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Case No: CH/2009/APP/0651

Neutral Citation Number: [2009] EWHC 209 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 February 2010

Before :

THE HON MR JUSTICE ARNOLD

- -

Between :

PHONOGRAPHIC PERFORMANCE LIMITED	**Appellant**
- and -	
THE BRITISH HOSPITALITY ASSOCIATION AND OTHER INTERESTED PARTIES	**Respondents**

- -
- -

Ian Mill Q.C., **Tom Weisselberg** instructed by, and **Justin Goldspink** of, **GSC Solicitors LLP** for the **Appellant**
Robert Howe Q.C. and **James Segan** instructed by **Denton Wilde Sapte LLP** and **Eversheds LLP** for the **Respondents**

Hearing dates: 27-28 January 2010

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Judgment

MR JUSTICE ARNOLD :

Introduction

1. These are appeals by Phonographic Performance Limited ("PPL") against an interim decision dated 18 September 2009 ("the Interim Decision") and a final decision and order dated 15 October 2009 of the Copyright Tribunal (Henry Carr Q.C. (Deputy Chairman), Jeffrey Manton JP and Roger Field) on three references by the Secretary of State for Trade and Industry (as he then was) under section 128A(4)(a) of the Copyright, Designs and Patents Act 1988, namely (i) CT 92/05 in respect of PPL's Tariff 110 for public houses, bars, restaurants and cafés, (ii) CT 91/05 in respect of PPL's Tariff 111 for shops and stores and (iii) CT 93/05 in respect of PPL's Tariff 112 for factories and offices ("the References"). These Tariffs (which, like the Tribunal, I shall refer to collectively as "the New Tariffs") apply to the public performance of sound recordings as background music in the respective types of premises. The New Tariffs came partially into force on 1 January 2005 and fully into force on 1 January 2006.

2. As explained in more detail below, the New Tariffs were promulgated by PPL following amendments to the 1988 Act which came into force on 31 October 2003, the effect of which was substantially to remove an exception to copyright in sound recordings where they were publicly performed by means of broadcasts. The New Tariffs did not simply provide a tariff for licences covering those acts which did not previously require a licence, however. Instead, they replaced PPL's Tariffs 013 (hotels – Tariff 110 now applies to hotel bars and restaurants), 014 (public houses and bars) 015 (restaurants and cafés), 064 (small shops), 065 (larger stores) and 086 (factories and offices) ("the Previous Tariffs"), which only applied to public performances of sound recordings otherwise than by means of broadcasts, with so-called "delivery system neutral" tariffs.

3. The New Tariffs were referred to the Tribunal by the Secretary of State for a determination as to whether they were reasonable. Accordingly, as discussed below, they were not conventional adversarial disputes. Nevertheless, it is convenient to describe those involved in the References as "the parties". PPL contended that the New Tariffs were reasonable. The respondents to this appeal contended that they were not.

4. The Tribunal decided that the New Tariffs were not reasonable. Accordingly, it made an order under section 128B(3)(a) of the 1988 Act varying the New Tariffs. The effect of the variation, shortly stated, was to re-instate the Previous Tariffs and extend them to all means of delivery subject to (i) an increase in the royalties payable by 10% in addition to an adjustment in line with the Retail Price Index ("RPI") and (ii) the imposition of a concessionary discount rate for some small users. PPL now appeals against that decision, contending that the Tribunal erred in law.

The parties

5. PPL is a collective licensing body which acts on behalf of around 4,400 record companies and 47,000 performers. The record company members of PPL have transferred to PPL their exclusive rights under section 16(1)(c) and section 19 of the 1988 Act to play, show or otherwise perform in public sound recordings in respect of

which they own the copyright or enjoy exclusive licences. PPL's repertoire includes the vast majority of commercially published sound recordings in the United Kingdom. PPL grants blanket licences to users to exploit its repertoire in return for the payment of royalties. There are different tariffs for different classes of user. After deducting its administrative expenses, PPL distributes the royalties to the record companies and performers whose sound recordings and musical or other performances have been exploited by the users.

6. As PPL emphasises, these proceedings are not simply about the entitlement to royalties of record companies. By virtue of section 182D(1) of the 1988 Act, performers whose performances are featured in commercially published sound recordings which are played in public are entitled to equitable remuneration. In practice, performers receive 50% of PPL's distributions by way of equitable remuneration. For performers, most of whom are of modest means, public performance royalties are a vital part of their professional income.

7. The British Hospitality Association ("the BHA") is the representative body for those owning and operating hotels, restaurants and cafes. Its members include 9,000 hotels, 11,000 restaurants and 18,000 contract catering outlets, employing over 500,000 people. The British Beer and Pub Association ("the BBPA") is the representative body for the beer and pub sector. It represents more than half of the 58,000 pub and bar owners in the UK, which together account for 98% of all beer brewed in the UK. The Eversheds Consortium consists of a range of music users, representative bodies and background music suppliers. Its membership has varied over time, but has included at differing times two of the biggest UK retailers, Asda and the Arcadia Group, significant industry bodies such as the British Retail Consortium ("BRC"), the Association of Convenience Stores and the Music Users' Council ("MUC") and the majority of the specialist background music providers in the UK. I shall refer to the BHA, the BBPA and the Eversheds Consortium collectively as "the Interested Parties".

8. The BHA and the BBPA's interest in the References has been to oppose Tariff 110 (pubs etc). The Eversheds Consortium's interest has been to oppose Tariff 111 (shops and stores), although the Music Users' Council represented users potentially covered by all three New Tariffs and the background music providers supply users potentially covered by all three New Tariffs. Prior to the hearing before the Tribunal, the BHA and the BBPA on the one hand and the Eversheds Consortium on the other hand made separate representations and were separately represented, but co-operated with one another. At the hearing before the Tribunal and at the hearing of the appeal, the two sets of Interested Parties instructed the same counsel and thus presented a united front. It is important to note that, neither before the Tribunal nor before me, was counsel for the Interested Parties instructed on behalf of any party specifically to oppose Tariff 112 (factories and offices). I shall return to the significance of this point below.

<u>Statutory background</u>

9. I set out the relevant statutory provisions as they currently stand in the Appendix to this judgment.

10. Prior to 31 October 2003, section 72(1) of the 1988 Act provided that the showing or playing in public of a broadcast to an audience who had not paid for admission to the

place where the broadcast was to be seen or heard did not infringe any copyright in the broadcast or any sound recording included in it (there was a parallel exception to performers' rights in Schedule 2 paragraph 18(1) of the 1988 Act). PPL contended that section 72 was incompatible with Article 8(2) of Council Directive 92/100/EC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property: see *Phonographic Performance Ltd v Department of Trade and Industry* [2004] EWHC 1795 (Ch), [2004] EMLR 30.

11. Subsequently, the Government exercised its powers under section 2 of the European Communities Act 1972 to implement Article 11(1)(b) of European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (which amended Article 10(3) of Directive 92/100/EEC to introduce the so-called "three-step test" for exceptions into the latter directive) so as to amend section 72 into its current form by means of regulation 21(1) of the Copyright and Related Rights Regulations 2003, SI 2003/2498 (Schedule 2 paragraph 18 was also amended, by regulation 21(2)). The amendment excludes from section 72(1) any "excepted sound recording", which is defined by subsection (1A) as a sound recording whose author is not the author of the broadcast in which it is included and which is a recording of music with or without words. The result of this amendment was that many users who publicly performed sound recordings by means of broadcasts henceforward required a licence from PPL in order to avoid infringement of copyright, whereas previously they had not. This removed an anomaly that previously existed, which was that there was no exception to the copyright in musical and literary works corresponding to section 72, and so such users did require a licence from the Performing Right Society Ltd ("PRS"), the collective licensing body which administers the corresponding rights on behalf of authors and publishers of musical works and associated literary works.

12. The Copyright Tribunal was originally established by the Copyright Act 1956 under the name the Performing Right Tribunal to regulate the activities of PPL and PRS. It was re-named and given an expanded jurisdiction by Chapter VIII of Part I of the 1988 Act. Its jurisdiction has been further increased by subsequent amendments to the 1988 Act.

13. References to the Copyright Tribunal are governed by the provisions contained in Chapter VII of Part I of the 1988 Act. In brief outline, so far as is relevant for present purposes, section 116 defines the expressions "licensing scheme" and "licensing body". PPL falls within the definition of a licensing body and the New Tariffs each fall within the definition of a licensing scheme. Section 118 provides that a proposed licensing scheme may be referred to the Tribunal by an organisation claiming to be representative of persons claiming that they require licences in cases to which the scheme would apply. The BHA, the BBPA and some of the members of the Eversheds Consortium are such organisations. Section 119 provides that, if while a licensing scheme is in operation a dispute arises between the operator and either a person claiming he requires a licence or a representative body, that person or body may refer the scheme to the Tribunal. Both section 118 and section 119 provide for the Tribunal to make such order "as the Tribunal may determine to be reasonable in the circumstances". Section 120 provides for further references in certain circumstances. Section 123 provides for the effect of an order of the Tribunal as to a scheme. Section 129 requires the Tribunal to have regard to the availability of other

schemes to other persons in similar circumstances and the terms of those schemes. It also requires the Tribunal to exercise its powers to ensure that there is "no unreasonable discrimination" between licensees under the scheme and licensees under other schemes operated by the same person. Section 135 provides that the reference in sections 129 to 134 of specific matters which the Tribunal must take into account in certain cases "does not affect the Tribunal's general obligation in any case to have regard to all relevant considerations".

14. The procedure on a reference under sections 118 or 119 is governed by rules 3 to 19 of the Copyright Tribunal Rules 1989. The procedure is essentially an adversarial one, requiring the referrer to serve a statement of case (rule 3), the operator to serve a statement of case (rule 9), the Chairman to give directions for the further conduct of the proceedings, including directions as to disclosure and inspection of documents and the giving of evidence on affidavit (rule 11), and for the parties to be entitled to attend a hearing, address the Tribunal, give evidence and call witnesses (rule 14(1)). The Tribunal has power to order cross-examination of witnesses (rule 14(3)).

15. Over the years there have been repeated criticisms of the complexity, cost and duration of references to the Tribunal: see, for example, *Collective Licensing* (Monopolies and Mergers Commission report, December 1988, Cm 530), paragraphs 7.21-7.28; *Performing Rights* (Monopolies and Mergers Commission report, February 1996, Cm 3147), paragraphs 2.92-2.95, 2.132; Freegard and Black, *The Decisions of the UK Performing Right and Copyright Tribunal* (Butterworths, 1997), chapter 3; and more recently *Review of the Copyright Tribunal* (United Kingdom Intellectual Property Office report, May 2007) *passim*; and *The Work and Operation of the Copyright Tribunal* (House of Commons Innovation, Universities and Skills Committee report, March 2008, HC 245) *passim*. This is a matter that the Tribunal itself has expressed concern about: see, for example, *Universities UK Ltd v Copyright Licensing Agency Ltd* [2002] RPC 36 at [13]-[17] and *British Phonographic Industry Ltd v Mechanical Copyright Society Ltd* [2008] EMLR 5 at [282]-[284].

16. Perhaps for that reason, as well as amending section 72, the 2003 Regulations by regulation 21(3) inserted new sections 128A and 128B into Chapter VII of Part I of the 1988 Act. These relate to licences and licensing schemes for the public performance of excepted sound recordings. The key provisions for present purposes may be summarised as follows.

17. Section 128A(2),(3) requires a licensing body to notify the Secretary of State of the details of any proposed licence or licensing scheme for excepted sound recordings 28 days before it comes into operation. Section 128A(4) provides that the Secretary of the State shall, after taking into account the matters set out in section 128A(6), decide whether or not to refer the licence or scheme to the Tribunal for a determination of whether it is "reasonable in the circumstances". The matters which section 128A(6) requires the Secretary of State to take into account are (a) whether the terms of the licence or scheme take account of the factors set out in section 128A(7), (b) any representations received, (c) previous Tribunal determinations, (d) the availability and terms of other licences or schemes to other persons in similar circumstances and (e) the extent to which the licensing body has consulted over the licence or scheme. I set out the factors listed in section 128A(7) below ("the statutory factors").

18. Where a licence or scheme is referred by the Secretary of State to the Tribunal under section 128A, section 128B(1) provides that the Tribunal "may make appropriate enquiries to establish whether" it "is reasonable in the circumstances". Section 128B(2) requires the Tribunal to take into account the statutory factors and any other factor it considers relevant. Section 128B(3) provides for the Tribunal to make such order "as the Tribunal may determine to be reasonable in the circumstances".

19. The fact that, on their face, sections 128A and 128B are confined to licences or schemes relating to excepted sound recordings gave rise to an issue between the parties as to the Tribunal's jurisdiction in respect of these references. PPL contended, in short, that the Tribunal only had jurisdiction to consider the New Tariffs insofar as they related to excepted sound recordings, i.e. public performance by means of broadcasts, although it would be open to the Interested Parties to bring section 118 or 119 references in respect of the New Tariffs insofar as they related to other sound recordings i.e. public performance by other means. The Interested Parties contended, in short, that the Tribunal had jurisdiction to consider the New Tariffs as a whole. The Tribunal (His Honour Judge Fysh Q.C., S.C. (Chairman), Rear-Admiral James Carine and Colonel Roderick Arnold) substantially upheld PPL's contention in a decision dated 26 February 2008. Both parties appealed, and this Court allowed the Interested Parties' appeal: see *Phonographic Performance Ltd v British Hospitality Association* [2008] EWHC 2715 (Ch), [2009] RPC 7.

20. In its decision on jurisdiction, the Tribunal observed (omitting footnotes):

> "28. Though there seems to have been consultation both on the EU and national level regarding the change to CDPA '88, s 72, when it came to the procedure for integrating the implementation of the amendment into the framework of chapter VII of the CDPA '88, there seems (inexplicably) to have been no consultation or even discussion. Thus, the procedure which involves the Secretary of State making the reference to the Tribunal under s. 128A(2), is unusual (perhaps even unique) in intellectual property legislation in the UK. Moreover, the new procedure is not even adversarial; the imposition of an investigative (or inquisitorial) role on the Tribunal has a distinct civil law ring about it. We are aware that this burden resting upon the Chairman has been the subject of comment for a number of reasons.
>
> 29. The present Chairman has made extensive enquiries concerning the origins of these sections but has drawn no useful result whatever. Regarding s 128A and B, the learned editors of *Copinger and Skone James on Copyright* (15th edn) record with some understatement, that
>
> 'the purpose of adopting this machinery is not wholly clear.'"

I would add that the editors of *Copinger* went on to say:

> "However, it may be that the Government considered that the users of broadcasts might not have sufficient resources to bring a reference to the Tribunal under the ordinary law."

21. In a Consultation Paper issued by the UKIPO on behalf of the Minister of State for Innovation, Universities and Skills in June 2008, the Government consulted on proposed changes to sections 67 and 72 of the 1988 Act (and the corresponding exceptions to performers' rights) and proposed that sections 128A and 128B be repealed: see paragraphs 149-153. The Consultation Paper stated at paragraph 151:

> "Sections 128A and 128B were intended to minimise costs for users in taking licensing schemes to the Tribunal. As the user is not a party to the proceedings, it does not have the risk of being liable for the costs of the other party in the event that it is successful in challenging the licence fees."

22. In a paragraph of his judgment on the jurisdiction appeal which the Tribunal quoted in the Interim Decision at [15], Kitchin J said at [10]:

> "Clearly the intention of the Government was to create a procedure which would minimise costs for users. Schemes are subject to consideration by the Secretary of State and then, where appropriate, investigation by the Tribunal with the result that users need not be party to the proceedings and so can avoid the risk of being liable for costs in the event of an unsuccessful challenge. In practice, however, it has created such difficulties that UKIPO considers the sections should be repealed. One such difficulty is that the Tribunal itself does not consider it has the appropriate remit or resources to cope with the procedure. Another is that the two track nature of the Tribunal's jurisdiction is overly complicated. A yet further difficulty, of direct relevance to this dispute, is the lack of clarity as to the scope of the jurisdiction conferred by the sections and the real practical problems this has created."

23. In November 2009 the Government published its response to the consultation, concluding that both the exceptions and sections 128A and 128B should be repealed. The timetable proposed for implementation was that a statutory instrument to amend the 1988 Act should be laid in February 2010 and come into force in April 2010. During the hearing, I was told that implementation was on track to meet this timetable. It follows that the Tribunal's jurisdiction with which I am concerned on this appeal will shortly cease to exist.

<u>The Previous Tariffs</u>

24. As is described by the Tribunal in the Interim Decision at [41]-[44], it was common ground before the Tribunal that there had been a long history of negotiation and agreement of tariffs for hotels, pubs, etc between PPL and the BHA/BBPA or their predecessors, which had led to periodic changes in both the structure of the tariffs and the level of the fees. The most recent negotiations, between June 1999 and February 2001, had resulted in an agreement over Tariffs 013, 014 and 015 which came into

effect on 1 May 2001. For the first time, these tariffs included a sliding scale based an "audible area" i.e. the area of the premises within which sound recordings could be heard. The fee for an audible area of up to 400 m² was £80. Thereafter the fee increased in bands of £10 per 50 m². The rates were frozen until 1 September 2002 and thereafter increased annually in line with the RPI. As the Tribunal recorded, when the agreement was concluded, PPL's then Head of General Licensing stated in a letter to the BHA and two other associations dated 6 February 2001:

> "I am delighted that after two and a half years of negotiations we have been able to reach a satisfactory and harmonious compromise which is undoubtedly in the interests of all our members."

25. There was no evidence before the Tribunal as to the circumstances in which Tariff 064 and 065 (shops and stores) and 086 (factories and offices) came to be set. It appears, however, that for some time PPL had set the fees for smaller shops and for factories and offices at the same rate as the lowest rate which applied to pubs etc. Thus under Tariff 064 the annual fee for shops with an audible area of up to 600 m² was £80 from 1 May 2001, with RPI increases from 1 September 2002. Under Tariff 065, an additional amount was payable for each additional 50 m² above 600 m². Under Tariff 086 the annual fee for factories and offices was the same as under Tariffs 064 and 065, namely £80 up to 600 m² with an additional amount for each additional 50 m² above 600 m².

The New Tariffs

26. Under Tariff 110 (pubs etc), the fees payable to PPL increase in bands defined by the size of the audible area. The first band is for premises up to 100 m², in respect of which the fee is £100. Each subsequent band provides for a further £100 to be paid in respect of each further 100m² of audible area. A concessionary discount is also available to certain licensees: where a licensee has an audible area of 50 m² or less and only uses "traditional" radio or television broadcasts (as defined in the tariff), then the licensee is eligible for a licence fee of £50 per annum provided that entry to the premises is free.

27. Tariff 111 (shops and stores) also adopts a banding approach by reference to the size of the audible area. The first band is for premises of up to 100 m², in respect of which the fee is £100. The fees for the next two bands (of up to 200m² and up to 300m²) increase by a further £50 for each band. Thereafter the amount of the increase remains the same between bands (at £50), but the sizes of the bands increase further (with bands being 1,000 m² for premises greater than 5,000 m²). The tariff also includes a concessionary discount in the same form as Tariff 110.

28. Tariff 112 (factories and offices) adopts a banding structure based on the number of employees to whom the sound recordings are audible. The first band is 1-25 employees, with a fee of £100. The fee then increases by £100 for each additional batch of 25 employees. This tariff therefore differs from Tariffs 110 and 111 in focusing on the number of actual listeners rather than the audible area. A concessionary discount is available if the factory or office has 10 or fewer employees listening to "traditional" television or radio broadcasts.

The PRS Tariffs

29. Like PPL, PRS has a number of different tariffs. Those relevant to the References are Tariff P (for public houses), Tariff HR (for hotels, restaurants and cafés), Tariff RS (for shops and stores) and Tariff I (for industrial premises, offices and canteens) ("the PRS Tariffs"). The PRS Tariffs before the Tribunal are more complicated than the PPL tariffs in issue, but the main features of them may be summarised as follows.

30. Tariff P (effective from 1 October 2004 to 30 September 2005) has two bands, for bar areas of up to 120 m^2 and bar areas greater than 120 m^2. The fees charged in each band vary with type of delivery system used by the licensee. Thus the fee for bars up to 120 m^2 ranges from £59.91 (for stand-alone television) to £186.15 (for music centre etc). The fee for bars over 120 m^2 ranges from £89.88 (for stand-alone television) to £279.23 (for music centre etc).

31. Tariff HR (effective from 1 July 2004 to 31 October 2004) has different bands set according to the seating capacity (for lounges, bars, restaurants, fast food outlets, dining rooms and other rooms for the general use of guests or customers) or number of letting bedrooms (for the bedrooms and common areas in hotels). Again, the fees also vary according to the type of delivery system used by the licensees. Thus the fee for lounges, bars etc ranges from £90.82 up to 30 seating capacity and £30.26 for each additional 20 or part thereof (for television) to £254.32 up to 30 seating capacity and £84.77 for each additional 20 or part thereof (for a video juke box). The fee for bedrooms etc ranges from £36.34 per 15 bedrooms (for television etc) to £72.69 (for television etc plus CD player etc), with reductions for small residential hotels and seasonal establishments.

32. Tariff RS (effective from 6 January 2004 to 31 December 2004) has bands based on the size of the shops. The first band is up to 100 m^2, the second band is 101-200 m^2, and the third band is 201-300 m^2. After that, the size of the bands progressively widens. The fee payable ranges from £104.73 to £1,152.30 for 9,001-10,000 m^2.

33. The fee payable under Tariff I (effective from 1 March 2004 to 28 February 2005) is 6.58p for each group of 25 employees (or part thereof) for each half hour (or part thereof) of performance per day. The rate for canteens is 13.06p per day.

History of the References

34. The Tribunal summarised the history of the References in the Interim Decision at [22]-[25]. In view of the arguments before me, it is regrettably necessary to give a more detailed account. This is a summary of the even fuller account provided to me by the Interested Parties.

35. In late October and early November 2003 PPL wrote to 51 organisations informing them of the changes to section 72 and inviting them to be part of a consultation process. In February 2004 PPL sent a questionnaire to around 11,000 copyright users. There were 1,249 responses. On 31 August 2004 PriceWaterhouse Coopers ("PWC") produced an analysis of the responses. In addition, PPL had meetings with a number of trade bodies, including the BHA, BBPA and MUC. In early September 2004 PPL circulated a consultation paper containing provisional tariffs to users who had responded to the questionnaire and representative bodies, asking for responses by

early October 2004. A number of responses were received. It should be noted that the Interested Parties were very critical of this consultation process for reasons that it is not necessary to go into.

36. On 1 December 2004 PPL notified each of the New Tariffs, together with a fourth tariff, Tariff 113 (hairdressers and beauty salons, replacing Tariff 066), to the Secretary of State. Each notification included a submission by PPL of between 30 and 35 pages in which PPL argued that the New Tariffs were reasonable, with between 11 and 13 supporting schedules (not including the PWC analysis, which was disclosed by PPL at a later stage). The submissions and supporting schedules for the New Tariffs run to 393 pages and occupy an entire file of the papers for the appeal. In section 9 of each submission PPL contended that the reasonableness of the New Tariffs was supported by comparison with the PRS Tariffs. In each case, PPL summarised, and annexed copies of, the relevant PRS Tariffs and compared the New Tariffs with the PRS Tariffs in some detail.

37. In early 2005, a number of users and representative bodies made written representations to the Secretary of State opposing the New Tariffs, and in particular contending that the increases in fees payable under the New Tariffs by comparison with the Previous Tariffs were unreasonable. Representations were made jointly by the BHA and BBPA on 4 February 2005, by the British Shops and Stores Association ("BSSA") on 7 February 2005 and by the MUC on 25 February 2005. Most of these representations related to Tariff 110 (pubs etc) and, to a lesser extent, Tariff 111 (shops and stores), but the MUC did address Tariff 112.

38. In their representations the BHA/BBPA contended *inter alia* that no increase in rates over the Previous Tariffs was justified and that the PRS Tariffs were not a suitable comparator. In support of the former contention, they relied upon, and annexed a copy of, PPL's letter dated 6 February 2001. In support of the latter contention, they relied upon an analysis (contained in Annex 4 to the representations) of a random sample of 300 premises comparing the fees payable under (i) the relevant Previous Tariffs, (ii) Tariff 110 and (iii) the equivalent PRS Tariffs. This purported to show that the total amount payable under the Previous Tariffs for the premises in question was £22,391.16, the total amount payable under the New Tariffs £91,830 and the total amount payable under the PRS Tariffs £73,884.34.

39. On 18 March 2005 PPL filed a further 24 page submission to the Secretary of State responding to the representations made by the BHA, BBPA, BSSA and MUC. Among other points, PPL criticised the figures contained in Annex 4 to the BHA/BBPA representations on a number of grounds, including the representativeness of the sample, but nevertheless sought to make positive points based on those figures. The principal point made by PPL in the latter regard was that the figures showed that the amounts payable under the Previous Tariffs fell far short of those payable under the PRS Tariffs, and thus justified an increase over the rates payable under the Previous Tariffs.

40. On 5 October 2005 the Secretary of State referred the New Tariffs to the Tribunal. He did not refer Tariff 113 to the Tribunal, which no one had filed any representations objecting to. Indeed, as I understand it, the National Hairdressers' Federation had agreed to Tariff 113. So far as I am aware, PPL has continued to operate Tariff 113 since then without challenge.

41. On 3 January 2006 the Copyright Tribunal issued a Practice Direction concerning references to it by the Secretary of State under section 128A. This merits quotation in full:

> "This Practice Direction sets out the procedure that the Tribunal intends to adopt in considering references that are made to it by the Secretary of State for Trade and Industry under s. 128A of the Act and in the exercise of the powers conferred on the Tribunal pursuant to s. 128B of the Act.
>
> 1. The licensing body shall within 21 days of receipt of notice that the Secretary of State has referred a proposed licence or licensing scheme to the Tribunal:
>
>   a) serve on all other parties which to its knowledge have made representations to it or to the Secretary of State copies of all documents it has put before the Secretary of State; and
>
>   b) serve on the Secretary to the Tribunal (with copies to all such other parties) such other representations as it may wish to make to the Tribunal, together with a list of the names and addresses of the other parties.
>
> 2. Within 21 days of service of the documents specified in paragraph 1 above the other parties shall serve on the Secretary to the Tribunal (with copies to the licensing body) any further representations that they may wish to make to the Tribunal.
>
> 3. Within 14 days of service on it of any further representations pursuant to paragraph 2 above, the licensing body may make representations strictly in reply to any new matters raised in such further representations.
>
> 4. The Tribunal will then address such questions (if any) as it considers appropriate to the licensing body and/or any of the other parties and will inform any third party that it considers should be notified of the existence of the reference and shall set such time limits for the answering of such questions or for the making of representations by the third parties or further representations by the licensing body and/or the other parties as it sees fit.
>
> 5. The Tribunal, after considering all relevant materials, will issue its formal decision.

It should be noted that:-

(a) save in exceptional circumstances, the Tribunal will not hold any hearings; and

(b) where the Tribunal has pursuant to s. 128B(3) confirmed or varied a licence or licensing scheme, it is open to any relevant person to:

(i) lodge an appeal to the High Court pursuant to s. 152 of the Act; and/or

(ii) refer such licence or licensing scheme to the Tribunal pursuant to s. 120 of the Act."

42. On the same date the Chairman of the Tribunal directed that PPL should comply with paragraph 1 of the Practice Direction in respect of each of the References by 31 January 2006.

43. On 27 January 2006 PPL submitted three sets of written representations to the Tribunal. Each was just five pages long. PPL explained the brevity of its by stating that:

> "PPL's representations in support of this tariff were set out exhaustively in the consultation and notification documents. PPL relies upon its arguments in those documents and does not consider it necessary at this stage to advance further argument. PPL has seen no substantive representations subsequent to its detailed Response of 18 March 2005 and notes that the Secretary of State in his letter of 5 October 2005 gave no reasons for his decision to refer the licence and tariff to the Tribunal. Therefore this document is relatively brief."

44. In February and early March 2006, representations to the Tribunal were submitted by (a) the Federation of Licensed Victuallers Associations, (b) the BSSA, (c) the BRC, (d) the Booksellers Association, (e) the Horticultural Trades Association, (f) the BBPA and BHA and (g) the then members of the Eversheds Consortium. These representations continued to oppose the New Tariffs, but the focus of the representations was Tariffs 110 and 111. Only the Eversheds Consortium addressed Tariff 112, and they stated that they had no comment on the fairness or otherwise of the corresponding Previous Tariff.

45. The BBPA/BHA and Eversheds Consortium representations were substantial documents: the BBPA/BHA submission was 17 pages long with 12 appendices and the Eversheds Consortium's submission was 33 pages long with eight appendices. The BBPA/BHA submission included a copy of its representations to the Secretary of State, and the annexes thereto, including Annex 4. Both representations relied upon, and annexed a copy of, PPL's letter dated 6 February 2001. Both representations addressed the comparison between the New Tariffs and the PRS Tariffs. In the case of the Eversheds Consortium's submission, this included a comparison set out in two annexes (Annex H and I) of the total amounts payable to PPL and PRS by a shop in

respect of the supply of background music under relevant PPL tariffs and PRS tariffs respectively in 2004 and 2006.

46. On 21 April 2006 PPL filed a composite reply to the representations which had been made to the Tribunal by the various interested parties in the References, which ran to 63 pages. Section 4 of the reply (pages 8-11) dealt with the Tribunal's jurisdiction under section 128B, contending that it was limited to excepted sound recordings. Section 9 of the reply (pages 36-37) dealt with the Previous Tariffs. Section 10 of the reply (pages 37-48) dealt with the PRS Tariffs at some length. It included two tables comparing the tariffs for pubs etc and for shops and stores. It also repeated and elaborated upon PPL's criticisms of the figures contained in Annex 4 to the BHA/BBPA representations to the Secretary of State.

47. In the course of its reply, PPL stated:

"1. INTRODUCTORY COMMENTS

The nature of this document

..

1.2 … because many of the respondents who have participated in these references made very brief and in some cases no representations during the consultation process, and have only now stated their positions in any detail, this reply document is the first opportunity that PPL has had to deal with many of their points. That fact, as well as the diverse range of the respondents' submissions, explains the length of this reply document. The reply is also lengthy because the Practice Direction envisages, save in exceptional circumstances, a written rather than an oral procedure. This is a course which PPL welcomes both on grounds of cost effectiveness and speed.

...

13. THE NEXT STEPS

13.1 PPL's position is that there is sufficient information before the Tribunal for it to exercise its powers under Section 128B of the 1988 Act, although PPL would be happy to address any requests for information that the Tribunal may make.

…

13.3 Eversheds say that either the Historical Tariffs are accepted or a detailed review is required. PPL submits that this process is a detailed review. Leaving aside that the Historical Tariffs are no longer appropriate …, the need for an even more detailed review is wholly unclear…."

48. On 17 May 2006 the Eversheds Consortium filed a short submission addressing the jurisdictional issue which PPL had raised in its reply. The BHA and BBPA filed a short submission on 18 May 2006.

49. On 18 September 2006, the parties filed (a) an agreed Chronology, (b) an agreed Statement of Facts and (c) skeleton arguments on the merits.

50. On 13 February 2007 the Chairman of the Tribunal wrote to the parties responding to letters enquiring about the slow progress of the References. He expressed concerns about the scope of the Tribunal's jurisdiction and as to how the References should be dealt with, and he proposed a hearing to consider those questions.

51. That hearing was convened on 8 November 2007. Prior to the hearing the parties lodged further skeleton arguments. The skeleton arguments primarily focussed on the jurisdictional and procedural issues, but also addressed the merits. The Interested Parties also lodged a bundle of documents they relied on, including a copy of an internal memorandum of the Brewers' Society dated 28 July 1989 ("the Brewers Society Memo"). During the course of the hearing counsel for the Interested Parties addressed the Tribunal on the importance of the Previous Tariffs as comparators, and took the Tribunal to both the Brewers Society Memo and PPL's letter dated 6 February 2001. Counsel for PPL submitted that the Tribunal had already received very substantial written representations, that the best way for the Tribunal to perform its task was to have assistance from the parties and that disclosure and expert evidence were not required.

52. As noted above, the Tribunal gave its decision on the jurisdictional issue on 26 February 2008. Both sides appealed. The appeal was heard on 30 October 2008 and determined on 21 November 2008.

53. The Tribunal subsequently convened a directions hearing on 13 February 2009 in order to consider how the References should be dealt with. In advance of this hearing PPL and the Interested Parties set out their respective positions in a joint letter to the Deputy Chairman dated 12 February 2009. The Interested Parties proposed that there should be one round of written submissions exchanged within an agreed period after the directions hearing, followed by a one day hearing on the merits. PPL did not want to commit the Tribunal to any hearing at that stage. Instead, it proposed that the Tribunal should simply consider the papers before deciding if any further information or arguments were required, or if a hearing was necessary. PPL also suggested that, if there was to be a hearing, it should be listed for two days instead of one. At the hearing, the Deputy Chairman decided that the parties should provide an agreed reading list. A hearing of one to two days would be listed on a provisional basis. The Tribunal would decide whether this was necessary after considering the materials in the agreed reading list. If there was to be a hearing, the parties were to provide an agreed Statement of Facts 14 days in advance of it.

54. An agreed reading list was duly provided to the Tribunal. In late June 2009 both sides wrote to the Tribunal to say that they thought it would be helpful to have a hearing. On 16 July 2009, the parties lodged the agreed Statement of Facts. On 24 July 2009 both sides lodged skeleton arguments. PPL's skeleton argument ran to 26 pages with seven annexes, including a complete copy of its reply representations dated 21 April 2006 (Annexe VI) and a set of charts and tables in relation to Tariffs 110 and 111

which included licensing data for 2008 and comparisons with the PRS Tariffs (Annex VII). Although the skeleton argument said in passing that the Tribunal "may find the need to seek out further information as regards other matters", it did not specify any particular matters as requiring investigation by the Tribunal. The Interested Parties' skeleton argument ran to 30 pages and was accompanied by a 106 page bundle of documents (most of which had been filed previously).

55. The hearing took place on 30 July 2009 and was completed within one day. At the hearing counsel for the Interested Parties submitted some comparisons between the New Tariffs and the Previous Tariffs using the licensing data contained in Annex VII to PPL's skeleton argument. He also made submissions as to the difficulties in comparing the New Tariffs with the PRS Tariffs. The Tribunal asked him to let them have a short note of those points following the hearing.

56. On 31 July 2009 the Interested Parties submitted the requested note. This consisted of a comparison between the terms of the two sets of tariffs which runs to less than three pages.

57. On 11 August 2009 PPL filed a 12 page response, in which it submitted that "the differences are not such as to render a comparison difficult", that some were out of date, that "many of these differences … have been identified in PPL's documents" and that "[t]he overriding point remains that PRS tariffs across the board substantially exceed PPL's new tariffs". PPL also submitted that:

> "in making a financial comparison, the best source of information in practice is the Interested Parties, who pay fees to both PPL and to the PRS. They have decided not to share that information because it no doubt does not assist their case."

Included within PPL's response was a table setting out a comparison between the fees payable by Hilton Hotels under the New Tariffs with those which PPL estimated were payable under the PRS Tariffs, namely £17,197.60 against £30,757.81.

58. On 14 August 2009 the Interested Parties wrote to the Tribunal objecting to PPL's submission of 11 August 2009 as going well beyond a mere reply to their note of 31 July 2009. The Interested Parties argued that there had to be an end to the parties' submissions and that the PPL submission raised new factual points which the Interested Parties disagreed with but had not had the opportunity to deal with. The letter went on:

> "Quite apart from this, we are surprised by PPL's suggestion that the Interested Parties have failed to produce information about PRS rates. The information in question is not readily available to the Interested Parties, as PPL suggests, not least because a number of them are representative trade bodies. The Interested Parties cannot get information about the total fees raised by the Tariffs; they cannot get information about a decently representative proportion of the thousands of businesses paying under the New Tariffs without carrying out lengthy, costly and time-consuming surveys; and the position of individual licensees will inevitably be selective and

> unrepresentative. Furthermore, in the past, when the Interested Parties have carried out surveys of their members and/or produced information from specific licensees, PPL has contested the figures."

59. On 20 August 2009 PPL relied to the letter dated 14 August 2009 accepting that some comparison evidence had been put forward by the Interested Parties in the past in relation to Tariff 110, but submitting that it was unreliable. PPL disputed that it would not be possible for the Interested Parties to provide details of the fees their members paid.

<u>General principles applicable to Copyright Tribunal references</u>

60. The general principles applicable to references to the Tribunal are well established and are not in dispute. As sections 118(4), 119(3), 120(4) and 128B(3) make clear, the Tribunal's essential task is to determine what is reasonable in the circumstances. As Harman J said in *Association of Independent Radio Companies Ltd v Phonographic Performance Ltd* (unreported, 16 January 16, 1986), "the discretion created is thus in the widest and most general of terms". The statute requires the Tribunal to take certain specific matters into account in particular types of cases, but section 135 makes it clear that the Tribunal is under a general obligation to have regard to all relevant considerations. There is no presumption in favour of a referred scheme and there is no presumption that the referred scheme should be varied: *British Phonographic Industry v Mechanical-Copyright Protection Society Ltd* [1993] EMLR 86 at 99.

61. Two closely-related matters that are habitually taken into account are previous agreements and comparable licences. The Tribunal summarised the relevant principles in *British Phonographic Industry v Mechanical-Copyright Protection Society Ltd* [2008] EMLR 5 as follows (omitting footnotes):

> "49. *The willing buyer/willing seller test.* This is a classic test in this jurisdiction whose present applicability has been expressly endorsed by all concerned. In assessing a reasonable tariff, the Tribunal has frequently addressed the matter on the basis that the proper rate is that which would be negotiated between a willing licensor and a willing licensee of the copyright repertoire. Before examination of the relevant circumstances to be taken into account in this notional exercise, it is however common practice to identify an existing tariff as a starting point. If such a licence exists (and particularly, if it is recent) and addresses comparable subject matter—and even better, if it was freely negotiated (rather than being as it were, 'imposed' by the Tribunal), that may be particularly relevant and helpful in determining the right tariff (and other terms) of a licence. Such an agreement it has been said, is the best record of the market value of the relevant rights at the time (see below 'Comparators'). The Alliance submitted that this approach, though certainly not wrong, is simplistic since it often does not take into account the benefits to the licensee of collective bargaining. Nonetheless, our assessment of the centrality of

this consideration and its relevance to this case, is undiminished.

50. *Comparators.* As noted above, s.129 of the Act *requires* the Tribunal to take into account schemes and licences 'to other persons in similar circumstances'. Mr Richard Boulton, the Applicants' principal expert, put the position with admirable clarity in his first Report, thus:

> 'The comparable royalties approach is often regarded as the best approach to use in circumstances where the parties do not agree on the level of royalty. Negotiations between a willing licensor and a willing licensee, in the circumstances, will provide, in theory, the best available information about the level of a reasonable royalty.'

51. In *AIRC v PPL*, the Tribunal stressed the importance of comparators:

> 'It is for the Tribunal in assessing the transactions cited as comparable to decide to what extent the rights licensed are of the same *or a similar kind*, whether the transactions were concluded at arm's length with neither side affected by stress, and whether they were affected by legal factors which do not apply in this case. It is then for the Tribunal to adapt any relevant comparators to the case under review.' [Emphasis added]

Thus, starting with a cited comparator, it is open to the Tribunal to take notice of it (or of parts of it) and to use it (or reject it entirely) as the case may require. The authorities show that whilst the utility of comparators has frequently occupied the Tribunal's time, in practice they appear to have been more of a legitimate quarry (or template) for particular terms and figures rather than as full precedents for a particular licence. In a few cases, comparators, particularly comparators from overseas, have proved to possess very little probative value whatever.

…

53. When one is dealing with the licensing of 'similar' rights, some comparators may be more relevant than others. For example, in cases where the exploitation of music requires licences both from the owners of the rights in the composition (i.e. the Alliance representing composers and publishers of music) and that of the owners of the rights in the sound recordings (i.e. the record companies or the PPL), the Tribunal has held that: (a) these two types of rights are legitimate comparators; and (b)

there is no reason to treat one as being qualitatively superior to the other. …

54. Where there are sufficiently comparable licences, the Tribunal should adopt a similar rate '*absent any special circumstances*': *AEI v PPL* at 256.

55. What one usually finds in the authorities is evidence of a *degree* of comparability, ranging from the superficial to the more realistic. iTunes submitted that even where the comparability was rather inexact, one could neverthless take the comparables into account, '*but scale them down because of the differences*'.

56. Finally, this must be said of comparables: though the Tribunal may impose different rates upon different parties in respect of essentially the same rights, it must not thereby discriminate between licensees … unless there is 'a logical reason for it'."

62. In a footnote to paragraph [53] the Tribunal cited three authorities in support of the propositions stated, including the conclusion of the Tribunal in *Association of Independent Radio Companies Ltd v Phonographic Performance Ltd* [1993] EMLR 181 at 239 that "the royalty yield of both tariffs should be in the same general range".

63. The Tribunal has often stated that what matters most is what is paid rather than how it is calculated: see e.g. *British Sky Broadcasting Ltd v Performing Right Society Ltd* [1998] EMLR 193 at [6.3].

The Tribunal's decision

64. The Interim Decision should be read in full by anyone trying to understand this judgment. I provide the following summary for convenience only.

65. In section A ([1]) it introduced the References. In section B ([2]-[11]) it described the parties. In doing so, it reminded itself that its task was not to favour either side, but to maintain the balance between copyright owners and users. At [9] the Tribunal said:

> "Factories and Offices were not represented before the Tribunal, and no formal opposition was received to the new Factories and Offices scheme. …. At the hearing before us the parties were agreed that we should treat the Factories and Offices scheme under Tariff 112 in the same way, and subject to the same principles, as Tariffs 110 and 111."

66. In section C ([12]-[21]), the Tribunal set out the relevant statutory background. At [15]-[16] the Tribunal said:

"15. The reference [in section 128B(1)] to the making of 'appropriate enquiries' indicates that the Tribunal is to act as an investigatory rather than adjudicatory body. This is a role which the Tribunal has not performed in the past, and which it

> is ill-equipped ever to perform. Kitchin J explained the purpose of this provision and the difficulties which it creates, in the Jurisdiction Judgment ...
>
> 16. In the present case we have had the benefit of numerous written representations and skeleton arguments from the parties, as well as oral submissions. This is clearly not a case where the Tribunal has been required to make its own investigations in the absence of assistance from the parties. Whilst, of course, we take into account the position of those parties who have made representations but had not appeared before us, and of factories and offices, otherwise we are satisfied that our duty to make appropriate enquiries in the present case is fulfilled by considering the information that the parties have put before us."

67. In section D ([22]-[25]), the Tribunal summarised the history of the References.

68. In section E ([26]), the Tribunal stated the issues between the parties as follows:

> "The key issue between the parties is the amount of annual fees sought by PPL under the New Tariffs. The Interested Parties also do not accept the structure of the New Tariffs, and in particular the bandings, which are explained in more detail below. In addition there are two more minor issues concerning (a) the definition of 'audible area' in relation to pubs etc under New Tariff 110 and (b) whether there should be a surcharge for users who play sound recordings in public before obtaining a licence from PPL."

69. In section F ([27]-[28]) the Tribunal considered its role, and rejected a submission by PPL suggesting that it was limited to one of review.

70. In section G ([29]-[32]) the Tribunal referred to the well-established principle that, when considering reasonableness, the Tribunal would take into account comparable licences. The Tribunal went on to note that the Interested Parties relied on the Previous Tariffs, whereas PPL relied on the PRS Tariffs.

71. In section H ([33]-[40) the Tribunal considered the increases in rates which had been introduced under the New Tariffs by comparison with the Previous Tariffs, concluding that the comparison showed "a very substantial increase".

72. In section I [41]-[44]), the Tribunal summarised the history of negotiation of the Previous Tariffs. The account at [41]-[43] was derived from the Agreed Statement of Facts. At [44] the Tribunal quoted from the PPL letter dated 6 February 2001.

73. In section J ([45]-[48]) the Tribunal summarised the Interested Parties' case. In short, this was that the Previous Tariffs were the closest comparable licences and that there was no justification for the increases contained in the New Tariffs.

74. In section K ([49]-[89] the Tribunal considered PPL's main arguments in support of the increased rates under New Tariffs, namely (i) the change to section 72 of the 1988 Act, (ii) the statutory factors, (iii) the PRS Tariffs, which PPL contended were the closest comparable licences, (iv) the suggestion that the absolute amounts payable were not very large and (v) the value of background music. I shall consider the third part of this section in some detail below, but at this stage I note that at [69] the Tribunal quoted from the Brewers' Society Memo.

75. In section L ([90]-[107]) the Tribunal set out its conclusions on the key issues. In summary, it decided that the Previous Tariffs were the best comparator and that it was appropriate to retain the structure of those tariffs. Nevertheless, it considered that an increase in rates was appropriate to take account of the amendment to section 72. It decided that the PRS Tariffs were of less weight. Overall, it concluded that an increase of 10% in addition to the RPI adjustment was reasonable, subject to the imposition of a concessionary discount for some smaller licensees.

76. In section M ([108]-[110]) the Tribunal dealt with the definition of "audible area", concluding that this issue was resolved by its decision to re-instate the Previous Tariffs. In section N ([111]-[113] it considered the surcharge issue, on which it decided in favour of PPL. In section O ([114]-[116]) it dealt with outstanding matters and the way forward.

Principles applicable to an appeal from the Copyright Tribunal

77. Section 152(1) of the 1988 Act provides that an appeal lies "on any point of law arising from a decision of the Tribunal". Although section 152(1) does not say so explicitly, it is well established that this means that an appeal only lies on a point of law. As Hoffmann J (as he then was) said in *Performing Rights Society Ltd v British Entertainment and Dancing Association Ltd* [1993] EMLR 325 at 330, "The determination of the amount of the royalty is not the most promising material in which to find an error of law." He went on to observe at 331 that the Tribunal in that case had been "engaged in an exercise in which it is notoriously easier to be right than to explain why".

78. In *Phonographic Performance Ltd v Candy Rock Recording Ltd* [1999] EMLR 806, Sir Richard Scott V-C (as he then was) said at 812:

> "There are … certain well-known bases on which dissatisfaction with a finding of fact can be presented as a challenge on a point of law. Paragraph 70 of volume 1 of *Halsbury's Laws*, 4th ed., sets out the principle:
>
>> 'Errors of law include misinterpretation of a statute or other legal document or a rule of common law; asking oneself and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; …; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil any express duty to give reasons … Determination of the primary facts is not a matter of

> > law, but to make a finding unsupported by any evidence is an error of law.'"

He added at 822:

> "It cannot be necessary for a Tribunal to mention expressly every relevant matter that has been placed before it in argument or in evidence. Remarks made by Lord Hoffmann in *Piglowska v. Piglowski* [1999] 1 WLR 1360, are apposite. Lord Hoffmann commented that: 'The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed …', and warned that: 'an appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself'."

79. In *Phonographic Performance Ltd v Virgin Retail Ltd* [2001] EMLR 139, Jacob J (as he then was) quoted the first of these passages and added at [16]:

> "I would add this. Many of the questions faced by the Tribunal are of fact and degree, for instance whether a prior agreement or decision of the Tribunal can be used as a comparator for the case in hand. Adapting the words of Lord Simon of Glaisdale in the tax case of *Ransom v Higgs* [1974] STC 359 at 561:
>
> > 'There lies a "no man's land" of fact and degree where it is for the Tribunal to evaluate whether the prior agreement or decision is an appropriate comparator or not. The court can only interfere where the degree of fact is so inclined towards one frontier or the other as to lead it to believe that there is only one conclusion to which the Tribunal could reasonably have come.'"

80. As counsel for the Interested Parties submitted, it is important to bear in mind that the Copyright Tribunal is a specialist tribunal created by Parliament specifically for the purpose of regulating collective copyright licensing. As Baroness Hale of Richmond said in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678 at [30]:

> "… This is an expert Tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert Tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the Tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, [2002] 3 All E R 279 at [16]. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence

> and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

81. This passage was recently cited by both Jacob and Toulson LJJ in *Commissioners for Her Majesty's Revenue and Customs v Procter & Gamble UK Ltd* [2009] EWCA Civ 407, [2009] STC 1990. Mummery LJ added at [74]:

> "I cannot emphasise too strongly that the issue on an appeal from the Tribunal is not whether the appellate body agrees with its conclusions. It is this: *as a matter of law, was the Tribunal entitled to reach its conclusions*? It is a misconception of the very nature an appeal on a point of law to treat it, as too many appellants tend to do, as just another hearing of the self-same issue that was decided by the Tribunal."

<u>The appeal</u>

82. PPL's Grounds of Appeal run to 21 pages. The grounds are set out in 15 paragraphs (many of which are broken down in sub-paragraphs and some sub-sub-paragraphs) under eight headings. These grounds have been elaborated in a skeleton argument which extends to 144 paragraphs over 56 pages, despite containing only sparing references to legislation and case law. Despite (or perhaps because of) their length, it is not easy to extract from either document a clear and succinct statement of the errors of law which it is alleged that the Tribunal made. Counsel for PPL was more concise in his oral submissions. Furthermore, he clarified the nature of the errors of law contended for by PPL as being (i) substantial procedural irregularity, (ii) failure to take relevant considerations into account and (iii) the making of findings unsupported by any evidence. Nevertheless, the length of the Grounds of Appeal and the skeleton argument, and the fact that the papers for the appeal include all the materials which were before the Tribunal, provide a clear indication that what PPL is seeking to do is not to identify and correct errors of law on the part of the Tribunal, but rather to re-argue submissions which the Tribunal did not accept. As will become clear, that indication is confirmed when one comes to consider the individual grounds of appeal. In what follows I shall summarise the parties' submissions in relation to each ground, but I have taken all the submissions made into account.

<u>Ground A: the investigatory obligations of the Tribunal</u>

83. The Tribunal accepted at [15] that its role under section 128B(1) was to "act as an investigatory rather than an adjudicatory body" and at [16] that it had a "duty to make enquiries". Despite this acceptance, PPL contend that the Tribunal was under an obligation to investigate the reasonableness of the New Tariffs which it failed to discharge. This ground of appeal forms PPL's central complaint and it underpins a number of the other grounds.

84. So far as the obligation to investigate is concerned, counsel for PPL submitted that, when read together with section 135, section 128B(1) imposed an obligation on the

Tribunal to make appropriate enquiries to establish whether or not a referred scheme was reasonable. Counsel for the Interested Parties submitted that it was clear from the word "may" in section 128B(1) that the Tribunal was not under an obligation to investigate, but rather it had a discretion as to whether to make any enquiries, and if so what enquiries to make.

85. I agree with the Tribunal in its decision on jurisdiction that the Tribunal's role under section 128B is inquisitorial rather than adversarial. This follows from the fact that schemes are referred to it by the Secretary of State, from the absence of formal parties, from the absence of a formal adversarial procedure such as that under rules 3-15 of the 1989 Rules and from the power to make enquiries. I do not accept that section 128B(1) imposes an obligation on the Tribunal to investigate. On the contrary, I consider that the word "may" clearly indicates that section 128B(1) confers a discretion on the Tribunal as to whether to make any enquiries at all. Furthermore, the reference to "any such enquiries" in section 128B(2) confirms that the Tribunal may decide not to make enquiries. Given that the Tribunal has a discretion as to whether to investigate at all, it follows that it must have a discretion as to what enquiries to make. Of course the discretion must be exercised upon a proper basis, but a discretion it remains. Section 135 does not require the Tribunal to make enquiries, but only to have regard to all relevant considerations. It has no different impact in the context of a section 128B reference than it has in the context of a section 118 or 119 reference.

86. Counsel for PPL next submitted that the Tribunal had been wrong to conclude at [16] that in the present case its duty to make enquiries was fulfilled by considering the information that the parties had put before it. Counsel for the Interested Parties submitted that this was an exercise of its discretion which could not be attacked unless it was irrational or perverse, and that on the contrary it was an eminently reasonable one.

87. In general, before coming to PPL's specific complaints, I agree with counsel for the Interested Parties. In the present case a substantial volume of material had been put before the Tribunal by PPL and by the Interested Parties. Both PPL and the Interested Parties were represented by specialist counsel and solicitors with considerable experience of Tribunal references. Although the procedure adopted by the Tribunal under the Practice Direction was not a conventional adversarial procedure, it enabled each side to set out its own position in detail and to respond to the other side's position in detail, and both sides repeatedly used that opportunity both in writing and orally over a period of nearly four years. In those circumstances the Tribunal was entitled to conclude that it did not need to make any additional enquiries.

88. Furthermore, as counsel for the Interested Parties pointed out, PPL's consistent stance throughout the References was that the Tribunal had enough information to make a decision and did not need to enquire further: see in particular its initial submissions dated 27 January 2006 (paragraph 43 above), its reply dated 21 April 2006 (paragraph 47 above), its submissions at the hearing on 8 November 2007 (paragraph 51 above) and its position recorded in the joint letter dated 12 February 2009 (paragraph 53 above). Even in its skeleton argument dated 24 July 2009 (paragraph 54 above), when it first floated the suggestion that the Tribunal might need to seek out further information, it made no specific submissions as to matters that should be investigated. Even at the hearing, as I shall discuss below, PPL did not contend that the Tribunal was obliged to make further enquiries. Nor did it go that far in the post-hearing

correspondence (paragraphs 57 and 59 above). In those circumstances it does not lie in PPL's mouth to complain that the Tribunal made an error of law by failing to investigate certain matters.

89. Turning to PPL's specific complaints, PPL contend that the Tribunal failed to investigate three principal matters: (1) the circumstances in which the Previous Tariffs were negotiated or set, (2) the financial implications of the PRS Tariffs and (3) the impact of Tariff 112 on factories and offices.

The circumstances in which the Previous Tariffs were negotiated or set

90. Counsel for PPL submitted that the Tribunal had failed properly to investigate the negotiations behind the Previous Tariffs for hotels, pubs etc and was wrong to rely on the Brewers' Society Memo and PPL's letter dated 6 February 2001 as accurately evidencing the parties' positions. Furthermore, he submitted that the Tribunal had failed to investigate the circumstances in which the Previous Tariffs for shops and stores and for factories and offices had been set, and had wrongly transposed its conclusions in respect of hotels, pubs etc onto shops and stores and factories and offices.

91. In my judgment it has not been shown that the Tribunal made any error of law in this regard. PPL cannot say that the Tribunal did not consider the circumstances in which the Previous Tariffs were negotiated or set, because it did. The Tribunal evidently took the view that it had enough information to reach a conclusion with regard to the history of the Previous Tariffs. The Tribunal was entitled to take that view. The Interested Parties had made it clear that they were relying on the Previous Tariffs as being the best comparator in their representations to the Secretary of State and they reiterated that contention in each of their submissions to the Tribunal. As a result, both sides had addressed the Tribunal at length on the Previous Tariffs, including the history behind them, both in writing and orally. Furthermore, the Interested Parties had made it clear that they were relying upon the 6 February 2001 letter in the BHA/BBPA's representations to the Secretary of State (paragraph 38 above) and subsequently. They had also made it clear that they were relying upon the Brewers' Society Memo at the hearing on 8 November 2007 (paragraph 51 above) and subsequently. PPL had ample opportunity to adduce evidence, or to request that the Tribunal seek information from others, to rebut or qualify the points made by the Interested Parties in reliance upon those documents. Equally, it had ample opportunity to adduce evidence, or to request that the Tribunal seek information from others, about the circumstances in which the shops and stores and factories and offices tariffs had been set. If PPL failed to take such opportunities, the Tribunal was entitled in the exercise of its discretion to decide not to investigate the matter for PPL. Furthermore, as noted above, the Tribunal's account in [41]-[43] was based on the Agreed Statement of Facts.

The financial implications of the PRS Tariffs

92. Counsel for PPL submitted that the Tribunal had failed to investigate the financial implications of the PRS Tariffs compared to those of the New Tariffs. Although dealt with second in PPL's grounds of appeal and skeleton argument, this was the point which counsel for PPL put at the forefront of his oral argument, together with Ground B, which is considered separately below.

93. In order to deal with this point, it is necessary to set out the Tribunal's reasoning with regard to the PRS Tariffs in more detail. At [66] the Tribunal recorded that it was PPL's case that the fees payable under the New Tariffs were lower than those payable under the corresponding PRS Tariffs, and that this was a strong indicator that the New Tariffs were reasonable. At [67] the Tribunal stated that it considered that there was a clear difficulty with this submission, namely that PPL must have been aware of the equivalent PRS tariffs when negotiating the Previous Tariffs for pubs etc. and could have relied on them as supporting a higher rate. Thus one would expect this factor to have been taken into account by the parties to the negotiations. At [68] the Tribunal recorded that PPL accepted that it was aware of the PRS rates from time to time, but contended that the Previous Tariffs undervalued their rights. The Tribunal did not consider that this either explained or justified the increases under the New Tariffs. At [69]-[70] the Tribunal found that PPL had in fact relied on the PRS Tariffs during negotiations for the Previous Tariffs, as evidenced by the Brewers' Society Memo, and had achieved substantial increases over the years. At [71] the Tribunal recorded the Interested Parties' submission that, while the rights could be considered comparable, this was a weaker comparison than the Previous Tariffs which were agreed and took the PRS Tariffs into account.

94. At [72]-[76] the Tribunal recorded the submissions made by counsel for the Interested Parties orally at the hearing and in the subsequent note as to the extreme difficulty in making meaningful comparisons between the New Tariffs and the PRS Tariffs. At [77]-[80] the Tribunal summarised the correspondence on 11, 14 and 20 August 2009. At [81] the Tribunal stated that it did not consider it appropriate to require the Interested Parties to provide further financial information for two reasons. First, it was satisfied that it had enough information to reach a decision. Secondly, the dispute had been going on for far too long and it would be wrong to delay its resolution still further unless it was absolutely necessary to do so.

95. The Tribunal expressed its conclusions as follows:

> "82. We can now state our conclusions in relation to the PRS Tariffs as a comparator. First, we are satisfied that differences in the method of charging and calculation of bands make a direct comparison difficult, most particularly in relation to pubs, bars, restaurants and cafes and factories and offices. Nonetheless, we also conclude that the PRS Tariffs appear to be higher than the Previous Tariffs, most recently established in 2001. In relation to shops and stores, even assuming that the Interested Parties are correct in their submissions as to different exemptions, reductions etc it seems clear that the PRS rate is higher. This suggests that the PRS Tariffs for other commercial premises would also be higher, were a direct comparison possible.
>
> 83. We are not able to conclude, however, that the PRS Tariffs are necessarily the same as or higher than the New Tariffs because such a direct comparison of sufficient detail is not possible. Nor would it have made a difference to our overall conclusion even if we were satisfied that the PRS Tariffs were always the same as or higher than the New Tariffs, for the reasons set out below.

> 84. In our view, the differences between the PPL and PRS tariffs were known to PPL at all material times during the negotiations and agreements in respect of the Previous Tariffs for pubs, restaurants etc. These differences could have been (and in fact were) deployed by PPL in achieving agreements for increased rates which are contained in the Previous Tariffs. Accordingly, it seems to us that any differences between the PPL and PRS Tariffs have been considered and factored into agreements in respect of the Previous Tariffs. We do not accept PPL's submission that, with full knowledge of the differences between the PRS and PPL tariffs, they nonetheless undervalued their rights during negotiations, so that a very substantial increase from the Previous Tariffs is reasonable.
>
> 85. Furthermore, we accept the submission of the Interested Parties that the Previous Tariffs, voluntarily agreed, or based on voluntary agreements, in respect of PPL's rights in sound recordings, are a close comparable to the New Tariffs, and closer than the PRS tariffs. This does not mean that we have ignored the PRS Tariffs as a comparable. The fact that, generally, they appear to be higher than the Previous Tariffs is a point that we take into account when considering the level of increase for the new broadcast rights in sound recordings, as explained below."

96. Counsel for PPL submitted that the Tribunal was in breach of its obligation to investigate because, having concluded that comparison between the *terms* of the respective tariffs was either "difficult" or "not possible", the Tribunal had failed either to require the Interested Parties to produce comparative information as the *amounts paid* by licensees under the respective tariffs or to request information from PRS as to the *overall yield* of the PRS Tariffs which could be compared with the overall yield of the New Tariffs (information which PPL had not provided to the Tribunal despite the Interested Parties' request that it do so, but which PPL offered to provide in its letter dated 20 August 2009). He argued that this was a matter that the Tribunal was obliged to investigate for three main reasons. First, because of its general relevance to the key issue between the parties, bearing in mind the Tribunal's obligation under section 129 not unreasonably to discriminate between licensees and the fact that the PRS Tariffs included broadcast works. Secondly, because of its relevance to the question of PPL's knowledge at the time of negotiating the Previous Tariffs. Thirdly, because it was only in the Interested Parties' skeleton argument dated 24 July 2009 that the Interested Parties had raised for the first time the argument as to the difficulty of comparing the terms of the respective tariffs and only at the hearing that the Interested Parties had articulated those differences in detail. For those reasons, he submitted, the Tribunal had been wrong to reject PPL's suggestions following the hearing that the Interested Parties should produce comparison information. In the alternative, the Tribunal should have sought information from PRS. Counsel argued that the Tribunal had thereby committed a serious procedural irregularity. In addition and in consequence, it failed to take into account a relevant consideration, namely the comparative royalty yield of the two sets of tariffs, and had made a finding of fact

unsupported by evidence, namely that the PRS Tariffs were not necessarily the same as or higher than the New Tariffs.

97. In my judgment it has not been shown that the Tribunal made any error of law in this respect either. As counsel for the Interested Parties pointed out, the comparability of the New Tariffs with the PRS Tariffs was a central issue from the word go. The comparison with the PRS Tariffs was raised by PPL itself in its initial submissions to the Secretary of State (paragraph 36 above). The Interested Parties' representations to the Secretary of State (paragraph 38 above) not only made it crystal clear that they took issue with PPL over the comparability of the PRS Tariffs, but also provided figures comparing the financial effects of the respective tariffs. PPL's response in its further submission to the Secretary of State (paragraph 39 above) was to criticise the Interested Parties' figures, but nevertheless to seek to make positive points about them. It was not to demand that the Interested Parties should be required to produce additional information regarding the amounts payable under the respective tariffs, still less that information should be sought from PRS. The same pattern was repeated in the parties' written representations to the Tribunal (paragraphs 45 and 46 above).

98. I do not accept that PPL was taken by surprise by the contention in the Interested Parties' skeleton argument dated 24 July 2009 that the tariffs were difficult to compare, or by the Interested Parties' development of that argument at the hearing. As counsel for the Interested Parties pointed out, not only was PPL fully aware of the terms of the respective tariffs at all times, but also PPL itself made the point that "Comparisons between the PPL tariff … and the PRS tariff … are difficult to draw" in its initial submissions to the Secretary of State (paragraph 36 above). Thus PPL was aware of the point from the outset. Furthermore, in its reply submissions to the Tribunal (paragraph 46 above), PPL made detailed comparisons between the tariffs but acknowledged certain difficulties in doing so.

99. At the hearing, counsel then appearing for PPL was able to, and did, respond to the argument that the tariffs were difficult to compare, but he did not request the Tribunal to require the Interested Parties to produce further information. Furthermore, during the hearing the Chairman said to PPL's counsel that the Tribunal would be interested to know the total yield of the PRS Tariffs compared to the total yield of the New Tariffs. PPL's counsel said that he was not sure how one could find out the PRS figure. Counsel for the Interested Parties suggested that PRS would be willing to provide the figure if asked by the Tribunal, whereupon counsel for PPL suggested that parties write a joint letter to PRS following the hearing. Later, however, counsel for PPL said that PPL would write to PRS. In the event, PPL did not do so. Instead, PPL's stance during the post-hearing correspondence was not that the Interested Parties should be required to produce further financial information, still less that PRS should be requested to do so, but rather that the Tribunal should draw an adverse inference from the Interested Parties' failure to do so.

100. If PPL thought that it was important for the Tribunal to have more information about the relative financial effects of the New Tariffs and the PRS Tariffs than (a) it could itself provide (bearing in mind that PPL did provide some comparative information, such as the Hilton Hotels figures) and (b) the Interested Parties had volunteered (such as the figures in Annex 4 to the BHA/BBPA representations to the Secretary of State), PPL had ample opportunities during the course of the References to request the Tribunal to require such information to be produced. Equally, PPL could have written

to PRS to request information about the yield of the PRS Tariffs at any time. When PPL suggested during the post-hearing correspondence that the Interested Parties could provide further information, the Tribunal was entitled in the exercise of its discretion to conclude that it was not appropriate to require the Interested Parties to provide any more information for the reasons it gave at [81].

The impact on Tariff 112 on factories and offices

101. Although it was expressed by counsel as another failure to investigate, in my view PPL's real complaint here is a different one. As indicated above, Tariff 112 attracted relatively little opposition either by way of representations to the Secretary of State or by way of representations to the Tribunal. Moreover, there was no specific opposition either by any representative body representing licensees under Tariff 112 or by individual licensees. The Interested Parties' skeleton argument dated 24 July 2009 said almost nothing about Tariff 112. As will be seen below, at the hearing counsel for the Interested Parties expressly informed the Tribunal that he was not instructed on behalf of factories and offices and he did not say anything on their behalf.

102. During the hearing, the Chairman raised the position of factories and offices first with counsel for PPL and then with counsel for the Interested Parties:

> "CHAIRMAN: I think our general thought was that we would probably treat factories the same as we treated the others. In other words you point out that although the basis of calculation, the banding, is different there does not seem to us to be a great difference, in principle. So, in other words, if we agreed with you in relation to shops, et cetera, we would probably agree with you in relation to factories.
>
> MR SAINI: We respectfully agree with that as the appropriate approach. As far as factories are concerned, we have not provided a comparative table because the real fight here was on the pubs' tariff and the shops' tariff, but as far as factories are concerned there is, again, very, very favourable comparisons with the PRS.
>
> CHAIRMAN: The same point.
>
> MR SAINI: The same point arising.
>
> …
>
> THE CHAIRMAN: Mr Howe, do you agree with Mr Saini that the factories, this being a decision of principle, the factories should be treated in the same way as the other applicants?
>
> MR HOWE: Yes.
>
> THE CHAIRMAN: In the sense they are not represented.
>
> MR HOWE: Yes.

THE CHAIRMAN: But the logic would appear to be the same.

MR HOWE: It is the same, sir, yes. I obviously have not said anything on their behalf.

THE CHAIRMAN: No. no.

MR HOWE: I was not briefed to do so, but there is –

THE CHAIRMAN: It would follow.

MR HOWE: It would follow as a matter of principle."

103. As noted above, in the Interim Decision the Tribunal stated at [9] that at the hearing the parties had agreed that Tariff 112 should be treated in the same way as Tariffs 110 and 111. At the hearing before me, counsel for PPL submitted that counsel who had appeared for PPL before the Tribunal had not agreed this. I do not accept that submission: I consider that the transcript shows that it was common ground between the parties at the hearing that the three Tariffs should be treated in the same way.

104. Counsel for PPL also submitted, however, that such agreement as there was did not relieve the Tribunal of its investigative obligation in relation to Tariff 112 given that there were material differences between the position regarding Tariffs 110 and Tariff 111 on the one hand and Tariff 112 on the other. For the reasons I have given above, I do not accept that the Tribunal was under an obligation to investigate Tariff 112.

105. It seems to me, however, that PPL's real complaint is that, putting it in adversarial terms, counsel for the Interested Parties had no authority to reach any agreement in relation to factories and offices since (as he was careful to make clear) he did not represent them. On the other hand, given that this was not an adversarial procedure, it can be said that that was immaterial. Moreover, the question posed by the Chairman was an objective one as to which both counsel were in a position to assist the Tribunal.

106. Counsel for PPL argued, however, that, as a consequence of its reliance upon the agreement between counsel, the Tribunal had failed to take into account certain highly relevant considerations in relation to Tariff 112. First, it was essentially unopposed by users. That, he submitted, was an important factor given that the procedure under section 128B did not entail either the costs of a traditional section 118 or 119 reference or a significant risk of an adverse costs order against the referrer. Secondly, the "market reaction" (as to which, see below) was most positive in relation to Tariff 112. Thirdly, there was a stark difference between Tariffs 110 and 111, which were based on audible area, and Tariff 112, which was based on the number of employees. This was plainly significant when it came to consideration of the second statutory factor (as to which, see below). Fourthly, whereas the Interested Parties had strongly opposed the changes to the bands in the other Previous Tariffs, in PPL's survey 14 out of 29 factory and office respondents had supported a change to bands based on the number of employees and only one had opposed it. Fifthly, the equivalent PRS Tariff used bands based on the number of employees (leaving aside the question of the level of royalties payable). Accordingly, he submitted that the Tribunal should not have simply re-instated the Previous Tariff based on audible area, but should at the very

minimum have devised a tariff with bands based on the numbers of employees and awarded a greater increase in the fees payable than the 10% plus RPI awarded in relation to Tariffs 110 and 111.

107. Speaking for myself, I have to say that I think that there is force in the points made by counsel for PPL. In particular, it seems to me that the Tribunal's conclusion that the Previous Tariffs were the best comparator did not lead to the conclusion that the rather imperfect audience measure contained in Tariff 086 should be retained when an objectively better measure, supported by most of those affected who responded to the survey, was available. My view of the merits of the argument is immaterial, however. The question is whether the Tribunal fell into an error of law. I am not persuaded that it did. The Tribunal recorded the first, third and fifth points in the Interim Decision, and so it plainly took them into account. I shall deal with the second point separately below. The fourth point was not mentioned by the Tribunal in the Interim Decision, but for the reasons given by Sir Richard Scott V-C in the *Candy Rock* case I do not consider that it was obliged to do so. The weight to be given to these points was a matter for the Tribunal. Moreover, I can understand the pragmatic appeal to the Tribunal of adopting the same approach to all three New Tariffs.

Ground B: the PRS Tariffs

108. As formulated in the Ground of Appeal and in PPL's skeleton argument, this ground relates to both the Previous Tariffs and the PRS Tariffs. I think it is more convenient to consider the two separately, however, particularly since the Previous Tariffs are also the subject of the next ground of appeal. Moreover, as stated above, in his oral submissions counsel for PPL put the PRS Tariffs at the forefront of his argument.

109. PPL contend that the Tribunal was wrong not to regard the PRS Tariffs as the best comparator. Put in that way, of course, the decision does not disclose an error of law, because identification of the closest comparator was squarely a matter for the Tribunal. Accordingly, counsel for PPL advanced a number of criticisms of the reasoning in the Interim Decision. First, he complained of the Tribunal's failure to investigate the financial implications of the PRS Tariffs. I have already dealt with that, and I shall say no more about it.

110. Secondly, counsel attacked the reasoning at [82]-[85] of the Interim Decision. He submitted that, having concluded that it was either "difficult" or "not possible" to compare the Previous Tariffs with the PRS Tariffs, the Tribunal could not rationally go on to conclude that the differences between them were known to PPL at all material times and had been taken into account in the negotiations over the Previous Tariffs. I do not agree. The difficulty in making a precise comparison would not have prevented PPL, and on the Tribunal's findings did not in fact prevent PPL, from making the point that the PRS Tariffs were generally higher than the Previous Tariffs. Indeed, that was the nature of PPL's case throughout the References. It is true that, during the negotiations, PPL did not have available to it hard information as to the comparative financial implications of the respective tariffs, and that some information on that point was made available during the References. It is PPL's own case that that information was not enough to enable firm conclusions to be drawn, however. As discussed above, it was not until a very late stage of the References that PPL suggested that the Interested Parties should produce more comparative information

and only on the appeal that PPL positively contended that the Tribunal should have required them to do so.

111. Thirdly, counsel submitted that the Tribunal's finding that PPL knew the differences between the Previous Tariffs and the PRS Tariffs was false, because PPL did not know the relative financial yields of the respective tariffs. I do not accept this argument. I do not read the Interim Decision as saying that PPL did know the relative financial yields.

112. Fourthly, counsel submitted that in any event there was no evidence to support the conclusion that PPL had deployed the PRS Tariffs in the negotiations. I do not accept that. There was evidence, including but not limited to the Brewers' Society Memo, from which the Tribunal was entitled to reach that conclusion. Indeed, it would be surprising if PPL had not relied on the PRS Tariffs during the negotiations.

113. Fifthly, counsel complained that the Tribunal had not mentioned any of the authorities regarding the comparability of the PPL and PRS tariffs in its decision. Those authorities would have been well known to Tribunal, and in any event were cited to it by PPL. I have no doubt that the Tribunal would have had them in mind, and I do not consider that the Tribunal was obliged to mention them in its decision.

114. Sixthly, counsel submitted that the Tribunal had failed to take into account the fact that the PRS Tariffs had not been challenged by a reference to the Tribunal, nor was there any evidence that users objected to them. I am unimpressed by the first point, since as counsel for the Interested Parties submitted that might simply mean that users were afraid to undertake the cost and risk of a reference. It is true that the Interested Parties did commence protective section 119 references in respect of the New Tariffs following the Tribunal's decision on jurisdiction, but by then they were already embroiled in a dispute over the New Tariffs. (Those references became otiose when the Interested Parties were successful on their appeal.) The second point has more force, but its weight was a matter for the Tribunal. It is true that neither point was mentioned by the Tribunal in the Interim Decision, but it is clear from the Tribunal's reasoning that the Tribunal would not have regarded them as of significance.

115. Seventhly, counsel submitted that upon analysis of the Interim Decision it could be seen that the Tribunal had discounted the PRS Tariffs as a comparator altogether, which was contrary to established principles. I do not accept this. The Tribunal expressly stated at [85] and [96] that it had taken the PRS Tariffs into account as supporting the uplift of 10% which it applied to the Previous Tariffs.

116. In summary, it was for the Tribunal to assess the value of the PRS Tariffs as a comparator. It did not conclude that the PRS Tariffs were of no value, but rather that they only supported a modest increase in the royalty rates payable under the Previous Tariffs. The Tribunal made no error of law in reaching that conclusion.

Ground C: the Previous Tariffs

117. PPL contend that the Tribunal was wrong to regard the Previous Tariffs as the best comparator. Again, put in that way the decision does not disclose an error of law. The principal argument advanced by counsel for PPL was that the Tribunal failed to investigate the history of the Previous Tariffs. I have already dealt with that. He also

submitted that the Tribunal's finding at [84] was unsupported by evidence. Again, I have dealt with that in the context of the alleged failure to investigate. He also made some minor points, for example, about the consultation exercise, but none of these come close to establishing that the Tribunal erred in law in concluding that the Previous Tariffs were the closest comparator.

Ground D: market reaction

118. PPL contend that the Tribunal failed to take into account what it calls the "market reaction" to the New Tariffs. This is that the number of users licensed by PPL increased from 81,921 in 2005 to 105,981 in 2008: from 38,417 to 41,212 under Tariff 110, from 41,629 to 53,218 under Tariff 111 and from 1,875 to 11,551 under Tariff 112. PPL say that that is a strong indication as to the reasonableness of the New Tariffs, and particularly so in the case of Tariff 112. The Interested Parties say that the increase in numbers is attributable to the removal of the section 72 defence, meaning that many more users will have required licences, and accordingly this is of no significance. Moreover, the Interested Parties point to their opposition to the New Tariffs and suggest that users will have been paying on sufferance while awaiting the outcome of the References. PPL accept that the amendment to section 72 will have meant that more users required licences if they wished to continue using PPL's repertoire, but submit that users had the alternatives of "switching off" and using non-PPL repertoire open to them. Furthermore, PPL pointed to the fact that the Interested Parties had predicted in their representations to the Tribunal that users would switch off as a result of the New Tariffs, but this had not happened.

119. This issue was not directly addressed by the Tribunal in the Interim Decision, and I have to say that I think it would have been better if the Tribunal had done so. Nevertheless, I consider that it is reasonably clear from the Tribunal's reasoning, in particular its references to the widespread complaints from users about the New Tariffs at [10]-[11] and [87], that it did not accept that the market reaction to the New Tariffs was such as to support its reasonableness.

Ground E: measurement of audience

120. PPL contend that the Tribunal failed to take into account the fact that the New Tariffs were structured in a way which properly reflected the size of the audience whereas the Previous Tariffs were not. In support of this contention counsel for PPL made four main points. First, it was only in 2001 that PPL introduced banding by audible area into Tariffs 013, 014 and 015, whereas previously it had charged a flat fee. At that time, it had no data as to the range of audible areas covered by the tariffs. Accordingly, he submitted that the Previous Tariffs could not be regarded as either soundly-based or definitive of what the parties regarded as reasonable. Secondly, the evidence before the Tribunal showed that around 97% of sites fell within the first band. It followed, counsel submitted, that the banding in the Previous Tariffs failed to reflect the size of the audience contrary to the second statutory factor (as to which, see below). Thirdly, counsel submitted that the structure of the Previous Tariffs was manifestly unsatisfactory in certain other ways, for example, the fact that the same is payable for 400 m^2 in a hotel corridor as for the same area in a pub and the narrow width of the bands over 400 m^2. Fourthly, counsel submitted that in relation to Tariff 112 it was irrational for the Tribunal to adopt audible area as the measure of audience rather than the number of employees for the reasons given in paragraph 106 above.

121. In my opinion, these points provide considerable support for the proposition that the *structure* of the New Tariffs is more reasonable than the *structure* of the Previous Tariffs. It does not follow, however, that the *amounts payable* under the New Tariffs are reasonable. Still less does it follow that the Tribunal erred in law in concluding that the New Tariffs were unreasonable.

122. The Tribunal dealt with this point at [61]-[63]. It concluded that the agreement between the parties as to the structure of Tariffs 013, 014 and 015 in 2001 was evidence that it was reasonable. Furthermore, it pointed out that the bands in the New Tariffs started at 100 m^2, whereas those in the Previous Tariffs started at 400 m^2. Unless one reduced the rates in the lower bands, which PPL strongly opposed, it inevitably followed that adoption of the structure of the New Tariffs would lead to a substantial increase in the amounts payable by many licensees who were previously in the first band, which was one reason why the Interested Parties opposed it.

123. Thus, the Tribunal addressed its mind to the question of how the audience should be measured. It concluded that, in the light of PPL's resistance to a reduction in rates in the lower bands, it was more reasonable to retain the structure of the Previous Tariffs than to adopt the New Tariffs. That was a conclusion which it was entitled to reach.

<u>Ground F: the statutory factors</u>

124. The statutory factors set out in section 128A(7) are as follows:

> "(a) the extent to which the broadcasts to be shown or played by a potential licensee in circumstances mentioned in subsection (1) are likely to include excepted sound recordings;
>
> (b) the size and the nature of the audience that a licence or licensing scheme would permit to hear the excepted sound recordings;
>
> (c) what commercial benefit a potential licensee is likely to obtain from playing the excepted sound recordings; and
>
> (d) the extent to which the owners of copyright in the excepted sound recordings will receive equitable remuneration, from sources other than the proposed licence or licensing scheme, for the inclusion of their recordings in the broadcasts to be shown or played in public by a potential licensee."

125. As noted above, PPL rely upon these factors as supporting the reasonableness of the New Tariffs. The Tribunal considered this issue at [56]-[65]. It concluded, in short, that the statutory factors did not support the reasonableness of the New Tariffs. It gave four reasons for this conclusion, the first of which was that there was no connection between the statutory factors and the levels of fees charged by PPL under the New Tariffs.

126. Before the Tribunal, PPL's case focussed upon the second factor, the size and nature of the audience. Its main point in relation to this factor was that it supported the

reasonableness of the New Tariffs because they properly reflected the size of the audience. I have already dealt with that point.

127. On the appeal, PPL also sought to place reliance upon the third factor, the commercial benefit to the licensee. Since PPL did not particularly rely on the third factor before it, the Tribunal said little about it in this context. It did address this issue, however, when considering PPL's last argument in support of the New Tariffs at [88]-[89]. It concluded that, save to the extent that the New Tariffs covered PPL's new rights in respect of broadcast sound recordings, this did not justify an increase in the rates payable under the Previous Tariffs. That was a conclusion which it was entitled to reach.

Ground G: the concessionary discount

128. The concessionary discount was not a feature of the Previous Tariffs. It was part of the New Tariffs. PPL contend that, having concluded that the New Tariffs were not reasonable but that the Previous Tariffs would be reasonable if increased by 10% plus RPI, it was irrational for the Tribunal to take the concessionary discount from the New Tariffs and apply to the Previous Tariffs. I do not accept this contention. The Tribunal explained its reasons for imposing the concessionary discount at [102]-[107]. It emphasised that it was aware that the concessionary discount did not form part of the Previous Tariffs, but nevertheless decided that it would be reasonable to include the concessionary discount to balance the increase of 10% which it had decided to apply to the Previous Tariffs. That was a matter for the Tribunal to decide. It made no error of law.

Ground H: costs

129. PPL make a free-standing challenge to the Tribunal's costs order. The Tribunal ordered PPL to pay 50% of the costs of the References. PPL contend that this was wrong in law since it did not reflect the inquisitorial nature of the Tribunal's jurisdiction under section 128B. PPL say that the Tribunal should have made no order as to costs. In my judgment the Tribunal's costs order was one that was within the ambit of its discretion given the quasi-adversarial position of the parties and given that it justifiably regarded the Interested Parties as substantial "winners". It did not err in law in making that order.

Conclusion

130. The appeal is dismissed.

Appendix

72 Free public showing or playing of broadcast

(1) The showing or playing in public of a broadcast to an audience who have not paid for admission to the place where the broadcast is to be seen or heard does not infringe any copyright in—

(a) the broadcast;

(b) any sound recording (except so far as it is an excepted sound recording) included in it; or

(c) any film included in it.

(1A) For the purposes of this Part an 'excepted sound recording' is a sound recording–

(a) whose author is not the author of the broadcast in which it is included; and

(b) which is a recording of music with or without words spoken or sung.

(1B) Where by virtue of subsection (1) the copyright in a broadcast shown or played in public is not infringed, copyright in any excepted sound recording included in it is not infringed if the playing or showing of that broadcast in public–

(a) forms part of the activities of an organisation that is not established or conducted for profit; or

(b) is necessary for the purposes of–

(i) repairing equipment for the reception of broadcasts;

(ii) demonstrating that a repair to such equipment has been carried out; or

(iii) demonstrating such equipment which is being sold or let for hire or offered or exposed for sale or hire.

(2) The audience shall be treated as having paid for admission to a place—

(a) if they have paid for admission to a place of which that place forms part; or

(b) if goods or services are supplied at that place (or a place of which it forms part)—

(i) at prices which are substantially attributable to the facilities afforded for seeing or hearing the broadcast, or

(ii) at prices exceeding those usually charged there and which are partly attributable to those facilities.

(3) The following shall not be regarded as having paid for admission to a place—

(a) persons admitted as residents or inmates of the place;

(b) persons admitted as members of a club or society where the payment is only for membership of the club or society and the provision of facilities for seeing or hearing broadcasts is only incidental to the main purposes of the club or society.

(4) Where the making of the broadcast was an infringement of the copyright in a sound recording or film, the fact that it was heard or seen in public by the reception of the broadcast shall be taken into account in assessing the damages for that infringement.

Chapter VII

Copyright Licensing

Licensing schemes and licensing bodies

116 Licensing schemes and licensing bodies

(1) In this Part a 'licensing scheme' means a scheme setting out—

(a) the classes of case in which the operator of the scheme, or the person on whose behalf he acts, is willing to grant copyright licences, and

(b) the terms on which licences would be granted in those classes of case;

and for this purpose a 'scheme' includes anything in the nature of a scheme, whether described as a scheme or as a tariff or by any other name.

(2) In this Chapter a 'licensing body means a society or other organisation which has as its main object, or one of its main objects, the negotiation or granting, either as owner or prospective owner of copyright or as agent for him, of copyright licences, and whose objects include the granting of licences covering works of more than one author.

(3) In this section 'copyright licences' means licences to do, or authorise the doing of, any of the acts restricted by copyright.

(4) References in this Chapter to licences or licensing schemes covering works of more than one author do not include licences or schemes covering only—

(a) a single collective work or collective works of which the authors are the same, or

(b) works made by, or by employees of or commissioned by, a single individual, firm, company or group of companies.

For this purpose a group of companies means a holding company and its subsidiaries, within the meaning of section 736 of the Companies Act 1985.

References and applications with respect to licensing schemes

…

118 Reference of proposed licensing scheme to tribunal

(1) The terms of a licensing scheme proposed to be operated by a licensing body may be referred to the Copyright Tribunal by an organisation claiming to be representative of persons claiming that they require licences in cases of a description to which the scheme would apply, either generally or in relation to any description of case.

(2) The Tribunal shall first decide whether to entertain the reference, and may decline to do so on the ground that the reference is premature.

(3) If the Tribunal decides to entertain the reference it shall consider the matter referred and make such order, either confirming or varying the proposed scheme, either generally or so far as it relates to cases of the description to which the reference relates, as the Tribunal may determine to be reasonable in the circumstances.

(4) The order may be made so as to be in force indefinitely or for such period as the Tribunal may determine.

119 Reference of licensing scheme to tribunal

(1) If while a licensing scheme is in operation a dispute arises between the operator of the scheme and—

(a) a person claiming that he requires a licence in a case of a description to which the scheme applies, or

(b) an organisation claiming to be representative of such persons,

that person or organisation may refer the scheme to the Copyright Tribunal in so far as it relates to cases of that description.

(2) A scheme which has been referred to the Tribunal under this section shall remain in operation until proceedings on the reference are concluded.

(3) The Tribunal shall consider the matter in dispute and make such order, either confirming or varying the scheme so far as it relates to cases of the description to which the reference relates, as the Tribunal may determine to be reasonable in the circumstances.

(4) The order may be made so as to be in force indefinitely or for such period as the Tribunal may determine.

120 Further reference of scheme to tribunal

(1) Where the Copyright Tribunal has on a previous reference of a licensing scheme under section 118, 119 or 128A, or under this section, made an order with respect to the scheme, then, while the order remains in force—

(a) the operator of the scheme,

(b) a person claiming that he requires a licence in a case of the description to which the order applies, or

(c) an organisation claiming to be representative of such persons,

may refer the scheme again to the Tribunal so far as it relates to cases of that description.

(2) A licensing scheme shall not, except with the special leave of the Tribunal, be referred again to the Tribunal in respect of the same description of cases—

(a) within twelve months from the date of the order on the previous reference, or

(b) if the order was made so as to be in force for 15 months or less, until the last three months before the expiry of the order.

(3) A scheme which has been referred to the Tribunal under this section shall remain in operation until proceedings on the reference are concluded.

(4) The Tribunal shall consider the matter in dispute and make such order, either confirming, varying or further varying the scheme so far as it relates to cases of the description to which the reference relates, as the Tribunal may determine to be reasonable in the circumstances.

(5) The order may be made so as to be in force indefinitely or for such period as the Tribunal may determine.

….

128A Notification of licence or licensing scheme for excepted sound recordings

(1) This section only applies to a proposed licence or licensing scheme that will authorise the playing in public of excepted sound recordings included in broadcasts, in circumstances where by reason of the exclusion of excepted sound recordings from section 72(1), the playing in public of such recordings would otherwise infringe the copyright in them.

(2) A licensing body must notify the Secretary of State of the details of any proposed licence or licensing scheme for excepted sound recordings before it comes into operation.

(3) A licence or licensing scheme, which has been notified under subsection (2), may not be operated by the licensing body until 28 days have elapsed since that notification.

(4) Subject to subsection (5), the Secretary of State shall take into account the matters set out in subsection (6) and then either –

(a) refer the licence or licensing scheme to the Copyright Tribunal for a determination of whether the licence or licensing scheme is reasonable in the circumstances, or

(b) notify the licensing body that he does not intend to refer the licence or licensing scheme to the Tribunal.

(5) If the Secretary of State becomes aware –

(a) that a licensing body has failed to notify him of a licence or licensing scheme under subsection (2) before it comes into operation; or

(b) that a licence or licensing scheme has been operated within 28 days of a notification under subsection (2),

subsection (4) does not apply, but the Secretary of State may at any time refer the licence or licensing scheme to the Tribunal for a determination of whether the licence or licensing scheme is reasonable in the circumstances, or may notify the licensing body that he does not intend to refer it to the Tribunal.

(6) The matters referred to in subsection (4) are –

(a) whether the terms and conditions of the proposed licence or licensing scheme have taken into account the factors set out in subsection (7);

(b) any written representations received by the Secretary of State;

(c) previous determinations of the Tribunal;

(d) the availability of other schemes, or the granting of other licences, to other persons in similar circumstances, and the terms of those schemes or licences; and

(e) the extent to which the licensing body has consulted any person who would be affected by the proposed licence or licensing scheme, or organisations representing such persons, and the steps, if any, it has taken as a result.

(7) The factors referred to in subsection (6) are –

(a) the extent to which the broadcasts to be shown or played by a potential licensee in circumstances mentioned in subsection (1) are likely to include excepted sound recordings;

(b) the size and the nature of the audience that a licence or licensing scheme would permit to hear the excepted sound recordings;

(c) what commercial benefit a potential licensee is likely to obtain from playing the excepted sound recordings; and

(d) the extent to which the owners of copyright in the excepted sound recordings will receive equitable remuneration, from sources other than the proposed licence or licensing scheme, for the inclusion of their recordings in the broadcasts to be shown or played in public by a potential licensee.

(8) A proposed licence or licensing scheme that must be notified to the Secretary of State under subsection (2) may only be referred to the Tribunal under section 118 or 125 before such notification takes place.

(9) A proposed licensing scheme that has been notified to the Secretary of State under subsection (2) may only be referred to the Tribunal under section 119 after the Secretary of State has notified the licensing body that he does not intend to refer the licensing scheme to the Tribunal.

(10) If a reference made to the Tribunal under section 118 or 125 is permitted under subsection (8) then –

(a) the reference shall not be considered premature only because the licence or licensing scheme has not been notified to the Secretary of State under subsection (2); and

(b) where the Tribunal decides to entertain the reference, subsection (2) to (5) shall not apply.

(11) Nothing in this section shall be taken to prejudice any right to make a reference or application to the Tribunal under sections 120 to 122, 126 or 127.

(12) This section applies to modifications to an existing licence or licensing scheme as it applies to a proposed licence or licensing scheme.

(13) In this section and in section 128B, any reference to a 'licence' means a licence granted by a licensing body otherwise than in pursuance of a licensing scheme and which covers works of more than one author.

128B References to the Tribunal by the Secretary of State under section 128A

(1) The Copyright Tribunal may make appropriate enquiries to establish whether a licence or licensing scheme referred to it by the Secretary of State under section 128A(4)(a) or (5) is reasonable in the circumstances.

(2) When considering the matter referred, and after concluding any such enquiries, the Tribunal shall take into account –

(a) whether the terms and conditions of the proposed licence or licensing scheme have taken into account the factors set out in section 128A(7);

and

(b) any other factors it considers relevant,

and shall then make an order under subsection (3).

(3) The Tribunal shall make such order -

(a) in the case of a licensing scheme, either confirming or varying the proposed scheme, either generally or so far as it relates to cases of any description; or

(b) in the case of a licence, either confirming or varying the proposed licence,

as the Tribunal may determine to be reasonable in the circumstances.

(4) The Tribunal may direct that the order, so far as it reduces the amount of charges payable, has effect from a date before that on which it is made. If such a direction is made, any necessary repayments to a licensee shall be made in respect of charges already paid.

(5) The Tribunal may award simple interest on repayments, at such rate and for such period, ending not later than the date of the order, as it thinks fit.

Factors to be taken into account in certain classes of case

129 General considerations: unreasonable discrimination

In determining what is reasonable on a reference or application under this Chapter relating to a licensing scheme or licence, the Copyright Tribunal shall have regard to—

(a) the availability of other schemes, or the granting of other licences, to other persons in similar circumstances, and

(b) the terms of those schemes or licences,

and shall exercise its powers so as to secure that there is no unreasonable discrimination between licensees, or prospective licensees, under the scheme or licence to which the reference or application relates and licensees under other schemes operated by, or other licences granted by, the same person.

….

135 Mention of specific matters not to exclude other relevant considerations

The mention in sections 129 to 134 of specific matters to which the Copyright Tribunal is to have regard in certain classes of case does not affect the Tribunal's general obligation in any case to have regard to all relevant considerations