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6 **IN THE COMPETITION**
7 **APPEAL**
8 **TRIBUNAL**
9

CaseNo: 1634/7/7/24

10 Salisbury Square House
11 8 Salisbury Square
12 London EC4Y 8AP

16th March 2026

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15 Before:
16 Justin Turner KC

17
18 (Sitting as a Tribunal in England and Wales)

19
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21 BETWEEN:

22
23 Mr David Alexander de Horne Rowntree

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25 **Proposed Class Representative**

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27 V

28
29 (1) the Performing Right Society Limited
30 (2) PRS For Music Limited

31
32 **Proposed Defendants**

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

37
38 Jack Williams (Instructed by Willkie Farr & Gallagher (UK) LLP) On Behalf of Mr David
39 Alexander de Horne Rowntree

40
41 Meredith Pickford KC & George McDonald (Instructed by Macfarlanes LLP) On Behalf of
42 the Performing Right Society Limited and PRS For Music Limited

43
44 Jamie Carpenter KC On Behalf of LCM Funding UK Limited

45
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(10.28 am)

THE CHAIR: Some of you are joining us live streaming on our website, so I'm going to start with a warning.

An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, and breach of that provision is punishable as contempt of court.

Right, good morning.

Submissions by MR PICKFORD

MR PICKFORD: Good morning, my Lord.

I appear for PRS with Mr McDonald. Mr Williams appears for Mr Rowntree and Mr Carpenter KC for the funder.

The overarching issue on costs to be decided today is this: to what extent should costs incurred by PRS in defending against Mr Rowntree's failed proceedings be met to the largest reasonable extent by Mr Rowntree's insurance provider and funder, as we argue, and indeed, if necessary, Mr Rowntree -- but he has both the insurance cover and a funder -- or by the PRS, which in reality means its members who are largely made up of the very songwriters that Mr Rowntree said he was trying to protect.

Now, the order we seek, as, sir, you're aware, is that order for costs on an indemnity basis entitles us to no more than our reasonable costs, and the reason we seek it is to minimise the extent, as I've explained, to which songwriters pick up the costs of Mr Rowntree's failed proceedings.

Now, why Mr Rowntree prefers the interests of insurers and financiers over songwriters he doesn't say, but we say it's totally at odds with his claims to be protecting their interests, as well as assurances that he gave them in his claims

1 website, and I'm going to come on to.

2 So there are five issues between the parties.

3 The first is the basis of assessment.

4 Second is whether the tribunal should depart from the normal order that costs follow
5 the event. That wasn't originally an issue between us and Mr Rowntree, but he's now
6 changed positions on that, so it is now an issue between us and I will address it.

7 The third is the level of payment on account. Mr Rowntree accepts that he should
8 make a payment on account, but he says the payment should be no more than
9 30 per cent of our costs.

10 THE CHAIR: Is there any reason why I can't summarily assess the costs today that
11 seems to be more desirable?

12 MR PICKFORD: There is, because we were seeking detailed assessment because
13 we said that that would be appropriate in the circumstances of the number of hearings
14 that we had. Neither Mr Rowntree nor the funder said, "no, you should have summary
15 assessment", and I haven't come here today to seek summary assessment, so --

16 THE CHAIR: Explain to me why I can't summarily assess the costs today?

17 MR PICKFORD: Well, because I am embarrassed in that I have not prepared to argue
18 summary assessment, because that wasn't that issue between us. My position was
19 that there should be detailed assessment.

20 Obviously, if the Tribunal wishes to summarily assess today then it can, and I can
21 make the bare bones of the arguments that we would have sought to have made, in
22 relation to the details had it gone on.

23 THE CHAIR: You say you come ill equipped. What is it that you're missing in your
24 armoury?

25 MR PICKFORD: Our position was that the nature of the issues that we were going to
26 be dealing with today were relatively high-level ones, and what I haven't particularly

1 sought to do is go through and justify each element of the costs that we are claiming,
2 because that would have been a matter for detailed assessment rather than summary
3 assessment.

4 However, if we want to deal with it on a relatively high-level basis, and I can see that
5 there's obviously some keenness from you, sir, to do that, then I can seek to assist on
6 that relatively high-level basis. But it isn't the application that we were making, and it
7 wasn't --

8 THE CHAIR: I understand that, but you say you're not in a position to deal with it in
9 detail, but then we're not doing detailed assessment. We're talking about summarily
10 assessing the costs.

11 MR PICKFORD: Yes.

12 THE CHAIR: You put material before the court as to your costs. Is that not appropriate
13 for summary assessment, and what additional information would you wish to put
14 before the court if the costs had been --

15 MR PICKFORD: Had we been seeking summary assessment, I imagine the answer
16 to that is there is further material.

17 I'd probably like to take instructions --

18 THE CHAIR: Yes, of course.

19 MR PICKFORD: -- because, if I may say so, the detail of our costs in relation to things
20 like charge out rates et cetera is a point that Mr McDonald was going to be addressing
21 you on, insofar as it even came up for the hearing on the basis that we had prepared.
22 So it may be -- and I'll obviously have to take instructions and confer with my learned
23 junior -- that on issues of the detail of the justification for our costs, you are better
24 addressed by Mr McDonald than by me on that because of the way that we have
25 shared this out.

26 But I think, if what I'm hearing from the tribunal, what you would like is to determine it

1 on a summary basis today, the best thing is that I take instructions and we work out
2 how we best assist the Tribunal with that.

3 THE CHAIR: Do you want to take instructions on that then?

4 MR PICKFORD: If I may, thank you.

5 THE CHAIR: Yes. Just before you do, Mr Williams, what's your position?

6 MR WILLIAMS: We have no objection to summary assessment for today's purposes.
7 That is subject to a crucial caveat in relation to the amount the cap for any costs today,
8 the Gutmann issue, if I can call that.

9 THE CHAIR: Yes. Okay, I appreciate that. The two need to somehow gel
10 appropriately, but --

11 MR WILLIAMS: They do interrelate because, of course, we can't have a finalised
12 order --

13 THE CHAIR: Yes, I've got that in mind.

14 MR WILLIAMS: I'm grateful.

15 THE CHAIR: If you'd like to take instructions. (Pause)

16 MR PICKFORD: Sir, our position is that if we can deal with all the points of principle
17 this morning, we would be happy then to turn to a deep question of the summary
18 assessment of the actual sums this afternoon, if that was something that the Tribunal
19 were amenable to.

20 There are quite a lot of points of principle to get through.

21 THE CHAIR: Well, shall we see how we go on timing?

22 MR PICKFORD: Yes.

23 So I think I was making the submissions just to explain what the five areas of
24 contention were.

25 THE CHAIR: Yes, I've read the skeletons. Obviously I know what the five issues are.

26 MR PICKFORD: I'm very grateful.

1 So, the Tribunal will be aware that there have been three requests from Mr Rowntree
2 for an adjournment of this hearing. I understand that he's no longer pursuing that
3 adjournment.

4 THE CHAIR: Fine.

5 MR PICKFORD: I also understand that he is quite willing to stand up and make the
6 points that he wants to make about Gutmann and the impact of any cap that he says
7 arises from Gutmann now, today.

8 THE CHAIR: Yes, but we're not going to deal with that today, as we indicated in our
9 letter on Friday.

10 MR PICKFORD: So I understood that I wasn't going to deal with that in relation to the
11 funder?

12 THE CHAIR: Yes. Sorry, are we at cross purposes?

13 MR PICKFORD: We might be.

14 THE CHAIR: Yes.

15 MR PICKFORD: It might just be helpful for me to then take one step back.

16 That there are five issues between us, and I know the Tribunal knows this, but I think
17 for clarity it's helpful that I just set -- so there's obviously basis of assessment; there is
18 whether the costs follow the event; payment on account interest; and then, finally, what
19 order should be made, if any, as against the funder.

20 Now it is that fifth issue that we had understood that the Tribunal wished to park.

21 THE CHAIR: Mm-hmm.

22 MR PICKFORD: And we consistently, with what we understood from the Tribunal last
23 week, had parked that issue.

24 THE CHAIR: Mm-hmm.

25 MR PICKFORD: Now, there is a complicating feature, which is this: Mr Rowntree now
26 says, as an entirely new point, that postdates Gutmann, ah ha, well, not only is there

1 an implication for Gutmann in relation to the funder issue as to whether the funder
2 should be jointly and severally liable, he says there's also an issue arising out of
3 Gutmann for whether any order as against me only -- just forget everything about the
4 funder -- should be capped at 1.5 million, because that's the limit of my ATE insurance.
5 That's what he seems to be hinting at. He obviously hasn't put that in any skeleton,
6 any revised skeleton, but that's what he's clearly hinting at in correspondence that his
7 solicitors sent on Friday. It was in the light of that point that originally Mr Rowntree
8 was urging this Tribunal to adjourn this hearing because he wanted, he said, time in
9 order to argue that point.

10 Now, I spoke to Mr Williams this morning and he says they no longer want to adjourn
11 in the light of that, he has assured me that he is ready to deal with his point on Gutmann
12 insofar as it affects him. Forget about the funder, insofar as it affects him.

13 THE CHAIR: Well, we'll see how we get to -- we may get to areas of some complexity,
14 and particularly in light of Mr Carpenter withdrawing his earlier offer. So, let's press
15 on with the other issues and we can get to that at the end, perhaps.

16 MR PICKFORD: Understood. (Pause)

17 Just before moving on to the substance, I have just one further introductory comment,
18 which is in fact the extent of the funder's involvement, because we are a little surprised
19 by the extent to which the funder has made submissions on points that arise between
20 us and Mr Rowntree. It is obviously the case that a funder always has an indirect
21 interest in the outcome of pretty well everything that is argued between PRS on the
22 one hand and Mr Rowntree on the other, because if it goes to the substance of the
23 claim or the likely success of his claim, then it may well indirectly affect him at the end
24 of the day. But that does not give him a right to come along and make duplicative
25 submissions of his own.

26 In my submission, the only thing that Mr Carpenter should be making submissions

1 about is issue 5, namely the funder point, and we're not dealing with that today.

2 THE CHAIR: I'm sure Mr Carpenter will have the desirability to avoid duplication well
3 in mind, but I don't propose to be on that, shut him out from making any observations
4 today.

5 MR PICKFORD: So turning then to the first issue, the basis of assessment. I'm sure,
6 sir, that you are well aware of the general power to award costs, which is in rule 104
7 of the Tribunal's rules.

8 THE CHAIR: I have come across that in the past. Yes.

9 MR PICKFORD: I thought as much. Likewise, obviously, the difference between
10 standard and indemnity costs, which one finds in rule 44 of the CPR. I'm not proposing
11 to take you to those, sir.

12 Now, there is a spat between Mr Rowntree and ourselves about whether we've
13 changed the basis on which we're seeking our order. We haven't done that at all, and
14 I don't really want to get into the detail of that say for one point, which is that, we say,
15 Mr Rowntree is introducing some confusion as to the correct test for indemnity costs,
16 and it would be helpful to clarify that first. So if we could go please, to --Mr --

17 THE CHAIR: I mean, you say "anything out of the norm".

18 MR PICKFORD: We say, "anything out of the norm", yes.

19 THE CHAIR: I mean, if we were in the High Court, it'd be a pretty sort of touchy-feely
20 test applying "out of the norm", whatever that means.

21 MR PICKFORD: Yes. Yes, exactly.

22 THE CHAIR: Do we need to get into the authorities particularly on this?

23 MR PICKFORD: Well, perhaps not. I mean, there is still a strand, if I can call it that,
24 of submission that we see lingering from Mr Rowntree where, on the one hand, he
25 seems willing to accept anything out of the norm, but, on the other hand, he keeps
26 trying to sort of turn it back to something that's, in some way, a mark of personal, high

1 | unreasonableness on his part. And that isn't the test. We do say he has been
2 | unreasonable.

3 | THE CHAIR: I'm going to be working on the basis of out of the norm, if that's of
4 | assistance.

5 | MR PICKFORD: In which case I'm very grateful.

6 | Of course, sir, you will be aware that the authorities that I don't need to take you to,
7 | but, for instance, Excelsior make it very clear that there's a very wide discretion. It's
8 | out of the norm. It is not moral condemnation. It's just what --

9 | THE CHAIR: Yes.

10 | MR PICKFORD: -- would be just in the circumstances of the case.

11 | THE CHAIR: Yes.

12 | MR PICKFORD: There is also a further authority that you probably don't need me to
13 | take you to because, hopefully, the proposition from that is pretty straightforward,
14 | which concerns ADR. It's the case of PGF II. And the point is that unreasonably
15 | refusing ADR is obviously unreasonable, and so can silence in the face of an offer for
16 | ADR. That can also be unreasonable.

17 | THE CHAIR: Yes. I mean, that seemed to be, jumping ahead, that seemed to be your
18 | best point of your five points. It would be useful to look at, I think, the pre-action
19 | materials.

20 | MR PICKFORD: Yes.

21 | THE CHAIR: I haven't refreshed my memory of them.

22 | MR PICKFORD: We will do that, and very much I'm going to develop that point. There
23 | are others I'd like to develop too, because what I hope to persuade you, sir, is actually
24 | it's a combination of points that would all come together here.

25 | A further point, again, which hopefully I can just make in general terms without
26 | necessarily having to go back to the authority, is about the nature of opt-out

1 proceedings versus opt-in proceedings.

2 I'm sure, sir, you're aware of the Supreme Court's judgment in Evans, which now
3 makes very clear that opt-out proceedings are a very powerful tool, and they need to
4 be handled with great care. You can't go around bringing opt-out claims without due
5 regard to the fact that there are very substantial repercussions that follow from that.
6 That's a point that obviously Evans makes very strongly.

7 In the light of that background in relation to the legal principles, as I've explained, we
8 seek an order that minimises the extent to which the songwriters pick up the tab. We
9 say that the unusual circumstances of this case make that a just order. We rely on
10 a number of factors, in particular, six features that we say arise in combination with
11 one another.

12 THE CHAIR: Okay. Six. Sorry, I've only got five on my list.

13 MR PICKFORD: Well, it depends a bit how one groups though, sir?

14 THE CHAIR: Right.

15 MR PICKFORD: I split them out into each individual component, but the key point is
16 they all come together, so it doesn't necessarily matter, ultimately, whether it's five or
17 six or however many.

18 First, that Mr Rowntree was seeking to act on behalf of persons who were members
19 of the non-profit-making organisation he was suing, so they were, in fact, suing
20 themselves.

21 Secondly, he did that in opt-out proceedings on behalf of a very large class of such
22 persons, with the result that every single member of the class was automatically suing
23 themselves unless they took the active step of applying to remove themselves from
24 the litigation.

25 Third --

26 THE CHAIR: So your first point is divided for reasons, I understand, into 1(a) and 1(b).

1 MR PICKFORD: Yes.

2 THE CHAIR: Okay.

3 MR PICKFORD: Yes, exactly. The reason why I've put it that way -- to anticipate what
4 I'm going, if it's causing confusion -- is because what you'll see Mr Williams does is he
5 seeks to say, "1(a) on its own, that's not good enough reason. 1(b) on its own, well,
6 that's not good enough reason".

7 THE CHAIR: Well, I understand that you say you have to look at it holistically; yes?

8 MR PICKFORD: Yes. So I'm trying to be as clear as possible about how things fit
9 together.

10 Third point is at the same time as 1(a) and 1(b), my first two features, he took no steps
11 whatsoever to obtain some indication of permission or support from those he was
12 purporting to represent or indeed from their representatives, for example, on the PRS's
13 members council or board or distribution committee.

14 Now, one can see why that likely came about, because as the Tribunal recorded in its
15 judgment at 87, this claim was never about the songwriter. It didn't come from the
16 songwriters. It came from solicitors and funders. So one can well see why they might
17 have not really engaged with that step, but that does not excuse the failure to engage
18 with that step when it comes to the costs consequences.

19 We do maintain that Mr Rowntree's approach in this regard was cavalier as to the
20 actual preferences of the group that he was purporting to represent, and that they
21 would or could find themselves contributing to unrecovered costs if the action failed.

22 The fourth point then is that he also made no use of any of the dispute resolution
23 procedures that he had available to him, whether as a member of the PRS or because
24 PRS were actively seeking to find ways to open a dialogue with him.

25 If I could go, please, to the judgment just to remind you, sir, of what was found here.

26 It's in the bundle tab 29 and I'm going to page 399.

1 | Could I ask you, sir, please to read paragraph 107. (Pause)

2 | Since the Tribunal made that finding, Mr Rowntree hasn't provided any explanation for

3 | this hearing as to why he didn't engage in those processes, despite being urged to by

4 | the PRS. And we say that issuing proceedings should always be a last resort and

5 | particularly so for collective opt-out actions when you're bringing a claim where the

6 | claimants are suing themselves.

7 | THE CHAIR: And he refers to paragraphs in the claim form, doesn't he, in his skeleton,

8 | I think?

9 | MR PICKFORD: He may. I mean, to my submission, that doesn't meet my point.

10 | THE CHAIR: All right. Okay. I'll let him go to that.

11 | MR PICKFORD: Because my point is that -- well, I think the best thing to do actually

12 | is if I go on to examine the points that, sir, you said you would benefit from being

13 | reminded of in a little more detail.

14 | THE CHAIR: Yes.

15 | MR PICKFORD: So I'm actually going to go to some of that pre-action first of all.

16 | THE CHAIR: Yes, okay, that would be helpful, thank you.

17 | MR PICKFORD: What he says, in relation specifically to the -- it's in the context of

18 | dealing with ADR. What he says of us is that there was "all out opposition". That's

19 | what he says, and that is simply not true.

20 | If we could go, then, to the bundle. If we start at tab 50.

21 | THE CHAIR: Sorry, which -- which -- I've got tab --

22 | MR PICKFORD: This is the "O". Do you have it in --I apologise, you may have it in

23 | a number of volumes and I've got it electronically. It's the one where it's got tab 50 in

24 | it.

25 | THE CHAIR: Yes, yes. (Pause)

26 | MR PICKFORD: If you could open that, please. Tab 50. It's page 1340.

1 THE CHAIR: Yes.

2 MR PICKFORD: So my understanding is this is the first formal letter kicking off an
3 explanation of what is considered to be the claim. It's effectively the letter before
4 action. If one goes through to the end of that letter on page 1353, you'll see what it's
5 said about alternative dispute resolution, if you read paragraph 56, please.

6 THE CHAIR: Yes.

7 MR PICKFORD: Then there's a holding response at the next tab, which you don't
8 need to see, which is 51. Then the substantive response then comes at tab 52. It's
9 the initial substantive response.

10 THE CHAIR: Mm-hmm.

11 MR PICKFORD: Then if you go to the next letter at 53 from --

12 THE CHAIR: What am I meant to look at in this?

13 MR PICKFORD: So nothing particularly going to ADR here. I'm just trying to explain --

14 THE CHAIR: So you didn't make any concessions at this point or suggest any
15 meetings or resolutions?

16 MR PICKFORD: No, that comes in the next letter.

17 THE CHAIR: Okay, that's fine. (Pause)

18 Yes. So then where do you go?

19 MR PICKFORD: So that's then followed up in the next tab with the letter of
20 10 March 2023.

21 THE CHAIR: That's quite a lot later; yes?

22 MR PICKFORD: Yes.

23 THE CHAIR: Nearly a year, yes.

24 MR PICKFORD: Well, because my understanding is that everything then effectively
25 went quite quiet.

26 THE CHAIR: Okay.

1 MR PICKFORD: And --

2 THE CHAIR: No correspondence, no meetings. No --

3 MR PICKFORD: No.

4 THE CHAIR: No.

5 MR PICKFORD: We then began to pick up matters. You can see, actually, that there's

6 the beginnings of the matter coming back to life at the beginning of 2023. We don't

7 have those letters in the bundle, so they're referred to in paragraph 1 of the 10 March

8 letter. But what we do see --

9 THE CHAIR: There was some correspondence.

10 MR PICKFORD: We're on page 1364 of the bundle.

11 THE CHAIR: Yes, and it refers to a letter in October 2022 and a letter in

12 February 2023. So this is a response to a letter of 3 February, which I haven't got,

13 I think.

14 MR PICKFORD: Yes. I don't think we've got that in the bundle.

15 THE CHAIR: No.

16 MR PICKFORD: No one has said it's of any particular relevance. But what one does

17 see here is there's obviously a disagreement between the parties about whether they

18 are engaging substantively. One sees that in paragraph 2.

19 Then, in paragraph 4, we see:

20 "Nonetheless, PRS takes any concerns expressed by its members very seriously and

21 is committed to being open and transparent about the way in which it operates. [It]

22 has therefore spent considerable time and resources compiling information in

23 response to your 12 January letter. These responses are set out below."

24 So we can infer that there were requests for information, and this is what this letter is

25 seeking to address. Then we see that there is a substantial response and various

26 tables and information that is provided in this letter over a number of pages.

1 | And then if we --

2 | THE CHAIR: Just looking at paragraph 5, you say you offer a meeting.

3 | MR PICKFORD: Yes.

4 | THE CHAIR: "Such a meeting could avoid the incurrence of further unnecessary costs

5 | in protracted correspondence."

6 | So you're willing to discuss specific suggestions or proposals?

7 | MR PICKFORD: Yes, in paragraph 44, at the end, we conclude --

8 | THE CHAIR: Sorry, give me a second, paragraph 44 --

9 | MR PICKFORD: From 1371 is our conclusion, refers back:

10 | "As noted above, if your client continues to have queries, members of PRS' Members

11 | Council would be willing to meet with your client to avoid the incurrence of further

12 | unnecessary costs and protracted correspondence regarding concerns which are

13 | clearly unfounded. Our client would also be willing to consider and discuss specific

14 | suggestions or proposals which your client may wish to make regarding its distribution

15 | policies - our client is confident in its position that its policies deal with revenue in a fair

16 | and proportionate manner, but nonetheless takes concerns raised by members very

17 | seriously."

18 | THE CHAIR: Yes.

19 | MR PICKFORD: So even though we think that the competition claim makes no sense

20 | whatsoever, we are going out of our way still to try to engage with Mr Rowntree in

21 | a fair and serious way.

22 | THE CHAIR: Sorry, Mr Pickford. The claim was issued when? It says the

23 | 10th of March letter, when there's a claim issue.

24 | MR PICKFORD: The claim was issued -- bear with me.

25 | THE CHAIR: We can pick it up in due course.

26 | MR PICKFORD: Yes. I know the claim was after this date.

1 THE CHAIR: Yes. Sorry. Well, somebody will pick it up in due course.

2 MR PICKFORD: It was a couple of months -- I think it was a month or so later, but
3 I can give you the date in just a moment. I'm afraid I don't have it on the tip of my
4 tongue.

5 We end this letter at paragraph 45. We say, "It would be misguided and inappropriate
6 for your client to initiate proceedings", obviously because we're saying, "Look, if you've
7 got concerns, explain them to us in a meeting and we'll try and sit down and work this
8 one out".

9 If we then go to the next tab, which is tab 54, this is 23 May. At this stage there still
10 had been no issuing of the claim. We referred back to our letter of 10 March, which
11 was acknowledged by receipt of the letter of 23 March:

12 "We have not had any substantive response to our letter, from which we infer that
13 information we have provided has answered your client's questions and allayed the
14 concerns which may have expressed this line of correspondence.

15 "Notwithstanding this, PRS remains open to the prospect of a meeting between the
16 parties if that would be beneficial, per our letter".

17 THE CHAIR: You've not put in any evidence as to what proposals you would have, or
18 how you would have attempted to resolve this in the meeting.

19 MR PICKFORD: No. Indeed, that isn't in anyone's proposals. So there isn't any
20 problem with there being prejudice in the Tribunal understanding how it would have
21 been resolved. We're just saying we are open. We are willing to speak.

22 THE CHAIR: Yes.

23 MR PICKFORD: Of course, in the light of the Tribunal's findings that ultimately this
24 case was struck out because it didn't disclose a cause of action, it's perhaps not
25 surprising that we're not putting forward our concrete response, because at this
26 stage --

1 THE CHAIR: Sure. I mean, the point, no doubt -- I think it is said against you, but no
2 doubt will be said against you -- it's not clear that this would have resulted in the
3 avoidance of proceedings, now, of course. As you point out, you were successful, but
4 it's not clear that a compromise would have been reached which would have avoided
5 these proceedings, other than to say you have a meritorious case.

6 MR PICKFORD: It's never clear. It's never clear. If a party turned down ADR, you
7 can never say -- or rarely -- if all you know is that one party was offering ADR and the
8 other party ultimately didn't pick it up, you're not able to say, "Well, we know, if only --"

9 THE CHAIR: In some cases a party comes to court, it's said if only they had written
10 a letter before action, we would have agreed to A, B and C, and that's not been done
11 in this case. Not a criticism. It's just an observation.

12 MR PICKFORD: No. Because for the observation that I made before, what we
13 needed to do was to sit down with Mr Rowntree and really try to understand what was
14 at the essence of what he wanted us to do differently.

15 THE CHAIR: Yes, and no doubt your advice would have been -- the legal advice
16 would have been, "Well, he hasn't got a case here".

17 MR PICKFORD: Well, that --

18 THE CHAIR: You don't have to answer that question. (Inaudible) privilege.

19 MR PICKFORD: I'm not going to. I don't have Mr Williams and Mr Carpenter standing
20 up and saying, "Right, well, you have waived privilege. Can we see all your advice
21 now?"

22 But what I can say is that, of course, a possibility if the parties sat down is that
23 Mr Rowntree might have realised that actually what he thought was something that we
24 should be doing differently or better, we couldn't do, because either we were actually
25 doing perhaps things that he wasn't aware of --

26 THE CHAIR: You leverage paragraph 107 of the judgments?

1 MR PICKFORD: Yes.

2 THE CHAIR: This is just an inappropriate way of going about these sorts of
3 procedures.

4 MR PICKFORD: I mean, to be clear, alternative dispute resolution doesn't have to
5 end in there being some sort of compromise between the parties' positions. It could
6 well have ended with Mr Rowntree ultimately understanding that the concerns that he
7 had were not actually ones that were going to lead him to a successful claim. Indeed,
8 we would say that if he had been sufficiently open-minded, he should have come to
9 that conclusion.

10 THE CHAIR: Yes. I beg your pardon. Do we need to look at any other letters?

11 MR PICKFORD: In terms of letters, no, I don't think we do.

12 THE CHAIR: (Overspeaking)

13 MR PICKFORD: I just want to make a submission --

14 THE CHAIR: Yes.

15 MR PICKFORD: -- that following the letter that I've just taken you to of 23 May 2023,
16 Mr Rowntree was entirely silent as to that offer. He never came back and said, "Okay,
17 I'll meet". Rather, he wrote back, saying, "What's your address for service? I'm
18 bringing the claim". Then he brought his claim.

19 So the claim came at some point after 23 May 2023, and I'm sure I will be able to tell
20 you in due course exactly when that was.

21 THE CHAIR: Yes.

22 MR PICKFORD: It was ultimately filed on 28 February 2024.

23 THE CHAIR: Thank you.

24 MR PICKFORD: That's the pre-action stage. It's possibly helpful just to very briefly
25 cover the post-issuance of proceedings as well.

26 My first point, of course, is that the pre-action is the critical bit, because once you've

1 issued the proceedings, then everyone is in a different game. You know, we've got to
2 get a big legal team together and start preparing for the fact that there's likely to be
3 a hearing. But nonetheless, even in the period post-issuance of the proceedings, we
4 were still approaching Mr Rowntree to seek to persuade him to meet, so that we could
5 see if we could find some resolution. We got as far as one meeting, and then
6 Mr Rowntree decided that he wasn't going to consider whether he was even willing to
7 meet at all until he was in receipt of some further information. That's where things
8 faltered. That was shortly before the hearing, and there then wasn't a further meeting.
9 Our position is that the suggestion that there was all out opposition in the context of
10 ADR is totally wrong. The fault here very substantially lies on Mr Rowntree. It's his
11 claim and he is the person who is in the wrong.

12 There has been, in my submission, a storm in a teacup about the fact that we referred
13 to in this cost hearing, or Mr Day refers to some without prejudice, save as to costs
14 correspondence. The Tribunal doesn't need to read the specifics of that. It doesn't
15 actually reveal anything about the parties' substantive positions. It's just about, "Will
16 you meet terms for meeting?" So I don't think I need to say anything more about that
17 issue.

18 That's our fourth point. That's what, sir, you referred to as what you thought was one
19 of our best points, about the failure to engage properly in ADR.

20 The fifth point of our combined points is the weakness of Mr Rowntree's claim,
21 because it was struck out. So we're not in the territory of, for example, at the end of
22 a trial, where we're having a cost dispute about an entire proceedings that have gone
23 all the way. This case didn't even get past first base. Moreover, he didn't present
24 evidence satisfying the critical Microsoft test, and he wasn't able to persuade the
25 Tribunal, at least at the hearing that we had, that he passed the cost/benefit test either.
26 So we say this thoroughly failed, this claim.

1 On that, there's a small point to pick up, because Mr Williams says our point on
2 proportionality is nonsensical. But he comes to that conclusion by mischaracterizing
3 what our point is. Sir, if you could go back to the Tribunal's judgment, which is back
4 in tab 29, on page 382. (Pause)

5 I'm sure you are aware of what I'm about to show you, but to make it very clear, given
6 the point that's been taken against me, obviously the Tribunal came to a distinct
7 conclusion at paragraph 64 about the strikeout issue. One sees that on page 382.
8 Then the Tribunal comes to another distinct conclusion about the proportionality issue,
9 at paragraph 105, on page 398 of the bundle. (Pause)

10 THE CHAIR: Yes.

11 MR PICKFORD: Our point is a very simple one. It is that irrespective of the basis on
12 which Mr Rowntree failed on the strikeout aspect of his claim, he also failed on
13 cost/benefit, and he says, "Ah ha! Well, assume I win on everything, then it's
14 nonsensical to argue that I would fail on proportionality in the future". But that isn't our
15 point. Our point is: let's assume that he wins his appeal, which is only on the strikeout
16 issue. Well, even then, he's still got all the problems that he had previously on
17 proportionality. That's our point. He doesn't have an answer to that.

18 THE CHAIR: Is there an appeal taking place, by the way? Permission has been
19 granted, and when is --

20 MR WILLIAMS: Yes, sir you granted --

21 THE CHAIR: I granted permission.

22 MR WILLIAMS: -- permission to appeal unanimously on both grounds.

23 THE CHAIR: Terrible memory. I do apologise.

24 MR WILLIAMS: That's quite okay. It's understandable.

25 THE CHAIR: When's it going to be heard? Do we know?

26 MR WILLIAMS: I think in June. We've got a date in June.

1 THE CHAIR: Yes. Okay. Thank you very much.

2 MR PICKFORD: Then the sixth of my combined points, so the final one, is this: whilst

3 Mr Rowntree never bothered to get the support of songwriters, what he did do is

4 reassure them that they weren't going to be the ones picking up the costs if things

5 went wrong.

6 THE CHAIR: Yes. I didn't really understand what this had to do with indemnity costs.

7 MR PICKFORD: Well, it's --

8 THE CHAIR: Which paragraph of your skeleton is this, sorry?

9 MR PICKFORD: Well, I'm afraid I can't tell you exactly which paragraph of the

10 skeleton. What I can tell you is what you need to look at in order for me to explain the

11 point, if I may.

12 THE CHAIR: Yes. Of course. Yes.

13 MR PICKFORD: If you go to the claims website, that's at tab 19, and it's 167. (Pause)

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

15 MR PICKFORD: Okay. We see about halfway down the page, "18: What are the risks

16 for me in joining the claim?"

17 THE CHAIR: Right.

18 MR PICKFORD: Do you have that, sir?

19 THE CHAIR: Which point, sorry?

20 MR PICKFORD: I'm on page 167 of the bundle.

21 THE CHAIR: I'm sorry. I'm on 166.

22 MR PICKFORD: This is the claims website.

23 THE CHAIR: Yes, I've got it now.

24 MR PICKFORD: This is a statement to songwriters.

25 THE CHAIR: Yes.

26 MR PICKFORD: It's not to us. It's to songwriters.

1 THE CHAIR: Mm-hmm.

2 MR PICKFORD: Sir, have you read 18? (Overspeaking)

3 THE CHAIR: Yes, I have read it. Thank you.

4 MR PICKFORD: In itself, the title is a little odd, "What are the risks for me in joining
5 the claim?", because of course this was opt-out proceedings, so already it's
6 suggesting.

7 THE CHAIR: Okay, I've got that point.

8 MR PICKFORD: Then there's the first sentence:
9 "Usually in litigation, the losing party is ordered to pay the winning party's costs."
10 Then there's an explanation of how songwriters don't have anything to worry about
11 because Mr Rowntree and his funder will have to pay the costs of the defendant if he
12 loses. Then he goes on to say, but there is one exception, and that's if there are issues
13 that concern the individual songwriters individually.
14 So that was, Mr Rowntree, in my submission, telling the class that there wasn't
15 anything to really worry about here because he was going to, or his funder was going
16 to, make sure that they didn't lose out if there were costs. But of course, what he didn't
17 say is that they might well lose out if he lost because he was in any cost argument
18 going to try and put as much of those costs back onto them via a different route,
19 because it's always songwriters that are picking up the bill.

20 THE CHAIR: Okay. So it's just the "you're suing yourself" point again. It's another
21 manifestation.

22 MR PICKFORD: It's the "suing yourself" point, but in the context of what that implies
23 for --

24 THE CHAIR: But what's this got to do with whether I choose to order indemnity costs?
25 This seems to be -- you're asking me to scold the PCR for making an accurate
26 statement, some sort of punitive?

1 MR PICKFORD: No, sir, I'm not.

2 THE CHAIR: Am I misunderstanding?

3 MR PICKFORD: Let me try and be clear about what my point is.

4 THE CHAIR: Yes.

5 MR PICKFORD: My point is that the Tribunal has, as we discussed at the outset,
6 a very broad discretion as to the type of cost order that it is appropriate to make, and
7 ultimately it has to be guided by what is just.

8 I've taken you through a number of points which I say combine together in of
9 themselves, before we even get on to this, which make it just to make the order.

10 THE CHAIR: Mr Rowntree said, look, it's not clear that payments would -- was it you
11 who said, sorry -- I think Mr Rowntree said it was not clear that payments would come
12 from the writers. There may well be an adjustment with the record producers, the
13 publishers. We looked at the rules and we decided there was a power to do that, and
14 it wasn't a clear cut case, at least as the parties put to me, that it would be the writers
15 footing the bill.

16 MR PICKFORD: I may not be being clear. I'm just talking here about footing the bill
17 for costs.

18 THE CHAIR: Yes. No, I understand. The conversation was in the context of
19 damages, but the same would apply to costs.

20 MR PICKFORD: It may be I need to take you to some of the evidence --

21 THE CHAIR: I don't think so. The point is, it's not clear what should have been said
22 in this paragraph, that costs will have to be paid by individual writers, because that has
23 not been decided. Costs may have had to be paid by the publishers who are benefiting
24 from their, sort of, unjust enrichment, if I can paraphrase it that way.

25 MR PICKFORD: Well, I think what could have been said is something more like what
26 Mr Rowntree says now, which is a third -- having set out all of this, which from -- if you

1 read this and you're a songwriter, you're not a lawyer, you're just a songwriter. If I read
2 that and I was a songwriter, I'd think, "Okay, great guy, Mr Rowntree, I've got nothing
3 to worry about here. There's this claim that's being brought in my name and either it's
4 going to be successful, in which case, supposedly I'll benefit from that. Or if it's not,
5 then Mr Rowntree and his funder are going to have to pay the costs. So it's all fine."
6 What they could fairly have said is actually, there's a significant cost risk for everyone
7 here for all members of the PRS, which is that if we lose --
8 THE CHAIR: Well, why couldn't he have just said, look, if the PRS loses, it has to pay
9 costs?
10 MR PICKFORD: No, not we. Him.
11 THE CHAIR: No. Why he could not have said if the PRS loses it would have to pay
12 costs? Why does he have to -- sorry, am I misunderstanding?
13 MR PICKFORD: Yes. I'm not being clear, I'm sorry.
14 THE CHAIR: No, no, it's my fault.
15 MR PICKFORD: I am talking about the situation where Mr Rowntree loses.
16 THE CHAIR: Right.
17 MR PICKFORD: So what Mr Rowntree says here is to songwriters.
18 THE CHAIR: Yes. Okay. Sorry. Yes.
19 MR PICKFORD: Yes. You songwriters got nothing to worry about here --
20 THE CHAIR: Right.
21 MR PICKFORD: -- because I'm bringing this claim on your behalf. And, indeed, he
22 suggests that they have to join, but let's put that to one side. You haven't got anything
23 to worry about because if I lose you're going to be fine because I'm going to pick up
24 the tab.
25 THE CHAIR: Through the ATE insurance?
26 MR PICKFORD: We didn't actually mention ATE insurance, but I mean, that's

1 | presumably implicitly what's in his mind. And/or his funder is going to pick up the tab.
2 | He refers to himself and his funder.
3 | THE CHAIR: Yes.
4 | MR PICKFORD: My point is that that is a very partial perspective, because what he's
5 | actually now saying in this hearing is "I'd like to pick up 30 per cent of the tab, please".
6 | THE CHAIR: But what should he have said when he wrote this?
7 | MR PICKFORD: He should have said to songwriters, that there is --
8 | THE CHAIR: It is the same point. You're saying the PRS is left with a bill that's going
9 | to be picked up by the client.
10 | MR PICKFORD: Unrecovered costs. Yes.
11 | THE CHAIR: Yes. That was what I understood.
12 | MR PICKFORD: Sorry, I thought it's because you thought it was if we lost.
13 | THE CHAIR: All right, well you lose the cost application. Anyway, yes, there may be
14 | a bill, the PRS. So why couldn't he have just said, "Look, if, of course, in other
15 | circumstances, the PRS may have to pick up the bill?" There are circumstances where
16 | the PRS may have to pick up the bill for costs?
17 | MR PICKFORD: Yes, well, he could have said that.
18 | THE CHAIR: And you'd have been happy with that?
19 | MR PICKFORD: If it was sufficiently clear to songwriters. Because, of course,
20 | songwriters have a choice --
21 | THE CHAIR: You can't even explain the position to me, which I accept is my fault.
22 | But, I mean, it's not an easy thing to have all the cost contingencies in a short
23 | statement to the members, is it?
24 | MR PICKFORD: With respect, I think the point that was missing here is some
25 | explanation to songwriters that they were at risk of having to contribute to a cost bill if
26 | he lost, because that is exactly what he's saying in this --

1 THE CHAIR: That would not be accurate. It's the PRS who's at risk.

2 MR PICKFORD: Yes. Well, then through the PRS, but it's a members' organisation.

3 THE CHAIR: Well, it's a company limited by guarantee. Isn't that right?

4 MR PICKFORD: I believe so. But it's also a non-profit making, and I've provided you

5 with --

6 THE CHAIR: But how the PRS then -- I think I'm repeating myself now. The PRS

7 doesn't necessarily issue a bill to all its members or deduct all the member's royalties.

8 The PRS is faced with the costs bill. How the PRS pays for that is unknown. It's

9 a matter for the board of the PRS.

10 MR PICKFORD: There are two -- what Mr Day explains in his evidence is that there

11 are two possibilities, basically. It's an increase in PRS's costs, obviously, because it

12 now has more costs than it would otherwise have, and that can flow through in two

13 different ways. Either it means that if it pushes it through into the relevant costs that

14 are taken account and deducted in relation to royalties, then everyone's going to get

15 a little bit less royalties, or they have less -- it goes through in some other way, so they

16 have less money to spend on other activities that they carry out, again, for the benefit

17 of their members, in particular songwriters, because songwriters are the beneficiaries

18 of most of those charities. But either way --

19 THE CHAIR: Or they could ask the publishers to dig into their pockets?

20 MR PICKFORD: Well, there's no particular -- it wouldn't be fair, sir, to ask just

21 publishers to --

22

23 THE CHAIR: Well, I mean, that was discussed at some length at the last hearing, and

24 I don't -- I mean, there's been no ruling on that. But I've got the point.

25 MR PICKFORD: Yes. I don't think I need to spend more time on that.

26 THE CHAIR: Was that all the points?

1 MR PICKFORD: Those are the points, but I have a couple of submissions to make to
2 tie it together --

3 THE CHAIR: Right.

4 MR PICKFORD: -- because of the way in which Mr Williams responds to them.
5 Because what he does is he goes through each of those points individually and says,
6 well, this of itself, that's -- you know, the first one, the fact that it's a member's
7 organisation, that's not of itself good enough. Or the fact that it's opt-out proceedings,
8 that's not of itself good enough. But what he fails to address entirely is that it's the
9 combination --

10 THE CHAIR: Yes. No, I understand that. That's always the problem when you
11 enumerate your arguments, they tend to -- but we have to look at it holistically.

12 MR PICKFORD: Exactly. It's like, it's like defending an allegation of drunk driving by
13 saying, well, driving --

14 THE CHAIR: The analogy is not going to help. Let's move on.

15 What's the next point? So we've done indemnity costs. Anything else you want to say
16 on that?

17 MR PICKFORD: No, I think, sir, that in relation to indemnity costs, that's all I need to
18 say.

19 So next issue is whether costs should follow the event.

20 THE CHAIR: Yes. Well, my provisional view is you have the better arguments on that
21 at the moment, so you can take this very swiftly I think.

22 MR PICKFORD: Thank you, sir.

23 THE CHAIR: Pick up points in reply if necessary.

24 MR PICKFORD: In which case, I probably simply need to say, that the starting point
25 in law, of course, is that costs follow the event. As we referred to in our skeleton
26 argument, there are a number of cases, judgments delivered by the Court of Appeal

1 and for instance, by, Mrs Justice Gloster, as she then was, that basically tell courts
2 and tribunals they should back off trying to do some perfect job in relation to issues
3 based --

4 THE CHAIR: Yes. This is all bread and butter.

5 MR PICKFORD: Exactly. And we say that the kinds of points that are raised against
6 us here are very third, indeed fourth-order points. We want --

7 THE CHAIR: I've read your skeleton on that. As I said, at the moment, you're pushing
8 at an open door.

9 MR PICKFORD: I'm grateful. In which case, I will come back on that only insofar as
10 you need me to in reply.

11 So the next issue then is payment on account.

12 THE CHAIR: Yes.

13 MR PICKFORD: Our total costs up to 31 August as we set out in our skeleton are
14 £2,597,491.99. Our position is that an interim payment of £1.8 million would be an
15 appropriate one for payment on account; that is 69 per cent of our costs; and that's if
16 we lose on the indemnity versus standard argument. So that's on a standard basis.

17 If we win on indemnity, then we say it should be £1.9 million; and that would be
18 75 per cent of our costs.

19 Again, as I'm sure, Sir, you're very well aware, 70 per cent is often a kind of initial level
20 in terms of a rule of thumb for a payment on account. Obviously the Tribunal has the
21 discretion to take into account whatever circumstances it sees fit, but that's a classic
22 starting point.

23 Now, we make the following points as to why it's unlikely there are going to be any
24 particularly substantial discounts that take this case out of the norm. We're already
25 allowing some significant discounts. We're just saying they're not going to be even
26 bigger than that.

1 The first is that our costs of around £2.6 million are significantly less than
2 Mr Rowntree's costs, which are estimated to exceed £3.6 million. That's first Day at
3 paragraph 38.4.

4 Secondly, this application was factually and legally quite complex, and the
5 proceedings were of considerable importance, obviously, to the PRS because they
6 were challenging the very basis on which the PRS does its key job, which is distribute
7 royalties to its members.

8 THE CHAIR: Well, not really. It was the undistributed royalties it was concerned with.
9 It wasn't attacking how you distribute royalties to your members. It was dealing with
10 how you address royalties where you can't find the members.

11 MR PICKFORD: Well, on its face, yes, but, actually, as I sought to explain at the last
12 hearing, there are substantial ramifications for Mr Rowntree's approach because the
13 way that we treat Black Box actually comes -- so-called "Black Box", we don't call it
14 "Black Box" -- out of our general approach to how we seek to distribute everything on
15 effectively a pro-rata basis. The pro-rata approach goes across the board in terms of
16 our distribution methods. And it is sometimes --

17 THE CHAIR: Anyway, it's kind of my fault for setting this hare running because we're
18 just going to rehearse what we've already discussed in our (inaudible).

19 MR PICKFORD: Yes.

20 THE CHAIR: But I take your point. You say this was a very important case to the PRS
21 and --

22 MR PICKFORD: Yes.

23 THE CHAIR: -- if the source of sums of money that were being suggested are
24 considered, you absolutely have to defend yourself properly.

25 MR PICKFORD: We say that there aren't going to be any significant reductions to
26 PRS's solicitors' hourly rates. They're approximately 30 per cent above guideline

1 hourly rates, but this was a case justifying that --

2 THE CHAIR: Why was it justifying more than guideline rates?

3 MR PICKFORD: Because of the points that I just made. It was a complex --

4 THE CHAIR: What was the complexity?

5 MR PICKFORD: Well, the complexity -- one of the complexities, to be quite frank, was
6 trying -- I mean, it's certainly something that I think -- I'm going to try to put this in a way
7 that doesn't get into revealing anything that's privileged.

8 Standing back, what one could well see is that, in a case of this nature, it would be
9 potentially a challenge for any lawyers that had to address it to try to work out what it
10 was that was actually really being argued. On its face, it was a competition law claim
11 for something that we had apparently done wrong. There was considerable, if I may
12 say so, circularity and something that was elusive about what the real problem was.
13 And that, objectively, would have taken -- some sort of thing that would have taken
14 a great deal of analysis to try to actually work out whether there's anything in there or
15 not. It was not an easy case.

16 THE CHAIR: Sorry, just trying to get -- it was the legal complexity is really what you're
17 saying, as opposed to the factual complexity.

18 MR PICKFORD: Well, first, there was the legal complexity. Actually, the factual
19 situation is far from simple, because although we try to present as simplified a version
20 as we could for the Tribunal in terms of making everything capable of being understood
21 and determined at the previous hearing, the PRS actually has a very, very
22 sophisticated and complex set of rules as to how ultimately it deals with all sorts of
23 different contingencies. Taking that degree of complexity and turning it into something
24 that is capable of being digested in a two or three-day hearing, again, in my
25 submission, is relatively challenging.

26 Mr McDonald is going to address you on the detail, if we come on to deal with the

1 issue of summary assessment. It was actually in terms of hourly rates. It was
2 Mr McDonald that was going to address you on the issue of hourly rates, but --

3 THE CHAIR: That's fine. I look forward to hearing from him.

4 MR PICKFORD: It's more his specialist area than it is mine.

5 THE CHAIR: Yes, no, no, that's fine.

6 MR PICKFORD: But, in essence, that's what we say. (Pause)

7 And the wider point for --

8 THE CHAIR: Just sort of summarising where we are, you say, for reasons which
9 Mr McDonald will elaborate upon, this is a complex case and justifies the uplift on the
10 guidelines.

11 MR PICKFORD: It does. What I say is if in order for the Tribunal to get a handle on
12 whether those sums are actually inflated and substantially more than they should be,
13 sir, you need some kind of benchmark, and it is telling that Mr Rowntree is not willing
14 to offer you that benchmark. He's not willing to say, "Ah ha! Well, you can see that
15 they massively overspent because, look, we were the claimants and we did this case
16 and we dealt with these issues for much less money."

17 THE CHAIR: I mean, you can point to a lot of money that was spent by the class
18 representative, but it's not an equality of arms inasmuch as you can find out what the
19 PRS does by picking up the phone to someone at the PRS. The proposed class
20 representative doesn't have -- I mean, he's doing something quite different. So I'm not
21 sure this is a case where one would necessarily expect equality even as a starting
22 point, equality of costs.

23 Now that may work for you or against you. I'm not --

24 MR PICKFORD: Quite, sir, because it's quite easy to throw an accusation saying,
25 "This is all unfair. You haven't done this fairly enough. We think that songwriters are
26 getting short changed". And then to try to unpick that and actually: what worked out?

1 Well, why? In what respects? Which bits of this is he really complaining about?
2 Et cetera. That's actually quite a difficult thing to do.

3 THE CHAIR: You were presented with a claim form. What were the ambiguities in
4 that that caused you particular problems? Is there anything you want to point me to
5 or ...?

6 MR PICKFORD: Well, I think, sir, one point, I won't be able to give you the paragraph
7 reference, but I can tell you about it.

8 You'll recall, from the first hearing, there was an ambiguity about whether International
9 was in or out of the claim. Ultimately, the Tribunal decided that it was going to be in
10 the claim.

11 THE CHAIR: That was very much a matter that I thought no one had addressed their
12 mind to at least sufficiently until we got to the second hearing.

13 MR PICKFORD: Yes, but the point here is, well, I think we always understood that it
14 was out. It became much more important --

15 THE CHAIR: Yes.

16 MR PICKFORD: -- when we got to the second hearing, because it was at that stage
17 where actually it seemed like quite a lot turned on it from the point of view of the total
18 value of the Black Box.

19 THE CHAIR: Yes.

20 MR PICKFORD: And, as was recorded in the judgment, even Mr Ward's
21 King's Counsel accepted that there was a lack of clarity in their case.

22 THE CHAIR: I mean, I think I ruled that it was pleaded, but --

23 MR PICKFORD: You ruled it was pleaded --

24 THE CHAIR: -- it was accepted that it needed a bit of buffing up.

25 MR PICKFORD: Yes, and, indeed, if I may say so, the gist of what one gets from that
26 is -- and honestly it's very clear why a Tribunal would do this -- even if there's some

1 | ambiguity, you're not at the outset, in a proportionality challenge, going to shut
2 | someone out of what they might well have pleaded.

3 | THE CHAIR: Yes. I have got that point.

4 | MR PICKFORD: But --

5 | THE CHAIR: Anyway, I recall what happened, yes.

6 | MR PICKFORD: Yes.

7 | THE CHAIR: That's an area that you point out as to --

8 | MR PICKFORD: So that's one issue.

9 | The other is just more generally, and it's hard to find, again, a specific paragraph to
10 | say, "Well, there you go. That crystallises it" because the fact that there isn't such
11 | a paragraph is in essence part of the point. It's very difficult to get a grasp of what it
12 | really is that was being complained about in terms of what we should have done
13 | differently, why it was that what we were doing was so bad. Ultimately, that is the
14 | essence of why we won on the strike-out.

15 | THE CHAIR: Yes.

16 | MR PICKFORD: But when you have a 50-page or 80-page pleading that makes lots
17 | and lots of complaints but ultimately doesn't actually grapple with that kernel, that
18 | actually takes a lot of work.

19 | THE CHAIR: Yes.

20 | MR PICKFORD: Because when you have a clear, well-pleaded claim that's got a good
21 | point. Well, then you identify the point, you deal with it, and actually that's relatively
22 | straightforward. It's when you have a claim such as this, which is ultimately not
23 | sufficiently coherent but it got past the strike-out test, that one has to spend a lot of
24 | time parsing and trying to work out and extract what it is that they might be arguing.
25 | Because, of course, it's no good for me if I come into to the Tribunal and there's some
26 | big thing that I've missed because actually it's there, but you have to peer really hard.

1 Because if everyone else has peered really hard and seen it and I haven't, then that's
2 not going to help the Tribunal. So that's my submission as to why this is a classic case
3 where the burden of dealing with this claim was inevitably going to be quite high.
4 But all I'm trying to do is persuade you, sir, that it's not out of the ordinary such as to
5 merit a much more substantial deduction for the purposes of a payment on account.
6 I'm not saying "Give us 100 per cent". I'm saying "Give us 69 per cent or 75 depending
7 on the basis on which you order costs". So that is that on the issue of the payment on
8 account.
9 In relation to interest, that's something that Mr McDonald is going to address you on.
10 And then we have the question that we began this discussion with, which is: well, does
11 anything now change as a result of ...?
12 THE CHAIR: We can park that until the end; is that all right?
13 MR PICKFORD: Yes, we can, yes.
14 Sir, I'm just going to check, if I may, with those behind me --
15 THE CHAIR: Why don't we have --
16 MR PICKFORD: Five minutes.
17 THE CHAIR: Five minutes?
18 Now, you're going to check about whether you're objecting to summary assessment.
19 MR PICKFORD: I think as long as we have -- that may well be Mr McDonald whose
20 area is more than mine -- sufficient time just to assemble our points to make our case
21 on that, we're not objecting.
22 THE CHAIR: Right. I'm not quite sure what the caveat is. Obviously, are you -- why
23 don't we take ten minutes now --
24 MR PICKFORD: Yes.
25 THE CHAIR: -- so you can have a chat through?
26 Obviously, there'll be ample time to deal with this issue, and whether that's

1 Mr McDonald or yourself, it's fine, but it'd be nice to know where we're going on that
2 at all.

3 MR PICKFORD: Okay. I'm grateful.

4 (11.36 am)

5 (A short break)

6 (11.47 am)

7 MR PICKFORD: Sir, before I sit down, I just have two further short points to make.

8 When I say sit down, it was to sit down --

9 THE CHAIR: Yes, yes.

10 MR PICKFORD: -- and Mr McDonald to follow.

11 You asked us about summary assessment versus detailed. Our preference is still for
12 detailed. I have two points to make on that, but I also heard what the Tribunal said,
13 so, ultimately, if summary is what everyone wants to do, summary it will be.

14 The two points in support of the position that we originally advanced and which
15 seemed to be accepted by my learned friends is the commercial court guidance on
16 when one has summary assessment as opposed to detailed assessment is
17 a £250,000 threshold. Ordinarily, in the commercial court, cases up to a value of costs
18 of £250,000 are addressed summarily, and thereafter one would have detailed
19 assessment. So we are an order of magnitude higher than that.

20 THE CHAIR: But that's only the commercial court.

21 MR PICKFORD: It is only the commercial court.

22 THE CHAIR: Not other courts.

23 MR PICKFORD: I take that point, sir. I'm making both of these points relatively lightly,
24 but I'm making them so that the Tribunal has all of our submissions before deciding
25 what to do. So that's the first.

26 The second is, obviously, as it wasn't opposed that we would go to detailed

1 assessment, we don't, for example, have a schedule of costs for today, whereas if we
2 were going to do summary assessment, we'd have to obviously include today's costs.
3 There may be ways around that. It may be that they can be dealt with on the papers
4 afterwards, but that is an obstacle to a full summary assessment today, because it's
5 not what we --

6 THE CHAIR: Do you have an indication of what your costs are today, just so that we
7 have a ballpark?

8 MR PICKFORD: I've got a shaking head behind me, sir. I've got two shaking heads
9 now. I mean, we can try to come up with one, but we obviously haven't got a schedule
10 we can give, or realistically won't be giving today. So those are the only two points.

11 THE CHAIR: Well, if you're able to come up with a figure over lunch, that would be
12 fine. If you can't, you can't. I appreciate that. Yes.

13 MR PICKFORD: Sir, if I may then hand --

14 THE CHAIR: You're dealing with interest.

15 MR McDONALD: Yes.

16 THE CHAIR: Yes. Thank you. Okay.

17

18 Submissions by MR McDONALD

19 MR McDONALD: I'm going to take interest first, out of the areas within my remit.

20 There is a preliminary point of interest, which is whether, as we originally proposed, it
21 should be dealt with by the cost judge, as happened in the Ad Tech proceedings, or
22 whether, sir, you deal with it now. We're content either way. We proposed it be dealt
23 with by the cost judge, really for efficiency, and also because the cost judge can look
24 back and therefore determine the appropriate periods of interests.

25 THE CHAIR: That's a separate matter, but in terms of determining whether you're
26 entitled to interest or your costs, that can't be a matter for the cost judge, surely.

1 MR McDONALD: Well, it was left to the cost judge in Ad Tech.

2 THE CHAIR: Yes.

3 MR McDONALD: And we will be saying that the cost judge has jurisdiction himself to
4 order interest and costs under the CPR, which would apply to him. But that's
5 a separate argument. We just thought it might be helpful for all the arguments to be
6 dealt with at once by the cost judge. But, sir, if you want to deal with the point of
7 principle now, we're happy to deal with it. I was just explaining where we started from
8 on that.

9 I'll proceed to address you on the point of principle. The starting point for that is to
10 happily identify two common ground points between us. The first is that I accept that
11 there's no common law right to interest. That's a point that's made by the PCR and
12 the funder. It has to be contained in the rules.

13 Secondly, the funder accepts -- and I'm assuming that the PCR accepts as well -- that
14 the Tribunal Rules can provide for payment of interest in principle, and we see that
15 they do in some circumstances. So the critical issue between us is: do the rules in
16 fact confer power on the Tribunal to award interest on costs? That's the critical
17 question?

18 THE CHAIR: You have got three authorities who say no: Merricks, Flynn and
19 Churchill Gowns, and then you rely on later Court of Appeal cases.

20 MR McDONALD: We do.

21 THE CHAIR: Do we need to look at those?

22 MR McDONALD: Yes. I'll start with the rules and then look at the authorities, if I may,
23 just to take us through that.

24 We rely primarily on rule 104, which, sir, you indicated earlier you were familiar with,
25 as I'm sure you are.

26 THE CHAIR: Yes.

1 MR McDONALD: That's authorities 59.

2 THE CHAIR: Yes.

3 MR McDONALD: I don't have tabs in my bundle, but it's page 59.

4 THE CHAIR: I've got it here.

5 MR McDONALD: 104(2): "The Tribunal may, at its discretion, subject to rules 48
6 and 49, at any stage --"

7 THE CHAIR: Any order it thinks fit.

8 MR McDONALD: Make any order it thinks fit.

9 THE CHAIR: You say broad discretion.

10 MR McDONALD: Also, it's in relation to the payment of costs, in respect to the whole
11 or part of the proceedings.

12 THE CHAIR: You say, on its face, that should cover making an order for interest.

13 MR McDONALD: Exactly. Just simply as a matter of language, interest on costs is in
14 relation to costs. Indeed, this issue or a similar issue was considered in the tax
15 tribunal, and the tax tribunal is in fact the only authority (inaudible) referred to which
16 sets out its reasoning for its conclusion. That's the Curran case. We can find that at
17 authorities 353. (Pause)

18 Page 353, so I'm expecting it might be tab 24.

19 THE CHAIR: Yes.

20 MR McDONALD: As a tax tribunal case, I accept that it's not binding on you, but it
21 does helpfully contain an analysis of a similar rule in the tax tribunal rules, and we can
22 find that at paragraph 40, which is on page 362. There's a heading "Interest" on
23 page 361, but the relevant part is paragraph 40, where the Tribunal held:

24 "In respect to the period for which interest should run, there is no specific rule in the
25 Tribunal rules corresponding to that in CPR rule 44.3(6)(g), which allows a costs order
26 of the court to include an order that interest be paid from or until a certain date,

1 including a date before judgment".

2 So it's a similar position that we're in here.

3 THE CHAIR: Right. How does this help me?

4 MR McDONALD: I'll come on to the help in a bit:

5 "I have considered whether rule 10 may be construed to allow the Tribunal to make
6 such an order. Consistently with what I have decided in relation to interim payment of
7 costs, I also consider that, in the interest of fairness and justice, rule 10 should be
8 construed so as to permit the Tribunal to award interest on costs from a date before
9 the relevant decision. Rule 10(1) [and this is the critical part] provides that the Tribunal
10 'may make an order in respect of costs' (my emphasis). If rule 10 were narrowly
11 construed so as to exclude a power to order interest from an earlier date, that could
12 operate unfairly, particularly where the Tribunal itself makes a summary assessment,
13 accordingly makes the only decision as to costs".

14 So although in my judgment the Tribunal does have such jurisdiction, it was then left
15 to the cost judge.

16 The point I make is that in this case, the tax tribunal held that a power in respect of
17 costs --

18 THE CHAIR: Yes, I understand that, but I don't see how it helps me in the light of
19 Merricks and Churchill Gowns.

20 MR McDONALD: Well, I'll come on to those in a moment.

21 THE CHAIR: Leaving me on a cliffhanger, are you?

22 MR McDONALD: Well, I mean, very simply, I'll say now what we say about them.
23 Firstly, they're not binding on you in the sense that previous tribunal -- they're treated
24 with great respect, of course, but they're not strictly binding on you.

25 THE CHAIR: They're not binding. But you're not saying they are obiter.

26 MR McDONALD: I'm not saying they're --

1 THE CHAIR: You're not saying they are per incuriam.

2 MR McDONALD: Well, the reason I can't address you on per incuriam is we don't
3 know what was submitted to the Tribunal in Merricks, because it's one paragraph in
4 Merricks. We don't know what was said to the Tribunal, and it was dealt with amongst
5 more serious issues between the parties. So it's unclear whether the points that I'm
6 making were actually --

7 THE CHAIR: It's dealt with shortly, yes.

8 MR McDONALD: It's dealt with very shortly. I don't mean that critically. There are
9 other more important things that were going on.

10 THE CHAIR: More important than interest?

11 MR McDONALD: Since then we've had -- there are other decisions which I'll take you
12 to, which we say perhaps coloured the position. But you are entitled to look at it anew
13 in the sense that if you're satisfied that the rules do give you power, then you're entitled
14 to find that. You can depart from those previous decisions. As I said, you're not bound
15 by them and we don't know how much analysis was carried out, because in the two
16 later cases, the Flynn Pharma case and the other case, all they did was refer back to
17 Merricks. There was no reconsideration of the position. They just cited Merricks and
18 followed it.

19 THE CHAIR: But isn't this a matter that needs to get sorted out by the Court of Appeal,
20 rather than this Tribunal ploughing its own furrow?

21 MR McDONALD: Well, it may be, but this Tribunal would need to give its determination
22 of the point before we went to the Court of Appeal. We say that "in relation to" is at
23 the very least broader than "in respect of". It may (overspeaking).

24 THE CHAIR: Yes, I got that point.

25 MR McDONALD: Turning now to the second point, which is a related point about
26 rule 104. If we go back to 104, at page 59 in the bundle. It's the meaning of costs.

1 THE CHAIR: Yes.

2 MR McDONALD: It says:

3 "For the purposes of these rules 'costs' means costs and expenses recoverable before
4 the Senior Courts of England and Wales".

5 That effectively takes us into the CPR, which is why there have been references to the
6 CPR. The relevant CPR rule we can find on page 10 of the authorities. It should be
7 the previous tab.

8 THE CHAIR: All right. (Pause)

9 MR McDONALD: Page 10. I'll come back to this when we're addressing summary
10 assessment, but:

11 "Court's discretion as to costs

12 "44.2(1) The court has discretion as to --

13 (a) whether costs are payable by one party to another;

14 (b) the amount of those costs; and

15 (c) when they are to be paid".

16 Then one of the orders that the court can make is interest on costs, and we can see
17 that if you look at subparagraph 6 at the bottom of the page.

18 THE CHAIR: Yes.

19 MR McDONALD: Then over the page, it says:

20 "(6) The orders which the court may make under this rule --"

21 THE CHAIR: Interest on costs, yes.

22 MR McDONALD: Then pay interest on costs.

23 THE CHAIR: Right.

24 MR McDONALD: We say that ties into our submissions in respect of "in relation to".

25 In the CPR, they treat interest on costs as a matter exercised under 44.2, which is the
26 rule relating to costs. Alternatively, we say, well, in fact, it could be construed itself as

1 a cost or an expense recoverable under the CPR. But I don't need to go that far. I only
2 need to say that it's "in relation to", and we say it clearly is. It's in the same rule. It's
3 under the same powers in that rule.

4 Then the other matters I rely upon in relation to the new authorities. The first is the
5 Court of Appeal's decision in the Evans (inaudible) case. (Pause)
6 You're getting another authorities bundle, I'm told. (Inaudible)

7 THE CHAIR: (Overspeaking) It's Evans.

8 MR McDONALD: Yes. Evans is in your original bundle. It's not in the new one. It's
9 at tab 69.

10 THE CHAIR: Okay.

11 MR McDONALD: It will probably be near the end of your original bundle.

12 THE CHAIR: Yes, I've got it. This is Court of Appeal.

13 MR McDONALD: Court of Appeal.

14 THE CHAIR: I've not looked at this, just to be aware in advance.

15 MR McDONALD: Just to orientate you, this is the order made. What you'll see that
16 they do is at paragraph 14, and that's on page 1551 --

17 THE CHAIR: Yes.

18 MR McDONALD: The Court of Appeal ordered that the respondent bank shall pay to
19 Mr Evans on a joint and several basis costs of and occasioned by the CPO application.
20 So that's the costs order.

21 Then at (b) --

22 THE CHAIR: Yes.

23 MR McDONALD: "Interest on those costs from the date on which they're paid by or
24 on behalf of Mr Evans to the date of this order at a rate of 3% per annum above the
25 Bank of England base rate from time to time."

26 So what the Court of Appeal ordered was interest on the first instance costs.

1 THE CHAIR: Yes, I understand what you mean. But they didn't don't deal with -- it's
2 not clear that Merricks was drawn to their attention.

3 MR McDONALD: It's not clear. And I accept that it doesn't -- it's even not clear
4 whether there was any specific argument about the jurisdictional powers to do that.

5 But the starting point, I'd say, is that the Court of Appeal got it right. The point made
6 by Mr Carpenter is that they could have been exercising different powers that they had
7 under a different CPR rule. We don't know whether that's the case. It seems most
8 likely that they were exercising the powers that they had vis-à-vis the Tribunal powers.

9 But even if they were exercising a different power, it would seem pretty strange that
10 the Court of Appeal on an appeal could order interest on the costs at first instance, but
11 the Tribunal lacked jurisdiction to order costs at first instance. It would mean that the
12 parties, by appealing, would somehow assume a greater right to interest than they
13 would have had at first instance, which would, in my submission, be most unusual.

14 The next decision I rely upon is the DAF Trucks case, and we can see that at 1672.
15 I'll get that to you. This is in the inserts, I believe.

16 THE CHAIR: In the new bundle?

17 MR McDONALD: In the new bundle. It's referred to in Mr Carpenter's skeleton.

18 THE CHAIR: Yes.

19 MR McDONALD: It should be tab 75.

20 THE CHAIR: Yes.

21 MR McDONALD: The relevant section is at 1670.

22 THE CHAIR: Yes. Hold on. Let me just make a note.

23 Tab 5. Just give me a second. (Pause)

24 Yes.

25 MR McDONALD: You'll see that 3 -- it provides a payment on account of costs at 3(a)
26 and 3(b), so the 70 per cent payment on account and then a 75 per cent payment on

1 account in the two sets of proceedings. And then at paragraph 4:
2 "Any judgment debt arising in relation to the sums specified under paragraph 3 of this
3 Order shall carry daily interest at the per annum rate stipulated by section 17 of the
4 Judgments Act ... from (and including) the date of this Order ..."
5 THE CHAIR: This is just under the Judgments Act?
6 MR McDONALD: Well, what it's doing is it's directing that the Judgments Act shall
7 apply from an earlier date, because of the slight oddity in the Tribunal rules that if you
8 give a judgment that then needs to be registered in the High Court.
9 THE CHAIR: Yes.
10 MR McDONALD: Before the Judgment Debts Act rate would apply.
11 THE CHAIR: Yes.
12 MR McDONALD: So what this does is it brings forward the Judgment Debts Act to the
13 date of this order. So there's no dispute --
14 THE CHAIR: I understand. But it's not from the date of payment of the costs?
15 MR McDONALD: No it's not, but the point I make is that this is the exercise of
16 a jurisdiction in respect of interest on costs.
17 THE CHAIR: Yes.
18 MR McDONALD: Which on --
19 THE CHAIR: But again, we -- sorry, not a criticism of your submissions, but we don't
20 know what argument there was.
21 MR McDONALD: We don't know, but this was the problem. The only case where we
22 know what was really argued is the tax tribunal case, because we see the reasoning.
23 THE CHAIR: But I mean, Mr Justice Roth, of course, would have been thoroughly
24 familiar with the terms of rule 104. He probably even drafted it. But he'd been
25 thoroughly familiar with it, and the fact is he didn't alight on the arguments you're
26 putting forward.

1 MR McDONALD: As I said, I'm not trying to intend to criticise any of the decisions
2 here. We simply don't know what was put before him. The points I'm making now
3 may not have been raised with him. He may not have been taken to the tax tribunal's
4 case. He may not have been taken to the CPR, which make it clear that interests --

5 THE CHAIR: I mean, those don't really nail the point. The tax tribunal case is of
6 interest. Your point on the CPR doesn't -- it's a perfectly decent advocacy point, but it
7 doesn't actually nail it.

8 MR McDONALD: No. But the simple point is we don't really know what was argued
9 before him.

10 THE CHAIR: No.

11 MR McDONALD: And one might see that how the conclusion can be reached if points
12 were taken on -- I don't know. You know, who knows how they were presented. It
13 looks like they were in with a mishmash of other more important points. And these
14 sort of situations can arise where points are dealt with in more detail at a subsequent
15 hearing.

16 Then the last point I rely upon are the recent Court of Appeal decisions in
17 Gutmann v Apple and BT v Le Patourel. You'll no doubt be familiar with these sorts
18 of issues in those cases, which was funder paid first before the class, and the
19 Tribunal's powers in respect of that.

20 The Court of Appeal on BT v Le Patourel and in Gutmann v Apple and in various
21 Tribunal decisions such as McLaren, held that the Tribunal's powers under
22 rules 2, 4, 53, 98 and 104 were sufficiently broad to confer power on the Tribunal to
23 make an award for payment to the funder before the class, effectively, out of damages.
24 That was in the context of funders' fees being costs and expenses.

25 I don't have to take you through all of those, but we say that, in essence, if the
26 Tribunal's powers are wide enough to make an order to pay the funder first before the

1 class, when the funders' fee is a return on the amount that has been funded, it would
2 be surprising if the Tribunal's powers were not sufficiently broad to order interest on
3 costs to be recoverable by a receiving party.

4 I can give you the references for that if it'd be helpful. I'm sure you're familiar with
5 them, but the references are paragraph 99 of BT v Le Patourel.

6 THE CHAIR: Yes.

7 MR McDONALD: And paragraph 82 of Gutmann v Apple.

8 THE CHAIR: Just remind me of that.

9 MR McDONALD: It might be worthwhile. Looking at Gutmann v Apple, then. Tab 54.
10 It starts on page 1197. The relevant bit is on page 1220, starts at paragraph 78. The
11 part that I particularly draw your attention to is paragraph 82, which is on 1221.

12 THE CHAIR: Yes.

13 MR McDONALD: And this is:

14 "The wide powers conferred on the CAT by [rule] 47C(3) are reflected in the CAT
15 Rules. These include not just Rule 93 [93 deals with the distribution of the award] but
16 as Green LJ pointed out in argument Rules 2 and 4 which impose a free-standing duty
17 on the CAT to apply the general principles set out in Rule 4. The general principles
18 give the CAT broad overarching powers to ensure that costs and expenses are dealt
19 with fairly and proportionately in accordance with the principles of justice. This would
20 include ordering that the funder and the lawyers are paid in priority to the class, a form
21 of order which might be particularly necessary where the CAT considers the take-up
22 of the damages award by the class might be high [et cetera, et cetera]."

23 So I accept it's not squarely on point and that it's dealing with the position with funders'
24 fees, but I rely on the emphasis placed on the width of the Tribunal's powers under its
25 rules. And we know that those powers have to be interpreted in accordance with the
26 general principles because rule 2 --

1 THE CHAIR: So I'm just looking for the bit in rule 4.

2 MR McDONALD: Yes. So in rule 4, it seems that they're relying on the just and
3 proportionate.

4 THE CHAIR: "Justly and at proportionate cost". That's what you think the reference
5 is to?

6 MR McDONALD: Yes. And then if you look at the end of rule 2, and I'm sure you're
7 familiar with this, but it provides that the Tribunal rules generally must be interpreted
8 in accordance with the general principles. So if you look at page 41 of the bundle, the
9 authorities bundle.

10 THE CHAIR: Sorry, I'm on a loose copy. Just give me the --

11 MR McDONALD: It's 2(2). Right at the bottom of rule 2.

12 THE CHAIR: Yes.

13 MR McDONALD: "These rules are to be applied by the Tribunal."

14 THE CHAIR: Yes. Okay.

15 MR McDONALD: We said that's another factor encouraging interpreting rule 104
16 broadly.

17 Then if we -- we can look at Merricks briefly.

18 THE CHAIR: Well, I take your point. There's no reasoning there and we don't know
19 the scope of the argument.

20 MR McDONALD: Yes. And it may have been dealt with very quickly given the other
21 things that are being dealt with. In that case, Mr Justice Roth identified that there
22 would be a lacuna in the rules in light of his findings. We said there's no lacuna, and
23 there's a good reason --

24 THE CHAIR: So it's more than just in passing, isn't it? I mean, Mr Justice Roth clearly
25 addressed his mind to it and identified the lacuna. And we don't know the details of
26 the argument but, nevertheless, it wasn't a passing over to comment or something

1 where -- and the question I'll have to decide whether it's appropriate for me to look at
2 this afresh or whether I should really be following those authorities, insofar as anyone's
3 interested, looked at again, looked at by the Court of Appeal to try and resolve these
4 matters. That seems the more attractive approach.

5 MR McDONALD: If it helps you in terms of the effect of previous Tribunal decisions
6 on this Tribunal, we've included the Deutsche Bahn case in the bundle. This might be
7 in the insert. It's at tab 73, and the relevant paragraph is 17 on 1624. (Pause)

8 I won't confess to be over all the detail of the substantive issue which has been
9 determined, but the (inaudible) argument was that:

10 "The Claimants, unsurprisingly, placed considerable reliance on the conclusion that
11 was reached in Emerson I [which was a prior decision], and rightly so. Nevertheless,
12 prior decisions of the Tribunal are not binding on the Tribunal, and whilst entitled to
13 great respect [and I accept that], it is necessary (subject to the question of abuse,
14 which we consider in Section VII below) to consider the substance of the question
15 anew."

16 And so we say that's the approach that you should be adopting here.

17 Then one last point on this is in Ad Tech, there was a similar argument raised in
18 Ad Tech, and detailed submissions were filed by the parties in the Ad Tech collective
19 action on it.

20 THE CHAIR: It went off to the cost judge.

21 MR McDONALD: And Mr Justice Marcus Smith didn't consider it was so obvious that
22 he should just determine there and then that the Tribunal lacked jurisdiction. He sent
23 it to the cost judge for consideration. So the --

24 THE CHAIR: That seems a little bit odd. On the one hand he could grasp the nettle.
25 On the other hand, he could let the Court of Appeal deal with it, but sending it back
26 down to the cost judge doesn't seem to assist greatly. What's the cost judge to do

1 faced with these other authorities and the Tribunal? And not being a specialist within
2 this Tribunal?

3 MR McDONALD: I can see the force in that. But the only point I'm making from it is
4 that had the Merricks decision been so clear cut that there was no arguable reason to
5 depart from it in Ad Tech, the Tribunal would have said, "well, no, there's no
6 jurisdiction. We're following Merricks", but there's enough in it.

7 THE CHAIR: But, I mean, you make some persuasive points that there's a question
8 mark over whether Merricks is right, and you give the reasons for that. But it's not
9 clearly wrong. And that's the difficulty. I mean, there are cogent arguments as to why
10 Merricks is right. In those circumstances, it would be odd for me to depart from that.
11 You've not shown any authorities which clearly show that Merricks is wrong. You've
12 just articulated some examples or some points.

13 MR McDONALD: The simple question, we say: is interest on costs in relation to costs?

14 THE CHAIR: Yes.

15 MR McDONALD: We say the answer is obviously: yes. If you're with me on that, we
16 say it is clearly wrong.

17 THE CHAIR: I see the argument.

18 MR McDONALD: I'm grateful. I'll leave interest on costs now.

19 In terms of the summary assessment points --

20 THE CHAIR: Yes, I would like to go through the costs schedule with you, which I think
21 is in bundle D.

22 First of all, just help me understand -- be reminded, and I think I've reminded myself,
23 what work product was produced coming up to the hearing, I've heard Mr Pickford's
24 submissions as to a lot of head scratching and trying to work out what the case was.

25 Sorry, I'm not doing justice to Mr Pickford's submissions, but that thread. But in terms
26 of what was produced in terms of evidence --

1 MR McDONALD: We have a helpful summary of this if it helps, and that's at page 26
2 of the bundle.

3 THE CHAIR: 26 of ...?

4 MR McDONALD: The hearing bundle.

5 And this is Mr Day's first statement.

6 THE CHAIR: Yes, I've read that. It's helpful up to a point Lord Copper. But it's useful,
7 actually, to be reminded of the particular documents.

8 MR McDONALD: Yes.

9 THE CHAIR: I looked at them quite a while ago, and they are in the bundles, I think.

10 MR McDONALD: We may (several inaudible words) in summary, if we look at
11 paragraph 38.2.3.

12 THE CHAIR: Yes.

13 MR McDONALD: "The claim raised a number of complex factual issues with
14 10 witness statements being filed and served ..."

15 THE CHAIR: Yes, I was interested in the evidence served by your client.

16 MR McDONALD: Yes, understood. Then at 38.2.4:
17 "The claim also raised expert issues, with five expert reports being filed and served
18 of c.300 pages in total ..."

19 THE CHAIR: Yes.

20 MR McDONALD: We can of course have a look at -- I may not be the best placed to
21 describe the actual statements and expert reports themselves, because I've only been
22 dealing with costs.

23 THE CHAIR: Well, if Mr Pickford wants to pick this up, that's absolutely fine.

24 MR McDONALD: It may be.

25 THE CHAIR: But let's look at them now because I think this is an appropriate juncture.
26 It may be just a question of telling me where they are in the bundles.

1 MR McDONALD: Yes. I'm sure I can get someone to write me a list of the --

2 THE CHAIR: Let's do it now. I don't need a list. I just need someone just to shout

3 where they all are.

4 MR McDONALD: If you look at bundle G.

5 THE CHAIR: Yes.

6 There were some statements from Mr Arber. That was at 38. As I recall, Mr Arber

7 was the director of operational improvement at PRS. He sets out what PRS's

8 distribution policy is and the various categories, all of which was very helpful. But, as

9 I understood this statement, it was essentially Mr Arber explaining what goes on at the

10 PRS, which presumably people at the PRS, if it didn't necessarily have them at their

11 fingertips, but would have known these. He goes through the overview. It's

12 paragraph 49: efforts to maximise accurate distribution of royalties. He's really

13 dealing -- I think it's a fair summary and someone will shout if I've got this wrong -- with

14 how the PRS works and the problems the PRS faces.

15 THE CHAIR: Is that ...?

16

17 Further submissions by MR PICKFORD

18 MR PICKFORD: Sir, sorry, we're going to be boxing and coxing.

19 THE CHAIR: Yes, of course, no, absolutely, absolutely.

20 MR PICKFORD: (Inaudible) dealing with the intricacies of costs.

21 THE CHAIR: Yes, of course.

22 MR PICKFORD: And I'm going to deal with the substance.

23 THE CHAIR: Yes, no, absolutely.

24 MR PICKFORD: Yes, that's quite right. We have the first statement of Mr Arber. It's

25 a substantial statement, and it obviously -- whilst it goes without saying that these are

26 matters within the scope of what PRS knows about, it still has to make sure that what

1 | it says is accurate.

2 | THE CHAIR: Tease them out and --

3 | MR PICKFORD: It has to speak to all the various people, you know, to make sure.

4 | As I said before, at one level, there's a relatively simple idea. The idea of pro-rata

5 | distribution of royalties is a kind of fairly core principle, but when it comes to exactly

6 | how that plays out in lots of different circumstances and all sorts of contingencies, it

7 | becomes relatively complex.

8 | THE CHAIR: I understand. And then there was the Fishman --

9 | MR PICKFORD: So then there's the Fishman --

10 | THE CHAIR: -- which was more straightforward, I expect.

11 | MR PICKFORD: Yes. That's all about our corporate structure, being

12 | non-profit-making and also explaining, of course, all of the many opportunities that

13 | were available to Mr Rowntree in terms of it being a member's organisation, if you had

14 | a gripe, he could have pursued his concerns through the various boards, et cetera,

15 | that are there to represent songwriters. That's, you know --

16 | THE CHAIR: Then a very short statement from Mr Arber in reply, this was before the

17 | first hearing, and then I think his third statement was after the first hearing .

18 | MR PICKFORD: That's right.

19 | THE CHAIR: I got that right.

20 | MR PICKFORD: Then we had -- that's quite right. The third statement was made in

21 | response to the Tribunal wanting to have a more complete picture of the matters that

22 | might be able to guide it as to the issue of proportionality.

23 | THE CHAIR: Yes.

24 | MR PICKFORD: You'll recall that initially we tried to give an overnight answer to

25 | something that the Tribunal asked us, and we did that at the hearing.

26 | THE CHAIR: I remember that, yes, yes.

1 MR PICKFORD: And then this was our attempt to do it in a lot more detail. As he
2 explains in his evidence, that was a substantial piece of work because we don't
3 approach the world in the way that Mr Rowntree approaches the world. We don't think
4 of there being Black Box royalties per se. What we had to do is to create models that
5 effectively extract it out. What, within the way, we allocate royalties will just
6 automatically flow through to people under our rules. We don't distribute for a lot of
7 categories. The non-Black Box, followed by then distributing the Black Box.
8 We have a rule in which the Black Box doesn't appear as its own category, and what
9 we had to do in order to grapple with the claim is first to say, "Okay, what is
10 Mr Rowntree saying is the Black Box element here?"
11 THE CHAIR: Yes.
12 MR PICKFORD: "I think we can model that". And so there's actually a substantial
13 amount of modelling that went into that issue.
14 Then we had finally a fourth statement from Mr Arber, because Mr Savage had
15 misunderstood one aspect of Mr Arber's evidence.
16 THE CHAIR: Yes.
17 MR PICKFORD: So we had a short form statement where he comes back and says,
18 "There's a misunderstanding here. This is what I'm saying".
19 THE CHAIR: In terms of just trying to understand what was presented to the Tribunal,
20 you put in a pleading --
21 MR PICKFORD: Yes, we put in two pleadings, so we put in, I think --
22 THE CHAIR: Just leading up to the first hearing -- sorry, I thought I looked at it
23 earlier -- a response to the claim form.
24 MR PICKFORD: We put in one response.
25 THE CHAIR: Can we just have a look at that? That's --
26 MR PICKFORD: Yes.

1 THE CHAIR: Is it in bundle A? (Pause)

2 MR PICKFORD: Yes, so we have --

3 THE CHAIR: Sorry, where is it?

4 MR PICKFORD: It's at D21.

5 THE CHAIR: Thank you. We're just turning the pages, see what was engaged with.

6 There's a lot of sort of general background on what the relevant tests are. Then you

7 pick it up at page 7, I think.

8 MR PICKFORD: Yes.

9 THE CHAIR: And deal with the allegations being made. At 33, you identify the

10 problem with his claim, and I think these are the points you won on the reverse

11 strike-out. Then you mention Microsoft. And you develop your summary judgment

12 application from paragraph 42.

13 MR PICKFORD: Right. We went into some detail explaining different types of

14 scenarios that might arise in relation to when there's good data or bad data. This was

15 to try to cut through what was potentially we found confusing in the way that

16 Mr Rowntree was presenting his case. So we were trying to bring some clarity.

17 THE CHAIR: At 55, you pick up the Microsoft test.

18 MR PICKFORD: Yes.

19 THE CHAIR: And then cost benefit at 66. And then go on to deal with funding.

20 MR PICKFORD: Yes.

21 THE CHAIR: That's helpful just to remind myself of this.

22 Can we have a look at the schedule of costs?

23 I think it's bundle B. Yes, bundle B so I've got it.

24 MR PICKFORD: At 18.

25 THE CHAIR: Yes, so page 161 I think?

26 MR PICKFORD: Yes.

1 THE CHAIR: So there's work in the pre-action correspondence and matters arising
2 from pre-action correspondence. So this is up to 10 March 2024.
3 Sorry, just remind me again when was the claim issued?
4 MR PICKFORD: The claim was issued in February 2024.
5 THE CHAIR: So this was --
6 MR PICKFORD: Just up to issue with the claim.
7 THE CHAIR: We've seen some of the correspondence, and there's quite, you know,
8 a punchy sum of money already spent and looking just at the solicitors. So 292, so
9 that was prior to preparation of any of the work product we've looked at.
10 MR PICKFORD: Yes.
11 THE CHAIR: This is just taking instructions, identifying the issues so forth.
12 MR PICKFORD: And also drafting some quite lengthy letters. I gave you two
13 examples of those. We went to see when we were going through the correspondence.
14 There were two chunky letters which provide lots of information and try to meet, as far
15 as we could understand it, Mr Rowntree's concerns.
16 THE CHAIR: Then we've got the period 2, which is considering the application;
17 preparing defendant's response to the application, which we just looked at; liaising
18 with experts, I'll come back to that; preparing witness evidence, so that's Arber 1 and
19 Fishman 1; and considering responding to the inter-partes correspondence. Then
20 what seems an extremely large figure here, and we'll come on to cancel, but just nearly
21 just shy of £1 million.
22 What was all that -- you mean, sort of -- by then, if you add the two figures together,
23 we're nearly getting close to £1.25 million. Given the work product, that seems a great
24 deal. Is there anything sort of happening under the surface that --
25 MR PICKFORD: Yes.
26 THE CHAIR: -- would be ...?

1 MR PICKFORD: There's, firstly, the product that you've seen and we looked, for
2 instance, a bit at Arber. One thing that's been pointed out to me in relation to the first
3 Arber is that he summarised it: we have a 180-page distribution policy, so it is very
4 complex, and he goes through and seeks to encapsulate that in something that's more
5 digestible for the --

6 THE CHAIR: Yes. I think, in the judgment, I said I didn't feel sufficient attention had
7 been given to the internal rules, and that's in the judgment, isn't it? I've received very
8 limited submissions on --

9 MR PICKFORD: Yes.

10 THE CHAIR: -- how the various policies interact with each other.

11 MR PICKFORD: In my submission, that's not a reason to criticise us in terms of our
12 costs. We responded to the claim as it was put against us.

13 THE CHAIR: Are you able just to explain why, I mean --

14 MR PICKFORD: There was also -- so --

15 THE CHAIR: -- in producing what seems to be quite simple statements and pleading,
16 fairly straightforward, the costs are so much?

17 And I appreciate quite a lot of effort went into teasing out the relevant information from
18 the PRS. But is there anything else that --

19 MR PICKFORD: Well, things that are under the surface include liaising with experts.
20 We didn't actually ultimately have any expert evidence, but we did have an expert
21 statement that we had to grapple with.

22 THE CHAIR: Okay. So if we look at liaising with experts and their relevance -- this is
23 Oxera you were liaising with -- I mean, they were relatively modest. It suggests you
24 weren't leaning on them particularly heavily. I see those on the last page. They
25 are 78,000. (Pause)

26 Anything else I should be aware of?

1 MR PICKFORD: Yes. I'm instructed that what this bundle doesn't have, but that we
2 would have had in a bundle on a detailed assessment, is the volumes of the material
3 that those behind me actually had to review, in order to try to synthesise the evidence
4 that ultimately the Tribunal saw, because there's no point in us for a three-day hearing
5 producing things that are totally indigestible.

6 THE CHAIR: Yes.

7 MR PICKFORD: A lot of work can go into taking something substantial and complex
8 and turning it into something that is sufficiently simple that it can be addressed. I can't
9 show you those materials, because they're not in the bundle, because we didn't come
10 to make the application that we're now effectively --

11 THE CHAIR: If you were making an application for an interim payment --

12 MR PICKFORD: Yes.

13 THE CHAIR: -- these questions would have been --

14 MR PICKFORD: Well, in my submission, in relation to the interim payment, the level
15 at which those kinds of things are ordinarily addressed is at a relatively high level, and
16 it wouldn't have necessitated us --

17 THE CHAIR: I think these are relatively high-level questions. I'm just trying to
18 understand. Obviously, I'm conscious of the materials that went before the Tribunal.
19 I've also got in mind that you're interrogating the PRS about its own systems. I'm sure
20 that's not super straightforward, but one would have thought two partners sitting down
21 with the PRS for a month ought to be able to get to the bottom of the things at the level
22 we dealt with it at the first hearing. Please tell me if you disagree.

23 MR PICKFORD: I do disagree, sir. It's very hard at this sort of level to demonstrate
24 things other than at a relatively superficial level of argument. But in my submission,
25 given the -- what we can hold on to, and the kind of benchmarks we do have, is this
26 was clearly a very substantial case and a pretty complex one, given that we see

1 Mr Rowntree himself incurred £3.6 million.

2 THE CHAIR: Yes. But if Mr Rowntree was being asked about how he arrived at his
3 costs, he may be given an even harder time than you, Mr Pickford. That doesn't help
4 me.

5 MR PICKFORD: Well, sir, in my submission, it does (overspeaking).

6 THE CHAIR: A lot of costs -- I'm not for a moment suggesting these costs weren't
7 spent. But the question is, should they have been spent prior to at this stage of the
8 proceedings?

9 MR PICKFORD: Well, my primary submission on that is, if one finds it surprising, the
10 extent of the cost that was spent -- and we're dealing obviously with quite large sums
11 of money here -- the best way of actually grappling with that is to have a full-on detailed
12 assessment. Then you can go through and look at these things with the kind of
13 (inaudible).

14 THE CHAIR: We have discussed that.

15 MR PICKFORD: And I say that's still available to the Tribunal. But if we're not going
16 to do it --

17 THE CHAIR: Yes.

18 MR PICKFORD: -- then inevitably one has to find other higher-level benchmarks.
19 A benchmark, it may be -- we're not asking for 3.6 -- we're just saying, look at what
20 we've got in terms of benchmarks.

21 THE CHAIR: Yes, I've got that point and you've heard my observation on that. But in
22 terms of a high level -- and we are dealing with this at a high level -- but in terms of
23 high-level heads of costs, obviously the touchstone I've got are the skeletons, the
24 materials, the pleading, the evidence. You say in addition there were documents to
25 review, and I think you've identified the contracts and the distribution agreement that
26 needed to be analysed. Are there any other large heads that are under the surface

1 | which I'm not familiar with?

2 | MR PICKFORD: I mentioned the expert evidence as well. I'm just going to turn around
3 | and take instructions.

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

5 | MR PICKFORD: So the other point I haven't drawn attention to is, of course, the need
6 | for us to address and interrogate the evidence that we were dealing with. Half of the
7 | witness statements you've seen are then ours.

8 | THE CHAIR: Yes.

9 | MR PICKFORD: Then of course there's the other witness statements that were
10 | Mr Rowntree's, and in particular we had various iterations of Mr Savage's analysis.
11 | That was a complex and difficult thing to grapple with. It might be helpful to go back
12 | to Mr Savage's statement, if someone could give me a reference for that. I think his
13 | first statement is at tab 46 of the main bundle. That's page 1111. (Pause)

14 | There's the report. It then had a lot of annexes, which I think one sees on 1161. Some
15 | of that's obviously PRS material, but it's obviously being deployed against us, so we
16 | had to review it and understand what it is that was sought to be extracted.

17 | THE CHAIR: But at this stage of the proceedings, you're not meant to, on certification,
18 | follow to the nth degree every point that may arise in the case. That would be an
19 | explanation, that too much time has been spent considering what the answers to
20 | things would be if they're certified, and whether it's appropriate to spend these sorts
21 | of costs prior to certification.

22 | MR PICKFORD: My submission is ultimately there will be a subjective assessment
23 | for this Tribunal to make in relation to that. The kind of case we were facing, in my
24 | submission, it would be not generally appropriate for a solicitor doing the best job that
25 | they could reasonably do, and proportionately do on behalf of their client, to not
26 | engage in pretty in-depth analysis of these points, because we didn't really ever know

1 | what it was that was the problem. I come back to that, but it has quite far-reaching
2 | ramifications. If you've got a very clearly defined case against you, then it's easier to
3 | draw the line in terms of saying, "Well, proportionately, we're going to do X, but we're
4 | not going to do W, Y and Z yet, because that's very much for another day". If you
5 | have an inchoate and very difficult case to understand made against you, in my
6 | submission, inevitably you are going to have to do a lot more work to make sure
7 | something isn't going to come and trip you up later on that you're missing.

8 | I realise I made that submission before, but it is the essence of my answer to this point
9 | as well. It's not easy to draw the line. Sir, you will, you will ultimately have to draw the
10 | line, but I submit that what we did was not unreasonable, given the scale of these
11 | proceedings, given the potential ramifications for the PRS if it turned out we were
12 | wrong. Indeed, what we were trying to do, of course, ultimately, was save money,
13 | because we did put quite a lot of effort into knocking this one on the head at the outset.
14 | Another legal team might have said, "Oh, strike out. That's never happened so far at
15 | this stage in the Tribunal, so perhaps you shouldn't bother with that. Let's just focus
16 | on some narrow issues". But we looked at it and we pored over it and we thought,
17 | "We don't understand this case. We're going to go for it". Ultimately we brought the
18 | point that way.

19 | THE CHAIR: But the point you succeeded on, the strike out point, you could have
20 | made 24 hours after receiving the claim form, just on the face of the claim form.
21 | I mean, that's not to say you don't have to deal with other issues, but on that narrow,
22 | narrow point, it just really turned on the pleading, didn't it?

23 | MR PICKFORD: Well, with the benefit of hindsight, perhaps, sir, but not at the time,
24 | no.

25 | THE CHAIR: Okay. That's very helpful. Did you have any other -- nothing else you
26 | wanted to add on the (inaudible) questions?

1 MR PICKFORD: (Overspeaking) Yes. It's been pointed out to me again that of course
2 the reports that we've been looking at so far were the reports for certification. So, for
3 instance, all of the Savage reports that we went into some detail in responding to.
4 They weren't his evidence for trial. They were his evidence in order to obtain
5 certification.

6 THE CHAIR: No, I understand that.

7 MR PICKFORD: On their side, they didn't respond and say, okay, fair enough. We
8 see we haven't really got a case. They pushed on, and we of course then had to
9 address that, and we had the full trial that we did. (Overspeaking)

10 THE CHAIR: Sorry, I interrupted the natural flow.

11 MR PICKFORD: I think we're now back into Mr McDonald's realm.

12 THE CHAIR: Mr McDonald. Nice to hear from you again. What are we on now?
13

14 Further submissions by MR McDONALD

15 MR McDONALD: Well, I think we've dealt with some of the detail already. I mean,
16 I will just set out some general principles, and these are relevant to your approach to
17 the assessment and including hourly rates as well. We can find those just in the CPR,
18 and I appreciate that --

19 THE CHAIR: What's the point you're trying to make, so I know where we're going?

20 MR McDONALD: The point is that there are certain -- they are viewed as pillars of
21 wisdom in the costs office. There are various factors that the court takes into account
22 when determining the reasonableness and proportionality of costs. I was just going to
23 identify those factors for you and make some brief comments about how they may be
24 applicable in this case.

25 THE CHAIR: Yes. Very good.

26 MR McDONALD: We can find those at the authorities bundle. It's at the first tab.

1 (Pause)

2 Page 12 of the bundle. That's rule 44.4. "The court will have regard to all the
3 circumstances in deciding whether costs were ..."

4 Then you get the two different tests, depending on the standard or indemnity basis.

5 Then if you go to sub rule 3, over the page.

6 THE CHAIR: Yes.

7 MR McDONALD: These are the factors, the pillars of wisdom the court will also have
8 regard to. Then it lists certain things. Just taking you through them briefly, and you'll
9 have lots of these points already, but the conduct of all the parties, including in
10 particular conduct before as well as during the proceedings and the efforts made, if
11 any, before and during the proceedings in order to resolve the dispute. You've heard
12 my learned friend Mr Pickford on that, and he's also raised issues in relation to the
13 conduct, for example, the way that the PCR's case, how well it was specified or not
14 specified, as the case may be, putting us to additional costs.

15 The next one is the amount of value of any money or property involved. As you know,
16 it was put as a very high-value case. The proper test is to look at the case at the value
17 it's put on by the claimant. We say that's a relevant factor when looking at the costs
18 involved. The important --

19 THE CHAIR: It troubles me we haven't value for this claim, have we? It's one of the
20 criticisms made in the -- one of your beacons of success, that --

21 MR McDONALD: It was. I'm sure others will be helping with that. But on any view, it
22 wasn't a -- given that it was being brought as a collective action and said to be
23 presumably of cost benefit to the class, you would have thought that (overspeaking).

24 THE CHAIR: Yes. I mean, you've been taking the point the other way, as I understand
25 it, for the last hearing. It fails the Microsoft test. We don't know how much money is
26 at stake, because we don't know the proportion that should be redistributed. It's

1 difficult then to come along now and say it was always about huge sums of money.

2 MR McDONALD: Well, it was presented on the basis, and the relevant --

3 THE CHAIR: Mr Pickford's going to jump up in a minute, I'm sure I've got this all

4 wrong.

5 MR McDONALD: I'm sure I (overspeaking).

6 THE CHAIR: I can see him shifting from side to side uncomfortably.

7 MR McDONALD: Well, perhaps Mr Pickford can address you on the value, but --

8 THE CHAIR: Yes. I mean, it's in the judgment.

9 MR McDONALD: It's in the judgment. And I mean, if the claimant wasn't presenting

10 this as a low-value case, is all I really need to say.

11 THE CHAIR: That's fair enough.

12 MR McDONALD: And then:

13 "The importance of the matter to all the parties".

14 We say, for obvious reasons, this was very important to my client.

15 "The particular complexity of the matter or the difficulty and novelty of the questions

16 raised."

17 You've already been addressed on that, and I would refer again to Mr Day's statement

18 where he picks up on some further points.

19 "Skill, effort, specialised knowledge and responsibility involved."

20 We say that is satisfied again in this case, given the nature of the case. And when

21 seeking permission to appeal the PCR themselves said this raised novel issues which

22 justified an appeal.

23 "The time spent on the case."

24 You've been taken to that to a certain extent, I always find "the time spent on the case"

25 a rather unusual one to include here because the time taken is as long as it's taken,

26 but it's there as a factor, and we say it's understandable why considerable time was

1 spent on the case.

2 "Place where and the circumstance in which work or any part of it was done."

3 Rightly, there's no dispute that this was a City of London-type case, and certainly the
4 parties have got leading lawyers acting for them, so there can be no dispute about
5 that.

6 "Receiving party's last approved or agreed budget."

7 That doesn't really apply here because it wasn't budgeted. But if one were to have
8 regard to budgets, then that brings us back to what the claimant budgeted and their
9 budget, as we know, came up to 3.6 at the end.

10 So that's the framework in which you're looking at costs, and when costs judges on
11 a detailed assessment look at, on a granular level including on hourly rates, they apply
12 the same factors to determine what the appropriate rates are. So what they don't do
13 on a detailed assessment is apply the sort of clear and compelling reason to depart
14 from the guideline hourly rates, for example. They weigh up all these factors. And
15 given what we're doing is -- I'm not saying it's hybrid, but you know, we're looking at
16 a large bill, which is being summarily assessed. And in those circumstances, I would
17 say when you're having regard to whether to depart from the rates, these are the
18 factors. And they all point in our favour that this is a good case to depart from the
19 hourly rates upwards.

20 THE CHAIR: Okay. Right, next.

21 MR McDONALD: In terms of the criticisms made, there were specific points raised by
22 the PCR and the funder on our costs. Specific issues have been raised. It may be
23 that I respond to those generally and in reply so I know how they put it.

24 There's one point I just want to make clear about the hourly rates, which is that in our
25 schedule of costs, you may have seen we refer to the "effective hourly rate". And
26 that's because discounts were applied by my instructing solicitors to the client such

1 that when the client's being billed -- and I'm not waiving privilege in any, any billing
2 process -- but it's just the client, the number of hours for each fee earner billed and
3 then an amount is allowed for them applying the discount. So the easiest way --
4 THE CHAIR: Do I have a figure if I took your costs at face value, struck out the hourly
5 rates and put back the guideline rates, what figure do we come up with?
6 MR McDONALD: We do have that.
7 THE CHAIR: I got a little confused on your -- just so that I have the figure in mind.
8 Don't read anything into this at all. So what would the bill come up to?
9 MR McDONALD: So if you go to --
10 THE CHAIR: Just tell me.
11 MR McDONALD: Yes. So the numbers I've got are -- so I'm not sure we have the
12 guideline --
13 THE CHAIR: You applied a 30 per cent figure or 35 per cent figure, and I ended up
14 scratching my head, not quite following what it was.
15 MR McDONALD: I can give you the 15 per cent figure.
16 THE CHAIR: How does 15 help me? So the task I'm engaged with: these are the
17 hourly rates. This is all you're getting. This is all on a hypothesis. What would that
18 mean you get? And if you need to do it over the adjournment that's fine.
19 MR McDONALD: We may need to. I can tell you the figures that we do have.
20 THE CHAIR: Well, it's the answer to my question that I wanted.
21 MR McDONALD: Understood. So we'll get that for you over lunch.
22 The point I was making is that because of the discounts that have been applied, what
23 we call the effective hourly rate is set out in our statement of costs. It's needed some
24 minor corrections. We realised there was a slight error, but you can find the effective
25 hourly rates in the -- there's a supplemental bundle you should have. I'm not sure if
26 that's made its way to you?

1 THE CHAIR: I've got the inserts for the authorities?

2 MR McDONALD: Well, maybe I can bring that?

3 THE CHAIR: Yes. I'm not quite sure that's what I'm after, but I'm happy to look at it.

4 MR McDONALD: The point that we would make is that --

5 THE CHAIR: Let's go back to what Mr Day says. He sets out what the hourly rates
6 are, and I think you're saying that those are subject to discount. Is that right?

7 MR McDONALD: So if you look at page 161.

8 THE CHAIR: No, I just want to look at Mr Day's -- oh, sorry. I beg your pardon.

9 MR McDONALD: The schedule at 161. (Pause)

10 THE CHAIR: Yes, that's quite right. That's what I was looking at. So he's got an
11 effective hourly rate. So I've got the effective hourly rates?

12 MR McDONALD: Yes.

13 THE CHAIR: I'm not interested in the headline hourly rates. I'm interested in the
14 effective hourly rates. But then the question is if you -- and I assume that's what he's
15 used to come up with his calculations, the effective hourly rate. What I need to do is
16 find out the extent to which they marry up to the guideline rates, which is easy, but
17 then what impact that has on the figures, if we were to replace those with guideline
18 rates --

19 MR McDONALD: Yes.

20 THE CHAIR: -- to get an idea of what we're talking about exactly.

21 MR McDONALD: I just wanted.

22 THE CHAIR: And that's what you're going to do over the adjournment?

23 MR McDONALD: It is. I was just trying to explain, draw your attention, to the effective
24 hourly rate point, which is what we say is the relevant rate --

25 THE CHAIR: Yes. Because that's what they're being billed.

26 MR McDONALD: That's what --

1 THE CHAIR: I'm not even sure why we're having this discussion about another rate.

2 MR McDONALD: It's because it's a rate -- it's an issue raised by --

3 THE CHAIR: All right.

4

5 Further submissions by MR PICKFORD

6 MR PICKFORD: Sir, before we finish, just to come back on the one point about the

7 claim value.

8 You were handed up a note by Mr Rowntree's counsel at, I think it was the end of

9 day 1 of the hearing, where he set out what the claim value was, having been asked

10 to actually come up with a number. That note indicated the claim value of between

11 £380.8 million and £436.8 million. That's what they were saying the claim value was.

12 That is not, ultimately, what the Tribunal decided at all, obviously. But the point --

13 THE CHAIR: Can you show me that note after the adjournment? I'd quite like to

14 remind myself. I assume it's not in the bundles.

15 MR PICKFORD: No, it is. It's at page 328 of bundle D.

16 THE CHAIR: This is for the adjourned hearing though, isn't it? 16 June?

17 Which paragraph do you want me to look at?

18 MR PICKFORD: I'm looking at paragraph 9 and this is submissions "PCR Second

19 Note on Matters Raised on CPO Hearing Day 1." (Pause)

20 THE CHAIR: Okay. Thank you. Right.

21 I think we adjourn for lunch and see you all at 2.00.

22 (12.55 pm)

23 (The short adjournment)

24 (2.03 pm)

25 MR PICKFORD: Mr McDonald is going to come back with some points on responses

26 to some questions that you had before the short adjournment.

1 I simply wanted to pick up the point that we were dealing with just before we sat down,
2 because it's been pointed out to me we might have been at slight cross purposes. It's
3 a very small point, but just to make sure that that my point is the same as the one you
4 understood me to be making.

5 We were looking at page 328 of the bundle, which is tab 26. (Pause)

6 THE CHAIR: The second note. Yes.

7 MR PICKFORD: I had been referring to paragraph 9 of that note. And then --

8 THE CHAIR: I looked at the figure before. We may have been at cross purposes.

9 MR PICKFORD: So we were slightly at cross purposes, because the figure before on
10 paragraph 8, that's the non-MTOL part of their claim.

11 THE CHAIR: Okay.

12 MR PICKFORD: And then there's an MTOL part. If you add them together you get to
13 the figures in 9.

14 THE CHAIR: I read it too quickly. Thank you.

15 MR McDONALD: Sir, I just have some numbers for you.

16 THE CHAIR: Yes. Thank you.

17 MR McDONALD: So the guideline hourly rate. If we amended our schedule just on
18 guideline hourly rates the figure would be £2,033,000.

19 THE CHAIR: Okay. So that's the figure I came up with. I just wanted to make sure.

20 MR McDONALD: And just so you have them, the figure for guideline rate plus
21 15 per cent, and that's a percentage referred to by the PCR, that's £2,263,000 and
22 then some pounds and pence. And then the figure for guideline rates plus 30 per cent
23 is £2,487,000 plus some pounds and pence.

24 And then the other figure you asked for was the costs of these applications.

25 THE CHAIR: Oh, yes. Yes. If you were in a position to provide it.

26 MR McDONALD: So just on a broad-brush basis -- I'll explain how we calculated this

1 in a moment -- but we have the cost of the funder application as £57,000.

2 THE CHAIR: Yes.

3 MR McDONALD: And the cost of the costs application against the PCR of £133,000.

4 THE CHAIR: So £130,000 costs.

5 MR McDONALD: So the total is £190,000 for the two applications. In the time
6 available we haven't managed to allocate precisely item by item, but what we've done
7 is the total we would claim is £190,000.

8 THE CHAIR: And that needs to be added on to the figures in the 2.6 or whatever it
9 is?

10 MR McDONALD: Yes. And what we've done is we've considered amongst ourselves
11 the allocation between the two applications without going line by line, and we took
12 a 70:30 split, which seems to us to reflect broadly the --

13 THE CHAIR: Okay. That's helpful. Thank you very much.

14

15 Submissions by MR WILLIAMS

16 MR WILLIAMS: Sir, with your permission, I'll address you on the first two topics,
17 namely the indemnity basis or the standard basis, and then the reasonable amount
18 that PRS can cover in principle.

19 Then my learned friend, Mr Carpenter KC, will address you on payment on accounts
20 and summary assessment and interest on costs. I can cox and box with some detail
21 if necessary on those two topics.

22 THE CHAIR: Right. Fine. So what are you starting with?

23 MR WILLIAMS: Okay. Starting with indemnity basis.

24 THE CHAIR: Okay. I only need you to focus on the one point really about the
25 pre-action correspondence.

26 MR WILLIAMS: I certainly will in light of that indication, sir. I'm very grateful for that.

1 That cuts through quite a bit.

2 Two introductory points if I may, however. The first is that the PRS ultimately seeks,
3 as we've seen, costs of £2.6 million in respect of a three-day certification hearing,
4 largely concerning its own rules and discrete points.

5 THE CHAIR: Just remind me. I remember the first day and the third day. I'm a little
6 hazy onto the second day, which was attached to the first day. Was that a full day?

7 MR WILLIAMS: I understand it was. I wasn't there either.

8 THE CHAIR: Oh, right. I'm sorry. Okay.

9 MR WILLIAMS: But yes, that's correct.

10 THE CHAIR: So the two-day hearing and then the additional. Yes.

11 MR WILLIAMS: That's right. With the third-day hearing just on the question of cost
12 benefit.

13 THE CHAIR: Yes. The third day seemed to sort of expand to fill a space that was
14 made available.

15 MR WILLIAMS: Yes. And that's because of course, the --

16 THE CHAIR: Sorry, you don't have to --

17 MR WILLIAMS: No, it's absolutely fine, sir. It's the ever increasing amount of the
18 black box. In those circumstances where you'll recall the ever increasing amounts that
19 the PRS were telling us the black box was worth, it's unsurprising, to meet the ADR
20 point that, prior to proceedings, the parties were not able to settle because the other
21 side were never fully transparent or clear on the size of the black box or the claim
22 value, despite requests for information.

23 You can see that from your own experience between changing from £10 million on
24 Day 1 of the hearing to then £19 million; it then went to £40; it then went to £55.
25 Ultimately, in the judgment, you accepted, for certification purposes, £200 million. And
26 that was our case. We've seen a lot --

1 THE CHAIR: The £200 million --

2 MR WILLIAMS: Being the pot, the size of the allocation. I accept that.

3 There has been some rather skidding over the differences between the size of the
4 black box and the claim value. I accept that different figures at different points in time
5 did vary between those figures, because, as my learned friend frankly and candidly
6 admitted earlier, they did take and understand our case to mean something which was
7 not ultimately accepted -- the pleading point in relation to the category 2 publishers,
8 those who were paid directly, not being included in the claim -- and that was not
9 accepted.

10 My learned friend is a very experienced silk in competition law, and I do say that it
11 doesn't take an utter genius to work out that that was our claim, even though I accept
12 it could have been clearer, but that was the pleaded position.

13 Now, in relation to my headline point about the £2.6 million, I do also need to make
14 clear upfront that the PRS has knowingly and voluntarily incurred those levels of costs,
15 despite knowing since the outset of these proceedings that Mr Rowntree had ATE
16 insurance of £1.5 million for certification. It has never challenged that amount as
17 insufficient. It was no part of its application.

18 THE CHAIR: That's the bit we're not hearing today.

19 MR WILLIAMS: That does go -- but it does, in my submission, go to the overall justice
20 and fairness of the amounts being claimed that's actually fed through each level of the
21 analysis for indemnity costs and so on.

22 My second introductory point on indemnity costs will be a trite one to you, sir, so I'll
23 deal with it very quickly, but it is worth bearing in mind the two-fold consequences of
24 an indemnity costs order.

25 Firstly, it enables the receiving party to incur and be awarded disproportionate costs.

26 I can see, having looked at the sums in question, why my learned friends may wish to

1 avoid that consequence. Secondly, it also enables the receiving party to be given the
2 benefit of the doubt in the assessment of the reasonable costs, with the onus being
3 shifted onto the paying party. I do say that's inappropriate. It's no wonder in those
4 circumstances why the authorities -- the Court of Appeal in Arcadia and
5 Mr Justice Roth in Socrates -- describe the award of indemnity costs as "a very
6 extreme step", as per Mr Justice Roth, and "penal" in nature, as the Court of Appeal
7 said in Arcadia.

8 There were six points that my learned friend relied upon. In light of your indication,
9 I will focus primarily, if not exclusively, on the ADR point, but I do just wish to
10 categorise those allegations and make one point of law, if I may go into one authority.
11 Those six categories of allegations go into three buckets in my submission. Firstly,
12 you have aspects relating to Mr Rowntree's conduct, so that was ADR.

13 THE CHAIR: Just focus on the one point, I think.

14 MR WILLIAMS: That's ADR and the website. Then the claim itself and other
15 circumstances.

16 Now, in relation to the conduct -- so the ADR and the website, but ADR in
17 particular -- in light of the indications. I accept this is a holistic assessment. I also
18 accept that indemnity costs can be awarded based on circumstances without needing
19 unreasonable conduct, and I accept, in respect of conduct, it doesn't have to be
20 unreasonable to a high degree of moral condemnation.

21 But -- and this is important for ADR, sir -- I do take issue with the legal test that my
22 learned friend is applying, saying it's not unreasonable as to a high level.

23 If I can just show you one authority for that proposition.

24 THE CHAIR: You're not saying out of the norm is the correct test?

25 MR WILLIAMS: I am saying out of the norm is absolutely correct, sir. But in the
26 application of that principle, when one is looking at conduct, as opposed to

1 | circumstances or the claim itself as a matter of substance, when you're looking at
2 | conduct, so whether not accepting ADR was unreasonable, it is unreasonable to
3 | a high degree. That is the legal test.

4 | Whereas my learned friend does dispute that, and I just wish to show you one
5 | paragraph, if I may. That's authorities volume 1 at tab 35. You should have there, sir,
6 | the Suez case.

7 | THE CHAIR: Yes.

8 | MR WILLIAMS: The passage I rely upon is at page 525. It's the judgment of
9 | Mr Justice Teare. At paragraph 7, if you're there, he says this:

10 | "There is a long line of authority that where it is said that a party's conduct was
11 | unreasonable it must be unreasonable to a high degree to justify an order for indemnity
12 | costs."

13 | Just so you can see, this isn't just an obiter point on the previous page. This was the
14 | key issue in the case.

15 | Then, paragraph 8:

16 | "It was suggested that the requirement that conduct must be unreasonable to a high
17 | degree was not stated in the CPR ... However, the requirement is, I think, a necessary
18 | corollary of the scheme ... the conduct must be unreasonable to a high degree."

19 | And then he cites various other Court of Appeal decisions, including
20 | Lord Justice Coulson on the next page of paragraph 9:

21 | "... Indemnity costs are appropriate only where the conduct of a paying party is
22 | unreasonable 'to a high degree'."

23 | So, just so there are no ships passing in the night on this issue, I do say that where
24 | my learned friend is relying upon conduct allegations, the legal test is "unreasonable
25 | to a high degree". Now, in that context, I can go to the ADR point and address that
26 | head on.

1 Now, the PRS, as you know, sir, alleges that proceedings could have been avoided
2 had Mr Rowntree been more open to ADR and used the PRS's own governance
3 proceedings before the bringing of the claim. Now, on the law, sir, unless it would
4 assist, I don't intend to turn these authorities up, but you will have seen from the
5 skeleton arguments the citation of two Court of Appeal cases, and we can go to them
6 if it would help.

7 But Kiam says that:

8 " ... it would be rare [that's a quotation] [when] refusal of a settlement ... [will] attract ...
9 an adverse [costs order] ..."

10 And the Gore case, which expresses, and I quote:

11 " ... some difficulty in accepting that the desire of a party to have his rights determined
12 [in] a court of law ... [amounts to] unreasonable conduct ..."

13 And holding that:

14 " ... even if unreasonable, [a failure to engage in ADR] does not automatically result in
15 a costs penalty."

16 I don't propose to turn those up unless it would assist you, sir.

17 I'm grateful.

18 On the facts, could we please turn to the claim form, which I think was the passage
19 you had in mind earlier, sir? That's --

20 THE CHAIR: Remind me, where's the claim form?

21 MR WILLIAMS: Yes, it's bundle C, tab 20.

22 THE CHAIR: Yes.

23 MR WILLIAMS: In particular, the passage starts at page 194. I would just like to take
24 this blow by blow, if I may.

25 So the bottom of the page, you should see there paragraph 91. So this is under the
26 heading "Whether the parties have used [ADR]". You then have a description of the

1 first letter we were taken to in February, and the holding response in May 2022, which
2 is two years before the issue of the claim.

3 Then if you read the last sentence of paragraph 91 on page 195, this is the beginning
4 of my key submission, headline point that:

5 " ... the Proposed Defendants' response limited its analysis of [the] distributions to
6 a portion of the Black Box royalties from multi-territorial online licensing, omitted to
7 respond to important elements of the claim set out in the letter before action ..."

8 This is a theme we'll keep returning to. You will then see, at paragraph 92, a list of
9 substantive correspondence, all prior to the claim form. Then, at 93, you again have
10 the point that:

11 "The Proposed Defendants [the PRS] ... have refrained from responding to all of the
12 requests made by the [PCR] and continued to be selective in data, information and
13 clarifications that have been provided. Indeed, PRS has even claimed ... surprisingly
14 that is not able to say what portion of ... [the] Black Box ... was distributed to writers."

15 Again, I return to my headline point that that conduct continued across the proceedings
16 to the extent that even now, sir, we do not know what level of the black box or the level
17 of the claim value my learned friend and the PRS ascribe to the claim. To jog your
18 memory, sir, that's because Arber is only presented on a sample basis for
19 certain years.

20 To make the point even stronger, at paragraphs 94 and 95, these assist me, sir,
21 because they add the point that it was very clear that category 2 direct payments were
22 included in the claim because, even at this stage, we were saying at 95, about five
23 lines down:

24 " ... either directly by ICE, or through other entities. Savage 1 confirms the data
25 provided by the Defendants in pre-action correspondence are insufficient to refute the
26 claims brought ..."

1 Savage was our independent expert, sir.

2 So the reason why, drawing this to a point, it was not settled is because Mr Rowntree
3 did not consider himself, prior to the issue of the claim, to be in a position to settle or
4 reach any meaningful ADR on an informed basis, based on the potential claim value.

5 Now, for ADR to be successful, it's such an obvious point --

6 THE CHAIR: Where's your evidence of that?

7 MR WILLIAMS: Well, the evidence is, sir, that the correspondence, blow by blow, as
8 summarised in the claim form, has never been contradicted.

9 THE CHAIR: You were invited -- you were given the opportunity to go to a meeting
10 and to discuss -- sorry, I'm paraphrasing what's in that letter, we've looked at it -- and
11 you didn't take up that offer, and as I understand, you didn't engage the writer
12 representatives on the board either; am I wrong about that?

13 MR WILLIAMS: Sir, you're not wrong, before the claim was issued. My learned friend
14 put his central core of the foundation on pre-action lack of engagement. I've shown
15 you, in my submission, extensive pre-action correspondence way beyond the norm of
16 pre-action correspondence, in my experience at least. Normally, we have one or two
17 letters; we've had a series of letters. There was then a meeting after issuing. I'm not
18 going to go into the substance of that for obvious reasons, but there was a meeting.
19 Mr Rowntree has not been silent in the face of ADR, and I wish to make that point very
20 clear.

21 In relation to the underlying governance procedures, I should take you to the CPO
22 reply, because that explains why Mr Rowntree did not specifically use those. That's
23 at bundle --

24 THE CHAIR: Sorry, that's the reply. I was more interested in the pre-action position.
25 This lasted for a couple of years, this pre-action going around, and you were given the
26 off chance of a meeting and you didn't accept it.

1 MR WILLIAMS: That's because we requested, or Mr Rowntree requested by his then
2 solicitors acting, a number of points of clarification around the black box -- the very
3 issue that has plagued us right through to today -- the size of the black box. He kept
4 on asking questions. There were omissions in response.

5 THE CHAIR: Precisely why you need to get people in the same room.

6 MR WILLIAMS: I take that point, sir, but one is considering here whether the conduct
7 in question is one of these "rare" cases, to use the Court of Appeal words.

8 THE CHAIR: That's a separate point. I still don't understand why you didn't attend
9 that meeting, having been offered.

10 MR WILLIAMS: That's exactly what I will address by showing you the CPO reply. It's
11 not a temporal point. It explains why, prior to action, the governance procedures were
12 not used. We have to bear in mind, sir, this is --

13 THE CHAIR: Show me that, then.

14 MR WILLIAMS: That's bundle D, tab 22, page 259. It starts at paragraph 27.3.1. If
15 I could invite you to read those three subparagraphs, so 27.3, point 1 to point 3.

16 THE CHAIR: All right.

17 MR WILLIAMS: The important one, in my submission, is the last subparagraph.

18 THE CHAIR: Just let me read the last one. Right.

19 MR WILLIAMS: There were sensible reasons why a member suing a putatively
20 dominant company does not choose to use the internal governance procedures; in
21 particular, given the factual context set out here. The two key points are that other
22 complaints have been ignored, and he's aware of that fact; and secondly, the
23 composition of the decision-making procedures don't necessarily involve songwriters.
24 That's the last point.

25 One has to take into context, sir, that in the award of indemnity costs, it has to be
26 conduct that's so high to meet the "rare" point.

1 THE CHAIR: I understand. You made that point.

2 MR WILLIAMS: In my submission, and this isn't particularly surprising, the ADR
3 of -- the format of going to a meeting - was not taken up at that juncture. However,
4 the key point is it was taken up after the issuing of the claim. This was a two-year
5 period, sir. There does come a point where one issues it in the face of lack of
6 information from the other side, despite having asked for it.

7 Sir, in light of your indication, I was going to deal with the points of substance about
8 the claim itself and the circumstances that my learned friend relied upon. But if that
9 wouldn't assist, I can move swiftly on.

10 THE CHAIR: We can move on. Yes.

11 MR WILLIAMS: I'm grateful.

12 That takes us to the second key issue, which is that of entitlement, ie the amount that
13 the PRS is entitled to recover, including following suitable reductions. So at this stage,
14 whether there should be a reduction --

15 THE CHAIR: The issue by issue reduction.

16 MR WILLIAMS: The issue by issue reduction.

17 THE CHAIR: Yes. You've got an uphill task on that, just to warn you.

18 MR WILLIAMS: That's quite okay, sir. You've said, in fairness, to both of us where
19 we have uphill struggles, and I think that's gratefully received.

20 At this juncture, I was going to address you in detail on Gutmann. Now, our headline
21 position on this is that personal liability should be capped at 1.5 million, which is the
22 ATE level.

23 THE CHAIR: We're not doing Gutmann.

24 MR WILLIAMS: Which is the joinder point. I just wanted to make --

25 THE CHAIR: No, we're not doing that now. No.

26 MR WILLIAMS: That's understood.

1 THE CHAIR: Save your points.

2 MR WILLIAMS: In which case, that point may come back. The only reason I --

3 THE CHAIR: It may well come back. I appreciate that.

4 MR WILLIAMS: In which case, the only reason I'm pushing back ever so slightly, sir,

5 is there is an element of circularity here, because Gutmann demonstrates the

6 relevance of ATE goes not only to the issue of funder joinder, but also the prior

7 question on whether the PRS is entitled to seek and recover costs above the insurance

8 level at all.

9 THE CHAIR: Okay. Well, we can come back to that when we get to it.

10 MR WILLIAMS: In which case, I can address you on the three key points that we say

11 merit a reduction at this stage. Those three points, to headline them, and then I'll

12 address them in turn, are first: challenges to the authorisation of Mr Rowntree as the

13 class representative, including on grounds of conflict, were resoundingly refused and

14 rejected.

15 THE CHAIR: I remember that took a little more than a heartbeat, and really didn't

16 occupy this Tribunal for long?

17 MR WILLIAMS: That may be true from the --

18 THE CHAIR: I know there was some correspondence on it, but I -- it's of course

19 necessary that this Tribunal scrutinises Mr Rowntree, and we're of course grateful for

20 the assistance we received from the relevant defendant or respondent, I should say,

21 on that. But it's very difficult to identify a specific issue here that is to be taken out of

22 the context of Mr Rowntree's suitability generally.

23 MR WILLIAMS: Sir, I understand that from the Tribunal's perspective. I make two

24 points in response, if I may. The first is that this actually occupied a large amount of

25 airtime in the arguments leading to the trial. It may ultimately have been dropped, but

26 that doesn't make the point a good one or one of incurring fewer costs in the first place.

1 There were significant costs. We've done an analysis, or the funder has done an
2 analysis, based on page count, and it was about ten per cent of page count. Now,
3 I accept that that's not necessarily scientific.

4 THE CHAIR: This Tribunal is obliged to scrutinise the class representative. Indeed,
5 in this case, we even had him in the witness box, as I recall. The Tribunal is
6 necessarily grateful for any observations that the respondent makes, because it makes
7 it easier to focus on potential issues. So I don't see a reason at the moment why these
8 shouldn't be general costs in the action.

9 MR WILLIAMS: Well, that's well understood, sir. But you'll recall that the certification
10 requirements fall into two distinct camps: firstly, authorisation of the class
11 representative; and second, eligibility of the claims themselves for inclusion in
12 proceedings. My learned friends' arguments all went to the authorisation
13 (overspeaking).

14 THE CHAIR: I understand that.

15 MR WILLIAMS: And the PRS lost those arguments. There is authority in the bundles,
16 an order from Mr Justice Roth in the Merricks case, whereby he accepted the point
17 that I'm putting to you, sir, which is that there are two distinct requirements, and where
18 a defendant has lost on one of them -- in that case the authorisation
19 requirement -- despite resounding success elsewhere, nonetheless, there should be
20 an issue by issue costs assessment.

21 Sir, I can show you that if that would assist. That's authorities bundle 1, tab 33. That
22 begins at page 479, but the page I would ask you to turn up is page 486. It begins at
23 paragraph 18. This is the judgment of Mr Justice Roth in the first certification decision
24 in Merricks, at a time before the Supreme Court judgment.

25 He acknowledges there the starting point is the respondents were undoubtedly the
26 successful party, because the CPO was dismissed. Then importantly, over the page

1 at paragraph 21, he says this:

2 "Since the authorisation of the Applicant was an entirely separate issue from the
3 question of certification of the claims, we consider it is appropriate to disallow a part
4 of the Respondents' costs. Moreover, we consider that the Applicant would be entitled
5 to recover a part of his costs of meeting the unsuccessful arguments raised against
6 him on that issue. Rather than making cross-orders, the better approach is to reflect
7 the overall position in a single deduction from the Respondents' costs".

8 My short and simple point, sir, is that's exactly my case.

9 THE CHAIR: Okay.

10 MR WILLIAMS: I won't take you to the CPO judgment, which you'll be well familiar
11 with.

12 The second of the three aspects that we suggest leads to a reduction at this stage is
13 in relation to the funding matters. The Tribunal, quite properly, in my respectful
14 submission, found that generally the jurisdiction to control funder fees is best exercised
15 after judgment, and that it was not in a position to determine the matter at the
16 certification stage. Instead, sir, you found that the right time to scrutinise these matters
17 was and indeed is at the time of distribution. You'll notice paragraphs 83 and 86 of
18 your CPO judgment.

19 It's true, and I accept, that the Tribunal noted that the size of the funder fee is
20 background for the cost benefit analysis, but I have three short responses to that.

21 First, the PRS's position was that the funding issues meant that Mr Rowntree could
22 not be authorised at all, and the proceedings, I quote, "cannot be certified based on
23 the PCR's funding position". That was the key point that led to the additional costs,
24 and that was the point that was wholly rejected. So it's the same point I've just been
25 making about authorisation requirement.

26 The second point: even in relation to cost benefits, the PRS, in its reply at least,

1 accepted that the Tribunal did not make a final determination as to whether the
2 funder's fee was appropriate. So there's no actual finding that my learned friend was
3 successful on the funder's fee.

4 The third point, which has slightly been lost sight of in the written materials before you,
5 sir, is that the PRS raised a whole host of other points on funding that were not
6 accepted, including that it was inappropriate for the funder to be paid first out of the
7 damages before they were distributed to the class, and that just wasn't addressed.
8 Indeed, with respect, multiple authorities, including from the Court of Appeal in
9 Gutmann, have shown that that is wrong. This did cause additional costs. It may not
10 have taken much time at the hearing, sir. I'm prepared to accept that. But there was
11 an awful lot of paperwork on these issues. Again, the funder has done in its reply
12 some calculations which I accept are not scientific, but they show that it was around
13 10 to 15 per cent of the page count of the CPO response reply and skeletons. So this
14 was a significant point. Indeed, at least on one calculation, the funder's submissions,
15 it did occupy 10 per cent of the hearing time, which may jar slightly with your
16 recollection, sir, of which I, of course, make no criticism given the length of time that
17 has since passed. That's the second of the three points.

18 The third is the black box and the cost-benefit analysis. I make in turn three points
19 about those costs.

20 First, it's important to recall that at least initially, the PRS's objection was focused on
21 lengthy submissions that the cost-benefit analysis was failed, because the PCR failed
22 to explain how any distribution could reach the songwriters. Sir, that was rejected by
23 the Tribunal. That's at paragraph 108 of the CPO judgment. I can take you to that if
24 that would assist. That's my first point.

25 The second point in relation to the black box is it's important to recall also, as we've
26 discussed, that the PRS lost on the key pleading point that seemingly led to the PRS's

1 artificial deflation of the size of the black box. That's the category 2 direct royalty
2 payments. I can take you through the CPO judgment if that would assist, sir, but I can
3 move on. I'm grateful.

4 But the key point is that Mr Rowntree succeeded, for the purposes of the certification
5 judgment, on the size of the black box being £200 million. We've seen earlier today,
6 just after lunch and before lunch, indeed, the reference to the day 1 and day 2 notes
7 from the first part of the hearing. That's slightly misleading, because of course what's
8 happened since then is we got a gradual drip-feeding, if I can put it that way, of
9 additional material from the PRS. Those earlier figures were not the ultimate size of
10 the black box that we submitted should apply for the day 3 hearing. All of the skeleton
11 arguments were about £200 million, and we won on that point, sir. That's as plain as
12 day. But I can give you a reference.

13 THE CHAIR: As I recall, it was absolutely shambolic on both sides when it comes to
14 addressing proportionality by reference to the potential damages. Neither side really
15 squared up to that point.

16 MR WILLIAMS: It's very difficult from Mr Rowntree's position. This is information
17 which is clearly only held by the PRS.

18 THE CHAIR: Well, maybe, but you're bringing the claim.

19 MR WILLIAMS: Of course. But, sir --

20 THE CHAIR: You've got to show it's proportionate.

21 MR WILLIAMS: But in which case, we (overspeaking).

22 THE CHAIR: If you're not sure, then don't bring the claim, and find out whether it's
23 proportionate before bringing the claim. That's the point that could be made against
24 you.

25 MR WILLIAMS: Sir, if I may say so, with respect, that is rather unfair on Mr Rowntree.
26 One can see a problem, understand a problem, without knowing the size, the exact

1 size. If Mr Rowntree hadn't asked the question before issue, I would take your point
2 entirely, sir, and that would be fair. But having asked the question a series of times,
3 and then it was the PRS that put in issue the cost-benefit analysis in its CPO response,
4 one would have expected the PRS, if it's going to raise a question of proportionality
5 and cost-benefit, to put a value on it, and it didn't. This was information within its
6 control.

7 THE CHAIR: You've had my observation.

8 MR WILLIAMS: In which case, sir, those are the three key points on why we say there
9 should be a deduction at this stage, and that ends my chunk of submissions on the
10 first issue of the basis and the second on whether there should be reductions in
11 principle at this stage.

12 THE CHAIR: And then where do we go next?

13 MR WILLIAMS: We next go to payment on account, which is the same series of
14 submissions on summary assessment, in effect. My learned friend Mr Carpenter was
15 going to address you first on that, and I can pop up to add anything non-duplicative.

16 THE CHAIR: And then who's dealing with interest?

17 MR WILLIAMS: Interest on costs is my learned friend as well. It's a techie costs point.
18 I'm grateful.

19

20 Submissions by MR CARPENTER

21 MR CARPENTER: That's good to know where I stand.

22 Sir, I gratefully adopt my learned friend's submissions on behalf of the PCR for the
23 funder. I gratefully adopt his submissions on the basis of assessment and what the
24 costs order should be.

25 I'm going to add, if I may, two very short points on the principle of indemnity costs, just
26 on what the test is, not the facts. And the first is just to reinforce what my learned

1 friend correctly submitted is the test when one is looking at conduct and that is
2 unreasonable to a high degree. And where confusion may arise is because another
3 expression which can sound similar but is crucially different is conduct worthy of moral
4 condemnation. That is certainly not the test, but it was the pre-CPR test which the
5 early post-CPR cases were very keen to make clear was no longer the test.

6 THE CHAIR: I rather shut Mr Pickford off when he tried to get his authorities and he's
7 not addressed me on Suez, but Suez is relied upon. Have I got that right?

8 MR CARPENTER: So Suez -- my learned friend took you to Suez --

9 THE CHAIR: When you're looking at conduct, that's the test you should apply, and
10 I must give Mr Pickford an opportunity to respond properly.

11 MR CARPENTER: Of course, and I'm sure he will.

12 Can I just show you, sir, one other sub-paragraph from one authority which really
13 brings this home? And it's the Richmond Pharmacology case. It's tab 26 in the
14 authorities bundle. I'm afraid I don't know in the hard copies what volume that might
15 be. I'm told it's volume 1. And it's paragraph 4(b), which is page 381 of the bundle.

16 THE CHAIR: Okay. I've read that.

17 MR CARPENTER: At the top of that page and the very bottom of the page before we
18 see a list of all of the key cases that the deputy judge had referred to, you'll see in 4(b),
19 obviously, first of all, the distinction I'm raising is very clearly made. The deputy judge
20 there also says they have to be "unreasonable to a high degree".

21 And then the last sentence is also important:

22 "'Unreasonable' in this context does not mean merely wrong or misguided in
23 hindsight."

24 It is important, I respectfully submit, to keep in mind that this is a high bar, particularly
25 where you are looking at issues of conduct.

26 Then the only other point I wanted to make is in relation to *Gore v Naheed*. As I'm

1 | sure you appreciate, sir, that case and cases like it are cases about what the costs
2 | order should be. They're not actually about the basis of assessment. We're used to
3 | having arguments about whether a refusal of ADR, for example, should be reflected
4 | in the costs order, but it's obviously a whole other level of seriousness to augment
5 | those into points about the basis of assessment, and that's something we just don't
6 | see in the authorities.

7 | So I'll move on then to what I think is now, as I understand it, simply a question of
8 | summary assessment. We've moved on from any question of payment on account.
9 | It's simply a question of your determination of what are the reasonable, and on the
10 | standard basis, proportionate costs that the PRS should have incurred. I make
11 | essentially the same points, but I make them with a view to a final determination,
12 | rather than simply a conservative assessment of what might be the result.

13 | THE CHAIR: The process is the same, is that right? When you're summarily
14 | assessing costs and when you're --

15 | MR CARPENTER: It's a different question, but you're going to be guided to a slightly
16 | different answer by largely the same concepts. When you're ordering a payment on
17 | account, you're asking yourself what might the result be in some future assessment
18 | process and perhaps being slightly conservative to allow for uncertainty in that regard.
19 | If you're conducting a summary assessment, you are determining that final number.

20 | THE CHAIR: You are grasping the nettle, so to speak.

21 | MR CARPENTER: You are grasping the nettle. But you're applying exactly the same
22 | concepts of reasonableness and proportionality. You're looking at the same material,
23 | you're determining the hourly rates, and so on.

24 | So we identified four particular areas in our submissions which we say are indicative
25 | in particular of excessive costs. But before I get into those, I'm going to make three
26 | overarching points.

1 One concerns the level of detail about these costs, the second concerns the total level
2 of costs, and the third is the issue of complexity on which you heard from my learned
3 friend Mr Pickford this morning.

4 So taking each of those in turn. As far as the level of detail is concerned, we really
5 don't have very much. All we have is the document that begins at page 161 of the
6 hearing bundle B, tab 18, which simply gives us the total number of hours incurred by
7 each fee earner in the various periods of the litigation into which this has been divided.
8 We made the point that this wasn't very satisfactory even for the purposes of, perhaps,
9 the higher-level assessment of a payment on account. And I know this is something
10 that the PCR's solicitors have been corresponding about for some time and have been
11 met with a blanket refusal to provide any more than we have. The position is really
12 a fortiori now we're looking at, well, actually, what is the reasonable and proportionate
13 figure? Because if this is all the PRS can give you to explain what they were doing
14 and why they were doing it, it is, frankly, not very much.

15 Whatever basis you ultimately decide this assessment should take place on, that is
16 something which, in my respectful submission, has to count against the PRS and in
17 favour of the paying parties. It is very difficult to understand simply from these
18 numbers what work was actually being done, why it was being done, who was doing
19 it and when, except in the most broad terms.

20 Turning, then, to the totality of the costs, you will obviously have seen, sir, the points
21 we make that this is simply an extremely large number for this stage of the
22 proceedings.

23 THE CHAIR: I've read your skeleton very carefully.

24 MR CARPENTER: You have you will have seen there are other cases where smaller
25 numbers than this have been criticised. A particular point that my learned friend
26 Mr Pickford makes is that the PCR's costs are higher. You made your own observation

1 about that, sir. You're probably aware of what Mr Justice Roth said in Merricks. He
2 says it's essentially irrelevant. You can't compare what the two sides are incurring.

3 And in any event --

4 THE CHAIR: In the context of a class action?

5 MR CARPENTER: Yes. And were the boot on the other foot, of course, undoubtedly
6 the same points would be taken. In any event, you simply have to look at this costs
7 claim on its own merits, on the basis of the material that is being put before you.

8 Complexity, I'll say perhaps a little bit more about. Shortly, we say, that this is not
9 a complex case. Everybody always says.

10 THE CHAIR: In fairness, Mr Carpenter, you weren't at the hearing and I assume you
11 weren't involved in preparing it.

12 MR CARPENTER: I wasn't.

13 THE CHAIR: You're not best placed to assist me on this.

14 MR CARPENTER: Of course, I've read the judgment and I've familiarised myself,
15 I hope, enough with the issues to be able to make the submission.

16 THE CHAIR: You probably haven't read all the transcripts?

17 MR CARPENTER: I certainly have not. I will quite accept that. If I get shot down,
18 I get shot down, but I do make the submission, and if my learned friend Mr Williams
19 needs to say anything to back it up, of course --

20 THE CHAIR: Obviously, I understand the submission, I understand the point you're
21 making, I was at the hearing and I have reread the judgment. So I think I know where
22 we are. What "complex" means is on a scale as, you know, where you put it. I'm not
23 sure there's much else to say, is there? Unless you want to add?

24 MR CARPENTER: You have your view, sir, but complexity does have to mean
25 something, that's the point I make. Anybody can say their case is complex because it
26 raises a new point, and that's the point the president, as you know, specifically made

1 in Spottiswoode, is that novelty is not the same as complexity. This was an argument
2 which one can see from the skeleton arguments. You'll recall, sir, we see it in the
3 judgment. It was run without extensive reference to authority. It wasn't
4 a document-heavy case. It wasn't a factually --

5 THE CHAIR: There was no preliminary disclosure. There was no complex economics
6 that I had to grapple with. In fact, my complaint from clients was the economics really
7 didn't add up to a row of beans. So in those senses, it was a simple, simple case.

8 MR CARPENTER: Exactly. You have the point, sir.

9 Well, let me move on then to some of the specifics. So the four areas that we singled
10 out in our submissions were hourly rates, the number of fee earners, excessive senior
11 fee earners and counsel fees. Obviously, there is still the overarching point that there
12 is simply too much time here. That goes without saying. But those are the areas
13 which perhaps invite particular examination. Now --

14 THE CHAIR: You don't need to address me on hourly rates.

15 MR CARPENTER: I'm very grateful. Then I will move on to having a look at a little bit
16 of what we can see in the detail of this breakdown. If I can ask you to turn that back
17 up, at bundle B, tab 18, beginning at page 161.

18 THE CHAIR: Sorry, just give me a second.

19 MR CARPENTER: And I'm looking at what we can see at page 162 onwards. We
20 looked at this morning and you made some observations on that.

21 Aside from the sheer enormous amount of time that is in this breakdown in particular
22 in period 2, but really throughout the whole of it, two points, in my submission, really
23 leap out. Firstly is the large number of fee earners overall who were involved in this
24 case, and not just involved, but actually racking up large numbers of hours. I mean,
25 we can see when we have multiple fee earners, it's not that, you know, perhaps --

26 THE CHAIR: I mean, the number of fee earners doesn't really -- if they're all doing

1 different things, that's fine. Surely I'm better to focus on the total number of hours,
2 aren't I, rather than --

3 MR CARPENTER: Well --

4 THE CHAIR: Sometimes it can be more efficient at different people doing things.
5 Sometimes they have different expertise. It's the total number of hours spent in each
6 period that surely is more informative?

7 MR CARPENTER: Well, the total number of hours is of course important. But if
8 a submission is going to be made that that is a reasonable number of hours, then one
9 does have to look at how it's made up and the significance of seeing lots of people, all
10 recording high numbers of hours is that is strongly suggestive of duplication, of multiple
11 people doing the same work. There is a big difference between one person racking
12 up an enormous number of hours and five people racking up exactly the same number
13 of hours that add to the same total. It's much more likely in the latter scenario that
14 people are doing the same thing twice.

15 THE CHAIR: Ten people charging more than £500 an hour?

16 MR CARPENTER: Yes, exactly. I mean, just to take example, one case from
17 period 2. If we look at the fee earner who individually recorded the highest number of
18 hours, that's Emma Radcliffe. She is a Grade A fee earner. She records 356.5 hours.
19 Now, if we assume a 40 billable hour working week, which is maybe slightly on the
20 high side, that is about nine weeks of doing nothing else but working on this case for
21 one fee earner alone. And if she'd done all the work herself, I would be submitting that
22 that is quite a lot, but it's only actually about a fifth of the total hours in this period. And
23 she is not alone in recording a very significant number of hours. We have, for example,
24 Zoe Carter, a Grade B, fee earner, recording only slightly fewer.

25 So those are the sorts of things that, in my submission, give a strong indication that
26 the work is just being done in a duplicative way. It's not being done efficiently or

1 reasonably.

2 What we also can see from this breakdown, if we match up the names against the
3 indication that we have at page 161 of the grades of each of these fee earners, is how
4 much of the work is being skewed towards the more senior fee earners. There's
5 a table in paragraph 48 of my skeleton argument that you may have looked at, which
6 illustrates this quite starkly, that we have 70 per cent or so plus of all of the time in the
7 periods up to the end of the hearing, work being done by Grade A and Grade B,
8 ie senior fee earners, and after period 2, absolutely nothing being done by Grade D
9 fee earners, and that is suggestive of an inappropriate manning of this case,
10 insufficient delegation of work to junior fee earners, and just too much being done by
11 the senior fee earners, of whom we see a lot. I mean, we see, for example, in period 1,
12 five Grade A fee earners all recording time; in period 2, four Grade A fee earners and
13 so on. The pattern is really repeated throughout this.

14 We also point to counsel's fees. I'm not going to give you, sir, an alternative figure
15 which we propose, but total counsel fees for a case of this nature of over £438,000 is,
16 we say, significantly on the high side. That falls to be reduced. Otherwise, it really is
17 just too much time for the amount of work and the work product which we explored
18 this morning.

19 THE CHAIR: I've got those points.

20 MR CARPENTER: You have those points, and I'm going to stop except to make one
21 point. That is about the costs of the applications. Just to say, those fall to be dealt
22 with separately, certainly in relation to my client, and my learned friend Mr McDonald
23 gave you a figure for what would be sought against the funder. If the result of this
24 process is, in fact, that there was never any need to bring my client into this, then, just
25 to make clear, we would be seeking our costs.

26 THE CHAIR: I'm sorry, your client specifically, I beg your pardon?

1 MR CARPENTER: Yes. My client as the funder. Mr Williams can make his own
2 submissions about the PCR's position, but in terms of what you're summarily
3 assessing, that shouldn't include the costs of any application against the funder until
4 we know what the result of the assessment is, and then we can look at that separately.
5 That's the only point there.

6 THE CHAIR: Understood.

7 MR CARPENTER: Sir, unless there's anything about the level of the costs, sir, that
8 I can otherwise assist you with, I'll move on to interest on costs. Again, I'll try to take
9 this quite briefly.

10 We are agreed that there must be a power to award interest in the rules. My learned
11 friend says he can find it in Rule 104. The difficulty is, of course, that three previous
12 Tribunals have held that that is not the case. I would say it's also implicit in the order
13 that was made in the Royal Mail case that that was as far as the Tribunal felt in that
14 case that it could go. But obviously I have no evidence that the point was actually
15 argued. But we have three express decisions of the Tribunal that there is no power to
16 award interest. No Tribunal has previously held the contrary. So this is not a situation
17 where you have to choose between conflicting decisions. The jurisprudence of this
18 Tribunal has been entirely consistent and therefore on the basis of judicial comity, in
19 my respectful submission, unless those decisions are obviously wrong or have been
20 superseded by later authority, then you ought to follow them.

21 As for that later authority, I think the way it's put is that the Court of Appeal in Gutmann
22 and Le Patourel emphasised the breadth of the Tribunal's powers in relation to costs
23 generally and other areas. But, with respect, I submit that that is nothing to the point.
24 There either is an express power or a power which is clearly implicit in the wording of
25 the rules, or there is not. Appealing to the breadth of the Tribunal's powers in other
26 respects is not going to assist.

1 The Curran case, a good deal of weight is put on -- I appreciate that you didn't consider
2 that it was going to be a great deal of assistance to you, but it is relied on so I should --

3 THE CHAIR: Sorry this is the tax --

4 MR CARPENTER: This is the tax tribunal case. Now, there's a very important point
5 of distinction, which is that orders of this Tribunal, as my learned friend properly
6 accepts, do not in themselves give rise to judgment debts. That only will occur if and
7 when it is ever necessary to enforce and once the order has been --

8 THE CHAIR: It gets transferred over to the --

9 MR CARPENTER: -- with the High Court, that is the point of the wording in Royal Mail.
10 The Royal Mail order was, as it were, an advance determination pursuant to whatever
11 rules may be available under section 17(2) of the Judgments Act that interest would,
12 in those circumstances, be backdated to the date of the order.

13 THE CHAIR: Why did the Competition Appeal Tribunal have power to do that?

14 MR CARPENTER: Well, we do question that in our skeleton argument. I don't want
15 to be too disrespectful to the Tribunal that made that order, but that is, in my respectful
16 submission, as questionable as the decision in Ad Tech.

17 THE CHAIR: Another tricky question.

18 MR CARPENTER: Yes. What power is being exercised in that situation is not entirely
19 clear, and why would the Tribunal at that point be seized of it anyway. But that explains
20 at least the thinking, which is obviously implicit in that case.

21 In Curran, it was noted, and perhaps we can just orientate ourselves --

22 THE CHAIR: Yes.

23 MR CARPENTER: So this is tab 24 of the authorities bundle, and it's page 362.

24 In fact, no, I'll pick this up, first of all, at 361.

25 THE CHAIR: Yes.

26 MR CARPENTER: What is noted of significance, first of all, in paragraph 37 is that

1 orders of the first-tier tribunal do give rise to judgment debts. So the Judgments Act
2 does apply, and therefore so, interest automatically applies to its costs orders, at least
3 post-judgment interest automatically applies without the Tribunal needing to do
4 anything.

5 THE CHAIR: So that's a distinction.

6 MR CARPENTER: That's a first point. I accept that it only gets me so far, but it gets
7 me a fair way.

8 Now, what Mr McDonald would doubtless say in reply is, "Yes, but the Tribunal also
9 went on to say we need to deal with pre-judgment interest", and it's in respect of
10 pre-judgment interest that, in paragraph 40, the Tribunal noted that:

11 " ... there [was] no specific rule ... corresponding to ... CPR 44.3(6)(g)..."

12 But was prepared to read it into a rule (overspeaking) --

13 THE CHAIR: In respect of costs. Rule 104(1), yes.

14 MR CARPENTER: And that's Mr McDonald's point. If I can put it this way, with
15 respect to him, it's really the high point of his argument, if one is going to put the
16 Tribunal jurisprudence to one side.

17 Now, there are two points to make about that. Firstly, CPR 44.3(6)(g), and of course
18 we don't have the whole of the first-tier Tribunal rules in front of us, has been held by
19 the Court of Appeal to derive from section 17(2) of the Judgments Act 1838. That's
20 the Rowe case. I don't think we need to turn that up, but the reference is in our
21 skeleton argument.

22 Again, it's important that the parallel rule, which is being looked at in Curran, is one
23 which still derives from the same overarching statutory position, which is that the
24 Judgments Act applies to orders in the first-tier Tribunal and also to orders in the
25 High Court.

26 But what also importantly follows from that is you can't say, as the PRS do, "Well,

1 because you find 44.3(6)(g) in a load of rules that govern making costs orders,
2 therefore, it should be regarded as an aspect of making a costs order".

3 Rowe is dead against that submission because Rowe makes clear that, while you may
4 find it there, it's serving a very different function, and it comes from a very different
5 place. So what you're left with is simply a desire to read into those rules effectively,
6 and we see it quite candidly here in paragraph 40 in Curran. The Tribunal wants to
7 get to this answer, and it finds the answer in those words. That is, with respect to that
8 Tribunal, to do exactly what Lord Nicholls criticised the Court of Appeal for in Nykredit,
9 which is to "let its heart rule its head", that there must be a power, and it's a power
10 which shouldn't lightly be read in.

11 THE CHAIR: So why can't -- just going back to the rules, 104, why doesn't
12 it -- I appreciate why you say you shouldn't place too much weight on Curran, but what
13 about the words in 104?

14 " ...any order it thinks fit in relation to the payment of costs ..."

15 So that's 104(2), if you recall.

16 MR CARPENTER: Yes, so that's the essence of Mr McDonald's argument.

17 THE CHAIR: Yes. He doesn't just get there from Curran. He says it's -- he dangles
18 that in front of me.

19 MR CARPENTER: Yes.

20 THE CHAIR: "Oh, look, someone's done it before". But he can get it out of rule 104,
21 he says, "Look, it's just not enough attention was paid to this broader power that you
22 get from 104(2)". I don't think that's a --

23 MR CARPENTER: And that is because we have a clear understanding, in my
24 submission, of what it is to make an order in relation to costs. Interest on costs has
25 always been in its own special category that has to be specifically provided for, and
26 we get an indication of what the statutory interpretation guidance should be from the

1 way it was dealt with in Nykredit. We haven't actually looked at Nykredit because it's
2 common ground now that there's no common law power to award interest on costs.
3 But I think it is perhaps helpful.

4 THE CHAIR: But there's no common law. Sorry, I'm probably not following you closely
5 enough, but why does, in relation to the payment, costs only apply to the costs and
6 not the interests on the costs? You said, well, interest on costs is different to costs,
7 which is easy to say, but which is your best authority to ...?

8 MR CARPENTER: Well, probably Nykredit. I mean, the point that comes from
9 Nykredit very clearly is it has to be specifically provided for, in my submission.

10 THE CHAIR: Right.

11 MR CARPENTER: So if we can go, please, to tab 3 in the authorities bundle, page 71,
12 first of all, and then we'll look at something on 72.

13 THE CHAIR: Sorry, paragraph 71 or page 71?

14 MR CARPENTER: So it's page 71, letters F and G.

15 THE CHAIR: Yes.

16 MR CARPENTER: So F, we see that pre-judgment interest is being sought, effectively
17 backdating interest to the date of the order below. G is where Lord Nicholls says:
18 "I have to say that in the Kuwait Airways case the court was lured into error. It let its
19 heart rule its head."
20 Then he points out that there's no power apart from in statute. Then he looks at the
21 power in the old RSC, which the Court of Appeal had purported to exercise in
22 Kuwait Airways. This is what I take from this, at the top of 72, the paragraph that
23 begins there:
24 "However desirable it might be for the court to have power to order the payment of
25 interest on costs from a date earlier than the date on which the court gives judgment,
26 I do not think such a power can be squeezed out of this rule. That would be to use

1 the rule as a means of doing indirectly what the court has no power to do directly."

2 THE CHAIR: I'm sorry. In the rule, it was which bit? So sorry, I didn't read that.

3 MR CARPENTER: The rule was that from the old RSC, which we see at H on the
4 bottom of the page.

5 THE CHAIR: " ... judgment or order ... takes effect from the day of its date ... Such
6 a judgment ..."

7 THE CHAIR: (Inaudible) the same point, is it?

8 MR CARPENTER: No, but in my submission, one can take this point from it: that
9 interest on costs is something that needs to be specifically provided for, and you
10 shouldn't go looking for it in rules that don't specifically provide for it. And 104
11 undoubtedly does not specifically provide for it. To find it in that rule, you would have
12 to be, as it were, determined to see it there.

13 THE CHAIR: I see. You say, only with the benefit of hindsight, when faced with this
14 problem, could one think that 104(2) is talking about interest. That's another rather
15 crude way of putting it. Yes.

16 MR CARPENTER: (Overspeaking) That's particularly clear when we think that where
17 they do provide for it -- they do in rule 49, for example, it's there in terms -- and of
18 course, the very next rule is 105, which deals specifically with interest, but only interest
19 on damages and penalties. If it's there to be seen in 104(2), of course, it wasn't seen
20 by Mr Justice Roth, Mr Justice Zacaroli and any of the others who have previously
21 looked at this issue.

22 THE CHAIR: A wonderfully lawyerly point, isn't it? The costs of interest. I mean, the
23 commercial world would take this very differently. But anyway, there we are. That's
24 the world we live in.

25 MR CARPENTER: There we are. There either is a lacuna in the rules or there isn't.
26 We say there is. For whatever reason it hasn't been filled, but it's still there.

1 THE CHAIR: You say you've got authority in your favour, and it's not clear enough
2 against you for me to start to disrupt the harmony in this Tribunal.

3 MR CARPENTER: Exactly. We're all striving for harmony.

4 Unless there is anything I can particularly assist with, I've covered the ground that
5 I need to.

6 THE CHAIR: Do you have anything to add?
7

8 Further submissions by MR WILLIAMS

9 MR WILLIAMS: Three small footnotes, if I can call them that.

10 First, in relation to complexity. Of course, it bears emphasis that Macfarlanes are
11 long-standing competition and regulatory advisors to the PRS. It shouldn't have been
12 a particularly complex case for the solicitors in question, racking up those levels of
13 costs when one bears in mind those circumstances.

14 The second point is my instructing solicitors behind me are very keen to make the
15 point, since they were instructed in Merricks, that in that case before Mr Justice Roth
16 on interests for costs, it was specifically argued about. There were brief written
17 submissions from both sides from (inaudible).

18 THE CHAIR: Yes. One can see it was dealt with shortly in the judgment. One can
19 see it was argued.

20 MR WILLIAMS: My learned friend took certain points that whether it was or wasn't
21 argued. We know for a fact in this case it was argued about. Then --

22 THE CHAIR: We don't know whether, it seems unlikely that it wouldn't have been, but
23 we don't know whether there was a focus on Rule 104(2). We don't know.

24 MR WILLIAMS: That's only fair, sir.

25 THE CHAIR: But it seems very unlikely that that would have been overlooked,
26 because it's written exactly the first place you'd look.

1 MR WILLIAMS: Mastercard were aided with Ben Williams KC, who is a cost specialist,
2 and Mr Merricks was aided by Mr Nick Bacon KC, also a cost specialist. So it's
3 surprising that everybody missed this point, if there is one.

4 Then my third and final footnote is in relation to costs of this hearing. Our submission
5 is that costs will follow the event from today's purposes. So if, sir, you are with us on
6 indemnity costs, interests and the level of costs, for example, it would be my
7 submission that we should have our costs in this case. This hearing has been primarily
8 about those three matters at great length, and to the extent, if not agreed, we are
9 content for that to be summarily assessed, on the papers.

10 It is just worth bearing in mind as my final point, sir, this has all been pursued with
11 great vigour by the PRS. For example, the PRS's submissions total 54 pages, have
12 been drafted by three counsel, a silk, two senior juniors. It's been filed with three
13 witness statements from a partner. There are over 300 pages of exhibits to those
14 statements. For this hearing alone, until yesterday, there were nine volumes of
15 hearing bundles, 1500 pages, three volumes of 74 authorities, and so forth.

16 THE CHAIR: I've got the point, yes.

17 MR WILLIAMS: But that is illustrative, sir, of the racking up of costs in these
18 proceedings.

19 THE CHAIR: Yes. Well, we've got the figure. Yes.

20 MR WILLIAMS: I'm grateful.

21 THE CHAIR: Mr Pickford, sorry. I particularly cut you off on authorities on the
22 indemnity costs, which with the benefit of hindsight was probably a mistake. But the
23 point obviously put against you is when it comes to conduct, different criteria apply.

24 (Overspeaking)

25

26 Further submissions by MR PICKFORD

1 MR PICKFORD: Well, sir, that is not the way we see the law. So probably it's helpful
2 if I take you to the authorities.

3 THE CHAIR: Yes, of course. Yes. I apologise.

4 MR PICKFORD: No, not at all.

5 If we pick it up, please -- I'm just going to get back to my submissions. The case that
6 I was going to start with -- there are two cases -- bear with me a moment. (Pause)
7 Excelsior, at tab 8 of the authorities bundle.

8 THE CHAIR: Yes.

9 MR PICKFORD: We say this is a leading authority in this area. It's what one might
10 call a relatively powerful court, including Lord Woolf, Lord Chief Justice, and
11 Lord Justice Waller and Lord Justice Laws.

12 THE CHAIR: Yes.

13 MR PICKFORD: If we could go, please, to first the judgment of the Lord Chief Justice
14 at paragraph 31 to 32. (Pause)
15 It's on page 141 of the bundle.

16 THE CHAIR: Yes, I've got it. Yes.

17 MR PICKFORD: Could I ask you, sir, please to read 31 to 32. (Pause)

18 THE CHAIR: Yes. Okay.

19 MR PICKFORD: Then there's reference at 37, in the judgment of Lord Justice Waller,
20 to the case of Reid Minty. Could I ask you, please, to read paragraph 37. (Pause)
21 Then we have a reference to the case of Kiam in paragraph 38. If I could also ask
22 you, please, sir, to read paragraph 38. (Pause)
23 Then that comes together in paragraph 39, where Lord Justice Waller says:
24 "The question will always be: is there something in the conduct of the action or the
25 circumstances of the case which takes the case out of the norm in a way which justifies
26 an order for indemnity costs?"

1 It's a broad discretion, and it would be wrong to compartmentalise it in the way that my
2 learned friends seek to do. You were referred to, in support for that
3 compartmentalisation, inter alia, a judgment of a deputy judge of the High Court. In
4 my submission, this is the judgment, sir, that you should be basing yourself on in
5 relation to the appropriate test, not the judgment to which you were shown.

6 The next of the authorities I wanted to refer to is the PGF II case, which is at tab 25.

7 THE CHAIR: Sorry, just going back. I appreciate what you said about the deputy
8 judge, but can I just go back to that at tab 26.

9 MR PICKFORD: Yes.

10 THE CHAIR: It was quite a considered -- he looked at quite a few authorities, didn't
11 he. Yes. He looked at --

12 MR PICKFORD: He does not refer to the judgment that I've just taken you to.

13 THE CHAIR: I see.

14 MR PICKFORD: To make good upon my point about why one shouldn't seek to invent
15 very specific tests for different specific ways of labelling submissions; in my
16 submission, the nature of this case has a number of different factors that should be
17 taken into account. Obviously, the key point that I'm focusing on, because it's the key
18 point, sir, that you're interested in, is the lack of proper engagement with ADR.

19 THE CHAIR: Yes.

20 MR PICKFORD: But the context for that matters. The context, of course, is that this
21 was an opt-out claim brought on behalf of a class of members of a members'
22 organisation who are suing themselves. What I say is, it's all those factors taken
23 together that really matter. There might be some claims where perhaps some lack of
24 engagement with ADR wouldn't be, of itself, what takes you over the edge. But my
25 submission here is that you need to be very, very careful when you pick up the
26 incredibly powerful tool of opt-out proceedings and you purport to wave it around,

1 allegedly on behalf of people who are ultimately going to have to pick up the tab if you
2 get it wrong. That's where prior engagement, seeking the views of members and ADR,
3 really come into themselves. They are a fortiori important matters in a case such as
4 this. In my submission, that's why it is appropriate, as the Court of Appeal said in the
5 Excelsior case, that one applies a broad test. Ultimately, it's for this Tribunal to do
6 justice.

7 We say, the just outcome is that it is not songwriters themselves and publishers, who
8 have done nothing wrong, that ultimately pay the price for this. It should be
9 Mr Rowntree, with his funder and his insurer, that pick up the bill insofar as possible.
10 That's the essence of that.

11 If we could then go to the PGF II case which I mentioned, which is at tab 25, just one
12 back from the Richmond Pharmacology case we were looking at. This is a decision
13 of the Court of Appeal again. It's Lord Justice Briggs, as he then was. Again, this is
14 a very powerful court. If we could go, please, to paragraph 34, which is the beginning
15 of the discussion of a failure to take part in ADR. Could I ask you, please, to read
16 paragraph 34. (Pause)

17 I get two points from that. Firstly, refusing ADR without a good basis is inherently
18 unreasonable, and simply not responding to a request for ADR is itself generally
19 unreasonable.

20 That takes me then to deal with and reply to some of the factual points that have been
21 advanced by Mr Williams on this subject. He made the submission, by taking you to
22 Mr Rowntree's claim, that it was never denied and therefore must be accepted, what
23 Mr Rowntree says in his claim about his attempts to get information from us. That is
24 simply incorrect. We never got to pleading a defence, because we struck out his claim.

25 THE CHAIR: Yes. I'm with you on that. (Inaudible) pleading rarely makes it
26 determinative.

1 MR PICKFORD: In relation to the point about the concern that Mr Rowntree had, that
2 he wasn't getting the information out of us that he wanted, this goes to really the
3 essence in many ways of this claim. We don't see the world in the same way as
4 Mr Rowntree sees it. If we had the information that he wanted, because we packaged
5 up black box royalties and we could give him the sums that he wanted, obviously we
6 would have given it to him. He is a member, and he's threatening us with multi-million
7 pound litigation. It's just not realistic that we're trying to avoid engaging with him. We
8 weren't trying to avoid engaging with him at all. We were trying to engage with him.
9 Ultimately, what Mr Williams was unable to deny is that prior to issuing, Mr Rowntree
10 was silent in the face of our offer of ADR, and even after that he only engaged in one
11 meeting and then he refused a second.

12 Sir, you made a point about the parties' cases dealing with the issue of proportionality,
13 and you described us both as being shambolic. I think that was your --

14 THE CHAIR: Yes, it was. Yes.

15 MR PICKFORD: If I might just briefly respond on that. What we say about that is, with
16 the greatest respect, that's not fair in relation to PRS. It follows from the point I was
17 just making, about the fact that we don't produce black box information in the way that
18 Mr Rowntree thinks that we should be producing it. It might be just helpful to look at
19 Mr Arber's third statement, just very briefly on this, because he explains the challenges
20 that he had in bringing together the information that he produced in his third statement.

21 That's at page 1019 of the bundle, tab 43. (Pause)

22 If I could ask you, please, to go to 1019 and look at paragraph 9 briefly to the end of
23 10. I can summarise it for you. The gist of what he's saying is that he had to look at
24 a vast amount of data to prepare what he did. It involved a lot of people doing a lot of
25 work over a lot of time. But ultimately, there isn't an inherent distribution value that
26 corresponds to the way of the world that Mr Rowntree looks at it. That's in

1 paragraph 10.6. That's consonant with the point that I've been seeking to explain to
2 this Tribunal. There's just a mismatch there.

3 There was a point made about us not responding to Ms Cross. This was the point that
4 there was a --

5 THE CHAIR: She was a lady who just wrote a letter and --

6 MR PICKFORD: She was the lady who wrote a letter during COVID.

7 THE CHAIR: I heard about that at the last hearing.

8 MR PICKFORD: Exactly. The office wasn't staffed and her letter got lost. But if she
9 wanted to pursue it, obviously she could have pursued it. So that really is scraping
10 the barrel, we say.

11 Sir, would you like me to address you on the various issues-based deductions? You've
12 now heard from Mr Williams on that.

13 In the light of that and the fact that we are not going to be dealing with the issues that
14 Mr Williams raised about the CAT, I'm not sure that there's very much for me to say
15 other than what Mr McDonald has to respond on.

16 MR McDONALD: Yes, I'll try to be brief and just address the points in short order.

17 So the first point raised was there was complaints about the level of detail, and we say
18 the level of detail was ample and, notably, it wasn't said that you would have had any
19 further detail had we used the prescribed summary assessment form in the CPR. So
20 we say that goes nowhere. You have the detail in front of you and you've asked
21 questions on it. They've raised points about it. It's also worth remembering that we
22 were preparing this for the purpose of an interim payment where one does normally
23 expect --

24 THE CHAIR: Sometimes one gets a narrative around these schedules. So Mr Day,
25 for example, could have said, look, you may think it's a long time to spend on a short
26 witness statement, but this is why -- boom, boom, boom, boom. But we haven't got

1 that in this case.

2 MR McDONALD: I mean, to be fair, neither the PCR nor the funder said specifically
3 that the witness statement took too long. So we were responding to the points they've
4 raised in the evidence of Mr Day, and he has explained why the costs are what they
5 are. But if they don't raise it, it's not something we're going to pre-empt necessarily.
6 The next point was a comparison with other cases. We said that's not very helpful at
7 all. You're looking at the costs in this case, what's been incurred in other CPO
8 applications doesn't really go anywhere. It's also somewhat inconsistent with the
9 suggestion that the claim that the PCR costs are irrelevant. They say that you can't
10 even look at their costs here, but other proceedings are apparently somehow relevant.
11 Now, just on that last point, it's rather surprising that my learned friend says
12 a comparison with the PCR costs is irrelevant. That's because -- I've got the guide to
13 the summary assessment of costs here, and I can pass them down the line. It won't
14 take long to look at. (Handed)

15 So this is in the White Book, but I've got printouts just for ease. The front page just
16 show what it is, and the second page is paragraph 11. (Pause)

17 THE CHAIR: Sorry, just reading the introduction. I didn't realise there was another
18 page. Right. Okay.

19 MR McDONALD: Paragraph 11:

20 "The costs which the paying party has incurred for its own representation may be
21 relevant when considering the reasonable support and receiving party's costs.
22 However, they are only a factor and not decisive. Both parties may have incurred
23 costs which are unreasonable." [as read]

24 THE CHAIR: I've read that, yes.

25 MR McDONALD: So I accept it's not determinative, but just to say it goes in the bin is
26 not the correct approach to looking at the other party's costs.

1 I've also been handed a note just to remind you that in Day 1 we do actually provide
2 further explanation of the work done in the relevant periods. I can give you a reference
3 to that. That's tab 2 of the main bundle, page 20. If you wanted to look at that, that's
4 day 1 for these proceedings, applications.

5 THE CHAIR: What am I looking at?

6 MR McDONALD: So Mr Day in his first witness statement, he does explain the work
7 that we did in the various periods.

8 THE CHAIR: Okay, just remind me of that.

9 MR McDONALD: So that's at tab 2, page 20 of the main hearing bundle.

10 THE CHAIR: Yes.

11 MR McDONALD: So you'll see "CPO Application", paragraph 7. Then Mr Day goes
12 through the various stages, setting out what happened. It's with an eye to two things.
13 It's with an eye to the work that was being done, and also to support the failure to
14 engage in ADR point.

15 THE CHAIR: Yes.

16 MR McDONALD: We didn't supply you with a bundle of all the underlying
17 correspondence because we weren't expecting to have to go through sort of item by
18 item, effectively. But there is a lot of work which goes on in these sorts of procedures,
19 which I'm sure you're familiar with.

20 THE CHAIR: Yes.

21 MR McDONALD: In terms of the number of fee earners, the way it often works and
22 worked here for proceedings of this nature, that there are different work streams,
23 different fee earners are tasked with different tasks that they're required to complete.
24 That's an efficient and normal way of doing it. It doesn't necessarily lead to duplication,
25 rather they do the tasks that are allocated to them.

26 There was a complaint made about insufficient delegation. There was delegation to

1 lower fee earners, but, to be fair, this type of case is perhaps not best suited to a huge
2 number of paralegals working on it, for example, because there wasn't a massive
3 disclosure exercise, which is where the paralegals really earn their crust. There's also
4 an issue which is that sometimes paralegals, due to a lack of experience, no criticism
5 at all, will take longer to do things than perhaps a senior figure. So it doesn't really
6 lead to a cost saving, particularly in a case of this nature.

7 Then a point was taken about the counsel team. It's worth mentioning that the PCR
8 instructed, three silks and two juniors to argue this, whereas in reality we only had one
9 silk and one junior with conduct throughout. The first junior changed and I helped with
10 funding issues and that was my only real role.

11 The last point was taken just while we were looking at the quantum by Mr Williams.
12 There was a point taken about long-standing advisors in the Macfarlanes act for PRS.
13 That's a bad point. These were a standalone claim bringing a novel issue which hadn't
14 been raised in previous proceedings. Mr Day's evidence is that his previous
15 involvement made no or no material difference to the cost being incurred. So we say
16 there's no reason to second guess that, and that goes nowhere.

17 Then dealing with interest -- unless I can assist you further on the summary
18 assessment -- the point seemed to be made about Curran, which is that it was dealing
19 with something different about the statutory power. That's not what was happening in
20 Curran. That happened in the earlier paragraphs, and that was about interest going
21 forwards. The paragraph I took you to, paragraph 40, that was looking at costs going
22 backwards, and it found the power in the rules. So I didn't quite follow my learned
23 friend's point on that.

24 The other point was in Nykredit, but in Nykredit, as you pointed out, sir, the rule that
25 was being referred to was nothing like the rule we have here, which says in relation to
26 costs. The last point that was relied upon was, "Oh well, the Tribunal rules address

1 interest in Rule 105 and that's a good indicator". But we say that supports our position
2 because what the drafters may well have thought is, "Well, we've dealt with everything
3 to do with costs in 104, so 105 is dealing with interest on damages".

4 THE CHAIR: Maybe.

5 MR McDONALD: We can't really, you know, none of us know quite what the drafters
6 were thinking, but there's no reason to prefer the PCR's analysis.

7 A point was taken about Mastercard and they were being represented by -- the point
8 was taken in Mastercard. Now, surprisingly, given that Willkie is saying, oh, well, we
9 were acting in Mastercard, if this had already been argued, no doubt we would have
10 seen the skeleton arguments for it.

11 I think that's all. But if I may --

12 MR PICKFORD: I have one "for avoidance of doubt" point, just so we're clear.
13 Mr Williams and Mr Carpenter raised some points about the costs of today. That
14 seemed to be getting slightly ahead of things because we don't actually have an order
15 in relation to today yet, but do you want to hear me in relation to the cost of today now?
16 Or do you want to --

17 THE CHAIR: How can you do that when you don't know what the result is? I'm
18 intrigued. (Overspeaking).

19 MR PICKFORD: Well, quite. But that didn't stop Mr Williams or Mr Carpenter trying
20 to make submissions. Mr Carpenter made submissions about how he is a funder --

21 THE CHAIR: I would normally expect the costs of today to go with the action.

22 MR PICKFORD: Yes.

23 THE CHAIR: Subject to any particular reasons why I shouldn't.

24 MR PICKFORD: Well, there are some particular issues that arise, in fact, in relation
25 to the funder. I don't accept what Mr Carpenter had to say at all.

26 THE CHAIR: Can we just park that for the moment --

1 MR PICKFORD: I'm very happy to.

2 THE CHAIR: -- and see where we are. I don't think you're having long on it, on the
3 costs of today. We can have five minutes at the end.

4 MR PICKFORD: Understood.

5 THE CHAIR: Right. I suggest we take ten minutes now and then I'll give judgment.

6 (3.26 pm)

7 (A short break)

8 (3.43 pm)

9

10 Judgment (submitted to the learned judge for approval)

11 (4.20 pm)

12 Right. Because of the litigation funder's potential role in this, I don't think at the
13 moment I can make an order for payment by a particular date, but I'm happy to --

14

15 Discussion re costs

16 MR CARPENTER: No one has suggested, through all of these arguments about joint
17 and several liability and all the rest of it, that the ATE insurance will not respond. I have
18 every reason to believe that it will. I don't think anybody suggests otherwise.

19 This should be the end of my client's involvement in these proceedings. If it was going
20 to be said that somehow they should remain live because there is some concern that
21 that costs liability won't be satisfied, then that submission needs to be made to you.

22 But I would be surprised if it was. There would be no evidential basis for it.

23 THE CHAIR: I mean, Mr Pickford needs to take instructions on that. Things have
24 obviously moved on and so forth. So I'm inclined -- can I just hear what Mr Pickford's
25 position is so that we can -- (Pause)

26 MR PICKFORD: Sir, from our perspective, we would be content with an order, for

1 example, to pay within 14 days with liberty to apply, so that if we're not paid, we'll come
2 back and have an argument about what happens next.

3 THE CHAIR: Yes.

4 MR PICKFORD: But on the basis of Mr Carpenter's assurances and, indeed, their
5 never having been contradicted by Mr Rowntree, hopefully that eventuality should not
6 arise.

7 THE CHAIR: Well, I think perhaps a little longer than 14 days, but --

8 MR WILLIAMS: We don't object to that, sir. We would suggest 21 days at least.

9 THE CHAIR: Well, I'm going to suggest 28 days just because three parties need to
10 liaise and make sure, and obviously there'll be liberty to apply.

11 Costs, is there anything you want to add on that?

12 MR CARPENTER: Well, as far as my client is concerned, in my submission, the
13 application for costs against it should simply be dismissed, and I will seek the costs of
14 that application.

15 THE CHAIR: Right. We haven't dealt with the application for seeking costs against
16 you. So it might be premature to --

17 MR CARPENTER: If payment is made, and, as I say, there's no suggestion that it
18 won't be, then there will be no conceivable basis to look to my client for anything.

19 Were you minded, were this to be sought by the PRS, to keep the application open
20 against my client, at least until that payment has been made, then to avoid us having
21 to come back or deal with anything afterwards, on paper, I would at least ask that you
22 deal on a contingent basis with what should happen if the payment is made, as
23 everybody expects it to be, which is that the application against my client should be
24 dismissed and my client should have the costs of that application. I'll ask you to deal
25 with those costs this afternoon if you're willing to do so. Obviously, I have an eye on
26 the clock, but it would be nice to be able to get everything off the table if we possibly

1 can today.

2 MR PICKFORD: Sir, we strongly, strongly object to that order, and there's a number
3 of reasons for that.

4 Firstly, I have no idea what cost he's asking for because there is no costs statement
5 that's been provided for summary assessment. If you are seeking summary
6 assessment, the rule is you need to provide your statement at least, I think, it's
7 24 hours in advance. We don't know what they are yet.

8 THE CHAIR: It hasn't been successful. He's chosen to come along --

9 MR PICKFORD: Well, he's okay. He's saying that he wants them determined this
10 afternoon. That's -- so even hypothetically.

11 THE CHAIR: Are you accepting he should have his costs?

12 MR PICKFORD: No, not at all. But that's an immediate problem with his application
13 for costs on a summary contingent basis.

14 But there are some more fundamental problems with it, if I may. What Mr Carpenter
15 overlooks is the history of why he's here at all. First thing to say is that in relation to
16 the points that Mr Carpenter made today, he didn't need to be here for any of those.
17 The funder has just decided to wade in on issues, all of which could have been
18 addressed --

19 THE CHAIR: Perhaps I can cut through this. I have to say, my preliminary view is
20 there should be no order to costs as against the -- we haven't determined the issue.
21 If it's determined, it may be they'll need to be a cost order. But as matters currently
22 stand, as against PRS and the funder, you pay your own costs. That's just
23 a provisional view.

24 If you object to that view and want to press, then I will very much have an open mind
25 and I'd suggest putting submissions in writing, limited to one-and-a-half pages.

26 MR WILLIAMS: Thank you, sir. We'll take that away.

1 THE CHAIR: And then the costs of today. Just remind me, the costs in relation
2 to -- there was £100,000, was it for --

3 MR PICKFORD: It was £133,000 as against the PCR and £57,000, I think, in terms
4 of the maths, as against the funder.

5 THE CHAIR: £57,000 is the bit we're not dealing with.
6 So we've got the £133,000.

7 MR PICKFORD: That's right.

8 THE CHAIR: I'm not going to do that today. My provisional view, and I have given
9 this some thought, is that these should be your costs as costs for the general action,
10 and I would summarily assess them at £75,000.
11 But that's just a provisional view. If parties want to argue that, I'll keep a fully open
12 mind, and again I'd suggest putting submissions in writing. So that's the £133,000.
13 And so again, I'd suggest submissions of up to a page and a half to deal with this.

14 MR WILLIAMS: Thank you, sir.
15 Sir, I would encourage you to settle this matter once and for all today, so far as
16 possible. There are two main reasons for that.
17 Firstly, we were successful on the three key and core issues in dispute today. Without
18 those issues, we wouldn't have been here at all. So I do say that we should be
19 awarded our costs.

20 THE CHAIR: I'm not going to make a decision today on this, so you need to put in
21 your submissions in writing, which will I give due consideration. I don't think a hearing
22 will be necessary, but if you think a hearing is necessary, let me know.
23 I mean, do bear in mind that the PRS has been successful in this action and given the
24 complexity of the matters we're dealing with, it was necessary to come today. You've
25 been successful on some things. You've been very unsuccessful on other things.

26 MR WILLIAMS: I understand.

1 The second point that I'm encouraged to make is we did make an offer which has been
2 beaten, and I can show you the correspondence on that --

3 THE CHAIR: Okay. There isn't time to deal with this today, that's all. So if you can
4 put submissions in, in writing. Obviously, we're coming back to argue afresh what the
5 liabilities of the funder is. We may have to have another hearing anyway, but --

6 MR WILLIAMS: We will need, I'm told, longer than a page and a half because we'll
7 have a costs statement.

8 THE CHAIR: How much do you need? I just don't want it to turn into a --

9 MR WILLIAMS: Five pages?

10 THE CHAIR: Five pages, appropriately spaced. And, obviously, Mr Pickford, you
11 have the same. I'm going to ask you to go first, and then Mr Pickford to go and answer.
12 It'll just make it a little more efficient, I think. And if you need to reply --

13 MR WILLIAMS: And can we ask for an indulgence of two weeks for those
14 submissions?

15 THE CHAIR: Yes, of course. Yes.

16 So, Mr Pickford, if you can respond in a week.

17 MR PICKFORD: Can we have two as well?

18 THE CHAIR: You can have two weeks and then a week in reply. Whether you want
19 to be in this fight or not, yours is a separate --

20 MR CARPENTER: I'm sorry to rise again. I just wanted to be clear about where we
21 are with the substantive determination of the funder application, because you
22 mentioned that may yet need to be determined.

23 THE CHAIR: Well, it's not been determined. It's not been determined, but it probably
24 goes away --

25 MR CARPENTER: Yes.

26 THE CHAIR: -- for the reasons you say.

1 MR CARPENTER: If that is the mutual understanding, then I'm sure we can work this
2 out between us. If there is something sort of lurking behind the scenes that I'm missing
3 here, then perhaps we should know. But if it's just a question of if the ATE responds
4 as we expect, that's it, subject to the question of costs.

5 THE CHAIR: And you have liberty to apply. If for whatever reason the ATE doesn't
6 write the cheque, you all have liberty to apply.

7 MR CARPENTER: And perhaps we can just provide in the order that if that payment
8 is made, then thereupon the application against the funder is dismissed?

9 THE CHAIR: Well, I'll leave you to sort out the wording of that.

10 MR PICKFORD: There's a slight opportunism there. It hasn't been determined.
11 Mr Carpenter is insistent on having a determination of something that he hasn't had
12 determined.

13 THE CHAIR: Maybe it's withdrawn or -- I don't know. But anyway, falls away. I'll leave
14 you to sort out an order.

15 Is there anything else we need to deal with today?

16 MR PICKFORD: No, sir.

17 (4.30 pm)

18 (The hearing was adjourned)

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?