Appeal Ref: CA-2026-000160

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE

Neutral citations: [2025] EWHC 1944 (Ch) & [2025] EWHC 3262 (Ch)

BETWEEN:

(1)–(6) TRUSTEES OF THE AFM AND SAG-AFTRA INTELLECTUAL PROPERTY RIGHTS DISTRIBUTION FUND (as listed in the continuation sheet to the re-amended claim form) & OTHERS

Claimants/Appellants

- and -

SECRETARY OF STATE FOR BUSINESS, INNOVATION, SCIENCE AND TRADE

Defendant/Respondent

RESPONDENT'S REPLACEMENT APPEAL SKELETON ARGUMENT

References to the High Court's rulings are in the form:

- *[2025] EWHC 1944 (Ch) of 30 July 2025; [2025] R.P.C. 21, per Richards J (the "**July Judgment**");*
- *[2025] EWHC 3262 (Ch) of 11 December 2025 per Richards J and Master Brightwell (the "**December Judgment**"); and*
- *the refusal of permission to appeal of 19 December 2025, per Richards J and Master Brightwell (**"PTA Judgment"**).*

*References to the Appellants' Grounds of Appeal are in the form "**GoA**" and to the Appeal Skeleton Argument are in the form **"ASkel"**.*

*References to the Core and Supplementary Bundles are in the form [**CB/tab number/page number**] and [**SB/tab number/page number**].*

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2 October 2026 (bundle references added 16 October 2026)

I. INTRODUCTION & SUMMARY

1. This claim is an ambitious attempt to seek substantial *Francovich* damages[1] from the UK Government, prior to the abolition of such actions by the *European Union (Withdrawal) Act 2018*, on the basis of the UK's alleged non-compliance with its EU and international copyright law obligations. The claim alleges that the Secretary of State has unlawfully denied musical performers the right to "*equitable remuneration*" when sound recordings are broadcast or communicated to the public in the UK.

2. The Secretary of State (the "**SoS**" or "**the Defendant**") denies these allegations, in circumstances where, **first**, during the relevant period the rights relied on by the Appellants were not available to UK performers in the US. **Secondly**, and relatedly, the UK decided in good faith to limit the scope of the rights available to US performers in a way that (i) was on its face consistent with the wording and negotiating history of the relevant EU Directives and international treaties; (ii) did not attract any criticism or challenge from the EU institutions or stakeholders (including the Appellants); and (iii) was consistent with the statements and practices of the EU institutions and various Member States. The SoS therefore contends that any breaches of EU law cannot come close to being *"sufficiently serious"* (i.e. that the UK manifestly and gravely disregarded the limits on its discretion)[2] to establish liability for *Francovich* damages.

3. The July Judgment at §§71-72 [**CB/7/110-111**] struck out claims brought by Claimants 1-8 (trade unions and/or trustees of a fund representing certain performers) for *Francovich* damages on behalf of their members (the Appellants do not contest this). That leaves Claimants 9-12, who are individual performers who seek, pursuant to CPR r.19.8, to act on behalf of a class of approximately 30,000 "*US Performers*" (see §23 below).

4. In this appeal, the Appellants seek to keep alive their preferred option for a representative claim under CPR r.19.8, by which they would avoid the need to carry out an assessment of *whether* each member of the represented class has in fact suffered loss and could be entitled to damages, and - if so – *how much*. However, this approach involves substantial shortcuts that cannot be

[1] Arising out of the Court of Justice of the European Union ("CJEU")'s judgment in Joined Cases C-6/90 and C-9/90 Francovich v Italian Republic (ECLI:EU:C:1991:428) [1993] 2 C.M.L.R. 66.

[2] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* (ECLI:EU:C:1996:79) [1996] QB 404 ("***Brasserie du Pêcheur***"), at 499F, §55.

reconciled with the wording of the rule or the common law compensatory principle. The SoS resists the appeal. In summary:

4.1. **Grounds 1.1-1.2 and 1.5:** The proposed class includes performers who have suffered no loss. They do not have the "*same interest*" as performers with viable claims for damages, per *Lloyd v Google* [2022] AC 1217 ("***Lloyd***") and *Prismall v Google UK Ltd* [2025] KB 663 ("***Prismall***"). Further, even among performers who have suffered loss, any entitlement to damages and quantum depends on individual circumstances. The Appellants' proposed approach of applying discounts to the class of represented performers as a whole would therefore compensate performers who suffered no loss and undercompensate those with valid claims in a way that is inconsistent with the compensatory principle (that is, putting the claimant in the same position, as best money can do it, as if the wrong had not occurred): *Lloyd* at §80. CPR r.19.8 does not provide the statutory basis required to depart from this common law principle and award aggregate damages, as for example with s.47C of the *Competition Act 1998* ("**CA 1998**").

4.2. **Ground 1.3:** The "*broad axe*" principle invoked by the Appellants does not remove the requirement to establish that each class member has suffered loss. Nor can it appropriately be used in circumstances where no *"forensic difficulties"* of quantification arise.

4.3. **Ground 1.4:** The Appellants' reliance on *EMI Records v Riley* [1981] 1 WLR 923 (***"EMI"***) and *Independiente Ltd v Music Trading On-Line UK Ltd* [2003] EWHC 470 (Ch) (***"Independiente"***) does not assist where the proposed class includes performers who have not suffered any loss. There are also clear differences between the proposed approach for assessing loss in *EMI* and the approach proposed here by the Appellants. In any event, the doctrine of precedent requires that CPR r.19.8 is approached consistently with *Lloyd* and *Prismall*.

4.4. **Ground 2:** The Appellants significantly overstate the significance of the PPL exercise. There would be no need for the top-down discounts proposed by the Appellants if the issues affecting performers' entitlement to damages could be addressed solely by reference to the data held by PPL.

5. The remainder of this Skeleton Argument is structured as follows: **Section II** sets out a background to the appeal; **Section III** briefly considers the legal framework, focusing on the courts' approach to CPR r.19.8; **Section IV** responds to the Appellants' arguments; and **Section V** sets out a very brief conclusion.

II. BACKGROUND TO THE APPEAL

A. Equitable remuneration

6. This case is about performers' rights to equitable remuneration. These are rights conferred on performers and phonogram producers to a share in income generated by the exploitation of certain sound recordings in which a performance is embodied: July Judgment §§6-7 [**CB/7/94**]. The amounts of equitable remuneration are generally small. For example, the mean claim value per performer is around £30.[3]

7. For example, when BBC Radio 1 plays a Kendrick Lamar song, the BBC pays a licence fee to Phonographic Performance Limited ("**PPL**"). PPL then distributes that sum to the producer (often the record label) and performers who performed on the track. Where the performers in question qualify for equitable remuneration, PPL splits payments equally between producers and performers. However, where equitable remuneration is not due (e.g. in the case of US performers whom the Appellants seek to represent), the entirety of the sum goes to the producer. "*Featured artists*" (in this example, Kendrick Lamar) and producers have generally negotiated contractual arrangements to share equitable remuneration paid to the latter, whereas "*non-featured artists*" (e.g. a session drummer who performed on the track) have not negotiated such agreements.[4] PPL also takes a percentage of the licence as an administration fee.

B. The legal framework for the right to equitable remuneration

Domestic law

8. The Appellants have not attempted to explain the applicable legal framework in the ASkel. The right to equitable remuneration arises, for domestic purposes, from s.182D(1) of the *Copyright*

[3] See the Witness Statement of Robin Stout, Deputy Director of Copyright Policy at the Intellectual Property Office, of 28 October 2025, at §15 [**SB/15/112**].

[4] The difference between featured and non-featured artists is explained in the July Judgment §27 [**CB/7/99**].

Designs and Patents Act 1988 ("**CDPA**") which has provided, at all material times, that:

> "(1) Where a commercially published sound recording of the whole or any substantial part of a qualifying performance – (a) is played in public, or (b) is communicated to the public otherwise than by its being made available to the public in the way mentioned in section 182CA(1), the performer is entitled to equitable remuneration from the owner of the copyright in the sound recording…"

9. The concept of a "*qualifying performance"* is governed by ss.181 and 206 of the CDPA: July Judgment §§9-10 [**CB/7/95**]. In summary, a "*qualifying performance*" was during the relevant time one that: (i) took place in a *"qualifying country"*; or (ii) was given by a citizen, subject or resident of a *"qualifying country"*.

10. Between 1 December 2016 (prior to the claim period) and 31 December 2020, the list of "*qualifying countries"* in s.206 CDPA, pursuant to amendments by s.22(5) of the *Intellectual Property Act 2014*, comprised the UK, any other EEA state, the Channel Islands, the Isle of Man, Gibraltar, any country party to the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961* ("**the Rome Convention**"),[5] or any other country designated by Order in Council pursuant to s.208.

The Rome Convention

11. The UK acceded to the Rome Convention in 1963. Neither the EU nor the US have ever been a party to the Rome Convention: July Judgment, §15 [**CB/7/96**]. As explained in the July Judgment at §13 [**CB/7/96**]:

> "In very broad terms, Article 12 of the Rome Convention required a "single equitable remuneration" to be paid by the user of a phonogram to the performers, or the producers of that phonogram, or both. Article 4 of the Rome Convention required signatories to confer "national treatment" to performers and producers of phonograms if various "points of attachment" are satisfied: for example if the performance in question took place in another contracting state (a "criterion of performance") or if the performance is incorporated in a phonogram which is protected under the Rome Convention because the first fixation of the sound was made in another contracting state (the "criterion of fixation"). Articles 5(3) and 16 of the Rome Convention permitted signatories to derogate from that obligation in relation to certain "points of attachment" and in certain other respects. Article 3 defines "phonogram" to mean "any exclusively aural fixation of sounds of a performance or of other sounds"."

[5] United Nations, Treaty Series, vol. 496, p. 43.

12. Upon ratification of the Rome Convention, the UK made a declaration under Art.16 that essentially limited the right to remuneration to situations where other signatory states offered reciprocal treatment to UK musicians: July Judgment §14 [**CB/7/96**].

The WIPO Performances and Phonograms Treaty (WPPT)

13. The *WIPO Performances and Phonograms Treaty* ("**WPPT**") was adopted on 20 December 1996. The US has signed and ratified the WPPT. The UK, the EU and other EU Member States also signed and ratified it: July Judgment §17 [**CB/7/96**].[6]

14. Whilst Art.15(1) WPPT confers a right to a share in a single equitable remuneration, Art.15(3) permits contracting parties to enter reservations with respect to that right. This reservation must be read alongside Art.4(2), which provides that Contracting Parties do not have to confer national treatment as regards the right to a single equitable remuneration if and to the extent that another party has exercised its ability to derogate from that obligation under Art.15(3).

15. As the July Judgment explained at §17(ii) [**CB/7/97**]:

> "When it ratified the WPPT, the US made an important derogation under Article 15(3) of the WPPT to the effect that it would apply the provisions of Article 15(1) "only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord delivered, as provided under the United States law". Thus, under the WPPT the US was prepared to offer only a restricted entitlement to equitable remuneration when phonograms were exploited in the US."

Relevant European Directives

16. The relevant EU law with which the Appellants allege UK law was not compliant was first enacted in Council Directive No.92/100/EEC of 19 November 1992 on rental and lending rights and on certain rights related to copyright in the field of intellectual property (the "**1992 Directive**").[7] As enacted, Art.8(2) obliged Member States to provide certain performers and phonogram producers with a right to share in a single equitable remuneration:

> "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

[6] The European Community and UK signed the WPPT in 1996 and 1997 respectively. The UK ratified the WPPT on 14 December 2009 along with the EU and other EU Member States.

[7] OJEC L 346, 27.11.1992, pp. 61–66.

> 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."

17. Domestically, the *Copyright and Related Rights Regulations 1996* (SI 1996/2967) (the "**1996 Regulations**") implemented the 1992 Directive. Regulation 20 of the 1996 Regulations operated so as to insert s.182D into the CDPA.

18. On 27 December 2006, the EU adopted Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (the "**2006 Directive**").[8] This repealed and replaced the 1992 Directive. However, Art.8(2) of the 2006 Directive provided for the right to equitable remuneration in the same terms as in the 1992 Directive.

19. The CJEU's judgment in Case C-265/19, *Recorded Artists Actors Performers* (**"RAAP"**),[9] handed down in September 2020, three months before the end of the Brexit transition period on 31 December 2020, is central to the Appellants' contention that the UK acted in breach of EU law during the relevant period (i.e. including the period before the judgment was issued by the CJEU). As explained in the July Judgment at §22 [**CB/7/98**]:

> "In RAAP, the CJEU reached the following conclusions (i) Article 8(2) of the Directive together with the WPPT required individual member states to confer on nationals of third states that were signatories to the WPPT a right to equitable remuneration. (ii) Individual member states could not dilute or qualify the right to a single equitable remuneration on the grounds that a particular third state, such as the US, was prepared to offer only a limited right pursuant to the WPPT. (iii) It is for the EU legislature alone to decide whether to legislate, on a harmonised basis, to provide that third states who offered only limited rights pursuant to the WPPT would receive only limited rights from the EU in return."

The status of the US

20. It is common ground that, applying the framework described above:

    20.1. The US is not a Contracting Party to the Rome Convention. Accordingly, it would only ever have been a "*qualifying country*" for the purposes of the right to equitable remuneration conferred under the CDPA if and to the extent that it was designated as such by an Order made under s.208 CDPA.

[8] OJEU L 376, 27.12.2006, pp. 28–35.

[9] (ECLI:EU:C:2020:677); [2021] 1 C.M.L.R. 22, OJEU L 376, 27.12.2006, pp. 28–35.

20.2. As regards the right to equitable remuneration, the US has only ever been designated as a "*qualifying country*" to the extent that it extended the same rights to UK performers, i.e. on the basis of reciprocity. US law only confers a limited right to equitable remuneration on UK performers. Accordingly, UK law operates (and operated throughout the relevant claim period) to confer US performers with similarly limited rights in respect of phonograms exploited in the UK.

C. The Appellants and a summary of the claim

21. The July Judgment summarises at §2 [**CB/7/93**] the different claimants in these proceedings:

> "(i) C7 (AFM) and C8 (SAG-AFTRA) are two US labour unions. Their membership consists of hundreds of thousands of working performers in the music and entertainment industry. …
>
> (ii) C1 to C6 are trustees of a fund (the Fund) that administers, collects and distributes royalty payments to members of AFM and SAG-AFTRA.
>
> (iii) C9 to C12 are four individual performers. C9 and C10 are members of AFM and C11 and C12 are members of SAG-AFTRA."

22. The Appellants allege that the UK failed properly to implement Art.8(2) of the 1992 and 2006 Directives and to comply with *"the overlapping obligation on Member States to comply with international obligations assumed by the EU on their behalf including under the WPPT"*.[10] In essence, they argue that US performers should have shared in the notional 50% performer allocation (split between featured and non-featured artists), with the remaining 50% allocated to producers.[11]

D. The representative action

Proposed class definition

23. As set out at §8 of the December Judgment [**CB/6/69-70**], Claimants 9-12 seek to bring representative claims on behalf of a class described in §15 of their Amended Particulars of Claim ("**APOC**") [**CB/10/148-149**], namely:

> "…all members (including deceased members) represented by AFM and by SAG-AFTRA

[10] APOC, §§34, 47 [**CB/10/154, 158-159**].

[11] Instead, US performers' notional shares of equitable remuneration were allocated to producers. See APOC §57.6 [**CB/10/164-165**], which claims between £5m and £5.6m for each year from 2016 onward.

who:

15.1 have given a performance in the United States which has been incorporated in a published phonogram; or

15.2 have had a performance (given in the United States or elsewhere) incorporated in a phonogram which was: (a) published by a producer who is a United States national or resident; or (b) first (including simultaneously) published in the United States; or

15.3 are or were at the material time United States nationals or residents."

Quantification of damages for individual class members

24. The December Judgment explains at §10 [**CB/6/70**] that (with emphasis added):

> "C9 to C12 seek Francovich damages calculated by reference to the difference between the "limited entitlement" which US Performers obtain under domestic UK law and the "full
>
> entitlement" (see the July Judgment at [18]) that they say they would have had if the UK had complied with its obligations under EU law. On the face of it, and without prejudging C9 to C12's arguments as to how the process might be adapted to obviate, at least in part, **the need for an individual assessment of damages**, quantifying that claim would therefore involve:
>
> (i) identifying, **for each performer** falling within paragraphs 15.1 to 15.3 of the APOC, performances given by that person which have been recorded in a phonogram which has been exploited in the UK, but for which that person has received no equitable remuneration;
>
> (ii) calculating the equitable remuneration that those persons would have received if it had been calculated on the basis of full entitlement;
>
> (iii) determining the difference between the amount of equitable remuneration received in respect of performances in paragraph i) (necessarily zero) and the amount in paragraph ii) to calculate the loss which C9 to C12 assert has been suffered by the class."

25. As recognised at §11 of the December Judgment [**CB/6/70-71**], this process involves *"an amalgamation of a large number of individual assessments of damage"*. To that end, the Appellants rely heavily on work conducted by PPL, a collective management organisation (**"CMO"**) that collects remuneration derived from the public playing of recordings in the UK: July Judgment §§25-30 [**CB/7/99-100**]. In order to assist with this litigation, PPL has (as summarised at §12 of the December Judgment [**CB/6/71**]) provided the parties with analysis which seeks to (i) identify every individual performer who, on the Appellants' case, would have been entitled to equitable remuneration (or equitable remuneration in a greater amount), and (ii) calculate the

amount of equitable remuneration payable to each on the basis of an assumption that those performers had fully qualified.

Limitations of the PPL exercise

26. The SoS contends that he can only be held liable for losses caused by the UK's failure to comply with its EU law obligations. That is because a state can only be liable for *Francovich* damages if there is "*a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties*": Brasserie du Pêcheur, 499C, §51. As a result, it is wrong for the Appellants to assess the quantum of each performer's claim on the basis of the "*raw*" figure at §10(ii) of the December Judgment (quoted at §24 above): December Judgment §16 [**CB/6/71-72**].

27. The most obvious issue arising is, what the December Judgment refers at §16(i) to as, the "**Parallel Entitlement Issue**":

    27.1. Parallel entitlements arise where performers are entitled to equitable remuneration under UK domestic law without any need to invoke principles of EU law (due to their nationality, residence, or other factor). Examples of where this may arise are given at §31 of the July Judgment [**CB/7/100**], such as where a performer's residence in the US confers a limited entitlement to equitable remuneration under UK domestic law but their Canadian nationality (Canada being a Rome Convention signatory which has made no derogation) could confer a parallel entitlement to full equitable remuneration.

    27.2. As recognised at §19(i)(a) of the December Judgment [**CB/6/73**], class members may have attributes (e.g. residence in a Rome Convention state) that are not reflected in the PPL Data (a so-called "**unknown parallel entitlement"**), meaning that PPL is unaware of its existence. Importantly, the adjective "*unknown*" does not denote that parallel entitlements are incapable of being ascertained. US performers will be able to provide the necessary evidence to establish whether or not a parallel entitlement exists – e.g. by producing evidence or information of nationality and citizenship.

28. The Parallel Entitlement Issue is relevant to the Appellants' attempts (i) to determine who falls within the represented class of US performers and (ii) to quantify the losses suffered by the class. As explained in the December Judgment at §19(ii) [**CB/6/73**] (with emphasis added):

> "… if the SoS is correct in her arguments on the parallel entitlement issue then, before any particular US Performer's entitlement to Francovich damages could be established, it would be necessary to consider whether he or she holds any unknown parallel entitlement. That,

by definition, could not be ascertained by reference to PPL's data. **If it were necessary to decide whether every individual US Performer had unknown parallel entitlement or not, the only option would be to contact all members of the class**."

29. Importantly, the Parallel Entitlement Issue may give rise to members of the class who have suffered no loss at all:

    29.1. In the Appellants' evidence in support of their top-down approach to CPR r.19.8, they identified five performers from a sample of 91 (i.e. roughly 5%) as having no entitlement to equitable remuneration.[12]

    29.2. The SoS submitted evidence in response indicating the correct number of performers with a parallel entitlement precluding the recovery of equitable remuneration was eight (i.e. just under 10%); but that *"*[t]*he real number is likely to be higher for the reasons given above – i.e. that the PPL data is reliant on information provided to PPL, so is incomplete, and because information on citizenship and other qualifying criteria will not always be publicly available"*.[13]

    29.3. In suggesting at GoA §2.1 [**CB/1/15**] and ASkel §17.4 [**CB/2/24**] that these matters were *"unchallenged"*, the Appellants fail to acknowledge the SoS's evidence.

30. Another potential issue (the ***"Atresmedia Issue"***) arises, even if the Appellants choose not to focus on this (see ASkel fn. 3 [**CB/2/20**]), in relation to the exploitation of audiovisual fixations incorporating phonograms (referred to as "**AFIPs**").[14] The SoS's case is that, following the CJEU's judgment of 18 September 2020 in *Atresmedia Corporacion de Medios de Comunicacion SA v Asociacion de Gestion de Derechos Intelectuales,* Case C-147/19 (ECLI:EU:C:2020:935) [2020] E.C.D.R. 21 (*"**Atresmedia**"*), it is clear the 2006 Directive did not require that equitable remuneration is paid in respect of audiovisual fixations incorporating phonograms. *Atresmedia* is binding on the High Court pursuant to s.6(3)-(5) of the *European Union (Withdrawal) Act 2018*, as the Appellants acknowledge: see July Judgment §137(i) [**CB/7/126**]. If the SoS is correct in this view (i.e. which may only arise if the Appellants, after the liability trial, successfully appealed

[12] See the Witness Statement of Camille Pellicano, then a trainee solicitor at Reed Smith (who act for the Claimants), of 10 October 2025, at §17 [**SB/13/101**].

[13] See Mr Stout's Witness Statement of 28 October 2025, at §8 [**SB/15/110**].

[14] As the July Judgment recognised at §134 [**CB/7/125**], *"*[i]*t is common for sound performances to be incorporated into audiovisual works. At a high level of generality … one can think of previously recorded songs played as part of a movie soundtrack as an example of this phenomenon."*

and persuaded this Court to depart from *Atresmedia*), then as explained in the December Judgment at §19(iv) [**CB/6/73-74**]:

> "… before Francovich damages could be assessed, it would be necessary to consider the extent to which each relevant phonogram had been exploited in an AFIP. PPL hold some data on the way in which individual phonograms have been exploited. However, as can be seen from [163] to [165] of the July Judgment, there is room for uncertainty at the margins as to what precisely does constitute an AFIP. Indeed, it is because of that uncertainty that PPL has been given permission to intervene in these proceedings. Accordingly, if the SoS is correct, it is likely that working out any individual US Performer's entitlement to Francovich damages would not be straightforward."

E. Procedural history

31. This appeal came about after the Appellants were unable to give the Court sufficient confidence on **two occasions** that they had "*firm and workable proposals that deal with all the practicalities*" (December Judgment §81 [**CB/6/86**]) for the CPR 19.8 claim to proceed to trial, notwithstanding the fact that the Appellants had issued these proceedings almost three years prior to the CCMC. The SoS had pointed out this failure by the Appellants in correspondence and then, after the Appellants were unwilling to apply for an order under CPR r.19.8(1)(b) to continue the claims in a representative capacity, the SoS made an application pursuant to CPR r.19.8(2) for the Court to direct that C9-12 could not act as representative claimants on 28 October 2024 [**SB/2/13-20**]. That application was considered at a hearing before Richards J on 30 June to 2 July 2025, following which the Court handed down the July Judgment on 30 July 2025.

32. In that Judgment, Richards J identified at §70 [**CB/7/109**] that:

> "Until the commencement of the hearing, the Claimants appeared to be proceeding on the basis that the process with PPL alone would enable both (i) the members of the class to be determined and (ii) a calculation to be performed of the amount that would be owed to each such member if the claims succeeded without the need for any engagement with individual US Performers."

33. Richards J then proceeded to identify a number of *"difficulties with that approach"*. These included, at §70(iii) and (vi) [**CB/7/110**]:

> "(iii) The causation issue referred to in paragraph 35 might require an exercise to identify which US Performers might have parallel entitlement. Any parallel entitlement might depend on US Performers' own circumstances, such as their residence or citizenship which they have not disclosed to AFM or SAG-AFTRA. It might well involve an analysis of parallel entitlements that US Performers could have claimed, but did not. The suggestion by Mr Howe KC that it might be possible to send out questionnaires to members after judgment is given on common issues of fact or law is lacking in specifics. Many of the US Performers would obtain relatively small sums even if the claims succeeded. What should

> the court do if they simply decline to fill in questionnaires? Moreover, US Performers might have an incentive to downplay their parallel entitlements. It is not obvious how a questionnaire exercise would deal with that risk. …
>
> (vi) As noted in paragraph 164 below, the Claimants' proposed amendments relating to audio-visual works raise the prospect that a particular US Performer's entitlement to damages might depend on fine points of interpretation as to whether a particular broadcast has the requisite "level of originality" to amount an "audiovisual work". There must be a question as to whether PPL's data will be able to address highly nuanced questions like that."

34. Richards J agreed with the SoS that the Appellants had not put forward a proposal for the CPR 19.8 claim to deal with the need for an individual assessment of damages. However, he decided to give the Appellants a further opportunity to reformulate their proposals: July Judgment §§71-72 [**CB/7/110-111**].

35. Those reformulated proposals were served on 10 October 2025. At §15 of those proposals [**SB/4/32**], the Appellants summarised their proposed "top-down" methodology as follows (with emphasis added):

> "Cs would propose that the Court should apply a discount based on the percentage of such performers resulting from the sampling exercise. That would result in D not overpaying. As between the members of the class it is the fairest reasonably achievable outcome. **In theory it results in a member who has no non-US parallel entitlement losing a percentage of damages to which he or she would have been entitled.** However the assessment of damages has always been regarded as a jury question, and this strikes a fair balance between precision and pragmatism, particularly having regard to the relatively small level of any likely deduction."

36. As regards the *Atresmedia* Issue, the Appellants again proposed a top-down approach, which seeks to estimate an apportionment between different categories of televisual broadcasts, accepting "*the impossibility of working out track by track what kinds of programmes each track had featured in*".

37. Following a hearing on 5-6 November 2025, where the Appellants' reformulated proposals were considered (along with a "*still further fallback approach* [that] *emerged in response to questions from the bench*" at the hearing: December Judgment §38 [**CB/6/77**]), Richards J and Master Brightwell concluded that the requirements of CPR r.19.8 were not met. The key passages of the December Judgment are at §§41-58 [**CB/6/77-82**], and the SoS considers them in more detail in response to the appeal at Section IV below.

38. The Court gave the Appellants one further opportunity and ordered the Appellants to carry out a sampling exercise to see what proportion of performers may have Parallel Entitlements and

what proportion would consent to be joined as a party to the claim. In response to the products of this sampling exercise, and following the earlier procedural steps in this litigation, the SoS took the pragmatic view not to object to the claim proceeding to a liability trial. The SoS reserved the right to return to whether proceeding to a quantum trial would be proportionate in circumstances where: (i) the Appellants' estimated claim value, based on the sampling exercise, was now £5.8 million, rather than the Appellants' original estimate of £21.5 million (although the Appellants chose to put that original value in the ASkel at §5 [**CB/2/18**]); (ii) that value was likely to reduce further if the SoS was successful on certain arguments such as the *Atresmedia* issue; and (iii) that quantum was likely to be around, if not materially below, the Appellants' costs budget just for the liability trial. Richards J recognised the SoS's right to return to these points, recording in an Order dated 3 June 2026 at §7 [**SB/6/43**] that the SoS may make a new application under CPR r.19.8(2), on the handing down of the judgment following the liability trial.

III. LEGAL FRAMEWORK

39. As set out above, the Appellants seek to bring a representative claim under CPR r.19.8(1) which provides:

> "(1) Where more than one person has the same interest in a claim – (a) the claim may be begun; or (b) the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest."

40. The leading authority on the representative claim procedure (then contained in CPR r.19.6), is *Lloyd*. In the Supreme Court's unanimous judgment, Lord Leggatt explained that the Court has a discretion whether to allow a claim to proceed as a representative action but **if and only if** the requirement for the representative to have the "*same* interest" as the person(s) represented is satisfied: p.1246D-F at §75. However, Lord Leggatt held at §80 that the same interest requirement will not be satisfied where an individualised assessment of damages is necessary. That is because (with emphasis added):

> "The potential for claiming damages in a representative action is, however, limited by the nature of the remedy of damages at common law. **What limits the scope for claiming damages in representative proceedings is the compensatory principle on which damages for a civil wrong are awarded** with the object of putting the claimant - as an individual - in the same position, as best money can do it, as if the wrong had not occurred. In the ordinary course, **this necessitates an individualised assessment** which raises no common issue and cannot fairly or effectively be carried out without the participation in the proceedings of the individuals concerned. **A representative action is therefore not a suitable vehicle for such an exercise.**"

41. The significance of this finding that a representative action is not suitable where damages must be assessed on an individual basis is seen in the facts of *Lloyd*. It concerned a proposed representative claim on behalf of millions of iPhone users alleging breaches of the *Data Protection Act 1998*. In concluding that the claim could not proceed as a representative claim, Lord Leggatt held, **first**, that the class did not meet the same interest requirement because the effect of Google's conduct was not uniform across the class. He summarised the position at §87 as follows: *"*[i]*f liability is established, the ordinary application of the compensatory principle would therefore result in different awards of compensation to different individuals. Furthermore, the amount of any compensation recoverable by any member of the class would depend on a variety of circumstances particular to that individual. Individualised assessment of damages would therefore be required."*[15]

42. **Secondly**, Lord Leggatt concluded that, even if material damage or distress did not need to be shown to establish an entitlement to damages, *"it would still be necessary for this purpose to establish the extent of the unlawful processing in his or her individual case"*: §144. In this connection, Lord Leggatt rejected a proposed "lowest common denominator" approach in circumstances where *"the facts alleged are insufficient to establish that any individual member of the represented class is entitled to damages. That is so even if it is unnecessary to prove that the alleged breaches caused any material damage or distress to the individual"*: §147. He then considered further at §§148-153 the central importance of an individualised assessment on the facts of the case.

43. Lord Leggatt has since re-emphasised in *AXA Insurance UK plc v Inland Revenue Commissioners* [2026] 1 WLR 3716, in a concurring judgment, that the representative claims procedure "*is limited by a requirement that the representative(s) and all those represented must have the "same interest" and* ***by its inability to deal with any individual differences between claims***" (emphasis added): p.3760E, §177.

44. The issue in *Lloyd* was that it could not be demonstrated that anyone within the class had a viable claim for damages, such that the "*same interest*" condition was met. It is clear, however, from this Court's subsequent judgment in *Prismall* (a case not mentioned in the ASkel at all), that the same issues arise where it cannot be demonstrated by the class representative that

[15] Mr Lloyd's attempts to circumvent this issue by claiming damages for "*loss of control*" or alternatively "*user damages*" both failed: see §§138 and 143 respectively.

everyone within the class has an entitlement to damages. As Sharp P and Davies and Dingemans LJJ emphasised at the outset of *Prismall* at §5:[16]

> "There are two points that are fundamental to an understanding of the outcome of the case before the judge and of this appeal. First, that the need to show that each member of the class has a realistic prospect of establishing misuse of private information arises because CPR r 19.8(1) requires the person bringing the claim, and those on whose behalf the claim is brought, to have "the same interest". And secondly, that it was and remains common ground between the parties that, adopting the approach taken by the Supreme Court in Lloyd v Google LLC [2022] AC 1217 ("Lloyd v Google") to representative actions, **each member of the class** of approximately 1.6 million persons whose patient records were transferred to Google and DeepMind **has to have a realistic prospect of succeeding in their claim**."

45. In *Prismall*, the representative claim was one for damages for misuse of private information. The fundamental issue though was that: *"a representative class claim for misuse of private information is always going to be very difficult to bring. This is because relevant circumstances will affect whether there is a reasonable expectation of privacy for any particular claimant, which will itself affect whether all of the represented class have 'the same interest'"*: §66. As a result, the Court of Appeal upheld the High Court's conclusion that the "*same interest*" requirement was not met, even when approached on a "*lowest common denominator*" basis.

IV. RESPONSE TO THE APPEAL

A. Two fundamental flaws in the Appellants' top-down approach (Grounds 1.1-1.4)

46. By Ground 1, the Appellants argue that the Court below was wrong to reject the Appellants' preferred option of a top-down approach that would avoid an individualised assessment for each member of the represented class. However, the representative claims procedure is unsuitable for determining liability and quantum issues that require individualised assessment: *Lloyd*, *AXA* and *Prismall* cited above. In these proceedings, the losses of any performer within the proposed class would have to be calculated by considering that performer's individual characteristics: July Judgment §67 [**CB/7/109**], December Judgment §§54, 56-57 [**CB/6/80-82**]; PTA Judgment §§6-7 [**CB/8/136-137**]. The Appellants' top-down approach is therefore fundamentally flawed in two respects.

47. **First**, it remains the case that the Appellants' approach "*would almost certainly result in a component of damages being awarded in relation to US Performers who have suffered no loss*": December Judgment §44

[16] Underlined emphasis in the original; emphasis in bold added.

[**CB/6/78**]. This issue was illustrated by the following example at §45 of the December Judgment [**CB/6/79**]:

> "Consider, for example a particular US Performer (A) who has an unknown parallel entitlement and another US Performer (B) who has no such entitlement. Assume that PPL's data indicates that both would be due £100 if liability for *Francovich* damages is established. Suppose, however, that C9 to C12 lose on their Causation Arguments and the sampling exercise that C9 to C12 favour suggests that a 10% reduction should be made to take into account the general prevalence of hidden parallel entitlement. In that case, A would obtain damages of £90, even though he or she has suffered no loss. B would obtain damages of £90, even though he or she has suffered loss of £100."

48. The inclusion of "*no-loss*" performers within the class is directly analogous to the failed representative action in *Prismall*. As summarised at §45 above, this Court made clear at §5 of its judgment that, in light of *Lloyd*, *"each member of the class … has to have a realistic prospect of succeeding in their claim"*. This requirement ensures that the "*same interest*" condition at CPR r.19.8(1) is satisfied. Put simply: performers who have not suffered any loss do not have the "*same interest*" as those who have.

49. **Secondly**, even for those performers who have suffered some loss, their entitlement to damages requires an individualised assessment as regards the Parallel Entitlement and *Atresmedia* Issues. As the December Judgment concluded at §56 [**CB/6/81**]: *"C9 to C12 effectively ask to be excused from the requirement to prove loss in any individual case and be permitted to prove loss on a "class-wide" basis so that damages are awarded to the class by reference to "average loss" rather than the loss of any member of the class."* The Court rightly stressed in the following paragraph (§57 [**CB/6/81-82**]) that if this were permissible:

> "… a similar proposal could have been used to circumvent some of the objections raised in *Lloyd v Google* itself. The Supreme Court was clearly concerned in that case with the fact that the proposed representative action required an individual assessment of the harm that each member of the proposed class suffered (see for example [87] and [145] to [147] of Lord Leggatt's judgment). If C9 to C12's proposal was acceptable then objections such as these could have been overcome by a statistical modelling exercise that sought to estimate "average harm" and awarded damages to the class by reference to that harm."

50. The Appellants' approach would directly undermine the compensatory principle. This point can be illustrated by reference to a hypothetical performer who is said to have a claim for £20,000 and whose claim is unaffected by **either** the Parallel Entitlement or *Atresmedia* Issues. If the claims of all class members were to be reduced by 10% to account for the Parallel Entitlement Issue and 40% to account for the *Atresmedia* Issue, regardless of each performer's individual

circumstances, the performer in question would be undercompensated by almost £10,000.[17] The hypothetical performer is therefore not put in the same position they would be had the alleged wrong not occurred.

51. Indeed, the Appellants have accepted this possibility in their proposals, as quoted above at §35, but suggest that this inconsistency with the compensatory principle, which could see performers whom C9-C12 seek to represent not receive compensation to which they could be entitled to, can be ignored as part of striking a "*fair balance*". Self-evidently, these performers do not have the "*same interest*" as performers who are affected by either the Parallel Entitlement or *Atresmedia* Issues.

52. In light of these two fundamental flaws in the Appellants' proposed approach, there is nothing in their arguments at ASkel §§16-19 [**CB/2/23-26**]:

    52.1. As to the **first** argument (that the Court below confused the means of assessment with the result), even if it were assumed to be true that those having suffered no loss ought not to receive any compensation as a result of any damages assessment, as identified in the second fundamental flaw above, some performers may receive *less* compensation than they may have been entitled to. A remarkable feature of the Appellants' argument is that they seem to accept it is "*fair*" to avoid the compensatory principle and for some of the performers not to be placed, "*in the same position, as best money can do it, as if the* [alleged] *wrong had not occurred*": *Lloyd* at [80]. In any event, as explained above, those performers cannot have the "*same interest*" as those who would receive their full entitlement (if there were any entitlement).

    52.2. The **second** argument criticises the notion that there is a requirement that damages must always be calculated on an individualised basis. However, this is contrary to clear authority in *Lloyd*, *AXA* and *Prismall* set out above at §§40-45.

[17] See §29 above for the basis for applying a 10% discount for the Parallel Entitlement Issue. As regards the *Atresmedia* Issue, see the First Witness Statement of David Burns, Head of Music Copyright Policy at the Intellectual Property Office, of 6 August 2024, stating at §6 that publicly available data on musicians' earnings (2008-2019) and PPL revenues (2023) indicated broadcasting revenues amounted to c.40% of the overall totals [**SB/7/51-52**].

53. The Appellants seem to accept these issues in seeking to get round the fact that "*justice has to be applied within the parameters of legal norms*" (December Judgment §44), by invoking the so-called "*broad axe*" principle. However, the December Judgment was correct at §§44-46 [**CB/6/78-79**] to dismiss the Appellants' attempts to sidestep fundamental issues in their approach. Two points bear emphasis:

53.1. It is only once "*a Court has established loss on a balance of probabilities*" and "*the claimant is entitled to be compensated*" that "*the Court will do its best to quantify the compensation on the available evidence*" (i.e. apply the "broad axe" principle): *Royal Mail Group Ltd. v DAF Trucks Ltd* [2024] EWCA Civ 181, per Flaux C at §145, relying on *One Step (Support) Ltd v Morris-Garner* [2019] AC 649, pp.673E-674D per Lord Reed DPSC (as he then was) at §§37-38 and *Merricks v Mastercard* [2021] 3 All E.R. 285 p. 303b-g at §§46-47, per Lord Briggs JSC. As the December Judgment rightly recognised at §46 [**CB/6/79**], it cannot be established that all members of the proposed class have a viable claim for damages. For class members without such a claim, the broad axe principle simply cannot be invoked.

53.2. The "*broad axe*" only applies where *"forensic difficulties"* of quantification arise: e.g. see the various cases cited by Lord Briggs JSC in *Merricks* pp.303e-305e at §§47-51. The Appellants do not suggest that such obstacles exist. For example, the Parallel Entitlement Issue does not involve consideration of an unknowable counterfactual situation, where an element of informed guesswork may be needed or the information is impossible to ascertain. Instead, each performer is entirely capable of providing individualised evidence – e.g. as to their place of birth, nationality and residence – that would allow the Court to assess their entitlement to damages.

54. The Appellants also criticise the Court below for concluding that CPR r.19.8 does not alter the compensatory principle: see December Judgment §44 [**CB/6/78**].[18] Contrary to the ASkel at

[18] The extent to which legislation may override the common law was considered in *R v Secretary of State for the Home Department, ex p Pierson,* [1998] AC 539 at 573, where Lord Browne-Wilkinson said: *"*[i]*t is well established that Parliament does not legislate in a vacuum: statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express statutory provisions. Parliament is presumed not to have intended to change the common law unless it has clearly indicated such intention either expressly or by necessary implication."*

§17.3 [**CB/2/24**], the High Court's comparison with s.47C of the *CA 1998* is both correct and relevant. As the December Judgment recognised at §56 [**CB/6/81**], the Appellants *"effectively ask the court to fashion a collective proceedings regime, like that seen in the Competition Appeal Tribunal, but without the statutory underpinning set out in s 47C(2) of the Competition Act 1998"* (see also §44 [**CB/6/78**]). Lord Briggs JSC explained in *Merricks*, p.307d-f at §58, that by this provision *"the compensatory principle is expressly, and radically, modified. Where aggregate damages are to be awarded, section 47C of the Act removes the ordinary requirement for the separate assessment of each claimant's loss in the plainest terms."* (emphasis added) CPR r.19.8 does not have the effect of permitting the award of aggregate damages suffered by the class as a whole, as can be seen from the various statements in *Lloyd* (e.g. at §80).

55. The Appellants' **third** argument (ASkel, §§18-19 [**CB/2/24-26**]) is that the Court below was wrong to consider that damages in a representative action have to be calculated in precise amounts for each represented individual. However, the three alleged flaws in the Court's reasoning are baseless:

55.1. Cases where claimants are represented in common do not assist the Appellants. **First**, that is not the basis on which these proceedings are brought. **Secondly**, the *"same interest"* requirement at CPR r.19.8(1) would not be met in circumstances where it is acknowledged that certain class members do not have an entitlement to damages. **Thirdly**, unlike in such cases, it *is* possible in these proceedings to undertake an individualised assessment of damages – e.g. to work out whether a given performer has a parallel entitlement.

55.2. While the Court may not normally exercise a supervisory jurisdiction to control how damages are divided among direct parties, the principled basis which explains why representative actions are different is the "*same interest*" requirement under CPR r.19.8(1). The CPR, as secondary legislation, has imposed a requirement which is distinct from claims where all the claimants are direct parties to the action. The question of whether or not the claim in this case can continue on a "*top-down*" approach is not a matter of discretion, contrary to the ASkel at §18.2, because it must first satisfy the threshold "*same interest*" requirement. Further, the Appellants ignore the fact that, as explained above, the individualised assessment required by the compensatory principle goes to both **liability** and **quantum**; it is not just a case of how damages are distributed within the class.

55.3. The issues are in no way analogous to *Standard Life Assurance Ltd. v Building Design Partnership Ltd* [2022] 1 WLR 878, where a single claimant pursued its own cause of action. In any event, it is clear from §1 of Coulson LJ's judgment (p.880F) in that case that the sampled allegations could only be extrapolated from if they were *"found, on the balance of probabilities, to be properly representative of the pool of allegations as a whole"*. Such an approach is not viable in these proceedings, where the Parallel Entitlement and *Atresmedia* Issues do not affect the class equally.

The Appellants' reliance on *EMI Records* and *Independiente* (Ground 1.5)

56. The Appellants rely heavily on *EMI* and *Independiente*. Nothing in these authorities, however, remedies the obvious deficiencies in the Appellants' top-down approach.

57. **First**, and most fundamentally, the approach in *EMI* and *Independiente* does not apply where the proposed class includes performers who have not suffered any loss: December Judgment at §55 [**CB/6/81**]. As Lord Leggatt recognised in *Lloyd* (p.1240F-G at §53) (emphasis added):

> "In each case the claims were allowed to proceed as representative actions. Because **it was accepted or could safely be assumed that the owner of the copyright in any pirated recording was a member of the represented class**, this procedure enabled breach of copyright to be proved and damages to be awarded without the need to prove which particular pirated recordings had been sold in what quantities. Again, what mattered was that the members of the class had a community of interest in suing the defendant."

58. The ASkel at §20 [**CB/2/26**] ignores this aspect of *EMI* by skipping to the next step in the analysis of how the damages were calculated. However, in this case, as explained above, it cannot *"safely be assumed"* that all such performers are members of the proposed class.[19] Or, to adopt the language from *Warrick v Queen's College Oxford (No 4)* (1871) LR 6 Ch App 716, at p.726 per Lord Hatherley LC, cited in *Lloyd* at §55, not all members of the class have a *"common enemy"* in the form of the SoS. Again, these limits reflect the "*same interest*" requirement under CPR r.19.8, as interpreted in *Lloyd* and *Prismall*.

59. As the December Judgment rightly recognised at §54 [**CB/6/80**]:

[19] Nor, for the avoidance of doubt, can the class be defined in a way that requires liability issues to be determined before it can be known whether or not a person is a class member: see *Emerald Supplies Ltd v British Airways plc* [2011] Ch 345, (p.360H-361A-C and E-F) at §§62-63 and 65 per Mummery LJ; summarised in *Lloyd* (p.1241E-G at §56).

> "Once all relevant passages of Lloyd v Google are read in context, it becomes clear that neither EMI (nor Independiente) are being endorsed as setting out a general principle that, provided the members of the relevant class have consented, a representative of that class is entitled in all cases to seek damages on a top-down or global basis under CPR 19.8 without any need for individual class members to be joined as claimants."

60. The fact that performers may have consented to a particular distribution arrangement (in the event in this litigation, that the representative organisations (C1-C8) act as their agents) plainly does not confer on those performers a cause of action. This approaches questions about liability to pay damages and distribution the wrong way around. It is only if a cause of action exists that a performer can be included within the class and therefore included within the distribution.[20] That is why the Appellants are wrong to criticise the Court below for not relying on the fact that the US Performers have already consented to a particular distribution arrangement: ASkel §21 [**CB/2/26-27**].

61. **Secondly**, *EMI* gave rise to very different issues in circumstances where:

61.1. There was no suggestion that class members' entitlement to damages depended on individualised issues – e.g. like the Parallel Entitlement and *Atresmedia* Issues that arise in these proceedings: December Judgment at §52 [**CB/6/80**].

61.2. As summarised in ASkel §20 [**CB/2/26**], in *EMI* "[a]*part from a very small number of specific cassettes which had been identified, it was completely unknown which works among the repertoire of the represented class had been pirated, so any particular record company might or might not have a cause of action at all*".[21] In other words, even if an individualised assessment might be useful, it was incapable of being performed because of an evidential lacuna. As already noted in relation to the broad axe principle at §53 above, an individualised assessment is possible in these proceedings, in particular in relation to the Parallel Entitlement Issue.

62. **Thirdly**, to the extent that *EMI* and *Independiente* lend any support to the Appellants' top-down approach, the relevant elements of the reasoning in those judgments should be rejected pursuant

[20] The way in which the Appellants conflate a liability to pay damages with the logically posterior question of distribution is further evident from the submissions at ASkel §§18.2 and 21 [**CB/2/25-27**].

[21] See also December Judgment at §49 [**CB/6/79**].

to the doctrine of precedent because they are both High Court decisions that are inconsistent with and pre-dated *Lloyd* and *Prismall*.

The nature of the PPL exercise does not affect the analysis (Ground 2)

63. The December Judgment correctly concluded at §42(ii) [**CB/6/78**] that the present claim does not fall within the category of cases contemplated in *Lloyd* (p.1248G-1249A) at §82 – e.g. where the allegation is that class members were all wrongly charged a uniform fixed fee.

64. ASkel §§13, 24 and 27 [**CB/2/21-22, 27-29**] place great weight on the fact that the PPL exercise involves a *"uniform process"* based on *"centrally held data"*, that is conducted on a *"common basis"*, and that there is no pleaded dispute about the accuracy of the PPL figures. But this overlooks the inability of that exercise to account properly for the full impacts of the Parallel Entitlement and *Atresmedia* Issues. Put simply, there would be no need for the Appellants' proposed discounts to an aggregate sum of damages to account for these matters if this could be done solely by reference to the PPL data: see, further, July Judgment at §70 [**CB/7/109-110**]. That is why, for example, the July Judgment at §§31-32 [**CB/7/100**] and the December Judgment at §19(i)(b) [**CB/6/73**] refer to "*unknown parallel entitlements*" as those that are not reflected in the PPL data.

65. ASkel §27.1 [**CB/2/28**] may be correct that *"even if determining the sums due to the performers could be said to involve an individualised assessment, it is one with numerous common issues"*. However, the fact that some common issues arise does not mean the "*same interest*" requirement is satisfied for all issues in dispute. The best that can be said in these circumstances is that the proceedings *may* be suited to bifurcated CPR r.19.8 proceedings, as envisaged in *Lloyd* at §81.

Other arguments relied on by the Appellants under Ground 2

66. ASkel §27.3 [**CB/2/29**] contends that *"*[i]*n circumstances where there is not yet any pleaded issue as to the parallel entitlements of any specific US Performers, it is premature to assume that the circumstances of any, all or even substantially all performers will need to be examined."* This point is difficult to follow. However, and in any event:

    66.1. It is understandable that no pleaded issues arise in relation to specific performers before information and/or evidence has been provided to the SoS. There is, however, a clear plea in the SoS's Amended Defence §4(b)(iv) [**CB/11/177-178**] that the requirements of CPR r.19.8 are not satisfied as a result of the Parallel Entitlement Issue. The July and December Judgments are premised on the fact that, if the

Appellants' primary case on causation fails, the Parallel Entitlement Issue is likely to have a significant bearing on class members' entitlement to damages;

66.2. It is entirely appropriate to consider the impact of the Parallel Entitlement Issue on the viability of the CPR r.19.8 procedure at this stage: see, for example, *Wirral Council* [2023] EWHC 3114 (Comm), per Michael Green J at §§46 and 56 emphasising that the parties and Court should be clear as to how the CPR r.19.8 procedure will work from the outset of proceedings.[22]

67. ASkel §28 [**CB/2/29**] raises broader access to justice issues arising from *"joining 30,000 or so individuals as claimants; or requiring 30,000 separate claims to be brought"*. However, as the July Judgment at §94 recognised (a finding that the Appellants do not appeal against), their claim could have been brought in other ways, e.g. by way of a group litigation order. In any event, as *Lloyd* demonstrates, the fact that opt-in proceedings may be more challenging to pursue (§§25-28 and 85) does not justify an expansive and unprincipled interpretation of the opt-out mechanism at CPR r.19.8.

68. ASkel §29 [**CB/2/29-30**] suggests *"*[t]*here is widespread use of the representative procedure in large intellectual property claims on behalf of members of CMOs for non-payment of royalties"*. However, there is no meaningful attempt to explain why the various proceedings referred to are analogous to the present claim as regards the representative action procedure. For example, the comparison with *PPL Ltd v Department of Trade and Industry* [2004] 1 WLR 2893 leads nowhere, as there is no suggestion that claim was brought under the precursor to CPR r.19.8. Instead, as can be seen from §3 of the judgment, PPL was able to act as the **sole** claimant precisely because it had obtained assignments of rights and/or exclusive licences from its record company members.

V. CONCLUSION

69. For the reasons given above, the Court of Appeal is invited to dismiss the appeal.

[22] This judgment was upheld on appeal in [2025] EWCA Civ 40, per Flaux C.