FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2025] CSIH 14
GP3/23 & GP4/23

Lord President
Lady Wise
Lord Clark

OPINION OF THE COURT

delivered by LORD PENTLAND, the LORD PRESIDENT

in the reclaiming motion

JOSEPH MACKAY

Applicant and Respondent

against

(FIRST) NISSAN MOTOR CO LTD; (SECOND) NISSAN MOTOR MANUFACTURING (UK) LIMITED; (THIRD) NISSAN MOTOR IBÉRICA SA; (FOURTH) NISSAN INTERNATIONAL SA; and (FIFTH) NISSAN MOTOR (GB) LIMITED

Defenders and Reclaimers

(SIXTH) RENAULT SA; (SEVENTH) RENAULT FLINS; (EIGHTH); RENAULT SAS; (NINTH) RENAULT UK LIMITED; and (TENTH) RCI FINANCIAL SERVICES LIMITED

Defenders and Respondents

Applicant and Respondent: Milligan KC, Middleton KC, A Smith KC, Black; Lefevres
First to Fifth Defenders and Reclaimers: Watts KC; Arnott; Pinsent Masons LLP
Sixth to Tenth Defenders and Respondents: Crawford KC, D Welsh; Harper Macleod LLP

20 May 2025

Introduction

[1] In order to initiate group proceedings in Scotland two preliminary applications require to be made to the court: an application to appoint a representative party and an

application for permission to bring the proposed group proceedings. Two such applications came before the Lord Ordinary for an opposed hearing. He decided to grant them both. The first to fifth defenders (various Nissan companies) challenge those decisions. In short they contend that the applicant failed to demonstrate that he was a suitable person to be appointed as a representative party. They also say that permission for the proposed group proceedings should have been refused because it had not been shown that it would be a more efficient administration of justice for the claims to be brought as group proceedings rather than individually; that it had not been demonstrated that the proposed proceedings had any real prospect of success; and that it had not been shown that the proposed proceedings raised the same, similar or related issues.

[2] The sixth to tenth defenders (various Renault companies) have not reclaimed against the Lord Ordinary's decisions. Senior counsel instructed on their behalf did, however, make some brief oral submissions at the summar roll hearing to assist the court.

Group procedure in Scotland

[3] Although the statutory introduction of group proceedings in Scotland is a relatively recent development, its gestation period was lengthy. The present case is the first opportunity for the Inner House to provide some general guidance about the approach which should be taken towards the preliminary applications.

[4] As Lord Ericht explained in *Bridgehouse* v *Bayerische Motoren Werke AG* 2024 SC 270, the origins of the Scottish rules go back at least as far as 1988 when the Lord Advocate (Lord Cameron of Lochbroom) referred the matter to the Scottish Law Commission for consideration. The Commission carried out a comparative study of class action and similar regimes in other jurisdictions and recommended in 1996 that there should be introduced a

procedure for multi-party actions where a number of persons have the same or similar rights (Multi-Party Actions*: Report on a reference under section 3(1)(e) of the Law Commissions Act* 1965 (Scot Law Com No 154)). An important feature of the Commission's recommendations concerned the role of the representative party. The Commission emphasised that it was important to ensure that the representative party "will fairly and adequately protect the interests of the class". The requirement of "fairly" protecting the interests of the group implied that the person concerned should be independent of the defenders, that there should be no apparent conflict of interest with other group members and that one member of the group was not likely to be favoured at the expense of another. The requirement that the representative party should protect the interests of other group members "adequately" implied that he or she had the financial resources likely to be necessary to support the litigation and the determination to pursue it to a conclusion (SLC report, paras 4.36 and 4.37).

[5] In 2009 the Scottish Civil Courts Review endorsed the Commission's recommendation that multi-party procedure should be introduced. In addressing the criteria for certification, the review made the following recommendation:

> "The SLC recommended that there should be a procedure for certifying an action as suitable for multi-party proceedings. Having regard to the experience of other jurisdictions, we agree that this would be desirable. In considering whether to grant a certification order, the court should be satisfied (a) that the applicant is one of a group of persons whose claims give rise to common or similar issues of fact or law; (b) that the adoption of the group proceedings procedure is preferable to any other available procedure for the fair, economic and expeditious determination of similar or common issues; and (c) that the applicant is an appropriate person to be appointed as a representative party, having regard in particular to his financial resources, and will fairly and adequately represent the interests of the group in relation to the common issues." *(Report of the Scottish Civil Courts Review* (2009) *Volume 2, ch 13, para 65).*

[6] There ensued considerable delay in taking forward the recommendations made by the Commission and the Review. It was not until 5 June 2018 that the Civil Litigation

(Expenses and Group Proceedings) (Scotland) Act 2018 received Royal Assent. The Act implemented *inter alia* the Review's recommendations relating to group procedure. Part 4 introduced a new form of procedure in the Court of Session to be known as "group procedure". Proceedings subject to that procedure were to be known as "group proceedings". The proceedings would be similar to what is known as "multi-party actions" or "class actions" in other jurisdictions. The purpose of the new group procedure was to make it possible for justiciable issues affecting two or more persons to be determined by means of a single representative court process, thereby avoiding the need for each member of the group to commence separate proceedings. The new group procedure was to be available only in the Court of Session.

[7] The objectives of the new system were set out in the Policy Memorandum for the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill which led to the 2018 Act as follows:

> "The introduction of a group procedure will help to broaden access to justice by allowing multi-litigants the opportunity to bring an action at a lower cost than individual cases. In turn, taking forward a number of related claims as a group procedure can help deliver a more streamlined and cost-effective outcome and reduce court time. An additional and important societal benefit to facilitating collective redress is the potential to deter harmful behaviour on the part of businesses and encourage corporate social responsibility. The introduction of a group procedure would help deliver a more streamlined approach to benefit both users and the courts." (para 93)

[8] The framework governing group procedure is to be found in sections 20 and 21 of the 2018 Act. They provide *inter alia* as follows:

> **"20 Group proceedings**
>
> (1) There is to be a form of procedure in the Court of Session known as 'group procedure', and proceedings subject to that procedure are to be known as 'group proceedings'.

(2) A person (a 'representative party') may bring group proceedings on behalf of two or more persons (a 'group') each of whom has a separate claim which may be the subject of civil proceedings.

(3) A person may be a representative party in group proceedings—
(a) whether or not the person is a member of the group on whose behalf the proceedings are brought,
(b) only if so authorised by the Court.

(4) There is to be no more than one representative party in group proceedings.

(5) Group proceedings may be brought only with the permission of the Court.

(6) The Court may give permission—
(a) only if it considers that all of the claims made in the proceedings raise issues (whether of fact or law) which are the same as, or similar or related to, each other,
(b) only if it is satisfied that the representative party has made all reasonable efforts to identify and notify all potential members of the group about the proceedings, and
(c) in accordance with provision made in an act of sederunt under section 21(1).

(7) An act of sederunt under section 21(1) may provide for group proceedings to be brought as—
(a) opt-in proceedings,
(b) opt-out proceedings, or
(c) either opt-in proceedings or opt-out proceedings.

(8) In subsection (7)—
(a) 'opt-in proceedings' are group proceedings which are brought with the express consent of each member of the group on whose behalf they are brought,
(b) 'opt-out proceedings' are group proceedings which are brought on behalf of a group, each member of which has a claim which is of a description specified by the Court as being eligible to be brought in the proceedings and—
(i) is domiciled in Scotland and has not given notice that the member does not consent to the claim being brought in the proceedings, or
(ii) is not domiciled in Scotland and has given express consent to the claim being brought in the proceedings.

(9) In group proceedings, the representative party may—
(a) make claims on behalf of the members of the group,
(b) subject to provision made in an act of sederunt under section 21(1), do anything else in relation to those claims that the members would have been able to do had the members made the claims in other civil proceedings.

(10) Section 11 of the Court of Session Act 1988 (jury actions) does not apply to group proceedings.

21 Group procedure: rules

(1) The Court of Session may make provision by act of sederunt about group procedure.

(2) Without limiting that generality, the power in subsection (1) includes power to make provision for or about—
  (a) persons who may be authorised to be a representative party,
  (b) action to be taken by a representative party in connection with group proceedings (whether before or after the proceedings are brought),
  (c) the means by which a person may—
    (i) give consent for the person's claim to be brought in group proceedings,
    (ii) give notice that the person does not consent to the person's claim being brought in group proceedings,
  (d) types of claim that may not be made in group proceedings,
  (e) circumstances in which permission to bring group proceedings may be refused,
  (f) appeals against the granting or refusal of such permission,
  (g) the disapplication or modification of section 39 of the Courts Reform (Scotland) Act 2014 (exclusive competence of the sheriff court) in relation to group proceedings,
  (h) the making of an additional claim in group proceedings after the proceedings have been brought (including the transfer of a claim made in other civil proceedings),
  (i) the exclusion of a claim made in group proceedings from the proceedings (including the transfer of the claim to other civil proceedings),
  (j) the replacement of a representative party,
  (k) steps that may be taken by a representative party only with the permission of the Court.

(3) Nothing in an act of sederunt under subsection (1) is to derogate from section 20.

(4) An act of sederunt under subsection (1) may make—
  (a) incidental, supplementary, consequential, transitional, transitory or saving provision,
  (b) provision amending, repealing or revoking any enactment relating to matters with respect to which an act of sederunt under subsection (1) may be made,
  (c) different provision for different purposes.

…

(6) In subsection (2), 'representative party' is to be construed in accordance with section 20(2)."

[9] The act of sederunt contemplated by section 21(1) came into force on 31 July 2020 (Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Group Proceedings) 2020 (SSI/2020/208)). It added a new Chapter 26A entitled "Group Procedure" to the Rules of the Court of Session. On 24 September 2020 the Lord President (Carloway) issued a Practice Note providing guidance about the operation of the new rules (Practice Note No 2 of 2020: Group Proceedings under Chapter 26A).

[10] The rules in Chapter 26A confer substantial case-management powers on the Lord Ordinary and are clearly intended to allow for flexibility and discretion in handling this new type of litigation. The rules should be seen as the servants of the court and not as its masters.

[11] It is important to note that RCS 26A.3(1) provides that subject to the other provisions of the Chapter, the procedure in group proceedings is to be such as the Lord Ordinary is to order or direct. In the same vein RCS 26A.27 provides that at any time before final judgment, the Lord Ordinary may, at his own instance or on the motion of any party, make such order as he thinks necessary to secure the fair and efficient determination of the proceedings.

[12] Paragraph 10 of the Practice Note explains that the procedural framework provides the court with flexibility about how best to manage group proceedings. The procedure is based, in part, on the commercial actions model. It allows for early intervention and case management by the court to deal with what could be complex litigation. The procedure in, and progress of, group proceedings is to be under the direct control of the Lord Ordinary. The court will take a pro-active approach.

[13] Part 2 of Chapter 26A contains the rules governing applications to be a representative party. RCS 26A.7 is headed "Determination of an application by a person to be a representative party". The rule provides as follows:

> (1) An applicant may be authorised under section 20(3)(b) of the Act to be a representative party in group proceedings only where the applicant has satisfied the Lord Ordinary that the applicant is a suitable person who can act in that capacity should such authorisation be given.
>
> (2) The matters which are to be considered by the Lord Ordinary when deciding whether or not an applicant is a suitable person under paragraph (1) include—
> (a) the special abilities and relevant expertise of the applicant;
> (b) the applicant's own interest in the proceedings;
> (c) whether there would be any potential benefit to the applicant, financial or otherwise, should the application be authorised;
> (d) confirmation that the applicant is independent from the defender;
> (e) demonstration that the applicant would act fairly and adequately in the interests of the group members as a whole, and that the applicant's own interests do not conflict with those of the group whom the applicant seeks to represent; and
> (f) the demonstration of sufficient competence by the applicant to litigate the claims properly, including financial resources to meet any expenses awards (the details of funding arrangements do not require to be disclosed).
>
> (3) The Lord Ordinary may refuse an application made by an applicant seeking authorisation to be given under section 20(3)(b) of the Act where the applicant has not satisfied the Lord Ordinary that the applicant is a suitable person, in terms of paragraphs (1) and (2), to act in that capacity.
>
> (4) Authorisation given under paragraph (1) endures until the group proceedings finish or until permission is withdrawn."

[14] Part 3 of Chapter 26A concerns permission to bring group proceedings. RCS 26A.11 provides *inter alia* as follows:

> "(5) The circumstances in which permission to bring proceedings to which this Chapter applies may be refused by the Lord Ordinary are as follows—
> (a) the criteria set out in section 20(6)(a) or (b) (or both (a) and (b)) of the Act have not been met;
> (b) it has not been demonstrated that there is a *prima facie* case;
> (c) it has not been demonstrated that it is a more efficient administration of justice for the claims to be brought as group proceedings rather than by separate individual proceedings;
> (d) it has not been demonstrated that the proposed proceedings have any real prospects of success."

[15] Part 4 of Chapter 26A is entitled "Opt-In Procedure". It provides that a person gives consent for their claim to be brought in group proceedings by sending notice to that effect to the representative party in Form 26A.14-A (RCS 26A.14). Provision is made for there to be a group register showing the membership of the group of persons on whose behalf proceedings are to be brought (RCS 26A.15). The group register requires to be lodged in the relevant court office and served on the defender. The register is to be considered by the court at all hearings of the proceedings (RCS 26A.15(7)).

[16] Part 5 of Chapter 26A governs commencement of group proceedings. It provides that the service upon a defender of a group register amounts to the commencement of the proceedings in respect of those persons who are group members, and are recorded as such on the group register that is served (RCS 26A.18). A group register requires to be served when making an application for authorisation to be a representative party or for permission for group proceedings to be brought (RCS 26A.5(8) and RCS.26A.9(4)). While the group proceedings may be said to have commenced in a broad sense after service of the group register, that is clearly just for the purpose of and in the context of the application process and is relevant largely for time-bar purposes. The group proceedings have not been raised as such given that the applications have still to be determined. Each of the rules (RCS 26A.5(7)(a) and 26A.9(3)(a)) also states that "the summons by which it is proposed to institute proceedings" is to be served when making the application, which shows beyond doubt that the proceedings have not yet been instituted at that stage. Moreover, paragraph 8 of the Practice Note puts the matter beyond doubt. It state that:

> "A group may only raise such proceedings where the court has authorised a person to be the group's representative party and given permission for the proceedings to be brought".

[17] The 2018 Act and the Rules of Court made thereunder show that Scottish group procedure has been designed to include a number of key features. It is not a system for managing numerous actions brought by different pursuers, each of whom has an individual claim. Instead, there is a single action brought by one party, the representative party, on behalf of persons who each have a separate claim. The court does not grant a separate decree in respect of each individual person: it grants a decree in respect of the action brought by the representative party. The litigation is conducted by the firm of solicitors acting in the proceedings. The court deals only with that firm and only that firm is entitled to enrol motions and deal with the other aspects of conducting the group proceedings. There is to be no more than one representative party in group proceedings.

[18] Scottish group procedure is at present an opt-in procedure only. Chapter 26A permits only opt-in proceedings.

[19] The emphasis of the new court rules is on judicial case management and the rules provide broad powers to enable the court to tailor the procedure in response to the circumstances and complexity of individual cases.

[20] In Scottish group procedure, two matters require certification by the court at the outset: (a) the proposed representative party must be authorised by the court and (b) group proceedings may be brought only with the court's permission. Certification takes place at an initial stage before service of the summons. Applications to be a representative party and to bring group proceedings are motions made before calling (RCS 26A.5; 26A.9; Practice Note, para 11). Each application is given a separate process number by the court's administration. If the motions are granted, the substantive action itself is given its own separate process number and the summons is then served and defences lodged.

[21] As Lord Ericht observed in *Bridgehouse*, *supra*, experience in other jurisdictions has shown that certification is no mere formality and can prove to be one of the most contentious phases of a multi-party action (para [16]).

[22] There are no restrictions on the subject matter of group proceedings. So, for example, permission has been granted to bring group proceedings in relation to diesel emissions, historical sexual abuse of young boys and unsafe working practices in Kenyan tea plantations causing musculoskeletal injuries.

Core facts

[23] The respondent, Mr Joseph Mackay, applied for permission to bring group proceedings concerning the alleged fitting to Nissan and Renault diesel vehicles by their manufacturers of prohibited defeat devices for the control of nitrogen oxide emissions during regulatory testing. He also applied to be authorised as the representative party on behalf of approximately 8,500 persons claiming to have suffered loss as a result of that alleged behaviour. The first to fifth proposed defenders are various companies in the Nissan group and the sixth to tenth proposed defenders are several companies in the Renault group. Both applications were opposed by each group of companies and came before the Lord Ordinary for a hearing.

[24] In the draft summons accompanying the application for permission, the proposed pursuers made the following averments:

> "In 1999, the first and sixth defenders entered into a partnership, known as the Renault-Nissan Alliance, each holding a substantial number of shares and voting rights in the other. In March 2002, the first and sixth defenders jointly incorporated Renault-Nissan BV in the Netherlands, *inter alia* to develop common global research, development, design and engineering strategies applicable to Renault and Nissan vehicles, for implementation by the first and sixth defenders' own executive committees. In October 2016, the first defenders acquired a controlling interest in the Mitsubishi Motors Corporation ('Mitsubishi') and made them an equal partner in

> said Alliance, which is now known as the Renault-Nissan-Mitsubishi Alliance. In June 2017, the first defenders and Mitsubishi jointly incorporated Nissan-Mitsubishi BV to explore and implement engineering synergies for Nissan and Mitsubishi vehicles, again, for implementation by the first defenders' own executive committee. In March 2019, the roles of Renault-Nissan BV and Nissan-Mitsubishi BV were taken over by the Alliance Operating Board."

[25] In the group proceedings application the respondent averred that the Nissan and Renault companies fraudulently, which failing negligently, misrepresented to the group members that their vehicles and their Euro 5 or Euro 6 diesel engines had been tested and complied (without unlawful modification) with EU and UK statutory requirements, including regulatory emissions levels; that they were fit lawfully to be sold, registered and put into service in the UK and the EU; and that they did not incorporate unlawful prohibited defeat devices. The respondent pleaded that it was more efficient for the administration of justice for the claims to be brought as group proceedings, rather than as individual proceedings. There was a *prima facie* case; it had real prospects of success. The aggregate value of the claims was not yet susceptible to precise calculation. The final total would depend upon the court's approach to quantification of loss, as to which there were various potential possible approaches.

[26] By interlocutor dated 5 July 2024 in the application for authorisation to be a representative party, the Lord Ordinary authorised the applicant to be the representative party in the proposed group proceedings against the Nissan and Renault companies and ordered that the authorisation was to endure until the group proceedings finished or until permission was withdrawn. On 19 July 2024, following a hearing, the Lord Ordinary issued a further interlocutor in the representative party application process by which he allowed the first to fifth defenders' opposed motion for leave to reclaim against his interlocutor of 5 July 2024 to be dropped.

[27] By interlocutor dated 19 July 2024 pronounced in the other process, that is the proceedings for the application for permission to bring group proceedings, the Lord Ordinary granted permission under section 20(5) of the 2018 Act and, in terms of Rule of Court 26A.12, made a number of orders amongst which he defined the issues in the group proceedings as follows:

> "Claims arising in Scotland from the diesel NOx emissions issues affecting certain Nissan and Renault vehicles with diesel engines manufactured to Euro 5 or Euro 6 emissions standards (excluding Euro 6d and Euro 6d Temp); the pursuers allege that defeat devices unlawfully reduced the effectiveness of said vehicles' nitrogen oxide (NOx) emissions control systems and the defenders have caused loss and damage to the pursuers".

[28] The Lord Ordinary in the interlocutor of 19 July 2024 made various further orders concerning lodging of the group register, time limits, withdrawal of consent and advertisement. He appointed further procedure to take place thereafter.

The Lord Ordinary's decision

[29] The requirement that the issues in the proposed group proceedings, whether of fact or law, were the same as, or similar or related to each other did not mean that the issues for resolution had to be identical in the case of every member of the group, merely similar or related to each other. Despite the presence of two distinct groups of proposed defenders, each member of the group was claiming that a defeat device was fitted in a vehicle in which he or she had a financial interest of some kind, and that loss was suffered. Issues of fact and law would be of general application to all group members and capable of resolution despite some specific issues perhaps requiring sub-group or individual resolution (*Campbell* v *James Finlay (Kenya) Ltd* 2022 SLT 751, [5]).

[30] A press release dated 6 February 2023 from the "Renault-Nissan-Mitsubishi Alliance" stated that the alliance was a partnership with a unique model which leveraged

the leadership strengths of each member company, uniting their skills, talents and technologies to streamline idea sharing, fast-track innovation, improve cost efficiency and add value. A report of a hearing by the European Parliament's Committee of Inquiry into Emission Measurements in the Automotive Sector dated 13 July 2016 suggested that the hardware (but not software) of certain engine types was common to Renault and Nissan in Europe. This material provided a proper basis to conclude that there was sufficient communality amongst the members of the proposed group to warrant the legal and factual issues being ventilated in the proposed proceedings being deemed to be, at least, "related" to each other.

[31] At the initial stage in the process the existence of a *prima facie* case required no more than the appearance of a serious question or questions to be tried. It did not call for the application of tests of relevancy or specification which would apply once the pleadings were finally settled. The application disclosed a *prima facie* case. While the case (at least in its current mode of expression) was beset with apparent difficulties which would require to be addressed, if need be by very robust case management, if and when matters proceeded, in the meantime there was nothing that could not be so addressed. Enough had been said to demonstrate a *prima facie* case in the requisite sense.

[32] It was obvious that, in a case involving over 8,000 potential claimants, the prospect of individual proceedings bordered on the unthinkable, and would run entirely contrary to the policy aim of the 2018 Act to widen and improve access to justice.

[33] It had been demonstrated that the proposed proceedings had a real prospect of success. The phrase "real prospects of success" ought to be considered in the same way as a similar phrase was construed in *Wightman* v *Advocate General for Scotland* 2018 SC 388. Satisfaction of the test required the demonstration of real and substantial prospects of

success, albeit less than probable success. The test did not create an insurmountable barrier which would prevent what might appear to be a weak case from being fully argued in due course. It could not be said that the pursuers would probably succeed in whole or in part, but they might well do so. That was sufficient for present purposes.

[34] As to the application to be the representative party, it was not claimed that the applicant enjoyed any special ability or relevant expertise; he was simply one of the members of the proposed group who was willing to act as a representative party and appeared to the solicitors who would be conducting the proposed proceedings to be unaffected by any obvious inability to do so.

[35] It was not suggested that the respondent had any interest in the proceedings save for the financial claim which flowed from his membership of the proposed group. There was no suggestion that he was anything other than wholly independent of the proposed defenders.

[36] No positive attempt was made to demonstrate (as opposed to assert) that the applicant would act fairly and adequately in the interests of the group members as a whole, though nothing was said against him in those respects either. The possibility of positive conflict between Nissan and Renault claimants or as between owners and lessees was more theoretical than real. In the event that any such conflict did emerge, RCS 26A.8 provided the means of replacing the applicant as the representative party. It was reasonable to proceed on the basis that it had been demonstrated that there presently existed no conflict of interest. As to the requirement to demonstrate sufficient competence to litigate the claims properly and meet any expenses awards, all that was said of the applicant was that he appeared to the solicitors to be a level-headed individual, who would listen carefully to legal advice and make a sensible decision as and when called upon to do so. No attempt had been made to

demonstrate that he was someone used to receiving legal advice, asking relevant questions, considering and acting upon it. It would, however, be wrong to assume that he might simply accept advice given to him somewhat uncritically and possibly become a mere cipher for the solicitors. None of the defenders relied upon that consideration.

[37] On the question of financial resources, Quantum Claims Compensation Specialists Limited had agreed to provide funding for the proposed proceedings and to bear expenses awarded against the representative party. The latest accounts for that company (for the financial period to 30 April 2023) disclosed cash in hand at that date to be a little over £3.9 million, and net assets of £8.9 million. The accounts were unaudited and no more recent figures were available. It was not disputed that the company had given similar undertakings in other group proceedings and had other potential liabilities. The undertaking, at least as matters stood, was sufficient to demonstrate that adequate financial resources were likely to be available to meet any expenses awards which might be made in the foreseeable future. If that situation changed, as by the state of the company's finances deteriorating materially, then the availability of caution could be addressed at an appropriate point.

[38] In summary, on the positive side, the applicant had a legitimate personal interest in the proposed proceedings to the extent of his own claim, but no further. He was independent of the defenders. He had no present conflict of interest with other group members. He could call upon adequate financial resources to act as a representative party. On the other hand, he claimed no special abilities or relevant expertise and had not demonstrated that he would act fairly and adequately in the interests of group members or that he was sufficiently competent to conduct the litigation, although equally nothing suggested otherwise.

[39] Taking all of these matters into consideration, it could be concluded – by a relatively small margin – that the respondent was a suitable person to be authorised to act as a representative party in the proposed proceedings. It was evident that a relatively benign view fell to be taken of the question of suitability to be a representative party if the group proceedings facility was to work as designed in the improvement of access to justice. A fairly wide range of individuals might, on that view, be suitable to be a representative party. The applicant fell within that range.

Submissions for the first to fifth reclaimers

Permission for group proceedings

[40] The Lord Ordinary had erred in the exercise of his discretion and misdirected himself in law in concluding that there was no ground upon which he was entitled to refuse permission for group proceedings to be brought (*Forsyth* v *AF Stoddard and Co Ltd* 1985 SLT 51). He could and should have refused permission on a number of grounds. In granting permission he reached a decision which was not reasonably open to him (*Thomson* v *Corporation of Glasgow* 1962 SC (HL) 36).

[41] The test set out in section 20(6)(a) of the 2018 Act was not met. The issues of fact or law had to be the same as, or similar, or related to each other. The proposed group of pursuers comprised a disparate group of members whose actions differed in a number of key respects. Nissan and Renault were, and continued to be, separate entities. Both manufacturers had independent research and development functions and arm's length supply arrangements. There were some basic engine types common to both Nissan and Renault vehicles, but the two manufacturers adopted differing emissions control systems, software and approaches to calibration and configuration, resulting in significant differences

between the engines and emission control systems. Further differences were the inherently different characteristics of owners and lessees of the two manufacturers' vehicles.

[42] The Lord Ordinary erred in relying on an unsubstantiated press release issued in February 2023 by the "Renault-Nissan-Mitsubishi Alliance". This was a public relations document. It did not provide an adequate basis for finding communality amongst the proposed group. The language of the release was generalised.

[43] The pleadings disclosed no averments which would enable the reclaimers or the court to discern the basis upon which many of the pursuers claimed to have suffered any loss. There was no *prima facie* case. Many of the claims were time-barred. The pleadings were irrelevant (*Jamieson* v *Jamieson* 1952 SC (HL) 44). Reference was made to a "common methodology", but no explanation was provided as to what that methodology would be or the basis upon which owners' claims and the lessees' claims could be quantified in the same way. A case that was fundamentally irrelevant was not a *prima facie* case. The applications should at least have been refused *in hoc statu* for the pursuers to correct the multiple difficulties with the group register and to clarify their position on loss.

[44] The Lord Ordinary failed to take account of the submission made to him about the potential need for cross-disclosure of commercially sensitive information between two direct competitors. This was a serious issue. It was not clear how the challenges posed by disclosure of material in these circumstances could be managed. Such challenges would have an impact on the efficiency of dealing with the claims against Nissan and Renault in the same action. Those acting for the reclaimers had been unable to give assurances to their clients that commercial confidentiality would be protected. No solution to the difficulty had been proposed or identified.

[45] The lack of specification and relevancy, acknowledged by the Lord Ordinary, was not given sufficient weight when considering whether there were real prospects of success under RCS 26A.11(5)(d). A case which inevitably could not survive debate could not be said to have a real prospect of success. The terms of Chapter 26A made it clear that these were relevant and necessary considerations to be addressed in deciding whether the applications should be granted. The requirement that a claim must demonstrate a real prospect of success was a necessary procedural hurdle to filter out frivolous and time-wasting claims.

[46] The group register was not fit for purpose. Over 1,300 of the estimated 8,500 entries on the group register were duplicated. That was not in the interests of the efficient administration of justice.

Appointment of the representative party

[47] The court required to give consideration to the factors listed in RCS 26A.7(2) in determining the suitability of the applicant as the representative party.

[48] No effort had been made to demonstrate that the applicant had any special abilities or experience such as to make him a suitable person to be a representative party. There was no material before the Lord Ordinary to enable him to be satisfied that this requirement was met.

[49] The applicant was a member of the group and therefore had an interest in the proceedings, although the paucity of the pleadings on this matter was such that the exact nature of his interest was indeterminable.

[50] There was no effort to demonstrate the applicant's ability to act fairly or adequately in the interests of the group members as a whole, or that his own interests would not conflict with those of the group whom he sought to represent. The applicant owned two Nissan

vehicles. He had provided a brief affirmation that he would act in the interests of the group, but it did not address his ability to act fairly or adequately in the interests of owners of Renault vehicles, or lessees of either Nissan or Renault vehicles. His statement disclosed no particular expertise or ability to act fairly or adequately in the interests of the group members as a whole. The Lord Ordinary was not entitled to conclude that he possessed these abilities. The Lord Ordinary acknowledged that no steps had been taken to satisfy the court that the applicant would act fairly and in the interests of the group members as a whole.

[51] The material before the Lord Ordinary as to the applicant's competence and ability to meet an expenses award against him was inadequate. RCS 26A.7(2)(f) required the applicant to demonstrate that he was in a position to meet an expenses award, while also stating that he need not disclose details of funding arrangements. The only material before the court was produced by the reclaimers and did not concern the applicant's competence or financial position. It consisted merely of the publicly available statutory accounts of Quantum Claims Compensation Specialists Limited. The accounts were unaudited and over a year old. The Lord Ordinary nonetheless concluded that the accounts sufficiently demonstrated that adequate financial resources were likely to be available to meet any expenses awards in the foreseeable future course of the proceedings. He did not have material before him to enable him reasonably to reach such a conclusion. It was the unchallenged submission of the reclaimers that the costs of equivalent litigation in England and Wales ran into tens of millions of pounds.

[52] The decision to grant the application for permission to be a representative party was unreasonable; it was reached on the basis of irrelevant factors; it failed to take sufficient account of other important factors (*Thomson* v *Corporation of Glasgow, supra*).

Competency of the challenge to appointment of the representative party

[53] The interlocutor appointing the applicant as representative party had been competently reclaimed. The 2018 Act provided for the making of an application for the appointment of a representative party and an application for permission to bring group proceedings. Both applications involved a single cause defined in section 20 of the 2018 Act as a "group proceeding". There was only one "proceeding" once permission had been granted, namely the group proceeding.

[54] In terms of RCS 38.6(1) the reclaiming motion enrolled in the application for permission to bring group proceedings had the effect of opening up all the Lord Ordinary's interlocutors in the "cause". The cause was defined in RCS 1.3 as the "proceedings". The fact that the appointment of the representative party was made in a separate process did not render it a "proceeding" or "cause" separate to the group proceeding. To suggest otherwise ignored the practical reality of the situation and disregarded the spirit and the letter of the 2018 Act and the rules made thereunder.

Submissions for the sixth to tenth respondents

[55] The sole test for the appointment of a representative party was suitability. The consideration of suitability was to be determined by the factors listed in RCS 26A.7(2). Those factors were not an exhaustive list, but each required to be addressed when the Lord Ordinary considered the suitability of the representative party. No consideration had been given to the revelation of commercially sensitive material in an action pursued against two direct competitors with a different presence in Scotland and with different vehicles on

the Scottish market. This was relevant to the Lord Ordinary's consideration of RCS 26A.7(2)(c) and the efficient administration of justice.

[56] The statutory criteria under section 20(6)(a) of the 2018 Act had not been met. While some Renault engines featured in Nissan models, the way in which they were calibrated, designed and homologated was different. For these reasons Nissan and Renault were, and are, distinct and separate.

Submissions for the applicant

Competency of the challenge to appointment of the representative party

[57] The reclaimers' challenge to the appointment of the representative party was not competent. The reclaiming motion had been enrolled only in respect of interlocutors concerned with permission to bring group proceedings. Leave to reclaim was required, but had not been sought in respect of the interlocutors concerned with the appointment of the representative party. The rules of court envisaged that the applications would be dealt with sequentially. The group proceedings are brought by the representative party. The summons bore the name of the representative party (*Thompsons Solicitors Scotland* v *James Finlay (Kenya) Ltd* 2022 SLT 731, [14]). Without an appointed representative party there could be no successful application for permission to bring group proceedings. Refusal of an application to be a representative party was, accordingly, a practical barrier to a grant of permission to bring group proceedings in favour of that applicant. Had the reclaimers wished to reclaim the appointment of the applicant, they required to have sought and been granted leave to reclaim in the application seeking the appointment of the representative party (RCS 38.2(6); 38.3(3)(a), and *Bridgehouse*, *supra*).

Appointment of the representative party

[58] The factors in RCS 26A.7(2) were merely for consideration by the Lord Ordinary and allowed for an exercise of his judicial discretion (*Forsyth* v *AF Stoddard and Co Ltd, supra,* p 53). They were not mandatory requirements, nor were they exhaustive. The only mandatory requirement was that the applicant should be a "suitable person". This meant that the proposed representative party would prosecute the action efficiently and effectively. Only clearly unsuitable candidates should be denied appointment. This included situations where there was an impression that a conflict of interest could arise (*Thompsons Solicitors Scotland* v *James Finlay (Kenya) Ltd*, *supra*).

[59] In previous group proceedings in Scotland, the representative party was an ordinary member of the group who relied on substantially the same factors as the representative in this case (*Bridgehouse*, *supra*). The Volkswagen Group NOx Emissions litigation was successfully conducted by a representative party in substantially the same position as the applicant (*Crossley & Ors* v *Volkswagen Aktiengesellschaft* [2020] EWHC 783 (QB)). The bar to appointment was low. A high bar would be an impediment to access to justice. The applicant was an ordinary and willing member of the group. For the purposes of the group proceedings, he would have an experienced legal team, including senior and junior counsel, a team of solicitors from a large firm which had experience of acting in multi-party litigation, and other Scottish firms who were part of a steering group of agents, all of whom had experience in multi-party litigation in Scotland.

[60] There was a protective mechanism encompassed by the rules to ensure safeguarding of the group as a whole in the group proceedings. Any member could challenge the representative and seek to be appointed in his place (RCS 26A.8(2)). In addition, any

settlement must be achieved only after consultation with the other group members (RCS 26A.30).

[61] RCS 26A.7(2)(f) required consideration of whether the applicant had demonstrated sufficient competence to litigate the claims properly, including financial resources to meet any expenses awards. The rule expressly acknowledged that the applicant need not disclose the details of the funding arrangements. Something of a dichotomy arose between the requirement that the court consider the applicant's ability to meet adverse expenses awards on the one hand and not requiring the applicant to disclose the details of his funding arrangements on the other. All the court required was for the nature of the applicant's financial resources to meet any award of expenses to be explained. Where the applicant relied on funding from a third party (as here), the detail of the funding arrangements need not be disclosed. The applicant confirmed that Quantum Claims Compensation Specialists Limited were providing funding to the representative party and the group members. An undertaking was provided on behalf of Quantum Claims to that end. They had never failed to meet any award of expenses in their history. The funding received by the applicant from Quantum Claims was apt to demonstrate sufficient financial resources to meet any adverse expenses awards. Quantum Claims' publicly available accounts disclosed cash in hand of over £3.9m and net assets of £8.9m. If this was a financial barrier, access to justice would scarcely be available in Scotland for cases of this nature. There were unlikely to be other potential funders. The general legal principle applicable was that even an impecunious litigant was entitled to advance a stateable case other than in exceptional circumstances (*McTear's Executrix* v *Imperial Tobacco Ltd* 1996 SC 514).

Permission for group proceedings

[62] The court was not adjudicating on the merits of the issues in dispute; the court had to consider whether the applicant had satisfied the requirements of common issues; that there was a *prima facie* case, and that group proceedings were the best way of proceeding to determine the issues between the parties.

[63] The Rules envisaged that the court might refuse permission in four situations (RCS 26A.11(5) and section 20(6) of the 2018 Act). These circumstances collectively required the application of a commonality test, a merits assessment, and a superiority test.

[64] Permission to bring group proceedings could be refused if the two requirements of section 20(6)(a) and (b) of the 2018 Act had not been met, namely that "all of the claims made in the proceedings raise issues (whether of fact or law) which are the same as, or similar or related to each other" (the commonality test) and that "the representative party has made all reasonable efforts to identify and notify all potential members of the group about the proceedings", which was not in dispute.

[65] As regards commonality, the court was required to assess whether there were generic issues of fact and law which could be resolved for all of the group, even if there were issues which would require to be dealt with on the basis of sub-groups or even individual determination (*Campbell* v *James Findlay (Kenya) Ltd*, *supra*, para [5]). Nothing in the language of the test required the claims to be identical to one another. It required similarity or relationship. The group members all presented claims arising from the same, similar or related issues of fact and law, namely the issue of excessive NOx emissions from their purchased, owned or leased vehicles containing Euro 5 or Euro 6 diesel engines, which they alleged contained unlawful defeat devices causing them to sustain loss and damage. The court was entitled to place reliance on the material provided, which demonstrated the link

between Nissan and Renault and tended towards a significant degree of sharing of technology between Nissan and Renault, and the commonality of engine types between Nissan and Renault in Europe.

[66] The applicant offered to prove a substantial link between the Nissan and Renault defenders as regards the research, development, design, and engineering strategies of their respective vehicles. That was borne out, on its face, by the material placed before the Lord Ordinary. The Lord Ordinary was entitled to rely on the press release of 6 February 2023, which was signed by the Chairman of the Renault-Nissan-Mitsubishi Alliance and produced on the Nissan Motor Co global website.

[67] Nissan and Renault defenders were being jointly case-managed in respect of litigation arising from substantially the same issues as the current group proceedings in England and Wales. Nissan and Renault defenders were one of the lead NOx cases proceeding in England, and there had been no opposition by them to the Group Litigation Order. There was no explanation as to why the Nissan defenders seemed content in one jurisdiction to be jointly case-managed with the Renault defenders, but in Scotland were adopting an inconsistent position. The requirements of section 20(6)(a) and (b) were satisfied.

[68] Insofar as the reclaimers founded on the state of the group register and the requirement to disclose potentially commercially sensitive information between the parties, such issues were not directly relevant to the question of whether group proceedings were a more efficient administration of justice. These matters were capable of being dealt with in the course of the group proceedings under the case-management powers of the Lord Ordinary.

[69] Permission to bring group proceedings could be refused if a *prima facie* case had not been demonstrated by the applicant, or that the proposed proceedings had any real prospects of success: RCS 26A.11(5)(b) and (d). The court should resist any temptation to delve into the substantive merits of the proceedings at this stage. All that was required to satisfy the requirement of a *prima facie* case was that the applicant demonstrated a stateable case. "Real prospects of success" had the meaning that the prospects were real rather than fanciful or speculative. The test was not one of *probabalis causa* (*Wightman* v *Advocate General for Scotland*, *supra*, [9]). The purpose of the rules was to filter out obviously unmeritorious claims. The summons had not yet been signeted and so it was too early to consider questions of relevancy and specification. The applicant had lodged a bundle of documents containing information about recalls of affected vehicles and the results of various NOx test results which were indicative of the presence of prohibited defeat devices. He had demonstrated a *prima facie* case and real prospects of success. Further questions as to the substantive merit or otherwise of the applicant's averments, including relevancy and specification were for a later date.

[70] Finally, permission to bring group proceedings could be refused where it had not been demonstrated that it would be more efficient for the administration of justice for the claims to be brought as group proceedings rather than by separate individual proceedings, in terms of RCS 26A.11(5)(c). This was a superiority test of whether group procedure was more suitable for the proposed claims. There was an obvious case for efficiency in bringing group proceedings rather than individual proceedings for numerous individuals. Permission could only be refused if group proceedings would not be more efficient for the administration of justice than individual proceedings.

[71] There had been an unfortunate proliferation of protracted procedure at the appointment and permission stages of group proceedings. While there was no necessity for an oral hearing in respect of applications for the appointment of the representative party, and the rules envisaged that an application for permission would be dealt with summarily, in practice a hearing had taken place in each of the cases, at times leading to delay of many weeks or months. This contrasted with judicial review procedure, where the rules required decisions on permission to be made within tight timescales (RCS 58.7). The experience of representative parties in the emissions cases was that applications for appointment and permission had taken many months to come before the court and months further for decisions on the appointment of the representative party and permission to bring group proceedings. The principal aim of the introduction of group proceedings was to enable access to justice to secure the efficient determination in cases such as the case at hand. The reclaiming motion presented an opportunity to emphasise the need to deal with the preliminary stages as expeditiously as possible.

Analysis and decision

The policy aims of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018

[72] The decisions of the Lord Ordinary to authorise the applicant as the representative party and to give permission for the proposed group proceedings to be brought were discretionary in nature. This is clear from the statutory provisions: for example, section 20(6) of the 2018 Act states that the court may give permission for group proceedings to be brought if certain conditions are satisfied. It is also clear from the rules of court: for example RCS 26A.7(1) provides that an applicant may be authorised to be a representative party where he has satisfied the Lord Ordinary that he is a suitable person to act in that

capacity. Whether to grant or refuse the applications in the present case did not, therefore, involve hard-edged questions of legal principle of the type that are amenable to review on their merits by an appellate court. Rather, the decisions entailed the exercise of broad powers of case-management in the overall interests of the fair administration of justice. They can only be reversed on appeal in strictly constrained circumstances. The resolution of such questions falls pre-eminently within the discretionary sphere of decision-making entrusted to the Lord Ordinary, who in this case was not only an experienced commercial judge, but also one with considerable experience of handling group proceedings.

[73] The exercise of such broad and discretionary case-management powers requires a pragmatic and realistic approach to be adopted with a particular emphasis being given to ensuring that the underlying policy, aim and purpose of the 2018 Act are given proper effect. The clear objective of the 2018 Act is to increase access to justice by creating a new procedure designed to enable similar claims to be grouped together so that they no longer had to be brought individually. The procedure is intended to be streamlined and efficient. The court is expected to handle group claims in a flexible and cost-efficient manner. Technical points should not be allowed to get in the way, particularly at the outset of proceedings.

[74] A further policy aim of the 2018 Act is to promote social responsibility on the part of businesses and thereby to protect and strengthen the rights and interests of consumers. Facilitating an efficient and effective means of collective redress for groups of claimants has the potential to deter damaging conduct by businesses.

[75] It is important that the policy aims of the 2018 Act are reflected in the court's approach to disposal of the preliminary applications for appointment of a representative party and for permission to bring group proceedings. Such applications must be dealt with

expeditiously and flexibly. They should not be allowed to become unduly drawn out by protracted procedure. The determination of such applications must not become ensnared in technicality or the exploration of detailed questions of fact or law. The key point is that they are preliminary applications; they must be treated as such and disposed of without delay.

Review of discretionary decision-making

[76] The well-established test for this court when invited to interfere with a discretionary decision is whether the Lord Ordinary misdirected himself in law or otherwise transgressed the limits of discretion reposed in him so as to permit an appellate court to intervene and set aside his decision (*Forsyth* v *A F Stoddard & Co Ltd* 1985 SLT 51, Lord Justice Clerk (Wheatley), p 53). An appellate court will not lightly interfere with the exercise of a discretion by a lower court. In particular, the Inner House will not overrule the discretion of a lower court merely because it might have exercised it differently (*Thomson* v *Corporation of Glasgow* 1962 SC (HL) 36, Lord Reid p 66).

Appointment of the representative party

[77] Turning first to the decision to authorise the applicant as the representative party, it is clear from the Lord Ordinary's opinion that he addressed all the relevant considerations in determining the applicant's suitability to hold that position. RCS 26A.7(1) and (3) make clear that the sole criterion to act in that capacity is suitability. The matters specified in RCS 26A.7(2) are ones which the Lord Ordinary is required to consider when deciding whether or not the applicant is a suitable person, but this does not mean that the applicant requires to tick off each and every one of these requirements in order to demonstrate that he is so suitable. That would involve an unrealistically prescriptive and inflexible approach.

There is only one overriding requirement, that of suitability. Whether or not an applicant is suitable must be assessed in a holistic fashion, taking account of all the relevant features of the particular case and having regard to the considerations mentioned in RCS 26A.7(2). The issue is one to be addressed in the round.

[78] The court is entirely satisfied that the Lord Ordinary did not misdirect himself in law. In the course of the summar roll hearing senior counsel for the reclaimers all but conceded as much. The Lord Ordinary correctly understood the test he was called on to apply.

[79] The question then resolves into whether it can be said that the Lord Ordinary erred in the weight he attached to the various considerations which he took into account. Matters of weight were quintessentially for him as the discretionary decision-maker. The Inner House will not interfere with his assessment of them unless it is clear that he has left out of account some relevant factor or taken account of an irrelevant consideration or if his decision was in some sense wholly unreasonable or unjudicial.

[80] The reclaimers' challenge falls well short of meeting this standard. The Lord Ordinary was fully entitled to conclude that the applicant was a suitable person to be authorised to act as the representative party in the proposed group proceedings. In summary, the applicant had no interest in the proceedings other than his own claim; he was wholly independent of the defenders; there was nothing to suggest that he would act otherwise than fairly and adequately in the group's interests; he had the support of a highly-qualified team of solicitors and independent counsel; and there was an undertaking from the funding company to meet all legal liabilities.

[81] The reclaimers sought to challenge the Lord Ordinary's evaluation of some of these considerations, for example by pointing out that the funders' accounts were unaudited and

out of date and that nothing concrete had been put forward to prove that the applicant would act fairly or was sufficiently qualified. However, these sort of points go merely to weight. They are not open for reappraisal by the Inner House absent clear and manifest misdirection, of which there is none in the present case.

[82] Looking at matters at a somewhat more granular level, the reality of the position is that there is nothing to suggest that the applicant will be anything other than fully capable of prosecuting the proposed proceedings efficiently and effectively. In circumstances where there is a complete lack of any factors pointing towards unsuitability, it is difficult to see what more the applicant can reasonably be expected to do in order to demonstrate his suitability. The applicant is essentially an ordinary and willing member of the group of claimants. Standing behind him he has the benefit of an experienced team of solicitors from a large firm, which has developed expertise of acting in multi-party litigation. There is also a steering group of solicitors, all of whom have similar experience. The practical running of the proposed litigation will obviously be in the hands of the legal team, which, it is important to note, includes experienced independent members of the Faculty of Advocates. In terms of the funding arrangements, all group members (including the applicant) are obliged to cooperate with their solicitors and counsel, not to deliberately mislead them and to accept their legal advice given in good faith. In return the solicitors have agreed to perform all necessary work in pursuing the claims of group members and to abide by the applicable legal professional standards. There is no suggestion that the applicant's interests are anything other than entirely aligned with those of the other group members whom he wishes to represent. The funders, Quantum Claims Compensation Specialists Limited, have been responsible for funding many multi-party and individual litigations. It was not disputed that they have never failed to meet any adverse award of expenses.

[83] There is force in the applicant's submission that if he were not considered to be a suitable person it is difficult to see how anyone could be found who would be willing to take on the role of representative party. There is unlikely to be a wide or deep pool of aspirants. If the bar were to be set at too high a level, for example by an insistence on the possession of particular expertise or technical qualifications, the result would be to undermine access to justice. On this aspect the court agrees with Lord Ericht's observation in *Bridgehouse* v *Bayerische Motoren Werke AG* 2024 SC 270, [44] that an unduly restrictive approach to the appointment of a group member as group representative could discourage the bringing of group proceedings in Scotland and would run counter to the policy objective of broadening access to justice.

[84] It should be recalled that there are safeguards in place to protect the interests of group members in the event that difficulties should arise. RCS 26A.8(2) allows a group member to apply to the court seeking permission to authorise the replacement of the representative party with another person. RCS 26A.30 requires the representative party to consult with the group members on the terms of any proposed settlement before any damages in connection with the proceedings may be distributed.

[85] In these circumstances, the court is satisfied that there is no basis for interfering with the Lord Ordinary's decision to grant the application for appointment of the applicant as the representative party. We shall come back to the question of whether the challenge to that decision is one that has been competently brought before this court.

Permission to bring group proceedings

[86] The Lord Ordinary's decision to authorise the bringing of group proceedings was also a discretionary decision. There is no justification for the Inner House to interfere with it.

[87] As the Lord Ordinary correctly observed (para [41]), the statutory test does not require the issues for resolution in group proceedings to be identical in the case of every group member; they merely have to be similar or related to each other. In this context there was ample material before the Lord Ordinary to entitle him to hold that there was sufficient communality amongst the members of the proposed group to allow the factual and legal issues to be regarded as at least related to each other. Essentially the group members all wish to pursue claims for loss and damage arising from the issue of excessive NOx emissions from vehicles containing Euro 5 or Euro 6 diesel engines which were fitted with illegal defeat devices. Each group member claims that a defeat device was fitted in a vehicle in which he or she had some kind of financial interest and that he or she suffered loss thereby.

[88] The applicant averred the existence of a substantial link between the Renault and Nissan defenders as regards the research, development, design and engineering strategies of the vehicles which they respectively produced. Such a link was supported by the terms of the press release from the "Renault-Nissan-Mitsibushi Alliance"; this stated that the alliance was a partnership with a unique model which leveraged the leadership strengths of each membership company, uniting their skills, talents and technologies to streamline idea sharing, fast-track innovation, improve cost-efficiency and add value. The reclaimers' attempts to undermine the import of the press release by characterising it as a public relations document are wholly unconvincing. The release was an officially authorised

public statement of the nature of the relationship between the member companies. The Lord Ordinary was well-entitled to have regard to it as material evidence showing a significant commercial relationship between Renault and Nissan. He was also justified in taking account in this connection of the report of the hearing by the European Parliament's Committee of Inquiry into Emission Measurements in the Automotive Sector suggesting that the hardware of certain engine types was common to Renault and Nissan in Europe.

[89] The court is satisfied that the Lord Ordinary was also justified in concluding that the application demonstrated the existence of a *prima facie* case and that there were real prospects of success. The former requires no more than the appearance of a serious question to be tried or, as it has also been put, that there is a case to argue and a case to answer (*Reed Stenhouse (UK) Ltd* v *Brodie* 1986 SLT 354, 358B-C; *Toynar Ltd* v *Whitbread & Co plc* 1988 SLT 433). This is a low test. It does not involve examination of questions of relevancy and specification of averments. The appropriate stage at which to deal with such questions is after the pleadings have been finalised, not at the stage of a preliminary application. The test of there being real prospects of success is similarly not an exacting one. The prospects have to be genuine as opposed to being speculative or fanciful. The test is not one of *probabilis causa* (*Wightman* v *Advocate General for Scotland* 2018 SC 388, [9]). It should not be interpreted as setting up an insurmountable barrier preventing what might appear to be a weak case from being fully developed and argued as the proceedings develop.

[90] The preliminary nature of the application is also relevant. Questions concerning how to protect commercial confidentiality in the context of recovery and cross-disclosure of evidence, the merits of possible time-bar defences and the state of the group register are not suitable for detailed exploration when considering whether to authorise the bringing of group proceedings. These, like all other substantive issues which may arise, should be left

for determination later. There is no substance in the reclaimers' argument that the application should have been refused *in hoc statu* to allow these alleged difficulties to be addressed. This submission fails to appreciate that the application was of a preliminary nature and that substantive questions are not suitable for resolution at the outset of the proposed proceedings.

[91] There can be no doubt that it would be more efficient for the administration of justice for the large number of claims to be brought as group proceedings rather than their having to be pursued individually. There are over 8,000 claimants. The Lord Ordinary was correct to observe ([45]) that the prospect of individual proceedings borders on the unthinkable, and would run entirely counter to the policy aim of the 2018 Act to widen and improve access to justice.

Competency of challenge to appointment of the representative party

[92] That leaves the question of the competency of the challenge to the appointment of the representative party being addressed in the context of the single reclaiming motion that is before the court. The only reclaiming motion enrolled was in the proceedings for permission to bring group proceedings (case reference number GP3/23).

[93] The court agrees with the submission by the representative party that Chapter 26 of the Rules of Court envisages that the applications for appointment of a representative party and the application for permission to bring group proceedings are to be disposed of sequentially. This is evident, for example, from RCS 26A.12(1)(a) which provides that where the Lord Ordinary gives permission for group proceedings to be brought he is to make an order which states the name and designation of the representative party. There has to be a representative party in office before such an order can be made. Moreover, the proposed

summons which accompanies the application for permission is at the instance of the representative party. It is clear that unless and until a representative party has been appointed, a grant of permission to bring group proceedings cannot competently be made.

[94] From this it follows that the two applications are separate and distinct. That is why the practice of the court has been to treat them as stand-alone processes with their own individual case numbers. Each application constitutes a separate proceeding before the court. No reclaiming motion was enrolled in the proceedings for the appointment of a representative party (case reference number GP4/23). The result is that there is no competent appeal before the court challenging the Lord Ordinary's decision to grant that particular application.

[95] In conclusion on this aspect, the court considers that the reclaiming motion in the permission application does not have the effect of opening up for review any of the interlocutors pronounced in the different application for appointment of the representative party. The reclaimers' argument that the separate applications should be treated as a single set of proceedings is without merit.

[96] With a view to providing guidance for the future the court has expressed its views on the challenge to the appointment of the representative party, but the fact remains that there is no competent challenge before the court in relation to the interlocutors pronounced in that process.

Disposal

[97] The reclaiming motion in the application for permission to bring group proceedings will be refused. The court will formally decline to entertain the challenge to the appointment of the representative party. All questions as to expenses are reserved.