

Claim No: H50YJ547

IN THE COUNTY COURT AT CENTRAL LONDON

BETWEEN:

Date: 1 June 2023

BEFORE:

DEPUTY DISTRICT JUDGE GROUT

MR COLIN ROBERTSON (aka “MILLENNIAL WOES”)

Claimant/Applicant

v

GOOGLE LLC

Defendant/Respondent

Mr. Patrick Boch (instructed through **Direct Access**) for the **Claimant/Applicant**
Ms. Catrin Evans KC (instructed by **Pinsent Masons LLP**) for the **Defendant/Respondent**

Hearing date: 17 May 2023

APPROVED JUDGMENT

This judgment was handed down at 10.00am on 1 June 2023 in open court, the attendance of the parties and their representatives having been excused. A copy of the approved judgment has been sent to the parties or their legal representatives by email.

[numbers in square brackets denote a reference to the main hearing bundle]

Deputy District Judge Grout:

Introduction

1. The Claimant is an individual who, at all material times, created content which he uploaded to the popular video sharing company, YouTube.
2. The Defendant is an American multinational technology company perhaps best known for its online search engine technology. Its stated mission is to “organise the world’s information and make it universally accessible and useful”. Among other things, it is the owner of YouTube.
3. The Court has before it an application, filed by the Claimant and dated 22 April 2022, which seeks relief from sanctions in respect of an apparent deficiency in relation to the way in which the Claim Form in this case was purportedly served, the details of which I will return to in a moment (“the Application”). Before doing so, however, it is helpful to briefly set out the nature of the claim and what, procedurally, appears to have happened to date.

Background to the Claim

4. The Claimant’s Claim Form alleges that the Defendant terminated his YouTube channels on 22 February 2021, having “demonetised” and “shadow banned” them prior to termination. The Claimant alleges that these actions amounted to unlawful discrimination (both direct and indirect) on account of his philosophical beliefs or race, contrary to the relevant provisions of the Equality Act 2010 (“the EqA”). Alternatively, the Claimant alleges that termination of his YouTube channels constituted a breach of contract because (a) the Claimant had not published content which contravened the Defendant’s hate speech policy, and (b) the Defendant’s exercise of its contractual discretion was unreasonable. Consequently, the Claimant seeks declarations that the Defendant’s actions were discriminatory, injunctive relief to reinstate his channels, and damages.

5. The Claimant's Particulars of Claim explain that the Claimant published videos on YouTube between January 2014 and February 2021 on a range of cultural, social, and political issues. He worked full-time on this and was able to make a living from them. The Claimant's publishing activity was governed by a contract, entered into in December 2013, whereby the Claimant agreed to the Defendant's general terms of service ("the Terms"). Certain YouTube policies were incorporated into the contract ("the Policies"). Together, these documents constituted "the Agreement".
6. The Claimant operated under the pseudonym "Millennial Woes". His channels and following on YouTube grew over time, as did his income from them. His main channel reached around 58,000 subscribers. During the relevant period, the Claimant published around 1,500 videos, most of which had several thousand views. He made a living from the channels until January 2018 when PayPal (a third-party payment provider) terminated his account with it.
7. The Claimant alleges that at some point in 2018 the Defendant began "shadow banning" his channels which, according to the Claimant, is a practice whereby the Defendant used indirect means (such as not recommending his channels or unsubscribing subscribers from them) in order to stifle the channels' growth and profitability.
8. On 5 June 2019, the Claimant published an article concerning the way YouTube removes hateful content as well as the way it makes "borderline" content less visible. On 25 July 2019, the Claimant received a notification from the Defendant stating that his main channel would no longer be eligible to monetise. The communication indicated that the channel was not operating in accordance with the Policies, although no particulars were given.
9. On 22 February 2021, the Defendant terminated all of the Claimant's YouTube channels and imposed upon him a lifetime ban meaning that he could not create or manage any further YouTube content. The Claimant received a number of notices (all received on the same day) which each related to a specific video which had been published on the various channels the Claimant operated. The notices explained that the videos violated YouTube's hate speech policy and so had been removed. They stated that:

“Content glorifying or inciting violence against another person or group of people is not allowed on YouTube. We also don’t allow any content that encourages hatred of another person or group...”

10. According to the Claimant, there were three videos which had seemingly breached the Policies. The first was called “Millenniyule 2020: The Jolly Heretic” which featured a conversation between the Claimant and a Professor of Anthropology on the apparent similarities between the evolutionary characteristics and strategies of medieval women accused of being witches, and modern radical feminists. The second was entitled “The Tommy Robinson Thing” and concerned a conversation with another YouTube content creator about Stephen Yaxley-Lennon. The third, “Reviewing the Greatest Show in the Galaxy”, involved a conversation with another video-creator about an episode of *Dr Who* in the context of what the Claimant describes as “left-wing television programming”.
11. The Claimant appealed the notices using the Defendant’s internal review process, but his appeals were dismissed.
12. At paragraphs 26-28 of his Particulars of Claim, the Claimant sets out the basis of his discrimination claim. The Claimant says, in short, that the Defendant allows other channels, which manifest different, left-wing, beliefs, to operate, and provides a number of examples. He says that this demonstrates that left-wing content is treated more leniently than right-wing dissident content, including that of the Claimant’s. He says that, to his knowledge, those responsible for publishing left-wing content have not been subject to shadow banning or demonetisation. He says that his content did not, in any event, breach YouTube’s hate speech policy and certainly did not incite violence or hatred towards any individual or group. He concludes that the difference in treatment is because of the Claimant’s philosophical beliefs and that the Defendant has treated him less-favourably because of those beliefs. The Claimant also alleges that he has been treated less favourably because he is white when compared with content creators of other ethnicities. He provides some examples of content created by non-white creators which he says does breach the Policies (and in some instances has been removed) but the channels have still been permitted to operate. Finally, the Claimant alleges that the

Defendant's hate speech policy indirectly discriminates against him because, among other things, it prohibits content which claims that individuals or groups are physically or mentally inferior based on any of the identified "protected attributes" when, according to the Claimant, "a belief in differing abilities and inequality is an essential trait of right-wing thought".

13. At paragraphs 29-41 of his Particulars of Claim, the Claimant advances an alternative claim for breach of contract. In short, it is alleged that there was no basis for termination because the Claimant had not violated the hate speech policy or, if he had, it was unreasonable for the Defendant to terminate his channels.

14. At paragraphs 42-50 of his Particulars of Claim, the Claimant sets out the damages and remedies he seeks.

Procedural History

15. The Claim Form was issued on 7 October 2021 and was returned to the Claimant's representative for service. The address given in respect of the Defendant on the Claim Form was one in the United States of America.

16. The Claim Form, Particulars of Claim, and the Response Pack were said to have been personally served on the Defendant on 5 April 2022, the instructed Process Server having provided an affidavit to this effect.

17. By letter dated 19 April 2022, the Defendant's legal representatives, Pinsent Masons, wrote to the Claimant's legal representative informing him, among other things, that as the Defendant is based in the United States of America, the Claimant ought to have applied for permission to serve the Claim Form out of the jurisdiction or, if he considered that permission was not required, file Form N510 setting out the grounds upon which it is said that permission is not required. Neither of those things had been done and the time for service had now expired. The letter highlighted other alleged failures with the way in which the Claim Form had been filed which are not relevant for present purposes.

18. The Claimant's legal representative responded to that letter on 22 April 2022 attaching a completed Form N510 and explaining that he intended to make an application for relief from sanctions. He sought confirmation from the Defendant as to whether it would oppose the Application. On the same date, the Application, along with the Form N510, was filed with the Court. In July and September 2022, the Claimant's legal representative chased the Court Office asking for sealed copies of the Application so that the same could be served on the Defendant. On 16 September 2022, an unsealed copy of the Application was served on the Defendant which was asked to confirm its position on the matter. On 23 September 2022, the Defendant wrote to the Court and the Claimant's legal representative explaining, among other things, that it would be opposing the Application.
19. The matter came before Deputy District Judge Althaus on 28 September 2022. The Defendant sought an adjournment on the grounds that it wished to make arguments about jurisdiction. That application was opposed by the Claimant but, ultimately, the judge granted the adjournment. The parties then filed and served witness statements and, following another adjourned hearing, the matter came before Deputy District Judge Cheunviratsakul on 19 April 2023. The judge, having heard from both counsel, concluded that there was insufficient time to deal with the Application, in light of the points which were to be advanced, and adjourned it to today, having helpfully factored in some time to read the papers in advance of the hearing.
20. It is against that backdrop that the Application comes to be determined.

The Hearing

21. At the hearing of the Application, the Claimant was represented by Mr. Boch of Counsel, the Defendant was represented by Ms. Evans KC. In advance of the hearing, I had been provided with a hearing bundle, various authorities bundles, as well as skeleton arguments and supplementary notes prepared by both counsel. The Application is predicated on the assertion that this is a case where permission of the Court was (and is) not required in order to serve the Claim Form outside the jurisdiction. What it seeks, therefore, is relief from sanctions because the relevant Form N510 had not been filed

with the Court as required by CPR 6.34. The Defendant's primary contention, however, is that this is a case where permission of the Court is required for service outside the jurisdiction, such permission not having been sought. That, therefore, is one issue that needs to be resolved.

22. In addition, the parties are at odds as to whether this is a circumstance in which CPR 7.6(3) applies. The Defendant says that it is because what the Claimant requires is an order to extend the time for service, the time for service having expired. The Claimant says that CPR 7.6(3) is of no application because the rule relating to permission to serve a claim form out of the jurisdiction where no Form N510 has been filed is self-contained within CPR 6.34(2), irrespective of the timing of when any such application for permission is made.

23. If the Claimant is right about the above (which is disputed), it is agreed that the framework through which the Court should consider whether or not to grant permission is by application of the test for relief from sanctions. The Claimant says that he should be granted relief, the Defendant says that he should not.

24. It is necessary to deal with each of the arguments in turn.

The competing arguments on whether permission to serve outside the jurisdiction is required

25. CPR 6.33 sets out the circumstances in which permission of the Court is not required in respect of service of a claim form outside the United Kingdom. Mr. Boch says that the present case falls within this provision and he relies, specifically, upon CPR 6.33(2B)(b) which provides that:

“The claimant may serve the claim form on the defendant outside of the United Kingdom where, for each claim made against the defendant to be served and included in the claim form-

(a) ...

(b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim;

(c) ...”

26. As Ms. Evans KC helpfully pointed out, the genesis of (b) was explained by Waksman J in *IBM United Kingdom Limited v Lzlabs GmbH and Others* [2022] EWHC 2094 (TCC) at paras. 130-131:

“130. First, it is important to recall how sub-paragraph (b) came about. It originally formed paragraph 3.1 (6) (d) of PD 6B i.e. it was one of the usual gateways through which the court could permit service out. In recent years this was not much used because of the Brussels Regulation (both in its original and recast forms) which provided a specific route for service out based on an EJC without the need for permission, provided that the particular requirements of the Regulation were met. That route, of course, disappeared after 31 December, 2020 because of Brexit. It was replaced by the similar provision of the Hague Convention 2005 to which the UK acceded as a signatory in its own right as from 1 January, 2021.

131. On 6 April 2021, subparagraph (b) was added to 6.33 (2B) which previously consisted only of sub-paragraph (a). Accordingly 6.33 (2B) now covered the Hague Convention route and the "old" PD 6B route which is why paragraph 3.1 (6) (d) of PD 6B was in turn removed. It is now shown as "[omitted]" in the relevant part of PD 6B. The key change, of course, was that there was now no need for permission in relation to sub-paragraph (b) provided that its requirements were met.”

27. In the present case, Mr. Boch points to the fact that the Terms contained the following Governing Law Clause (“the Clause”) [50]:

“If you live in the United Kingdom this Agreement, and your relationship with YouTube under this Agreement will be governed by the laws of your country of residence, and legal proceedings may be brought in your local courts.”

28. Mr. Boch submits that the Clause is wide enough to encompass not only the contractual claim against the Defendant (which is the alternative claim) but also the primary claims brought under the EqA. It is wide enough, he says, because of the distinction to be drawn between the phrase “this Agreement” and the phrase “...and your relationship with YouTube under this Agreement”. In short, he submits that the two must mean different things and that the reference to “your relationship” is wide enough to include the discrimination claims which arise as a result of the relationship between the two parties. Moreover, the respective claims are, says Mr. Boch, “inexorably linked” as they all arise out of the allegation that the Claimant breached YouTube’s hate speech policy.
29. In support of his argument, Mr. Boch relies upon the decision of the House of Lords in *Fiona Trust & Holding Corporation and Others v Privalov and Others* [2007] 4 All E.R. 951 and the decision of the High Court in *Eastern Pacific Chartering Ltd v Pola Maritime Ltd* [2021] 1 WLR 5475.
30. In response, Ms. Evans KC contends that the Claimant is not entitled to rely upon CPR 6.33(2B)(b). She submits that it is clear from that provision that each claim contained within the Claim Form must fall within the terms of the Clause and that, in the present claim, the Claimant’s claims under the EqA do not. She submits that there is no clause within the Terms which gives this Court the jurisdiction to hear claims under the EqA and that the Clause should not be construed as permitting the same. Ms. Evans KC argues that, properly understood, the Clause is limited to claims arising under the contractual relationship between the parties and that the claim under the EqA is not such a claim. Rather, it is a statutory tort: see *Robinson v HRH Al Qasimi* [2021] EWCA Civ 862.
31. In support of her contention, Ms. Evans KC relies upon the decision of the Court of Appeal in *Ryanair Ltd v Esso Italiana Srl* [2013] 2 CLC 950 as well as the decision of the High Court in *Bazhanov v Fosman* [2017] EWHC 3404 (Comm) and *IBM United Kingdom Ltd v LzLabs GmbH* [2022] EWHC 2094 (TCC).

The competing arguments on whether CPR 7.6(3) applies

32. CPR 7.6 provides, under the heading “Extension of time for serving a claim form”, as follows:

“(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 the 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 by that order.

(3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if—

- (a) the court has failed to serve the claim form; or
- (b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and
- (c) in either case, the claimant has acted promptly in making the application.

(4) An application for an order extending the time for compliance with rule 7.5—

- (a) must be supported by evidence; and
- (b) may be made without notice.”

33. Ms. Evans KC submits that, in the present case, CPR 7.6(3) is engaged because the Claim Form was not validly served within 6 months of the date of its issue as required by CPR 7.5(2). It had not been validly served because the Claimant had not, at the time of purported service, filed Form N510 with the Court as required by CPR 6.34(2) and only did so once the time for service of the Claim Form had expired. She submits that a claimant who has failed to serve within time cannot use another rule to seek to bypass the requirements and strictures of CPR 7.6(3): see *Ideal Shopping Direct Ltd v Mastercard Inc* [2022] EWCA Civ 14.

34. Mr. Boch frankly accepted that if CPR 7.6(3) is engaged then the Claimant is in difficulty. However, he submits that the Court should have no regard to CPR 7.6(3) because the correct approach in this case is to have regard solely to CPR 6.34(2) and, in deciding whether to grant permission retrospectively under CPR 6.34(2)(b), to apply the test for relief from sanctions. He submits that if permission is granted in accordance with this approach, then the Claim Form can be declared as having been validly served on 5 April 2022 (when it was delivered to the Defendant by the process server). He relies, in support of his argument, upon the judgment of the High Court in *Athena Capital Fund SICAV-FIS SCA and Others v Secretariat of State for the Holy See* [2021] EWHC 3166 (Comm).

Relief from Sanctions

35. Ultimately, Mr. Boch accepted that the failure to file the Form N510 was serious and that there was not a good reason for it, although he did, on a number of occasions, refer to the incident as “not trivial” and “not particularly serious”. He submitted, however, that when considering all the circumstances of the case it was proper to grant relief. He said that if relief was not granted, it would run contrary to the principles of efficiency and proportionality as, in reality, the Claimant would simply have to start a fresh claim and, at the same time, seek permission to extend the limitation period in respect of the EqA claims. He said that, on any view, the failure to file the Form N510 was an innocent mistake and so there was no deliberate intention to avoid compliance with the rules. He pointed out that as soon as the Claimant was notified that the Form N510 had not been filed, it was filed and served promptly (within 3 days). He said that no prejudice has

been caused to the Defendant as a result of the error, despite the Defendant's protestations to the contrary. Further, he submitted that the Defendant's approach to opposing the application appeared to be both "tactical and opportunistic". Mr. Boch also made the point that it is clear from the authorities discussed elsewhere in relation to failures concerning a Form N510, the courts appear willing to readily grant relief.

36. Ms. Evans KC argued that relief ought to be refused. She submitted that the failure to complete, file, and serve a Form N510 was serious not least because it is an important document which sets out the basis upon which it is asserted that the permission of the Court is not required to serve outside the jurisdiction. She said that whilst there is no basis to doubt that the reason for the failure was a mistake, that in itself does not constitute a good excuse, not least in circumstances where the Claimant was at all times represented by counsel. As to all the circumstances, Ms. Evans KC argued that the Defendant had suffered prejudice as it was unaware of the basis upon which it was asserted the English courts had jurisdiction. It has also expended time and cost in dealing with the issue. The error, she says, was compounded by the fact that the Claimant waited until the last minute to purport to serve the Claim Form. Other criticisms were made of the conduct of the Claimant's legal representative which it is not necessary to set out here. Finally, Ms. Evans KC pointed out that, although this is not the time to determine such issues, there are other jurisdictional issues in relation to, in particular, the EqA claims, it not being at all clear whether the Defendant is bound by that legislation.

Discussion and Findings

37. The Application has thrown up some interesting issues and I am grateful to both counsel for their very helpful written and oral submissions.

Is permission of the Court required to serve outside the jurisdiction?

38. At the hearing, it appeared to be the agreed position of the parties that if the Claimant's claim had been brought solely as a breach of contract claim then, in light of the Clause, CPR 6.33(2B)(b) would have applied such that permission of the Court would not be required to serve the Claim Form outside the United Kingdom (though the Form N510 would still have needed to be filed). It is, therefore, the claims under the EqA which present the difficulty. Ms. Evans KC pointed to the fact that this is so because CPR 6.33(2B) requires that "for each claim made against the defendant to be served and included in the claim form" and, where (b) is engaged, the relevant contract must contain a term to the effect that the Court shall have jurisdiction to determine "that claim". Here, Ms. Evans KC says that the Clause does not contain a term which gives the Court jurisdiction to hear the EqA claims.

39. It is helpful, I think, to start by looking at the general approach the courts ought to take to the construction and interpretation of governing law and jurisdiction clauses. In *Fiona Trust & Holding Corporation and Others v Privalov and Others* [2007] UKHL 40, the House of Lords decided that the time had come for a "fresh start" to be made as regards the construction of arbitration clauses. Having made reference to various authorities, Lord Hoffman said this:

"12. I do not propose to analyse these and other such cases any further because in my opinion the distinctions which they make reflect no credit upon English commercial law. It may be a great disappointment to the judges who explained so carefully the effects of the various linguistic nuances if they could learn that the draftsman of so widely used a standard form as Shelltime 4 obviously regarded the expressions "arising under this charter" in clause 41(b) and "arisen out of this charter" in clause 41(c)(1)(a)(i) as mutually interchangeable. So I applaud the opinion expressed by Longmore LJ in the Court of Appeal (at paragraph 17) that the time has come to draw a line under the authorities to date and make a fresh start. I think that a fresh start is justified by the developments which have occurred in this branch of the law in recent years and in particular by the adoption of the principle of separability by Parliament in section 7 of the

1996 Act. That section was obviously intended to enable the courts to give effect to the reasonable commercial expectations of the parties about the questions which they intended to be decided by arbitration. But section 7 will not achieve its purpose if the courts adopt an approach to construction which is likely in many cases to defeat those expectations. The approach to construction therefore needs to be re-examined.

13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: 'if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.'"

40. Those observations concern, of course, an arbitration clause but I see no reason as to why they should not apply equally to a comparable clause which favours litigation. Ms. Evans KC did not take a point on that but what she did highlight is that *Fiona Trust* (as well as a number of the other cases cited during argument) concerned what she called "proper commercial disputes". She submitted that, in a commercial context, it is entirely foreseeable that parties would want a "one stop shop" for the resolution of their disputes, but the same cannot be said in the context of non-commercial disputes.

41. I fully accept that the relationship between the parties in *Fiona Trust* was somewhat different as compared with that of the parties in the present case, but I am not persuaded that that, in itself, is a material consideration. First, whilst the nature of the parties might well be something to bear in mind, the starting point must surely be the wording of the relevant clause. If the wording is clear and unambiguous, or can otherwise be readily discerned, the identity of the parties may add little to a court's analysis of the clause. Secondly, the principle identified by the House of Lords in *Fiona Trust*, that businessmen are likely to have intended that any dispute arising out of their relationship be determined by the same tribunal, ought equally, it seems to me, to apply to

contractual relationships which may, at first blush, appear less sophisticated than those with which the cited authorities are concerned, but which, nevertheless, can be taken as having intended that all disputes arising from the relationship between the parties be determined together, unless, of course, the wording of the relevant clause makes clear that certain matters are to be excluded. Thirdly, and in any event, the relationship between the parties in the present case was akin to a business relationship in the sense that the Claimant was using the Defendant's platform as a way to make a living. In short, on the issue of construction of the Clause in this case, I think I can be guided by the approach taken in *Fiona Trust*.

42. Turning, then, to the wording of the Clause in the present case, Mr. Boch, during argument, stressed that a distinction must be drawn between the phrase "this Agreement" and "and your relationship with YouTube under this Agreement" such that they must mean different things and that the latter must be broader than the former. It seems to me that that must be right- otherwise the second phrase would be meaningless. It is difficult to conceive that the Defendant, a multinational company which is owned by one of the biggest companies in the world, would subject itself, as well as its millions of users, to clauses which did not mean anything. When I asked Ms. Evans KC about the distinction, she suggested that when one looks at the Terms, they contain a variety of obligations (in respect of both parties), incorporate various policies [38], deal with permissions and restrictions [41] as well as the circumstances in which a user's account can be suspended and terminated [45]-[46]. It is all of this, Ms. Evans KC says, that constitutes "the relationship" between the parties. What the Clause seeks to do, according to Ms. Evans KC, is to inform the parties that English law will regulate what can and cannot be done under the Agreement. The clause is not, she says, an invitation to bring other types of claims against the Defendant.

43. In support of her argument Ms. Evans KC pointed to the observations of the Court of Appeal in *Ryanair Ltd v Esso Italiana Srl* [2013] 2 CLC 950 at paras. 46-49:

"46. Such reasoning, however, does not carry over into a situation where there is no contractual dispute (by which I intend to include disputes about contracts), but all that has happened is that a buyer has bought goods from a seller who has participated in a cartel. I think that rational businessmen would be surprised to

be told that a non-exclusive jurisdiction clause bound or entitled the parties to that sale to litigate in a contractually agreed forum an entirely non-contractual claim for breach of statutory duty pursuant to article 101 , the essence of which depended on proof of unlawful arrangements between the seller and third parties with whom the buyer had no relationship whatsoever, and the gravamen of which was a matter which probably affected many other potential claimants, with whom such a buyer might very well wish to link itself.

47. Even on the assumption of a contractual link such as a claim under article IV, there is no authority in this or other jurisdictions which has been brought to our attention to support Ryanair's claim. In this connection, Esso Italiana relied before Eder J on *Provimi Ltd v Roche Products Ltd* [2003] EWHC 961 (Comm); [2003] 2 All ER (Comm) 683 , where a group of claimants who had bought vitamins from various defendant manufacturing sellers of such products brought a claim for breach of statutory duty against them on the allegation, supported by a decision of the European Commission, that they had participated in an illegal cartel contrary to the then article 81 . Such a multi-party claim involving multi-party defendants may be thought to be typical of such a claim for breach of statutory duty. Many of the defendants had jurisdiction clauses in their standard terms and conditions in favour of Swiss, German or French courts, and relied on them in an attempt to defeat jurisdiction in England, which had otherwise been established under the Brussels Convention. Aikens J, who heard evidence of foreign law about such jurisdiction clauses, held that the attempt to rely on them failed in each case. However, Eder J said that he was not assisted by *Provimi* because the case was largely, if not entirely influenced by principles of construction arising under Swiss, German or French law (at para [20]).

48. In this court, Mr Beard again referred to and relied on *Provimi*. However, Mr Auld also relied on one passage in *Provimi* (at para [120]), not referred to by Eder J, where Aikens J may seem to be suggesting that an English way of looking at the French clause ('exclusive jurisdiction over all and any disputes arising herefrom') would be to conclude 'that the present disputes have arisen out of the legal relationship in connection with which the jurisdiction clauses were made'. However, Aikens J immediately went on to discount such an

English view, saying that he had to have regard to the fact that if the nature of the claim is tortious, ‘then a French court would be inclined to say that the dispute arises out of the tort’. Aikens J commented further and more speculatively about such matters at para [124], where he balanced arguments as to whether the dispute can be said to arise out of the contract of sale or out of the pre-existing illegal cartel. It would seem that he was pondering on the width of the expression ‘arising from’. This was prior to *Fiona Trust*, which disparaged fine distinctions of language and rather proceeded on the basis of what contracting parties would be reasonably understood to wish for in terms of one-stop adjudication of their contractual disputes.

49. Mr Auld cited *Provimi* at para [120] in support of his contention that a tortious claim which was intimately connected with a contractual claim would naturally fall within a contractual jurisdiction clause and even one which used the language of ‘disputes under this Agreement’ (emphasis added). However, he did not submit to this court, and he had not submitted to Eder J, that a tortious claim which had to stand by itself could or should be considered to fall within the scope of that expression, however broadly it is interpreted in accordance with the doctrine of *Fiona Trust*. Therefore that question does not arise. But even if it did, I see nothing in the *Fiona Trust* doctrine of a presumption in favour of one-stop adjudication to justify a conclusion that the parties to this supply contract should reasonably be regarded as intending that a purely tortious claim which lies against a cartel of Italian suppliers of fuel oil at Italian airports for breach of EU and/or Italian law should fall within the jurisdiction provisions of an English law contract, just because the claimant buyer is willing to limit his claim to only one of the cartel members, namely his seller, albeit his claim extends to the total supply from all the cartel members.”

44. I must confess that I did not find the attempt by Ms. Evans KC to explain the differences between the phrases used in the Clause, nor the recourse to *Ryanair*, convincing. This is for the following reasons. It is quite clear from the Terms that the Terms themselves plus the YouTube Community Guidelines and the Policy, Safety and Copyright Policies together comprise “the Agreement” [38]. Accordingly, disputes arising out of any of these documents are disputes arising under “this Agreement” for the purpose of the

Clause. They are not something extraneous to the Agreement which might fall under the broader scope of (and help to explain what is meant by) the Claimant's "relationship with YouTube under this Agreement". As to *Ryanair*, the first point to note is that the facts which gave rise to the dispute in that case are a world away from the present. Secondly, the relevant clause in that case was a non-exclusive jurisdiction clause (in favour of the English courts) and referred to the resolution of "disputes under this Agreement". Thirdly, the Court of Appeal ultimately found that there was no contractual claim which is why it went on to make the observations that it did as set out at para. 43 above. In contrast, in the present case, there is a contractual claim. Indeed, it seems to me that the contractual claim and the claims under the EqA are so closely knitted together on the facts that it would be a rather odd result if the Clause was construed in such a way that it covered one but excluded the other. Ms. Evans KC made the obvious point that claims under the EqA can, and often do, arise in circumstances where there is no contractual relationship between the parties. But, in the present case, the claims under the EqA arise only in light of the contractual relationship between the parties. Put shortly, the discrimination claims arise because of the way the Defendant is said to have acted (or, in the case of other YouTube content creators, not acted) in furtherance and in light of the Policies which form part of the Agreement. The factual matrix which gives rise to both sets of claims is clearly very similar if not identical.

45. In *Eastern Pacific Chartering Inc v Pola Maritime Ltd* [2021] 1 WLR 5475 the clause under consideration provided that:

"This Charter Party shall be governed by English law and any dispute arising out of or in connection with this Charter shall be submitted to the exclusive jurisdiction of the high court of justice in England and Wales ..."

46. Patricia Robertson QC, sitting as a Deputy High Court Judge, held at para. 37 of the judgment that:

"The language "in connection with" is naturally to be read as, if anything, wider than "arising under", or variants on that phrase. Taking a broad and common sense approach to construing the clause, as I am enjoined in *Fiona Trust* to do, a tort claim may be said to arise "in connection with" the charter not only where

there are parallel claims in tort and contract (as, for example, for breach of a duty of care) but also where the claim arises solely in tort but is in a meaningful sense causatively connected with the relationship created by the charter and the rights and obligations arising therefrom.”

47. Having considered the competing arguments, which have been carefully and thoughtfully advanced on both sides, I have reached the following conclusions:

- (a) The Clause in the present case ought to be construed in accordance with the principles set out in *Fiona Trust*.
- (b) Accordingly, the Clause should be construed from the starting point that the parties intended that any dispute arising out of their relationship ought to be decided by the same tribunal.
- (c) There is no language contained within the Clause which makes it clear that certain types of disputes should be excluded from the Court’s jurisdiction.
- (d) On the contrary, the Clause, on its face, is wide, limited not only to matters arising under the Agreement but also to matters arising out of the relationship between the parties under the Agreement.
- (e) The Claimant’s contractual claim clearly arises under the Agreement and is thus covered by the Clause.
- (f) The Claimant’s claims under the EqA clearly arise as a result of the relationship between the parties under the Agreement. Put another way, absent any such relationship there would be no claims.
- (g) Moreover, there is a strong factual nexus between both sets of claims which lends support to the proposition that they ought properly to be heard and determined together.
- (h) Even if there was no contractual claim, the claims under the EqA are, in a real and meaningful sense, causatively connected with the relationship which arises between the parties under the Agreement such that they ought properly to be found to fall within the scope of the Clause.

Consequently, I find that both sets of claims do fall within the meaning of the Clause such that the Claimant is entitled to rely upon CPR 6.33(2B)(b). Accordingly, it follows that permission of the Court was not required in order to serve the Claim Form out of the jurisdiction. None of the authorities relied upon by the Defendant dictates a different answer.

Does CPR 7.6(3) apply?

48. It is, I think, common ground between the parties that (a) the Claim Form was issued on 7 October 2021, (b) the identified address for service of the Claim Form was one in the United States of America, (c) the Claim Form, Particulars of Claim and Response Pack were received by the Defendant at its foreign address, having been delivered by a process server on 5 April 2022, (d) whilst the same had been received by the Defendant, it had not been formally served because Form N510 had not been filed with the Court (or served on the Defendant), and (e) the Form N510 was not filed with the Court until 22 April 2022.

49. I should record that at various stages during both his written and oral submissions Mr. Boch appeared to be somewhat equivocal as to whether formal service had in fact taken place on 5 April 2022. For the avoidance of any doubt on the matter, I am satisfied that the Claim Form had been received by the Defendant on 5 April 2022, but it had not been served. This is because CPR 6.34 (which Mr. Boch relies upon) provides as follows:

“(1) Where the claimant intends to serve a claim form on a defendant under rule 6.32 or 6.33, the claimant must—

- (a) file with the claim form a notice containing a statement of the grounds on which the claimant is entitled to serve the claim form out of the jurisdiction; and
- (b) serve a copy of that notice with the claim form.

(2) Where the claimant fails to file with the claim form a copy of the notice referred to in paragraph (1)(a), the claim form may only be served—

- (a) once the claimant files the notice; or
- (b) if the court gives permission.”

As has already been explored above, the Claimant intended to serve pursuant to CPR 6.33(2B)(b), so (1) above was clearly engaged. The commentary accompanying CPR 6.34 explains that the “notice” referred to in that rule is a reference to Form N510. It is common ground that such a notice was not filed with the Claim Form. A consequence of that is that (2) makes clear that the Claim Form may only be served (a) once the Claimant files the notice, or (b) if the Court gives permission. Neither of those things had occurred as at 5 April 2022 and so there had been no service.

50. The real issue of contention is the stage at which the Court can grant permission under CPR 6.34(2)(b); Mr Boch submits that the Court can do so at any time and by reference solely to that provision and, where necessary, the test for relief from sanctions. Ms. Evans KC submits that that provision is clearly intended to deal with applications that are made in time, i.e., within the period during which service of the Claim Form can be effected, and that any application made out of time must be determined by reference to CPR 7.6(3).

51. Both counsel referred to the judgment of Simon Salzedo QC, sitting as a Judge of the High Court, in *Athena Capital Fund SICAC-FIS SCA and Others v Secretariat of State for the Holy See* [2021] EWHC 3166 (Comm), though both counsel disagreed as to quite what had happened in that case and, consequently, what proposition it was authority for. I indicated that I would read the judgment following the hearing, which I have done. I note, in passing, that the judgment was in fact overturned on appeal (see [2022] EWCA Civ 1051) although not in respect of any of the points which are presently under consideration. Materially, it appears that the case concerned a claim brought against the defendant which arose out of an agreement pertaining to the purchase of shares. The claimants initially formed the view that permission to serve the

claim form outside the jurisdiction was required and they obtained it. They subsequently formed the view that permission was not required but, as a consequence, they ought to have filed the Form N510 which they had not done. They therefore applied for permission to serve the claim form without having filed the Form N510 pursuant to CPR 6.34(2)(b). The Court found that the words of CPR 6.34(2) provided a sanction for failing to file the Form N510 (or, alternatively, obtaining the Court's permission pursuant to (b)), that sanction being that the claim form could not be served. An application for permission under (b) was therefore an application for relief from sanctions within the meaning of CPR 3.9. The dispute between counsel arises as to (a) whether the application for permission under (b) was made within time or not, and (b) why the Court had had no regard to CPR 7.6(3).

52. Dealing with each of those issues in turn, the Learned Judge sets out the procedural history of the case at paras. 41-51 of his judgment. It is clear from those paragraphs that the claim form was issued on 16 June 2020 along with an application for permission to serve outside the jurisdiction (para. 41). Permission was granted on 17 June 2020 and service was carried out later that month and so within time (para. 42). On 7 October 2020, the defendant filed an application to set aside service on the ground that there had been a failure to comply with the State Immunity Act 1978. On 16 October 2020, the claimants applied to extend time for service of the claim form (presumably because they saw force in the point being advanced by the Defendant) which was granted on 19 October 2020 with variations to that order being made on 21 October 2020, 27 October 2020, and 17 November 2020 (paras. 43-45). Service was then effected in accordance with the State Immunity Act on 14 January 2021, following which the defendant filed an intention to challenge the jurisdiction of the court which it then did (paras. 46-47). Evidence on the jurisdiction point was exchanged and a hearing was set down for 25 and 26 October 2021. On 12 October 2021, the claimants sent a letter to the defendant giving notice that its position would now be that permission to serve outside the jurisdiction was never required (para. 48). The Court, of its own motion, invited the defendant to consider whether any issue arose under CPR 6.34(2) (para. 50). The claimants then applied, on 21 October 2021, seeking "retrospective permission" under CPR 6.34(2)(b) "for the claim form and particulars of claim to have been served without a Form N510, alternatively that they be treated as validly served and if necessary for relief from sanctions" (para. 51). Accordingly, if that understanding of the facts is

correct, it seems clear to me that the application of 21 October 2021 was clearly an application that was being made out of time.

53. Consequently, why, if the position taken by Ms. Evans KC is correct, did the Court not consider CPR 7.6(3)? It would appear that, the Court having raised the issue of CPR 6.34 of its own motion, neither party raised the potential relevance of CPR 7.6(3). The Learned Judge summarised the position of the parties at para. 106:

“The claimants submit that the proper course is for the court now to grant retrospective permission to serve the claim form without a form N510 under the power in CPR r 6.34(2)(b). The defendant does not dispute that there is power in the court to grant such permission retrospectively, but it submits that the application for such power to be exercised is an application for relief from sanctions. The claimants disagree.”

54. That having been said, the Learned Judge did consider a number of authorities where issues in relation to the Form N510 had been raised. Although none of them appear to be on all fours with the present case, the Learned Judge’s summary of them at para. 117 of the judgment is helpful:

“I have to decide whether the Claimants’ application for retrospective permission under CPR 6.34(2)(b) is an application for relief from an implied sanction. As far as authority is concerned, the following may be gleaned from the cases I have mentioned above:

- i) Although made in a slightly different context, there remains validity in the general point made by Gloster J in *the Wadi Sudr* [2009] 1 Lloyd’s Rep 666 that the claimant’s statement of the basis upon which it asserts jurisdiction under the Brussels regime is a matter of significance because of the potential importance of which court is first seised;
- ii) David Steel J considered an application under CPR 6.34(2)(b) without reference to relief from sanctions in *DSG* [2011] IL Pr 33, but since the case predated the reformulation of CPR 3.9 and the Court of Appeal’s decision

in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, I do not think I can draw a great deal from that;

iii) In *BDI-BioEnergy* 19 December 2017, HHJ Hacon appeared to find it obvious that an application under CPR 6.34(2)(b) was an application for relief from sanction and, moreover, that he could not characterise as a trivial breach the fact that in that case the N510 had not been filed, even though it had been served;

iv) In *Cargill* [2018] EWHC 974, Popplewell J indicated that he would have given permission under 6.34(2)(b) without referring to relief from sanctions, but given that this was a very brief and explicitly *obiter* indication and there is no suggestion that relief from sanction was referred to in argument, I do not think I can treat this as authority on the particular issue with which I am concerned;

v) In *re Carna Meats (UK) Ltd* [2020] 1 WLR 1176, the ticking of an incorrect box on form N510 was treated as a minor procedural irregularity, but that is plainly at a different level to failing to file or serve the form at all;

vi) In *Ablynx* [2019] FSR 29 where an N510 had been filed but not served, HHJ Hacon seems to have proceeded on the basis that if relief from sanction was required, then the breach was neither serious nor significant.”

55. At para 118, the Learned Judge concluded that:

“To my mind, the words of CPR 6.34(2) plainly provide a sanction for failing to file the notice contained in form N510 or to obtain the Court's permission, namely that the claim form may not be served. In context, that means that it will not be treated as having been served formally, so as to initiate the procedures that follow service of the claim form. Whether this is called an express or implied sanction, I think that an application for permission under CPR 6.34(2)(b) is an application for relief from sanction within the meaning of CPR

3.9 and that there apply to it the principles laid down by the Court of Appeal in *Denton v TH White* [2014] 1 WLR 3926.”

56. I must confess that, prior to having had regard to the various authorities concerning Form N510, I was inclined to agree with the position taken by Ms. Evans KC as to the relevance and applicability of CPR 7.6(3). This is for the following reasons:

- (a) First, CPR 7.6(1) provides that “The claimant may apply for an order extending the period for compliance with rule 7.5” (i.e., the rule on service of a claim form). No distinction is drawn between 7.5(1), addressing service within the jurisdiction, and 7.5(2), addressing service out of the jurisdiction. On the face of it, therefore, it is difficult to see why CPR 7.6, as a whole, would not apply to applications for an extension of time to serve a claim form out of the jurisdiction,
- (b) Secondly, I do see the force in the argument advanced by Ms. Evans KC that a claimant who has failed to serve within time cannot use another rule to seek to bypass the requirements and strictures of CPR 7.6(3): see *Ideal Shopping Direct Ltd v Mastercard Inc* [2022] EWCA Civ 14 at paras. 146-147 (although that was a case concerned with whether the general provision provided by CPR 3.10 could be used to override the specific provisions of CPR 6.15, CPR 6.16, or CPR 7.6(3), the Court finding that it could not), and
- (c) Thirdly, if CPR 7.6(3) does not apply to circumstances such as the present then it means that those who are seeking to extend time for service out of the jurisdiction out of time are, theoretically at least, in a more advantageous position than those who are seeking to extend time for service within the jurisdiction out of time as the rigors of CPR 7.6(3) apply to those in the latter category but not the former, which would, on the face of things, be a rather peculiar and difficult to justify distinction.

57. All that having been said, it seems clear from the authorities that do exist on the subject that the approach of the courts to issues arising under CPR 6.34 is to resolve them by reference to that rule and the test for relief from sanctions, irrespective of the timing of any such application for permission made pursuant to CPR 6.34(2)(b): see, for example, *Athena Capital* (where, materially, the Court was concerned with granting retrospective

permission to serve the claim form without a Form N510), *BDI-BioEnergy* (where, among other things, the Form N510 had not been filed with the Court at all but the Court was still prepared to consider the matter by reference to relief from sanctions and grant retrospective permission to file it out of time), and *DSG International* (where the Court treated the incorrectly completed Form N510 as a nullity but opined that the Court still retained a discretion to grant permission pursuant to CPR 6.34(2)(b)).

58. Accordingly, I have reached the conclusion that, notwithstanding my observations at para. 56 above, CPR 7.6(3) does not apply in the circumstances of this case and, instead, I will decide the Claimant's application for permission under CPR 6.34(2)(b) by reference to the test for relief from sanctions.

Should the Claimant be granted relief from sanctions?

59. CPR 3.9 provides that:

“(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost;
and

(b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence.”

The well-known guidance given by the Court of Appeal in *Denton v TH White Ltd* [2014] EWCA Civ 906 is to approach applications for relief from sanctions in three stages, namely to (i) assess the seriousness and significance of the breach, (ii) identify why the breach occurred, and (iii) evaluate all the circumstances of the case so as to

enable the Court to deal justly with the application (which includes consideration of the factors set out at (a) and (b) above.

60. Although at times equivocal about it, Mr. Boch ultimately accepted that the breach in the present case was a serious one and that there was no good reason for it. He was right to do so. Even if he had maintained otherwise, I would have reached the same conclusion. Put simply, the filing and service of the Form N510 is not only a requirement under the rules, its purpose is to make clear the basis upon which it is said that the Court has jurisdiction, whilst at the same time explaining why permission to serve out of the jurisdiction is not required. The failure to comply with that simple, but important, requirement also means that, in accordance with the rule, a claim form cannot be served unless the Court gives permission. The failure to file (and serve) the form was clearly both serious and significant. As for the reason for the failure, whilst I am quite prepared to accept that it was no more than an innocent oversight, that is quite plainly not a good enough explanation, not least when the Claimant was, at that time, legally represented.

61. As is often the case, whether to grant relief or not comes down to an assessment of all the circumstances. As to the need for litigation to be conducted efficiently and at proportionate cost, it is a somewhat regrettable feature of this case that, because of the oversight in respect of the Form N510, considerable disruption (and cost) has been occasioned right from the outset of the proceedings. That, I am afraid, falls at the door of the Claimant. I do not agree that the Defendant has sought to unfairly and unreasonably take advantage of the Claimant's mistake by opposing the Application. As is clear from the above, the error has raised a number of issues which took a whole day of Court time to resolve. Whilst it is true that the Defendant could have chosen not to oppose the Application, I am not at all surprised that it did. As to the need to enforce compliance with rules, here CPR 6.34, I have already observed that this was an innocent mistake rather than a wilful refusal to comply. I also acknowledge that, if the Application is refused, the likely course will be that the Claimant starts again albeit that he will have an additional hurdle in his way on account of limitation in respect of the claims under the EqA.

62. It is right to say, as Mr. Boch did, that once the Claimant became aware of the error, he acted promptly in completing, filing, and serving the Form N510, along with the Application. Because of the stage this claim is at, granting relief will not derail the course of the proceedings or imperil any hearing date (there is not one). The claim is right at the beginning and, if relief is granted, the next step will be for the Defendant to file its defence or any other application it may consider appropriate. As to the suggestion that the Defendant will suffer prejudice were relief to be granted, I am not persuaded that that is right. The assertion that the Defendant was, in the absence of the Form N510, unaware of the basis upon which it was said the Court had jurisdiction is questionable in light of the content of the Letter Before Action, dated 28 June 2021 [128-137]. But, even putting that to one side, the Court had previously adjourned the listing of the Application so that the Defendant could consider its position and respond accordingly. It has now done that, and its position has been fully ventilated at this hearing. I do accept that the Defendant has spent time and incurred cost in responding to the Application, but that is a matter which can be considered further when it comes to the issues of costs. To the extent that it is relevant to determining the Application, I do not think that the alleged prejudice suffered by the Defendant is material. I have also considered the criticisms which have been made of the Claimant's legal representative's conduct as set out in the witness statement of the Defendant's solicitor [94-104]. I have not considered it necessary to detail those criticisms as, irrespective of whether or not they are well-founded, they do not appear to me to materially assist me with the determination of the Application.

63. Taking all those matters into account, I have reached the conclusion that it is appropriate to grant the Claimant relief from sanctions. The failure to file and serve the Form N510 was unfortunate but it was not the type of error which, on the facts of this case, justifies what would in effect be the summary disposal of the Claimant's claim if relief was not granted. The far more sensible course is to grant relief and allow the claim to proceed, with the Defendant having the full range of options open to it in respect of how it chooses to respond to the substantive claim.

Standing Back

64. Standing back and looking at this matter holistically and in accordance with the Overriding Objective, I am satisfied that the above conclusions are justified. When one looks at the matter simply, the parties are where they are because of the failure in respect of the Form N510. The cited authorities appear to point in favour of granting relief in circumstances akin to the present, and it is not difficult to appreciate why. The failing can be easily remedied without causing any material prejudice to either party. It would not be in the spirit of the Overriding Objective to refuse the Application and make the Claimant start again.

65. I simply add that it is clear from the correspondence between the Defendant's solicitors and the Claimant's legal representative, which I have seen as part of the Application, that the lawyers have not got off to the best start insofar as their dealings with one another are concerned. I hope that, going forward, that situation will improve as, if it does not, a likely consequence is that of increased cost for both sides.

Overall Conclusion

66. For the reasons given above,

- (a) The Court declares that permission of the Court was not required to serve the Claim Form out of the jurisdiction as the present case is one to which CPR 6.33(2B)(b) applies.
- (b) The Court declares that CPR 7.6(3) does not apply in the circumstances of this case and, instead, the Claimant's application for permission under CPR 6.34(2)(b) has been determined by reference to the test for relief from sanctions.
- (c) The Claimant is granted relief from sanctions in respect of his failure to file and serve the Form N510.

(d) The Claimant is granted retrospective permission to file and serve the Claim Form and Particulars of Claim without the Form N510, with the Claim Form and Particulars of Claim therefore having been served on 5 April 2022.

67. I will hear from counsel as to the form of the Order and in respect of any consequential matters arising from this judgment.

Deputy District Judge Grout

1 June 2023