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THE HIGH COURT

RECORD NO. 2002/350 SP

IN THE MATTER OF THE COPYRIGHT ACT, 1963
AND IN THE MATTER OF AN ARBITRATION PURSUANT TO SECTION 41(1)(b) OF THE COPYRIGHT ACT, 1963 AND ORDER 84, RULES 45 TO 49 OF THE RULES OF THE SUPERIOR COURTS, 1986 FROM A DECISION MADE BY AN ARBITRATOR APPOINTED BY THE CONTROLLER OF INDUSTRIAL AND COMMERCIAL PROPERTY PURSUANT TO SECTION 41(1)(b) OF THE COPYRIGHT ACT, 1963

BETWEEN

CARRICKDALE HOTEL LIMITED

PLAINTIFF

AND
THE CONTROLLER OF INDUSTRIAL AND COMMERCIAL PROPERTY
AND PHONOGRAPHIC PERFORMANCE (IRELAND) LIMITED

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 23rd February, 2007

1. This judgment is concerned with an issue which has arisen out of my judgment of 12th May, 2004 (reported at [2004] 3 I.R. 410) and the order made on foot of that judgment on 24th June, 2004, which has been brought before the court by way of a motion to "speak to the minutes of the judgment and order", so as to resolve a dispute between the parties as to the correct interpretation of an aspect of the judgment and order.

2. In the judgment I stated (at p. 474) that I proposed to vary the award of the arbitrator. I further stated that the tariff structure for reproducing the repertoire of the second defendant (PPI) in a nightclub would follow the structure adopted by the arbitrator, and, in broad terms, would accommodate the features which I then outlined. Following delivery of the judgment, the parties were given time to consider how that decision should be formulated in the order of the court. Having heard the submissions of the parties the order of the court was made on 24th June, 2004. By consensus of the parties the varied award was formulated as a schedule to the order (the Schedule), in which all of the elements of the determination of the equitable remuneration payable by a nightclub owner under s. 17(4)(b) of the Copyright Act of 1963 were intended to be set out.

3. In the course of identifying the issue which has arisen, I think it helpful to consider how the features outlined in the judgment (at p. 474) have in fact been accommodated in the Schedule, which sets out the relevant sums payable to PPI as of January, 1998. The position is as follows:

> (a) The fixed fee element is included as the "annual fixed payment".
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> (b)&(c) The fee per event element is based on a tariff structure similar to tariff No. 2 in PPI's tariff book. The structure is to allot a fee or rate for each attendance or capacity band of 50 between zero and 1,000 and to provide for a rateable charge in respect of each band of 50 above 1,000.
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> (d) The Schedule accommodates the option of basing attendance on venue capacity or actual attendance by agreement or, in default of agreement, at the election of PPI, subject to, in the event of venue capacity applying, the appropriate evidence from the relevant public authority being provided to PPI. This is provided for in note (d). In the context of the issue I am now considering, I think it is worth noting the reason I gave for not adjusting actual attendance as the arbitrator had done: because the reasons which the arbitrator had advanced in support of that adjustment would not have validity where the fee structure was not revenue related. I pointed out that every attendee at a nightclub enjoys the benefit of PPI's repertoire whether he pays an admission fee or not.
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> (e)&(f) The fee per event table is based on a fee of IR£80 for the attendance band from 501 to 550, subject to increase in subsequent years in line with the Consumer Price Index (CPI) (note (b)). Note (b) also provides that the annual fixed payment is subject to increase in accordance with the CPI for subsequent years, as are the admission prices in the price adjustment factor table.
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> (g) At note (c) the event length adjustment is included.
>
> (h) At note (a) the admission price adjustment factor is included and it is in relation to this element of the computation of the equitable remuneration that the issue has arisen.

4. Note (a) in the Schedule states that the rates set out in the fee per event table are applicable where "the gross admission charge" lies in the range of IR£5 to IR£6.30. Outside that range an admission price factor adjustment is to be applied to the rates in the fee per event table according to the table set out in note (a). There are two elements in the price factor adjustment. The first is what is described as the "gross admission price range" (the first column of the table), and the second is the admission price adjustment factor referable to that range (the second column in the table). There is a third column in the table which helpfully sets out the effect of the adjustment as a reduction or an increase of the rates (the expression "standard rates" is used but I attach no significance to that) in the fee per event table. For example, the price adjustment factor table shows that in the price range from IR£5 to IR£6.30 the price adjustment factor is 1.00, which means that there is no effect on the standard rate, whereas in the IR£6.31 to IR£7.54 range the price adjustment factor is 1.15, reflecting an increase of 15% on the standard rate. The issue which has arisen is whether the relevant price to which the price range column is applied is the full admission price, as PPI contends, or average admission charges to take account of concessions and discounts, as the nightclub owner on whose behalf the issue was raised contends. The judgment is silent on this point and, as I understand it, it is common case that it never featured in the submissions before this Court on the hearing of the appeal.

5. The genesis and evolution of the issue would appear to be as follows:

> Note (a) in the PPI's tariff No. 2 which was in operation before the arbitrator's award was in precisely the same terms as note (a) in the Schedule, save that the price range figures in the latter have been adjusted in accordance with the CPI. However, in that tariff No. 2 the fee per event table and the notes to it were introduced by text which set out the terms and conditions of the arrangement between PPI and commercial discotheque and nightclub venues. Clause 1 provided that the equitable remuneration payable to PPI should be computed in accordance with the fee per event table and the notes. Clause 2 provided that certain information was to be furnished to PPI by each venue in respect of each calendar quarter,

namely, the number of events held, the average attendances at events held, and "average admission charges to events held indicating the number of full price, concessionary price and complimentary admissions". As I understand it, the practice of PPI prior to the award of the arbitrator becoming operative was to use the average admission charge, rather than the full advertised price of admission, for the purpose of applying the admission price adjustment factor in computing the tariff applicable to a particular venue.

Following the arbitrator's award but before the decision of the court on the appeal against the arbitrator's award, in tariff No. 2 then in operation, clause 2 was amended to require information in relation to admission charges to events, and in practice the full admission charge, rather than an average, was utilised in applying the price adjustment factor in the computation of the tariff.

As I recorded in my judgment (at p. 434) the case made by the plaintiff's experts, Farrell Grant Sparks, Chartered Accountants, before the arbitrator and which was the basis of the plaintiff's case on the hearing of the appeal was that there should be a price adjustment factor and that a tariff which did not recognise such factor would have to be deemed inequitable. In practice, they adopted the tariff No. 2 table. Accordingly, both at the hearing before the arbitrator and on the hearing of the appeal, the plaintiff and PPI adopted a similar approach in relation to the price adjustment factor. However, in his award the arbitrator departed from the price adjustment bands and the adjustment rates in tariff No. 2.

In giving judgment on the appeal, I recorded (at p.444) that the application of an admission price adjustment was non-controversial, although I stated that the theory underlying the weighting applied by the arbitrator and its appropriateness would have to be considered later. In rejecting the arbitrator's use of revenue related baseline rates (at p. 467), I stated as follows:

> "The arbitrator erred in basing his baseline rates on some level of notional revenue which appears to encompass admission price and bar spend and in purporting to justify their fairness on the basis that they represented what he considered to be a fair percentage of total notional profit. Moreover, if, as I understand to be the case, the percentage of total notional profit which the tariff structure accommodates increases as attendance level, and correspondingly notional turnover, increases, the error is compounded. There is no objective justification in the context of fixing a fair price for reproduction of a record in a night club, for discriminating between big venues and small venues in this manner. The weighting of the price adjustment factor is similarly misconceived."

6. As I have stated, whether in identifying within which of the components of the first column of the price adjustment factor table (Gross Admission Price Range) a venue falls for a particular period the full admission price or an average should be used, was not addressed before the court. If it had been on 24th June, 2004 and I had been asked to determine that issue in the light of the judgment, I would have determined that the full admission price should be used. In interpreting the meaning of "equitable remuneration" in s. 17 of the Act of 1963, I stated as follows (at p. 465):

> "In short, equitable remuneration is a fair price for the service provided. In the context of the service which is the subject of this reference under s. 31(3), in my view, a fair price is a sum which fairly reflects the value to the night club owner of the use of the second defendant's repertoire, while fairly recompensing the latter for the availability of the repertoire."

7. When the fee per event rates contained in tariff No. 2 as it operated before the award of the arbitrator were related to notional revenue, fairness required that the admission price adjustment factor should be applied in a manner which reflected actuality, which required averaging. As the fee per event rates set out in the Schedule are not related to notional revenue the *raison d'être* for averaging is no longer there.

8. Viewing the issue at a practical level, the nightclub owner's business model may well consider it beneficial to allow admission to the night club on Monday night or Tuesday night at concessionary or discounted admission prices. But that does not justify a reduction in the rate which PPI is paid for the use of its repertoire on a Monday night or a Tuesday night in circumstances in which it reaps no additional benefit in terms of the price it is paid for use of its repertoire on Friday night and Saturday night.

9. The conclusion I have come to is consistent with the actual wording of the Schedule because there is nothing in the schedule to suggest that the expression "gross admission charge" or "gross admission price" refers to anything other than the full price. I should perhaps say that my understanding of "gross" in this context means gross before Value Added Tax and other taxes.