CLAIM No QB-2020-003024

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

B E T W E E N:-

(1) FACEBOOK, INC
(2) FACEBOOK IRELAND LIMITED

Claimants

-and-

(1) FATIH HALTAS

(2) MOBIBURN LIMITED

(3) OAK SMART TECHNOLOGY LIMITED

Defendants

_____

DEFENCE

_____

Preliminary Matters

1.   Unless otherwise stated, in this Defence references to paragraphs are references to paragraphs within the Particulars of Claim herein.

2.   For ease of reference the Defendants will adopt the section headings used in the Particulars of Claim, but the Defendants thereby make no admissions.

**General and Summary of Defence**

The relevant ecosystem and role of MobiBurn and its software

3.   A 'mobile app' is software that can be downloaded and used on mobile devices (typically iPhones or Android devices). There is a large, global market in mobile apps,

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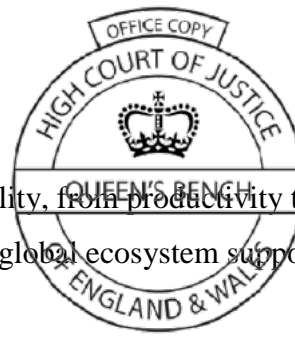
which offer a massively diverse range of functionality, from productivity tools through to entertainment and gaming. There is also a large global ecosystem supporting mobile app development and publication.

4. In broad terms, developers and publishers of mobile apps can generate revenue from them in three ways: they can charge users a one-off fee or subscription; they can sell digital advertising space available on the app through "ad networks" (one of the largest of which is operated by Facebook and is responsible for the vast bulk of Facebook's annual revenues); or they can licence user data collected by the app (with the user's consent) to one or more data monetization companies ('DMCs'), which aggregate and process the data to assist in appropriately targeting digital advertising campaigns. All three approaches to income generation are widely used; all are wholly legitimate.

5. A mobile app developer who wishes to generate revenue by licensing user data to a DMC typically does so by registering with the DMC and embedding the DMC's Software Development Kit ('SDK') into the app. A DMC's SDK contains the functionality needed to retrieve the user data of interest to the DMC and to send it to the DMC's server for collection; the mobile app developer can trigger the functionality built into the SDK and is thereby relieved from having to develop such functionality itself (albeit the developer still needs to understand how to embed and trigger the SDK). A mobile app developer who wishes to generate revenue via multiple DMCs would typically need to embed multiple separate SDKs into its app, thereby increasing complexity and cost.

6. During the last quarter of 2017, the First Defendant ('Mr Haltas') identified what he believed to be a gap in the market, namely an intermediary to sit between mobile app developers and DMCs, providing a single point of contact for mobile app developers to licence data to multiple DMCs without the complexity of having to integrate with multiple SDKs. Mr Haltas set up the Second Defendant ('MobiBurn'), as a wholly owned subsidiary of the Third Defendant ('Oak Smart') to fill that gap. MobiBurn commissioned the development of, first, the MobiBurn SDK Bundle and, later, the MobiBurn SDK.
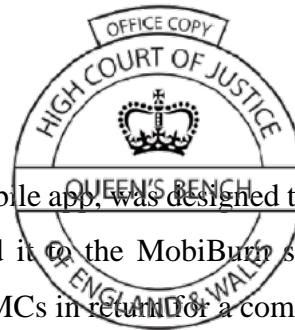
7. The MobiBurn SDK, when embedded within a mobile app, was designed to access user data and (provided that the user consented) send it to the MobiBurn server, where MobiBurn would collect it on behalf of partner DMCs in return for a commission, part of which was to be passed on to the mobile app developer. From the perspective of a developer wishing to monetise its mobile app through data acquisition, MobiBurn made matters technically more straightforward: rather than embedding multiple DMC SDKs into an app, the developer could embed the MobiBurn SDK and have immediate access to all of MobiBurn's DMC partners. The MobiBurn SDK in practice was little used, and accounted for only around 3% of MobiBurn's total revenue.

8. The MobiBurn SDK Bundle was a different technical mechanism for achieving a similar commercial result and the same practical result from a developer's perspective. It was a lightweight SDK that acted as a 'wrapper' and abstraction layer for a number of DMC SDKs ('**sub-SDKs**'). A developer could embed the MobiBurn SDK Bundle within their mobile app (a '**Primary App**') and thereby make use of all of the sub-SDKs within it without any further programming; instead, a developer simply needed to configure their MobiBurn account to specify to which DMCs they wished to activate and the MobiBurn SDK Bundle enabled the relevant sub-SDK. Once activated, a sub-SDK would operate as if it has been embedded directly into the Primary App.

9. Sub-SDKs wrapped by the MobiBurn SDK Bundle included the MobiBurn SDK, an SDK from a DMC known as OneAudience, and a number of other SDKs of no relevance to the present claim. Whereas data acquired through the MobiBurn SDK was sent to MobiBurn's server, data acquired through other sub-SDKs (including the OneAudience SDK) was sent directly to the relevant DMC; it did not go via MobiBurn's servers, and MobiBurn had no control over or access to it. Around 97% of the revenue received by MobiBurn related to such data.

10. In addition to serving as a convenient wrapper for the sub-SDKs, after the introduction of the GDPR in May 2018 the MobiBurn SDK Bundle introduced an important governance mechanism: it ensured by technical means that no sub-SDKs would be able to send any data to DMCs unless and until the Primary App had displayed a Privacy Notice and the user had consented to the data collection.

11.   The MobiBurn business was not a success, and has been dormant since June 2019.

Defence of Mr Haltas and MobiBurn

12.   The thrust of Facebook's complaint is Primary Apps incorporating the MobiBurn SDK Bundle transferred data obtained from Facebook to DMCs, in breach of Facebook's policies, and that Mr Haltas and MobiBurn are liable for procuring breaches of developers' contracts with Facebook. It is also said that Mr Haltas was himself in breach of contractual obligations to Facebook because he incorporated the MobiBurn SDK Bundle into a mobile app known as '*Hardik Messenger*'.

13.   Facebook's claim is misconceived in that:

13.1.   MobiBurn had no interest in collecting data from Facebook and it did not do so. The MobiBurn servers were not programmed to collect Facebook data and were thus technically incapable of doing so. What MobiBurn collected (via the MobiBurn SDK, and only with user consent) was data stored on user's devices. Use of that data (whether by MobiBurn, developers of Primary Apps, or end users) is not governed by Facebook's terms, conditions or policies.

13.2.   The Hardik Messenger app was technically incapable of collecting Facebook data and it did not do so. Nothing relating to the use of Hardik Messenger (whether by Mr Haltas, MobiBurn or an end user) was or could conceivably be governed by Facebook's terms, conditions or policies. Hardik Messenger is a mobile app; it has nothing to do with Facebook.

13.3.   To the best of the Defendants' knowledge, there was only one DMC whose sub-SDK was incorporated within the MobiBurn SDK Bundle that may have been technically capable of collecting Facebook data through the MobiBurn SDK Bundle, namely OneAudience. That sub-SDK could only have done so in circumstances where:

13.3.1.   The Primary App used "Login with Facebook", a tool provided by Facebook which, if integrated by a developer into a mobile app, allowed users to login

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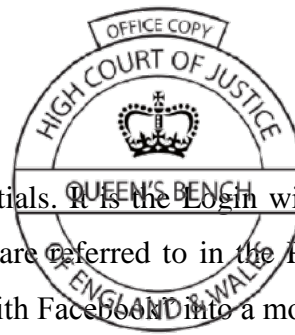
to the app using their Facebook credentials. It is the Login with Facebook feature that generates digital keys that are referred to in the Particulars of Claim. In order to incorporate "Login with Facebook" into a mobile app, the developer must sign up to be a "Facebook Developer" and must register the app with Facebook.

13.3.2.   The Primary App incorporated the "com.facebook.AccessToken" Java class, which is part of the mechanism used by Facebook's API for managing access to user data, in an unmodified form.

13.3.3.   The end user of the Primary App must have logged into the app using the Login with Facebook feature.

13.3.4.   The end user of the Primary App must have consented to the data collection and transfer.

13.4.   The Defendants believe that a total of 284 Primary Apps incorporated and made live use of the MobiBurn SDK Bundle, of which only three met the criteria set out in paragraph 13.3 above. Therefore, a maximum of three Primary Apps could even theoretically have accessed Facebook data through use of the MobiBurn SDK.

13.5.   The Defendants do not know whether OneAudience ever in fact collected Facebook data through any of those three Primary Apps or was capable of doing so. Neither MobiBurn nor Mr Haltas intended for OneAudience to do so; nor did either intend that any Facebook Developers should breach their contracts with Facebook.

13.6.   What the Defendants do know is that no Facebook data was ever collected or transferred by MobiBurn, and that MobiBurn never received any revenue from OneAudience (or any other source) in relation to any Facebook data.

14.   In summary, if (which is not admitted) any Facebook data was collected and/or sent to a DMC through use of the MobiBurn SDK Bundle, that was not part of MobiBurn's or
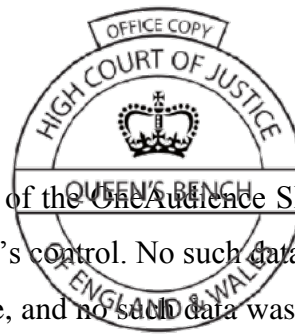
Mr Haltas' design or intention but was a function of the OneAudience SDK, the data flow from which was wholly outside of MobiBurn's control. No such data was sent by the MobiBurn SDK or the MobiBurn SDK Bundle, and no such data was collected by MobiBurn servers. The MobiBurn business was about mobile apps and mobile devices; it was not about Facebook.

Oak Smart

15. The Third Defendant ('Oak Smart') is a publisher of mobile apps (both its own proprietary apps and third-party apps). For the purposes of its app publishing business, Oak Smart uses Facebook. Specifically, Oak Smart uses Facebook for Business, a user acquisition and monetisation service offered by Facebook that allows publishers to advertise apps on its platforms (which include Facebook, Instagram, Messenger and the Facebook Audience Network) and to offer up space on mobile apps to advertisers. In order to use Facebook for Business in this way, Oak Smart has had to register the apps that it publishes with Facebook. It has registered around 400 of such apps ('Oak Smart Apps'). Although registered with Facebook (so that Facebook for Business services can be used in relation to them), the Oak Smart Apps are not Facebook apps – they do not run on the Facebook Platform but on mobile devices.

16. Oak Smart is a successful business, and is heavily reliant on use of the Facebook for Business user acquisition and monetisation services for that success.

17. Oak Smart had no involvement in the MobiBurn business or any of the matters that form the basis of Facebook's claim. Only 68 Oak Smart Apps contained the MobiBurn SDK Bundle or the MobiBurn SDK. None of these apps contained the "Login with Facebook" feature. Therefore, none were technically capable of accessing (still less collecting or transferring) any Facebook data, and none did so.

18. The only allegation made against Oak Smart is that it failed to comply with a request by Facebook for an audit. In fact, Facebook did not have the contractual audit right that it asserted; in any event, Oak Smart did (and remains willing to) comply. There is no proper basis for a claim against it.

The Parties

The Claimants

19. Paragraph 1 is admitted.

20. As to paragraph 2:

    20.1. The first sentence is admitted. Facebook uses its social networking website and mobile application as the basis for a substantial advertising business, whereby advertisers can create and run campaigns that are delivered through the website and mobile application to Facebook's users;

    20.2. The second sentence is too broad a generalisation. The Defendants address the applicability or otherwise of Facebook's Terms of Service and other rules that govern different types of access to, and use of, Facebook, below in the particular circumstances of this case;

    20.3. The third sentence is admitted.

21. As to paragraph 3:

    21.1. The first sentence is admitted;

    21.2. The second sentence is admitted;

    21.3. The third sentence is too broad a generalisation and the Defendants address the applicability or otherwise of Facebook's Terms of Service and Platform Policies below in the particular circumstances of this case.

22. As to footnote 1:

    22.1. It is admitted that previous versions of the Platform Policies have been called the "*Developer Principles and Policies*", the "*Platform Guidelines*" or the "*Developer Terms of Service*";

22.2. It is not admitted (because the Defendants do not know) that the material provisions have at all material times been substantially the same and the Claimants are put to strict proof;

22.3. By way of example:

22.3.1. Section 3.10 of Platform Policies, on 24 April 2018, read as follows:

"*Don't transfer any data that you receive from us (including anonymous, aggregate, or derived data) to any ad network, data broker or other advertising or monetization-related service.*"

22.3.2. Whereas on 25 April 2018, Section 3.10 of Platform Policies was amended to read as follows:

"*Don't directly or indirectly transfer any data that you receive from us (including anonymous, aggregate, or derived data) to any ad network, data broker or other advertising or monetization-related service. By "indirectly" we mean you aren't allowed to, for example, transfer data to a third party who then transfers the data to an ad network.*" (emphasis added);

22.3.3. The Defendants will contend that the amendment is not insubstantial.

22.4. The Claimants are further put to strict proof of the precise (i) Terms of Service; (ii) other rules that govern different types of access to, and use of, Facebook; and (iii) Platform Policies which they allege applied from time to time during the material times.

The Defendants

23. As to paragraph 4:

23.1. While Mr Haltas studied computer engineering at university, he is not experienced with developing (coding or designing) mobile apps, his practical

programming knowledge is limited to what he learnt during his degree and he has no work experience relevant to mobile app development;

23.2. Mr Haltas was a commercial user of Facebook;

23.3. Mr Haltas was registered as a Developer on the Facebook Platform.

24. As to paragraph 4(a):

24.1. Although some time ago, Mr Haltas' recollection is that he created three Facebook user accounts:

24.1.1. on 19 October 2007 under the name "*Fatih Haltaş*". Mr Haltas believes that he has deleted that account. To the best of Mr Haltas' recollection it has never been used for publishing apps on the Facebook Platform or for any other commercial purposes;

24.1.2. Gulbeyaz Haltas is a personal Facebook account created by Mr Haltas (on 15 October 2013) on behalf of his mother. It may have been used for publishing a few apps on the Facebook Platform. At that time, MobiBurn did not exist. The account has never been used for publishing apps after publication of the MobiBurn SDK Bundle;

24.1.3. on 7 September 2016 under the name "*Fatih Haltaş*". This is the main account actively used by Mr Haltas for publishing apps.

24.2. Mr Haltas accepted Facebook's then current Terms of Service when he created each of the accounts. The Claimants are put to strict proof of the applicable Terms of Service at the relevant times.

24.3. Mr Haltas also was an administrator of 69 "Pages" (being profiles on Facebook used to promote a business or other commercial, political, or charitable organisation or endeavour). Facebook obliges commercial users to create such Pages to perform marketing activities on the Facebook Platform.

24.4. Mr Haltas believes that he created those Pages between June 2018 and October 2019, however he cannot currently verify this as his Facebook account has been suspended.

24.5. Mr Haltas created five business accounts, including one for Oak Smart.

24.6. Mr Haltas does not recognise the Instagram profiles to which reference is made and no particulars have been provided. In those circumstances Mr Haltas can neither admit nor deny that he created two Instagram profiles.

25. As to paragraph 4 (b), Mr Haltas repeats the admission in sub-paragraph 24.2 above. The Claimants are put to strict proof of the applicable Terms of Service at the relevant times

26. As to paragraph 4(c), Mr Haltas admits that he registered a Developer account on a date he cannot now recall and will have accepted the then applicable Platform Policies. The Claimants are put to strict proof of the date of the registration and of the applicable Platform Policies at that time.

27. As to paragraph 5:

27.1. Mr Haltas is and was at all material times the sole director and sole legal owner of the shares in the Oak Smart, a company incorporated in England and Wales with company number 10862887;

27.2. Mr Haltas also is and was at all material times the sole director of MobiBurn, a company incorporated in England and Wales with company number 11080185;

27.3. Both Oak Smart and MobiBurn have at all material times acted under the direction and control of Mr Haltas.

28. As to paragraph 6:

28.1. MobiBurn engaged third party developers to develop both the MobiBurn SDK and the MobiBurn SDK Bundle. Mr Haltas was not aware of the precise details

of the work done by the third-party contractors in order to create the MobiBurn SDK or MobiBurn SDK Bundle. MobiBurn has not developed or commissioned the development of any other SDKs.

28.2.   The meaning of the tendentious expression "self-compromised" is not made clear. However, a primary function of the MobiBurn SDK Bundle was to ensure that no data was collected by any sub-SDK without the user's express consent. It is denied that users who voluntarily and expressly agreed to data collection are aptly characterised as having "self-compromised". The Defendants repeat that contention in respect of each occasion where the expression is used.

28.3.   The MobiBurn SDK accessed certain basic information from the user's device (subject to user consent) and sent it to MobiBurn servers. To that extent only it is admitted that the MobiBurn SDK would "collect" information. It is denied that any data from Facebook was ever "collected" by the MobiBurn SDK. The MobiBurn servers were not developed to collect Facebook data and were not capable of doing so.

28.4.   The MobiBurn SDK Bundle did not collect any information. It was a mere wrapper.

28.5.   Until June 2019 the MobiBurn SDK Bundle contained the OneAudience SDK. The Defendants do not know whether OneAudience servers had been designed to collect Facebook user data or, if so, whether any Facebook was ever transferred to OneAudience servers. Of the 284 Primary Apps that the Claimants believe made live use of the MobiBurn SDK Bundle, no more than three were technically capable of accessing Facebook data.

28.6.   The MobiBurn business has not proved successful and MobiBurn has been effectively dormant since June 2019, with no employees, contractors or agents.

28.7.   Save as aforesaid, paragraph 6 is denied.

29.   Paragraph 7 is admitted.

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30.   As to paragraph 8:

30.1.   The mobile apps published by Oak Smart are only for use on iOS and Android devices. None of the mobile apps are for the Facebook Platform.

30.2.   Oak Smart designs, develops and publishes mobile games.

30.3.   Oak Smart states on its website that it creates utility, security and gaming apps.

30.4.   Oak Smart also acts as a publishing company. Therefore, there are several 'apps' registered on the Facebook Platform for marketing purposes, but not all of them are owned by Oak Smart.

30.5.   Mr Haltas is registered as a developer on the Facebook Platform. Oak Smart is not and, as a corporation, cannot be. Mr Haltas created a business account on Facebook Business Manager to provide marketing services for apps on behalf of Oak Smart and to receive payments. Between June 2018 and April 2019, Mr Haltas created and operated various Facebook accounts, including Pages for Oak Smart apps.

30.6.   Mr Haltas believes that between June 2018 and April 2019, Oak Smart used the Facebook Platform only for monetisation and, to that end, Mr Haltas added the bank account details of Oak Smart to Facebook to receive payments for ads displayed in the apps.

30.7.   In the premises, it is admitted that Oak Smart (acting through Mr Haltas) agreed to be bound by Facebook's Terms of Service and Platform Policies in relation to its use of the Facebook Platform between June 2018 and April 2019.

30.8.   On 10 July 2019 Oak Smart entered into a written agreement with Facebook (Appendix 1) so that it could commence using the Facebook Platform for user acquisition.

31.   The Particulars of Claim contain no allegation that MobiBurn at any time accepted any (i) Terms of Service; (ii) other rules that govern different types of access to, and use of, Facebook; or (iii) the Platform Policies.

Relevant provisions of Facebook's Terms of Service and Platform Policies

32.   As to paragraph 9:

32.1.   The current version of the Terms of Service, at clause 3.2.1, provides as follows:

"*You therefore agree not to engage in the conduct described below (or to facilitate or support others in doing so):*
1. You may not use our Products to do or share anything:
- *That breaches these Terms, our Community Standards and other terms and policies that apply to your use of Facebook.*
- *That is unlawful, misleading, discriminatory or fraudulent.*
- *That infringes or breaches someone else's rights, including their intellectual property rights.*"

32.2.   The Claimants are put to strict proof of the wording of the Terms of Service at the time it is alleged Mr Haltas / Oak Smart accepted those terms.

33.   As to paragraph 10:

33.1.   The current version of the Terms of Service, at clause 3.2.3, provides as follows:

"*You therefore agree not to engage in the conduct described below (or to facilitate or support others in doing so):*

3   You may not access or collect data from our Products using automated means (without our prior permission) or attempt to access data that you do not have permission to access."

33.2.   The Claimants are put to strict proof of the wording of the Terms of Service at the time it is alleged Mr Haltas / Oak Smart accepted those terms.

34.   Paragraphs 11 and 12 are accepted as a broad paraphrase of the current Platform Policy (without thereby making any admissions) but the Defendants will refer to the Platform Policies at trial for their full terms, context and effect. The Claimants are put to strict proof as to the wording of the Platform Policy at the time it is alleged that Mr Haltas / Oak Smart accepted those terms.

35.   As to paragraph 13:

    35.1.   The current version of the Platform Policy contains the words quoted.

    35.2.   The Claimants are put to strict proof of the wording of the Platform Policy at the time it is alleged Mr Haltas / Oak Smart accepted those terms.

36.   Paragraph 14 is noted. The Defendants will do likewise.

Development and use of the MobiBurn SDK Bundle

37.   Paragraphs 15 to 17 are denied.

38.   The Claimants are put to strict proof of each occasion when it is alleged that the MobiBurn SDK or the MobiBurn SDK Bundle requested data from Facebook.

39.   Mr Haltas is not a software developer and did not develop the MobiBurn SDK Bundle.

40.   It is denied that Mr Haltas and/or MobiBurn knowingly developed an SDK bundle designed to obtain data from Facebook. Neither Mr Haltas nor MobiBurn at any time had any intention of collecting data from Facebook, and they did not do so.

41.   The MobiBurn SDK Bundle did not collect any data from any source. It was a mere wrapper for sub-SDKs, and a means of ensuring that sub-SDKs could not collect data from any source without the app user's express consent.

42.   The MobiBurn SDK could not request data from Facebook unless the "Login with Facebook" tool was also incorporated in the Primary app and the other technical criteria set out in paragraph 13.3 above met (which was the case with at most three apps, none of which have been available since April 2018) and the user of the app had in fact logged

in with Facebook. It is the "Login with Facebook" feature that generates digital keys. In any event, MobiBurn's servers were not developed to collect Facebook data and were incapable of doing so. Accordingly, it is denied that Mr Haltas and/or MobiBurn "used" the MobiBurn SDK to access and collect data from Facebook as alleged.

43.   If (which the Defendants do not know) and to the extent that the OneAudience SDK collected data from Facebook, it did not do so with Mr Haltas's or MobiBurn's knowledge, and neither Mr Haltas nor MobiBurn benefitted from any such collection.

44.   The Defendants will rely inter alia upon the following facts:

44.1.   The vast majority (around 98%) of the payments made by MobiBurn are payments to developers whose Primary Apps did not contain Login with Facebook feature (needed to obtain data from Facebook). MobiBurn never paid any developer for Facebook data.

44.2.   There is no difference between the amounts of payments made to developers who meet or fail to meet requirements for accessing Facebook set out in paragraph 13.3 above.

44.3.   There is also no difference between the amounts of payments made by OneAudience to MobiBurn for the data collected by the three Primary Apps that incorporated Login with Facebook and were therefore in principle capable of accessing Facebook data (provided users logged in using Login with Facebook) and payment made by OneAudience to MobiBurn for the data collected by other Primary Apps.

44.4.   Collection of user data from social media accounts is of no commercial value. Most of the information that can be collected from social media accounts, including user's full name, are usually worthless for DMCs or already readily available from other sources.
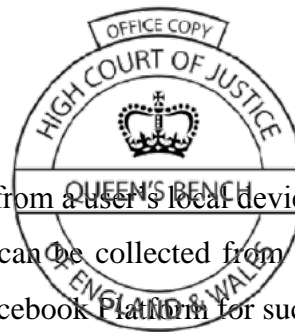
44.5.   The MobiBurn SDK is able to collect data from a user's local device. Such data is the same as or similar to the data that can be collected from social media accounts. There is no need to access the Facebook Platform for such data.

44.6.   MobiBurn has been fully transparent.

45.   Insofar as Mr Haltas and/or MobiBurn collected data from the user's device, that collection was not governed by or in breach of any Facebook terms or conditions. For the avoidance of doubt:

45.1.   The meaning of the tendentious expression "self-compromised" is not made clear. It is denied that users "self-compromised".

45.2.   It is denied that either the MobiBurn SDK or the MobiBurn SDK Bundle enabled MobiBurn to collect any information about the user from their Facebook account.

45.3.   It is denied that Mr Haltas and/or MobiBurn was in breach of any applicable Facebook terms and conditions. In particular, but without prejudice to the generality of the denial, neither Mr Haltas nor MobiBurn sold, licensed or purchased any data obtained from Facebook or transferred any such data to any third party, whether through the MobiBurn SDK or the MobiBurn SDK Bundle, or at all.

46.   Paragraph 18 is admitted (save that it is denied that the OneAudience SDK was "malicious").

47.   Paragraph 19 is admitted. As to paragraph 19:

47.1.   OneAudience was a well-known actor in the data business. There was no reason for MobiBurn to exclude the OneAudience SDK from the MobiBurn SDK Bundle at that time. The OneAudience SDK was removed from the MobiBurn SDK Bundle in June 2019.

47.2.   Fatih Haltas did not develop the MobiBurn SDK Bundle, he is not by profession a developer. The development was outsourced by MobiBurn.

48.   As to paragraph 20:

48.1.   The MobiBurn SDK contained code that, if embedded within a Primary App that implemented Login with Facebook, was capable of accessing the digital key associated with that Primary App and using that key to retrieve basic user information from Facebook. It is denied that such feature is aptly characterised as "malicious": it did not exploit any defect in a Primary App or the Facebook Platform.

48.2.   It is denied that the MobiBurn SDK was programmed to "collect" the digital key as alleged. It had the capability to access the digital key but had no capability to store it. Further, MobiBurn's servers were also not technically able to store the digital key.

48.3.   It is denied that the MobiBurn SDK was capable of making automated requests for data from Facebook as alleged. It was capable of making requests only when embedded within a Primary App that used the Login with Facebook feature (or which there were only ever three) and where the user had in fact logged in using that feature. Further, it did not do so in an automated way but only in response to the Primary App's user consenting to such data access. In any event, the MobiBurn servers were not configured to collect any Facebook data, so no Facebook data has ever in fact been collected by the MobiBurn SDK.

48.4.   It is denied that Mr Haltas and/or MobiBurn caused the MobiBurn SDK to misrepresent the source of requests as alleged. If (which is not admitted) any requests for data from Facebook were ever made by the MobiBurn SDK, they were made using the digital key associated with the Primary App. That is entirely normal and legitimate: app developers habitually use third-party libraries when developing their apps; from the perspective of a platform such as the Facebook Platform, a Primary App and any third-party libraries incorporated within it, such as the MobiBurn SDK, as a single unitary whole. By providing a
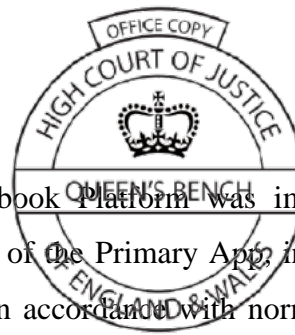
digital key to a Primary App, the Facebook Platform was implicitly and necessarily authorising its use by all parts of the Primary App, including any third-party libraries embedded within it, in accordance with normal software engineering principles.

48.5.   In any event, neither Mr Haltas nor MobiBurn knew that the MobiBurn SDK contained code capable of accessing Facebook data, specified that it should do so, nor ever used such data. Accordingly, even if (which is denied) the MobiBurn SDK misrepresented the source of any request as alleged, it is denied that Mr Haltas or MobiBurn caused it to do so.

48.6.   It is denied that the MobiBurn SDK is aptly characterised as "malicious".

48.7.   It is admitted that the OneAudience SDK was included (until June 2019) in the MobiBurn SDK Bundle. No admission is made as to whether the OneAudience SDK, when embedded within the MobiBurn SDK Bundle, ever made requests for access to Facebook data, such matters being outwith the Defendants' knowledge. It is denied (if it be alleged) that any data collected by the OneAudience SDK (or any of the sub-SDKs within the MobiBurn SDK Bundle apart from the MobiBurn SDK) was collected or processed in any way by MobiBurn.

48.8.   Save as aforesaid, paragraph 20 is denied.

49.   As to paragraph 21:

49.1.   It is denied that the MobiBurn SDK sent automated requests for data to Facebook computers. Paragraph 48 above is repeated. If (which is not admitted) the MobiBurn SDK ever sent requests for data to Facebook computers (which could only ever have been through one of three Primary Apps that used Login with Facebook), it is denied that it did so every 24 hours.

49.2.   It is admitted that the MobiBurn SDK was capable of requesting a user's name, locale, time zone, email address, Facebook ID and gender from the Facebook

Platform, when embedded within a Primary App that used Login with Facebook and the app's user had so logged in. It is not admitted that the MobiBurn SDK ever in fact requested any such data from Facebook.

49.3. It is admitted that the Facebook Platform contains technical restrictions that ensure that no app can retrieve data beyond that authorised by the user. It is denied (if it be alleged) that the MobiBurn SDK was designed to or did seek to circumvent such restrictions.

49.4. As to the final sentence, if (which is not admitted) the MobiBurn SDK ever accessed Facebook data, it is admitted that it was capable of sending it to MobiBurn's server. However, MobiBurn's server was incapable of processing, collecting or storing any such data and it did not do so.

49.5. No admission is made in relation to the OneAudience SDK, details of precisely what it did (if anything) with Facebook data being outwith the Defendants' knowledge.

49.6. Save as aforesaid, paragraph 21 is denied.

50. As to paragraph 22:

50.1. The first sentence is admitted.

50.2. The second sentence is denied. Subject to the user giving the requisite permissions, the MobiBurn SDK recorded location, the identity of the cell tower to which the user's device was connected at the time of data collection (specifically, MCC, MNC, LAC and Cell ID), and a list of apps installed on the device; it did not collect any call logs, contacts or browser information.

51. Paragraph 23 is denied. Mr Haltas caused MobiBurn to outsource development of the MobiBurn SDK Bundle and to distribute the MobiBurn SDK Bundle and promote it to Developers. Mr Haltas, acting through MobiBurn, provided the MobiBurn SDK Bundle to Developers for incorporation into their apps. The MobiBurn SDK Bundle was not malicious.
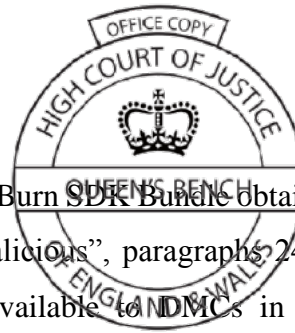
52.   Save that neither the MobiBurn SDK nor the MobiBurn SDK Bundle obtained any data improperly and or are aptly characterised as "malicious", paragraphs 24 and 25 are admitted. Collecting user data and making it available to DMCs in return for a commission, with users' express consent, is a wholly legitimate business model. Indeed, it is a business model that Facebook itself has adopted (albeit rather than making data available to DMCs, it monetises user data through its in-house advertising empire). It is denied that Mr Haltas and/or MobiBurn have at any time paid for or received a commission in respect of any Facebook data.

Purported Enforcement action taken by Facebook

53.   Paragraph 26 is accepted as a paraphrase of the subsequent paragraphs. The November Letter (see the next paragraph hereof) did not request an audit or invoke Section 7.9 of Platform Policies specifically.

54.   As to paragraph 27:

54.1.   On or about 21 November 2019, Facebook's U.S. counsel wrote to Mr Haltas in his capacity as CEO of MobiBurn (the "**November Letter**") alleging that Facebook had evidence that MobiBurn had violated and facilitated violations of Facebook's Terms of Service and policies. The November Letter contained the words quoted;

54.2.   The Defendants will refer to the November Letter at trial for its full terms and effect.

55.   Paragraph 28 contains a reasonable paraphrase of the effect of the November Letter.

56.   As to paragraph 29, the November Letter made the demands listed.

57.   As to paragraph 30 it is admitted and averred that MobiBurn (through Mr Haltas) responded on 25 November 2019. The Defendants will refer to that letter at trial for its full terms and effect.

58.   MobiBurn's letter dated 25 November 2019 made it clear that MobiBurn primarily acts as an intermediary in the data business. MobiBurn further stated that it performed development and testing activities for an improved version of the bundle to make sure that the bundle operates smoothly. In the same letter, MobiBurn also confirmed that it no longer performed any development works in relation to SDKs and that it had, '*as an indication of our good faith, ENTIRELY TERMINATED all SDKs that are under development or in testing phase following [Facebook's] letter*'.

59.   Paragraph 31 is admitted and averred. That was true.

60.   As to paragraph 32, the Defendants can neither admit nor deny what the Claimants investigated or confirmed, as they do not know.

61.   As to paragraph 33:

    61.1.   The first sentence is admitted.

    61.2.   Fatih Haltas was away from his office for a business trip but responded in writing.

    61.3.   It is denied that Mr Haltas, then or on any other occasion, gave misleading information to Facebook. It is noted that no particulars of the alleged misleading information are provided.

    61.4.   Mr Haltas, to the best of his knowledge, explained MobiBurn's position. Mr Haltas had only limited information available at that time but communicated the information he had received from contractors (although he had not had any opportunity thoroughly to review it). This was because Facebook set short time limits for MobiBurn to respond to its letters and responding to these requests was unreasonably burdensome for a dormant company with no employees.

    61.5.   The initial information Mr Haltas received from the relevant contractors was that three Primary Apps contained both the MobiBurn SDK Bundle (including the OneAudience SDK) and the "Login with Facebook" facility, and that no other Primary Apps were therefore capable of accessing Facebook data. Mr

Haltas believed and still believes the information he was given to be true. At that time, the detail of the functionality contained within the MobiBurn SDK was not known to Mr Haltas.

61.6.   Notwithstanding his belief that MobiBurn had not acted unlawfully, on receiving that information Mr Haltas sought the removal of the three Primary Apps that were technically capable of accessing Facebook from the Google Play app store.

61.7.   Mr Haltas was certain that MobiBurn did not collect or sell Facebook data and MobiBurn only acted as an intermediary. Further, although Mr Haltas did not know at that time that the MobiBurn SDK was a part of the MobiBurn SDK Bundle, this was irrelevant because MobiBurn did not collect Facebook data (whether through the MobiBurn SDK or otherwise), MobiBurn's server being incapable of processing Facebook data.

62.   Save that some of the requests were augmented rather than merely repeated, paragraph 34 is admitted.

63.   As to paragraph 35, it is admitted that Mr Haltas responded on 16 December 2019. The Defendants will refer to that letter at trial for its full terms and effect. The denial that MobiBurn had acquired any Facebook data was true.

64.   Save that the Defendants do not know whether it was "in light of these responses', and save that some of the requests were augmented still further rather than merely being repeated, paragraph 36 is admitted. The Defendants will refer to that letter at trial for its full terms and effect.

65.   The November Letter was addressed to:

F. Fatih Haltas, CEO
Oak Technology
MobiBurn Limited

66.   The November letter stated as follows:
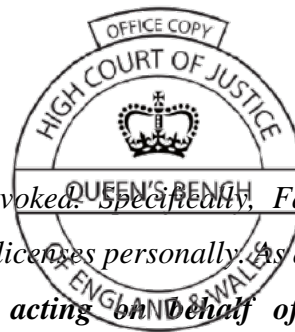
*"Your license to access Facebook has been revoked. Specifically, Facebook has revoked the license of MobiBurn and each of your licenses personally. As a result, **you, your agents, your employees and/or anyone acting on behalf of MobiBurn (collectively "You" or "Your") may not access the Facebook or Instagram websites and applications, employ their APIs, or use any of the services offered by Facebook for any reason whatsoever.** Facebook has taken appropriate technical measures connected with this revocation and will consider further activity by You on its websites or services as unauthorized access to its protected computer networks."*

67. MobiBurn was at no time subject to the Facebook Terms of Service or Platform Policies, nor do the Particulars of Claim allege that it was. The November Letter therefore purported to terminate Mr Haltas's licence to use Facebook and with it the contracts between Mr Haltas and Facebook, including the contract incorporating the Platform Policy. At that time the audit rights contained in the Platform Policy did not survive the termination of the contract.

68. In the premises, on 3 January 2020, MobiBurn was not subject to any audit rights and Mr Haltas had ceased to be subject to any audit rights. The Claimants had no legitimate grounds for invoking audit rights against Oak Smart, on the basis that:

68.1. it was not involved in any way in the development or distribution of the MobiBurn SDK or the MobiBurn SDK Bundle;

68.2. it has not at any time accessed Facebook data through automated means;

68.3. it has not developed or published any Primary Apps that were technically capable of accessing (still less collecting or transferring) any Facebook data; and

68.4. no allegations of wrongdoing have been made against it, save in relation to audit rights.

69. As to paragraph 37, the Defendants will refer to Mr Haltas's response for its full terms and effect.

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70.   MobiBurn, in its letter dated 7 January 2020, stated that:

"*… it is irrelevant whether a code, whose existence and functionality are not even known to MobiBurn, contained in MobiBurn SDK version 1.9.0 (or in some other versions) is designed to improperly collect data from Facebook endpoints.*"

71.   Although Mr Haltas was not aware at that time that the MobiBurn SDK was a part of the MobiBurn SDK Bundle, this was irrelevant because MobiBurn did not collect Facebook data. Paragraph 61.7 above is repeated.

72.   Paragraph 38 is admitted. The letter of 7 January 2020 explained that Oak Smart was not a "*valid recipient of* [the Facebook's] *letters*" and had been "*irrelevantly included as an addressee*". However, Oak Smart did voluntarily respond to the numerous questions raised by Facebook as to the activities of MobiBurn and Oak Smart, and explained that Oak Smart was merely a holding company for MobiBurn that did not provide services to MobiBurn or any third parties, or engage with the data business.

73.   As to paragraphs 39 and 40:

73.1.   The Defendants will refer to the letters of 7 February 2020 and 2 March 2020 at trial for their full terms and effect;

73.2.   The Defendants will refer to the letters of 25 November 2019, 5 December 2019 and 16 December 2019 at trial for their full terms and effect;

73.3.   On 13 February 2020, Oak Smart sent an e-mail to Facebook's U.S. counsel explaining that it did not consider the issues identified in Facebook's letter of 7 February 2020 to be relevant to Oak Smart and therefore that no further action would be taken by Oak Smart in relation to Facebook's requests. It requested Oak Smart's access to the Facebook services be reinstated;

73.4.   Also on 13 February 2020, MobiBurn sent an e-mail to Facebook's U.S. counsel stating that "*Facebook continues to repeat the same questions and requests for which MobiBurn has already provided its answers*" and repeating the information provided previously which MobiBurn believed demonstrated that it

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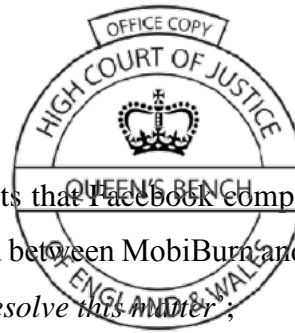
had not committed the alleged unlawful acts that Facebook complained about. The e-mail also suggested a meeting be held between MobiBurn and Facebook's representatives in a '*bona fide attempt to resolve this matter*';

73.5. In the letter dated 2 March 2020, Facebook's U.S. counsel sought to clarify that its letter dated 7 February 2020 was "*solely directed*" at Mr Haltas (despite being addressed to all of the Defendants) and that "*when Facebook invoked its contractual right to demand proof of compliance with its Platform Policies, including an audit, it did so, requiring [Mr Haltas] to prove [Mr Haltas'] compliance – as a Facebook developer – with its Platform Policies*". In the premises, it is denied that Facebook in fact purported to invoke its audit rights against MobiBurn or Oak Smart on 7 February 2020 as alleged.

73.6. On 9 March 2020, Mr Haltas responded to Facebook's U.S. counsel in an attempt to explain his role and background. Mr Haltas repeated information previously provided regarding the MobiBurn SDK Bundle and stated that "*I believe that MobiBurn has already provided the necessary responses and feel free to contact MobiBurn if you need further clarification*".

73.7. Following receipt of each of Facebook's letters, Mr Haltas, MobiBurn and Oak Smart each tried to provide the information requested so far as they were able or the information was relevant to the allegations made, and within the (unreasonably short) deadlines stipulated by Facebook.

74. Paragraph 41 is admitted save no admissions as are made as to the causation implied by the use of the word "therefore", particularly in circumstances where Facebook did not respond to Mr Haltas's e-mail of 9 March 2020.

Mr Haltas allegedly breached his contract with Facebook Ireland

75. As to paragraph 42:

75.1. It is admitted that the mobile app Hardik Messenger contained the MobiBurn SDK Bundle (which it is denied is malicious) and was created as an app on the

Facebook platform using the developer account associated with Fatih Haltas. It is denied that Mr Haltas developed this app.

75.2. Hardik Messenger did not incorporate the Login with Facebook feature. Accordingly, it is technically impossible for Hardik Messenger to collect Facebook data.

75.3. This app has been defined on the Facebook platform only for Facebook for Business services. It is not an app that interoperates with the Facebook Platform in any way.

75.4. It is denied that the MobiBurn SDK Bundle is aptly characterised as "malicious".

76. For the reasons set out above paragraph 43 is denied.

77. As to paragraph 44, the Defendants will refer to the letters of 7 February 2020 and 9 March 2020, and the e-mails of 13 February 2020 and 9 March 2020 at trial for their full terms and effect. Paragraph 73 above is repeated. In the premises set out above, by 7 February 2020 Facebook had purported to terminate its contract with Mr Haltas, who was freed of any obligation to agree any audit request. It is denied that Mr Haltas's response was unsatisfactory, whether wholly or otherwise. As explained above, Mr Haltas cooperated with Facebook in good faith, responding to the numerous requests for information (including providing financial statements) made by Facebook truthfully, quickly and to the best of his knowledge at each material time. It is denied that Mr Haltas's response to Facebook's letter of 7 February 2020 is fairly or accurately characterised as a refusal by Mr Haltas to agree to the audit request. In his e-mail dated 9 March 2020, Mr Haltas explained the nature of the investigations already carried out by the Defendants, and why in the light of those investigations he considered an audit to be redundant.

78. In the premises paragraph 45 is denied.

Mr Haltas and MobiBurn allegedly induced or procured breaches of Developers' contracts with Facebook

79. As to paragraph 46:

   79.1. The MobiBurn SDK Bundle was not aimed at Facebook developers, and not every owner of apps that incorporated the MobiBurn SDK Bundle was a Facebook Developer.

   79.2. Further, only three of the 284 Primary Apps were even technically capable of collecting Facebook data through the MobiBurn SDK. MobiBurn had no commercial interest in Facebook data and did not collect it. Paragraph 44 above is repeated. It is denied (if it be alleged) that the MobiBurn SDK could be used by any third party to collect data from Facebook.

   79.3. If (which is not admitted), any other sub-SDKs contained within the MobiBurn SDK Bundle collected Facebook data, neither Mr Haltas nor MobiBurn knew that at any material time.

   79.4. Accordingly, even if (which is not admitted) any Facebook Developer incorporating the MobiBurn SDK Bundle was in breach of any contractual obligation to Facebook thereby, it is denied that Mr Haltas and/or MobiBurn intended such breach.

   79.5. Paragraph 46 is denied.

Alleged interference with contractual relations

80. It is admitted that in broad terms Mr Haltas knew what contractual obligations were owed by Developers to Facebook under the Terms of Service and Platform Policies. He did not have detailed knowledge of the same. Save as aforesaid, for the reasons set out above paragraph 47 is denied.

81. For the reasons set out above paragraph 48 is denied.

82.   As to paragraph 49:

82.1.   The first sentence is noted. There are no such developers as none were induced or procured to breach (whether knowingly or not) the Terms of Service and Platform Policies.

82.2.   For the reasons set out above the second sentence is denied.

Alleged Breaches of contracts between Developers and Facebook

83.   It is not admitted that any Developers who incorporated the MobiBurn SDK Bundle into Primary Apps in fact collected any data from Facebook Products as alleged, and Facebook is put to strict proof that any did. It is denied that any Developers did so using the MobiBurn SDK. Save as aforesaid, for the reasons set out above paragraphs 50 and 51 are denied.

Alleged Knowledge of contracts between Developers and Facebook

84.   As to paragraph 52, it is admitted that Mr Haltas is familiar with the Platform Policies in general terms but not with Developers' entire contractual obligations to Facebook. Mr Haltas did not target Facebook developers since he did not intend to collect Facebook data or interact with Facebook. He agreed to Platform Policies in order to use Facebook for Business services. He made himself familiar with the terms relevant to app publishing. The provisions related to handling data are not relevant to his use of Facebook. Otherwise paragraph 52 is denied.

85.   As to paragraph 53 the Defendants repeat paragraph 84 above. Although a "Developer" on the Facebook Platform, for the purposes of accessing Facebook for Business services, Mr Haltas is not a developer of apps.

86.   As to paragraph 54:

86.1.   It is admitted that Mr Fatih is the sole director of MobiBurn;

86.2. MobiBurn has at all times acted under his direction and control (although operations, such as the creation of the MobiBurn SDK Bundle, marketing services, business development and administration were outsourced);

86.3. It is admitted that knowledge on the part of Mr Haltas is attributed to MobiBurn;

86.4. MobiBurn was at no time subject to the Facebook Terms of Service or Platform Policies, nor do the Particulars of Claim allege that it was.

Alleged intention to induce or procure breaches of Developers' contracts with Facebook

87. For the reasons set out above paragraph 55 is denied.

Alleged Damage

88. The Defendants can neither admit nor deny paragraph 56 because they do not know. Further no particulars are given.

89. Other than that, through its U.S. counsel Facebook entered into correspondence with and sent cease-and-desist letters to Mr Haltas, MobiBurn and Oak Smart, the Defendants can neither admit nor deny paragraph 57 because they do not know. Further no particulars are given.

90. Paragraph 58 is denied. The Defendants will refer to the correspondence at trial for its full terms and effect. Mr Haltas cooperated to the fullest extent reasonably possible bearing in mind that some of the requests related to commercially sensitive information.

91. The Defendants can neither admit nor deny paragraph 59 because they do not know. Further no particulars are given.

Oak Smart allegedly breached its contract with Facebook Ireland

92. As to paragraph 60:

92.1. It is admitted that Oak Smart was bound by Facebook's Terms of Service and Platform Policies on the basis and to the extent set out in paragraph 30 above.

92.2. It is admitted that Section 7.9 of the Terms of Services contain an audit right.

92.3. The stated purpose of an audit under section 7.9 of the Platform Policy is "to ensure your use of Platform and data you receive from us is safe and complies with our Terms". On a proper construction of section 7.9 of the Platform Policy, Facebook has no right to audit for any other purpose. Alternatively, it was an implied term of the Platform Policy that Facebook would not request an order other than for the purposes stated in section 7.9 and/or not to invoke audit rights capriciously (such term being obvious and necessary for the business efficacy of the contract).

93. As to paragraph 61:

93.1. Neither the correspondence, nor the Particulars of Claim disclose any grounds for Facebook to request an audit against Oak Smart under section 7.9. Alternatively, in light of the explanations and information given by Oak Smart as set out in paragraph 73 above, Facebook's request for an audit of Oak Smart was capricious. Accordingly, Facebook had no right to request any audit.

93.2. It is denied (if it be alleged) that Oak Smart had any involvement in any of the matters of which Facebook complained or which form the subject matter of these Particulars of Claim. Save for an (irrelevant) request of Oak Smart for a list of the Oak Smart Apps (none of which were capable of accessing Facebook data), all of the information sought by Facebook pursuant to the purported audit request related to the activities of MobiBurn. Oak Smart does not and has never developed, distributed, marketed or used SDKs or any other product that uses data obtained from Facebook.

93.3. Notwithstanding that, Oak Smart did not "refuse" Facebook's audit request. Rather, Oak Smart explained why an audit was inappropriate, and provided information as set out in paragraph 73 above. Without prejudice to that, Oak Smart offered to submit to an audit as part of open pre-action negotiations.

93.4. In the premises paragraph 61 is denied.

94.   As to paragraph 62:

94.1.   The letter dated 3 January 2020 is admitted. It is denied that it purported to invoke a contractual right of audit against Oak Smart in any capacity other than as parent of MobiBurn. Information was said to be sought from Oak Smart '*based in part on your representations that MobiBurn has no employees or agents*'.

94.2.   The email dated 13 February 2020 is admitted. That email did not address Facebook's alleged contractual audit right with respect to Oak Smart and did not refuse to allow Facebook to exercise that alleged right. Further, by Facebook's U.S. counsel's letter of 2 March 2020, Facebook clarified that it was not seeking to invoke audit rights as against Oak Smart.

94.3.   In any event Oak Smart was entitled to refuse any request for an audit (although it did not do so). Paragraph 93 above is repeated.

Relief claimed

95.   As to paragraph 63:

95.1.   breaches of contract by Mr Haltas and /or Oak Smart are denied;

95.2.   the inducing or procuring by Mr Haltas and/or MobiBurn of breaches by Developers of their contractual obligations owed to Facebook are denied;

95.3.   causation is denied;

95.4.   no admissions are made as to whether Facebook has suffered loss and damage;

95.5.   no admissions are made as to Paragraph 59. Paragraph 93 hereof above is repeated.

96.   Paragraph 64 is denied.

97.   Paragraph 65 is denied. Without prejudice to, or derogation from, that denial:

97.1.   No data was obtained directly or indirectly from Facebook;

97.2.   No payments have been received or made in relation to Facebook data.

98.   Paragraph 66 is denied. Paragraph 66 provides no material upon which it is possible to infer the alleged intention. In fact, MobiBurn discontinued the distribution of MobiBurn SDK Bundle in November 2019 and publicly announced this. There are no grounds for the injunction sought.

99.   As to paragraph 67:

99.1.   Mr Haltas is no longer subject to Section 7.9 of the Platform Policies;

99.2.   Oak Smart has always been and remains ready, able and willing to comply with any contractually compliant request to exercise the audit rights contained in Section 7.9 of the Platform Policies.

100.   It is denied that the Claimants are entitled to the relief claimed.

101.   Further, it is denied that the expression "malicious software" is too vague to be the subject matter of an injunction.

102.   Still further, the Particulars of Claim disclose no grounds for the award of an injunction preventing the Defendants from accessing Facebook and the Facebook Platform and/or using Facebook Products (including the Instagram service) for any reason whatsoever. Such an injunction should not be granted as a matter of discretion. The remedy sought is particularly disproportionate and unjustified against Oak Smart against whom the only allegation is failure to co-operate in an audit, the entitlement to which is disputed.

T. E. Bergin QC

Matthew Lavy

STATEMENT OF TRUTH

I believe that the facts stated in this Defence are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed: *Fatih Haltas* ....

Mr Fatih Haltas, on behalf of himself, MobiBurn Limited and Oak Smart Technology Limited

Served this 28 October 2020 by Kemp Little LLP, 138 Cheapside, London E2CV 6BJ, Solicitors for the Defendants