" basis, in which case duration may not be a factor in terms of assessing rate. The duration of the hypothetical licence is likely to be highly fact-specific; and it is dangerous to articulate too concrete a general rule.

vi) *An assessment of economic benefits/costs.* In *Merck*, Bacon J described an economic benefits approach for the valuing of a notional licence. This approach "would seek to value the notional licence by reference to the incremental economic benefits expected to be obtained through the licensee's use of the rights granted by the licence, and the costs to the licensor as a result of granting the rights under the licence".[71] Where the economic costs and economic benefits can be quantified in clear monetary terms as at the time of the hypothetical negotiation, this is obviously a helpful approach to inform the price that would (in the counterfactual case) be reached. But it will be very rare for a Case (c) instance to be capable of resolution on this basis. In the first place, the cost to the licensor of giving a licence – given that, in Case (c) cases, the licensor is using its rights to sell its own product – will be very difficult to compute. The expected benefits to the licensee may be easier to compute, but care must be taken to avoid this approach becoming the equivalent of an account of profits. Where it can be said, on the basis of sound if "broadbrush" evidence, that the cost to A of licensing a right is £15 and the profit to B in using those rights and monetising them is £20, then a payment by B to A of £16-£19 for those rights would represent a theoretical bargain that might be achieved. This approach is no more than a version of the "ultimatum game", first described by Nobel laureate John Harsanyi in 1961. According to the rules of the game, two players (both knowing the rules in advance) interact to decide how to divide a sum of money. The first player, the proposer, proposes a division of the sum with the second player, the responder. The responder can either accept the proposed division or reject it. If the responder accepts, the money is split according to the proposal; if the responder rejects, neither player receives anything. Although the rational responder ought to accept *any* amount, no matter how small, in practice offers of below 30% split are rejected by the responder. The game thus provides helpful guidance as to how a defined pot of money (here B's profit) should be split, but it assumes that the pot is quantifiable by reference to A's costs and B's revenue/profit; and that will rarely be the case.

66. In terms of how the exercise of assessing negotiation damages is to be accomplished, it is trite that no precise assessment can be achieved. The Court must do the best that it can on the evidence before it. Assessment is often said to be based on the exercise of a sound imagination and the practice of the broad

[71] Merck at [81(ii)].

axe. That is a good description of the approach that the Court should take to the assessment of the evidence. But it is as important for the outcome to be rationally defensible as an objective outcome, where the reasoning on the basis of the evidence before the court can be discerned. An assessment of quantum that bears resemblance to Selden's Lord Chancellor's foot is to be deprecated.

ASSESSMENT OF NEGOTIATION DAMAGES IN THE PRESENT CASE

Introduction

67. The best starting point for assessing negotiation damages is to work out the terms of the hypothetical licence needed to render lawful a defendant's infringements of a claimant's property rights.[72] When this has been done, the "price" that the defendant must pay to the claimant can be considered, although this is (in a non-market case) the hardest part of the assessment.

The counterparties to the hypothetical licence

68. It might be thought that this was obvious, that the counterparties to the hypothetical licence would have to be the Swatch Group and Samsung. A case could be made for disaggregating the entities within the Swatch Group and assessing the terms of a hypothetical licence between each entity and Samsung. Neither expert attempted this, and (although it is something worth bearing in mind) the point is unlikely to make a difference in this case, since none of the Swatch Group was willing to licence to third parties on any terms[73] and there was no competition between the entities in the Swatch Group.

69. Mr Bezant's approach, however, involved considering *two* sets of hypothetical negotiations.[74] Mr Bezant was instructed to hypothesise two sets of notional licences – (i) between the Swatch Group and the App developers and (ii) between the Swatch Group and Samsung.[75] Mr Bezant was instructed to take this approach:[76] but he must (as an expert to the Court) have considered it a reasonable proposition on which to base his report.

70. I consider this to be an incorrect starting point. Negotiation damages need to be assessed by reference to the licence *Samsung* needs to render lawful the various infringements identified in the Liability Judgment. The fact that the App Developers were also infringing the Swatch Group's rights (just as users of a Samsung Smartwatch who downloaded an Infringing Watch Face App may have been) is nothing to the point. Had Samsung chosen to structure its business differently – say by requiring App Developers to have a licence for any third party intellectual property rights and by enforcing that requirement so that

[72] The process may be the same in a *One Step* case, but there is clearly a difference between negotiating damages in a property context and negotiating damages in a contractual context. Here we are concerned with the former, not the latter.
[73] Of course, "any terms" puts it too high – there is some price (if only the acquisition price of all the Swatch Group) at which a deal could be done. But, confining ourselves to seeking a *compensatory* rate, it is plain that the Swatch Group were unwilling sellers of their intellectual property rights.
[74] See Bezant 1/[2.5]. See also Bezant 1/[5.8(1)].
[75] Bezant 1/[5.8(1)].
[76] See the opening words of Bezant 1/[2.5].

licences were in fact obtained by App Developers – then of course the claims of the Swatch Group would never have arisen. Indeed, the notion that the App Developers needed to refrain from infringing other peoples' intellectual property was written into the SGA store's terms and conditions. Non-compliance with these terms and conditions has led Samsung to infringe, and it lies ill in the mouth of Samsung to seek to reduce the damages it must pay because of infringements that arise out of the very business it was consciously conducting and controlling and promoting.

71. Mr Bezant should have sought to determine the terms of a hypothetical licence between Samsung and the Swatch Group, without regard to a third party's potential need for a licence also. The point of the exercise is to assess the damages payable by Samsung for its infringements as established in the Liability Judgment.

The scope of the hypothetical licence

Mr Bezant's approach

72. The scope of the licence that Mr Bezant hypothesised was unduly narrow in a number of respects. In the first place, Mr Bezant was instructed to perform his assessment of negotiation damages "with reference to Samsung and the App Developers' actual use of the Infringed Trade Marks".[77] Mr Bezant thus had primary regard to the downloads set out in Table 1. Whilst reference to after-the-event occurrences is permissible as a means of ascertaining what sort of licence Samsung required, in particular its scope, there is no immediate justification for basing the terms of the hypothetical licence on events after the fact.

73. The time for assessing negotiation damages is prior to the infringements occurring. The assessment is based on future expectation, not hindsight.[78] Hindsight enables the infringer to do that which a party seeking an ex ante licence cannot do, namely tailor the terms of the licence to precisely what occurred. Suppose – which may well be the case here – a defendant's business proposition (requiring use of the claimant's property) is highly speculative, in that (viewing matters *ex ante* and not *ex post*) it might range from the hugely successful to the spectacularly unsuccessful. Neither claimant nor defendant ought to be able to take *undue* advantage of what later occurred when considering the terms of the hypothetical licence, including its price. It is permissible to use what subsequently occurred to *inform* the expectations the parties may have had at the time of the hypothetical negotiations, but the parties are not entitled to avail themselves of a "crystal ball" to precisely tailor the terms of the hypothetical licence.

74. Mr Bezant's starting point should have been to ask what sort of licence Samsung needed in order to render lawful that which it was *proposing* to do. Instead, his report was tied to articulating not so much the terms of an *ex ante* licence, but

[77] Bezant 1/[2.9(2)].
[78] See paragraph 65(ii).

rather assessing what was needed, *ex post*, to validate Samsung's infringements:[79]

> **Scope of the rights.** The Notional Licences would have related solely "to the specific rights infringed" and "to the actual manner and scope of the infringing use including the extent to which (if at all) it was downloaded by users and the extent to which any such downloads were paid for [by] users".

That is not the right approach.[80] In effect, Mr Bezant was forcing the cost of Samsung's decision to enable infringing Watch Face Apps to be downloaded via the SGA store onto the Swatch group. This is entirely irrational. It is to be inferred that Samsung enabled the SGA store "ecosystem" for business purposes of their own, which would have some benefit to Samsung. Quite why the Swatch group should give up the rights over its brands for next to nothing (US$301) is not explained by Mr Bezant.

75. Secondly, the notional licences hypothesised by Mr Bezant would be "limited to use of the infringing signs in relation to the downloads of watch face apps from the SGA store by Samsung smartwatch users and not any use of the infringing signs in relation to Samsung smartwatches themselves".[81] Thus, the exclusive focus is on Dial Branding Infringements. Store Display Infringements and Double Barrelled Infringements are left out of account. These infringements do not feature in Mr Bezant's analysis, and so a number of infringements found by the Court in the Liability Judgment are not licensed by Mr Bezant's notional licence at all – or, rather, they are licensed for nothing. I do not consider that it is permissible, when assessing negotiation damages to proceed on such a basis.

Mr Forbes' approach

76. Mr Forbes' approach – set out in his expert report for the purposes of the Quantum Trial (**Forbes 1**) – involved defining the scope of the licence as a complete co-branding licence, and providing his assessment of the value of such a licence. As will be seen, this resulted in Mr Forbes assessing as negotiation damages the value of a licence far more extensive than was actually required by Samsung in order to render its infringements lawful.

77. Mr Forbes began with the point that Mr Bezant had substantially ignored, namely the value of brands in general, and the value of the Swatch Group's brands in particular. In general terms:[82]

> **[2.7]** Brands are a vital and often discussed component of modern business. The analysis of how brands should be regarded and understood (which I am applying in this report) is consistent with my experience and many academics, business writers and practitioners.

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[79] Bezant 1/[5.8(2)].

[80] At times, Mr Bezant correctly articulated the approach. In Bezant 1/[5.11], Mr Bezant states: "I assume that the Hypothetical Negotiations would have occurred *ex ante* but I rely on the information about the actual extent of use as a proxy for the parties' expectations at that time". This is an acceptable statement of the law, but it does not represent the approach Mr Bezant actually adopted.

[81] Bezant 1/[15.8(3)].

[82] Forbes 1.

[2.8] In practical terms, creating and leveraging brands offers significant benefits to any business. In particular: 1) they make a clear promise to customers, a succinct and recognisable guarantee of what to expect; and 2) they generate value (actual and perceived) for their owners. There are many examples of the commercial importance of brands and the high values they command.

[2.9] It is sometimes thought that consumers primarily focus on the product or service they receive, which in these circumstances would be the watch itself and the associated buying experience, rather than the brand of the provider. However, on analysis it is clear that a brand is often a critical means of promising a distinctive quality and experience to consumers. For a brand to remain relevant, it must consistently deliver against the promises it makes, across all aspects of its product and service delivery and communications.

[2.10] In the watch industry, there are several important touch points where a brand must provide against customer expectations if it is to deliver against its promise, maintain customer satisfaction and loyalty, and therefore preserve its value. Such touch points occur throughout the consumer experience (such as advertising, social media, the retail environment and the product packaging) where a brand is expected to deliver against the promise it makes. Watch brands have relatively high customer engagement and a brand is a vital component in assuring customers what to expect, a shorthand expression of the product and service they seek.

[2.11] Strong brands can be summarised by adherence to the following three dimensions:

- Distinctiveness – or being clearly differentiated from the alternatives.
- Relevance – in aligning with customer needs and expectations.
- Consistency – as is for example proposed by McKinsey as the three Cs: "1) Consistency 2) Consistency 3) Consistency"

[2.12] In a commercial context these can be seen in applications of brand licensing, where strong control is generally required by licensors of valuable brands under a commercial framework to preserve and develop brand value, and where licensees also benefit from deployment of the brands.

78. As I have already indicated, I accept this evidence, and make the following specific findings:

i) I accept Mr Forbes' evidence that brands are valuable. This is no more (at least in this case) a reflection of (i) the law regarding trade marks and (ii) the findings in the Liability Judgment.

ii) I accept that brands are of particular importance in the case of watches; and I find that the Swatch group's brands were (i) extremely valuable to the group and (ii) not property that the Swatch group was prepared to licence to third parties.

79. It was common ground that the Swatch group was an unwilling seller and that Samsung was an unwilling buyer. Willingness is not a relevant factor in determining negotiation damages, but it is central to one of the tests used to assess negotiation damages. In cases such as this, assuming willingness on the

part of either or both the buyer and/or the seller in the hypothetical negotiation takes matters no further. That is because willingness to sell is directly related to price, which is the precise value or measure under consideration. It would be nonsense to say that the Swatch group would be unwilling to sell at any price. There will be some price (if only the total value of the entire Swatch Group) at which a licence could be acquired by Samsung. Thus, the postulation of a "willing" seller is essentially meaningless. At some point, the price will be so high that even the most unwilling seller will become willing.

80. The Swatch group sought to draw a distinction between the Swatch group's willingness to sell (it was unwilling) and Samsung's willingness to buy. The point was made – and, so far as it went, it was correct – that to some extent Samsung must have been a willing acquirer of the Swatch group's intellectual property, because Samsung used the Infringing Watch Face Apps and thereby infringed the Swatch group's rights. I do not consider this point to be helpful. In the first place, it was Samsung's evidence that they did not want to infringe, and that they had in place processes (which failed) to prevent infringements. It might be said that Samsung's processes were inadequate, but I do not consider that it is open to me on the evidence to conclude that Samsung were reckless in infringing other people's intellectual property, in the sense of being subjectively indifferent as to the risk of infringement.

81. The furthest I can go is to hold that Samsung did not devote as much resource to this matter as they might have done; and it may be that they did so under the mistaken impression that liability could be avoided if infringing apps like the Infringing Watch Face Apps were "taken down" the moment they were identified and notified to Samsung (which is what happened in this case).

82. To this extent, Samsung were "willing" users of the Swatch group's intellectual property. But, just as with the Swatch group, this says nothing meaningful about the extent to which Samsung "valued" these rights. Samsung may very well have been willing to use the Swatch group's intellectual property at zero cost to them (Samsung), but that says nothing about Samsung's willingness to pay any higher rate.

83. During the course of the hearing, the epithet "willing to use, unwilling to pay" was regarded as an accurate description of Samsung's position. So it is: but this, too, is an unhelpful description which says nothing about price or willingness to pay on Samsung's part. To the extent it implies some kind of moral disapprobation (which it does) that is irrelevant. The damages that I am seeking to assess are and are intended to be compensatory not punitive.

84. In contrast to Mr Bezant – whose focus was unacceptably *ex post* – Mr Forbes did at least attempt to frame the sort of "package" that the Swatch group and Samsung would have been discussing in *ex ante* negotiations for the hypothetical licence. Mr Forbes' conclusion was that the negotiation damages ought to be US$170 million. That figure, for reasons I shall come to, is to overstate the case by some distance. However, unlike Mr Bezant's work, Mr Forbes' report does at least provide some form of a starting point for an assessment of negotiation damages.

85. Mr Forbes recognised that the Swatch group would not, and would under no foreseeable circumstances, ever have been a willing licensor of its rights.[83] However, the most plausible basis for working out what price the Swatch group would have demanded in the counterfactual case we are considering was a full-fledged co-branding collaboration, whereby the key elements of the Swatch group's brands would have been superimposed upon the Samsung Smartwatch. This "co-branding" would have extended well-beyond the mere downloading of an Infringing Watch Face App, although this would have been a part of the co-branding arrangement. Additionally, various parts of the "hardware" of the Samsung Smartwatch would also be co-branded, including the watch case, the crown of the watch (if any), the strap, chargers and packaging.[84] Although not mentioned by Mr Forbes, doubtless this co-branding could have extended to the bezel.

86. The critical point to note is that this collaboration is far more extensive than anything Samsung would have contemplated at the time of the hypothetical negotiation. What Mr Forbes was postulating was a co-branding exercise like the Apple/Hermès exclusive watch product, which is marketed as a product "designed by Apple in California and by Hermès in Paris". This collaboration – between an electronics manufacturer and an exclusive clothes, accessories and fragrances house – is far more natural than one between two watch makers, one traditional and one electronic. But that is not the point. The point is that Samsung never intended co-branding along these lines at all.

87. Mr Forbes considered and dismissed this point:[85]

> I understand the difference between a full product collaboration (such as Apple Watch Hermès and MoonSwatch) compared with a licence to use, for example, a Tissot watch face on a Samsung smartwatch. However, in my opinion, it does not make that much difference in this case given the importance of the branding on the watch face.

88. I disagree with this, for it fails to take into account what Samsung would have said at the negotiations being hypothesised. Samsung's point – and it would have been correct – was that it had no need of most of the rights that form part of Mr Forbes' hypothetical licence. On this basis, Samsung would end up paying "compensatory" damages for rights that it not only never infringed, but also had no intention of infringing in circumstances where Samsung could control absolutely whether the infringement occurred or not.[86]

89. One consequence of Mr Forbes' approach was that he did not consider the actual infringements committed by Samsung (namely, Dial Branding Infringements, Store Display Infringements and Double Barrelled Infringements) but proceeded to value a licence that Samsung neither wanted nor needed.[87]

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[83] Forbes 1/[5.2] to [5.4].
[84] Forbes 1/[5.8].
[85] Forbes 1/[5.9].
[86] The point is that whilst Samsung might inadvertently allow an infringing App into the SGA store, the notion that Samsung might *inadvertently* permit Swatch Group branding on – say – a Smartwatch strap (or any other Smartwatch *hardware*) is fanciful.
[87] Forbes 1/[5.9] and [5.10].

90. Mr Forbes then considered the sort of terms that would have informed this licence.[88] It is unnecessary to consider these. I am not seeking (unlike in a "FRAND" case) to frame the terms of a licence between two parties who cannot agree a deal for future licensing arrangments. The infringements in this case ceased long ago, and what matters is the *rate for* not the *terms of* a hypothetical licence.

91. Turning to these rates, Mr Forbes set out the royalties that would be charged by the Swatch group in a table at Forbes 1/[2.28]. Setting out extracts from this table, Mr Forbes put forward the following figures:

	A Omega	B Tissot	C Swatch	
Unit price for the smartwatch	US$1,300	US$650	US$450	
Royal rate (%)	24.62%	21.08%	16.22%	
Royalty per unit	US$320	US$137	US$73	
Volume of sales over infringing period	75,000	1,050,000	2,100,000	
Total royalties	US$24m	US$144m	US$52m	= US$220m

Table 2: Mr Forbes' royalty calculations

92. It will be noted that the total royalties calculated, in respect of three brands – Omega, Tissot and Swatch – amount to US$220m, whereas the damages claimed by the Swatch group for *all* infringements in respect of *all* brands is the slightly more modest US$170m. I will come to the explanation for this in due course. The following points can be made with regard to Mr Forbes' assessment:

i) There is nothing wrong in Mr Forbes taking a sample of three watch brands – here, Omega, Tissot and Swatch –, working out what rates the Swatch group might charge for co-branding in these cases, and then extrapolating from this sample to reach an overall figure. The samples have been taken from the "luxury" brands (Omega), the "middle" brands (Tissot) and the "basic" brands (Swatch) as set out in Table 1, and so are broadly representative. Although, in cross-examination, Mr Forbes was accused of "cherry picking" his brands, I do not consider that to be a sustainable criticism.

ii) The unit prices for the smartwatches – US$1,300 (Omega), US$650 (Tissot) and US$450 (Swatch) – are ***not*** the prices at which the Samsung Smartwatches actually sold for during the infringing period. Rather, these prices represented Mr Forbes' assessment of the prices that fully co-branded Samsung Smartwatches might have commanded in a counterfactual world where not only the software of the watches was co-branded, but also the hardware.

iii) This explains the different prices for the different co-branding exercises. Omega, as a luxury brand, would retail for more than the lesser Tissot

[88] See Forbes 1/[5.15].

and Swatch brands.[89] This makes sense, and if the exercise I were engaged in was an assessment of the royalties chargeable for a co-branding infringement of this sort, then I might give these figures some weight. However, this is not what Samsung did – and, more importantly, not what Samsung intended to do. Samsung, in the hypothetical negotiation we are postulating, would be seeking to licence (i) advertisement of the app in the SGA store (ie, a licence for potential Store Display Infringement) and (ii) downloads of Infringing Watch Face Apps (ie, Dial Branding Infringements).

iv) There was no suggestion in the evidence that Samsung would have charged *more* for its Smartwatches if it had obtained, *ex ante*, a licence along these lines. Indeed, the speed with which Samsung took down the Infringing Watch Face Apps is powerful evidence that these Apps added nothing to the sale price of Samsung Smartwatches. The hypothetical negotiation between the Swatch group and Samsung would (to the extent the price of the Smartwatch was relevant) have proceeded on the basis that rates would (if necessary) be calculated by reference to the actual sale price of the Samsung Smartwatches, not by reference to some invented figure representing a product neither party had any intention – even in the counterfactual world – of selling. According to Mr Bezant, the average price of a Samsung Smartwatch during the relevant period was US$220.[90] Mr Forbes' prices of US$1,300, US$650 and US$450 are not responsible counterfactual assessments, but derive from the world of fantasy.

v) The volume of sales postulated by Mr Forbes are also based on an unreal counterfactual world. If volume of sales are relevant – and I will come to this – then actual volumes sold, not putative volumes, should govern given Samsung's business model. Whilst I consider that the use of the Swatch group trade marks benefited Samsung, I consider that it would be unwise to anticipate a material increase in Smartwatch sales. I have been provided with the (confidential) revenues for smartwatch sales. Without disclosing too much, these suggest total sales over the infringing period of just over 3 million Smartwatch units, which is less than the total sales for the three "co-branded" watches assessed by Mr Forbes (which were Omega: 75,000 units; Tissot: 1,050,000 units; and Swatch: 2,100,000 units). Again, these figures derive from the realm of fantasy and do not constitute a responsible counterfactual assessment.

93. To complete the picture, I should briefly explain how Mr Forbes managed to contract or reduce his assessment of royalties of US$220m for three branded watches to royalties of a mere US$170m for all brands *including* these three. Ordinarily, one would expect the figure to go up:

i) Mr Forbes recognised that his figures might be regarded as over-optimistic. He therefore applied a probability of success weighting, reducing the royalties by 25% (Omega) and 50% (Tissot and Swatch).

[89] Mr Forbes' assessment in this regard appears at the table in Forbes 1/[6.4].
[90] Bezant 1/Table 9-3 at [9.20].

The problem that I have with these discounts is that they appear to be as speculative as the figures they are discounting.

ii) Mr Forbes then applied an upward weighting to this discounted figure, so as to obtain a global figure for all infringed brands.

94. Mr Forbes' calculations are thus fragile, speculative and over-optimistic in favour of the Swatch Group. Mr Forbes also provided to two "cross-checks" for his US$170m figure. By a coincidence some might regard as startling, but I regard as inevitable given the tendentious approach of the experts, these cross-checks also reached a figure not materially different from US$170m.

95. The only point of value that I derive from Mr Forbes' evidence is a ball-park figure for the monies that Samsung should be paying the Swatch Group by way of negotiating damages. I consider – given Mr Forbes' evidence as to brand value, which I accept – that the damages payable by Samsung ought to have six noughts or zeros after no more than two positive integers. To that extent, I derive some value from the evidence of Mr Forbes.

96. The starting point has got to be to identify the rights that, *ex ante*, Samsung would have been seeking to obtain from Swatch. Mr Bezant accepted that this was the case, but then failed to articulate what rights *ex ante* Samsung would have needed, preferring to consider simply the number of infringing downloads and ignoring altogether the infringements involving the SGA store. Mr Bezant's approach is thus as unhelpful as that of Mr Forbes.

The evidence as to the "value" of the hypothetical licence

Introduction

97. As I have described, it is not possible to divorce Mr Forbes' assessment of the scope of the hypothetical licence from his assessment of the value of the rights conferred by that hypothetical licence. I have set out my reasons for rejecting Mr Forbes' assessment of the level of negotiating damages.

98. Mr Bezant, by contrast, defined the scope of the licence wrongly – again for reasons I have explained – but it is nevertheless appropriate to consider how Mr Bezant ended up with a value of a mere US$301.

99. Mr Bezant identified three approaches for valuing the rights conferred by the Swatch group on Samsung pursuant to the notional licence. These three approaches were: (i) a "comparables" approach, based on royalties in other, similar licences; (ii) an "economic benefits" approach, which assessed the net incremental value generated by the licensee's use of the intellectual property infringed and how this value should be shared between the licensee and licensor. The net incremental value took into account both costs and benefits to both parties; and (iii) a cost-based approach, which considered the cost to the licensee of developing its own IP as an alternative to using the IP of the licensor.[91]

[91] Bezant 1/[6.2].

100. Mr Bezant explained why the first and third of his approaches did not produce meaningful outputs, and why he adopted an "economic benefits" approach. I shall consider Mr Bezant's two (rejected by him) approaches first, before turning to the approach in fact adopted by Mr Bezant.

A comparables approach

101. Mr Bezant noted:[92]

> An arm's length transaction between a willing licensor and a willing licensee, in similar circumstances and in respect of the same or similar IP, provides, in principle, the best available information about the appropriate level of royalty. The comparables approach is therefore often regarded as the best approach to assessing a royalty for IP, particularly where it is difficult to isolate the incremental expected benefits from the use of the IP.

102. I do not agree with the qualification at the end of this quotation (which I have underlined), for it implies that the incremental expected benefits approach is better than a comparables approach where those benefits can be identified. Where comparables exist, they are, in my judgement, the best evidence of rate. That is because comparables represent market outcomes, and price is the output of a market. Provided the market is competitive – "arm's length" – the comparable rate will be the best evidence of rate for negotiation damages purposes. Nor do I accept that this approach is even the next best approach where useful comparables are unavailable.

103. In cases like this, comparables do not exist. Neither expert in this case was able to advance a rate by reference to comparables, and there was no evidence before me by way of which such a rate could be calculated.[93] That is not to say that transactions were not put before the court – they were.[94] It is that neither side sought to contend that these transactions could constitute a reliable basis for the assessment of negotiation damages in this case. I agree with both experts in this regard.

104. One transaction which *neither* expert contended was helpful was the following (described by Mr Bezant in Bezant 1):

> **[7.36]** I understand that Samsung's use of the Infringed Trade Marks involved their use on smartwatch faces and in smartwatch app names. That is, the rights licensed under the Notional Licence relates, in part, to their use on smartwatch faces. Therefore, publicly available evidence of royalty rates for licences relating to smartwatch faces may be informative of the reasonable royalties of the Notional Licences.
>
> **[7.37]** I have not identified any such evidence, but I have identified evidence in respect of one licence related to a Swiss clock face being used digitally.
>
> **[7.38]** Specifically, in September 2012, the Swiss Federal Railway service objected to the clock face used by Apple as the default option for its "Clock" app. It was reported that the Swiss Federal Railway service considered that the clock face "too closely

[92] Bezant 1/[6.4].
[93] See Bezant 1/Sections 6 and 7.
[94] Certain agreements that were disclosed by the Swatch Group are described by Mr Bezant at Bezant 1/[7.9], and Mr Bezant also considers certain publicly available information at Bezant 1/[7.30]ff.

resembled" its design, which has been honoured by both the Museum of Modern Art in New York and the London Design Museum. At the time, this design was licensed to Mondaine, a Swiss watch company.

[7.39] On 12 October 2012, Apple reportedly paid a lump sum of around CHF 20.0 million to settle the objection from the Swiss Federal Railway service regarding the clock face used by Apple as the default option for its "Clock" app on the home screen of devices which used iOS6, its digital operating system (ie, to be used by default on Apple devices including the iPhone)…

105. Mr Bezant concluded that this settlement – I shall refer to it as the **Apple Settlement** – had limited relevance to the present case. That was also Mr Forbes' view. I agree:

i) There is no evidence as to precisely what the terms of the Apple Settlement were.

ii) The number of infringements were significantly greater in the case of the Apple Settlement than in the present. The "Clock" was used as a default across millions of iPhones (and iPads), whereas in this case infringing watch faces had to be downloaded from the SGA store and this only occurred to a limited extent.

iii) The rights infringed were different. This is a trade mark case. The Apple Settlement concerned infringement of a design right.

106. It would be an error to treat the Apple Settlement as a comparator for these reasons, and (consistently with the approach of the experts, whose evidence I accept on this point) I do not do so. The most that the Apple Settlement provides is an indication as to "ball park", in which case the sum paid (just under US$25 million at present exchange rates) suggests (or rather confirms) that both sides are wrong in their quantification.

A cost-based approach

107. A cost-based approach considers the cost to the licensee of developing its own IP as an alternative to using the IP of the licensor.[95] Mr Bezant rejected the viability of this approach for the following reasons:[96]

I understand that it would not have been possible for Samsung or the App Developers to recreate the Infringed Trade Marks without still infringing the Swatch Group's rights. Consequently, there is no alternative whereby Samsung or the App Developers would achieve the same outcome by other means.

108. I agree with this assessment. I would only say that I would be extremely sceptical as to whether a viable cost-based approach could ever constitute a proper way of assessing negotiation damages. But, since neither expert advanced a valuation on this basis, I consider this point no further.

[95] Bezant 1/[6.2(3)].
[96] Bezant 1/[6.14].

The economic benefits approach

109. Mr Bezant described the economic benefits approach as one where:[97]

> …it is necessary first to estimate: (i) the incremental economic benefits expected to be obtained by the licensee through its use of the IP; and (ii) those expected to be foregone by the licensor. It is then necessary to consider how the net benefits should be shared between the parties.

110. As I have described, this approach only works where: (i) it is possible to ascertain with a high degree of confidence the value (expressed in money terms) that each side attaches to rights they are acquiring or giving up; and (ii) the "profit" the defendant putative licensee anticipates will be *greater* than the "loss" the claimant putative licensee anticipates. Both elements involve difficulty.

111. Mr Bezant assessed the benefits to Samsung of the hypothetical licences as comprising direct and indirect benefits. The direct benefits were the (very small revenues) accruing to Samsung, which Mr Bezant quantified at US$301.[98] Mr Bezant assessed the indirect benefits to Samsung as nil. In making this assessment, Mr Bezant was looking at tangible changes in the sales of Samsung smart watches (either by volume or by price or both) and he could identify none:

> **[8.66]** Samsung's large size relative to any potential indirect benefits and its high level of diversification mean that it is inherently difficult to prove or disprove a causal relationship between the trade mark infringements and Samsung's performance.
>
> **[8.67]** However, I have not identified any quantitative evidence that suggests that Samsung's sales of smartwatches increased as a result of the infringements. I further consider that the qualitative evidence suggests that any such benefit is likely to have been negligible.
>
> **[8.68]** Therefore, I consider that the economic benefits that accrued to Samsung as a result of the infringing Apps are limited to the US$301 of revenue that it earned from the sale of paid-for Infringing Apps. In principle, it may have enjoyed some additional indirect benefits through its share of any increased sales of apps that were not infringing Apps. I do not have sufficient information to value these indirect benefits, but I consider they are likely to be limited.

112. So far as the detriment to the Swatch group was concerned, Mr Bezant considered "any damage caused to the Swatch Group by the trade mark infringements…to have been negligible".[99] In assessing "damage", Mr Bezant again adopted a quantitative view:

> **[4.68]** I have not identified any quantitative evidence that suggests that the Swatch Group's sales of watches decreased as a result of the infringements. I further consider that the qualitative evidence suggests that any such damage is likely to have been

[97] Bezant 1/[8.1].
[98] Bezant 1/[8.18]. Mr Bezant considered the direct benefits to the App Developers separately. For reasons that I have given, I do not consider this to be appropriate. Adding the direct benefits to the App Developers to the Samsung direct benefits gives a total of US$1,003, which is not material in the scheme of things.
[99] Bezant 1/[8.2].

negligible. Similarly, I have not identified any evidence of a decrease in the Swatch Group's brand value or prestige that can be attributable to the infringing Apps.

[4.69] To the extent that damage to the Swatch Group was positive (but small), it would be difficult to identify such damage from the information available to me. This is because the Swatch Group's diversified range of brands and its large size means that it is not possible to control for every factor that may have affected its performance since the start of the Combined Infringing Periods to isolate the effect of the infringements (if any) and that it is difficult to identify small changes in that performance.

[4.70] However, I consider that:

(1) There is no evidence that the Swatch Group suffered damage to the extent it claims as a result of the trade mark infringements; and

(2) There is no evidence more generally that the Swatch Group suffered any non-negligible damage as a result of the trade mark infringements.

113. Accordingly, Mr Bezant concluded that the economic benefits approach justified a maximum negotiating damages level of US$301. I consider this to be an indefensible proposition for the following reasons:

i) The analysis focusses on quantifiable economic benefits to the exclusion of the *value* attaching to the putative rights being acquired (by Samsung) or conferred (by Swatch). Whilst such a quantitative approach may provide an *indicator* of value in certain cases, it is by no means conclusive or even reliable.

ii) In the present case, the *value* to Samsung of the rights granted by way of the hypothetical licence was greater than the direct and indirect benefits assessed by Mr Bezant, who confined himself to looking at the "bottom line". This is for the following reasons. First, as was noted in the Liability Judgment, the "ecosystem" surrounding Samsung smartwatches – the SGA store and the apps available on it – added to the user experience of purchasers and potential purchasers of Samsung Smartwatches. Samsung sought to minimise the value of this "ecosystem" by repeatedly suggesting (i) that only a minority of users accessed the SGA store at all and (ii) that what was being measured was the marginal benefit of the Infringing Watch Face Apps, not the benefit of making available the SGA store through which many Apps could be downloaded. This misses the point of Samsung's business model: the experience Samsung was offering was access to the SGA store, which would have – "on display", as it were – a vast range of applications to suit any taste. Of course, Samsung could have been much more ruthless in their offering and cut back on the Apps they wanted to make available via the SGA store. But that is precisely what Samsung did *not* do. The very fact that Samsung went to the expense of establishing the SGA store and populating it with Apps in the way it did shows that Samsung attached a value to the "ecosystem" far in excess of the revenue it obtained. Revenue raising was clearly not a priority: why else permit "free" apps? None of this value to Samsung was measured by Mr Bezant.

iii) Secondly, to the extent that a user of a Samsung Smartwatch downloaded an infringing app, they too would likely infringe the Swatch group's rights. Whilst I appreciate that it is unlikely that the Swatch group would actually commence proceedings against an individual user (unless, perhaps, they were particularly prominent), every purchaser of a smartwatch would expect to have a device compliant with the laws of the country in which they used the Smartwatch. There is value *to Samsung* in selling legally compliant devices, even if that factor is price neutral. Consumers *expect* (and have a right to expect) compliant goods. Again, this value is unmeasured by Mr Bezant.

iv) Thirdly, by focussing exclusively on the benefits Samsung *actually* received, Mr Bezant adopted an after-the-event assessment of benefit which placed the risk and burden of commercial failure squarely on the Swatch group and not (where it should belong) on Samsung. There was no evidence before me as to what Samsung might have hoped to gain had they entered into negotiations with the Swatch group *ex ante*. It is perfectly possible that Samsung were hoping/expecting for much more from infringing downloads and that they would have valued the rights they should have obtained correspondingly higher. Put another way, the risk of failure should not rest on the claimant, but on the infringer; and there was no evidence before me as to what constituted "failure" in this particular case.

v) Looking at the other side of the equation, Mr Bezant entirely mistakes the nature of negotiation damages in focussing on the *damage* to the Swatch group of the Infringing Watch Face Apps. The price that an owner of property will charge for the use of that property is not measured by the harm to the owner if the property is unlawfully used. That can be a measure of compensation that the law offers the injured party, but it is not negotiation damages. Mr Bezant's analysis accordingly misses the point.

vi) I accept that the cost of producing the property unlawfully used by the infringer can be a guideline to the *minimum* price that the producer would demand. Cost, in this sense, represents a floor. In the case of intangible property, however, "cost" is a very difficult matter to assess, because of the very intangibility of the thing, and the fact that it is replicable. If this were a case of the manufacture of fungible, but physical, "widgets", and a defendant took one and used it unlawfully, then negotiation damages (assuming no market) would have as their starting point the cost to the producer plus a reasonable profit. But that is a measure that is in essential terms irrelevant in the case of intellectual property.

vii) The problem with trade marks is that their value increases in intangible ways over time. It is fanciful to suggest that because no immediate consequences of an infringement can be shown, there is no damage and there is no value in a licence. To the contrary: marks should not be exposed to a death by a thousand cuts. That is a point made very clearly in the evidence that I heard.

114. The question that Mr Bezant did not ask, still less answer, is the point that Mr Forbes began with. Brands have value, and there can be no doubt that if the Swatch group had been minded to co-brand with interested third parties, the Swatch group could have commanded a hefty price. That fact, alone, renders Mr Bezant's assessment of negotiating damages at US$301 entirely implausible and wrong. The fact is that Mr Bezant has understated the value that Samsung attached to the Infringing Watch Face Apps, and has allowed that understated value to "trump" the far higher value that the Swatch group attached to the rights that Samsung infringed.

A third way?

115. This is a case where both sides have presented extreme assessments of quantum of loss. In this case, a pendulum arbitration approach would be unjust, as well as wrong.

116. For the reasons given, the approach of both experts is wrong. Whichever approach were to be adopted, a clearly incorrect outcome would obtain by at least one order of magnitude. The figures advanced by both experts sit well outside the latitude afforded to a Court applying a "broad brush". When this point was raised, before and during the trial, neither party suggested that a third way was not possible, and some suggestions were made as to how the figures advanced by Mr Bezant and Mr Forbes might be trimmed or adjusted. But these suggestions were no more than variants on themes that I have comprehensively rejected.

117. Neither expert addressed with any degree of precision what rights Samsung would need, *ex ante*, in order to render its infringing conduct compliant. Mr Bezant simply focussed on the watch-face downloads (ie, the Dial Branding Infringements), and disregarded the Store Display Infringements and the Double Barrelled Infringements. The putative licence considered by Mr Bezant was insufficient to legitimise the business that Samsung was intending to run.

118. Mr Forbes erred in the other direction, contemplating a co-branding exercise that Samsung never intended or contemplated. In particular:

i) Samsung never contemplated any hardware modifications or "physical" branding that would involve any infringement of the Swatch group's brands.

ii) Samsung did contemplate their Smartwatches being "customised" through Apps, including by way of Watch Face Apps. As I have already stressed, although Samsung's witnesses sought to suggest that such apps were a minor, almost immaterial, offering, I reject that evidence as (i) inconsistent with the Liability Judgment and (ii) inconsistent with Samsung's practice, which was to offer alternative watch-face designs and (iii) inconsistent with evidence before me. Indeed, given that Samsung was promulgating its product as a *watch* (although obviously it is also an electronic device), its insistence at trial on Watch Face Apps being unimportant is impossible to accept.

iii) That being said, Samsung did not want to infringe other people's intellectual property rights. It did not *intend* the Infringing Watch Face Apps. The furthest one can go would be to say that Samsung was insufficiently assiduous in preventing infringements, possibly because it felt that it was protected from substantial damages if it took down promptly any infringing Apps. That point was run at the Liability Trial, and it failed. There is no room for re-visiting it at the quantum stage. It may be that Samsung made a miscalculation as to its legal position and the financial consequences of hosting and permitting the downloading of the Infringing Watch Face Apps. If that was the case, then this is an irrelevant factor to the assessment of negotiation damages.

iv) What *is* clear is that Samsung did not value the rights it was infringing enough to continue with its use of the Swatch Group brands and to pay for a licence in the future. This case, as I have noted, only concerns past infringements, and there has been no need for a discussion of a licence because Samsung have removed the infringing applications. That is, I consider, cogent evidence of the value of the Infringing Watch Face Apps to Samsung. Samsung were able to remove the Infringing Watch Face Apps from the SGA store at no economic cost to Samsung.

119. On the basis of these findings, it is possible to articulate the rights that Samsung would have sought to negotiate with the Swatch Group. What Samsung would have wanted was a licence to validate infringements of the Swatch Group marks which were infringements that Samsung could (at least if they thought about it) anticipate but which they did not actually desire, because the value Samsung attached to the use of these Infringing Watch Face Apps was not very high. (That, as I have noted, is implicit in the fact that Samsung took down these Apps when notified by the Swatch Group that they were potentially infringing.)

120. Although Mr Bezant relied on this fact – and on the limited number of downloads and the tiny revenue generated by them – to suggest that a licence was of little or no value to Samsung, that is nevertheless an error. Samsung is an organisation that will want to comply with the law and ensure that the use of the products it sells is compliant with the legal regimes in the countries in which it sells those products so that its purchasers can be assured that their product is compliant with these laws. The value to Samsung of a licence is that it renders lawful an otherwise unlawful consequence of its business practices. Samsung chose to operate the SGA store and chose to permit App Developers to sell Apps through it. The value that Samsung would obtain from a licence was (i) the ability to run the SGA store without infringing and (ii) the ability to sell watches without causing users (as well as Samsung) to infringe as and when an Infringing Watch Face App was downloaded.

121. So much for the "value" on the Samsung side of the equation. Turning to the Swatch group, there was no serious dispute that the Swatch group's trade marks were valuable, particularly when one focusses on *value* (ie, the price that can be commanded to a *willing* purchaser) and not on what damage the Swatch group would suffer if there was an infringement (which is not a relevant question in the case of negotiating damages).

122. On this basis, Samsung needed a licence from the Swatch group validating any infringement that might occur in the future on the basis that (i) any infringement would be rectified by removal as soon as identified, but that (ii) pending such removal Samsung would need to pay for any infringement committed by it either by way of a Dial Branding Infringement or by way of a Store Display Infringement.

123. As I suggested to counsel during the course of the hearing – neither of whom liked the analogy – the licence that Samsung needed in this context was a form of contingent protection to insure against a known risk eventuating despite Samsung's endeavours to prevent that risk eventuating. What is interesting about this case is that Samsung did not desire to host or cause the downloading of Infringing Watch Face Apps, but that it deliberately marketed and sold a product where this risk was both identifiable and foreseeable.

124. The terms of the necessary hypothetical licence and the level of the licence fee should be assessed on this basis. From the Swatch group's point of view, the reason why the licence was needed is irrelevant: the Swatch group did not want to dilute or damage its brand, for whatever reason, and it is (as it seems to me) entitled to demand a price that is commensurate to the value of the marks to the Swatch group.

125. Samsung's position is different. It is quite clear that Samsung does not value the marks as such, and considers that they make no real marginal difference to its offering to consumers. But it does not follow from this that the rate should be low. Samsung may not value the (unlawful) use of the Swatch group's brands, but it does value running a lawful and compliant business. Samsung has (or had) chosen the nature of the product it wanted to sell, and the value of the licence to it is to render that which is unlawful, lawful. This is simply an unavoidable cost of running the business that Samsung has chosen to run, and if Samsung has misunderstood or underestimated this cost, then that is its lookout, not the Swatch group's.

126. It follows that the starting point for an assessment of what the outcome of the hypothetical *ex ante* negotiations between the Swatch group and Samsung would be is the evidence of Mr Forbes. Although Mr Forbes has valued the wrong thing – a full-co-branding exercise, rather than the much more limited "insurance against infringement" that Samsung needed – his evidence at least provides a rough starting point for the exercise I am undertaking.

127. For the reasons I have given, Mr Forbes' calculations of royalties need to be based on *actual sales* by Samsung at the *actual rates* sold. (I should make clear that a broad brush is being applied to these figures.) There is no basis for assuming a higher unit price or higher volumes sold. For the purpose of assessing royalties, the sale price would have been the price at which the actual watches sold – US$220 – and the volumes would be assessed by a percentage of the number of limited co-branded products sold by Samsung. Co-branding in this case (the term is not a term of art) means downloading onto a Smartwatch an Infringing Watch Face App. In this case, therefore, the royalty rate would be calculated by reference to a volume times unit price formula, where volume is informed by the number of downloads and the rate is calculated by reference to

the unit price of the Smartwatch (not the App: the Infringing Watch Face App is the way in which co-branding takes place). For the moment, I consider that the royalty rate should be along the lines of that assessed by Mr Forbes (and as set out in Table 2): 20% (as an average). There is no need to differentiate between different brands, because I do not consider that such distinctions would pertain in the case of a purely software-based watch-face. On this basis, negotiation damages amount to US$7,040,000:

Unit price = US$220

Royalty rate (20%) per unit = US$44

Co-branded units sold (ie, number of downloads) = 160,000

Total royalty = 160,000 units x US$44 = US$7,040,000

128. This only addresses the Dial Branding Infringements, and leaves out of account the Store Display Infringements. The Store Display Infringements would (to my mind) be the infringements constituting the most serious threat to the Swatch brands. The use of the Swatch Group brands on Samsung's supermarket shelves (to use the physical analogy), downloadable for nothing or for little money, is to my mind very damaging to the Swatch Group's property interests. The low price is demeaning of the brands the Swatch Group seek to promulgate. By contrast, association of the Swatch Group's brands with a quality product like a Samsung Smartwatch is rather less damaging.

129. The manner in which the hypothetical license fee ought to be calculated therefore needs to be adjusted:

i) There should be separate licence fees payable in respect of the Store Display Infringements and the Dial Branding Infringements. As regards the former, it seems to me (given the indicative figure for a full co-branding exercise) that a flat fee of US$10m is appropriate.

ii) On the other hand, a rate of 20% of the Smartwatch Price is obviously too high, because it is based upon a full (hardware and software) co-branding collaboration. In this case, the co-branding was software only, and would be ephemeral both (i) because users change their watch faces and (ii) because Samsung would remove the offending App the moment it was notified. There is thus only a limited correlation between a percentage royalty rate and the unit price, which at 20% is clearly too high. For each download, a flat fee of US$10/download is a more reasonable outcome. This gives 160,000 x US$10 = US$1,600,000.

130. Accordingly, I assess the negotiating damages in this case at US$11,600,000. Although there is clearly a broadbrush element to this assessment, this figure can be justified. The evidence of Mr Forbes shows that substantial value attaches to the Swatch group's rights in the Infringing Watch Face Apps. Although Mr Forbes' assessment is obviously wrong by an order of magnitude, his approach is nevertheless closer (particularly if one strips out the inflated unit cost and the inflated volumes, as I have done). The figure also dovetails with the Apple Settlement, which I stress is no comparable, but which is sufficiently

similar to render my assessment consistent and not (as the experts' quantification was) inconsistent. The rate is sufficiently high to incentivise companies who sell Apps via stores like the SGA store (both Apple and Google operate stores along these lines) to respect the intellectual property rights of others, without rendering their businesses uneconomic (which would have been the effect of Mr Forbes' quantification).

Annex 1

Terms and abbreviations used in the Judgment

Term or abbreviation used	First reference in the Judgment
Appeal Judgment	Paragraph 5
App Developers	Paragraph 7(vi)
Apple Settlement	Paragraph 105
Apps	Paragraph 7(iv)
Bezant 1	Paragraph 7(v)
Dial Branding	Paragraph 7(vii)
Dial Branding Infringements	Paragraph 8(i)
Double Barrelled Infringements	Paragraph 8(iii)
Forbes 1	Paragraph 76
Infringing Watch Face Apps	Paragraph 7(v)
Liability Judgment	Paragraph 2
Liability Trial	Paragraph 2
Mr Bezant	Paragraph 2
Mr Forbes	Paragraph 2
Quantum Trial	Paragraph 6
Samsung	Paragraph 7(iii)
SGA store	Paragraph 7(iv)
Smartwatch	Paragraph 7(x)
Store Display Infringements	Paragraph 8(ii)
Swatch	Paragraph 7(i)
Swatch group	Paragraph 7(i)
Watch Face Apps	Paragraph 7(iv)