



Neutral citation [2025] CAT 49

Case No: 1634/7/7/24

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

27 August 2025

Before:

JUSTIN TURNER KC
(Chair)
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) PERFORMING RIGHT SOCIETY LIMITED
(2) PRS FOR MUSIC LIMITED**

Proposed Defendants

Heard at the Rolls Building on 12-13 February 2025 and Salisbury Square House on 16 June 2025

JUDGMENT (CPO)

APPEARANCES

Tim Ward KC, Aidan Robertson KC, David Went and Jack Williams (instructed by Maitland Walker LLP and Willkie Farr & Gallagher (UK) LLP) appeared on behalf of the Proposed Class Representative.

Meredith Pickford KC, Charlotte Thomas and Hugh Whelan (instructed by Macfarlanes LLP) appeared on behalf of the Proposed Defendants.

CONTENTS

A.	Introduction	4
B.	Background to Black Box royalties.....	7
	(1) Royalty streams	7
	(2) Main types of licensing.....	8
	(3) Black Box royalties.....	9
C.	The Claim	11
D.	The Application for an adjournment.....	13
E.	The Application to strike out the claim and for summary judgment.....	15
	(1) The PRS Rules	20
	(2) Analysis	22
F.	Is the claim suitable for aggregate damages?	25
G.	Proportionality	30
H.	The authorisation condition.....	42
I.	Conclusion	44

A. INTRODUCTION

1. This is an application by the proposed class representative, Mr Rowntree (the “PCR”), for a collective proceedings order (“CPO”) pursuant to section 47B of the Competition Act 1998 (the “Act”). The proposed proceedings are opt-out proceedings, and the proposed class consists essentially of any person who between 9 March 2017 and the date of issue of these proceedings was a songwriter member of the Performing Rights Society Limited. Although not defined in the proposed class (a matter which if this matter proceeds should be remedied), a songwriter member is a creator of music or lyrics who has an interest in the copyright associated with those works and is to be distinguished from a publisher who makes music available to the public.
2. This Tribunal needs to determine whether these collective proceedings should be certified. It needs to be satisfied that the eligibility conditions under section 47B of the Act and Rule 79 of the Competition Appeal Tribunal Rules 2015 (the “Rules”) are met. It also needs to be satisfied that it is just and reasonable for the PCR, Mr Rowntree, to act as a class representative.
3. The Second Defendant is a wholly owned subsidiary of the First Defendant. The First Defendant is the collective management organisation (“CMO”) in the United Kingdom which, through the Second Defendant, collects and distributes performing right royalties for music copyright works to its members. The First Defendant is a company limited by guarantee. It has approximately 175,000 members who are entered onto its register of members. Of these the majority, approximately 165,000, are songwriter members. Other members are publishers. Hereafter we refer to the First and Second Defendants jointly as “the PRS”.
4. The PRS collects and distributes royalties relating to the public performance of musical works in respect of which it has been assigned the “performing rights”. The First Defendant is a company limited by guarantee and exists only for the benefit of its members. The PRS is governed by a Members Council and a Board. The Members Council currently comprises: four independent non-executive Council Members, ten publisher Council Members, ten writer Council

Members and the CEO. In previous years covering the period of the proposed claim there has been a similar, although not identical, constitution. The Board comprises a mixture of publisher and writer members: the current composition being, one executive board member; four writer Council Members; four publisher Council Members and four non-executive board members.

5. The First Defendant has rules and regulations, a Distribution Policy, codes of conduct and complaints procedures. The structure of the PRS is important background to this claim for two reasons. First, the class which it is proposed will bring the claim against the PRS are themselves members of the First Defendant; indeed they represent the majority of members of the First Defendant and, as members, have the potential to influence the governance of the organisation. Second, any award of damages or costs against the PRS may impact returns to its members which potentially exposes members of the proposed class to those costs and damages. In these circumstances we have considered it appropriate to pay particular attention to the cost and benefits of these proceedings.
6. The complaint which underpins this claim concerns that proportion of performing rights royalties collected by the PRS which cannot be matched with the correct songwriter or publisher because of inaccurate or insufficient information. The PCR refers to these as “Black Box” royalties. Complaint is made that for each royalty stream Black Box royalties are distributed to songwriters and publishers in the same proportions as matched royalties, but that this leads to unfairness. The unfairness is said to arise because the proportion of writer royalties which are Black Box is greater than the proportion of publisher royalties which are Black Box. The PCR seeks, by way of a claim for damages under section 47A of the Act, what is in effect a redistribution of Black Box royalties away from publisher members to writer members.
7. A first certification hearing took place on 12 and 13 February 2025. At that hearing certification was opposed by the PRS for failing to satisfy the eligibility condition and the authorisation condition for the following reasons:

- (1) that the claim had no reasonable prospect of success, with an application being made to strike out the claim and/or for reverse summary judgment;
 - (2) that the application does not pass the *Microsoft* test because no sufficient expert methodology was described and because of the failure to specify a counterfactual;
 - (3) that the application does not satisfy the cost-benefit test; and
 - (4) that there were conflicts within the class including with the PCR which made Mr Rowntree unsuitable as a class representative.
8. The application was supported with a witness statement from David Rowntree; a witness statement from Alfons Karabuda of Naomi Musickforlag AB, who provided evidence as to the nature and scale of Black Box royalties; a witness statement of Julian Maitland-Walker of Maitland Walker LLP who were solicitors for the PCR; an expert report from Richard Murgatroyd of RBB Economics addressing market dominance; expert reports from Patrick Savage of YMU Business Management Limited addressing a methodology for calculating class wide damages; and a witness statement from John Astill of Exton Advisors who provided evidence relating to the securing of litigation funding for the class.
9. In answer, and in support of the application for summary judgment, the PRS served witness statements from Karen Fishman, Lead Counsel-Corporate at the Second Defendant who described the PRS's corporate structure and governance; and Timothy Arber, Director of Operational Improvement at the Second Defendant who gave evidence in relation to revenues streams and "Black Box" royalties.
10. During the course of the hearing this Tribunal became concerned about aspects of the cost-benefit analysis and in particular the estimated size of the costs compared to the size of the claim for damages. We were not satisfied that there was sufficient evidence before the Tribunal to assess the size of any damages

claim, so we invited the PCR to adjourn this matter in order to give both the PCR and PRS an opportunity to submit further evidence on this point.

11. During the period of the adjournment, on 15 May 2025, Willkie Farr & Gallagher (UK) LLP wrote to this Tribunal to inform us that they were now instructed by the PCR in place of Maitland Walker LLP. This was notable given that Maitland Walker LLP had prepared the claim and secured litigation funding prior to the identification of Mr Rowntree as a proposed class representative. The removal of Maitland Walker LLP and the introduction of a new firm of solicitors was unexpected in the circumstances. The change of solicitors gave rise to an application by the PCR to adjourn this hearing of 16 June 2025 in order that Mr Rowntree's new legal representatives should have the opportunity to propose amendments to the CPO Application. For the reasons given below we have refused that application.
12. In these unusual circumstances we found it of assistance to hear oral evidence from Mr Rowntree as to the process he had been through to determine whether it was appropriate to change solicitors during the course of certification. We considered this relevant to our being satisfied that he was a suitable class representative.

B. BACKGROUND TO BLACK BOX ROYALITES

13. Members assign to the PRS their performing rights pursuant to standard form terms. The PRS agrees to use its best endeavours to pay to its members, the royalties due to them under its constitution.

(1) Royalty streams

14. There are four main categories of royalty revenue: (i) broadcasting; (ii) public performance; (iii) online; and (iv) international.

- (1) The “**broadcasting**” category relates to the licensing of PRS members' works broadcast on TV and radio, including BBC, ITV and Sky.

- (2) The “**public performance**” category relates to the licensing of the performance of PRS members’ works in public, whether as recorded music or live. Examples include performing live music in pop concerts and playing recorded music at public venues.
- (3) The “**online**” category relates to the licensing of PRS members’ works for digital services of all types including music downloads and streaming, podcasts, and video on demand services. The “online” category can broadly be split into two sub-categories, being: multi-territorial online licensing (“MTOL”) and non-MTOL online. Digital music service providers (“DSPs”) which operate in multiple territories, such as Spotify or Apple Music, generally fall into MTOL, whereas non-MTOL online generally covers online audio-visual services such as Netflix, video games and audio services which predominantly operate only in the UK.
- (4) The “**international**” category relates to the licensing of PRS members’ works in territories outside the UK. This typically involves and relies upon licensing and distribution activity undertaken by CMOs based overseas in the relevant territory, with whom PRS has entered into reciprocal agreements. PRS relies upon information received from those affiliate CMOs to make onward distributions to its members.

(2) **Main types of licensing**

- 15. The two main types of licensing are: (i) repertoire-specific licensing (which generally applies only to MTOL); and (ii) blanket repertoire licensing (which generally applies to broadcast, non-MTOL, international and public performance).
- 16. Blanket repertoire licences authorise the use of any and all works in the PRS repertoire. The amount received by PRS pursuant to such licences does not tend to vary based on the number of times that particular underlying works are exploited. It is typically a fixed amount for a given period (which can vary from

period to period) covering the term of the relevant licence for the use of the whole repertoire.

17. The PRS submit that under a blanket repertoire licence there is no inherent distribution value for any particular usage on any given source or platform. The usage is not valued until the late stages of PRS's distribution process are completed and, would depend, *inter alia*, on the number of times a particular work is performed as a proportion of the total usage of works performed. In the case of repertoire-specific licences, PRS receives revenue collected from repertoire-specific licensing on a transactional basis by reference to individual usage, which has an associated value ascribed to it prior to the distribution stage.
18. In most cases accurate information is available to identify which works have been performed. Census information provided by the relevant licensee enables accurate identification of the works that have been played. This would apply, for example, to most online streaming and many radio stations. A second method used is sample-based distribution which involves collecting a representative sample of actual performances over a period and using that as a basis for distributing royalties more generally. This tends to be used where usage is repetitive. A third method is analogy-based distribution which is used where there is insufficient data available such as in the case of use in pubs and restaurants. The appropriateness of these methods is not the subject of this dispute.

(3) Black Box royalties

19. Royalties are distributed by reference to specific works. It is necessary for the PRS to be able to identify the writers and publishers entitled to a share of royalties in respect of each work. The PRS relies upon its members to register their works and to provide accurate information about writers and publishers entitled to a share of the royalties. Where the writer of a work has a publisher, it is the publisher which is responsible for registering the work. The publisher is also required to register the interests of the writers and must register the relevant publishing agreement. The standard arrangement is that the publisher receives 50% of the royalties and the writers the other 50%. PRS does not accept

works that seek to allocate more than 50% of royalties to the publisher. In some cases the writer may receive more than 50% of the royalties. Where the registration of a work is unpublished the writer is responsible for registering their interest in the work.

20. When a work is registered it is issued a tunecode which is used to identify that work. Subsequently it should be issued with an International Standard Musical Work Code and may receive one or more of the international codes.
21. Evidence was filed on behalf of the PRS by the Director of Operational Improvement at the Second Defendant, Timothy Arber. Mr Arber describes the efforts the PRS makes to maximise the accurate distribution of royalties. He describes PRS's Distribution Committee which is a subcommittee of the board in the following terms:

“56. ...The Distribution Committee's specific duties include considering and approving PRS management's proposals on distribution policy, which involves considering the financial impact that policy decisions may have on members' earnings, and considering the balance of cost efficiency and accuracy. When carrying out their duties, the members of the Distribution Committee must act in the interests of all the members of PRS as a whole. The Distribution Committee includes an equal number of writer members and publisher members as well as independent non- executive directors.

57. At the beginning of each year, PRS management, in consultation with the Distribution Committee, sets an agenda for the (up to 6) Distribution Committee meetings scheduled for the year ahead, based on matters that the Distribution Committee has asked PRS management to look into and matters which PRS management wishes the Distribution Committee to consider and/or approve. This can include a wide variety of situations, including a change in data availability, processing or cost, which affects how royalties would be distributed in respect of a certain type of usage or under a certain policy. During the course of the year, other matters invariably arise which require action to be taken and which are therefore added to the Distribution Committee's agenda. These matters may relate to issues that are one-off, such as an unexpected receipt of licence fees, or matters that may be temporary in nature, such as unanticipated delays in receiving data.

58. The prioritisation of matters brought to the Distribution Committee's attention is based on factors such as: (i) the value of distributions governed by the policy; (ii) the potential benefit of a review, such as increased accuracy or cost efficiency; and (iii) the potential risks of not reviewing current policy, such as the absence of a distribution policy for a new revenue stream, or ongoing distributions which need further consideration in light of a change in data availability.”

22. Mr Arber explains reasons why writers may not receive royalties in respect of their works, which the PCR calls Black Box royalties. “Unclaimed” royalties may arise where, for example, the PRS has not been provided with correct bank details for a writer. In these circumstances the money is held for 3 years after which it may be forfeited. It is said by PRS that such sums cannot form part of this claim as no unclaimed royalties have been distributed to publishers during the relevant period.
23. Another particular reason why a writer may not receive royalties is the inability to identify the relevant work. On receipt of usage data, the PRS first seeks to identify works using automated process systems. This matches approximately 90% of the works. Where this is unsuccessful manual matching takes place by research officers in the Processing Operations team and the results are control checked by Operational Assurance. There is a *de minimis* threshold for manual matching of £5 which has been applied in the past and is now £3. About 2.5% of usages are matched this way. This means that approximately 7.5% of works remain unidentified.
24. A further reason why a writer may not receive royalties is where a work is identified but not all the writers and/or publishers are identified. This may be because parties have not registered their interest or because there is a dispute as to entitlement. In these circumstances (at least in respect of non-MTOL shares) money is held on account for 3 years during which time the relevant members can register their interests after which the relevant funds are distributed over the claimed shares.
25. In addition, there may be situations where the PRS has identified some but not all publishers or writers associated with a work.

C. THE CLAIM

26. It is averred that the PRS is dominant in the market for the administration of performing rights royalties for songwriters and/or writers and publishers (excluding option 3 publishers) in the United Kingdom. It is said that it has abused and continues to abuse its dominant position contrary to the Chapter II

Prohibition, and prior to 31 December 2020 contrary to Article 102 of TFEU. It is also said the PRS has breached and is continuing to breach the Chapter I Prohibition (and prior to 31 December 2020 Article 101 TFEU) by its agreements with its members and/or its royalty distribution decisions.

27. It is averred in the Collective Proceedings Claim Form that most Black Box royalties relate to songwriters:

“45.1. The number of songwriter members is far greater than the number of publishers. Of the 165,000 PRS members, well in excess of 160,000 members are likely to be songwriters. Accordingly, the reporting and data defects will more likely apply to a songwriter than to a publisher. There are only several large publishers in the United Kingdom, and they conclude many hundreds or thousands of agreements with individual songwriters.

45.2. Most of the royalties processed by PRS relate to songwriters. As explained above in the case of public performances outside the United Kingdom, publisher members typically choose to be paid their share of the royalty outside of the United Kingdom. Publishers also tend to be paid direct in respect of multi-territorial online licensing.

45.3. When staff at PRS input musical works and interested party data into PRS’s databases, they are more likely to transcribe publisher details correctly as there is more familiarity with the names of publishers.

45.4. Publishers are more likely to verify the accuracy of a royalty payment than a songwriter. Publishers have significant resources to check whether their royalty payments are correct and to conduct royalty payment audits and, where necessary, question the amount of a royalty payment with PRS.”

28. It is also said that Black Box royalties owed to songwriter members are being distributed to publishers and that this is unfair. In particular it is said:

“62. In breach of this special responsibility PRS is imposing unfair trading terms on its songwriter members through its policies that permit the distribution to publishers of performing rights royalties owed to PRS songwriter members. Moreover, the distribution policies of PRS and their implementation are not equitable since they require songwriters to dispose of their works without entitling them to obtain the full royalties owing to them.

63. To the extent that songwriter royalties cannot be matched to the correct songwriter – hence the Black Box – there is no objective reason why the unmatched royalties should not be allocated to the songwriters as a class. There is no objective reason why any portion of unmatched songwriter royalties should be paid to publishers as a class.”

29. There is no complaint about the efforts to which the PRS go to identify works and/or writers. The PRS has not disputed that royalties associated with

unidentified works are, in certain cases, distributed *pro rata* between publishers and writers. Nor, at this stage of the proceedings, does it contradict the contention that legal persons who should be entitled royalties, but cannot be identified, are more likely to be songwriters than publishers.

D. THE APPLICATION FOR AN ADJOURNMENT

30. This application for a collective proceedings order was first heard on 12 and 13 February 2025. Determination of the question of certification was adjourned to give the parties an opportunity to adduce further evidence relating to the cost-benefit of the proceedings. A further hearing was listed on 16 June 2025. On 15 May 2025 Willkie Farr & Gallagher (UK) LLP wrote to inform the Tribunal that they were now instructed in these proceedings in place of Maitland Walker LLP. They stated in their letter that a change in solicitors may necessitate amendments to the application for a collective proceedings order and that this was under consideration. They further suggested that the hearing on 16 June 2025 may need to be adjourned.

31. On 5 June 2025 Willkie Farr & Gallagher (UK) LLP wrote a further letter to this Tribunal applying for an adjournment of the 16 June 2025 CPO hearing in these Proceedings. They gave the following reasons:

“(a) on the basis of the analysis and assessment already carried out, and without waiver of any privilege, a number of channels of further inquiry have been identified that it would be in the interests of the proposed class be pursued now and prior to certification. These inquiries are being actively pursued, however, they will not be completed by 16 June;

(b) in light of the analysis and assessment of the proposed claim that has been undertaken in the time available, and again without any waiver of privilege over advice given to the PCR, it is likely that the PCR will make an application to amend aspects of the CPO Application and supporting documents and/or adduce further evidence. We wrote to the solicitors for the Proposed Defendants on 22 May 2025 to seek their consent to this course, should the PCR be so advised to make amendments and adduce further evidence. By a letter dated 3 June 2025, the Proposed Defendants stated their opposition to any such course (a copy of the correspondence is attached for the Tribunal’s reference);

(c) the new team of advisors means that there will need to be updates made to the litigation budget, the ATE insurance policy and certain of the documents filed in support of the CPO, such as at least those describing the budget and the legal team. Although Mr Rowntree’s current funder and the ATE insurers have

accepted his decision to replace his existing legal advisors, and no issues are anticipated in getting the relevant documents updated, it takes time for the relevant documentation to be settled and put in place. The Tribunal and the Proposed Defendants will need to have an opportunity to consider these updates, but it is now clear that the updates will not be completed in advance of 16 June; and

(d) accordingly, the PCR is not in a position to properly address the issue of proportionality at the hearing of 16 June.”

32. The letter identifies a number of channels of enquiry, without stating what they are, and it states that “it is likely” that there will be an application to amend aspects of the CPO Application. Since 5 June 2025, no evidence has been served to support the application for an adjournment or to expand upon those reasons: no draft amendments have been produced, nor has there been any indication of the likely scope of any future amendments.
33. It is unsatisfactory that this application for a collective proceedings order should be adjourned for a second time. Further delay leads to further commercial uncertainty and further expenditure of costs. We recognise that a period is required for the new legal advisors to assimilate the details of this case, but we assume a material amount of reading would have occurred before 15 May 2025 since when there has been a further four weeks during which to consider materials. It is not self-evident that this is insufficient time for the advisors to be sufficiently appraised of matters as they stand, particularly when they have access to counsel who are familiar with the proceedings. At the very least we would have expected an application for an adjournment to be supported by substantive reasons as to why a further adjournment was necessary and, insofar as amendments to pleadings and other documents are being contemplated, either draft amendments or at the very least a proper explanation as to the nature and scope of those amendments and cogent reasons why a draft is not yet available. Stating that it is “likely” that an application of unexplained scope will be made is not a sufficient justification for an adjournment. The application is therefore refused.

E. THE APPLICATION TO STRIKE OUT THE CLAIM AND FOR SUMMARY JUDGMENT

34. Rule 79(4) of the Rules provides that at the hearing of an application for a collective proceedings order the Tribunal may hear an application to strike out the claims under Rule 41(1) or for summary judgment under Rule 43(1). In *Merricks v Mastercard Inc* [2020] UKSC 51; [2021] Bus LR 25 (“*Merricks*”) Lord Briggs stated at [26]:

“26. Rules 41 and 43 provide for the CAT, on the application of a party or of its own initiative, to have power to strike out all or part of a claim or to give summary judgment in relation to a claim or an issue in a claim against a claimant or defendant. These powers are fully applicable to collective proceedings, both generally and at the time of the hearing of an application for a CPO: see rule 79(4). They enable the CAT to prevent collective proceedings going to a (probably very expensive) trial in cases where they, or parts of them, disclose no reasonable cause of action, are abusive or do not raise triable issues. In short, they enable the CAT to exercise a merits-based control over collective proceedings on lines similar to those available in civil proceedings generally.”

35. The principles to be applied on a summary judgment application are well known and are set out by Lewison J in *Easy Air Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. A strike out application will succeed where there are no reasonable grounds for making the claim such as where the pleaded claim will fail as a matter of law or where the claim form fails to identify a coherent basis for bringing the claim.
36. The complaint underpinning this claim is said to be the “unfairness” of imposing trading terms that permit the distribution to publisher members of performing right royalties owed to songwriter members. If a songwriter owns or has an interest in the copyright of a musical or literary work and it is performed in public, it might be said to be “unfair” – in the sense of unsatisfactory – if for one reason or another they do not receive royalty payments corresponding to that interest. That is not however the unfairness to which reference is made in the Claim Form. The unfairness is *not* said to be the failure to match particular works to member writers with an interest in those works. The unfairness is said to be the failure to distribute unmatched royalties owed to writers where they do not have an identified interest in the copyright of the particular works.

37. As we have already observed, no complaint is made in these proceedings in relation to the PRS's inability, in certain instances, to identify the writers whose works are being performed. It is not suggested that the PRS's systems, by which it matches works to writers, are materially deficient or inadequately implemented. Nor is it suggested that the PRS is not entitled to distribute royalties corresponding to unmatched works to persons other than the writer associated with the work.
38. The PRS advances various reasons why it is entitled to summary judgment. Some of these reasons were elusive but two were clearly advanced. The **first** is that the Claim Form does not articulate a claim to which section 47B of the Act is capable of applying. It is said that individual writers do not have a claim against the PRS and consequently writers as a class do not have a claim against the PRS.
39. The **second** was a complaint that no proper counterfactual has been described in that there is a failure to explain how Black Box royalties should be distributed. We deal with this second complaint when we come to consider whether the claims are suitable for an aggregate award of damages.
40. Section 47A of the Act provides:

“47A Proceedings before the Tribunal: claims for damages etc.

(1) A person may make a claim to which this section applies in proceedings before the Tribunal, subject to the provisions of this Act and Tribunal rules.

(2) This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of—

(a) the Chapter I prohibition, or

(b) the Chapter II prohibition.

(3) The claims are—

(a) a claim for damages;

(b) any other claim for a sum of money;

(c) in proceedings in England and Wales or Northern Ireland, a claim for an injunction. ...”

41. Section 47B(1) of the Act provides:

“47B Collective proceedings before the Tribunal

(1) Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies (“collective proceedings”). ...”

42. Mr Pickford KC on behalf of the PRS correctly submits that collective proceedings require the members of the class to have a claim under section 47A of the Act. Section 47B of the Act does not of itself provide a cause of action. As stated in *Walter Hugh Merricks CBE v Mastercard Inc & Others* [2022] CAT 13 at [26]:

“26. The bringing of collective proceedings by the proposed class representative combines actual claims by the proposed class members and a CPO is required for those collective proceedings to *continue*: s. 47B(1) and (4). Accordingly, the individual claims of potential class members are not contingent claims or potential future claims which can start or crystallise only if and when a CPO is granted. It is therefore fundamental to the CPO application that all the potential class members have existing claims at the time when the application is made. This contrasts with the position where an applicant needs the permission of the court to start the proceedings, e.g. for judicial review: see s. 31(3) of the Senior Courts Act 1981; or for committal for certain kinds of contempt: see CPR r. 81.3(5).” (emphasis in original).

43. The same conclusion was reached by this Tribunal in *Commercial and Interregional Card Claims I Ltd v Mastercard Incorporated & Others* [2024] CAT 39 where it was stated:

“61. There is also, in our judgment, a clear distinction between a class definition which might, inadvertently, produce the result that a class member turns out not to have a claim, and the deliberate inclusion in the class of a large number (potentially the majority) of class members in respect of which it is known that they have no claim. The former is a necessary function of the type of proceedings, involving classes with large membership, and reflects the discouragement by the Tribunal in [129] of [*Gutmann v First MTR South Western Trains Limited* [2021] CAT 31] of “speculative examples”. The latter seems to us to disregard altogether the plain requirements of section 47B.

62. In *Neill v Sony Interactive Entertainment* [2023] CAT 73, the proposed class representative sought to include in the proposed class consumers who purchased games after the proceedings had been issued. The Tribunal held that section 47B (read with 47A(2)) prevented such an approach, accepting Sony’s argument that the purpose of the collective proceedings regime was to combine claims which must be extant at the time of the claim form. Although not directly addressing the question before us now, we agree that the logic of the Tribunal’s decision in *Neill v Sony* supports the Proposed Defendants’ arguments here.

63. We therefore agree with the Proposed Defendants that section 47B(1) does not permit the collective actions regime to include class members who have no basis to make a claim and could not advance such a claim in any other forum. That is clear from the plain wording of the statute and is also consistent with the authorities which were cited to us. The PCRs derive no assistance in their reliance on observations in [*Mastercard v Merricks* [2020] UKSC 51] and [*Gutmann v First MTR South Western Trains Limited* [2021] CAT 31] about situations where there may be no loss, or no need to prove loss because of the aggregate damages regime. That is a different question altogether and not relevant to the one before us.”

44. The PCR made reference to the decision of the Court of Appeal *London & South Eastern Railway Limited v Gutmann* [2022] EWCA Civ 1077 (“*Gutmann CA*”) where it is stated at [93]:

“93. The law relating to abuse is concerned with consumer unfairness because when an undertaking is dominant it is, by definition, freed from competitive shackles which otherwise incentivise and discipline it to maximise consumer welfare and benefit. This is why most laws worldwide which prohibit abuse of dominance include within the prohibition some form of “unfair” terms and prices. ...”

45. The PCR also drew attention to paragraphs [37]–[43] of *Gutmann CA* to support the proposition that each individual in an opt out claim does not have to prove liability and that damages can be assessed on an aggregate basis. That is correct but that does not mean the class should not properly be drawn so that a top-down analysis of liability can be applied. As stated in that case:

“38. We disagree. It is common ground that quantum should be calculated so that an award of damages does not overcompensate. Section 47C(2) does not rewrite the constituents of the tort to remove liability issues; it merely permits those ingredients to be established deploying different - top down - evidence. In determining quantum, the CAT therefore necessarily ensures that it excludes from the calculation those who fail at the liability stage and the methodology must, at some point, include a device for winnowing out no-loss members of the class. When this methodology is applied it necessarily traverses the boundary between recoverability and non-recoverability. These are two sides of the same coin. We therefore have difficulty in understanding how an aggregate quantum exercise does not involve the CAT simultaneously determining liability for the simple reason that in fixing the outer-parameters of quantum it is also drawing the line between liability and non-liability. The language of section 47C(2) is consistent with this. It creates a power for the CAT in determining what is “recoverable” to apply an aggregate approach. The converse of recoverable is irrecoverable; the exercise of determining aggregate recoverability necessarily entails excluding categories of consumer who should recover nothing.

39. In addition, section 47C(2) must be construed purposively. This includes: ensuring that the provision is “effective”; ensuring that it facilitates but does not hinder the enforcement of rights; and, enabling the collective regime to

operate as a device which creates *ex ante* incentives for undertakings to comply with the law (see [*BT Group plc v Justin Le Patourel* [2022] EWCA Civ 593] paragraphs [25] – [30]). In *NTN Corporation and others v Stellantis NV and others* [2022] EWCA Civ 16 at paragraph [29] (“*NTN*”), the Court of Appeal, citing earlier Supreme Court and other judgments, described the principle of effectiveness: “... *procedural and evidential rules must not make it practically impossible or excessively difficult to vindicate ... justiciable rights*.” (emphasis in original).

46. The PRS points out that most writer members of the PRS will have their works and shares properly recorded and will have received royalty payments owed to them. They submit that it follows that the majority of the class do not have individual claims against the PRS and that consequently the claim on behalf of writer members is not properly constituted in accordance with section 47B of the Act.
47. It is necessary to have regard to how exactly the claim is put by the PCR. The abuse of dominance (Chapter II Prohibition) is said by the PCR to be the imposition of “*unfair trading terms on its songwriter members through its policies that permit the distribution to publishers of performing rights royalties owed to PRS songwriter members*” (see paragraph 62 of the Collective Proceedings Claim Form cited above).
48. The greater focus was on the Chapter II Prohibition. In respect of the Chapter I Prohibition, the Collective Proceedings Claim form did not articulate a materially different case save that it was stated:

“Agreement and/or Decision of an Association of Undertakings

66. The PRS Rules and Regulations form part of the contract of membership between PRS and each of its members. Pursuant to Clause 4(b) of the PRS standard terms of assignment for writers, writers are bound by the PRS Constitution, which is in turn defined at Clause 1(b) as comprising PRS’s Memorandum of Association, Articles of Association, and the Rules and Regulations.

...

Appreciable restriction of competition

68. PRS’s agreements with members and/or its royalty distribution decisions have distorted the competitive dynamic between songwriters and publishers in the light of the fact that PRS has distributed a significant amount of Black Box royalties to publishers that should have been paid to songwriters.

69. The vast majority of PRS members are songwriters. The number of publishers in the United Kingdom is relatively small. The several larger publishers will handle many hundreds or thousands of songwriter contracts. There is therefore in many cases a competitive imbalance between a songwriter and a publisher which will often have a stronger negotiating position over the songwriter.

70. The decisions by PRS to allocate royalties to publishers that should be paid to songwriters exacerbates this competitive imbalance and distorts the competitive process between them.”

(1) The PRS Rules

49. The PCR draws attention to the PRS Rules and policies to support its case. Clause 4(b) of the PRS standard terms for writers states:

“4. You:- ... (b) accept that you are bound by our Constitution;”

50. The Constitution is defined at 1(b) as:

“Constitution means our Memorandum of Association, Articles of Association, Rules and Regulations (which are available from us upon request) and any changes or additions made from time to time to those documents”

51. Rule 2 of the Rules and Regulations of the PRS governs the distribution of revenues. The provisions are lengthy and for that reason are not set out in full. Rule 2(ga) deals with the situation where “*after taking all necessary measures to identify the persons interested in that work [they are] unable to distribute the net fee...*”. In these circumstances the sums are kept in a separate account and the PRS is required to make this information available to the public. Rule 2(gb) and 2(h) essentially provide that after three years these sums shall be deemed non-distributable. In particular Rule 2(gb) states:

“(gb) Where, notwithstanding the steps taken in Rule 2(ga), the Society is unable to identify the person interested in the work for the purposes of paying that person the sum before the expiration of three years from the end of the relevant financial year, the sum shall on the expiration of that period be deemed to be “non-distributable” for the purposes of the following Rule 2(gc) PROVIDED that no sum shall be deemed non-distributable under this Rule where the identity of the person interested in the work has been ascertained or is ascertainable by the Society, but that, having verified its records and other readily available records relating to that person, the Society has been unable to locate the person interested for the purposes of effecting payment of the sum. Such sum shall be considered “unclaimed” for the purposes of these Rules and shall be dealt with in accordance with the provisions of Rule 2(h).”

52. Rule 2(gc) states:

“(gc) All sums deemed non-distributable under Rule 2(gb) shall be dealt with in accordance with the following provisions:

(i) where the sum relates to any share which may be payable to a publisher or proprietor of the work, the sum shall, where the composer and/or author of the work has been identified, be paid to, as the case may be, that composer and/or author and/or the Affiliated society of which the composer and/or author is a member;

(ii) subject to Rule 2(gc)(iii) below, all sums other than sums referred to in Rule 2(gc)(i), shall be credited to such revenue accounts as the Council shall from time to time direct and distributed *pro rata* amongst the persons entitled to participate in the distribution at which the sums were allocated;

(iii) The Members’ Council may before any distribution is made pursuant to Rule 2(gc)(ii) direct that the whole or any part of the sums referred to in that Rule be applied to the reserve fund referred to in Article 58(b) of the Articles of Association; and/or used for such charitable and/or other purposes consistent with Article 58(a)(ii)-(v) as the Council shall, in each case, have determined is necessary and in the interests of the Society.”

53. It is said that these rules are directed to “unclaimed” royalties, where the work has been identified but one or more relevant writer members have not, such that payment cannot be made. It is of note that in 2(gc)(ii) and (iii) that redistribution is contemplated. The rules provide that this could be *pro rata* distributed among persons entitled to distributions from the revenue account or there could be a distribution to a charity.

54. In addition to the PRS Rules there is a Distribution Policy. This is a detailed document of over 100 pages and deals with different types of revenue. The PCR draws attention to a passage on page 21 in relation to Broadcast Revenue where it is stated that:

“No money is reserved for any unmatchable usages. Any subsequent claims for unmatched usages are funded from next year’s revenue for the same revenue pool.”

55. The PCR also points to page 84 of the Distribution Policy where it is stated in relation to on-line revenue:

“Unmatchables and carry forwards

...

For multi-territory transactional online usage, we collect revenue relating to usage of works that could not be identified (Unmatchables), or for shares of matched works where the owner cannot be identified (Copyright Control).

For most online services, we collect revenue relating to UK usage and for only the repertoire we administer directly. This is distributed at the earliest opportunity after the initial distributions of matched repertoire royalties. We distribute it pro rata over all identified repertoire for the relevant service and usage period.

For some smaller services, we collect revenue relating to UK usage for all repertoire, including repertoire from owners whose multi-territory online rights PRS does not otherwise administer directly. For this, a different approach is followed to help facilitate and administer royalty payments to those repertoire owners. This money is distributed as follows:

- Unmatchables:
 - 75% of the money for unmatched usage is distributed pro rata over the identified repertoire on an annual basis for the relevant service and period. Such distributions will be made across all matched data for all rightsholders, including direct licensors.
 - The remaining money is held for three years to fund claims and disputes, after which it is distributed pro rata over all identified repertoire for the relevant service and usage period.
- Copyright Control:
 - All money for unidentified shares is held for the three years before being distributed pro rata. This allows us to attempt to make adjustments for unidentified shares which are subsequently registered.

‘Pro rata’: in this context, this means money is distributed using the identified (matched) repertoire. Therefore, to all those who participated in the original distribution, we will distribute an equivalent share of the unmatchable and copyright control revenue.”

(2) Analysis

56. We have not heard detailed submissions on the correct interpretation of the PRS Rules and the Distribution Policy. In the event that these proceedings progress to trial we see scope for further elucidation as to their correct interpretation and how the PRS Rules and Distribution Policy interplay. For present purposes, on this application for summary judgment/strikeout, we accept the interpretation advanced by the PCR at paragraph 46 of the Collective Proceedings Claim form:

“It is averred that the distribution of unmatched Black Box royalties is allocated in the same or similar percentages as PRS distributes matched royalties...”

57. We accept it is arguable that the proportion of writers' royalties that are Black Box is greater than the corresponding proportion for publishers. We also accept that it is arguable that when Black Box royalties are distributed *pro rata*, writer members will receive a lesser sum than they would were they to be distributed in accordance with a formula reflecting the proportion of writers' works which give rise to Black Box royalties.
58. In response to the PRS's application the PCR contends that it is not obliged to identify a specific individual with a claim under section 47A of the Act because section 47C(2) contemplates an aggregate award of damages. We accept that as an evidential matter claims can be proven top down at an aggregate level, but that does not mean that the class should not be crafted to consist of members with individual claims.
59. We return to the individual claim which each member of the class is said to have against the PRS. At paragraph 7 of the Collective Proceedings Claim form in the "Claim Summary" it is said that the PRS's distribution policies are "unfair". That unfairness is explained at paragraph 8: "*The unfairness arises because PRS pays royalties to publishers which likely belong to songwriters and should be paid to them*". At paragraph 62 it is said the "*PRS is imposing unfair trading terms on its songwriter members through its policies that permit the distribution to publishers of performing rights royalties **owed** to PRS songwriter members*" (cited in full above, emphasis added).
60. The PCR describes the unfairness as not paying royalties "owed" to songwriters. However, the writers (and for that matter publishers) who receive Black Box royalties as a result of their being redistributed have no prima facie entitlement to those revenues. Other than receiving royalties for their own works, what is owed to songwriters is only that which is promised in accordance with the PRS's rules and policies. It is *not* contended that the PRS is not complying with its contractual obligations. If one looks beyond the contract and asks what *should* the PRS's rules and policies provide for, then one can reasonably contend that the PRS should seek to ensure writer members should get paid an appropriate royalty when their works are performed in public. However, there is no

contention that writer members are not generally being paid an appropriate royalty for their works.

61. The people who are potentially “owed” Black Box royalties are those whose work is performed and for various reasons cannot be identified and therefore paid. However, the class is not drawn to describe those people, it is drawn to describe *all* writer members of the PRS.
62. It follows that no reasons are advanced which are capable of supporting the contention that members of the class share the common feature of being “owed” Black Box royalties. Further no coherent reasons are advanced to support the position that, notwithstanding that members of the class are not owed these Black Box royalties, it is unfair and abusive not to pay them these royalties, or a greater proportion of them.
63. As we have observed, it is not said that it is inappropriate to redistribute Black Box royalties, away from the people who have a potential claim to those royalties, to others. The complaint relates to the manner of this redistribution. No doubt Black Box royalties could be redistributed in many different ways and some of these ways might be considered preferable to others: for example they could be given to those members who are the most needy; or to a musical charity; or to every member in equal portion; or, as they are, distributed *pro rata*. Just because one manner of distribution might be considered preferable to another does not of itself mean exercising a choice is unfair or abusive.
64. We conclude that the Claim Form does not disclose facts which support the claim for infringement of Chapter I or Chapter II of the Act, nor does the collective action have a reasonable prospect of success. In the premises the applications for summary judgment and to strike out the claims succeed, and certification is refused.

F. IS THE CLAIM SUITABLE FOR AGGREGATE DAMAGES?

65. The *Microsoft* test,¹ originally formulated by Rothstein J, was adopted by the Supreme Court in *Merricks* and has been found to be a helpful guide. See [135] of *Merricks*:

“135. In considering the expert evidence relied on by the applicant to seek to satisfy the CAT that the claims were suitable for determination in collective proceedings, the CAT decided that the approach it should adopt could appropriately be drawn from the following passage in the judgment of Rothstein J in the Supreme Court of Canada in the *Microsoft* case [2013] SCC 57:

“the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.”

136. Neither party sought to argue before the CAT that this was not an appropriate approach for the CAT to adopt (see paras 58–59 of the CAT’s judgment).”

66. In *Gutmann CA*, Green LJ made observations on the *Microsoft* test.

“53. **Not a statute:** The *Microsoft* test is not a statutory test. There is no magic to it. It articulates a common sense approach that any court should be able to apply. It confers upon the court or tribunal a broad discretion to approve of the methodology to be used at trial. This is evident from the following terms used in the test: “sufficiently credible or plausible”, “some basis in fact”, “a realistic prospect of establishing loss on a class-wide basis”, “the methodology cannot be purely theoretical or hypothetical”, “grounded in the facts of the particular case”, “some evidence of the availability of the data to which the methodology is to be applied.” The words “sufficiently”, “some” (used twice in the test), “grounded”, “realistic” and “purely”, highlight both the discretion conferred upon the CAT to make a value judgment, but also the relative nature of the exercise.

54. **The test is counterfactual:** The methodology is based upon a counterfactual model of how the market would have operated absent the abuse. It is quintessentially hypothetical and, for this reason, will use assumptions and models and, frequently, regression analysis. It is therefore not a fair criticism to make of a methodology that it is hypothetical; though, equally, the CAT will expect to see “some” factual basis for the assumptions and models deployed,

¹ The *Microsoft* test is based on the Canadian Supreme Court decision in *Pro-Sys Consultants Ltd v Microsoft Corp*n [2013] SCC 57.

hence also the reference in *Microsoft* to the methodology not being “purely” theoretical or hypothetical.

55. **Absence of disclosure:** The methodology is subject to a certification assessment prior to disclosure and is thereby necessarily provisional and might, properly, identify refinements and further work to be carried out after disclosure. In many competition cases there will be a distinct informational asymmetry between a claimant and a defendant which might be exacerbated in aggregate damages, top down, cases where the relevant information might predominantly be in the possession of the defendant. At the certification stage all that might be possible is for the class representative to advance a methodology identifying what might be done following disclosure. This is why in *Microsoft* the Court referred, in prospective terms, to there being “some evidence of the availability of the data to which the methodology is to be applied.”

56. **Issues not answers:** At the certification stage the methodology must identify the issues, not the answers. The CAT is concerned to identify the issues and gauge whether the methodology proposed for determining those issues is workable at trial when the issues are tested and might lead to different answers, some in favour of defendants. Because of this the CAT will wish to assess whether, if the defendants do win on some issues at trial, the methodology is capable of being adjusted so as to reflect only partial victory by the class.

57. **Intuition and common sense:** Judges are expected to use their common sense. In this case the acceptance by the CAT of the assumption made by the expert, Mr Holt, that Travelcard holders could be assumed, rationally, to wish to pay the lowest possible fare is an example of the CAT arriving at a conclusion it considered was common sense or “informed guesswork”. The validity of this approach has repeatedly been endorsed in case law: see e.g., [Merricks] paragraphs [48] – [51].

58. **The breadth of the axe and the nature of the claim:** In forming its judgment at the certification stage the CAT will bear in mind that at trial it is armed with a broad axe by which it can fill gaps and plug lacunae in the methodology. The axe head is adjustable and can expand and retract to meet the nature of the case...”

67. The Black Box royalties comprise works or interests in works which cannot be identified by the PRS. It is said that it is wrong to distribute those royalties *pro rata*. In order to make an aggregate award of damages it is necessary to formulate a counterfactual and to identify the revenues which would in the counterfactual have been paid to the class. The Collective Proceedings Claim Form at paragraph 76, makes reference to Savage 1 as disclosing the common methodology for determining damages on a class-wide aggregate basis.
68. Mr Savage is executive chair of YMU Business Management Limited which provides specialist accounting, tax, royalties and professional advice to clients in the music business. He was instructed to provide a methodology for

determining class wide damages and his attention was drawn to the *Microsoft* test. The methodology he proposes is first set out in section 6 of his expert report. He describes Black Box royalties as including works which cannot be identified or those where particular writers or publishers associated with the work cannot be identified. He says that in most cases this arises because of “poor, missing or inconsistent data”.

69. Mr Savage explains that he needs to identify the amounts of Black Box royalties due to writer members which have otherwise been distributed to publishers and that he will need to calculate:

“6.1.1 the monetary amount of Black Box royalties that are due to PRS writer members over the class period, and

6.1.2 the monetary amount of Black Box royalties that PRS writer members actually received.”

70. At paragraph 6.5 he states that he will need to determine the portion of royalties which could not be matched to particular works or interested persons. He then states at paragraphs 7.2 and 7.3 of his report:

“7.2. In order to assess the Black Box revenue which has been incorrectly distributed over the class period to publisher members rather than writer members and calculate the aggregate damages due to class members (before interest), this blueprint will consider Black Box monies in each income type (Broadcast, Public Performance, Online and International) separately. The blueprint will closely follow the steps that PRS take to record and match music usage, as detailed in sections 8 to 12 of this report.

7.3. For the reasons explained above, this exercise is not simply a matter of comparing the value of distributions PRS make in aggregate to publisher members with those to their writer members. As PRS receives some royalties that are due to its members (as well as some royalties that are due to non-PRS members, under RRAs, for example), while third parties distribute royalties directly to PRS members (foreign CMOs and Administration Partners, for example), I will need to review the royalty receipts into PRS and payments by PRS together with the reporting of third party royalty allocations and payments. For the reasons set out below in the subsequent sections I expect PRS to have this information.” (emphasis in original).

71. He states at paragraph 7.6 of his report:

“7.6 In all instances, the below reviews of the various income streams would determine the expected distribution amounts to the writer and publisher members, against what PRS and/or Administration Partners have actually distributed to writer and publisher members. The difference in the expected

writer amounts versus what has been distributed (or indeed is held for distribution), constitutes class damages.”

72. In order to describe the counterfactual it is necessary to acquire information about the works which fall into the Black Box. For example, if a work is unknown because the data associated with it is corrupted it may not have been possible for the PRS to identify the work. In these circumstances it necessarily follows that the PRS is unable to identify the publishers or writers registered in respect of that work. This claim is based upon the contention that writers are more likely to be impacted in the case of Black Box royalties than publishers. The counterfactual requires an understanding of the extent to which Black Box royalties are owed to writers. But if works are unknown it is *prima facie* unknowable, in respect of those works, what proportions of royalties are owed to publishers and to writers. Mr Savage’s report does not explain how his audit of the data can enlighten the Tribunal as to the extent to which royalties associated with unknown works are impacting writers more than publishers. He gives no explanation of how for unknown works the “expected distribution” is to be ascertained.
73. His report then looks at the various types of royalty streams and purports to explain the methodology he would use to audit the various income types. But again, in these sections he does not properly address this problem of how he will identify the counterfactual. When questioned on this point Mr Robertson KC initially submitted that some sampling could be carried out. But the method by which that sampling could take place was not explained. In response to the Tribunal’s questions a note was provided entitled “*PCR Note on Matters Raised on CPO Hearing Day 1*”. This note states at paragraph 6:

“6. The audit process is focused on the situations “where music usage cannot be directly and wholly matched to a specific work and or the associated writer or publisher members”: Savage 1 ¶7.1. The process is aimed at identifying “Black Box revenue which has been incorrectly distributed over the class period to publisher members rather than writer members ... The blueprint will closely follow the steps that PRS take to record and match music usage, as detailed in sections 8 to 12 of this report”: Savage 1 ¶7.2.” (bundle references omitted).

74. We accept for present purposes that an audit may elucidate the amount of Black Box royalties and how those revenues have in fact been distributed. The note then states:
- “7. As explained at Savage 1 ¶7.6, “In all instances, the below reviews [i.e. at sections 8-12 of Savage 1] of the various income streams would determine the expected distribution amounts to the writer and publisher members, against what PRS and/or [Mandated Entities] have actually distributed to writer and publisher members”.
- “8. The gist given by Leading Counsel explained that Mr Savage would take as a starting point the expectation that the PRS’s income stream would be split 50/50 between publishers and writers. If there were divergences from that, an audit would wish to understand whether that income was being treated as Black Box royalties and if so how those were being actually distributed.” (bundle references omitted).”
75. Paragraph 7.6 of Mr Savage’s report explains that reviews of the data could determine the expected distribution to writer and publisher members. We interpret this to mean that it is possible to look at particular distributions of revenues for known works. The distribution of Black Box revenues is said to be the same (i.e. *pro rata*). What is not known is what the distribution of Black Box revenues *should* be on the counterfactual, and paragraph 7.6 does not address this.
76. As to paragraph 8 of the note, the reference to an expectation of a 50:50 split and looking for a divergence from this does not of itself explain how the counterfactual is to be arrived at.
77. We have at the forefront of our mind that we are only wielding a broad axe at the certification stage and that due allowance should be made for imperfections in the methodology which can be addressed going forward. But as yet the PCR has not, even in general terms, identified a plausible approach to how it might estimate the sums that should be paid to writer members on the counterfactual. It follows that the PCR has not identified a sufficiently credible or plausible method of how damages are to be assessed.
78. In the circumstances we decline to certify for this additional reason. Had the application for strike out and summary judgment not succeeded we would have been receptive to the submission that in the light of further information that has

been provided by the PRS during the course of this hearing between 13 February and 16 June 2025, the PCR should have a further opportunity to formulate its counterfactual in the light of that information. However, it is not clear to us that the defects to which we refer are easily remedied.

G. PROPORTIONALITY

79. Under Rule 79(2)(a), in determining whether the claims are suitable to be brought as collective proceedings this Tribunal is required to take into account *“the costs and the benefits of continuing the collective proceedings”*.
80. The legal costs of bringing the claim are estimated by the PCR to be a little under £18m. The PCR has in place a litigation funding agreement (“LFA”) with LCM Funding UK Limited (“LCM”) dated 14 September 2021 which was amended on 23 February 2024. The LFA provides two mechanisms for payment of the “Funders Fee”. In the event that the Funders Fee is approved to be paid out of undistributed damages the following sums are payable, although remain subject to approval by the Tribunal.

Time Period	Funder's Fee
≤ 6 months	Capital Deployed plus 4x Capital Deployed
6 months and 1 day < X ≤ 12 months	Capital Deployed plus 4.25x Capital Deployed
12 months and 1 day < X ≤ 18 months	Capital Deployed plus 4.5x Capital Deployed
18 months and 1 day < X ≤ 24 months	Capital Deployed plus 4.75x Capital Deployed
24 months and 1 day < X ≤ 30 months	Capital Deployed plus 5x Capital Deployed
30 months and 1 day < X ≤ 36 months	Capital Deployed plus 5.25x Capital Deployed
36 months and 1 day < X ≤ 42 months	Capital Deployed plus 5.5x Capital Deployed
42 months and 1 day < X ≤ 48 months	Capital Deployed plus 5.75x Capital Deployed
48 months and 1 day < X ≤ 54 months	Capital Deployed plus 6.00x Capital Deployed
54 months and 1 day < X ≤ 60 months	Capital Deployed plus 6.25x Capital Deployed
60 months and 1 day < X ≤ ∞	Capital Deployed plus 6.50x Capital Deployed + 30% annual compound interest on Capital Deployed

81. In the event that the Tribunal approves payment of the Funders Fee other than from wholly undistributed damages then the following sums are payable, again subject to the Tribunal’s approval.

Time Period	Funder's Fee
≤ 6 months	Capital Deployed plus 2x Capital Deployed
6 months and 1 day < X ≤ 12 months	Capital Deployed plus 2.25x Capital Deployed
12 months and 1 day < X ≤ 18 months	Capital Deployed plus 2.5x Capital Deployed
18 months and 1 day < X ≤ 24 months	Capital Deployed plus 2.75x Capital Deployed
24 months and 1 day < X ≤ 30 months	Capital Deployed plus 3x Capital Deployed
30 months and 1 day < X ≤ 36 months	Capital Deployed plus 3.25x Capital Deployed
36 months and 1 day < X ≤ 42 months	Capital Deployed plus 3.5x Capital Deployed
42 months and 1 day < X ≤ 48 months	Capital Deployed plus 3.75x Capital Deployed
48 months and 1 day < X ≤ 54 months	Capital Deployed plus 4.00x Capital Deployed
54 months and 1 day < X ≤ 60 months	Capital Deployed plus 4.25x Capital Deployed
60 months and 1 day < X ≤ ∞	Capital Deployed plus 4.50 x Capital Deployed + 30% annual compound interest on Capital Deployed

82. The PRS invites us to rule that these returns are excessive and inconsistent with the cost-benefit of these proceedings. It is pointed out that the trial of the claim, if it were to proceed to trial, will almost certainly be heard 5 years after 14 September 2021 which will engage the maximum multiplier. It is also pointed out that compound interest on capital deployed is thereafter to run at 30%.
83. This Tribunal has a supervisory role in authorising the payment of a funder's fee. However generally that jurisdiction is best exercised after judgment. As stated by this Tribunal in *Gormsen v Meta Platforms Inc* [2024] CAT 11 (cited by the Court of Appeal in *Gutmann v Apple Inc & Others* [2025] EWCA Civ 459):

“34. We are very grateful to Meta for raising this point. We accept entirely that funding gives rise to at least two issues in relation to which the Tribunal must exercise great care: (1) First, there is the question of whether – in terms of straightforward allocation – a funder is taking more from the class than they properly should. (2) Secondly, there is a danger of perverse incentives arising; or (to put it more accurately) in a conflict between funders' interests and class interests manifesting itself. The problem, as we see it, is that funders are (as the law presently stands) precluded from aligning themselves with the class: they cannot, without more, lawfully, seek a return that is based on the damages recovered by the class. To this extent, therefore, the “perverse incentives” are imposed on funders.

35. Both of these points arise against a context of commercial – and largely confidential – negotiation between the PCR and the funder, into which the Tribunal should be slow to venture. The collective actions regime in this jurisdiction depends on funders being ready and willing to assume the very considerable financial risk in funding litigation that is, on any view, large, complex and enormously expensive. It is not for this Tribunal, on certification,

to review the commercial arrangements that have been reached between the class representative and the funder. That was a point made by Mr Bacon, KC, for the PCR, and in substance we agree with it: the return to the funder, and questions of costs generally, are controlled by the Tribunal on settlement or judgment, and the Tribunal will be astute to ensure that a system intended to further access to justice does exactly that, and does not become a “cash cow” either for lawyers or for funders.

36. That being said, there do come points where funding arrangements contain provisions that are sufficiently extreme to warrant calling out or in extremis a blanket refusal to certify....”

84. In *Walter Merricks v Mastercard Inc & Others* [2025] CAT 28 (“*Merricks (Settlement)*”) this Tribunal considered, in the context of a settlement agreement, the return which the funder should receive. It drew upon the jurisprudence and experience of Australian courts in class actions, citing the Full Court of the Federal Court of Australia in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148 (“*Money Max*”). The Tribunal in *Merricks (Settlement)* stated at [170] regarding *Money Max*:

“170. [*Money Max*] was a shareholder class action where the representative plaintiff sought an order from the court at an early stage of the proceedings approving a funding commission rate of 30% of any settlement or judgment of damages. The court declined to make that order, stating at [11]:

“...Court approval of a reasonable funding commission rate is to be left to a later stage when more probative and more complete information will be available to the Court, probably at the stage of settlement approval or the distribution of damages.”

Then, under the heading “The benefit of judicial approval of the funding commission rate”, the court stated, at [80]:

“We do not seek to and cannot predetermine the relevant considerations for the approval of a reasonable funding commission rate. They will be a matter for the judge hearing the approval application and it will depend upon the circumstances. However, it seems likely that the relevant considerations would include the following:

- (a) the funding commission rate agreed by sophisticated class members and the number of such class members who agreed. That can be said to show acceptance of a particular rate by astute class members;
- (b) the information provided to class members as to the funding commission. That may be important to understand the extent to which class members were informed when agreeing to the funding commission rate;
- (c) a comparison of the funding commission with funding commissions in other Part IVA proceedings and/or what is available or common in the

market. It will be relevant to know the broad parameters of the funding commission rates available in the market;

(d) the litigation risks of providing funding in the proceeding. This is a critical factor and the assessment must avoid the risk of hindsight bias and recognise that the funder took on those risks at the commencement of the proceeding;

(e) the quantum of adverse costs exposure that the funder assumed. This is another important factor and the assessment must recognise that the funder assumed that risk at the commencement of the proceeding;

(f) the legal costs expended and to be expended, and the security for costs provided, by the funder;

(g) the amount of any settlement or judgment. This could be of particular significance when a very large or very small settlement or judgment is obtained. The aggregate commission received will be a product of the commission rate and the amount of settlement or judgment. It will be important to ensure that the aggregate commission received is proportionate to the amount sought and recovered in the proceeding and the risks assumed by the funder;

(h) any substantial objections made by class members in relation to any litigation funding charges. This may reveal concerns not otherwise apparent to the Court; and

(i) class members' likely recovery "in hand" under any pre-existing funding arrangements."

85. The Tribunal in *Merricks (Settlement)* went on to state:

"176. We fully recognise the importance of litigation funding to this action, as to most collective proceedings. As Lord Sales stated in his judgment in [*R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] 1 WLR 2594 (with which the majority of the Supreme Court agreed), at [12]:

"... the effectiveness of group litigation may depend on the use of third party funding, since such litigation often involves high numbers of claimants who have individually suffered only a small amount of loss, where the pursuit of claims on any other basis would be uncommercial."

And the Court of Appeal has often referred to the role played by litigation funding for collective proceedings: see e.g. *BT Group PLC v Le Patourel* [2022] EWCA Civ 593 at [77]. In *Road Haulage Association Ltd v Traton SE and ors (Trucks: CPO)* [2024] CAT 51, the Tribunal said at [87]: "third party funding from commercial funders provides the fuel which enables the vehicle of collective proceedings to operate".

177. At the same time, the Tribunal has made clear that it is generally not practicable to assess the reasonableness of a funder's return under an LFA at the time of certification; that is a matter that can more appropriately be addressed after a judgment for damages or a settlement: e.g. *Gormsen v Meta Platforms Inc* [2024] CAT at [35]; *Gutmann v Apple Inc* [2025] CAT 459 at [12]. This reflects the approach of the Australian jurisprudence set out in

Money Max: para 170 above. Significantly, the Tribunal’s adoption of this approach in [*Gutmann CA*] was endorsed by the Court of Appeal in that case, where the Chancellor stated in his judgment (with which Green and Birss LJ agreed) at [90]:

“Any issue as to the reasonableness of the funder’s return is to be addressed at the time of distribution.” (footnotes omitted).

86. Notwithstanding the persuasive submissions of Ms Thomas, for the PRS, as to the appropriateness of a Funder’s Fee of this magnitude, we do not consider we are in a position to determine this matter at certification. The right time for the Tribunal to scrutinise this matter will be at the time of distribution when appropriate evidence is available. We nevertheless do consider that the agreed size of the Funder’s Fee is part of the background which needs to be considered when assessing overall the costs-benefit of the proceedings. Although this Tribunal has the power to reduce these sums, under clause 9.3 of the LFA, the PCR is required on behalf of the class to seek approval of these sums. In addressing proportionality, we consider it appropriate to have regard not only to the costs proposed to be spent by the PCR but the costs which may be recovered by LCM under the LFA in forming an overall picture of the costs and benefits of the litigation.
87. We are alert to the fact that where preparation of class actions are initiated by lawyers, rather than members of the class – as in this case – it may be that it is the revenue stream to the lawyers and the funder which is the principal incentive to the pursuit of these proceedings rather than the benefits to the class.
88. When this Tribunal attempted to explore the costs of this claim relative to the damages which may be awarded, on 13 February 2025, we were not provided with an indication of the total damages. The PRS produced certain figures during the course of the hearing estimating the notional value of unidentified and unmatched royalites over the relevant period. It did this for (i) MTOL; and (ii) TV and radio only, which were said represent 44% of the overall distribution. It produced the following table:

Table 1 - Estimated allocation of unmatched works and unidentified shares value – PRS 2017 - 2023

	Publisher (£)	Writer (£)	Publisher (%)	Writer (%)
MTOL	£10.5m	£76.3m	12.1%	87.9%
TV & Radio (blanket)	£9.3m	£10.7m	46.5%	53.5%

89. The table indicates that £19.8m of Black Box royalties had been distributed to publishers from these particular revenue streams (representing 44% of the total distribution). The relevant figure for assessing damages for these revenue streams is the proportion of that £19.8m which it is said should have gone to the proposed class.

90. These figures were produced on instructions. The figures did not show that it is clear-cut that the costs associated with these proceedings were proportionate to the claim. We therefore directed that further evidence should be adduced on the issue of proportionality which led to the adjournment of this application. We have since received a third and fourth witness statement from Timothy Arber and a fourth expert report of Patrick Savage. Mr Arber in his third witness statement estimated unidentified and unmatched royalties to be £55m for the relevant period. Mr Arber analysed a year of data for different revenue streams, broadly covering 2022/2023. He explains his approach at paragraph 15 of his third witness statement:

“15. For categories of revenue licensed on a blanket basis, I have identified the publisher/writer allocation of unmatched and unidentified royalties by analysing the publisher/writer allocation of the matched and identified royalties, because unmatched and unidentified royalties are in effect spread proportionally over matched and identified usage as part of the main distribution. For MTOL, unmatched and unidentified “residual” amounts are distributed in a separate distribution (albeit via the same effective approach i.e. the revenue is spread proportionally over the matched and identified usage from the original distribution), so I have analysed the publisher/writer allocation of the residual amounts in the separate residual distribution.”

91. He presented the results of his analysis in a further table, also called “Table 1”.

Table 1 – Summary of analysis of unmatched works and/or unidentified shares (2017-2023)

Category of revenue	Total dist. 2017 - 2023 (£m) ¹	Total dist. 2017 - 2023(%) ²	Writer allocation of Unidentified/ Unmatched (£m) ³	Publisher allocation of Unidentified/ Unmatched (£m) ⁴	Writer allocation of Unmatched/ Unidentified (%) ⁵	Publisher allocation of Unidentified/ Unmatched (%) ⁶
Estimates based on sample analysis						
MTOL	1,188.64	24%	174.40	22.99	88.35%	11.65%
Broadcast (TV & Radio)	1,004.98	20%	15.21	13.27	53.41%	46.59%
International ⁷	1,714.67	34%	9.38	0.47	95.23%	4.77%
Estimates applying TV & Radio analysis to other categories of revenue						
Public performance	898.94	18%	19.10	16.43	53.76%	46.24%
Non-MTOL Online	231.62	5%	2.61	2.30	53.19%	46.81%
Total						
All PRS 2017-2023	5,038.85 ⁸	100%	220.69	55.46	79.92%	20.08%

92. The relevant figure for determining the size of the claim is the proportion of that £55m which on the counterfactual it is said should have been paid to the writers.
93. The data for MTOL and International require further explanation as they were a source of controversy. In this instance the MTOL revenues were estimated by extrapolating data from a single DSP, being Spotify.
94. MTOL revenues are received on a transactional basis by reference to usage. The licences are multi-territorial. The entity licensing the rights invoices the relevant DSP for the repertoire it controls. Licenses are granted by ICE,² or other mandated entities. ICE, or the relevant mandated entity, sends royalties to PRS for distribution to its writer members and to “Category 1 Publishers”. Category 1 Publishers are members of the PRS. “Category 2 Publishers” on the other hand arrange their affairs such that they are paid royalties directly by the relevant mandated entity and in respect of these works PRS distributes only the writer share of the royalties. A similar position arises in relation to International revenue: that is, the relevant CMO will pay publishers directly and the PRS will only distribute royalties owed to its writer members (and any shares for publisher members not directly represented in the territory). The fact that

² ICE holds the copyright database which is the central source of all works information relating to the PRS. It is a joint venture between the PRS and two other affiliated CMOs from Germany and Sweden.

publishers are receiving royalties from entities other than the PRS explains why the writer allocation of unmatched royalties in Table 1 for MTOL and International is considerably greater than the unmatched royalties in relation to publishers. This is because the matched distributions used by PRS to calculate the *pro rata* distribution of unmatched royalties do not include royalties to Category 2 publishers.

95. Mr Savage had a number of criticisms of the estimate made by Mr Arber. The most significant was the contention that his calculations were inadequate because they failed to take into account the sums paid directly to publishers by ICE and other mandated entities. He suggests that the amount of royalties paid to Category 2 Publishers is likely to be as high if not higher than those paid to Category 1 Publishers. It is contended that insofar as there are Black Box royalties associated with works relating to Category 2 Publishers they will not be paid to writer members. The evidence of Mr Savage indicates these Black Box royalties could amount to another £150m.
96. The PRS submits that such Black Box royalties fell outside the pleaded case and were not relevant. The PCR disagreed and pointed to the following paragraphs in its Collective Proceedings Claim Form (emphasis added):

“9. The majority of Black Box royalties held by PRS belong to writers because (a) the vast majority of the 165,000 PRS members are songwriters and there will therefore be more reporting and data issues applicable to songwriters; (b) **PRS collects royalties on behalf of songwriters in respect of use worldwide, but, by contrast, tends to collect royalties on behalf of publishers only in respect of use in the United Kingdom. Entities abroad (such as foreign CMOs) tend to pay publishers direct whereas they account to PRS for the songwriter share of the royalties collected abroad.**

10. Thus, the reporting and data issues are more likely to apply to the songwriters and PRS administers a larger proportion of royalties belonging to songwriters. It is likely therefore that the majority of Black Box royalties are songwriter royalties.

...

30. Foreign CMOs tend to account for performing rights royalties belonging to PRS members differently according to whether the member is a songwriter or publisher. **Most publishers have subsidiaries in the country concerned and the foreign CMO tends to account direct to the publisher in that country, rather than paying the royalty to PRS. By contrast, foreign CMOs remit all (or nearly all) the songwriter royalties to PRS.**

47. ...Pending disclosure, the best particulars that the Proposed Class Representative can provide as to how PRS distributes unmatched Black Box royalties are as follows: ...

47.6. Mr Karabuda, a music composer, member of the Board and Executive Committee of STIM (the Swedish PRO), and Honorary President of the European Composer and Songwriter Alliance, has provided evidence for purposes of these Proposed Collective Proceedings to the effect that **Black Box royalties are paid on a pro rata or market share basis and that this results in the overwhelming majority of Black Box royalties (including Black Box royalties distributed direct to publishers by foreign CMOs, ICE, and other entities) being distributed to publishers and writers losing out on royalties owed to them** (Karabuda 1, paras. 21 and 22).

...

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

62. In breach of this special responsibility PRS is imposing unfair trading terms on its songwriter members through its policies that permit the distribution to publishers of performing rights royalties owed to PRS songwriter members. Moreover, the distribution policies of PRS and their implementation are not equitable since they require songwriters to dispose of their works without entitling them to obtain the full royalties owing to them.”

97. The Collective Proceedings Claim Form makes reference to an obligation that the PRS has to ensure that songwriter royalties are equitably allocated. It is apparent this includes those cases where royalties are paid to foreign CMOs. Further, Mr Savage in his first report also made reference to Black Box revenue distributed direct to publishers by foreign CMOs. At paragraph 14.1 he stated:

“14.1 While the headline figures provided by Macfarlanes LLP on behalf of PRS show more revenue being distributed to writers than publishers, the revenue figures do not include the significant amounts of revenue (including Black Box revenue) distributed direct to publishers by Administration Partners and foreign CMOs. It is therefore not possible to assess the proportion of income paid to each of writer and publisher members notwithstanding that this is a fundamental part of the claim. In any event I would expect the majority of revenue collected by PRS for PRS controlled works to be distributed to writer members given that publisher members are in many cases paid directly by foreign CMOs and Administration Partners.”

98. Mr Ward KC, for the PCR, accepted that the Collective Proceedings Claim Form might benefit from further clarification in the way it deals with this category of Black Box royalties but contended that the point was pleaded.
99. We agree that for present purposes we should take account of this limb of damages when assessing proportionality. We are conscious that these revenue streams are complicated and that we are not in a position to resolve disputes as to the likely size of the Black Box royalties. We accept the PCR's position that the figure of Black Box royalties could be in the order of £200m if international and MTOL royalties paid to other entities are taken into account. The size of the claim is not known because the PCR is unable to produce an estimate of the proportion of that £200m of Black Box royalties which should have been paid to writers in the counterfactual.
100. A further concern, given the size of costs, is who is going to pay those costs. If the PCR is successful in its claim, and obtains a costs order, then an award of costs of up to £18m could be made against PRS. The PRS will also have to pay damages, a proportion of which may be diverted to LCM to pay the Funders Fee. It is not clear however how the PRS can pay costs and damages other than by diverting its revenues away from its members. As a not-for-profit organisation every pound spent may be a pound less for its members. It was suggested that it might be legally possible to attach a levy directed to publisher members of the PRS only. Attention was drawn to Rule 2(j) of the PRS Rules and Regulations, which states:
- “(j) The Society may recover from any member any sums paid in error by deducting such sums from any monies distributable to such member.”
101. This rule does not plainly give a power to the PRS to levy publishers to pay legal costs as these are not usually described as “sums paid in error”. Furthermore it is an open question as to whether this rule gives a power to levy a sum for the payment of damages at all and/or that proportion of damages which is to be paid to LCM as the Funders Fee. Although we express no concluded view on this matter, it might be argued that the power granted by Rule 2(j) is limited to the making of adjustments in circumstances where

payments have been made which do not accord with the rules and policies of the PRS. This would need to be the subject of further argument.

102. It follows that if payment of costs, damages and Funder's Fee is coming out of the PRS's revenues this has the potential to impact writer members. How those sums are to be found will no doubt be subject to debate within the governing structures of the PRS. It is not at this stage plain that a successful claim will not result in a proportion of revenues, which otherwise would be paid to writers, being diverted to pay costs or the Funder's Fee.
103. We remain doubtful that the cost-benefit of these proceedings favours certification. The class may in effect find itself contributing to the costs of the litigation, the Funders Fee, and any payment of damages if it is successful. It is in reasonable contemplation that at the end of these proceedings, even if the claim is successful the principal beneficiaries may be the legal advisors and LCM and not the class. The agreement reached under the LFA is to pay a Funders Fee which might reasonably be expected to be as much as, or more than, sums awarded in damages. We recognise we will have the power not to authorise those payments but the PCR, having agreed them and having agreed he will seek payment of those sums, means they form part of the overall picture.
104. It has been submitted by the PCR that we should have regard not only to the size of any damages claim but to the impact a successful claim will have on the distribution of future revenues. It is not clear to us that it has been shown that this litigation is necessary to impact the distribution of future Black Box royalties, for the reasons given below. We therefore do not attach much weight to this consideration.
105. We have ruled that this claim does not pass the *Microsoft* Test. In the event that the PCR is in a position to formulate the counterfactual such that the size of the claim could be better understood we would revisit the question of proportionality. But as matters currently stand we are not persuaded that it has been shown that the costs-benefit favours continuation of these proceedings. The central problem is that the class is, in a manner of speaking, suing itself.

106. We also have regard to Rule 79(2)(g) of the Rules of this Tribunal where it states that:

“(2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including—

...

(g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the 1998 Act or otherwise.”

107. An alternative way of resolving the dispute – which has not been attempted – is for class members to make representations to the Members Council and/or the Board and/or the Distribution Committee, through its writer member representatives. There is no evidence that this has been attempted by members of the class prior to this claim being put together by the solicitors and funders. Nor is it clear that those writer members on the governing bodies support these proceedings. The first salvo in this dispute was formal correspondence on 14 February 2022 from Maitland Walker LLP to the PRS stating that it had been instructed to pursue opt-out collective proceedings. The letter stated that “*we do not consider that any formal mediation or ADR is appropriate*”. This approach was unfortunate and not in the interest of the class. It is in reasonable contemplation that there was scope for formulating alternative ways of distributing Black Box royalties which might benefit the class more than spending these eye-watering sums on lawyers and funders. If this claim were to have proceeded, we would have encouraged the parties to look at alternative ways of resolving this dispute.

108. A further point raised by the PRS in relation to cost-benefit is that the PCR has not disclosed a thought-through distribution plan in that (a) he has not identified the collective sum he says should be distributed; and (b) has failed to explain how any distribution plan could reach songwriters whose current contact/payment details are not held. We have dealt with point (a) in the context of the *Microsoft* test. We do not find in the PRS’s favour on point (b). This class is unusually circumscribed in that the PRS holds details and can communicate with its members. The fact that in the case of a small proportion of members

those details may be incorrect does not mean that a distribution plan is unworkable.

H. THE AUTHORISATION CONDITION

109. Rules 78(1) and (2) require this Tribunal to consider whether the PCR, Mr Rowntree, would fairly and adequately act in the interests of the class, and does not have a material interest that is in conflict with the class.
110. Mr Rowntree is a professional musician who was a member of the well-known band Blur. Prior to that he undertook an HND in Computer Science at Thames Polytechnic. In 2005 he studied for the Graduate Diploma in Law and thereafter attended the Legal Practice Course at BPP. He is now a qualified solicitor, having trained at Kingsley Napley.
111. Mr Rowntree has been active in politics. He was a county councillor for the University division in Norwich between 2017–2021. He has taken a role in songwriter advocacy through the Featured Artists Coalition. In his witness statement he expresses frustration at the lack of power many less successful writers have to negotiate fair royalty payments.
112. Mr Rowntree has established a consultative committee comprising Sir Gerald Barling and Professor Ameila Fletcher, both distinguished competition law experts. This appears to have been set up in response to an application to cross-examine Mr Rowntree which we refused on 24 January 2025.
113. The PRS submit that Mr Rowntree is not suitable to be a class representative. Ms Thomas, for the PRS, submitted that there was a potential conflict between Mr Rowntree and the class. The conflict was said to arise both in relation to damages and to the future conduct of the PRS in response to these proceedings. It was submitted that redistributing money from publishers to writers might be advantageous to some writers but not others and might ultimately benefit Mr Rowntree.

114. The particular conflicts being advanced were not easy to grasp and appeared to be speculative. This claim is against the PRS not against publishers. Part of the problem in articulating the conflict arises from the fact that the counterfactual is not yet properly articulated by the PCR. Moreover, it might be said that the entire case is riven with *potential* conflicts and complexities arising from the writers also being members of the defendant company. At this stage of the proceedings the speculations as to a conflict Mr Rowntree *might* have is not supported by the materials before us and is not a reason to refuse to authorise Mr Rowntree.
115. We also considered the decision to change solicitors between the dates of this hearing on 12 and 13 February 2025 and its resumption on 16 June 2025. In particular we formed the view that the manner in which Mr Rowntree made that decision might throw some light onto his suitability as a class representative. The Tribunal asked Mr Rowntree in the witness box to describe briefly his decision-making process.
116. Two things were apparent from his response to our questions. The first was that it was *his* decision to change solicitors and he did this to protect the interests of the class. Confronting his concerns and making this change appeared consistent with his acting in what he believed to be the interests of the class. The second is that he made this decision without consulting his advisory committee. A decision of this strategic importance is precisely the sort of area in respect of which the input of an experienced advisory committee might have been helpful and it would have been preferable if its input had been sought. Mr Rowntree's view was that it was obvious to him that he should change solicitors and that he did not need to consult on this topic.
117. We are of the view that Mr Rowntree is suitable to act as the class representative but depending upon how this case progresses, if it progresses at all, this is a matter which may need to be revisited.

I. CONCLUSION

118. The application for summary judgment and to strike out the claim succeeds, and we refuse to certify the claims as eligible for inclusion in collective proceedings.

119. This decision is unanimous.

Justin Turner KC
Chair

Professor Davil Ulph CBE

Hugh Kelly

Charles Dhanowa CBE KC (Hon)
Registrar

Date: 27 August 2025