



THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 82

Record Number: 2019/226

**Costello J.
Noonan J.
Murray J.**

BETWEEN/

RECORDED ARTISTS ACTORS PERFORMERS LIMITED

**PLAINTIFF/
APPELLANT**

- AND -

PHONOGRAPHIC PERFORMANCE (IRELAND) LIMITED

**DEFENDANT/
RESPONDENT**

JUDGMENT of Ms. Justice Costello delivered on the 3rd day of April 2020

Introduction

1. This is an appeal against the judgments and order of the High Court (Simons J.) dated 11 January 2019 ([2019] IEHC 3) and 22 February 2019 ([2019] IEHC 94) in respect of two preliminary legal issues which were fixed for determination by an order of the High Court (Cregan J.) of 30 April 2018. These are:-

"Whether s. 208(1) of the Copyright & Related Rights Act, 2000 (The Act of 2000), places the statutory obligation to determine the payments to be made by way of equitable remuneration to performers upon the Plaintiff (RAAP), and not the Defendant (PPI)?"

and,

"Whether, under s. 281 of the Act of 2000, RAAP is entitled to receive all remuneration payable by PPI to performers arising out of the playing in public, broadcasting or cable transmission of recordings of their performances in the State?"

Background

2. The proceedings arise from a dispute as to the distribution of licence fees payable in respect of the playing of sound recordings in public, or the inclusion of a sound recording in a broadcast or a cable programme service. They raise issues as to the sharing of the licence fees as between the owner of the copyright in the sound recording (the producer) and the performers who have a parallel right in such recordings, referred to as the

performer's right (to receive equitable remuneration). The central issue concerns the statutory functions of the organisations which represent producers and performers respectively. The plaintiff/appellant (hereinafter "RAAP") acts on behalf of performers and the defendant/respondent (hereinafter "PPI") represents producers. RAAP contends that the statutory obligation to determine the payments to be made by way of equitable remuneration to performers rests with it, and that it is entitled to receive all remuneration collected by PPI due to performers and, upon receipt of same, to distribute those monies.

Legislative background
Directive 2006/115/EC ('the 2006 Directive')

3. The starting point is Directive 92/100/EEC ("the 1992 Directive"). This Directive provided for a shared right of equitable remuneration as between the owner of the copyright in a sound recording and the performers. The 1992 Directive has been codified in the 2006 Directive on rights relating to copyright. In each version of the Directive, the relevant provision is article 8 and the text of which, in both, is identical. It provides as follows:-

"Article 8

Broadcasting and communication to the public

- 1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.*
- 2. Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them."*
4. Article 8(2) provides that the user of the recording shall pay a single equitable remuneration, and that the remuneration paid shall be shared between the relevant performers and phonogram producers. If the performers and producers do not reach agreement (a positive act of the parties) member states may establish the conditions upon which the single payment is to be shared between them. The article does not address who is to reach such agreement on behalf of the producers and the performers respectively.
5. Ireland implemented the requirements of the 1992 Directive via the Copyright and Related Rights Act 2000 ("the Act of 2000"). The State subsequently decided that the Act of 2000 implemented the 2006 Directive, as it was essentially a codified version of the

earlier Directive. The Act of 2000 transposes the two steps envisaged by article 8(2) by means of s.38, and ss. 205 and 208 of the Act of 2000.

Section 38

6. Section 38(1) provides:-

"(1) Notwithstanding the provisions of section 37, where a person proposes to -

(a) play a sound recording in public, or

(b) include a sound recording in a broadcast or a cable programme service,

he or she may do so as of right where he or she -

(i) agrees to make payments in respect of such playing or inclusion in a broadcast or a cable programme service to a licensing body, and

(ii) complies with the requirements of this section."

7. Subsection (2) provides that a person may avail of the right to play a sound recording in public, or to include a sound recording in a broadcast or a cable programme service, where they give notice to each licensing body concerned of the intention to play the recording, informing those bodies of the date on and from which they intend to do so, and make payments to the licensing body at specified intervals. The section further provides that the user must comply with any reasonable conditions relating to payments, as may be notified by the licensing body, and must comply with any reasonable requests for information from the licensing body in order to calculate and manage payments under the section.

8. Section 38(3) provides:-

"(3) A person who satisfies the conditions specified in subsection (2) shall be deemed to be in the same position as regards infringement of copyright as if he or she had been the holder of a licence granted by the owner of the copyright in question at all material times."

9. The licence fee (referred to as equitable remuneration in article 8(2)) is payable by the user to a licensing body. Subsection (15) defines a licensing body for the purposes of s.38 as:-

"...a society, a company registered under the Companies Acts, 1963 to 1999, or other organisation which has as one of its objects the negotiation or granting of licences to play sound recordings in public or to include sound recordings in broadcasts or cable programme services, either as owner or prospective owner of copyright in the said sound recording or as his or her exclusive licensee, agent or designated representative and shall include a human person who has the right to negotiate or grant a licence to play sound recordings in public or to include sound

recordings in broadcasts or cable programme services, either as owner or prospective owner of copyright in the sound recordings.”

10. Section 38 is thus concerned with the owners, or prospective owners, of the copyright in the sound recordings, and the right of third parties to play the sound recordings or to include them in a broadcast or a cable programme service. If third parties (the user) wish to play a sound recording in public, or to include it in a broadcast or cable programme service, the user must agree to make payments, in effect a licence fee, to a licensing body who acts on behalf of the copyright owner, or prospective copyright owner, and otherwise comply with the requirements of s.38. This provision is not concerned expressly with the performer’s right to equitable remuneration. PPI is a licensing body within the meaning of s.38.

Sections 205, 208 and 265

11. As noted above, article 8(2) of the 2006 Directive requires that the equitable remuneration (the licence fee collected from the user) be shared between the producer and the performer. This is provided for under the Act of 2000 principally in ss. 205 and 208. Section 205 confers a right on performers which is separate from, and in addition to, the right of the holder of the copyright in the recording. It provides as follows:-

“(1) Subject to subsection (2), a performer has the exclusive right to authorise or prohibit the making available to the public of copies of a recording of the whole or any substantial part of a qualifying performance and it is immaterial whether the copy is made directly or indirectly.

(2) Where a copy of a sound recording is-

(a) played in public, or

(b) included in a broadcast or cable programme service,

the right conferred by this section shall be deemed to be satisfied by the payment of equitable remuneration as specified in section 208.”

12. The performer is given a right to authorise, or prohibit, the making available to the public of copies of a recording of the whole or a substantial part of the performance. The section provides that the performance must be what is called a “qualifying performance”. There is a dispute between the parties in separate proceedings as to whether the Act, in limiting the rights of performers to only those performances which meet the criteria of qualifying performances established by the Act, has properly transposed the 2006 Directive. That dispute is not relevant to the issues in this appeal.
13. The performer’s right, conferred by s.205, is deemed to be satisfied by the payment of equitable remuneration. The equitable remuneration is payable by the user who plays the sound recording or includes it, or a substantial part of it, in a broadcast or cable programme services. The user’s obligation is met by paying the agreed sum to the

copyright owners' licensing body pursuant to s.38, which sum comprises both the licence fee payable to the owner of the copyright and the equitable remuneration due to the performers. The performer's right is deemed to be satisfied by the payment of equitable remuneration as specified in s.208. This section confers the right on the performer to receive from the owner of the copyright in the sound recording – not the user referred to in s.38 – the equitable remuneration which is deemed by the provisions of s.205 to satisfy the performer's right conferred by that section.

14. Section 208 provides:-

"(1) A performer has a right to equitable remuneration from the owner of the copyright in a sound recording where the sound recording of the whole or any substantial part of a qualifying performance which has been made available to the public for commercial purposes is-

(a) played in public, or

(b) included in a broadcast or cable programme service.

(2) A performer shall not assign the right to equitable remuneration under this section except to a collecting society for the purpose of enabling the collecting society to exercise that right on his or her behalf.

(3) The right to equitable remuneration is transmissible by testamentary disposition or by operation of law, as personal or moveable property, and it may be assigned or further transmitted, including by assignment, by any person who legally acquires the right.

(4) Subject to subsections (5) to (9), the amount of equitable remuneration payable under this section is that which has been agreed by or on behalf of the persons by and to whom it is payable."

15. Subsections (5) to (10) provide for a procedure of referral to the Controller of Intellectual Property ("the Controller") by the person by, or to whom, equitable remuneration is payable, in circumstances where there is no agreement as to the amount of equitable remuneration payable.

16. The performer's right to payment of equitable remuneration is a right conferred on each performer. It is a property right. It is transmissible by testamentary disposal or by operation of law. Any person who legally acquires the right may assign it, or further transmit the right. However, the performer is protected against the perceived pressures to which he or she might be subjected by producers, to assign to the producer in question this right. The performer is thus expressly prohibited from assigning the right to equitable remuneration to any party, save to a collecting society for the purposes of enabling the collecting society to collect the equitable remuneration on his or her behalf. This reflects the protection afforded to performers under the 2006 Directive. The right to equitable remuneration cannot be waived by a performer (Article 5(2)), but the administration of

the right to obtain equitable remuneration may be entrusted to collecting societies representing authors or performers (Article 5(3)). The 2006 Directive provides that member states may regulate whether, and to what extent, the administration by collecting societies of the right to obtain equitable remuneration may be imposed, as well as the question as to from whom this remuneration may be claimed or collected.

17. The term "collecting society" is not defined in either the 2006 Directive nor in s.208. However, s.265 defines a licensing body in the context of performers (as opposed to producers) as:-

"...a society or other organisation which has as its main object, or one of its main objects, the negotiating or granting, either as owner or prospective owner of a performer's property rights, or as exclusive licensee or as agent for him or her, of performers' property rights licences, and whose objects include the granting of licences relating to the performances of more than one performer."

RAAP is a licensing body within the meaning of s.265. The first preliminary issue concerns the administration of performers' rights to receive equitable remuneration pursuant to ss. 205 and 208.

Sections 280, 281 and 286

18. Part III, Chapter 8 of the Act of 2000 is entitled "Registration of Licensing Bodies in Respect of Performers' Property Rights". Section 286 provides that any body operating as a licensing body within the meaning specified in s.265 is obliged to register in accordance with the provisions of the Act, and to remain registered for as long as it continues to operate in that capacity. Section 280 deals with the registration of licensing bodies. Subsections (1) to (3) require the Controller to establish and maintain a register of licensing bodies in such form as may be prescribed by the Minister for Enterprise, Trade and Employment, and to keep the register in such a form that it is capable of being used to make a copy of any entry in the register. The register shall be kept in such a place as may be prescribed by the Minister and shall be made available for inspection at such times and in such a manner as prescribed by the Minister, subject to the payment of a fee. Additionally, where a request is made to the Controller for a certified/uncertified copy of, or extract from, an entry in the register, the Controller shall issue a copy of the entry.

19. Subsections (5) and (6) provide:-

"(5) The Controller shall register an applicant or renew a registration where the Controller is satisfied that-

(a) the applicant comes within the definition of a licensing body specified in section 265, and

(b) the applicant has provided such information and satisfied such conditions as may be prescribed by the Minister for the purposes of registration.

- (6) *The information to be prescribed under subsection (5)(b) shall include the following:*
- (a) *the name of the applicant;*
 - (b) *the address of the applicant;*
 - (c) *the names of the chairperson and other members of the board or officers, or names of partners, as the case may be, of the applicant;*
 - (d) *a copy of the memorandum and articles of association, or partnership agreement of the applicant;*
 - (e) *details of the scheme;*
 - (f) *details of the scales of charges or proposed charges to be levied by the applicant;*
 - (g) *the class of rightsowners represented or proposed to be represented by the applicant;*
 - (h) *in the case of a licensing body in relation to which any provisions of the European Union (Collective Rights Management) (Directive 2014/26/EU) Regulations 2016 (referred to in this section as "Regulations of 2016") apply, a statement of compliance and appropriate supporting evidence."*

Subsection (7)(a) provides that:-

"In this section and section 284-

"statement of compliance" means a document, in electronic form and signed by a person authorised by the licensing body, stating that the licensing body has complied, is complying and will comply with the requirements imposed on it by the Regulations of 2016 to the extent as specified in the document;

"appropriate supporting evidence" means information supporting the statements made in the statement of compliance."

20. It is thus an administrative matter whether an applicant is registered as a licensing body in respect of performers' property rights. The applicant, at its election, specifies the class or classes of rightsowners represented, or proposed to be represented, by the applicant. The applicant may apply for registration in respect of a class or classes of rightsowners at a time when it acts for very few performers, or even no performers, in a particular class at the time of registration. It is possible for an applicant to specify a class of rightsowners in its application for registration in respect of whom one or more body is already licensed to represent. The Act does not require that there be a single licensing body in respect of each class of rightsowners, and it does not mandate that there should in fact be one licensing body in respect of each class of rightsowners. Once an applicant

has met the statutory requirements, the Controller must register the applicant as a licensing body pursuant to s.280(5). He has no discretion in this regard, and in effecting registration he makes no determination as to the authority of the applicant to hold itself out as representing any class of rightsowners. Subsection (7) provides that the Controller shall grant a certificate to each applicant who is registered as a licensing body.

21. Section 281 provides as follows:-

"A certificate granted under section 280 (7) shall include the particulars specified in subsection (6) of that section and the certificate shall be evidence of the right of the licensing body, until the contrary is proved, to act on behalf of the classes of rightsowners for whom it claims representation rights or on behalf of the rightsowners who have assigned rights to it, or exclusively licensed it, as specified in that certificate."

22. The certificate sets out the particulars of subsection (6). These include the classes of rightsowners represented or proposed to be represented by the applicant. The certificate is evidence of the right of the licensing body to act on behalf of the classes of rightsowners for whom it claims representation rights. It is also evidence of the right to act on behalf of rightsowners who have assigned rights to it, or who have exclusively licensed it. The certificate is evidence of the right to act "until the contrary is proved." The interplay between ss. 280 and 281 is central to resolving the issues raised on appeal in relation to the second preliminary issue directed to be tried by Cregan J.

Collective Rights Management Directive 2014/26/EU

23. Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market ("the CRM Directive") was relied upon by RAAP in the High Court, and on appeal, in support of its position. The CRM Directive arose out of recognition of the need to improve the functioning of collective management organisations ("CMOs") for the benefit of right-holders of copyright and related rights. It sets out detailed provisions in relation to the authorisation, membership, management and conduct of CMOs. Importantly, while it recognises the benefit of CMOs for individual right-holders, it does not require that a right-holder manage his or her rights through a CMO. They may manage those rights individually. This is left up to the member states. Recital 2 of the CRM Directive provides:-

*"The dissemination of content which is protected by copyright and related rights, including books, audiovisual productions and recorded music, and services linked thereto, requires the licensing of rights by different holders of copyright and related rights, such as authors, performers, producers and publishers. **It is normally for the rightholder to choose between the individual or collective management of his rights, unless Member States provide otherwise, in compliance with Union law and the international obligations of the Union and its Member States.** Management of copyright and related rights includes granting of licences to users, auditing of users, monitoring of the use of rights, enforcement of copyright*

and related rights, collection of rights revenue derived from the exploitation of rights and the distribution of the amounts due to rightholders. Collective management organisations enable rightholders to be remunerated for uses which they would not be in a position to control or enforce themselves, including in non-domestic markets.” (emphasis added)

An issue to be resolved is whether the Act of 2000 provides for mandatory collective management of rights and/or a presumption that a CMO represents right-holders of a particular class who may not, in fact, have authorised it so to do.

24. Recital 6 records the Commission Recommendation 2005/737/EC which sets out the entitlement of right-holders to choose their CMOs. Recital 8 states that the aim of the Directive is to provide for coordination of national rules concerning access to the activity of managing copyright and related rights by CMOs. Recital 12 states that:-

*“**This Directive**, while applying to all collective management organisations, with the exception of Title III...**does not interfere with arrangements concerning the management of rights in the Member States such as individual management**, the extended effect of an agreement between a representative collective management organisation and a user, i.e. extended collective licensing, mandatory collective management, legal presumptions of representation and transfer of rights to collective management organisations.” (emphasis added)*

25. Recital 19 states that a right-holder should be able freely to choose a CMO for the management of his rights, provided that the CMO that the right-holder wishes to choose already manages such rights or categories of rights. It provides that right-holders should be able easily to withdraw their rights, or categories of rights, from a CMO and to manage those rights individually, or to entrust or transfer the management of all, or part, of them to another CMO, or any entity, save where a member state provides for mandatory collective management of rights, in which case the right-holders’ choice is limited to other CMOs. Recital 26 refers to CMOs collecting, managing and distributing revenue from the exploitation of rights “entrusted” to them by right-holders.
26. The definition of certain terms appearing in the CRM Directive are set out in Article 3. Collective Management Organisation is defined as “*any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria: (i) it is owned or controlled by its members; (ii) it is organised on a not-for-profit basis*”; and rightholder means “*any person or entity, other than a collective management organisation, that holds a copyright or related right or, under an agreement for the exploitation of rights or by law, is entitled to a share of the rights revenue.*”
27. Chapter 1 of the CRM Directive (Articles 5-10) deals with the representation of right-holders, and the membership and organisation of CMOs. Article 5 is titled “Rights of

rightholders”; subparagraph (2) entitles right-holders to authorise a CMO to act on their behalf. It provides:-

“Rightholders shall have the right to authorise a collective management organisation of their choice to manage the rights, categories of rights or types of works and other subject-matter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence or establishment of either the collective management organisation or the rightholder. Unless the collective management organisation has objectively justified reasons to refuse management, it shall be obliged to manage such rights, categories of rights or types of works and other subject-matter, provided that their management falls within the scope of its activity.” (emphasis added)

The right-holder has the right to terminate the authority of the CMO to manage his or her rights or to withdraw management of his or her rights from the CMO on reasonable notice. Subparagraph (7) provides:-

“In cases where a rightholder authorises a collective management organisation to manage his rights, he shall give consent specifically for each right or category of rights or type of works and other subject-matter which he authorises the collective management organisation to manage. Any such consent shall be evidenced in documentary form.” (emphasis added)

28. Thereafter, Chapter 2 deals with the management of rights revenue, Chapter 3 with management of rights on behalf of other CMOs, Chapter 4 with relations with users and Chapter 5 with transparency and reporting. These provisions apply where the CMO concerned is authorised to manage rights on behalf of a right-holder. A central issue in this appeal is the question of the identity of the right-holders whose rights RAAP is authorised to manage, and whether it is necessary for there to be a positive act by individual right-holders authorising RAAP to manage their rights in respect of the categories of rights which come within the classes of rights in respect of which RAAP is registered, pursuant to ss. 280 and 281 of the Act of 2000.

2016 Regulations

29. The European Union (Collective Rights Management) (Directive 2014/26/EU) Regulations 2016 (“the 2016 Regulations”) S.I. 156 of 2016, transposed the CRM Directive into domestic law. The definition of CMO is that set out in the CRM Directive. A member in relation to a CMO means:-

“a rightholder or a person representing rightholders, (including another collective management organisation or an association of rightholders), fulfilling the membership requirements of the collective management organisation...and admitted to membership by it.”

30. A rightholder means:-

"any person, other than a collective management organisation...who holds a copyright or related right or who, under an agreement for the exploitation of such a right or by law, is entitled to a share of the rights revenue in respect of such a right."

31. Part 2 of the 2016 Regulations deals with CMOs and Chapter 1 is headed "Representation of rightholders and membership and organisation of collective management organisations."
32. Article 3 sets out the general principles which require a CMO to act in the best interests of the right-holders "whose rights it represents." Article 4, subparagraphs (2) and (4) reproduce Article 5, subparagraphs (2) and (4) of the CRM Directive. Importantly, subparagraphs (7) and (8) of Article 4 provide:-
- "(7) **In cases where a rightholder authorises a collective management organisation to manage rights, the rightholder shall give consent specifically for each right or category of rights or type of works and other subject-matter which the collective management organisation is authorised to manage and any such consent shall be evidenced in documentary form.***
- (8) A collective management organisation shall inform rightholders of their rights under this Regulation, as well as of any conditions attached to the right set out in paragraph (3), **before obtaining their consent** to its managing any right or category of rights or type of works and other subject-matter."* (emphasis added)
33. The 2016 Regulations thus envisage the CMO informing right-holders of their rights under the Regulation before the right-holder gives his or her consent to the CMO managing his or her rights. The consent must be specifically given in respect of each right, or category of rights, and must be evidenced in documentary form. Article 5(5) of the 2016 Regulations refers to the refusal of a "request for membership by a rightholder or person representing rightholders" which underlines the fact that the right-holder must seek membership of a CMO before the CMO can be authorised to act on his or her behalf.

Decision of the High Court

34. The trial judge held that the first preliminary issue presented the question whether the combined effect of the provisions of the Act of 2000, and in particular the interaction between ss.38, 205 and 281, is to confer a statutory obligation on either PPI or RAAP to determine the equitable remuneration payable to individual performers. He identified four functions conferred on a collecting society. The first, under s.208(2), is to collect the equitable remuneration payable to a qualifying performer. He held that this function may only be exercised by a collecting society in circumstances where the individual performer has assigned his or her right to the collecting society. Secondly, he said that a collecting society has a related function of negotiating the manner in which the equitable remuneration is divided up between, in the first instance, performers and producers and secondly, as between performers *inter se*. He held that this right is derived from s.208(4) and, by implication, from the CRM Directive.

35. His third and fourth conclusions are at the heart of the appeal by RAAP on this issue. They are explained at paras 40-44 of the judgment of 11 January 2019:-

"(iii). Determination of equitable remuneration

40. *The holding of a right to negotiate does not, however, confer upon RAAP a right to determine the amounts payable to individual performers. The only entity with legal authority to determine the amounts payable is the Controller. Whereas the Copyright Act 2000 does envisage that the basis for the distribution of the equitable remuneration will be achieved by agreement, it expressly provides a dispute resolution mechanism in default of agreement. RAAP is entitled, as a collecting society, to seek to negotiate a particular scheme of distribution on behalf of those performers who have assigned the right to collect equitable remuneration to it. If, however, an agreement cannot be reached, then the matter must be referred to the Controller pursuant to the provisions of sections 208(5) to (9). The language of section 208(5) is sufficiently broad to allow a collecting society, which has been assigned the right to collect the equitable remuneration, to refer a dispute to the Controller as 'the person [...] to whom it is payable', i.e. as assignee. Even if I am incorrect in thinking this, a work-around, similar to that employed in Carrickdale Hotel Ltd. v. Controller of Industrial and Commercial Property (High Court 2002 No. 350 SP), can be employed whereby the position of an individual performer is put forward as a test case to govern all performers in a similar position.*

(iv). Calculation of payment to individual performers

41. *There then remains the separate, narrow function of calculating the payment due to individual performers in accordance with an agreed—or imposed—scheme of distribution. This is a mechanical exercise, and requires an analysis of matters such as the frequency with which a particular sound recording has been made available to the public, and the identification of the individual performers involved in that sound recording and their roles, e.g. featured or non-featured performer. It will also require consideration of whether individual performers qualify for the payment of the equitable remuneration in accordance with the qualifying criteria prescribed under Part III, Chapter 9 of the Copyright Act 2000. (This latter issue is the subject-matter of the first set of proceedings).*

42. *A collecting society, such as RAAP, does not have a statutory function in this regard. This is because the statutory obligation to make a payment resides with the producer (or its representative). Once the detail of a scheme of distribution has been finalised—whether by agreement or by the Controller—it is a matter for the producer (or its representative) to pay out the relevant amounts to individual performers. The fact that an individual performer might express a preference that the equitable remuneration be paid to a collecting society on his or her behalf does not confer a function on the collecting society of calculating the payment. Rather, the function of the collecting society is confined to the collection of the fee, and, in*

the event of some discrepancy between the fee paid and the terms of the distribution scheme, to pursuing this with the producer (or its representative).

43. *The fact that RAAP does not have a role in calculating the amounts payable to individual performers does not detract from its role in representing performers who have assigned rights to it. In particular, the important role of negotiating a scheme of distribution remains.*

44. *In summary, my conclusions in respect of the first preliminary issue are as follows. A collecting society is entitled (i) to negotiate on behalf of its members, and (ii) to collect the amounts payable in accordance with a scheme of distribution. A collecting society has no function in making the final determination as to how licence fees are to be distributed between (i) performers and producers, and (ii) performers intra se. That function resides with the Controller. The separate mechanical function of calculating the amounts of the payments accruing to individual performers in accordance with a distribution scheme is a matter for the producer (or its representative)."*

36. The trial judge next considered the second preliminary issue. He noted that it stemmed from the fact that RAAP asserts that it is entitled, by virtue of its registration as a licensing body under ss. 280 and 281 of the Act of 2000, to collect on behalf of all performers within the licensed classes, irrespective of whether the individual performer has assigned his or her rights to RAAP. He held the argument was predicated on "the extreme position that sections 280 and 281 empower the Controller to grant an *exclusive* licence whereby a single entity is authorised to collect equitable remuneration on behalf of all of the performers within an entire class." He said this cannot be read into the wording of s.280. Furthermore, had the legislative intent been to create an exclusive licence, such as that contended for by RAAP, the Act would need to establish criteria against which a decision to grant, or refuse, a licence would have to be established and there were no such criteria in the Act. He reviewed the requirements in s.280(5) and (6), and concluded that the Act required the Controller to consider narrow administrative matters only. Once these were satisfied, the Controller was required to register the applicant as a licensing body. At paras. 55 and 56 of his judgment he concluded:-

"55. *Again, had the legislative intent been to allow the Controller to make the dramatic decision of granting an exclusive right to a licensing body to represent the entirety of a specified class of performers, this would require consideration of a greater range of policy matters than those actually prescribed.*

56. *I have concluded that the legislative intent in imposing a requirement under section 286 to register as a licensing body was merely to provide for the establishment of a publicly accessible register of entities who hold themselves out as willing to act on behalf of certain classes of performers. The register allows individual performers to identify representative bodies, and to have the assurance that the entity has met certain minimal requirements in terms of its legal form etc. It also allows the*

individual performers to consider the details of the scale of charges or proposed charges to be levied by the registered licensing body.”

37. The trial judge said that RAAP overstated the legal effect of s.281. RAAP argued that the phrase “the classes of rightsowners for whom it claims representation rights” in the section meant that, by virtue of registration in respect of a class of rights, a licensing body is presumptively entitled to act as if the rights of performers within that class had actually been assigned or licensed to it. The trial judge held that registration allows a licensing body to hold itself out as available to represent the proposed class, but this does not dispense with the necessity for those individual performers to request representation and to grant the requisite assignments, or exclusive licences, to authorise the licensing body to act on their behalf. He concluded at para. 62:-

“In summary, registration as a licensing body does not confer a presumptive right to act on behalf of all performers within the registered classes without any requirement for assignment or licensing. Applying this to the facts of the case, RAAP is only entitled to collect the equitable remuneration on behalf of those individual performers who have actually assigned the right to do so to it pursuant to the provisions of section 208(2).”

38. The trial judge then considered the arguments of RAAP based upon the CRM Directive and competition law. He held that the Directive did not require a member state to provide for statutory authorisation of CMOs and it, therefore, followed that s.281 fell to be interpreted in its own terms. He also held, by reference to its recitals, that the Directive was procedural in nature and that it was not intended to alter the substantive law of copyright and related rights. Accordingly, he rejected the argument of RAAP that it, rather than PPI, was entitled to collect, calculate and distribute the equitable remuneration payable to right-holders, based upon the Directive. He also rejected the suggestion that the construction of the Act of 2000 contended for by PPI yielded an anti-competitive situation whereby PPI collected and distributed remuneration on behalf of the producers and the performers.

39. Following the delivery of the reserved judgment, the parties addressed the court in relation to the form of order and the costs of the application. An issue was raised by RAAP in relation to the finding in the principal judgment that the entitlement of a CMO to collect the equitable remuneration was contingent on the performer having made an assignment, or granted a licence, to the CMO. RAAP submitted that it does not have any assignment of rights but rather enters into contractual arrangements whereby performers become members of RAAP and thereby, authorise RAAP to collect on their behalf. It submitted that the true dispute between the parties was whether RAAP had a deemed entitlement to collect on behalf of all members of the class of performers for which it was registered. In his judgment of 22 February 2019, the trial judge held that:-

“[T]he distinction which RAAP seeks to draw between (i) the assignment or licensing of rights, and (ii) other contractual arrangements between a collecting society and its members, is not something which had been argued at the hearing

before me in November 2018. As noted at the outset, the preliminary issues were presented to the court at the level of general principle only, and there was no agreed set of facts against which those issues were to be decided. In order to determine the second preliminary issue, it was necessary for this court to reach a conclusion on what formalities were required before a collecting society could collect the section 208 equitable remuneration on behalf of a performer. For the reasons set out in the principal judgment I concluded – rightly or wrongly – that assignment or licensing was required. This conclusion was based on the statutory language of section 208. Put otherwise, in order for me to determine the question of whether registration conferred a presumptive entitlement to collect on behalf of all members of the registered class, I thought it necessary to reach a view on the interpretation of section 208. If RAAP disagrees with this conclusion, then it has, of course, a full right of appeal to the Court of Appeal. The finding in the principal judgment might well be overturned, and the Court of Appeal or even the Supreme Court might decide that the correct interpretation of the legislation is that the right to collect the equitable remuneration extends to persons who are members of a collecting society but have not formally assigned or licensed any rights to it.”

Collective management of performers’ rights

40. The first issue which must be addressed is whether the collective management of performers’ rights is either mandatory or presumed. This arises from the argument advanced by RAAP that it is deemed to represent all performers within the class of performers in respect of whom it claims representation, subject to rebuttal of this presumption. The Act of 2000 must be construed in a manner that is, insofar as possible, compatible with each of the 2006 Directive, the CRM Directive and the 2016 Regulations. The 2006 Directive is non-prescriptive. It does not indicate how the rights referred to in Article 8(2) are to be transposed into national law. The CRM Directive establishes that it is for the individual right-holder to choose between individual or collective management of his or her rights, unless a member state provides otherwise (Recital 2). The CRM Directive leaves to member states whether to permit the individual management of right-holders’ rights (Recital 12), or whether to provide for mandatory collective management of rights (Recital 19). Article 3(a) provides that a CMO may be authorised by law or by way of assignment, license or any other contractual arrangement to manage right-holders’ rights on behalf of more than one right-holder. It leaves to the member states whether to authorise this by statute. This is not required by the CRM Directive. The right-holders have the right to authorise a CMO of their choice to manage their rights or categories of rights (Article 5). Article 5(7) provides that in cases where a right-holder authorises a CMO to manage his rights, he must give consent, evidenced in documentary form, specifically for each right or category of rights or type of works or other subject-matter which he authorises the CMO to manage. The right-holder may withdraw his or her rights, or category of rights, from one CMO and entrust or transfer the management of all, or part, of them to another CMO or entity. These provisions are reflected in the 2016 Regulations. Thus, the CRM Directive recognises that there may be more than one CMO authorised to act on behalf of right-holders in respect of the same class of rights.

41. I am satisfied that the CRM Directive does not mandate the collective management of rights on behalf of right-holders and that it leaves to the member states the choice whether or not to impose such a requirement. This was not disputed by RAAP which, as I have noted, contended that it is deemed to represent all performers within the class of performers in respect of whom it claims representation, subject to rebuttal of this presumption.
42. In my judgment, the Act of 2000 does not impose any such mandatory collective management of rights, nor any presumption of collective management of rights in favour of any CMO. Neither party advance the proposition that the State had elected to require mandatory collective management of rights on behalf of right-holders. It was accepted by RAAP that a right-holder could withdraw his or her rights, or class of rights, from management by RAAP and, by implication, manage those rights individually. It was submitted that, in theory, it was open to the Controller to register a second CMO in respect of the classes of rights in respect of which RAAP was already a licensing body, but it was submitted that such a registration would be "unworkable." I do not accept that submission, and in any event, it is inconsistent with the freedom of individual performers to choose which CMO they wish to manage their rights, which is emphasised in the 2006 Directive, the CRM Directive and the 2016 Regulations. This freedom of choice is offended equally if performers' rights are deemed to be managed either by PPI or RAAP. Even where a member state elects to impose collective management of rights, nonetheless, the freedom of choice of the performer must be respected and accommodated. The CRM Directive requires that the choice must be made *before* the CMO is *authorised* to manage the rights in question. This is particularly clear from the 2016 Regulations, article 4(7) of which states:-

"In cases where a rightholder authorises a collective management organisation to manage rights, the rightholder shall give consent specifically for each rights or category of rights or types of works and other subject matter which the collective management organisation is authorised to manage and any such consent shall be evidenced in documentary form." (emphasis added)

In my judgment, it is not possible to reconcile the provisions of the CRM Directive and the 2016 Regulations with a presumed authorisation to manage the rights of right-holders. This means that it is not permissible to impose exclusive collective management in respect of any one class of rights. The question of "workability" simply does not arise.

43. I am satisfied that the mandatory collective management of rights, the presumption of authorisation of a CMO, or the exclusive collective management of rights through one licensed CMO is inconsistent with the provisions of s.280 of the Act of 2000 and of the Directives. As discussed above, the Controller is obliged to register as a licensing body in respect of performers' property rights, any applicant who meets the requirements of s.280 in respect of the class or classes of rights set out in the application for registration. The Act of 2000 does not require that there be a single licensing body in respect of each possible class of rights or rightsowners, and it does not mandate that there should in fact

be one licensing body in respect of each class of rights or rightsowners. The Controller is obliged to register each qualifying applicant as a licensing body in respect of the classes of rights included in his application. It is clear that the Act of 2000 does not provide for an exclusive licensing body per class of rights, nor does it preclude the registration of more than one licensing body in respect of each such class.

Section 281

44. RAAP contends that under s.281 a certificate of registration obtained pursuant to s.280 is proof of a right to act, unless and until the performer has appointed another CMO or has indicated that he or she wishes to manage his or her own rights. In other words, it is RAAP's case that a CMO is **deemed to have the right** to act in respect of all right-holders who come within the class of rights in the certificate until, by a positive choice by each individual performer, the contrary can be proved. It submits that the construction accorded to s.281 by the trial judge ignores the words "until the contrary is proved", and effectively renders the entire section redundant since "the contrary would only be proved" if the registration ends, in which case the certificate lapses.
45. A central tenet of RAAP's case is that once it is registered as a licensing body in respect of certain classes of rights set out in the certificate granted by the Controller, it thereby has the right to act on behalf of the classes of rights "for whom it claims representation rights." It says it "claims representation rights" in respect of all right-holders within the class, wherever they are in the world, by virtue of the certificate granted under s.280(7), unless the individual performer has indicated that he or she wishes to entrust the management of his or her rights to another CMO, or to manage those rights him or herself. RAAP says that the certificate evidences its registration and thus, its right to operate as a licensing body. It says the certificate operates to confer a substantive right to act on behalf of all performers within the class of rights in respect of which it is registered and, thereby, binds all such performers unless they opt out, pursuant to unspecified provisions or procedures.
46. I am satisfied that this submission is incorrect and is inconsistent with the terms of the CRM Directive. Article 5(7) of the Directive requires:-

"In cases where a rightholder authorises a collective management organisation to manage his rights, he shall give consent specifically for each right or category of rights or type of works and other subject-matter which he authorises the collective management organisation to manage. Any such consent shall be evidenced in documentary form."

It is also inconsistent with Article 4(7) of the 2016 Regulations cited above.

47. I am not satisfied that the application, by a body such as RAAP, to be registered as a licensing body in respect of a class or classes of rights, which results in the issue of a certificate by the Controller, satisfies this requirement. There is no role for the right-holder to authorise a CMO to manage his rights in this procedure, and there is no consent given by the right-holder to the management of his or her rights by the CMO. The

application by the CMO, and the certificate granted to it, cannot be evidence of the consent of the individual right-holder to authorise the CMO to manage their rights.

48. It is also inconsistent with the provisions of the Act of 2000. As noted above, it is possible for the Controller to register more than one licensing body in respect of any class or classes of rights. If RAAP is correct, then each such CMO has the right in law, by virtue of its registration and the granting of a certificate under s.280(7), to act on behalf of all right-holders within the classes of rightsowners in respect of whom it is registered, as they comprise rightsowners for whom it claims representational rights. Thus, on this construction, the Oireachtas intended that simply by registering as a licensing body in respect of a particular class of right-holders **and no more**, multiple CMOs would each have the right to act on behalf of all right-holders. The suggested construction cannot be saved by some form of first-past-the-post reading. Likewise, there is no suggestion that the Controller is empowered to decide who, of a number of applicants, to register as the sole licensing body in respect of a particular class of rights. The Act of 2000 cannot confer statutory rights on the first CMO to be licensed under s.280 in respect of a class of rights, which are not conferred on a CMO subsequently registered as a licensing body in respect of the same class of rights. Therefore, the asserted statutory rights must apply to each and every CMO licensed as a licensing body. There cannot, accordingly, be a rebuttable deemed right to manage the rights of all performers falling within a particular class of rights, arising from s.281 of the Act of 2000, as each such CMO would be deemed, until the contrary was proved, to act on behalf of the right-holders in the particular class. That this would be so, notwithstanding the fact that there could be more than one CMO thereby deemed to act on the right-holder's behalf (possibly neither of which had been actually authorised to act by the individual right-holder) reinforces this point.
49. Furthermore, if the entitlement to act arose from the fact of registration in respect of a particular class of rights and it extended, as a result, to all performers coming within the class (absent those who opted out of such representation), the second part of s.281 would be superfluous, as assignment of rights or exclusive licensing of rights would be unnecessary in order to authorise the CMO to manage the rights of the right-holders.
50. Section 281 is concerned with the certificate granted under s.280(7). It must include the particulars specified in s.280(6). Thereafter, s.281 goes on to provide that the certificate is evidence of the right of the licensing body to act on behalf of the classes of rightsowners for whom it claims representation rights, or on behalf of the rightsowners who have assigned rights to it, or exclusively licensed it, as specified in that certificate. The section does not create or confer any substantive right upon the licensing body (other than satisfying the statutory requirement that in order to act as a CMO within the State, the body must be registered). It evidences an authorisation – a right – to conduct the business of a licensing body in representing right-holders. In my view, the licensing body registered to act on behalf of a class of right-holders thereby “claims representational rights” in respect of that class in the sense of identifying the class or classes of performers whom it actually represents, or proposes to represent. Registration does not

actually confer such a right, nor authorise a licensing body to act for a performer coming within the class or classes of rights in respect of whom the licensing body is registered until the individual performer authorises the licensing body so to act, whether directly or through another CMO. The authorisation by the individual performer must be consensual. A right-holder has a right to choose whether or not to be represented by a particular CMO. The construction contended for is simply inconsistent with the freedom of choice conferred upon the individual performers. At the very least, if the legislature had intended to impose upon those performers representation which they had not sought nor consented to, one would expect this to have been clearly stated.

51. Registering as a CMO serves an important role in the functioning of the Act of 2000. Once a CMO is registered, and thus represents itself as being prepared to act on behalf of all right-holders coming within the scope of its registration, it is required to act on behalf of any such right-holders who requests it to so act, unless the CMO has objectively justified reasons to refuse management, in accordance with Article 5(2) of the CRM Directive. It is then required to comply with the requirements which the CRM Directive, the Act of 2000 and the 2016 Regulations impose on CMOs.
52. The phrase "until the contrary is proved" in s.281, to my mind, deals with a situation where there may be a discrepancy between the certificate granted and the actual authorisation of the licensing body; the licensing body may cease to satisfy the requirements set out in s.280(6), or may have ceased to act in respect of certain classes of rights in respect of which it was registered, or where individual performers have withdrawn their authorisation of the CMO to act on their behalf.
53. The distinction between the registration of a CMO and the authorisation of a CMO by individual right-holders is in keeping with the provisions of Article 3(a) of the CRM Directive and s.280 of the Act of 2000. A CMO is defined, for the purposes of the Directive, as an organisation which is "authorised by **law** or by way of assignment, licence or any other contractual arrangement". I am satisfied that performers' licensing bodies, who are registered pursuant to s.280, are not thereby authorised by any section of the Act of 2000 to act on behalf of any individual right-holder. Therefore, they are not authorised by law. Performers must authorise a CMO to act on their behalf, either by way of assignment, licence or any other contractual arrangement. In keeping with the requirements of Article 5(7) of the CRM Directive, the right-holder must authorise the CMO specifically for each right or category of rights or type of works or other subject-matter which he authorises the CMO to manage.
54. In my judgment, a licensing body that is registered pursuant to s.280 of the Act of 2000 has no deemed right to act, as a matter of law, on behalf of all performers coming within the scope of its registration. The right, therefore, of any CMO to act on behalf of performers must be based upon assignment, licence or other contractual arrangements. The section must recognise the rightsowners' right to manage their rights individually. They must not be required to positively opt out of a presumed management by a CMO

with whom they have no positive consensual arrangement, whether directly or indirectly, through arrangements between CMOs.

55. This analysis is not altered by the obligations imposed by the CRM Directive (and the 2016 Regulations) on performers' CMOs in relation to right-holders. In my judgment, the obligations of a CMO towards the right-holders whose rights it manages does not extend to those right-holders who never authorised the CMO to manage their rights, or entrusted their rights to the CMO, in the first place. Whether this leaves such right-holders with inadequate protection is not a matter which can alter the proper construction of the legislation.
56. For this reason, I agree with the trial judge on the second preliminary issue insofar as he held that, under s.281 of the Act of 2000, RAAP is not entitled to receive all remuneration payable by PPI to performers arising out of the playing in public, broadcasting or cable transmission of recordings of their performances in the State. It is entitled to receive all remuneration payable by PPI to performers who have authorised RAAP to manage those rights on their behalf by rightsowners who have assigned rights to it or have exclusively licensed it.
57. However, I would go further than the trial judge. The CRM Directive recognises, in the definition of CMO, that a right-holder may authorise a CMO to manage his or her rights by means of "any other contractual arrangement". This is reproduced in the 2016 Regulations. Section 265, of the Act of 2000, defines a licensing body of performers as an organisation "either as owner or prospective owner of a performer's property rights, or as exclusive licensee or as agent for him or her" who negotiates and grants performers' property right licences. Thus, the Act of 2000 likewise acknowledges that a CMO may be validly authorised to manage the rights of performers otherwise than by granting an exclusive licence so to act to the CMO, or by an assignment of their rights. More flexible authorisations are permissible. It is not necessary to read s.281 in a manner which confines the right of CMOs otherwise properly authorised to act on behalf of right-holders to those who have actually assigned their rights or granted exclusive licenses to a specific CMO. In my view, if RAAP has been authorised by a "contractual arrangement" to manage the rights of particular performers, then it is entitled to receive all remuneration payable by PPI to those performers, on their behalf. Whether or not any particular relationship – actual or inferred, express or implied – between RAAP and an individual performer falls within the description "contractual arrangement" is an issue of fact that can only be determined by reference to a specific and actual example.

Payments pursuant to s.208(1) of the Act of 2000

58. The issue raised in the first preliminary issue is phrased in a binary fashion, but the question cannot be so answered. To recap, the question as framed is addressed to whether s.208(1) places the statutory obligation to determine the payments to be made by way of equitable remuneration to performers upon RAAP, or upon PPI.
59. In my view, the position is as follows. If a performer has authorised RAAP to manage his or her rights, then PPI must remit the total sum due to that performer to RAAP, pursuant

to the distribution scheme agreed between PPI and RAAP. If no such agreement between RAAP and PPI has been reached, then, under the provisions of s.208(5)-(9), the Controller will determine the amount of equitable remuneration payable.

60. RAAP's own distribution scheme governs the further distribution of the performers' share between the individual performers on a sound recording. It is no function of PPI to engage in calculating the equitable remuneration due to each individual performer in those circumstances.
61. The difficulty arises in respect of performers who have not authorised RAAP to manage their right to equitable remuneration. As a matter of first principle, if RAAP has not been authorised to act on behalf of a performer, it cannot have a right to receive the equitable remuneration collected by PPI from third parties in respect of performers for whom it is not authorised to act. Any other conclusion would be inconsistent with the CRM Directive which recognises the right of right-holders to manage their rights individually or to have those rights managed **by a CMO of their choice**, and which requires the consent of the right-holder to be evidenced in documentary form, specifying each right or category of rights which the CMO in question is authorised to manage. If individual performers have chosen to manage their right to equitable remuneration themselves, then PPI must pay the equitable remuneration payable to those performers directly. In this judgment, we are not concerned with the practicalities of how this is to be achieved (nor, in the absence of any agreed or assumed facts, can we consider this), but nonetheless, that is the principle.
62. The issue for resolution is, what is to become of the equitable remuneration collected by PPI from users which is payable to performers who have neither authorised RAAP to act on their behalf, nor taken active steps to manage their rights individually? The scheme under the Act of 2000, reflecting the scheme in the Directives, is that there is a single payment collected on behalf of two distinct classes of right-holders: producers and performers. The single payment, made by third parties, is payable to a producers' licensing body, as defined in s.38(15). It is clear from the provisions of s.38 that there may be more than one such producers' licensing body.
63. Producers' licensing bodies must pay the performers the equitable remuneration included in the payment received by them from the users, pursuant to s.38. The duty of the producers' licensing body is to pay the equitable remuneration to the performer(s) entitled to the payment. Section 205 creates the right of a performer to payment of equitable remuneration where copies of a sound recording are played in public, or included in a broadcast or cable programme services. That equitable remuneration must be paid "as specified" in s.208.
64. Pursuant to s.208, the performer has the right to receive the equitable remuneration payable to him or her from the owner of the copyright in the relevant sound recording – not the licensing body acting on behalf of the owner of the copyright. It is the licensing body who receives the payments from the third party, which includes the equitable remuneration payable to the performers. In so doing, it acts on behalf of the owner of

the copyright in the sound recording. Therefore, the licensing body is required to fulfil the obligation of the owner of the copyright set out in s.208(1). The licensing body must pay to the performer the equitable remuneration due to him or her. Where performers have authorised a CMO to manage their rights in respect of the sound recording in question, then the licensing body (PPI) must pay the equitable remuneration due to the performers to the CMO authorised to act on behalf of the performers. Where all performers in respect of the sound recording in question have authorised the same CMO to manage their right to receive the equitable remuneration payable, then, as discussed above, the entire sum due should be paid by PPI to the relevant CMO (RAAP, or any other registered CMO) and it is then a matter for the CMO of the performers in question, applying its own distribution scheme, to calculate the sums due to each individual performer.

65. Where none, or only some, of the performers in a sound recording have entrusted the management of their right to equitable remuneration to one CMO this is not possible, for reasons I have already explained. A calculation must be made to ascertain the total sum due to the performer(s) who have authorised a particular CMO to manage their right to equitable remuneration in a particular sound recording, so that the amount due to those performers may be paid to the party to whom it is payable (their authorised CMO). But, a CMO has no claim to monies due to performers it is not authorised to represent, so, in those circumstances, it is not a party to whom the equitable remuneration "is payable." Neither does a producers CMO have a right to those monies. But, this does not mean that by default the monies must, therefore, be paid over to an unauthorised performers CMO. The fallacy lies in the binary position adopted by RAAP based upon the fact that there is one licensing body for producers in the State (PPI) and one licensing body for performers in the State (RAAP), and furthermore, its argument that it is presumed to represent all performers in relation to sound recordings. As a matter of law, the rights of either producers or performers may be managed individually or collectively and, if collectively, there may be more than one CMO authorised to manage the rights on behalf of either the producers or the performers.
66. It seems to me that it must follow that there is an obligation on each producers' licensing body (in this case PPI) to ascertain the party to whom it should remit the equitable remuneration due to the performers in respect of individual sound recordings, in accordance with s.208(4). Save in the case where one CMO is in fact authorised in respect of all of the performers on an individual sound recording, this necessitates PPI in the first instance, transmitting to RAAP the monies due, in respect of the equitable remuneration, to the performers who have actually authorised RAAP to manage their right to equitable remuneration, and to retain, for appropriate distribution, the equitable remuneration of those performers who have not authorised RAAP to manage their rights. PPI must then pay those monies to either the performers individually, assuming they are individually managing their right to equitable remuneration (whether by choice or by default), or to any other CMO who is authorised to manage the equitable remuneration on behalf of those other performers. Whether this, in practice, means that it is likely that individual performers may not receive the equitable remuneration payable to them, pursuant to s.208, is not a matter for this court on this trial of a preliminary issue. I

would observe in passing that the producer of a sound recording ought to know the identity of the performers on the sound recording it produced and thus, ought to be in a position, without undue difficulty, to discharge its statutory obligation to pay to the individual performer the equitable remuneration due to him or her.

67. The distribution scheme operating between producers and performers is that all of the performers on a sound recording are jointly entitled to equitable remuneration amounting to 50% of the sum paid by the third party to the licensing body, pursuant to s.38 of the Act of 2000. The Act is silent on who is to calculate the portion of the 50% share payable to performers who have authorised a CMO (RAAP) to manage their right to equitable remuneration, as opposed to performers who have not, in respect of the same sound recording. It seems to me, by default, the calculation must be made by PPI as s.38 of the Act of 2000 requires that it, as a licensing body, receives the payment on behalf of the copyright owners and the performers, and it is obliged to pay the equitable remuneration due to performers to the persons "to whom it is payable." I see no basis in the Act of 2000, nor the Directives, upon which it can be said that a CMO, which has not been authorised to act on behalf of performers, should have either that right or that duty.
68. As is apparent from the above, I do not agree with the trial judge that RAAP, as the CMO for the performers for whom it acts, has no role in calculating the amounts payable to individual performers. It has such a role in relation to those performers for whom it is authorised to act, and it does so through the distribution scheme adopted by its members and right-holders. I do not agree that it is for PPI to calculate all payments due to all individual performers, as appears to be the implication of the judgment of the trial judge in paras. 41-42 of his principal judgment.
69. The practical implications of my construction of the Act of 2000 are matters which do not arise on this appeal. The trial of the two preliminary issues proceeded in the absence of any evidence or agreed facts.
70. Furthermore, the fact that at present there is but one CMO registered to represent producers, and one to represent performers, cannot inform the proper construction of the Act of 2000. The evils identified by RAAP in its submissions to this court arise from the legislation, both European and domestic. It may be that the legislative regime is ineffective in practice adequately to protect the rights of performers who do not actively manage their rights, either individually or by authorising a CMO to manage their rights. That is a matter upon which I make no observation. But, that cannot alter the proper construction of the statute as enacted, and in light of existing EU law.

Conclusions

71. I would answer the two preliminary issues directed to be tried as follows. In relation to the first issue, s.208(1) of the Act of 2000 does not place the statutory obligation to determine the payments to be made by way of equitable remuneration to performers upon either RAAP or PPI. The section establishes the means by which the performers' right to equitable remuneration, granted by s.205 of the Act of 2000, is deemed to be satisfied. Section 208(1) merely provides that a performer has a right to equitable

remuneration from the owner of the copyright in the sound recording in question. Subsections (4)-(9) govern the determination of the amount of equitable remuneration payable, whether by agreement or otherwise. The default position is that there should be agreement between the persons by whom it is payable, and the persons to whom it is payable. For the reasons previously explained, the equitable remuneration is payable by the licensing body which, pursuant to s.38, received the licence fee from the user. In the circumstances of this case, this is PPI. The equitable remuneration is payable to a performers CMO where performers have authorised a CMO to manage their rights. Therefore, any agreement in relation to the amount payable to these performers must be between the producers' CMO and the performers' CMO, that is PPI and RAAP. This agreement is in relation to the split of the sums paid by the user between the producers' licensing body and the performers' CMO.

72. In respect of performers who are managing their individual rights, the Act of 2000 envisages that there should be an agreement between the producers' licensing body (PPI) and each individual performer who is managing his or her own rights.
73. In respect of performers who are not represented by a CMO, and who do not actively manage their rights on their own behalfs, a performers CMO (RAAP) has no role in relation to the equitable remuneration payable to those performers.
74. As regards the first two situations, the dispute resolution mechanism provided by ss.(5)-(9) of s.208 may be invoked, in which case the Controller will determine the payments to be made by equitable remuneration in respect of the performers the subject of the application before him or her.
75. Where an individual performer does not actively manage the right to receive equitable remuneration, PPI must retain the sums due to those performers, as there is no basis for it to pay those sums to a CMO who does not represent such performers. If, in order to fulfil that obligation, it is necessary to calculate the amount of equitable remuneration payable to a performer or performers who have neither authorised RAAP (or any other CMO) to manage the right in question, nor reached an agreement with the individual performers, then PPI must carry out that function. If that function involves dividing the 50% equitable remuneration payable between a number of performers in respect of a sound recording, some of whom have authorised RAAP to manage their rights and some of whom have not, this may give rise to practical difficulties, but the principle is nonetheless clear. If the issue cannot be resolved by agreement, PPI may apply to the Controller for an order in respect of the unrepresented performer(s). If RAAP is of the view that PPI have divided the 50% equitable remuneration in a manner which is unfair to the performer(s) for whom it acts, RAAP may likewise apply to the Controller, pursuant to s.208.
76. I would answer the second preliminary issue in the negative. RAAP is entitled to receive all such remuneration as is payable by PPI to performers who have authorised RAAP to represent them, whether by assignment, exclusive licence or other contractual arrangement, including agreements with other CMOs or associations of right-holders. It

is not deemed to be entitled to receive all such remuneration unless and until right-holders choose to manage their own rights or entrust the management of those rights to another CMO or agent, or otherwise indicate that they do not consent to RAAP managing their rights.

77. Insofar as the trial judge held otherwise, I would respectfully disagree with his judgment. In particular, I do not, with respect, believe that s.208(2) confers upon a collecting society the function of collecting equitable remuneration which is payable to a qualifying performer. Subsection (2) is for the protection of performers. It prohibits them from assigning their right to equitable remuneration to any party. However, it creates an exception to that prohibition, which permits a performer to assign the right in order that it may be managed on their behalf. Performers may assign their right to a collecting society for the purpose of that collecting society exercising the performers' right to equitable remuneration on behalf of the performers. The subsection does not provide that a collecting society may only collect equitable remuneration on behalf of a performer where the individual performer has, in fact, assigned their right to the collecting society. The subsection does not confer the right on a collecting society to collect the equitable remuneration as such.
78. At para. 40 of his judgment, the trial judge held that the right of a performers' CMO to negotiate with a producers' CMO, in relation to the split of the fee paid by users between producers and performers, does not confer any right on the performers' CMO to determine the rights of the right-holders for whom it acts, *inter se*. The CMO's distribution scheme, agreed by the right-holders whom it represents, sets out how the equitable remuneration is to be divided between different performers. The CMO administers the scheme. It is obliged to publish the scheme and operate the scheme. In so doing, it determines the amount of equitable remuneration payable to each individual performer in accordance with that agreed distribution scheme. Its right to do so is not to be found in s.208 of the Act of 2000.
79. For the reasons I have previously set out, I would disagree with the decision of the trial judge at paras. 42 and 44, and at paras. 62 and 71 of his judgment of 11 January 2019.
80. For these reasons, I would allow the appeal and vary the order of the High Court. The Court will hear the parties in relation to the precise form of the order to be made.

I agree **Noonan J.**

I agree **Murray J.**