IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 220

Originating Summons No 158 of 2020

Between

Composers and Authors
Society of Singapore Ltd

… *Applicant*

And

SingNet Pte Ltd

… *Respondent*

JUDGMENT

[Copyright] — [Copyright tribunal]

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Composers and Authors Society of Singapore Ltd
v
SingNet Pte Ltd

[2020] SGHC 220

High Court — Originating Summons No 158 of 2020
Dedar Singh Gill J
6, 14 July 2020

13 October 2020 Judgment reserved.

Dedar Singh Gill J:

Introduction and Background

1 Pursuant to s 169(1) of the Copyright Act (Cap 63, 2006 Rev Ed) (the "**Act**"), a copyright tribunal ("**CT**") issued an order (dated 15 January 2020)[1] allowing the Composers and Authors Society of Singapore Ltd ("**COMPASS**") to refer a question of law to the High Court. This order resulted in COMPASS filing the present originating summons to refer the following question of law ("**Question**") for determination by this court:[2]

> Whether the Copyright Tribunal under section 163(2), read with section 163(6)(b), of the Copyright Act (Cap. 63) ('the Act'), has the power to grant a retrospective order, specifically, an order

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1 Respondent's Bundle of Documents ("**RBOD**"), Tab 1, Schedule A to HC/OS 158/2020

2 RBOD, Tab 1, HC/OS 158/2020

> that applies for the period 1 April 2013, up until the date of the order of the Copyright Tribunal in CT 1/2019 in the application made pursuant to section 163(2) of the Act, by the Applicant SingNet Pte Ltd, on 31 January 2019.

2 By way of background[3], COMPASS is a Singapore-incorporated company limited by guarantee. It functions as a collecting society in Singapore, representing owners of musical works and administering the various rights in such works on behalf of its members. COMPASS operates a licence scheme for Pay Television Service in Singapore, under which it offers an annual licence from 1 April to 31 March (the "**Licence Scheme**"). The respondent, SingNet Pte Ltd ("**SingNet**"), is a private company providing television cable services. To provide these services, SingNet procures and broadcasts a wide range of channels through its Pay TV service, known as "Singtel TV Pay TV" (formerly known as "MioTV").

3 On 31 January 2019, SingNet commenced proceedings in CT No 1 of 2019 against COMPASS in relation to the Licence Scheme ("**Tribunal Proceedings**").[4] It applied to the CT under s 163(2) of the Act for orders that:

> (a) "the charges as demanded by [COMPASS] for the licence in respect of the right of communication of copyright musical works are unreasonable and arbitrary";
>
> (b) "the charges demanded should be derived only from and in relation to content of the [SingNet's] Singtel TV Pay TV service which

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3 RBOD, Tab 1, Schedule A to HC/OS 158/2020, Judgment of the Copyright Tribunal in CT 1/2019, dated 15 January 2020, at [3]-[8].

4 RBOD, Tab 5, Application to the Copyright Tribunal dated 31 Jan 2019.

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utilises works for which a licence is required from [COMPASS] (the "Relevant Content")";

(c) "the [CT] fix a reasonable sum (including a reasonable tariff rate) for the charges that may be demanded by [COMPASS] in relation to [SingNet] for the Relevant Content of the Singtel TV Pay TV service"; and

(d) "the licence issued shall entitle [SingNet] to use any and all copyright works administered by [COMPASS] for the Relevant Content"

(the "**Application**").

4 COMPASS denies that its charges, terms and conditions are unreasonable and arbitrary. It claims that since 1 April 2013, SingNet has screened movies, shows and programmes on SingNet's television channels, through the Singtel TV television network, that utilise or feature various musical works belonging to owners represented by COMPASS. This was done without SingNet making any application to a copyright tribunal established under the Act ("**Tribunal**") between 1 April 2013 and 30 January 2019.

5 On 11 March 2019, COMPASS commenced Suit No 261 of 2019 (the "**Suit**") against SingNet for acts of copyright infringement allegedly committed since on or about 1 April 2013 in respect of various musical works belonging to the owners represented by COMPASS. On 9 July 2019, the High Court ordered a stay of the Suit pending the determination of the Tribunal Proceedings. It was during the course of the Tribunal Proceedings that COMPASS' request under s 169(1) of the Act to refer the Question to the High Court was allowed, leading to the present originating summons.

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6 Against the above background, the crux of the Question before me is this – when determining an application made under s 163(2) of the Act, does the Tribunal have the jurisdiction under ss 163(2) read with 163(6)(*b*) to make orders which take effect retrospectively from a time predating the said orders? COMPASS submits that the answer to the Question is "No", whereas SingNet says the answer is "Yes".

The interpretation of ss 163(2) and 163(6)(*b*) in the context of the relevant statutory framework under the Act

7 Section 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) provides that "[i]n the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object". As set out by the Court of Appeal in *Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 ("***Ting Choon Meng***") at [59], the process of purposive statutory interpretation consists of three steps:

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> (a) First, ascertaining the possible interpretations of the text, as it has been enacted. This however should never be done by examining the provision in question in isolation. Rather, it should be undertaken having due regard to the context of that text within the written law as a whole.
>
> (b) Second, ascertaining the legislative purpose or object of the statute. This may be discerned from the language used in the enactment; but as I demonstrate below, it can also be discerned by resorting to extraneous material in certain circumstances. In this regard, the court should principally consider the general legislative purpose of the enactment by reference to any mischief that Parliament was seeking to address by it. In addition, the court should be mindful of the possibility that the specific provision that is being interpreted may have been enacted by reason of some specific mischief or object that may be distinct from, but not inconsistent with, the general legislative purpose underlying the written law as a whole. …
>
> (c) Third, comparing the possible interpretations of the text against the purposes or objects of the statute. Where the purpose of the provision in question as discerned from the language used in the enactment clearly supports one interpretation, reference to extraneous materials may be had for a limited function – to confirm but not to alter the ordinary meaning of the provision as purposively ascertained; …

8 Taking a purposive interpretation of ss 163(2) and 163(6)(*b*), within the context of the Act as a whole, my view is that the Question is to be answered in the negative. I elaborate on my reasons and deal with the parties' arguments below. For ease of reference, sections 163(2) and 163(6)(*b*) of the Act state as follows:

> **Application to Tribunal in relation to licences**
>
> **163. –** …
>
> ***(2) A person who claims***, in a case to which a licence scheme applies, that ***he requires a licence but*** that ***the grant of a licence in accordance with the scheme would***, in that case, ***be subject to the payment of charges, or to conditions, that are not reasonable in the circumstances*** of the case, ***may apply*** to a Tribunal under this section.
>
> …

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> ***(6) Where an application is made to a Tribunal under subsection*** (1), ***(2)***, (3) or (4), the Tribunal shall give to the applicant, to the licensor concerned and to every other party (if any) to the application an opportunity of presenting their cases and, ***if the Tribunal is satisfied that the claim of the applicant is well-founded***, ***the Tribunal shall make an order specifying***, in respect of the matters specified in the order —
>
> …
>
> (*b*) in the case of ***an application under subsection (2)*** or (3) ***— the charges***, if any, ***and the conditions, that the Tribunal considers reasonable in the circumstances*** in relation to the applicant; …
>
> …
>
> [emphasis in bold italics added]

9 Under s 163(2) of the Act, a person may apply to the Tribunal where it claims, in a case to which a licence scheme applies, that it requires a licence but that the applicable charges and/or conditions are not reasonable. Pursuant to s 163(6)(*b*) of the Act, the Tribunal may then make orders determining the application ("**final orders**"), which specify the charges and conditions that it considers reasonable in the circumstances. On a plain reading of these two provisions, nothing indicates to me that Parliament intended the Tribunal to have the jurisdiction to make final orders having retrospective effect.

10 Having considered the two provisions in isolation, the next task is to consider them in the wider context of the statutory framework under s 163 read with ss 165 and 168 of the Act (the "**statutory framework**"). Under s 163 of the Act, applications to the Tribunal may not only be made under s 163(2), but also under ss 163(1), (3) and (4). Although the Question only relates to two specific provisions in s 163 (*ie,* subsections (2) and (6)(*b*)), it is important to appreciate how all the provisions in ss 163, 165 and 168 are intended to work

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together, in order to understand the scope and purpose of the individual provisions (see *Ting Choon Meng* at [59(a)]).

11 I will thus start by setting out the parties' interpretations of how the relevant provisions in the Act are intended to work, before discussing my own interpretation.

The parties' interpretations

12 COMPASS submits that where there is a dispute over the reasonableness of the charges and conditions applicable to the grant of a licence under an existing licence scheme, the Act is intended to work as follows. First, the copyright user (*ie*, SingNet) ought to make an application to the Tribunal in relation to the licence under s 163(2) of the Act. The onus lies on the user to do so because only users have the *locus standi* to make applications under that provision.[5] Once the application has been made, then:

(a) while the application is pending before the Tribunal (the "**interim period**"), the applicant will be able to obtain prospective protection against liability for copyright infringement ("**infringement liability**") under s 164(1) of the Act if it has (i) complied with the conditions of the applicable licence scheme, and (ii) either paid or undertaken to pay the applicable charges[6]; and

(b) after the Tribunal makes its final orders on the application under s 163(2) of the Act, the applicant may then obtain prospective protection against infringement liability under s 165(4) if the applicant has (i)

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5 Applicant's submissions, paras 24-26.

6 Applicant's submissions, paras 27-30.

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complied with such conditions as specified in the final orders; and (ii) either paid or undertaken to pay any applicable charges.[7]

13 Given the availability of the prospective protections above, COMPASS argues that SingNet ought to have applied to the Tribunal under s 163(2) of the Act at an early stage, *before* SingNet made use of the copyright works.[8] If SingNet wishes to use the copyright works pending the determination of its Application, it should comply with the terms of COMPASS' existing licence scheme so as to obtain the prospective protection of s 164(1) of the Act. Once the Tribunal makes its final orders on the application, SingNet should then comply with the terms of such orders so as to obtain the prospective protection of s 165(4) of the Act. Having failed to do any of these things, COMPASS says that SingNet cannot now seek retrospective protection from the Tribunal under the Act. Parliament has already contemplated and provided for the prospective protection of copyright users during the interim period and after the Tribunal makes its final orders, as set out at [12] above. There was simply no further legislative intention for the Tribunal to also have the jurisdiction to make final orders with retrospective effect.

14 To reinforce its case, COMPASS cites the reasoning of an earlier decision by the Tribunal in *Sunvic Production Pte Ltd v Composers and Authors Society of Singapore Ltd* [1993] SGCRT 1 ("***Sunvic***").[9] In *Sunvic*[10], the applicant originally applied to the Tribunal under s 163(2) of the Act, but the application was later amended to a reference under s 161(1)(*b*) in respect of a

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7 Applicant's submissions, paras 33-34.

8 Applicant's submissions, paras 36-37 and 65-66.

9 Applicant's submissions, paras 12-20.

10 Respondent's Bundle of Authorities ("**RBOA**"), Tab 4.

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licence scheme operated by the respondent. The original application in *Sunvic* was made on the basis that the applicant "requires licences for the public performance of copyright music" in three of its concerts that had already taken place ("**three past concerts**"), as well as for "all [its] future concerts". By the date of the hearing before the Tribunal in *Sunvic*, 12 of the "future concerts" had already taken place, and are hereinafter referred to as the "**interim concerts**".

15 The Tribunal in *Sunvic* held that it had no jurisdiction under s 163(2) read with s 165(4) of the Act to make retrospective final orders as to the charges and conditions applicable to the three past concerts and the interim concerts. COMPASS relies, *inter alia,* on the following portions of the Tribunal's reasoning (at [3.2]–[3.4] and [4.5]):

> 3.2 ***In the case of the three [past] conceits*** [*sic*] it is to be noted that these took place several months before the filing of Sunvic's application under s. 163(2) on the 8th of October 1992. The application was for an order as to the charges and conditions which apply in respect of the application of the licence scheme to events that had already taken place. … After hearing arguments from the parties, the Tribunal came to the decision that ***under s. 163(2) of the Copyright Act, the Tribunal did not have the jurisdiction to make a retrospective order***.
>
> 3.3 …
>
> Assuming the Tribunal, under s. 163(2) and s.163(6)(b), can specify the charges and conditions it considered reasonable in respect of the three named concerts and that the charges set were lower than the 3% rate set out in the licence scheme, then in such a case, ***if Sunvic was prepared to pay the charges and to comply with the conditions set out in the order, it would be entitled in proceedings for infringement to rely on the protection of s. 165(4).*** In effect, this will mean that Sunvic will be treated as if it had at all material times a licence granted by the owner of the copyright concerned on the conditions, and subject to payment of the charges (if any), specified in the order of the Tribunal. The 'material times' in this scenario will be the times of the performances of the three

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named concerts; in other words at the time of the infringing acts complained of. ***If Sunvic had by the date of the Tribunal's decision already been sued for damages for copyright infringement in respect of those performances it is difficult to see how s. 165(4) can operate***. The point could be made that Sunvic had not in fact been sued for copyright infringement by COMPASS. Nevertheless, subject to the limitation period, there was no reason as to why Sunvic could not have been sued, and the suit once brought would relate to the cause of action which arose at the date of the unauthorised performances.

The Tribunal is of the view that ***it would be wrong in principle for the benefit of s.165(4) to apply on a retrospective basis***. This is especially so if the concerts in issue had already taken place before the date of the application. The Tribunal is of the view that ***at the date of the three named conceits,*** [*sic*] ***COMPASS had acquired a vested right to sue for damages***. ***If Parliament intended that the Tribunal should have the power to grant orders with a retrospective effect, clear words are needed***. This is especially so as the order could ***affect the rights of the copyright owner to sue for damages for copyright infringement***. This right would have ***crystallised on infringement***. Further, ***where s. 165(4) applies, the protection also relates to criminal proceedings under s. 136(6) (see s. 149(2)(d). The offence would have been committed at the time of the unauthorised performance.*** It is difficult to see how s. 165(4) can be made to operate retrospectively by backdating the order in such circumstances.

3.4 Finally, it is to be noted that s. 165(4) only operates where the conditions specified in the order have been complied with and the charges paid (or have been undertaken to be paid). ***The conditions which the Tribunal might want to impose may relate to matters concerning the performance***. ***If the concert had already taken place*** before the order is made ***it is difficult to see how the conference [sic] organiser can comply with those conditions***. For these reasons we are of the view that there is no power to back date the effect of the order.

…

4.5 ***Another difficulty*** which might have arisen with the application in respect of 'all future concerts' under s. 163(2) ***relates to the interim concerts and any other concerts held by Sunvic before the date of the Tribunal's order***. The Tribunal has already decided, in respects of the 'three named concerts' that there is no power to make a retrospective order

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> for these three concerts. Similarly, ***it is arguable that the interim concerts and any others held before the date of the order would not in any event be covered as the effective date of the Tribunal's order is the date of the order***. The issue is a difficult one since the point could be made that in respects of these concerts, they did at least take place after the application for 'all future concerts' was made to the Tribunal. ***We accept that if our interpretation that there is no power to backdate the effect of the order under s. 163(2) is correct, it means that it is important to try and obtain the decision of the Tribunal before the intended date of performance***. ***In some cases, this may be very difficult***. ***The reverse, however, is equally true. If the Tribunal had the power to backdate*** the effect of its order, ***a prospective licensee could wait until very late in the day before applying to the Tribunal.*** In making this comment, we wish to make it absolutely clear that we are not suggesting that this is what happened in the present case. The Tribunal accepts that it may be desirable in some situations for it to have the statutory power to backdate the effect of its orders at least to the date of the application. Such a statutory provision will have to include the power to order the licensor to make payments to the licensee if lower royalty rate is set by the Tribunal. If our interpretation is correct, then it may be that an amendment to the Copyright Act will be needed on the relevant provisions. This point will be briefly touched on again below. In the present case, even if we are wrong on the question of backdating and the interim concerts (including any other concerts held before the date of the order), the point remains that the application in respect of 'all future concerts' is not in our view (for the reasons given earlier) one which is properly formulated under s. 163(2).
>
> [emphasis in bold italics added]

Although an in-depth discussion of *Sunvic* is not necessary, I will discuss the relevant parts of the decision below, where appropriate.

16 SingNet offers a different interpretation of the Act. Contrary to COMPASS' submission, SingNet argues that pending the determination of its Application under s 163(2) of the Act, the protection under s 164 would not apply.[11] This is because s 164 only applies where there is a "licence scheme…in

[11] Respondent's submissions, paras 60-61.

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operation by virtue of [Part VII of the Act]". In SingNet's case, however, the only licence scheme in question is that unilaterally put into operation by the licensor, COMPASS. Section 164 is instead meant to apply to licence schemes which remain in operation by virtue of s 161(8) of the Act. Section 161(8) provides that "[an existing] licence scheme…referred to a Tribunal under [s 161 of the Act] shall remain in operation…until the Tribunal makes an order in pursuance of the reference". According to SingNet, if Parliament had intended a copyright user to comply with *any* existing licence scheme pending the Tribunal's final orders (*ie*, because the Tribunal has no power to retrospectively vary the licence scheme in respect of the period pre-dating the final orders), then it would have been straightforward to include licence schemes unilaterally imposed by the licensor within s 164. However, since Parliament did not do so, that could therefore not have been Parliament's intention.

17 SingNet further contends that if the Question is answered in the negative, a licensor would be incentivised to drag out negotiations and Tribunal proceedings to allow itself to continue dictating licence terms for as long as possible during the interim period.[12] This creates the potential for abuse since the said licence terms may very well be unreasonable. In such a situation, prior to obtaining final orders from the Tribunal, SingNet says that a copyright user is left with three unenviable options:[13]

(a) first, refrain completely from using the copyright works;

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12 Respondent's submissions, para 65.

13 Respondent's submissions, para 58.

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(b) second, continue to use the copyright works under threat from the owner who has a "vested" right to sue for copyright infringement, however unreasonable the terms of the licence scheme may be; or

(c) third, adhere to the terms of the licence scheme under protest, but with no prospect of recovering any overpayment.

18 In SingNet's view, such an outcome could not have been intended by Parliament. Instead, SingNet submits that the Tribunal's powers under s 163(2) read with s 163(6)(b) of the Act should be interpreted in accordance with Parliament's intentions in establishing the Tribunal.[14] As explained during the Second Reading of the Copyright (Amendment) Bill (Bill No 16/2009), Parliament's objective in establishing the Act was to "strike a fair balance between the rights of copyright owners and copyright users", and its objective in establishing the Tribunal was to "provide an expeditious forum" for the resolution of licensing disputes without the need for court proceedings, and for the Tribunal to "act as a check against licensors imposing unreasonable licensing fees and terms" (*Singapore Parliamentary Debates,* Official Report (15 September 2009) vol 86 at cols 1497–99).[15]

19 To promote these purposes, SingNet argues that the Tribunal must have wide powers in relation to the disputes before it, including the power to make retrospective final orders under s 163(2) read with s 163(6)(*b*) of the Act. It also points out that neither provision expressly excludes the power to make a retrospective final order from the Tribunal's jurisdiction[16]. On the contrary, the

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14 Respondent's submissions at para 6(a), (d), (e) and (f), and paras 18-19.

15 Respondent's submissions at paras 19-20.

16 Respondent's submissions at paras 41-42.

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Tribunal was established for the very purpose of altering the relative legal positions of copyright owners and users, based on what it considers reasonable in the circumstances.[17]

My interpretation

20 Having set out each party's interpretation of the relevant provisions of the Act, I now discuss my own interpretation. The Copyright Act 1987 (Act 2 of 1987), which established the Tribunal, was first enacted in 1987. The Second Reading for the Copyright Bill (Bill No 8/1986) at the time does not shed particular light on the purpose of either the legislation or the Tribunal which is relevant to our present inquiry. Nonetheless, subsequent amendments have been made to the relevant provisions (*ie,* in Part VII) of the Act through the Copyright (Amendment) Bill (Bill No 16/2009). As stated by the Court of Appeal in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 (at [35]):

> The relevant Parliamentary intention is to be found at the time the law was enacted or, in some circumstances, when it subsequently reaffirms the particular statutory provision in question: see *Constitutional Reference No 1 of 1995* [1995] 1 SLR(R) 803 at [44]

21 In my view, the statements in the Second Reading of the Copyright (Amendment) Bill (Bill No 16/2009), referred to by SingNet at [18] above, are broadly reflective of the general purpose of the Act and the specific purpose of the provisions establishing the Tribunal and its statutory framework. SingNet's case is, however, based on a misconception as to how the relevant provisions in the Act carry out these purposes. Based on my analysis of the statutory framework, there are three main reasons why the Question should be answered in the negative. I discuss these reasons in turn.

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17 Respondent's submissions at para 53.

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The availability of interim protection under s 168 read with s 165 of the Act

22 First, both SingNet's and COMPASS' understanding of the Act fails to address a crucial provision in the statutory framework – namely, section 168. I reproduce the section here for ease of reference:

> **Interim orders**
>
> **168.** ***Where an application or reference is made*** to a Tribunal under this Act, ***the Tribunal may make an interim order having effect until the final decision*** of the Tribunal on the application or reference is given.
>
> [emphasis in bold italics added]

23 Section 168 of the Act is the missing piece of the puzzle. This section provides that the Tribunal is empowered to make interim orders on any "application or reference…to a Tribunal under [the] Act", which includes an application made under ss 163(1), (2), (3) or (4). The wording of s 168 expressly indicates that it is intended to govern the parties' relative legal positions during the interim period (*ie,* while applications or references are pending before the Tribunal). Contrary to SingNet's case at [17] above, there is therefore at least a fourth option open to an aggrieved copyright user (including one in SingNet's position) under the statutory framework. Specifically, it is open to such a user to:

(a) make an application to the Tribunal under s 163(2) of the Act; and

(b) concurrently or as soon as practicable, seek interim orders under s 168 of the Act.

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24 Where the Tribunal makes any interim or final orders on an application under ss 163(1), (2) or (3) of the Act, section 165(4) provides for the legal effect of such orders. I reproduce that provision here for reference:

> **Effect of order of Tribunal in relation to licences**
>
> **165**.— …
>
> ***(4) Where a Tribunal has made an order on an application under section 163(1), (2) or (3)*** specifying charges, if any, and conditions, in relation to the applicant, in respect of the matters specified in the order, ***then if*** —
>
> (a) ***the applicant has complied with the conditions*** specified in the order; ***and***
>
> (b) in a case where the order specifies any charges — he ***has paid*** those ***charges*** to the licensor ***or***, if the amount payable could not be ascertained, ***has given*** to the licensor ***an undertaking*** in writing ***to pay*** the charges when ascertained,
>
> ***the applicant shall be in the like position***, in ***any proceedings for infringement*** of copyright relating to any of those matters, ***as if*** he had ***at all material times been the holder of a licence*** granted by the owner of the copyright concerned on the conditions, and subject to payment of the charges (if any), specified in the order.
>
> [emphasis in bold italics added]

25 In the above provision, the phrase "an order on an application under section 163(1), (2) or (3) specifying charges, if any, and conditions, in relation to the applicant" includes both interim orders and final orders made to that effect. Section 149 of the Act clearly states that under Part VII, which sets out the statutory framework, the term "order" includes "an interim order". This is unless the context otherwise requires, which it does not. The effect of s 165(4) is therefore this. It covers the situation where the Tribunal has made interim or final orders on an application under ss 163(1), (2) or (3) of the Act specifying the conditions and any charges in relation to the applicant in question. In such a situation, if the applicant has complied with the conditions specified in the orders, and either paid or undertaken to pay any applicable charges, then in any

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proceedings for copyright infringement, the applicant shall be in the like position as if it had at all material times been the holder of the requisite licence.

26 In a similar vein, for applications under s 163(4) of the Act, where the Tribunal makes any interim or final orders "specifying the charges (if any) and conditions in relation to the persons, or to persons included in the classes of persons, specified in the order", s 165(5) (read with s 149 in the case of interim orders) provides for the orders' legal effect. Section 165(5) affords the aforementioned persons with protection against infringement liability if they have complied with the conditions specified in the interim or final orders, and paid or undertaken to pay any specified charges.

27 It is hence clear that when an application is made under s 163 of the Act, copyright users may be protected against infringement liability not only after the Tribunal has made its final orders (under s 165), but also during the preceding interim period (under ss 168 read with 165). At the hearing before me, SingNet's counsel accepted that on hindsight, at the time that SingNet made its Application, it was also possibly open to SingNet to have sought interim orders under s 168 during the interim period.

28 In the absence of s 168 of the Act, the two scenarios painted before me by SingNet and COMPASS are likely to follow. First, assuming the Tribunal has no jurisdiction to make retrospective final orders in applications under s 163 of the Act, there would be an incentive for copyright owners to deliberately delay negotiations and/or Tribunal proceedings so that they can dictate terms for as long as possible pending the Tribunal's final determination. Alternatively, if the Tribunal has the jurisdiction to make retrospective final orders, copyright users may make the strategic choice of infringing upon the copyright works first. As the Tribunal in *Sunvic* ([14] *supra* at [4.5]) highlighted, copyright users may

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choose to wait until very late in the day when the copyright owner finally commences Tribunal or court proceedings, before seeking final orders that retrospectively vary the charges and conditions applicable at the time of their infringement. This would then allow them to obtain protection from infringement liability under s 165 of the Act. To my mind, Parliament could not have intended either of these two scenarios, given that each allows for potential abuse in the manner I have just described. Instead, Parliament enacted s 168 of the Act to allow parties to seek the necessary *prospective* interim orders, thereby excluding the potential for such abuse. This understanding of the role of s 168 in the statutory framework is consistent with, and furthers, the general purpose of the Act. It "strike[s] a fair balance between the rights of copyright owners and copyright users", and "act[s] as a check" against potential abuse by either party.

29 I emphasise, however, that s 168 read with s 165 of the Act is *not* meant as a licence for copyright users to engage in copyright infringement. It is only meant to afford copyright users, who have sought, obtained and complied with the Tribunal's interim orders, a defence in copyright infringement proceedings for the limited period of time pending the Tribunal's final determination. In particular, nothing in the wording of s 168 of the Act indicates that interim orders are intended to apply retrospectively. This means that if a copyright user wishes to avail itself of the protection under s 168 read with s 165, it is incumbent upon it to make an application to the Tribunal, as well as seek interim orders pending the Tribunal's determination, *as early as possible*. This would allow the Tribunal to consider the matter at an early stage, so that it may pre-emptively address any foreseeable issues and make flexible adjustments that take into account the specific circumstances of the parties. All of these go towards striking a fair balance between the interests of the copyright owner and user, in line with the purposes of the Act. Although s 168 of the Act does not

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indicate that only the copyright user may seek an interim order, the onus may often lie upon the user to do so. This is because in the absence of any interim orders, the applicant would not be able to avail itself of the protection under s 165 during the interim period, and any use of the copyright works may expose it to civil, and even criminal, liability for copyright infringement.

30 I also note that on the face of s 168, there is no express restriction on the types of interim orders that the Tribunal may make. There is therefore a potentially wide range of flexible orders that the Tribunal may resort to in order to achieve fairness between the parties, pending the determination of the application. I will return to this point later in my examination of the relevant Australian legislation and case authorities (see [47]–[55] below).

31 Seen in the above light, there is simply no need for the Tribunal to have the jurisdiction to make retrospective final orders under ss 163(2) and 163(6)(*b*) of the Act (or any of the other subsections in s 163). Nothing in the wording or purpose of the aforesaid provisions, as well as s 165 of the Act, supports the existence of such a jurisdiction. On the contrary, the existence of such a jurisdiction would allow copyright users to abuse the statutory framework in the manner described at [28] above. This would render the prospective interim protection provided by s 168 read with s 165 of the Act redundant to a large extent, which cannot have been intended by Parliament.

32 At this juncture, I also make a related observation. When an existing licence scheme is referred to the Tribunal under s 161 of the Act, s 161(8) states that the scheme "shall remain in operation…until the Tribunal makes an order in pursuance of the reference". Similarly, where a further reference is made under s 162 of the Act, s 162(5) states that "[s 161(8)] shall apply" with respect to the licence scheme that is the subject of the further reference. It appears that,

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in situations where ss 161(8) and 162(5) of the Act operate, there is a "licence scheme…in operation by virtue of [Part VII of the Act] pending the making of an order on a reference" which triggers the protection for copyright users under s 164. Under s 164 of the Act, the copyright user will be protected against infringement liability if, at the material times, it has complied with the conditions and paid or undertaken to pay the charges under the applicable licence scheme. This means that for references under ss 161 and 162 of the Act, there is protection for copyright users *pending the making of any interim or final orders*. In my view, this protection strengthens the position that there is no need for final orders that take retrospective effect in respect of the same interim period.

33 On the other hand, there is no equivalent of ss 161(8) or 162(5) which applies to applications under s 163(2) of the Act. The result is that for such applications, there is no "licence scheme… in operation by virtue of [Part VII of the Act]" to trigger the protection under s 164. This is an argument also raised by SingNet's counsel, as set out at [16] above. It appears, however, that for applications under s 163(2), there is no need for the protection under s 164 of the Act to be available pending the making of any interim or final orders. Quite apart from s 164, insofar as (a) the licensor would grant a licence provided that the charges (which are the subject of the application) continue to apply, and (b) the user agrees to pay those charges for the licence, there would be no liability for copyright infringement *in any event*. This is because there would essentially be an agreement between the parties as to the terms of the use of the copyright works.

34 Once, however, the Tribunal makes interim or final orders, the said orders may vary the charges applicable to the applicant user. In such a situation, there would be no agreement between the parties as to the terms of use. Thus, it

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would not suffice for the copyright user to merely pay the charges as varied by the Tribunal. There is still a need to expressly provide in s 165(4) of the Act that upon paying the said charges (and complying with the conditions specified in the orders), the user is treated *as if* it had the requisite licence at the material times. This is notwithstanding that no such licence may have actually been granted by the licensor.

35 As such, even if the protection under s 164 of Act is not available in applications under s 163(2), this does not necessitate the Tribunal having the jurisdiction to make retrospective final orders under ss 163(2) and 163(6)(*b*). In any case, as mentioned, s 168 read with s 165 of the Act still provides protection for copyright users during the interim period. I thus maintain my view as set out at [31] above.

36 Lastly, the foregoing discussion at [22]–[35] above also makes the following point clear. Prior to an application to the Tribunal being made under s 163(2) of the Act, there is simply *no* protection under the statutory framework for a copyright user to use copyright works without paying the applicable charges for the requisite licence. The copyright user is not entitled to such use and would be liable for copyright infringement if it cannot raise any other defence under the remaining provisions of the Act. As mentioned at [29] above, if a copyright user disputes the applicable charges but needs to use the copyright works prior to the issuance of the Tribunal's final orders, the appropriate course of action is to apply under s 163(2) of the Act and seek interim protection under s 168 at an early stage. A failure to do so is no defence to infringement liability.

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Parliament could not have intended to allow copyright users to retrospectively absolve themselves of liability for past copyright infringement

37 My second main reason for answering the Question in the negative is this. Under the Act, acts of copyright infringement may not only attract civil liability, but also criminal liability. Such liability, if any, would accrue at the date of the infringement. When the Tribunal makes its final orders on an application under s 163(2) of the Act, the effect of its orders, as set out in s 165(4), is that if the applicant complies with the conditions specified in the orders and pays or undertakes to pay any applicable charges, the applicant will have a defence in not only civil proceedings for copyright infringement, but also criminal proceedings for an alleged contravention of s 136(6): see s 149(2)(*d*).

38 The paradigm situation where a copyright user would want to seek retrospective final orders is when it has used the licensor's copyright works without paying the applicable charges, which use would in itself amount to copyright infringement. In such a situation, granting the user retrospective final orders means that upon fulfilling the conditions of s 165(4), the user will be able to retrospectively absolve itself of both *criminal liability* (where applicable) *and civil liability* for infringements committed during the period predating the final orders. This is a point also raised by the Tribunal in *Sunvic* ([14] *supra* at [3.4]) and relied on by COMPASS.[18]

39 I see no basis for finding that Parliament had intended s 163(2) (read with ss 163(6)(*b*) and 165(4) of the Act) to be used for such a far-reaching purpose. Crucially, based on the wording of s 165(4) of the Act, the copyright user can still be protected from liability *even if* the Tribunal's final orders (a)

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[18] Applicant's submissions, paras 37 and 62-63,

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specify that the original charges are reasonable and should stay in place; or (b) retrospectively *raise* the applicable charges, in respect of the period predating the orders. It cannot be right that a copyright user, who has committed copyright infringement and refused to pay the original applicable charges (that were ultimately found not to be unreasonable to the user), could nonetheless be allowed to retrospectively "whitewash" its civil and criminal liability for past infringements. The Tribunal was simply not intended to act as a dhobi to "whitewash" such infringing activities.

40 At the hearing before me, SingNet's counsel implored this court to take into account the specific circumstances of the parties' underlying dispute.[19] Counsel argued that SingNet had engaged in protracted negotiations with COMPASS over the previous six years, during which time COMPASS had apparently tolerated SingNet's use of its copyright works without threatening civil proceedings or relying upon the penal provisions in the Act. According to counsel, this is not a situation where COMPASS had actively sought to enforce its rights (in a civil action).

41 I am unable to accept this. The issue before me is a question of law, which should not be determined based on the parties' specific circumstances, except perhaps insofar as they are representative of the general or systemic effect that any particular interpretation of s 163(2) and s 163(6)(*b*) of the Act might have. The parties' specific circumstances are not representative in such a way, since during the previous six years, SingNet failed to avail itself of the protection it could have sought. If SingNet had intended to use the copyright works without reaching a compromise with COMPASS and wanted to avoid

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19 Minute sheet dated 6 July 2020, 10am ("**Minute Sheet**"), at pp 5-6.

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infringement liability, SingNet ought to have applied to the Tribunal under s 163(2) of the Act, and concurrently sought interim orders under s 168 (and complied with the same). Yet, it only chose to do the former on 31 January 2019 and completely omitted to do the latter even as of the date of the hearing before me. Given that SingNet would not be in its current position had it used the statutory framework in the way that the framework was intended to be used, SingNet cannot now rely on its specific circumstances to ask this court to ignore the general, far-reaching consequences of its position (at [37]–[39] above).

The Tribunal has no power to award interest under the Act, and there is no express requirement to return any excess charges or pay any shortfall

42 Turning to my third main reason for answering the Question in the negative, I highlight two related situations in which SingNet's case faces difficulties. The first is the same paradigm situation mentioned in [38] above. In such a situation, the licensor must surely be entitled to interest on the charges that the user ought to have paid at the time of its use of the copyright works but did not. COMPASS makes the argument, with which I agree, that such interest would properly be recoverable in an action for copyright infringement.[20] The Tribunal, however, does not have the power to award interest under the statutory framework. At the hearing before me, SingNet's counsel did not dispute this and, in any event, was unable to direct me to any provision in the Act conferring such a power. If the Tribunal has the jurisdiction to retrospectively determine the charges applicable to the period predating its final orders, then in an application under s 163 of the Act, the wording of ss 165(4) and 165(5) means that the copyright user can "whitewash" its liability for past infringements by paying *only* the said charges *after* the final orders have been made. The user

[20] Applicant's submissions, paras 69 and 72.

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would not have to pay any interest for the delayed payment in order to avail itself of that protection (see also s 165(6) of the Act). Such an outcome would be highly unfair and prejudicial to the licensor, and surely could not have been intended by Parliament.

43 The second related situation is where the Tribunal, assuming it has the necessary jurisdiction, makes final orders that retrospectively *vary* the charges applicable to the period predating the said orders. If the said charges are adjusted downwards, one would expect that any excess paid by the copyright user at the time should be returned. Conversely, if the charges are adjusted upwards, then the copyright user should have to pay the shortfall to the licensor. There are, however, no express provisions in the Act which mandate the return of such excess charges, or the payment of the shortfall (as the case may be). Furthermore, as mentioned, there is no provision under the Act allowing the Tribunal to order that interest be paid on those amounts. To my mind, Parliament could not have intended to omit such an important requirement for the excess charges or shortfall to be repaid/paid (as the case may be), or to unfairly deprive the relevant party of interest. The lack of these two features thus supports my view that the Tribunal was not intended to have the jurisdiction to retrospectively vary the applicable charges.

Conclusion on my analysis of the statutory framework under the Act

44 For the reasons above and taking into account the context of the entire statutory framework, my view is that Parliament had no intention for the Tribunal to have the jurisdiction to make retrospective final orders under ss 163(2) and 163(6)(*b*) of the Act.

45 I now briefly address the decision in *Singapore Broadcasting Corporation v The Performing Right Society Ltd (Composers and Authors*

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Society of Singapore Ltd, Third Party) [1991] SGCRT 1 ("***SBC***"), which SingNet cites.[21] In that case, the applicant made an application under s 163(2) of the Act in respect of a licence scheme operated by the respondent (which was published prior to the date of the application). The Tribunal there decided to vary the licence scheme, and it held that "[s]ince [it] is essentially considering the reasonableness of the published licence scheme, in [the scheme's] application to SBC, … the licence set out in its order can properly date back to the date when the scheme was published". SingNet submits that *SBC* is authority for the proposition that the Tribunal has the jurisdiction to make retrospective final orders under s 163(2) of the Act. COMPASS denies this. It cites a point made by the Tribunal in *Sunvic* ([14] *supra*) at [3.7] – namely, that in *SBC,* the party which had asked for the final order to take retrospective effect was the respondent, and there was no objection by the applicant.[22]

46 The difficulty with COMPASS' response is this. As SingNet correctly argues, parties cannot, by agreement or a lack of objection, confer on the Tribunal jurisdiction which the Tribunal does not have. That said, insofar as the Tribunal in *SBC* decided that it has the jurisdiction under s 163(2) of the Act to make retrospective orders, I respectfully disagree for all the reasons set out above. Counsel in that case do not appear to have raised any arguments for the Tribunal's consideration which address the three reasons I have given. In my view, should parties wish to apply the Tribunal's orders in a retrospective manner, it is for them to implement such an arrangement between themselves, and not for the Tribunal to make final orders under the statutory framework to that effect.

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21 Respondent's submissions, paras 81-87; Minute Sheet at p 12.

22 Applicant's submissions, at para 16(f).

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Foreign jurisdictions

Australian position

47 My interpretation of the statutory framework under the Act, and the individual scope of ss 163(2) and 163(6)(b), is supported by my examination of Australia's copyright legislation, and the Australian case authorities. The Act itself is modelled upon the Copyright Act 1968 (Aust) ("**Australian Act**").[23] Sections 163, 165 and 168 of the Act are modelled upon ss 157, 159 and 160 of the Australian Act respectively.

48 In particular, section 163(2) of the Act is *in pari materia* with s 157(2) of the Australian Act. Although s 163(6)(*b*) of the Act is not identical to the entire s 157(6B) of the Australian Act, it is *in pari materia* with s 157(6B)(a) of the Australian Act. For ease of reference, the relevant Australian provisions are set out here:

> **157 Application to Tribunal in relation to licences**
>
> …
>
> *Licence scheme sets unreasonable charges or conditions for case*
>
> (2) A person who claims, in a case to which a licence scheme applies, that he or she requires a licence but that the grant of a licence in accordance with the scheme would, in that case, be subject to the payment of charges, or to conditions, that are not reasonable in the circumstances of the case may apply to the Tribunal under this section.
>
> …
>
> *Order dealing with application under subsection (2) or (3)*
>
> (6B) If the Tribunal is satisfied that the claim of an applicant under subsection (2) or (3) is well-founded, the Tribunal must either:

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23 Applicant's submissions, at paras 47-54.

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> (a) make an order specifying, in respect of the matters specified in the order, the charges, if any, and the conditions, that the Tribunal considers reasonable in the circumstances in relation to the applicant; or
>
> (b) order that the applicant be granted a licence in the terms proposed by the applicant, the licensor concerned or another party to the application.
>
> …
>
> **160 Interim orders**
>
> Where an application or reference is made to the Tribunal under this [Australian] Act, the Tribunal may make an interim order having effect until the final decision of the Tribunal on the application or reference.

49 In *Universal Music Australia and others v EMI Music Publishing Australia Pty Ltd and others* [2000] ACopyT 5 *("**Universal Music**")*[24], the representatives of record manufacturers had applied to the Australian tribunal under ss 152A and 152B of the Australian Act (which provisions are not relevant for our present purposes) to determine the royalties to be paid to the owners of the copyright in various musical works, and the manner of payment. Pending the determination of the application, the applicants sought interim orders under s 160 of the Australian Act for the continuation of a previous agreement between the parties that had already expired. At [19]–[20], the Australian tribunal referred to an earlier unreported decision in *In Reference by Australasian Performing Right Association Limited* (7 October 1994, Copyright Tribunal) (Australia) ("***Re APRA***") as follows:

> 19 ***In [Re APRA], the tribunal considered the ambit of s 160***. The tribunal had been invited to make interim orders ***in applications under ss*** 154 and ***157*** for the determination of royalties to be paid by commercial television stations for the right to broadcast music. ***It was proposed that the tribunal make [interim] orders, the effect of which would have been***

[24] Applicant's Bundle of Documents and Authorities ("**ABODA**"), Tab 14.

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> ***to alter retrospectively the royalties that had been paid***. It was argued that the tribunal did not have power to make retrospective orders when it determined royalties under ss 154 and 157 and accordingly no such power could subsist under s 160. That is to say, ***so the argument went, the ambit of the power conferred by s 160 was confined by the nature of the final relief that could be granted***.
>
> 20 ***The tribunal was prepared to accept, without deciding, that there was no power to make retrospective orders under s*** 154 or ***157***. However, ***as regards s 160, the Tribunal did not accept that the power was circumscribed in the manner argued***. The Tribunal said (at 12):
>
> > '***The whole thrust*** *of Part VI* ***of the [Australian] Act****, which is entitled "The Copyright Tribunal",* ***is to enable the Tribunal to achieve an appropriate balance between the interests of copyright owners,*** *whose work is to be the subject of a licence,* ***and the interests of those who wish to make use of that work*** *for a reasonable fee and on reasonable terms and conditions. We see no reason why the ambit of s 160 should be circumscribed by the provisions of ss 154 and 157 assuming that it is correct to say that those sections do not authorise a final decision which has retrospective effect.'*
>
> Later, the Tribunal said (at 13):
>
> > *'[We] do not construe [ss 154 and 155] as limiting* ***the wide words of s 160,*** *which in our opinion,* ***empower the Tribunal to make an order which, in a particular and common sense way, will provide appropriately for the period up to final determination.****'*
>
> [emphasis in bold italics added]

COMPASS argues that the views in *Re APRA* (as set out in *Universal Music* at [20]) on s 157 of the Australian Act support its position that s 163(2) of the Act confers no jurisdiction to make retrospective orders.[25] SingNet's response is that

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25 Applicant's submissions, paras 47-50.

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these views appear to have been reached without much discussion of the underlying reasons, and should hence not be accorded substantial weight.[26]

50 Although I accept SingNet's response, I find the decisions of *Universal Music* and *Re APRA* to be instructive for different reasons. *Re APRA's* comments on s 160 of the Australian Act shed light on the role that s 168 of the Act is meant to play in the statutory framework – specifically, it is meant to enable the Tribunal to make interim orders which "in a particular and common sense way, will provide appropriately for the period up to final determination". The Australian tribunal in *Universal Music* aptly demonstrates how this role is to be carried out. Having found it reasonable to accord the applicants some of the interim protection they sought, the Australian tribunal ordered (at [30]) that pending the determination of the application, the expired agreement between the parties was to be continued, save that the rate of royalty therein would be reduced by 7.5%, and the amounts deducted placed in an interest-bearing account. These orders were made on the applicants' undertaking that, *inter alia*, they would:

> (a) pay the amounts deducted into an interest-bearing account in the applicants' solicitors' names;
>
> (b) maintain accounting records of those amounts which would permit an auditing of the accounts at the order/direction of the Australian tribunal;
>
> (c) "submit to such orders (if any) as the [Australian] tribunal makes in relation to the payment of the amounts in the account and…pay such

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[26] Respondent's further submissions, paras 6-7.

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> funds…as the tribunal…may direct, to any person whether or not a party, adversely affected by the operation of the interim order of the tribunal or any continuation thereof"; and
>
> (d) pay to the respondents interest on any moneys received in the account.

51 Both Australian decisions strengthen the position that during the interim period, s 168 (read with s 165) of the Act is meant to be the main provision governing the parties' relative legal positions. More importantly, the decisions usefully illustrate the potential scope and flexibility of the interim orders that the Tribunal may make in order to strike a fair balance between the interests of copyright owners and users. Such orders may, for example, adjust the charges and/or conditions applicable to the applicant during the interim period, which may or may not take reference from the parties' previous agreements, and even establish a "retention fund".

52 At a basic level (although there might be variations), a "retention fund" involves an arrangement where some or all of the charges payable during the interim period are paid into and held in an escrow account (see *Universal Music* at [23]). Should it subsequently turn out that the rates of the charges payable during the interim period exceed the rates which the Tribunal's final orders determine to be reasonable, the excess can then be returned to the copyright user. At first glance, such an arrangement appears to require the Tribunal to make final orders that retrospectively "claw back" the excess amounts. It appears to me, however, that it is equally possible to effect this arrangement by making interim orders with the *prospective effect* of deciding that the amounts paid into the fund during the interim period are ultimately to be apportioned according to the Tribunal's final determination. The Australian tribunal in

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Universal Music alluded to this point (at [30]) by stating that its orders "along these lines might also avoid the difficulty that the [t]ribunal may not be able to make a retrospective order". As such, the establishment of a "retention fund" may well fall within the range of prospective interim orders that parties can seek under s 168 of the Act.

53 In *Universal Music,* the Australian tribunal had made the interim orders as set out at [50] above on the applicants' undertakings as listed in sub-paragraphs (a) to (d). This illustrates yet another important point. In order to best enable the Tribunal to strike a fair balance between the parties' interests during the interim period, copyright users and owners should be both willing to engage in dialogue and compromise to address the other's concerns as far as possible. In particular, parties should be prepared to consider giving the necessary undertakings in order to facilitate the fair and practical implementation of the Tribunal's interim orders. As was the case in *Universal Music* in relation to the "retention fund", such undertakings may include agreeing to maintain proper accounting records for auditing purposes, handing over any interest received on the amounts in the fund, and following the directions of the Tribunal to pay out certain amounts. Such undertakings may go a long way towards satisfying the Tribunal and the opposing party that the latter's interests are being fairly protected under any interim arrangement.

54 It may certainly be argued that the Tribunal could simply make interim orders to compel some of these arrangements. However, such an approach may be undesirable as it may give rise to more areas of dispute between the parties and hinder the Tribunal from expeditiously reaching a fair compromise. Should a party come before the Tribunal unwilling to facilitate the implementation of a fair and practical interim arrangement, it will have no one but itself to blame if the Tribunal, left with no better alternatives, makes interim orders that the

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Tribunal itself considers to be the fairest in the circumstances but which are less than ideal from that party's perspective. To avoid such an outcome, parties are thus encouraged to consider giving the appropriate undertakings to facilitate the formulation of better alternatives.

55 Returning to my main point, I thus find that *Re APRA* and *Universal Music* support the view that s 168 of the Act is meant to enable the Tribunal to achieve a fair balance between the interests of copyright owners and users during the interim period, by allowing it to draw upon a wide range of flexible measures. This militates against any finding that ss 163(2) and 163(6)(*b*) of the Act are intended to serve an overlapping or conflicting role by conferring on the Tribunal the jurisdiction to make retrospective final orders in respect of the same interim period.

56 SingNet cites another Australian tribunal decision[27], *Phonographic Performance Company of Australia Limited under s 154(1) of the Copyright Act 1968 (Cth)* [2016] ACopyT 3 ("***Re PPCA***")[28], where the applicant made a reference under s 154 of the Australian Act (which s 160 of the Act is based on). SingNet says that in that case, the reference was heard in April and May 2015, the decision was issued on 13 May 2016, and the Australian tribunal (at [20]) made a retrospective final order taking effect from 1 July 2011.

57 COMPASS argues that *Re PPCA* is not authority for the proposition that the Australian tribunal can make retrospective orders for two reasons.[29] First, the parties in that case had apparently agreed to the retrospective order being

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27 Respondent's further submissions, paras 8-9.

28 Respondent's Additional Bundle of Authorities ("**RABOA**"), Tab 3.

29 Applicant's further submissions, paras 9-15.

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made, so the Australian tribunal did not decide the issue. Second, the reference in *Re PPCA* was made under s 154 of the Australian Act (which s 160 of the Act is modelled upon) in respect of a "proposed licence scheme", and the decision is thus "not on point".[30] SingNet's response is two-fold.[31] First, similar to the argument made at [46] above, the Australian tribunal must have accepted that it had the jurisdiction to make a retrospective order since parties, cannot by agreement or a lack of objection, confer on the tribunal jurisdiction which it does not have. Second, the decision nonetheless supports SingNet's position that the Australian tribunal has the jurisdiction to make retrospective orders under s 157 of the Australian Act (*ie,* the equivalent of s 163 of the Act) because both that provision and s 154 of the Australian Act similarly have no express restriction against making such orders.

58 Although I accept SingNet's first response, I find *Re PPCA* to be of limited assistance to its position. In that case, the Australian tribunal's discussion (*ie,* at [20], [126] and [133] of the decision) was primarily focussed on deciding what pricing structure it should impose in exercise of its jurisdiction to make retrospective final orders, rather than the basis of that jurisdiction. Further, as mentioned, s 168 of the Act plays a central role in providing copyright users with an avenue for protection from infringement liability during the interim period. In the Australian context, there is thus a question of how the tribunal's jurisdiction to make retrospective final orders is meant to sit alongside the interim protection already afforded by s 160 of the Australian Act (*ie,* the equivalent of s 168 of the Act). As this question does not appear to have arisen for consideration in *Re PPCA*, SingNet's case is not brought much further,

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30 Applicant's further submissions, paras 9-15.

31 Respondent's further submissions, paras 8-9.

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especially with respect to addressing the three reasons given for my negative answer to the Question.

New Zealand, UK and Hong Kong positions

59 I now discuss the relevant legislation and case authorities from New Zealand, the UK and Hong Kong, which concern the making of applications and references to the tribunal in relation to licences and licence schemes. Although there are some differences between the relevant legislation in each jurisdiction, there are also many similarities. This is perhaps to be expected, as the Hong Kong and New Zealand legislation appear to have borrowed heavily from the UK legislation. In particular, the relevant legislation in all three jurisdictions contain express provisions that allow the tribunal's final orders (on references under certain provisions) to take retrospective effect. In these backdating provisions, the common thread is that the tribunal's final orders are not permitted to take effect from a date earlier than the date on which the reference was made. In the present case, SingNet seeks to go even further than these provisions in arguing that the Tribunal has the jurisdiction to make final orders which retrospectively take effect from a date *prior to the making of the Application*. Given that the statutory framework does not even contain any express provision permitting backdating to the date of the application/reference, I am not persuaded that Parliament intended to confer the even more far-reaching jurisdiction that SingNet argues the Tribunal has.

60 Starting with the New Zealand position, COMPASS refers to the Copyright Act 1994 (NZ) ("**NZ Act**"). It cites the decision of *Phonographic Performances (NZ) Ltd v Radioworks Limited* [2010] NZCopyT 1; [2010]

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NZCOP1 (19 May 2010) ("***Radioworks***").[32] In that case, a proposed licence scheme was referred to the New Zealand tribunal under s 149 of the NZ Act (*ie,* the supposed equivalent of s 161 of the Act). After hearing the reference, the said tribunal issued retrospective final orders pursuant to an express backdating provision. COMPASS highlights that unlike the situation in *Radioworks*, no backdating provision applies to applications under s 163(2) of the Act. Given this difference in the relevant provisions under the NZ Act and the Act, I fail to see how *Radioworks* assists COMPASS' case, save that it merely illustrates the general point I have already made in [59] above (*ie,* that whereas the NZ Act at least contains limited backdating provisions, the Act has no such provision at all).

61 More generally, the relevant backdating provision in the NZ Act (*ie,* s 152(3)) provides that in determining certain references, the New Zealand tribunal may retrospectively vary the applicable charges under the licence scheme from the date of the reference (or if later, the licence scheme's date of operation). If the New Zealand tribunal exercises this jurisdiction, s 152(4) of the NZ Act requires "any necessary repayments, or further payments [to] be made in respect of charges already paid". Pursuant to s 222A of the NZ Act, the New Zealand tribunal also has the express power to award interest as "compensation for [the] delay in payment of the money".

62 In essence, the New Zealand tribunal's limited jurisdiction to retrospectively vary the applicable charges under a licence scheme is accompanied by both (a) an express requirement that any resulting excess charges or shortfall must be repaid/paid (as the case may be), and (b) an express

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[32] Applicant's submissions, paras 59-62.

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power to award interest on those amounts. This reinforces my view (at [43] above) – namely, that the absence of both these features in the Act indicates that the Tribunal was not intended to have the same jurisdiction.

63 Apart from the preceding points in [60]–[62], however, I am not prepared to draw any other inferences about the Tribunal's jurisdiction under ss 163(2) and 163(6)(*b*) of the Act, and the statutory framework generally, based on the NZ Act. Although s 153 of the NZ Act appears to be the equivalent of s 163 of the Act, there is no provision in the former legislation which is *in pari materia* to s 163(2) of the Act. Looking at the NZ Act by itself, it may also be argued that an internal comparison between its provisions can be made. Specifically, there are express backdating provisions which apply to certain references under the NZ Act, but none which apply to applications under s 153. This supports the contextual inference that retrospective orders cannot be made in applications under s 153 of the NZ Act. The same reasoning, however, does not apply to the present case, because there are no express backdating provisions in the Act at all. One therefore cannot draw the same contextual inference about the Tribunal's lack of jurisdiction to make retrospective final orders under ss 163(2) and 163(6)(*b*) of the Act.

64 Turning to the UK position, I refer to the Copyright Act 1956 (c 74) (UK) ("**1956 UK Act**"), which has now been superseded by the Copyright, Designs and Patents Act 1988 (c 48) (UK) ("**1988 UK Act**"). I also set out the following commentary by the learned authors of *Copinger and Skone James on Copyright* vol 1 (Gillian Davies, Nicholas Caddick, Gwilym Harbottle eds) (Sweet & Maxwell, 17th Ed, 2016) ("***Copinger and Skone James***"), at para 28-105, about the UK tribunal's jurisdiction to make retrospective orders on certain references made under the UK Acts:

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> …***Under the 1956 [UK] Act the [UK tribunal] had no power to backdate its order [on a reference of a licence scheme]***, which took effect on the scheme from the date the order was made. [567] ***The 1988 [UK] Act [ie, s 123(3)] introduced a limited ability for the [UK] Tribunal to backdate the effect of its order on the scheme referred to it***. Thus, where the order of the [UK] Tribunal varies the amount of charges payable under a licensing scheme, the [UK] Tribunal may direct that the order has such effect from a date earlier than that on which the order is made, but not earlier than the date on which the reference was made or, if later, on which the scheme came into operation.[568] Any necessary repayments, or further payments, in respect of charges already paid must then be made.[569]
>
> [emphasis in bold italics added]

65 In my judgment, the UK position provides some assistance to COMPASS' case. On a plain reading of the 1956 UK Act, it is clear to me that the legislation did not confer any jurisdiction on the UK tribunal to make retrospective final orders. In particular, the legislation had no express backdating provisions at all, whether in respect of references or applications to the UK tribunal. As the learned authors of *Copinger and Skone James* point out, a "limited" backdating provision for references (*ie,* s 123(3)) was then introduced as part of the 1988 UK Act. This confirms my plain reading of the earlier UK Act, since the introduction of such a provision would not have been necessary if the jurisdiction to make retrospective final orders had already existed. Similarly, on a plain reading of the Act, there are no express backdating provisions or words in ss 163(2) and 163(6)(*b*) which suggest that the Tribunal has any jurisdiction to make retrospective final orders. This supports my view at [9] above.

66 Under the 1988 UK Act, the new backdating provision, s 123(3), only applies to *references* of proposed and existing *licence schemes* under ss 118, 119 and 120 (*ie,* the supposed equivalents of ss 160, 161 and 162 of the Act respectively). This much may be gleaned from the wording of ss 123(1) and

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123(3), which refers only to "references" of entire licence schemes (*ie,* under ss 118, 119 and 120 of the 1988 UK Act). Since the said wording does not refer at all to "applications" concerning the grant of individual licences, the backdating provision, in my view, clearly does not apply to such applications made under s 121 of the 1988 UK Act (which is the supposed equivalent of s 163 of the Act). Importantly, where the UK tribunal decides to retrospectively vary the applicable charges under a licence scheme pursuant to s 123(3), sub-paragraph (a) expressly requires "any necessary repayments, or further payments, [to] be made in respect of charges already paid". This further persuades me that in the absence of an equivalent requirement under the Act, the Tribunal was not intended to have the same jurisdiction to retrospectively vary the applicable charges under s 163(2) read with s 163(6)(*b*) (see [43] above).

67 Beyond the general points made above, however, it is difficult to draw any other *specific* inferences from the UK Acts about the Tribunal's jurisdiction under s 163(2) of the Act. This is because, as COMPASS' counsel acknowledged, there is no provision in the UK Acts which is *in pari materia* to s 163(2) of the Act.

68 Finally, SingNet also cites the Hong Kong tribunal decision of *Neway Music Limited v Hong Kong Karaoke Licensing Alliance Limited Hong Kong* (Case No. 2/2010) ("***Neway***") in support of its case.[33] The relevant Hong Kong legislation is the Copyright Ordinance (Cap 528) (Hong Kong) ("**HK Ordinance**"). In *Neway*, a reference was made in respect of an existing licence scheme under s 156 of the HK Ordinance (*ie,* the supposed equivalent of s 161 of the Act). Although the Hong Kong tribunal in the case issued certain

[33] Respondent's further submissions at para 2-5; RABOA, Tab 3.

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retrospective final orders, the basis of its jurisdiction to do so does not appear to have been argued by counsel or discussed in the decision. *Neway* therefore does not advance SingNet's case.

69 I note, however, that under s 160(3) of the HK Ordinance, the HK tribunal is empowered to retrospectively vary the applicable charges when proposed and existing licence schemes are referred to it under ss 155, 156 and 157 (*ie,* the supposed equivalents of ss 160, 161 and 162 of the Act). The exercise of such jurisdiction is accompanied by an express requirement under s 160(3)(a) of the HK Ordinance for "any necessary repayments, or further payments, [to] be made in respect of charges already paid". Similar to what I have said above (at [43], [62] and [66]), this militates against the suggestion that under the Act, the Tribunal was intended to have the same jurisdiction under s 163(2) read with s 163(6)(*b*), even though there is no requirement for any resulting excess charges or shortfall to be repaid/paid (as the case may be).

70 In summary, I am of the view that the New Zealand, UK and Hong Kong positions support in certain respects (and do not detract from) my conclusion at [44] above, as reinforced by the Australian position.

Conclusion

71 For all the reasons discussed above, the Question is to be answered in the negative. I will hear parties on costs at a later date.

Dedar Singh Gill
Judge

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