Neutral Citation Number: [2022] EWHC 489 (QB)

Case No: QB-2020-004688

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 March 2022

Before :

THE HONOURABLE MR JUSTICE NICKLIN

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Between :

SMO
(a child represented by Anne Longfield as litigation friend)
acting as a representative claimant pursuant to CPR 19.6 **Claimant**

- and -

(1) TikTok Inc.
(2) TikTok Information Technologies Limited
(3) TikTok Technology Limited
(4) Bytedance Limited
(5) Beijing Bytedance Technology Co. Limited
(6) Musical.ly **Defendants**

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Charles Ciumei QC and Helen Morton (instructed by **Scott + Scott UK LLP**)
for the **Claimant**
Anya Proops QC, Christopher Knight and Zac Sammour (instructed by **Hogan Lovells International LLP**) for the **Second Defendant**

Hearing date: 1 March 2022

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Approved Judgment

The Honourable Mr Justice Nicklin :

1. There are three applications by the Claimant before the Court. Two Application Notices were issued by the Claimant on 22 February 2022. In combination, they sought:

   i) permission to serve the Claim Form on the Defendants who are domiciled outside England & Wales and, in respect of whom permission to serve out is required;

   ii) an extension of the period within which to serve the Claim Form on the Defendants who have not yet been served; and

   iii) permission to serve the Claim Form by alternative means on the First, Fourth, Fifth and Sixth Defendants by service on solicitors who have acted for the Defendants but who have confirmed that they are not authorised to accept service of the Claim Form.

2. The claim has several unusual features. The Claimant is a child, under the age of 16. Her litigation friend is the (now former) Children's Commissioner for England. As described in her claim, this is a representative claim sought to be brought by the Claimant for herself and on behalf of a class of children who use or have used TikTok, the social media platform. It is alleged by the Claimant that the six Defendants are responsible for processing the personal data of the children and for invading their privacy and misusing the children's private information.

3. The Claimant's representative claim is brought on behalf of a class of children, namely all those who are, or were, account holders and users of TikTok from 25 May 2018, who were (a) resident in the UK or the European Economic Area ("EEA"); and (b) under the "*relevant age*", defined as follows: (i) in the UK, under 13 years old when they used TikTok, whether or not they subsequently reached the age of 13 (pursuant to s.9 Data Protection Act 2018 ("DPA 2018")); or, (ii) in relation to Children in the EEA, under 16 years old when they used TikTok, whether or not they subsequently reached the age of 16 or any lower age provided by law in the Member State in which they were resident at the time of using TikTok (pursuant to Art.8(1) of the General Data Protection Regulation ("GDPR")).

4. The Claim Form was issued on 30 December 2020. The date is of potentially some significance as I shall explain further below.

5. Prior to issue of the Claim Form, the Claimant made an *ex parte* application seeking her anonymisation. The Application Notice seeking that order was filed shortly after 4pm on Sunday 20 December 2020. Monday 21 December 2020 was the very last day of the legal term. The urgency, the Judge was told, stemmed from the fact that the Brexit transition period ended on 31 December 2020. This would bring about changes to the law relevant to the claim. Two changes were identified. The first related to the GDPR. The Claimant submitted that, if the Claim Form was issued prior to 1 January 2021, the English Court would have jurisdiction over the Second Defendant in respect of the class of members in the EEA. After that date the position was "*less clear*". The second change was that, if the Claim Form was issued prior to 1 January 2021, the Claimant would be able to serve the Third Defendant without requiring the Court's permission. The third point was identified to the Judge in the following terms:

> "Further, and crucially, if these intended proceedings are issued prior to 1 January 2021, any judgment given is enforceable in Member States without further procedures. If the proceedings are issued from 1 January 2021 onwards, local laws of each Member State will apply which could severely impact and/or prejudice to Claimant's ability to enforce."

6. The Judge directed a hearing – in the vacation – on 30 December 2020 and handed down judgment that same day **[2020] EWHC 3589 (QB)**. The Claimant was represented by the same solicitors and Counsel as the hearing before me. The Judge granted the Claimant anonymity in the proceedings for the reasons explained in the judgment. He was critical of the last-minute nature of the application launched by the Claimant – see [7]-[11] – but in the end he was prepared to hear the application.

7. Having been granted permission to anonymise the Claimant, the Claim Form was issued on 30 December 2020. The Claim Form identifies six Defendants.

   i) The First Defendant is a company incorporated in California, USA. The Claimant alleges that it is named as a data controller which processes personal data in the TikTok Privacy Policy dated October 2019. The Claimant's case is that for at least the early part of the period of the claim, the First Defendant was a data controller of personal data of the class of children sought to be represented by the Claimant.

   ii) The Second Defendant is an English company with a place of business in London.[1] The Second Defendant is alleged to own 100% of the share capital in the Third Defendant, a company incorporated in the Republic of Ireland with a place of business in Dublin. The Claimant alleges, based on the TikTok Privacy Policy dated 5 October 2021, that the Second and Third Defendants are joint data controllers and that they process personal data in the UK and EEA respectively. The Claimant's case is that the Second Defendant is registered with the Information Commissioner's Office as a data controller, having registered from 13 October 2020. The Data Protection Officer of the Second Defendant alleged to be the Third Defendant. The Claimant has stated that, at least for the period January 2019 to July 2020, the Second Defendant "*may not have been a data controller*". The Privacy Policies between January 2019 -July 2020 stated that TikTok was provided and controlled by the First Defendant.

   iii) The Fourth Defendant is incorporated in the Cayman Islands and is said to be the "*ultimate parent holding company of the Bytedance group*". It is alleged to be the ultimate parent of the Second Defendant. In this role, it is contended that "it must be assumed that the [Fourth Defendant] makes, or is involved in making, global decisions affecting the manner of collection and use of the Children's personal data and private information".

   iv) The Fifth Defendant is a privately held company headquartered in Beijing, China. The Claimant contends that it is to be inferred that the Fifth Defendant "*owns and/or otherwise controls*" the First and Sixth Defendants. It is alleged

[1] There has been an issue over the correct name of the Second Defendant, but it appears that the Claimant now accepts that the correct name of the Second Defendant, as it appears in the ICO's register, is TikTok Information Technologies UK Limited. No application has yet been made formally to amend to correct the name of the Second Defendant.

that the TikTok algorithm, said to responsible for TikTok's "*competitive advantage and global success*", is owned by the Fifth Defendant, which is alleged to be the "*epicentre of the Bytedance Group*". On this basis it is said that it is "*reasonably to be inferred*" that the Fifth Defendant is also a data controller of the Children's personal data and/or private information.

v) The Sixth Defendant is an exempted company with limited liability incorporated under the laws of the Cayman Islands, with its principal place of business in Shanghai, China.

8. As will be apparent, only the Second Defendant is domiciled within the jurisdiction of the Court. Therefore, from the point of issue of the Claim Form, the Claimant's solicitors were aware that they needed to apply for permission to serve the Claim Form on, at least, the First, Fourth, Fifth and Sixth Defendants ("the Service Out Defendants"). A claimant who needs to serve a Claim Form out of the jurisdiction has 6 months to do so from the date of issue: CPR 7.5(2).

9. After the Claim Form was issued, no application was made seeking permission to serve the Claim Form out of the jurisdiction on the Service Out Defendants. Instead, on 31 December 2020, the Claimant sent a 27-page letter of claim to all Defendants. No pre-action protocol letter had been sent to the Defendants or any of them. The Claimant's solicitors suggested in their letter that they had issued the Claim Form, without the customary and required pre-action correspondence, "*in order to facilitate the step… to the making of Court orders for anonymity and a confidentiality ring*". The letter identified the basis of the Claimant's claim and invited the non-English companies to accept service without the need for the Claimant to obtain permission to serve out of the jurisdiction. The letter requested a response by 28 January 2021. The Claimant's solicitors stated that it was "*not appropriate*" to serve the Claim Form that they had issued the day before, "*in particular*" because the Supreme Court was due to hear an appeal in ***Lloyd -v- Google*** in April 2021. The Claimant's solicitors invited the Defendants to agree a stay until the Supreme Court had given its judgment in ***Lloyd -v- Google***. I need to explain a little about those proceedings.

10. Mr Lloyd had brought a claim against Google Inc for alleged breached of the Data Protection Act 1998. Google Inc was a Delaware corporation. As such, the claimant needed the court's permission to serve the Claim Form on Google outside the jurisdiction. The application for permission had been contested by Google on the grounds that the claim had no real prospect of success as: (1) damages could not be awarded under the DPA 1998 for "*loss of control*" of data without proof that it caused financial damage or distress; and, in any event (2) the claim was not suitable to proceed as a representative action under CPR 19.6.

11. At first instance, on 8 October 2018, Warby J decided both issues in Google's favour and therefore refused permission to serve the proceedings on Google: **[2019] 1 WLR 1265**. The judge held that, even if the legal foundation for the claim made in the action were sound, he should exercise the discretion conferred by CPR 19.6(2) by refusing to allow the claim to be continued as a representative action. He characterised the claim as "*officious litigation, embarked upon on behalf of individuals who have not authorised it*". He held that the representative claimant "*should not be permitted to consume substantial resources in the pursuit of litigation on behalf of others who have*

little to gain from it, and have not authorised the pursuit of the claim, nor indicated any concern about the matters to be litigated": [102]-[104].

12. The Court of Appeal handed down judgment, reversing Warby J, on 2 October 2019 **[2020] QB 747**. It took a very different view of the merits of the representative claim. The Court of Appeal regarded the fact that the members of the represented class had not authorised the claim as an irrelevant factor, which they held the judge had wrongly taken into account, and that it was open to them to exercise the discretion afresh. The Court of Appeal described the litigation as the only way of obtaining a civil compensatory remedy for what, if proved, was a "*wholesale and deliberate misuse of personal data without consent, undertaken with a view to commercial profit*": [86]. In these circumstances the Court of Appeal held that, as a matter of discretion, the claim should be allowed to proceed.

13. The Supreme Court gave permission to appeal on 11 March 2020. As the parties in the present case recognised, the representative nature of the Claimant's claim meant that there were similarities with the ***Lloyd -v- Google*** litigation, and that the decision of the Supreme Court could have an impact on the viability of the Claimant's claim in these proceedings, particularly in respect of the representative claim.

14. That explains the background to the request for a stay, made in the Claimant's solicitors' letter of 31 December 2020.

15. On 5 February 2021, Hogan Lovells responded on behalf of all six identified Defendants. They suggested that the Claim Form had already been issued, not for the reasons advanced in the Claimant's solicitors' letter of 31 December 2020, but for the "*entirely tactical reasons*" identified in Warby J's judgment granting anonymity ([6]), i.e. the perceived advantages in avoiding changes in the law that would come into force on 1 January 2021. Nevertheless, on behalf of all six Defendants, Hogan Lovells agreed to the proposed stay pending the Supreme Court's decision in ***Lloyd -v- Google***. On the final page of the letter, under the heading "*Service of the Claim*", the Defendants' solicitors stated:

> "… our clients' positions regarding service of the Claim are reserved. Our clients' agreement to a stay is given expressly on the basis that it is without prejudice to their right to contest the jurisdiction of the Court and/or to oppose any application by your client for permission to serve out, if so advised…
>
> For the avoidance of doubt, we do not have instructions to accept service on behalf of any of our clients. This letter does not constitute submission to the jurisdiction by any of our clients and is without prejudice to any challenge to the jurisdiction of the English Court in respect of any claim howsoever served."

16. Following that, a consent order was filed by the parties which led to an Order made by Master Gidden on 6 April 2021. The order provided that:

> "… all further proceedings in this claim be stayed until 28 days after the earlier of (1) the hand down of the Lloyd -v- Google judgment; or (2) either party becoming aware that the Lloyd-v- Google judgment will not be handed down because of settlement, discontinuance or otherwise and providing written notice to that effect to the other".

The order recorded, in a recitation, that the Defendants had expressly reserved their position on whether the English Court had jurisdiction over one or more of the Defendants and in respect of any potential application by the Claimant for permission to serve the Claim Form out of the jurisdiction.

17. In respect of service of the Claim Form on the Service Out Defendants, as noted above, the Claimant had 6 months to serve the Claim Form from 30 December 2020. Over three months of this period elapsed before the Order of Master Gidden was made.

18. The Supreme Court gave its judgment in ***Lloyd -v- Google*** on 10 November 2021. The Court reversed the decision of the Court of Appeal and restored the order of Warby J, essentially for the reasons given by the Judge. I will need to look at the Supreme Court decision in more detail shortly.

19. Pursuant to Master Gidden's order of 6 April 2021, the stay of these proceedings would be lifted in 28 days. The parties knew that this would be the position. The Claimant's solicitors must have realised that, without an extension of time, the Claimant only had 3 months left to serve the Claim Form on the Service Out Defendants. Despite this, the Claimant's solicitors took no steps to prepare an application for permission to serve the Claim Form on the Service Out Defendants or an application for an extension of time to serve the Claim Form.

20. On 19 November 2021, Hogan Lovells wrote to the Claimant's solicitors inviting them to accept that, in light of the Supreme Court judgment, the representative claim advanced by the Claimant was no longer viable. The Claimant was invited to discontinue the claim by 26 November 2021, with Hogan Lovells contending that it ought not to have been brought "*when it was or at all*".

21. On 8 December 2021, the stay was lifted. From that point, the remaining time for serving the Claim Form began counting down again. Yet, still no steps were taken to prepare an application for permission to serve the Claim Form on the Service Out Defendants or an extension of time.

22. On 21 December 2021, the Claimant's solicitors replied to the letter of 19 November 2021. They rejected the contention that the claim could not proceed following the Supreme Court decision in ***Lloyd -v- Google***. Separately, they complained that they had not received a substantive response to the letter of claim. The Claimant's solicitors suggested a further "*short stay*" to enable (i) provision of a response to the letter of claim, by 31 January 2022; and (ii) service of the Claim Form, together with Particulars of Claim, by 28 February 2022. The Claimant's solicitors also invited Hogan Lovells to confirm that the Defendants would agree to service being effected on Hogan Lovells "*on behalf of each of your clients, including (given the COVID epidemic) by email*". The letter sought a response by 4.30pm the following day.

23. I would pause to observe that the proffered timetable in that letter took service of the Claim Form *beyond* the four months permitted to serve a Claim Form on the Second Defendant and, taking into account the effect of the stay (as the parties then understood it), perilously close to the limit of the six-month period for serving on Service Out Defendants, without apparently factoring in (a) the need to obtain permission to serve out; and, thereafter, (b) the likely time frame, if permission were granted, of effecting service. Anyone familiar with service of process outside the jurisdiction would know

that the time that can be taken to effect service can vary significantly from country to country. It should have been clear to reasonably competent litigation solicitors, not least from a cursory investigation of previous authorities (several of which are referred to below), that there was likely to be significant delay in effecting service of a Claim Form on a defendant in the People's Republic of China.

24. Hogan Lovells responded by letter on 23 December 2021. They complained about the unrealistic 24-hour deadline for a reply imposed by the letter of 21 December 2021. The proposed further stay was rejected. The Defendants' solicitors stated that, if the claim was to proceed, then the Claimant would need to apply for permission to serve the Claim Form out of the jurisdiction. The penultimate paragraph repeated again the position regarding service of proceedings:

> "For the avoidance of doubt, and consistent with our previous correspondence, (i) our clients are not agreeable to accepting service and we do not agree to accept service of proceedings by email and (ii) nothing in this letter amounts to any submission to the jurisdiction by our clients."

25. Following the letter of 23 December 2021, it was beyond doubt that, if a claim was to be advanced against them, the Claimant would now need to serve the Claim Form on *all* Defendants. For at least the Service Out Defendants that inevitably meant also obtaining the Court's permission to serve the Claim Form out of the jurisdiction. Yet, still, no application was made either for this permission or for an extension of time for the period to serve the Claim Form.

26. On 31 December 2021, the Claim Form and Particulars of Claim were served on the Second Defendant. In subsequent correspondence, the Claimant's solicitors acknowledged, what was then the common understanding, that the last date for service of the Claim Form on the Second Defendant was 1 January 2022.

27. On 4 January 2022, the Claimant's solicitors contacted the Foreign Process Service of HMCTS seeking guidance on the estimated time it would take to effect service of a Claim Form on a defendant domiciled in the People's Republic of China. I was told at the hearing that this was the first time that the Claimant's solicitors had inquired about this. The email requesting this information stated:

> "We are commencing the process of requesting permission from the Court to serve the Claim Form and Particulars of Claim outside the jurisdiction. We have reviewed the service requirements to China, and understand that it must go through Foreign Process".

28. A representative of the Foreign Process Section responded, on 6 January 2022, and stated that service in China could take over a year from the time the request was sent until a certificate of service was returned.

29. If at no point before then, the receipt of that email should have sounded alarm bells at the Claimant's solicitors. The position was stark. Without an extension of the six-month period to serve the Claim Form provided under CPR 7.5(2), the Claim Form was going to expire long before the Claim Form was likely to be served on the Fifth Defendant. Not only that. The Claimant also needed to obtain permission to serve the Claim Form out of the jurisdiction on the Service Out Defendants. The likely time it would take,

once permission to serve out was granted, was not as bad for the First, Fourth and Sixth Defendants, but still time was relatively tight. Despite these pressing issues, even then no application was made, either for permission to serve the Claim Form on any defendant outside the jurisdiction or for an extension of time of the period within which to serve the Claim Form.

30. On 11 January 2022, Hogan Lovells responded following service of the Claim Form on the Second Defendant. They sought an extension of time for service of the Defence, until 16 March 2022 at the earliest, and indicated that, in light of the Supreme Court decision in ***Lloyd -v- Google***, the Second Defendant intended to apply for summary judgment against the Claimant. The letter stated, again:

> "… we do not have instructions from our foreign-domiciled clients to accept service on their behalf, whether by email or otherwise. We assume you will therefore shortly be applying for permission to serve out of the jurisdiction (if you have not already done so)."

31. Hogan Lovells also made clear that it was likely that the foreign-domiciled Defendants would challenge any order granting permission to serve out on several of the issues going to the viability of the claim. As those issues were likely to overlap significantly with the Second Defendant's threatened summary judgment application, they suggested that it would better serve the overriding objective if all the applications were heard together.

32. Following receipt of that letter, still the Claimant made no application to the Court for permission to serve the Claim Form out of the jurisdiction or for any extension of time to do so. Instead, the Claimant's solicitors responded to Hogan Lovells, on 17 January 2022. They rejected the Second Defendant's proposed timetable for service of its Defence. Somewhat unrealistically, particularly in light of previous correspondence, the Claimant's solicitors invited the foreign-domiciled Defendants to accept service of the Claimant's application for permission to serve the Claim Form out of the jurisdiction, so that the summary judgment application and the application for permission to serve out could be heard at the same time. The Claimant's solicitors proposed that the applications should be issued by 28 February 2022, with evidence being served by 28 March 2022, reply evidence by 4 April 2022 and a hearing to be fixed after 26 April 2022.

33. Again, I would observe that, without an extension of time for service of the Claim Form, the timetable proposed by the Claimant would have proved academic. The time for serving the Claim Form would have expired long before the proposed hearing of the applications could have taken place.

34. Even then, the Claimant still took no steps to issue an Application Notice seeking permission to serve the Claim Form on the Service Out Defendants and/or an extension of time for doing so. The continued failure to issue an Application Notice seeking an extension of time is particularly surprising given that the Claimant's solicitors had been told, on 6 January 2022, that it could take a year to effect service in China.

35. Hogan Lovells responded on 21 January 2022. They confirmed that their lack of instructions to accept service of the Claim Form on the foreign domiciled defendants also extended to not accepting service of Applications made in the proceedings.

This stance was hardly surprising and was entirely consistent with the stance that had been adopted by the Defendants since at least February 2021. Even this did not provoke the Claimant's solicitors to issue any application regarding service of the Claim Form and the period for doing so.

36. On 31 January 2022, the Claimant and Second Defendant filed a consent order containing agreed directions for the Second Defendant's intended summary judgment application. That consent order was marked to go before the assigned Master.

37. It was not until 22 February 2022 that the Claimant finally issued the Applications that are currently before the Court.

Evidence in support of the Applications

38. The Application Notices were accompanied by two witness statements of the Claimant's solicitor, Tom Southwell, both dated 22 February 2022. They were accompanied by over 700 pages of documents and exhibits. On both Application Notices, the Claimant's solicitors had indicated that they wished the applications to be dealt with without a hearing. A letter from the Claimant's solicitors was filed with the Application Notices. It included the following:

> "1.2 We have today filed two applications:
>
> (a) for an order for permission to serve the claim form out of the jurisdiction under CPR r.6.36, and for service by an alternative method pursuant to CPR 6.15(1) and 6.27 in relation to each of on the First, Fourth, Fifth and Sixth Defendants (the Service Out Defendants); and
>
> (b) for an order for an extension of time for service of the Claim Form pursuant to CPR r.7.6.
>
> 1.3 We respectfully request that the straightforward extension of time application be addressed with a degree of urgency for the reasons set out herein and in the short witness statement accompanying that application.
>
> 1.4 The circumstances in which the applications have been made are set out in the first and second witness statements of Tom Southwell which accompany the two applications.
>
> 1.5 In summary:
>
> (a) The Claim Form was issued by the Court on 30 December 2020. Shortly afterwards, the parties agreed to stay the proceedings pending the decision of the Supreme Court in relation to Google LLC's appeal against the Court of Appeal's judgment in ***Lloyd -v- Google LLC*** **[2019] EWCA Civ 1599**.
>
> (b) The Supreme Court's judgment was handed down on 10 November 2021 with the result that the stay expired on 8 December 2021.
>
> (c) Since the expiry of the stay my firm has been in correspondence with the Defendants' solicitors, Hogan Lovells LLP, in relation to the

future conduct of the proceedings. As part of that correspondence, my firm sought the Defendants' agreement to accept service of the Claim Form. The Defendants have refused to accept service of the Claim Form. That refusal was finally communicated to my firm by letter dated 21 January 2022.

(d) Since that time my firm and the Claimant's counsel team have been working diligently to prepare the service out application in relation to the four Service Out Defendants in three different jurisdictions (USA, Cayman and People's Republic of China) as well as preparing proceedings for service in Ireland (for which permission is not required as the proceedings herein were issued before 31 December 2020). Unfortunately, that preparation was disrupted by the COVID-19 pandemic and by commitments to other court hearings as explained in the short second witness statement of Tom Southwell.

1.6 The deadline for service of the claim form and particulars of claim on the Service Out Defendants is 3 March 2022. In the case of the First, Fourth and Sixth Defendants, a request for an extension of time is sought out of an abundance of caution in case the Court is unable to consider the service out application sufficiently far in advance of the deadline. In the case of the Fifth Defendant, which is resident in China, I understand from discussions with the Foreign Process Section that service may take at least a year (it is partly for this reason that the Claimant has applied for an Order for substituted service as part of the service out application).

1.7 We would be grateful for any assistance the Court can provide the Claimant in order to ensure that the extension application in particular is considered by the Court as soon as practicable (and the service out application if time allows)…"

39. I have underlined three passages in that letter, as they merit comment at this stage.

i) First, the extension of time application was very far from "*straightforward*".

ii) Second, against the history of the repeated and consistent refusal of the Service Out Defendants to accept service of the Claim Form without the permission of the Court being obtained, the suggestion that it was only on 21 January 2022 that the refusal was only "*finally communicated*" to the Claimant's solicitors was apt to mislead. I have not, in fact, been misled because, in the process of dealing with these applications I have become fully familiar with the background.

iii) Finally, the deadline of 3 March 2022 for service of the Claim Form on the Service Out Defendants, as recorded in the letter, reflected the position that all parties had understood it to be.

40. Mr Southwell's witness statements dealt with several areas of evidence relevant to the Applications. His first witness statement contains the evidence in support of the application to serve the Claim Form out of the jurisdiction and the application for an order for alternative service of the Claimant on the Defendants for whom permission to serve out is required permitting service by email of the Claim Form on Hogan Lovells.

41. He set out the history of the litigation, explained the basis of the Claimant's claim and why England & Wales was said to be the proper forum for the claim. In summary, it is contended that all Defendants "*have either registered or self-declared or it is reasonably to be inferred are data controllers and/or data processors*" in relation to personal data of all of the children in the class sought to be represented by the Claimant. Further, it is alleged that they are responsible for "*invading their privacy and misusing the Children's private information*".

42. As the application for permission to serve out was to be made *ex parte*, Mr Southwell's first statement contained a section headed "*Further points relevant to full and frank disclosure*". The key matter identified was the impact of the Supreme Court's decision in ***Lloyd -v- Google***. Mr Southwell referred to Hogan Lovells' contention that the decision established that "*loss of control*" of data was not damage capable of supporting a claim with proof of some damage in any individual case. Mr Southwell responded that this point was irrelevant because the Claimant's claim was not brought under the Data Protection Act 1998 or the Data Protection Directive (as had the been the case in the ***Lloyd -v- Google*** case), but (1) under the Data Protection Act 2018 and the GDPR; and (2) for misuse of private information. Mr Southwell stated that the Supreme Court left consideration of the GDPR "*to one side*" ([16]) and Mr Lloyd had not brought a claim for misuse of private information. Finally, Mr Southwell contended that s.13 Data Protection Act 1998, upon which Mr Lloyd had exclusively relied, was in materially different terms from Art. 82(1) GDPR:

> "142. Section 13 of DPA 98 provided a remedy for an individual who suffered either 'damage' or 'distress' as a result of any contravention of that Act. It was this provision which the Supreme Court interpreted (based on the prior legislative scheme) as not including a claim for non-material damage. However, Art.82(1) GDPR expressly sets out the opposite and makes clear that the GDPR does allow a claim for non-material damage:
>
> > 'Any person who has suffered material <u>or non-material damage</u> as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.' [emphasis in original]
>
> 143. Further, it is clear that 'non-material damage' in the GDPR, for these purposes, includes loss of control of personal data. Recital 146 states that the 'concept of damage should be broadly interpreted' and control, and loss of it, is referred to in a number of other recitals, including
>
> (a) Recital 7 GDPR states that '[n]atural persons should have control of their own personal data';
>
> (b) Recital 75 GDPR, concerning the risks to the rights and freedoms of natural persons states that those risks:
>
> > '… may result from personal data processing which could lead to physical material or <u>non-material damage</u>, in particular … where data subjects may be deprived of their rights and freedoms or <u>prevented from exercising control over their personal data</u>…' [emphasis in original]

(c) Recital 85 GDPR, which concerns the 'Notification Obligations of Breaches to the Supervisory Authority', defines damage as follows:

> 'A personal data breach may, if not addressed in an appropriate and timely manner, result in physical, material or non-material damage to natural persons such as loss of control over their personal data or limitation of their rights, discrimination, identity theft, fraud, financial loss, unauthorised reversal of pseudonymisation, damage to reputation, loss of confidentiality of personal data protected by professional secrecy or any other significant economic or social disadvantage to the natural person concerned' [emphasis in original]

144. Accordingly, under the express provisions of the GDPR, compensation *is* available for non-material damage, and the term 'damage' includes loss of control over a subject's personal data. The Supreme Court's decision on this point in ***Lloyd -v- Google*** is not applicable to the Claim (the Supreme Court specifically noted – at paragraph 109 – that the expression 'loss of control' does not appear in the DPA 1998 and that none of the requirements of the Act is predicated on 'control' over personal data by the data subject. This is in contrast to the GDPR), and the Defendants' arguments are irrelevant. This is, at the very least, a real prospect of success of the Claimant's claim on this point."

43. The second ground upon which Mr Southwell sought to distinguish ***Lloyd -v- Google*** was the issue of the inappropriateness of representative proceedings where an investigation as to the individual circumstances of the alleged breach was required – see e.g. [80], [86], [131] and [144], and [97]-[99] in respect of the misuse of private information claim. Mr Southwell argued that Hogan Lovells' reliance on this point was "*incorrect*" and that "*the present case is totally different to* **Lloyd -v- Google**". He explained:

> "148. … The class is very different, comprising children with a TikTok account and who actually *used* TikTok while logged into that account in the Claim Period. The personal data and private information collected and processed not only includes all of the information required for setting up an account, device information and location, but also includes behavioural and content information (including the content viewed, how long the user views videos, what advertisements are viewed and for how long, how many times videos are viewed and search history), and inferred information such as age-range and gender. This extends well beyond the situation in ***Lloyd***."

44. The third point raised by Hogan Lovells that Mr Southwell sought to address was that a "*lowest common denominator*" claim (see Supreme Court discussion in [145]-[147]) would not pass the *de minimis* threshold. He contended that the reason why this was held to be the case in ***Lloyd -v- Google*** was because Mr Lloyd wanted to proceed with his representative claim "*without proof of some unlawful processing of an individual's personal data beyond the bare minimum required to bring them within the definition of the represented class*" ([153]). Mr Southwell contended this is not the case with the Claimant's claim. He added:

> "In any event, even if the Claim was limited to 'lowest common denominator', the processing of the Children's personal data was unlawful (and in breach of numerous provisions under the GDPR), and the personal data in fact processed in respect of each of the Children was extensive".

45. Mr Southwell, in the section of this statement making full and frank disclosure, also referred to claims brought in the Netherlands that have been commenced since the issue of the Claim Form in these proceedings. Mr Southwell stated, based on information provided to him from colleagues in his firm's Amsterdam Office that the claims brought in the Netherlands had material differences from the present claim:

> "(a) I understand that the Dutch Proceedings are specifically focused on Dutch consumers and do not affect users in the UK and the rest of the EEA outside of the Netherlands.
>
> (b) The class of Dutch consumers affected by the Dutch proceedings is wider than the present claim: the three Dutch proceedings are brought on behalf of (i) Dutch users of TikTok under the age of 18… or (ii) "*Dutch users*" (i.e. both children and adults)… In contrast, the present Claim is concerned with children under the Relevant Age across the UK and EEA.
>
> (c) Although some entities are named in both sets of proceedings, the list of defendants is not the same as between the Dutch and present actions.
>
> (d) While there is some overlap in terms of alleged GDPR infringements by TikTok, different causes of action are pleaded in the Netherlands compared with the action brought in these proceedings. In particular, I understand that the Dutch claims include claims for breaches of Dutch consumer protection law."

46. Nevertheless, Mr Southwell stated that, given that there were now proceedings in the Netherlands, the Claimant intended to "*carve out*" Dutch children from her claim, and would amend her claim accordingly.

47. As to the application for alternative service of the Claim Form on Hogan Lovells, Mr Southwell contends that those Defendants who have not been served with the Claim Form are fully aware of the claim because of their close connection with the Second Defendant and because they have instructed Hogan Lovells to respond to, and correspond with, the Claimant's solicitors in relation to the claim.

48. As a fallback position, Mr Southwell sought, on behalf of the Claimant, an alternative service order in respect of only the Fifth Defendant, and that is the position that was adopted at the hearing. Mr Southwell recognised that the People's Republic of China objected to all forms of service other than that effected in accordance with the terms of the Hague Service Convention ("the Hague Convention"). He noted that this could take up to a year. He referred to the experience of his Dutch counterparts in the Netherlands litigation where the process of serving the originating court process began on 30 August 2021 and is not yet complete. Apart from delay, which Mr Southwell acknowledged "*may not be a sufficiently good reason*" to justify an order for alternative service, he identified further reasons why an order should be granted in this case.

> "(a) The Claim has already been on foot for over a year and service through the official channels would likely delay it yet another year. The Claimant is seeking relief including a final injunction to prevent unlawful processing of personal data of children, and the longer the proceedings take to be resolved, the longer that unlawful processing continues unchecked for the Claimant and the Class.
>
> (b) As explained below, the [Fifth] Defendant has known the substance of the Claim for well over a year.
>
> (c) The [Second] Defendant has already been served, the [Third] Defendant is currently being served, and (on the assumption that the application for permission to serve out of the jurisdiction is successful, but the Court declines the Claimants' request for an Order permitting alternative service on each of the Service Out Defendants) the [First, Fourth and Sixth] Defendants will be served as promptly as possible. In circumstances where (i) five out of the six Defendants have been (or will be soon) properly served; (ii) all the Defendants are part of the same corporate entity and have the same legal representation; and (iii) the [Fifth] Defendant will have had notice of the Claim Form and Particulars of Claim even if not properly served, delaying any further step in proceedings for a year for one defendant to be officially served would unnecessarily bring the proceedings to a long, albeit temporary, standstill. Alternatively, claims against the different Defendants could proceed at different rates, which would result in unnecessary and complicated duplication in both time and cost (for both parties and the Court), as well as being hugely inefficient. This is particularly acute in circumstances where the [Second] Defendant has agreed, in their letter of 21 January 2022, to a timetable for their 'reverse summary judgment and/or strike out' application leading to a hearing to be list on the first available date after 26 April 2022."

49. Finally, in his first witness statement, Mr Southwell set out a section headed "*Urgency and Extension of time for service*". By way of explanation for the delay in making the Applications, he stated that:

> i) the Claimant's solicitors have repeatedly sought in correspondence agreement to service out of the Claim Form, which Hogan Lovells "*finally rejected*" in their letter of 21 January 2022; and
>
> ii) since that time, the Claimant's legal team have been "*working to progress the application*", but "*unfortunately that effort has been undermined by two factors outside of the Claimant's control*". First, Mr Ciumei QC contracted COVID and he was unable to work on the Service Out Application from 27 January to 7 February 2022. Second, since "*that time*" (i.e. the letter from Hogan Lovells of 21 January 2022), Mr Southwell and the Claimant's counsel had commitments in respect of court hearings in other matters which "*limited our ability to progress the Service Out Application*". Mr Southwell stated that he believed "*it was reasonable for the claimant to seek to agree arrangements for service with the Defendants before issuing this application*".

50. Mr Southwell added to this evidence in his second Witness Statement, served in support of the application for an extension of time for service of the claim Form on the First,

Fourth, Fifth and Sixth Defendants. The Claimant's solicitors believe that they have successfully served the Third Defendant. It appears this may not be without controversy or challenge, but I will say no more about that because it is not relevant for the applications I have to determine. Mr Southwell has made the point that the limitation period for any claim does not expire until "*well into 2024*".

Directions for the Hearing on 1 March 2022

51. The Claimant's Applications were referred to me on the papers on 24 February 2022. I also saw that a consent order had also been filed on 31 January 2022. I made an order, in two parts. The first embodied the consent order submitted by the Claimant and the Second Defendant on 31 January 2022. That provided directions for the listing of an Application to be made by the Second Defendant for summary judgment on/striking out of the Claimant's claim leading, ultimately, to a hearing to be fixed in the period between 26 April 2022 and 29 July 2022. The second part of the Order dealt with the Applications issued by the Claimant on 22 February 2022. Given what I was told was the impending expiry of the period for serving the Claim Form, I directed that the Claimant's Applications would be listed for hearing on 1 March 2022. In the reasons for the Order, I noted:

> "The Claim Form was issued as long ago as 30 December 2020. No attempt appears to have been made to serve the Claim Form on the Service Out Defendants for over 13 months, and, for reasons that do not appear to me to be adequately explained, the Claimant's representatives have only recently turned their mind to the issue of service of the Claim Form upon these Defendants, domiciled respectively in USA, Cayman Islands, People's Republic of China and the Cayman Islands.
>
> The Second Defendant's solicitors refused to accept service on behalf of Service Out Defendants on 21 January 2022. It has taken over a further month for the Service and Extension of Time Applications to be issued by the Claimant. As a direct consequence, the Court is now being asked to deal with these substantial applications – lodged with over 700 pages of supporting information – without a hearing on an *ex parte* basis with only 1 week to go before the period for serving the Claim Form expires. I note that the Claimant's original proposal was to make the Service Applications on notice to the Service Out Defendants. These Applications are beyond 'last minute'. It appears that, without an extension being granted, the Claimant highly unlikely to be able practically to serve the Claim Form in the remaining period."

52. I required a skeleton argument to be filed on behalf of the Claimant dealing specifically with the following issues:

i) whether there is a good reason for making an order for alternative service of the Claim Form and the authorities guiding the exercise of the Court's discretion to make an order under CPR 6.15 and/or 6.27;

ii) the authorities guiding the exercise of the Court's discretion to extend the period for serving a Claim Form;

iii) whether the Court has jurisdiction, and if so whether it should exercise such jurisdiction, to make an order permitting alternative service of the Claim Form

on the Fifth Defendant when it appears that service of originating process is required to be effected under the Hague Convention; and

iv) as it was an *ex parte* application, all points that could be fairly made on behalf of the absent parties in relation to (a) the specific points raised, and (b) generally.

53. Finally, I directed that the Second Defendant, if it wished to make submissions at the hearing on 1 March 2022, was also to file a skeleton argument by 10am on 28 February 2022. I explained that, although the Second Defendant was not directly concerned with the Applications, it nevertheless had an interest in their determination because of the potential impact on the litigation as a whole of a potential delay of up to a year whilst the Fifth Defendant was served with the Claim Form.

54. Following those directions, I have received skeleton arguments from Charles Ciumei QC for the Claimant and Anya Proops QC for the Second Defendant. I should express my gratitude for the care that has obviously been taken, under some time pressure, to present these written arguments and for the work of the solicitors, on both sides, to provide the bundles for the hearing. The volume of material and the issues raised in the skeleton arguments to my mind demonstrate that none of these applications was "*straightforward*" and collectively were never suitable for determination without a hearing. I consider that the Claimant's solicitors are open to criticism for the way in which these applications have been presented to the Court. Without doubt, they have caused immense disruption to the work of the Media & Communications List which has had to accommodate, at short notice, a full day's hearing and has required me, urgently, to provide a decision and this judgment.

Dispute over the effect of the stay and the last date for service of the Claim Form

55. The Claimant's skeleton argument for the hearing, filed and exchanged on Monday 28 February 2022, raised for the first time a suggestion that the period for serving the Claim Form on the Service Out Defendants did not, in fact, expire until 6 April 2022. The explanation for this was:

> "… the deadline for service of the Claim Form on the Service Out Defendants was estimated at 3 March 2022. However, this was based on the stay being agreed between the parties in 2021 having commenced on 6 April 2021 ("the Stay"), i.e. the date of the Order made by Master Giddon (sic). The Claimant has reconsidered this point and pursuant to CPR 2.11, it appears that the Stay in fact commenced on 3 March 2021, when there was a written agreement between the parties. This means that the relevant deadline for service of the Claim Form is 6 April 2022, so an extension of time may not be needed (depending on the date when judgment is handed down) if permission to serve out is granted. Nevertheless out of an abundance of caution, an extension is still sought in relation to the [First, Fourth and Sixth] Defendants."

56. As an alternative, in a footnote to the skeleton, the Claimant contended that the deadline for service of the Claim Form on the Service Out Defendants might be 21 March 2022, if the stay ran from the date on which the consent order was filed by the parties with the Court, which was 19 March 2021. Ms Proops QC indicated that this interpretation of the events – and the more generous period that it provides for service of the Claim

Form on the Service Out Defendants – is likely to be disputed in the event that it proves to be material whether the Claim Form has been served within the prescribed period.

57. The law reports are littered with decisions, in relation to service of the Claim Form, where Claimants have complicated the arrangements for service of the Claim Form. I do not need to determine the point – which ultimately is likely to need to be resolved by an application of contractual principles – as to when the stay commenced, and therefore the date by which the Claim Form has to be served, but it threatens to add to the examples of cases where needless complications attend service of a Claim Form within the prescribed period. It is surprising that the point about the date on which the stay commenced was first raised in the skeleton argument for this hearing.

Service Out: the Law

58. I will take the principles that apply to the grant of permission out from Mr Ciumei QC's skeleton argument.

59. On an application for permission to serve a foreign defendant out of the jurisdiction, the claimant must satisfy three requirements: ***Altimo Holdings and Investment Ltd -v- Kyrgyz Mobil Tel Ltd*** **[2012] 1 WLR 1804** [71]:

    i) First, the claimant must demonstrate that there is a serious issue to be tried on the merits – this is the same test as for summary judgment, i.e. whether there is a real (as opposed to fanciful) prospect of success.

    ii) Second, the claimant must demonstrate that there is a good arguable case that the claim falls within one of the categories identified in CPR PD 6B §3.1, the so-called gateways. A good arguable case means connotes that one side has a much better argument than the other.

    iii) Finally, the claimant must satisfy the Court that, in all the circumstances, England & Wales is clearly or distinctly the appropriate forum for the trial of the dispute and that the Court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

60. The Court should exercise restraint and not conduct a mini-trial. The Court's focus should be on the Particulars of Claim and whether on the basis of the facts stated, the relevant cause(s) of action has/have a real prospect of success: ***Okpabi -v- Royal Dutch Shell plc*** **[2021] 1 WLR 1294** [21]-[23].

Service Out: Discussion and decision

61. From CPR PD 6B §3.1, the Claimant relies on the gateways in Paragraphs (2) (claim for an injunction); (3) (necessary and proper party); (4A) (claim based on closely connected facts); (9) (claim in tort); and (21) (claim for misuse of private information).

62. I do not need to go through the authorities Mr Ciumei has provided as to what is required to be demonstrated to come within one or more of the gateways as I am satisfied, at least, that the requirements for Gateways (2), (9) and (21) are met, at least for the claim brought by the Claimant in her own capacity.

63. The real issue is whether the impact of ***Lloyd -v- Google*** means that, at this stage, the Claimant cannot demonstrate a serious issue to be tried in respect of the representative claim. In other words, whether in the light of the Supreme Court decision, the claim brought on this basis is no better than fanciful.

64. I have found this a more difficult issue. At first instance, in ***Lloyd -v- Google***, Warby J decided the point and refused to grant permission to serve the Claim Form out of the jurisdiction on the defendant. He had the immeasurable advantage of having submissions made by both parties. I have had only submissions made by the Claimant. The issue is primarily (if not exclusively) an issue of law and the proper interpretation of the GDPR and whether the Supreme Court's conclusion in ***Lloyd -v- Google*** can properly be distinguished. I can readily see the arguments that could be advanced by the Defendants, but they have not yet been developed. As this is really a matter of law, I wrestled with whether I should do my best to resolve the point, on this *ex parte* application. However, I have concluded that I should not. Not least because, to do so, I would effectively have to carry out my own research as to the contrary argument. That is neither appropriate nor realistically possible in the time I have. The test is whether the argument advanced by the Claimant in relation to ***Lloyd -v- Google*** has a real prospect of success. Having heard only the Claimant's argument properly argued, I consider that she has satisfied me at this stage, and expressly on that basis, that there is a serious issue to be tried on this point. Leaving aside any application to set aside my order granting permission to serve out by one or more of the Service Out Defendants, it is likely that the Court will have this point argued fully between the Claimant and the Second Defendant at the forthcoming summary judgment/strike out application. Nothing I say in this judgment prejudges the argument on that occasion or the decision that the Court may reach. There is also the separate point, which was determined against the claimant in ***Lloyd -v- Google*** by Warby J, as to whether the Court should permit the Claimant's claim to proceed on a representative basis.

65. I am satisfied that, both in respect of the individual claim advanced by the Claimant and the representative claim she seeks to bring, the first two requirements for service out are met. As a matter of discretion, I am also satisfied that England & Wales is the clearly the most appropriate jurisdiction. No other alternative jurisdiction is (or has been) realistically advanced. Insofar as there is a claim for similar relief in the Netherlands, the Claimant has recognised that she must amend her claim to exclude from its ambit any of those who are claimants in the Dutch proceedings. It has not been suggested that the claim that the Claimant wishes to bring on a representative basis is being, or could be, brought in the Dutch proceedings. Certainly, in respect of the claim advanced on behalf of children based in England and Wales, this Court is clearly the most appropriate jurisdiction to hear and determine the claim.

66. Finally, in exercising my discretion to give permission to serve out, it seems to me that I can take into account that it would be very unsatisfactory for me to refuse permission in circumstances where it highly likely that the Claimant would seek to appeal that decision. Such an appeal would present the same problem of only one party being represented and only one side of the argument being advanced. If I grant permission on this *ex parte* basis, the Service Out Defendants' position will be protected. Those Defendants, or any of them, can apply to set aside the permission I have granted, and a decision will be made on an *inter partes* basis. A decision reached following that process – as happened in ***Lloyd -v- Google –*** is much to be preferred.

67. I will therefore grant permission for the Claimant to serve the Claim Form on the First, Fourth, Fifth and Sixth Defendants out of the jurisdiction.

Extension of time for service of the Claim Form: CPR 7.6

68. As noted above:

i) the Claim Form was issued on 30 December 2020;

ii) the Claimant had 6 months from the date of issue to serve the Claim Form on the Service Out Defendants; and

iii) there is now a dispute between the parties as to the effective period of the stay that was agreed between them and therefore the final date for service of the Claim Form on the Service Out Defendants. Depending on how events are interpreted – and their legal effect – this date apparently ranges from 28 February 2022 to 6 April 2022.

69. The Court can extend the time for service of the Claim Form pursuant to CPR 7.6, which provides:

> "(1) The claimant may apply for an order extending the period for compliance with rule 7.5.
>
> (2) The general rule is that an application to extend time for compliance with rule 7.5 must be made-
>
> (a) within the period specified by rule 7.5; or
>
> (b) where an order has been made under this rule, within the period for service specified in that order.
>
> (3) …
>
> (4) An application for an order extending time for compliance with rule 7.5-
>
> (a) must be supported by evidence; and
>
> (b) may be made without notice."

70. The evidence supporting an application for an extension of time under CPR 7.6 must contain "*a full explanation as to why the claim has not been served*": CPR PD 7A §8.2(4).

71. Distilled from several Court of Appeal authorities, the principles to be applied when considering an application under CPR 7.6 were set out by Blackburne J in ***Sodastream Ltd -v- Coates*** **[2009] EWHC 1936 (Ch)** [50]:

i) The principal and frequently the only question is to determine whether there was a good reason for the claimant's failure to serve the Claim Form within the period allowed by the rules.

ii) If there is a very good reason for the failure to serve within the specified period, an extension of time will usually be granted, for example where the court has been unable to serve the Claim Form, or the claimant has taken all reasonable steps to serve but has been unable to do so.

iii) Conversely, the absence of any good reason for the failure to serve is likely to be a decisive factor against the grant of an extension of time.

iv) The weaker the reason for failure to serve, the more likely the court will be to refuse to grant the extension.

v) Whether the limitation period applicable to the claim has expired is of importance to the exercise of the discretion since an extension has the effect of extending the period of limitation and disturbing the entitlement of the potential defendant to be free of the possibility of any claim.

vi) The fact that the claimant has delayed serving the Claim Form until the particulars of claim were ready is not likely to provide a good reason for the failure to serve.

vii) The fact that the person to be served has been supplied with a copy of the Claim Form or is otherwise aware of the claimant's wish to take proceedings against him is a factor to be considered.

viii) Provided he has done nothing to put obstacles in the claimant's way, a potential defendant is under no obligation to give any positive assistance to the claimant to serve the Claim Form, so that the fact that the potential defendant has simply sat back, and awaited developments (if any) is an entirely neutral factor in the exercise of the discretion.

72. To those principles can be added the following:

i) The Court should only extend the period for serving the Claim Form when it is satisfied that to do so furthers the overriding objective: CPR 1.2. As such, an order under CPR 7.6 should be made only where to do so will enable the court to deal with the case in question "*justly and at proportionate cost*", which, in turn, requires the court to ensure that "*the parties are on an equal footing and can participate fully in proceedings*" and that the case is dealt with "*fairly*": ***Formal Holdings Ltd -v- Frankland Assets Inc*** **[2021] EWHC 1415** [34] *per* HHJ Klein.

ii) In general, an extension of time is not justified where it is needed because of the negligence of those acting for the claimant. But it does not follow that an extension of time will necessarily be granted in a limitation case where those acting for the claimant have acted competently: ***Cecil -v- Bayat*** **[2011] 1 WLR 3086** [44] *per* Stanley Burnton LJ. Funding difficulties are not usually a good reason justifying an extension of time: ***Cecil*** [47].

iii) An action is completely constituted when the Claim Form is *issued*, but it is not until the Claim Form is *served* that the defendant becomes subject to the court's

jurisdiction: ***Barton -v- Wright Hassall LLP*** **[2018] 1 WLR 1119** [8] *per* Lord Sumption.

iv) Joinder of a foreign defendant is an exercise of extra territorial jurisdiction, and no criticism can be made of such a defendant who refuses to instruct English solicitors to accept service: ***Euro-Asian Oil SA -v- Abilo (UK) Ltd*** **[2013] EWHC 485 (Comm)** [36] *per* Burton J.

v) The fact that, if the limitation period has not expired, the claimant will be able to issue a fresh claim is not, itself, a justification for granting an extension of time: ***Cecil*** [48]; and ***Aktas -v- Adepta*** **[2011] QB 894** [91].

Decision

73. I refuse to grant any extension of time for serving the Claim Form on the remaining Defendants. The inescapable reality is that the reason that the Claimant needs an extension of time is that she has failed to take the necessary steps to serve the Claim Form within the time for doing so until practically the last minute. There is no good reason for that failure. On the contrary, the Claimant finds herself in this position largely because of the tactical decision to issue the Claim Form on 30 December 2020 in order to take advantage of a more favourable legal regime that would be unavailable after 1 January 2021. In this case, apart from the litigation advantage obtained by issuing the claim before 1 January 2021, there was no other reason for the Claimant to issue the Claim Form when she did. There was no limitation issue; the ***Lloyd -v- Google*** decision was awaited; and there had been no pre-action correspondence, as there should have been.

74. For understandable and legitimate reasons, the parties wanted to wait for the Supreme Court decision in ***Lloyd -v- Google***. But the Claimant also wanted to obtain the benefit of having issued her claim before changes in the law that took effect on 1 January 2021. The Claimant was perfectly entitled to seek that benefit, but it came with an unavoidable downside. Once the Claim Form was issued, the period within which it had to be served on the Service Out Defendants began to count down. It took over three months, half the period for service of a Claim Form, before a stay pending the Supreme Court decision was ordered by the Court. The Claimant could have sought the permission to serve the Claimant on the Service Out Defendants at any stage after issue of the Claim Form, but she did not do so. Perhaps that was because of the complexities of litigation brought on this representative basis and/or issues relating to the funding of the claim, but that is not a good enough reason. The primary responsibility on the Claimant's solicitors is the proper progression of the claim, including adherence to the prescribed deadlines.

75. Once the Supreme Court's decision was given on 10 November 2021, the deadline for serving the Claim Form (and the need to obtain permission to serve out) became a pressing reality again. In my judgment, whatever can be said about the failure to make an application for permission to serve the Claim Form on the Service Out Defendants prior to the stay, there was no excuse for the failure to progress that application as soon as the Supreme Court decision was known. It was the essential and obvious next step that the Claimant had to take, and it had to be taken before a deadline. I can appreciate that the Claimant's advisors would have preferred an opportunity to consider the implications of the Supreme Court decision, but the decision to issue the Claim From on 30 December 2020 meant that time was not a luxury that they had.

76. The stay was lifted on 8 December 2021. It took until 31 December 2021 before the Particulars of Claim were served, which, as then understood was practically on the last day of the period permitted for service on the Second Defendant. It was not until 4 January 2022, that the Claimant's advisors first turned to consider the mechanics of serving the Claim Form on the Fifth Defendant and, critically, how long that step was likely to take. They learned that serving the Claim Form on the Fifth Defendant could take a year or more, but even that information did not spur the Claimant's team into action. Indeed, proposals put forward by the Claimant's solicitors at this stage (see [22]-[23] and [32]-[33] above) suggest that they had simply failed to grasp the looming deadline for service of the Claim Form. The delay between 6 January 2022 and 22 February 2022, when the Applications were finally issued, is barely explained in the evidence and is not justified. A 10-day period of illness of Leading Counsel, and the court commitments of other lawyers, cannot be an adequate excuse. This was a pressing deadline that needed immediate attention and urgent action.

77. The Claimant's side is entirely at fault for the position the Claimant now finds herself in. The Defendants have done nothing to obstruct service of the Claim Form. They did not mislead the Claimant as to the position on service. This is not a case where the Claimant has been lulled into believing that service will be accepted, only for the position to change shortly before the deadline for service. The Defendants have simply refused to accept service otherwise than in accordance with the CPR. They are entitled to do so, and Hogan Lovells have been consistent in making the position clear throughout. It is for a claimant to establish the jurisdiction of the Court over a defendant by service of the Claim Form in the time permitted and, where necessary, to obtain the Court's permission to serve out of the jurisdiction. These might be considered to be fundamental and basic principles of civil litigation.

78. Mr Ciumei QC's strongest argument was that an extension of the time to serve the Claim Form on the Fifth Defendant was always going to be required. Nevertheless, I do not consider that this excuses the failure properly to progress the application for permission to serve the Claim Form out of the jurisdiction. It may be that, had the application to serve the Claim Form out of the jurisdiction on the Service Out Defendants been made promptly following the Supreme Court decision in ***Lloyd -v- Google***, the Court might, when granting permission to serve out, have also granted an extension of time to reflect the time it was likely to take to serve the Claim Form on the Fifth Defendant. Critically, the Claimant did not do this. Instead, she allowed a further 3 months to pass before the Application was finally issued. As I have explained, she has not provided a good reason for this delay and consequently she cannot provide a good reason why she has failed to serve the Claim Form on the Service Out Defendants.

Alternative service of the Claim Form on the Defendants' English Solicitors: CPR 6.15 and 6.37(5)(b)(i)

79. In respect of service of the Claim Form on a foreign domiciled defendant, CPR 6.40 provides, so far as is material:

> "(3) Where a party wishes to serve a claim form or other document on a party out of the United Kingdom, it may be served-

(a) by any method provided for by … rule 6.42 (service through foreign governments, judicial authorities and British consular authorities); or

(b) by any method permitted by a Civil Procedure Convention or Treaty; or

(c) by any other method permitted by the law of the country in which it is to be served.

(4) Nothing in paragraph (3) or in any court order authorises or requires any person to do anything which is contrary to the law of the country where the claim form or other document is to be served."

80. CPR 6.15 provides:

"(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.

(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.

(3) An application for an order under this rule –

(a) must be supported by evidence; and

(b) may be made without notice.

(4) An order under this rule must specify –

(a) the method or place of service;

(b) the date on which the claim form is deemed served; and

(c) the period for –

(i) filing an acknowledgment of service;

(ii) filing an admission; or

(iii) filing a defence."

81. It is common ground that, if the Court has granted permission to serve a Claim Form on a defendant outside the jurisdiction, then CPR 6.37(5)(b)(i) gives the Court jurisdiction to permit service of the Claim Form on that defendant by alternative means: see e.g. ***Marashen Ltd -v- Kenvett Ltd*** **[2018] 1 WLR 288** [17]-[18].

82. The Order that Claimant seeks, pursuant to this rule, is:

"The Claimant has permission to effect service of the Claim Form and Particulars of Claim on the First, Fourth, Fifth and Sixth Defendants by personal delivery to Hogan Lovells International LLP, at Atlantic House, Holborn Viaduct, LONDON

EC1A 2FG, or by email to [email address given], marked for the attention of Ivan Shiu"

The draft Order is defective, in that it fails to comply with CPR 6.15(4)(b), but if an order for alternative service is granted that could be remedied. The Application Notice also states that the application for alternative service of the Claim Form on the Service Out Defendants is made under CPR 6.15 and 6.27. The latter rule, which governs alternative service of documents other than the Claim Form is not appropriate.

83. Although the Application Notice seeks an order for alternative service on all Service Out Defendants, at the hearing the Claimant limited the application to the Fifth Defendant. That is because the Claimant's advisors believe that they could effect service on the other Service Out Defendants without an alternative service order.

84. The applicable principles when considering an application for alternative service of the Claim Form on a defendant domiciled in the People's Republic of China were recently summarised in ***Godo Kaisha IP Bridge 1 -v- Huawei Technologies Co Ltd*** **[2021] FSR 33** [12]:

i) Where the court gives permission to serve a Claim Form out of the jurisdiction, it also has power, by reason of CPR 6.37(5)(b)(i) and 6.15(1), to make an order permitting service by an alternative method or at an alternative address: ***Celgard LLC -v- Shenzhen Senior Technology Material Co Ltd*** **[2020] FSR 37** [115] and ***GHS Global Hospitality Ltd -v- Beale*** **[2021] EWHC 488 (Ch)** [10].

ii) Such an order can only be made if the court is satisfied that there is "*a good reason*". If there is a good reason, the most important aspect of the jurisdiction is to ensure that the defendant is adequately informed of the contents of the Claim Form and the nature of the claim: ***Celgard LLC*** [116]).

iii) Where a defendant is resident in a country that is party to a convention as regards service, then service in accordance with that convention is "*the prime way of service*" in that country: ***Deutsche Bank AG -v- Sebastian Holdings Inc*** **[2014] EWHC 112 (Comm)** [27]). Further, where a country has (like China) stated its objection under Article 10 of the Hague Convention to service otherwise than through the authority that it has designated to deal with service under the Convention, an order for alternative service will only be made in "*exceptional circumstances*" (sometimes referred to as "*special circumstances*"): ***Société Générale -v- Goldas Kuyumculuk Sanayi Ithalat Ihracat AS*** **[2017] EWHC 667** [49(9)(b)] and, on appeal **[2019] 1 WLR 346** [31]–[35]; ***Marashen*** [57]; and ***M -v- N*** **[2021] EWHC 360 (Comm)** [8(iv)].

iv) In determining whether exceptional circumstances exist, each case will turn on its own particular facts and involves balancing the various factors: ***GHS*** [12].

v) Mere delay or additional expense arising from having to serve in accordance with the Hague Convention do not, without more, constitute exceptional circumstances: ***Société Générale*** **[2017] EWHC 667 (Comm)** [49(9)(a)] and **[2018] EWCA Civ 1093** [31]–[35]. However, delay might suffice when coupled with another factor or factors such as, for example, some form of litigation

prejudice or where it is of such exceptional length as to be incompatible with the due administration of justice: ***Marashen*** [57]; and ***Celgard*** [119].

vi) Some examples of the sort of factors which might help establish the existence of exceptional circumstances are set out in ***M -v- N*** [9]-[10]. They include, for example, the need for urgent interim injunctive relief or for relief under the Arbitration Act 1996 .

85. Mr Ciumei QC referred me to several first instance decisions in which these principles have been applied:

i) In ***JSC BTA Bank -v- Ablyazov*** **[2011] EWHC 2988 (Comm)**, Teare J considered that a delay of between 9 months and 2 years in service of the Claim Form was a factor to be taken into account when considering the litigation prejudice of delay.

ii) In ***Bill Kenwright Ltd -v- Flash Entertainment FZ LLC*** **[2016] EWHC 1951 (QB)**, Haddon-Cave J considered that a delay of 8 months was "*inordinate delay*" in the context of that case ([48]) and that the application for an order for alternative service was not driven by a "*mere desire for speed*" ([54]).

iii) In ***Nokia Technologies -v- Oneplus Technology (Shenzen) Co. Ltd*** **[2022] EWHC 293 (Pat)**, Marcus Smith J made an order permitting alternative service of the Claim Form on the relevant defendants. However, in that case the claimant was found to have "*tried very hard to effect regular service pursuant to the Convention*" ([29]) and that the relevant defendants were already "*informally enmeshed in [the] litigation*" and it was "*not a case of a true stranger being dragged kicking and screaming across the threshold of these courts*" ([33]). The relevant defendants had already received copies of the pleadings in the action and that the proposed method of alternative was highly likely to bring the proceedings to their attention ([34]).

86. In ***Cecil -v- Bayat***, Stanley Burnton LJ suggested that one of the reasons why, in a Hague Convention case, exceptional or special circumstances were required before an alternative service order could be made was the interference that such an order represented with the sovereignty of the relevant state ([65]). In ***Abela -v- Baadarani*** **[2013] 1 WLR 2043**, Lord Sumption doubted whether such an analysis was helpful [53]:

> "The characterisation of the service of process abroad as an assertion of sovereignty may have been superficially plausible under the old form of writ ("We command you …"). But it is, and probably always was, in reality no more than notice of the commencement of proceedings which was necessary to enable the defendant to decide whether and if so how to respond in his own interest. It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like "exorbitant". The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum."

87. In ***Société Générale***, Popplewell J nevertheless held that issues of comity were still of importance, where a Hague Convention state had permitted service of originating process only by certain means [49(9)(b)]:

> "It remains relevant whether the method of service which the Court is being asked to sanction under CPR 6.15 is one which is not permitted by the terms of the Hague Convention or the bilateral treaty in question. For example, where the country in which service is to be effected has stated its objections under Article 10 of the Hague Convention to service otherwise than through its designated authority, as part of the reciprocal arrangements for mutual assistance on service with this country, comity requires the English Court to take account of and give weight to those objections... In such cases relief should only be granted under Rule 6.15 in exceptional circumstances. I would regard the statement of Stanley Burnton LJ in ***Cecil*** at [65] to that effect, with which Wilson and Rix LJJ agreed, as remaining good law; it accords with the earlier judgment of the Court in [***Knauf UK GmbH v British Gypsum Ltd*** **[2002] 1 WLR 907**] at [58]-[59]; Lord Clarke at paragraphs [33] and [45] of ***Abela*** was careful to except such cases from his analysis of when only a good reason was required, and to express no view on them (at [34]); and although Stanley Burnton LJ's reasoning that service abroad is an exercise of sovereignty cannot survive what was said by Lord Sumption (with unanimous support) at [53] of ***Abela***, there is nothing in that analysis which undermines the rationale that as a matter of comity the English Court should not lightly treat service by a method to which the foreign country has objected under mutual assistance treaty arrangements as sufficient. That is not to say, however, that there can never be a good reason for ordering service by an alternative method in a Hague Convention case: [***Bank St Petersburg OJSC -v- Arkhangelsky*** **[2014] 1 WLR 4360**] at [26]."

This statement was approved by the Court of Appeal in ***Société Générale***: [32]-[33]. In ***Abela***, Lord Clarke specifically noted that the appeal did not concern a case in which the Hague Convention applied and so the alternative service order "*did not run the risk of subverting the provision of any such convention or treaty*": [34].

Submissions

88. Mr Ciumei QC submitted that there was a good reason to authorise service of the Claim Form by the alternative method proposed by the Claimant.

i) First, Hogan Lovells have been instructed to act for all the Defendants and have corresponded with the Claimant's solicitors regarding the claim and, indeed, agreed the stay with them. This represents the reality of the situation that all the Defendants are part of the same essential group that operates the TikTok platform.

ii) Second, because of this, the Service Out Defendants are fully aware of the claim that is being brought against them and are likely to have full knowledge of the contents of the Claim Form and the Particulars of Claim that has already been served on the Second Defendant.

iii) Third, the First, Fourth and Fifth Defendants are involved in the Dutch proceedings, in which the First and Fourth Defendants had both appeared.

iv) Fourth, it can take a year (or more) to serve the Fifth Defendant in the People's Republic of China under the Hague Convention. The Second and Third Defendants have both been served with the proceedings. The First, Fourth and Sixth Defendants "*can be served in short order*" once permission to serve out has been granted and there is (or shortly will be) a pending application by the Second Defendant for summary judgment on the claim. Delay in serving the Fifth Defendant threatens to disrupt the litigation, which disruption has been held in several authorities to justify an order for alternative service in Hague Convention cases.

89. In respect of the application in respect of the Fifth Defendant, I asked Mr Ciumei QC to identify the exceptional or special circumstances that justified the Court making an order for alternative service in the terms sought. He submitted that the four matters I have identified in the paragraph above are individually and collectively to be regarded as exceptional circumstances. He laid greatest emphasis on the potential disruption to the litigation caused by a year's delay in effecting service on the Fifth Defendant.

90. It was recognised at the hearing that, if I refused the application for alternative service and the application for an extension of time within which to serve the Claim Form, the current claim against the Fifth Defendant could not be pursued. However, as the limitation period has not expired, it would be open to the Claimant to issue a fresh claim against the Fifth Defendant. I asked Mr Ciumei whether he submitted that the Claimant would be substantially prejudiced if that were the result. He identified the following. First, the additional costs of a fresh claim, second the fact that there would then be two claims, with the possibility of the claims having to be joined or consolidated subsequently. Finally, that the Fifth Defendant's alleged breaches were ongoing. Mr Ciumei QC did not identify any prejudice as a result of the change of law that took place – at the end of the Brexit transition period – on 1 January 2021. Mr Ciumei responded that the Claimant did rely on this as an "*element*" of prejudice, but he contended that the change of law did not necessarily prevent a claim because the Claimant could rely upon the EU GDPR rather than the UK version.

Decision

91. I am not persuaded that the Claimant has demonstrated a good reason for authorising service of the Claim Form on the Fifth Defendant by the alternative means of service upon Hogan Lovells. In reality, the Claimant needs to serve the Claim Form by this means because, in the very limited time that remains, it is the only way that the Claim Form could practically be served on the Fifth Defendant before the time allowed under CPR 7.5 expires. There are no exceptional or special circumstances. On the contrary, this case is remarkably prosaic. The Claimant has simply failed properly to attend to service of the Claim Form until, as they then understood matters, about a week before the time for doing so was due to expire. In that respect, the Claimant is no different from the host of other litigants who have failed properly to prioritise service of a Claim Form and who have unwisely left matters to the last minute.

92. I have set out the chronology of the action above. The Defendants' solicitors had been consistent throughout: the Service Out Defendants were not going to authorise or accept service of the proceedings. As such, it was plain from the point at which the Claim Form was issued, on 30 December 2020, that the Claimant would have to obtain permission to serve the Claim Form on the Service Out Defendants. The Claim Form

was issued on 30 December 2020, not because there was any limitation issue, but for the tactical reasons I have identified.

93. I can accept that, if it were the only consideration, it would have been better for the future management and conduct of the claim if the Fifth Defendant could have been served at a point reasonably proximate to the other Defendants. But this is not a factor which, on its own, can be described as exceptional or special. It is not unusual for a claim to be brought against several defendants, some of whom are foreign-domiciled and, in respect of whom, service of the Claim Form may take longer. Ms Proops QC suggested that staggered litigation against both domestic and international defendants is not uncommon. On its own, delay caused by the requirement to serve a Claim Form on a defendant in compliance with the Hague Convention cannot justify bypassing its requirements by the simple expedient of an alternative service order. A litigant must recognise this, factor in the potential delay and prosecute his litigation accordingly. Fundamentally, in my judgment this is just a delay case with no other factors marking it out in any way as special or exceptional. There is neither a good reason for authorising alternative service nor exceptional or special circumstances justifying such an order in respect of the Fifth Defendant.

94. I recognise that the effect of my decisions will be that it will be practically impossible for the Claimant now to effect service of the Claim Form in this action on the Fifth Defendant. This will inevitably cause some prejudice to the Defendant, but in my judgment this is not so serious as to require the Court to take a different course. This is not a limitation case. There may be some cost implications, but this litigation is being funded on a commercial basis and, ultimately if costs have been wasted or further costs must be incurred, the responsibility for that lies with the Claimant's side. If the Claimant still wants to pursue a claim against the Fifth Defendant, then she has the option of issuing a fresh claim. Although Mr Ciumei appeared not to regard this as representing any significant prejudice, the Claimant will lose whatever litigation advantage there was, as against the Fifth Defendant, of starting the Claim before the changes in the law that took effect on 1 January 2021. Whatever its weight, that is a factor which counts in the Fifth Defendant's favour. If the Claimant wanted the benefits of a more advantageous legal terrain by issuing the Claim Form on 30 December 2020, it was incumbent on her to make sure she served that Claim Form as required by the rules.

95. As a matter of practical reality, the effect of having to issue a separate Claim Form against the Fifth Defendant may well not be as dramatic as the Claimant was suggesting. The next stage is this litigation is going to be the hearing of the summary judgment application brought by the Second Defendant. If that is successful, as it is an attack on the viability of the whole claim on a representative basis, following ***Lloyd -v- Google***, that will effectively bring an end to the claim against all Defendants. Judged neutrally, there must be a high likelihood of an appeal, whatever the decision on the summary judgment application. The time taken for any appeal to be resolved will mean that, in all probability, and if the Claimant takes the necessary steps promptly, there would be no reason why a second claim against the Fifth Defendant could not be brought into rough alignment with the existing claim.