COMMERCIAL COURT

[2026] IEHC 466

RECORD NUMBER 2016/6897P

THE HIGH COURT

BETWEEN

RECORDED ARTISTS ACTORS PERFORMERS LIMITED

PLAINTIFF

AND

PHONOGRAPHIC PERFORMANCE (IRELAND) LIMITED, THE MINISTER FOR JOBS ENTERPRISE AND INNOVATION IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 15th day of July, 2026

INTRODUCTION

1. This is a pre-trial application by the first defendant ("**PPI**") to amend its Counterclaim, in order to make a claim that there was a breach of a contract dated 23 April 2002 (the "**Contract**"), which it has with the plaintiff ("**RAAP**"). The motion was issued on 10 June, 20026 and it was heard on 3 July 2026.
2. The underlying dispute centres on that Contract, which was reached regarding the distribution of licence fees, for the playing of sound recordings in public, between RAAP, and PPI.
3. RAAP is a collective rights organisation that represents the rights of its performer members, while PPI is a collective rights organisation which represents record companies. The Contract makes provision for payment to qualifying performers who are members of RAAP, and qualifying performers who are not members of RAAP.
4. Under the terms of the Contract, PPI was to pay RAAP 50% of revenues from tracks, which included a 'qualifying' performance, less PPI's expenses and administrative charges involved in the collection and distribution of such income.
5. RAAP's primary claim in the substantive proceedings is that PPI acted wrongfully and in breach of the Contract in PPI's calculation of the portion of the licence fees payable to the performers (known as 'equitable remuneration'), insofar as it applied a fractions-based approach to the calculation of equitable remuneration. RAAP also claims that PPI wrongfully retained revenues collected by it, for the benefit of producers.
6. In its Counterclaim (prior to its proposed amendment), PPI claims that RAAP wrongfully requested sums from PPI and as a result, PPI says that RAAP was overpaid by PPI between 2002 and 2014, as the fractions-based approach was not applied.
7. In related proceedings, RAAP also claims that PPI abused its dominant position by, inter alia, imposing unfair trading terms on RAAP.

<u>The amendment to the pleadings</u>

8. PPI states that the need for the amendments arose out of review of documents which were disclosed by RAAP to PPI in September 2025, and after PPI obtained expert advice, on those documents and after consultation with counsel, which occurred in late March 2026.
9. The proposed amendments allege a breach by RAAP of the Contract because of the manner in which RAAP distributed the income, which was due to performers, who were members of RAAP. In particular, PPI claims that RAAP breached the Contract by not complying with the Distribution Scheme which is annexed to the Contract, by wrongfully retaining 10% of the income, which was due to foreign performers, and allocating same to its full members.
10. PPI also claims, in its proposed amendments, that RAAP was acting as PPI's agent in respect of payments to performers and so this alleged breach by PPI of the Contract leaves PPI exposed to claims from these performers. For this reason, PPI says that its proposed amendments state that PPI is relying on the express indemnity in the Contract from RAAP to PPI in the event of a claim from a performer.
11. The full text of the proposed amendments are set out in the underlined text of the following extract:

'36. The Agreement entered into between the parties on 23 April 2002 included the following express terms and/or conditions:

> <u>*(a) Clause 4.1 whereby the parties agreed that RAAP would distribute equitable remuneration to its own Members, who are qualifying performers, in accordance with its Distribution Scheme annexed to the Agreement.*</u>
>
> <u>*(b) Clause 5 whereby the parties agreed that for consideration RAAP would act as PPI's Agent to distribute equitable remuneration in respect of Qualifying Performances amongst those entitled thereto in accordance with its Distribution Scheme annexed to the Agreement.*</u>

[…]

(g) Clause 7.3.7 whereby RAAP agreed to "have the Distribution Scheme approved by its members within twenty-four months of the date hereof" and

(h) Clause 7.6 whereby RAAP agreed to indemnify and hold PPI harmless "in respect of any loss howsoever caused due to the breach of this agreement of [sic] due to the operation of, or the terms of, the Distribution Scheme or the operations of RAAP generally".

[…]

38. In breach of the said agreement, RAAP has:-

(a)failed and/or refused to distribute equitable remuneration to its own Members who are Qualifying Performers in accordance with its Distribution Scheme;

(b)failed and/or refused to distribute equitable remuneration as PPI's Agent in respect of Qualifying Performances amongst those entitled thereto in accordance RAAP's Distribution Scheme;

[…]

(g) Failed and/or refused to "have the Distribution Scheme approved by its members within twenty-four months of the date hereof".

[…]

Particulars of Breach of Agreement

(i) *[…] RAAP failed to repay to PPI income due to non-Qualifying Performers.[…]*

[…]

(iii) RAAP distributed equitable remuneration other than in accordance with its Distribution Scheme. In this regard RAAP operated one scheme whereby it took 10% of the income received from PPI, which it called background music, and attributed it

to its own full members. RAAP had further scheme whereby they took 10% of the money that was due to foreign performers and allocated this to their full members. Neither of these schemes has basis in the Distribution Scheme.'

RAAP's objection to the amendments

12. RAAP objects to the amendments on two key grounds, namely that they are (i) outside the ambit of the original dispute between the parties as set down in the pleadings to date, and (ii) that RAAP would be prejudiced if these amendments were to be allowed, particularly as the trial, which is due to last eight weeks, is fixed to start on 27 October 2026.
13. In addition, RAAP states that there was a delay in PPI seeking the court's approval for the amendment of its counterclaim, which, it says, means that this Court should refuse the application to amend.

Delay

14. It is proposed firstly to deal with RAAP's complaint about PPI's delay in applying to amend the pleadings. In this regard, RAAP points out that the discovery of documents outlining how RAAP distributed the income to its performer members, which triggered the proposed amendments, was made in September 2025.
15. While the discovered documents contained the evidence of how the income was distributed by RAAP to the performers, PPI points out that the witness statement on behalf of RAAP, from Mr. Colman Clinch, explains how that distribution of income, which is contained in the discovered documents, was operated by RAAP. This witness statement was delivered on 23 March 2026.
16. In this Court's view, the alleged delay is not a determinative factor in this application. This is because, while there was some delay in proposing the amendments, they were first proposed to RAAP by PPI on 31 March 2026, which is some seven months prior to the

trial date. On that date, PPI furnished RAAP with the proposed amendments to the Counterclaim, and a timeline for consequential amendments to the pleadings.

17. In the context of RAAP now complaining about PPI's delay, it is important to note that, for a period of seven weeks, RAAP did not reply to this correspondence. Accordingly, for this entire period of seven weeks, PPI was not to know whether RAAP agreed, or did not agree, to the proposed amendments.

18. In fact, PPI might still not know RAAP's position, had it not sent a further letter to RAAP on 19 May 2026, seeking a reply. It was only on 26 May 2026, and so some two months after the initial request for consent to the amendment of the counterclaim, that RAAP indicated that it did not *'consent to the proposed re-amendments given the serious prejudice it will cause [RAAP].'*

19. This refusal then resulting in PPI issuing this motion on 10 June 2026 seeking this Court's consent to the amendment of the Counterclaim. The motion was heard by this Court on 3 July 2026 and judgment is being delivered on 13 July 2026, as to whether the amendments will be permitted, but it is important to remember that some 3½ months previously, RAAP was notified of the proposed amendments.

20. In all these circumstances, and particularly as it took RAAP two months to indicate its position, this Court does not believe that the delay in PPI seeking to amend the Counterclaim is such as to justify the denial of the Court's approval for same.

21. Next, this Court will consider the two primary reasons relied upon by RAAP to support its claim that the Court should not consent to the amendments.

LAW REGARDING THE AMENDMENT OF PLEADINGS

22. In this regard, there was no dispute between the parties as to the applicable law. That law was recently summarised by Collins J. in *Stafford v Rice* [2022] IECA 47, at para. 23, and it is not necessary to set out same in full. It is clear from *Stafford* that:

- the power to amend pleadings is a broad or liberal one;
- an amendment will be permitted if it '*relate[s] to an issue between the parties arising from the subject matter of the proceedings';* unless
- one can "*identify some prejudice that stems 'from the fact of the belated alteration in the pleadings rather than the presence (if allowed) of the amendment itself.'*"

(i) <u>Do amendments relate to issue arising from subject matter of the pleadings?</u>

23. A key element of PPI's application to permit the amendment to the Counterclaim is that it came to its attention that these amendments to the pleadings were necessary, when its expert examined RAAP's discovered documents. PPI says that it came to its expert's attention that before RAAP distributed income to its performer members, it took 10% off the top, which it put into retained earnings, and thereafter distributed the balance to its performer members.

24. As can be seen from the proposed amendments, PPI claims that this deduction of 10% amounts to a breach of the Distribution Scheme, which RAAP is required to comply with under the terms of the Contract (a contract in which, it is pleaded, RAAP was appointed as PPI's agent to distribute funds to performers). Since under the terms of that Contract, RAAP indemnifies PPI in respect of any claims made against PPI by performers, PPI specifically refers to this indemnity in its amended Counterclaim.

<u>The amendments concern a breach of the Contract which is already in issue</u>

25. To answer the question of whether the amendments relate to an issue arising from the subject matter of the pleadings, firstly, on an analysis of these proposed amendments, they relate to an alleged breach of the terms of the Contract. Yet, it is also the case that an

alleged breach of that Contract is already in issue between the parties. This is because PPI claims (at para. 38 of its existing Counterclaim) that RAAP: breached Clause 7.3.2 of the Contract by failing to provide it with details of qualifying performers playing on tracks in non-qualifying countries; breached Clause 7.3.3 in failing to take care in distributing income received from PPI; breached Clause 7.3.4 in failing to maintain a database; and breached an implied term of the Contract in seeking payment in respect of non-qualifying performance. (For its part, RAAP claims that PPI breached the Contract by: improperly applying a 'fractions-based approach' to its calculation of equitable remuneration; deciding that the US was not a qualifying country for the purposes of the Contract; retaining revenues collected from broadcasters in respect of the making of 'playlists'; and deducting certain expenses from the amounts to be shared with performers).

26. It is of course true that, to date, PPI has not claimed that RAAP breached the Contract by its failure to comply with the terms of the Distribution Scheme. However, it seems to this Court that this breach of the Contract can be said to be an issue that arises from the subject matter of the proceedings, since breaches of the Contract are already the subject matter of the proceedings.

Discovery already ordered of documents relating to distribution by RAAP to performers

27. Secondly, it is relevant to note that the documents which were disclosed, which led to the proposed amendment of the Counterclaim, arose from a discovery order that was granted by Cregan J. The category of discovery, which was sought, was in the following terms:

'Category 1

All documents including those created, issued or received by [RAAP], its servants or agents relating to:

(i) [RAAP's] distribution scheme(s)/ rule(s) in respect of distributions to individual performers (including, without prejudice to the generality of the foregoing, the

process by which revenue distribution occurs to members and all schemes/policies relating to retention of revenue and closure policies, including the number of years prior to closure operating and the distributions of sums from unclaimed income).

(ii) All distributions paid (and due but not yet distributed) by [RAAP] to performers during the existence of the Agency Agreement including documents demarcating annual distributions due and any additional payments received under any closure policy and all sums not yet distributed to identified performers, including in particular rules in respect of prepayments, advances, pipeline money.'

28. It is relevant to note that PPI's request for voluntary discovery was refused by RAAP, on the same basis as the amendments to the Counterclaim are being resisted. This is because RAAP claimed in the discovery application that the focus of the pleadings was, as counsel for RAAP described it before this Court, on the *interface between RAAP and PPI*, and not on the *interface between RAAP and its performer members*. RAAP claims that, in particular, the focus of the pleadings was *not* on the calculation and distribution of payments by RAAP to its performer members. On this basis, RAAP refused to make the discovery of details of how it distributed its income to its performer members. As noted by Cregan J.:

'PPI's request for these categories of documents was refused. Instead [RAAP] offered to discover those documents which were, in effect, ***invoices which [RAAP] sent to [PPI]*** *in respect of qualifying tracks or qualifying performers or performances' (Emphasis added)t*[1] (Emphasis added)

[1] Transcript of Cregan J. Judgment, dated 16 June 2017 pg. 18, lines 12-17.

29. Thus, RAAP felt that discovery of documents relating to the interface between RAAP and PPI were relevant to the dispute but *not* documents relating to the interface between RAAP and its performer members. A similar approach is being taken by RAAP to the proposed amendments to the Counterclaim, i.e. that they should not be permitted since they do not relate to the interface between RAAP and PPI, but instead relate to the interface between RAAP and its performer members.

30. However, in considering RAAP's offer of voluntary discovery which was restricted to documents relating to the interface between RAAP and PPI, Cregan J. did not agree with RAAP's approach. He did not agree with RAAP's claim that, in effect, these documents relating to how RAAP distributed the income to its members were *not* relevant to the dispute between the parties. He held that:

    'However, in my view that offer does not meet the case at all. It ***is clear that what PPI wishes to understand is [RAAP's] distribution scheme*** *and rules in respect of distribution to performers, the amount of distributions paid individual performers, and all sums not yet distributed to performers (including rules in respect of pre-payments, advances and pipeline money) and* ***the manner in which unclaimed and non-distributable income has been dealt with during the terms of the Agreement.****'* (Emphasis added)

31. Then Cregan J. concluded:

    'At a late stage in the application [RAAP] agreed to discovery the documents sought at category 1(i), i.e. RAAP's distribution scheme rules, and therefore it is not necessary for me to rule on that.

    However, Category 1(ii) is also relevant and material and should be discovered. These ***documents relate to all distributions paid by RAAP to performers*** *during the existence of the Agency Agreement (including documents demarcating annual distributions due* *and any additional payments received under the closure policy, and also include also sums not yet distributed to identified performers) and* ***in my view it is abundantly clear that these documents are highly relevant and material to the claims being made by PPI against [RAAP]****.*

Discovery of these documents is not only relevant and necessary but also proportionate and I will, therefore, direct their discovery.

<u>*Category 1(iv)*</u>

This relates to the approval of the distribution scheme and this has also been agreed to by [RAAP]' (Emphasis added)

32. It is of particular relevance to note that Cregan J. found that the distribution by RAAP of the income to its performers (and so to use the language of counsel for RAAP, the interface between RAAP and its performer members) was *'highly relevant and material'* to PPI's case against RAAP. It is also relevant to note that this finding was not appealed by RAAP and so is binding on the parties.

33. Yet, as already noted, in this application, RAAP puts a lot of emphasis on the fact that up to this proposed amendment to the Counterclaim, it says the focus of this case has been on the *interface between PPI and RAAP*. This is because it claims that the pleadings concentrate on how monies, due to performers, were calculated and then *paid to RAAP by PPI* under the terms of the Contract (and not, on how monies are calculated and paid by RAAP to its performer members).

34. For this reason, RAAP says that, *if* the amendments are allowed, it will *also* have to deal with claims regarding the *calculation and distribution of monies by RAAP to performers* and thus it will have to focus on the interface between RAAP and performers, as well as the interface between RAAP and PPI.

35. However, this appears to be the same argument which was made (unsuccessfully) by RAAP before Cregan J., namely that Cregan J. should just concentrate on the interface between RAAP and PPI. If he did, then RAAP appeared to be saying that he would accept that RAAP's offer to discover invoices sent *by RAAP to PPI* was sufficient, as that was all that was relevant to the dispute.

36. However, Cregan J. found that documents relating to '*all distributions paid by RAAP to performers'* (i.e. the interface between *RAAP and the performers*) were in fact '*highly relevant'.* Cregan J.'s finding, which was not appealed, supports a finding that an amendment of the Counterclaim (arising from the discovery of those very same documents) and relating to how distributions were paid by RAAP to performers '*relate[s] to an issue arising from the subject matter of the proceedings'*, such that the amendment should be permitted.

37. Furthermore, it is difficult to see how RAAP's argument, that the proceedings relate solely to the interface between RAAP and PPI, could succeed in preventing the amendment of the pleadings (to include a reference to the distribution of income by RAAP to performers), when the same argument did not succeed in preventing discovery of documents (relating to the distribution of income by RAAP to performers).

<u>The flipside of RAAP's claims that PPI's calculations are incorrect</u>

38. Thirdly, in these proceedings RAAP claims that *PPI's calculations,* of what is due to performers, *are incorrect.* PPI denies this claim, and so effectively claims that its calculations *are correct*. Accordingly, one could say that the flipside of PPI's denial, that its calculations are incorrect, is a claim that how RAAP distributes income to performers (to the extent that it is different from PPI's approach) must be incorrect. As such, it seems to this Court that the flipside of the current claim by RAAP that PPI's calculations are incorrect, and PPI's denial of same, is the argument being made in the proposed

amendments to the Counterclaim (that RAAP's calculations and distribution is incorrect). Thus, these amendments could be said to relate to an issue arising from the subject matter of the proceedings.

39. For all these reasons, this Court concludes that the proposed amendments to the Counterclaim relate to an issue arising from the subject matter of the proceedings.

(ii) Is there prejudice that stems from the belated alteration in the pleadings?

40. Understandably, RAAP is not pleased that on 24 November 2025, PPI told the Commercial Court that the case was ready to go to trial, and then RAAP learnt on 31 March 2026 that PPI wished to amend its pleadings.

41. However, unfortunately in any late amendment to pleadings, events can change matters and the events which changed matters, in this instance, is the discovery of documents and their analysis by PPI's expert. For this reason, the fact that in November 2025 PPI told the Commercial Court that it was ready to go to trial is not, *per se*, sufficient justification for this Court to refuse to approve the amendments. Something much more in the nature of prejudice must be established than, in effect - our opponent told us that it was ready to proceed, and so it should not be permitted to resile from that position.

42. As regards what might be regarded as sufficient prejudice to RAAP arising from the *belated* alteration of the pleadings, it is important to bear in mind that, while this application was heard on 3 July 2026 (with judgment delivered on 13 July 2026), PPI's intention to amend its pleadings was brought to RAAP's attention on 31 March 2026.

43. Thus, from that date, RAAP has known that it may have to deal with these claims regarding the Distribution Scheme at a trial which was fixed to take place a full seven months later. Having seven months to deal with *additional* claims of breach of contract (to those already pleaded) could not be regarded as a sufficient prejudice, in this Court's view, to justify a refusal by this Court of its consent to the amendment of the pleadings.

44. This is particularly so, when one considers that the claims arise solely from material which is in RAAP's possession and so RAAP is not in a position where it is having to deal with material with which it is not familiar. It also appears to be the case that the amendments do not involve any new evidence, since PPI points out that RAAP's affidavits and witness statements already fully address how RAAP does its calculations.

45. In addition, the amendments do not raise a new cause of action, since the dispute already involves alleged breaches of the Contract, *albeit* they deal with a different breach of the Contract.

46. Furthermore, RAAP was on notice that PPI did not regard RAAP's calculations as correct, so the claims in the amended pleadings could not be regarded as a completely novel claim. For example, at para. 38 of PPI's existing Counterclaim, PPI claims that:

> *'In breach of the said agreement, RAAP has:-*
>
> *(a) failed and/or refused to "provide PPI with details of all Qualifying Performers playing on tracks in Non-Qualifying Countries ... " in accordance with Clause 7.3.1. of the Agreement or at all;*
>
> *(b)* ***failed and/or refused to "take care in distributing income*** *received from PPI, ensuring that Equitable Remuneration is only paid to Qualified Performers" ;*
>
> *(c) failed and/****or refused to "maintain a database system in sufficient order and detail to enable it to comply with its obligations*** *hereunder"; and*
>
> *(d) sought payment in respect of performances which are non-Qualifying Performances within the meaning of the Agreement.'* (Emphasis added)

47. It is, of course, true that witness statements have already been delivered by RAAP, and so one is well advanced in preparation for the trial. Accordingly, the fact that the amendment of the Counterclaim comes *after* those witness statements have been delivered

is not ideal. However, it is important to bear in mind that witness statements are not evidence, but rather a summary of what a witness intends to state in evidence.

48. Thus, RAAP's relevant witness regarding the alleged breach of the Distribution Scheme (Mr. Clinch) will have a full opportunity to deal, in his actual evidence to the court, with any of the claims which are contained in the amended Counterclaim. For this reason, the fact that witness statements have been delivered is not, in this Court's view, a sufficient prejudice to justify a denial of the Court's permission to the amendment of the Counterclaim, such as to deprive PPI and the Court from having the trial deal with *'the real questions in controversy between the parties'*.[2]

49. In this regard, the directions which have been agreed between the parties provide that, on 9 July 2026, after the hearing of this application (on 3 July 2006), PPI is required to deliver its expert reports and witness statements. Then, within 21 days, on 30 July 2026, RAAP must deliver its replying expert reports. Counsel for PPI indicated that it has no difficulty in principle[3] if Mr. Clinch wants to put in a further witness statement on the same date as RAAP's replying experts' witness statements are delivered.

50. It is also relevant to note that the claims in the proposed amendments are said to rely on expert evidence, and, as noted, replying expert witness statements are not required to be delivered by RAAP until 30 July 2026. Thus, RAAP will get an opportunity to have its expert deal with the expert evidence provided by PPI, due on 9 July 2026, which appears to be the basis for the amendments to the Counterclaim.

51. Finally, as regards prejudice, it is also relevant to note that RAAP wants the trial date to go ahead as scheduled, and it is insistent that it is *not* seeking an adjournment of the trial, in order to have more time to deal with the amendments. That is RAAP's prerogative.

[2] Croke v Waterford Crystal Ltd [2004] IESC 97, [2005] 2 IR 383 per Geoghegan J. at para 36.
[3] Transcript, pg. 82, lines 7-11: 'in principle, we have no difficulty with Mr. Clinch or Mr. Casey or whatever factual witnesses thought to be appropriate addressing this at the same time as their experts do, as provided for in the existing submissions.'

However, it is relevant to note that RAAP *could* have sought to relieve the prejudice, it says will be inflicted upon it by the amendments to the Counterclaim, but it chose not to do so. By insisting that it will not apply for an adjournment of the trial date, it is ensuring that, any prejudice it suffers, cannot be alleviated by other means.

52. While not determinative, this does not assist RAAP, when this Court comes to addressing whether there is *sufficient* prejudice to RAAP to justify this Court in refusing to permit the amendments to the Counterclaim.

53. Instead, RAAP suggests that the issues raised by the amendments might be considered in a subsequent module to the trial. However, this Court believes that from the perspective of the efficient use of court resources, this would not be the most efficient way to resolve the dispute between the parties. This is particularly so where a key aspect of the dispute concerns how monies are calculated and paid to performers. To put it another way, RAAP's claim in these proceedings is that PPI's method of calculation under the Contract is wrong, yet, the second module, if there were to be one, would address the claim that RAAP's calculations under the same Contract are wrong.

54. As noted by Collins J. in *Stafford*, at para. 30, '*it clearly makes sense to have the breach of contract claim heard and determined at the same time'* as the other claims in that case, '*rather than requiring that claim to be pursued by way of separate action'.* The same logic applies in this case, in this Court's view.

<u>CONCLUSION</u>

55. For the foregoing reasons, this Court concludes that the amendments to the Counterclaim should be permitted.

56. This matter will be listed for mention on 21 July 2026 at 10.45 a.m. to deal with any final orders and costs. However, on the assumption that it should *not* be necessary to expend

costs on a further court sitting, and in order to facilitate the parties agreeing all outstanding matters, the parties have liberty to notify the Registrar if such a listing proves to be unnecessary. This is particularly so in light of the clear implication from *Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform* [2023] IECA 189 at para. 94, that there is an onus on lawyers to take a broad-brush approach to costs.