

Tiananmen KTV & Lounge Pte Ltd and Others v Innoform Entertainment Pte Ltd
[2011] SGCRT 1

Case Number : CT 1/2010

Decision Date : 19 October 2011

Tribunal/Court : Copyright Tribunal

Coram : Stanley Lai Tze Chang; Ng-Loy Wee Loon; Thian Yee Sze

Counsel Name(s) : SS Dhillon and Sunil Singh Panoo (Dhillon & Partners) for the applicants; R Nandakumar and Clare Lin (KhattarWong) for the respondent

Parties : Tiananmen KTV & Lounge Pte Ltd; Club Infinitude Pte Ltd; Grand Century Nite Club Pte Ltd; Oriental Supreme KTV Pte Ltd — Innoform Entertainment Pte Ltd

19 October 2011

Judgment reserved.

District Judge Thian Yee Sze (President):

1 The application before us, which involves the reasonableness of charges imposed under a licence scheme, is the first involving a licence scheme for the reproduction or copying of karaoke videos in a Karaoke On Demand (KOD) system since the Copyright Tribunal's ('the Tribunal') scope of coverage in relation to disputes involving the terms of licences granted was expanded to include those arising out of any work and subject-matter other than works and any form of licence right. As a matter of fact, in an earlier case involving the same type of licence scheme before the amendments which expanded the jurisdiction of the Tribunal were promulgated, the Tribunal ruled that it did not have jurisdiction in respect of disputes arising out of KOD licences.

2 After considering all the evidence and submissions from parties, we dismissed the application with costs. We now set out the grounds of our decision.

The role of the Copyright Tribunal – a check against licensors imposing unreasonable licensing fees and terms

3 The Copyright Tribunal in Singapore is a creature of statute, established under the Copyright Act (Cap 63) ('the Act') in part to exercise a measure of control over the activities of organisations, commonly referred to as collecting societies, which administer the exercise of specific rights restricted by the copyright in particular types of work (as defined in s 7 of the Act) or subject-matter other than works (see Part IV of the Act which deals with copyright in 'subject-matter other than works') collectively on behalf of various owners of the copyright in these works or subject-matter other than works. Such regulatory control is necessary in the public interest to curb any abuse by the collecting societies or collective licensing bodies, which are often in a monopolistic position as a result of their right to license the use of virtually all the works and subject-matter other than works needed in a particular sector (eg popular music in the entertainment world). Prior to 31 December 2009, the Tribunal's jurisdiction under Part VII of the Act to regulate such organisations which wield extensive control over the exercise of copyright through licensing agreements or schemes was limited to

licences in relation to five categories of work and subject-matter other than works, namely literary, dramatic or musical work, computer programmes and sound recordings. In addition, licence *rights* in relation to the above five categories for reproduction or copying were also not covered save for the making of a sound recording or film of a literary, dramatic or musical work or an adaptation of the work for the purpose of broadcasting or cable transmission of this work or the adaptation – in other words, copying or reproduction was only covered where it was in relation to activities specifically stipulated in the Act ^[note: 1].

4 With the pervasiveness of technology in every facet of modern living and commercial activity, including the development of original work and expression, the limited categories of works in respect of which the Tribunal had jurisdiction to address disputes, which was restricted essentially to traditional forms of work and specified types of licences, reduced its ability to effectively carry out its mandate to regulate the businesses of organisations such as collecting societies and act as a check against oppressive monopolistic practices. For example, disputes arising from the reproduction and storage of digital cinematographic films in hard discs for commercial use, which is prevalent today, did not come under the purview of the Tribunal. The limited jurisdiction of the Tribunal was clearly illustrated in the case of *Orchard KTV & Lounge Pte Ltd v Recording Industry Performance Singapore Pte Ltd (RIPS)* (CRT 1 of 2005), where the Tribunal decided that it did not have jurisdiction to hear a case involving a licence scheme concerning the copying and public performance of films through a KOD system.

5 To address such limitations, the Act was amended with effect from 31 December 2009 to expand the Tribunal's jurisdiction over all types of copyright work and subject-matter other than works. The purpose and intent of this set of amendments was unequivocally stated as follows: "to allow the Tribunal to play its intended role in the face of technological developments" ^[note: 2]. At the same time, the amendments to the Act make clear that the Tribunal has jurisdiction over collecting societies and agencies (see s 149(1) of the amended Act). The Senior Minister of State for Law, Associate Professor Ho Peng Kee, in moving the Bill at the Second Reading, explained the rationale for this move:

... the second amendment seeks to refine the scope of the Tribunal's jurisdiction to cover licensors who are in the business of collectively administering copyright licences for different copyright owners. **This change is mainly in recognition of the fact that licensors such as collecting societies and commercial agencies are capable of amassing a wide repertoire of copyright works. As such, they are able to adopt a relatively strong bargaining position vis-à-vis licensees or businesses that make use of the copyright works under their purview. In this way, the Copyright Tribunal can act as a check against licensors imposing unreasonable licensing fees and terms.**

(emphasis added)

6 With the latest amendments, the Tribunal now has jurisdiction to preside over disputes arising out of licence schemes for all manner of works and subject-matter other than works and all types of licence rights and acts – s 149 of the Act defines "licence" broadly:

"licence" means a licence granted by or on behalf of the owner or prospective owner of the copyright in **a work or other subject-matter** to do **an act** comprised in the copyright;

(emphasis added)

Background to the dispute

7 The business model of each of the four Applicants, as well as the five other organisations which were each made a party to the proceedings, includes the provision of karaoke and other entertainment services on their premises.

8 In order to be able to offer karaoke facilities, which entails the playing of karaoke music videos using the KOD technology, the Applicants are required to apply for and obtain five different licences, as follows:

- (i) A licence for the *reproduction* of the cinematograph film in the form of a karaoke version of a music video ('the KOD licence');
- (ii) A licence for the *public performance* of the cinematograph film. The public performance licence is obtained from the Recording Industry Performance Singapore Pte Ltd ('RIPS'), a collecting agency appointed by the recording companies to administer such licences on their behalf in Singapore;
- (iii) A licence for the *reproduction* of musical works and related lyrics. This licence is obtained from the Composers and Authors Society of Singapore ('COMPASS'), which represents composers, authors and publishers of musical works and lyrics in Singapore ^[note: 3];
- (iv) A licence for the *public performance* of musical works and related lyrics – this is to be distinguished from the licence paid to RIPS, which relates to the public performance of the cinematograph film, *not* that of the underlying musical works and lyrics. This licence is similarly obtained from COMPASS; and
- (v) A public entertainment licence issued by the Singapore Police Force.

9 The dispute relates to the amount of fees levied and the mode of payment for the first type of licence, which the Applicants obtained from the Respondent company ('the Respondent').

10 Since April 2007, the Respondent has been operating a KOD licence scheme and are the exclusive authorised agents of 14 recording companies for the granting of KOD licences for the reproduction of cinematograph films in KOD systems and collection of licence fees. The record companies represented by the Respondent include the biggest names in the industry such as EMI Music International, Rock Record (S) Pte Ltd, Sony Music Entertainment Singapore (Pte) Ltd, Universal Music Pte Ltd and Warner Music Pte Ltd. Other than the Respondent, at least two other companies, Horizon Music Entertainment Pte Ltd (which represents four record companies) and K-Net Music Pte Ltd (which represents three record companies ^[note: 4]), are in the same business of granting KOD licences on behalf of record companies and acting as collecting agents.

11 The terms of the KOD licence granted by the Respondent are spelt out in the "Innoform Entertainment Pte Ltd Karaoke On Demand ("KOD") Licence Agreement" ('the Agreement') ^[note: 5]. It is not disputed that this Agreement governs the contractual relationship between the Respondent and each of the Applicants and parties. The licence is with regard only to the *reproduction* right in cinematograph films (see Clause 1.2(d)) – Clause 1.1 of the Agreement states that the nature of the right granted to each Applicant is:

a non-exclusive, non-assignable and non-transferable right and licence to **reproduce** Videos on a KOD System to enable retrieval and public performance within the Applicant's Outlet in Singapore ...

(emphasis added)

12 Clause 1.2(a) further provides that only one copy of each video is to be reproduced:

the reproduction of **one (1)** copy of each Video on the Permitted Hard Disk, for use at the Outlet *via* the KOD System;

(emphasis added)

13 The cost of the KOD licence is detailed in the Tariffs Schedule attached to the application form for the licence [note: 6]. There are four categories of tariff, classified according to the nature of an applicant's business:

Tariff Category	Description
Category A	KTV Karaoke Lounge/Night Club
Category B	Pub/Bar/Lounge
Category C	Restaurants, Government Statutory Board and others
Category D	Ad-hoc Events

14 The licence fees for Category A are the highest. All the Applicants and parties are establishments under that category. The rate payable for such establishments is in turn dependent on the seating capacity in the premises – the Tariffs Schedule defines “seating capacity” as “the number of people that the rooms and/or common singing halls can accommodate according to the Public Entertainment Licence”. The rates are as follows:

Seating Capacity	Rate (per location per annum)
39 and below	S\$7,000
40 – 49	S\$8,000
50 – 59	S\$10,000
60 – 69	S\$12,000
70 – 79	S\$14,000
80 – 89	S\$16,000
90 – 99	S\$18,000
100 – 109	S\$20,000
110 – 119	S\$22,000
120 – 129	S\$24,000

130 – 139	S\$26,000
140 – 149	S\$28,000
150 and above	S\$30,000

15 Based on the Tariffs Schedule, the licence fee payable by each Applicant annually is \$30,000. It should be noted that the rates in the Tariffs Schedule themselves may fluctuate – the Schedule is stated to be “subject to periodical adjustments and the final confirmation of InnoForm Entertainment Pte Ltd”.

16 In respect of the mode of payment of the licence fee, it is stated in the Tariffs Schedule that the fees “are payable in advance unless otherwise stated”. Clause 4 of the Agreement stipulates further terms relating to licence fees:

4.1 Applicant shall pay to InnoForm a non-refundable licence fee calculated in accordance with the Tariffs Schedule ... upon the signing of this Agreement and/or any other date(s) accepted by InnoForm. Payment under this clause shall be made without any deduction or set-off.

4.2 Applicant shall not under any circumstances, even if the Applicant ceases its business and terminates its business licence, be entitled to any refund of any part of the Licence Fee. However, InnoForm may, in its absolute discretion and subject to the retention of a minimum of the Licence Fee equivalent to a proportion of 6 months, refund a portion of the Licence Fee paid by the Applicant.

4.3 All costs and expenses associated with the acquisition, installation, operation and maintenance of the KOD System and the Permitted Hard Disk (and any hardware, software and any other equipment therein comprised) shall be borne exclusively by the Applicant.

The Application under s 163(2) of the Act

17 While the Applicants accepted that they should pay licence fees for the reproduction of the cinematograph film in the KOD system ^[note: 7], they were dissatisfied with the quantum of charges and conditions (specifically with regard to the mode of payment) imposed by the Respondent, and thus applied under s 163(2) of the Act for the following orders:

1. That the charges and mode of payment demanded by INNOFORM ENTERTAINMENT PTE. LTD. for their “Karaoke on Demand Licence” are unreasonable, arbitrary and capricious; and
2. Further or alternatively, that the charges and mode of payment as demanded by INNOFORM ENTERTAINMENT PTE. LTD. for their “Karaoke on Demand Licence” are unconscionable.
3. That the Copyright Tribunal fix a reasonable sum and mode of payment for the charges that may be demanded by INNOFORM ENTERTAINMENT PTE. LTD. for their “Karaoke on Demand Licence”.

(at paragraph 1 of Form 13 filed by the Applicants)

18 Five other organisations, namely Dynasty Classic KTV Pte Ltd, Tuberose KTV & Niteclub Pte Ltd, Aurora De Club Pte Ltd, Super Star KTV Club and Deluxe Lido Palace Pte Ltd applied pursuant to s 163(5) of the Act to be made a party to the application in support of the Applicants’ case under s 163(2) by virtue of

their having a substantial interest in the matter as they too required a KOD licence from the Respondent. Satisfied that all five organisations had a substantial interest in the matter, the Tribunal allowed them to be made a party to the application.

19 The Respondent denied all of the Applicants' assertions.

20 It should be highlighted at this juncture that initially, the Applicants contended that they did not make a copy of the karaoke music video on the Permitted Hard Disc. The Applicants' stance called into question the basis of the need for a KOD licence to be obtained by the Applicants in the first place – if there was no reproduction, the issue of the reasonableness of charges and conditions of the Licence under s 163(2) would not arise at all. This was a similar issue raised in the case of *Orchard KTV & Lounge Pte Ltd*, although it was never addressed by the Tribunal as it had decided that it had no jurisdiction over the matter. After conferring with their clients, the Applicants' counsel later withdrew this point and confirmed that the Applicants would not be disputing the fact that a copy of the said video was made by them on the Permitted Hard Disc (within which the KOD system is stored) and that the reproduction was done "on behalf of all the Applicants by the KOD Supplier" (at paragraph 14 of the Applicants' Case (Amendment No 1)) [note: 8]. The case submitted before the Tribunal hence proceeded on the basis that there was an act of reproduction of the music video on the Permitted Hard Disc by the Applicants through the supplier of the KOD system, one Innoform Digital Media Pte Ltd ('IDM'), from whom the Applicants rented the KOD system [note: 9]. It is noted that IDM and the Respondent are related companies [note: 10], although nothing in this case turned on that fact.

Issues before the Tribunal

21 In determining the merits of the Applicants' case, the following issues were addressed:

- (a) On whom the burden of proof lies.
- (b) Whether the charges for the KOD licence imposed by the Respondent are not reasonable in the circumstances of the case, as stipulated in s 163(2) of the Act.
- (c) Whether the mode of payment of the licence fee stipulated in the Agreement is not reasonable in the circumstances of the case, as stipulated in s 163(2) of the Act.

22 These issues were dealt with in turn.

(a) On whom the burden of proof lies

23 The first question which the Tribunal had to answer was whether the burden lay on the Applicants to prove that the Respondent's charges and conditions were *not* reasonable or if it was incumbent on the Respondent to prove that its charges and conditions were reasonable.

24 The Applicants took the stance that since it had filed the Application to challenge the reasonableness of the charges and conditions, the Respondent had "the burden of, at the very least, setting out the basis and justification of their charges" [note: 11]. On the other hand, the Respondent submitted that the Applicants bore the burden of proof to show that their charges and conditions were unreasonable. The Respondent further contended that there was "a *presumption* in favour of retaining an existing licence scheme without variation, unless the applicant proves that it is unreasonable in the circumstances." [note: 12]

25 When speaking of the burden of proof, one must distinguish between the *legal* burden of proof and the *evidential* burden of proof. It is a trite common law principle that the *legal* burden, or the burden of proving a fact to the requisite standard of proof, always remains with the party who seeks to prove that fact. The *evidential* burden, or the burden of adducing evidence to meet the standard of proof or to prevent the opposing

party from meeting the standard of proof, may be on either party, depending on the circumstances of the case. The crucial distinction between the legal and evidential burden of proof was explained by VK Rajah JA in the decision of the Court of Appeal in *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855:

57 Indeed, Mr Sham's contentions on this point bring into sharp focus the crucial distinction between the legal and the evidential burden. When is it the responsibility of the plaintiff in a case to produce evidence to prove his case? Conversely, when is it the responsibility of the defendant to produce evidence to rebut the plaintiff's evidence? Mr Sham seemingly contended for the position whereby the burden laid squarely and irreversibly with the plaintiff; while this is not entirely incorrect, it would be helpful to clarify the differences between the legal and the evidential burden.

58 The term "burden of proof" is more properly used with reference to the obligation to prove. There are in fact two kinds of burden in relation to the adduction of evidence. **The first, designated the legal burden of proof, is, properly speaking, a burden of proof, for it describes the obligation to persuade the trier of fact that, in view of the evidence, the fact in dispute exists. This obligation never shifts in respect of any fact, and only "shifts" in a manner of loose terminology when a legal presumption operates. The second is a burden of proof only loosely speaking, for it falls short of an obligation to prove that a particular fact exists. It is more accurately designated the evidential burden to produce evidence since, whenever it operates, the failure to adduce some evidence, whether in propounding or rebutting, will mean a failure to engage the question of the existence of a particular fact or to keep this question alive. As such, this burden can and will shift.**

59 The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Since the terms "proved", "disproved" and "not proved" are statutory definitions contained in the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"), the term "proof", wherever it appears in the EA and unless the context otherwise suggests, means the burden to satisfy the court of the existence or non-existence of some fact, that is, the legal burden of proof: see ss 103 and 105 of the EA. **However, this is not to say that the evidential burden, which is the burden to adduce sufficient evidence to raise an issue for the consideration of the trier of fact, does not exist. It exists as the tactical onus to contradict, weaken or explain away the evidence that has been led; there is no distinction between such tactical onus and the evidential burden.**

60 To contextualise the above principles, **at the start of the plaintiff's case, the legal burden of proving the existence of any relevant fact that the plaintiff must prove and the evidential burden of adducing some (not inherently incredible) evidence of the existence of such fact coincide. Upon adduction of that evidence, the evidential burden shifts to the defendant, as the case may be, to adduce some evidence in rebuttal. If no evidence in rebuttal is adduced, the court may conclude from the evidence of the plaintiff that the legal burden is also discharged and making a finding on the fact against the defendant.** If, on the other hand, evidence in rebuttal is adduced, the evidential burden shifts back to the plaintiff. If, ultimately, the evidential burden comes to rest on the defendant, the legal burden of proof of that relevant fact would have been discharged by the plaintiff. **The legal burden of proof - a permanent and enduring burden - does not shift. A party who has the legal burden of proof on any issue must discharge it throughout.** Sometimes, the legal burden is spoken of, inaccurately, as "shifting"; but what is truly meant is that another issue has been engaged, on which the opposite party bears the legal burden of proof.

(emphasis added)

26 Applying the above principles, on whom does the *legal* burden of proof lie in this case? It is clear to us that it was for the Applicants to discharge their legal burden on a balance of probabilities (which is the standard of proof in civil cases) to prove that the Respondent's charges and conditions were *not* reasonable. The evidential burden would be initially on the Applicants to establish this on a balance of probabilities. If it

achieved this, the burden would shift to the Respondent to try at least to equalise the probabilities. We are supported in our analysis by s 163(6) of the Act which provides guidance as to how the Tribunal is to approach such applications procedurally:

(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 —

(emphasis added)

27 Section 163(6) clearly provides that the Tribunal must be satisfied that the Applicant's claim is **well-founded** before it interferes with the terms of the licence in question. To put it in another way, the Applicants must satisfy the legal burden of proving that their claim that the charges and conditions were not reasonable was well-founded; the legal burden lay not on the Respondent to show that the charges and conditions of the licence were reasonable. This was also the position of the Tribunal in *Singapore Broadcasting Corporation (SBC) v The Performing Right Society Ltd (Composers and Authors Society of Singapore Ltd, Third Party)* [1991] SGCRT 1:

SBC accepts that under section 163(2)(b), it has the burden of proof in establishing that the PRS licence scheme is unreasonable in its application to SBC. The Tribunal must be satisfied that the case of the applicant (SBC) is well founded before it can exercise its powers under section 163(6). If the Tribunal is so satisfied, then it is obliged to make an order specifying the charges, if any, and the conditions, that are considered reasonable in the circumstances in relation to the applicant.

...

The central issue before this Tribunal is whether the PRS licence scheme is unreasonable in its application to SBC. The burden of proof in this respect is on SBC. In the event that this Tribunal is satisfied that the case on unreasonableness is well founded, it is then obliged to make an order stipulating the charges, if any, and the conditions, that are considered reasonable to the applicant. The reasonableness of the PRS licence scheme must be looked at in the particular circumstances of the case at hand. This Tribunal accepts that reasonableness is not a concept whose parameters can be defined with mathematical precision. It is a matter which is to be looked at broadly and whose essence is fairness to the parties. Viewed in this manner many diverse factors will be relevant including flexibility and practicality. It is possible that within this concept of reasonableness, a number of different types of schemes might be accommodated. For convenience, this Tribunal proposes to deal first with the reasonableness of the local valuation scheme proposed by SBC. **The central issue, however, remains whether SBC can show that the PRS licence scheme is unreasonable in its application to SBC. Only when that has been proven will it be necessary for this Tribunal to consider variations or alternative schemes.** The SBC local valuation scheme is considered first, simply as a matter of convenience.

(at paragraphs 10.1 and 13 of the judgment; **emphasis added**)

28 This Tribunal is in full agreement with the approach of the Tribunal in *SBC v The Performing Right Society Ltd*.

29 The Respondent put forth a related argument and submitted that there was a *presumption* of reasonableness since the licence was in force. With respect, this contention was without any legal basis. Legal or evidential presumptions (eg the statutory presumptions under the Misuse of Drugs Act (Cap 185), a presumption of a resulting trust where a person makes a gratuitous transfer of property to another person's

name) did not arise in this case. Such was also the position of the Tribunal in *Sunvic Production Pte Ltd v Composers and Authors Society of Singapore Ltd (COMPASS)* [1993] SGCR 1 at paragraph 9.1 in relation to an application under s 161(1):

The choice is between varying or confirming the scheme. In so deciding, the criterion to be applied is one of reasonableness. **We are of the view that in the case of a reference under s 161 there is no presumption in favour of either.** The matter is within the discretion of the Tribunal.

(emphasis added)

30 The Copyright Tribunal in the United Kingdom (UK), when determining similar applications brought under ss 119, 121 and 126 of the Copyright, Designs and Patents Act 1988 (an application under s 119 of the UK Act is similar to that under s 161(1) of the Singapore Act) in the case of *The British Phonographic Industry Ltd and Others v Mechanical-Copyright Protection Society Ltd and Others* (CT84 – 90/05) held a similar view to this Tribunal on the issues of burden of proof and the operation of presumptions:

46. **There is no presumption in favour of the referred scheme** nor is there a presumption that a referred scheme should be varied. ... On an application to the Tribunal, **the burden of proof is on the applicant to show that the particular licence offered to him is unreasonable; ...**

(emphasis added)

31 In any event, whether such an evidential presumption within the context of applications under the Act arises does not change the position that the legal burden of proof rests on the Applicant. In *Tang Siu Lan v Pua Ai Seok and others* (OS 423 of 2000, unreported), Lai Kew Chai J succinctly explained the relationship between such presumptions and the burden of proof, and that the former is just an evidential rule:

10 In my view the correct analysis was that a resulting trust arose in favour of the 4th defendant upon his transfer of his interest under the joint tenancy without consideration to the 1st to 3rd defendants who held his equitable interest upon trust for him. **Here, equity raised a presumption that the 4th defendant did not intend to make a gift of his interest to the 1st to 3rd defendants.** It was asserted and therefore must be accepted by the 1st to 3rd defendants and the 4th defendant that the so-called consideration of \$600,000.00, which was stated in the Transfer signed by the 4th defendant in favour of the 1st to 3rd defendants, was purely for the purpose of ascertaining the stamp duty. **I thought equity in this case, as was usually the case, did not presume that the 4th defendant had intended to make a gift to the 1st to the 3rd defendants. At the bottom of it, this was simply an evidential rule. The burden of proving that the transfer amounted to a gift rested with and was upon the 4th defendant. On the evidence before me, the 4th defendant did not adduce any evidence to discharge that burden of proof.**

(emphasis added)

(b) Whether the charges for the KOD licence imposed by the Respondent are not reasonable in the circumstances of the case, as stipulated in s 163(2) of the Act

32 Having determined that the Applicants bore the legal burden to prove their case, the next question was whether the Applicants had proved to the satisfaction of the Tribunal that the charges for the KOD licence imposed by the Respondent were not reasonable in the circumstances of the case.

33 Before we delve into the evidence before us, it was important to address two preliminary issues: first, the definition of “reasonable” under the Act and second, the extent to which the usual evidential principles and rules apply to proceedings before the Tribunal.

(i) *The test of "reasonableness"*

34 The Tribunal has in two earlier decisions expounded on the meaning of "reasonable" within the context of the Act. In *SBC v The Performing Right Society Ltd*, the Tribunal opined thus in the context of s 163(2):

Mr Walton, submitted, on behalf of SBC, that a licence can only be held to be "reasonable" if reasons could be given for it. Reasonable means "for reasons". The PRS took a different view. **They argued that "reasonable" does not necessarily mean "logically rational". This Tribunal was urged to look at the matter broadly from the point of view of what was fair or equitable. In particular, Mr Fysh submitted that reasonableness could not in this context be assessed on a purely mathematical basis. This Tribunal agrees with the submissions of PRS on this point.** The Shorter Oxford English Dictionary (3rd.Ed.) defines reasonable as:

"A. adj 1. Endowed with reason. Now rare. 2. Having sound judgement; sensible, sane. Also, not asking for too much. ME. b. Requiring the use of reason (nonce-use). SHAKS. 3. Agreeable to reason; not irrational, absurd or ridiculous ME. 4. Not going beyond the limit assigned by reason; not extravagant or excessive; moderate ME. b. Moderate in price; inexpensive 1667. 5. Of such an amount, size, number, etc., as is judged to be appropriate or suitable to the circumstances or purpose, late ME. b. Of a fair, average , or considerable amount, size, etc."

It is the view of this Tribunal that "reasonable" in the context of section 163(2) bears the broader meaning of "fair". In this sense, it is similar to the task of evaluating "equitable remuneration" under other licensing sections of the Copyright Act < see for example section 158(3)(a) > . **This Tribunal also accepts that "reasonableness" must be assessed in the particular circumstances of the position of the parties in Singapore. This Tribunal accepts that it is not bound by any decision on royalty rates from other jurisdictions. These decisions may however be of some help for comparative purposes, although the Tribunal is reminded that the circumstances prevailing in other countries may not be the same as in Singapore.**

...

In determining the law, SBC argued that commonsense and logic should be the guidelines to follow. In the absence of binding precedents, commonsense is undoubtedly a good indicator of reasonableness . This Tribunal also accepts as being compatible with the determination that "reasonable" bears the meaning of "fair".

...

The reasonableness of the PRS licence scheme must be looked at in the particular circumstances of the case at hand. This Tribunal accepts that reasonableness is not a concept whose parameters can be defined with mathematical precision. It is a matter which is to be looked at broadly and whose essence is fairness to the parties. Viewed in this manner many diverse factors will be relevant including flexibility and practicality. It is possible that within this concept of reasonableness, a number of different types of schemes might be accommodated.

(at paragraphs 10.2 and 13 of the judgment; **emphasis added**)

35 We adopt the above views of the Tribunal. In the later case of *Sunvic Production Pte Ltd*, the Tribunal (adopting the definition of reasonableness of the Tribunal in *SBC v The Performing Right Society Ltd*) again reiterated that what is reasonable is not to be decided on a purely mathematical basis, this time in the context of an application under s 161 of the Act:

We also adopt the definition of reasonableness accepted by the Copyright Tribunal in *SBC v PRS* [1991] FSR 573 at 593 to 594. **In essence, "reasonable" means "fair" or "equitable". Reasonableness is not something which can be assessed on a purely mathematical basis. We also accept that within the context of "reasonableness" a number of different schemes might be accommodated. A number of different royalty rates might also fall within the scope of what is reasonable. Reasonableness must be looked at in the context of local circumstances. Evidence as to terms and rates in other jurisdictions whilst useful for comparative purposes are not binding. Further, where the circumstances in those jurisdictions are different they may not even be useful as comparisons.**

(at paragraph 9.1 of the judgment; **emphasis added**)

36 Essentially, what is "reasonable" means what is fair and equitable having regard to the particular factual matrix at hand, and entails a value judgment which cannot be arrived at through the application of a rigid mathematical formula. Instead, what is reasonable is to be determined by looking at the circumstances of the position of the parties in Singapore. As for the position in other jurisdictions, such evidence may serve as a useful guide for the purposes of comparison, although they would need to be regarded with circumspection as the prevailing conditions in those jurisdictions may be very different from those in Singapore. In the absence of binding precedents, commonsense is a good indicator of reasonableness.

37 In determining that which is "reasonable", what are some of the factors which are to be looked at? To this, we turn to the practices of equivalent Tribunals in Australia and the UK for guidance. The Copyright Tribunal of Australia (it should be noted that Singapore's Copyright Act is largely modeled on the Australian Copyright Act 1968 and not on its English equivalent) has, in the case of *Reference by Phonographic Performance Company of Australia Limited* [2007] ACopyT 1, laid down some of the factors to be considered when considering a reference brought to the Tribunal by the licensor under s 154(1) of the Australian Copyright Act 1968 (to consider, among other matters, the reasonableness of the licence fees imposed for the use of sound recordings in public) which proposes to bring a licence scheme into operation, and which both the Applicants and the Respondent cited and submitted can be adopted by this Tribunal:

11 In determining whether a proposed scheme, and the licence fee payable under it, are reasonable, a number of approaches might be adopted. The approaches include the following, which may overlap to a certain extent:

- Market rate: the rate actually being charged for the same licence in the same market in similar circumstances.
- Notional bargain rate: the rate on which the Tribunal considers the parties would agree in a hypothetical negotiation, between a willing but not anxious licensor and a willing but not anxious licensee.
- Comparable bargains: bargains not in the same market but sufficiently similar to such a notional bargain as to provide guidance to the Tribunal.
- Judicial estimation: the rate determined by the Tribunal after taking into account a range of matters such as:

- previous agreements or negotiations between the parties;
- comparison with other jurisdictions;
- comparison with rates set by other licensors, capacity to pay, value of the copyright material, the general public interest and the interests of consumers; and
- administrative costs of a licensing body (see *Audio Visual Copyright Society Ltd v Foxtel Management Pty Ltd* (No. 4) 68 IPR 367 at [131] and [142].

12 The Society contends, in essence, that there is no market rate or comparable bargain available in the present case. The Tribunal's approach, therefore, must be a combination of notional bargain rate and judicial estimation. It may be that the latter includes the former.

38 The factors set out by the Tribunal in the above case were endorsed by the Australian Copyright Tribunal in the recent case of *Reference by Phonographic Performance Company of Australia Limited (ACN 000 680 704) under Section 154(1) of the Copyright Act 1968* [2010] ACopyT 1.

A survey of the practice of the Performing Right Tribunal (the predecessor to the Copyright Tribunal prior to 1988) and the Copyright Tribunal in the UK suggests a similar approach. The learned authors of *The Modern Law of Copyright and Designs* (3rd Edition, Butterworths, 2000) have usefully summarised the approach of the two Tribunals in assessing the proper tariff over the years:

26.17 Most references made to the Performing Right Tribunal and the Copyright Tribunal in relation to licensing schemes have related to the royalties or tariff to be paid by the licensees within the scheme. **In assessing the proper tariff the Tribunal has adopted the principle that the proper rate – in most circumstances – is that which would be negotiated between a willing licensor and a willing licensee. Relevant considerations include the value of the copyright music to the music user's business and the need of the collecting societies to exploit their repertoire. In arriving at a rate the Performing Right Tribunal usually started from an existing tariff to see whether it represented a proper assessment of the market value at the time it was negotiated and, if so, whether there had been a material change in the circumstances since that date and the date of the reference. ...**

...

The Tribunal ... turned to **a consideration of possible comparables, such as existing royalty rates paid by other types of users or of rates paid in other countries by users for similar rights.** This was the approach adopted by the Copyright Tribunal in *British Airways plc v Performing Right Society Ltd* which concerned the tariff set by the PRS for the use of music on aircraft. The Tribunal considered UK comparables from other businesses, in particular cinemas, as well as comparables for airlines registered in other countries.

26.18 The PRS on a number of occasions has suggested a tariff calculated as a percentage of the actual takings of the copyright user as it considers that this is the only true way of reflecting the actual use being made of its repertoire. The disclosure of such figures was, not unnaturally, resisted by the copyright users and in such cases the Tribunal initially imposed a tariff calculated in accordance with a formula, specially devised to meet the case, which yielded approximately the same amount in revenue as that based on actual takings. Individual licensees under the scheme were also given the option, after notification to the PRS, of applying a percentage based upon their actual takings if this yielded a lower figure than the formula. The Tribunal stated that the licensee was in a sense to be regarded as paying a

premium for the privilege of withholding his trading figures. In a more recent case, however, the Tribunal regarded the fear of inadvertent disclosure of trading figures by the PRS as having proved unfounded and fixed the tariff as a percentage of actual receipts. **It is clear that revenue can only be used as a basis for calculation of a tariff where there is an adequate nexus between the use of music and revenues earned.**

(emphasis added)

39 This Tribunal, like both the parties before us, came to the view that the formulation of the guiding principles and factors in the case of *Reference by Phonographic Performance Company of Australia Limited* [2007] ACopyT 1 were appropriate to the case at hand and in line with the practice of our Copyright Tribunal, as well as the comparable Tribunal in the UK. In assessing the reasonableness of the charges and mode of payment in the matter before us, reference was made to these factors.

(ii) *The extent to which the usual evidential principles and rules apply to proceedings before the Tribunal*

40 As would become apparent later in the judgment, the Tribunal's decision rested ultimately on the evidence (or lack thereof) presented before us. Both the Applicants and the Respondent made numerous averments and assertions which, unfortunately, were not supported by evidence. It was hence important for us to first consider the question if the Tribunal could make a finding that the quantum of charges of a licence to which s 163 of the Act applies were "not reasonable in the circumstances of the case" *despite* the dearth of evidence. This question stemmed from the provision in s 173 of the Act, which stipulates that the Tribunal shall not be bound by the Evidence Act (Cap 97):

In proceedings before the Tribunal –

...

(b) the Tribunal shall not be bound by the Evidence Act (Cap. 97); and

(c) the proceedings shall be conducted with as little formality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit.

(emphasis added)

41 The question then arises as to the extent to which the Tribunal, sitting as an administrative tribunal, can depart from the usual evidential principles and rules which bind the adversarial process of judicial proceedings in a court of law.

42 To this end, useful guidance can be drawn from the position taken by the Australian Copyright Tribunal in two cases which were brought to our attention by the Respondent's counsel: *Reference by Australasian Performing Right Association Ltd; Re Australian Broadcasting Corporation* [1985] 5 IPR 449 (*Ref by APRA; Re ABC*) and *Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd & Ors (No 3)* [2005] ACopyT 1.

43 Section 164 of the Australian Copyright Act 1968 sets out the procedure before the Copyright Tribunal, the wording of which is *pari materia* with s 173 of our Act:

In proceedings before the Tribunal:

(a) the procedure of the Tribunal is, subject to this Act and the regulations, within the discretion of the Tribunal;

(b) the Tribunal is not bound by the rules of evidence; and

(c) the proceedings shall be conducted with as little formality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit.

44 In the case of *Ref by APRA; Re ABC* at 463 – 464, the Tribunal, in interpreting the scope of s 164, opined that the mere fact that it was not bound by the rules of evidence did not mean that it should not base its decisions on the material before it:

We do not sit as a court of record but as an administrative tribunal. Nevertheless, the parties have filed detailed statements of their cases and also points in support of those cases; **each has led extensive evidence. The Tribunal's power to call evidence without the consent of both parties is at least doubtful; cf ss 167(2) of the Act. In any event, it would be quite impractical for it to do so.** It is therefore appropriate, in our opinion, to apply by analogy what has been said in the authorities to which we have referred. No reference to any potential infringement of the Trade Practices Act was made by the ABC in its case or in its points in support of that case **or, at least in any direct way, in the evidence.** As we have said, no mention of the matter was made until counsel for the ABC embarked upon his final address. The final address of counsel for APRA was then complete, although, of course, he was afforded a reply.

The authorities referred to establish that, while it is necessary that the Tribunal consider a potentially relevant illegality that appears clearly to arise on the face of the evidence, it is another thing altogether to suggest that the Tribunal will lightly infer illegality or make findings that serious allegations have been established **unless the evidence is clear and cogent.**

Section 164 of the Copyright Act provides that in proceedings before it, the tribunal is not bound by the rules of evidence. However, we adopt what was said by the Tribunal in the *WEA Records* case (48 ALR at p 119):

"Counsel for the record company accepted that not all the relevant evidence was available in relation to the trade practices issues which had been raised. It was suggested that s 164 could assist the Tribunal in such a situation. In our opinion the mere fact that the Tribunal is not bound by the rules of evidence does not mean that it should not base its decisions on the material before it."

Thus a party making serious allegations, such as are involved in the ABC submissions, must substantiate them and not rely on generalisations or assertions unsupported by the evidence or other material before the Tribunal.

(emphasis added)

45 Similarly, in the *Foxtel Management* case, the Australian Copyright Tribunal took the view that the stipulation in s 164 does not mean that the Tribunal must, over objection, receive any evidence that is tendered before it which would not have been admitted under the usual rules of evidence:

5 Section 164 of the Act provides that in proceedings before the Tribunal, the procedure of the Tribunal is, subject to Act and the regulations, within the Tribunal's discretion, and that the Tribunal is 'not bound by the rules of evidence'. Similarly, s 4 of the Evidence Act 1995 (Cth) (the 'Evidence Act') makes it clear that the Evidence Act does not apply to the Tribunal. **But these provisions do not show that the rules of evidence and the provisions of the Evidence Act may not prove useful guidance for the Tribunal.**

6 A **statutory provision that an administrative tribunal is not bound by the rules of evidence does not signify that the tribunal must, over objection, supinely receive any evidence that is tendered before it:** cf *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 (*`Pochi'*) at 492-493. **Indeed, if the tribunal concludes that certain evidence tendered is not `evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding', the tribunal will not be at liberty to reach a decision in reliance on that evidence, and, therefore, objection to it having been taken, the tribunal should not admit it;** cf *Pochi* at 492-493, and cases which Brennan J's statement of principle *Pochi* has been followed or cited with approval, such as *Rodriguez v Telstra Corp Ltd* [2002] FCA 30 at [25]; *Hehir v Financial Advisers Australia Pty Ltd* [2002] QSC 92 at [18]; *Vouris, Re; Epromotions Australia Pty Ltd v Relectronic-Remech Pty Ltd (in liq)* [2003] NSWSC 702; (2003) 177 FLR 289 at [129]- [131]. The words quoted in the last sentence constitute the familiar definition of `evidence that is relevant in a proceeding' found in s 55(1) of the Evidence Act. (We acknowledge that, because of the absence of pleadings, it may sometimes, particularly at an early stage of a hearing, be less clear before an administrative tribunal than before a court, what the `facts in issue' are.)

7 **Similarly, in our view the Tribunal can, within its statutory discretion as to its procedure, refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:**

- `(a) be unfairly prejudicial to a party; or**
- (b) be misleading or confusing, or**
- (c) cause or result in undue waste of time' (cf Evidence Act, s 135).**

8 In so far as Mr Delany, a non-director, **purports to state in general and conclusory terms that Foxtel's board of directors has `always considered' the amount of equitable remuneration to be of a certain general dimension and has not focused on larger figures, we are clearly of the view that we would not be assisted at all by that evidence. In the absence of minutes or other evidence of the proceedings at meetings of the board of directors, or of evidence of the basis of Mr Delany's knowledge of the board's deliberations, this part of Mr Delany's testimony would carry no weight for us.**

(emphasis added)

46 Similarly, in the UK case of *The British Phonographic Industry Ltd and Others v Mechanical-Copyright Protection Society Ltd and Others*, the Tribunal exercised its discretion in determining reasonableness "in the light of the evidence" [note: 13].

47 Like the equivalent tribunals in Australia and the UK, this Tribunal must arrive at a determination concerning the reasonableness of the charges and conditions and by logical extension, whether the Applicant's claim is "well-founded", based on the evidence tendered and submissions put forth by parties before the Tribunal. Of course, the Tribunal does not need to accept all the evidence and submissions tendered, so long as it is satisfied that the burden of proof in relation to whether the claim is well-founded has been met based on the available evidence and submissions.

48 We further agree with the stance taken by the Australian Copyright Tribunal spelt out in the cases of *Ref by APRA; Re ABC and Foxtel Management* in respect of the applicability and usefulness of rules of evidence despite the express legislative provision that the Tribunal is not bound by the rules of evidence and the Evidence Act.

49 At the end of the day, the Tribunal must be mindful to observe the principle of procedural fairness, which is fundamental to any modern concept of a fair hearing. Embodied in the concept of procedural fairness or justice are the well-established precepts that a tribunal adjudicating in the matter must allow all parties to be heard and that it must not at any time descend into the arena as that may impinge on the Tribunal's perceived ability to be completely impartial. General rules of evidence, coupled with the guiding principles enunciated in the two Australian decisions cited above, guard against any breach of procedural fairness and any allegation of arbitrariness in respect of the Tribunal's decision-making faculty.

50 Our attention was brought to two English precedents which suggest that the Copyright Tribunal may determine that a charge is unreasonable for *reasons which depart from those suggested by the parties*, and that the Tribunal is not circumscribed by the proposals of the parties.

51 In *The Independent Television Companies Association Ltd and anor v The Performing Right Society Ltd* (PRT 38/81), the Performing Right Tribunal considered a licence scheme setting out the conditions upon which the Performing Right Society (PRS) was prepared to license the performance of works from the PRS repertoire of music works (1) on the originator's television channel and (2) for public performance when the performance was broadcast.

52 The originators argued that the royalty should be based on the amount paid under previous agreements, with various adjustments to take into account changes in the retail price index, changes in the amount of music broadcast by the companies, changes in the number of television licences and in the repertoire of the PRS. The PRS argued that the royalty should be linked to the net advertising revenue of the companies. Notably, the Tribunal *did not confine itself to the metric suggested by the parties in ascertaining the royalty to be paid*. While agreeing in part with the originators' suggestion that the previous levels of royalty, the changes in the retail price index, the amount of music broadcast by companies, and changes in the number of television licences and in the repertoire of the PRS were all factors relevant to determination of the proper royalty, the Tribunal concluded that a few other factors were relevant [note: 14]:

53 The Tribunal also suggested that the metric of assessment was less important than the ultimate result: "it is the result, not the mechanism, which is of prime significance" [note: 15].

54 The Copyright Tribunal subsequently approved of the following *dictum* from the above case in *British Airways plc v Performing Right Society Ltd* (CT 45/97): "the real issue is not the basis of calculation but the result of the calculation" (at [51]). British Airways argued that the tariff set by the PRS for the use of music on aircraft was unreasonable because it failed to take into account (1) the "switch-off period" (where in-flight entertainment was not available), (2) the "usage factor" (not every passenger used the entertainment system), and (3) the "non-PRS works factor" (not every work used by British Airways was part of the PRS repertoire). The Tribunal noted that, nonetheless, British Airways did not claim that the US Tariff, which did not take into account any of these factors, was unreasonable. Hence the Tribunal opined that "if the price is right then the basis of calculation ceases to be unreasonable...The basis of calculation is a subsidiary issue". Ultimately, the Tribunal imposed a simplified tariff based on (A) a flat rate per passenger carried for takeoff and landing music and (B) a standard rate charge per passenger using the in-flight entertainment system for in-flight entertainment music. It was notable that (A) and (B) bore no relation to the metric articulated by British Airways in its case.

55 Thus, the English position seems to be that the Tribunal may vary a licence scheme charge even if it does not accept the rubric of a "reasonable" charge put forward by the applicant. As the Tribunal in the *British Airways* case opined:

We do not regard our jurisdiction as circumscribed by the proposals of the parties. It is not just a question of choosing between the two proposals. We are under a statutory duty to determine terms which are reasonable in all the relevant circumstances.

56 Be that as it may it should be emphasised that although the two English precedents suggest that the Copyright Tribunal may determine that a charge is unreasonable for *reasons which depart from those suggested by the parties*, and that the Tribunal is not circumscribed by the *proposals* or *arguments* of the parties, a careful consideration of the English precedents would reveal that the decisions of the UK Tribunal in the said cases were, at the end of the day, still *founded on the evidence put forth by the parties themselves*. As highlighted earlier, the importance of adducing relevant evidence of sufficient weight would become apparent as we delved into the nature and probative value of the evidence which was presented by parties at the hearing to support their averments and submissions.

57 With this in mind, it is to the evidence which we now turn.

(iii) *Whether the charges for the KOD licence imposed by the Respondent are not reasonable in the circumstances of the case, as stipulated in 163(2) of the Act*

58 The Applicants called four witnesses of fact to testify in support of their Application:

- Per Choon Ching (AW1), a Director of SKID Pte Ltd, a company which used to provide KOD systems to karaoke business establishments.
- Chia Sze Chang (AW2), who was employed by all four Applicants as a Manager.
- Quek Kah Pok (AW3), a Director of Dynasty Classic KTV Pte Ltd.
- Ng Teck Ho (AW4), a Manager and Consultant for Tuberose KTV & Niteclub Pte Ltd, Aurora De Club Pte Ltd and Super Star KTV Club.

59 The Respondent adduced evidence from three witnesses of fact:

- Tan Eng Wah (RW1), the Managing Director of the Respondent
- Yam Kok Yew (RW2), the Senior Licensing Manager of the Respondent
- Chua Kiam Wee (RW3), the Operating Manager of IDM, the KOD supplier of the Applicants.

60 No expert witnesses were called. This was in contrast to the other cases brought before the Tribunal (referred to above), as well as cases before the Copyright Tribunals in Australia and UK, where extensive expert evidence was called and tendered to support the case of the respective parties, particularly to address, *inter alia*, considerations in relation to the local market rate and conditions, notional bargain rate, the rates and practices in other jurisdictions with a similar market, capacity of the licensee to pay, evidence on revenue and other accounts of the respective parties, and the value or worth of the copyright material in question.

61 The Applicants contended that the following factors were to be taken into account in determining if the KOD licence fees were reasonable or otherwise:

- (1) The value and/or rights granted by the Respondent's KOD licence;
- (2) The other relevant licence schemes in Singapore;
- (3) Other licences being collected for and on behalf of record companies for rights pertaining to cinematograph films;

- (4) The charges by COMPASS for a similar licence scheme (for KOD systems) covering lyrical and musical works;
- (5) Whether the charges payable should be dependent on seating capacity or if it should be a flat fee;
- (6) Other similar licence schemes found in other jurisdictions;
- (7) The number of other recording companies not under the Respondent producing cinematograph films;
- (8) The market share of cinematograph films under the Respondent's repertoire;
- (9) The effect the Tribunal's decision (regarding the reasonableness of the Respondent's licence scheme) may have on other licence schemes, including potential licence schemes; and
- (10) Whether the Applicant's business has alternatives or requires the use of the KOD system and cinematograph films under the Respondent's repertoire;

62 The Tribunal examined the evidence adduced and arguments raised in relation to each factor.

(1) The value and/or rights granted by the Respondent's KOD licence

63 The gist of the Applicants' argument is that the Agreement gives the Applicants a contractual right to reproduce only one copy of the cinematograph film in the form of a karaoke version of a music video and nothing more. It does not grant the Applicants any rights for the use of the *underlying* musical works and lyrics. In addition, the Applicants have to pay the supplier of the KOD system separately for the rental of the KOD system and to download the music videos into the KOD system [note: 16]. These facts were not in dispute.

64 The Applicants did not raise any evidence to buttress the contention that the value or actual worth of the copyright material covered under the KOD licence is so restricted that it is not commensurate with the licence fees set out in Category A of the Tariffs Schedule. Without any evidence on what the market rate is for the same kind of licence in the same market in similar circumstances or any other form of evidence to support the assertion, it would not be possible for the Tribunal to take this factor into account.

(2) The other relevant licence schemes in Singapore

65 It was not disputed that each of the Applicants pays or is liable to pay the following sums for the other four licences required (listed in paragraph 8 above) before karaoke facilities can be offered:

- A licence for the *public performance* of the cinematograph film obtained from RIPS:

\$8,300 per annum

- A licence for the reproduction of musical works and related lyrics obtained from COMPASS:

A flat fee of \$1,000 per annum [note: 17]

- A licence for the *public performance* of musical works and related lyrics obtained from COMPASS:

1st Applicant	\$7,278.60
2nd Applicant	\$5,458.95
3rd Applicant	\$7,278.60
4th Applicant	\$7,538.56

- A public entertainment licence issued by the Singapore Police Force:

1st Applicant	\$960.00
2nd Applicant	\$960.00
3rd Applicant	\$960.00
4th Applicant	\$1,200.00

66 Once again, aside from setting out the various rates of fees payable, no evidence was adduced as to how the Tribunal should assess the reasonableness or otherwise of the KOD licence fee at \$30,000 per annum in relation to the other types of fees. Without any evidence on the value or worth of the different types of rights administered by the other collecting bodies or societies (eg right for the public performance of cinematograph films and musical and lyrical works, right of reproduction of musical and lyrical works), as well as the basis for arriving at the respective fees and rates, the Tribunal cannot begin to evaluate the reasonableness of the quantum of the fees imposed by the Respondent as compared to the other collecting bodies and for other types of licences required.

67 As for licences that permit reproduction of cinematograph films – which is the subject-matter of this dispute – the Tribunal was shown the application forms of Horizon Music Entertainment Pte Ltd^[note: 18] and K-Net Music Pte Ltd^[note: 19] showing the annual licence fee of \$7,000 imposed by Horizon Music Entertainment Pte Ltd (which represents four record companies) which would be payable by the Applicants and the annual licence fee of \$14,500 imposed by K-Net Music Pte Ltd (which represents three record companies) which would be payable by the Applicants, without more (such as the number of songs in each company's repertoire). This information did not help either party to determine the reasonableness of the Respondent's charges or otherwise. No witnesses from either of these two companies were called to explain how the charges were arrived at. Even if – and this is a big assumption – the charges of these two companies were based on the number of record companies represented by these companies, there is a huge discrepancy between the rates: Horizon Music Entertainment Pte Ltd's licence fee works out to \$1,750 per record company, whereas that of K-Net Music Pte Ltd works out to \$4,833 per record company. Neither the Applicants nor the Respondent sought to explain the existence of this discrepancy. Any comparison made by the Tribunal purely on the number of record companies represented by each company would not be a meaningful one as information or evidence on other factors which needed to be considered such as the number of songs in the repertoire of each company and the value or worth of the copyright material was not elicited. Such information was not made available to the Tribunal.

(3) Other licences being collected for and on behalf of record companies for rights pertaining to cinematograph films; (4) The charges by COMPASS for a similar licence scheme (for KOD systems) covering lyrical and musical works; and (5) Whether the charges payable should be dependent on seating capacity or if it should be a flat fee.

68 The arguments on this point are related to those raised in point (2) above. The Applicants' submissions were detailed in their Closing Submissions:

43 It is humbly submitted that the Tribunal must take into account existing licence schemes formulated for and on behalf of Record Companies pertaining to cinematographic films. **This is because the Tribunal must be clear that there must be no overlapping of rights between the Respondents' KOD Licence Scheme and the other licence schemes by Record Companies. An understanding of the co-relation of these licence schemes is also an important consideration.**

44 Presently, as set out above, RIPS collects the sum of \$8,300.00 from the Applicants for the Public Performance of cinematographic films on behalf of the Recording Companies. **The collection of such fees for the Public Performance of cinematographic films has been in place for years. It is humbly submitted that these fees go towards partly funding the production costs of these cinematographic films.** As such, ... statements that the Respondents' KOD Licence Scheme must take into account the production costs of the cinematographic films are flawed. Cinematographic films have been produced for years and thereafter the fees for its public performance have been formulated. However, the Respondents' KOD Licence Scheme is a relatively new event.

...

48. In addition to that, the Applicants cannot be charged for 2 licences for the same effect, i.e. the transmission of the cinematographic films on the televised screen.

49 **It is further submitted that the fees payable under the RIP's Licence Scheme is correctly based on capacity, as this is for public performance, i.e. the bigger the place the more chances for a larger portion of the public to enjoy the performance. Whereas the Respondents' KOD Licence Scheme is for the use of 1 copy of their cinematographic films found in the KOD Server. It should not be dependent on the size of the place, because no matter how big the size is, there is only the use of 1 copy of the said films.**

(emphasis added)

69 The arguments of the Applicants were attractive at first blush. However, no evidence was led on any of the factual assertions upon which the arguments were based. There was no evidence on the "co-relation of these licence schemes". Witness AW2 asserted in his affidavit of evidence-in-chief that

Even if we are liable to pay licence fees for the KOD System, the fees should be a proportion of the fees for the Public Performance Licence. It should not be more than 3 times the amount of the Public Performance Licence fee instead.

(at paragraph 13)

70 The said licence fee for the public performance of the cinematograph film is payable to RIPS, the amount of which is, according to the website printout [note: 20], dependent on the type of establishment and the seating capacity (similar to the Respondent's charging model). Aside from AW2's opinion on this (who was neither in a position to provide expert evidence on this nor did he represent himself to be an industry expert in the area of charging models of such licence fees and the market rates and practices in this regard), there was

no other evidence led to support his assertions. As AW2 testified during cross-examination, his statement that the KOD licence fees should be pegged as a proportion of the public performance licence fee was his personal opinion from the point of view as a layman [note: 21]. None of the witnesses for the Applicants or the Respondent were in the position to testify on the basis of the fees imposed by RIPS and if the fees went towards partly funding the production costs of these cinematograph films. Any opinion offered by the parties or their counsel on the correctness of the basis of RIPS' licence fees (see paragraph 49 of the Applicants' Closing Submissions) or the basis of the other licence schemes was at best conjecture as none of the witnesses knew the considerations and factors which went into the pricing of these fees [note: 22]. The Tribunal also noted that the position adopted by and the evidence of Witnesses AW3 and AW4 (through their affidavits of evidence-in-chief and oral testimony given during the hearing) on this and all other aspects of their case was by and large identical to that of AW2 and hence would not be re-hashed here.

71 The same observation would apply in respect of the argument that a flat fee should be charged since COMPASS charges a flat fee for the reproduction of musical works and lyrics. In the Applicants' Closing Submissions, specific reference was made to the licence fee collected by COMPASS for the *reproduction* of musical works and related lyrics, which is set at a flat fee of \$1,000, as opposed to the licence fee for the reproduction of the cinematograph film charged by the Respondent, which is on a graduated scale depending on the type and seating capacity (for those falling under Category A) of the establishment. The comparison with the fee charged by COMPASS for the reproduction of musical works and related lyrics was a relevant one as both concerned reproduction rights of the same genre of works to which copyright attached. However, it was unfortunate that the Applicants failed to adduce more evidence on this point. It would have been helpful for the Tribunal's assessment if a witness either from COMPASS or who had first-hand knowledge of the workings and charging framework employed by COMPASS was called by either party to explain how the fees were arrived at, and if there was a correlation between the fees COMPASS charged for the twin rights of reproduction and public performance of a musical work and lyrics. There was also some evidence that in addition to the \$1,000 annual fee, COMPASS also charged \$3.00 for each song reproduced in the KOD system [note: 23], which suggested that the reproduction fee was not just a flat fee of \$1,000. As explained earlier with regard to point (2) above, without evidence on the structure and basis of the different types of licence schemes and rates, including the licence schemes administered by COMPASS [note: 24], the Tribunal could not begin to embark on a proper assessment of the reasonableness of the Respondent's charges as compared to the other schemes.

(6) Other similar licence schemes found in other jurisdictions

72 The Respondent placed before the Tribunal evidence from the websites of two foreign collecting societies which operate a similar business as the Respondent. The first is the licensing body in Malaysia, Public Performance (Malaysia) ('PPM'), which acts as a "one-stop licensing body" representing the recording industry. It issues licences for, *inter alia*, public performance and reproduction [note: 25]. Again, without the benefit of evidence from witnesses who know the workings of PPM, the operating and business environment Malaysia, the local market conditions and the basis for the stipulated licence fees, merely relying on the rates "plucked" from the Internet, without more, did not aid the Tribunal in its deliberations. As an example, and as the Applicants themselves argued [note: 26], from the website print-outs, it was not clear if the fees cover the public performance of music videos and sound recordings, as well as the reproduction of sound recordings.

73 The Tribunal made similar observations with regard to the website print-outs of Phonographic Performance (South East Asia) Ltd ('PPSDAL'). No witness who had sufficient knowledge of the circumstances prevailing in Hong Kong, which may not be the same as those in Singapore, was called. As such, the comparison with other jurisdictions in light of the lack of evidence of the operating conditions in those jurisdictions was not helpful (see *SBC v The Performing Right Society Ltd* and *Sunvic Production Pte Ltd*).

74 The Tribunal noted that all the documentary evidence presented before us showing information of the licence schemes in other jurisdiction and on which the Applicants relied was from the Respondent. Information and evidence on the *rates* of other licence schemes in Singapore was also largely drawn from internet downloads and application forms (some of which were undated and not completed) [note: 27]. In support of its Application, the Applicants did not adduce any other documentary evidence or called any witnesses who had the requisite industry knowledge or expertise to explain the basis for the rates and what the market practices

are in comparable situations. Neither was there cogent evidence adduced on the market rate, notional bargain rate and any comparable bargains, factors which are important in the Tribunal's determination of reasonableness or otherwise of the fees charged by the Respondent (see the guidance from *Reference by Phonographic Performance Company of Australia Limited* cited in paragraph 37 above). Such omission on the part of the Applicants to adduce such evidence (which we assumed must have been a considered one) led to the unfortunate consequence that insufficient evidence was brought to the table. Without concrete evidence on these critical aspects of the case to allow the Tribunal to make an objective and meaningful comparison, the Application could not be advanced merely on the documentary evidence put together through internet downloads, application forms and the like, coupled with submissions which were not backed up by objective evidence. In gist, there was simply no foundation of evidence on which to assess the strength of the Applicant's averments in respect of this and the earlier factors enumerated above.

(7) The number of other recording companies not under the Respondent producing cinematograph films; and (8) The market share of cinematograph films under the Respondent's repertoire

75 The Applicants submitted that the number of songs under the Respondent's repertoire as compared to the number of songs in the repertoire of other record companies for which the Respondent is not the collecting agent is a relevant consideration. This is so because the reasonableness of the Respondent's charges must be seen in the context that it does not have the majority or significant share of the cinematograph films available in the entire market. Witness AW1 testified that there are approximately more than 1,000 record companies which produce the type of cinematograph films in question and that there are more than 100,000 of such films in the Singapore market as at 2008. First, the weight to be accorded to AW1's testimony was doubtful as AW1's estimates were not backed by verified empirical data but solely by virtue of his limited personal knowledge – he stated in his affidavit of evidence-in-chief that his belief and estimate of the number of such films was based on work he undertook for one customer (Partyworld KTV Pte Ltd) [note: 28]. He also did not provide any basis for his statement that there were more than 1,000 record companies producing cinematograph films. Neither was he an expert in this aspect of the music and recording industry. His evidence was at best speculative. In any event, even if this specific fact was duly proved, there was still no empirical or other evidence for the Tribunal to assess if the rate of \$30,000 per annum imposed by the Respondent is reasonable by virtue of the fact that the Respondent's repertoire represents but a fraction of the entire market. The Tribunal cannot simply go by "gut feel" in such matters of assessment as that would smack of capriciousness and arbitrariness. The Tribunal has to make a value judgment ultimately on what is reasonable, but the exercise of that judgment must be grounded on available and cogent evidence.

76 A related point raised by both parties was the number of songs played by the Applicants each month out of the 50,000 or so [note: 29] cinematograph films downloaded on the KOD system. The Applicants asserted that about 400 – 800 of such films were "used" each month by each of them, although not all of these films were from the Respondent's repertoire [note: 30]. The Respondents, on the other hand, submitted that the figure was much higher at 2,000 or so per month and submitted a compilation from raw data extracted from the KOD system [note: 31]. Nothing could turn on this point, however, as no evidence was led as to why and how the number of cinematograph films "used" each month should be a relevant consideration in determining the reasonableness of the charges.

(9) The effect the Tribunal's decision (regarding the reasonableness of the Respondent's licence scheme) may have on other licence schemes, including potential licence schemes

77 The Applicants submitted that the Tribunal must consider the effect of its decision on other licence schemes, including potential licence schemes that may be formulated by other record companies to collect licence fees for the use of the reproduction of cinematograph films in the KOD system. They cited the practices of K-Net Music Pte Ltd and Horizon Music Entertainment Pte Ltd, which they asserted "have taken the cue from the Respondents to charge exorbitant rates, while only representing 3 and 4 Record Companies respectively" [note: 32]. Once again, and with respect, the assertion that the rates of the Respondent and the two other collecting agents are exorbitant was a bald one and unsupported by any evidence. We repeat our earlier observations on the nature and cogency of evidence adduced by the Applicants pertaining to the other arguments raised by the Applicants set out in the preceding paragraphs of this judgment.

(10) Whether the Applicant's business has alternatives or requires the use of the KOD system and cinematograph films under the Respondent's repertoire

78 The evidence adduced by the Applicants, particularly that of AW2 [note: 33], and which the Tribunal accepted, was that "they require the songs under the Respondents' repertoire to survive" and that "because of the advancement of technology, they need to use the KOD System to stream the films. This is not only in line with efficiency which the Patrons are accustomed to, but music videos now mainly come in digital form and are not available in hard copies or in discs. This is how the industry works now" [note: 34]. They hence argued that as the Respondent is in effect running a monopoly, they must not charge exorbitant rates. The Applicants further submitted that they do not have any alternative source of such karaoke videos which are vital to their business.

79 Unfortunately, this did not advance the Applicants' case for the reasons stated earlier – there was simply not an iota of evidence of probative value to suggest that the rates are exorbitant in the first place.

80 Having addressed all the factors put forth by the Applicants in support of their case, it would behove the Tribunal to make the following general observations with regard to the nature and probative value of the evidence adduced by the Applicants. The evidence presented by the Applicants was largely through the testimony of various persons connected with the karaoke business, including managers of the lounges, as well as the supplier of KOD systems. While they were largely consistent with one another, their testimony could not bring the Applicants across the required threshold. The managers gave evidence on what they thought was appropriate; reference was made to rates charged in other jurisdictions. The Applicants' counsel also suggested to Witness RW1 that as the production costs of the cinematograph films had already been factored into the licence fees for public performance, any further inclusion of production costs in the calculation of fees for the KOD reproduction licence would be tantamount to double-charging [note: 35]. However, all that testimony and suggestions could not take the Applicants very far. The Applicants' witnesses were giving speculative evidence, and at times, crossed over into giving opinions. While the Tribunal is not bound by the strict rules contained in the Evidence Act, such testimony was not sufficiently convincing as the witnesses were not shown to be appropriately versed in the conditions and requirements of the other jurisdictions referred to, or what was actually taken into account in charges for KOD and other related licences in Singapore and abroad. In the circumstances therefore, the Tribunal could give little weight to all of this.

81 It merits re-iteration that nothing was brought before the Tribunal to show how the rates were derived in other jurisdictions, how they were applied in practice, what the turnover of business was in other comparable businesses abroad, and what proportion of such turnover the charged rates would have been. Within Singapore itself, there was no evidence given of what comparable businesses would have been charged, nor whether these charges would have constituted a disproportionately high cost of business compared to other costs, taking into account the fact that these venues were primarily focused on music performance of some kind.

82 That being the state of the evidence adduced by the Applicants, the Tribunal had to come to the conclusion that the Applicants had not met the requirement that they show that the rates charged were unreasonable. The evidential burden was on them, and they had not brought enough into play to enable the Tribunal to come to that conclusion.

83 As the Tribunal concluded that the Applicants had not met the requirements under the Act, it was not necessary to go into detail into the evidence adduced by the Respondent. It would suffice to note that the totality of the evidence given by the other side was not sufficiently cogent or convincing either and the observations regarding the state of evidence adduced by the Applicants applied with equal force to the Respondent. But as the burden lay on the Applicants to bring into the hearing sufficient evidence to show that the rates were unreasonable, and they had not done so, the shortcoming in the position of the Respondent was in the present proceedings moot.

84 Be that as it may, although we would reiterate that our decision did not turn on the strength of the Respondent's evidence as we had already made the finding that the Applicants had not satisfied the evidential threshold in the first place and the Application would hence be dismissed on that score, we would make some observations on the probative value of the evidence placed before us by the Respondent for the sake of completeness.

85 The Respondent submitted that its KOD licence fees were reasonable for the following reasons:

(1) When compared to the prevailing market rate charged by Horizon Music Entertainment Pte Ltd and K-Net Music Pte Ltd, its fees are reasonable;

(2) The fees charged are comparable to KOD licence fees charged by collecting agencies across the region;

(3) The fees charged are reasonable when compared to the KOD licence fees charged by RIPS previously;

(4) The Respondent has to incur costs to administer the KOD licences, including paying the recording companies for the exclusive licences, and the profits earned by the Respondent are small;

(5) Intervention by the Tribunal is unnecessary as the amount of KOD licence fees are determined by market forces;

(6) The KOD licence fee of \$30,000 is not excessive as the Respondent has obtained KOD licences from 14 record companies, and there are savings if one party administers the collection instead of 14 separate record companies administering it.

86 These arguments were dealt with in turn.

(1) When compared to the prevailing market rate charged by Horizon Music Entertainment Pte Ltd and K-Net Music Pte Ltd, its fees are reasonable

87 The Respondent submitted that as it represented 14 recording companies while the other two companies only represented three or four recording companies which were "smaller labels and would not be able to match the Respondents in terms of the number of songs provided" [note: 36], its charges were reasonable. This conclusion was drawn by the Respondent after comparing the maximum fees charged by the three companies for KOD licences, as follows:

Name of collecting agency for KOD licences	Maximum licence fee chargeable
Respondent	\$30,000
Horizon Music Entertainment Pte Ltd	\$7,000
K-Net Music Pte Ltd	\$14,500

88 Without details on the basis of the charges by the other two companies and objective evidence on the value or worth of the copyright material for which they had licence rights, it would not be practicable to make a value judgment on the reasonableness of the Respondent's fees vis-à-vis the fees of the other two companies. Further, the Respondent's whole argument rests on the assumption (for which no basis has been provided) that the fees of the other two companies are reasonable in the first place. If there was sufficient evidence led on this point, the Tribunal may well have come to the finding that the fees charged by any or all three companies were unreasonable. Again, without credible evidence presented to us, the conclusion drawn by the Respondent was but purely speculative.

(2) The fees charged are comparable to KOD licence fees charged by collecting agencies across the region

89 We had earlier dealt with the probative value of the evidence led on this point by both parties (see paragraphs 72 to 74 above) and would not repeat them here. It would suffice for us to state that there was no cogent evidence from either the Applicants or the Respondent [note: 37] for the Tribunal to draw a meaningful comparison.

(3) The fees charged are reasonable when compared to the KOD licence fees charged by RIPS previously

90 Aside from relying on the rate of fees published by RIPS as at 2003 for KOD licences [note: 38], the Respondent did not adduce any other evidence to prove this averment. The Respondent sought to argue that it had a fairer way of charging for such licences as it had a more nuanced and graduated scale of charging (with 13 different scales depending on the seating capacity) as opposed the scale imposed by RIPS, which had only three. A related argument raised was that since taking over the administration of KOD licences in 2007, it had not increased its fees despite increasing the size of its repertoire, while RIPS (which is a non-profit organisation) had increased their public performance licence fees by some 8%. Again, without evidence on the practice of RIPS or how their rates were derived, the assertions were bare ones. As a matter of fact, Witness RW2, who was the Senior Licensing Manager of the Respondent who oversaw the "implementation and enforcement of the KOD licence" [note: 39], did not even know the basis for the licence fees and charging model adopted by the Respondent itself. RW2 further testified that none of the officers in the present management of the Respondent was involved in formulating the Respondent's fee structure [note: 40].

(4) The Respondent has to incur costs to administer the KOD licences, including paying the recording companies for the exclusive licences, and the profits earned by the Respondent are small.

91 The Respondent argued that as the costs of administering the KOD licences are substantial, the profits they make are small, and any reduction in the licence fees charged would result in its business becoming unviable or unprofitable. No evidence was placed before us on the costs to the Respondent of administering the KOD licence scheme and the profit/loss statements to buttress its assertions. The Respondent submitted that it did not provide evidence to support the oral testimony given towards this end as it did not want "competitors in the market to have access to these figures and compete with them for the licences from the Record Companies" [note: 41]. With respect, this concern on the part of the Respondent could have been easily addressed through an application under s 171 of the Act for the Tribunal to direct that the hearing or part of the hearing before us takes place in private or to give directions prohibiting or restricting the publication of evidence given before the Tribunal or of matters contained in documents produced to the Tribunal. In any event, the prerogative was the Respondent's to decide what evidence to be presented before the Tribunal. In the end, the Respondent chose not to produce its financial statements [note: 42]. The Respondent's contentions on this point were hence not made out.

(5) Intervention by the Tribunal is unnecessary as the amount of KOD licence fees are determined by market forces

92 The Respondent further submitted that the forces of demand and supply in the market would be a check against any unreasonableness or oppressive fees which the Respondent or other collecting agencies may wish to charge. As such, where there is "a willing seller and willing buyer", "there is no compelling reason for

the Tribunal to intervene in a commercial transaction when the transaction is within limits" [note: 43].

93 The argument that the market would "self-regulate", so to speak, and arrive at an equilibrium through the economic forces of demand and supply is fallacious – one key reason for the amendments to the Copyright Act in 2009 was to give the Tribunal the power to assert regulatory control to curb abuse by collective licensing bodies such as the Respondent company which are in a dominant or even monopolistic position vis-à-vis licensees. That this is necessary was underscored during the Second Reading of the Amendment Bill, as highlighted earlier in paragraph 5 above. It is the Tribunal's role to "act as a check against licensors imposing unreasonable licensing fees and terms" – it is evident that Parliament has, by conferring that power on the Tribunal, acknowledged that pure market forces, if unregulated, are not sufficient to act as that check.

94 The Respondent raised the related argument that one indication that its fees are reasonable is the fact that none of the Applicants have stated that they cannot afford the fees so charged. AW2 acknowledged thus at the trial:

Q: Mr Chia, nowhere in your affidavit have you stated that you were not able to afford to pay this amount.

A: I---I never mentioned I'm not---I never mentioned---I didn't say I cannot afford to pay.

Q: In other words, Mr Chia, it's not a question of you're not being able to afford to pay this amount. You just think that the amount is too high?

A: Yes, your Honour.

(at page 41 line 29 to page 42 line 3 of Day 1 of the Transcript)

95 To prove that the Applicants could well afford to pay the fees, the Respondent engaged private investigators to patronise three of the Applicants for one night. According to RW1's affidavit of evidence-in-chief:

42. ... The amount incurred by the private investigators as costs payable for one night was S\$357.95 for Tiananmen, S\$450.00 for Club Infinitude and S\$350.99 for Grand Century Nite Club. Tiananmen, Grand Century and Club Infinitude have a total of 38, 34 and 42 rooms respectively. On the assumption that the revenue earned for each room a night amounts to the cost of a bottle of Martell VSOP, the total revenue earned by Tiananmen, Grand Century and Club Infinitude for a year amounts to S\$5.472 million, S\$4.284 million and S\$6.804 million respectively. In comparison, the annual KOD Licence Fee payable by the aforesaid clubs, amounting to S\$30,000 each, is only a small proportion of the estimated revenue earned by these clubs in a year.

43. As the Applicants are using karaoke to generate their business, it is reasonable that the Applicants need to pay the Record Companies for the reproduction of their cinematographic work. The KOD Licence Fee, amounting to 0.4% - 0.7% of the estimated annual revenue received by the Applicants, is an extremely reasonable sum to pay, bearing in mind that the Applicants' main source of revenue is derived from karaoke entertainment.

96 The Respondent then exhibited a document which purported to contain the estimated monthly and annual turnover of each of the Applicants [note: 44]. The evidence presented was flawed in a few respects. First, a few unverified underlying assumptions were made by the Respondent in calculating the estimated turnover – it was assumed that the average patron's expenses would be equivalent to one bottle of Martell VSOP or its equivalent, an assumption for which the Respondent gave no basis; that expenses by the private investigators for that one night would be sufficient a sample size; that the patrons' spending habits within each establishment and across the three establishments were uniform. Second, the private investigators were not

called to testify before the Tribunal in order for the method of their operations and their findings to be tested. Third, the formula used to project the turnover was not based on any accepted accounting principles. The Respondent's officer who prepared it was not a qualified accountant [note: 45]. To put it bluntly, the method in arriving at the estimated turnover employed by the Respondent was over-simplistic and did not stand up to scrutiny. The Tribunal could not, in the circumstances, accord it due weight.

97 The conclusion sought to be drawn by the Respondent was in any event unfounded: it did not follow that *if* the Applicants could *not* afford to pay, the fees are necessarily unreasonable as there may be many other reasons why the Applicants could or could not pay the fees imposed (for example, their business may not be good because of a whole host of factors). Although a party's capacity to pay the licence fees is a factor to consider, it is one of the many considerations to be taken into account by the Tribunal in determining reasonableness. In any case, the evidence adduced by the Respondent to show that the Applicants had deep pockets was unreliable, as explained above.

98 The other related argument put forth by the Respondent was that the Applicants had the freedom to choose not to pay to have access to the Respondent's repertoire of karaoke music videos and songs but instead rely on cover versions of the videos and songs and other genre of musical works (eg Korean songs). In court, the Applicants' witnesses gave evidence that there were not many cover versions of karaoke music videos to choose from as opposed to those by original recording artistes [note: 46] and that Chinese songs are the mainstay given the nature of their business and the profile of their clients [note: 47]. In light of the testimony of the Applicants' witnesses, which was contrary to the position which the Respondent sought to persuade the Tribunal to take, and in the absence of other cogent evidence from the Respondent on this point, the Tribunal accepted the Applicants' evidence. The Respondent's argument on this related point similarly failed to gain traction.

(6) The KOD licence fee of \$30,000 is not excessive as the Respondent has obtained KOD licences from 14 record companies, and there are savings if one party administers the collection instead of 14 separate record companies administering it.

99 The Tribunal needs only to comment that no evidence was adduced by the Respondent in support of this argument. The Respondent contended in its Closing Submissions (at paragraph 69) without objective evidence to back up its opinion that "there is a high possibility that this would also result in higher KOD Licence Fees being paid by karaoke operators" if there was no body like the Respondent to administer the licence scheme collectively and that "(t)he maximum sum of S\$30,000 is reasonable because it is a consolidation of licences from 14 Record Companies and it is a much cheaper sum payable by the karaoke operators instead of the karaoke operators having to obtain 14 separate licences from the Record Companies." This argument too had to fail.

(c) Whether the mode of payment of the licence fee stipulated in the Agreement is not reasonable in the circumstances of the case, as stipulated in s 163(2) of the Act

100 This issue can be dealt with swiftly. The Applicants argued that the mode of payment of the licence fee stipulated in the Tariffs Schedule (ie that the fee is payable in advance unless otherwise stated) is unreasonable. In their Closing Submissions at paragraph 84, the Applicants submitted that requiring licensees to pay the fees in advance was unreasonable "for the simple reason that the quantum of the fees payable is too high. Although the other licences have similar conditions, that is more acceptable as the fees are lower". Since the Tribunal had found that the Applicants had failed in their claim that the fees charged are not reasonable, their underlying basis for arguing that the mode of payment is unreasonable (which hinges on the sole point of the fees payable being too high) similarly failed. As the Applicants themselves conceded, such a condition is common in other licences of this nature [note: 48].

101 The Respondent further sought the Tribunal's assistance to obtain a copy of the signed Agreement from each of the Applicants, whom the Respondent claimed refused or neglected to return the signed copy to the Respondent despite the fact that a KOD licence had been granted to each of them. This the Tribunal would not so order as this was not the appropriate adjudicative forum to do so.

Conclusion

102 For all the foregoing reasons, the Application in CT 1 of 2010 was dismissed as the Applicants did not satisfy the Tribunal that its claim was well-founded. Although the Applicants did not succeed in their claim, this was not so much a result of the strength of the Respondent's evidence, which we found lacking in cogency in any case, but a consequence of the Applicants' failure to adduce sufficient evidence to cross the necessary threshold to discharge its evidential burden, which in turn led to its failure to satisfy the legal burden of proof. In the circumstances, the Respondent is awarded 50% of the party-and-party costs in these proceedings incurred by it, the quantum of which is to be agreed by parties, and if not, to be taxed by the Tribunal.

Application dismissed with costs.

[note: 1] See the old s 149(1) of the Act.

[note: 2] See the Second Reading of the Copyright (Amendment) Bill on 15 September 2009.

[note: 3] See paragraphs 65 and 71 of the judgment below.

[note: 4] See BD-117 and 118.

[note: 5] At BD-142 to 145.

[note: 6] At BD-179 to 180.

[note: 7] See the confirmation of this position by the Applicants at the hearing at page 33 line 6 to page 34 line 29 of Day 2 of the Transcript. Also see the testimony of Witness AW2 at page 14 lines 25 – 28 of Day 1 of the Transcript and the testimony of Witness AW3 at page 8 line 30 to page 9 line 1 of Day 2 of the Transcript.

[note: 8] Also see the testimony of AW2 at page 26 lines 14 – 16 of Day 1 of the Transcript. Upon further questioning from the Tribunal, AW2 confirmed the Applicants' position on this point – see page 60 line 17 to page 64 line 4 of Day 1 of the Transcript.

[note: 9] See the confirmation by both the Applicants and the Respondent's counsel again on the fact of reproduction of one copy of the cinematograph film on the hard disc of the KOD system and that the dispute was only in relation only to the quantum of licence fees to be paid for this reproduction licence at page 102 line 22 to page 103 line 31 of Day 2 of the Transcript.

[note: 10] See RW2's affidavit of evidence-in-chief at paragraph 4 and RW1's testimony that IDM is wholly owned by the Respondent at page 19 lines 12 - 14 of Day 3 of the Transcript.

[note: 11] At paragraph 74 of the Applicants' Closing Submissions.

[note: 12] At paragraph 25 of the Respondents' Further Written Submissions.

[note: 13] At paragraph 48 of the judgment.

[note: 14] These included: (1) changes in the size of the originators' television audience; (2) any substantial changes in the general standard of living; and (3) changes in the relevant PRS administrative costs: at [76].

[note: 15] PRT 38/81, at [51].

[note: 16] The monthly rental fee for the KOD system for each Applicant is \$1,500 – see BD-99 to 102.

[note: 17] Although none of the Applicants currently pay a licence fee for the reproduction of musical works and related lyrics to COMPASS, the evidence adduced indicates that COMPASS has issued letters to the karaoke lounge operators asking for payment of a licence fee of \$1,000 per annum for the reproduction of musical works and related lyrics in their KOD systems – see BD-96, 97, 164, 211 – 214, the testimony of AW2 at page 7 lines 8 – 31, page 57 lines 28 – 30 of Day 1 of the Transcript, the testimony of AW3 at page 8 lines 24 – 27 of Day 2 of the Transcript and the testimony of RW1 at page 47 lines 13 – 29 of Day 3 of the Transcript.

[note: 18] At RBD 82 – 83.

[note: 19] At RBD 112 – 115.

[note: 20] At BD-108 to 109.

[note: 21] At page 9 lines 23 – 29 of Day 1 of the Transcript.

[note: 22] See, for example, the testimony of AW3, who admitted that he did not know what these considerations were – at page 9 lines 26 – 28 of Day 2 of the Transcript. Also see the testimony of RW1, who too admitted that he did not know how RIPS operated at all – at page 77 line 10 to page 78 line 17 of Day 2 of the Transcript.

[note: 23] See AW1's affidavit of evidence-in-chief at paragraph 15.

[note: 24] The evidence of AW3 that the annual fee of \$1,000 imposed by COMPASS for reproduction rights of musical works and lyrics was about 7 – 10% of the fee charged by COMPASS for public performance rights of the same musical works and lyrics was but conjecture devoid of any basis and was merely his personal opinion – see page 24 lines 3 – 13 of Day 2 of the Transcript, at which AW3 admitted that "I cannot say how they think but I think their idea is about 7% to 10% of what I pay for public performance.....".

[note: 25] The evidence tendered by the Respondent on PPM in the form of website print-outs is at RBD-101 to 111.

[note: 26] At paragraph 51 of the Applicants' Closing Submissions.

[note: 27] See BD-103 to 109, BD-112 to 116 to 112, BD-124 to 139.

[note: 28] At paragraphs 8 – 9 of AW1's affidavit of evidence-in-chief.

[note: 29] This figure was an estimate given by RW3 during cross-examination at page 128 lines 7 - 14 of Day 3 of the Transcript.

[note: 30] At paragraph 36d of AW2's affidavit of evidence-in-chief.

[note: 31] At RBD-96.

[note: 32] At paragraph 70 of the Applicants' Closing Submissions.

[note: 33] See paragraphs 37 to 39 of AW2's affidavit of evidence-in-chief.

[note: 34] At paragraph 76 of the Applicants' Closing Submissions.

[note: 35] See page 61 line 26 to page 62 line 14 of Day 3 of the Transcript.

[note: 36] At paragraph 20 of the Respondent's Closing Submissions.

[note: 37] RW1 acknowledged that he was not in a position to comment on the licensing schemes and practices of the licensing bodies in Malaysia – see page 2 lines 19 – 29 of Day 3 of the Transcript. RW3 also acknowledged the same in respect of the licensing practices in Malaysia and Hong Kong – see page 94 lines 13 – 18, 29 – 31 and page 95 lines 5 – 13 of Day 3 of Transcript.

[note: 38] At BD-137.

[note: 39] At paragraph 4 of RW2's affidavit of evidence-in-chief.

[note: 40] At page 80 lines 10 – 22 and page 85 lines 3 – 9 of Day 3 of the Transcript.

[note: 41] At paragraph 42 of the Respondents' Closing Submissions.

[note: 42] See the exchange between the Respondent's Counsel and the Tribunal at page 46 line 23 to page 50 line 25 of Day 2 of the Transcript.

[note: 43] At paragraph 43 of the Respondents' Closing Submissions.

[note: 44] At RBD-84.

[note: 45] See RW1's testimony at page 30 lines 19 – 24 of Day 3 of the Transcript.

[note: 46] See AW3's testimony at page 16 lines 20 – 23 of Day 2 of the Transcript.

[note: 47] See AW2's testimony at page 43 lines 7 – 22 of Day 1 of the Transcript.

[note: 48] See also the testimony of AW2 at page 15 lines 2 – 17 of Day 1 of the Transcript.

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