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**IN THE COMPETITION**

Case No: 1634/7/7/24

**APPEAL**

**TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

16<sup>th</sup> June 2025

Before:  
Justin Turner KC  
Professor David Ulph CBE  
Hugh Kelly  
(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

Mr David Alexander de Horne Rowntree

**Proposed Class Representative**

v

(1) the Performing Right Society Limited

(2) PRS For Music Limited

**Proposed Defendants**

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**A P P E A R A N C E S**

Tim Ward KC, David Went, and Jack Williams On Behalf of Mr David Alexander de Horne Rowntree (Instructed by Willkie Farr & Gallagher (UK) LLP)

Meredith Pickford KC and Hugh Whelan On Behalf of the Performing Right Society Limited and PRS For Music Limited (Instructed by Macfarlanes LLP)

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**Monday, 16 June 2025**

(10.33 am)

THE CHAIR: Some of you are joining us live stream on our website. I'm going to start with a warning. An official recording is being made and an authorised transcript will be produced. It is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual of the proceedings, and breach of that provision is punishable as contempt of court. (Pause)

Mr Ward.

Opening submissions by MR WARD

MR WARD: Thank you, sir. Good morning. I appear for the Proposed Class Representative with Mr Went and Mr Williams. For the PRS, we have Mr Pickford KC and Mr Whelan.

There are three agenda items as we understand it: there's the Proposed Class Representative's application for an adjournment; there's the possible questioning of Mr Rowntree by the Tribunal; and then there's the issue of costs and benefits of the application. As to the fourth item, Mr Arber's witness statement, we've made clear we don't oppose that in our skeleton argument, and I'll submit in due course it makes no difference to the issues.

If I may, I'll start with the application to adjourn. I want to say a few words about it and then turn to two critical authorities. The short reason for the application, as you of course appreciate, is to enable the Proposed Class Representative to advance the interests of the class in the manner he considers best calculated to do so. And that in itself reflects the core obligation of the class representative to act in the interests of the class members: here, individual songwriters.

If I may just make a point that is perhaps painfully obvious: the class regime is about

1 access to justice for members of the class; it is not a personal claim by Mr Rowntree.  
2 We saw the PRS's skeleton talk about Mr Rowntree having to live with the self-inflicted  
3 consequences of his actions, but what they're really saying, of course, is that the class  
4 should live with those consequences, and be deprived of the benefit of what  
5 Mr Rowntree considers to be the appropriate course of action.

6 Now, what we will see shortly is that the Tribunal's own case law makes clear that  
7 class representatives are usually allowed to amend their case at the preliminary stage.  
8 We'll look at two cases where this has happened after certification has been  
9 considered, and I will come to that.

10 Our overarching submission is that, in this case, the adjournment would serve the  
11 objectives of the class regime and the governing principles of the Tribunal's rules.  
12 Those are, of course: dealing with the case justly; at proportionate cost; expeditiously  
13 and fairly; and in particular, the application seeks to serve the high-level objective of  
14 securing access to justice.

15 In saying all of that, we of course acknowledge the additional burden that this places  
16 on the Tribunal and indeed on the Proposed Defendants. But our core submission is  
17 that the costs and any delay involved would be relatively modest in the scheme of this  
18 kind of action. We are at a very preliminary stage; we are not seeking to derail  
19 a lengthy trial that is about to start.

20 I want to make just one other point about costs before moving to these precedents,  
21 that this adjournment application has the potential to save costs, because, of course,  
22 if the claim is certified on the basis currently put forward, then the likely consequence  
23 is that the Tribunal will face an application later to amend the suite of documents  
24 currently before you. Then experience suggests it may well face argument about  
25 whether certification needs to be reopened. So we do say it's more efficient to  
26 consider the case in the form that Mr Rowntree wishes to advance.

1 Over the weekend, we had correspondence from Macfarlanes about this, raising the  
2 prospect of wasted costs --

3 THE CHAIR: Apologies, Mr Ward. We don't seem to have -- are we meant to have  
4 a transcript today?

5 MR WARD: No. I'm told no.

6 THE CHAIR: Oh, okay. Fine. That's all right.

7 MR WARD: Sorry.

8 I was just going to make a point before turning to the authority -- a couple more points,  
9 actually. I was going to say over the weekend we had correspondence from  
10 Macfarlanes raising the prospect of wasted costs and even suggestions that provisions  
11 of the code of conduct might be relevant here. If either of them is pursued, we will  
12 address them, but in my respectful submission, that is all very wide of the mark.

13 What we have here is an application made in pursuit of the best interests of the  
14 represented class, and both the change of representation and the amendments to the  
15 claim at an early stage, are both commonplace and indeed consistent with the  
16 objectives of the regime. The core objection, we think, from the PRS is essentially  
17 about timing; that the PCR has been too slow to bring forward these proposed  
18 amendments. If that is the complaint, we don't accept it.

19 As you know, Willkie, the firm instructing me, were first instructed on 14 May. So that  
20 is about a month before today's hearing, and it's stating the obvious --

21 THE CHAIR: You say the amendments, what amendments?

22 MR WARD: Well, proposed ...

23 THE CHAIR: What were the proposed amendments?

24 MR WARD: We don't have them, sir, and I'm coming to that now.

25 THE CHAIR: So this is an original use of the word "proposed". Not-yet-proposed  
26 amendments.

1 MR WARD: It is -- well, let me be more explicit, sir. Consistent with the  
2 correspondence that you have seen, that my solicitors are considering actively  
3 questions of amendments to the pleading, revisiting the funding arrangement and  
4 considering putting further evidence before the Tribunal.

5 THE CHAIR: Amendments to the pleading?

6 MR WARD: Pleading.

7 THE CHAIR: What aspects?

8 MR WARD: Sir, I --

9 THE CHAIR: Are you not in a position to say yet?

10 MR WARD: Of course, deliberations currently underway are privileged. I have to fully  
11 face the fact that I have nothing concrete to put before you today in terms of what is  
12 proposed, but in truth, what is happening is a full reconsideration of the way the case  
13 is being put in order to best advance the interests of the class.

14 My solicitors wrote as early as 22 May to make clear that they anticipated this course,  
15 and proposing directions to a September hearing. The PRS objected, saying  
16 essentially it was already too late, but of course, just to keep one's mind focused on  
17 the timeline, my solicitors were instructed on 14 May. Today is, I think, 16 June. Of  
18 course, it would have been in nobody's interests if what one might call partially  
19 developed proposals were brought forward in a rush.

20 If they'd been put before you sometime in the last few days, there's no doubt PRS  
21 would have said it was all too late, and there wasn't time to deal with them, because it  
22 was already said it was too late as soon as the proposal was raised.

23 So what we ask for is a short adjournment in order to effectively and efficiently develop  
24 the case in the ways that I have indicated. We're not asking for an indefinite or lengthy  
25 adjournment, so that matters can be considered fairly and in the round, in the autumn,  
26 at the earliest convenient date. We're not asking for some great indulgence there in

1 terms of time.

2 THE CHAIR: When you talk about "proposed amendments", you're not limiting them  
3 to the issue before us today? The question of --

4 MR WARD: No, certainly not.

5 THE CHAIR: -- the extent of the damage. It could be on any aspect of the case?

6 MR WARD: Yes, yes.

7 PROFESSOR ULPH: You're talking about a full reconsideration of the way the case  
8 is put, and you say that would be a short adjournment? I'm not quite sure how you  
9 reconcile that.

10 MR WARD: What I'm really talking about is the potential to refine the way it's put,  
11 would be a better way of putting it.

12 PROFESSOR ULPH: Okay.

13 MR WARD: Not -- I mean, obviously - it's not a completely different case. That's  
14 a different matter. But that is not what I'm seeking leave to do.

15 THE CHAIR: Is there going to be a transcript at the end of this hearing? There's not  
16 a -- yes. It's just not a simultaneous -- right.

17 MR WARD: So that might involve, for example, changes to the distribution of the  
18 litigation plan, for example, which is a matter that has been considered before you;  
19 that's been the topic of criticism. It might involve further expert evidence, for example.  
20 I'm not proposing -- I'm glad, Professor Ulph, you picked me up on that language of  
21 "full reconsideration". I didn't intend to suggest some radical departure, as opposed  
22 to "refinement" to put the case as effectively as it can be put. That's what we have in  
23 mind. Thank you for picking me up.

24 THE CHAIR: In terms of how we've arrived at this position, we have the prospect of  
25 hearing from Mr Rowntree, that may or may not be necessary. But what is the process  
26 been that's led to a change of solicitors? As we indicated in our correspondence, we

1 | don't know the reasons, but was this initiated by Mr Rowntree, was there a -- has he  
2 | been taking advice from his advisory board? What's the process been?  
3 | MR WARD: So the best I can do is refer you to the letter of 13 June -- it was sent on  
4 | Friday -- which sets out information --  
5 | THE CHAIR: Where do I find that?  
6 | MR WARD: I have it to hand up, in case it's not there. Where is it now? It should be  
7 | at the back of bundle C, now. (Handed)  
8 | THE CHAIR: Yes.  
9 | MR WARD: If you haven't had a chance to see that, sir -- which, given its lateness,  
10 | I understand -- it may be best to read it.  
11 | THE CHAIR: Hold on.  
12 | MR WARD: (Overspeaking)  
13 | THE CHAIR: Yes. Sorry, I was just trying to get the bundles working anyway. Hold  
14 | on.  
15 | MR WARD: We have hard copies if it's helpful.  
16 | THE CHAIR: Yes. If I can't actually get my bundles to work, which will be a ...  
17 | MR WARD: Would you like me to pass forward these hard copies?  
18 | THE CHAIR: Yes, that will be helpful, but I still will need the bundles at some point  
19 | this morning, I'm sure. So, let's try it here.  
20 | MR WARD: C155.  
21 | THE CHAIR: Just try --  
22 | Sorry, what page of bundle C?  
23 | MR WARD: C155.  
24 | THE CHAIR: Thanks.  
25 | MR WARD: The letter does two things --  
26 | THE CHAIR: It's actually 156 in here. Oh no, it's not, I think it's not made it into the

1 | electronic bundles yet, but I've got it now anyway. Yes. Thank you.

2 | MR WARD: Perhaps it would be most efficient for you to read it rather than me to, as  
3 | it were, take you through it?

4 | THE CHAIR: Yes, of course. (Pause)

5 | Yes, I have read this.

6 | MR WARD: Oh, good.

7 | THE CHAIR: Yes.

8 | MR WARD: So it starts then, by making the observation about the difficulties  
9 | that -- well, let me back up slightly. What you indicated in your letter was what you  
10 | were interested in is the process, rather than any privileged matters.

11 | THE CHAIR: Yes.

12 | MR WARD: We took that very much to heart. The letter observes that, in the first  
13 | substantive paragraph:

14 | "Circumstances regarding decisions to change of solicitors, mindful that there is a limit  
15 | to what can be said without waiving privilege or giving the Proposed Defendants  
16 | prejudicial advantage through disclosure of privileged or confidential matters relating  
17 | to litigation strategy". [As read]

18 | So when one starts to think about the reasons for the change of solicitor, one can see  
19 | immediately that that is a potential issue. Then, of course the letter records that there  
20 | is no waiver of privilege in what is referred to.

21 | Then, I should say -- we'll come to that. Thank you.

22 | It goes on and explains that it was -- over the page:

23 | "Following the hearing, in advance of this decision, the PCR consulted others  
24 | regarding his claim and a potential change. Then he sent this firm some limited  
25 | materials". [As read]

26 | In respect of those, there's a sort of double -- for the avoidance of doubt -- of no waiver



1 of privilege in those materials, of course. Then, "had further discussion with the funder  
2 and instructed on 14 May". [As read]  
3 Then there's more, if you like, debate with, Macfarlanes about the exact timing of the  
4 switch of counsel and the reasons for it.  
5 Before going further ... (Pause)  
6 THE CHAIR: Yes. So in answer to my question, "Who has Mr Rowntree taken ..." As  
7 you rightly point out, this isn't Mr Rowntree's action. He's a class representative and  
8 is required to act in certain ways.  
9 MR WARD: Yes.  
10 THE CHAIR: One of the things the Tribunal has to do is be vigilant to make sure that's  
11 taking place.  
12 MR WARD: Yes.  
13 THE CHAIR: So the question was, who is Mr Rowntree -- in reaching the decision  
14 that he wants to change solicitors, who was he taking advice from?  
15 MR WARD: Yes, and there is an answer to that in here. If you prefer -- if you still want  
16 to know something more specific, then I --  
17 THE CHAIR: Where's the answer to that? Sorry.  
18 MR WARD: It's at the top of the page.  
19 THE CHAIR: The top of which page?  
20 MR WARD: Sorry. Page 2.  
21 THE CHAIR: Yes.  
22 MR WARD: It says:  
23 "He consulted others, sent limited materials to this firm, and then had a further  
24 discussion with his litigation funder". [As read]  
25 THE CHAIR: Yes. So who did he speak to and in what order?  
26 MR WARD: (Overspeaking)

1 THE CHAIR: That's what we'd like to know. I mean, we can put Mr Rowntree in the  
2 witness box, or you can take instructions.

3 MR WARD: If you'll allow me, I'll take instructions when we have a short adjournment,  
4 on that.

5 THE CHAIR: Yes.

6 MR WARD: Because we can certainly answer that question, of course, if it would be  
7 of assistance.

8 May I just make a point which is something of a sidebar here. Because of the  
9 sensitivity about the matters that we're talking about in terms of privilege as well as  
10 confidentiality, we fully appreciate it's not your intention to ask about privileged  
11 matters. But we're also concerned about the possibility of requests for inspection of  
12 any of the matters that are referred to here, and you will appreciate that rule 102 of  
13 the CAT rules governs this matter. My solicitor has a concern that by even referring  
14 to these kind of engagements between Mr Rowntree and his solicitors, there may be  
15 requests for documents that have been referred to, even though those documents  
16 themselves have not been provided to the CAT. So we'd be grateful for an indication  
17 that there is no prospect of obtaining, through disclosure or request, documents that  
18 we're discussing around this topic.

19 THE CHAIR: Yes. I mean, that's a little bit of an abstract -- whereas I have sympathy  
20 with your position, that's a bit abstract when we're not actually talking about any  
21 documents.

22 MR WARD: Well, we're not, other than just by very general reference in this letter.

23 THE CHAIR: That's your letter. The question I asked didn't relate to any documents.

24 MR WARD: No, indeed. Well, that I fully appreciate, sir.

25 If you permit me to progress the application a little further --

26 THE CHAIR: Sure.

1 MR WARD: -- then I can get specific answers to your questions at the short  
2 adjournment, and then we can see where we are in terms of whether you still feel the  
3 need to ask (overspeaking).

4 THE CHAIR: Yes. You say "the short adjournment". Is this going to take --

5 MR WARD: When I said "short adjournment", I didn't mean that. I actually meant the  
6 usual mid-morning break.

7 THE CHAIR: Well, if we're going to go that long, yes.

8 MR WARD: If we're going to go that long.

9 THE CHAIR: I mean, show me cases which we're familiar with where the Tribunal has  
10 given people a second bite of the cherry. Scarcely seems necessary. Moreover,  
11 we've given you a second bite of the cherry in this case anyway, so we're not quite  
12 sure that there's a proposition of law to get out of these. But if you want to take us to  
13 them briefly --

14 MR WARD: I'd like to show you, sir, if I can, while those behind me assemble the  
15 necessary instructions.

16 THE CHAIR: Yes.

17 MR WARD: If nothing else (overspeaking).

18 THE CHAIR: We can take a break for you to get instructions, of course. Yes.

19 MR WARD: That's the (inaudible) reason (inaudible) helpful, because there are cases  
20 where indeed, as you put it, sir, the Tribunal did allow a second bite at the cherry,  
21 through quite a wide range -- fundamental amendments to the claim. The first is Pride,  
22 which -- as I say, I fully appreciate this will be familiar -- that's under bundle F, tab 7.  
23 What you will recall --

24 THE CHAIR: Hold on, hold on, hold on, hold on. It's not in the authorities bundle.

25 MR WARD: Sorry, I said it is. It's in my bundle, F7.

26 THE CHAIR: So, authorities bundle I've got, and then I've got A, B and C, I think, for

1 authorities bundles, and there's F as well. I see.

2 All right. Okay. I beg your pardon. Yes. Authorities bundle F. Yes.

3 MR WARD: I'm much obliged.

4 Just to remind you, this was obviously a class claim about mobility scooters. If you  
5 look at paragraph 6 on page 4 --

6 THE CHAIR: Sorry, I'm still catching up. Which tab?

7 MR WARD: Sorry. It's F7.

8 THE CHAIR: Yes. I'm with you now.

9 MR WARD: Are we there?

10 THE CHAIR: Yes.

11 MR WARD: (Inaudible) Thank you.

12 So if we look at page 4, paragraph 6. It's important that this is a purely follow-on claim.

13 The gravamen of it was a practice which you can see described about ten lines down.

14 The dealers would not advertise certain models of scooters online at prices below

15 RRP. At paragraph 12 on the next page, you can see that the issue was whether there

16 was an anti-competitive agreement or concerted practice. And the OFT, as it was,

17 decision, found there were such agreements with -- I think it was -- eight retailers. So

18 it found eight specific agreements.

19 But if we go over the page, please, to page 6, we can see at paragraph 14, the decision

20 states:

21 "Pride's policies concerning the online advertising of prices below RRP applied to its

22 dealer network generally". [As read]

23 So there were eight specific agreements with specific dealers, but there was

24 a generalised policy. What happened in essence is, there was a debate -- this

25 mattered in the case because of complex transitional provisions that meant that the

26 claimant had to bring a pure follow-on claim, and they tried to bring that on a broader

1 basis than purchases from those eight particular dealers.

2 If you could please turn to page 41, we then get to the part that really matters for our  
3 purpose. You will see that Mr Justice Roth, chairing the Tribunal, allowed an  
4 application for an adjournment where the PCR's expert had approached his analysis  
5 on the basis of instructions that were, in a sense, premised on the wrong view of the  
6 law.

7 At 111, we can see Mr de la Mare, for the proposed class representative, saying:

8 They should approach "the matter on the basis that in the counterfactual, Pride would  
9 have not operated the policy at all". [As read]

10 The CAT rejected that approach at 112, saying essentially that -- we'll pick it up, fourth  
11 line:

12 "If we were to adopt the approach urged by Mr de la Mare, we would be enabling the  
13 applicant to claim damages, not merely for the result of the eight infringements but for  
14 a policy which was not unlawful and for any other infringements which were unlawful  
15 but are time-barred. This would allow [him] to circumvent the boundaries and follow  
16 it". [As read]

17 Then, most materially for our purposes, 113:

18 "Where does this leave the CPO application? Mr Noble, in his very frank and helpful  
19 oral evidence, accepted he had not approached the definition of subclasses and thus  
20 the estimation of loss on this basis. He had not been instructed to do so". [As read]

21 Then over the page, please, at 114:

22 "We therefore invited the parties to consider whether the application should be  
23 adjourned to enable the applicant to reformulate her claim and the definition of  
24 subclasses in particular". [As read].

25 Then at 115, Mr de la Mare responded by requesting an adjournment. Then at 116,  
26 the Tribunal says:

1 "We recognise this is a burden on Pride, the defendant, but it can be substantially  
2 mitigated by an order for costs. It must be remembered that Pride is found to have  
3 committed a hard-core infringement, and we emphasise the following. Moreover, the  
4 present proceedings are only at the initial stage, and claimants are usually allowed to  
5 amend their case so far in advance of the trial. We do not see a harsher test should  
6 apply just because these are collective proceedings". [As read]

7 Then moving on, at 117(d), the Tribunal observes:

8 "The class which the applicant seeks to represent comprises many particularly  
9 vulnerable consumers. The amount of loss said to have been suffered by each  
10 consumer may be small, relative to the usual measure of competition or damages, but  
11 for many of the individuals concerned it may well be significant. If there is a plausible  
12 way in which the applicant may be able to pursue collective proceedings on their  
13 behalf, it would be harsh to deny her that opportunity". [As read]

14 In fairness, Mr Noble had said in the box that he thought he would be able to do this.  
15 But of course, this was an iterative process, so to some extent that was speculative,  
16 and as far as I know, the Pride case in fact didn't proceed, although of course I don't  
17 know the reasons why.

18 THE CHAIR: But I mean, what propositions of law are you getting out of this?

19 MR WARD: I'm getting propositions really about practice rather than law in the sense  
20 that the two passages --

21 THE CHAIR: Well, here's an example where it was appropriate to have an  
22 adjournment. I mean, no doubt Mr Meredith [sic] could come up with examples where  
23 it wasn't appropriate to have an adjournment. I don't see how that particularly assists  
24 us in this case.

25 MR WARD: Well, what I respectfully submit persists is the emphasis that the Tribunal  
26 places at 116 on the practice of allowing claimants to amend their claim in advance of

1 trial and the emphasis it places at 117(d) on the need to (inaudible) find an opportunity  
2 to pursue the collective proceedings, if there was a plausible way to do so.

3 So it's an attitude -- it's an approach by the Tribunal that emphasises the interest of  
4 access to justice, even though, in a sense, what had happened was the defendant had  
5 come up with what appeared to be a knockout blow in the course of the hearing.

6 THE CHAIR: How will this -- you mentioned that adjournments can normally be met  
7 in costs. Who's going to end up picking up the tab for the costs? If you were ordered  
8 to pay the cost to date, if you were to significantly change your case -- and I appreciate  
9 you're not saying you are, you're saying they're refining it -- but let's take it forward on  
10 that basis. If you were made an order to pay the costs to date, who has to pay those  
11 costs?

12 MR WARD: I'll take instructions on that point as well, sir. I anticipate the answer will  
13 be the funder but I would not wish to speak out of turn.

14 May I also show you Gormsen. This is E53. Authority bundle E. It's under volume 2,  
15 at least in my hard copy.

16 THE CHAIR: Okay. Before we go to it, what's the principle you're getting out of this?

17 MR WARD: Again, emphasising that even though the CAT had really wide-ranging  
18 concerns about the economic methodology of (Several inaudible words), it said the  
19 appropriate course was to allow that to be reconsidered, rather than saying you simply  
20 proceed on the basis of the evidence currently advanced. It's not the same situation,  
21 but it again shows a willingness to say that the interest in access to justice justified  
22 such a course.

23 THE CHAIR: I'm really getting very little assistance from this.

24 MR WARD: Well, I'm sorry, sir.

25 THE CHAIR: As you must appreciate, of course, the CAT will earnestly consider an  
26 adjournment and consider the matters that you're drawing to our attention. Indeed, in

1 | this very case, did we not at the last hearing, indeed, give an adjournment precisely  
2 | for the reasons that are given in these cases. So I'm not sure what principle we're  
3 | wrestling with here.

4 | MR WARD: Well, let me just show you one paragraph.

5 | THE CHAIR: Yes.

6 | MR WARD: -- which just again -- I fully accept, sir, I'm not offering you a bright line  
7 | legal principle. It is rather the approach of the CAT to this kind of case. And if we  
8 | could turn to page 44, please. So it's E53 and it's paragraph 57.

9 | THE CHAIR: Yes.

10 | MR WARD: Where they say, last two lines:

11 | "Without significantly more articulation there is no blueprint to trial and the PCR has  
12 | unequivocally failed the Pro-Sys test. It follows there can be no question of acceding  
13 | to the application at this stage. Meta invited us, if this was our conclusion, to put the  
14 | application out of its misery and refuse it. We declined to do so unless that is in order  
15 | that the proposed class representative asks us to make. Our preference, consistent  
16 | with the importance of access to justice articulated by the Supreme Court in Merricks,  
17 | is that the proposed class representative have another go, but we wish there to be no  
18 | misunderstanding: the methodology so far advanced will need a root and branch  
19 | re-evaluation." [As read]

20 | So again, not a bright line proposition of law, sir, of course, but more an indication of  
21 | the approach of the CAT in such class claims.

22 | THE CHAIR: I mean, the difficulty we have here is we have no idea why  
23 | you're -- I mean, it can't be -- let me know your position -- is it, that at any time  
24 | someone can turn up and say, in a class action, "We'd like an adjournment, please.  
25 | We can't tell you why, but we'd like one because we think we can refine our case".

26 | I mean, that --



1 MR WARD: Absolutely not but that's not the situation (overspeaking) --

2 THE CHAIR: But, well, what's the situation in this case? You won't tell me why you  
3 need an adjournment other than the fact that your solicitors have been instructed for  
4 a month.

5 MR WARD: We have a situation where the class representative has concluded it is  
6 appropriate to change representation. New solicitors have been instructed. Inevitably,  
7 that means that fresh thinking is being applied to the case. The application is being  
8 made specifically in order to allow that fresh thinking to crystallise, in order that the  
9 Tribunal can consider the application for certification on the basis of the arguments  
10 calculated to best advance it.

11 THE CHAIR: You had a month to -- you've had considerably longer to consider these  
12 matters than this Tribunal has, and you must at some level have an appreciation of  
13 what the case is about after a month. And insofar as things are crystallising, you must  
14 know in what area they're likely to crystallise or not, but for your own good reasons,  
15 you're choosing to not tell the Tribunal what those are and seek an adjournment  
16 anyway.

17 MR WARD: It's very difficult, sir, with respect, to tell the Tribunal about emerging  
18 thinking, that's our concern. But if we were to come before you and say, well, this is  
19 the sort of thing we're looking at, but we're not there yet, then obviously that would  
20 create hostages to fortune --

21 THE CHAIR: Maybe. I mean --

22 MR WARD: -- (Overspeaking) that's a privilege. But, of course, in any kind of class  
23 claim, there is the added complexity that one also has to, of course, deal with other  
24 stakeholders. It's not just Mr Rowntree, it's other stakeholders. So I don't --

25 THE CHAIR: Sorry, by other stakeholders, you mean?

26 MR WARD: The funders, for example, need to be kept on board to the appropriate

1 degree. And so, I think just when one recognises the nature of the claim, the idea that,  
2 after four weeks there is a lack of alacrity in not having a full suite of amendments and  
3 refinements, we respectfully resist. Work is going on, work is underway.

4 And of course, the timing of this hearing is, if I may say from the point of view of the  
5 Proposed Class Representative, not ideal. That's just the reality. That's why the  
6 proposal was a short adjournment into the autumn. Give a window for that work to be  
7 completed and not present half-baked proposals that in any event, would be objected  
8 to as too late. Then there can be a short but orderly process where such refinements  
9 which are so advised can be put, and the certification process can be completed. That  
10 is the proposal, sir.

11 If I may, I can try and take instructions now on the point. We may need to rise briefly.

12 THE CHAIR: Yes. We can rise for five minutes.

13 (11.05 am)

14 (A short break)

15 (11.13 am)

16 MR WARD: Sir. Thank you very much for that opportunity. I have an answer to give  
17 you. If I may be forgiven for labouring the point, the answers are given in order to  
18 indicate process rather than content.

19 THE CHAIR: Yes. Understood.

20 MR WARD: Because privilege is fully maintained. It's also worth bearing in mind, just  
21 before I begin, that the Proposed Class Representative is himself a qualified solicitor.

22 THE CHAIR: I'm aware of that.

23 MR WARD: So he took the following steps. He talked to the litigation funder. He also  
24 discussed matters with a costs lawyer. Obviously, this course had potential  
25 implications for costs. The funder provided information about names of firms to  
26 consider. He also did his own research. He met a representative of Willkie and then

1 instructed Willkie in due course. As to the consultation panel, I understand he has  
2 kept them informed of (Inaudible) developments.

3 Dealing with the other question --

4 THE CHAIR: I'm sorry. Well, "kept them informed", what does that mean? You say  
5 he talked to the funder. At what point did he consult his committee? It was a very  
6 eminent committee, as I recall.

7 MR WARD: I can get a specific answer to that question.

8 THE CHAIR: Well, maybe we'll ask Mr Rowntree, I think, rather than just having to  
9 get up and get down.

10 MR WARD: And then the other question you asked me about was if there were to be  
11 an adjournment, who would be responsible for the cost? And I'm told the answer is  
12 the ATE insurer. (Pause)

13 THE CHAIR: Thank you.

14 MR WARD: Sir, unless I can assist further --

15 THE CHAIR: No. I think it would probably be appropriate to hear from Mr Rowntree,  
16 at this stage.

17 MR WARD: Is it your intention that he be sworn, sir, formally?

18 THE CHAIR: Umm.

19 MR WARD: Or answer questions from (inaudible) my solicitors.

20 THE CHAIR: No, you need to come up here so we can hear and I think we'll swear  
21 him.

22  
23 DAVID ALEXANDER DE HORNE ROWNTREE (affirmed)

24 THE CHAIR: Mr Rowntree, thank you. My understanding, I think, from what went on  
25 at the last hearing is that you became involved in these proceedings once the solicitors  
26 and funder had already developed the case to some extent.

1 A. Yes. That's correct...

2 THE CHAIR: Sorry, please.

3 A. They'd been working on the case, I think for two years before they got me involved.

4 THE CHAIR: Yes. And the funding agreement was in place at that stage; is that right?

5 A. They certainly had preliminary agreement with the funder, yes. The funding

6 agreement, of course, is with me, not with them. So the funding agreement wasn't

7 signed until I became involved.

8 THE CHAIR: Right. And presumably you took an active interest in its contents?

9 A. Yes.

10 THE CHAIR: You explained that you had a panel of advisers -- I can't remember the

11 term, consultation panel -- which includes Sir Gerald Barling, I think and

12 Professor Fletcher. When it came to considering a change of solicitors, to what extent

13 did you involve them and at what date did you involve them?

14 A. I hadn't involved them in that decision at all. The decision I took, because I lost

15 confidence in my firm of solicitors...

16 THE CHAIR: Okay. We don't want to know the reasons at all, but -- and why didn't

17 you involve them in that decision?

18 A. That wasn't a decision on which I needed legal advice. It was clear to me that I had

19 to change my solicitors. This is my duty to the class.

20 THE CHAIR: Right. So what role do you think the consultative committee has?

21 A. They've been most useful when I've talked to them about the process. Obviously,

22 this is not a jurisdiction I'm familiar with, so they've been most useful. I've talked to

23 them about how the CAT works, what's expected of me.

24 THE CHAIR: Right. So you've used them in an advisory capacity? Not to assist you

25 in the conduct of the proceedings?

26 A. I certainly didn't use them to decide whether or not to change solicitors. That, to

1 me, seemed completely obvious. One loses confidence in one's solicitors, one has to  
2 change them. I'd be failing my duty to the class if I didn't.

3 THE CHAIR: Right. Right. And what involvement did the funder have in that decision?  
4 Did they approach you to recommend changing solicitors or did you approach them?

5 A. I -- yes, I met -- I asked for a meeting with the funder, so I guess I approached the  
6 funder.

7 THE CHAIR: Right. I'm grateful. Okay. I didn't have any further questions.

8 MR WARD: (Inaudible).

9 THE CHAIR: All right. Mr Meredith [sic], I'm not going to give the opportunity to you  
10 to ask any questions.

11 Mr Rowntree, thank you very much indeed. I'm grateful. You're released from your  
12 affirmation.

13 (The witness was released)

14 MR WARD: Sir, thank you. You'll anticipate my submission is that Mr Rowntree has  
15 acted responsibly, prudently, and not in any sense impulsively in acting in a manner  
16 he thinks is best calculated to advance the interests of the class. And unless I can  
17 assist further -- in fact, let me just make sure from behind that someone wants me to  
18 say. Sir, unless I can assist further those are the submissions in regard to the  
19 application for adjournment.

20  
21 Reply submissions by MR PICKFORD

22 MR PICKFORD: Mr Chair, members of the Tribunal. The application for the  
23 adjournment, we say, is misconceived and we say, I'm afraid, that it also raises some  
24 concerning issues about the basis on which it was made and the information that was  
25 provided to the Tribunal in support of it.

26 There are two main reasons that are advanced in support of the application. They are

1 the recent instruction of the legal team and Mr Rowntree's apparent intention to amend  
2 his application. Now applying for an adjournment in the middle of a part heard hearing,  
3 very shortly before the further hearing, is highly unusual and it obviously has serious  
4 consequences, and it's a serious application to make: it's liable, obviously, to  
5 inconvenience the Tribunal, to waste its limited resources; it prejudices us. It's  
6 obviously something to be done in a fully considered manner. So no doubt  
7 Mr Rowntree's new legal team will have thought extremely carefully about how they  
8 put the application when they did in their letter of 5 June.

9 Now, if we could please go to that letter, it's to be found in the bundle at C142/1. So  
10 we have the letter here to the Registrar. In the second full paragraph we see:

11 "Having regard to the very short period of time that this firm --"

12 THE CHAIR: Yes. Thank you. Yes.

13 MR PICKFORD: "-- the newly instructed counsel have had to get up to speed and  
14 consider the issues, the PCR applies for an adjournment."

15 And then there's a discussion about some possible further amendments that the PCR  
16 may wish to make and then at point (d), on the next page:

17 "Accordingly, the PCR is not in a position to properly address the issue of  
18 proportionality at the hearing of 16 June."

19 Now, just pausing there. This is, we say, a somewhat puzzling letter, because at the  
20 heart of the basis of the application is it's being said that he's only just instructed  
21 a fresh legal team and yet he doesn't tell us when the replacement counsel were  
22 actually instructed. He doesn't tell us when the replacement solicitors first had some  
23 idea that they might need to prepare for this hearing. He doesn't say what efforts he  
24 went to ensure that he instructed a new legal team without jeopardising this hearing  
25 date. All of that information has been kept back.

26 And we say, contrary to what one would expect from an application of this sort, there's

1 obviously no witness statement either. Now, the reasonable inference that we say we  
2 and the Tribunal were being invited to draw from this letter was that Mr Rowntree had  
3 replaced his previous legal team and that's partly true, but not entirely, and that as at  
4 5 June, he'd only just instructed a new one because, of course, had his new counsel  
5 team, for example, been instructed for weeks beforehand, and had they had proper  
6 capacity, there would have been no problem whatsoever with properly appearing for  
7 this hearing.

8 Now, we sought clarification as to whether our inferences were right, and Mr Rowntree  
9 refused to engage with us; he cited legal professional privilege. We said that's a little  
10 bit odd because the essence of his case was: we don't have enough time to prepare;  
11 counsel haven't got enough time, but we're not going to tell you anything more about  
12 it, even when they were instructed.

13 We say that response was unsatisfactory, and it becomes more unsatisfactory when  
14 one actually then delves into the issues more deeply.

15 If we could go back, please, to the transcript for the end of the last hearing. We'll find  
16 that at T, tab 2, page 215. (Pause)

17 Mr Chairman, I'm sure you will recollect, and the Tribunal will recollect, at the end of  
18 the hearing, we see at line 18, you, sir, said:

19 "Then we will fix up another hearing for half a day. Does that sound sensible?"

20 I said yes, Mr Robertson said yes, then:

21 "Whether or not it is necessary to bring leading counsel in for long, I am not sure -- well,  
22 the principal submissions, it is really just this issue --"

23 And then Mr Robertson interrupted:

24 "Mr Went will be doing it anyway, so ...".

25 And then, Chair: "Right. Good".

26 So at that point everyone knew what was going to happen. It was going to be Mr Went

1 who was going to be doing the hearing for Mr Rowntree. Mr Went, of course, pleaded  
2 the claim, originally with Mr Brealey KC, and he made a very substantial contribution  
3 to the oral submissions at the hearing in February.

4 Just in passing, I'd note there's never been an explanation as to why Mr Brealey KC,  
5 who pleaded the claim, wasn't available for this hearing -- that's not been explained.

6 There was a point that was made in a letter of Friday, but it wasn't pursued by Mr Ward  
7 today. We received a letter on Friday suggesting that the reason for changing their  
8 mind about instructing Mr Went and instructing a silk instead was that they discovered  
9 that there was going to be leading counsel on the other side, and so they decided to  
10 arm themselves in the same manner. I don't know whether that point is still being  
11 pursued; it's certainly a bad point, but I don't know whether I need to anticipate it as  
12 something that Mr Ward is going to come back to in reply or not.

13 The short answer is: when the solicitors were exchanging availabilities, it was clear  
14 from 15 March onwards, when our availability was proposed, that it would be me that  
15 was doing the hearing. Ms Thomas wasn't in fact available for this hearing, and  
16 Mr Rowntree went ahead, in any event, and agreed to the date of the hearing on the  
17 basis that Mr Went was available.

18 That was the basis on which this hearing was set up. For your reference, the 15 March  
19 email is at C156, but that's just for your reference. So obviously at that point,  
20 Mr Rowntree, very much unfazed by the fact that it was going to be leading counsel  
21 and Mr Went, and of course Mr Went is an experienced competition lawyer. Indeed,  
22 he's precisely the same call as I am; we're both 1999 call. If I may respectfully say so,  
23 he represented Mr Rowntree very effectively before, and he is here before you today.  
24 This is a half day hearing dealing with some limited evidence for which he was  
25 obviously very well capable.

26 That's the first point in anticipation of a possible complaint about a change of counsel.



1 We then come back to the point that's made in the letter of 5 June that I showed you  
2 about not being properly in a position to address proportionality at the hearing because  
3 of the very short period of time that counsel has had to get up to speed. I have to say  
4 it was with considerable surprise that we saw Mr Went's name on the skeleton  
5 argument, because we assumed that he was no longer instructed.

6 Of course, if he is instructed, he was always going to be capable of dealing with this  
7 hearing on his own. We say that that is a somewhat surprising context in which to be  
8 both applying for an adjournment, but not mentioning that point at all in the letter that  
9 seeks the adjournment.

10 If we then turn to Mr Ward's difficulties with preparing for this hearing: as I said, one  
11 might infer from the letter that he'd only been instructed for a few days. He's now  
12 explained that that's not true; they were forced to come clean on that on Friday and  
13 explain that, in fact, he's been instructed for a whole month. Now, manifestly, that's  
14 more than enough time for any competent barrister with adequate time to both get up  
15 to speed on such a hearing as this, and to plead amendments if they really want to.  
16 That would be the case for any competent barrister, a fortiori someone of Mr Ward's  
17 ability.

18 THE CHAIR: It's not just a question of the barrister, is it? I mean, there's  
19 a chamber -- two things going on: first of all, on the proportionality evidence, the fact  
20 is it's something of a moveable feast on both sides of the court, and it's not just  
21 a problem with the PCR. You've, no doubt for understandable reasons, refined your  
22 position in your evidence.

23 MR PICKFORD: Yes.

24 THE CHAIR: Couple that with the new firm of solicitors who clearly are brought in to  
25 look at the case from a different perspective, or to add value to the case. So it's  
26 understandable that they will need a period to get up to speed, to develop their thinking

1 and indeed to keep track of this evolving case as to the proportionality in what the  
2 nature of the damage will be. Just saying that Mr Went has been there all the time  
3 isn't a perfect answer to that. I appreciate your point that it didn't fall out of the 5 June  
4 letter, but it still doesn't resolve this application.

5 MR PICKFORD: Yes, I accept that Mr Went's availability may not be a complete  
6 answer to the way it's being put, but I do say it's a very material fact in terms of the  
7 ability of the legal team to deal with the issues and to make amendments; to have the  
8 core person in the team who originally pleaded it and appeared at the first hearing, still  
9 part of the team. That fact was not even mentioned in the letter, so we say it's  
10 a serious omission.

11 In relation to Mr Ward, my point is this: someone who had sufficient capacity and was  
12 instructed a month in advance should have been able to do what was necessary to be  
13 at this hearing, if necessary, with amendments. Indeed, we were told earlier in  
14 correspondence that amendments would be forthcoming before this hearing. They  
15 haven't been, but what we were told in correspondence is they would be.

16 We know that, Mr Ward -- obviously, because he would necessarily have been guided  
17 by his duties -- when he took the case, he obviously would have considered whether  
18 he had a sufficient amount of time to do it. Because, of course, the obligation is  
19 either -- if you think you have a sufficient amount of time and under the cab rank rule,  
20 you must accept. If you don't think that you've got enough time to prepare properly for  
21 the hearing and do everything that's required before that hearing, you must decline.  
22 That's clear in the BSB rules, I'm sure I don't need to go to it, but we've got them in  
23 case they're necessary.

24 What they have to explain, therefore, is what changed between when Mr Ward was  
25 originally instructed -- when he must have thought he had sufficient time to deal with  
26 this case -- and 5 June, when it's now being said that they haven't got sufficient time

1 to deal with this case.

2 THE CHAIR: I don't think it's just a question -- I'm sure Mr Ward is fully prepared for  
3 the case, but that's -- you know, barristers tend to have overinflated opinions of their  
4 importance, but there is a very important team of solicitors who are in the process of  
5 formulating arguments, and that's the complexity here.

6 MR PICKFORD: Well, I was going to come on to that. So I mean, I've been dealing  
7 with them in their respective boxes as it were.

8 THE CHAIR: Yes.

9 MR PICKFORD: So let me deal with the solicitors issue. We now know that  
10 Mr Rowntree had contact with Willkie Farr over two months ago. They didn't formally  
11 instruct them until over a month ago, but he was in contact with them for the last  
12 two months. They have a team that's led by not one, but two very experienced, highly  
13 regarded competition lawyers, Mr Boris Bronfentrinker and Ms Elaine Whiteford, and  
14 they have the huge firepower of a leading US firm behind them. Moreover, the  
15 evidence that was necessary for this hearing -- pursuant to the directions that the  
16 Tribunal had given for further evidence -- had already been prepared by their  
17 predecessor firm.

18 So we say, given the lead-in that they had of two months, plus a formal instruction for  
19 one month -- and they obviously could have been thinking about what they were going  
20 to be potentially doing and how they might resource it ahead of the month -- we say  
21 they had manifestly sufficient time to get up to speed for this hearing too. Obviously,  
22 we quite accept it's a team effort -- it's counsel and solicitors -- and in both respects  
23 we are surprised that it's said, in a letter of 5 June, "I'm sorry, we haven't got enough  
24 time".

25 Insofar as the application is put on that basis, we say it should be rejected.

26 Now, if I could then move on to the potentially related issue of the amendments. We

1 say that is an equally unacceptable basis for the application, and I've got three short  
2 points to make in that respect. The first one is a very obvious one, which has already  
3 been canvassed, sir, which is: we haven't been provided with the amendments. It's  
4 a quite extraordinary application to say, "Here's an adjournment application we need  
5 to make for amendments", and then not to come forward with those amendments; to  
6 sit on your hands rather than to move mountains.

7 If there is a hearing that's going to be happening in a month's time, that is the  
8 quintessential example of a time when you work round the clock to make sure that  
9 you've got your amendments, so that they can be taken into account properly. That's  
10 the first problem.

11 The second is that Mr Ward has been very careful not to commit himself to saying,  
12 "These amendments only go to proportionality". There was a slight, I would say,  
13 Freudian slip when he said, "full reconsideration of the case as previously put", but  
14 he's reined it back in now. But obviously he's reserving the ability to make potentially  
15 quite profound amendments which will potentially go to issues that we have already  
16 had a hearing on.

17 We say that there is no jurisprudence whatsoever that supports the idea that,  
18 mid-hearing -- mid-hearing -- you can make amendments that require the earlier parts  
19 of the hearing to be revisited prior to there being any ruling by the court or the Tribunal  
20 on the case as it's been heard.

21 THE CHAIR: It's right there's no evidence in support of the adjournment? Evidence  
22 in support of the adjournment? There --

23 MR PICKFORD: Yes.

24 THE CHAIR: Do you want to address us on whether there's evidence in support of  
25 the adjournment?

26 MR PICKFORD: Yes. Sorry, I may not be fully understanding --

1 THE CHAIR: Press on, Mr Pickford.

2 MR PICKFORD: I am. I'm going to be drawing these strands together.

3 THE CHAIR: Yes, of course.

4 MR PICKFORD: We've summarised the nearest we can get in terms of relevant  
5 jurisprudence, which is on very late amendments. That is pretrial: so not when you've  
6 had 80 per cent of the argument, but prior to having the argument in our skeleton, and  
7 that's the easiest way I think of just --

8 THE CHAIR: Well, I've read that, and --

9 MR PICKFORD: Thank you.

10 THE CHAIR: -- it's for the same reason of limited assistance, but we appreciate those  
11 principles.

12 MR PICKFORD: Well, in my submission, respectfully, it should be of assistance to  
13 this Tribunal because the Lady Chief Justice in particular in Quah makes some very  
14 pertinent comments in relation to the type of amendments that are being sought here.  
15 It is said, for example, that an application for an adjournment based on amendments,  
16 which, I quote:

17 "... arise out of a fresh examination of possible arguments by fresh counsel ..." [as  
18 read]

19 is precisely the sort of reason that does not find favour with the courts. So, the courts  
20 have been very clear that just instructing fresh counsel is not an excuse -- it's not  
21 a justification for new amendments at all, it is precisely the opposite. I'm going to come  
22 on to deal with what's said to be the wider public interest context here in a moment;  
23 that's the way Mr Ward puts his case.

24 But as a general matter, these amendments are far, far too late on the basis of ordinary  
25 principles in relation to such proposed amendments, precisely because they're going  
26 to stymie the Tribunal from deciding the case on the basis that it's currently heard it

1 and potentially reopen it to start again. I mean, in my submission, it's somewhat like  
2 a football match, and you're 75 minutes in, and then someone says to the ref, "Can  
3 you pause this and start it again next season, because we've got a new owner and  
4 he's instructed a new manager and he's not quite sure about the tactics".

5 I mean, we say it's really that extreme. It's a very, very unusual type of application.

6 THE CHAIR: Football's wasted on me, I'm afraid.

7 MR PICKFORD: Okay, well.

8 THE CHAIR: I'll take your word for it that that was a helpful analogy.

9 MR PICKFORD: Sir, drawing those strands together and making some concluding  
10 points. I've got three further points to make on this aspect: first, Mr Ward's point to the  
11 fact that he says, "Well, Mr Rowntree is required to act in the interests of the class".  
12 The way they put it in their skeleton was that the decision to change representation is  
13 not a matter for criticism.

14 Now, I'm afraid my submission is it very much is a matter for criticism if the implication  
15 of doing so is to lose a hearing date and to revisit the case when that was not  
16 necessary. If Mr Rowntree had been dissatisfied with his representation, he would  
17 evidently have known that at the last hearing. That was the time when evidently those  
18 thoughts coalesced in Mr Rowntree's mind.

19 We know he started talking to others seemingly soon after that. The first thing that  
20 any competent lawyer who he might have talked to would have advised him at that  
21 point is the need to move extremely promptly if you're going to switch representation.  
22 You can't just sit on your hands and then pull yourself up by your bootstraps by having  
23 left it too late and getting your adjournment.

24 THE CHAIR: That's not what -- I think. Yes, I'm not sure how fair that is as  
25 a submission. I didn't press Mr Rowntree for a detailed timetable from the perspective  
26 of understanding whether he'd moved with sufficient swiftness or not; that was not the

1 purpose of the questions. These things -- obviously, funders have to be brought along  
2 and consideration given to no doubt many aspects when changing solicitors. I'm not  
3 sure there's a basis for saying that he didn't act swiftly enough.

4 MR PICKFORD: Well, I put it on two bases: one is that this hearing has been known  
5 about since February, so that is four months ago. We say the fact that we are now at  
6 this hearing, hearing an adjournment application made just a week or so ago, does  
7 imply that Mr Rowntree took too long. That's my first submission.

8 The second actually comes out of some of the evidence that Mr Rowntree gave to the  
9 Tribunal. He said, "I didn't think it was necessary to speak to my consultative panel;  
10 I went through the process myself first, and then I spoke to them".

11 Then the question was asked, "Well, what did you get out of your consultative panel?"

12 He said, "Well, I get information on ..." I think "process" or "logistics" -- it was one word  
13 along those lines. In my submission, had Mr Rowntree thought to speak to his  
14 consultative panel early, that is precisely the sort of help that they could have given  
15 him to say, "Okay, we're sorry that things didn't work out with your original solicitors.  
16 If you're thinking of changing, you're going to need to really get a move on, because  
17 this is important. You've got four months, but you're going to need to make sure that  
18 you put things in place sufficiently promptly". So I do have two --

19 THE CHAIR: The difficulty the Tribunal's facing is that we -- maybe things have taken  
20 a long time, maybe they haven't, but the big unknown is what the extent of the  
21 proposed adjustments to the case are.

22 MR PICKFORD: Yes.

23 THE CHAIR: Until one knows those, it's very difficult to form a view as to whether or  
24 not the time period is sufficient or not, or whether an adjournment is appropriate or  
25 not. That's the gamble the Proposed Class Representative is taking saying, "I want to  
26 change my case, but I'm not going to tell you how".

1 MR PICKFORD: Yes. Well, in my submission that tells against the application. You  
2 can't both say you need amendments and then not come with either the amendments,  
3 or at least a very clear description of what you're proposing to do --

4 THE CHAIR: Yes.

5 MR PICKFORD: -- so that we, and the Tribunal, can assess whether that application  
6 is justified by its supposed basis. If you don't do that, well, then that's, we say, tough;  
7 you shouldn't get your amendments.

8 Just two further points to make concluding this. There were references to two cases  
9 where, after the end of the hearing -- so there's a decision on the certification  
10 application -- the Tribunal has then said, "Given the basis of our decision, we are,  
11 however, not going to dismiss, we're going to allow you an opportunity to amend". But  
12 those are very different from this case, because what they're seeking to do here is  
13 prevent the Tribunal from even getting to ruling on the case as it was originally put.  
14 We say that that is an improper interference with the tribunal's processes.

15 If they want to make a submission at the end of the hearing and -- sorry, after the  
16 ruling, well, that they maybe should get another go -- well, I mean, maybe they won't  
17 need it, maybe they'll be certified on the basis of their claim as it is. If they do need it,  
18 then that is something that can be considered properly in the light of the Tribunal's  
19 ruling, because it may be that they have good arguments to have another go, such as  
20 in *Pride*, or it may be that they don't have good arguments to have another go, such  
21 as in *Riefa*, where, again, the representative came along and said, "Well, the Tribunal  
22 always lets people have another go", and the president said, "No, not in this case. You  
23 failed the authorisation condition, I'm dismissing your application".

24 So it all depends on the basis that the Tribunal takes its decision. That's why we say  
25 the cases that Mr Ward cited are unhelpful; they don't go to this issue. They go to  
26 a different issue of when you can concretely assess whether there is a justification, or



1 | there isn't, for coming back again. So that's the point we make on that.

2 | The final point is this: we say the prejudice of an adjournment in these circumstances  
3 | is clear: it's inconsistent with the principle of finality; it deprives the parties of the  
4 | opportunity to bring these, what we say are misconceived, proceedings to a close; it  
5 | deprives other Tribunal users of capacity; it wastes everyone's valuable resources and  
6 | time, including, obviously, those of the Tribunal itself.

7 | We say it's a wholly unreasonable application, and it was made on the basis of  
8 | an insufficient explanation of the true factual situation when it was originally brought,  
9 | and it shouldn't be accepted.

10 | If I may just take instructions. Sir, you asked me one question, which I don't know  
11 | whether I've addressed, about whether I was going to be making submissions on the  
12 | evidential basis for it?

13 | THE CHAIR: The evidential basis for the adjournment, yes.

14 | MR PICKFORD: Yes. Well, I mean, there is no strict evidential basis for it; there is  
15 | no witness evidence as such. What we've got is two letters with piecemeal bits of  
16 | information; firstly, we say a very inadequate explanation, and then a somewhat fuller  
17 | explanation.

18 | THE CHAIR: On 5 June, you mean?

19 | MR PICKFORD: Yes, the 5 June letter. Then when it became clear that they weren't  
20 | going to get away with that, in the light of our skeleton argument, and they saw that,  
21 | "Maybe we do need to provide a bit more information", then we've got the 13th. Then  
22 | we have some very, very limited evidence from Mr Rowntree, to which I referred. As  
23 | I say, that actually goes to show that he should have made better use of his  
24 | consultative panel.

25 | That's essentially it. I mean, I've sought to address you on those points. If there are  
26 | particular bits that I haven't addressed, I'm very happy to attempt to do so.

1 THE CHAIR: Fine. Thank you.

2  
3 Reply submissions by MR WARD

4 MR WARD: A few brief points, if I may, in reply, sir. Firstly, it's just worth bearing in  
5 mind some timeline aspects that Mr Pickford glossed out. A letter was sent on 15 May  
6 indicating the change of solicitors.

7 As early as 22 May, my solicitors wrote to Macfarlanes to explain that amendments  
8 were in contemplation. It was 3 June that Macfarlanes wrote back and said it was all  
9 too late, and then it was on 5 June that my solicitors made the application to the  
10 Tribunal. There seems to be a fairly confusing but potentially irrelevant topic about  
11 availability of leading counsel.

12 THE CHAIR: I don't think --

13 MR WARD: The understanding is in the letter.

14 THE CHAIR: I don't think you need to address me on that.

15 MR WARD: Let me deal with what I think is the important point here, which is about  
16 proportionality and the surprising suggestion that there may be some code of conduct  
17 issue here. The issue about proportionality is this: we are here equipped to deal with  
18 the case as currently developed on cost/benefit analysis. You would have seen that  
19 from the skeleton argument. There was no difficulty in counsel's availability in having  
20 enough time to deal with that.

21 The submission that is being advanced today is that an adjournment is appropriate so  
22 that a carefully developed suite of changes to the way the case is being put can be  
23 advanced. That is evidently a matter that requires both input of counsel, law firm,  
24 potential witnesses both factual and expert, and not something that is somehow to be  
25 associated with my availability, Mr Pickford's flattery notwithstanding. With respect,  
26 that submission really just misses the mark.

1 In terms of the generalised allegation of sitting on hands, that also is just unrealistic  
2 when one looks at the complexity and sophistication of this kind of litigation. As to  
3 Mr Rowntree's evidence, it was interesting to hear the change of tack, because  
4 obviously you've heard his evidence that he took this seriously and carefully. As  
5 a result, Mr Pickford said, instead, it was all too slow.

6 As to the consultative panel, of course that can have different roles at different times  
7 in the proceedings. We wouldn't accept the suggestion, if it is being made, that there  
8 was a strict obligation on Mr Rowntree, given the views that he had reached, to consult  
9 with them. What you heard, sir, was he took an entirely responsible course.

10 So unless I can assist further, those are the submissions in reply. Thank you.

11 THE CHAIR: We'll have five minutes for the shorthand writer.

12 (11.49 am)

13 (A short break)

14 (11.58 am)

15 THE CHAIR: We're not going to give judgment on this now. We will hear argument  
16 on other aspects today. I mean, the two issues are not entirely independent of each  
17 other -- whether there should be an adjournment and where we are on proportionality,  
18 in any event -- but for that and other reasons, we will give judgment on the adjournment  
19 in due course. But we will hear argument on the other matters today.

20  
21 Housekeeping

22 MR PICKFORD: Thank you, sir. Can I just raise one quick point on housekeeping,  
23 which is -- I've had a word with my learned friend about how long we think we're going  
24 to be.

25 THE CHAIR: Yes.

26 MR PICKFORD: Because of course, this was a half day hearing to deal with

1 something. We've now got an hour left before lunch. I was just wishing to find out  
2 whether --

3 THE CHAIR: If we have to go into the afternoon, we'll go into the afternoon. Yes.  
4 Yes.

5 MR WARD: I'll do my best not to be the cause of that, sir.

6  
7 Further submissions by MR WARD

8 MR WARD: You have our primary submission that the cost and benefit should be  
9 considered in the context of the revised application and that's, I think, what you just  
10 alluded to, sir. But that is our case. And of course, you appreciate from the case law  
11 and indeed, as set out in our skeleton, cost/benefit is not a freestanding hurdle. We  
12 get that from Merricks in the Supreme Court at paragraph 61. And Gutmann shows  
13 us that a claim may be certified even if this particular criterion is not satisfied. Although  
14 of course, we submit, that it is.

15 I'm going to make five submissions about this. The first is information asymmetry. It  
16 is inescapable that there is a fundamental asymmetry in this case. The information  
17 needed to properly value the black box royalties as the building block of the claim is  
18 not accessible to the PCR. The PCR is criticised for relying on limited information in  
19 trying to value it, including statements made by industry experts in the public domain,  
20 but also the witness evidence of Mr Karabuda, who is an experienced expert in the  
21 industry.

22 May I just show you again what he said. This is just for context. This is A11 and you  
23 will see at A11, on page 2 he talks about --

24 THE CHAIR: Hold on, hold on, give me a -- sorry, my -- (Pause)

25 Yes. Sorry, fire away.

26 MR WARD: And he has experience both in the Swedish Performing Rights Society,

1 other organisations, but also, if you turn to page 5, working with New Internet Media,  
2 a consortium with European Commission funding, which is promoting fairness for  
3 music creators and they have a project called Fair Music, which, at paragraph 11,  
4 "aims to promote and enhance transparency".

5 And in terms of just the overall scale of black box royalties, you'll see at paragraph 16,  
6 he says that in their application for EU funding, so obviously not about the UK, black  
7 box royalties distributed on a "pro rata" basis were around 7 billion. And this is why,  
8 in my client's perspective, the numbers advanced by the PRS are, shall we say --

9 THE CHAIR: Sorry. So that figure of 7 billion comes from where?

10 MR WARD: He says it's from the -- sorry, I've just put the file away. I'll bring it back.  
11 So this is --

12 THE CHAIR: We appreciate a while ago we looked at some of those materials in this  
13 case.

14 MR WARD: So he says in the Fair Music Project application for EU funding, it was  
15 noted -- and Fair Music Project is the organisation he is involved with -- that black box  
16 royalties on a pro rata basis are around 7 billion.

17 THE CHAIR: Why does Fair Music say that?

18 MR WARD: Why does it say it?

19 THE CHAIR: Yes.

20 MR WARD: (Inaudible) but I showed you before that it's a programme sponsored by  
21 the EU culture programme. It's a consortium.

22 I'm not seeking to rely on this number, sir. It's context before we go into more granular  
23 matters.

24 THE CHAIR: Right.

25 MR WARD: And Mr Savage was also criticised in my friend's skeleton, for referring to  
26 statements made publicly by certain other industry experts.

1 But ultimately, of course -- the real issue here is this. In the several years that have  
2 passed since the pre-action process, the PRS has not chosen to advance any kind of  
3 comprehensive analysis of the level of black box royalties and even the detail now set  
4 out in Mr Arber's third witness statement was provided at the Tribunal's prompting.

5 This is significant because the PRS did not seek to resist certification on the basis that  
6 the overall quantum of damages was too small, or the amount of black box royalties  
7 was too little. It made various objections, including on cost/benefit, but not that one --

8 THE CHAIR: It would really assist me, before we criticise the PRS, I mean, when you  
9 issue this claim, one of the criteria is a question of proportionality. So it's something  
10 that the claimant is required to -- the Proposed Class Representative is required to  
11 address. And at the last hearing we had from you, after significant amount of toing  
12 and froing, a second note --

13 MR WARD: Yes.

14 THE CHAIR: -- which sought to articulate and was handed up.

15 MR WARD: B108.

16 THE CHAIR: And this is all pleaded --

17 MR WARD: Yes.

18 THE CHAIR: -- but we can come to that in a minute. But first of all, proportionality.  
19 Perhaps we can get rid of the costs side. As I understand the potential costs with the  
20 uplift were 82 million, is that --

21 MR WARD: Yes.

22 THE CHAIR: And then, I think, there was interest on that, which Ms Thomas at the  
23 last hearing said would be an extra ten million.

24 MR WARD: Yes.

25 THE CHAIR: Can we agree what the costs figure is for the purposes of today?

26 MR WARD: I can get instructions as to the exact figure, but I'm not going to dispute

1 any of that on my feet.

2 THE CHAIR: Right.

3 MR WARD: We do make a point about that, though, sir. That of course, the question

4 of a success fee and a funder return are properly addressed at the distribution phase.

5 And so if, in the light of the level of damages awarded, the CAT took a view about that,

6 that would be a matter at that point.

7 THE CHAIR: We might cut it down but at the moment --

8 MR WARD: That's what --

9 THE CHAIR: -- potentially 90 million.

10 MR WARD: Potentially.

11 THE CHAIR: And that's not going to be recoverable -- that 90 million won't be

12 recoverable from the defendants. Is that right?

13 MR WARD: The cost would be recoverable.

14 THE CHAIR: The full 90 million?

15 MR WARD: Not the funder return.

16 THE CHAIR: Yes, that's what I meant. Yes. The costs would be, yes, but not the

17 funder return. So the funder return is the difference between 90 and 14 so it's a very

18 large sum of money. So who's going to pay that?

19 MR WARD: That would be a matter for the Tribunal at the distribution phase.

20 THE CHAIR: That will be the quantity but let's assume we're with you on the 90 million.

21 That's going to be paid by the writers, isn't it?

22 MR WARD: Not necessarily, no. It's going to be --

23 THE CHAIR: It's going to be paid by --

24 MR WARD: Separate question of who is going to pay. There was an argument about

25 this before, in February, as well, about the ability of the PRS to recoup that from the

26 publishers who've been overpaid.

1 THE CHAIR: Right. Okay. But you're not recovering that from -- sorry, you're not  
2 recovering that from the PRS? That was the point of my question. So the 14 million --  
3 MR WARD: Yes.  
4 THE CHAIR: -- or maybe a little bit more than that -- you can say the PRS has to write  
5 a cheque for that because they ran a bad case. That leaves the funders' fees of  
6 75/80 million. And that's going to come out of damages. So that's going to come from  
7 writers. So on the costs.  
8 MR WARD: Not the writers, sir, no, with respect, no because --  
9 THE CHAIR: Well, the class.  
10 MR WARD: The judgment would be against the PRS for the entire sum of the  
11 damages.  
12 THE CHAIR: Yes. And that's money going to the class.  
13 MR WARD: I beg your pardon, sir?  
14 THE CHAIR: That's money that will go to the class.  
15 MR WARD: Yes, so the funders' fee can potentially, of course, come out of  
16 undistributed funds.  
17 THE CHAIR: Yes. So when considering cost/benefit, we've got to have in mind, as  
18 the Tribunal, the fact that the 70 million may have to come out of the damages and of  
19 course we will have a discretion to knock that down. But the potential cost to the class  
20 is 70 million.  
21 MR WARD: Sir, again, I respectfully don't accept it's a cost to the class. The PRS  
22 is -- it would come out of undistributed damages. So in that sense it's not a cost to the  
23 class.  
24 THE CHAIR: The undistributed damages. This is not a case where -- it's coming out  
25 of damages. Why would it be undistributed damages?  
26 MR WARD: Potentially as a matter of order of priority. This again would be a matter



1 for the Tribunal.

2 THE CHAIR: Right. But it could be coming out of the pot of money.

3 MR WARD: Yes, coming out of the pot.

4 THE CHAIR: Which is owed to the class.

5 MR WARD: Yes. In that sense, yes.

6 THE CHAIR: There's going to be no trouble with distribution in this case except for

7 the very people who actually have a claim against the PRS are the ones you can't

8 identify, which presumably you won't be able to identify them either.

9 MR WARD: (Overspeaking)

10 THE CHAIR: You may be able to find out who they are. But anyway. But there's

11 a large pot of money that is going to go to the funders and that's something that in

12 considering cost/benefit, we have to be alert to, presumably. You don't disagree with

13 that?

14 MR WARD: I don't disagree, subject to the very, very large caveat that that is a matter

15 that can be addressed at the distribution stage by the Tribunal.

16 THE CHAIR: It might get cut down, but I mean, we're having to make a decision today.

17 Let's assume it was cut down significantly and please, if the funders are in the court,

18 don't take this as a hint. I'm merely just looking up. Say, we say that, okay, you won.

19 Actually, the funders only deserve a 100 per cent uplift. Then we'd be talking about

20 30 million and then 14 million or so would have to come out of the class in those

21 circumstances. So again, the sum we've got to be alert to.

22 MR WARD: Yes, sir. Alert to, but it is for another day, in my respectful submission.

23 THE CHAIR: But there's going to be some things, some large sum of money,

24 necessarily, some large sum of money coming out of damages to pay the funders.

25 MR WARD: Absolutely.

26 THE CHAIR: That's if you're successful.

1 MR WARD: Absolutely.

2 THE CHAIR: And that sum, we need to have regard to how much that sum might be.

3 And we know the top end is around about 80-odd and the bottom end, let's say if the

4 bottom end was 15, let's say. You're saying the bottom end might be.

5 MR WARD: Well, I don't know what the bottom end is but you would have seen some

6 of the observations of the Tribunal in the Merricks settlement judgment --

7 THE CHAIR: Yes.

8 MR WARD: -- about the appropriateness of dealing with this at the stage of

9 distribution.

10 THE CHAIR: Yes. But we've still got to deal with the proportionality of the case as

11 a whole at this stage. Yes.

12 MR WARD: Proportionality at this stage but having regard to the fact that this can be

13 dealt with, and should be dealt with, at distribution stage.

14 THE CHAIR: Yes. But you're not suggesting that there won't be a significant sum

15 going to the funders if you're successful. Obviously, that's the nature of the economics.

16 MR WARD: Subject, of course, to the Tribunal's discretion. The submission I am

17 making, though, is that this is a matter for the distribution phase, rather than

18 pre-deciding now exactly what the level of that --

19 THE CHAIR: How can we engage in a cost/benefit and proportionality assessment

20 now if you're not allowing us to look at the potential downside to the class?

21 MR WARD: (Inaudible) If you just look at --

22 THE CHAIR: No, you don't need to show us Merricks. Merricks is not dealing with

23 certification.

24 MR WARD: I'm not suggesting it is irrelevant for the purposes of certification that the

25 funder is seeking a substantial fee. What I am saying, though, is that the level of that

26 return is a matter for the distribution phase, and that is also relevant to (overspeaking).

1 THE CHAIR: Up to a point, up to a point. Realistically, up to a point.

2 MR WARD: I don't want to talk you down on behalf of the funder of my own client.

3 THE CHAIR: No. So anyway, we have to keep in mind the costs.

4 MR WARD: Yes.

5 THE CHAIR: Now explain your case on the benefits, what this action is going  
6 to -- that's where we just pulled out the second note.

7 MR WARD: Yes. This note was based on the basis of the material that was available  
8 to Mr Savage, as well as developing certain points from Mr Arber's evidence. The  
9 numbers here are -- it comes out with black box royalties of 320 to 480 million, at the  
10 bottom of page 3, but also more substantial royalties in respect of a non-MTOL as well.  
11 At 9, the --

12 THE CHAIR: So what I want to understand is: is this still your case? Because I'm  
13 going to take you through this line by line if it is, if you're saying your case has moved  
14 on in the light of the evidence that's been exchanged.

15 MR WARD: Let me give a -- I hope it's not a disagreeably nuanced answer to that  
16 question. I started with Mr Karabuda, because what this represents, this note, is what  
17 the Proposed Class Representative's own best endeavours have shown the value of  
18 the claim to be. What we've been faced with, on the other hand, is now some work by  
19 the PRS which we say is obviously starkly different to this. Our primary submission is  
20 that there should be disclosure after certification so it can be resolved, and that the  
21 PRS's case significantly understates the level of the black box royalties. That's the  
22 submission. Right.

23 THE CHAIR: Right. Okay. So let's just have a look at how it's put in Arber 3.

24 MR WARD: Yes.

25 THE CHAIR: We have this table.

26 MR WARD: Yes.

1 THE CHAIR: If we look at the column at the end, it identifies -- "unidentified",  
2 "unmatched" -- sorry. The row at the end, not the column. I beg your pardon.

3 As 220 -- this is from 2017 to 2023 -- this is an estimate, and I know you may have  
4 comments on whether that's close or not. We'll get on to those in due course.

5 You then have the publisher allocation, which is 55. You say that figure may be very  
6 different from 55, but how are you going to arrive at how much of that 55 should be  
7 going to the -- or how much of the 220 should be going to the writers? What's the  
8 counterfactual?

9 MR WARD: That is going to be a matter of evidence in due course, is the answer.  
10 I mean, you've seen the way the case is developed at the moment. The core  
11 proposition, as you know --

12 THE CHAIR: Sorry, what is a matter for evidence?

13 MR WARD: Exactly what share of that should be payable to writers.

14 THE CHAIR: Right. So what's your position? I mean, this is the entire basis of your  
15 claim.

16 MR WARD: Yes. You appreciate --

17 THE CHAIR: Maybe it should be less. You have to have some positive case.

18 MR WARD: You appreciate, sir, that the case is that PRS's approach of paying black  
19 box royalties on a pro rata basis leads to under-compensation of songwriters, and  
20 that's because of data problems which are more likely to arise with songwriters. This  
21 is obviously the core of the case.

22 Excuse me, someone's trying to pass me a note very noisily.

23 Of course, that proposition has not been countermanded by the PRS in any way, and  
24 there's been no application on the part of the --

25 THE CHAIR: I just want to know if you have a positive case as to what -- so that's -- at  
26 the moment, because at the last hearing, which I appreciate you weren't at, there was

1 lots of talk about 50/50. Okay. And if you look at this bottom row, as I understand, it's  
2 80/20.

3 MR WARD: So this is, we would respectfully submit, this is an incomplete picture. If  
4 you'll allow me to come on to that, I certainly shall.

5 THE CHAIR: Right. Yes, of course. But what's your case at the moment? You sort  
6 of pleaded it out in your second note. Is that still your case? The figures in that note,  
7 or --

8 MR WARD: So that is the case (inaudible) on the basis of the information then  
9 available.

10 THE CHAIR: Right. So what's --

11 MR WARD: As you appreciate, it is our earnest desire to firstly obtain disclosure, but  
12 secondly to obtain further expert evidence on the valuation of the case. It may turn  
13 out to be higher or it may turn out to be lower than that. I fully accept, though, that that  
14 note reflects the limitations on the PCR's position arising out of the asymmetry of  
15 information. We simply do not have, at this stage in the proceedings, access to the  
16 information that the PRS does about the scale of the black box royalties.

17 THE CHAIR: Let's assume for a minute that this is accurate. What would your case  
18 be on this? Are you saying that if it is indeed the case that 80 per cent of these, as  
19 you call them, black box royalties are going to writers and 20 per cent are going to  
20 publishers --

21 MR WARD: We don't accept this is the right number at all.

22 THE CHAIR: Okay, so if that was the number -- if we form the view that at this stage  
23 that seems to be the best number.

24 MR WARD: We really just don't accept the premise.

25 THE CHAIR: Right.

26 MR WARD: The issue of 50/50 is one where there has been some confusion and as

1 I understand it -- I do my best from what I've been able to understand -- 50/50 was  
2 accepted as the appropriate course for so-called unmatched works. Those are works  
3 where the song itself cannot be identified on the basis that -- the typical practice is that  
4 songwriters get at least 50 per cent of the royalties. In fact, they're required to.

5 There's a suggestion in my friend's skeleton that that part of the case was abandoned  
6 at the hearing. That is not right, and indeed, the correspondence that he relies on  
7 shows the contrary. I'll deal with that in reply if he develops that point. So that is the  
8 extent of the 50/50 point.

9 Beyond that, the issue is simply that the asymmetry that -- sorry, not asymmetry. The  
10 imbalance that exists between the defects to songwriter data and the defects to  
11 publisher data means that allocating black box royalties on the basis of matched  
12 royalties creates an inbuilt bias against songwriters.

13 THE CHAIR: So paragraph 5 of your note --

14 MR WARD: Sorry, sir, I've put it away. If you give me a moment --

15 THE CHAIR: Do keep it open, because we're not --

16 MR WARD: Yes.

17 THE CHAIR: You refer to Karabuda, paragraph 5. It states:

18 "The overwhelming majority of black box royalties belong to writers but the  
19 overwhelming majority are paid to publishers. If it is assumed that 75 per cent of Black  
20 Box MTOL royalties belong to writers" [as read]

21 Okay. (Pause)

22 I don't know where that assumption comes from, whether that's your case or whether  
23 that is -- what percentage of black box royalties do you think belong to writers?

24 MR WARD: I don't have a percentage to give you, sir. It's --

25 THE CHAIR: Well, how do you know they're not getting their dues, if they're not -- if  
26 you don't have a figure. I mean, there is a figure. We can interrogate the PRS more

1 to find out if those figures --

2 MR WARD: (Inaudible) precisely because royalties are being distributed on a pro rata  
3 basis. The core premise of the case is that it is more likely that writers will have, in  
4 fact -- would be the correct recipient of black box royalties, because it is more likely  
5 that data deficiencies pertain to writers. So that's why we know the actual figure is not  
6 the right figure. And that proposition, that the data difficulties are more likely to pertain  
7 to writers, has not been challenged. The exact amount will be a matter for trial. The  
8 further factual (Overspeaking).

9 THE CHAIR: There is an assumption in your case that the publishers are getting as  
10 much as the writers or more.

11 MR WARD: Well, you see, the point is that we know that the black box royalties are  
12 being distributed pro rata. That's what the PRS itself says. The factual premise of the  
13 case is that that unduly favours publishers, because the royalty -- sorry, the data  
14 difficulties are preponderantly for writers. That's the essence of the case, and that part  
15 of the case has not been challenged.

16 THE CHAIR: Sorry, I don't want to -- if you haven't got a positive case on this, I'm not  
17 going to carry on pressing you.

18 MR WARD: (Overspeaking).

19 THE CHAIR: But the 75 per cent in paragraph 5 -- I mean, is that truly an assumption  
20 or is that an assumption based on something?

21 MR WARD: It's illustrative. That's what it is.

22 THE CHAIR: Illustrative. I see.

23 MR WARD: So to that extent, sir, we don't have a positive case beyond what's in  
24 this --

25 THE CHAIR: So how is this Tribunal meant to take a view on whether it's proportionate  
26 or not?

1 MR WARD: Because what I am going to suggest to you is that on the -- the reason  
2 I started with information asymmetry is that my client has done the best they can with  
3 the information that they're able to obtain at this stage.

4 I'm sorry to repeat myself, but if I may, just in order to encapsulate the submission: if  
5 the case is certified, there will be disclosure. There will be an application for extensive  
6 disclosure of this data which the PRS itself holds. So at the moment we are hampered  
7 and it's just structural, and it's not unusual in a competition case. The defendant holds  
8 the information; the claimant does not.

9 So this case that's being constructed in this note uses the information that was then  
10 available. But we fully accept, to that extent it is a provisional case. What you're faced  
11 with, sir, today --

12 THE CHAIR: What's the provisional case?

13 MR WARD: Well, the provisional case about how much the claim is worth.

14 THE CHAIR: How much is the claim worth, provisionally?

15 MR WARD: Well, the answer is -- the numbers in this document indicate the scale of  
16 the black box royalties. I am not able to give you a percentage of that which represents  
17 the actual share of overpayment to publishers.

18 THE CHAIR: So the scale of the black box royalties in this case, that comes  
19 from -- can you just take me through the references here, because that's in  
20 paragraph 3, I think.

21 MR WARD: It starts with the figures in the PRS's own annual transparency report,  
22 and then it breaks that down, and then it relies on an estimate from Mr Savage of 20  
23 to 30 per cent.

24 THE CHAIR: Can we see how Mr Savage arrives at that?

25 MR WARD: Yes.

26 THE CHAIR: As I recall, he just points to something on the internet. Is that my



1 recollection? I may be wrong.

2 MR WARD: No. It's a slightly pejorative way of describing it, but let's turn it up.

3 Mr Savage's first report is in A23. The paragraph is 4.14. I must have the wrong

4 report.

5 THE CHAIR: Yes. That's it. Just over the page on page 10. "It is estimated ..." and

6 he gives footnote 10.

7 MR WARD: Yes. He refers to a statement by two senior people in the industry.

8 Annabella Coldrick, CEO of Music Managers Forum, and Graham Davies, CEO of the

9 Ivors Academy.

10 I should just say, to be clear, there's then a reference to the evidence before the select

11 committee. I'm not going to pursue that, sir. It's obvious --

12 THE CHAIR: We haven't got any of these materials. It's not even clear whether they're

13 talking about the UK. It seems to be Music Business Worldwide. We don't know.

14 I mean --

15 MR WARD: We do have first statements, actually. This information is in the bundle

16 summary.

17 THE CHAIR: Do we?

18 MR WARD: Yes, it is. (Overspeaking)

19 THE CHAIR: Let's have a look at it.

20 MR WARD: Sir, obviously this is not -- we're not engaged in a merits assessment

21 here, as you appreciate. These were statements used by Mr Savage to develop his

22 initial report, based on these people -- industry insiders. Of course, if the case is

23 certified, there will be disclosure. There will be further evidence. My instructing

24 solicitors --

25 THE CHAIR: 20 to 30 per cent of streaming royalties from MTOLs, black box seems

26 a surprising --

1 MR WARD: I think Mr Pickford's figure is 16 for MTOL. It's not actually very difficult.

2 (Pause)

3 I may have said something misleading there about the PRS's case. Mr Pickford will  
4 answer that.

5 THE CHAIR: Okay. All right. That's fine.

6 MR WARD: So that was Mr Savage, doing what he could with what he was able to  
7 find in the public domain. We've seen Mr Karabuda, who's also given evidence about  
8 the large scale of the black box royalties, and this note that you have from trial was  
9 prepared using the materials then available.

10 But where we are today is that in response to your questioning at the last hearing, the  
11 PRS has produced further information, recognising that it has access to this material.  
12 And the reason I start with information asymmetry is because, of course, we are doing  
13 the best we can with what is available to us. At the moment, what we've seen from  
14 the PRS is ever-changing numbers, that have also increased impressively over time.  
15 Could we turn to the transcript, please, of the last hearing.

16 THE CHAIR: Yes, I've got this in mind. The figures have clearly increased  
17 significantly, and you say, "Look, it just shows that nobody knows where they are at  
18 the moment". We were told at the last hearing it was --

19 MR WARD: 10 million.

20 THE CHAIR: 10 million.

21 MR WARD: Now it's 55.

22 THE CHAIR: Now it's 55. It may be 23. I think, actually, you have to look at the  
23 difference. But anyway, whichever figure -- clearly these figures have been difficult to  
24 get hold of and it's a moveable feast.

25 MR WARD: Indeed, and that's why we say the appropriate course is to actually allow  
26 disclosure to take place. Experts can look at this and we can come up with robust

1 numbers the Tribunal could rely on.

2 THE CHAIR: Now, let's assume that we were concerned about the proportionality of  
3 this case, and you're unable to assist us sufficiently today. In the short term, without  
4 saying, "Right, this can go off, you can only incur your 14 million through to trial, and  
5 then we'll scratch our heads about it at that stage" -- let's assume you want to grasp  
6 the nettle. What could be done in -- at reasonable expense and reasonable time in  
7 the near future to get a better understanding of what the figure should be?

8 MR WARD: Obviously, if the case goes further, the next thing that will happen will be  
9 case management.

10 THE CHAIR: No, this is -- before we're prepared to certify it, we want to make sure  
11 we've got -- we're sympathetic to your position that the figures have been changing,  
12 you haven't got to the bottom of them, that you're in a very difficult position. Assuming  
13 we were sympathetic to those -- an assumption -- what steps could be taken before  
14 this went through to certification?

15 MR WARD: (Overspeaking) a question for Mr Pickford, really. Because, of course,  
16 we don't know. We're on the outside. PRS has the information. Various witness  
17 statements make noises about how difficult it all is. But I am going to --

18 THE CHAIR: I'll bring up his third statement. It's quite a -- you know, it's a not  
19 insignificant piece of work, this third statement. Clearly, on its face, it seems that he's  
20 taken the task very seriously and has tried to come up with some figures. And you  
21 may have criticisms of those or not.

22 MR WARD: We do, and we have really a big picture criticism of it as much as we have  
23 anything that is granular. I'd like to come on to that, if I may. I do also want to make  
24 just a couple of more sort of framing points about this, if I may, before I get my hands  
25 dirty with the detail.

26 One is that this isn't just a claim for past damages, of course. It's also a claim about

1 the way PRS will distribute damages in the future. You yourself, sir, observed at the  
2 last hearing that that was relevant to the cost/benefit analysis, because if we win, it will  
3 be changed.

4 THE CHAIR: Well, I understand that, but that's not a concluded view, so don't think  
5 you don't have to address me on this.

6 MR WARD: Well, I am addressing you now, and I'm making the submission that, if  
7 I may respectfully say, sir, it was right, because obviously what is at issue here is the  
8 manner in which PRS carries on this activity: it's ongoing, and if we succeed, of course,  
9 as a responsible body, the PRS will change its practice.

10 THE CHAIR: But there may be other ways of getting the PRS to change its practice.

11 MR WARD: Well --

12 THE CHAIR: Making representations to the board, a clearly articulated case that,  
13 "Look, this is what's going wrong, here are the figures ..."

14 MR WARD: That may be, but thus far --

15 THE CHAIR: There may not be a need to litigate in that respect.

16 MR WARD: We're in litigation in which the claim is being opposed. The PRS hasn't  
17 come and said, "You know what? Actually, you've got a good point here". That's not  
18 its defence, that "You don't need to sue us because we're going to make changes".  
19 That's not the case. Mr Pickford is going to stand up and say it's all completely  
20 misconceived, in fact he already has.

21 THE CHAIR: In terms of -- you're suing the PRS for a lot of damages. You're not  
22 approaching the PRS and saying, "Look, can we adjust things so that they are fairer  
23 going forward? These are the concerns ..." It's not clear that any representation has  
24 been made at the political level within the organisation.

25 MR WARD: There was -- I do know this much: there was an extensive pre-action  
26 process. Obviously, many people from the PRS are here today; they're obviously

1 | closely engaged in this litigation. If they wanted to change their systems, I'm sure the  
2 | Tribunal will be the first to hear about it. So we're not addressing a case where the  
3 | PRS is saying, "We're happy to deal with this in some alternative manner".

4 | THE CHAIR: So can you give any examples where in a claim for damages, future  
5 | behaviour has been a relevant consideration when it comes to proportionality?

6 | MR WARD: I think you will find that in -- it may have been -- sorry, not directly relevant  
7 | to proportionality, but obviously the courts have made clear that they take into account  
8 | the potential of future behavioural changes in the context of remedy. I think from  
9 | recollection, it's Le Patourel. Someone will give me the reference.

10 | But in my respectful submission, when you're looking at what benefit this claim could  
11 | bring, the benefits of future change in this context is directly relevant. We're not  
12 | dealing with a situation where, say, there was a historic cartel, and it's just a question  
13 | of how much money is due to be paid on the number of widgets that were bought in  
14 | a particular time period; this is about a practice going forward. So albeit that that is  
15 | not quantifiable, it is a qualitative benefit of this litigation.

16 | In my respectful submission, I can't point to any authority, but it's patently right that it  
17 | is relevant. And you, sir, were right to say so at the last hearing, albeit if it was only  
18 | provisional thinking. It's also right to say that even on the PRS's skeleton, they suggest  
19 | a per capita value of the claim of up to £60, even on their very pessimistic numbers.

20 | And you will find --

21 | THE CHAIR: Can you --

22 | MR WARD: Yes, defendants' skeleton, Skel/B2.

23 | THE CHAIR: I've got the skeleton, yes.

24 | MR WARD: Skeleton. I have paragraph 38. (Pause)

25 | So --

26 | THE CHAIR: Yes, £60.

1 MR WARD: £60, based on various assumptions they say are generous that we say  
2 are not. That's their case, and in fact, we think they admit something very important.  
3 That's obviously well in scale for litigation in the Tribunal. It doesn't only exist for  
4 billion-pound claims, or very large sums paid to individuals. And we think that's wrong,  
5 in any event.

6 Can I talk now about what we think is the central plank of their attack in terms of scale?  
7 That we can take from their skeleton as well at paragraph 24. The issue here is about  
8 remedies actually distributed by entities such as ICE, that distribute directly to  
9 publishers, and Mr Arber's table completely ignores those royalties that go directly to  
10 publishers. This is dealt with at paragraph 24:

11 "Mr Savage also criticises Mr Arber's MTOL calculations for failing to take account of  
12 payments made to publishers directly by ICE or other mandated entities." [as read]

13 Mr Savage thinks that's roughly another 150 million, albeit on the PRS's numbers.

14 "However, these criticisms ... are wholly misguided given the claim ... That is because  
15 revenues which are received and distributed by entities other than PRS are manifestly  
16 not part of the claim." [as read]

17 Then various paragraphs of the claim are cited, and I'm going to show you, selectively.

18 Then at 25, it says:

19 "It follows that the alternative sum of 151.41 million for MTOL revenue does not relate  
20 to the claim as brought." [as read]

21 So the issue here is whether there's another 150 million of black box royalties paid to  
22 publishers, is it simply outside the scope of the pleaded claim? In our respectful  
23 submission, it is not. I fully accept that, should the case go forward, the pleading may  
24 be amended and clarified, but as pleaded, it is there. I'm going to show you now, if  
25 I may, why. Because this is really the big issue in Mr Arber's witness statement.

26 So if we go to tab A1, which is the claim form.

1 PROFESSOR ULPH: Where are we going to?

2 MR WARD: Sorry, sir?

3 PROFESSOR ULPH: Where are you taking us to?

4 MR WARD: Bundle A, tab 1, and it's page 2, paragraph 7.

5 THE CHAIR: Sorry, just give me a second. For some reason, it's not in my bundle.

6 (Pause)

7 Just give me a second, sorry. (Pause)

8 Sorry, I'm having -- not getting to this for some reason. Sorry, where did you want

9 me? Bundle A? What am I doing wrong here? (Pause)

10 Thank you. Thank you very much. Sorry about that, I'm just having a -- just give us

11 a minute.

12 MR WARD: Does the whole Tribunal have it?

13 THE CHAIR: Yes, I think we all do now.

14 MR WARD: Excellent. So I was just going to say, so you know where we're going,

15 we're going to look at some key paragraphs in here, then we're going to look at some

16 of the evidence. So paragraph 7 says:

17 "The purpose of this application is to enable opt-out collective proceedings by PRS's

18 songwriter members. The collective proceedings claim damages suffered by

19 songwriters caused by PRS's unfair royalty distribution policies." [as read]

20 That term is not defined there, but we'll see how this is developed. If we turn, please

21 now to page 13, the heading above paragraph 46.

22 THE CHAIR: Sorry, just give me a moment. (Pause)

23 Yes.

24 MR WARD: "Publishers are paid more black box royalties than they are entitled to",

25 which is obviously the factual foundation of the claim. Then more specifically, at 47.6,

26 please, on page 16, you'll see this is talking about Mr Karabuda's evidence. It explains

1 in the third line:

2 "[He] has provided evidence for the purpose of these proposed collective proceedings  
3 to the effect that Black Box royalties are paid on a pro rata or market share basis and  
4 that this results in the overwhelming majority of black box royalties (including black  
5 box royalties distributed direct to publishers by foreign CMOs, ICE and other entities)  
6 being distributed to publishers and writers losing out." [as read]

7 Then if we move on to page 19, please. (Pause)

8 Do you have that, sir?

9 THE CHAIR: Which paragraph?

10 MR WARD: Under the heading, "Abuse of dominance". 59:

11 "PRS's distribution policies constitute an unfair trading term."

12 Then 61:

13 "Songwriters are required to assign their performing rights to PRS which has special  
14 responsibility to ensure songwriter royalties are properly allocated and the right  
15 balance is struck between the freedom of writers to dispose of their works and the  
16 effective management of their rights by PRS. In addition, although PRS is not  
17 responsible for actually distributing the entirety of Black Box performing rights royalties  
18 from the exploitation of PRS repertoire (because, for example, such royalties are paid  
19 direct to publishers by foreign CMOs and other entities), PRS is nevertheless required  
20 to ensure that publisher and songwriter members receive their equitable allocation of  
21 the overall Black Box royalties." [as read]

22 Then at 62:

23 "In breach of this special responsibility PRS is imposing unfair trading terms on its  
24 songwriter members through its policies that permit the distribution to publishers of  
25 performing rights royalties owed to PRS songwriter members. Moreover, the  
26 distribution policies of PRS and their implementation are not equitable ..." [as read]



1 And so forth.

2 PROFESSOR ULPH: Sorry, can I go back to paragraph 61?

3 MR WARD: Yes.

4 PROFESSOR ULPH: You say at the end of that paragraph:

5 "PRS is nevertheless required to ensure that publisher and songwriter members

6 receive their equitable allocation..."

7 My question is: required by whom?

8 MR WARD: By the law. By the law of abuse of dominance; it's part of their special

9 responsibility. That's the core legal submission.

10 PROFESSOR ULPH: Okay.

11 MR WARD: That is not being the subject of a strike out application. Now, in fact, PRS

12 hasn't taken issue with any of that for the purpose of certification, and the factual

13 foundation of it is, in fact, confirmed in Mr Arber's first witness statement. Can I ask

14 you to turn that up, please? It's in bundle B under tab 34. B1 if you have it in hard

15 copy. (Pause)

16 Can we start please on page 12. You see at 41.1:

17 "A PRS writer member will assign 100 per cent of their interest in the performing rights

18 of the works." [as read]

19 So we understand that to be worldwide. And then if we go back, please to page 10,

20 paragraph 30. It talks, at the bottom of paragraph 30, how ICE, which is a joint venture

21 that PRS is part of:

22 "ICE's copyright database aggregates databases from a number of CMOs and

23 develops and maintains systems to provide consolidated copyright data." [as read]

24 So here he's explaining, in a sense, the PRS database, which is the source of the

25 trouble, is in fact an input into the work of ICE, PRS's joint venture.

26 With apologies for moving around, if we now move on to page 20. In fact, perhaps to

1 pick it up on page 19. 73:

2 "ICE licences PRS's rights for MTOL and processes the relevant usage data on PRS's  
3 behalf." [as read]

4 Then if we turn the page, 74:

5 "PRS generally allows [which is the word in the claim form] the Category 2 Publishers'  
6 Mandated Entities to licence the matching performing rights in the PRS repertoire ...  
7 In these cases, PRS allows the Mandated Entities to collect the performing rights  
8 royalties [and] pay the publisher share of these royalties to the publisher directly." [as  
9 read]

10 THE CHAIR: So it's sublicensing to the other --

11 MR WARD: Yes, and if we just --

12 THE CHAIR: -- collecting agencies, and therefore you say it ties it into the obligation  
13 to make sure that everything comes back (Overspeaking) appropriately?

14 MR WARD: Exactly. That has not been the subject of argument at certification. And  
15 I wanted to show you another paragraph while we have this open: 76, this completes  
16 the factual picture.

17 "PRS only receives and distributes royalties for MTOL in respect of the writer share  
18 and the publisher share for Category 1 Publishers. PRS allows the payment of the  
19 publisher share of the performing royalties for the Category 2 Publishers to flow  
20 directly to [them] via their respective mandated entities." [as read]

21 As you've no doubt absorbed, the category two publishers are the big players in the  
22 field. So what happens, therefore, is a lot of black box royalties are syphoned off at  
23 that stage, and the pleaded claim concerns abuse in that respect, as you've already  
24 seen.

25 It's fair to say that this point is plainly put in issue by more material, which I'm going to  
26 show you relatively briefly, given the time. Firstly, can we go back to Mr Savage's first

1 report, which is A22? (Pause)

2 If we could turn please to page 8 of that -- sorry, it's A23, thank you. (Pause)

3 This is the report that accompanied the claim form. Page 8, please, paragraph 4.9. It  
4 explains what we've just been talking about and says:

5 "Accordingly, a material amount of royalty revenue collected under MTOL  
6 arrangements does not flow directly to PRS but is reported via a combination of  
7 collection society partnerships (such as ICE)." [as read]

8 And then, if we go to page 10, at the bottom of the page where Mr Savage summarises  
9 the case, second line:

10 "It is alleged that the vast majority of black box royalties relate to the writer's share,  
11 But, when distributed, royalties that should be paid to writers are paid to publishers.  
12 In other words, PRS pays, or permits to be paid, royalties it knows belongs to PRS  
13 writer members." [as read]

14 And then if we move on, please, to page 47. This is where Mr Savage criticises some  
15 of the information provided by Macfarlanes at that stage. And if you look at 14.1:

16 "While the headline figures provided by Macfarlanes LLP on behalf of PRS show more  
17 revenue being distributed to writers than publishers, the revenue figures do not include  
18 the significant amounts of revenue (including black box revenue) distributed direct to  
19 publishers by administration partners and foreign CMOs." [as read]

20 So this again is the same point. It is therefore not possible to assess the proportion of  
21 income paid to each of writer and publisher members. Notwithstanding, this is  
22 a fundamental part of the claim. In any event, I would expect the majority of revenue  
23 collected by PRS to be distributed to writer members, since the publishers are paid  
24 directly.

25 And I'm just reminded, the words "administration partners" and "mandated entities"  
26 are being used interchangeably.

1 And then finally, in this report, if we go back to page 16, please.

2 THE CHAIR: 16?

3 MR WARD: Yes. Sorry, I said 16, it's actually 17.

4 THE CHAIR: Yes.

5 MR WARD: This is under his heading of "Methodology". 6.1:

6 "I will need to determine the amount of black box due to writer members that has  
7 otherwise been distributed." [as read]

8 And then at 6.6, over the page:

9 "The focus of the rules [blah, blah, blah] I will also need to review the revenue for  
10 exploitation of PRS registered works which is not received by PRS but where PRS will  
11 have been provided with the requisite information on such revenue distribution. This  
12 is particularly pertinent in cases where publisher members are paid directly by third  
13 parties." [as read]

14 So this is all, in a sense, unsurprisingly consistent with the pleaded claim and he says  
15 that if "publisher members are paid directly by Administration Partners, I would expect  
16 PRS to have this information because PRS is acting as principal in its arrangements  
17 with members" [as read], and even if it doesn't have it, one might reasonably expect it  
18 would be in its control in the disclosure sense of the word control.

19 And then Mr Savage raises more points about this in his second witness statement.

20 And then you've already seen that Mr Arber, in his first witness statement, deals with  
21 these arrangements. They are obviously understood to be relevant.

22 And then finally, under this head, if you can turn up the PCR's reply to the PRS's  
23 response to the CPO application -- this is B1/27 -- issue is joined with us again. And  
24 if we could turn, please, to -- so sorry, page 7.

25 THE CHAIR: Give me a second. (Pause)

26 MR WARD: We can see here, "Failure to fully explain how MTOL black box royalties

1 are dealt with". And it says:

2 "The application to strike out must be viewed in the context of the Proposed  
3 Defendants not having fully explained how black box royalties are dealt with. There  
4 are concerns with Mr Arber's evidence on MTOL royalties in particular. These  
5 concerns relate to what he calls category one and two publishers. As he states,  
6 entities such as ICE process on their behalf. [This is stuff you've seen, of course,  
7 already.] The PRS receives and distributes royalties for category one, but PRS allows  
8 [Mr Arber's word] the payment of the publisher's share to be paid directly to them or  
9 mandated entities. "In short, as he explains at paragraph 76, PRS distributes the  
10 writers' share and category one publishers' share of royalties in a matched work. By  
11 contrast, PRS only distributes the writer's share of the matched work where the  
12 publisher is category two.

13 "The concerns are as follows. In pre-action correspondence the PCR noted that PRS  
14 had omitted to provide information on the amounts of revenue distributed direct to  
15 Category 2 Publishers."

16 17.2:

17 "Mr Arber does not explain whether ICE and/or PRS are informed of the claims made."

18 17.3:

19 "Mr Arber says that since 2018, DSPs [that's digital service providers, like Spotify]  
20 have paid each direct licensor or mandated entity their share. Accordingly, assuming  
21 that publishers do claim more matched royalties than writers, publishers will receive  
22 a higher percentage of the unclaimed black box royalties distributed by DSPs." [as  
23 read]

24 So this has been rather a lengthy process, but I've taken you through it because it's to  
25 show you why this revenue is indeed within the scope of the claim. And when we go  
26 back to Arber 3, if we can, please, in the tables you took me to.

1 THE CHAIR: Yes.

2 MR WARD: Sorry. I'm looking for it. Here, it's gone. You're probably ahead of me,  
3 but if you need a reference, it's C116. We find ourselves in exactly the same position.  
4 And this table, at table 1, talks about -- if you look at MTOL, you can see that it says,  
5 "Writer allocation, 174 million. Publisher allocation, 22.9". But that reflects the fact  
6 that it's only category one publishers that are being distributed by PRS. So there's  
7 a large piece of money missing from this, because it's distributed by these third-party  
8 entities.

9 In fact, exactly the same point can be made about International, where again, you see  
10 that the writer allocation is 9.3 and the publisher is 0.47, but it's precisely the same  
11 point about third-party responsibility.

12 Now, obviously, that is an issue for trial and the point I make here, though, is that's  
13 why these numbers do not tell the full story, even though, in my respectful submission,  
14 the Proposed Class Representative has been --

15 THE CHAIR: Do we have the information to expand this? I appreciate you have other  
16 criticisms of this table, but do we have the information to expand this table to include  
17 those sums which you say are pleading, which (overspeaking) --

18 MR WARD: If by "we" you mean you and I, the best --

19 THE CHAIR: Well, from the information in the documents, yes.

20 MR WARD: No, the best we can do is, and Mr Savage made an attempt at this in his  
21 witness statement, his fourth statement, which is, if you turn up C118, page 17, doing  
22 his best, if I may say, without the data, he says at 3.10.7:

23 "In any event, assuming that Black Box MTOL royalties paid by Mandated Entities to  
24 Category 2 Publishers is at least as high as the Black Box MTOL writer royalties paid  
25 by PRS, this implies that Black Box MTOL royalties paid to publishers in relation to  
26 PRS-controlled repertoire amounted to at least £151.41 million." [as read]

1 Which is how we end up with an overall figure for black box royalties somewhere in  
2 the region of 200 million, not Mr Pickford's 55.

3 I accept that that is just Mr Savage doing the best he can, making an inference. We,  
4 in this courtroom, do not have access to this information. What access PRS has, what  
5 information it actually holds, we do not know that, but as ICE in particular and one  
6 other is a joint venture with PRS, it seems most unlikely this information is not within  
7 its control, in the extended sense of control that we are familiar with for the purpose of  
8 disclosure. In other words, a right to possession or at least a right to inspect.

9 THE CHAIR: Sorry, how has he got to 151.41?

10 MR WARD: The best I can do is (overspeaking) --

11 THE CHAIR: Uses pro-rata, does he?

12 MR WARD: He's sort of compared it to the level of writer royalties, is what he's done.  
13 But we don't know, is the truth. But we can see it's likely to be a very substantial sum.

14 (Pause)

15 None of this was challenged in Mr Arber's fourth witness statement, it should be said,  
16 or even, I think, in Mr Pickford's skeleton, other than the point of principle that he  
17 insists the correct answer is 55 million.

18 MR PICKFORD: It is challenged for other reasons.

19 MR WARD: He'll explain what. There's an issue over an additional 90 million, which  
20 I'm not pressing on you, as we have read out Mr Arber's fourth witness statement. And  
21 that's why I said, in opening, that it didn't really matter, because the figures here in  
22 Mr Arber's third witness statement simply do not engage with this point, even though  
23 the Proposed Class Representative has been making it, even at the stage of pre-action  
24 correspondence.

25 So that's why we respectfully submit that for the purpose of your exercise today,  
26 55 million does omit a large piece of the claim. Exactly how much, I do not know but

1 that takes me back to my point about information asymmetry.

2 Sir, it's one minute to one and I have got more to do.

3 THE CHAIR: What have you got to cover?

4 MR WARD: I was going to say a bit more about some of the details. Actually not very  
5 much more. I can't imagine it's going to take more than 15 minutes.

6 (1.00 pm)

7 (The short adjournment)

8 (2.01 pm)

9 MR WARD: Thank you, sir. I think 15 minutes still sounds about right having had  
10 a look. What I thought I would do, if it would be of assistance, is just -- I promised five  
11 points and that's always dangerous if one doesn't deliver five. So I'm just going to  
12 itemise the five and then explain the thing I'm going to say more about and show you  
13 a little bit more authority.

14 The first point was asymmetry. I've said enough about that, I think.

15 The second was the claim is future looking, and I'm going to come back to that just to  
16 show you some authority in a minute.

17 The third was the per capita value of £60, even on PRS numbers.

18 The fourth is flaws with Arber 3, which we've done part of and that's where I'm going  
19 to spend my time.

20 And fifthly was fees to be considered at distribution. And what I want to do is just show  
21 you just a few small crumbs of authority that I fear you already know anyway, but just  
22 to make good a couple of those points.

23 So may we go, please, to the Gutmann certification judgment and this is E48. We're  
24 talking now about future looking claims. E48, page 72.

25 THE CHAIR: Okay, thank you.

26 MR WARD: Yes. And this is the Tribunal chaired by Mr Justice Roth talking about



1 cost benefit. And, as you know, in that case, you'll see at 178 that the Tribunal found  
2 that the cost/benefit analysis came out against the grant of CPO.

3 So sorry, sir, page 72 of the judgment. 178, as is well known, the cost/benefit analysis  
4 comes out slightly against the grant of CPO, but it, of course, certified the case  
5 anyway, looking at the factors in the round.

6 One of the points made above there is, in a sense, the future-looking benefit point  
7 where he refers to a quote from the Canadian Supreme Court in a passage adopted  
8 by Lord Briggs in Merricks:

9 "Such proceedings also promote efficiency ..."

10 THE CHAIR: Sorry, where are you?

11 MR WARD: 177, sorry.

12 THE CHAIR: Yes. Yes. Okay. Yes.

13 MR WARD: So you see the quote from it says:

14 "As McLachlin CJ noted in the Canadian Supreme Court in a passage quoted and  
15 adopted by Lord Briggs [i.e., in Merricks], such proceedings also promote efficiency  
16 and justice by ensuring actual and potential wrongdoers modify their behaviour."

17 So there, in Gutmann, that's taken into account as part of the CAT's analysis of  
18 cost/benefit and then a slightly different but related --

19 THE CHAIR: It's not quite going as far as we would like to go in this case, at least not  
20 with clarity. It's not saying that when considering cost/benefit, you should look at the  
21 future benefits.

22 MR WARD: Well, with respect, sir, it's pretty similar to what I said this morning, and  
23 indeed quite similar to what you said in February. (Pause)

24 THE CHAIR: I mean, contemplating a small percentage of class members --

25 MR WARD: Yes.

26 THE CHAIR: -- actually being bothered to go and claim their small sum of money,

1 | which --

2 | MR WARD: That was the issue that he was grappling with.

3 | THE CHAIR: Yes, but I'm not putting to you here that even if you're right a proportion  
4 | of the writers can't be bothered. I'm not putting that to you.

5 | MR WARD: We have an unusual class, as you say, in the sense there's literally  
6 | a database of their names.

7 | THE CHAIR: Except the missing ones, except the aggrieved missing ones.

8 | MR WARD: Well, that's another story (overspeaking).

9 | THE CHAIR: But anyway, let's not go back there. Yes.

10 | MR WARD: Let's go to Gutmann in the Court of Appeal, where a different but related  
11 | point is made, under the next tab, E49, on page 28. And this is Lord Justice Green  
12 | giving the judgment of the court. And it's dealing with the same objection by the  
13 | defendants. And he says something slightly different, but it's the same -- pointing in  
14 | the same direction, I would respectfully suggest. It's paragraph 87 and if we pick it up  
15 | in the fourth line:

16 | "Whilst we express no decided position upon the issue, it certainly seems arguable  
17 | that it is open to the CAT if it accepts the appellant's gloomy forecast in terms of  
18 | uptake, to consider whether there are appropriate proxies to distribution to individual  
19 | claimants, such as ordering a prospective reduction in fares. [It says] On the basis it's  
20 | impossible from a practical perspective to cure the past, a forward-looking remedy  
21 | might suffice." [as read]

22 | I don't say that's on all fours, of course I don't.

23 | THE CHAIR: No.

24 | MR WARD: And then whilst --

25 | THE CHAIR: I mean, the whole -- it's a thorny issue, how you assess proportionality,  
26 | anyway. I mean, at what point is something proportionate.

1 MR WARD: Well --

2 THE CHAIR: Then -- I mean, that's a sub-question of that, saying, "Do I take into  
3 account future behaviour? Am I allowed to take it into account? If I do take it into  
4 account, to what extent do you take it into account?"

5 MR WARD: As I submitted this morning, it's inevitably a qualitative factor rather than  
6 a quantitative factor.

7 THE CHAIR: Yes.

8 MR WARD: Of course, it is a multi-factorial (overspeaking).

9 THE CHAIR: But it can be a quantitative factor. It's not necessarily a qualitative factor.

10 MR WARD: In this instance, I'm not suggesting a number can be put on it. But  
11 obviously one could look -- I suppose having said that, one could -- obviously the past  
12 is in some sense indicative of the future here. It's not that the future-looking remedy  
13 is something completely unrelated.

14 THE CHAIR: Okay.

15 MR WARD: Then I was just -- something we touched on this morning; I thought it  
16 would be helpful to see. This is the Merricks settlement judgment, which deals with  
17 the question of the size of fees. This really is just for completeness. And this is  
18 authorities bundle F, tab 10.

19 THE CHAIR: Yes.

20 MR WARD: It's paragraphs 176 and 177:

21 "We fully recognise the importance of litigation funding to this action, as to most  
22 collective proceedings. As Lord Sales stated in PACCAR, the effectiveness of group  
23 litigation may depend on third-party funding, since such litigation often involves high  
24 numbers of claimants who have individually suffered only a small amount of loss,  
25 where the pursuit of claims on other basis would be uncommercial. The Court of  
26 Appeal has often referred to the role played by litigation funding". [As read]

1 Then it quotes from the Road Haulage Association case:

2 "Third-party funding from commercial funders provides the fuel which enables the  
3 vehicle of collective proceedings to operate. [And then it's 177]. At the same time,  
4 the Tribunal has made clear it is generally not practicable to assess the  
5 reasonableness of the funder's return at the time of certification. That is a matter that  
6 can more appropriately be addressed after judgment for damages or a settlement [and  
7 then it quotes authority]. This reflects Australian jurisprudence. Significantly, the  
8 Tribunal's adoption of this approach in Gutmann was endorsed by the Court of Appeal  
9 in that case, where the chancellor stated: 'Any issue as to the reasonableness of the  
10 funder's return is to be addressed at the time of distribution'". [As read]

11 So that was just really the point I made this morning.

12 With your permission, I'm going to turn back to Mr Arber's third witness statement and  
13 deal with some slightly more granular points than the ones we already dealt with. And  
14 that is C116. By way of generality, though --

15 THE CHAIR: Sorry. Give me a second.

16 MR WARD: C116. Tab 116, and it's internal page 14.

17 THE CHAIR: Okay.

18 MR WARD: This is where he deals with MTOL. But before we just delve into the detail  
19 of that a little bit, my high-level submission is that you can see, when you read Arber  
20 3, Savage 4 and now Arber 4, that this is undoubtedly very complex. The PRS says  
21 various things have been misunderstood, but I'm afraid I am going to just repeat my  
22 earlier point that that really does show the need to address the asymmetry in this case.  
23 But I wanted to focus on MTOL, and you heard this morning why we say the amount  
24 of royalties in MTOL is seriously understated, and what's been done in the time  
25 available -- if we look at C116, paragraph 33 -- is an analysis of -- sorry, sir, I can hear  
26 you flipping.

1 THE CHAIR: Sorry. No, carry on.

2 MR WARD: I just wanted to make sure I didn't carry on.

3 THE CHAIR: No, I'm listening.

4 MR WARD: Thank you.

5 Page 14, paragraph 33:

6 "In the time available, I focused on analysing data relating to residual amounts PRS  
7 received from ICE and other Mandated Entities in respect of Spotify for 2022". [As  
8 read]

9 So, again, I fully appreciate the force of the words in the time available, but what we  
10 have is one streamer, albeit the largest DSP, for one year. Of course, you heard my  
11 submissions this morning that these residual amounts emit quite a lot.

12 Then what Mr Savage says about this is, "Well, there are serious reasons to doubt  
13 that it is representative". May I show you that? This is in Mr Savage's fourth report,  
14 which is in the same bundle under tab 118, page 10. He says, at 3.9.3, he accepts  
15 Spotify as the market leader. But he says:

16 "Spotify has been strengthening its guidelines on the use of metadata and becoming  
17 stricter ... This is in the context of many collective societies and publishers estimating  
18 around 25% of music publishing revenue does not reach its rightful owner. Therefore,  
19 by applying the Spotify unmatched and unidentified percentage ... the calculations  
20 may underestimate the size of Black Box arising from DSPs. I would expect PRS  
21 readily to know the actual level of Black Box royalties being paid across different  
22 streaming platforms". [As read]

23 I understand, of course, this exercise was done for today, but the point is that this is  
24 a reason to say, "Well, it can't be just assumed that Spotify is actually representative,  
25 or even that particular year".

26 There is a further point here, that there was a significant change in practice for these

1 digital service providers partway through the life of this claim, which is at page 21,  
2 where, in fact, Mr Savage is summarising back something Mr Arber said.

3 If we look at 3.14.1, it says, picking up four lines down, paragraphs 78 and 79 of Arber  
4 1 explain:

5 "Under the model in place until around 2018, DSPs paid all unmatched royalties  
6 relating to online usage in the UK ... to ICE and ICE provided these amounts without  
7 distributing any amounts to other rightsholders". [As read]

8 So it's been an evolving picture. Spotify, in our respectful submission, cannot be  
9 assumed to be representative.

10 Then if I can just say a very few words about non-MTOL. We go back now, please, to  
11 Mr Arber's third witness statement under tab 116, page 11. What Mr Arber does is  
12 breaks down non-MTOL into two categories, for the purpose of his estimate.

13 THE CHAIR: Which paragraph are you on?

14 MR WARD: C116, page 11.

15 THE CHAIR: Can you give me a paragraph number?

16 MR WARD: 27.1.

17 THE CHAIR: Okay.

18 MR WARD: Yes. This is non-MTOL online. So it's not music streaming, but it's online  
19 services. He gives the example of Netflix.

20 THE CHAIR: Yes.

21 MR WARD: He says:

22 "Netflix and TV broadcasting are quite similar. So I consider the best available  
23 non-MTOL online would be the TV sample exercise". [As read]

24 What he is saying there, of course, is that even TV, broadcast TV, is done by a sample  
25 exercise. But we'll see in a moment -- Mr Savage says this is just a completely  
26 different method of assessment, but I'm going to deal with these points in a composite

1 way.

2 The other category Mr Arber looked at was public performance. If you look at 27.2.2,  
3 he says:

4 "Public performance live [in other words, live performance]. PRS has undertaken  
5 a sense check of its 2022 data for live performance for reported setlists". [As read]

6 So it's a sense check within one year. He said "This looks quite similar to radio", and  
7 he used a radio sample analysis.

8 I'll just show you what Mr Savage says about this. If we go to C118, page 8. This is  
9 back in Savage 4.

10 THE CHAIR: Yes.

11 MR WARD: I'm taking those two in turn. 3.7.2. In respect of the non-MTOL online,  
12 he used a TV sample analysis. But what Mr Savage says is that there are differences  
13 in how the PRS deals with non-MTOL and main TV broadcasters. He says:

14 "Main TV broadcasters are all dealt with on a full census basis [in other words, they  
15 really itemise what they've used] whereas blanket standalone licences for companies  
16 like Netflix run through an auto-match process. High-value usages unmatched are  
17 manually matched, but we don't know what high-value means, and it is likely there will  
18 be more unmatched data for these broadcast service providers than for traditional  
19 broadcasters". [As read]

20 Then turning to public performance live, he says, well, the idea is to apply the same  
21 percentage of unmatched use for radio. But he says:

22 "While paragraph 27.2.2 says he carried out a sense check of 2022 data for reported  
23 set lists, he doesn't give any indication of the amount of public performance live  
24 royalties for which there are no set lists and will be treated pro-rata". [As read]

25 So these are quite granular points, and I make them only really by way of illustration.

26 What you have is a sample exercise done in the last few weeks. In our respectful

1 submission, it is no substitute for the full examination of the data. I'm sure Mr Pickford  
2 would dissent, but --

3 THE CHAIR: We still need to form a view as to proportionality at this stage, and as  
4 I understand -- I'm sorry, I just want to make sure I understand your position -- you're  
5 not wanting to put forward a figure for the size of this claim at the moment. Or are you  
6 putting forward a figure?

7 MR WARD: My position on that is: you've got the note which was produced for trial.

8 THE CHAIR: Okay.

9 MR WARD: Since that, for the reasons we discussed this morning, the case is  
10 obviously moving on, or would like to, subject of course to the Tribunal's view.

11 THE CHAIR: Right.

12 MR WARD: So I'm not going to hang my hat entirely on those figures, but nor am  
13 I going to formally resile from them. I accept that they were (overspeaking).

14 THE CHAIR: Those figures are particularly problematic for you, because they seem  
15 to point loosely to things on the internet --

16 MR WARD: Well, based on --

17 THE CHAIR: -- without really producing the materials that might lie underneath them.

18 MR WARD: Well, that's right in the sense that -- the way I would put it, perhaps less  
19 pejoratively, is that the PCR did the best they could with publicly available materials,  
20 and Mr Karabuda's witness statement -- obviously PRS has the data. We do submit  
21 that PRS's approach has radically --

22 THE CHAIR: You've got data from PRS now.

23 MR WARD: Yes.

24 THE CHAIR: You might say it's massively underestimating, but have you got --

25 MR WARD: Yes.

26 THE CHAIR: I mean, it seems you have potentially got a case to make if you say that:



1 | look, table 1 is all very well and it may be defective for the following half-dozen  
2 | reasons, but if you add in the missing revenue streams from overseas, you come up  
3 | with a figure of ...  
4 | But I just want to know what your submission on that is.  
5 | MR WARD: Around 200 million, because we've got the 55 million, which is the figure  
6 | that Mr Pickford relies on.  
7 | THE CHAIR: That's not the claim, is it? The 55 million is not the claim.  
8 | MR WARD: No, that is the total black box royalties.  
9 | THE CHAIR: Yes.  
10 | MR WARD: So that's --  
11 | THE CHAIR: And then you have that shimmy to get to 151.  
12 | MR WARD: 151 is part of that 200. It's not additional.  
13 | THE CHAIR: Yes. So it's -- as I understand it --  
14 | MR WARD: You round up.  
15 | THE CHAIR: Yes. And then -- but what's your claim?  
16 | MR WARD: That is the bit where frankly, I accept I can't do anything other than  
17 | give -- as I explained in the note that was handed up, an illustrative figure was given.  
18 | That percentage will depend on the more detailed evidence in due course, both from  
19 | on our side and from the PRS.  
20 | THE CHAIR: So you say, effectively, it comes out of 200 million, you say?  
21 | MR WARD: Comes out of 200 million, not 55.  
22 | THE CHAIR: And the distribution of that, how much of that 200 million is going to  
23 | publishers and how much should go to publishers and should go to writers? We're  
24 | sort of -- you're not assisting us on.  
25 | MR WARD: Well, we know how much goes to publishers. That (overspeaking) --  
26 | THE CHAIR: Of that 200 million.

1 MR WARD: Of that 200 million. There's the 150 million-ish that Mr Savage has  
2 identified, plus what is in the table in Arber 3.

3 THE CHAIR: So the 150, you say, goes to the publishers.

4 MR WARD: Plus what's in this table, which is another --

5 THE CHAIR: The 55. So that's all going to the publishers out of about what total?

6 MR WARD: Sorry, not out of 200. Out of -- what, 350 is it? 370?

7 THE CHAIR: Maybe you want to just think about those figures while I'm hearing from  
8 Mr Meredith [sic]?

9 MR WARD: Yes, we will. But the point --

10 THE CHAIR: I understand that there are challenges, but one needs some ballpark  
11 figures just to know whether this makes any sense at all as a piece of litigation.

12 MR WARD: And, of course, I can't give you an actual figure. I have to face up to that.  
13 There's no point pretending.

14 THE CHAIR: You can't give us a precise figure, but you can give us a --

15 MR WARD: Well.

16 THE CHAIR: I mean, you've given us figures before.

17 MR WARD: No, so we've got -- yes. But I'm accepting that those figures are based  
18 on limited information.

19 THE CHAIR: But you now have a lot more information.

20 MR WARD: Indeed.

21 THE CHAIR: And I appreciate there's been no cross-examination on any of this, but  
22 it may assist your case, I'm just saying, it may assist your case say, on the face of  
23 these figures, with the adjustments you say are appropriate, actually, one can come  
24 at a figure which doesn't mean this litigation is disproportionate. I just want to give you  
25 an opportunity to make that submission if you want to.

26 MR WARD: I'd very much like to.

1 THE CHAIR: So why don't you have a think about where you get to on that.

2 MR WARD: All right. Well, those are my submissions subject to that. Thank you.

3 THE CHAIR: Thank you.

4 Mr Meredith [sic].

5  
6 Reply submissions by MR PICKFORD

7 MR PICKFORD: Thank you, sir. So the scheme of my submissions is going to be,  
8 first, I'm going to address quantum. Then I'm going to very briefly address costs and  
9 look at the comparison between the two. And then I'm going to deal with Mr Ward's  
10 other points about the future and other considerations that he says this Tribunal should  
11 take into account.

12 So on quantum, as you were just putting to Mr Ward, there are essentially two core  
13 tasks, and I'm going to deal with those each in turn. So the first one is we need to  
14 come up with a sum representing the so-called "black box royalties" that have been  
15 paid to publishers, because that's the total set of which some of this claim seeks to  
16 have a grasp. And Mr Arber has done his best, and we know that his figure is  
17 55 million over seven years. I'm going to come on and explain how he gets to that and  
18 I'm going to deal with some of the criticisms of it.

19 And then secondly, we're going to need to take that figure and try and work out as best  
20 as we can, how much of that might, in fact, go to writers under the claim. And that's  
21 where it gets really hard, because one of the fundamental difficulties with this claim,  
22 which is one of the reasons why we said this claim was inherently flawed, is there isn't  
23 a counterfactual. There's no explanation by Mr Rowntree, ever, of how he says he'd  
24 do a better job. And so that's one of the difficulties (Overspeaking).

25 THE CHAIR: The thing I think you need to focus on is the missing 150 in your table.  
26 You say it's not been pleaded, but whether it's been clearly pleaded or not is maybe

1 open to debate. But there seems that there was a reference to those royalties going  
2 to publishers.

3 MR PICKFORD: Well, I'm happy to -- I mean, I'm obviously going to address that.  
4 I wasn't going to address it first, but --

5 THE CHAIR: No, no, no, you take your own course. But obviously that's an important  
6 aspect.

7 MR PICKFORD: That is well understood. I mean that is now the essential difference  
8 between our figures and Mr Ward's figures, because Mr Savage originally had another  
9 90 million in (overspeaking) --

10 THE CHAIR: Which he's not pursuing.

11 MR PICKFORD: -- and now that's been put to one side.

12 THE CHAIR: For present purposes at least.

13 MR PICKFORD: I don't accept, however, what Mr Ward says about getting to 200  
14 because he's double counting, because his new figure for MTOL is about 150 million.  
15 And then he's added on to that Mr Arber's figures, which already include MTOL as  
16 well, in the sum of about 20 million. So --

17 THE CHAIR: You will need to take us through this quite carefully. Yes.

18 MR PICKFORD: But I say, his maths doesn't work even for his new figures. So let's  
19 start then with an estimation of the size of the claim. What we say is that Mr Arber's  
20 approach in this regard, in fact, has been generous to Mr Rowntree in at least two  
21 respects and he notes them in his third statement. It's paragraph 17.1, but I don't need  
22 to go to it.

23 The first is that he assumes that all the potentially affected sums relate to royalty  
24 bearing uses, rather than works which would never actually bear royalties. For  
25 example, works in the public domain or other works that no one would ever be entitled  
26 to payment for. And that is some of what comes, ultimately ends up getting paid by,

1 for instance, Spotify in MTOL royalties because someone inadvertently says, "Oh, we  
2 need to pay for this interview with, you know, some pop star" and that doesn't actually  
3 attract any royalties.

4 So he's assumed that all of that is royalty bearing and secondly, he's assumed that  
5 there's no unmatched usage and unidentified shares that are subsequently claimed  
6 and paid. So he's just taking a snapshot and ignoring the fact that obviously over  
7 a three-year period, those sums may get whittled down. So that's the starting point.

8 If we go to his table one, please, which is in bundle C116 and it's at page 8. Sorry,  
9 skipped past it myself. So we see he's broken it down there into the categories that  
10 we're beginning to become a bit familiar with. So there's the MTOL. Then there's  
11 broadcast, international, public performance and then non-MTOL online. And he's set  
12 out there the total distribution over the seven years between 2017 and 2023 and then  
13 total distribution, percentages of those different categories that add up ultimately to  
14 100 per cent. And then he's got his writer allocation and then his publisher allocation  
15 is obviously the 55 that we're currently heavily focused on.

16 Notably, a point worth picking up from this, is that in terms of the percentages of the  
17 total black box that have been allocated to writers versus publishers, we see that  
18 almost 80 per cent has already been distributed to writers and only 20 per cent has  
19 been distributed to publishers. So writers are already, we say, in terms of what PRS  
20 distributes, doing very well under the pro rata approach.

21 THE CHAIR: No, I understand that, yes.

22 MR PICKFORD: Now, there was a point that was made by my learned friend in his  
23 skeleton. He didn't make it in oral submissions. So I'm not sure whether it's still  
24 pursued, but just so I can make sure that the Tribunal isn't confused by it. They  
25 suggested a number of times in their skeleton that we're saying the claim only applies  
26 to MTOL, but we're not saying that. We've never said that, and this table doesn't say

1 that either.

2 THE CHAIR: I think he said something at the last hearing that got interpreted that  
3 way, whether rightly or wrongly, doesn't matter. But --

4 MR PICKFORD: Yes, well, the reason why I mention it actually is this, is because  
5 what I said at the last hearing is relevant here. It's because what I was describing at  
6 the last hearing is the following point. In relation to MTOL, one can at least identify  
7 something that one could reasonably describe as a black box. Because what happens  
8 with MTOL is it is transaction specific and so there will be payments that come in  
9 respect of works that we can match and so they're fine. And there will be then separate  
10 payments that come, and we won't know what the work is but there will be an  
11 identifiable amount of money that came in respect of that work that we then didn't know  
12 what to do with it.

13 And so in the MTOL world, you can reasonably say, well, we can come to a view about  
14 black box based on that kind of data. That is in contrast to blanket licensing, when  
15 what happens is that we get paid a blanket licence fee and that is simply distributed  
16 over all of the works that we are able to identify. So there's never a specific amount  
17 that's allocated to some black box and that's a difference that I tried to explain at the  
18 last hearing. And that's where I think this confusion has possibly come from.

19 PROFESSOR ULPH: You say this is allocated to all works you can identify.

20 MR PICKFORD: Yes.

21 PROFESSOR ULPH: Can you just elaborate on what that means, please?

22 MR PICKFORD: So it depends on the -- I can give an example. So for example, for  
23 the BBC, as we discussed at the last hearing, there's a census basis for allocation.  
24 So the BBC will pay a licence fee of X and then they will supply census data over  
25 which that is then -- that X is then distributed. Now it might be that there are some slip  
26 ups in that. It might be that the BBC got it a bit wrong or that there's something that

1 they didn't, you know, record when they should have done. But as far as the way that  
2 it works for the PRS, the PRS simply distributes the amount that's received over  
3 whatever is the appropriate base, which in that case would be the census data that it's  
4 been provided with. So that's what I mean by that.

5 THE CHAIR: Just because there was something in your evidence that confused me,  
6 how does it evaluate -- so it gets a list of things that have been played on the radio.

7 MR PICKFORD: Yes.

8 THE CHAIR: May be sampled, may be comprehensive. And then it needs to decide  
9 what to pay those people, those copyright owners and publishers, writers and  
10 publishers.

11 MR PICKFORD: Yes.

12 THE CHAIR: How does it decide what to pay per song?

13 MR PICKFORD: Effectively, it's able to work out, given the total number of minutes,  
14 say.

15 THE CHAIR: Say it's per minutes, because you said you've done a per minute  
16 calculation for this exercise, but you do it per minute calculation anyway.

17 MR PICKFORD: Yes, it's per minute.

18 THE CHAIR: So everyone gets the same, whether you're top of the charts or obscure,  
19 it's a per minute.

20 MR PICKFORD: So there are different values per radio station because obviously  
21 different radio stations have different numbers of listeners.

22 THE CHAIR: Yes.

23 MR PICKFORD: There are weightings per time of day.

24 THE CHAIR: Yes.

25 MR PICKFORD: And then it's per minute.

26 THE CHAIR: Okay, that makes sense.

1 PROFESSOR ULPH: So this would actually mean that using the census you'd identify  
2 how many times a particular song by a particular writer had been played. Okay.

3 THE CHAIR: And this is sometimes done by sampling, as I understand. Is that  
4 necessary?

5 MR PICKFORD: That's correct.

6 THE CHAIR: And what happens if you're a struggling artist who only gets played on  
7 Easter Monday through some new artists programme, and that doesn't happen to fall  
8 within the sample window?

9 MR PICKFORD: Well, sampling is only done in particular circumstances where it's  
10 likely to be appropriate and the key example we gave in our evidence previously is  
11 certain sports channels, not the BBC but other channels, that have a pretty limited  
12 repertoire and so it's considered to be appropriate, in relation to the very limited  
13 number of songs that they like to play relative to Radio 1 through to Radio 6, to have  
14 a sample. So if you're an esoteric pop band, you should be picked up in relation to  
15 BBC. If it just so happens that somehow you got picked for a sports programme, which  
16 is unlikely, then what, Mr Chair, you're putting to me may be correct.

17 THE CHAIR: We're not really concerned with any of that.

18 MR PICKFORD: But this is -- yes, that's -- I think that's the best that I can say for the  
19 purposes of, of this hearing.

20 In terms of the categories then we've got in this table, for MTOL, as Mr Ward took you  
21 to, Mr Arber carried out his calculations based on Spotify data from 2022, and then he  
22 extrapolated from that, and he explained the reason why he did that; it's because this  
23 is a resource intensive exercise, it wasn't an easy thing to do, and at this stage, it's  
24 obviously just an estimate. I mean, this isn't the damages hearing.

25 THE CHAIR: No.

26 MR PICKFORD: We're just doing our best. Also, it does have to be remembered,



1 I think, here: Mr Arber works for the PRS. The PRS is a members organisation that  
2 represents the interests of writers, inter alia. Indeed, that's what most of its  
3 membership is: writers. So there's no reason for him to be seeking to -- he's not  
4 a stooge of publishers. He's doing his best for --

5 THE CHAIR: I'm not suggesting he's a stooge at all, but I mean, I think you are on the  
6 receiving end of a claim, so ...

7 MR PICKFORD: Yes. Now, there are two main criticisms in relation to MTOL. I'm  
8 going to deal with them in turn. The first I'm going to deal with is the one that's made  
9 about whether Spotify is representative. Because Mr Ward took you to Mr Savage's  
10 evidence where he says, "Ah ha, well, Spotify may not be representative".

11 THE CHAIR: (Inaudible), yes.

12 MR PICKFORD: I would like to pick up on that and see where Mr Savage  
13 actually -- what he's basing his evidence on. So if we could start, please, with  
14 Savage 4, which is at tab 118 of the C bundle, and page 31, this is one of the exhibits.  
15 (Pause)

16 THE CHAIR: Have you got an internal number for the exhibit, sorry.

17 MR PICKFORD: It's internal page 30 -- oh, sorry, it's page 31. I'm afraid it doesn't  
18 have an internal number because it's part of a -- it says at the top, "MIDiA Spotify  
19 secures half of the UK streaming market". It's an article.

20 THE CHAIR: Yes, I've got that.

21 MR PICKFORD: Thank you. So at the bottom of the page we see, some analysis  
22 provided by MIDiA Research. It shows a breakdown of the UK subscription market for  
23 Q4 2024. We see that Spotify, Amazon, Apple and YouTube collectively account for  
24 over 98 per cent of the market, and then there is an "other" which is 1.7 per cent of the  
25 market. This is Mr Savage's own evidence, and it's that 98 per cent of the market is  
26 Spotify plus three big tech companies: Amazon, Apple and Google. Now, what

1 Mr Savage relies on to say that Spotify is some kind of outlier with much better  
2 metadata is a blog, and that's a couple of pages on.

3 It starts at page 34 of this bundle. It's, "What is music metadata and why is important  
4 to digital music?" A missing word. Does the Tribunal have that?

5 THE CHAIR: Yes.

6 MR PICKFORD: Then the bit that he actually refers to is a couple of pages on page 37  
7 towards the bottom of the page. It says this:

8 "It is a long way road ahead until a common path will be found and applied at a global  
9 level, but in the meantime also international streaming platforms like Apple Music or  
10 Spotify are strengthening their guidelines and getting more strict about the quality of  
11 the metadata delivered, enforcing to distribute adequate information causing  
12 otherwise content to be removed."

13 It might sound like I've had a seizure there, but that is in fact, those are the words.  
14 Notwithstanding that it seems to have been drafted either by very early AI or someone  
15 who speaks English as a second language, it does not remotely support the inference  
16 that Mr Savage seeks to draw from it, because what he seeks to draw from it is: he  
17 says, "Oh, well, look, it refers to Spotify and Apple Music and they're strengthening  
18 their process. So by process of deduction, I don't think that Spotify is necessarily  
19 representative".

20 But it actually refers to international streaming platforms like Apple Music or Spotify,  
21 and of course Amazon and Google are equally international streaming platforms. So  
22 that is it. That's the basis for saying that Spotify is better than everyone else, and it's  
23 not representative and there is no basis for it. That blog is not good enough.

24 Then there's the second point, which is the issue about the category two publishers,  
25 and it's the point, sir, that you raised with me. We say that the criticism of Mr Arber for  
26 not including those sums is an unfair one because the claim does not properly include

1 those sums, and Mr Ward very carefully omitted the key paragraph of the claim when  
2 he was taking you through it that deals with this. If we could go, please, to the claim  
3 form. It's to be found in the A bundle, tab 1, paragraph 8.

4 THE CHAIR: Just give me a second. (Pause)

5 Sorry, which paragraph?

6 MR PICKFORD: Actually, let's start with 7. So 7 is what Mr Ward took you to.

7 THE CHAIR: Sorry, can you give me a bundle page?

8 MR PICKFORD: Yes, so it's tab 1, page 2. And it's A.

9 THE CHAIR: Sorry, I'm struggling today with bundles, for some reason. (Pause)

10 Okay, yes.

11 MR PICKFORD: Thank you. So Mr Ward took you to paragraph 7:

12 "The collective proceedings claim damages suffered by songwriters caused by PRS's  
13 unfair royalty distribution policies ..."

14 But then he skipped over paragraph 8, and paragraph 8 is the core paragraph in terms  
15 of determining the scope of the claim. So what paragraph 8 says is:

16 "The unfairness arises because PRS pays royalties to publishers which likely belong  
17 to songwriters and should be paid to them. More specifically, the claim relates to the  
18 portion of performing rights royalties collected by PRS which cannot be matched with  
19 the correct songwriter or publisher because of, inter alia, incomplete reporting by  
20 licensee or data issues, including on the PRS database."

21 That states in terms that the claim specifically relates to the portion of the royalties that  
22 are collected by PRS, it's about --

23 THE CHAIR: I mean, it does relate to it, but it's a question of: is it limited to it?

24 MR PICKFORD: Given also what's said in the first sentence that the unfairness arises  
25 because it's about what PRS pays, we took this to mean that the claim was about what  
26 PRS collects in and what it pays out, not least because we don't understand how we

1 | could be the right defendant for a claim about monies that we don't even --

2 | THE CHAIR: As I understand it, the point being put is that you own the copyright  
3 | and/or you were assigned aspects of the copyright and you were then fiduciary in  
4 | respect of that copyright, and you then are responsible to making sure that the  
5 | interests of the writer are looked after, when it then gets sublicensed to the various  
6 | collecting societies.

7 | MR PICKFORD: There might be a claim that could that perhaps could be articulated.  
8 | We read this --

9 | THE CHAIR: But I mean, the lack of clarity of the pleading can be -- if indeed you're  
10 | right, I'm not saying you are -- fixed. We've looked at other materials as well, which  
11 | says certainly the claimant described his complaint with respect to other collecting  
12 | societies. And we were shown quite a lot of documents.

13 | MR PICKFORD: Yes.

14 | THE CHAIR: I don't know if you're going to go through them all.

15 | MR PICKFORD: No, because most of it wasn't in the pleading.

16 | THE CHAIR: I think you've got to look beyond the black letter pleading point.

17 | MR PICKFORD: Well, with respect, I do understand obviously there's the possibility  
18 | of amending, but if this claim were amended to seek to pursue a claim against PRS in  
19 | respect of sums that PRS never received, we would have to consider whether we  
20 | would apply to strike that out; that isn't how this claim is currently put.

21 | THE CHAIR: No, but we're on proportionality at the moment, and there is potentially  
22 | a claim which extends beyond the matters in table one. It's just whether you have  
23 | anything to say on the substance of that, or whether it's just --

24 | MR PICKFORD: I do, because on proportionality, I say that that has to be judged by  
25 | reference to the claim as pleaded. To make sense of the claim as a whole, you have  
26 | to read it in the light of this very clear statement, we say, in paragraph 8. That is that

1 it's a claim for what PRS pays out. Indeed, in our skeleton -- I'm not going to go  
2 through them all now -- but paragraph 25 of our skeleton, we have highlighted about  
3 ten places where the claim is about what PRS pays.

4 If the claim is to be amended to a claim about not just what PRS pays, but to seek to  
5 make PRS responsible for what others do, well, then we'll have to consider that claim.

6 But that isn't the pleaded claim, and so we say that wouldn't be the right basis for the  
7 Tribunal to consider proportionality today.

8 If it wants to allow an amendment and to consider proportionality again --

9 THE CHAIR: This is different to the other proposed amendments. Here, the PCR  
10 doesn't accept that the pleading is deficient, but says in any event, it can be amended  
11 to make it clearer what his case is. So it would be perhaps strange to not permit that  
12 at this stage of the proceedings, now this matter has been flushed out.

13 MR PICKFORD: If it were amended --

14 THE CHAIR: That might lead to an adjournment, but it would mean we couldn't resolve  
15 proportionality today if that was the sole issue.

16 MR PICKFORD: That is potentially true. It might be that you couldn't resolve it today  
17 if -- big "if" -- the Tribunal came to the view that by including this particular aspect that  
18 pushed it up sufficiently.

19 THE CHAIR: Yes, yes, yes.

20 MR PICKFORD: I'm going to come on to deal with some points on that. But I do agree  
21 that we couldn't, because what we'd then have to do is consider whether we were  
22 going to apply to strike it out. We'd be entitled to do that. Then the Tribunal would  
23 have to decide: well, does it agree that this is properly part of a claim or not? Then it  
24 might reject our strike out and say, "Yes, we we're not in agreement, and therefore we  
25 do think that this is proportionate because the sum is X". Or it might say, "No, actually  
26 we agree this claim is not properly argued against the PRS, and therefore we're not

1 going to include that as part of the relevant sums".

2 If one traces the path through, that's how this would arise. But there are two further  
3 problems with the £151 million figure. The first of them is that I can't see how it was  
4 derived, and nor could Mr Ward help you with that. It's a figure that's in there; no  
5 one -- we simply don't know where it comes from. So that's a difficulty.

6 THE CHAIR: Sorry, I think when we were looking at the £151 million figure, we did  
7 wonder whether, if we look at table one in Arber 3, whether it's the difference between  
8 the £174.4 million and the £22.99 million.

9 MR PICKFORD: One ... Sorry, so the -- we're looking at the difference between -- I'm  
10 afraid, sorry, I'm not --

11 THE CHAIR: The £174.4 million.

12 MR PICKFORD: Yes.

13 THE CHAIR: And the subsequent figure next to it, which is £22.99 million.

14 MR PICKFORD: Yes. I'm afraid I don't know.

15 THE CHAIR: Okay.

16 MR PICKFORD: It's not my figure. It's not explained. The case that --

17 THE CHAIR: Well, it is explained. Should we just have a look at what's said? You  
18 may feel pleading is inadequate, but it is explained. Do you have the reference, sorry,  
19 Mr Kelly?

20 MR KELLY: Yes, it is C118, page 17.

21 THE CHAIR: Yes.

22 MR KELLY: And it's paragraph 3.10(h)(vii).

23 THE CHAIR: Yes. Let me just take it through that one. Yes.

24 THE CHAIR: So Mr Savage is saying let's assume that the black box royalties are as  
25 high as the black box rights royalties, which are stated in Arber's table 1, which is  
26 £174.4 million. Then if we deduct from that the amount of publisher royalties of £22.99

1 million, you end up with something around £151 million.

2 MR KELLY: Exactly.

3 THE CHAIR: Okay.

4 MR PICKFORD: Well, that's how it's apparently derived. Mr Kelly is a better one,  
5 obviously, for the numbers than either of the counsel before you, which is unsurprising.  
6 There is a further problem with it, which is that it is based seemingly -- well, actually,  
7 I'm going to have to consider whether that's correct or not. I thought, because I didn't  
8 understand where it came from, that it was potentially based on the 30 per cent figure  
9 for black box, but I'm just going to need to pause for a moment and think about whether  
10 that's right. I'm actually going to seek to take instructions on it. I'm not asking you to  
11 rise, but -- (Pause)

12 I think the position must be that if this is calculated as it appears to have been  
13 calculated as suggested by Mr Kelly, it doesn't make an assumption about 30 per cent.  
14 I thought that it had, because that was what Mr Savage was previously saying.  
15 Whether it's appropriate or not as a means of calculating MTOL for international,  
16 I simply can't say, because I don't have any evidence in response on that. The reason  
17 why we try to -- the Tribunal obviously didn't make directions for reply evidence. We  
18 did provide one very limited reply evidence, that we deliberately kept very, very short --

19 THE CHAIR: No, I understand.

20 MR PICKFORD: -- in order to make proper submissions on whether 151 is a sensible  
21 number or not a sensible number. I would need some evidence on that, and I don't  
22 have that. But I do say, it's not actually the number that matches up against the claim,  
23 when you take account of paragraph 8. That's my submission in relation to it.

24 THE CHAIR: Obtaining a figure for MTOL category 2 royalties shouldn't be -- I mean,  
25 why can't you just pro rata it in the way that Mr Savage has done?

26 MR PICKFORD: I'm afraid I don't know the answer, because it might be that what

1 Mr Savage has done is a reasonable approximation or it might not, and I would have  
2 to --

3 THE CHAIR: You have had Mr Savage's evidence for a while.

4 MR PICKFORD: Well, we have but we deliberately didn't seek to come back with  
5 a large Arber 4, with a whole host of further points, because we were trying to keep  
6 our evidence within proportionate bounds, and there was only what appeared to us to  
7 be one key point where he'd gone off -- where he'd simply totally misunderstood what  
8 our evidence was saying. So that's why we focused our attention on that.

9 We didn't develop further evidence on this, because my submission is that this is not  
10 properly part of the claim. If I'm wrong on that, well, then I'm wrong on that.

11 THE CHAIR: Sure. I understand.

12 MR PICKFORD: But that's our position on it.

13 THE CHAIR: Okay. But if that is the right figure, one then needs to decide what that  
14 does to the claim.

15  
16 MR PICKFORD: Yes, because of course that's just a --

17 THE CHAIR: Which is the point I put to the Proposed Class Representative. What's  
18 your back of the envelope calculation, assuming the 151 is correct?

19 MR PICKFORD: It would appear, then, if the 151 is correct, that obviously the total  
20 claim value or potential --

21 THE CHAIR: So you add the 151 to the 220.

22 MR PICKFORD: You wouldn't add it to the 220, no, because that's --

23 THE CHAIR: Hmm.

24 MR PICKFORD: Because you'd add it, at best, to the 55, as Mr Ward said.

25 THE CHAIR: Yes. Okay. Yes.

26 So you end up at 200, which is what Mr Ward, I think, submitted. And then --



1 MR PICKFORD: Well, it seems to me that there was some double counting there, but  
2 I'd have to take stock of that now that Mr Kelly has helpfully revealed to us how this  
3 number was actually kept, where it seems to come from, whether that's true or not.

4 THE CHAIR: Okay. You then have to readjust the percentages in the last two  
5 columns, and then you have to work out what the claim is against you.

6 MR PICKFORD: You would, if you are now including in the claim for sums that PRS  
7 has received and distributed, sums that PRS never received and never distributed.  
8 Yes. But of course, you have my submission on that.

9 It might be convenient at this moment to address very briefly the note 2. That seems  
10 to have been resurrected by Mr Ward in the hearing. It wasn't referred to in his  
11 skeleton, but he's now saying, well, he's not entirely giving up on note 2.

12 The points to make about note 2 are: that is based on the alleged 30 per cent figure  
13 for black box across all categories of royalty, and that is not --

14 THE CHAIR: Sorry, the 30 per cent --

15 MR PICKFORD: Their figures assume that 30 per cent of all distributed revenues, are  
16 black box.

17 THE CHAIR: He says the 70 per cent is just illustrative.

18 MR PICKFORD: No, that's a different thing.

19 THE CHAIR: Oh, okay.

20 MR PICKFORD: Let's go to the notes. So it's at B108, page 2.

21 THE CHAIR: Yes. Which paragraph? Three?

22 MR PICKFORD: Paragraph 4. It said that we don't dispute their evidence that 20 to  
23 30 per cent of MTOL royalties are black box, as repeated in Savage, and then I believe  
24 they go on to use -- mine says they use actually 30 per cent of the upper end of that.

25 Of course, we do dispute that and we certainly have evidence now from Mr Arber, in  
26 Arber 3, that plainly disputes that 30 per cent figure.

1 THE CHAIR: Sorry. Just draw my attention -- you're right. Just draw my attention to  
2 that.

3 MR PICKFORD: It's implicit in -- if we go back to third Arber.

4 THE CHAIR: Yes.

5 MR PICKFORD: It's implicit in the table. It doesn't actually calculate the figures, but  
6 you can work them out from table 1. So if one added up -- let's take MTOL as an  
7 example. If you added up the 174 plus the 22.99 for writers and publishers,  
8 unidentified allocations, and then you divide that by the total of 1188.6, you would  
9 come to a percentage for MTOL. I've done the maths. It's 16.6 per cent.

10 THE CHAIR: What about for broadcast?

11 MR PICKFORD: I have not done it for the other ones because it was MTOL that was  
12 the one that would seem to be -- where we were having a dispute.

13 THE CHAIR: Yes. I understand.

14 MR PICKFORD: But you could do it for the other ones, and indeed we will happily --

15 THE CHAIR: No, that's fine.

16 MR PICKFORD: Coming back to the now resurrected note 2, that seems to be -- as  
17 far as we can understand it -- based firstly on an assumption that it's 20 to 30 per cent.  
18 Indeed, I think they've gone for the 30 per cent in their calculations. Then --

19 THE CHAIR: Where do they get the 20 to 30 per cent from?

20 MR PICKFORD: Well, they have basically plucked it virtually from thin air. What they  
21 base it on is Mr Savage --

22 THE CHAIR: Is that the paragraph we looked at?

23 MR PICKFORD: I think --

24 THE CHAIR: 4.14 of Savage.

25 MR PICKFORD: Yes, I think it's that paragraph. It's a paragraph that cross-refers to  
26 what some other people have said --

1 THE CHAIR: Yes.

2 MR PICKFORD: -- based on unattributed -- and there's other people who said, well,  
3 someone else says it's this. It's like a sort of wild goose chase of unattributed figures  
4 that no one actually can provide any source for. So we say that's not a sensible basis  
5 when we've got -- we have the PRS here, for the PRS, because also, those figures  
6 are not for the UK. They're generally -- seem to be European wide. We often actually  
7 don't know precisely what they're supposed to be.

8 THE CHAIR: Then it's the next paragraph, the 75%, which is illustrative  
9 (overspeaking) --

10 MR PICKFORD: Well, that paragraph is quite telling, in fact, because that paragraph  
11 is trying to grapple with stage 2, which I'm going to come on to shortly, which is -- okay,  
12 let's assume we've got a publisher (inaudible), a --

13 THE CHAIR: No, I understand.

14 MR PICKFORD: But the reason why it's telling is because if you accept the numbers  
15 in Mr Arber's evidence at table 1, in Arber 3, you see that it's 80 per cent to  
16 20 per cent.

17 THE CHAIR: Yes, I put that point in.

18 MR PICKFORD: Yes. And what they're saying is, well, maybe it should be as much  
19 as 75 per cent. Well, if it's 75 per cent, we've already overshot. So the damage is  
20 zero.

21 THE CHAIR: We're back into the -- actually, irrespective of the state of the pleading,  
22 you actually do have to factor in what the category 2 folks are doing.

23 MR PICKFORD: Yes. Well, what you've got to do is then come on to stage 2, which  
24 is what I'm going to come on to very shortly, which is having worked out the total pot,  
25 you've then got to think, actually, how much of this pot is being potentially wrongly  
26 allocated. We haven't got there yet.

1 THE CHAIR: No, but we can get that from your figures later on.

2 MR PICKFORD: You can.

3 THE CHAIR: 25. I've got 25, 62 per cent for unmatched works and 38 per cent for  
4 unidentified shares. So you say, the unmatched works -- they're probably not  
5 discriminating between publishers and writers. Am I anticipating correctly your  
6 submissions? But the 38 per cent may well be biased unfairly towards writers.

7 MR PICKFORD: Indeed. We certainly don't accept -- I mean, Mr Ward said, well, we  
8 don't dispute that writers are losing out. We certainly don't accept that writers are  
9 losing out. We just haven't got to that part of any hearing yet, because we've never  
10 been offered a counterfactual by which to assess whether what we're doing is unfair.  
11 What we're doing, as I've explained in the previous hearing, is we allocate pro rata to  
12 what we already know, and currently writers do very well out of that.

13 So you're right. I mean, skipping through -- I'm trying to see whether there are other  
14 points I was going to make or that would be helpful to make before we get to this part.  
15 We may be able to move swiftly to this part. If you just give me a moment, I'm just  
16 going to see whether there's anything I particularly need to say before moving to it.

17 I mean, there probably are a few points it might be helpful for me to cover that Mr Ward  
18 made before we just get on to this section. So, I think that this is somewhere that the  
19 Tribunal got to with Mr Ward anyway. But he referred to criticisms that Mr Savage  
20 makes of Mr Arber's estimates for non-MTOLs such as broadcast, non-MTOL online  
21 and public performance. We don't accept those criticisms, but nor do we have  
22 evidence that comes back on them, for the reasons that I've already explained.

23 The key point is, for present purposes, Mr Savage doesn't come up with different  
24 numbers in the light of those criticisms. For the purpose of this hearing, they might  
25 have some criticisms, but we say they don't really go anywhere particularly, and that's  
26 again why we haven't come back on them. But we definitely don't accept them.

1 Again, there have been criticisms made of the fact that our figures, have, gone up.  
2 The key point there, of course, is that Mr Arber, when he has come to produce  
3 a witness statement, doing his best for the Tribunal, he has conservatively relied on  
4 the biggest numbers that are available to him. So, for example --

5 THE CHAIR: All a bit seat of the pants at the last hearing when we got to this aspect  
6 of the case.

7 MR PICKFORD: Yes, it was. It was an overnight letter. We've now taken the time to  
8 go through doing the analysis as carefully as we can, in a proportionate way -- that is,  
9 you know, sometimes taking Spotify as an example -- and in the light of that, where  
10 there's been a choice, for example, between the live numbers that were used in the  
11 pre-action correspondence and the numbers that come from the transparency  
12 accounts, we've gone for the bigger numbers.

13 So yes, it is true that the numbers have moved because we've been doing our best to  
14 provide the best information to the Tribunal. But my arguments are posited on the  
15 largest numbers, not the smallest ones. So, in that sense, we're assuming points  
16 against ourselves. I'm not trying to use smaller numbers, when in fact there are larger  
17 ones out there. Sir, I think that's the key point we make about that.

18 We then come on to the issue of the estimation of damages. So we come to a pot and  
19 then we have to work out, well, from that pot, how much realistically is actually going  
20 to be potentially in a claim. And that's where, as, sir, you rightly pointed out to me, we  
21 have Mr Arber's evidence about the estimate between unmatched usage on the one  
22 hand and unidentified shares on the other. His best estimate of that for the purpose  
23 of this hearing is 62 per cent for unmatched, 38 per cent for unidentified shares.

24 THE CHAIR: Just remind me, he gets that from?

25 MR PICKFORD: He gets that from broadcast data. So you see that in his third witness  
26 statement at paragraph 25, which is C116, 11.

1 THE CHAIR: Yes, I've got that. Just reminding myself. Yes.

2 MR PICKFORD: Thank you.

3 THE CHAIR: From broadcast, yes.

4 MR PICKFORD: Sir, I'm not saying that is the sum across all categories. I'm saying  
5 it's our best estimate based on what we currently have. So if one took my 55 million  
6 figure, that would mean that approximately 21 million of the claim related to  
7 unidentified shares, as opposed to unmatched, and from the last hearing, we  
8 understood that the focus of the claim was not so much on the unmatched, where they  
9 were saying 50/50, it was on the unidentified shares. And Mr Ward says he isn't  
10 resiled from that, I think, is what I understood.

11 MR WARD: I'm sorry if I wasn't clear. What I was saying was both parts form part of  
12 the claim. That's what Mr Robertson was saying on the transcript, too. But I'll address  
13 that further in reply, but just so that Mr Pickford's not confused.

14 THE CHAIR: But focusing on the 30 per cent, then why do you then cut that  
15 into -- because the writers are already getting a proportion of those unidentified so you  
16 end up with -- yes.

17 MR PICKFORD: Well, we have understood -- and if one goes back to the transcript,  
18 it would it be a fair reading of what Mr Robertson said is -- that the focus was on the  
19 second aspect, namely --

20 THE CHAIR: Let's assume that for present purposes. So you've got your 200 million --

21 MR PICKFORD: Yes.

22 THE CHAIR: -- now. I know you don't -- you object to it, but just for present purposes,  
23 we (Inaudible). So we're up to 200.

24 MR PICKFORD: So that would increase my figure towards 80 million, I think, rather  
25 than 21 million, if that were, at that point. There is then a further step which is one has  
26 to say, okay, well, now we're looking at the bit where there really appears to be an

1 | alleged problem. How much of that has wrongly gone to publishers when it should  
2 | have gone to writers? Because so far, all we've done is (overspeaking) --

3 | THE CHAIR: Why wouldn't it be all of it? Sorry, I'm just thinking aloud. Why wouldn't  
4 | it be all of it if it's unidentified shares? So I'm assuming that's a matched work so they  
5 | know who the publisher is --

6 | MR PICKFORD: Yes.

7 | THE CHAIR: -- but they just don't know the shares. So why wouldn't all that be going  
8 | to the writers?

9 | MR PICKFORD: Because it doesn't because ordinarily it's 50/50.

10 | THE CHAIR: I appreciate, but on -- the PCR -- sorry, maybe we're at cross purposes.  
11 | The PCR is saying the writers have been hard done by. So why shouldn't all that  
12 | 80 million go to the writers?

13 | MR PICKFORD: Because it's never been suggested, I understood, that the alternative  
14 | methodology was that whenever there's a problem with identifying shares, all of that,  
15 | 100 per cent of that, should only ever go to the writers.

16 | THE CHAIR: No, that's not what I'm putting to you. Oh, I think maybe it is what I'm  
17 | putting to you, but if you've got an unmatched work.

18 | MR PICKFORD: Yes.

19 | THE CHAIR: The writer is losing out and the publisher is losing out.

20 | MR PICKFORD: Yes.

21 | THE CHAIR: Assuming they're different people. If you've got unidentified shares --

22 | MR PICKFORD: Yes.

23 | THE CHAIR: -- isn't it only the writers?

24 | MR PICKFORD: No. No, it's the same because the writer and the publisher are both  
25 | people who may not be identified correctly and therefore able to receive their shares  
26 | so --

1 THE CHAIR: You know who the work is.

2 MR PICKFORD: Yes.

3 THE CHAIR: So you can identify the publisher.

4 MR PICKFORD: Well, not -- no, because the database, if you assume that we know  
5 what the work is and therefore we can identify the publisher, one might say, well,  
6 therefore we can identify the writer. The way it works is that if we can't identify the  
7 work, then we're totally stuck and I think --

8 THE CHAIR: In most cases. Maybe there are some not, but in most cases for  
9 well-known works, if you know it's hit X from Decca, you can identify the publisher but  
10 what you don't know is all the shares. You don't actually know that the lyrics in that  
11 case were written by one of the obscurer band members or somebody who's staying  
12 with the band at the weekend. That's information you don't have. So if it's a typical  
13 work being played on the radio, if you know the work, you'll know who the publisher is.

14 MR PICKFORD: I don't believe that that is the case.

15 THE CHAIR: How can you not know who the publisher is?

16 MR PICKFORD: That's not our evidence and I'm going to turn around and get some  
17 instructions on (overspeaking).

18 THE CHAIR: Do you want to just take some instructions on that?

19 MR PICKFORD: Yes.

20 THE CHAIR: I appreciate there may be occasionally exceptions to that but as  
21 a general matter. (Pause)

22 MR PICKFORD: There was a point I made at the previous hearing. There were two  
23 points to make in response to, sir, the point you put to me. First is this, that where  
24 there is a work that is matched but there are problems in relation to identification of  
25 shares, ordinarily where that happens is where there are multiple writers and multiple  
26 publishers involved and --



1 THE CHAIR: Multiple publishers?

2 MR PICKFORD: Multiple publishers. Multiple writers with multiple publishers. And  
3 so what will typically happen is that there might be one publisher and writer set that is  
4 properly identified, and then there will be another portion which isn't properly identified  
5 at all. And we won't know the publisher and we won't know the writer either.

6 THE CHAIR: Is it common to have multiple publishers?

7 MR PICKFORD: Yes. Both, because they may well be represented by -- different  
8 writers may be represented by different publishers, for a start.

9 THE CHAIR: All right.

10 MR PICKFORD: So that's the first point, actually this is where this (overspeaking) --

11 THE CHAIR: You don't have any evidence on the frequency of that?

12 MR PICKFORD: I don't think we do, but what we certainly -- I'm being instructed Blur  
13 (Overspeaking), but I don't think that's in evidence.

14 THE CHAIR: Well, I don't think we need to personalise --

15 MR PICKFORD: But apparently there is an example of multiple writers with multiple  
16 publishers.

17 THE CHAIR: Okay.

18 MR PICKFORD: But we definitely do not have in evidence -- and so that's why I have  
19 resisted what's been put to me by you, sir -- that as long as you know what the work  
20 is, you know the publisher. We don't accept that.

21 THE CHAIR: You'll know one of the publishers, but not necessarily (Inaudible).

22 MR PICKFORD: You might. I mean, there may be situations where the whole record  
23 is blank. Most commonly, there's often a problem because you've got  
24 multiple -- there's some problem that's arisen from the multiple writers with the multiple  
25 publishers.

26 The second point to make --

1 THE CHAIR: Anyway, I was wrong in my assumption. I understand.

2 MR PICKFORD: The second point to make comes back to the point that I made at  
3 the first hearing, which is it's a requirement, when you register a work in the first place,  
4 if you're a publisher, you have to register both your interest and the songwriter interest  
5 at the same time. You're not allowed to just register your interest. That's one of the  
6 PRS's rules. So if you're a publisher, you're not allowed to just register your interest.  
7 You have to do both.

8 So, our submission last time and I'll repeat it this time, is that ordinarily, in fact, this is  
9 a problem that goes together hand in hand. If there's a problem, it's going to affect  
10 both the publisher and the writer. We haven't got any details or information on --

11 THE CHAIR: What we haven't got --

12 MR PICKFORD: -- that yet.

13 THE CHAIR: -- in this paragraph is those cases where you know the name of the  
14 writer but you don't have the right bank account details and those sorts of things.  
15 That's not --

16 MR PICKFORD: So...

17 THE CHAIR: -- I don't know which category that falls within.

18 MR PICKFORD: So that's the third category. And that category, you may recall from  
19 the previous hearing, we --

20 THE CHAIR: You retain those?

21 MR PICKFORD: Yes, we've retained them, and they shouldn't be -- they shouldn't be  
22 part of this damages claim because we haven't distributed anything, precisely because  
23 there's been this argument.

24 THE CHAIR: I beg your pardon.

25 MR PICKFORD: Yes. So the focus really is just on the first two categories.

26 Now, Mr Ward was saying, sort of five, ten minutes ago, "Well, we're definitely

1 maintaining the claim in respect of unmatched as well". Well, if he is, he has advanced  
2 only one proposal in relation to unmatched, which is 50/50. That was what  
3 Mr Robertson said, and I think it's what Mr Ward didn't demur from.

4 In relation to that, we explained at paragraph 35 of our skeleton -- and it may be helpful  
5 just to turn this up -- it's in skeleton bundle B, tab 2. I'll have to find it myself.  
6 Paragraph 35, which I hope should be on page 11.

7 THE CHAIR: But, I mean, I'm not sure the way you put it here is helpful, given where  
8 we've got to, but you can still make the point.

9 MR PICKFORD: You might have to redo the numbers. You might have to change --

10 THE CHAIR: Well, the fact is, because we've got these category 2 people -- but if you  
11 look at it, you know, broadly it's -- for broadcast it's 50/50 and non-MTOL online it's  
12 50/50. I'm being very approximate here, of course. So if these are 50/50, it doesn't  
13 look as if there's much of a sizable claim.

14 MR PICKFORD: Yes, that's the point.

15 THE CHAIR: You can just take it at that level.

16 MR PICKFORD: If we put the ICE to one side and you distribute 50/50 for unmatched,  
17 actually, damages will be zero, because there's no way of distributing the other pot for  
18 the unidentified shares. In a way, even if you gave 100 per cent of that pot to writers,  
19 they wouldn't get back what they've lost from going to a 50/50 distribution, because  
20 currently they do better than 50/50.

21 THE CHAIR: Well, yes. You're putting ICE, et cetera, to one side, yes.

22 MR PICKFORD: Well, I haven't redone the numbers (overspeaking).

23 THE CHAIR: No, I understand. If you do that, then it's worse. If you include them it  
24 should come out much of a muchness, I would have thought.

25 MR PICKFORD: We would have to do -- yes. I mean, I think it would still come out  
26 very small, actually, if you do that -- if you added ICE back in.

1 If we then go on to the issue of the costs, it can be very brief on this point. The claim  
2 is going to cost very significant -- we say pretty staggering sums, apparently -- to  
3 pursue in terms of return to the funder. There was a number of 14 million being  
4 bandied around for legal costs. I believe even as at the last hearing, the cost budget  
5 had gone up to 18 million, and of course, that was prior to a change of solicitors to the  
6 new US law firm. So I think we can assume --

7 THE CHAIR: I think it's gone back down to 14, unless I'm mistaken, but --

8 MR PICKFORD: I haven't --

9 THE CHAIR: Maybe that's not the case. Maybe that's not the case.

10 MR PICKFORD: No, I think Mr Ward might have been using out-of-date numbers.

11 THE CHAIR: Okay.

12 MR PICKFORD: We are not aware -- I mean, certainly I'm working on the  
13 assumption --

14 THE CHAIR: We'd better have the right figure.

15 MR PICKFORD: -- that the number has already got to 18, and that's prior to starting  
16 again with a new, no doubt excellent, but very expensive law firm. So the legal costs  
17 are going to be very, very considerable. Then there's the return to the funder, which  
18 is again orders of magnitude above that, because they require a return, which is  
19 a multiple of the legal costs.

20 There was a bit of confusion, I think, from, Mr Ward about how that scheme worked,  
21 as at the previous figures that were being provided for costs and assuming a hearing  
22 date or, sorry, I think a date for determination of claim of September 2026 -- that was  
23 what we made some assumptions on before in our previous skeleton -- we calculated  
24 that there would be £82 million in funding costs if the funder was paid prior to recovery,  
25 and there would be £112 million if the funder was paid out of undistributed damages.  
26 So they reserve the right, and obviously no doubt will ask to be paid first, but the

1 amount that they get paid depends on whether they do get paid first or they get paid  
2 second.

3 In any event, from my experience of these cases, the lawyers do get paid first anyway,  
4 so we can pretty well guarantee that the legal costs are not going to be recoverable  
5 by the -- they are going to come out, because they'll have already been paid, to get to  
6 that stage.

7 There was also, I think, an exchange where we didn't agree with what Mr Ward was  
8 saying about how the scheme would work. But I think you ultimately got to a position  
9 where he was agreeing with you, sir, which is: initially it was being said that the money  
10 for the funder's return would come from us, the PRS, as if it didn't come out of  
11 undistributed damages. But that isn't correct. It's always going to come out of  
12 damages. What we would be liable to pay is two things: potentially costs, if we lose,  
13 legal costs, and some damages, and that's it. They don't get a further dip for the  
14 funder's costs. The funder has to get everything out of the damages.

15 THE CHAIR: That's my understanding.

16 MR PICKFORD: So insofar as the funder gets paid, that will come out of, the sums  
17 that go to the class.

18 THE CHAIR: Yes.

19 MR PICKFORD: I made some calculations, which I said meant that the claim was  
20 somewhere between 0 and 10 million. That was starting with my 55 million. I then  
21 went to 21 million. Then I assumed that 50 per cent of what went to publishers had  
22 wrongly gone to publishers and should go to writers. That's how I got to 10 million.

23 Now I accept, obviously, where one is on that scale depends on whether ICE is  
24 included or not, and one can rerun those calculations with those numbers. But even  
25 if one did, in my submission, we'd still be no better than the sort of same order of  
26 magnitude and probably lower than the costs of the claim, by the time one has actually

1 worked through and taken the gross pot size and worked out what percentage of that  
2 pot is actually likely to end up in the hands of the class.

3 THE CHAIR: I mean, if the cost of the claim is, well, let's say 18 million, and it seems  
4 likely -- if successful in the litigation -- that the Proposed Class Representative will  
5 succeed in respect of 20 million, where does that leave us? Is that disproportionate?  
6 I mean, when it comes to the funder's costs, we can just say, well, tough. You're only  
7 getting your 20 million back.

8 MR PICKFORD: Well, in my submission, it should --

9 THE CHAIR: At what point does something become disproportionate?

10 MR PICKFORD: Well, there obviously isn't, when one's considering a multi-factorial  
11 assessment of proportionality, a line. Mr Ward can't give you a line and I can't give  
12 you a line, but I can make submissions as to why I say if in fact it's coming out at  
13 around, say, 20 million -- we're assuming that's roughly about the level of the  
14 costs -- why it does not pass the cost/benefit test, and that is because there are other  
15 issues that I say should be taken into account.

16 One of them is that even if I fail on my submission for strike out that I made at the last  
17 hearing, I still say that this is an exceptionally weak claim, where no proper  
18 counterfactual explaining what we did wrong has ever been articulated, and that the  
19 Tribunal is entitled to -- and indeed I say should -- take that into account in considering  
20 the relative merits of allowing this claim to proceed or not to proceed. So that's the  
21 first point on that.

22 Secondly, the PRS is a not-for-profit members' organisation, run for the benefit of its  
23 members, including songwriters. Mr Rowntree, a vociferous campaigner, has  
24 available to him the full apparatus of the internal mechanisms within that organisation  
25 to effect change, if he wishes to seek to effect change. He doesn't have to do this.  
26 This is very unusual. This is not like a claim where you've got a follow-on because

1 someone was in a cartel, and the only remedy that the people who've been affected  
2 by that cartel have is to probably to come and bring CPO proceedings. This is not that  
3 case at all. If Mr Rowntree thinks that there's something unfair about the way that we  
4 deal with the difficult issue of how one distributes royalties where you don't know who  
5 they're for, then he's quite welcome to seek to effect change through our internal  
6 processes. Indeed, he's welcome to seek to effect it by direct dialogue with the PRS,  
7 because -- I do have to pick Mr Ward up on something. He said that we've offered no  
8 alternative channels for resolving this. I think there was (overspeaking).

9 MR WARD: I didn't say that.

10 MR PICKFORD: Well, he said something that seemed to me to be very  
11 (Overspeaking).

12 THE CHAIR: I think he said that if you were going to make changes, you'd be telling  
13 us.

14 MR PICKFORD: So he said that first and then he said we hadn't offered an alternative.  
15 We can look at the transcript when it comes.

16 THE CHAIR: Well, he has said, anyway, he's not pursuing that.

17 MR PICKFORD: What I need to make clear is that we have offered to meet  
18 Mr Rowntree to avoid the need for this claim. We are quite happy to seek to deal with  
19 any member's concerns and particularly -- obviously -- concerns of this nature that are  
20 likely to lead to, we say, huge wasted costs that ultimately are going to be borne by  
21 our members, and to deal with it in some other method. That offer has been made  
22 previously and it remains open. I'm making it clear on the record now.

23 The fourth point is: there was reference to the apparent benefits of the future, as  
24 opposed to the claim now. We say, if you're really looking at the future, as opposed  
25 to a retrospective damages claim, that does not pass the relative test that we know  
26 from the Supreme Court in Merricks, relative to High Court proceedings, because you

1 don't need all of the complication and cost and paraphernalia of an opt-out damages  
2 claim if what you're really concerned with is establishing a point of principle as regards  
3 what we do for the future. That claim could be brought far more simply in the chancery  
4 division, and so making that comparison between, a CPO claim and alternative  
5 litigation routes, we say that the calculus does not come out in favour of a CPO, if  
6 you're not really that interested in the CPO, in damages. There has to be, in most  
7 cases -- and certainly we say in this case -- a credible and sensible and significant  
8 damages claim for this claim to get over the hurdle of the cost/benefit test being  
9 satisfied.

10 Two more points on that.

11 THE CHAIR: We've got to have a break for the stenographer.

12 MR PICKFORD: Of course.

13 THE CHAIR: We've got to 3.25. I think now might be -- sorry to interrupt you mid-flow,  
14 but you've got to the end of your point. We'll just have five minutes. If everyone could  
15 be back after five minutes, as opposed to seven minutes, I'd be very grateful. Thank  
16 you.

17 (3.28 pm)

18 (A short break)

19 (3.35 pm)

20 MR PICKFORD: Thank you.

21 I've just got three short further points to make. The first of those is to give you  
22 a reference. I was making submissions about what I said last time, when answering  
23 a question from you, sir, about unidentified shares and how they go hand in hand as  
24 between the publisher and the writer. It may be helpful to see Mr Arber's second  
25 statement in this regard. We can find that at tab 98 of bundle B, and I'm looking at  
26 paragraph 10 and 11 on page 3. (Pause)



1 If one goes to towards the end of paragraph 10, Mr Arber is addressing something that  
2 Mr Savage has suggested. It's the final couple of sentences:

3 "Mr Savage seems to be envisaging a different situation where a published PRS writer  
4 member's share (only) might not be registered or actively registered; and he supposes  
5 that, in that scenario, PRS would still knowingly distribute money to the (known)  
6 member publisher but not to the writer. This should not in principle occur, however,  
7 for the reasons set out in my first statement". [As read]

8 Then he goes on to summarise that in paragraph 11. If I could ask the Tribunal to  
9 read paragraph 11.

10 THE CHAIR: Mm-hmm.

11 MR PICKFORD: They're making the point that the publisher isn't going to get paid  
12 unless they do what they're supposed to do, and that's to record both shares. This is  
13 why these things tend to go hand in hand.

14 The second point concerns the £60 figure that Mr Ward said is our estimate. It's  
15 important to be very clear that we calculated that sum simply by taking 10 million and  
16 dividing it by 160,000 class members. A couple of sub-points there. The first is that  
17 Mr Arber's third witness statement explained that nearly 40 per cent of those writer  
18 members never receive any royalty payments. They simply were allowed to become  
19 a member of the PRS. You don't have to receive royalties at all. So it seems extremely  
20 likely that many of those persons, if they're part of the class, would receive a payment  
21 irrespective of whether they have ever been entitled to any royalty payments ever, for  
22 anything that they've ever done.

23 Parenthetically, the Tribunal referred me last time to the CICC case, and the point  
24 made there -- for your reference, I made it at day 2 of the transcript on page 62 -- but  
25 in the CICC case, the Tribunal said that it's unacceptable to include within the class  
26 a large number of class members in respect of whom it's known they have no claim.

1 THE CHAIR: Yes, I think we're going back over old ground.

2 MR PICKFORD: Yes, but I'm just noting that that, I said, was parenthetical. The key  
3 point here is that even if one includes all of them, the £60 figure ignored all of the legal  
4 costs and ignored the funder's costs. If you take those into account, it collapses to  
5 zero. That's not a figure that we're suggesting is what they'd actually like to see at the  
6 end of the day.

7 MR PICKFORD: Then the final point is the reliance that's placed by my learned friend  
8 on the Merricks judgment. He and I read the implications of that case very differently.  
9 This is the settlement judgment. We find that in the authorities bundle, tab 10 of  
10 authorities F. Sorry, I'm just going to have to get there myself. My -- (Pause) Yes.  
11 Good. So this is a judgment of Mr Justice Roth.

12 If one looks on page 3, actually, coincidentally, we see that Mr Merricks was  
13 represented by Willkie Farr and Mr Mark Brealey, so it's the same legal team, as either  
14 are or have been instructed in this case. Then the Merricks claim -- it's shown at  
15 paragraph 12 -- was a purely follow-on action, in contrast to this claim, which is  
16 obviously standalone.

17 Then if one goes to page 28, paragraph 71 of the judgment, one sees an explanation  
18 of the proposal in the application for the settlement. There's an explanation there of  
19 the three pots. So there's £200 million total. £100 million of that is ring-fenced for the  
20 class, £45-odd million of that is the minimum return to the funder -- that basically has  
21 been calculated as comprising the cost fees and disbursements, so that's broadly  
22 speaking the professionals -- and then pot three, the remaining £54 million odd, and  
23 that is a pot that might either go to the funder or might go to the class members,  
24 depending on various contingencies.

25 The Tribunal then goes on to comment about this at paragraph 182, which is on  
26 page 70 of the bundle here. They say:

1 "Although settlement has secured a positive payment, the outcome of the present  
2 case is very far from a success for a class of some 44 million claimants. The  
3 settlement sum is only a little over 1.4 per cent of the original value placed on the claim  
4 of £14 billion with interest only to September 2016, and under 1.2 per cent of the  
5 revised claim value of £16.7 billion with interest only."

6 What that works out as, if you do the maths, is a settlement of a little less than  
7 £2.50 per class member. What my learned friend relies on this authority for is to say,  
8 "Well, look, all these things can be worked out at the end. Don't worry. We can work  
9 out who'll pick up the tab at the end of the process, but it shouldn't really concern the  
10 Tribunal now".

11 But what I say is that claims such as Merricks, which are worth just a penny in the  
12 pound, and principally benefit the professionals involved, are not a good  
13 advertisement for a loose approach to considering cost/benefit at this stage. Because,  
14 as the Tribunal noted there, the outcome was very far from a success for the class,  
15 and that was in a follow-on claim. We say this claim is vastly weaker than Merricks;  
16 it's worth vastly less; and it will cost a great deal to bring.

17 My conclusion then is that we all know that the regime that's sought to be employed  
18 here is a very powerful tool for providing collective relief against genuine competition  
19 law breaches. The Tribunal is its guardian, but the regime mustn't be misused for  
20 claims that don't offer a proper benefit for the class. In my submission, this is one of  
21 those claims.

22 Unless I can be of any further assistance, those are my submissions on behalf of PRS.

23  
24 Reply submissions by MR WARD

25 MR WARD: Sir, thank you. A few points in reply. Starting with the Arber 3 table one,  
26 please, C116, page 8. (Pause)

1 What is the value of the royalties here? The answer is, if you look at the publisher  
2 allocation, and add the £151 million that Mr Savage has proposed because of the  
3 third-party MTOL issue, if I can call it that colloquially, you get to £206 million. So  
4 that's very roughly four times what Mr Pickford said, and Mr Pickford's £60 per class  
5 member, if you accepted his figures, which we don't, would of course also be roughly  
6 four times that as well. I'm going to come in a minute to unpick some of what he said  
7 about that.

8 While we're here, though, I want to deal with a slightly different point, which he made  
9 relatively early in his submissions about non-MTOL blanket, where he said there isn't  
10 really such a thing as black box, but what there is in non-MTOL blanket is pro rata  
11 distribution. That is made clearest, I think, by Arber 3, and if we look at the next page,  
12 we can see it explained in paragraph 20.

13 It's talking about the BBC, which operates on a so-called census basis. So it reports,  
14 and it says that:

15 "Members can make valid claims, but if under its BBC licence, PRS received £100 for  
16 100 different uses, but PRS is only able to match 99 of those works, PRS distribute  
17 £100 over the 99 matched works." [as read]

18 So the gravamen of the Proposed Class Representative's complaint applies equally to  
19 non-MTOL. Obviously, we have a disagreement about what is in the Proposed Class  
20 Representative's claim; whether or not it includes the third-party MTOL royalties.  
21 I took you to the passages that show that. Clearly, the operative part extends to it. As  
22 you appreciate, sir, we are minded to amend the pleadings, and if, as Mr Pickford says,  
23 he was confused, then we'll clarify that.

24 He also made clear they deliberately did not come back on those numbers from  
25 Mr Savage. As Mr Kelly said, their derivation is pretty arithmetic. Mr Savage's fourth  
26 report explains it. I've shown you this before. It's C118, 17.

1 But I want to, while we're here, also talk about something else where I think there is  
2 some lack of clarity potentially. And that is again in Arber 3, tab C116, page 11. This  
3 is to do with unmatched works versus unmatched shares. What he explains is that --

4 THE CHAIR: Can you give me the paragraph number?

5 MR WARD: Paragraph 25, I'm so sorry.

6 THE CHAIR: Paragraph 25.

7 MR WARD: Yes, page 11. He says:

8 "As part of our consideration of broadcast revenue [so one relatively narrow category],  
9 PRS has been able to undertake a granular analysis per work/per share, based on  
10 information on the system, given PRS is a blanket licensor, and receives and identifies  
11 all usage." [as read]

12 It says then:

13 "This further analysis of Broadcast sample periods indicated that as a percentage of  
14 unmatched usage and unidentified shares, 62% was for unmatched works and 38%  
15 was unidentified shares." [as read]

16 I'll be corrected if I've got this wrong, because the terminology has moved around on  
17 both sides. Unmatched works are where we do not know what the work was.  
18 Unidentified shares are we don't know about one or more particular shares. As  
19 Mr Pickford said, sometimes there are multiple publishers for one song.

20 But what's important then is that when we look at Mr Pickford's £60 in his skeleton, he  
21 treats this unmatched work as essentially a zero, as I understand it correctly. So if we  
22 look at the paragraph in his skeleton at page 10.

23 MR PICKFORD: That's correct.

24 MR WARD: Thank you. Well, that's helpful to have clarified immediately. But if we  
25 go to page 10 of his skeleton, paragraph 34. Given his helpful confirmation, I don't  
26 need to go through the arithmetic, but essentially, he takes his £55 million, applies the

1 percentage for unmatched works from this one particular sample, and takes away  
2 again, £34 million, and says, "There you are, you have £21 million". That ultimately  
3 drives his £60 figure.

4 Of course, we're four times higher, but we don't accept that the unmatched works are  
5 outside the claim. This is where -- we were surprised by what they said in their  
6 skeleton about this, I confess. Can I ask you to turn up the transcript from Day 2,  
7 which, if you're in the transcript bundle, is T2/195, which is page 194 of the transcript.

8 (Pause)

9 You'll see Mr Robertson says at 16:

10 "There are two basic types of black box royalties, just to make my position clear on  
11 that. There are those where usage information does not identify the work [unmatched  
12 work] ... For that we accept the only sensible way of splitting it is 50/50."

13 For some reason this seems to have generated an idea in the minds of PRS that the  
14 unmatched work claim is somehow abandoned. Indeed, a letter is cited in the  
15 footnotes --

16 THE CHAIR: But isn't that because at the moment the distribution is 50/50?

17 MR WARD: Well, no, sir, because of course, unmatched work is only part of the  
18 distribution --

19 THE CHAIR: I understand that. So your complaint at the moment -- sorry, I may be  
20 misunderstanding -- is that with all these black box royalties, they get distributed in  
21 accordance with the baseline position, which is --

22 MR WARD: Sir, no. Our complaint is they're distributed pro rata, which  
23 (Overspeaking).

24 THE CHAIR: Yes, that's I meant by "baseline".

25 MR WARD: It means by reference to what PRS can identify. So in other words, the  
26 unmatched part is distributed in the way that the matched part is distributed. Our case

1 is based on the premise that that introduces a bias against writers, not the answer  
2 should be 50/50 in all cases. This is a sort of not -- what Mr Robertson was saying  
3 was, "In the absence of information, 50/50 is the best we can do, because ..."

4 THE CHAIR: We don't know the figure. That that pro rata figure, we don't know what  
5 it is, is that right?

6 MR WARD: No, we don't. We don't. (Pause)

7 So we heard some explanation from Mr Pickford about exactly what combinations of  
8 writers and publishers may or may not be unmatched. And of course, we haven't got  
9 any real evidence about that.

10 THE CHAIR: I mean, that pro rata -- sorry. That pro rata figure must be easily  
11 ascertained, because that's the basis on which black box royalties have been  
12 distributed last year, for example.

13 MR WARD: Sir ... (Pause)

14 I was just going to show you a letter at C120. This is Maitland Walker. You'll see -- I'm  
15 conscious of the time, but very briefly -- bottom of paragraph 1, this is after the hearing:  
16 "No intention to alter the case advanced by the PCR which has been the same from  
17 the outset." [as read]

18 Then in the fourth line:

19 "We are aware PRS does not always distribute the writer and publisher portion of  
20 royalties for songs." [as read]

21 What I wanted to do now is just take you --

22 THE CHAIR: Sorry, just where were you reading again? I apologise.

23 MR WARD: Well, the most important point here is the one at the bottom of  
24 paragraph 1, that nothing in Mr Robertson's submission was receding in some way  
25 from the breadth of the pleaded case, and that does seem to have caused confusion.

26 THE CHAIR: Then there's a general presumption that royalties should be split 50/50.

1 You said it should be thought that PRS should be distributing black box royalties on  
2 a 50/50 basis? Okay.

3 MR WARD: Obviously, sir, this -- I remind you, there's an adjournment application  
4 here.

5 But the point I'm making anyway is just that Mr Pickford's figure of £60, which becomes  
6 £240, in any event, disregards any element for unmatched works. Where we get to in  
7 the end, that's a more complicated question.

8 Then what was said as part of giving an explanation, he took you to Arber 2, which is  
9 at B98, where some explanation was given. (Pause)

10 I showed you paragraph 10, where he explains essentially that if, for example, there  
11 are two publishers and two corresponding writers, and only publisher A and writer A's  
12 works have been registered, publisher A and writer A would be allocated, and  
13 publisher B and writer B would not.

14 That's, of course, just one instance of data problems. Mr Savage responded to this at  
15 B103, page 5. This is Savage 3. He says:

16 "Mr Arber does not say in this second statement or anywhere in his first and I have not  
17 been able to identify a PRS rule or policy which states that if publisher B's interest in  
18 the work has been correctly registered, but writer B's interest is not, that PRS would  
19 not pay the applicable royalties to publisher B. My understanding from the PRS rules  
20 and policies is if publisher B's details are correct and writer B's details are incorrect,  
21 publisher B would be paid."

22 That's his understanding. So it is murky, and of course we'd like to explore it at trial.

23 Almost finished. Costs. Well, I'm instructed a revised budget is being prepared. As  
24 to PRS and its willingness --

25 THE CHAIR: What's -- as of today, I appreciate a revised budget's being prepared,  
26 as of today, we're -- I was wrong that the £18 million had gone back to £14 million; it's



1 still £18 million is today's figure?

2 MR WARD: Can we write to you an update when we're able?

3 THE CHAIR: Yes, of course. Yes.

4 MR WARD: Then we had a sort of debate about Mr Rowntree's ability to use  
5 alternative channels and what Mr Pickford said is that if Mr Rowntree thinks there is  
6 something unfair, he should approach them. Well, this litigation has been  
7 demonstrated for several years that he does. And the simple fact of the matter is there  
8 has been no open proposal that PRS will change its ways. But that takes me...

9 THE CHAIR: There has been an offer of a meeting. That's presumably something  
10 you're going to agree to, one assumes.

11 MR WARD: Actually, I just don't know, to be perfectly frank. It was news to me,  
12 personally. I'm not saying it's not true.

13 THE CHAIR: It may have only come today, but nevertheless, the offer has been made.

14 MR WARD: I'm sure it will be considered.

15 The last thing I was going to -- is it last? Yes -- was about the future and the past.  
16 Because Mr Pickford trained all his fire on our claim for the past, but then he said,  
17 "Well, if you've got a claim for the future, you could just seek declaratory relief in the  
18 High Court", as if the damages claim didn't exist. At one point in the past, the future  
19 claim didn't exist. Now the damages claim is to be treated as if it didn't exist.  
20 Obviously, it's both.

21 THE CHAIR: I'm not sure what the declaratory relief would be. He didn't say  
22 "declaratory relief".

23 MR WARD: (Overspeaking) or some other (overspeaking).

24 THE CHAIR: He said, "a claim in the High Court", which I -- by the time I'd finished  
25 scratching my head, he'd moved on to something else.

26 MR WARD: (Overspeaking) Just really to eliminate any doubt in your mind, if we go

1 to A1/38, right at the back of the pleading, we can see --

2 THE CHAIR: Yes.

3 MR WARD: This is as it's going through various requirements for a claim form:

4 "iii. In proceedings in England and Wales or Northern Ireland, whether the class  
5 representative is making an application for an injunction. The Proposed Class  
6 Representative seeks an order that the Proposed Defendants cease the infringing  
7 conduct."

8 THE CHAIR: Sorry, I'm still scrolling through at a snail's pace through this document.  
9 What page are you?

10 MR WARD: Internal page 38 and indeed (inaudible).

11 THE CHAIR: (Inaudible) get through in the bundle. 44. Your internal numbers are  
12 different to ours. Which paragraph?

13 MR WARD: 122.

14 THE CHAIR: All right. Start again. Yes.

15 MR WARD: Under the heading "Whether the class representative is making an  
16 application for an injunction", it says:

17 "The Proposed Class Representative seeks an order that the Proposed Defendants  
18 cease infringing conduct". [As read]

19 That is, the forward-looking element of the claim strictly would not be needed anyway.

20 THE CHAIR: Mm-hmm.

21 MR WARD: Unless I can assist further, those are our submissions.

22  
23 Reply submissions by MR PICKFORD

24 MR PICKFORD: I have two very small corrections, if I may. One of them is that  
25 Mr Ward said that there was no information before the Tribunal on the split for  
26 unmatched works, whether it was 50/50 or something different. That isn't correct. If

1 one looks at Mr Arber's third witness statement on page 11, tab 116, table 2.

2 THE CHAIR: Yes.

3 MR PICKFORD: This gives an analysis for broadcast, which is obviously untainted by  
4 the ICE issue --

5 THE CHAIR: What paragraph are you on?

6 MR PICKFORD: Table 2, which is just below paragraph 24. It's just above  
7 paragraph 25.

8 This is an analysis for broadcast, so this is going to be untainted by the ICE issue. We  
9 can put that to one side. It shows the writer shares versus the publisher shares for  
10 matched and distributed, which is obviously ultimately the same. It's the pro rata that's  
11 used for the unmatched. It's 53 point something per cent for writers, and in each case,  
12 46 point something per cent for publishers. So there is evidence indicatively on that  
13 split, and it's in favour of writers, not publishers.

14 The second point of correction -- so that's why we say that they do worse if they went  
15 for a 50/50 split.

16 THE CHAIR: Sorry. Why is that different to the figure in table 1?

17 MR PICKFORD: It's not -- it's consistent with the figures in table 1.

18 THE CHAIR: Because they've added broadcast and TV together. Yes.

19 MR PICKFORD: But what it shows in particular is the split for the -- what we were  
20 concerned was with was the split between --

21 THE CHAIR: Yes, I understand.

22 MR PICKFORD: The second point is: Mr Ward relied on a part of the transcript. He  
23 said what we'd referred to in the transcript was Mr Robertson's point about 50/50.  
24 Actually, we refer to a different -- it was that plus another bit.

25 So if one goes to the transcript very briefly, it's day 2, page 195. (Pause)

26 He stopped at line 22, which is, "We accept the only sensible way of splitting those is

1 50/50" [as read], as if that was the point.

2 THE CHAIR: It's 194 in mine.

3 MR PICKFORD: I beg your pardon. It's 195 in mine.

4 THE CHAIR: Okay. Yes.

5 MR PICKFORD: But in any event, if one continues, the next bit's the key:

6 "However, what we are concerned about is where the information shows that the

7 writer", [as read] et cetera.

8 It's that paragraph -- it was those two read together that led us to understand that their

9 focus was on the second part, not the first part. So it's those statements together.

10 That was all.

11 THE CHAIR: Thank you very much.

12 (4.04 pm)

13 (The court adjourned)

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