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IN THE COMPETITION

CaseNo: 1634/7/7/24

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 12th - Friday 14th February 2025

Before:

Justin Turner KC
Professor David Ulph CBE
Hugh Kelly

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Mr David Alexander de Horne Rowntree

Proposed Class Representative

v

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

Proposed Defendants

A P P E A R A N C E S

Aidan Robertson KC and David Went On Behalf of Mr David Alexander de Horne Rowntree
(Instructed by Maitland Walker LLP)

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

Thursday, 13 February 2025

(10.00 am)

(Proceedings delayed)

(10.06 am)

MR ROBERTSON: Sir, shall I just deal with a couple of points of housekeeping before handing back to Mr Pickford?

THE CHAIRMAN: Yes. Are we on livestream? For those joining us on livestream, 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, visual, of the proceedings and breach of that provision is punishable as contempt of court.

Housekeeping

MR ROBERTSON: Sir, first to check that the tribunal received two notes from us last night?

THE CHAIRMAN: Yes.

MR ROBERTSON: Good.

Second, I just want to make a correction to our description of Mr Karabuda --

THE CHAIRMAN: Yes.

MR ROBERTSON: -- as being a member of the board and executive committee of STIM. He was at the time he made his witness statement in February 2024. He stepped down

1 from that position or those positions in May 2024, so he
2 is no longer on the board and executive committee of
3 STIM. I express my gratitude to my learned friends for
4 drawing that to our attention.

5 THE CHAIRMAN: Yes. (Pause)

6 Submissions by MR PICKFORD (continued)

7 MR PICKFORD: Sir, if I could also begin with one hopefully
8 minor correction. There was a question yesterday about
9 the board minutes and whether they were public.

10 I turned around. Unfortunately those behind me thought
11 I said "board members", so I --

12 THE CHAIRMAN: Do not worry. They are --

13 MR PICKFORD: There are a number of things that are public.
14 I could --

15 THE CHAIRMAN: Let us not worry.

16 MR PICKFORD: But every board minute, no, that is not
17 necessarily public.

18 Right. If I could then continue where I was
19 yesterday.

20 THE CHAIRMAN: Yes. I mean, where you were yesterday, as
21 I recall, was saying that the MTOL discrepancies were
22 6 million over -- or I may have got that slightly
23 wrong -- over seven years, a fairly small sum of money.

24 MR PICKFORD: There are approximately 10. I think it is
25 actually 10.5.

1 THE CHAIRMAN: I beg your pardon. Okay. Yes. Obviously
2 the note we have received --

3 MR PICKFORD: That is saying something different, yes.

4 THE CHAIRMAN: -- is saying something different, and
5 understanding those differences will be important,
6 I think. (Pause)

7 MR PICKFORD: We are seeking to finalise a letter which sets
8 out the numbers this morning.

9 THE CHAIRMAN: Right.

10 MR PICKFORD: It has not -- as I said yesterday, some of it
11 is relatively straightforward. Other bits are much
12 harder because we do not really have something that
13 corresponds to black box and, as soon as that is done,
14 then I can speak to that. So I think I will probably be
15 speaking to that --

16 THE CHAIRMAN: All right. We have a big gulf between
17 10 million and 480 million, so --

18 MR PICKFORD: Yes. Well, if I could refer to -- I did not
19 receive that note, unfortunately, today by 7 o'clock or
20 by any time when I was awake because it was sent,
21 I believe, some time after 10 o'clock to the wrong email
22 address, so I have only seen their note very briefly
23 this morning. Likewise, it was not sent to my
24 instructing solicitors until after 10 o'clock yesterday,
25 so we have been trying to take instructions on it again

1 this morning.

2 THE CHAIRMAN: Yes, sure. I understand that. It is
3 important, and of course you have to have ample time to
4 deal with it. We understand one of the differences may
5 be -- and perhaps you can help us with this -- one of
6 the differences may be that there are works where you
7 will be dealing with, I think, the curated situation, as
8 I recall, if I have not got that wrong, so there are
9 those examples where you cannot identify the works.
10 There may be another set of cases where you can identify
11 the work, but the money, nevertheless, for whatever
12 reason, is not getting to the writer.

13 MR PICKFORD: Yes.

14 THE CHAIRMAN: So that may need to be added on to your
15 10 million figure and it may be a greater proportion.
16 Whether it gets us to 320 to 480, we will have to see.

17 MR PICKFORD: Yes. I am very confident that it is not going
18 to get us there. Can I suggest that we approach it in
19 this way? This issue goes to essentially cost benefit.
20 It is the last of the three points that I am going to be
21 making today, so I --

22 THE CHAIRMAN: Well, it is not -- yes, okay.

23 MR PICKFORD: I think it principally goes to that, but the
24 points on which we rely for strikeout and, in my
25 submission, also for the *Microsoft* point do not depend

1 on the precise value of the claim.

2 THE CHAIRMAN: No, but you have seen the other notes, the
3 note dealing with the --

4 MR PICKFORD: I have seen the first note, yes. So the first
5 note I did get.

6 THE CHAIRMAN: Okay.

7 MR PICKFORD: The second note I did not. We say that the
8 first note does not really take matters further forward
9 and I will come to why.

10 THE CHAIRMAN: All right. Okay. Thank you.

11 MR PICKFORD: So then, if I -- but -- sorry -- in terms of
12 how we are going to deal with it, so I would propose to
13 address the overall issue of the value of the claim,
14 what we may be talking about in relation to so-called
15 black box, when I address the tribunal on cost benefit
16 analysis, which will be later. It may well be after the
17 lunch adjournment. But if -- it may be that, because of
18 the very, very late note that we got, that I have only
19 seen this morning and likewise my clients have only seen
20 this morning, we cannot address everything in that note
21 in these proceedings, and my proposal, if that is the
22 case, is that the tribunal consider whether they can
23 decide this certification on the basis that we say do
24 not depend on those numbers, and if it can, then we win.
25 If it cannot, then there will need to be further -- if

1 the view of the tribunal is, "Well, we do not accept
2 your strikeout ..." --

3 THE CHAIRMAN: I am not sure we are particularly attracted
4 to chop this up in that way. I think we probably need
5 to take a holistic view of how this case is going to
6 develop, So.

7 MR PICKFORD: In that case, if the tribunal believes that
8 the total amount is something that it really wants to
9 form a view on, I think there will have to be further
10 directions to allow us fairly and properly to respond.
11 Obviously --

12 THE CHAIRMAN: We may need evidence. Doing things on
13 instructions is helpful up to a point, but we may need
14 to have evidence on this.

15 MR PICKFORD: Yes. So I am going to give you whatever I can
16 that we have been able to do overnight, as I said,
17 probably after lunch. If that is not adequate from the
18 tribunal's point of view, because it is not going to be
19 a complete picture, it is going to be whatever -- it is
20 going to be the best that we are able to do --

21 THE CHAIRMAN: Mm-hm.

22 MR PICKFORD: -- then we will have to have further
23 directions to address this matter, in my submission,
24 because we cannot -- I cannot do better than that.

25 THE CHAIRMAN: Okay. Let us press on for now.

1 MR PICKFORD: Very good.

2 So what I was doing yesterday was explaining the
3 three different steps in the process of taking usage and
4 translating it into a payment to a songwriter or
5 a publisher, and corresponding to that you can have
6 a data problem that arises at any of those three steps.
7 So it might be that the work is unmatched, in which case
8 you simply do not know what the work is at all and you
9 cannot look up what the shares are that you are supposed
10 to allocate. You do not know even whether it is a work
11 in respect of which there is a publisher at all or
12 whether it is simply a songwriter member who is not
13 published. So if the problem is at the highest level,
14 that gives you essentially the biggest problem in terms
15 of working out what to do next.

16 Secondly, you could have a problem at the share
17 identification level, so there might be some problem
18 with the completeness of the picture. You know what the
19 work is, but when you then go and look up the work on
20 the database, you see there is some problem with trying
21 to work out actually who is entitled what.

22 The key point there is that, as explained by
23 Mr Arber in his first statement -- I am not going to
24 take you to it, but the paragraphs begin at 23. It is
25 the section from 23 through to 36 and then a later

1 section at 84 through to 90, and then he comes back to
2 this, but it is basically the same point again in his
3 second statement at paragraph 11. He is just referring
4 back to what he said before -- if there are problems in
5 terms of the completeness of the information that is
6 available for identification of shares, in principle it
7 should affect both the publisher and the songwriter
8 because one of the conditions for the publisher getting
9 paid is that it has submitted complete information in
10 relation to shares. That is what it is required to do
11 under its terms and its obligations to the PRS. So the
12 publisher and the songwriter go hand in hand in that
13 context, and that is what Mr Arber explains.

14 PROFESSOR ULPH: Sorry, can I just ask?

15 MR PICKFORD: Yes.

16 PROFESSOR ULPH: In that case, there is no presumption that
17 the shares are necessarily 50% going to the publisher
18 and 50% going to the songwriter. It could be
19 a different share?

20 MR PICKFORD: Yes. The only presumption is that it cannot
21 be more than 50% that goes to the publisher. That is
22 an absolute rule because, if the publisher tried to
23 register a work with more than 50% interest to itself,
24 it would be rejected.

25 THE CHAIRMAN: That is -- why? It is the answer -- this is

1 something to protect writers, is it?

2 MR PICKFORD: Yes, that is my --

3 THE CHAIRMAN: It is a policy to protect writers, yes.

4 MR PICKFORD: Yes, that is my understanding. So, I mean, as
5 I said yesterday, a sample contract is 50/50, and
6 I think it probably would be fair to say, but this is
7 just simply on instruction, that that is going to be
8 very much the norm. But of course there will be
9 situations, as I also submitted before, where someone is
10 not published, in which case the songwriter is entitled
11 to 100% because there is no publisher. But if you
12 cannot identify the work, you simply do not know where
13 you are because --

14 THE CHAIRMAN: You need to elaborate on "that is going to
15 very much be the norm".

16 MR PICKFORD: Sorry, the ...?

17 THE CHAIRMAN: That the 50/50 --

18 MR PICKFORD: The 50/50 --

19 THE CHAIRMAN: -- is going to be very much the norm because
20 obviously that is crucial to the way that -- the
21 mechanism that is being proposed by Mr Savage.

22 MR PICKFORD: In respect of published works. So if there is
23 a contract between a songwriter and a publisher, the
24 normal split that we would expect to see would be 50/50,
25 but it does not have to be.

1 THE CHAIRMAN: No, no, I appreciate it does not have to be.
2 But if one is trying to analyse the data, the movements
3 away from 50/50, one needs to know whether it mostly is
4 50/50 or it --

5 MR PICKFORD: My understanding is for published works that
6 would be true.

7 THE CHAIRMAN: Published works, yes.

8 MR PICKFORD: But the point --

9 THE CHAIRMAN: So at this stage it is a reasonable
10 hypothesis that for published works it is 50/50?

11 MR PICKFORD: In general, on the basis of instructions, yes.
12 I do not have that in evidence, but that is --

13 THE CHAIRMAN: Well, that would be common ground, yes, yes.

14 MR PICKFORD: Yes.

15 THE CHAIRMAN: That is what the class representative is
16 saying.

17 MR PICKFORD: But that does not solve the problem that
18 I identified, which is that, if you do not know what the
19 work is, you do not actually know whether it is
20 a published work or an unpublished work because if it is
21 an unpublished work, it will be 100% to the songwriter
22 and --

23 THE CHAIRMAN: What do you mean by "unpublished", just to be
24 clear what that ...

25 MR PICKFORD: So as a songwriter I could write a song,

1 I could not enter into any deal -- I do not set up
2 a separate publishing company. I simply write a song,
3 I register as a member of the PRS and I --

4 THE CHAIRMAN: So, yes, that is not unpublished; it is
5 self-published?

6 MR PICKFORD: No.

7 THE CHAIRMAN: No?

8 MR PICKFORD: I am not sure it is helpful -- well, I do not
9 think that that is necessarily the most helpful way of
10 putting it because --

11 THE CHAIRMAN: "Published" means putting it in the public
12 domain or ...?

13 MR PICKFORD: Well, my understanding of "published" means
14 that there is -- that you have an entity that is
15 a publisher because a publisher is a defined type of
16 entity that the PRS deals with. It deals with
17 songwriters and publishers. So if you -- if I set up my
18 own publishing house just for my works, then I would be
19 self-published and I would claim both the publisher
20 share and the songwriter share. However, I could just
21 be a songwriter who does nothing more than create a song
22 that I upload to Spotify.

23 THE CHAIRMAN: Okay. So if you are self-published, as you
24 said, you set up your own -- does it have to be
25 incorporated, the publishing house?

1 MR PICKFORD: I am afraid I do not know. I can ask.

2 THE CHAIRMAN: I mean, these might be distinctions without
3 differences. It may be just whether somebody says they
4 have got a published --

5 MR PICKFORD: I would have to take instructions on that.

6 I am not sure anything, in my submission, turns on it.

7 THE CHAIRMAN: Well, it may. What percentage of works are
8 unpublished, and, if we are going to answer that
9 question, we need to know -- because you accept for
10 published works -- and what it means is really important
11 because you are saying for published works it is, for
12 practical purposes, 50/50.

13 MR PICKFORD: I think -- well, I am not sure I would go
14 quite that far. I think we accept that the normal
15 contract would be 50/50. How many deviate I cannot say
16 because I do not have instructions on that, but it is
17 going to be something relatively close to that.

18 THE CHAIRMAN: Right. Unless you are going to advance
19 a positive case to the contrary, I am going to assume in
20 the class representative's favour it is 50/50. But then
21 you say that there are unpublished works.

22 MR PICKFORD: Yes.

23 THE CHAIRMAN: We are now -- how many of those are we
24 talking about? What percentage of revenues?

25 MR PICKFORD: Those behind me will hear what you are saying

1 and we will see if we can provide that information.

2 I cannot point you to the evidence on that and I do not

3 have instructions on it at the moment.

4 THE CHAIRMAN: Right. Okay. But you have just said that we

5 need to take account of unpublished works, so --

6 MR PICKFORD: Well, to be clear, in my submission --

7 THE CHAIRMAN: -- I am not --

8 MR PICKFORD: -- my case is not dependent on trying to prove

9 to you specific proportions or numbers. My case

10 proceeds on a matter of principle, which is that, as

11 a matter of principle --

12 THE CHAIRMAN: No, no, no, no. This is central to the

13 *Microsoft* test of how are damages going to be measured.

14 MR PICKFORD: Yes.

15 THE CHAIRMAN: That requires, as I understand it -- and

16 I may be misinterpreting because I have not had long

17 with these notes -- as I understand it, it very much --

18 as was said yesterday, that depends on the 50/50 split.

19 I mean, you look, and so far as it comes away from

20 50/50 -- so you say -- on the one hand you say that

21 50/50 is there or thereabouts -- I am putting words in

22 your mouth -- but you say, "But you have to think about

23 all the unpublished stuff". So the next thing is, well,

24 is the unpublished stuff a lot because one could

25 envisage, in terms of revenues, it might be a very small

1 amount.

2 MR PICKFORD: So I am going to come back to this --

3 THE CHAIRMAN: Okay.

4 MR PICKFORD: -- because -- I mean, in a nutshell, my
5 submission is, if the rule that we put in place instead
6 of what we do, which is match unmatched works and
7 unidentified royalties shares by reference to what we
8 can match -- and we put in place of that a 50/50 rule,
9 it will be the first case in history where there is
10 negative damages because currently songwriters get more
11 than 50% of the shares of undistributed royalties. So
12 if you -- because we are doing our best and our best is
13 that, well, we are going to do it by reference to what
14 is matched, and if --

15 THE CHAIRMAN: You will have to develop that anyway. At the
16 moment that is certainly something we are interested to
17 understand, what the unpublished works amount to,
18 approximately at least.

19 MR PICKFORD: Yes, that is understood. In my submission, my
20 case does not depend on it and I would like to explain
21 why --

22 THE CHAIRMAN: Yes, yes, okay.

23 MR PICKFORD: -- but we have also heard that the tribunal
24 would like to know it and obviously we will do our best
25 to assist.

1 PROFESSOR ULPH: Sorry, can I just come back with one
2 further question, looking at this -- about the 50/50
3 rule. We have heard that publishers sometimes allocate
4 a share of the money coming to them to songwriters.

5 MR PICKFORD: Yes.

6 PROFESSOR ULPH: So that 50/50 rule, does that include
7 this --

8 MR PICKFORD: No, no.

9 PROFESSOR ULPH: So there might be a subsequent allocation?

10 MR PICKFORD: Yes.

11 PROFESSOR ULPH: Right, okay.

12 MR PICKFORD: That is entirely -- that is invisible to us
13 because that is just a private contract between the
14 publisher and the songwriter.

15 PROFESSOR ULPH: Okay.

16 MR PICKFORD: That is what the publisher does with its
17 share.

18 PROFESSOR ULPH: Okay. That was my point. You have no
19 record or understanding of what that --

20 MR PICKFORD: Correct.

21 PROFESSOR ULPH: All right. (Pause)

22 MR PICKFORD: The third and final problem, then, that can
23 arise -- so I have dealt with works and I have dealt
24 with --

25 THE CHAIRMAN: Yes, share identification.

1 MR PICKFORD: -- share identification -- is claiming
2 problems. So we know what the work is, we know what the
3 share identification is but then we discover that we
4 cannot actually pay to somebody.

5 THE CHAIRMAN: You have got the wrong bank account.

6 MR PICKFORD: The wrong bank account or whatever. Now, that
7 is covered by Mr Arber in his first witness statement,
8 at paragraphs 99 to 104 and I am going to come back to
9 deal with that further. But the key point -- one key
10 point to understand is that those unclaimed amounts for
11 the six years -- six to seven years of the claim have
12 not been distributed, so there has been no distribution
13 because the PRS, I think possibly partly because they
14 are trying -- there is only so much that I can give away
15 about what is happening behind the scenes between
16 Mr Rowntree and PRS, but there is obviously an argument
17 about what should happen in relation to black box
18 royalties.

19 THE CHAIRMAN: Right.

20 MR PICKFORD: In relation to those royalties, we can
21 identify what would have been a songwriter royalty as
22 opposed to what would have been a publisher royalty.
23 That is the bit that we can do because obviously it is
24 just the bank details of the relevant party that we do
25 not know.

1 THE CHAIRMAN: Yes, yes.

2 MR PICKFORD: But there could not be any damages in relation
3 to that because those sums have not been distributed
4 yet. They are --

5 THE CHAIRMAN: Going back to the --

6 MR PICKFORD: Going back to the whole of the period, yes.
7 That is --

8 THE CHAIRMAN: So they are all sitting in an account
9 somewhere, waiting for someone to pop up and say, "Oh
10 sorry, it was a '3' not a '4'", on their account number?

11 MR PICKFORD: Exactly, yes. Exactly.

12 THE CHAIRMAN: So we can forget those. They are not --

13 MR PICKFORD: Yes, and that is paragraph 104 of Mr Arber's
14 statement where he explains that.

15 THE CHAIRMAN: Okay. (Pause)

16 MR PICKFORD: So if we then come on to what the PRS does in
17 relation to these problems. The first thing to do is
18 that, of course, the PRS seeks to minimise the problems
19 and we set out in our skeleton, by reference to the
20 evidence, the various activities that it undertakes:
21 outreach, trying to maximise the --

22 THE CHAIRMAN: We have got all of that, yes (overspeaking).

23 MR PICKFORD: (overspeaking) -- all of that, yes.
24 The second point, then, is if it is in a situation
25 where there are some royalties that have not been

1 distributed in the normal direct way, it needs to decide
2 what to do with them. One thing, of course, it could do
3 is potentially give them to a charity, and indeed it
4 does do that in relation to all interest that is earned
5 on sums that are being held back because it has not
6 worked out what to do with them yet. The two charities
7 in question are the PRS Foundation and the
8 PRS Members' Fund. Both of those support songwriters.
9 The PRS Members' Fund supports songwriter members in
10 times of need and the foundation supports new music and
11 talent. That is again set out in Mr Arber's statement
12 at paragraph 106.

13 Now, just pausing there, I was not quite sure what
14 Mr Robertson's case was on providing monies to charity.
15 I think initially he cited, "Look, here is something
16 else you could do. Here is what another society did.
17 They gave money to charity". He then seemed to -- it
18 was then put to him, "Well, was that lawful?" --

19 THE CHAIRMAN: Yes, he is obviously not going to say, "Yes,
20 that will solve our problem because it is ..." --

21 MR PICKFORD: So he is back to debating(?) that. But the
22 corollary of that is -- I think he is saying that us
23 giving money to charities rather than seeking to
24 distribute it is unlawful. I think that is what he is
25 saying.

1 THE CHAIRMAN: But, anyway, let us -- hold on a second.
2 That is an advocacy point, yes.

3 MR PICKFORD: Well, I do not think it is, with respect, sir.

4 THE CHAIRMAN: The more important point is the claim centred
5 around money going to people whom it is not going to --
6 who it is not meant to go to, that seems to be
7 an inevitable -- that seems to be inevitable.

8 MR PICKFORD: Yes.

9 THE CHAIRMAN: Then one asks, "Well, who does it -- if it is
10 going to someone undeserving, why does it matter which
11 undeserving person it is?".

12 MR PICKFORD: Well, we tried to make it as close to what is
13 sensible and fair as we can.

14 THE CHAIRMAN: Yes, you say that is a sensible way of doing
15 it.

16 MR PICKFORD: The --

17 THE CHAIRMAN: Giving it to charity would be another
18 sensible way of doing --

19 MR PICKFORD: Yes, and I said we do that with some of it.
20 So obviously the procedures that we have in order to
21 develop the policies have been explained by Ms Fishman
22 and the policies have also been developed and ultimately
23 approved by boards which are -- on which songwriters and
24 publishers have an equal representation because of
25 course we are a members organisation. We are not --

1 THE CHAIRMAN: We understand, yes.

2 MR PICKFORD: We are not for profit. We are seeking to
3 protect everyone. But in relation to unmatched or
4 unidentified works, it is essentially common ground that
5 we distribute pro rata over the matched revenue, so
6 there is no dispute between us on that core issue. That
7 is the way that we do it and that is because we think
8 that is the fairest and simplest and most effective way
9 of doing it.

10 PROFESSOR ULPH: Just to be clear, you are saying that for
11 the matched funds you distribute it 60% to songwriters,
12 40% to publishers?

13 MR PICKFORD: Yes.

14 PROFESSOR ULPH: That is the ratio you use for the unmatched
15 ones?

16 MR PICKFORD: Yes.

17 PROFESSOR ULPH: Okay, that is ... (Pause)

18 MR PICKFORD: Yes. So the heart of what we do is in
19 relation to those items rather than the unclaimed point,
20 which I said is not an issue because we have not
21 distributed to anyone. There is no dispute in what we
22 do. The question then is: is there an arguable case in
23 relation to that? So if I can then go on, then, to deal
24 with my three points that I am going to take here.

25 The first of those is strike out reverse summary

1 judgment, and if I could very briefly just start with
2 some law on that. I am not going to take too long over
3 it. Well, it looks like you think I probably -- I may
4 not need to.

5 THE CHAIRMAN: Take it briefly. Some members of the
6 tribunal may appreciate just a summary, I think.

7 MR PICKFORD: Well, in which case I will just give a very
8 brief summary, and if any members of the tribunal say,
9 "Please can you take me to the case?", I am happy to do
10 so, but I do think -- it is broadly common ground.

11 So what the court needs to consider is whether the
12 claimant has a realistic as opposed to a fanciful
13 prospect of success, and that has been defined in the
14 case law as "a claim that has some degree of
15 conviction". It has to be more than merely arguable.
16 It was suggested yesterday that arguability is the test.
17 Arguability is not the test. It has to be more than
18 merely arguable. I am referring here, for future
19 reference, to a very convenient summary of the
20 principles in *Forrest Fresh v Coca Cola*. That is in
21 authorities bundle B, tab 10.

22 Obviously, however, it should not conduct
23 a mini-trial, but equally that does not mean that the
24 court has to take at face value everything that the
25 claimant says in its statements. In some cases there

1 may simply be no substance to factual assertions, and if
2 that can be easily determined on an application like
3 this, then it should be because it avoids having a large
4 and expensive trial when everyone knows that ultimately
5 the case is fanciful and it is not going to go anywhere.

6 Now, it is said by Mr Robertson, "Ah, well, you
7 should not strike out or have summary judgment in
8 a developing area of the law", and my response to that
9 is twofold. He did not explain, in my submission, what
10 the relevant legal issue is that is relevant to our
11 strikeout that is a developing area of the law. I am
12 going to come on to explain what the legal issue is and
13 in my submission it is very clear. There is really no
14 room for doubt about it. So we are not in a developing
15 area of the law in that sense.

16 Secondly, even if there were some area of the law
17 that were engaged, that were developing, we say that if
18 Mr Rowntree's claim is illogical and incoherent, then it
19 should be struck out regardless because it is going to
20 fail. So that is my answer to what Mr Robertson has
21 said on that.

22 So I have three points to make in relation to the
23 strike out summary judgment application. The first is
24 that the claim does not articulate -- rather,
25 Mr Rowntree does not articulate a claim that any

1 individual member of the PRS could bring under
2 competition law. That is the first point and I am going
3 to come on to develop it in a moment.

4 The second point is that it proceeds on
5 a straightforwardly illogical and incorrect premise, and
6 we have pointed that out to Mr Rowntree and he has not
7 answered it and nor has Mr Savage.

8 The third, which overlaps, in my submission, with
9 the *Microsoft* point, but I say it can actually arise
10 under both here and under *Microsoft*, is there is no
11 explanation in the claim ultimately of what
12 a counterfactual way of distributing royalties would be
13 that demonstrates why our approach is actually unfair.

14 So those are my three points I am going to make. So
15 if I can start, then, with the --

16 THE CHAIRMAN: Sorry, I am going to try not to ask you too
17 many questions and take you out of your way, but how
18 many -- is it knowable how many people -- how many
19 members of the PRS are affected by this problem? You
20 said it is a problem of not receiving the royalties they
21 are entitled to. Is that just unknowable?

22 MR PICKFORD: In the --

23 THE CHAIRMAN: Of the 160,000, does this affect 1%, 50%?

24 MR PICKFORD: I do not think that is knowable, but I am
25 going to turn around and see whether anyone is

1 contradicting me on that. I am getting a lot of shaking
2 heads, so I think --

3 THE CHAIRMAN: There will be some information about it.
4 There will be, no doubt, some issues where people have
5 said, "I have not had any royalties for a year. What is
6 going on?", and they go, "Sorry, you moved house and you
7 did not tell us" or "You changed banks and you did not
8 tell us", so there will be a proportion that you can
9 identify as being affected by this issue.

10 MR PICKFORD: Yes. So I think what we can do to give it
11 context is we can identify, for example, the proportion
12 of, say, MTOL revenue that is undistributed, so you
13 can -- because we discussed that yesterday -- so you can
14 contextualise it in that sense.

15 THE CHAIRMAN: That is --

16 MR PICKFORD: That is a different argument --

17 THE CHAIRMAN: There will also be a proportion of people
18 who -- where you fix the problem.

19 MR PICKFORD: Yes.

20 THE CHAIRMAN: There is also a proportion of people, when
21 you move to the manual stage, you can say that you can
22 fix it that way as well.

23 MR PICKFORD: Exactly, and we do -- it is in Mr Arber's
24 evidence -- we manually match -- it used to be £5, it is
25 now down to £3, so we actually have -- we have real

1 people trying to match works even down to the value of
2 £3 worth of royalties.

3 THE CHAIRMAN: Yes, yes. Anyway, I am not surprised that it
4 is not really knowable how many people get affected by
5 this. Sorry.

6 MR PICKFORD: No, not at all. I am happy to answer
7 questions if I can.

8 So starting, then, with the first point, that there
9 is no individual claim here, if we could start, please,
10 by just picking up the authorities bundle. It is
11 authorities A, tab 2, page 1, {AUTH-A/2/1}. We are
12 going back to basics. In this case it is necessary to
13 go back to basics.

14 THE CHAIRMAN: Yes.

15 MR PICKFORD: So section 47A(1) is the provision that
16 empowers the tribunal to hear competition claims, in
17 essence, and critically, under subsection (1):

18 "A person may make a claim to which this section
19 applies in proceedings before the Tribunal, subject to
20 the provisions of this Act and Tribunal rules."

21 So that is the starting place for the tribunal's
22 jurisdiction altogether.

23 We then have got section 47B, which is a couple of
24 pages on, page {AUTH-A/2/3}. Again, subsection (1) of
25 that says:

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

5 So the key thing about collective proceedings is
6 that they combine claims that could be brought under
7 section 47A by individuals. It is separate(?).

8 Then if I could go to the tribunal's guide, please,
9 which is in authorities D, and it is at tab 32 of that,
10 {AUTH-D/32/1}, I am looking for paragraph 6.3, which is
11 on page {AUTH-D/32/2}, the extract.

12 The guide, at 6.3, draws what we say is the logical
13 and only implication that one can draw from the
14 structure of section 47A and 47B, namely that:

15 "... collective proceedings are a form of procedure
16 and do not establish a new cause of action. The claims
17 of the class members brought together in collective
18 proceedings, or subject to collective settlement, must
19 each be claims to which section 47A of the 1998 Act
20 applies."

21 THE CHAIRMAN: I mean, that is just commentary on what you
22 say comes out of the --

23 MR PICKFORD: Exactly (overspeaking).

24 THE CHAIRMAN: -- (overspeaking).

25 MR PICKFORD: But in my view it is a helpful and very clear

1 statement of what those two subsections must mean.

2 The essential problem with Mr Rowntree's claim at
3 its absolute heart is he does not tell us what the
4 individual class member, the hypothetical individual
5 class member who has a claim, looks like or how their
6 competition claim arises. His claim begins -- and
7 Mr Robertson made no real apologies for this yesterday.
8 He said that it is at the class level. He was unable to
9 articulate, in respect of Harriet, what her claim would
10 be under competition law, just -- so if we just assume
11 a hypothetical --

12 THE CHAIRMAN: Well, why could it not be, "Look,
13 I appreciate it is going to be difficult to compensate
14 me where you do not have my details but you could have
15 a system whereby you give all that missing -- those
16 missing royalties back to the writers, in which case
17 I would at least receive a greater proportion of it and
18 that would be a fair outcome". I mean, why would that
19 not work?

20 MR PICKFORD: Well --

21 THE CHAIRMAN: I mean, it is put at class level,
22 I appreciate, but Harriet at the moment is getting --
23 let us assume she is getting 160,000th of 50% or 40%,
24 whatever it is, and she should get 160,000th, full stop.

25 MR PICKFORD: So there is no complaint by Mr Rowntree about

1 our systems for trying to do our best to identify --

2 THE CHAIRMAN: No, I understand that. I understand that,
3 yes.

4 MR PICKFORD: So it is not said that there is any problem
5 there, and in that case there is not -- in terms of
6 Harriet, in our submission, Harriet does not have
7 a competition claim because of the fact that what the
8 PRS does is in situations when it cannot -- by
9 definition it cannot give Harriet any more money --

10 THE CHAIRMAN: Well, it can -- it is giving her a little
11 bit. I mean, it may be reduced to absurdity, I
12 appreciate, but it is giving -- if the money is going to
13 writers and she is a writer, she is getting 160,000th of
14 what she is owed. Now, you may say that that is just
15 like a preposterous argument, I appreciate that, but one
16 could articulate it that way --

17 MR PICKFORD: I would say that --

18 THE CHAIRMAN: -- as opposed to getting nothing if it all
19 went to the publishers, for example.

20 MR PICKFORD: Well -- but she does not get nothing. There
21 is no suggestion she gets nothing. The contention is
22 that we allocate it according to matched revenue. We do
23 not --

24 THE CHAIRMAN: Yes, I know. I am putting hypotheticals to
25 you. Yes, yes, I appreciate that. But you say it is

1 not abusive. The fact is, through someone's fault, we
2 do not know whose -- it may be through Harriet's
3 fault -- she has not received royalties which she
4 deserves, and that is not abusive --

5 MR PICKFORD: Yes. I mean, because -- and we say --

6 THE CHAIRMAN: -- if the royalties have not found their way
7 to her.

8 MR PICKFORD: There is not any complaint about that. As you
9 say, it could be Harriet's fault. It might be perhaps
10 her publisher's fault, in which case maybe she has
11 a cause of action against her publisher.

12 THE CHAIRMAN: Or it may be -- and what can you do about it?
13 You can leave the sums in an account forever, accruing
14 interest and paying it to charities, that interest or
15 whatever, or you could -- I mean, if you do nothing --
16 I do not know, would that be abusive either, if you just
17 said, "Well, what can we do?", and just leave it in the
18 account?

19 MR PICKFORD: It would not, no, because we could give it to
20 charity and we do give some of it to charity.

21 THE CHAIRMAN: What happens if it gets distributed -- sorry,
22 I am taking you off your course again, but these are
23 important points.

24 MR PICKFORD: No, please.

25 THE CHAIRMAN: But what happens then if it gets distributed

1 and then Harriet pops up four years later and says,
2 "I have not received any royalties. I noticed that my
3 bank account was incorrectly recorded. Come on guys"?
4 Then do you say, "Well, I am sorry, tough, we have
5 distributed it"? You are not going to go, "Oh no, here
6 is your £1 million"?

7 MR PICKFORD: I think in general, yes, but obviously it
8 depends -- for instance, if it is an unclaimed amount,
9 at the moment it would not be "Tough", I imagine,
10 because none of that has been distributed yet.
11 I mean ...

12 But, yes, there will come a period -- there will
13 come a point at which sums cannot be claimed anymore
14 after -- typically after three years because --

15 THE CHAIRMAN: So once they have been distributed, they
16 cannot be claimed?

17 MR PICKFORD: -- life has moved -- well, no, that is not
18 quite right because distributions happen on a regular
19 basis, I understand actually quarterly, and so, if there
20 is a quarterly distribution of revenues from a blanket
21 licence, as I was discussing yesterday, what happens is
22 that everything is just distributed over what is known
23 and what is not known is effectively ignored. If
24 someone comes along in a later distribution period, but,
25 say, within three years, and says --

1 THE CHAIRMAN: No, I was just asking. I understand within
2 the three years, but after the three years you have
3 effectively got a cut-off even if it is an accounting
4 error?

5 MR PICKFORD: That is ... (Pause)

6 I mean, I think generally that is correct. There
7 are examples. There was one that I was going to give;
8 for example, if there is a dispute, say, because of a --
9 a probate dispute, ie, who is entitled to a songwriter's
10 royalties, then that could go on and there could be sums
11 reserved in that for many, many years. So it is not the
12 case that every single time that there is some kind of
13 problem with paying someone's money because we do not
14 know who to give it to, that necessarily just expires
15 after three years. I think it depends on the nature of
16 the problem. But my understanding is that the general
17 policy is that after three years that is likely to be
18 game over for getting hold of that particular sum of
19 money.

20 THE CHAIRMAN: Yes, okay.

21 MR PICKFORD: But to come back to my point, in my submission
22 Mr Robertson's claim does depend on saying, "But
23 song- -- but Harriet is a songwriter and therefore there
24 is something about her as a songwriter, as a member of
25 this class, that means that it would be fairer if it

1 went to songwriters". But if you actually look at
2 Harriet's position as to either she got everything that
3 she is entitled to -- in which case, what is the
4 problem? Surely she does not have a claim there -- or
5 she did not get everything that she was entitled to, but
6 that is, by definition, something that they are not
7 complaining about as our fault. We cannot do anything,
8 by definition, because it is a data problem. So she
9 does not get that, and it goes to various other people
10 that look like her in some ways, ie, they have something
11 to do with works. They include songwriters and
12 publishers. All Mr Robertson is saying is, "No,
13 actually, we think it should go to -- more of it should
14 go to the class of songwriters". I am going to come on
15 to why that does not work anyway on the facts, but --

16 THE CHAIRMAN: So the class in this case -- the class is
17 being represented as the potential recipients of money
18 which they are not entitled to because it really belongs
19 to somebody else, but what is your view -- maybe you are
20 coming on to whether the class should properly be
21 described as people who have not received royalty
22 payments, whether it is actually -- the class is writer
23 members.

24 MR PICKFORD: I do not know because in my submission it does
25 not -- the whole thing does not really make sense

1 because it only starts at a class level. There will be
2 plenty of songwriters who have got -- who are in no
3 different situation from a publisher and most of their
4 data is good and they receive, to a good approximation,
5 everything that they are entitled to receive.

6 So my point is that actually it is necessary, and it
7 is not for me to answer this question. Really it is for
8 Mr Robertson to answer it and say, "What does ..." --

9 THE CHAIRMAN: But your submission would be that most class
10 members -- so the class is defined by reference to the
11 writers, I think -- I think writer members -- most of
12 the class members will simply have no claim?

13 MR PICKFORD: Yes.

14 THE CHAIRMAN: It is not just -- it is not one of those
15 cases where the edges of the class are a bit frayed and
16 you get some people who do not have a claim in there.
17 This is -- actually striking at the heart of the class
18 are people who simply have no claim against the PRS.

19 MR PICKFORD: Well, because in my submission --

20 THE CHAIRMAN: They are getting their royalties, their
21 details are all on there and --

22 MR PICKFORD: Yes. In my submission most people have not
23 got a claim.

24 THE CHAIRMAN: Yes.

25 MR PICKFORD: No one has a claim because he has not

1 articulated at an individual level what the hypothetical
2 claimant actually looks like and why that particular
3 claimant, at least hypothetically, should be getting
4 more.

5 THE CHAIRMAN: No, I understand.

6 MR PICKFORD: Mr Robertson's answer to that was -- obviously
7 I understand it is entirely right that the tribunal
8 should put these points to me, but Mr Robertson's answer
9 was, "Oh, do not worry. Gutmann says that claims can be
10 proved at an aggregate level". There is no dispute
11 about proving a claim at an aggregate level with
12 evidence. That is all that Gutmann is about. I can
13 take the tribunal to it if you would like to go back to
14 it, but Gutmann --

15 THE CHAIRMAN: Well, you (overspeaking) --

16 MR PICKFORD: -- is not saying -- it is not overruling the
17 basic principle that you have to have a claim that is
18 capable of being aggregated. It just says -- and in
19 Gutmann, of course, it is very easy to see what the
20 hypothetical claimant would have looked like. It is
21 Harriet, when she bought a full fare ticket and she
22 should have been given credit for her season ticket. So
23 that is our first point.

24 I think I can probably save quite a bit of time in
25 relation to Gutmann if it is not controversial on that

1 point.

2 THE CHAIRMAN: Yes, yes.

3 MR PICKFORD: I think I can skip over that.

4 THE CHAIRMAN: Just give me one moment. I just want to look
5 up a case. Sorry, I am not texting people.

6 MR PICKFORD: Of course. (Pause)

7 THE CHAIRMAN: There is another case which is not mentioned
8 which may be relevant to this.

9 CICC, 2024, which refers to the problems of defining
10 classes in the context of Gutmann. Perhaps you could
11 have a look at that over the --

12 MR PICKFORD: Yes.

13 THE CHAIRMAN: -- adjournment. It is fairly
14 self-explanatory. It is round about paragraph 50-ish.

15 MR PICKFORD: Thank you.

16 THE CHAIRMAN: That is a decision of the -- of this
17 tribunal. It will be on the website.

18 MR PICKFORD: Thank you, sir.

19 So that is my first point. I say there just is not
20 a proper articulation of a claim by reference to
21 a hypothetical songwriter who is -- so this is why
22 Harriet has actually got a claim in competition law, as
23 opposed to songwriters generally.

24 Just -- I am probably going further than I need to
25 in making this clear, but another comeback from

1 Mr Robertson was he said -- he thinks that we are saying
2 that we need to identify an actual specific claimant,
3 like we need to say, "Here is Adele". We are not saying
4 that. We do not say that he needs to say, "Look, here
5 is Adele and here is her problem and here is the
6 particular facts of Adele", but he does need to be able
7 to explain a hypothetical claimant that can have a cause
8 of action.

9 Okay, the second problem is that we say that this
10 claim reflects a serious misapprehension --

11 THE CHAIRMAN: This is your illogical premise?

12 MR PICKFORD: This is the illogical -- yes. It is both
13 illogical and contrary to evidence that supports the
14 illogicality and there has not been any comeback on
15 that.

16 So in Mr Rowntree's skeleton he says -- well, he
17 says that the proposed defendants -- this is at
18 paragraph 34, but I can just read it to you,
19 {SKEL/1/12}:

20 "The Proposed Defendants have not grappled with the
21 fundamental point at the centre of the PCR's claim,
22 namely, that it is possible to identify what portions of
23 Black Box royalties belong to writers and publishers,
24 respectively, but that PRS distributes to publishers
25 Black Box royalties that belong and should be paid to

1 writers."

2 That is the essence of his claim. So the point
3 where we agree with him is that it is indeed fundamental
4 to his claim that it is possible to identify what
5 portions of black box royalties belong to writers and
6 publishers respectively. Where we disagree is that we
7 have not engaged with that because in our evidence we
8 have indeed engaged with that very problem. It is the
9 problem that is at the heart of why we cannot distribute
10 directly to the people that, in an ideal world, we would
11 be distributing to.

12 If I could go, please, to Mr Arber's evidence --

13 THE CHAIRMAN: Yes. Sorry, remind me where it is again.

14 MR PICKFORD: It is in bundle B, tab 34, and if we could
15 start, please, at paragraph 64, which is on page 17,
16 {B/34/17}. (Pause)

17 So we are in a section here of the statement dealing
18 with problems of identifying the work. So this is the
19 first of the three problems that I have explained to the
20 tribunal that can arise.

21 THE CHAIRMAN: Yes.

22 MR PICKFORD: This is simply just for the tribunal's
23 benefit, to locate which bit of the statement we are in.
24 We do not actually have to particularly read
25 paragraph 64. So it is problems identifying the work.

1 Then if we go on, please, to -- just above
2 paragraph 71, {B/34/19}, a couple of pages on, we see
3 "Approach to distribution for non-MTOL: unmatched
4 usage". I referred to this yesterday. Paragraph 71:

5 "Non-MTOL royalty revenues are paid pursuant to
6 blanket repertoire licences pursuant to which, as
7 explained in paragraph 16 above, there is no inherent
8 distribution value for any particular usage. It is only
9 at the distribution phase when the revenue is split
10 across the matched usage for a particular period, that
11 the value of the usage of individual works becomes
12 known. Where usage is matched to a work, royalties are
13 distributed in line with the share picture for that work
14 which is based on the work registration.

15 "In short, where:

16 "the usage is unmatched, no revenue is allocated to
17 it (and therefore no revenue is retained in respect of
18 the usage), and there is no matched work from which to
19 identify the share picture (including to understand what
20 the writer/publisher percentage split would be),
21 assuming that the usage is in fact a musical work (as
22 opposed to, for example, sound effects [etc] ...) ..."

23 So that is the situation for non-MTOL and I sought
24 to explain that yesterday.

25 Then we are going to look at the situation for MTOL,

1 which is a couple of paragraphs on at 79.1, {B/34/22}.

2 THE CHAIRMAN: Sorry, just on -- so non-MTOL, where does
3 that leave us?

4 MR PICKFORD: So where that leaves us is, if we are outside
5 the domain of effectively the Spotifys and the Apples,
6 etc, of this world, Apple Music, and we are dealing with
7 a blanket licence, there is a fee that has been paid for
8 that blanket licence.

9 THE CHAIRMAN: Yes, yes.

10 MR PICKFORD: When it comes to account for royalties, which
11 I think takes place on a quarterly basis --

12 THE CHAIRMAN: That is done on a sampling, specifically, is
13 it, or might it be curated?

14 MR PICKFORD: It can be done on a number of different
15 bases --

16 THE CHAIRMAN: Right, yes.

17 MR PICKFORD: -- but one way or another a dataset is created
18 of works which are either the matched works, as best we
19 know them, or an approximation of what we believe would
20 be the nearest to the matched works; for instance, the
21 pub licence.

22 THE CHAIRMAN: Right, yes. Then these never get re- -- so
23 you never identify a sum which gets redistributed?

24 MR PICKFORD: Exactly.

25 THE CHAIRMAN: So it could be said -- sorry, do not get too

1 sensitive about it -- it could be said that this is
2 unfair, but it is unfair for other reasons, nothing to
3 do with the nature of this claim. So if somebody -- if
4 you have got an unmatched falling within a blanket
5 licence -- in a pub, every night they play an unmatched
6 song, the royalties are not getting to that person --

7 MR PICKFORD: Okay.

8 THE CHAIRMAN: -- so there is a potential complaint for that
9 person to have, but the fact is that these royalties are
10 then not being redistributed to publishers and writers
11 in the proportions so you say it does not fall within
12 the claim?

13 MR PICKFORD: Yes, exactly. They are not going to -- in
14 your instance they are going to neither the publisher
15 nor the writer of that work because the work is
16 invisible in the hypothesised circumstances. With --
17 I think you are going to struggle to get me to agree to
18 unfairness because of course --

19 THE CHAIRMAN: I am not asking you to agree to that, but
20 I am just saying, if one was putting it that way,
21 then --

22 MR PICKFORD: Because we say what we do is fair because it
23 is the best that we can do --

24 THE CHAIRMAN: It is not necessarily your unfairness but it
25 is just from the perspective of the writer. Any writer

1 who is not getting royalties to which they are entitled
2 might say that that is unfair. It might not be your
3 fault, it might be somebody else's fault, it might even
4 be their fault, but they would say that that is ... So
5 do not assume that unfairness is a criticism of the PRS.

6 MR PICKFORD: I am just --

7 THE CHAIRMAN: I am just trying to articulate a scenario.

8 That is all.

9 MR PICKFORD: I think if "unfairness" in this context is
10 defined at a sort of universal level by reference to
11 what a perfect world would produce --

12 THE CHAIRMAN: All right. A platonic reality, yes.

13 MR PICKFORD: Yes -- then that could be accepted, but in the
14 real world we certainly do not accept there is any
15 unfairness at all.

16 THE CHAIRMAN: No, of course not.

17 PROFESSOR ULPH: Sorry, can I just clarify this point
18 about ... I think there are two issues here. One is,
19 where you are using this kind of analogy method to try
20 to match works, clearly there is a problem that it could
21 be just wrong in a sense, that the distribution of what
22 is played on Radio 1 and Radio 2 is not actually the
23 precise distribution of works that has been played in
24 particular pubs --

25 MR PICKFORD: Yes.

1 PROFESSOR ULPH: -- so you might be attributing some revenue
2 to songs because they are played very frequently on
3 Radio 1 and Radio 2 --

4 MR PICKFORD: Mm-hm.

5 PROFESSOR ULPH: -- and saying that that is also revenue
6 that flows to songs being played in the pubs.

7 MR PICKFORD: Yes.

8 PROFESSOR ULPH: Songs which are being played in the pubs
9 but are not all that frequently played on Radio 1 and
10 Radio 2 to some extent are missing out on revenues which
11 they would have got had you had a perfect way of
12 monitoring what was being played in pubs.

13 MR PICKFORD: Well, we --

14 PROFESSOR ULPH: Okay. Relative to that hypothetical
15 perfect census method in pubs, you are not getting it
16 quite right, but I did not understand that to be
17 necessarily a black box problem. I thought the
18 black box problem was all about the missing data type of
19 issues.

20 MR PICKFORD: Yes, yes. That is our understanding.

21 PROFESSOR ULPH: All right. Okay.

22 MR PICKFORD: We do not understand -- and Mr Robertson did
23 not rise to his feet when I said yesterday -- we do not
24 understand that the mere fact that we do
25 an analogy-based distribution where that is the most

1 appropriate thing to do is complained about, and there
2 was no jumping up and saying, "No, we do complain about
3 that", so, yes, I agree, sir.

4 PROFESSOR ULPH: So that is not part of black box, as you
5 understand it; okay.

6 MR PICKFORD: Yes. Just on that, so I have not given the
7 wrong impression, we are very much talking about
8 hypotheticals there in terms of the hypothetical person
9 that is not -- ultimately does not get their song
10 performance rights. There are systems -- for example,
11 you can -- if you are a gigging musician and you want to
12 make sure -- you also happen to own some intellectual
13 property rights in your song, you are quite entitled to
14 go to the PRS and say, "Here is my set list. Here are
15 the songs that are actually going to be played in this
16 pub. Please can you make sure that I actually get what
17 I am entitled to for that?", and that will be taken into
18 account. Obviously there will be people who do not do
19 that, in which case we can only do the best that we can
20 do. But it is not the case that the system is, sort of,
21 set up so that it only has the big people in mind. On
22 the contrary.

23 THE CHAIRMAN: Does the claim -- does the collective
24 proceedings claim form pick up non-MTOL revenues, given
25 that they are not -- there is not a redistribution? As

1 a matter of pleading, does it fall within the claim?

2 MR PICKFORD: We find the claim quite difficult to
3 understand. I think that -- I would prefer if that were
4 a question directed at Mr Robertson because it is his
5 claim.

6 THE CHAIRMAN: Right.

7 MR PICKFORD: On one reading, possibly, yes, because it is
8 in a very broad level, but you will have to ask
9 Mr Robertson what --

10 THE CHAIRMAN: Is it linked to this process of
11 redistribution? You say there is no redistribution,
12 because -- it is a short point, really. You say there
13 is no redistribution when it comes to non-MTOL, and I am
14 just -- is the claim linked to this distribution?

15 MR PICKFORD: If one infers from Mr Robertson's evidence --
16 Mr Savage's report what they are complaining about,
17 I think they are also complaining about non-MTOL
18 licensing because he talks about trying to work out his
19 damages by reference including to broadcasting revenue,
20 and that is non-MTOL. So from that perspective, I think
21 they are talking about --

22 THE CHAIRMAN: I was talking about the pleading, not the
23 evidence.

24 MR PICKFORD: Well, I think that is for Mr Robertson to --

25 THE CHAIRMAN: Well --

1 MR PICKFORD: It is not, in my respectful submission, the
2 most clearly pleaded claim.

3 So that was non-MTOL. Then, sir, is it convenient
4 if I move to MTOL?

5 THE CHAIRMAN: Keep going, yes, yes.

6 MR PICKFORD: Thank you.

7 So then if we go back to Mr Arber's statement at
8 page 22. I am looking at paragraph 79.1, {B/34/22}. At
9 this point Mr Arber is now talking about what happens
10 for MTOL, and he says in short:

11 "[where] the royalty is unmatched to a work, there
12 is revenue but there is no way of knowing what the share
13 picture looks like (including who the interested parties
14 are and what any writer/publisher percentage split would
15 be)."

16 So here we have a situation where there is revenue
17 because something has been reported back by Spotify,
18 saying, "Here is gobbledygook work and we think we owe
19 you £10 in respect of gobbledygook work", and we look up
20 gobbledygook work and we say, "Well, we have not got
21 a clue who that is", so --

22 THE CHAIRMAN: But the writer/publisher percentage split
23 would normally be 50/50?

24 MR PICKFORD: That would normally be so, but we do not know,
25 and so rather than just guess --

1 THE CHAIRMAN: Well, it is not guessing. You say that is --

2 MR PICKFORD: Well, I say we do something much better --

3 THE CHAIRMAN: But you do not know what the split between

4 the writers would be?

5 MR PICKFORD: No, so what we do is we use the best available

6 information we have got, which is, "What is the split

7 for what we do know about?". That is what we go on to

8 explain in paragraphs 79.2 and 79.3 of Mr Arber's

9 statement there, and that is the bit that is common

10 ground between me and my learned friend. But when we do

11 not know, we match --

12 THE CHAIRMAN: What to do, yes.

13 MR PICKFORD: -- we use matched splits because that is the

14 best information we have got. That is better than just

15 saying that it is 50/50, we think, and indeed, as I will

16 come on to explain, songwriters do better than just

17 50/50 under that approach.

18 THE CHAIRMAN: Yes. You have explained that, yes.

19 MR PICKFORD: So the entire point of the situation, when you

20 cannot match up, which is the essence of the black box

21 problem, is that we do not know what we would put into

22 a songwriter pot strictly and a publisher pot strictly,

23 so we do our best and we match according to what we

24 know; and the claim proceeds on the basis -- it is there

25 in black and white in the skeleton -- that we are able

1 to identify what should have gone to songwriters and
2 what should have gone to publishers and that we are
3 somehow overriding that and giving publishers an unfair
4 leg up, and that is simply factually totally wrong. We
5 have explained that in ...

6 Of course, logically, it does not really make any
7 sense. If the essence of an undistributed, an unmatched
8 royalty problem is that we do not know what the work is,
9 of course, how are we ever going to know what the
10 distribution is? Because as soon as you accept that you
11 need to know what the work is to look up who is entitled
12 to what under it, then it follows as a matter of logic.
13 But if you do not know what the work is, you are not
14 going to be able to do that and you are not going to be
15 able to create the pots -- these two separate pots in
16 the way that the claim assumes that we can.

17 PROFESSOR ULPH: So can I just see if I have understood your
18 point? So you are saying that in some sense the problem
19 here is that actually their counterfactual is that they
20 can match perfectly --

21 MR PICKFORD: Yes.

22 PROFESSOR ULPH: -- they can match perfectly stuff which, by
23 definition --

24 MR PICKFORD: They cannot do.

25 PROFESSOR ULPH: -- does not match?

1 MR PICKFORD: Exactly.

2 PROFESSOR ULPH: That is the essence of --

3 MR PICKFORD: That is --

4 PROFESSOR ULPH: You are saying there is an implicit
5 counterfactual that they could match perfectly?

6 MR PICKFORD: Yes, because --

7 PROFESSOR ULPH: Okay.

8 MR PICKFORD: Because they say in terms in their skeleton --
9 and it is also implicit in the claim -- that there is
10 an alternative world where you can identify what
11 songwriters should be getting and songwriters then get
12 their dues. We say, "Well, there is no world in which
13 you can do any better than what we do because by
14 definition ..." --

15 PROFESSOR ULPH: That is --

16 MR PICKFORD: -- "... you do not know".

17 THE CHAIRMAN: Sorry, obviously I am losing track, but they
18 say it should be -- in the final analysis, when you step
19 back, there should be a 50/50 split and there is not so
20 something is going wrong, and what is going wrong is
21 undistributed -- distribution of undistributed
22 royalties?

23 MR PICKFORD: Well --

24 THE CHAIRMAN: That is --

25 MR PICKFORD: I think we need to be very careful here about

1 the assertion that there is not a 50/50 split. The
2 50/50 came to the fore when Mr Robertson explained what
3 the nub of what --

4 THE CHAIRMAN: Yes, it is in the note. Yes.

5 MR PICKFORD: It is in the note -- of what Mr Savage was
6 saying. There is no basis for saying that the split is
7 less than 50/50. There is no --

8 THE CHAIRMAN: But that is a separate point, but the -- yes.
9 But that is --

10 MR PICKFORD: What was asserted -- the assertion in the
11 claim is that -- is essentially this: it is that, by
12 inference, we think it is likely that songwriters and
13 certainly the less successful songwriters probably
14 suffer from more data problems than publishers.

15 THE CHAIRMAN: That is not implausible.

16 MR PICKFORD: That -- and what we say is, even if one
17 accepts that, that is not the same thing as saying
18 that -- pleading or having evidence that more than 50%
19 of unmatched royalties are going to publishers, and they
20 are not. As best as I am able to help the tribunal on
21 this issue overnight, I am going to provide a letter
22 which gives examples to illustrate that very point.
23 That is not -- but that was not the pleaded claim. It
24 was not the pleaded claim that it was more than 50, but
25 now that has kind of come to the fore, we are now

1 seeking to help the tribunal understand that not only is
2 there no basis for it, it is also just wrong.

3 THE CHAIRMAN: So you can say that -- how are you going to
4 do that?

5 MR PICKFORD: So what I am going to show you, I hope, is by
6 reference to TV and radio broadcasting, which we have
7 been -- because of the way that is accounted for, and
8 for the example of Spotify, what the breakdowns are in
9 terms of the amounts of royalties that go to songwriters
10 and publishers respectively --

11 THE CHAIRMAN: This is distributed royalties?

12 MR PICKFORD: No, sorry, that are, in the words of
13 Mr Rowntree, black box.

14 THE CHAIRMAN: Right.

15 MR PICKFORD: So the equivalent of the 10 --

16 THE CHAIRMAN: You say, "Here are some black box royalties,
17 they have got distributed and this is how we have
18 distributed them"?

19 MR PICKFORD: Yes, and as I explained yesterday, we can do
20 that most precisely for MTOL because of the way in which
21 MTOL actually works. It is a more --

22 THE CHAIRMAN: I understand all the front end and
23 identifying the works and so forth, but the
24 distribution --

25 MR PICKFORD: Yes.

1 THE CHAIRMAN: -- you are distributing them according to
2 something -- maybe I am not understanding this. How do
3 you -- so with MTOL works, when you then want to
4 distribute the undistributed royalties, black box
5 royalties, how do you decide what proportion to do them
6 in?

7 MR PICKFORD: In relation to what was matched, so if --

8 THE CHAIRMAN: But for MTOL?

9 MR PICKFORD: For MTOL, yes.

10 THE CHAIRMAN: I see. So you have got lots of different
11 matching mechanisms, depending on what you are doing?

12 MR PICKFORD: Yes.

13 THE CHAIRMAN: Yes, I see. So taking MTOL, which might be
14 a nice example to use, you say that, "If you look at how
15 we distribute undistributed royalties on MTOL, you will
16 see that there is not 50% going to publishers"?

17 MR PICKFORD: Yes.

18 THE CHAIRMAN: Yes, I see.

19 MR PICKFORD: Quite.

20 PROFESSOR ULPH: Sorry, can I just raise a question here?

21 I think there is quite a lot of confusion about
22 different issues. So would you accept the following
23 proposition: that if it is the case that the propensity
24 for songwriter royalties to be mismatched is higher than
25 that of publishers -- and I think you say that for the

1 purposes of your arguments today you are prepared to
2 accept that hypothesis --

3 MR PICKFORD: Mm-hm.

4 PROFESSOR ULPH: -- would you also accept, then, that almost
5 as a matter of arithmetic, if you then use the
6 proportion of matched royalties to match the black box
7 royalties, you are going to end up giving songwriters,
8 as a group -- not individual songwriters, but as
9 a group -- too low a percentage of the royalties? It
10 seems to me that is almost an arithmetical proposition.

11 MR PICKFORD: So --

12 PROFESSOR ULPH: So I just want to ask you: do you accept
13 that as an arithmetical proposition?

14 MR PICKFORD: Subject to two important qualifications.

15 PROFESSOR ULPH: Subject to all those assumptions?

16 MR PICKFORD: Can I give you the qualifications, please, as
17 well, not just the assumptions, if I may.

18 So the qualifications are, firstly, that one would
19 be able to see, from the fact that still more than 50%
20 goes to songwriters, that it cannot be a huge sum
21 because, if it was a massive issue, then genuinely there
22 would be more than 50% going to publishers.

23 PROFESSOR ULPH: Yes.

24 MR PICKFORD: Secondly, when one talks about the "true
25 amount", we do not know what the true amount is, so this

1 is a hypothetical --

2 PROFESSOR ULPH: Yes.

3 MR PICKFORD: In an ideal world, we would -- there might be
4 a little bit more if one assumes that songwriters are
5 particularly bad at dealing with data, but we do not
6 know what that little bit more is --

7 PROFESSOR ULPH: I completely agree. You do not know what
8 the right thing is. But as an almost matter of
9 arithmetic --

10 MR PICKFORD: Yes.

11 PROFESSOR ULPH: -- do you accept that -- the point I want
12 to make is that that has absolutely nothing to do with
13 the proportion of royalties that are in the black box
14 that accrue to songwriters as against publishers. There
15 are all kinds of reasons why the proportion of royalties
16 that are in the black box, that are in some sense
17 songwriter royalties, would be higher than that for
18 publishers just because on a -- the total royalties
19 going to songwriters are higher than the total royalties
20 going to publishers. It is nothing to do with the issue
21 of whether or not, because of this different propensity
22 for songwriter and publisher royalties being unmatched,
23 there is a problem with your method of allocating on the
24 proportion that is in the matched, so --

25 MR PICKFORD: So I do not accept there is a problem with our

1 method --

2 PROFESSOR ULPH: I just think there is a lot of confusion
3 around, where people keep on talking about that it is
4 the proportion of royalties that are in the black box
5 that matters or the proportion of royalties that are in
6 some other box that matters. There are all kinds of
7 reasons why songwriter royalties could be a higher
8 proportion of black box royalties other than the fact
9 that they have a higher propensity to be mismatched.

10 MR PICKFORD: Well, if they have a higher propensity to be
11 mismatched, that would obviously bring it down, what --

12 PROFESSOR ULPH: It would be --

13 MR PICKFORD: -- what they actually get relative to the
14 counterfactual.

15 PROFESSOR ULPH: Yes, if there was a higher propensity for
16 songwriter royalties to be mismatched and if in general
17 songwriters earned the same amount as publishers, then
18 it would turn out to be the case that songwriter
19 royalties would form a higher proportion of the
20 black box. But there could be other reasons why
21 songwriter royalties are a higher proportion of the
22 black box, just because they earn, in general, a higher
23 proportion of royalties, whether they are matched or
24 unmatched.

25 MR PICKFORD: Yes, yes, yes.

1 PROFESSOR ULPH: So I just think keeping on talking about
2 the percentage of royalties that are in the black box is
3 just not a helpful way of conducting the discussion.
4 I think focusing on this fundamental question about what
5 is the relative propensity for songwriter and publisher
6 royalties to be unmatched is the right way to describe
7 what is the essence of the problem here, and the fact
8 that if you -- if it is right that you match on the
9 basis -- you assign black box royalties on the same
10 proportion as you assign matched royalties, that will
11 arithmetically lead the songwriters getting too low
12 a proportion.

13 MR PICKFORD: Well, it depends what one means by "too low"
14 because firstly -- and it is a very important
15 qualification -- we do not accept that these facts are
16 true. We are simply accepting it for the purposes of
17 this argument today, and that is very important to make
18 clear. Now --

19 PROFESSOR ULPH: I accept that.

20 MR PICKFORD: But we say, okay, if it were the case that
21 there are more songwriters that have got data problems,
22 what you are putting to me is that that would mean that,
23 if you distribute over matched, there is going to be
24 some effect that pushes down what songwriters receive.
25 But in addition to the first point that I made, we

1 simply -- this is a -- both a hypothetical and it is
2 about something that we cannot know. We do not know --

3 PROFESSOR ULPH: Certainly, absolutely.

4 MR PICKFORD: -- whether it is even true and we cannot know
5 whether it is true because we do not know who the
6 unmatched works actually correspond to. So in the real
7 world -- and this is critical -- in the real world that
8 we are in, we are simply doing the best that we could
9 possibly do with the information we have got. There is
10 no alternative that we can go to to say, "Okay, well,
11 let us now, by reference to the works ...", which is how
12 we distribute -- that is -- those are the rights that
13 are transferred to us, assigned to us, is the rights in
14 a work, and so everything that we do is based around --
15 as close as it can be, to royalties in respect of that
16 work.

17 PROFESSOR ULPH: Yes.

18 MR PICKFORD: If there is a work that -- because the writer
19 was not sufficiently clued up to get registered
20 properly, well, to some extent, I mean, that is tough.
21 However, we --

22 PROFESSOR ULPH: You --

23 MR PICKFORD: -- do our best, but there is not a complaint
24 about our systems. We do the best that we possibly can,
25 both to make sure that that problem is as small as it

1 can be and then to distribute using the best information
2 that we have got.

3 Now -- and it could be -- we could also hypothesise
4 that, perhaps, because there is -- you know -- I mean,
5 it is just a hypothesis, but it could be that there is
6 one publisher who is inept and has made some mistake in
7 relation to its data and it is not getting paid, so it
8 could be that, in fact, it goes the other way round and
9 we are never going to know because the whole essence of
10 this is that it is unknowable.

11 PROFESSOR ULPH: Yes, I agree, I agree. I am just talking
12 about the aggregate level. But the point I want to make
13 is that the issue seems to me to be the counterfactual
14 point. So you have a rule of how you are going to
15 allocate the black box royalties, given, as you say, all
16 the information that is available to you. The question
17 is: is there a better alternative to that?

18 MR PICKFORD: Yes.

19 PROFESSOR ULPH: One which is cost-effective to PRS --

20 MR PICKFORD: Yes.

21 PROFESSOR ULPH: -- that on an ongoing basis, year after
22 year, they could implement an alternative allocation of
23 the whole --

24 MR PICKFORD: Yes.

25 PROFESSOR ULPH: -- that somehow applies to correct the

1 problem that exists with the existing rule? If you
2 accept the existing rule is not quite -- getting it
3 quite right, there still is the question: is there
4 a credible cost-effective alternative? That seems to me
5 to be the point that you are --

6 MR PICKFORD: Well, to be very clear, we do not accept that
7 the system is not right. We say it is not perfect.
8 That is what we accept.

9 PROFESSOR ULPH: Quite.

10 MR PICKFORD: But it is not perfect because it could never
11 be perfect.

12 PROFESSOR ULPH: I agree. It is never going to be perfect.

13 MR PICKFORD: It could -- and our position is that it could
14 not be better in this respect because we do not know
15 whether this -- this is a hypothesis, these are some
16 assumed facts, so it might be the case that songwriters
17 are doing worse. We do not know that is true. We do
18 not know that is true. We are just assuming that for
19 the sake of this argument. But it is just -- it is
20 a hypothesis about something that we cannot know
21 because, in respect of the works themselves, which is
22 how we distribute --

23 THE CHAIRMAN: Well, you know for the second category.

24 MR PICKFORD: Yes, for unclaimed.

25 THE CHAIRMAN: For unclaimed.

1 MR PICKFORD: Exactly. For unclaimed, there is no claim.

2 THE CHAIRMAN: Yes, okay. You have got those where you can

3 identify the work but you cannot identify the --

4 MR PICKFORD: If you cannot identify the shares --

5 THE CHAIRMAN: Sorry, I --

6 MR PICKFORD: Okay. So the three levels are the works, and

7 if you cannot identify the work, then there is literally

8 nothing that you can look up --

9 THE CHAIRMAN: Yes, yes, yes.

10 MR PICKFORD: -- to get a share picture --

11 THE CHAIRMAN: Yes, we know -- the share identification is

12 the same.

13 MR PICKFORD: Yes, then you have the share identification

14 level. You might or might not have enough information

15 to try to piece together some approximate information

16 about that. In some cases you might be able to. You

17 might be able to --

18 THE CHAIRMAN: (Overspeaking) The share identification is

19 not necessarily unknowable entirely. You may have

20 some -- that is the only point that I --

21 MR PICKFORD: (Overspeaking) In every case -- yes, it is

22 not necessarily the case that for all share

23 identification errors there would be no way of trying to

24 work out a songwriter and a publisher or a songwriter

25 and a publisher split, but it is certainly not the case

1 relation -- what we have been dealing with -- it is just
2 for completeness -- we have been dealing with the
3 unmatched and the -- where there is a problem in terms
4 of the royalty distribution. Claiming we say is not
5 an issue here because we have not distributed any of the
6 unclaimed royalties, and, in any event, if you think
7 about it, if the problem is that we have not -- you
8 know, if we have not got the bank details for one of our
9 members, it is utterly fanciful that there is going to
10 be an alternative method of getting that person some
11 money. Even if we have a transaction and even if there
12 were some damages, how are they going to get paid? We
13 cannot contact them to give them some money.

14 THE CHAIRMAN: But, as you say, that is not part of this
15 issue.

16 MR PICKFORD: But the -- exactly.

17 So before then dealing the counterfactual point,
18 if I -- I would like to come back to the case, Mr Chair,
19 that you very helpfully referred us to, the CICC case.
20 The point that I think comes out of that is -- and I do
21 not think it is in the bundle so I am just going to read
22 a bit for the benefit of the whole court:

23 "There is, in our judgment ..."

24 This is paragraph 61:

25 "There is, in our judgment, a clear distinction

1 between a class definition which might inadvertently
2 produce the result that a class member turns out not to
3 have a claim and a deliberate inclusion in the class of
4 a large number, potentially the majority, of class
5 members in respect of which it is known that they have
6 no claim. The former is a necessary function of the
7 type of proceedings involving the classes with large
8 membership and reflects discouragement by the tribunal
9 of *Gutmann's* speculative examples. The latter seems to
10 us to disregard altogether the plain requirements of
11 section 47B [as read]."

12 We say, as framed, this -- to respond to your point,
13 sir, as framed, the class definition here necessarily
14 involves people that have not got a claim because at
15 best -- you have heard me on why I say no one has
16 actually got a claim, so --

17 THE CHAIRMAN: Yes. So you have got those who have no
18 complaint, so they have got all their royalties --

19 MR PICKFORD: Yes, exactly.

20 THE CHAIRMAN: -- but also it is not clear to me what the
21 claim is for those who have not got their royalties.

22 MR PICKFORD: Quite, quite. We thoroughly endorse that.

23 But the --

24 THE CHAIRMAN: It is possible there are odd isolated
25 examples where maybe it is an error at the claimant's

1 end. There might be. One cannot say one way or the
2 other. But that is not the general proposition.

3 MR PICKFORD: Quite. I mean, if you think about the -- so
4 if we think about the -- let us suppose Harriet has got
5 good -- call it "good data", just as a way of
6 summarising it, to say that, "No, there is not a problem
7 that leads to a so-called black box royalty". If
8 Harriet has good data, she does not have anything to
9 complain about, let alone a claim. So the first step is
10 that the claim -- the class would have to be those
11 songwriters effectively with bad data. That would be
12 the first step.

13 THE CHAIRMAN: That is the point I was putting to you, yes.
14 Yes, yes.

15 MR PICKFORD: Yes, and we agree. I say, well, even those
16 people have not got a claim because in that category, by
17 definition, they are not ever going to get what they are
18 entitled to and they are getting something back,
19 potentially, as long as they have got actual bank
20 details, and it is just a squabble about -- that applies
21 only at a higher level about songwriters versus
22 publishers. We say that that does not give them
23 a competition claim either, but -- for the reasons
24 I gave.

25 But in response to your point, sir, even the class,

1 as it is currently defined, it certainly could never be
2 the case that it should include people with good data
3 because they just -- they are like the positive -- the
4 putative publisher who is alleged to have good data.

5 THE CHAIRMAN: Okay. I have got that point, yes.

6 MR PICKFORD: There is also a helpful point in Gutmann which
7 I skipped over because I was trying to save some time,
8 but it is at paragraph 38, {AUTH-B/13/12}. I will just
9 give the reference. What the Court of Appeal says there
10 is that it is important that the methodology has
11 "a device for winnowing out no-loss members of the
12 class". So implicit in that is that, even if you are
13 allowed to prove a claim using top-down evidence, it
14 still has to be established at some level, who is
15 supposed to be in the class and who is not, and the
16 claim as presented does not do that at all because it is
17 all songwriters. So Gutmann at 38 is consistent with
18 the CICC case.

19 If I could then turn to the last of our summary
20 judgment strikeout points, which is also one that is
21 going to then take us into the Microsoft point. I say,
22 even if I am wrong on the first two points I have given
23 you, so we are in a world now where it is permissible to
24 have a claim under section 47B, even where we have not
25 properly identified the hypothetical class member that

1 has that claim and we are now also in a world where
2 somehow we can divide all undistributed royalties into
3 what should have gone to songwriters and what should
4 have gone to publishers -- and we say that by definition
5 we cannot do that -- even then, the problem that
6 Mr Rowntree faces is that manifestly, when you have
7 a data problem, there is never going to be a perfect
8 redistribution mechanism because by definition you have
9 got a problem, so you are always, at that point, dealing
10 with approximations necessarily as a matter of logic,
11 and in that world you are always going to have some
12 winners and losers, depending upon the precise way in
13 which you deal with those approximations.

14 It is not realistic, I say, to come to this tribunal
15 and at an incredibly superficial level just say, "Well,
16 based on this supposition, we think that songwriters
17 might be doing worse", and not say, at least in terms
18 that we can understand, how you actually put in place
19 a different system that solves the problem because, if
20 you cannot explain that, you cannot possibly explain why
21 what we are doing is so unfair that it is a competition
22 law problem, that it is exploitation of our market
23 power, because of course exploitative abuses are a high
24 test, as I am sure the tribunal will know, and if they
25 cannot even tell us what we should actually be doing in

1 some reasonably concrete terms differently, then how can
2 we know that this is remotely unfair? So that is the
3 essence of the third point.

4 I can illustrate it by reference to the closest that
5 Mr Rowntree comes to articulating what he says he would
6 do because, when we were explaining this problem, we
7 were saying, "What do you do?". We said in our
8 response, "I mean, it would be daft to do it on a per
9 capita basis", and Mr Rowntree came back in his reply
10 and said, "No, maybe you do do it on a per capita
11 basis". So what I understand he means is across every
12 single member you just take everything that you cannot
13 allocate directly and you just divide it entirely
14 equally, somewhat like the calculation -- the £66 over
15 seven years calculation that I gave the tribunal
16 yesterday.

17 Now, that is a different approach. It is the
18 only -- it is the nearest that he has come to any
19 alternative counterfactual. He did not actually say it
20 is a counterfactual. He just says, "Well, I am not
21 going to rule it out".

22 But my submission in relation to that is what that
23 would obviously do is mean that, for instance, if you
24 are someone whose music is played a huge amount and
25 there are some data problems in the system somewhere,

1 you will receive exactly the same amount as any member
2 of the PRS, so anyone who wants to join the PRS just
3 gets a share of these undistributed royalties,
4 irrespective of whether they have ever had their song
5 played on Spotify or anywhere. I could join -- I could
6 put some of my compositions online and join -- and start
7 playing -- you know, I am sure no one would be
8 interested in them, but it does not matter. On the per
9 capita distribution model it is great, it is free money,
10 because it does not matter whether there is any matched
11 usage. You just have to be a PRS member. That is it.

12 We say the fact that this is an alternative --
13 I mean, my submission is that it is daft, but you do not
14 even need to go so far as to agree with me on that. You
15 just have to agree with me that the mere positing of
16 that alternative cannot possibly demonstrate that what
17 we do is so unfair as to be unlawful.

18 THE CHAIRMAN: Okay, we have got that point, I think. Yes.

19 MR PICKFORD: Okay. I am now going to turn to Microsoft.

20 So if we could begin, please, back with Gutmann. It is
21 one of our favourite authorities in this case.

22 THE CHAIRMAN: The case, yes.

23 MR PICKFORD: So that is in authorities bundle B, tab 13,

24 {AUTH-B/13/1}, and I am going to need to find it as
25 well. (Pause)

1 So the --

2 THE CHAIRMAN: Which tab again, please?

3 MR PICKFORD: It is tab 13.

4 If we go to {AUTH-B/13/16}, that is where, at
5 section E, the analysis of the Court of Appeal begins of
6 the *Microsoft* test. At paragraph 44 there is
7 a statement of the issue, essentially: does the
8 methodology that has been advanced satisfy the Microsoft
9 test?

10 Then, at 46, there is an explanation as follows:

11 "In relation to whether damages could be addressed
12 as a common issue [which is obviously one of the
13 requirements of certifying an action such as this] the
14 Court considered that this depended upon the state of
15 the expert evidence and the methodology proposed by the
16 class."

17 This point is referring to Merricks.

18 "The articulation of the test to be applied by
19 Rothstein J in *Microsoft* at paragraph [118] was adopted
20 in Merricks in this jurisdiction. He said:

21 "In my view, the expert methodology ..."

22 THE CHAIRMAN: We have got this in mind. I think there is
23 probably no need to read that, yes.

24 MR PICKFORD: Yes, okay.

25 So that is then developed -- in which case, you

1 probably do not need me to take the tribunal to the
2 further passage -- but for your note, it is further
3 developed in observations on the Microsoft test from
4 paragraphs 52 through to 63. I am not going to take the
5 tribunal to those directly. I was simply saying what
6 the six core propositions are that I draw from that.

7 THE CHAIRMAN: That is the "broad axe" passage?

8 MR PICKFORD: It is that passage, yes.

9 So the first point is that the tribunal must
10 approach the issue of damages methodology on a common
11 sense basis, and that is another way essentially of the
12 "broad axe" point being made.

13 Secondly, the methodology must offer a realistic
14 prospect of establishing loss on a class-wide basis.
15 That is one of the ways it is put.

16 Thirdly, it inherently involves a hypothetical
17 counterfactual because it is concerned with the world
18 without the impugned conduct or agreement. That should
19 be common ground. But nonetheless it cannot be wholly
20 hypothetical. It must be grounded in the facts of the
21 case and there must be some factual basis for its
22 assumptions. You will recall what I said about the
23 factual -- there being no factual basis for the
24 assumption on which we were having the discussion
25 before.

1 Fifth, that extends to the issue of availability of
2 data, so there must be evidence of the availability of
3 data to which the methodology is to be applied.

4 Then, sixth, the methodology cannot be expected to
5 be applied to such data, obviously at the certification
6 stage, so as to provide actual damages calculations
7 because we are at a pre-disclosure stage.

8 So I am obviously not saying they need to be able to
9 tell us what the number is for damages but they do need
10 to be able to explain what the data is they are going to
11 use and the methodology they are going to use applied to
12 that data that is going to give them the answer, and --

13 THE CHAIRMAN: Sorry, we are still on your strikeout, so we
14 are not --

15 MR PICKFORD: No, sorry. We have moved on.

16 THE CHAIRMAN: We have moved on?

17 MR PICKFORD: We have moved now to Microsoft. I am very
18 sorry if --

19 THE CHAIRMAN: You said the two were related so I --

20 MR PICKFORD: I beg your pardon. So I was explaining -- so
21 the first point that I made, just coming back, was the
22 essence of how we put the counterfactual point in
23 a strikeout context, which is that, if you have not even
24 pleaded effectively the way in which you say a fair
25 distribution could work, you have --

1 THE CHAIRMAN: Why is that part -- I am not disagreeing.
2 I am just trying to understand. Why is that part of the
3 strikeout? So let us say they have not articulated
4 clearly a counterfactual or you say the counterfactual
5 that has been articulated is unsatisfactory for other
6 reasons, why is the claim struck out for that reason?

7 MR PICKFORD: Because I say it does not --

8 THE CHAIRMAN: Just summarise that for me.

9 MR PICKFORD: Because as a matter -- okay. In which case,
10 I may need to backtrack a little bit.

11 There is a requirement in any competition case to be
12 able to consider what the world looks like absent the
13 problem. You can call it a counterfactual or you can
14 call it how -- you know, the context in which
15 competition would occur in the absence of the agreement
16 or the conduct --

17 THE CHAIRMAN: Yes.

18 MR PICKFORD: -- but, as a matter of competition law, that
19 really lies at the heart of explaining what
20 a competition problem is. You are always saying that
21 this is what you are doing --

22 THE CHAIRMAN: There must be a reference point for the
23 abuse, but what is the -- and the authority you rely on
24 for that?

25 MR PICKFORD: So we have got, I mean --

1 THE CHAIRMAN: Is it in your skeleton?

2 MR PICKFORD: Yes, we refer to a number in our skeleton.

3 I mean, for instance -- so in the context of

4 Article 101, which is part of the claim here -- it is

5 101 and 102 -- it would be the seminal case of

6 *Société Technique Minière*.

7 THE CHAIRMAN: Which paragraph of your skeleton is this?

8 MR PICKFORD: So the paragraph in my skeleton I am just

9 going to give you in a moment. I think it is

10 footnote ... (Pause)

11 Sorry. The best place might be our response.

12 I will give you that reference in just a moment, but in

13 the meantime we can actually go to some of the relevant

14 authorities.

15 So if we go, please, to authorities bundle C,

16 tab 27, {AUTH-C/27/1}, this is the *Société Technique*

17 case, one of the founding competition law judgments.

18 If one goes to {AUTH-C/27/15}, page 250 of the

19 internal numbering --

20 THE CHAIRMAN: Yes, internal number is fine, yes.

21 MR PICKFORD: {AUTH-C/27/15}, thank you. My computer is

22 catching up. At the top of the page --

23 THE CHAIRMAN: "The competition in question must be

24 understood within the actual context in which it would

25 occur ..."

1 MR PICKFORD: "... in the absence of the agreement in
2 dispute."

3 THE CHAIRMAN: Right.

4 MR PICKFORD: So in our skeleton at paragraph 34 -- in our
5 skeleton at paragraph 34 we refer back to the response
6 at paragraph 56(b), and there are a number of
7 authorities referred to there. That is the note. We
8 give quite a lot. If I could also take the tribunal,
9 please, to authorities bundle D, so this is dealing
10 with -- so that was on 101. The main way in which
11 I understand the case is put is, in fact, 102, so let us
12 take 102 up as well. Authorities bundle D, tab 31,
13 {AUTH-D/31/1}.

14 THE CHAIRMAN: Hold on a second. (Pause)

15 Yes.

16 MR PICKFORD: The page there -- I have a reference, but I am
17 afraid I have lost the reference, so I am going to have
18 to rely on Ms Thomas to give me the reference for the
19 right page. I think it may have come from the fact that
20 I thought this point was common ground between me and my
21 learned friend. I apologise --

22 THE CHAIRMAN: Yes, it is -- well, it is -- yes. It is just
23 whether it arises on a strikeout application.

24 MR PICKFORD: Yes, I --

25 THE CHAIRMAN: It is helpful to see how firmly it is put and

1 how emphatically it is put.

2 MR PICKFORD: If we go to page 5, please, of that guidance
3 paper, {AUTH-D/31/5} --

4 THE CHAIRMAN: Yes.

5 MR PICKFORD: -- at paragraph 21, at the top -- so this is
6 in a 102 context:

7 "When pursuing a case the Commission will develop
8 the analysis of the general factors mentioned in [the
9 previous paragraph], together with the more specific
10 factors described in the sections dealing with certain
11 types of exclusionary conduct, and any other factors
12 which it may consider to be appropriate. This
13 assessment will usually be made by comparing the actual
14 or likely future situation in the relevant market ..."

15 THE CHAIRMAN: Okay, but it is usually ...?

16 MR PICKFORD: Yes.

17 THE CHAIRMAN: We are on a strikeout here, so --

18 MR PICKFORD: Well, in my submission, there was not --

19 THE CHAIRMAN: Are there any other cases that are --

20 MR PICKFORD: There were quite a few. It would be probably
21 easiest for me to do that over the short adjournment.

22 THE CHAIRMAN: It may not be necessary to turn them all up,
23 but it would just be helpful to have the relevant
24 paragraphs and --

25 MR PICKFORD: Yes, I will do that.

1 THE CHAIRMAN: After the adjournment is fine.

2 MR PICKFORD: But it would probably be -- in practical
3 terms --

4 THE CHAIRMAN: It is a readily understandable proposition.

5 MR PICKFORD: Yes. In some senses, in my submission, it
6 does not really -- it does not ultimately matter if the
7 tribunal is not willing to decide that point with me on
8 this strikeout because I have put -- I come back and
9 make the counterfactual point again, I say with even
10 more legs on it, in the context of Microsoft.

11 THE CHAIRMAN: Yes, because you (overspeaking) -- yes.

12 MR PICKFORD: It is, in essence -- I am entirely open about
13 it. At its heart it is the same point, albeit it flows
14 through in a different context --

15 THE CHAIRMAN: Yes, yes.

16 MR PICKFORD: -- so I am happy for the time being to focus
17 on it in the Microsoft context.

18 THE CHAIRMAN: Yes.

19 MR PICKFORD: So if we can -- yes. We have gone through the
20 *Gutmann* test and I have explained what I say the six
21 core principles are that the tribunal should draw from
22 it --

23 THE CHAIRMAN: Yes.

24 MR PICKFORD: -- and indeed the Microsoft test. Then we see
25 whether Mr Savage's work matches up against that. So

1 his first report is at bundle A/23, {A/23/1}. (Pause)

2 We say it is, in fact, slightly surprising in some
3 sense that it falls to me to be taking you through
4 Mr Savage's report, which I am going to have to do, to
5 demonstrate what is there and what is not there because
6 really you would have expected the PCR to take you
7 through and show you how Mr Savage satisfies the test.

8 But, in any event, if we begin, please, on
9 {A/23/17}, he explains at paragraphs 6.1 and 6.2, in the
10 simplest terms as he says it, what he is going to need
11 to calculate. There is no real disagreement with the
12 essence of what he is saying he would need to do. He
13 would need to look at what actually happens, then he
14 would need to come up with some methodology for what he
15 says should have happened. So, so far, so good, but it
16 does not give you a methodology.

17 Then if we go on at 7.6 on page {A/23/21}, I think
18 that has been referred to by the PCR. He describes
19 what he is going to do below. He says:

20 "In all instances, the below ..." --

21 THE CHAIRMAN: Sorry, which paragraph?

22 MR PICKFORD: 7.6 on page 21. He says he is going to review
23 the various income streams and determine "the expected
24 distribution amounts to the writer and publisher
25 members, against what PRS and/or Administration Partners

1 have actually distributed to writer and publisher
2 members". So again he is telling us he is going to make
3 this comparison with the actual world and the
4 counterfactual.

5 THE CHAIRMAN: Yes.

6 MR PICKFORD: But then when one goes through the rest of his
7 report, nowhere is he able to identify how he says he is
8 going to make this split between unmatched writer and
9 unmatched publisher shares. He does not have
10 a methodology for doing that. What we heard --

11 THE CHAIRMAN: Well, do you mean how it should be done?

12 MR PICKFORD: Yes, how it should be done -- sorry, yes,
13 because the first -- the absolute heart of what his
14 methodology needs to be able to do is say, "This is what
15 the PRS actually did", fine. That is not the difficult
16 bit --

17 THE CHAIRMAN: He can audit what has happened --

18 MR PICKFORD: Fine, he can also audit what has happened, but
19 that is not a methodology --

20 THE CHAIRMAN: -- or investigate it. But that is not
21 a methodology. You need the comparator.

22 MR PICKFORD: (Overspeaking) He needs to then say, "Okay,
23 here is how I, Mr Savage, would have solved this
24 problem. Here is how I would have come up with what the
25 songwriter and publisher shares should be". In my

1 submission, that is an unknowable for the reasons that
2 I gave you before.

3 THE CHAIRMAN: Right. Well, we have the new note now which
4 I think you have accepted that it perhaps had not been
5 grappled with with Mr Savage. We now have the note.

6 MR PICKFORD: Yes. That is the first of the notes, yes. So
7 my reading of that note is that it does not take matters
8 any further forward.

9 THE CHAIRMAN: Well, we should have a look at it, I think.

10 (Pause)

11 It is paragraph 8, is it not, through to 10?

12 MR PICKFORD: Well, in my submission -- so let us take it
13 paragraph by paragraph. Paragraph 8 explains that the
14 starting point for his expectation of what he would see
15 would be a split 50/50 between publishers and writers,
16 and if there were divergences from that, he would
17 conduct an audit to try to understand whether that
18 income was being treated as black box royalties and, if
19 so, how those were actually being distributed.

20 THE CHAIRMAN: Mm-hm.

21 MR PICKFORD: Well, the heart of it is that is not
22 explaining how he is actually going to work out what
23 should have happened. All he is saying is there, "I am
24 going to conduct an audit and see whether there is
25 a 50/50 split". For the reasons that, Professor, you

1 gave, well, that is not actually going to give you the
2 answer. What it is going to --

3 THE CHAIRMAN: Hold on. Let us just see what he is saying
4 here. He is saying that:

5 "The starting point is that there be a 50/50 between
6 publishers and writers. If there were divergences from
7 that ... [as read]"

8 So it is the next bit that is crucial:

9 "... an audit would wish to understand whether that
10 income was being treated ... [as read]."

11 So the income being referred to there is presumably
12 that portion of income which diverts from 50/50.

13 "... whether that income was being treated as
14 black box royalties and, if so, how those were being
15 actually distributed [as read]."

16 But the distribution --

17 MR PICKFORD: So, so far, so --

18 THE CHAIRMAN: -- we know -- we know how you distribute it,
19 at least the MTOL. That may require auditing or
20 investigating, but that is knowable.

21 MR PICKFORD: That is just describing the actual world. He
22 is saying, "Well, I expect to see 50/50, and if there is
23 not 50/50, I am going to want to try and work out, well,
24 how much of that relates to undistributed and I am going
25 to want to work out how those numbers have potentially

1 been distributed", but we --

2 THE CHAIRMAN: That is why you say it does not take it
3 forward?

4 MR PICKFORD: It does not take it forward. It is still just
5 a description of the actual world, with him just doing
6 some forensic analysis to provide a bit more colour on
7 the actual world.

8 Likewise, 9; likewise, 10. There is no articulation
9 whatsoever of the methodology by which he is going to
10 solve the problem, and we say --

11 THE CHAIRMAN: Is it not actually you could cross out the
12 50/50, the first sentence, and indeed, if there were
13 divergences, irrespective of whether the divergences
14 were 50/50, the claimant would wish to understand what
15 the black box royalties are and how they are being
16 distributed. That is going to be part of the process.
17 But the question -- the problem still is that we do not
18 have a counterfactual. We are not saying here that the
19 counterfactual is the deviation from 50/50.

20 MR PICKFORD: No. So yesterday I thought that that was
21 maybe the case that was being made, but then -- but they
22 have backed away from that now in this note, so that is
23 not the case.

24 So it is not explained. That methodology you will
25 not find in first Arber [sic], you will not find it in

1 second Arber [sic] and it is not here in this note.

2 Mr Robertson was not able to --

3 THE CHAIRMAN: Mr Savage, do you mean?

4 MR PICKFORD: Sorry, yes. I beg your pardon. You will not
5 find it in first or second Savage -- I beg your pardon,
6 I misspoke -- and you will not find it in this note. It
7 was telling that when the tribunal asked Mr Robertson,
8 "Give me the gist. Where is it? Where is the heart of
9 what you are going to do?", initially he could not do
10 that, and then, when he came back after lunch, he said,
11 "Well, the gist is that it is about 50/50", and, sir,
12 you asked him, "Well, where is that in the report?", and
13 he said, "Well, it is not", and that is why we got the
14 note. In my submission that is incredibly telling
15 because the absolutely crucial thing that Mr Savage has
16 not grappled with is how is he going to solve what we
17 say is ultimately an insoluble problem. We do what we
18 can, which is we say, "Okay, we do not know what the
19 answer is, we could never know what the answer is
20 because we do not know what the perfect world data is,
21 so we are just going to do our best and we are going to
22 do it by reference to what is matched because that is
23 what we know".

24 THE CHAIRMAN: Okay. Well, let us see what Mr Robertson
25 says about that.

1 PROFESSOR ULPH: If I could ask a question. There still is
2 a difference between what Mr Savage might do as
3 a one-off exercise and what the PRS might do on
4 an annual basis to come up with a different way of
5 allocating --

6 MR PICKFORD: Yes.

7 PROFESSOR ULPH: -- and that is what -- the response. Is
8 that what you mean by "the counterfactual"?

9 MR PICKFORD: Yes.

10 PROFESSOR ULPH: What is the alternative policy for PRS to
11 conduct that would be cost-effective on an ongoing
12 annual basis?

13 MR PICKFORD: So there are two -- so that is very helpful.
14 Thank you for pointing it out. There are two ways --
15 that is probably the best way of articulating where the
16 counterfactual point finds a home, as between the
17 damages methodology of Mr Savage and in the context of
18 the articulation of the claim.

19 So the way Professor Ulph has described it in
20 relation to what alternative on an ongoing basis should
21 we be doing, that is what I say is deficient in the
22 claim because there needs to be -- to explain why what
23 we are doing is so unfair as to be a competition
24 problem, there needs to be some explanation of what we
25 should be doing on an ongoing basis that would be

1 better. Related to that, in order to come up with
2 a damages calculation, Mr Savage also needs to explain,
3 well, how is he going to grapple with the problem. In
4 my submission they actually ultimately -- you are
5 entirely right to approach them analytically and
6 distinctly, albeit they then overlap because I say it is
7 the same problem. Basically they are facing both
8 that -- they have to grapple with the basic issue that
9 they claim -- they say expressly in their skeleton --
10 a fundamental part of their case is that they say they
11 can -- they could identify what should be going to
12 songwriters and what should be going to publishers as
13 distinct from what we do, and that is how they would
14 approach the problem.

15 I have shown you Mr Arber's evidence, which says
16 that you cannot do that if it is unmatched. You just
17 cannot do that. As a matter of logic, you obviously
18 cannot do that. There is no comeback to that by
19 Mr Rowntree. What there is is a continued assertion by
20 my learned friend and by Mr Savage where they keep
21 saying, "The PRS has not disputed that I could get the
22 information that I need for my methodology". We have.
23 We have got Mr Arber's statement which says that we do
24 not know that split and they have told us that that
25 split is at the heart of their case. So we have come

1 back on it and they just wilfully have shut their eyes
2 to that core problem.

3 So, with respect to Mr Savage, when he talks
4 about -- for instance, he talks in his reports about
5 sampling. He does not explain, again, through the use
6 of sampling, how he is going to grapple with the
7 problem. Sampling is just actually, by him, used as
8 a means of trying to get a snapshot of the actual world
9 and, indeed, obviously we can give probably fuller
10 information on that from our resources. So that
11 fundamental problem has not been solved in any of his
12 reports or by the note.

13 MR KELLY: Can I just ask one question here? Thinking about
14 counterfactuals, one could say, "Well, what do other
15 CMOs do around the world?". Black box seems to be
16 a universal problem, you know. Are there any
17 alternatives to the proportionate distribution of
18 black box royalties that the PRS is aware of that could
19 provide an insight into what alternatives it could adopt
20 itself?

21 MR PICKFORD: Well, I am sure I could ask that question, but
22 that really is not incumbent on us in relation to this
23 claim. I mean, Mr Rowntree, if he is going to have
24 a claim in a court of law, signed with a statement of
25 truth, saying, "I believe that there is this problem and

1 here is why the way that you are dealing with it is so
2 unfair as to be a competition problem", he needs to
3 identify that. He needs to come and say, "You know
4 what? You do it this way, but I know that in Sweden
5 they do it in this far better way, and the reason why
6 you are wrong is because you are not doing it in the way
7 they do it in Sweden".

8 THE CHAIRMAN: There are lots of alternatives to come up
9 with, but that is quite a long way from whether this way
10 is abusive. One could give it all to charities, as an
11 alternative; one could give it all to charity; one could
12 split it 80/20; one could split it 70/30; one could
13 split it 60/40; one could go 40/60; one could give it to
14 everyone whose name begins with the letter A. There are
15 lots of alternative ways of doing it --

16 MR PICKFORD: Absolutely.

17 THE CHAIRMAN: -- but it does not answer the question of
18 whether or not this is abusive.

19 MR PICKFORD: Quite.

20 THE CHAIRMAN: You say you need a non-abusive example to put
21 into the *Microsoft* --

22 MR PICKFORD: I say --

23 THE CHAIRMAN: The trouble is, when you articulate any of
24 these alternatives, they are just as open to criticism
25 as you did when you gave the example just now of the

1 fact that, if you give it a head, you could have a -- we
2 could all be joining on tomorrow and --

3 MR PICKFORD: Yes, it sounds great.

4 THE CHAIRMAN: -- supplementing our income.

5 MR PICKFORD: It is like when a building society goes --

6 THE CHAIRMAN: Yes, not very much. It is a bit like when
7 a building society --

8 MR PICKFORD: It obviously opens up carpet bagging in a huge
9 way.

10 Yes, I agree wholeheartedly with your comments,
11 Mr Chair.

12 My response to Mr Kelly was not to say that that is
13 efficient. It is just that that would be --

14 THE CHAIRMAN: No, I understand.

15 MR PICKFORD: It is just turning it round. It is not what
16 the --

17 THE CHAIRMAN: (overspeaking) -- what the class
18 representative has not done is say, "Look, this is how
19 it is done in other countries. It is plainly fairer".
20 They have not done --

21 MR PICKFORD: Exactly. They have not even done that. If he
22 had tried to do that, I would be making the same points
23 that --

24 THE CHAIRMAN: You may or may not. You may go, "Well,
25 actually, yes, that is much better, you know, let us

1 see", but it has not been done.

2 MR PICKFORD: It has not been done. That is the bottom
3 line.

4 So that is really at the heart of the methodology
5 point. If you then come back to try to match that up
6 against the --

7 THE CHAIRMAN: The requirements.

8 MR PICKFORD: -- the Microsoft test as explained in Gutmann,
9 it just does not satisfy it. It does not offer
10 a realistic prospect of establishing loss. There is no
11 factual basis for it. There is no sensible evidence of
12 the availability of data. It does not satisfy any of
13 the criteria. It does not get off first base, to be
14 totally frank.

15 THE CHAIRMAN: Yes.

16 MR PICKFORD: So that is the second point, Microsoft.

17 Then my third head that I am going to be dealing
18 with before ultimately handing over to Ms Thomas is the
19 cost benefit issue.

20 THE CHAIRMAN: Well, you said you needed to --

21 MR PICKFORD: Well --

22 THE CHAIRMAN: Have you done that now? The position --

23 MR PICKFORD: It has been a work in progress. I am going to
24 turn round, if I may, and see what is happening on the
25 letter.

1 THE CHAIRMAN: Is that better done after lunch?

2 MR PICKFORD: It may be.

3 THE CHAIRMAN: Better done after lunch?

4 MR PICKFORD: Yes, we are going to have to deal at least
5 with the issues that relate to overall sums after lunch.

6 Now, there are points that I can make that, in my
7 submission, do not depend on those sums, so it is
8 probably sensible, whilst I am still on my feet, to deal
9 with those. Then we will simply save over the issues
10 around damages estimates, effectively, which I am going
11 to --

12 THE CHAIRMAN: Yes. Although you can make your submissions
13 on instructions, this will need to go in evidence so
14 please bear that in mind.

15 MR PICKFORD: Yes, that is understood. Without waiving
16 privilege, obviously the reason why there is some delay
17 here is because we obviously take it seriously and we
18 are trying to make sure that what we give to the
19 tribunal is right.

20 THE CHAIRMAN: Of course, of course. If you need more time,
21 we will try to accommodate that.

22 MR PICKFORD: With any case, certainly my experience from --
23 is that any case involving numbers -- when you are asked
24 to give numbers, people are naturally nervous about
25 making sure their numbers are right.

1 THE CHAIRMAN: Yes. Well, that is why you need time to
2 prepare evidence properly, but if that evidence is in
3 accordance with your instructions, then obviously we can
4 do it today. When looked at in more detail with the
5 qualifications, then we may all have to come back and
6 look at it again.

7 MR PICKFORD: Understood. So it is common ground, I think,
8 between me and my learned friend that pursuant to
9 Rule 79.2(b) of the Tribunal's Rules, one of the factors
10 that the tribunal needs to consider as to whether the
11 proceedings are eligible to continue as collective
12 proceedings is the costs and the benefits of continuing
13 the collective proceedings.

14 Now, Mr Robertson was at pains to emphasise
15 yesterday -- he said, "Well, it is just one of the
16 factors", but my response to that is: well, if the
17 tribunal is not satisfied that there is a sensible cost
18 benefit equation here, then it should be a determinative
19 factor. It does not really matter if they satisfy
20 everything else. If it is obviously not a sensible way
21 of proceeding, then it would be a perverse decision for
22 the tribunal to say, "I am going to allow it to go ahead
23 anyway".

24 THE CHAIRMAN: But there is a question of whether one looks
25 just at past damages or whether one also looks at the

1 future arrangements, so if you were to fail in this
2 action, then you would remedy the situation, going
3 forward. So there is the cost benefit of the damages
4 claim, but there is also the slightly bigger picture of
5 what it means to the -- to the future.

6 MR PICKFORD: That is fair. If the tribunal were persuaded
7 that there really was a competition law claim here that
8 could be advanced with conviction, it is not just
9 arguable, that it surpasses the fanciful test, and if
10 you are persuaded by that and you are also persuaded
11 that there is a methodology and you are also persuaded
12 that there are not the conflicts points and the funding
13 problems that Ms Thomas is going to come on to deal
14 with -- if you are persuaded by all of those things,
15 then, yes, it would be legitimate to take into account
16 that wider view in terms of looking at the cost benefit,
17 but we say there is a long way to get to to get to that
18 situation.

19 THE CHAIRMAN: Yes, sure. Sure, sure.

20 MR PICKFORD: So if I may, I would like, please, to just go
21 to one authority, which is the Spottiswoode v Nexans
22 case, which is to be found in the authorities bundle B,
23 at tab 24, {AUTH-B/24/1}. (Pause)

24 So this was an opt-out class action on behalf of
25 consumers that were said to be affected by a power

1 cables cartel, and one of the issues that concerned the
2 tribunal was the question of distribution. The
3 discussion we can pick up on {AUTH-B/24/19}. So the
4 discussion begins on 17, but I think we can go to 19.
5 In particular at paragraph 49 the tribunal says:

6 "It was submitted on behalf of the PCR that it was
7 premature to consider issues of distribution at the
8 certification stage and that the method of distribution
9 should not be developed until after settlement or
10 an aggregate award of damages has been made. The
11 litigation plan simply envisages that, after an award
12 has been made, members of the Class would be notified of
13 their right to claim and would be directed to submit
14 an online claim."

15 So that was the argument.

16 There is then reference to Merricks in support of
17 that submission at paragraph 50, {AUTH-B/24/20}.

18 Then at 51 the tribunal goes on and says this:

19 "As this passage makes clear, however, Lord Briggs
20 did not regard it as inevitably premature for the
21 Tribunal to have regard to a proposed distribution
22 method at the certification stage (as expressly stated
23 at [150]). Lord Briggs regarded consideration of
24 distribution proposals at the certification stage as
25 'generally' premature because such proposals tend to

1 engage the interests of the represented class inter se.
2 However, the Tribunal's concerns in the present case
3 about distribution relate not to fairness as between
4 members of the Class but a more fundamental question as
5 to whether the proposed collective proceedings offer
6 a real prospect of benefit to members of the Class as
7 distinct from lawyers and funders."

8 So that is the context there, and we say that there
9 is a very real problem along those lines in our case.
10 The point is developed further in paragraphs 53, 54 and
11 the second half of 55. What they say there is, in
12 essence, "We accept what is said in Merricks, that it is
13 all about relative suitability, sure, but even when you
14 are dealing with relative suitability, if the case just
15 looks like it is not a sensible use of resources and the
16 only people that are ultimately going to be -- that are
17 going to profit from it are the lawyers or the funders,
18 then you just generally should not be having a case at
19 all, let alone -- whether it is individual proceedings
20 or whether it is collective proceedings", and so these
21 are legitimate things to look at.

22 In that case they did not actually preclude that
23 case from being certified. What they did say is, "We
24 are not satisfied that you have got a sensible
25 distribution plan and so what we are going to do is let

1 the proceedings continue for the time being, you produce
2 a certification -- a distribution plan, and we reserve
3 the right to withdraw certification if we are not
4 satisfied with your distribution plan". So that was the
5 outcome of that case.

6 Now, what we say in this case is that there are very
7 serious problems with the approach of Mr Rowntree when
8 you get to thinking about, "Well, what happens if they
9 possibly manage to demonstrate that there are some sort
10 of damages?". There is no thought-through distribution
11 plan at all, for similar reasons, in some ways,
12 I suspect, to the reason that there is no
13 counterfactual --

14 THE CHAIRMAN: Well, is there an independent point? Is it
15 not just the same point? If the counterfactual is that
16 everyone should receive the same amount, then there is
17 no problem in implementing that.

18 MR PICKFORD: Well, if -- they do not commit to that,
19 though.

20 THE CHAIRMAN: No, no, I appreciate that, but if we are
21 again -- I am not sure this is an independent point.
22 This just seems to be looking at it from a different --
23 it is the same point from a slightly different
24 perspective.

25 MR PICKFORD: I agree that there is certainly quite a large

1 degree of overlap. I mean, I think there probably are
2 a couple of nuanced differences between the two.

3 THE CHAIRMAN: Okay, okay.

4 MR PICKFORD: One of them would be when -- no, actually,
5 I think I do not need to make that point. The point
6 I was going to make was about what one does in respect
7 of people that do not have any proper contact details.

8 THE CHAIRMAN: Yes. Well, they are still --

9 MR PICKFORD: If they have not got a bank account, they are
10 never going to get anything, and if that is a problem
11 for us, it is a problem for them too. So that is one of
12 the differences which probably does not come up so much
13 in the methodology point, but it does come up here.

14 There is also the point, of course, that there is
15 a very practical consideration when considering the
16 costs and benefits of this, which is a point that was
17 made to Mr Robertson yesterday by the tribunal, which
18 is, "Where Is this money going to come from?". I mean,
19 I accept that technically we might say, "Okay, well, we
20 are now going to change our distribution method going
21 forwards", if there were actually an alternative, but if
22 there are large damages sums, the rules that
23 Mr Robertson took you to yesterday, they permit us to go
24 back if we have not -- if there was an error, according
25 to the rules. What they do not contemplate is that we

1 go back because we have breached competition law and
2 say, "We have breached competition law and now, because
3 we have breached competition law, we are coming after
4 you to reclaim money". I mean, that is --

5 THE CHAIRMAN: So your position is that you are not entitled
6 to raise this money from the publishers? If you have a
7 £100 million claim, you cannot claim it from the
8 publishers? What is your position in relation to that?

9 MR PICKFORD: Our position is that there has been no -- it
10 is incumbent on Mr Rowntree to come up with some --
11 given the unusual nature --

12 THE CHAIRMAN: Well, he says, "Yes, you can just get it off
13 the publishers" --

14 MR PICKFORD: Well, we say he has not remotely established
15 that. We say, in order -- he is in a very unusual
16 situation. In many claims this would not be a concern
17 because you would not be seeking to represent and
18 appoint yourself as the representative of a class which
19 is claiming against an association, of which the
20 members -- sorry, the (overspeaking).

21 THE CHAIRMAN: (overspeaking) -- you are saying, "Here is
22 a company that does not have any money. They are going
23 to have to raise it against their shareholders", so is
24 it you are going to have to issue new shares --

25 MR PICKFORD: Well, we do not have shareholders. We are --

1 in any meaningful commercial -- we are a non-profit
2 organisation, and so the -- what we use --

3 THE CHAIRMAN: But --

4 MR PICKFORD: -- for the costs (overspeaking).

5 THE CHAIRMAN: (overspeaking). Sorry, I am not being
6 helpful. But I think the point is that legally there
7 are mechanisms by which you could seek contributions
8 from the publishers, and I just need to know your
9 position on that.

10 MR PICKFORD: Well, my position on that is --

11 THE CHAIRMAN: Maybe you do not want to say at this stage.

12 MR PICKFORD: My position on that is that it is incumbent on
13 Mr Rowntree, if he wants his claim to be certified, to
14 persuade the tribunal that, in the very unusual
15 circumstances of this case, that is a sensible thing for
16 the tribunal to do.

17 THE CHAIRMAN: So we looked at one rule, where we have
18 suggested to Mr Robertson, of course, that it was not
19 necessarily interpreted the way he was interpreting it.
20 Are there any other provisions that we should have
21 regard to?

22 MR PICKFORD: Not that I am --

23 THE CHAIRMAN: Mr Robertson put it -- shall we look at
24 Mr Robertson's new note on this?

25 MR PICKFORD: Yes. (Pause)

1 So when I read this, admittedly relatively -- this
2 part relatively briefly last night, I did not detect
3 anything new in it that was not a point that
4 Mr Robertson had already made earlier in that day.

5 THE CHAIRMAN: (Overspeaking) Sorry, the paragraph in this
6 is ...

7 (Pause)

8 Yes, sorry. So it is the first note, not the second
9 note, paragraph 12. We had better just have a look at
10 those again, just to remind ourselves of the rules.

11 (Pause)

12 Yes. I think it was the provisions that we looked
13 at ... (Pause)

14 It is the "Paid in error" point, is it not?

15 MR PICKFORD: That is what he says, yes, and we do not
16 accept that he has established the fact --

17 THE CHAIRMAN: If it is paid in accordance with your rules,
18 it cannot be paid in error. It is not -- that is your
19 submission.

20 MR PICKFORD: My submission is close to that. It is not
21 quite that.

22 THE CHAIRMAN: Right.

23 MR PICKFORD: My submission is that it is incumbent on
24 Mr Rowntree to satisfy this tribunal that these
25 proceedings are sensible in the sense that the costs

1 outweigh the benefits -- the benefits outweigh the
2 costs.

3 THE CHAIRMAN: (Overspeaking) well --

4 MR PICKFORD: Well, if I can just develop it. We say, in
5 that context he has got to show that, even if he gets
6 through all the way to what he says is the world that --
7 where he gets in damages, that that is actually going to
8 benefit the people that he is claiming to represent
9 rather than just causing a legal quagmire and
10 a situation that, given that we are just dealing with
11 a members' organisation, is not really one that we can
12 sensibly resolve. In that context he simply is pointing
13 to (i) and (j), which, at the very best, are -- do not
14 suggest on their face that what we will be able to claim
15 back from publishers is inadequate because on their
16 face, certainly, what they appear to be talking about,
17 which is what the tribunal said yesterday, is errors
18 under the rules, because of course these are the rules,
19 and so --

20 THE CHAIRMAN: So what does (gc2) mean?

21 MR PICKFORD: So this is dealing -- (gc2) is dealing with
22 the context in which a sum was non-distributable, so it
23 is being held in a non-distributable account, as
24 I understand it.

25 THE CHAIRMAN: Okay.

1 MR PICKFORD: "It should be credited to such revenue
2 accounts as the council should from time to time direct
3 and distributed pro rata amongst the persons entitled to
4 participate in the distribution [as read]."

5 So, for example, if -- to give the example of -- if
6 there are monies that ultimately do not have a home and
7 they are being held back because they satisfy this test,
8 then, once they get distributed, they will be
9 distributed pro rata --

10 THE CHAIRMAN: (Overspeaking) What do you --

11 MR PICKFORD: -- as I think is common ground between me and
12 my learned friend. Sorry?

13 THE CHAIRMAN: " ... entitled to participate [as read]."

14 Then one needs to look at 3 as well. I have not had
15 your submissions on this, so it would just be helpful to
16 have an explanation of how you say (gb) and (gc) and (i)
17 and (j) all fit together.

18 MR PICKFORD: I can do that. I think the best thing for me
19 to do on that issue is to take some instructions on
20 that --

21 THE CHAIRMAN: You can just think about it, okay.

22 MR PICKFORD: -- over lunch. But what I can point you to
23 is -- unfortunately we are in a version here that is not
24 the one that I marked up, unfortunately. It is
25 because --

1 THE CHAIRMAN: All right. Let us do it at 2 o'clock.

2 MR PICKFORD: -- it appears in two versions in the bundle,
3 but there are other -- there are provisions higher up --
4 in particular I think it is (c) -- I think it is Rule
5 2(c), from memory -- that basically provides the general
6 entitlement for the PRS to allocate in the way that its
7 board members determine is the most sensible way from --
8 in terms of their resolution. So there is a kind of
9 very general power to come up --

10 THE CHAIRMAN: (Overspeaking) Right, why cannot --

11 MR PICKFORD: -- with distribution powers.

12 THE CHAIRMAN: Why can that general power not be engaged to,
13 "We have abused our dominant position. There is
14 a shortfall for writers because too much has been going
15 to publishers"?

16 MR PICKFORD: So on --

17 THE CHAIRMAN: Why can the board not just say, "Look,
18 publishers, you can pop up a bit more"?

19 MR PICKFORD: On a forward-looking basis, it is conceivable
20 that you could change the rules, I suppose. I am
21 thinking on my feet here --

22 THE CHAIRMAN: (Overspeaking) Within these rules --

23 MR PICKFORD: Sorry, I was not being very precise -- change
24 the distribution methodologies to effect a new form of
25 distribution that does two things. One is that it runs

1 the distribution, according to the new world, where
2 apparently we do things in a better way, but you have
3 got my submissions on that.

4 THE CHAIRMAN: Mm-hm.

5 MR PICKFORD: I suppose hypothetically, secondly, it says,
6 "Also we are going to try to make up for what happened
7 in the past and we are going to take(?) things a bit
8 further".

9 THE CHAIRMAN: Yes.

10 MR PICKFORD: I mean, if there were genuine -- which we
11 dispute -- but if there were genuinely large sums of the
12 sorts that Mr Robertson is claiming, one can see that
13 that is not -- even if technically that mechanism
14 exists, at a practical level, if it really were some
15 huge redistribution, it would --

16 THE CHAIRMAN: Well, it might be 100 million or 200 million
17 or something, but looking at your -- looking at that
18 thing we had up, it is not as though those sorts of
19 funds would not be available if they were diverted.
20 I mean, the publishers may be pretty unhappy about it
21 beyond the assumption that they have been wrongly
22 overpaid by whatever the sum is, so -- anyway.
23 Mr Robertson submits there is plenty of scope within the
24 rules to pull levers.

25 MR PICKFORD: Yes, and my basic submission is that he has

1 not done enough because the burden is on him.

2 THE CHAIRMAN: I am not sure it is really a burden point.

3 We have got your notes. It is a question of
4 interpreting the powers. It is not as if Mr Robertson
5 is just waving his hands and going, "Well, we can work
6 something out at some stage". He is pointing to the
7 rules and says, "Look, there is scope within these rules
8 to take a bit more money from the publishers". The
9 publishers may not like it, but it will be in the
10 context of a judgment which says they have been wrongly
11 enriched and they will have to go along with it.

12 MR PICKFORD: Well, I was responding to what Mr Robertson
13 pointed to, which are the rules which I say are not
14 going to help him. I was being -- in answer to the
15 tribunal, I was trying to be helpful and explain --

16 THE CHAIRMAN: No, I understand, I understand.

17 MR PICKFORD: There are possibly higher level provisions
18 that could lead to changes. I am trying to be candid
19 and open.

20 THE CHAIRMAN: No, no, no --

21 MR PICKFORD: Yes, as -- it is conceivable that at
22 an administrative level that might be possible, but one
23 does have to ask oneself whether that is -- I mean, the
24 kinds of sums that he is talking about, again, that --

25 THE CHAIRMAN: Well, we are going to come on to what sums we

1 are talking about.

2 MR PICKFORD: Yes, indeed.

3 I have some further points to make, however, in this
4 context. This one was really developing from the points
5 that the tribunal was putting to Mr Robertson yesterday.
6 I have some discrete submissions also about cost
7 benefit, which are that the PRS is, as I have said
8 before, a members' organisation to which all of its
9 members have freely signed up. They were not forced to
10 do so, but they have decided to become members. The PRS
11 seeks to represent the interests of its members, both
12 songwriters and publishers, and I have explained that it
13 has procedures for seeking to do that.

14 THE CHAIRMAN: Mm-hm.

15 MR PICKFORD: Mr Rowntree is no doubt very well intentioned,
16 but he is a self-appointed representative of songwriters
17 and he brings an opt-out class action. That is, in my
18 submission, apt to cause particular concerns to this
19 tribunal because what we have is an individual who says,
20 "Well, I am going to represent songwriters, in essence,
21 whether they like it or not", because we all know that
22 the reality of an opt-out action is that most people do
23 not opt-in or opt-out. Well, sometimes people do opt
24 in, for instance in Trucks, but people certainly do not
25 generally opt out of an action. They might not even

1 know about it, most likely.

2 So Mr Rowntree is saying, "Well, I am going to come
3 along and I am going to represent songwriters in
4 an opt-out action", and we say that if he had come to
5 this tribunal with evidence that that is what
6 songwriters generally wanted, that would be one thing,
7 but he does not. He just says, "I think there is this
8 problem and I am going to sort it out on behalf of
9 songwriters".

10 THE CHAIRMAN: He was recruited to the already formulated
11 team, yes.

12 MR PICKFORD: Yes, indeed, indeed. The truth of the matter
13 is that there are some funders who thought and some
14 lawyers who thought, "I think there is a profitable
15 opportunity here", and no doubt, in addition to the
16 profitable opportunity, they would believe that they
17 would be serving the public interest as well. So they
18 will bring a claim and they will fund Mr Rowntree and he
19 will confront it.

20 But one has to ask whether that is really the right
21 way of dealing with this dispute when what we do know --
22 in contrast to the fact that we do not know that
23 songwriters actually want to be represented by
24 Mr Rowntree in this claim, what we do know is that they
25 have all signed up to be represented by the PRS and the

1 PRS has its own means of dealing with issues which can
2 be brought before it at an AGM, as explained in the
3 evidence.

4 So in that context I say that the tribunal has to
5 scrutinise this very, very carefully. There are
6 basically two ways in which this case can go, we can
7 posit. Let us suppose that Mr Rowntree ultimately
8 loses. If that is the way it goes, then the only
9 winners are going to be the lawyers because the funders
10 do not get paid if he loses, but the lawyers do, and it
11 is estimated that the existing costs were the best part
12 of 17-point-something million, of which a very large sum
13 was lawyers' costs. I think it was in excess of
14 10 million if you add counsel and --

15 THE CHAIRMAN: It is ever thus.

16 MR PICKFORD: Well, yes, but it is -- yes and no. It is
17 ever thus that, if the claim fails, the only people who
18 really win are the lawyers, but there is a big
19 difference between this and other cases for the very
20 reasons of the structure of the claim and who it is
21 against, because ordinarily, if this were a claim
22 against Mastercard, let us say, and let us suppose there
23 was a particular claim on behalf of the consumer group
24 and for some reason that failed, that does not rebound
25 at all on the people who are in that class because they

1 would have got some money, but they did not. It failed
2 and the person who picks up most of the tab for that is
3 the funders of the claim. Some of it, however, is
4 always going to be picked up by the defendant because
5 not all costs are recoverable.

6 In this context the defendant is the representative
7 organisation that represents, inter alia, 50% of what is
8 supposed to be the interests of those people protecting
9 the songwriters. So if this claim fails, in terms of
10 the irrecoverable costs, they are going to be picked up
11 ultimately by PRS members, including songwriters
12 themselves. That is not the case ordinarily for any
13 other class, say the consumers in a --

14 THE CHAIRMAN: This is one of the oddities of this claim.

15 I mean, if it is a strong claim and there are very
16 substantial damages and what those damages mean is going
17 to be a redistribution among members -- effectively it
18 is a redistribution among members where more of the
19 money goes to the class, these points are not
20 determinative on all those assumptions.

21 MR PICKFORD: So I understand. I was dealing with it
22 analytically, in two separate boxes. So I was firstly
23 considering the "What if he loses?" box. In that box it
24 is a bit different to your classic claim.

25 THE CHAIRMAN: I understand that.

1 MR PICKFORD: I am very happy to deal with the next box. My
2 submission is not predicated on: well, we assume they
3 definitely lose. Obviously I have to accept in this
4 world, where we have assumed that this is actually
5 a good claim --

6 THE CHAIRMAN: But if -- you say, if they lose, there is
7 going to be a downside for the class?

8 MR PICKFORD: Yes. So let us look at the alternative, which
9 is let us assume that they win. What we know is in that
10 world where they win, they still have very large sums of
11 lawyers' fees that are ultimately going to have to be
12 paid, but we also have the funders who are in line for
13 well in excess of 100 million. We discussed that
14 yesterday. I think, Mr Kelly, you made that
15 observation. So this is potentially very expensive, in
16 terms of the amount of any damages award that does not
17 make it back to the class. We are talking hundreds of
18 millions -- more than 100 million that does not make it
19 back to the class, even at the sums we are facing today,
20 not taking account of the fact that the claim is already
21 delayed and not taking account of the fact that lawyers'
22 fees will no doubt probably go up and -- it is the way
23 of the costs of these cases, that they rarely ever go
24 down.

25 In that context, even if they win, it is not clear

1 that songwriter members are even going to benefit,
2 because, even if they benefit on one side of the
3 equation, which is that we have a new distribution
4 method and their songwriter bit goes up, there is
5 a water bed here, and effectively what that obviously
6 means is that the publishers' bit goes down. We
7 discussed previously that the songwriters do not only
8 get the songwriter bit they get from the PRS, they also
9 potentially get a share of what the publishers get. So
10 whilst it goes up here, it is also going to go down to
11 some degree on the other side in terms of what would
12 feed through to them and the publishers --

13 THE CHAIRMAN: You say at the same time the water bed is
14 leaking because there are all the legal costs that --

15 MR PICKFORD: (Overspeaking) Exactly. Quite. That is
16 a nicer way of putting it than I had. But that is
17 precisely the point. So they have to -- to actually
18 win, the amount -- the net amount that they have to gain
19 by, as songwriters, minus the bit they are losing as
20 publishers, has got to outweigh the enormous leakage
21 that is going to the funders and the lawyers.

22 THE CHAIRMAN: We have got that point, yes.

23 MR PICKFORD: Yes, and that has not been demonstrated, we
24 say.

25 PROFESSOR ULPH: Can I just ask a question? Supposing this

1 new method by which black box funds are going to be
2 allocated turns out to be a lot more expensive for PRS
3 to operate, so where do those additional costs come into
4 your thinking?

5 MR PICKFORD: Well, they come in -- they are yet another
6 negative for the cost benefit of the enterprise.

7 PROFESSOR ULPH: Okay.

8 MR PICKFORD: But, I mean, that is when considered at this
9 level. I think they also enter in another way, which is
10 higher up, which is, of course -- we say -- our
11 submission, as you have heard many times now, is that we
12 do the best that we can. There is not anything better
13 that we can do, and Mr Rowntree has not come up with it.
14 But let us go to a hypothetical world now, where he has
15 come up with a better solution -- he has not, but let us
16 suppose he has -- you would obviously, at that point,
17 need to consider, "Well, is that solution actually
18 practical and cost-effective?", because obviously what
19 we are supposed to be doing is ultimately doing our job
20 as best we can, in a cost-effective way, that gets the
21 most royalties back to our members.

22 So in this hypothetical world where he suddenly
23 comes up with, "Ah-ha, I have got a great idea. You
24 send someone round on a -- whatever, and they do this
25 audit, in incredible detail, and that somehow solves the

1 problem" -- he has not explained that it would, but if
2 that was very expensive, then obviously that would be
3 a reason for saying that the whole thing does not work
4 in terms of saying that we have done anything wrong
5 because all we are doing is trying to find
6 a cost-effective and sensible approach, so it
7 potentially comes in at both levels.

8 But, again, that is all very hypothetical and it is
9 quite a few steps removed from my submissions, to be
10 frank, because I am not accepting that there is any
11 alternative there at all.

12 So with the exception of the points that I said
13 I was going to come back to after the short adjournment,
14 those are the points that I wanted to make, subject to
15 anything else -- no, there is not -- that those behind
16 me would like to say.

17 So, if I may, if that is convenient, pause there and
18 then deal with the other points that I said I would come
19 back to after --

20 THE CHAIRMAN: If you can --

21 MR PICKFORD: Oh yes, exactly. If you prefer, I can then
22 interpose. It was simply the point that --

23 THE CHAIRMAN: That is the --

24 MR PICKFORD: I am very happy to.

25 THE CHAIRMAN: No, no, we are carrying on. Apologies,

1 sorry.

2 Submissions by MS THOMAS

3 MS THOMAS: Thank you, sir. I know we are keen for lunch.

4 As you have heard, I will address you on the second
5 three points in the case, so conflicts, funding and
6 exclusions. Conflicts in some senses takes us back to
7 the substance of the case.

8 PROFESSOR ULPH: Sorry, can you speak up a bit?

9 MS THOMAS: I beg your pardon. Maybe I do not have the
10 microphone pointing to me. Thank you very much.

11 Mr Went explained to you that the issue of conflicts
12 engages both the eligibility condition and the
13 authorisation condition; the former, insofar as it shows
14 you that there is not a common issue, common to the
15 class, and the second, insofar as it engages the
16 position of Mr Rowntree personally as fiduciary to the
17 class. Mr Went has already referred you to Rule 78.2(a)
18 of the Tribunal Rules on the latter point.

19 There are two cases to show you, if I may. Maybe
20 we can make some progress on them before lunch. They
21 have both been mentioned already but I think it would be
22 helpful to show the relevant passages to you in a little
23 more detail.

24 The first is the *Trucks* authority in the
25 Court of Appeal. That is authorities bundle B, tab 15,

1 {AUTH-B/15/1}. While you find it, I think you have
2 already been told what it is about, so you will
3 appreciate the issue is the RHA sought to represent
4 a class of truck purchasers --

5 THE CHAIRMAN: Just before you get to the authorities, what
6 is the conflict you are addressing?

7 MS THOMAS: So there are conflicts within the class -- if it
8 would help for me to summarise the conflicts that we say
9 arise and why they engage Mr Rowntree's position.

10 The first reason why we say there is a conflict
11 stems from the fact that some members of the class
12 currently receive money that sits, as it were, on
13 Mr Rowntree's perception of the world, in the publisher
14 pot. These are, in particular, the people who receive
15 remittances from publishers under their publisher
16 agreements and also the self-published individuals.
17 This is a point that really goes to the absence of the
18 counterfactual, but the point is, depending on the
19 counterfactual to be applied, those individuals might
20 lose out because they lose some publishing money, and
21 until we know what Mr Rowntree plans to do instead, they
22 might lose out overall because it is not clear that
23 receiving songwriter money will compensate them for that
24 loss.

25 The second problem that arises is on the assumption

1 that he does want to apply what seems to be the current
2 leading candidate for a counterfactual, being the
3 per capita approach. So even leaving aside the idea
4 that there might be some publisher money being lost on
5 the part of those songwriters, if there is
6 a distribution on a per capita basis, it stands to
7 reason that some songwriters who are currently in the
8 class will lose out by that alternative distribution.

9 THE CHAIRMAN: Okay, I am not --

10 MS THOMAS: You gave yesterday, sir, the example of
11 Sir Paul McCartney, who may, one supposes, do well under
12 a pro rata approach, but if instead songwriter royalties
13 are going to be diluted and divided by 160,000 people,
14 obviously individuals in his position would be worse off
15 overall.

16 THE CHAIRMAN: Right, but the legal proposition that you say
17 is relevant to this?

18 MS THOMAS: The proposition is twofold. There are therefore
19 conflicts within the class that mean there are no common
20 issues. It is in Sir Paul's interests actively --

21 THE CHAIRMAN: (Overspeaking) I can see the no common issues
22 point, but I am not sure how the conflict dovetails with
23 that --

24 MS THOMAS: So the presence of a conflict within the class
25 means that it is not just in Sir Paul's interests that

1 these claims be certified. There is no common issue
2 that advantages him. To the contrary, he is
3 disadvantaged by the claim proceedings.

4 THE CHAIRMAN: Let us have a look at this.

5 MS THOMAS: The eligibility condition is therefore failed.

6 Then the second point is the authorisation condition has
7 failed because of two reasons really. Mr Rowntree
8 himself is therefore placed in an intolerable position.
9 He cannot be a fiduciary to a class that includes
10 conflicts and he also personally, we think, may be in
11 the position of a Sir Paul and therefore actually --

12 THE CHAIRMAN: (Overspeaking) he was not claiming anything
13 under this action.

14 MS THOMAS: All the more in that case because he would still
15 be disadvantaged going forward by a change in the rules
16 of the sort that he is seeking.

17 THE CHAIRMAN: I am not sure that is your best point, but
18 okay. Right.

19 MS THOMAS: I will see if I can develop it, sir. I was
20 going to take you to the *Trucks* authority. I think you
21 know what this case is about. The RHA sought to
22 represent a class of truck purchasers, which included
23 both used and new truck purchasers. This was an opt-in
24 case and they were not seeking aggregated damages.

25 The CAT had decided that the RHA could represent

1 both groups but an issue arose because of the difference
2 in interests between used and new truck purchasers
3 because they had converse interests in respect of the
4 question of pass-on. So the Court of Appeal received
5 detailed submissions on the issue of conflicts and at
6 {AUTH-B/15/25}, paragraph 88 of the judgment -- that is
7 on the screen already -- the Court of Appeal held that
8 the RHA could represent both groups, but thought that
9 the CAT had erred in its approach. It was necessary to
10 erect a so-called Chinese wall or information barrier
11 within the RHA and to have different funders for each
12 group. I have taken you to this because I think it is
13 helpful to look at what the Court of Appeal says about
14 the respects in which the CAT erred. This is at
15 paragraph 93 and forward of the judgment,
16 {AUTH-B/15/26}, over the page.

17 The first comment is that the CAT erred in its
18 conclusions that there was only a potential conflict of
19 interest and that that potential conflict could be dealt
20 with in future by active case management.

21 The Court of Appeal thought there was an actual
22 conflict, and although it is not quite reasoned out in
23 paragraph 94, the solution that the Court of Appeal
24 found is, by imposing the information barrier -- which
25 I think the idea is that that turns the actual conflict

1 into a potential conflict -- and then at that point you
2 will see, at the end of paragraph 94, it was necessary
3 to seek the informed consent of the proposed class
4 members to the RHA acting for them under those
5 conditions. That, of course, was possible in that case
6 because it was an opt-in class and so it was possible to
7 notify the conflict to the class members so that they
8 understood what was been done on their behalf.

9 Carrying on with the problems identified by the
10 Court of Appeal, we see at paragraph 95 the point that:

11 "... the CAT was wrong to accept the suggestion that
12 Dr Davis could be the expert for both sides of the ...
13 divide ..."

14 Over the page, {AUTH-B/27}, that could not be
15 resolved by informed consent. At paragraph 96, at the
16 end, you can see the Court of Appeal was not satisfied
17 with the idea that this could be resolved with a vague
18 promise that the RHA would be able to decide what to do.

19 THE CHAIRMAN: We have got the point. All right.

20 MS THOMAS: Paragraph 97, we see the quote --

21 THE CHAIRMAN: I mean, I am not quite sure what we are
22 getting out of this. It is quite a different case on
23 the facts.

24 MS THOMAS: Well, I want to get two things out in
25 particular, if I may --

1 THE CHAIRMAN: What are the principles you are trying to get
2 out?

3 MS THOMAS: First of all, when we have a problem of
4 conflict, it is not good enough to say, "We can probably
5 resolve this later on. Do not worry too hard about it
6 now". We need to confront it at the certification
7 hearing, where there is a genuine issue.

8 Second, the issue of informed consent could be
9 resolved in this case because it was an opt-in class.
10 That is not a solution we have here.

11 Third -- well, there are two points, but just to
12 push back a little against the idea that this was
13 a different case. The thing that is similar is that it
14 was a case about a pot of money, which in that case was
15 going to be the overcharge damages as established on
16 behalf of the class, and then there was a difference in
17 view between the two sets of class members --

18 THE CHAIRMAN: But how do you say there is any conflict in
19 this case? I have just been listening to submissions
20 that there is no counterfactual that has been identified
21 and you are now saying the counterfactual is causing
22 a conflict.

23 MS THOMAS: Well, if I may, this is why we have put it on
24 the basis that we have been criticised for saying that
25 it is a hypothetical --

1 THE CHAIRMAN: Well, you have to decide which horse you are
2 riding. If there is a counterfactual, then that needs
3 to be addressed, so --

4 MS THOMAS: I think this is a point I can address you on
5 usefully with reference to *Ennis v Apple*, which is my
6 next authority. The punchline here is I think the
7 difference is that Dr Ennis did have a counterfactual,
8 and so when the tribunal was determining the question of
9 conflict, it was able to look at the four corners of the
10 pleaded claim and say that there might have been
11 counterfactuals run which could have created a problem
12 with conflict. That is not a problem here because
13 Dr Ennis has given us a counterfactual and the one that
14 he has chosen does not create a conflict between the
15 class so it dismissed Apple's concerns about conflict
16 and said, "We are happy for this to go forward", because
17 there could have been ways that this could have been --

18 THE CHAIRMAN: We have looked at that, yes.

19 MS THOMAS: It is not done here.

20 THE CHAIRMAN: It is well established, the difference in
21 theoretical conflicts and actual conflicts, and I do not
22 see how you are articulating a case of an actual
23 conflict in this case when your position is that no
24 counterfactual -- for good reason your position is that
25 no counterfactual has been proposed. You cannot see it

1 anywhere in the evidence.

2 MS THOMAS: Sir, yes. I think this is an astute question.

3 So this is why I wanted to show you Trucks, because you
4 are quite right to say there is a difference between
5 an actual and a potential conflict.

6 The difference in the case of an actual conflict is
7 that it cannot be waived by informed consent.

8 A potential conflict can be waived by informed consent.

9 That --

10 THE CHAIRMAN: But at the moment we do not have actual or
11 potential -- we do not have anything.

12 MS THOMAS: We have reached lunchtime. I do want to show
13 *Ennis* to make good --

14 THE CHAIRMAN: (Overspeaking) All right. Let us do that
15 briefly, yes. Let us do that now.

16 MS THOMAS: Would you like me to give you the punchline
17 before lunch or come back?

18 THE CHAIRMAN: No, let us do it now.

19 MS THOMAS: All right. *Ennis* is at {AUTH-B/25/1}. It sets
20 out the legal principles at {AUTH-B/25/8}, paragraph 18
21 forward. It points out that a class representative is
22 a fiduciary with respect to the class. He is under
23 a duty not to place himself in a position where there is
24 a conflict between the interests of the principals for
25 whom he acts.

1 Over the page, {AUTH-B/25/9}, subparagraph (2)
2 addresses the difference between potential conflict and
3 actual conflict that I have just been addressing you on.
4 A potential being one where there is a real sensible
5 possibility of conflict, as distinct from a merely
6 conceivable one; and the point that I have just
7 submitted to you, that an actual conflict cannot be
8 resolved by informed consent; potential conflict can.
9 But I have also suggested to you that there is no way of
10 obtaining a formal consent in the circumstances of this
11 case, which makes it different from Trucks.

12 Subparagraph (3) highlights the point that Mr Went
13 made to you, which is that a mere difference is not the
14 same as a conflict. There is a reference here to the
15 Canadian case of Vivendi, which I do rely on. Again,
16 I am conscious we are close to lunch, but it is helpful
17 to look at Vivendi itself. That is at {AUTH-E/45/19}.

18 (Pause)

19 At paragraph 43, which you see on the left, in the
20 English side --

21 THE CHAIRMAN: Yes.

22 MS THOMAS: -- you can see the point is made that:

23 "All members of the class must benefit from the
24 successful prosecution of the action, although not
25 necessarily to the same extent."

1 Specifically, success for one member of the class
2 must bring with it a benefit to all the others.

3 Then the key conclusion is reached at paragraph 45,
4 over the page {AUTH-E/45/20}. I am sorry, it says that
5 it cannot be applied inflexibly.

6 Then it says that for a question to be common, it
7 does not necessarily have to lead to success for all,
8 but success for one member must not result in failure
9 for another.

10 The reason I wanted to show you paragraph 43 is to
11 highlight the point that, in my submission, the
12 proposition from this case is that success for one
13 member might not result in failure for another, not only
14 on the claim, but disadvantage more widely arising from
15 the -- (overspeaking).

16 THE CHAIRMAN: (Overspeaking) I think Mr Robertson made that
17 point.

18 MS THOMAS: Let us then go back to Ennis which is where this
19 counterfactual point arises, so paragraph 28.

20 THE CHAIRMAN: Yes. We have looked at that and we have ...

21 MS THOMAS: I am just waiting for this to come up. This is
22 authorities bundle B --

23 THE CHAIRMAN: Yes, we have been to this already. Yes, what
24 is the point?

25 MS THOMAS: What I would like to highlight is that here, the

1 Court of Appeal -- sorry, the CAT was able to conclude
2 that there was no conflict, because the damages claim
3 advanced by the PCR is based on the counterfactual in
4 the claim form. Apple had said: well, you could have
5 advanced a different counterfactual.

6 THE CHAIRMAN: We have discussed that and you have made that
7 submission, yes.

8 MS THOMAS: I am grateful. So the point being made is that
9 you need to determine whether there is a conflict based
10 on the claim form. You have got a hole(?) in this claim
11 form. So the problem here, as you have well in mind,
12 sir, is that what he has not done is specified the
13 counterfactual on which he relies, by comparison with
14 which it is said to be obvious that the PRS' policies
15 are unfair.

16 THE CHAIRMAN: They are submitting that money needs to be
17 taken away from the publishers and given to the writers.

18 MS THOMAS: Yes.

19 THE CHAIRMAN: It is not a conflict.

20 MS THOMAS: With respect, no, sir, for two reasons that
21 I have tried to submit to you but let me take you to it
22 more slowly.

23 So if that were the proposition, which I agree is
24 how Mr Rowntree is inviting you to think about it, there
25 is a pot of money for the publishers, let us move it to

1 the songwriters; how could that possibly be an issue?

2 In fact earlier, sir, you suggested: well, at least
3 everybody would be advantaged a little bit if we took
4 money out of publishers' pockets, divided it by 160,000,
5 gave everyone a little bit. There is not a conflict if
6 that is what is going on.

7 But the problem is, it is more complicated than
8 that, because of the fact that some class members have
9 an addition to an entitlement to the songwriter pot, if
10 we accept that such a thing exists, which of course we
11 do not. In addition, they have an entitlement to some
12 of the publisher pot, and therefore if you take money
13 out of the publisher pot --

14 THE CHAIRMAN: So this is not side letters. This is not
15 side agreements. This is because they are publishers.

16 MS THOMAS: It is both points, sir. It is one, that they
17 have an entitlement by means of their side agreements
18 with the publisher, which means that --

19 THE CHAIRMAN: (Overspeaking) Why will those be affected?

20 MS THOMAS: Those will be affected because if you imagine
21 an individual who -- I do not know. So you have £10
22 coming in, in respect of the song; again you have heard
23 the submissions, this is extremely simplified, in terms
24 of how it works; £5 goes to the writer, £5 goes to the
25 publisher. There is a side agreement under which the

1 writer is, in addition, entitled to £2.50 from the
2 publisher. If you have a claim which says you should
3 not be paying money to publishers, you take away that
4 £2.50 --

5 THE CHAIRMAN: The claim is for damages.

6 MS THOMAS: The claim is for damages. This is a very
7 important point, sir, because in my submission it is
8 very important when thinking about the issue of conflict
9 to recognise that what Mr Rowntree is trying to do is to
10 force a change to PRS' policies going forward. In fact,
11 that is the point that you yourself have recognised when
12 speaking to my learned friend --

13 THE CHAIRMAN: All right. But have you got a case where it
14 says that the -- it is not about whether there is
15 a conflict on the damages; it is a conflict going
16 forward.

17 MS THOMAS: So the Apple case does draw a distinction, just
18 for completeness, where it says they are not trying to
19 seek an injunction. The difference here is that there
20 is a difference sought, going forward, and you can see
21 that from Mr Rowntree's reply, which I have the
22 reference --

23 THE CHAIRMAN: It is not in the pleading. You said we have
24 to look at the pleading. Why is --

25 MS THOMAS: So --

1 THE CHAIRMAN: There is a lot of loose -- you know. There
2 is nothing to stop -- I mean, the fundamental problem,
3 it does not seem to be the point you are on, the
4 fundamental problem seems to be that we do not know what
5 is going to happen and how these damages are going to be
6 distributed. That is a problem for the case, and we
7 will hear from Mr Robertson on how it is going to be --

8 MS THOMAS: Yes.

9 THE CHAIRMAN: But it does not follow that every method of
10 awarding the damages is going to lead to conflicts in
11 the class. It does not at all. If you take 100 million
12 or 50 million and say: right, we are going to give
13 everyone in the class an extra 10 quid, or whatever the
14 maths works out at, that is not the conflict. You are
15 saying, on the one hand -- you have two different
16 advocates. One is standing up and saying: they have not
17 advanced a methodology. Then you stand up and say: the
18 methodology they have advanced leads to a conflict.
19 That is ... (Laughs)

20 MS THOMAS: I think --

21 THE CHAIRMAN: It is not ideal.

22 MS THOMAS: If I can cut through this point, and it may be
23 that on this basis you do not accept the submission, but
24 I do not suggest that the damages claim is what gives
25 rise to the conflict. What I rely on is the fact that

1 the whole claim is premised on changing PRS' policies
2 going forward, and therefore it is strongly
3 disadvantageous to certain members of the class --

4 THE CHAIRMAN: But we will not be changing the policies.

5 MS THOMAS: Well, this is where the counterfactual point
6 comes in, because what is being asked of you is a -- the
7 CAT does not issue declarations, which is part of the
8 issue. But what is being asked of you is a judgment
9 which will have a declaratory effect, that PRS' current
10 policy is unlawful, and some other not yet specified
11 policy.

12 THE CHAIRMAN: Yes, it is not yet specified. So you are
13 asking us to hypothesise that there will be -- the
14 effect of this judgment will have an impact on the PRS'
15 rules or conduct, as a result of which, there will be
16 a conflict, although we do not -- I mean, that is all
17 fantastically hypothetical at the moment; and it is
18 hypothetical because, as Mr Pickford has been saying,
19 and you have said repeatedly in your skeleton, nowhere
20 is it said what the counterfactual is.

21 MS THOMAS: Yes, yes. I think -- I will let you go, sir,
22 because I do not want to detain us from lunch on this
23 point.

24 But the difference, in my submission, is that when
25 the counterfactual needs to be specified, it is going to

1 have to be by the PCR at some point, we obviously say
2 now, they seem to suggest they might try and do it after
3 the disclosure. But we need to know at some point what
4 the lawful policy is going to be; and the declaratory
5 effect of the judgment will be that PRS ought to be
6 doing that and not this. The effect of the judgment
7 will therefore be very detrimental to the people who are
8 worse off under the counterfactual, but the PCR has not
9 yet told us.

10 What that means, as matters stand, we are in
11 a position of potential conflict because the PCR has not
12 yet told us the counterfactual. We do not know what it
13 is. In particular, if the counterfactual is going to be
14 that the distribution should be a per capita
15 distribution, that is the lawful thing that the PRS
16 ought to be doing; by contrast with its currently
17 supposedly unlawful policy. That will be to a material
18 disadvantage of numerous members of the class who will
19 therefore be disadvantaged if the claim goes forward.
20 That places Mr Rowntree, as fiduciary to the class, in
21 an intolerable position, not least because he is one of
22 those persons.

23 THE CHAIRMAN: All right. Well, we will come back to this
24 at 2 o'clock.

25 MS THOMAS: I am grateful, sir.

1 (1.12 pm)

2 (The short adjournment)

3 (2.00 pm)

4 THE CHAIRMAN: All right.

5 MS THOMAS: Good afternoon, sir. I will make two further
6 points, if I may, on the conflicts issue before leaving
7 that and turning to the topic of funding. The first is
8 to clarify where the point fits in in the structure of
9 our submissions. You pointed out to me, sir, that there
10 is a tension between saying there is no counterfactual
11 and a conflict arises on the basis of what we understand
12 the counterfactual to be. To be clear, the conflicts
13 point is really in the alternative to our primary case,
14 which is that there is no counterfactual. It is
15 an attempt to grapple or shadow-box with what
16 Mr Rowntree's case --

17 THE CHAIRMAN: The claim is against the PRS. Where is the
18 conflict?

19 MS THOMAS: I beg your pardon?

20 THE CHAIRMAN: So the claim is for damages from the PRS.

21 MS THOMAS: Yes.

22 THE CHAIRMAN: Where is the conflict? Why does one have to
23 dig between -- you have not said how the PRS is going to
24 meet a claim for damages, and no doubt that will depend,
25 among other things, on the size of the successful claim.

1 You may have all sorts of creative ideas, you may have
2 some of them in your back pocket already or it may be
3 that you will think of them going forward, but unless
4 you are saying, "This is the only way we can do it and
5 that creates a conflict", I do not see what this has to
6 do with anything. I mean, the claim is against the PRS.
7 It is as simple as that.

8 MS THOMAS: Sir, I am grateful. I sought to cut through it
9 by saying it is not the damages issue that creates the
10 conflict. It is the fact that PRS would be forced to
11 change its policies going forward.

12 THE CHAIRMAN: I do not know what the PRS -- the PRS may do
13 all sorts of things. The PRS may have come up with
14 a creative new auditing method so that all of this
15 disappears. Nowadays, on my phone, I can check if
16 somebody's bank account number is correct literally in
17 a second when they -- if I get their name and bank
18 account number, I can see instantly whether the name
19 matches the bank account number. It may be that there
20 are all sorts of creative ways that you will be able to
21 solve this going forward. I do not know. You have not
22 put in any evidence on that.

23 MS THOMAS: Sir, I will rest the point. You have, of
24 course, our primary submission, which is that of course
25 neither has Mr Rowntree and we do not --

1 THE CHAIRMAN: I have got that -- I have got that point.

2 MS THOMAS: So the point I wanted to make to you was just to
3 clarify where the conflicts point fits in, which is it
4 is an alternative to the primary submission, which is
5 there is no counterfactual, and the conflicts points are
6 so if we did have a counterfactual, what problems might
7 arise, but that --

8 THE CHAIRMAN: But it involves us beyond the PRS into
9 a world that you have not yet described and saying that,
10 if you have to meet a claim for damages, that then
11 creates tensions, or if you have to change your
12 policies, that will then create tensions, but you have
13 not said what changes you are going to make or how you
14 are going to raise funds, so it is the most abstract
15 concept of a conflict, as far as I can understand.

16 MS THOMAS: I will rest the point then, sir.

17 The second point was to say, even if there is no
18 conflict as such resting on the proceedings as they
19 stand, the sorts of points I have been describing about
20 why some class members may actually be disadvantaged in
21 the long run if PRS is forced to change its policies
22 along the sorts of lines Mr Rowntree is advocating do
23 make the concept of an opt-out class quite difficult.
24 It makes it difficult for someone who can see that they
25 are likely to be disadvantaged by a change in policy --

1 that aside, "Well, I do not know what Mr Rowntree is
2 proposing. Should I opt out of this class? Should
3 I advance my proceedings by different means instead?".
4 It is another reason why the absence of a counterfactual
5 makes it very difficult for the class members to assess
6 what Mr Rowntree is actually suggesting, whether it be
7 in their interests. I will leave this whole topic
8 there, if I may. I just wanted to make sure that you
9 understood where it fits in. Really our primary
10 complaint is that there is no --

11 THE CHAIRMAN: I have heard your submissions. Whether
12 I understand if it fits in or not is another matter, but
13 I have heard your submissions.

14 MS THOMAS: All right, thank you. The next topic is
15 funding, which is a very important topic, given that
16 it -- it might make the heart sink, but it contains
17 a number of very important and discrete issues.
18 A number of the points which I will make in relation to
19 funding support some of the submissions you have already
20 heard on the types of benefit, but others are
21 freestanding points which explain why the fundraising
22 arrangements or the funding arrangements are
23 inappropriate as they stand.

24 I will also, with respect, invite the tribunal to
25 consider whether, in light of the various problems with

1 the funding arrangements, some of which we have
2 discussed already and which I am going to outline, the
3 tribunal is able to conclude that Mr Rowntree and his
4 advisers are suitable to be appointed as fiduciary to
5 represent thousands of songwriters against their own
6 members' organisation. I should perhaps say for
7 Mr Rowntree's benefit, in making those submissions I do
8 not question his personal bona fides or his genuine
9 interests in advancing songwriters' interests, but
10 however laudable his personal goals, it does not follow
11 that he is suitable as a class representative, which the
12 tribunal should assess by reference to the arrangements
13 that he has felt it appropriate to enter into.

14 I do in this regard rely on *Riefa*, which I know the
15 tribunal is familiar with, but I would like to show you
16 the key paragraphs.

17 THE CHAIRMAN: If you are talking about the funding
18 agreement, he had nothing to do with it.

19 MS THOMAS: Well, that is one of the problems, sir. It was
20 entered into by him as the class representative --

21 THE CHAIRMAN: Well, it was not entered into by him. It was
22 already in place before he became the class
23 representative --

24 MS THOMAS: So I will --

25 THE CHAIRMAN: -- so it cannot make him unfit unless

1 everyone in the world is unfit.

2 MS THOMAS: Well --

3 THE CHAIRMAN: That is not to say it is not a problem, but
4 it does not make Mr Rowntree unfit if he was not
5 involved in negotiating it or agreeing it or signing it
6 or settling it or ...

7 MS THOMAS: Sir, I understand that. There are two problems,
8 I think, when coming to consider that sort of point.
9 The first is that PRS does not have full insight into
10 what has actually happened, nor does the tribunal, and
11 that is in part because the first version of the LFA has
12 not even been disclosed. We know that it existed
13 because it existed in September 2021, when the clock
14 started running. We know that it must have had very
15 different terms because it was resettled in light of
16 PACCAR to create quite a different multiple. So
17 Mr Rowntree must have been involved in some of those
18 decisions, including agreement of the very high
19 multiples that you see.

20 The second point is that --

21 THE CHAIRMAN: Well, we ought to be able to clarify that.

22 So the current version you think he may have been
23 involved in?

24 MS THOMAS: Well, we do not know. We heard in court
25 yesterday that the proceedings were initially, as

1 I understood it, created as a package and he was
2 identified as the PCR, but the current version of the
3 LFA, which I will be showing you, which you have seen
4 already, is dated February 2024, so the same date as the
5 issue of the claim form.

6 THE CHAIRMAN: We do not know what changes were made.

7 MS THOMAS: We do not. I think we know or we have inferred
8 that there must have been changes in light of *PACCAR*, so
9 it can be inferred -- you can see that there is
10 a percentage-based approach and now there is this
11 extremely high multiple-based approach that you have
12 looked at already, but we do not know what the changes
13 were.

14 THE CHAIRMAN: All right. Let us press on anyway.

15 MS THOMAS: I am grateful. I said there are two points
16 I was going to make in response to the point you
17 mentioned, sir.

18 The second point is that, although the proceedings
19 may have been presented to Mr Rowntree as a package and
20 to -- agreed with the LFA that had been agreed without
21 his prior input, nonetheless it was being said to him,
22 "Would you like to be a class representative? You will
23 be a fiduciary to the class. Here are the arrangements.
24 Are they suitable arrangements on behalf of the class?".

25 THE CHAIRMAN: All right. What was the case you wanted to

1 look at?

2 MS THOMAS: The *Riefa* case, sir. It is {AUTH-B/26/1}.

3 I would like to take you to paragraph 31, which is at
4 {AUTH-B/26/12}. You can see at the bottom of the page
5 the tribunal has just been through some of the
6 authorities and summarised the legal propositions that
7 it draws from them. The first paragraphs, (1) to (4),
8 will, I think, be familiar. They set out the test that
9 the tribunal is applying when it asks whether it is just
10 and reasonable for the PCR to act as the class
11 representative.

12 THE CHAIRMAN: Mm-hm.

13 MS THOMAS: At subparagraph (5), {AUTH-B/26/13}, the
14 tribunal emphasises:

15 "An important protection for potential class members
16 is that the PCR will properly act in the best interests
17 of the class including when agreeing any funding
18 arrangements, and in managing the proceedings going
19 forward including ongoing interactions with funders.
20 That requires the PCR to be sufficiently independent and
21 robust."

22 THE CHAIRMAN: Mm-hm.

23 MS THOMAS: Paragraph (6):

24 "In forming its view as to the ability of the PCR to
25 act fairly and adequately ... the Tribunal will consider

1 all relevant circumstances, including the question of
2 how the PCR has satisfied itself [that was a company in
3 that case] that the funding arrangements reasonably
4 serve and protect those interests.

5 "A further protection is that the terms of any
6 funding agreement should be open to scrutiny, not only
7 by the court but also by the members of the class on
8 whose behalf the claims are brought."

9 I am also showing you, if I may, a length -- sorry,
10 I should show you over the page, {AUTH-B/26/14},
11 subparagraph (8) contains a note of caution.

12 I will also show you paragraph 89, which sets out
13 some of the concerns that the tribunal had about the
14 proposed class representative in that case. I obviously
15 do not say that the points map over precisely, but it is
16 a good indicator of the sort of thing the tribunal
17 should be thinking about. That is on {AUTH-B/26/30}.

18 I can summarise these, but it may be useful for the
19 tribunal to cast its eyes down the page.

20 Subparagraph (1) concerned a clause relating to
21 whether -- relating to the need to seek an order
22 following a successful outcome for the costs, fees and
23 disbursements to be paid out of the award. A related
24 but not identical issue arises in this case.

25 Subparagraph (2) highlights that there was a concern

1 about what had been said in the witness evidence on that
2 point. But then the tribunal goes on to make some
3 broader points as well. Subparagraph (3):

4 "We were ... concerned about the brevity of the
5 description of the LFA (in its various iterations) ...
6 There [was no] evidence of independent detailed
7 consideration ...", including in respect of changes.

8 Over the page to subparagraph (4), {AUTH-B/26/31}:

9 "There were other indications of a lack of attention
10 to the detail ..."

11 I will draw the tribunal's attention to some such
12 examples in this case.

13 Then skipping ahead to subparagraph (5), there was
14 a statement about the concern as to confidentiality
15 provisions and the fact that the LFA was not public.

16 Then, at {AUTH-B/26/32}, paragraph 90, there is
17 a comment that the overall impression is that
18 Professor Riefa, the PCR, "was extremely reliant on her
19 legal advisers". It was not clear she had properly
20 understood the arrangements. The tribunal was concerned
21 about "her ability to protect the interests of the class
22 robustly and independently". I also draw your attention
23 to paragraph 91, which notes that the concerns are
24 cumulative. So it is not necessarily one concern that
25 is a knockout, but the building up of concerns paints

1 a picture which ultimately caused the tribunal not to
2 certify the claim. So the tribunal already has some of
3 the points in mind, I think, about how the genesis of
4 these proceedings came about.

5 In fact, this was -- a similar issue had been the
6 case in *Riefa* as well, at paragraph (5) of the judgment.
7 It is noted that it was a case where the proceedings
8 were created as a package and the PCR brought onboard
9 later, and that was a factor of concern. It is actually
10 not a factor that exonerates the PCR but a factor that
11 gives rise to greater concern because it would tend to
12 indicate that these are proceedings that are more run by
13 the lawyers and the PCR is only reliant on the lawyers.

14 So to make some of these points good, we obviously
15 need to look at the funding arrangements. You were
16 taken to the LFA yesterday. I would like to look at it
17 in more detail. As we have just been discussing, we
18 understand -- we do not have it, but there must have
19 been an original LFA entered into on 14 September 2021.
20 That was amended and restated on 23 February 2024, which
21 is when the claim was finally issued. You already have
22 the point that I will come on to, but one feature of
23 that is that the multiple was already becoming quite
24 high, even at the point when the claim was issued and
25 before anything else had happened.

1 So the LFA is at bundle B, tab 82.2. It appears
2 there, in the correspondence bundle, and not with the
3 claim form.

4 THE CHAIRMAN: I have it in tab 17. Oh, it is in more than
5 one place.

6 MS THOMAS: It was sent to the tribunal so the tribunal may
7 have different marked-up versions.

8 THE CHAIRMAN: I have bundle A, tab 17; is that right?

9 MS THOMAS: I think that may be the redacted version, sir.

10 THE CHAIRMAN: All right. Okay. So I had better go to the
11 right one. So bundle B ...?

12 MS THOMAS: {B/82.2/1}.

13 Let me double-check that to make sure that I am
14 not ...

15 Just for completeness -- I will be corrected if this
16 is wrong -- the version at A/17 was enclosed with the
17 claim form but it is described as the "non-confidential
18 litigation funding agreement".

19 THE CHAIRMAN: It has some --

20 MS THOMAS: Scrolling down, one can see it has various
21 black boxes. Sir, I am showing you the version that was
22 provided in correspondence only after that was pressed
23 for.

24 So, as I have already highlighted, we do not have
25 the original LFA, which we understand will have been

1 entered into on a different commercial basis. We do not
2 know what that basis was.

3 THE CHAIRMAN: Okay. Why does that matter?

4 MS THOMAS: Well, it matters because, as you have seen from
5 Riefa, one of the questions we should be asking
6 ourselves is how these -- this LFA and the conclusion
7 that its terms were reasonable and in the interests of
8 the class was entered into and how that conclusion was
9 reached by Professor Rowntree [sic] in consultation --
10 by Mr Rowntree in consultation with his --

11 THE CHAIRMAN: Right, well, we do not really know how it was
12 arrived at. What is wrong with it? Let us cut to the
13 chase.

14 MS THOMAS: Let us do that exactly. Just taking you to the
15 document as we understand it, let us go to {B/82.2/6}.
16 These are some of the definitions you have been shown
17 already. The first one I want to pause on is
18 clause 1.34, which shows you that the funding limit, as
19 at February 2024, was 13,529 --

20 THE CHAIRMAN: Yes, I can read that.

21 MS THOMAS: -- or such other sums as the parties may from
22 time to time agree, including ATE insurance and IPT.

23 So Mr Rowntree, in his first witness statement,
24 addressed this limit at paragraph 40, so this is
25 {A/16/9}. Keep that in number in mind, 13,529,900.

1 So in his witness statement he said, "The funding
2 agreement will give us access of up to 13,977", and he
3 also seems to suggest that that is in addition to
4 adverse costs cover, whereas, as we have just seen from
5 the LFA, the sum included the ATE insurance premium. So
6 this was a wrong statement in Mr Rowntree's first
7 witness statement, obviously a mistaken one. It has
8 never been corrected, including in his second witness
9 statement. We did get a rider in a letter to the
10 tribunal earlier this week, on Tuesday, which purported
11 to set out some updated numbers, but Mr Rowntree has
12 never corrected this mistaken statement.

13 THE CHAIRMAN: Right. We are on the suitability of the
14 litigation agreement at the moment, yes. We now seem to
15 have moved on to Mr Rowntree. Let us -- I would really
16 like your submissions on what you say is inappropriate
17 in this agreement at the moment.

18 MS THOMAS: We are combining --

19 THE CHAIRMAN: Well, let us just focus on -- so far there
20 is -- I have got a sum of 13,529; right?

21 MS THOMAS: I am grateful. So --

22 THE CHAIRMAN: For convenience ...

23 MS THOMAS: -- that will go to a submission which I will
24 take later, which is the failure to keep track of the
25 costs of this case, including the detail of what --

1 THE CHAIRMAN: All right. If we could just press on with
2 the agreement.

3 MS THOMAS: There is a problem arising from this term, which
4 is that that term has been increased. The tribunal --
5 Maitland Walker wrote to the tribunal on Tuesday to say
6 that the funding limit is now 14,529,000. One objection
7 that we have is that we do not have any of the
8 contractual documentation supporting that. It is not --

9 THE CHAIRMAN: Right. Can we look at -- I would really like
10 to hear your submissions on what is wrong with this
11 agreement, as opposed to what is going around --

12 MS THOMAS: Of course. One submission, then, is that the
13 documents are not complete. We do not have them all.
14 That is a transparency problem. The third problem,
15 which I will address you on now, is that it does arise
16 from its terms, and it provides, in my submission,
17 an excessive return to the funder, having regard to the
18 other cost benefit issues in this case.

19 You began to look at this with Mr Went yesterday but
20 I would obviously like to pause on some of the
21 clauses --

22 THE CHAIRMAN: So the one I have got here, this has a lot of
23 redactions. I may be looking at the wrong one. There
24 are two here, are there?

25 MS THOMAS: I anticipate you may be at the bundle A/17 one.

1 THE CHAIRMAN: No, I am in 82 --

2 MS THOMAS: I think there are some redactions for things
3 like addresses and banks -- you know, bank account
4 details.

5 THE CHAIRMAN: This one has more redactions than the other
6 one.

7 Right, okay. All right.

8 MS THOMAS: I will take you to the points I want to take you
9 to, and let me know, sir, if you have a redaction at the
10 relevant point.

11 So we are on the definitions page, which is
12 {B/82.2/4}. We can -- this is Mr Rowntree's witness
13 statement. So there is the definition of "Capital
14 Deployed", which includes, in particular, action costs
15 paid by the funder, just to understand what that means.

16 Over the page, on page {B/82.2/6}, is the effective
17 date of 14 September 2021. That is already three and
18 a half years ago. To locate us in time, the pre-action
19 correspondence began in February 2022 and proceedings
20 were issued in February 2024. Just underneath that is
21 the funder's fee, which we are told is calculated in
22 accordance with clause 9, which I will come to next. We
23 have already seen the funding limit.

24 Over the page, {B/82.2/7}, is the definition of
25 "Recovery", which Mr Went showed to you, but very

1 swiftly. I wanted to pause on it to highlight to you
2 that it shows:

3 "'Recovery' means all and any amounts received by or
4 on behalf of the Claimant and/or Class Members ..."

5 Then it lists out what is encompassed by that,
6 including, in particular:

7 "Any award, settlement or compromise in respect of
8 interest and/or costs."

9 Then over the page, again, {B/82.2/8}, there is
10 a defined term, "Undistributed Damages", so damages that
11 are part of the recovery and that have not been claimed
12 by class members.

13 So clause 9 is the next clause of interest and that
14 is the one that you have looked at with my learned
15 friend, Mr Went. This is where the funder's fee is
16 calculated and therefore what we say gives rise to
17 an excessive return in the circumstances.

18 Then clause 9.3, {B/82.2/14}:

19 "The Claimant shall seek approval ... for the
20 payment from any Recovery of the Claimant's costs, fees
21 and disbursements ..."

22 I will come to that.

23 Then clauses 9.6 and 9.8, maybe we could have them
24 side by side, if that is all right, {B/82.2/14-15}.

25 They give you the figures for the fee that the funder is

1 expecting or hoping to receive in this case. Our
2 skeleton argument attempts to calculate what some of
3 them might add up to. Of course that is already out of
4 date because we have been told that there is an updated
5 funding limit and therefore potentially an even higher
6 capital deployed figure at the end of the day --

7 THE CHAIRMAN: Not a big difference.

8 MS THOMAS: Just to give you the figures, clause 9.6 has
9 a return of 5.5 times capital deployed, after
10 five years, and then a 30% compounding amount --

11 THE CHAIRMAN: Yes, we have looked at it. We are familiar
12 with the figures, yes.

13 MS THOMAS: We have looked at the dates.

14 THE CHAIRMAN: What is wrong with those figures?

15 MS THOMAS: They are extraordinarily high, sir.

16 THE CHAIRMAN: On what basis?

17 MS THOMAS: They -- so there is an exponential -- first of
18 all, there is -- the size of the multiple is extremely
19 high. Second is the exponential --

20 THE CHAIRMAN: High compared to what?

21 MS THOMAS: I do not think there is any evidence from either
22 side before you on that.

23 THE CHAIRMAN: Well, then, I cannot -- how can we possibly
24 form a view?

25 MS THOMAS: I think we --

1 THE CHAIRMAN: It is your submission that they are
2 exceptionally high. Where are you getting that from?
3 Is that finger in the air? It seems a lot to me.

4 MS THOMAS: I would say two things, sir. The first is that
5 it is a high return that is then compounded by the 30%
6 compounding feature. I think the tribunal can take note
7 of the fact that anything which compounds
8 exponentially -- still less something which compounds
9 exponentially --

10 THE CHAIRMAN: Well, they are what they are. I mean, they
11 are putting qualitative -- if you are saying they are
12 out of line with the market or disproportionate to the
13 merits or -- I mean, we are not in a position, at this
14 stage, to take a view on whether these are reasonable or
15 not, are we?

16 MS THOMAS: So there is one point in particular that I would
17 draw your attention to on the terms of the agreement
18 before looking at the circumstances, which is the
19 feature of the multiplication and then the compounding,
20 dating from September 2021. So we are in a position
21 where, because of the length of time taken to --

22 THE CHAIRMAN: So the compounding starts when? Sorry.

23 MS THOMAS: The compounding starts five years
24 from September --

25 THE CHAIRMAN: Just give me the date.

1 MS THOMAS: So September 2026, and I think Mr Went told you
2 yesterday that on their current litigation plan, which
3 I think we are already a couple of months behind on, we
4 are not taking the judgment in this case until
5 March 2028, so we will be well into that exponential
6 compounding period before -- even on a --

7 THE CHAIRMAN: Right. One can do the maths on that and work
8 out -- we can convert it to a -- it says "30%" but one
9 could actually just carry on writing out that column for
10 the --

11 MS THOMAS: It will get higher and higher exponentially,
12 yes, sir. The point is, even leaving aside what you
13 think about the numbers per se, the fact that they do
14 not --

15 THE CHAIRMAN: (overspeaking) what the -- the tribunal is
16 not -- the tribunal could investigate this and it would
17 require proper evidence, and maybe when it -- at the end
18 of these proceedings, if we get that far, there will be
19 proper evidence of whether these are reasonable and
20 proportionate, having regard to the merits, the
21 complexity of the action, the market and what other
22 people were prepared to fund it at, and weighty
23 consideration could be given to all those factors. At
24 the end of it, we might decide that actually this is
25 stonkingly good value or we might decide that this is

1 simply outrageous, but just eyeballing them and putting
2 a finger in the air and going, "It looks a lot to me",
3 with no expertise in how this market works is very
4 difficult.

5 MS THOMAS: I would say two things, sir. I completely
6 understand your position. The first is that, even just
7 looking at the outweigh on its own, the fact that the
8 clock started running two and a half years before the
9 proceedings were launched does have an unfairly
10 compounding effect on the return of --

11 THE CHAIRMAN: But all the same -- (overspeaking) -- it
12 means the sums are higher, but all the same points still
13 bite. Are they -- I mean, what would other funders in
14 the market do; what are the merits of the case. I mean,
15 this has been, I assume, looked at in exquisite detail
16 by the funders and by the lawyers, and we know there was
17 some sort of competitive process --

18 MS THOMAS: Sir, if I may, the point I am making is
19 a slightly different one, which is that the effect of
20 that delay was of course in the hands of Mr Rowntree
21 because he entered into an LFA at a very early point
22 before even any pre-action correspondence had begun and
23 therefore before any costs had even been incurred, and
24 he was the one who dictated the moment when proceedings
25 were launched and therefore -- (overspeaking)

1 THE CHAIRMAN: I am not sure we have any evidence that he
2 was at fault at the time of this litigation, have we?

3 MS THOMAS: Simply that it is a choice that lay on the
4 claimant's side. I will leave that point there, sir.

5 The second thing I would say is that, even if the
6 tribunal concludes that these are purely competitive
7 terms -- and I accept --

8 THE CHAIRMAN: No, no, no, no. We are not -- there is no
9 question of us reaching that conclusion. Neither party
10 have put forward evidence directed to how competitive
11 these return rates are and so we are not forming
12 a view -- we are not in a position to form a view.

13 MS THOMAS: My point is simply that you should take note of
14 the absolute numbers which are high and compare them to
15 what this litigation is seeking to achieve --

16 THE CHAIRMAN: That is about 4,000, which we are going to
17 hear about, and obviously that is very important, yes.

18 MS THOMAS: It is very important when you think about
19 proportionality, but you bear in mind --

20 THE CHAIRMAN: There is the cost of the litigation, of
21 course.

22 MS THOMAS: I think I told you I would give you the updated
23 calculations. Obviously you can get a calculator
24 yourselves, but based on the updated funding limit,
25 5.5 times the new funding limit is almost 82 million.

1 That is --

2 THE CHAIRMAN: Sorry, slow down.

3 MS THOMAS: I am on clause 9.6.

4 THE CHAIRMAN: Yes.

5 MS THOMAS: Under the new funding limit, 5.5 times is almost
6 82 million, and then 30% of the capital deployed is
7 4.5 million. After two years the compounded sum is
8 10.3; after three years, 17 --

9 THE CHAIRMAN: Perhaps you can write those down and --

10 MS THOMAS: If that can be put onto the transcript, but yes.
11 By way of updating that paragraph of our skeleton, we
12 calculate them by reference to the old limit. The
13 completeness figure is 112 for the position under 9.8.

14 THE CHAIRMAN: But the total costs, if we go to 2028,
15 including the funder's fee -- or the funder's fee if we
16 go to 2028 is what?

17 MS THOMAS: What I have to hand are the figures for -- so it
18 is either 82 or 112, depending on whether we are under
19 clause 9.6 or 9.8, and then, if I add two years' worth
20 of compounding to that, which is slightly more than the
21 assumption of March 2028, but it seems that we might be
22 a couple of months behind already, the compounded sum to
23 add to that is 10.3 million, I believe.

24 THE CHAIRMAN: Okay.

25 MS THOMAS: The problem which does arise from the terms of

1 the LFA and which you can see on the face of clause 9
2 arises from clause 9.3. If I may, sir, you yesterday
3 suggested that this is a question about the vires issue
4 and so whether the tribunal has power to distribute
5 damages from the award -- sorry, so whether the tribunal
6 has power to award payment of the funder's fee to the
7 funder prior to the distribution of damages under the
8 award. As you rightly noted, sir, that is a point that
9 is under appeal to the Court of Appeal. That is not
10 a point we take at this stage. We have reserved our
11 position in relation to it. If the Court of Appeal does
12 take a relevant decision, obviously we will be writing
13 to the other side and we may be back before you.

14 But there is a separate issue which is to do with
15 the position of conflict that clause 9.3 places
16 Mr Rowntree in at the end of the day, and the submission
17 is really a short one. Even if it is permissible at the
18 end of the day for a funder's fee to be paid out of
19 undistributed damages, at that hearing the person who is
20 making that argument should not be Mr Rowntree. It
21 should be somebody for the funder who is separately
22 represented and who is able to say to the tribunal,
23 "This is a wonderful LFA, it is so competitive" -- those
24 sorts of points we have just been discussing -- "we
25 ought to get our return out of undistributed damages

1 because of the ..." --

2 THE CHAIRMAN: Right. Why are we -- what is the point of
3 this submission?

4 MS THOMAS: The problem with the terms that Mr Rowntree has
5 entered into is that, instead of the funder being the
6 one to make these arguments at the end of the day, he
7 has placed himself into position where he will be --

8 THE CHAIRMAN: Well, that is a matter that can be dealt with
9 as a matter of directions at that time.

10 MS THOMAS: Well, in my submission --

11 THE CHAIRMAN: Independent people can be appointed to
12 consider this arrangement. It is all within the
13 discretion of the tribunal.

14 MS THOMAS: That is true. The trouble is that Mr Rowntree
15 has entered into an LFA which removes his discretion in
16 that clause 9.3 is expressed in mandatory terms. It
17 says that, {B/82.2/14}:

18 "The Claimant shall seek approval from the Tribunal
19 for the payment from any Recovery of the Claimant's
20 costs, fees and disbursements ..."

21 THE CHAIRMAN: That could be done another way.

22 MS THOMAS: Well, the proposition you have just advanced,
23 sir, that there ought to be somebody separately
24 representing the funder's interests --

25 THE CHAIRMAN: Well, that can be sorted out in due course.

1 Maybe somebody will need to be -- maybe there will need
2 to be separate counsel to -- that the funders --

3 MS THOMAS: In my submission there would have to be, sir,
4 otherwise it would be the PRS -- (overspeaking).

5 THE CHAIRMAN: (overspeaking) But that does not mean that
6 the class representative is unsuitable.

7 MS THOMAS: It means the funding arrangements he has entered
8 into are unsuitable, sir, because of the mandatory
9 language that is contained in clause 9.3, which --

10 THE CHAIRMAN: All right. What is the mandatory language?

11 MS THOMAS: "The Claimant shall seek approval from the
12 Tribunal for the payment from any Recovery of the
13 Claimant's costs, fees and disbursements ..."

14 The issue arises in --

15 THE CHAIRMAN: But why would the funder -- sorry. Maybe
16 I am misunderstanding. If the funder did not have that
17 term in, how would the funder be assured they are going
18 to get anything back? Because the class representative,
19 if he feels like it, might ask for some -- for the
20 funder to be paid, is the funder going to fork out on
21 that basis? The funder says, "You have to go and ask on
22 our behalf. That is the condition of us funding the
23 litigation", and then it is for the tribunal to police
24 that, insofar as it is able. How can it work if that
25 clause was not there? Am I misunderstanding?

1 MS THOMAS: Well, as it stands, it mandates Mr Rowntree to
2 be the one who makes those arguments, so --

3 THE CHAIRMAN: Right. But nobody else has standing, do
4 they? (Pause)

5 MS THOMAS: I am being told in Riefa it was contemplated
6 that the funder would make its own application, but
7 obviously -- yes, by the tribunal that was put forward.
8 It is obviously also in the Merricks settlement that the
9 funder has been able to make separate representations.

10 THE CHAIRMAN: Well, they may be able to make separate
11 representations. That is a different matter. But --
12 the funder does not have standing in the case, so the
13 funder cannot just, at the end of the proceedings, stand
14 up and say, "I would like an order for the payment of
15 costs", can they?

16 MS THOMAS: Well, the position might be, sir, that what is
17 needed is an amended version of this clause.

18 THE CHAIRMAN: Why does it need to be amended? I do not
19 understand.

20 MS THOMAS: Because at the moment it says that Mr Rowntree
21 is the one who has to seek approval from the tribunal
22 and in particular --

23 THE CHAIRMAN: Mr Rowntree -- there is no one else who --
24 there are only two parties to this action.

25 MS THOMAS: There is a further issue created by this clause,

1 which is that Mr Rowntree says that it gives him
2 a discretion to choose between whether it is distributed
3 or undistributed damages, and that actually places him,
4 if that is right, into quite a complicated position.

5 THE CHAIRMAN: Where does it say there is a -- right.

6 MS THOMAS: This is Mr Rowntree's own case.

7 THE CHAIRMAN: Okay. Well, the law is going to be clarified
8 on this, is it not? The tribunal, I think, will be in
9 the driving seat by the time we get to this stage,
10 I think.

11 MS THOMAS: I accept that --

12 THE CHAIRMAN: I do not think that anything complex really
13 arises. Is there anything in the case law that says it
14 is not appropriate, this term?

15 MS THOMAS: It is obviously the question of vires and appeal
16 to the Court of Appeal, and this conflicts point was
17 also taken in *Riefa*. So if I may say, Mr Rowntree's
18 case on this clause is that the LFA leaves open the
19 possibility of the PCR requesting the tribunal to order
20 the funder's return be paid pre-distribution, so I think
21 his position is, "Yes, I have got to make the
22 application, but I can decide at that point whether it
23 is pre- or post-distribution". It seems to me that puts
24 him in an impossible position because if the funder is
25 saying to him, "I would like my damages to be paid out

1 of the award pre-distribution", because it is said:
2 well, if the damages are paid out by an account credit
3 and that is what I need(?), Mr Rowntree at that point
4 will say, "Well, my case is that I have a discretion how
5 to operate this clause".

6 THE CHAIRMAN: Well, I think this is all going to be looked
7 at by the Court of Appeal very soon, because this was
8 the same as the -- I have read the judgment in that case
9 and it is the same structure. So the Court of Appeal
10 will look at that and it may well be wholly
11 inappropriate and then it is all back to square one.

12 MS THOMAS: I accept the Court of Appeal judgment will be
13 informative, so it may be that what we should do is come
14 back if we perceive there still to be a problem --

15 THE CHAIRMAN: (Overspeaking) coming back, if there is
16 a reversal of the -- I mean, the Court of Appeal --
17 there may be a choice of -- if the Court of Appeal say
18 it should not come out of an award of damages, we can
19 put a line through one of those and then the class
20 representative is not making a choice.

21 MS THOMAS: What will still remain open, though, is the
22 point that I am trying to persuade you of, sir, which is
23 that, even if there is vires on the part of the tribunal
24 to make a payment to the funder out of undistributed
25 damages, it does not follow that Mr Rowntree's position

1 is a comfortable one from the position of conflict
2 because he is the one who will be having to say to the
3 tribunal, "Not only am I asking you to take the money
4 out of the class ..." --

5 THE CHAIRMAN: If he stands up and says, "Look, we have got
6 a funding agreement. Under the terms of the funding
7 agreement, I am requesting the funder to be paid", and
8 then no doubt a whole bunch of other lawyers will
9 come in and want to intervene, the funder will want to
10 intervene. There may be an amicus there on behalf of
11 the class. All sorts of things will happen.

12 MS THOMAS: The specific position Mr Rowntree has taken is
13 that he has a discretion with this clause. We do not
14 understand how --

15 THE CHAIRMAN: We are now going in a circle. You have just
16 said that is going to be resolved by -- may well be
17 resolved by the Court of Appeal --

18 MS THOMAS: I cannot (?) accept that, sir, because the
19 Court of Appeal -- with respect, because the
20 Court of Appeal is addressing the issue of vires. I do
21 accept that the Court of Appeal's decision may be
22 informative on these conflicts points, but it is
23 a different issue that the Court of Appeal is
24 considering.

25 THE CHAIRMAN: If the Court of Appeal says there is not

1 power to have these sorts of clauses, then there will be
2 a force of one.

3 MS THOMAS: (overspeaking) but if the Court of Appeal says
4 there is a power to have such clauses, it will not
5 answer the question whether --

6 THE CHAIRMAN: Of course it will not. If it says it is all
7 right, it is all right, yes.

8 I know -- I have heard your submissions.

9 MS THOMAS: I am grateful for --

10 THE CHAIRMAN: You are facing an uphill battle.

11 MS THOMAS: I appreciate that, sir. Just for complete
12 clarity and just so that the point remains open to us,
13 in light of whatever the Court of Appeal says, we do
14 think that there is a separate issue of conflict which
15 is -- (overspeaking).

16 THE CHAIRMAN: I know. You have made that submission and we
17 had a ...

18 What else?

19 MS THOMAS: The next problem with the LFA I would like to
20 draw your attention to is also one that you discussed
21 with Mr Went. It is clause 16.4. It is at page 22,
22 {B/82.2/22}. This is the issue about termination. You
23 will remember that clause 16.4 says that if the
24 agreement is terminated pursuant to clause 16.1 or 16.2,
25 the funder does not have to pay costs anymore but it

1 retains its right to be paid its full funder's fee in
2 the amounts and on the basis that we have just been
3 discussing when we were looking at clause 9, and, of
4 course, clause 16.4 survives termination otherwise it
5 would not have any effect.

6 You discussed with Mr Went yesterday clauses 16.1
7 and 16.2. So the clause we have just been looking at
8 is, in my submission, a lopsided provision. It entitles
9 the funder to its full fee, not merely, for example,
10 a return of the costs it has put in to date, and the
11 situation in which it arises are both the funder's
12 fault, as it were.

13 So 16.1, if the funder considers that the merits
14 have changed, you pointed out yesterday, sir, that that
15 clause in itself is lopsided in various respects, in
16 that it does not make provision for the advice to be
17 made available and it makes it difficult for Mr Rowntree
18 to discuss or persuade the funder of its position
19 otherwise.

20 16.2 expressly provides that those quite lopsided
21 consequences following --

22 THE CHAIRMAN: I thought this was going to be amended.

23 MS THOMAS: I am not sure it was accepted expressly, sir.

24 THE CHAIRMAN: Well, I think it was.

25 MS THOMAS: All right. We will look forward to that letter.

1 THE CHAIRMAN: That was an amend amendment that --

2 MS THOMAS: I am grateful. 16.2, I say, is also problematic
3 because there is quite a lot of (inaudible) arise from
4 breach by the funder, and it is said against me, "Oh,
5 this is fine because clause 16.2 does not have a
6 materiality limitation and so it is commercially
7 reasonable because, if the funder breaches even for
8 a minor reason, Mr Rowntree has the ability to terminate
9 straightaway", but that is an argument for imposing
10 a materiality requirement before clause 16.4 can bite.
11 It is not an argument for allowing those terminating
12 consequences to apply even in cases of material breach,
13 where Mr Rowntree would otherwise conclude in the best
14 interests of the class that he needs to find a different
15 funder.

16 In addition, you have already my submission that,
17 even in a case of material breach -- of long funder(?)
18 breach, sorry -- the termination consequences of
19 clause 16.4 are far too lopsided because they entitle
20 the funder to its full fee, even where it has stopped
21 funding the action partway through and even where it is
22 in breach. So I do not think that the answers that
23 Mr Rowntree has given are good ones to explain why those
24 termination provisions are commercially reasonable.

25 (Pause)

1 Sorry, sir. I anticipated your consideration of
2 clause 16.2. I think you have my submission on it. So
3 the lack of materiality is -- it negates(?) as a point,
4 but it is actually a further problem, really. It is
5 something that could be solved by amending the clause
6 and the consequences of 16.4 themselves are
7 disproportionate and need amending in any event. So
8 that is the LFA.

9 The next document I would like to take you to is the
10 ATE policy, and then I have one more submission which
11 I tried to start on, but --

12 THE CHAIRMAN: Where is the ATE policy?

13 MS THOMAS: The ATE policy I think we only have a redacted
14 version of, so that is in your original bundle,
15 bundle A, tab 19, page 2, {A/19/2}. (Pause)

16 Yes.

17 THE CHAIRMAN: Yes.

18 MS THOMAS: A short point has arisen on this in
19 correspondence, so it is not addressed in either of our
20 skeleton arguments.

21 THE CHAIRMAN: Right.

22 MS THOMAS: The issue is this -- I will give you the
23 references to the letters, and you can let me know if --

24 THE CHAIRMAN: Tell me what the issue is.

25 MS THOMAS: So in correspondence Macfarlanes for PRS asked

1 Maitland Walker for some detail about the basis on which
2 the premium is calculated. You can see already that
3 this is a redacted ATE policy so we do not have the
4 detail of the premium.

5 THE CHAIRMAN: Why does the premium concern you?

6 MS THOMAS: So the point -- in fact, maybe I should show you
7 the letter. It is at --

8 THE CHAIRMAN: Just tell me what the point is first.

9 MS THOMAS: It is to understand -- because it appeared that
10 Mr Rowntree had agreed to assume personal liability to
11 pay the ATE premium without limitation, and so
12 Macfarlanes was trying to understand if there was
13 a limitation on the ATE policy, and --

14 THE CHAIRMAN: The premium has been made, as far as you are
15 concerned?

16 MS THOMAS: There is a provision -- as I understand it, it
17 is redacted -- as I understand it, there is a contingent
18 element of the premium which will be payable only on
19 success. The reason this matters is that the question
20 of whether CAT's ATE policies infringe PACCAR is a live
21 one which is also coming before the Court of Appeal
22 quite shortly. So the position at first instance is
23 that it has currently been held that they do not affect
24 PACCAR, but the Court of Appeal, I believe, is going to
25 list the appeals from those cases in April or May. So

1 Macfarlanes obviously want to understand if there was
2 a risk that the ATE policy might not be enforceable
3 because of that problem. So Maitland Walker replied to
4 Macfarlanes' concern on 17 January. My ultimate
5 submission on this is going to be, by the way, sir --
6 (Laughs) you are wondering what it is going to be --
7 that we should hold the ring and not make any changes
8 until we know what the Court of Appeal is going to say,
9 but I want to --

10 THE CHAIRMAN: That seems eminently sensible. If it is not
11 in your skeletons, do I need to engage with this?

12 MS THOMAS: So the reason is that an endorsement to the
13 ATE policy has been proposed. As I understand it, the
14 original answer is, "No, there is not a cap", but now
15 that we have realised this problem, we actually would
16 quite like there to be a cap because we do not want
17 Mr Rowntree to be exposed like this, "Here is an
18 endorsement to the policy which implements a cap".
19 I will be told if this is wrong. We --

20 THE CHAIRMAN: Both of these -- both the litigation funding
21 agreement and the ATE policy have got to be approved
22 subject to further clarification by the Court of Appeal.
23 Is that not -- and you know, we are not going to say,
24 "Well, we do not care what the Court of Appeal says, it
25 is certified to the end". I mean, that would be

1 ridiculous.

2 MS THOMAS: I think my submission then will be that you have
3 the point. The endorsement should not be entered into.
4 We should revisit the matter after the Court of Appeal
5 has confirmed the position.

6 THE CHAIRMAN: Is there any objection to that point? Sorry,
7 Mr Robertson?

8 MR ROBERTSON: No.

9 MS THOMAS: I am grateful. In fact, given the timelines
10 involved, it is not impossible that we will stress it(?)
11 at the consequential, following this judgment, so I am
12 glad you have confirmed that.

13 For completeness, there are two other outstanding
14 issues in correspondence where I think we are agreed on
15 the substance and we say the LFA should be clarified to
16 reflect what we understand the substance to be. So
17 I hope that can all be resolved without troubling you,
18 sir. I am not hearing a jumping up to confirm but we
19 will obviously revert in correspondence.

20 The final point, which is the one that I sought to
21 start with, is -- concerns the approach of the costs in
22 this case generally. You heard yesterday that there was
23 quite a material inaccuracy, it seems, in the updated
24 costs budget that was filed on Tuesday. An updated one
25 was promised that removed that £450,000 error, if you

1 remember, sir, that I enquired about.

2 THE CHAIRMAN: Yes.

3 MS THOMAS: I do not believe we have received an updated

4 budget yet and so I do not really understand what those

5 other disbursements were, why -- where they were going

6 to come in. But I would invite you, as part of the cost

7 benefit issue, to look at the revised cost budget

8 whenever it does come in and, in particular, to review

9 whatever the final number is for the pre-CPO stoppage --

10 THE CHAIRMAN: Where is it? Why do you not have it?

11 MS THOMAS: Well --

12 MR ROBERTSON: We do actually have copies now which we can

13 circulate --

14 THE CHAIRMAN: I think that would be a good idea. We can

15 just knock this on the head.

16 MS THOMAS: While that is happening, if I could ask the

17 operator to call up the original litigation budget,

18 which is {A/18.2/1}. I think --

19 THE CHAIRMAN: Where is it in the bundles?

20 MS THOMAS: Bundle A, tab 18.2, {A/18.2/1}. (Pause)

21 THE CHAIRMAN: That is not what I was looking at yesterday.

22 The one in the bundle was not the one I was looking at

23 yesterday. (Pause)

24 MR WENT: It was there. I -- this was handed to me recently

25 and I have just checked it. It looks as though the

1 wrong version has been printed out.

2 THE CHAIRMAN: Here?

3 MR WENT: Yes -- oh sorry, it is not. I am going ahead.

4 Okay, no. Forgive me. So it is the figure on the row,

5 "Other disbursements".

6 THE CHAIRMAN: For the claim form and the CPO, the first

7 column?

8 MR WENT: Exactly, and so the --

9 THE CHAIRMAN: "Other disbursements".

10 MR WENT: There is a sum still there but it should not have

11 been -- it should have been allocated throughout the

12 case, as opposed to just --

13 THE CHAIRMAN: I see. So it is entered onto the --

14 MR WENT: Yes.

15 MS THOMAS: The point I have on this is a short one. It

16 arises in the context of the cost benefit points that

17 you have been hearing about, which is that both the

18 numbers involved are high -- obviously a matter directly

19 relevant to the cost benefit -- but also the increase in

20 the numbers since the proceedings were issued is

21 somewhat remarkable and the control of the increase

22 seems to be lacking and the --

23 THE CHAIRMAN: So -- right, yes. So it has gone up to 15.6

24 on the --

25 MS THOMAS: Yes. I am obviously not, in the time available,

1 able to double-check all of the figures, but I am
2 glancing backwards and forwards and it looks to me that
3 the costs for the later phases of the proceedings have
4 not been adjusted or adjusted significantly. The cost
5 of the trial, for example, I can see is estimated to be
6 the same. The costs for experts, the same.

7 THE CHAIRMAN: (overspeaking). Right, so the costs have
8 been updated, not unusually.

9 MS THOMAS: They have, not unusually. You have the original
10 litigation budget on your screen in front of you, so you
11 will be able to do the same exercise backwards and
12 forwards.

13 THE CHAIRMAN: What is your point on this?

14 MS THOMAS: That there has been a jump in the pre-CPO phase.

15 THE CHAIRMAN: Yes, I understand that, so my question is to
16 say, well, what --

17 MS THOMAS: Yes, it is twofold. One is that the size of
18 that jump is pretty considerable. We have gone from
19 1.8 million to 2.5 million, if I read it correctly, and
20 I am making sure I am matching up -- no, I beg your
21 pardon, I think it is actually -- hang on.

22 THE CHAIRMAN: Right, but I still do not quite -- you say it
23 has gone up. Are you saying these are -- I am not
24 making a costs order today.

25 MS THOMAS: You are not, sir (overspeaking).

1 THE CHAIRMAN: It has gone up, so ...

2 MS THOMAS: It is -- when you consider the suitability of
3 the funding arrangements overall, you should have regard
4 to the fact that mistakes have been made, as we have
5 just seen, and also Mr Rowntree's first witness
6 statement suggests a lack of possible --

7 THE CHAIRMAN: But this is not necessarily -- I understand
8 your point on the figures being wrong, but this is not
9 necessarily mistakes being made. This is re-estimating
10 possible re-assessing costs.

11 MS THOMAS: So this is why I am focusing on the pre-CPO
12 stage. This is not re-estimating costs. These should
13 be incurred costs. We were not actually told where the
14 incurred costs are --

15 THE CHAIRMAN: I do not know how your costs compare to this,
16 for example.

17 MS THOMAS: The point I am making is that the jump in costs
18 is significant. That is --

19 THE CHAIRMAN: Okay, but so you are saying, because there
20 has been a jump in costs in the pre-certification stage,
21 that is a reason for not certifying these proceedings?

22 MS THOMAS: It is not a complete bar, of course not, sir.
23 It is a point that I suggest you weigh in the balance
24 when you think about cost benefit analysis and the
25 proceedings to be run (overspeaking).

1 THE CHAIRMAN: (Overspeaking) But the cost benefit point --
2 I thought your more powerful point was, "Look, there is
3 potentially 100 million of costs and it is very
4 difficult to see how the damages would be ..." That is
5 your submission. I am not saying that -- so why are we
6 quibbling that something has gone up a few hundred
7 thousand? It seems to be immaterial.

8 MS THOMAS: I will not take too much time on this, but the
9 point is, if we have had such a significant jump in the
10 pre-CPO phase, bearing in mind that the litigation
11 budget was filed when the claim form had(?) been
12 prepared, one can assume that the subsequent stages --

13 THE CHAIRMAN: Well, maybe.

14 MS THOMAS: (Overspeaking) -- are likely to go up, and they
15 have not been adjusted at all to reflect what apparently
16 is an increase in costs in the way that these
17 proceedings have been pursued. So I would invite you to
18 throw that into the mix, as it were, when thinking about
19 what is the number going to be at the end of the day
20 that we are actually going to be multiplying when we get
21 to those big multipliers because we have already seen
22 a couple of increases in the funding limit. It will
23 presumably be increased again if we have further
24 overspends. So the submission is simply: we have
25 evidence of overspend, that is likely to happen and you

1 should take that into account when you talk about cost
2 benefit.

3 Sir, that is everything I have to say on funding,
4 unless I can assist you further.

5 THE CHAIRMAN: No.

6 MS THOMAS: I am grateful.

7 The final point is exclusions, which is a short one
8 but an important one that PRS is concerned about. It is
9 obviously the only one that arises if the tribunal is
10 minded to grant the CPO. You discussed it briefly with
11 Mr Went yesterday. So the original class definition
12 from the claim form is at {A/1/29}.

13 You can see that --

14 THE CHAIRMAN: Hold on, sir.

15 MS THOMAS: Sorry, sir. (Pause)

16 {A/1/29}, this is paragraph 101 of the claim form.

17 So it is a fairly standard form exclusion really:

18 "The officers, directors, and employees of the
19 Proposed Defendants, their subsidiaries ...", and so on.

20 So PRS was trying to understand, in correspondence,
21 the point in time at which that exclusion bit and
22 Mr Rowntree explained his thinking in the letter at
23 {B/74/1}.

24 I think I can make those submissions on --

25 THE CHAIRMAN: Just tell me what the point is.

1 MS THOMAS: So this letter raised two issues. One is that
2 Mr Rowntree has said, I think, that the question should
3 be whether these individuals meet that definition as at
4 the date of the CPO. PRS pointed out that that was
5 wrong because it has to be at the date of the claim form
6 for the reasons we have been discussing, and that was
7 accepted by Mr Rowntree, but PRS said, "We are quite
8 concerned about the position going forward and going
9 backwards", because the point of this exclusion, which
10 is something that Mr Rowntree accepts in this letter
11 that I am about to show you, is to ensure that no
12 conflicts of interest arise on behalf of PRS' own
13 officers, directors and employees and the opt-out class
14 action that has been pursued in their name, and --

15 THE CHAIRMAN: Sorry, just explain to me what you want. You
16 want more people in or fewer people in?

17 MS THOMAS: So I believe -- so there are two issues between
18 us now. We want more people in because we want, as
19 it -- we want more people excluded, more people
20 excluded.

21 THE CHAIRMAN: So who do you want excluded?

22 MS THOMAS: We want excluded officers, directors and
23 employees, going forward after the date of the claim
24 form but also historically prior to the date of the
25 claim form.

1 THE CHAIRMAN: So the same people that you wanted prior to
2 the date of the claim form?

3 MS THOMAS: Exactly, yes, so persons who might have --

4 THE CHAIRMAN: Who joined during the relevant period?

5 MS THOMAS: I do not think we have confined the definition
6 to "during the relevant period". You saw --

7 THE CHAIRMAN: Sorry, say that again. I did not hear that.

8 MS THOMAS: We have not confined it that way, no, because
9 this issue of so-called black box royalties has been
10 under discussion for some years; Mr Robertson
11 particularly I think in 2004.

12 THE CHAIRMAN: So why does it matter if someone is included
13 in the class who is, let us say, a director or on the
14 board -- yes, directors, right, before the claim was
15 issued? Why does it matter?

16 MS THOMAS: So the concern which PRS has, which is a genuine
17 one, is that such persons, directors, will have been
18 members of PRS' board, members' council, they will have
19 been involved --

20 THE CHAIRMAN: Yes, I get that, so why is that a problem?

21 MS THOMAS: They will have been involved in discussions
22 about distribution policies. They may even have thought
23 about this issue in particular. In that capacity they
24 would have had access to confidential and potentially
25 privileged advice in relation to the approach that PRS

1 takes to such matters. It is not fair either to PRS,
2 who is naturally concerned to protect its interests in
3 respect of those points, or to those individuals, to
4 place them in that position of conflict. As a matter of
5 proportionality we do not really understand why the
6 insistence, as it were, is being taken against us. You
7 heard yesterday the number of persons that --

8 THE CHAIRMAN: They are going to be in the class. They are
9 not involved in conducting proceedings.

10 MS THOMAS: That is correct, but PRS' interests in
11 protecting its confidential information is still
12 present --

13 THE CHAIRMAN: Why is your confidential information
14 imperilled just because they are in the class?

15 MS THOMAS: So the individual persons that are placed in
16 a position where a claim is being advanced which is
17 supposed to be in their interests, supposed to get them
18 a load of money, as you have heard from my learned
19 friends, and they may possess confidential or privileged
20 information that could advance that claim, in my
21 submission, it is not proportionate or necessary for
22 those individuals to be placed in that conflict of
23 interest nor for PRS to be placed in a position where it
24 is concerned about that information being shared.

25 Really, the reason I wanted to show you this letter

1 and paragraph 3 of it, where Mr Rowntree highlights at
2 the bottom that the reason for their exclusion was the
3 potential for a conflict of interest, is that
4 Mr Rowntree accepts this point. He realises --

5 THE CHAIRMAN: Just let me understand the issue, rather than
6 the "He says, she says". Right, so you say they -- if
7 they are in the class, then they may have confidential
8 information?

9 MS THOMAS: So this will be people in the class --

10 THE CHAIRMAN: They will be put in a difficult position.
11 How does the difficult position arise?

12 MS THOMAS: They will be in a position where they possess
13 confidential and potentially privileged information that
14 they hold from their days working for PRS as an officer
15 or a director and their duties in that capacity and they
16 have been opted in to an opt-out class which seeks to
17 advance their interests by saying, "You are entitled to
18 money because we say that what PRS was doing in relation
19 to these policies was unlawful", and those individuals
20 are in a position where they hold conflict information
21 that may be relevant to that claim.

22 THE CHAIRMAN: Right, right, but they are not going to be --
23 I mean, they are not involved in the conduct of the
24 proceedings.

25 MS THOMAS: In my submission why should the risk be risked?

1 THE CHAIRMAN: I am just trying to understand the risk.

2 MS THOMAS: The risk is that they are in the class. They
3 have a conflict of interest. Mr Rowntree has accepted
4 the potential for conflict of interest. We have
5 discussed earlier the rules about conflicts in the class
6 and why they should be avoided and, in particular, why
7 they cannot be waived in the case.

8 THE CHAIRMAN: That is not -- okay.

9 MS THOMAS: To that extent, there is a conflict arising from
10 that issue, however small. PRS is entitled to insist on
11 protection of its interests and there is no sense in
12 placing those individuals in that position either, given
13 the small number of persons involved in the --

14 THE CHAIRMAN: Well, is it a small number? If it is going
15 back -- going forwards and backwards as far as you like,
16 is it a small number?

17 MS THOMAS: I do not have instructions on that, but I would
18 submit that you can see on any view it is a small number
19 in the context of a claim of 160,000 in size.

20 THE CHAIRMAN: How many employees do you have?

21 MS THOMAS: That I would have to double-check. I think you
22 heard the point that on the board it is five to ten
23 people each year, so that could be multiplied,
24 I suppose, by the number of years and that gives you
25 a sense of the number involved.

1 THE CHAIRMAN: But it is not just board members you are
2 seeking to exclude, is it? It is officers, employees
3 on -- employees of subsidiaries. I mean, it may be that
4 it is a small number. I just do not know.

5 MS THOMAS: In any event, that explains our -- the confusion
6 as to why the point has been taken and why a sensible
7 exclusion is not being offered.

8 THE CHAIRMAN: Okay.

9 MS THOMAS: In any event, the conflict point arises in
10 respect of the number, so I will obviously come back to
11 you if I can get some instructions on the number of
12 employees that PRS has. But I make the submission in
13 any event, sir, that the problem arises.

14 THE CHAIRMAN: There is no -- is there any learning on the
15 exclusions that anyone with a potential conflict should
16 be excluded from the --

17 MS THOMAS: Well, we looked earlier, sir, obviously in
18 a different context, at the *Trucks* case, and I drew your
19 attention --

20 THE CHAIRMAN: It is not quite the same thing, is it?

21 MS THOMAS: It is not, no, but what you did have is the
22 learning in this collective proceedings context on the
23 issue of actual and potential conflicts.

24 THE CHAIRMAN: But this is not a conflict within the class.

25 MS THOMAS: I think it is a conflict in any event, though,

1 sir. I do not think --

2 THE CHAIRMAN: You are saying -- I do not know -- you are
3 saying they may be privy to some confidential
4 information and there is a conflict between the --
5 a conflict between there being a claim -- I mean, why is
6 it any different to any employee suing their employer?

7 MS THOMAS: I think --

8 THE CHAIRMAN: Employees sue their employers all the time
9 and they are privy to confidential information and -- it
10 does not seem to follow, just because someone is suing
11 their employer or the company they have had
12 a relationship with, that that should be forbidden
13 because of potential conflicts.

14 MS THOMAS: I do not think that is an analogous situation,
15 sir, in particular because the conflict there arises
16 on -- I am thinking on my feet so I may not articulate
17 it well -- but the conflict arises on an individual
18 level and it is therefore possible and usually obvious
19 that, in order for the claim to be advanced, unless
20 there are --

21 THE CHAIRMAN: Well, I may be head of HR and I have been
22 involved in taking legal advice and putting in all the
23 employment regulations, I then get sacked and take my
24 employer to an employment tribunal, so that is a part of
25 the issue, but it is not one on one. You are saying,

1 well, I would not be allowed to do that because there is
2 a conflict?

3 MS THOMAS: I am reflecting on how to articulate it, sir.

4 Excuse me. (Pause)

5 Yes, yes, so although I have drawn your attention to
6 this issue of conflict of interest which was accepted
7 by --

8 THE CHAIRMAN: But --

9 MS THOMAS: I do not want to make this a hard-edged legal
10 conflict point. We just do not really understand why
11 this quite standard exclusion is being accepted.

12 THE CHAIRMAN: It would be perfectly open to the class
13 representative to call one of your former directors and
14 say -- well, you could not talk about
15 privileged information, but say, "Look, this is why
16 we were doing this. We were doing this because we
17 were putting ..." -- I am not for a moment suggesting
18 that this is the case. This is purely hypothetical --
19 but, "A certain publisher was putting huge pressure on
20 us to do this and they have a lot of clout and so that
21 is why we have revisited it and on balance we decided
22 that it was okay", but, you know, they could call
23 a witness to give evidence about that.

24 MS THOMAS: I do not think I am in any position to accept
25 that, sir --

1 THE CHAIRMAN: Why could they not?

2 MS THOMAS: That individual would have -- they may well have
3 been a director in their fiduciary duties. They will
4 have terms in their employment contracts. I do not
5 know, but I do not think we can --

6 THE CHAIRMAN: But you can call X employees to give evidence
7 against you. I am not sure why the mere fact that --
8 that would seem a far more direct conflict -- just
9 trying to test your proposition -- that would be a far
10 more direct conflict --

11 MS THOMAS: (overspeaking) concerned.

12 THE CHAIRMAN: -- and you are trying to exclude all
13 employees, and the fact that they are just in the
14 class -- I mean, they are not doing anything. They are
15 just sitting there and potentially going to get their X
16 pounds --

17 MR PICKFORD: Yes. It depends, of course, in part on the
18 nature of the information. So I have highlighted that
19 one thing we are concerned about it is privilege.

20 THE CHAIRMAN: So I understand what is -- so what is agreed,
21 it is from the date of the claim form --

22 MS THOMAS: From the date of the claim form, the class
23 representative has rowed -- the proposed class
24 representative has rowed back on his position, and
25 I showed you the original definition, which included --

1 THE CHAIRMAN: Well, just tell me what the position is as of
2 now.

3 MS THOMAS: So I think in argument yesterday you indicated
4 that the order really ought to include officers and
5 directors going forward, but I do not think that that
6 has yet been accepted. The position they are currently
7 proposing is that it is employees as at the time of the
8 claim form and also going forward. So not officers and
9 directors, which has the rather remarkable proposition
10 that Mr Rowntree is left in the position of saying,
11 "Songwriter members of PRS' own members' council will
12 have to step out of the room while these proceedings are
13 being discussed. I will not have the ability to
14 influence PRS' decision-making", which is
15 counter-productive --

16 THE CHAIRMAN: Sorry, I am not following that at all. Just
17 slow right down on that.

18 MS THOMAS: So this is --

19 THE CHAIRMAN: I thought this was about who is in the class.
20 Now, who is stepping out of the room?

21 MS THOMAS: This is the room of the members' council. So
22 because Mr Rowntree wants officers and directors,
23 including current and future officers and directors, to
24 be included in his --

25 THE CHAIRMAN: I see. You say if this comes before the

1 board, then --

2 MS THOMAS: Well, that is his solution. He says, "Do not
3 worry ..." --

4 THE CHAIRMAN: No, I am saying your submission is that, if
5 they are in the class and then it comes before the
6 board, that is a bit awkward. They are going to be in
7 a conflicted position. That, I understand. So that is
8 current directors.

9 MS THOMAS: Indeed. Mr Rowntree recognises that, but his
10 solution is not to implement a sensible exclusion but to
11 say they can step outside and therefore only the
12 publisher members will be the ones conducting the
13 litigation or the decisions .

14 THE CHAIRMAN: So I can see there is some force in your
15 position that let us say officers and directors from the
16 date of the claim form, going forward, should not be in
17 the class.

18 MS THOMAS: Yes. In respect of the position going back --
19 this is a genuine concern on the part of PRS --
20 I wondered, in light of the indications -- this is
21 a point of proportionality. It is an exclusion --
22 a sensible exclusion to make sure that the class is
23 workable. There is also exclusion on the part of
24 tribunal members and so on, which I think is quite
25 standard, just in case you have any secret published

1 works that might make you a member of the class --

2 THE CHAIRMAN: Well, I think if we see in the statute ...

3 MS THOMAS: Yes. But as a matter of proportionality and

4 workability of the class, we submit this is

5 a proportionate exclusion. I hear what you say about

6 the number of employees and I would have to take

7 instructions --

8 THE CHAIRMAN: Well, I do not -- at the moment, I do not see

9 the conflict of employees, but we will --

10 MS THOMAS: I wonder if an exclusion retrospectively for

11 officers and directors and in particular previous

12 members on the members' council who are particularly

13 likely to have seen privileged information might be

14 a sensible middle ground. I would have to take

15 instructions on that.

16 THE CHAIRMAN: Well, that is -- okay. Let us see what the

17 claimants say.

18 MS THOMAS: All right. That concludes my submissions, sir,

19 and that is the sixth point that we have.

20 THE CHAIRMAN: Thank you.

21 Further submissions by MR PICKFORD

22 MR PICKFORD: Sir, I said I would come back on some points

23 after the short adjournment. I think there are three

24 things on the topic list.

25 What I would suggest is that -- we have a letter

1 here, finally. It has only literally just -- we have
2 just been looking at it for a very short time, certainly
3 for my learned friend, and it will take a little bit of
4 time for the tribunal to read. Can I suggest that we
5 take a five-minute adjournment now and it will give --

6 THE CHAIRMAN: We have got nowhere to sit and read it so we
7 will stay here and sit quietly for five minutes while we
8 read it.

9 MR PICKFORD: Would it be okay if I stepped outside the
10 room?

11 THE CHAIRMAN: Yes, it will.

12 (3.07 pm)

13 (A short pause)

14 (3.13 pm)

15 THE CHAIRMAN: Right. So just talk me through this table --
16 sorry, I have read it. My head is spinning, perhaps on
17 several occasions during this case.

18 MR PICKFORD: I will do my best.

19 THE CHAIRMAN: So the figures in the table are the --

20 MR PICKFORD: Yes, so the figures in the table are
21 an estimate of black box royalties for respectively
22 MTOL, taking the top row, and secondly TV and radio,
23 taking them separately. Those figures have been derived
24 in some different ways, so the --

25 THE CHAIRMAN: Yes. For the moment let us just concentrate

1 on the MTOL, so the easiest one to understand. Why is
2 there such a discrepancy between the writer and the
3 publisher?

4 MR PICKFORD: Exactly, because of the way -- because of the
5 way that the ICE system works, there is only
6 a relatively smaller amount of publishers' royalties --

7 THE CHAIRMAN: I see.

8 MR PICKFORD: -- that PRS has anything to do with --

9 THE CHAIRMAN: Yes, yes, yes. Okay, yes. I understand
10 that. Yes, yes.

11 MR PICKFORD: -- so --

12 THE CHAIRMAN: But that does not apply to TV and radio,
13 which --

14 MR PICKFORD: It does not apply. There is no such
15 equivalent. So the TV and the radio is the equivalent
16 of -- the kind of clean example. Yesterday, Mr Kelly,
17 and indeed everyone, was trying to get at, "What is the
18 nearest way you would actually expect to see 50/50 if
19 what was being said, that it was a 50/50 distribution?".
20 That one can see in the TV and radio approach because
21 there is no --

22 THE CHAIRMAN: Yes, I understand. So you say the maximum
23 possible claim is that maximum -- is the figure for the
24 publishers?

25 MR PICKFORD: The maximum possible claim -- yes, exactly --

1 is the figure of -- so this is over the claim period,
2 but this is only for just under 50% of our royalties
3 because that is all we were able to do in the time.

4 THE CHAIRMAN: So the very, very top end is effectively
5 40 million-ish, even assuming that everything that the
6 publishers have received should have gone to the
7 writers, which is not the case. You are --

8 MR PICKFORD: Exactly, and that is if you take this
9 20 million and you double it. Obviously we have not --

10 THE CHAIRMAN: Yes, I appreciate that.

11 MR PICKFORD: -- given you the figures because we cannot.
12 That is the best we can do.

13 THE CHAIRMAN: Mr Robertson will obviously not have had
14 an opportunity to consider this properly.

15 MR ROBERTSON: That is right. We have had five minutes
16 outside court.

17 THE CHAIRMAN: Yes, but on its face it is a serious
18 challenge to the proportionality of the costs.

19 MR ROBERTSON: Yes.

20 THE CHAIRMAN: I am not expecting you to deal with this
21 today, which means we will probably have to come back
22 and consider this point, proportionality, in the light
23 of further evidence. So is that your position or ...?

24 MR ROBERTSON: That seems a very sensible way of approaching
25 it, for us to put in reply submissions and any

1 supporting evidence --

2 THE CHAIRMAN: Well, this needs to go -- Mr Pickford,

3 I understand and I am extremely grateful this has been

4 done so rapidly, but it needs to be checked and --

5 MR PICKFORD: Absolutely.

6 THE CHAIRMAN: I will not criticise anyone if this needs to

7 be revisited, but it needs to be accurate, in a witness

8 statement.

9 MR PICKFORD: Indeed. So what I was going to do -- that is

10 exactly right, sir. So I was going to propose that

11 actually we need to -- we can try and agree it between

12 ourselves, but we need to establish some directions that

13 start with that, with us providing some evidence on --

14 THE CHAIRMAN: Yes, and then Mr Robertson must have ample

15 opportunity to respond(?), because it is an important

16 point.

17 MR PICKFORD: Exactly, and then we can come back and say

18 anything --

19 THE CHAIRMAN: Have further argument on it.

20 MR PICKFORD: Yes, quite.

21 THE CHAIRMAN: So let us deal with directions at the end.

22 Mr Robertson, I do not want to leave everything else

23 hanging, so if we could deal with submissions on

24 everything else in reply on all other aspects of the

25 case now, rather than adjourn the whole thing, so when

1 we come back, it is just on proportionality.

2 MR ROBERTSON: Yes, I was planning to reply when Mr Pickford
3 has finished and I will be short.

4 THE CHAIRMAN: Yes. Mr Pickford, is there anything useful
5 to say at this stage or ...?

6 MR PICKFORD: Only two other very, very quick things, and
7 I can just deal with them really by references. There
8 was a discussion again, prior to lunch, about the
9 rules -- the PRS' rules. I was making the submission
10 that, in fact, there was a rule higher up that was kind
11 of the overarching rule, that gave us the discretion to
12 do things like --

13 THE CHAIRMAN: Yes, yes, yes.

14 MR PICKFORD: That is Rule 2(c). It was -- it had the right
15 rule and I can give --

16 THE CHAIRMAN: (overspeaking) but you are not saying -- it
17 is entirely our fault in that we have been exploring
18 this -- but you have not actually said -- if you are on
19 the receiving end of the claim, you have not said how
20 you will fund it. You have made the submission that
21 ultimately you are a members' organisation and it is all
22 very -- that is a relevant factor and it hugely
23 complicates things and you do not have to sit on FAC
24 shareholders or anything like that. So you have made
25 that point but you have not actually said how you are

1 going to fund it so there is a limit to how far we can
2 probably take that.

3 MR PICKFORD: Indeed, quite. Then very, very quickly, the
4 third and final point is I was asked a question about
5 the number of unpublished writers. I cannot give you
6 that number now, but we can take that away and probably
7 put that in as a small further point in the evidence
8 that we are going to provide.

9 THE CHAIRMAN: Okay.

10 MR PICKFORD: Thank you. Thank you. Those are my
11 submissions.

12 Further submissions by MS THOMAS

13 MS THOMAS: Sir, very shortly, I said I would take
14 instructions on the exclusions point, if that would
15 assist. We were talking about the position
16 retrospectively and at the moment the draft covers
17 officers, directors and employees. I am instructed that
18 we would be happy to drop employees from that. The
19 concern in relation to officers and directors is
20 twofold. They will have sat on the members' council and
21 been part of having formulated the policies in question
22 that we are talking about, and there is a particular
23 concern dating from February 2024 -- sorry,
24 February 2022, where the pre-action correspondence began
25 and those individuals may have been involved in

1 publishing confidential --

2 THE CHAIRMAN: Yes, but there is nothing to stop class
3 representatives speaking to those people and picking
4 their brains as much as they -- and calling them as
5 witnesses. That must be right. You are not saying that
6 they are not entitled to have -- I mean, as lawyers
7 always do, they have to navigate their way through
8 privilege and through fiduciary duties and through
9 ongoing obligations and confidentiality. All that has
10 to be taken into account, of course.

11 MS THOMAS: I accept all of that. The concern is that it
12 does place them in an uncomfortable position. It places
13 PRS' confidential information at risk. It is a question
14 of proportionality on the size of the class, now that
15 their ask, as it were, has been abated(?), so that it
16 covers only officers and directors and only for
17 a limited time period. It is a very proportionate
18 exclusion and one that has been raised ...

19 THE CHAIRMAN: I see that.

20 MS THOMAS: I am grateful.

21 Reply submissions by MR ROBERTSON

22 MR ROBERTSON: Sir, first of all, a pat on the back to
23 Mr Pickford for coming in 15 minutes under time on the
24 chess clock.

25 (Mr Pickford joking off mic, not transcribed)

1 I have five points I want to make in reply, mostly
2 short. First of all, just a point of information. We
3 were discussing this morning about what was the
4 definition of essentially a "publisher". It was just to
5 draw to your attention, "Publisher" is defined in the
6 PRS rules.

7 THE CHAIRMAN: Yes, I picked those -- you mentioned that.
8 Someone mentioned that.

9 MR ROBERTSON: Yes. Second point: at various points we have
10 been referred to class members with perfect information
11 -- with perfect data and therefore who would not have a
12 claim. On that point, can I just take you to
13 Mr Savage's second report at {B/32/11}? (Pause)

14 Paragraph 4.13:

15 "In this context, it is worth noting that the PRS
16 database is an 'open' database ..."

17 THE CHAIRMAN: Sorry, I may be in the wrong -- which tab am
18 I meant to be in?

19 MR ROBERTSON: Tab 32, page 11.

20 THE CHAIRMAN: Oh yes, okay.

21 MR ROBERTSON: Mr Savage's second report:

22 "In this context, it is worth noting that the PRS
23 database is an 'open' database in many ways. In the
24 course of my work, I have spoken to companies that offer
25 the service of carrying out a full review of

1 a songwriter's musical works catalogue to identify if
2 there are any data errors and how to have those issues
3 rectified. Even where a songwriter pays for this
4 process to be done, the songwriter's works need to be
5 reviewed periodically as the works details can be
6 amended without any intervention on the part of the
7 songwriter and without their knowledge. In other words,
8 even after a songwriter has ensured that their works
9 data is correct, errors can then enter into the PRS
10 database without the songwriter having taken any steps
11 to introduce the errors and without the songwriter being
12 aware that changes have been made."

13 So this sort of vision of, "Once you have got your
14 data absolutely right, then it is right for always",
15 that does not appear to be the case and it cannot be
16 assumed to be the case.

17 It also indicates that there are songwriters who are
18 sufficiently switched on and successful to avail
19 themselves of that service. So we are not just talking
20 about data errors affecting the less clued up, as it
21 were. It appears to be a problem across the class.

22 The third point I wish to make by way of reply is in
23 relation to a question as to whether non-MTOL review is
24 part of the claim, and this is just to confirm that it
25 is. The claim form does not limit the claim to MTOL

1 revenue only, and that is set out at paragraph 47 of the
2 claim form. It is probably worth having a quick look at
3 that.

4 THE CHAIRMAN: Sorry, I misunderstood. Yes, I understood it
5 was part of the claim, so --

6 MR ROBERTSON: Okay. In that case I do not need to -- it is
7 paragraph 47 of the claim form and the succeeding
8 subparagraphs.

9 The fourth point, which comes under the cost benefit
10 heading, is the discussion that we had earlier on today
11 about how does the PRS pay damages. This is just to
12 emphasise that my note last night, referring to
13 rules 2(i) and 2(j), which I can tell you are not
14 immediately attracted to --

15 THE CHAIRMAN: Do not make any assumptions. We are just
16 trying to understand them. That is all.

17 MR ROBERTSON: But those are our submissions.

18 As to -- in answer to the question I was asked,
19 which is, "What is the contractual entitlement that the
20 PRS has vis a vis its members?" -- and that is the
21 contractual entitlement -- obviously as discussed
22 earlier on today, in terms of satisfying the damages
23 award, the PRS could then change its revenue
24 distribution policies to withhold sums that are
25 otherwise due to publishers on the basis that --

1 THE CHAIRMAN: But the fact that the PRS has not assumed
2 a position on this or said one way or the other -- it
3 has not said, "We are going to go out of business", it
4 has not said, "We cannot get the money", it has not
5 said ...

6 So although -- and it is probably my fault for
7 prompting this discussion, but it is not something we
8 can resolve -- we are not being invited to resolve it at
9 this stage by either side. Mr Pickford, you are shaking
10 your head. Are you disagreeing? You are agreeing.

11 MR PICKFORD: No, when you repeat a negative, I shake my
12 head, so I agree.

13 MR ROBERTSON: The fifth and final point in reply -- and it
14 is the most significant -- is: what is our
15 counterfactual?

16 THE CHAIRMAN: Yes.

17 MR ROBERTSON: Our counterfactual is that black box
18 royalties attributable to writers were not paid to -- on
19 the matched basis and ended up in the pockets of
20 publishers.

21 THE CHAIRMAN: Now, that is the complaint. That is not the
22 counterfactual.

23 MR ROBERTSON: Well, it is, but that did not happen because,
24 if that did not happen, then --

25 THE CHAIRMAN: So what should happen?

1 MR ROBERTSON: -- there would not have been an abuse.

2 THE CHAIRMAN: What should happen?

3 MR ROBERTSON: We --

4 THE CHAIRMAN: You have got to say, "This should have
5 happened, but this that should not have happened
6 happened". What is the difference? What is the
7 counterfactual that you are putting before the tribunal?
8 This is all for another day?

9 MR ROBERTSON: Well, hopefully I will be here for another
10 day. But at this stage our counterfactual is just that
11 that did not happen and that the black box royalties
12 attributable to writers were paid to writers and no part
13 of them were paid to publishers.

14 THE CHAIRMAN: Yes.

15 MR ROBERTSON: It is as simple and as straightforward as
16 that. Now, there are two basic types of black box
17 royalties, just to make my position clear on that.
18 There are those where usage information does not
19 identify the work.

20 THE CHAIRMAN: Yes.

21 MR ROBERTSON: For that, we accept the only sensible way of
22 splitting those is 50/50.

23 THE CHAIRMAN: Yes.

24 MR ROBERTSON: However, what we are concerned about is where
25 the information shows that writer -- the reason why they

1 have gone into the black box is that writer information
2 is missing. So you know the reason why it has gone into
3 the black boxes. There is lack of information about the
4 writer. So you know that that comes within the writer's
5 black box. You do not know which writer, obviously --
6 that is the source of the problem -- but you do know it
7 is attributable to lack of information about the writer,
8 not about the publisher, and it is that which we focus
9 upon, and it is that which Mr Savage, in his
10 methodology, includes as one of the things that he will
11 seek to identify.

12 Perhaps if I could just take you to Mr Savage's
13 first report, hopefully for the last time today.

14 THE CHAIRMAN: Yes. Sorry, if you can just remind me where
15 it is?

16 MR ROBERTSON: {A/23/17}. (Pause)

17 Paragraph 6.5.

18 THE CHAIRMAN: Yes.

19 MR ROBERTSON: "Of that distributed revenue, I will need to
20 determine the portion that could not be matched to
21 particular works or interested persons or which was
22 allocated to a public domain interested party number and
23 was therefore Black Box. I will need to bear in mind
24 that usages which were treated as Black Box might
25 subsequently be claimed by PRS members within the

1 requisite period and potentially no longer be a source
2 of Black Box royalties. I will also need to examine the
3 usage that fell below the processing thresholds, the
4 cumulative value of that usage and the member make-up of
5 those works. As regards the Black Box revenue, I will
6 then also need to determine the particular reason for
7 allocation of the revenue as Black Box."

8 I am not going to read out paragraphs 6.6 to 6.9,
9 but that is all part of that piece.

10 Then if you look at -- I have said in our note that
11 he then goes through each particular type of PRS income
12 type, so in relation to broadcasting, broadcast revenue,
13 page {A/23/23}. At the bottom of the page -- so this is
14 under the heading "Treatment of Black Box",
15 paragraph 8.2.6:

16 "In respect of Broadcast Revenue, Black Box income
17 will include the following."

18 Then he lists out the various types of black box
19 income. Turning the page, {A/23/24}, the penultimate
20 bullet point:

21 "There are data issues with the interested party
22 information held on the PRS databases and so the
23 royalties cannot be allocated to the correct PRS
24 members."

25 He notes the same point -- I am not going to go

1 through it -- for each of the other types of revenue at
2 paragraphs 9.2.5, 10.2.8 and 11.2.4.

3 So that is the proposed methodology for identifying
4 that black box income.

5 PROFESSOR ULPH: Can I just clarify something? Because when
6 I had a discussion with Mr Pickford earlier on, he was
7 saying that this is really, really hard to say whether
8 any given flow of revenue was attributable to either
9 publishers or songwriters. You are now saying there are
10 certain streams of revenue which you can say are
11 definitely songwriter revenue; we just do not know which
12 particular songwriter.

13 So one question then is: supposing you say, because
14 we have identified this as songwriter revenue, then to
15 deal with your -- whether it is a claim at the aggregate
16 level, you can put that into a slightly different box
17 and say that the true black box is just the stop(?),
18 that you cannot decide whether it is publisher or
19 songwriter, and then you have a rule for allocating
20 that --

21 MR ROBERTSON: Correct, yes.

22 PROFESSOR ULPH: -- either an existing rule or some other
23 rule --

24 MR ROBERTSON: Yes.

25 PROFESSOR ULPH: -- why does that not solve the problem,

1 then? Just, if you can identify which is the
2 songwriter, purely songwriter revenue, and you can put
3 it into a box easily, where is the source of the problem
4 now? You seem to think that it is quite easy to
5 identify those flows of revenue which are definitely
6 a songwriter --

7 MR ROBERTSON: That is the methodology we have proposed to
8 identify the damages and that is how we think these
9 royalties should have been dealt with; so that is the
10 counterfactual. I was attracted to your suggestion this
11 morning, in fact, that this is actually -- the problem
12 arises just because it is an arithmetical problem, and
13 you think: well, if it is arithmetical, you could just
14 have a correction to that. That might be one way of
15 doing it.

16 I should also say, when it is said to be too
17 difficult; I just want to have a very quick look at this
18 letter that has arrived this afternoon. Footnote 3
19 suggests that the PRS has done something similar
20 overnight; and we will save our submissions for that.

21 But it does appear to be doable, and so that is why
22 we say that Mr Savage is the appropriate person -- or
23 one of his colleagues -- to go and carry out this
24 exercise for the purposes(?) of the tribunal.

25 PROFESSOR ULPH: But then I do not quite see why Mr Savage's

1 methodology involves going through and looking at the
2 various revenue streams and looking at whether they are
3 50/50 or not, and then trying to draw conclusions. Why
4 do you not just audit the streams and say: this arises
5 because we do not know the songwriter details. If that
6 is the sole reason why there is an informational
7 problem, you can quite easily put that into a box,
8 saying: this is the songwriter box.

9 MR ROBERTSON: I do not know why that has not been the
10 approach that has been taken. That will come out,
11 assuming we are given certification, on disclosure and
12 further evidence.

13 PROFESSOR ULPH: Right.

14 MR ROBERTSON: I feel Mr Pickford rising to his feet beside
15 me, so he may have another view on this, but those are
16 our submissions.

17 PROFESSOR ULPH: I am sorry if I am confusing an already
18 confused topic.

19 MR ROBERTSON: I should say that I do not think -- oh,
20 Mr Went -- perhaps before Mr Pickford gets to his feet,
21 Mr Went would like to address you on the exclusions
22 issue very quickly.

23 Further submissions by MR WENT

24 MR WENT: I will be brief on this.

25 Having considered this, the PCR is content to have

1 the exclusion extended to directors, officers and
2 employees from the date of the pre-action correspondence
3 starting; I think that is one of the dates that was
4 mentioned, but we do not see any principled basis on
5 which to have it any earlier than that.

6 THE CHAIRMAN: Okay. So all those categories, from the
7 pre-action correspondence to the end of these
8 proceedings, are --

9 MR WENT: Yes.

10 THE CHAIRMAN: Fine.

11 MR WENT: I take it, you do not need to hear from me any
12 further on the funding points that have been raised?

13 THE CHAIRMAN: Well, if there is anything that you want to
14 say --

15 MR WENT: Just very briefly. Just for your reference --

16 THE CHAIRMAN: I am sorry. I should know where it is. It
17 is -- where is the funding ...?

18 MR WENT: No, I am going to take a couple of references to
19 you. I do not think we need to turn back to the LFA.
20 There was a discussion about the LFA being amended
21 *post-PACCAR*. Just for your reference, Astill 1,
22 paragraphs 26 to 27 does explain that. That is at
23 {B/35/6}.

24 THE CHAIRMAN: Yes. I was inaccurate. Mr Rowntree was
25 onboard by then, yes.

1 MR WENT: Indeed, indeed.

2 I just wanted to pick up, just in terms of -- this
3 is a minor point, in terms of the compound interest
4 calculations. I think it was suggested that they
5 amounted to 10.3 million, was the figure I noted down,
6 but that is not a figure we recognise from the
7 calculations that we have done, it is nearer 5 million.
8 But if there is any need to clarify that, I am sure that
9 can be done.

10 I did just finally want to mention that the
11 requirement to apply, and I know you have had
12 a discussion about this with my learned friend; in our
13 case, as far as we can see, it is the same as in *Gutmann*
14 *v Apple*, which obviously you are familiar with,
15 Mr Chairman. We do not see any difference. So those,
16 I think, are the only points.

17 Oh, just on clause 16.1, just to say, I think we
18 said we would take that back to the funder, but we are
19 not envisaging any issue.

20 THE CHAIRMAN: Okay, there was one other -- so what do you
21 say the total -- you suggested 2028. I cannot remember
22 when in 2028.

23 MR WENT: March 2028, I think it is, on the current
24 timetable.

25 THE CHAIRMAN: Right. No doubt I will be long retired by

1 then. March 2028, so what will be the costs? What does
2 the -- what is the figure?

3 MR WENT: I do not think we necessarily agreed with the
4 multiples being calculated.

5 THE CHAIRMAN: Can you just tell me what the figure is in
6 2028? I mean, I can work it out, but ...

7 MR WENT: Yes. So I think it is 82 million, if it is
8 pre-distribution.

9 THE CHAIRMAN: 82 million.

10 MR WENT: Yes, indeed, yes. I have mentioned the compound
11 interest, that that needs to be added onto these
12 figures. So we say --

13 THE CHAIRMAN: Right, so with compound interest.

14 MR WENT: This is the 30% --

15 THE CHAIRMAN: (Overspeaking) Yes, yes, but are you doing
16 the maths or are you leaving us to do it? That is all.

17 MR WENT: It is 5 million at that point in time, based on
18 our calculations. So it is 82 plus 5. So 87, if it is
19 pre-distribution damages, if the fund -- yes. If the
20 funders pay pre-distribution; and 112, again plus the
21 5 million, if it is undistributed damages. But it may
22 well -- I had understood there may be a written note
23 from my learned friend just confirming the figures on
24 their side, but we could --

25 THE CHAIRMAN: Yes. Perhaps you could agree them, yes.

1 MR PICKFORD: Could I just very, very briefly respond to
2 Mr Robertson's final point?

3 THE CHAIRMAN: Yes.

4 Reply submissions by MR PICKFORD

5 MR PICKFORD: So there has now been a pretty radical
6 development in terms of the case, because I took you
7 through three different types of problem and we are now
8 just down to one, because the first one, the matching
9 one, when I explained, we just -- if you cannot match
10 the works, then there is no basis to do anything, and
11 that has now been conceded, as I understand it, and we
12 cannot do any -- well, I think he is saying it should
13 be -- he thinks that should be 50/50. I think that is
14 what he is saying.

15 THE CHAIRMAN: Sorry, I got confused. Let me just clarify.
16 Mr Robertson, what is your position on the ...?

17 MR ROBERTSON: If royalty revenue comes in and you cannot
18 identify the work, then there is no sensible way of
19 distinguishing between publishers and writers.

20 THE CHAIRMAN: Can you do it 50/50 --

21 MR ROBERTSON: Yes.

22 THE CHAIRMAN: -- rather than the pro rata that is used at
23 the moment?

24 MR ROBERTSON: Yes, that would just seem to be the sensible
25 approach.

1 THE CHAIRMAN: Does that make sense? At the moment, it is
2 not 50/50.

3 MR PICKFORD: Well, I understand -- no, it is better for
4 songwriters than that. So we will take that away, but
5 I think we need to make -- when we come back to deal
6 with the figures, I think we may need to make some
7 submissions on that alternative version of the case,
8 because that is not how it was put until literally just
9 now at the end of the reply.

10 THE CHAIRMAN: Because the pro rata, it is from that figure,
11 because we are talking about -- are we talking about
12 exclusively MTOL or not?

13 MR PICKFORD: No. I think this, as I understand it, applies
14 to all -- all of its claim.

15 THE CHAIRMAN: So why do you say that it will be more to the
16 writers? Where do I get that figure from?

17 MR PICKFORD: Because, for instance, for TV and radio, where
18 there are no complicating factors, we already see that
19 writers already get a substantially bigger share than
20 50%.

21 THE CHAIRMAN: Yes. So for MTOL they get 76 -- sorry, they
22 get 87%.

23 MR PICKFORD: Yes. It depends a bit, obviously, on how
24 these --

25 THE CHAIRMAN: For TV and radio, 53; but we still have the

1 other categories.

2 MR PICKFORD: So now we have a new version of the case,
3 which is 50% -- if it is an unidentified -- it is
4 an unmatched work, it is 50/50, he says; and if it is
5 an unidentified share, then he says we should identify
6 the songwriter shares and give those to songwriters. It
7 is still just an assertion --

8 THE CHAIRMAN: Sorry, say that again more slowly? Sorry, it
9 is getting late in the day.

10 MR PICKFORD: So I explained that there were three different
11 levels.

12 THE CHAIRMAN: Yes, yes, yes, yes.

13 MR PICKFORD: At the top level, the new case that is now
14 being advanced, as of five minutes ago --

15 THE CHAIRMAN: Yes, I got that, yes. The next one is where
16 you know the work.

17 MR PICKFORD: The next one is where we know the work, but we
18 cannot distribute because there is an incomplete share
19 picture. What is now being said is that that is really,
20 I think, at the crux of it. He says: ah, well, there,
21 you should be giving songwriters generally their due.
22 He still does not say how we are supposed to do that.
23 I have explained to you, and I think we will have to
24 come back on this new version of the claim that is
25 focusing on this bit, as the problematic aspect, that

1 we --

2 THE CHAIRMAN: Is it being said that you could make better
3 investigations and identify it, and that seems to be
4 a very different case?

5 MR PICKFORD: Well, quite. That is not -- I mean, until,
6 again, five minutes ago, the case was not: well, your
7 audits are not good enough. The case was that: your
8 distribution policy is flawed.

9 It now seems that it is being said, we should --
10 obviously, of course, we do not conduct ourselves
11 without any sorts of audits or means of checking that
12 what we are doing is according to our rules.

13 Even on that particular part, it does not make the
14 problem go away; that I say he has got and he has never
15 provided an answer to, which is: how do you find what
16 the songwriter share should have been, in circumstances
17 where we say we were not able to do it for one reason or
18 another? In particular, Mr Arber explained in his
19 evidence --

20 THE CHAIRMAN: Sorry, why is it not -- is Mr Robertson not
21 saying, "So if you know the work but cannot distribute,
22 100% should be going to the writers"? Mr Robertson,
23 what is your position -- sorry -- where you know the
24 work but cannot distribute for whatever reason? What
25 are you saying would happen?

1 MR ROBERTSON: The royalties cannot be distributed because
2 the writer basically is not identified. That should not
3 go into the general black box royalties pot. It should
4 be separately dealt with, and distributed to writers
5 as --

6 THE CHAIRMAN: As a class, as a class?

7 MR ROBERTSON: Yes.

8 MR PICKFORD: So one --

9 MR KELLY: Just a question. If we took that route, so based
10 on today's letter where we have got an amount of
11 unmatched works for MTOL of 10.5 million. The extreme
12 scenario is that all of that would go to the writers,
13 and that therefore sets a limit for any damages amount
14 in respect of that particular source of revenue.

15 MR ROBERTSON: I do not think we agree with that. I think
16 we are going to have to come back on that point.

17 MR KELLY: That is a point you are going to come back on.

18 MR PICKFORD: Okay. So in the new version of the case, what
19 I am now understanding is that for identified works, but
20 with a problem in relation to the share picture, it is
21 being said: ah well, we are worried about this, because
22 we think that publishers are going to get paid and
23 songwriters are not, and therefore if --

24 THE CHAIRMAN: That is all right. Keep going. I am just
25 concentrating.

1 MR PICKFORD: We have explained in our evidence, Mr Arber
2 has explained, that is not how the system works. For
3 every songwriter and publisher pair, effectively, they
4 go hand-in-hand. So if you have got publisher -- say
5 you have got a work that has got two sets of publishers
6 and two songwriters. So publisher A and songwriter B
7 [as said] are a pair; they work together. Publisher B
8 and songwriter B are a pair; they work together.

9 If songwriter B and publisher B have got -- there is
10 a problem in relation to anything to do with that
11 picture, whether it is on the publisher's side or the
12 songwriter's side, they do not get paid, because there
13 is a problem there. If --

14 THE CHAIRMAN: It is not like the publisher gets --

15 MR PICKFORD: No.

16 THE CHAIRMAN: -- its bit.

17 MR PICKFORD: No. The only circumstance in which the
18 publisher gets its bit, where the songwriter does not,
19 is where the songwriter is not a member. So if it is
20 down --

21 THE CHAIRMAN: We are not concerned with that.

22 MR PICKFORD: Yes. But if they are both members, but there
23 is some problem that is preventing --

24 THE CHAIRMAN: That incentivises publishers to make sure
25 they have got the information --

1 MR PICKFORD: Exactly. They are not entitled to get paid,
2 unless they have got clean information there; unless
3 they have filled it out. Mr Arber explained that.

4 THE CHAIRMAN: Sorry, just recapping. There is then the
5 third case where you have got the wrong bank account
6 each time, and they are just held in --

7 MR PICKFORD: Yes. At the moment, they are being --

8 THE CHAIRMAN: -- literally just in a -- (overspeaking).

9 MR PICKFORD: (Overspeaking) They are literally just being
10 held. The only people who benefit from those at the
11 moment are songwriters, because obviously interest will
12 be earned on those and that goes to songwriter-focused
13 charities.

14 THE CHAIRMAN: Okay.

15 MR PICKFORD: So we are just in that middle group, and in
16 relation to that middle group, if that is what we are
17 now complaining about effectively, I am explaining to
18 you that Mr Arber has given evidence that it just does
19 not work in the way that is being posited by Mr Rowntree
20 and --

21 THE CHAIRMAN: It does not work, in the sense that the
22 publishers' fees are withheld. That is the bit that
23 you --

24 MR PICKFORD: Yes, because they --

25 THE CHAIRMAN: You say that is a misapprehension.

1 MR PICKFORD: It is a misapprehension. They do not get paid
2 together. There needs to be a complete share picture or
3 the publisher ain't [sic] gonna get what they want.

4 PROFESSOR ULPH: Could I just ask, in that context, would
5 publishers be aware that money is being held back
6 because of problems with identifying the songwriter?

7 MR PICKFORD: Yes. My instructions are, if they are doing
8 their job properly, yes, so there will be means of
9 finding that out.

10 THE CHAIRMAN: So there is --

11 MR PICKFORD: Yes. They might not be, if they are asleep on
12 the job.

13 PROFESSOR ULPH: Well, they would have incentives to go out
14 there and try to nail them down.

15 MR PICKFORD: Yes. Indeed, by the very fact that their
16 incentives -- this is a point that -- these are my
17 instructions. They have the responsibility, they have
18 the incentives because they want to get all that money
19 in, and a corollary of that is that the songwriters will
20 get paid that are associated with them.

21 So in particular, one of the complaints was about
22 international, that we -- the information -- the stuff
23 that goes direct to publishers and it is said: ah-ha,
24 well, that is all going direct, but what about the
25 songwriters? Well, if the publisher is able to get

1 its -- it has to have good information to even get it
2 direct, and so if it has good information, that will
3 flow through to the songwriters too, via the PRS
4 channel. So they come as a pair.

5 So we say this just reflects a misunderstanding of
6 how the process works and it would be deeply unfortunate
7 if we spent 30 million plus on a trial to come to this
8 conclusion.

9 THE CHAIRMAN: So -- and then what is your proposal for
10 directions, then? Sorry, Mr Pickford, was there
11 something else --

12 MR PICKFORD: Yes.

13 THE CHAIRMAN: -- before we get to that?

14 MR PICKFORD: Yes. Sorry, actually, when I say they come as
15 a pair, it has been pointed out to me, they come -- it
16 is tilted actually in favour of songwriters, to this
17 degree: that if we go to -- it is probably worth going
18 to Arber 1, which is {B/34/24}.

19 (Pause)

20 So to this extent, there is an advantage for
21 writers. At paragraph 88, on page 24, my learned junior
22 has reminded me that Mr Arber's evidence is:

23 "Where PRS has identified a likely PRS member
24 publisher, PRS pays 50% to the writer(s) and holds the
25 other 50% -- the potential publisher share -- back from

1 distribution."

2 But there is not a corresponding thing that works --
3 we do not have any evidence that there is anything that
4 works the other way round. So to that extent, there is
5 actually a way in which a writer can get shared -- can
6 get paid, whilst the publisher share has been held back
7 and --

8 THE CHAIRMAN: I do not really understand that. I do not
9 know what "a likely PRS" -- if you know what the writer
10 is, you would know with certainty what the publisher is.
11 I am not sure why -- that does not actually make sense
12 to me.

13 MR PICKFORD: The "not vice versa" bit is, I am told, at
14 Arber 2, paragraph 10, which is at {B/98/3}.

15 (Pause)

16 So what is being dealt with there is the point that
17 I was explaining to you before.

18 THE CHAIRMAN: (Overspeaking) Yes.

19 MR PICKFORD: So -- but coming back to the core point.

20 There still is not an explanation as to how this
21 mythical sum is going to be determined. We say it does
22 not exist, and we still have not been told how we are
23 going to find this pot that we really should be giving
24 to songwriters, but that we are not. If that were that
25 easy, as Professor Ulph said, you would think we would

1 evidence on the case generally. This is just on the
2 question of proportionality, so if it is relevant to
3 that.

4 MR PICKFORD: Okay, right.

5 THE CHAIRMAN: It may be relevant because it may be part of
6 your calculation. Anyway, how long do you need?

7 MR PICKFORD: It has been pointed out that also we have half
8 term next week. I suggest --

9 THE CHAIRMAN: I am not putting you under pressure. Take as
10 long as you need. We want it done properly.

11 MR PICKFORD: I think to do it properly -- could we have
12 four weeks, please, to make sure we do it properly?
13 I mean, three as an absolute minimum, given half term,
14 but ...

15 THE CHAIRMAN: Four weeks. Likewise, how long do you need?

16 MR ROBERTSON: I am instructed four weeks.

17 THE CHAIRMAN: Okay. So we may need -- you may need to
18 narrow things with correspondence as well, so ... Then
19 we will fix up another hearing for half a day. Does
20 that sound sensible?

21 MR PICKFORD: Yes.

22 MR ROBERTSON: Yes.

23 THE CHAIRMAN: Whether or not it is necessary to bring
24 leading counsel in for long, I am not sure -- well, the
25 principal submissions, it is really just this issue

1 that --

2 MR ROBERTSON: Mr Went will be doing it anyway, so ...

3 THE CHAIRMAN: Right. Good. So maybe we can just liaise in
4 correspondence about fixing that. Then there will need
5 to be short written submissions. It may not be -- if
6 you do not think it is necessary --

7 MR PICKFORD: I would imagine probably it would be helpful
8 to timetable them.

9 THE CHAIRMAN: We will need those a few days before, but
10 perhaps we can settle on those directions when we
11 know -- so we would be looking after Easter, would we
12 not, for a hearing?

13 MR PICKFORD: Yes. (Pause)

14 THE CHAIRMAN: Thank you.

15 (3.58 pm)

16 (The hearing adjourned until a further date)

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