Neutral Citation Number: [2011] EWCA Civ 650

Case No: A3/2010/2111

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COPYRIGHT TRIBUNAL
MR JUSTICE FLOYD
CH/2009/APP/0563

Royal Courts of Justice
Strand, London, WC2A 2LL

27/05/2011

B e f o r e :

LORD JUSTICE LONGMORE
LORD JUSTICE WILSON
and
LORD JUSTICE ETHERTON

Between:

CSC MEDIA GROUP LIMITED (Formerly known as Chart Show Channels Ltd)	**Appellant**
- and -	
VIDEO PERFORMANCE LIMITED	**Respondent**

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Michael Crane QC and Mr Edmund Cullen (instructed by Davenport Lyons) for the Appellant
Mr Ian Mill QC and Mr Tom Weisselberg (instructed by Olswang LLP) for the Respondent
Hearing dates : 13th April 2011

HTML VERSION OF JUDGMENT

Crown Copyright ©

Lord Justice Etherton :

Introduction

1. This is an appeal by CSC Media Group Limited ("CSC"), a broadcaster of television music channels, from the order of Floyd J dated 30 September 2010 by which he set aside part of the interim decision ("the Decision") and order dated 7 September 2010 of the Copyright Tribunal ("the Tribunal") (HH Judge Fysh QC SC, Rear-Admiral James Carine and Colonel Roderick Arnold) and he remitted certain matters to a newly constituted Tribunal for re-hearing. The part of the Decision and order which the Judge set aside was the Tribunal's determination that the royalty rate payable by CSC to the respondent, Video Performance Limited ("VPL"), for the use of VPL's music video repertoire in CSC's television music channels should be the headline rate of 12.5% of CSC's gross revenue, pro-rated by reference to the total broadcast hours.

2. The decision of the Tribunal was made on CSC's application under section 126 of the Copyright, Designs and Patents Act 1988 ("the Act"). That section provides that a licensee under a copyright licence from a licensing body like VPL, which is due to expire, may apply to the Tribunal on the ground that it is unreasonable in the circumstances that the licence should cease to be in force. Section 126(4) provides that, if the Tribunal finds the application well-founded, it shall make an order declaring that the licensee shall continue to be entitled to the benefit of the licence on such terms as the Tribunal may determine to be reasonable in the circumstances.

3. The hearing before the Tribunal lasted three weeks, in which evidence was given by 14 factual witnesses and 2 expert witnesses. The decision runs to 50 pages and 210 paragraphs. By the time the Tribunal published its decision the costs incurred by each side were in excess of £1m.

4. The Judge considered that the Tribunal's decision on the royalty rate was fundamentally flawed by, among other things, its methodology and its failure to take account or sufficient account of a licence previously granted by VPL to BSkyB; and that the Tribunal acted improperly and irrationally in deciding on a pro-rating formula which differed from that agreed by both parties. The Judge concluded "with considerable regret" that the matter would have to be remitted for a re-hearing before a differently constituted Tribunal.

5. Mummery LJ granted permission for a second appeal to this Court. CSC does not challenge the Judge's order insofar as it sets aside the Tribunal's decision on pro-rating. It only appeals the Judge's order insofar as it sets aside the entirety of the Tribunal's decision on the royalty rate. VPL has issued a Respondent's Notice seeking to uphold the Judge's order on four further grounds in respect of which, VPL argues, the Tribunal was plainly wrong.

Background

6. The following summary is mostly taken from the Judge's clear and helpful account.

7. VPL is a licensing body within the meaning of section 126 of the Act. Its members are record companies and other persons who are owners or exclusive licensees of the rights to broadcast and show certain music videos in public and the right to permit the copying of those videos for the purpose of subsequent broadcast or public show. VPL licenses broadcasts of music videos on behalf of its members (and copying for the purpose of such broadcasting). VPL seeks to grant licences to its repertoire ("the VPL Repertoire") in return for a royalty calculated by reference to the gross revenue that will be received by a licensee in respect of the broadcast of the television channel, pro-rated by reference to the channel's usage of the VPL Repertoire. It has also granted licences on a fixed fee basis. Its licensees are generally broadcasters of music television channels (that is, television channels where a substantial proportion of the broadcasting output comprises music videos).

8. CSC carries on business as a broadcaster of music television channels. It initially operated three music television channels. From 2004 it additionally managed three music television channels for BSkyB. Those channels were then purchased by CSC in 2006. CSC now operates seven music television channels and a similar number of non-music channels.

9. CSC has effectively been licensed by VPL since September 2002 under the terms of a written licence which provided for the payment to VPL of a pro-rated fee based on the headline rate of 20% of gross revenue ("the CSC 2003 Licence"). The CSC 2003 Licence was never signed. It expired on 17 September 2005. CSC has been licensed since then under the terms of a letter ("the Extension Letter") whose purpose was to give the parties three months in which to negotiate new terms. Following the making of the application to the Tribunal under section 126 of the Act, CSC has been licensed by virtue of section 126(3). That sub-section provides that, where a reference has been made to the Tribunal in respect of a licence, the licence shall remain in operation until the proceedings on the reference are concluded.

The legal principles

10. As mentioned above, the licence terms to be determined by the Tribunal under section 126(4) are those which are "reasonable in the circumstances". Section 128(3) provides that the Tribunal may direct that an order under section 126 has effect from a date before that on which it is made, subject to certain limitations. Section 129 provides, among other things, for the Tribunal to have regard to comparables, as follows:

"129. 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."

11. Section 135 provides that the obligation to have regard to those specific matters "does not affect the Tribunal's general obligation in any case to have regard to all relevant considerations".

12. By virtue of section 152(1) of the Act there is a right of appeal from the Tribunal to the High Court on a point of law.

13. The role of the appellate court on an appeal from the Tribunal was helpfully reviewed by Arnold J in *PPL v The British Hospitality Association [2009] EWHC 209(Ch)*. As he pointed out, the appellate court will accord due respect to the Tribunal as a specialist tribunal created by Parliament specifically for the purpose of regulating collective copyright licensing. On that point, Baroness Hale's well-known observation in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678 at [30] (with reference to the Asylum and Immigration Tribunal) is apposite :

    "… 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."

14. That passage was cited by Jacob and Toulson LJJ in *HMRC v Procter & Gamble UK Ltd* [2009] EWCA Civ 407, [2009] STC 1990, in which 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."

15. There are three connected points. First, it is not necessary for the Tribunal to mention every argument and every piece of evidence deployed before it. As Sir Richard Scott V-C said in *PPL v Candy Rock Recording Ltd* [1999] EMLR 806 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'"

16. Secondly, as appears from that citation, it is not appropriate to adopt an overly technical analysis of the Tribunal's decision, dissecting its logic and reasoning under a forensic microscope so as to expose minor infelicities of language, structure, presentation and so forth.

17. Thirdly, there are many matters on which the Tribunal's view can really only be attacked as an error of law if no tribunal, properly directing itself to the evidence and the law, could have reached the conclusion or formed the view which the Tribunal did. As Hoffmann J said in *The Performing Right Society Ltd v The 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. The jurisdiction of the Tribunal could hardly be expressed in simpler terms. Section 27(4) of the Copyright Act 1956 says that it shall make such order 'as the tribunal may determine to be reasonable in the circumstances'. The Tribunal expressly directed itself in accordance with this provision. It seems to me that it can only have erred in law if it did something which no Tribunal, if it thought about the matter, could have regarded as reasonable. Irrationality could in theory be demonstrated in two ways. First, the royalty fixed by the Tribunal might be so large or so small that no rational Tribunal could have arrived at such a figure… Secondly, the reasons given by the Tribunal … might disclose some *non sequitur* which invalidates the reasoning."

18. The same point was reflected in the following observations of Jacob J in *PPL v Virgin Retail Ltd* [2001] EMLR 139 at [16]:

    "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.'"

19. That point is also well conveyed in the following statement of Nicholls LJ in *Smith Kline & French Laboratories Ltd's (Cimetidine) Patents* [1990] RPC 203 (which concerned the terms of a patents licence, including the royalty rate, settled by the Comptroller pursuant to the Patents Act 1977) at 250:

    "In some fields, identifying a sum as "reasonable remuneration" will not be particularly difficult or susceptible of much scope for differing views. Payment of reasonable remuneration for a standard piece of work done by a craftsman or a member of a profession is an example. In other fields the matter will stand very differently. This is so with licences of right. The complexities and uncertainties involved in cases such as the present appeals are formidable. In such cases the exercise is bound to be one in the carrying out of which different minds may readily reach differing conclusions, according to the weight which different minds consider ought fairly to be given to the various features of the case. An example of this is the extent to which rival comparables advanced by SK&F and the applicants assist in the present case. Inevitably there are points of resemblance and points of distinction in almost all comparables. The weight to be attached to these various points, and the conclusion on the degree of assistance a particular comparable affords, are matters which lie in the judgment of the tribunal to whom the calculation has been entrusted."

The Decision

20. In [19] to [45] of his judgment the Judge described in impeccable terms the Tribunal's lengthy and detailed Decision. For the purpose of this appeal, and gratefully relying heavily on the Judge's account, it is possible to summarise relatively briefly the Tribunal's principal points and its methodology as follows.

21. In the first section of the Decision the Tribunal described the history of music videos. It explained that music videos began to be made some thirty years ago purely to promote the recordings of a group or singer. By the mid-1980s those "pop promos" had evolved into a genre, often achieving sophisticated quality. They were by then a mature part of the entertainment market. In 1981 MTV introduced the first broadcast music video channel, stringing together music videos, head to tail, interspersed with advertising. The Tribunal also explained that it had seen a demonstration of music videos both alone and as broadcast. This had involved stripping the video of sound and vice versa. The demonstration had satisfied the Tribunal that the VPL Repertoire formed the principal attraction of **CSC**'s business. The Tribunal recognised that advertisers paid substantial sums to advertise on music video channel broadcasts.

22. The Tribunal said ([15]), in comparing pop radio:

"Commercial radio and music videos are rather different products and royalties payable to licensing bodies under commercial radio broadcasting agreements have, we consider, only a modest bearing on the major issues to be decided here."

23. At [17] to [21] of the Decision the Tribunal described the "pop promo effect". The Tribunal rejected VPL's evidence and case that the effect which the broadcast of pop videos had on the sales of recordings to which they related was no longer the factor that it had been in the past, and that it was accordingly no longer appropriate to have regard to this promotional effect when setting royalties. The Tribunal concluded that the pop promo effect should serve, as it had in the past, to reduce the royalty rate.

24. In the section of the Decision headed "The music video market and the parties" the Tribunal concluded that MTV, Box Television ("Box") and BSkyB were the three major players. Apart from those three, there were other smaller players, some of which had failed as businesses.

25. In the section of the Decision headed "What is on offer?" the Tribunal referred to what VPL called its "Standard Licensing Approach". VPL described this as either a royalty based deal or a fixed fee deal. Insofar as it was a royalty based deal, it was described ([54]) (so far as relevant to this appeal) as requiring the licensee to pay 20% of the gross revenue (as defined) subject to the deduction of certain costs. The Tribunal recorded that it was not always easy to translate the fixed fee into a percentage of

revenue. In addition the Tribunal found that VPL's approach to offering licences to minor players was "take it or leave it".

26. The Tribunal described ([60]) (so far as relevant to this appeal) the rival contentions of the parties as to the reasonable financial terms to be included in the licence, as follows. VPL required a 20% royalty rate on gross revenue (as defined) less up to 15% in respect of advertising and sponsorship costs, and pro-rated to reflect the usage of the VPL Repertoire as a proportion of **CSC**'s Programming Content. **CSC** proposed a royalty rate of 8% of gross revenue, less up to 15% in respect of advertising costs and up to 35% in respect of sponsorship costs, and fairly pro-rated in any event to reflect usage.

27. In [61] to [73] of the Decision the Tribunal addressed the statutory framework and the general approach which the law required the Tribunal to take. It referred to, and quoted, sections 126, 129 and 135 of the Act. The Tribunal described the legal approach to comparators in [67] to [73]. It is appropriate to set out those paragraphs in full in view of the Judge's conclusion that the Tribunal's failure properly to deal with the BskyB Licence as a comparator fatally undermined the validity of the Tribunal's conclusion on the reasonable royalty rate.

"67: **Comparators** As noted above, s.129 of the Act *requires* the Tribunal to take into account schemes and licenses 'to other persons in similar circumstances.' Mr Richard Boulton, an expert who has frequently given evidence before the Tribunal, put the position with great clarity, thus [in the 2007 *Joint Online Licence* reference]:
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. "
"68. 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*]
69. 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 license.
70. On the issue of royalty rates, comparators have featured strongly in the arguments of VPL reliance being placed upon the antecedent licensing of the same rights to **CSC** (e.g. in the 2003 License) and to others. Comparators have also featured in the case of **CSC** in respect of the rates charged by PPL for its standard commercial radio licenses. Not surprisingly VPL characterised the 2003 License as being 'a compelling comparator'.
71. 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 licenses both from the owners of the rights in the music videos (i.e. VPL) and

that of the owners of the rights of the composers and publishers of music (i.e. PRS for music), 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.
72. Where there are sufficiently comparable licenses, the Tribunal should adopt a similar rate "*absent any special circumstances":* AEI v PPL *supra* at 256.
73. 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 (see above para 62) unless there is "a logical reason for it"."

28. The Tribunal rejected VPL's argument that the **CSC** 2003 Licence was a "strong and compelling comparator". It accepted **CSC**'s submission that the **CSC** 2003 Licence represented only a convenient record of a temporary modus vivendi and that it was not a record of the terms of a concluded agreement, freely entered into.

29. In a section of the Decision headed "The origin of and justification for the 20% rate" the Tribunal rejected VPL's evidence and case that the 20% rate had been established for a long period of time, even prior to 2002. The Tribunal preferred **CSC**'s evidence that 20% was an "aspirational rate". The Tribunal concluded [124] that:

"a long shadow must fall over the very existence of VPL's so-called Standard Licensing Approach… We accept the fact of its 'imposition' by VPL in the case of nominal users of the Repertoire; but this does not elevate it to the status of in effect, a tariff."

30. In a section of the Decision headed "Changes in the market" the Tribunal observed that the change in the market in favour of internet usage had affected and would continue to affect advertising on music video channels. The Tribunal concluded that the effect was greatly to diminish the value of the older licence agreements with VPL as comparators. The Tribunal decided, for that reason, to place less reliance on agreements with VPL which were made before January 2005.

31. The Tribunal then compared music videos with radio and considered the rates charged by PPL for standard commercial radio licences, which spanned a range from 2% of net broadcasting revenue (for small stations) to 5% (for the largest stations). Having referred to some of the evidence on this topic the Tribunal said the following at [133]–[135]:

"133. … In the circumstances, we consider that a detailed analysis of the evidence on this topic is not required because the main point being made by **CSC** is a very general one and it is this: both offerings are driven by music and in the case of commercial radio, the rates are assumed to have been the outcome of arm's length negotiation and agreement. How can music video therefore reasonably be said to be worth *four times* that of commercial radio?
134. Music videos are a *genre* of entertainment independent of others; these are not fungible products. The music video is obviously worth more than commercial radio as a licensable commodity. But how much more?
135. Every product has its price. By now, as a result of both the evidence and the demonstration, we have had enough experience of music videos to form a *prima facie*

view of their worth in the hierarchy of entertainment. In our view, VPL's demand for four times the maximum headline rate for commercial radio is unreasonable. The rate must be less than 20% of defined revenue on this ground alone. At the other end, the highest figure emerging from this evidence on commercial radio is possibly, 5.75% and we may therefore take this sum as the lower starting point. The **CSC** has proposed its 8% royalty with *inter alia* this in view, believing it to be generous. We think that the figure should be more than that."

32. Accordingly, the Tribunal's view at this point was that the appropriate royalty rate lay somewhere in the range of 8% to 20%. It then reduced that range further in the following two paragraphs under the heading "The reduced window":

"136. Taking this, the 'pop promo effect' and the evidence relating to a changing market into account, we consider that the right royalty rate must be over 10% and less than 15%. The rest is fine tuning - to which we now turn.
137. There are two main areas by which to fix the thus diminished window of royalty rate:
(a) Consideration of other music video licenses as comparables, and
(b) The 'available profits' approach."

33. The Tribunal then considered other music licences. It again rejected the **CSC** 2003 Licence and indeed all other licences as useful comparables, other than a licence agreed with BSkyB in 2004 ("the BSkyB Licence"). The Tribunal said the following of the BSkyB Licence:

"160. The second license which was agreed in July 2004 spanned the period covering the sale of the BSkyB channels to **CSC**. It was signed only in 2007, just after the sale. The relevant part of this agreement shows that BSkyB agreed to pay 20% of all revenue streams with pro-ration to take place only in the event that more than 20% of programming content (i.e. airtime less promotions, station 'idents' etc) comprised non-VPL material. There was also to be a quarterly refundable advance of £16,000. On its face therefore this *was* an example of the 20% license in a deal struck with a major player in the field. What better example do you want asked Mr Hollander rhetorically?
161. In answer, Mr Baldwin again went for the figures available from disclosure and was able to show that whatever the agreement provided, the figures of royalty paid did not square with the 20% royalty agreed. They were less. As with Box, possible 'wrinkles' were located in whether or not certain sums had been pro-rated or not and it is right to say that Mr Clark (who was asked many questions on the workings of this agreement) was defensive rather than helpful on the matter: see T10/31. On the other side Mr MacMillan who was also cross-examined about BSkyB was unable to provide full answers: T7/113-114 and 145-147. No one from BSkyB was called. There is thus some uncertainty about the *workings* of the agreement – *but none about its terms*.
162. **CSC** also suggested that by the time the agreement was signed, BSkyB wanted to have nothing more to do with their music video *debacle* which they had witnessed and disposed of – and were just no longer interested. We find this an unconvincing argument.
163. In our view, the BSkyB agreement is an example of the Standard Licensing Approach being accepted with a major player."

34. In a section of the Decision headed "The 'available profits' approach: Economic benefits" the Tribunal considered **CSC**'s past, present and projected financial position for the period 2008 to 2011 on the basis of figures extracted from **CSC**'s management accounts for 2008, forecast earnings for 2009 to 2011, and a royalty to VPL of 20% with pro-rating. The Tribunal concluded:

"187. Whilst we feel that both sides may have exaggerated their fortunes and misfortunes past and present, under this head, on any account we are certainly not looking at a rosy picture of untrammelled growth in **CSC**'s fortunes on foot of its music video business ..."

35. In a section of the Decision headed "Risk sharing" the Tribunal concluded that the licensee took the far greater share of the risk, and this factor pointed in **CSC**'s favour.

36. In relation to pro-rating, the Tribunal pointed out that in the **CSC** 2003 Licence the pro-rating was based on the proportion which VPL content bore to the total broadcast hours. By contrast, in the offered licence, pro-rating was the proportion which the VPL Repertoire bore to "Programming Content" (as defined). As I have said, The Tribunal decided that the old formula should be the one included in the new licence.

37. In the final section of Decision headed "Conclusion" the Tribunal said simply in [208]:

"We have decided in the light of the foregoing that the reasonable royalty rate should be 12.5% of **CSC**'s Gross Revenue subject to the proposed deductions in respect of advertising etc. The various other changes to VPL's 2008 Offered License may be derived from our findings above."

The Judge's judgment

38. The critical parts of the Judge's judgment, for the purposes of this appeal, can be summarised very briefly as follows.

39. First, the Judge held ([48]) that it was clear that the Tribunal arrived at the reduced window, that is 10% to 15%, without reference to the matters it discussed later, in particular the BSkyB Licence and the available profits.

40. Secondly, the Judge held ([49)] that the Tribunal's view on the 10% to 15% range of royalty, reached without regard to the matters discussed subsequently, was a concluded as opposed to a provisional view. He observed ([50]) that there would be nothing wrong in that approach were it clear that those matters also pointed clearly to a royalty in that range. He said that was not, however, the case because the BSkyB Licence was at 20% with limited pro-rating; and the Tribunal formed, or at least recorded, no view on what royalty the available profits approach indicated.

41. The Judge concluded ([52]) that it was "wrong in principle to relegate the single most significant comparable to the role of fine tuning a royalty rate which has already been decided to lie in a range considerably below the rate appearing in that licence"; and that was "particularly so where the diminished window has itself been fixed by

reference to the comparable (radio) which the Tribunal considered less relevant". The Judge said that approach was contrary to the following statement by the Tribunal in *AEI Rediffusion Music Limited v PPL* [1998] RPC 335 at 347, which he considered to be correct:

"It is well established that, if the Tribunal is satisfied that there exist other licences which are sufficiently comparable to the licence they are going [*semble* to be] asked to settle, the Tribunal should adopt a similar rate absent any special circumstances. (See section 129 of the Act, *Smith Kline & French Ltd's (Cimetidine) Patents* and *British Phonographic Industry Ltd v Mechanical Copyright Protection Society Ltd (No 2)* (*BPI v MCPS*). Thus had there been a number of pre-existing licences for satellite broadcast background music which the Tribunal had either settled, or was satisfied had been entered into consensually by parties with equal bargaining power, the Tribunal would adopt similar if not identical rates and conditions."

42. The Judge continued ([52]):

"That approach involves starting with the most relevant comparable and adapting it to the circumstances of the present case. It seems to me that the almost inevitable consequence of adopting the Tribunal's approach in the present case is that the comparable will be given insufficient weight. Accordingly, in my judgment, the Tribunal has fallen into error here. Although the Tribunal clearly set out to apply the statutory obligation to have regard to comparables in general, the two stage process which it applied has prevented it from doing so. "

43. Although that was sufficient for the Judge to conclude that the matter had to be remitted for a re-hearing before a newly constituted Tribunal, he made ([54]) the following further critical observations on matters taken into account by the Tribunal in setting the reduced window. First, he said that the rate being demanded by VPL was not, as the Tribunal thought, four times the commercial radio rate, given that the VPL rate was subject to pro-rating. If the Tribunal set its top figure of 15% as being three times the commercial radio rate, then, given pro-rating at a typical figure of 80%, that was not, he said, far from the figure VPL was asking for.

44. Secondly, the Judge said that the Tribunal's assessment of the worth of the product in the hierarchy of entertainment did not seem to be based on any evidence or reasoning. The Judge considered it was wrong in principle for the Tribunal to arrive at a view of the worth of the product without considering the comparable licence and the available profits.

45. Thirdly, the Judge said that, although the Tribunal was perfectly entitled to have regard to the pop promo effect and the changing market, the right place in principle to consider those matters would have been by way of adjustment of any comparable royalty rate; but that was not what the Tribunal had done.

46. The Judge then turned to the question of pro-rating. The parties were agreed that the pro-rating should not be based, as in **CSC** 2003 Licence, on the proportion which the VPL Repertoire bore to the total broadcast hours, but rather in accordance with the formula in the offered licence. As I have said, under that licence pro-rating was the proportion which the VPL Repertoire bore to "Programming Content". The definition

of that expression excluded "advertising, promotions, sponsorship slots, trailers, station announcements and station identity signals."

47. As I have said, the Judge concluded ([62]) that the Tribunal did not have a proper or rational basis for departing from the agreed formula. He said that the reason the Tribunal gave, that VPL would be charging for programmes made by the licensee, was wrong.

48. The Tribunal observed that the new formula had a dramatic effect increasing the amount of the royalty. The Judge thought ([64]) it likely, however, that the Tribunal had not taken that important difference into account in setting the royalty.

49. As I have said, there is no challenge on this appeal to the Judge's decision that the Tribunal's decision on pro-rating should be set aside.

The Respondent's notice

50. Building upon, or at all events reflecting, the Judge's criticisms in [54] of his judgment, VPL submits that the Tribunal's process of reasoning in arriving at the reduced window of 10% to 15% was fundamentally wrong, and its decision on that band was (in the words of the Respondent's Notice) "so fallacious as to be irrational."

51. VPL says that, in order to reach the reduced window, the Tribunal took into account the following four factors: (1) the highest PPL rate for commercial radio was 5%; (2) the "worth" of the product; (3) the "pop promo effect"; and (4) the evidence relating to a changing market. VPL criticises the Tribunal's reliance on each as follows.

52. The Tribunal rejected ([133]) **CSC**'s comparison with commercial radio and declined to consider the evidence in relation to it in detail. The Tribunal nevertheless said ([135)] that, by reference to the PPL commercial radio rate, the VPL headline rate was too high "on this ground alone". VPL submits that the Tribunal was wrong to place any reliance on the commercial radio comparison in order to reach its conclusion.

53. VPL further submits that the Tribunal made a factual error and misunderstood the evidence before it as to the significance of commercial radio. VPL says that the Tribunal was simply wrong to say that the music video rate sought by VPL was "*four times* that of commercial radio" ([133]) or "four times the maximum headline rate for commercial radio" ([135]). It says that the actual percentage of revenue paid to PPL by commercial radio broadcasters was set by the Tribunal in 1993 (*AIRC v PPL* [1993] EMLR 181) and does not involve any pro-rating mechanism. VPL submits, therefore, that the highest current PPL rate for commercial radio is 5%. Taking VPL's proposed rate of 20% pro-rated according to the amount of usage, a licensee whose programming was 75% VPL Repertoire would in effect pay 15%.

54. Next, VPL says that the Tribunal was wrong to conclude and to take into account ([135]) its view of the "worth [of music videos] in the hierarchy of entertainment". VPL submits that it was no part of the Tribunal's function to make a subjective value judgment on the intrinsic "worth" of music videos; nor was the Tribunal equipped to make such a judgment. VPL endorses the Judge's observations (at [54(ii)] of his

judgment) that the Tribunal's assessment of "worth" "does not seem to be based on any evidence or reasoning", and was wrong in principle since it was reached without considering comparable licences and the available profits.

55. So far as concerns the pop promo effect, the Tribunal considered ([18] and [21]) that the notoriety of the artistes involved was bound to be of downstream benefit to those who feature on music videos. The Tribunal, therefore, discounted from a 20% rate so as to take into account an ongoing pop promo effect of the broadcast on television of the VPL Repertoire. ([21]). VPL argues that, in so deciding, the Tribunal entirely failed to deal with the substantial issues on promotion that arose between the parties. First, the Tribunal failed to identify the "product" being promoted, in particular whether it was the CD or sound recording or the artist (and thus for whose benefit). Secondly, there was no evidence before the Tribunal to support the assertion that playing music videos sells more CDs, and the Tribunal ignored (or at any event did not refer in the Decision to) the evidence to the contrary adduced by VPL. Thirdly, the Tribunal was wrong to place reliance on the evidence of Mr Roger Drage ([20]) in relation to alleged promotional benefit: his experience pre-dated the recently changing market and the charging by VPL of a royalty rate. Fourthly, the Tribunal did not address VPL's case that, even if promotional benefit was relevant, such benefit had already been built into the 20% rate. Fifthly, the Tribunal had previously been asked in *Virgin Retail v PPL* [2000] EMLR 323 to give weight to promotional benefit when setting a reasonable rate and declined to do so, but the Tribunal in the present case did not explain why it reached a different conclusion on the evidence before it. Sixthly, it was logically incorrect for the Tribunal to conclude ([21]) that, because of the promotional effect, it was "reasonable to apply a deduction to VPL's headline 20% rate". VPL's submission was that 20% was appropriate either because it already allowed for a promotional discount or because it was appropriate in the round after considering all factors. It was not a starting point for making a discount for any promotional benefit which the Tribunal thought should be taken into account.

56. So far as concerns the Tribunal's reliance ([136]) on the changing market, the Tribunal had earlier found ([125]) that the prospect for music video broadcasting was not good and that the value of the product in which advertising was embedded had gone down and was likely to continue to go down; the effect of declining advertising was ongoing and account must be taken of that; and accordingly ([127]) that change must be reflected in the royalty being reduced from the proposed headline figure of 20%. VPL says that the Tribunal's approach was illogical since the effect of having a percentage royalty rate based on the licensee's gross revenues was that, if advertising revenue falls, the sums payable are also reduced – a point not addressed by the Tribunal. Further, in forming its view about profitability and advertising revenues at the stage of setting the reduced window, the Tribunal ignored the evidence that **CSC** had made very substantial profits in each year up to 2007 (and in particular 2005, 2006 and 2007) and that its main competitor, Box, had also made substantial profits in preceding years. VPL says that error – the failure to take into account post 2006 years of outstanding growth - is reinforced by the Tribunal's decision to backdate to 1 January 2006 the rate which it determined.

The appeal

57. At the heart of the appeal is the criticism that the Judge, instead of applying the principles (which he set out in his judgment) relevant to an appeal from a decision of a specialist tribunal, unrealistically imputed to the Tribunal a faulty process of reasoning. In very broad terms, **CSC** says that appears from the following. In concluding that the Tribunal had not taken proper account of comparables, the Judge assumed, against the Tribunal, that it had ignored the legal principles which it had correctly set out in the Decision. Further, he artificially compartmentalised the Decision, instead of reading it as a whole. He wrongly and unrealistically failed to attribute to the Tribunal an awareness, in fixing the reduced window, of its subsequent discussion of comparables; and he failed to appreciate that the Tribunal's treatment of the relevance and weight of those comparables, especially the BSkyB Licence, was coloured by its earlier discussion of, for example, changes in the market. Further, in criticising the Tribunal's two stage approach, and its failure to start with the BSkyB comparable and to make adjustments to it, the Judge sought to impose an analytical straightjacket that was unprincipled since it was not required as a matter of law. In any event, the approach which the Judge said the Tribunal should have taken was indeed in substance the approach of the Tribunal, since it discounted from VPL's 20% rate.

58. **CSC** rejects the criticisms of the Judge in [54] of his judgment, which were repeated and expanded in the Respondent's Notice.

59. At the outset of the appeal, **CSC** accepted that, because the Tribunal made an error in holding that pro-rating should be based on the **CSC** 2003 Licence rather than the formula in the currently offered licence (that is, according to Programming Content), there would in any event have to be a re-hearing, even if a limited one. A re-hearing would be necessary because **CSC** would have to pay more to VPL under the formula in the offered licence (since that would increase the proportion of gross revenue subject to the royalty because time spent on non Programming Content would be left out of account), and **CSC** wished to be able to argue that this should operate to reduce the 12.5% headline royalty rate determined by the Tribunal. The rehearing would have to take place before a newly constituted panel since all the Tribunal members who made the Decision have now retired. During the course of the oral hearing of the appeal **CSC** changed its position on a rehearing. In order to avoid a remission to the Tribunal on any point, **CSC** conceded that, if it succeeded in the appeal, it would accept the pro-rating formula under the offered licence without any consequential reduction in the royalty rate of 12.5%.

Discussion

60. Mr Mill has emphasised the financial importance of this case to VPL. The outcome will not merely affect the terms of its licence with **CSC**, but, at least potentially, the terms of licences to others wishing to use the VPL Repertoire. He has also rightly emphasised the experience and expertise of Floyd J, a former deputy chairman of the Tribunal, in this field. Giving due weight to those matters, and all that has been said on behalf of VPL in support of Floyd J's clear and careful judgment, I nevertheless cannot agree with it.

61. At the heart of the Judge's judgment was his criticism that the Tribunal (1) reached a concluded view of the reduced window of 10% to 15% without reference to the BSkyB Licence, even though the headline royalty under the BSkyB Licence was 20%,

and (2) thereby adopted a procedure which was both inconsistent with *AEI Rediffusion Music* and wrong in principle since the Tribunal ought to have started its analysis with the most relevant comparable, namely the BSkyB Licence, and then adapted it to the circumstances of the case.

62. That criticism, in my respectful judgment, takes an unrealistic and unjustified view of the Tribunal's reasoning and adopts too prescriptive a view of the way in which cases such as the present one must be decided.

63. The first point to be noted is that, very early in the Decision, and long before the Tribunal expressed its view in [136] and [137] that the royalty rate was within the reduced window range of 10% to 15%, it had surveyed the music video market. It had identified the major players, including BSkyB, and the minor players. It had recorded that BSkyB's channels had been sold to **CSC**, which had previously managed them; there was no evidence of what MTV was paying; and Box was of no assistance. Accordingly, the only potential comparable in respect of a major player was the historic evidence in respect of the BSkyB Licence.

64. Secondly, the Tribunal had also in effect rejected VPL's case that it had secured in the market a freely negotiated and voluntary acceptance of its alleged Standard Licensing Approach of a headline 20% royalty.

65. Thirdly, the Tribunal had identified changes in the market, and in particular internet usage and declining advertising revenue, and had drawn the conclusion that it would be right to place less value on agreements with VPL made before January 2005. It thereby made a finding directly relevant to the assessment of any comparables.

66. Fourthly, it is apparent that the Tribunal's approach was, from the outset, to take as a starting point VPL's headline 20% royalty and then to identify factors bearing on that rate. That was done in the context of VPL's basic argument ([53] ff) that the royalty under its Standard Licensing Approach was 20% of gross revenue, subject to certain deductions and with pro-rating. The BSkyB Licence had a headline royalty of 20% and was the only example found by the Tribunal of the Standard Licensing Approach by a major player ([163]). The Tribunal's approach of making adjustments from VPL's headline royalty of 20% (and so the BSkyB comparator royalty rate) is quite clear from [21] and [127] of the Decision, in which the Tribunal said as follows:

"21. We believe that the original promotional effect is still present; the notoriety of the artistes involved is bound to be of downstream benefit to those who feature on music videos. Moreover, **CSC** are substantial users of the Repertoire. In this case (like VPL did in the past), we therefore consider it reasonable to apply a reduction to VPL's headline 20% royalty so as to take account of the ongoing 'pop promo effect' of the Repertoire ..."
"127. In our view, the first effect of this evidence is greatly to diminish the value of the older licence agreements with VPL as comparators. In this regard, it is difficult to know where to draw the line with any degree of certainty particularly as one was in any event dealing in those early days with an immature market. We have decided therefore to place less value on agreements with VPL which were made before January 2005. The effect of declining advertising is of course ongoing and account must also be taken of that too. In any event, this change will be reflected in the royalty

again being reduced from the proposed headline figure of 20% of defined advertising revenue (see below)."

67. The plain consequence of that reasoning, all reached before the Tribunal gave its conclusion on the reduced window, was that the BSkyB Licence (which was agreed in 2004 even though not signed until 2007), as the sole comparator of a major player in support of a 20% headline royalty, (1) was of greatly diminished value (adopting the language of [127] of the Decision) because of changes in the market; (2) had to be discounted to take account of the decline in advertising (the source of 96% of **CSC**'s income); and (3) had also to be discounted to take account of the ongoing pop promo effect of VPL's Repertoire.

68. It is, of course, perfectly true that this was not explicitly stated in that way in that part of the Tribunal's decision leading up to the Tribunal's conclusion on the reduced window of 10% to 15%. Nor, critically, was it expressly stated that, by virtue of those three matters qualifying and adjusting the BSkyB Licence as a comparator, the BSkyB Licence did not justify the top of the reduced window being more than 15%. I regard it as obvious, however, that this was the view of the Tribunal in the light of its express findings of fact.

69. In this connection, I consider that it is unrealistic to subject the Tribunal's reasoning to a rigorous analysis which supposes that, in fixing the reduced window at 10% to 15%, the Tribunal shut out of its mind or overlooked or forgot the factual conclusions that it expressly stated in a subsequent part of the Decision. They included its finding that the BSkyB Licence was an example, but the only example, of the Standard Licensing Approach being accepted by a major player. The obvious or in any event the logical explanation for the omission of any reference to the BSkyB Licence at the point in the Decision where the Tribunal fixed the reduced window was that the Tribunal considered the BSkyB Licence had to be so heavily discounted and adjusted for the reasons stated in the early part of the Decision that its only value, if any, was at the fine tuning stage.

70. I agree with Mr Crane that this is also borne out by the fact that the Tribunal, when it came to consider the "fine tuning" within the reduced window, addressing itself directly to the BSkyB Licence as a comparator, did not fix the royalty rate at the top of that window. That is particularly striking in the light of Mr Mill's submission that, in reality (bearing in mind all its financial terms set out in [160] of the Decision), the BSkyB Licence provided for a royalty considerably greater than the 20% sought by VPL adjusted to take account of pro-rating and allowable deductions in respect of advertising and sponsorship costs. It is no answer, in my judgment, for Mr Mill to riposte, as he did, that the Tribunal's reasons for fixing the rate in the middle of the reduced window are unexplained and obscure and that the Tribunal might have made the rate less than 15% because of, for example, available profits. That reference to the deduction to take account of available profits seems to me only to reinforce the point that, had the Tribunal not adopted what the Judge called a two stage process, it would have made no difference to the rate determined by the Tribunal.

71. Furthermore, to come to a different conclusion about the Tribunal's reasoning would necessarily involve an assumption that the Tribunal ignored its own statement of the proper legal approach in [61] to [73] of the Decision. That includes its references

(quoted above) to section 129 of the Act in [62] and [67], and to the 2007 *Joint Online Licence* reference in [67], and to the *AIRC* case in [68], and generally the express recognition by the Tribunal of the importance to be given to comparators in [69] to [73], including its statement in [72] that, where there are sufficiently comparable licences, the Tribunal "should adopt a similar rate *"absent any special circumstances*"" (Tribunal's emphasis).

72. It would be an unusual case to conclude that a specialist tribunal, in a lengthy, conscientious and detailed judgment, had ignored its own clear and proper statement of the correct legal approach. There may be rare cases in which an error is so clear that a conclusion to that effect is unavoidable. That is not the present case. The Tribunal's findings of fact in the Decision are capable of supporting a perfectly proper conclusion by the Tribunal about the reduced window or range for the reasonable royalty payable by **CSC** and a perfectly proper treatment by the Tribunal of the BSkyB Licence as a comparator. That, in my judgment, is the correct way to view the Decision.

73. Futhermore, I do not accept the proposition, if the Judge intended to advance it in [52] of his judgment, that the only legally valid way of dealing with such a dispute as the present one, is by "starting with the most relevant comparable and adapting it to the circumstances of the … case". Plainly, that is a logical approach and probably the one most likely to ensure a correct answer. As Lloyd LJ said in *Smith Kline & French Laboratories Ltd's (Cimetidine) Patents* at page 236;

"where close comparables exist, they provide by far the best and surest approach. There is no better guide to what a willing licensor and a willing licensee would agree than what other licensors and licensees have in fact agreed in comparable cases".

74. The law is not, however, so prescriptive as to impose on the Tribunal a particular analytical structure and methodology. The statutory duty of the Tribunal is to determine such terms of the licence as are reasonable in the circumstances (s.126(4)) and, for that purpose, to "have regard to" comparable schemes and licences (s.129) and all other relevant considerations (s.135). The Act gives no further directions or guidance. Provided that the Tribunal discharges that duty, the precise way in which it carries out its analysis and the order in which it addresses the material issues in its decision cannot undermine the validity of its conclusions.

75. I turn to consider the matters in the Respondent's Notice, which reflect and expand upon the criticisms of the Judge in [54] of his judgment. Those matters can only support an order setting aside the Decision as to the royalty rate and remitting it for re-hearing if they disclose errors of law, including obviously wrong findings of fact of sufficient importance to undermine the validity of the Decision.

76. The first area of criticism concerns the Tribunal's treatment of commercial radio. I do not accept that the three aspects relied upon by VPL disclose an error of law undermining the validity of the Decision. The first issue is whether the Tribunal made an error of law in relying to any extent at all on a comparison with commercial radio. The Tribunal, having considered the evidence, concluded that commercial radio broadcasting agreements had "only a modest bearing" on the issues it had to determine ([15]), and stated that much of the evidence on the point did not assist ([133]). The Tribunal took the view, however, that the evidence could provide limited assistance

for a very high level generalised comparison ([133]): namely, whether music video could be worth four times that of commercial radio. In my judgment, it is impossible to say that, in the light of the evidence and the submissions briefly summarised in [128] to [133] of the Decision, the Tribunal was legally precluded from taking the view that the evidence of commercial radio could be used to that limited extent. Indeed, it is to be noted that this was not one of the Judge's criticisms of the Tribunal's decision in [54] of his judgment.

77. The second point made by VPL on the commercial radio comparison is that the Tribunal made an obvious error in saying ([135]) that VPL's demand for a 20% royalty rate was "four times the maximum headline rate for commercial radio". VPL is plainly correct if pro-rating is taken into account. Mr Mill submitted that this was important since the Tribunal used the commercial radio comparison to fix the upper limit of the reduced window. I reject this criticism. It mischaracterises the exercise conducted by the Tribunal. The Tribunal was, in relation to the commercial radio comparison, carrying out a broad-brush exercise at a high level of generality. I do not accept the suggestion that the Tribunal had overlooked the fact that the radio licences granted by PPL did not involve pro-rating whereas the royalty sought from **CSC** was to be pro-rated. It is simply inconceivable. The absence of pro-rating in the radio licences was expressly mentioned in [131] of the Decision – just two paragraphs before the Tribunal posed the question as to how music videos could reasonably be said to be worth four times that of commercial radio. The formula for pro-rating in respect of the 20% royalty sought by VPL was a major issue before the Tribunal. The reality is that the Tribunal was simply using headline rates to carry out the broad brush comparative exercise to which I have referred.

78. The next criticism is that the Tribunal's view of the comparative worth of commercial radio and music videos was purely subjective and therefore illegitimate. Mr Mill emphasised, in that connection, the Tribunal's statement in [135] that:

"we have had enough experience of music videos to form a prima facie view of their worth in the hierarchy of entertainment"

79. That criticism too is unjustified. The Tribunal said ([135]) that it was able to form its view "as a result of both the evidence and the demonstration". That was a global reference to everything that the Tribunal had seen and heard. I accept that the language used by the Tribunal, and in particular its reference to "the hierarchy of entertainment", is obscure and could have been better expressed. It is clear, however, that the Tribunal was not expressing a view about inherent artistic value or aesthetic merit. The Tribunal had earlier expressly stated ([14]) that its members "banished any subjective views upon the viewing of music videos". Rather, the Tribunal was expressing a view about the range of licence fees which could be commanded in the market in respect of the different forms of entertainment, about which evidence had been given. In relation to commercial radio, that evidence was briefly summarised in [129] to [132] of the Decision.

80. Finally, on this aspect, it is to be noted that the Tribunal did not rely only on the commercial radio comparison in fixing the upper limit of the reduced window. The Tribunal also took into account ([136]) the pop promo effect and the evidence relating to a changing market. Even if, which I do not accept, there was any factual error or

unjustified factual finding by the Tribunal in relation to the commercial radio comparison, it was not such as would justify setting aside and ordering a re-hearing of the entire Decision in relation to the royalty rate.

81. In relation to the discount applied by the Tribunal to take account of the pop promo effect, I have set out the various criticisms of VPL in [55] above. Mr Mill began his oral submissions on this aspect by referring us to the Judge's observation in [54(iii)] of his judgment that the Tribunal should have taken account of the downward pressure on the royalty rate of the pop promo effect (and the changing market) by adjusting any comparable royalty rate, but that was an exercise which the Tribunal had not performed. I do not accept that criticism, and, in any event, I do not see how it can assist VPL. There was considerable evidence to support the Tribunal's view of the pop promo effect. Unlike VPL, the Judge accepted that the Tribunal was entitled to have regard to the downward pressure of the pop promo effect and the changing market. Mr Mill accepted in argument, and in any event I have held earlier in this judgment, that, provided the Tribunal gives proper weight to comparators in accordance with sections 129 and 135 of the Act, the law does not prescribe only one method of analysis, that is to say the precise order in which the Tribunal must address the issues, the evidence and make its conclusions, even if there are inherent dangers if a logically unsound method is adopted. For the reasons I have already given, I do not accept that the methodology of the Tribunal was faulty. In arriving at the reduced window the Tribunal discounted the pop promo effect from VPL's headline 20% royalty, which was also the headline royalty in the BSkyB Licence, itself the only example of VPL's alleged Standard Licensing Approach being accepted by a major player. Furthermore, for the reasons I have given, the Tribunal implicitly reached the conclusion of fact that the BSkyB Licence was itself of limited value as a comparable in view of its date.

82. I can deal quite shortly with the other criticisms of this aspect of the Decision. None of them involves an error of law. Moreover, they are all contrary to the Judge's view that the Tribunal was perfectly entitled to have regard to the downward pressure on the royalty rate of the pop promo effect. Mr Mill did not elaborate in his oral submissions on VPL's complaint that the Tribunal failed to identify the "product" being promoted. I reject it in any event. As **CSC** has observed in its supplemental skeleton argument, the Tribunal referred in [5] of the Decision to music videos as "a promotional tool to persuade the public to purchase the audio sound recording"; and in [17] to their purpose as being "to encourage retail sales of the "hard" recordings to which they relate". The Tribunal recognised the identity of interest between the record company and the artist. This is reflected in the Tribunal's reference ([18]) to "the promotional impact so far as the artistes (and thus the record companies and VPL) are concerned".

83. I also reject the criticism that the Tribunal failed to appreciate and conclude that promotion did not increase the size of the "sales pie", but merely altered the shares of distribution of the pie between different artists. Related criticisms are that that Tribunal placed inappropriate weight on the evidence of Mr Drage, and failed to take account of market changes, and that it failed to follow, or explain why it refused to follow, the Tribunal's decision in the *Virgin Retail* case not to give weight to promotional benefit when setting a reasonable rate. The short answer to all these points is that Mr Drage, a former managing director of VPL, gave evidence in support of a discount for the pop promo effect, which the Tribunal accepted ([20]). In particular he gave evidence that, for substantial users of the VPL Repertoire, VPL had

in the past reduced its royalty rate from 20% specifically to take into account the promotional effect of music videos. Mr Mill criticised Mr Drage's evidence as "historic" because it related to his personal knowledge and involvement up to 2002. It is simply impossible, however, to contend in the light of the evidence as a whole, and particularly that of Mr Drage, as well as *AIRC v PPL* [1993] EMLR 181 (which concerned commercial radio broadcasting licences) in which the Tribunal took account of the pop promo effect, that no tribunal, properly directing itself to the evidence, could have reached the conclusion of the Tribunal in the Decision as to the persistence of the pop promo effect. The *Virgin Retail* case, on which VPL relies, is more recent than the *AIRC* case, but both cases were fact sensitive, and *Virgin Retail* concerned a quite different factual situation (in-store radio) to that under consideration in the present case. Indeed, it is conceded in VPL's skeleton argument that the reasoning in *Virgin Retail* is not applicable here.

84. So far as concerns the complaint that the Tribunal failed to consider whether and to what extent a promotional discount had already been taken into account in the 20% rate, and in particular in the 20% headline rate in the BSkyB Licence, the short answer is that, as I have said, Mr Drage's evidence was that VPL had in the past reduced its royalty rate from 20% specifically to take account of the promotional effect of music videos. Furthermore, no evidence was adduced by VPL that any promotional discount was specially taken into account in the 20% headline rate in the BSkyB Licence.

85. None of VPL's criticisms of the Tribunal's reliance on changes in the market, and in particular the impact of internet use and the fall in advertising revenue, concerns an error of law. Mr Mill concentrated his oral submissions on two points. The first was that the Tribunal did not address the argument that, since the royalty was expressed as a percentage of revenue, the licence fee would diminish in line with any reduction in revenue. Apart, however, from the obvious point that fixed costs would not normally diminish proportionately to a decline in revenue, it is simply impossible to contend that no tribunal, properly directing itself to the evidence, could conclude that the changes in the market identified by the Tribunal should reduce the royalty rate.

86. The second point addressed by Mr Mill in his oral submissions was that it was wrong of the Tribunal, in fixing the royalty rate at 12.5% for the period from 1 January 2006, to have regard to **CSC**'s financial results for 2008, which was a particularly poor year at a time of economic recession, when the Tribunal did not have the comparable results for 2006 and 2007. It appears that no evidence was adduced of **CSC**'s financial performance in those or indeed any earlier years comparable to that for 2008. The short answer to the point is that it might have supported an argument that there should be a variable rate for different years but no such argument was advanced by VPL when it made its closing submissions to the Tribunal. Nor is the failure of the Tribunal to fix a variable rate a matter raised in the Respondent's Notice.

87. So far as concerns **CSC**'s other criticisms of this aspect of the Tribunal's decision, it is sufficient to say they are all points on the evidence and the Tribunal's conclusions on the evidence rather than points of law. The evidence about Box's performance, for example, was limited. As regards VPL's complaint in its skeleton argument that the Tribunal, when reviewing the effect of the changing market, failed to consider rates paid to VPL in new related markets, in particular the rates currently charged for Video

on Demand provided by cable television broadcasters, the short answer is that it is not a point raised in the Respondent's Notice.

Conclusion

88. For all those reasons, I would allow this appeal.

Postscript: seeking clarification of decisions of the Tribunal

89. An important issue in the appeals in this case has been whether the Tribunal took account of the BSkyB Licence in arriving at the reduced window of 10% to 15%. It appears that no consideration was given to requesting clarification from the Tribunal on this point. Counsel on both sides have expressed the view that, in the light of the terms of the Decision and of VPL's grounds of appeal, any such request would have been inappropriate. It is unnecessary to reach a conclusion on the point. As it happens, during the course of the oral hearing in this Court it emerged that the two panel lay members of the Tribunal retired very shortly after the Decision was published, and HH Judge Fysh subsequently retired.

90. It is nevertheless worth bearing in mind, in respect of future appeals from the Tribunal, that a request to the Tribunal for clarification of its decision is procedurally possible in an appropriate case, and may avoid the need for the time and cost of a full appeal and remission for a further hearing. Unlike most appeals to the High Court and the Court of Appeal, permission to appeal is not required for an appeal on a point of law from the Tribunal. There is, nonetheless, no reason why the procedure for inviting a trial judge or tribunal to provide clarification and further reasons which was considered and approved by the Court of Appeal in *English v Emery, Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002]1 WLR 2409, and has been particularly developed in employment appeals as the so-called *Burns/Barke* procedure (following *Burns v Royal Mail Group* [2004] ICR 1103 and *Barke v SEETEC Business Technology Centre* [2005] EWCA Civ 578, [2005] ICR 1373), should not be adapted to appeals from the Tribunal under section 152(1) of the Act. The procedure would be for the appellate court, on application or on its own initiative, before reaching a final determination on the appeal, to invite the Tribunal to provide additional reasons for its decision, or, where appropriate, its reasons for a specific finding, and to adjourn the appeal in the meantime. Those cases, and the recent decision of this court in *Korashi v Abertaw Bro Morgannwg University Local Health Board* [2011] EWCA Civ 187, outline the need for caution in resorting to the procedure, and its avoidance in a case where, for example, the inadequacy of reasoning is so fundamental that there is a real risk that supplementary reasons will be reconstructions of proper reasons rather than the unexpressed actual reasons for the decision. In an appropriate case, however, it could be of great practical merit in saving the considerable costs and court time of an appeal and a re-hearing.

Lord Justice Wilson

91. I agree.

Lord Justice Longmore

92. I also agree.